Neutral Citation Number: [2026] EWHC 202 (TCC)

Case No: HT-2026-MAN-000003

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS IN MANCHESTER
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Manchester Civil Justice Centre,
1 Bridge Street West, Manchester M60 9DJ

Date handed down: 4 February 2026

Before:

HIS HONOUR JUDGE STEPHEN DAVIES
SITTING AS A JUDGE OF THE HIGH COURT

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Between:

CR CONSTRUCTION (UK) COMPANY LIMITED	**Claimant / Applicant**
- and -	
BARCLAYS BANK PLC	**Defendant / Respondent**
- and -	
NORTHERN GATEWAY (FEC) NO. 7 LIMITED	**Intervener**

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- -

MATHIAS CHEUNG (instructed by **Trowers & Hamlins LLP, Birmingham**) for the **Claimant / Applicant**
NEHALI SHAH (instructed by **Eversheds Sutherland LLP, Manchester**) for the **Defendant / Respondent**
SEAN WILKEN KC (instructed by **Addleshaw Goddard LLP, Manchester**) for the **Intervener**

Hearing dates: 29 January 2026
Draft judgment circulated: 3 February 2026

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APPROVED JUDGMENT

Remote hand-down

This judgment was handed down remotely at 2pm on 4 February 2026 by circulation to the parties or their representatives by email and by release to The National Archives.

I direct that pursuant to CPR PD 39A paragraph 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

His Honour Judge Stephen Davies

His Honour Judge Stephen Davies:

1. By an application notice dated 7/1/26 the Claimant, CR Construction (UK) Company Limited ("**the Contractor**"), seeks an interim injunction against the Defendant, Barclays Bank plc ("**the Bank**"), which, in summary, would restrain it from making any payment to the Intervener, Northern Gateway FEC (No 7) Limited ("**the Employer**"), pursuant to a demand made on it by the Employer under a performance bond dated 29/3/22 ("**the Bond**") in the sum of £2,475,441.02 in respect of liquidated damages due to the Employer from the Contractor. It also seeks an interim injunction against the Bank which, as now pursued, would require it to return the payment which it has received from Hongkong and Shanghai Banking Corporation Limited ("**HSB**") under the counter-guarantee given to it by HSB in relation to the Bond.

2. The Contractor argues that it is entitled to obtain an injunction on what are now three separate grounds. First, that the demand was strongly arguably not made in accordance with the requirements of the Bond. Second, that before the demand was served the Bond was strongly arguably already discharged due to the repudiatory breach of the underlying construction contract made between the Contractor and the Employer ("**the Contract**") which it had accepted. Third, that there is strongly arguably nothing due under the Bond because the Contractor is entitled either: (i) to dispute the quantum of the sum claimed under the demand; or (ii) to set off the retention monies currently withheld by the Employer under the Contract, which exceed the amount of the liquidated damages.

3. The Bank contends that the claim is completely misconceived because: (i) on the authorities, the only basis on which an injunction could be granted against it as the bank issuing the Bond would be a case of fraud of which it had notice, which is not contended for by the Contractor; (ii) even if this was not so, there is no merit, strong or otherwise, in any of the three grounds advanced by the Contractor; (iii) in any event, damages would be an adequate remedy for the Contractor but not for the Bank and the balance of convenience favours refusing the injunction; and (iv) there is no merit at all in the separate injunction requiring it to return the payment received under the counter-guarantee from HSB.

4. The Employer supports the Bank's objections to the grant of the injunction.

5. The application was initially listed on 19/1/26 but when the Employer, who had not been joined to the proceedings nor served with the application or evidence in support, sought to be heard a consent order was eventually agreed between the parties under which the Employer was joined as such and the hearing was adjourned to a date to be decided by me in the absence of agreement, with a timetable for the service of evidence in response and reply.

6. This joinder notwithstanding, the Contractor has not sought to join the Employer to the claim as an additional defendant nor to advance a case that, even if it is not entitled to maintain its case as against the Bank, it is entitled to maintain the same or a similar case as against the Employer.

7. In the result I have been provided with witness statements from all three parties (one in support and one in reply from Mr Kitchener of the Contractor, one from Mr Neill of the Bank and one from Mr Payne of the Employer), as well as full and impressive written submissions and oral submissions from counsel instructed by the parties from 10:30am to 5:30pm on 29/1/26. I adjourned to prepare my judgment, which is intended to address the principal points raised in sufficient detail for the parties to understand the reasons for my decision.

The three-stage test for the grant of an interim injunction.

