Master Marine AS *v* Labroy Offshore Ltd and others
[2012] SGCA 27

Case Number	: Civil Appeal No 79 of 2011
Decision Date	: 18 April 2012
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Chan Leng Sun SC, Sheik Umar and Joanne Chia (Wong & Leow LLC) for the appellant; Steven Lim, instructed by Prakash Mulani and Bhaskaran Sivasamy (M&A Law Corporation) for the first respondent; Lee Eng Beng SC, Sim Kwan Kiat and Chong Kah Kheng (Rajah & Tann LLP) for the second to fourth respondents.
Parties	: Master Marine AS — Labroy Offshore Ltd and others

Credit and Security – Performance bonds

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2011] SGHC 234.]

18 April 2012 Judgment reserved.

V K Rajah JA (delivering the judgment of the court):

Introduction

1 This is an appeal against the decision of the High Court judge ("the Judge") in *Labroy Offshore Ltd v Master Marine AS and others* [2011] SGHC 234 ("GD"), granting an injunction restraining the second to fourth respondents (together, "the Banks") from paying the appellant, Master Marine AS ("MM"), monies it demanded under several "Refund Guarantees" issued by the Banks in its favour. We should add that the underlying transaction here is an international shipbuilding contract and that "Refund Guarantees", otherwise known as performance bonds, commonly feature as security in such matters for a buyer's advances of the purchase price.

2 In the course of construing the subject instruments, many interesting issues were raised, namely: (a) consideration of the nature of a first demand performance bond; (b) how this type of instrument should be construed; (c) how much attention should be given to the instrument's contextual setting; and (d) when a demand would be effective.

The facts

3 On 28 March 2007, the first respondent, Labroy Offshore Ltd ("Labroy"), and MM entered into an agreement (the "Underlying Contract") for the former to construct and the latter to purchase an offshore elevating rig ("the Rig"). Under Article 3.8 read with Article 3.2 of the Underlying Contract, MM was to pay part of the purchase price of the Rig in five precalculated instalments before delivery, according to certain milestones. MM's liability to pay, however, was subject to Labroy procuring "Refund Guarantee(s)" from first class international banks to "secure the repayment to [MM] of all instalments of the [purchase price] paid by [MM] to [Labroy]".

4 As required, Labroy approached the Banks on or before 16 May 2007 with their request and each bank issued its own "Refund Guarantee" in MM's favour, purporting to guarantee approximately a

third of each instalment. All of the letters bore the heading "Refund Guarantee" with a designated serial number, made reference to the Underlying Contract in the subject title, and carried an expiry date of 31 August 2010. There were altogether 12 Refund Guarantees issued: four from the second respondent, four from the third respondent and four from the fourth respondent. The Refund Guarantees also provided for three types of demands that MM could serve on the Banks for repayment of their advances. These were the "Initial Demand", the "Deferred Demand" and the "New Demand". The circumstances in which each of these demands could be made were set out in the Refund Guarantees as follows: [note: 1]

3. At the request of [LABROY] ... we, [OCBC/UOB/DBS] ... hereby:-

   a. absolutely, irrevocably and unconditionally guarantee to pay to you an amount up to but not exceeding a total amount of … (the "Guaranteed Amount") representing one-third of the [First/Second/Third/Fourth] Installment plus interest at the rate of six percent (6%) per annum, if and when the same or any part thereof becomes repayable to the Owner [*ie*, MM] from the Builder [*ie*, Labroy] in accordance with the terms of the Contract [*ie*, the Underlying Contract]; subject to clause 3 (b) below and provided always that our maximum liability under this Refund Guarantee shall not at any time exceed the Guaranteed Amount.

   b. Irrevocably undertake that payment under this Refund Guarantee will be effected by us within fourteen (14) Singapore banking days following our receipt of a written demand from the Owner for payment, stating that the Contract is cancelled or rescinded by the Owner in accordance with the terms of the Contract, which statement shall be final and conclusive, together with the original of this Refund Guarantee. We shall inform Builder by way of registered mail and electronic mail (for which acknowledgement is not required from Builder) by 6pm of the next Singapore banking day from the date of receipt of such written demand from the Owner.

   PROVIDED THAT, in the event we receive notification ("Notification") from the Builder within (5) Singapore banking days from the date of our receipt of your written demand referred to in paragraph 3 (b) above (which demand shall be referred to hereinafter as the "**Initial Demand**") that your claim for refundment is disputed by the Builder and has been referred to arbitration in accordance with the Contract, we shall be entitled to defer payment of the entire sum claimed under the Initial Demand and only be liable to pay to the Owner the sum adjudged to be due to the Owner by the Builder pursuant to an award (hereinafter the "Award") made under such arbitration or as agreed pursuant to a settlement agreement between the Builder and the Owner such deferred payment to be payable by us to the Owner immediately upon receipt by us from the Owner of a further written demand (which demand shall be referred to hereinafter as the "**Deferred Demand**") for the sum(s) so adjudged together with a certified true copy of the Award or the settlement agreement (as the case may be) and PROVIDED ALWAYS that our maximum liability hereunder shall not at any time exceed the Guaranteed Amount.

   For the avoidance of doubt, we shall not be obliged to make any payment under the Initial Demand till five (5) Singapore banking days have elapsed from the date of our receipt of the Initial Demand. …

   In the event of (i) any possible delay in the delivery of the Rig or (ii) if an Initial Demand has been made and your claim for refundment is disputed and referred to arbitration and the said arbitration cannot reasonably be expected to be concluded thirty (30) Singapore banking days before the Expiry Date [*ie*, of the Refund Guarantee], ... the Owner shall be entitled to request from the Builder for a replacement guarantee to be issued by us in similar terms as this Refund Guarantee with expiry date 30 calendar days from the new anticipated date of the delivery of the Rig to the Owner or conclusion of the arbitration (as the case may be) ... which replacement guarantee must be furnished by the Builder to the Owner not later than fourteen (14) Singapore banking days before the Expiry Date ... ***In the event such replacement guarantee is not furnished no less than fourteen (14) Singapore banking days before the Expiry Date*** *... as provided in Article 3.8 of the [Underlying] Contract* ***, the Owner shall be entitled to make a written demand (which demand shall be referred to hereinafter as the "New Demand") for the sum claimed under the Initial Demand (if made) and stating that the Builder has failed to furnish a replacement guarantee (such statement to be final and conclusive) and we shall pay the Owner the said sum claimed under the New Demand immediately upon our receipt of the New Demand irrespective of whether or not the claim under the New Demand is disputed by the Builder or has been referred to arbitration or there is an arbitration claim pending; subject always to the New Demand being received by us on or before the Expiry Date ... .***

For the avoidance of doubt, the Owner may make only one Initial Demand and one Deferred Demand and/or one New Demand under this Refund Guarantee and we will make payment in the manner described above for each such demand upon our receipt of the Initial Demand or the Deferred Demand or the New Demand, provided always that any such demand is received by us on or before the Expiry Date ... For the purpose herein, "banking days" shall be the days (other than a Saturday or Sunday) on which banks are open for business in Singapore.

