

COURT OF APPEAL

4 November 2008; 27 January 2009

GREENLAND BANK LTD
(IN LIQUIDATION)

v

AMERICAN EXPRESS BANK LTD

[2009] EWCA Civ 14

Before Lord Justice WARD,
Lord Justice HUGHES and
Lord Justice RIMER

Performance bonds — Performance bond provided by bank on behalf of another bank — Requesting bank entered into liquidation — Performance bond not renewed — Requesting bank seeking return of deposit — Whether performance bond had expired.

On 10 June 1998 Westmont Power (Bangladesh) Ltd (“Westmont”) had entered into a Power Purchase Agreement for the supply of electricity to the Bangladesh Power Development Board (“Bangladesh Power”) for a period of 15 years, concluding on 10 June 2013. It was a term of that contract that within 15 days of its execution, Westmont would provide Bangladesh Power with a performance bond (“the bond”, also referred to as “the guarantee”), in a form set out in schedule 11 to the contract which was to be a continuing security in the sum of US\$1.5 million to ensure Westmont’s obligations under the contract, including its obligations to pay liquidated damages. It was a term of the contract that Westmont maintain the performance bond at all times for 15 years until 10 June 2013. Schedule 11 stipulated that the guarantee would be valid for the full 15 years of the term of the contract and that it would be irrevocable and unconditional.

Westmont was a customer of Greenland Bank Ltd (“Greenland”), which carried on its banking business in Kampala in Uganda. Greenland was not itself a “scheduled bank” in Bangladesh and it had, therefore, to procure American Express Bank Ltd (“Amex”) to provide the performance bond against a deposit by Greenland of US\$1.5 million with Amex and annual commission of US\$15,000. Amex were not prepared to give a bond for the full 15 years and agreed to issue it with an initial validity of two years with yearly roll-overs thereafter, including this provision for renewal:

On 10th June 2000, this Guarantee shall expire. On such date this Guarantee shall become null and void, whether or not returned to us [Amex] for cancellation, unless we shall have agreed, on receipt of your [Bangladesh Power’s] written request therefor, not later than 1 month prior to such date, to renew this Guarantee for a further period of one year. Thereafter, this Guarantee may be renewed for successive periods of one year on the terms hereof, or on such other terms as we may from time to time agree, until 10th June 2013.

Before the date of the expiry of the guarantee, Greenland was placed in liquidation and on 3 April 1999 Deloitte & Touche were appointed receivers and later liquidators.

Although under the terms of the performance bond, Bangladesh Power was the person to request a renewal of the bond, Bangladesh Power did nothing but there was evidence that Westmont sent a fax requesting renewal dated 9 May 2000, which Amex denied having received.

In June 2000 Amex requested the return of the guarantee from Bangladesh Power and requested disposal instructions for the deposit from the Bank of Uganda. In July the liquidators of Greenland wrote to Amex requesting repayment of the deposit. Soon after, Amex wrote to Bangladesh Power stating that they were closing the books on the guarantee. They also wrote to the liquidators indicating their willingness to return the deposit. In the meantime, Bangladesh Power wrote to Westmont requesting remedial measures for the failure to maintain the performance bond. Westmont in turn wrote to Amex challenging the assertion that the guarantee had lapsed and threatening to bring a claim.

Westmont brought an action seeking declarations from the High Court of Bangladesh in Dhaka that Bangladesh Power was not bound to return the bond and that Amex extend or renew the bond. It sought a permanent injunction restraining Amex from demanding the return of the bond.

Bangladesh Power now requested the renewal of the bond. Amex sought instructions from the liquidators of Greenland, who refused the request in view of the fact that Greenland had stopped trading. In response, Amex explained that they were not able to return the deposit in view of the legal proceedings. They wrote to Bangladesh Power stating that they had received instructions not to extend the bond.

On 5 May 2004 the High Court in Bangladesh gave judgment in favour of Westmont. The appeal of Amex remained pending.

