Bocotra Construction Pte Ltd and others
v
Attorney-General

[1995] SGCA 50

Court of Appeal — Civil Appeal No 168 of 1994
Yong Pung How CJ, M Karthigesu JA and L P Thean JA
23 March; 23 May 1995

Civil Procedure *— Injunctions — Interim injunction — Injunction to restrain call on performance guarantee — Whether interim declaratory relief available as alternative to injunction*

Contract *— Contractual terms — Rules of construction — Performance guarantee — Whether provisions in performance guarantee to be construed so as to affect right of beneficiary to make demand — Whether performance guarantee properly construed to be demand bond — Whether right to make demand premised on contractual interpretation of performance guarantee or nature of underlying transaction*

Credit and Security *— Performance bond — Call by beneficiary for payment — Interim injunction to restrain call — Whether challenge to validity of bond in arbitration basis for court to enjoin call on bond — Principle of autonomy of guarantees from underlying contract — Fraud as exception — Unconscionability as emerging exception — Whether balance of convenience test applicable*

Facts

The appellant contractor had sought interim declaratory relief in lieu of an injunction with respect of a performance guarantee they provided the Director-General of Public Works ("DGPW"), a government entity. The High Court held that the performance guarantee was a demand bond and proof of default was not required before the bank could be called to make payment thereunder. The substantial points in this appeal were (a) whether on a true construction of the guarantee, proof of the debtor's default in performance was required before the guaranteed sum would become payable to the beneficiary; (b) whether the existence of a genuine and substantial challenge to a performance guarantee as such gave rise to a right at law to enjoin a call on the performance guarantee; and (c) whether an arbitration rule empowering an arbitrator to order that security be provided for amounts in dispute also gave the arbitrator power to order that the moneys payable was under the control of the beneficiary pending the final award.

Held, dismissing the appeal:

(1) A reference in a performance guarantee to a provision in a separate contract did not as such incorporate the contract "by reference" into the performance guarantee or qualified the right of the beneficiary to make a demand. Reference to "such liability as you may determine" did not mean that the beneficiary was entitled to specify the quantum payable after liability had been determined when the beneficiary was also provided with the power to

determine both default and quantum. Conditions regulating the procedural aspects of calling on a performance guarantee did not render the guarantee conditional in the true sense. The lack of a conclusive evidence clause in the guarantee was immaterial when the terms of the guarantee pointed toward the clear conclusion that it was an unconditional demand bond and proof of default was not required before a call for payment could be made: at [22] to [26].

(2) The mere fact that the validity of a guarantee was substantially challenged in other proceedings would not automatically provide a basis for a court to issue an injunction restraining an intended call for payment. It would still be in the exceptional case of fraud that an injunction could be granted: at [38].

(3) When provision of security for disputed amounts was not in issue, an arbitration rule empowering an arbitrator to order that security be provided for amounts in dispute, was inapplicable to give the arbitrator power to order that the moneys payable was under the control of the beneficiary pending the final award: at [55].

[Observation: Whether there was fraud (or unconscionability) was the sole consideration in applications for injunctions restraining payment or calls on bonds to be granted. "Balance of convenience" was not a consideration, and it did not lie in the mouth of the defendant to claim that damages would still be an adequate remedy: at [46].]

Case(s) referred to

American Cyanamid Co Ltd v Ethicon Ltd [1975] AC 396; [1975] 1 All ER 504 (distd)

Barclay Mowlem Construction v Simon Engineering (Australia) (1991) 23 NSWLR 451; [1991] APCLR 1 (distd)

Bhoja Trader, The [1981] 2 Lloyd's Rep 256 (refd)

Bolivinter Oil SA v Chase Manhattan Bank NA [1984] 1 Lloyd's Rep 251 (folld)

Brody, White and Co Inc v Chemet Handel Trading (S) Pte Ltd [1992] 3 SLR(R) 146; [1993] 1 SLR 65 (folld)

Deutsche Rückversicherung AG v Walbrook Insurance Co Ltd [1995] 1 WLR 1017; [1994] 4 All ER 181 (refd)

Edward Owen Engineering Ltd v Barclays Bank International Ltd [1978] QB 159; [1978] 1 All ER 976 (folld)

Elan Digital Systems Ltd v Elan Computers Ltd [1984] FSR 373 (folld)

Esal (Commodities) Ltd and Reltor Ltd v Oriental Credit Ltd and Wells Fargo Bank NA [1985] 2 Lloyd's Rep 546 (refd)

Esso Petroleum Malaysia Inc v Kago Petroleum [1995] 1 MLJ 149 (folld)

Howe Richardson Scale Co Ltd v Polimex-Cekop and National Westminster Bank Ltd [1978] 1 Lloyd's Rep 161 (not folld)

I E Contractors v Lloyd's Bank [1990] 2 Lloyd's Rep 496 (refd)

Kvaerner Singapore Pte Ltd v UDL Shipbuilding (Singapore) Pte Ltd [1993] 2 SLR(R) 341; [1993] 3 SLR 350 (refd)

Pearson Bridge (NSW) Pty Ltd v State Rail Authority of New South Wales (1982) 1 A Con LR 81 (refd)

Potton Homes Ltd v Coleman Contractors Ltd (1984) 28 Build LR 19 (refd)

Rajaram v Ganesh [1994] 3 SLR(R) 79; [1995] 1 SLR 159 (refd)

R D Harbottle (Mercantile) Ltd v National Westminster Bank Ltd [1978] QB 146; [1977] 2 All ER 862 (refd)

Royal Design Studio Pte Ltd v Chang Development Pte Ltd [1990] 2 SLR(R) 520; [1990] SLR 1116 (refd)

Siporex Trade SA v Banque Indosuez [1986] 2 Lloyd's Rep 146 (folld)

State Trading Corp of India v E D & F Man (Sugar) Ltd [1981] Com LR 235 (refd)

Legislation referred to

Government Proceedings Act (Cap 121, 1985 Rev Ed) s 27(1)

Michael Khoo, Josephine Low and Cheah Kok Lim (Michael Khoo & B B Ong) and Ho Chien Mien (Allen & Gledhill) for the appellants;
Lee Seiu Kin and Lionel Yee (Attorney-General's Chambers) for the Attorney-General.

