# AXA Insurance Pte Ltd *v* Chiu Teng Construction Co Pte Ltd

*[2021] SGCA 62*

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| **Case Number** | : Civil Appeal No 151 of 2020 |
| **Decision Date** | : 24 June 2021 |
| **Tribunal/Court** | : Court of Appeal |
| **Coram** | : Sundaresh Menon CJ; Steven Chong JCA; Quentin Loh JAD |
| **Counsel Name(s)** | : Ganesh Bharath Ratnam (Gurbani & Co LLC) for the appellant; Lee Peng Khoon Edwin and Jayaraman Sanjana (Eldan Law LLC) for the respondent. |
| **Parties** | : AXA Insurance Pte Ltd — Chiu Teng Construction Co Pte Ltd |

*Credit and Security – Performance bond*

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2020] SGHC 234.]

24 June 2021

**Steven Chong JCA (delivering the grounds of decision of the court):**

**Introduction**

1 Not infrequently, financial institutions, including insurance companies, who issue performance bonds seek to avoid liability on grounds which do not appear on the plain reading of such bonds. In so doing, they purport to invoke various legal principles in aid of their efforts to read defences into such bonds.

2 It cannot be overlooked that the use of performance bonds is an integral feature of the construction industry. One of the principal reasons for its widespread usage is for the allocation of the risk of non-payment in the event of default. Insurance companies respond to this need by agreeing to issue performance bonds *for a fee*. However, it is open to the insurance company to define its risk appetite by the terms of the performance bonds. What insurance companies cannot do is to rewrite the bargain between the parties with the benefit of hindsight. This was amply illustrated by the facts of this appeal which was against the decision of the High Court judge ("the Judge") in *Chiu Teng Construction Co Pte Ltd v AXA Insurance Pte Ltd* [2020] SGHC 234 ("the GD"). It was therefore unsurprising that the attempt by the insurance company failed and consequently we dismissed this appeal with brief grounds on 17 May 2021. These are our detailed grounds.

**Facts**

***Parties***

3 The respondent, Chiu Teng Construction Co Pte Ltd ("CTC"), is a company in the building construction business. It was the main contractor for a project for upgrading and refurbishment works at the Nanyang Technological University ("the Project"). QBH Pte Ltd ("QBH"), presently in liquidation, was also a company in the building construction business. CTC engaged QBH as a subcontractor for the Project on 1 August 2016 under a subcontract (the "Subcontract"). The appellant, AXA Insurance Pte Ltd ("AXA"), is an insurance company. At QBH's request, AXA issued Performance Bond No LBP/P1821315 dated 25 July 2016 ("the Bond") in favour of CTC. The Bond was for the amount of $397,687.50.

4 In the interests of clarity, we begin by defining some of the terms we employ in the course of

our analysis. We refer to (a) the party in whose favour a bond is issued as the "beneficiary"; (b) the party who requests the issuance of the bond and who has an account with the party issuing the bond as the "account party"; and (c) the party issuing the bond as the "issuer". We also refer to the contract between the beneficiary and the account party as the "principal" or "underlying" contract, the performance of which is secured by the performance bond, to distinguish it from any contract between the account party and the issuer and from the bond itself. In these terms, CTC was the beneficiary, QBH was the account party, AXA was the issuer, and the Subcontract was the principal or underlying contract.

***Background to the dispute***

5 The dispute in this case centred on AXA's obligation to pay under the Bond in response to CTC's call on the Bond, which in turn was predicated on CTC's claims for breaches of the Subcontract by QBH. To properly situate the present dispute, it is necessary to consider some background facts concerning the relationship between QBH and CTC.

6 In the course of the Project, a dispute had arisen over QBH's Payment Claim No 23, which was served on CTC on 25 August 2018. Payment Claim No 23 sought payment of $1,108,739.94 for work done up to 25 August 2018. In Payment Response No 23 dated 4 September 2018, CTC asserted instead that QBH should pay $805,843.13 to CTC. On 14 September 2018, QBH submitted this dispute for adjudication under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) by way of an adjudication application. On 5 October 2018, the adjudicator determined in an Adjudication Determination that CTC owed QBH a sum of $386,856.21. On 30 October 2018, however, CTC served a Notice of Termination of the Subcontract on QBH.

7 At around the same time as this dispute over Payment Claim No 23, CTC purported to call on the Bond on 14 September 2018 ("the First Call"). On 9 October 2018, QBH commenced HC/OS 1239/2018 ("OS 1239/2018") to restrain AXA from making and CTC from receiving any payment under the Bond. On 23 April 2019, QBH was put into liquidation, pursuant to winding-up proceedings in HC/CWU 318/2018. This was filed by Dormakaba Singapore Pte Ltd which is unrelated to CTC. On 3 July 2019, the judge who heard OS 1239/2018 (who was also the Judge below in this case) held that the Bond was an indemnity performance bond and that, as CTC had not provided evidence of actual loss, the First Call was defective. The Judge therefore granted the injunction sought.

8 On 18 February 2020, CTC wrote to QBH's liquidators, claiming that QBH had failed to complete the works required under the Subcontract and/or had carried out defective works, and had therefore breached the Subcontract (the "18 February Letter"). Annexed to the 18 February Letter was a breakdown of CTC's claims against QBH, together with supporting documents. The total amount of losses claimed to have been suffered was $484,108.28. QBH's liquidators did not reply.

9 On 13 March 2020, CTC wrote to AXA, purporting to call on the Bond again ("the Second Call"), on the basis of the claims stated in the 18 February Letter. The Second Call was the subject of the dispute in this case. On 31 March 2020, AXA replied that the Second Call was defective and that it was not obliged to make payment.

10 On 19 June 2020, CTC applied to the High Court in HC/OS 603/2020 ("OS 603/2020") for an order that AXA make payment of $397,687.50 to CTC pursuant to the Bond, and, further and/or alternatively, a declaration that the Bond's validity was extended to 24 December 2020.

**The decision below**

11 The Judge held that CTC was entitled to payment of the amount secured under the Bond. Following his earlier decision in OS 1239/2018, the Judge found that the Bond was *in pari materia* with the bonds in *JBE Properties Pte Ltd v Gammon Pte Ltd* [2011] 2 SLR 47 ("*JBE*") and *York International Pte Ltd v Voltas Ltd* [2013] 3 SLR 1142 ("*York International*") (see the GD at [13]–[14]). The Judge found that the prior cases had left open the question of how a party calling on an indemnity performance bond ought to prove its losses, and accepted AXA's contention that "an independent determination, arbitral award or admission [was] necessary for [CTC] to definitively prove its losses" (see the GD at [16]–[17]). For the purposes of these grounds, we refer to "independent determination, arbitral award or admission" as "determination or admission". As we will go on to discuss, however, the Judge's holding must be carefully understood in its context (see [86]–[87] below).

12 The Judge disagreed with AXA's contention that the court could not undertake an independent determination of whether CTC had suffered actual losses, observing that this court had done so in *JBE*. The Judge reasoned that while the two parties to the underlying contract were present before the court in *JBE*, the absence of QBH in the proceedings before him did not prevent him from considering and deciding on CTC's claims. While such a determination was not done in *York International*, that was because the relief sought was only for a stay pending the completion of arbitral proceedings (which were already afoot). Finally, the mere fact that CTC and QBH had previously entered into an arbitration agreement did not benefit AXA as AXA could not insist on an independent determination but then require CTC to proceed by way of an arbitration. Neither CTC nor QBH had commenced arbitration or could be compelled to do so (see the GD at [21]–[24]).

13 On the facts, the Judge found that CTC had adequately proved its total losses of $475,940.74 and an additional $8,167.54 due to administrative charges under the Subcontract. He observed that AXA's counsel was unable to make any submission as to the accuracy of CTC's claim. However, the Judge was satisfied that there was sufficient evidence of loss which justified the Second Call (see the GD at [26]–[27]). Turning to the issue of the time limits, the Judge found that the time period for AXA's liability was extended to 24 June 2020, which AXA also accepted. As the Second Call was made before that date, it was made within the validity period of the Bond (see the GD at [32]–[33]). No issue has been taken with the time limits on appeal and we do not need to say anything further about this.

14 Therefore, the Judge found that AXA was liable to CTC under the Bond for the sum of $397,687.50 plus interest at the rate of 5.33% per annum from 19 June 2020, the date of commencement of OS 603/2020. The Judge also ordered costs fixed at $9,000 (all-in) to CTC (see the GD at [35]).

