



Bonds and guarantees

Introduction

1 I'll start with a horror story:

- Six years ago you let a big sub-contract to Bloggs (2005) Ltd to carry out the M & E works at a landmark office development in the City of London. You were naturally concerned that this company might be financially suspect, so acting prudently, or so you thought, you asked Bloggs plc to provide you with some security. During all of your exchanges with Bloggs plc at the time, the form of security proposed was referred to as a 'Performance Bond'. You understood that this meant you were fully covered in the event of any default by the subsidiary and at the same time you took comfort from that fact that the MD of Bloggs plc, Mr Biffa Bloggs, telephoned you and said, *"Don't you f***** worry mate. All my companies are top f***** notch and I personally guarantee their performance."*
- Three years ago the heating system pipe work installed by Bloggs (2011) Ltd was subject to multiple corrosion type failures. The failures appear to have been caused by poor workmanship and supervision. The employer elected to rip out and replace the heating system pipe work and presented you with a claim for the £5m costs of this work. Although Bloggs (2005) Ltd went into administration shortly after completing the works, Bloggs plc has continued to thrive. However, when you wrote to Bloggs plc claiming the £5m under the 'Performance Bond' and the verbal guarantee, Mr Biffa Bloggs telephoned you to reject the claim in terms that were as forthright as his previous endorsement of his subsidiary.
- Today was the first day of the trial in the Technology and Construction Court of the proceedings you issued against Bloggs plc to recover the £5m. You have spent half a million pounds in legal costs to get this far and so has Bloggs plc. Your QC advises you that Mr Bloggs' verbal guarantee is worthless. She also says that the peculiar wording of the document that you believed was a 'Performance Bond' is open to a number of different interpretations, which may make the document effectively worthless against Bloggs plc. The QC also mentions that if judgment goes against you, not only will you never see a penny of the £5m but you will also be required to pay most of Bloggs plc's legal costs and your own legal costs will have been entirely wasted.
- You are having difficulty sleeping at nights ...

2 It might be said that participation in any legal proceedings can be a nightmare whatever the subject matter of those proceedings but the scenario described above gives a flavour of the particular problems that can be associated with disputes over bonds and guarantees. There are in my view a number of reasons for this:

2.1 Bonds and guarantees are relatively complex instrument that attempt to set out the obligations between two parties that are consequential upon the actions or inactions of another party.



- 2.2 The language used in bonds and guarantees is frequently confusing and/or obscure. Even in the twenty first century, it is common to see bond and guarantee documents that employ forms of expression more common to the nineteenth century.
- 2.3 Disputes over bonds and guarantees will often involve significant sums of money.
- 2.4 Disputes over bonds and guarantees tend to have something of an 'all or nothing' flavour. This is because disputes will ordinarily turn upon matters of interpretation with little scope for middle ground. If the interpretation of the disputed clause you argue for prevails then you will probably recover 100% of the money claimed but if your interpretation is rejected you're likely to get nothing¹ (apart from a large bill for tow sets of legal costs).

Bonds and guarantees: what's in a name?

- 3 Bonds and guarantees are forms of security. The security is provided by a third party so in a typical arrangement, A contracts with B but A also enters into a separate agreement with C to protect itself against any failure by B. This separate agreement requires C to "guarantee" the obligations of B. C will not of course be offering such comfort to A without having covering its position with B, so ordinarily B will be under an obligation to make good any loss suffered by C, should C have to pay A². So ordinarily we have three sets of interlocking obligations:
 - 3.1 As between A and B: the principal contract
 - 3.2 As between A and C: the bond or guarantee
 - 3.3 As between B and C: the indemnity
- 4 Since the area of law that we are concerned with here is that of 'Suretyship' I will use the very broad brush description, "surety contracts" to embrace all forms of third party security arrangements.
- 5 In the construction industry, the various titles applied to surety contracts will usually include use of the word "bond" or "guarantee" to include for example, on-demand bonds, simple bonds, performance bonds, conditional-demand bonds, bank guarantees, demand guarantees, default bonds, performance guarantees, surety bonds, surety guarantees, parent company guarantees. What these documents should have in common is the underlying objective of providing some assurance as to payment (or fulfilment of obligations) from a solvent (or expected to be solvent) third party.
- 6 In reality the words "bond" and "guarantee" are omnibus terms that can be entirely meaningless. To take one example in *Trafalgar House Construction (Regions) Ltd v General Surety v Guarantee Co. Ltd*³ at first instance the Judge concluded that a document entitled 'Bond' was a conditional bond. The Court of Appeal decided that the same document was to be treated as the equivalent of an on demand bond but the House of Lords had the final say concluding that the document was in fact a type of a guarantee! (If eight Judges cannot agree, what hope for the rest of us?)

