FEDERAL COURT OF AUSTRALIA

Clough Engineering Limited v Oil and Natural Gas Corporation Limited

[2008] FCAFC 136

CONTRACT - construction contract – nature and construction of performance guarantees – whether right to exercise guarantees conditioned upon actual breach – whether bona fide claim of breach sufficient – whether actual breaches have occurred – exercise of performance bank guarantees to full amount – whether disproportionate exercise – whether unconscionable conduct – interlocutory injunctive relief refused at first instance – leave to appeal granted – performance bank guarantees held unconditional – breaches established – no serious question as to unconscionable conduct – appeal dismissed

Trade Practices Act 1974 (Cth) s 51AA
International Arbitration Act 1994 (Cth) s 3, s 7, s 18

Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001) 208 CLR 199 cited
Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd (2003) 214 CLR 51 cited
Australian Competition and Consumer Commission v Samton Holdings Pty Ltd (2002) 117 FCR 301 cited
Bachmann Pty Ltd v BHP Power New Zealand Ltd [1999] 1 VR 420 cited
Barclay Mowlem Construction Ltd v Simon Engineering (Australia) Pty Ltd (1991) 23 NSWLR 451 cited
Bateman Project Engineering Pty Ltd v Resolute Ltd (2000) 3 WAR 493 cited
Baulderstone Hornibrook Pty Ltd v Qantas Airways Ltd [2000] FCA 672 cited
Blomley v Ryan (1956) 99 CLR 362 cited
Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334 cited
Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd [2007] FCA 881 cited
Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd (No 2) [2007] FCA 927 cited
Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd (No 3) [2007] FCA 2082 cited
Comandate Marine Corp v Pan Australia Shipping Pty Ltd (2006) 157 FCR 45 cited
Fletcher Construction Australia Ltd v Varnsdorf Pty Ltd [1998] 3 VR 812 cited
Hughes Bros Pty Ltd v Telede Pty Ltd (1989) 7 BCL 210 cited
Ideas Plus Investments Ltd v National Australia Bank Ltd (2006) 32 WAR 467 cited
Legione v Hateley (1983) 152 CLR 406 cited
Neilson v Overseas Projects Corporation of Victoria Ltd [2005] 223 CLR 331 cited
Olex Focas Pty Ltd v Skodaexport Co Ltd [1998] 3 VR 380 cited

Pearson Bridge (NSW) Pty Ltd v State Rail Authority of New South Wales (1982) 1 Australian Construction Law Reports 81 cited
Reed Construction Services Pty ltd v Kheng Seng (Aust) Pty Ltd (1999) 15 BCL 158 cited
Rejan Constructions Pty Ltd v Manningham Medical Centre Pty Ltd [2002] VSC 579 cited
Re Media, Entertainment and Arts Alliance; Ex parte The Hoyts Corporation Pty Ltd (1993) 178 CLR 379 cited
Shiloh Spinners Ltd v Harding [1973] AC 691 cited
Toomey v Eagle Star Insurance Co Ltd [1994] 1 Lloyd's Law Rep 516 cited
Wood Hall Ltd v The Pipeline Authority (1979) 141 CLR 443 cited

CLOUGH ENGINEERING LIMITED ACN 009 093 869 v OIL AND NATURAL GAS CORPORATION LIMITED, COMMONWEALTH BANK OF AUSTRALIA ACN 123 123 124, HSBC BANK AUSTRALIA LIMITED ACN 006 434 162 and BNP PARIBAS ABN 23 000 000 117
WAD 13 OF 2008

FRENCH, JACOBSON AND GRAHAM JJ
22 JULY 2008
PERTH

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

WESTERN AUSTRALIA DISTRICT REGISTRY **WAD 13 OF 2008**

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	**CLOUGH ENGINEERING LIMITED** **ACN 009 093 869** **Appellant**
AND:	**OIL AND NATURAL GAS CORPORATION LIMITED** **First Respondent**
	COMMONWEALTH BANK OF AUSTRALIA **ACN 123 123 124** **Second Respondent**
	HSBC BANK AUSTRALIA LIMITED **ACN 006 434 162** **Third Respondent**
	BNP PARIBAS **ABN 23 000 000 117** **Fourth Respondent**

JUDGES: **FRENCH, JACOBSON AND GRAHAM JJ**

DATE OF ORDER: **22 JULY 2008**

WHERE MADE: **PERTH**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant pay the first respondent's costs of the appeal.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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JUDGES:	**FRENCH, JACOBSON AND GRAHAM JJ**
DATE:	**22 JULY 2008**
PLACE:	**PERTH**

REASONS FOR JUDGMENT

Introduction

1 This appeal arises out of a claim by an Australian company, Clough Engineering Ltd (Clough), for interlocutory injunctive relief to restrain an Indian company, Oil and Natural Gas Corporation Ltd (ONGC) and three Australian banks from calling upon, or paying under, performance guarantees issued by the banks. The guarantees were furnished by Clough pursuant to its obligations under an international construction contract (the Contract).

2 Clough contended that there was a genuine dispute between the parties as to whether it was in default of its obligations to perform the Contract. It also contended that any breach was caused by ONGC's failure to perform.

3 The two principal issues which arose on the claim for injunctive relief were:

. First, whether in those circumstances, upon the proper construction of the Contract, ONGC was entitled to invoke the performance guarantees;

. Second, whether a call on the performance guarantees contravened s 51AA of the *Trade Practices Act 1974* (Cth) (TPA) on the ground that it was unconscionable within the meaning of the unwritten law of Australia.

4 The learned primary judge rejected Clough's submissions as to the construction of the Contract. He also found that ONGC did not engage in unconscionable conduct by invoking the performance guarantees. His conclusion, in that respect, did not turn upon whether ONGC was responsible for Clough's breaches. Rather, he held that Clough had breached the Contract in two further important respects relating to the extension of the guarantees and certain insurance policies. In addition, the primary judge considered that the claim for injunctive relief should be rejected on discretionary grounds.

5 Clough appeals against each of these findings, including the findings of fact that it was in breach of the Contract. A further issue was raised on the appeal by way of a notice of contention. The Contract was governed by Indian law and the parties agreed to submit any dispute to arbitration. ONGC contended that the Court ought to have given effect to the arbitration clause and thereby declined to entertain the proceedings. There was a strong argument in favour of that contention and it would have been preferable for his Honour to have addressed it at the threshold: *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45. See also as to the grant of interim relief: *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334. In the event Clough failed on the merits before his Honour. In our opinion his Honour's reasoning on the merits was correct and the appeal should be dismissed. It is not necessary in the circumstances to deal with the matters raised in the notice of contention.

Factual and procedural background

6 In January 2005 Clough entered into the Contract with ONGC. The Contract was a lump sum contract for an amount in excess of US$215 million. It related to the development of oil and gas fields off the coast of the State of Andhra Pradesh in India and the construction of associated onshore facilities.

7 It was a term of the Contract that Clough would furnish ONGC, within two weeks of signing, an unconditional and irrevocable performance bank guarantee for the performance of the Contract. The form of the guarantee was set out in Appendix III, Annexure A of the agreement. The amount for which the guarantees provided was to be in excess of US$21 million, representing 10% of the contract price. There was provision in the Contract for extension of the guarantee in the event that completion of the works was delayed. ONGC had the right under the Contract to invoke the performance guarantees "… in the event of the Contractor failing to honour any of the commitments entered into under this contract".

8 Under each performance guarantee the guaranteeing bank undertook to pay immediately on first demand in writing the moneys demanded to the extent of the limit of the guarantee "… on breach of contract by Contractor without any demur, reservation, contest or protest or without any reference to the Contractor." Any demand made by ONGC on the bank by serving a written notice was to be "… conclusive and binding, without any proof on the bank as regards the amount due and payable, notwithstanding any dispute(s) pending before any Court, Tribunal, Arbitrator or any other authority …". It was agreed that the guarantee was irrevocable.

9 The Contract contained an arbitration provision covering "… any dispute, difference, question or disagreement" which might arise between the parties or their respective representatives or assignees "… at any time in connection with construction, meaning, operation, effect, interpretation or out of the contract or breach thereof …". There was provision for three arbitrators and a mechanism for their appointment. It is not in dispute that the *International Arbitration Act 1994* (Cth) applies to the arbitration for the purposes of Australian law.

10 The Contract contained a choice of law provision requiring that all questions, disputes or differences arising under, out of, or in connection with, the contract be settled in accordance with the laws of India (both procedural and substantive) from time to time in force and to the exclusive jurisdiction of the courts in India. This was subject to the provisions of the arbitration clause.

11 The performance guarantees were provided by three banks, the Commonwealth Bank of Australia, the HSBC Bank Australia Ltd and BNP Paribas. The banks are all Australian companies and the guarantees were entered into in Australia.

12 Disputes arose between Clough and ONGC over extensions of time for the performance of the Contract and, associated with those disputes, issues relating to the extension of the guarantees and of insurance cover for Clough. On 4 June 2007 the Contract was terminated by ONGC by a facsimile letter to Clough bearing that date. On the same date, ONGC made demand upon the banks under the guarantees.

13 On 5 June 2007 Clough commenced proceedings in this Court naming ONGC and the three banks as respondents. It sought final relief by way of declarations, injunctions and damages arising from conduct on the part of ONGC said to have been in contravention of s 51AA of the TPA, which prohibits corporations in trade and commerce from engaging in unconscionable conduct according to the unwritten law of the States and Territories.

14 By way of interlocutory relief Clough sought orders on 5 June 2007 for leave to serve the application out of the jurisdiction on ONGC in India. It also sought an injunction, until trial or determination of the proceeding, to restrain ONGC from making a demand for payment from any one or more of the banks under the performance guarantees granted by the banks which were apparently dated 14 January, 19 January and 13 January 2005 respectively. It sought an injunction, until trial and determination of the proceeding or until further order, to restrain the banks from making payment to ONGC. It proffered an undertaking as to damages. On that day an ex parte interlocutory injunction was granted against the banks restraining each of them from making payment to ONGC.

15 The originating application was amended by leave granted by Gilmour J on 6 June 2007. On 7 June 2007 an ex parte interim injunction was granted against ONGC restraining it from taking further steps to demand or obtain payment or renewing such claims or demands, from the banks under the performance guarantees: *Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd* [2007] FCA 881. Orders were also made on 7 June 2007 for leave to serve ONGC out of the jurisdiction. The injunction against the banks was extended on 12 June 2007 and on 19 June 2007, following an inter partes hearing, when an application by the banks to discharge the injunction was dismissed: *Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd (No 2)* [2007] FCA 927.

16 On 20 July 2007 ONGC filed a motion seeking orders that the amended application be set aside, service of the amended application on it be set aside and that the order granting leave to serve the amended application out of the jurisdiction be set aside. ONGC also

sought an order that the interlocutory injunction granted against it on 7 June 2007 and extended on 12 and 19 June 2007 be discharged.

17 On 21 December 2007, for reasons which he then published, his Honour made orders effectively in terms of the motion. He also discharged the injunctions against each of the banks. His Honour made an order on the same day staying the execution of his orders pending the determination of an application for leave to appeal from his judgment: *Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd (No 3)* [2007] FCA 2082.

18 On 29 February 2008 his Honour granted Clough leave to appeal from his judgment and stayed the execution of his orders of 21 December 2007 pending the determination of the appeal. He extended the injunctions granted by paragraphs 4 and 5 of his orders made on 19 June 2007 pending the determination of the appeal and made a direction that the hearing of the appeal be expedited.

19 The appeal came on for hearing before the Full Court on 29 May 2008.

The Contract

20 The Contract between Clough and ONGC was dated 6 January 2005. It was entitled "Contract for Integrated Development of G-1 and GS-15 Fields (G1DP) Project". The Contract recited that Tender Inquiries had been invited on 29 March 2004 and that Clough had submitted its offer on 9 August 2004. It recited that the Contract had been awarded as a negotiated lump sum equivalent contract price of US$215,351,156.33. The work to be carried out under the Contract was defined in cl 1.1.37 of the General Conditions as including:

> everything required to provide and complete a full functioning GS-15-1 Well platform, Pipelines (both Rigid and flexible), Sub sea Control system and Control Umbilical (Offshore and Onshore), Sub sea manifold, Sub sea Christmas Trees, Modification of existing platform GS-15-4, Onshore Oil & Gas processing Facilities, Gas Compression Facilities and Oil Pumping Facilities etc. at offshore fields G-1 and GS-15 in Krishna Godavari Basin located off the East Coast of India and Onshore facilities at Odalarevu, Near Amlapuram, Andhra Pradesh, India…

The works were more fully described in the "Bidding Documents".

