IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1994] SGHC 219

OS 266/1994

Between

Bocotra Construction Pte Ltd

… *Plaintiff*

And

Attorney General

… *Defendant*

GROUNDS OF DECISION

Arbitration — Arbitral tribunal — Powers; Banking — Performance bonds

Version No 1: 29 Oct 2026 (23:45 hrs)

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Bocotra Construction Pte Ltd and Others v Attorney General

[1994] SGHC 219

OS 266/1994
Goh Joon Seng J
28 October 1994

1 Cur Adv Vult

2 The plaintiffs are building and civil engineering contractors.

3 On 27 November 1987, the plaintiffs entered into an agreement with the Director-General of Public Works (`PWD`) for and on behalf of the government of the Republic of Singapore (`the government`), for the engineering survey and investigation, design, construction and maintenance, of the then proposed Central Expressway Phase II from Bukit Timah Road to Chin Swee Road (`the contract`). The contract sum was $312,888,888.

4 By cl 9 of the conditions of contract, the plaintiffs were required to provide a guarantee in the prescribed form to be issued by an approved bank to be jointly and severally bound with the plaintiffs in a sum equal to 10% of the contract sum.

5 Pursuant to cl 9 aforesaid, the plaintiffs procured the issue of a performance bond (`the bond`) by the Standard Chartered Bank (`the bank`) for the sum of $31,288,888.80. The bond reads:

> *Whereas by a contract (hereinafter called the contract) dated 27 November 1987 and made between Messrs Bocotra Construction Pte Ltd, whose registered office is situated at Level 19, UIC Building, No 5 Shenton Way, Singapore 0106, Lee Kim Tah (Pte) Ltd, whose registered office is situated at 20 Jalan Afifi, #07-00, CISCO Centre, Singapore 1440, Metrobilt Construction Pte Ltd, whose registered office is situated at 36 Robinson Road #05-01 City House, Singapore 0106 and L Prestressing Pte Ltd, whose registered office is situated at 4 Second Chin Bee Road, Jurong, Singapore 2261 (hereinafter called `the contractor`) of the one part and the government of the Republic of Singapore (hereinafter called `the government`) of the other part whereby the contractor upon and subject to the conditions annexed to the contract agreed to design, construct and maintain the Central Expressway Phase II from Bukit Timah Road to Chin Swee Road and all other related works as specified therein in consideration of the payment of a sum (referred to in the contract and hereinafter called `the contract sum`).*

6 And whereas by cl 9 of the conditions of contract, the contractor must provide a bank guarantee for a sum equal to ten per cent (10%) of the contract sum, for the due performance of the contract.

> *1 Now we, Standard Chartered Bank, hereby agree to pay to the government forthwith on demand any sum or sums not exceeding in the aggregate Singapore Dollars Thirty One Million Two Hundred and Eighty Eight Thousand Eight Hundred and Eighty Eight and Cents Eighty Only (S$31,288,888.80) (hereinafter referred to as the `guaranteed sum`) upon receipt of any written notice from you.*
>
> *2 On receipt of the guaranteed sum from us, you shall be entitled to utilised [sic] it to satisfy such liability of the contractor as you may determine, arising from or due to the default of the contractor. The balance of the guaranteed sum, if any shall be refunded to us.*
>
> (3) We shall not be discharged or released from this guarantee by any arrangement made between you and the contractor with or without our consent or by the contractor or by any forbearance whether as to amount time performance or in any other way.
>
> (4) This guarantee is valid from the date hereof up to the date the engineer issues the maintenance certificate in accordance with cl 55 of the conditions of the contract.

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> (5) This guarantee is conditional upon a claim being made by the government by notice in writing to us and a claim hereunder must be made within six (6) months from the expiry of this guarantee.
>
> (6) The government may make more than one claim on this guarantee so long as the claims are made within six (6) months from the expiry of this guarantee and the total claims under this guarantee do not exceed the guaranteed sum.
>
> *Dated this 13th day of August 1988.*

7 The bond thus expires on the issue of the maintenance certificate under cl 55 of the conditions of contract and any claim thereunder must be made within six months therefrom. The issue of the maintenance certificate itself depends on the issue of the certificate of completion under cl 47(1) of the conditions of contract.

8 Clause 47 reads:

> *(1) When the contractor shall consider that the whole of the works has been substantially completed and has satisfactorily passed any final test that may be prescribed by the contract he may give a notice to that effect to the engineer or to the engineer`s representative accompanied by an undertaking to finish any outstanding work during the period of maintenance. Such notice and undertaking shall be in writing and shall be deemed to be a request by the contractor for the engineer to issue a certificate of completion in respect of the works and the engineer shall within 21 days of the date of delivery of such notice either issue to the contractor (with a copy to the employer) a certificate of completion stating the date on which in his opinion the works were substantially completed in accordance with the contract or else give instructions in writing to the contractor specifying all the work which in the engineer`s opinion requires to be done by the contractor, before the issue of such certificate. If the engineer shall give such instructions the contractor shall be entitled to receive such certificate of completion within 21 days of completion to the satisfaction of the engineer of the work specified by the said instructions.*
>
> (2) …
>
> (3) If the engineer shall be of the opinion that any part of the works shall have been substantially completed and shall have satisfactorily passed any final test that may be prescribed by

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> the contract he may issue a certificate of completion in respect of that part of the works before completion of the whole of the works and upon the issue of such certificate the contractor shall be deemed to have undertaken to complete any outstanding work in that part of the works during the period of maintenance.
>
> …

9 Clause 55 of the conditions of contract reads:

> *(1) Upon the expiration of the period of maintenance or where there is more than one such period upon the expiration of the latest period and when all outstanding work referred to under cl 47 and all work of repair, amendment, reconstruction, rectification and making good of defects, imperfections, shrinkages and other faults referred to under cll 48 and 49 shall have been completed the engineer shall issue to the contractor a maintenance certificate stating the date on which the contractor shall have completed his obligations to design, construct, complete and maintain the works to the engineer`s satisfaction.*
>
> (2) The issue of the maintenance certificate shall not be taken as relieving either the contractor or the eEmployer from any liability the one towards the other arising out of or in any way connected with the performance of their respective obligations under the contract.

