IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1995] SGHC 168

Suit 660/1994

Between

Star-Trans Far East Pte Ltd

… *Plaintiff*

And

Norske-Tech Ltd

… *Defendant*

GROUNDS OF DECISION

Arbitration — Stay of court proceedings; Banking — Performance bonds; Civil Procedure — Injunctions

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Star-Trans Far East Pte Ltd v Norske-Tech Ltd and Others

[1995] SGHC 168

Suit 660/1994
G P Selvam J
14 July 1995

1 **Background facts**

2 The action arose out of a written contract dated 24 February 1993 and made initially between the plaintiffs in this action and the first defendants. It was numbered 6021 (the contract).

3 For a proper understanding of the issues it is necessary to explain the contract and the relationship between the parties to the action. The plaintiffs, Star-Trans Far East Pte Ltd, carry on the business as freight forwarders. They are a Singapore company.

4 The first defendants (Norske-Tech Ltd) are a Hong Kong incorporated company. The second defendants (PT Riau Andalan Pulp & Paper) are incorporated in Indonesia for the purpose of managing a pulp and paper mill in that country.

5 The purpose of the contract was for Star-Trans Far East Pte Ltd and Speditor OY (the third defendants) (described in the contract collectively as `the forwarder`) to organize ocean carriage of plant and equipment from various

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parts of the world to the construction site of the proposed paper mill in Riau, Indonesia. The first defendants (described in the contract as `the owner`) had undertaken the construction of the paper mill. The contract was signed by the plaintiffs, the third defendants and the first defendants.

6 By a document in the form of a letter from the second defendants referred to in it as RAPP and the first defendants referred to in it as NTL addressed to the plaintiffs and the third defendants, the second defendants gave a guarantee that the first defendants would perform the contract. I shall refer to this document, which is undated, as the `performance guarantee`. It is necessary to set out its contents in full:

> *We refer to the contract dated 24 February 1993 between Norske-Tech Ltd and Star Trans Far East Pte Ltd jointly with Speditor OY (freight forwarder) relating to the services by the forwarder and the owner by Norske-Tech Ltd of Freight Forwarding Services set out in the Contract No 6021.*

7 In consideration of the forwarder entering into the contract with Norske-Tech Ltd, RAPP irrevocable guarantees the performance undertakes to pay to the forwarder if Norske-Tech Ltd fails to pay them all amounts which are due to be paid by Norske-Tech Ltd under the contract.

8 The forwarder irrevocably agrees that all the rights of Norske-Tech Ltd under the contract may be exercised by RAPP and all the obligations of Norske-Tech Ltd shall be discharged if performed by RAPP and, without prejudice to the generality of the foregoing, that the rights of Norske-Tech Ltd under the contract may at any time be assigned to RAPP.

9 The forwarder shall at all times, unless notified in writing to the contrary by RAPP and Norske-Tech Ltd, act in accordance with all notices and

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instructions by RAPP as if such notices and instructions were given by Norske-Tech Ltd.

10 This letter shall be governed by and shall be construed in accordance with the laws of England.

11 The performance guarantee bears the signature of the plaintiffs and the first and the second defendants. It was not signed by the third defendants even though it was jointly addressed to them. The second defendants, therefore, were fully interested and involved in the contract.

12 **The previous proceedings**

13 Before this action the first defendants had instituted another action against the plaintiffs: S 1864/93. This suit was brought to obtain urgent delivery of cargo in the possession of the plaintiffs under a purported lien over the cargo. A statement of claim was filed but nothing further was done. The statement of claim was, of course, an elaboration of the claim in respect of and restricted to the withholding of cargo.

14 Later, the present plaintiffs commenced S 1898/93. The defendants in that action were the same as in this action. The endorsement of claim was as follows:

> *The plaintiff`s claim is for US$4,018,116.38 being the amount outstanding on 14 September 1993 in respect of freight, expenses, charges for services rendered, interest, and all other sums payable by the first and/or second defendants under or in connection with a written contract dated 24 February 1993 entered into between the plaintiffs jointly with the third defendants and the first defendants (the contract), and for contractual interest pursuant to the contract, and/or for damages for breach of the first and second defendants` duties under the contract, and/or against the second defendant under a*

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> *irrevocable contract of guarantee executed by the second defendants in favour of the plaintiffs over the payment obligations of the first defendant under the contract.*

15 **Conduct of parties before action**

16 The plaintiffs in S 1898/93 by ex parte SIC 5590/93 effectively applied for a Mareva injunction on the assets of the first and/or second defendants in Singapore up to the sum of US$6.13m. The gist of the ground on which the application was founded was that the conduct of the first and second defendants `had been less than honest, and there was a likelihood of their assets being dissipated to defeat the plaintiffs` claim.` The application was heard inter partes by LP Thean J [as he then was] and dismissed with costs to be paid by the plaintiffs to the defendants.

