

Guyana and Trinidad Mutual Fire
Insurance Company Limited

Appellant

v.

R.K. Plummer and Associates Limited

Respondents

FROM

THE COURT OF APPEAL OF
TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
20TH JANUARY 1992

Present at the hearing:-

LORD KEITH OF KINKEL
LORD JAUNCEY OF TULLICHETTLE
LORD BROWNE-WILKINSON
SIR MAURICE CASEY

[Delivered by Lord Browne-Wilkinson]

This is an appeal from an order of the Court of Appeal of Trinidad and Tobago dated 31st March 1988 affirming the order of the Honourable Madame Justice Permanand that there be judgment under Order 14 against the appellant, Guyana and Trinidad Mutual Fire Insurance Company Limited ("Guyana"), for damages to be assessed and costs.

The background to the case, so far as presently appearing from the evidence, is as follows. In 1980, the Water and Sewerage Authority undertook certain construction works employing as main contractor the respondents, R.K. Plummer and Associates Limited ("the Main Contractor"). The Main Contractor wished to sub-contract part of the work to Proven Products Marketing Company Limited ("the Sub-Contractors"). The Main Contractor (and possibly the employer) required the Sub-Contractors to provide "a performance Bond". On 30th April 1982 the Main Contractor and the Sub-Contractors apparently entered into a sub-contract. The sub-contract is not in evidence, save that a copy of clause 8 and part of clause 9 is exhibited to an affidavit.

On the same day, 30th April 1982, a Deed ("the Deed") was executed by the Sub-Contractors and

Guyana. It is necessary to set out its terms in full (paragraphs of the Deed having been numbered for ease of reference):-

- "(1) KNOW ALL MEN BY THESE PRESENTS that We, PROVEN PRODUCTS MARKETING COMPANY LIMITED a Company duly incorporated under Companies Ordinance having its registered office at No. 47 Dundonald Street Port of Spain Island of Trinidad, (hereinafter called 'the sub-contractor') is held and firmly bound to R.K. PLUMMER AND ASSOCIATES in the sum of TWO HUNDRED AND FOUR THOUSAND THREE HUNDRED AND EIGHTY-TWO DOLLARS AND FIFTY SIX CENTS (\$204,382.56 TT Currency).
- (2) TO BE PAID TO R.K. PLUMMER AND ASSOCIATES for which payment well and truly be made we bind ourselves and each of us and our successors and assigns and/or the Executors and Administrators of us and each of us jointly and severally held and bound by these presents:
- (3) DATED this 30th day of April, 1982.
- (4) WHEREAS by Contract hereto annexed and marked 'A' and bearing even date herewith and made between R.K. PLUMMER AND ASSOCIATES of the One Part and the Sub-Contractor of the Other Part for the consideration therein mentioned the Sub-Contractor contracted and agreed for the SUPPLY and INSTALLATION of SUSPENDED CEILING PARTITIONING, SOLID RUBBER FLOORING 3.75 m.m., STUDDED RUBBER FLOORING, SOLID RUBBER FLOORING 2.5 m.m., CARPETING and ALTRO SAFETY FLOORING at WATER AND SEWERAGE AUTHORITY, ST. JOSEPH, as well as other works in connection therewith in accordance with the Architectural and Engineering Drawings bearing the following numbers and titles viz:
- WATER AND SEWERAGE AUTHORITY, Block A and B, FL 1-7 referred to the Articles of Agreement of the said Contract upon the terms expressed in the Conditions and Bills of Quantities marked 'B' attached to the said Contract.
- (5) AND WHEREAS THE GUYANA AND TRINIDAD MUTUAL FIRE INSURANCE COMPANY LIMITED, 95-97 Queen Street, Port of Spain, Trinidad, has/have agreed to become Surety for the due observance and performance by the Contractor for all and several the agreements conditions matters and things under the said

Agreement to by them observed, performed and done.

(6) NOW the condition of the above written Bond or Obligation is such that if the said Contractor shall well and truly observe and perform all and every the Conditions and Agreements by them to be observed and performed as hereinbefore mentioned and shall in a proper and workmanlike manner do all and every the acts, matters and things by them to be done under the said Agreement to the satisfaction of R.K. PLUMMER AND ASSOCIATES or their Successors in office for the time being.

