

IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF BELIZE

CLAIM No. CV 214 of 2022

BETWEEN:

[1] BELIZE SOCIAL INVESTMENT FUND

Claimant/ 2<sup>nd</sup> Ancillary Defendant

and

[1] INSURANCE CORPORATION OF BELIZE LIMITED

Defendant/ 1<sup>st</sup> Ancillary Claimant

and

[1] WINSTON COLEMAN t/a MACK'S CONSTRUCTION

1<sup>st</sup> Ancillary Defendant/ 2<sup>nd</sup> Ancillary Claimant

**Appearances:**

E. Andrew Marshalleck, SC and Jaraad Ysaguirre for the Claimant/ 2<sup>nd</sup> Ancillary Defendant

Julie-Ann Ellis-Bradley for the Defendant/ 1<sup>st</sup> Ancillary Claimant

Magalie M Perdomo for the 1<sup>st</sup> Ancillary Defendant / 2<sup>nd</sup> Ancillary Claimant

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2023: May 2  
September 6  
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### DECISION ON PRELIMINARY ISSUES

[1] **FARNESE, J:** This dispute arises from a construction contract between Winston Coleman T/A Mack's Construction (Coleman Construction) and the Belize Social Investment Fund (the Fund) to

build the Corazon Creek Technical High School. The Insurance Corporation of Belize (ICB) provided surety for a performance bond (Bond) related to the construction contract. While the parties dispute how the construction contract came to an end, they agree that the contract ended before construction on the High School was completed. The Fund is seeking to call on the Bond, but Coleman Construction disputes that they were in breach of the contract. As a result, ICB argues that they are not obligated to pay the Bond until the Fund has proven that Coleman Construction breached the contract. The Fund disagrees and argues that ICB's obligation under the Bond is triggered by the Fund's declaration of the breach.

- [2] During the case management conference, the parties agreed to try the issue of the proper interpretation of the Bond as a separate, preliminary issue. ICB asserts that the Bond is more properly described as a conditional bond where a surety commits to pay when specific conditions are proven to exist. The Bond is not an unconditional or an on-demand bond that allows the Fund to call for payment upon the surety before breach of the construction contract and damages are proven. The Fund agrees that the Bond is not an unconditional or on-demand Bond but argues that the condition specified in the Bond that triggers ICB's obligation is the Fund's declaration, made in good faith (i.e. the default exists in fact), of Coleman Construction's default. The practical consequence of the court's decision will be a determination whether ICB must pay the Bond before or after any dispute concerning who was responsible for the construction contract not being completed on time is resolved.

## **Issues**

- [3] The Parties agreed to the following two issues to be tried separately as preliminary issues:
- a. Whether payment pursuant to the Performance Bond PB/0006138 is conditioned on both proof of an actual breach by the Contractor of the Contract of 18<sup>th</sup> May, 2020 and a declaration of default by the Employer?
  - b. Alternatively, whether payment pursuant to the Performance Bond PB/0006138 is conditioned solely on a declaration by the Employer that the Contractor is in default under the Contract of 18<sup>th</sup> May, 2020?

A third issue was not agreed to because the Claimant is not arguing that it is a demand bond but rather that the condition that triggers payment under the Bond has been met.

- c. Whether Performance Bond PB/ 0006138 is in the nature of a performance bond which requires a breach by the Contractor as a condition precedent to payment (i.e. conditional) as opposed to a demand bond which is payable upon demand by the employer without the need to establish default/ breach on the part of the Contractor (unconditional)?

## Analysis

- [4] The construction industry uses performance bonds as a guarantee of timely completion of projects. A bank or insurance company will issue the performance bond and will take a counter indemnity from the contractor.<sup>1</sup> These bonds can come into two forms – the conditional bond and the on-demand bond. As its name suggests, under a conditional bond payment is due when the beneficiary proves that conditions specified in the agreement exist. On-demand bonds require payment when the beneficiary makes a written demand without proof of default.<sup>2</sup>
- [5] To determine whether ICB's obligation to the Fund under the Bond is an on-demand or conditional bond, the court must look to the actual language used by the parties:<sup>3</sup>

The task of the court is to ascertain the objective meaning of the words used by the parties by reference to what a reasonable person, in the position of the parties, would have understood the parties to mean. The contract must be considered as a whole, and as such the court should not approach the task of construction by focusing too much on the individual words at the expense of the contract as a whole.

