محكمة قطر الدولية
ومركز تسوية المنازعات
QATAR INTERNATIONAL COURT
AND DISPUTE RESOLUTION CENTRE

In the name of His Highness Sheikh Tamim Bin Hamad Al Thani,

Emir of the State of Qatar

IN THE CIVIL AND COMMERCIAL COURT

OF THE QATAR FINANCIAL CENTRE

FIRST INSTANCE CIRCUIT

5 September 2019

Case No. 3 of 2019

Between:

LEONARDO S.p.A

Claimant

v

DOHA BANK ASSURANCE COMPANY LLC

Defendant

JUDGMENT

Before:

Justice Bruce Robertson

Justice Frances Kirkham

Justice Arthur Hamilton

DECLARATIONS

The Court makes the following Declarations:

1. The claimant made a valid demand on the Advance Payment Guarantee no. P1/10/1930/16/0001 dated 19 April 2016, as amended by the defendant's letter dated 9 May 2016;

2. The claimant is entitled to payment of €10,549,440 being the sum payable pursuant to the claimant's second demand made under the Advance Payment Guarantee;

3. The claimant made a valid demand on the Payment Guarantee no. P1/10/1931/16/0001 dated 19 April 2016; and

4. The claimant is entitled to payment of €4,070,000 being the sum payable under the Payment Guarantee.

ORDER

1. The defendant must pay the claimant the sum of €14,619,440;

2. The defendant must pay the claimant's reasonable costs of and relating to preliminary issues 2.1 - 2.1.5 and to applications for summary judgment, to be assessed by the Registrar if not agreed; and

3. The parties have permission to make further application to this Court.

JUDGMENT

1. The Court is obliged to Mr Simon Hale, the claimant's Counsel, and Mr Sanjay Patel, Counsel for the defendant, for their help with this case.

2. The claimant is a company established and registered in Italy providing services in the sectors of aerospace, defence and security. It is common ground that the claimant changed its name from Finmeccanica S.p.A. to its current name and that no issue arises from that. On 13 February 2019 the claimant commenced proceedings against the defendant, a company established and registered in the Qatar Financial Centre ('QFC'). The defendant has a licence to conduct long term insurance in or from the QFC and is regulated by the Qatar Financial Centre Regulatory Authority.

3. The dispute concerns demands made by the claimant on:

    a) an advance payment guarantee no. P1/10/1930/16/0001 dated 19 April 2016, as amended by the defendant's letter dated 9 May 2016 ('the APG'); and

    b) a performance bond guarantee no. P1/10/1931/16/0001 dated 19 April 2016 ('the PB')

    Both demands were rejected by the defendant.

4. The claimant had contracted with Qatar Armed Forces ('QAF'). The claimant and PAT Engineering Enterprises Co WLL ('PAT') entered into a bespoke subcontract on 8 March 2016 whereby PAT was to provide engineering, procurement and construction of seven towers to support low level radar system ('LLRS') systems ('the Contract').

5. The Contract required PAT to provide an advance payment guarantee and a performance bond. PAT was a customer of the defendant. The defendant provided the APG and the PB in favour of the claimant.

6. On 13 May 2016 the claimant paid PAT the sum of €12,210,000 by way of advance payment as agreed in the Contract.

7. The claimant terminated the contract by letter dated 14 May 2018. It appears that no formal claim has been made by either the claimant or PAT following termination.

8. By a letter written in May 2018, the claimant made a demand on the APG in the sum of €12,210,000. The demand was rejected by the defendant by letter dated 24 May 2018.

9. On 2 August 2018, the claimant made a second demand on the APG for €10,549,440. On the same date, a written demand was made by the claimant on the PB for €4,070,000. The two demands were for a total of €14,619,440. The defendant rejected both demands broadly for the following reasons:

    a. the claimant had failed to comply with its obligations under the Contract;

    b. the claimant had failed to include a supporting statement that the defendant was in breach of its obligations under the Contract; and

    c. the claimant had failed to make a demand for the correct amount under the APG.

    The reasons are set out in more detail and discussed below.

10. The claimant asks the Court to grant the following relief:

    a. A declaration that the claimant made a valid call on the APG and had the right to payment under the APG;

    b. A declaration that the claimant made a valid call on the PB and had the right to payment under the PB;

    c. Damages for breach of contract in the sum of €10,549,440 being the sum otherwise recoverable under the APG, or such other sum as the Court considers due;

    d. Damages for breach of contract in the sum of €4,070,000 being the sum otherwise recoverable under the PB, or such other sum as the Court considers due;

    e. Such further or other relief as the Court considers appropriate; and

    f. An order that the defendant is to pay the claimant the costs of these proceedings.

11. By its defence dated 26 March 2019 the defendant maintained that the claimant was not entitled to the relief that it seeks. The defendant's case is that the claimant has not made valid demands under the APG or PB because neither demand contained a written claim setting out the value of the claimant's claim under the Contract. Further, neither demand contained a supporting statement that complied with the requirements of the ICC Uniform Rules on Demand Guarantees ('URDG'). In addition, the claimant's demand under the APG was said to be invalid because it was for a sum greater than the amount guaranteed under the APG.

12. The defendant also alleged that the claimant presented its demands to the defendant fraudulently as these contained representations that the claimant knew to be untrue and/or was reckless as to the truthfulness of those representations. The defendant's case is that the fraudulent representations were that the claimant was entitled to recover the total sum of €14,619,440 from the defendant under the APG and PB on the grounds that it was entitled to recover the same under the Contract. The defendant submits, among other matters, that the claimant did not have (nor could it have had) an honest belief in the truth of that representation.

13. On 21 April 2019 the Court issued directions concerning case management and procedure.

14. The parties filed an agreed list of issues on 9 May 2019. These are set out as follows, using the agreed numbering :

> 2.1. Whether the demands on the APG and the PB were validly made;
>
> 2.1.1 Whether it was a requirement of the APG, the PB and/or the URDG that the demands include a statement, and/or include a copy, of a written claim to PAT setting out the value of the claimant's claims under its underlying contract with PAT;
>
> 2.1.2 Whether the claimant complied with the formal requirements as set out under the APG, the PB and Articles 15(a) and 17(e) of the URDG. In particular, it is the defendant's case that Articles 15(a) and 17(e) of the URDG required the claimant's supporting statement to show the sum that was due as a result of PAT's breach of its obligations;
>
> 2.1.3 Whether the claimant demanded a sum under the APG that was greater than the amount guaranteed by the APG;

2.1.4 Whether the claimant's demand on the APG is invalid on the grounds that the claimant cannot profit from its own wrong (which the claimant denies) by making a demand on the APG that did not recognise the alleged value of the unpaid work that PAT had allegedly carried out prior to termination of its subcontract with the claimant;

2.1.5 Whether the claimant made the demands fraudulently in the particular respects pleaded by the defendant; and

2.2 Whether the defendant is entitled as a matter of the Court's jurisdiction to serve a substantive defence based on issues of the underlying contract between the claimant and PAT in circumstances where:

a) the defendant is not a party to the underlying contract between the claimant and PAT; and
b) the underlying contract between the claimant and PAT contains an exclusive arbitration clause.

15. The parties agreed that issues 2.1.1 - 2.1.4 above should be determined by the Court as preliminary issues. They were listed for hearing on 29 July 2019. (Issue 2.2 was not considered at that hearing.)

16. The claimant indicated that it intended to make an application for summary judgment in respect of the fraud defence (issue 2.1.5) and indeed did so. The defendant filed a response on 13 June 2019 and a statement in reply was filed by the claimant on 26 June 2019. Subsequently, the parties agreed, following enquiry by the Court, that issue 2.1.5 and the application for summary judgment could also sensibly be dealt with at the hearing on 29 July 2019.

