

Insights

PROTECTING A PERFORMANCE BOND: LESSONS FROM CR CONSTRUCTION UK V BARCLAYS BANK PLC

Apr 30, 2026

SUMMARY

In this Insight, Marcus Birch considers the case of CR Construction (UK) Limited v Barclays Bank plc [2026] EWHC 202 (TCC) which concerned an unsuccessful application by a contractor for an injunction restraining the bank which issued its performance bond from paying out under a demand made by the employer.

CR Construction (UK) Limited v Barclays Bank plc [2026] EWHC 202 (TCC) concerned an unsuccessful application by a contractor for an injunction restraining the bank which issued its performance bond from paying out under a demand made by the employer. It is a straightforward application of the normal principles laid down in previous cases, from *Edward Owen Engineering Ltd v Barclays Bank International Ltd [1978] 1 All ER 976*, through *Simon Carves Ltd v Ensus UK Ltd [2011] EWHC 657* and on to more recent cases such as *Shapoorji Pallonji and Co Private Ltd v Yumn Ltd [2021] EWHC 862 (Comm)*.

The learned judge resolved the application very shortly, and his reasoning can be summarised in three propositions:

- First, the bond was on a true construction an on-demand bond, payable on presentation of a formally valid demand, and not an on-default instrument requiring proof of breach or loss.
- Secondly, for such bonds, the only basis on which a court will restrain a bank from paying out on a formally valid demand is fraud of which the bank had notice.
- Thirdly, the contractor had not alleged fraud, so there was no basis on which the application could succeed.

This Insight takes a closer look at the case.

THOUGHTS

The decision itself is therefore rather routine. The particular interest lies in the commercial and procedural background to the case, which illustrates both how performance bonds work in practice in a dispute, and how a contractor should be alert to other means of protecting its financial position short of seeking to injunct its bank. The lesson is that the English courts will grant an injunction restraining a call or a payment under a bond only very rarely, and so contractors need to do all they can to prevent one from being made.

The contractual structure and fact pattern were standard. FEC as Employer and CR UK as Contractor entered into a building contract on JCT Design and Build 2016 terms, which required CR UK to provide a performance bond of 10% of the contract sum (£11 million), which CR UK duly procured from Barclays Bank. The bond was not the standard JCT form, but a bespoke tripartite agreement between Employer, Contractor and bank. Barclays then required a counter-guarantee from CR UK's parent company ("**CR Group**"), which CR Group procured from HSBC in Hong Kong. HSBC will have held security for that guarantee as part of its overall banking arrangements with CR Group.

The Project (the Victoria Riverside redevelopment in Manchester) was to be completed in two sections, with Section 1 to be completed by 1 July 2024 and Section 2 by 17 February 2025. Both Sectional Completion dates were missed, and with no extensions of time having been granted, in February 2025 the Employer both issued a notice requiring CR UK to pay over £3,000,000 in liquidated damages, and terminated the contract.

CR UK made clear in correspondence that it challenged the failure to grant extensions of time, the levying of the liquidated damages, and the termination. However, it did not at that stage commence legal proceedings. This was a missed opportunity to mitigate risk, in the sense that an adjudication decision supporting an extension of time would have reduced its exposure to liquidated damages, and an adjudication decision declaring the termination to have been invalid would have protected CR UK from claims for damages arising from the termination. At the same time, CR UK did not pay any part of the liquidated sums claimed. It allowed the situation to remain at a standstill. Again, this was a missed opportunity. Had CR UK paid all or part of the sums claimed, and even without prejudice to its position as to the causes of delay and the lawfulness of the termination, it could have reduced the risk of FEC calling the bond and facilitated a commercial resolution.

In December 2025, FEC sent a demand to the Bank requiring payment of £2,475,441. The Bank identified certain potential technical deficiencies and held off paying out until they were resolved. In the meantime, it seems that the Bank made a call on the HSBC counter-guarantee and HSBC made a payment under that agreement.

It was only at this point that CR UK took definite legal action. First, in early January 2026, it commenced the claim for an interim injunction against the Bank (i) restraining it from making any payment to FEC under the demand; and (ii) requiring it to return the payment received from HSBC

under the counter-guarantee. It did not seek to make any application against FEC. That was perhaps another missed opportunity; under the *Simon Carves* line of cases, the grounds for granting an injunction against the beneficiary of a performance bond are notably wider than those in respect of a bank. In particular, the court can restrain a beneficiary from making or pursuing a demand where the underlying contract prevents it from doing so. While FEC successfully sought to be added as Intervener, which enabled it to support the Bank's objections to the grant of the injunction, the absence of any application directed at FEC reduced the applicant's scope for argument.

CR UK also added HSBC as a second defendant in the injunction proceedings, but ultimately that was of no benefit as the claim form was not served on HSBC and in any event the counter-guarantee was subject to the exclusive jurisdiction of the Hong Kong courts so the court could not see any basis for any relief against HSBC.

CR UK's second action was to commence an adjudication challenging the validity of the termination. As noted by the judge, this was eleven months after the termination and did not provide meaningful support to the applicant's position on the injunction application.

The application was dismissed. The learned judge stressed the fundamental shortcoming in the applicant's approach to the case, namely that it had limited its application to the Bank and had not pleaded any type of fraud which is the sole basis upon which an injunction can be made against a bank. For completeness, and to avoid the difficulty of the contractor later applying for an injunction against the employer, he went on to consider the substance of CR UK's arguments as if such an application had been made. He therefore considered all three limbs of the standard test for an injunction, but did not consider that the case advanced satisfied any of the limbs.

This is therefore a routine case on the legal principles, but a valuable lesson on the strategy. It teaches us that a contractor concerned to protect itself from the financial and reputational damage thought to be inherent in a bond call needs to act early, and well before any call is threatened or made. In this case, the contractor's options included a prompt challenge to the levying of liquidated damages and termination, or paying some or all of the sums claimed under reservation and seeking a commercial resolution. In other cases, the position will be more complex. Here, it appears that the prolonged standstill between the parties forced the Employer to call the bond, which prompted the Bank to call on the counter-guarantee, and left CR UK with very limited options. It went for the high-risk route of seeking an injunction, and ended up further out of pocket on costs.

RELATED CAPABILITIES

- Construction Disputes

MEET THE TEAM



Marcus Birch

Consultant, London

marcus.birch@bclplaw.com

[+44 \(0\) 20 3400 4605](tel:+442034004605)

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be “Attorney Advertising” under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP’s principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.