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: [2020] QIC (F) 5

IN THE CIVIL AND COMMERCIAL COURT
OF THE QATAR FINANCIAL CENTRE
FIRST INSTANCE CIRCUIT

31 May 2020

CASE No. 8 of 2019

(1) OBAYASHI QATAR LLC
(2) HBK CONTRACTING CO. WLL

Claimants/Applicants

v

QATAR FIRST BANK LLC (PUBLIC)

Defendant/Respondent

JUDGMENT

Members of the Court

Justice Arthur Hamilton

Justice Fritz Brand

Justice Ali Malek QC

ORDER

1. The Claimants' Application for Summary Judgment in respect of the Performance Bond is successful; the Defendant is liable to satisfy the demand for payment in the sum of QAR 19,800,000.00;

2. The Claimants' Application for Summary Judgment in respect of the Advance Payment Guarantee is successful but only to the extent that the Defendant is liable to satisfy the demand for payment in the sum of QAR 5,419,250.12;

3. The Claimants' are awarded interest in the sum of QAR 1,452,006.96;

4. The Defendant's Counterclaim is struck out; and

5. The Parties are to seek to agree matters relating to costs and further procedure between them. If they are unable to do so, either or both parties may apply to the Court.

JUDGMENT

Introduction

1. Obayashi Qatar LCC ("Obayashi") and HBK Contracting Co WLL ("HBK Contracting") (together "the Claimants") bring, *inter alia*, an application for summary judgment against Qatar First Bank LCC ("the Bank").

2. In short, the Claimants contend that the Bank is liable to satisfy demands for payment made under two guarantees described in more detail below: an undated advance payment guarantee and an undated performance bond (together "the Bonds"). The Bank denies any liability and brings a Counterclaim against the Claimants.

Parties

3. The principal parties are as follows. The Claimants as an unincorporated joint venture were appointed as a contractor by Msheireb Properties to complete certain works in relation to the Msheireb Downtown Doha Project in Doha, Qatar.

4. The Claimants appointed Classical Palace Trading & Contracting SPC ("CP") as a sub-contractor to perform certain aspects of these works, namely hotel finishes and fit-out works, Msheireb Phase 3 ("the Project").

5. The Bank is a Sharia compliant bank incorporated in the Qatar Financial Centre ("the QFC"). The Bank is authorised by the QFC Regulatory Authority.

The Applications

6. The Claimants bring an application for summary judgment under the Bonds. They claim a total of QAR 29,700,000 together with interest at the rate of 4.5%. They also seek to strike out the Bank's Counterclaim.

7. The summary judgment and strike out applications are made pursuant to Article 22.6 of the Regulations and Procedural Rules of the Court ("the Rules") which provides that "[t]he Court may, if it considers that justice so requires, give summary judgment on a claim or defence or on any issue".

8. Guidance as to when the Court should exercise its discretion under Art 22.6 of the Rules is provided in Practice Direction No 2 of 2019.

9. Paragraph 3 provides that the Court may exercise that power if:

> "(a) it considers that-
>
> (i) the defendant to the claim…has no prospect of defending the claim or issue;
>
> (ii) the claimant to…the counterclaim has no prospect of succeeding on the claim or issue; or
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

10. The Bank in response asked the Court to dismiss both the application for summary judgment and the strike out application concerning the Counterclaim. It also sought an order for the appointment of an expert to consider matters relating to the Bonds including recovery and the Claimants' entitlement to demand liquidation of the Bonds. As to its Counterclaim, it sought an order that the Claimants indemnify the Bank in a sum not less that QAR 10,000,000 or such amount as the Court finds appropriate.

The Contracts: The Subcontract Agreement and Bonds

The Subcontract Agreement

11. The main contracts were as follows and are considered in greater detail below. The Bonds were issued pursuant to the Subcontract Agreement which required CP to obtain: (i) a performance bond guaranteeing performance of its obligations under the Subcontract Agreement and (ii) an advance payment guarantee with regards to an advance payment of QAR 9,900,000 made by the Claimants to CP.

The Bonds

12. The Bonds were obtained by CP in accordance with the Subcontract Agreement. They were issued by the Bank pursuant to facility arrangements with CP entered in October 2014.

13. The PB (QFBLG1410270004) provided, so far as is material, as follows (paragraph numbers have been added to the text):

> "[1] By this bond, we [the Bank] PO Box 28028, Doha, Qatar (hereinafter called "the Surety") and [CP] PO Box No 23278 Doha, Qatar (hereinafter called the Subcontractor") are irrevocably and unconditionally bound unto [the Claimants] PO Box 1362 of Doha, Qatar (hereinafter called "the Main Contractor") in the sum of QAR 19,800,000.00….for the payment of which sum [CP] and [the Bank] bind themselves, their successors and assigns jointly and severally by those presents.
>
> [2] Whereas [CP] by an agreement between [the Claimants] on the one part and [CP] on the other part has entered in a Subcontract for the Doha Downtown Project Phase 3 for Msheireb Properties (hereinafter called "the said Subcontract") in conformity with the provisions of the said Subcontract Agreement.
>
> [3] Now the condition of the above written bond is such that the foregoing amount is payable by [the Bank] to [the Claimants] or its representative without regard to any objections from [CP] any other party upon the first written demand of [the Claimants] stating that [CP] has failed to fulfil his obligations under the terms of the said Subcontract Agreement.
>
> [4] This bond shall remain valid until 28 June 2017 (90 days after maintenance period), after which no claim will be entertained by us and this guarantee will automatically become null and void.
>
> [5] In case of any extension of Subcontract, the guarantee shall be extended further on your written request prior to the stated expiry date without any objection from the Subcontractor".

14. The PB was extended by agreement on a number of occasions with the latest amendment, confirmed by letter dated 9 January 2019 from the Bank, extending the duration of the bond until 31 August 2020.

15. The APG was for QAR 9,900,000 under reference number QFBLG141027005. It provides as follows (again with paragraph numbers added for convenience):

> "[1] By this Bond we [CP] … (hereinafter called the Subcontractor) and [the Bank] … (hereinafter called the Surety) are irrevocably and unconditionally bound unto [Claimants] (herein called Contractor) in the sum of QAR 9,900,000.00 (QAR Nine Million Nine Hundred Thousand Only) for the payment of which sum the [CP] and t[the Bank] bind themselves … jointly and severally by these presents, in consideration of the Advance Payment by [the Claimants] to [CP].
>
> [2] WHEREAS [CP] by an agreement made between [CP] of the one part and [the Claimants] of the other part has entered into an agreement for works known as Doha Downtown Project Phase 3 for Msheireb Properties (hereinafter called the Subcontract) in conformity with the provisions of the Subcontract.
>
> [3] NOW THE CONDITION of the above written Bond is that the foregoing amount is payable by [the Bank] to [the Claimants] or its representative without regard to any objections from [CP] or any other party upon first written demand of [the Claimants].
>
> [4] The value of this Bond shall progressively be reduced by the amount deducted by [the Claimants] from [CP] as contained in the certificates and payments against the said Advance Payment.
>
> [5] The Bond shall remain valid until [the Claimants] receives full repayment of the Advance Payment amount from [CP], or until 29 March 2016 whichever may occur later."

16. The APG was extended on a number of occasions with the latest amendment by letter from the Bank dated 26 December 2018 extending the duration of the APG until 30 June 2019.

The Proceedings

17. On 11 June 2019 the Claimants instituted the present proceedings against the Bank. On 18 July 2019 the Bank served its Defence. That Defence included, in addition to a defence on the merits, a challenge to the Court's jurisdiction to hear the case. It also included a statement that the Bank "reserves its right to submit a counterclaim…"

18. The jurisdictional challenge as well as an application by the Bank to transfer the proceedings to the national Qatari courts was heard by the Court on 25 November 2019. Having considered the parties' arguments, at the conclusion of the hearing the Court rejected the jurisdictional challenge and declined to transfer the proceedings. The Court indicated that the reasons for the decision would follow. On 3 December 2019 the Court issued its written judgment as well as procedural directions for the future conduct of the case.

