IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S 136 of 2016

BETWEEN:



**DANIEL MATTHEW SIMIC**
First Appellant

**HAZEL MARY DELANEY**
Second Appellant

**RICHARD PAUL SAPSFORD**
Third Appellant

**SIMIC MANAGEMENT INTERNATIONAL PTY LIMITED ACN 134 150 833 in its own capacity and as trustee for the DANIEL SIMIC FAMILY TRUST**
Fourth Appellant

**TRACK & MACHINE OPERATIONS PTY LTD ACN 134 620 018**
Fifth Appellant

and

**NEW SOUTH WALES LAND AND HOUSING CORPORATION ABN 24 960 729 253**
First Respondent

**AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED ABN 11 005 357 522**
Second Respondent

**NEBAX CONSTRUCTIONS PTY LIMITED ACN 101 054 068**
Third Respondent

## APPELLANTS' SUBMISSIONS

### Part I: Internet Certification

1. The Appellants certify that this submission is in a form suitable for publication on the internet.

O'Neill McDonald Lawyers
Level 12, 84 Pitt Street
SYDNEY NSW 2000

Telephone: 02 9221 3600
Fax: 02 9232 4749
Ref: Gregory Matthew McDonald

**Part II: The issue or issues that the appeal presents**

2. This Appeal presents the following issues:

   i) Is the principle of "strict compliance" that applies to letters of credit and bank guarantees only applicable after the letter of credit or bank guarantee has been properly construed so as to make any "documentary discrepancy" irrelevant;

   ii) When construing a "bank guarantee" or letter of credit to determine whether the claimant is the proper beneficiary named in the bank guarantee or letter of credit, may the Court have regard to a contract referred to in that instrument even though the terms of that contract have not been incorporated into the instrument and the contract was not previously provided to the issuing bank?; and

   iii) May an entity whose name and description is substantially different to that appearing in a bank guarantee nevertheless successfully require an issuing bank to pay out on that guarantee.

**Part III: Certification re section 78B of the Judiciary Act 1903**

3. The Appellants consider that no notice is required to be given in compliance with s 78B of the *Judiciary Act* 1903.

**Part IV: Reports and citation**

4. There is no authorised report of the reasons for judgment of either the primary or the intermediate court in this matter. The internet citation for the reasons of the primary judge is *New South Wales and Housing Corporation v Australian and New Zealand Banking Group Limited* [2015] NSWSC 176 and the internet citation of the reasons of the New South Wales Court of Appeal is *Simic v New South Wales Land and Housing Corporation* [2015] NSWCA 413.

**Part V: Relevant Facts**

5. On 13 October 2009 the Third Respondent ("**Nebax**") submitted to the First Respondent ("**Corporation**") a tender to perform building construction works at 3-7 Karowa Street Bomaderry identified as "Project/Job No: BG 2J8".[1]

[1] Simic v New South Wales Land and Housing Corporation [2015] NSWCA 413 at [8]

6. On 4 March 2010 the Corporation wrote to Nebax (on "Housing New South Wales" letterhead) accepting the tender, enclosed a "Formal Instrument of Agreement" and requested that Nebax provide "Original Bankers Certificate(s)" totalling $146,965.06 as the security required by the "Principal" under the proposed building contract.[2]

7. Also enclosed was a draft of the "Unconditional Bankers Certificate" sought by the Corporation. This included the following description of the "Principal":[3]

> *TO: NEW SOUTH WALES LAND AND HOUSING CORPORATION (ABN 24 960 729 253) trading as Housing NSW (ABN 45 754 121 940) 223-239 Liverpool Road, Ashfield (hereinafter called the "Principal").*

8. The draft Unconditional Banker's Certificate stated that it was a security deposit by Nebax and referred to:

> *"Job No: BG2J8 C-71561 – Bomaderry (3-7 Karowa Street) – Matter NO: 20092540."*

9. On 4 March 2010 Nebax and the Corporation executed the Formal Instrument of Agreement (the "**Construction Contract**"). The Construction Contract is described as "Contract No: S1384". The "Principal" was described in the Construction Contract as:[4]

> *NEW SOUTH WALES LAND AND HOUSING CORPORATION (ABN 24 960 729 253) a statutory authority constituted pursuant to section 6(1) of the Housing Act 2001 and having its principal office at 223-239 Liverpool Road Ashfield in the State of New South Wales (the "Principal").*

10. On 16 April 2010, a director of Nebax, Mr Simic, attended on the Caringbah branch of the Second Respondent ("**ANZ**") and advised its employee (Ms Hanna) that Nebax "has just obtained a contract from Housing NSW" and needed two bank guarantees "made out to New South Wales Land & Housing Department trading as Housing NSW".[5]

11. Mr Simic then gave Ms Hanna the details of the bank guarantees ("**Undertakings**") which Ms Hanna entered into a template on her computer to create the Undertakings.[6]

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[2] Ibid [9]-[10]
[3] Ibid [10]
[4] Ibid [11]
[5] Ibid [17]
[6] New South Wales Land and Housing Corporation v Australia and New Zealand Banking Group Limited [2015] NSWSC 176 at [19]

