OUTER HOUSE, COURT OF SESSION

[2026] CSOH 67

CA10/26

OPINION OF LORD SANDISON

In the cause

THE RENAISSANCE CLUB AT ARCHERFIELD, LLP

Pursuer

against

BVB SURETIES LIMITED

Defender

Pursuer: Ellis KC; Morton Fraser MacRoberts LLP
Defender: G Walker KC, Convery; Brodies LLP

14 July 2026

Introduction

[1] The pursuer in this commercial action seeks payment of a principal sum of £1,251,638.80 from the defender, a company incorporated in the British Virgin Islands, pursuant to a performance bond granted by the defender to the pursuer in May 2024 in security of the obligations of a company called Taylor's Property Developments (Yorkshire) Limited under a contract with the pursuer for the design and build of a residential development in East Lothian. The pursuer made a written demand for payment under the bond dated 14 September 2025, which was delivered to the defender on 29 September 2025. The defender maintains that the demand did not comply with the requirements of the bond,

and that it is accordingly not liable to pay the sum demanded. Each party challenges the relevancy of the other's case, and the matter came before me for discussion at debate.

Background

[2] The material terms of the performance bond are as follows:

> "2. We BVB SURETIES LIMITED … irrevocably and unconditionally promise to pay, as primary obligor, to you on your first written demand and waiving all rights of objection and deference and without reference to the Contractor an amount or amounts not exceeding in aggregate £1,251,638.80 (**Bond Amount**) provided that your demand complies with the provisions of this Performance Bond.
>
> …
>
> 4. Your demand under this Performance Bond must be received at the office of issuance of this Performance Bond provided below before Expiry and must be in the form set out in Appendix 1 attached to this Performance Bond stating:
>
> 4.1 That the Contractor has failed to perform the Contract in accordance with its terms and conditions;
>
> 4.2 in what respects the Contractor has so failed;
>
> 4.3 that as a result of such failure, the amount claimed is due to you; and
>
> 4.4 the amount claimed.
>
> We shall accept such demand as conclusive evidence, for the purposes of this Performance Bond alone, that the amount claimed is due to you under this Performance Bond.
>
> …
>
> 8. This Performance Bond and any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with it or its subject matter or formation shall be governed by, and construed in accordance with, the law of Scotland.
>
> 9. The Scottish Courts shall have non-exclusive jurisdiction to settle any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with this Performance Bond or its subject matter or formation."

Appendix 1 to the bond was in the following terms:

> "**Form of Demand**
> TO: [BOND PROVIDER]
> Re: [INSERT DETAILS OF PERFORMANCE BOND]
> Dear [NAME OF ADDRESSEE(S)],

We refer to the performance bond, particulars of which are set out above (**Performance Bond**). Capitalised terms used, but not defined, in this demand are defined in the Performance Bond.

The Contractor has failed to the perform the Contract in accordance with its terms and conditions in the following respects:

[INSERT BRIEF DETAILS OF THE BREACH]

As a result of such failure, the sum due to us is [£][INSERT]

We hereby demand payment from you of the said sum of [£][INSERT] under the terms of the Performance Bond representing the amount due to us in respect of the Contractor's failure to perform the Contract.

The sum demanded does not exceed the Bond Amount set out in clause 2 of the Performance Bond and this demand has been issued before Expiry.

Payment of the above sum should be made to the following account:

[INSERT]

Yours faithfully,

[SIGNATURE]
[Director **OR** Company secretary] of the Beneficiary"

The demand letter dated 14 September 2025 was addressed on the notepaper of the pursuer to the defender at its registered office in Tortola, and its operative text was as follows:

"Re: Renaissance Club at Archerfield LLP Performance Bond for contract dated 14 December 2022 with Taylor's Property Developments (Yorkshire) Ltd (the Contract).

Dear BVB Sureties Limited

We refer to the performance bond, particulars of which are set out above (**Performance Bond**). Capitalised terms used, but not defined, in this demand are defined in the Performance Bond.

The Contractor has failed to the perform the Contract in accordance with its terms and conditions in the following respects:

The Contractor has carried out defective work, in breach of its contractual obligations (such obligations include, but are not limited to: carrying out and completing the Works (as defined in the Contract) in a proper and workmanlike manner;

adequately protecting all types of work and all parts of the Works; providing constant management and supervision of the Works; and coordinating the Works. Breaches include, but are not limited to, breaches of the following numbered clauses of the contract:

- 2.1.1 (obligation to carry out and complete the works in a proper and workmanlike manner and in compliance with the Contract Documents, the Construction Phase Plan and Statutory Requirements);
- A34 – 410 Work in all Sections (obligation to adequately protect all types of work and all parts of the Works, including work carried out by others, throughout the Contract); and
- A33 – 510 Supervision (in addition to constant management and supervision of the works provided by the Contractor's person in charge, all significant types of work must be under the close control of competent trade supervisors to ensure maintenance of satisfactory quality and progress).

Said breaches of contract have resulted in us incurring loss (damages) as we have required to instruct others to carry out remedial works.

Said defective work relates to, inter alia:

[There follow 18 bullet points setting out specific claimed instances of defective work.]

As a result of such failures, the sum due to us is £1,811,492 (exclusive of VAT).

