BARBADOS

IN THE HIGH COURT OF JUSTICE
CIVIL DIVISION

No 512 of 2005

BETWEEN:

JOHNSTON INTERNATIONAL LIMITED PLAINTIFF

AND

CLICO INTERNATIONAL GENERAL INSURANCE LIMITED DEFENDANT

Before the Honourable Mr. Justice William Chandler, Judge of the High Court

Date: 31st May, 2005
14th July, 2005
16th May, 2006

Messrs Elliott D. Mottley & Co. for the Plaintiff
Mr. Leslie Haynes Q.C., Attorney-at-law for the Defendants
Mr. Michael R. Yearwood with Mr. Junior Allsopp for the third Party

JUDGMENT

INTRODUCTION

[1**]** This is an application by way of Summons ("the Summons") filed herein on the 30th day of May, 2005 by Everson R. Elcock & Co. Ltd. for the following orders: That:

(1) Everson R. Elcock & Co. Ltd. be joined as a defendant in this action.

(2) There be a stay of all proceedings pending arbitration proceedings between the plaintiff and Everson R. Elcock & Co. Ltd. or until further order.

(3) CLICO International General Insurance Limited be restrained whether by its servants and/or agents from paying any sum to the plaintiff under the bond dated the 12 day of August 2002.

(4) The costs of this application be provided for.

(5) Further or other relief.

BACKGROUND:

[2] The Plaintiff Johnston International Limited is a Company incorporated in Turks and Caicos Islands and registered in Barbados as an External Company Number 19382 under the Companies Act Cap. 308 and having its principal place of business at the 'Aberfoyle'. 5th Avenue, Belleville St. Michael, Barbados. It brought an action by Writ of summons filed in the High Court of Barbados on the 9th day of March, 2005 against the defendant CLICO International General Insurance (CLICO) a limited liability company incorporated and registered in Barbados with offices situated at Whitepark Road, Bridgetown. By virtue of the Writ of Summons, the Plaintiff alleges that the defendant on the 7th day of July 2002 executed a bond in the sum of $925,166.62 conditioned for the due performance by Everson R. Elcock and Company Limited of a written agreement made on the 17th day of July 2002 between the Plaintiff and Everson R. Elcock and Company Limited (the sub Contract) for the construction of the new Barbados Hilton Hotel at Needhams Point, St. Michael and to be constructed by the Plaintiff or Needhams Point Holding Limited pursuant to a contract dated 12 June 2002. The statement of claim alleges, inter alia, that on the 26th day of July, 2004 in breach of the sub contract, Everson R. Elcock and Company Limited failed to achieve substantial completion of the scope of works and that in accordance with the Terms and conditions of the Bond, the Plaintiff was now entitled to the sum of $925,166.62. By way of summons Elcock seeks the relief outlined in the introduction to this judgment.

ISSUE:

[3] The only issue for determination by this Court is whether Everson R. Elcock & Co. Ltd. is to be joined as a defendant to the proceedings, the relief sought at paragraph 2 to 5 inclusive in the summons is dependent upon and falls to be considered after the determination of this issue.

SUBMISSIONS

[4] Mr. Yearwood submits that Everson R. Elcock & Co. Ltd. ("Elcock") should be joined as a party for the following reasons.

That Elcock is liable under the terms of the bond to indemnify CLICO in respect of any liability CLICO may have under the bond. Thus it has an interest in the outcome of proceedings which is more than a mere commercial interest since it would ultimately be affected in its pockets. He relies on, inter alia, **Gurtner vs**

Circuit [1968] All ER 328 and Order 15 Rule 6(2)(b) of the Rules of the Supreme Court of Barbados.

