

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE  
Port of Spain**

**Claim No. CV2017-04638**

**BETWEEN**

**TRINIDAD AND TOBAGO ELECTRICITY COMMISSION**

**Claimant**

**AND**

**MARITIME GENERAL INSURANCE COMPANY LIMITED**

**Defendant**

**Before the Honourable Mme. Justice Jacqueline Wilson**

**Date of Delivery: November 27, 2018**

**APPEARANCES:**

Mr. Colin Kangaloo and Ms. Stephanie Moe Attorneys at law for the Claimant  
Mr. Robin Otway Attorney at law for the Defendant

## **JUDGMENT**

### **INTRODUCTION**

1. The Claimant is responsible for the generation and supply of electricity in Trinidad and Tobago. In May 2012 the Claimant entered into a contract with a firm of Consultants (DMP) under which DMP agreed to provide advice and assistance to the Claimant on the acquisition of land for the construction of a substation (the Contract).

2. It was a requirement of the Contract that DMP would provide sureties or obtain the guarantee of an insurance company or bank who would be liable to the Claimant for the due performance of DMP's obligations. The guarantee was to be set out in a bond in terms approved by the Claimant.<sup>1</sup>
3. Pursuant to this requirement, on 12 February 2012, DMP and the Defendant entered into a bond with the Claimant in the sum of \$732,270.00 (the Bond).
4. The Claimant alleges that DMP has breached its obligations under the Contract causing loss and damage. The Claimant states that it is thereby entitled to call in the Bond. The Claimant has sought payment from the Defendant of the full amount that it alleges to be due under the Bond, but the Defendant has refused to comply. As a result, the Claimant has instituted these proceedings against the Defendant seeking payment of the sum of \$732,270.00.
5. The Defendant asserts that its liability under the Bond does not arise until the breach and loss alleged by the Claimant are first established. The Defendant has therefore applied to the court to dismiss the Claimant's claim on the ground that it discloses no reasonable cause of action.
6. The Defendant has also brought an ancillary claim against DMP seeking an indemnification of any sums for which it may become liable to the Claimant under the Bond.

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<sup>1</sup> See clause 12

## ISSUE

7. The issue that arises is whether the Defendant's obligations under the Bond are enforceable on demand by the Claimant or upon proof of breach and loss.

## THE DEFENDANT'S SUBMISSIONS

8. Counsel for the Defendant contends that the mere assertion of breach and loss by the Claimant is not adequate to enforce the Bond. Counsel argues that the Defendant's liability under the Bond does not arise until the breach and loss alleged by the Claimant are first established in keeping with the dispute resolution procedures under the Contract.
9. Counsel for the Defendant relies on a line of authority which draws the distinction between a performance bond, which is enforceable on demand, and a conventional guarantee, where the liability of the guarantor arises only when the debtor's actual liability is established: ***Apua Funding Limited and the Government of Antigua and Barbuda v RBTT Trust Limited Civ App No 94 of 2010; Marubeni Hong Kong and South China Ltd v Government of Mongolia [2005] 1 WLR 2497; Vossloh Aktiengesellschaft v Alpha Trains (UK) Ltd [2010] EWHC 2443.***
10. In ***Apua Funding***, Justice of Appeal Mendonca held that:

*"A performance bond or guarantee is an unconventional undertaking to pay a specific sum of money. It is often payable on a simple demand. It stands on the same footing as a letter of credit. Where the beneficiary of such a performance bond or guarantee seeks payment in accordance with its terms, the giver of the bond or guarantee must pay regardless of the state of*

*affairs between the parties in the underlying transaction, which in this case would be the bond transaction involving APUA Funding, the Government and the respondent. It therefore differs from a conventional guarantee where a claim under the guarantee can be defeated by any defence open to the party whose performance is being guaranteed. The only basis on which the giver of the bond or guarantee may refuse to pay is where there is clear fraud of which he has notice.”<sup>2</sup>*

11. In discussing the approach to interpretation of the guarantee in question, Mendonca JA stated further that:

*“What is the true nature of the document is of course a matter of construction. It is the Court’s task to determine the nature of the document by looking at it as a whole without any preconceptions as to what it is (see Gold Coast Ltd. v Caja de Ahorros del Mediterraneo and Ors. [2001] EWCA Civ 1806). In doing so the Court is concerned with the main burden of the instrument.”<sup>3</sup>*