...

5. Our liability under this Refund Guarantee *shall not be affected by any alteration to or variation of the terms of the Contract* which the Owner may hereafter agree with the Builder, *or by any other matter or circumstances*, including bankruptcy or insolvency of the Builder, which might otherwise discharge our liabilities as guarantor of the Builder's obligations as aforesaid.

...

7. After the Expiry Date, this Refund Guarantee shall be null and void whether or not it is returned to us for cancellation.

[emphasis added in italics and bold italics]

It was with the concrete assurance of these Refund Guarantees in place that MM proceeded to make four instalments of the purchase price to Labroy, amounting to approximately €85,080,000. [note: 2]

5 As it turned out, the Rig was not ready by 28 June 2010 which was the original delivery date the parties had agreed to. This had certain ramifications for Labroy: under limb (i) of the third paragraph to the proviso of clause 3 of the Refund Guarantee ("the First Limb"), it was obliged to procure a "replacement guarantee" for MM by a stipulated deadline, *viz*, 14 Singapore banking days before the expiry date of the subsisting Refund Guarantees (see [4] above). However, this was not done. Instead, Labroy prevailed upon the Banks to issue letters *extending* the expiry date of the subsisting Refund Guarantees. (That being said, this particular discrepancy in form - that is to say an extension in lieu of replacement - is not an issue before us, as MM's position in the hearing was that

these extensions were valid.) [note: 3]

6 Even while this difficulty was being resolved, MM and Labroy were intensely wrangling on several other fronts. The first was the question of who was to blame for the delay in the delivery of the Rig. MM pointed to what parties termed the "Graha Incident" on 22 April 2010, where construction of the Rig had come to a standstill because Labroy allegedly had not paid its subcontractors and suppliers. [note: 4] In contrast, Labroy claimed the delay was the result of various last minute variations MM had made to the specifications of the Rig and MM's late delivery of "Owner Furnished Equipment" necessary for the Rig's construction. [note: 5] The second was the issue of a reasonable new delivery date: MM alleged Labroy revised its building schedule multiple times without consulting them. MM also objected to the unilateral revisions made by Labroy as they were unrealistic and unreasonable. [note: 6] Finally, because parties could not arrive at a mutually agreeable delivery date, the Banks were only willing to extend the Refund Guarantees for month-long periods each time an application for extension was made by Labroy. [note: 7] MM claimed these month-long extensions were "invalid" as the Refund Guarantees clearly envisioned extensions lasting *30 calendar days beyond the "new anticipated date of delivery"*. [note: 8]

7 Fearing that their advances were not adequately secured, MM uncompromisingly pursued the extension issue mentioned at [6] above. This was vividly reflected in a frantic stream of correspondence exchanged between parties over the period from 12 January 2011 to 6 April 2011: [note: 9] MM, on the one hand, demanded that Labroy rectify the allegedly invalid extensions and Labroy, on the other hand, maintained that the extensions were indeed valid. Meanwhile, Labroy continued procuring extensions for further month-long periods and MM continued to provisionally accept these with the unequivocal qualification that its rights were reserved.

8 In the meantime, on 10 March 2011, reports of Drydocks World LLC - the parent company to Drydocks World South East Asia Pte Ltd, which assumed 100% ownership of Labroy only after the Underlying Contract had been entered into - facing $24.9 billion worth of debt surfaced. [note: 10] MM's fears of holding inadequate security were now severely exacerbated by the disturbing possibility that Labroy might never complete construction of the Rig. On 7 April 2011, as per their usual practice, Labroy applied to the Banks for further extensions of the Refund Guarantees which were expiring on 30 April 2011. The Banks responded by issuing letters to MM confirming that the expiry date was extended to 31 May 2011. The date of issue of these said letters from the Banks ranged from 8 to 12 April 2011. However, these letters were not furnished to MM by 11 April 2011, as required under each of the Refund Guarantees. *Labroy does not dispute its failure to furnish the Refund Guarantees on time.* [note: 11]

9 On 12 April 2011, MM served on Labroy a notice of rescission citing the following as grounds for termination of the Underlying Contract: [note: 12]

(a) that Labroy failed to furnish extensions of the Refund Guarantees lasting 30 days beyond the new anticipated delivery date of the Rig by the deadline of 7 April 2011 (a breach of Article 3.8 of the Underlying Contract);

(b) that Labroy failed to furnish replacement guarantees (or extended Refund Guarantees) no later than 14 Singapore banking days before the expiry date of the subsisting Refund Guarantees (a breach of the First Limb of the third paragraph to the proviso of clause 3 of the Refund Guarantee);

(c) that Labroy failed to deliver the Rig for a period in excess of 180 days after the delivery date of 29 June 2010 (which includes one day of permissible delay that MM had accepted) (a breach of Article 11.3 of the Underlying Contract); and

(d) that the total accumulated delay of non-permissible delay and *force majeure* delay amounted to 270 days or more after the delivery date (a breach of Article 11.5 of the Underlying Contract).

10 Soon after on the same day, MM served on each of the Banks a letter of demand which read as follows: [note: 13]

> ... In accordance with the terms and conditions of the Refund Guarantees issued by you as per above, Owner [*ie*, MM] hereby makes a demand for payment ("New Demand") of all instalments guaranteed under the above listed Refund Guarantees + interest thereon at the annual rate of 6% from the date when such instalments were paid until the date of refund as aforesaid, on the basis that the Builder [*ie*, Labroy] has failed to provide extended guarantees no later than 14 Working Days before expiry as per Article 3.8 of the Construction Contract [*ie*, the Underlying Contract] and/or to provide replacement guarantees no later than 14 Singapore Banking Days before the Expiry Date as per the terms of the Refund Guarantees...
>
> Further and/or alternatively, Owner hereby makes a demand for payment under the above Refund Guarantees issued by yourselves, on the basis that the Construction Contract is rescinded by the Owner in accordance with the terms of the Construction Contract ("Initial Demand").