[Editorial note: The decision from which this appeal arose is reported at [1994] 3 SLR(R) 723.]

23 May 1995 Judgment reserved.

M Karthigesu JA (delivering the judgment of the court):

1 This is an appeal against the order of Goh Joon Seng J made on 28 October 1994, dismissing the appellants' application for declaratory relief pursuant to an order made in arbitration proceedings between the parties on 25 February 1994. In a related matter which was concurrently heard before this Court of Appeal as Civil Appeal No 132/94 [reported at *Bocotra Construction Pte Ltd v AG* [1995] 2 SLR(R) 282] (also referred to hereinafter as "the related appeal"), the learned judge had held that the interim order relating to the letter of guarantee number 957/88/875 made by Tun Mohamed Suffian, the arbitrator appointed, was not binding on the respondent because the award was invalid or void. At the conclusion of the hearing, we reserved judgments on both appeals. The factual background in respect of both appeals was similar, and we will refer to the facts as set out in our judgment in respect of Civil Appeal No 132/94. The abbreviated terms and references used in that judgment are also employed here.

The proceedings from which this appeal arose

2 The present appeal, like the related appeal, arose from a dispute relating to the arbitrator's order on 25 February 1994 in the following terms:

> I hereby declare that the respondent is not entitled to demand or otherwise take any steps to call for payment of any sum under the letter of guarantee No 957/88/875 dated 13 August 1988 until such time as

> the respondent's entitlement to make such or any call for payment under the said letter of guarantee has been determined in this arbitration.

3 On 22 March 1994, the appellants filed an originating summons praying for declaratory relief in terms and effect which reflect those provided by the arbitrator's order. The appellants prayed for the following reliefs:

> (1) A declaration that the defendant whether acting by itself, its officers, servants or agents of any of them or otherwise howsoever is not entitled until after final award in the arbitration between the abovenamed parties has been made and published to the parties to:
>
> > (a) give, furnish or provide any written notice pursuant to the letter of guarantee No 957/88/874 for $31,288,888.80 (the guaranteed sum) dated 13 August 1988 issued by Standard Chartered Bank (the guarantee) to Standard Chartered Bank; and
> >
> > (b) claim, collect, obtain, acquire or receive the guaranteed sum or any part thereof from the Standard Chartered Bank, its officers, servants or agents or otherwise howsoever.
>
> (2) A declaration that on the true construction of the guarantee and in the circumstances the guaranteed sum or any part thereof is payable only on proof by the defendant of the plaintiffs' default under the contract dated 27 November 1987 made between the plaintiffs and the defendant.
>
> …
>
> (6) A declaration that the arbitrator was and is empowered to make an order pursuant to the agreed SIAC (*sic*) rules and particularly r 18(g) that the money payable under the bank's letter of guarantee is property or a thing under the control of the defendant pending the final award and r 20.5.

4 The present proceedings were heard by Goh Joon Seng J immediately after the conclusion of the hearing in the related appeal. Upon hearing the parties in that appeal, Goh Joon Seng J declared that the order of the arbitrator did not bind the PWD, founding his decision on three grounds: the arbitrator was not seised of the dispute relating to the guarantee, interim declaratory relief was unknown in law, and r 18(g) which the arbitrator relied on as the source of his power to make the order had been misinterpreted by the arbitrator. Consistent with that ruling and his grounds thereof, in dealing with the present appeal, Goh Joon Seng J dismissed the above prayers sought by the appellants and awarded the respondent the costs of both the proceedings.

The appeal

5 The issues which required consideration in the present appeal did not correspond entirely with those which arose in the related appeal, notwithstanding that the factual background was similar. Where appropriate, we shall make the relevant references to our reasons in respect of the related appeal. In this judgment, we shall deal with the appeal according to the specific prayers sought by the appellants.

Prayer 2 — proof of default as a precondition for a call

6 In relation to prayer 2, the question was whether proof of the appellants' default in performance was required before the guaranteed sum (or part thereof) under the contract would become payable. The judge below declined to declare that this was the true construction of the guarantee. He held that the guarantee was not subject to any finding of default in performance on the appellants' part by the arbitrator. The judge opined that the guarantee was essentially a demand bond under which the bank would have to pay on demand the amount demanded up to the limit of the guaranteed sum.

7 On appeal, the appellants contended that the judge below had erred in so holding. First, it was contended that the judge had failed to consider the relevance of the fact that the recital to the guarantee referred to cl 9 of the conditions. The recital states:

> [W]hereas by cl 9 of the conditions of contract, the contractor must provide a bank guarantee for a sum equal to ten per cent (10%) of the contract sum, for the due performance of the contract.

8 On this basis, the appellants submitted that the contract itself had qualified the right of the respondent to make a demand on the guarantee. Second, cl 1 contained an agreement by the bank to pay the respondent "forthwith on demand any sums not exceeding in the aggregate Singapore Dollars Thirty One Million Two Hundred and Eighty Eight Thousand Eight Hundred and Eighty Eight Cents Eighty only ($31,288,888.80) … upon receipt of any written notice…". Clause 5 in turn subjected the guarantee to a condition that a claim had to be made upon the bank by notice in writing, "within six (6) months from the expiry of this guarantee". On this basis, the appellants submitted that on its face, this is not an unqualified absolute right to demand. Moreover, the determination of the validity of the guarantee was crucial for the purpose of ascertaining whether the respondent has made a claim within the inbuilt limitation period of six months under cl 5. Clause 4 specifies thus:

> This guarantee is valid from the date hereof up to the date the engineer issues the maintenance certificate in accordance with cl 55 of the conditions of the contract.