**The parties' submissions on appeal**

15 It was common ground between the parties that the Bond in this case was an indemnity performance bond (however, see the discussion at [34]–[36] below). On appeal, AXA maintained its argument that QBH's breach of the Subcontract and any loss suffered by CTC had to be established by a determination or admission *before* CTC could call on the Bond. On the facts of this case, CTC had not established its claims against QBH by way of a determination or admission, and so AXA was not liable to pay under the Bond. In the absence of such determination or admission, it was inappropriate for the Judge to have proceeded to determine whether CTC had suffered actual loss in this case and to find that it could call on the Bond on the basis of such "proved" loss. It therefore sought an order for the sum of $397,687.50 plus interest at the rate of 5.33% per annum from 19 June 2020 to be refunded to AXA.

16 In response, CTC argued that there was no requirement at law or in the Bond that breach and actual losses could only be proved by a final judgment or determination. In this case, CTC had proved its losses by way of the documents which were attached to the 18 February Letter, which included payment vouchers and invoices reflecting the losses actually suffered by CTC. In any event, QBH's liquidators had accepted CTC's claims by failing to respond to its letter.

**Issues to be determined**

17 Based on the decision below and the parties' cases, the following issues arose for our determination in this appeal.

(a) Was the Bond payable only upon a determination or admission of QBH's breach of the Subcontract and the loss suffered by CTC?

(b) If not, were the breach and the loss established on the facts? Two sub-issues arose in this regard.

(i) Should the Judge have gone on to consider whether the breach and the loss were established in this case?

(ii) Was the Judge correct to find that the breach and the loss were established?

18 Before turning to each of these issues, however, we begin with some observations on the proper characterisation of the Bond.

**The proper characterisation of the Bond**

19 As we have noted at [15] above, it was common ground between the parties that the Bond was an indemnity performance bond. The proper characterisation of the Bond was therefore not in dispute in the High Court or before us. However, we venture to make some observations about the terminology used in this area and the proper characterisation of certain kinds of performance bonds.

20 The central distinction in the present case, as presented by the parties, was that between an indemnity performance bond and an on-demand performance bond. This distinction, in turn, touched on the distinction between indemnities and guarantees. This area can be fraught with difficulty, not least because the terminology employed by parties and the courts has not always been consistent. As this court observed in *American Home Assurance Co v Hong Lam Marine Pte Ltd* [1999] 2 SLR(R) 992 ("*American Home*") at [43]:

> The term 'performance bond' or 'performance guarantee' is sometimes used to denote a genuine contract of guarantee or indemnity. To make matters even more confusing, a guarantee or indemnity may be given in circumstances in which one might expect to find a true performance bond. The nature of the particular contract, whether it happens to be a guarantee or an indemnity, or a performance bond, and whether the normal incidents of a contract of that class have been modified, is ultimately a question of its construction in each case, and is often very difficult to resolve …

Indeed, in the passage quoted, this court was only referring to three types of instruments – the on-demand performance bond, the guarantee, and the indemnity. In the present case, we also had to consider the indemnity performance bond and how that related to these other instruments. Notwithstanding what was stated in *American Home* and the approach taken in other authorities, however, we doubt the utility of relying on the term "performance bond" and the categories of "on-demand" and "indemnity" performance bonds in the legal analysis of the effects of such instruments. Given the risk of confusion, we take the opportunity in these grounds to clarify some aspects of these types of instruments, while highlighting certain areas which call for further consideration in an appropriate case.

21 We begin with the distinction between a *guarantee* and an *indemnity*. The essential distinction between these two is that the guarantor under a guarantee (also referred to as a surety) only has a *secondary* liability, whereas the indemnifier under an indemnity has a *primary* liability: see Wayne Courtney, John Phillips & James O'Donovan, *The Modern Contract of Guarantee* (Sweet & Maxwell, 3rd Ed, 2016) ("*Modern Contract of Guarantee*") at para 1-092. A guarantor's liability is subject to the principle of co-extensiveness, such that the scope of the guarantor's liability is affected by the scope of the liability of the party whose obligation is guaranteed, *ie*, the principal (see also *American Home* at [40]). There is no such principle in relation to an indemnity. There are a number of other differences but they are not pertinent to the present case (for which, see *Modern Contract of Guarantee* at para 1-091).

22 This distinction between primary and secondary liability should not be misunderstood. Under both an indemnity and a guarantee, the indemnifier and the guarantor are solely responsible for the obligations under the respective instruments. The references to "primary" or "secondary" liability do not affect this allocation of the burden. It follows that even in a situation of secondary liability, the beneficiary can proceed against the surety under a guarantee without first claiming against the party whose performance is secured by the guarantee. Absent any specific terms in the guarantee, there is nothing preventing the beneficiary from doing so, since the guarantor is directly liable to the beneficiary under the guarantee. Indeed, this is common practice when it comes to guarantees obtained by banks as conditions for loans. In this regard, a beneficiary of a guarantee is in the same position as a beneficiary of an indemnity, who can certainly claim against the indemnifier directly. Instead, the difference lies largely in the nature of the defences that the surety can raise (relying on the principle of co-extensiveness and the other rules relating to suretyship), which may not be available to an indemnifier depending on the terms of the indemnity.

23 Turning to performance bonds, we observe first that the term "performance bond" is a practical term arising from commercial practice and contracts in certain industries like the construction industry. In and of itself, referring to an instrument as a "performance bond" does not say anything about its legal character. When the authorities speak, therefore, of two types of performance bond, *viz*, conditional performance bonds and on-demand, or unconditional, performance bonds (see *York International* at [17]; *JBE* at [14]; and *Master Marine AS v Labroy Offshore Ltd and others* [2012] 3 SLR 125 ("*Master Marine*") at [26] and [28]), we understand them to be speaking only *descriptively* in terms of what the terms of the bond provide. That is simply a matter of construing the bonds, but does not necessarily dictate their legal categorisation. When we turn to categorising these bonds in terms of their legal effect, it may be more helpful to shed the language of "performance" bonds. The term unnecessarily complicates the issue as it risks giving the impression that such bonds are always tied to performance of the underlying contract, which, in truth, is only the *context* in which such bonds are usually sought and issued. Instead, what they are depends on the construction of their terms and effect, and not on the words or labels used.

24 Simply put, then, on-demand performance bonds are just demand bonds, that is, bonds payable on demand. Such demand bonds have been sometimes described as a "particularly stringent form of contract of indemnity by which a primary liability, wholly independent of any liability which may arise as between the principal and the creditor, falls upon the surety": *American Home* at [41]. This is a helpful description insofar as it emphasises the independence of the obligation under the demand bond

from the underlying contract. We observe, however, that the description may be nuanced further. In this regard, demand bonds can be said to be distinct from *both* guarantees and indemnities. On the one hand, they are certainly not guarantees as they impose a primary liability on the issuer. On the other hand, they are not indemnities because they do not "indemnify" the beneficiary against loss, but simply impose an obligation on the issuer to pay the sum under the bond upon a valid call being made (see Wayne Courtney, *Contractual Indemnities* (Hart Publishing, 2014) ("*Contractual Indemnities*") at para 9-25). The advantage of the strictness of such on-demand performance bonds was stated by this court in *Master Marine* at [26] as follows:

> … As a general rule, the bank [*ie*, the issuer] will not concern itself with the merits of any underlying dispute between the beneficiary and its customer [*ie*, the account party], or with the factual accuracy or otherwise of any statement made to it by the beneficiary or the genuineness of any document presented to it in order to obtain payment: see *Andrews & Millett* at para 16–001. …

25 Turning to conditional performance bonds (*ie*, documents described as performance bonds where the obligation to pay is conditional on something other than a mere demand or presentation of documents), the classification of such bonds has not always been clear. As we have some doubts about the correctness of the approach that have been taken to these bonds, we first begin by setting out the position as it stands presently, before turning to express our concerns below.

26 Instruments described as conditional performance bonds have sometimes been treated as *guarantees*, while others, like in *JBE*, have been treated as true *indemnities*. This divergence in approaches arises from the conditional nature of such bonds, which has led courts to take different approaches on the facts of each case and the language of each bond. An example of the former approach is the decision of this court in *Econ Piling Pte Ltd v Aviva General Insurance Pte Ltd and another* [2006] 4 SLR(R) 501 at [21] and [24], where this court construed a "default bond", *ie*, a bond payable only on default of the account party, as a guarantee. Similarly, the learned authors of *Chitty on Contracts* (H G Beale gen ed) (Sweet & Maxwell, 33rd Ed, 2018) at para 37-128 have stated the general approach taken to conditional bonds in the United Kingdom as follows:

> Conditional bonds are based upon breach of the underlying building contract by the contractor, and because they are based on a failure by the principal to perform, *conditional bonds are in the nature of contracts of guarantee*. [emphasis added]

27 This divergence in approaches was summarised in *Modern Contract of Guarantee* at para 13-075:

> Where the [issuer's] liability to pay the demand is conditional upon default by the principal and consequent loss to the beneficiary, the bond will usually be classified as a form of guarantee. *In rare cases, a conditional bond may be construed as a type of indemnity*. [emphasis added]

The cases cited for the last proposition emphasised are *JBE* and *Master Marine*. In other words, under the current state of the authorities, where appropriate, a conditional performance bond will be construed as a *true indemnity*, or, as the court described it in *JBE*, as a true indemnity performance bond. In the remainder of these grounds, we refer to these true indemnity conditional performance bonds as "indemnity performance bonds", without necessarily endorsing this terminology, as we explain below. We turn now to consider some of the authorities which have addressed such bonds.

