

This case arose out of a contract between Resource Recovery Solutions Derbyshire Ltd (“*RRS*”) and Interserve Construction Limited (“*ICL*”) to construct a waste treatment facility in Derbyshire (“*the Contract*”). Pursuant to the Contract, ICL procured the issue of a performance bond (“*PB*”) and a retention bond (“*RB*”) (together, “*the Bonds*”) from the Defendant (“*Euler*”) in favour of RRS.

By a borrower debenture (“*the Debenture*”) between RRS and the Claimant (“*SMBCE*”): (i) RRS purported to assign the Bonds to SMBCE, and; (ii) RRS appointed SMBCE as its attorney with power to do any act. RRS subsequently served notice of assignment on Euler, who signed and returned the attached acknowledgment of receipt (together the notice and acknowledgment or “*N&A*”).

The construction project did not go well. In April 2019, a notice was served under a related contract which had the effect of terminating the Contract in around August 2019. Because of this, SMBCE called on the Bonds in July 2019 by serving demands for payment under each (“*the Demands*”), but Euler refused to pay on the basis that the assignments and/or demands were not valid. SMBCE then issued proceedings on 6 August 2019 in which the following issues arose:

- (1) whether failure to comply with clause 9 of the PB meant it was not validly assigned;
- (2) whether SMBCE was entitled to make a demand under the PB as RRS’s attorney, and;
- (3) whether the Demands had been signed in accordance with the terms of the Bonds.

As the PB was due to expire on 20 August 2019 (two weeks after issue), SMBCE applied for abridgment of time for service and an expedited hearing of the claim before that date. The Commercial Court granted the application and fixed the hearing for 13 August, and gave judgment on 15 August.

### **(1) Assignment of the PB**

Under clause 9, assignment of the PB was “*subject to the assignee confirming to [Euler] in writing its acceptance of the [RRS]’s repayment obligation pursuant to clause 8*”. SMBCE argued that its failure (which it conceded) to comply with clause 9 did not prevent assignment of the PB because: (a) the N&A constituted a binding agreement that the assignment was valid,

notwithstanding clause 9, or; (b) the N&A contained a waiver of the requirement in clause 9. Butcher J did not accept either of these arguments:

- (a) The only potential agreement in the N&A would have been a bilateral one between RRS and Euler. Such an agreement would not have been binding as it was not supported by consideration: “[the N&A] as a whole...was not intended to provide benefits to [Euler]”.
- (b) Clause 12.2 of the PB provided that no waiver of any right or remedy “shall... amend, delete or add to the terms... of this [PB] unless...expressly stated in that waiver”. Butcher J considered that this clause required a purported waiver to identify the terms of the PB it sought to “amend, delete or add to”. The wording of the N&A was so wide as to cover a range of potential liabilities; it did not sufficiently identify clause 9 to amount to waiver thereof.

## **(2) Demand under the PB qua attorney**

In the absence of effective assignment, SMBCE’s case was that it had been entitled to service the demand under the PB (“**PB Demand**”) qua RRS’s attorney. SMBCE had signed the PB Demand twice: first on its own account, and second in its capacity as attorney for RRS pursuant to clause 17 of the Debenture. Euler contended that a claim qua attorney could not be brought in the proceedings because RRS was not party thereto.

Butcher J considered that this did not defeat SMBCE’s claim for a declaration that the PB Demand was valid (although it precluded an order for payment under the PB). Despite not being party to the PB, SMBCE was a non-party with sufficient interest in the matter and was therefore entitled to seek such a declaration.

## **(3) Signature of the Demands**

Finally, Euler contended that the Demands (each signed by a director of SMBCE) did not comply the terms of the Bonds requiring that: (a) a demand under the PB was to be “signed by a director of the Employer”, and (b) a demand under the RB “must bear the signature of a duly authorised officer of the Employer” (‘Employer’ being defined as RRS and, in the case of the PB, including its successors and assignees). Butcher J did not accept Euler’s narrow interpretation of the Bonds:

- (a) On the proper construction of the PB, the signature of a director of a company with a valid power of attorney from RRS was sufficient because: (i) the commercial justification of the signature requirement (ensuring the person making the demand is authorised to do so) is met, and; (ii) the extended definition of ‘Employer’ indicates that the parties did not require signature by specific individuals who were actually directors of the particular company RRS.
- (b) The duly authorised signature of an assignee of the RB was sufficient because, despite the absence of an extended definition of ‘Employer’ as including RRS’s assignees, the parties to the RB plainly contemplating that it could be assigned.