12. Mr Simic did not give Ms Hanna a copy of the Construction Contract or a copy of the Unconditional Banker's Certificate.[7]

13. On 16 April 2010 Mr Simic signed two forms of indemnity and application for guarantee on behalf of Nebax. (This indemnity was in turn secured by guarantees granted to ANZ by the Appellants). The forms were addressed to the ANZ. The indemnity begins:[8]

> *"To facilitate my/our business transactions with (a)* ***New South Wales Land & Housing Department trading as Housing NSW ABN 45754121940*** *(the Favouree) I/we ask the Bank to execute a guarantee or security in your standard form (from time to time), unless we have attached or provided you with the form of guarantee that we request you to issue under the request, for an amount not exceeding $73,482.53"*

14. The draft Undertakings were then signed by Ms Hanna on behalf of ANZ[9] and provided to Mr Simic who subsequently provided them to the Corporation.[10]

15. The form of the Undertakings is appended to these submissions. The description of the "Principal" in the Undertakings is inconsistent with it being a reference to the Corporation in the following respects:

    i) The Principal is "New South Wales Land & Housing Department" whereas the correct name for the Corporation (as provided in the Housing Act 2001 (NSW)) is "New South Wales Land and Housing Corporation"[11]. Therefore the "&" and the "Department" are inconsistent;

    ii) The ABN stated in the Undertakings (being 45754121940) was never the ABN for the Corporation whose actual ABN was at all relevant times "24 960 729 253";[12]

    iii) The Corporation has never formally had "Housing NSW" as its trading name, although officers of the Corporation have from time to time used the letterhead of Housing New South Wales;[13] and

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[7] Ibid [23] and Simic v New South Wales Land and Housing Corporation [2015] NSWCA 413 at [26]
[8] Simic v New South Wales Land and Housing Corporation [2015] NSWCA 413 at [19]
[9] Ibid [20]
[10] New South Wales Land and Housing Corporation v Australia and New Zealand Banking Group Limited [2015] NSWSC 176 at [25]
[11] Simic v New South Wales Land and Housing Corporation [2015] NSWCA 413 at [27]
[12] Ibid [27]
[13] Ibid [37]

iv) At the date of the Undertakings, "Housing NSW" was a division of the Department of Human Services (the Director-General of which was the manager of the affairs of the First Respondent). There has never been a government department called the "New South Wales Land & Housing Department;[14]

16. The Undertakings include the following statement:

> *"("ANZ") asks the Principal to accept this bank guarantee ("Undertaking") in connection with a contract or agreement between the Principal and Customer for Job Number: PO409021, Bomaderry* (sic) *– Design & Construct 3-7 Karowa Street Contract Number BG2J8"*

17. The "Job Number" (PO409021) described in the Undertakings does not appear in the Construction Contract or any other document. Further the "Contract Number" (BG2J8) given in the Undertakings does not match the contract number in the Construction Contract (S1384).[15]

18. On 2 October 2013 the Corporation wrote to the ANZ demanding payment of the amount of $146,965.06 pursuant to the "two Bankers Certificates dated 16 April 2010"[16] (being the Undertakings).

19. ANZ refused to pay given that the Corporation was not named as the Principal in the Undertakings.[17]

20. The Corporation commenced proceedings against ANZ and ANZ served a cross claim on the Appellants as guarantors of Nebax's liability for the Undertakings.

The decision of the primary judge

21. The primary judge reasoned that in circumstances where there was no entity that matched the description in the Undertaking that a reasonable business person, "without going outside the four corners of the guarantees would understand that question to be resolved by ascertaining who was the other party with Nebax to the contract identified in the Description". Further, that this could be answered "by engaging the principle that evidence can be admitted to identify a party to or the subject matter of an agreement" and

[14] Ibid [36]
[15] Ibid [24]
[16] Ibid [29]
[17] Ibid [29]-[30]

that by reference to the terms of the Construction Contract that entity was the Corporation. The primary judge concluded that this result was achieved either by reference to the principles of the "objective approach" to contract construction, as set out in *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at [35], or alternatively to the principles concerning misnomer or avoiding absurdity.[18]

22. The primary judge characterised the Undertakings as "Unilateral Contracts"[19] and accepted that the identity of the "Principal" in the Undertakings must be answered by reference to the indemnity and communications between the ANZ and Nebax. The primary judge did not consider it a valid objection that ANZ had never been provided with the correct name of the Corporation (or the draft Undertakings or Construction Contract) and that this name did not appear in the Nebax Indemnity or in any other document created between Nebax and ANZ. Rather, the primary judge held, if that mistake had been brought to the attention of Ms Hanna she could easily have found out the correct name from Mr Simic.[20]

23. The primary judge concluded[21] that it was "self–evident from the language of the Indemnity and guarantees" that the Principal objectively intended to be named in the Undertakings was the Corporation.

24. The Appellants filed an appeal of the primary judge's orders in favour of the Corporation as against ANZ, claiming to have standing to challenge those orders as a party effected by them.[22]

25. The Appellants argued before the Court of Appeal that when construing the Undertakings what was critical was the instructions that Mr Simic gave to Ms Hanna, not the instructions Mr Simic should have given. Further, that in having regard to the terms of the Construction Contract, the primary judge failed to recognise the unique nature of bank guarantees which are subject to the "autonomy" and "strict compliance principles".