8. The well-known applicable test for the grant of an interim injunction is summarised in the commentary in the *White Book 2025, Volume 2*, at paragraph 15-7 as follows:

> "According to the *American Cyanamid* case, when an application is made for an interlocutory injunction, in the exercise of the court's discretion an initial question falls for consideration. That is: (1) Is there a serious question to be tried? If the answer to that question is "yes", then two further related questions arise; they are: (2) Would damages be an adequate remedy for a party injured by the court's grant of, or its failure to grant, an injunction? (3) If not, where does the "balance of convenience" lie?"

9. Mr Cheung submitted that in the particular context of an application seeking to provisionally restrain a party from calling on a performance bond or a surety from paying out under a bond, the general approach of the Courts has been helpfully summarised by Akenhead J in *Simon Carves Ltd v Ensus UK Ltd* [2011] EWHC 657 (TCC) at [33] as follows:

> "(a) Unless material fraud is established at a final trial or there is clear evidence of fraud at the without notice or interim injunction stage, the Court will not act to prevent a bank from paying out on an on demand bond provided that the conditions of the bond itself have been complied with (such as formal notice in writing). However, fraud is not the only ground upon which a call on the bond can be restrained by injunction.
>
> (b) The same applies in relation to a beneficiary seeking payment under the bond.
>
> (c) There is no legal authority which permits the beneficiary to make a call on the bond when it is expressly disentitled from doing so.
>
> (d) In principle, if the underlying contract, in relation to which the bond has been provided by way of security, clearly and expressly prevents the beneficiary party to the contract from making a demand under the bond, it can be restrained by the Court from making a demand under the bond.
>
> (e) The Court when considering the case at a final trial will be able to determine finally what the underlying contract provides by way of restriction on the beneficiary party in calling on the bond. The position is necessarily different at the without notice or interim injunction stage because the Court can only very rarely form a final view as to what the contract means. However, given the importance of bonds and letters of credit in the commercial world, it would be necessary at this early stage for the Court to be satisfied on the arguments and evidence put before it that the party seeking an injunction against the beneficiary had a strong case. It cannot be expected that the court at that stage will make in effect what is a final ruling."

10. The difficulty for Mr Cheung is that this statement of principle clearly distinguishes between an application for an interim injunction against a bank, where clear evidence of fraud is required, and an application for an interim injunction against the beneficiary, where it is also sufficient to establish a strong case that the beneficiary is clearly and expressly prevented under the underlying contract from making a demand under the bond. Whilst I note that Akenhead J said at (a) that "fraud is not the only ground upon which a call on the bond can be restrained by injunction", the reference to a call on a bond is plainly a reference to a call by the beneficiary and there is no other authority which states in clear terms that an injunction may be granted against a bank on a wider basis equivalent to the circumstances in which an injunction may be granted against a beneficiary.

11. Since in this case: (a) the Contractor does not and cannot on the evidence make an allegation of fraud against the Bank; (b) the Contractor has chosen not to make the Employer a party to the claim or to its interim injunction application, it is not sufficient for the Contractor to obtain an injunction to establish – even if it could - that the Employer is clearly and expressly prevented under the underlying contract from making a demand under the Bond.

12. On that preliminary basis, the application as formulated and as pursued against the Bank simply cannot succeed and must be dismissed.

13. However, since the claim has been fully argued and responded to on the merits, and to avoid the difficulty which might arise if the application was refused on this basis and the Contractor then applied for an interim injunction against the Employer on the same grounds, I will also consider the application on the merits.

The underlying construction contract.

14. On 29 September 2021 the Employer and the Contractor entered into the Contract for the design and construction of 634 residential units with associated amenity spaces, commercial units and public realm ("the Works") as part of the Victoria Riverside project, Manchester ("the Project") with a contract sum of £117,028,973.17 plus VAT. The Contract was an amended version of the standard form JCT Design and Build Contract 2016.

15. The Contract required the Contractor to provide a bond for the sum of £11,702,897.30 (i.e. 10% of the contract sum) in favour of the Employer, and the Bank agreed to and did provide the Bond.

16. Since the authorities to which I have been referred all confirm that what matters is not the description applied to a bond but its proper interpretation by reference to its terms, it is convenient to summarise and construe the relevant terms of the Bond at this point.

The Bond.

17. The Bond is a tri-partite contract to which the Bank, the Contractor and the Employer are all parties. For what it is worth it does describe itself as a "performance bond".

18. The Recitals refer to the Contract and to an anterior agreement between the Contractor and the Employer for the provision of a "guarantee".