21 The Contract comprised a covering Agreement and documents which were together listed in order of priority as follows:

1.	Agreement	
2.	Annexure 'A'	General Conditions of Contract
3.	Annexure 'B'	Bidding Documents comprising of Volume II to Volume V (Part IV) including Addenda/other documents issued by Company, agreed Minutes of the Prebid Meetings, subsequent correspondences exchanged between the Company and the Contractor which have been agreed to by the Company and the Contractor. Drawings and Datasheets have been prepared as preliminary data from which the Contractor should, after review for suitability and conformance with the requirements of Project, develop its own design and engineering for the Works. The Company does not warrant or guarantee the accuracy or adequacy of the data in Bidding document. In case of conflicts within the Bidding documents cited below, same shall be referred to Company for clarifications: i) Description of the Works & Design Criteria ii) Specifications/data Sheets iii) P&IDs and other drawings/Documents In the event of conflict between the documents, the order of precedence is addenda and subsequent correspondences, Scope of Work, Design Basis, then Technical Specifications (Annexure-B).
4.	Annexure 'C'	Contract price schedule and Rental Rate Schedule.
5.	Annexure 'D'	Construction schedule/Project Key Dates.
6.	Annexure 'E'	Project Instructions.
7.	Annexure 'F'	Milestone payment formula giving break-up of the negotiated lump sum prices.

22 The Contract was said to constitute the entire Agreement between ONGC and Clough with respect to the subject matter of the contract and to supersede all communications, negotiations and agreements (whether written or oral) of the parties with respect thereto made prior to the date of the Agreement. The Entire Agreement clause was repeated in cl 1.2.5 of the General Conditions of Contract.

23 Choice of law and arbitration clauses which were the subject of contention on this appeal were as follows:

> 1.3.1 All questions, disputes or differences arising under, out of or in connection with this Contract shall be settled in accordance with laws of India (both procedural and substantive) from time to time in force and to the exclusive jurisdiction of the Courts in India, subject to the provisions of clause 1.3.2.
>
> 1.3.2 **Arbitration**
> Except as otherwise provided elsewhere in the contract if any dispute,

> difference, question or disagreement arises between the parties hereto or their respective representatives or assignees, at any time in connection with construction, meaning, operation, effect, interpretation or out of the contract or breach thereof the same shall be decided by an Arbitral Tribunal consisting of three Arbitrators. Each party shall appoint one Arbitrator and the Arbitrators so appointed shall appoint the third arbitrator who will act as Presiding Arbitrator.
> …
>
> It is a term of the contract that the party invoking arbitration shall specify all disputes to be referred to arbitration at the time of invocation of arbitration and not thereafter.
>
> It is also a term of the contract that neither party to the contract shall be entitled for any interest on the amount of the award.
> ...
>
> The venue of the arbitration shall be the place from where the contract has been made.
>
> …
>
> Subject to as aforesaid the provisions of the Arbitration and Conciliation Act, 1996 and any statutory modifications or re-enactment in lieu thereof shall apply to the arbitration proceedings under this clause.

24 An important part of the General Conditions related to performance guarantees and relevantly provided as follows:

> 3.3 **Performance Guarantee**
>
> 3.3.1 The Contractor shall furnish to the Company within 2 weeks from the date of signing of this Contract an unconditional and irrevocable Performance Bank Guarantee for due performance of the Contract, as per proforma given at Appendix – II [sic] of Annexure A of Agreement, for a sum equivalent to 10% of the Contract price. This irrevocable Performance Bank Guarantee shall be drawn in favour of the Company and shall be valid initially upto [sic] a period of Scheduled Completion Date for the Works of the Contract and warranty period plus sixty (60) days.
>
> 3.3.2 In the event completion of Works is delayed beyond the Scheduled Completion Date for any reasons whatsoever, the Contractor shall get the validity of the guarantee suitably extended so as to make it valid for 12 months plus 60 days from the actual date of completion of Works. However if the delay is attributable to the Company, Company shall bear the cost of extension of such Performance Guarantee for such extended period at the normal bank rates as applicable to International Banking procedures.
>
> 3.3.3 The Company shall have the right under this guarantee to invoke the Banker's guarantee and claim the amount there under [sic] in the event of the

Contractor failing to honour any of the commitments entered into under this Contract. In case Contractor fails to furnish the requisite Bank Guarantee as stipulated above, then the Company shall have the option to terminate the Contract and forfeit the Bid security amount and no compensation for the Works performed shall be payable upon such termination. Upon completion of Works the above said guarantee shall be considered to constitute the Contractor's warranty for the Work done by him or for the Works supplied and their performance as per the specifications and any other conditions against this Contract. The warranty shall be in force for 12 months, from the completion date as provided in Clause 5.10.2 & 5.10.3.

3.3.4 The foreign bidders will give bank guarantees from an Indian nationalized/scheduled bank situated in their country or in India, or from any bank as given at Appendix IV of Annexure-A. If any foreign bidder desires to furnish guarantee from a bank other than above, such bidder should furnish collateral security/guarantee/confirmation from any of the above foreign banks or the State Bank of India.

3.3.5 Notwithstanding what has been stated here above in this Clause in the event of completion of project being delayed beyond the Scheduled Completion Date(s) or extended date(s) extended as per provision of the Contract, the Company may without prejudice to any other right or remedy available to the Company under the Contract, operate the Bank Guarantee to recover the liquidated damages leviable as per Clause 6.3.2. The Bank Guarantee amount shall there upon [sic] be increased to the original amount, or the Contractor may alternatively submit a fresh Bank Guarantee for the equivalent amount of liquidated damages recovered.

3.3.6 The Contractor shall also arrange for the Performance Guarantee to remain valid until the expiration of the Guarantee period for entire Works or if different Guarantee periods become applicable to the different part of Works, then until expiration of latest of such guarantee period. If different guarantee period become [sic] applicable to different parts of Works, then the Performance Guarantee is to be kept valid for 10% of the full value of the part of the Works (as accepted by the Company) for which the guarantee period are yet to expire.

3.3.7 The Company shall return the Performance Guarantee to the Contractor upon the expiration of the Performance Guarantee unless any extension is required in accordance with the Contract.

25 Section 6 of the General Conditions dealt with guarantees and liabilities under the Contract. In clause 6.1.1 Clough agreed to ensure that the materials, equipment and components used in the execution of the works under the Contract would be new and unused. It also warranted that every work executed under the Contract would be free from all defects and faults in design and engineering, materials workmanship and handling. The warranty was valid for a period of 12 months from the date of the issue of the certificate of completion and acceptance.

26 By clause 6.1.2 if, during the period of the warranty, the plant, machinery and equipment was discovered not to conform to the description and quality referred to in clause 6.1.1, or to have deteriorated otherwise than by fair wear and tear, then Clough was required to make good the defects and any damage to the works caused by such defects. In default, ONGC would be entitled to use other agencies to carry out the relevant rectification work and to recover the costs from Clough. The clause then provided:

> The Contractor agrees to make payment against such claim within 30 days of receipt thereof. If the Contractor fails to pay the amount to the Company within 30 days from the receipt of the invoice then amount may be deducted by the company from any money which is due or may become due to the Contractor including Company's right to encash the performance guarantee furnished by the Contractor in accordance with provision of Clause 3.3.

It may be noted that that part of the clause does not appear to make grammatical sense.

27 There was also provision in the General Conditions for liquidated damages, for failure to complete the entire works before the scheduled date or extended date or if Clough repudiated the contract for completion of the works. There was provision for termination of the contract on notice:

> The Company may without prejudice to its right to effect recovery by any other method, deduct the amount of liquidated damages from any money belonging to the Contractor in its hands (which includes the Company's right to claim such amount against Contractor's Bank Guarantee) or which may become due to the Contractor. Any such recovery of liquidated damages shall not in any way relieve the Contractor from any of its obligations to complete the Works or from any other obligations and liabilities under the Contract.

28 Part 7 of the General Conditions was entitled "RISK DISTRIBUTION" and provided, inter alia, for Clough to take out insurance for the benefit of and in the joint names of ONGC and itself against all risk for physical losses or damage suffered by works and temporary works or part of the works up to the Contract value thereof or such additional sum as might be specified in the Contract. The policies to be taken out by Clough were specified in clause 7.3.6. They were:

(i) Cargo Transit Insurance

(ii) Contractor's All Risks Insurance

(iii) Third Party Liability Insurance

(iv) Automobile and Transportation Liability Insurance

(v) Workman's Compensation

(vi) Such other insurances as might be specifically agreed upon by the parties.

29 Clause 7.3.8 required Clough, prior to commencing any relevant part of the works, to deliver to ONGC copies of the insurance policies as evidence that the required policies were in full force and effect. In the event of a failure by Clough to take out and keep in force the relevant insurance policies, then ONGC was authorised by clause 7.3.9 to take out and keep in effect appropriate and necessary insurance. ONGC could pay the necessary premiums and deduct the amount so paid with interest from any moneys due or which might become due to Clough or recover the same as a debt.

Pro forma for performance guarantee letter

30 Appendix III of the General Conditions of Contract set out a pro forma for the performance guarantee letter between any relevant bank and ONGC. It was in the following terms:

> To:
>
> Oil and Natural Gas Corporation Limited
> 15-E, Maker Towers
> Cuffe Parade, Colaba,
> Mumbai – 400 005 (India)
>
> Dear Sirs,
>
> 1. In consideration of Oil and Natural Gas Corporation Ltd incorporated under the Companies Act 1956 having its registered office at Jeevan Bharati, Tower-II, 124 Indira Chowk, New Delhi – 110 001, India and one of its offices at 15-E, Maker Towers, Cuffe Parade, Mumbai- 400 005 & Rajahmundry Asset situated at Godavari Bhavan, ONGC Base Complex, Rajahmundry – 533 106, AP (hereinafter referred to as "Company" which expression shall unless repugnant to the context or meaning thereof includes all its successors, administrators, executors and assigns) having entered into a Contract No … dated … (hereinafter called "The Contract" which expression shall include all the amendments thereto) with M/s … having its registered/head office at … (hereinafter referred to as "The Contractor") which expression shall, unless repugnant to the context or meaning thereof include all its successors, administrators, executors and assigns) and Company having agreed that the Contractor shall furnish to Company a performance guarantee for Indian Rupees/US$... for the faithful performance of the entire Contract.

2. We … (name of the Bank) registered under the laws of … (name of the country) having head/registered office at … (hereinafter referred to as "the Bank") which expression shall, unless repugnant to the context or meaning thereof include all its successors, administrators, executors and permitted assigns) do hereby guarantee and undertake to pay immediately on first demand in writing and any/all moneys to the extent of Indian Rs/US$... (in figures) (Indian Rupees/US Dollars …) (in words) on breach of Contract by Contractor without any demur, reservation, contest or protest and/or without any reference to the Contractor. Any such demand made by Company on the Bank by serving a written notice shall be conclusive and binding, without any proof, on the bank as regards the amount due and payable, notwithstanding any dispute(s) pending before any Court, Tribunal, Arbitrator or any other authority and/or any other matter or things whatsoever, as liability under these presents being absolute and unequivocal. We agree that the guarantee herein contained shall be irrevocable. This guarantee shall not be determined, discharged or affected by the liquidation, winding up, dissolution or insolvency of the Contractor and shall remain valid, binding and operative against the Bank.

   Company shall have the unqualified option to operate this bank Guarantee to recover Liquidated Damages as leviable under the Contract.

3. The Bank also agree that Company at its option shall be entitled to enforce this Guarantee against the Bank as a principal debtor, in the first instance, without proceeding against the Contractor and notwithstanding any security or other guarantee that Company may have in relation to the Contractor's liabilities.

