Case No: HT-2020-000025

Neutral Citation Number: [2020] EWHC 468 (TCC)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
TECHNOLOGY AND CONSTRUCTION COURT (QB)

Rolls Building
Fetter Lane
London, EC4A 1NL

Date of judgment: 28 February 2020

Before :

THE HONOURABLE MR JUSTICE FRASER

- -

Between :

Yuanda (UK) Company Limited
Applicant/Claimant

- and –

(1) Multiplex Construction Europe Limited
(formerly known as Brookfield Multiplex Construction Europe Limited)
(2) Australia and New Zealand Banking Group Limited
Respondents/Defendants

- -

Approved Judgment

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Alexander Hickey QC and James Hatt (instructed by **Devonshires Solicitors LLP**)
for the Applicant/Claimant
Sean Wilken QC (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**)
for the First Respondent/Defendant
Laura John (instructed by **DLA Piper UK LLP**)
for the Second Respondent/Defendant

Hearing dates: 20, 27 January 2020, and 19 February 2020

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Mr Justice Fraser:

Introduction

1. These proceedings concern an injunction which was obtained by Yuanda (UK) Company Ltd ("Yuanda") against both Multiplex Construction Europe Ltd ("Multiplex") and the Australia and New Zealand Banking Group Ltd ("the Bank") preventing the Bank from paying out, on demand, to Multiplex the sum of £4,411,490.70 ("the Sum") said by Multiplex to have fallen due to it under a financial instrument issued by the Bank. That instrument is Guarantee No. GO207831002 dated 26 May 2015 ("the Guarantee"), and the Sum is the maximum sum under the terms of the Guarantee. The Guarantee has an expiry date, which I deal with further at [18] below. The demand, or call, was made by Multiplex dated 17 January 2020. Yuanda obtained the injunction shortly after that, and seeks continuation of it, as will become clear.

2. The Guarantee was provided in respect of a contract between Multiplex and Yuanda for works at a major construction project at One Blackfriars Road in London ("the Project"). Further details, in so far as they are relevant to these proceedings at this stage, are provided below at [8] and following.

3. The demand was made on 17 January 2020, which was a Friday. On the following Monday morning, 20 January 2020, Yuanda's legal representatives notified the court that it wished to obtain a very urgent *ex parte* hearing in order to obtain interim injunctive relief restraining a call and/or payment out on a bond. The court provided Yuanda with a hearing at 2.00pm on the same day. A skeleton argument and draft witness statement from Mr Richard Anderson for Yuanda was provided to the court, but there was no application notice, no draft proceedings, nor was there a draft Order provided. The reason for identifying this is these features are relevant in terms of the relief sought in the (subsequent) draft proceedings brought by Yuanda, as will become clear. Mr Anderson is one of Yuanda's solicitors.

4. A draft Order, in something of a bare if not completely novel form, was provided to the court at 1.58pm, which evidently is only two minutes before the hearing. Notice of the application had been given by Yuanda to each of Multiplex and the Bank, and so Multiplex (although not the Bank) was represented at the hearing at 2.00pm, although Mr Wilken QC had not had very much time involved in the case. He certainly had not been given much time to study the draft Order. The application therefore proceeded *ex parte* on notice. At that point Yuanda, in its evidence, was alleging fraud and bad faith against Multiplex; Mr Anderson's witness statement, which was signed in court at the application, had a number of paragraphs under the heading "Multiplex's bad faith".

5. Yuanda satisfied me that an injunction was justified at that stage, clearing the necessary hurdles for the making of an interim injunction with a return date for no longer than 7 days later. However, the order could not be made in the terms of the draft that was submitted, as there was no reference within that order either to the necessary undertakings which are routinely required for *ex parte* orders, nor was there any reference to fortification of the undertaking in damages. Despite Yuanda's best endeavours to persuade the court that no fortification of the undertaking in damages was required in this particular case, fortification was something that I considered was

in this case plainly required. This was particularly as Multiplex made various observations about Yuanda's potential financial situation, but not solely because of that. I would have required fortification of the undertaking in any event, regardless of those observations. I would also observe that in this case, there was undoubtedly sufficient time to have lodged a draft order considerably earlier than 1.58pm on 20 January 2020, as well as to have lodged proceedings themselves, at least in draft. Paragraph 4.3(1) of Practice Direction 25A requires a draft order to "be filed with the court two hours before the hearing wherever possible", rather than the two minutes before the hearing adopted in this case. A draft order is not only very useful to the court, as it enables the judge in advance to work out what he or she is being asked to grant by way of injunctive relief; it also assists the applicant by concentrating the mind on what undertakings are usually required before such urgent orders will be granted. Yuanda was given time to draft an order in more suitable terms, the court having indicated that an injunction would be granted.

6. I therefore made an order later that afternoon that, in operative part, prevented Multiplex from pursuing the demand of 17 January 2020 made on the Guarantee, together with an earlier demand dated 11 December 2019 which seemed to have been abandoned. The order also prevented the Bank from making any payment in respect of the Guarantee until the return date or further order. The first return date was fixed for 27 January 2020, one week later than the grant of the urgent order. At that second hearing Mr Wilken again attended for Multiplex. Proceedings had been issued by Yuanda by that stage, and served against both Respondents/Defendants, although these were not (as the court had been told on 20 January 2020 would be the case) Part 8 proceedings, but were rather proceedings under Part 7. By that date, no Particulars of Claim were available.

7. I wish to make it clear that no criticism is intended of the Bank, in any respect, for not appearing, and not being represented, at either of the hearings on 20 or 27 January 2020. It is not at all unusual for a Bank not to be able to attend such hearings, and/or not to wish to attend in any event. Banks are very often neutral in arguments about the effect of terms within such financial instruments. The position of the Bank in these proceedings generally is very well summarised by Ms John in her skeleton argument for the second return date in the following terms:
"ANZ is an established and reputable bank, which honours its payment obligations. Its primary concern in these proceedings, both substantively and reputationally, is therefore for all relevant matters to be resolved as quickly and efficiently as possible."
The Bank does not, however, adopt a neutral position on all the legal issues before the court, as will become clear when the proper construction of Clause 4 of the Guarantee is considered below.

8. One Blackfriars Road, or as its marketing name has it, simply "One Blackfriars", is a major building recently constructed in London immediately next to Blackfriars Bridge on the South Bank of the Thames. It is 170m tall and 50 storeys high, and due to its distinctive shape, has also become known as The Vase or The Boomerang. It consists of a tower, a hotel and a retail/leisure facility called the Podium. It is the tower that is 50 storeys high. The Employer is St George PLC and St George South London Ltd jointly, both of which are members of the Berkeley Group of companies. Multiplex is the main contractor under a JCT Design and Build (2011) contract (the "Main Contract") to carry out the main shell and core works. Multiplex appointed Yuanda to

carry out, as sub-contractor to Multiplex, the façade works for the Development under a JCT Design and Build (2011) Sub-Contract dated 14 July 2014 ("the sub-contract"). Yuanda obtained the Guarantee from the Bank as security for its performance of the sub-contract, that security being provided to Multiplex on the terms set out in the Guarantee.

9. The Main Contract works were delayed, and the sub-contract works were delayed. The parties are in dispute about the cause of delay. Multiplex maintain that Yuanda are to blame, and Yuanda contend that they are entitled to an extension of time for the sub-contract works together with substantial further payment by way of loss and expense suffered as a result of delay.

10. Multiplex entered into a compromise agreement with the Employer in respect of certain matters arising under the Main Contract on 17 October 2019 (the "Settlement Agreement"). The evidence served by Multiplex makes it clear that there was a cap in the Main Contract upon liquidated and ascertained damages payable to the Employer ("LADs") in the sum of £7.5 million. Absent this cap, it is said that Multiplex's potential liability for delay could have been as high as £55 million. However, regardless of that, in the Settlement Agreement Multiplex and the Employer agreed that Multiplex would pay LADs under the Main Contract in the sum of £7.5 million, the full amount of the cap. Mr Grinstead's evidence for Yuanda in his second witness statement states that the Employer issued an invoice to Multiplex for this sum of £7.5m and also gave Multiplex a notice under clause 2.29.1 of the Main Contract asserting a right to be paid or deduct LADs from Multiplex. It is correct to state that Mr Grinstead queries the validity of this notice because he says that "the Main Contract was superseded at that time" but the basis for that assertion is that Multiplex and the Employer reached a settlement under the Main Contract, which does not of itself disapply the Main Contract terms. Given Multiplex accepts, in the evidence before me, that the sub-contact works were and are in delay, and that the main contract works were also in delay, the basis of Mr Grinstead's belief that the Main Contract no longer applied is wholly unclear (and in any event appears to me to be wrong). It is also irrelevant, in my judgment.

11. Regardless of that, Multiplex demanded the sum of £7.5 million by way of LADs from Yuanda in a letter dated 22 November 2019, that sum said to have been levied against Multiplex by the Employer in respect of delay. Yuanda denied that it was responsible, or that the claimed sum of LADs was due to Multiplex from Yuanda. Yuanda also considers that it is due sums from Multiplex; it has submitted a claim for its final account to Multiplex. It has been paid the sum of £41.9 million in respect of the works, and maintains that the total amount of its final account including a sizeable amount for loss and expense should be £48.9 million.

