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Case No: HC07C00272

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Appeal Ref: CH/2007/APP/0637
Royal Courts of Justice
Strand, London, WC2A 2LL

13 November 2007

B e f o r e :

THE HONOURABLE MR JUSTICE LEWISON

Between:

(1) FRANSINA JOHANNA VAN DER MERWE **(2) GERRIT LE ROUX VAN DER MERWE**	**Appellants/ Defendants**
- and -	
IIG CAPITAL LLC	**Respondent/ Claimant**

Mr Matthew Collings QC and Mr Adam Smith (instructed by HL Miller & Co.) for the Defendants/Appellants
Mr Paul McGrath and Mr Jeremy Brier (instructed by Jones Day) for the Claimant/Respondent.
Hearing dates: 15th October 2007

Mr. Justice Lewison :

Introduction

1. Mr and Mrs Van Der Merwe have been in business together for 30 years. They began their business careers in South Africa but moved to the UK in 2002. Before their move they had formed a company, together with other investors, to market flowers and to export vegetables abroad. On their move to the UK they bought a company called Hurst Parnell & Co Ltd, which was in the vegetable business. But they realised that its business had not been well run. So in 2004 they formed a new company called Hurst Parnell Import & Export Ltd ("HPIE") to import fresh fruit and vegetables under the "Fair Lady" brand. Mr and Mrs Van Der Merwe are directors of HPIE. It is registered in England and Wales.

2. In 2004 Mrs Van Der Merwe came across IIG Capital LLC ("IIG"), a company registered in New York and carrying on business there. She understood that it was interested in financing business start ups by trade finance and invoice discounting. IIG began affording finance to HPIE. However, the relationship had its ups and downs and Mr and Mrs Van Der Merwe transferred HPIE's business to Barclays. But in 2006 IIG recaptured HPIE's financing and a series of documents were entered into. All the documents were executed on the same day: 30 June 2006. One of those documents is at the heart of this dispute.

3. The first of the relevant documents is a loan agreement made between IIG and HPIE. The loan agreement contains a number of warranties given and obligations undertaken by HPIE. These include (for example) warranties about the accuracy of HPIE's accounts and financial statements (clause 8); obligations to provide regular accounts (clause 10.1); obligations to maintain insurance (clause 10.1.9); obligations not to enter into transactions otherwise than in the normal course of business (clause 11.4) and not to make loans to affiliates (clause 11.6). Clause 27.1 of that agreement said that the agreement was to be governed by New York Law. The second of the relevant documents was a debenture granted over the assets of HPIE. The third was a document described as a guarantee and signed by Mrs Van Der Merwe. I will refer to it as the guarantee, without prejudice to the contention of either party. Mr Van Der Merwe signed an identical document, although it was not in evidence.

4. On 12 January 2007 IIG demanded US$30,303,576 from HPIE said to be due under the loan agreement; and on the same day appointed administrators over HPIE. HPIE did not pay the amount demanded; and on 16 January 2007 IIG sent letters to Mr and Mrs Van Der Merwe reciting the

failure of HPIE to pay and certifying that the amount due and payable by each of them under the guarantee was US$30,303,576. The letter demanded payment within 2 days. Mr and Mrs Van Der Merwe have not paid.

5. The principal issue I have to decide is whether, in resisting IIG's demand for payment under the guarantee, Mr and Mrs Van Der Merwe are entitled to raise defences that could have been raised by HPIE in resisting a demand made against it for repayment under the loan agreement. It is accepted that if they can, then whether those alleged defences are good ones can only be decided at trial. However, on an application for summary judgment Master Teverson decided that the terms of the guarantee prevented Mr and Mrs Van Der Merwe from relying on such defences. He held that once IIG had certified what was due under the guarantee Mr and Mrs Van Der Merwe were contractually bound to pay the amount certified. Mr and Mrs Van Der Merwe appeal against that decision, with the Master's permission.

The terms of the guarantee

6. The guarantee begins by describing itself as "THIS GUARANTEE" and Mrs Van Der Merwe is described as "the Guarantor". Recital (A) records the grant of the facility to HPIE (described as "the Borrower") of US$23,000,000. Recital (B) says that it was a condition precedent to the grant of the facility that the "Guarantor enters into this Guarantee of the obligations of the Borrower to the Lender under the [Loan] Agreement". Recital (C) says that the guarantee is an "all monies" guarantee.

