Neutral Citation Number: [2012] EWHC 1715 (Comm)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Case No: 2011 FOLIO 1591

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/06/2012

Before :

Mr JUSTICE CHRISTOPHER CLARKE

Between :

(1) WUHAN GUOYU LOGISTICS GROUP CO LTD
(2) YANGZHOU GUOYU SHIPBUILDING CO LTD — **Claimants**

- and -

EMPORIKI BANK OF GREECE SA — **Defendant**

Jonathan Hirst QC and Sara Cockerill QC(instructed by **Reed Smith LLP**) for the **Claimants**
Sean O'Sullivan and James Hart (instructed by **Ince & Co LLP**) for the **Defendant**

Hearing date: 1st June 2012

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

MR JUSTICE CHRISTOPHER CLARKE:

The question

1. The central question in the present case is whether a payment guarantee is a guarantee, properly so called, or a demand bond.

The facts

2. The claimants (hereafter "the Seller") jointly operate a shipyard in Yangzhou, People's Republic of China. On 29 November 2006 they entered into two Shipbuilding Contracts with Swissmarine Inc of Liberia or nominee, as Buyer. These contracts were for the construction of two 57,000 DWT bulk carriers, known as Hull No. GY402 and Hull No. GY404.

3. In November 2007 the Shipbuilding Contracts were novated to Kantara Navigation Limited and Tamassos Navigation Limited ("the Buyer") of the Marshall Islands, respectively.

4. The contract price for Hull GY 404 ("the Vessel") was to be US $ 41,250,000, payable in five instalments. Under Article 3 (b) of the Shipbuilding Contract for the Vessel ("the Shipbuilding Contract") the Second Instalment of US $ 10,312,500 was payable within 5 New York banking days of receipt by the Buyer of a Refund Guarantee in the form annexed as Exhibit "A" issued by the Seller's bank together with a certificate of the cutting of the first steel plate of the Vessel in the Seller's workshop. The Article provided that the Seller:

> "*shall notify with a telefax notice to the Buyer stating that the 1st 300 mt of steel plate has been cut in its workshop approved by the Buyer's representative and demand for payment of this instalment*".

This phraseology leaves it unclear whether it is the workshop or the cutting that is to be approved.

5. Exhibit A contained the text of an irrevocable letter of guarantee – the Refund Guarantee - in respect of the repayment by the Seller to the Buyer of the 1st to 4th instalments of the price. Under Clause 7 of the Shipbuilding Contract payments were to be refunded in the event that the Contract was rescinded or cancelled in accordance with the terms of the contract. Exhibit A is headed "*To be finally approved by the buyer's bank and seller's bank*".

6. Exhibit B contained the text of an irrevocable letter of guarantee in respect of the payment by the Buyer to the Seller of the 2nd instalment of the price, as required by Clause 6 of the Shipbuilding Contract. It has the same heading.

7. The defendant - Emporiki Bank of Greece S.A ("the Bank") - is a Greek bank, now almost entirely owned by Credit Agricole, which provided finance to the Buyer for its purchase of the Vessel under a facility agreement dated 27 November 2007.

8. On 20 November 2007 the Bank of China issued a Refund Guarantee on behalf of the Seller securing the first instalment for the Buyer. The Buyer paid this instalment.

9. By a Deed of Assignment dated 27 November 2007 the Buyer assigned to the Bank (a) all moneys and claims for moneys due to the Buyer under the Shipbuilding Contract at any time; and (b) the Refund Guarantee and any other guarantee given to the Buyer as security for money due to it under the Shipbuilding Contract.

10. Notice of the Assignment was given to the Seller on 27 November 2007 and an acknowledgment of the notice by the Seller was issued on 10 December 2007.

11. On 14 December 2007 the Bank issued what was described as a guarantee ("the Payment Guarantee") in respect of the second instalment of the price of the vessel under the Shipbuilding Contract. That instalment has not been paid.

12. The Payment Guarantee, which was transmitted by the Bank to the Bank of China, provides, inter alia, as follows:

> *"DETAILS OF GUARANTEE*
>
> *Dear Sirs,*
>
> *(1) In consideration of your entering into a Shipbuilding Contract dated 29th November 2006 ("the Shipbuilding Contract") with Tamassos Navigation Ltd as the buyer ("the BUYER") and WUHAN Guoyu Logistics Group CP LTD and Yangzhou Guoyu Shipbuilding CO., LTD as the seller ("the SELLER") for the construction of one (1) 57,000 Metric Tons Deadweight OEC known as YANGZHOU GUOYU SHIPBUILDING COMPANY LTD. HULL NO. GY404 ("the VESSEL"), we, EMPORIKI BANK OF GREECE SA, hereby IRREVOCABLY, ABSOLUTELY and UNCONDITIONALLY guarantee, as the primary obligor and not merely as the surety, the due and punctual payment by the BUYER of the 2nd installment of the Contract Price amounting to a total sum of United States Dollars 10,312,500.00 (Ten million three hundred twelve thousand five hundred only) as specified in (2) below.*
>
> *(2) The Instalment guaranteed hereunder, pursuant to the terms of the Shipbuilding Contract, comprises the 2nd installment in the amount of U.S. Dollars 10,312,500.00 (Ten million three hundred twelve thousand five hundred only) payable by the BUYER within five (5) New York banking days after completion cutting of the first 300 MT of steel plate in your Seller's workshop and written notice thereof along with certificate of cutting of steel plate countersigned for approval by the Buyers representative.*
>
> *(3) We also IRREVOCABLY, ABSOLUTELY and UNCONDITIONALLY guarantee, as primary obligor and not merely as surety, the due and punctual payment by the BUYER of interest on the second Installment guaranteed hereunder at the rate equal to the three months US$ LIBOR quoted on page no.3750 of Telerate, 2 days before the date from which interest becomes effective, plus 1% margin, from and including the first day after the date of installment in default until the date of full payment by us of such amount guaranteed hereunder.*
>
> *(4) In the event that the BUYER fails to punctually pay the second Installment guaranteed hereunder or the BUYER fails to pay any interest*

thereon, and any such default continues for a period of twenty (20) days, then, upon receipt by us of your first written demand stating that the Buyer has been in default of the payment obligation for twenty (20) days, we shall immediately pay to you or your assignee the unpaid 2nd Installment, together with the Interest as specified in paragraph (3) hereof, without requesting you to take any or further action, procedure or step against the BUYER or with respect to any other security which you may hold.