12. Multiplex therefore commenced an adjudication against Yuanda by issuing a Notice of Adjudication dated 2 December 2019. Adjudication is a form of compulsory interim dispute resolution which was imposed on the construction industry, originally, by the Housing Grants, Construction and Regeneration Act 1996. It is now a mandatory feature of construction contracts and has been for many years. If a construction contract does not include adjudication and other provisions expressly, it has them imposed into it by means of that statute. In this sub-contract, adjudication is contractually included at clause 8.2 of the sub-contract terms. The relevant

adjudication regime is what is called the Scheme, which is the shorthand reference to the Scheme for Construction Contracts included in SI 1998 No.649. The Scheme is designed to give a referring party a decision within 28 days, which can be extended by agreement of the parties. In this case, the parties agreed between themselves that the adjudicator would have until 6 March 2020 to produce his decision. That is a period of just over four months after the commencement of the adjudication.

13. The final point by way of introduction is that Multiplex made an earlier call on the Guarantee on 11 December 2019. That call was either withdrawn or abandoned by Multiplex. The precise legal characterisation of how it was not pursued, based on the emails passing between the Bank and Multiplex, might be controversial between them, but given the later call that was made on 17 January 2019, that particular issue (if issue it is) is not relevant for the purpose of these proceedings. No party – the Bank, Multiplex nor Yuanda – contends that a further call could not be made on 17 January 2019 because of the earlier, potentially withdrawn, call in December. Obviously that first call was made only very shortly after the adjudication had commenced on 2 December 2019, and after the Referral Notice itself had been served by Multiplex on 9 December 2019. I deal with the first call only as a matter of historical detail.

The terms of the Guarantee

14. The instrument uses the terms "this Guarantee Bond" but it was referred to by Yuanda, both in its initial application and draft order, as the Guarantee, and the parties have referred to it as the Guarantee throughout. I will therefore for consistency call it the Guarantee. As often happens, the wording of the Guarantee in the instrument itself is in block capitals throughout. This may be a historic remnant of the days when telexes were widely used, as telex did not differentiate between lower and upper case letters. Regardless of why block capitals were used in the instrument, for ease of reading I have not reproduced the wording in this judgment entirely in block capitals. Nothing turns in this case on whether any words are capitalised or not.

15. It is in the following terms:
"Guarantee Amount:
Not Exceeding GBP 4,411,490.70
[the amount then follows in words]

Special Conditions:

THIS GUARANTEE BOND is made as a deed BETWEEN the following parties whose names and registered office addresses are set out in the Schedule to this Bond (the 'Schedule')

(1) The 'Sub-Contractor'

(2) The 'Guarantor' as guarantor, and

(3) The 'Contractor' as principle Contractor

WHEREAS

(1) By a contract (the 'Contract') entered into or to be entered into between the Contractor and the Sub-Contractor, particulars of which are set out in the Schedule, the Sub-Contractor has agreed with the Contractor to execute works ('the Works') upon and subject to the terms and conditions therein set out.

(2) The Guarantor has agreed with the Contractor, at the request of the Sub-Contractor, to guarantee the performance of the obligations of the Sub-Contractor under the Contract upon the terms and conditions of this Guarantee Bond subject to the limitation set out in the clause 2.

NOW THIS DEED WITNESSES AS FOLLOWS: -

1. The Guarantor guarantees to the Contractor that in the event of a breach of the Contract by the Sub-Contractor, the Guarantor shall subject to the provisions of this Guarantee Bond satisfy and discharge the damages sustained by the Contractor as established and ascertained pursuant to and in accordance with the provisions of or by reference to the Contract and taking into account all sums due or to become due to the Sub-Contractor.

2. The maximum aggregate liability of the Guarantor under this Guarantee Bond shall not exceed the sum set out in the Schedule (the 'Bond Amount') and be subject to such limitation and to clause 4.

3. The Guarantor shall not be discharged or released by any alteration of any of the terms, conditions and provisions of the Contract or in the extent or nature of the Works and no allowance of time by the Contractor under or in respect of the Contract or the Works shall in any way release, reduce or affect the liability of the Guarantor under this Guarantee Bond.

4. Whether or not this Guarantee Bond shall be returned to the Guarantor, the obligations of the Guarantor under this Guarantee Bond shall be released and discharged absolutely upon Expiry (as defined in the Schedule). Any claim in writing containing particulars of the Sub-Contractor's breach of his obligation(s) under the Contract must be made upon the Guarantor before Expiry, or would be deemed invalid otherwise.

5. The Sub-Contractor, having requested the execution of this Guarantee Bond by the Guarantor, undertakes to the Guarantor (without limitation of any other rights and remedies of the Contractor or the Guarantor against the Sub-Contractor) to perform and discharge the obligations on its part set out in the contract.

6. This Guarantee Bond and the benefit thereof shall not be assigned without the prior written consent of the Guarantor and the Sub-Contractor.

7. The parties to this Guarantee Bond do not intend that any of its terms will be enforceable, by virtue of The Contracts (Rights of Third Parties) Act 1999 or otherwise, by any person not a party to it.

This Guarantee Bond shall be governed by and construed in accordance with the laws of England and Wales and only the courts of England and Wales shall have jurisdiction hereunder."

16. The governing law of the Guarantee is therefore clearly the law of England and Wales. The accompanying schedule makes clear that the Bank is the guarantor, Multiplex is the contractor and Yuanda is the sub-contractor. The schedule also makes it clear that the amount of the Guarantee is not fixed. The schedule states that "the Bond Amount" is £4,411,490.70 "and reduced to GBP 2,205,745.35….. from Practical Completion of the Main Contract Works." Practical Completion of the Main Contract Works has not yet occurred, therefore the amount of the Guarantee at the time of the demand made on 17 January 2020 is the higher one, the maximum amount of the Guarantee, namely £4.411 million.

17. Mr Hickey QC for Yuanda attempted, at the second return date, to raise as an issue whether Practical Completion had in fact occurred. He said he was doing this on instructions. Orally, he submitted that "people are living in it". However, nowhere in Yuanda's evidence was this point raised. Mr Marke for Multiplex in his witness statement of 10 February 2020 had expressly stated that the last section of the sub-contract works were "still not finished or practically complete" and, although Yuanda served evidence in response to that, which was Mr Grinstead's second statement, no point of evidence was raised that the works *were* practically complete. Nor was this raised in the skeleton arguments for Yuanda for either of the hearings. Given the amount of the Guarantee is stated in the Schedule that accompanies it as reducing upon practical completion to £2,205,745.35, or one half of the Sum, if this were a point that was to be seriously pursued by Yuanda, evidence would not only be expected, it would be plainly required. No application was made by Yuanda to put in late evidence to deal with this point, even when this point was raised by the court at the hearing. It is simply not procedurally correct or valid for evidence to be adduced in this way, "on instructions". Therefore, the evidence before the court is that the works are not practically complete. One Blackfriars is also a large and complex building, and the fact that people might be living in one part of it does not mean that the works as a whole are practically complete in contractual terms. Sections of the complex may be complete, and others may not be. This is borne out by the submissions made in the adjudication in any event.

18. So far as the expiry date of the Guarantee is concerned, the schedule makes it clear that "the expiry date is to be the earlier of the following", with two alternatives. The first is 28 days following the date of issue of the Notice of Completion of Making Good under the Main Contract; the second is 4 April 2020. It is common ground that the Notice of Completion of Making Good is some way far off into the distance, and the earlier of the two alternatives is the appropriate way of calculating the expiry date, and that is the calendar date. The Guarantee therefore expires on 4 April 2020, subject to legal arguments raised by Yuanda about the effect of Clause 4 which I deal with below.

19. At the first return date on 27 January 2020, there seemed to have been a shift in the parties' position, at least so far as the parties before the court were concerned. The Bank did not attend but had, sensibly and co-operatively, indicated that service would be accepted at the address of their London branch, rather than at their registered office on the other side of the world. Mr Hickey (who has appeared at all the hearings for Yuanda) explained that Yuanda had decided not to issue proceedings against Multiplex under CPR Part 8 – which is for resolution of points of construction or law containing no substantial disputes of fact - but rather had drafted and served

proceedings under CPR Part 7. Yuanda also explained that the Claim Form which had been served did not allege fraud.

20. Multiplex did not seek to have the interim injunction lifted on that first return date, but rather sought a date for a substantive hearing (which could also be described as the first effective return date) with a time estimate of one day, to be heard as soon as possible. Multiplex contended that the demand of 17 January 2020 was a valid one; alternatively was certainly not an invalid one, which may or may not amount to the same thing. However, Multiplex also explained that one potential construction of the Guarantee would permit it to make another, fresh call between 6 March 2020 and 4 April 2020, if it succeeded in the adjudication which was at that point (and remains as at the date of this judgment) still underway.

21. The parties were therefore given a date for that hearing of 19 February 2020. Multiplex served evidence from Mr Thomas Marke, its Legal Director who oversees legal matters on its European projects. The Bank served evidence for that hearing from Mr Christopher Harvey, its solicitor at DLA Piper UK LLP, and attended the hearing by counsel and took a full part. Yuanda served reply evidence from Mr James Grinstead, one of its solicitors who had also served evidence before the first return date to supplement that of Mr Anderson, which had been relied upon at the very first hearing on 20 January 2020. I have considered all of the evidence, and all of the authorities cited to the court. I however only refer to that which is necessary to resolve the dispute between the parties.

The issues between the parties

22. The dispute in these proceedings is a little wider now than it was when Yuanda first applied to the court on 20 January 2020, but not by a great deal. Essentially, the crux of the present dispute concerning the Guarantee (as opposed to the wider differences said to be between them by Yuanda concerning the Project) is whether Multiplex was entitled to make a demand on the Guarantee on 17 January 2020. If the answer to that is no, then the parties are not agreed upon whether Multiplex, on the assumption it is successful in the adjudication, can make a valid demand on the Guarantee after 6 March 2020 when that (hypothetically favourable) decision will be issued, but before the Guarantee arguably expires on 4 April 2020. I shall call this latter type of demand an Adjudication Decision Demand.