17 In the same action, ie S 1898/93, the first and second defendants took out two summons-in-chambers. By SIC 5608/93 they prayed for an order for delivery up of certain cargoes on board the mv Svenja upon payment of certain sums to the plaintiffs` solicitors. By SIC 5708/93 the first and second defendants applied for a similar order in respect of certain cargoes on the Gallia. The two applications were heard by LP Thean J who in substance granted the orders sought.

18 On 8 October 1993 that is after the above suits had been filed and well before the present suit was commenced, the plaintiffs` solicitors wrote to the defendants` solicitors in the following terms:

> *We refer to the various proceedings which have been instituted in court over this matter.*

19 As you are aware, in the Contract No 6021 dated 24 February 1993 (the contract) made between our respective clients, there is a provision which

requires that all disputes arising out of or in connection with the contract to be referred to arbitration on the terms stated therein.

20 Hence we are concerned and suggest that both parties should, at this juncture, come to an agreement on the future conduct of this matter. We propose that the issues relating to demurrage, costs, expenses and the alleged breaches of the contract should be referred to arbitration. As for the present proceedings which have been instituted, these could be stayed or discontinued once all the ancillary matters have been resolved. Further, we would propose that for the purpose of saving of costs, an arbitration in a manner other than under the ICC Rules be agreed between the parties and that this be conducted in Singapore.

21 We will be obliged if you could take your clients` instructions and revert to us on the aforesaid.

22 It is important to note that the plaintiffs refer to `present proceedings` meaning the actions mentioned above. Their call for arbitration was unambiguous and unconditional. Further, it was clear that such call was made by the plaintiffs to the first as well as the second defendants because both defendants were represented by the same solicitors, M/s Wong Yoong Tan & Molly Lim. The arbitration clause of the contract read as follows:

> *Any disputes arising out of or in connection with this contract shall be finally settled by arbitrators, without recourse to the courts, under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators appointed under such rules. The findings of the arbitrators shall be binding on the parties and enforceable in any court of competent jurisdiction.*

23 This contract shall be governed by and construed in accordance with the laws of England.

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24 The place of arbitration shall be Singapore.

25 Performance of the contract shall continue during the arbitration proceedings. No payment due or payable to forwarder by owner shall be withheld on account of pending reference to arbitration.

26 Wong Yoong Tan & Molly Lim, the solicitors for the first and second defendants, then wrote to the plaintiffs` solicitors asking whether the third defendants, who are also a party to the contract, were similarly inclined to refer the matter to arbitration. On the 27 October 1993 the plaintiffs reaffirmed the plaintiffs` keenness for an arbitration in an unambiguous reply:

> *Although Speditor OY is a party to the contract, they have indicated that they are not interested in the dispute between our respective clients under the contract and* ***we have only made them a nominal party in the said legal proceedings****. [Emphasis added.]*

27 The plaintiffs` solicitors went on to add:

> *We will seek the views of Speditor OY as to whether they wish to firstly take part in the proposed arbitration proceedings and if so, whether they agree to our proposal to refer the dispute to arbitration in a manner other than under the ICC Rules. We will revert to you once we have received a reply from Speditor OY. In the event that they do not wish to take part in the arbitration proceedings, then we do not see the need to make them a party thereto.*

28 It was therefore clear as far as the plaintiffs were concerned that the arbitration could proceed without the third defendants being a party to the arbitration proceedings.

29 The first and second defendants` solicitors responded by a letter dated 1 November 1993 as follows:

> *We refer to your fax dated 27 October 1993.*

30 How have Speditor OY indicated that they are not interested in the dispute between our respective clients? For your information, our clients are holding Speditor OY jointly liable together with your clients for any loss and damage suffered by our clients by reason of the non-performance of their obligations under the contract. As such, if you do not intend to make Speditor OY a party to the arbitration proceedings, we will do so.

