Neutral Citation Number: [2019] EWHC 2250 (Comm)

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

COMMERCIAL COURT (QBD)

CL-2019-000493

Admiralty, Commercial &

Technology & Construction Court

7 Rolls Building

Ground Floor, Rolls Building

Fetter Lane

London

EC4A 1NL

15 August 2019

Before

Mr Justice Butcher

BETWEEN:

SUMITOMO MITSUI BANKING CORPORATION EUROPE LIMITED

Claimant

-v-

EULER HERMES EUROPE SA (NV)

Defendant

Simon Croall QC (Quadrant Chambers) and **Adam Al-Attar** (South Square Chambers) (Instructed by **Norton Rose Fulbright LLP**) appeared on behalf of the Claimant

Chantal-Aimee Doerries QC (Atkin Chambers) and **Marc Lixenberg** (Atkin Chambers) (Instructed by **Gateley Legal)** appeared on behalf of the Defendant

APPROVED JUDGMENT

MR JUSTICE BUTCHER:

1. This has been the expedited hearing of a Part 8 claim brought by the Claimant, Sumitomo Mitsui Banking Corporation Europe Ltd ("SMBCE") against Euler Hermes Europe SA (NV) ("EH").
2. What is at issue is SMBCE's entitlement to recover under a performance bond and a retention bond issued by EH.
3. The background to this dispute relates to the construction and commissioning of a waste treatment facility at Sinfin Lane in Derby, which I will call "the Facility". The Facility is intended to be delivered as a public private partnership (or PPP) scheme. It involves, amongst others, Derbyshire County Council and Derbyshire City Council, or "the Councils", as the procuring authorities; Resource Recovery Solutions Derbyshire Ltd (or "RRS"), as the project company responsible for delivering the Facility; Interserve Construction Ltd (or “ICL”), as the construction company responsible for the design, construction, commissioning and completion of the Facility; Interserve PLC (or “Interserve”) as the Guarantor under the construction contract; UK GIP, Bayerische Landesbank, Sumitomo Mitsui Banking Corporation and Shinsei Bank Ltd as lenders; and SMBCE as Security Trustee.
4. As with many PPP projects, this one involves a concession whereby a private company is given the right to build and operate a particular public sector project. The private company is a legal entity established by sponsors solely for the purposes of the project, ie an SPV. Private parties lend money to and acquire

an equity stake in the SPV. The construction and maintenance of the project itself is contracted out by the SPV to contractors and operators. In the present case, the Councils are the public bodies which wish to have a project accomplished. The private sponsors are Renewi PFI Investments Ltd and Interserve Developments Number 4 Ltd. The sponsors set up a joint venture company called Resource Recovery Solutions (Derbyshire) Holdings Ltd which wholly owns RRS.

5. The Councils contracted in what I will call the Project Agreement with RRS as the project company responsible for designing, constructing, commissioning and operating the facility. RRS procured funding from the lenders for the capital costs associated with the construction of the Facility and it contracted with ICL for the design, construction, commissioning and completion of the Facility. That construction contract was dated 20 August 2014. Under it, ICL was responsible for discharging substantially all RRS's obligations under its contract with the Councils.

6. Under the terms of that Construction Contract, ICL provided to RRS two bonds. In the first place a performance bond. It was dated 20 August 2014 and was between EH and RRS. I will call it the Performance Bond. In the second place a retention bond dated 18 December 2018, again between EH and RRS. I will call that the Retention Bond. In broad terms, the Performance Bond was to protect RRS in the circumstances defined in the Performance Bond which include an insolvency default of ICL or of Interserve. The Retention Bond was agreed in lieu of retention monies which would otherwise have been retained by RRS during the period of construction against structural or other defects being discovered. The Retention Bond also protects RRS in the circumstances defined

in the Retention Bond and, like the Performance Bond, these include the administration of ICL or of Interserve. I will return to the terms of the Performance Bond and of the Retention Bond in due course.

7. RRS entered into a Borrower Debenture with SMBCE as Security Trustee. It was dated 20 August 2014. Clause 3.1 of the Borrower Debenture provided in part:

"3.1 Creation of Security Assignments. The Chargor [RRS], with full title guarantee, as security for the payment or discharge of all Secured Sums assigns absolutely to the Security Trustee as Trustee for the Finance Parties [the lenders]:

"(a) all of its present and future rights, title and interests in respect of the Assigned Documents, the Document Claims, and any guarantees, warranties, licences and/or other agreements of the Chargor ..."

The Assigned Documents, as defined, included the Performance Bond and the Retention Bond.

8. It is also convenient to refer at this point to clause 17.1 of the Borrower Debenture. It provided in part as follows:

"17 Power of Attorney.

"17.1 Appointment of attorney: The Chargor, by way of security, hereby irrevocably appoints the Security Trustee, whether or not a Receiver or administrator has been appointed, and any Receiver separately, to be its attorney (with full power to appoint substitutes and to delegate) with power in its name and on its behalf and as its act and deed or otherwise to:

(a) execute and deliver and otherwise perfect any agreement, assurance, deed, instrument or document; and

(b) perform any other act of any description;

which may be required of the Chargor under this Debenture or may be deemed by such attorney necessary or desirable for any purpose of this Debenture, or to constitute, enhance or perfect the security intended to be constituted by it or to convey or transfer legal ownership of any Assets."

9. The issues which I have to decide include whether there has been an effective assignment of the Performance Bond and the Retention Bond such that SMBCE can sue on them. I will revert to the details of that issue. At this juncture it may, however, be noted that the Performance Bond expires on 20 August 2019. That is to say, a date five years after the date of the Performance Bond. The Retention Bond expires on 30 June 2020.

