IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

TECHNOLOGY & CONSTRUCTION COURT (QBD)

[2020] EWHC 968 (TCC)

No. HT-2020-000032

Rolls Building

Fetter Lane

London, EC4A 1NL

Friday, 14 February 2020

Before:

THE HONOURABLE MR JUSTICE WAKSMAN

B E T W E E N :

TECNICAS REUNIDAS SAUDIA FOR SERVICES AND CONTRACTING CO. LTD.

Claimant

- and -

THE KOREA DEVELOPMENT BANK

Defendant

MR R. CHOAT (instructed by Cameron McKenna Nabarro Olswang LLP) appeared on behalf of the Claimant.

MR A. HAYDON QC (instructed by Fladgate LLP) appeared on behalf of the Defendant.

J U D G M E N T

MR JUSTICE WAKSMAN:

Introduction

1 This is an application for summary judgment brought by Tecnicas Reunidas Saudia For Services and Contracting Company Limited ("TRS"), the main contractor, in relation to a major construction project in Saudi Arabia. It is thus the employer of the sub-contractor relevant to this case. TRS is a Spanish entity. The Defendant bank, as its name suggests, the Korea Development Bank, is a South Korean bank ("the Bank"). The claim is for judgment on a demand guarantee which was executed by the Bank in favour of TRS at the instruction of the relevant sub-contractor or its parent company, which was a condition of the sub-contract to be entered into between TRS and the sub-contractor. It was a guarantee in relation to certain advance payments which were contractually required to be made by TRS to the sub-contractor. It guaranteed the return of such of the advance payments as had not been used up in paying for work actually done in the event of default by the sub-contractor in relation to the project ("the Guarantee").

2 In this case, TRS says that the sub-contractor effectively walked off site in around middle to late 2019, and as a result it made demand upon the Bank pursuant to the demand guarantee. The Bank has not paid. There is now, in reality, one point, but an important one, taken by the Bank, as to why it was entitled not to make payment under the demand guarantee; I will refer to the details of this hereafter.

Background

3 I should now explain something of the background.

4 A number of demands were made upon the Bank but in fact the only one which is relevant for today's purposes is that made on 30 December last year. Shortly before that, TRS became aware that a court in Korea was being moved by the sub-contractor, or the subsidiary or parent company, for an injunction to prevent the Bank from paying out under the guarantee if it was otherwise disposed to do so. The reason why the sub-contractor said it was entitled to such an injunction was because it said that there was underlying fraud in relation to the guarantee or performance on site or matters of that kind, an argument which would appear to be somewhat wider than the limited principle of English law dealing with circumstances where the court should prevent a bank from paying out under a guarantee.

5 What then happened was that TRS joined in the proceedings in Korea objecting to the injunction. I will say more a little later about the particular part played by the Bank and, indeed, the sub-contractor, Sungchang, in those proceedings. But the present position, and the position a couple of weeks ago, was that it was thought at that stage that a judgment would soon come out in Korea and might end up with an order preventing the Bank from paying out under the guarantee. The Bank would be forced to observe such an order and could use that as a reason for not paying out in any proceedings brought here. That injected a degree of urgency into the situation, although I was not prepared to grant an *ex parte* injunction here for the money to be paid into court, when it was eventually sought some weeks after TRS knew about all of this. In the event, the injunction side of things has gone away because the Bank has accepted that it could not rely on any Korean injunction sought by Sungchang to resist enforcement, if the application for summary judgment here succeeds. In other words, whatever happens in Korea, that cannot stop the Bank from being obliged to make payment, provided there is a judgment against it here.

Summary Judgment Application

6 On that basis, what was left was the application for summary judgment. The principles under Part 24 are well known. The claimant must demonstrate that the Bank has no real prospect of

successfully defending the claim and it must also show that there is no other compelling reason for a trial. On the one hand, the court must not conduct an inappropriate mini-trial. On the other hand, the defence to be advanced, in order to pass the real prospect threshold, must be real and not fanciful.

7 For the purpose of this application, a number of witness statements have been provided, though it is not necessary to make detailed reference to them. It is the documents that they refer to that are more important. But for the record, I should say that in total there have been three witness statements of Mr Wood - on 27 January, 31 January and 10 February - and there have been two witness statements from Mr Breslin of the Bank's solicitors opposing this application - they are dated 7 and 12 February.