31 We are instructed by our clients that they will refer their claims against your clients and Speditor OY to arbitration pursuant to the terms of the contract, namely, under the ICC Rules.

32 On 8 March 1994, the first and second defendants` solicitors wrote to their counterparts as follows:

> *As you are aware, we have been instructed by our clients to commence arbitration proceedings. In this respect, we wish to inform you that our clients have nominated Professor Peter Wetterstein of Finland as an arbitrator.*

33 Pending the filing of our request for arbitration, kindly let us know the arbitrator whom your clients intend to nominate, so that our respective arbitrators can agree on a third arbitrator. We will, thereafter, notify the International Chamber of Commerce of the respective arbitrators for their confirmation and for the appointment of the third arbitrator if the arbitrators nominated by our respective clients fail to agree on the third arbitrator.

34 Please let us have your reply within seven days hereof, failing which we will proceed to set the arbitration proceedings in motion without further reference to you.

35 Apparently a Finnish arbitrator was unacceptable to them even though the arbitration was to be conducted in accordance with ICC rules and apparently

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there was nothing in them to prevent the appointment of a foreign arbitrator. The plaintiffs were not minded to accept the contractual stipulation as it stood. After they heard the name of the Finnish arbitrator, the plaintiffs made a volte face about arbitration. They decided to resile from it and looked for a means to avoid an arbitration. It began with a cold response and an objection to a Finnish arbitrator contained in a letter of 17 March 1994 from the plaintiffs` solicitors.

> *Thank you for your telefax of 8 March 1994.*
>
> 36 In order to enable us to take our clients` instructions on your telefax of 8 March 1994, please let us know on an entirely without prejudice basis the claims your clients intend to refer to arbitration.
>
> 37 You are in any event not entitled to force our clients to nominate their arbitrator within the arbitrary period of seven days.
>
> 38 In the interim, we would like to place on record our objections to the appointment of Professor Peter Wetterstein of Finland. Given that the place of arbitration is Singapore, we fail to see the necessity of appointing a Finnish arbitrator. Please explain the special qualifications that necessitate his appointment over that of a resident of Singapore. We reserve our rights to challenge the reasonableness of his appointment and will object to the payment of any costs/disbursements arising from his appointment.
>
> 39 Finally, all our clients` rights and defences are expressly reserved, including but not limited to the right to refer and/or allow the disputes to be determined by the Singapore courts and/or any other court of competent jurisdiction.

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40 That letter received a somewhat peremptory reply from the first and second defendants` solicitors on 21 March 1994:

> *We refer to your fax dated 17 March 1994.*

41 The claims which our clients intend to refer to arbitration include all matters presently in dispute between our respective clients in relation to the contract. Your clients and you ought to know what these disputes are since they have been touched upon previously.

42 As for the nomination of an arbitrator by your clients, if your clients do not intend to appoint one, we have no desire nor any inclination to `force` your clients to do so. Your clients` failure to nominate their arbitrator will be to their own peril. We will let matters take its own course in the arbitration.

43 The reasons for our nomination of Professor Wetterstein as an arbitrator will be apparent to you once the request for arbitration has been forwarded to you. In respect of your objections to his nomination, which appear to rest on the grounds of costs only, we would inform you that the question of costs of the arbitrators will be fixed by the International Chamber of Commerce (ICC) pursuant to the ICC Rules of Arbitration. In any case, it is not for your clients to dictate to our clients who their arbitrator should be.

44 As for the last paragraph of your letter, we do not understand what is intended. As far as we are concerned, the parties have agreed to proceed to arbitration. It is insidious to suggest otherwise.

45 It is to be observed that it was the plaintiffs who, having first required the first and second defendants to adhere to the arbitration clause, had a sudden change of mind.

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46 **The action**

47 Without taking any further steps in furtherance of arbitration, the plaintiffs issued the issue of the writ in this action on 25 April 1994. The writ was indorsed with the following principal claims and reliefs:

> *Freight, expenses, charges for services rendered, interest, and all other sums payable by the first and/or second defendants under or in connection with a written contract dated 24 February 1993 entered into between the plaintiffs jointly with the third defendants and the first defendants (the contract), and for contractual interest pursuant to the contract, and/or for damages for breaches of the first and/or second defendants` duties under the contract, and/or all sums payable by the second defendants under a irrevocable contract of guarantee executed by the second defendants in favour of the plaintiffs over the payment obligations of the first defendant under the contract, which are not the subject matter of a related suit in S 1898/93; and/or*

