Neutral Citation Number: [2013] EWHC 3201 (TCC)
Case No: HT-13-370

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Rolls Building, 7 Rolls Building
London EC4A 1NL
24 October 2013

B e f o r e :

MR. JUSTICE EDWARDS-STUART

Between:

Doosan Babcock Limited
(formerly Doosan Babcock Energy Limited) **Claimant**

- and -

Comercializadora de Equipos y Materiales
Mabe Limitada
(previously known as Mabe Chile Limitada) **Defendant**

Steven Walker Esq, QC & Miss Serena Cheng
(instructed by Pinsent Masons LLP) for the Claimant
Stephen Dennison Esq, QC
(instructed by CMS Cameron McKenna LLP) & Rupert Choat Esq for the Defendant
Hearing dates: 18th October 2013

Mr. Justice Edwards-Stuart:

1. On 4 October 2013 I granted the Claimant an interim injunction to restrain the Defendant ("MABE") from making a call on two performance guarantees. The injunction was granted for 14 days and so there was a further hearing on 18 October 2013, at which MABE was represented by Mr. Stephen Dennison QC, instructed by CMS Cameron McKenna and Mr. Rupert Choat.

2. MABE applied to discharge the injunction on the grounds that the Claimant's case was misconceived as a matter of construction of the contract and that, in any event, it was necessary for the Claimant to show that it had an arguable case that MABE's refusal to issue Taking-Over Certificates was not done in good faith and that it had not done so.

3. The Claimant was represented by Mr. Steven Walker QC (as before), together with Miss Serena Cheng. At the conclusion of the hearing I said that I would extend the injunction until 6 pm on Monday, 21 October 2013, by which time I would have reached a decision as to whether or not the injunction should be continued. The application raises a number of questions which, the hearing being on a Friday afternoon, the parties were, somewhat inevitably, unable to argue as fully as one would have liked.

4. The background to the hearing of the application on 4 October 2013, which was made on a without notice basis (although MABE was represented), is set out in my judgment dated 11 October 2013. This judgment should be read in conjunction with that judgment, but for the convenience of the reader, I will repeat briefly the background to the dispute that gave rise to the application.

The background

5. The two performance guarantees the subject of this dispute are "on-demand" guarantees, so the banks concerned are required to pay on receipt of a demand by MABE that complies with the requirements of the guarantees. The application arises out of a contract by which, essentially, the Claimant agreed to supply two boilers for a power plant in Brazil. The performance guarantee in relation to each unit expires either on the issue of a Taking-Over Certificate for that unit or, under the current letters of guarantee, 31 December 2013, whichever is earlier.

6. The Claimant's case is that it was entitled to Taking-Over Certificates when the boilers were taken into use by MABE, which it says happened on 30 November 2012 for Unit 1 and on 10 May 2013 for Unit 2. By two letters dated 10 July 2013 the Claimant requested the issue of the Taking-Over Certificates. MABE refused, relying on a provision in the contract which, it says, permits it to withhold a Taking-Over Certificate where the unit has been used by the employer only as a temporary measure in accordance with the terms of the contract or by agreement of the parties.

7. The Claimant submits that this ground for withholding these certificates is spurious. The evidence, which in this respect is largely a matter of public record, shows that the units have been in commercial operation for several months, since when they have exported more than 7,500 hours of power at various loads to the local grid.

The background

8. Mr. Dennison did not challenge the jurisdiction of the court under section 44 of the Arbitration Act 1996 to grant interim relief in the circumstances of this application, and the points taken in relation to service at the previous hearing were no longer pursued. If I may say so, these were sensible and realistic concessions. His submissions were directed to the question of whether or not there was any material to support the Claimant's case that MABE's refusal to issue the Taking-Over Certificates was a breach of contract, still less a breach of contract that was committed in bad faith.

9. He also submitted, and I accept, that the court has no jurisdiction to make binding findings of fact or to construe the contract between the parties when they have agreed expressly that any disputes will be determined by arbitration in London.

10. I must therefore make it absolutely clear that anything that I say in the rest of this judgment is not to be taken either as a finding of fact or as a determination of a point of law that is intended to be final and binding on the parties. As I said in my first judgment (see paragraphs 42-43) the consideration for the court at this stage is whether or not the Claimant has shown a strong case that MABE's refusal to issue the Taking-Over Certificates is a breach of contract, alternatively that it has a reasonable prospect of showing that it was a breach of contract.