(7) THEN the above written Bond or Obligation shall be void otherwise the same shall remain in full force and effect."

On 14th June 1982 the Main Contractor gave a written "Work Order" to the Sub-Contractors to carry out the sub-contract works. The Works Order stated that the order was

"subject to and fully conditioned by ...:-

- (1) ...
- (2) Sub-contract Performance Bond dated 30th April 1982
- (3) (a) Main Contract provisions
(b) Sub-contract provisions ..."

The Main Contract (apart from certain excerpts) is not in evidence.

There were disagreements between the Main Contractor and the Sub-Contractors as to alleged delays in performance by the Sub-Contractors. It appears that in July 1984 the Main Contractor gave ten days' notice of termination of the sub-contract but apparently afforded the Sub-Contractors a moratorium. However, on 20th September 1984 the Main Contractor determined the sub-contract "in accordance with clause 20 of the form of sub-contract" (which is not in evidence). There is a letter of 20th July 1984 from architects (who were apparently architects to the Main Contract) certifying that the contract was in delay due to the Sub-Contractors' lack of performance and approving and endorsing the decision to determine the sub-contract.

On 27th February 1985 the Main Contractor issued a writ against Guyana. The statement of claim alleges the sub-contract and the Deed. It alleges default by the Sub-Contractors and the termination of the sub-contract. It alleges that in consequence the Main Contractor has suffered damage in excess of TT\$2,015,857 and claims damages from Guyana. In its

defence Guyana admits entering into the Deed but alleges that its maximum liability thereunder is \$204,382.56 (i.e. the sum mentioned in paragraph 1 of the Deed). Guyana makes no admission of any default by the Sub-Contractors and pleads that no such default has been established.

On 4th April 1985 the Main Contractor took out a summons for judgment under Order 14 claiming damages to be assessed and costs. This summons was supported by an affidavit exhibiting the Deed, but otherwise merely verifying the statement of claim. An affidavit in answer deposed, on information from the managing director of the Sub-Contractors, that there had been no breach of the sub-contract. Finally, the Main Contractor put in evidence in reply in which, for the first time, the Main Contractor alleged that it had determined the sub-contract "bona fide under an honest sense of dissatisfaction with the work of" the Sub-Contractors.

Although breaches of the sub-contract by the Sub-Contractors are alleged in the pleadings, the evidence in support of the Order 14 summons made no attempt to prove such breaches. Accordingly, when the Order 14 summons came on for hearing the Main Contractor based its case for summary judgment on the fact that the Sub-Contractors had not carried out the work, as required by paragraph 6 of the Deed "to the satisfaction of" the Main Contractor. The judgments of both the trial judge and the Court of Appeal are almost entirely concerned with the question whether the Main Contractor was entitled to judgment against Guyana on proof only that it was dissatisfied with the performance of the sub-contract or whether the Main Contractor, in order to establish liability, had also to prove that such dissatisfaction was reasonable or that there had been a breach of the sub-contract. Both courts held that if the Main Contractor was genuinely dissatisfied with the performance by the Sub-Contractors (whether or not such dissatisfaction was reasonable) Guyana were liable. On that basis they gave judgment against Guyana under Order 14. It was assumed in both courts that if the events referred to in paragraph 6 of the Deed had not occurred (i.e. if the Main Contractor was not satisfied with the Sub-Contractors' performance) Guyana were liable.

In the course of the hearing before the Board, it emerged that there was a much more fundamental question arising from the nature and exact wording of the Deed. In the courts below it was assumed that since the Deed was a "performance bond" any failure by the Sub-Contractors to satisfy its terms would necessarily give rise to an obligation on Guyana, as surety, to make good the default of the Sub-Contractors. But that is not the literal effect of the words used.

The Deed is a bond. A conditional bond operates in *terrorem*. It starts by creating an obligation to pay a fixed sum of money, as in paragraphs 1 and 2 of the Deed. This obligation is then subjected to conditions which, if satisfied, release the obligor from the obligation to pay the fixed sum of money: see paragraphs 6 and 7. Therefore if one were considering the liability, not of Guyana (the surety), but of the Sub-Contractors (the obligor), the question would indeed be whether the conditions in paragraph 6 of the Deed had been satisfied. If they had not, the Sub-Contractors would have been liable under the Deed to pay the sum mentioned in paragraph 1 of the Deed: the liability of the Sub-Contractors under the Deed is to pay a fixed sum of money, not damages.