[5] Mr. Mottley, on the other hand submits that the plaintiff's cause of action is founded upon the bond in question. He furthers submits that the court is not concerned with the underlying causes of any breach of contract. All that is required is to prove the breach of the bond. He posits that once the plaintiff proves the delivery of the documents required by the bond, that is, notice of intention to claim, the amount claimed and the breach relied upon, then the monies become payable by CLICO to the plaintiff under the bond. His client, having satisfied the terms of the bond is now entitled to recover since the Court is not concerned with the underlying causes of a breach, consequently, Elcock is not entitled to be joined. He relies on several cases including B***olivinter O.I SA. v. Chase Manhattan Bank N.A and Others 1984 1WLR 392, Balfour Beatty Civil Engineering & ANR (together T/A R Balfour Beatty Costain (Cardiff Bay Barrage) Joint Venture) v. Technical General Guarantee Company Ltd. 1999 WL 852268. And at R.D. Harbottle (Mercantile) Ltd v National West Minister Bank Ltd. and Others [1978] QB 146.***

LAW AND APPLICATION:

[6] Order 15 Rule 6(2)(b) of the Rules of Supreme Court provides that:

> "At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion order any of the following persons to be added as a party namely:
>
> (i) Any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well between the parties to the cause or matter".

[7] ***In Gurtner v Circuit [1968] 1ALL E.R. 328*** the application of this Order was explained when it was held that "the court had discretion to add a party to an action if he would be affected in his legal rights or his pocket (in that he would be

bound to foot the bill) by the determination of the dispute;" The reasoning was that a matter was not effectively "adjudicated upon" within R.S.C Ord 15,r.6(2)(b) unless … all those who would be liable to satisfy the judgment were given an opportunity to be heard;"

[8] Lord Denning MR. at page 332 stated:

> "It seems to me that, when two parties are in dispute in an action at law and the determination of that dispute will directly affect a third person in his legal rights or in his pocket, in that he will be bound to foot the bill, then the court in its discretion may allow him to he added as a party on such terms as it thinks fit. By so doing the court achieves the object of the rule. It enables all matters in dispute 'to be effectually and completely determined and adjudicated upon' between all those directly concerned in the outcome."

[9] Lord Diplock opined:

> "clearly the rules of natural justice require that a person who is to be bound by a judgment in an action brought against another party and directly liable to the plaintiff on the judgment should be entitled to be heard in the proceedings in which the judgment is sought to be obtained. A matter in dispute is not, in my view, effectually and completely "adjudicated upon" unless the rules of natural justice are observed, and all those who will be liable to satisfy the judgment are given an opportunity to be heard."

[10] ***Gurtner v. Circuit was followed in Citizen Insurance Co Ltd. V. Ali (1987) High Court, Trinidad and Tobago No. 803 of 1987 (unreported)*** where Gopeesingh J held that "once it is established that the proprietary or pecuniary rights of the party applying to be joined as a defendant are directly affected by the proceedings, the party so applying should be granted leave to be joined as a defendant even though new expense and new evidence would be necessitated thereby."

[11] Likewise in ***Sanders Lead Co. Inc v. Entores Metal Brokers Ltd [1984] 1 All ER 857*** it was held that a person had to have an interest directly related to the subject matter of an action before he was entitled to intervene in the action under the RSC Ord 15, r 6(2)(b). A mere commercial interest in the out come of the action, divorced from its subject matter, such as the interest of a creditor of one of the parties, was no sufficient to entitle a person to intervene.

[12] Another case which emphasizes the principle is ***Steinorth v. Barclays Bank Plc.[1990-91] CILRN3 (Grand Court, Cayman Islands)*** which held that in order

to establish that his presence is necessary the intervener must show an arguable claim against an existing party to the suit, though the court retains a complete discretion whether or not to grant the application. Intervention may be allowed against the wishes of the plaintiff.

[13] Similarly in **The trustee of the property of the party of the Bankrupt v. Bateman & Co. Ltd and another 1WLR 1015** it was held that only a person directly affected by the outcome of the matter should be joined, per Stamp J "Where as here, the surety would be directly affected by the determination of the question whether a payment made to the creditor is a fraudulent preference the surety ought, in my judgment, to be made a party to the proceedings. It would be quite contrary to the principle to decide the question without giving the surety the opportunity of adducing such evidence as he has and making such submissions as appears to him appropriate."

[14] These principles are also discussed in the text **Commonwealth Caribbean Civil Practice and Procedure by Gilbert and Vanessa Kodilinye – 1999-Cavendish Publishing Limited** where the author states at page 47, that "By Order 15, r 6(2) a person who is not a party to an action as originally constituted may be added to as a party either by the court of its own motion or on the application of an existing party or the intervener himself where;

(a) the presence of the intervener is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon.

