QUEENSWAY QUAY DEVELOPMENT COMPANY LIMITED v. COSEC-COMPANHIA DE SEGURO DE CREDITOS S.A.

COURT OF APPEAL (Fieldsend, P., Huggins and Davis, JJ.A.): July 29th, 1996

Arbitration—agreement of reference—incorporation of terms—arbitration provisions of building contract not incorporated into "on demand" performance bond by provision that "subject to the law applicable to the guaranteed contract" and to "jurisdiction" there specified—"jurisdiction" is that of competent court and not sufficient reference to jurisdiction of arbitrator if stay of proceedings sought

Guarantee and indemnity—performance bond—"on demand" bond—"conclusive evidence" provision—clause in performance bond that creditor's demand "conclusive evidence" of debtor's failure to meet guaranteed obligation precludes guarantor from giving evidence that debtor's liabilities to be set off against counter-liabilities of creditor

Civil Procedure—judgments and orders—summary judgment—leave to defend—order for stay of proceedings pending arbitration on application for summary judgment not implicit unconditional leave to defend—appeal against order not precluded by Court of Appeal Ordinance, s.22

The appellant sought summary judgment against the respondent in the Supreme Court regarding a claim under a performance bond.

The appellant development company employed a construction company ("the builder") to undertake a large construction project. The building contract specified, *inter alia*, that (a) it was governed by the law of Gibraltar; (b) disputes arising under it would be settled by arbitration, according to the provisions of the Arbitration Ordinance; and (c) the builder was obliged to enter into a performance bond to allow the appellant to claim from a guarantor (the respondent) any loss it suffered as a result of any failure by the builder to perform its obligations under the building contract.

The performance bond stated, *inter alia*, that (a) the amount payable under the guarantee was "the amount of loss actually suffered" by the appellant; (b) a claim by the appellant, accompanied by a signed statement that the builder had failed to comply with its obligations, would "be accepted as conclusive evidence that the amount claimed, up to the guaranteed amount," was due to the appellant under the guarantee; and (c) as between the appellant and the respondent, disputes relating to the

guarantee "shall be subject to the law applicable to the guaranteed contract and to the jurisdiction specified in that same contract." Although the performance bond purported to be between the respondent and the builder, the appellant also signed it.

Following an alleged failure by the builder to meet its obligations under the building contract, the appellant made a claim against the respondent under the bond, accompanied by a signed statement as required. It appeared that the builder also sought to make a claim against the appellant under the building contract and the respondent therefore refused to pay out to the appellant, arguing that when the amount claimed by the builder was set off against the sum sought by the appellant, no balance was due and accordingly the appellant had "actually suffered" no loss.

The appellant applied for summary judgment to be entered against the respondent under O.14 of the Rules of the Supreme Court for the amount claimed under the bond. The respondent cross-claimed for a stay of the proceedings pending arbitration, which it alleged had been implicitly agreed between the parties and the Supreme Court (Pizzarello, Ag. C.J.) refused to order summary judgment, ordered a stay pending arbitration and adjourned the action *sine die*, "to be restored on application after the determination of the arbitration."

On appeal, the appellant submitted that (a) there was no arbitration agreement between the parties, because there were no specific words incorporating the arbitration clause from the building contract into the performance bond, which was in any case an agreement between the respondent and the builder; (b) it could not be said that the two documents were effectively part of the same contract, notwithstanding its signature of the performance bond, since they were for entirely different purposes, the bond being an autonomous contract designed specifically to allow the appellant to recover for defaults of the builder without having to submit to lengthy arbitration or court proceedings; (c) the stipulation that the bond was covered by the same "jurisdiction" as the building contract did not refer to the jurisdiction of an arbitrator appointed under the terms of that contract, but solely to the jurisdiction of the Gibraltar courts, and it did not therefore import into the guarantee the arbitration provisions; (d) because the appellant's demand was "conclusive evidence" of the loss it had incurred as a result of the builder's default, the bond was an "on demand" bond, incompatible with arbitration, and the respondent could not seek to set off any potential liability of the appellant to the builder against its obligation to pay out under the bond; and (e) the court should consider the matter afresh and, in the circumstances of the case, overturn the stay and order summary judgment in its favour under O.14 of the Rules of the Supreme Court.

The respondent submitted in reply that (a) there was an arbitration agreement between the parties, because the stipulation that the bond "shall be subject to the law applicable to the guaranteed contract and to the jurisdiction specified in that same contract" incorporated the

arbitration provisions of the building contract; the appellant had accordingly bound itself to submit to arbitration and the stay had properly been granted; (b) in particular, the "jurisdiction" specified in the building contract referred not only to the jurisdiction of the Gibraltar court but also to the jurisdiction of an arbitrator appointed pursuant to that contract; (c) the bond was not an autonomous agreement but part and parcel of the building contract, and had been accepted as such by the appellant when it signed the bond; (d) in any case, it owed the appellant no money under the bond because no loss was "actually suffered," because the money apparently due to the appellant because of the alleged default of the builder should be set off against the claim by the builder against the appellant; and (e) furthermore, the present appeal should not be entertained at all, as it was precluded by s.22 of the Court of Appeal Ordinance, which stipulated that the court could hear an appeal against any order of the Supreme Court except, *inter alia*, an appeal against an order granting unconditional leave to defend, which was what the lower court had implicitly granted in refusing to give summary judgment for the appellant.

Held, allowing the appeal:

(1) There was no sufficiently clear agreement that disputes between the parties would be referred to arbitration; clear language was required to oust the jurisdiction of the court. The arbitration provision of the building contract provided that disputes between the appellant and the builder should be settled by arbitration and if either of them wished to seek a stay, it would have to come to the court under s.8 of the Arbitration Ordinance. Because the proper law of the building contract was Gibraltar law, by its terms the bond was also governed by the law of Gibraltar and in the circumstances, the Gibraltar courts had jurisdiction over disputes concerning the guarantee. The statement that all disputes were subject to the same "jurisdiction" as those under the building contract thus referred to the jurisdiction of the court as set out above and not to the jurisdiction of an arbitrator; it could not therefore be said that that condition constituted an agreement to arbitrate disputes arising under the bond. Moreover, the appellant's signature of the bond merely showed that that document met the requirements of the building contract and did not operate to incorporate its terms. It followed that the stay should not have been granted (page 339, lines 31–32; page 341, lines 25–37; page 346, line 38 – page 347, line 10; page 347, lines 29–32).

(2) Furthermore, although the mere use of the word "conclusive" did not of itself establish the bond as an "on demand" bond, it was in fact such a bond, its purpose being to avoid the complexities of seeking a remedy under the building contract and to provide an immediate remedy for the builder's defaults. It was not therefore possible to argue that the appellant had suffered no actual loss under the building contract. Rather, the bond provided for the payment of liquidated

damages in the event of any default by the builder, payable on demand. Because the appellant's letter of demand was "conclusive evidence" that payment of that amount was due under the bond, evidence that a claim by the builder against the appellant should be set off against it was inadmissible. Accordingly, even if there had been an agreement to arbitrate, there was in fact no ground for dispute (page 341, lines 2–24; page 341, line 38 – page 342, line 8; page 347, lines 11–28; page 352, line 24 – page 353, line 23).