The Contract

17. The Contract price was €40.7m. Pursuant to Article 4 the claimant was to make a down payment to PAT of €12,210,000 upon presentation of both an invoice or claim and the APG in that amount. Article 4 provided for milestone payments by reference to completion and acceptance of elements of the work. Down payment recovery by the claimant of the €12.2m was linked to those milestone payments.

18. Article 4.3 provided that payment to PAT would be made "on a flow down basis" and that payments would be effected after receipt of the relevant payment from the QAF. This provision was described at the hearing as a pay-when-paid clause. The defendant did not challenge the proposition that the consequence was that the claimant would pay PAT only after receipt of the relevant payment from QAF.

19. Article 5 permitted PAT to claim an extension of time for completion if delayed by the claimant in various circumstances including the issue of variations.

20. Article 8 contained the requirements for PAT to provide the APG and PG. Article 8.3 stated "*Any Bond shall be irrevocable and to be used at simple request by the [claimant]...*"

21. By Article 14.1, if PAT failed under its own responsibility to deliver any or all of the work within 30 working days of a letter from the claimant, the claimant would be entitled to claim damages.

22. Article 16 permitted the claimant to terminate the contract and to "*claim for reimbursement by [PAT] of the damages*" in various circumstances.

23. Article 16.1.7 provided that, in the event of termination of the contract between the claimant and QAF, the claimant would "*recognize to [PAT] an amount to be agreed by the parties for the works already executed and not paid before the termination.*".

24. Article 16.2 provided "*In case of termination as aforesaid ...*" PAT remained responsible for reimbursing the claimant "*cost equivalent to the balance of the contract price paid by the [claimant] for the terminated portion of the Contract.*"

25. The Contract contains a clause requiring the parties to submit disputes to arbitration. It appears that no arbitration proceedings have been commenced.

26. The Contract is subject to Swiss Law.

27. The claimant and PAT agreed an amendment to the Contract, by which they agreed that the milestones be split into two, and they agreed a different set of milestone payments and down payment recovery.

28. In December 2016 the parties agreed to split the first milestone payment into two, which would enable PAT to issue an invoice. PAT did issue an invoice that month, in the sum of €1,660,560. That invoice has not been paid. The claimant's case is that PAT was not entitled to payment as it had not carried out all the work required under the relevant milestone. And it appears that QAF have made no payment to the claimant.

29. Correspondence between the claimant and PAT during 2017 reflects the discontent of both parties to the Contract for various reasons, including PAT's claims for variations and consequent increase in the contract price, which the claimant appears not to have accepted, and the claimant's dissatisfaction with PAT's performance.

30. On 29 April 2017 the claimant wrote to PAT as follows:

> *"In connection with an audit of the financial statements of Finmeccanica S.p.A as of 31st December 2016, our independent auditors wish to determine whether our records of indebtedness to you agree with our records. Please furnish them with an open item statement of our indebtedness to you, listing unpaid items at 31.12.16. According to our records, our indebtedness to you on that date included in the below amount.*
>
> *Amount payable to you QR 14,828,247.28 (Euro 3,874,640.00) (Client can request statement in case they don't want to mention the payable amount)*
>
> *Please send the open item statement directly to our independent auditors or send the confirmation via email to Mr. ..."*

The claimant submits that the letters had been issued in accordance with the claimant's internal accountancy procedure and Italian accountancy requirements, as explained in a witness statement prepared by Mr Soldati, the claimant's Head of Export Air Defence Programmes. A document prepared by the claimant's auditors appears to confirm this.

31. By letter dated 6 April 2018 the claimant gave PAT notice to remedy default. It required PAT to take immediate steps to remedy deficiencies within 30 working days, failing which the claimant would terminate the Contract and claim compensation from PAT.

32. On 14 May 2018 the claimant terminated the Contract, citing PAT's fundamental failure to perform its obligations.

33. The defendant alleges that, as at the date of termination, the claimant had substantial liabilities to PAT. The claimant contends that PAT is liable to it.

The APG

34. The APG dated 19 April 2016 was amended on 9 May 2016. The amended APG refers to the Contract, and then provides:

> *"The Finmeccanica has to pay to PAT Euro 12,210,000 (Euro Twelve Million Two Hundred and Ten Thousand) being 30% of the said contract price.*
> *Therefore, Doha Bank Assurance Company LLC, irrevocably guarantee, as security for and joint debtor with PAT, the reimbursement in Euro in the same proportion as the above value of any sums up to Euro 12,210,000 (Euro Twelve Million Two Hundred and ten Thousand), that Finmeccanica have to claim back in writing from PAT.*
> *This guarantee is unconditionally payable to Finmeccanica upon first written demand by him, in case PAT should fail to meet its obligations of delivery and/or completion of Design, Procurement and Construction of Infrastructures and Plants for LLRS Systems Installation under the above mentioned contract.*
> *This guarantee will be automatically reduced proportionally to the value of each partial delivery and/or completion of Design Procurement and Construction of Infrastructures and Plants for the LLRS Systems Installation upon presentation by PAT to Doha Bank Assurance Company LLC of copies of the above mentioned project's relevant documents (Progress Invoice) approved, certified and signed by Finmeccanica project representative."*
> ...
> *This guarantee is subject to URDG (Uniform Rules for Demand Guarantees) ICC Publication 758."*

The PG

35. The PG also refers to the Contract, then states:

"PAT is bound to supply and carry out to Finmeccanica Design, Procurement and Construction of Infrastructures and Plants for LLRS Systems Installation.

As per Article 8 of the said contract, PAT will provide Finmeccanica a [sic] Insurance guarantee for the amount of Euro 4,070,000 (Euro Four Million Seventy Thousand) representing 10% of the total contract price.

Therefore, Doha Bank Assurance Company LLC, irrevocably guarantee, as security for and joint debtor with PAT, the reimbursement in Euro in the same proportion as the above value of any sums up to Euro 4,070,000 (Euro Four Million Seventy Thousand), that Finmeccanica might have to claim in writing from PAT.

This guarantee is unconditionally payable to Finmeccanica upon first written demand by him, in case PAT should fail to meet its obligations of delivery and/or completion of Design, Procurement and Construction of Infrastructures and Plants for LLRS Systems Installation under the above mentioned contract, but not later than 03/05/2019 and shall not be returned to us to be cancelled definitely.

....

This guarantee is subject to URDG (Uniform Rules for Demand Guarantees) ICC Publication 758."

The claimant's demands and defendant's rejections under the APG and PG

APG

36. In May 2018, the claimant made a demand on the defendant under the APG for €12,210,000, which the defendant rejected on 24 May 2018.

37. On 2 August 2018 the claimant made a second demand of the defendant under the APG, in the sum of €10,549,440. (That sum represents 12,210,000 – 1,660,560 - the amount of PAT's December 2016 invoice). The claimant stated

> *"Pursuant to Art. 15 of the ... URDG [the claimant] hereby states and declares that PAT has failed to perform its material obligations under Articles 2, 5 and 12 of the Contract and specifically that:*
>
> - *PAT failed to perform the Final Design as per paragraph 4.4 of the Statement of Work....*

- *....in violation of paragraph 1.2 of the Statement of Work PAT provided an absolutely unsatisfactory organisation....*
- *PAT failed to provide evidence of the existence of long lead purchase orders...*
- *PAT failed to provide evidence of the grade A qualification for building and Construction... which was a mandatory requirement for carrying out the contractual activities.*
- *Moreover, PAT failed to remedy such breaches within the notified thirty (30) working days period, determining the termination of the Contract pursuant to Art. 16.1.5 of the Contract."*

The claimant demanded immediate payment of €10,549,440, stating "*such amount is the result of the proportional reduction of Euro 1,660,560 of the total amount of the Advance Payment Guarantee (Euro 12,210,000) made in accordance with the terms of the Guarantee.*

The above proportional reduction has been made in consideration of the fact that PAT has issued on 23 December 2016 and pursuant to Article 4 of Amendment no. 1 to the Contract the Invoice number # 224-01/002 equivalent to Euro 3,874,640".