Before Evans-Lombe J, Greenland claimed against Amex for the return of the deposit of US\$1.5 million. The court dismissed the claim but gave permission to appeal, holding that: (1) under the law of Bangladesh, the applicable law of the bond, it had been found at first instance that the bond had been extended, and to challenge that finding it would be necessary for Amex to persuade the appellate court to accept new evidence. There was a likelihood that Amex would be unable to adduce further evidence so that there was a real prospect that the first instance court’s decision would be upheld; and (2) the wording of the bond did not exclude the possibility of the construction suggested by Amex in these proceedings that no annual renewals were required after 10 June 2001. It was a possibility that the bond would be rectified so as to exclude the requirement for the agreement of Amex to renewal.

Greenland appealed. Greenland had to show that the appellate court in Bangladesh would come to a different conclusion than the first instance court. Greenland contended first that for “complete justice” to be done as required by the Bangladesh constitution, the appellate court must take account of three Amex documents which revealed the true position. Secondly, it was wrong

to construe the bond to mean that, if it were renewed on 10 June 2000 then renewal subsequent to 10 June 2001 would occur automatically. Thirdly, there was no evidence of any antecedent agreement between Amex and Bangladesh Power that the bond was to remain in place until 10 June 2013 and consequently no ground for any rectification so as to exclude the renewal clause.

—Held by the Court of Appeal (WARD, HUGHES and RIMER LJ), that the appeal would be dismissed but the action would be stayed pending the outcome of the appeal in Bangladesh.

(1) There was a real prospect that the appellate court in Bangladesh would refuse to admit new evidence from Amex. If so, the findings of fact at first instance would lead to the conclusion that there had been a renewal of the bond (*see* para 27);

—Ladd v Marshall [1954] 1 WLR 1489, considered.

(2) Although on a true construction of the guarantee Greenland's arguments for annual renewal were to be preferred, there was a real prospect that the Bangladesh appellate court would uphold the conclusion at first instance that on a proper construction of the renewal clause the consent of Amex was required only for the initial extension from June 2000 but not thereafter, and that the guarantee would then become "irrevocable and unconditional" (*see* para 36).

(3) The rectification argument had no prospects of success in view of correspondence between the parties before the execution of the guarantee (*see* para 44).

—Per Hughes LJ: it would be wrong of English courts to pre-empt the decision in the litigation in Bangladesh by making the order sought by Greenland Bank unless the outcome of that litigation is plain. As things stood, the judgment was against Amex and thus against the claim made by Greenland in the present proceedings.

The following case was referred to in the judgment:

Ladd v Marshall (CA) [1954] 1 WLR 1489.

This was an appeal by Greenland against the decision of Evans-Lombe J wherein he declined to order the return of the deposit under the bond on the grounds that there was a real prospect that the decision at first instance of the court in Bangladesh would be upheld on appeal, so that the bond remained in force.

Gordon Bennett, instructed by Edwin Coe for the appellant; David Wolfson, instructed by Mishcon de Reya, for the respondent

The further facts are stated in the judgment of Ward LJ.

Tuesday, 27 January 2009

JUDGMENT

Lord Justice WARD:

In praise of forensic schizophrenia

1. This is the kind of litigation that could feed the public's worst perception of lawyers and the law. Jonathan Swift, author of *Gulliver's Travels*, once described lawyers as:

... a society of men ... bred up from their youth in the art of proving, by words multiplied for the purpose, that white is black, and black is white ...

and then he added maliciously:

... according as they are paid.

That calumny against the profession could perhaps be voiced in this case by a cynical observer of this litigation. Here Westmont Power (Bangladesh) Ltd ("Westmont") brought an action against American Express Bank Ltd ("Amex") in Bangladesh for a declaration, in effect, that a guarantee given by Amex had not expired. Amex resisted vigorously and claimed the return of the guarantee from the beneficiary. Amex lost. Now, in a complete volte-face, Amex have successfully contended before Evans-Lombe J in a claim brought against it here by Greenland Bank Ltd (in liquidation) ("Greenland") that they could have been wrong in that defence and that there is a real prospect that the Bangladesh court did decide the matter correctly against it. That is Amex's defence here notwithstanding the fact that back in Dhaka Amex still stoutly maintain their appeal against that decision on grounds that it is riddled with error. Riding two horses at the same time is always difficult enough: riding them when they are charging in opposite directions is an altogether remarkable feat, so let me begin by praising the skills of counsel for Amex, Mr David Wolfson, who with customary courtesy, cogency, and not a little charm, managed to stay in the saddle notwithstanding some hostile fire from at least this incredulous member of the court. He escapes all Swift's opprobrium. How did he manage it?

