

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA
(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION No. 0030 of 2022

5 (Arising from Civil Suit No. 0022 of 2022)

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|----|--|---|-------|
| 1. | VS HYDRO UGANDA LIMITED | } | |
| 2. | VS HYDRO (PVT) LIMITED | } | |
| 3. | BENTHOTAGE NISHAN CHANDANA MAHANAMA | } | |
| | APPLICANTS | | |
| 10 | 4. PRABODHA KESHANA SUMANASEREKA | } | |

VERSUS

- | | | | |
|----|--|---|--------------------------|
| 1. | RWENZORI HYDRO (PVT) LTD | } | |
| 15 | 2. NYAMAGASANI 11 HPP LIMITED | } | |
| 3. | GREENEWUS ENERGY AFRICA LIMITED | } | RESPONDENTS |
| 4. | UAP OLD MUTUAL INSURANCE UGANDA LIMITED | } | |

Before: Hon Justice Stephen Mubiru.

RULING

20. Background.

On or about 9th February, 2017 and 31st March, 2017 the applicants and the 1st respondent executed three separate Engineering, Procurement and Construction Turnkey Contracts in respect of the Nyamagasani I Hydro power project, Nyamagasani II Hydro power project and
25 Kakaka Hydropower project in Kasese District respectively, which required the 1st applicant to obtain advance payment and performance guarantees from a reputable insurance company, to secure the repayment of the sum of US \$ 3,000,000 advanced to the 1st applicant under a facility letter doted 11th August 2020. The 1st applicant duly obtained the requisite guarantees from the
4th respondent, M/s UAP Old Mutual Insurance Uganda Limited, issued on condition of the 1st
30 and 2nd applicants issuing general counter indemnities, while the 3rd and 4th applicants were required to take out personal counter indemnities. The 4th respondent then issued the following bonds;

i. An Advance Payment Bond No. 010/133/1/000716/2020 for US \$ 3,000,000 dated 30th August, 2021 securing the lending of US \$ 3,000,000 by the 1st respondent to the 1st and 2nd applicants under a loan facility letter dated 11th August 2020.

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ii. An Advance Payment Bond No. 010/133/1/000717/2021 for US \$ 1,500,000 dated 2nd February 2021 issued in favour of the 3rd respondent securing the lending of US \$ 1,500,000 by the 3rd respondent to the 1st and 2nd applicants under a loan facility letter dated 11th August, 2020 later updated by the 14th April 2021 facility letter.

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iii. An Advance Payment Bond - Site works No. 010/133/1/000711/2019 for US \$ 800,000 dated 29th July, 2021 issued in favour of 1st respondent securing an advance payment of US \$ 800,000 paid by the 1st respondent to the 1st applicant pursuant to the EPC contract dated 31st March, 2017 between 1st applicant and the 1st respondent in respect of Nyamagasani I Hydro Power Project.

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iv. A Performance Bond No. 010/132/1/001055/2017 for US \$ 2,577,020 dated 29th July, 2021 issued in favour of the 1st respondent securing the 1st respondent's performance of its contractual obligations as Contractor pursuant to the EPC contract dated 3rd March, 2017 between the 1st applicant and the 1st respondent in respect of Nyamagasani I Hydro Power Project.

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v. A Performance Bond No. 010/132/1/001054/2017 for US \$ 1,322,150 dated 25th May, 2021 issued in favour of the 2nd respondent securing the 1st applicant's performance of its contractual obligations pursuant to the EPC contract dated 31st March, 2017 between the 1st applicant and the 2nd respondent in respect of Nyamagasani II Hydro Power Project.

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30 All five bonds relate to the three Engineering, Procurement and Construction Turnkey Contracts. By two of those bonds, one dated 31st March, 2017 the 1st and 2nd respondents contracted the 1st applicant to design, build and complete the Nvamagasani I Hydro Power Project (bonds; i, iii,

and iv above respectively) and the other for the design, building and completion of the Nvماغاسانی II Hydro Power Project (Bond (v)). By the third contract dated 9th February, 2019 the 3rd respondent contracted the 1st applicant to design, build and complete the Kakaka Hydro Power Project in respect of which (Bond (ii) was issued.

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b. The application.

This application by Chamber Summons is made under the provisions of article 126 of *The Constitution of the Republic of Uganda, 1995*; section 33 of *The Judicature Act*; section 98 of
10 *The Civil Procedure Act*, and Order 41, rules 1, 2, 7 and 9 of *The Civil Procedure Rules*. The applicant seeks a temporary injunction order restraining the 4th respondent its agents, receivers, managers, servants, assignees or any other person acting under or pursuant to their authority, from effecting payment on the demand on the performance and advance bonds numbers; 010/133/1/000716/2020; 010/133/1/00711/2019; 010/133/1/000709/2019;
15 010/132/1/001055/2017; 10/133/1/001054/2017 and 10/132/1/000/717/2021 until final determination and disposal of the main suit. It is the applicant's case that the issue for determination in the main suit is whether the respondents are in breach of the Engineering, Procurement and Construction Turnkey Contracts and thus it is unjust for the 4th respondent to honour the call.

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c. The affidavits in reply;

In the 1st and 3rd respondents' affidavit in reply, it is averred that works under the Engineering, Procurement and Construction Turnkey Contracts were partially executed by the 1st applicant and
25 the same are incomplete to date. The 1st applicant breached the terms of the contracts as the works contemplated under the contracts were not completed. It is the reason which prompted the 1st to 3rd respondents thereafter on 5th December, 2021 made a call to the bonds. The 1st respondent called advance payment bond No. 010/133/1/00711/2019 and performance Bond No. 010/132/1/001055/2017. At the time of the call on the bonds, the project work was not yet
30 completed. By letter dated 2nd December, 2022, the 4th respondent undertook to extend performance bonds No. 010/132/1/001055/2017 and 010/132/1/001054/2017 as well as advance

payment bond No. 010/133/1/000711/2019 but the same were never extended, owing to pending approvals from the regulator of the 4th respondent. The bonds were never renewed. The calls on the bonds were justified by the terms of the contracts. It is just and equitable that the bonds are cashed accordingly. The damages suffered by the applicants (if any) can be duly compensated.

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d. The affidavit in rejoinder;

The applicants averred that the Engineering, Procurement and Construction Turnkey Contracts were fully performed and the projects reached commercial operation during the year 2021 following which the 3rd respondent entered into contracts with M/s Operations and Maintenance Limited, and procured operational insurance signifying that the contracts were fully performed. Under the Advance Payment Bond No. 010/133/1/000711/2019, Site works for the sum of US \$ 800,000 in favour of the 1st applicant M/s Rwenzori Hydro (PVT) Limited. By virtue of Clause 14.6 of the Engineering, Procurement and Construction Turnkey Contract, repayment of the advance would be subtracted from the next monthly payments as presented on the interim payment invoice/certificate and this Advance Payment bond was amortised under the Interim Payment Certificates Nos. 01 to 52 and only a balance of US \$ 7,900.61 remains due and if any call is made it should be limited to the balance pending on the bond.

Performance Bond No. 010/132/1/001054/2017 in favour of the 2nd respondent (M/s Nyamagasani II HPP Limited for the construction of Nyamagasani II Hydro power project in the sum of US \$ 1,322,150.00 was to remain valid until the construction was completed and project connected to the power grid, upon which an operational insurance would be procured. It ceased to have legal effect on 1st May, 2021 when the 3rd respondent procured operational insurance implying that the contract was fully performed under the terms of the Engineering, Procurement and Construction Turnkey Contracts. Performance Bond No. 010/132/1/001055/2017 in favour of the 1st respondent (M/s Rwenzori Hydro (PVT) Limited for the construction of Nyamagasani I Hydro power project in the sum of US \$ 2,577,020.00 was to remain valid until the construction was completed and project connected to the power grid, upon which an operational insurance would be procured. It ceased to have legal effect on 19th August, 2021 when the project reached commercial operation and 3rd respondent procured operational insurance under the agreements

with M/s Operation & Maintenance Uganda Limited implying that the contract was fully performed.

On the 11th August, 2020, the 1st and 2nd applicants procured a loan from the 1st and 3rd respondents in the sum of US \$. 3,000,000.00 for the payment of sub-suppliers, internal staff, and sub-contractors under the Engineering, Procurement and Construction Turnkey Contracts, which was secured by Advance Payment Bond No. 010/133/1/000716/2020. On the 14th April 2021, the 1st and 2nd applicants procured two other loans from the 1st and 3rd respondents secured by Advance Payment Bond No. 10/132/1/000/717/2021 dated 20th January, 2022 in the sum of US \$. 1,500,000.00 and Advance Payment Bond No. 010/133/1/000709/2019 dated 31st August, 2021 in the sum of US \$. 550,000 As well as performance Bond No. 010/132/1/001060/2018 dated 31st August, 2021 in the sum of US \$ 985,325. The 1st, 2nd and 3rd respondents did not fully honour their obligations under the loan agreements, which led to several suits (eight of them specified in the affidavit) against the 1st applicant, for recovery of money due for the services rendered to it.

The claims in those suits and other claims submitted by the 1st applicant to offset the advance and repayment of the two facilities were not considered before the calls were made and thus the 1st, 2nd and 3rd respondents' call on the Advance Payment Bonds No. 10/132/1/000/717/2021 and No. 010/133/1/000716/2020 was premature since not all amounts under the loan agreements were utilised and repayments were made. The 4th respondent on the 3rd January, 2022 wrote to the 1st to 3rd respondents requesting for further particulars regarding the amortised amounts, and the nature of default alleged as a condition for the call, and to date no information has been furnished. The call on the bonds was illegal, fraudulent and amounts to unjust enrichment and such fraudulent acts cannot be sanctioned by court since the hydro power plants reached commercial operation and tests to confirm completion were made and commercial operation confirmed by Uganda Electricity Transmission Company Limited. Under the Engineering, Procurement and Construction Turnkey Contract No. 2010-10-03 the 1st and 2nd applicants on 31st October, 2021 submitted contract claims for additional payments US \$ 4,321,071.13 while on the same day under contract No. 2013-33-02 they submitted contract claims to the 1st respondent for additional payments of a total sum of US \$ 4,396,121.74

5. Submissions of counsel for the applicants.

M/s Jason & Co Advocates on behalf of the applicants submitted that the 1st and 2nd applicants seek an injunction to stop payment of the bonds. There is no basis at all to make the call there is compelling evidence of fraud in making the call and there is an issue of whether a letter of undertaking by the 4th respondent amounted to a valid and binding undertaking to renew the bonds. The advance payment bonds indicate the 4th respondent is under an obligation to pay. There is evidence in the affidavit in support and that in rejoinder that inasmuch as the bond appears to be unconditional, two conditions are listed making it a hybrid bond. The principal has failed to pay the advance payment in accordance with the conditions of the underlying contract and a call has to site the amount which the principal has failed to pay. The call dated 5th December, 2021 does not detail the nature of the advance that has failed to be paid, the amount the principal has failed to repay. The 4th respondent in the affidavit in reply refers to the 1st 2nd and 3rd respondent requesting them to comply with the two conditions under the advance payment bonds which was not complied with. Clause 14.2 of the three EPC contract provides for repayment amortisation of the advance bonds. Clause 14.4 provides for the schedule of payments based on monthly interim payments. The affidavit in rejoinder there is evidence of payment endorsement advice and payment certificate summary, annexes A and B show that 52 interim payment certificates have been paid by the respondents, the 1st applicant which indicated that the advance payment bonds have been amortised or repaid. The only balance pending on the advance payment US \$ 7,900 that has not been amortised. The fraud is for calling the full amount of the bond, with full knowledge that it has been amortised.

