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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT

No. CL-2021-000194/
CL-2021-000189

Commercial Court
7 Rolls Building
Fetter Lane
London
EC4A 1NL

Neutral Citation Number : [2021] EWHC 862 (Comm)

Tuesday, 6 April 2021

Before:

HIS HONOUR JUDGE PELLING QC
(Sitting as a Judge of the High Court)

B E T W E E N :

SHAPOORJI PALLONJI & COMPANY PRIVATE LIMITED — Claimant
(a company incorporated under the laws of India)

- and -

YUMN LTD — Defendant
(a company incorporated under the laws of Rwanda)

- and -

STANDARD CHARTERED BANK — Third Party

MR T. SPRANGE QC (instructed by King & Spalding International LLP) appeared on behalf of the Claimant.

MR S. HALE (instructed by Fladgate LLP) appeared on behalf of the Defendant.

MR CHOO appeared on behalf of the Third Party Bank.

J U D G M E N T

HIS HONOUR JUDGE PELLING QC:

1 This is the hearing of two applications being:

(a) An application in an arbitration claim issued in the Commercial Court on 29 March 2021 between Shapoorji Pallonji and Company Private Limited (SPC) as claimant and Yumn Limited (YL) as defendant for orders

(i) Requiring YL to withdraw its 23 March 2021 demand to Standard Chartered Bank (Bank) for immediate payment of $32.2m, under a first demand bond dated 12 January 2017 issued by bank to YL as beneficiary (the Bond); and

(ii) restraining YL from making any further demands under Bond pending any final order of an ICC Emergency Arbitrator

("CC application"); and

(b) An application by YL in proceedings issued in the TCC on 31 March 2021 between YL as claimant and the Bank as defendant for an interim order requiring the Bank to pay the sum of $32.2m to YL as beneficiary under the Bond ("TCC application"").

2 Since these applications were issued, there have been a number of developments which have changed the issues that arise on this hearing. First, the TCC application was heard initially on a without notice basis by Fraser J on 31 March 2021. He was aware that the CC application was to be heard on an urgent basis on 2 April 2021 and, in consequence, directed that the TCC proceedings be transferred to the Commercial Court and that the application by YL against the Bank be heard at the same time and by the same judge who would hear the Commercial Court proceedings. Secondly, the Bank has accepted that YL has made a formally valid demand under the Bond and has agreed to be bound by whatever order I make on this application. SPC does not contend that the demand is formally invalid. It

follows that the TCC application can be placed to one side. The real issues between the parties are those that arise on the CC application between YL and SPC.

3 The other point that I need to refer to at the outset concerns a fundamental difference of law between YL and SPC. SPC contends that I should grant the orders sought in effect without regard to any of the well-established principles relating to the approach an English court takes to attempts to prevent a beneficiary from recovering what is due on an on demand bond, or a similar instrument, on the basis that the substantive agreement between YL and SPC contains an arbitration agreement, that the dispute between the parties as to whether YL is entitled to make a demand under the Bond is one that must be determined under the arbitration agreement and that the question whether YL should be restrained from claiming payment under the Bond should be determined by an emergency arbitrator appointed under the ICC rules, being the institutional arbitration rules the parties have agreed will apply to any arbitration between them. SPC submits that such an arbitrator will apply different and significantly laxer principles than those that are applied by the English courts and that I should therefore grant an interim order that in effect precludes YL from claiming sums due under the Bond until an emergency arbitrator can determine SPC's claim for the relief set out in substantially the terms sought in the CC application..

4 It was suggested at one stage by Mr Sprange QC, on behalf of SPC, that I should make an order in the terms set out in paragraph 42 of SPC's application to the emergency arbitrator, being as follows:

> "42.1 … a provisional order that:

> 42.1.1 the operation of the Demand be suspended until the Emergency Arbitrator has issued his or her final order on the emergency measures sought; and
>
> 42.1.2 the Project Company refrain from calling the Bond until the Emergency Arbitrator has issued his or her final order on the emergency measures sought."

That cannot be right because (a), no claim or application is made by SPC against the Bank as would be required if an order in the terms of para 42.1.1 or a variant of it was to be made and (b) YL has done all that it is required to do to obtain payment under the terms of bond and thus an order in the terms of 42.1.2 would serve no useful purpose. I suggested to Mr Sprange that, in these circumstances, his application would have to be for an order freezing the proceeds of the Bond in the hands of YL. He did not accept that analysis and, in any event, on the evidence available, SPC cannot satisfy the test that would apply to an application for such an order. In the end, Mr Sprange maintained his applications for the orders sought in the CC application, summarised above but over until any application can be heard by an emergency arbitrator.