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[18] New South Wales Land and Housing Corporation v Australia and New Zealand Banking Group Limited [2015] NSWSC 176 at [66]-[67]
[19] Ibid [69]
[20] Ibid [76]
[21] Ibid [78]
[22] Insurance Exchange of Australasia Group v Dooley (2000) 50 NSWLR 222 and Chaina v Lavaro Homes Pty Ltd [2008] NSWCA 353

ANZ's obligation was independent of the underlying transaction between Nebax and the Corporation. The primary responsibility of ANZ was to payout strictly in accordance with the terms of the Undertaking and not on some alternative basis after it had informed itself that an error had occurred in the description of the "Principal".

The decision of the Court of Appeal

26. Emmett AJA (with whom the other judges agreed) firstly noted that "little judicial attention has been squarely directed to the interrelationship between [ordinary principles of contractual construction] on the one hand and the principles peculiar to letters of credit (being those of strict compliance and autonomy) on the other hand."[23] His Honour then postulated that the "documentary discrepancy" being considered would not arise if it could be shown (as the Corporation argued) that the principles of strict compliance and autonomy are "principles of performance and not of the antecedent process of construction."[24] His Honour concluded that whilst the principle of strict compliance was properly classified as one of "performance" (ie applying after the letter of credit has been construed) the autonomy principle "must necessarily form part of the process of construction."[25]

27. Based on his conclusion as to the application of the autonomy principle to the process of construction, Emmett AJA found it unnecessary to determine whether the "discrepancy" being considered "[fell] foul of the principle of strict compliance"[26] and instead concerned himself with the single question of whether "the autonomy principle applies in the present case to prevent regard being had to the correct description of the beneficiary of the Undertakings in the Construction Contract."[27] His Honour noted that the mere mention of the underlying construction contract in the Undertakings was not sufficient to incorporate the terms of that instrument into the Undertakings (citing *Wood Hall Limited v The Pipeline Authority* (1979) 141 CLR 443 at 445) but nevertheless held "there is a difference between, on the one hand, construing a letter of credit with reference to the **terms** of the underlying contract .....and, on the other hand, construing such an instrument with reference to the mere **identification** of that underlying contract,

[23] Simic v New South Wales Land and Housing Corporation [2015] NSWCA 413 at [96]
[24] Ibid [97]
[25] Ibid [98]-[99]
[26] Ibid [101]
[27] Ibid [102]

particularly where the contract is already identified in the instrument itself.[28] His Honour then concluded:

> *"....if the underlying contract is identified in the letter of credit, then the identifying features of that contract (which must at least include the parties to it) may be considered in construing the letter of credit."*[29]

28. Emmett AJA concluded:

> *"..once the Corporation had furnished to ANZ indisputable evidence that it was the entity that was a party, as "Principal", to the contract or agreement with Nebax described in the Undertakings, there was no basis upon which ANZ would be entitled to refrain from meeting the demand."*[30]

**Part VI Argument**

**Errors alleged**

29. The Appellants challenge both the Court of Appeal's determination that the principle of "strict compliance" is limited only to performance and the determination that the autonomy principle does not exclude the parties from construing the terms of a letter of credit by having regard to the names of a party referred to in an instrument described in the letter of credit.

30. The Appellants also challenge the Court of Appeal's conclusion that because an underlying contract is identified in the letter of credit then the names of the parties to that contract (but not the contract terms) may be considered when construing the letter of credit.

31. The Appellants contend that the major error made by the primary judge that was continued by the Court of Appeal was to construe the Undertakings as if those Undertakings were a tripartite agreement rather than an autonomous unilateral undertaking by ANZ (as described in paragraphs 33 to 35 below). It would seem that, at least in respect of the Court of Appeal, this error may have arisen in part, due to Emmett AJA's misdescription of the Undertakings as being "expressed as synallagmatic

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[28] Ibid [104]
[29] Ibid [106]
[30] Ibid [112]

agreements between ANZ and the Corporation"[31] when in fact they were expressed as, and are, unilateral undertakings [32] by ANZ in favour of a non-existent entity.

32. Finally, the Appellants challenge the Court of Appeal's finding that once the Corporation had furnished to ANZ proof that it was the "Principal" identified in the contract referred to in the Undertaking "there was no basis upon which ANZ would be entitled to refrain from meeting the demand." The Appellants contend that this finding elides the separate concepts of firstly identifying the proper favouree (which could only occur from the terms of the Undertakings themselves) and secondly ANZ's continuing strict obligation to Nebax to only pay the amounts nominated in the Undertakings to "New South Wales Land & Housing Department trading as Housing NSW ABN 45754121940" irrespective of who was the intended favouree.