(3) Lastly, it could not be said that unconditional leave to defend had been given. Once a stay had been ordered, the Supreme Court had had no power to make any other order in the matter, except perhaps as to costs. Because summary judgment could not therefore have been at issue once the stay had been ordered, the court was not precluded from hearing the present appeal by s.22 of the Court of Appeal Ordinance and it had full power to consider afresh whether to make an order under O.14. For these reasons, the stay of proceedings would be set aside and summary judgment would be entered in favour of the appellant (page 342, lines 27–43; page 348, lines 5–14; page 348, line 32 – page 349, line 35; page 353, line 44 – page 354, line 6).

Cases cited:

(1) *Aughton* v. *M.F. Kent Servs. Ltd*. (1991), 57 BLR 1; 31 Con LR 60, applied.

(2) *Bache & Co. (London) Ltd.* v. *Banque Vernes & Comm. de Paris S.A.*, [1973] 2 Lloyd's Rep. 437; (1973), 117 Sol. Jo. 483, considered.

(3) *Birmingham Corp.* v. *Barnes*, [1935] A.C. 292; [1935] All E.R. Rep. 533, distinguished.

(4) *Bremer Vulkan Schiffbau & Maschinenfabrik* v. *South India Shipping Corp. Ltd.*, [1981] A.C. 909; [1981] 1 All E.R. 289.

(5) *Channel Tunnel Group Ltd*. v. *Balfour Beatty Constr. Ltd.*, [1993] A.C. 334; [1993] 1 All E.R. 664, considered.

(6) *Dialdas* v. *Minories Fin. Ltd.*, C.A., Civ. App. No. 27 of 1989, unreported.

(7) *Forestal Mimosa Ltd*. v. *Oriental Credit Ltd.*, [1986] 1 W.L.R. 631; [1986] 2 All E.R. 400, *dicta* of Sir John Megaw considered.

(8) *General Surety & Guar. Co. Ltd*. v. *Francis Parker Ltd.* (1977), 6 BLR 16.

(9) *Home & Overseas Ins. Co*. v. *Mentor Ins. Co. (UK) Ltd*., [1990] 1 W.L.R. 153; [1989] 3 All E.R. 74, applied.

(10) *Hongkong & Shanghai Banking Corp*. v. *Kloeckner & Co. A.G.*, [1990] 2 Q.B. 514; [1989] 3 All E.R. 513.

(11) *I.E. Contractors Ltd.* v. *Lloyd's Bank PLC*, [1990] 2 Lloyd's Rep. 496; (1990), 51 BLR 1, considered.

(12) *Nichimen Corp*. v. *Gatoil Overseas Inc*., [1987] 2 Lloyd's Rep. 46, *dicta* of Kerr, L.J. considered.

(13) *Owen (Edward) Engr. Ltd*. v. *Barclays Bank Intl. Ltd*., [1978] Q.B. 159; [1978] 1 All E.R. 976, applied.
(14) *Sethia (S.L.) Liners Ltd*. v. *State Trading Corp. of India*, [1985] 1 W.L.R. 1398, *dicta* of Kerr, L.J. considered.
(15) *Thomas (T.W.) & Co. Ltd*. v. *Portsea S.S. Co. Ltd*., [1912] A.C. 1; [1911] W.N. 151, applied.
(16) *United Merthyr Collieries Co., In re* (1872), L.R. 15 Eq. 46; 21 W.R. 117, distinguished.

Legislation construed:
Arbitration Ordinance (1984 Edition), s.8:

> "If any party to an arbitration agreement . . . commences any legal proceedings in any court against any other party to the arbitration agreement . . . in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement . . . may make an order staying the proceedings."

Court of Appeal Ordinance (1984 Edition), s.22:

> "Without prejudice to anything contained in the Constitution of Gibraltar an appeal shall lie to the Court of Appeal from any decision of the Supreme Court other than—
>
> . . .
>
> (ii) an order giving unconditional leave to defend an action. . . ."

Rules of the Supreme Court, O.14, r.3: The relevant terms of this rule are set out at page 348, line 18.

J. Higham and *L.E.C. Baglietto* for the appellant;
J.E. Triay, Q.C. and *M.W. Isola* for the respondent.

HUGGINS, J.A.: The plaintiff ("the employer") contracted with a Portuguese company ("the builder") for the development of land off Queensway. Disputes have arisen under that contract. It was a term in the contract that such disputes should be referred to arbitration and an arbitration has now commenced. It was also a term of the contract that the builder should provide a performance bond in terms of a pro forma set out in the instructions to tenderers. The builder procured the defendant ("the guarantor") to provide a performance bond and the present action is brought by the employer to enforce the bond. The employer sought summary judgment under O.14 of the Rules of the Supreme Court, but the guarantor asked for a stay of the action pending arbitration pursuant to an alleged agreement to refer disputes under the bond to arbitration. It is sufficient to say at this stage that the Chief Justice granted a stay, although it will be necessary hereafter to consider the rest of his order.

The first issue for decision must be whether the Chief Justice was right to grant a stay, and that depends upon the interpretation of the bond itself. It is necessary to set out the full terms of the bond, which is not in the precise terms of the document specified in the instructions to tenderers, but it was signed by the employer as well as by the builder and the guarantor, so its terms have been accepted by the employer as being sufficiently in conformity with the building contract. Those terms are in two parts. The first part is the "General Conditions," which appears to be in a standard form intended for incorporation in various types of performance bond:

> "The Companhia de Seguro de Creditos, E.P. (COSEC) agrees, subject to the terms and conditions contained in the tender or in the contract and to the statements contained in the proposal submitted to COSEC by the contractor/supplier (hereinafter called 'the contractor'), to pay to the owner of the works/supplies (hereinafter called 'the employer') the guaranteed percentage of the amount of any loss which the employer may sustain by reason of occurrence of a breach or default on the part of the contractor in any of the terms of the said tender or contract.
>
> *Article 1: Guarantee statement*
>
> 1. COSEC agrees, subject to the provisions of this bond policy, to pay to the employer—up to the guaranteed limit and within the stipulated time—the amount of any loss arising in connection with any failure by the contractor to comply with any of the contractual/legal obligations of the tender/contract, as defined in the Specific Conditions hereto.
>
> 2. Any variation or amendment to the legal and/or contractual obligations guaranteed by this policy, which may imply an aggravation of the risk, must be previously agreed to by COSEC.
>
> *Article 2: Duration of Guarantee*
>
> Unless otherwise agreed, this insurance contract shall only be effective upon payment of the premium, comes into effect on the commencement date defined in the Specific Conditions and shall remain in force until the date on which the guaranteed obligation has been actually discharged.
>
> *Article 3: Premium*
>
> 1. The premium becomes payable at the date on which the policy is made.
>
> 2. Whenever there will be an aggravation of the risk, including any variation of the guaranteed obligations, of the terms to be observed by the contractor or of the guaranteed limit, the contractor shall also pay an amount of additional premium. The payment of this premium shall be made within a period of 5 days from the date of its notice to the contractor.