(5) We hereby agree that at your option this Guarantee and the undertaking hereunder shall be assignable to the Bank of China Limited, Hubei Branch, 65 Huangshi Road, Wuhan City, Hubei 430013, the People's Republic of China.....

....

IN WITNESS WHEREOF, we have caused this Letter of Guarantee to be executed and delivered by our duly authorised representative the day and year above written."

13. The first cutting of steel for the Vessel is said by the Seller to have taken place on 18 April 2009. No representative of the Buyer was present and there is a dispute as to whether the steel cutting took place at all.

14. On 29 April 2009 the Bank received a Refund Guarantee issued by the Bank of China in respect of the Second Instalment. It was not entirely in the form of Exhibit B. The Seller says that that is because it was in the form agreed in respect of the first instalment with logical amendments (save for a single erroneous reference in a subsidiary paragraph to the first, which, the Seller submits, should obviously signify the second, instalment) and that it should be regarded as being in agreed form.

15. Initially the Seller declined to make any change in the Refund Guarantee. But after correspondence the Seller agreed to make the corrections requested by the Buyer. However, it is the Seller's case, disputed by the Buyer, that any such agreement was only intended to form part of a possible deal whereby the payment date of the Second Instalment would be revised to 30 June 2009, which was never, in fact, made. No Refund Guarantee in the altered form has been issued.

16. On 11 May 2009 the Seller sent to the Buyer, inter alia, an invoice for the Second Instalment dated 4 May 2009 and a written demand for payment together with a certificate that the steel cutting for the Vessel had been done at 10:58 a.m. on April 18 2009 at the Seller's shipyard. The certificate appears to have been signed by each of the claimants and by a Bureau Veritas surveyor. It was not signed by any representative of the Buyer. It is the Buyer's case that they were given inadequate notice to enable them to be present on that date.

17. Demand for payment under the Payment Guarantee was made on 22 June 2011. The demand recited that 300 mt of steel plates had been cut by 28 April 2009.

18. There is an issue between the Seller and the Buyer as to whether the Second (and the Third) Instalments are due. The Buyer contends in respect of the Second Instalment (a) that there is no proof that the first 300 mt of steel for the Vessel has, in fact, been cut; (b) that the condition of approval by the Buyer of such cutting has not been met; and (c) that the Seller has not provided in respect of the Second Instalment the Refund Guarantee required by the Shipbuilding Contract, namely a Guarantee in the form finally approved by the banks of the Buyer and the Seller. These issues, and others, are to be determined at an arbitration due to be heard in September.

19. The Shipbuilding Contract has come to an end; but the means by which it has done so is in dispute. Both the Seller and the Buyer claim that the other party was in repudiatory breach and that they have cancelled or rescinded the contract in consequence.

The contentions in outline

20. The Seller submits that the Payment Guarantee is in the nature of a demand or performance bond. Payment is due upon a written demand, whether or not the payment which the bond "guarantees" is actually due by the Buyer to the Seller. That demand has been made and the Seller claims summary judgment for the principal and interest.

21. The Bank contends that the instrument is a guarantee properly so called. If the Second Instalment was and is not due, there can be no liability under the guarantee. There is a dispute as to whether the Buyer is liable to pay the Second Instalment which – as is common ground – cannot be determined summarily. The Seller must await the determination of that question in the arbitration. If successful it can then recover under the Payment Guarantee.

Discussion

22. The obligation of a guarantor is to be responsible for the contractual performance due by another person to a third. In the classic case, A guarantees the debt of B to C. He thereby undertakes to see to it that B pays C in accordance with the contract between B and C. If B does not pay C, A, the guarantor, is in breach of his obligation and is liable in damages: *Moschi v Lep Air Services* [1973] A.C.33. Guarantees can cover any type of obligation (not simply debt) and may take different forms. The terms of the guarantee may be such that the guarantor's liability is not of the classic "see-to-it" variety. The guarantee may provide that, if the debt is not paid by B, then A will pay it, and A's obligation will be in debt. Or it may provide that the guarantor is obliged to pay what B owes only if a demand is made of him; and it may require him to be given notice, or information of a particular type or form.

23. The commercial purpose of a guarantee is to ensure that the creditor is paid the debt owed to him by the debtor who is being guaranteed. English law affords a guarantor under a guarantee of the classic type a considerable degree of legal protection. If, without his consent, the creditor varies the underlying contract or gives the debtor an extension of time or releases any security that he holds for the debt, the guarantor will be discharged. For that reason guarantees habitually contain clauses intended to secure that the efficacy of the guarantee is not prejudicially affected in this way.

24. The essential characteristic of a guarantee is that the liability of the guarantor is a secondary one. It is the debtor who is primarily liable to pay. If, therefore, the debtor has no liability the guarantor has none either. The guarantor may avail himself of all the defences available to the debtor in respect of the payment sought.

25. Suppliers of goods or services, particular ship builders, need cash to keep going. A guarantee of an instalment from a solvent third party will provide security – at any rate in the end. But if there is a dispute as to whether the instalment is due (either because there is a dispute as to the event upon which it arises or because it is said that the supplier is in breach and, as a result, there is a set off of some kind) they may find that they cannot recover from the guarantor in respect of that instalment unless and until a court is satisfied that the debt guaranteed is truly owing.

26. Hence the practice has developed, now well established, of having payment guarantees that are not guarantees, properly so called, but instruments - often called demand bonds or performance bonds - by which a bank or similar institution promises to pay an instalment due against a written demand, or a written demand accompanied by certain documents such as a certificate from the seller or a third party as to the occurrence of certain events, the presentation of such documents being the only condition of payment. If they are presented the Bank is obliged to pay, unless there is fraud[1]. This is so even if there is a dispute as to whether the instalment is truly due. Liability arises from the instrument rather than the underlying contractual arrangement. An instrument of this kind is akin to a letter of credit in that the bank is concerned only to see whether or not the documents produced are those for which the instrument calls.

27. It is in the interest of a seller to secure a demand bond. He will then be assured of payment from the bank even though there is a dispute about whether the money is due. It is, or may be, in the interest of the bank - and the buyer who is being financed by the bank (who will probably have given it an indemnity) - to give a guarantee and not a bond. It will then only have to pay if the buyer should have paid; and it will avoid the risk, which may be significant, of paying a seller in a foreign country from whom it may in practice be difficult to secure repayment. This is particularly so if there is not in place an operative refund guarantee from another reputable bank. At the same time a guarantee may put the bank in difficulty because it may not be able to pay out safely if there is any dispute as to the existence of the obligation guaranteed.