23. The court will rarely answer hypothetical questions. However, in this case, in order to answer the first question, the validity of the 17 January 2020 demand, it is necessary to construe the instrument in accordance with its terms. Part of that exercise requires analysis of the passage in the Guarantee that states "as established and ascertained pursuant to and in accordance with the provisions of or by reference to the contract and taking into account all sums due to or to become due to the sub-contractor". Given the contract contains, as it must by statute, adjudication provisions for disputes, it would be wholly artificial to construe that element of the Guarantee without considering whether the sum of any adjudicator's decision in Multiplex' favour either qualified, or did not qualify, as a sum that was "established and ascertained". In other words, the exercise of construing the Guarantee is no different if one includes the question of whether Multiplex can made an Adjudication Decision Demand.

24. Further, given the over-riding objective in CPR Part 1, and the need to deal with disputes justly and at proportionate cost, it would in my judgment be somewhat contrary to that, to postpone considering the validity of an Adjudication Decision Demand until after 6 March 2020. One of the consequences of doing so would be wholly to ignore a major element of the current dispute, in respect of which Yuanda obtained urgent *ex parte* relief. Further, another hearing would be necessary following the adjudication decision, with the period for that hearing, and any reserved judgment (and consequent decision to make a further demand on the Bank, if Multiplex were successful in its arguments) to be compressed in time so that a decision was available to the parties prior to the expiry of the Guarantee on 4 April 2020. This would not only be unfair to the parties but would, arguably, defeat the commercial purpose (or one of the reasonably arguable commercial purposes, as the parties cannot agree on its commercial purpose) of the Guarantee itself.

25. Also on this point, on 28 January 2020 – which was the day after the first return date – Multiplex made an open offer to Yuanda on this very issue. Multiplex stated that if both parties (Yuanda and Multiplex) would agree that the terms of the Guarantee entitled Multiplex to make a demand on it in the amount awarded by the adjudicator, if that were to be the outcome of the adjudication, then Multiplex would agree not to make a call prior to any such decision, and there would be no need for further injunctive proceedings. This offer was not accepted by Yuanda, and it remained available for acceptance up to (and indeed during) the substantive hearing on 19 February 2020. This is a further factor that justifies resolving, at this stage, the question of whether an Adjudication Decision Demand would be valid.

26. Mr Hickey for Yuanda sought to persuade me at the hearing on 19 February 2020 that Yuanda was entitled to what he called "a full trial" in the Part 7 proceedings in order to resolve all the matters of dispute under the Guarantee. He also sought to persuade me, by means of what I will term Yuanda's Clause 4 argument, that there was no real urgency as the Guarantee did not expire on 4 April 2020, as both Multiplex and indeed the Bank maintained. I deal with that argument below. Regardless of its prospects of success, it is a legal argument of construction that can and should be decided now, in accordance with the overriding objective.

27. The Bank holds cross-security (also referred to in places as a counter-guarantee) from China Construction Bank Corp, Liaoning Branch (or "CCB") in respect of its obligations under the Guarantee. CCB made a request for the issue of the Guarantee to the Shanghai Branch of the Bank ("ANZ China"), and there is a counter-guarantee or cross-security in place between CCB and ANZ China, given the issue of the Guarantee by the Bank in London. The Bank was not neutral on the point of construction raised by Yuanda, which sought to persuade the court that the Guarantee does not expire on 4 April 2020. I deal with this further below where I deal with the Clause 4 issue. The Bank also issued what Ms John described as a contingent application, seeking directions for an expedited trial, if Yuanda were successful on 19 February 2020 in persuading the court that a trial on Yuanda's Part 7 claim was required, and the injunction should remain in place until then.

28. Reading the Particulars of Claim, one can readily see that they are in reality a Part 8 claim dressed up as a Part 7 claim. The relief sought is injunctive and declaratory relief. There is no claim for damages, and indeed the pleading does not raise any

disputed issues of fact. Paragraph 13 of the pleading recites that there is a "substantial difference between the parties' valuations of the final account" but does not seek to prosecute that in the Part 7 action. I was not persuaded by Yuanda that there are any issues in its Part 7 claim that require a trial on a later date than 19 February 2020.

29. In any event, Yuanda's right to a trial on its Part 7 claim should not be conflated with its right to have the injunction continued until the date of that trial. In order properly to consider whether the interim relief granted by way of injunction on 20 January 2020, and continued on 27 January 2020, should remain in place or be discharged, there are certain issues of construction of the Guarantee that require determination. I notified the parties on 27 January 2020 that this would be done at the hearing of 19 February 2020. All the parties came to that hearing fully prepared to do that, and full argument was heard on those issues. Whether anything still remains in the Part 7 claim once this judgment is handed down on those issues, is something that can be addressed once those issues are determined. Certainly, more is required from Yuanda in terms of obtaining continuation of the injunction than simply issuing a claim under CPR Part 7 (whether it should or ought to have been issued under CPR Part 8) together with making a plea for a trial at some date in the future.

30. Finally before turning to the issues, it is a notable point that Yuanda relied upon fraud when it sought, and obtained, its urgent injunction on 20 January 2020, but did not pursue fraud after issue of its claim form on 22 January 2020, at either of the two return dates.

31. There are special rules concerning fraud, which must be pleaded. A claim alleging fraud may not be made unless the following matters are satisfied:

    1. There must have been some material fact that "*tilts the balance and justifies an inference of dishonesty*": ***JSC Bank of Moscow v Kekhman*** [2015] EWHC 3073 (Comm) at [20] per Flaux J (as he then was).

    2. The claimant must have given clear instructions to plead a claim in fraud and there must have been "*reasonably credible material*" to support the allegation: ***Medcalf v Mardell*** [2003] 1 AC 120 at [22] per Lord Bingham.

    3. The claimant must be able to plead primary facts ("particulars") from which a claim involving dishonesty may be proven, as the court will not allow a party to prove a claim in fraud other than on the basis of those primary facts: ***Three Rivers District Council v The Governor and Company of the Bank of England (No 3)*** [2003] 2 AC 1 at [55], [160] and [186].

32. There are also specific provisions both in the Bar Standards Board Handbook and the Solicitors Regulation Authority Code of Conduct 2011, which govern the professional obligations of both barristers and solicitors so far as pleading fraud is concerned. These substantially reproduce the guidance given in ***Medcalf*** which I identify in [31](2) above.

33. I do not criticise those who act for Yuanda in deciding not to plead and pursue any case in fraud. Doubtless aware of their professional responsibilities, I am confident that careful consideration would have been given to the case against both Multiplex and the Bank which could properly be pleaded. Multiplex do not rely upon the fact

that an injunction was obtained on the basis of evidence asserting fraud, which was then abandoned, as one of the grounds upon which the injunction should be discharged, regardless of the answer to the issues of construction. However, the fact that fraud was raised, then abandoned 48 hours later, cannot be wholly ignored. Given Multiplex do not take the point, it is not necessary to consider it in any detail, but it ought to be noted that had Yuanda actually drafted proceedings, and also drafted Particulars of Claim, prior to the first attendance at court on at 2.00pm on 20 January 2020, this situation would not have arisen. Realisation that fraud ought not to be pleaded would have occurred far earlier in the process. Given the events of the period 11 December 2019 and 17 January 2020, when Yuanda knew that Multiplex was seeking to make a call on the Guarantee, and also given that notice was given to Yuanda on 17 January 2020 that Multiplex was making another call, I consider there was sufficient time for proceedings at least to have been drafted.

34. However, in order to resolve the existing dispute concerning the injunction, and whether it ought to be continued, the following issues between the parties need resolving:
1. What type of instrument is the Guarantee? Is it a performance bond, or an on-demand bond?
2. If it is the former, as a matter of construction, what are the requirements in order for the beneficiary (Multiplex) to make a valid call on the guarantor (the Bank) which the Bank must pay? This requires consideration specifically of the wording of:
(a) Clause 1 of the Guarantee; and
(b) Clause 4 of the Guarantee;
3. Was Yuanda entitled to an interim injunction on 20 January 2020 and/or is Yuanda entitled to continuation of the injunction that it obtained?

35. These issues were identified to the parties in the hearing and none of them argued with the formulation, although the wording has been slightly refined since then. Further, the fact that each of Clauses 1 and 4 is identified specifically in Issue 2 does not mean that those parts of the Guarantee are being construed in isolation, or that the principle that the instrument is to be construed as a whole is being contravened. It is simply convenient to identify those parts of the Guarantee where the parties disagree on the meaning of the provisions.

36. The starting point for resolving the issues identified at [34] above is to construe the Guarantee in accordance with its terms. The first of the three issues is most important, due to the fact that the Bank itself is a respondent/defendant to the injunction obtained by Yuanda on 20 January 2020, and also due to the severe restrictions on the court interfering with the operation and satisfaction of on-demand bonds, enshrined in what is called the autonomy principle.

37. The first of the three issues therefore falls to be decided first, although it is also a matter of construction of the Guarantee. I will therefore deal with the principles of construction before I turn to the type of instrument, and detailed consideration of those terms in particular that are controversial.