Article 4: Contractor's obligations

1. The contractor shall:

(a) pay all the premiums and additionals thereto, at the place and on the dates defined in the Specific Conditions hereto;

(b) upon request deliver up to COSEC all documents and information in respect of the contract to which this guarantee applies;

(c) release all such accounting data as COSEC may require;

(d) notify COSEC in advance of any possible variation to be agreed in respect of the guaranteed obligations;

(e) notify COSEC of the occurrence of any litigation with the employer likely to affect performance of the guaranteed obligations, within 5 days of becoming aware of such occurrence;

(f) upon request assign and transfer to COSEC the necessary power of attorney, in order that all practicable measures may be taken to prevent or minimise loss;

(g) notify COSEC in advance of the discontinuance or change of his activity, as well as of any alteration of the society articles or of the guaranteed obligations, alienation or property, conveyance of this concern or the assignment of credits to the prejudice of his assets.

2. If the contractor fails to comply with any of the conditions of this Article, COSEC shall be entitled to require from him, by way of compensation, a sum up to 2% of the amounts paid to the employer or, if there was no claim, a sum up to the amount of initial premium paid.

Article 5: Claims

1. 'Claims' shall be deemed to be any failure by the contractor to comply with the guaranteed obligations which according to the law or to the contractual terms entitles the employer to call the bond.

2. In the case of litigation about the performance of the guaranteed obligations, persisting over a period exceeding 30 days, COSEC may accept the claim within 30 days of the expiry of that period, in view of supporting evidence.

3. COSEC agrees that the litigation referred to in paragraph 2 of this Article should be resolved by arbitration, subject to the conditions set out in the Specific Conditions hereto.

Article 6: Payment of claims

The amount of loss payable shall correspond to the amount of loss actually suffered by the employer, up to the guaranteed limit. The payment of claim shall be made within a period of 30 days from the date on which COSEC has received notification of the claim in which the employer declared the amount of damages and stated the failure by the contractor to discharge the claim notified to him by the employer.

Article 7: Subrogation—recoveries

1. The contractor binds himself not to impair any of the steps which COSEC may purpose to take after becoming aware of the contractor's failure or after being notified by the employer to discharge the claim.

2. Upon payment of the claim, COSEC shall be subrogated in all the employer's rights against the contractor, and therefore be entitled to recover from the contractor the amount of claim paid and the amount of any legal interest payable, attorney and consultancy fees, judicial and extra-judicial costs and any other kind of substantiated expenses.

3. The contractor shall insofar as it may be lawful permit COSEC to effect recovery of the amount of claim paid.

Article 8: Jurisdiction

The jurisdiction competent to deal with any case arising in connection with this policy shall be defined in the Specific Conditions hereto.

The insurance contract is ruled by the General Conditions, Specific Conditions and endorsement thereto, which are deemed to be an integral part of the policy."

The Specific Conditions form the second part of this particular guarantee:

"*Policyholder*: Intercon-Construcao Internacional A.C.E., head office: Rua Castilho, 149–19–1000 Lisboa.

Beneficiary: Queensway Quay Development Co., head office: Gibraltar.

I. *Guaranteed obligation (Article 1 of the General Conditions)*

By this policy we, Cosec-Companhia de Seguro de Creditos S.A., undertake to guarantee the payment to and on demand of the beneficiary, up to the guaranteed amount, on the event of the applicant/policyholder failing to fulfil the contract for the construction of the 'Phase 1—Ragged Staff Wharf' provided that the claim of the beneficiary hereunder is received in writing at the head office of this company, accompanied by your signed statement that the applicant/policyholder has failed to fulfil the contract. Such claim and statement shall be accepted as conclusive evidence that the amount claimed, up to the guaranteed amount, is due to the beneficiary under this guarantee.

II. *Guaranteed Amount (Article 1 of the General Conditions)*

Ecu 1,966,326.5 + £401,530.

Duration of the Guarantee (Article 2 of the General Conditions)

From October 22nd, 1990 to October 22nd, 1991, subject to automatic extension for subsequent period of 12 months until the confirmed discharge of the guaranteed obligation, or until the date on which the beneficiary notifies COSEC of its cancellation.

IV. *Premium (Article 3 of the General Conditions)*

1. Initial premium:

(a) Amount: Esc.: 1 395 842$00, increased of legal surcharges and seal, calculated at the exchange rate of 1 Ecu = Esc.: 182$564 and 1 £ = 262$572, of October 18th, 1990.

(b) Place/date of payment: immediate payment required at COSEC's head office.

2. On the basis of the positive variation of the Escudo exchange against the Ecu and the English Pound, on a quarterly basis, COSEC will require payment of an additional premium for the respective difference also due if in case of a claim the above mentioned exchange rate shows a positive variation between the date considered for the last premium calculation and the date considered for payment of the claim, the additional premium payable immediately upon notification, at COSEC's head office.

3. The policyholder is also required to pay any amount of premium due in respect of each period of automatic extension of the guarantee period or of the exchange variation pending on the guaranteed amount; immediate payment upon notification is required at COSEC's head office.

4. If the date of cancellation of this policy does not coincide with the expiry of the guarantee period in progress, COSEC will charge premium for the period running between the date of expiry and the date of cancellation, or will refund the amount of premium in respect of the unexpired period.

V. *Jurisdiction (Article 8 of the General Conditions)*

1. The jurisdiction competent to deal with any case arising between COSEC and the policyholder in connection with this policy is the Judiciary District of Lisbon.

2. In what concerns the relations between COSEC and the beneficiary all questions arising in connection with this insurance contract, its interpretation, its performance and non-performance, shall be subject to the law applicable to the guaranteed contract and to the jurisdiction specified in that same contract.

VI. *Final Stipulation*

The policyholder certifies that on this date, he is not aware of any fact which might presuppose the failure to comply with the guaranteed obligation."

There is disagreement between the employer and the guarantor as to the proper approach to the interpretation of these two sets of conditions, but the judge held that the General Conditions were "the matrix which are altered by the Specific Conditions rather than the Specific Conditions being the matrix which incorporates by reference some of the General Conditions." That is now challenged by the guarantor, although its

counsel accepts that the contract must be viewed as a whole. I do not think the judge was wrong in his approach.