10. The Long-Stop Date for completion of the Facility under the Project Agreement was reached on 30 September 2018. By that date a Completion Certificate had not been issued under the Project Agreement or the Construction Contract in respect of ICL's design, construction and commissioning of the Facility. I understand that that remains the case today.

11. On 11 April 2019 the Councils gave notice of their intention to terminate the Project Agreement. This was stated to be pursuant to clause 57.1 of the Project Agreement and to be a consequence of RRS's, and it may be said by extension ICL's, failure to complete the Facility by the long-stop date. Service of that notice started the Required Period under the agreement between the Councils, Sumitomo Banking Corp as Facility Agent, and SMBCE as Security Trustee, an agreement which has been called "the Funders' Direct Agreement". The Required Period is a period of 120 days during which the Councils were prohibited, amongst other things, from issuing a notice to terminate the Project Agreement. The Councils'

notice stated that the Required Period would end on 12 August 2019 and stated that at that point "… the Councils will serve a notice of termination under clause 57.1 of the Project Agreement upon the Contractor." Clause 57.1.2.3 of the Project Agreement provides that the Project Agreement is automatically terminated on the date falling 30 days after the date on which RRS receives the notice of termination under clause 57.1. The termination of the Project Agreement automatically terminates the Construction Contract.

12. Pursuant to the terms of the Funders' Direct Agreement, the lenders were permitted to serve a notice on the Councils if the lenders considered that there was No Liquid Market consisting of at least two replacement contractors that would be prepared to offer Fair Value for the Project. The lenders served such a notice on 19 July 2019. The Councils had 14 days to challenge that notice, that is to say by 2 August 2019. On 2 August 2019 the Councils agreed with the lenders that there was No Liquid Market. This meant that the Project Agreement terminated automatically and was another event under which the Construction Contract was to terminate automatically.

13. It is also of importance for present purposes to note that on 15 March 2019 Interserve entered administration under schedule B1 of the Insolvency Act 1986.

<u>The terms of the bonds</u>

14. The Performance Bond named EH as “the Bondsman”, ICL as “the Contractor”, and referred to the Construction Contract as "the Contract". It defined RRS as “the Employer” and provided that this term "shall include it successors in title and all permitted assignees under this Bond".

15. It provided, in part, as follows:

"Now this deed witnesses as follows:

Obligation of the Bondsman

1.1 In consideration of the Employer accepting the Bondsman's obligations herein contained in discharge of the Contractor's obligation to procure a performance bond and in consideration of the payment of £10 from the Employer to the Bondsman (receipt of which the Bondsman acknowledges), the Bondsman hereby unconditionally and irrevocably agrees that the Employer may from time to time make one or more written demands on the Bondsman stating that ...

(b) any of the events of default set out in limbs (c) - (f) of the definition of ICL Default (as that term is defined in the Contract) (an 'Insolvency Default').

1.2 The Bondsman will, subject to clauses 2, 3, 5 and 7 below, pay any sum or sums so demanded:

(a) without the Bondsman being entitled or obliged to make any enquiry of the Employer;

(b) without the need for the Employer to take any legal action other than that required to be evidenced under clause 2 below) or obtain the consent of the Contractor;

(c) notwithstanding any objection by the Contractor or any other third party;

(d) without any proof or conditions (other than those required to be evidenced under clause 2 or clause 3, below, as appropriate);

(e) in full, free of any present or future taxes, levies, duties, charges, fees or withholdings and without any right of set-off, deduction or counterclaim; and

(f) within the timescales set out in clauses 2 and 3 below.

...

3 Insolvency Defaults

3.1 In the event of an Insolvency Default the Employer shall notify the Bondsman that there has been an Insolvency Default and the amount of its demand, which notice shall be signed by a director of the Employer and, subject to clauses 5 and 7 below, the Bondsman shall pay such amount or amounts within ten business days of receipt of such notice.

3.2. The Bondsman's obligation to make payment under this clause 3 shall be a primary, independent and absolute obligation.

4. Conclusive Proof

Subject to clauses 5 and 7 below (and without prejudice to clause 8 below), a written demand made in accordance with clause 2 or 3 above, shall constitute conclusive proof (and shall be admissible as such) of the Bondsman's obligation to pay the amount or amounts so demanded. The Bondsman shall in relation to any demand made by the Employer in accordance with clause 3 above, have no right and shall be under no duty or responsibility to enquire into the reason or circumstance of the demand, the respective rights and/or obligations and/or liabilities of the Employer and the Contractor under the Contract, the authenticity of the demand or the authority of the persons signing any demand for or on behalf of the Employer.

5. Maximum Amount

Save in relation to any liability for the payment of interest pursuant to clause 8 below and/or the costs incurred by the Employer in enforcing its rights under this Bond, the maximum liability of the Bondsman under this Bond shall not:

(a) in the aggregate exceed the Original Bond Amount."

(I interpose to say that the Original Bond Amount was the sum of £21,816,882.)

"8. Overpayment and Underpayment

If following payment of a claim under this Bond it is held by judgment of a court of competent jurisdiction that the amount paid by the Bondsman exceeds or is less than the corresponding liability of the Contractor under the Contract (and, in the case of an underpayment, such liability remains un-discharged), then in the event of an overpayment, the Employer shall forthwith repay to the Bondsman the excess, plus interest on that excess at the rate set out in the Contract, from the date the original payment was made by the Bondsman; or, in the event of an underpayment, the Bondsman shall, subject to clause 5, above, forthwith pay the shortfall to the Employer plus interest on the shortfall of the rate set out in the Contract from the date the original payment was made by the Bondsman.

9. Assignment

Subject to the assignee confirming to the Bondsman in writing its acceptance of the Employer's repayment obligation pursuant to clause 8, the Employer may assign the benefit of this Bond to any party (or trustee or agent thereof) acquiring an interest in the Works and/or providing finance in respect of the Works or taking an assignment of the Contract under and in accordance with the terms of the Contract or the Senior Lenders' Direct Agreement (as such term is defined in the Contract) but, otherwise, this bond, or its benefit, may not be assigned without the prior written agreement of the Bondsman.