28 In *JBE*, JBE Properties Pte Ltd ("JBE") was a developer which awarded a building contract to Gammon Pte Limited ("Gammon"). BNP Paribas Singapore ("BNP") issued a performance bond in favour

of JBE at Gammon's request. The cladding of the building turned out to be defective. Before Gammon could rectify the cladding, JBE solicited bids to replace the existing cladding and to install new cladding, and accepted what it alleged was the lowest bid of $2.2m. On this and other bases, JBE made a call on the bond. Gammon then applied to restrain JBE's call. The High Court considered that the bond was an on-demand performance bond and granted an interim injunction on the basis of unconscionability. JBE appealed. On appeal, the parties proceeded on the basis that, apart from the $2.2m claimed for rectifying the cladding defects, there would be no basis for JBE to call on the bond.

29 Although the parties had argued on the basis that the bond was an on-demand performance bond, this court revisited the characterisation of the bond. It considered cl 5 of that bond (which was *in pari materia* with cl 5 of the present Bond) and found that, although there were some characteristics of an on-demand performance bond, the provision of a 30-day deferment of payment suggested that it was not an on-demand bond. Further, the crucial factor was cl 1 (again, *in pari materia* with cl 1 of the Bond in this case) which clearly provided that BNP's obligation to pay was limited to actual loss sustained by JBE. At the very least, there was an ambiguity which allowed the court to construe the bond as a *true indemnity performance bond* (see *JBE* at [18]–[19]). The essential distinction identified between an on-demand performance bond and a true indemnity performance bond was that the latter was "conditioned upon facts rather than upon documents or upon a mere demand" (see *JBE* at [10]).

30 The central issue in *JBE* was whether the High Court judge was correct to have restrained JBE from receiving payment under the bond. JBE was not entitled to call on the bond unless and until it had suffered actual loss due to breach of the building contract by Gammon. As such, the appeal turned on an analysis of "the evidence adduced by JBE to prove its alleged actual loss" (see *JBE* at [20]). This court found that JBE should not have relied on a quotation of $2.2m to remedy "relatively minor" cladding defects by replacing the cladding entirely. In any event, that sum would be grossly inflated if it was directed at remedying those defects (see *JBE* at [29]). Therefore, this court concluded that JBE had failed to show that, "at the date of its call on the [b]ond, it had suffered actual loss arising from Gammon's breach of the [b]uilding [c]ontract" (see *JBE* at [30]). For the same reason, JBE's call would be unconscionable if the bond were an on-demand performance bond. The appeal was therefore dismissed.

31 This court again had occasion to discuss indemnity performance bonds in *Master Marine*. In the course of discussing the principles applicable to "first demand", or unconditional, performance bonds, this court also considered how those bonds differed from indemnity performance bonds at [28], finding that the indemnity performance bond is one "where the merits of the underlying dispute might be relevant", thus "diminish[ing] the effectiveness of the traditional on demand performance bond". This court also observed that, although indemnity performance bonds are conditional, they are not guarantees as the issuer is under a primary and not secondary liability (*Master Marine* at [29]).

32 In *York International*, the High Court was faced with a bond on similar terms as the bond in *JBE* and the Bond in the present proceedings. In that case, the account party sought to restrain the beneficiary from receiving payment from the issuer pending the outcome of arbitral proceedings between the account party and beneficiary. The judge found that the bond in question was conditional in nature and "premised on there *in fact* having been a breach of the underlying contract leading to loss" [emphasis in original] (see *York International* at [38]). The judge then granted the injunction as sought. However, the exact *basis* for the judge's decision to grant the injunction was not, with respect, entirely clear. After concluding that the bond was a conditional one, it seems that the judge decided that *therefore* (without any further steps in his reasoning) the injunction ought to be granted. It suffices to note for present purposes that *York International* did not consider the question of how a beneficiary's loss was to be proved for the purposes of calling on an indemnity

performance bond.

33 On the basis of the present authorities, the position may be summarised as follows.

(a) Both indemnity and on-demand performance bonds, in contrast to guarantees, give rise to primary liability on the issuer to pay the sums under the bonds (see *American Home* at [40]–[41]; *Master Marine* at [29]–[30]).

(b) A beneficiary under an on-demand performance bond is entitled to "*immediate* payment from the bank, subject only to a compliant demand being made on it" [emphasis in original] and the issuer will generally not be concerned with the merits of the underlying dispute between the beneficiary and account party. Hence, the issuer's obligation is *independent* of those facts (see *Master Marine* at [26]). By contrast, for an indemnity performance bond, the merits of the underlying dispute become relevant, and there may be a requirement to consider the underlying facts to assess the validity of the call. As a result, an indemnity performance bond "diminishes the effectiveness of the traditional on demand performance bond as a cash equivalent" (see *Master Marine* at [28]).

(c) An on-demand performance bond is conditioned on "documents or upon a mere demand" whereas an indemnity performance bond is "conditioned upon facts" (see *JBE* at [10]; *York International* at [29]). For the latter, the payment under the bond responds to the fact of breach and loss, whereas for the former, the payment responds to the presentation of compliant documents and/or demand.

34 Having set out the position as we understand it to be at present, we consider there to be certain issues which may call for more detailed consideration in the future. We highlight these only for consideration and without prejudging the issues, which can be decided in the appropriate case with the assistance of counsel. As will be seen, the outcome of the present appeal did not turn on resolving any of these issues, and we would have dismissed the appeal regardless.

35 First, the question of how to characterise conditional performance bonds in legal terms, *ie*, as guarantees or indemnities, may need to be revisited. At a *prima facie* level, it strikes us as potentially odd to describe a conditional performance bond as an indemnity when the obligation to pay under the bond is entirely conditional on the proof of breach by the account party and loss suffered by the beneficiary. Although we recognise that indemnities *can* be conditional on breach of the underlying contract (see *Anglomar Shipping Co Ltd v Swan Hunter Shipbuilders Ltd and Swan Hunter Group Ltd (The "London Lion")* [1980] 2 Lloyd's Rep 456 ("*The London Lion*"); *Contractual Indemnities* at para 9-6; *Modern Contract of Guarantee* at para 1-090), the conditional nature of such bonds could arguably be construed as strong grounds in favour of characterising them as guarantees (see [26] above). We note that this court in *JBE* did not appear to have in mind the possibility that the conditional performance bond was a guarantee instead of an indemnity (see *JBE* at [19]) – the parties had not disputed the characterisation of the bond, the court's focus was instead on the distinction between a demand bond and a conditional bond, and the court may have been swayed by the use of the words "shall indemnify".

36 Second, on a related point, if the above issue is revisited, the court may have to consider how to distinguish between an indemnity and a guarantee where the obligation to pay is conditional on breach of the underlying contract. For example, the court would have to consider the relevance of certain terms which appear to exclude or vary the implications of suretyship under a guarantee. Another relevant factor would be the extent to which the issuer's liability is co-extensive with that of the account party (see *Contractual Indemnities* at para 9-16). The relative weight to be given to

each of these, and other, factors will have to be carefully considered. Specifically, the conclusion in *JBE* that a bond *in pari materia* with the bond in that case (as the Bond in the present appeal was) would be an indemnity may need to be reconsidered by a careful examination of the terms of the bond, although we do not prejudge the outcome of such a reconsideration.

37 We do not think that our observations here will introduce any significant degree of uncertainty in practice, as long as it is noted that we are dealing here, as noted at [35] above, with conditional bonds. In most cases, as in the present appeal, the distinction between a guarantee and an indemnity would not be significant, given that breach and loss would need to be established either way in most cases (subject, as always, to the specific terms of each bond). There is also no difference to when the beneficiary can proceed directly against the surety or indemnifier without first suing the account party (see [22] above). Indeed, the vast majority of cases will be resolved simply on a construction of the terms of the instrument. The distinction may only be relevant in a case where the principle of co-extensiveness would affect the issuer's liability, for example, if the issue is whether the issuer's obligation to pay can be restricted by reference to a limitation or exclusion clause in the underlying contract (see *The London Lion*), or where the issue turns on the specific rules relating to guarantees, or where the underlying contract is found to be void or discharged. In this last-mentioned scenario, however, even an indemnity which refers the issuer's liability to a pre-existing contract may not survive the invalidity of the underlying contract – the result depends entirely on the terms of the instrument in question. These issues can be taken up in the appropriate case and, we would venture to state, would not affect the commercial operation of such instruments in most cases.