(b) It would be just and convenient to determine a question or issue relating to any relief or remedy claimed in the cause or matter between the intervener and existing party as well as between the existing parties".

[15] ***In Winston Hamilton Romalho v. Lalta Persaud & Sons Ltd and Omadatt Samaroo Leonard Wharton (Third Party)(1974) 22 WIR 73*** the plaintiff (appellant) sued the defendants for damages in respect of damages done to his car by a vehicle owned by the first defendant and driven by the second defendant.

[16] The defendants denied negligence and obtained leave to join the third party alleging that the accident was caused by the negligent driving of the latter of his car, and that he was completely to blame for the accident. The trial judge upheld the defendants' contention, and dismissed the plaintiff's claim. No application was made at the trial to make the third party a defendant, nor did the judge do so of his own motion.

[17] On appeal application was made by the plaintiff to join the third party as a defendant: It was held (1) (by Persaud JA) that the third party ought not to have been joined for the purpose of determining the issue raised between the plaintiff and the defendants; but on the assumption that his presence was necessary to enable the court to effectually and completely adjudicate in the matter, it was too

late to effect a joinder now, the period of limitation having run against the plaintiff. The appeal was dismissed and the Judgment of court below affirmed.

Persaud, J.A., referring to the dicta of Lord Denning, M.R. and Lord Diplock, L.J. above quoted in Gurtner v. Circuit said:

> The test laid down in that case seems to be, as LORD DENNING has put it, where a third person has to foot the bill, and according to LORD DIPLOCK, where that person is to be bound by the judgment. In Amon v. Rapheal Tuck & Sons, Ltd. (6) DELVIN, J., preferred the narrower construction of the rule, and held that an intervenor must be directly or legally interested in the answer to the question under debate. A person is legally interested in the answer," said DELVIN,J., "only if he can say that it may lead to a result that will affect him legally-that is by curtailing his legal rights. That will not be the case unless an order may be made in the action which will operate on something in which he is legally interested."

[18] It seems to me that in order to determine whether Elcock has an interest directly affected by the proceedings one has to look to the pleadings in this matter and the bond which is the subject matter of the suit.

[19] The Bond sets out the relationship between the parties, Johnston, Elcock and CLICO. It is the interpretation of the bond that determines the relationship between the parties, their rights and duties. The relevant parts of the Bond are as follows:

> "TO: Johnston International Limited
> "Aberfoyle"
> 5th Avenue
> Belleville
> St. Michael
> Barbados National Bank
>
> KNOW ALL MEN BY THESE PRESENTS
>
> That Everson R. Elcock and Company Limited as Sub-Contractor (hereinafter called the **"Contractor")** and Clico International General Insurance Limited as Surety (hereinafter called the "**Surety**"), whose Principal Office is located at D L Duprey Financial Centre White Park Road in the parish of St. Michael are firmly bound unto Johnston International Limited as Obligee

(hereinafter called the "**Obligee**") to fulfil the obligations of the Contractor and Surety under the Contract to which reference is hereafter made in the amount of Nine Hundred and Twenty Five Thousand One Hundred and Sixty Six Dollars and Sixty Two cents Barbados (BDS $925,166.62) for payment whereof the Contractor and the Surety bind themselves their heirs, executors, administrators, successors and assigns jointly and severally firmly by these presents.

Whereas the Obligee has by Contract dated the SEVENTH day of JULY 2002 CONTRACTED WITH THE contractor for the supply and installation of electrical works to a hotel to be called the "Barbados Hilton" (The "**Contract**" **Documents**") a copy of which is annexed hereto.