28. In practice the beneficiary of a demand bond is likely to be able to obtain summary judgement if he is not paid on presentation of conforming documents even though there is a bona fide dispute as to whether the sum in question is due; whereas for the beneficiary of a guarantee the opposite is the case (unless it is clear that the defence is unrealistic).

29. It is, therefore, of critical importance to decide into which category any given instrument falls. That is a question of construction of the instrument in its commercial

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[1] For a discussion of the authorities on what has to be shown to avoid summary judgment see *Enka Insaat Ve Sanayi A.S. v Banca Popolare Dell'Alto Adige SPA* [2009] EWHC 2410 (Comm), where Teare J held that the test is whether there was a real prospect that the bank will establish at trial that the only realistic inference is that the fraud exception applies.

and contractual context, an exercise which needs to be carried out without any pre-assumption as to the likely answer.

Nomenclature

30. In the remainder of this judgment I shall refer to the two categories as (i) a guarantee; and (ii) a demand bond. I do so in order to distinguish instruments with distinctly different legal incidents.

31. The language of business and banking does not adopt such distinct categorisation. Instruments are often described as guarantees which are not guarantees properly so called. Demand bonds are dealt with in the ICC's *Uniform Rules for Demand Guarantee.* The incorporation of these rules was treated as determinative that the instrument was a demand bond in *Meritz Fire and Marine v. Jan de Nul* [2011] EWCA Civ 827; [2011] 2 Lloyd's Rep. 379. See [19]; and the absence of any such incorporation as neutral in *WS Tankship B.V. v The Kwangu Bank Ltd*[2011] EWHC 3103. Contrariwise instruments described as "Bonds" have been regarded as guarantees: see para 50 below.

The authorities

32. The distinction between the two categories has been considered in a number of authorities, in which a number of features have been treated as indicia that the instrument under consideration falls into one category rather than another. Legal textbooks have identified particular criteria or combinations thereof as having that effect. That exercise is not without value subject to the caveat (i) that the answer to the question cannot be given by a tick box approach; (ii) that the same factor, e.g. the description of the instrument as a guarantee, may have a different significance from case to case; and (iii) that few factors, with the exception of a conclusive evidence clause, are, on their own, likely to be decisive. As Waller, LJ said in *IIG v Van der Merwe* [2008] 2 Lloyd's Rep 187 [20] "*..the context is important...even minor variations in language plus a different context can produce different results..*"

Demand bonds

33. In some of the authorities the case proceeded on the assumption, or an acceptance, that the instrument was a performance bond. In *Esal (Commodities) Ltd v Oriental Credit Ltd* [1985] 2 Lloyd's Rep 546 the instrument was described as a performance bond under which the supplier's bank undertook to pay to the buyer a specified amount on the buyer's written demand "*in the event that the supplier fails to execute the contract in perfect performance*". The Court of Appeal rejected the contention that the words quoted meant that there was no liability unless and until there had been a breach of the underlying contract of sale. It did so on the basis that this interpretation would involve the bank taking upon itself the obligation of deciding the merits of the dispute under a contract of sale for which, as was "*virtually common ground*", it was wholly unfitted and which the parties could not sensibly have intended. It would mean that, unless there was clear evidence that the seller admitted that he was in breach of contract, payment could never safely be made by the bank in the absence of a judgment of a competent court of jurisdiction and this result would be wholly inconsistent with the entire object of the transaction namely to enable the beneficiary to obtain prompt payment.

34. I note that the authors of *Jack* on *Documentary Credits* say of this case:

> *"It may be said that the approach of the court was to categorise the bond as a first demand performance bond and to deduce from this that it was unconditional and the bank was not concerned with liability on the underlying contract. But banks do give conditional guarantees, whose function is the perfectly valid one of providing security against the insolvency of a seller or a contractor, and which are not intended to provide payment until the default is established. The answer provided by the Court of Appeal was almost certainly correct. But the reasoning has surely to start with the wording of the contract".*

35. In *Siporex Trade S.A. v Banque Indosuez* [1986] 2 Lloyd's Rep 146 claims were made under what were described as guarantees. The guarantees read:

> *"We hereby issue our guarantee favour Siporex Trader SA as follows...*
>
> *..We hereby engage and undertake to pay on your first written demand any sum or sums not exceeding £...in the event that by latest 7 December 1984 no bankers' irrevocable documentary letter of credit has been issued in favour of Siporex by Comdel ...Any claim(s) hereunder must be supported by your declaration to that effect ..."*

36. Hirst J held, relying on earlier decisions – *Howe Richardson Scale Co Ltd v Polimex-Cekop and NWB Ltd* [1978] 1 Lloyd's Rep 161; *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] 1 QB 159; and *Esal* - (i) that there was nothing in the bond before him to differentiate it from those quoted in these earlier authorities; (ii) that it was "*extremely important that, for such a frequently adopted commercial transaction, there should be a consistency of approach by the Courts so that all parties know clearly where they stand*"; (iii) that the whole commercial purpose of a performance bond "*is to provide a security which is to be readily, promptly and assuredly realisable when the prescribed event occurs; a purpose reflected in the provision that the bond should be payable "on first demand*"; and (iv) that the defendants' approach would frustrate that essential purpose.

37. This case illustrates (a) that the use of the word "guarantee" is not determinative; and (b) that if the undertaking of the Bank is to pay on "first written demand" supported by a particular declaration as the only condition of payment the instrument is likely to be treated as an obligation to pay, upon that demand, the amount specified regardless of the underlying position as between seller and buyer.

38. In *I.E. Contractors Ltd v Lloyd's Bank PLC and Rafidain Bank* [1990] 2 Lloyd's Rep 496 Rafidain Bank issued performance bonds in favour of Iraqi employers who had agreed with the plaintiffs (formerly GKN) to construct some poultry slaughterhouses. The bonds contained the following:

> *" (1) We have issued in your favour, as beneficiaries, this letter of guarantee, to indemnify you against any damages that you may sustain up to an amount of I.D 211.896 ...*
>
> *(2) Covering. Performance of contract guarantee covering damages which you claim are duly and properly owing to your organisation by GKN*

Contractors Ltd under the terms of the contract for a slaughterhouse ... made on ,,,

(3) We undertake to pay you, unconditionally, the said amount on demand, being your claim for damages brought about by the above named principal".