10 The period of maintenance stipulated in the contract is one year from the date of issue of the certificate of completion.

11 The completion date stipulated in the contract was 25 January 1991 subject to provisions for extension of time.

12 Work commenced on 25 January 1988. Substantially the whole of the works, including the tunnels, were opened for public use in a formal ceremony on 21 September 1991.

13 On 24 September 1991 the engineer issued a partial completion certificate, under cl 47(3), certifying completion of the bulk of the works including the tunnels with effect from 5 September 1991. He has not to date

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issued his certificate of completion for the whole of the works because of outstanding works which were left uncompleted by the plaintiffs being removal of the cofferdam in the Singapore River, construction of the river wall, completion of certain ramps, staircases and underpasses and other miscellaneous items. Consequently the maintenance certificate has also not been issued.

14 In the meantime disputes having arisen between the plaintiffs and PWD, the plaintiffs by letter of 14 August 1991 required the said disputes to be referred to arbitration under cl 60 of the conditions of contract. Clause 60 reads:

> *If any dispute or difference of any kind whatsoever shall arise between the employer or the engineer and the contractor in connection with or arising out of the contract or the carrying out of the works (whether during the progress of the works or after their completion and whether before or after the termination, abandonment or breach of the contract) it shall in the first place be referred to and settled by the engineer who within a period of 45 days after being requested by either party to do so shall give written notice of his decision to the contractor. ... If the engineer shall fail to give notice of his decision as aforesaid within a period of 45 days after being requested as aforesaid or if either the employer or the contractor be dissatisfied with any such decision then and in any such case either the employer or the contractor may within 45 days after receiving notice of such decision ... require that the matter or matters in dispute be referred to arbitration as hereinafter provided.*

15 Pursuant to the said reference, the plaintiffs and PWD on behalf of the government on 19 January 1993 appointed Tun Mohamed Suffian to be the sole arbitrator (`the arbitrator`).

16 A set of rules for the arbitration based on the Arbitration Rules of the Singapore International Arbitration Centre was agreed upon (`the agreed rules`), r 18(g) of which reads:

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> *18 Unless the parties at any time agree otherwise, and subject to any mandatory limitations of any applicable law, the tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a proper opportunity to state their views, to:*
>
> …
>
> (g) order the preservation, storage, sale or other disposal of any property or thing under the control of any party;

17 By their points of claim filed and served on or about 16 February 1993, the plaintiffs are alleging that there were errors in the tender documents relating to the highway alignments and the drawings and flood level requirements given on the drawings and specifications and maladministration of the contract by PWD. The plaintiffs are also contending that the works were substantially completed on 15 August 1991, that is 202 days after the completion date of 25 January 1991 stated in the contract. But they contend that, for the delays caused by PWD, they are entitled to an extension of time totalling 384 days of which only 73 days have been granted by the engineer. By reason aforesaid, the plaintiffs are claiming a sum of $138,448,900 as at September 1991.

18 By their points of defence, filed and served on or about 17 September 1993, PWD deny the plaintiffs` claim. PWD are also contending that the tunnels are defective and that this was confirmed by a quality audit report of the engineering consulting firm of Harris & Sutherland. PWD`s claim for remedial costs and liquidated damages for delay amounts to $87,000,000. These are the subject matter of PWD`s counterclaim.

19 The counterclaim was filed and served on or about 15 November 1993. On 23 December 1993, at a hearing before the arbitrator, PWD applied for judgment in default of defence due within one month from date of service of the counterclaim. The plaintiffs however contended that the counterclaim was not

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within the reference to arbitration as the claims therein had not been referred to the engineer for his decision in accordance with cl 60 of the conditions of contract. Following this objection, PWD referred their counterclaim to the engineer with a view to making a separate reference to arbitration but did not withdraw the counterclaim which remained filed with the arbitrator.

20 In the meantime, by letter of 5 February 1994, PWD notified the plaintiffs and the bank of their intention to call on the bond on 19 February 1994.

21 On receipt of PWD`s letter of 5 February 1994, the solicitors for the plaintiffs wrote on 9 February 1994 to the arbitrator for an order `restraining` PWD from doing so until the matter could be heard on 25 February 1994.

22 On 14 February 1994, the arbitrator made the interim restraining order reading:

> *I hereby restrain the PWD Singapore, respondents, from calling the bank guarantee referred to therein, until I have had an opportunity of hearing and considering submissions by each party at the hearing which has been fixed for 25 February (1994).*

23 On the same day, the Attorney General (`A-G`) on behalf of PWD wrote to the arbitrator pointing out, inter alia **,** that the arbitrator did not have jurisdiction to grant an injunction either under the agreed rules, the Arbitration Act (Cap 10) or at common law. In particular, the A-G drew the attention of the arbitrator to s 27 of the Government Proceedings Act (Cap 121) which reads:

> *27(1) In any civil proceedings by or against the government the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between private persons, and otherwise to give such appropriate relief as the case may require:*
>
> *Provided that -*

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> (a) where in any proceedings against the government any such relief is sought as might in proceedings between private persons be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and
>
> (b) …
>
> *(2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the government if the effect of granting the injunction or making the order would be to give any relief against the government which could not have been obtained in proceedings against the government.*

24 On 15 February 1994, the arbitrator wrote to the plaintiffs` solicitors copied to the A-G as follows:

> *I refer to the A-G`s letter dated 14 February and faxed to me on the same date. It would appear that Sieu Kin`s arguments that I have no jurisdiction to restrain the PWD, Singapore, respondents, from calling on the bank guarantee of 13 August 1988 are correct. Unless I hear from you arguments to the contrary by 4.30pm 17 February, I propose to withdraw my order of yesterday, as being null and void. …*

25 On the same day the plaintiffs` solicitors submitted that the arbitrator under the agreed rules had power to determine his own jurisdiction and that if he revoked his order, grave injustice would be done.