From this, it appeared that MM was concurrently making both a New Demand and an Initial Demand. However, we pause to observe that it is plain from the tenor of this demand letter that MM's *primary* basis for demanding payment was Labroy's failure to ensure that the replacement guarantees or the relevant extensions were procured timeously. The Initial Demand was made in the alternative - seemingly *pro forma*.

11 On 15 April 2011, Labroy and MM agreed to refer the issue of the validity of MM's purported rescission to arbitration in accordance with Article 19.4 of the Underlying Contract. This arbitration is still ongoing. As a precautionary measure, nonetheless, on 18 April 2011, Labroy took out an *ex parte* application for an interim injunction restraining the Banks from making payment to MM and/or enjoining MM from receiving payment from the Banks. The position of Labroy and the Banks (which supported Labroy's application) was that until and to the extent Labroy is adjudged liable for sums under the arbitration proceedings, the Banks are not liable to pay. The interim injunction was granted. Likewise, when the substantive application was heard on 19 May 2011 and 6 June 2011, the Judge made the injunction final. The present appeal before us is against this final order.

The decision below

12 Before the Judge, MM clarified that it was seeking repayment on the basis that it had made a valid New Demand under the First Limb (GD at [20]). This was despite there also being mention of an Initial Demand in its demand letters to the Banks (see [10] above). A New Demand under limb (ii) of the third paragraph to the proviso of clause 3 of the Refund Guarantee ("the Second Limb") could not have been made at that time, because arbitration had not yet commenced. In light of this, the Judge focused his attention on the third paragraph of the proviso to clause 3 of the Refund Guarantee (the "New Demand Clause") so as to determine what he thought was the main issue before him, *viz*, whether MM was entitled to make a New Demand under the First Limb when the Underlying Contract had been rescinded. On his interpretation of the New Demand Clause, the answer was "no" (GD at

[30]). His reasons were as follows.

13 Firstly, the Judge concurred with the submission made by counsel for the Banks, Mr Lee Eng Beng SC ("Mr Lee SC"), that the First Limb and the Second Limb to the New Demand Clause applied to *mutually exclusive situations*: whilst the First Limb applied where MM intended to keep the Underlying Contract *alive* (notwithstanding the late delivery), the Second Limb applied where the Underlying Contract was *rescinded*. [note: 14] If that were not the case, use of the phrase "*new anticipated date of delivery*" in the First Limb as a reference point for the replacement guarantees' expiry dates would be nonsensical as a rescission would imply that MM did not want to take delivery of the Rig any more (GD at [35]).

14 Secondly, the Judge opined that this disjunctive way of reading the New Demand Clause "accorded with the overall scheme of the Refund Guarantees" (GD at [36]). Labroy clearly intended to put MM in a secured position, but at the same time did not want to give the latter a *carte blanche* to demand repayment with no proper basis. As such, the Deferred Demand was introduced, where repayment obligations would be held in abeyance pending the arbitration tribunal's decision on the issue of whether Labroy was truly in breach. If, as MM averred, it was entitled to make a New Demand under the First Limb even after the Underlying Contract was rescinded and the validity of the rescission was referred to arbitration, this would have the effect of allowing MM "to get around the deferral of its right to a refund pending the resolution of the parties' dispute" (GD at [36]–[38]).

Summary of the parties' arguments

15 Pertinently, all parties are in agreement that the New Demand Clause functions as a first demand performance bond. This is notwithstanding the instruments being titled "Refund *Guarantees*". However, we will venture even further to say that the *entire* Refund Guarantee operates as a first demand performance bond. Our reasons for finding so will be elaborated on later at [43]–[45]. It is suffice to say at present that it was clear the parties intended that the subject instruments act as *cash equivalents* payable on the beneficiary's demand *simpliciter* or where required, supported by specified documents. This is the defining characteristic of a first demand performance bond: see [26] below. (In contrast, conditional performance bonds or guarantees are payable usually on proof of default: see below at [29]).

16 However, the parties seriously part ways on the manner in which they read the New Demand Clause. Specifically, they disagree on the conditions that have to be fulfilled to make a valid New Demand under the First Limb. According to counsel for MM, Mr Chan Leng Sun SC, a valid New Demand under the First Limb can be made once Labroy fails to discharge its absolute obligation to procure extended Refund Guarantees and/or replacement guarantees within the stipulated deadline. In this regard, Labroy did not dispute that the extensions were supplied a day late on 12 April 2011 (see [8] above), and so the New Demand under the First Limb had been validly made.

17 In contrast, Labroy avers that there are two kinds of New Demands that MM can make. They are:

(a) a New Demand under the First Limb, which, per the wording of the New Demand Clause, requires that there be a delay in delivery and *no Initial Demand made by MM*; and

(b) a New Demand under the Second Limb, which requires that *MM make an Initial Demand* that Labroy disputes, and for parties to refer their disagreement to arbitration.

Since a New Demand can arise out of two very different sets of facts which appear to be mutually exclusive (*ie*, because either an Initial Demand has been made, or it has not), counsel for Labroy, Mr Steven Lim ("Mr Lim") submits that the New Demand Clause was badly drafted and is "ambiguous". Nevertheless, under this construction, MM's New Demand under the First Limb would be invalid, as it had made an Initial Demand *at the same time*. In other words, the condition that no Initial Demand be made was not fulfilled.

18 The purpose of setting out such precise conditions - Mr Lim explains -is because parties anticipated two specific situations. The first is where the Refund Guarantees lapse following the delay in delivery, thereby leaving MM in an unsecured position. In such a case, though MM's right to make an Initial Demand subsists, without a provision requiring procurement of a replacement guarantee expiring 30 days from the new anticipated date of delivery, the right to make a call would be pointless. The second is where the Refund Guarantees lapse in the course of a protracted arbitration. In such a case, though MM's right to make a Deferred Demand subsists, in the absence of a provision requiring procurement of a replacement guarantee expiring 30 days after the conclusion of the arbitration, MM would still have no assurance of being repaid. [note: 15]

19 In the case of the Banks, they forcefully argue that for a valid New Demand under the First Limb to be made, the Underlying Contract must be alive. Based on this argument, MM - by virtue of the fact that it had purported to rescind the Underlying Contract before issuing the letter of demand - had not made a valid New Demand. To support this assertion, Mr Lee SC reiterates his submission recorded at [13] above. He also rather persuasively points out that if MM had issued a New Demand without serving a notice of rescission, this would serve to *affirm* rather than contradict the Underlying Contract.