We hereby demand payment from you of the sum of £1,251,638.80 under the terms of the Performance Bond representing the amount due to us in respect of the Contractor's failure to perform the Contract.

The sum demanded does not exceed the Bond Amount set out in clause 2 of the Performance Bond and this demand has been issued before Expiry.

Payment of the above sum should be made to the following account:

[Details of the pursuer's bank account are set out]

Yours faithfully,

Gerald S. Sarvadi, General Partner [handwritten]
Gerald S Sarvadi, General Partner"

Evidence and admissions

[3] The pursuer produced an affidavit from Mr Gerald Sarvadi which narrated *inter alia* that he was at all material times a designated partner in the pursuer. He was also an

expressly authorised signatory for the pursuer at all such times, during which he was also registered as a person with significant control of it on the Companies Register. The performance bond itself had been addressed to him as a representative of the pursuer. Documentary material vouching each of these claims was produced. The parties entered into a joint minute of admissions accepting the veracity of these claims. Mr Sarvadi further explained in his affidavit that he usually described himself as a "General Partner" in the pursuer when dealing on its behalf because in practice he was the person responsible for its routine management.

Defender's submissions

[4] On behalf of the defender, senior counsel submitted that the demand letter did not comply with the terms of the performance bond, and that the defender was accordingly under no obligation to pay the pursuer. In particular, the letter did not comply with the requirements of clause 4.2 of the bond because it failed to specify each factual matter said to give rise to a breach of the underlying design and build contract and which clause or clauses of that contract were said to have been breached in consequence of such matter. Further, the letter bore to be signed by Mr Sarvadi as "General Partner", a capacity not recognised in law in relation to a limited liability partnership, and in that regard also did not comply with the requirements of Appendix 1 to the bond. The court should sustain the defender's plea to the relevancy of the pursuer's case, and dismiss the action.

[5] Performance bonds fell to be construed in the same way as any other contractual document: *South Lanarkshire Council* v *Coface SA* [2016] CSIH 15, [2016] BLR 237 at [15]. The ultimate aim of contractual construction was to determine what a reasonable person with all the background knowledge which would reasonably have been available to the

parties in the situation in which they were at the time of the contract would have understood them to have meant: *Rainy Sky SA* v *Kookmin Bank Co Ltd* [2011] UKSC 50, [2011] 1 WLR 2900 at [21]. In interpreting a contractual provision, the court should adopt a purposive approach, one which had regard to the fundamental objectives that reasonable persons in the parties' position would have had in mind: *Ashtead Plant Hire Co Ltd* v *Granton Central Developments Limited* [2020] CSIH 2, 2020 SC 244, 2020 SLT 575 at [11]. Where contractual wording was capable of having more than one meaning, that which made better commercial sense according to the fundamental purposes of the contract might properly be preferred, even if a more natural meaning which produced a reasonable result was also available: *Ashtead* at [12].

[6] A document presented by way of demand under a performance demand had to be precisely that which the bond called for. The reason for this principle was explained in *South Lanarkshire Council* at [12]:

> "… implementation of the contract is normally conditional on the presentation of documents and nothing more; there is no means of checking whether performance is due by reference to underlying facts, and thus the documents must be exactly what is required by the contract. Moreover, a performance bond can be enforced by the beneficiary very easily, by the mere sending of documents, and there is therefore a danger that the right to call up the bond can be abused. Accordingly some degree of strictness is required. When the granter of the performance bond makes payment, it generally has a right to be reimbursed by the party whose obligations are guaranteed, either contractually or on a restitutionary basis. If the granter does not ensure that the documents comply fully with the terms of the bond, that right to reimbursement will generally be denied".

In the present case, clause 4 of the bond and the Appendix set out the requirements for a relevant demand. The demand letter in the present case did not comply with those requirements. Approaching the matter first textually, the ordinary meaning of a requirement to state that the contractor had failed to perform the contract in accordance with its terms and conditions, and in what respects it had so failed, was to impose an obligation upon the beneficiary to state in any demand each factual matter said to give rise to a breach of the contract and which clauses of the contract were said to have been breached thereby. It was only by specifying each of those matters that the pursuer could give notice to the defender of the respects in which the contractor had failed to perform. Such a construction was consistent with the broader contractual context.

[7] As the final sentence of clause 4 made clear, a valid demand presented under the performance bond was conclusive evidence, for its purposes, that the amount claimed by the beneficiary was due to them. A requirement to provide brief details in any demand was entirely consistent with the obligation arising from clause 4 to specify each asserted defect founded upon and, in respect of each, the provision of the contract which was breached. It was in specifying those matters that a person making a claim under the bond provided "brief details of the breach".

[8] Approaching the matter purposively, the fundamental objectives of reasonable persons in the parties' position would have been, for the pursuer, to obtain security that, in the event of default by the contractor in respect of its contractual obligations under the contract, a sum would be obtainable from the defender, upon presentation of a demand. The fundamental objective for the defender would have been to ensure clarity as to the asserted breach of the contract by the contractor, in order that the defender could recover from it any sums paid out to the pursuer and to prevent abuse of the bond by wrongful demand. A construction of clause 4 which did not require specification of each asserted defect founded upon and, in respect of each, the provision of the contract breached, would fail to attain those fundamental objectives.