39. Staughton LJ considered the general nature of performance bonds as follows:

"But the general nature of performance bonds has been considered many times in the last 12 years, and the decisions give some guidance as to what, in the view of English law, the parties are likely to have intended. So too the general practice of bankers may give some guidance, even though it is not alleged, or at any rate proved, to have amounted to a binding custom. These matters may perhaps appropriately be treated as part of the background matrix or surrounding circumstances. But it must never be forgotten that the task of the Court is to construe the documents which were used in this case, and not in any others.

...

The first principle which the cases establish is that a performance bond, like a letter of credit, will generally be found to be conditioned upon the presentation of one or more documents, rather than upon the actual existence of facts which those documents assert. If the letter of credit or bond requires a document asserting that goods have been shipped or that a contract has been broken, and if such a document is presented, the bank must pay. It is nothing to the point that the document is untruthful, and that the goods have not been shipped or the contract not broken. The only exception is what is called established or obvious fraud. This doctrine has been laid down in recent years by cases too numerous to mention. The justification for it is said to be that bankers can check documents, but do not have the means or inclination to check facts, at any rate for the modest commission which they charge on a letter of credit or performance bond"

40. The "guarantee" in that case was treated by the parties and the Court as a performance bond. The issue was as to what was required by way of demand in order to comply with the requirements of the bond. The Court held that the demand could not be a mere demand but must state that it was a claim for damages. The case illustrates that reference to the purpose of the instrument ("*to indemnify you against any damages that you may sustain...*") does not necessarily signify that those damages have to be established if there is to be recovery under a bond which calls for payment against documents.

41. *Gold Coast Ltd v Caja De Ahorros Del Mediterraneo* [2001] EWCA Civ 1806; [2002] 1 Lloyd's Rep 617 concerned a Refund Guarantee under a shipbuilding contract. Its terms were:

"In consideration of your payment...of the instalment..under the Shipbuilding Contract we do hereby irrevocably and unconditionally undertake..that we will pay you within five ...days of your written demand .. amounts due to you under this Guarantee if and when the instalment becomes refundable from the

Builder under and pursuant to the terms and conditions of the Shipbuilding Contract.

This Guarantee is subject to the following conditions

1 *We shall pay any amounts payable under this Guarantee upon receipt of a certificate issued by Lloyd's Bank...*

...

5 *Any variation amendment to or waiver given in respect of the Agreement will not limit, reduce or exonerate our liability under this Guarantee"*

42. The judgment of the Court, which was given by Tuckey LJ, contains the following observations:

"15 *Turning then to the instrument itself, I accept Mr. Jacobs' submission that the task is to decide the nature of the instrument by looking at it as a whole without any preconceptions as to what it is. Undoubtedly there are features of the document which favour each side's construction. Before considering these in more detail it is helpful to consider such guidance as there is in the cases and texts to which we have been referred.*

16 *In* Paget's Law of Banking (11th Edition) *under the heading 'Contract of suretyship –v- demand guarantee' the authors say:*

> *Where an instrument i) relates to an underlying transaction between parties in different jurisdictions, ii) is issued by a bank, iii) contains an undertaking to pay 'on demand' (with or without the words 'first' and/or 'written') and iv) does not contain clauses excluding or limiting the defences available to a guarantor, it will almost always be construed as a demand guarantee.*

In the instant case features i), ii) and iii) favour the Buyer, but iv) favours the Defendant banks (condition 5).

17 *There is a further feature which favours the Buyer and that is that payment is to be made against a certificate (condition 1). In* I.E. Contractors –v- Lloyds Bank *[1990] 2 Lloyds Rep 496, 500 Staughton LJ observed that:*

> *"There is a bias or presumption in favour of the construction which holds a performance bond to be conditioned upon documents rather than facts. But I would not hold the presumption to be irrebuttable, if the meaning is plain"*[2]

[2] In *Marubeni* (see para 51 below) Carnwath, LJ observed that this "*observation was not necessary to the decision. There was no argument that the instrument in that case required more than the assertion of a claim to damages*".

18 *In* Paget *there is a further passage under the same heading to which I have referred which says:*

> *"In construing guarantees it must be remembered that a demand guarantee can hardly avoid making reference to the obligation for whose performance the guarantee is security. A bare promise to pay on demand without any reference to the principal's obligation would leave the principal even more exposed in the event of a fraudulent demand because there would be room for argument as to which obligations were being secured".*

19 *There is a passage to similar effect in* Documentary Credits by Jack, Malek and Quest *[2001] where the authors say at para. 12(57 :*

> *"In particular, ... a (demand) guarantee will not be construed as payable only if a particular event has occurred, simply because the guarantee sets out, without more, the event or events following the happening of which it is intended that a demand may be made.*

What is said in these passages is illustrated by Esal (Commodities) Limited –v- Oriental Credit Limited *[1985] 2 Lloyds Rep. 546 where the words of the instrument were:*

> *"We undertake to pay the said amount on your written demand in the event that the supplier fails to execute the contract in perfect performance ..... "*

The court held that the bond was payable on demand despite the fact that it referred to the supplier's failure to perform the underlying contract about which there was a dispute. At page 549 Ackner LJ (with whom the other members of the court agreed) observed:

> *If the performance bond was so conditional, then unless there was clear evidence that the seller admitted that he was in breach of the contract of sale, payment could never safely be made by the bank except on a judgment of a court of competent jurisdiction and this result would be wholly inconsistent with the entire object of the transaction, namely to enable the beneficiary to obtain prompt and certain payment."*

43. The Court rejected the submission that the instrument was a guarantee in the following terms:

> "21 *I do not accept these submissions. The instrument has all the appearances of a first demand guarantee. It describes itself as a guarantee, but this is simply a label; it does not use the language of*

guarantee. Rather the obligation, which is expressed to be an 'irrevocable and unconditional undertaking', is that the bank's 'will pay' on a first written demand. The only express condition of payment is contained in condition 1. This requires a certificate but makes no reference to arbitration or underlying liability under the shipbuilding contract. The instrument contains its own dispute resolution provisions".

