# The saga of *Saipem v GLNG*

**Injunctions, bank guarantees and s 67J of the**

***Queensland Building and Construction Commission Act 1991* (Qld)**

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## Introduction

1. Sagas, so Wikipedia reliably informs us, are:

> '…tales in prose which share some similarities with the epic, often with stanzas or whole poems in alliterative verse…of heroic deeds of days long gone, "tales of worthy men" who were often Vikings, sometimes pagan, sometimes Christian…They are sometimes romanticised and fantastic.'[2]

2. Sadly, the story of our protagonist, Saipem Australia Pty Ltd ('Saipem') and its adversary, GLNG Operations Pty Ltd ('GLNG') does not consist of alliterative verse. It has no Vikings, pagans, romance or fantasy (that I know of). It may, however, be said that the parties' Queen's Counsel were worthy men, and in some instances, their arguments could be described as 'heroic'.

3. Saipem's journey began on 4 January 2011, when it contracted to build GLNG a gas transmission pipeline to transfer coal seam gas from the Surat Basin to a liquefied natural gas plant at Curtis Island, near Gladstone.[3]

4. As unlikely as it might seem for a project of this nature, the parties fell out. They sought to resolve some of their differences by arbitration. The genesis of today's saga is GLNG's three attempted (and mostly successful) raids on Saipem's performance security, which took the form of bank guarantees. GLNG's impertinences were met by Saipem's three

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[2] https://en.wikipedia.org/wiki/Saga.
[3] *Saipem Australia Pty Ltd v GLNG Operations Pty Ltd* [2014] QSC 310 ('*Saipem No 1*') [5].

applications for interlocutory injunctions to restrain (or enjoin) GLNG from having recourse to the security.[4]

5. In each case, Saipem sought the aid of s 67J of the *Queensland Building and Construction Commission Act 1991* (Qld) (the 'QBCC Act'), which imposes a notice requirement on the use of security by a 'contracting party'.

6. The contests were fought before three different judges, as the parties passed through the revolving door of the Queensland Supreme Court Applications List. Over ten questions of law were traversed concerning the application of s 67J and its intersection with an ouster clause in Saipem's contract with GLNG ('the Contract').

7. Before relaying the relevant facts of each application, the arguments raised, and the gist of the decisions, I will provide what is sure to be a riveting account of some of the relevant principles governing the grant of interlocutory injunctions. I will leave you with a summary of the implications of the decisions, some matters for future consideration and what I hope will be some useful suggestions for those drafting contracts.

**Interlocutory injunctions: relevant principles**

8. The purpose of an interlocutory injunction is to preserve the status quo until the rights of the parties can be determined at the hearing of the suit.[5] The jurisdiction of the court to grant an interlocutory injunction is a statutory one. Under s 9(3) of the *Civil Proceedings Act 2011* (Qld), the court may, at any stage of a proceeding, grant an interlocutory injunction if it considers it just or convenient.

9. The conferral of that power is not at large, but may only be exercised to protect a legal (including statutory) or equitable right which the court has jurisdiction to enforce by final judgment.[6] The principles to be applied in the exercise of the jurisdiction are equitable in nature.[7]

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[4] *Saipem No 1* [2014] QSC 310, *Saipem Australia Pty Ltd v GLNG Operations Pty Ltd (No 2)* [2016] 1 Qd R 254 ('*Saipem No 2'*), *Saipem Australia Pty Ltd v GLNG Operations Pty Ltd* [2017] QSC 294 ('*Saipem No 3'*).
[5] Sir Frederick Jordan, *Chapters on Equity in New South Wales* (6th ed, 1947) 146, cited by Gleeson CJ *in Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 216 [9] ('*Lenah Game Meats'*).
[6] *Lenah Game Meats* (2001) 208 CLR 199, 241 [91], 248 [105] (Gummow and Hayne JJ).
[7] *Mayfair Trading Co Pty Ltd v Dreyer* (1958) 101 CLR 428, 454, I C F Spry, *The Principles of Equitable Remedies* (Lawbook Co, 9th ed, 2014) 341-342.

*ABC v O'Neill*

10. In *Australian Broadcasting Corporation v O'Neill*[8] ('*O'Neill'*), Gleeson CJ and Crennan J put forward three criteria for a court to apply in determining whether to grant an interlocutory injunction. In essence, the applicant must show:

    (a) first, that there is a 'serious question to be tried' as to the applicant's entitlement to relief;

    (b) secondly, that the applicant is likely to suffer injury for which damages will not be an adequate remedy; and

    (c) thirdly, that the balance of convenience favours the grant of an injunction. [9]

11. Their Honours also stated in *O'Neill* that they agreed with the explanation of these 'organising principles' by Gummow and Hayne JJ in their judgment.[10] Unfortunately, Gummow and Hayne JJ differed in their formulation of the principles. In particular, they affirmed a two-pronged test proposed in *Beecham Group Ltd v Bristol Laboratories Pty Ltd*[11] ('*Beecham'*). Their Honours held:

> 'The relevant principles in Australia are those explained in *Beecham Group Ltd v Bristol Laboratories Pty Ltd*. This Court…said that on such applications the court addresses itself to two main inquiries and continued:
>
> > "The first is whether the plaintiff has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief … The second inquiry is … whether the inconvenience or injury which the plaintiff would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the defendant would suffer if an injunction were granted."
>
> By using the phrase "prima facie case", their Honours did not mean that the plaintiff must show that it is more probable than not that at trial the plaintiff will succeed; it is sufficient that the plaintiff show a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial…With reference to the first inquiry, the court continued…:
>
> > "How strong the probability needs to be depends, no doubt, upon the nature of the rights [the plaintiff] asserts and the practical consequences likely to flow from the order he seeks."[12]
>
> (footnotes omitted)

[8] (2006) 227 CLR 57 ('*O'Neill'*).
[9] Ibid 68 [19], citing Doyle CJ in *Jakudo Pty Ltd v South Australian Telecasters Ltd* (1997) 69 SASR 440, 442-443.
[10] Ibid 68 [19].
[11] (1968) 118 CLR 618 ('*Beecham'*).
[12] *O'Neill* (2006) 227 CLR 57, 81-82 [65].

*Serious question to be tried v prima facie case*

12. The difference between the two approaches lies in the use of the phrase 'serious question to be tried' as opposed to 'prima facie case' and the inadequacy of damages as a separate and essential criterion. As to the former, the conflict between the concepts of a prima facie case and a serious question to be tried was reconciled (some might say unconvincingly) by Gummow and Hayne JJ in a further passage from *O'Neill.* Their Honours referred to Lord Diplock's preference, in *American Cyanamid Co v Ethicon Ltd*,[13] for the applicant to point to a 'serious question to be tried' rather than to a 'prima facie case.' Their Honours held:

> 'When *Beecham* and *American Cyanamid* are read with an understanding of the issues for determination and an appreciation of the similarity in outcome, much of the assumed disparity in principle between them loses its force. There is then no objection to the use of the phrase "serious question" if it is understood as conveying the notion that the seriousness of the question, like the strength of the probability referred to in *Beecham*, depends upon the considerations emphasised in *Beecham*.'[14]

13. In the first *Saipem* decision, Martin J treated the concepts of a 'prima facie case' and 'serious question to be tried' as equivalents. In the later *Saipem* decisions, the Court considered whether Saipem had established a 'serious question to be tried' (or, in shorthand, a 'serious question' or 'serious case').

*Inadequacy of damages*

14. There is some divergence in the cases as to whether the inadequacy of damages is a separate and essential criterion to be met by the applicant, or whether it is one of the factors to be considered in assessing the balance of convenience.[15] The point assumes importance if a contractor is struggling to establish that damages would not be an adequate remedy, for example, by reason of reputational damage resulting from a call on security.