20 In summary, both Labroy and the Banks agree with the Judge's finding that instead of trying to prematurely retrieve its advances under a New Demand, the proper thing for MM to do would be to wait for the conclusion of arbitration proceedings and make a valid Deferred Demand (see [14] above).

Issues arising in this appeal

21 The primary issue this Court has to consider is: exactly what are the condition precedents to making a valid New Demand? This can only be determined *vide* a proper construction of the relevant clause in the Refund Guarantees. The second, less cogent, issue that Labroy raises in its submissions is that of unconscionability; namely that it is unconscionable for MM to: (a) exploit the ambiguity of the New Demand Clause by demanding repayment *now* when it would suffer no prejudice waiting for the arbitration award; and (b) demand repayment on the basis that Labroy was a day late in supplying the extended Refund Guarantees and/or replacement guarantees, since it knew MM's failure to meet the deadline was due an inadvertent failure to take into account the fact that 22 April 2011 was a public holiday. [note: 16]

22 We are not impressed by Labroy's second contention of unconscionability. If, on a proper construction of the Refund Guarantees, we find that MM is *entitled* to enforce its rights in such a manner, then it would not lie in Labroy's mouth to claim that such enforcement is unconscionable. Furthermore, we observe that in the course of the hearing, Labroy rightly conceded that *time was of the essence in the New Demand Clause* (on why this was axiomatic, see [26] and [35] below). In the event this condition is breached (as was the case here), the court ordinarily will not exercise its jurisdiction to grant the breaching party equitable relief in instruments of this genre even though it may have the power to do so. The reasons for this have been succinctly explained by Lord Hoffmann in *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514 at 519B:

The principle that equity will restrain the enforcement of legal rights when it would be unconscionable to insist upon them has an attractive breadth. But the reasons why the courts have rejected such generalisations are founded not merely upon authority (see *per* Lord Radcliffe in *Campbell Discount Co. Ltd. v. Bridge* [1962] A.C. 600, 626) but also upon practical considerations of business. ***These are, in summary, that in many forms of transaction it is of great importance that if something happens for which the contract has made express provision, the parties should know with certainty that the terms of the contract will be enforced. The existence of an undefined discretion to refuse to enforce the contract on the ground that this would be "unconscionable" is sufficient to create uncertainty*** . Even if it is most unlikely that a discretion to grant relief will be exercised, its mere existence enables litigation to be employed as a negotiating tactic. The realities of commercial life are that this may cause injustice which cannot be fully compensated by the ultimate decision in the case.

[emphasis added in bold italics]

23 On this note, we now turn to the construction issue on which this appeal pivots.

Nature of the document

24 Before we address the substantive issue of this appeal, we pause here to make some observations on the nature of a first demand performance bond: specifically, how it functions and its purpose in the business world (see [25]–[27]). We shall also address how it differs from a guarantee and a conditional bond (see [28]–[30] below). Finally, we shall consider the principle of strict compliance in performance bonds and examine the reasons behind having such a doctrine (see [31]–[33]). It is worth noting that the present appeal turns on the last point.

25 Essentially, a first demand performance bond is an undertaking by the bond issuer (usually a bank) to pay a specified sum to the beneficiary immediately on receipt of a compliant demand. It is essentially a promissory note payable on demand. The bank issues such a bond on the instructions of its customer (the bond applicant and account holder) who, in turn, furnishes security to the bank for the full amount. The account holder procures such a bond to act as good security for due performance of the underlying contract between itself and the beneficiary. As such, a performance bond acts as a "risk-distributing device" which transfers the risk of default from the beneficiary to the account holder: see G Andrews and R Millett, *Law of Guarantees* (Sweet & Maxwell, 6th Ed, 2011) ("*Andrews & Millett*") at paras 16-003 and 16-007.

26 The enormous advantage to the beneficiary of this tripartite arrangement is that the beneficiary has the assurance of *immediate* payment from the bank, subject only to a compliant demand being made on it. This is because the bank's obligation to pay in accordance with the terms of the agreement is entirely independent of the underlying contract between the bank's customer and the beneficiary; the two are autonomous contracts vis-à-vis different parties (albeit with obligations that are closely related). As a general rule, the bank will not concern itself with the merits of any underlying dispute between the beneficiary and its customer, 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. When payment is to be made against documents, there is no requirement that any assertion in the documents be correct in law: see *Meritz Fire and Marine Insurance Co Ltd v Jan de Nul NV and another* [2011] 2 Lloyd's Rep 379 at [26]. In this way, first demand performance bonds bear close substantive resemblance to letters of credit: see *Edward Owen Engineering Ltd v Barclays Bank International Ltd and Another* [1978] 1 QB 159 at 171A. At this juncture, we pause to note that notwithstanding various similarities observed between the two, a performance bond is not "equivalent to a letter of

credit for *all purposes*" [emphasis added] (LP Thean JA, "*The Enforcement of a Performance Bond: The Perspective of the Underlying Contract*" [1998] 19 Sing LR 389 ("*Enforcement of a Performance Bond*") at p 400). No more need be stated here, but for more on the distinction between the two, see *Enforcement of a Performance Bond* at pp 400–415.

27 It was this peculiar "document-centric" function of performance bonds that Staughton LJ alluded to in *IE Contractors Ltd v Lloyds Bank PLC and Rafidain Bank* [1990] 2 Lloyd's Rep 496 ("*IE Contractors*") at 499 in observing that:

> … a performance bond, like a letter of credit, will generally be found to be conditioned upon the presentation of one or more documents, rather than upon the actual existence of facts which those documents assert. If the letter of credit or bond requires a document asserting that goods have been shipped or that a contract has been broken, and if such a document is presented, the bank must pay. It is nothing to the point that the document is untruthful, and that the goods have not been shipped or the contract not broken. ...The justification for it is said to be that bankers can check documents, but do not have the means or the inclination to check facts, at any rate for the modest commission which they charge on a letter of credit or performance bond.