The background

The contractual arrangements

2. On 10 June 1998 Westmont entered into a Power Purchase Agreement for the supply of electricity to the Bangladesh Power Development Board ("Bangladesh Power") for a period of 15 years, concluding, therefore, on 10 June 2013. It

was a term of that contract that within 15 days of its execution Westmont would provide Bangladesh Power with a Performance Bond ("the bond"), sometimes, and probably inaccurately, referred to as "the guarantee", in a form set out in a schedule 11 to the contract which was to be a continuing security in the sum of US\$1.5 million to ensure Westmont's obligations under the contract, including its obligations to pay liquidated damages. It was a term of the contract that:

16.6.2 [Westmont] shall maintain the Performance Bonds at all times during the Term [of 15 years] from the full Commercial Operation Date; provided that [Westmont] may have 15 days to replenish the Performance Bonds so as to return it to the designated level, in the event that [Bangladesh Power] retains or collects funds from the Performance Bonds.

Schedule 11 stipulated that the guarantee would be valid for the full 15 years of the term of the contract and that it would be irrevocable and unconditional.

3. Westmont was a customer of Greenland, which carried on its banking business in Kampala in Uganda. Greenland was not itself a "scheduled bank" in Bangladesh and it had, therefore, to procure Amex to provide the performance bond subject, however, to Greenland depositing US\$1.5 million with Amex and agreeing to pay an annual commission of US\$15,000, being 1 per cent of the sum secured by the bond. Amex were not prepared to give a guarantee for the full 15 years and proposed to issue the bond with an initial validity of two years only with yearly rollovers thereafter. I shall have to examine the detail of these negotiations later in this judgment. For present purposes it is sufficient to record that the terms eventually agreed included this provision for the renewal of the bond/guarantee:

On 10th June 2000, this Guarantee shall expire. On such date this Guarantee shall become null and void, whether or not returned to us [Amex] for cancellation, unless we shall have agreed, on receipt of your [Bangladesh Power's] written request therefor, not later than 1 month prior to such date, to renew this Guarantee for a further period of one year. Thereafter, this Guarantee may be renewed for successive periods of one year on the terms hereof, or on such other terms as we may from time to time agree, until 10th June 2013.

4. Greenland procured the provision of the sum of US\$1.5 million which was held by Amex to the credit of Greenland and attracted interest on terms agreed between Greenland and Amex.

The renewal of the Performance Bond

5. Before the date of the expiry of the guarantee, Greenland was placed in liquidation and on 3 April 1999 Deloitte & Touche were appointed receivers of the bank and later liquidators.

6. Although under the terms of the Performance Bond Bangladesh Power was the person to request a renewal of the bond, Bangladesh Power did nothing but there was evidence that Westmont sent a fax dated 9 May 2000 to the London office of Amex, with a copy to Bangladesh Power, referring to the bond and saying:

We refer to the captioned matter and write to advise that the Beneficiary of the Guarantee, Bangladesh Power Development Board, requires that the Guarantee is to be renewed for a further period of one year up to June 10th 2001.

Kindly ensure that the necessary action is taken to ensure that the validity period of the Guarantee is extended before the current expiry date of June 10th 2000. The Bangladesh Power Development Board is to be advised of the renewal of the Guarantee.

Amex steadfastly deny ever having received that communication.

7. On the contrary, Amex faxed Bangladesh Power on 11 June 2000 in these terms:

Since the subject guarantee has expired, we absolve ourselves from all liabilities against this guarantee. All your rights to claim against the subject guarantee ceases [*sic*] to exist. Kindly return us the original of the said guarantee at your earliest. If the original guarantee cannot be traced by you please sign and return the statement below. Please treat this as most urgent.

8. On 27 June 2000 Amex wrote to the Bank of Uganda:

I can now confirm that our guarantee has expired without a claim and without a request for extension. As such, funds held by AEB London in support of this guarantee can now be released to the liquidators of Greenland Bank. With this in mind please let us have your disposal instructions for the deposit (USD 1.5 million plus accrued interest). I would like to point out that we have not yet taken our charges for the extension of this guarantee last year. Our fee of USD15,000 (1%) will be deducted from the funds held before they are paid to you.