It is upon Specific Condition V.2 that the guarantor relies as disclosing an arbitration agreement binding on the employer-beneficiary. Mr. Triay for the guarantor argues that the words "the law applicable to the guaranteed contract and to the jurisdiction specified in that same contract" are a reference to clause 41 of the building contract, which, it is common ground, binds the employer and the builder to have any dispute under the building contract resolved by arbitration. The material parts of clause 41 of the building contract read as follows:

> "*Settlement of disputes*—The governing law of the contract shall be the law of Gibraltar. Arbitration shall be conducted in accordance with the rules and regulations for the time being of the International Chamber of Commerce (Paris).
>
> 41.1. All disputes arising in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce (Paris).
>
> . . .
>
> 41.7. *Law of Gibraltar*. The law of Gibraltar shall be the proper law of this contract and in particular the provisions of the Arbitration Ordinance in force from time to time shall apply to any arbitration under this contract wherever the same, or any part of it, shall be conducted."

If, as Mr. Triay submits and as the judge held, "jurisdiction" in Specific Condition V.2 of the bond includes "arbitral jurisdiction" in addition to "territorial jurisdiction," then there has been an agreement to arbitrate disputes arising in relation to the bond. It is accepted that the meaning of the word "jurisdiction" can vary according to its context, but Mr. Higham for the employer submits that in the present context, it must mean territorial jurisdiction: "jurisdiction" should not be equated with "agreement to arbitrate." Indeed, where parties intend to oust the jurisdiction of the courts, they must use very clear language: *Aughton Ltd.* v. *M.F. Kent Servs. Ltd*. (1). It is true that the *dicta* of Ralph Gibson, L.J. and Sir John Megaw in that case were in the context of a "general incorporation" agreement, but I think they are of wider application. Mr. Higham points out that the word "jurisdiction" is used in Specific Condition V.1 to indicate "the Judiciary District of Lisbon" (which appears to be a territorial jurisdiction rather than the jurisdiction of a tribunal) and invites the court to give the word a similar meaning in condition V.2. That, he says, would be the natural meaning in the context. Moreover, an arbitration clause would be inconsistent with the nature of an "on demand" bond.

This last argument requires us to consider whether this is an "on demand" bond (a guarantee payable on demand) rather than, as Mr. Triay would have us hold, in the nature of an insurance policy, which is how the parties described it in Specific Condition V.2.

The contention of the employer is that the performance bond is an autonomous contract which is enforceable without reference to the underlying contract. The guarantor submits that because the employer (the beneficiary) has by signing the bond become party to it, it is not an autonomous contract and the guarantor can set off against the employer's claim claims which the builder has against the employer under the building contract. The basis of this submission is that if the guarantor pays under the bond, the guarantor will be subrogated to the rights of the employer under the building contract and, if it sues the builder for an indemnity in respect of the moneys it (the guarantor) has been forced to pay out, it may be met by a counterclaim which the builder has against the employer. That, the argument goes, cannot be right as it deprives the guarantor of any effective remedy to recover the moneys it has to pay out under the bond: "It makes commercial nonsense." The foundation of Mr. Higham's argument is that Specific Condition I provides that a demand from the beneficiary (the employer) together with a signed statement that the builder has failed to fulfil the building contract "shall be accepted as conclusive evidence that the amount claimed, up to the guaranteed amount, is due to the beneficiary under the guarantee." That is a very strong argument and it is not inconsistent with the line of cases of which *Edward Owen Engr. Ltd.* v. *Barclays Bank Intl. Ltd.* (13) is an example. There it was held that the performance bond was independent of the contract which was guaranteed and that the court was not concerned in the least with the relations between the parties to the latter contract. Here, in precisely the same way, the demand is to be conclusive evidence that the amount claimed is due.

Mr. Triay submits that this line of cases is inapplicable because here there were not just two parties to the bond but three: the builder was a signatory. That would doubtless be a valid consideration if the joinder of the builder could be shown to have in some way altered the relationship between the employer and the guarantor from that which would have existed if the bond had been confined to the terms of the Specific Conditions and had been signed only by the employer and the guarantor. Mr. Triay says that because the employer has signed a bond containing the General Conditions, which refer in Article 6 to "the amount of loss actually suffered by the employer," the rights of the guarantor against the employer have indeed been altered from those under a simple bipartite performance bond.

As I understand it, the only reason for saying this is the suggestion that "actual loss" is not suffered when, as here, the breach or default on the part of the builder is one for which the underlying contract provides that liquidated damages shall be payable. It is clear on the face of it that the letter containing the employer's claim or demand is based upon a failure to pay liquidated damages which the employer believes to be due. The argument is, therefore, that the claim is shown to be without foundation

despite the fact that it is to be conclusive evidence that the money is due. I accept, of course, that if the claim has been shown on the face of it to be without foundation, the introduction of the word "conclusive" will not save it, but I cannot agree that in the circumstances here it has been established that there was no actual loss.

I think Mr. Higham is right when he contends that where a contract provides for the payment of liquidated damages in the event of a breach or default and there is a failure to pay liquidated damages which have become due, a loss is created. It is true that where there is an agreement for liquidated damages in the event of a breach or default and there is failure to pay liquidated damages which have become due, a loss is created. It is true that an agreement for liquidated damages involves an estimate of the loss which is anticipated will result from a breach or default, but, once the breach or default has occurred, a failure to pay the agreed damages becomes an actual loss. No other amount is recoverable in respect of that breach or default. I do not find *City of Birmingham* v. *Barnes* (3) and *In re United Merthyr Collieries Co.* (16), which were concerned with the meaning of "actual cost," of any assistance. The builder signed the bond because there were provisions in it under which the builder took on additional obligations, but those obligations did not affect the employer: they were for the benefit of the guarantor in relation to the guarantee. Therefore it seems to me that Mr. Higham is right when he argues that the bond is payable "on demand": there is nothing in the language used which is clearly inconsistent with that conclusion.

We come back to the question whether there was an agreement to arbitrate. Mr. Triay also relied upon Article 5 of the General Conditions. The language of that condition is somewhat obscure, possibly because the document is a translation. In particular I think it is clear that the word "litigation" has been used where "dispute" would be more apt. By Article 5.3, the guarantor agrees that disputes about the performance of the obligations under the building contract shall be resolved by arbitration. Although bound by the building contract itself to submit such disputes to arbitration, the employer has not by this Article so agreed with the guarantor. I have come to the conclusion that "jurisdiction" in Specific Condition V does not include "arbitral jurisdiction," that an agreement by the employer to arbitrate has not been clearly established and that no stay should have been granted.

If that be wrong, the question would remain whether there was a dispute to go to arbitration. This would depend upon whether a defence of set-off is available. The Chief Justice held that it was. What the guarantor relies upon is not a claim which it has against the plaintiff employer but a claim which the builder has against the employer. I do not think that that is a set-off at all, for a set-off is a cross-claim by a defendant for money: what the guarantor is really alleging is that by reason of the builder's claim against the employer, the loss actually suffered by the employer is

less than it would otherwise have been. Once again, set-off is an argument that is not open to the guarantor, because by Specific Condition I, the letter of demand is made conclusive evidence as to the amount due under the bond, and evidence that the amount should be reduced by the amount of the builder's cross-claim against the employer is not admissible. Accordingly, even if there were an agreement to arbitrate, in my view, the guarantor has no good ground at all for disputing the claim and there is no "dispute" to refer to arbitration.