*Where therefore the instrument contains provisions creating liability to pay that will point to it being a performance bond. But it may not necessarily be so. In Marubeni Hong Kong and South China Ltd. v Government of Mongolia [2005] 1 WLR 2497, the instrument contained a provision that the issuer “unconditionally pledges to pay to you upon your simple demand all amounts payable.” It was held that the instrument was not a performance bond because those words were qualified by language which indicated that the obligation only arose if the amounts payable were not paid when the same*

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<sup>2</sup> See paragraph 23

<sup>3</sup> *Ibid.*, at paragraph 31

*became due. The Court of Appeal held that the wording was more appropriate to a secondary obligation, that is one conditional upon default of the buyer. This case illustrates the importance with construing the document as a whole.*

*In the Marubeni case the Court of Appeal of England .....was of the opinion that in the absence of [such] overt language in a document outside the banking context there was a presumption against the document being a performance bond or guarantee. The question in those circumstances was whether there was a sufficient indication in the wording of the instrument to displace that presumption. I think this is an appropriate approach to the interpretation of the Government's guarantee and indemnity in this case. The question then is whether the language of the guarantee and indemnity is sufficient to displace the presumption that is not a performance bond".<sup>4</sup>*

12. Counsel for the Defendant cited similar dicta in **Vossloh** (supra) where Sir William Blackburn sitting as a Judge of the High Court of England and Wales stated as follows:

*"This brings me to the so-called 'performance bond', sometimes known as a 'performance guarantee', often as a 'demand bond' or 'demand guarantee' or even as a 'first demand guarantee'. In the context of the present dispute I prefer the expression 'demand bond.' In essence it is a particularly stringent contract of indemnity. It is a contractual undertaking by a person, usually a bank, to pay a specified amount of money to a third party on the occurrence of a stated event, usually the non-fulfilment of a contractual obligation by the principal to that third party.*

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<sup>4</sup> Ibid., at paragraphs 33 and 34

*Sometimes the wording of the contract has the result that the liability of the person who has given the bond arises on mere demand by the creditor, notwithstanding that it may be evident that the principal is not in any way in default or even that the creditor himself is in default under his contract with the principal. It all depends on the wording of the instrument. It is often a difficult question to determine whether, on its true construction, a particular contract which provides for payment on demand is a performance or demand bond (where the obligation to pay is triggered by a demand alone or by a demand accompanied by the provision of specified documents) or whether it is a guarantee (strictly so called) where the obligation to pay is of the 'see to it' kind, i.e. conditional on proof by the creditor of default by the principal."<sup>5</sup>*

13. Counsel for the Defendant relies on the above dicta to support the conclusion that the Bond is a contract of guarantee under which the liability of the Defendant arises where the breach of contract and loss alleged by the Claimant must first be established.
  
14. Counsel for the Defendant submits further that under the dispute resolution procedures of the Contract the parties are required to seek to resolve their dispute or difference in good faith, failing which the dispute must be referred to the Dispute Resolution Centre of the Trinidad and Tobago Chamber of Industry and Commerce.<sup>6</sup> If the dispute remains unresolved, it must then be referred to arbitration in accordance with the Arbitration Act.<sup>7</sup>

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<sup>5</sup>[2011] 2 All ER 307 at page 313, paragraph 28

<sup>6</sup> Clause 31

<sup>7</sup> Clause 32

15. The Defendant submits that arbitration proceedings have been instituted by the Claimant and that those proceedings are the appropriate forum in which the alleged breach and loss should be established.
16. The Defendant argues further that the Claimant's statement of case makes detailed allegations regarding DMP's breach of contract in circumstances where the Defendant was not involved in the work performed by DMP and is thereby unable to respond to the Claimant's allegations. The Defendant argues that the court should order that DMP be joined as a defendant to these proceedings so that the material allegations could be addressed or, alternatively, that the proceedings should be stayed until the determination of the arbitration proceedings.

#### **THE CLAIMANT'S RESPONSE**

17. Counsel for the Claimant accepts that the conditions of breach and loss are required to call in the Bond. Counsel asserts, however, that prior judgment is not required to satisfy the conditions as such an approach would defeat the commercial purpose for which the Bond was intended.
18. Counsel submits that the commercial purpose of a bond is to receive prompt and immediate payment upon default by the principal: ***Cargill International SA and another v Bangladesh Sugar and Food Industries Corp [1964] 4 All ER 563*** .
19. In ***Cargill*** Morison J stated that:

*"I start with the commercial purpose of a performance bond.*

*....Such a bond is, effectively, as valuable as a promissory note and is intended to affect the 'tempo' of parties' obligations; in the sense that when an allegation of breach of contract is made (in good faith), the beneficiary can call the bond and receive its value pending the resolution of the contractual disputes. He does not have to await the final determination of his rights before he receives some moneys.*

*....The concept that money must be paid without question, and the rights and wrongs argued about later, is a familiar one in international trade, and substantial building contracts. A performance bond may assume the characteristics of a guarantee, especially, if not exclusively, in building contracts, where the beneficiary must show, as a prerequisite for calling on the bond, that by reason of the contractors' non-performance he has sustained damage (see Trafalgar House Construction (Regions) Ltd v General Surety and Guarantee Co Ltd [1995] 3 All ER 737, [1996] AC 199).*

*However, it seems to me implicit in the nature of a bond, and in the approach of the court to injunction applications, that, in the absence of some clear words to a different effect, when the bond is called, there will, at some stage in the future, be an 'accounting' between the parties in the sense that their rights and obligations will be finally determined at some future date. The bond is not intended to represent an 'estimate' of the amount of damages to which the beneficiary may be entitled for the breach alleged to give rise to the right to call. The bond is a 'guarantee' of due performance. If the amount of the bond is not sufficient to satisfy the beneficiary's claim for damages, he can bring proceedings for his loss. As far as I am aware, and no case was cited to me to suggest otherwise, the performance*



*bond is not intended to supplant the right to sue for damages. Indeed, such a contention would conflict with what I believe to be the commercial purpose of these instruments.”<sup>8</sup>*

20. Counsel for the Claimant contends that there is no requirement to resolve the underlying contractual dispute before calling in the Bond as no such conditions are specified in the Bond and, in the absence of an admission by DMP, such an approach would defeat the commercial purpose of prompt and certain payment for which the Bond was entered: ***Esal (Commodities) Limited Relto Limited v Oriental Credit Limited Wells Fargo Bank N.A. 1985 WL 311114*** and ***TTI Team Telecom International Ltd v Hutchinson 3G UK Ltd [2003] ALL ER 83; Moschi v Lep Air Services Ltd and Ors [1973] AC 331.***

21. In ***Esal***, Ackner LJ held that:

*“(Counsel for the Defendant) is obliged to accept that if he is right, the bank, by entering into the performance bond is taking upon itself the obligation of deciding the merits of a dispute under a contract of sale, a function for which it is virtually common ground the bank is wholly unfitted and which the parties could not sensibly have intended. As Mr. Sumption for WF correctly submitted, if the performance bond was so conditional, then unless there was clear evidence that the seller admitted that 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 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 and certain payment. There is no need to cite, at any length, the*

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<sup>8</sup> [1996] 4 All ER 563 at p 568

*well-known case of Edward Owen Engineering Limited –v- Barclays Bank [1978] 1QB 159 as to the general nature of a performance bond, where it is stressed that a bank is not concerned in the least with the relations between the supplier and the customer, nor with the question whether the supplier has performed his contractual obligation or not, nor with the question whether the supplier is in default or not, the only exception being where there is clear evidence both of fraud and of the bank’s knowledge of that fraud.”<sup>9</sup>*

22. Counsel submits that the Claimant has set out the relevant default, loss and damage extensively in its pleadings and that it has properly called in the Bond in the manner provided.
23. Counsel submits further that the dispute resolution provisions of the Contract are not incorporated into the Bond and are therefore irrelevant to a determination of the Defendant’s liability under the Bond.

## **DISCUSSION**

24. The authorities make it clear that, whatever designation may be ascribed to the Bond, the Defendant’s liability under it must be discerned from the wording of the Bond itself and the contractual provisions under which it was established. This is so because the distinguishing features of a contract of guarantee or a contract of indemnity may otherwise be blurred by the terms of the agreement between the parties.
25. In ***Moschi*** Lord Reid set the parameters of his decision in the following terms:

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<sup>9</sup> At page 4 of transcript

*“I would not proceed by saying this is a contract of guarantee and there is a general rule applicable to all guarantees. Parties are free to make any agreement they like and we must I think determine just what this agreement means.”<sup>10</sup>*

26. Similarly, Lord Diplock stated as follows:

*...Whether any particular contractual promise is to be classified as a guarantee... depends upon the words in which the parties have expressed the promise.*

*...Where the contractual promise can be correctly classified as a guarantee it is open to the parties expressly to exclude or vary any of their mutual rights or obligations which would otherwise result from it being classifiable as a guarantee. Every case must depend upon the true construction of the actual words in which the promise is expressed.”<sup>11</sup>*

27. The starting point, therefore, is to consider the terms of the Bond and the relevant contractual provisions, giving the words their natural and ordinary meaning.