...

11. Third Parties

This Bond shall not confer any benefit upon and no term hereof shall be enforceable by any person under or by virtue of the Contracts (Rights of Third Parties) Act 1999.

12. Non-Waiver

12.1 No failure or delay by either party in exercising any right or remedy under this Bond shall operate as a waiver; nor shall any single or partial exercise or waiver of any right or remedy preclude the exercise of any other right or remedy, unless a waiver is given in writing by that party.

12.2 No waiver under clause 12.1 shall be a waiver of a past or future default or breach, nor shall it amend, delete or add to the terms, conditions or provisions of this Bond unless (and then only to the extent) expressly stated in that waiver.

...

14. Governing law

This Bond and any non-contractual obligations connected with it shall be governed by and construed in accordance with the laws and subject to the exclusive jurisdiction of the courts of England."

16. The Retention Bond again defined RRS as "the Employer". It had no provision that the term was to include successors or assignees. It defined EH as "the Bond Provider". It defined ICL as "the Contractor", and the Construction Contract as "the Contract". It provided, in part, as follows:

"2. In consideration of the Employer accepting this Deed in lieu of the Contractor's retention obligations (as specified in the Contract and in consideration of the payment of £10 from the Employer to the Bond Provider (receipt of which the Bond Provider acknowledges), the Bond Provider hereby

undertakes unconditionally and irrevocably that upon the giving of the Employer's first written demand stating:

2.1 that, in the Employer's opinion, the Contractor has failed to perform or observe any of its duties and/or obligations arising under the Contract and/or has committed a breach of any provision and/or has failed to fulfil any warranty or indemnity set out in the Contract and/or has failed to satisfy any of its liabilities under the Contract and/or an event set out in limbs (c) to (f), (dd) to (ff) of the definition of ICL Default has occurred;

2.2 the remaining amount of the Bond Amount (to be calculated as specified below),

the Bond Provider shall on one or more occasions and without proof or condition and notwithstanding any objections which may be made by the Contractor pay to the Employer or as the Employer may direct within 10 working days thereafter such an amount as the Employer may in such demand require. The Employer may make one or more demands under this Deed, provided that the maximum liability of the Bond Provider under this Bond shall not:

2.4 in the aggregate, exceed the Original Bond Amount…"

(I interpose that the Original Bond Amount is the sum of £7,273,000.)

3. Any demand must bear the signature of a duly authorised officer of the Employer. The Bond Provider shall, in relation to any demand made by the Employer in accordance with clause 2 above, have no right and shall be under no duty or responsibility to enquire into the reason or circumstance of the demand made by the Employer, the respective rights and/or obligations and/or liabilities of the Employer and the Contractor under the Contract, the authenticity of the

demand made by the Employer or the authority of the persons signing any demand for or on behalf of the Employer.

4. Any demand made by the Employer in accordance with terms of this Bond shall be conclusive evidence of the Bond Provider's liability and of the amount of the sum(s) which it is liable to pay to the Employer, notwithstanding any objection made by the Contractor or any other person.

...

6. The Employer may assign this Deed or any benefit hereunder to any party (or trustee or agent thereof) acquiring an interest in the Works (as defined under the Contract) and/or providing finance in respect of the Works (as defined under the Contract) or taking an assignment of the Contract under and in accordance with the terms of the Contract or the Senior Lenders' Direct Agreement (as defined in the Contract) but, otherwise, this Deed, or its benefit, may not be assigned without the prior written agreement of the Bond Provider.

…

11. This Deed and any non-contractual obligations connected with it shall be governed by and construed in accordance with the laws of England and the Bond Provider hereby irrevocably and unconditionally submits to the exclusive jurisdiction of the English Courts.

12. Notwithstanding any other provision of this Deed (but expressly without prejudice to Clause 4) nothing in this Deed confers or purports to confer any right to enforce any of its terms or on any person who is not a party to it and the provisions of the Contracts (Rights of Third Parties) Act 1999 shall not apply to this Deed."

The Notices of Assignment

17. In relation to the Performance Bond, RRS sent a Notice of Assignment and Acknowledgement of Receipt to EH, dated 20 August 2014. It was in the form of a letter addressed to EH. It was headed "Notice of Assignment and Acknowledgement of Receipt". It provided in part as follows:

"Dear Sirs,

Performance Bond entered into between Euler Hermes Europe SA (NA (sic)) and Resource Recovery Solutions (Derbyshire) Limited in relation to the Derby City Long Term Waste Management Project (the 'Document')

We refer to the Document. We refer also to a debenture (the 'Deed') dated 20 August 2014 made between Sumitomo Mitsui Banking Corporation as Security Trustee for certain beneficiaries named therein (the 'Security Trustee') and ourselves ('Chargor').

We hereby give you notice that by a first ranking assignment contained in the Deed, all of the Chargor's present and future right, title, interest and benefit in, under and to the Document including any sums payable to the Chargor pursuant to all representations and warranties, undertakings and indemnities to, agreements with and security to be provided in favour of the Chargor in respect of or pursuant to the Document, and any rights of abatement or set-off, and all other rights of recovery under or pursuant to the Document and any net proceeds of any claims, awards and judgments which may at any time be received or receivable by the Chargor pursuant to the Document, together with the benefit of all powers and remedies for enforcing the same were assigned to the Security Trustee by way of security.