19. The first operative clause, clause 1, provides as follows:

> "If the Contractor fails to pay any debt, damages or other sum of money which the Contractor is or becomes liable to pay to the Employer under or in connection with the Construction Contract (Due Amount), the Surety shall, subject to the terms of this Deed, and if required to do so by notice in writing given by the Employer and received by the Surety, pay the Due Amount to the Employer, up to a maximum aggregate amount of the Maximum Amount".

20. Two initial observations may be made.

21. First, the "Due Amount" is defined by reference to the Contractor's failure to pay any "debt, damages or other sum of money" which it is liable to pay to the Employer under the Contract. It follows that it is envisaged that the Due Amount will be a specified sum, even if a liability for damages, as otherwise it is difficult to see how the Bank would know what it had to pay and whether it was up the maximum amount or not.

22. Second, the Bank's obligation to pay the Due Amount is "subject to the terms of this Deed" and only arises "if required to do so by notice in writing given by the Employer and received by the [Bank]". It follows that clause 1 is not a stand-alone obligation and is subject to the further terms of the Bond and also that the obligation is conditional upon the Bank receiving written notice from the Employer.

23. Clause 2 provides that the Bank's liability under the Bond shall be not affected in three categories of case, of which the second is relevant here. All three are common clauses found in standard form guarantee documents and seek to exclude the operation of well-established common law rules as to the circumstances in which a guarantee may be discharged due to changes relating to the principal contract.

24. The second, clause 2.2, provides that:

> "No termination of the Construction Contract, and no termination of the Contractor's employment under the Construction Contract, shall reduce the liability of the Surety under this Deed".

25. Mr Cheung submits that this only applies to a termination under and pursuant to the terms of the Contract and does not apply to a case where one party's repudiatory breach of the contract is accepted by the other as discharging the contract (which is what the Contractor alleges has happened here).

26. This is an important argument given that it is a major plank of the Contractor's case that the Bond has been discharged by its acceptance of the Employer's repudiatory breach of contract. It is common ground that under the general law a surety would be discharged in such a case. Mr Cheung referred me to a number of texts and authorities in support of this well-established rule, but there is no need for me to refer to them here. It is also well-established that many standard form guarantees contain clauses excluding the operation of this rule and that they are effective according to their terms.

27. Whilst I accept that the Bond must be read in the light of the terms of the Contract, which is expressly referred to in the Bond, and whilst I also accept that the Contract does contain detailed provisions in relation to termination but no express reference to repudiation, I am wholly unpersuaded that clause 2.2 must be read in this limited sense. Termination is an ordinary word which is just as apt to cover the discharge of a contract by one party accepting the repudiatory breach of the other as it is to cover the exercise of a contractual right of termination for convenience or for cause, whether breach by the other or insolvency or otherwise. There is no obvious reason why it should be construed as having the limited meaning of the exercise of a contractual right of termination and every reason why it should bear its ordinary wider meaning.

28. In particular, it is not at all unusual for a party upon whom a termination notice has been served to contest the legitimacy of the termination and to respond by treating that notice as repudiatory and as discharging the contract. That is as frequently the case in construction contracts as much as any other type of commercial contract. It would be surprising if it had been intended that the Bond should survive a contractual termination, lawful or otherwise, but should not survive the acceptance of a repudiatory termination as discharging the contract.

29. In my judgment it cannot be said that the Contractor has a strong case in relation to this point of construction. I am prepared to accept that the point of construction narrowly passes the test of being seriously arguable, but no more than that.

30. Clause 5.1 provides:

> "This Deed creates a guarantee and not an indemnity, and accordingly the Employer shall be entitled to recover no more under this Deed in respect of any matter than the Employer would be entitled to recover from the Contractor in respect of that matter, net of any set-off."

31. Mr Cheung is plainly right to submit that this makes it plain that it is the Company, and not the Bank, which is the primary obligor and that this creates a limit on the Bank's liability, which is co-extensive with and not greater than the Contractor's liability.

32. However, I do not accept Mr Cheung's further submission that clause 5.1 creates an independent right of set-off whereby the Bank must not pay out in excess of any net amount which may be asserted by the Company as being only due as a result of any asserted right of set-off against the due amount the subject of the Employer's notice to the Bank (and any certificate pursuant to clause 5.3(b) – considered below). In my judgment it simply means that the co-extensiveness principle applies to the net liability of the Contractor, so that if the Employer must in law give credit as against the Contractor for a set-off then it may not give notice to the Bank for a sum which does not also give that credit.

33. Again, in my judgment the Contractor does not have a strong case on this further construction point and its argument only narrowly passes the test of being seriously arguable.

34. Furthermore, however, as Ms Shah submitted, given the certification provision to which I now refer it is not open to the Contractor in any event to argue as against the Bank that it is entitled to rely upon some further set-off above and beyond any set-off which may already have been applied and taken into account in the certified due amount.