26 After considering the said submission by letter of 15 February 1994 on behalf of the plaintiffs and the response of the A-G of the same date, the arbitrator on 16 February 1994 withdrew his order of 14 February 1994.

27 However, following further submissions by letters from the plaintiffs` solicitors, the arbitrator on 18 February 1994, made the following order:

> *Debating this matter by correspondence without a closing date even by instant fax is unsatisfactory, as I might mistakenly make a decision without the benefit of full arguments by both sides and be overinfluenced by the last communication received.*

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28 I therefore direct that this matter be debated at our next meeting in Singapore on 25th of this month. Until then, I direct the respondent do preserve the bank guarantee dated 13 August 1988 by desisting from making a call on it in the manner proposed in its letter of 5 February; otherwise it would cause injustice to the claimants.

29 Notwithstanding further objection from the A-G, the arbitrator refused to revoke his order of 18 February 1994. The matter then came up for hearing before the arbitrator on 25 February 1994. At the end of the hearing the arbitrator made an order in the following terms:

> *Upon hearing counsel for the claimants and counsel for the respondent, I hereby declare that the respondent is not entitled to demand or otherwise take any steps to call for payment of any sum under the letter of guarantee No 957/88/875 dated 13 August 1988 until such time as the respondent`s entitlement to make such or any call for payment under the said letter of guarantee has been determined in this arbitration.*

30 On 4 March 1994, the A-G filed OM 19/94 for, inter alia , `a declaration that the interim award dated 25 February 1994` was invalid and or void.

31 On 7 March 1994, the arbitrator gave his grounds of decision which read:

> *After full face-to-face arguments I declared, on the claimant`s application and over the PWD`s objection, as follows:*
>
> *`... the [PWD] is not entitled to demand or otherwise take any steps to call for payment of any sum under [the letter of guarantee] dated 13 August 1988 until such time as the [PWD`s] entitlement to make such or any call for payment under the said letter of guarantee has been determined in this arbitration.`*
>
> *This declaration supersedes the temporary order I made on 18 February.*

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32 I am of the opinion that the declaration is neither an injunction nor an order for specific performance which even a court is not allowed to issue by s 27(1) of the Government Proceedings Act (Cap 121): it is merely an order declaratory of the rights of the parties which the Act allows a court to make. Moreover, the money payable under the bank`s letter of guarantee is property or thing under the control of the PWD: and r 18(g) of SIAC Rules expressly allows an arbitrator to make an order for its preservation, which my declaration is.

33 The letter of guarantee by its terms clearly relates to the contract in question in this arbitration. It refers to the joint venture, to the project to be undertaken by the joint venture and to cl 9 of the conditions of contract. It cannot be said that the joint venture has no standing in it.

34 On 22 March 1994, the plaintiffs filed these proceedings for the following reliefs:

> *1 A declaration that the defendant whether acting by itself, its officers, servants or agents of any of them or otherwise howsoever is not entitled until after final award in the arbitration between the abovenamed parties has been made and published to the parties to:*
>
> (a) give, furnish or provide any written notice pursuant to the letter of guarantee No 957/88/874 for S$31,288,888.80 (`the guaranteed sum`) dated 13 August 1988 issued by Standard Chartered Bank (`the guarantee`) to Standard Chartered Bank; and
>
> (b) claim, collect, obtain, acquire or receive the guaranteed sum or any part thereof from the Standard Chartered Bank, its officers, servants or agents or otherwise howsoever.
>
> *2 A declaration that on the true construction of the guarantee and in the circumstances the guaranteed sum or any part thereof is payable only on proof by the defendant of the plaintiffs` default under the contract dated 27 November 1987 made between the plaintiffs and the defendant.*

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3 A declaration that the following issues are within the terms of the reference to arbitration between the plaintiffs and the defendant commenced by the plaintiffs on 14 August 1991:

(1) the date [by] which the works as defined in the general conditions of contract ought to have been completed;

(2) the date by which the works were completed;

(3) whether the engineer should have given a certificate of completion of the whole of the works as at 15 August 1991;

(4) the commencement and end of the maintenance period and works to be done therein;

(5) whether the engineer was independent in certifying or deciding not to certify under the contract;

(6) whether there are any defects in the works;

(7) if there are any defects in the works, who is contractually responsible for them;

(8) whether the defendant has rights under cl 48(4) of the general conditions of contract to do remedial work and require the plaintiffs to pay for it;

(9) whether the defendant has a right to deduct or to claim, liquidated damages for delay, if so for what period.

4 A declaration that issues identified in para 4 [sic] above relate to the continued existence of the guarantee and the plaintiffs default as referred to in para 2 herein above.

5 A declaration stating:

(a) that any enforcement of the letter of guarantee referred to under para 1(a) by the defendant is void, inoperative and of no effect; and

(b) that the plaintiffs be afforded a reasonable opportunity to be heard in respect of the issues identified under para (3) above.

6 A declaration that the arbitrator was and is empowered to make an order pursuant to the agreed SIAC rules and particularly r 18(g) that the money payable under the bank`s letter of guarantee is property or a thing under the control of the defendant pending the final award and r 20.5.

7 Such other relief as the court may deem just.

8 The defendant to pay the plaintiffs` costs of and occasioned by this application to be taxed if not agreed.

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35 This application came up for hearing before me immediately after the conclusion of the hearing in OM No 19/94 in which I made an order declaring that the arbitrator`s order of 25 February 1994 `is not binding on the applicant`, that is PWD, government of the Republic of Singapore, with costs reserved. [See ***Re An Arbitration between Bocotra Construction Pte Ltd & Ors v Public Works Department, Government of the Republic of Singapore*** .]

36 At the hearing, counsel for the plaintiffs abandoned prayers 3, 4 and 5. He pursued prayers 1 and 2. He requested a ruling on prayer 6 (which raised issues similar to those in OM No 19/94) based on his arguments in the originating motion. Much depends on whether on its true construction the bond is a `demand bond` payable on demand or one subject to finding by the arbitrator of default on the part of the plaintiffs. I will therefore deal with the three prayers in the order of prayer 2, 1 and 6.