¹ Valuation disputes may be equally complex over large sums but will rarely provide for either nil or a 100% recovery.

² In this paper I have used both the A - B - C and the employer - contractor - guarantor nomenclatures to describe the parties to typical surety contracts.

³ [1995] 3 WLR 204; (1994) 66 BLR 42



- 7 The *Trafalgar House* case cited above confirms that the label attached to a document is not conclusive as to the legal principles upon which it is based. It is therefore important to look beyond the title page and consider the nature of the obligations imposed by the wording of the document. In particular it will be important to determine whether or not the document includes primary or secondary obligations.
- 8 The main (and significant) difference between primary and secondary obligations can be illustrated by reference to the A – B – C arrangement outlined in paragraph 3 above:
- 8.1 If C assumes a primary obligation to A then this obligation comprises a stand alone undertaking by C that is not contingent upon any liability being established by A against B⁴.
- 8.2 If C assumes a secondary obligation to A then this obligation will be contingent upon a breach by B of the contract with A. If A cannot establish a breach by B then C has no liability.
- 9 Thus from C's point of view, a primary obligation is considerably more onerous and unsurprisingly, many of the disputes over surety contracts that have reached the courts have involved C arguing that its obligation to A was secondary rather than primary.

Primary obligations

- 10 In construction, the most common example of a primary obligation is that contained in an 'on demand bond' under which C is required to pay A the sum demanded without reference to the liability position between A and B. In a true on demand bond you would usually expect to find wording along the following lines:

"I promise to pay you on receipt of your written request without proof or conditions."

- 11 It should be obvious that this sort of primary obligation is rather open-ended and onerous. We can look at one of the leading cases from 1978⁵ to illustrate the stark reality of how an on demand bond can work in practice. In *Edward Owen* the contractors agreed with Libyan customers to supply and erect glass houses in Libya. The customers asked for a performance guarantee for 10 per cent of the contract price and this was provided by the contractors' bank, with the guarantee document providing that the sum was to be payable "on demand without proof or conditions". Although there was no default or breach of contract by the contractors the Libyan customers demanded and received payment from the bank. The court held that, subject only to proof of fraud on the part of the customers, the guarantee had to be enforced. Lord Denning observed that in this instance the guarantee provided was virtually the same as a promissory note⁶, payable on demand.

- 12 An on demand bond is therefore equivalent to a blank cheque and as such, gives the benefitting party – usually the employer - a huge advantage whilst conversely imposing upon the contractor the substantial risk that the employer may abuse its position by making a demand without any due cause.

4 A primary obligation is frequently referred to as a contract of indemnity but in order to avoid confusion, in this paper references to an indemnity will reflect B's obligation to make good C's loss – see paragraph 3 of this paper.

5 *Edward Owen v. Barclays Bank* [1978] Q.B. 159, CA.

6 Something of an old fashioned term these days, but a Promissory Note comprises a written promise by one party to pay when demanded a specific amount of money to another party.



- 13 If the arrangement between A and C is a true on demand bond then the legal position remains that A need only comply with the provisions concerning serving the demand on C in order to get the cash and C may only avoid its obligation to pay if there is clear evidence of fraud. This is a difficult hurdle for anyone seeking to restrain payment - a mere suspicion of fraud will not be enough - and in the thirty years or so since the *Edward Owen* case was decided the Courts have continued to dismiss applications to prevent payment under on demand bonds. A good example of this approach can be seen in the *Enka Insaat v Banca Popolare* case set out in paragraph 32.2 of this paper. (However it has to be noted that in a decision handed down on 23 March 2011⁷, the Technology and Construction Court granted an injunction restraining an employer from seeking payment under an on demand bond, where the employer was said to be in breach of the terms of the principal contract. It will be interesting to see if this decision gives rise to a new exception to the principle that payment under on demand bonds can only be restrained where fraud is alleged.)
- 14 A question frequently asked is: "*Can the contractor recover the money paid out under an on demand bond if it was not at fault?*" In theory, the answer to this question is "Yes" because an on demand bond will not ordinarily give A an absolute entitlement to the money collected but will simply provide a trouble free mechanism for securing payment. However, the practical reality may be different.
 - 14.1 In the typical situation, if A took advantage of on demand bond and obtained from C a large payment without any actual entitlement, C would recover this sum from B relying upon B's indemnity. B therefore would be out of pocket despite having done nothing wrong.
 - 14.2 The proper course of action for B would therefore be to follow the contractual dispute procedures and seek to establish that there was no default. Ultimately, if B could establish that it was not in default it would expect a Court of Tribunal to order A to return the money or at least give some credit for this money.
 - 14.3 However, this course of action may not represent a realistic or practical solution for B. At best, the contractual dispute procedures will be long winded and expensive and at worst may amount to a waste of time if A is an entity in a foreign state where claims enforcement is difficult or if A has become insolvent during the intervening period.
- 15 The use of on demand bonds is common in international projects – where the prospects for recovery of money due may be poor – but rather unusual in UK based construction work. However, we sometimes see on demand bonds in the form of retention bonds and advance payment bonds being provided in relation to large UK projects, for example in the petrochemical and process engineering fields. Generally speaking:
 - 15.1 A retention bond is usually provided to cover the employer's costs in the event that the contractor does not attend to specific items of work, maintenance or defects during the DLP.
 - 15.2 An advance payment bond is usually issued to cover the sum paid in advance by the employer and is intended to provide the employer with some protection in the event that the advance payment is effectively lost if the contractor becomes insolvent before any works are carried out.