The Guarantee

8 Let me then turn to the Guarantee itself. It has passed through various iterations, but the form in which it was operative prior to any demand being made has been set out in the skeleton argument of TRS and I am going to read from that. It is not suggested that it is inaccurate in any way. It first of all refers to the beneficiary as TRS, giving its full company name, its company number and its address. Secondly, the guarantor, which, again, is given its full name, but also the full name of the advising bank, BNP Paribas SA ("BNP"). Then the applicant, which is the relevant Sungchang and Abdullah Al-Shaikh Contracting Co Ltd, giving its address in Saudi Arabia. And then the operative clauses:

> "We, The Korea Development Bank, with all the relevant details, have knowledge of subcontracts number [then it is given]..dated 20 November between TRS (the contractor) and Sungchang (the sub-contractor) for the execution of electromechanical works. We hereby guarantee, irrevocably and unconditionally undertake to pay to the beneficiary any or all sums up to the aggregate maximum amount of SAR 40.505.563[it is about £8 million, I think, which is referred to as the guarantee amount]…equivalent to the amount of the advance payment made by the contractor to the sub-contractor as security for the faithful observance of the obligations arising out of the mentioned subcontract. The guaranteed amount will be paid to the beneficiary within five business days after receipt of your first written simple demand signed by the beneficiary duly authorised officer indicating that the sub-contractor has failed to fulfil any of the conditions of the subcontract and the beneficiary has wired the sub-contractor, as advance payment, an amount equal or larger than the demanded amount date the date of remittance without restriction and notwithstanding any objection of the sub-contractor. It is a condition for any claim and payment under this guarantee to be made that the funds paid as advance payments subject to the terms of the subcontract must have been received by the sub-contractor on its account number 042-117994-03 held with HSBC."

I shall refer to this last clause hereafter as the "HSBC condition".

9 It then goes on to say that the guarantee will be effective from the date of issue and until 31 December 2019, the expiry date. That date had been extended on at least one occasion.

> "Any demand under this guarantee must arrive at our counter by no later than end of business hours of the expiry date, this guarantee shall automatically become null and void whether or not its original copy is returned to us. This guarantee shall be governed and construed in accordance with the laws of England and Wales and shall be subject to the ICC Uniform Rules for Demand Guarantees URDG ICC Publication 758. If, in case of any conflict between the laws of England and Wales and the ICC Uniform Rules for Demand Guarantees ICC Publication 758, the latter shall prevail."

10 And then there is a jurisdiction clause identifying the courts of London as having the relevant jurisdiction.

11

12 It ends,

> "Yours faithfully, Korea Development Bank."

13 On 30 December 2019, TRS's demand was for the full guaranteed amount. That presentation was made by TRS personally in Seoul to the Korea Bank.

14 It is common ground that if the HSBC condition is not fulfilled, then there is no amount validly due on 30 December and there cannot be a further presentation because the guarantee expired the following day. If there is a real prospect, therefore, that the argument for breach will succeed at trial, summary judgment must be refused. If there is no real prospect and no other compelling reason for a trial, then judgment should be granted.

The Facts

15 So far as the underlying facts are concerned, first, TRS says that it made the relevant advance payment to Sungchang on 17 October by paying it in response to the invoice for that payment sent to it by Sungchang. The bank details provided for the payment to be wired (which it was) were as follows. It said "the Saudi British Bank", which we have all been abbreviating to "SABB". It then gives an account number which corresponds to the account number in the guarantee. There is no evidence before me to suggest that that payment was not in fact made, and I proceed upon the basis that it was. If the payment was not made, that would be the very first point which Sungchang would be telling the Bank and which it would be telling the court in Korea and there is no suggestion of that kind.

The HSBC Defence

16 The defence raised now is to the effect that even if payment was made, it was not made to an account with HSBC Bank; rather, it was made to an account with the same account number but at SABB Bank. Put a little more formally, what the Bank contends is that when the guarantee refers to "at HSBC Bank", what that means, and can only mean, is that it is payment at a branch of a bank trading as HSBC Bank. The Bank says that payment to SABB, even with the same account number, does not fall within that definition and therefore the clause has not been fulfilled, or at least there is a real prospect of establishing that at trial. I ref to this as "the HSBC Defence".

17 First, it is necessary to say something about SABB Bank. It is a bank which, at the material time, was 40 per cent owned by HSBC Holdings Plc ("Holdings"). It was described in Holdings' 2018 Accounts as an "associate". An example of the logo used by SABB can be found at p.17 of B1, which I will turn up in a moment; what that logo shows is the words SABB in a very similar font to the font which is used by HSBC, followed by the well-known and distinctive HSBC symbol; this comprises the two triangles facing each other within four red triangles. There is then some Arabic on the right hand side which I infer is what SABB would be in Arabic. HSBC has published SABB results via a direct HSBC logo and that is to be found at divider 18 of B1. One then also has, at divider 17, what appears to be an SABB document explaining what it does and what its activities cover, which is headed again by SABB, the HSBC logo and some Arabic.

18 In addition, it is the case that there is no retail HSBC Bank in Saudi Arabia other than SABB. It is correct to say, as Mr Breslin has pointed out, that there appears to be an entity called HSBC Saudi Arabia, which is an investment bank, and there is some evidence which says it is not a deposit taker; so it would not be used for a regular current account or anything of that kind. That is owned 51 per cent by SABB. I do not think this is of any real significance because it is not a retail bank. What this reference does, however, show, is that even that bank was itself the subject of a majority ownership of SABB which, in my judgment, if it proves anything, proves the association between SABB and HSBC.