35. Clause 5.3 lies at the heart of this case. It provides as follows.

> "Any demand made by the Employer under this Deed must be accompanied by either:
>
> (a) what purports to be a certified copy of (i) a judgment of a court; (ii) an arbitrator's award; or (iii) a decision of an adjudicator, in each case against the Contractor in favour of the Employer under the Construction Contract; or
>
> (b) a certificate from the Employer that is purported to be counter signed by the Employer's Agent, purportedly based on the non-performance of the Contractor, to confirm the Contractor's breach,
>
> and any one of which shall be conclusive evidence for the purposes of this Deed as to any liability of the Contractor to which such judgment, or award or decision or certification relates."

36. A number of points arise from this clause.

37. First, it imposes an obligation on the Employer to provide one or other of the required documents with its demand.

38. Second, where such a document is provided then it is to be conclusive evidence as to the Contractor's liability upon which the Bank can safely rely. This is significant, as the authorities cited by Ms Shah in relation to such clauses demonstrate. For present purposes it suffices for me to refer to the relevant section of her written submissions and to record that in her opening submissions she referred me to the principal authorities cited therein which establish the proposition for which she contends, which cannot seriously be contested.

> "Even if there is no such underlying liability, if there is a compliant certificate under clause 5.3(b), then [the Bank] will be obliged to make payment on being given written notice by [the Employer] to do so. Thus, "a clause which – if effective – requires payment against certification by the beneficiary is likely to be inconsistent with the need for the beneficiary to establish the liability (other than though such certification) of the principal debtor in order to enforce the guarantee[1]".

39. Third, in each case what is required is something which has some degree of independence from the Employer. It is obvious that a court judgment, arbitrator's award or adjudicator's decision will – in the absence of very compelling evidence to the contrary - be completely impartial of the Employer. Whilst a contractor may well not consider that the Employer's Agent appointed under a construction contract will display quite the same independence, nonetheless it may reasonably be expected that such a person or firm, counter-signing a certificate in their capacity as Employer's Agent, would not do so unless they were satisfied that the certificate was correct.

40. Fourth, the use of the word "purported" makes clear that in each case the Bank may safely rely on the document if it appears to comply with the requirements of this clause, so that the Bank is not required for example to seek independent confirmation from the court, arbitrator, adjudicator or Employer's Agent.

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[1] *Autoridad del Canal de Panama v Sacyr SA* [2018] 1 All ER (Comm) 916 at [81(6)]. See also *Bitumen Invest AS v Richmond Mercantile Limited FZC* [2017] 1 Lloyd's Rep 219 in particular at [27]; *Van Der Merwe v IIG Capital LLC* [2008] 2 All ER (Comm) 1173 at [32]; *Balfour Beatty Civil Engineering v Technical & Guarantee Co Ltd* [2000] CLC 252

41. Fifth, although Mr Cheung submitted that the reference to "liability" meant that the conclusive effect related only to liability in the strict sense, rather than liability for a specified sum, in my judgment that argument cannot prevail against the points that: (a) it is to be expected that the vast majority of judgments, awards and decisions are for a specified sum; (b) as already stated, by reference to clause 1 above, the reference to liability is plainly a reference to the Due Amount, which is envisaged to be a specified sum; and (c) it would make no sense at all for a Bank to have to rely on such a document only as to liability in the strict sense as opposed to liability in the full sense for the sum specified in the demand.

42. Again, I am satisfied that the Contractor does not have a strong case in relation to these arguments and that its case is only narrowly arguable.

43. Clause 6 provides for the Bond to have effect up until either 90 days after the issue of a practical completion certificate / statement or in any event until 17/1/26 (save in relation to demands received prior to such date).

44. These are the only specific terms of the Bond to which I need to refer.

The counter-guarantee.

45. On 4/3/22 HSB issued its counter-guarantee to the Bank at the request of the Contractor's Hong Kong parent company, CR Const Grp Holdings Ltd ("**CR Group**"). HSB agreed to make payment to the Bank against presentation of a demand "by authenticated swift stating that you have received a valid claim under your guarantee bond in accordance with its terms" if received on or before 16/2/26, being the specified expiry date of the counter-guarantee.

46. It is expressly made subject to the Uniform Rules for Demand Guarantees 2010 Revision ("**URDG 758**") which include: (a) Article 34, which provides that, unless otherwise provided in the counter-guarantee, its governing law shall be that of the location of the counter-guarantor's branch or office that issued the instrument: and (b) Article 35, which provides that in the absence of express provision, any dispute between the counter-guarantor and the guarantor shall be settled exclusively by the competent court of that country. As Ms Shah submits, given HSB's location in Hong Kong, the counter-guarantee is governed by Hong Kong law and subject to the exclusive jurisdiction of the Hong Kong courts.

