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' REPLY

Part I: Internet Certification

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

Part II: Reply

<u>The architecture of the Undertakings</u>

2. The First Respondent submits that the Appellants "*contend that when construing performance bonds and letters of credit a court may not have regard to the commercial objects to be secured by the Undertakings, their genesis, background and context, and materials reasonably available to the parties when the contract was made.*"[1] This is incorrect. What the Appellants submitted was that when construing the Undertakings the principle of "strict compliance" is not limited to "performance"[2]. To the extent that extraneous material is to be taken into account, it is to be limited to the material passing between the customer (Nebax) and the issuing bank (ANZ)[3].
3. Central to this dispute, and to the apparent inconsistencies between the authorities cited by the Appellants and those cited by the First Respondent, is the "architecture" of the letter of credit or performance bond being considered (in this matter, the

[1] First Respondent's Submissions 29 June 2016 [16]
[2] Appellant's Submissions 8 June 2016 [29]
[3] Ibid [54]

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"Undertakings"). As the Appellants explained in their submissions in chief,[4] the Undertakings are neither a tripartite contract nor a synallagmatic agreement between ANZ and the Corporation (a better description of the Undertakings is "a promissory note payable on demand"[5] or a "unilateral contract"[6]) and any attempt to construe these instruments as if they were "an ordinary contract" between the Corporation, Nebax and ANZ (as contended for by the First Respondent) will result in error.

4. The Undertakings are unilateral undertakings by ANZ resulting from a contract between the customer (Nebax) and the issuing bank (ANZ) to which the Corporation was not a party (the "Applications"[7]); the Undertakings are however autonomous from the Applications; meaning that the Undertakings are independent of the related but separate contracts[8] and are construed against the circumstances, knowledge and commercial purposes of ANZ and not the circumstances of the parties to the related but independent contracts.

The authorities relied on by the First Respondent

5. The First Respondent relies on *IE Contractors Ltd v Lloyds Bank PLC*[9] per Leggatt J. as authority for the proposition that a two-step process is involved when considering whether there has been compliance with a performance bond, firstly construing what the performance bond requires, secondly determining whether the requirements of the bond have been met. So much can be agreed to; that does not however mean that the performance bond is construed against the underlying contract when the issuing bank does not have that contract and the terms of that contract have not been incorporated into the performance bond. Neither does it mean that the issuing bank's contractual obligations to its customer are ignored.

6. The First Respondent then refers to the House of Lords' decision in *Equitable Trust Company of New York v Dawson Partners Ltd*[10] and to the first instance decision[11] and Court of Appeal[12] judgments in support of its argument that Courts have considered extraneous material when construing performance bonds. In *Dawson Partners* (unlike the present case) there were direct communications between all three parties (ie the issuing bank, the customer and the beneficiary) regarding the final terms of the performance bond[13]. What was construed in *Dawson Partners* was the terms of an amendment made to the performance bond that arose from communications directly between the issuing bank and the beneficiary.

7. The First Respondent then dismisses as irrelevant the decisions of *J H Rayner & Co v Hambro's Bank Ltd*[14], *Dessaleng Beyene and Jean M Hanson v Irving Trust Co*[15], *United Bank Ltd v Banque Nationale de Paris*[16], *Hanil Bank v Pt Bank Negara*

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[4] Ibid [33]-[34]
[5] Master Marine AS v Labroy Offshore Ltd [2012] SGCA 27 at [25]
[6] United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd [1968] 1 All ER 104 at 109
[7] CB 1 pages 127 and 128
[8] Master Marine AS v Labroy Offshore Ltd [2012] SGCA 27 at [26] and United City Merchants (Investments) Ltd v Royal Bank of Canada (H.L.E.) [1983] 1 AC 168 at 182-183
[9] [1989] 2 Lloyds Reports 205 at 208 (col 2)
[10] (1927) 27 Lloyds Reports 49
[11] (1926) 24 Lloyds Reports 261 at 262
[12] (1926) 25 Lloyds Reports 90
[13] Equitable Trust Company of New York v Dawson Partners Ltd (1927) 27 Lloyds Reports 49 at 50-51
[14] [1943] KB 37
[15] 762 F 2d 4 (2d Cir, 1985)
[16] [1991] 2 SLR 60

Indonesia[17] and *Westpac Banking Corporation v South Carolina National Bank*[18] on the basis that these decisions are "pure compliance cases". What is a "pure compliance case" is not explained by the First Respondent. However, it would be inconsistent with its own description of a "two-step" process to suggest that there was no process of "construction" in these authorities before there was a consideration of compliance.