That leaves the application for summary judgment under O.14. A question arises as to the extent to which an appeal lies to the Court of Appeal on this aspect of the case. There were two summonses before the Chief Justice, one for summary judgment under O.14 or, alternatively, for the trial of questions of law under O.14A and the other for a stay of the action pending arbitration. The judge approached the matter on the basis that the plaintiff's summons was for summary judgment "and" for determination of points of law, whereas those claims were in truth in the alternative. As a result, there is some difficulty in ascertaining what his decision was. The order as drawn up and entered was that the action be stayed pending the result of an arbitration, whilst the application for summary judgment under O.14 was "refused" but "adjourned *sine die* to be restored on application after the determination of the arbitration." Nothing is said about the points of law to which the application under O.14A would have related, although in his reasoned judgment, the judge had of necessity decided several points of law for the purpose of reaching his decision under O.14. It has been accepted before us that we are not concerned with O.14A.

It is contended by the guarantor that a refusal of summary judgment was equivalent to dismissing the application, that the guarantor was implicitly given unconditional leave to defend and that by virtue of s.22 of the Court of Appeal Ordinance, no appeal lies from the grant of unconditional leave to defend. I think one thing is certain: the Chief Justice did not intend to give unconditional leave to defend. If that had been his intention, he would not have adjourned the application under O.14. Indeed, if the action was stayed, he had no jurisdiction to give leave to defend. The most benevolent possible view of his order seems to me to be that he was indicating that if he had not been persuaded that the action should be stayed, he would have given unconditional leave to defend. Would that amount to a provisional granting of unconditional leave to defend which takes effect if, as we are agreed, the stay must be quashed? No authority has been cited as to this. For my part, I think any ruling on the application for summary judgment was *obiter* and that s.22 of the Court of Appeal Ordinance has no application: we have all the powers of the Supreme Court to deal with the application under O.14.

The only defence to this application which the Chief Justice seems to have thought was arguable was that of set-off. For the reasons given, I

would hold that it was not arguable. However, the guarantor contends that there are other arguable defences. The most important of these is that the employer has put forward a fraudulent claim. There is no doubt that clear fraud of which the guarantor had notice would be a good defence: see *Edward Owen Engr. Ltd.* v. *Barclays Bank Intl. Ltd.* (13) ([1978] Q.B. at 171). As I understand it, the contention is that here there is clear evidence of fraud in that (a) the claim on the bond is on the face of it for liquidated damages and not "actual loss"; and (b) the architects who have refused extensions of time under the building contract were employed by the claimant and have failed to act impartially. The Chief Justice held that "there is not enough evidence shown to me to make out fraud." It is complained that in so saying, he showed that he was requiring the guarantor to discharge the onus of proving fraud, whereas the question was whether there was an arguable case as to the existence of fraud. I do not think the judge was in such error. He considered that there was no evidence of fraud, because a claim for liquidated damages was a claim for actual loss and because the only evidence of "unfairness" arose from the relationship between the claimant and the architects, a relationship of which the guarantor had been fully aware and to which it had not objected: there was no evidence at all of actual bias. I think he was right.

The second defence which is said to be arguable is that the building contract had been varied without the agreement of the guarantor contrary to Article 1.2 of the General Conditions and that the bond was thereby discharged. Article 1.2 of the General Conditions provides that any variation of the obligations under the building contract must be agreed by the guarantor if it aggravates the risk to the guarantor under the bond. The building contract made provision for variation (which might or might not increase the obligations of the builder) but did not mention any requirement of the agreement of the prospective guarantor where the increased obligation on the builder would result in additional risk to the guarantor. It would be inevitable that any additional obligation on the builder could lead to an additional chance of breach of the building contract and, therefore, of a claim against the guarantor. The guarantor contends that a variation of the building contract without its consent automatically discharged the guarantee. Even if a variation without consent which aggravated the risk would discharge the guarantor's liability, there is no evidence of such a variation. If the demand under Specific Condition I is conclusive evidence that the amount claimed is due, it would necessarily be conclusive evidence that there had been no variation which had aggravated the risk: evidence to the contrary is not admissible. That defence is not open.

Finally, it was contended that the guarantor was entitled to challenge the quantification of the loss suffered. As to this, again, I have already given my reasons for concluding that such a defence was not open.

It follows that I would allow the appeal, dismiss the cross-appeal and give leave to the employer to enter judgment for the amount claimed.

FIELDSEND, P.: This appeal concerns the rights of the plaintiff-appellant, Queensway, a Gibraltar company, under a "performance bond" given by the defendant-respondent, COSEC, a Portugese insurance company, in relation to building works in Gibraltar undertaken for Queensway by a Portugese contractor, Intercon.

The building contract was a substantial one and the contract required Intercon to provide a bank performance guarantee for 10% of the value of the contract. This was given in the sum of up to approximately £2m. on October 22nd, 1990 in a document headed "Performance Bond Specific Conditions," to which was attached a printed document, apparently in use by COSEC for such cases, headed "Performance Bond, Works and Supplies, General Conditions."

These documents and the pertinent facts are set out in the judgment of Huggins, J.A., with whose conclusions I agree and it is unnecessary for me to repeat them.

The plaintiff made a demand under the bond on June 14th, 1994 for liquidated damages for delay in completing the works. It issued a writ on July 22nd and made an application for summary judgment on November 4th. On November 14th, the defendant by summons sought a stay pending arbitration which it alleged was provided for in the contract between COSEC and Queensway.

By consent, the application for summary judgment and the summons seeking a stay were eventually heard together on the same papers which it was said covered all the issues. Judgment was given on January 23rd, 1996, staying the proceedings pending arbitration, the order also refusing summary judgment, presumably in the light of the decision to grant a stay.

On appeal, the case was argued on two bases: (a) whether there should have been a stay pending arbitration; and (b) if not, whether summary judgment should have been granted.

1. *Arbitration*

Whether there should have been a stay pending arbitration depends upon whether there was an agreement between Queensway and COSEC to settle any dispute between them by arbitration and to exclude the jurisdiction of the court. Article 8 of the General Conditions provides: "The jurisdiction competent to deal with any case arising in connection with this policy shall be defined in the Specific Conditions hereto." Specific Condition V, headed "Jurisdiction" and cross-referenced to Article 8 of the General Conditions, provides first that the jurisdiction competent to deal with any case between COSEC and Intercon in connection with the policy is the Judiciary District of Lisbon. It then provides in para. 2:

> "In what concerns the relations between COSEC and [Queensway] all questions arising in connection with this insurance contract, its interpretation, its performance and non-performance, shall be subject to the law applicable to the guaranteed contract and to the jurisdiction specified in that same contract."

