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

Neutral Citation: [2024] QIC (F) 55

IN THE QATAR FINANCIAL CENTRE

CIVIL AND COMMERCIAL COURT

FIRST INSTANCE CIRCUIT

Date: 28 November 2024

CASE NO: CTFIC0042/2024

THALES QFZ LLC

Claimant/Applicant

V

ALJABER ENGINEERING W.L.L.

Defendant/Respondent

AND

BNP PARIBAS QATAR

Notice Party

JUDGMENT

Before:

Justice Fritz Brand

Order

1. Pending the outcome of the action instituted by the Applicant as the Claimant against the Respondent as the Defendant in this matter, the Respondent is ordered to:

    i. Withdraw, unequivocally and unconditionally, the demand for payment it issued to BNP Paribas – Qatar dated 29 October 2024, pursuant to the Performance Guarantee dated 30 January 2022 with reference number 6691lGQ2200069 (as extended until 31 October 2025), relating to the Subcontract concluded between the parties on or about 29 January 2022 with reference number 383/SC/010/22.

    ii. Communicate such withdrawal to BNP Paribas - Qatar in writing forthwith and send a copy of such written communication to the Applicant.

2. Paragraphs 4, 5, and 6 of the Interim Injunction issued in this matter on 7 November 2024, read with paragraphs 1, 3, and 4 of Schedule B thereto, are hereby confirmed, pending the outcome of this case.

3. The Respondent is directed to pay the reasonable costs incurred by the Claimant in this application, including the costs of the hearings on 7 November and 17 November 2024, the quantum of such costs to be determined by the Registrar if not agreed.

Judgment

1. On 7 November 2023, this Court granted an Interim Injunction against the Respondent pursuant to an ex parte application by the Applicant, with 17 November 2024 as the return day of that Order. In accordance with the terms of the Order, the documents presented to the Court at the initial hearing were duly served upon the Respondent. On the return day, both parties were legally represented, and the matter was fully argued de novo. I thereupon reserved judgment in the matter, which I hereby hand down.

2. Pending the return day, I formulated written reasons for granting the Interim Injunction (the '**Reasons**'; **[**2024] QIC (F) 53). The Reasons also reflect the background of the application and the arguments advanced in support thereof, which were repeated on behalf of the Applicant on the return day. As I see it, a reiteration of the same subject matter would be a futile exercise. Hence, I propose that this judgment be read as a continuation of the Reasons instead.

3. As appears from the Reasons, the Applicant accepted, at least for the sake of argument, that the Performance Guarantee relied upon by the Respondent is a self-standing, autonomous on-demand performance bond and that the Letter of Demand of 29 October 2024 constitutes a demand as contemplated by the terms of the bond.

4. Accordingly, the sole basis for the Applicant's challenge of that demand rested, and still rests, on what has become known as the "*fraud exception*," as recognised by this Court, for instance, in *Obayashi Qatar LLC v Qatar First Bank LLC [2020] QIC(F) 5* at paragraph 90 and in *Leonardo SpA v Doha Bank Assurance Company LLC [2019] QIC (F) 6* at paragraph 75. (Appealed but not against the fraud exception; see [2020] QIC (A) 1).

5. As explained in the Reasons, the gravamen of the fraud exception is that despite the general rule that the courts will not normally interfere with calls and payment against calls pursuant to self-standing on-demand bonds on the basis of objections by the procurer of the bond, or disputes between the procurer and the beneficiary, the Court will restrain a call if it is established that it was fraudulently made. As to when a demand or call can be said to have been fraudulently made, it is accepted on good authority that a call is fraudulent where it is made with no honest belief in the truth of the contents or recklessly, with the maker of the demand not caring one way or the other whether the contents of the demand are true or false.

6. Stated somewhat differently, the principle is that the Court will not interfere with the exercise of a demand for payment under a demand bond on the basis of an allegation that it is not true to say that the beneficiary is entitled to payment under the bond, for instance, because the allegation that the procurer has acted in breach of the underlying contract is untrue. The Court will only interfere if it can be shown that the demand is

dishonest, in the sense that the maker of the demand knew that the allegation on which it is based is untrue or was reckless in not caring whether the factual allegations relied upon for the demand were true or false. By the inherent nature of the onus, this normally entails a high hurdle for the challenger to overcome.

7. As also explained in the Reasons, the factual basis advanced by the Applicant for its reliance on the fraud exception derives from the allegation in the challenged demand of 29 October 2024 that the underlying contract between the parties had been terminated due to the Applicant's breach. The Applicant contended, in its submissions, that this allegation was untrue because the Respondent has never purported or attempted to terminate the underlying subcontract.