9 The appellants therefore appeared to maintain that on account of the necessity to refer to the conditions to ascertain the expiry date of the guarantee, the contract and the guarantee were inextricably interlinked and should not be treated as independent contracts.

10 Finally, it was contended that cl 2 did not make the guarantee an unconditional one. It would only operate after the receipt of the money following the call and must be read to refer to the determination of quantum by the respondent, rather than to the issue of liability. Clause 2 states:

> On receipt of the guaranteed sum from us, you shall be entitled to utilised (*sic*) it to satisfy such liability of the contractor as you may determine, arising from or due to the default of the contractor. The balance of the guaranteed sum, if any, shall be refunded to us.

11 In short, the appellants contended that the guarantee should not be construed as a demand bond as its terms indicate otherwise.

12 A preliminary point was raised by the respondent in the written case, raising jurisdictional objections to the appellants' *locus standi* in such an action. It was submitted that the guarantee is an independent contract between the bank and the respondent, the appellants not being parties to the guarantee. As no arguments in this respect were raised before us at the hearing of the appeal, we shall address our minds only to the submissions as presented.

13 As regards the substantive issues arising under prayer 2, some analysis of the terms of the guarantee was required at the outset. It was not disputed that the guarantee was, in substance, a performance bond which had been issued by the bank to secure the appellants' due performance under the contract. The tendency of the English courts has been to treat performance bonds as unconditional provided there is a clear statement that the amount guaranteed is payable by the bank simply upon a written demand being made, even though there may be some indications to the contrary elsewhere in the document. In the present case, the judge below adopted the reasoning of the court in *Esal (Commodities) Ltd and Reltor Ltd v Oriental Credit Ltd and Wells Fargo Bank NA* [1985] Lloyd's Rep 546. In this case, the bank undertook "to pay the said amount on your written demand in the event that the supplier fails to execute the written performance". The court held that the reference to the stipulated "event" of default in execution did not alter the fact that the money would become payable upon a written demand being made. The beneficiary of the bond was under no obligation to show a failure to perform by the supplier in order to call for payment. It may be noted that the court held this to be an unconditional performance bond despite the absence of any provision that contractual liability (or default) was to be determined by the beneficiary.

14 In *I E Contractors v Lloyd's Bank* [1990] 2 Lloyd's Rep 496, Staughton LJ opined that in cases of ambiguity there was "a bias or (rebuttable) presumption in favour of the construction which holds a performance bond to be conditioned upon documents rather than facts" (at 500). In the case of unconditional bonds, this would simply require the making of a written demand rather than proof of the facts, for example, of default or failure to perform. Ultimately, this raises a question of construction, and of examining the intent of the document. This approach is clearly borne out in numerous cases, including the two cited above. A recent authority for this proposition emanating from a source closer to home is that of the Malaysian Supreme Court in *Esso Petroleum Malaysia Inc v Kago Petroleum* [1995] 1 MLJ 149. Peh Swee Chin SCJ, delivering the court's judgment, opined that the real issue was one of contractual interpretation of the performance bond and not of the nature of the transaction. We consider this to be the correct approach to adopt.

15 Turning to consider the terms of the guarantee, we note that the recital to the guarantee referred to cl 9 of the conditions, which specified the appellants' obligations to obtain the guarantee. *Barclay Mowlem Construction v Simon Engineering (Australia)* (1991) 23 NSWLR 451; [1991] APCLR 1 was cited by the appellants to support their contentions in this regard. *The Barclay Mowlem* case involved a performance bond relating to a building contract. The bond was expressed in clear "unconditional" terms as follows (at 454):

> [T]he surety unconditionally undertakes to pay on demand to the obligee any sum which may from time to time be demanded by the obligee to a maximum of four hundred and fifty-one thousand and nine hundred and eighty-two dollars ($451,982) …

16 In addition, there was a further stipulation thus (at 455):

> Should the obligee notify the surety that it desires payment to be made to it of the whole or any part or parts of the security sum it is unconditionally agreed by the surety that such payment or payments will be made to the obligee forthwith and without further reference to the contractor and notwithstanding any notice given by the contractor to the surety not to pay the same …

17 Despite such clarity of expression, Rolfe J went on to grant an interlocutory injunction restraining the obligee (defendant) from calling on the bond. This was apparently because cl 5.6 of the underlying building contract, specifying when the defendant would become entitled to call on the bond, had been incorporated into the performance bond. The relevant portion of this clause provided (at 453):

> 5.6 *Conversion of security*. If the principal becomes entitled to exercise all or any of his rights under the contract in respect of the security the principal may convert into money the security that does not consist of money.

18 It was common ground that the entitlement of the defendant referred to in the above clause had not yet arisen, the defendant having conceded that there were genuine and substantial disputes in relation to the performance of the building work. The appellants in the present case sought to show that, by analogy, the recital in the guarantee, by referring to cl 9 of the conditions, had incorporated the conditions. Hence, the guarantee was said to be dependent on due performance of the contract. Since the issue of due performance was the subject of the ongoing arbitration, the appellants contended that the entitlement to call on the bond had not yet arisen, similar to the *Barclay Mowlem* litigation.