- [6] Neither party disputes that the proper construction of the Bond is as a conditional bond, however, the third issue asks the court to consider whether the Bond is on-demand or conditional.

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<sup>1</sup> Coleman Construction signed a counter indemnity with ICB.

<sup>2</sup> Johnston International Ltd. v. Clico International General Insurance Ltd. et al. BB 2008 CA 5 at para 23 [C/ico].

<sup>3</sup> Yuanda (UK) Company Limited v. Brookefield Multiplex Construction Europe Ltd. [2020] EWHC 468 (TCC) at para 37 [Yuanda].

- [7] In this case, ICB is named as “the Surety” in the document titled a “Performance Bond” for an amount not exceeding BZ\$387,453.62. ICB’s obligation to the Fund, named as “the Employer” in the Bond, is defined in the Bond as the following:

**Whenever the Contractor shall be, and declared by the Employer to be, in default under the Contract, the Employer having performed the Employer’s obligations thereunder, the Surety may promptly remedy the default or shall promptly:**

1. Complete the Contract in accordance with its terms and conditions; or
2. Obtain a bid or bids from qualified bidders for submissions to the Employer for completing the Contract in accordance with its terms and conditions, and upon determination by the Employer and the Surety of the lowest responsive bidder, arrange for a Contract between such Bidder and Employer and make as available as work progresses (even though there should be a default or succession of defaults under the Contract or Contracts of completion arranged under this paragraph) sufficient funds to pay the cost of completion less the balance of the Contract Price; but not exceeding, including other costs and damages for which the Surety may be liable hereunder, the amount set forth in the first paragraph hereof. The term “Balance of the Contract Price”, as used in this paragraph, shall mean the total amount payable by the Employer to the Contractor under the Contract, less the amount properly paid by the Employer to the Contractor; or
3. Pay the Employer the amount required by the Employer to complete the Contract in accordance with its terms and conditions up to a total not exceeding the amount of this bond.

The Surety shall not be liable for a greater sum than specified penalty of this bond. [emphasis added].

- [8] I find that the Bond is accurately described as a conditional and not an on-demand bond because the contract between the Parties clearly lists three conditions before the ICB is obliged to pay the Fund:

- a. The Coleman Construction is in default of the underlying construction contract;
- b. The Fund has declared that there is a default (and implicitly is calling on the Bond); and,
- c. The Fund is not in default of the underlying construction contract.

This finding answers the third issue - Whether Performance Bond PB/ 0006138 is in the nature of a performance bond which requires a breach by the Contractor as a condition precedent to payment (i.e. conditional) as opposed to a demand bond which is payable upon demand by the employer without the need to establish default/ breach on the part of the Contractor (unconditional).