11. Accordingly, and in particular, nothing that I say in this judgment is intended to be binding upon the arbitrators whose task it is to determine any dispute between the parties. The role of the court is limited to the question of whether or not the Claimant is entitled to interim relief. For the avoidance of any doubt, if in this judgment I express any conclusion about the underlying dispute that is in terms that might be thought to be binding on the parties, that is not how it is to be read.

The submissions at the hearing: does the Claimant have a strong case?

12. Mr. Dennison confined his submissions to the merits of the Claimant's case and the law relating to the grant of interim relief in cases involving performance guarantees. He submitted that the Claimant's case was misconceived because it was based on a misunderstanding both of the contract and of MABE's position. It is not arguable, he submitted, that the Claimant was or is entitled to the Taking-Over Certificates. At paragraphs 12 and 13 of his skeleton argument he made these submissions:

> "12. The Contract required [the Claimant] to design supply and deliver the two boiler units and to provide technical services including those required for Tests on Completion to be undertaken; see in particular the scheme for completion at clauses 7-10 of the Contract and Appendix 7. Note in particular clauses 7.4, 8.2 and generally clauses 9 and 10.
>
> 13. In essence completion, Taking-Over by MABE, was to occur after the Tests on Completion (including the Performance Tests) had been satisfactorily completed. Post delivery of the boiler units completion of [the Claimant's] scope of works was dependent on the installation of the boilers themselves, completion or sufficient completion of the wider power plant, commissioning and testing. Completion was therefore dependent on performance by [the Claimant] and by others including MABE and the regulatory authorities; see generally the statement of Mr. Travassos at paragraphs 3 to 5 inclusive."
>
> (Original emphasis)

13. The expression "Tests on Completion" is defined in clause 1.1.3.4 of the contract in the following terms:

> "'Tests on Completion' means the tests which are specified in the Contractor's Proposals or agreed by both Parties or instructed as a Variation, and which are

carried out under Clause 9 [*Tests on Completion*] before the Works or Section (as the case may be) is taken over by the Employer."

The definition of the term "Tests after Completion" is stated not to be used. This is reflected in the fact that clause 12, which concerns Tests after Completion, is deleted in its entirety.

14. Clause 9.1 of the original standard form was also deleted in its entirety. That clause stated that the Tests on Completion included pre-commissioning and commissioning tests and trial operation. In its place was substituted the following:

> "The Contractor shall carry out the Tests on Completion set out in the Project Quality and Inspection Plan set out in the Contractor's Proposals in accordance with this Clause and Sub-Clause 7.4 [*Testing*].
>
> The Contractor shall give the Engineer an opportunity to witness any of the Tests on Completion.
>
> The Contractor will notify the Employer of the performance testing procedure 36 months after the Commencement Date (or within such period as may be agreed between the parties).
>
> Unless otherwise agreed, the Employer will carry out the performance tests for the Works in accordance with the performance testing procedure notified by the Contractor within 14 days of being notified of the performance tests.
>
> If the Employer carries out the performance tests in accordance with the performance testing procedure notified by the Contractor the Contractor confirms that the Works will achieve the performance guarantees set out in Schedule 7 [Delay Damages and Performance Liquidated Damages Summary].
>
> …
>
> Notwithstanding anything to the contrary in the Contract, if performance liquidated damages should become payable these shall be the sole remedy for shortfall of performance and no other claims shall be entertained by the Employer, the Owner or any subcontractors of the Employer or the Owner.
>
> Performance liquidated damages are based on a 'no harm/no foul' principle for the Employer and/or the Owner, with the Contractor being able to benefit from overachievement in a performance guarantee to compensate any under achievement in another performance guarantee based on the performance liquidated damages rates set out in Schedule 7 [Delay Damages and Performance Liquidated Damages Summary]. Performance offsets are permitted between the three Units (i.e. the Units supplied under both the Pecem and Itaqui supply contracts).
>
> Notwithstanding anything to the contrary in this Contract, performance liquidated damages are only to be taken into consideration for coal firing.
>
> The maximum amount of performance liquidated damages shall not exceed 15% of the part of the Contract Price relating to the Unit in default."