7. The document contains a single definition in clause 1.2. The defined term is "Guaranteed Monies" and the definition is:

> "(i) all moneys and liabilities (whether actual or contingent) which are now or may at any time hereafter be due, owing, payable, or expressed to be due, owing or payable, to the Lender from or by the Borrower (ii) all interest…costs, commissions, fees and other charges and expenses which the Lender may charge against the Borrower; and (iii) all legal and other costs, charges and expenses which the Lender may incur in enforcing or obtaining, or attempting to enforce or obtain, payment of any such moneys…"

8. Clause 2 contains the main payment obligation and reads:

> "In consideration of the Lender agreeing to enter into the Agreement, the Guarantor as principal obligor and not merely as surety unconditionally and irrevocably:
>
> 2.1 guarantees to the Lender the due and punctual payment of the Guaranteed Moneys and agrees that, if at any time or from time to time any of the Guaranteed Moneys are not paid in full on their due date … it will immediately upon demand unconditionally pay to the Lender the Guaranteed Moneys which have not been so paid
>
> 2.2 As an original and independent obligation under this Deed, the Guarantor shall
>
> 2.2.1 indemnify the Lender and keep the Lender indemnified against any loss … incurred by the Lender as a result of a failure by the Borrower to make due and punctual payment of any of the Guaranteed Monies …"

9. Clause 3 is headed "Preservation of Guarantee" and provides:

> "3.1 The Lender shall be at liberty without thereby affecting its rights hereunder at any

time at its absolute discretion and with or without the consent or knowledge of or notice to the Guarantor:

3.1.1 to give time to any Obligor for the payment of all or any sums due or payable under the Agreement or any other Finance Document;

3.1.2 to neglect or forbear to enforce payment of all or any sums due or payable under the Agreement or any other Finance Document and (without prejudice to the foregoing) to grant any indulgence or forbearance to and fail to assert or pursue or delay in asserting or pursuing any right or remedy against any Obligor thereunder;

3.1.3 to accept, vary, exchange, renew, abstain from perfecting, or release any other security now held or to be held by it for or on account of the Financial Indebtedness;

3.1.4 to amend, add to or vary the terms of the Finance Documents;

3.1.5 to compound with, accept compositions from and make any other arrangements with any other Obligor.

3.2 This Guarantee and the rights of the Lender hereunder shall not be affected by:

3.2.1 the appointment of a receiver, trustee or similar officer of any other Obligor, its undertaking or all or any of its or his asset.

3.2.2 Any alteration of the status of any other Obligor or any defective or irregular exercise of the powers of the Borrower to raise finance

3.2.3 The insolvency, bankruptcy, death, incapacity, winding up, liquidation or dissolution of any other Obligor;

3.2.3 Any failure by the Lender to take any other security for all or any part of the indebtedness agreed to be taken by the Lender pursuant to the Finance Documents or any total or partial invalidity, voidability or unenforceability of any such security;

3.2.4 The doing by the Lender of anything referred to in clause 3.1 above; or

3.2.5 Any other act or circumstance which (apart from this provision) would or might constitute a legal or equitable defence for or discharge of a surety or guarantor,

and this Guarantee may be called and/or enforced without steps or proceedings first being taken against any other Obligor."

10. Clause 4.2 provided that:

"A certificate in writing signed by a duly authorised officer or officers of the Lender stating the amount at any particular time due and payable by the Guarantor under this Guarantee shall, save for manifest error, be conclusive and binding on the Guarantor for the purposes hereof."

11. Clause 5 said that the guarantee was "a continuing guarantee" and would remain in force until all sums "due from the Borrower under the Finance Documents have been paid in full". Clause 7.3 prevented the Guarantor from asserting any set-off against the Borrower. Finally, clause 14 said that the guarantee was to be governed by English law.