[9] On the pursuer's construction, the defender would be required to treat a non-exhaustive list of asserted defects which were said by the pursuer to constitute breaches

of a non-exhaustive list of contractual terms as sufficient. The effect of that construction would be that the defender would be left to infer from a heterogeneous list which term of the contract each defect was said to relate to, and to understand that other defects, and other terms of the contract, were founded upon or said to have been contravened but remained unspecified. It would not be entitled to seek clarification of these matters and, instead, would be obliged to treat the demand letter as conclusive evidence that the amount claimed was due to the pursuer, irrespective of the uncertainty arising. The pursuer's construction would expose the defender to the risk of arbitrary and ill-founded claims. Contracts negotiated between commercial parties would typically seek to avoid such risks. Moreover, performance bonds typically proceeded against a background that the bond issuer would have made arrangements to recover from the contractor sums any paid out, and sought to mitigate any risks that they might be prevented from doing so: *South Lanarkshire Council* at [12]. The pursuer's construction would expose the defender to the risk of not being able to recover because it was unable to demonstrate that the payments it made were properly due, as result of the generality of the demand letter.

[10] Any demand presented by the pursuer required to be precisely what the bond called for. In stating that the claimed defective work related to *inter alia* 18 different, heterogeneous defects and narrating expressly inclusive and unspecific lists of contractual clauses, the demand letter was prejudicial to the defender and, more importantly, did not comply with the terms of the bond as properly construed. It was not open to the pursuer now to disclaim its reliance on inclusive lists by claiming that only the breaches and defects specifically listed in the demand letter should be taken as representing those founded on. That was inconsistent with the terms of the letter, which were all that mattered for the issue of its validity. The defender was not obliged to pay for that reason alone.

[11] Further and in any event, Appendix 1 to the bond anticipated that any demand would be signed by a director or company secretary of the beneficiary. It was accepted that that did not, in principle, prevent the pursuer, an LLP, from validly calling upon the bond. The substance of the parties' agreement, construed objectively, should prevail over niceties of wording, and in particular over clauses that had not been well drafted: *Ashtead* at [11]. However, the substance of the parties' agreement, having regard to what Appendix 1 provided, must be taken to have been that the demand letter required to be signed by a person with ability to bind the pursuer, and for that person to sign the demand in the capacity in which they were able to do so. Such a construction made sense contextually and purposively.

[12] The demand letter was a document which, if valid, had direct legal and financial consequences. Production of a valid demand gave rise, without anything further, to an obligation on the defender to pay the pursuer. A reasonable person with all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of entering into the bond would understand that the effect of Appendix 1 was that the person signing any demand required to do so in the capacity in which he or she could bind the pursuer. If that were not so, there would be no reason to include the words "Director or Company secretary" in Appendix 1, indicating a requirement that the demand should be signed by someone who had authority to do so by dint of an office held. Such a requirement afforded a level of protection to the defender by limiting the persons who could sign a demand on the bond to those with apparent authority and whose status as office bearer was a matter of public record.

[13] Mr Sarvadi signed the demand letter as "General Partner". It was accepted by the pursuer that Mr Sarvadi was not a "General Partner" in it. That was not surprising, since

the concept of a "General Partner" was unknown to the law of LLPs. The pursuer now sought to supplement the actual terms of the demand letter with information about Mr Sarvadi's status, by way of pleading and production. That information was not included within the demand letter itself and, other than in relation to Mr Sarvadi's status as a person with significant control (which appeared on the Register of Companies but which, at its highest, might be broadly equivalent to being the beneficial owner of shares within a limited company, as opposed to being a director or company secretary), was not information capable of being ascertained independently by the defender. The pursuer's attempt to rely on the extraneous information it had now provided, and on its explanation of why Mr Sarvadi signed as "General Partner", in order to insist upon the validity of the demand letter, was exactly the kind of "almost the same, which will do just as well" argument which was adversely commented upon in the *South Lanarkshire* case, under reference to *I.E. Contractors Ltd* v *Lloyds Bank PLC* [1990] 2 Lloyd's L R 496. The demand letter required to be signed by a person with ability to bind the pursuer, and for that person to sign the demand in the capacity in which they were able to bind it. Even if the pursuer now offered to prove the former requirement, the letter, as a matter of fact, was not signed in a way capable of satisfying the latter requirement. Again, that alone entitled the defender to decline to pay.

Pursuer's submissions

[14] On behalf of the pursuer, senior counsel submitted that the court should pronounce decree *de plano*. It was accepted that performance bonds fell to be interpreted in the same manner as other commercial contracts. In the interpretation of a commercial contract, the court's task was to ascertain the objective meaning of the language which the parties had

chosen to express their agreement: *Wood* v *Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 at [10] and [13]. Consistently with that approach, in *Rainy Sky* at [21], reference was made to what a reasonable person with the appropriate background knowledge would have understood the parties to have meant by the language which they used.

[15] It was accepted that a demand under a performance bond had to comply with the requirements of the performance bond. Those requirements were to be found by construction of the bond itself. Some degree of strictness was required. The degree of strictness required was itself a question of construction of the bond: *South Lanarkshire Council* at [12], *I.E. Contractors*. The construction of contractual notices was governed by the same principles as governed the construction of commercial contracts. The construction of notices was to be approached objectively, and the issue was how a reasonable recipient would have understood the notice: *HOE International* v *Andersen* [2017] CSIH 9, 2017 SC 313 at [28]. On the question of construction of the notice, the appropriate approach was that of a reasonable man exercising his common sense in the circumstances of the particular case. There was not a requirement for absolute clarity or the absolute absence of any possible ambiguity: *HOE* at [31].

