IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal in terms of Section 5(1) of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996 read together with Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka

SC/CHC/Appeal No: 52/2007
H.C (Civil) No. 47/2005(1)

Lagan International Limited,
Lagan House,
19, Clarendon Road,
Belfast, BT 13 GB,
Northern Ireland.

PLAINTIFF

Vs.

Janashakthi Insurance Company Limited,
No. 47, Muttiah Road,
Colombo 2.

DEFENDANT

And now between

Alliansz Insurance Lanka Limited,
No. 675, Dr. Danister De Silva Mawatha,
Colombo 9

Formerly, Janashakthi Insurance Company Limited, Janashakthi Insurance PLC., and Janashakthi General Insurance Limited,
No. 47, Muttiah Road,
Colombo 2.

DEFENDANT – APPELLANT

Vs.

Lagan International Limited,
Lagan House,
19, Clarendon Road,
Belfast, BT 13 GB,
Northern Ireland.

PLAINTIFF – RESPONDENT

Before: **Murdu N. B. Fernando, PC, CJ**
E.A.G.R. Amarasekera, J
Arjuna Obeyesekere, J

Counsel: Dr. Romesh De Silva, PC with N.R. Sivendran and Sankamali Somarathna for the Defendant – Appellant

Avindra Rodrigo, PC with Aruna De Silva for the Plaintiff – Respondent

Argued on: 26th November 2021, 19th February 2024 and 26th March 2024

Written Submissions: Tendered by the Defendant – Appellant on 15th January 2018 and 22nd May 2024

Tendered by the Plaintiff – Respondent on 15th December 2017 and 20th May 2024

Decided on: 25th February 2025

Obeyesekere, J

This is an appeal arising from a judgment delivered on 4th September 2007 by the High Court of the Western Province holden in Colombo [the Commercial High Court/High Court]. By the said judgment, the High Court held in favour of the Plaintiff – Respondent [**the Plaintiff**] in a sum of USD 247,000 in its Sri Lankan rupee equivalent together with interest from 16th October 2004. Aggrieved by the said judgment, the Defendant – Appellant [**the Defendant**] invoked the appellate jurisdiction of this Court by its petition of appeal filed on 30th October 2007.

Gan Airport Development Project

The Plaintiff is a company duly incorporated in Northern Ireland, and is engaged in the business of civil engineering and public works. On 13th December 2002, the Plaintiff had entered into a contract with the Ministry of Finance and Treasury of the Republic of Maldives to carry out the Gan Airport Development Project. Among the work that the Plaintiff was required to carry out as part of the said project was the construction of a fuel farm on Gan Island, Maldives.

With a view to sub-contracting the work relating to the fuel farm of the said project, the Plaintiff by way of a tender floated in September 2003 had called for proposals from qualified entities to carry out the said work. According to the Plaintiff, the proposal submitted by V Com Heavy Engineers (Pvt) Limited [**V Com HE**], a company registered under the laws of Sri Lanka had been selected for the execution of the work relating to the fuel farm.

The Plaintiff states that it was a pre-condition of the tender that the selected party shall submit a Performance Bond to secure the advance payment that the Plaintiff was required to make. Accordingly, the following Performance Bond dated 31st December 2003 [**P4**] had been issued by the Defendant addressed to the Project Manager of the Plaintiff:

> "*WHEREAS M/s **V Com Heavy Engineers** (Pvt) Limited of No. 21, Deal Place, Colombo 3 (hereinafter called the 'Contractor') has **undertaken the project work** of upgrading of Gan Airport (hereinafter called the Contract)*
>
> *AND whereas it has been stipulated by you in the said Contract that the Contractor shall furnish you with a Performance Bond by a recognised Insurance Company for the sum specified therein as security for compliance with its obligations in accordance with the Contract.*
>
> *AND whereas **we have agreed to give the Contractor** such a Performance Bond.*
>
> *NOW THEREFORE we hereby affirm that we are the Guarantor and responsible to you, on behalf of the Contractor upto a total sum of USD 247,000 Only (Sri Lankan*

Rupees 23,879,962) such sum being payable in the type and proportions of currencies in which the Contract Price is payable, and we undertake to pay you, upon your first written demand and without cavil or argument, any sum or sums within the limits of USD 247,000 (Rs. 23,879,962) as aforesaid without your needing to prove or to show grounds or reasons for your demand for the sum specified therein.

WE hereby waive the necessity of your demanding the said debt from the Contractor before presenting us with this demand.

WE further agree that no change or addition to or other modification of the terms of the Contract or of the works to be performed thereunder or of any of the Contract Document which may be made between you and the Contractor shall in any way release us from any liability under this guarantee, and we hereby waive notice or any such change or modification.

This guarantee shall be valid until 2nd August 2005.

Not withdrawing anything here above contained our liability under this guarantee is restricted to USD 247,000 (Rs. 23,879,962) and will expire on 2nd August 2005, unless a claim is lodged with us in writing on or before that date or our liability under this Guarantee will cease without any further notice to you."

Attached to P4 was a Schedule [**D1**] which formed part and parcel of P4. In terms of D1, (a) the insured was V Com HE, (b) the work was to be carried out by V Com HE; (c) the beneficiary was the Project Manager of the Plaintiff, and (d) the commencement date of the Bond was 7th November 2003.