**Submissions**

Three related but autonomous contracts

33. The Undertakings involve the "underlying" Building Contract between Nebax and the Corporation, the contract between Nebax (as customer) and ANZ and the potential contract between ANZ and the favouree named in the Undertakings. Although each of these contracts or potential contracts are related they are nevertheless autonomous,[33] meaning that the undertaking given by the issuing bank is separate and independent from the underlying contract between Nebax and the Corporation.[34] Most importantly, the Undertakings themselves, as the primary judge noted, were "unilateral contracts" by ANZ.[35]

34. Most importantly the contract between ANZ and Nebax is not a simple contract of agency[36] and any obligation that ANZ has to pay pursuant to the terms of the

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[31] Ibid [20]
[32] See United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd [1968] 1 All ER 104 at 109 per Diplock LJ
[33] United City Merchants (Investments) Ltd v Royal Bank of Canada (H.L.(E.)) [1983] 1 AC 168 at 182-183
[34] Edward Owen Engineering Ltd v Barclays Bank International Ltd [1978] 1 All ER 976 at 981
[35] New South Wales Land and Housing Corporation v Australia and New Zealand Banking Group Limited [2015] NSWSC 176 at [69], citing Diplock LJ in United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd [1968] 1 All ER 104 at 109
[36] Friedlander v The Bank of Australasia (1910) 8 CLR 85 at 94 per Griffith C.J.

Undertakings does not arise as a result of ANZ being the agent of Nebax.[37] ANZ undertook an obligation of its own in its own name that clearly distinguishes it from a mere agent that creates a contract between its principal and a third party.[38] The Appellants contend that the fact that the customer-banker relationship between Nebax and ANZ is not one of agency militates against any contractual obligation that the customer may owe the beneficiary being necessarily imported into its contract with the issuing bank or into the Undertakings themselves,[39] even if the underlying contractual relationship is expressly referred to in the Undertakings.[40]

35. Secondly, the bank is not required (or even permitted) to speculate about the underlying facts when exercising its mandate granted by the customer. In *Westpac Banking Corporation v South Carolina National Bank*[41] the Privy Council held that the Court of Appeal was wrong to have gone beyond the terms of a bill of lading itself and to draw inferences of fact as to what occurred when the bill was issued. Lord Goff held:

> *"...it is well settled that a bank which issues a letter of credit is concerned with the form of the documents presented to it, and not with the underlying facts. It forms no part of the bank's function when considering whether to pay against the documents presented to it to speculate about the underlying facts."*

36. To similar effect was the statement by Donaldson MR in *Banque de L'Indochine et de Suez S.A. v J.H. Rayner (Mincing Lane) Ltd:*[42]

> *I approach this aspect of the appeal on the same basis as did the judge, namely, that the banker is not concerned with why the buyer has called for particular documents (Commercial Banking Co. of Sydney Ltd. v. Jalsard Pty. Ltd. [1973] A.C. 279), that there is no room for documents which are almost the same, or which will do just as well, as those specified (Equitable Trust Co. of New York v. Dawson Partners Ltd. (1926) 27 Ll.L.Rep. 49), that whilst the bank is entitled to put a reasonable construction upon any ambiguity in its mandate, if the mandate is clear there must be strict compliance with that mandate (Jalsard's case [1973] A.C. 279), that documents have to be taken up or rejected promptly*

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[37] United Trading Corporation S.A. and Murray Clayton Ltd v Allied Arab Bank Ltd [1985] 2 Lloyd's Rep 554 at 559.8

[38] The Relationship between Banker and Buyer under Documentary Letters of Credit: 'Documentary Letters of Credits- A comparative study' submitted for the degree of D. Phil (Oxon) page 45

[39] Courts will rarely imply terms into first demand guarantees Cauxell Ltd v Lloyds Bank Ltd (1995) Times Law Rep, 26 December

[40] United Trading Corporation S.A. at 559-560 see also 'The Independence Principle of Letters of Credit and Demand Guarantees': Enonchong, Oxford University press 2011 at [4.02]

[41] [1986] 1 Lloyd's Rep 311 at 315

[42] [1983] Q.B. 711 at 729-730

*and without opportunity for prolonged inquiry (Hansson v. Hamel and Horley Ltd. [1922] 2 A.C. 36) and that a tender of documents which properly read and understood calls for further inquiry or are such as to invite litigation are a bad tender (M. Golodetz & Co. Inc. v. Czarnikow-Rionda Co. Inc. [1980] 1 W.L.R.*

The principle of strict compliance

37. The critical aspect to the contractual relationship between the customer and the bank is that the bank's entitlement to be reimbursed by the customer (or, as in this case, a third party guarantor) is dependent on the bank paying out strictly in accordance with the terms of its instructions.[43] As Lord Sumner described the situation in *Equitable Trust Co of New York v Dawson Partners Ltd:*[44]

> *"It is both common ground and common sense that in [letters of credit] transactions the accepting bank can only claim [reimbursement] if the conditions on which it is authorised to accept are in the matter of the accompanying documents strictly observed." There is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines. The bank....knows nothing officially of the details of the transaction financed [by the credit and] cannot take upon itself to decide what will do well enough and what will not. If it does as it is told, it is safe, if it declines to do anything else it is safe; if it departs from the conditions laid down [in the credit] it acts at its own risk."*

38. Lord Justice Goddard said in *J.H. Rayner and Company Limited v Hambros Bank* Limited [45] the following about the letter of credit contractual relationship between the bank and the customer:

> *"The person who requests the bank to establish the credit can impose what terms he likes..... If it does pay on other terms it runs the risk of its customer refusing to reimburse it. It does not matter whether the terms imposed by the person who requires the bank to open the credit seem reasonable or unreasonable. The bank is not concerned with that. If it accepts the mandate to open the credit, it must do exactly what its customer requires it to do.*

39. To similar effect are the comments made by Bailhache J. in *English, Scottish & Australia Bank Ltd v Bank of South Africa,*[46] Jenkins L.J. in *Hamzeh Malas & Sons v British Imex*

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[43] Agasha Mugasha, The Law of Letters of Credit and Bank Guarantees: Federation Press 2003, page 24 and 127 and Peter Ellinger and Dora Neo, The Law and Practice of Documentary Letters of Credit: Hart Publishing 2010, page 86

[44] [1927] 27 Lloyd's Reports 49 at 52

[45] [1943] KB 37 at 42

[46] [1922] 13 Lloyd's Reports 21 at 24

*Industries Ltd* [47] and by Roskill L.J in *Howe Richardson Scale Co Ltd v Polimex-Cekop and National Westminster Bank Ltd*[48] and the commentary by Peter Ellinger.[49]

40. The principle of "strict compliance" arises as a result of a performance bond or letter of credit being "as good as cash".[50] As Stephen J. explained in *Wood Hall Limited v The Pipeline Authority:*[51]

> *"Once a document of this character ceases to be the equivalent of a cash payment, being instantly and unconditionally convertible to cash, it necessarily loses acceptability."*

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41. Further, as both Gibbs J.[52] and Stephen J.[53] noted in *Wood Hall*, the issuing bank has given an express unconditional undertaking to the named Favouree that it will pay strictly in compliance with the terms of the bank guarantee issued to the Favouree and for the issuing bank to instead inquire into the rights of the parties would be inconsistent with that express undertaking.

42. The conclusion by Emmett AJA that this principle only applies after the "construction" of the bank guarantee or letter of credit is inconsistent with a bank guarantee or letter of credit being "as good as cash". It is equally inconsistent with the unconditional express
20 undertaking of ANZ to payout only to the *"New South Wales Land & Housing Department trading as Housing NSW ABN 45 754 121 940"*. It is also contrary to authority that the de minimis principle does not apply to any contractual relationship between the favouree and the issuing bank.[54]

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[47] [1958] 2 QB 127 at 129
[48] Cited by Lord Denning in Edward Owen Ltd v Barclays Bank [1978] 1 QB 159 at 171
[49] Peter Ellinger, The Doctrine of Strict Compliance: Its Development and current construction (Lex Mercatoria: Essays on International Commercial Law in Honour of Francis Reynolds) published by LLP Press 2000
[50] S McCracken and A Everett, Everett and McCracken's Banking and Financial Institutions Law (7th Ed, 2009, Lawbook Co) at [14.060]
[51] (1979) 141 CLR 443 at 457
[52] Ibid at 451
[53] Ibid at 457
[54] Moralice (London) Ltd v E.D. and F. Man, [1954] 2 Lloyd's Reports 526 as considered in Bunge Corporation v Vegetable Vitamin Foods (Private) Ltd (1985) 1 Lloyd's Reports 613 at 616

43. Emmett AJA does not cite any precedent in support of the proposition that the principle of strict compliance arises only after the construction process has been completed and therefore makes a documentary discrepancy irrelevant.[55] The Appellants contend that such a finding is inconsistent with the passages from *Wood Hall* referred to at [40]-[41] above and inconsistent with the following authorities:

i) *Equitable Trust Co of New York v Dawson Partners Ltd* [56] wherein the House of Lords rejected an argument that the issuing bank was entitled to construe the reference to a certificate that was "issued by experts" to include a certificate issued by a single expert;

ii) *JH Rayner and Co Ltd v Hambro's Bank Ltd* [57] wherein the Court of Appeal held that the issuing bank could not be expected to construe the reference to "Cormandel groundnuts" as "machine-shelled groundnut kernels";

iii) *United Bank Ltd v Banque Nationale de Paris* [58] wherein the High Court of Singapore held that the issuing bank was not required to payout to "Pan Associated Pte Ltd" on a letter of credit issued in favour of "Pan Associated Ltd" despite evidence to the effect that the letter of credit must have been intended to be in favour of Pan Associated Pte Ltd because there was no Pan Associated Pte Ltd and that there could not be such an entity due to the incorporation naming laws applying in Singapore; and

iv) *Dessaleng Beyene and Jean M Hanson v Irving Trust Co*[59] where the United States Court of Appeals (2nd Circuit) held that the misspelling of the name of "Mohammed Sofan" to "Mohammed Soran" was a material discrepancy that entitled the issuing bank to refuse to pay under the terms of a letter of credit;

v) *Hanil Bank v PT Bank Negara Indonesia* [60] where it was held that it was appropriate for the issuing bank to reject a tender by a party claiming under the name of 'Sung Jun Electronics Co Ltd' when the letter of credit had been issued