[16] Clause 4 of the performance bond required receipt of a demand by the defender in the form set out in Appendix 1 thereto. The demand letter expressly stated that the contractor had failed to perform the contract in accordance with its terms and conditions. It then provided a brief description of the nature of the breaches as manifested in defective work. It then pointed to the parts of the contract which were said to have been breached. It narrated that the "said" listed breaches had resulted in loss. That was sufficient to comply

with the requirements of the bond, which might be summarised as being to provide a brief description of the respects in which the contractor had failed.

[17] The demand letter then went on to provide a list of 18 instances of defective work which did not purport to be comprehensive. That information supplemented what was necessary to comply with the requirements of the bond. The level of detail given was more than that necessary to comply with the bond. In any event it was not necessary for the demand letter to be effective that the list supplementing the brief description should be entirely comprehensive. It provided notice of instances of breach. It served to demonstrate that there was a real basis for the brief description given. No more was required to serve the purposes of the bond. The demand then, following the prescribed wording, stated that as a result of "such failures" (namely, the breaches of contract listed) the specified sum was due, which exceeded the amount of the bond. That clearly complied with the requirements of clause 4 of the bond. The brief description of the breaches and the statement of the provisions of the contract breached, supplemented by the list of instances of defective work, clearly met the threshold.

[18] A reasonable reading of the demand letter let the recipient know that the contractor was in breach of the obligations which were listed (ie in what respects the contractor had failed), as evidenced by defective work. The fact that other instances of breach might exist (as indicated by the phrase "not limited to") did not detract from the list of provisions which had been breached and the brief description of the nature of those breaches. The listed instances of defective work provided further information beyond that strictly necessary, but in providing those further details it was not to be expected in a respect of a contract like that in question that every single instance of breach would be listed.

[19] In any event a reasonable reader would understand that the brief description of the nature of the breaches provided and the specified contract conditions noted were those relevant for the demand. Those were the breaches on which the demand was based. There was no question of a reasonable recipient being left in doubt as to what was founded upon. There was no basis in the words of the bond or the commercial context to require anything more. The purpose of the provisions about notice of the breach in the demand was to provide some information to the defender as to the nature of the alleged breach or breaches, so that it could understand that there was an actual basis for a claimed loss, reducing the possibility of abuse. The demand letter clearly satisfied that objective. There was no need to require greater notice or detail in an on-demand bond.

[20] Investigation of the existence of defects or breaches was not part of the anticipated procedure under such a bond. The defender was expected to pay on receipt of a compliant demand. There was no anticipation of the defender checking whether the contractual performance actually had been defective prior to making payment under the bond. A level of detail which might be required for that purpose was not required, although in any event the level of detail in the demand letter would have sufficed for that purpose. A greater level of detail was not required for the purpose of recovery of payment by the defender from the contractor. That would in the ordinary case be governed by a contractual obligation by the contractor to pay predicated solely upon payment having been triggered under the bond. The recovery of payment by the defender would not depend on the existence or otherwise of the alleged defects and breaches.

[21] In any event, in a bond related to a contract in which there could be multiple breaches, such as the present, it was not of utility in the demand process to require a detailed statement of each instance of breach at a level more than, or more comprehensive

than, that contained in the demand letter. If the defender had wished to get the detail which it now desiderated, it would have said so in the bond and would not merely have referred to "brief details".

[22] Clause 4 of the performance bond made no provision about the signatory of a demand. Appendix 1 set out the form to be followed by any demand. The form of demand was phrased in the first-person plural. It was to be signed on behalf of the beneficiary. The words used made provision for signature by a director or company secretary. That was obviously only applicable to the case of a company which had a company secretary and directors. It was common ground that the provision could not have envisaged that the pursuer as an LLP would be unable to make a demand under the bond.

[23] Once the express provision for a director or company secretary was accepted as not applicable, there was no specific provision about who might sign. There was no provision about the position to be held by the signatory. There was no requirement that the signatory hold any specific position, formal or otherwise. All that was required was that someone sign on behalf of the pursuer. That inferred that the person signing was able to sign on its behalf. There was also to be a description of the position of the signatory within the pursuer, but the words of the bond did not require the person signing on behalf of an LLP to have any specific position. The court should be slow to add a specific provision about the requirements for a demand where none was stipulated by the parties.

[24] The demand letter was signed by Mr Sarvadi as "General Partner". In his affidavit he indicated that he styled himself as such. Indeed he had signed the relevant partnership agreement of the pursuer so designing himself. The parties would not expect that the defender would explore what was said *ex facie* of the demand letter. There was no reason why a signatory described in that manner did not meet the requirements of the bond in the

absence of specific provision within it. There was no such provision. It was enough that Mr Sarvadi signed on behalf of the pursuer and described his position in the pursuer. The parties would not have expected the status of the signatory to be examined by the recipient.