The Master's judgment

12. The Master summarised IIG's case as being that liability under the guarantee arose upon service on Mr and Mrs Van Der Merwe of a demand in proper form, without the need to prove any liability under the underlying loan agreement. His general approach to construction was that he should construe the guarantee in its factual and commercial setting without any preconceptions as to what it was. Having said that, he took into account the fact that Mr and Mrs Van Der Merwe were private individuals rather than banks. This brought into play "a strong presumption" against interpreting the guarantee as if it were "a performance bond or on demand guarantee issued by a bank". He then asked himself whether there were sufficient indications in the wording of the guarantee construed in its factual and commercial context to displace that presumption. He decided that there were. In essence, the Master held that there were six features of the overall transaction that led to that conclusion. They were:

i) the fact that IIG and HPIE were in different jurisdictions;

ii) the fact that the parties provided that the loan agreement was to be governed by New York law whereas the Guarantees were to be governed by English law;

iii) the inclusion in clause 2 of the guarantees of a "principal debtor" clause;

iv) the express inclusion in clause 2 of the guarantees that the Lender is paid "immediately upon demand unconditionally";

v) the reference in the definition of the "Guaranteed Moneys" to the words "or expressed to be due, owing or payable";

vi) the presence of clause 4.2 in the context of the guarantees read as a whole.

Categorisation and construction

13. Sometimes it is necessary to decide whether an agreement falls within a particular legal category. For example statutory security of tenure may be conferred on someone who is a tenant, but not on someone who is not. Or the application of the assets of an insolvent company under insolvency legislation may differ according to whether a security is a fixed charge or a floating charge. In this kind of case, the ultimate inquiry is whether the rights and obligations created by an agreement fall within the legal category created by an external rule of law; in other words whether a particular label is the right one to attach to the instrument in question. In such a case, as Lord Millett explained in *Agnew v Commissioner of Inland Revenue* [2001] 2 A.C. 710 the process has two stages:

> "In deciding whether a charge is a fixed charge or a floating charge, the court is engaged in a two-stage process. At the first stage it must construe the instrument of charge and seek to gather the intentions of the parties from the language they have used. But the object at this stage of the process is not to discover whether the parties intended to create a fixed or a floating charge. It is to ascertain the nature of the rights and obligations which the parties intended to grant each other in respect of the charged assets. Once these have been ascertained, the court can then embark on the second stage of the process, which is one of categorisation. This is a matter of law. It does not depend on the intention of the parties. If their intention, properly gathered from the language of the instrument, is to grant the company rights in respect of the charged assets which are inconsistent with the nature of a fixed charge, then the charge cannot be a fixed charge however they may have chosen to describe it. A similar process is

involved in construing a document to see whether it creates a licence or tenancy."

14. In the present case there is no external rule of law which is dependent on the particular label that is attached to the instrument. The question is: what rights and obligations have the parties created by the words of the instrument, construed in its factual and commercial context? In other words, I am concerned with the first stage only of the two-stage process.

The case law

15. Although both Mr Collings QC, who appeared for Mr and Mrs Van Der Merwe, and Mr McGrath, who appeared for IIG, recognised that the correct interpretation of the instrument in issue depended on its own wording and context, I was nevertheless referred to a number of decided cases.

16. I begin with *Gold Coast Ltd v Caja de Ahorros del Mediterraneo* [2003] 1 All ER (Comm) 142. The instruments in issue were refund guarantees given by ten Spanish banks in support of a buyer's obligation to make potentially refundable payments under a shipbuilding contract. Condition 1 of the guarantee said:

> "We shall pay any amount payable under this Guarantee upon receipt of a certificate issued by LLOYDS BANK PLC stating the amount of the Instalment paid to the Builder under the Agreements, the date of such payment that you have become entitled to a refund pursuant to the Agreements and that the Builder has not made such refund."

17. Condition 5 said that variations or waivers would not affect the liability of the guarantors. Tuckey LJ said that there was no standard practice in relation to the nature of such guarantees. In other words the question was one of construction rather than classification. He accepted the submission that the instrument should be construed "by looking at it as a whole without any preconceptions as to what it is" (¶ 15). He pointed out that the payment condition required a certificate but made no reference to arbitration or underlying liability under the shipbuilding contract. Provided, therefore, that the bank certified a default, the guarantors had to pay. However, he also said that condition 5 gave the guarantors their best point, although it did not tip the balance. Hale and Simon Brown LJJ agreed.

18. Mr Collings relied in particular on the decision of the Court of Appeal in *Marubeni Hong Kong Ltd v Mongolian Government* [2005] 1 WLR 2497, which the Master also took as his starting point.