**Was the Bond payable only upon determination by a court or tribunal or an admission?**

38 In this appeal, it was common ground that the Bond was an indemnity performance bond, meaning that it was necessary for CTC to establish breach and loss to compel payment under the Bond. However, nothing in this appeal turned on the characterisation of the Bond as an indemnity instead of a guarantee. There was no difference in the present appeal whether AXA was under a primary liability or secondary liability, given our clarification of these terms at [22] above. Instead, the appeal turned entirely on a proper construction of the terms of the Bond and the conditions that needed to be satisfied before payment on the Bond was required.

39 Before turning to our decision, we think it necessary to first clarify what the Judge held. Contrary to CTC's interpretation of the GD, the Judge did not decide that, for *every* call to be valid, the beneficiary first had to obtain a determination or admission and present that to the issuer. As is apparent at [20] of the GD, the Judge considered that if a call was made without such means of proof being presented, the issuer could *choose* to accept it. In other words, it would still be consistent with the Bond for an issuer to accept proof *less than* a determination or admission under the Bond. It followed that the Judge considered that it was not *necessary* for the beneficiary to present a determination or admission before a valid call on the Bond could be made. We agreed.

40 In our judgment, the question was answered by examining the terms of the Bond. That had to be the first port of call. The material provisions of the Bond were as follows:

> 1 In the event of the Sub-Contractor failing to fulfil any of the terms and conditions of the said contract, we shall indemnify [CTC] against all losses, damages, costs, expenses or otherwise sustained by [CTC] thereby up to the sum of Singapore Dollars Three Hundred Ninety Seven Thousand Six Hundred Eighty Seven and Cents Fifty Only (S$ 397,687.50) (the 'Guaranteed Sum') upon receiving your written notice of claim for payment made pursuant to Clause 4 hereof.

…

4 This guarantee is conditional upon a claim or direction as specified herein being made by you by way of a notice in writing addressed to us and the same being received by us at 8 Shenton Way #27-01, AXA Tower, Singapore 068811 within 90 days from the expiry of this guarantee. Thereafter this guarantee shall become null and void notwithstanding that this guarantee is not returned to us for cancellation except for any claim(s) or direction submitted to us in writing not later than 90 days from the expiry of this guarantee.

5 We shall be obliged to effect the payment required under such a claim or direction within 30 business days of our receipt thereof. We shall be under no duty to inquire into the reasons, circumstances or authenticity of the grounds for such claim or direction and shall be entitled to rely upon any written notice thereof received by us (within the period specified in Clause 4 hereof) as final and conclusive.

…

[emphasis in original]

41 Clause 1 of the Bond, in our view, clearly spelt out the answer to the question before us in this appeal. It would suffice for CTC to establish that QBH had failed to fulfil any of the terms of the Subcontract and that CTC thereby sustained losses. There was no reference anywhere in the Bond to a determination by a court or tribunal or an admission from QBH. The fact that the Bond was payable only if QBH had breached the Subcontract and caused loss to CTC did not mean that such breach and loss could only be proved by way of a determination or admission.

42 In the first place, AXA's arguments betrayed a confusion about the nature of the underlying facts to which the Bond responded. As is apparent from the language of the Bond, the obligation to pay is conditional on the facts of breach of the underlying contract and loss. AXA's arguments conflated the *facts* to which the Bond responded with the *proof* of those facts. This was apparent from AXA's own submission that an admission, aside from a determination by a court or a tribunal, would suffice for a valid call to be made on the Bond. In our view, this was fatal to AXA's case as this submission revealed that AXA was concerned primarily with a question of *proof* instead of the actual, substantive facts to which the Bond responded to – the common denominator of such determination or admission was that these were all means of proof of certain underlying facts.

43 Even more problematically, AXA's submissions revealed that it was primarily concerned with proof *as against QBH* and not itself. This entirely misunderstood the nature of its obligations under the Bond. In a dispute between AXA and CTC over AXA's obligations under the Bond, the only relevant question was whether CTC could prove QBH's breach and its loss *as against AXA*. The real fatal flaw in AXA's case was its wholly baseless assumption and suggestion that CTC had to prove its case *against QBH* and obtain a determination against it before enforcing the bond against AXA, or that *QBH* had to admit liability first. This was wrong because (a) the Bond was issued *by AXA*, who, whether as a guarantor or indemnifier, was made directly responsible to CTC to pay under the Bond if the conditions were satisfied, and the claim brought by CTC was against AXA under the Bond; and (b) contrary to AXA's naïve assumption, even a judgment against QBH would not bind AXA as a matter of law (see [81]–[83] below). Although QBH's conduct was relevant to the question of whether there was breach and loss, QBH was never a party to the present proceedings and there was nothing preventing CTC from claiming against AXA in this manner. In a dispute between AXA and CTC, there was no rule of evidence requiring CTC to first prove its case against QBH.

44 The other provision relevant to the question of how AXA was to evaluate any call by CTC was cl 5 of the Bond. In our view, the existence of cl 5 showed that AXA had in fact contracted to protect itself, and it could not now argue that it was unable to assess the beneficiary's claim on the Bond as a reason for reading the sought-after requirement into the Bond. To recap, cl 5 read:

> We [*ie*, AXA] shall be obliged to effect the payment required under such a claim or direction within 30 business days of our receipt thereof. We shall be under no duty to inquire into the reasons, circumstances or authenticity of the grounds for such claim or direction and shall be entitled to rely upon any written notice thereof received by us (within the period specified in Clause 4 hereof) as final and conclusive.

Clause 5 enabled AXA to pay on the Bond without inquiring into the facts of breach and loss alleged by CTC, and deemed such payment to be consistent with the Bond. In our view, cl 5 was directed primarily at AXA's relationship with QBH – the clause ensured that AXA's recourse against QBH would remain unaffected even if AXA did not undertake an independent evaluation of the facts underlying the call on the Bond and accepted a written notice from CTC as final and conclusive. This preserved any claim that AXA could have against QBH. Whatever AXA's reasons for not relying on cl 5 in relation to the Second Call, we found that it could not now complain that there were such insurmountable practical difficulties that would warrant reading into the Bond a requirement that CTC present a determination or admission before a call could be made. It was incongruous for the issuer to rely on its alleged difficulties in contesting the claim submitted by a beneficiary when such a clause was designed to relieve the issuer of any obligation to "inquire into the reasons, circumstances or authenticity of the grounds for such claim".

45 We were also of the view that the language of cl 5 undermined AXA's argument that the beneficiary had to present a determination or admission before a call could be made. If CTC had presented a court order to AXA to call on the Bond, it made little sense for cl 5 to provide that AXA would not be obliged to inquire into the "reasons, circumstances or authenticity" of a *court* order. Instead, cl 5 appeared to assume that all that would be before the issuer would be a claim on the Bond *without* any such determination or admission, which AXA would be entitled to accept as final and conclusive. If cl 5 permitted AXA to accept CTC's written notice as final and conclusive without a determination or admission, it followed that cl 1 could not have required such a determination or admission to be presented before a call could be made.

46 Seen in the light of these clauses, we could not accept AXA's argument that there was any room to read the proposed requirement into the Bond. The language of the Bond clearly set out what facts the Bond responded to and, in the absence of express stipulation of how those facts had to be proved, no limitation on the means of proof could be read into the Bond. We were unable to accept, in this regard, that there was any ambiguity in the language of the Bond in relation to what was needed to be proved before the beneficiary could make a valid call. This was a conclusion we arrived at simply on the terms of the Bond, regardless of whether it was a guarantee or an indemnity.