19 I will say more about those matters shortly, but to come back to the chronology, the response to the demand made on 30 December came from the Bank addressed to BNP on 7 January, which BNP forwarded to TRS on 8 January. It took two points. One concerned a discrepancy in the description of a passport number, but that is not being pursued here. But, secondly, having stated the HSBC condition, then it said:

> "However, according to the documents furnished by you, a certain portion of the advance payment was received by the sub-contractor on its bank account held with the Saudi British Bank. We are therefore of the

conclusion that the condition under the guarantee is not satisfied and therefore the Bank is not obliged to honour the demand."

The Proper Interpretation of the HSBC Condition

20 TRS has a number of answers to the defence raised by the Bank. I will deal with them in this order. First of all, I am going to deal with the proper interpretation of the HSBC Condition. In respect of that, I have been recited to a number of familiar authorities. I start with *Rainy Sky & Ors v Kookmin Bank* [2011] UKSC 50. This reason why this is referred to me is because it is a performance bond case. The particular paragraphs to which I was taken by TRS began at para.10. This is, of course, in the Supreme Court.

> "It is common ground that the terms of the Contracts are relevant to the true construction of the Bonds. They are referred to in the Bonds and provide the immediate context in which the Bonds were entered into. They are thus plainly an important aid to the meaning of the Bonds."

That is to say, the underlying contracts. Then at para.14:

> "For the most part, the correct approach to construction of the Bonds, as in the case of any contract, was not in dispute. The principles have been discussed in many cases, notably of course, as Lord Neuberger MR… those cases show that the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant…the relevant reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

21 Mr Choat also referred me to para.21, which says:

> "The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."

22 Then at para.23 which, in fact was referred to by Mr Haydon QC:

> "Where the parties have used unambiguous language, the court must apply it…The underlying result…"
> And then he quotes some cases.

23 Mr Haydon does not take issue with para.10 or 14, but says that para.21 is really only dealing with situations where there is ambiguity and the language used has more than one potential meaning. However, that is the case here that because the Bank does not actually rely only on the words which are printed in the HSBC condition. HSBC Bank is not defined by reference to any company or any particular legal entity, unlike the other parties described in the guarantee. As I have already indicated, what the Bank says is that HSBC Condition requires payment at a branch (there is no reference to "branch" in the guarantee) of a <u>bank trading as HSBC Bank</u>. Those words are not there either. On the other hand, TRS effectively says that it is payment to a bank which is either trading or associated with HSBC Bank and on that basis, SABB is well covered within the definition. Those are both potential meanings of the clause. Both parties seek to make sense of it and add to the words which are already there. In my judgment, therefore, this is not a case where the words are wholly unambiguous and it is a case where, to the extent relevant, the words of para.21 of *Rainy Sky* are apposite.

24 The next case one looked at was then *Arnold v Britton* [2015] AC 1619 (SC) [15] and the familiar set of principles which are laid out by Lord Neuberger. I am not going to go through all of them, but I mention the ones that were relied upon by Mr Haydon. First, that in some cases reliance on commercial common sense and surrounding circumstances must not be invoked to undervalue the importance of the language of the provision to be construed. The meaning is most obviously to be

gleaned from the language of the provision. Then he goes on to say in his second point that the less clear the words are then, effectively, the more the court can properly depart from them. The third point was that you should not invoke commercial common sense retrospectively.

> "The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties…"

That, of course, is well understood. Equally, in para.20 he says one cannot just reject a provision because it would have been very imprudent for one of the parties.

25 What all that is getting at is the situation where, on the construction of the contract which is against one party, that party says that it would have been a very unfavourable contract, there would have been enormous risks and all matters of that kind. That argument is unlikely to succeed. But it has to be distinguished, in my judgment, from situations where the result of the interpretation being advanced by the other party means that the entire contract has become pointless or useless or a commercial absurdity. There are many statements of principle to the effect that in those circumstances, the court has to interpret it using commercial common sense. At one point, Mr Choat referred to the Latin phrase *"verba ita sunt intelligenda res magis valeta quam pereat"* which effectively means that the court should attempt to validate the contract. That does not mean interfere with or rewrite it. But it means that where it is possible to interpret it in a way which means that the contract actually exists at all, rather than effectively being something close to a nullity, the former course should be taken.

26 *Wood v Capita* I do not intend to go to. Both sides accept that after this long series of cases, at the end of the day, the exercise of interpretation can use and does use as tools both textual and contextual analysis.

27 Mr Haydon also referred to *Multi-Link Leisure Developments Ltd v Lanarkshire Council* [2010] UKSC 47 (SC, Scotland) which we looked at. I do not think that adds anything to the other authorities.