There are several matters that I must state at this point. The first is that it is not disputed that P4 was an on-demand payable Performance Bond. The second is that P4 was issued in anticipation of V Com HE entering into a contract with the Plaintiff. Thus, at the time P4 was issued, there was no written contract between the Plaintiff and V Com HE and the Defendant therefore did not have the benefit of examining any written contract related to the carrying out of the work of the fuel farm. Yet, the Defendant was content on issuing P4 and did not insist upon there being a written contract between V Com HE and the Plaintiff for P4 to become effective. The third is that P4 has been issued to secure the due

performance by V Com HE of its contractual obligations to the Plaintiff. The fourth is that any change, addition or other modification of the terms of the Contract that V Com HE had with the Plaintiff did not require the approval of the Defendant nor did such a change affect the liability of the Defendant.

It is borne out by **P18**, to which I shall refer to later in this judgment, that it was '*a precondition of the said tender that the applicant company be registered and operate a bank account in the United Kingdom*', and for that reason, the Plaintiff agreed to award the contract to a sister company of V Com HE, namely V Com International UK Limited [**V Com UK**] incorporated in the United Kingdom '*subject to the understanding that V Com HE shall carry out the work and/or be entitled to the rights and be subject to duties under the contract*.'

Accordingly, on 9th February 2004, the Plaintiff entered into a contract [**P21**] with V Com UK in terms of which V Com UK was required to carry out the design, fabrication and installation of the said fuel farm. It was the position of the Plaintiff that V Com HE and V Com UK were jointly involved in the execution of the work under the project. Attached to P21 as 'Appendix F' was P4, with P4 thus forming part and parcel of P21.

Breach by V Com and claim under P4

The Plaintiff claimed that there was considerable delay on the part of V Com UK and V Com HE in procuring steel plates, other materials and machinery necessary to execute the works and that what was procured did not meet the specifications. While keeping the Defendant informed of such delays [vide letter dated 1st October 2004 (**P7**)], the Plaintiff had communicated its concerns arising from such delay to V Com HE by its letter dated 14th October 2004 [**P8**]. The Plaintiff states that notwithstanding the steps taken by it, V Com UK and V Com HE had suspended the work and failed to commence work in spite of being so requested by the Plaintiff. This led to the Plaintiff terminating P21 by letter dated 26th October 2004 [**P9**], with P9 being copied to the Defendant.

By letter dated 16th October 2004 [**P10**], the Plaintiff demanded from the Defendant payment of the sum of USD 247,000 under and in terms of P4. While I shall refer to later in this judgment the correspondence that was exchanged between the Plaintiff and the

Defendant pursuant to P10, it shall suffice to state at this point that the Defendant eventually denied liability under P4.

The refusal by the Defendant to pay under and in terms of P4 culminated in the Plaintiff instituting action in the High Court seeking the recovery of the Rupee equivalent of the said sum of USD 247,000. While the Plaintiff led the evidence of John Anthony Gourley, its Project Manager and read in evidence documents marked P1 – P21, the Defendant did not lead the evidence of any witnesses but only marked documents D1 – D3 during cross examination of the witness of the Plaintiff. Thus, the circumstances in which it came to issue P4 and any specific terms and conditions subject to which P4 was issued have not been laid before Court by the Defendant. It is thereafter that judgment was delivered by the High Court in favour of the Plaintiff.

The learned President's Counsel for the Defendant raised two primary arguments before this Court. In order to give context to the said arguments and the conclusions that I shall arrive in relation to the said two arguments, I must first consider the position of the parties under a performance bond.

Performance Bonds

Performance bonds, also referred to as performance guarantees or demand guarantees, are binding and unconditional contractual undertakings usually given by a bank or an insurance company to pay a specified amount of money to a known beneficiary on the occurrence of a certain event, which is usually the non-fulfilment of a contractual obligation undertaken by the party at whose request the guarantee was issued [the principal] to the beneficiary. Such instruments are "*usually*" payable on demand and sometimes require the presentation of certain specified documents in support of the demand. I say "*usually*" for the reason that in spite of the nomenclature used to describe such an instrument, the precise scope of such guarantee and the intention of the parties would be reflected in, and decided by the wording used in such instrument. Thus, while the specific terms and conditions that need to be satisfied to claim payment would vary from one instrument to another, it is not unusual to find performance bonds which clearly specify that any claim lodged in terms of such a bond are payable not only on demand, but without demur, cavil or argument on the part of the issuer.

Demand guarantees must perhaps be distinguished from bonds which are clearly conditional and which on the face of it require the beneficiary to establish the loss suffered by it prior to the issuer of the bond honouring a claim. As pointed out in **Paget's Law of Banking** [15th edition; page 988]:

> "*The essential difference between a guarantee in the strict sense (i.e. a contract of suretyship) and a demand guarantee is that the liability of a surety is secondary, whereas the liability of the issuer of a demand guarantee is primary and triggered by demand. A surety's liability is co-extensive with that of the principal debtor and, if default by the principal debtor is disputed by the surety, it must be proved by the creditor. Neither proposition applies to a demand guarantee.* ***The principle which underlies demand guarantees is that each contract is autonomous.*** *In particular, the obligations of the guarantor are not affected by disputes under the underlying contract between the beneficiary and the principal.* ***If the beneficiary makes an honest demand, it matters not whether as between himself and the principal he is entitled to payment****. The guarantor must honour the demand, the principal must reimburse the guarantor (or counter-guarantor), and any disputes between the principal and the beneficiary, including any claim by the principal that the drawing was a breach of the contract between them, must be resolved in separate proceedings to which the bank will not be a party."* [emphasis added]

That a demand guarantee is an autonomous contract and therefore stands apart from the underlying contract, requiring payment to be made irrespective of any dispute between the beneficiary and the principal at whose request the bank issued such guarantee was considered in **Standard Bank London Limited v Canara Bank** [2002 EWHC 1032 (Comm)] where it was held as follows:

> "*It is well established that demand guarantees of this kind are normally intended to operate as autonomous contracts in the sense that the guarantor's obligation to pay is not linked to the underlying transaction but depends only on the making of a demand which conforms to the requirements of the guarantee. This principle was established in Edward Owen Engineering Limited v Barclays Bank International Limited [1978] 1 Q.B. 159 and has been consistently applied in subsequent cases. This is a well-recognised aspect of international banking practice which forms*

another important aspect of the background against which the guarantee falls to be construed."