We irrevocably and unconditionally instruct and authorise you as follows (notwithstanding any previous directions which we may have given you to the contrary):

1. all monies payable by you to the Chargor pursuant to the Document shall be paid into account number 324003 in the Chargor's name held with Sumitomo Mitsui Banking Corporation Europe Limited, sort code 40-51-25 (the 'Proceeds Account') unless and until otherwise directed by the Security Trustee whereupon such moneys shall be paid in accordance with the instructions of the Security Trustee;

2. Notwithstanding the assignment referred to above or the making of any payment by you to the Security Trustee pursuant to it, the Chargor shall remain liable under the Document to perform all the obligations assumed by it under the Document and neither the Security Trustee nor any receiver, delegate or sub-delegate appointed by it shall at any time be under any obligation or liability to you under or in respect of the Document;

3. The Chargor shall not vary or waive (or agree to vary or waive) any provision of the Document or exercise any right to rescind or terminate the Document without the prior written consent of the Security Trustee but otherwise the Chargor shall be entitled to exercise all its rights, powers and discretions under the Document unless and until you receive written notice from the Security Trustee to the contrary, in which event all rights, powers and discretions shall be exercisable by the Security Trustee or as it directs;

4. Unless otherwise directed by the Security Trustee, you shall furnish or disclose to the Security Trustee in addition to ourselves all notices, matters or

things required under the Document to be furnished and disclosed to ourselves ...

Please acknowledge receipt of this notice of assignment and confirm that:

(a) You will pay all sums due under the Document as directed by or pursuant to this notice of assignment;

(b) You will not claim or exercise any set-off or counterclaim in respect of sums payable under the Document;

(c) You have not received any other notice of assignment or charge of the Document or that any third party has or will have any right or interest whatsoever in, or has made or will make or will be making any claim or demand or taking any action whatsoever in respect of the Document; and

(d) You agree to and will comply with the other provisions of this notice of assignment

by signing the acknowledgment on the attached copy of this notice of assignment and returning that copy to the Security Trustee at [SMBCE], 99 Queen Victoria Street, London EC4V 4EH marked for the attention of the Steve Bundy/Roland Robertson, with a copy to Messrs Norton Rose Fulbright LLP ..."

18. That, as I say, was signed for and on behalf of RRS.

19. It was then signed on behalf of EH on the duplicate, which was addressed to SMBCE, under text which read:

"We acknowledge receipt of the notice of assignment of which this is a copy and confirm each of the matters referred to in the notice of assignment."

20. In relation to the Retention Bond, RRS sent a Notice of Assignment and Acknowledgment of Receipt to EH dated 19 July 2019. It was in essentially the same terms, mutatis mutandis, as the Notice of Assignment in relation to the

Performance Bond. As I understand it. EH has not signed or returned an acknowledgment of receipt.

The call on the Bonds

21. It has not been in dispute that the entry of Interserve into administration constituted an Insolvency Default as defined in clause 1.1(b) of the Performance Bond, and an "event" for the purposes of clause 2.1 of the Retention Bond.

22. The Bonds were not immediately called on. However, on 19 July 2019 SMBCE served on EH a Performance Bond Demand and a Retention Bond Demand.

23. Both demands were in very similar terms. I will quote from the demand on the Performance Bond. It was headed "**Performance Bond between Euler Hermes SA (NV) ... and … RRS ... executed by deed dated 20 August 2014 (the 'Performance Bond')**"

It provided in part:

"We refer to the Performance Bond, RRS' notice of assignment of the Performance Bond to us in our capacity as Security Trustee dated 20 August 2014 (the 'Notice of Assignment') and Euler Hermes' acknowledgment of the Notice of Assignment dated 28 August 2014.

Pursuant to paragraph 3 of the Notice of Assignment, we, in our capacity as Security Trustee, hereby give notice to Euler Hermes that all of RRS' rights, powers and discretions under the Performance Bond shall now be exercisable by the Security Trustee or as it directs, and not by RRS.

Pursuant to clauses 1.1(b) and 3.1 of the Performance Bond, we hereby give notice to Euler Hermes that:

(1) an Insolvency Default (as defined in clause 1.1(b) of the Performance Bond)

has occurred by reason of an event of default set out in limb (f) of the definition of ICL Default (as that term is defined in the Contract) as a result of the appointment of the administrators to Interserve PLC (being the Guarantor, as defined in the Contract) by an order of the High Court; and

(2) we hereby make a written demand for the full Bond Amount of £21,816,882 ..."

24. The demand under the Performance Bond and the demand under the Retention Bond were each signed by a director of SMBCE twice. The first signature was said to be for and on behalf of SMBCE as Security Trustee. The second was said to be for and on behalf of SMBCE as Security Trustee "in its capacity as attorney for [RRS] pursuant to clause 17 (*Power of attorney*) of the debenture dated 20 August 2014 between RRS and the Security Trustee". As I have said, the Performance Bond demand stated that a sum of £21,816,882 was payable by EH under the Bond within ten business days. The Retention Bond demand stated that a sum of £7,273,000 was payable by EH under the Bond within ten working days. In accordance with those demands those sums would have been payable by 2 August 2019.

The Proceedings

25. EH did not pay under the Bonds on 2 August.

26. On 5 August 2019, Gateley Legal, on behalf of EH, sent a letter to SMBCE's solicitors which read, in part, as follows:

"You will appreciate that, as the surety, our client has no first-hand knowledge of the project or any discussions that may being ongoing between the relevant parties. Our client is therefore, entirely reliant on the information that is provided

to us by [ICL] and hopefully, yourselves.

We have received some information from ICL including a draft adjudication notice, which indicates that RRS has suffered no loss as a result of the insolvency of Interserve Plc. The information which we have received from ICL gives rise to a very legitimate concern that if there is no loss, the call on the bond has made on a false premise. Whilst our client is not in a position to rush to judgment, it does put our client in a position of unease that the demand is made in circumstances where there is no loss.