28 In my judgment, objectively speaking, it is plain that SABB is a bank which is associated with HSBC. Mr Haydon makes the point that the words "associated with" may have rough edges. Perhaps, but so may "trading as", for that matter; but that is not a reason not to use these terms where they can be reasonably understood. It is also against an objective factual background it is the case that, subject to the investment bank, the only HSBC related or associated bank in Saudi Arabia is SABB.

29 Mr Haydon was not impressed by the relevance of the use of the HSBC logo but I am. It is highly important and it is a worldwide symbol which is known by all to connote the activities of HSBC. If there was not permitted association with HSBC in England for sure there would be a passing-off action, and to that extent, in my judgment, SABB can, in fact, be regarded as "trading as", because it using its association with HSBC via the logo, even if it does not say HSBC.

30 The next point is this. It is the case, objectively speaking, that it is impossible for there to be an account with the number which is specified in the guarantee both with SABB and with some other HSBC entity anywhere. That, in itself, indicates the close association between the two, because it means that why it is being referred in certain reports as associated with or sometimes not referred to in various lists. Critically, it is regarded as part of its banking operations to avoid the duplication of account numbers.

31 If the position was as contended for by the Bank, then a very odd result would occur. It would mean that the guarantee was worthless from the moment that it was executed. That is because, on the Bank's case, the HSBC condition could never be complied with, even though payment has been made to a bank account with that number and to the only domestic bank associated with HSBC in Saudi Arabia. The guarantee was therefore destined to fail and it was a wholly useless and pointless exercise. That is why I consider that the interpretative approach here must be one which recognises that one interpretation would not merely be commercially risky or commercially disastrous for a party, it would mean that there is no point in the document at all. Objectively speaking, that makes even less sense when one recognises that there were subsequent iterations of the guarantee following the payment in October 2017, I think, iterations in 2018 and again in March 2019, including on at least one occasion, extending the expiry date for the guarantee, all of which would be utterly pointless if the Bank's construction is correct.

32 In my judgment, it is also important to take the view, albeit that it is not determinative, that it is quite impossible to suppose that the Bank did not know that the relevant payment had at least been made, leaving aside the name of the bank account into which it went. That is obvious, because if the payment had not been made, the first person to complain would be its instructing party and none of that happened. None of the adjustments to the guarantee make any sense unless it was by that stage regarded as operative. Yet, on the Bank's interpretation, what it means is that although payment had been made, by a windfall it actually had no liability under it at all.

33 In relation to all of that, Mr Haydon made the overarching point that TRS's response here cannot work because the Bank could not reasonably have known what the actual bank account number was. Therefore, the fact of the bank account being in the way that I have described is not something which can be appealed to on the question of construction. I reject that. The Bank's position today, for the purpose of various arguments, has been that the HSBC condition is very important, not only to Sungchang, but also to it. But if it was, then a reasonable person in the position of the Bank would check that payment has been made to the correct bank account and it is not suggested there is any real difficulty about that. All the Bank had to do, as would be contemplated at the time of the making of the contracts and their amendments thereafter, was to ask Sungchang about it or to see the invoices being presented or something of that kind. I am in no doubt that the actual identity of the bank account with that particular number was something that was reasonably available to the Bank. The instructing party was hardly likely to deny such information to it since the Bank was the one who was asked to provide the guarantee. For those purposes, I consider that even before that payment was made, that material was reasonably available to the Bank if it was such an important condition.

34 Secondly, one is entitled, in my judgment, to look at the position later on when all the various amendments were made and after payment itself had been made. I was referred to *Portsmouth City FCA v Sellar Properties (Portsmouth) Ltd.* [2004] EWCA Civ 760. I do not accept that its ambit, when it referred to amended agreements, is as limited as Mr Haydon contends. He says that you can only look at the amended versions when the provision in issue is itself the one which has been amended and that in this case the HSBC Condition itself was not the subject of amendment. He took me to para.47 of the judgment in that case. He says that the correct approach is to construe the amended clause in the light of the background knowledge reasonably available at the time when the amendment is agreed but to recognise that such knowledge includes the knowledge that the new clause is to take the place of the existing clause. I do not consider that the fact that there have been all these amendments is irrelevant, particularly when those amendments took place after payment had been made. In any event, in my judgment, the underlying fact about the nature of the bank account to be used was reasonably available to the parties at the outset. It is important to note here that the amendments which were made, while not to the HSBC Condition itself, were certainly

related in the sense that they were changes to the expiry date and matters of that kind which go to the underlying performance of the guarantee.

35 At this point I need to mention something more about the Korean proceedings. Mr Haydon made the point, which is obviously correct, that it is important for the Bank to ensure that it does not pay out when it should not pay out, because otherwise that would put it in difficulties in relation to getting performance by the sub-contractor on the counter-guarantee. However, there is a strange disconnect between what has been happening in Korea and what has been happening here. In Korea, the sub-contractor was arguing fraud. It took no point on the absence of any formal conditions in the guarantee, let alone the one about the HSBC conditions. That is important because, of course, it will have a liability to the Bank on the counter-guarantee if the Bank pays; therefore if there was something of importance in relation to the HSBC condition, one would expect it to be advanced. But it was not.