15. Although it was not expressed in these terms, Saipem in each application sought injunctions to protect a claimed statutory right, namely the right to notice under s 67J,

[13] [1975] AC 396, 407.
[14] *O'Neill* (2006) 227 CLR 57, 83 [70].
[15] See, eg, *O'Neill* (2006) 227 CLR 57, 68 [19] (Gleeson CJ and Crennan J) cf *Active Leisure (Sports) Pty Ltd v Sportsman's Australia Ltd* [1991] 1 Qd R 301, 303-304 (Shepherdson J), 311 (Cooper J), *Samsung Electronics Co Ltd v Apple Inc* (2011) 217 FCR 238, 260 [63] ('*Samsung'*).

and in *Saipem No 2* and *Saipem No 3*, to restrain a breach of an implied negative stipulation contained in the Contract.[16] Each case can be said to fall within equity's 'auxiliary' jurisdiction.[17] In such cases, the authorities indicate that the applicant *must* show that damages will not be an adequate remedy.[18] However, *Sino Iron Pty Ltd v Mineralogy Pty Ltd (No 2)*[19] suggests that establishing the inadequacy of damages might not be so onerous a task. In that case, the Western Australia Court of Appeal held:

> '…The question of whether the injury cannot properly be compensated in damages involves a consideration of whether it is just in all the circumstances that the plaintiff be confined to their remedy in damages.'[20] (citations omitted)

*Strength of the applicant's case*

16. Turning to matters other than the adequacy of damages, the apparent strength of the parties' substantive cases is an important factor in assessing the balance of convenience.[21]

17. If the grant of an interlocutory injunction would amount to final relief, in the sense that it would have the practical effect of granting the successful party all that it seeks, or because the harm to the losing party will be complete, the strength of the applicant's case assumes a greater significance.[22] A court may need to have a 'closer look' at the applicant's case than it otherwise would.[23]

*Effect on third parties*

18. Another factor to be considered is the impact the grant or refusal of the injunction would have on third persons or the public generally.[24] For example, a fall in the share price and

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[16] *Saipem No 2* [2016] 1 Qd R 254, 259 [18], *Saipem No 3* [2017] QSC 294 [2], [39].
[17] See J D Heydon J, M J Leeming M and P G Turner, *Meagher, Gummow and Lehane's Equity Doctrines and Remedie*s (LexisNexis Butterworths, 5th ed, 2015) 702 [21-025], 738 [21-195].
[18] See, eg, *Lucas Stuart Pty Ltd v Hemmes Hermitage Pty Ltd* (2012) 28 BCL 226, 226-227 [4]-[6] (Campbell JA), 233 [48] (Macfarlan JA), 234 [62] (Young JA) ('*Lucas Stuart'*), *Sino Iron Pty Ltd v Mineralogy Pty Ltd (No 2)* [2017] WASCA 76 [131], *Bankstown City Council v Alamdo Holdings Pty Ltd* (2005) 223 CLR 660, 665 [10] cf *Atarashii Stone Pty Ltd v Granite Transformations Pty Ltd (No 2)* [2017] ACTSC 139 [21]-[28]. This may be contrasted with injunctions to protect equitable rights, which fall within equity's exclusive jurisdiction and do not depend on the adequacy of damages (*Heavener v Loomes* (1924) 34 CLR 306, 326).
[19] [2017] WASCA 76.
[20] Ibid [131].
[21] *Samsung* (2011) 217 FCR 238, 261 [67].
[22] Walter Sofronoff, 'Interlocutory Injunctions Having Final Effect' (1987) 61 *Australian Law Journal* 341, 349.
[23] *Australian Competition and Consumer Commission (ACCC) v Allphones Retail Pty Ltd (No 2)* (2009) 253 ALR 324, 330 [31].
[24] *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1, 41-43 [65]-[66].

market capitalisation of a contractor (or a related company) resulting from a call on security could be weighed in determining the balance of convenience.[25]

**The *Saipem* decisions: contractual and legislative provisions, terminology**

19. Although the suspense must now be difficult to bear, I will, before examining the entrails of the *Saipem* decisions, set out the pivotal contractual and legislative provisions which the court considered, and terminology I will adopt.

*Clause 5.5 of the Contract*

20. First, a clause of the Contract which Saipem would come to regret. Clause 5.5 governed GLNG's recourse to security. Clause 5.5(c) proved to be the harbinger of doom in two of the *Saipem* decisions. Clause 5.5 provided, relevantly:

> '(a) Notwithstanding anything else to the contrary in this Contract, [GLNG] may demand, receive and use the proceeds of any Performance Security to recover any Loss suffered or incurred by [GLNG] as a result of [Saipem's] default under this Contract or to recover any debt due from [Saipem] to [GLNG].
>
> (b) [GLNG] may, in its absolute discretion, call on the whole, or any part, of any Performance Security, under clause 5.5(a)…
>
> (c) [Saipem] covenants with [GLNG] that **[Saipem] will not institute any proceedings, exercise any right or take any steps to injunct or otherwise restrain**:
>
> …
>
> (ii) [GLNG] from taking any steps for the purpose of making a demand under any Performance Security…
>
> …
>
> even where [Saipem] disputes [GLNG's] right to payment (including where dispute resolution proceedings have been commenced under this contract).'[26]
>
> (emphasis added)

*Sections 67J and 67E of the QBCC Act*

21. What was to prove more favourable for Saipem in its assaults on GLNG may be credited to the Queensland Government. Section 67J of the QBCC Act conditions recourse to

[25] *Fabtech Australia Pty Ltd v Laing O'Rourke Australia Construction Pty Ltd* [2015] FCA 1371 at [47].
[26] See *Saipem No 1* [2014] QSC 310 [58], *Saipem No 2* [2016] 1 Qd R 254, 257 [4], *Saipem No 3* [2017] QSC 294 [6].

security upon the giving of written notice. It is contained in Division 2 of Part 4A of the Act and provides, relevantly:

> '**67J Set-offs under building contracts**
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> (1) **The contracting party** for a building contract **may use a security** or retention amount, in whole or in part, to obtain an amount owed under the contract, **only if the contracting party has given notice** in writing to the contracted party **advising of** the proposed use and of **the amount owed**.
>
> (2) The notice must be given within 28 days after the contracting party becomes aware, or ought reasonably to have become aware, of the contracting party's right to obtain the amount owed.
>
> …
>
> (4) This section does not apply if, under the contract—
>
> (a) work has been taken out of the hands of the contracted party or the contract has been terminated;
>
> ...
>
> (5) In this section—
>
> ***amount owed***, under a building contract, means an amount that, under the contract, is a **debt due** from the contracted party for the contract to the contracting party for the contract because of circumstances associated with the contracted party's performance of the contract.
>
> …' (emphasis added)

22. Saipem was also assisted by s 67E of the QBCC Act. Section 67E mitigates the effect of contractual provisions which are inconsistent with certain provisions of the Act. Section 67E is contained in Division 1 of Part 4A of the QBCC Act and provides, relevantly:

> '(2) However, if a building contract, or a provision of a building contract, is inconsistent with a provision (the ***Act provision***) of this part applying to the building contract, the building contract, or **the provision of the building contract, has effect only to the extent it is not inconsistent with the Act provision**.
>
> (3) Without limiting subsection (2), a building contract is **unenforceable** against the contracted party for the contract to the extent that the contract provides for retention amounts or security in a way that is **inconsistent with a condition to which the contract is subject under division 2**.'
>
> (emphasis added)