47. Although, the claim form was amended after issue to add HSB as second defendant, it has not been served by the Contractor upon HSB and, as Ms Shah submits, it is difficult to see on what basis the Contractor could make any claim for substantive relief against HSB, even if it could find a way around the jurisdictional difficulties identified above. The application notice has not been amended to join HSB as a party to the application and in oral opening submissions Mr Cheung acknowledged that as matters stood the Contractor had no intention to make HSB a party to the proceedings or to the application.

48. Thus, insofar as any relief is sought in relation to the counter-guarantee, it is sought against the Bank. Since HSB has already paid the Bank under the counter-guarantee and since CR Group has already reimbursed HSB in relation to such sum, it is difficult to see on what basis this court ought sensibly to order the Bank to return such payment to HSB.

Subsequent events under the Contract.

49. It is common ground that: (a) the Employer's Agent under the contract was named as "Arcadis"; (b) there were two sectional completion dates of 1/7/24 and 17/2/25; (c) Arcadis issued non-completion notices under the Contract in relation to the Contractor's failure to complete by both dates. Importantly, on 19/2/25 Arcadis also issued a notice of liquidated damages under the Contract, requiring the Contractor to pay a net sum of £3,160,876 to the Employer. Although the Contractor had issued four applications for extensions of time under the Contract, these had not been accepted by Arcadis as at 19/2/25. Instead, on 15/1/25 Arcadis issued a notice of default under clause 8.4.1.2

of the Contract, based on the Contractor's alleged failure to proceed regularly and diligently with the performance of its obligations, and on 20/2/25 Arcadis issued a notice of termination pursuant to clause 8.4.2 of the Contract, on the stated basis that the specified defaults outlined in the default notice had not been rectified by the required deadline of 31/1/25. On 31/3/25 the Contractor's solicitors emailed Arcadis to communicate the Contractor's position that its termination was both repudiatory and was accepted as such.

50. As is clear, therefore, the Contractor strongly disputed and continues to dispute the failure to grant any extensions of time, the levying of liquidated damages and the termination of the Contract. However, under the Contract the Employer is entitled to proceed on the basis that it is entitled to levy liquidated damages and to treat the Contract as determined under clause 8.4.2 unless and until such time as its actions are the subject of an adverse decision by a duly appointed adjudicator under the dispute resolution provisions of the Contract, by an adverse determination of the Court or by agreement, none of which has happened.

51. On 13/1/26 the Contractor commenced an adjudication against the Employer to challenge the validity of the Employer's default notice and termination notice. Mr Cheung informed me in oral submissions that this adjudication is based on technical points as to the validity of these notices and that a further adjudication is in the course of preparation in relation to the delay related issues referred to above.

52. It is to be noted that the Contractor has therefore waited some eleven months before commencing adjudication proceedings for no good reason which has been explained in its evidence. However, assuming that there are no unforeseen difficulties with progressing the already-issued adjudication and no unforeseen delays with issuing or progressing the substantive delay related adjudication, within the next two or three months at most it may well be known whether or not the Contractor's current challenges to the validity of the termination and to the validity of the levying of liquidated damages have been successful.

53. In oral submissions Mr Cheung submitted that the Contractor had a strong case on repudiatory breach. In my judgment there is no basis for this submission. It is what is obviously a heavily disputed case, whose resolution will depend upon a close examination of the reasons why the project was in delay, the extent to which (if at all) the Contractor was entitled to extensions of time and the validity (both technical and substantive) of the default and termination notices and the overall financial consequences of these events. Mr Cheung submitted that it was unusual for an employer to terminate at such a late stage of the project (according to the Contractor the project was 95% complete). That point seems to me to be of no relevance. It is impossible to say any more than that on the evidence before me – such as it is – there is no basis for making any assumptions one way or another as to the underlying merits of the dispute.

54. Of course, since adjudication has only a temporarily binding status, any legal proceedings which may be brought by any dissatisfied party would likely take significantly longer to complete. Nonetheless, assuming the Contractor was successful in its adjudication and that the Employer was unable to advance any of the narrowly circumscribed bases for refusing to comply with such adjudication decisions, in the meantime the Contractor would be entitled to enforce the decisions against the Employer. In particular, prima facie the Contractor would, if entirely successful, be entitled to require the Employer to reimburse the amount of the liquidated damages the subject of the demand made against the Bond in this case[2].