38. By letter dated 26 August 2018 the defendant rejected the claimant's second demand under the APG. (The first point made by the defendant was in relation to the claimant's entitlement to make the demand, given that the named beneficiary under the APG was Finmecanica. As set out above, that point is not pursued). The letter went on to say:

> *"By Article 15(a) of the URDG any demand must be supported by a statement by [the claimant] as Beneficiary, indicating in what respect ... PAT is in breach of its obligations under the underlying relationship. In this regard, the Demand expressly states that 'PAT has failed to perform its material obligations under Articles 2, 5 and 12 of the Contract' and then cites four examples of what [the claimant] says constitutes material breaches (the Alleged Breaches). [The claimant] goes on to state that 'PAT failed to remedy such breaches within the notified thirty (30) working days period., determining the termination of the Contract pursuant to Art. 16.1.5 of the Contract'.*
>
> *DBAC requires notarized and authenticated copies ... of documents verifying that*

i. *the alleged breaches are breaches of 'material obligations' that would give rise to termination of the ... Contract;*

ii. *Notice was provided to PAT in relation to the Alleged Breaches as set out in the Demand; and*

iii. *PAT failed to remedy the Alleged Breaches within the notified thirty (30) working days period."*

The [APG] contains an express exclusion of coverage with regards to 'non-fulfilment or breach of contract caused by[the claimant]'. DBAC is aware of failings and non-compliance of [the claimant's] obligations under the ... Contract. To the extent that the Alleged Breaches were in fact breaches of material obligations (which is denied) it is manifestly evident that these breaches were caused by [the claimant] itself, by its own actions and failures in causing substantial delays to the preliminary design phase of the project. Further, it is evident that [the claimant] regularly changed its requirements and did not provide PAT with the necessary access to the sites to carry out the work. [The claimant's] own failures to provide full site access to PAT and [the claimant's] ongoing requests for regular and substantial changes in work requirements over a prolonged period, have been the cause of delays, additional work, costs and losses under the ... Contract giving rise to remedies and claims for PAT. As such, the position is not correctly represented in the statement provided in the Demand under Article 15(b) of the [URDG] 758. Rather it is demonstrably [the claimant's] own actions and omissions which have given rise to Alleged Breaches and remedies for PAT. Such failings by [the claimant] should not give rise to payments under the Guarantee.

There is an absence of certainty in relation to the exact sum sought under the Guarantee. DBAC say this because

- *Under the Previous Demand, a sum of Euro 12,210,000 was represented by [the claimant] as being payable under the Guarantee and claimed.*

- *Paragraph 5 of the Guarantee states that the Guarantee 'will be automatically reduced proportionally to the value of each partial delivery and/or completion of Design Procurement and Construction of Infrastructures and Plants .... upon presentation*

by PAT to DBAC of copies of the payment documents specified in the above mentioned contract.'

- ...

- *Further, DBAC is aware that other significant works have been completed in relation to the project giving rise to deductions of the amount to be paid under the Guarantee....."*

PG

39. By letter dated 2 August 2018 the claimant made its demand of the defendant under the PG for immediate payment of €4,070,000. That letter was in substantially the same form as the claimant's letter of the same date making its demand under the APG.

40. By letter dated 26 August, the defendant rejected the claimant's demand under the PG. That letter is in very similar terms to the letter rejecting the APG demand. The letter states:

> *"By Article 15(a) of the URDG any demand must be supported by a statement by [the claimant] as Beneficiary, indicating in what respect ... PAT is in breach of its obligations under the underlying relationship. In this regard, the Demand expressly states that 'PAT has failed to perform its material obligations under Articles 2, 5 and 12 of the Contract' and then cites four examples of what [the claimant] says constitutes material breaches (the Alleged Breaches). [The claimant] goes on to state that 'PAT failed to remedy such breaches within the notified thirty (30) working days period, determining the termination of the Contract pursuant to Art. 16.1.5 of the Contract'. DBAC requires notarized and authenticated copies ... of documents verifying that*
>
> *(1) the alleged breaches are breaches of 'material obligations' that would give rise to termination of the ... Contract;*
>
> *(2) Notice was provided to PAT in relation to the alleged breaches as set out in the Demand; and*
>
> *(3) PAT failed to remedy the Alleged Breaches within the notified 30 working days period."*

The [PG] contains an express exclusion of coverage with regards to 'non-fulfilment or breach of contract caused by [the claimant]'. DBAC is aware of failings and non-compliance of [the claimant's] obligations under the ... Contract. To the extent that the Alleged Breaches were in fact breaches of material obligations (which is denied) it is manifestly evident that these breaches were caused by [the claimant] itself, by its own actions and failures in causing substantial delays to the preliminary design phase of the project. Further, it is evident that [the claimant] regularly changed its requirements and did not provide PAT with the necessary access to the sites to carry out the work. [The claimant's] own failures to provide full site access to PAT and [the claimant's] ongoing requests for regular and substantial changes in work requirements over a prolonged period, have been the cause of delays, additional work, costs and losses under the ... Contract giving rise to remedies and claims for PAT. As such, the position is not correctly represented in the statement provided in the Demand under Article 15(b) of the [URDG] 758. Rather it is demonstrably [the claimant's] own actions and omissions which have given rise to Alleged Breaches and remedies for PAT. Such failings by [the claimant] should not give rise to payments under the Guarantee."

41. Thus, it is apparent that, prior to rejecting the demands, the defendant must have investigated matters under the Contract, but only from PAT's point of view, to have enabled it to have made such detailed allegations as to PAT's and the claimant's respective positions under the Contract.

Relevant provisions of the Uniform Rules for Demand Guarantees (URDG) 758

ARTICLE 7: NON-DOCUMENTARY CONDITIONS A guarantee should not contain a condition other than a date or the lapse of a period without specifying a document to indicate compliance with that condition. If the Guarantee does not specify any such document and the fulfilment of the condition cannot be determined from the guarantor's own records or from an index specified in the guarantee, then the guarantor will deem such condition as not stated and will disregard it except for the purpose of determining whether data that may appear in a document specified in and presented under the guarantee do not conflict with data in the guarantee.

ARTICLE 12: EXTENT OF GUARANTOR'S LIABILITY UNDER GUARANTEE A guarantor is liable to the beneficiary only in accordance with, first, the terms and conditions of the guarantee and, second, these rules so far as consistent with those terms and conditions, up to the guarantee amount.

ARTICLE 15: REQUIREMENTS FOR DEMAND

(a)A demand under the guarantee shall be supported by such other documents as the guarantee specifies, and in any event by a statement, by the beneficiary, indicating in what respect the applicant is in breach of its obligations under the underlying relationship. This statement may be in the demand or in a separate signed document accompanying or identifying the demand.

(b)...

(c)The requirement for a supporting statement in paragraph (a) or (b) of this article applies except to the extent that the guarantee or counter-guarantee expressly excludes this requirement. Exclusion terms such as "The supporting statement under article 15[(a)] [(b)] is excluded" satisfy the requirement of this paragraph.

ARTICLE 17: PARTIAL DEMAND AND MULTIPLE DEMANDS; AMOUNT OF DEMANDS

...

(e) A demand is a non-complying demand if:

(i)it is for more than the amount available under the guarantee, or

(ii) any supporting statement or other documents required by the guarantee indicate amounts that in total are less than the amount demanded

ARTICLE 24 NON-COMPLYING DEMAND, WAIVER AND NOTICE

(a)When the guarantor determines that a demand under the guarantee is not a complying demand, it may reject that demand or, in its sole judgement, approach the instructing party, or in the case of a counter-guarantee, the counter-guarantor, for a waiver of the discrepancies.

...

(c)Nothing in paragraphs (a) or (b) of this article shall extend the period mentioned in article 20...