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[55] His Honour did refer in footnote 99 to the text of Nelson Enonchong, The Independence Principle of Letters of Credit and Demand Guarantees (Oxford University Press 2011) at [4.55] however that passage does not go so far as to suggest that construing a letter of credit circumvents any difficulty that a documentary discrepancy would otherwise cause to the principle of strict compliance

[56] (1927) 27 Lloyd's Reports 49 at 52

[57] [1943] 1 KB 37 at 42-3

[58] [1991] 2 SLR 60 at 71-3

[59] 762 F 2d 4 (2nd Cir, 1985)

[60] 41 UCC Rep Serv 2d 618 (SDNY 2000)

in favour of 'Sung Jin Electronics co Ltd' even though the error was that of the issuing bank when drafting the letter of credit;

vi) *Tradax Petroleum Inc v Coral Petroleum Inc* [61] wherein the United States Court of Appeals (5th Circuit) rejected an argument by the beneficiary that the letter of credit should be construed so as to avoid the absurdity of the seller being required to deliver 30,000 barrels of 'sweet crude' but accompanied by a manifest showing delivery of 30,000 barrels of 'sour crude'. The Court also rejected an application by the favouree that the letter of credit should be rectified on the basis that despite any mutual mistake by the parties to the underlying contract there was no mistake by the issuing bank that had simply complied with its customer's instructions; and

vii) *Maridive & Oil Services (SAE) v CAN Insurance Co (Europe) Ltd* [62] where the Court of Appeal rejected an argument that the performance bond should be construed commercially, so that a reference to the favouree as "P&I Club, The Shipowners' Mutual Protection and Indemnity Association (Luxembourg) (hereinafter called the Obligee) a legal representative of Maridive & Oil Services (S.A.E.)" should be held to include, as a separate claimant, Maridive & Oil Services (S.A.E.).

44. The Appellants contend that the determination by Emmett AJA that the principle of strict compliance is subject to the anterior step of construing the bank guarantee is also contrary to the statement of principle by the New South Wales Court of Appeal in *Griffin Energy Group Pty Ltd v ICICI Bank* Limited [63] that letters of credit were "stand alone instruments" for which no regard was to be had to any provision of the underlying contract because "a letter of credit [was] the equivalent of a cash payment." The Court then recorded that the letters of credit "must be construed by reference to what a reasonable business person would have understood the terms to mean" but importantly held that this construction process was "subject to the principle stated in the previous paragraph". That is to say, the construing of the letter of credit was subject to the principle of a letter of credit being the equivalent of cash, or, that the proper construction of the letter of credit at all times remains subject to the principle of strict compliance.

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[61] 878 F 2d 830 (5th Cir 1989)
[62] [2002] EWCA Civ 369 at [10] and [51]
[63] (2015) 317 ALR 395 at [46]-[47]

45. Logic dictates that the proper construction of bank guarantees must always be subject to the principle of strict compliance given the dual obligations that the issuing bank has. Not only is it obliged to its customer to draft the bank guarantee in favour of the entity designated by the customer, it has also given an unconditional undertaking to the recipient to payout strictly in accordance with the terms of that bank guarantee. It would be inconsistent with both obligations for bank guarantees to be construed inconsistently with their express terms. Similarly, the suggestion at [110] of the Court of Appeal judgment that ANZ could have made inquiry as to whether the New South Wales Land & Housing Department existed or whether the Corporation had a construction contract with Nebax is also inconsistent with the express terms of the Undertakings [64] and with authority.[65]

No relevant contract created

46. The concept enunciated by Emmett AJA is also contrary to the argument that the consideration from the favouree to the issuing bank that causes the promise by the Bank to be enforceable by the favouree is a promise by the favouree to accept the letter of credit in the terms drafted.[66]

47. The Appellants contend that the correct enunciation of the relationship between letters of credit and contractual construction principles is that described by John F. Dolan [67] as follows:

> *"[letters] of credit are sui generis and that the law of contracts supplements the law of credits only to the extent that contract principles do not interfere with the unique nature of [letters] of credit"*

48. Another way of formulating this argument is to say that ANZ was, as a result of its contract with Nebax, contractually obliged to make an irrevocable offer to the favouree described in the Undertakings. Until such time as that offer was accepted by the named

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[64] See the terms of the Undertakings as annexed, in particular the acknowledgement by the Principal that ANZ has no responsibility or obligation to investigate the authenticity or correctness of the matters stated in the demand or notice.

[65] Banque de L'Indochine et de Suez S.A. v J.H. Rayner (Mincing Lane) Ltd [1983] Q.B. 711 at 729-730, referred to in [36] above. Also see Lord Sumner in Hansson v. Hamel and Horley Ltd. [1922] A.C. 36 at 46 and M. Golodetz & Co. Inc. v. Czarnikow-Rionda Co. Inc. [1979] 2 All ER 726 at 739 per Donaldosn J, accepted on appeal at [1980] 1 All ER 501 at 506-507

[66] Malek and Quest "Jack: Documentary Credits" (2009) Tottel Publishing [5.9] citing Elder Dempster Lines Ltd v Ionic Shipping Agency Inc [1968] 1 Lloyd's Reports 529 at 535

[67] 'The Law of Letters of Credit' (1984) published by WG&L

favouree (by making a claim on the Undertakings in accordance with their terms) then no contract existed between the named favouree and ANZ. In this matter as the Corporation was never the named favouree then a contract could never have existed as between ANZ and the Corporation. It follows therefore that if there never was any contract between the Corporation and ANZ then the "usual rules of contractual construction" should never have been applied by the Court of Appeal to this non-existing contract.