The demand on the Bond and the argument as to its validity.

55. On 19/12/25 a demand was sent to the Bank under the Bond, counter-signed by Arcadis, demanding payment of a due amount of £2,475,441.02. Due to the Bank identifying certain potential technical

[2] Although this has not been investigated in submissions, it has not been argued by the Contractor that it would not be entitled to recover the amount paid to the Employer under the demand and it appears to be settled law that it would be entitled to do so.

non-compliances with this demand a two-page further demand and certificate was sent to the Bank on 14/1/2 "out of an abundance of caution". Since this rectified three of the four alleged procedural defects identified by Mr Kitchener in his second witness statement it is sensible to focus on the remaining procedural defect as argued for by Mr Cheung.

56. In short, the letterheading on the top right-hand side of the first page of the demand read "Far East Consortium" rather than "Northern Gateway (FEC) No. 7 Limited". It was signed by Gavin Taylor, who was identified as "regional general manager". No company information appeared on the bottom of the pages of the letter. The accompanying two-page certificate was the same in these regards. In his second witness statement Mr Kitchener had observed that "the Employer is a private limited company registered in England and Wales whereas Far East Consortium International Limited is incorporated in the Cayman Islands with limited liability and listed on the Stock Exchange of Hong Kong with Stock Code 0035".

57. In reply, Ms Shah and Mr Wilken KC referred me to the following further content of the letter and certificate: (i) that its stated subject was "Notification of a Claim under a Performance Bond by Northern Gateway (FEC) No. 7 Limited"; (ii) that its text began "please accept this as Notice … prepared by FEC[3] and signed by FEC … under the terms of the Bond"; (iii) that it continued in paragraph 2.1 "this letter is Notice confirming the non-performance and breach of the Contractor and under which the Employer now requires the Surety to pay to it the Due Amount, being £2,475,441.02". They also noted that the Contract named "Gavin Taylor of the Far East Consortium" as the Employer's Representative and that the Employer's accounts showed him as a statutory director.

58. In his submissions in response Mr Cheung submitted that this was still not sufficient to make clear that the demand was made by the Employer. He also observed that the demand ended by requesting the Bank to "arrange for the payment of the Due Amount forthwith into the following account", the details of which were of an account in the name "FEC Northern Gateway Development Limited", which is similar to but not the same as that of the Employer. Ms Shah and Mr Wilken expressed their concern that Mr Cheung was referring to this additional point when it had not been included in Mr Kitchener's evidence.

59. In my consequential directions I had directed that the Contractor should file and serve any supplemental evidence and skeleton argument by 4pm on 26/1/26. Although the second witness statement of Mr Kitchener was filed and served in accordance with that direction, no supplemental skeleton argument had been filed. Nor had any authorities been identified as addressing the legal effect of alleged non-compliance with the formal requirements of a demand. That was unhelpful. Whilst I am not suggesting that this was a deliberate ambush, because it is fair to say that until the Contractor and its advisers had seen the witness statement of Mr Neill made 16/1/26 they had not previously seen the demand or the certificate, the fact remains that the Contractor's evidence in reply did not provide all of the evidence on which Mr Cheung relied and that there was no advance explanation as to which point(s) were going to be relied upon and on what precise legal basis.

60. To recap, what clause 1 of the Bond required was "notice in writing given by the Employer" together with "a certificate from the Employer".

61. The sole argument advanced by Mr Cheung was that it was unclear from the demand and certificate whether they were "given by" or "from" the entity identified as "Far East Consortium" rather than the Employer as Northern Gateway (FEC) No. 7 Limited.

62. I am certainly prepared to accept that the drafting of the letterheading, the failure to use formal letters which provided the company information, and the failure to identify the capacity of Gavin Taylor all appear somewhat careless and introduce some initial element of doubt. However, I also

[3] Where "FEC" was defined in paragraph 1.1 as "Northern Gateway (FEC) No. 7 Limited (**FEC**) acting as Employer [which had] entered into [the Contract]" and where in paragraph 1.4 it was stated that the Bank had agreed to provide the Employer with the Bond.

accept the submission from Ms Shah and Mr Wilken that if one reads the demand and the certificate as a whole, by reference to their content and their substance rather than with undue formality, it is plain beyond any serious doubt that they were, in content and in substance, a demand and a certificate from the Employer rather than from some other entity.

63. In his oral submissions Mr Cheung made reference to passages in some of the authorities already cited to establish the proposition that a valid demand is a prerequisite to its obligation to pay out under a bond. In that respect I have also referred to the authoritative textbook *Law of Guarantees* (7th edition) by Andrews and Millett, where it is stated at par. 7-007 that "if the guarantee does require a demand to be made, and the requirement for a demand is not waived by the guarantor, the question whether a particular demand meets the contractual requirements is a matter of construction in each case".

