

SUPREME COURT OF QUEENSLAND

CITATION: *General Trade Industries Pty Ltd v AGL Energy Limited*
[2014] QSC 319

PARTIES: **GENERAL TRADE INDUSTRIES PTY LTD**
(applicant)
v
AGL ENERGY LIMITED
(respondent)

FILE NO/S: 10469 of 2014

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 6 November 2014 (*ex tempore*)

DELIVERED AT: Brisbane

HEARING DATE: 6 November 2014

JUDGE: Carmody CJ

ORDERS: **1. The application is dismissed;**
2. The applicant to pay the respondent's costs of and incidental to the application on a standard basis to be agreed and if not agreed, assessed.

CATCHWORDS: GUARANTEE AND INDEMNITY – DISCHARGE OF SURETY – DISCHARGE OF SURETY BY AGREEMENT – whether deed of release gave rise to a present entitlement to the return of two guarantees provided by the applicant to the respondent under a construction contract

COUNSEL: M Hindman for the applicant.
K E Downes QC with L Clark for the respondent.

SOLICITORS: Clifford Goulton for the applicant.
Herbert Smith Freehills for the respondent.

THE CHIEF JUSTICE: The applicant seeks interim relief from the burden of two guarantees provided to the respondent under a construction contract in 2013. Each surety exceeds \$600,000 and is almost five per cent of the original contract sum. The first guarantee expires on 30 November 2014 and the second at this time next year.

5

The applicant concedes the obligation to demonstrate a prima facie case in the sense that there must be a serious issue to be tried and it must be favoured by the balance of convenience. The triable issue on the applicant's case is whether it has a present entitlement to the return of the guarantees under a deed of release dated the 13 August 2014.

10

The context

The meaning and effect of the deed depends on the intended purpose of the parties as identified from the text and context of the disputed documents. The respondent had paid \$20.8 million for work completed up to 31 July 2014 in respect of construction work completed under the contract. The applicant had served two process claims (10 and 11) and a statutory demand on the respondent.

15

20

The parties agreed to settle a dispute about the progress claims and the statutory demand on a without-admissions or costs basis, for \$27.5 million in accordance with the terms of the deed.

The text

25

Clause 8 states:

30

Subject to the terms of this deed, the parties wish to release all conceivable claims against each other in respect of the contract and dispute, whether or not all material facts are known to the party giving the release, and wish this deed to have effect in a manner that most effectively releases any claims of the parties against each other in relation to the contract and the dispute.

35

There is no mention in the recital of an intention by the parties to terminate the construction contract. However, under the heading "Mutual Release", clause 5(a) provides:

40

Subject to ... clause 5(c), each party releases and discharges the other party ... from any claim, action, demand, suit or proceeding for damages, debt, restitution, equitable compensation, account, injunction, specific performance or any other remedy that each party has or may have against the other ... in respect of:

45

(1) the contract,

(2) ... the dispute.

... whether known or unknown at the date of the deed and whether arising at common law in equity under statute or otherwise (the release matters).

50

In support of the releases granted in clause 5(a), each party covenanted not to claim, sue or take any action against the other in respect of the released matters. Clause 5(c) provides that nothing in clause 5(a) released, discharged or terminated and that clause 5(b) does not apply to the obligations contained in clauses 2(a), 5, 29, 34.6 and 35 of the contract, which, for the avoidance of doubt, the parties agreed to continue in effect.

Clause 5.3(d) of the contract provides that if the applicant does not provide replacement security to the respondent on demand 15 business days prior to the expiry of the security, the respondent is entitled to demand the full amount of the security and hold the proceeds to have recourse to - in respect of an amount payable or believed to be payable by the applicant to the respondent in connection with the contract.

Under clause 5.4 of the construction contract, the respondent's entitlement to any unreleased security or replacement security ended or ceased with the termination of the contract. In that event, the respondent, subject to subclause 5.2, has to release and return the security to the applicant. It is by a combination of clause 5(a) of the deed and 5.4(b) of the construction contract that the applicant says it has a present entitlement to the return of both bank guarantee but, in particular, the guarantee that expires on 30 November 2014. Today is the last day for the respondent to call for a replacement security.

The respondent wrote to the applicant about the replacement of security on 15 October 2014. In responding on 22 October 2014, the respondent noted the replacement security requirement and said that it would "...revert to (the respondent) by 6 November 2014", that is, today. There was no mention at that point in time of the alleged terminating effect of the deed. However, on 30 October 2014, the applicant formally "notes" that the contract was terminated, other than as to the non-release clauses, by the deed. Importantly, the deed released the parties from each others' claims, whether known or unknown, as at 13 August 2014 when the deed was executed, but not otherwise.

Under the construction contract, the respondent is entitled to have defective work rectified and expenses incurred in doing so treated as a debt due and payable from the applicant. On the applicant's argument, the respondent intended to surrender the ability to call on the guarantee to satisfy any debt arising out of defective work except to the extent that it might be covered by clause 5 of the construction contract. The applicant contends that the only reasonable way of construing clause 5(a) is an intended termination of the contract and the replacement with another one made up of the non-release matters mentioned in clause 5(c), that is, that the 5(c) matters survive the termination in clause 5(a). The argument as it is put at paragraph 15 of the applicant's outline is that that manifest and mutual intention of the parties is revealed by the recitals and the scope of the releases in clause 5(a). To grant the applicant the relief sought would, according to the respondent, seriously interfere with continuing contractual obligations of the parties and deprive it of a significant benefit it has under the construction contract. However, the contention that the parties both intended to terminate the construction contract as and from 13 August 2014 is inconsistent with the use of the term "mutual release" rather than "termination" in clause 5 and the lack of any reference to termination in the recital to the deed.

Moreover, it is improbable in the context of this dispute that the respondent, who might be exposed to defective or incomplete work, would give up the only effective security it might ultimately have to draw on to satisfy debts arising under defects clauses.

5

Accordingly, I am not persuaded that there is a prima facie case that the applicant has a present entitlement to the release and the return of either or both securities by reason of the fact that the construction contract was not terminated on 13 August 2014. That conclusion makes the balance of convenience issue unnecessary to determine.

10

The application is dismissed. The applicant to pay the respondent's costs of and incidental to the application on a standard basis to be agreed and if not agreed, assessed.

15