19. In *Marubeni* a Hong Kong company agreed to supply a Mongolian company with textile plant and machinery. A form of guarantee was provided by the Mongolian Government. The relevant terms of the letter were as follows:

> "In consideration of your entering into the deferred payment sales contract … the undersigned Ministry of Finance of Mongolia unconditionally pledges to pay to you upon your simple demand all amounts payable under the agreement if not paid when the same becomes due … and further pledges the full and timely performance and observance by the buyer of all the terms and conditions of the agreement. Further Ministry of Finance undertakes to hold indemnify and hold you harmless from and against any cost and damage which may be incurred by or asserted against you in connection with any obligations of the buyer to pay any amount under the agreement when the same becomes due and payable …"

20. Refinancing arrangements were entered into between the two companies. The Mongolian Government contended that the arrangements amounted to a material variation, so that its obligations were discharged. This contention succeeded at first instance and the Claimant appealed.

Counsel described the issue that arose on the appeal as follows:

> "It turns on the correct characterisation of the MMOF letter: was it an unconditional independent promise by the Mongolian Government to pay on demand all amounts payable under the sales contract (that is a demand bond), or was it a secondary or conditional promise to act as a surety? In the former case the obligation to pay arises upon a simple demand or demand supported by a specified document. In the latter case, not only must the claimant prove the actual indebtedness of the debtor, but the guarantor has all the defences available to the debtor, and is discharged automatically (under the rule in *Holme v Brunskill* (1878) 3 QBD 495) if there is any variation of the arrangements with the principal debtor without his consent which might prejudice his interests."

21. The argument for Marubeni was that where in international transactions a bond or guarantee is expressed to be payable upon demand, in the absence of clear words indicating that liability under it is conditional upon the existence of liability on the part of the account party in connection with the underlying transaction, the guarantee is intended and should be construed as an independent guarantee entitling the beneficiary to payment simply against an appropriately worded demand accompanied by such other documents (if any) as the guarantee may require. (¶ 13) This argument was said to be supported by previous caselaw. The opposing argument for the Mongolian Government was that outside the field of first demand instruments or performance bonds issued by banks, the courts have not been willing, in the absence of clear words, to interpret documents in which a party undertakes obligations in relation to an agreement between two other parties as imposing unconditional primary liability. The mere fact that the obligation of the guarantor is expressed to be to pay "on demand", and without conditions, is insufficient to create primary liability. (¶ 17) This argument was also said to be supported by previous caselaw. It will be seen, however, that the argument all turned on the effect to be given to the obligation "to pay to you upon your simple demand all amounts payable under the agreement."

22. Carnwath LJ referred to difficulties of terminology and referred to the (almost) indiscriminate use of the phrases "performance bond", "performance guarantee", "demand guarantee", "demand bond" and "first demand bond". He referred to a contrast between an "independent guarantee" and a "true contract of guarantee" or suretyship. The former imposes a primary liability while the second imposes a secondary liability. This discussion seems to me to focus on what is the appropriate label to attribute to different kinds of document. Carnwath LJ then said (¶ 23) that it cannot be assumed that cases relating to banking instruments provide a useful guide to construing guarantees given outside the banking sphere. Commenting on the previous caselaw cited in support of Marubeni's argument Carnwath LJ said (¶ 28):

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

23. Commenting on the *Gold Coast* case Carnwath LJ said:

> "Mr Howard relied on the court's disregard of the term "guarantee". However, the other features of the instrument were sufficient to displace the ordinary sense of that term. In particular, the provision for a bank certificate as a trigger for payment was a clear indication that the obligation to pay was independent of any need to establish default

under the main contract."

24. Thus in the opinion of Carnwath LJ the fact that a bank certificate was the trigger for payment was a "clear indication" that the obligation to pay was independent (i.e. a primary obligation).

25. Carnwath LJ then considered the letter in the appeal before him. He pointed out that it described itself as a guarantee, although that was not decisive. He said that there was no language in the letter appropriate to a demand bond; and that the transaction was outside the banking context. That created a strong presumption against Marubeni's interpretation. Marubeni's interpretation, it will be recalled, was that where in international transactions a guarantee is expressed to be payable upon demand, in the absence of clear contrary words it should be construed as an independent guarantee entitling the beneficiary to payment simply against an appropriately worded demand. Thus what Carnwath LJ is saying is that outside a banking context there is a strong presumption against giving the words "on demand" the effect of creating an independent primary obligation. Carnwath LJ then considered the effect of such a presumption. He said (¶ 31):

> "The question then becomes whether there are sufficient indications in the wording of the instrument to displace that presumption. Mr Howard relied on the words "unconditionally pledges" and "simple demand". However, they are qualified by the following words, which indicate that the obligation only arises if the "amounts payable under the agreement (are) not paid when the same becomes due". As Cresswell J said, this is wording appropriate to a secondary obligation, that is one conditional upon default by the buyer. It is true that in *Esal* [1985] 2 Lloyd's Rep 546 similar wording was held insufficient to displace the ordinary effect of what was admittedly a performance bond. However, here the starting-point is different, and there is no reason for reading the words in other than their ordinary meaning."