⁷ Simon Carves Limited v Ensus UK Ltd [2011] EWHC 657 (TCC)



Secondary obligations

- 16 Secondary obligations are far more common in relation to domestic construction projects in the form of a bond or guarantee that provides security to A, only in the event that as against B, A can establish a default and a sustained loss. The obligation is secondary because it depends for its existence upon a liability arising under the principal contract. In the construction field instruments creating secondary obligations are most frequently described as 'default bonds', or 'performance bonds'. In this paper I shall use the description "conditional bonds" to describe these types of instruments in the sense that C's secondary obligations will only be triggered on condition that certain prescribed events occur.
- 17 Parent company guarantees are a typical example of a secondary obligation - the parent guarantees the performance of the subsidiary but is only required to take action if the subsidiary causes the employer to sustain a loss.
- 18 It can immediately be seen that this type of arrangement does not create the significant advantage presented by on demand bonds. The potential for abuse is not there because the payment cannot be released until the breach and the loss have been established which will ordinarily entail some form of due process such as adjudication or arbitration, where B will have a chance to fight its corner.
- 19 Insofar as conditional bonds require C to make good the loss sustained by A if B defaults, conditional bonds are a form of guarantee. As such there are a number of legal principles derived from the law of guarantee that are applicable to conditional bonds, including as follows:

Formality

- 20 The rule that a guarantee must be signed and in writing to be enforceable dates back to section 4 of the Statute of Frauds 1677. Put another way, a guarantee that is only provided verbally (along the lines of Mr Biffa Bloggs' colourful statement) is useless. In *Actionstrength v International Glass Engineering*⁸ a subcontractor sought payment directly from the employer where the main contractor had become insolvent. The subcontractor's claim was brought on the basis that the employer had said that the subcontractor should carry on working and that the employer would ensure that he got paid. The sub-contractor's claim failed on the basis that the apparent "guarantee" by the employer in respect of the main contractor's payment obligations had not been recorded in writing and so could not constitute an enforceable guarantee.
- 21 Note however that the requirements of the Statute of Frauds may be satisfied by e-mail exchanges. In *Golden Ocean Group v Salgaocar Limited*⁹ the Court found that an e-mail chain was not too disjointed as to comprise a written guarantee and that where the e-mails bore electronic signatures, this was sufficient for the purposes of section 4 of the Statute of Frauds to produce a binding guarantee.

Co-extensiveness

- 22 This principle underpinning guarantees provides that C shall have no greater liability to A than B would have had. This rule obviously acts to the advantage of C who can make use of any defences to claims advanced by A that B could

8 *Actionstrength Ltd (trading as Vital Resources) v International Glass Engineering In.Gl Spa and others* [2003] BLR 207

9 *Golden Ocean Group Limited v (1) Salgaocar Mining Industry PVT Ltd; and (2) Mr Anil V Salgaocar*. See CILL May 2011 at page 3022.



have used. By contrast under a primary obligation the extent of C's liability to A is dictated solely by the wording of the document.