4. The Bank further agree that Company shall have the fullest liberty without our consent and without affecting in any manner our obligations hereunder to vary any of the terms and conditions of the said Contract or to extend time of performance by the said Contractor(s) from time to time or to postpone for any time or from time to time exercise of any of the powers vested in Company against the said Contractor(s) and to forebear or enforce any of the terms and conditions relating to the said agreement and we shall not be relieved from our liability by reason of any such variation, or extension being granted to the said Contractor(s) or for any forbearance, act or omission on the part of Company or any indulgence by Company to the said Contractor(s) or any such matter or thing whatsoever which under the law relating to sureties would, but for this provision, have effect of so relieving us.

5. The Bank further agree that the Guarantee herein contained shall remain in full force during the period that is taken for the performance of the Contract and all dues of company under or by virtue of this Contract have been fully paid and its claim satisfied or discharged or till Company discharges this guarantee in writing, whichever is earlier or until the date of expiry of the claim period specified in para 9 of this Bank Guarantee, whichever shall first occur.

6. This Guarantee shall not be discharged by any change in our constitution, in the constitution of Company or that of the Contractor.

7. The Bank confirms that this guarantee has been issued with observance of appropriate laws of the country of issue.

8. The Bank also agree that this guarantee shall be governed and construed in accordance with Indian Laws and subject to the exclusive jurisdiction of Indian Courts of the place from where tenders have been invited.

9. Notwithstanding anything contained herein above, our liability under this Guarantee is limited to Indian Rs/US$... (in figures) (Indian Rupees/US Dollars…) (in words) and our guarantee shall remain in force until … (indicate the date of expiry of bank guarantee).

Any claim under this Guarantee must be received by us before the expiry of this Bank Guarantee. If no such claim has been received by us by the said date, the rights of Company under this Guarantee will cease. However, if such a claim has been received by us within the said date, all the rights of Company under this Guarantee shall be valid and shall not cease until we have satisfied that claim.

In witness whereon, the Bank through its authorised officer has set its hand and stamp on this … day of … at …

Other contractual documents

31 A number of other documents were incorporated in the Contract. Documents to which reference was made on the hearing of the appeal included:

1. *Letter from Clough to ONGC dated 19 October 2004*. The letter concerned discussions held on 19 October 2004. The letter recorded that in a meeting held on that date ONGC had emphasised that Clough's offer had insurance numbers of 10% of contract value (US$22.76m).

2. *Letter from Clough to ONGC dated 25 October 2004.* This letter referred to a meeting of 25 October 2004 and ONGC's belief that Clough's insurance costs appeared to be high. Clough referred to its experience in insurance for deep water projects and observed that the normal premiums were always greater for sub sea deep water projects because of the need to cover additional risks.

3. *ONGC clarifications to responding bidders' queries.* A bidder had sought a "neutral" choice of law clause and proposed that disputes arising out of or in connection with the contract be settled in accordance with the laws of England and Wales. This was not agreed and the bidder was required to follow bid document requirements. A request that arbitration under the contract be settled in accordance with the Rules of Arbitration of the International Chamber of Commerce and for the venue of such arbitration proceedings to be London and their language to be English was rejected.

A request for deletion of the interest provision in clause 1.3.2 on the basis that arbitral proceedings in India are a long drawn out process was also rejected.

Milestone payment formula

32 The milestone payment formula in Annexure F to the General Conditions of Contract provided for the first milestone payment to be made upon submission of the policy or policies of insurance specific for the project and certificate of insurance for other policies and proof of 100% premium paid and accepted by the company.

Statutory Framework - The *International Arbitration Act 1974*

33 The *International Arbitration Act 1974* has four parts. Part I contains Preliminary provisions. Part II is entitled "Enforcement of foreign awards" (ss 3-14). Part III relates to international commercial arbitrations (ss 15-29). Part IV deals with the application of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

34 Three international instruments are scheduled to the Act. Schedule 1 comprises the United Nations Conference on International Commercial Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Although scheduled to the Act it is not given the force of law by the Act. Schedule 2 comprises the UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985). Section 16 of the Act provides, inter alia, that subject to Pt III, the Model Law has the force of law in Australia. The Investment Convention, which is set out in Schedule 3, also has the force of law in Australia (s 32) but is not material for present purposes.

35 Section 3 of the Act which is contained in Pt II – Enforcement of foreign awards, provides the interpretation of various terms used in that Part. The following definitions are relevant:

> ***arbitration agreement*** means an agreement in writing of the kind referred to in sub-article 1 of Article II of the Convention
>
> …
>
> ***court*** means any court in Australia, including a court of a State or Territory.

36 Article II of the Convention provides:

> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

37 Section 7 deals with the enforcement of foreign arbitration agreements. It provides:

> (1) Where:
>
> (a) the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a Convention country;
>
> (b) the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a country not being Australia or a Convention country, and a party to the agreement is Australia or a State or a person who was, at the time when the agreement was made, domiciled or ordinarily resident in Australia;
>
> (c) a party to an arbitration agreement is the Government of a Convention country or of part of a Convention country or the government of a territory of a Convention country, being a territory to which the Convention extends; or
>
> (d) a party to an arbitration agreement is a person who was, at the time when the agreement was made, domiciled or ordinarily resident in a country that is a Convention country;
>
> this section applies to the agreement.
>
> (2) Subject to this Part, where:
>
> (a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and
>
> (b) the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration;
>
> on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter.
>
> (3) Where a court makes an order under subsection (2), it may, for the purpose of preserving the rights of the parties, make such interim or supplementary orders as it

thinks fit in relation to any property that is the subject of the matter to which the first-mentioned order relates.

(4) For the purposes of subsections (2) and (3), a reference to a party includes a reference to a person claiming through or under a party.

(5) A court shall not make an order under subsection (2) if the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

38 Section 18 of the Act provides:

Courts specified for purposes of Article 6 of Model Law

The following courts shall be taken to have been specified in Article 6 of the Model Law as courts competent to perform the functions referred to in that article:

(a) if the place of arbitration is, or is to be, in a State – the Supreme Court of that State;

(b) if the place of arbitration is, or is to be, in a Territory:

(i) the Supreme Court of that Territory; or
(ii) if there is no Supreme Court established in that Territory – the Supreme Court of the State or Territory that has jurisdiction in relation to that Territory.

39 Relevant provisions of the Model Law are as follows:

Article 1. *Scope of application*

(1) This Law applies to international commercial arbitration, subject to any agreement in force between this State and any other State or States.

(2) The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.

(3) An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

…

> (5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

40 Article 2 provides, inter alia, that the term "court" means a body or organ of the judicial system of a State (in this context referring to a nation state). Article 5 provides:

> In matters governed by this Law, no court shall intervene except where so provided in this Law.

41 Article 7 deals with the definition and form of arbitration agreements. Articles 8 and 9 deal with cases which are the subject of arbitration agreements are brought before a court. They are in the following terms:

> Article 8. *Arbitration agreement and interim measures by court*
>
> (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable or being performed.
>
> (2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.
>
> Article 9. *Arbitration agreement and interim measures by court*
>
> It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

42 It will be noted by reference to Article 1(2) that the provisions of Articles 8 and 9 will both apply whether or not the place of arbitration is in the territory of the contracting State. That is to say, Articles 8 and 9 are applicable to a court before which an action is brought in a matter which is the subject of an arbitration agreement under which the place of arbitration is outside Australia.

Statutory framework – *Trade Practices Act 1974* (Cth)

43 Section 51AA of the TPA provides:

> (1) A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.
>
> (2) This section does not apply to conduct that is prohibited by section 51AB or 51AC.

44 Section 80 provides for the grant of injunctive relief in relation to contraventions of provisions of the Act (including s 51AA). Section 80(2) authorises the Court to grant an interim injunction pending determination of an application for final relief under s 80.

45 There was contention about the effect of the provision of the Contract applying the laws of India and whether that provision could be invoked as a defence against a claim of unconscionable conduct in connection with the exercise of ONGC's powers to call on the performance bank guarantees under the Contract. Some reference was made to ss 67 and 68 of the TPA which void any term of a contract which has the effect, inter alia, of excluding the conditions and warranties implied into certain classes of contract under Div 2 of Pt V of the TPA. It was argued that these express provisions in Div 2, and the absence of any like exclusion in relation to s 51AA, indicated that parties to a contract could effectively "contract out" of the application of s 51AA.

The primary judge's reasons for decision

46 The primary judge identified the bases upon which Clough sought to restrain the invocation of, or payment under, the performance bank guarantees. These were:

1. The Contract properly construed prohibited a demand being made in the circumstances.

2. Alternatively, ONGC had caused or contributed to the circumstances leading to the claimed breaches.

3. Alternatively, ONGC's claim was unconscionable conduct in contravention of s 51AA of the TPA.

4. The demand made by ONGC did not satisfy the conditions of a valid demand under the performance bank guarantees.

47 His Honour characterised ONGC's motion, under O 9 r 7, to set aside service of the amended application as involving a review of the original decision to grant leave and a

rehearing which could proceed on the basis of additional material. To maintain service out of the jurisdiction Clough would need to demonstrate a prima facie case for the relief which it claimed. The test was whether, on the material before the Court, inferences were open which if translated into findings of fact would support the relief claimed. An arguable case had to be demonstrated.

48 His Honour turned first to the motion to set aside service. The question whether there was a prima facie case required a "detailed consideration" of four questions:

(a) the proper construction of the performance bank guarantee provisions in the Contract;

(b) whether any of the claimed or demonstrated breaches of the Contract by Clough was arguably caused by breaches on the part of ONGC and, if so, whether ONGC was thereby in contravention of s 51AA in making demands under the performance bank guarantees;

(c) whether any demonstrated breach of the Contract relied upon by ONGC, not caused or even arguably caused by breach(es) on the part of ONGC, entitled ONGC to make demands under the performance bank guarantees;

(d) whether the demands made by ONGC under the performance bank guarantees were invalid on their face.

49 His Honour took the view that it was appropriate to resolve the construction issue despite the interlocutory nature of the motion. Full argument had been presented by both sides over a three day hearing. There was no suggestion that the evidence was other than complete. The area of contest was not beset by difficulty or novelty. He observed that the entitlement under clause 3.3.3 was expressed as conditional upon "the contractor failing to honour any of the commitments entered into under this contract". The principal issue was whether the words "failing to honour" required that it be established as a fact that Clough had failed in some respect to honour its contractual commitments or whether it was sufficient that ONGC claimed that Clough had so failed. These alternatives defined a "construction spectrum".

50 Clough's submissions on the construction of clause 3.3 were summarised. Clough submitted that the performance bank guarantees could be called on only in specific circumstances, namely:

(a) where there was an acknowledgment or arbitral or other determination giving ONGC the right to obtain moneys during the performance of the Contract and prior to practical completion (other than in relation to matters covered by clauses 5.9.7.2 and 7.3.9 of the Contract);

(b) where Clough failed to pay an amount claimed by ONGC under clause 5.9.7.2 (effectively for the cost of the removal and substitution of suitable materials or removal and rectification of any work) or failed to pay money claimed by ONGC under clause 7.3.9 (effectively for any premium paid for insurance by ONGC);

(c) where Clough failed to pay for the costs of remedial works within 30 days during the guarantee/warranty period as required under clause 6.1.2 of the Contract; and

(d) where there was an acknowledgment or arbitral or other determination that ONGC had a right to recover liquidated damages under clause 6.3.2 of the Contract.

51 Clough argued that clause 3.3.3 allocated risk to it in the specified circumstances. The clause otherwise provided ONGC with the capacity to have recourse to the banks in the event that Clough was slow to, or unable, or unwilling to pay ONGC where ONGC had established that Clough had failed to honour its commitments. Clough submitted that its construction was in harmony with Appendix III. The proforma performance bank guarantee in that Appendix conditioned a call on "breach" not "asserted or claimed breach".

52 The Contract is governed by Indian law: see clause 1.3.1. However, it was not suggested that there was evidence which demonstrated that Indian law would approach the question of construction of the Contract in a different way. The appeal, and the hearing before the primary judge, were argued upon the basis that in the absence of evidence to the contrary, Indian law is presumed to be the same as the law of Australia: *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331; at [125] per Gummow and Hayne JJ at [249] per Callinan J and at [267] per Heydon J.