15. Mr. Walker submitted that this amended wording introduced the concept of performance tests that were to be carried out by MABE after the Tests on Completion had been

satisfactorily carried out. The testing, he said, was in two parts. The first part was the pre-delivery test regime and the second part consisted of the performance tests. The Claimant's proposal document was exhibited to the witness statement of Mr. Bruno Travassos, who was MABE's Commissioning Coordinator for the project. That included a document entitled "Quality and Inspection Plan", which listed a number of checks and procedures culminating with the "End of Manufacture" and "Shipping Preparation". It was common ground that these were factory tests, all of which took place before the units were shipped. As Mr. Walker pointed out, that is why the second paragraph of clause 9.1 gave MABE, as the Engineer under the contract, the right to witness any of the Tests on Completion.

16. I can find nothing in clause 9.1, or indeed anywhere else in the contract, that refers to any "Test on Completion" other than the factory tests described in the Quality and Inspection Plan. The scheme of clause 9.1 in my judgment is that it is the employer who was to carry out the performance tests and the contractor guaranteed that the Works would achieve the performance guarantees set out in Schedule 7. Schedule 7 was in fact entitled "Appendix 7 - Summary of Liquidated Damages for Delay and Performance". It set out in a table the Performance Liquidated Damages, which identified the sums payable per relevant unit of performance (which varied according to the particular aspect of performance concerned) by which the actual performance fell short of the performance specified. However, the table did not show the specified performance for each aspect: that was to be found in section 4.1 of the Contractor's Proposals, which was entitled "List of Performance Guarantees".

17. Under the heading "Notes on Boiler Guarantees", it was stated that "Performance guarantee test conditions are as specified under Appendix-1". Under Note 5 ("Boiler Efficiency"), it was stated that the "boiler performance acceptance tests" would be carried out by the contractor. Appendix 1 set out the design operating conditions.

18. It seems to me to be clear that some, if not all, of these performance tests could only be carried out once the units had been put into use. Mr. Dennison accepted this: indeed, he asserted it because it was his case that successful completion of the performance tests was the trigger for the issue of the Taking-Over Certificate. Mr. Dennison relied on clause 8.2 which, he submitted, defines completion by reference to the tests required to be undertaken, not the more narrowly defined "Tests on Completion".

19. The difficulty with this submission is that "Time for Completion" is defined (by clause 1.1.3.3) as:

> "'Time for Completion' means the time for completing the Works or Section (as the case may be) under Sub-Clause 8.2 [*Time for Completion*], as stated in the Appendix to Tender (with any extension under Sub-Clause 8.4 [*Extension of Time for Completion*]), calculated from the Commencement Date."

An amendment to the contract provides that the "Time(s) for Completion are set out in Schedule 3". Schedule 3 is the Delivery Schedule. That schedule is a bar chart, showing the periods for the activities identified in the chart. Certain key dates in the chart have been amended, so that there are new dates for Unit 1 for the boiler hydro test; the boiler start-up and boiler commercial operation. The last of these dates is in month 41. No subsequent activities are described in the schedule. The provisions for

liquidated damages for delay set out in Appendix 7 relate solely to the agreed delivery dates for the equipment as shown in the contractual schedule. So the last event that can give rise to a claim for liquidated damages for delay is the putting of the boilers into commercial operation.

20. For the purposes of the present application it does not matter whether the "Time for Completion" under clause 8.2 is defined in clause 1.1.3.3 as delivery of the equipment or the date when Unit 1 went into commercial operation: both events occurred (for both units) well before the Taking-Over Certificates were requested in July 2013.

21. In the light of these considerations I do not consider that Mr. Dennison's submissions are well founded. Therefore I conclude that the Claimant has established a strong case that the Taking-Over Certificates were not dependent on completion of the performance tests. On the contrary, the scheme of the contract, as it seems to me, was that non-achievement of the performance specification did not trigger an entitlement to liquidated damages for delay, but rather to a stated sum for a particular degree of underperformance. If MABE's case is correct, the consequence of the failure to meet one of the performance requirements would be that the Works would never achieve completion and the Claimant would never be entitled to Taking-Over Certificates. In my view, it is strongly arguable that the remedy for non-achievement of the performance specification is the payment of the specified sum by way of liquidated damages and nothing else.

22. Accordingly, I do not consider that the able submissions of Mr. Dennison undermine my provisional conclusion that the Claimant has a strong case that it was entitled to Taking-Over Certificates at the time when it requested them in July 2013. If all the Claimant needs to show, in order to cross the threshold for interim relief, is that it has a strong case to the effect that MABE's failure to issue Taking-Over Certificates was (and is) a breach of contract, then it has done so.

The submissions at the hearing: did MABE act in good faith?