37 **Prayer 2**

38 By this, the plaintiffs are seeking a declaration that on the true construction of the bond and in the circumstances the guaranteed sum is only payable upon proof of default on the part of the plaintiffs, that is, to the satisfaction of the arbitrator.

39 The bond in favour of the government was furnished by the plaintiffs pursuant to cl 9 of the conditions of contract. Clause 9 stipulated that the bond `shall be in the prescribed form`. The form was prescribed in Appendix II to the Instructions to Tenderers. Therefore the wording of the bond had been agreed to by the plaintiffs.

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40 Clause 1 states that the bank `hereby agree to pay to the government forthwith on demand any sum or sums ...` up to $31,288,888.80. The bank therefore has to pay on demand under cl 1. Under cl 2, `on receipt of the guaranteed sum` the government `shall be entitled to utilised [sic] it to satisfy such liability of the [the plaintiffs] as [the government] may determine, arising from or due to the default of the [plaintiffs].` The determination [on receipt of the guaranteed sum] `of such liability of the [plaintiffs] ... arising from or due to the default of the [plaintiffs]` is by the government. The balance, if any, of the guaranteed sum shall then be refunded to the bank. This is inconsistent with the contention that the bond is to be called on only after the arbitrator has found default on the part of the plaintiffs.

41 Further, if it was intended that the bond be conditional upon proof of liability as found by the arbitrator, the expiry date of the bond would not have hinged on the issue of the maintenance certificate as it might expire before the finding of default by the arbitrator.

42 Lastly, if the bond is only to be called up after the arbitrator has determined the default, the amount to be called up to satisfy the liability would then have been known and that would be the amount the bank will pay, in which case there will be no occasion for the balance of the guaranteed sum (less such liability) to be refunded to the bank because there would have been no demand under the bond until the amount of such liability had been determined by the arbitrator.

43 That the bond so worded is a demand bond is consistent with banking practice otherwise banks will have the unenviable task of deciding whether payment when demanded has to be made. In ***Esal (Commodities) Ltd & Anor v Oriental Credit Ltd & Anor*** , the performance bond stated:

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> *We undertake to pay the said amount on your written demand in the event that the supplier fails to execute the contract in perfect performance ...*

44 Ackner LJ said at p 549:

> *OCL contend that on the true construction of the performance bond, either: (a) There was no liability under the performance bond unless and until there had been a breach of the underlying contract of sale, and this was never established. Alternatively (b) that the beneficiary of the performance bond not only had to make a written demand for payment under and pursuant to the performance bond, but he must in the making of the demand assert that the demand was made because the supplier had failed properly to execute the contract.*

45 Mr Tugendhat supports both constructions by relying upon the words in the undertaking immediately following `written demand` -

> *` ... in the event that the supplier fails to execute the contract in perfect performance.`*
>
> *As regards the first interpretation, Mr Tugendhat is obliged to accept that if he is right, the bank, by entering into the performance bond, is taking upon itself the obligation of deciding the merits of a dispute under a contract of sale, a function for which it is virtually common ground the bank is wholly unfitted and which the parties could not sensibly have intended. ... If the performance bond was so conditional, then unless there was clear evidence that the seller admitted that he was in breach of the contract of sale, payment could never safely be made by the bank except on a judgment of a competent court of jurisdiction and this result would be wholly inconsistent with the entire object of the transaction, namely, to enable the beneficiary to obtain prompt and certain payment.*

46 I am therefore of the view that the bond is a demand bond under which the bank has to pay to the government on demand the amount demanded up to the limit of the `guaranteed sum`.

47 **Prayer 1**

48 By s 27 of the Government Proceedings Act, where in any proceedings against the government, any such relief is sought as might in proceedings between private persons be granted by way of injunction, the court shall not grant an injunction but may in lieu thereof make an order declaratory of the rights of the parties. Thus the principles governing the grant of a declaration in these proceedings are those pertaining to the grant of injunction in actions between private persons. Hence the issue is whether the government if it were a private person should be restrained from calling on the bond which I have found to be a demand bond.

49 It is the government`s contention that they have counterclaims amounting to $87,000,000 for remedial works, uncompleted works and liquidated damages for delay in completion. It is not alleged that the government does not have a bona fide belief that there has been default on the part of the plaintiffs. The plaintiffs, however, are contending that the certificate of completion under cl 47(1) ought to have been issued on 15 August 1991 and the maintenance certificate 12 months thereafter. If so, the Bond would have expired by March 1993 at the latest. Since these issues are before the arbitrator, the government should not be allowed to call on the Bond until after the arbitrator has adjudicated on these issues.

50 On the law, I should begin with ***RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd & Ors*** . In that case the English plaintiffs entered into three contracts of sale with Egyptian buyers and each contract provided that the plaintiffs would establish a guarantee confirmed by a bank in favour of the buyers. The terms of the guarantees were very wide and the amounts secured were payable on the buyers` demand. They were established with Egyptian banks and confirmed by the defendant English bank at which the plaintiffs had an account. The buyers demanded payment under the guarantees.