36 So far as the Bank is concerned, because it has said that it is an important condition for it as well, in the Korea proceedings it was objecting to the injunction by saying that if it was prevented from paying on a guarantee this would damage its reputation, or even the international reputation of Korea itself and it would have a very serious impact. That was addressing the application made by the sub-contractor. The only reference we get to a possible problem with the presentation was at p.205, where it refers to the inability of the Bank to examine the underlying disputes. It said that it would be in the interest of the Bank, both economically and legally, that if there was no formal defect, the guarantee payment should be made in accordance with the terms of the guarantee. So it is right to say that there is that qualification there in relation to "formal defects". But that is it. Otherwise, the HSBC condition, said now to be so clearly broken, did not feature at all.

37 The next point made by Mr Haydon was that if, when it got the invoice, TRS saw that there was a reference to SABB, all it needed to do was to amend the guarantee and then all would be fine and that would be the answer. I do not think life would be quite that simple. First of all, the Bank could simply refuse to amend the guarantee and as between it and the Bank there is nothing that TRS could have done about it. It was then said it would negotiate with the sub-contractor and refuse to make payment unless this change was made. That may or may not be right, but it is certainly not straightforward, in my view.

38 One therefore returns to the point that on the Bank's interpretation this guarantee has been an entirely worthless document almost from the word go. It became worthless the moment that payment was effected.

39 I was taken to *Lukoil Mid-East Ltd. v Barclays Bank Plc* [2016] BLR 162, where the Court interpreted a contract to avoid what it regarded as an absurdity upon its face. There, one provision said that there could not be any amendments, or that no amendments would relieve them from their responsibilities, while another clause said that they would perform on the condition that their amendment had been made affecting the timely performance of the work. This was taken up at para.30 of the judgment of Stuart-Smith J, saying that there was a major objection to interpreting that in a different way. It would be almost inconceivable that in the course of a huge construction contract there would be no changes to the scope of the works, so that would impact on timely performance so that it would be inconceivable they would ever be able to make the statement that was required to give rise to an effective demand. In other words, it was dealing with an absurdity, a pointlessness situation. Mr Choat relied on that authority as analogous and support for TRS's position here. Mr Haydon said this was not so because that was a case where it was more or less apparent on the face of the guarantee that it would be an impossibility or pointless. Or at least one could take it as read that there was going to be a huge construction contract with lots of amendments, whereas the pointlessness does not spring from the page in relation to the guarantee here.

40 I accept that there is that difference, but I do not accept that arguments from absurdity and pointlessness are ones which can only be drawn directly from the page of the document. So, the fact that, as it has turned out, the Bank's interpretation would render the guarantee entirely useless is one which I can and do properly take into account.

41 Therefore, in my judgment, the Court should, if it can, strive for an interpretation which is open to it on the words of the guarantee and which will avoid pointlessness or absurdity. In my judgment, that is what I should do here; rather than limit the expanded version of the condition to a branch of a bank trading as HSBC, it should be a bank or a branch of a bank "trading as HSBC or associated with HSBC". On that basis, there is no breach of the condition. There is no downside to the Bank. It is not a case where either interpretation is going to penalise one side or the other. All it means is that the Bank will have to pay out in circumstances where it cannot be doubted that the sub-contractor has, in fact, received the payment into an account with a particular number. It is just that the name of the Bank specified was SABB and not HSBC. The downside, on the other hand, would be to TRS, who, having made the relevant payment, is now unable to call upon the guarantee in the circumstances which have arisen. That is the absurdity which the Bank's interpretation would engender.

Misnomer

42 There is a separate strand of Mr Choat's arguments which then depend on the document or the principle of "misnomer". That has been described in various different ways. At paragraph 10-18 of the Sixth Edition of Lewison's *The Interpretation of Contracts* ("*Lewison*") the heading is: "The court may correct an obvious misnomer as a matter of interpretation". I think I can actually deal with this point by referring to how Rix LJ referred to it in ***Durnford Trading AG v OAO Atlantrybflot [2005] 1 Lloyd's Rep. 289***, even though commentators or other judges have suggested that his formulation may be somewhat too narrow:

> "It seems to me that the doctrine of misnomer is of uncertain width. It is clearly a doctrine of construction, but it is not plain to what extent it permits the reference to extrinsic evidence. *Davies v Elsby Brothers Ltd* would suggest that where there are two possible entities, the rule is a strict one: unless one can say from the four corners of the document that the parties must have intended to refer to one rather than the other entity, then the doctrine does not apply. If, however, there is only one possible entity, then it is possible to use extrinsic evidence to identify a misdescribed party. It is arguable that *Nittan v Solent Steel* falls into this latter category. Moreover, the cases, as does common sense, suggest that a case of mere misnomer is not easily (query if ever?) concluded to be such without the mistake being explicable."