23. In this part of the judgment I will assume that the Claimant is not entitled to interim relief unless it has a realistic prospect of showing that MABE's refusal to issue the Taking-Over Certificates was not done with a *bona fide* belief in its entitlement to do so.

24. In its letter of 7 August 2013 MABE asserted that the Claimant had "not yet completed the Permanent Works relating to Units 1 and 2". It was asserted that until certain non-conformities in the work were resolved the Tests on Completion could not be carried out. The letter then continued as follows:

> "Section 10.2(a) of the Supply Contract states that the Employer shall not use any part of the Works <u>other than as a temporary measure for purposes stated in the Contract</u> before the issuance of the Taking-Over Certificate for this part, subject to such part being deemed to have been taken over as of the date of such use.
>
> The current use to which Mabe has put the works fits precisely the exception set forth in Section 10.2(a).

> Mabe is currently using the Works in the context of UTE Pecém's commissioning tests so as to make sure that the Units are able to operate in accordance with the requirements set forth in the EPC contract between Mabe and Porto do Pecém Geração de Energia SA. Following completion of such commissioning activities, Mabe will conduct the Tests on Completion in order to ensure that the Works satisfy the performance requirements set out in the Supply Contract. Such Tests on Completion are scheduled to occur on last week of August.
>
> Until the commissioning and the Tests on Completion on UTE Pecém 1shall have been completed, there is no room to argue that the Boilers for Units 1 and 2 have been taken over."
>
> (Original emphasis)

25. Even making due allowance for the fact that this letter was probably not written by a person whose mother tongue was English, the concept of a "temporary measure" in the context of this contract is, I would have thought, straightforward. The taking into use of equipment as a temporary measure implies that the arrangement will last for a short or limited time only. The Claimant has a strong case for saying that that cannot have been the case here. There has been no suggestion, so far as I am aware, that MABE intends to take either of the units out of commercial operation. In these circumstances I have difficulty in seeing how anyone could in good faith assert that the taking into use of the units by MABE in July 2013 was only a temporary measure.

26. I must emphasise again that this is not a finding that MABE has not acted in good faith: it is simply my conclusion that the Claimant has a realistic prospect of establishing this in the arbitration. It is not a claim that can be dismissed as fanciful.

The authorities

27. Mr. Walker submitted, correctly in my view, that injunctions concerning demands under performance bonds and guarantees have historically been treated differently to applications for other forms of interim injunction. The reason for this is that a performance guarantee stands on a similar footing to a letter of credit, and so in the same way the bank which gives a performance guarantee must honour that guarantee according to its terms. The bank is not concerned with the relations between the supplier and customer and whether or not the supplier has performed his contractual obligations: see, for example, *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159.

28. Mr. Walker accepted also that the same considerations have been held to apply as between the provider and the beneficiary of an enforceable bond or guarantee. In this context he referred me to *Group Josi Re v. Walbrook Insurance Co Ltd. and Ors* [1996] 1 WLR 1152, per Staughton LJ at page 801, and to the judgment of Philips J, as he then was, in *Deutsche Ruckversicherung AG v. Walbrook Insurance Co Ltd and Ors* [1994] 4 All ER 181, where he said:

> "I turn to consider Mr. Bartlett's submission that a different test falls to be applied where an injunction is sought against the beneficiary [rather than the bank]. It seems to me that the effect of Mr. Bartlett's submissions is to deprive

> the letter of credit of any special status so far as the beneficiary is concerned. If a beneficiary is to be held to be fraudulent if he draws on a letter of credit in circumstances where he is uncertain as to the validity of his right to payment under the underlying contract, the plaintiff seeking to enjoin him will have to do no more than persuade the court that there is a seriously arguable case that the claim under the underlying contract is invalid. This will rob the beneficiary of much of the benefit which a letter of credit is intended to bestow. Where a letter of credit is issued by way of conditional payment under an underlying contract, I do not consider it correct to imply a term into the underlying contract that the beneficiary will not draw on the letter of credit unless payment under the underlying contract is due. On the contrary, I consider that the correct contractual inference that should normally be drawn is that the beneficiary will be entitled to draw on the letter of credit provided that he has a bona fide claim to payment under the underlying contract. If this is correct, there is no basis for the suggestion that the court should apply a different test when considering an application to restrain a beneficiary, rather than a bank, from effecting payment under a letter of credit".
>
> (Mr. Walker's emphasis)

29. Mr. Walker submitted that the need to show fraud before an injunction would be granted in this type of case meant that, in the absence of fraud, an applicant for an injunction would have no realistic prospects of success because there would not be a serious issue to be tried within the meaning of the *American Cyanamid* test.

