IN THE SUPREME COURT OF BELIZE A.D. 2015
(CIVIL)

CLAIM NO. 36 of 2015

BETWEEN

A&N CONSTURCTION (A firm) Claimant

AND

HERITAGE BANK LIMITED Defendant

Before: **The Honourable Madame Justice Griffith**

Date of hearing: **26th November, 2015 & 18th December, 2015 (on written submissions)**

Appearances: **Mr. Fred Lumor S.C. of Lumor & Co. for the Claimant and Mr. Andrew Marshelleck S.C. of Barrow & Co. LLP for the Defendant.**

DECISION

Payment under contract for works – Performance bond – Creation of performance bond – No execution under seal – Absence of consideration – Construction of terms of letter for payment.

Introduction

1. The Claimant, A&N Construction (A&N) is a construction firm owned by Mr. Norman Reimer. The Defendant, Heritage Bank Ltd. ('the Bank') is a commercial bank carrying on business in Belize. This claim is for $228,202.36 alleged to be the sum due under a Performance Bond issued by the Bank in favour of A&N in connection with a construction contract executed between A&N and one Triple B Heavy Equipment Ltd. ('Triple B'). The allegation is that the Bond provided for payment of the amount claimed, by the Bank to the Claimant, upon the occurrence of a certain event. The Bank resists the claim on the basis that the document sought to be relied upon by A&N did not create a performance bond and in fact gave rise to no legal liability for payment on the part of the Bank.

2. At the trial, the Defendant raised a preliminary objection to the claim on the basis that the case advanced at trial was different from that which was pleaded. The difference arose out of the fact that the witness statement of the Claimant placed reliance upon a different contract than that pleaded in the statement of claim. It was submitted that the claim advanced, was fundamentally different from that which was pleaded and ought to be struck out, as the difference could only be cured by amendment of the claim which could not be effected due to the constrictive operation of Part 20 of the CPR. The preliminary objection was disposed of in favour of the Claimant and the Court sets outs below, its determination of the objection and the claim as a whole.

Issues

3. The following issues arise for determination in the claim

   Preliminary Issue

   (i) Is the claim advanced to trial different from the case pleaded so as to warrant the striking out of the claim?

   Substantive Claim

   (ii) Did the Bank execute a performance bond in favour of the Claimant for payment of the sum of $228,202.36.

<u>Preliminary Issue – Objection to Variation in the Claim</u>

4. The claim issued and statement of claim filed, pleaded a contract and letter for payment, respectively dated 6th and 1st December, 2011 as the basis of the cause of action for breach of the performance bond as alleged. The claim was for damages in the sum of $228,202.36 for breach of the performance bond, created by the letter of 1st December, 2011. After the case management conference and in compliance with the Court's orders on case management, the Claimant filed its only witness statement by Mr. Norman Reimer, wherein the breach of performance bond alleged was based on a contract dated 12th and letter dated the 9th, both of December, 2011.

5. The second contract, albeit between the same parties, was submitted by learned senior counsel for the Defendant, to have created an entirely new cause of action as the first contract had been performed. Given the existence of a different cause of action as the contract as pleaded had been performed, the claim could only be tried if amended to include that different cause of action and such amendment could not be effected, given the restriction on amendments to a statement of case after the case management conference, as provided under Part 20 of the CPR. Learned Senior Counsel on behalf of the Claimant submitted that whilst the particulars had changed, the cause of action remained the same – viz – damages for breach of a performance bond and given the time at which the witness statement was filed and the fact that the Defendant addressed the second contract in its defence and witness statements, there was no prejudice suffered by the Defendant and the claim could properly be tried.
6. Learned senior counsel on behalf of the Claimant relied inter alia, on the case of **DMV Ltd v Tom. L. Vidrine[1],** per Morrison JA who re-affirmed the importance of pleadings in spite of the advent of the CPR which by the introduction of witness statements, rendered less reliance on pleadings to foreshadow the evidence at trial. Within that same authority, Morrison JA cited the words of Barrow JA in the Eastern Caribbean Court of Appeal's decision of **Eastern Caribbean Flour Mills Ltd v Boyea[2]** who had cited with approval the words of Lord Woolf MR in McPhilemy v Times Newspapers Ltd [1999] 3 All E.R. 775 with respect to the reduced need for extensive pleadings in light of the use of witness statements. More particularly, Barrow JA acknowledged that whilst the role and requirements of pleadings was rendered no different by the stipulated use of witness statements there was no longer a need for extensively particularized pleadings.