Clause 41 (as finally agreed) provides under "Settlement of disputes" that the governing law of the contract shall be the law of Gibraltar, and continues: "Arbitration shall be conducted in accordance with the rules and regulations for the time being of the International Chamber of Commerce (Paris)." Clause 41.1 provides: "All disputes arising in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce (Paris)." Clause 41.4 gives the arbitrator power, *inter alia*, to rectify the building contract so it accurately reflects the true agreement between the employer and the contractor. Clause 41.7 reads:

> "*Law of Gibraltar*. The law of Gibraltar shall be the proper law of this contract and in particular the provisions of the Arbitration Ordinance in force from time to time shall apply to any arbitration under this contract wherever the same, or any part of it, shall be conducted."

The learned judge below held that Specific Condition V.2, as read with clause 41 of the building contract, was a written agreement to submit to arbitration disputes between Queensway and COSEC relating to the performance bond. This Mr. Higham for Queensway challenges. He relied primarily on *T.W. Thomas & Co. Ltd*. v. *Portsea S.S. Co*. (15) and *Aughton Ltd*. v. *M.F. Kent Servs. Ltd*. (1). Each of these cases was concerned with whether general words incorporating the terms of an underlying contract were sufficient to amount to an agreement to be found by an arbitration clause in that underlying contract. The *Portsea* case concerned words in a bill of lading that "all other terms and conditions . . . to be as per charter party. . . ." It was held that these words did not incorporate the provisions as to arbitration in the charter party into the bill of lading. The *Aughton* case was concerned with whether words in a sub-sub-contract which incorporated the terms of a sub-contract were sufficient to incorporate an arbitration clause in the sub-contract into the sub-sub-contract. It was held that they did not do so.

To that extent, the cases are distinguishable from the case we have to consider. Nevertheless, there are principles set out in those cases which are of general application. As Lord Gorell said in the *Portsea* case ([1912] A.C. at 9):

> "Now I think, broadly speaking, that very clear language should be introduced into any contract which is to have that effect [*i.e*. to oust the jurisdiction of the courts], and I am by no means prepared to say that this contract, when studied with care, was ever intended to exclude, or does carry out any intention of excluding, the

jurisdiction of the Courts in cases between the shipowner and the bill of lading holder."

See also the speech of Lord Robson (*ibid*., at 11):

"It is to be remembered that the bill of lading is a negotiable instrument, and if the obligations of those who are parties to such a contract are to be enlarged beyond matters which ordinarily concern them, or if it is sought to deprive either party of his ordinary legal remedies, the contract cannot be too explicit and precise."

In *Aughton*, different approaches were adopted to the problem of incorporating an arbitration clause in the sub-contract into the sub-sub-contract by Ralph Gibson, L.J. and Sir John Megaw. In the result, each reached the conclusion that the words used there were insufficient to establish that the arbitration clause had been incorporated. Sir John Megaw stressed (57 BLR at 32) the nature of what is often called an "arbitration clause," pointing out that it is in truth an agreement separate from, though collateral to, the contract to which it relates (see also *Bremer Vulkan Schiffbau & Maschinenfabrik* v. *South India Shipping* (4)). He concluded (*ibid*.):

"If this self-contained contract is to be incorporated, it must be expressly referred to in the document which is relied on as the incorporating writing. It is not incorporated by a mere reference to the terms and conditions of the contract to which the arbitration clause constitutes a collateral contract."

Despite his different reasoning, Ralph Gibson, L.J. also stressed the necessity for the clear incorporation of an arbitration agreement (*ibid*., at 25):

"I also recognise the importance of the point that clear words should be required before a party is to be deprived, by an agreement imputed to him, of his ordinary right of access to the court in exchange for a right to arbitrate."

Mr. Triay for COSEC accepted these authorities, but sought to distinguish them on two grounds. First, that the terms of Article 8 and Condition V.2, as read with clause 4l of the main contract, in fact constituted an express incorporation in the bond of an agreement to arbitrate; and, secondly, that the connection between the bond and the underlying building contract was a very close one and so rendered the *ratio decidendi* in each of the authorities inapplicable to the present case.

As to the first argument, I cannot read clause 41 as a whole as specifying a jurisdiction. Clause 41.1 does not purport to do more than provide that disputes between Queensway and Intercon are to be settled by arbitration. It does not provide that the general jurisdiction of the court is ousted. All it does it to call into play the provisions of s.8 of the Arbitration Ordinance, which allows a party to seek a stay of any proceedings if they so wish. To do this, the party will have to come, as it did, to the Gibraltar court, which has jurisdiction to deal with the matter.

In short, clause 41 is not a provision as to "jurisdiction," but merely a provision that as between Queensway and Intercon, there is an agreement under which either party is entitled to have a dispute settled by arbitration.

That no jurisdiction was specified in the building contract does not mean that the Gibraltar court has no jurisdiction under Specific Condition V.2. The proper law of the main contract is declared to be Gibraltar law and therefore the proper law applicable to the guarantee. In the circumstances, the court with jurisdiction over disputes concerning the guarantee must be the Gibraltar court.

This conclusion is not affected in my view by Mr. Triay's second argument that the connection between the bond and the underlying building contract is so close that it is probable that disputes under the bond were envisaged by the parties as determinable by the same mechanism of arbitration. It is true that Condition V.2 refers to the bond as an "insurance contract" and that all three parties have signed both the Specific and the General Conditions. I deal later with what I regard as the true effect of the contract as a whole. But what is clear is that the bond is an agreement of a completely different nature from that of the building contract—as different in fact as the bill of lading was in *Portsea* from the charterparty. As Lord Denning, M.R. observed in *Edward Owen Engr. Ltd.* v. *Barclays Bank Intl. Ltd.* (13), in general a bond of the nature of this bond is a special contract similar in nature to a letter of credit, particularly where, as here, there is a conclusive evidence provision ([1978] Q.B. at 169–172). But even without that, a performance bond is designed to avoid the complexities involved in seeking a remedy under the building contract itself. It is a guarantee of due performance, designed to give an immediate remedy.

In my view, Specific Condition V.2 is not a sufficiently clear agreement between Queensway and COSEC that any question arising in connection with the bond is to be referred to arbitration. On this aspect of the case, I am satisfied that the appellant must succeed.

This conclusion means that the appellant can now proceed to the next stage of the appeal and ask for summary judgment, subject, however, to Mr. Triay's contention that there is no appeal against the learned judge's order refusing summary judgment.

2. *Right of appeal*

By reason of s.22 of the Court of Appeal Ordinance, no appeal lies against an order giving unconditional leave to defend an action. The relevant parts of the order of the court below are:

> "1. This action . . . is hereby stayed pending the result of the arbitration.
>
> 2. The plaintiff's application for summary judgment is refused.
>
> 3. The plaintiff's application for judgment under O.14 be

adjourned *sine die*, to be restored on application after the merits of the arbitration.