30. However, he submitted that the position is different where the Claimant can put in issue the validity of the guarantee or the beneficiary's right to make a call on it, as May LJ explained in *Sirius International Insurance Co (Publ) v FAI General Insurance Ltd* [2003] EWCA Civ 470, [2003] 1 WLR 2214. That was a case in which the parties had expressly agreed that the beneficiary (Sirius) would not draw down under a letter of credit unless one of two stipulated conditions was fulfilled. At paragraph 26 May LJ said this:

> "… this is the autonomous nature of letters of credit. By means of it, banks are protected and the cash nature of letters of credit is maintained. There is no authority extending this autonomy for the benefit of the beneficiary of a letter of credit so as to entitle him as against the seller to draw the letter of credit when he is expressly not entitled to do so."

And at paragraph 33:

> "This result may, as Mr. Vos suggested, be contrary to one view of the merits. But another view is that Sirius should not, as between themselves and FAI, be regarded as entitled to do that which they expressly agreed not to do".

31. These are types of case, as Mr. Walker effectively submitted, where the parties have agreed expressly that the beneficiary's entitlement to make a demand on the guarantee was either qualified or would be extinguished if certain events occurred. Where this was the case, Mr. Walker submitted, in order to obtain an interim injunction a claimant

would only have to show that he had a realistic prospect of proving that, in the events that had occurred, the beneficiary could not make a demand on guarantee.

32. A case where the claimant was able to show this was *Simon Carves v Ensus UK* [2011] BLR 340, a decision of Akenhead J. In that case the contract provided that the bond was to become null and void upon the issue of an Acceptance Certificate, save in respect of pending or previous claims. An Acceptance Certificate had been issued, but a dispute arose over whether any claims were pending or had been previously notified by the time of its issue. I discussed this case in my previous judgment, and I will not repeat what I said about it. The principle stated by Akenhead J was that if the underlying contract, in relation to which the bond had been provided by way of security, clearly and expressly prevented the beneficiary from making a demand under the bond, he could be restrained by the court from making such a demand.

33. Mr. Dennison submitted that, in the absence of a clear case of fraud, the court should refuse to restrain a bank from making a payment in response to a call, and that the same applied where the application was made to restrain the beneficiary from making a call on the bond. He submitted that the *Ensus* case was unhelpful, because in that case the relevant completion certificate had already been issued so that there was no right to call on the bond. He submitted that there was a critical distinction to be drawn between a situation where, on the one hand, the party has expressly agreed that it has no right to call on the bond, and on the other, where the court would have to determine disputes in respect of the underlying contract in order to determine if the claim could properly be made.

34. In the *Ensus* case, when giving his decision following the first hearing of the application for interim relief, Akenhead J said this:

> "But what I am concerned to consider is the relationship between the Contractor and the Purchaser, which is a contractual one and the extent to which under the terms of the contract in the light of the facts which are said to have happened (or not happened, as the case may be) whether this call, this demand, could legitimately have been made. In the ordinary course of events and historically a court of equity, and indeed now any court, can act by way of injunction to enjoin a party who is about to commit or is committing a breach of contract to prevent that occurring. Of course I cannot decide today whether there is a breach of contract. All I can decide is as to whether there is at least a reasonably good or good arguable case or at least on the argument as it is run today, a serious issue to be tried for Cyanamid purposes, whether there is a sufficiently good argument."
>
> (Emphasis added)

35. In my view it is clear from that passage that Akenhead J was concerned with whether or not there had been a breach of the underlying contract. The position in this case seems to me to be virtually indistinguishable.

36. I accept that this decision has extended the law, but in my view it has done so adopting a principled and incremental approach that does not undermine the general principles applicable to interim injunctions to restrain a party making a call on a bond. I adhere to

my original view that this decision justifies the grant of interim relief in this case if the Claimant can show a strong case.