53 The question of whether the Contract contains an express or implied negative stipulation which qualified the entitlement of ONGC to call upon the performance guarantee turns upon the proper construction of clause 3.3 of the Contract. The learned primary judge held at [53] that upon the proper construction of the clause, ONGC was entitled to call upon

the performance guarantees where it had a "bona fide belief" in its claim that Clough was in breach of the Contract.

54 His Honour began by observing that the terms of the guarantees, set out in Appendix III of Annexure A to the Contract, had to be construed in the context of the document as a whole. They promised payment, even where disputes were pending before a court or arbitrator. That was a powerful indicator that a mere claimed breach of contract, not fraudulently asserted, was sufficient to trigger an entitlement to call on the guarantees. There was no contention in this case that ONGC had made a fraudulent claim. That construction was reinforced by the requirement on the banks to pay "without any demur, reservation, contest or protest and/or without any reference to the contractor". Their liability under the guarantees was "absolute and unequivocal".

55 His Honour referred to *Ideas Plus Investments Ltd v National Australia Bank Ltd* (2006) 32 WAR 467 in which the Western Australian Court of Appeal held that a certificate provided by the National Australia Bank to HSBC certifying that conditions of a letter of credit had been met "amounted to no more than an implied representation that [NAB] had reasonable grounds for issuing the certificate" (at [51]). Written demands were also analogous to the requisite statutory declaration in *Fletcher Construction Australia Ltd v Varnsdorf Pty Ltd* [1998] 3 VR 812 to the effect that the amount claimed represented an amount remaining unpaid to the owner. This was so even where the amount was disputed.

56 His Honour said that if ONGC could not call on the guarantees until there was admitted or established breach of contract, the time at which the matter might be determined by the arbitral tribunal or court could be well after the performance guarantee had expired. Such a construction would not make commercial common sense.

57 His Honour considered that a commercial object of the performance bank guarantees under the Contract was to allocate the risk of a party being out of pocket pending the resolution of a dispute and that ONGC was entitled to call upon them even where a genuine dispute existed as to whether or not Clough was in breach and whether or not damage had been suffered. ONGC says that this construction was supported by the requirement in clause 3.3.1 that Clough furnish ONGC, within two weeks of signing the Contract, with an unconditional and irrevocable performance bank guarantee in terms set out in the Appendix.

His Honour referred to Wallace IND, *Hudson's Building and Engineering Contracts* (11th ed, London Sweet & Maxwell, 1995) at [17,075]:

> insofar as a construction contract may make clear provision for the furnishing of an *unconditional* guarantee as security for due performance, the normal interpretation … will be that, in response to the stipulated demand, an unqualified transfer of the sums in question is intended, provided only that there is a bona fide dispute or claim on the secured party's part, and any further investigation of its merits or extent is not usually intended by the contract.

58 His Honour considered that Clough was not assisted by clauses 3.3.2-3.3.5 and 8.3.5 which entitled ONGC to withhold approval and payment of progress claims. That would provide a form of security to ONGC where there was a dispute because while arbitration was pending it was not required to pay the disputed amount to Clough. It did not inform the question of the circumstances in which the performance guarantees could be called upon.

59 His Honour did not accept Clough's submission that ONGC's construction would permit a call on the full amount of the performance bank guarantees, US$21.5 million, even in the case of a trivial or a general breach. Equity would generally intervene to ameliorate the application of a legal right if employed capriciously or unreasonably or harshly or oppressively such as to be unconscionable. Section 51AA of the TPA might also afford relevant protection. This did not mean that the entitlement at law to call on the whole amount should be read down from what was otherwise a construction in harmony with the Contract as a whole and which in its context produced a commercially sensible meaning. His Honour said (at [53]):

> Accordingly, in my opinion, upon the proper construction of cl 3.3.3, ONGC was entitled to call on the performance guarantees where it had a *bona fide* belief in the genuineness of its claim that Clough had failed to honour commitments under the Construction Contract.

His Honour did not consider that there was a prima facie case or a serious issue to be tried in favour of the construction contended for by Clough.

60 Having found adversely to Clough on the construction of clause 3.3.3, his Honour considered the argument that ONGC had contravened s 51AA of the TPA. Although he had found that the performance bank guarantees could be invoked merely upon an assertion of breach on the part of Clough there were examples of demonstrated breach. Clough had accepted that it was in breach in:

(a) failing to deliver three "Christmas Trees" which were vital components for completion of the well;

(b) failing to undertake shallow water works and onshore works separately from the offshore works.

Clough contended that the breaches which it conceded had been caused by ONGC's own breaches and that it would be unconscionable, within the meaning of s 51AA, for ONGC to call on the performance bank guarantees. Clough argued that its delay in providing the "Christmas Trees" flowed from ONGC's breach relating to "DHPTT Cards". ONGC had also failed to effect well completion in relation to deep water work and had lost the first "Christmas Tree" and certain tools, all of which delayed the project. ONGC's own breaches were also said to have occasioned Clough's failure to undertake shallow water works.

61 ONGC contended that Clough was indisputably in breach of its contractual obligations in two further respects. It had failed to extend the period for the validity of the performance bank guarantees in response to an extension of time for completion of the Contract. It had also failed to provide documentary proof that relevant insurance cover was being maintained. ONGC maintained that those obligations existed even on the assumption that the need for extensions of time was the result of breaches on its part.

62 His Honour referred to the importance of performance guarantees stating (at [63]):

> Performance guarantees play a critical part in international commerce and in international construction contracts, in particular.

Objectively viewed, they were of critical importance to ONGC under the Contract. No payments would become due and payable to Clough until it had furnished the guarantees and the certificate of insurance.

63 His Honour traversed the history of dealings between the parties in relation to an extension of time for the Contract. He referred to correspondence over a period commencing on 20 March 2006 through to 4 June 2007. On 15 April 2006 ONGC sent a letter to Clough provisionally extending the time for completion of the works to 31 January 2007 without prejudice to its rights to recover liquidated damages under the contract. On 3 June 2006 ONGC required Clough to extend the guarantees as required by the Contract. It repeated that demand by letter dated 16 June 2006. Clough advised ONGC on the same date that the new

schedule completion date should be 11 July 2007. On 21 July 2006 Clough agreed with ONGC at a meeting in New Delhi to adopt a "proactive approach" to the expeditious completion of the project by the end of the working season of 2007, which was the end of April 2007.

64 ONGC again required Clough to extend the performance bank guarantees on 29 July 2006 and repeated its request on 12 August 2006. The time for completion of the project was extended to 13 April 2007 by a letter from ONGC to Clough dated 4 September 2006. On 7 October, 2 and 6 November 2006 and 29 March 2007, ONGC wrote to Clough requesting it to extend the guarantees. At that time they were current to 14 June 2007. Clough contended that clause 3.3.2 required it to extend each guarantee to "make it valid for 12 months plus 60 days from the actual date of completion of Works". At that time the date was not known, nor would be known, until a further determination and agreement between the parties. Clough would await that agreement and then act accordingly. ONGC provisionally granted a further extension of time for completion of the works until 30 April 2008 by letter of 11 April 2007, which also required Clough to extend the guarantees. The latter request was repeated by a letter dated 14 April 2007.

65 Clough proposed a "road map" to meet objectives towards completion of the works. It said it would require the three performance guarantees held by ONGC to be returned, but was willing to provide a performance guarantee to the value of 10% of the remaining work. On 1 June 2007 Clough's chief executive officer wrote to ONGC saying:

> I understand that the bonds (referring to the performance guarantees) currently expire in June and appreciate that allowing the bonds to lapse may be contrary to that agreed between ourselves. I am seeking agreement from my Board to extend the bonds to ensure we have sufficient time to conclude our negotiations. This action is of course subject to your agreement to reach a negotiated exit solution as was the direction from Mr Bose at my last meeting.

66 His Honour found against Clough's contention that the extension of time for the scheduled completion of the Works by ONGC to 4 July 4007 was unilateral and not the subject of mutual agreement. ONGC's reservation of rights to recover liquidated damages did not detract from the agreement reached between the parties. In his Honour's opinion, Clough was obliged, under clause 3.3.2 of the contract to extend the validity of the guarantees so they would be valid for 12 months plus 60 days from the date of completion of works as varied. On the basis of the two variations to which he had referred (extending the date for

completion to 31 January 2007 and later to 13 April 2007) Clough, within a reasonable time of the date of each variation, was required to extend the guarantees to 31 March 2008 and 30 June 2008 respectively. We understand his Honour to have intended to say 13 rather than 30 June, ie 12 months plus 60 days after 13 April 2007.

67 Even if it were the case that clause 3.3.2 required Clough to extend the performance bank guarantees at any time prior to their lapsing, as Clough contended, it was clear that:

(a) at 16 April 2007 Clough was not prepared to extend the performance bank guarantees;

(b) at 1 June 2007 the CEO of Clough had no relevant authority from the board to extend them and, in any event, the authorisation was said to be subject to ONGC agreeing "to reach a negotiated exit solution".

His Honour held that the guarantees were never extended prior to the termination of the contract. Accordingly, whatever view was taken of the obligation to extend the validity of the insurance policies, Clough was in breach of clause 3.3.2 in relation to the guarantees. He also found Clough to be in breach of its contractual obligations to provide relevant policies of insurance or certificates of insurance. This was a breach of clause 7.3.8.

68 His Honour found that Clough was in actual breach of the Contract in two important respects, namely its failure to extend the performance guarantees and its failure to deliver copies of the relevant policies of insurance and certificates of insurance covering the extended completion dates and warranty periods.

69 His Honour said (at [95]):

> It follows that, in calling up the performance guarantees in respect of those breaches, ONGC was acting according to a legal entitlement under cl 3.3.3 untainted by conduct which could even arguably be characterised as unconscionable in contravention of the TPA. The position is the same in relation to the breach by Clough of cl 7.3.8 concerning the insurance documents.

His Honour was therefore not persuaded that there was any prima facie case or serious issue to be tried in respect of the alleged contraventions by ONGC of s 51AA of the TPA in that respect.

70 His Honour also dealt with a contention by Clough that demands made by ONGC against the banks were not valid because they failed to contain a statement of an amount due

and payable by Clough to ONGC. His Honour accepted that the performance guarantees each contemplated that less than the full amount guaranteed might be the subject of a demand. However, each also contemplated a demand for the full amount. A demand for the full amount was made in each case predicated on a statement that Clough was in breach of the construction contract. His Honour found no serious issue of prima facie case as to the invalidity of the demands.

71 His Honour then made some findings in relation to the balance of convenience. He said (at [101]):

> This obviously is not to inform my discretion as to whether to grant injunctive relief.

There being no serious issue to be tried, the exercise of his discretion did not arise.

72 In that respect his Honour found there was no evidence to establish any specific irreparable damage to Clough. Some of the consequences to which it had pointed were not uncommon in such matters and, indeed, were often the probable consequences. Such consequences broadly were in the anticipation of Clough when the performance guarantees were given.

73 As to the effect of payment under the performance bank guarantees on Clough's commercial reputation, his Honour accorded no significant weight to those concerns.

Issues on the appeal

74 There were 17 grounds of appeal. It is not necessary to set them out in full, but it is convenient to summarise, from them, the issues for determination:

A. Whether on their proper construction clause 3.3.3 of the Contract and the terms of the performance bank guarantees entitled ONGC to call on the guarantees solely on condition of a bona fide claim that Clough had failed to honour commitments under the Contract or whether there was an implied or express negative stipulation requiring actual breach (grounds 1 to 5).

B. Whether the demands under the performance bank guarantees were validly made (ground 6).

C. Whether Clough was in breach of its obligations under the Contract in respect of extension of the performance bank guarantees and provision of insurance cover (grounds 7 to 13).

D. Whether ONGC acted unconscionably in calling on the performance bank guarantees (grounds 7 to 13).

E. Whether the balance of convenience favoured the grant of the injunction (grounds 14 to 17).

F. Whether Clough is precluded by the Choice of Law provision in the Contract from invoking s 51AA of the TPA (notice of contention 4).