Principles of construction

38. The principles to be applied are, as one would hope, not controversial. As to be expected, the principles applicable to the construction of a contractual provision are

effectively agreed. The Supreme Court has set out the key principles in a series of cases: ***Rainy Sky SA v Kookmin Bank*** [2011] UKSC 50; ***Arnold v Britton*** [2015] UKSC 361; and ***Wood v Capita Insurance Services Ltd*** [2017] UKSC 24. These make clear that the task of the court is to ascertain the objective meaning of the words used by the parties by reference to what a reasonable person, in the position of the parties, would have understood the parties to mean. The contract must be considered as a whole, and as such the court should not approach the task of construction by focusing too much on the individual words at the expense of the contract as a whole. The court must take into account the nature, formality, and quality of the drafting of the contract.

39. These cases establish the modern and applicable case law on the construction of written terms. They were recently referred to in another decision of the Supreme Court, ***Barnardo's v Buckinghamshire*** [2018] UKSC 55 where Lord Hodge (with whom all the other members of the Supreme Court agreed) considered the principles, and these cases themselves. He referred at [13] to these cases as "the trilogy of cases" which "has given guidance ….. which does not need to be repeated". He stated:
"In deciding which interpretative tools will best assist in ascertaining the meaning of an instrument, and the weight to be given to each of the interpretative tools, the court must have regard to the nature and circumstances of the particular instrument."

40. That case concerned the question of interpretation of a clause in a pension scheme trust deed which defined the phrase "Retail Prices Index" and allowed the trustees of the pension scheme to adopt a "replacement" of the officially published Retail Prices Index ("the RPI"). The issue was whether the clause allowed the pension scheme trustees to adopt an index of price inflation, such as the Consumer Prices Index ("the CPI"), when the official body responsible for compiling the RPI (now the Office of National Statistics) had not discontinued the RPI, thereby requiring its replacement.

41. Essentially, Barnardo's, the very well-known children's charity, argued that the clause empowered the trustees to adopt another index which they considered a more suitable measure of price inflation, whether or not the RPI continued to be published. Adoption of the CPI would also enable a reduction of the scheme's deficit. Construing words in a pension scheme is not the same process as construing words in a commercial instrument such as a bond or guarantee. Because of the particular characteristics of a pension scheme, which are identified at [14] of the judgment and do not arise in the context of a commercial contract, less weight was attached "to the background factual matrix than might be appropriate in certain commercial contracts". But that is not the case here. This is purely a commercial instrument and the background factual matrix is important.

42. A feature which is present in this case, upon which Yuanda seek to rely, is how closely the wording of the instrument follows the ABI Model Form of Guarantee Bond. The ABI is the Association of British Insurers, a trade association for the insurance industry. The ABI have produced a Model Form of Guarantee Bond and accompanying Guidance Notes. The UK insurance industry is said to be the largest insurance industry in Europe and the third largest in the world. Certainly, a great number of bonds and guarantees are issued by different insurers, and also (as in this case) by banks, in this jurisdiction.

43. Although those guidance notes are not entirely without some interest, I do not consider them to be an aid to construction. Firstly, being guided by the Guidance Notes seems to me to come perilously close to construing the words in the Guarantee by using the subjective intentions of one of the parties. This is impermissible as an aid to construction. As is now widely accepted, the language of the agreement is important. As it was put in the first case of the trilogy, which pre-dated both ***Wood v Capita*** and ***Arnold v Britton***, but which still applies, "*where the parties have used unambiguous language, the court must apply it*": ***Rainy Sky SA v Kookmin Bank*** [2011] UKSC 50 per Lord Clarke at [23]. The more difficult questions of construction only arise if the "*language used by the parties…*[has] *more than one potential meaning*", so that "*there are two possible constructions*" at [21].

44. The second reason, far less important than the first, but still in my judgment compelling, is that the wording of Clause 4 in the Guarantee in this case is not even the same as that in the Model Form. For either or both of those reasons, I am not assisted or guided to any appreciable extent in the exercise of construing the Guarantee by the Guidance Notes. The background factual matrix includes that instruments such as this are designed to give beneficiaries some degree of security, provided by a financial institution, so that funds are available directly to the beneficiary by that institution in the event that the conditions in the instrument are satisfied.

45. As regards authorities specifically in relation to guarantees, while there may be some useful guidance in the cases, many of these turn on the actual language used in the instrument as well as the relevant context and the wording of the underlying contracts. As such, ANZ drew to my attention – and was in agreement with - the views of the author of *Law of Guarantees* Sweet & Maxwell (7th ed. 2015) that as *"each contract will depend on its own wording, previous case law is of little assistance in determining how this question should be answered in any given case"* [16-013].

46. It is the words to which one must therefore turn. So far as the factual matrix is concerned, when "*interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties*": ***Arnold v Britton*** [2015] UKSC 3619 per Lord Neuberger at [21]. In my judgment, all of the parties knew that bonds are provided to underpin potential financial obligations on the part of the sub-contractor, here Yuanda, in terms of its performance in the sub-contract. The extent of that underpinning, and the mechanism by which it is achieved, is dependent upon the terms of the financial instrument itself.

Construction of the Guarantee

47. There are two main different types of financial instruments used not only in construction projects, shipbuilding projects, but also other large financial projects of many kinds, and also in international trade. Both types are sometimes called simply bonds or guarantees, as though those terms were interchangeable between the two types. Sometimes they are called, as here, bond guarantees, a composite term using both words. Other descriptive terms are used, but for the purposes of this judgment I shall refer to the two main types as on-demand bonds, and performance bonds. Claiming a sum under such an instrument is described as making a call on a bond, although it is also sometimes called making a demand.

48. In general terms, bonds of both types will have been issued by a financial institution such as a bank, or an insurance company, with a financial amount or financial limit contained in the bond. The theory is that in some circumstances the beneficiary of such an instrument can make a call on the bond, and when such a valid call or demand is received by the bank or institution, it will pay the financial amount to that beneficiary. The bank will almost always have some underlying security available to it, that security having been provided to it as part of the commercial arrangement whereby it provides the bond. Here, as is usual, that security may ultimately have been provided by Yuanda, the party that has (with the Bank) provided the bond in Multiplex's favour. I have referred in outline above to the cross-security between CCB and ANZ China, but the terms of that underlying cross-security are not, in my judgment, relevant to the issues between the parties in these proceedings. Multiplex, as beneficiary, has the potential benefit available to it of the sums the subject of the Guarantee, on the terms set out in that instrument.

49. The distinction between the two different types of instruments is important. So-called on demand bonds are those where the bank or insurance will pay out, literally, on demand. Such instruments have been considered in numerous cases, including those such as ***MW High Tech Projects UK Ltd v Biffa Waste Services Ltd*** [2015] EWHC 949 (TCC) and ***Tetronics (International) Ltd v HSBC Bank PLC*** [2018] EWHC 201 (TCC). Letters of credit and on-demand bonds are broadly the same type of instrument as one another, although as in all cases, it is the terms of the instrument are what is important, and not its headline description or title. On-demand bonds are instruments of primary liability. Where, as in the instant case, a bank is made the defendant, very strict rules apply that restrict the availability of relief to the party seeking to restrain payment out of the amount under an on-demand bond. Sometimes on-demand bonds are called "unconditional" bonds.

50. The relevant law applicable to letters of credit, performance bonds and guarantees is well known, but is conveniently set out in the decision of the Privy Council in ***Alternative Power Solution Ltd v Central Electricity Board*** [2014] UKPC 31. That case concerned the CEB, a body corporate responsible for the control of electricity supplies in Mauritius, contracting with the first defendant seller (a Mauritian company) for the purchase of one million fluorescent light bulbs and submitting an irrevocable letter of credit for approximately US$760,000 issued by the second defendant bank. CEB was the buyer of the bulbs. A dispute arose between buyer and seller concerning the quality of the bulbs, and an injunction was granted preventing payment out under the letter of credit. The Supreme Court of Mauritius dismissed the appeal by the seller, who then appealed to the Privy Council. The seller's appeal was allowed. The principle is succinctly set out in the first part of the headnote at [2015] 1 WLR 697 in the following terms:

> "in interlocutory proceedings the correct test for application of the fraud exception to the strict general rule that the court would not intervene to prevent a banker from making payment under a letter of credit following a compliant presentation of documents was whether it was seriously arguable that on the material available the only realistic inference was that the beneficiary could not honestly have believed in the validity of its demands under the letter of credit and that the bank was aware of such fraud."

51. This is known as the fraud exception. The headnote continues "the expression 'seriously arguable' was intended to be a significantly more stringent test than good arguable case, let alone serious issue to be tried; that even where it was possible to establish the test for fraud as opposed to mere possibility of fraud, the balance of convenience would almost always militate against the grant of an injunction…." The autonomy principle to which I have referred in [36] above is called that because the liability of the bank or insurance company under the on-demand bond is autonomous to any liability or performance under the underlying, and separate, contract between the two other parties (whether seller and buyer, or main contractor and sub-contractor, or whatever commercial relationship they may have). All that is usually required is presentation to the bank of compliant documentation.

52. The other, second type, of financial instruments are called performance bonds or guarantees. They are sometimes also called "conditional" bonds. They are instruments of secondary liability. Their purpose is effectively to guarantee the liability of one party (here, the sub-contractor Yuanda) to another (here, the main contractor Multiplex) by means of the security available from the guarantor (the Bank) in the guarantee, up to the figure or total sum available in that guarantee. They depend upon underlying liability, in this case from Yuanda to Multiplex.