Variation of the principal contract

- 23 One of the basic rules of a guarantee is that any variation in the principal contract can discharge C from liability. This rule was established in the 19th century case of *Holme v Brunskill*¹⁰ in which it was held that:

"... if there is any alteration to the terms of the guaranteed contract, the surety ought to be consulted and his consent sought. If the surety does not consent then the surety is discharged... except in cases where it is self-evident that the alteration is unsubstantial or must be beneficial to the surety."

- 24 Again, this rule does not apply to on-demand bonds because a contract creating primary obligations operates independently of the principal contract.
- 25 In the real world contractual obligations may be revised from time to time. All the more so under construction contracts that will specifically provide for varied works. In order to prevent even de minimus variations from discharging the guarantee obligations, the following wording or similar should usually be present in any conditional bond:

"The Guarantor shall not be discharged or released by any alteration of any of the terms, conditions and provisions of the Contract or in the extent or nature of the Works and no allowance of time by the Employer under or in respect of the Contract or the Works shall in any way release, reduce or affect the liability of the Guarantor under this Guarantee Bond"

- 26 These provisions are often referred to as 'indulgence clauses' but if substantive changes are made to the principal contract that may potentially prejudice the interests of C then the indulgence clause may not be watertight. Where variations are significant it is important to consider the impact they may have on any guarantee whether in the form of a conditional bond or a parent company guarantee.¹¹ It is always therefore advisable to secure C's consent when contemplating any major changes to the principal contract.
- 27 In the construction context, a very recent example from the Courts illustrates the risks for the employer contemplating extra contractual arrangements, even with the best possible motives, without having first informed the guarantor.

- 27.1 The Hackney Empire Theatre obtained a performance bond from Aviva guaranteeing the performance of Sunley Turiff Construction who had been engaged to renovate the theatre complex. Various claims were submitted by Sunley and the Theatre agreed to make advance payments of up to £1m under a side agreement. Aviva did not consent to this side agreement nor were they invited to be involved in the negotiations. Sunley subsequently went into liquidation and the theatre claimed from Aviva the £750,000 paid out in advance under the side agreement. Aviva rejected these claims arguing that this case fell within the rule in *Holme v Brunskill*.

- 27.2 After extensive argument, the court decided in favour of the Theatre finding that on the facts, the rule in *Holme v Brunskill* did not apply where the side agreement did not amount to a material alteration to the terms of the building contract

10 (1878) 3 QBD 495

11 In *Marubeni Hong Kong and South China Ltd v The Mongolian Government* [2004] EWHC 472 (Comm) Mr Justice Creswell noted that "The question whether an alteration is insubstantial or cannot be prejudicial to the surety is answered objectively without reference to what the parties thought."



and that to the extent that the side agreement varied the terms of the building contract those variations were beneficial to Aviva. However, the court also noted the general principle that if the Theatre had acted in a manner in relation to the building contract which, whilst not amounting to a variation of its terms, was prima facie prejudicial to the insurer, Aviva would have been discharged from its obligations under the guarantee.

- 27.3** It took the Theatre some 7½ years to obtain this decision and no doubt a lot of stress and legal costs, (that could not be recovered 100% from Aviva). With hindsight it would have been a lot easier to involve Aviva at outset. Maybe Aviva might not have been willing to agree the specific terms of the side agreement but leaving them out of the picture entirely presented Aviva with solid grounds to maintain a respectable argument that the guarantee was to be treated as fully discharged.
- 28** This caution against varying the principal contract reflects the importance of making sure that the surety contract covers the scope of the work intended under the principal contract. Hence it is useful as an aside to consider how conditional bonds may be affected by more modern procurement routes such as framework agreements.
- 28.1** The main advantage of these arrangements is to allow flexibility in that contracts are “called off” as and when the employer wishes during the framework period with the intention that certain aspects of the works are agreed in advance. In setting up this type of arrangement it is important to consider how any guarantee is drafted.
- 28.2** Framework arrangements in the private sector¹² do have a tendency to “creep” beyond the scope of what was originally intended at the outset, particularly if the first projects are brought to a successful conclusion. The contractor’s work scope may well extend beyond that guaranteed by any conditional bond and to the extent that this development materially changes the contractor’s obligations, the guarantor may be discharged. Again, you need to pay careful attention to the wording of the framework agreement. Often, they are written so that the contract between the parties for the actual work is a separate contract from the framework agreement itself. Any conditional bond will need to take account of this.

What can go wrong?