G. Whether Clough is precluded from seeking injunctive relief against ONGC by reason of the arbitration clause in the Contract (notice of contention 5).

H. Whether injunctive relief should have been refused on the basis that damages was an adequate remedy for Clough (notice of contention 7).

I. Whether injunctive relief should have been refused because Clough commenced proceedings in breach of clauses 1.3.1 and 1.3.2 of the Contract (notice of contention 8).

Before turning to the particular issues it is helpful to consider general principles relevant to the construction of contract provisions relating to performance guarantees.

Constructional principles relating to performance bank guarantees

75 The principles under which a court will construe the terms of a bank's undertaking in a performance guarantee, and the contract between a contractor and an owner, have been stated in a series of authorities over the last 30 years. The seminal decision is that of the High Court in *Wood Hall Ltd v The Pipeline Authority* (1979) 141 CLR 443.

76 Reference was made in *Wood Hall Ltd* 141 CLR 443 to the commercial purpose of the guarantees, which in that case was that they be equivalent to cash: see Barwick CJ (at 445); Gibbs J (at 453); Stephen J (at 457-458). As Stephen J observed, to introduce a qualification on the entitlement of the owner to call upon the performance guarantees (at 457):

> … would be to deprive them of the quality which gives them commercial currency.

Barwick CJ and Gibbs J expressed similar views to Stephen J. Gibbs J stated the argument made on behalf of the contractor, which was that the performance guarantee must be construed in light of the contract between the Authority and the contractor (at 450). His Honour rejected the submission that the right to invoke the guarantee was conditional upon the contractor having committed a breach of its primary obligations under the contract. He placed emphasis upon the express statement in the guarantee that the undertaking of the bank was unconditional (at 451).

77 Nevertheless, the authorities have recognised three principal exceptions to the rule that a court will not enjoin the issuer of a performance guarantee, or bond, from performing its unconditional obligation to make payment. The exceptions were succinctly stated, with references to relevant authorities, by Austin J in *Reed Construction Services Pty Ltd v Kheng Seng (Aust) Pty Ltd* (1999) 15 BCL 158 at 164-165:

First - the Court will enjoin the party in whose favour the performance guarantee has been given from acting fraudulently: see eg *Wood Hall Ltd* 141 CLR per Gibbs J (at 451). As the primary judge observed at [36] Clough does not assert that ONGC has made a fraudulent claim. Accordingly, the first exception has no application in the present case.

Second - the party in whose favour the performance bank guarantee has been given may be enjoined from acting unconscionably in contravention of s 51AA of the TPA*: Olex Focas Pty Ltd v Skodaexport Co Ltd* [1998] 3 VR 380. On this point, different views have been expressed about the reach of s 51AA. The High Court has not determined which of these views is correct: *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at [44]-[45]. In any event, none of the categories of unconscionable conduct recognised in *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd* (2002) 117 FCR 301 at [48] apply in this case. Accordingly, the second exception has no application.

Third - the most important exception for present purposes, is that, whilst the Court will not restrain the issuer of a performance guarantee from acting on an unqualified promise to pay:

> … if the party in whose favour the bond has been given has made a contract promising not to call upon the bond, breach of that contractual promise may be enjoined on normal principles relating to the enforcement by injunction of negative

> stipulations in contracts.
> *Reed Construction Services* 15 BCL at 164 (Austin J)

It may be preferable not to describe this as an exception but rather as an over-riding rule because it emphasises that the "primary focus" will always be the proper construction of the contract: *Bateman Project Engineering Pty Ltd v Resolute Ltd* (2000) 23 WAR 493 per Owen J at [30]. Stephen J recognised this in *Wood Hall Ltd* 141 CLR at 459 by observing that the provisions of the contract may qualify the right to call on the undertaking contained in a performance guarantee.

78 Numerous authorities have accepted the third proposition. Many were referred to in *Reed* at 165. Others include *Fletcher Construction* [1998] 3 VR at 826-7*; Bachmann Pty Ltd v BHP Power New Zealand Ltd* [1999] 1 VR 420 at [28]; *Baulderstone Hornibrook Pty Ltd v Qantas Airways Ltd* [2000] FCA 672 at [10], *Rejan Constructions Pty Ltd v Manningham Medical Centre Pty Ltd* [2002] VSC 579 at [37].

79 In *Fletcher Construction* [1998] 3 VR 812, Charles JA at 821 and Callaway JA at 826 recognised that there are generally two commercial reasons why a beneficiary of a performance guarantee may have stipulated for such an entitlement. One is to provide security for a valid claim against the contractor. The second, which is additional to the first, is to allocate the risk between the parties as to who shall be out of pocket pending the resolution of a dispute between them. Callaway JA went on to observe that it is a question of construction of the underlying contract whether the guarantee is provided solely by way of security or also as a risk allocation device. He went on to say (at 827):

> Remembering that we are speaking of guarantees in the sense of standby letters of credit, performance bonds, guarantees in lieu of retention moneys and the like, the latter purpose is often present and commercial practice plays a large part in construing the contract. No implication may be made that is inconsistent with an agreed allocation of risk as to who shall be out of pocket pending resolution of a dispute and clauses in the contract that do not expressly inhibit the beneficiary from calling upon the security should not be too readily construed to have that effect. As I have already indicated, they may simply refer to the kind of default which, if it is alleged in good faith, enables the beneficiary to have recourse to the security or its proceeds.

80 It seems to us that his Honour's reference to a default "alleged in good faith" was intended to embrace the first exception we have set out above. That is to say, the breach relied upon to support a call on the performance guarantee must not be asserted fraudulently

because the Court will enjoin a party from so acting. Thus, subject to the exceptions of fraud and unconscionability, the beneficiary of a performance guarantee granted in its favour as a risk allocation device, will be entitled to call upon the guarantee even if it turns out, ultimately, that the other party was not in default: *Fletcher Construction* [1998] 3 VR at 827.

81 In determining whether the underlying contract confers an unfettered right to call upon the performance guarantee, the importance of such instruments in the construction industry, both nationally and internationally, is a factor which bears upon the question of construction of the Contract. A number of authorities support this proposition:

(1) In *Wood Hall Ltd* 141 CLR at 457-458, Stephen J referred to English authority which described the performance guarantee as standing on a similar footing to a letter of credit.

(2) In the passage from the judgment of Callaway JA in *Fletcher Construction* [1998] 3 VR at 827 quoted above, his Honour emphasised the importance of commercial practice in construing the contract. The reference in the judgment of Charles JA at 822 to the passage from *Hudson's Building and Engineering Contracts*, is to similar effect.

(3) In *Bachmann* [1999] 1 VR 420, Brooking JA referred at [51] to the practice in the United States. He said that the generally accepted view in that country is that standby letters of credit (and hence, performance guarantees) are intended by the parties to the underlying contract to require the supplier or contractor to:

> … stand out of the amount of the credit in favour of the buyer pending resolution of the underlying dispute.

(4) This approach is supported by the observations of Hobhouse LJ in *Toomey v Eagle Star Insurance Co Ltd* [1994] 1 Lloyd's Law Rep 516 at 520, that parties to a commercial contract are to be taken to have contracted against a background which includes the earlier authorities on the construction of similar contracts.

82 Notwithstanding the importance of commercial practice, the statements in these authorities do not suggest that the Court should depart from the task of construing the terms of the contract in each case. What the authorities emphasise is that the commercial background informs the construction of the contract. In particular, as Callaway JA said in the

passage quoted above, the Court ought not too readily favour a construction which is inconsistent with an agreed allocation of risk as to who is to be out of pocket pending resolution of the dispute about breach.

83 It follows that clear words will be required to support a construction which inhibits a beneficiary from calling on a performance guarantee where a breach is alleged in good faith, ie, non-fraudulently. This view is also supported by the remarks of Charles JA in *Fletcher Construction* [1998] 3 VR at 820-821. There, his Honour analysed and placed some doubt upon the correctness of decisions such as *Pearson Bridge (NSW) Pty Ltd v State Rail Authority of New South Wales* (1982) 1 Australian Construction Law Reports 81 at 86.

84 In *Pearson Bridge* 1 Australian Construction Law Reports at 86, and in other authorities which have followed it, Yeldham J held that the words "(i)f the Principal becomes entitled to exercise all or any of the rights under the Contract …" contained an implied negative stipulation which qualified the Principal's entitlement to call upon the guarantee. In *Fletcher Construction* [1998] 3 VR, Charles JA at 820-821 appeared to prefer the views of Cole J in *Hughes Bros Pty Ltd v Telede Pty Ltd* (1989) 7 BCL 210, where his Honour concluded that a similar clause contained no such qualification.

85 The question of construction as to whether the underlying contract contains a qualification on the right to call upon the security must be determined in light of the contract and the form of the performance guarantee as contained in the contract. This accords with the basic principle of construction that the terms of an instrument must be read as a whole: *Re Media, Entertainment and Arts Alliance; Ex parte The Hoyts Corporation Pty Ltd* (1993) 178 CLR 379 at 386-387. It also accords with the approach taken to the construction of the underlying contract in the leading authorities to which we have referred: see eg *Wood Hall Ltd* 141 CLR at 445, 451, 457-458; *Fletcher Construction* [1998] 3 VR at 821-822.

Issue A – conditions on the power to call on the performance bank guarantees

86 Clough submitted that the primary judge's characterisation of the condition on the exercise of the performance bank guarantee as "a bona fide belief" in ONGC's entitlement to claim a breach of contract, was erroneous. It was contrary to the express language of the Contract when read with the terms of the performance bank guarantees. Clough also emphasised the language of clause 3.3 of the Contract and the terms of clause 2 of the form

of performance guarantee in support of its submission that the primary judge's conclusion on the question of construction was erroneous.

87 The substance of Clough's argument may be reduced to four propositions as follows:

. Although as between ONGC and the banks, the obligations of the banks to make payment under the performance guarantees is governed by the terms of those instruments, ONGC's entitlement to call on the guarantees, as against Clough, depends on the terms of the Contract, in particular clause 3.3.

. The condition upon which ONGC was entitled to call upon the guarantees was expressly stated in clause 3.3.3. The critical condition was stated to be "in the event of the Contractor (Clough) failing to honour any of the commitments entered into under this Contract".

. These words do not specify events "bona fide believed" to be breaches. They refer to actual failures to perform the Contract. These words are similar to those contained in the contracts in issue in proceedings such as *Pearson Bridge* (1982) 1 Australian Construction Law Reports 81, and *Reed Construction Services* 15 BCL 158.

. This is supported by the language of the performance guarantees under which the banks undertook to pay on demand "on breach of Contract by the Contractor".

88 The starting point for consideration of Clough's submissions is clause 3.3.1 of the Contract. That clause required Clough to furnish to ONGC an "unconditional and irrevocable" guarantee for the performance of the Contract in accordance with the terms of the pro forma.

89 It is true that as between ONGC and the banks, once a demand was made under the performance guarantees the banks were obliged to make payment in accordance with the terms of the security. It is also true that ONGC's entitlement to call on the guarantees depended upon the terms of the Contract, and in particular clause 3.3.

90 But cases such as *Re Media, Entertainment and Arts Alliance; Ex parte The Hoyts Corporation Pty Ltd* 178 CLR 379 to which Gilmour J referred at [35], are authority for the

proposition that the proper construction of ONGC's contractual entitlement under clause 3.3 must be informed by a consideration of the provisions of the prescribed performance guarantees.

91 Clough's obligation in clause 3.3.1 of the Contract to furnish a performance guarantee "as per proforma" set out in the Appendix, made the terms of the performance guarantee a part of the contractual arrangements between Clough and ONGC. It did not import the terms of the Contract into the performance guarantee: see *Reed Construction Services* 15 BCL at 166. However, it is almost trite to say that the contractual arrangements between the parties must be considered as whole.

92 The essential question then is whether, clause 3.3.3 of the Contract, when read with clause 2 of the performance guarantee, imports an express or implied negative stipulation in the Contract that ONGC would not invoke the security absent actual breach. More particularly, was there an express or implied negative stipulation precluding ONGC from calling upon the guarantee in the event that Clough was able to establish a genuine dispute as to whether it was in breach of the Contract? See *Reed Construction Services* 15 BCL at 165.