19 Having perused the *Barclay Mowlem* case, we agree with the respondent that it involved a rather unique form of performance bond. The bond in fact contained the following "incorporation" clause in its opening recital:

> Whereas the principal, Simon Engineering (Australia) Pty Ltd … has entered into a written agreement with Barclay Bros Ltd … for the performance of contract No 301 (Principal 5407/28) for Allied Mills *which contract is by reference made a part hereof and is hereinafter called 'the said contract'*. [emphasis added]

20 By this recital, the underlying building contract had been expressly incorporated into the bond, and the appellants had a clear contractual right to enforce the term of that building contract enjoining a call on the bond. It must also be noted that the defendant's counsel conducted the defence in the *Barclay Mowlem* case on a somewhat curious footing. On one hand, it was conceded that there were substantial disputes relating to the underlying contract. Consequently, counsel conceded that the defendant's entitlement to convert the security under cl 5.6 had not yet arisen. Yeldham J, in *Pearson Bridge (NSW) Pty Ltd v State Rail Authority of New South Wales* (1982) 1 A Con LR 81, had to deal with a clause similar to cl 5.6. Yeldham J opined that the clause was:

> … explicit in permitting the defendant to convert any other security, whether such security has been accepted in lieu of cash, into money only if it becomes entitled to exercise any of its other contractual rights concerning security. A perusal of the contract as a whole leaves a firm impression that the parties intended that, where the contractor was in default and in consequence the defendant suffered damage, then where necessary it should have resort to the retention moneys and only to the security if the former should prove insufficient.

21 On the facts in *Barclay Mowlem*, it appears that there was an important distinction from *Pearson Bridge*: there were no retention moneys which the defendant could have had initial resort to as the performance bond had been obtained in lieu of retention moneys. Hence, it was puzzling why counsel had conceded that the entitlement to call for payment pursuant to cl 5.6 had not arisen. Rolfe J's judgment did not advert to any

other facts or considerations, presumably because the defendant's concessions made this unnecessary. From the outset, these concessions would have been fatal to the defence. In spite of this, counsel still maintained that the defendant had an unrestricted right to call on the bond, which was not qualified or conditional upon the terms of the underlying contract. This position was clearly not tenable, given that the performance bond was clearly worded to incorporate the underlying contract. In such circumstances, Rolfe J was entitled to consider that he could look to the underlying contractual position as between the parties in determining whether to restrain the defendant from calling on the bond. On account of the defendant's concessions, Rolfe J was not even required to address the question whether the defendant had any right to call for payment to begin with.

22 The guarantee before us is fundamentally different from that which was considered by Rolfe J in *Barclay Mowlem*. There is no "incorporation" clause in any form. There is no provision within the contract which attempts to circumscribe the respondent's right to call for payment. The logic of the appellants' submissions is somewhat baffling, as it amounts to asserting that simply because the guarantee referred to cl 9, the terms of the entire contract were thereby incorporated "by reference" into the guarantee. We are quite unable to see how the passing reference to cl 9 in the recital could support the appellants' arguments that the contract itself had qualified the right of the respondent to make a demand on the guarantee. Even if the contract had been incorporated into the guarantee, the appellants could not point to any provision within the contract (and indeed there was none) which might expressly preclude the respondent from making a call for payment on the guarantee.

23 A more arguable submission was put forward in relation to cl 2 of the guarantee. The appellants argued that the reference to "such liability as you may determine" in cl 2 meant only that the respondent was entitled to specify the quantum payable after liability had been determined. Yet, as the judge below had noted, the same clause provides that the Government may determine such liability of the contractor "arising from or due to the default of the contractor". There is no reference to "proof of default" within the guarantee. In our opinion, the only meaningful construction to be given to cl 2 is that it enables the Government to determine both the aspects of liability (or default) and quantum. Otherwise, the guarantee would have failed to provide for how liability (or default) is to be established. There may have been less room for debate if cl 2 had expressly provided that proof of default was unnecessary. Nevertheless, it is reasonably clear from examining all the terms of the guarantee that no proof of default is required before the bank can be called to make payment. Moreover, the express provision for the respondent to deduct sums under the guarantee and refund the balance (if any) to the bank would be rendered quite otiose if

default had to be determined first by some unspecified entity other than the Government. There would be no purpose served in requiring the bank to pay out the entire guaranteed sum and then "permitting" the respondent to refund the balance. The judge below observed (at [36]):

> … if the bond is only to be called up after the arbitrator has determined the default, the amount to be called up to satisfy the liability would then have been known and that would be the amount the bank will pay, in which case there will be no occasion for the balance of the guaranteed sum (less such liability) to be refunded to the bank …

24 The only "conditions" attaching to a call on the guarantee do not render the guarantee conditional in the true sense. By cl 5, the respondent is required to make a written demand within six months from the date of the expiry of the guarantee. These "conditions" would regulate the right to call on the guarantee but they were purely procedural matters. No other qualifications are prescribed. In any event, there is no dispute by the bank that they had been satisfied. The appellants contended, however, that cl 5 had not been satisfied as the maintenance certificate should have been issued in August 1992, with the consequence that any intended call for payment after 5 February 1994 would have been out of time. This was one of the disputed issues raised in the present arbitration proceedings under the primary reference. The outcome of those proceedings may well have critical implications on the validity of the guarantee. It is not entirely clear what the appellants sought to argue on this basis. It appears that they were suggesting that the fact that the validity of the guarantee was disputed and may be affected by the outcome of the arbitration proceedings could constitute a reason by itself for saying that the guarantee was not a demand bond. We are not persuaded by this submission. The guarantee does not require the bank to enquire about the due performance of the contract. As far as the bank is concerned, its validity is not dependent on when or whether the engineer ought to have issued the maintenance certificate. The fact remains that the engineer has not issued either the completion certificate or the maintenance certificate. Thus the guarantee remains *prima facie* valid. In any event, to adopt the appellants' construction would mean that the respondent would suffer the clear prejudice of being in a position where it cannot call on the guarantee at present, and may eventually be precluded from calling on the guarantee altogether, if the arbitrator ultimately determines that the maintenance certificate should have been issued as contended in the appellants' points of claim. This would emasculate the entire purpose of the guarantee, when *prima facie*, at least as far as the bank is concerned, it appears to remain valid.