9. On 7 July 2000 the liquidators of Greenland wrote to Amex calling for repayment of the deposit. On 10 July Amex wrote to Bangladesh Power reminding them of their request of the return of the original bond but concluding: "However as we do not have any liability under this we are closing our

books". On 17 July Bangladesh Power wrote to Westmont:

Pursuant to article 16.6.2 of the Power Purchase Agreement (PPA) the Company [Westmont] shall maintain the Performance Bond at all times during the term from the Full Commercial Operation Date. The Bank guarantee no 31/98 dated 25th June, 1998 for US\$1,500,000 issued by American Express Bank Ltd, 60 Buckingham Palace Road, London in favour of you has expired on June 13th [sic] 2000. Please note that failure of the Company to provide Performance Bond on [sic] a timely manner is clearly an Event of Default in respect of the Company as provided in article 14.1.I.(iii) of the PPA. You are therefore requested to take it as notice for remedial measure to be taken by you within the time as stipulated in article 14.4. of the PPA.

10. On 19 July 2000 Amex wrote to the liquidators indicating their willingness to return the deposit. By contrast on the same date Westmont wrote to Amex challenging their assertion that the bond had lapsed and threatening to bring a claim against Amex.

11. That claim was in fact issued in the High Court of Bangladesh for the district of Dhaka in which Westmont sought declarations against Amex in Bangladesh and in London that Bangladesh Power was not legally bound to return the original guarantee no 31/98 to the defendants as directed by Amex in its letter dated 10 July 2000. Westmont also sought a direction that Amex extend or renew the Guarantee for a further period of one year. It also sought a permanent injunction restraining the defendants from demanding the return of the guarantee.

12. In the light of that litigation Amex had to write to the Bank of Uganda on 10 August informing them that because the bond had become the subject of legal proceedings in Bangladesh, they were unable to release the deposit to the liquidators of Greenland.

13. Meanwhile on 8 August 2000 Bangladesh Power wrote to Amex as follows:

... this is to inform you that the said Bank Guarantee is required to be extended every year till 10.06.2013 as per article 16.6 of PPA with Westmont Power (Bangladesh) Pvt Ltd.

You are, therefore, requested to arrange the extension of Bank Guarantee with effect from 11.06.2000 to 11.06.2001 at the earliest.

14. On 21 August 2000 Amex wrote to the liquidators of Greenland drawing their attention to the request from "the beneficiary of the guarantee" to extend it for a period of one year and asking:

To enable us to adhere to their request we would appreciate if you could provide us with your instructions to do so.

On 22 August the liquidators refused to give those instructions on the ground that Greenland had ceased trading and no extension could be given. The letter continued:

We expect remittance of the matured deposit of US\$1.6 million. We have received a statement of our Amex account which indicates a debit of US\$15,000 dated 21st July 2000 as Guarantee commission. We insist that you reverse this debit because we are not renewing the Guarantee.

15. In response, Amex wrote a letter on 23 August which has assumed importance in this appeal because it was not put in evidence in the Bangladesh proceedings:

... With respect to your request for remittance of the deposit, as you may be aware, the guarantee is currently the subject of litigation in Bangladesh, involving ... American Express ... We are resisting these proceedings strenuously ... However, whilst these proceedings remain extant, we regret that we are not in a position to remit the deposit to you.

With respect to your request for a reversal of the debt [sic: should be "debit"] of US\$15,000 in respect of the Guarantee commission, we would clarify that this was for the period 1999/2000 and was therefore due in respect of the Guarantee whilst it was in force.

16. On the same date, 23 August 2000, Amex wrote to Bangladesh Power in answer to its letter of 8 August stating:

... The Guarantee expired on 10th June 2000 and in accordance with its terms any requests for extension or renewal had to have been received by us at least one month prior to that date. In addition, our customer (at whose request the guarantee was issued) has instructed us not to "extend" the guarantee.

We therefore regret that we are not in a position to extend the above guarantee.

The proceedings in Bangladesh

17. On 20 July 2000 Westmont began proceedings in the High Court in Dhaka seeking against Amex in Dhaka and Amex in London declarations that Bangladesh Power was not legally bound to return the original guarantee as Amex had requested in the letter of 10 July 2000; a direction that Amex extend or renew the guarantee for a further period of one year; and a permanent injunction restraining Amex from demanding the return of the guarantee.

