IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO. E-155 OF 2000

IN EQUITY

BETWEEN	**FINSAC LIMITED**	**APPLICANT**
A N D	**CFC CONSTRUCTION CO. LTD.**	**FIRST RESPONDENT**
A N D	**RUNAWAY BAY DEVELOPMENT LTD.**	**SECOND RESPONDENT**

Heard June 17 and 18, 2002

Derek N. Jones, Esq., and Maliaca Wong instructed by Myers, Fletcher & Gordon for the Applicant; C. Dennis Morrison, Q.C. instructed by Dunn Cox for the 1st Respondent; and Conrad George, instructed by Hart, Muirhead, Fatta for the 2nd Respondent.

ANDERSON: J.

This is an application by way of originating summons on the part of the applicant Finsac Limited ("the Applicant") for relief in the following terms:

(1) A declaration as to whether Performance Bond dated November 20, 1997 was validly called by the second respondent.

(2) An order in relation to the costs of these proceedings.

(3) Such further or other relief as the court may deem appropriate."

The bond in question, was given by the National Commercial Bank (N.C.B.) to Runaway Bay Development Limited (R.B.D.L.) which was "the employer" under a construction contract in which the building construction was to be carried out by CFC Construction, "the contractor".

In relevant part, the bond provides as follows:-

"Now therefore, the condition of this obligation is such that if the contractor shall promptly and faithfully perform the contract, (including any amendments thereto), then this obligation shall be null and void; otherwise, it shall remain in full force and effect. Whenever the contractor shall be and declared by the employer to be in default under the contract, the employer having performed the employer's obligation thereunder, the surety may promptly remedy the default or shall promptly; -

(1) Complete the contract in accordance with it's terms and conditions;

(2) Obtain a bid or bids from qualified bidders for submitting to the employer for completing the contract; or

(3) pay the employer the amount required by the employee to complete the contract in accordance with its terms and conditions up to a total not exceeding the amount of this bond".

For the Applicant, Mr. Jones in outline submissions, submitted that in order for the employer to properly call the bond, four conditions precedent would have to be met as follows:

(a) the contractor would have to be in default

(b) contractor was declared by the employer to be in default

(c) the employer had performed its obligation under the contract

(d) the employer had suffered damage from any breach on the part of the contractor.

The Applicant contends in this action, that:-

- The bond in the instant case is a conditional bond;
- For the employer to make a valid claim it must bring an action and prove breach and damages that it has suffered;
- On so doing, the Employer will be entitled to recover from the surety such part of the damages as
    - Relates to the obligations guaranteed; and
    - Which it has not recovered from some other source.

Mr. Jones submitted that even if one assumed the existence of (a) to (c) above, it would still be necessary for the proper calling of the bond, for there to be "damages" as set out at (d) above. In support of this submission, he cited ***Keating on Building Contracts 6th Edition*** p. 274:-

> "If in substance the bond guarantees the contractor's performance, the employer has to establish damages occasioned by the breach or breaches of condition and if he succeeds, he recovers the amount of the damages proved".

In further support of this submission, he cited the case ***Tins Industrial Company Limited v. Kono Insurance Limited 1987 42 BLR*** p. 110 at page 117, a decision of the Court of Appeal of Hong Kong. It is common ground, that R.B.D.L. called the bond for the non-payment of outstanding workers' wages and end of contract bonus. It is true that there is term of the contract between the contractor and the employer, that the contractor is responsible for employing workers and paying them. This is set out at clause 28 of the contract. The question therefore, is whether the non-payment of the workers end of contract bonus at a point in time after the certificate of practical completion had been issued and the building handed over, was a timely call of the bond in question.

Mr. Jones in his outline submissions at number 8 and 9 states the following.
"Assuming that C.F.C. was in breach of the contract for not paying the workers and declared by R.B.D.L. so to be *and* that R.B.D.L. performed its obligations, the question is whether the bond can be called for this kind of payment.
We submit that the answer is no. This is because the non-payment of the workers would not result in the damage to the employer. The non-payment of the workers may a breach of contract between workers and contractor. The illegal act of workers could not be damage suffered by the employer under the contract between employer and contractor. The bond certainly could not be intended to cover illegal acts of third parties."

