

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CHAMBERS

CITATION : SWANHILL ENTERPRISES PTY LTD -v- QBE
INSURANCE (AUSTRALIA) LTD [2017] WASC
279

CORAM : MASTER SANDERSON

HEARD : 30 AUGUST 2017

DELIVERED : 3 OCTOBER 2017

FILE NO/S : CIV 1370 of 2017

BETWEEN : SWANHILL ENTERPRISES PTY LTD
Plaintiff

AND

QBE INSURANCE (AUSTRALIA) LTD
Defendant

FILE NO/S : CIV 1371 of 2017

BETWEEN : 176 ADELAIDE TERRACE PTY LTD
Plaintiff

AND

QBE INSURANCE (AUSTRALIA) LTD
Defendant

Catchwords:

Letter of credit - Enforcement of performance and maintenance bonds - Turns
on own facts

Legislation:

Competition and Consumer Act 2010 (Cth)

Result:

Judgment for the plaintiff

Category: B

Representation:

CIV 1370 of 2017

Counsel:

Plaintiff : Mr M N Solomon SC & Mr T Carmady
Defendant : Mr M Condon SC & Ms T Yonker

Solicitors:

Plaintiff : Williams & Hughes
Defendant : Makinson d'Apice

CIV 1371 of 2017

Counsel:

Plaintiff : Mr M N Solomon SC & Mr T Carmady
Defendant : Mr M Condon SC & Ms T Yonker

Solicitors:

Plaintiff : Williams & Hughes
Defendant : Makinson d'Apice

Case(s) referred to in judgment(s):

Ideas Plus Investments Ltd v National Australia Bank Ltd [2006] WASC 215;
(2006) 32 WAR 467

Simic v New South Wales Land & Housing Corporation [2016] HCA 47

United City Merchants (Investments) Ltd v Royal Bank of Canada [1983] 1 AC
168

1 **MASTER SANDERSON:** These reasons deal with summary judgment
applications in each of the two actions. In both matters the plaintiffs seek
to enforce so-called 'maintenance/performance bonds'. There are some
slight differences between the facts in each case. However, the central
point raised by both actions is the same.

2 The facts are common to both actions and can be summarised as
follows. Each of the plaintiffs undertook a property development with the
builder being Diploma Construction (WA) Pty Ltd (Diploma). The
defendant was the financier of Diploma. On or around 2 September 2014
Diploma requested that the defendant issue a performance bond and a
maintenance bond in favour of Swanhill Enterprises Pty Ltd (Swanhill) in
an amount of \$273,889. On 2 December 2014 the defendant issued the
two separate bonds.

3 On 18 September 2014 Diploma requested the defendant issue a
performance bond and a maintenance bond in favour of 176 Adelaide
Terrace Perth Pty Ltd (Adelaide) each in the amount of \$530,277. On
20 November 2014 the defendant issued the two bonds.

4 I will come back to the terms of these bonds in due course. For
present purposes it is enough to note by letter dated 20 December 2016
Swanhill called upon the defendant to make payment under both the
performance bond and the maintenance bond. On 22 September 2016
Adelaide called upon both bonds issued in their favour. The defendant in
each case declined to make payment. The plaintiffs seek summary
judgment in relation to the amounts allegedly owing in relation to all four
bonds.

5 There was no dispute between the parties as to the applicable
principles for summary judgment. Judgment will only be ordered in the
clearest of cases. If there are disputes of fact between the parties the
version of facts most favourable to the defendant must be assumed.

6 It is difficult to overstate the importance of irrevocable letters of
credit of which these performance and maintenance bonds are but a
species. Various judges over the years have described the finance
instruments as the 'crankshaft of modern trade' or the 'life blood of
international commerce'. With this in mind it is important to consider the
actual mechanism which leads to the issuing of such bonds and how they
in fact operate. This was set out by Lord Diplock in *United City
Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168.
His Lordship put the position as follows:

The documentary credit point

My Lords, for the proposition on the documentary credit point, both in the broad form for which counsel for the confirming bank have strenuously argued at all stages of this appeal and in the narrower form or 'halfway house' that commended itself to the Court of Appeal, there is no direct authority to be found either in English or Privy Council cases or among the numerous decisions of courts in the United States of America to which reference is made in the judgments of the Court of Appeal in the instant case. So the point falls to be decided by reference to first principles as to the legal nature of the contractual obligations assumed by the various parties to a transaction consisting of an international sale of goods to be financed by means of a confirmed irrevocable documentary credit. It is trite law that there are four autonomous though interconnected contractual relationships involved: (1) the underlying contract for the sale of goods, to which the only parties are the buyer and the seller; (2) the contract between the buyer and the issuing bank under which the latter agrees to issue the credit and either itself or through a confirming bank to notify the credit to the seller and to make payments to or to the order of the seller (or to pay, accept or negotiate bills of exchange drawn by the seller) against presentation of stipulated documents; and the buyer agrees to reimburse the issuing bank for payments made under the credit. For such reimbursement the stipulated documents, if they include a document of title such as a bill of lading, constitute a security available to the issuing bank; (3) if payment is to be made through a confirming bank, the contract between the issuing bank and the confirming bank authorising and requiring the latter to make such payments and to remit the stipulated documents to the issuing bank when they are received, the issuing bank in turn agreeing to reimburse the confirming bank for payments made under the credit; (4) the contract between the confirming bank and the seller under which the confirming bank undertakes to pay to the seller (or to accept or negotiate without recourse to drawer bills of exchange drawn by him) up to the amount of the credit against presentation of the stipulated documents.