53. Considering the wording of this particular Guarantee, it is clear to me that this Guarantee is a financial instrument of the second type. The second recital states that:
"The Guarantor has agreed with the Contractor, at the request of the Sub-Contractor, to guarantee the performance of the obligations of the Sub-Contractor under the Contract upon the terms and conditions of this Guarantee Bond….."

54. The wording of Clause 1 states:
"The Guarantor guarantees to the Contractor that in the event of a breach of the Contract by the Sub-Contractor, the Guarantor shall subject to the provisions of this Guarantee Bond satisfy and discharge the damages sustained by the Contractor as established and ascertained pursuant to and in accordance with the provisions of or by reference to the Contract and taking into account all sums due or to become due to the Sub-Contractor." (emphasis added)

55. The above emphasis should not be taken as my ignoring the words "taking into account all sums due…." in Clause 1, as that is one of the main battlegrounds between the parties on issue 2(a) as I have defined them in [34] above. I have emphasised the passages above as these make clear, on their very clear words, that the Guarantee is establishing secondary liability on the part of the Bank to the primary liability of the sub-contractor, Yuanda. Multiplex is not in a better position under the Guarantee than it is under the sub-contract.

56. Further, there is a complete absence of the sort of words that would be both expected and required in an on-demand bond. As a simple starting point, the word "demand" does not appear anywhere, nor do any of its synonyms. The language of the instrument is simply not that of a type which would create the primary obligation to be expected in an on-demand bond.

57. I am further reinforced in my construction of this instrument by the fact that a guarantee on, admittedly, a modified version of the ABI Model Form was before the

Court in ***Ziggurat LLP v CC International Insurance Company plc*** [2017] EWHC 3286 (TCC), which was considered by Coulson J (as he then was). In that case, there was a new clause 2, which was a bespoke addition by the parties, as is made clear at [8] in the judgment. However, that new clause 2 did not, in my judgment, have an impact upon the nature or characterisation of the type of instrument in that case. All that the bespoke clause did was to state the following:
"The damages payable under this Guarantee Bond shall include (without limitation) any debt or other sum payable to the Employer under the Contract following the insolvency (as defined in the Schedule) of the Contractor."

58. Given that case did indeed concern insolvency, clause 2 was one of the main battlegrounds of the parties in that case. However, the nature of the type of bond was not substantially changed by that clause 2. In other words, those words did not go to the nature of the liability on the part of the guarantor, and whether it was an instrument of primary or secondary liability. All that bespoke clause did was clarify what was to be included in the damages payable under the instrument. Other than clause 2, that instrument was also in the same ABI Model Form as used for the Guarantee in the instant case.

59. The judge found at [23] that:
"A bond of this sort is an instrument of secondary liability. The surety cannot be in a worse position, as against the employer, than the contractor."

60. That is the same conclusion that I have also reached on this instrument, so closely framed to follow the ABI Model Form of Guarantee Bond (although as will be seen in this case, clause 4 is very slightly different from the Model Form). It is an instrument of secondary liability. This view is reinforced by the wording of Clause 5, whereby:
"The Sub-Contractor, having requested the execution of this Guarantee Bond by the Guarantor, undertakes to the Guarantor (without limitation of any other rights and remedies of the Contractor or the Guarantor against the Sub-Contractor) to perform and discharge the obligations on its part set out in the contract."

61. This answers Issue 1 as set out at [34] above, "what type of instrument is the Guarantee?". It is a performance bond. I therefore turn to the subsequent issues of construction, namely those concerning Clauses 1 and 4 in particular of the Guarantee.

Clause 1 of the Guarantee

62. This can be conveniently re-stated here, with different emphasis to that used above:

"The Guarantor guarantees to the Contractor that <u>in the event of a breach of the Contract by the Sub-Contractor</u>, the Guarantor shall subject to the provisions of this Guarantee Bond satisfy and discharge the damages sustained by the Contractor as established and ascertained pursuant to and in accordance with the provisions of or by reference to the Contract and taking into account all sums due or to become due to the Sub-Contractor."

63. It is clear that firstly a breach is required by Yuanda. When or if that occurs, then the Bank "shall subject to the provisions of this Guarantee Bond satisfy and discharge the damages sustained by the Contractor." This satisfaction and discharge would be by means of payment under the Guarantee, in other words payment out to Multiplex by

the Bank. However, the "damages sustained by" Multiplex must be "established and ascertained pursuant to and in accordance with the provisions of or by reference to the Contract and taking into account all sums due or to become due to" Yuanda.

64. Mr Hickey for Yuanda submitted that in order for the process of establishing or ascertaining all sums due or to become due to Yuanda, any call on the Guarantee must wait until after the Yuanda final account has either been agreed, or determined by means of a final judgment in High Court litigation. Mr Wilken challenged this interpretation of the clause, and maintained that in this case, Multiplex had complied with all that was necessary in terms of seeking recovery of the LADs paid to the Employer from Yuanda under the indemnity contained in the sub-contract. Multiplex had done so by claiming the sum of £7.5 million in LADs from Yuanda, and by not paying that sum to Multiplex, Yuanda was in breach such that a claim could be made on the Guarantee. The Bank was effectively neutral on this point, although subject to the points made in relation to the expiry date of the Guarantee and Clause 4. Mr Wilken's fall back or alternative interpretation was that, even if he was wrong about the claim for LADs that has been made against Yuanda, if the adjudication that is currently underway were to be resolved in Multiplex's favour, then that certainly would – so far as any sum that might be awarded to Multiplex – qualify as being damages that had been "established and ascertained pursuant to and in accordance with the provisions of or by reference to the Contract and taking into account all sums due or to become due to" Yuanda.

65. Mr Hickey maintained that more was required from Multiplex than a mere assertion that a sum was due, in order for Multiplex validly to make a call on this performance bond. He also relied in this respect on the case of ***Ziggurat*** to which I have already referred at [57] above.

66. In that case, [1] of the judgment identifies what the case actually concerned. Pursuant to a building contract incorporating the JCT 2011 standard form, the claimant Ziggurat had employed County Contractors (UK) Limited ("County") to build blocks of student studios in Newcastle Upon Tyne. County's performance was the subject of a Performance Guarantee Bond provided by the defendant, HCC International Insurance Co plc ("HCC") to the claimant which was dated 28 January 2015. County became insolvent, having suspended the works, which meant that other contractors were engaged by the claimant to complete the works. The additional costs were claimed from, but not paid by, County. A subsequent claim was made on the Bond which was not satisfied, and the claimant brought Part 8 proceedings to resolve the issues between it and HCC.

67. The important point to identify about that case is that it concerned insolvency, termination upon insolvency, and the obligations from County to the claimant, and vice versa, in the circumstances of insolvency. It should also be noted that the JCT 2011 standard form, as with so many standard forms in this field, includes detailed provisions on insolvency. These are all set out at [4] in the judgment. The findings that are most relevant in this instance are those at [28] and [29], which state that the financial ascertainment exercise following a termination is important and there could be no liability under the termination clauses until this exercise had been done. As set out at [55] to [57], it was made clear in the judgment that this had to be done, and

after that had been done, a call could be made on the Guarantee. The headings appear in the judgment itself:

"7. Declaration 2: Is the Debt due or can it be challenged?

7.1 The Original Debate

55. The original debate under the umbrella of Declaration 2 ranged far and wide. At one point, the defendant was suggesting that the claimant needed either to get a judgment against County, or at least get County's agreement that they were liable for the debt, before any claim could be made under the Bond. That is wholly incorrect: the decisions in ***Tower Housing*** and ***Paddington Churches*** make plain that what is required to trigger a claim under the Bond is the completion of the ascertainment exercise under clause 8.7. Once that has happened, a claim can be made under the Bond.

56. Once the process under clause 8.7 of the building contract is concluded, it is not only quite unnecessary for the claimant to pursue County before making a claim against the defendant, but it is also unnecessary for the claimant to have any further communication of any kind with County. The claimant can look to the defendant for payment.

57. Any other result would destroy the commercial value and purpose of the Bond. The Bond is required to provide the claimant with the ability to recover at least some of its losses against a solvent party. It would circumvent that commercial purpose if the claimant was then required to issue separate proceedings against that insolvent party (and get the necessary permission to do so) and/or to reach an agreement with the insolvent party, in order to establish either liability or quantum under the Bond."

68. There are two points that can be made, which are in essence somewhat obvious, but are worth stating as the correct place to start this exercise of construction. Firstly, the wording of the Guarantee, establishing as it does a secondary liability on the part of the Bank for Yuanda's obligations to Multiplex, invokes and depends upon the terms of the underlying sub-contract. That much is obvious from the actual words used, namely "established and ascertained pursuant to and in accordance with the provisions of or by reference to the" sub-contract. Secondly, this is the Model Form of Bond Guarantee that can be used in a variety of situations (and also, therefore, with a variety of different underlying contractual agreements between contractor and sub-contractor). Establishing and ascertaining sums due under the sub-contract depends upon that underlying contract, not upon the terms of the Guarantee. This may be two different ways of stating the same point, but it is in my judgment essential to have regard to this. Both Yuanda and Multiplex, from time to time, both in their evidence and some of their arguments, rather drifted away from this central point and focused upon what establishing and ascertaining sums under the Guarantee meant.