The rationale for requiring that banks honour such demand guarantees in terms of the particular instrument without raising objection is the underlying commercial purpose that a performance bond plays in facilitating international commerce. It is accepted that a performance bond performs the role of an effective safeguard against non-performance, inadequate performance or delayed performance and is meant to be a security which is readily, promptly and assuredly realisable upon the occurrence of the event stipulated in the bond.

It is well established that if the beneficiary seeks payment in accordance with the terms of an on-demand payable performance bond, the bank must pay regardless of how "unfair" such claim might be to the principal at whose request the bond was issued. As a general rule the bank will not be concerned with the rights or wrongs of any underlying dispute between the beneficiary and the principal, or with the factual accuracy of the statement made by the beneficiary or the genuineness of any document presented in order to obtain payment.

The above position has been clearly laid down in **R. D. Harbottle (Mercantile) Ltd. v National Westminster Bank Ltd and others** [(1978) Q.B. 146; at pages 155,156] where Kerr J, stated as follows:

"*It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks.* ***They are the lifeblood of international commerce.*** *Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts. The courts are not concerned with their difficulties to enforce such claims; these are risks which the merchants take. In this case the plaintiffs took the risk of the unconditional wording of the guarantees. The machinery and commitments of banks are on a different level. They must be*

allowed to be honoured, free from interference by the courts. Otherwise, trust in international commerce could be irreparably damaged.

I need only briefly refer to a few authorities. They were mostly concerned with confirmed letters of credit, but they equally apply to confirmed performance guarantees. In both cases the banks are only concerned to ensure that the terms of their mandate and confirmations are complied with, e.g. of the conformity of the documents presented, and in this case of the fact that a demand for payment had been made by the buyers under their existing guarantee. This is unfortunate for the plaintiffs, but it is what they have agreed. Banks are not concerned with the rights or wrongs of the underlying disputes but only with the performance of the obligations which they themselves have confirmed." [emphasis added]

The above passage was cited with approval by Lord Denning in **Edward Owen Engineering Limited v Barclays Bank International Limited and another** [1978 Q.B. 159], which is one of the earliest cases to have considered the liability of a bank under an on-demand performance guarantee, and which has been followed by our Courts on numerous occasions, including in **Indica Traders (Pvt) Limited v Seoul Lanka Construction (Pvt) Limited and others** [(1994) 3 Sri LR 387] and **Hemas Marketing (Pvt) Limited v Chandrasiri and others** [(1994) 2 Sri LR 181].

Having engaged in a long discussion on the similarities between an irrevocable letter of credit and a performance guarantee in the context of the purpose for which such instruments are used in international commerce, Lord Denning went on to state as follows:

"*A performance bond is a new creature so far as we are concerned. It has many similarities to a letter of credit, with which of course we are very familiar. It has been long established that when a letter of credit is issued and confirmed by a bank, the bank must pay it if the documents are in order and the terms of the credit are satisfied. Any dispute between buyer and seller must be settled between themselves. The bank must honour the credit. That was clearly stated in Hamzeh Malas & Sons v. British Imex Industries Ltd. [1958] 2 Q.B. 127. Jenkins L.J., giving the judgment of this court, said, at p. 129*:

"*... it seems to be plain enough that the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes upon the banker an absolute obligation to pay, irrespective of any dispute there may be between the parties as to whether the goods are up to contract or not.* ***An elaborate commercial system has been built up on the footing that bankers' confirmed credits are of that character****, and, in my judgment, it would be wrong for this court in the present case to interfere with the established practice*."

To this general principle there is an exception in the case of what is called established or obvious fraud to the knowledge of the bank." [page 169]

"***So, as one takes instance after instance, these performance guarantees are virtually promissory notes payable on demand****. So long as the Libyan customers make an honest demand, the banks are bound to pay: and the banks will rarely, if ever, be in a position to know whether the demand is honest or not. At any rate they will not be able to prove it to be dishonest. So they will have to pay.*

All this leads to the conclusion that the performance guarantee stands on a similar footing to a letter of credit. ***A bank which gives a performance guarantee must honour that guarantee according to its terms****. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not.* ***The bank must pay according to its guarantee, on demand, if so stipulated, without proof or conditions****. The only exception is when there is a clear fraud of which the bank has notice*." [pages 170, 171; emphasis added]

Donaldson, MR stated in **Bolivinter Oil SA v Chase Manhattan Bank and others** [(1984) 1 All ER 351; at page 352] that, "*The unique value of such a letter (of credit), bond or guarantee is that the beneficiary can be completely satisfied that, whatever disputes may thereafter arise between him and the bank's customer in relation to the performance or* ***indeed existence of the underlying contract****, the bank is personally undertaking to pay him provided that the specified conditions are met.*" [emphasis added]

In **Howe Richardson Scale Co. Ltd. v Polimex-Cekop and National Westminster Bank Ltd** [June 23, 1977; Court of Appeal (Civil Division) Transcript No. 270], Roskill L.J. spoke to the same effect when he stated that:

> "*Whether the obligation arises under a letter of credit or under a guarantee, the obligation of the bank is to perform that which it is required to perform by that particular contract, and that obligation does not in the ordinary way depend on the correct resolution of a dispute as to the sufficiency of performance by the seller to the buyer or by the buyer to the seller as the case may be under the sale and purchase contract; the bank here is simply concerned to see whether the event has happened upon which its obligation to pay has risen*."