5 Mr Hale on behalf of YL submits that this is all heretical and wrong, that the principles that apply to attempts to preclude a beneficiary seeking to enforce an on demand bond are well-established, based on sound principles of public policy, and apply to an application to an English Court by a party in the position of SPC to restrain either a guarantor bank or a beneficiary from giving effect to such a bond in accordance with its terms, irrespective of whether there is an arbitration agreement between the parties.

6 Finally, before turning to the facts and law, I record that, for reasons that are entirely unclear, SPC purported to join the Bank as a "*Third Party*" to the CC proceedings. This is procedurally wrong. The CC claim is an arbitration claim. The bond is an autonomous contract between YL as beneficiary, and the Bank. It is expressly made subject to English law and critically it is subject to an exclusive jurisdiction clause in favour of courts of England and Wales. There is no arbitration agreement between the Bank and SPC whether relating to the Bond or otherwise. Had SPC wished to seek an injunction that restrained the bank from paying what is due under the Bond, it should have done so under s.37 Senior Courts Act 1981. As I see it as present, there should be an order striking out the arbitration claim to the extent it purports to be bought against the bank but I will hear further form counsel on this issue after delivery of this judgment.

7 I now turn to the relevant background facts. The underlying contracts are three in number and each concern the design, engineering, construction, commissioning and testing by SPC of a power plant being constructed in Rwanda, which YL will own or operate following completion. The Shapoorji group was required to provide their services under a supply agreement between YL and Shapoorji Limited, a construction contract between YL and SPC and an umbrella agreement between YL, Shapoorji Limited and SPC. Each of these Agreements was made simultaneously on 29 December 2016. The Governing law of each agreement is English law and as I noted earlier, each is subject to an arbitration agreement in substantially the same terms. Each provides for arbitration in accordance with ICC rules and makes Singapore the seat of the arbitration.

8 Security is provided for by clause 15 of the umbrella agreement. By that agreement, as a condition precedent to being entitled to any payments under the contracts, the Shapoorji parties were required to provide a bond in the form set out in schedule 1 of the umbrella

agreement, in the amount of 15 per cent of the aggregate contract price, which was USD$32.2million. The Bond, underwritten by the Bank, was provided pursuant to this obligation. The Bond was originally due to expire on 10 January 2020, but was extended ultimately until 30 June 2021. A factor to be borne in mind is that if YL is forced to withdraw its demand, as SPC seek on this application, it may be precluded from making another one before the Bond expires.

9 By clause 2 of the Bond, the Bank undertook unconditionally and irrevocably to pay YL no later than two business days after the business day on which it received a written demand from the beneficiary. Any demand had to be in the form set out at annex 2 of the Bond. As I have said, it is common ground that YL's demand satisfies these requirements.

10 By clause 12 of the Bond, the Bond and all non-contractual obligations arising from or connected with it are governed by English law and, by clause 13, it was provided that the courts of England and Wales would have exclusive jurisdiction to determine any disputes arising from or connected with the Bond. None of this is in dispute, nor is it in dispute that the "contract" referred to in the Bond refers collectively to the suit of substantive agreements between The Shapoorji parties and YL referred to earlier.

11 As is apparent from what I have said so far, there are no conditions precedent to the making of a valid demand under the Bond, other than the requirement contained in the Bond that any demand was to be in the prescribed form and was delivered on a business day and within business hours. It is not suggested there was any provision, whether express or implied, within either of the substantive agreements or the umbrella agreement that permitted a claim being made on the Bond only in defined circumstances.

12 By a letter dated 23 March 2021 from YL to the Bank, YL demanded payment of the full amount secured by the Bond:

> "… due to the following reasons:
>
> (a) Failure by [SPC] to meet the Date for Taking Over as defined in the Contract and consequential liability to pay Delay Liquidated Damages as required under the Contract; and
>
> (b) Failure by [SPC] to provide the Top-Up Performance Bond within six months of the expected Date of Taking Over, as agreed by the parties."

I return in more detail to these allegations later in this judgment. The demand concluded by setting out the required details of the account to which the funds were required to be paid.

13 YL submits that the effect of this was that the Bank was obliged to make payment without set-off, deduction, enquiry or in any circumstances other than unconditionally, no later than close of business on 25 March 2021. I agree unless one of the three very limited exceptions to which I refer in detail below has been made out to the required standard. YL submits, and I find, that once it had submitted its demand there was nothing further for it to do other than to receive the funds to which it was entitled under the Bond. In fact, the Bank did not pay by 25 March 2021. Apparently, it only notified SPC of the demand on 26 March 2021. What happened thereafter was that, on 26 March 2021, SPC requested YL to withdraw its demand and at the same time sent letters to the Bank alleging the demand was unlawful and fraudulent. This was followed by a letter from SPC's London solicitors to both the Bank and YL in which they stated that:

> "... we consider your purported invocation of the Bond Amount to be baseless, and the reasons for your demand to be fabricated."