69. An example of this was the evidence of Mr Marke for Multiplex. He referred to payment and monthly certificates, and stated that "in its latest certificate, Multiplex certified the sum of £37,929,654 (net cumulative total)". He used this as a mechanism to demonstrate an overpayment to Yuanda of £4 million approximately, absent any question of LADs. However, the use of the word "certificate" by Multiplex is in my judgment incorrect. It connotes the involvement of a third party certifier. Such an entity has a quasi-arbitral role, as set out in ***Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd*** [2006] EWHC 89 (TCC). In that case, Jackson J (as he then

was) reviewed the authorities concerning the role that such a professional occupied, between [22] and [35]. He made it clear that the person or entity occupying such a role, whether architect or contract administrator, was under a legal duty to balance the competing interests between the two contracting parties (here, it would be between Multiplex and Yuanda) and act fairly. He called this person "the decision-maker". He found the following:

"33. In many forms of building contract a professional person retained by the employer, and sometimes a professional person directly employed by the employer, has decision-making functions allocated to him. I will call that person "the decision-maker". The decisions which he makes are often required to be in the form of certificates, but this is not always so. For example, there are many contracts (of which the present one is an instance) in which extensions of time do not take the form of certificates.

34. Three propositions emerge from the authorities concerning the position of the decision-maker.

(1) The precise role and duties of the decision-maker will be determined by the terms of the contract under which he is required to act.

(2) Generally the decision-maker is not, and cannot be regarded as, independent of the employer.

(3) When performing his decision-making function, the decision-maker is required to act in a manner which has variously been described as independent, impartial, fair and honest. These concepts are overlapping but not synonymous. They connote that the decision-maker must use his professional skills and his best endeavours to reach the right decision, as opposed to a decision which favours the interests of the employer."

70. Multiplex appear to have proceeded, and certainly from its evidence also appear to believe, that a statement of sums due to it, issued by itself, has the same status of a certificate issued by a decision-maker. That can be the only explanation for Mr Marke's use of the word "certificate". That is incorrect for two reasons. Firstly, Multiplex is not a decision-maker (in the sense that Jackson J was using the term in ***Scheldebouw)***, and cannot *certify* (in the sense that word is used and understood in the industry) sums due to itself by way of issuing certificates. Secondly, and equally powerfully (if not entirely determinative of this point), the sub-contract does not have any contractual mechanism whereby "certificates" in this sense are issued in any event. I deal further with the payment provisions of the sub-contract below, after quoting the actual terms upon which focus was addressed at the hearing.

71. Mr Hickey is correct on at least this point; a mere statement or assertion by Multiplex to Yuanda that a sum is due to Multiplex by way of LADs cannot be, without more, treated as though it were a certificate, nor can it be equated to the establishment and ascertainment of damages due to Multiplex pursuant to and in accordance with the terms of the sub-contract.

72. To be fair to Mr Wilken, he accepted that Mr Marke was wrong to use the term "certificate" and, when the point was explored, he did not seek to construe the different demands for payment by Multiplex as certificates.

73. In order to determine this issue, it is necessary to consider the actual terms of the JCT Design and Build Sub-Contract Conditions 2011 themselves (as amended); in other words, the sub-contract itself. A full copy was available to the court, both at the first hearing and upon the second return date. I shall only deal with the clauses that are relevant to the terms in question in respect of the issues between the parties on this injunction. The headings appear in the terms. The clauses are as follows:

"2.3A The Sub-Contractor acknowledges that:

.1 the Sub-Contract Particulars (item 5) provides for Key Dates by which certain activities shall be completed by the Sub-Contractor in order for the Contractor to carry out its obligations in accordance with the Main Contract and/or in accordance with other subcontracts under the Main Contract; and

.2 if such activities are not completed by any relevant Key Date, it is foreseeable that the Contractor will suffer or incur costs, losses, expenses and/or damage whether in respect of liabilities to the Employer under the Main Contract, to other sub-contractors under the terms of their respective sub-contracts, to other third parties or otherwise; and

.3 as a consequence of clause 2.3A, the Sub-Contractor shall carry out its obligations under this Sub-Contract so as to ensure that any Key date is achieved.

Nothing in this clause 2.3A limits or derogates from the Sub Contractor's other obligations or liabilities under this Sub-Contact, and in particular its primary obligation to achieve completion of the Sub-Contract Works (or any Section thereof) within the relevant period or periods for completion."

"Compliance with the Main Contract and indemnity

2.5 ·1 Insofar as the Contractor's obligations under the Main Contract, as identified in or by the Schedule of information, relate and apply to the Sub-Contract Works or any part of them, the Sub-Contractor shall observe, perform and comply with those obligations (including, without limitation, those under clauses 2.18 (*Fees or charges legally demandable*), 2.19 and 2.20 (*Royalties and patent rights*) and 3.15 (*Antiquities*) of the Main Contract Conditions) and shall indemnify and hold harmless the Contractor against and from:

·1 any breach, non-observance or non-performance by the Sub-Contractor or his employees or agents of any of the provisions of the Main Contract; and

·2 any act or omission of the Sub-Contractor or his employees or agents which involves the Contractor in any liability to the Employer under the provisions of the Main Contract.

·2 Subject to the exceptions contained in clauses 6·4 and 6·7·1, the Sub-Contractor shall indemnify and hold harmless the Contractor against and from any claim, damage, loss or expense due to or resulting from any negligence or breach of duty on the part of the Sub-Contractor, his employees or agents (including any misuse

by him or them of scaffolding or other property belonging to or provided by the Contractor)."

"Failure of Sub-Contractor to complete on time

2.21 If the Sub-Contractor fails to complete the Sub-Contract Works or such works in any Section within the relevant period or periods for completion, and if the Contractor gives notice to that effect to the Sub-Contractor within a reasonable time of the expiry of the period or periods, the Sub-Contractor shall pay or allow to the Contractor the amount of any direct loss and/or expense suffered of incurred by the Contractor and cased by that failure."

74. Payment is dealt with in Section 4 of the sub-contract terms. This Project was performed on the adjustment basis, one of the two alternatives in Section 4 (the other being the remeasurement basis) and interim payments are dealt with in clause 4.9. These are done by means of a Payment Application (by Yuanda); a Payment Notice (by Multiplex) together with the potential for Pay Less Notices if applicable. This process is all clearly set out in Section 4.

75. A relevant clause in my judgment is that contained at 4.21, under the heading "Contractor's reimbursement". This deals with the situation whereby "the regular progress of the Main Contract Works or any part of them" is materially affected by any act, omission or default of the Sub-Contractor, Yuanda. This entitles Multiplex to recover loss and expense from Yuanda. Clause 4.21.2 states that "any amount agreed by the Parties as due in respect of any loss and/or expense therefore caused to [Multiplex] may be deducted from any sums due or to become due to [Yuanda] <u>or shall be recoverable by [Multiplex] from [Yuanda] as a debt</u>." (emphasis added)

76. Thus, the sub-contract terms clearly include two important features, so far as delay to the Main Contract works, and LADs levied by the Employer against Multiplex, are concerned. Firstly, so far as failure to complete on time is concerned, clause 2.21 means that Yuanda has to "pay or allow to [Multiplex] the amount of any direct loss and/or expense suffered or incurred by [Multiplex] and caused by that failure". Secondly, so far as progress of the Main Contract works is concerned, clause 4.21.1 states that the amount of loss and/or expense caused by Multiplex by acts, omissions or defaults by Yuanda can be deducted from any sums that are due (or may become due) to Yuanda "or shall be recoverable…as a debt".

77. It can therefore be seen that in order for Yuanda to be liable to Multiplex for the sum of LADs which are claimed, the following has to occur:
1. Under clause 2.21, Yuanda has to have failed to complete the Sub-contract works (or works within a section) within the period in the Sub-contract for completion of those works.
2. Multiplex has to have given notice of this within a reasonable time of the expiry of the period.
3. Yuanda must then pay or allow to Multiplex the amount of any direct loss and/or expense incurred by Multiplex that was caused by that failure.

78. Implicit within (1) above, the failure to complete, is that Yuanda must have failed to complete within the period for completion as extended, if extended it has been. Such

an extension would either be given by Multiplex, or (potentially) by an adjudicator if there were a dispute about it, that was referred to adjudication and the adjudicator issued a decision granting an extension. This is because, unless or until such an adjudicator's decision was overturned by a judgment in litigation, or an award in arbitration, that decision would be binding on the parties in accordance with the well-known principle of "interim finality" applied to such decisions following cases such as ***Macob Civil Engineering Ltd v Morrison Construction Ltd*** [1999] EWHC Technology 254; ***Bouygues (UK) Ltd v Dahl-Jensen UK Ltd*** [2000] EWCA Civ 507; and ***Carillion Construction Ltd v Devonport Royal Dockyard*** [2005] EWCA Civ 1358.

79. Under clause 2.5.1.1 and 2.5.1.2, Yuanda agreed to indemnify and hold harmless Multiplex against and from any breach by Yuanda of any of the provisions of the Main Contract; and any act or omission of Yuanda which involved Multiplex in any liability to the Employer under the provisions of the Main Contract. In my judgment, liability by Multiplex to the Employer for £7.5 million by way of LADs fall within the scope of this indemnity. Mr Hickey in his oral submissions sought, at one point, to maintain that there was no indemnity in the Sub-contract. I reject that submission. There plainly is, and it is to be found in clause 2.5 under the heading "Compliance with the Main Contract and indemnity".

80. Finally, in clause 2.3A, Yuanda acknowledged the foreseeability of costs, losses, expenses and damage being suffered by Multiplex if sub-contract activities were not completed in accordance with key dates in order for Multiplex to carry out its obligations under the Main Contract. In my judgment, this clause does not create a separate or free-standing liability to Multiplex on the part of Yuanda. It does, however, remove one potential point of argument from Yuanda, as it prevents Yuanda from arguing lack of foreseeability if Multiplex were to suffer, and claim from Yuanda, damages for delay, inter alia.