I would make two (2) observations here; Firstly, it seems to me that if the workers, pursuing their legitimate industrial relations rights proceeded to demonstrate outside of the hotel in such a manner to cause alarm, this would not necessarily be an "illegal act", unless it constituted a breach of the peace. Secondly, if such action created alarm among the guests and caused them to cancel their stay at the hotel, that this may give rise to damages that would flow from the non-payment, as being reasonably foreseeable, even although the workers' actions were not illegal. The question may still arise, however, as to whether such damage would be covered by the bond. Given the issuing of the Certificate of Practical Completion and the implication of that issue, it would seem to me that thereafter, such coverage as is afforded by the bond during the defects liability period which the contract contemplates, would be in relation, not to acts or omissions of the

contractor as between itself and the workers, but in relation to defects in the building itself. I say this because Mr. Jones proceeded on the basis that in the absence of damages to the employer the call was, *per se*, not validly made. It may well be, that even if there were damages, it would not necessarily, *ipso facto*, be valid.

Mr. Morrison for the first respondent adopted the submissions that Mr. Jones had made, with respect to the need to show that damages had accrued to the employer as a prerequisite for the call of the bond. He, however, sought to place the call within a historical context. Having outlined the context in which the demand had been made, he concluded that it was clear that at February 1, 2000 when the demand was made under the terms of the bond, there was clearly evidence of a dispute as to the relative positions of the 1st and 2nd Respondents. He submitted that on the clear language of the instrument, the call was premature, as the conditions for making it had not been proven to have been fulfilled. It was necessary to show, not only that the contractor was in breach, but also that the employer had declared the contractor to be in breach, and that the employer itself was not in breach. He submitted, accordingly, that in the absence of proof of these facts, the call on the bond was premature. He therefore was also of the view that the declaration should be granted.

Mr. George started by suggesting, (I deliberately avoid saying, "submitting") that if the matters mentioned by Mr. Morrison for the 1st Respondent were being canvassed before this court, he would consider making an application that the hearing be adjourned at this stage and be allowed to continue as if started by way of Writ of Summons. This was not, in his view, the court before which proof of the matters so referred to, could be proven. I stated the court's view that Mr. Morrison was not canvassing this court for a finding as to the factual nature of the allegations which were made on both sides, but was suggesting that the exchanges demonstrated the existence of an unresolved dispute which would have made the call premature. Further, I took the view that paragraph 6 of the Agreement dated March 1, 2000, between the Employer, the Contractor and the Applicant, pursuant to which the payment had been made, purportedly under the terms of the bond, clearly contemplated an application like the instant one before this court, and thus gave this court

proper jurisdiction in relation to the issue of whether the call was validly and timely made.

He further submitted, that the call which had been made by letter from the attorneys for the second respondent on the 1st February 2000 was a proper call. While he accepted that there were two types on bonds as Mr. Jones had suggested, the single bond and the conditional bond, he submitted that this conditional bond had to be construed strictly on its own terms, and that it did not contemplate the necessity for any damages to be proven in order to make the call timely. In other words he submitted that the bond here was a bond *sui generis*, and that in the absence of a requirement for damages to be shown by the employer, the bond was properly called at the time it was. The force and effect of the bond was purely a matter of construction, and it would be contrary to the rules of construction to import a term into this bond that there is a need for damages to have been suffered, and proven. In support of this proposition he cited *Keating* page 273 and adopted the following for the purposes of this submission:-

> "Ordinarily the bondsman is only called upon to make payment when called upon to do so. In the construction industry the most common type of bond is a performance bond entered into by a bank or insurance company at the behest of the contractor and in favour of the employer. In substance, the bondsman promises to pay up to the amount of the bond if the contractor fails to perform his contract. It is a matter of construction whether this amounts to a guarantee of performance requiring proof of both breach and damage, or to a promise to pay in circumstances which are less onerous to establish".

He accordingly was of the view that although this bond was a conditional bond, the employer, in this case, had only the "less onerous" obligation, and not the obligation to prove "breach and damage". Further, in responding to the submission by the Applicant and the 2nd Respondent, that practical completion having been reached and the hotel having been handed over to RBDL, it was, in any event too late for a call based upon non-payment of workers' end of contract bonus, he submitted that it was the performance of the entire contract which was being guaranteed and not merely the completion of the building, and that the contract was still subsisting, given the continuance of the defects liability period for a further year. Mr. Jones in response, however, stated that it was not

the burden of his submission that the bond was discharged by practical completion. Rather, the issue was whether if the nature of the bond in substance guarantees performance, then that is the source from which the obligation to prove damages arises. As is stated in Keating, at page 274:

> "A conditional bond is one which is expressed to be "conditioned" upon a particular event or events and commonly upon the satisfactory performance of the contractor. The employer's right to recover from the bondsman depends on the construction of the bond. If in substance the bond guarantees the contractor's performance, the employer has to establish damages occasioned by the breach or breaches of conditions and, *if he succeeds*, (emphasis mine) he recovers the amount of damages proved".