64. In this case it seems to me that: (a) the Bond itself requires no particular form of demand, only that the written notice and certificate must be given by or come from the Employer; (b) although the notice and certificate were headed "Far East Consortium", it was plain from the body of the letters that the notice and certificate were intended to be given by the Employer; (c) a reasonable recipient in the position of the Bank would have no reason to consider that Gavin Taylor was not authorised to give the notice or certificate on behalf of the Employer and, indeed, by simple reference to the Contract and to publicly available company information would see that he authorised to deal with the Contractor under the Contract and was a statutory director of the Employer.

65. In the circumstances, it seems to me that this submission does not establish a strong case and, at best, it only narrowly arguable. Even then, it is only arguable as against the Employer which is, as I have said, not a party to the injunction application. In one of the cases to which Mr Cheung referred me, the decision of Fraser J in *Tetronics v HSBC* [2018] EWHC 201 (TCC), whilst the judge accepted at [35] that a "valid call was necessary as a prerequisite to any right to payment" he also held that an allegation that the call was invalid was not a good basis for an injunction against the bank, concluding at [40] that "on the correct approach therefore, which is to consider the matter as one of continuation or discharge of the injunction against the Bank, the Bank is entitled to rely upon the autonomy principle, unless the fraud exception applies".

Conclusions on the merits of the claims sought to be advanced by the Contractor.

66. Mr Cheung's starting point was that since the Contractor was a party to the Bond it was entitled to bring a claim under the Bond to seek a declaration as regards any dispute as to the status of the demand under the Contract and to obtain an interim injunction insofar as the Bank was proposing to act in breach of contract in a manner adverse to the interests of the Contractor.

67. For all of the reasons identified above, the fact that the Contractor could, as a party to the Bond make an application, does not assist it, since none of the allegations made disclose a case in fraud as against the Bank and nor do they disclose a strong case as against the Bank in relation to the validity of the demand if, contrary to my conclusion, that is a proper test to apply.

68. In the circumstances, the claim for an interim injunction fails at the first hurdle of establishing either a case in fraud against the Bank or (if the correct test) a strong case against the Bank or, if relevant, against the Employer. For completeness, however, I will consider the remaining issues of the adequacy of damages and the balance of convenience.

Damages an adequate remedy?

69. In his second witness statement, explaining the current position whereby CR Group has already paid HSB the amount it has had to pay under the counter-guarantee, Mr Kitchener stated that "this amount is considered as an inter-company loan between CR and CR Group [and] CR is required to repay CR Group given the internal policy".

70. However, no details as to this internal policy are provided, nor is there any evidence to demonstrate that CR Group is unable to waive insistence on this policy, assuming that the Contractor itself was not in a financial position to make this payment.

71. Further, even if CR Group did demand payment from the Contractor, there is no hard evidence provided to support the assertion by Mr Kitchener in his witness statement that this would result in a significant loss of working capital such as was very likely to jeopardise the Contractor's creditworthiness and the viability of its other ongoing construction projects listed in his evidence. Nor is there hard evidence to support his assertion that the loss and damage which it would be likely to incur in the event of potential delays, claims and/or termination of other projects would be irreparable and very difficult to quantify financially.

72. All of this is mere assertion rather than sufficient evidence upon which the court can safely rely. The same is true of the assertion that if an interim injunction was not granted the Contractor would be at risk of losing future projects through having to disclose the fact of the call upon the Bond having been made or that an injunction had been refused. The evidence of Mr Kitchener is that it would have to disclose in any event the fact that it has been faced with a call on the Bond and that this alone would cause the Contractor prejudice in terms of its ability to obtain future projects. It is difficult to see how this could be materially worsened by its having to honour the Bond and pay the money in the meantime. Although Mr Cheung relied on the acceptance by Akenhead J of prejudice in this regard in the *Carves* case, it is not entirely clear to me whether this was based on evidence already before the judge in relation to such matters or his own experience of the tendering and bond provision process in equivalent cases. In either case I do not consider that I am in a position to draw similar conclusions in this case.

73. So far as the Bank is concerned, since it has already received money from HSB it may be said that if it simply had to retain the funds and not pay them out to the Employer pending the determination of the dispute it would not itself suffer any obvious risk of financial loss unless that placed it in breach of the Bond vis-à-vis the Employer. However, that would not be the case if it had to refund the money to HSB and if there was any risk that it would be unable to rely on its existing demand under the counter-guarantee in the event that it successfully defended the claim but only after the counter-guarantee had expired. Whether or not this risk could be avoided by careful drafting of the order has not been ventilated, but there is no obvious reason why the Bank should have to face this risk.