48 A declaration that the first and/or second defendants whether by themselves and/or their agents and/or servants and including but not limited to the First National Bank of Boston, and/or assignees and/or successors in title or otherwise howsoever are not entitled to invoke and/or encash and/or howsoever call, demand, or make any request for payment on the Banker`s Guarantee No 1530-0243-59 dated 8 March 1993 for US $200,000.00 issued by Banque Indosuez naming the first defendants as beneficiaries (the said bank guarantee) and/or any bank draft(s) or similar bill(s) of exchange issued pursuant to the said bank guarantee, and/or receive or otherwise howsoever deal with the sum of US$200,000 or any part thereof paid or to be paid under the said bank guarantee and/or any bank draft(s) or similar bill(s) of exchange issued pursuant to the said bank guarantee.

49 On the same day the plaintiffs obtained ex parte the following substantive orders:

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> *The first defendants, namely, Norske-Tech Ltd and/or the second defendants, namely, PT Riau Andalan Pulp & Paper whether by themselves and/or their agents and/or servants, and including but not limited to the First National Bank of Boston, and/or assignees and/or successors in title or otherwise howsoever be restrained and an injunction is hereby granted restraining them from invoking and/or encashing and/or calling, demanding or otherwise requesting for payment on the said bank guarantee and/or any bank draft(s) or similar bill(s) of exchange issued pursuant to the said bank guarantee, and/or receiving or otherwise howsoever dealing with the sum of US$200,000 or any part thereof paid or to be paid under the said bank guarantee, and/or any bank draft(s) or similar bill(s) of exchange issued pursuant to the said bank guarantee until further order; and/or*

50 The first and/or second defendants whether by themselves and/or their agents and/or servants, and including but not limited to the First National Bank of Boston, and/or assignees and/or successors in title or otherwise howsoever be restrained and an injunction is hereby granted restraining them from removing or causing or permitting to be removed or taking any steps howsoever to remove out of the jurisdiction or disposing of, assigning, or transferring, or pledging, or diminishing, or dissipating or in any way howsoever dealing with the sum of US$200,000 or any part thereof paid or to be paid under the said bank guarantee and/or any bank draft(s) or similar bill(s) of exchange issued pursuant to the said bank guarantee until further order.

51 **The application**

52 The first and second defendants then applied for an order to stay all further proceedings on the ground that the plaintiffs have agreed to submit the disputes between them to arbitration and to set aside the ex parte orders relating to a bank guarantee issued by Banque Indosuez. I granted the orders and the plaintiffs have appealed against my decision. I shall now state the reasons for granting the orders.

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53 **Decision on application for stay**

54 First, I must comment on the performance guarantee. It is not a guarantee in the usual sense of that expression because the word guarantee is used in a wide sense. Additionally, it imposes liabilities and confers rights on the second defendants. It is not a novation because the first defendants are not discharged from their liability. Under the performance guarantee the second defendants acquire the first defendants` rights and assume their liabilities while the first defendants` rights and liabilities continue their parallel existence. The true effect of the performance guarantee therefore is to implicitly make the second defendants an additional party to the contract. Their liabilities and rights were joint and several. This construction is fortified by the fact that the second defendants joined forces with the first defendants to assert their rights under the contract in S 1898/93. The plaintiffs raised no objection on the ground that the second defendants had no such rights. Accordingly the second defendants are entitled to call on the plaintiffs for an arbitration and are obliged to submit to arbitration if asked to do so by the plaintiffs.

55 The plaintiffs opposed the application for stay of the action on two grounds. First, they said that the second defendants were not a party to the arbitration agreement. The plaintiffs relied on maritime law cases where the question was whether an arbitration clause in a charterparty was incorporated in the bill of lading. They also relied on certain cases on the effect of an arbitration clause in the principal`s contract on a guarantor. This line of argument has no relevance to this case because, as demonstrated earlier, the second defendants are in effect an additional party to the contract. Accordingly, they are entitled to join in the arbitration. The plaintiffs must be deemed to have accepted this position when their solicitors wrote to the solicitors of the first defendants calling for the arbitration.