43 *Lewison* states that even if that view is correct, the Court would be able to take into account the same evidence of the background as would be admissible for the purpose of interpreting the contract, including any relevant course of dealing between the parties:

> "In the end the question is one of interpretation of the contract in question, and therefore the material available and the techniques used in contractual interpretation ought to apply even where the allegation is one of misnomer."

44 In my judgment, this case falls precisely within that characterisation of the doctrine of misnomer. It is impossible for there to have been any other competing bank account than the one which the sub-contractor actually had with that number with SABB because the evidence establishes that it simply cannot be done. There is no other qualifying bank account with that number into which a payment could be made. That being so, there is only one possible candidate and not two, and the only candidate is that bank account with that number held by SABB. So if, for some reason, the

general interpretation which I have given is found to be wrong, then the doctrine of misnomer would, in any event, permit extrinsic evidence to establish that point.

45 In my judgment, it does not matter whether the parties were aware of the problem or not in terms of how the mistake arose. It is not a case of rectification, as Mr Haydon has pointed out. It is simply a question of what the factual reality is.

46 I was also referred to the case of *Gastronome UK Ltd. v Anglo Dutch Meats UK Ltd.* [2006] EWCA Civ 1233. Mr Haydon sought to distinguish that on the basis that while the court read the documents which referred to Gastronome as "Sapod", being its previous name, on the basis that it was only the Sapod entity which could have been the relevant supplier to the company called IFS. That was something appreciated by the parties at the time and that is the distinction. But I do not think that is the distinction on the basis of what Rix LJ said. Moreover, the misnomer, if that is what it was, or the mistake, if that is what it was, is readily explicable on the basis that HSBC might well be used loosely to describe SABB for all the reasons that I have indicated. On that basis, the origin of the mistake, if that is what it was, is clear.

47 For all those reasons, I take the view that there is no arguable breach of the HSBC condition at all. That, in fact, is sufficient for me to dispose of this application and grant summary However, in deference to the further arguments that were raised, I am going to deal with those as well.

The Article 7 Point

48 Mr Choat's first alternative argument is that Article 7 of the URDG engages here in a way which would remove the HSBC Condition entirely. At this point, it is necessary for me to set out some of the provisions of the URDG and say something about it generally. The URDG is not a set of arbitrary or random standard terms that one party or other may habitually attach to its contracts regardless of where they came from or how they were drafted. The URDG is an internationally recognised set of rules which are contributed to and revised from time to time by a group of international users, including banks, so as to provide clarity and certainty to the creation and the performance of demand guarantees.

49 I say that because, in my judgment, it is quite wrong to reduce these rules to a set of standard conditions and to apply the principles of interpretation to which I was referred as set out in *Lewison*. They are far more important than that. Article 6 says that guarantors deal with documents and not with goods, services or performance to which the documents may relate. Article 7 says that 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 (not applicable here) or from an index specified in the guarantee (not applicable here) then the guarantor will deem such condition as not stated and will disregard it, except for the purpose of determining aspects of data which again do not arise here.

50 The reason for Article 7 is Article 6. That is to say that banks do not deal with matters concerning the ins and outs of the underlying contract or performance thereunder. They simply deal with documents. Article 7, as has been pointed out in one of the commentaries to which I was referred (but it is obvious anyway), is actually there for the protection of paying banks. It is so that banks do not have to conduct investigations which are not the subject of a stipulated document. That is why it is usually invoked by the bank to say that it need not observe a condition whose subject-matter need not be considered by it or investigated by it because it is not the subject of a document. That is why Article 7 says "will disregard it".

51 Article 15A then says: "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 that 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 the demand." So the first point which is relevant here is that the demand shall be supported by such other documents as the guarantee specifies. But before leaving Article 15A, I should observe that this is an example of where 15A actually overrides whatever it is the parties have stipulated. It does not matter if the parties have only stipulated a document whereby the beneficiary says that the applicant is in breach of contract. Article 15A says it has got to go further and it has actually got to say in what respect the applicant is in breach of contract. That shows the importance and the overriding nature of these rules, in my judgment.

52 The Article 7 point arose yesterday and was not originally part of TRS's case. Mr Haydon said to me this morning that it was a new point and he was going to deal with it as best he could. I asked him whether he wanted an adjournment to deal with it point more fully; he said that he did not and would deal with it today. Therefore, I deal with this point fully on the basis of the evidence and the submissions I have heard today and there is no reason why I should not.