47 The importance to be given to the terms of the Bond becomes clear when we consider how risk is structured under such bonds. When an issuer issues a performance bond, it assumes a certain credit risk. That risk is managed at two levels. First, the issuer will ensure that it is indemnified by the account party in the event that the bond is paid out. That is a matter to be arranged and agreed between the issuer and the account party. Whatever the arrangement or agreement might be, it has no bearing on the enforceability of the bond *vis-à-vis* the beneficiary. In this regard, the issuer also takes on the risk that the account party might become insolvent, and it is for the issuer to protect itself against that eventuality, for example, by obtaining a cross-guarantee from the directors. Second, the risk is also managed by defining the precise circumstances under which the bond is

payable. That is achieved by a precise drafting of the terms of the bond. Indeed, as this court observed in *Master Marine* at [31]:

> On the issue of when payment must be made on service of a demand, it is usually the case in both conditional and unconditional performance bonds that a demand can be made subject to: (a) the fulfilment of various condition precedents; and/or (b) compliance with the stipulated form: see also *O'Donovan and Phillips* at para 13-06 and Poh Chu Chai, *Guarantees and Performance Bonds* (LexisNexis, 2008) at p 310. In fact, one of the usual condition precedents to making a demand in conditional performance bonds is *actual breach* by the account party of the underlying contract. Other possible conditions include the occurrence of other trigger events (*eg*, insolvency) or the need for the beneficiary to take additional steps prior to making the demand. Inserting these conditions help to safeguard the account party from abusive calls by the beneficiary, where a simple demand by the beneficiary would be sufficient to bring about a bank's obligation to make payment under the bond. ***As for the form of the demand, the beneficiary may need to assert a breach of the underlying contract, or furnish prima facie evidence of the account party's alleged breach (in the case of conditional performance bonds), etc.*** *However, whether condition precedents are set or a form is prescribed, the doctrine of strict compliance equally applies*. … [emphasis in original in italics; emphasis added in bold italics]

48 Nowhere in the Bond was it stipulated that QBH's breach and the losses suffered by CTC had to be determined by a court or a tribunal, or admitted to by QBH, before the sum was payable under the Bond. Given the absence of any such express condition, what AXA's argument amounted to was that the court should *imply* a requirement into the Bond that such breach and loss could only be proved by a determination or admission. Quite apart from the fact that AXA had not addressed whether the conditions for implication were met, we did not think that there was a basis for implying any such term in this context. As this court stated clearly in *Master Marine* at [28]:

> … [T]he nature and characteristics of the instrument is a matter for agreement between the parties to the contract: it is for them to decide what arrangement best suits their needs. The courts should not be astute in ascribing or imputing intentions to the parties in this genre of instruments if the terms are not explicit …

49 If an issuer's intention is to issue a bond which is only payable upon a determination by a court or tribunal or an admission by the account party, then it is for the issuer to expressly spell that out in the terms of the bond. In that event, the beneficiary might well reject the bond and insist that the account party procure a performance bond without such a stipulation. What is impermissible is for the issuer to advance such an argument *ex post facto* after the insolvency risk of the account party has materialised (as it has here). In other words, the terms of the Bond in this case set out the allocation of risks between the parties and, on the present terms, the insolvency risk of the account party lay squarely with the issuer where, on the face of things, there does not appear to be any viable recourse by AXA against QBH for recovery of the sum payable under the Bond.

50 For similar reasons, we did not agree with AXA that, in the *absence* of express terms, the court should construe the Bond as being triggered only upon a call supported by a determination or an admission. With respect, it seemed to us that the exact opposite should be the case. In the absence of express terms, no such requirement should be read into the Bond. It is for the party who wishes to stipulate more restrictive conditions on how a bond may be called to do so, as the above discussion (and especially the *dicta* quoted from *Master Marine* at [47] above) makes clear. The parties to such commercial instruments must be entitled to rely on the language of the bond to conduct their affairs.

51 As we pointed out to AXA's counsel, Mr Ganesh Bharath Ratnam ("Mr Ganesh"), during the

hearing, however one characterised his arguments, the central issue was whether he could convince the court to read the requirement that he sought into the Bond. We found no basis at all on which we could do so, given the language of the Bond and the principles we have discussed. This, in our view, was an insurmountable hurdle in AXA's appeal. In any event, as we will now go on to discuss, we also found none of AXA's arguments for imposing such a requirement convincing.

52 First, we were unable to agree with AXA's interpretation of the authorities relating to (in the present parlance) indemnity performance bonds, which it sought to interpret in support of its argument that such a requirement was part of the character of such bonds. For the avoidance of doubt, our observations here apply equally to all conditional bonds, whether they are indemnities or guarantees. Mr Ganesh first pointed us to Ackner LJ's *dicta* in *Esal (Commodities) Ltd v Oriental Credit Ltd* [1985] 2 Lloyd's Rep 546 ("*Esal*") at 549, which was quoted by Staughton LJ in *IE Contractors Ltd v Lloyds Bank plc and Rafidain Bank* [1990] 2 Lloyd's Rep 496 ("*IE Contractors Ltd*") at 500:

> … if the performance bond was so conditional, then unless there was clear evidence that the seller admitted that he was in breach of the contract of sale, payment could never safely be made by the bank except on a judgment of a Court of competent jurisdiction and this result would be wholly inconsistent with the entire object of the transaction, namely to enable the beneficiary to obtain prompt and certain payment.

Mr Ganesh argued that this was a clear statement that, for a conditional bond, payment could *only* be made "on a judgment of a competent Court of jurisdiction". We disagreed. First, the paragraph preceding the quote from *Esal* in *IE Contractors Ltd* at 500 clearly shows that the issue in *Esal* was whether the bond should be *interpreted* such that payment was conditional on an actual failure to perform the underlying contract. Seen in that light, the court in *Esal* was not intending to set out exhaustively the means by which a beneficiary could prove breach and loss to justify a call on a conditional bond, but was only considering what the parties would have intended. Second, the *dicta* itself only suggested that the issuer could not "safely" make payment without such judgment or admission. That was not a statement that the only acceptable proof was by way of judgment or admission, but a statement about the risk of making an unjustified payment and the recourse that the issuer would have against the account party. This risk was identified in *Esal* because it was relevant to the interpretation of the bond in question, not as a reason for reading any conditions into a conditional bond.

53 Mr Ganesh then referred us to the decision of this court in *JBE* for the proposition that breach and loss could not be proved simply on the basis of the beneficiary's own documents. In the first place, even if that proposition could be found in *JBE*, that decision was directed to an entirely different situation, where the beneficiary and the account party, *ie*, the parties to the underlying contract, were both parties to the proceedings and there was a dispute between them about the proof of actual loss (see *JBE* at [25]–[30]). Where there is a dispute over the proof of loss, the parties would certainly argue over the documents tendered by the beneficiary, and the court would have to decide if the claims are made out. Where, however, as in the present case, there was no dispute between CTC and QBH, and AXA had chosen not to raise a dispute about the factual basis of CTC's claim, there was no reason why the court could not look to CTC's documents as *evidence* to determine if the call was valid.

54 In any event, on a closer reading of *JBE*, we did not think that *JBE* stood for the proposition that the breach and loss could not be proved on the basis of the beneficiary's own documents. The closest that this court came to making any pronouncement on the use of documents was in relation to the broader issue of whether the bond was *conditioned* on facts or documents (see *JBE* at [10]).

AXA, however, appeared to have misunderstood this distinction to mean that allowing CTC to prove its claims *using* its own documents would amount to treating the bond as conditioned on documents (we discuss this confusion in further detail at [61] below). Once that misunderstanding was set aside, *JBE* could not be read as supporting AXA's argument.

55 We also did not accept AXA's interpretation of this court's observations in *Samsung C&T Corp v Soon Li Heng Civil Engineering Pte Ltd* [2020] 2 SLR 955 ("*Soon Li Heng*") at [41]–[44] as somehow supporting its case that the requirement for a determination or admission was inherent in the nature of a conditional bond. As this argument involved a close scrutiny of this court's observations in that case, we set out the material parts in full:

> 41 We start our analysis on the persuasiveness of the Australian decisions by referring to the distinction first raised in *Fletcher* ([34] *supra*), and adopted in *Clough* ([34] *supra*), as to whether the purpose of a contractual provision requiring the issuance of a security is merely to provide security for amounts that might be found due to a beneficiary or is a risk allocation device that addresses the issue as to who is to be out of pocket while the dispute is being determined (see *Patterson* at [39]). If it is the former, the beneficiary is not entitled to demand payment under the security pending resolution of any dispute. If it is the latter, the beneficiary is entitled to demand payment pending such resolution, unless there is some ground to restrain it from doing so, other than the existence of a dispute.
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> 42 In Singapore, the distinction between the two types of security is expressed differently although with similar consequences. It is a distinction between a security payable on default and one payable on demand. Even for security of the latter type, the purpose of the bond may be described as providing security to the beneficiary for the counterparty's performance of its obligations under the building contract between them. However, the mere reference to this purpose does not necessarily mean that the security is of the first type mentioned in *Fletcher*. …
>
> 43 For a security payable on default, the beneficiary must establish the default of the counterparty before being entitled to payment under the security. This is similar to the first type mentioned in *Fletcher*. We pause to reiterate that our reference to 'the counterparty' is to the other party in the building contract and not to the issuer of the security.
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> 44 For a security payable on demand, the beneficiary is *prima facie* entitled to be paid under the security immediately once he makes a demand on the issuer of the security. The beneficiary does not have to establish the counterparty's default even if the terms of the security require it to assert that the counterparty is in default when demand for payment is made. This is similar to the second type mentioned in *Fletcher*. However, under the second type, it is still open to the counterparty to restrain the beneficiary from obtaining payment if the counterparty can establish a ground for the injunction. In Singapore, either fraud or unconscionability provides such a ground.