81. No references to adjudication have been commenced by either party, other than the one to which I have already referred at [12] above.

82. The parties have not been able to agree that Yuanda is liable to Multiplex for the sum of £7,500,000 in LADs. Indeed, there is a specific dispute between them on that very issue, and it is that that has been referred to adjudication, that being the one referred to in [12] above, which is currently underway with a decision expected by 6 March 2020. Paragraph 4 of the Notice of Adjudication dated 2 December 2019 states what the dispute is, recites the factual background, and states that the Delay Damages (which is how the £7.5 million is referred to) has been incurred "as a result of Yuanda's breaches of contract, acts or omissions" and these are then identified. The relief sought consists of decisions and declarations regarding delay and failures to complete by Yuanda to three specific sections of the works, Sections 14, 20 and 21; a decision and declaration that by reason of Yuanda's failures, Multiplex has incurred loss and expense in the sum identified "in the form of liquidated damages levied by" the Employer; and a decision and declaration that Yuanda pay Multiplex the sum of £7,500,000, or such other sum as the adjudicator determines is fair and reasonable.

83. In my judgment, a decision by the adjudicator that awards Multiplex any sum, when one considers the scope of the dispute referred to him, would undoubtedly qualify as

being an amount "established and ascertained pursuant to and in accordance with the provisions of or by reference to the Contract". It would also take into account such defences as Yuanda would have available to it to defend, in the adjudication, the claim for £7,500,000. What those amounts are, if any, and how they fall to be taken into account when considering the claim brought by Multiplex, are matters in the adjudication. They are not matters that this court has to take into account, or in my judgment should take into account, when considering a demand made on the Guarantee, if the demand is for an amount that has been decided in Multiplex's favour in the adjudication. In this respect therefore, a favourable decision for a money sum due to Multiplex that was made by an adjudicator would be something that was "established and ascertained" in accordance with the sub-contract machinery.

84. Mr Hickey had an argument that clause 2.21 of the sub-contract terms required Multiplex to make a claim against Yuanda within a reasonable time, and he maintained that the claim raised in November 2019 could not be within a reasonable time. This is a very weak argument, and I reject it. Firstly, the liability on the part of Multiplex to the Employer only crystallised, on the evidence before the court, in October/November 2019. The Referral Notice in the adjudication shows that the Employer gave notice to Multiplex on 6 November 2019 that it would deduct the amount of £7.5 million in LADs. The settlement agreement which agreed this was just a couple of weeks earlier on 17 October 2019. On the face of it, that appears to be within a reasonable time. Secondly, whether notice within a reasonable time was a condition precedent to recovery by Multiplex is not even pleaded in Yuanda's Particulars of Claim. The wording of the clause suggests that it is not such a condition precedent. Thirdly, if it is a good point, it is something that could (if Yuanda sought to raise it) be raised before the adjudicator in the ongoing adjudication, and taken account of by him in the establishment and ascertainment exercise currently underway to determine whether Multiplex is, under the contract, entitled to the sum of £7.5 million in LADS, some other sum, or (potentially) nothing at all. The important point to remember is that the adjudication is an express contractual mechanism for the resolution of disputes under the contract. It is included in Section 8.2 of the sub-contract terms.

85. Mr Hickey also had another argument that because clause 1 referred to the requirement to take "into account all sums due or to become due to the Sub-Contractor" this meant that no valid call could be made on the Guarantee until Yuanda's Final Account claim had been decided, whether by agreement (which may or may not be unlikely) or in some future High Court proceedings, that have not yet been initiated. I reject that submission, which seems to me to wholly speculative, putting it at its most favourable to Yuanda.

86. The sub-contract terms plainly require Yuanda to "pay or allow" to Multiplex (under clause 2.21) the amount of direct loss and/or expense suffered by Multiplex caused by a failure by Yuanda to complete the sub-contract works on time. The terms also entitle Multiplex to seek loss and expense from Yuanda due to a failure to progress the sub-contract works (under clause 4.21), which sums are to be recoverable from Yuanda as a debt. If the adjudicator decides that Yuanda is liable to pay Multiplex the sum of £7.5 million (or any other lesser sum) as a result of LADs which Multiplex have paid or are liable to pay the Employer, then that decision entitles Multiplex to that sum under the sub-contract terms. A decision in Multiplex's favour does not

entitle Multiplex only to some sort of notional credit, to be used at the very end of the accounting process under the sub-contract. This is not what "pay or allow" means, and it is not what "recoverable as a debt" means either.

87. Yuanda prayed further in aid very heavily the authority to which I have already referred at [57] above, namely ***Ziggurat LLP v CC International Insurance Company plc*** [2017] EWHC 3286 (TCC). I have already identified that this case concerned termination and insolvency. It is plain that the judgment is considering the insolvency of County, the termination provisions, whether County was in breach of contract and also the contractual mechanism for establishing and ascertaining the sum due in those circumstances. This is made clear by numerous passages throughout the judgment, including those at [26], [28], [31], [34] and [35]. Indeed, the express approval in the judgment of an earlier case, namely ***Paddington Churches Housing Association v Technical and General Guarantee Co Limited*** [1999] BLR 244, makes this crystal clear. That was a decision of HHJ Bowsher QC, and Coulson J (as he then was) explained that case as restating "the importance of the contractual ascertainment exercise." He also said that the judge in that had "reiterated both the secondary liability that arose under the bond and the importance of the contractual mechanism." By contractual mechanism, he was referring to the contractual mechanism in the sub-contract.

88. My decision in this case is not contrary to the decision of ***Ziggurat***, far from it. I consider my decision that the contractual mechanism is what is required to establish and ascertain the amount that can be the subject of a valid demand on the Guarantee to be entirely consistent with the decision in ***Ziggurat***. The only difference is that in ***Ziggurat*** there was a termination following an insolvency, and there were unmeritorious arguments raised by County which simply sought to dispute a certified sum was due.

89. In [52] of ***Ziggurat*** the following conclusion was stated:
"Thus, the arguments belatedly raised by County's solicitors as to the validity or otherwise of the termination notice go nowhere. As from the date that County became insolvent, whether or not the employer had given notice of termination, and regardless of belated arguments as to repudiation, clauses 8.7.3-8.7.5 applied in any event. CAG certified that the debt had been calculated in accordance with those clauses, so County were in breach because they failed to pay it. Thus, subject to what I say about Declaration 2, the defendant is liable to pay the debt (subject to the cap introduced by the maximum amount recoverable) as damages under the Bond."
(emphasis added)
CAG means CAG Architects Limited, the contract administrator, as explained at [9] in the judgment. A contract administrator is a decision-maker of the type referred to in ***Scheldebouw.***

90. The conclusion that I have reached is entirely consistent with the ratio of ***Ziggurat.*** Guarantees that are drafted in this form (and the bespoke amendment to the instrument in ***Ziggurat*** does not dilute this conclusion, as that amendment dealt with insolvency) require establishment and ascertainment in accordance with the mechanism in the underlying contract, which in the instant case is the sub-contract between Multiplex and Yuanda.

91. Another way of testing my conclusion in [83] above is to consider the following scenario. If Multiplex were, absent consideration of the Guarantee, to receive a favourable and valid decision that was made within the jurisdiction of the adjudicator, would Yuanda be required under the sub-contract terms to pay or allow to Multiplex that amount? The answer to that is obviously yes. Another way of posing the same question is to ask whether Multiplex would be entitled to summary judgment in enforcement proceedings in this court for the amount of any favourable decision. Assuming the decision was one that was valid (and I will not recite all the cases in this respect) then the answer to that question is also undoubtedly yes. Any argument raised on enforcement proceedings by Yuanda that there might be other sums due in the future, in the other direction, in respect of its final account, would not entitle it to avoid judgment in respect of a payment that would undoubtedly be due to Multiplex under the terms of the sub-contract.

92. Mr Wilken also submitted that, given that the commercial purpose of the Guarantee is to provide what he called "performance security during the project", to approach the matter of construction in the manner contended for by Yuanda would be entirely to defeat the instrument's commercial purpose. I do not consider that it is necessary to consider this point in great detail, as it is clear to me, given the words of both the Guarantee and the sub-contract, that Multiplex can make a demand on the Guarantee for the amount of any decision in its favour by the adjudicator. I do however agree that this is the purpose of the Guarantee, and that were Yuanda's construction to be preferred, that purpose would be entirely frustrated. Mr Wilken's "performance security" argument was met by Mr Hickey with his interpretation of Clause 4, to which I will now turn. Mr Hickey also had a secondary argument in this respect, which was that even if he were wrong on the Clause 4 point, and it would defeat the commercial purpose, then that was simply the contractual risk that had been accepted by the parties in the terms of the commercial agreement they had all reached.

93. I will therefore now turn to Clause 4, and then return to this point about performance security afterwards. However, it should be clear from the passages above that I consider that the answer to the competing constructions of Clause 1 is the alternative construction adopted by Mr Wilken.

Clause 4 of the Guarantee

94. This issue of construction was mounted by Yuanda to demonstrate, in a way, an answer to the response of Multiplex to the contention that a valid demand on the Guarantee could only be made at the very end of the final account process, whenever that might be, probably when a judgment was handed down in High Court proceedings that have not yet been commenced at some indeterminate stage in the future. Yuanda argued, as a primary defence to the claim that this would defeat the commercial purpose of the Guarantee, that the Bank would still have an obligation to pay, as long as a valid demand had been made prior to 4 April 2020.