The position therefore is that where the bank has clearly undertaken to pay on demand, and where the claim is in conformity with the requirements of the bond, it must do so without demur. While it is not open for the bank to refer to any underlying dispute between the beneficiary and the principal, the bank must also not go in search of reasons to justify any refusal to pay. After all, it is an instrument that the bank has willingly issued and it must honour its word. However, Courts do recognise that banks can refuse to honour a demand where such a demand is fraudulent. In the absence of fraud on the part of the beneficiary who is making the claim which may include any misrepresentation on the part of the principal that induced the bank to issue the guarantee in the first place, the bank's obligation to pay under the guarantee against presentation of the demand and where stipulated, any documents, is absolute.

Has the Plaintiff made a valid demand in terms of P4?

This brings me to the first argument of the learned President's Counsel for the Defendant that the demand P10 that was made by the Plaintiff was not in accordance with the provisions of P4 and in the absence of a valid demand, the Defendant was not obliged to make any payment under P4. This argument was premised on three grounds to which I shall refer to in the course of this discussion.

The following two provisions of P4 are relevant in this regard:

(a) *" … we undertake to pay you, upon your **first written demand** and without cavil or argument, any sum or sums within the limits of USD 247,000 (Rs. 23,879,962) as aforesaid without your needing to prove or to show grounds or reasons for your demand for the sum specified therein."*

(b) *" … our liability under this guarantee is restricted to USD 247,000 (Rs. 23,879,962) and will expire on 2nd August 2005, **unless a claim is lodged with us in writing on or before that date** ...*"

The cumulative effect of the above two provisions is that, (a) the Plaintiff must lodge its claim on or before 2nd August 2005, (b) such claim must be in writing, and (c) the Defendant must make payment of a sum of money up to USD 247,000 upon the first written demand that the Plaintiff shall make. P4 does not contain any further conditions nor does P4 require the Plaintiff to tender any documents in support of its claim. I must state that the use of the prefix 'first' does not mean that the beneficiary cannot make more than one written demand but only means that the bank must honour the claim the moment it receives such demand. This is reflective of the true nature of an on-demand payable guarantee and the requirement on the part of the bank that it pay immediately, provided the specific terms by which a claim must adhere to have been complied with.

While there is no dispute that a written claim was lodged on or before 2nd August 2005, I shall now consider the correspondence exchanged between the Plaintiff and the Defendant once it was clear to the Plaintiff that V Com HE / V Com UK had abandoned work, in order to determine if the Plaintiff has lodged its claim and if there has been a valid written demand of the sums of money due under P4.

The first in the series of correspondence is letter dated 16th October 2004 [**P10**] by which the Plaintiff informed the Defendant as follows:

> "*With reference to our letter dated 1st October 2004 on the above subject, we hereby inform you it is now evident that V Com are unable to recover the situation and **we must hereby demand payment of the USD 247,000** in full …*"

The copy of P10 received by the Defendant was marked as **D2**.

I am in agreement with the Plaintiff that:

(a) by P10, sent under the name of Roy Wilson, Construction Director of the Plaintiff, but said to contain the signature of J Gooley, Project Manager of the Plaintiff, the Plaintiff lodged its claim; and

(b) on the face of it, P10 was a written demand on which the Defendant could have acted.

By facsimile dated 19th October 2004 [**P11**] the Defendant duly acknowledged the receipt of P10 without prejudice to its rights. This was followed by a further facsimile sent by the Defendant on 29th November 2004 [**P13**] informing the Plaintiff that, "*we have been instructed by our lawyers that* ***the demand made by you is not valid****. Therefore, we regret our inability to make any payment under the above mentioned bond*." [emphasis added]

Upon the Plaintiff seeking "*the reason given by your lawyers for this decision*" [**P14**], the Defendant replied as follows – vide letter dated 1st December 2004 [**P15**] addressed to Roy Wilson, Construction Director of the Plaintiff:

> "*We refer to your letter dated 16th October 2004 on the above subject, purported to have been signed by another person on your behalf, telefaxed to us and also to the original thereof received by us* ***without signature****, and to our tentative acknowledgement of 19th October 2004 without prejudice to our rights.*
>
> *We have obtained legal advise and we write to inform you that we are not liable to pay any claim on your purported demand and we deny any liability to pay your purported claim."* [emphasis added]

Thus, the rejection by the Defendant of the claim in P10 was solely on the basis that the demand had not been signed.

It was admitted by the Plaintiff that by mistake, '**D2**' which was the copy of P10 that was sent by facsimile and later posted to the Defendant did not bear a signature, although the copy of D2 [i.e. P10] that was retained by the Plaintiff contained the signature. The

absence of a signature on the copy of P10 that was received by the Defendant is one of the three grounds relied upon by the learned President's Counsel for the Defendant in support of his first argument that there was no valid written demand made by the Plaintiff.