28 In addition, Staughton LJ also quite rightly noted that (*IE Contractors* at 499):

> On the other hand there is no reason why a performance bond should not depart from the usual pattern, and be conditioned upon the existence of facts rather than the production of a document asserting those facts. It might be inconvenient for the bank, but it is a perfectly lawful contract if the parties choose to make it.

What Staughton LJ envisaged in the latter case was a performance bond predicated on the existence (and/or proof) of a breach and/or the occasioning of loss and damage on the underlying contract. This is of course an altogether different type of bond where the merits of the underlying dispute might be relevant. Such an instrument diminishes the effectiveness of the traditional on demand performance bond as a cash equivalent for the beneficiary as it might import by reference the need to verify or attest to facts before a compliant demand can be or is deemed made. However, the 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 (for reasons why this is the case, see [32] below).

29 Such bonds conditioned on breach and/or actual loss are usually described as "conditional bonds": see J O'Donovan and J Phillips, *The Modern Contract of Guarantee*, (Sweet & Maxwell, 2nd Ed, 2010) ("*O'Donovan and Phillips*") at paras 13-03–13-04. The authors liken them to having some characteristics of guarantees, though it should be noted that they are not guarantees in the true sense of the word. A true "see to it" guarantee is a contract whereby the surety promises the creditor to be responsible, in addition to the principal, for performance of the underlying contract between the principal and the creditor, if the principal fails to perform his obligations: see *Andrews & Millett* at para 1-004. The surety's liability is thus *secondary* to that of the principal. In contrast, the liability of the bond issuer to honour payment on the bond is a *primary* liability that falls on its shoulders alone: see *American Home Assurance Co v Hong Lam Marine Pte Ltd* [1999] 2 SLR(R) 992 at [41]. An example of a conditional bond is found in *JBE Properties Pte Ltd v Gammon Pte Ltd* [2011] 2 SLR 47, where this court found that the obligation of the bank was limited to payment against *actual losses* (at [19]).

30 As a final point of clarification, we note that businessmen commonly refer to first demand

performance bonds as "first demand performance *guarantees*". This is a bit of a misnomer for reasons already explained at [29] above.

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) ("*Poh*") 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.* There are good reasons for this requirement.

32 First and foremost, more often than not, an issuing bank knows nothing about the details of the transaction between the account party and the beneficiary. Hence, the bank cannot be expected to decide what exactly will (or will not) suffice. It may turn only to the wording of the performance bond for guidance. Secondly, the function that performance bonds are supposed to serve (*viz*, providing prompt payment to the beneficiary: see [26] above) can only be achieved if the banks are able to complete its assessment quickly, with little expense and little need to exercise its individual discretion. It is precisely this function that results in time always being of the essence in performance bonds. Thirdly, the speed at which decisions can be made is also relevant in the litigation context: the court, when assessing whether or not to grant an injunction to prevent payment under a performance bond, should be able to reach its decision quickly by referring only to the bond instrument. Fourthly, strict compliance is necessary to ensure certainty for both the account party and the beneficiary. The account party protects his interests by inserting in the performance bond all necessary requirements before monies can be paid out thereunder. The beneficiary in turn benefits from the certainty that he will be paid if he complies strictly with the terms of the performance bond. Cases where the courts appear to have departed from this general principle of strict compliance can perhaps be explained as being fact-centric and turning on the proper construction of the instruments in question. Ultimately, there is no room for the application of any vague notions of unconscionability or the *de minimis* exception that Labroy propounds, at [21] above and [50] below.

33 As for how to identify the condition precedents or prescribed form to be met, this is a matter of construing the instrument. This brings us neatly to the next issue of approaching the question of construction in the context of performance bonds.

The construction process in performance bonds

Treatment of extrinsic evidence

34 We begin our analysis by referring to the general principles of contractual interpretation, as explicated in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich*"). In *Zurich*, this Court stated in no uncertain terms (at [114]) that ambiguity is no longer a prerequisite for the admissibility of extrinsic evidence in aid of contractual interpretation. As words are sometimes penumbral, the external context of the contract

(encompassing the surrounding factual matrix, prior negotiations, *etc*) will, more often than not, help to define the contours and limits of the penumbra: see *Zurich* at [122]. That being said, before beginning the construction exercise, the "first and foremost consideration in approaching any written contract must be the essence and attributes of the document being examined" as "[d]ifferent genres of documents may require different treatment by the court at various stages of the analytical process": see *Zurich* at [110].

35 In our view, the first demand performance bond, in particular, is one such document where the court should be restrained in its examination of the external context and extrinsic evidence. First, like a standard form contract, "the presumption [is] that all the terms of the agreement between the parties are contained in the contract": see *Zurich* at [110]. As already mentioned at [26] above, the primary role of a performance bond in commerce is to ensure expediency in payment. At the time the call is made, both the beneficiary and bank need to be able to determine quickly if the demand is valid simply *by looking at the bond instrument itself*. There should not be a need for cross-references to be made to the underlying contract to determine the ambit of the condition precedents *etc*. Secondly, performance bonds are most commonly used in commercial contexts, particularly in the construction industry and in the area of international trade. Parties to these transactions are, more often than not, experienced commercial men who are able to appreciate that the underlying contract and the bond are independent contracts with different obligations vis-à-vis different parties. It would thus be reasonable to expect that parties ordinarily intend for each of these contracts to contain *all* the terms of the respective parties' agreements.

36 That being said, in situations where the wording of the bond instrument is patently ambiguous, and it cannot be readily determined from the internal context of the document how to read the disputed provision, the court's only recourse is to refer to extrinsic evidence for a better understanding of the parties' objective intentions and/or commercial purpose. Similarly, if the plain wording of the contract suggests a meaning inconsistent with the obvious external context in which the contract is made, this might indicate that "*that* construction might *not* be as clear as was initially thought and might, on the contrary, be evidence of ["latent"] ambiguity" [emphasis in original]: see *Sandar Aung v Parkway Hospitals Singapore Pte Ltd (trading as Mount Elizabeth Hospital and another)* [2007] 2 SLR(R) 891 at [29], which this Court referred to in *Zurich* at [128]. As for the form of extrinsic evidence to admit in both situations, the most immediately relevant material (in the sense that it affects the way in which the language of the document would be understood by a reasonable person: see *Zurich* at [125]) would ordinarily be the underlying agreement that necessitates the procurement of the performance bond.