93 In our view there was no such stipulation. We reject Clough's submission that the words "on breach of Contract" in the performance guarantee indicate that the intention of the parties was that there must be actual breach before the guarantee could be invoked. To so confine the terms of the Contract would be to ignore the words "notwithstanding any dispute(s) pending" in clause 2 of the performance guarantee.

94 It seems to us to be plain that upon the proper construction of clause 3.3.3 of the Contract, when read together with clause 2 of the performance guarantee, ONGC was entitled to invoke the guarantee notwithstanding the existence of a dispute between Clough and ONGC as to whether Clough had failed to honour any of its commitments under the Contract.

95 The whole tenor of the performance guarantee is that it was payable on demand by ONGC on breach by Clough but without reference to Clough and without any "demur, reservation, contest or protest" by that company. In our view this emphasises the proposition that the intention of the parties to the Contract was that Clough was not entitled to raise the existence of a dispute as to whether it was in actual breach as an answer to an invocation of the guarantee and a claim under it.

96 This is further borne out by the stipulation in clause 2 of the form of guarantee that a written demand by ONGC on the bank would be conclusive and binding, without any proof of the amount payable, "notwithstanding any dispute(s) pending before" a court or tribunal.

97 We do not consider that the words "notwithstanding any dispute(s)" refer only to a dispute as to the amount claimed under the performance guarantee. Such an approach would be unduly narrow and uncommercial. It would ignore the concluding words of the sentence which refer to a dispute pending before a court or tribunal. Those words contemplate the entirety of the dispute; that is to say a dispute by Clough as to whether it was in breach.

98 Further support for the construction of clause 3.3.3 of the Contract, which we favour, is to be found in the words of clause 2 of the form of guarantee "and/or without any reference to the Contractor" and "liability under these presents being absolute and unequivocal".

99 Here, the terms of clause 3.3 of the Contract, read with clause 2 of the guarantee, show that the commercial purpose of the Contract was to allocate the risk of who should be out of pocket notwithstanding that there may be a genuine dispute as to whether Clough had failed to honour commitments under the Contract. The risk was allocated to Clough, there being no clear words to inhibit ONGC as the beneficiary of the guarantee from invoking it: *Fletcher Construction* [1998] 3 VR at 821, 827.

100 Indeed, not only are there no clear words inhibiting a call, the express words of clause 2 of the performance guarantee show that it was the intention of the parties that ONGC could invoke the guarantee even if the claimed breach was genuinely disputed.

101 It is true, as Clough submitted, that the Contract makes no reference to a "bona fide belief" as to the genuineness of the claimed breach. But as Callaway JA observed in *Fletcher Construction* [1998] 3 VR at 827, the operative words simply refer to the kind of breach which:

> if it is alleged in good faith enables the beneficiary to have recourse to the security or its proceeds.

102 In our view the primary judge's reference to a "belief" was no more than a paraphrase of the test stated by Callaway JA in *Fletcher Construction* [1998] 3 VR 812 in the passage we have quoted. This test was stated in similar terms by Brooking JA in *Bachmann* [1999] 1 VR at [53]. His Honour construed the condition entitling the beneficiary to invoke the

security as "a bona fide claim" of breach. In our opinion this was what the primary judge intended to convey in expressing his view as to the proper construction of clause 3.3.3 as he did at [53].

103 Indeed, the effect of the construction urged upon us by Clough would confine the practical right of recourse to the security to circumstances where there was no genuine dispute as to the question of breach. Council for Clough conceded that clause 3.3.3 did not require that the breach be established in curial or arbitral proceedings but in our view that does not detract from the proposition that the construction for which he contended would exclude ONGC from access to the security where Clough was able to point to a genuine dispute: *Fletcher Construction* [1998] 3 VR at 822; *Bachmann* [1999] 1 VR at [53].

104 Further support for the view that there was no express or implied qualification upon ONGC's entitlement to invoke the security upon a bona fide claim of breach is to be found in the second sentence of clause 3.3.3 of the Contract. That sentence provides that if Clough failed to furnish the performance guarantee ONGC was not obliged to make payment for any works performed and that ONGC was entitled to terminate the Contract. A similar clause was contained in the contract in *Fletcher Construction* [1998] 3 VR 812. Charles JA was of the view that it "very much supported" the conclusion that the right to invoke the security was not subject to an undisputed claim of breach (at 822).

105 We do not consider that the decision in *Pearson Bridge* (1982) 1 Australian Construction Law Reports 81, or other authorities which have followed it, assist Clough's case. The relevant clause in *Pearson Bridge* (1982) 1 Australian Construction Law Reports 81 authorised the Principal to invoke the security if he became "entitled to exercise all or any of his rights" under the contract. *Pearson Bridge* (1982) 1 Australian Construction Law Reports 81 was followed by Rolfe J in *Barclay Mowlem Construction Ltd v Simon Engineering (Australia) Pty Ltd* (1991) 23 NSWLR 451. The relevant clause in that case was virtually identical to the clause in *Pearson Bridge* (1982) 1 Australian Construction Law Reports 81. So too, the clause construed by Austin J in *Reed Construction Services* 15 BCL 158 was to similar effect. It provided that the security would be available to the proprietor "whenever the Proprietor shall be entitled to the payment of moneys by the Builder."

106 There are two short answers to the submission that these authorities are of assistance to Clough. First, in *Pearson Bridge* (1982) 1 Australian Construction Law Reports at 86

Yeldham J considered that the contract authorised the Principal to invoke the security only if it became entitled to exercise its rights. These words in the relevant clause were also emphasised by Rolfe J in *Barclay Mowlem* 23 NSWLR at 458. In our view those words do not inform the proper construction of clause 3.3.3 of the Contract in the present case, particularly when that clause is read with clause 2 of the pro forma performance guarantee. Second, the analysis undertaken by Charles JA in *Fletcher Construction* [1998] 3 VR at 820-821 casts doubt upon the construction adopted in *Pearson Bridge* (1982) 1 Australian Construction Law Reports 81 and the cases that have followed it. *Fletcher Construction* [1998] 3 VR 812 is a decision of an intermediate Court of Appeal. Batt JA expressly agreed with Charles JA and Callaway JA.

107 It is unnecessary for us to express a view as to the correctness of the decision in the *Pearson Bridge* (1982) 1 Australian Construction Law Reports 81 line of cases. But it is to be noted that in *Bachmann* [1999] 1 VR 420, which was also a decision of the Victorian Court of Appeal, Brooking JA (with whom Tadgell and Ormiston JJA agreed) cited those cases at [28]ff as authority for the proposition that a qualified contractual prohibition on the conversion of a security into cash contains an enforceable promise. However, as Brooking JA observed at [29] the question which arose was as to the content of the qualification. It is notable that the contract in *Bachmann* [1999] 1 VR 420 provided that the security may be invoked if the purchaser "becomes entitled to exercise a right". This clause is similar to that in *Pearson Bridge* (1982) 1 Australian Construction Law Reports 81.

108 As we said above, Brooking JA was of the view that the effect of the clause was to render the security enforceable upon a bona fide claim of breach. His Honour had regard, at [54], to the form of security which contained an unconditional promise to pay on demand without reference to the supplier. He considered that this supported the view that the parties contemplated that it was the supplier who should be out of pocket pending the resolution of the dispute.

109 In our opinion, the approach taken by Brooking JA in *Bachmann* [1999] 1 VR 420, which in large measure reflects and follows that of *Fletcher Construction* [1998] 3 VR 812, supports the view that a bona fide dispute as to whether Clough had failed to honour its commitments under the Contract, did not preclude ONGC from invoking the performance guarantees.

110 To the extent that commercial practice and the background and historical purpose of this type of security informs its construction, we consider that the observations of Callaway JA in *Fletcher Construction* [1998] 3 VR 812 and Brooking JA in *Bachmann* [1999] 1 VR 420, provide further support for the conclusion we have reached.

111 We have taken into account a further submission made by senior counsel for Clough as to the particular purpose for which the performance guarantees were granted. This submission is best illustrated by reference to clause 3.3.5 and clause 6.3.2 of the Contract. Counsel submitted that clause 3.3.5 provides an example of circumstances in which the performance guarantees could be invoked. He submitted that the right to invoke the guarantees pursuant to clause 3.3.5 to recover liquidated damages under clause 6.3.2, was predicated on actual breach.

112 It may be accepted that the right to recover liquidated damages is ultimately to be determined in legal proceedings and the right is predicated upon actual breach. But for the reasons set out above, we do not consider that the Contract conferred the practical right of recourse to the security only where moneys were due to ONGC "in some such sense as actually or indisputably due": *Bachmann* [1999] 1 VR at [53].

Issue B – validity of the demand

113 In ground 6 of the notice of appeal it is contended that the demands made under the performance bank guarantees were invalid because they did not contain a statement of an amount actually due and payable by Clough. Clough asserted that a demand for the full amount guaranteed was not valid absent identification of a material breach and consideration of whether a call for the full amount was disproportionate.

114 Clause 2 of the proforma performance bank guarantee set out in Appendix III to the General Conditions of Contract contained the undertaking of the bank issuing the guarantee to "hereby guarantee and undertake to pay immediately on first demand in writing and any/all moneys to the extent of US$7,178,371.88 … on breach of contract by contractor …". Clause 2 further provides that "Any such demand made by Company on the Bank by serving a written notice shall be conclusive and binding, without any proof, on the bank as regards the amount due and payable".

115 Clough submitted that the banks' undertaking, made by reference to a maximum amount specified in the performance bank guarantees, indicated that an amount had to be claimed and that it was insufficient to call on the maximum. The reference in clause 2 to the conclusive and binding nature of the demand "without any proof, on the bank as regards the amount due and payable" was said to support a requirement that the actual amount payable had to be specified. Absent a specification of the actual amount due and payable as in fact due and payable, the demands were said not to be valid.

116 ONGC responded to Clough's submissions by relying upon his Honour's reasons for rejecting them at first instance. We agree. A condition of the kind propounded by Clough, upon the validity of demands under the guarantees would be of considerable commercial significance. No such condition is expressed in clause 2 or anywhere else in the guarantee. Nor is such a condition necessary to give business efficacy to the guarantee or the provisions of the Contract. Bad faith limitations on the exercise of the right to call in the guarantee would no doubt inhibit the capricious selection of the maximum amount. There is, however, no allegation of fraud or want of good faith in this case. In our opinion there is no basis for the condition on the validity of demands for which Clough contends.

Issue C - Correspondence and meetings related to extension of performance guarantees and insurance cover

117 His Honour found that Clough was in breach of its obligations under the Contract in relation to the extension of the performance guarantees and its failure to deliver copies of policies of insurance and certificates of insurance to cover the extended completion date and warranty period.

118 It is helpful to refer to the terms of some of the correspondence and minutes of meetings leading up to ONGC's notice of termination which were in evidence before his Honour. These included the following:

(i) Letter dated 20 March 2006 from Clough to ONGC referring to an agreement to defer sub-sea installation work to 2007 season. The letter said:

> In line with this agreement and our CEO's telephone conversation with your ED-CES and based on the contract schedule we request an extension of time beyond January 1, 2007.

(ii) Letter dated 7 April 2006 from Clough to ONGC referring to a letter sent on 21 March 2006 [sic] and noting no response. The letter said:

> We request your formal approval of the extension of time referred to in above correspondence within five working days.

(iii) Letter dated 11 April 2006 from Clough to ONGC requesting copy of the main Contract with an extended completion date.

(iv) Letter dated 12 April 2006 from Clough to ONGC repeating request for extension to Contract completion date. Absent such extension Clough would have to prepare to demobilise all vessels from the field to have them out by 15 April 2006.

(v) Fax dated 15 April 2006 from ONGC to Clough:

> ONGC hereby provisionally extends the time for completion of the above mentioned work up to 31.01.2007 with out [sic] prejudice to the right of ONGC to recover liquidated damages in accordance with the provisions of the said contract.
>
> Provided that not withstanding [sic] the extension hereby granted, time is and shall still continue to be the essence of the said contract.