The High Court, referring to the fact that D2 received by the Defendant did not bear a signature, stated as follows:

> "*Therefore the Defendant has argued that there is no proper demand made in terms of the performance bond. However, the document marked P11 which was sent by the Assistant General Manager (Legal) of the Defendant company has acknowledged the receipt of the said letter dated 16th October 2004. Therefore it is crystal clear that the demand made in terms of the performance bond has been received by the Defendant. Thus, the Defendant company was fully aware of the contents in the said letter in which the demand was made in terms of the performance bond marked P4 although no signature had been placed on it. In the circumstances, it is my opinion that the Defendant cannot refute the demand made in terms of the performance bond since it had the proper knowledge of the demand made in this regard."*

I am of the view that even though P10/D2 was in writing, it was reasonable for the Defendant to be concerned with its authenticity due to the lack of a signature, and for that reason I cannot fault the Defendant for not acting on D2 immediately upon receipt of the demand. While that is a matter on which the Defendant could have sought clarification from the Plaintiff, the fact that the Defendant acknowledged the receipt of D2 makes it clear that the Defendant was in fact satisfied that D2 originated from the Plaintiff, and that it had no issue relating to the authenticity of D2. Thus, the refusal by the Defendant to honour its obligation in terms of P4 based on the demand in D2 was frivolous and wrong.

The Defendant and the Plaintiff thereafter engaged in a series of correspondence based on P10/D2. It is only by P15 that the Defendant conveyed the reason why it cannot honour the claim lodged with it by D2. In other words, the position of the Defendant in P15 that it is not liable to honour the claim was based on the absence of a signature on D2, and nothing else. P15 thus left the door open for the Plaintiff to lodge a fresh claim or demand.

In response to P15, the Plaintiff sent the following letter dated 1st December 2004 [**P16**] to the Defendant, signed by its Project Manager:

> "*With reference to your fax dated 1st December 2004,* ***we hereby submit our demand*** *against Bond No. APB 2003-2080.*
>
> *We seek your written confirmation that this is now a valid demand signed by the Project Manager of Lagan International Limited, Gan Airport, Republic of Maldives.*
>
> *The original demand is now being forwarded to you by registered post.*" [emphasis added]

P16 was followed by a further letter dated 9th December 2004 [**P17**] signed by the Project Manager of the Plaintiff, informing the Defendant as follows:

> "*As you are aware, by its letter dated 16th October 2004, Lagan International Limited (Lagan) gave you notification that it was making a call on the Performance Bond No. APB 2003-2080 (the Bond) as a consequence of the failure by the Contractor to perform its obligations at the Gan Airport Development Project.*
>
> *Without prejudice to its 16th October notification, Lagan re-submitted its written demand against the Bond on 1st December 2004.*
>
> *Despite the demand(s) made by Lagan on the Bond, you have refused to make payment. For the avoidance of any doubt, and again without prejudice to the demands/calls previously made,* ***Lagan now gives further notice that it makes a call pursuant to the Bond***." [emphasis added]

While it is clear that P17 is the culmination of the claim process that commenced with P10, it was the position of the Plaintiff that even if D2 was not a valid demand, that P16 as well as P17 served as valid written claims lodged under P4. The learned President's Counsel for the Defendant submitted (a) that P10 was the only document annexed to the plaint, (b) the Plaintiff was relying solely upon P10 as evidenced by its prayer to the plaint where the Plaintiff was demanding interest from the date of P10, and (c) for that reason,

the Plaintiff cannot rely on P16 and/or P17 to support its position that even if P10 is not valid, the Plaintiff has made a valid demand by P16 and/or P17. This was the second ground urged by the learned President's Counsel for the Defendant in support of his first argument. Even though I have already expressed the view that the Defendant could have acted upon D2/P10 since there was no issue with regard to its authenticity, I shall nonetheless consider this submission of the Defendant.

Even though it is correct to say that only P10 has been annexed to the plaint, the Plaintiff has stated in paragraph 10 of the plaint that, '*without prejudice to the validity of its written demand dated 16th October 2004 referred to above, thereafter* ***by a further letter dated 1st December 2004 and other demands****, the Plaintiff again demanded from the Defendant payment of the sum of USD 247,000 under the said Bond.*' Based on this averment, the Plaintiff raised Issue Nos. 9 and 10 to the effect that its demand is reflected not only in P10 and P16 but in other demands, as well. P16 and P17 were annexed to the affidavit of the Plaintiff's witness and no objection was raised to these two documents, although the Defendant moved that several other documents be marked subject to proof. Thus, I am not in agreement with the submission of the Defendant that the Plaintiff cannot rely on P16 and/or P17.

The third ground relied upon by the learned President's Counsel for the Defendant in support of his first argument was that although P16 refers to an original demand being forwarded by registered post, no such original demand was received by the Defendant, as admitted by the Plaintiff's witness, and that P16 too was not a valid claim. Although the witness did not explain what was meant by the reference in P16 to an original demand being forwarded by registered post, it is clear that the use of the words '*we hereby submit our demand against Bond No. APB 2003-2080'* and *'we seek your written confirmation that this is now a valid demand'* in P16*,* is a reference to P16 itself, and that together with the reference in P17 that '*Lagan re-submitted its written demand against the Bond on 1st December 2004'* clearly demonstrate that P16 was in fact a valid written demand.