56 AXA relied on the court's observation at [41] of *Soon Li Heng* that, where the purpose of a contractual provision requiring issuance of a security is only to provide security for amounts that might be found due to a beneficiary, "the beneficiary is not entitled to demand payment under the security pending resolution of any dispute". Reading [41] of *Soon Li Heng* together with [43] of that judgment, AXA argued that this court had applied that proposition to security payable on default in general. It followed, in its submission, that CTC had to establish that there was no dispute before it could call on the Bond. It could only do so by either presenting a determination by a court or tribunal, or by presenting an admission by QBH. Otherwise, CTC would be benefiting from security pending resolution of any dispute.

57 However, in this case, there was no real dispute between CTC and QBH (even assuming QBH's liquidators' silence cannot be taken, strictly speaking, as an admission). In fact, it was strictly irrelevant to AXA's obligations under the Bond whether or not there was a dispute between CTC and QBH, unless AXA could bring in QBH's evidence into these proceedings. Further, there were no pending proceedings elsewhere. QBH's liquidators had failed to respond to the 18 February Letter, leading CTC to call on the Bond. QBH's liquidators then did not reply to AXA as well. It bears repeating that CTC was not at all to blame for QBH's winding up. There was therefore no existing *dispute* between CTC and QBH that needed to be resolved before CTC could make the call against AXA. AXA's reliance on *Soon Li Heng* was therefore misplaced on the facts.

58 In any event, we did not agree with AXA's interpretation of this court's observations in *Soon Li Heng*. This court at [43] of *Soon Li Heng* was not applying the broad proposition at [41] to the *issuer's* liability to pay under security payable on default without qualification.

59 In the first place, the court's analysis has to be read consistently with the principle that, whether the bond is a guarantee or an indemnity, there is no need for the beneficiary to seek remedy from the account party *first*. There is nothing preventing the beneficiary from calling on the bond or suing the issuer directly without proceeding against the account party. The beneficiary may choose to do so, for example, if the account party is insolvent, and even if the account party refuses to admit to liability. Further, the issuer may choose to pay even if there is such a dispute, or it may choose to raise its own dispute against the beneficiary. In the context of discussing the liability owed by the issuer to the beneficiary under a bond, it is more appropriate to describe the relevant dispute as being between the beneficiary and *the issuer*. Further, AXA's interpretation of the court's observations appears to suggest that the result of the dispute between the beneficiary and account party would be determinative of the issuer's liability. However, that would not be consistent with the principle that any decision by a court or tribunal as between the beneficiary and account party is not binding on the issuer, and the beneficiary will have to prove the account party's breach of the principal contract and loss caused to it *independently* against the issuer, unless the bond provides otherwise, an estoppel arises, or the issuer accepts the result (see [81]–[83] below).

60 We also observe that the Australian cases referred to in *Soon Li Heng*, namely *Fletcher Construction Australia Ltd v Varnsdorf Pty Ltd* [1998] 3 VR 812 ("*Fletcher*"), *Clough Engineering Ltd v Oil and Natural Gas Corp Ltd* [2008] FCAFC 136 and *Patterson Building Group Pty Ltd v Holroyd City Council* [2013] NSWSC 1484, were concerned with the relationship between the beneficiary and account party, not with the issuer's liability. It was in that context that the Court of Appeal of the Supreme Court of Victoria held in *Fletcher* at 821 that, where the contractual provision for security in the *principal* contract between the beneficiary and account party only provides security for amounts that may be found due, rather than to allocate risk pending the resolution of any dispute, the beneficiary is not entitled *under the principal contract* to call on the security pending resolution of its dispute with the account party. In other words, those cases are concerned only with the beneficiary's contractual obligations to the account party under the principal contract and not under the bond *vis-à-vis* the issuer. Given the different context in which the proposition was initially stated, it would be surprising if the court in *Soon Li Heng* was intending to simply import that proposition to all securities payable on default and to the *issuer's* liability under such instruments. Indeed, we observe that the court's language was not so general or absolute – at [42] of *Soon Li Heng*, this court did not state that the distinction would bear the same consequences, but only "similar" consequences. We understood the court's remarks at [41]–[43] of *Soon Li Heng* to be general observations that for moneys to be payable under security payable on default, the beneficiary must establish the said default.

61 Second, even apart from the question of authority, we did not agree with AXA that not

imposing such a requirement would erode the distinction between a conditional bond (whether characterised as a guarantee or an indemnity) and a demand bond by making the bond conditional on documents and not facts. This argument was based on an incorrect understanding of the distinction, as elaborated in *JBE*, between a bond conditioned on documents and a bond conditioned on facts. The key is what the bond responds to. A bond conditioned on documents responds to the presentation of a compliant document, just as moneys would be paid under a letter of credit upon presentation of the necessary documents of title. A bond conditioned on facts responds to the facts specified in the bond, and documents may be proof of those facts. However, the mere fact that the beneficiary's own documents are used to *establish* or *prove* the facts of breach and loss does not make the bond responsive to documents. Indeed, turning the argument on its head, AXA's position was in fact that the Bond should be responsive only to a particular type of document, that is, the determination by the court or tribunal, or a formal admission, rather than the underlying facts. Once again, it was entirely open to AXA to propose a bond that would respond to such determination or admission instead of the facts of breach and loss, howsoever proved, or at least require such determination or admission as a condition precedent to a valid call. Not having done so, it was not open to AXA to ask this court to read such a requirement into the Bond.

62 On a related point, we did not find AXA's repeated references to CTC's documents as "untested" persuasive. First, the documents were "untested" by QBH only because of its insolvency and the liquidator's failure to respond to CTC's 18 February Letter. As we have observed, the risk of the insolvency of the account party is part of the risk undertaken by the issuer in issuing a performance bond, and CTC was not to blame for QBH's insolvency. Second, although the documents may not have been tested by QBH or its liquidator, CTC nonetheless had to satisfy the court of QBH's breach and losses caused to itself, as we explain at [77] below. As we also explain, however, AXA's decision not to raise any dispute in relation to QBH's breach or the losses suffered by CTC could not be held against CTC.

63 Third, we were unable to attach any weight to AXA's contention that such a requirement for a determination or admission was justified on account of "practical considerations". The gist of this argument was found in the Appellant's Case at para 72:

> As a matter of general application, financial institutions which typically grant performance bonds are third parties only tangentially connected with the underlying contracts. Further, as a practical consideration, financial institutions which typically grant performance bonds are in no position to understand the technical and engineering requirements of the various contracts (construction or otherwise) underlying performance bonds which have been issued. Certainly, such financial institutions are in no position to monitor each account party's performance of their respective contracts from time to time. Guarantors, like banks, '*do not have the means or the inclination to check facts, at any rate for the modest commission which they charge on a … performance bond*'. [emphasis in original]

64 Even if we accepted the existence of these practical constraints, we did not see how this could convince us to interfere in the bargain between the parties. We have already noted that the existence of cl 5 in the Bond precluded AXA from making any such argument (see [44] above). Further, the problem with this argument was that any such practical difficulty arose from the very nature of a conditional bond under which payment was only to be made upon breach of the underlying contract and loss suffered. Whatever practical difficulties may have been faced by AXA, it rang hollow for AXA to argue before us that it could not assess whether the account party had breached the principal contract and whether the beneficiary had suffered loss. That was a matter which it had chosen to take on by issuing, for a fee, the Bond under which payment was conditional on those facts. At the risk of repetition, we state again that AXA could have, if it had so intended, provided for

conditions precedent requiring certain forms of proof. It would also have been open to AXA to determine what rights it wished to have against QBH or its directors to require their assistance in making the necessary assessments of the facts or in resolving any difficulties with any call on the Bond. Not having done so (or having done so inadequately), the alleged practical difficulties faced by AXA could not justify the court intervening to rewrite the bargain between AXA and CTC.

65 Fourth, we accepted CTC's argument that implying such a requirement would result in a real risk of delay that could reduce the utility of the Bond. The Bond had a certain period of validity. A requirement that a determination or admission be obtained *even before* calling on the Bond would give rise to the risk that a call on the Bond would be out of time. To impose such a requirement without express language in the Bond would be to significantly rewrite the balance of risks between the parties, and was yet another argument why AXA should be held to the language of the Bond which did not impose such a requirement.

66 In our judgment, the net effect of AXA's arguments, if accepted, would be to completely rewrite the terms of the Bond. In effect, a beneficiary would first have to establish the account party's liability to pay damages for breach of the contract, either by obtaining the account party's admission or obtaining an award or judgment against the account party, before calling on the Bond. In the absence of such a condition precedent in the Bond itself, it was not for this court to rewrite the terms of the Bond simply because certain risks, which ought to have been anticipated, have materialised. We therefore concluded that there was no requirement in the Bond for CTC to present a determination or admission before making the Second Call.