14 Notwithstanding the Bank saying, correctly, in my judgment, that it had not been provided with "*irrefutable evidence*" of the alleged fraud, which the bank said was "… *required if fraud is to serve as a basis for withholding payment* …", it continued to fail to pay and it was only shortly before the hearing before me that it agreed to comply with such order as might be made by the court on the application I am now determining.

15 YL maintains that there is no evidence of fraud whatsoever, much less to the level required for an order preventing payment under an on demand bond. It is noteworthy that in his skeleton Mr Sprange QC does not refer, at any rate expressly, to fraud. He says of the reasons given in the demand referred to above that:

> "Both reasons are entirely without basis and cannot give rise to inference that there was an honest belief on the part of Yumn in making the call on the Bond".

In substance, he alleges that the failures relied on are:

> "… because any such failure was a direct result of its dishonest and bad faith tactics in deliberately not engaging with Shapoorji's extension of time requests – all of which in the four years of the life of the Project have been rejected."

I will return, as I have said, to those factual allegations later in this judgment.

16 It is now necessary that I summarise the relevant legal principles. In doing so, I start with what I characterise as the traditional response of English law to applications to restrain enforcement of on demand bonds and similar instruments, and then turn to the principles that Mr Sprange maintains should lead to a different outcome in this case.

17 Turning to the traditional English law response, it is necessary to distinguish between at least four different fact situations, being:

(a) applications to restrain a beneficiary from enforcing a bond obligation before enforcement steps have been taken or the right to do so has arisen;

(b) applications to restrain underwriters, such as the Bank in this case, from complying with their obligations under an instrument, such as the Bond in this case;

(c) applications to restrain a beneficiary after the right to enforce has arisen, or steps to enforce have been commenced; and

(d) applications to force a beneficiary to reverse the steps it has taken to enforce its rights under the instrument in question.

Whilst this case is one that falls within fact situation (d) above, it is necessary to consider the first three of these circumstances, because the principles that apply in those situations have been considered in a significant number of cases and are likely to assist in arriving at the appropriate approach to cases like this falling within fact situation (d), where there is little or no authority as to the applicable principles.

18 Category (b) does not arise directly in this case, because, as I have said: (1) SPC does not seek relief against the Bank and cannot do so because it has not issued any proceedings against it; and (2) YL does not now seek an order requiring the Bank to comply with its

obligations under the Bond, because the Bank has agreed to comply with whatever order I make on this application. However, it is helpful to identify the applicable principles because they provide the springboard for ascertaining the principles that apply in the other situations. In summary:

(a) English law regards instruments, such as the Bond, as the equivalent of cash and an injunction that prevents a bank from complying with its obligations under such an instrument as interfering with that principle;

(b) it is inherent in agreeing to provide an instrument, such as the Bond in this case, that the party in SPC's position has agreed to payment being made notwithstanding the existence of a dispute as to the beneficiary's entitlement to payment, something emphasised expressly in this case by clause 3 of the Bond; and

(c) the Bank has made a promise in its capacity as a banker and generally the court will not use its coercive powers to cause a bank to dishonour its promise and thereby run the risk of damage to its reputation.

Authority for these three core principles is to be found in Bolivinter Oil SA v Chase Manhattan Bank [1984] 1 WLR 392 and were summarised comprehensively most recently in Tetronics (International) Ltd v HSBC Bank Plc [2018] EWHC 201(TCC), by Fraser J at paragraphs 23-28.

19 It follows from these core principles that a court will generally grant an injunction where there is no dispute as to the formal validity of the demand only where it is established that the only realistic inference is that (a) the beneficiary could not honestly have believed that it was entitled to make a demand for payment and (b) the bank was aware that the demand was fraudulent - see in that regard Edward Owen Engineering Ltd v Barclays Bank International Ltd [1978] 1 QB 159, applied in United City Merchants (Investments) Ltd v

Royal Bank of Canada & Ors [1982] 2 Lloyd's Rep. 1, by Lord Diplock at page 6, and Alternative Power Solution Ltd v Central Electricity Board & Anr [2014] UKPC 31; [2015] 1 WLR 697). This is generally referred to in the authorities and textbooks as the "*fraud exception*".