*Section 67A: definition of 'security'*

23. Sections 67J and 67E turn on the definitions in s 67A of the QBCC Act. Most relevant is the definition of 'security' as follows:

> '***"security"***, for a building contract, means something—
>
> (a) given to, or for the direct or indirect benefit of, the contracting party for the contract by or for the contracted party for the contract; and
>
> (b) **intended to secure, wholly or partly, the performance of the contract**; and
>
> (c) in the form of either, or a combination of both, of the following—
>
> (i) an amount, other than an amount held as a retention amount for the contract;
>
> (ii) 1 or more valuable instruments, whether or not exchanged for, or held instead of, a retention amount for the contract.'
>
> (emphasis added)

*Terminology*

24. As to terminology, I use the term 'security' to refer to a performance bond or bank guarantee as described by French CJ in *Simic v New South Wales Land and Housing Corporation*:[27]

> 'Performance bonds, sometimes misleadingly called "bank guarantees" … take the form of a promise by the issuing institution that it will pay, to the beneficiary named in the bond, an amount up to the limit set out in the bond unconditionally or on specified conditions and without reference to the terms of the contract between the parties.'[28] (footnotes omitted)

25. For convenience, I will refer to the beneficiary of the security (or the 'contracting party' under the QBCC Act) as the 'principal.' I will refer to the party who procures, from the issuing institution, security for the benefit of the principal (or the 'contracted party' under the QBCC Act) as the 'contractor'.

26. I will refer to the *Saipem* decisions in chronological order as '*Saipem No 1*',[29] '*Saipem No 2*'[30] and '*Saipem No 3*'.[31]

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[27] (2016) 260 CLR 85.
[28] Ibid 89 [2].
[29] *Saipem No 1* [2014] QSC 310.
[30] *Saipem No 2* [2016] 1 Qd R 254.
[31] *Saipem No 3* [2017] QSC 294.

***Saipem No 1***

27. Saipem's first encounter with GLNG occurred in 2014.

28. GLNG had agreed to make certain 'Milestone Advance Payments' to Saipem to assist Saipem with its cash flow.[32] Saipem was required to repay these to GLNG.[33] Saipem was also required to provide security for the Milestone Advance Payments, in the form of bank guarantees.[34] GLNG could have recourse to the bank guarantees if (amongst other things) Saipem failed to repay the Milestone Advance Payments.[35]

29. Saipem failed to repay the Milestone Advance Payments when requested,[36] and GLNG sought recourse to the bank guarantees.[37] Saipem asked Martin J to halt this incursion.[38]

*The serious question to tried*

30. Martin J dealt first with whether there was a serious question to be tried.

*(a) section 67J applied such that notice was required*

31. Saipem argued that GLNG was required by s 67J to give a notice in writing to Saipem prior to having recourse to the bank guarantees.[39] Although not expressed in the judgment, it is apparent that GLNG failed to give a s 67J notice.

32. GLNG argued that s 67J did not apply because the bank guarantees were not 'security' within the meaning of s 67A of the QBCC Act. The purpose of the bank guarantees was to secure *repayment* of the Milestone Advance Payments and not the performance of work required under the Contract.[40] It submitted that the reference to 'performance of the contract' in the definition of 'security' is a reference to carrying out of the building and construction work required under the 'building contract'.[41]

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[32] *Saipem No 1* [2014] QSC 310 [6]-[7], [18].
[33] Ibid [15].
[34] Ibid [16].
[35] Ibid [16].
[36] Ibid [24].
[37] Ibid [25].
[38] Ibid [2].
[39] Ibid [33].
[40] Ibid [34].
[41] Ibid [35].

33. Martin J's response might be described as tepid. His Honour stated: 'Why there should be such a restriction is not immediately obvious.'[42] He rejected GLNG's argument. The reference to the 'performance of the contract' in the definition of 'security' was not confined to the carrying out of building work.[43] The bank guarantees secured performance of *part* of the Contract and amounted to 'security' for the purpose of s 67J.[44]

*(b) the time for giving notice had not arrived: there was no 'debt due'*

34. Saipem then contended that the time in which the notice under s 67J could be given had not begun to run. This was because there was no 'debt due' from Saipem to GLNG and thus no 'amount owed' (within the meaning of s 67J).[45]

35. According to Saipem, it was entitled under the Contract to set off from the Milestone Advance Payments certain 'Bonus Payments', which were owing to it by virtue of its entitlements to extensions of time.[46] Further, it had a right of equitable set-off against GLNG as a result of extension of time claims.[47] GLNG disputed both assertions.[48]

36. Martin J considered the meaning of 'debt due' in s 67J(5). His Honour cited the observations of Keane JA in *Multiplex Ltd v Qantas Airways Ltd*,[49] concerning an earlier version of s 67J, including the following:

> '…The 28 days referred to in s 67J(2) does not begin to run until a time after the right of the owner to recover some amount from the builder has *actually* accrued.'[50] (emphasis added)

37. It is implicit from Martin J's consideration in the judgment of Saipem's rights of set-off[51] that his Honour considered the term 'debt due' in s 67J to refer to an actual, rather than a claimed, debt due.

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[42] Ibid [35].
[43] Ibid [36].
[44] Ibid [37].
[45] Ibid [33].
[46] Ibid [44].
[47] Ibid [50].
[48] Ibid [45], [50].
[49] *Multiplex Ltd v Qantas Airways Ltd* [2006] QCA 337.
[50] Ibid [34].
[51] *Saipem No 1* [2014] QSC 310 [42]-[53].

38. Ultimately, his Honour found, relevantly, that there was a serious question to be tried as to whether there existed a 'debt due' for the purposes of s 67J and whether a right of set-off could be taken into account in determining its existence.[52] Saipem thus had a viable argument that the time for giving the notice had not begun to run.

*The balance of convenience*

39. There was merely the balance of convenience to consider.

40. Saipem argued first that its prima facie right to shelter behind s 67J would be destroyed by the call on the bank guarantees. Secondly, GLNG would not suffer prejudice because it would still have the bank guarantees to call on if it were found that moneys were owed to it. Thirdly, it would suffer loss to its reputation if the bank guarantees were called upon.[53]

41. GLNG wielded its axe. It relied on cl 5.5(c). The risk of harm to Saipem was one which it had created for itself by entering into the Contract on the terms it did.[54] The assessment of the balance of convenience should give considerable weight to the agreement between the parties.[55]

42. Martin J treated this argument with more enthusiasm. His Honour stated:

> 'It is … important, under the topic of balance of convenience, to bear in mind why a beneficiary of a performance guarantee may have stipulated for such an entitlement.'[56]

43. His Honour cited[57] two reasons for making such a stipulation, which were identified (by Calloway JA) in *Fletcher Construction Australia Ltd v Varnsdorf Pty Ltd*[58] ('*Fletcher'*):

    (a) first, to provide security for a valid claim against the contractor; and

    (b) secondly, to allocate the risk between the parties as to who shall be out of pocket pending the resolution of a dispute between them.[59]

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[52] Ibid [55].
[53] Ibid [57].
[54] Ibid [58]-[60].
[55] Ibid [69].
[56] Ibid [63].
[57] Ibid [64].
[58] [1998] 3 VR 812.
[59] Ibid 826.