[111] **Belize Civil Appeal No. 1 of 2010**
[2] **OECS Civil Appeal No. 12 of 2006**

He further stated however, that the purpose of pleadings remained to make clear the general nature of a party's case but in order to let the other side know what case it has to meet and therefore prevent surprise at the trial, the pleading must contain the particulars necessary to serve that purpose[3].

7. In large part, the mischief sought to be avoided in holding a party bound to his or her case as pleaded is to prevent prejudice to the other side by whatever means. That mischief is to a reasonable extent reduced by the newer regime of the CPR where the case management process including the filing of witness statements and required discovery of documents has the effect of removing any element of surprise at the trial. The words of Barrow JA in ***Eastern Caribbean Flour Mills***[4] therefore are understood in this light so that at no time would it be thought acceptable to say that because of the advance production of witness statements and discovery of documents would it be the case that a departure from a cause of action as pleaded is allowable under the new regime of the CPR.
8. Rather, it is thought within the spirit of the dicta of Barrow JA in ***Eastern Caribbean Flour Mills v Boyea***[5] and Morrison JA in ***DMV v Vidrine***, that in a case such as this, where the cause of action remains that as pleaded but the particulars have changed, the matter can nonetheless be tried substantially within the overall parameters of the case as pleaded. In this case the defence does not change; the particulars of the defence in fact spoke to the said second contract; the particulars arising in the Claimant's witness statement have been answered by the defence in its own evidence; and the pre-trial procedure provided ample opportunity for the opposing side to mount an objection to what it viewed as a change of case after case management. Instead of availing itself of that opportunity the Defendant proceeded on to trial.

[3] Supra @ para 43
[4] Ibid
[5] Supra @ paras 45-46

9. These circumstances as a whole lead the Court to its finding that although it is accepted that the particulars upon which the Claimant bases its claim differ from those pleaded, as an action for damages for breach of a performance bond the cause of action remains the same. The Defendant's defence made reference to the second contract and remains unaltered as it denies the creation of a performance bond. The Defendant has through its own witness statement addressed the allegation, thus the matter is justly tried within the margins of the case as originally pleaded. The caution of Barrow JA[6] to be vigilant to ensure that a change in statement of case does not masquerade as a change in particulars and to deal with each case on a case by case basis, is well heeded and applied in favour of the Claimant in this case. The preliminary objection is therefore dismissed.

Issue (ii) – Whether or not the Bank issued a performance bond

The Evidence

10. The Claimant's case was that A&N Construction entered into two contracts to carry out certain road works for another construction company – Triple B Heavy Equipment Ltd. The contracts were in fact sub-contracts under a main contract for works, which Triple B held with the Government of Belize. A&N was not a party to that main contract but according to A&N, it was leery of Triple B's ability to pay for any works it carried out under the sub-contract, thus it required a performance bond from the Bank to ensure that it received its payment once the works were carried out. Having made their position clear to Triple B, it was on that basis that as Triple B's bankers, the Defendant issued what A&N termed the performance bonds.
11. With respect to the two contracts between A&N and Triple B, although the first one was performed and no longer the subject of the claim, both contracts and attendant circumstances are relevant for consideration and as such are set out with some particularity.