20 I turn now to the factual situations (a) and (c) referred to above. Each concerns an application to restrain the beneficiary under such instruments as the Bond in this case from seeking to enforce their rights thereunder. In such situations, the court will generally grant an injunction to restrain a beneficiary from breaching an express obligation contained in the underlying commercial agreement not to make demand other than in defined circumstances - see Sirius International Insurance Company v FAI General Insurance Limited & Ors [2003] EWCA Civ 470; [2003] 1 WLR 2214 and MW High Tech Projects UK Ltd v Biffa Waste Services Ltd [2015] EWHC 949 (TCC), per Stuart-Smith J (as he then was) at paragraphs 34-37.

21 However, those principles are of no application in this case because there is no express condition precedent in the Contracts that had to be met prior to making a demand. No implied obligations to that effect have been asserted by SPC. It is difficult to see how any such term could be implied applying the general principles that apply to the implication of terms in long form professionally drawn contracts – as to which see Marks and Spencer plc v. BNP Paribas [2015] UKSC 72 - especially having regard to high level of certainty required before an injunction can be granted. As Stuart-Smith J made clear in MW High Tech (ibid.):

> "It must be positively established that [the beneficiary] was not entitled to draw down under the underlying contract"

– see paragraph 34. As Popplewell J (as he then was) emphasised in Ouais Group Engineering and Contracting v Saipem SpA [2013] EWHC 990 (Comm) at paragraph 45, a case concerning an application against a beneficiary:

> "In my view the court must have a high degree of assurance that the beneficiary is not entitled to call on an on demand bond before it will, at an interlocutory stage, restrain payment of the bond."

As he concluded:

> "The nature of an on demand bond is that it is payable merely upon an assertion by the beneficiary of his entitlement to payment, without inquiry into the validity of the grounds asserted by the beneficiary as giving rise to that entitlement. The court should be reluctant to interfere unless confident that the grounds asserted do not give rise to the entitlement to payment. For this reason what is usually required at the interlocutory stage is, at the least, a strong case that there is no such entitlement."

It is that last requirement which has been referred to in at least some of the authorities as the "*enhanced evidential standard*".

22 For completeness, I should mention the role of the fraud exception in this context. In Themehelp Ltd v West [1996] QB 84, a case not cited or referred to by either party, the Court of Appeal concluded that the fraud exception may be of no application in the claim for an order restraining a beneficiary from making a demand on an instrument such as the

Bond in this case. If correct, that might suggest that injunctions could be obtained against beneficiaries in wider circumstances than would be the case where an injunction as sought against an underwriting institution. However, Mr Sprange did not rely on that authority, it has been much criticised and has been regarded either as not binding at all - see Group Josi Re Co SA v Walbrook Insurance Co Ltd [1996] 1 WLR 1152, per Staughton LJ (as he then was) at 1161-2 - or as only applying where the claim against the beneficiary is brought before any question of enforcement arose - see Czarnikow-Rionda Sugar Trading Inc v Standard Bank London Ltd & Ors [1999] 2 Lloyd's Rep. 187, per Rix J (as he then was) at 202. All this and more led Foxton J to hold in Salam Air SAOC v Latam Airlines Group SA [2020] EWHC 2414 (Comm) at paragraphs 41-42 that a party seeking an order against a beneficiary which was not relying on a breach of an express or implied condition precedent to the making of a valid demand must rely on the fraud exception at least in all cases other those brought before any question of enforcement arose and that :

> "In my view there is a very powerful case that an anti-beneficiary injunction should have to meet the same enhanced merits test as an injunction against the credit-provider. As I have noted, the enhanced merits requirement is a concomitant of the decision to treat irrevocable credits and similar instruments as equivalent to cash, a consideration which weighs as much in favour of its application to injunctions against the beneficiary which (if granted) would make the instrument very inferior to cash, as to injunctions against the credit provider preventing payment.
>
> For that reason, the enhanced merits test is not limited to cases in which the fraud exception is relied upon, but also extends to applications to injunct

> payment on the basis that the pre-conditions to a call on the instrument have not been satisfied."

23 It is clear from these authorities that an Injunction restraining a beneficiary from enforcing payment under an on demand bond will be granted only where it is shown either that the demand would be in breach of an express condition precedent to the right to demand payment or in breach of an implied obligation to similar effect providing such an implied term can be shown to the enhanced standard or it can be shown to the enhanced evidential standard that any demand is fraudulent unless (perhaps) an injunction has been sought before any question of enforcement arose.