## **THE CONTRACT**

28. As indicated above, under the Contract DMP agreed to provide advice and assistance to the Claimant on the acquisition of land for the construction of a substation.

29. The scope of works to be performed by DMP spanned some nineteen sub-paragraphs, which are listed below<sup>12</sup>:

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<sup>10</sup> At p. 344 G

<sup>11</sup> Page 348G to 349D

<sup>12</sup> See clause 2 of the Contract

- a) *Liaise with and advise land owners regarding the land acquisition process and related matters, prepare and serve letters and section 4, 5 and 8 Notices and other related field work;*
- b) *Conduct title searches to ascertain ownership and any encumbrances;*
- c) *Analyse title search results and verify title for each property, review existing titles and opinions, and other legal services related to transfer of property to the Commission;*
- d) *Review and ensure the accuracy of title information on survey plans;*
- e) *Conduct valuations for properties, negotiate with land owners and finalise compensation packages. Valuers shall be licensed and approved by the Commissioner of Valuations;*
- f) *Prepare LAA Section 4, 5 and 8 Legal Notices and drafts LAA Section 5 and 8 Cabinet Notes. Co-ordinate the entire process to publication in the Gazette and in local newspapers. Serves notices on affected land owners including drafting of letters accompanying such notices and related activities;*
- g) *Prepare Notices to the Registrar General and follow the registration of the acquisitions;*

- h) Prepare Returns for acquired lands and file with District Revenue Offices;*
- i) Prepare, execute and serve all legal instruments as necessary, including agreements of sale, leases, licenses, permits, warrants and easements;*
- j) Liaise, collaborate, orchestrate with and attend meetings as required with but not limited to surveyors, valuers, land owners' legal representatives and Government agencies, including the Director of Surveys, Commissioner of State Lands, Caroni (1975) Limited, Commissioner of Valuations and Registrar General;*
- k) Liaise with the Commissioner of State Lands and Solicitor General concerning State Lands (2-acre agricultural parcels, Caroni lands, others) and obtain long term interests for the Commission by way of resumption, leases or easements;*
- l) Prepare all correspondence to land owners and relevant Government agencies;*
- m) Give legal advice to the Commission related to the acquisition of land interests;*
- n) Ensure that all of the works are performed in accordance with the Commission's standards and specifications;*
- o) Prepare and follow project schedules to ensure that deadlines and project milestones are realized;*

- p) *Coordinate the functions of the various personnel and teams assigned to the works;*
- q) *Promptly report all irregularities or perceived or envisaged problems to the Manager, Transmission Development and Engineering Services;*
- r) *To obtain vacant possession of the lands;*
- s) *Provide such other services or actions that are required to achieve the Commission's Objectives as set out in Section 3.0- General Specification.*

30. It is immediately apparent that the services that DMP were to provide under the Contract are stated with varying degrees of specificity. Therefore, the circumstances in which an event of default may be considered to arise are varied and extensive.
31. The contractual provisions relating to the Bond are in the following terms (redacted only for the purpose of substituting the names of the parties to the Contract with their designations used herein):

*"[DMP] shall be required at his own expense to provide good and sufficient sureties approved by the [Claimant] or to obtain the guarantee of an insurance company or bank (in either case to be approved by the [Claimant]) to be jointly and severally bound together with him to the [Claimant] in the sum provided in the tender for the due performance of the Contract under the terms of a bond: the said bond to be such as shall be approved by the [Claimant]."*<sup>13</sup>

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<sup>13</sup> Clause 12

32. The Contract provides that the Bond is to be read and construed as part of the Contract together with other documents that are described as “Accompanying Documents.”<sup>14</sup> The Contract also provides that in the case of conflict among the Accompanying Documents, the latest document shall take precedence.<sup>15</sup>