Now, therefore, the condition of this obligation is such that if the Contractor shall faithfully perform all provisions of the Contract on its part, and indemnify and save harmless the Obligee from all loss, cost of damage which it may suffer by reason of the failure to perform all provisions of the Contract, then this obligation shall be null and void otherwise it shall remain in full force and effect. The surety shall have no obligation to make any payment to the Obligee hereunder unless the Obligee delivers to the Surety either:-

(i) a written notice signed by both the Contractor and the Obligee that the Contractor and the Obligee have mutually agreed that the amount of damages concerned is payable to the Obligee; or

(ii) a legally certified copy of an award (which is not the subject of any appeal demand in arbitration or court proceedings carried out in accordance with the terms of the Contract under which damages are payable by the Contractor or the Surety to the Obligee); or

(iii) the Contractor is in breach of the Contract and fails to remedy the breach within thirty (30) days after receiving written notice from the Obligee requiring the Contractor so to do. The notice shall state the intention to claim hereunder the amount claimed and the breach relied upon.

> If the Obligee shall deliver any notice as previously mentioned, the Surety shall within twenty one (21) days of delivery of such notice, pay to the Obligee the amount specified in such notice or such lesser amount as shall, together with any payments previously made hereunder, be equal to the sum stated herein.
>
> This Bond shall not be voided by reason of:
>
> (1) Any alteration of the Contract made between the Obligee and the Contractor."

[20] The Pleadings in this matter in instructive as far as the relationship between the parties is concerned. The pleadings in the Statement of Claim, so far as relevant are as follows:

(3) "On or about the seventh day of July 2002, the Defendant executed a Bond in the sum of $925,166.62 (Barbados Currency), conditioned for the due performance by Everson R. Elcock & Company Limited of a written agreement made on the 17th day of July 2002 between the Plaintiff and Everson R. Elcock & Company Limited ("The Sub-Contract") for the construction of the new Barbados Hilton Hotel at Needhams Point in the parish of St. Michael ("The Building Works") to be constructed by the Plaintiff for Needhams Point Holding Limited pursuant to contract dated 12 June 2002.

(5) On the 26th day of July 2004, in breach of the Sub-Contract, Everson R. Elcock & Company Limited failed to achieve substantial completion of the scope of works and the Plaintiff became entitled under the Contract to the liquidated damages as specified in paragraph 4 thereof. In addition Everson R. Elcock & Company Limited has consequently failed to perform all provisions of the contract on its part and to indemnify and save harmless the Plaintiff from all loss and cost of damage that the Plaintiff has suffered by reason of Everson R. Elcock & Company Limited's failure to perform all the Terms of the Sub-Contract.

(6) In accordance with the Terms of the Bond, the Plaintiff by letter dated the 14th day of December 2004, advised the Defendant that Everson R. Elcock & Company Limited had not met the Sub-Contract's adjusted substantial completion date and further that Everson R. Elcock & Company Limited had been given 30 days to remedy this default.

(7) Everson R. Elcock & Company Limited as at the 14th day of December 2004 had continued in default of the Sub-Contract by failing to achieve substantial completion and further, by letter dated the 14th day of January 2004, the Plaintiff duly demanded of the Defendant the sum of $925,166.62 under and in accordance with the Terms and Conditions of the Bond.

(8) The Defendant has failed and continues to fail to make any payment as demanded by the Plaintiff."

[21] In Clause 5.3 of the Affidavit in support of the application in summary judgment Mr. Barry Coomber, Commercial Manager of the plaintiff deposes that, "it was a condition of the bond that the defendant would make payment to the plaintiff on demand provided that:

(1) "The Contractor was in breach;

(2) The Contractor fails to remedy the breach within 30 days after receiving written notice from a Plaintiff to remedy the breach and;

(3) The delivery of notice of the Plaintiff's intention to make a claim, the said amount claimed and the breach relied upon."

[22] Paragraph 6-1 and 6-2 allege notification of alleged breaches on the part of the contractor to the contractor itself and the time delimited by the Plaintiff to the Contractor for remedying same.

[23] Paragraph 7-1 refers to the notification by the Plaintiff to the Defendant of the Contractor's alleged breach.

[24] Paragraph 6-2 is especially poignant in that it refers to a letter of 14/12/2004, the pleading in respect of which alleges that the Contractor had 30 days from the date of the letter to remedy the breach failing which the Plaintiff would seek to claim the full amount of $925,106.62 due under the bond.

[25] This Court must consider the totality of the pleadings in this matter and the Affidavit evidence in support of the relief sought as they impact upon the rights of the parties and the rights, if any, of the proposed Third party.