(d)When the guarantor rejects a demand, it shall give a single notice to that effect to the presenter of the demand. The notice shall state:

(i)that the guarantor is rejecting the demand, and

(ii)each discrepancy for which the guarantor rejects the demand.

(e)The notice required by paragraph (d) or (e) of this article shall be sent without delay but not later than the close of the fifth business day following the day of presentation.

(f)A guarantor failing to act in accordance with paragraphs (d) or (e) of this article shall be precluded from claiming that the demand and any related documents do not constitute a complying demand.

...

Issues 2.1.1 and 2.1.2

2.1.1 "Whether it was a requirement of the APG, the PB and/or the URDG that the demands include a statement, and/or include a copy, of a written claim to PAT setting out the value of the claimant's claims under its underlying contract with PAT."

2.1.2 "Whether the claimant complied with the formal requirements as set out under the APG, the PB and Articles 15(a) and 17(e) of the URDG. In particular, it is the defendant's case that Articles 15(a) and 17(e) of the URDG required the claimant's supporting statement to show the sum that was due as a result of PAT's breach of its obligations."

The legal landscape

42. Demand guarantees (or bonds) have been a feature of the English legal landscape for at least 40 years. In *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] 1 QB 159 Lord Denning MR compared them to letters of credit, describing them as "*virtually promissory notes payable on demand*". Geoffrey Lane LJ observed that they had "more of the characteristics of a promissory note than the characteristics of a guarantee". In *United City Merchants (Investments) Limited v Royal Bank of Canada* [1983] 1 AC 168 at page 183 Lord Diplock said: *"The whole commercial purpose for which the system of confirmed irrevocable documentary credits has been developed in international trade is to give the seller an assured right to be paid before he parts with control of the goods that does not permit of any dispute with the buyer as*

to the performance of the contract of sale being used as a ground for non-payment or reduction or deferment of payment." That statement is, with others, referred to by Tomlinson LJ at paragraph 20 in *Wuhan Guonyu Logistics Group Co Ltd v Emporiki Bank of Greece SA [2014] 4 All ER 870 (Comm),* a case concerning the analogous commercial purpose of a demand performance guarantee.

43. The parties to this case are in broad agreement as to the principles involved. It is mutually recognised that each of the APG and the PG is a demand guarantee and, as such, is, in contrast to a suretyship, an autonomous obligation to pay against stipulated documents. There is, accordingly, no need for the beneficiary under the guarantee to substantiate that, as between the parties to the underlying contract, it is entitled to the sum demanded from the guarantor. Disputes under that underlying contract fall to be resolved, by a process of "accounting" between the parties to it, on another day. The beneficiary must, however, at the time of making the demand, have an honest belief that it is so entitled.

44. Demand guarantees are an important feature of international business. Their value has been recognised by jurisdictions world-wide, both in the common law and in the civilian tradition. The International Chamber of Commerce has over the years published URDG, designed to harmonise and facilitate the operation of such instruments. Both the APG and the PG are expressly subject to the 2010 version of such rules (URDG 758).

Issues 2.1.1 and 2.1.2.

45. These issues are interrelated and can be discussed together. They apply both to the APG and the PB, although the language of these two instruments is not identical. The primary questions which arise on both are (1) of interpretation and operation of the guarantees and (2) whether in the circumstances the defendant is precluded from maintaining that the demands made were non-complying demands. It is convenient to deal first with the question of interpretation and operation.

46. The full terms of the guarantees have been set out above and it is unnecessary to repeat them. The question of interpretation turns on the final phrase in the relative paragraph of each of the instruments. In the case of the PB that phrase is "*any sums up to Euro 4,070,000 that Finmeccanica might have to claim in writing from PAT*". In the case of the APG the phrase is

"*any sums up to Euro 12,210,000 that Finmeccanica might have to claim back in writing from PAT*". So, the figures in each instrument differ and the APG, given its nature, refers to "claim back" rather than simply "claim". Otherwise, the provisions are identical.

47. It is convenient first to interpret the PG. Some aspects of interpretation of the crucial words are uncontroversial. The word "might" in the phrase "might have to claim" posits a futurity as at the date of execution of the guarantee: it envisages that the beneficiary might (or might not) at a future date have a claim. The word "have" in the phrase "have to claim" does not import any obligation to claim but the prospect of an occasion or reason to claim. What is controversial is the import of the words "in writing".

48. By the time of the hearing there was accord between the parties that these words identified the scope of the guarantee, that is, the indemnity embraced claims against PAT made in writing, but not otherwise. Thus, any claim against it made merely verbally was not within that scope. However, the defendant's contention was that the words used also imported that, on a demand on the guarantee being made, claims in writing, made by the claimant against PAT, must be contained in the demand, whether in the form of copies of such claims or, at least, in the form of a statement in writing referring to such claims.

49. At the outset of his oral argument Mr Patel for the defendant cited two cases from the (English) Court of Appeal - *Esal (Commodities) Limited Reltor Limited v Oriental Credit Limited* 1985 WL 311114 or [1985] 2 Lloyd's Rep. 546 and *I.E. Contractors Ltd v Lloyds Bank* 1990 WL 754829 or [1990] 2 Lloyd's Rep. 496. Among other things, he also adopted the word "trigger" (used by Sir Denys Buckley at page 503 of the Lloyd's report of *I.E. Contractors*) to describe what made the indemnity bite. These cases will be discussed further in this judgment (see paragraph 59 below). In neither of them was the guarantee in question subject to URDG 758, nor to any earlier version of the same, nor to any other set of international rules. By contrast, both the PG and the APG are expressly subject to URDG 758. As explained in its Introduction, the aims of that version of the rules included greater clarity and more precision than had been found in the earlier rules. The PG and the APG must each be interpreted in that context. The true question on this aspect in each case is whether the demand made on 2 August 2018 was a "non-complying demand" within the meaning of URDG 758 and thus one which the defendant was entitled to reject.

50. Article 12 of URDG 758 provides

> "*A guarantor is liable to the beneficiary only in accordance with, first, the terms and conditions of the guarantee and, second, these rules so far as consistent with those terms and conditions, up to the guarantee amount.*"

Thus, the liability of the guarantor is regulated by the terms and conditions of the guarantee and by the rules in so far as consistent with them. It was not suggested that Article 15 (infra), or indeed any other Article of these rules, was inconsistent with the PB (or the APG).

51. Article 15 of URDG prescribes the requirements for a demand. Article 15(a)provides:

> "*A demand under the guarantee shall be supported by such other documents as the guarantee specifies, and in any event by a statement by the beneficiary, indicating in what respect the applicant is in breach of its obligations under the underlying relationship...*"

52. Thus, in a case such as this, a demand, to be complying, must be supported as a minimum by a statement by the beneficiary indicating in what respect the applicant is in breach of its obligations under the underlying contract. It must also be supported "*by such other documents as the guarantee specifies*". A particular guarantee may not specify any other such documents; in which event the demand will be complying so long as it is supported by a relative statement of breach. On the other hand, if the guarantee does specify another document or documents, these must be presented in support of the demand. The words "*documents as the guarantee specifies*" are important. Consistently with the underlying principles of URDG 758 of clarity and precision, what is required (if anything) by such support is a document which the guarantee "*specifies*", that is, identifies, both clearly and precisely, as being required. If there is no such clear and precise identification of such a document, then there is no requirement for a demand other than that it be supported by a relative statement of breach.

53. The demand made on 2 August 2018 under the PG clearly set out a relative statement of breach (see paragraphs 35 and 37 above). Did the PG require more by way of a specified document or documents? The answer is plainly in the negative. In particular, the PG did not specify that a demand under it must be supported by a copy or copies of any claim or claims made upon PAT nor by a document referring to such a claim or claims. The inclusion in the PG of the words "in writing" falls far short of a specification of any such document. These words are not

surplusage. They restrict the scope of the guarantee to claims, whenever made, as are in writing. What they do not do is to specify additional documents required to support a demand when made. Accordingly, the defendant's contention that the demand made on 2 August 2018 under the PB was non-complying by reason of the absence of the documents desiderated must, as a matter of interpretation of the language of the guarantee as read with URDG 758, be rejected-unless there is persuasive authority to the contrary.