53 Mr Choat says that the guarantee does not refer to any document in relation to the HSBC condition. On the face of it, that is correct. The first clause says that there will be a written demand and what it should indicate, namely that the sub-contractor has failed to fulfil the conditions and that the sub-contractor has had wired to it the guaranteed amount at the date of remittance. The fact that there

is then a separate clause which comes after that one does not, in my judgment, mean that as a matter of interpretation, one reads into the second clause some form of documentary condition. If that was the case, it would have been built in to what the written demand had to indicate, in the first paragraph.

54 Mr Haydon said that because banks should only be dealing with documents one can infer, and should infer, that there should have been something in the second clause to the effect that the satisfaction of this condition must be evidenced by a statement to the effect it has been satisfied, or something along those lines, in a document as well. But it does not say that. It is dangerous and wrong, in my judgment, to imply the documentary element when we know from Article 7 that sometimes these (non-documentary) conditions are included. Mr Haydon took me to the definition of "document" in the URDG but I did not find that of any assistance in dealing with this clause.

55 What Mr Haydon then said was that there are "conditions" and "conditions", effectively, for the purposes of Article 7. So that what Article 7 was really only dealing with were conditions that had to be satisfied by the date of payment rather than pre-conditions. He said the HSBC condition is a pre-condition because without the initial payment being made then the guarantee would not be effective at all. In one sense that is right. If the sub-contractor has not been paid then the guarantee will not become operative. But that is a rather hollow submission here, because the sub-contractor was paid, took no point on it and the guarantee was thereafter operative. Looking objectively at conduct of the parties, the parties would not be amending and dealing with different iterations of a guarantee that was not operative. That, in my judgment, is sufficient to dispose of the pre-condition argument. However, in any event, it is not how the actual clause is phrased. It says it is a condition for any claim and payment under this guarantee and it is expressed to be the sort of condition which would have to be satisfied before demand could validly be made. Nor do I see anything in the language of Article 7 about conditions and preconditions.

56 Mr Haydon then made reference to doubts which have been expressed about the operation of Article 7. In that regard, he took me to, first of all, an extract from Paget's *Law of Banking,* and I will read out the whole of the paragraph to which he took me at p1030. This is not dealing with demand guarantees, it is actually dealing with UCP600 (the rules for documentary credits), but there was a similar, provision there, though not identical. He says this:

> "Although Article 14H is mandatory in form, it nevertheless creates a problem of legal analysis, as does it predecessor. If the buyer instructs his bank and the bank agrees to issue a credit containing a non-documentary condition, why should not the parties' apparent specific intentions override the UCP. This would be the usual consequence of an inconsistency between a specifically negotiated term in the contract and standard terms and conditions incorporated by reference."

That is interesting as far as it goes, but it then says this:

> "It should nonetheless be noted that other provisions of the UCP," and he gives two examples, "can similarly override other specifically negotiated terms of the credit and to this extent the terms of the UCP600 are unusual standard terms and conditions incorporated by reference"

57 This echoes a point I made earlier on about not simply regarding them as ordinary terms and conditions, and attributing to them the importance which is warranted. Here we are dealing with international rules which govern all relevant demand guarantees and where they are the same rules for all of them. That is as true for URDG as it is for the UCP.

58 One then goes on to the commentary on some cases. The first was where the had to deal with an equivalent clause in UCP 500 relief upon by the issuing bank refusing reimbursement. It said that the purpose of the prohibition on non-documentary conditions was to protect a negotiating bank or presumably a beneficiary against the issuing bank. But here, the issuing bank was turning Article 30 on its head by attempting to use it to renege on its obligations under the credit. That is very analogous to what has happened in this case, in my judgment.

59 I was then referred to *Oliver & Anor v Dubai Bank Kenya Ltd* [2007] EWHC 2165 (Comm), a decision of Andrew Smith J where, again, that clause was invoked. It is right to say that his principal decision was in fact that the letter of credit did actually create a documentary condition, in which case the relevant clause would have no application. What he then went on to say *obiter* was if the clause had applied, the court might have to consider whether the general words that incorporate the UCB in the letter of credit should prevail over the parties express stipulation in condition 3. I do not have a real difficulty about that. Mr Haydon invoked Article 12 of the URDG, which says that: "A guarantor is liable to the beneficiary only in accordance with first the terms and conditions of the guarantee and, second, with these rules, so far as consistent with those terms and conditions, up to the guarantee amount." Quite so. The importance attributed to the URDG here is reflected in that part of the guarantee which says if this is a conflict between English law and the URDG, URDG prevails. But it seems to me that what one has here is a provision whose very existence assumes that parties might, very specifically, put into the contract a clause which is referring to a factual condition but not one which is a documentary condition. What Article 7 is doing deliberately is to create an override. I do not accept that one must dismiss Article 7 by reference to Article 12 by saying that there is an inconsistency. There is an inconsistency, but it is created by a deliberate override which is designed to protect the issuing bank and therefore one cannot get rid of Article 7 simply by saying that there is a conflict and the way to deal with the conflict effectively is to read out Article 7 altogether.