Mr. George referred further to the head note of the TINS case, and that section of the head note which is in the following terms:

> "Now the condition of the above written bond is such that if the contractor should perform and observe all the terms, provisions conditions and stipulations of the said contract on the contractor's part to be performed and observed according to the true purport intent and meaning thereof, or if, on default by the contractor, the surety shall satisfy and discharge the damages sustained by the employer thereby up to the amount of the above written bond, then this obligation should be null and void but otherwise shall be and remain in full force and effect".

Mr. George, therefore, suggests that whereas the bond in the Tins case specifically referred to damages, the bond in this case did not so refer and there may be very good reasons why a bond given in the Jamaican construction environment would not incorporate a reference to damages. I understood this to be an invitation for the court to take judicial notice of the industrial relations climate in Jamaica and the implications for bonds of this kind.

In making a determination, I am greatly assisted by the judgment of Hunter J.A. in the Tins case. In the course of his judgment he makes the observation as to the two kinds of bonds which Mr. Jones had referred to in his opening submissions. I take it that it is common ground that the bond being considered here is accepted to be a conditional bond.

I adopt the section of Hunter J.A's decision in the Tins case where he states the following.

> "One of the best known bonds of this nature was that given by the Trade Indemnity Company Limited to the Workington Harbour & Dock Board which came before the House of Lords on two separate occasions. The terms of that bond we can see from the report of that case ***Workington Harbour & Dock Board v. Trade Indemnity Company Limited (No. 2) 1937 3AER 39.*** At page 144 in the judgment Slesser L. J., he sets out the terms of that bond in full. I am not going to read it all. It is sufficient to say that the bond in its effect, is indistinguishable from the first part of the bond here, viz, the contractors part of our bond. In the course of his judgment in that case, Geer L.J. on the preceding page 143 says this in relation this bond:
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> > "The plaintiff bringing an action has not merely to prove a breach of contract he has to prove damages which he suffered by reason of that breach of contract".
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> The matter then went to the House of Lords where for the second time in this litigation, the main speech was given by Lord Atkins, 1938 2 AER 101 he says this at page 105:
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> > "My Lords both actions were brought on the money bond. It is well established that in such an action the plaintiff has to establish damages occasioned by the breach or breaches of the conditions and, if he succeeds, he recovers judgment on whole amount of the bond but can only issue execution for the amount of the damages proved".

In my view that summary of the law by Hunter J.A. is a correct statement and is dispositive of the issue herein.

I am unsure as to the universal application of the proposition advanced in Mr. Jones' final submission (No. 15 in the "summary" on page 3 of his outline submissions) that: "The bond was not properly called as RBDL can have no claim for damages it suffered as a result of the non-payment of wages to workers of C.F.C". (My emphasis) As I have suggested above, it seems to me that there may arise circumstances, flowing out of a non-payment of wages, and giving rise to damages, in which the bond could possibly have been called. I do, however, accept that in the instant case where (a) certificate of practical completion had been issued, (b) the hotel had been handed over and (c) the liability

which remained on the surety in relation to the bond would only have been in respect of defects in the building, then, using TINS as a guide, I am satisfied that in the absence of any proof of damages the bond was invalidly called and I so find. Even if I am wrong in that finding, I also hold that the conditions precedent to the calling of the bond, on the evidence available, had not been met. I am strengthened in this view by a submission of Mr. George which seemed to say that it did not matter whether the employer itself was in breach, as the reason for non-payment was not a material consideration in determining the validity of the call. I hold that on a clear construction of the bond, the employer had to have demonstrated that it was not in breach of its own obligations. I find that it had not established that fact, nor indeed had the existence of all the conditions precedent been objectively determined.

In the circumstances, this court:

1) Grants a declaration that the bond was invalidly called;
2) Orders that the sum of $30,000,000.00 is to be repaid by the 2nd Respondent to the Applicant within 21 days
3) Awards costs of this action to the Applicant and the 1st Respondent, to be agreed or taxed.
4) Stays execution of this Judgment for 21 days.
5) Grants Certificate for counsel.
6) Grants Leave to appeal, if necessary.