54. Mr Patel relied heavily on *AES-3C Maritza East 1 EOOD v Credit Agricole Corporate and Investment Bank and Another* [2011] EWHC 123 (TCC) and [2011] BLR 249, where Ramsey J held that a demand (there referred to as "the First Demand") was not a valid demand because it did not comply with clause 4(f) of the relative bond. That clause provided that the respondent bank should have no liability in respect of a demand which did not satisfy all of certain requirements, including "*(f) the demand contains any notice or claim against Contractor relating to the respective breach of its obligations to which the demand refers*". The bond in that case was subject, with certain exceptions, to an earlier version of URDG (namely, URDG 458). That earlier version was, in important respects, different from URDG 758: in particular, it did not include equivalents of Articles 15(a) and 24 (d) and (f).

55. As appears from the judgment in *AES*, certain notices or claims were, as required by clause 4(f), included with the demand. These were to the effect that the total which had been claimed from the Contractor amounted to €27 million. However, the amount actually demanded was €93 million. It was held that in these circumstances the demand for the larger sum was invalid.

56. Mr Patel placed particular reliance on certain observations made by the learned judge at paragraph 39 of the judgment, in particular: "*The purpose of the documentation under the URDG strongly supports the fact that prospective claims for sums payable by [the Contractor] at a future date are not to be the subject of demand under the Bond, even if such sums might inevitably be due and payable at a future date.*" The documentation referred to appears to be the notices or claims contained, in furtherance of clause 4(f), in the demand. The judge continued: "*That is not to say that in cases where, for instance, there are defects giving rise to claims for damages for breach of contract such claims could not be made. In such cases there is an accrued right to pay damages although the sum actually paid to make good those damages may not have been incurred.*"

57. These observations and the determination of that case were made in the particular context of the terms of the bond, including clause 4(f), sought to be enforced. The ground of judgment was that the amount demanded far exceeded the amount supported by the claim documents required to be contained in, and in fact contained in, the demand. That is very different from the position under the PB. In particular, it does not follow from the fact that the bond in *AES* expressly required notices or claims under the underlying contract to be contained in any demand that in the present case, where there is no such express requirement, a requirement to that effect is to be implied.

58. Although again the case turned essentially on its own facts, a contrasting result was reached in *Enka Insaat VE Sanayi AS v Banca Popolare Dell'alto Adige SpA* [2009] EWHC 2410 (Comm) where the issue was the significance of the word "*accordingly*" in an Advance Payment Guarantee, which also differed from the bond in this case by including a "conclusive evidence" provision and not being subject to any URDG. At paragraph 35 Teare J. held that, for various reasons, "*accordingly*" did not impose an obligation to state (or to have reason to believe) that the beneficiary had suffered damage in the amount claimed (or was entitled to repayment of the price advanced). The case merely illustrates that a different set of words may give rise to no implication that a beneficiary must state certain things, not expressly required, to render a demand valid.

59. As regards *Esal* (referred to in paragraph 49 above) the construction of the guarantee - which in that case found favour with Ackner and Glidewell LLJ, but not necessarily with Neill LJ - was that the beneficiary "*must (in the making of the demand) assert that the demand was made because the supplier had failed properly to execute the contract*". That, essentially, is what Article 15(a) requires with respect to the statement of breach. That requirement was met here. *Esal* does not support the proposition that additional documentation is required to "trigger" liability under the guarantee. In *I.E. Contractors* the construction favoured by the court of the (somewhat tortuous) guarantee under discussion was that "*the demand is required to state that it is a claim for damages brought by the contractors*", that is, it must identify that for which indemnity is demanded from the guarantor. The statement of breach, required by Article 15(a) and met here, goes further in that it requires identification of the breaches of obligation under the underlying relationship. *I.E. Contractors* does not assist the defendant.

60. There being no persuasive English or other authority to the contrary, the defendant's challenge to the validity of the 2 August 2018 demand on the PB must, for the reasons stated in paragraphs 52 and 53 above, be rejected. For the same reasons the defendant's challenge to

the validity of the demand made on that date on the APG must likewise fail. Lest it be thought to have been overlooked, mention should be made of Article 7 of URDG 758 (which militates against inclusion in a guarantee of virtually all conditions without specifying a document to indicate compliance with that condition). That Article, although referred to in argument, does not assist in resolving the issues in this case.

61. It should be added that a submission was also made that the demands on the PG and the APG were also non-complying by reason of the absence in each case of supporting documents identifying sums claimed to be payable or repayable respectively by PAT. But, neither guarantee specified that, on presentation of a demand under it, there must be tendered a document quantifying the loss sustained as at that date by reason of PAT's breach of obligation or what remained repayable under the APG as at that date; further, the demand on the APG in fact identified, by reference to the proportional reduction of the total amount guaranteed, the amount that was demanded, with a reservation of the right to make a further demand for the reasons there stated. So, this submission must also be rejected.

62. Issue 2.1.2 also refers to Article 17(e) of URDG 758, which renders a demand non-complying if any supporting statement or other documents required by the guarantee indicate amounts that in total are less than the amount demanded. This "excessive demand" provision parallels to some extent the circumstances in *AES* discussed above. The crucial difference is that in *AES* the bond expressly required the presentation of claims with the demand; in this case no such documentation was specified as being required.

Notice of discrepancy

63. Article 24 of URDG 758 (headed "Non-complying demand, waiver and notice") provides, under subparagraph (d), that, when a guarantor rejects a demand, it is to give a single notice to that effect to the presenter of the demand. That notice must state "*each discrepancy for which the guarantor rejects the demand*". By subparagraph (f) a guarantor who fails to act in accordance with subparagraph (d) is precluded from claiming that the demand does not constitute a complying demand.

64. The defendant did reject both of the demands made on 2 August 2018. These rejections may have been outside the short timescale allowed for stating a rejection but no point was taken on this; religious holidays may have intervened. The critical question is whether the alleged

discrepancies now relied on were notified in the rejections. The letters of rejection, both dated 26 August 2018, have been set out above (at paragraphs 38 and 40). Neither letter stated that the discrepancy for which the demand was rejected was either of the alleged discrepancies now relied on. There is in each letter, a call for verification that "*Notice was provided to PAT in relation to the Alleged Breaches as set out in the Demand*"; but that relates to verification that prior to termination of that contract PAT was given the requisite 30-day notice to remedy the breaches referred to. It does not state any discrepancy for which the defendant rejected the demand. Indeed, except possibly with regard to questioning the right of Leonardo (rather than Finmeccanica) to insist on the guarantees, the letters of rejection appear to focus more on rights and obligations under the underlying contract than on any legitimate basis for rejecting either of the demands.

65. "Precluded" means what it says. In a question between the beneficiary and the guarantor (here the claimant and the defendant respectively) a guarantor who fails within the (relatively short) period prescribed to state a particular discrepancy, cannot subsequently dispute that the demand made was not, by reason of that discrepancy, a complying demand. It cannot resist judgment against it on any such basis. Mr Patel submitted that the guarantor should be allowed to "amplify" its challenge subsequently, as in legal proceedings. But that would destroy the commercial purpose of an "on demand" guarantee by encouraging delayed challenges. Unless any challenge is made forthwith, the advantage of immediacy, together with the aims of clarity and precision, would be frustrated. The simple ground of preclusion is, on its own, sufficient to determine issues 2.1.1 and 2.1.2 in the claimant's favour.

Issue 2.1.3

2.1.3 "Whether the claimant demanded a sum under the APG that was greater than the amount guaranteed by the APG."