8. *Rainy Sky SA v Kookmin Bank*[19], properly understood, does not assist the First Respondent either. The performance bonds considered in *Rainy Sky* expressly incorporated the terms of the underlying contract[20]. Further, unlike the Undertakings, the issuing bank in *Rainy Sky SA* expressly acknowledged that it had received the underlying contract[21]. Importantly it was common ground that the underlying contracts were relevant to the construction of the bonds[22] therefore the issue raised by these proceedings was not even considered. Finally, *Rainy Sky SA* involved a performance bond that on its face had two possible constructions[23]. However, the Court accepted[24] that if the language used permits only one construction, that construction must be applied. In this matter there was no ambiguity presenting itself and therefore no basis for introducing extraneous material so as to resolve the ambiguity[25].

9. The First Respondent then relies on *Master Marine AS v Labroy Offshore Ltd*[26]. This decision involved performance bonds that at least implicitly incorporated the terms of the underlying contract[27]. This fact may explain why the Court of Appeal of Singapore simply assumed that the underlying contract was relevant extrinsic evidence to the construction of the performance bond without any consideration as to whether that document was reasonably available to the maker of the unilateral undertaking, or even whether the construction of a unilateral undertaking is determined in the same manner as a synallagmatic contract.

Construing the Undertakings in accordance with *Rainy Sky SA*

10. The passage in *Rainy Sky SA* relied on by the First Respondent[28] on their construction argument records Lord Clarke of Stone-Cum-Ebony JSC reiterating the statements made by Lord Hoffmann in *Investors Compensation Scheme*[29] in relation to construing commercial contracts in general. Given the "architecture" of the particular performance bond in *Rainy Sky SA*[30], those statements were applicable. However applying them to the present situation is not so straightforward.

11. The "ultimate aim" of interpreting a provision in a contract (as explained in *Rainy Sky SA*) is "to determine what the parties meant by the language used". In this matter that

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[17] 41 UCC Rep Serv 2d 618 (SDNY 2000)
[18] [1986] 1 Lloyds Reports 311
[19] [2011] 1 WLR 2900
[20] at [7]
[21] Ibid
[22] Ibid at [10]
[23] Ibid at [9]
[24] Ibid at [16],[23]
[25] Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337 at 352 and Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Limited (2015) 325 ALR 188 at [52]
[26] [2012] SGCA 27; [2012] 3 SLR 125
[27] Ibid [4] (3(a.) the reference to "in accordance with the terms of the contract", and 3 the reference to "and has been referred to arbitration in accordance with the contract" "in accordance with the terms of the contract" and "as provided in Article 3.8 of the Contract"
[28] First Respondent's Submissions 29 June 2016 [75]-[76]
[29] [1998] 1 WLR 896, 912H
[30] as explained in paragraph [8] above

means to determine what ANZ meant by the language it used in the Undertakings. To determine ANZ's "meaning", reference is had to what the "reasonable person" would have understood the Undertakings to mean (having regard to the "surrounding circumstances known"[31] to ANZ at the time of the creation of the Undertakings)[32].