With it being evident by P15 that the Defendant will not be honouring its obligation in terms of P4 based on D2, and even though the Plaintiff had made a fresh demand by P16 pursuant to P15, by P17 the Plaintiff gave '*further notice that it makes a call pursuant to the Bond*' '*for the avoidance of any doubt, and again without prejudice to the*

demands/calls previously made'. The wording in P17 to my mind is a clear and unambiguous written claim lodged by the Plaintiff demanding payment under P4 and was certainly a written demand that the law required the Defendant to have honoured.

The High Court took the following view on P16 and P17:

> *"Furthermore, there had been another demand made in terms of the document marked P4 by the Plaintiff from the Defendant. This demand was made by letter dated 1st December 2004 and was produced in evidence marked P16. This letter had been signed by the witness who gave evidence in this case. Moreover, another letter dated 9th December 2004 had been sent by the Plaintiff requesting the Defendant to make payment due on the performance bond and it was produced marked as P17 in evidence.*
>
> *In the circumstances, it is clear that a proper demand had been made by the Plaintiff from the Defendant in terms of the performance bond marked P4."*

I am in agreement with the conclusion reached by the High Court. Taking into consideration all of the above circumstances, I am of the view that while the Defendant should have acted on P10/D2, P16 and P17 too were valid demands made in terms of P4 and that the Defendant is liable to honour its obligations under and in terms of P4.

<u>Is the Defendant liable to pay under P4?</u>

I shall now consider the second argument of the learned President's Counsel for the Defendant that:

(a) by P4, the Defendant had only guaranteed the performance of V Com HE under a contract that V Com HE was said to have had with the Plaintiff;

(b) the plaint revealed that the Plaintiff did not have any contract with V Com HE but instead, the Plaintiff had admittedly entered into a contract only with V Com UK; and

(c) the Defendant is therefore not obliged to honour any default on the part of V Com UK under P21.

I should perhaps reiterate two things. The first is that P4 had been annexed to P21 as Appendix 'F' and formed part of P21. The second is that every guarantee revolves around its own wording which reflects the intention of the parties, and that while the argument of the learned President's Counsel has much merit, the conclusion that I shall reach on this matter is based entirely on the wording of P4, the intention of the parties and the events surrounding this transaction.

In considering this argument, I shall bear in mind what Lord Justice Simon said in **Openwork Limited v Alessandro Forte** [(2018) EWCA Civ 783] that, "*The Court should strive to give some meaning to contractual clauses agreed by the parties if it is at all possible to do so*." He thereafter cited with approval the following passage of Lord Wright in **WN Hillas & Co Ltd v Arcos Ltd** [(1932) 147 LT 503]:

> "*But it is clear that the parties both intended to make a contract and thought they had done so. Business men often record the most important agreements in crude and summary fashion: modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the Court to construe such documents fairly and broadly, without being too astute or subtle in finding defects, but, on the contrary, the Court should seek to apply the old maxim of English law, 'verba ita sunt intelligenda ut res magis valeat quam pereat.' [words are to be understood such that the subject matter may be more effective than wasted]. That maxim, however, does not mean that the Court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as for instance, the implication of what is just and reasonable to be ascertained by the Court as matter of machinery where the contractual intention is clear but the contract is silent on some detail. Thus, in contracts for future performance over a period, the parties may neither be able nor desire to specify many matters of detail, but leave them to be adjusted in the working out of the contract. … Furthermore, even if the construction of the words used may be difficult, that is not a reason for*

holding them too ambiguous or uncertain to be enforced, if the fair meaning of the parties can be extracted."

In **G Scammell & Nephew Ltd v HC & JG Ouston** [1941 AC 251], Lord Wright stated that:

"*The object of the court is to do justice between the parties, and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance and not mere form. It will not be deterred by mere difficulties of interpretation. Difficulty is not synonymous with ambiguity so long as any definite meaning can be extracted. But the test of intention is to be found in the words used. If these words, considered however broadly and untechnically and with due regard to all the just implications, fail to evince any definite meaning on which the court can safely act, the court has no choice but to say that there is no contract. Such a position is not often found*."

A similar sentiment was expressed in **Astor Management AG and another v Antalaya Mining Plc and another** [(2017) EWHC 425 (Comm)] by Leggatt, J when he stated that, "*The role of the court in a commercial dispute is to give legal effect to what the parties have agreed, not to throw its hands in the air and refuse to do so because the parties have not made its task easy. To hold that a clause is too uncertain to be enforceable is a last resort or, as Lord Denning MR once put it, 'a counsel of despair': see Nea Agrex SA v Baltic Shipping Co Ltd [1976] 1 QB 933, 943*."

With P4 being an on-demand payable guarantee, the Defendant had undertaken to the Plaintiff "*to pay you, **upon your first written demand** and **without cavil or argument**, any sum or sums within the limits of USD 247,000 (Rs. 23,879,962) as aforesaid **without your needing to prove or to show grounds or reasons for your demand** for the sum specified therein.*" I have already referred to the fact that an on-demand performance guarantee is similar to letters of credit and thus, must be accorded the same sanctity afforded to letters of credit, as they are the lifeblood of international commerce. I have also stated that any dispute between the parties to the underlying contract shall not affect the obligation of the bank to honour a claim under such a guarantee, and that probably the only exception is where the bank is able to establish that a demand is fraudulent. In this

case, the Defendant did raise an issue whether the Plaintiff has practiced a fraud on it by presenting a claim which does not result out of a breach of V Com HE but the said issue has been answered in the negative by the High Court, probably for the reason that no material at all was presented to the High Court by the Defendant to establish fraud.