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The plaintiffs, who contended that the buyers had no justification for demanding payment, brought three actions against the English bank and, in each action, the other defendants were the relevant Egyptian bank and buyers. They sought a declaration against each defendant that the buyers had no right to draw on the guarantees and injunctions restraining all the defendant banks from making, and all the buyers from demanding, payment under the guarantees. The plaintiffs applied ex parte for, and were granted, interlocutory injunctions against each defendant. The Egyptian defendants did not enter an appearance and took no part in the subsequent proceedings. In granting the English bank`s application to have the injunctions against them discharged, Kerr J held (1) that, even on the assumptions that the courts would entertain an action against the English bank and the Egyptian banks for a declaration that the buyers were not entitled to payment under the guarantees and that the court had rightly granted injunctions on the ex parte applications in circumstances where it was obvious that the actions were a contrivance to obtain relief against the English bank and the Egyptian defendants and to bring the latter within the jurisdiction of the court, the plaintiffs would only have a cause of action against the English bank if the English bank debited their account in breach of contract and, since the plaintiffs would have an adequate remedy in damages and the damage incurred by the English bank if it failed to honour its international obligations far outweighed any damage likely to be incurred by the plaintiffs, the court would discharge the injunctions granted against the English bank; (2) that the court had an inherent jurisdiction to discharge or refuse to continue an injunction; and, since it was doubtful whether the injunctions should have been granted, there were no grounds for continuing them and they had no legal force in Egypt, the court would exercise that jurisdiction to discharge the injunctions made against the Egyptian defendants, although they had neither entered an appearance nor

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applied for them to be discharged. In the course of his judgment, Kerr J said at pp 155-156:

> *... It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood 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.*

51 In ***Edward Owen Engineering Ltd v Barclays Bank International Ltd & Anor*** the plaintiffs, English suppliers, contracted with Libyan customers to erect greenhouses in Libya and agreed that a performance guarantee for ten per cent of the contract price should be issued by the defendant English bank and lodged with a Libyan bank. The contract, which was governed by Libyan law, provided that an irrevocable confirmed, or confirmable, letter of credit payable at the English bank was to be opened in favour of the plaintiffs. After the plaintiffs had given a counter-guarantee to the English bank, the latter on their own responsibility and on the plaintiffs` behalf gave a performance bond for Â£50,203 to the Libyan bank and confirmed that their guarantee was payable `on demand without proof or conditions.` The Libyan bank then issued a guarantee bond for the plaintiffs for the same sum in favour of the Libyan customers. No letter of credit which complied with the terms of the contract was opened by the customers and the plaintiffs, after telling them that the guarantee given had no effect, accepted their conduct as a repudiation of the contract. At the customers` request the Libyan bank then claimed Â£50,203 under the

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guarantee from the English bank. The plaintiffs obtained an interim injunction on their ex parte application to restrain the English bank from paying the Libyan bank. Kerr J discharged the injunction. The appeal by the plaintiffs was dismissed by the Court of Appeal. In dismissing the appeal, Lord Denning MR said at pp 170-171:

> *... 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.*

52 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.

53 In ***Howe Richardson Scale Co Ltd v Polimex-Cekop and National Westminster Bank Ltd*** , the sellers on 15 January 1976 entered into a contract with the buyers (Polimex) for the sale and delivery of some valuable equipment. The contract price was Â£500,000 of which Â£25,000 was payable in advance within 45 days of the signing of the contract `on presentation by the seller bank guarantee`. Â£50,000 was to be paid by `irrevocable, unconfirmed letter of credit` opened upon notification that the goods were ready for shipment and the balance of Â£425,000 was payable `within Westminster Bank/Bank Handlowy

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financial agreement of 20 March 1975`. The guarantee which was provided by the second defendants, the National Westminster Bank Ltd, stated, inter alia:

> *We have been informed that [the sellers] have concluded the contract ... total value of Â£500,000. It is also known to us that the goods shall be delivered until 31 March 1977 ... In this connection we ... agree to give the guarantee for the refund of the advance payment amounting to Â£25,000 ... in favour of Messrs Polimex on their first demand in case of non-delivery of the ordered goods until 31 March 1977 ... This guarantee is irrevocable and valid until 30 November 1977.*

54 The sellers received the advance payment of Â£25,000. For some reason Polimex did not open the letter of credit in connection with the second instalment, but the sellers completed the manufacture of a greater part, if not all, of the goods, and in due course received through the financial agreement a substantial sum of money somewhere between Â£300,000 and Â£400,000 on account of the final instalment. It appeared, although the facts were not clear, that no shipping instructions were ever received by Polimex. Polimex claimed repayment of Â£25,000 under the guarantee, on the ground that the delivery had not been made by 31 March 1977. The second defendants took the view that it was bound to honour its obligations under the guarantee and advised the sellers of its view. The sellers applied for an injunction to restrain Polimex from claiming under the guarantee. The application was refused. The sellers` appeal was dismissed by the Court of Appeal which also refused leave to appeal to the House of Lords. Roskill LJ, with whom Cumming-Bruce LJ agreed, said at p 165:

> *... The bank, in principle, is in a position not identical with but very similar to the position of a bank which has opened a confirmed irrevocable letter of credit. 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*

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> *purchase contract; the bank here is simply concerned to see whether the event has happened upon which its obligation to pay has arisen. The bank takes the view that that time has come and that it is compelled to pay; in my view it would be quite wrong for the court to interfere with Polimex`s apparent right under this guarantee to seek payment from the bank, because to do so would involve putting upon the bank an obligation to inquire whether or not there had been timeous performance of the sellers` obligations under the sale contract. Further, in accordance with the principles laid down by the House of Lords in the* ***American Cyanamid*** *case the balance of convenience, it seems to me, is against the grant of an injunction. I would dismiss this appeal and uphold the order of Mr Justice Donaldson.*

55 I should add that Polimex have not been represented before us. The bank, although the plaintiffs have not sought to appeal against the setting aside of the injunction against it, has appeared. Mr Peter Scott, for the bank, relied upon a judgment of Mr Justice Kerr in ***Harbottle v National Westminster Bank Ltd*** [1977] 3 WLR 752, as justifying the bank`s intervening in these proceedings in order to resist the grant of the injunction against Polimex. It seems to me that Mr Justice Kerr`s judgment, the correctness of which has not been questioned before us, justifies this action which the bank has taken in appearing.