44. Tuckey LJ regarded the "*if and when*" part of the instrument as doing no more than identifying the contractual events which triggered the right to call the refund guarantees. He did not think that condition 5 tipped the balance in favour of treating the instrument as a guarantee, As to that he said:

> *"25 ...Such a clause was only one of the features which persuaded the House of Lords in Trafalgar House that the instrument in question was a true guarantee. For the reasons given by Lord Jauncey in the passage to which I have referred, there were other very compelling reasons for this conclusion, not least the language of suretyship, strikingly absent from the present case. There are, as Mr. Boyd suggested, possible reasons for including such a clause in an instrument which is intended to be autonomous. It might, for example, have been included to avoid any argument that variation of the shipbuilding contract by, for example, postponing a stage payment or remitting part of it in settlement of any cross-claim would imperil recovery under the refund guarantees. It could have been inserted simply to ensure that the rule applicable to true guarantees did not apply to this instrument."*

45. In *WS Tankship II BV v The Kwangju Bank Ltd* [2011] EWHC 3103 the Letter of Guarantee, which was a guarantee of a refund of advance payments, provided :

> *"If, in connection with the terms of the Contract, the Buyer shall become entitled to a refund of the Advance Payments made to the Builder prior to the delivery of the vessel we hereby irrevocably guarantee the repayment of the same to the Buyer within thirty (30) days after demand not exceeding USD... ...*
>
> *The payment by the undersigned under this guarantee ... shall be made upon simple receipt by us of a written demand from you including a signed statement certifying that the buyer's demand for refund has been made in conformity with Article X of the contract and the Builder has failed to make the Refund".*

46. Blair J held that the fact that the guarantee provided that "*If ... the Buyer shall become entitled to a refund of the Advance Payments ... we hereby irrevocably guarantee the repayment of the same...*" did not, in context, point to the Bank's liability being secondary. The provision for payment on demand against a certificate showed that it was the statement which conditioned the bank's obligation to pay rather than the buyer's contractual entitlement to a refund.

Conclusive evidence clauses

47. In *Balfour Beatty Civil Engineering v Technical & General Guarantee Co Ltd* [2000] CLC 252 there was a Bond under which the sub-contractor and the defendant (which was described as "the Surety") undertook to make payment to the contractor upon receipt of the contractor's first written demand signed by an authorised signatory of the contractor whose signature was to be authenticated by the contractor's banker. The demand was to specify the amount claimed and state that the sub-contractor had failed to fulfil its obligations and that the sum demanded was due and payable. Such a demand was to be accepted by the Surety as conclusive evidence that the sum demanded was due. The provisions for payment on "first demand" and the conclusive evidence clause left Waller LJ in no doubt that that the bond was intended to be met without the Surety having either the right or the duty to make any detailed enquiry provided the demand letter conformed to the conditions of the bond.

48. In *IIG Capital LLC v Van Der Merwe* [2008] EWCA Civ 542; [2008] 2 Lloyd's Rep 187 the Court held that, outside the banking context, there was a strong presumption against deeds of guarantee being treated as demand bonds. In that case the guarantee was held to be a demand bond because of a combination of factors: (a) the agreement to pay as principal debtor and not merely as surety; (b) the provision that, if the guaranteed monies were not paid in full, the guarantor would immediately upon demand unconditionally pay to the lender the amounts which had not been paid; (c) the definition of the "guaranteed monies" as including monies "*expressed to be due owing or payable to the Lender*"; and the matter was put "*beyond doubt*" by the conclusive evidence clause. See also *Enka Insaat Ve Sanayi A.S. v Banca Popolare Dell'Alto Adige SPA* [2009] EWHC 2410 (Comm).

Guarantees

49. In other cases the courts have treated the instrument as a guarantee in the true sense.

50. Thus in *Trafalgar House Construction (Records) Ltd v General Surety & Guarantee Co Ltd* [1996] 1 AC 199 the subcontractor and the appellants provided a Bond for 10 percent of the value of the subcontract on condition that "*if the subcontractors shall duly perform and observe*" all the terms of the contract or "*if on default by the subcontractor the surety shall satisfy and discharge the damages sustained by the main contractor thereby*" up to the amount of the Bond then the obligation would be null and void but otherwise remain in full force. The House of Lords, reversing the decisions at first instance and in the Court of Appeal, held the Bond to be a guarantee. Reliance was placed on the fact that bonds in similar form had always been treated as guarantee; the bond referred to the appellants as "the surety"; the contract appeared in substance to be one to answer for the default of another; and it contained express provisions negating release of the surety upon a variation of the contract or forbearance as to time.

51. In *Marubeni Hong Kong and South China Ltd v Mongolian Government* [2002] 1 WLR 2497 the Mongolian Ministry of Finance agreed with Marubeni, which was supplying machinery to a Mongolian corporation, that it:

> "*..unconditionally pledges to pay you upon your simple demand all amounts payable under the agreement if not paid when the same becomes due.. and*

further pledges the full and timely performance and observance by the buyer of all the terms and conditions of the agreement...

The Ministry of Finance hereby waives any right to require you to proceed against the buyer or against any security received from the buyer or any third party or to pursue any other remedy available to you".

52. The Court regarded the instrument as a guarantee. It was not a banking instrument. It was not described either on its face or in a supporting legal opinion as a demand bond or something having similar legal effect. The legal opinion described it as a guarantee. That was not conclusive, although, as Carnwath LJ (as he then was) put it "*if MHK wanted the additional security of a demand bond, one would have expected them to have insisted on appropriate language to describe it*". He thought the absence of such language, outside a banking context, created a strong presumption in favour of a guarantee. The words "*unconditionally pledges*" and "*simple demand*" were qualified by the following words which indicated that the obligation only arose if the amounts payable under the agreement were not paid when they became due – wording appropriate to a secondary obligation. He regarded the waiver clause as a roundabout way of indicating any intention that the instrument should provide readily realisable security and as, at best, a neutral indication.

53. In *Vossloh Aktiengesellschaft v Alpha Trains (UK) Ltd* [2010] EWHC 2443 (Ch); [2011] 2 All ER (Comm) 307 at [19]-[34] Sir William Blackburne considered the difference between a contract of suretyship and one of indemnity. He had to deal with a Guarantee which provided:

"2. GUARANTEE AND INDEMNITY
2.1 In consideration of the Angel Trains Group placing orders under any Call-Off Notice the Guarantor hereby unconditionally and irrevocably as a continuing obligation and as principal debtor and not merely as surety, as a separate, continuing and primary obligation:

(a) guarantees to each Beneficiary the due and punctual observance and performance by each Guaranteed Party of each obligation owed by such Guaranteed Party to that Beneficiary contained in the Relevant Documents to which the Guaranteed Party is a party;

(b) guarantees to each Beneficiary the due and punctual payment by each Guaranteed Party of all its Secured Obligations;

...