We appreciate your view that your client is under no obligation to explain the reason why the demand has been made because your client's view is that the bond does not allow our client to enquire as to the nature of the losses. Putting aside whether that is right or wrong, you will appreciate our client's view is that it is very important to know whether the demand that has been made is genuine and that it is it has made in good faith.

We appreciate that we only have ICL's view on this point and so it would give our client great comfort if you could explain your client's position as soon as possible.

In addition to the above, we understand from ICL that there are a number of ongoing discussions in respect of your position and the negotiations that it is intended will take place with RRS and with Derbyshire County Council (the 'Council'). Obviously, if the parties without prejudice discussions would result in no call being made on the bond you will appreciate that this is also very significant for our client.

Please could you confirm the current status of those discussions and what, if

any, action is being taken by your client and/or ICL in this regard.

We understand that ICL intends to complete the works under the contract yet we had understood that there was a disagreement between ICL and RRS in respect of the Acceptance Tests (as defined in the construction contract) but that ICL fully intended to complete the works. It would assist our client to know whether you have any information in respect of this.

We would be grateful if you would provide responses to these questions to allow our client to assess the matter internally. If you wish to discuss this matter in tele-con then please let us know and we will be happy to discuss this matter with you."

27. The reference in that letter to "information received from ICL", was apparently to a notice given on 2 August by ICL of an intention to refer a dispute with RRS to adjudication. In that notice ICL stated that the administration of Interserve was beneficial, was not an ICL Default, and was not causative of any loss to RRS.

28. On 6 August 2019 SMBCE commenced Part 8 proceedings against EH.

29. The Claim Form appended Points of Claim. In the Claim Form and the Points of Claim SMBCE claimed for declarations and orders as follows:

"(a) a declaration that the demands made are in conformity with and are valid demands under the Performance Bond and the Retention Bond respectively;

(b) a declaration that EH is liable to pay SMBCE the amounts of £21,816,883 under the Performance Bond, and £7,273,000 under the Retention Bond;

(c) an order that EH pay SMBCE those amounts forthwith; and

(d) an order that EH pay SMBCE interest on those amounts from 2 August until payment.

30. At the same time SMBCE stated that it was applying for an order that the Part 8

claim be heard and determined before 20 August 2019, and for directions that there should be an abridgement of the time for service on EH, directions for an expedited hearing in the vacation, and other procedural directions needed for such an expedited hearing. The basis on which an expedited hearing was sought was set out in a witness statement of Andrew Hartley, and in a skeleton argument served on behalf of SMBCE on 6 August 2019. What was said was that the matter was urgent because of the impending expiry of the Performance Bond on 20 August 2019. It was said that if there was an unarticulated defect in the demand on the Performance Bond, SMBCE needed to know what it was in order, if possible, to cure that defect by the issue of a fresh demand before 20 August 2019.

31. A hearing took place on 7 August 2019 at which SMBCE was represented by Mr Croall QC, and EH, having received notice of the hearing, was represented by Ms Doerries QC. On that occasion I ordered the hearing of the Part 8 claim to be expedited and certified as vacation business, and fixed the hearing for 13 August 2019. In order to permit the resolution of such issues as could be decided (and to ascertain whether there were issues which could not be decided at that point), I ordered that EH should file and serve a document identifying its grounds for refusing to make payment in accordance with the demands which had been made under the Performance Bond and the Retention Bond, and any evidence on which it wished to rely.

32. On 9 August 2019 EH served its Grounds for Refusing to Make Payment in Accordance with the Demands dated 19 July 2019 made under the Performance Bond and the Retention Bond. No evidence was served.

38. The document which was served identified the grounds on which EH relied. They were as follows:

(1) That there was no valid assignment of the Performance Bond because SMBCE had not, prior to the purported assignment, confirmed its acceptance of the Employer's repayment obligation pursuant to clause 8 of the Performance Bond. That, further, the purported notice of assignment could not be valid, as the underlying assignment was not effective; and that EH's signature on the notice of assignment was no more than a confirmation of receipt of the letter.

(2) That, in any event, the notice of demand under the Performance Bond, dated 19 July 2019, was not signed by the Employer, namely RRS, as required by clause 3.1 for the Performance Bond.

(3) That the demand under the Retention Bond was not signed by a duly authorised officer of the Employer, namely RRS, and was not therefore a valid demand.

Analysis

The Performance Bond

The Parties' Positions

42. As I have said, EH's submission was that there had been no effective assignment of the Performance Bond because there had not, prior to the assignment of the Performance Bond effected by the Debenture been either a confirmation given to EH by SMBCE that it accepted the obligation of RRS under clause 8 of the Performance Bond, or a written agreement (by EH) that there could be an assignment to SMBCE without its having given such a confirmation.

43. For its part, SMBCE pointed out that there was no dispute that the assignment

contained in the Debenture was valid as between the assignor, RRS, and the assignee, SMBCE. The only question was whether there was an effective assignment vis-à-vis EH. The issue was whether, because of non-compliance with clause 9 of the Performance Bond, and in the absence of waiver or agreement to the contrary, there was no transfer of the chose in action on the Performance Bond. It referred in this context to Linden Gardens v Lenesta Ltd [1994] 1 AC 85 at 108 C-G. I agree that there was no dispute as to the validity of the assignment as between the assignor and the assignee, and that the significance of the issue is as SMBCE submitted. I add here that if there was no effective assignment, in the sense that I have described, then it would follow -- and I did not understand SMBCE seriously to dispute -- that SMBCE would not have become a "permitted assignee" under and for the purposes of the Performance Bond.

44. SMBCE disputed that the opening words of clause 9 of the Performance Bond created a condition precedent. It contended that they did not require that there should be an acceptance of the repayment obligation by the assignee before an assignment was effected, and indeed that it was impossible that there could have been. This was because the assignment was effected on 20 August 2014 by the Debenture. That was the same date as the Performance Bond. Prior to that date there was neither an assignee nor a Bondsman for the purposes of clause 9.