37. But if I am wrong about this, I consider that the same result can be reached by another route. In *Alghussein Establishment v Eton College* [1991] 1 All ER 267 the leading speech was given by Lord Jauncey, with which all other members of the House agreed. The case concerned the construction of a provision in an agreement for a lease, but the case raised the general question of the extent to which a party could be permitted to benefit from his own wrong. At page 273 Lord Jauncey said this:

> "[Counsel] for the appellants submitted that the *New Zealand Shipping* case [1919] AC1 and all the other relevant authorities were concerned with questions involving avoidance of a contract and they had no application to a case such as this where the continuance of that contract was involved. There was, he said, a fundamental difference between a provision which allowed the party to rely on his own wrong to avoid a contract and a provision which entitled him to enjoy a contractual benefit because of his wrong. I do not consider that this argument is sound. Although the authorities to which I have already referred involve cases of avoidance, the clear theme running through them all was that no man can take advantage of his own wrong. There was nothing in any of them to suggest that the foregoing proposition was limited to cases where the parties in breach were seeking to avoid a contract and I can see no reason for so limiting it. A party who seeks to obtain a benefit under a continuing contract on account of his breach is just as much taking advantage of his own wrong as a party who relies on his breach to avoid a contract and thereby escape his obligations."

A little later, on page 274, he said this:

> "… there remains the question whether, in the words of Lord Diplock in *Cheall's* case [1983] 2 AC 180, 189, the agreement contains clear express provisions to contradict the presumption that it was not the intention of the parties that either should be entitled to rely on his own breach in order to obtain a benefit. I find no such clear express provision. Although the proviso refers specifically to the wilful default of the tenant, it does not state that the tenant should be entitled to take advantage thereof. It is one thing for wilful default of a party to be made the occasion upon which a provision comes into operation but is quite another thing for that party to be given the right to rely on that default."

38. For the reasons that I have already given, I consider that the Claimant has a strong case that MABE's refusal to issue Taking-Over Certificates for Units 1 and 2 was and is a breach of contract. It is as a result of that breach, and only that breach, that MABE is in a position to make a call on the performance guarantees. If MABE had issued the certificates, the guarantees would have expired and so there would be no guarantee on which to make a call. If it is found by the arbitrators that MABE should have issued the Taking-Over Certificates when the Claimant requested them in July 2013, then in my view it must follow that the arbitrators will find that the performance guarantees had expired by the time that these proceedings were issued and would be entitled to make an interim award to that effect.

39. In the light of the principle established or recognised by the House of Lords in the *Alghussein* case, I cannot see how it would be just to refuse interim relief in a case where the defendant can only make a call on the bond by setting up a state of affairs which, on the material before the court, has a strong likelihood of being shown to be the direct result of his own deliberate breach of contract. For example, as in this case, where the continuing validity of the bond is solely the result of the absence of the Taking-Over Certificates, which in turn is said to be the result of the MABE's wrongful refusal to issue them.

40. I am content to agree with Akenhead J that, in a case involving a bond, a performance guarantee or letter of credit, the claimant will need to show a strong case that there has been such a breach of contract by the defendant. However, if the principle set out in the *Alghussein* case is in play, it may be that it would be sufficient for the claimant to demonstrate only that his case had a realistic prospect of success. Since in this case I am satisfied that the Claimant has a strong case, it is not necessary for me to decide this point.

My conclusion

41. I consider that the Claimant has made out its case for interim relief. There is a strong case that MABE's failure to issue the Taking-Over Certificates was a breach of contract. There is also a strong case that MABE is seeking to take advantage of its own breach of contract to derive a benefit, namely the continuing existence of the performance guarantees.

42. In addition, I consider that the Claimant has a realistic prospect of establishing that MABE's refusal to issue the certificates on the ground that the operation of the units was a temporary measure was not a *bona fide* position.

43. In these circumstances, I remain of the view that it is appropriate to grant interim relief in this case for the reasons that I gave in my earlier judgment, at least until 31 December 2013 when the performance guarantees would have expired in any event.

44. I therefore propose to continue the injunction in the same terms until one of the following:

> i) the arbitrators have heard and determined the issue of whether or not MABE's refusal to issue the Taking-Over Certificates was a breach of contract; or
>
> ii) further order.

45. I expect the Claimant to give an undertaking within 24 hours that it will use its best endeavours to assist the arbitral process and to enable the arbitrators to determine this issue as soon as reasonably practicable.

46. There is to be liberty to apply. If, towards the end of this year, it appears that the arbitrators will not be able to decide the issue before the bonds are due to expire, then MABE may apply to vary the order. I anticipate that a material consideration on such an

application will be whether or not the Claimant has arranged for the performance guarantees to be extended beyond 31 December 2013.

47. I will hear counsel, on a date convenient to the parties, on any other questions arising out of this judgment.