26. Three points emerge from this passage. First, the question is whether there are "sufficient indications" to displace the presumption. But since the presumption is a strong one, the indications must themselves be cogent. Second, although Carnwath LJ refers to indications in "the wording of the instrument", it seems to me that some reliance could be placed, in an appropriate case, on the background to the transaction. Third, words should be given their ordinary meaning.

27. I was referred to previous cases on two other topics. The first was the significance of describing a surety as a "primary obligor". In *Heald v O'Connor* [1971] 1 WLR 497 a surety for a company's obligations under a debenture promised:

> "if and whenever the company makes default in payment of any such principal money [to] pay the amount thereof on demand provided that the liability hereunder of the guarantor shall be as a primary obligor and not merely as a surety".

28. Fisher J said:

> "The obligation is to pay the principal moneys to become due under the debenture if and whenever the company makes default. The statement of claim refers to it as a guarantee and pleads the company's default and the consequent liability of the guarantor. The only straw for the plaintiff to clutch is the phrase "as a primary obligor and not merely as a surety" but that, in my judgment, is merely part of the common form of provision to avoid the consequences of giving time or indulgence to the principal debtor and cannot convert what is in reality a guarantee into an indemnity."

29. Commenting on that case in *General Produce Co v United Bank Ltd* [1979] 2 Lloyd's Rep 255 (which contained a similar provision) Lloyd J said:

"I agree with Mr. Justice Fisher that it is common to find a provision such as is found here in par. 5 in guarantees, and I certainly do not hold that it automatically converts every guarantee into an indemnity. But equally its operation is not confined to the consequences of giving time or other indulgence to the principal debtor, and I very much doubt if Mr. Justice Fisher intended so to confine it. In the present case it is combined with a provision for the continuance of the bank's rights despite the release of the principal debtor's liability by operation of law. The release of the principal debtor normally discharges the guarantor as does a binding agreement to give time. The words in par. 5 seem to me equally apt to enable the guarantor's liability to continue as if he were the principal debtor in either case. That does not necessarily mean that he is to be regarded as the principal debtor for all purposes from the inception of the guarantee but only that the creditor is entitled to treat him as the principal debtor in certain events."

30. The second topic on which I was shown caselaw was the effect of a certification clause such as clause 4.2. On this I was shown the decision of the Court of Appeal in *Bache & Co (London) Ltd v Banque Vernes et Commerciale de Paris SA* [1973] 2 Lloyd's Rep 437. Commodity brokers on the London Commodity Exchange demanded a bank guarantee before entering into buying and selling transactions on behalf of their customer, a French trading company. The defendants, who were the trading company's bankers, gave the guarantee which contained a conclusive evidence clause. The clause provided:

"Notice of default shall from time to time, be given by [plaintiffs] to [defendants] and on receipt of any such notice [defendants] will forthwith pay . . . the amount stated therein as due, such notice of default being as between [plaintiffs and defendants] conclusive evidence that [defendants'] liability hereunder has accrued in respect of the amount claimed."

31. Lord Denning MR said:

"The question is whether that conclusive evidence clause is conclusive against the party who signs the guarantee. Is he compelled to pay under it even though he alleges that the accounts are erroneous? As matter of principle I should think the clause is binding according to its terms."

32. Having considered previous authority, he held that such a clause was not contrary to public policy and took effect according to its terms. Megaw LJ agreed, saying that the words were "perfectly clear". Scarman LJ also agreed. He said:

"[I]t is, I think, clear beyond dispute that the words "conclusive evidence" in this contract of guarantee are to be a bar to any evidence being tendered to show that the statements in the notice of default were not correct."

33. In *Balfour Beatty Civil Engineering Ltd v Technical & General Guarantee Co Ltd* (1999) 68 Con LR 180 the guarantor undertook to pay on first demand on receipt of a certificate:

"Stating that the Sub-Contractor has failed to fulfil its obligations under the said Sub-Contract and that the sum demanded is due and payable and such demand shall be accepted by the Surety as conclusive evidence that the sum of demand is due hereunder."