44. After traversing the decisions in *Fletcher, Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd*[60] and others,[61] Martin J proceeded to crush what hope Saipem may have harboured:

> 'The words in clause 5.5(c) of the contract are clear…The risk has been allocated by the contract to Saipem…Where a party has accepted the risk, then it has a substantial hurdle to overcome when dealing with the balance of convenience. In this case, the various matters set out above lead to the balance tipping in favour of GLNG.'[62]

45. His Honour refused the injunction.

*Comment*

46. Before joining Saipem on its second quest, a couple of points may be noted.

47. First, *Saipem No 1* (and the subsequent *Saipem* decisions) are examples of interlocutory injunctions sought in aid of statutory rights. The unspoken assumption in each case was that the QBCC Act in fact confers a right upon a contracted party to receive notice in conformance with s 67J. This is despite the fact that s 67J is not cast in those terms. Rather, s 67J imposes an *obligation* on the *contracting party*. If, as the corollary to this, a right to notice is conferred upon the contracted party, it is by necessary implication.[63]

48. Secondly, in prohibiting Saipem from instituting proceedings or seeking an injunction, cl 5.5(c) could be construed as purporting (at least in part) to oust the jurisdiction of the court. To that extent it was arguably void as being against public policy, and unenforceable.[64] This seems to have been accepted by GLNG, which did not contend that the clause denied the Court jurisdiction to grant the injunction.[65]

49. GLNG submitted, in effect, that cl 5.5(c) was effective for a different purpose, which was to evince the parties' intention with respect to a call on the bank guarantees.[66] The legitimacy of this argument is supported by the decision in *Anaconda Operations Pty Ltd*

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[60] (2008) 249 ALR 458.
[61] *Bateman Project Engineering Pty Ltd v Resolute Limited* (2000) 23 WAR 493 ('*Bateman'*) and *Lucas Stuart* (2012) 28 BCL 226.
[62] *Saipem No 1* [2014] QSC 310 [69].
[63] See, eg, Heydon et al, above n 17, 728-729 [21-170].
[64] See Owen J's discussion of the legal principles in *Bateman* (2000) 23 WAR 493, 500-502 [20]-[25] in respect of an analogous clause.
[65] Ibid [69].
[66] Ibid [58]-[60], [69].

*v Fluor Daniel Pty Ltd*[67] and more recently *CPB Contractors Pty Ltd v JKC Australia LNG Pty Ltd (No 2).*[68]

50. Finally, and this is why I consider Saipem to have been a bit unlucky, a case which would have been helpful to it (as was proven in *Saipem No 2*) was decided after the application was heard. This was *Monadelphous Engineering Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd*[69] (*'Monadelphous'*). *Monadelphous* assisted in mitigating the effect of cl 5.5(c) on the balance of convenience.

***Saipem No 2***

51. Time passed. Saipem, undaunted by the unappetizing result in *Saipem No 1*, made another trek down George Street. It was 2015, and winter was coming. This time, Saipem endeavoured to arrest GLNG's call on the security in respect of liquidated damages for alleged delay to Mechanical and Practical Completion.[70]

*The serious question to be tried*

52. Saipem advanced three compelling arguments before McMurdo J (as his Honour then was) to establish that there was a serious question to be tried.

*(a) no contractual entitlement to use security*

53. Its opening salvo was that GLNG had no *contractual* entitlement to have recourse to the bank guarantees. The Contract, particularly cl 5.5(a), conditioned recourse upon there being a 'debt due' from Saipem to GLNG. Saipem's entitlement to extensions of time had the effect that no liquidated damages were owing. The liquidated damages claimed by GLNG were thus not 'debts due' – they were merely amounts which GLNG *claimed* were debts due.[71]

54. McMurdo J agreed with Saipem's construction of the Contract: if no debt were due from Saipem to GLNG, GLNG would be precluded from using the bank guarantees.[72]

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[67] (2000) 16 BCL 230, 234 [15].
[68] [2017] WASCA 123 [95]-[96].
[69] [2014] QCA 330.
[70] *Saipem No 2* [2016] 1 Qd R 254, 258-259 [9], [11].
[71] Ibid 259 [12], [18].
[72] Ibid 268 [55].

McMurdo J accepted that Saipem had a serious case but made no finding as to its relative strength.[73]

*(b) no final relief due to support an injunction as claims determined by arbitration*

55. GLNG tried to mitigate the effectiveness of Saipem's contractual argument. It submitted that, as the disputes about extensions of time and the dates of Mechanical and Practical Completion were to be determined by arbitration, Saipem had no case for final determination which could found an interlocutory injunction.[74]

56. McMurdo J gave this argument short shrift. His Honour held that Saipem did claim final relief, by way of declarations, and, although there was no specific claim for a final injunction, Saipem sought 'further or other orders'. If Saipem's case were upheld by an arbitrator the court could grant a declaration that there was no amount owed or a debt due and a final injunction to restrain GLNG from having recourse to the bank guarantees.[75]

*(c) no entitlement to use security under s 67J without an 'amount owed'*

57. Saipem next argued that s 67J permits a contracting party to *use* security only where there is actually an 'amount owed', meaning a 'debt due', in this case from Saipem to GLNG. As Saipem was entitled to extensions of time, no amount was owed to GLNG.[76]

58. McMurdo J was not persuaded, concluding:

> '… s 67J(1) affects the right of a contracting party to use a security or retention amount only by requiring the notice which it describes. The section is engaged where that entitlement to use a security or retention amount otherwise exists and once engaged, its effect is to qualify the entitlement by requiring the notice. Therefore, if no debt is due to GLNG, it is precluded from using the bank guarantees by the terms of cl 5.5(a) rather than by, or also by, s 67J(1).'[77]

*(d) the s 67 notices were out of time*

59. Saipem put forward its final argument. GLNG had given two notices, purportedly pursuant to s 67J, on 18 December 2014. The first notice related to the delay to

[73] Ibid 260 [22]. Neither party pressed for a finding as to the relative strength of Saipem's case for extensions of time.
[74] Ibid 260-261 [23]-[25].
[75] Ibid 261 [26].
[76] Ibid 260 [20], 261 [28].
[77] Ibid 262-263 [33].

Mechanical Completion, the second notice to the delay to Practical Completion. [78] Saipem submitted, in effect, that the notices were late. That is, they were not given within 28 days after GLNG became aware or ought reasonably to have become aware, of its right to obtain the 'amount owed' as required by s 67J(2).[79]

60. As to the first notice, concerning the delay to Mechanical Completion, McMurdo J found (in effect) that the notice was out of time. It was delivered more than 3 months after Mechanical Completion had been certified as complete, and more than 4 months after Mechanical Completion had been achieved.[80]

61. GLNG argued, bravely, that the notice could still be valid even though it was given out of time. McMurdo J considered that although the point was arguable, the better view seemed to be that a noncompliance with the time limit would invalidate the notice.[81]

62. McMurdo J then considered the second notice, in respect of the delay to Practical Completion. Practical Completion was certified on 10 December 2014 as being achieved on 9 October 2014.[82] The second notice was therefore given only 8 days after Practical Completion was certified but more than 28 days after Practical Completion was achieved.

63. On his Honour's view of the Contract, GLNG had no entitlement to liquidated damages until the date Practical Completion was *certified*. Until that date there was no 'amount owed' or 'debt due' that could be the subject of the notice.[83]

64. Saipem's reliance on GLNG's earlier correspondence misfired. It argued that GLNG had maintained, as early as September 2014, that Practical Completion had not occurred. The implication was that GLNG knew at that stage that something would have to be paid by way of liquidated damages for delay.[84] McMurdo J was unreceptive, stating that the 28 day period does not commence from an awareness that *something* would have to be paid to the contracting party.[85]

65. McMurdo J concluded that Saipem's case for invalidity of the second notice was weak.

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[78] Ibid 263 [9], [11].
[79] Ibid [21].
[80] Ibid [35].
[81] Ibid 263 [36]-[38].
[82] Ibid 264 [39].
[83] Ibid 264 [40].
[84] Ibid 264 [41].
[85] Ibid 264 [41].