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56 The next argument of the plaintiffs was that the first defendants, by commencing S 1864/93, waived their right to call for an arbitration. There are two reasons why this argument is flawed. First, the suit was commenced with the principal object of obtaining an order for delivery on an urgent basis. The first defendants could not have achieved that object in arbitration proceedings. The plaintiffs` action was oppressive and the only effective remedy against that was an action in the court and a mandatory order for delivery. Institution of the suit was not inconsistent with their desire or intention to have all other disputes being submitted to arbitration. The evidence clearly showed they were willing and desirous of submitting them to arbitration. In fact the correspondence showed that they had agreed to submit the disputes to arbitration and nominated their arbitrator.

57 Finally, I found that the plaintiffs were not acting in good faith on this issue because they were the first to call for arbitration. After having done that they made a volte face when the first and second defendants nominated a Finnish arbitrator, which they were entitled to do. Thus they were blowing hot and blowing cold about arbitration. Singapore being an international commercial centre, the courts should not discourage international arbitration with the participation of international arbitrators. Such arbitrations are not uncommon or illegal in Singapore.

58 **Decision on performance bond**

59 I shall now consider the application for discharge of the injunction. The guarantee was issued by Banque Indosuez and it read as follows:

> *M/s Star-Trans Far East Pte Ltd have informed us that they have entered into a contract on 24 February 1993 with you for the supply of Freight Forwarding services as described in the Contract No 6021.*

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60 At the request of M/s Star-Trans Far East Pte Ltd, we Banque Indosuez, herewith irrevocably undertake to pay you on first demand, irrespective of the validity and the effects of the above mentioned contract and waiving expressly all rights of objection and defence arising from the said contract, any amount up to: USD200,000 (United States Dollars Two Hundred Thousand Only) upon receipt of your written and duly signed request for payment and your written confirmation that M/s Star-Trans Far East Pte Ltd have not complied with the conditions of the contract referred to as above. Multiple drawings are permitted under this bank bond provided that the total of all amounts paid shall not exceed the amount stated above. This bond is effective immediately. We shall pay the sum demanded immediately through a bank draft payable in Singapore.

61 Your request for payment and your confirmation hereunder signed by duly authorized signatory of your company should be presented to us through your bankers.

62 Our indemnity is valid until 30 September 1994 and expires in full and automatically if your written request for payment and your written confirmation through your bankers are not in our possession on or before that date.

63 We confirm that you may assign your rights under this bank bond and upon such assignment all rights hereunder may be exercised by your assignee as notified in writing by you to us.

64 This indemnity is governed by the laws of England and the place of jurisdiction is Singapore.

65 Principles of law applicable to banker`s letters of credit have now been largely settled. Unlike a banker`s letter of credit, a performance bond or

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guarantee is comparatively a new instrument in commercial transactions. It has become typified as a mirror image of a documentary credit. A documentary credit is a form of security in favour of a contractor or an exporter. Its principal purpose is to ensure that the contractor or exporter is assured of payment and gets paid without delay. In the absence of fraud the contractor or exporter must be paid provided the terms of credit are fulfilled even though there may be disputes arising out of the underlying contract. This is known as the doctrine of independence. The performance bond, on the other hand, is provided by the contractor or exporter whom I shall call the `principal`. Its purpose is to ensure the principal performs his obligations. It is a deterrent against default by the principal. Under English law the performance bond is also governed by the doctrine of independence - that is, because it is furnished by a financial institution which is not privy to the underlying contract it must be enforced if the beneficiary strictly complies with the terms and conditions of the instrument even though there may be disputes between the parties to the underlying contract.

66 A number of English cases on performance bonds illustrate the point. established for the first time that the well-established principle that courts will not exercise the wide discretion to grant injunctions to prevent payment under a letter of credit on the ground that there are disputes under the underlying contract equally applied to performance bonds. Kerr J stated the principle as follows 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 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*

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> *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.*

67 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, eg 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.

68 and affirmed the principle stated by Kerr J. Fraud on the part of the principal was recognized as an exceptional circumstance. Elsewhere it has been said that the court will intervene only when the circumstances are `most exceptional` or `wholly exceptional`: see . In all these cases the application was directed against the guarantor bank or the banks intervened to oppose the application on the ground that fulfilling their international obligations was of paramount importance to them.

69 The question then arises as to whether a different principle applies when an order is sought not against the guarantor bank but the principal alone and the bank does not intervene to oppose the application. The following cases offer some guidance.