60 If the inconsistency arguments raised by Mr Haydon were correct, it would mean, effectively that Article 7 could never apply. It is, as with the documentary credits regime, something which has been in various iterations of the rules, and deliberately so, and is considered to be important; I have no doubt that the driving force behind it was the protection of the issuing banks.

61 I was also referred to the *IE Contractors v Lloyds Bank* [1990] 2 Lloyd's Rep. 496, a decision which was not, in fact, on URDG. But it is a case where the Court found that there was to be a documentary condition to be read into the contract. It is noteworthy that in that particular case what was required to be read in was that there was a claim for damages brought about by the contractors, as distinct from a simple demand for the money under the guarantee. That is, in any event, a different situation, because as one can see from Article 15A, the need to state a breach by the underlying contractor and why there is a breach, is of fundamental importance. That is really what this case was dealing with. It was not dealing with Article 7 in any event. Although there is a reference to a presumption in favour of holding a performance bond to be conditioned upon documents rather than facts, that does not have any impact or bearing on the application of Article 7 in the context in which it now appears. It is, in any event, not described as an irrebuttable presumption. Finally, in my judgment, it is absolutely plain that one cannot make a documentary condition out of the HSBC Condition.

62 For those reasons, despite the arguments that have been advanced by Mr Haydon, I take the view (if I needed to) that Article 7 is engaged and does apply to remove the condition. The importance of this particular condition was emphasised by Mr Haydon but, actually, what was particularly important, in my judgment, was that the sub-contractor was paid; that is what has happened here. As I say, in the context where payment has already been made, the importance in that sense appears to have disappeared because this is a point that the sub-contractor has not taken.

63 It was not suggested that Article 7 is an option for the Bank to exercise or not; correctly, because the Bank must disregard that actual condition. Therefore, if I was wrong on the interpretation of the HSBC condition and misnomer, Article 7 would remove the actual condition in any event.

64 Mr Haydon's final point here is that I should not decide the Article 7 issue because it is a point of general importance and it would be of interest to the banking community and otherwise. Therefore that is not suitable for summary judgment. He referred me to one case in the White Book where what happened was that the judge refused to rule on a short point of construction on the terms of an insurance contract where those terms were said to be standard terms, widely used in the insurance market. I see that, but it is not actually authority for the proposition that a court is obliged not to grant summary judgment if there is an important point involved. I do not accept that the Article 7 point itself is a compelling reason for a trial.

Timing Points

65 That, then, leaves finally two points about further objections made by the Bank following 30 December. Going back to the URDG, Article 24D states:

> "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 that the guarantor was rejecting the demand and each discrepancy for which the guarantor rejects the demand."

Then it says:

> "The notice required shall be sent without delay, but not later than the close of the fifth business day following the day of presentation."

66 Mr Choat invokes Article 24 in two ways. First, he says, even assuming it was served by the fifth day, there is an overriding requirement that it be served without delay, and here there was delay. It was served very shortly before the expiry of the five days. I am not prepared to find that there is an unanswerable case so far as that is concerned. It seems to me that Mr Haydon is right. Were this point to be live, one would have to look in much more detail about what the Bank knew and was doing in circumstances where, in fact, the problem, if there was one, for TRS, would have arisen by the end of 31 December because that is when the guarantee would have expired. Thus in one sense it would not matter whether the rejection came in two, three or four days. There would not be anything that TRS could do about it. So, it is not possible to say clearly that the rejection was not served without delay.

67 The second point made by Mr Choat is that, in any event, what was done on 7 January was to send the objections to BNP and not to TRS. That only came the following day. Mr Haydon, in his written skeleton argument, posed a number of questions about the true role of BNP. BNP formally is the advising bank and therefore is the agent of the issuing bank or the instructing party, but is certainly not the agent of the beneficiary of the guarantee. But Mr Haydon said that this does not reflect the true realities here because BNP got involved in, for example, actually presenting at least one of the earlier demands and in respect of that, the Bank then replied to BNP. Therefore, it is said, it is at least arguable for these purposes that BNP should be regarded as the agent of TRS and in that sense the sending of the objections to it on 7 January was in time.

68 I agree with Mr Choat that there is a short answer to this. The strict words talk about the "presenter". The party that presented the demand on at least one earlier occasion was BNP, as one can see from the telex. All that means is that if that was the presenter on <u>that</u> occasion, then all the presentee (the Bank) has to do is to respond to that presenter. But when it comes to 30 December, the presenter there was TRS itself, who attended at the premises of the Bank in Seoul. On that occasion the presenter was TRS and therefore the response should have been made to TRS. I do not consider that there is any point on agency which can interfere with that. So, had it been necessary, I would also have found for TRS on this basis.

<u>Conclusion</u>

69 For all those reasons, I find that there is no real prospect of a successful defence here nor is there any other compelling reason for a trial. Accordingly, I will grant summary judgment to TRS.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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