- [9] The remaining analysis, therefore, must decide whether the first or second issue accurately reflects when ICB's obligations under the Bond are triggered. The central difference between the issue is that first issue would result in ICB waiting until the dispute between the Fund and Coleman Construction as to whether the underlying construction contract was breached is resolved before their obligations under the Bond would arise. The interpretation of the Bond reflected in the second issue would have ICB pay the Fund upfront.
- [10] I find neither issue accurately reflects when the obligation to pay is triggered because neither references proof that the Fund is not in breach of the underlying construction contract. This oversight is likely reflective of the fact that equity requires a claimant to come to court with clean hands. Nonetheless, any attempt to call on the Bond by the Fund must be made in good faith. Therefore, after reviewing the language of the Bond in context of the agreement as a whole, I find that where there is *prima facie* evidence of a default by Coleman Construction, and "in the absence of clear and obvious fraud,"<sup>4</sup> by the Fund, ICB is obligated to pay the Bond amount, or otherwise meet their obligations, upon the Fund declaring the default.
- [11] As previously explained, something more of than the Fund's declaration of default is needed to trigger the Bond because ICB's obligations arise "Whenever the Contractor shall be, **and** declared to be, in default under the Contract..." An interpretation that sees the dispute between Coleman Construction and the Fund over the cause of the default resolved before ICB is obliged to pay the Bond, however, is not supported on a plain reading of the Bond. The Bond reflects an agreement among the parties that timely completion of the construction contract was the primary purpose of the Bond.
- [12] Under the operative clauses of the Bond, ICB agrees to "remedy the default" in one of three ways: (1) by completing the contract themselves; (2) obtaining bids from others to complete the contract; or (3) paying the Fund "the amount required...to complete the Contract...to a total not exceeding the amount of this bond." All three options aim to ensure that the construction contract will be completed "in accordance with [the contract's] terms of conditions."

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<sup>4</sup> Clico at para 23.

[13] That ICB is relieved of its obligations under the Bond if Coleman Construction “shall **promptly** and faithfully perform the said Contract” add furthers supports to that interpretation. Likewise, where the Fund declares a default, ICB agreed to “**promptly** remedy” or “**promptly**” implement one of the three options described above. Having to wait until the dispute over the cause of the default has been adjudicated defeats the purpose of the Bond to facilitate the timely construction of the Corazon Creek Technical High School.

[14] Unlike the performance bonds considered by other courts in the authorities presented by the Parties in this matter, payment of “damages” in the Bond is a secondary obligation found only in option (2). The court in **Yuanda (UK) Company Limited v. Brookefield Multiplex Construction Europe Ltd.** found that the amount owing was an amount for damages that had to be ascertained by an adjudicator because the performance bond contained the following language:<sup>5</sup>

The Guarantor guarantees to the Contractor that in the event of a breach of the Contract by the Sub-Contractor, the Guarantor **shall subject to the provisions of this Guarantee Bond satisfy and discharge the damages sustained by the Contractor as established and ascertained** pursuant to and in accordance with the provisions of or by reference to the Contract and taking into account all sums due or to become due to the Subcontractor...[emphasis added].

[15] In **Trafalgar House Construction (Regions) Ltd. v. General Surety & Guarantee Co. Ltd.**,<sup>6</sup> the court similarly found that proof of damages was required to be found before payment of a bond was due because the bond contained the following language:<sup>7</sup>

...if on default by the subcontractors the surety **shall satisfy and discharge the damages sustained by the main contractor thereby up to the amount of the above written bond** then this obligation shall be null and void but otherwise shall be and remain in full force and effect...[emphasis added]

[16] In the Bond, only damages associated with having to find another contractor to complete the project are contemplated. The Bond does not contemplate paying damages for breach of contract

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<sup>5</sup> Yuanda at para 109.

<sup>6</sup> [1996] 1 AC 199.

<sup>7</sup> As quoted with approval in *Clico* at para 27.

generally. ICB is required to pay the amount to complete the contract before any dispute between Coleman Construction and the Fund over the cause of the default is resolved.

[17] This interpretation does not leave ICB without recourse, or the Fund with a windfall, if the dispute between the Fund and Coleman Construction is resolved in Coleman Construction's favor. That is the purpose of the Counter Indemnity agreement Coleman Construction signed with ICB. Coleman Construction will undoubtedly include the amount it is liable for under the Counter Indemnity in its claim for damages against the Fund.

### **Disposition**

[18] I find that where there is *prima facie* evidence of a default by Coleman Construction, and in the absence of clear and obvious fraud by the Fund, payment pursuant to the Performance Bond PB/0006138 is conditioned on a declaration by the Fund that the Coleman Construction is in default under the Contract of 18<sup>th</sup> May, 2020. Costs in this application are awarded in the cause.

**Patricia Farnese**  
**High Court Judge**