19. On 15 December 2019 the Bank served Defence Memorandum No. 4. This expanded upon its defence on the merits and introduced a Counterclaim for damages in the sum of QAR 10,000,000.

20. On 12 January 2020 the Claimants served an Amended Reply. They argued that the Bank's Counterclaim should be disregarded because no proper basis (including jurisdictional basis) for it had been identified. The Claimants also sought permission to make an application to the Court for summary judgment on their claims and reserved their position as to an application to strike out the Counterclaim.

21. On 27 January 2020 the Court issued directions, including that the Claimants serve their application for summary judgment/strike out by 30 January 2020. The Claimants served an application for summary judgment in respect of their claims for payment of QAR 9,900,000 with respect to the APG and QR 19,800,000 with respect to the PB with interest, together with an application to strike out the Bank's Counterclaim. No

application was made by the Claimants with respect to a claim made for consequential losses.

22. On 26 February 2020 the Bank served Defence Memorandum No.6. The Claimants served a reply to the application for summary judgment and strike out on 4 March 2020.

23. No witness statements were filed by either party. Skeleton submissions were served by both parties outlining their respective positions.

24. A hearing on the Claimants' applications was set for 7 and 8 April 2020. By reason of the outbreak of the coronavirus (Covid-19) pandemic with the impossibility of travel due to lockdowns, the Court was unable to convene in Doha for that hearing. However, with the agreement of the parties, on those dates a hearing was conducted remotely with the members of the Court and the advocates participating by video-conference facilities in different jurisdictions. A facility was also put in place for the parties, their other advisers and interested members of the public to hear the proceedings. These arrangements operated satisfactorily and all parties cooperated to ensure that the hearing was conducted fairly and efficiently.

25. The Court considers that it can and should determine the applications on the basis of the materials and arguments before it. It therefore declines the Bank's request that a panel of independent finance and engineering experts is appointed to review the Statement of Claim and Defence. The issues that are required to be determined are not technical or complex. Many of the issues are concerned with contractual interpretation. They can be determined without expert input.

Material Facts

26. The submissions of counsel ranged widely, including over several contractual relationships other than those constituted by the APG and the PB. Although in the end the issues for determination on this application may be relatively narrow, it is appropriate to describe these relationships and to outline the material facts.

27. The Subcontract Agreement between the Claimants and CP has already been mentioned. It was executed by these parties on dates in October and November 2014. The contract price was QAR 198,000,000 or such other sums as might be payable under it. CP had been nominated as subcontractor for these works by Msheireb Properties, the ultimate employer in respect of the project. It contained a number of appendices and attached General Conditions of Subcontract.

28. Clause 14.2 of these Conditions provided that the Claimants, as Main Contractor, "shall make an advance payment, as an interest-free loan for mobilization, when the Subcontractor submits a guarantee in accordance with this Sub-Clause. The advance payment shall be five percent (5%) of the Accepted Subcontract Sum excluding provisional sums and shall be paid in one instalment." The Sub-clause also provided: "The advance payment shall be repaid through ten percent (10%) deduction of the amount of each Interim Subcontract Payment commencing from the first Interim Subcontract Payment after the Subcontract Advance Payment." Clause 14.3 provided that CP should submit monthly statements showing the amounts to which it considered itself to be entitled. Clause 14.6 made detailed provision for the calculation and payment of interim amounts.

29. CP was a customer of the Bank. A Facility Agreement dated 1 October 2014 was in place at the time of the Subcontract Agreement which included provision for an advance payment guarantee for the amount of QAR 9,900,000 and a performance bond for the amount of QAR 19,800,000.

30. The Bank's Terms of Business provided as follows with respect to bank guarantees:

> "4.2 **Demand**: In the event that the Bank is called upon to make payment under any Letter of Guarantee issued to a third party, the Customer hereby irrevocably and unconditionally directs the Bank to pay first the amount demanded from the Bank under the Bank Guarantee. The Bank shall not be obliged [to] enquire to the propriety, validity or amount of any claim made on the Bank under or pursuant to the Bank Guarantee.
>
> 4.3 **Payment**: The Customer shall forthwith upon demand by the Bank pay to the Bank the amount demanded under the respective Letter of Guarantee and any other monies paid or payable by the Bank together with all the actual cost involved, notwithstanding that, (a) the said monies may not have been properly due under the Letter of Guarantee whether because the corresponding sum was not properly due to the beneficiary or for any other reason, (b) the Letter of Guarantee or any provision thereof is void, voidable or invalid or is not enforceable against the Bank for any reason whatsoever, whether known to the Bank or not."

31. The Bank also obtained from CP an assignment of all payments and moneys due or to become due to CP under or in respect of the nominated subcontract between it and the Claimants. That assignment was contained in an Assignment Agreement dated 21 October 2014 ("the Assignment"), which was notified to the Claimants by Notice of Assignment dated 22 October 2014 (sent by CP and copied to the Bank as assignee).

32. On the latter date the Claimants wrote to the Bank informing it that it had awarded the subcontract to CP and stating that, at the latter's request, "we hereby irrevocably confirm to make the payments due, less deduction, if any, in connection with [the project] as per the terms of the Sub-Contract Agreement through Bank Transfer or cheque as per details below…" ("the Claimants' Undertaking"). An account in the name of the Bank, with banking details, is then specified described as "the Designated Account".

33. The Notice of Assignment provided by clause 8:

> "This notice shall be governed by and construed in accordance with the laws of Qatar and the courts of Qatar shall have exclusive jurisdiction to settle any dispute arising therefrom."

34. The subcontract works commenced in November 2014. In all, 48 Nominated Subcontractor Payment Certificates were issued by the Claimants on a monthly basis during the execution of the contract, which were referred to during the course of these proceedings as Interim Payment Certificates (IPCs). The first of these (IPC-01, undated) recorded that the Advance Payment of 5% had been made. The second (IPC-02, dated 30 November 2014) recorded that a gross sum of QAR 1,036,103.36 was certified, from which QAR 103,610.34 (10%) was deducted in respect of Recovery of Advance Payment, the net amount due under that certificate being QAR 828,882.68. In IPC-03 (dated 31 December 2014) again a gross sum is certified subject to a 10% deduction (QAR 19,369.18) in respect of the Advance Payment of 5%. A further deduction is made in relation to Retention, a net sum due of QAR 154,953.44 being certified as due.

35. This pattern continues up to and including IPC-07 (dated 30 April 2015), although in that certificate, while the percentage of the Advance Payment is recorded as "5%", the figure is given as QAR 14,850,000 rather than QAR 9,900,000. IPC-08 (also dated 30 April 2015) is in the same terms as IPC-07 except that the Advance Payment is there stated to be 7.5% (QAR 14,850,000) rather than 5%. In these two certificates the recovery at 10% in respect of Advance Payment is applied against the increased amount of QR 14,850,000. Net sums are recorded as due under each of these certificates.

36. No explanation is given on the face of these certificates as to why the Advance Payment is recorded as now being QAR 14,850,000 rather than QAR 9,900,000. However, it appears that in April 2015 the Claimants made a further advance payment to CP of QAR 4,950,000. There is nothing to suggest that at the time the Bank was party to, or had knowledge of, this further advance.

37. The pattern in IPC-08 continues in later certificates, although from IPC-11 (dated 31 July 2015) other deductions ("Backcharges from Others", "Other Deductions") begin also to appear. IPC-24 (dated 31 July 2015) records an Advance Payment of "5%+5%"), in the sum of QAR 19,800,000, apparently reflecting a further increase in the advance payments. The "Recovery against Advance Payment" is set against this increased sum. Again, there is nothing on the face of the certificate to indicate that the Bank was a party to, or had knowledge of, any further advance.

38. In IPC-26 (dated 31 August 2016) the original Advance Payment (of 5%) is separated out from later such advances, which are then and thereafter described as "Supplementary Advance Payment (5%)". The Recoveries are split equally between these two classes of advance payment. The total amount recovered against the original Advance Payment is there recorded as being QAR 1,252,431.50. In IPC-30 (dated "Dec.16 and Jan.17 combined") the total amount recorded as recovered against the original Advance Payment leaps, without explanation in the certificate, from a previously certified amount of QAR 1,987,700.46 to QAR 4,074,278.27. In IPC-35 (dated 31 July 2017) the total recovery against the original advance of QAR 9,900,000 is certified as QAR 4,480,741.80. In IPC-36 (dated 31 August 2017) that recovery is, without any expressed explanation, wholly cancelled out with a blank (that is, nil) recorded in its place.