### **THE BOND**

33. The opening paragraph of the Bond states that:

*“BY THIS BOND I/We DEPOO, MAHARAJ & PERSAUD whose registered office is at FIRST FLOOR, 141 DUKE STREET, PORT OF SPAIN, TRINIDAD (hereinafter called “the Contractor”) and MARITIME GENERAL INSURANCE COMPANY LIMITED whose registered office is at MARITIME CENTRE, 29 TENTH AVENUE, BARATARIA, TRINIDAD (hereinafter called “the Surety”) are held and firmly bound unto the TRINIDAD AND TOBAGO ELECTRICITY COMMISSION of #63, FREDERICK STREET, P.O. BOX 121, PORT OF SPAIN, TRINIDAD (hereinafter called “the Commissioner”) in the sum of SEVEN HUNDRED AND THIRTY-TWO THOUSAND, TWO HUNDRED AND SEVENTY TRINIDAD AND TOBAGO DOLLARS (\$732,270.00) for the payment of which sum the Contractor and the Surety bind themselves, their successors and assigns jointly and severally by these presents.”*

34. I understand the above paragraph to mean that the Bond is a tripartite agreement under which DMP and the Defendant, as surety, entered into binding obligations with the Claimant for the payment of \$732,270.00. Such payment is enforceable by the Claimant against either DMP, or the Defendant, or both, including their successors and persons assigned by them.

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<sup>14</sup> Clause 9

<sup>15</sup> Clause 10

35. The Bond states further that:

*“WHEREAS the Contractor has entered into a Contract (hereinafter called the “the said Contract”) with the Commission for the execution of the Works and the original of the said Contract is annexed to and bound up with these presents.*

*WHEREAS as one of terms upon which the said Contract was made, it was expressly agreed between the parties thereto that the Contractor and the Surety should enter into a Bond conditioned as hereinafter mentioned.”*

36. I understand the above words to mean no more than that the requirement to enter into the Bond is stated in the Contract and that the Bond and the Contract are to be read together.

37. The material provision of the Bond then provides as follows:

*“NOW THE CONDITION of the above-written Bond is such that if the Contractor shall duly perform and observe all the terms, provisions, conditions and stipulations of the said Contract on the Contractor’s part to be performed and observed according to the true purport, intent and meaning thereof and save harmless and keep indemnified the Commission from all actions, losses, damages and expenses which the Commission may sustain or incur by reason of the non-performance or breach of the said Contract or if on default by the Contractor the Surety shall satisfy and discharge the damages sustained by the Commission thereby up to the amount of the above-written Bond then this obligation shall be null and void, but otherwise shall be and remain in full force and effect;”*



38. The wording of the operative provision of the Bond is unique in that it does not expressly define the circumstances in which the Defendant's liability under the Bond arises. On the contrary, it outlines the context in which the Bond shall not be effective. Notwithstanding the unusual structure of the language used, I understand the words to mean that the Defendant's liability under the Bond arises where (i) DMP has breached its obligations under the Contract; (ii) DMP has failed to indemnify the Claimant for the loss or damage sustained as a result of the breach; and (iii) the Defendant has similarly failed to indemnify the Claimant for the loss or damage.

39. The Bond continues in the following terms:

*"...but no alteration in terms of the said Contract made by agreement between the Commission and the Contractor or in the extent or nature of the Works to be executed and no allowance of time by the Commission under the said Contract nor any forbearance or forgiveness in or in respect of any matter or thing concerning the said Contract on the part of the Commission shall in any way release the Surety from any liability under the above-written Bond."*

40. I understand the above words to mean that the Defendant's liability under the Bond is not affected by any variation of the Contract made by mutual agreement between DMP and the Claimant or by the Claimant's waiver of liability on the part of DMP.

41. The final paragraphs of the Bond provide that:

*"PROVIDED ALWAYS that all the rights and remedies of the Commission under the above-written Bond are in addition to and not in substitution for its rights and remedies under the said Contract."*

*This Bond shall remain in full force and effect for the duration of the Contract including any contractual maintenance period or extension of the Contract after which the said Bond shall become null and void.”*

42. The above words are self-explanatory and require no elaboration.
43. As indicated above, the wording of the material provisions of the Bond stipulates that the Defendant’s liability arises where there is a breach of the Contract by DMP which causes the Claimant to sustain loss or damage for which it has not been compensated by DMP or the Defendant. The wording suggests that the Defendant’s liability to the Claimant is secondary to that of DMP and that the Bond is in the nature of a contract of guarantee.
44. However, there are indications to the contrary. Under the waiver of liability clause, the Defendant’s liability under the Bond may be invoked without reference to a contractual breach by DMP. Therefore, in circumstances where a waiver is granted, the Defendant’s liability is independent of DMP’s non-performance of its contractual obligations. This suggests that the Bond has features that are characteristic of a performance bond.
45. It should also be mentioned that under an indemnity agreement between DMP and the Defendant, the Defendant has a right of recourse against DMP that is enforceable on demand in respect of any sums that are paid or due to be paid by the Defendant under the Bond.<sup>16</sup>