10 Material relevant to construction

49. If, contrary to the argument above, this Court finds that it was permissible for the Court of Appeal to have construed the terms of the Undertakings to determine the proper favouree, the Appellants contend that the Court of Appeal erred in considering material that was not known to ANZ.

50. As noted at [27] above, when construing the Undertakings, Emmett AJA drew a distinction between having regard to the terms of the Construction Contract (which was impermissible) and having regard to the names of the parties in the Construction Contract (which was permissible). His Honour cited two authorities in support of this
20 distinction being *Griffin Energy Group Pty Ltd v ICICI Bank Ltd* and *Rainy Sky SA v Kookmin Bank.*[68] *Rainy Sky SA* was however, as Emmett AJA acknowledges, a matter in which the performance bond stated that "terms and expressions used in this bond shall have the same meaning as in the contract". In those circumstances the terminology of the underlying contract had been expressly incorporated into the performance bond and therefore is clearly distinguishable from the Undertakings.

51. The issue in *Griffin Energy Group* to the proper construction of the term "due and payable" was not resolved by reference to any terms in the underlying sale Agreement but "to the ordinary meaning [of that term]".[69] The reference in the judgment to the
30 terms of the Sale Agreement[70] was in respect of the question of whether the obligation to make a payment under the Sale Agreement had, as a matter of fact, become due and

[68] [2011] UKSC 50
[69] (2015) 317 ALR 395 at [52]-[53]
[70] Ibid at [55]-[59]

payable and not to any consideration of the proper meaning of that term as it appeared in the letter of credit.

52. The Court of Appeal noted however in *Griffin Energy Group* [71] that "the language, surrounding circumstances and commercial purpose or objects of the Sale Agreement are different from those of the Letters of Credit." For that reason reference to the terms of the Sale Agreement (or in this case the Construction Contract) would not be appropriate to construe the letter of credit (or the Undertakings).

53. The Appellants accept that there exists a relevant distinction between the 'parties to a contract' and the 'terms of a contract', when considering the admissibility of post contractual conduct,[72] but contend that this principle has no application in the present circumstances. Similarly the primary judge's reference to 'parol evidence being admissible to identify the parties to a contract' or to correct an error in the contract [73] ignores the fundamental distinction between synallagmatic agreements and this unilateral undertaking by ANZ as discussed by Diplock LJ in *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd.*[74] With a synallagmatic contract it is possible that the objective intention of the two parties has not been properly recorded in the written instrument. With this particular unilateral undertaking, ANZ gave the very undertaking that it intended to give and there was no error.

54. The Appellants submit that the only material that the Court should have had regard to when construing the Undertakings was the terms of the Undertakings themselves or, if that submission is not accepted, only to the documentation passing between Nebax and ANZ (assuming that no contract has been created between ANZ and any favouree) or alternatively passing between the favouree and ANZ (if a contract between ANZ and the favouree had been created). Having regard to any other material means that the Court is no longer construing what Nebax and ANZ clearly meant by the reference to "*New South Wales Land & Housing Department trading as Housing NSW ABN 45754121940*" but is instead considering what Mr Simic should have been referring to

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[71] Ibid at [47]
[72] Filadelfia Projects Pty Ltd v Entirity Business Services Pty Ltd [2011] NSWSC 116
[73] New South Wales Land and Housing Corporation v Australia and New Zealand Banking Group Limited [2015] NSWSC 176 at [62]
[74] [1968] 1 All ER 104 at 109

when he gave his instructions to Ms Hanna- this not being a circumstance known to ANZ.

55. The argument that because Nebax intended the favouree to be the Corporation then the Undertakings should be construed in accordance with that intention fails for the reason why a similar argument was dismissed in respect of rectification in *Tradax Petroleum* (see [43(vi) above), that being that it was never the objective intention of ANZ that the favouree was to be the Corporation and ANZ is not, for the purposes of construing the promise made in the Undertaking, the agent of Nebax.

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**Part VII: Legislation**

56. The Appellants contend there are no applicable constitutional provisions, statutes or regulations to this appeal.

**Part VIII: Orders Sought**

20 57. The Appellants seek the following orders:

i) Appeal allowed;

ii) Order the First Respondent to pay the Appellants' costs of this appeal and the Second Respondent's costs of this appeal;

iii) Orders made by the Court of Appeal on 18 December 2015 be set aside and in lieu thereof the following orders made:

a) appeal allowed;

b) the Summons filed by the First Respondent on 23 June 2014 be dismissed;

30 c) the Cross Summons filed by the Second Respondent on 24 October 2014 be dismissed;

d) the First Respondent pay the costs of the Appellants and of the Second Respondent of this Appeal, and of the proceedings at first instance.

iv) Order that the First Respondent reimburse the Second Respondent the sum of $146,965.06 (and interest thereon) that the Second Respondent paid the First Respondent on 29 September 2015.

v) Order that the Second Respondent reimburse the Appellants the sum of $146,965.06 (and interest thereon) that the Appellants paid the Second Respondent on 2 September 2015.