*The balance of convenience*

66. His Honour turned to look at the balance of convenience.

*(a) reputational damage*

67. First, his Honour considered uncontradicted evidence that Saipem would suffer reputational damage if a demand were made on the bank guarantees.[86]

68. GLNG was unsympathetic in its response. It submitted that Saipem could avoid that loss by doing what it did after it was refused an injunction in *Saipem No 1*: pay the sums demanded.[87] GLNG relied on an excoriating rebuke delivered to a contractor by Kenneth Martin J in *Central Petroleum Ltd v Century Energy Services Pty Ltd*, including as follows:[88]

> '… Here, it sits readily within the capacity and financial wherewithal of this Applicant to quickly and completely extricate itself from all potential threat of this Banker's Undertaking being called. It could in swift time (effectively on a without prejudice basis) render a payment of the relatively modest sum (assessed in a commercial context) to Century. The Applicant's damaged business reputation argument is a paradigm case of a party "bootstrapping" towards its own asserted prejudice to achieve its end game of injunctive relief. This I assess to be unacceptable.'[89]

69. McMurdo J spared Saipem a similar tongue-lashing. His Honour accepted that there was a prospect of loss to Saipem if GLNG were permitted to have recourse to the bank guarantees. But he concluded that it was at least probable that Saipem could pay the amounts claimed if it had to do so to avoid that prospect.[90]

*(b) cl 5.5 is a risk allocation device and sways the balance of convenience*

70. GLNG wheeled out cl 5.5(c). Obligingly, McMurdo J found that cl 5.5(c) clearly demonstrated that the bank guarantees were provided as a means of risk allocation in the sense referred to by Calloway JA in *Fletcher*.[91] Citing *Sugar Australia Pty Ltd v Lend Lease Services Pty Ltd*[92] ('*Sugar Australia'*), his Honour noted that if the 'second'

[86] Ibid 265 [44].
[87] Ibid 265 [46].
[88] [2011] WASC 211.
[89] Ibid [79].
[90] *Saipem No 2* [2016] 1 Qd R 254, 270 [64]-[65].
[91] Ibid 266 [48], 267 [51].
[92] (2015) 31 BCL 407, 410-413 [21], [25], [31], [34] (Osborne and Ferguson JJA).

purpose of a performance guarantee is risk allocation in that sense, that has an often decisive impact upon the balance of convenience if a court is asked to restrain recourse to the guarantee.[93]

*(c) cl 5.5(c) is inconsistent with 67J and of no effect: ss 67E and 108D QBCC Act*

71. Saipem was not deterred. It submitted, in effect, that cl 5.5(c) was inconsistent with s 67J.[94] The invalidating provisions of s 67E, and s 108D of the QBCC Act, which prohibits contracting out of the Act, operated such that cl 5.5(c) should not have the effect that the bank guarantees served as a means of risk allocation.[95]

72. Having concluded that s 67J was a provision which could be affected by s 67E,[96] McMurdo J considered the alleged inconsistency of cl 5.5(c) with s 67J. Although expressing the view that it was not inconsistent, his Honour conceded that if the Contract could be construed as permitting GLNG to use a security without giving the s 67J notice, to that extent it *would* be inconsistent with s 67J. Thus, to that extent, the Contract would be of no effect (according to s 67E(2)) and unenforceable against Saipem (according to s 67E(3)).[97]

73. Proceeding on the assumption that an inconsistency existed, his Honour was influenced by obiter dicta of Fraser JA in *Monadelphous*[98] which suggested that, to the extent a contractual provision is affected by s 67E, it cannot be taken into account in assessing the balance of convenience.[99]

74. McMurdo J concluded that s 67E (and perhaps s 108D) affected the balance of convenience to the extent Saipem's case rested on GLNG's failure to comply with s 67J.[100] His Honour disregarded cl 5.5(c) to that extent.[101]

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[93] *Saipem No 2* [2016] 1 Qd R 266 [49].
[94] Ibid [52].
[95] Ibid [52].
[96] Ibid 267-268 [54].
[97] Ibid 268 [55]-[56].
[98] *Monadelphous* [2014] QCA 330 [41].
[99] *Saipem No 2* [2016] 1 Qd R 254, 268-269 [57]-[58].
[100] Ibid 269 [59].
[101] Ibid 269 [61]-[62].

*(d) inconsistency with s 67J does not affect a dispute over a contractual right of recourse*

75. The show was not quite over. McMurdo J considered ss 67E and 108D did *not* affect the relevance of cl 5.5(c) to the agreed risk allocation with respect to GLNG's *contractual* entitlement to have recourse to the bank guarantees.[102] McMurdo J concluded that Saipem had established a serious case that GLNG had no contractual entitlement to use the bank guarantees, although its strength could not fairly be assessed within the judgment.[103] But the Contract, in particular cl 5.5(c), had the effect that the balance of convenience did not favour the grant of an injunction on that ground.[104]

*(e) the strength of Saipem cases on Mechanical and Practical Completion*

76. McMurdo J then considered the strength of Saipem's cases for non-compliance with s 67J. His Honour noted the case for non-compliance in respect of the claim for delay to Mechanical Completion was strong, but the case relating to the claim for delay to Practical Completion was weak.[105]

*(f) no prejudice to GLNG: it would still have the bank guarantees even if the injunction were granted*

77. Finally, his Honour considered Saipem's submission that GLNG would not be prejudiced by the grant of an injunction, because it would still have the benefit of the bank guarantees if Saipem were found liable for liquidated damages. There was no joy there for Saipem: GLNG would be prejudiced by not having the money at an earlier stage.[106]

*The result*

78. The final score was, for practical purposes, one all.

79. In respect of the claim arising from the delay to Practical Completion, McMurdo J decided to restrain GLNG from calling on the bank guarantees, but only for 14 days. This was to allow Saipem to pay the amount demanded.[107] Saipem's case for non-compliance

[102] Ibid 269 [59].
[103] Ibid 269 [60].
[104] Ibid 269 [60].
[105] Ibid 269 [61]-[62].
[106] Ibid 269-270 [63].
[107] Ibid 270 [65].

with s 67J was weak, and it was at least probable that Saipem could pay the amount claimed.[108]

80. His Honour considered GLNG's submission that there would be no utility in granting an injunction concerning the claim for delay to Mechanical Completion if Saipem were already exposed to damage in respect of the claim for delay to Practical Completion.[109] His Honour was not dissuaded. Saipem would be likely to pay the amount demanded in respect of the latter claim to avoid the bank guarantees being called on.[110]

81. His Honour decided to grant the injunction with respect to the claim arising from the delay to Mechanical Completion, given Saipem's case for non-compliance with s 67J was strong.[111]

*Comment*

82. Putting the result to one side, McMurdo J's ruling that s 67J does *not* have the effect that a party may only use security where there is an 'amount owed' to it creates an interesting anomaly.

83. The confluence of two other matters which flow from the decision suggest that a principal will still need to point to an 'amount owed' in order to have recourse to security. These are:

    (a) first, the fact that unless there is an 'amount owed,' a s 67J notice cannot be given; and

    (b) secondly, the likely effect of s 67J, as demonstrated by the injunctions which were granted, is that the absence of a complying notice under that section prevents the principal from having recourse to security.

84. The irregularity derives from the consequence which s 67J attaches to the existence of an 'amount owed'. It is the capacity of the contracting party to give the notice, not to use the security.