45. Ultimately, however, it appeared to me that nothing turned on whether the opening words of clause 9 created a condition precedent or not. This is because SMBCE accepted that they did create a "requirement" whereby, waiver or agreement otherwise apart, there would not be an effective assignment of the chose in action unless there had been a confirmation of the assignee's acceptance of the Employer's

repayment obligation pursuant to clause 8 of the Performance Bond. As SMBCE has not at any point, up to and including today, given such a confirmation, it was, as I understood it, accepted that, subject to there having been an agreement otherwise or a waiver of the requirement, the assignment was not effective to have transferred the chose in action or to make SMBCE a "permitted assignee".

46. What SMBCE submitted, however, was that the effect of the Notice of Assignment and Acknowledgment of Receipt of 20 August 2014, which had been signed and returned to SMBCE by EH, was either a contractual agreement that there was an effective assignment notwithstanding that SMBCE had not accepted the Employer's repayment obligation pursuant to clause 8 of the Performance Bond; or was a waiver of the requirement that SMBCE had to accept that repayment obligation for there to be an effective assignment. SMBCE submitted that clause 2 of the Notice of Assignment, by stating that "[RRS] shall remain liable under [the Performance Bond] to perform all the obligations assumed by it under [the Performance Bond] and neither SMBCE nor any receiver, delegate or sub-delegate appointed by it shall at any time be under any obligation or liability to you under or in respect of the [Performance Bond]", embodied a clear agreement (or statement giving rise to a waiver) that SMBCE had not assumed and was not required to assume any of RRS's obligations under the Performance Bond, including the repayment obligation under clause 8. SMBCE's argument was further to the effect that the Notice of Assignment made it clear that, notwithstanding that SMBCE had not assumed any such obligation, the assignment was effective as against EH.

47. EH countered this argument by contending that the Notice of Assignment gave rise neither to a contract nor a waiver as contended for by SMBCE. Especially given its

heading, it was not clear enough to do either. Furthermore, in relation to the suggestion of a contract, it was not clear who it was that SMBCE was contending were parties to the contract alleged. In any event, there was no consideration provided for the alleged promise by EH. As to waiver, there was no 'express statement' of an amendment, deletion or addition to the terms of the Performance Bond as required by its clause 12.2, and therefore, for that reason if no other, there could not be an effective waiver.

48. I am unable to find that the Notice of Assignment constitutes a binding contract. It is true that it contains the language of agreement by EH, in particular by the words "Please acknowledge receipt of this notice of assignment and confirm that ... you agree to and will comply with the other provisions of this notice of assignment." EH, in providing its copy confirmed the matters referred to in the notice of assignment, and these included the agreement to comply with the other provisions of the notice of assignment.

49. If there was an agreement then in my judgment it was a bilateral agreement between EH and RRS. RRS was the sender of the letter and EH its recipient. It is RRS which is referred to as "we" within the document and the Security Trustee is referred to as an entity separate from "we" and "you", ie, apparently distinct from the parties to the agreement. That is relevant to the issue of whether there was consideration, which in my judgment is the most difficult issue for SMBCE in establishing a binding contract. As Mr Croall accepted, if the agreement was bilateral then consideration must be found to have been provided by RRS.
I consider that it is very difficult to see how anything of value in the eyes of the law, whether by way of benefit to EH or detriment to RRS, was provided.

50. Mr Croall identified two possibilities. In the first place, and as a result of questions from me, he suggested that the provision in clause 3 that RRS would not waive or vary or agree to waive or vary any provision of the Performance Bond, or exercise a right to rescind or terminate it, without the prior written consent of the Security Trustee might constitute a valuable promise. What he suggested was that the addition of the point that the rights would not be exercised without the prior written consent of the Security Trustee was a new promise made to EH, and that new promise was valuable consideration. But if that was a promise at all it would only be good consideration if its performance would be regarded as good consideration. The performance of this promise would restrict the circumstances in which RRS could agree to vary or waive provisions in the Performance Bond or exercise a right to rescind or terminate it. In each of these cases it seems clear that the variation, waiver, rescission or termination envisaged is something which would benefit EH. Indeed, it is because these are matters which may potentially prejudice the security that the clause states that they are not to be exercised without the prior written consent of the Security Trustee. Accordingly I do not see that the promise that these matters will not be done without the consent of the Security Trustee can be regarded as a benefit to EH.

51. Secondly, Mr Croall suggested that the terms of clauses 1 and 3 (at least) provided "practical benefits", in that they allowed EH to know where it stood. I do not consider that the nomination of a bank account into which payments are to be made, unless and until directed otherwise, or the provision that rights would be exercised by the Chargor until notice is provided by the Security Trustee saying that they will be exercised by it, provide practical benefits or amount to

consideration.

52. I do not regard the finding that there was no consideration simply as a technical point. Reading the Notice of Assignment as a whole it appears to me clear that it was not intended to provide benefits to EH, but was rather intended (in relevant part) to impose requirements on EH and to lay down or indicate the limits to its rights. This is perhaps unsurprising. It is not a document which represented a negotiation with EH, and thus was not seeking to embody matters which EH wanted or had bargained for.

53. SMBCE contended that even if there was no contract contained in the Notice of Assignment, it contained a waiver of the requirement that SMBCE should have accepted the repayment obligation for there to be an effective assignment. In this regard, SMBCE relied on the well-known statement of Lord Denning MR in W J Alan and Co Ltd v El Nasr Export and Import Co [1972] 2 QB 189 at 231 A to C.