[26] In this regard the submissions of Messrs Mottley, Yearwood and Haynes with respect to the performance bond are very important, Mr. Mottley submits that the only responsibility the Plaintiff has under the terms of the bond is to notify the Defendant that there was a breach. If the required notice is given and the breach is not remedied, the obligation to pay arises, he submits that the Court is not concerned with the underlying dispute between the parties. The obligation of the Defendant to pay arises from the contract between the Plaintiff and the Defendant. The dispute between the Plaintiff and the Contractor must be settled between themselves. The sole cause of action is the breach of the bond.

[27] ***In Edward Owen Engineering Ltd. V. Barclays Bank International Ltd and Another [1978] Q.B. 159 Lord Denning*** stated that in many ways a performance bond "has many similarities to a letter of credit. It has been long established that when a letter of credit is issued and confirmed by a bank, the bank must pay it if the documents are in order and the terms of the credit are satisfied. Any dispute between buyer and seller must be settled between themselves. The bank must honour the credit…A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer;" Herein lies the basis of Messrs Mottley's submission that by signing the Bond CLICO International General Insurance Limited became liable to the Plaintiff without the need to prove any underlying cause of the breaches.

[28] Mr. Yearwood and Mr. Haynes, on the other hand, submit that the matter turns on the interpretation of the bond. They further submit that Mr. Mottley's submission is posited on the bond being an unconditional bond. Whereas Mr. Haynes' submission is posited on the bond being a conditional bond. This is also the position taken by Mr. Yearwood.

[29] Mr. Haynes submits that, if there is any ambiguity in the interpretation of the bond, the Court should exercise its discretion in favour of Everson R. Elcock and Company.

[30] It is clear to this Court that the Suit in question revolves around the bond, the subject matter of the action. As I have already said, the rights of the parties are conditioned by the interpretation to be placed on the words used in that bond.

[31] Clauses (1) and (2) of the operative part of the bond detail specific actions on which the bond is payable, none of which is relevant to the present proceedings. Clause (3) is the relevant clause, and its language is in the following terms "… the Contractor is in breach of the contract" and "fails to remedy the breach within 30 days after receiving written notice from the contractor requiring the Contractor to do so".

[32] It is debatable whether the language of the operative part of the bond that the "Obligee … deliver to the Surety either (1) or (2) or (3) refers to delivery of notice of mutual agreement of an amount of damages under (1) or legally certified copy of an award under (2) or notice refers to (3) since no use is made of the word notice in clause (3) in other words clause (3) does not speak to notice of a breach, the notice required is that the Contractor fails to remedy the breach within 30 days of receiving written notice from the Obligee requiring the Contractor to remedy the breach.

[33] I merely make this observation from the point of view of my findings that the issue of whether the bond is payable on notice only or on proof of breach and failure to

remedy the breach or breaches after notice is for the determination of the substantive issue of whether the Plaintiff is entitled to summary judgment.

[34] I have already adverted to the Submissions of Counsel with respect to their interpretations of the Bond, that is, whether it is a conditional one or is unconditional. The wording of the Bond, the subject matter of this action, may be compared with the Bond in ***Balfour Beatty Civil Engineering of ANR v. Technical and General Guarantee Company Ltd. 199 WL 852268.***

[35] The performance bond was in the following terms:-

> "By this Bond we Leadrail Limited whose registered office is at 41 Lythe Fell Avenue Halton Lancaster LA2 6NJ (hereinafter called the Sub-Contractor) and Technical & General Guarantee Company Limited of Salisbury House 15 Victoria Street Douglas Isle of Man 1M1 2LW (hereinafter called the Surety) are held and firmly bound into Balfour Beatty/Costain Joint Venture (hereinafter called the Contractor) in the maximum sum of Eighty nine thousand eight hundred and twenty five pounds (89,825.00) for the payment of which sum the Sub-Contractor and the Surety bind themselves, their successors and assignees jointly and severally by these presents.
>
> …
>
> Now the conditions of the above written Bond are such that:
>
> 1. The Surety hereby undertakes to pay to the Contractor up to 89,825.00 upon receipt of the Contractors first written demand at the Suretys above address signed by a duly authorised signatory of the Contractor. The signature is to be authenticated by the Contractors Banker.
>
> (a) Specifying the amount claimed by the Contractor and confirming that his amount constitutes no more than 89,825.00 or any remaining balance thereof and
>
> (b) Stating that the Sub-Contractor has failed to fulfil its obligations under the said Sub-Contract and that the sum demanded is due and payable and such demand shall be accepted by the Surety as conclusive evidence that the sum of demand is due hereunder."