56 In ***Intraco Ltd v Notis Shipping Corporation*** , the sellers at the beginning of April 1981, sold their vessel `Bhoja Trader` to the buyers. The contract was in the Norwegian sale form which included a guarantee that the vessel at the time of delivery was free from all encumbrances and maritime liens or other debts whatsoever and further provided an indemnity in respect of the consequences of any such claim incurred prior to the time of delivery. The purchase price was US$810,000 with US$41,000 being paid as a deposit, US$369,000 payable in cash on delivery and the balance of US$400,000 being paid within 90 days of delivery by means of a bank guarantee which provided, inter alia , for payment to:

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> *M/s Notis Shipping Corporation of Liberia ... upon receipt of tested telex of Citibank NA Piraeus ... Piraeus Greece of the sellers simple demand stating the amount due and also that such amount has not been paid by the buyers M/s Intraco Ltd and confirm that they have in their possession protocol of receipt of delivery executed as above.*

57 Delivery took place at Calcutta on April 16, and shortly afterwards the vessel was arrested. The buyers had to provide security of US$200,000 to obtain her release and consequently alleged that they had suffered large losses due to cancellation of cargo bookings for the vessel. The buyers claimed against the sellers for breach of contract. As the sellers had no assets in England other than their rights under the bank guarantee, the buyers applied ex parte to Goff J for an injunction restraining the sellers from calling upon the bank to make payment. Goff J granted the injunction until the matter could be considered inter partes **.** At the inter partes hearing Staughton J refused to continue the injunction. On appeal, the buyers` appeal was dismissed by the Court of Appeal. Leave to appeal to the House of Lords was refused. Donaldson LJ who delivered the judgment of the Court of Appeal said at p 257:

> *In refusing to interfere with the sellers` right to call upon the bank to make payment under its guarantee, the learned judge acted in conformity with the well-established principle that the court will not grant such an injunction unless fraud is involved (see* ***Richardson (Howe) Scale Co Ltd v Polimex-Cekop & Anor*** *[1978] 1 Lloyd`s Rep 161). We agree with him. Irrevocable letters of credit and bank guarantees given in circumstances such that they are the equivalent of an irrevocable letter of credit have been said to be the life blood of commerce. Thrombosis will occur, if, unless fraud is involved, the courts intervene and thereby disturb the mercantile practice of treating rights thereunder as being the equivalent of cash in hand.*

58 Although this line of authorities shows the court`s reluctance to restrain a bank from making payment under the guarantee or interfere with the sellers` right to call upon the bank to do so except in cases of fraud, the grant or refusal of an injunction is subject to the principles governing the exercise of the inherent

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equitable jurisdiction of the courts. `The courts have a discretion to grant interlocutory injunctions whenever it is just or convenient to do so.`: per Kerr J in the ***Harbottle*** case3 at p 158. To determine if it is `just or convenient` to restrain a call on the bond, one cannot completely disregard the underlying contract.

59 In ***Potton Homes Ltd v Coleman*** C ***ontractors Ltd*** , the plaintiffs by three contracts agreed to supply the defendants with prefabricated building units. The plaintiffs furnished a performance bond for each contract. The plaintiffs claimed under the contracts. It was admitted that Â£89,621 was due. The balance was disputed. The defendants also alleged defects particularly with regard to the second contract and made a demand upon the performance bond for the second contract which was for Â£68,816.92. The plaintiffs obtained an interim injunction restraining the defendants from calling on that performance bond. The plaintiffs then applied for summary judgment for their claim and the deputy judge gave judgment for Â£89,621 but ordered a stay of execution. He held that he had no power to restrain the defendants from calling on the performance bond but ordered under the Rules of the Supreme Court O 29 r 2(1) that the proceeds of the call on the performance bond be frozen and paid into a joint account. The defendants` appeal was allowed by the Court of Appeal which held that the proceeds of the call on the first demand bond were to be treated as cash in hand and the bank was both obliged and right to pay the defendants Â£68,816.92. But in the course of his judgment, Eveleigh LJ said at p 28:

> *As between buyer and seller the underlying contract cannot be disregarded so readily. If the seller has lawfully avoided the contract prima facie, it seems to me he should be entitled to restrain the buyer from making use of the performance bond. Moreover, in principle I do not think it possible to say that in no circumstances whatsoever, apart from fraud, will the court restrain the buyer. The facts of each case must be considered. If*

> *the contract is avoided or if there is a failure of consideration between buyer and seller for which the seller undertook to procure the issue of the performance bond, I do not see why, as between seller and buyer, the seller should not be unable to prevent a call upon the bond by the mere assertion that the bond is to be treated as cash in hand. It is true that in* ***Edward Owen Ltd v Barclays Bank*** *it was unsuccessfully submitted that the failure of the buyer to procure a letter of credit in accordance with the contract terms should entitle the plaintiffs to an injunction against the bank. That case, however, was not concerned with the position as between buyer and seller, and any statements as to the irrelevance of the failure to provide the letter of credit must be seen in that context.*

60 May LJ, on the other hand at p 31, said:

> *The first point taken on behalf of the appellants herein, a point which is indeed fundamental to the ultimate success of the appeal, is whether it is correct in law to treat first demand bonds, such as the one for Â£68,816.92 in the present case, in the same way as irrevocable letters of credit, and thus effectively as cash in hand. In my opinion such bonds are to be so treated. It may be that they have not been in use as a form of commercial paper for as long as letters of credit, but that they should be treated in the same way as the latter flows, in my opinion, from that irrevocable nature of the obligation assumed by the relevant bank in such cases."*

61 The approach of Eveleigh LJ in the ***Potton Homes*** case7 was also that taken by LP Thean J (as he then was) in ***Royal Design Studio Pte Ltd v Chang Development Pte Ltd*** . There, by an agreement dated 11 July 1988 made between the plaintiff and the defendant, the plaintiff agreed at its own cost and expense to construct and complete for the defendant nine units of 3-storey terrace houses, and, in consideration therefor, the defendant agreed on completion of construction of the terrace houses and issue of the temporary occupation licences in respect thereof to convey to the plaintiff 31/2 units of the terrace houses. Pursuant to the agreement, the plaintiff procured the issue of a performance bond of $120,000. Under the agreement, the plaintiff was to complete construction within 14 months and to secure issue of the temporary occupation licences within 17 months from the date of the permit to commence