Regarding the two performance bonds, a call was made on basis that they were not renewed 28 days before the expiry of the contract as required. From the reading of the bonds it is evidently clear that they are conditional in nature which requires the 1st 2nd and 3rd respondents to specify the nature of default by the contractor, justifying the call. With the conditional bonds they would

require either an arbitral award or a judgment of court indicating the nature of the breach before a call can be made. No judgment or arbitral award has been presented to form the basis of the call of the bonds. There is evidence that has been admitted the 1st, 2nd and 3rd respondent in the affidavit in reply indicating that the three hydro power projects have reached commercial
5 operation. The right to call and use the performance bonds is dictated by the terms of the underlying EPC Contracts. Clause 4.2 of the EPC contracts the performance bonds remain valid until takeover of the three projects. Upon take over, the performance bonds lapsed. The affidavit in rejoinder annexes L1 to L4 shows that UETCL indicates the projects have reached commercial
10 operation. The respondent declined to issue the takeover certificates for avoiding the retention period to run.

On 30th November, 2021 the 1st and 2nd applicants wrote to the 4th respondent requesting the 4th respondent to extend the bonds 28 days before the expiry. On 2nd December, 2021 the 4th respondent wrote to the 1st, 2nd and 3rd respondents, annexure R8 to the affidavit of the 2nd respondent stating that it shall be extended effective from 1st January, 2021 to December, 2021 to
15 expire 31st August, 2022. The undertaking created a valid and binding extension. The 4th respondent was requested on time; it was 29 days before the expiry date. There is no renewal because the process was cut short by the call.

They raise a *prima facie* case, and on the question of balance of convenience, the 1st and 2nd
20 applicants have a quasi-monopoly in the hydro power project business. If the court does not restrain the payment the applicants stand to lose in a manner that cannot be atoned. It will damage their reputation when applying for guarantees for future projects. The affidavit in rejoinder paragraph (i) and (m) indicate that there are pending additional payments one of US 4,321,071 and the other 4,396,121 it will be offset. They amounts became due on 31st October,
25 2021 about 52 days before the calls were made.

f. Submissions of counsel for the 1st, 2nd and 3rd respondents.

M/s MMAKS Advocates together with Shonubi, Musoke & Co Advocates, on behalf of the 1st,
30 2nd and 3rd respondents submitted that bonds (i) and (ii) are essentially third-party demand guarantees securing borrowings under specific loan facility agreements with interest accruing on

the amount lent. It is merely incidental in relation to those guarantees that the lending is intended to be utilized by the Contractor in funding its EPC contractual obligations. The loan facility agreements provide for repayment of these advances by the Contractor on demand and/or otherwise on a schedule to be agreed between it and the lender and the guarantee to be called in the event of default in repayment by the contractor. Bond (iii) is a third-party demand guarantee for an EPC advance payment and recoveries of the advance payment are to be from certified payments due from time to time from the 1st respondent as Employer to the 1st applicant as Contractor. Bonds (iv) and (v) are bonds securing the Contractor's performance of its EPC obligations entitling the 1st respondent to demand on them upon breach of the said Contractor EPC obligations.

The suit is on five distinct bonds. The first two were straight lending of US \$ 3,000,000 repayable on demand. It has not been repaid. It was secured by ordinary third party guarantees. The facility letter dated 11th August, 2020. By that date the bulk of the loan had been paid out. On 5th December, 2021 the 1st respondent indicated the default on paying the advance amount. On 9th December, 2021 the Insurance Company responded introducing new terms. Bond two at B (ii) (a) too is a straight lending of US 1,500,000. There was no response to a call on this bond. They are under URDG 798 article 24 (d) (e) and (f) and article 20 (b) notice of rejection and the reasons should be issued within 5 days. If no rejection within that period or invalidly.

The 3rd guarantee is an advance payment guarantee of US 800,000. It was triggered by failure to repay in full and if not extended 28 days prior to expiry. The 4th guarantee is an advance payment guarantee of US 2,577,020. It was triggered by failure to repay in full and if not extended 28 days prior to expiry. The 5th guarantee is an advance payment guarantee of US 1,322,150. The call was based on failure to extend. The applicant exposed themselves to the risks of belated renew. Bond 3 was renewed for the full amount.

g. Submissions of counsel for the 4th respondent.

M/s S & L Advocates, on behalf of the 4th respondent submitted that the 4th respondent is a nominal defendant in the main suit and therefore does not oppose the application. Annex R11 of

the 4th respondent's reply is a set of five letters addressed to the 1st – 3rd respondents, in response to the calls that were made. The 4th respondent had to seek regulatory approval. Paragraph 6 – 8 of the respondent's affidavit shows that the 4th respondent made undertakings. Five calls were made in respect to bonds three of which were to expire on 31st December, and two in August of the following year; 1st September, 2021. Annexure "F" to the application is for the sum of US \$ 3,000,000 and "R" for the sum of US \$ 1,500,000. Making five call at the time was wrong. The accusation of failure to renew when it is months before expiry too was wrong. There are serious issues as between the parties for determination. Commencement of renewal would ordinarily be a month or two months before. Para 14 – 16 of the affidavit in reply. Exhibit R11 a letter from the 4th respondent explains the halt on the extension

h. Submissions in rejoinder by counsel for the applicants;

The renewal process is based on the wording of the bond. The extension had to be triggered by the 1st 2nd and 3rd respondents. Annexure H, I and J show that the extension was sought 30th November, 2021 and on the same date the 1st applicant wrote to the 4th respondent requesting for extension of the same. On 2nd December, 2021 the undertaking was made. The performance bonds gave the 1 – 3rd respondent to seek extension. They were aware of the need to seek approval of the regulator which they were aware of. It was bad faith to have sought renewal belatedly. L1 to L4 when the project has reached completion. They obtained operational bonds and operational insurance. There is evidence. Para 7 of annexure A1. Annexure RF.

i. The decision.

It has been established by the law and the decided cases that, the main purpose for issuance of a temporary injunction order is the preservation of the suit property and the maintenance of the *status quo* between the parties pending the disposal of the main suit. The conditions for the grant of an interlocutory injunction are now, well settled. First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will

decide an application on the balance of convenience (see *E.A. Industries v. Trufoods*, [1972] E.A. 420 *American Cyanamid Co v. Ethicon Limited* [1975] AC 396; *Geilla v. Cassman Brown Co. Ltd* [1973] E.A. 358 and *GAPCO Uganda Limited v. Kaweesa and another H.C. Misc Application No. 259 of 2013*). The conditions that have to be fulfilled before court exercises its

5 discretion to grant an interlocutory injunction have been well laid out as the following:-

1. The Applicant has shown a *prima facie* case with a probability of success.
2. The likelihood of the applicants suffering irreparable damage which would not be adequately compensated by award of damages.
3. Where in doubt in respect of the above 2 considerations, then the application will be

10 decided on a balance of convenience (see *Fellowes and Son v. Fisher* [1976] 1 QB 122).

The applicants seek to restrain payment under 5 guarantees. The independence of the demand guarantee from the underlying contract has the effect that, in principle, the guarantor must pay a demand presented in compliance with the terms of the guarantee, irrespective of whether or not the Principal has, in fact, committed a breach of the underlying contract with the Beneficiary.

15 Therefore Courts will very rarely order a bank not to pay a beneficiary who has made an apparently complying demand. However, in order to preserve the autonomy between the banks' obligations, on the one hand, and the rights and obligations of the parties to the underlying contract on the other, the law applies a separate, more stringent, test in the case of injunctions sought against the payment of demand guarantees. The exceptions are; (i) fraud affecting the

20 documents presented by the beneficiary (for example if they have been forged). Fraud is not limited to dishonesty or fraudulent intent, but extends to an absence of objective good faith, as where no reasonable person would have considered the demand to be justified e.g. if the beneficiary had no honest belief in the validity of its demand; (ii) illegality in the demand guarantee contract or underlying contract; (iii) the infringement of international obligations and

25 express contractual derogation from the principle of autonomy; and (iv) the total failure of the basis of the contract, i.e. the reason for its existence.

In the instant application, the applicants rely on the fraud exception. To prove that a demand under a performance guarantee is fraudulent, the applicant for an injunction must show that the

beneficiary knows that the demand is fraudulent, or that the circumstances around the demand are such that the only reasonable inference is that the demand is fraudulent.

The International Chamber of Commerce defines a demand guarantee in article 2 of its 2010
5 Uniform Rules for Demand Guarantees (URDG) 758, as “any signed undertaking, however
named or described, providing for payment on presentation of a complying demand.” In
contradistinction, a letter of credit is a strong payment instrument. A documentary credit is in
essence a banker’s assurance of payment against presentment of specified documents. Over the
years both instruments have secured a strong presence in international commerce. To this end,
10 English courts have aptly described these instruments as the “lifeblood of commerce” (see *RD
Harbottle (Mercantile) Ltd v. National Westminster Bank Ltd* [1977] 2 All ER 862 at 870b;
Edward Owen Engineering Ltd v Barclays Bank International Ltd [1978] 1 All ER 976 at 983;
and *Intraco Ltd v Notis Shipping Corporation (the Bhoja Trader)* [1981] 2 Lloyd’s Rep 256 at
257. This is only natural as both demand guarantees and letters of credit satisfy their purpose by
15 ensuring that the commercial transaction, particularly in terms of payment with regard to letters
of credit, is secure. Given their similarity in function and the legal principles that demand
guarantees and letters of credit share, cases dealing with the one instrument are regularly referred
to in cases relating to the other.

20 A guarantee is essentially a promise by a third party to ensure that an obligor meets its liabilities
to another. Performance Guarantees enjoy widespread use in the services industry, particularly in
construction / engineering projects and international sale of goods contracts, where they are
typically used to secure the interests of the supplier for the performance of the consumer’s
obligation to pay, especially when no previous dealings have taken place between them. It is now
25 common practice for many suppliers in the public and major private sectors in strong bargaining
positions, to demand that buyers provide demand guarantees as security to ensure that the terms
of their contract are adhered to. They are versatile instruments that are essential to risk
management in credit transactions. There are two main types of guarantee: suretyship guarantees
and demand guarantees.