39. That blank is repeated in all subsequent certificates up to and including the last, IPC-48 (dated "June-August 2019"). The last certificate showing a positive net "Amount Due for Payment" (to CP or its assignee) was IPC-35, referred to above, where the amount stated to be due under that certificate was QAR 636,200.48.

40. In November 2017 the Claimants and CP entered into an agreement headed "Supplemental Agreement to the Nominated Agreement" ("the Supplemental Agreement"). In that agreement it is recorded (a) that the Claimants had already provided significant financial support to CP "over and above the original Nominated Sub-contract advances", that additional support being there stated to be a debt standing at QAR

50,792,253, (b) that CP was currently unable to repay that amount and (c) that it could not currently pay a back-log of salaries and wages to its staff and direct labour.

41. The Supplemental Agreement goes on to state that CP had requested the Claimants to pay immediately a further advance of QAR 6,426,484 so that CP could pay its project staff and labour back-log and that it needed QAR 38,199,847 to pay its subcontractors and suppliers. The Claimants agreed to provide further financial support to CP "in order to assist [it] to complete its remaining scope of works…".

42. The Supplemental Agreement also provided as follows by clauses 8-12:

> "8. By receiving this additional financial support, CP unconditionally agrees that [the Claimants] shall take management control over CP's Nominated Sub-contract operations, including but not limited to staff allocation and direction, direct labour, plant and equipment, subcontractors and suppliers, including sub-contract administration and payment approvals and timing;
>
> 9. In addition [the Claimants] shall extend its financial support by paying CP's agreed staff and labour employed on the Nominated Sub-contract works going forward until completion (or a date mutually agreed).
>
> 10. In consideration of this further financial support, CP agrees that the debt shall be reconciled and recovered by;
>
> a) Repayment of the full debt by CP to [the Claimants] by 15th July 2018 or Taking-over of the Works, whichever occurs earlier;
>
> Or
>
> b) Recovery of the full debt by [the Claimants], by way of liquidation of Bank Guarantees and Security Cheques in hand (please refer Annexure 3) upon failure by CP to comply with term 10.a) above.

> 11. CP unconditionally agrees to extend its existing Bank Guarantees (as in Annexure 3) and keep them in full force until 15th July 2019, or such other date as may be requested by [the Claimants]. These Bank Guarantees are to be extended by CP by 15th December 2017 or sooner.
>
> 12. CP unconditionally agrees not to claim any additional monies from [the Claimants] due to Nominated Sub-contract domestic matters, and any claims lodged by CP shall be solely limited to those matters of Employer varied works, and/or other claims that can be jointly brought to the Employer, on a back to back basis.
>
> ALL OTHER TERMS AND CONDITIONS AGREED IN THE SUBCONTRACT AGREEMENT DATED 04th NOVEMBER 2014 WILL REMAIN UNCHANGED."

43. Among the Bank Guarantees listed in Annexure 3 of the Supplemental Agreement were the APG and the PB as well as three guarantees from Commercial Bank.

44. On 19 February 2019 the Claimants wrote to the Bank (copied to CP) with reference to the APG stating "this is to inform you our subcontractor [CP] has failed to fulfil its obligation as per the terms and conditions of the subcontract. In view thereof, we request you to kindly treat this letter as our **WRITTEN DEMAND** for the payment of the guarantee and transfer the amount of QAR 9,900,000 to our current Account as per details below." Details of that account were then given.

45. On the same date the Claimants wrote to the Bank (copied to CP) with reference to the PB stating "this is to inform you that our subcontractor [CP] has failed to fulfil its obligation under the terms of the Subcontract Agreement. In view thereof, we request you to kindly treat this letter as our **WRITTEN DEMAND** for the payment of the guarantee and transfer the amount of QAR 19,800,000/- to our current Account as per details below". Details of that account were then given.

46. No immediate response was received to either of these letters. The matter was pursued with reference to the Bonds by a further letter from the Claimants dated 28 February 2019. No response having been received to it, lawyers for the Claimants on 14 March 2019 wrote to the Senior Relationship Manager-Corporate Banking of the Bank referring to the earlier demands and warning of legal proceedings.

47. By an undated letter in Arabic an attorney acting for the Bank responded to the letter of 14 March 2019. An English translation of that letter reads that, with respect to the Bonds:

> "….the law prescribes that the bond shall consequently expire in the case of the extinguishment of the debt guaranteed, and whereas the performance bond is an ancillary to such debt, the extinguishment thereof implies the expiration of the performance bonds as an ancillary shall not remain without the original.
>
> In such case and as the performance bonds mentioned in your letter expired due to extinction of the obligation for which the two bonds were issued to guarantee the fulfilment thereof according to the contracting contract concluded between both parties, we would like to inform you that the client confirms the fulfilment of its obligations guaranteed by such performance bonds. Thus, the disbursement of the same shall entail consequences and responsibilities on the part of the bank. Therefore, the client requesting such bonds shall be referred to".

48. No other basis for rejecting the written demands was advanced at that time.

Bonds: Governing Law

49. The Bonds do not contain governing law provisions. The Claimants' contended that the governing law was the national laws of Qatar and asserted in their Skeleton Submissions that "it is common ground between the Parties that [the Bonds] are subject to the domestic laws of Qatar". On the other hand, Mr Daillet, counsel for the Bank, was more ambiguous. In response to an enquiry from the Court, he described it as "a tricky question". He did

not accept that there was common ground between the parties on the issue of governing law.

50. In favour of the national laws of Qatar, in its Claim Form and Statement of Claim at paragraph 31.4, the Claimants relied on three matters. First, that the Bonds refer to the Subcontract Agreement which is subject to Qatar law. Second, the Bonds are for the benefit of the Claimants, a Qatar based joint venture formed by entities incorporated in Qatar. Thirdly, that the Bonds were provided at the request of CP, another Qatar incorporated entity. By reason of these matters, the Claimants contended that the Bonds were closely related to Qatar and accordingly the governing law should be considered to be the national laws of Qatar.

51. On the other hand, as appears on the face of each of the APG and the PG, the Bank is a body authorized by the QFC Regulatory Authority; each of these instruments is written on the Bank's official paper and, although the Bank and CP are both bound to pay the sum guaranteed, the primary liability is on the Bank. The Bank alone is referred to as the paying party in the "first written demand" clause in each instrument.

52. The Court considers that it is unnecessary to reach a conclusion as to whether the national laws of Qatar or the laws of the QFC are the governing law of the Bonds. This is because it considers that there is no material difference between these laws in relation to the issues we have to decide. The Court also notes that the parties did not allege before us that any consequences flowed from the decision on governing law because of differences in the respective laws.

53. The laws of the QFC recognise and give effect to standard principles applied internationally to financial instruments (see Article 11(2) of the Contract Regulations: "The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned, except where the application of such a usage is excluded by the contract or would be unreasonable"). There is an issue between the parties of whether the Bonds are on demand guarantees giving rise

to a primary liability to pay or are conditional instruments giving rise to a secondary liability. Both types of instrument are used in international business or trade. Ultimately, we have to give effect to the parties' intentions as recorded in the Bonds.

54. For the reasons explained below, we have concluded that the Bonds were "on demand" guarantees. These instruments have their origins in international trade. They are dealt with in the national laws of Qatar. "Subchapter VIII: Letter of Guarantee", Articles 406-413 of the Commercial Code of Qatar, deals with what, in other systems of law, would be recognised as "on demand" guarantees.

55. Article 413 provides that, save as otherwise stipulated in that Subchapter, "the rules prevailing in international transactions on the law of guarantee shall apply". We construe that as importing that, whether an "on demand" guarantee has international elements or is purely domestic, the rules prevailing in international transactions will, as a matter of national Qatari law, apply, subject to any contrary stipulation in the Subchapter, to it. Thus, subject to any such stipulation, it appears to be unnecessary to decide which of the two possible systems of law governs the APG and the PB.