P4 was issued on 31st December 2003 but stipulated that its validity period shall begin on 7th November 2003 and be valid until 2nd August 2005. Although the Defendant did not lead any evidence in this regard, it is safe to assume that the request for a guarantee was made by V Com HE for the reason that it is V Com HE who responded to the tender and had been identified as the contractor in P4. However, at the time P4 was issued, there was no written contract either between the Plaintiff and V Com HE or between the Plaintiff and V Com UK, and thus, for obvious reasons, P4 does not refer to any written contract between V Com HE and the Plaintiff. What P4 does refer to is the fact that V Com HE "*has **undertaken the project work** of upgrading of Gan Airport*".

I must state that it was admitted by the Plaintiff's witness during cross examination that:

(a) P21 was the only written contract that it had in relation to the fuel farm project;

(b) P21 was with V Com UK;

(c) The Plaintiff did not have any written contract with V Com HE; and

(d) P4 was issued to ensure due performance by V Com HE of the contract that V Com HE is said to have had with the Plaintiff, or in other words, to secure the due performance of V Com HE in the carrying out of the fuel farm project.

The Defendant did not claim that V Com HE was required to enter into a written contract for P4 to become effective. Thus, P4 only contemplated (a) a contract between the Plaintiff and V Com HE and not a written contract, and (b) for the project work to be carried out by V Com HE. I am therefore inclined to take the view that as long as the evidence established that the work was required to be carried out by V Com HE and the work was in fact carried out by V Com HE, the Defendant would be liable under and in terms of P4. I must also state that the Defendant did not lead any evidence to contradict

this position, although the factual circumstances under which P4 was issued was within the knowledge of the Defendant.

Having said so, I shall now consider the explanation of the Plaintiff relating to the involvement of V Com UK and V Com HE in the execution of the work relating to the fuel farm project. In the evidence-in-chief of the Plaintiff's witness submitted by way of an affidavit, he has stated as follows:

> "*I state that there was considerable delay on the part of V Com International UK Limited in procuring steel plates necessary for the sub-contract work, and ultimately the procured steel plates did not comply with the specifications and this was revealed when V Com Heavy Engineers (Pvt) Limited commenced the erection of the tank No. 1 on or about September 2004.*
>
> *There were repeated delays on the part of V Com International UK Limited and V Com Heavy Engineers (Pvt) Limited in obtaining materials and/or machinery for sub-contract work …*
>
> *There was continued inability on the part of V Com International UK Limited and V Com Heavy Engineers (Pvt) Limited to keep up with the sub-contract deadlines.*
>
> *I state that due to a lack of material on the site as of 7th October 2004, V Com International UK Limited and V Com Heavy Engineers (Pvt) Limited were unable to continue with the sub-contract work, and also of this date, staff of V Com Heavy Engineers (Pvt) Limited had stopped doing work at the sub-contract site as they have not been paid by V Com Heavy Engineers (Pvt) Limited.*
>
> *In the circumstances, acting in terms of clause 7.1 of the sub-contract, by letter dated 14th October 2004 I required V Com International UK Limited and V Com Heavy Engineers (Pvt) Limited to recommence work within 7 days.*
>
> *By a letter dated 16th October 2004 I informed that the Plaintiff no longer has any confidence in the ability of V Com International UK Limited and V Com Heavy Engineers (Pvt) Limited to complete the project and stated that they had abandoned*

the project and that the Plaintiff had no option to terminate the sub-contract with effect from 21st October 2004.

Thereafter by letter dated 26th October 2004 written by the Plaintiff, the said sub-contract agreement was terminated and same was copied to the Defendant. In proof thereof, I produce herewith marked P9 a true copy of the said letter dated 26th October 2004 sent by the Plaintiff to Jagath Navaratne of V Com Heavy Engineers Private Limited."

Thus, the position of the Plaintiff as borne out by the above evidence of its witness was that the execution of the work under the project was carried out by V Com HE. The letter of termination was served on the Chairman of V Com HE. This position is borne out by P9 addressed to the Chairman of V Com HE with copy to the Defendant where the Plaintiff puts V Com HE on notice that the Contract between them will be terminated as V Com HE is in default.

Apart from P9, the above position of the Plaintiff was not supported by any independent evidence until the witness was asked during cross examination whether V Com HE has instituted action against the Plaintiff for breach of contract relating to the execution of the fuel tank farm project, and whether:

"V Com Heavy Engineers Private Limited has filed action in this Court on the basis that you have not paid them money due to them, that is the basis of the case?"

"The Plaintiffs in that case V Com Heavy Engineers Private Limited and V Com International UK Limited have taken up the position that they duly and properly performed their obligations?"

The action referred to in the above questions is an action filed in the Commercial High Court with V Com HE and V Com UK being named as the 1st and 2nd plaintiffs and the Plaintiff in this appeal being named as the defendant.

While the witness answered the above three questions in the affirmative, the learned Counsel for the Plaintiff marked through this witness, the plaint, objections and answer filed in that case as **P18**, **P19** and **P20**, respectively. It appears to me from the above

questions and several other questions that were put to the witness thereafter that the Defendant was aware that the work was being performed by V Com HE.

In their plaint P18, V Com HE and V Com UK have confirmed the following:

(a) The position of the Plaintiff that it is V Com HE who responded to the tender floated by the Plaintiff;

(b) That it was *a precondition of the said tender that the applicant company be registered and operate a bank account in the United Kingdom* and for that reason, the Plaintiff had agreed to award the contract to V Com UK '*subject to the understanding that V Com HE shall carry out* the *work and/or be entitled to the rights and be subject to duties under the contract*.'

