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PERFORMANCE BONDS: ENGLISH COURT CONFIRMS PAYMENTS CANNOT BE STOPPED WITHOUT FRAUD

I. KEY TAKEAWAYS

- *The beneficiary of a performance bond may be restrained from making a demand under the bond in limited circumstances where there is a strong contractual case. Injunctions against banks, however, will only be granted where there is clear evidence of fraud. Arguments based on contractual disputes, set-offs, or defects in the demand will not suffice to restrain payment as against the banks.*
- *Minor defects in bond demand documentation will not invalidate a demand where the substance and intent are clear.*
- *Parties seeking to challenge a bond call should act promptly and pursue their remedies without delay. Courts will take account of any failure to respond with urgency.*

Performance bonds and guarantees are standard tools in construction and commercial contracts. They are commonly used to secure performance of works, payment of liquidated damages, warranty obligations, or overall completion of the contract. Their principal function is providing the beneficiary with prompt recourse to funds, often on demand, while leaving disputes as to the contractor's actual liability to be resolved separately.

While parties may seek injunctive relief either to restrain a beneficiary from making a demand or to restrain an issuer from paying, English courts have historically adopted a restrictive approach to such intervention. As a general rule, payment under an on-demand instrument will only be restrained where there is clear evidence of fraud, and where the issuer has notice of that fraud. Attempts to expand the scope of intervention beyond fraud, whether by relying on defects in the demand, disputes under the underlying contract, or broader notions of good faith, have largely been rejected.

This long-standing position was recently reaffirmed by the High Court of Justice in *CR Construction (UK) Co Ltd v Barclays Bank plc* [2026] EWHC 202 (TCC). The case arose from a contractor's attempt to restrain payment under a performance bond following termination of a major construction project in Manchester. The employer had certified liquidated damages and made a demand of approximately £2.47 million under the bond. The contractor applied for an interim injunction against the issuing bank, arguing that the demand was non-compliant, that the bond had been discharged following the employer's alleged repudiatory breach of the underlying contract, and that no net sum was due once set-offs were taken into account. No allegation of fraud was made.

The Court applied the well-established test for interim injunctive relief under English law. First, the applicant must establish that there is a serious issue to be tried. Second, the applicant must show that damages would not be an adequate remedy. Third, the balance of convenience must favour the grant of relief. In the specific context of performance bonds,

that test operates subject to an additional threshold: where relief is sought against the issuing bank, it will not be granted absent clear evidence of fraud of which the bank has notice.

The Court rejected the application at the threshold. It held that, as against a bank, none of the grounds advanced could justify injunctive relief in the absence of fraud. The contractor's case was, in substance, that the employer was not entitled under the underlying contract to call on the bond. Even if that were correct, it did not engage the primary basis for restraining a bank from paying. The Court emphasised the distinction between restraining a beneficiary from making a demand and restraining a bank from honouring it. The former may, in limited circumstances, be restrained on the basis of a strong contractual case, but the latter will not be restrained absent fraud of which the bank has notice.

The Court nevertheless addressed the contractor's arguments on their merits. The bond contained a certification mechanism under which a certificate issued by the employer and countersigned by the employer's agent constituted conclusive evidence of the contractor's liability. The contractor sought to rely on alleged set-offs and disputes as to the quantum of liquidated damages. The Court rejected that approach. Where the parties have agreed that certification is conclusive for the purposes of the bond, the issuer is entitled to rely on it. Disputes as to the underlying liability do not operate as a condition precedent to payment. They are deferred to subsequent proceedings between the contractor and the employer.

The contractor's argument that the bond had been discharged by its acceptance of the employer's repudiatory breach of the underlying contract was also rejected. The Court construed the relevant provision of the bond providing that termination would not reduce the surety's liability as extending to termination by acceptance of repudiation. That conclusion reflects the commercial justification for such provisions. Performance security is intended to survive disputes as to the manner in which the contract has come to an end. The contractor's construction argument was, at best, narrowly arguable and fell short of the standard required for an injunction against a beneficiary, and in any event did not assist a claim directed at the bank.

The challenge to the formal validity of the demand was also rejected. The contractor pointed to inconsistencies in the demand documentation, including the use of a group letterhead and references to related entities. The Court accepted that the drafting was imperfect. It was not, however, ambiguous. Reading the demand as a whole, the Court held "it is plain beyond any serious doubt that they were, in content and in substance, a demand and a certificate from the Employer rather than from some other entity". In the absence of any contractual requirement of strict form, minor defects of presentation did not invalidate the demand.

For completeness, the Court considered the requirements for interim relief. The contractor's evidence of irreparable harm was found wanting. Assertions of financial prejudice and reputational damage were unsupported by concrete evidence. The Court also placed weight on the contractor's delay in commencing adjudication proceedings and its failure to act with urgency when the bond call became apparent. Against that background, and given the availability of adjudication as a mechanism for obtaining interim relief on the merits, the balance of convenience did not favour grant of interim relief.

The Court also recognised that restraining payment under a performance bond has implications beyond the immediate parties. Such instruments play a central role in the allocation of risk in construction and infrastructure projects. Their commercial value depends on certainty of payment. Judicial interference, absent compelling justification, risks undermining that function. That consideration weighed against the grant of an injunction, even if the other factors had been more evenly balanced.

The decision is therefore a clear application of established principles. Where interim relief is sought in relation to on-demand performance bonds against the issuing bank, the absence of fraud is ordinarily fatal. Parties must therefore be clear at the outset as to the true nature of their complaint. Where the dispute concerns the employer's entitlement to call on the bond under the underlying contract, the appropriate course is to proceed against the beneficiary.

The judgment also confirms the significance of certification mechanisms within bonds. Where parties have agreed that a certificate constitutes conclusive evidence of liability, that agreement will be given effect. Arguments as to quantum, set-off, or underlying entitlement will not prevent payment. They are matters to be resolved in subsequent proceedings.

Timing is equally important. The Court was influenced by the contractor's delay in pursuing its remedies and in responding to the bond call. Parties seeking to challenge termination, delay damages, or certification should do so promptly.

These principles apply equally to English law-governed instruments used in cross-border transactions and construction projects, including advance payment guarantees, retention bonds, standby letters of credit and counter-guarantees issued through international banking mechanisms. Korean contractors and sponsors active in overseas construction projects, particularly where English law is chosen as the governing law, should proceed on the basis that such instruments will be honoured in the absence of fraud. Disputes as to entitlement under the underlying contract will not prevent payment, and risk management must be structured accordingly, including careful drafting of bond terms and timely recourse to dispute resolution remedies against the beneficiary.

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