3 PAYMENT
3.1 All sums payable hereunder shall be paid on demand to such bank account as may be specified in any demand made by a Beneficiary hereunder, in immediately available funds, free of any restriction or condition and free and clear of and without any deduction or withholding, whether for or on account of tax, by way of set-off or otherwise, except to the extent required by law ..."

54. He regarded clauses 2.1 (a) and (b) as in the classic language of guarantee and the instrument as giving rise to secondary liability. Clause 3.1 did not define the

circumstance in which VAG would be liable. It assumed such liability ("*hereunder*"). It was, therefore, a neutral factor.

The Seller's submissions

55. Mr Jonathan Hirst QC referred to para 34.4 of *Paget* (see paragraph 42 above), which I set out again for ease of reference:

> *"Where an instrument:*
> *(a) relates to an underlying transaction between parties in different jurisdictions,*
> *(b) is issued by a bank,*
> *(c) contains an undertaking to pay 'on demand' and*
> *(d) does not contain clauses excluding or limiting the defences available to a guarantor,*
> *it will almost always be construed as a demand guarantee."*

He submitted that, in the present case, the Payment Guarantee, as he put it, "*ticks all the boxes*" and should be construed as a demand bond.

56. As to (a), the Seller is Chinese; the Buyer is from the Marshall Islands; and the Bank is in Greece. The Payment Guarantee was given in respect of shipbuilding contracts – a context in which refund guarantees have often been found to be demand guarantees.

57. As to (b) the guarantee was plainly issued by a bank. In this connection he referred to Jack/Malek/Quest *"The Law of Documentary Credits"* which at paragraph 12.55 states [3]:

> *"it may be concluded from the cases that where a guarantee or bond is stated to be payable by a bank or financial institution on demand in the absence of clear words indicating that liability under it is conditional upon the existence of liability on the part of the account party in connection with the underlying transaction, the guarantee is to be construed as an independent guarantee entitling the beneficiary to payment simply against an appropriately worded demand accompanied by such other documents as the guarantee may require."*

58. As to (c) he submits that the essence of the obligation is to pay "*upon receipt of your first written demand stating that the Buyer has been in default of the payment obligation for 20 days*". He submits that the use of the words "*on first written demand*" is a strong indicator that the instrument is intended to be a demand guarantee. Thus in the *Gold Coast* case at first instance (giving summary judgment)[4] [29] Thomas J indicated that:

> *"The use of the words "on first written demand" is the language of an obligation independent of the underlying contract"*

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[3] See to similar effect Philips and O'Donovan paragraph 13-23, Andrews and Millett *Law of Guarantees* paragraph 16-002, Enonchong *The independence principle in demand guarantees and performance bonds* paragraph 3.72.
[4] [2001] EWHC 504.

In *Balfour Beatty Civil Engineering & Anor v Technical & General Guarantee Co Ltd* [2000] CLC 252 Waller LJ stated:

> *"This bond contains language which seems to me to make it absolutely clear that this is a bond intended to be met without the surety having either the right or the duty to make any detailed inquiry provided the demand letter conforms with the conditions of the bond. It requires payment on 'first demand...."*[5];

Esal (Commodities) v Oriental Credit [1985] 2 Lloyd's Rep. 546, *Siporex v Banque Indosuez* [1986] 2 Lloyd's Rep. 146 and *Gold Coast* were all "*first written demand*" cases.

59. Further, the requirement that the written demand shall have a statement of the Buyer's default was, he submitted, the equivalent of the certificate required of the beneficiary of a letter of credit or performance bond. It is true that there is no conclusive evidence clause. If there was the position would be put beyond doubt. But the absence of such a clause does not detract from the other indicia of what the parties intended. These include the fact that under the Payment Guarantee the Bank *"irrevocably absolutely and unconditionally guarantee[s] to the [Seller] as the primary obligor and not merely as the surety"* which is consistent with the instrument being a demand bond.

60. As to (d), Clause (7), taken as a whole, is not to be regarded as reflective only of a surety type relationship as was the clause in *Trafalgar House.*

61. In particular, the first half of clause (7) states:

> *"Our obligations under this guarantee shall not be affected or prejudiced by any dispute between you as the Seller and the Buyer under the Shipbuilding Contract or by the Seller's delay in construction or delivery of the vessel due to whatever causes ..."*

This, he submits, makes clear that the instrument is a self-standing demand bond. Its function is (i) to make quite clear that liability is not to be affected because of disputes under the underlying contract (ii) to ensure that the liability would not be imperilled by any rescheduling between Buyer and Seller.

Conclusion

62. Despite the strength of these points, I am not persuaded that the Payment Guarantee is to be regarded as a demand bond for the following reasons.

63. The instrument is continuously referred to as a Guarantee: see the heading ("*Details of Guarantee*") and clauses 1, 2, 3, 4, 5, 9, 10, 11, 12, and 13, together with the ending. That is far from conclusive. But it is a pointer.

64. Both Exhibit A, which contains terms for the Refund Guarantee, and Exhibit B, which contains terms for the Payment Guarantee stipulate an "*Irrevocable Letter of Guarantee*". The terms of Exhibit A provide that, should the Seller fail to make any repayment of an instalment due under the Shipbuilding Contract, the Seller's bank is to pay the Buyer "*the amount which the Seller ought to pay*". Exhibit A also provides

[5] There was also a conclusive evidence clause.

that in the event that there is a dispute between Buyer and Seller as to whether the Seller is liable to repay the instalment in question, and consequently whether the Buyer shall have the right to demand payment from the Seller's bank, then, if such dispute is submitted to arbitration, the Seller's bank shall be entitled to withhold payment until the award and must the then pay a refund to the extent that the award orders.

65. Mr Hirst relies on the absence of such provisions in Exhibit B as an indication that the Performance Guarantee is a demand bond rather than a guarantee. But, as it seems to me, the expression "*Irrevocable Letter of Guarantee*", used in Exhibit A, can readily be regarded as having the same legal meaning in Exhibit B.