56. The Court considers that the recent decision of the Appellate Division (before the President and Justices Rajah SC and Malek QC) in *Leonardo S.p.A v Doha Bank Assurance Company LLC* [2020] QIC (A) 1 is relevant. The Appellate Division referred to the Uniform Rules for Demand Guarantees (URDG 758) as a code which "is accepted to represent the law and practice applied internationally in respect of demand guarantees" (paragraph 42). In *Leonardo,* URDG 758 was expressly incorporated into the demand instruments considered in that case. In the present case the Bonds do not do so but it seems to the Court that it is entitled to have regard to URDG 758 as a source representing international banking practice in relation to demand guarantees whether the Bonds are governed by the national laws of Qatar or QFC Law.

The PB

Parties' Contentions

The Claimants

57. There was a dispute between the Claimants and the Bank about the PB and whether it operated as a demand instrument.

58. The Claimants contended the PB was an irrevocable, unconditional and on demand bank bond, payable upon the first written demand of the Claimants claiming that CP had failed to fulfil its obligations under the terms of the Subcontract Agreement.

59. It contended that the PB (as well as the APG) were autonomous standalone contractual instruments governed by their respective terms and the provisions of Articles 406 to 413 of Qatar's Commercial Code (Law 27 of 2006) ("the Commercial Code").

60. Pursuant to Article 406 of the Commercial Code, it was alleged the Bank was obliged to comply with the demands notwithstanding any objections from CP. Article 409 of the Commercial Code provides "a bank shall not be entitled to refuse to pay the beneficiary due to any reason connected to the bank's relationship with the applicant or the applicant's relationship with the beneficiary".

61. Article 171(1) of Qatar's Civil Code (Law No 22 of 2004 ("the Civil Code") provides that "a contract is the law of the contracting parties and it may not be revoked or amended, except by agreement of both parties and for reasons prescribed by law".

62. The Claimants contend that all they were required to do under the PB was to issue a written demand for payment from the Bank which they did in the terms set out above. It was enough to state that "[CP] has failed to fulfil its obligations under the terms of the [the Subcontract Agreement]..."

The Bank

63. The Bank argued that the purpose of the PB was to guarantee the obligations of CP under the Subcontract Agreement. It argued that this purpose was evidenced by (i) the reference in the PB to the Subcontract Agreement; (ii) the fact that the Claimants must refer to a failure by CP to fulfil its obligations under the Subcontract Agreement in order to liquidate the PB and (iii) the fact that the PB is extendable only if the Subcontract is extended.

64. It argued that that the PB is therefore connected to the underlying contract (i.e. the Subcontract Agreement).

65. In its Defence Memorandum No 4, the Bank at paragraph 5.4 alleged "The Performance Bond is neither a corporate guarantee, nor a mere demand guarantee, but is a sort of hybrid security, which tries to combine the straight-forwardness of the demand guarantee with a connection with an underlying relationship". In its Skeleton Submissions, the Bank contended (paragrpah 3.2) that "the Bonds are conditional".

66. Having characterised the PB in these terms, it then relies on a number of matters to contend that it has no liability under the PB.

67. It contends that the Claimants took over the Project Works. It argues that the PB was intended to guarantee CP's performance of the subcontract works and not a debt that was agreed subsequently between the Claimants and CP.

68. The position is stated in its Skeleton Submissions as follows. In paragraph 3.21 "The Subcontract Agreement was effectively deemed terminated by the Supplemental Agreement and it was replaced by a loan agreement resulting in a debt which was agreed between [the Claimants] and CP to be guaranteed by the Bonds, and therefore the main condition that the Performance Bond shall guarantee CP's performance cannot be applied,

which invalidates the Performance Bond". Paragraph 3.22 "The [Claimants] completely changed the purpose of the Bonds to cover a claimed debt with CP, which invalidated them".

69. The Bank also contends that even if the PB was not conditional and linked to the Subcontract Agreement in the manner alleged, it is entitled to rely on the fraud exception. In its Skeleton Submissions at paragraph 5.1 it defined fraud as "a wrongful or criminal deception intended to result in financial or personal gain".

70. The Bank's fraud case was put on a number of different grounds. There is a substantial overlap of the Bank's case of fraud in connection with the PG and the APG.

71. It is convenient to summarise the Bank's fraud case by reference to its skeleton submission.

    a. First, it is alleged that the Claimants breached the terms of the Assignment Agreement. Linked to this are allegations that "CP's debt towards the Claimants is tainted by fraud"; that "the use of the Bonds as security for the repayment of a fraudulent debt is fraudulent as well"; "that the extension requests are tainted by fraud"; that "the liquidation requests are tainted by fraud" (the Bank's Skeleton Submission at para 5.2).

    b. Secondly, it is alleged that there has been a diversion of both the APG and PG from their original purpose (the Bank's Skeleton Submission at paragraph 5.3). The thrust of the argument here is that the purpose of the PG was to guarantee the obligations of CP under the Subcontract Agreement. The complaint is that the Subcontract was novated by the Supplemental Agreement involving the discharge of the Subcontract Agreement and the Claimants taking over the project.

    c. Thirdly, it is alleged that the Subcontract Agreement was replaced by a loan agreement. This follows from the Supplemental Agreement containing an

acknowledgement of debt by CP to the Claimants; a commitment by CP to repay a debt and security to secure CP's obligation to repay its debt.

d. Finally, it is said that discharge of the Subcontract Agreement and the novation outlined above was a fraud on the Bank because this was kept secret from the Bank whose consent was never sought. It is said that the PG was connected to the Subcontract Agreement but its purpose was changed into a guarantee of payment of the debt due from CP to the Claimants. This change in purpose defrauded the Bank.

72. There are separate points in relation to the APG that are alleged in paragraph 5.4 of the Bank's Skeleton Submission, but these are considered below in relation to the APG.

Discussion

73. The two main issues on the PG are these:

a. First, whether the PG is a demand instrument.

b. Secondly, whether the Bank has successfully invoked the fraud exception in the context of an application for summary judgment.

74. We turn to the issue of construction of the PG. It is important to make a distinction between two different types of instruments that are used in international finance.

75. The first is "on demand" guarantees or bonds (however labelled) where payment is required on a demand complying with the terms of the instrument. It is a general principle of banking law and practice that an "on demand" guarantee is independent of the underlying relationship between the party in whose favour the guarantee is granted (the

beneficiary) and the party whose obligations are guaranteed (the applicant). This is reflected, for example, in Article 5(a) of URDG 758 which provides: "An [on demand] guarantee is by its nature independent of the underlying relationship…, and the guarantor is in no way concerned with or bound by such relationship". What this means is that if the PG is a demand instrument it is independent of the Subcontract Agreement. Provided an honest demand is made by the beneficiary (the Claimants), the guarantor (the Bank) has to pay.

76. An "on demand" guarantee is an instrument of primary obligation on the part of the issuer. The bank giving the instrument is required to pay on demand and can raise very limited defences to payment (such as the fraud exception which is considered below). Liability may arise simply on a compliant demand being made within the validity of the instrument. This is why it is sometimes likened to a letter of credit. This reflects the feature that with "on-demand" documents the parties are dealing in documents only. This documents principle is reflected in Article 6 of URDG 758 which provides: "Guarantors deal with documents and not with goods, services or performance to which the documents may relate".

77. The second type of instrument are guarantees or bonds which are conditional. They give rise to a secondary liability on the part of the issuer and are sometimes referred to as "see to it" guarantees.

78. When approaching the question of construction as to which type of instrument is in play, the Court construes the instrument without any preconception as to the type of the instrument. All depends on what the parties' agreed.