(vi) Fax dated 24 April 2006 from ONGC to Clough drawing attention to outstanding issues requiring resolution. The fax concluded:

> In view of the non availability of information and firm schedule for the supply of sub sea hardware Project group is not in a position to process the Time Extension Proposal for submission to the ONGC senior management for perusal and approval.

(vii) Letter dated 26 April 2006 from Clough to ONGC making clear that request for extension resulted from ONGC's default in provision of company-supplied equipment (ie DHPTT cards) as well as ONGC's delays in drilling and completions program. Clough acknowledged ONGC confirmation that Clough was entitled to an extension of time to complete obligations under the Contract:

> Clough accepts ONGC's deferment of the Scheduled Completion Date beyond the 2006 Working Season without prejudice to its full entitlement, and hereby advises ONGC that it is entitled to an extension of time to at least 11 April 2007 which is the first reasonable date by which the project can be completed.

Clough denied ONGC's entitlement to recover liquidated damages.

(viii) Fax dated 3 June 2006 from ONGC to Clough. This fax began:

> Please refer to above ONGC communications on the subject matter, still the compliances are pending from CEL related to the Central Excise, Insurance policies & Performance Bank guarantee.
>
> …
>
> ii. *Insurance policies*: Original insurance policies were taken by CEL considering completion date as 15.4.2006. In view of CEL's request for time limit for completion till 13.4.2007, all insurance policies need to be revalidated accordingly *as per Cl No 7.3.1*.
>
> iii. *Performance bank guarantee*: In view of CEL's request for time limit for completion till 13.4.2007, Performance bank guarantee submitted earlier need to be revalidated accordingly *as per Cl No 3.3*.
>
> [Emphasis in original]

(ix) Letter dated 16 June 2006 from Clough to ONGC. This letter submitted a claim for the completion of the remaining works. It constituted an offer covering both schedule and cost and subject to conditions. These included a requirement that the performance bond be reduced in value by the proportionate amount of the work already completed by Clough in the original contract.

(x) Letter dated 13 July 2006 from Clough to ONGC referring to severe defaults by ONGC relating to the provision to Clough of free-issue materials and completion of ONGC's drilling and completions program. Clough referred to a claim submission of 16 June 2006 to support a reasonable extension of time, a reasonable cost compensation and amendment of milestone payment definitions.

(xi) Minutes of meeting 21 July 2006 between Clough and ONGC. The meeting discussed stoppage of work by Clough. Clough was suffering shortage of funds to make payments to vendors and subcontractors. Clough would have to incur additional expenditure for the third completion of project by early 2007. ONGC agreed, inter alia, to "[C]onsider time extension for the delay if attributable to ONGC on account of DHPT card". Clough agreed to withdraw actions arising out of letter of 16 June 2006 and resume project work immediately. Both parties free to invoke respective rights and remedies. The minutes concluded:

> Meeting concluded with assurance given by ONGC and CEL to each other on their part. The CEL agreed to adopt pro-active approach to complete the project expeditiously with in the time frame set out ie by the end of the working season 2007. [sic]

The minutes were countersigned by both parties.

(xii) Fax dated 29 July 2006 from ONGC to Clough repeating its request for revalidation of insurance policies and performance bank guarantees in light of Clough's requests for extension to 13 April 2007.

(xiii) Fax dated 9 August 2006 from ONGC to Clough re incident on Sagar Bhushan over well G1-DP. BOP riser had parted due to rough sea conditions.

(xiv) Letter dated 11 August 2006 from Clough to ONGC asking for confirmation for joint meeting advised in ONGC correspondence of 1 August 2006.

(xv) Fax dated 12 August 2006 from ONGC to Clough including the following:

> During the discussions held between [Clough] and ONGC on 2-08-06 … [Clough] has assured that the PBGs and all insurance policies will be kept valid and [Clough] will take due care to extend the same prior to the expiry of the same.

(xvi) Minutes of meeting 23 August 2006. ONGC's proposed drilling schedule discussed. At Item 1.13:

> CEL/Cameron to review the delivery dates critically and seek ways to improve upon these such that completion of the project in April 2007 is not compromised.

(xvii) Fax dated 28 August 2006 from ONGC to Clough advising that ONGC to furnish indicative drilling and well completion schedule.

(xviii) Fax dated 4 September 2006 from ONGC to Clough:

> The scheduled completion date of the project under the subject mentioned contract awarded to M/s **CLOUGH ENGINEERING LTD** was 15.04.2006, but M/s CEL could not complete the works as per schedule and have asked vide their various letters for extension of time of the contract to complete the balance works.
>
> Oil and Natural Gas Corporation Limited (ONGC) after having considered outcome of meetings at the senior level of both the sides, hereby extends the time for Completion of the above mentioned Project up to 13.04.2007. However Extension up to 26.02.2007 shall be considered without levy of Liquidated Damages and extension thereafter up to 13.04.2007 would be without prejudice to ONGC's right to recover Liquidated Damages in accordance with the provisions of the said contract.
>
> Provided that not withstanding [sic] the extension hereby granted, time is and shall still continue to be the essence of the said contract**.**

(xix) Letter dated 20 September 2006 from Clough to ONGC. Clough acknowledged receipt of letter of 4 September 2006 and advised that it did not agree with ONGC's position that the scheduled completion date be extended to 13 April 2007. Because of ONGC's delays Clough claimed to have been severely affected in its ability to perform under the Contract. As a consequence it maintained time was no longer of the essence but at large. ONGC's right to recover liquidated damages was voided and Clough was obliged to perform the works in a reasonable time.

(xx) Fax dated 7 October 2006 from ONGC to Clough. This fax noted that Clough was yet to comply with requirements relating to the insurance policies and the performance bank guarantees. It was referred to clause 7.3.1 "… in view of contract amendment for project completion by 15.4.2007". It was also required to extend the validity of the performance bank guarantees "… as per Cl No 3.3, in view of contract amendment for project completion by 15.4.2007". The fax concluded:

> In spite of several reminders [Clough] has not submitted the required details/documents till date. ONGC needs the required details/documents & in the absence of above documents it may not be possible to release any future payment to [Clough].

(xxi) Fax dated 2 November 2006 from ONGC to Clough. Clough was again reminded to extend its insurance policy in accordance with clause 7.3 and also to extend the validity of the performance bank guarantees pursuant to clause 3.3.

(xxii) Fax dated 6 November 2006 from ONGC to Clough. This repeated the substance of the fax of 2 November 2006 and concluded:

> Clough to note that extension of Insurance Policies and PBG are pre-rquisites [sic] for effecting any future payments under this contract.

(xxiii) Fax dated 18 January 2007 from ONGC to Clough requesting a firm action plan be submitted, failing which the fax message could be treated as notice under the provisions of the Contract:

> … as then ONGC would be left with no alternative but to initiate undesirable and avoidable actions of invoking provisions of clause 8.4.1.1 vi) & viii) and clause 8.4.1.2 of the Contract, hold all the due payments including encashment of the Performance Bank Guarantee to execute the balance works at the risk and cost of CEL as per the provisions of the Contract.

(xxiv) Fax dated 29 January 2007 from ONGC to Clough. A similar threat was made absent Clough submitting a firm action plan not later than 1 February 2007.

(xxv) Fax dated 29 March 2007 from ONGC to Clough. ONGC said it had extended the time for completion of the project to 13 April 2007 by its letter of 4 September 2006. As completion by that date was not possible it noted that the contractor's all risk and third party liability policies for the Contract were valid till 15 April 2007 only. ONGC pointed out that under clause 7.3 of the General Conditions of the Contract, it was Clough's responsibility to keep the policies of insurance valid throughout the period of the execution of the works. Clough was advised to do what was necessary to extend the validity of the policies and to keep them valid. ONGC also referred to various earlier communications in which Clough was advised to extend the validity of the performance bank guarantees as per clause 3.3 of the General Conditions of Contract. The fax stated:

> CEL is now once again advised to take immediate necessary actions to get extended, the validity of the insurance policies and PBG's as required under the terms and conditions of the contract and submit to ONGC extended insurance policies and PBG's by 10.04.2007 positively. In case CEL fails to comply with these requirements, ONGC will be constrained to take actions as per the provisions of the contract, as maybe deemed fit under the present circumstances. This is without prejudice to our rights under the contract and law.

(xxvi) Letter dated 3 April 2007 from Clough to ONGC replying to ONGC's letter of 29 March 2007. Clough advised that it had prepared three indicative schedules jointly reviewed by itself and ONGC. It then stated:

> [Clough] advises that the current expiry date for the CAR insurance is 15.04.07. [Clough] is in the process of extending the insurance and intends for the extension to be in place prior to the current expiry date of 15.04.07. If required, CEL will provide a certificate of currency of that extension to ONGC. For clarity, the need for extension of the insurances is wholly due to ONGC delays to the project and [Clough] reiterates previous advice that all time and costs associated with these delays are to the account of ONGC, including the costs of these further insurance extensions.

In relation to the performance bank guarantees Clough stated:

> As ONGC is aware, the Performance Bank Guarantee(s) (PBG) is current to 14th June 2007. Contract clause 3.3.2 provides for the extension of the PBG "to make it valid for 12 months plus 60 days from the actual date of completion of Works". The date of actual completion of Works is not now known nor can it be known until after the Way Forward has been determined and agreed between the parties. Rather than pre-empt the outcome of these deliberations by extending the validity of the PBG, [Clough] will wait until an agreement is reached concerning the Way Forward, and to then act accordingly.

(xxvii) Fax dated 11 April 2007 from ONGC to Clough. ONGC reiterated that the requisite extensions of the insurance policies and the performance bank guarantees were required under the contract and could be put in place by Clough without further loss of time.

(xxviii) Fax dated 14 April 2007 from ONGC to Clough. ONGC observed that it had not received any confirmation of the extension of the insurance policies. Nor had it received any extension of the performance bank guarantees. Clough was again advised to submit extended guarantees "without any further delay".

(xxix) Letter dated 16 April 2007 from Clough to ONGC. Clough wrote to ONGC with a proposed scheduling of outcomes and stated:

> In addition to the payments listed above, CEL would require the three existing bonds presently held by ONGC to be returned. But in recognition that work will still be required to complete the onshore plant, CEL is willing to provide a performance bond to the value of 10% of the remaining work, ie USD 2.17m. CEL will require this bond to be returned at mechanical completion of the onshore plant.

(xxx) Letter dated 1 June 2007 from Clough to ONGC. The Chief Executive of Clough wrote to the Chairman and Managing Director of ONGC noting that ONGC was considering calling on the bank guarantees provided by Clough. The letter stated:

> I understand that the bonds currently expire in June and appreciate that allowing the bonds to lapse may be contrary to that agreed between ourselves. I am seeking agreement from my board to extend the bonds to ensure we have sufficient time to conclude our negotiations. This action is of course subject to your agreement to reach a negotiated exit solution as was the direction from Mr Bose at my last meeting.

119 ONGC's notice of termination issued on 4 June 2007. It referred to the Contract and in para 1 stated, inter alia:

> The effective date of the commencement of works was 30.11.2004, the date of Notification of Award of the works and the entire Scope of the Works was to be completed by the overall completion date of 15.04.2006, revised to 13.04.2007 & provisionally extended up to 30.04.2008.

The notice went on to allege delay and default on the part of Clough and breach of the Contract. ONGC alleged, inter alia, that Clough had "failed and neglected" to complete the works in accordance with the Contract. At para 3 of the notice it stated:

> In view of the breach of the Contract committed by you and also repudiation/abandoning of the Contract on your part, ONGC hereby terminates the contract.

120 On 11 June 2007 Clough acknowledged receipt of the termination notice. It denied that it was in breach of the Contract and said that any delays in performance of its obligations were due to ONGC's delays. It then stated:

> The matters in dispute between CEL and ONGC (including, but not limited to CEL's rights to damages) are hereby referred to arbitration as per clause 1.3.2 of the Contract and CEL nominates/appoints Justice BN Srikrishna (former Judge, Supreme Court of India) as first arbitrator as per the said clause. CEL calls upon ONGC to nominate a second arbitrator within 30 days of receipt of this letter in accordance with clause 1.3.2 of the Contract.

On 26 June 2007 ONGC appointed a former Chief Justice of India, VN Khare, as an arbitrator. Justice BPJ Reddy was appointed the chairman of the arbitrators' panel.