[108] Ibid 270 [65].
[109] Ibid 270 [66].
[110] Ibid 270 [66].
[111] Ibid 270 [66].

***Saipem No 3***

85. I turn now to the Saipem's final attempt, two years later, to thwart GLNG's seemingly relentless pursuit of Saipem's bank guarantees. The jacarandas were out, and it was Holmes CJ who drew the judicial 'short straw'. The application was the ultimate consequence of alleged defects in the pipeline.[112]

86. The decision concerned, in part, the distinction between unliquidated damages and debt. Unliquidated damages are damages which are not the subject of agreement between the parties and are determined by the court.[113] The essence of a debt is an obligation of one person to pay a certain, or liquidated, sum to another.[114]

87. The relevant facts are as follows.

88. The Contract enabled GLNG to direct Saipem to rectify any defect. It provided that if Saipem failed to comply with a direction, GLNG was entitled, by notice, to remedy the defect at Saipem's expense.[115]

89. Clause 34.6(b) of the Contract provided that:

> '(b) the actual and demonstrable costs of rectification work incurred by [GLNG] under clause 34.6(a):
>
> (1) will be a debt due and payable immediately by [Saipem] to [GLNG] following Notice from [GLNG] of the costs incurred; and
>
> (2) may be recovered by [GLNG]…by having access to the Performance Security.'

90. In June 2016, GLNG issued a notice which directed Saipem to rectify the pipeline's corrosion protection system. Saipem disputed the validity of the notice.[116]

91. By letter of 22 July 2016, GLNG gave notice under cl 34.6, purportedly under s 67J, that it would remedy the defects at Saipem's expense. It advised that the 'actual and demonstrable costs' of doing so would be a debt due and payable on notice being given

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[112] *Saipem No 3* [2017] QSC 294 [2], [7].
[113] See J-*Corp Pty Ltd v Mladenis* (2010) 26 BCL 106, 112 [40], 114 [48] (Newnes JA) (Buss and Miller JJA agreeing).
[114] *HL Diagnostics Pty Ltd v Psycadian Ltd* [2005] WASC 234 [27], citing *Young v Queensland Trustees Ltd* (1956) 99 CLR 560, 567.
[115] Ibid [7].
[116] Ibid [7], [8].

of the costs incurred, and could be recovered by GLNG from the proceeds of the performance security.[117]

92. On 19 August 2016, GLNG advised of its intention to call on the bank guarantees in respect of the rectification costs. It gave an estimate of the costs of the initial work but advised it would issue notices pursuant to cl 34.6(b)(1) setting out the actual costs of the work.[118]

93. Subsequently, GLNG sent ten letters, one per month, advising of the amounts incurred in the rectification process. Each identified itself as a notice under s 67J, and, amongst other things, advised that GLNG would call on the bank guarantees in respect of the sum specified.[119] A further notice, said to be pursuant to s 67J, was given on 14 July 2017, advising of the total of the amounts set out in the ten notices.[120]

*The serious question to be tried*

*(a) contractual entitlement to recourse to security*

94. It was common ground that there was a serious question to be tried as to whether there were defects in the pipeline requiring rectification.[121] It may be inferred from that that there was serious question to be tried as to whether GLNG was entitled under the Contract to call on the bank guarantees.

*(b) failure to give notice under s 67J*

95. Saipem was not discouraged by the plethora of putative notices which had emanated from GLNG. It submitted that no notice had been given in respect of the use of security as required by s 67J.[122]

96. Saipem's argument focused on the (in)effectiveness of the ten monthly notices:

[117] Ibid [8].
[118] Ibid [8].
[119] Ibid [9].
[120] Ibid [9].
[121] Ibid [2].
[122] Ibid [10].

(a) first, GLNG had a right under the Contract to call on the bank guarantees immediately the rectification costs were incurred, regardless of whether it had given notice so as to make these costs a debt due under cl 34.6(b)(1);[123]

(b) secondly, each of the ten notices identifying the amount of rectification costs was a claim for unliquidated damages, and each of the amounts identified was an 'amount owed' for the purpose of s 67J;[124]

(c) thirdly, GLNG had been aware of each of the amounts identified in the notices for more than 28 days and accordingly, each of the ten notices were out of time.[125]

97. Holmes CJ first considered whether GLNG was entitled to call on the bank guarantees immediately the costs had been incurred.[126] Her Honour concluded that Saipem had a least a reasonable argument on this point.[127]

98. The Chief Justice then dealt with whether s 67J extends to require notice to be given of a proposed use of security in respect of a claim for unliquidated damages.[128] More particularly, she considered whether a 'debt due' in the definition of 'amount owed' should be read as including an entitlement to unliquidated damages.[129]

99. At the urging of Saipem, her Honour considered the decision on the point in *Beyfield Pty Ltd v Northbuild Construction Sunshine Coast Pty Ltd*[130], and McMurdo J's analysis of *Beyfield* in *Saipem No 2*.[131]

100. Her Honour found objections to both these authorities, and limited assistance from extrinsic sources.[132] The Chief Justice concluded:

> '…the definition of 'amount owed' as it now appears in s 67J is, in my view, unambiguous. I acknowledge that there may be an anomaly in placing a constraint on recovery of debts from securities, but not on recovery of unliquidated amounts. But by the most liberal of

[123] Ibid [10].
[124] Ibid [13].
[125] Ibid [10], [13].
[126] Ibid [10]-[12].
[127] *Saipem No 3* [2017] QSC 294 [12].
[128] Ibid [13].
[129] Ibid [14].
[130] [2014] QSC 12.
[131] *Saipem No 3* [2017] QSC 294 [14]-[24]. Note that McMurdo J's analysis on this point is omitted from the earlier discussion of *Saipem No 2* for the sake of brevity.
[132] *Saipem No 3* [2017] QSC 294 [25]-[26].

> readings in an endeavour to meet what one might regard as the purposes of the provision, one would struggle to construe 'an amount that, under the contract, is a debt due from the contracted party…" as applying to an unliquidated damages claim.'[133]

101. Despite this, her Honour stopped short of finding that there was no serious question to be tried as to the application of s 67J. Given the decisions in *Beyfield* and *Saipem No 2*, her Honour accepted (but only just) that there remained a 'live argument on the point.'[134]

*GLNG's alternative arguments on the serious question to be tried*

102. The Chief Justice moved on to consider a number of arguments raised by GLNG.

*(a) whether it is sufficient for a s 67J notice to give an estimate of the 'amount owed'*

103. GLNG submitted, optimistically, that its notice of 19 August 2016 giving an estimate of the cost of rectification was a notice under s 67J. Her Honour was diplomatic in her response: 'I do not think on any construction of s 67J that advising of an estimate could constitute notice of an amount owed.'[135]

*(b) whether lateness renders a s 67J notice ineffective*

104. GLNG next argued that a failure to give a s 67J notice within the required 28 day period did not render it ineffective. Holmes CJ expressed her agreement with McMurdo J in *Saipem No 2*: the stronger argument is that a breach of the requirements of s 67J renders a notice purportedly given under it invalid.[136]

*(c) recharacterising an amount advised in a late notice in order to give a timely notice*

105. GLNG tried a different tack. It submitted, in effect, that the Contract gave it the option to recover the costs of rectification as a loss or as a debt. Even if it had, through non-compliance with s 67J, lost its right to have recourse to security in respect of the *loss*, it was still entitled to have recourse in respect of a *debt*. The notice of 14 July 2017 which gave the total of the rectification costs both created the debt and constituted notice for s 67J. Alternatively, its ten monthly notices both created a series of debts and constituted valid notices under s 67J.[137]

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[133] Ibid [26].
[134] Ibid [27].
[135] Ibid [28].
[136] Ibid [29].
[137] Ibid [30].