95. The wording of Clause 4 is as follows:
"Whether or not this Guarantee Bond shall be returned to the Guarantor, the obligations of the Guarantor under this Guarantee Bond shall be released and discharged absolutely upon Expiry (as defined in the Schedule). Any claim in writing containing particulars of the Sub-Contractor's breach of his obligation(s) under the

Contract must be made upon the Guarantor before expiry, or would be deemed invalid otherwise."

96. Firstly, it should be noted that this wording does not follow the standard wording in the ABI Model Form of Guarantee Bond. That does not necessarily matter, because it is the words chosen by the parties that require consideration in an exercise of construing the instrument. I refer to it for the sake of accuracy. Clause 4 uses the express phrase "released and discharged absolutely". It does go on to state that for a claim to be valid it has to include certain requirements and it must be made "before expiry", otherwise it would be deemed invalid.

97. Yuanda argued that this meant that as long as a claim was made prior to expiry, it would – by definition – remain valid, until well after the expiry date, even for some years. Accordingly, the Guarantee would effectively remain in force for as long as necessary after the expiry date of 4 April 2020, even in respect of the demand (say) made in January 2020 or another demand made in March 2020. I reject that construction for two main reasons. Firstly, it requires one wholly to ignore the phrase "released and discharged absolutely upon expiry". They are very clear words, entirely unambiguous, and mean what they say. Secondly, it would require the addition of other words, and Mr Hickey accepted this in the hearing, such as "but would remain obliged to pay valid demands received before expiry."

98. Ms John for the Bank made some powerful arguments in favour of a fixed end-date for the Bank's obligations to pay out any sums under the Guarantee. On this point, the Bank was definitely not neutral, and one can well understand why. Her arguments were that there was only a limited life to the existence of the cross-security to which I have referred, but also the inherent undesirability of open-ended payment obligations being assumed by (or found to be upon) the Bank, which would have no specific end date – either by reference to the calendar, or to the Project – and which would, or could, go far on into the future. If Mr Hickey's submissions were correct, a valid demand could be made for payment out under the Guarantee, to be satisfied by payment out by the Bank years later, only at the end (say) of a full trial, with judgment, in the Technology and Construction Court or (the other alternative) after an award in an arbitration. Throughout the whole of that period, the Bank would be in limbo. It would not know how much it would have to pay out to Multiplex. It would not know when it was to pay out. One has only to identify these consequences to see what a very extreme result would eventuate.

99. I also consider it material, though not in any way of primary relevance or conclusive in terms of the construction of the words, that Yuanda cannot point to the specific completion of any particular dispute resolution process, or even an approximate date, when they say the establishment and ascertainment necessary on their interpretation of the clause would be completed. The phrase "some way well into the distant future" comes to mind. Indeed, it might be said that Yuanda has refrained, either deliberately or accidentally I cannot tell (although I suspect it must be the former) from even commencing or initiating any formal dispute resolution process under the sub-contract in respect of the Yuanda final account.

100. There is nothing to stop commercial parties from entering into such an arrangement, but in my judgment it would require extremely clear words, and words very different

to those expressly included in this Guarantee, to achieve such a result. This is because the outcome of such an arrangement would be, in my judgment, so extraordinarily non-commercial. The security provided by such a guarantee, were one to be expressly worded to have that effect, would be for potential payment under the instrument only at some extremely far off point in the future, in an indeterminate amount, after the project were completed, and after all the vicissitudes of litigation or arbitration had run their course. In my judgment, that is not the commercial purpose of a guarantee such as this one, and it is not the outcome of the exercise of construing the words in fact used in the instrument by the parties. It is plainly not the meaning of Clause 4.

101. I therefore turn to the words upon which Mr Hickey relies, and consider what purpose they have. They are that "any claim in writing containing particulars of the Sub-Contractor's breach of his obligation(s) under the Contract must be made upon the Guarantor before expiry, or would be deemed invalid otherwise". I consider that Ms John had a complete answer also to the meaning of these words. They are there to deal with a potential situation where a valid claim could be made before expiry, yet insufficient time might remain for payment out to be made. It should be noted in this respect that the calendar date for expiry is specified, but no time is given. It should also be noted that the Guarantee was made, as has been explained, at the request of one bank in China to another in respect of a project in London. Not only is there no time of day specified, but no time zone is specified in the Guarantee either. China, where the cross-security is provided, itself has five different time zones, and Shanghai is 8 hours ahead of London. In those circumstances, in my judgment, it makes perfect sense for the parties to have identified that a claim under the Guarantee had to be made, including particulars of breach, prior to expiry, otherwise it would be invalid. Payment out of a valid claim would never be instantaneous, and these words deal with the admittedly rare, but possible, situation where a valid claim was made prior to expiry but payment out by the Bank might only be possible or feasible shortly after expiry.

102. I therefore turn to the third issue, namely was Yuanda entitled to an interim injunction on 20 January 2020 and/or is Yuanda entitled to continuation of the injunction that it obtained?

The grant of the injunction on 20 January 2020

103. The state of play between Multiplex and Yuanda as of 17 January 2020 (when the demand was made to the Bank by Multiplex), and also on 20 January 2020 (when Yuanda applied urgently for an injunction restraining both Multiplex and the Bank, was that Multiplex had made a demand from Yuanda for the sum of LADs, that demand having been made by a letter dated 22 November 2019. The demand sought payment by 29 November 2019. I am not being pejorative by describing this as a "demand"; that is the same term that was used by Multiplex in paragraph 4.5 of its Notice of Adjudication. Yuanda denied the same was due in a letter dated 28 November 2019. Multiplex therefore correctly identified this as a dispute between the parties; it was plainly a dispute arising under the sub-contract. The adjudication was commenced by way of the Notice issued on 2 December 2019.

104. Notwithstanding this, Multiplex sought to claim under the Guarantee by way of demand dated 11 December 2019. This demand was not proceeded with. The reasons for that are not material. A further, or fresh, demand was made on 17 January 2020. In

my judgment, Multiplex were behaving as though the Guarantee was an on-demand bond.

105. Injunctions restraining banks from paying out under on-demand bonds or other similar instruments of primary obligation, such as letters of credit, are very rarely granted. For a claim to succeed against a bank, the facts must satisfy the fraud exception to the autonomy principle. Here, Yuanda covered both the options by including both the Bank and the beneficiary under the Guarantee in its application for an injunction. Whether it was right to do so is something that is likely to be explored when costs are decided. Yuanda was entitled to its injunction on 20 January 2020 against Multiplex as that was necessary in order to restrain Multiplex from pursuing the demand for payment out to it under the Guarantee.

106. Turning, however, to continuation of the injunction past the date of this judgment, that becomes a different matter. Firstly, I have made it clear in the answers to the issues identified that the requirements that must be satisfied for Multiplex to make a valid call on the Guarantee are that the sum claimed must have been established and ascertained in accordance with the terms of the sub-contract. In the circumstances of this case, this means an adjudication decision in the ongoing adjudication (which the parties expect on or slightly before 6 March 2020) in Multiplex's favour. A valid call can only be made in the sum of that decision, up to the amount of the Guarantee itself, which is £4,411,490.70.

107. Secondly, and although there was no specific consideration given to this at the hearing, it seems to me that there can be no question of continuing the injunction against the Bank. Fraud is no longer pursued, and in those circumstances I do not see how any injunction could properly continue against the Bank.

108. So far as continuation of the injunction against Multiplex is concerned, there is therefore a potential, narrow, window after handing down of this judgment (expected to be on 28 February 2020) and the date of the adjudicator's decision. However, Multiplex no longer seek to claim under the demand of 17 January 2020. This much is clear from the open offer to which I have referred at [25] above. Also, the Bank, who are currently a party to these proceedings, will now know the correct legal analysis for a valid demand under the Guarantee. It may be that good sense will lead to the parties agreeing that continuation of the injunction against Multiplex is not necessary in order to cover the duration of the narrow window to which I have referred, and potentially the matter could be dealt with by way of undertakings between them. It may also be the case that my findings in [103] to [105] above will have relevance only in respect of costs.

The answers to the three issues

109. These are therefore, in summary, as follows:

1. What type of instrument is the Guarantee? Is it a performance bond, or an on-demand bond?
Answer: It is a performance bond that creates a secondary liability upon the Bank in respect of Yuanda's liabilities to Multiplex under the sub-contract.

2. If it is the former, as a matter of construction, what are the requirements in order for the beneficiary (Multiplex) to make a valid call on the guarantor (the Bank) which the Bank must pay? This requires consideration specifically of the wording of:
(a) Clause 1 of the Guarantee; and
(b) Clause 4 of the Guarantee;
Answer: The requirements are that the sum claimed under the Guarantee must have been established and ascertained under the sub-contract. In the factual circumstances between the parties on this project, that means that Multiplex must obtain an adjudicator's decision in its favour in respect of the LADs claimed against Yuanda.

3. Was Yuanda entitled to an interim injunction on 20 January 2020 and/or is Yuanda entitled to continuation of the injunction that it obtained?
Answer: Yuanda is only entitled to continuation of the injunction against Multiplex in any event, and that may not be necessary. It was entitled to an injunction against Multiplex on 20 January 2020 as Multiplex appear to have been behaving as though the Guarantee was an on-demand bond, which it is not.

110. I am grateful to all counsel for their helpful submissions, and cooperative and constructive approach to the substantive hearing. It has only been possible to produce this judgment in the time scale in which it has been produced due to the clarity of their submissions and their excellent and comprehensive skeleton arguments.