34. Waller LJ said:

"This bond contains language which seems to me to make it absolutely clear that this is a bond intended to be met without the surety having either the right or the duty to make any detailed inquiry provided the demand letter conforms with the conditions of the bond. It requires payment on 'first demand'; it provides that the statements required to be made should be conclusive evidence of the facts stated therein. That is the clearest possible indication that as between the surety, and the promisee, there will be no investigation into the underlying facts."

35. Commenting on this kind of clause O'Donovan and Phillips say in The Modern Contract of Guarantee English Edition (2003) (¶ 5-107):

> "The extraordinary effect of … the more usual conclusive evidence clause, in the context of a guarantee, however, is that a guarantee which is not phrased in terms of a performance bond payable simply on demand without proof of default becomes analogous to such a guarantee as a result of the inclusion of this clause."

36. They point out, however, that although in the case of a performance bond the issuing bank will usually have the benefit of counter-security, where the guarantor is a private person, such as a company director, there will usually be no such security.

Discussion

37. I do not think that it is helpful to consider what label to attach to the instruments in this case. The question is: what obligations did Mr and Mrs Van Der Merwe assume by entering into them? That is to be ascertained by considering the meaning that the instruments would convey to a reasonable reader with the background knowledge of the parties. In considering that question it is necessary to pay attention to the instrument as a whole and not to dissect it into its constituent parts, even though, for the purposes of exposition, the points need to be dealt with one by one. In the end, it is the overall effect of the instrument that counts. One pointer towards a particular conclusion, not decisive in itself, may in combination with other pointers lead ineluctably towards a particular conclusion.

Background

38. I begin with the background. Mr Collings points out that Mr and Mrs Van Der Merwe are individuals and company directors. They are not especially wealthy. There can never have been any expectation that they would be able to satisfy even a proportion of any demand made on the guarantees. He submits, therefore, that a guarantee payable simply on production of the relevant documents would not be equivalent to cash, which is the usual objective of a performance bond issued by a bank. I do not doubt that the ability of Mr and Mrs Van Der Merwe to pay is less than that of a bank. That is true whether the instrument imposes a primary or a secondary liability. But it does not follow that there is no advantage to IIG in having a mechanism for enforcing payment without having to investigate the underlying merits of any claim against HPIE. This circumstance brings into play the strong presumption that a guarantee under which the obligor promises to pay "on demand" does not without more impose a primary liability. But it does no more than that.

39. Next Mr Collings points out that HPIE is registered in England and Wales, the same jurisdiction in which Mr and Mrs Van De Merwe live and that IIG has a debenture over HPIE's assets. Thus he says that it is not the case that the borrower is in some "difficult foreign jurisdiction" where he could evade payment. I do not consider that this is a feature of any weight. On demand bonds are well known in a purely domestic context, particularly in the context of building and engineering projects. They are not restricted to international transactions. I would not, therefore have attached the weight to this circumstance that the Master did.

40. Next Mr Collings points out that the liability guaranteed was simply the repayment of a loan. I cannot see that anything of significance turns on this. Lenders, just as much as suppliers of machinery, seek the comfort of security.

41. Mr Collings then says that there is no counter-bond from HPIE to Mr and Mrs Van Der Merwe. There is therefore no express mechanism for an eventual accounting between the parties. I am not at all sure that the absence of any arrangement between Mr and Mrs Van Der Merwe and HPIE is something of which IIG would necessarily have been aware at the date of the financing package, but no point was taken about this. I agree, therefore, that this is a potentially relevant circumstance. Mr Collings drew attention to the decision of the House of Lords in *Trafalgar House Construction (Regions) Ltd v General Surety & Guarantee Co Ltd* [1996] 1 AC 199 in which the House of Lords viewed with scepticism a submission that it was an implied term of a bond that any overpayment would be repaid. However, in *Comdel Commodities Ltd v Siporex Trade SA* [1997] 1 Lloyd's Rep 424 Potter LJ said:

> "Those authorities are to the effect that it is implicit in the nature of a performance bond that, in the absence of some clear words to a different effect, when the bond is called, there will at some stage in the future be an 'accounting' between the parties to the contract of sale in the sense that their rights and obligations will finally be determined at some future date. The bond is a guarantee of due performance; it is not to be treated as representing a pre-estimate of the amount of damages to which the beneficiary may be entitled in respect of the breach of contract giving rise to the right to call for payment under the bond. If the amount of the bond is not enough to satisfy the seller's claim for damages, the buyer is liable to the seller for damages in excess of the amount of the bond. On the other hand, if the amount of the bond is more than enough to satisfy the seller's claim for damages, the buyer can recover from the seller the amount of the bond which exceeds the seller's damages.
>
> It does not appear that there is anything in the words of the contracts of sale in this case to exclude the implication that there would at some stage be an 'accounting' between the parties in the sense that their rights and obligations would be finally determined at some future date."