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With a suretyship guarantee, equity will intervene to protect a guarantor in some circumstances (for example, if the underlying contractual obligations which it has guaranteed have been increased without the guarantor's consent). A surety's obligations are also secondary: the beneficiary of the guarantee must first establish the main obligor's liability and default. When they are used in that context, they often require one or more of the following documents: a written statement indicating breach by the applicant; a judgment or arbitral award confirming the breach of contract; a written notice demanding payment of the specified amount; and/or a certificate by an expert or surveyor attesting to a certain fact (the amount paid or outstanding, the quality or the quantity of the product, and so on). Suretyship guarantees tend to be drafted with wording that makes the guarantor "primary obligor" and liable to "pay on first demand" (i.e. gives the guarantor a primary obligation to perform the primary debtor's obligations once the debtor defaults).

A demand guarantee may be defined as an undertaking given for payment of a fixed or maximum sum of money on presentation to the party giving the undertaking of a demand for payment (nearly always required to be in writing) and such other documents (if any) as may be specified in the guarantee within the period and in conformance with the other conditions of the guarantee. Most demand guarantees are payable on "first written demand" or "simple demand" without any additional documents. Normally, demand guarantees are not subject to the equitable defences that are available in the case of suretyship guarantees. In *Edward Owen Engineering Ltd v. Barclays Bank International Ltd and another* [1978] 1 QB 159; [1978] 1 Lloyd's Rep 166; and [1978] 1 All ER 976 Lord Denning MR held that performance guarantees were virtually promissory notes payable on demand. He also stated that;

All this leads to the conclusion that the performance guarantee stands on a similar footing to a letter of credit. A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand, if so stipulated, without proof or conditions. The only exception is when there is clear fraud of which the bank has notice.

Similarly in *R D Harbottle (Mercantile) Ltd. v. National Westminster Bank Ltd.*, [1978] 1 QB 146; [1978] 2 All E.R. 862 at 870, Judge Kerr states:

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

A demand guarantee stands on a similar footing to a letter of credit, and so in the same way the bank which gives a performance guarantee must honour that guarantee according to its terms.
15 The bank is not concerned with the relations between the supplier and customer and whether or not the supplier has performed his contractual obligations (see *Group Josi Re v. Walbrook Insurance Co Ltd. and others* [1996] 1 WLR 1152 at page 801 and *Deutsche Ruckversicherung AG v. Walbrook Insurance Co Ltd and others*[1994] 4 All ER 181).

20 Some of the key characteristics of demand guarantees are that they contain an undertaking to pay on demand, an absence of clauses excluding or limiting the equitable defences normally available to a guarantor, the guarantor is a primary obligor and not merely acting as the surety, payment is triggered by a demand and the obligation to pay is stated to be immediate, and the obligation to pay was unaffected by any dispute in the underlying contract. Demand guarantees
25 are more onerous for guarantors as they have far less room for argument about whether payment is due and generally no access to the equitable defences. As such, demand guarantees are intended to prevent or penalise bad faith, poor performance and non-performance for whatever reason. They also provide the beneficiary with a ready source of funds that can be used to help meet the costs of remedying the principal's failure to perform in terms of the underlying contract.

30 A demand guarantee is not quite as good as cash or a letter of credit, but it is a lot closer to cash than a suretyship guarantee is, and there is far less scope for litigation about whether payment is due from the guarantor. With a demand guarantee payment is only conditional on the beneficiary

serving a demand in the required form (although this can be made conditional on an event happening). Perhaps the most significant feature of demand guarantees, however, is that they afford vital safeguards against abusive calls by the parties to commercial transactions.

5 Demand guarantees, being a substitute for cash, are created to provide the beneficiary with a speedy monetary remedy against the principal to the underlying contract, and to that end they are primary in form and documentary in character. This means that the demand guarantee is an abstract payment undertaking, which is expressed to be payable solely on presentation of a written demand and / or any other specified documents conforming to the terms of the
10 undertaking, and is independent of the underlying contract. In view of this, any demand within the maximum amount stipulated in the demand guarantee must, in principle, be paid by the guarantor, irrespective of whether the underlying contract has, in fact, been breached and irrespective of the loss actually suffered by the beneficiary. This is in contrast to the suretyship guarantee that is an undertaking to be answerable for another's debt or default, and is triggered
15 only by proof of actual default and is not independent of the underlying contract, and which is limited to the amount of loss suffered from the default within the maximum amount stipulated in the guarantee. In this regard, demand guarantees differ from surety guarantees or bonds, in which the security lender (i.e., surety) is only involved if the principal party defaults in the performance of an obligation.

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The operative words of the performance guarantee Bond No. 010/132/1/001055/2017 for US \$ 2,577,020 dated 29th July, 2021 and Performance Bond No. 010/132/1/001054/2017 for US \$ 1,322,150 dated 25th May, 2021 show that they required the respondents to submit;

25a demand in writing and [a] written statement stating that; (a) the Contractor is in breach of its obligation(s) under the Contract, and (b) the respect in which the Contractor is in breach.

A conditional bond imposes an obligation upon the guarantor, subject to the beneficiary
30 establishing proven default in the underlying contract. The beneficiary, when making a call on such a bond, must have a judgment or award evidencing both a proven breach of the underlying contract, together with a loss suffered by the beneficiary as a consequence of this breach. The

wording of the performance guarantees in the instant case, to the extent that they require some conditions to be satisfied by the beneficiaries in order for them to make a call on the bonds, such as specifying the grounds under which they believe the principal has breached the underlying contract or the loss that they have suffered, are hybrid bonds. In other words they contain both
5 “on demand” language and “guarantee” language.

Hybrid bonds could fall anywhere along the spectrum between conditional bonds and “pure” on-demand bonds, for instance the beneficiary may have to produce specific documents evidencing the grounds under which they believe the principal has breached the underlying contract or the
10 loss that they have suffered, may require the production of an architect/surveyor/engineer’s certificate stating its opinion that there is a breach of the contract and the amount stated in the demand is the appropriate compensation for the breach; may require authentication of the signature of the Owner in the demand; or may require authentication of the signature of the architect/surveyor/engineer in the certificate.

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On the other hand, by the advance payment guarantees No. 010/133/1/000716/2020 for US \$ 3,000,000 dated 30th August, 2021, Bond No. 010/133/1/000717/2021 for US \$ 1,500,000 dated 2nd February 2021 and Advance Payment Bond - Site works No. 010/133/1/000711/2019 for US \$ 800,000 dated 29th July, 2021 the 4th respondent M/s UAP Old Mutual Insurance Uganda
20 Limited unconditionally and irrevocably undertook and guaranteed to pay the beneficiary on the beneficiary’s loss payee;

.....without right or cavil, objection or contest any sum or sums not exceeding US \$ 3,000,000 upon receipt by us of your demand in writing and your written
25 statement stating that the Principal has not repaid the credit under the Facility Letter.....

A “pure” on-demand bond is characterised by the absence of any conditions required to make a call on the bond other than the making of the call itself. On-demand bonds are usually a
30 substitute for a cash deposit that the contractor would place with the developer to either secure the performance of the contractor, or to secure the advance payment that the developer has paid the contractor for the works. They are used such that the contractors are able to use more cash for

their projects and at the same time, developers can have a peace of mind that should the contractors default, they can still recover a sum of money from the bank/insurer.

It would appear that the advance payment guarantees in the instant case are absolute, requiring
5 only a statement of default from the beneficiary, without an indication of the nature of the
default, or the presentation of a certificate by an engineer or surveyor, or presentation of a
judgment or arbitral award. The 4th respondent giving the guarantee is concerned only with the
terms of the demand, not with the question of whether or not it is justified. Irrespective of the
existence of any disputes between the parties, such a bond can be invoked by the beneficiary as
10 per stipulations therein. By those expressions, the advance payment guarantees *prima facie*
imposed an obligation on the 4th respondent, M/s UAP Old Mutual Insurance Uganda Limited,
upon demand made on it, which was to be conclusive as regards the amount due and payable by
it under the guarantee, to pay the applicants the amount so demanded absolutely and
unconditionally, notwithstanding any dispute or disputes raised by the respondents and
15 notwithstanding any legal proceedings pending in any court or tribunal relating thereto.

These clearly are demand advance payment guarantees under which, subject to the fraud
exception, the 4th respondent's obligations are autonomous from the underlying contract between
the 1st, 2nd and 3rd respondent beneficiaries and the 1st applicant as principal; which means that, in
20 principle, the 4th respondent must pay if proper complying documents are presented, even if the
1st, 2nd and 3rd respondent beneficiaries and the 1st applicant as principal have not stipulated that
there is a default under the original underlying contract.

In order to obtain a temporary injunction, the applicants will be required to establish that: (i)
25 there is a serious question to be tried as to whether the 1st to 3rd respondents have a right to call
on the guarantees; (ii) that if the application is not granted, the applicants stand to suffer
irreparable damage; and (iii) the balance of convenience favours leaving the guarantees intact
until the dispute is resolved. This will often be the case where the applicants can demonstrate
that the payment of damages in lieu of an injunction would be an inadequate remedy.

30

While it might appear that these requirements could be readily satisfied where there is a *bona fide* dispute, particularly where the applicant stands to suffer significant reputational damage if a call were to be made, in the context of demand performance guarantees, courts will typically refuse an injunction unless there are special circumstances that suggest they should do otherwise.

5 The rationale behind this is that, by agreeing that the applicant will provide the demand performance guarantee on the terms set out in the contract, the parties have also agreed to allocate the financial risk of any dispute to the applicant until it is finally resolved.

There are however at least three instances where courts will deviate from this position: (i) where
10 there is compelling evidence of fraud on the part of the beneficiary; (ii) where there is compelling evidence of unconscionable conduct on the part of the beneficiary; or (iii) to ensure the beneficiary adheres to any contractual promise not to call on the performance guarantee (i.e. a negative stipulation). Unless the above circumstances are present, a court is likely to refuse an injunction for the reasons set out above.

15

i. Whether the applicants have a *prima facie* case against the respondents.

First, a preliminary assessment must be made of the merits of the suit that has been filed against the respondents, to ensure that there is a “serious question to be tried.” One of the criteria to be
20 applied when considering whether or not to grant a temporary injunction is disclosure by the applicant’s pleadings, of a “serious triable issue,” with a possibility of success, not necessarily one that has a probability of success (see *American Cyanamid v. Ethicon* [1975] AC 396; [1975] ALL ER 504; *Godfrey Sekitoleko and four others v. Seezi Peter Mutabazi and two others*, [2001–2005] HCB 80 and *Nsubuga and another v. Mutawe* [1974] E.A 487). There is no need to be
25 satisfied that a permanent injunction is probable at trial; the court only needs be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried. A serious question is thus any question that is not frivolous or vexatious. As long as the claim is not frivolous or vexatious, the requirement of a *prima facie* case is met. The Court must be satisfied that there is a serious question to be tried as to whether the respondent has a right to call on the
30 guarantee (see *G&S Engineering Services v. MACH Energy Australia Pty Ltd* [2019] NSWSC 407).

The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried, and that there is at least a reasonable chance that the applicant will succeed at trial. The applicant needs to show only a reasonable likelihood of
5 success on the merits. The applicant's burden on this part of the test is relatively low, and in most cases an applicant will be able to show that there is a serious question to be tried. The applicant is required to provide reasonably available evidence to satisfy the court with a sufficient degree of certainty that the applicant is the rights-holder and that his or her rights are being infringed, or that such infringement is imminent. The applicant must show a strong probability that the feared
10 conduct and resulting damage will occur.