[36] Waller J. in interpreting this Bond, said:

> "This bond contains language which seems to me to make it absolutely clear that this is a bond intended to be met without the surety having either the right or the duty to make any detailed inquiry provided the demand letter conforms with the conditions of the bond. It requires payment on first demand; it provides that the statements required to be made should be conclusive evidence of the facts stated therein. That is the clearest possible indication that as between the surety, and the promisee, there will be no investigation into the underlying facts."

[37] In **R.D. Harbottle (Mercantile) Ltd. v National Westminister Bank [1978] QB 146 Kerr J** noted that there had been negotiations between the parties about the wording of the guarantee.

He said:

> "A great deal turns on the wording of the guarantees. Under the contracts this was to be agreed between the plaintiffs and the buyers. There were then negotiations about the wording. The plaintiffs were naturally anxious to provide some safeguard about the buyers' rights to draw on the guarantees. Initially they required that there should be proof of a breach of contract on their part; later they suggested the presentation of a protocol signed by the plaintiffs and the buyers, or alternatively of an arbitration award. But the buyers would evidently not agree to any such stipulations. Ultimately the guarantees simply provided that payment would be made on the buyers' "first demand" without any safeguard. In one case there were some additional words, but nothing turns on them. Performance guarantees in such unqualified terms seem astonishing, but I am told that they are by no means unusual, particularly in transactions with customers in the Middle East. In effect, the sellers rely on the probity and reputation of their buyers and on their good relations with them. But this trust is inevitably sometimes abused, and I understand that such guarantees are sometimes drawn upon, partly or wholly, without any or any apparent justification, almost as though they represented a discount in favour of the buyers. In such cases the sellers are then left merely

> with claims for breaches of contract against their buyers and the difficulty of establishing and enforcing such claims."

[38] The learned Judge clearly is adverting to the fact that, in spite of these negotiations, the bond ultimately did not reflect the conditions discussed by the parties. Herein lies the distinction between conditional and unconditional bonds. Clearly there is a marked difference in the bond in this case and those which the Courts considered in the cited authorities. This is also reflected in the plaintiff's pleadings, paragraph 3 of which alleged that the Bond was Conditioned (Emphasis mine) on "the due performance by Everson R. Elcock & Company Limited of a written contract .."

[39] Reference is also made to the text "Bonds, Guarantees and Performance Security in the Construction Industry – ***By Paul Newman – 1999 Published by Jordans*** at Pages 108 and 109 where the author noted under the heading "Performance Bonds."

> Performance Bonds Conditional and unconditional bonds which are often known, semi-colloquially, as performance bonds, which fall into two types. "The on-demand bond is obviously popular with certain clients and has its origins in international contracting, particularly in the Middle East. Subsequently, it has been used on a number of UK projects. The principle underlying the on-demand bond is that it can be called without the beneficiary having suffered loss, although the Courts will, to temper the effect, pay close regard to any conditions relating to a call which is made. The second type of bond, the conditional or default bond, is more akin to a guarantee and has been regularly used in the UK, particularly by local authorities on civil engineering schemes, for a great number of years. The traditionally, the conditional bond has been for 10 per cent of the contract value. The conditional bond differs from the on-demand bond in one critical respect. It requires a fault to be proved on the part of the contractor before the value of the bond is paid out to the employer. The use of the words 'now the condition of the above written Bond is such that if the contractor shall duly perform and observe all the terms of the said Contract … then this obligation shall be null and void' has been common for a very long time.

[40] The learned author then goes on to consider the difficulties the Courts have experienced in the interpretation of these different types of bonds and the varying nature of the interpretations placed on bonds by the Courts.