**Part IX: Time**

58. It is estimated that 1 to 1.5 hours will be required for the presentation of the Appellants' oral argument.

8 June 2016

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M.A. ASHHURST SC
Tel: 02 8227 4400
Fax: 02 8227 4444
Email: ashhurst.m@universitychambers.com.au

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A. F. FERNON
Tel: 02 8227 4400
Fax: 02 8227 4444
Email: fernon.a@universitychambers.com.au

"D"



# AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED

## ABN 11 005 357 522

## ORIGINAL - TO BE PROVIDED TO THE FAVOUREE

## BANK GUARANTEE

Guarantee No: 108781

| | |
|---|---|
| Favouree | To: New South Wales Land & Housing Department Trading As Housing NSW ABN 45754121940 (The Principal) |
| Business name or trading name | For: Nehax Constructions Australia Pty Ltd ACN 101054068 (The Customer) |
| Description of contract/agreement | Australia and New Zealand Banking Group Limited ("ANZ") asks the Principal to accept this bank guarantee ("Undertaking") in connection with a contract or agreement between the Principal and Customer for Job Number: P0409021, Bomaderry - Design & Construct 3-7 Kurowa Street. Contract No: BG2J8. |
| Amount | In consideration of the Principal accepting this Undertaking and its terms, ANZ undertakes unconditionally to pay the Principal on written demand from time to time any sum or sums up to an aggregate amount not exceeding 73,482.53 AUD ("Amount") |

ANZ will pay the Amount or any part of it to the Principal upon presentation of this original Undertaking (accompanied by a written demand) at any ANZ branch located within Australia without reference to the Customer and even if the Customer has given ANZ notice not to pay the money, and without regard to the performance or non-performance of the Customer or Principal under the terms of the contract or agreement.

By accepting this Undertaking, the Principal acknowledges and agrees that ANZ may rely entirely on any demand or notice as presented to it and has no responsibility or obligation to investigate the authenticity or correctness of the matters stated in a demand or notice, the signatures on the same, the positions of such signatories or the capacity or entitlement of the Principal to give and execute the demand or notice.

Any alterations to the terms of the contract or agreement or any extensions of time or any other forbearance by the Principal or Customer will not impair or discharge ANZ's liability under the Undertaking.

This Undertaking remains in force until the first to occur of:-

* The Principal notifies ANZ in writing that the Undertaking is no longer required.

* This original Undertaking is returned to ANZ.-

* ANZ has paid to the Principal the Amount or the balance outstanding of the Amount.

On expiry or when no longer required this Original Undertaking must be returned for cancellation to the Manager of any ANZ branch located within Australia.

Notwithstanding anything stated in this Undertaking, ANZ has the right to terminate it at any time by paying the Principal the Amount or the balance outstanding of the Amount, or any lesser amount that the Principal may require.

This Undertaking is personal to the Principal. The Principal cannot assign, transfer, charge or otherwise deal with its rights under this Undertaking and ANZ will not recognise any purported assignment, transfer, charge or other dealing.

This Undertaking will be governed by the laws of New South Wales ("Governing Jurisdiction")

Dated this Friday, 16 April 2010

Executed by Adele Hanna, Relationship Manager at Caringbah, New South Wales for and on behalf of Australia and New Zealand Banking Group Limited ABN 11 005 357 522

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED ABN 11 005 357 522 CARINGBAH 204-218 KINGSWAY

This is the annexure marked "D" referred to in the Affidavit of Adele Hanna sworn on 6th September 2014 before me:

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Solicitor Sydney / Justice of the Peace

# AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED
## ABN 11 005 357 522
## ORIGINAL - TO BE PROVIDED TO THE FAVOUREE
## BANK GUARANTEE

Guarantee No: 108783

| | |
|---|---|
| Favouree | To: New South Wales Land & Housing Department trading as Housing NSW ABN 45754121940 (The Principal) |
| Business name or trading name | For: Nebax Constructions Australia Pty Ltd ACN 101054068 (The Customer) |
| Description of contract/agreement | Australia and New Zealand Banking Group Limited ("ANZ") asks the Principal to accept this bank guarantee ("Undertaking") in connection with a contract or agreement between the Principal and Customer for Job Number: P0409021, Bombaderry - Design & Construct 3-7 Kurowa Street Contract Number BG2J8 |
| Amount | In consideration of the Principal accepting this Undertaking and its terms, ANZ undertakes unconditionally to pay the Principal on written demand from time to time any sum or sums up to an aggregate amount not exceeding 73,482.53 AUD ("Amount") |

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Dated this Friday, 16 April 2010

Executed by Adele Hanna, Relationship manager at Caringbah, New South Wales for and on behalf of Australia and New Zealand Banking Group Limited ABN 11 005 357 522.

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED
304-318 KINGSWAY
CARINGBAH
A.B.N. 11 005 357 522