24 Against that background, I turn to factual circumstance (d) referred to above. In Tectonics (ibid.) Fraser J considered a submission that a right to seek an injunction against a beneficiary was lost once a demand was made and no other steps remained to be taken by the beneficiary other than to receive payment. Fraser J disagreed with this as a matter of principle but he concluded that it was not necessary for him to decide that point on the facts of the case before him. Notwithstanding that Fraser J's analysis was *obiter,* I respectfully agree with it. No other approach would be principled. Subject to the safeguards described by Foxton J in Salam Air (ibid.), there is no principled reason why a court could not order a beneficiary to withdraw a demand if the circumstances are such that it would have restrained it from making a demand. It was not suggested by Popplewell J in Ouais (ibid.) that the court had no power to order a beneficiary to withdraw a demand as had been sought in that case. It strikes me as doubtful that such a point would have been erroneously overlooked in that case. For those reasons, I consider I should approach an application for an order that a beneficiary withdraw its demand in essentially the same way as Foxton J approached the issue he had to decide in Salam Air. As I have said earlier, I accept Mr Hale's narrower

point that an order in the terms of para 42 of SPC's application to the emergency arbitrator could not be granted. However, that is not the application that SPC advanced at hearing.

25 I now return to Mr Sprange's submissions. His case is beguilingly simple. He says that the question whether or not to order YL to withdraw its demand or restrain it from presenting another is ultimately one for the emergency arbitrator and, thereafter, and to the extent necessary, a fully constituted arbitral panel. He maintains, therefore, that the learning to which I have referred earlier in this judgment is, in essence, irrelevant and that all I should do is to make orders and grant injunctions to preserve the position until the emergency arbitrator can decide that issue. If right this would inevitably involve me directing that YL withdraws its demand and restraining it from presenting another until after the emergency arbitrator has decided the issue. In making this submission, it is said that the emergency arbitrator will adopt an entirely different approach to that of the English courts and, by implication, will grant the orders that SPC seek, notwithstanding the approach of English law to such applications.

26 Three issues arise, therefore, as I see it, being:

(a) Whether the dispute concerning whether YL's demand on the bond is wrongful one to which the arbitration agreement applies;

(b) Assuming the answer to (a) is "Yes", whether the emergency arbitrator will adopt a different approach to the application for injunctive relief from that adopted by the English courts; and

(c) if the answer to (b) is at least arguably "Yes", whether that should lead to a different outcome from that which would result if there was no arbitration agreement in play.

27 I can dispose of the first of these issues quite quickly. The arbitration agreement contained in clause 12.3 of the umbrella agreement, which is in substantially similar terms to that contained in the other agreements, relates to any "*dispute*" between YL and SPC. "*Dispute*" is defined in clause 1.1.15 of the umbrella agreement as including any dispute arising between YL and SPC in connection with or arising out of the umbrella agreement. Given the terms of the proper law and jurisdiction provisions in the bond and that the bond is in a form annexed to umbrella agreement, it might have been argued that the intention of parties was to leave disputes as to whether YL was entitled to make demands under the Bond outside the scope of the arbitration agreement. However Mr Hale conceded for the purposes of this application only that it was arguable that such disputes were within the scope of the arbitration agreement and in light of that I say no more about it.

28 The next issue concerns whether the emergency arbitrator will or should adopt a different approach to a court in England when deciding whether to grant the order sought by SPC. As to that, the arbitrator is obliged to apply substantive English law to the question, because that is the governing law of the substantive contract as well as the Bond. Singapore law is merely the curial law of the arbitration and is immaterial to the substantive questions that arise. Thus, the fact that Singapore law appears to adopt a different approach to attempts to restrain the enforcement of bonds is, of itself, immaterial.

29 Nonetheless, SPC submits that the arbitration is an ICC arbitration, and the emergency arbitrator will apply a different approach to the grant of the orders sought by SPC from that adopted by a court in England. Some care is needed in considering that submission. Whilst it is realistically arguable that such an arbitrator will apply procedural rules and principles that are different from and independent of those applied by a state court, that does not lead necessarily to the conclusion that the emergency arbitrator will grant the order sought by SPC when a court in England would not. The principles that I have outlined above, to the

extent they are principles of substantive English law, will apply irrespective of whether the issues are being considered by a court in England or by an international arbitrator required to apply substantive English law to the dispute between the parties. However, that said, this is not in any sense a pre-emptive challenge to the decision-making of the emergency arbitrator, and he must be left to do his work as he considers appropriate. Again, realistically Mr Hale was prepared to accept that it was at least arguable, for the purposes of this application only, that the emergency arbitrator should approach SPC's application in the manner contended for by SPC.

30 That, therefore, brings me to the third of the issues I identified a moment ago. That is, assuming SPC is correct in submitting that an emergency arbitrator would apply a different test from that applied by the English courts, should that lead me to making the order sought by SPC, pursuant to section 44 of the Arbitration Act 1996? In my judgment, it does not. My reasons for reaching that conclusion are as follows.