(c) That on or about 6th April 2004, V Com HE *sent its workmen to Gan Island Maldives and commenced work on the Fuel Farm Tank Farm in terms and in keeping with the provisions of the sub-contract;*

(d) That the work relating to the fuel farm was carried out by V Com HE using the workmen employed by V Com HE. The details of the work carried out by V Com HE have been clearly set out in a letter dated 25th October 2004 annexed to the plaint.

The Plaintiff did not dispute the above averments in P18 and even made a cross claim against V Com UK and V Com HE in that case. Thus, the position of the Plaintiff that work under the fuel farm project was undertaken and carried out by V Com HE has been independently substantiated. It is this work that was to be performed by V Com HE that has been secured by P4 and in the event of non-performance by V Com HE, the Defendant had undertaken in terms of P4 to pay the Plaintiff the said sum of USD 247,000.

In considering the argument of the Defendant that V Com HE did not have any contract with the Plaintiff and that the Defendant is therefore not liable in terms of P4, the High Court stated as follows:

> "*On the face of the Performance Bond, it is seen that M/s V Com Heavy Engineers (Pvt) Limited is the company which has furnished the performance bond although*

the party who was to perform the work under the sub contract for which this performance bond was furnished has been V Com International (UK) Limited. The sub-contractor in this case V Com International (UK) Limited is not referred to in the performance bond. Therefore it is necessary to ascertain whether the subcontractor, V Com International (UK) Limited whose name has not been referred to in the performance bond is bound by the terms contained in P3 read with the terms in the Bond marked P4. This position was queried at length from the witness for the plaintiff in cross examination. He in answer to questions said that both V Com International (UK) Limited and V Com Heavy Engineers (Pvt) Limited are sister companies. He has further stated that the company V Com International (UK) Limited employed V Com Heavy Engineers (Pvt) Limited to carry out the work referred to in the subcontract.

Explaining this position, witness also said that a case bearing No. HC (C) 1/2007(1) had been filed in this Court jointly by both V Com International (UK) Limited and V Com Heavy Engineers (Pvt) Limited as plaintiffs against the plaintiff in this case making it the defendant, claiming damages for breach of contract. A copy of the plaint in that action filed by the said two sister companies against the plaintiff in this case was produced in evidence and was marked as P18 and P19. In that, it is stated that the contract referred to in the document marked P3 was awarded to V Com International (UK) Limited and the work pertaining to the said contract was carried out by V Com Heavy Engineers (Pvt) Limited. This fact has not been contradicted."

The High Court thereafter referred to two paragraphs in P18 the content of which I have re-produced at paragraph (b) above, and concluded that, "*Therefore, it is clear that V Com Heavy Engineers (Pvt) Limited was employed to carry out the work of the fuel farm by V Com International (UK) Limited. ... Therefore it is my opinion that the plaintiff is entitled to claim damages from the defendant….*"

Taking into consideration the above material, and bearing in mind that I must strive to give legal effect to what the Plaintiff and the Defendant have agreed in P4, the position of the Plaintiff that:

(a) although P21 was formally executed with V Com UK, for the reason explained above the Contractor who executed the work was V Com HE; and

(b) the default complained of by the Plaintiff is that of V Com HE,

has to be accepted.

It is clear that the Defendant is not being called upon to honour any default on the part of V Com UK but that of V Com HE. This is in line with P4 where the Defendant had agreed to secure any loss arising from V Com HE undertaking the project work. I am therefore in agreement with the conclusion reached by the High Court on the second argument of the Defendant.

There is one other matter that I must advert to, that being to the provision in P4 which provided that the underlying contract between the principal and the beneficiary could be amended without notice to the Defendant. This position is reflected in P4 in the following manner:

> "*WE further agree that* ***no change*** *or addition to or other modification* ***of the terms of the Contract*** *or of the works to be performed thereunder or* ***of any of the Contract Document*** *which may be made between you and the Contractor shall in any way release us from any liability under this guarantee, and we hereby waive notice or any such change or modification.*"

Thus, while it was open for the Plaintiff to have amended the terms and conditions that it may have initially agreed with V Com HE, it was also open for the Plaintiff to have entered into a written contract with V Com UK, with the performance of the work that V Com HE had undertaken to do at the time P4 was issued being carried out by V Com HE, without affecting the validity of P4. Such a course of action not only did not require the consent or agreement of the Defendant but the Defendant had even waived the necessity to be notified of same and gone onto to state that it shall not be released from any liability as a result of any such change or modification. In my view, this provision in P4, taken in conjunction with the absence of a requirement in P4 for a written contract estops the Defendant from claiming that it is not liable to honour a demand under P4 since the written contract had been executed with V Com UK.

Taking into consideration all of the above circumstances, I am of the view that the Defendant is liable under and in terms of P4 to honour a claim made by the Plaintiff in terms of P4.

Conclusion

In the above circumstances, the judgment of the High Court is affirmed. The appeal of the Defendant is accordingly dismissed. The Plaintiff shall be entitled to costs before both Courts.

JUDGE OF THE SUPREME COURT

Murdu N.B. Fernando, PC, CJ

I agree.

CHIEF JUSTICE

E.A.G.R. Amarasekera, J

I agree.

JUDGE OF THE SUPREME COURT