[25] Even if the bond fell to be construed as requiring that the designation of the signatory must describe how the signatory had authority to sign on behalf of the pursuer, or perhaps that the signatory was someone of significance in the pursuer, Mr Sarvadi's signature and description was sufficient. He was of sufficient standing within the pursuer to sign the demand letter. That could be seen from the performance bond itself, which was addressed to him for the pursuer. He described himself as a “Partner”. That was sufficient to indicate authority to sign the demand letter. It was sufficient to meet any reasonable requirement of the bond. It did not matter that a further description was added to the word “Partner”. It signified no more or less than would be signified had it been signed as “Senior Partner” or “Managing Partner”. Neither of those added descriptions was likely to cause any concern. The extra description did not detract from the authority that was given by the word “Partner”. If it was relevant to look beyond the demand letter to examine Mr Sarvadi’s actual position with the pursuer, it could be seen that he was a designated partner of the pursuer. He was an authorised signatory. He was a person with significant control of the pursuer. He was a person who was clearly qualified to sign on its behalf.

[26] The pursuer had established the necessary formalities to trigger the defender's liability under the bond and was entitled to decree as concluded for.

Decision

Applicable legal principles

[27] The law's approach to performance bonds grew out of that which had been developed in the context of letters of credit, and (subject in every case to the proper construction of the bond under examination) is characterised by treating such a bond as one variation of that species of bargain which usefully functions in commerce by imposing on its granter an absolute obligation to pay in accordance with its terms, irrespective of any dispute between the parties to the underlying contract to which the bond relates, unless there is clear fraud or forgery of which the granter is aware: *Hamzeh Malas & Sons* v *British Imex Industries Ltd* [1958] 2 QB 127, [1958] 2 WLR 100; *Edward Owen Engineering Ltd* v *Barclays Bank International Ltd* [1978] QB 159, [1977] 3 WLR 764. *South Lanarkshire Council* v *Coface SA* confirms that the construction of performance bonds is governed by the same principles that apply to the construction of contracts in general, ie the so-called objective and contextual approach described by the UK Supreme Court most recently in *Providence Building Services Ltd* v *Hexagon Housing Association Ltd* [2026] UKSC 1, [2016] 1 WLR 538 at [21].

[28] No delicate exercise of construction is required in order to conclude that the bond in the present case falls into the category of bond payable merely against the presentation of documents meeting the criteria which it furnishes. By clause 2, the defender:

> "irrevocably and unconditionally promise[d] to pay … on … first written demand and waiving all rights of objection and deference and without reference to the Contractor … provided that [the] demand complies with the provisions of this Performance Bond",

to which clause 4 adds that a demand meeting the description it provides shall be accepted as conclusive evidence for the purposes of the bond that the amount claimed is due to the beneficiary.

[29] The focus for present purposes is thus on the proper construction of the bond's description of the features of a demand which will render it a valid trigger for payment of the sum guaranteed. That description appears from clause 4: the demand "must be in the form set out in Appendix 1" and in substance must state (a) that the contractor has failed to perform the contract in accordance with its terms and conditions; (b) in what respects the contractor has so failed; (c) that as a result of such failure, the amount claimed is due to the beneficiary; and (d) the amount claimed. The description of what is required thus contains stipulations as to both form and content. It follows that this is a case where the bond prescribes as an indispensable condition for the effective exercise of the contractual right it confers on the beneficiary that the notice purporting to exercise that right must not only be in a particular form, but also must contain certain specific information (see *Mannai Investment Co Ltd* v *Eagle Star Life Assurance Co Ltd* [1997] AC 749, per Lord Steyn at 767E). Put another way, the four matters of substance identified in clause 4 represent part of the "formal and technical requirements" for a valid demand (*Mannai* per Lord Clyde at 781G).

[30] It is in relation to requirements of that kind that the notion of "strict compliance" is often said to apply, ie as was originally put by Lord Sumner, in the context of letters of credit, in *Equitable Trust Co of New York* v *Dawson Partners Ltd* [1927] 27 Lloyd's LR 49 at 52, that: "there is no room for documents which are almost the same, or which will do just as well". There are, however, two fundamental issues which attend the deployment of such a notion. Firstly, the doctrine of strict compliance does not necessarily apply, at least to the fullest possible extent, to every performance bond. Under reference to *JH Rayner and Co*

Ltd v *Hambro's Bank Ltd* [1943] KB 37 (another letter of credit case), per Goddard LJ at 43: "The question is 'What was the promise which the bank made to the beneficiary under the credit, and did the beneficiary avail himself of that promise?'", the court in *I.E. Contractors* noted that "the degree of compliance required by a performance bond may be strict, or not so strict. It is a question of construction of the bond". However, most performance bonds provide no express indication as to the required degree of compliance beyond the use (as in the present case) of words like "must", and the precise nature of any implication as to that degree may be difficult to discern. Although certain reasons were suggested in *South Lanarkshire Council* as to why strict compliance might presumptively be required, which are set out above and were essentially concerned with the protection of the position of the bond issuer in a question with the party in security of whose obligations it granted the bond, the particular nature of the arrangements made by the issuer in this case in relation to any right of recourse against the contractor is unknown to the court and, more importantly, is not said to have been known to the pursuer when the bond was entered into, and in any event I agree with the observations in *I.E. Contractors* that the fact that one construction of the bond would produce a result desirable or salutary to the interests of its issuer but not necessarily to those of its beneficiary is not a sufficient reason to adopt that construction. In *Siporex Trade SA* v *Banque Indosuez* [1986] 2 Lloyd's LR 146 at 159, Hirst J accepted a submission that, unlike the established position in relation to letters of credit, precise wording in a demand under a performance bond was generally not essential, provided that there was "no ambiguity, no risk of the [bond issuer] being misled, and no risk of it being confused or otherwise prejudiced". Looking at the matter as a whole, it is difficult to disagree with the brief, if somewhat unhelpful, summary of the situation in relation to performance bonds advanced in *South Lanarkshire Council* at [12]: "some degree of strictness is required".