66. Clause (1) sets out the core obligation in what is, in my view, the classic language of a guarantee. It is true that the Bank's undertaking is given irrevocably, absolutely and unconditionally. But that begs the question of what it is that the Bank undertakes to do – which is to guarantee the due and punctual payment of the Second Instalment. It is not a guarantee of what is not due.

67. I have not ignored the fact that the undertaking is given as primary obligor and not merely as surety. But that, too, begs the question of what the Bank, has, as primary obligor, undertaken to do, which is to guarantee payment of the Second Instalment. The existence of an "as primary obligor and not merely as surety" clause does not automatically mean that the instrument is not a guarantee: *Carey Value Added v Group Urvasco* [2011] 2 AER (Comm) 149[22].

68. Clause (1) does not limit itself to saying that the Bank will guarantee the Second Instalment. It identifies what it means by the Second Instalment, which is to be "*as specified in (2) below*". Clause (2) is in similar - but not identical - terms to Article II 3 (b) of the Shipbuilding Contract. It introduces a new requirement for a certificate of cutting of steel plate "*countersigned for approval by the Buyer's representative*". Mr Hirst submitted that this was a badly executed attempt to reflect the terms of that Article, which cannot affect the basic nature of the instrument; and that the parties could not have intended that the Buyer should be able to stymie payment by the Bank of the Second Instalment under the Guarantee by refusing to sign an approval.

69. I do not think it right to treat the words quoted as without relevant effect or significance. In my view they must be treated as part of the definition of the contractual undertaking of the Bank, at whose behest - or that of the Buyer - they are likely to have been incorporated. The words provide a means by which the Bank may be assured that it is safe to pay out. Whilst the Buyer might be able to prevent payment by refusing to sign a certificate, the Court should not assume that the Buyer will act in bad faith, or that it would necessarily be in the Buyer's interest not to sign. The Buyer might well wish to ensure that the Bank did pay in order for the contract to proceed. If the Buyer refused to sign without justification it would be open to an arbitral tribunal to order it to do so.

70. The effect of clauses (1) and (2) appears to me to indicate that the Bank is not simply agreeing to pay on demand the Second Instalment if it is not paid by the Buyer. It is undertaking the liability of a guarantor in respect of the Second Instalment as defined in clause (2) which has the added requirement, not to be found in the Shipbuilding Contract, of a certificate countersigned by the Buyer's representative.

71. Clause (3) contains a guarantee of interest from and including the "*first day after the date of instalment in default*". That is difficult to reconcile with a free standing obligation to pay interest from any given date or following demand. The Buyer has to be "*in default*" if interest is to start to run. Clause (4) provides for the payment of interest "*as specified in paragraph (3) hereof*". It would, theoretically, be possible for there to be a freestanding obligation to pay the principal amount but for interest only to be due if default was established but, as was common ground, the combination would border on the absurd.

72. Clause (4) provides for immediate payment upon first written demand stating that the Buyer has been in default for 20 days. That is an indicator of a demand bond. If the Payment Guarantee had done no more than provide that, in the event that the Second Instalment was not paid, the Bank would pay it on a first written demand stating that it was due and unpaid, the basis for saying that the instrument was a demand bond would be very strong. But clause (4) follows on from clause (1) which, as I have said, expresses the core obligation in the language of guarantee; from clause 2 which defines the Second Instalment in terms which are not identical to those in the Shipbuilding Contract; and from clause 3 which contemplates interest only after default.

73. Further the obligation to pay on demand in clause (4) follows the words:

> *"In the event that the BUYER fails to punctually pay the second Installment guaranteed hereunder, or the BUYER fails to pay any interest thereon, and any such default continues for a period of twenty (20) days, then, upon receipt by us of your first written demand..."*

Those words refer back to the guarantee which is the subject of clause (1) and the specification of the Instalment made in clause (2) ("*guaranteed hereunder*"), and indicate, in my view, that it is not the case that there is only one condition of payment i.e. a first written demand with the requisite statement. The words "*In the event that...then*" are an indication that the obligation to pay on demand arises when, but not before, the event specified has occurred. In the light of clauses (1) and (2) they are not words needed simply to describe when a demand bond may be called. The event specified comprises non payment of what is guaranteed (which is due payment) and a continuous 20 day default. A demand and written notice of such default, for which the clause additionally provides, is a necessary, but not a sufficient condition of recovery.

74. In those circumstances the provision for payment on demand is not inconsistent with the instrument being an on demand guarantee.

75. I have not forgotten that the fact that reference is made in the instrument to the contractual default to which it relates, and for which it is security, does not necessarily mean that the beneficiary has to show that default has occurred. Thus in *Gold Coast* the "*if and when*" part of the instrument was, in context (which included the fact that the instrument had all the appearance of a first demand guarantee and did not use the language of guarantee in the core provision) treated as doing no more than identifying the contractual events which triggered the right to call the refund guarantees. In other differently worded contracts, the words "*to pay on your written demand ...in the event that...*" have not been held to create a guarantee: *Esal; Siporex.*

76. The phraseology in, and the structure of, clauses (1) (2) and (4) goes, in my view, well beyond what was needed for the purpose of identifying the obligation for which security was being given. If the obligation is to be regarded as nothing more than an obligation to pay the amount of the Second Instalment upon receipt of a demand asserting that it is due, the provision in clause (2) for a countersigned approval is a dead letter. The "*In the event that ...then...*" language appears to me, in context, to confirm the conditionality of the event.

77. The concluding words of clause (4) (*"without requesting you to take any or further action, procedure or step against the BUYER or with respect to any other security you own"*) show that the Seller is not required to commence an arbitration against the Buyer in order to obtain payment from the Bank. If the instrument is a demand bond, the provision would be unnecessary (although it could be regarded as confirmatory) since the Bank has a primary liability. They seem to me more consistent with a guarantee, since, if the liability is secondary, they foreclose any suggestion that the Seller must proceed against the primary obligor first. Similar words were not regarded as suggesting a demand bond in *Marubeni*.

78. The opening words of clause (7) favour the Seller's case. But I am not persuaded that they should, in context, be taken to signify (and they do not say in terms) that it is not open to the Bank to contend that the conditions specified in the Shipbuilding Contract and clause (2) of the Payment Guarantee for the 2nd instalment to become due have not occurred, i.e. that it is not open to the Bank to contend that there has been (a) no Refund Guarantee; (b) no cutting of 300 mt of steel plate and (c) no countersigned certificate.