Again, it is trite law that in contract (4), with which alone the instant appeal is directly concerned, the parties to it, the seller and the confirming bank, 'deal in documents and not in goods', as article 8 of the Uniform Customs puts it. If, on their face, the documents presented to the confirming bank by the seller conform with the requirements of the credit as notified to him by the confirming bank, that bank is under a contractual obligation to the seller to honour the credit, notwithstanding that the bank has knowledge that the seller at the time of presentation of the conforming documents is alleged by the buyer to have, and in fact has already, committed a breach of his contract with the buyer for the sale of the goods to which the documents appear on their face to relate that would have entitled the buyer to treat the contract of sale as rescinded and to reject the goods and refuse to pay the seller the purchase price. The whole commercial purpose for which the system of confirmed irrevocable

documentary credits has been developed in international trade is to give to the seller an assured right to be paid before he parts with control of the goods that does not permit of any dispute with the buyer as to the performance of the contract of sale being used as a ground for non-payment or reduction or deferment of payment (182 - 183).

7 In this case there are only three steps not the four anticipated by his Lordship. First, there is the underlying contract. Here that is the construction contract between Diploma and Swanhill on the one hand and Diploma and Adelaide on the other. There is then the contract between Diploma and the defendant under which the defendant agreed to issue the performance and maintenance bonds. Step three is missing and can be put to one side. The performance and maintenance bonds themselves are the contract between Swanhill and the defendant on one hand and Adelaide and the defendant on the other. So the question then is do the documents presented by the plaintiffs to the defendant conform with the requirements stipulated in the bonds. If they do then the defendant is under a contractual obligation to each of the plaintiffs to honour the credit notwithstanding the defendant has knowledge that one or other of the plaintiffs at the time of presentation of the confirming documents is alleged by Diploma to have committed a breach of the contract with Diploma which would have entitled Diploma to treat the contract as rescinded and refuse to pay the amounts now claimed under the performance and maintenance bonds.

8 It is convenient at this point to set out the terms of the bonds. Each of the four bonds are in the same form. Relevantly they read as follows:

This undertaking is to continue until:

- notification has been received from the Principal that the Sum is no longer required by the Principal; or
- this undertaking is returned to the Financial Institution; or
- payment to the Principal by the Financial Institution of the whole of the Sum or such part as the Principal may require.

Should the Financial Institution be notified in writing, purporting to be signed by for and on behalf of the Principal that the Principal desires payment to be made of the whole or any part or parts of the Sum, it is unconditionally agreed that the Financial Institution will make the payment or payments to the Principal forthwith without reference to the Contractor and notwithstanding any notice given by the Contractor not to pay same.

A demand for payment delivered pursuant to this undertaking must include certification by or on behalf of the Principal that:

- a) the Contractor has breached its performance obligations under the Contract and the breach has not been remedied; and
- b) the amount demanded represents an amount or amounts of loss, cost or expense actually incurred by the Principal as a result of the breach.

The Financial Institution has no obligation to investigate the authenticity of any statement made in connection with a demand for payment delivered pursuant to this undertaking.

Provided always that the Financial Institution may at any time without being required so to do pay to the Principal:

- the Sum less any amount or amounts it may previously have paid under this undertaking or
- such lesser sum as may be required and specified by the Principal

and thereupon the liability of the Financial Institution hereunder shall immediately cease.

9 The defendant's argument in each case can be summarised in this way. On the facts Diploma was not in breach of its contract with either of the plaintiffs. In other words no entitlement to rely upon the bonds arose. Each of the plaintiffs knew that to be the case and it was therefore unconscionable for the plaintiffs to call upon the bonds. The defendant says the plaintiffs' unconscionable conduct is a breach of the provisions of the *Competition and Consumer Act 2010* (Cth) such that each of the plaintiffs can be restrained from calling upon the bonds. In the context of a summary judgment application the defendant maintains its position is arguable and summary judgment ought not be granted.

10 In response to the plaintiffs' applications the defendant lodged a large amount of affidavit material seeking to establish circumstances had not arisen as between the plaintiffs and Diploma which would allow the plaintiffs to call on any of the bonds. It is unnecessary for me to address that evidence. For the purposes of this application I am prepared to assume a factual position most favourable to the defendant - that is, it is arguable circumstances had not arisen as between Diploma and the plaintiffs justifying a call upon the bonds. It is however important to note I have done nothing more than conclude the position is arguable. It is neither necessary nor appropriate for me to conclude the defendant's argument carries the day.