[31] Secondly, even if one accepts that strict compliance is required in any particular case, it may well not be clear, without more, quite what that acceptance entails.

As Lord Hoffmann put it in *Mannai* at 776C - D, in the very context of discussing a requirement that unilateral contractual notices must be served in strict compliance with the conditions set out by the document allowing for them:

> "To say that compliance must be strict does not explain why some other technique of interpretation is being used or what it is. A variation of this explanation is to say that the language of the notice must be strictly construed. But what does it mean to say that a document must be 'strictly' construed, as opposed to the normal process of ascertaining the intentions of the author? The expression does not explain itself."

In assessing the compliance of a unilateral notice supposedly given in terms of a contractual power with the requirements of that power as to the substance of the notice, the law usually applies the criterion of what is now called the "reasonable recipient", which involves asking whether that substance is sufficiently clear and unambiguous to leave a reasonable recipient exercising his common sense in the context and circumstances in no doubt that nature of the message being conveyed is that which the power requires to be conveyed, ignoring immaterial errors which would not have misled him and not requiring an absolute clarity or an absolute absence of any possible ambiguity: *Delta Vale Properties Ltd* v *Mills* [1990] 1 WLR 445, esp per Slade LJ at 454E - G; *Carradine Properties Ltd* v *Aslam* [1976] 1 WLR 442 per Goulding J at 444; *Mannai* per Lord Steyn at 768E - H, Lord Clyde at 782C - D. With the possible exception that the focus in the context of a demand issued under a performance bond ought to be more on the terms of the document itself rather than on the background circumstances against which it was issued (a matter that makes no practical difference in the present case) that test is effectively the one which was applied in *Siporex*, and is sufficiently exacting as to be capable as a matter of principle of being applied in determining the question of whether the substance of a demand issued pursuant to a performance bond adequately conveyed the message which the terms of the bond required it to convey, even allowing for the degree of strictness which falls to be applied in considering that question.

Application to the present case

Form and substance of the demand

[32] In the present case, it is apparent that the bond contemplates, and therefore allows, some degree of latitude in both the form and content of the envisaged demand letter. The form set out in Appendix 1 is plainly not one in which a particular prescribed form of words, and only those words, must be used. At various points, most notably in requiring the insertion of "brief details of the breach", the form envisages and indeed requires the provision of some material to be supplied at the will of the beneficiary. The pursuer did provide such material in that regard, and it is the nature of that additional material which the defender criticises as not being in sufficient conformity with the required form and content of a valid demand letter, in that it (a) fails to specify each factual matter said to have given rise to a breach of the construction contract and to specify each provision of the contract said to have been breached, and (b) alludes to the existence of failures on the part of the contractor to perform the underlying contract in accordance with its terms and conditions which went beyond those specified in the letter, and refers to the existence of defective work, some specified and some not, some or all of which is said to have resulted in loss and damage to the pursuer of a value in excess of the sum guaranteed by the bond, without making it clear whether that defective work is said to have been caused by the specified or unspecified failures.

[33] Dealing with the first of those objections, I am unable to agree with the defender's submission that the bond requires each and every factual matter said to have given rise to a

breach of the construction contract, and each contractual clause said to have been breached, to be stated in a valid demand letter. The context in which a demand may be made is one where a sum limited to around £1.25 million (presumably a proportion of the notional value of the construction contract) is guaranteed by the bond, and where the loss capable of being caused to the pursuer by breaches of the contract may well exceed that amount. Equally, facts giving rise to breaches of the contract may not cause any loss to the pursuer at all. In that context, it is clear that the only factual matters which commercially sensible parties may be taken to have intended should be included in a demand letter are those said to have given rise to the breaches of contract identified in the demand as productive of the losses in respect of which the guarantee is being called upon, as opposed to matters which, for one reason or another, may amount to further and different breaches of contract but which are not said to have resulted in such losses. The pursuer has no interest in being required to provide details of the latter kind of breach and the defender, correspondingly, has no interest in hearing about anything that is not being made the subject of the claim against it. That is the construction which fits with the context and purpose of the arrangement between the parties.