- 29** I have talked of primary and secondary obligations but in practice these are not mutually exclusive. For example the employer may attempt to improve his or her position by attempting to introduce primary obligations into what was supposed to be a secondary obligation instrument. Conversely the contractor may attempt to water down the potentially drastic effect of an on demand bond by introducing pre-conditions to making a demand. The extent to which these efforts succeed will always depend upon the facts of each case and the wording finally obtained, but any uncertainty is likely to give rise to disputed interpretation that may ultimately require a judge to pronounce upon, years and pounds later.
- 30** For example:
- 30.1** The wording of an on demand bond may require the notice of demand to include copies of warning notices served on the contractor or a simple statement from the architect/engineer that the contractor is in default.

¹² Public sector frameworks are subject to EU Law which restricts, amongst other things, the duration of the frameworks.



This wording should not detract from the bond being an on-demand bond, as all these provisions do is add to the administrative steps that are required to trigger payment. There is no suggestion that any default on the part of the contractor or loss on the part of the employer needs to be proved.

- 30.2 Conversely, take the position where what is stated to be an on-demand bond includes a provision along the following lines::

"The Guarantor guarantees to the Employer that in the event of a breach of the Contract by the Contractor the Guarantor shall discharge on demand the damages sustained by the Employer as established and ascertained pursuant to and in accordance with the Building Contract."

The words "sustained" and "established and ascertained pursuant to and in accordance with the Building Contract" all carry with them the suggestion that some proof of loss is required and would in my view be more than enough to deal with any counter-argument that the words "on demand" made this an on demand bond conveying primary obligations.

- 31 Some real and recent examples of disputes over surety contracts are as follows:

- 31.1 In the Australian case of Clough Engineering Limited v Oil and Natural Gas Corporation Limited¹³ the wording in the construction contract provided that Clough was to provide an unconditional and irrevocable bond and ONGC would have the right to claim an amount up to 10% of the value of the contract "in the event of the Contractor failing to honour any of the commitments entered into under this contract". The wording of the bond itself provided for the bank to pay immediately on first demand: "on breach of contract by the Contractor without any demur, reservation, contest or protest or without reference to the Contractor." Clough maintained that the wording in the contract prevented a demand being made and that ONGC had to prove breach on the part of Clough before a claim could be made on the bond. The Judge at first instance rejected this and held that it was sufficient for ONGC to call the bond where it had a make a demand bona fide belief that Clough was in breach. When both the contract and the bond were considered together it was clear that a claimed breach of contract was sufficient to trigger payment under the bond. This decision was upheld on appeal.

- 31.2 In Enka Insaat VE Sanayi A.S. v Banca Popolare Dell'Alto Adige SpA¹⁴ the guarantees for the subcontractor's performance were stated to be "on demand" and any demand made required Enka to state that the subcontractor had failed to fulfil its obligations under the sub-contract and that Enka was accordingly entitled to payment, payment to be made without proof or conditions. The bank argued that the demands were made fraudulently where Enka had no honest belief that the subcontractor was liable to repay the demanded sums. The court found that on a proper interpretation of the Guarantees, Enka was not required to state or believe that it had suffered damage when making a demand. Hence the demands were valid and had to be honoured.

- 31.3 In Vossloh Aktiengesellschaft v Alpha Trains (UK) Ltd¹⁵ the court found that a guarantee did not give rise to any liability to pay against a mere assertion of breach or failure to pay money. On a proper interpretation the guarantee assumed that there had been default by the contractor in performing the contract or in making payment of

13 [2008] FCA FC 136 (22 July 2008)

14 See CILL November 2009 at page 2777.

15 [2010] EWHC 2443 (Ch)



a sum that was due. The court confirmed the position that where the instrument is issued by an entity that is not a bank there will be a presumption that it will not give rise to primary obligations by the mere use of the words “on demand”.

- 32 These examples all concerned disputes over whether primary or secondary obligations were created. However, bond and guarantees are types of contract and clarity and mutual understanding of the parties’ rights and obligations are essential requirements of any contract under English Law. In reality, disputes can arise where any of the material provisions are unclear but for the purposes of illustration we can look at two important examples:

32.1 What events are covered by the guarantee?

32.2 How long does the guarantee last?

What events are covered by the guarantee?

- 33 In a conditional bond it will be important to make sure the wording is clear as what amounts to a default. The case of *Perar v General Surety*¹⁶ provides an example of what can happen if the wording is unclear as to whether or not insolvency per se amounts to a default. In this case, the building contract was terminated because the contractor went into administrative receivership. The contract was the JCT Standard Form of Building Contract with Contractor’s Design 1981 Edition. Clause 27.2 provided:

“In the event of the Contractor having an administrative receiver, as defined in the Insolvency Act 1986, appointed the employment of the Contractor under this Contract shall be forthwith automatically determined”

- 34 The employer made a call on the bond but the Court of Appeal held that the employer could not treat the automatic determination of the employment of the contractor as an act of abandonment of the contract amounting to repudiation. This was because the contract expressly set out what was to happen in such circumstances and set out what liability each party had to the other. It is for this reason that a well drafted conditional bond should always make clear that termination in the event of insolvency is a default.