The dispute between the parties relates to breach of the terms of the advance payment and performance bonds. While the respondents claim that by the applicants' failure to repay the sums advanced under the facilities and the 1st applicant's failure to extend the bonds, conditions have
15 arisen which entitle the respondents to make calls on the bonds, the applicants disagree and contend that the demands were not made in accordance with the terms of the bond in so far as the bonds stipulate that the written demand must specify the nature of default alleged, which the respondents did not, and that subsequent variation of the terms of the bonds without the insurers consent significantly altered the risk guaranteed, which had the effect of discharging the
20 insurance company from its liability under the bonds.

A closer examination of the nature of the dispute reveals that it springs from characterisation by the respondents, of the advance payment and performance guarantees as "on demand / unconditional guarantees" which do not require them to furnish any reason for making a call on
25 them, while the applicants characterise them as "conditional / default guarantees" which require the respondents to specify the nature of default by the contractor justifying the call. I find these to be serious questions to be tried. They, and other issues that the parties may subsequently raise at the trial, are the basis upon which the court will determine whether the respondents have a right to call on the guarantees. To obtain an interlocutory injunction an applicant must show only
30 that its claim is not frivolous or vexatious, that is to say, it has a serious issue to be tried. The applicants have satisfied this requirement.

- ii. Whether the applicants will have an adequate remedy at law or will be irreparably harmed if the injunction does not issue.

5 Second, the applicants must show that they will suffer irreparable harm if the court refused to grant the injunction and the respondents were allowed to continue in their course of conduct. “Irreparable” in this context refers not to the size of the harm that would be suffered, but its nature. If the harm could not be quantified by payment of money, or if the harm is not readily calculated or estimated, this part of the test will usually be satisfied. In some cases, the
10 availability of damages often precludes such a finding.

Irreparable damage has been defined by *Black’s Law Dictionary*, 9th Edition page 447 to mean; “damages that cannot be easily ascertained because there is no fixed pecuniary standard of measurement.” It has also been defined as “loss that cannot be compensated for with money”
15 (see *City Council of Kampala v. Donozio Musisi Sekyaya C.A. Civil Application No. 3 of 2000*). The purpose of granting a temporary injunction is for preservation of the parties, legal rights pending litigation. The court doesn’t determine the legal rights to the property but merely preserves it in its current condition until the legal title or ownership can be established or declared. If failure to grant the injunction might compromise the applicants’ ability to assert their
20 claimed rights, for example when intervening adverse claims by third parties are created, there is a very high likelihood of occasioning a loss that cannot be compensated for with money.

The Court may grant a temporary injunction if it is apparent that the respondent is about to embark on a course of action that would infringe an applicant’s rights. The court will particularly
25 be inclined to grant the injunction where there appears to be a *prima facie* breach of property rights, or where the potential harm that could flow should a court order not be granted is difficult or impossible to calculate and quantify at a later stage in the suit, or where the damages when awarded may be irrecoverable (see *Itek Corp. v. First Nat. Bank of Boston, 566 F. Supp. 1210 (D. Mass. 1983)*). The fact that damages may be reasonably calculable will provide an applicant
30 with little consolation in the event those damages ultimately prove uncollectable.

As an injunction is an equitable and discretionary remedy, it is a general rule that an injunction will not be granted where damages are an adequate remedy. Before an injunction is ordered, it must be established that an award of damages is not an adequate remedy. That type of claim can be made in exceptional cases involving breach of contract, akin to a breach of fiduciary duty, where the normal remedies are inadequate and where deterrence of others is an important factor. An injunction ought not to be granted where the respondent would be restored to the financial position it would have been in had the injunction not been granted.

In order to establish that damages are not adequate, the innocent party will generally have to adduce evidence either that a) the subject matter of the contract is rare or unique or b) damages would be financially ineffective. Damages may be found to be an inadequate remedy in the following circumstances, among others: (a) the damage is impossible to repair; (b) the damage is not easily susceptible to be measured in economic terms; (c) the harm caused is not a financial one; (d) monetary damages are unlikely to be recovered; (e) an award of damages is inappropriate in light of the importance of the interest in issue; and (f) the harm has not yet occurred or the wrong is continuing. If there is an adequate alternative remedy, the claimant should pursue such remedy.

Examples of rare or unique subject matters might be the sale of an interest in land (as no two pieces of land are the same) or a one-off antique vase. In both scenarios, damages may not be an adequate remedy because no market substitute exists, and the innocent party would therefore be unable to secure equivalent performance (no matter what the price). Examples of circumstances where damages may be financially ineffective might be where the defaulting party is insolvent and unable to pay; if damages would be difficult to quantify (e.g. a contract to indemnify); if an order for the payment of damages would be difficult to enforce (e.g. because any enforcement would need to be in a foreign country); or if an express term of the contract restricts or limits the damages recoverable for that particular breach.

The calling up of a demand guarantee, especially if it is an unfair or fraudulent calling, often has the following severe consequences for the principal: irreparable damage to his commercial reputation; cash liquidity problems; and the risk that the cash will be misappropriated by the

beneficiary and no longer recoverable. Courts have recognised on a number of occasions that calls upon performance guarantees may cause significant damage to a contractor's reputation and financial standing that is not readily curable by an award of damages (see for example *Barclay Mowlem Construction Ltd v. Simon Engineering (Aust) Pty Ltd* (1991) 23 NSWLR 451 at 461 – 5 462; *Reed Construction Services Pty Ltd v. Kheng Seng (Australia) Pty Ltd* (1999) 15 BCL 158 at 167; *Lucas Stuart Pty Ltd v. Hemmes Hermitage Pty Ltd* [2010] NSWCA 283 at [45]; *Austrak Pty Ltd v. John Holland Pty Ltd* [2006] QSC 103 and *Structural Systems (Constructions) v. Hansen Yuncken Pty Ltd* [2010] FCA 1358.).

10 Calling of a guarantee tends to erode the confidence banks have in the contractor's systems and project management. It tarnishes the business image of a contractor, especially where such contractor has built its business on meeting its contractual obligations, meaning completing its obligations without the need for security ever being called upon. Irreparable damage will be done to its reputation as: (a) its clients may question its ability to meet its contractual obligations; (b) 15 its prospects of future successful tenders will be diminished; and competitors will take advantage to the contractor's detriment.

The fees payable in respect of the face value of each bank guarantee and the amount of the facility which the bank is prepared to advance to the contractor is directly referable to how the 20 bank assesses the contingent risk that the bank guarantee will be called upon. As a result of a call on a guarantee, the bank will be likely to assess the contractor's contingent liability risk as being higher. If the bank were to assess that the contingent liability of the contractor in relation to bank guarantees is higher than in previous years as a result of the respondent calling the guarantee, then those fees may increase and the limit of the facility may decrease for the contractor 25 specifically. Furthermore, in the world of commerce, a contractor's reputation is paramount. A contractor's "security" history (in the sense of whether any of its bank guarantees have ever been cashed) is an important part of that contractor's reputation, and is taken into account by prospective clients of the contractor when considering "Expressions of Interest" or tenders. If loss is suffered, for example, through failure to obtain tenders, the assessment of damages would 30 be a difficult and unsatisfactory process.

The calling up of a bank guarantee is a serious matter, with the potential to irreparably damage the contractor's reputation as a competent service provider, which might be taken advantage of in future projects by the contractor's competitors. It is in that context that Hunter J in *Abigroup Contractors Pty Ltd v. Peninsula Balmain Pty Ltd 2003] HCA Trans 688* opined:

5

The question of commercial reputation and the effect of a demand on a large contractor, with a record to date which has been evidenced in that context, should not be underestimated and there is a strong legitimate entitlement on the part of such a contractor to protect that reputation to the hilt.

10

Similarly Rolfe J in *Barclay Mowlem v. Simon Engineering (Australia) Pty Ltd (1991) 23. NSWLR 451* stated;

15

Once the evidence [of damage to reputation] is admitted...it demonstrates how inadequate a remedy in damages would be. The matter, so far as the plaintiff is concerned, which is detrimentally affected upon a performance bond being called up, is the perceived ability of the plaintiff to properly perform its obligations under a contract. If the plaintiff's ability in this regard is called in question, even improperly, it is not difficult to infer that there will be damage to its reputation in the industry in which it operates. Nor is it difficult to infer that its competitors would be quick to utilise such information in competing with the plaintiff. Finally, particularly as matters presently stand in the commercial world, questions may be raised as to the financial viability of the plaintiff ... This would be underlined if ... there has not previously been any call upon a performance bond. In other words people may be tempted to ask whether the plaintiff's business was "going downhill."

20

In the instant case though, the court has not been furnished with facts on basis of which it may determine the extent to which, if at all, it is likely that serious businessmen would question the applicants' capacity to engage in construction work or jump to conclusions that damage their reputation in the industry, simply because a bank guarantee has been called on. It cannot be left to speculation that their reputation is likely to be seriously damaged by knowledge that one or more of their banker's undertakings has been called on. This though does not imply that the applicants might not suffer damage to their reputation which could not be adequately recompensed by an award of damages should it turn out that the respondents wrongly demanded payment.

30

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That notwithstanding, irreparable damage may be occasioned to the commercial reputation of the principal by an abusive enforcement of a first demand guarantee. For that reason a temporary injunction may be issued in order to prevent the abusive and imminent enforcement of a first demand guarantee, pending a decision of the main suit. The injunction will be granted in case of
5 a *prima facie* or manifest abuse or fraud by the beneficiary, or in case of collusion of the latter with the principal. In such cases the fraud or the abuse merges with the bad faith of the beneficiary who seeks to enforce his/her guarantee while he/she/it is fully aware that the enforcement requirements are not met. While the Courts acknowledge that the beneficiary of a first demand guarantee has the right to enforce such guarantee without having to worry
10 immediately of what the principal owes or does not owe, the beneficiary may not, on the other hand, knowingly exercise his/her/its right to enforce the guarantor's commitment with a view to receiving funds that are not due to him/her/it. As such, a request for enforcement of a guarantee must be held manifestly abusive wherever there is a *prima facie* awareness of the lack of right by the beneficiary and the knowledge of such abuse by the guarantor, are both established.

15

Our legal system must of necessity entail mechanisms to prevent the wrongful, fraudulent and/or otherwise unconscionable calling of guarantees, even on-demand guarantees, without compromising the independence or autonomy principle, the documents principle and the strict compliance principle underpinning their utility in commerce. Although the beneficiary does not
20 need to prove a breach of contract to call on the bond, the beneficiary will not be allowed to call on the bond abusively. If the contractor can prove that the beneficiary called on the bond abusively, he may resist the call on the bond.

The court will thus now proceed to determine whether the applicants have made out a case of an
25 unfair, abusive or fraudulent calling of the guarantees, by considering the following sub-issues; (a) whether the applicants have made out a *prima facie* case of fraud in the documents rather than the underlying transaction; (b) whether the 1st to 3rd respondents could not honestly have believed in the validity of their demand under the guarantees; (c) whether the 4th respondent knew of the fraud at the time the 1st to 3rd respondents sought payment under the guarantees.