**Were breach and loss established on the facts?**

67 AXA's primary case was that the Bond should only respond to a determination by a court or arbitral tribunal that QBH had breached the Subcontract and caused loss to CTC, or an admission by QBH of the same. Any proof of breach and loss was, therefore, supposed to have been done as between QBH and CTC in separate proceedings involving QBH, which had to be resolved before any proceedings could be brought against AXA. We have rejected this argument for the reasons set out above. However, it remained the case that CTC was still required to prove breach and loss to the satisfaction of the court in these proceedings against AXA before the court could order the enforcement of the Bond against AXA, the issuer.

68 We turn now to assess whether CTC had established QBH's breach of the Subcontract and its losses on the facts. Apart from its primary case above, AXA also put forward further arguments that the Judge *should not* have gone on to consider whether CTC had established breach and loss on the facts in these proceedings and, hence, the Judge's decision on the facts should be set aside. AXA also raised certain specific complaints regarding the Judge's approach (as opposed to making submissions on the evidence itself). We deal with these arguments in turn.

***Should the Judge have gone on to consider whether breach and loss was established?***

69 We begin by identifying the further arguments that AXA raised to supports its position that the Judge should not have gone to determine whether there was a breach of the Subcontract and loss caused to CTC. In the light of the above analysis and our determination of the prior issue, certain of AXA's arguments fell away. In particular, our analysis above led us to reject the arguments that: (a) the Judge's decision effectively allowed CTC to cure a defect in the call *ex post facto* (since the absence of a determination or admission at the time of the call was not actually a defect); (b) the Judge's decision effectively allowed a beneficiary to rely on its own documents and demands and eroded the distinction between a demand bond and an conditional bond (since this argument was

based on the same confusion described above at [61] concerning the distinction between documents and facts); (c) the Judge's decision required the issuer to test for itself the accuracy of the beneficiary's claim in the first instance (since that simply followed from the fact that the issuer had to satisfy itself that the conditions for payment were met: see [64] above); and (d) the Judge could not have concluded that there was a breach or loss in the absence of an independent determination, arbitral award or admission (since this argument was based on AXA's conflation of the *facts* and the *proof of facts*, and there was nothing preventing the proof of underlying facts by another method). In the following, we focus on the remaining arguments.

70 First, AXA argued that the procedure was improper as CTC ought to have commenced a suit, given that there were likely to be disputes of fact: O 5 r 2 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"). However, this submission was contradicted by AXA's own position that it did not have knowledge of the facts or the circumstances of CTC's claims against QBH under the Subcontract, and that it was not in a position to assess the accuracy of CTC's claims. There was hence no real likelihood of any substantial dispute of fact. In any event, the mere fact of a procedural defect (assuming that the action should have commenced by writ) would not defeat the entire proceedings: O 2 r 1(1) of the ROC.

71 Second, AXA submitted that the relevant counterparty to the Subcontract, QBH, was not before the court. In the absence of QBH, AXA argued, the Judge was not in a position to arrive at a "definitive or conclusive (or even binding)" decision concerning QBH's breach of the Subcontract and the losses suffered by CTC. With respect, this objection was misconceived.

> (a) First, AXA's argument blurred the distinction between the Subcontract and the Bond. As between CTC and AXA, in respect of a dispute arising under the *Bond*, there was no reason whatsoever that the court's determination of the facts of QBH's breach and loss would not be final and conclusive. While the same determination may not be conclusive as between CTC and *QBH*, that was a separate question entirely.
>
> (b) Second, this was in keeping with AXA's liability under the Bond. In the absence of any provision otherwise in the Bond, CTC was entitled to look to AXA to pay out for QBH's breach of the Subcontract and the loss caused without proceeding against QBH first: see *Contractual Indemnities* at para 5-15. This was so whether the Bond was an indemnity or a guarantee (see [22] above).
>
> (c) Third, CTC was not obliged to join QBH to the proceedings. None of the situations where a party had to be joined to proceedings applied (see O 15 r 4 of the ROC). Even if there were an issue with nonjoinder, O 15 r 6(1) of the ROC provides:
>
>> No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party; and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.
>
> (d) Fourth, CTC bore no fault whatsoever for QBH's absence in these proceedings. That was a consequence of QBH's insolvency over which CTC had no control. QBH's liquidators had failed to respond to letters from CTC and from AXA. Further, this being a matter concerning the Bond itself, we did not see any reason for criticising CTC's decision not to join QBH even when the liquidators had not responded. Insofar as this was a result of QBH's insolvency, that would, in our view, be part of the insolvency risk that AXA had accepted when it agreed to issue the performance bond (for a fee) on QBH's behalf.

(e) Fifth, if AXA was truly concerned about an abuse of process, it was open to it to apply for a stay or some other order from the court. It made no such application in the lead-up to the hearing below.

The absence of QBH in these proceedings did not in any way cast doubt on the court's determination of AXA's liability to CTC.

72 Third, the fact that CTC and QBH had agreed in the Subcontract to subject any disputes relating to that contract to arbitration did not prevent the Judge from addressing CTC's claims *vis-à-vis* AXA. This followed from the fact that CTC's claim was against AXA, and it was AXA's liability in question. In any event, there being no existing arbitral proceedings at the time, there was no risk of inconsistent findings and the Judge rightly did not decline to decide the matter on the evidence before him.

73 We therefore found no reason to impugn the Judge's decision to proceed to decide, on the evidence presented by CTC, whether it had sufficiently established QBH's breach and losses that it had suffered for the purposes of determining if the Second Call was valid.

***Was the Judge correct to find that breach and loss was established?***

74 Before turning to the Judge's decision and the evidence in this case, we begin by setting out the scope of AXA's position before the High Court and before us on appeal. AXA's consistent position was that it was *unable* to assess the veracity of CTC's claims of breach and loss. It made no submission at all that CTC had failed to prove its loss on the documents provided. The closest it came to doing so was at the hearing before the Judge on 13 August 2020, in the following exchange recorded by the Judge:

| | |
|---|---|
| Court: | … Does [counsel for AXA] have any submission with regard to the evidence produced by [CTC] in making its call? |
| [AXA's counsel]: | [AXA] not able to make any submission on the documents provided by [CTC] in its claim, *aside from pointing out that Appendix 1 relates to events that took place around the time of the first call and [CTC] could have taken it up in arbitration at the time*. Also submit that court should not proceed with this inquiry because the company is under liquidation. Unable to make any submission that on the face of the documents, there is anything wrong with [CTC's] claim. |

[emphasis added]

75 However, even as regards the submission that the matters raised related to events that took place at around the time of the First Call, that was not a submission that these losses were not actually suffered by CTC or were not proved on the documents, but was restricted to an argument that CTC had not pursued the claims with expediency before an arbitral tribunal. This is made clear by the final confirmation that AXA was not able to make any submission that there was anything wrong with CTC's claims on the face of the documents. On appeal, there was likewise no attempt to argue that the documents did not prove the loss. At paras 18–19 of the Appellant's Case, AXA only pointed out again that CTC had failed to take steps to prosecute their alleged claims until 18 February 2020.

Thereafter, AXA's only argument as to the proof of loss was its contention that the Judge had misapplied the burden of proof (at paras 87–89 of the Appellant's Case), which we now consider.

76 AXA contended that, by taking the documents presented by CTC at face value, the Judge effectively placed the burden on AXA to disprove the accuracy of CTC's documents. We disagreed. This incorrectly characterised the Judge's reasoning, as it did not adequately recognise the distinction between the *legal* and *evidential* burden of proof. The legal burden of proof remains on one party, while the evidential burden can shift: *SCT Technologies Pte Ltd v Western Copper Co Ltd* [2016] 1 SLR 1471 at [17]–[18]. The legal burden was on CTC to prove that QBH had breached the Subcontract and caused it loss. As we conclude below at [77], the Judge was entitled to find that the evidence adduced by CTC raised a sufficient case as to call for a response from AXA. AXA offered no response. Therefore, AXA had not met the evidential burden which had shifted to it, and CTC's claim against AXA was established.

77 Apart from this argument, AXA did not (and indeed, given how the case below and on appeal had been run, *could not*) pursue an argument before us that the appeal ought to be allowed because the documents did not establish CTC's claim or that the Judge had erred in his appreciation of the evidence presented by CTC. However, for the avoidance of doubt, we considered whether CTC had satisfied its burden of establishing the breach by QBH and the resultant losses. On a review of the documents presented by CTC, we were satisfied that there was enough objective evidence of losses caused by QBH's non-performance or defective performance of the Subcontract which gave rise to a *prima facie* case that QBH had breached the Subcontract and had caused CTC to suffer loss of an amount that exceeded the sum secured by the Bond. As there was no evidence or submission to the contrary, we accordingly upheld the Judge's finding that the legal burden had been discharged and the requisite breach and loss proved. We state here for the avoidance of doubt that this did not determine the issue as between CTC and QBH (or its liquidators), and no estoppel has arisen between those parties.