66. This issue relates only to the demand on the APG. That guarantee was, in furtherance of the Contract, issued on 19 April 2016. It guaranteed the repayment to the claimant of monies paid by it in advance, as provided for in the Contract. In terms of that guarantee as at the time of issue, the guaranteed amount automatically reduced proportionally to the value of each partial delivery and/or completion of the Contract works upon presentation of certain

documents. That provision of the guarantee was on 9 May 2016 replaced by a provision in the following terms:

> "*This guarantee shall be automatically reduced proportionally to the value of each partial delivery and/or completion of Design Procurement and Construction of Infrastructures and Plants for LLRS Systems Installation upon presentation by PAT to [the defendant] copies of the above mentioned project's relevant documents (Progress Invoice) approved, certified and signed by [the claimant] project representative.*"

67. Certain works were carried out by PAT under the Contract. Towards the end of 2016 PAT submitted to the claimant an invoice in the sum of €3,874,640 for design work. The claimant's Mr Soldati had invited PAT to submit an invoice for certain work done. That invitation was in the context of there being in that contract a "pay-when-paid" clause (clause 4.3) in the following terms:

> "*The payment due to [PAT] shall be made on a "flow down basis" and each payment shall be effected after receipt of the relevant payment from [Qatari Armed Forces*]".

Thus, while PAT may have done work and, at the claimant's invitation, invoiced the claimant for it, PAT had no entitlement to receive payment until the claimant itself had received payment for that part of the works from the ultimate employer, the QAF. No doubt the claimant hoped in December 2016 that it would be paid promptly by the ultimate employer, thus opening the way for PAT in turn to be paid by the claimant. In the event no such payment, in so far as appears, was made by the ultimate employer at any time during the running of the Contract.

68. The situation in relation to PAT's invoice and the claimant's attitude to works carried out by PAT will be explored more fully when the defences of fraud and unconscionability are discussed later in this judgment. However, for present purposes what is important is by what sum, if any, the sum originally covered by the APG (€12,210,000) was reduced by operation of the proportional reduction provision (as replaced). Such reduction could contractually occur only "*upon presentation to [the defendant] copies of the above projects relevant documents (Progress Invoice) approved, certified and signed by [the claimant] project representative*".

69. It is clear that, if there was any such presentation, the defendant must know of it and be able to exhibit in this process the relevant copy documents approved, certified and signed by the claimant's project representative. There has been no such exhibition by it. The inevitable inference is that there never was any such presentation by PAT to the defendant. It matters not, for the purposes of issue 2.1.3, whether in some other way the claimant acknowledged that PAT had done work of value for which, subject always to the "pay when paid" clause, it had a right to receive payment from the claimant. Unless the terms of the replaced proportional reduction provision in the APG were satisfied, the amount covered by that guarantee remained unreduced and, in a question between the claimant and the defendant, the latter remained fully exposed under the guarantee in that unreduced amount. In the event, the claimant on 2 August 2018 demanded, for reasons referred to in that demand, a lesser sum than that which it might have demanded.

70. But that under-demand does not assist the defendant.

71. In relation to issue 2.1.3 no contention was advanced by the claimant founded on Article 24 of URDG 758. So, it is unnecessary to discuss that Article in the context of that issue. However, for the reasons expressed above the defendant must also fail on that issue.

Issue 2.1.5 and the claimant's application for summary judgment by reason of the fraud defence

Issue 2.1.5: "Whether the claimant made the demands fraudulently in the particular respects pleaded by the defendant."

72. The defendant's case is that the claimant's demands were made fraudulently and that this provides a defence to the claimant's claims. Issue 2.1.5 can conveniently be considered together with the claimant's application for summary judgment in the sum of €14,619,440, made on the ground that there is no prospect that the fraud defence can succeed.

73. Article 22.6 of the Court's Rules permits the Court, if it considers that justice so requires, to give summary judgment on a claim or defence or on any issue.

74. As pleaded, the defendant's case is summarised in paragraph 3(b) of its defence. The essence is its contention that the claimant presented its demands under the guarantees fraudulently, as

they contained representations that the claimant knew to be untrue and/or that the claimant was reckless as to the truthfulness of their representations. The fraudulent representations were that the claimant was entitled to recover the total sum of €14,619,440 from the defendant (ie the total demanded in August 2018). They allege that the demands amounted to a representation that PAT was entitled to no payment at all for any of the work which it had carried out under the Contract, over a two-year period, and that the claimant was entitled to a further claim against PAT for €2,409,440. The claimant did not have, and could not have had, an honest belief in the truth of that representation. The claimant had not set out claims against PAT in the sum of €14,619,440 either in the two August 2018 demands or prior to that date. Further, as the claimant knew or should have known, the claimant could not have had a claim against PAT in that sum on the date on which the demands had been made.

75. The defendant's allegations of fraud are of a most serious nature. Mr Patel for the defendant accepts that it must show that the only realistic inference to be drawn from the evidence is that the demands were made fraudulently. The claimant accepts that it bears the burden of proving that summary judgment should be granted. In *National Infrastructure Development Company Limited v Banco Santander* [2018] 1 All ER (Comm) 156 at para [23] the (English) Court of Appeal approved the composite test formulated by Teare J in *Enka Insaat* (supra) for whether summary judgment should be granted in a context such as this. That test was "*whether there is a real prospect that the [guarantor] will establish at trial that the only realistic inference is that the fraud exception applies"* and that, in applying that test, *"the Court must be mindful of the principle that banks, when sued on a letter of credit or performance bond or guarantee, need particularly cogent evidence to establish the fraud exception.*" That test is apt in the present context.

76. The Court has been provided with two witness statements from Mr Soldati and one witness statement from Mr Jones, a partner in Clyde & Co, the defendant's lawyers. The defendant relies on a substantial volume of material in relation to what it contends are PAT's entitlements under the Contract.

77. Mr Patel accepts that the demands did not need to be correct; the claimant's duty was to act in good faith. The defendant relies on the following to demonstrate the claimant's lack of honest belief that it was entitled to payment of a total of €14,619,440 under both guarantees: The claimant initially demanded €12.2m under the APG then claimed a lower sum in its second demand under the APG; the claimant's own request in December 2016 that PAT invoice for €1,660,560 pursuant to the split milestone, indicating that the claimant knew that PAT was entitled to payment of at least that sum; the claimant's admission, in relation to audit, that it

was indebted to PAT in the sum of €3,874,640. The defendant challenges Mr Soldati's evidence on the ground that no honest witness would have failed to mention in a witness statement the December 2016 invoice. The claimant has not even now explained or justified its own demands. It is difficult to conceive of circumstances in which the breaches asserted in the claimant's demands could result in claims of the value of the sums demanded. The claimant's claims are based on an asserted final account position which is inherently incredible, ie one in which PAT would be entitled to no payment after two years' of work.

78. The Court bears in mind that Mr Soldati's evidence has not been tested. Nevertheless, on careful review of that evidence, the Court considers that the criticisms of Mr Soldati are unfair. His evidence is that he had a genuine belief that the claimant was entitled to make demands under both guarantees. He explains the contemporaneous assessment that he made of the claims which the claimant might have against PAT. He understood that no down payment recovery had occurred because the claimant had not authorised any payment to PAT because no milestone had been reached and, in any event, no relevant payment is said to have been received from QAF. Mr Soldati had taken legal advice before making the demands. He has explained why the second APG demand was for a lower sum than the second demand: first, it was reduced by an amount equivalent to the first down payment recovery sum even though, he contends, the first, revised, milestone had not been attained, and, secondly, an internal decision had been taken to demand less than the full sum with the aim of obtaining swifter payment from the defendant. Mr Soldati has answered the defendant's allegations regarding information provided to the claimant's auditors (see paragraph 30 above). He has explained his genuine belief in these matters. There is no substantive contradictory evidence. Mr Patel's repeated assertion that the claimant failed to acknowledge the value of PAT's work, both before and after the rendering of the invoice in December 2016, proceeds on the false assumption that any entitlement which PAT had to payment for that work was unconditional (which it was not).