12. The reasonable person would firstly take into account ANZ's contractual obligation created by the Applications[33] to produce the Undertakings in favour of "New South Wales Land & Housing Department trading as Housing NSW ABN 45754121940 (The Principal)" (the "Department"). The reasonable person would note that whilst a "contract or agreement" is referred to in the Undertakings the terms of that "contract" are not incorporated into the Undertakings. Further, that although the Undertakings refer to a contract between Nebax and the "Principal", the "Principal" is not defined in the Undertakings as the Corporation but rather as the "Department". Finally, the "reasonable person" would take into account the principle of strict compliance, because it is an objective fact known to ANZ that the effective use of performance bonds (and its own entitlement to be reimbursed by the customer in respect of the Undertakings) depends on ANZ strictly complying with the terms of the Undertakings and the Application.
13. The reasonable person would not take into account the underlying Construction Contract between Nebax and the Corporation because:
    i) ANZ had not been told about any contract between the Corporation and Nebax (it had been told of a contract between the "Department" and Nebax);
    ii) the contract between Nebax and the Corporation was not available to ANZ (nor reasonably available to it at the time of entering into the Undertakings[34]), and
    iii) the contract referred to in the Undertakings did not in any event properly describe the contract between Nebax and the Corporation (neither the reference to the parties to that contract or the "Job Number" or "Contract No." were correct[35]).
14. The reasonable person would also not take into account that the entity described as the "Department" did not exist as this was not information known to ANZ or reasonably available to ANZ at the time the Undertakings were issued or relevant to ANZ's commercial purpose in issuing the Undertakings.
15. Finally, it is not permissible to imply into the Undertakings a term that the ANZ would pay some other entity if it is demonstrated to ANZ that the Department does not exist because it is not necessary for the commercial purpose of the performance bonds[36].

<u>The critical flaw in the First Respondent's construction argument</u>

16. The critical flaw in the First Respondent's argument that the Court should construe the Undertakings by reference to the underlying contract between Nebax and the Corporation is illustrated when it submits[37] (as it must, to be consistent with its construction argument) that:

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[31] Codelfa, supra at 352; Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451, 462; DTR Nominees Pty Ltd v Mona Homes Pty Ltd (1978) 138 CLR 423, 429; Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165, 179

[32] Maggbury Pty Ltd v Häfele Australia Pty Ltd (2001) 210 CLR 181 at [11] citing Lord Hoffman in Investors Compensation Ltd v West Bromwich Building Society (1998) 1 All ER 98 at 114

[33] AB1/127-8

[34] Maggbury Pty Ltd v Häfele Australia Pty Ltd (2001) 210 CLR 181 at [11]

[35] Discrepancies in the Undertakings' references to the construction contract are set out in Annexure "A"

[36] Cauxwell v Lloyds Bank PLC Unreported 7 November 1995 ComC per Cresswell J at 7-8

[37] First Respondent's Submissions 29 June 2016 [74]

"Emmett AJA was not correct at CA [101] (sic [99]) *in suggesting that the autonomy principle restricts the availability of material. That proposition is not consistent with the authorities we have cited."*

17. The "autonomy principle restricts the availability of material" in the manner described by the New South Wales Court of Appeal in *Griffin Energy Group Pty Ltd v ICIC Bank Ltd*[38] when the Court held:

"It is to be noted that the language, surrounding circumstances and commercial purpose or objects of the sale agreement are different from those of the letters of credit."

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The First Respondent's Notice of Contention (the misnomer and absurdity arguments)

18. The First Respondent also submits that the Undertakings should be construed to avoid the absurdity of the Undertakings being construed as favouring a non-existing entity[39]. The "misnomer-absurdity" argument is of course inconsistent with the approach taken in each of *Banque Nationale de Paris*[40] *Irving Trust Co*[41] and *Hanil Bank*[42]. In each of those matters the misnomer argument was rejected because it would be inconsistent with the strict compliance obligation of the issuing bank and would impose additional obligations on the issuing bank that it did not undertake[43].

19. The error in the First Respondent's "misnomer-absurdity" argument is the same error
20 that occurs in its broader construction argument. It implicitly assumes that what is being considered is a tripartite agreement, or at the very least a synallagmatic contract rather than a unilateral undertaking by ANZ. The First Respondent's submission that "human beings sometimes use wrong words"[44] obscures the question from what perspective is "wrong" being considered. ANZ used the words in the Undertaking that it was contractually obligated to use and therefore the words were not "wrong" from ANZ's perspective. The critical distinguishing feature between the authorities referred to in [18] above and the general misnomer authorities relied on by the First Respondent is that what is being construed in the authorities described above is a unilateral undertaking (subject to the principal of strict compliance) not a synallagmatic contract.
30 ANZ did not make any error describing the favouree as the Department. ANZ acted strictly in accordance with the Applications and its oral instructions from Mr Simic. The First Respondent is asking the court to rectify a linguistic mistake, not in the Undertakings, but in the Applications, being the anterior contracts between Nebax and ANZ . In so doing the First Respondent has ignored the autonomy principle. The words that appear in the Applications could not have conveyed to ANZ that it should issue the Undertakings in favour of the Corporation.