37 An instructive illustration of a case where extrinsic evidence shone light on latent ambiguity in the performance bond is *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 ("*Rainy Sky (SC)*"). The salient facts of the case are summarised below.

38 The appellants entered into several agreements with Jinse Shipbuilding Co Ltd ("Jinse") for the sale and purchase of ships. Under these agreements, the appellants were to pay the purchase price in advance, but were able to demand that Jinse refund those payments in certain circumstances. When Jinse became insolvent, the appellants sued the respondent on the performance bonds issued by the respondent to the appellants to secure the obligations of Jinse. The crucial provisions of the bonds were paragraphs 2 and 3 which read as follows (*Rainy Sky (SC)* at 2903-2904):

> 2. Pursuant to the terms of the contract, you are entitled, upon your rejection of the vessel in accordance with the terms of the contract, your termination, cancellation or rescission of the contract or upon a total loss of the vessel, to repayment of the pre-delivery instalments of the contract price paid by you prior to such termination … .

> 3. In consideration of your agreement to make the pre-delivery instalments under the contract … , we hereby, as primary obligor, irrevocably and unconditionally undertake to pay to you, your successors and assigns, on your first written demand, *all such sums* due to you under the contract …
>
> [emphasis added]

The key issue before the UK Supreme Court was what the parties meant by the phrase "all such sums" in paragraph 3 of the bonds. Did this mean that Jinse's insolvency was one of the trigger events contemplated by the performance bond as a condition precedent to making a valid demand for a refund? The appellants responded with a resounding "yes". However, on a plain reading of the bond instrument's terms, the odds were against them as paragraph 2 of the bond mentioned "termination, cancellation or rescission" of the contract and "total loss of the vessel" as grounds for repayment but was silent as to insolvency.

39 In *Kookmin Bank v Rainy Sky SA and others* [2010] EWCA Civ 582 ("*Rainy Sky (CA)*"), Sir Simon Tuckey ("Sir Simon") of the Court of Appeal (whose views the Supreme Court largely adopted) laid out his approach to the construction process as follows (at [19]):

> The court must first look at the words which the parties have used in the bond itself. The shipbuilding contract is of course the context and cause for the bond but is nevertheless a separate contract between different parties. If the language of the bond leads clearly to a conclusion that one or other of the constructions contended for is the correct one, the Court must give effect to it, however surprising or unreasonable the result might be. *But if there are two possible constructions, the Court is entitled to reject the one which is unreasonable and, in a commercial context, the one which flouts business commonsense.* [emphasis added]

The process by which one arrives at two competing constructions was also addressed by this Court in *Zurich* at [130] in the following terms:

> [T]he court will *first* take into account the plain language of the contract together with relevant extrinsic material which is evidence of its context. *Then, if, in the light of this context*, the plain language of the contract becomes ambiguous (*ie*, it takes on another plausible meaning) or absurd, the court will be entitled to put on the contractual term in question an interpretation which is different from that demanded by its plain language. [emphasis in original]

40 On the facts of the case, Sir Simon referred to Arts X.5 (which obliged Jinse to refund the appellants' advances in the event of the appellants' termination, cancellation or rescission of the contract), X.6 (which obliged Jinse to refund the appellants' advances in the event of total loss or constructive total loss of the vessel prior to delivery) and XII (which obliged Jinse to refund the appellants' advances in the event of the former's insolvency) of the underlying contract between the appellants and Jinse. He also considered Article X.8 (which set out Jinse's obligation to procure refund guarantees securing the appellants' advances in the form of Exhibit A *which was "yet to be agreed" at the time* [emphasis added]) before concluding that the bond actually executed was "poorly drafted" for its failure to refer back to Article XII (*Rainy Sky (CA)* at [28]). In his view, the underlying contract made it clear that Jinse and the appellants had intended that the former's insolvency be regarded a trigger event for a call to be made. In fact, it would go against commercial common sense for insolvency to have been excluded as "insolvency of [Jinse] was the situation for which the security of the advance payment bond was most likely to be needed" (*Rainy Sky (CA)* at [30]).

A contextual approach to interpretation

41 Now that we have considered the role extrinsic material might play, the next step is the actual task of interpreting this genre of documents. On this, several texts have commended the strict interpretation approach where "the court rejects a common-sense view of what the language of the contract entails, and instead adopts a narrower reading of the words": see G McMeel, *The Construction of Contracts* (Oxford University Press, 2007) ("*McMeel*") at para 6.35. The strength of such an approach lies in the high degree of certainty it gives to the banks and beneficiaries that the demands are in compliance with the bond. The reality, however, is that the ordinary principles of interpretation that apply to all mercantile contracts apply also to performance bonds. In this regard, it bears setting out in brief a summary of the relevant principles of interpretation again: for a more precise exposition, see *Zurich* at [131]:

(a) first, the aim of the exercise of construction is to ascertain the meaning the document would convey to a reasonable business person;

(b) secondly, the courts are concerned with the objective expressed intention of the parties and not their actual intentions;

(c) thirdly, the courts will not excessively focus on particular phrases or words. The emphasis is on the document as a whole;

(d) fourthly, the courts are prepared to look to the legal, regulatory and factual matrix constituting the background in which the document was drafted to inform them on how to interpret the document;

(e) fifthly, the courts will give regard to the overall commercial purpose of the parties in entering into the transaction;

(f) sixthly, preference will be given to an interpretation that makes the contract and its performance lawful and effective;

(g) seventhly, where the contract appears to be one-sided or onerous, it will be construed strictly against the party seeking to rely on it;

(h) eighthly, an interpretation that leads to very unreasonable results will be avoided unless it is required by clear words and there is no other tenable construction;

(i) ninthly, a specially agreed provision should override an inconsistent standard provision which has not been individually negotiated; and

(j) tenthly, a more precise provision should override an inconsistent general provision.

It bears emphasising that these principles are just signposts rather than rules to be applied rigidly in every case. Which principle takes precedence depends in turn on the facts of the case under consideration. Ultimately, the court has a responsibility to respect the objective record of the parties' agreement as contained in the contract.

42 As a final word of caution: a contextual approach is certainly not a *carte blanche* for "creative interpretation" (as coined by Lord Lloyd in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 904D). As far as possible, the court should adhere to the plain meaning of the words, except for situations as described in [36] above. Because of the need for *commercial certainty* in this genre of instruments, the courts will hardly ever imply terms into them.