31 Firstly, the dispute between the parties concerning the contractual over-run had been on foot for many months, the formal demand by YL for payment of liquidated damages was made on 24 February 2021 and the demand for the top-up bond as long ago as 4 January 2021. It was open to SPC to refer the failure of YL to grant any of its applications for extensions in time to arbitration as soon as those applications had been refused and the contractual mechanisms for resolving such disputes had been exhausted and in that reference to seek an order from an EA from restraining YL from calling on the demand bond pending the resolution of that dispute. It chose not to do so. SPC took none of these steps. Instead, it chose not to refer the dispute to arbitration until after demand had been made by YL under the Bond and to apply to an English court for an order under section 44.

32 Secondly, no authority has been cited that suggests this court should apply a different approach to an application under section 44 from that which would apply to an application under section 37 of the Senior Courts Act 1981. Ouais Group Engineering (ibid.) was an application under section 44 - see the judgment of Popplewell J at paragraph 35. Popplewell J applied to the facts of that case the principles identified in the authorities I referred to earlier, amongst others - see paragraphs 39-47 of Popplewell J's judgment. It is possible that an emergency arbitrator procedure was not available on the facts of that case but there is no principled reason for adopting a different course where the party seeking an injunction from the English courts could have but chose not to refer a dispute to arbitration and apply for interim measures using such a procedure. If a party applies to an English court for an injunction to restrain a beneficiary of an on demand bond from enforcing payment, that court will apply the same principles (being those referred to above) for the reasons identified in those authorities and summarised above, whether that application is made under Section 44 or section 37.

33 Against that background, the sole questions that are material to this application are:

(a) Has SPC demonstrated to the relevant evidential standard that YL made a demand when it was expressly not entitled to do so;

(b) Has SPC demonstrated to the relevant evidential standard that YL made a demand when, by operation of an implied term, it was not entitled to do so; or

(c) has SPC demonstrated to the required evidential standard that YL's demands were fraudulent and known to the Bank to be fraudulent?

In answering these questions, the burden rests throughout on SPC to satisfy the court of the applicability of one or other of these exceptions and to do so to the enhanced evidential standard identified by the Privy Council in Alternative Power Solution (ibid.).

34 No attempt has been made by SPC to establish the existence of one of these exceptions, either to the requisite standard or at all. It is not alleged, and nor could it be, that there is any express condition precedent to the presentation of a claim under the Bond. It was not alleged either that any term is to be implied to that effect and for the reasons I have identified earlier any such assertion would fail to satisfy the enhanced evidential standard that applies even if the implication of such a term was arguable, which is not applying conventional principles.

35 The sole exception cited in the claim form is that the demand was fraudulently made. As I indicated earlier in this judgment I do not consider that to be arguable on the present state of the evidence either applying the enhanced evidential standard or at all. Although SPC alleges that the delay is only delay because of a bad faith or possibly dishonest refusal to entertain its applications for an extension of time, that has to be weighed in the round with what YL says. Mr Karasoy addresses this issue on behalf of YL at paragraphs 2.18 and following in these terms:

> "The Commencement Date of the Contract was on or around 23 February 2017 and it was agreed that the Date for Taking Over of the Works would be 36 months from the Commencement Date of the Contract. This was therefore on 23 February 2020.
>
> 2.19 Clause 8.7 is materially the same under both the Supply Contract and Construction Contract …
>
> (a) Under 8.7.1 of the Supply Contract, Shapoorji Limited is liable to pay (or allow at the Employer's discretion) Delay Liquidated Damages to the

Employer in the event and to the extent that Shapoorji Limited is in breach of its Clause 8.2 obligations under the Supply Contract …

(b) Under 8.7.1 of the Construction Contract, Shapoorji Rwanda is liable to pay (or allow at the Employer's discretion) Delay Liquidated Damages to the Employer if the Contractor fails to comply with the Time for Completion under Clause 8.2 …

2.20 Under Clause 8.7.2 and under Schedule 5, Delay Liquidated Damages are calculated in accordance with pre-defined rates for each day of the period commencing on the day after the applicable Date for Taking Over and expiring on the Date of Taking Over of the Works.

2.21 Under Clause 8.7.3, if Yumn requires payment or a deduction in respect of Delay Liquidated Damages, it must first serve notice to that effect on the Contractor. Provided a notice has been served, Yumn is not obliged to serve further notices where the period for which Delay Liquidated Damages were payable is ongoing. As I explain below, Yumn did serve the relevant notice of its intention to levy Delay Liquidated Damages and furthermore the issue of Shapoorji delay has been the subject of much discussion for more than a year and a half. Yumn continued to reserve its rights in this regard up to the date of the demand being made on the Bond.