25 In this regard, the judge below observed that the guarantee could not be dependent on proof of default as it could well have expired (without the parties' knowledge) before any finding of default by the arbitrator. It is important to bear in mind the commercial role that performance bonds are

intended to perform. The underlying purpose of a performance bond is to provide a security which is to be readily, promptly and assuredly realisable when the prescribed event occurs (*per* Ackner LJ in *Esal Commodities* ([13] *supra*) at 549 and Hirst J in *Siporex Trade SA v Banque Indosuez* [1986] 2 Lloyd's Rep 146 at 158). The arguments for certainty and commercial efficacy must surely prevail here, otherwise banks will bear the onerous burden of deciding whether payment when demanded has to be made (*Esal Commodities*, *per* Ackner LJ at 549). The terms of the guarantee do not support the appellants' contention that the bank was required to be satisfied through some unspecified independent means that there had been no due performance of the contract.

26 A further point made by the appellants was that there was no conclusive evidence clause in the guarantee. It should be noted that guarantees which serve the function of performance bonds are more akin to promissory notes than true contracts of suretyship (*Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159: *per* Lord Denning MR at 170H and Geoffrey Lane LJ at 175D). Nevertheless, the court will have to scrutinise the terms of the guarantee to determine its intent and effect (*per* Hirst J in *Siporex Trade SA v Banque Indosuez* at 158 and Staughton LJ in *I E Contractors Ltd v Lloyd's Bank plc* ([14] *supra*) at 503). In *Siporex Trade SA*, Hirst J (at 157) considered and rejected counsel's arguments which raised a similar contention that the absence of a conclusive evidence clause in the *Edward Owen* case was material. On the face of the guarantee before us, we are impelled to adopt the same view, as the terms of the guarantee point toward the clear conclusion that it was an unconditional demand bond. Proof of default in the appellants' performance of their contractual obligations is not required before a call for payment on the guarantee can be made; no such requirement is ascertainable from the terms of the guarantee.

Prayer 1 — availability of "declaratory injunctive relief"

27 The starting point is to consider s 27(1) of the Government Proceedings Act (Cap 121, 1985 Rev Ed) ("the GPA"), which states:

> In any civil proceedings by or against the Government the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between private persons and otherwise to give such appropriate relief as the case may require:
>
> Provided that —
>
> (*a*) where in any proceedings against the Government any such relief is sought as might between private persons be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties … .

28 The court is empowered only to grant a declaration if the circumstances are such that as between private parties, an injunction or an order for specific performance would be granted. The matter clearly involves an exercise of judicial discretion, within the context of the court's equitable jurisdiction. On this footing, the judge below framed the central issue as whether the Government, if it were a private person, should be restrained from calling on the guarantee (which had been determined to be a demand bond). From another perspective, the issue could be seen as whether the appellants had any legal or equitable right to an interim injunction (which could be translated into a declaration of rights) restraining the respondent from their intended call on the guarantee. The judge below ruled that they did not. An important point to note, as the judge did at the outset, was that the appellants had not alleged that the Government had acted without honest belief of its entitlement to make a call.

29 The judge below relied largely on the triumvirate of English cases reported in 1978: *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159; [1978] 1 All ER 976, *R D Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] QB 146; [1977] 2 All ER 862 and *Howe Richardson Scale Co Ltd v Polimex-Cekop and National Westminster Bank Ltd* [1978] 1 Lloyd's Rep 161, supplemented by the additional cases of *Intraco Ltd v Notis Shipping Corporation*; *The Bhoja Trader* [1981] 2 Lloyd's Rep 256 and *State Trading Corp of India v E D & F Man (Sugar)* [1981] Com LR 235. These cases established the following general principles: first, performance bonds stand on a similar footing as irrevocable letters of credit and, second, the court will not grant an injunction restraining a call or payment on the bond unless fraud is involved.

30 After analysing these authorities, the judge concluded that an ongoing arbitration on the disputes arising out of the underlying contract was not a ground on which to restrain the respondent from calling for payment on the guarantee, as long as there was an honest belief that the appellants had defaulted in performance of the contract. Even applying the balance of convenience test propounded in *American Cyanamid Co Ltd v Ethicon Ltd* [1975] AC 396, the judge was of the view that it did not favour the appellants because it was difficult to say when the arbitrator would arrive at a final award. Moreover, the Government could meet any damages that may be awarded if it transpires that the call was misconceived. Finally, repeating his views in Civil Appeal No 132/94, the judge held that the interim declaration sought by the appellants was not a relief known in law.

31 On appeal, the appellants contended that the judge below erred in failing to consider that there was a substantial challenge to the validity of the guarantee. Relying on Donaldson MR's *dicta* in *Bolivinter Oil SA v Chase Manhattan Bank* [1984] 1 Lloyd's Rep 251, the appellants submitted

that as long as there was a genuine and substantial challenge to the guarantee, a declaration in lieu of an injunction could be obtained to the effect that the respondent had no right to make a call for payment on the guarantee. Alternatively, they contended that the interim declaration was, in law, a final order which gave rise to *res judicata* between the parties. We have expressed our views in rejection of the appellants' submissions on this latter point in the related appeal and we do not propose to repeat them here.