30

- a) Whether the applicants have made out a prima facie case of fraud in the documents presented, rather than the underlying transaction.

A provision common to all the bonds is that “This Performance Bond shall be governed by the
5 Laws of Uganda and shall be subject to the Uniform Rules for Demand Guarantees, published as
number 758 by the International Chamber of Commerce, except as stated above.” A call on a
bond which is subject to the URDG No. 758 must be supported by a written statement stating: (i)
that the contractor is “in breach of his obligations under the underlying contract,” and (ii) “the
respect in which” the contractor is “in breach.” Article 15 of URDG No. 758 states that the
10 demand (or a supporting document) must state in “what respect the applicant is in breach of its
obligations under the underlying relationship.”

Where there is a condition precedent stipulated in the underlying contract, a failure to include a
statement in satisfaction of such a condition in the call will make the call invalid. A failure to
15 include such statements or any documents expressly required to be annexed to the demand would
therefore make the call non-compliant. In such a case the court may grant an injunction to
restrain (a) the beneficiary from making a call on the bond, where it is in breach of an express
obligation, or (b) the bank or other surety making payment when a call has been made.

20 In their respective statements of demand dated 5th December, 2021 when making calls on
Performance Bonds (iv) and (v) above; which are; Performance Bond No.
010/132/1/001055/2017 for US \$ 2,577,020 dated 29th July, 2021 issued in favour of the 1st
respondent securing the 1st respondent’s performance of its contractual obligations as Contractor
pursuant to the EPC contract dated 3rd March, 2017 between the 1st applicant and the 1st
25 respondent in respect of Nyamagasani I Hydro Power Project; and Performance Bond No.
010/132/1/001054/2017 for US \$ 1,322,150 dated 25th May, 2021 issued pursuant to the EPC
contract dated 31st March, 2017 between the 1st applicant and the 2nd respondent in respect of
Nyamagasani II Hydro Power Project, the 1st and 2nd respondents stated as follows;

30 By this demand letter we hereby inform you that as of 5th December, 2021 the
Principal has breached the contract, particularly the Principal is in default of Clause
4.2 of the Contract, having (for reasons not attributable to us), failed to extend the

Bond period prior to 28 days before the current expiry of the Bond. The deadline was exceeded on 3rd December, 2021.

In response to the two calls, the 4th respondent by its letters dated 9th December, 2021 replied as follows;

We refer to captioned subject. This is to acknowledge receipt of your letter dated 05th December, 2021 but received by us on 07th December, 2021 making a demand on the bond number 010/132/1/001054/2017 [and Bond number 010/132/1/001055/2017 respectively]. Kindly take note and adhere to the requirements for calling the Bond as stipulated in the Bond wording namely;

- Detailed statement with a breakdown of the outstanding amount (US \$ 1,322,150); [and US \$ 2,577,020 respectively].
- Repayments made by Principal as at date of call.

You are also required to complete the attached claim form. Please add support documentation. In the meantime, we are engaging the Principal (VS Hydro Uganda Limited) for a written statement regarding the same. We have also notified our Reinsurers for a Cash Call.

Article 20 (b) of URDG No. 758 requires the guarantor to pay when the guarantor determines that a demand is complying. Alternatively, when the guarantor determines that a demand under the guarantee is not a complying demand, it may reject that demand (see Article 24 (a) of URDG No. 758). It is noteworthy that in its reply, the 4th respondent was non-committal. It instead required the 1st and 2nd applicants to provide “a breakdown of the outstanding amount” and information regarding “repayments made by [the] Principal as at date of call,” yet the terms of the guarantee only required the 1st and 2nd applicants to present a demand in writing with a written statement, “stating that; (a) the Contractor is in breach of its obligation(s) under the Contract, and b) the respect in which the Contractor is in breach,” both of which requirements were met by the 1st and 2nd applicants’ statements of demand dated 5th December, 2021. Presumably the 4th respondent’s reply was directed at Article 25 of URDG No. 758 under which the amount payable under the guarantee has to be reduced by any amount paid under the guarantee.

35

This was not a rejection of the call for being non-compliant. Requiring the 2nd respondent to provide “a breakdown of the outstanding amount” and information regarding “repayments made by [the] Principal as at date of call,” did not mean that the debt had to be undisputed or finally determined before the 4th respondent’s obligation to pay could be triggered. Such a request could not deprive the beneficiary of the benefit an unconditional security. I am satisfied that the 2nd respondent’s call complied with the requirements of the guarantee and the request was only erroneously intended to verify the sum payable, a fact with which the 4th respondent should not have been concerned at all since it was not one of the specified requirements for making a call on the guarantee. It is critical to the efficacy of these financial arrangements that as between beneficiary and guarantor the position crystallises as at presentation of a demand, and that it is only in the case of fraudulent presentation or demand by the beneficiary that the guarantor can resist payment against an apparently conforming demand.

It is only Advance Payment Bond - Site works No. 010/133/1/000711/2019 in the sum of US \$ 800,000 dated 29th July, 2021 that required a call to specify; (a), that the Principal has failed to repay the advance payment in accordance with the conditions of the contract; and (b) the amount by which the Principal has failed to pay. Other terms of this Advance Payment Bond were that it was to become effective upon receipt or the first amount instalment. It was to be reduced by 1he payment amounts for Site Works by the Principal. The guaranteed amount was to be reduced by the amounts of the advance payment repaid to the 1st respondent, as evidenced its notices issued under sub-clause 14.6 of the conditions of the Contract. Following receipt (from the principal) of a copy of each purported notice, the 4th respondent as guarantor was to promptly notify the 1st respondent as the beneficiary, of the revised guaranteed amount accordingly. Any demand for payment was required to contain the 1st respondent’s signature(s) which, had to be be authenticated by its bankers or by a notary public. The call had to be made before 31st December, 2021 when the bonda was due to expire.

In its statement of demand dated 5th December, 2021 when making a calls on this Performance Bond, the 3rd respondent stated as follows;

By this demand letter we hereby inform you that as of 5th December, 2021 the Principal has not repaid the advance payments in accordance with the Contract. The outstanding amount which the Principal has not repaid is United States Dollars (USD) 800,000. Further, we inform you that the Principal has failed to extend the Bond period prior to 28 days before the current expiry of the Bond. This deadline was exceeded on 3rd December, 2021. WE ACCORDINGLY HEREBY DEMAND the immediate payment to us of the amount of United States Dollars (USD) 800,000, which amount is due and payable in accordance with the terms of the bond.

10 In response to that call the 4th respondent by its letter dated 9th December, 2021 replied as follows;

We refer to captioned subject. This is to acknowledge receipt of your letter doted 05th December, 2021 but received by us on 07th December, 2021 making a demand on the bond No. 010/133/1/000711/2019. Kindly take note and adhere to the requirements for calling the Bond as stipulated in the Bond wording namely;

- Detailed statement with a breakdown of the outstanding amount (US \$ 800,000)
- Repayments made by Principal as at date of call.

You are also required to complete the attached claim form. Please add support documentation. In the meantime, we are engaging the Principal (VS Hydro Uganda Limited) for a written statement regarding the same. We have also notified our Reinsurers for a Cash Call.

Considering the submissions by counsel for the applicants that at the time the 3rd respondent made a call on the bond, only US \$ 7,900.61 was outstanding, the long-hallowed approach is that the guarantee is intended to be an autonomous contract, independent of disputes between the principal and the beneficiary as to their relative entitlements pursuant to the different contract between themselves. It is well understood that, in the event that the sum demanded by the beneficiary is more than the beneficiary's entitlement under the underlying contract, that is an issue for the beneficiary and principal rather than the guarantor. Typically, any overpayment is recovered commensurate with the "accounting principle" in a subsequent accounting back (see *Wuhan Guoyu Logistics Group Co Ltd v. Emporiki Bank of Greece SA* [2013] EWCA Civ 1679; [2014] 1 Lloyd's Rep 273; [2014] BLR 119; *Comdel Commodities Ltd v. Siporex Trade SA*

[1997] 1 Lloyd's Rep 424 at 431: *Uzinterimpex JSC v. Standard Bank plc* [2008] EWCA Civ 819 and *Cargill SA v. Bangladesh Sugar Corporation* [1998] 1 WLR 461 at 471F). The guarantee is procured, subject to an implied term that the beneficiary will account to the other party to the underlying contract to the extent to which the beneficiary has been over-compensated by the guarantor.

An amortised bond is one in which the principal (face value) on the debt is paid down regularly, along with its interest expense over the life of the bond. By virtue of Clause 14.6 of the Engineering, Procurement and Construction Turnkey Contract, repayment of the advance Payment Bond No. 010/133/1/000711/2019, Site works for the sum of US \$ 800,000 in favour of the 1st applicant M/s Rwenzori Hydro (PVT) Limited would be subtracted from the next monthly payments as presented on the interim payment invoice/certificate. It was the 4th respondent's obligation under the terms of the bond, following receipt (from the principal) of a copy of each purported notice, to promptly notify the 1st respondent as the beneficiary, of the revised guaranteed amount accordingly.

No evidence was adduced to show that the 3rd respondent was regularly so up-dated and that it was privy to the revised guaranteed amount as at the date of that call. The only evidence available is a letter by the 1st applicant to the 4th respondent dated 4th January, 2021 and in email correspondences subsequent thereto that the details of the amortisation and the supporting documents were supplied. The letter states in part; "please see in the schedule in Annexure A which shows the accumulated amortisation of Advance Payments, as governed by Amendment 4 of August 2019, which shows the value unamortised as \$ 2,900.61." It is counsel for the applicants' submission nevertheless that this Advance Payment bond was amortised under the Interim Payment Certificates Nos. 01 to 52, such that only a balance of US \$ 7,900.61 remained due a at 5th December, 2021. That by virtue of the call the 3rd respondent will be over-compensated by approximately US \$ 792,099.39 is not by itself evidence of fraud. Guarantors deal with documents and not with goods, services or performance to which the documents may relate. There will usually be room for an accounting between the parties to reflect their rights and liabilities under the underlying contract.

Three core principles underpin the International Chamber of Commerce (ICC) Uniform Rules for Demand Guarantees (URDG 758): the independence or autonomy principle, the documents principle and the strict compliance principle. By virtue of those principles, demand guarantees, standby letters of credit, and commercial letters of credit are all treated as autonomous contracts whose operation will not be interfered with by courts on grounds irrelevant to the guarantee or credit itself. Guarantors are concerned with documents, rather than with goods, services or performance of the underlying contract (see *Leonardo S.p.A v. Doha Bank Assurance Company LLC* [2019] QIC (F) 6; [2020] QIC (A) 1). Under the autonomy principle, an issuing bank must make payment under a demand guarantee on receipt of compliant documents irrespective of any dispute which may have occurred in respect of the underlying transaction.