4. The costs of the plaintiff's application for summary judgment be reserved."

On the face of the order as a whole, unconditional leave to defend the action was not given to the defendant. Indeed, once a stay of the action pending arbitration had been granted, there was no room for the making of any other order in the action, save possibly as to costs, and the costs of the plaintiff's application for summary judgment were reserved.

This, I think, is sufficient to deal with the contention that the court below gave the defendant unconditional leave to defend. That is not what the order says, nor is it implicit even in the refusal of summary judgment which is consequent only upon the stay pending arbitration. Even the plaintiff's costs of his application for summary judgment were reserved.

But Mr. Triay argued further that in ordering a stay pending arbitration, the court must have been satisfied that there was a dispute between the parties; therefore, he said, the court had also decided that the defendant had satisfied it that there was "an issue or question in dispute which ought to be tried" (O.14, r.3(1)), so that summary judgment should not be granted. Hence it was submitted there had in effect been unconditional leave to defend.

He relied upon a passage in the judgment of Lord Mustill in *Channel Tunnel Group Ltd.* v. *Balfour Beatty Constr. Ltd.* (5), to the effect that in recent times, the exception to the mandatory stay for arbitration has been regarded as the opposite side of the coin to the jurisdiction of the court under O.14 to grant summary judgment where the defendant has no arguable defence. That this was not intended to be a statement of the law is clear from his powerful warning against encroachment on the parties' agreement to arbitrate and his reference to *Home & Overseas Ins. Co. Ltd*. v. *Mentor Ins. Co. (UK) Ltd.* (9), in which the distinction was drawn between staying proceedings for arbitration and granting summary judgment when no question of arbitration arose.

Those cases clearly establish that in cases where there is an agreement to arbitrate, it is particularly necessary not to allow full argument of the issue before the court which would have the effect of depriving a party of having his case heard before the arbitral tribunal upon which the parties had agreed. The test applicable in deciding whether or not to grant summary judgment where there is no agreement to arbitrate is different. Order 14 allows the court to grant judgment unless "the defendant satisfies the court . . . that there is an issue or question in dispute which ought to be tried. . . ."

We were not referred to authority directly concerned with summary judgment but in 1990, this court, Spry, P. *dubitante*, dealt in *Dialdas* v. *Minories Fin. Ltd.* (6) with the approach to be adopted. We were not referred to this decision in argument, but it does not seem to have been overtaken by any cases since then. There we adopted the approach

enunciated by Sir John Megaw in *Forestal Mimosa Ltd.* v. *Oriental Credit Ltd.* (7), which approved the judgment of Kerr, L.J. in *S.L. Sethia Liners Ltd.* v. *State Trading Corp. of India Ltd*. (14) and which was adopted by Kerr, L.J. in *Nichimen Corp.* v. *Gatoil Overseas Inc*. (12). I cannot do better than repeat some of the passages from those cases. First, from *Sethia* ([1985] 1 W.L.R. at 1401):

> "If a point of law is raised on behalf of the defendants, which the court feels able to consider without reference to contested facts simply on the submissions of the parties, then it is now settled that in applications for summary judgment under Order 14 the court will do so to see whether there is any substance in the proposed defence. If it concludes that, although arguable, the point is bad, then it will give judgment for the plaintiffs."

Secondly, from *Forestal Mimosa* ([1986] 1 W.L.R. at 636):

> "In my view, it would neither be good law nor good sense that, if each member of this court took a clear and confident view that the issue, though in one sense arguable, ought to be decided in favour of the plaintiffs, they should, nevertheless, dismiss the appeal, leaving the issues of law to be argued at the trial of the action . . . with the prospect of the issue, whichever way it might then he decided by the trial judge, coming again before this court, it may be many months hence."

Thirdly, from *Nichiman* ([1987] 2 Lloyd's Rep. at 51–52):

> "It has been said again and again in this Court in recent years that it is not sufficient to conclude that the defendants have an arguable case if the issues turn on a point of law, or other material, which enables the Court to form a definitive view on the rights of the plaintiffs there and then. . . . Most points are arguable, perhaps particularly in the Commercial Court, as Mr. Pollock's performance in this case amply demonstrated. In a case like the present, the Judge should only give leave to defend if, after full consideration of the material before him, he is satisfied that the plaintiff is not entitled to judgment there and then."

I am of the view, after considering both the contentions, that the appellant is not precluded from appealing on the question of whether summary judgment should be granted.

With the appropriate principles in mind, I turn to consider the performance bond given by COSEC to Queensway to determine whether Queensway has made out a case for the grant of summary judgment, or whether the arguments advanced by COSEC raise an issue or question which should go for trial.

3. *Should there be summary judgment?*

(a) *The contentions*

Queensway's case turns purely on the interpretation to be placed on the documents which constitute the contract between it and COSEC. Its

contention is that the wording of Specific Condition I makes it clear that the performance bond is what the authorities have called an "on demand" performance bond because of its "conclusive evidence" provision: see *Edward Owen Engr. Ltd.* v. *Barclays Bank Intl. Ltd*. (13), *Bache & Co. (London)* v. *Banque Vernes & Comm. de Paris S.A.* (2) and *I.E. Contractors Ltd.* v. *Lloyd's Bank PLC* (11), and discussed in *General Surety & Guar. Co. Ltd.* v. *Francis Parker Ltd*. (8).

COSEC's contention, again based solely on the interpretation of the documents constituting the agreement, was, to put it in its simplest terms, that the agreement was a tripartite agreement between COSEC, Queensway and Intercon, who had all signed both parts of it, and that looked at as a whole, it was apparent that this was not a true "on demand" bond. Mr. Triay accepted that the Special Conditions probably did amount to an on demand bond, but contended that when read in the light of the General Conditions, this was certainly not so.

(b) *Analysis of the contract*

Neither the Specific Conditions nor the General Conditions are very elegantly or exactly drafted, partly, perhaps, because they were prepared for parties speaking different languages; indeed, the General Conditions that were signed were translated from a standard Portuguese document. Also, each document was designed to meet a different objective: the General Conditions record a contract between COSEC and Intercon of the nature of an insurance policy, whereas the Special Conditions record a contract primarily between COSEC and Queensway of the nature of a guarantee, though Condition IV deals with the premium payable by Intercon to COSEC.

Special Condition I is headed "Guaranteed obligation (Article l of the General Conditions)." By it, COSEC undertakes to guarantee the payment to and on demand of Queensway up to the guaranteed amount, on the event of Intercon failing to fulfil the building contract, provided that the claim is received in writing accompanied by Queensway's signed statement that Intercon has so failed: "Such claim and statement shall be accepted as conclusive evidence that the amount claimed, up to the guaranteed amount, is due to the beneficiary under this guarantee."