79. Both Mr Hale and Mr Patel refer to English authorities as to the test to be applied when considering whether a demand under a bond or guarantee of the type with which this case is concerned, has been made fraudulently. A demand which the maker does not honestly believe to be correct as to its amount is a fraudulent demand. A person making a demand must have an honest belief that the sums demanded are due. The authorities refer to "established or obvious fraud". Fraud must be established by compelling evidence. Fraud should not be extended into cases involving a dispute on the underlying contract. *Benjamin Sale of Goods 10th edition* summarises the principles:

paragraph 24-024 "*A claim under a letter of credit is fraudulent where it amounts to deceit on the part of the beneficiary, namely where the beneficiary does not or cannot honestly believe in the validity of the claim.*"

paragraph 24-027 "*it is a general proposition that fraud must be established by compelling evidence*". "*…'established fraud' means that the fraud must be capable of being established with clarity at the interlocutory stage*".

paragraph 24- 028 "The evidential standard for fraud presents a formidable challenge."

80. The defendant submits that the demands were invalid, due to fraud, because of the existence of cross claims by PAT due to alleged failures by the claimant, yet fails to identify the other equally realistic possibility, namely that the claimant's demands were genuine but that the underlying Contract was in a state of dispute. It appears that the defendant had consulted with PAT and undertaken an investigation into the Contract, yet it has not acknowledged that the claimant might have grounds for claiming from PAT. It has not taken into account either that, on termination of a contract of this nature, it is likely that there will be claims and cross claims, or that the Contract provided that payment would be made to PAT only on a pay-when-paid basis. The defendant has failed to appreciate that a realistic inference to be drawn was that the claimant's demands were genuine but that the underlying Contract was in dispute.

81. The claimant's demands did not have to be made on the basis of some sort of accounting as between it and PAT. There is nothing in the APG or PB to require the claimant to give credit for any demands which PAT might have for unpaid work. The existence or possibility of valid claims for unpaid work is not incompatible with a lawful demand on either guarantee.

82. It is not the Court's task to attempt to examine the liabilities and entitlements of the claimant and PAT under the Contract.

83. A significant inconsistency in the defendant's case is that it did not, in the rejection notices, contend that the demands had been made dishonestly. On 29 July 2018 Clyde & Co wrote to the claimant concerning the demands and rejections. In that letter Clyde & Co did not mention dishonesty. Yet, the defendant contends, the demands were obviously dishonest.

84. Mr Patel relies on *HLC Engenharia E Gestao de Projectos SA v ABN Amro Bank* [2005] EWHC 2074 and *Tetronics (International) Ltd v HSBC Bank plc* [2018] EWHC 201 (TCC). In *HLC* Coulson J decided that the evidence was sufficient to enable him to conclude that the only inference to be drawn was that the demand had been made fraudulently. In *Tectronics*, Fraser J said that the facts of that case were unusual and concluded that the beneficiary's allegations as to breaches were "demonstrably false" on the evidence. The facts in both cases were such as to enable the court to find fraud. The facts in this case do not lead to that conclusion. The Court is not assisted by either case.

85. The evidence in this case does not support the defendant's contention that the claimant, or Mr Soldati, did not honestly believe that the demands to be made were correct demands. A court should refuse to honour a financial instrument, like a demand guarantee, on fraud grounds only in the very clearest cases of fraud, that is, where no other sensible conclusion can be reached. The defendant's case falls substantially short of that. Moreover, as Longmore LJ said in *National Infrastructure* (supra) at para [33]: "*It cannot be fraudulent to make a demand one is entitled to make*." As held above in relation to issue 2.1.3, the claimant was, at the time of making the demand on the APG, entitled to repayment of the whole amount which had been advanced (€12,210,000). It cannot have been fraudulent for it to demand, as it did, a lesser sum (€10,549,440). While the matter of substantive entitlement is not so immediately evident in relation to the PG, the test for summary judgment is, for the reasons given above, also satisfied in relation to it.

86. The Court should refuse to honour a financial instrument like a demand guarantee on fraud grounds only in the very clearest cases of fraud, that is, where no other sensible conclusions can be reached. That is not the positon here. The defendant is thus not entitled to the declaration sought at 2.1.5.

87. The Court concludes that the claimant has demonstrated, to the high level required for summary judgment, that it is entitled to judgment now on its claim for €14,619,440, and that it is in the interests of justice that the claimant's application for summary judgment should succeed. Accordingly, the claimant is entitled to summary judgment for payment, now, of €14,619,440.

Issue 2.1.4

"2.1.4: Whether the claimant's demand on the APG is invalid on the grounds that the claimant cannot profit from its own wrong (which the claimant denies) by making a demand on the APG

that did not recognise the alleged value of the unpaid work that PAT had allegedly carried out prior to termination of its subcontract with the claimant."

88. The parties refined the scope of issue 2.1.4 as "... a preliminary issue on the narrow legal question of whether the defendant is entitled to raise this species of defence as a matter of law, where the defendant is seeking to resist a call on a bond". At an early stage during the hearing on 29 July there was a dialogue between the Bench and Counsel as to whether either iteration could be satisfactorily dealt with as proposed, not least because of the need for a clear and unequivocal factual scenario within which the ruling would be rooted. A possibility which emerged was that the claimant might seek summary judgment on this point having regard to the specific legal point which the defendant had introduced. Consequently, and without opposition, the claimant filed and served a second application for summary judgment reflecting that issue. That is dealt with in the following section of this judgment.

89. As discussed later in the context of the application for summary judgment, this issue developed as the case progressed. It came to be a contention by the defendant that this Court should adopt and apply a doctrine developed in Singapore under which the court can, on the basis of "unconscionability", prevent a beneficiary under a demand guarantee enforcing it according to its terms.

90. It is not suggested that any such doctrine is part of the existing law of the QFC in relation to demand guarantees; nor that it is part of existing Qatari domestic law in that area (demand guarantees being recognised in the Commercial Code). However, there is no reason why this Court, regard being had to its international character, should not adopt a doctrine developed in another jurisdiction if to do so would be appropriate in the administration of justice before it. The question then is whether the adoption of that doctrine would be appropriate in the present context.

91. As the formulation and refinement of issue 2.1.4 make plain, the issue in this case relates only to the APG, not to the PG. For the reasons given later in disposing of the application for summary judgment, the Court is not persuaded that, even if the Singaporean doctrine were to be adopted, this would assist the defendant in this case.

92. The APG, although a unilateral document, is of a contractual nature. Contracts, at least generally, should be enforceable according to their terms. There are, however, exceptions. One such exception is where there is fraud. It is well established as a matter of English law that, in

relation to demand guarantees, "fraud unravels all". That principle has been widely received internationally.

93. There has been no such wide acceptance internationally of the Singaporean doctrine of unconscionability. In the course of argument Mr Hale referred the Court to Professor Nelson Enonchong's work entitled "*The Independence Principle of Letters of Credit and Demand Guarantees*" (2011). In chapter 7 the learned Professor addresses the "Unconscionability Exception" and discusses in that context not only English law but also the law in other jurisdictions, including that of Singapore. At paragraphs 7.29 to 7.35 he addresses the question whether, as a matter of legal policy, English law should recognise a general unconscionable conduct exception. His submission (at paragraph 7.29) is that on balance the policy reasons against recognition of the exception outweigh the reasons in favour of recognition and that therefore English law should not adopt it. Three main reasons are advanced against recognition. These, taken shortly, are (1) that the doctrine of unconscionability is an imprecise and vague ground for relief (paragraph 7.33), (2) that its recognition will result in more frequent judicial interference in the operation of the relative instruments (paragraph 7.34) and (3) that its recognition is likely to get the courts involved in to what are essentially disputes relating to the underlying contract, a matter with which the guarantee is not truly concerned (paragraph 7.35).