The independence or autonomy principle, insulates the bond or guarantee from the terms in the underlying contract. This is important because the autonomous nature of the bond or guarantee means that conditions giving rise to the obligation to pay are found exclusively in the bond or guarantee. This independence principle is embodied in Article 5 (a) of the URDG 758. As discussed in by the Privy Council in *Alternative Power Solution Ltd v. Central Electricity Board* [2014] UKPC 3, there is a bias or presumption in favour of the construction which holds a performance bond to be conditioned upon documents rather than facts, but the presumption is rebuttable (see *IE Contractors v. Lloyd's Bank* [1990] 2 Lloyd's Rep. 496). However, the appropriateness of the distinction between letters of credit and demand guarantees had been doubted in a more recent English Commercial Court judgment which suggests that the intention of the URDG is that the principle of strict compliance should apply both to letters of credit incorporating UCP 600 and demand guarantees incorporating URDG (see *Teare J in Sea-Cargo Skips v. State Bank of India* [2013] EWHC 177 (Comm)).

Demand guarantee undertakings rest on two legal principles: the principle of documentary or strict compliance, and the independence principle. The first legal principle essentially means that the guarantor is obliged to pay if the documents submitted with the demand for payment comply with the terms of the demand guarantee. The second legal principle is that the guarantor's obligations against the beneficiary are determined in the instrument itself, and are independent,

or abstract, of the underlying contract between the applicant for, and the beneficiary of, the guarantee, as well as the contract of mandate between the applicant and guarantor.

5 The essential characteristic of a demand guarantee is that it is independent of the underlying transaction between the applicant and the beneficiary that prompted the issuance of the guarantee. Further, a demand guarantee is also independent of the instruction relationship pursuant to the applicant having requested the guarantor to issue the guarantee in favour of the beneficiary. The conditions giving rise to the obligation to pay are found exclusively in the demand guarantee and the terms of the underlying contract are of no relevance (*see Edward*
10 *Owen Engineering Ltd v. Barclays Bank International Ltd [1978] 1 All ER 976, [1978] 1 QB 159, [1977] 3 WLR 764, [1978] 1 Lloyds Rep 166*). A direct consequence brought about by the independence principle is the “pay first, argue later” rule; the beneficiary of a demand guarantee can expect payment under the guarantee as soon as it is able to tender the documents stipulated in the demand guarantee, irrespective of any dispute arising from any of the contracts other than
15 the demand guarantee itself.

There are three core principles applicable to on-demand bonds under English law: (i) on-demand bonds are regarded as the equivalent of cash and an injunction that prevents a bank from complying with its obligations under such an instrument is seen as interfering with that principle;
20 (ii) it is inherent in agreeing to provide an on-demand bond that the party providing that bond has agreed to payment being made notwithstanding the existence of a dispute as to the beneficiary’s entitlement to payment; and (iii) the bank or surety has made a promise in its capacity as a banker/surety and generally the court will not use its coercive powers to cause a bank or surety to dishonour its promise and thereby run the risk of damage to its reputation.

25

English courts will rarely injunct a call on an on-demand bond. There are of course exceptions to the strict general rule that the court will not intervene to prevent a guarantor from making payment under a demand bond or guarantee following a compliant presentation of documents;
(a) where a condition precedent has not been complied with; where the beneficiary has made a
30 promise in the underlying contract not to call upon the bond; and (b) where there is a strong case that there has been fraud. The fraud exception is more or less universally acknowledged, and

illegality exception applied in some jurisdictions. In the United States of America (see *Intraworld Industries, Inc. v. Girard Trust Bank*, 336 A.2d 316 (Pa. S.C. 1975); *Sztejn v. J. Henry Schroder Banking Corp.* - 177 Misc. 719, 31 N.Y.S.2d 631 (Sup. Ct. 1941); *Asbury Park & Ocean Grove Bank v. National City Bank of New York* 35 N.Y.S.2d 985 (N.Y. Sup. Ct. 1942) and *New York Life Insurance Co. v. Hartford National Bank & Trust Co.*, 378 A.2d 562 (Conn. S.C. 1977) at p. 567), and South Africa (see *Joint Venture between Aveng (Africa) (Pty) Ltd and Strabag International GmbH v. South African National Roads Agency Soc Ltd and Another* [2020] ZASCA 146), illegality in the underlying contract is also an exception.

10 The “unconscionability” exception too forms part of Australian and Singapore law. Under Singapore law, the unconscionability principle has been expressed as follows: “where it can be said that the buyer has no honest belief that the seller has failed or refused to perform its obligation, a demand by the buyers in my view is a dishonest act which would justify a restraint order” (see *Samwoh Asphalt Premix Pte Ltd v. Sum Cheong Piling Private Limited and Another* 15 [2001] SGCA 79 at [21]). It is not possible to list or categorise what amounts to unconscionability as it all depends on the facts of each case. Generally, it involves an element of unfairness on the call on the performance bond which compels the Courts to restrain the call.

While fraud means that the beneficiary did not honestly believe there had been a breach of 20 contract when the call was made, on the other hand, unconscionability denotes elements of unfairness, reprehensible conduct or acts lacking in good faith such that the court would restrain the unfair party, i.e. the beneficiary, from calling on the bond. The fraud exception generally applies in two ways; when the issuer of a demand guarantee knows that a document, although correct in form, is, in point of fact, false or illegal, he cannot be called upon to recognise such a 25 document as complying with the terms of the demand guarantee. Where the documents or the underlying transaction are tainted with intentional fraud, the guarantee need not be honoured by the bank, even though the documents conform on their face and the court may grant injunctive relief restraining such honour (see *NMC Enterprises v. Columbia Broadcasting System, Inc* 14 U.C.C. REP . SERV. 1427 (N.Y. Sup. Ct. 1974).

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Despite the divergence in approach across the different jurisdictions, the principle of independence continues to be a dominant theory in demand-guarantee practice. With varying outcomes, Courts in different jurisdictions have considered whether the application of the fraud rule should be confined to cases of forged or fraudulent documents or extend to fraud in the underlying transaction. As a general proposition, injunctions will not be granted to prevent a party from calling upon a demand bank guarantee, except in cases of fraud, unconscionability, or breach of a negative stipulation in the underlying contract. Provisions in an underlying contract, which regulate calls on a bond, should only be considered with circumspection where events or conduct are of such degree such as to prick the conscience of a reasonable and sensible man.

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Resort to the underlying contract requires a certain and compelling case to be established; cases where the demand on the guarantee can be said to be “clearly untrue or false,” or “utterly without justification,” or where it is apparent there is “no right to payment.” Cases in which proof is furnished of the absence of any colourable or plausible basis under the underlying contract for the beneficiary to call the guarantee. In *Deutsche Rückversicherung AG v. Walbrook Insurance Co Ltd and others* [1994] 4 All ER 181, Philips J, said:

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If a beneficiary is to be held to be fraudulent if he draws on a letter of credit in circumstances where he is uncertain as to the validity of his right to payment under the underlying contract, the plaintiff seeking to enjoin him will have to do no more than persuade the court that there is a seriously arguable case that the claim under the underlying contract is invalid. This will rob the beneficiary of much of the benefit which a letter of credit is intended to bestow. Where a letter of credit is issued by way of conditional payment under an underlying contract, I do not consider it correct to imply a term into the underlying contract that the beneficiary will not draw on the letter of credit unless payment under the underlying contract is due. On the contrary, I consider that the correct contractual inference that should normally be drawn is that the beneficiary will be entitled to draw on the letter of credit provided that he has a bona fide claim to payment under the underlying contract. If this is correct, there is no basis for the suggestion that the court should apply a different test when considering an application to restrain a beneficiary, rather than a bank, from effecting payment under a letter of credit.

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While the notion of fraud may elude precise definition, it is a concept well known to the law, connoting some aspect of impropriety, dishonesty or deceit. Fraud is not mistake, error in

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interpreting a contract; fraud is something dishonest and morally wrong, resulting in mischief or unnecessary pain. Fraud is defined as the unlawful and intentional making of a misrepresentation that causes actual prejudice or is potentially prejudicial to another. The traditional approach of English courts to the calling of Bank Guarantees is to limit injunctions to situations where there is clear evidence of “fraud,” which under English law can only be proven if it is demonstrated that a false representation has been made (i) knowingly; or (ii) without belief in its truth; or (iii) recklessly without caring as to whether it be true or false (see *Derry v. Peek [1889] 14 App Cas 337*). Fraud in relation to the calling of Performance Bonds has been extensively discussed in cases such as *Enka Insaat Ve Sanayi v. Banca Popolare Dell’Alto Adige [2009] EWHC 2410*, which further confirms the high threshold for proving fraud under English law.

Given that the purpose of the fraud rule is to stop dishonest beneficiaries from abusing the demand guarantee system, this court is inclined to state that the test for fraud is met, not by showing breach or other non-compliance with the terms of the underlying contract, but when strong or compelling evidence is led to show that the documents presented to the Bank are forgeries or contain any express material misrepresentations. As in any other case, where fraud is alleged, it will not be inferred lightly and mere error, misunderstanding, non-compliance with the terms of a guarantee or oversight does not translate into fraud and will not amount to fraud. It should rise to the level of egregious conduct; meaning conspicuously, glaringly, or staggeringly or flagrantly bad, of a nature that would vitiate the very foundation of the bank guarantee. A kind of outrageous conduct which shocks the conscience of the court, such as or where the guarantee is called upon with absolutely no basis in fact. Courts will not permit a guarantee to be used for a purpose for which it was never generated. The facts of the case should depict that fraud committed by the beneficiary is of such nature that it destroys the entire underlying transaction.

In the instant case, as regards; (a) advance Payment Bond No. 010/133/1/000716/2020 for US \$ 3,000,000 dated 30th August, 2021 securing the lending of US \$ 3,000,000 by the 1st respondent to the 1st and 2nd applicants under a loan facility letter dated 11th August 2020; (b) advance Payment Bond No. 010/133/1/000717/2021 for US \$ 1,500,000 dated 2nd February 2021 issued in favour of the 3rd respondent securing the lending of US \$ 1,500,000 by the 3rd respondent to the 1st and 2nd applicants under a loan facility letter dated 11th August, 2020 later updated by the

14th April 2021 facility letter; and (c) advance Payment Bond - Site works No. 010/133/1/000711/2019 for US \$ 800,000 dated 29th July, 2021 issued in favour of 1st respondent securing an advance payment of US \$ 800,000 paid by the 1st respondent to the 1st applicant pursuant to the EPC contract dated 31st March, 2017 between 1st applicant and the 1st respondent
5 in respect of Nyamagasani I Hydro Power Project, the applicants have neither made out a case of fraud nor unconscionability. It has not been shown that the 1st to 3rd respondents could not honestly have believed in the validity of their demand under the guarantees. The application stands dismissed as regards the three bonds.