54. Mr Croall's submission was that clause 2 of the Notice of Assignment amounted to a clear indication by EH that its strict rights under the Performance Bond to require there to have been an undertaking of the repayment obligation before there was an effective assignment would not be insisted upon, which it was intended should be acted upon by SMBCE, and which had been acted upon, not least by the making of the demand on the Performance Bond which was made in this case.

55. Ms Doerries contested that clause 2 amounted to a clear indication that the terms of clause 9 of the Performance Bond would not be insisted upon. She also relied heavily on the terms of the non-waiver provision, clause 12 in the Performance Bond.

56. In my judgment, whatever otherwise might have been the effect of clause 2 of the Notice of Assignment it was not effective as a waiver of the requirement for there to have been an assumption of the repayment obligation under clause 8 of the Performance Bond in order for there to be an effective assignment under clause 9.

57. The waiver which SMBCE contends for must at least, in my judgment, be "a single ... waiver of any right or remedy" within clause 12.1 of the Performance Bond. Under clause 12.2, no waiver within clause 12.1 shall amend, delete or add to the terms, conditions or provisions of the Bond unless and then only to the extent expressly stated in that waiver. It is, as indeed Mr Croall accepted, SMBCE's case that the effect of the alleged waiver was to amend, delete or add to terms etc of the Performance Bond.

58. The question then arises as to whether, in the waiver, this "amendment, deletion or addition to the terms etc of the Performance Bond" can be said to have been "expressly stated in that waiver", and, if it cannot, what, if any, significance attaches to that.

59. Mr Croall's submission was in essence that the requirement of express statement in the waiver meant only that the waiver had to be sufficiently clear such that, on its natural meaning, it was plainly inconsistent with the exercise of rights pursuant to or insistence on the terms of clause 9 of the Performance Bond. He submitted that there was no requirement for the waiver to refer to the terms of the Bond, or to what parts of the Bond were being amended deleted or added to.

60. In my judgment clause 12.2 requires the waiver to be more specific than that. If that were all that was required it would add little to the requirement that there should be a waiver, which is provided for by clause 12.1. The first part of

clause 12.2 is instructive in this regard. It provides that a waiver of a past or future default or breach shall not be an effective waiver unless and only to the extent expressly stated in that waiver. I would regard it as clear that to be an effective waiver it would have expressly to identify the particular past, or potential future, "default or breach" which is waived. Similarly, in relation to the second part, I consider that it provides that a waiver will not amend, delete or add to the terms of the Performance Bond unless there is an identification of the terms amended, deleted or added to. This could be by reference to the particular terms, or by quotation, or indeed by a statement referable only to particular terms of the Performance Bond. What clause 12.2 is designed to avoid, however, is something being said to be a waiver where there has been no conscious acceptance of the effect of the supposed waiver on the terms of the Bond.

61. I do not consider that the alleged waiver meets this requirement. It does not expressly identify any terms of the Performance Bond, and in particular does not refer to clauses 8 or 9. Equally, there is no specific reference to a repayment obligation. The wording "shall [not] at any time be under any obligation or liability to you under or in respect of the Document" is wide wording which could cover a range of different potential liabilities. Indeed it is apparent that this wording was not drafted with any specific reference to the repayment obligation in the Performance Bond, not least from the fact that the same form of Notice of Assignment was specified in the Debenture to be used for a variety of Assigned Documents: see schedules 1 and 4. It was in fact used by SMBCE both in relation to the Performance Bond which included the clause 8 repayment obligation and the clause 9 limitation on an effective assignment, and in relation to the Retention

Bond, which did not.

62. Accordingly, and in the absence of citation of authority, I concluded that the alleged waiver did not meet the requirements of clause 12.2 and that as a result was not an effective waiver.

63. Because of the potential significance of the issue of the effect of clause 12.2, however, I asked the parties at the hearing to seek to identify any further authorities on the effect of a clause in the terms of clause 12 or similar terms. I have been helpfully provided by SMBCE with a number of authorities, including Credit Agricole Indo-Suez v BB Energy BV [2004] EWHC 750 (Comm), RGI International v Synergy Classic Ltd [2011] EWHC 3417, and Grupo Hotelero Urvasco SA v Carey Value Added SL [2013] EWHC 1039 (Comm). For its part, EH referred me to Actionstrength Ltd v International Glass Engineering In GI En SpA [2003] 2 AC 541, and to Rock Advertising Ltd v MWB Business Exchange Centres Ltd [2018] UKSC 24.

64. Consideration of these authorities has not caused me to exchange my view set out above as to effect of clause 12.2 of the Performance Bond or its application to the facts of this case. As is made clear in Rock Advertising, the parties to a contract may, in that contract, make provisions which limit the effectiveness which their subsequent dealings might otherwise have had in altering their obligations under that contract. While I accept, as stated in Crédit Agricole Indo-Suez and in RGI International, that a non-waiver clause can itself be waived, it would appear to me to be inconsistent with the recognition in Rock Advertising that party autonomy operates up to the conclusion of the contract and thereafter only to the extent that the contract allows to find that any conduct which would amount to a waiver of the

original right also amounts to a waiver of the non-waiver clause. In my judgment there would have to be something which showed that there was not only a waiver but a waiver of the non-waiver clause. An analogy may be drawn which what was said by Lord Sumption JSC in Rock Advertising about estoppels at paragraph 16. Applying that reasoning and language to an alleged waiver, it appears to me that if it is said that waiver prevents reliance on a no waiver clause there would have to be something which indicated that the waiver was effective notwithstanding its noncompliance with the non-waiver clause and something more would be required for this purpose than what might otherwise simply constitute a waiver of the original right itself. In my judgment, applying that test here, the terms of the Notice of Assignment did not meet it.

65. In those circumstances, I consider that the alleged waiver was not effective. The effect of that conclusion is that there was not an effective assignment for the purposes of transferring the chose in action under the Performance Bond and SMBCE did not become a "permitted assignee" thereunder.