79. The distinction between on demand instruments and guarantees that are conditional or "see to it" guarantees is clearly set out in the decision of Blair J in *WS Tankship II BV v The Kwangju Bank and another* [2011] EWHC 3103 (Comm) at [111- 112]:

“111. Whether Kwangju Bank is correct to submit that its liability is conditional on GEO being liable under the shipbuilding contract depends upon the nature of the instrument. There is a fundamental difference between a guarantee and a demand instrument. A guarantee imposes secondary liability, primary liability remaining with the principal debtor. A demand guarantee—also called a "first" demand or "on demand" guarantee or bond, the nomenclature does not matter—imposes primary liability on the issuer. Liability flows from the instrument, not the underlying contractual arrangements which give rise to the issue of the instrument. These are often international instruments, and the English law distinction between a guarantee and an indemnity may not be helpful. A better (though not perfect) analogy is with an irrevocable documentary credit, which like a demand guarantee, is an autonomous undertaking by the issuer. In the case of a demand guarantee, liability arises upon a demand that conforms with the requirements of the guarantee, including as to any supporting documents, and made within the validity period of the instrument. Such instruments cover a variety of situations, including tender guarantees, advance payment guarantees, performance guarantees, and so on. They have proved to be of great value in international commerce. Particularly when issued by financial institutions, the beneficiary has a promise to pay from a creditworthy promisor which is independent from that of its contractual counterparty. These points are uncontroversial, and emerge from the authorities beginning with early cases such as *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159, and the more recent Court of Appeal authority cited by the parties, *Marubeni Hong Kong and South China Ltd v Government of Mongolia* [2005] 1 WLR 2497, *Gold Coast Ltd v Caja de Ahorros del Mediterraneo* [2002] 1 Lloyd's Rep 617, and *IIG Capital LLC v Van Der Merwe* [2008] 2 Lloyd's Rep 187.

112. The nature of the instrument in question is a matter of construction of the instrument as a whole without any preconceptions as to what it is (*Gold Coast* at [15], *IIG* at [7]). As Tuckey LJ pointed out in *Gold Coast* at [21], the description of an instrument as a "guarantee" is simply a label. The question is as to its effect. At [16], he referred to a passage in *Paget's Law of Banking* (11th edn) where the authors say that an instrument which (i) relates to an underlying transaction between parties in different jurisdictions, (ii) is issued by a bank (iii) contains an undertaking to pay "on demand", and (iv) does not contain clauses excluding or limiting the defences available to a guarantor, will almost always be construed as a demand guarantee. There was force in Kwangju Bank's submission that subsequent authority shows that these indicia are not determinative. For example, *Associated British Ports v Ferryways NV* [2009] 1 Lloyd's Rep 595 at [12] shows that the fourth factor may be neutral. The mere use of the words "on demand" is also not determinative, since a secondary guarantee often requires a demand on the guarantor (*IIG* at [25]) (which may be relevant for example for

> limitation purposes). On the other hand, the significance of the fact that issue is by a financial institution is emphasised in *Marubeni* at [28]. It appears to me that whether or not determinative, the list of indicia is at least a useful checklist."

80. Blair J in this decision points out one point of significance when dealing with a demand guarantee. At [145] he said: "…the rules as to discharge of a surety on the basis of material variation or forbearance have no application to demand guarantees…..Any other finding would be contrary to principle and create much commercial uncertainty".

81. The Court considers that whether an instrument is an "on-demand" instrument or a conditional instrument is essentially a question of construction of the instrument concerned. It is a process which requires consideration of all the terms of the instrument.

82. The Court considers that the PG is an instrument of the first type and operates as a standalone autonomous obligation on the part of the Bank.

83. The terms of the PG have been set out in full above. The PG states that it is irrevocable and unconditional and payable "without regard to any objections from [CP] or any other party upon the first written demand of the [Claimants]".

84. We consider that the wording of the PG clearly points to a demand instrument. In particular it is expressed:

    a. to be "irrevocable and unconditional";
    b. "without regard to objection from [CP]; and
    c. "upon first written demand of the [Claimants]".

85. The Court reaches its conclusion by considering the terms of the PG. Although it is unnecessary to consider any other documents, the Court notes that its analysis is consistent with the Facility Agreement between the Bank and CP. As recorded above, the Bank's Terms make it clear that: "In the event that the Bank is called upon to make any payment under any Letter of Guarantee issued to a third party, the Customer hereby irrevocably and unconditionally directs the bank to pay first the amount demanded from the bank under the Bank Guarantee. The Bank shall not be obliged to enquire to the propriety, validity or amount of any claim made on the Bank under or pursuant to the Bank Guarantee".

86. In the light of the Court's conclusion on the construction of the PG as a demand instrument, the remaining question is whether the Claimants served a demand under the PG by a letter dated 17 February 2019 which triggered a liability on the part of the Bank to make payment. This depends on whether the demand complied with the terms of the PG. This again is a question of construction of the PG which will be subject to ordinary principles relating to contract interpretation.

87. The Court considers that the letter dated 17 February 2019 was a valid demand served under the PG. It was issued before the PG expired. It expressly referred to the PG and stated that "[CP] has failed to fulfil its obligation under the terms of the [Subcontract Agreement]..." The Court refers to the terms of the PG which is expressed to be unconditional and payable "upon the first written demand stating that the Subcontractor has failed to fulfil its obligations under the terms of the Subcontract Agreement" (emphasis added).

88. This statement is enough to establish liability under the PG. The Bank is not concerned with the issue of whether in fact CP had failed to fulfil its obligation(s) under the Subcontract Agreement. The "on demand" nature of the PG is intended to avoid the Bank having to go into this enquiry.

89. The Bank is accordingly liable to pay unless there is clear evidence that the beneficiaries of the PG (the Claimants) knew that CP is not in breach of the Subcontract Agreement. This is considered in the context of the fraud exception defence.

The Fraud Exception

90. The Bank invokes the fraud exception. Before considering the facts, the Court proposes to consider the nature of the fraud exception and how it operates where summary judgment is being sought on demand instruments. It is not a principle specifically mentioned in URDG 758 on the basis that it is for national laws to apply the principle. It is common ground between the parties that a fraud exception exists which arises whether the governing law of the Bonds is national Qatar law or QFC Law. The Court considers that the English caselaw, in this instance, is the best source of law.

91. In *RD Harbottle v National Westminster Bank* [1978] QB 146, 155 Kerr J said:

> "It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the lifeblood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in contracts."

92. In *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159 this passage was approved, and it was emphasised that the bank must honour a performance bond unless it has notice of clear fraud.

93. *Edward Owen* was approved by the House of Lords in *United City Merchants v Royal Bank of Canada* [1983] 1 A.C. 168. This case concerned a letter of credit issued to a seller of goods who presented apparently conforming documents including falsely dated bills

of lading which it (the seller) did not know were false. Having set out the obligations of the confirming bank to pay the seller Lord Diplock continued (page 183):

> "To this general statement of principle as to the contractual obligations of the confirming bank to the seller, there is one established exception: that is, where the seller, for the purpose of drawing on the credit, fraudulently presents to the confirming bank documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue. Although there does not appear among the English authorities any case in which this exception has been applied, it is well established in the American cases of which the leading or "landmark" case is *Sztejn v J.Henry Schroder Banking Corporation* (1941) 31 N.Y.S. 2d 631. This judgment of the New York Court of Appeals was referred to with approval by the English Court of Appeal in *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159, though this was actually a case about a performance bond under which a bank assumes obligations to a buyer analogous to those assumed by a confirming bank to the seller under a documentary credit. The exception for fraud on the part of the beneficiary seeking to avail himself of the credit is a clear application of the maxim *ex turpi causa non oritur actio* or, if plain English is to be preferred, "fraud unravels all". The courts will not allow their process to be used by a dishonest person to carry out a fraud."

94. Mere allegations of fraud or dishonesty are insufficient. There has to be supporting evidence. The party alleging fraud must identify the primary facts from which a claim in dishonesty has been proven.

95. As David Steel J said in *Uzinterimpex JSC v Standard Bank PLC* [2007] EWHC 1151 (Comm) at [107] (at first instance, there was no appeal on this aspect of the decision [2008] EWCA Civ 819)) "In the context of a performance bond or advance payment guarantee, a demand which the maker does not honestly believe to be correct as to its amount is a fraudulent demand:

> "…The question is whether when the demand was made the persons acting on behalf of the plaintiffs knew that the sum claimed was not due from Leadrail, and dishonestly made a demand despite that

> knowledge…": *Balfour Beatty v Technical General Guarantee Company Ltd* [1999] 68 Constr LR 180".