Application to the facts

43 We will now turn to characterise the Refund Guarantees and interpret the New Demand Clause.

44 On the issue of characterisation, Mr Lim submits that the Refund Guarantees function predominantly as an indemnity guarantee payable on proof of actual breach. [note: 17] The "on demand" element only arises in relation to the New Demand Clause. [note: 18] We disagree. Looking at the clauses of the Refund Guarantees, we are of the view that, notwithstanding its label, the entire instrument is an on demand performance bond. Labelling the instruments as guarantees does not change the substance or nature of it. A spoon does not become a fork by calling it one.

45 The essence of a guarantee is that it is predicated on actual breach by the creditor (see [29] above). However, clause 3(b) of the Refund Guarantees provides that an Initial Demand must be made in written form "stating that the Contract is cancelled or rescinded by the Owner in accordance with the Contract, *which statement shall be final and conclusive*" [emphasis added]. The italicised words make clear, in no uncertain terms, that the Banks are not to investigate the accuracy of MM's assertion of breach. Such is the characteristic hallmark of a first demand performance bond: immediate payment eschewing any manner of delving into the merits of the underlying dispute (see [26] above). Similarly, the New Demand Clause provides that "we [*ie*, the Banks] shall pay the Owner [*ie*, MM] the said sum claimed under the New Demand immediately upon our receipt of the New Demand *irrespective of whether or not the claim under the New Demand is disputed by the Builder or has been referred to arbitration or there is an arbitration claim pending*" [emphasis added]. In short, payment will be made whether or not MM was right to say there was a valid rescission. As for the Deferred Demand, the Refund Guarantees state that this may be made in written form "together with a *certified true copy of the Award*" [emphasis added]. We think this is by no means a requirement of proof of actual breach. Rather, it is a stipulated form quite commonly used in performance bonds to protect the account holder against abusive calls (see [31] above). Finally, clause 5 clears any doubt, whatsoever, that the Refund Guarantees function as standalone documents as the Banks' liabilities under the Refund Guarantees shall "*not be affected by ... any other matter or circumstances*" [emphasis added].

46 We move on now to the task of construing the New Demand Clause to see what conditions MM would have to fulfil. The parties have proffered three possible interpretations (see [16]–[19] above). In the case of Labroy, it *implies* into the New Demand under the First Limb, a condition that no Initial Demand be made, and into a New Demand under the Second Limb, a condition that an Initial Demand be made (see [17] above). We should note, in passing, that implication is to be distinguished from construction: the former works as an *ad hoc* gap filler when the parties have failed to include in the contract what they would have, whilst construction looks to the express terms of the contract to ascertain the meaning of the parties. The test for implication is that of necessity (see, in this regard, the "business efficacy" test and the "officious bystander" test in *McMeel* at paras 11.13–11.14 and also the decision of this Court in *Ng Giap Hoe v Westcomb Securities Pte Ltd and others* [2009] 3 SLR(R) 518 at [62]). However, Labroy does not address us on how this threshold is met. Instead, Mr Lim avers that a construction of the express terms reveals the parties' objective intention to preserve MM's security in two specific situations *so that it can continue to make an Initial or Deferred Demand and get its advances back*. The ambiguity of the New Demand Clause, he argues, obscures that intention.

47 We disagree with this proposed "construction". Even at first blush, it appears to us convoluted to say that the New Demand Clause was inserted to, in a way, supplement MM's efforts to make an Initial Demand or a Deferred Demand. Looking at the terms of the Refund Guarantees and construing

them as a whole (applying the third canon of interpretation: see [41] above), it is plain to us that the parties' objective intentions are to cover different contingencies. The *first* scenario, encompassing Initial Demands and Deferred Demands, is premised upon the continuing subsistence of valid Refund Guarantees without any lapse in their continuity and validity. Thus, payment need not necessarily be immediate if a reference to arbitration is made by Labroy upon receipt of an Initial Demand from MM. The latter has to await the outcome of that arbitration (in its favour) before any payment falls due under the Refund Guarantees. In the meantime, MM remains adequately secured pending the outcome of the arbitration. The *second* is an altogether different situation where the existence or continuance of the security is compromised by the failure to provide a replacement guarantee (or an extension of the Refund Guarantees) punctually. Plainly, such a breach goes to the heart of the security function that the Refund Guarantees are meant to uncompromisingly provide until the delivery of the vessel and/or the resolution of any disputes by arbitration. In such a scenario, *MM is inadequately secured*. The failure to comply with this fundamental security obligation even momentarily (regardless of whether the Underlying Contract is afoot or not and whether there is a pending arbitration) entitles MM to demand and receive repayment *"immediately"* of all advance payments it had made until then.

48 That being said, while the Refund Guarantees contemplate different types of demands, in fact, the parties only intend for payment to be effected once, upon which each Refund Guarantee is exhausted. This can be seen from the last sentence of clause 3(a) and the last sentence of the first paragraph to the proviso, which states that payment will be made on the condition that *"our maximum liability hereunder shall not at any time exceed the Guaranteed Amount"* [emphasis added].

49 Next, we note that Labroy's written submissions were silent on the effect that the phrase in bold italics at [4] above would have on the New Demand Clause. When quizzed on this at the hearing, Mr Lim took the position that this condition only applied to a New Demand under the Second Limb. This cannot be so. The phrase clearly applies to New Demands made *both* under the First Limb and the Second Limb. If not, there would be no need to state "the Initial Demand **(***if made*)" [emphasis added], since by his own argument, a New Demand under the Second Limb can only be made after an Initial Demand is made. Also, we note, that the parties themselves seem to accept Labroy's practice, between August 2010 and April 2011, of procuring *extended* Refund Guarantees within the stipulated deadline.

50 Thirdly, we should add that in the hearing, Mr Lim placed considerable emphasis on the fact that *even if* the phrase were to apply also to a New Demand under the First Limb, given that this was a substantial venture, parties would not mean for the entire transaction to be unravelled by something so slight as a one day delay. We disagree. Due to the role performance bonds play as documentary credit, more often than not, time is of the essence. In fact, Mr Lim himself conceded this was the case in the instrument before us (see [22] above). In such a situation, it would do Labroy no good to make a *de minimis* argument.