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or carry out building works issued to the defendant by the Building Control Division. Disputes arose between the plaintiff and the defendant. The plaintiff complained that the defendant had delayed some of the payments under interim certificates and such delay had put a severe strain on the plaintiff`s cash flow and hampered the progress of the works, thereby resulting in delay in the works. The defendant, on the other hand, complained that the plaintiff had been guilty of delay in the construction of the houses within the time agreed upon. The defendant had extended the time for completing the construction but reserved its right to impose liquidated damages. On 1 May 1990, the defendant by notice in writing terminated the agreement and requested the plaintiff to vacate the defendant`s land and premises. The plaintiff thereupon instituted action against the defendant and obtained ex parte injunctions to restrain the defendant from calling on the performance bond and from evicting the plaintiff from the defendant`s land and premises. The defendant applied by notice of motion for a discharge of the two injunctions and also for an order that the plaintiff vacate the land and premises of the defendant. LP Thean J discharged only the second injunction. He refused to discharge the injunction restraining the defendant from calling on the bond. One of his principal reasons for this was that the defendant was more than adequately secured. At p 234, this was what the learned judge, after referring to the dicta of Eveleigh and May LJJ in ***Potton Homes*** , said:

> *The dispute is only between the plaintiff and the defendant and relates solely to the main or underlying contract made between them. In such case, I do not see why the court should be inhibited from exercising its equitable jurisdiction and restraining the defendant from calling on the bond, if the facts warrant it, merely because the bond is like a letter of credit.*

62 On the material before me, it appears that the plaintiff had carried out a substantial part of the construction of the nine units of the terrace houses. Its complaint is that it could not proceed with the construction of the houses because the defendant refused to make the interim payments and the defendant`s

architect did not issue any further interim certificate after the sixth interim certificate. Under the agreement the plaintiff, on completion of the construction and issue of the temporary occupation licence would be entitled to the 31/2 units of the houses, and these 31/2 units have been sold for a total amount of $1.575m; the sales were made by the defendant and are yet to be completed, and the legal ownership of these units is still vested in the defendant. The defendant has paid to the plaintiff only $948,021.21 and a considerable sum of money is still in the hands of the defendant, which, if upon resolution of the dispute the plaintiff is found liable to pay damages to the defendant for breach of contract, can be applied by the defendant to set off such damages payable. In addition, Leslie Yeo Hern, the director of the plaintiff, had issued a personal guarantee to the defendant in the sum of $1m and there is no suggestion that this guarantee is worthless. Taking into account all these matters, it would be wrong, in my opinion, merely to accept the assertion of the defendant that the plaintiff was in breach of contract; that on that ground the defendant was entitled to call on the bond, and that the bond is like a letter of credit, and not to consider whether or not the defendant should be restrained from calling on the bond. All the relevant facts of the case must be considered.

63 But in the exercise of the court`s equitable jurisdiction unless the facts otherwise warrant it as in the ***Royal Design Studio*** case8, an ongoing arbitration on the disputes arising out of the underlying contract is not a ground on which to restrain the beneficiary from calling on the performance bond so long as he has an honest belief that there is a default by the other party to the underlying contract which entitles him to call on the performance bond.

64 In ***State Trading Corporation of India Ltd v ED & F Man (Sugar) Ltd & Anor*** the facts were that in April 1980, the plaintiffs had agreed to sell a quantity of sugar to the first defendants (Man), to be delivered in instalments

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from May to July 1980. The contract required the plaintiffs to `establish performance bond of 5 through I class bank in favour of buyers for maximum quantity under the contract immediately,` which they did through the second defendants, the State Bank of India. The bond provided that the bank would stand surety for the plaintiffs` due performance of the contract and that `should the seller fail for whatever reasons to carry out ... its obligations under the ... contract [the bank would] make payment immediately upon [the buyer`s] giving ... notice of the default on the part of the seller, notwithstanding any dispute between the seller and [the buyer].` The bank also agreed that the seller`s notice would be conclusive proof of default. There were the usual force majeure savings in the sale agreement. After part delivery had occurred, the Indian government barred any further export of sugar. Further deliveries were therefore not made. The defendant buyers accordingly proposed to give notice of default to the bank under the bond. The plaintiffs denied that they were in breach, relying on the force majeure clause. There were arbitration proceedings on foot to settle the question. Meanwhile, the plaintiffs were granted an ex parte order restraining the first defendants from giving notice to the bank under the bond. The injunction was discharged at the inter partes hearing and the plaintiffs appealed. The appeal was dismissed. It was held by Lord Denning, with whom Shaw and Griffiths LJJ agreed, that in earlier cases where the banks there had already received notice of default the performance bond had been held to be effective. However, the fact that the plaintiffs before him had challenged the allegation of default before notice had been served under the bond did not alter matters. Despite the interlocutory nature of the hearing, the plaintiffs were wrong to contend that a term must be implied in the sale agreement that notice of default would only be served when reasonable and just cause for doing so existed or where there was some evidence of default. Such a term would strike at the purpose and efficacy of the performance bond. He said:

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> *It would mean that the bank could be prevented from paying on the bond on a mere assertion by the seller that he was not in default. If there was a dispute - regardless of whether the seller was in default or not - this implied term could be introduced so as to hinder or prevent payment under the bond. I am quite clear that no such implied term is to be imported into the contract at all. The only term which is to be imported is that the buyer, when giving notice of default, must honestly believe that there has been a default on the part of the seller. Honest belief is enough. If there is no honest belief, it may be evidence of fraud. If there is sufficient evidence of fraud, the court might intervene and grant an injunction.*

65 Lord Denning went on to state that the first defendants were in any case sufficiently substantial to meet any future judgment for damages if notice of default had been wrongly given. The bond was there so that, on notice of default being given, the buyers would receive money in hand against their damages claim for non-performance. Such bonds fulfilled a most useful rule in international trade. The courts must see that they were honoured.