78 We did not accept AXA's argument that it was not in a position to dispute CTC's claim because it was not in possession of the facts. In the first place, that complaint may well be exaggerated. There are other instances in the law where one party has to deal with factual issues in court which it did not have anything to do with at the time, for example, in cases involving subrogation of claims. Further, if AXA's issue was that it could not obtain the necessary information from QBH, that was a matter which it could have protected itself in its contract with QBH or its directors. In any event, the risk of QBH's insolvency resulting in its non-participation in these proceedings was, as we have observed above, part of the risk that AXA undertook when it issued the Bond on QBH's behalf (see [49] above). We also observe that it was open to AXA to submit, even without adducing further evidence and simply on the basis of the documents tendered by CTC, that the documents did not support CTC's claims. However, AXA elected not to do so.

79 We therefore found that CTC had established QBH's breach of the Subcontract and losses of such a quantum as to justify the Second Call on the Bond for $397,687.50. The appeal therefore had to be dismissed.

**Would a determination by a court or tribunal or an admission be definitive proof of breach and loss?**

80 The above is sufficient for the disposal of the appeal. However, for the sake of clarifying certain matters, we go on to consider one final issue which arose from the Judge's statement in the GD at [17] (and repeated in [19]) that "an independent determination, arbitral award or admission is necessary for [CTC] to *definitively* prove its losses" [emphasis added]. We have already addressed

the question of whether such determination or admission is "necessary" for a valid call under the Bond, holding that there was no such requirement (see [66] above). Indeed, as noted at [39] above, the Judge also held at [20] of the GD that it was possible to enforce the Bond without such an "independent determination, arbitral award or admission". In the light of that statement, it is necessary to interpret the GD at [17] and [19] carefully, especially since there are some indications that the parties before us may have misconstrued the statement.

81 The Judge's statements at [17] and [19] of the GD cannot be construed to mean that AXA's liability as the issuer would only be definitively established by a determination obtained by CTC against QBH, or an admission by QBH. This proposition (which we do not think was what the Judge intended by these statements in any event) is incorrect, whether the Bond was an indemnity or a guarantee. In relation to guarantees, the general rule set out in *Ex parte Young; In re Kitchin* (1881) 17 Ch D 668 ("*Re Kitchin*") is that (as summarised by this court in *PT Jaya Sumpiles Indonesia and another v Kristle Trading Ltd and another appeal* [2009] 3 SLR(R) 689 ("*PT Jaya Sumpiles*") at [42]):

> … a judgment or an award against a principal debtor is not binding on the guarantor and is not evidence against the guarantor in an action by the creditor against the guarantor based on the judgment or the award. Instead, should the creditor sue the guarantor, it must prove the guarantor's liability in the same way as it must prove the principal debtor's liability if it were to bring an action against the principal debtor …

In *PT Jaya Sumpiles*, this court confirmed that this rule remains the law in Singapore: at [49]. The rationale for the rule was stated by James LJ in *Re Kitchin* at 672 as follows:

> … The arbitration is a proceeding to which [the surety] is no party; it is a proceeding between the creditor and the person who is alleged to have broken his contract, and if the surety is bound by it, any letter which the principal debtor had written, any expression he had used, or any step he had taken in the arbitration would be binding upon the surety. The principal debtor might entirely neglect to defend the surety properly in the arbitration; he might make admissions of various things which would be binding as against him, but which would not, in the absence of agreement, be binding as against the surety…

82 The same principle applies in the context of indemnities as well. The rationale identified above applies in this context too, and such a result is consistent with concepts of privity and *res judicata*. As stated in *Contractual Indemnities* at para 9-36:

> The basic position appears to be the same as that for guarantees and indemnities against claims by or liabilities to third parties. A judgment or arbitral award in favour of the creditor against the debtor is not binding on, nor conclusive evidence of liability against an indemnifier who was not party to the proceedings, nor a privy of one of the parties. The same applies to a settlement concluded between the creditor and debtor.

83 This, of course, is subject to the express terms of the instrument, which may provide that such a judgment or award is binding or must be accepted as conclusive by the issuer. There was no such term in this Bond. Further, it is subject to the possible existence of an estoppel raised against the issuer, if the facts permit that conclusion. Otherwise, in general, it is not true that a judgment or arbitral award against the account party will be binding on the issuer in terms of the latter's obligation to pay under a conditional bond (whether a guarantee or indemnity). The same should apply in respect of an admission from the account party. While the issuer may choose to *accept* such determination or admission as proof of breach and loss and, on that basis, make payment under the bond, this does not mean that the issuer is *required* to do so by reason of such a determination or

admission.

84 These principles are also reflected in the authorities pertaining to when the court will grant a stay of proceedings brought by an indemnified party against an indemnifier in favour of arbitration proceedings between the indemnified party and the party allegedly in breach of the underlying contract. A stay will not be granted as of course, since these are two distinct proceedings, and the indemnified party is entitled, as a matter of principle, to proceed against the indemnifier without first claiming against the breaching party. However, as a matter of the court's exercise of its inherent powers of case management, the court will consider the extent of overlap of issues between the two distinct proceedings: see *Maybank Kim Eng Securities Pte Ltd v Lim Keng Yong and another* [2016] 3 SLR 431 ("*Lim Keng Yong*") at [37]. The assumption in such cases is that the indemnifier is not necessarily *bound* by the outcome of the parallel proceedings, but in practical terms, "the efficient and fair resolution of the dispute" may require the arbitral proceedings to be completed first: see *Lim Keng Yong* at [37]–[39].

85 In our view, the issuer is *at liberty* to contest the claim notwithstanding a determination against or an admission by the account party. That contest may ultimately fail with adverse costs consequences. In certain cases, it may well be an abuse of process (in the sense of being a hopeless or entirely unmeritorious case) for the issuer to contend in separate proceedings that, despite an account party's attempted but failed defence, it would require the beneficiary to prove its claim all over again. Unless the judgment against the account party was obtained by default either of appearance or defence, or it could be shown that the account party had not conducted its defence properly, it may well be the case that the issuer would fail to raise a triable issue, with even more severe adverse costs consequences. This would necessarily be a fact-sensitive question, and we do not propose to exhaustively state the circumstances in which such a contention by the issuer would be an abuse of process. Regardless, it remains *open* to the issuer to resist a beneficiary's reliance on a determination against or admission by the account party, as it is not, at law, bound by that determination or admission.

86 Returning to the Judge's statement in the GD at [17] and [19], it is clear to us that the Judge did *not* have in mind such a situation of two separate determinations against the account party, on the one hand, and as against the issuer, on the other. The Judge's intended contrast was instead between such a determination or admission between the beneficiary and issuer, and the mere provision of documents which, "regardless of the volume and specificity, is insufficient to conclusively prove the matter" (see the GD at [19]). As the Judge went on to observe (see the GD at [20]):

> … A beneficiary under such a bond is always entitled to call on the bond if, in its opinion, it has suffered actual losses. Accompanying such a call will naturally be the provision of sufficient documents and evidence adduced to prove the breach of the underlying contract and the consequential losses suffered. If the guarantor under the bond accepts such documentation and pays the amount secured under the bond, that is the end of the matter. *If the documents are not accepted as proof, the parties would inevitably have to proceed to an independent determination, as in the present instance*. … [emphasis added]

87 The last sentence just quoted shows that the Judge, in thinking of an independent determination, was concerned not with the reliance of a determination against the *account party* in a claim against the *issuer*, but simply with a contrast between the mere provision of documents and a determination by the court. The reference to an "independent determination" at [20] of the GD was in fact to a determination between the *beneficiary* and the *issuer*. At [22] of the GD, the Judge again referred to the definitive proof of the beneficiary's case in court between the beneficiary and the issuer. Seen in this way, the Judge was simply restating the fact that the mere provision of

documents by the beneficiary to the issuer would not necessarily settle matters, as the issuer could choose to resist the call. However, the determination as between the beneficiary and the issuer can be undertaken by the court hearing the application to enforce the bond as the Judge rightly did below. It is clear to us that the Judge, in observing that, "[i]f the documents are not accepted as proof, the parties would inevitably have to proceed to an independent determination, *as in the present instance"*, was plainly stating that he was making that independent determination himself and was not referring to a requirement for a separate independent court or arbitral determination as between the beneficiary and the account party.

**Conclusion**

88 For the reasons above, we dismissed the appeal. We ordered AXA to pay CTC's costs fixed at $32,000 (all-in). The usual consequential orders would apply.