2.22 If the Contractor considers itself entitled to any extension of time … and/or additional payment the Contractor must comply with the strict (FIDIC-based) claim notice provisions of Clause 20.1. It is not a matter

for these proceedings but I note that Yumn's position is that the Contractor's request for extensions of time are time-barred for lack of timely notice under Clause 20.1 (and have been rejected by Yumn accordingly), and/or that the Contractor's EOT claims (to the extent any could be regarded as extant) have not been the subject of a final claim notice capable of determination by [the] Employer. As things stand today – and having done due diligence with the benefit of external legal and delay expert advice – Yumn considers that there is no EOT entitlement that would reduce the Employer's entitlement to Delay Liquidated Damages below the maximum cap explained below. That was also the position that pertained at the date when Yumn made its demand on the Bond ...

2.26 With respect to Delay Liquidated Damages, Clause 10.3 of the Umbrella Agreement provides that notwithstanding the cap on delay liquidated damages … the liability of each Contractor shall not exceed the Aggregate DLD Cap overall. The Aggregate DLD Cap is defined in the Umbrella Agreement as 10% of the Aggregate Contract Price as adjusted from time to time. Clause 17 of the Umbrella Agreement provides that if there is any difference or conflict between its terms and either the Supply or Construction Contract the terms of the Umbrella Agreement prevail …"

36 None of this evidence has been answered by SPC to the level required if the fraud exception was to be relied upon or at all. All the formal notice requirements imposed by the contract between the parties for the payment of liquidated damages and the provision of the Top Up

Bond have been provided and were delivered some weeks before the demand under the Bond. No attempt has been made to challenge any of this formally whether by reference to arbitration or otherwise. The stimulus for that action by SPC was it being given notice of the demand on the Bond by YL. On the material available there is nothing in the evidence before me that suggests this is anything other than a delay dispute between an employer and contractor of the sort that arises on a regular basis in the civil engineering and construction sectors.

37 Taking a step back from the detail, it is plain that none of the exceptions that a court in England must be satisfied about before making orders precluding a beneficiary from making or enforcing a demand on an on demand bond have been made out. That is sufficient to lead to dismissal of SPC's application.

38 In case I am wrong about that, I consider briefly the balance of convenience. The sole point made by SPC is that if it succeeds in demonstrating to an arbitral tribunal that the Bond has been wrongly called, it will suffer a loss incapable of being made good because, it alleges, YL is a special purpose vehicle owned by another special purpose vehicle and has no assets, or no sufficient assets, to meet such a claim and will by then, on its own admission, have expended the sums received pursuant to the Bond.

39 In my judgment, SPC faces a number of difficulties in advancing that submission. First, it chose to enter into contractual relations with YL. There is no evidence that its financial position has changed or changed to the knowledge of SPC since the date when the parties entered into the three substantive agreements referred to earlier.

40 Secondly, the plant that SPC has been engaged to construct is one that Mr Karasoy says YL will own and operate once it has been completed. That is inconsistent with YL not having

any assets and if anything is consistent with its present alleged financial state being the result of the delay that has occurred.

41 Thirdly, SPC chose to enter into contractual relations with YL on the basis that it would provide a bond in the form annexed to the umbrella agreement. It is not suggested that the Bond provided is anything other than such a bond. The Bond was subject to English law and to the exclusive jurisdiction of the English courts. SPC thus knew, or ought to have known, of the very limited circumstances in which the Bank could be restrained from paying or YL from demanding payment.

42 Fourthly, SPC knew or ought to have known that by clause 3 of the Bond the obligation of the Bank was to pay without any right of deduction and without being required to make any enquiries before paying. In my judgment, to conclude that the balance of convenience favours the grant of an injunction that would otherwise be refused on balance of convenience grounds, because of solvency concerns in relation to the beneficiary, would undermine the principle that the bonds, such as the Bond in this case, are the equivalent of cash. At the very least, therefore, if solvency risk is to be relied on, the applicant would have to demonstrate to the enhanced standard that it was a risk that was not apparent or not apparent to it at the time it entered into contractual relations with the beneficiary and could not reasonably have been anticipated at the time it entered into those contractual relationships. There is no evidence to that effect in this case.

43 In those circumstances, I am satisfied that the application by SPC for mandatory orders requiring YL to withdraw its demand should be dismissed and, the orders sought are refused.