79. Mr O' Sullivan submitted that the opening words of clause (7) have adequate application in other circumstances. They are apt to prevent the Bank from declining to pay because, although the Second Instalment has become due, the Buyer claims that, as a result of some subsequent failure on the part of the Seller, the Buyer has a counterclaim. I understood him also to accept that the clause would probably preclude the Bank, in circumstances where the Second Instalment was payable (because 300 mt of steel had been cut, a Refund Guarantee had been provided and a countersignature obtained) from relying on the contention that the Buyer had a set off which had accrued by the time of the instalment. I agree. Mr Hirst submitted that, in that case, the instrument was not a traditional guarantee. That does not, however, mean that it is not a guarantee at all.

80. The remaining words of clause (7) appear to me to be intended to ensure that the Seller is not at risk of having the guarantee rendered inoperative because of one or more of the classic reasons (variation or extension of time) why at common law a guarantor may be discharged. Mr Hirst submitted that the inclusion of provisions which were not strictly necessary should not be treated as denaturing the instrument. As to that, Courts have attached a different significance to such phraseology in the light of the context in which it appears: cp Tuckey LJ in *Gold Coast* and Lord Jauncey in *Trafalgar House*. In *Associated British Ports v Ferryways NV* [2009] EWCA Civ 189 the Court of Appeal regarded the absence of such phraseology as neutral. In the context in which those words appear in the present case their presence strikes me as a pointer to the conclusion that the Payment Guarantee is a guarantee properly so called.

The contractual context

81. Mr O'Sullivan submitted that there was a spectrum of circumstances in which an instrument such as the present might fall to be construed. At one end was a document, described as a guarantee, executed by a person other than a bank or a financial institution, such as a parent guaranteeing its subsidiary. In such a case there was a strong presumption that the document was a guarantee. At the other end of the spectrum is a guarantee given by a bank or financial institution whose business it is to open letters of credit or give performance bonds for a fee or commission, and which will have little knowledge of the underlying transaction. In such a case the Court would fairly readily construe a payment guarantee as a demand bond - an instrument whose essential characteristics are now very well known.

82. In the present case, as he submitted, the Bank was some way from this end of the spectrum. The Bank was not simply providing the Payment Guarantee in exchange for a fee. It was closely linked to the shipbuilding transaction since it was financing the Buyer. Far from having no means of, or interest in, determining what the position was under the underlying transaction it was inherently likely to be very interested in knowing, and well capable of finding out, whether the conditions for the payment of the Second Instalment had been met.

83. Mr Hirst submitted that no real distinction should be made between banks offering to provide guarantees in exchange for a fee and banks financing transactions. The proper distinction was between institutions such as banks and others e.g. parent companies providing guarantees for their subsidiaries.

84. I do not regard the contractual background as providing, in the present case, any particularly sure guide to the correct interpretation. Banks are used to providing performance bonds with all that that entails. As Hirst J said in *Siporex* they do not have to do so if they do not want to, and can no doubt secure indemnities if they do. But banks also provide guarantees (including guarantees to pay on demand) and it may be in their interest to limit their obligation to that. What they have undertaken must largely depend on what they have provided for in the relevant document.

85. In the present case the fact that the Bank is a financial institution means that the court should not in any way be surprised to find that it accepted the obligations of a demand bond. At the same time it cannot be said, given its role, that the Bank would not have wanted to be concerned with whether the Second Instalment was truly due.

86. Mr O'Sullivan submitted that it was relevant to consider the likelihood of the parties having agreed upon an instrument under which the Bank might be liable to pay the Second Instalment to a Chinese seller upon a bare demand, coupled with an assertion that it was due, and thus face the prospect that it might never be recovered; as opposed to agreeing, in effect, that the Bank would stand behind the Buyer if the Second Instalment was truly due either because this was accepted or established. He invited me to find that the latter was more likely.

87. Attractively though these submissions were put I do not regard them as persuasive in that form. Whether the parties agreed a guarantee or a demand bond would probably depend on their relative bargaining strength in the prevailing market conditions or, possibly, their drafting technique. Further it was plainly the intention of the parties

that any payment of the Second Instalment by or on behalf of the Buyer would be recoverable under a Refund Guarantee. The prospect of any payment under the Payment Guarantee going to China and never coming back was intended to be avoided by the contractual arrangements.

88. That circumstance is, however, of some significance. The construction which I favour would not preclude the Bank from contending that, whatever the Seller may say, the Bank has not been provided with the Refund Guarantee for which the Shipbuilding Contract provided, and which, under the Contract, was to be the precursor of any payment. The contrary construction would enable the Seller, unless fraudulent, to recover under the Payment Guarantee even if the Refund Guarantee had not been provided as agreed – the very circumstance in which all parties contemplated that it would not be paid.

Finale

89. Taking all these considerations into account, and considering the Payment Guarantee as a whole, I have come to the conclusion that it is, in law, a guarantee. To adapt the words used by Carnwath LJ in *Marubeni*, if the Seller wanted the additional security of a demand bond I would have expected it (i) not to use what was (a) described as, (b) took the form and used the language of, and (c) included provisions habitually found in, a guarantee; and (ii) to have used, instead, appropriate (and terser) language to make it clear that that was so.

90. In those circumstances I decline to give the Seller summary judgment.

Alternative defences

91. Mr O'Sullivan had an alternative defence which I need consider only briefly. He submitted that, on the assumption that the Payment Guarantee was a demand bond, some effect must be given to clause (2) so as to provide that submission of a countersigned certificate was an implied condition of the guarantee. As to that, if, contrary to my view (which is partly based on the need to give effect to the requirement of a signature under clause (2)), provision of such a certificate is not by reason of clauses (1) and (2) a condition of liability, I do not think that such a requirement can be implied. That would be inconsistent with the terms of the document which calls only for the provision of the demand specified in clause (4).

92. His second alternative defence was to contend that it was arguably a custom of the trade that no payment should be due in the absence of a Refund Guarantee. In my judgment, even if such a custom was provable, it would be ineffectual for the same reason, namely because the supposed custom would be inconsistent with the express provisions of clause (4).

Postscript

93. I am most grateful to all Counsel for the high quality of their submissions and to those instructing them for the efficient preparation of the material.