Issue D – whether Clough was in breach of its obligations under the Contract

121 Clough submitted that, following the failed well completion, the parties had begun negotiating an entire revision of the Contract sequence and completion, including the provision of new performance guarantees. The discussions continued through to June 2007. Clough submitted that the correspondence demonstrated that no agreement had been reached on a new completion date at that time. Its failure to renew the performance guarantees had to be considered in the context and in light of the circumstances that ONGC was actively negotiating with it and had provisionally extended the completion date to 30 April 2008. His Honour, it was said, did not have regard to the provisional extension.

122 Clough also submitted that there was no evidence that it had in fact refused to renew the performance guarantee. Its board was to discuss a suitable interim period for an extension pending further negotiation. Clough said that ONGC's insistence on it meeting its obligations under the Contract (according to the original contract terms and dates) was untenable.

123 ONGC argued that, as at 4 June 2007, and in light of the obvious importance from its perspective of having performance guarantees in place to cover the warranty period and in light of the many requests it had made for renewal of the guarantee, a reasonable time had well and truly elapsed since the obligation first arose in April 2006. Because Clough had repeatedly refused to renew the performance guarantees and because of its indication on 1 June 2007 that it would only do so on the basis of a "negotiated exit solution" ONGC's

decision to call on the guarantee created the security in ONGC's hand which Clough was obliged to provide.

124 It is necessary to revert to clauses 3.3.1 and 3.3.2. Clause 3.3.1 required Clough to furnish ONGC "within 2 weeks from the date of signing of this contract" with the relevant performance guarantee. It was to be valid up to a period of the scheduled completion date and warranty period plus 60 days. The performance guarantee was to be provided early in the life of the Contract, that is to say, within two weeks of signing. Under clause 3.3.3 ONGC had the option of terminating the Contract and forfeiting the bid security amount in the event of Clough failing to furnish the performance bank guarantee as stipulated in clause 3.3.1. These provisions clearly contemplated a performance guarantee being in place to cover the full term of the Contract from very early in the life of the Contract.

125 Clause 3.3.2 does not expressly state a time at which the performance bank guarantee was to be extended to meet an extension in the Contract completion date. In our opinion however, consistently with the scheme of the performance bank guarantee provisions, it was an implied term of the Contract that the guarantees were to be renewed within a reasonable time of the extension of the completion date. As ONGC pointed out in its submissions, had Clough been permitted to renew the guarantees at any time prior to their expiry, ONGC would have been left for a substantial period with guarantees valid for less than 12 months and 60 days from actual completion. On the material before him, his Honour was correct to find that Clough was obliged to extend the validity of the guarantees so that they would be valid for 12 months plus 60 days from the date of completion of the works at all times. Clough, was on the face of the documentary evidence, in breach of the Contract in this respect. In any event there was at no time an unequivocal commitment to an extension.

126 In relation to the provision of insurance certificates, Clough submitted that under clause 7.3.8 it was required to renew existing policies to ensure that everything remained insured at all times including over the period when the project was delayed in completion. It was to be given a reasonable time thereafter to provide certificates. Because the existing policies had not expired, Clough was not required to renew them and therefore not under an obligation to provide further certificates. The alleged breach of clause 7.3.8 had to be considered by reference to the following facts:

(a) By its fax of 3 April 2007 Clough informed ONGC that insurance policies that were in place expired in April 2007 and that it was in the process of extending them and, if required, would provide a copy of extensions.

(b) The insurance policies were in fact renewed until 19 April 2008.

(c) From the middle of April 2007 until the purported termination by ONG on 4 June 2007, Clough advanced constructive proposals for the future progress of the project and was attempting to organise meetings for the parties to negotiate for the progress. Clough submitted that the insurance certificate appears to have not been provided through an oversight while Clough was attempting to deal with the whole project.

127 ONGC contended that Clough was obliged, under clause 7.3.8, to produce upon its request a certificate of insurance to the effect that all premiums under the policy had been paid and including the validity of the policy. The trial judge had referred to correspondence addressed by ONGC to Clough between 3 June 2006 and 14 April 2007 requesting Clough to provide copies of certificates of insurance in accordance with clause 7.3.8. His Honour found that Clough never provided copies of the requested policies. ONGC pointed out that Clough did not challenge this evidence but instead alleged that it was in the process of extending the policies and, if required, would provide a copy of the extensions. Its obligations pursuant to clause 7.3.8 could not be satisfied by simply informing ONGC that it was in the process of extending the policies.

128 In our opinion, Clough was in breach of its obligations under the Contract in respect of the extension of the performance bank guarantees and the provision of insurance cover.

Issue E – Whether ONGC acted unconscionably in calling on the performance bank guarantees

129 Assuming s 51AA is capable of application in the proceedings in this Court notwithstanding the choice of law and arbitration provisions of the Contract, this was not a matter in which there was a serious case of unconscionable conduct to be tried.

130 The scope of s 51AA was discussed by the Full Court in *Samton* 117 FCR 301. As was pointed out in that case, a party alleging a contravention of s 51AA must be able to identify conduct which is unconscionable in a sense known to the "unwritten law, from time to time, of the States and Territories". Under the unwritten law, which is the common law of

Australia, unconscionable conduct will be such conduct as would support the grant of relief on principles set out in specific equitable doctrines.

131 Equity does not provide a remedy in respect of conduct in trade or commerce which is, in the opinion of a judge, unfair. It does not apply to unconscionable conduct at large: *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 245 (Gummow and Hayne JJ).

132 Some reliance was placed upon the judgment of Batt J in *Olex Focas* [1998] 3 VR 380. The case involved a construction project in India. Subcontractors engaged by a head contractor provided mobilisation guarantees to cover advances on progress payments, repayable in the ordinary course by deductions from progress payments, and also performance bank guarantees. Both classes of guarantee contained unconditional undertakings by the issuing banks to make payment on demand. The head contractor, in dispute with the subcontractors, called upon the full amount of the guarantees. In relation to the mobilisation guarantees this demand was made notwithstanding that the advances had been largely repaid and that the guarantees were limited to mobilisation/procurement advances and were not guarantees for other purposes.

133 The subcontractors applied for interlocutory injunctions requiring the head contractor to withdraw its demands and restraining the banks from making any payments under them. The interlocutory injunctions were granted in relation to the mobilisation guarantees but not in relation to the performance bank guarantees. Batt J noted in passing that the proper law of the guarantees was held to be that of the Czech Republic and, absent evidence, was assumed to be the same as that of Victoria. His Honour held that there was a serious question to be tried on whether the head contractor and the subcontractors were engaged in trade and commerce between Australia and a place outside of Australia for the purposes of s 6(2)(a) of the TPA. There was also a serious question to be tried whether the head contractor had acted unconscionably in contravention of s 51AA of the TPA by insisting on its strict legal rights in making demand under the mobilisation guarantees.

134 The judgment in *Olex Focas* [1998] 3 VR 380, which was given in August 1996, was one of the earliest judgments on the application of s 51AA. It preceded the consideration given to that provision by the High Court in *CG Berbatis Holdings* 214 CLR 51 which left open the question whether the prohibition in the section only extended to unconscionable

conduct in special disadvantage cases: eg *Blomley v Ryan* (1956) 99 CLR 362. In *Samton Holdings* 117 FCR 301 the Full Court observed that the terms of the section were not limited to special disadvantage cases.

135 Importantly, in relation to the performance bank guarantees, Batt J said (at 403):

> Despite the extension by the High Court in recent years of the use of the concept of unconscionable conduct as a criterion of liability, and despite the facts as deposed to by Mr Campbell, in this case I am not persuaded that the conduct of the first defendant in seeking to call up and procuring the call up of the performance bonds for their full amount is unconscionable or that there is a serious question to be tried about that.
>
> I reach that conclusion against the background of the historical purpose and use of such bonds, as discussed in the case that I have referred to earlier and in textbooks, and against the background of the High Court in *Wood Hall*, noting with apparent equanimity that it seemed that in making the demands the authority was acting pursuant to what it described as a "strategy" to put pressure on the contractor in the hope that the dispute between the parties might be settled more advantageously to the authority.

His Honour went on to say that he would not exercise his discretion to grant an injunction with respect to the performance bonds in any event having regard to their nature and the effect on international commerce that the grant of an injunction or the repeated grants of injunction might have. In that connection the balance of convenience favoured refusal.

136 In connection with the mobilisation and procurement guarantees which were for a limited purpose and in respect of which a demand for the full amount had been made notwithstanding that the relevant advances had been substantially repaid, his Honour took a different view. In so doing he relied upon the decision of the High Court in *Stern v McArthur* (1988) 165 CLR 489. That case was a case about relief against forfeiture of possession as between vendor and purchaser. In their joint judgment, Deane and Dawson JJ who, with Gaudron J, found the purchasers were entitled to relist against forfeiture, acknowledged, at 526, that in considering whether intervention were justified great weight would be given to the bargain which the parties had made for themselves – citing *Shiloh Spinners Ltd v Harding* [1973] AC 691 at 723 and *Legione v Hateley* (1983) 152 CLR 406 at 447. The usual elements of fraud, mistake, accident or surprise did not exhaust the scope of unconscionable or unconscientious behaviour which might attract relief. Their Honours said (at 526-527):

> The general underlying notion is that which has long been identified as underlying much of equity's traditional jurisdiction to grant relief against unconscientious conduct, namely, that a person should not be permitted to use or insist upon his legal

> rights to take advantage of another's special vulnerability or misadventure for the unjust enrichment of himself …

They further said (at 527):

> One situation in which equity has traditionally granted relief is where provision for forfeiture has been made to secure the payment of money and the party in default seeks relief upon the basis of payment of the amount owing together with the appropriate compensation. In that situation the object of the provision is achieved and it would be unconscientious for the other party to seek to take advantage of the forfeiture. An obvious application of this principle (although it may have emerged separately) is the equity of redemption in the case of a mortgage. There, no proof of fraud, mistake, accident or surprise is required to establish the equity because the very nature of the transaction is such that the court, acting upon conscience, will grant relief…

137 The final relief claimed in the application filed in the present proceedings included:

> A declaration that on the proper construction of the Contract entered into by [Clough] and [ONGC] on 30 November 1994 [sic] as recorded in an instrument dated 6 January 2005 (Contract), and in the events which have happened [ONGC], by threatening to make a demand on the performance guarantees granted by the [banks] has engaged in, or proposed to engage in, unconscionable conduct in contravention of s 51AA of the Act.

The final injunctive relief sought would restrain ONGC from making demand for payment from the banks and would restrain the banks from making payment to ONGC under the performance bank guarantees.

138 As already pointed out, on their proper construction, the performance bank guarantees were unconditioned on any actual breach and did entitle ONGC to call upon them for their full amount. Given the commercial purpose of such guarantees, recognised in *Wood Hall Ltd* 141 CLR 443 assuming the absence of fraud, there would seem to be very little, if any, scope for the application of equitable doctrines of unconscionable conduct to restrain the exercise by a party of its legal rights under such guarantees. There may be extreme cases which would merge into the area of bad faith exercises of the power. However that may be, the present is not a case which, on the materials before his Honour, justified any finding of a serious question to be tried of a contravention of s 51AA. The wide purpose of the performance bank guarantees and their character as reflecting an allocation of risk and a provision of security to their holder militate against any argument as to disproportion in their exercise.

139 We think his Honour was right to reject the contention that there was a serious question to be tried of unconscionable conduct on the part of ONGC in calling upon the performance bank guarantees.

Conclusion

140 The Court has found against Clough on each of the issues going to the substantive merits of the case upon which it based its claim for injunctive relief and sought to defend its application and service of the application out of the jurisdiction. It is not necessary to decide the questions raised on the notice of contention relating to the choice of law and arbitration provisions in the Contract. These obviously raise considerable difficulties for Clough. It is sufficient that the appeal be dismissed for the reasons we have set out.

I certify that the preceding one hundred and forty (140) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices French, Jacobson and Graham.

Associate:

Dated: 22 July 2008

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Date of Hearing: 29 and 30 May 2008
Date of Judgment: 22 July 2008