106. The Chief Justice was not convinced, preferring substance over form. Her Honour held:

> 'It seems to me, in fact, that each of the ten letters created a debt…But I have difficulty with the proposition that the 'amount owed' for the purposes of s 67J would change simply because a claim for unliquidated damages had been converted to a debt claim, the former precluded from recovery and the latter not, when the amount was literally the same and the same expenditures were concerned.[138]

*(d) whether s 67J applies if <u>any</u> work is taken out of a contractor's hands*

107. GLNG's final argument met with success of a kind unlikely to be celebrated by the Office of Parliamentary Counsel. Recall that s 67J(4)(a) provides that s 67J does not apply if, under the contract, 'work has been taken out of the hands of the contracted party or the contract has been terminated.'

108. GLNG argued that as the rectification work had been taken away from Saipem, GLNG was exempted from the obligation to give the s 67J notice.[139]

109. Saipem argued, in effect, that the exemption in s 67J(4)(a) applies where work has been taken out of the hands of the contractor *as an alternative to terminating the contract*.[140]

110. GLNG pointed to the fact that s 67J(4)(a) refers to 'work' rather than 'all works' or 'the works'. The reference to 'work' is to 'work subject to the claim for access to the security.'[141]

111. Her Honour concluded that GLNG 'had by far the stronger argument', holding that there was a serious question to be tried as to the application of s 67J(4).[142]

*The balance of convenience*

112. Things were looking sub-optimal for Saipem when the Chief Justice turned to assess the balance of convenience. They soon got worse.

*(a) damage to reputation*

[138] Ibid [31].
[139] Ibid [32].
[140] Ibid [32].
[141] Ibid [33].
[142] Ibid [34].

113. Her Honour first considered what might be called Saipem's 'old chestnut' argument that a call on the bank guarantees would cause damage to its reputation.[143] GLNG responded in kind by arguing that the damage could be easily avoided by Saipem paying the amount of the securities.[144]

114. Holmes CJ noted the evidence of Saipem's ample current assets (€1.892 billion) and shareholder equity (€4.885 billion).[145] Her Honour concluded that Saipem's financial position did not suggest that it would be forced to undergo the reputational damage asserted. Further, it appeared open to it to provide the funds the subject of the bank guarantees.[146]

*(b) the contractual argument and cl 5.5(c)*

115. Then, like the ghost of Banquo, cl 5.5(c) returned to haunt Saipem. GLNG again contended that Saipem's covenant not to seek to restrain GLNG, even when it disputed the debt, was a powerful factor in assessing the balance of convenience.[147]

116. Consistent with the approach of McMurdo J in *Saipem No 2*, Holmes CJ considered that cl 5.5(c) should be taken into account insofar as the serious question to be tried was related to the question of GLNG's contractual entitlement to recover rectification costs (and, it may be inferred, its contractual entitlement to have recourse to the bank guarantees). Her Honour stated:

> '…so far as the serious question to be tried is whether the pipeline is defective so as to entitle GLNG to recover rectification costs, the existence of clause 5.5(c) provides a very strong argument that Saipem has given up any right to injunctive relief on that ground, in a bargain which the Court should respect.'[148]

*(c) non-compliance with s 67J, cl 5.5(c) and Monadelphous*

117. On the question of GLNG's alleged non-compliance with s 67J, Saipem succeeded in persuading the Chief Justice to follow Fraser JA's obiter dicta in *Monadelphous*. Her Honour held that if s 67J were to apply, cl 5.5(c) would be inconsistent with it 'in so far

[143] Ibid [35].
[144] Ibid [36].
[145] Ibid [36].
[146] Ibid [41].
[147] Ibid [36].
[148] Ibid [39].

as it would prevent Saipem's reliance on a claimed failure to give notice' under s 67J. Her Honour declined to take cl 5.5(c) into account in assessing the balance of convenience in relation to the triable questions concerning the application and effect of s 67J.[149]

118. But despite this, the weakness of Saipem's argument on the application of s 67J brought it undone. The Chief Justice drove the final nail into the coffin and refused to grant the injunction.[150]

*Comment*

119. The first point to note about her Honour's judgment is that it exposes defects in the drafting of s 67J. It is unlikely that Parliament intended that a contractor has the benefit of a notice for calls on security in respect of debts but not in respect of unliquidated amounts. Yet that is the obvious consequence of using the term 'debt due' in the definition of 'amount owed' in s 67J(5).

120. And in s 67J(4), the use of the term 'work' instead of 'the works' or 'all works' drills another hole into s 67J: Holmes CJ's decision suggests a principal may avoid giving a s 67J notice by taking out of the hands of the contractor work which is the subject of the proposed use of security.

121. The Chief Justice's interpretation of these two aspects of s 67J (although not determinative) is, respectfully, justified by the text of the section. Yet it does not fit with the remedial role which appears to have been intended for s 67J.[151] Amending legislation is needed to bring harmony to this discord.

122. Secondly, Holmes CJ indicated that Saipem may have, by cl 5.5(c), 'given up any right to injunctive relief' on the question of GLNG's contractual entitlement to call on the bank guarantees. This might be construed as contrary to authorities which suggest that cl 5.5(c) was, to the extent it purported to prevent Saipem from seeking injunctive relief, unenforceable.[152] However, what I take her Honour to mean is that cl 5.5(c) reflected the

[149] Ibid [39].
[150] Ibid [40].
[151] The Explanatory Notes for the *Building and Construction Industry Payments Bill*, which led to the enactment of the current version of s 67J, and which were noted by the Chief Justice, include a statement that 67J 'limits the scope of set-offs available to contracting parties.'
[152] See *Bateman* (2000) 23 WAR 493, 500-502 [20]-[25].

parties' bargain, and was essentially determinative of the balance of convenience insofar as it related to GLNG's contractual entitlement to recourse to the bank guarantees.

**What does it all mean?**

123. What can we take from Saipem's struggle? The judgments are persuasive in a number of respects, but not all can be taken as determinative on questions of law.

124. All the *Saipem* decisions proceed on the premise that s 67J confers upon a contractor a right to notice of the proposed use of security which may be protected by injunction.

125. *Saipem No 1* indicates that the reference to 'performance of the contract' in the definition of 'security' in s 67A is not confined to the carrying out of building work.[153]

126. *Saipem No 1* also leaves open the possibility that there may be no 'debt due' and thus no 'amount owed' for the purpose of s 67J where the contractor has the benefit of a set-off.[154]

127. We learn from *Saipem No 2* that the fact that an issue under a contract must be resolved by arbitration does not mean that there can be no final relief to found an interlocutory injunction. A declaration or injunction giving effect to an arbitral award will amount to final relief.[155]

128. *Saipem No 1 and Saipem No 2* are consistent with the proposition that the reference to a 'debt due' in s 67J is to an actual, rather than a claimed, debt due.[156]

129. *Saipem No 2* and *Saipem No 3* indicate that the existence of a 'debt due' and thus an 'amount owed' governs the capacity of a party to give a s 67J notice, not its entitlement to use the security.[157]

[153] *Saipem No 1* [2014] QSC 310 [36].
[154] Ibid [54]-[55].
[155] *Saipem No 2* [2016] 1 Qd R 254, 261 [26].
[156] *Saipem No 1* [2014] QSC 310 [55], *Saipem No 2* [2016] 1 Qd R 254, 260 [22], 264 [40], 268 [55], 269 [60].
[157] *Saipem No 2* [2016] 1 Qd R 254, 262-263 [33], *Saipem No 3* [2017] QSC 294 [23].