32 The appellants contended that the validity of the guarantee would be an issue to be decided in the arbitration proceedings, arising out of performance of the construction contract (*ie* the underlying transaction). Consequently, they relied on Eveleigh LJ's statements in *Potton Homes Ltd v Coleman Contractors Ltd* (1984) 28 Build LR 19 at 28, which were followed by L P Thean J (as he then was) in *Royal Design Studio Pte Ltd v Chang Development Pte Ltd* [1990] 2 SLR(R) 520 at [15]. These statements suggest that the court, in exercising its equitable jurisdiction to grant an injunction restraining a call or payment on performance bonds, should not be precluded from adopting a broad approach, if the facts warrant it, to examine disputes relating to the underlying transaction as well. It was suggested that there was a distinction between the applicable principles in cases where the injunction sought to restrain banks from making payment, and those where the intended restraint was on the beneficiaries under the bond. The appellants also submitted that the judge below had wrongly extended the requirements in the *Royal Design* case by considering that there was no suggestion that the Government did not honestly believe that there had been default in performance on the appellants' part.

33 Finally, the appellants contended that, on the balance of convenience, declaratory relief should have been granted since the appellants might suffer irreparable damage to their reputation as a consequence of a call for payment under the guarantee. It was suggested, in line with Rolfe J's views as expressed in the *Barclay Mowlem* case (discussed earlier on another point), that if questions should be raised as to the appellants' ability to perform contracts properly, it would be difficult for a court to assess the damage occasioned to the appellants.

34 The respondent undertook a comprehensive and judicious survey of the relevant case law on restraint of calls or payment on bonds from a variety of common law jurisdictions. Of the various propositions of law suggested by the respondent, *four principles* may be extracted:

> (a) The "*autonomy*" *principle* — the guarantee constitutes a separate contract from the underlying transaction. The appellants are not privy to the guarantee.
>
> (b) The "*cash in hand*" *principle* — reflecting the importance of promoting commercial efficacy and certainty in the use of letters, guarantees and bonds. This ties in with the "autonomy" principle.

(c) The *"fraud" exception* — the sole exception to the "autonomy" and "cash in hand" principles arises where the plaintiff can establish fraud in the circumstances of the call or payment. This permits injunctive relief.

(d) There is no distinction between cases where an injunction is to restrain a bank (on payment) or the beneficiary under the guarantee (on calling for payment).

35 Principles (a) to (c) above were all alluded to and supported by the judge below. The weight of authority suggests that these principles are well entrenched. It is important to establish at the outset principle (d) above: contrary to the appellants' submissions, there is no distinction between the principles to be applied in cases dealing with attempts to restrain banks from making payment or those dealing with restraint of callers from calling for payment. This principle has been consistently endorsed in the English authorities, right up to recent cases such as *Deutsche Rückversicherung AG v Walbrook Insurance Co Ltd* [1994] 4 All ER 181. It was similarly endorsed by our Court of Appeal in *Brody, White and Co Inc v Chemet Handel Trading (S) Pte Ltd* [1992] 3 SLR(R) 146. Lai Kew Chai J, delivering the judgment of the court, opined (at [22]):

> … It was irrelevant that the injunction in the present case was one which prevented the appellants from encashing the letter of credit, rather than one which restrained the bank from honouring the credit. The consequence would have been the same: the documentary credit contract between the bank and the appellants, which should be independent of the underlying contract between the appellants and the respondents, was in effect being frozen by the injunction obtained by the respondents.

36 The appellants cited *Bolivinter Oil SA v Chase Manhattan Bank* ([31] *supra*) to support their contention that a "substantial challenge" as to the validity of the guarantee would suffice to invoke the court's jurisdiction to grant an injunction restraining the intended call. The appellants relied chiefly on Donaldson MR's observations at 257, which reads:

> Judges who are asked, often at short notice and *ex parte*, to issue an injunction restraining payment by a bank under an irrevocable letter of credit or performance bond or guarantee should ask whether there is any challenge to the validity of the letter, bond or guarantee itself. If there is not or if the challenge is not substantial, *prima facie* no injunction should be granted and the bank should be left free to honour its contractual obligation, although restrictions may well be imposed upon the freedom of the beneficiary to deal with the money after he has received it.

37 Reading only this passage, the appellants seemed to have some support for their contentions. Nevertheless, Donaldson MR's comments immediately following this passage posed important qualifications:

> *The wholly exceptional case* where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear, both as to the fact of fraud and as to the bank's knowledge.
>
> [emphasis added]

38 Donaldson MR was not suggesting that there should be a new category of exception to the general principle denying injunctions in such cases. Contrary to what the appellants suggested, we do not think that the mere fact that the validity of the guarantee was substantially challenged in other proceedings will automatically provide a basis for an injunction to be obtained restraining an intended call for payment. It will still be in the "wholly exceptional case" of fraud that an injunction can be granted.

39 We turn now to consider the statements of Eveleigh LJ in *Potton Homes* ([32] *supra*) at 28 which were relied upon by L P Thean J (as he then was) in the *Royal Design* case ([32] *supra*) at [18]. Eveleigh LJ said:

> [I]n principle I do not think it possible to say that in no circumstances whatsoever, apart from fraud, will the court restrain the buyer. The facts of each case must be considered. If the contract is avoided or if there is a failure of consideration between buyer and seller for which the seller undertook to procure the issue of the performance bond, I do not see why, as between seller and buyer, the seller should not be unable to prevent a call upon the bond by the mere assertion that the bond is to be treated as cash in hand.

40 Essentially, Eveleigh LJ opined that he did not think the "fraud" exception was the sole basis for an injunction to be granted. In *Royal Design*, L P Thean J refused to discharge an injunction restraining the defendant from calling upon a performance bond which had been obtained to secure the plaintiff's performance under a residential property construction contract. The terms of the construction agreement ("the agreement") required the plaintiff to complete construction within 14 months and to secure the issuance of temporary occupation licences within a specified time frame as well. The plaintiff alleged that the defendant had delayed payments under interim certificates and had caused them cash flow problems, thereby resulting in delay in their works. The defendant, on the other hand, alleged that the plaintiff had been guilty of delay in construction within the agreed time. The defendant eventually terminated the agreement and requested the plaintiff to vacate the land. The plaintiff commenced *ex parte* proceedings and obtained two injunctions, one of which restrained the defendant from calling upon the performance bond (for $120,000). The defendants applied to discharge both the injunctions and succeeded in respect of the first (which need not concern us here) but failed in respect of the injunction on the call.