8. Moreover, and more importantly, the Applicant contended that the maker of the demand knew that the allegation was untrue. In support of this contention, the Applicant relied on the fact that the Respondent's Defence and Counterclaim in the main case, which was filed on 3 November 2024 (four days after the letter of demand), does not rely on any termination of the subcontract at all. On the contrary, in these pleadings, the Respondent denied that the subcontract had been terminated by the Applicant and sought an order compelling the Applicant to maintain the Performance Guarantee until the completion of the Applicant's performance under the subcontract, which by implication is still valid and enforceable against the Applicant.

9. In its answer to the application, the Respondent relied mainly on the proposition that the Performance Guarantee is a bond payable on demand, which is not subject to claims and defences arising from the underlying contract. The proposition is undoubtedly supported by good authority and was, in fact, conceded by the Applicant from the outset.

10. With regard to the fraud exception, which constitutes the entire basis for the Applicant's case, the Respondent's answer was twofold. Firstly, the immunity of an on-demand guarantee from objections by the procurer, who is not a party to the guarantee, even trumps allegations of fraud by the procurer. Secondly, the Applicant's accusations of fraud had not been established on the facts of this case.

11. In support of the first answer, it was contended on behalf of the Respondent that allegations of fraud are reserved for the province of the criminal courts and do not constitute a valid basis for challenging the validity of a call for payment by the beneficiary pursuant to an on-demand guarantee, made by someone who is not a party to the independent contractual relationship between the guarantor and the beneficiary. However, I find this argument unsustainable, as it is irreconcilable and in direct conflict with the fraud exception, which has been accepted in earlier decisions of this Court.

12. As to the second answer, my earlier decision to grant the interim injunction, as set out in my Reasons, was based on the conclusion that the facts relied upon by the Applicant justified the inference, at least on a prima facie basis, that the author of the letter of demand must have known that the allegation that the subcontract had been terminated was untrue. This inference was primarily based on the allegations and the relief sought in the Respondent's Defence and Counterclaim, which were plainly founded on the premise that the subcontract was still valid and enforceable.

13. As also stated in my Reasons, a further basis for my conclusion that the allegation of termination, which is crucial to the demand, was, to the Respondent's knowledge, unfounded, arose from the fact that the Applicant had suspended its work under the subcontract in January 2023 and purported to terminate the contract in February 2023. Yet, the Respondent made no attempt to call on the Performance Guarantee. It was only after the Claim Form was filed and shortly before the Defence was due that the demand was made, on the face of it, with the aim of gaining a tactical advantage in the course of the litigation.

14. As was argued on behalf of the Respondent, it is true that the bond prescribes no time limit for making the demand, and thus, it may be made at any time. However, this argument misses the point. The point is that, on the face of it, the Respondent made the demand to gain a tactical advantage, regardless of whether its contents were true or false. This also addresses the further argument on behalf of the Respondent that the beneficiary's motive for making the demand is irrelevant. Though, in principle, the proposition is correct, it is subject to the qualification that if the apparent motive gives rise to an inference that the demand was fraudulently made, it is clearly relevant for that purpose.

15. As I noted at the time of the initial hearing and as set out in my Reasons (**[**2024] QIC (F) 53 at paragraph 13):

> *It is undoubtedly possible that, on the return day, the Respondent may be able to establish the truth of the allegations on which the demand relies. But at this stage, I find that the Applicant has made out a prima facie case, which is sufficient for present purposes.*

16. What I obviously had in mind is that, in response to the application, the Respondent would provide a justification or an explanation as to why the averment that the subcontract had been terminated was, in fact, true, or at least as to why the Respondent believed it to be true when the statement was made. In any event, the argument on the return day would then focus on the plausibility of that explanation.

17. Surprisingly, however, that never happened. Not a word was said in the Respondent's answer to the application in support of the allegation that the subcontract had been terminated, nor was there any explanation of the Respondent's bona fide belief that this allegation was true. In this light, I agree with the Applicant's argument that, absent any denial whatsoever of the challenge that the Respondent made the demand, knowing that it was untrue, that challenge had been established as a fact.

18. As a result, I find that the Applicant had succeeded in establishing the basis for the fraud exception, with the inevitable consequence that the Respondent's reliance on the demand must be restrained.

19. As to the costs of the application, I can think of no reason why costs should not follow the event. Since the Applicant is clearly the successful party, it is therefore entitled to its costs, including those incurred in both hearings. The quantum of such costs is to be determined by the Registrar if they are not agreed upon between the parties.

20. These are the reasons for the Order I propose to make.

By the Court,

[signed]

Justice Fritz Brand

A signed copy of this Judgment has been filed with the Registry.

Representation

The Claimant/Applicant was represented by Mr James Bowling of Counsel (4 Pump Court, London, United Kingdom), instructed by Al-Tamimi and Company (Dubai, United Arab Emirates).

The Defendant/Respondent was represented by Mr Hassan Okour of Alhababi Law Firm (Doha, Qatar).