20. Further, the so called "absurdity" would, contrary to the First Respondent's submissions not be resolved by reference to the terms of the contract described in the Undertakings because the contract described in the Undertakings was not the contract between Nebax
40 and the Corporation[45].

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[38] (2015) 317 ALR 395 at [47]
[39] First Respondent's Submissions 29 June 2016 [76]-[84]
[40] [1991] SGHC 78 at [40]
[41] 762 F 2d 4 (2d Cir, 1985) at [1]-[2]
[42] 41 UCC Rep Serv 2d 618 (SDNY 2000) at [5]
[43] Irving Trust Co supra at [2]
[44] First Respondent's Submissions 29 June 2016 [74]
[45] see paragraph [13(iii)] above and [38]-[39] of the Submissions of the Second Respondent filed 28 June 2016 which the Appellants respectfully adopt

The First Respondent's Cross Appeal (the rectification argument)

21. The claim to "rectify" the Undertakings to include the correct name of the Corporation (the First Respondent's Cross Appeal), is a claim to redraft the Undertakings, not to comply with the expressed objective intention of the Nebax-ANZ contract but rather with the Nebax-Corporation contract, to which ANZ is not a party. Similarly, the Corporation was not a party to the contract between Nebax and ANZ or to the instructions that Nebax gave ANZ (ANZ not being an agent of Nebax[46]). In the absence of an error by ANZ in carrying out the instructions it received from Nebax in the drafting of the Undertakings, there is no scope for the principles of rectification because "*Courts of Equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of the contracts*"[47]. The Undertakings were instruments made in pursuance of the Nebax-ANZ contract and there was no error between the terms of that contract and the creation of the Undertakings.

22. Consistently with the remainder of the First Respondent's submissions, the First Respondent's argument on rectification assumes that what is sought to be rectified is a tripartite agreement (as if the Corporation was a party) rather than a unilateral undertaking by ANZ to which the Corporation never became a party. The authorities relied on by the First Respondent are all examples of rectification of synallagmatic contracts and not the rectification of performance bonds. The only authority identified by any party that considered the rectification of a performance bond is *Tradax Petroleum American Inc v Coral Petroleum Inc*[48]. In that matter Reavley, Politz and Smith JJ. made the following relevant statement in relation to a rectification claim in respect of an apparent absurdity on the face of the performance bond:

> *"We agree with the District Court's determination that there was no mutual mistake here. Any mistake made was by Tradax and Coral only- not by FABC. FABC, without knowledge of the meanings of the technical designations included, prepared the letter of credit precisely in compliance with Coral's request. Tradax then failed to recognize that the letter of credit's terms did not reflect its agreement with Coral. In addition, there is no prior agreement between FABC and Tradax to which the letter of credit could be conformed. Contrary to Tradax's suggestion, neither FABC's internal summary of the transaction nor the underlying agreement between Tradax and Coral is evidence of a prior agreement between FABC and Tradax".*

23. Substituting "the Corporation" for Tradax, "ANZ" for FABC and "Nebax" for Coral the statements made by the 5th Circuit of the United States Court of Appeals apply with equal force to this current dispute. There was no "mutual mistake" because ANZ did not make any mistake. ANZ prepared the Undertakings precisely in accordance with Nebax's instructions. The Corporation then failed to identify any error in the drafting of the Undertakings. The only "mistakes" were made by Nebax and the Corporation not ANZ and it is ANZ's instrument that the First Respondent is seeking to rectify.