18. Judgment was given on 5 May 2004. A translation of that judgment was placed before the court but it was common ground that the translation was unsatisfactory. The experts who gave evidence before Evans-Lombe J may have given him some help with it and he “paraphrased” what seems to be the most relevant passage as follows:

As admitted in this case the Defendant issued the disputed Guarantee no 31/98 dated 25/6/98 in favour of Bangladesh Power at the request of Greenland and the Bank of Uganda on the application of Westmont, a Guarantee limited to US\$1.5 million in favour of Bangladesh Power, in order to comply with the provisions of the Contract. Based on a construction of that Guarantee it was submitted on behalf of Westmont that the Guarantee which would otherwise expire on 10th June 2000 will have to be extended on the application of Bangladesh Power for one year and thereafter extended up to 10th June 2013. On an examination of the text of the Guarantee exhibited by the Defendant it appears that the disputed Guarantee will expire on 10th June 2000 but at the written request of Bangladesh Power its duration will be extended for one year. Thereafter it will be further extended year by year. It is to be noted that the last line of the Guarantee is to the effect that it will remain effective up to 10th June 2013 and that it was to be irrevocable and unconditional until that date. On a construction of the Guarantee it is established that it was to last for 15 years and that it was to be irrevocable and unconditional up to that date, notwithstanding that it would expire on 10th June 2000 unless extended to June 2001.

19. The gist of the reasoning seems to be that the district judge in Dhaka found that the fax of 9 May 2000 was not a forgery, that it was sent by Westmont to Amex and received by Amex and that it constituted a written request for an extension of the bond for a further year. Amex’s agreement to the extension was to be implied from their apparently debiting Greenland’s account on 21 July 2000, ie after the bond would otherwise have expired, with a further annual fee of US\$15,000 as if for the year 2000 to 2001 (see the letter of 22 August at para 14 above).

20. The order made by the judge at the conclusion of that hearing declared that Bangladesh Power was not legally bound to return the guarantee as per the direction of the letter of Amex dated 10 July 2000 and further directed Amex to extend the duration of the guarantee for one year and to issue a new guarantee in favour of Bangladesh Power. A permanent injunction was issued to restrain Amex from demanding return of the guarantee.

21. Amex have appealed that order and it is clear from the grounds of appeal that they have understood the judge to have found (wrongly say Amex) that the guarantee was irrevocable and unconditional and consequently valid until 10 June 2013. That appeal has still not been heard and no indication was given to us as to when it is likely to be heard.

The claim brought in the High Court in London

22. The claim was brought in this jurisdiction by Greenland against Amex in London for the return of US\$1.5 million “which sum the Defendant has wrongfully refused to pay to the Claimant’s order pursuant to an instruction of 7 July 2000”. On 6 March 2008 Evans-Lombe J dismissed that claim but gave permission to appeal.

The judgment of Evans-Lombe J

23. He approached the matter in this way:

38. . . . It is accepted that the proper law of the Bond is the law of Bangladesh and that the Bangladesh courts have jurisdiction to decide, *inter alia*, whether or not the Bond has lapsed. It follows that the issue before me is whether there is a reasonable prospect that a Bangladesh court might come to an unchallengeable conclusion that the Bond has not lapsed.

. . .

48. . . . the Judge found that the Bond had been extended, on a finding that there had been a qualifying request for an extension made in time, to which Amex had indicated their agreement by taking a commission referable to a period June 2000 to June 2001. He arrived at that conclusion without having before him the evidence of the letter of 23rd August 2000 from Amex to the Liquidators in which they explain that this was a misapprehension. In order to challenge the District Judge’s finding of fact in the High Court it would be necessary to persuade that court to accept new evidence. Both experts agreed that principles similar to those applied to the admission of new evidence in the English Court of Appeal, under Rules defined in the case of *Ladd v Marshall*, would apply in Bangladesh and that it was possible that such evidence would not be permitted to be adduced so that an Appellate Court might be left with the finding of the Judge unaltered.

. . .

54. . . . I have come to the conclusion that there is a sufficient likelihood that Amex may be unable to adduce further evidence on this issue and be confined to the Judge’s finding that there

was such agreement in its appeal from his judgment, and that this possibility is sufficient to justify a conclusion that there is a real prospect that the Bangladesh courts might arrive at a final conclusion that the Bond did not lapse on 10th June 2000. I would add, in support of this conclusion, the possibility that a Bangladesh court might rectify the Bond's provisions so as to exclude the requirement for Amex's agreement.