66. SMBCE's alternative case is that if there was no effective assignment then it was RRS which could make the claim on the Performance Bond, and that RRS had done just that, in that the demand of 19 July 2019 was signed by SMBCE as attorney for RRS pursuant to its power of attorney.

67. In answer to this, Ms Doerries made a number of points. In the first place she submitted that the action was not properly constituted for such a claim. She submitted that as RRS was not a party to the action there could be no such claim. She said that, in the context of expedited hearing, that should be the end of the point. To that Mr Croall retorted that the first time that there had been any

indication that there was a dispute as to the validity of the assignment had been after the proceedings had been commenced and it had only been articulated in a coherent way on 9 August.

68. I considered that Ms Doerries was right at least to say that there could not be an order in favour of SMBCE for the payment of money under the Performance Bond. But Mr Croall submitted that different considerations apply to the grant of a declaration. He submitted that what was sought was a declaration that there had been a valid claim under the Performance Bond and that the money under it should be paid to the specified account in RRS's name, and that there was no reason why the court could not make those declarations even though RRS retained the chose in action. I consider that he was correct in relation to that procedural point. I note further that there is no longer a rule to the effect that a non-party to a contract may not seek a declaration as to its terms and effect, and that a non-party may be entitled to seek such a declaration provided it has sufficient interest in the matter. I consider that SMBCE does have such a sufficient interest.

69. Mr Croall further submitted that no concerns arose from the fact that RRS had not been made a party to the action, not least because he said that RRS was aware of what was occurring in this claim and on this hearing.

70. Ms Doerries further submitted that the demands were not appositely worded to be effective demands by RRS. I do not consider that to be correct. The Performance Bond specified only that in the event of an Insolvency Default, "the Employer shall notify the Bondsman that there has been an Insolvency Default and the amount of its demand, which notice shall be signed by a director of the Employer." Putting on one side for the moment the issue of whether the notice was "signed by a director

of the Employer", I consider that the notice did indeed notify EH of there having been an Insolvency Default and the amount of the demand. Furthermore, considering that the notice was signed on behalf of RRS by the officer of an entity which had a valid power of attorney from RRS, I consider it impossible to say that the notice was not a notification "by the Employer".

71. The only remaining question, therefore, is whether the notice complies with the requirement that it should be signed by "a director of the Employer". In this context it is of some note that the doctrine of strict compliance applicable to letters of credit is not necessarily applicable to bonds such as a performance bond: see IE Contractors Ltd v Lloyds Bank PLC [1990] 2 Lloyd's Rep 496 at 500-501 per Staughton LJ; Paget's Law of Banking (15th edition), paragraphs 35.10 and 38.3. The question as to whether there has been compliance is one of construction of the bond which will be subject to the ordinary principles, although these require regard to be had to the nature of the agreement and the extent to which it may have been carefully drafted on advice.

72. In my judgment, the phrase "signed by a director of the Employer" is to be construed as covering a case where there is a signature by a director of a company which holds a valid power of attorney from the Employer where such power of attorney extends to the execution and delivery of the notice. In this regard, it is of some significance that the definition of "Employer" extends in the Performance Bond to successors in title and all permitted assignees under the Bond. Though, as I have said, I do not consider that SMBCE was a permitted assignee and so this definition is not relevant for *that* purpose, it nevertheless indicates that in requiring the signature of a director of the Employer the Bond was not necessarily requiring

a signature by a director of RRS, the particular corporate entity, and only of that specific corporate entity. Accordingly, it can be seen that the requirement of a signature by a director of the Employer was not intended to ensure that the signature was one by a limited number of individuals who were actually directors of the particular company RRS. Instead, the commercial justification for the signature of a director is to ensure that the demander is authorised to make the demand. That is met when a director of a company which holds a power of attorney from the Employer signs the notice.

The Retention Bond

74. In relation to the Retention Bond the issues are somewhat different. In this case there was no comparable restriction on the effectiveness of the assignment. It is not in dispute that there has been an effective assignment so that the chose in action in relation to this Bond was passed to SMBCE. The issue in relation to this Bond arises because there is no express extended definition of "Employer" in the Retention Bond comparable to that in the Performance Bond. In other words, it does not have the words "which term shall include its successors in title and all permitted assignees under this Bond."

75. The question, therefore, arises as to whether, as a matter of construction of the Retention Bond, a notice signed by the officer of an assignee counts as the signature of a duly authorised officer of the Employer for the purposes of clause 3 of the Retention Bond.

76. In my judgment it does. The Retention Bond specifically contemplates that there may be an assignment of the deed to any party acquiring an interest in the Works or providing finance in respect of the Works or taking an assignment of the

Construction Contract (clause 6). It must have been contemplated that after an assignment it would have been the assignee which would be interested in making a demand on the Bond. Indeed, it would be surprising if after an assignment the assignee was dependent on the assignor for the exercise of a right to claim on the right assigned; namely, the Retention Bond. Especially is this so, because the assignor may be incapable of compulsion post-assignment, as in the case of administration. In my judgment, the Retention Bond is to be construed as meaning that the duly authorised officer of an assignee of the bond, if such an assignment is permitted by clause 6, counts as a duly authorised officer of the Employer for the purposes of clause 3.

77. I should add that even if that is wrong, the demand made in relation to the Retention Bond was signed by a director of SMBCE as attorney for RRS. I would consider that if there was a requirement, notwithstanding an assignment, for a signature by a duly authorised officer of RRS, that that signature satisfied that requirement.

Conclusion

78. For these reasons I am prepared to make a declaration to the effect that the demand on the Performance Bond by RRS through SMBCE as the holder of a power of attorney, was a valid demand; and also that the notice of demand on the Retention Bond was a valid demand by SMBCE as assignee.