11 In response to the defendant's claims the plaintiffs rely on what is generally known as the principle of autonomy or independence. This principle was explained by the High Court in *Simic v New South Wales Land & Housing Corporation* [2016] HCA 47. French CJ said:

Two complementary principles apply to letters of credit and performance bonds alike - the principle of strict compliance and the principle of autonomy or independence. ... The principle of autonomy requires that the letter of credit or performance bond be treated as independent of the underlying commercial contract. The principles of strict compliance and autonomy serve the immediate commercial purpose of such instruments of providing an equivalent to cash and the further purpose of performance bonds of allocating risk between the parties to the underlying contract until their dispute, if there be one, is resolved [6]. (footnotes omitted)

12 In *Ideas Plus Investments Ltd v National Australia Bank Ltd* [2006] WASC 215; (2006) 32 WAR 467, McLure JA further explained the position in this way [104]:

It is apparent from the language in the Letter of Credit that HSBC's obligation is to pay the money upon receipt of the specified documents, being the draft and the signed certificate. That is consistent with the law relating to letters of credit. The issuing bank's concern is only with the form of the documents presented to it and not the truth of the facts stated therein: *Westpac Banking Corporation v South Carolina National Bank* [1986] 1 Lloyd's Rep 311 at 315. The issuing bank's obligation under a letter of credit is autonomous and not in the nature of a surety: *Wood Hall Ltd v The Pipeline Authority* (*supra*). An issuing bank has an absolute and independent obligation to pay the beneficiary irrespective of any dispute as to the truth of the statements made in the documents. An established exception to this principle is fraud perpetrated by the beneficiary. If the issuing bank has knowledge of the fraud, that justifies non-payment even if the documents on their face comply with the letter of credit: *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159; *Inflatable Toy Company Pty Ltd v State Bank of New South Wales* (1994) 34 NSWLR 243.

13 While accepting the autonomy principle it is the defendant's position that there are exceptions to that principle. One is the case of fraud. The defendant then goes further and says it is arguable a possible further exception is unconscionable conduct. After all that is a statutory remedy which is available to a party who is the victim of such conduct. Counsel was able to offer no case in support of that proposition but submitted it is consistent with first principles.

14 There is a difficulty with that argument. As the cases make plain what is required on the part of a party seeking to enforce the bond is a

certification, first that the contractor has breached its performance obligations and second the amount demanded represents the loss suffered. It was understood by both the plaintiffs and the defendant there may be arguments between the plaintiffs and Diploma as to whether or not the plaintiffs' assertions are correct. That is not to the point. In my view it cannot possibly be unconscionable for Swanhill and Adelaide to make demand when the defendant was aware there could, at the time the demand was made, be disputes as between Diploma and the plaintiffs. That being so there is no substance in the defendant's contention.

- 15 Turning then to the defendant's argument based upon a failure of strict compliance there are four grounds which are advanced. First it is said the demands were issued to QBE Insurance (International) Ltd and not QBE Insurance (Australia) Ltd. Second it is said the Swanhill demand incorrectly sets out the defendant's address as 82 Park Street and not 82 Pitt Street. Third it is said the Adelaide demand purportedly made demand on two bonds but referred to the same serial number for each bond (the final digit on one should have been four and was five). Finally, it is said the demands referred to documents described as 'bank guarantees' or 'unconditional bank guarantees'. In *Simic* French CJ described the principle of strict compliance as follows:

According to the principle of strict compliance, a bank paying on a letter of credit or performance bond only has an obligation to do so and only has an entitlement to claim indemnity for the performance of that obligation if the conditions on which it is authorised and required to make payment are strictly observed. A demand for payment cannot be accepted on the basis that near enough is good enough. ...

The strict compliance principle requires that the party making demand on a performance bond be the party named in the bond as the beneficiary and that any conditions on payment set out in the bond are satisfied. It does not describe an obligation imposed on the issuing or accepting institution. Rather, it delimits the issuing institution's obligation to make payment and, correspondingly, its right to claim on an indemnity promise by the party requesting the issue of the bond. Where a performance bond is expressed, as in the present case, to be unconditional, strict compliance at least requires that the beneficiary making demand for payment be the beneficiary named in the bond. Unlike the autonomy principle, it is not a rule of construction of the bond [6] - [7]. (footnotes omitted)

- 16 Turning then to this case although the demands were made to QBE Insurance (International) rather than QBE Insurance (Australia) the correct ACN was used. I accept, as was submitted by the plaintiffs, the discrepancy was minor and typographical. It had no material effect on the entitlement to be paid under the bonds. Further there is no issue that the

defendant received the demands and understood them to relate to the relevant bonds.

17 Although the defendant's address was incorrectly described on the Swanhill demands the demand was served by hand at the correct address. The error is inconsequential.

18 As to the Adelaide demands the incorrect number was used on one of the demands. However copies of both bonds were attached to the email from Adelaide's solicitors which also included the letter of demand.

19 In reality all of the alleged deficiencies were minor. The main requirement of the bond if it was a conditional bond was first the claimant had to certify the contractor had breached its performance obligations. That was done in each of the demands. Second it was necessary for the claimant to specify the amount of loss. That too was done. I am satisfied there was strict compliance with the requirements of the demands.

20 There will be judgment for the plaintiffs in both actions. I will hear the parties as to the terms of the judgment and as to costs.