96. We consider this description of fraud is the correct one rather than relying on the definition of fraud as a "wrongful or criminal deception intended to result in financial or personal gain" as contended in the Bank's skeleton submission at paragraph 5.1.

Summary Judgment: Fraud Exception

97. The fraud exception has to be considered in the context of an application for summary judgment by the beneficiary. The Bank has to show the existence of a triable issue. Again, the English caselaw is of assistance.

98. Teare J in *Enka Insaat Ve Sanayi A.S. v Banca Popolare Dell'Alto Adige SpA* [2009] EWHC 2410 (Comm) [para 24]:

> "In my judgment the test to be applied must be that of a "real prospect" because that is the test set out in CPR Part 24. I do not consider that this court is bound to apply a "heightened test" because the courts in **Solo** and **Banque Saudi Fransi** were not considering a claim against a bank under a guarantee where the defence was that the demand was said to be fraudulent. I therefore consider that the test in the present context is whether there is a real prospect that the Banks will establish at trial that the only realistic inference is that the fraud exception applies, that is, that ENKA could not honestly have believed in the validity of its demands."

99. This approach to summary judgment where the fraud exception is raised was approved by the Court of Appeal in *National Infrastructure Development Co Ltd v Banco Santander SA* [2017] 1 Lloyd's Rep 361. We consider that it is the right approach to take in the present case.

100. Having set out the relevant legal principles, it is necessary to consider whether the Bank can invoke the fraud exception to the autonomy principle.

Claimants' Case

101. Before considering the Bank's case it is necessary to set out the justification advanced by the Claimants for making the demands. In summary it is as follows.

102. During the course of the Project, CP committed numerous breaches of its obligations under the Subcontract Agreement. CP completed only 47% of the works required under the Subcontract Agreement. Given CP's repeated failure to comply with its obligations, the Claimants contend that they were frequently required to appoint their own labour and subcontractors to undertake the outstanding work. The parties which the Claimants appointed included the Applicants' own labour, third party subcontractors, and also subcontractors and suppliers which had previously been appointed by CP itself.

103. The cost to the Claimants of these appointments was deducted against amounts otherwise due to CP under the Subcontract Agreement; these deducted amounts were referred to as "*deductions*" as between the parties. These deductions were permitted pursuant to Clause 3.3 of the Subcontract Agreement, which states "[p]rovided *that the* [Claimants] *has given notice of his decision* [sc. as to the amount of a deduction] *no later than* 7 *days before the date* [CP] *is due to be paid, this amount may be deducted from sums otherwise due to* [CP]".

104. Further, the Claimants' contend that CP is liable for the additional costs incurred by the Claimants pursuant to Clause 8.3 of the Subcontract Agreement, which provides:

> ".. ,[i]n *the event that* [CP] *fails to adopt the revised methods and/or take such other measures in accordance with this Sub-Clause,* the

> [Claimants] *may give a notice of default to* [CP] *specifying the failures. If [CP] fails to rectify the failure or provide a response which is satisfactory to the* [Claimants] *within* 7 *days of the date of such notice (or such other longer period as the* [Claimants] *may specify), the* [Claimants] *may instruct a third party contractor to adopt such methods and/or measures and (i)* [CP] *shall pay the costs arising to the* [Claimants] *in addition to the delay damages and other damages (if any) under Sub-Clause 8.7 and (ii)* [CP] *shall be liable for the third party contractor as if it were its subcontractor."*

105. The Claimants' further contend that CP's poor performance and breaches on the Subcontract Agreement continued. The Claimants and CP entered into the Supplemental Agreement to reset the balance of the relationship between CP and the Applicants following CP's various failures and its mounting debt to the Applicants, and also to provide assistance to CP to allow it to complete its works. As part of its obligations under the Supplemental Agreement, CP was required to maintain and extend the Performance Bond and APG. Amongst other things, this clearly indicated that: (i) it was agreed that CP still had a number of obligations under the Subcontract Agreement, the performance of which was guaranteed by the Performance Bond; and (ii) the advanced payment formed part of CP's outstanding debt to the Applicants. This latter point is further supported by the fact that, following entry into the Supplemental Agreement, IPCs were updated to highlight that the advanced payment remained fully outstanding. This continued to be the position under the IPCs until the end of the Project.

106. The Claimants contend that CP's works were due to be completed by a revised target date of 31 March 2018, but remain incomplete to date. Notwithstanding CP completed 47% of the Subcontract Works, any progress made on the Project after that was largely due to the efforts of the Claimants and other third parties.

107. In short, the Claimants contend that there is no basis for the Court to conclude that the demand under the PG was fraudulent. As at August 2019, being the latest IPC for CP, there existed a negative balance due from CP to the Applicants in the amount of QAR

53,289,452.41. This IPC also clearly shows that the advance payment remains outstanding. Despite many requests for the remaining amount to be paid, CP has repeatedly failed to do so.

The Bank's Case

108. The Bank's case as to why it can rely on the fraud exception is summarised above. It focuses on the alleged lack of transparency by the Claimants and CP concerning their agreements and in particular the entering into the Supplemental Agreement.

Discussion

109. The Court notes that the invocation of the fraud exception as a defence was made late in these proceedings in Defence Memorandum No 4. Although the Claimants argued that the Bank should be precluded from making a late allegation of fraud, the Court has considered this defence.

110. We consider that there is no basis on which the fraud exception can be invoked in the present case. It is important to stress that we are not required to make any findings as to whether there were in fact breaches of obligations by CP under the Subcontract. CP is not party to the present proceedings and, in principle, is not bound by any findings we make. The only issue we have to decide is whether there is a real prospect that the Bank will establish at trial that the only realistic inference is that the fraud exception applies, that is, that the Claimants could not honestly have believed in the validity of its demand under the PG. This test (see paragraph 98 above) is the appropriate application in the present circumstances of the "no prospect of successfully defending" guidance in Practice Direction 2/2019. There is no other compelling reason why this issue should await a trial.

111. What is clear on the materials before us was that CP had serious problems in discharging its obligations under the Subcontract Agreement. These are recorded in the Supplemental Agreement which refers in detail to CP's financial difficulties and needs. The purpose of the Supplemental Agreement was to enable the works required by the Subcontract Agreement to be carried out with additional financial support from the Claimants. Had CP performed as required by the Subcontract Agreement, it would have not been necessary for the Claimants to have undertaken works which should have been completed by CP.

112. We consider that the Subcontract Agreement was not terminated by the Supplemental Agreement. As expressed in the Supplemental Agreement, it proceeds on the basis that the Subcontract remains in force. It states at the end that "all other terms and conditions agreed in the Subcontract Agreement dated 04th November 2014 will remain unchanged". We do not see any legal basis for asserting that there was a novation resulting in the discharge of the Subcontract Agreement.

113. We note the allegations concern the Assignment. But this dispute is before the national Courts of Qatar and it would be contrary to principle of comity if we sought to make findings in relation to this dispute. It is enough to say that we do not see how anything alleged by the Bank engages the fraud exception rather than a breach of contract if the facts alleged were established.

114. We conclude that the fraud exception is not made out and that the Bank has not shown the existence of a triable issue.

The APG

115. The Bank advanced two related defences to the claim under the APG.

116. The first defence raised by the Bank against the claim based on the APG in its Defence Memorandum 1, of 18 July 2019, was that "the claimant has recovered 100% of the Advance Payment amount from CP as evident from [IPC] number 36 to 43 … which clearly shows that the Advance Payment of QAR 9,900,000 has been fully recovered".

117. Relying on its analysis of the IPCs, the Bank advanced a second defence in Defence Memorandum 4, dated 15 December 2019, to encompass one of fraud in that, so the Bank alleged, the Claimants acted fraudulently in presenting a claim based on the APG, knowing that as a fact, the advance payment had been repaid in full by way of deductions, on a monthly basis, from monies otherwise payable to CP.

118. The IPCs have been considered above. What is striking is that the APG appears to contemplate a reducing amount that is guaranteed depending on amount repaid and yet IPC48, covering the period June to August 2019, indicates that nothing had been recovered from the advance payment of QAR 9.9 million secured by the APG. This is surprising.