[6] OECS Flour Mills Ltd V Boyea Supra @ paras 45-46

The first of the two contracts was entered into on the 6th December, 2011. Along with this contract there was a letter, issued by the Bank to A&N dated the 1st December, 2011, by virtue of which the Bank gave what A&N asserts was a performance bond undertaking payment of monies due under the contract on behalf of Triple B. The contract provided (the specific works contracted are not relevant) as follows:-

> *"Payment for Services Rendered*
> *The Client shall cause payment to be made to the Provider for services rendered forthwith as soon as IPC payment is received. An instruction to the bank to this effect has already been issued and the bank (Heritage Bank) has issued a letter confirming that payments will be made no later than 45 days after the payment certificate has been agreed by and received from the Project Execution Unit. The Client undertakes to submit within 7 days after the end of each month the IPC to the Supervision Unit"*

The letter referred to which was issued by the Bank on 1st December, 2011, pre-dated the contract (this was not an issue) and stated as follows:-

> *"We advise that payment for works carried out for Road Fill by A&N Construction under the above contract dated 1st December, 2011 will be made by Heritage Bank Limited to A&N Construction no later than 45 days after the payment certificate has been agreed by and received from the Project Execution Unit for works relating to the Road Fill portion of the project"*

12. The second contract, similar in terms, was entered into on the 12th December, 2011 and along with that contract there was also a letter dated 9th December, 2011, issued by the Bank to A&N amounting to what the latter again insists, was a performance bond, undertaking payment of its monies due under the contract with Triple B. That contract and letter respectively provide as follows:-

> *"Payment for Services Rendered*
> *The client shall cause payment to be made at the rate of 50% to the provider for services rendered on commencement of paving works at each stage and the balance for such works will be made by Heritage Bank Ltd to A&N Construction no later than 45 days after the payment certificate has been agreed and received from the project execution unit for works relating to road paving and painting portion of the project."*

The letter –

> *"We advise that funding will be available for payment for works carried out under the above reference by A&N Construction on the basis of 50 per cent of value of works upon commencement of paving works at each stage. The balance of payments for such works will be made by Heritage Bank Ltd to A& N Construction no later than 45 days after the Payment certificate has been agreed by and received from the Project Execution Unit for works relating to the Road Paving and Painting portion of the project."*

The Submissions of Counsel

13. According to A&N, payment was effected under the first contract with no difficulty. In respect of the second contract, the Claimant says all payments were made except the final payment which is now being claimed. The bank states that there was no performance bond created and in any event the works claimed for were not performed and their client Triple B was forced to contract another person to carry out the works. There was some dispute with respect to whether the final payment related to road paving or road painting and whether or not Triple B received payment under the final IPC for work completed by A&N which the Bank then held onto because Triple B owed them money. A resolution of these alleged facts is not relevant to the Court's determination of the issue of the creation of the performance bond. The first thing to be considered in this regard is the nature of a performance bond.
14. Learned Senior Counsel on behalf of the Claimants provided authority which spoke to the nature of the performance bond or guarantee. Citing **Lingards Bank Security Documents**, learned senior counsel in his written submissions, highlighted the author's words to the effect that '*once an unconditional bond or guarantee has been given by a bank, the bank itself will be liable to pay on demand and will only escape if it can show fraud or that the liability for which demand is made is outside the terms of the bond*'.

Learned senior counsel in his written submissions also extracted from the same source that the performance bond or guarantee is considered enforceable by mercantile usage despite the fact that they are unsupported by consideration and so are not susceptible to challenge on the ground of failure of consideration.