LATER

44 This is an application for permission to appeal. The basis of the application is that there is no relevant authority in the area with which I am concerned, that the test that I formulated amounts to new law, so far as applications for injunctions under section 44 are concerned, and that there is an issue of public importance that arises, having regard to the interaction between substantive English law, the process of the English court and the processes that are appropriate to an arbitration under the ICC rules.

45 I am satisfied that permission to appeal should be refused. My reasons are as follows. Firstly, I have not sought to do anything other than to apply law going back many tens of years to the factual situation that arises in this case. Secondly, whilst it is true to say there is no authority specifically in relation to the area I am concerned with, it is noteworthy, as I said in the judgment, that in the Ouais case Popplewell J had no difficulty in entertaining the applications which were being made and dealing with them on the basis of the substantive law principles that I have relied upon. Thirdly, there is no principled reason for distinguishing between cases where the underlying relationship is subject to an arbitration agreement and those that are not or between those cases which are subject to an arbitration regime that enables a party to apply for interim measures to an emergency arbitrator and those that do not. In all cases where a party applies to an English court for orders such as those sought by SPC in this case the applicable principles are those I have summarised in the judgment.

46 As I said in the judgment, there was a choice to be made, so far as SPC is concerned. One was to refer the dispute between the parties to arbitration as soon as it arose and to seek an order from an emergency arbitrator before ever a claim was made under the Bond, if that was thought to be the appropriate way to proceed. However, SPC chose not to do that and

to apply for relief from the English courts under section 44. The English courts will apply the principles I have identified in those circumstances and for that reason no novel point which arises. In consequence of that, I do not consider that I have applied a new test or done anything other than apply conventional English legal principles going back many years. There is no realistic prospect of the Court of Appeal taking a different view.

47 Finally, it is said that there is an issue of public importance that arises. This part of the application for permission is advanced notwithstanding my conclusion that my decision is not realistically arguably wrong on the basis that the proposed appeal raises an issue of general importance which requires to be adjudicated on by the Court of Appeal. In my judgment in almost all cases failing within this category permission should be refused unless the decision is based for example on an authority that is binding but is realistically arguably wrongly decided. It is not appropriate that I give permission in this case on the alternative basis because as I have said (1) my decision is not at least arguably wrong and (2) there is no novel point that arises.

LATER

48 This is an application for permission for a stay. This is resisted root and branch by Mr Hale on grounds which come to this, that the application for the injunction has failed and failed as a matter of law, failed on the facts and, furthermore, would have failed on balance of convenience grounds as well. The application for permission to appeal has been refused as well. In those circumstances, he says that no stay is appropriate and that the parties should be left to manage their commercial affairs as they have designed.

49 Mr Sprange on the other hand submits that it would be appropriate for there to be a short stay, which he initially suggested should be for 14 days in order to allow an application for permission to appeal to be made to the Court of Appeal. In my judgment, seeking a stay for 14 days is entirely inappropriate in the circumstances of this case and, indeed, I have come very close to refusing a stay at all. I am only prepared to grant a stay of the most limited sort since with every minute that passes this is a further whittling down of the status of the on demand bond as the equivalent of cash.

50 In those circumstances, I will grant a stay until 12 noon tomorrow and that will be against an undertaking from Mr Sprange that no further applications will be made to the emergency arbitrator until after either (a) a refusal of a stay by the Court of Appeal or (b) otherwise a final order of the Court of Appeal disposing of the appeal or any application for permission.

LATER

51 The issue I now have to determine concerns the summary assessment of the costs recoverable by YL following their success in the proceedings. The total sum claimed is £28,501. The question that I have to ask myself at this stage is whether the work for which payment is claimed is reasonable and proportionate. Then I have to ask myself whether, in respect of such work as is reasonable and proportionate, whether the sums claimed are reasonable and proportionate sums for that work.

52 I will start with the hourly rates. The hourly rates are comfortably within what I would expect to see for commercial litigation of this sort and, therefore, there is nothing either unreasonable or disproportionate about the rates which have been identified. The hours which have been worked in relation to the telephone and letter attendances seem reasonable

and proportionate, with the possible exception of four hours of telephone attendances on the client by the Grade A fee earner. Two hours is proportionate.

53 So far as the remainder of the schedule is concerned, the attendances at the hearing are reasonable and proportionate, having regard to the fact that there was a second hearing today and counsel's fees are not challenged at all. So far as the work on documents is concerned, again, the categories of work which are identified are those which should properly be carried out on an application of this sort. The hours that have been expended are not excessive or anything other than reasonable and proportionate. Thus, with the small adjustment that I have made in relation to correspondence, the costs that are claimed are otherwise allowed as asked.

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CERTIFICATE

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