94. This Court finds that submission persuasive in the context of the enforcement of demand guarantees in this jurisdiction. The whole commercial purpose of such instruments, including advance payment guarantees, is to obviate the need for the parties to them to enter, at the stage of a demand under them, into disputes arising from the underlying contract. Such disputes may require to be addressed and resolved later. But, the commercial purpose of the guarantee is that the beneficiary under it obtain immediate relief, although it may require to give an accounting subsequently. While fraud, where obvious, may operate as an extra-contractual bar to the operation of contractual rights, wider exceptions are not to be encouraged. However, it is unnecessary for the resolution of these applications to exclude the possibility that, in some unusual case, an extra-contractual defence other than fraud might be available. For the reasons given below the facts of this case do not approach the making out of any such defence.

The claimant's second summary judgment application

95. As set out above, the final matter at the hearing was a second application for summary judgment by the claimant which was introduced during the hearing on the narrow point raised above in

2.1.4 with regard to the APG. This additional application is founded on the same factual scenario already canvassed. The defendant in the course of the hearing positively consented to this new aspect of the case being determined by the Court as part of the preliminary matters. It was mutually agreed that all documentation already filed was available for the parties to rely upon. The core point is circumscribed by the original pleadings and much which is said about the facts and in respect of the test for summary judgment when discussing the fraud defence is applicable here.

96. As noted in the section dealing with issue 2.1.4 above, the critical matter is whether a guarantor can resist a demand on a demand guarantee on the basis that, if the demand was met, it would result in the beneficiary profiting from its own wrong.

97. Responsibly the defendant consistently has acknowledged and conceded that there is no such defence in English law. However, the Singapore Courts have on a number of occasions accepted that, in cases falling short of fraud, where the demand is "unconscionable" a demand guarantee may be restrained.

98. The position is encapsulated in two judgments of the Singapore Court of Appeal and the possibility is advanced by the defendant before us as follows. Although the Singaporean doctrine of unconscionability in relation to demand guarantees has been set out in a number of cases, it is sufficient to refer to two judgments of the Singaporean Court of Appeal. In the first, *JBE Properties v Gammon* [2010] SGCA 46, the then Chief Justice, Chan Sek Keong CJ explained at paragraph 11 of the judgment the basis on which the Singaporean Courts had decided to depart from English case law. That paragraph is reproduced in full below:

> *"Even where a performance bond is expressed to be payable "on first demand without proof or conditions" (as in Edward Owen Engineering (at 170)), which, strictly speaking, means the paying bank is contractually obliged to pay the beneficiary once it makes a call on the performance bond, there is no reason why fraud (which is often difficult to prove) should be the sole ground for restraining the beneficiary from receiving payment. To adopt such a position is to "apply a standard of proof which will virtually assure the beneficiary [of] ... immediate payment ... and ... does nothing more than to transfer the security from the [paying bank] ... to the beneficiary" (see Chartered Electronics at [37]). This may in turn cause undue hardship to the obligor in many cases. For instance, where a call is made in bad faith, especially a call for payment of a sum well in*

excess of the quantum of the beneficiary's actual or potential loss, the beneficiary will gain more than what it has bargained for. Furthermore, if the amount paid to the beneficiary pursuant to a call is subsequently proved to be in excess of the quantum of its actual loss, the obligor runs the risk of being unable to recover any part of the excess amount should the beneficiary become insolvent. Yet another relevant consideration is that an excessive or abusive call can cause unwarranted economic harm to the obligor. This is particularly relevant in the context of the construction industry, where liquidity is frequently of the essence to contractors. In this regard, while the sum stipulated to be paid under a performance bond is usually pegged at only 5% to 10% of the contract price, this typically amounts to one or more progress payments under a building contract. In very large building contracts, the deprivation of a whole progress payment might well be fatal to the contractor-obligor's liquidity. These concerns are by no means fanciful, as evidenced by the mechanisms evolved by the construction industry to ensure the quick settlement of disputes relating to progress payments."

99. The Singapore Court of Appeal reiterated the availability of an unconscionability defence in the case of *Mount Sophia v Join-Am* [2012] SGCA 28. At paragraph 20, Andrew Phang Book Leong JA noted that an applicant seeking to restrain a demand on a demand guarantee needed to establish a "strong *prima facie* case of unconscionability". At paragraph 37 of the *Mount Sophia* judgment, the judge also elaborated what the Singaporean Courts meant by "unconscionability":

"Although unconscionability itself may not carry a precise definition, from the beneficiary's point of view, what constitutes unconscionable conduct should be reasonably apparent. It is probably very difficult to negligently act in bad faith, especially where positive action is required for a call on a performance bond. If the beneficiary's call on the bond is motivated by improper purposes, or such a call cannot be justified with clear evidence; or in any other situation where the beneficiary is less than certain about his entitlement to call on the bond and for what amount, the beneficiary ought to take a step back and re-examine its entitlement and conduct prior to calling on the bond. Unfairness is also an element of unconscionability, and the question as to whether or not notice was afforded to the obligor of

his alleged breach before the beneficiary's call on the bond would also be a relevant consideration."

100. Mr Patel argued that it is open to this Court to adopt such an approach and not simply to embrace the law as it exists in most western jurisdictions. In oral argument he relied heavily on Article 16 of the Contract, including 16.2 (the terms of which are recited at paragraph 24 above). While the language of that provision has its difficulties, it is clear that it envisages a liability, not an entitlement, of the Supplier (here PAT). It gives no support to the contention that the claimant, in making the demand on the APG, "profited from its own wrong" or unconscionably failed to acknowledge an entitlement of PAT.

101. An important point needs to be noted. The contractual arrangements in this case both incorporated the URDG which was not the position in the Singapore cases. The URDG emphasises the importance of reflecting international standard processes and expectations and it is submitted by the claimant that unconscionability does not reflect the orthodox international common law position.

102. Reliance was placed by the claimant on Wood, *International Loans, Bonds, Guarantees, Legal Opinions,* 3rd Ed, 2019, Vol 3, which at 38-020 notes:

"The international consensus in developed countries seems to be that international trade is fostered by enhancing liquidity and certainty of bank guarantees, and that the only exception should be clear fraud on the part of the beneficiary. This consensus is well documented in a study by Professors Norbert Horn and Eddy Wymeersch in "Bank Guarantees, Standby Letters of Credit and Performance Bonds in International Trade" in N Horn (ed) The Law of International Trade Finance (Kluwer, 1989), pp455-529."

103. The Court does not find it necessary, and therefore considers it inappropriate, to determine the matter at a level of high principle as it is satisfied that, on the facts in this case, there is no prospect that this defence, if it existed in this jurisdiction, could be sustained in this litigation.

104. The demands made were wholly consistent with the contractual arrangements between the parties as outlined earlier. There is a divide between the arrangements which related to the claimant and PAT and the issues which are before us between these parties.

105. The pay-when-paid regime and the accounting obligations are essential parts of the commercial environment. The claimant had made an allowance in the APG demand for a sum which it might have been thought, at that stage, not to be in contention. There is no evidence of improper purpose, bad faith or unfairness in the steps taken in making the demand.

106. Even if the Court were to embrace the Singapore approach there is no prospect of the defence succeeding and therefore the claimant should have summary judgment on this aspect also.

Costs

107. The claimant has succeeded on all preliminary issues and both applications for summary judgment considered by the Court. Accordingly, the defendant should pay the claimant's reasonable costs of and relating to those matters.

By the Court,

Justice Frances Kirkham

Representation

The Claimant was represented by Mr. Simon Hale, Counsel, 4 New Square, London, UK.

The Defendant was represented by Mr. Sanjay Patel, Counsel, 4 Pump Court, London, UK.

DIGITALLY SIGNED AND VERIFIED
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