15. In addition to legal treatise, learned senior counsel for the Claimant also cited the case of **Edward Owen Engineering Ltd v Barclays Bank International Ltd**.[7] as illustration of the legal effect of a performance bond. The facts of the case bear some repeating, even if in brief, in order to appreciate the relevance of the illustration. Very briefly, the plaintiffs in England, contracted to supply goods to buyers in Libya. The contract contained a condition precedent that the plaintiffs (the suppliers) give a performance bond for a percentage of the contract price for the performance of their supply obligations under the contract. The plaintiffs instructed their bankers (the Defendants) to give such a performance bond which the Defendants then instructed to be given on their behalf by a bank in Libya – the place of performance of the supply contract.
16. The buyers in Libya, were obliged under the contract to issue a confirmed letter of credit as payment for the goods to be supplied. The buyers failed to issue a confirmed letter of credit and the Plaintiffs repudiated the contract. In the face of that non-performance, the buyers claimed on the guarantee given the Libyan bank which then did likewise against the Defendants – the Plaintiff's bankers in England. It is in this regard that the suit arose as the Plaintiffs claimed an injunction against their bankers in England to prevent them from paying out under the performance guarantee. The injunction was granted then later discharged and the Plaintiffs appealed against the discharge.
17. On appeal it was held that a performance bond is similar to a confirmed letter of credit and once given, a bank was obliged to honour it and was not concerned with whether either party to the underlying contract was in default.

[7] [1978] 1 All ER 976

The exception to this rule only was fraud by one of the parties to the underlying contract of which the bank had notice. It was further held in this case that the defendants' guarantee had provided for payment on demand without proof or conditions, that the guarantee was in the nature of a promissory note payable on demand and the plaintiffs having not established fraud on the part of the buyers, the Defendants were required to honour their guarantee on the demand made by the Libyan bank.[8]

18. It was submitted in the case at bar that this was the legal position in which the defendant Bank finds itself. The letter issued by the Bank undertook to pay the Claimant the sums due to them for performance of their obligations under the contract with Triple B. According to the terms of the letter, the Bank's obligation to pay was due within 45 days of receipt of the international payment certificate (IPC) issued under Triple B's contract with the Government. This payment certificate was received in relation to the final payment for works done by the Claimant thus the Bank was obliged to pay the sum claimed.

19. On the other hand, learned senior counsel for the Bank submits that the letters issued by the Bank simply do not create a performance bond or other legal liability. In the first place, it was submitted that the letter was to be construed in conjunction with the contract between A&N and Triple B. In particular, the contractual obligation for payment was stated in terms that Triple B was '*to cause payment to be made to A&N for services rendered as soon as IPC payment is received*.' The contract further stated that '*…An instruction to the bank to this effect has already been issued…*'. The effect of this term of the contract submitted learned senior counsel for the Bank, was that the Bank was merely the paying agent of Triple B, and had confirmed by that letter, that whenever the Bank received payment from Triple B's contract with the Government, the Bank would remit the sums due to the Claimant.

[8] Edward Owen Engineering Ltd v Barclays Bank International Ltd supra

It was submitted, that there had been no obligation independent of the contract, created by the Bank to pay A&N from its own funds. The purpose of the letter it was submitted, was merely to document the Bank's position as the paying agent. In particular, the use of the words '*cause payment to be made*' and '*instruction*' confirm the position of the Bank.

20. In support of his contention as to the position of the Bank as mere paying agent for Triple B, learned senior counsel alluded firstly to the requirement that a bond be a document under seal which the letter in question was not. Further, that the letters did not take the form of any bond commonly used as performance bonds in building contracts or by the Bank.[9] In addition to the fact that the letter was not a document under seal and thus incapable of amounting to a bond of any sort, it was further submitted on behalf of learned counsel for the Bank that the use of the term 'guarantee' by the Claimant and Triple B was merely a term used by the parties and that the circumstances did not establish any guarantee in law either.
21. In order for there to have been a guarantee issued by the Bank, there would have needed to be established an independent binding contract between the Bank and the Claimant, which could not be established as it was recognized by all that there was no consideration much less offer and acceptance. Further and in any event, a guarantor was only to be liable to pay a beneficiary (in this case A&N) if the obligee (in this case Triple B), was contractually liable to the beneficiary. In this case it was submitted, no such liability has been established, as there remained a dispute of whether Triple B owed payment under the contract in respect of works claimed not to have been completed by A&N.