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70 In the principal sought an injunction against the beneficiaries contending that a term must be implied in the underlying agreement that a call on the performance bond can be made only when reasonable and just cause for doing so existed or where there was some evidence of default. The court rejected that contention. Lord Denning MR said in his judgment:

> *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 not honest belief, it may be evidence of fraud. If there is sufficient evidence of fraud, the court might intervene and grant of an injunction.*

71 In , an injunction was sought against the beneficiaries of a demand performance bond to restrain them from calling on the bond. As an alternative a Mareva injunction was sought to freeze the proceeds of the bond. Judge Hawser QC held that he had no power to restrain the defendants making a call on the bond and refused a Mareva injunction but ordered under O 29 r 2(1) that the proceeds be frozen and paid into court. The defendants appealed to the Court of Appeal contending that the performance bond should be treated in the same way as a letter of credit, that is as cash in hand and the proceeds should not be frozen. The Court of Appeal held that the plaintiff was correctly denied an injunction against the call on the bond and a Mareva injunction. It further held that O 29 r 2(1) could not be invoked to freeze cash in the hands of a party even though it may be directly connected with claims and counterclaims. Finally, the Court of Appeal decided that if the circumstances did not justify the grant of a Mareva injunction, then the proceeds of the performance bond cannot be frozen at all. Everleigh LJ, however, sounded a note of caution in the following words:

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> *Where there are some grounds for thinking that the plaintiffs might be able to show that a payment by the bank would not be in accordance with the plaintiffs` contract with the bank, then, in deciding whether or not an injunction should be granted, the similarities between a promissory note and a letter of credit, with references to the life blood of international commerce, may well be relevant considerations.*

72 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 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.

73 ... For a large construction project the employer may agree to provide finance (perhaps by way of advance payments) to enable the contractor to undertake the works. The contractor will almost certainly be asked to provide a performance bond. If the contractor were unable to perform because the employer failed to provide the finance, it would seem wrong to me if the court was not entitled to have regard to the terms of the underlying contract and could

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be prevented from considering the question whether or not to restrain the employer by the mere assertion that a performance bond is like a letter of credit.

74 In view of the above cases, the principles under English law applicable to the granting or refusing an application for an injunction to refrain a call on a performance bond by the beneficiary may be summarized as follows:

75 First, the injunction would be granted only in exceptional circumstances. As a general rule the court having regard to the purpose of the bond will be disinclined to granting it. Secondly, given that the application is of an interlocutory nature and even though the evidence will be by affidavits, the party making the application must come up with compelling evidence to establish the exceptional circumstances.

76 Thirdly, the rules in that it is sufficient for the plaintiff to establish that he has a good arguable claim to the right he seeks to enforce and that, because the court cannot decide on the claim on affidavit evidence, it is enough if the plaintiff shows that there is a serious question to be tried, do not apply to the injunction sought in this case. In none of the judgments in the above cases were the above principles enunciated by ***American Cyanamid*** applied.

77 Finally, I must refer to three Singapore cases laid down no new principles and it was an application of existing principles. None of the principles I set out was modified or nullified by the ***Royal Design*** case8. was essentially a case on the standard of proof when fraud is relied on. It did not modify or nullify the principles I have set out. Finally was a case decided on its own facts. In that case the circumstances were exceptional. The applicants induced the breach and relied on it to call on the performance bond. There was clear and unrefuted evidence that the applicants relied on their own wrong.

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78 In this case, my principal ground for setting aside the injunction is the plaintiffs` failure in their application for a Mareva injunction. The grounds of rejection of that application by LP Thean J [as he then was] had a bearing on the standing and financial position of the first and second defendants. Secondly, in this case there were no compelling circumstances to restrain the first and/or second defendants from enforcing their rights under the performance bond. The primary function of a court is to enforce contractual rights. Here, the plaintiffs were asking the court to rewrite their contract by granting the injunction. There was no evidence of fraud or other incriminating evidence against the first and second defendants or that they will not be able to repay the money if eventually there is a final decision against them. The bond here was for a mere US$200,000 compared with the sum of US$6.13m for which the plaintiffs sought a Mareva injunction and failed. Finally, the first and second defendants produced sufficient evidence to show that the plaintiffs were in prima facie breach of their contract and that they complied with the terms and conditions of the bond.

79 As the first and second defendants succeeded in their application, I ordered costs against the plaintiffs.

80 ***First and second defendants` application allowed.***

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Vivian Ang and Andrew Chan (Allen & Gledhill) for the plaintiffs
Molly Lim and Roland Tong (Wong Yoong Tan & Molly Lim) for the defendants

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