55. On the question of the further annual renewals after 10th June 2001, I have much less difficulty. Here the words of the last sentence of the final paragraph of the Bond do not exclude the possible construction suggested by Amex. Furthermore, their construction is supported by the matrix of fact existing at the time the Bond was entered into".

The grounds for this appeal

24. Greenland contend first that for "complete justice" to be done as required by the Bangladesh constitution, the appellate court must take account of three Amex documents which would have revealed the true position, namely, the email of 27 June, the fax of 19 July and the letter of 23 August 2000. Secondly, it was wrong to construe the bond to mean that, if it were renewed on 10 June 2000 then renewal subsequent to 10 June 2001 would occur automatically. Thirdly, there was no evidence of any antecedent agreement between Amex and Bangladesh Power that the guarantee was to remain in place until 10 June 2013 and consequently no ground for any rectification so as to exclude the renewal clause.

Discussion

The first ground of appeal: the admissibility of fresh evidence

25. It is common ground that the Appellate Division of the Bangladesh court will apply principles akin to the special grounds for admitting fresh evidence so familiar to us since *Ladd v Marshall* [1954] 1 WLR 1489, namely that: (1) the evidence could not have been obtained with reasonable diligence for use at the trial; (2) the evidence must have been such that, if given, it will probably have had an important influence on the result of the case though it need not be decisive; and (3) the evidence must be such as is presumably to be believed though it need not be incontrovertible. Article 104 of the Bangladesh constitution imposes a further overriding consideration that the Appellate Division issue "such orders as may be necessary for doing complete justice in any cause or matter pending before it".

26. It is Amex which must apply for this new evidence to be admitted. I cannot confidently say

that I have seen any such application in the material which has been placed before us, but assuming that the application has been made or can still be made, Amex nonetheless face the very considerable hurdle of explaining why the three documents were not put in evidence in Dhaka by them when they were part of the evidence placed before this court and when, consequently, the inference must be that they could with reasonable diligence have been tendered in Bangladesh. There is no real explanation forthcoming from Amex for this failure. There is some speculation about the reason for the omission, namely that on the state of the pleadings before the Bangladesh court, it was not relevant or expedient to correct the misapprehension that the receipt of US\$15,000 related to the year June 2000 to June 2001.

27. It seems to me that Amex will face an obvious difficulty in Bangladesh when it applies to admit this fresh evidence in its appeal. Evans-Lombe J found as a fact in para 48 of his judgment (para 23 above) that it was possible that the appellate court would leave the finding of Amex's agreement to the extension unaltered and there is no challenge to that in this court. Since it is common ground that we must approach the question by asking only whether there is a real as opposed to a fanciful prospect that the Bangladesh court will refuse to admit this evidence, then the conclusion seems to me inescapably to be that the question is very much open and that there is, accordingly, a real prospect that in Bangladesh Amex will remain stuck with the finding of fact against them that the receipt of the money does indicate their agreement to the renewal. Amex's difficulty there is Greenland's difficulty here. I would uphold the judgment of Evans-Lombe J in this respect.

The second ground: the proper construction of the renewal clause

28. Assuming for the purposes of this argument that the bond was renewed for one year to 10 June 2001, the question then is whether or not it was renewed thereafter. It is common ground that no request was made by Bangladesh Power or by anyone else on its behalf to renew the bond beyond June 2001. It would, therefore, have lapsed unless upon a proper construction of the bond renewal after June 2001 was automatic. It is further to be assumed for the purposes of this argument that the district judge indeed found, one way or another, that such automatic renewal had taken place.

29. I confess I find this argument to be fraught with difficulty. The crucial provision is contained in the last paragraph of the guarantee, and in particular in the last sentence. To repeat it:

On 10th June 2000, this Guarantee shall expire. On such date this Guarantee shall become null and void, whether or not returned to us for cancellation, unless we shall have agreed, on receipt of your written request therefor not later than one month prior to such date, to renew this Guarantee for a further period of one year. Thereafter, this Guarantee may be renewed for successive periods of one year on the terms hereof or on such other terms as we may from time to time agree, until 10th June 2013.