The Court's consideration

22. As the Court understands the variant positions of the parties, learned senior counsel for the Claimant, takes as established on its face, within the ordinary and natural meaning of the words used, that the letter issued by the Bank is a

[9] Examples of such forms used by the Bank were provided in the evidence of the Bank's witness.

performance bond in favour of the Claimant, to pay the sums due under the contract between the Claimant and Triple B. What is therefore required of the court by the Claimant, is to affirm this position and give effect to the legal consequence of the Bank having issued such a performance bond. On the other hand, learned senior counsel for the Bank, sees as the real issue, whether the letter issued is capable in law of amounting to a performance bond. It is urged upon the Court that the letter amounts to no such bond nor does it create any other obligation in law by the Bank, towards the Claimant.

23. It is the Court's position that the creation or not of the performance bond as alleged, is dependent upon the construction to be given to the letter and that construction in turn depends not only upon the terms of the letter, but upon all attendant circumstances, which include the contract between the Claimant and Triple B. The first task however, is to examine what a performance bond is. Both Counsel provided the Court with definitions and illustrations from legal treatise as to the nature and effect of a performance bond. The material and authorities provided by both counsel are accepted. In particular, the following definition supplied by learned senior counsel for the Defendant as extracted from various texts[10] is found useful – *'A bond is a deed by which one person (the obligor) binds himself to another person (the obligee) to pay a specified sum of money immediately, or at some fixed future date, or on the happening of a specified event.'*

24. A similar definition is proffered in Halsbury's Laws of England[11] in terms that - 'A *bond is a document made by deed whereby a third party guarantees the fulfilment by the contractor of the contract'.* It is also said - '*At common law a bond is an instrument under seal, usually a deed poll, whereby one person binds himself to another for the payment of a specified sum of money either immediately or at a fixed future date'.* [12]

[10] Tabs 4 and 5 Written Submissions on behalf of the Defendant
[11] 5th Ed. Vol 3 (Bonds, Insurance and Indemnities) para 383.
[12] Ibid para 289

25. In a contract for works which this is, the bond is provided, usually by a financial or other institution in respect of the works to be performed by one of the contracting parties. The bond is provided at the instance of the party who is to perform the works. In this case, the works under the contract are to be performed by A&N but the subject of the letter is Triple B's payment for the works under the contract. It is observed therefore in the first instance, that the terms of the letter do not accord with the usual manifestation of a performance bond in a works contract. One of the references provided by learned senior counsel for the Claimant is instructive insofar as it states (emphasis mine) [13]:-

> '*A performance bond or guarantee is a credit <u>designed to support non-monetary performance of a contract, as opposed to payment</u>, and is intended to be called upon only if the account party defaults under the underlying contract, though the bank's liability to pay is not dependent on proof of actual default, merely on presentation of a demand with such other document e.g. a certificate of default, as may be specified in the credit*.

26. A performance bond true to the form of what is usually rendered in contracts for works, would therefore have been a bond required by Triple B, to ensure the performance by the Claimant, of its works under the contract. The assurance of payment required by the Claimant has not been shown to form the subject of a performance bond in the usual sense of the term. In this regard, this is a circumstance that is found to work against construction of the letter as a performance bond, but the Court must still consider the transaction between the parties according to what was has been alleged. Subject matter of the bond aside, the Court considers also the submissions of learned senior counsel for the Claimant pertaining to the nature of a performance bond which he extracted from Goode on Legal Problems of Credit and Security[14].

[13] Lingard's Bank Security Documents pg 345-347 (appended in written submissions for Counsel for the Claimant)
[14] 5th Ed. P. 325 (appended in written submissions of Counsel for the Claimant)

27. The performance bond is therein categorized as a form of autonomous payment instrument and placed in the same category as an irrevocable commercial credit or a standby credit. Of these instruments, it is said and this was urged upon the Court, that they are '*considered enforceable by mercantile usage despite the fact that they are unsupported by consideration*.' The effect of this statement was well illustrated by the UK Court of Appeal's decision in ***Edward Owen Engineering Ltd v Barclays Bank International Ltd*** as discussed above. [15]