24. Finally, the 5th Circuit Court's statement that there was no prior agreement between the issuing bank and the favouree that the performance bond could be "conformed with" is also applicable in the present factual situation. In this present matter, there was no prior agreement (or even any prior communications) between the Corporation and ANZ

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[46] Friedlander v The Bank of Australasia (1910) 8 CLR 85 at 94 per Griffith CJ.
[47] Mackenzie v Coulson (1869) LR Eq 368 at 375
[48] 878 F 2d 830 (5th Cir 1989)

against which it could be claimed that the Undertakings should be rectified so as to comply with.

25. The submission by the First Respondent that Ms Hanna (the ANZ employee) "subjectively intended that the name of the favouree was to be that of Nebax's counter-party to the Construction Contract"[49] is incorrect. As explained at [13(iii)] above, the "Principal" described in the Undertakings is not Nebax's counterparty to the Construction Contract and Ms Hanna was never provided with the correct details of the "Construction Contract". It cannot be the case that Ms Hanna intended to insert the name of a party that she had never been told of or to insert the name of a party to a contract, the correct details of which she had never received.

26. The First Respondent's submission that in the Undertakings the word "Principal" is used "15 times and never the word Favouree"[50] is correct; what the First Respondent's submissions fail to acknowledge, however, is that the definition of "The Principal" (which appears against the word "Favouree") is "The New South Wales Land & Housing Department trading as Housing NSW ABN 45754121940". Therefore every one of those 15 times that the word "Principal" appears in the Undertakings it is referring to the description given to the favouree, i.e. the "Department".

Second Respondent's Cross Appeal

27. The Second Respondent's Cross Appeal would seem to depend on the terms of an agreement reached between counsel during the hearing before the primary judge. A copy of the relevant transcript of the first instance proceedings recording that agreement is Annexure "B" to these Submissions.

28. It is clear from the transcript in Annexure B[51] that the "agreement" reached between the parties was not intended to continue after the Undertakings were returned to the Second Respondent and the Second Respondent was not required to pay out on the Undertakings to the First Respondent. This is also consistent with the express term of the Undertakings that the Undertakings remain in force until returned to the Second Respondent, an event that occurred on 29 September 2015[52]. Further, there was no appeal by any party against the finding that there was not in existence any entity matching the description of the "Favouree" described in the Undertakings and therefore the premise upon which the parties "agreed" that there was no contingent liability in favour of the Second Respondent[53] has also been satisfied.

12 July 2016

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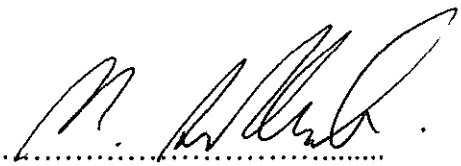
[49] First Respondent's Submissions 29 June 2016 [94]
[50] Ibid [108]
[51] Annexure B; T 46X
[52] AB3/972
[53] Annexure B; T 46L



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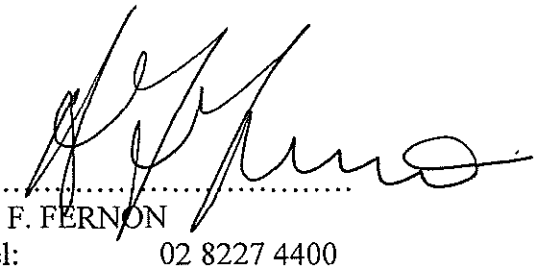

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Annexure "A"

Comparison of the Contract Between Nebax and the Corporation and the Reference to that Contract in the Undertakings

Terminology	Nebax/Corporation Contract[54]	Undertakings[55]
Parties	New South Wales Land and Housing Corporation ABN 24 960 729 253 and Nebax Constructions Australia Pty Limited ABN 84 101 054 068	New South Wales Land and Housing Department trading as Housing NSW ABN 45754121940 and Nebax Constructions Australia Pty Limited ACN 101054068
Contract No.	S1384	BG2J8
Job No.	BG2J8 C-71561	P0409021
(job address)	BOMADERRY (3-7 Karowa Street)	Bombaderry- 3-7 Karowa Street

[54] AB2/526
[55] AB1/66-7, AB1/124-5, AB3/875-877

Annexure "B"

HIS HONOUR: Just in terms of housekeeping what I propose to do is add the additional outline of submissions from the plaintiff and your speaking notes to the exhibit under the respective bits of submissions, only because experience teaches that if the matter goes elsewhere it's sometimes useful that the court has all the arguments that were put to me.