On the face of the Deed, the liability of Guyana is quite different. Guyana does not undertake any primary obligation to pay a fixed sum of money. It does not provide a bond at all. Therefore the provisions of paragraph 6 (which are merely conditions relieving from liability to pay the bonded sum) do not apply directly to the liability of Guyana at all. This is not a performance bond by the surety since the surety gives no bond. This case is to be compared with the joint primary obligation undertaken by both the principal and the surety in *Trade Indemnity Co. Ltd. v. Workington Harbour & Dock Board* [1937] A.C. 1.

It follows that the liability, if any, of Guyana has to be found in the only paragraph of the Deed in which Guyana undertakes any obligations, i.e. paragraph 5. Now paragraph 5 provides only that Guyana is to be "surety for the due observance and performance by the Contractor for all and several the agreements conditions matters and things under the said Agreement to [be] by them observed, performed and done". The reference to "the Contractor" is plainly an error and should have been a reference to "the Sub-contractor". "The said Agreement" referred to in paragraph 5 is a reference back to the sub-contract mentioned in paragraph 4. Therefore, on the face of it, Guyana as surety is only liable for actual breaches of the sub-contract by the Sub-Contractors. Unless it is shown that there has been a breach of the sub-contract Guyana as surety is not liable even if the Main Contractor is dissatisfied with the Sub-Contractors' performance within the meaning of paragraph 6.

Mr. Harvie, in his skilful argument, sought to avoid this conclusion by submitting that the obligations of the Sub-Contractors "under the said Agreement" included the obligation of the Sub-Contractors under the Deed. Accordingly, if the Sub-Contractors had wrongly failed to pay under its bond contained in the Deed, Guyana as surety was liable for that default. Therefore, he submitted, Guyana was indirectly liable if the Sub-Contractors had failed to satisfy the conditions in paragraph 6 of the Deed.

Whatever may prove to be the merits of that submission when the full terms of all the contractual documents and the surrounding circumstances are known and taken into account, it cannot at this stage sustain the judgment against Guyana under Order 14. For the submission to succeed it will have to be demonstrated that "the Contract" referred to in paragraph 4 of the Deed imposed some liability on the Sub-Contractors both to provide the bond and to satisfy it. In order to decide this point, the whole contractual position, i.e. the terms of the sub-contract and the Main Contract (which was apparently incorporated into the sub-contract) together with the terms of the Work Order will have to be looked at as one contractual entity. Yet the full terms of these documents are not even in evidence.

For these reasons the judgment under Order 14 cannot be sustained. The case will have to go to trial for decision in the light of all the relevant documents and surrounding circumstances.

It is therefore unnecessary for the Board to decide whether, on the false assumption underlying the point decided by the Court of Appeal, their decision on the construction and effect of paragraph 6 of the Deed is correct. However, the decision of the Court of Appeal on these points should not be treated as decisive on those issues. Given that the Deed expressly refers to and incorporates the sub-contract which in turn incorporates the Main Contract, the true construction and effect of the Deed can only be determined in the context of all the interlocking contractual documents. For example, in the course of argument it was demonstrated that under clause 27 of the Main Contract (which was in evidence) the duty of the Sub-Contractors was to carry out the work to "the reasonable satisfaction of the Architect". The Court of Appeal held that paragraph 6 of the Deed exposed the Sub-Contractors to liability under the bond in the event of failure to carry out the work to the satisfaction (whether reasonable or unreasonable) of the Main Contractor. At first sight, this dislocation between the performance obligations of the Sub-Contractors in the Main Contract and the liability under the bond taken to secure such performance seems improbable. However, the Board is expressing no concluded view on the true construction of the Deed. No proper view can be formed on the point in the absence of all the relevant documents which by reference are incorporated into the Deed and knowledge of the surrounding circumstances.

Their Lordships therefore allow the appeal and set aside the orders of Madame Justice Permanand and the Court of Appeal. The respondents must pay the costs of the Order 14 proceedings before the trial judge and the costs of the appeals to the Court of Appeal and the Board.