There seem to me to be strong grounds for concluding that the ordinary natural meaning of these words is that in each year after 2001 up to 2012, annual renewals can take place if the procedure prescribed for the first renewal is followed, namely that Amex agree to the extension following a written request by Bangladesh Power for renewal made not later than one month prior to the expiry of the year in question, the parties accepting that they can by agreement put some other procedure in place.

30. Mr Gordon Bennett argues with considerable force that the words “may be renewed” indicate that the guarantee may or may not be renewed at the end of each period. Something has to happen to determine whether it will be renewed or not. Someone (namely the beneficiary, Bangladesh Power) is required to do something (namely, make a written request) and Amex have to agree in order to effect a renewal. It does not happen automatically. If the true meaning of the words is that renewal would take place automatically, then this sentence should be re-phrased to read: “Thereafter, this Guarantee shall be renewed for successive periods of one year until 10th June 2013”. The words: “may be” give the sentence a very different connotation.

31. Mr Bennett also points out that the words “for successive periods of one year” indicate, obviously, that the guarantee could only be renewed for one year at a time. But if the intention had been that there should be automatic renewals to 10th June 2013 unless Bangladesh Power elected not to renew, then there would have been no reason not to permit it to renew for as long as it liked. There was no obvious commercial purpose to be served by allowing Bangladesh Power the option to terminate (or the option not to seek renewal) year-by-year: after all, Bangladesh Power wanted the bond to be irrevocable and unconditional for the term of the contract. On the other hand there was every reason why Amex should insist upon the opportunity to refuse renewal if circumstances should change. That was the effect of their credit control officer’s evidence to the court, namely that the purpose of periodic renewals was “to allow [Amex] to recon-

sider its facilities should there be a change of circumstances with the customer”.

32. Mr Bennett also submits that the words “on the terms hereof” refer not only to the content of the guarantee but also to the first two sentences of the paragraph cited above. The terms for renewal are as much terms of the guarantee as the amount of the guarantee.

33. In summary he submits that the construction advanced by Amex in this appeal before us is unnatural and the last sentence does not mean, as Amex contend: “thereafter this Guarantee shall be renewed for successive periods of one year unless you inform us that you do not wish to renew the Guarantee on the expiry of the current period”.

34. Mr Wolfson, for Amex, submits that an appellate court in Bangladesh might conclude that on a proper construction of the renewal clause, Amex’s consent was required for the initial extension from June 2000, but not thereafter. Once extended at June 2000 the bond becomes “irrevocable and unconditional” at least so far as Amex is concerned, a state of affairs consistent with the second recital to the bond which provides:

Whereas it has been stipulated by you [Bangladesh Power] in the contract that the seller [Westmont] shall furnish you with an *irrevocable and unconditional* Bank Guarantee by a scheduled Bank in Bangladesh . . . for the sum specified herein as security for compliance with the Seller’s performance obligations in accordance with the contract [with emphasis added by Mr Wolfson].

35. He submits that a construction of the bond which required formal renewal only at June 2000 was supported by the commercial purpose of the bond which was to provide security for Westmont’s obligations under the Power Purchase Agreement. He points out that clause 16.2 required Westmont to maintain the bond at all times during the full period of 15 years of the term of the agreement. Moreover, the draft bond which Westmont was to procure, as prescribed by schedule 11, contained no renewal clause at all but rather stated on its face that it was “irrevocable and unconditional”.

36. Were the decision mine to take, I would unhesitatingly prefer the arguments of Mr Bennett and reject those of Mr Wolfson but the decision is not for me. I have to decide whether there is a real prospect that the Bangladesh Appellate Division will uphold the district judge in Dhaka. Given the original purpose to be served by the guarantee and the words of the second preamble to it, I cannot conscientiously say that there is only a fanciful prospect that the decision of the judge will be upheld. On this ground, I must find against the appellant.

Rectification

37. I feel justified in being more robust in this regard. No case for rectification seems to have been advanced in Bangladesh. A wholly different case for rectification was pleaded in Amex's defence but not pursued at the trial before Evans-Lombe J. The rectification which attracted him (and, as I understand it, he was the first to raise it), was that an appellate court in Bangladesh might exclude the requirement for Amex's agreement to any renewals after June 2000 or even hold that the bond was to be issued for the full term of the contract, namely to June 2013.