How long does the guarantee last?

- 35 Equally it will be important to make clear when the obligations are to come to an end. Some conditional bonds are expressed to be for specific periods and others come to an end at stated times or on a date that may be fixed by reference to the principal contract. If the expiry date is not made clear then this may lead to disputes at a later stage. For example if a conditional bond is issued to guarantee a building contractor’s performance does the guarantee end at practical completion, at the end of the DLP or does it extend to cover any subsequently discovered latent defects for which the contractor may be liable in accordance with the building contract. Note that in the absence of any express terms it is not thought that there is any implied right to require the employer to release the guarantor upon completion of the works.

¹⁶ *Perar BV v General Surety & Guarantee Co Limited* (1994) 66 BLR



Issues to consider when negotiating surety contracts

- 36 As with any contract, certainty is the key but it will be obvious from what I've said above that confusion over bonds and guarantees may start at the negotiating stage, for example:

Employer: We're going to accept your tender but we want a bond."

Contractor: "What sort of bond?"

Employer: "A guarantee."

Taken at face value this exchange leaves neither party much the wiser as to what is required.

- 37 Those proposing a bond or guarantee should have a draft form of wording available. This should be a useful starting point but the form of wording tabled may be a something used previously – a precedent – that is regarded as being "tried and tested". Precedent forms are only tried and tested to the extent that they have not been analysed by a Court and found to be wanting. It is entirely possible that a precedent form may have been used previously without those signing it have ever fully understood its effects. It is therefore important to approach precedents with caution.
- 38 Some general points ought to be considered on first review of a draft form of wording for a bond or guarantee:
- 38.1 Does the text include phrases like "on-demand", "without proof or condition", "primary obligor" and "indemnity"? (These will obviously point to an intention to impose a primary obligation).
- 38.2 Is it intended that the guarantee or bond is to be issued by a bank (or by a specific bank) or by a parent company?
- 38.3 Does the wording mention a fixed or maximum value of the security required?
- 38.4 Does the wording read like something out of a Dickens novel?
- 38.5 Is there apparent evidence of amendment of a standard form?
- 39 I would say that the priority when being presented with a draft document should be to establish whether or not the employer is looking for security in the form of a primary or secondary obligation. In my view any request for an on demand bond in a domestic context should firmly resisted. If the employer wants an on demand bond, then the employer should be asked to fully justify why it feels the need to have such a potentially drastic security option. At the very least the contractor should counter offer a conditional bond as a reasonable alternative or seek to negotiate down the maximum sum recoverable. (In the Edward Owen case the sum covered was for 10% of the contract price). If there is no alternative and you are required to provide an on demand bond then the best you can probably do is to be aware of the potential risk imposed by such an arrangement. (In Edward Owen Lord Denning observed that it would make sense for the contractor to regard the amount secured by the on demand bond as being a discount on the price!)



- 40 Turning to the small print, as with any other contract the general question to think about when considering the detailed terms and conditions is something like: *"Does the wording clearly describe the obligations of the parties and prescribe the outcomes for all of the relevant eventualities?"* If the employer wants a primary obligation and the contractor is willing to concede this then it is in the interests of both parties to make sure this is clearly expressed so that future disputes may be avoided.
- 41 Thus it is important that the small print is consistently clear (ambiguity leads to arguments) as to the following issues:
- 41.1 The nature of the obligation imposed.
 - 41.2 The period over which the obligation is to be maintained and/or the expiry date.
 - 41.3 The maximum or aggregate maximum sum payable.
 - 41.4 The mechanism by which notice of demand is to be provided.
 - 41.5 What amounts to a default?
 - 41.6 If it is necessary for a loss to be "sustained" and how that sustained loss is to be proved.
 - 41.7 Those events that will discharge the guarantor's obligations.
 - 41.8 How disputes are to be resolved and pursuant to what law (just in case).
- 42 If there is uncertainty over any of these points then you may well find yourself in the nightmare scenario described at the start of this paper and your dispute may become one of the cases to be cited under the heading "What can go wrong" in future seminars on bonds and guarantees.

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