41 L P Thean J cited Eveleigh LJ's *dicta* in *Potton Homes* (at 28). In addressing the case before him, L P Thean J observed (at [20]–[21]):

> … We are not concerned with the 'irrevocable nature of the obligation assumed by the relevant bank'; we are concerned with the relationship between the parties under the main or underlying contract they made and the dispute arising from such relationship. … The dispute is only between the plaintiff and the defendant and relates solely to the main or underlying contract made between them. In such case, I do not see why the court should be inhibited from exercising its equitable jurisdiction and restraining the defendant from calling on the bond, if the facts warrant it, merely because the bond is like a letter of credit.
>
> … All the relevant facts of the case must be considered. Having considered them, in my judgment, the status quo ought to be preserved …

42 From the above statements, it was clear that L P Thean J felt that all the circumstances of the case, including the dispute relating to the underlying transaction, could be considered. He pointed also to the fact that the defendant had obtained a personal guarantee from the plaintiff's director in the sum of $1m and would thus be adequately secured in any event. On the evidence, however, there was no allegation or finding that the circumstances were such as to establish fraud on the defendant's part. In this connection, there was a conscious departure from principle (c) outlined earlier – that the sole exception to the general rule denying injunctions in such circumstances is where fraud is established.

43 G P Selvam JC (as he then was) in *Kvaerner Singapore Pte Ltd v UDL Shipbuilding (Singapore) Pte Ltd* [1993] 2 SLR(R) 341, opined that the "fraud" exception is not "an immutable principle of universal application". Relying mainly on Eveleigh LJ's *dicta* in *Potton Homes*, GP Selvam JC found the defendant's conduct in calling for payment to be "utterly lacking in *bona fides*" (at [10]). He opined that the injunction should not be discharged as the defendant had sought "to take advantage of the performance guarantee where by his own volition he (had failed) to perform a condition precedent …" (at [8]). The learned judicial commissioner went on to state that "in circumstances where it can be said that the buyer (*ie* defendants) had no honest belief that the seller has failed or refused to perform his obligations, a demand by the defendants/buyers … is a dishonest act which would justify a restraint order" (at [10]).

44 The judge below in the present case went on to observe that the balance of convenience did not favour the appellants. This was a conscious application of the *American Cyanamid* test. The judge was apparently not referred to the judgment of the Court of Appeal in *Brody, White* nor did he place any reliance on it. In this case, it was held that the balance of convenience test propounded in the *American Cyanamid* case would not be

applicable in cases involving irrevocable letters of credit. Lai Kew Chai J observed (at [16] and [20]):

> The present case concerned a banker's irrevocable letter of credit and case law in this area lays down the proposition that in the absence of a clear case of fraud or the like, an injunction should not normally be granted to interfere with such credits. In other words, the '*balance of convenience' test propounded in American Cyanamid Co v Ethicon Ltd … is generally not applicable in cases involving irrevocable credits*. …
>
> The only exception to the autonomy of the documentary credit transaction, therefore, is the fraud rule … .
>
> [emphasis added]

45 The statement in *Brody* that the balance of convenience test does not apply correctly indicates that cases involving such transactions are virtually *sui generis*. If the appellants' arguments are accepted, this would mean that the court has to deal with both the equitable principle as well as the balance of convenience. To require such a "double-barrelled" test would be dichotomous and illogical.

46 In our opinion, whether there is fraud or unconscionability is the sole consideration in applications for injunctions restraining payment or calls on bonds to be granted. Once this can be established, there is no necessity to expend energies in addressing the superfluous question of "balance of convenience". It does not lie in the mouth of the defendant to claim that damages would still somehow be an adequate remedy.

47 The "double-barrelled" test may have been employed by Roskill LJ in *Howe Richardson Scale Co Ltd v Polimex-Cekop and National Westminster Bank Ltd* ([29] *supra*) but this appears to be an isolated instance where the court actually addressed its mind to this question. In any case, Roskill LJ's statement on the balance of convenience was strictly obiter. In *Rajaram v Ganesh* [1994] 3 SLR(R) 79, Kan Ting Chiu J suggested that Lai Kew Chai J's comments in *Brody* were not an outright rejection of the balance of convenience test. Kan Ting Chiu J reasoned thus (at [25]):

> … The requirements for granting an injunction in such cases are more stringent than in a normal case, not less stringent. What [Lai Kew Chai J] said was that, unless a clear case of fraud is established, the matter will not proceed further to a consideration of the balance of convenience.

48 To allay these concerns, we need only note that dispensing with consideration of the balance of convenience does not make an injunction any easier to obtain. Indeed, a higher degree of strictness applies, as the applicant will be required to establish a clear case of fraud or unconscionability in interlocutory proceedings. It is clear that mere allegations are insufficient.