It will be seen at once that the first sentence of Condition I does not state clearly what payment COSEC is guaranteeing. It does not even say clearly that it will guarantee the payment of the claim, nor does it say when it will pay the claim. These points are, however, clarified by Article 1.1 and Article 6 of the General Conditions. By Article 1.1, COSEC agrees to pay "the amount of any loss arising in connection with any failure by the contractor to comply with any of the . . . obligations of the . . . contract" and by Article 6 to pay within 30 days of being notified of the claim.

It is upon these provisions that Queensway contends that the bond is a true "on demand" performance bond, such as those referred to in the authorities.

It seems that these bonds can take different forms. In *Bache* (2), what was guaranteed was payment of any balance due between traders in default of payment by one trader. In *I.E. Contractors* (11), what was guaranteed was payment of any damages sustained. In *Edward Owen* (13), the guarantee to the Libyan customers was simply said to "guarantee to you the firm 'Edward Owen' to the extent of [£50,203]" and in that case the guarantee was called because Edward Owen had not embarked on the contract. The draft guarantee in the contract documents in this case (which was not given) would have provided merely for the payment of a sum of 10% of the contract price in the event of the contractor failing to fulfil the contract. The preamble to the General Conditions purports to guarantee payment of the guaranteed percentage of any loss the employer may sustain from breach or default of the contractor. But what these guarantees do have in common is what has been referred to as a "conclusive evidence clause," such as that in the final sentence of Specific Condition I.

The binding effect of clauses such as this was considered by Lord Denning, M.R. in *Edward Owen* ([1978] Q.B. at 169), in which he likened a guarantee with such a clause to a letter of credit, and concluded (*ibid*., at 171):

> "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 contractual 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 a clear fraud of which the bank has notice."

On the face of things, therefore, the performance bond here, with its conclusive evidence clause, was one that had to be met by COSEC on the demand that Queensway made under it.

For COSEC, it was contended that this contract of guarantee was distinguishable from those referred to in the authorities and that on a proper reading of the two documents, Queensway could claim against COSEC for any default by Intercon only if it could show that it had suffered a net loss on a full account being struck between Queensway and Intercon. Hence, assuming the claim for liquidated damages for delay was actual loss (which was not admitted), COSEC was not obliged to pay under the guarantee if, as between Queensway and Intercon, no balance was due to Queensway.

This conclusion was said to follow because this was a tripartite agreement constituted by the two documents, each of which was signed

by each party, and that looked at as a whole, the contract was more akin to a contract of insurance than to a contract of guarantee. Interpreting the contract against this background, it was submitted, as I understood Mr. Triay's argument, that COSEC guaranteed only "loss actually suffered" (Article 6) and that this could not be determined until it was clear that even if Queensway had suffered some loss, this was more than what it may owe Intercon under the building contract. On this point, it was said that there was a dispute as to what Queensway may owe Intercon, which was the subject of incipient arbitration proceedings.

Thus, it was said, Queensway's claim as set out in its letter of June l4th, 1994, which stated merely that there had been a failure to complete various sections of the building on time entitling it to the liquidated damages provided for, was insufficient. To amount to compliance with Condition I of the bond, it should have gone on to state that the amount claimed was in fact a net loss, or "a loss actually suffered."

The background that led to this interpretation was said to be that, to the knowledge of Queensway, COSEC's only right to recover what it might pay to Queensway was through subrogation (Article 7.2) in Queensway's rights against Intercon: therefore Queensway could never have thought it could recover under the guarantee merely on its statement of what was done.

This is to read far too much into Queensway's signature on the General Conditions. The General Conditions impose no obligation of any sort upon Queensway. They constitute an insurance policy taken out by Intercon with COSEC against its liability for failure under its contract with Queensway. The only significance of Queensway's signature is as an acknowledgement that the document, when coupled with the Specific Conditions, is an acceptable guarantee.

There is no substance in the contention that Queensway must have realized that COSEC had no means, other than by subrogation, to recover what it might pay out under the guarantee. It may even be, reading Articles 4, 5.2 and the curiously worded Article 7.3 together, that COSEC has a right of recovery from Intercon of what it might pay under the guarantee, but that is by the way. COSEC could have covered itself against having to pay out under the bond by taking a counter-guarantee elsewhere with a conclusive evidence clause, such as that given to Barclays Bank in the *Edward Owen* case (*ibid*., at 167), that any payment made by the Bank would be conclusive evidence that it was liable to make that payment.

It was said that it would make commercial nonsense for COSEC to have agreed that a claim by Queensway was conclusive that it was due when Queensway might have no right to recover at the end of the day. But it would make as much commercial nonsense for Queensway

to have accepted a guarantee which would benefit it only after protracted arbitration with Intercon to determine if any balance was due to it.

Article 1.1 clearly envisages a claim arising during the execution of the contract and not necessarily at the end of it. This is borne out by Article 4 which gives COSEC, as against Intercon, the right to monitor performance of the contract so as to minimize any loss to Queensway caused by a failure of Intercon, which OSEC might have to pay under the guarantee.

In my view, the contract of guarantee obliges COSEC to pay any loss (up to the guaranteed amount) arising from the contractor's failure under the contract, within 30 days of notification, accompanied by a signed statement of the contractor's failure, and the claim and statement are conclusive evidence that the amount claimed is due under the guarantee. In short, the contract is an "on demand" performance bond as contended for by Queensway, and COSEC is bound by the conclusive evidence provision in Condition I.

This makes it unnecessary to deal with the question of COSEC's right to set-off. The only way that this could have arisen is if COSEC had some right against Queensway, which it clearly does not. There was no relationship between them as there was between the bank and its customer in *Hongkong & Shanghai Banking Corp*. v. *Kloeckner & Co. A.G*. (10).

(c) V*ariations*

It was argued that there had been variations to the contract which aggravated the risk undertaken by COSEC, to which it had not agreed, and that this discharged the bond. The learned trial judge dealt fully with this contention and concluded that any variation there might have been to the building contract did not discharge the contract of guarantee between COSEC and Queensway. In my view, he was entirely right: the contention advanced by COSEC is untenable.

(d) *Fraud*

There was no evidence that Queensway's claim or its formulation was fraudulent. Indeed, Mr. Triay, properly, in my view, did not urge fraud upon us. He really put his case on the basis that the claim was not a justified one because there had been no actual loss, the loss being only of liquidated damages against which had to be balanced what was due by Queensway to Intercon in the voluminous affidavits and correspondence. There is no substance in these arguments.

(e) *Conclusion*

In my view, the decision in this case turns solely on the interpretation, to be decided as a matter of law, of the guarantee. On the

arguments presented, although they took some time and involved reference to a number of authorities, I am satisfied that in the sense used in the authorities, the respondent did not raise any issue which ought to go to trial. I also would allow the appeal, dismiss the cross-appeal and grant summary judgment for the sum claimed, and it is so ordered.

DAVIS, J.A.: I have had the opportunity of reading the judgments in draft of the President and Huggins, J.A., with which I respectfully agree. I have nothing to add.

Appeal allowed; cross-appeal dismissed.