42. Based on this and other authorities Andrews & Millett on Guarantees (4th ed ¶ 16-034) say in the absence of express provision to the contrary the beneficiary of a performance bond who has been paid more than his due under the underlying transaction must repay the surplus. They comment:

> "The precise legal route by which the obligation to account arises probably does not matter, but it may be an implied term of the underlying contract, an implied collateral contract to make repayment or simply an operation of the basic equitable principles of restitution (founded on the unjust enrichment of the beneficiary)."

43. O'Donovan and Phillips (¶ 13-54) take a similar view, with the difference that whereas Potter LJ seems to have contemplated a claim for repayment by the party to the underlying transaction against the counter-party with the benefit of the bond, they envisage the claim for repayment being made by the person who provided the bond directly against the counter-party.

44. In my judgment the law has moved on from the position indicated by the *Trafalgar* case. If Mr and Mrs Van Der Merwe make a payment which turns out to exceed what is due from HPIE, they will be entitled to recover the overpayment either directly from IIG or indirectly via HPIE.

45. Mr Collings next draws attention to the fact that there is no upper limit to the amount that Mr and

Mrs Van Der Merwe are potentially liable to pay. He contrasts this with the almost universal practice in performance bonds issued by banks and other financial institutions under which the liability to pay is capped. I agree that this is also a potentially relevant circumstance. Mr McGrath pointed out, however, that unlike the usual situation in which the provider of a performance bond has no involvement in the underlying transaction, in the present case Mr and Mrs Van Der Merwe were directors of HPIE and were, therefore in a position to control how much it borrowed from IIG and hence to limit their own potential liability. The weight that can be attributed to this circumstance is therefore limited.

46. However, taking all these circumstances together, they do lead me to the conclusion that the strong presumption referred to in *Marubeni* applies. This was also the Master's conclusion. The question then is: whether there are sufficient indications in the wording to displace that presumption; and in considering that question words are to be read in their ordinary sense.

Terms of the guarantee

47. Mr Collings points out correctly that the instrument describes itself as a guarantee and Mrs Van Der Merwe as the Guarantor. The word "guarantee" crops up frequently in the detailed terms of the instrument. This in itself is of limited significance because of the variety of terminology in common use. Performance bonds are also called performance guarantees or on demand guarantees; and the familiar "guarantee" of a car or a household appliance does not connote any form of secondary liability.

48. The definition of "Guaranteed Monies", however, is of considerable significance. It includes not only those monies which HPIE actually owe IIG but also monies "*expressed* to be due, owing or payable" by HPIE to IIG. These words point towards the conclusion that the Guaranteed Monies may extend beyond what is actually owing by HPIE to IIG; and hence that the liability of Mr and Mrs Van Der Merwe is not necessarily co-extensive with that of HPIE. Mr Collings says that these words are hidden in a definition clause and should not be allowed to override the clear wording of clause 2.1. It is true that the words are contained in a definition clause, but the very purpose of the definition clause is to define the extent of Mrs Van Der Merwe's liability. That is what the quoted words do. Moreover, for reasons I shall explain, I do not consider that the wording of clause 2.1 is clear; at least not in the way that Mr Collings wishes to read it. On the contrary, the wording of clause 2 points against the construction for which Mr Collings contends. Mr Collings acknowledged that the quoted words must mean something. He suggested that they could be best explained as catering for the possibility that IIG and HPIE might agree a conclusive evidence clause as between themselves. Given that the loan agreement did not contain such a clause, and that the guarantee was executed contemporaneously with the loan agreement, the possibility is a remote one. Moreover, if the quoted phrase is evidence of some linkage with a conclusive evidence clause, why look further than clause 4.2 of the guarantee itself? Indeed in his oral submissions, when describing "first impressions", Mr Collings himself said that the quoted phrase naturally took one on to clause 4.2.