10 As regards the two performance guarantees, a guarantee terminates; (i) on expiry; (ii) when no amount remains payable under it, or; (iii) on presentation to the guarantor of the beneficiary's signed release from liability under the guarantee (see Article 25 (b) of URDG No. 758). Where a bond contains no express provision fixing the time of release, the bond or guarantee is usually released upon the performance of all the Contractor's obligations under the contract. The validity
15 period for Performance Bond No. 010/132/1/001055/2017 in the sum of US \$ 2,577,020 ran from 31st August, 2021 to 31st December, 2021 while that of Performance Bond No. 010/132/1/001055/2017 in the sum of US \$ 1,322,150 ran from 1st June, 2021 to 31st December, 2021. By the time the 1st and 2nd applicants made calls on the two guarantees on 5th December, 2021, they were left with approximately 26 days to expire. It is counsel for the applicants' submission that the two performance bonds expired with effect from 1st May, 2021 when the 3rd
20 respondent procured operational insurance implying that the contract was fully performed under the terms of the Engineering, Procurement and Construction Turnkey Contracts. It is further counsel for the applicants' submission that the 1st to 3rd respondents declined to issue the takeover certificates for avoidance of commencement of the retention period to run, which
25 conduct is unconscionable.

It would seem from the modern authorities in jurisdictions such as Singapore, Malaysia, Australia and South Africa that in the case of on demand guarantees or performance bonds the courts are now more willing to look beyond the fraud exception and consider unconscionability
30 as a separate and independent ground to allow for a restraining order on the beneficiary. To prove unconscionability, there must be evidence pointing towards unfairness, abusive and/or

dishonest conduct, going beyond a mere breach of contract. Unfairness *per se* does not necessarily amount to unconscionability although in every instance of unconscionability there will be an element of unfairness. Simply showing that there are disputes between the parties pursuant to the underlying contract *per se* will as well not suffice. As in the case of fraud, to
5 establish unconscionability there must be placed before the court manifest or strong evidence of some degree in respect of the alleged unconscionable conduct complained of, not a bare assertion. This additional ground of “unconscionability” should only be allowed with circumspection where events or conduct are of such degree such as to prick the conscience of a reasonable and sensible man.

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Each case has its own specific facts and governing contract, and the court’s decision is largely dependent on the facts of each case. In order to strike a balance between the principle of party autonomy and the court’s concern in regulating dishonest and unconscionable behaviour on the part of beneficiaries, this Court is persuaded to recognise the ground of unconscionability. Before
15 this court, the applicants have presented evidence to show that under Clause 4.2 of the EPC contracts the performance bonds were to remain valid until takeover of the three projects. Upon take over, the performance bonds would lapse. Common to both performance bonds is a stipulation that; “following the receipt by us of an authenticated copy of the taking-over certificate for the whole of the works under clause 10 of the conditions of the Contract, this
20 performance Bond shall be deemed to expire.” Annexures L1 to L4 of the affidavit in rejoinder show that UETCL indicated the projects had reached commercial operation.

In the first letter dated 23rd August, 2021, addressed to The Director, Rwenzori Hydro (Pvt) Ltd, the Managing Director / CEO of Uganda Electricity Transmission Company Ltd (UETCL) wrote
25 as follows;

Reference is made to your letter dated 20th August, 2021 confirming that all necessary tests as stipulated under schedule 5 of the PPA, which was signed on 16th December, 2016 between Rwenzori Hydro (PVT) and UETCL were completed; and subsequently the subject hydro power plant was commissioned successfully on 19th
30 August, 2021. Furthermore, you requested UETCL to acknowledge 19th August, 2021 as the official Commercial Operations Date for the subject plant. This therefore, is to confirm the Commercial Operations Date for the Nyamagasani 1 Hydro power plant as 19th August, 2021.

In the second undated letter addressed to The Director, Kakaka Hydro Power Plant, the Managing Director / CEO of Uganda Electricity Transmission Company Ltd (UETCL) wrote as follows;

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Reference is made to your letter dated 26th November, 2021 and further reference is made to the Power Purchase Agreement (PPA) signed between Greenewus Energy Africa Limited and UETCL dated 06th November, 2017. In this letter, you informed UETCL that the commissioning tests of the subject plant were completed and subsequently the Hydro Power Plant was commissioned successfully on 19th August, 2021. Furthermore, you request UETCL acknowledges 24th November, 2021 as the official Commercial Operations date for the plant. UETCL is pleased to inform you that we have reviewed the test results attached to the said letter, and we are satisfied the plant is now ready for commercial operation. This therefore, is to confirm the Commercial Operations Date (COD) for the Kakaka Hydro power plant as 24th November, 2021.

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The above-mentioned correspondences are evidence of such quality that there is a strong *prima facie* case, or it is a seriously arguable case, that the only realistic inference that can be drawn is that the Nyamagasani 1 Hydro power plant was commissioned on 19th August, 2021 while the Kakaka Hydro power plant was commissioned on 24th November, 2021. Therefore, by the time the 1st to 3rd respondents made calls on the two performance guarantees, they were well aware that the work the two bonds secured, had been substantially and properly performed such that by virtue of the terms contained therein, they would expire upon the 4th respondent receiving an authenticated copy of the taking-over certificate for the whole of the works, a function to be performed by them.

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It is clearly unconscionable to call a performance bond when the work it secures has been substantially and properly performed. I find in this case that the events which led to the calls on the guarantees were of such a degree that they would “prick the conscience of a reasonable and sensible person.” The applicants have satisfied the threshold of a seriously arguable case that the only realistic inference is the existence of unconscionability.

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Consequently in the call made on the two performance guarantees, a false representation was made as regards the applicants’ failure to substantially and properly perform their obligations in

the underlying contract. On basis of the evidence availed to court at this stage, the applicants have furnished proof of unconscionable conduct on the part of the 1st to 3rd respondents forming the basis of their call the performance guarantees. Although the merits of the parties' respective cases and their relative strengths are not to be considered at this stage, the court is of the view
5 that a strong *prima facie* case of unconscionability has been established.

b) Whether the 3rd respondent could not honestly have believed in the validity of its demand under the guarantee.

10 Other than in cases of illegality, a court may only step-in to enjoin a call on a guarantee in the case of fraud on the part of the beneficiary. An injunction will only be granted against a bank if there is a seriously arguable case that the person calling on it, did not honestly believe the validity of the cause (see *United Trading v. Allied Arab Bank [1981] 2 Lloyds 256, at para 257*).
When determining this in interlocutory proceedings, the Courts apply a two-stage test: (a) that
15 the beneficiary could not honestly have believed in the validity of its demand under the guarantee and (b) that the bank knew of the fraud at the time the beneficiary made the demand. It must be seriously arguable on the material available that the only realistic inference is that 3rd respondent could not honestly have believed in the validity of its demand under the guarantee.

20 The correct test is stated in *United Trading Corporation S.A. v. Allied Arab Bank Ltd [1985] 2 Lloyd's Rep 554*, namely; whether it is seriously arguable that, on the material available, the only realistic inference is that the beneficiary could not honestly have believed in the validity of its demands and that the bank was aware of that fact. To successfully rely on fraud, a party has to go further and show that the beneficiary made the call in bad faith, knowing it to be incorrect. If a
25 beneficiary makes a false representation without actual knowledge that it is false, but with no honest belief in its truth, this too could constitute a fraud in terms of the fraud exception. This is because fraud connotes the absence of an honest belief in either the entitlement to claim under the guarantee or in the amount claimed.

30 An injunction will be granted where, for the purpose of drawing on the guarantee, the beneficiary fraudulently presents to the bank documents that contain, expressly or by implication, material

representations of fact that to his knowledge are untrue (see *United City Merchants (Investments) Ltd. v. Royal Bank of Canada*, [1983] 1 A.C. 168 at 183). A material fraudulent misrepresentation occurs where the beneficiary makes a false statement or representation, knowing the representation to be false, or without belief in its truth; or recklessly, careless
5 whether it be true or false. The word “material” means “material to the bank’s duty to pay, so that if the document stated the truth the bank would be obliged to reject the document.

Demanding payment in the knowledge of the absence of material entitlement, constitutes fraud. There must be no honest belief in the validity of a demand for the fraud exception to apply (see
10 *Uzinterimpex JSC v. Standard Bank plc* [2007] 2 Lloyd’s Rep 187 para 107; *Intraco Ltd v. Notis Shipping Corporation (The Bhoja Trader)* [1981] 2 Lloyd’s Rep 256 and *National Infrastructure Development Co Ltd v. Banco Santander SA* [2016] EWHC 2990 Comm para 11). The fraud must be clearly illustrated, or it must be the only realistic inference that may be drawn from the available circumstantial evidence. Conduct whereby the beneficiary’s submission of the demand
15 rests on statements of fact which, to its own positive knowledge, are incorrect or contain misrepresentations, may translate into fraud.

A demand is fraudulent if the applicant knowingly misrepresented the material facts when the demand was made. The threshold to establish unconscionability is lower than to establish fraud.
20 In order to establish fraud, there must be clear evidence of fraud on the part of the beneficiary, and that the fraud is within the knowledge of the bank. Whereas for the exception of unconscionability, it is not required for the guarantor to have knowledge of any fraud or unfairness. All that is required is that the facts show that the beneficiary has acted unconscionably when calling on the bond.

25 c) Whether the 4th respondent knew of the fraud at the time the 1st to 3rd respondents sought payment under the guarantees.

It is necessary that at the time of the calling of the guarantee, the guarantor should have notice of the fraud. Moreover, such fact of notice along with its evidence has to be averred in the
30 application. A guarantor should not pay where a fraud by the beneficiary of the guarantee has been sufficiently brought to its knowledge before payment or demonstrated to a court called on

by the customer of the guarantor to issue an interlocutory injunction to restrain the guarantor from honouring the draft (see *Bank of Nova Scotia v. Angelica-Whitewear Ltd* [1987] 1 SCR 59).

5 The exception of unconscionability relied on by the applicants in the instant case does not require the guarantor to have knowledge of any unconscionability or unfairness. In conclusion therefore, having perused the pleadings of all parties and considered their submissions at length, I find that the applicant has made out a strong *prima facie* case of an unfair and unconscionable calling of the two performance guarantees.

10 iii. Balance of convenience (whether the threatened injury to the applicant outweighs the threatened harm the injunction might inflict on the respondents).

When the court is in doubt considering the outcome of its consideration of the first two factors, the third part of the test involves the court assessing which of the parties would suffer greater
15 harm from the granting or refusal of the injunction pending trial. Unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the applicant has any real prospect of succeeding in his or her claim at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

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This part of the test is referred to as the “balance of convenience.” Balance of convenience means comparative mischief or inconvenience that may be caused to the either party in the event of refusal or grant of injunction. It is necessary to assess the harm to the applicant if there is no injunction, and the prejudice or harm to the respondent if an injunction is imposed. The courts
25 examine a variety of factors, including the harm likely to be suffered by both parties from the granting or refusal of the injunction, and the current *status quo* as at the time of the injunction. The court should then take whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong.” It is thus necessary to weigh in the balance of convenience the public interest as well as the interest of the parties.