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<sup>16</sup> See paragraph 3 of the Defendant’s Ancillary Statement of Case dated 15 May 2018

46. In my view, the material provisions of the Bond and the contractual provisions overall support the conclusion that the Bond is, in effect, a contract of guarantee under which the Defendant's liability to the Claimant arises upon proof of DMP's breach of its contractual obligations and consequential loss by the Claimant. The provisions of the Bond that may be construed otherwise are not adequate to convert the intrinsic nature of the Bond into a performance bond, under which the Defendant's liability to the Claimant is enforceable on demand without proof of breach or loss. That is to say, the limited context in which the Claimant may enforce the Bond without reference to an underlying breach by DMP, namely where a waiver of liability has been granted, does not rebut the presumption against construing the Bond as a performance bond.
47. The Claimant's argument that the Bond is enforceable on demand is based upon a misplaced reliance on a line of cases where no proof of debt, default or damage was required to invoke the liability of the guarantor.
48. In ***TTI Team Telecom International***, the bond in question was subject to International Standard Practices under which the guarantor's liability to pay the debt was independent of the underlying transaction and subject only to presentation of the contractual documents upon which payment was required.
49. In ***Moschi***, the appellant had personally guaranteed a company's performance of its obligations to repay a debt in instalments to the respondent. The House of Lords held that the appellant was in breach of the guarantee as soon as the company fell into arrears with its payments and that the appellant then became liable to the respondent for the loss suffered by reason of the company's breach. Lord Diplock expressed the view that the actual words used in the

contract of guarantee were “simple, unambiguous and contained no qualification except to impose a limit upon the guarantor’s maximum liability under the guarantee.”<sup>17</sup> The debtor’s obligation was, similarly, straightforward and related solely to the repayment of a debt in instalments.

50. In **Cargill** the observations by Morison J were made in circumstances where the obligation to pay on demand was clear and unequivocal. Morison J stated that:

*“...the bond could not be in stronger terms: the bank unconditionally and absolutely bound itself to make payment only to the buyer ‘without any question whatsoever’ and ‘it is expressly understood that the sole judge for deciding whether the suppliers have performed the contract and fulfilled the terms and conditions of the contract will be’ the buyers....this type of bond can be called upon whenever there is a breach or perceived breach, however trivial.”<sup>18</sup>*

51. The context in which the courts’ findings were made in the above cases is far different from the present case. DMP’s obligations under the Contract are varied and extensive and the Bond does not contain an express provision that the Defendant’s obligations as a guarantor are enforceable on demand.
52. The critical question that follows is how then are the alleged breach and loss to be established? The Bond is silent on the point. It does not indicate the process by which the required findings are to be made.

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<sup>17</sup> At page 349 D

<sup>18</sup> See page 573 a-b

53. The Defendant argues that the alleged breach and damage should be established under the dispute resolution procedures of the Contract and that the pending arbitration proceedings are the appropriate forum for such a determination.
54. In the alternative, the Defendant submits that the court, in the exercise of its discretion, should order that DMP be joined as a defendant to the substantive claim so that the material allegations against DMP could be addressed.
55. The Claimant submits that the relevant default, loss and damage are set out extensively in the pleadings and that the dispute resolution provisions of the Contract are irrelevant to these proceedings as they relate to the underlying dispute between the Claimant and DMP.
56. The Claimant's argument is based on the premise that the Bond is enforceable on demand without the need for judgment on the contractual dispute. This argument has been rejected. Therefore, the Claimant's argument that the dispute resolution procedures are irrelevant to the Defendant's liability under the Bond must, similarly, fail.
57. Further, I do not consider it appropriate to order the joinder of DMP as a defendant to these proceedings, as advocated by Counsel for the Defendant. The Claimant does not dispute that it has given a "Notice of Arbitration" to DMP or that it intends to proceed with the arbitration. I construe this to be an acknowledgement by the Claimant that the arbitration proceedings are the appropriate forum for determining whether DMP has breached its contractual obligations to the Claimant causing loss and damage, which are the pre-requisites to calling in the Bond.

58. In the circumstances, I do not consider this to be an appropriate case to order the joinder of DMP as a defendant. Such an order would give sanction to a duplication of proceedings in which the same issues arise for determination between the same parties.
59. For the above reasons, the Claimant's claim is dismissed.
60. I will hear the parties on costs.

Jacqueline Wilson  
Judge