28. It has already been stated that the Court has no difficulty accepting these statements of law as to the nature and legal effect of performance bond. However, none of these statements, authorities or illustrations assist with the question as to whether the letter in the case at bar is capable in law amounting to a performance bond. Insofar as the Bank asserts that the letter does not accord with any of the instruments it usually executes as a performance bond, that fact would be irrelevant if the Court were nonetheless to find the letter sufficient for purposes of a bond. A bond however, performance or otherwise, is a document executed under seal or rather that is enforceable only if executed under seal. This was the position of learned senior counsel for the Defendant and this position is accepted as the correct one by the Court as per the definitions above[16]. The nature of a performance bond, as it were, unsupported by consideration, is in that regard, required to be executed under seal in order to be enforceable.

29. Additionally, the decision of **Marubeni Hong Kong and South China Ltd v The Mongolian Government[17]** is helpful in its discussion on the use and creation of performance bonds by banks. The facts of this decision are not relevant to the case at bar, but in order to understand the illustrative context of its use, the facts are briefly stated. The Claimant (a Hong Kong company) entered into an agreement with a Mongolian company to sell machinery, equipment and materials to the Mongolian company for over US$18 million.

[15] Supra, note 7
[16] Supra, notes 10-12
[17] [2005] EWCA Civ 395

Payment of the purchase price was to be made by instalments at specified times. The contract required the Mongolian company to provide a guarantee for payment of the purchase price from the Mongolian central bank. Instead, there was a letter issued by the Mongolian Government via its Minister of Finance, which was styled and intended to serve as the required guarantee. Following upon a dispute as to performance of the contract by the primary parties, the Claimant brought action against the Government to enforce the guarantee issued in the form of the letter.

30. In the course of its discussion on the issue of the effect of that letter, the Court of Appeal (Carnath J) examined a number of cases and principles derived from those cases, regarding the creation and operation of performance bonds by banks within the context of commercial undertakings. It is this discussion of principles that the Court extracts from the case rather than any application of the particular facts therein. In particular, the following statements are highlighted[18] (my emphasis):-

Paras 23-24

> *"….demand bonds" (however described) are a specialised form of irrevocable instrument, developed by the banking world for its commercial customers. They have been accepted by the courts as the equivalent of irrevocable letters of credit. As such, they have been described as part of "the lifeblood of commerce"; and, in the words of Donaldson LJ:*
>
> > *"Thrombosis will occur if, unless fraud is involved, the courts intervene and thereby disturb the mercantile practice of treating rights thereunder as being the equivalent of cash in hand." (*Intraco Ltd v Notis Shipping Corporation *[1981] 2 Lloyd's Rep 256, 257.)"*

Para 25

> *In* Siporex *Hirst J applied the same approach to the interpretation of an instrument issued by a bank pursuant to an obligation in an international trade agreement to provide a performance bond. The instrument was described in correspondence between the parties and with the bank as a performance bond.*

[18] Ibid paras 23 - 28

The judge commented:

> *"There is in my judgment no real hardship on the bank in imposing this strict liability to pay. A performance bond is a commercial instrument. No bank is obliged to enter into it unless they wish to and no doubt when they do so, they properly exact commercial terms and protect themselves by suitable cross-indemnities, such as were entered into in the present case." (Page 158.)*

Para 28

> *"In all these cases the documents were issued by banks, and were described as, or assumed to be, performance bonds. Not surprisingly, the courts interpreted them against the background of the law relating to such instruments. They provide no useful analogy for interpreting a document which was not issued by a bank and which contains no overt indication of an intention to create a performance bond or anything analogous to it…"*

31. Arising from these discussions above, the Court extracts firstly that a performance bond issued by a bank is a creature developed within mercantile usage and is intended to cover particular situations within commercial undertakings. A performance bond issued by a bank is clearly intended to operate as such and is entered upon commercial terms. That it is intended to operate as the equivalent to cash in hand either on demand or the happening of some event is also usually clear upon its terms. In the instant case there is nothing within the terms of that letter, which is neither a document executed under seal nor executed in accordance with any other formality for a bond or even contract, that can raise it to a level where it can be said that the subjective or objective intention of the bank was for it to operate as a primary liability payable on demand in favour of the Claimant. The letter was not a performance or any other kind of bond. It was not about performance of any works at all, it contained no term which made clear that it was intended to be an obligation by the Bank to pay on demand. The letter acknowledged the agreed and understood mechanism for issuing payment to the Claimant.