51 We next turn to Mr Lee SC's interpretation which is, at first blush, more seductive than Labroy's. He argues that a plain reading of the New Demand Clause will reveal that the First Limb applies where MM has elected to keep the Underlying Contract in force (for his reasons in support, see [13] and [19] above), and the Second Limb applies where the Underlying Contract is purportedly rescinded. This reading furthermore accords with the wording of Article 3.8 of the Underlying Contract, which states [note: 19] :

> The Owner's [*ie*, MM's] obligation to pay the first and subsequent instalments, excluding the instalment payable on delivery, shall be subject to the Builder [*ie*, Labroy] providing the Owner with a Refund Guarantee(s) from a first class international bank, satisfactory to the Owner, *in accordance with Annex E* to secure the repayment to Owner of all instalments of the Contract

> Price paid by Owner to Builder. ... If the Builder anticipates that the delivery of the Rig will be delayed beyond the [mutually agreed delivery date], the Builder shall no less than fourteen (14) Working Days prior to the expiry of the [existing Refund Guarantee(s)] procure that the Validity Date be extended for a further thirty (30) days, always ensuring that the Refund Guarantee(s) is valid until the date falling thirty (30) days beyond the delivery of the Rig. *Failure by the Builder to comply with its obligations in respect of the extension of the Refund Guarantee(s) shall entitle the Owner to cancel or rescind the Contract and **make a demand** under the Refund Guarantee(s) ...* [emphasis added in italics and bold italics]

However, Annex E to the Underlying Contract was a draft Refund Guarantee that did not incorporate the New Demand Clause. According to Mr Lee SC, this meant that the "demand" referred to in bold italics above (which could be made concurrently with rescission) was an Initial Demand.

52 Moreover, Mr Lee SC argued, the representatives of MM themselves seemed to appreciate these concerns, as evidenced by their letters to Labroy's representatives dated 3 May 2007 written while parties were still negotiating the terms of the draft Refund Guarantees. The clause being negotiated read:

> ... in the event such replacement guarantee is not furnished no less than fourteen (14) Singapore banking days before the Expiry Date ... as provided in Article 3.8 of the Contract, the Owner shall be entitled to make a written demand (which demand shall be referred to hereinafter as the "New Demand") *for the sum claimed under the Initial Demand …* [emphasis added]

The text in italics was initially removed by MM's representatives because "in a situation of delay in delivery where [Labroy] shall provide a new/prolonged guarantee, no Initial Demand will have been made. The wording does consequently not fit with such situation [sic]". [note: 20]

53 The most obvious flaw in Mr Lee SC's submission is how it anomalously penalises MM for serving the notice of rescission *before* (or even contemporaneously with) serving the requisite letter of demand on the Banks. It is difficult to accept that the parties had ever contemplated that the essential validity of a demand would ultimately hinge on the existence of the Underlying Contract. As the eighth canon of interpretation states, "an interpretation that leads to very unreasonable results will be avoided unless it is required by clear words and there is no other tenable construction": see above at [41(h)]. Certainly the terms of the Refund Guarantees do not reflect this explicitly. As such, Mr Lee SC's arguments are semantic niceties that cannot be reasonably attributed to the parties. We are unable to ascertain or impute any such intention in the Replacement Guarantees and would be, in any event, slow to objectively ascribe to the parties such an intention since this has not been made plain. But more than this, we think Mr Lee SC erred in arguing that the First Limb applies only when MM intends to keep the Underlying Contract alive. In our view, MM need only elect to keep the Underlying Contract alive *up to the point it requests that replacement guarantees and/or extended Refund Guarantees be furnished*, after which the responsibility is on Labroy to furnish the same by the stipulated deadline. *Crucially, once the deadline passes and no such Refund Guarantees are furnished, MM's right to serve a New Demand on the Bank crystallises into an accrued right and may be exercised anytime thereafter* "irrespective of whether or not the claim under the New Demand is disputed by the Builder or has been referred to arbitration or there is an arbitration claim pending" (under the New Demand Clause).

54 To reiterate, the Refund Guarantees' most important feature was their availability as security for any claims made by MM pending delivery of the Rig. Once this security was compromised by a "lapse" of the security, MM *was* entitled to exercise an entirely independent right to make a valid demand "irrespective" of any other pending disputes the parties might have. This is so even if MM

subsequently rescinded the Underlying Contract (as it did on 12 April 2011).

55 Finally, as for the arguments propounded by the Banks that make reference to the Underlying Contract and the parties' correspondence, in line with our views at [34]–[35] above, we have to disregard these arguments as the wording of the New Demand Clause is clear on its face. In the final analysis, the court must uphold the plain meaning of the bond's terms unless it is evident from a commercial view that parties could not have intended as such.

Conclusion

56 In the result, for the above reasons, we reject the respondents' interpretations of the New Demand Clause. We allow this appeal and discharge the injunction restraining the Banks from making payment to MM under the New Demand. The appellant is entitled to their costs here and below and the usual consequential orders are to apply as well.

57 On the issue of interest payable on the sums payable under the Refund Guarantees, we allow the parties 14 days from the date hereof to make written submissions to us as to whether we or the arbitral tribunal ought to deal with it and, if so, the terms of the appropriate order.

[note: 1] Appellant's Core Bundle Vol II ("2ACB"), p 142

[note: 2] Minute Sheet of Justice Quentin Loh (18 April 2011) in 2ACB p 19 at lines 11-12

[note: 3] Appellant's Case ("AC") p 5 at [5]

[note: 4] Record of Appeal Vol III ("3RA") Part C pp 164-165

[note: 5] 3RA Part A, p 10 at [21]

[note: 6] 3RA Part C, pp 103-104 at [30]

[note: 7] 3RA Part A, p 11 at [23]

[note: 8] Affidavit of Pal Are Sund dated 1 May 2011 at [19]; 3RA Part C, pp 99–100

[note: 9] 3RA Part B, pp 263-290; 2ACB, pp 200-202

[note: 10] 3RA Part C, p 174

[note: 11] 1st Respondent's Case ("1RC"), pp 6-7 at [12]

[note: 12] 2ACB, pp 207-209

[note: 13] 2ACB, pp 210-211

[note: 14] See [34] of Labroy v MM, at ASCB p 20 [note: 15] 1RC, pp11-12 at [27]-[29]

[note: 16] 1RC, p 31 at [56]

[note: 17] 1RC, p 10 at [22]

[note: 18] 1RC, p 11 at [25]

[note: 19] 3RA Part A pp 38–39; 2ACB pp 117–118

[note: 20] 2nd-4th Respondents' Supplemental Core Bundle Vol I, p10.

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