49 Even if the balance of convenience test were applicable, the trial judge's findings can be supported. The main considerations are these. First, the appellants had not shown any reasonable prospect of success in their claim for a permanent injunction. Their claim was founded on a vague assertion that the status quo must be preserved in the interests of justice rather than on any clear legal or equitable right arising under the contract or the guarantee. We move on to consider Rolfe J's *dicta* dealing with the adequacy of damages as a remedy in the *Barclay Mowlem* case. The relevant passage is set out below (at 461–462):

> The matter, so far as the plaintiff is concerned, which is detrimentally affected upon a performance bond being called-up, is the perceived ability of the plaintiff to properly perform its obligations under a contract. If the plaintiff's ability in this regard is called in question, even improperly, it is not difficult to infer that there will be damage to its reputation in the industry in which it operates. Nor is it difficult to infer that its competitors would be quick to utilize such information in competing with the plaintiff. Finally, particularly as matters presently stand in the commercial world, questions may be raised as to the financial viability of the plaintiff if it is unable to perform contracts properly. … In other words people may be tempted to ask whether the plaintiff's business was going 'downhill'. I find it difficult to see how a court could ever assess the damage occasioned to the plaintiff in these circumstances. I am of course not overlooking the fact that the court must do its best to assess damages, but it is only necessary to state the type of problems which may confront the plaintiff to demonstrate the difficulty, if not impossibility, which it would face in proving the quantum thereof.

50 If "damage to reputation" is accepted generally as a form of irreparable damage, then this can be easily invoked in every instance where performance bonds or bank guarantees had been issued. Rolfe J himself confessed that should the plaintiff's ability to perform the contract be called in question, "it is not difficult to infer that there will be damage to its reputation in the industry in which it operates". We are not persuaded by the appellants' submissions on this count. We disagree in particular with the appellants' contention that it would be relevant to consider the unthinkable consequences for large and established companies such as the appellants if their reputations were to be called into question. The appellants went so far as to submit that any suggestion that there had been no due performance while the dispute was still in the midst of arbitration would cast a slur on the appellants' reputation, such as to amount to some form of libel. This submission is, in our view, devoid of any possible justification. We do not see any reason why the courts should strive to uphold a presumption of infallibility on the appellants' part.

51 To treat Rolfe J's *dicta* as propounding a general principle may have potentially far-reaching implications. Bank guarantees and performance

bonds will become practically worthless since in every case, all that plaintiffs have to show is that they have some valid interest in protecting their commercial reputation. This negatives the purpose of performance bonds. In effect, it rewrites the underlying agreement between the parties, since it precludes a call for payment as long as some vague notion of "damage to reputation" can be said to arise. Moreover, Rolfe J's remarks relating to the adequacy of damages were made *obiter*. His Honour had already ruled, in what was clearly the *ratio decidendi* of the case, that the defendant had not been contractually entitled to exercise its rights under the contract to call upon the performance bond. On that ground alone, the case could have properly been disposed of.

52 It is unnecessary and undesirable to attempt to extract a principle for general application from Rolfe J's *dicta*. It was unnecessary on the facts of *Barclay Mowlem* itself. It is also undesirable since this will result in judicial approval of a general factual presumption that large companies deserve *prima facie* protection against any potential loss of reputation caused by payments on performance bonds. Again, this is unsupported by any known legal principle or common law authority. The real question is whether on the facts of each case, it can be said that the plaintiff would suffer irreparable damage. We respectfully adopt the view of the court below that even if the arbitrator should ultimately determine the dispute in favour of the appellants, an award of damages could adequately compensate the appellants. In any event, the appellants had not adduced any evidence that damages would not adequately compensate the appellants before the trial judge or before this court. There is also no doubt that the Government will be in a position to satisfy such an award. Applications for injunctions involve the exercise of judicial discretion. The present appeal was one against the judge's refusal to exercise his discretion. Donaldson MR observed, in *Elan Digital Systems Ltd v Elan Computers Ltd* [1984] FSR 373 at 384:

> [I]n the field of interim injunctions it is primarily the trial judge who is appointed to decide whether or not an injunction should be granted. This is not of course to say that there is no right of appeal, but there is a heavy burden on the appellant to show that the learned judge has erred in principle, and that in exercising his discretion there is either an error of principle or — which is the same thing in a different form — he exercised his discretion in a way which no reasonable judge properly directing himself as to the relevant considerations could have exercised it.

53 We are unable to find any apparent error to justify interfering with the judge's exercise of discretion. We are of the opinion that the trial judge had concluded correctly that declaratory relief in terms of prayer 1 should not be granted. While s 27 of the GPA permits a declaration to be granted in lieu of any injunction, the appellants had not established their entitlement to an injunction restraining the respondent from calling on the guarantee.

In particular, they had not shown, and indeed had conceded that they could not show, that fraud or unconscionability was present on the facts.

Prayer 6 — power under rr 18(g) and 20.5

54 The appellants prayed for a declaration under prayer 6 in relation to the arbitrator's powers under r 18(g). They contended that the arbitrator was empowered "to make an order pursuant to the agreed SIAC (*sic*) rules and particularly r 18(g) that the money payable under the bank's letter of guarantee is property or a thing under the control of the defendant pending the final award and r 20.5". In effect, prayer 6 sought to obtain the court's sanction of the arbitrator's order dated 25 February 1994. The issues are similar to those which arose in the related appeal. The judge below adopted the same reasons he had employed in that appeal and refused to grant the declaration sought. We rejected the appellants' arguments in respect of the arbitrator's powers under r 18(g) in the related appeal and we rule accordingly here in respect of prayer 6 as well.

55 In the present appeal, the declaration sought under prayer 6 apparently placed reliance on r 20.5 as well. Rule 20.5 relates to the arbitrator's power to order that security be provided for all or part of any amount in dispute in the arbitration. We do not see how r 20.5 can assist the appellants as the provision of security for the disputed amounts was not in issue here. The appellants seemed to acknowledge the inapplicability of r 20.5 as no reference was made to this rule in their case or in their oral submissions.

56 We are of the opinion that there is no reason to interfere with both the findings of the judge below and his exercise of discretion in refusing to grant the declarations sought. Accordingly, we dismiss the appeal with costs to the respondent. We also order that the security for costs of this appeal be paid out to the respondent's account of costs.

Headnoted by Arvin Lee.