32. If not a performance bond however, what if anything was the legal effect of the Bank's letter? As stated before, what seems to have been required was an assurance that the Claimant would be paid for its services; that they would not be left in the position that Triple B either neglected to or became incapable of paying them once they had performed the works and discharged their obligations under the contract. The nature of what was desired can be viewed as a guarantee of payment and whilst such a term was used by the Claimant, one must determine whether the letter was effective in that regard. Again, the position of the Defendant with respect to this question is that a guarantee is a contract and must contain all elements of a contract and the letter issued by the Bank in no way amounted to a contract as it lacked all elements of such. Halsbury's[19] defines a guarantee thus:-

> *"A guarantee is an accessory contract by which the promisor undertakes to be answerable to the promise for the debt, default or miscarriage of another person, whose primary liability to the promise must exist or be contemplated*
> *As in the case of any other contract, a valid guarantee requires an agreement, made between parties intending to create legal relations and having the capacity to contract, supported by consideration, actual or implied."*

33. However, in **Gold Coast Ltd v Caja de Ahorros del Mediterraneo and others[20]** where the question before the English Court of Appeal was a determination of the nature of the instrument the subject matter of the claim, it was seen that within commercial usage and across different fields, the term 'guarantee', can refer to a demand guarantee, a performance bond or even a stand-by letter of credit.[21] The approach in determining the nature of the instrument under consideration was to

> *"decide the nature of the instrument by looking at it as a whole without any preconceptions as to what it is"*[22]

[19] Halsbury's Laws of England 5th Ed. Vol [ ] para 638
[20] [2001] EWCA 1086
[21] Ibid per Hale LJ paras 10 et seq.
[22] Ibid para 15.

Further, at paragraph 21 of the above judgment the deliberation of the Court included the following:-

> *"The instrument has all the appearances of a first demand guarantee. It describes itself as a guarantee, but this is simply a label; it does not use the language of guarantee. Rather the obligation, which is expressed to be an 'irrevocable and unconditional undertaking', is that the bank's 'will pay' on a first written demand*."

34. In utilizing this approach to the instant case, there is no contract that has been created. A true guarantee in the sense of an independent but collateral contract cannot therefore be found to have been established. Is the letter in the nature however of a letter of credit? This was not asserted by the Claimant in such terms but from the Claimant's case, the intention was that the Bank would pay from its own funds independently of the contract with Triple B. The nature and effect of a letter of credit was stated in ***Edward Owen v Barclays Bank*** insofar as there being an independent obligation by the issuing bank which was irrevocable and payable on demand. In all of the cases discussed in the various authorities above, the fact of being payable on demand (even if defined with reference to the happening of an event) is clearly provided for in the instrument as is the fact that the undertaking to pay is irrevocable. It is not found that the letter issued by the Bank in the instant case rises to create an irrevocable letter of credit. The letter is also not a contractual guarantee. In the circumstances the claim must be dismissed.

Court's Conclusion and Disposition

35. The Claimant has failed to prove that the letter issued by the Defendant Bank amounts to a performance bond or guarantee of payment on behalf of Triple B. It is also found that the letter was not a confirmed or irrevocable letter of credit. By way of mention only, it is noted that an issue of estoppel was raised in the Claimant's reply but was never pursued at trial. There was no consideration of that issue by the Court.

36. The orders of the Court are:-

(i) The claim is dismissed;

(ii) Costs are awarded to the Defendant to be assessed if not agreed.

Dated this 18th Day of January, 2016

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Shona O. Griffith
Supreme Court Judge.