49. Mr Collings made a number of points about the detailed drafting of clause 2. He said that the phrase in clause 2.1 'it will immediately upon demand unconditionally pay to the lender… the Guaranteed Monies' is not support for a construction that the guarantees are performance bonds. It would be unusual for a guarantee not to be payable upon demand. The word 'unconditionally' describes the verb 'pay' (i.e. the actual payment, not the obligation to pay). In other words payment must be made not subject to conditions. I agree that an obligation to pay on demand is not enough on its own to displace the presumption that *Marubeni* holds exists. That, after all, was the case in *Marubeni* itself. But I do not regard this form of obligation as entirely neutral. First, a typical contract of suretyship is a promise that the principal debtor will perform his contract, whereas in the present case the

promise is a promise to pay the Guaranteed Monies. It is cast in the form of a primary obligation. Second, the promise in the present case is limited to payment of the Guaranteed Monies. It does not extend to the performance by HPIE of any of its other obligations under the loan agreement. Again this is consistent with an obligation to pay as a primary obligation. The usual contract of suretyship would extend to all the obligations of the principal debtor under his agreement with the creditor. Third, the promise to pay is introduced by the words "as principal obligor and not merely as surety". Mr Collings said that these words could be explained as preventing the release of a surety by, for example, the creditor giving time to the principal debtor. It is true that in some contexts these words are not enough, on their own, automatically to transform a contract of suretyship into a contract of indemnity. But in the present case they do not appear on their own, but appear in collocation with other words and phrases. Moreover, as Mr Collings pointed out, the introductory words appear to govern both clause 2.1 and clause 2.2. The latter clause is already a contract of indemnity which imposes a primary liability. So unless the introductory words are meaningless, they must have been intended to add something to clause 2.1.

50. Mr Collings said that if the obligation in clause 2.1 meant what IIG said it meant, then the whole of clause 3 was superfluous. He said that in *Gold Coast* Tuckey LJ described a similar submission as the best point. That is also true, but in this case the point cuts both ways. It cuts both ways because Mr Collings' explanation of the significance of the phrase "as principal obligor" would itself make clause 3 otiose. On either construction there is little, if any, part for clause 3 to play. Moreover, in *Gold Coast* although the point was the bank's best one, it was not enough.

51. What, in my judgment, clinches the argument in IIG's favour is clause 4.2. A certificate in the prescribed form is agreed to be conclusive and binding on Mrs Van Der Merwe save in the case of manifest error. What is it that the certificate must certify? It must certify "the amount at any particular time due and payable by the Guarantor under this Guarantee." Mr Collings said that this form of certificate was only conclusive as to the amount. It said nothing about liability. I reject this submission for two reasons. First, the certificate certifies an amount that is both "due" and "payable". A sum can be neither due nor payable unless there is a liability to pay it. Second, the certificate does not certify what is due under the loan agreement from HPIE to IIG. It certifies what is due under the guarantee. What is due under the guarantee extends to monies "expressed to be due" by HPIE to IIG. So the question whether HPIE is actually liable to IIG under the terms of the loan agreement (which is the defence that Mr and Mrs Van Der Merwe wish to raise) is irrelevant to the certificate. Both the *Bache* case and the quoted extract from O'Donovan and Phillips demonstrate the potency of a conclusive evidence clause. Its potency is all the more in this case, given that it is accompanied by:

i) The extended definition of "Guaranteed Monies";

ii) The "principal obligor" clause; and

iii) The obligation to pay "on demand".

52. Mr Collings fastened on the phrase in clause 4.2 "save in the case of manifest error". A "manifest error" is one that is obvious or easily demonstrable without extensive investigation. Mr Collings referred to the decision of Thomas J in *Invensys plc v Automotive Sealing Systems Ltd* (8 November 2001). That was a case in which a certificate made by an expert was to be conclusive save in the case of manifest error. Thomas J held that the expert's reasons could be examined in order to determine whether he had made a manifest error. But since the contract in that case provided for the expert to give reasons, Thomas J was undoubtedly right to say that the parties must have contemplated that those reasons could be examined to see whether any manifest error had been made. By contrast, in the present case the certificate was not required to contain any reasons. I did

not derive any assistance from the *Invensys* case.

53. In my judgment these features of the guarantee, taken together, are sufficient to displace the presumption that *Marubeni* holds exists. I do not need to consider whether any of them, on their own, would have been enough; because they are not on their own.

Result

54. For these reasons, which are substantially the same as those of Master Teverson, I dismiss the appeal.