The Bank's Case

119. The Bank's case can be summarised as follows:

a. the purpose of the APG was to secure repayment of the advance payment contemplated in clause 14.2 of the Subcontract Agreement. The purpose was not to secure any other debts owing by CP to the Claimants;

b. In terms of clause 14.2 of the Subcontract Agreement, the Claimants agreed to recover the advance payment on a monthly basis by way of a 10% deduction

from the amount which would otherwise be payable to CP during that month and to reflect these recoveries in the IPCs;

c. Although the Subcontract Agreement constituted a contract between CP and the Claimants, it was submitted to the Bank before the APG was issued. Hence the APG was issued on that basis and in consequence the Claimants bound themselves in terms of the APG, not to deviate from the payment terms in clause 14.2 or to amend those terms by subsequent agreement with CP without the consent of the Defendant. It follows that the conditions of the APG did not allow the Claimants the option or discretion not to make recoveries of the advance payment in accordance with clause 14.2 of the Subcontract Agreement.

d. The reallocation of recoveries that had already been made from the advance payment, to reflect repayments of the supplementary advance payment guaranteed by the Commercial Bank of Qatar, was illegal. Moreover, as the Bank alleged in Defence Memorandum 5, dated 27 January 2020, this manipulation of the IPC's constituted fraud by the Claimants and CP on the Bank.

e. Had clause 14.2 of the Subcontract Agreement been applied in accordance with its terms, the advance payment would have been recovered, at the latest by the end of September 2017 when IPC37 indicated that the supplementary advance payment, which was for the same amount, had been recovered in full through monthly deductions.

The Claimants' Case

120. The Claimants responded to these arguments as follows:

a. The APG is an autonomous contractual instrument governed solely by its own terms. It is an on-demand guarantee which operates in the same way as the PG.

b. CP's performance under the Subcontract Agreement was inadequate. In consequence, as explained above, the Claimants incurred significant expenses by undertaking and completing works that should have been done by CP. In terms of the Subcontract Agreement, CP was liable to the Claimants for these expenses. Hence it was ultimately agreed between the Claimants and CP that the debt thus incurred by CP to the Claimants would be recovered by way of deductions from amounts otherwise payable to CP and that this debt would be secured by the APG and the PG.

c. The supplementary advance payment reflected in the IPCs likewise resulted from CP's failure to perform its obligations under the Subcontract Agreement. The supplementary advance payment of QAR 9.9 million was made to assist CP by way of a payment of QAR 4,950,000.00 directly to third parties undertaking the subcontract works that CP had failed to perform while the balance of the advance was paid directly into CP's bank account.

d. Although the supplementary agreement between CP and the Claimants was only finalised in November 2017, the reallocation reflected in IPC36 embodied the terms of that agreement. Accordingly, it was also in accordance with that agreement that the advance payment guaranteed by the APG remained outstanding in full as reflected in subsequent IPCs.

e. The method of repayment of the advance payment was determined by the Subcontract Agreement to which the Bank was not a party. It is true that in terms of clause 14.2 recoveries had to occur in a certain way. But there was nothing preventing the parties to the Subcontract Agreement, i.e. CP and the Claimants, from amending this clause. Such amendment would be in accordance with article 171(1) of the Qatari Civil Code which provides that "a contract is the law

of the contracting parties and it may not be revoked or amended, except by agreement of both parties and for reasons prescribed by law".

f. The Bank had no say in this. It followed that nothing prevented the Claimants to grant CP an indulgence by deducting less than 10% of the amount otherwise owing to CP or, in fact, not to make any deductions from that amount at all.

g. In addition, there was nothing preventing the Claimants from agreeing with CP to reallocate the payments that had already been credited against the advance payment to some other debt owing by CP such as the supplementary advance payment. That is what happened. So, the entries in the IPC's do not reflect any breach of the Subcontract Agreement terms, but the implementation of amendments to those terms by agreement between the Claimants and CP.

h. The APG does not reduce in value automatically by recovery. In order to reduce the face value of the instrument, it would have to be reissued by the Bank reflecting a lower value on the face of it. This is so, firstly, because a security document of this kind cannot be subject to the uncertainty of an unascertainable value. Secondly, because automatic reduction would require a clear wording which the APG does not contain.

i. The face value of the APG could have been reduced by agreement between CP and the Bank when it was extended from time to time to take account of recoveries made against the advance payment made through deductions in the interim period that preceded the extension. But this did not happen. Thus the Claimants were entitled to accept that the renewed value of the APG remained QAR 9.9 million and that they could advance further payments to CP against the security of this guarantee.

j. It is clear that the Claimants and CP considered the advance payment as part of CP's outstanding debt which was secured by the APG. This is irrespective of the repayments of the advance payment indicated by the earlier IPCs. As a fact, the total debt owing by CP to the Claimants at all times exceeded the value of the APG.

k. The Bank's security and comfort does not lie in the reduction of the APG in accordance with the recoveries reflected in the IPCs. On the contrary, such security is to be found in clause 4.3 of the Facility Agreement which affords the Bank a back-to-back indemnity by CP of all amounts for which the Bank became liable under the APG.

Discussion

121. The first issue to determine is how to characterise the APG. The Court agrees with the Claimants' contention that the APG is an autonomous contractual instrument; that it is payable on demand and governed solely by its own terms. This conclusion is reached for the same reasons that the Court concluded that the PG is such an instrument.

122. Interpreting the APG in this way, the Court accepts the Claimants' argument that the terms of clause 14.2 of the Subcontract Agreement, governing the method of repayment of the advance payment, are not incorporated into the APG. Conversely stated, that the reference to "conformity with the provisions of the subcontract" in paragraph 2 of the APG, cannot be said to incorporate the method of repayment of the advance payment in clause 14.2. It constitutes no more than a record of the fact that the APG was issued by virtue of the provisions of the Subcontract Agreement.

123. Accordingly, we also agree with the Claimants' further argument that there was nothing to prevent the Claimants from agreeing with CP to reduce the recovery of the advance

payment to 5% per month or not to recover anything at all during a particular month or during the whole contract period. The Claimants' case that this is exactly what happened stands uncontroverted. In fact, it is borne out by the Supplemental Agreement.

124. However, we do not agree with the Claimants' further contentions that recoveries of the advance payment once made and recorded in the IPCs could be reversed or reallocated by agreement between CP and the Claimants; and that the face value of the APG could not be reduced through recovery, but only by way of an amendment to the amount guaranteed in terms of the bond.

125. Both these propositions fly in the face of paragraph 4 of the APG. In terms of this paragraph "The value of this bond shall progressively be reduced by the amount deducted by [the Claimants] from [CP] as contained in the [IPCs] and payments against the said Advance Payment".

126. The Claimants' argument that the automatic reduction of the value of the APG through recovery would render the value of the APG uncertain is answered by the very fact that such reduction is coupled to the recoveries accepted and recorded by the Claimants in the IPCs. The amount secured by the APG at any particular moment in time could therefore be determined with reference to the IPCs and any uncertainty concerning the reduced value of the bond could be eliminated in this way. The notion that the parties intended the face value of the APG to be changed every time a recovery is made through repayment of the advance payment is clearly untenable. The Claimants' further argument that such automatic reduction in the value of the APG would require clear wording is, in our view, answered by the clear wording of paragraph 4 of the APG.

127. The inevitable consequence of the Court's construction of paragraph 4 of the APG is that a deduction once recorded in the IPCs as a credit against the advance payment, could not be cancelled or reallocated to another debt owing by CP without the consent

of the Bank. This conclusion is dictated by logic. In terms of the agreement between the Claimants and the Bank embodied by the APG, every recovery of the advance payment reflected in the IPC reduces the value of the APG. Any cancellation or reallocation of that recovery would therefore amount to an increase in the value of the APG. The notion that such increase could occur without the consent or even the knowledge of the guarantor, is untenable. As far as the APG is concerned, CP's consent to such cancellation or reallocation is of no consequence.