[34] Turning to the second branch of the defender's complaint in this connection, it changes from the initial suggestion, already dealt with, that the minimum requirements for a valid demand were absent from the letter which was sent, and asserts rather that additional material provided in that letter resulted in it falling out of compliance with the applicable requirements in some relevant sense. In determining the yardstick to be used in determining whether additional material has that effect, it is in my opinion instructive to have regard to the approach taken by the English Court of Appeal in *Ex parte Stanford, In re Barber* (1886) 17 QBD 259. A schedule to the Bills of Sale Act 1882 supplied a particular

form to be used in circumstances where such a bill was made or given by way of security for the payment of money by its grantor, and section 9 of the Act provided that any such bill should be void unless made "in accordance with" that form. The bill under examination contained the material set out in the form, but also included additional material not contemplated by it. After a great deal of procedural wrangling, the matter came before the entire Court of Appeal. The majority judgment (Fry LJ being the lone dissenter) of Lord Esher MR, Cotton, Lindley, Bowen and Lopes LJJ held at 269 - 271 that the simplicity or prolixity, brevity or length of the additional material were too vague and uncertain in nature to form acceptable criteria for determining whether the actual bill was sufficiently in conformity with the prescribed form. Rather, in accordance with the sagacity embodied (and recognised since before the time of St Augustine) in the maxim "*superflua non nocent*", the question was whether the bill under examination departed from the prescribed form in any substantial or material respect. If not, then it was in sufficient conformity with the prescribed form. Usefully, it was further observed that there would be substantial or material departure if, and only if, any divergence from the form was calculated to give the bill a different legal consequence or effect, either greater or smaller, than that which would attach to it if drawn in the specified form, or if it departed from the form in a manner calculated to mislead those whom the use of the form was intended to protect. Such a test was regarded as sufficiently certain, familiar and capable of convenient application as to qualify it for use in determining what did and did not qualify as compliance with a prescribed form.

[35] Although there are evidently some differences in context between the situation in *Ex parte Stanford* and the present case, the underlying issues are very similar. A form is prescribed, undue divergence from which may lead to ineffectiveness, but verbatim

repetition of its words and only those words is not what is required. The judgment of the court represents a logical and useful analysis of what it means to be in conformity, including strict conformity, with the form in that situation. In essence, divergence from the form by way of the provision of additional information is substantial (ie a departure from strict conformity) if it is material. It is material if it would have as its natural consequence a different legal effect from that which would be produced if the additional material were absent, or else would naturally lead to its recipient being misled about some matter of significance for that effect.

[36] Applying those tests to the present case, the legal effect of a demand letter which was uncontroversially in entire conformity with the requirements of the bond would be the creation of an obligation on the part of the defender to pay to the pursuer a sum of up to the guaranteed amount of £1,251,638.80. An analysis of the significant parts of the demand letter shows that it begins by asserting in general terms failures on the part of the contractor to perform the contract in accordance with its terms and conditions in respect of the carrying out of defective work, in breach of its contractual obligations. It is then stated that those breaches include but are not limited to three specific kinds of breach, under reference to identified contractual provisions. Immediately after that assertion, it is claimed that "said breaches" have resulted in the pursuer incurring loss in the form of the cost of remedial works. A non-exclusive list of defective work is provided and there follows the assertion that the contractor's failures have resulted in a sum due to the pursuer of £1,811,492 exclusive of VAT. In other words, the loss said to have been incurred by the pursuer is expressly linked to the contractor's failures.

[37] One may safely disregard those elements of the letter dealing with the nature of the defective works. The form requires an assertion of failure on the part of the contractor to

perform the contract, a brief explanation of how it so failed, and a statement that as a result of the failures, a specified amount is claimed and is due to the beneficiary. There is no requirement to specify how the alleged failures resulted in an amount due to the beneficiary, merely to state that they did. That the pursuer chose to deal with that further matter, whether comprehensively or not, is a paradigm example of the provision of additional material which is not productive of any different legal effect from that which would be produced if it were absent.

[38] The next question is whether, had the allusion to other unspecified breaches of contract on the part of the contractor been omitted, the legal effect of the demand letter would have been different. It is important to note in this context that the appendix requires only the provision of "brief details" of how the contractor is said to have been in breach of contract. There is no suggestion that comprehensive details of any potential breach are required. Subject to the issue next to be discussed (as to the capacity of the additional material to mislead) a suggestion that more was done wrong by the contractor than those aspects of its work which are made the subject of specific complaint is, again, not something calculated to produce a different legal effect from that which would be produced without such a suggestion having been made.

[39] One must then examine the additional material through a different lens, and ask whether, notwithstanding that it was not naturally productive of any legal effect different from that which would have been produced had it been absent, its presence was nonetheless apt to lead to the defender being misled about some matter of significance as to that effect. I accept that the general (albeit undefined) background of "strictness" which attends the consideration of the terms of demand letters issued in terms of performance bonds demands a relatively rigorous examination of this issue. The enquiry envisaged in this regard by

Ex parte Stanford is in all material regards an early expression of what would now be called the "reasonable recipient" test. As set out above, that is, in itself, a test which is properly characterised as more strict than lax. It is, however, important to bear in mind throughout the exercise, per Lord Steyn in *Mannai* at 771A - D, that:

> "In determining the meaning of the language of … unilateral contractual notices, the law … generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language … After all, there is no reason whatever why such a document must be drafted by a lawyer … Such notices, even if they entail the exercise of important options, are habitually drafted by commercial men rather than lawyers. It would be a disservice to commercial practice to classify such notices as technical documents and to require them to be interpreted as such."