66 Thus the fact that there is an ongoing arbitration between the parties before the arbitrator in which a finding on the date on which the maintenance certificate ought to have been issued may be made is no reason to stop the calling up of the bond since there is no suggestion that the government does not honestly believe that there has been default on the part of the plaintiffs. If, as Lord Denning in the ***State Trading Corporation*** case9 said, the government gives notice of default wrongly, it can meet any damages that may be awarded against it. The balance of convenience is also not in favour of the plaintiffs, because it is difficult to gauge when the final award will be published by the arbitrator. There is also the dispute on whether the government`s counterclaim arising from the alleged defaults for which the bond is sought to be called on is effectively before the arbitrator. Any order having the effect of restraining the government from calling on the bond pending the publication of the final award

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may cause the same to expire by reason of the delay in the demand for payment under the bond.

67 For the reasons aforesaid, this is not a case in which an injunction would be ordered if the parties were private persons. Therefore it is not one in which a declaratory order should be made.

68 Even if this is a fit case for a declaratory order to be made in lieu of injunction, prayer 1 in seeking `a declaration that the [government] ... is not entitled [to call on the Bond] ***until*** after final award in the arbitration` ... has been published, is seeking an interim declaration. [Emphasis is mine.]

69 This is a relief unknown in law. In ***International General Electric Co of New York Ltd & Anor v Commissioners of Customs & Excise*** , the first plaintiff was a British company and a wholly owned subsidiary of the second plaintiff, a company incorporated under the law of the State of New York. The plaintiffs had for upwards of 40 years been importing into Britain a variety of electrical goods bearing the mark `GE` enclosed in a device. In March, the defendants, the Commissioners of Customs and Excise, stopped the plaintiffs` goods upon the ground that their importation into Britain infringed the Merchandise Marks Acts 1887 to 1953, by reason of the mark `GE` thereon, which mark, it was alleged, infringed the mark `GEC`, the trade mark of a British company. The plaintiffs having started an action, inter alia, for a declaration that the defendants were not entitled to detain their goods, moved ***ex parte*** for an interim declaration. Plowman J, following the decision of Romer J in ***Underhill v Ministry of Food*** , dismissed the motion on the ground that s 21 of the Crown Proceedings Act 1947, conferred no power on the court to make an interim declaration of rights. Section 21 of the Crown Proceedings Act 1947 is in pari materia with s 27 of our government Proceedings Act. On appeal, it

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was held that an order declaring the rights of parties must in its nature be a final order and (subject to appeal) be res judicata between the parties; and that in proceedings against the Crown it was not possible to obtain an order which corresponded to an interim injunction or an interim declaration which did not determine the rights of the parties but which was only intended to preserve the status quo. In giving his judgment with which Diplock LJ concurred, Upjohn LJ said at pp 789-790:

> *Having regard to s 21, in order to see what powers the court has to make orders in actions between the subject and the Crown, one has to ascertain what powers it has to make orders between subjects, for the court has `power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require.` As between subjects it cannot be doubted that some form of interlocutory relief can properly be sought and might be granted; but I say no more about that. It is, however, perfectly plain that the court in proceedings between subjects could not grant some form of interlocutory relief in the sense of some interim declaration. When you read on in the proviso, you find, however, that as against the Crown an injunction cannot be granted but an order may be made declaratory of the rights of the parties. But, as Romer J pointed out, an order declaring the rights of the parties must in its nature be a final order after a hearing when the court is in a position to declare what the rights of the parties are, and such an order must necessarily then be res judicata and bind the parties for ever, subject only, of course, to a right of appeal. It may be - and this is the only reservation I make upon the observations of Romer J - that in certain cases it is proper on a motion or on a summons under O 25 r 2, to make some declaration of rights upon some interlocutory proceeding. That, however, is infrequent and should only sparingly be exercised, but the point is that if it is determined on some interlocutory proceeding, it finally determines and declares the rights of the parties: it is not open to further review except on appeal. In this case, as in the case before Romer J, that is not sought. It is said that some form of interim declaration should be made merely to preserve the status quo and, therefore, this order we are being asked to make today ex parte, without hearing the defendants, is not apparently to be finally binding on the parties; it is something which later can be re-examined and some other form of declaration substituted if it is found to be appropriate after a full hearing when the matter comes on for trial.*

70 Speaking for my part I simply do not understand how there can be such an animal, as I ventured to call it in argument, as an interim declaratory order which does not finally declare the rights of the parties. It seems to me quite clear that in proceedings against the Crown it is impossible to get anything which corresponds to an interim injunction. When you come to the question of a final injunction, no doubt a declaratory order may be made in lieu thereof, for that finally determines the rights of the parties. But it seems to me quite impossible to invent some form of declaration which does not determine the rights of the parties but is only meant to preserve the status quo.

71 Accordingly, prayer 1 is dismissed.

72 **Prayer 6**

73 The enforcement and construction of the bond has not been referred to the arbitrator and hence he is not empowered to make the declaration in his order of 25 February 1994. The order was also purportedly made under r 18(g) of the agreed rules. Rule 18(g) is meant to apply to preservation, storage, sale or other disposal of property or thing particularly of a perishable nature which property or thing forms the subject matter of the arbitration or is otherwise relevant thereto. The bond or the money payable thereunder is not property or thing of a perishable nature requiring steps to be taken for its preservation. Neither did r 20.5 empower the arbitrator to make the said order. Rule 20.5 reads:

> *Without prejudice to the right of any party to apply to a competent court for pre-award conservatory measures (except those referred to in rr 20.1 or 20.2 or 20.3), the tribunal shall also have the power to order any party to provide security for all or part of any amount in dispute in the arbitration.*

74 Rule 20.5 thus empowers the arbitrator to order security for the claim or counterclaim if the same has also been referred to him.

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75 **On costs**

76 In the light of the declarations and order I have made, I award the Attorney General costs of these proceedings and of OM No 19 of 1994.

77 ***Claim dismissed*** .

Goh Joon Seng J

Michael Khoo, Christopher Lau, Josephine Low and Ho Chien Mien (Allen & Gledhill) for the plaintiffs
Lee Sieu Kin and Lionel Yee (Attorney General's Chambers) for the defendant

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