[41] The issue of whether or not the bond is conditional or unconditional must be determined on a proper construction of its terms. It must be borne in mind that there is another application before the Court set for another day, in which the plaintiffs are seeking summary judgment for the amount claimed under the said bond. The purpose of this application is limited to the issue of joinder. Whilst, the issue of whether the bond is conditional or not, is important, I am not called upon to make a final determination on it and so preclude the plaintiff from pursuing its application for summary judgment since, no argument has, as yet, been advanced in respect of that summons.

[42] Having regard to the manner in which this case has been pleaded in the Writ, the allegations of breaches on the part of Everson R. Elcock and Company Limited. The allegations of failure to remedy these breaches, and the possible interpretations which may be placed on the language of the performance bond as to the circumstances which will trigger the performance of the bond, I do not think that it would be right to deny Elcock the opportunity to be heard on the interpretation of the bond to which it was a party. It must be noted that this bond was executed by the Plaintiff the Defendant and Everson R. Elcock and Company Limited and it would be right and just to hear all parties
on the issue of its interpretation.

[43] To shut them out of the matter, at this stage, will be to deny them the opportunity to be heard with respect to the interpretation of a document (the bond) to which they were a party.

[44] I am fortified in my view when regard is paid to the operative part of the bond itself. Which reads "the conditions of this obligation is such that if the Contractor shall faithfully perform all provisions of the contract on its part, and indemnify and save harmless the Obligee from all loss, cost of damage which it may suffer by reason of the contract, this obligation shall be null and void otherwise it shall remain in full force and effect.

[45] I must note that the bond contains a declaration that the contractor and the surety are firmly bound to the Obligee to fulfil the obligations of the contractors and the surety under the contract in the amount of $925,166.62 Bds. Currency "…for payment whereof the contractor and the surety bind themselves their heirs, executors, administrators, successors and assigns jointly and severally firmly by these presents." This clearly may have implications for Elcock's obligation under the bond. I am of the view that Elcock will ultimately be affected by these proceedings in its pockets since it is under a duty to indemnify the Obligee. Its obligations are conditioned by the interpretation to be placed on the bond itself. It

therefore has a financial, as distinct from a mere commercial interest (divorced from the subject matter of the case) in the outcome of the proceedings.

[46] This Court cannot, at this stage of the proceedings, preclude a contracting party to the bond (i.e) Everson R. Elcock and Company, from being heard on a contract to which it is a party and under which, it appears that its liability to indemnify the Obligee, may cease upon the occurrences of certain events without that party being heard.

[47] It is the Court's opinion that, in this particular matter, Everson R. Elcock and Company Limited will be directly affected by the decision in the matter presently before the Court.

[48] It is on these premises that Everson R. Elcock and Company Limited may be joined as a defendant in the matter since it is due to their alleged breach that CLICO International General Insurance is being asked to pay the bond. They would be possessed of knowledge that would be important and definitely affect the outcome of the case and their pecuniary interests in the matter and hence their presence is necessary.

[49] **In *Williams v. Payne (1990) High Court Barbados No 29 of 1990 (unreported)* *Williams CJ*** pointed out that according to the supreme court practice intervention can be insisted upon in three classes of case (1) in a representative action where the intervener is one of a class whom the plaintiff claims to represent. (2) where the proprietary of pecuniary rights of the intervener are directly affected by the proceedings or where the intervener may be rendered liable to satisfy any judgment and (3) in actions for specific performance contracts, where third persons have an interest in the question of the manner in which the contract should be performed. Numbers (1) and (3) are irrelevant to this matter but No. (2) is certainly very relevant.

CONCLUSION AND DISPOSAL:

[50] Having regard to the principles on joinder outlined above Everson R. Elcock and Company Limited should be joined as a party to this cause because they will be directly affected by the decision in the matter presently before the court. I therefore hold that Everson R. Elcock and Company Limited should be joined as defendant in the matter. The other matters raised in the summons are adjourned for full argument thereon, so also is the summons filed by the plaintiff for summary judgment. The costs will be the costs in the cause.

William J. Chandler
High Court Judge