Applying those observations, and dealing firstly with the fact that the demand letter quite unnecessarily described defective work which was said to have arisen from the contractor's failures, it is not possible to see that the provision of that description would naturally have misled the letter's recipient about some matter of any significance as to its legal effect. Those details were simply irrelevant to that issue. Turning to the allusion in the letter to other unspecified breaches of contract on the part of the contractor, a reasonable commercial person reading the demand letter would in my view have concluded that the pursuer was saying that the specified contractual breaches had resulted in it suffering loss in consequence of those breaches in the amount of £1,811,492 and that, since that sum exceeded the amount guaranteed, it was unnecessary to say anything further, but that it was not conceded that the specified breaches which had produced that loss were the only ways in which the contractor had breached the contract. I can understand the suggestion that an unreasonable reader of the letter, positively searching for specious reasons to deny the liability which it had undertaken, might seize upon what was said in order to construct an argument about the presence of some ambiguity more theoretical than real, but that is not the standard of construction which falls to be applied. Strictness does not equate to absolute clarity or to an absolute absence of any possible ambiguity in this context. The formal requirements of the bond in relation to the matters of substance which the demand letter had to assert in order to be valid were met.

Signature of the demand letter

[40] Turning now to the formal requirement of the bond in relation to the capacity of the person signing the demand letter on behalf of the beneficiary, parties were in agreement that a demand letter issued by or on behalf of a beneficiary which was not a limited company did not require to bear to have been sent by a director or secretary of that beneficiary - accepting again, in this connection, that unwavering conformity with the appended form is not a proper reading of what the bond required. It was ultimately also a further matter of agreement between the parties that some description of the capacity of the person signing the demand letter on behalf of the pursuer had to be stated, although no consensus about quite what function that description had to serve.

[41] I do not find it possible to join in the parties' agreement that some description of the capacity of the person signing the demand letter was necessary in order to comply with the formal requirements of the bond. The form appended to the bond plainly contemplates that the beneficiary will be a type of incorporation which is unable to execute documents in its own name. Such an entity requires to act in that connection through officers or other authorised personnel who, in addition to signing their names, require to indicate their relationship to the entity if the face of the document is to show that they are signing as an expression of its will and not merely their own. Complications (not dealt with by the form

appended to the bond) may exist in the fairly common situation where the officer of a corporate entity issuing a demand letter is itself another corporate entity. Yet another situation has to be dealt with in relation to entities, such as at least certain types of partnership, where documents of the nature of the demand letter may, as a matter of general law, be signed in the name of the partnership itself, whether with or without an explanation of the identity and capacity of the individual adhibiting the firm's name. It is difficult to see why that form of execution should be capable of being objected to, and the form appended to the bond does not indeed indicate that it is. The bare indication in the form as to what is expected by way of a signature in one specific set of circumstances (albeit probably the most common one) cannot form a sound basis for what is essentially speculation as to what the formal requirements are supposed to be in a variety of other possible cases. Strictness, if that is what is called for, cannot properly be based on speculation.

[42] It is, rather, necessary to bear in mind that the only reasonable function of the signature to a demand letter (and thus the only one which the parties to the bond as reasonable commercial actors may be taken to have intended) is to indicate that it is issued by or on behalf of the beneficiary. The further consideration that performance bonds, both generally and in this case, function on the basis of the presentation of documents containing assertions, and not on the underlying facts, indicates that what is required is simply an appearance on the face of the demand letter as a whole that it has been issued by or on behalf of the beneficiary; in other words that, viewed reasonably, that that is what it bears to say. Consistent with the long-standing general law on letters of credit and performance bonds, if a demand letter bears on its face to have been issued by or on behalf of the relevant beneficiary, then the bond issuer may refuse to pay on the ground that it was not so issued only if it knows (and not merely suspects) that as a matter of fact the signature is forged or

the letter is otherwise attended by some fraud as to its issue (see eg *Edward Owen*, especially per Browne LJ at 172H - 173B).

[43] Applying that legal test to the facts of the present case, the demand letter was issued on the headed notepaper of the pursuer, stating its name, address, telephone number, registration number on the Register of Companies and VAT number. The letter is couched in the first-person plural, asks for payment to be made to a bank account in the name of the pursuer, and is signed by Mr Sarvadi as "General Partner". In my opinion, if a reasonable person, with no knowledge of any background beyond its terms, were to be shown the letter and asked by whom it appeared to have been sent, that person would not only unhesitatingly answer that it appeared to have been sent by Mr Sarvadi on behalf of the pursuer, but would be left wondering why the question had even been asked. The fact that, as a technical matter of law, a limited liability partnership has no "General Partner" would not lead such a person to suppose that the letter had not after all been sent on behalf of the pursuer; if he were to think at all about this particular issue in isolation (which I doubt), he would focus on the noun and not the qualifying adjective in the description of Mr Sarvadi's position. The defender had no positive extraneous reason to suspect, let alone believe, that the demand had not been properly issued on behalf of the pursuer. They were in such circumstances obliged to take the letter at face value as having been sent on behalf of the pursuer. The nature of the signature block provides no reason to resist the demand for payment apparently made on its behalf.

Disposal

[44] For the foregoing reasons, I shall sustain the pursuer's pleas-in-law, repel the defender's pleas, and grant decree *de plano* in the principal sum of £1,251,638.80, with interest at the rate of 8% a year from the date of citation until payment.