128. As to the Claimants' further argument that the face value of the APG had not been reduced upon extension of the expiry date on various occasions, the letters of extension made it clear that the APG was extended on the same terms and conditions as originally agreed upon. This means that once the value of the APG had been reduced – through recovery reflected in IPCs – prior to the extension, the extension pertained to the APG at its reduced value. Its face value would no longer be relevant and the parties to the extending agreement would know that this is so.

129. The Claimants' further argument, to the effect that the Bank was only concerned with the face value of the APG, as opposed to its reduced value, because the Bank did not find its security and comfort in recoveries of the advance payment, but in the indemnity from CP, is equally unconvincing.

130. We say this for two reasons. Firstly, the indemnity by CP would only be of significance if CP was in a position to honour that obligation. If CP proved to be financially unable to do so, as appears to be the case, the Bank would derive little comfort from the indemnity. Secondly, we believe that considerations as to motive, such as these, cannot serve to change the clear wording of paragraph 4 of the APG.

131. It follows that the Claimants are not entitled to demand payment of the full face value of the APG. This is so because the face value had been reduced through recovery recorded in the IPC's in accordance with paragraph 4 of the APG. We know that the

reason why those recoveries were not reflected in the final IPC is because they were cancelled or reallocated. That appears from IPC36 where recoveries credited against the advance payment in previous IPCs in an amount of QAR 4,480,741.88 had been cancelled and reallocated to the supplementary advance payment.

132. We reach the conclusion that the Claimants were entitled to claim QAR 5,419,250.12 (9,900,000 less 4,880,741,88) under the APG and not the full amount of the APG. This leaves two issues that need to be considered.

133. First, the Bank's case that the demand under the APG was not only wrong but also that it was fraudulent. We have no hesitation in rejecting this case. There was nothing dishonest in what the Claimants did. There was an issue about the nature and effect of the APG. The Claimants had a view of it. The fact that we have taken a different view does not involve any suggestion that the Claimants must have known that their demand was excessive and unlawful. Although we have rejected the Claimants arguments on the APG, they were of substance and made bona fide with a proper legal foundation. The Bank did not make any payment pursuant to the demand. Had it done so in an amount more that the Claimants were entitled, the Claimants would be under an obligation to account for the excess. The Court agrees with the Claimants' reliance in this context of the decision of Morison J in *Cargill International v Bangladesh Sugar and Food Industries Corp* [1996] 2 Lloyd's Rep 524.

134. Secondly, it is unclear whether this point was run by the Bank, but we confirm, for the avoidance of doubt, that the fact that we have decided the Claimants are entitled to a lesser sum under the APG to the sum demanded, does not entail any consequences to the validity of the demand under the APG or the Claimants' entitlement to the sum actually due. No authority was cited to us by the Bank on this issue. This is not a case under URG 758 where there is a regime dealing with what happens when there is a challenge to a demand.

135. It is reasonable to attribute to the parties an intention that, in the event of a demand that the Court finds is excessive, the guarantor is liable for the lesser sum as found by us. There was nothing to prevent the Bank disputing the demand and paying the sum it considered to be due. Moreover, there is no evidence or allegation that the Bank has been harmed or prejudiced by anything done by the Claimants in claiming under its demand what we have concluded to be the wrong amount.

Interest

136. The Claimants seeks summary judgment for interest on the principal sums for which judgment is sought on each of the APG and the PB. That is QAR 25,219,250.12 (19,800,000 plus 5,419, 250.12) in aggregate.

137. The interest claimed is at the rate of 4.5% per annum from the date of demand under the relative bond, namely, 19 February 2019. That is the rate of interest of the Claimants' bank. The capitalised figure of such interest as at the date of judgment amounts to QAR 1,452,006.96.

138. For this purpose, the parties proceeded in argument on the assumption that the issue was governed by the national laws of Qatar, rather than by the law of the QFC, the law of the forum. (The latter law expressly provides for an order for payment of interest as an available remedy: Procedural Rules, Article 10.4.9.) The Court is prepared to decide the issue on that assumption.

139. The only ground upon which the claim for interest was resisted was that the Bank is a Sharia-compliant financial institution. No authority, from the national courts of Qatar or otherwise, was put before us to support the proposition that that status was in law a ground for refusing an award of interest where that would otherwise be appropriate.

140. The fundamental principle of Sharia in this field, as we understand it, is that an individual or other person may not profit by the lending or other advancement of money; that is, usury is prohibited. But, in the present context the "interest" claimed is not of that nature. Rather, it represents compensation for the loss sustained by the Claimants for the improper failure by the Bank to pay the relative principal when it was due. Article 268 of the Civil Code of Qatar provides:

> "If the object of the obligation is a sum of money, and the debtor does not pay it after he has been given notice, and the creditor proves that as a result he has sustained detriment, the court may order the debtor to pay compensation, taking into account the requirements of equity".

141. In effect, an award of the interest claimed in this case would amount to such compensation. In these circumstances the amount claimed by way of "interest" is reasonable and equitable.

The Bank's Counterclaim

142. As stated in paragraph 17 above, the Bank did not file any counterclaim with its Defence, although it "reserved its right" to do so. The Counterclaim contemplated at that time appears, from the terms of paragraph 8 of Defence Memorandum No.1, to have been for sums allegedly diverted wrongfully from the Designated Account set up under the notified Assignment. No counterclaim on that basis was in the event ever filed in this Court. Proceedings had earlier been instituted by the Bank against the Claimants on this matter in the national courts of Qatar.

143. Since the Courts of Qatar are already seized of this dispute, as pointed out above, it would be contrary to the interests of comity for this Court to entertain any counterclaim on that basis.

144. It is necessary to consider the Counterclaim that is formulated in paragraph 13 of Defence Memorandum No.4. The Bank stated:

> "13.1 It is evident that the Claimant has unduly demanded the APG and the Performance Bond while it intentionally acted to harm the Defendant and to extract undue money and to maximise it[s] benefit by:
>
> (a) demanding full value of the APG while the Claimant acted intentionally in bad faith and in a fraudulent manner to avoid reducing the value of the APG; and
>
> (b) demanding full value of the Performance Bond after the Claimant changed its purpose and use.
>
> 13.2 By taking provisions, the Defendant will not be entitled to use an equivalent amount to fund its investments and operations.
>
> 13.3 All the above resulted in a financial loss for the Defendant which had to provision for the full value of the Bonds and this resulted in a net loss in its financial statements, which also caused reputational losses.
>
> 13.4 Therefore, the Defendant shall be compensated for such losses in an amount which is not less than QAR 10,000,000."

145. The Bank in paragraph 15 sought relief by way of indemnity for that amount.

146. In its Amended Reply (dated 12 January 2020) to this pleading the Claimants complained of the lack of a legal basis on which this counterclaim was presented.

147. In Memorandum No.6, filed on 26 February 2020, the Bank asserted that the Claimants' demands were "tainted with fraud" and that the Bank "was forced to take provisions for the value of the Bonds and is continuing". In its Reply, filed on 4 March 2020, the Claimants reiterated that the Bank had failed to attempt to substantiate its claim or to quantify its claimed losses.

148. The Counterclaim as presented is advanced on the basis of fraud allegedly committed by the Claimants. This is the same basis upon which resistance to payment on the APG and the PB is based.

149. For the reasons explained earlier in this judgment such a defence is untenable. Likewise, it is untenable on the averments made in the Counterclaim. Nor are the averments in support of losses sufficiently particularised to allow them to proceed. The Claimants have repeatedly called for greater particularisation, without any adequate response from the Bank. In these circumstances the Bank has no prospect of succeeding in its counterclaim. There is no other reason why the Counterclaim should proceed to trial.

150. In these circumstances the Claimants' application that it be struck out must be granted.

Costs and further procedure

151. The parties were agreed that these should be addressed once they had had an opportunity to consider the Court's judgment on the substantive issues. The parties are invited to see if they can agree on these matters, failing which the Court will determine all outstanding disputes.

By the Court,

Justice Arthur Hamilton

Representation:

The Claimants were represented by Mr Paul Fisher, Counsel, 4 New Square, London, UK.

The Defendant was represented by Mr Michel Daillet, Avocat, John and Wiedeman LLC, QFC, Qatar.