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The Court has the duty to balance or weigh the scales of justice by ensuring that the suit is not rendered nugatory while at the same time ensuring that a respondent is not impeded from the pursuit of his or her contractual rights. No doubt it would be wrong to grant a temporary injunction order pending disposal of the suit where the suit is frivolous or where such order
5 would inflict greater hardship than it would avoid. Save in the simplest cases, the decision to grant or to refuse an interlocutory injunction will cause to whichever party is unsuccessful on the application, some disadvantages which his or her ultimate success at the trial may show he or she ought to have been spared and the disadvantages may be such that the recovery of damages to which he or she would then be entitled would not be sufficient to compensate him or her fully for
10 all of them.

The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his or her succeeding at the trial is always a significant factor in assessing where the balance of convenience lies. The governing principle is that the court should
15 first consider whether if the applicant were to succeed at the trial in establishing his or her right to a permanent injunction, he or she would be adequately compensated by an award of damages for the loss he or she would have sustained as a result of the respondent's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the
20 respondent would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the applicant's claim appears to be at this stage.

If, on the other hand, damages would not provide an adequate remedy for the applicant in the event of his succeeding at the trial, the court should then consider whether, on the contrary
25 hypothesis that the respondent were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated by the applicant for the loss he or she would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages would be an adequate remedy and the applicant would be in a financial position to pay them, there would be no reason upon this ground to refuse
30 an interlocutory injunction.

Even if a party is able to establish the fraud exception, it still faces an insuperable difficulty, in that it will have an adequate remedy against the guarantor in damages if it pays despite being on notice of fraud. By contrast, an injunction might cause greater damage to the guarantor than the party seeking the injunction could pay on their undertaking as to damages. In these
5 circumstances, the balance of convenience will almost always be in favour of allowing the guarantor to pay. The balance of convenience will almost always militate against the grant of an injunction. The reasons for this disinclination become readily understandable when one contrasts the uncertainty in which a court finds itself with respect to the merits at the interlocutory stage, with the sometimes far-reaching albeit temporary practical consequences of an injunction, not
10 only for the parties to the litigation but also for the public at large. In any event, the beneficiary, who by agreeing to take a performance bond instead of a cash deposit already agreed to take on more risk for the contractor to have more cash on hand to perform the contract, will not be deemed to be acting unconscionably when he exercises his right to call on the bond.

15 Court will generally grant an injunction to restrain a beneficiary from breaching an express obligation contained in the underlying commercial agreement not to make demand other than in defined circumstances (see *Shapoorji Pallonji & Co Pvt Ltd. v. Yumn Ltd and Standard Charter Bank [2021] EWHC 862 (Comm) at [20]*). Similarly, where a beneficiary can only make a call on the bond by setting up a state of affairs which have a strong likelihood of being shown to be
20 the direct result of his own deliberate breach of contract, the injunction will issue. For example in *Doosan Babcock Ltd (formerly Doosan Babcock Energy Ltd) v. Comercializadora de Equipos y Materiales Mabe Limitada (previously known as Mabe Chile Limitada) [2013] EWHC 3010 (TCC); [2013] EWHC 3201 (TCC)*, the two performance guarantees the subject of the dispute were “on-demand” guarantees, so the banks concerned were required to pay on receipt of a
25 demand by MABE that complied with the requirements of the guarantees. The application before Court arose out of a contract by which, essentially, the Claimant agreed to supply two boilers for a power plant in Brazil. The performance guarantee in relation to each unit would expire, either on the issue of a Taking-Over Certificate for that unit or, under the letters of guarantee, 31st December, 2013, whichever was earlier.

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The contractor alleged that the employer was in breach of contract by not issuing taking-over certificates. The Claimant's case was that it was entitled to Taking-Over Certificates when the boilers were taken into use by MABE, which it said happened on 30th November, 2012 for Unit 1 and on 10th May, 2013 for Unit 2. By two letters dated 10th July, 2013 the Claimant requested the
5 issue of the Taking-Over Certificates. MABE refused, relying on a provision in the contract which, it said, permitted it to withhold a Taking-Over Certificate where the unit had been used by the employer only as a temporary measure in accordance with the terms of the contract or by agreement of the parties. The Claimant submitted that this ground for withholding the certificates was spurious. The evidence, which in this respect is largely a matter of public record, showed
10 that the units had been in commercial operation for several months, since when they had exported more than 7,500 hours of power at various loads to the local grid.

Edwards-Stuart, J found that it did not matter whether the "Time for Completion" under the contract was defined as delivery of the equipment or the date when Unit 1 went into commercial
15 operation, since both events occurred (for both units) well before the Taking-Over Certificates were requested in July, 2013. To decide otherwise would have meant that the consequence of the failure to meet one of the performance requirements would be that the Works would never achieve completion and the Claimant would never be entitled to Taking-Over Certificates. In the Court's view, it was strongly arguable that the remedy for non-achievement of the performance
20 specification was the payment of the specified sum by way of liquidated damages and nothing else. The Claimant had a strong case that it was entitled to Taking-Over Certificates at the time when it requested them in July, 2013. If all the Claimant needed to show, in order to cross the threshold for interim relief, was that it had a strong case to the effect that MABE's failure to issue Taking-Over Certificates was (and is) a breach of contract, then it has done so. The
25 Claimant was entitled to interim relief upon showing that it has a realistic prospect of showing that MABE's refusal to issue the Taking-Over Certificates was not done with a *bona fide* belief in its entitlement to do so.

The Court was of the considered view that the Claimant had a strong case that MABE's refusal
30 to issue Taking-Over Certificates for Units 1 and 2 was a breach of contract. It is as a result of that breach, and only that breach, that MABE was in a position to make a call on the

performance guarantees. If MABE had issued the certificates, the guarantees would have expired and so there would be no guarantee on which to make a call. There had been no suggestion in the proceedings that MABE intended to take either of the units out of commercial operation. In those circumstances the Court had difficulty in seeing how anyone could in good faith assert that the taking into use of the units by MABE in July, 2013 was only a temporary measure. The Court therefore granted an interim injunction preventing the employer under the amended FIDIC contract from calling the two performance bonds.

In that case, the continuing validity of the bond was solely the result of the absence of the Taking-Over Certificates, which in turn was said to be the result of the MABE's wrongful refusal to issue them. The Court found that there was a strong case that MABE's failure to issue the Taking-Over Certificates was a breach of contract. There was also a strong case that MABE was seeking to take advantage of its own breach of contract to derive a benefit, namely the continuing existence of the performance guarantees. No man can take advantage of his own wrong (see *Alghussein Establishment v Eton College [1988] 1 WLR 587*). If the contractor was unable to perform because the employer failed to provide finance, it would be wrong if the court was not entitled to have regard to the terms of the underlying contract (see *Potton Homes Ltd v. Coleman Contractors Ltd(1984) 28 BLR 19*). The Claimant had a realistic prospect of establishing that MABE's refusal to issue the certificates on the ground that the operation of the units was a temporary measure was not a *bona fide* position.

Similarly in the case at hand, the operative words of the performance guarantee Bond No. 010/132/1/001055/2017 for US \$ 2,577,020 dated 29th July, 2021 and Performance Bond No. 010/132/1/001054/2017 for US \$ 1,322,150 dated 25th May, 2021 show that their extension had to be initiated by the 1st to 3rd respondents, since they provide that;

.....the Beneficiary may require the principal to extend this guarantee if the obligations to be performed by the principal under the contract have not been performed by the date 28 days prior to the expiry date. We undertake to pay you such guaranteed amount upon receipt by us, within such period of 28 days, of your demand in writing and your written statement that the principal has not performed its obligations for reasons not attributable to the Beneficiary, and that this guarantee has not been extended.

On 30th November, 2021 the 1st and 2nd applicants wrote to the 4th respondent requesting the 4th respondent to extend the bonds 28 days before the expiry. It is further counsel for the applicants' submissions that although both performance bonds imposed on the 1st to 3rd respondents the duty
5 to seek their extension when deemed necessary, and whereas the 1st to 3rd respondents were at all time aware that the 4th respondent would need to seek approval of the regulator before extension of the guarantees could be done, it is only on 30th November, 2021 that the 1st to 3rd respondents notified the applicants of the need to procure an extension of the two bonds.. It is contended therefore, a submission I agree with, that the extension was sought in bad faith since renewal was
10 sought belatedly. Nevertheless, on the same date the 1st applicant wrote to the 4th respondent requesting for extension of the two bonds. On 2nd December, 2021 the 4th respondent made an undertaking to have them renewed. It is thus contended that it was unconscionable for the 1st to 3rd respondents to have relied on circumstances of their own making to make a call on the bonds since it was practically impossible to procure that extension timeously.

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Having found that the applicants have made out a strong *prima facie* case of an unfair or unconscionable calling of the guarantee, I find that the balance of convenience is in favour of the applicant. In light of all the foregoing, overall the “balance of convenience” or the “balance of justice” lies in favour of the grant of the interlocutory injunction. The application is accordingly
20 allowed. A temporary injunction hereby issues restraining the respondents, the 4th respondent its agents, receivers, managers, servants, assignees or any other person acting under or pursuant to their authority, from effecting payment on demand on Performance Bond No. 010/132/1/001055/2017 for US \$ 2,577,020 dated 29th July, 2021 issued in favour of the 1st respondent securing the 1st respondent's performance of its contractual obligations as Contractor
25 pursuant to the EPC contract dated 3rd March, 2017 between the 1st applicant and the 1st respondent in respect of Nyamagasani I Hydro Power Project; and Performance Bond No. 010/132/1/001054/2017 for US \$ 1,322,150 dated 25th May, 2021 issued in favour of the 2nd respondent securing the 1st applicant's performance of its contractual obligations pursuant to the EPC contract dated 31st March, 2017 between the 1st applicant and the 2nd respondent in respect
30 of Nyamagasani II Hydro Power Project until final determination and disposal of the main suit, or further orders of this Court.

For the avoidance of doubt on the other hand, as regards; (a) advance Payment Bond No. 010/133/1/000716/2020 for US \$ 3,000,000 dated 30th August, 2021 securing the lending of US \$ 3,000,000 by the 1st respondent to the 1st and 2nd applicants under a loan facility letter dated 11th August 2020; (b) advance Payment Bond No. 010/133/1/000717/2021 for US \$ 1,500,000 dated 2nd February 2021 issued in favour of the 3rd respondent securing the lending of US \$ 1,500,000 by the 3rd respondent to the 1st and 2nd applicants under a loan facility letter dated 11th August, 2020 later updated by the 14th April 2021 facility letter; and (c) advance Payment Bond - Site works No. 010/133/1/000711/2019 for US \$ 800,000 dated 29th July, 2021 issued in favour of 1st respondent securing an advance payment of US \$ 800,000 paid by the 1st respondent to the 1st applicant pursuant to the EPC contract dated 31st March, 2017 between 1st applicant and the 1st respondent in respect of Nyamagasani I Hydro Power Project, the applicants have neither made out a case of fraud nor unconscionability. It has not been shown that the 1st to 3rd respondents could not honestly have believed in the validity of their demand under the guarantees. The application stands dismissed as regards the three advance payment bonds. The costs of this application will abide the result of the suit.

Delivered electronically this 13th day of March, 2023
Mubiru.....

20

.....**Stephen**

Stephen Mubiru
Judge,
13th March, 2023.