38. This is, in my judgment and with great respect to the judge, a fanciful case to advance. It has never been pleaded. No evidence of any antecedent arrangements has been tendered. It is moreover wholly inconsistent with the way the negotiations proceeded.

39. Amex's immediate response when Greenland sought their help was to say on 24 June 1998:

... We propose to issue the bond with initial validity of 2 years with yearly roll-over thereafter.

Greenland's response faxed the same day commented:

The Performance Bond format prescribes that the Guarantee is to be valid for 15 years and [it] is preferable that the format not be changed. However, if the insurer is insistent on an initial period of 2 years and subsequent renewals thereafter, it appears that as long as the renewal is not conditional the format may be acceptable to the beneficiary.

I propose that the expiry date of 10th June 2013 be retained to avoid any problems considering that we will be placing the deposit of US\$1.5 million for the full tenure of the Performance Bond.

40. Consequently on 24 June Greenland faxed Amex a form of the Bond for their approval which stipulated that:

This Guarantee is valid until the 10th day of June 2013 and is irrevocable and unconditional.

41. That was not acceptable to Amex. On 25 June Amex faxed Greenland and Bangladesh Power a draft of the bond, the last paragraph of which was in the form of the bond as later executed save that it did not include the closing words "until 10th June 2013".

42. Later on 25 June Greenland faxed Amex a copy of a communication from the Bank of Uganda to them commenting on the draft being proposed for the bond in these terms:

In respect of expiry, the guarantee should be re-worded to include the initial expiry on 10th

June 2000 and thereafter to be renewed for successive periods of 1 (one) year each, (up to June 10 2013) on the terms hereof or on such other terms as we may from time to time agree.

They added their own comment:

They [Westmont] request that the Guarantee's initial expiry be on 10th June 2000 . . .

43. Finally on the same day Greenland faxed Amex to inform them that the text of the Amex draft was "agreeable to us except it should include the expiry date of 10th June 2013". The draft they proposed expanded the final sentence by inclusion of the further words "until 10th June 2003". That change was accepted by Amex, was set out in the guarantee as it was sent to Bangladesh Power and it was accepted in that form by the beneficiary — see paras 3 and 29 above.

44. In the light of that exchange of communications, it seems to me to be incontrovertible that Westmont were content with an initial period of guarantee to 10 June 2000, and for there to be annual renewals thereafter up to 10 June 2013. That was the position adopted by all parties, that was accepted by Bangladesh Power and in my judgment the rectification argument is absolutely hopeless. There is no real prospect of its success at all.

Conclusion

45. Even if the Bangladesh appellate court upholds the district judge's finding that the bond was extended for one year on 10 June 2000, and there is a real prospect that it will do so, that is not an end of it. The problem for Westmont remains that no request was made for any subsequent renewal and so, unless the bond remained automatically in force, it would have expired on 10 June 2001. The key question is, therefore, whether the bond can be construed to be irrevocable till 2013? With what I confess to be considerable reluctance on my part, I have to conclude that Mr Wolfson has persuaded me that even though the prospects of successfully arguing that are not high, the prospects of success cannot be said to be fanciful. To return to Jonathan Swift's view of lawyers, while Mr Wolfson has not shown that black is white nor that white is black, he has managed to paint the problem in a shade of grey. To that extent he has succeeded. I am, therefore, bound to dismiss the appeal although I would prefer to vary the judge's order by imposing a stay of the action pending the outcome of the appeal in Bangladesh, rather than ordering its outright dismissal at this stage.

Lord Justice HUGHES:

46. I agree that this appeal must be dismissed on the first and second grounds for the reasons set out by Ward LJ. The occasion for Amex to find itself

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arguing opposite cases in the alternative here and in Bangladesh arises from the potential conflict of jurisdictions. This seems to me to be a Bangladeshi contract, in which the proper law is that of Bangladesh and there is pending litigation in that country. The English courts would be wrong to pre-empt the decision in that litigation by making, in this country, the order sought by Greenland Bank unless the

outcome of that litigation is plain. It is not and, as things stand, the judgment is against Amex and thus against the claim made by Greenland in the present proceedings.

Lord Justice RIMER:

47. I also agree that the appeal should be dismissed and with the stay proposed by Ward LJ.