130. What flows from that, as illustrated particularly by *Saipem No 2*, is that time only begins to run for the purpose of giving a s 67J notice when there is a 'debt due' and thus an 'amount owed' which can be advised to the contracted party.[158]

131. *Saipem No 2* and *Saipem No 3* strongly indicate that a failure to send a s 67J notice within the required timeframe will render the notice invalid.[159]

132. *Saipem No 3* emphasises that a principal will not satisfy the notice requirement merely by giving an estimate of the 'amount owed.'[160]

133. However anomalous, *Saipem No 3* indicates that a 'debt due' and thus an 'amount owed' for the purpose of s 67J does not extend to an entitlement to unliquidated damages.[161]

134. Further, *Saipem No 3* indicates that a party has only one 28 day window in which it can give the s 67J notice for a particular 'amount owed,' regardless of how that amount is characterised.[162]

135. Finally, *Saipem No 3* indicates that where work which is the subject of a claim on security has been taken out of the contractor's hands, the exemption in s 67J(4)(a) applies and a call on the security in respect of the cost of that work will not require a s 67J notice.[163]

136. The *Saipem* decisions are also important illustrations of factors which bear upon the balance of convenience, and the dangers of a contractor agreeing to a covenant not to litigate.

137. All three decisions indicate that where the purpose of security is to allocate to the contractor the risk of being out-of-pocket in the event of a dispute, this weighs significantly against the contractor in assessing the balance of convenience.[164] A covenant not to institute a proceeding or seek an injunction in a dispute over security is a strong indicator that the security serves as a risk allocation device.

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[158] *Saipem No 2* [2016] 1 Qd R 254, 264 [40].
[159] *Saipem No 2* [2016] 1 Qd R 254, 263 [38], *Saipem No 3* [2017] QSC 294 [29].
[160] *Saipem No 3* [2017] QSC 294 [28].
[161] Ibid [26].
[162] Ibid [31].
[163] Ibid [34].
[164] *Saipem No 1* [2014] QSC 310 [63], [64], [69], *Saipem No 2* [2016] 1 Qd R 254, 266 [49], *Saipem No 3* [2017] QSC 294 [39].

138. Despite this, *Saipem No 2* and *Saipem No 3* indicate that such a covenant may be found to be inconsistent with s 67J. If that were the case, by s 67E or perhaps s 108D, it would be rendered ineffective or unenforceable, and may be disregarded when considering the balance of convenience, but only insofar as the contractor's case is based on non-compliance with s 67J.[165]

139. *Saipem No 2* and *Saipem No 3* also indicate that evidence of reputational risk is relevant to the balance of convenience, but that the financial capacity of a contractor to pay the amount demanded will indicate to the court that such a risk may be readily avoided, and favour the refusal of an injunction.[166]

**Future considerations**

140. There are two matters which might assist future combatants in prosecuting or defending applications to enjoin a principal's recourse to security.

*Assessment of the strength of the applicant's case*

141. First, the parties are entitled to, and should, ask the court for an assessment of the strength of the contractor's case. In the *Saipem* decisions, the Court was understandably reluctant to assess the strength of Saipem's case to the extent it was dependent on extensions of time or the existence of defects.[167]

142. The High Court in *Beecham* made clear that a court does not 'undertake a preliminary trial'.[168] But compelling authorities suggest that a court is nevertheless obliged to make a finding on the strength of an applicant's case. One is the Full Federal Court decision in *Samsung Electronics Co Ltd v Apple Inc.*[169]Another is the 2016 decision of the Western Australia Court of Appeal, *Mineralogy Pty Ltd v Sino Iron Pty Ltd*.[170] This case suggests that a court must undertake this task despite the urgency of the application, and the extent and complexity of affidavit material.[171]

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[165] *Saipem No 2* [2016] 1 Qd R 254, 269 [56]-[59], *Saipem No 3* [39].
[166] *Saipem No 2* [2016] 1 Qd R 254, 270 [65], *Saipem No 3* [41].
[167] GLNG had conceded that there was a serious question to be tried on these issues and in *Saipem No 2* the parties had not pressed for an assessment of the extension of time claims. Further, McMurdo J in that decision considered that the strength of GLNG's contractual entitlement could not be fairly assessed within the judgment: *Saipem No 2* [2016] 1 Qd R 269 [60].
[168] *Beecham* (1968) 118 CLR 618, 622.
[169] (2011) 217 FCR 238, 259 [59], 261 [67], 265-266 [87]- [89].
[170] [2016] WASCA 105.
[171] Ibid [101]-[103] (Newnes JA, McClure P and Corboy J agreeing).

*Need for a stronger case where the injunction amounts to final relief*

143. Secondly, a party may ask the court to take into account the extent to which the grant or refusal of the injunction would amount to the grant of final relief. The decision in *Sugar Australia* indicates that, where security serves as a risk allocation device, the grant of an interlocutory injunction to restrain recourse to it will in effect grant final relief in that the commercial purpose of the security will be defeated.[172] In considering that point, Osborn and Ferguson JJA observed that 'the plaintiff must confront a heavy onus'.[173]

144. It might therefore be argued for a principal in these circumstances that a stronger case must be shown by a contractor.

145. It would seem logical for the principle to apply in reverse. Where, for example, a contractor alleges non-compliance with s 67J, the refusal of an injunction would amount to final relief in that, if the principal were to lose at the final determination of the matter, a statutory protection will have been lost which cannot be revived. The contractor should not have to show as strong a case as it might otherwise have to. This would be consistent with the statement in *Beecham* to the effect that the probability of success to be shown by the applicant depends on the practical consequences likely to flow from the order sought (in this case, the preservation of a statutory right).[174]

146. The destruction of the right to notice was raised in *Saipem No 1* but not explored.[175] It will be interesting to see whether this argument will be raised in future cases.

**Practical matters: drafting suggestions**

147. Turning finally to practical matters, I offer some suggestions for those drafting contracts.

148. If acting for a principal:

    (a) first, allow recourse to security upon the making of a 'bona fide' claim by the principal, rather than use language which conditions recourse upon an actual state of affairs (such as there being a 'debt due' or an 'entitlement to exercise rights');

[172] *Sugar Australia Pty Ltd v Lend Lease Services Pty Ltd* (2015) 31 BCL 407, 411-413 [29]-[35].
[173] Ibid 412 [33].
[174] *Beecham* (1968) 118 CLR 618, 622.
[175] *Saipem No 1* [2014] QSC 310 [57].

(b) secondly, allow recourse to security for unliquidated damages;

(c) thirdly, include a statement in the contract to the effect that the purpose of the security is to allocate to the contractor the risk of being out-of-pocket in the event of the parties' dispute as to the principal's entitlement to recourse; and

(d) finally, ensure that the principal is entitled to carry out any part of the work itself.

149. If acting for a contractor, the obverse applies. Where, as is often the case, the principal is the party with superior bargaining power, the following outcomes may best be described as 'aspirational':

(a) first, condition the principal's recourse to security upon the existence only of debts due and which, if disputed by the contractor, are finally resolved according to the dispute resolution provisions of the contract; and

(b) secondly, ensure that the right of the contractor to obtain injunctive relief for any reason is expressly preserved.

**Conclusion**

150. In summary, Saipem's encounters with GLNG may not be the stuff of alliterative verse, but they are no less valuable for that. They will undoubtedly influence the way similar cases are decided in the future. *Saipem No 3* in particular may inspire the legislature to ensure that its ambitions for s 67J are realised. And perhaps the story is not over yet. For the sake of the jurisprudence, if not for the poetry, I look forward to *Saipem No 4*.