74. In its evidence and its submissions, the Bank made much of the reputational damage which it would suffer if it was to be restrained from discharging its obligations under the Bond. I find this difficult to accept given, as Mr Cheung submitted, there would be no question of anyone thinking that the Bank had deliberately defaulted on its obligations if it was restrained from doing so by order of the court. I accept that third parties may not necessarily have the same knowledge and appreciation of the legal position than would the Bank, but I still find the submission difficult to accept. It seems to me, however, that the same point is equally valid and of equal weight when one considers the balance of convenience. That is because of the wider concern which I am prepared to accept those involved in the provision of performance bonds in the construction and other sectors, including major bond issuing institutions such as the Bank, would have if it became known that a court in this jurisdiction had restrained a bank from performing its obligations under a performance bond on facts such as the present.

75. Further, if the Bank was to be restrained from paying the monies to the Employer, then the Employer would be deprived of the immediate right to use the monies and, again, it would face the prejudice of a loss of cashflow in such circumstances. At this point it is worth posing the question, also relevant as to the balance of convenience, as to the impact in terms of time of granting an injunction on the basis sought by the Contractor. The injunction sought is stated to be "until the final determination of the parties' dispute as to the validity of the Employer's purported termination of the … Contract". It is far from clear whether this is intended to refer to the (only temporarily

final) determination of the instant adjudication, apparently founded on technical arguments, or to the determination of some further adjudication related to the substance of the termination, or to the determination of some further adjudication related to the entitlement to levy liquidated damages or, in any such case where the Contractor did not accept the adjudicator's determination, until such further time as these underlying disputes had been determined by the court on a final basis. If the latter, that would have the consequence that this injunction could be in place for a number of years.

76. Although the Contractor has submitted that there are justified concerns about the Employer's own financial position, this does not seem to me to be a case where the respective positions of the Contractor and the Employer can obviously be distinguished from each other. The financial evidence submitted by each is out of date. It is possible that whichever company was to come out the worst from this dispute, assuming it is not resolved by ADR to their mutual benefit, may be caused serious financial difficulties which it may or may not be able to overcome and, if not, which those behind it will have to decide whether they are prepared to finance to keep the business afloat.

77. In the end, it seems to me that these issues are more relevant to the balance of convenience rather than to the adequacy of damages.

The balance of convenience.

78. For the reasons I have already given I am of the firm view that the balance of convenience favours refusing an injunction.

79. That is because: (i) on any view this is not a fraud case, which is the only case on the authorities where injunctions against banks to restrain their performance of their obligations against banks would normally be granted; (ii) even if the injunction is to be treated in some way as, in substance, an injunction against the Employer as the beneficiary, it is neither a strong case nor an unusual case, instead it is a fairly typical case where an employer under a construction contract has the benefit of a certificate entitling it to payment, which is the only pre-condition to its being able to make a claim on the bond freely given by the contractor, and where the contractor is seeking to avoid being required to pay on the basis of raising substantial arguments as to the true position which would involve either serial adjudications or one very heavy substantive adjudication to resolve even temporarily and even heavier litigation to resolve permanently.

80. Further: (iii) the Contractor was in a position to have challenged the Employer's conduct and the issue of the certificates back in February 2025 but did nothing until eleven months later; (iv) the Contractor did not act speedily in early December 2025 when it first became aware that the Employer was intending to make a demand on the Bond; (v) there is no credible evidence of any irreparable damage to the Contractor if an injunction is refused, where the starting point is that a contractor who has given a bond should either pay the employer voluntarily before the bond needs to be called or honour its obligations under the bond as soon as possible once the demand is made; (vi) in reality, on current evidence the only current party out of pocket if the injunction is refused is CR Group which, if the Contractor's position is as precarious as it says it is, and if the consequences of being required to transfer the funds to CR Group are as serious as it says they are, ought to lead to CR Group not requiring repayment pending the final resolution of these disputes if it genuinely believes the Contractor is a company worth saving.

81. Finally, (vii) the wider reputational damage to the performance bond market, especially in the construction sector and the UK, is a very significant reason in itself and justifies the refusal of the injunction. This, as Ms Shah submitted, is consistent with the approach of the Privy Council in *Alternative Power Solution Ltd v Central Electricity Board* [2014] UKPC 31 at paragraphs 79-81, where these wider considerations were accepted as ordinarily compelling grounds to refuse an injunction against a bank on the balance of convenience, even where fraud against the bank was alleged.