LUNCHEON ADJOURNMENT

DOCKER: Your Honour over the luncheon adjournment the issue between Mr Fernon and I has been resolved. If I could just turn your Honour to my speaking document at page 4, I think this is the most efficient way to do it.

HIS HONOUR: This is your outline of final submissions?

DOCKER: Yes, paragraph 15 was common ground before lunch.

HIS HONOUR: Yes.

DOCKER: So also was 16, your Honour, which was that if your Honour were to find that the bank guarantees are ineffective to create an obligation on the part of ANZ to anyone, then that means that there is no contingent liability in ANZ and therefore no liability in Nebax for something that ANZ may have to pay and the provision I showed your Honour, and therefore no liability.

HIS HONOUR: So that was common ground and remains common ground?

DOCKER: Yes. The thing that's changed, your Honour, though is if your Honour finds that the corporation can't call on the bank guarantees but for some reason the bank guarantees could be called on by someone else or they are still out there extant, then there is a contingent liability in ANZ which can be called upon by ANZ to Nebax which has happened because of the demands and then all the securities, the guarantees and securities are enforceable as well, so that's common ground between us.

HIS HONOUR: Is that to say they become enforceable upon the contingency becoming a reality?

DOCKER: No, they are enforceable now and what happens is that if the money is paid to ANZ and the bank guarantees expire without ANZ having to pay out, then we have to pay the money back.

HIS HONOUR: That seems a fair and reasonable solution. I was wondering about the slight harshness of the Bank's position.

DOCKER: It's not expressed your Honour in the documents, but if I was going to get to it my submission was that once the bank guarantees got returned to us and expired without us paying out on them there was no longer, the conditions of clause 17 I think it's (b)(iii) apply, in other words there is no possibility that we may have to pay out any more, so we have no rights to the

money, so we have to pay it back. That's how we say contractually it works, but that doesn't need to concern your Honour, we have just come to an agreement.

HIS HONOUR: Does that need to be formally recorded in some way or is it enough that it be on the transcript? It's a matter for you and not something I need to deal with, is it?

DOCKER: Your Honour I am content with how it is. I am happy, if my friend wants it recorded, we can do it. There is one thing I want to say about it and this is not so much necessary I think for your Honour's determination but so it is recorded, and that is if this third possibility arises and the money is paid to the bank, the bank is going to hold it in a term deposit until the bank's guarantees are returned.

HIS HONOUR: Yes and one way and another someone gets the benefit of that interest depending on what happens?

DOCKER: Yes.

HIS HONOUR: That sounds, I must say, with respect eminently sensible.

DOCKER: But the upshot of it is, your Honour, if that third possibility in 17 is found, then it's agreed between us that in terms of the cross-claim I am entitled to the relief I want.

HIS HONOUR: Yes, all right. Have you finished that and you are getting ready to move on to the next?

DOCKER: Yes.

HIS HONOUR: Can I just perhaps take you off your path and back to something we were talking about before lunch, that I was thinking about over the adjournment. If you just have a look at the guarantee again. I want to run past you and please forgive me if to some extent this repeats matters we have already had exchanges on.

I would like to run this past you, because one thing that occurred to me over the luncheon adjournment is that a number of the authorities that the parties wish to refer me to are out of the letter of credit and guarantee class of case where that which has been presented does not precisely reflect the document that was supposed to be presented. I am thinking about the case about the Coromandel nuts and that sort of line of country.

I at least may have fallen into a little bit of a category error by trying to analyse this problem in terms of the identity of documents or persons that have been presented to the Bank. I just want to put this to you as a way of analysing the problem and what the bank's obligation is.

If you go to the guarantee it says at about point 4, "ANZ will pay the amount",