JK Integrated (Pte Ltd) *v* 50 Robinson Pte Ltd and another [2015] SGHC 57

Case Number	: Originating Summons No 902 of 2014 (Summons Nos 5083 and 6043 of 2014)
Decision Date	: 04 March 2015
Tribunal/Court	: High Court
Coram	: Hoo Sheau Peng JC
Counsel Name(s)	: Koh Kok Kwang and Samuel Loke (CTLC Law Corporation) for the plaintiff; Chuah Chee Kian Christopher, Lee Hwai Bin and Chua Minghao (WongPartnership LLP) for the first defendant.
Parties	: JK Integrated (Pte Ltd) — 50 Robinson Pte Ltd and another

Building and construction law – Building and construction related contracts – guarantees and bonds

Credit and security – Performance bond

4 March 2015

Hoo Sheau Peng JC:

1 Summons No 5083 of 2014 was an application by the first defendant, 50 Robinson Pte Ltd ("the First Defendant"), to set aside an *ex parte* injunction obtained by the plaintiff, JK Integrated (Pte Ltd) ("the Plaintiff"), against the First Defendant's call on an on-demand performance bond on the ground of unconscionability. The hearing was on 8 December 2014. On 9 December 2014, I allowed the application. The Plaintiff has appealed against my decision, and I now set out my reasons.

Background Facts

Parties, the Contract and the Performance Bond

2 The Plaintiff is a building and construction company incorporated in Singapore. The First Defendant is a real estate development company. By way of a letter of award dated 21 June 2011 ("the Letter of Award"), the First Defendant engaged the Plaintiff as its main contractor for the construction of a 42-storey residential-cum-commercial building at 50 Robinson Road, Singapore ("the Project"), for the contract sum of $47m ("the Contract Sum").

3 On the same day, the First Defendant and the Plaintiff entered into a formal contract, adopting the standard form of the Singapore Institute of Architects, Articles and Conditions of Building Contract (Lump Sum Contract, 8th Edition) ("SIA Conditions"). The Letter of Award and SIA Conditions, *inter alia*, formed the contract between the parties ("the Contract").

4 A number of consultants were engaged for the Project ("the Consultants"), including Mr Ronny Chin Hong Oon of Ronny Chin Architects Pte Ltd ("the Architect"), JIA Quantity Surveyors and Project Managers Pte Ltd ("the Surveyor") and GNG Consultants Pte Ltd ("the Structural Engineer").

5 By cl 10 of the Letter of Award, the Plaintiff was required to provide the First Defendant with a performance bond to secure the performance of the Plaintiff's obligations. Accordingly, a performance

bond dated 13 September 2011 was issued by thesecond defendant, QBE Insurance (International) Limited ("the Second Defendant"), in favour of the First Defendant for the sum of $4.7m, being 10% of the Contract Sum ("the Performance Bond"). The relevant terms of the Performance Bond were as follows:

> 1 In consideration of the Employer not insisting on the Contractor paying ten percent (10%) of the Contract Sum as a security deposit for the Contract, we hereby irrevocably and unconditionally warrant and guarantee the due and faithful performance of the Contract by the Contractor.
>
> 2 We unconditionally and irrevocably undertake and covenant to pay in full forthwith upon demand in writing any sum or sums that may from time to time be demanded by the Employer up to a maximum aggregate sum of Singapore Dollars **Four Million and Seven Hundred Thousand Only (S$4,700,000.00)** (hereinafter referred to as "the Maximum Aggregate Sum") without further reference to the Contractor and without requiring any proof that the Employer is entitled to such sum or sums under the Contract or that the Contractor has failed to execute the Contract or is otherwise in breach of the Contract. Any sum or sums so demanded shall be paid forthwith by us, unconditionally without any set-off deductions or counter-claims whatsoever and notwithstanding the existence of any differences or disputes between the Employer and the Contractor arising under or out of or in connection with the Contract or the carrying out of works thereunder or as to any amount or amounts payable thereunder and notwithstanding that such differences or disputes have been referred to arbitrator or are the subject of proceedings in Court and notwithstanding any instruction which may be given to us by the Contractor not to pay the same or any part thereof.
>
> 3 We hereby confirm and agreed [*sic*] that we shall be under no duty or responsibility to inquire into:-
>
> (a) the reason or circumstance of any demand hereunder; or
>
> (b) the respective rights, obligations and/or liabilities of the Contractor and the Employer under the Contract …
>
> …
>
> 5 Our liability hereunder shall not be discharged, affected or impaired or otherwise released in any way by reason of any modification, amendment or variation in or to any of the conditions or provisions of the Contract or by reason of any breach or breaches of the Contract by the Contractor, whether the same are made with or without our knowledge or consent. …

Disputes between the parties

Execution of the Contract

6 Construction commenced on 1 September 2011 and was scheduled to be completed by 28 February 2014. Works went on smoothly and promptly for the first few months. However, in or around March 2012, works began to be delayed. The Plaintiff was of the opinion that the delays had been caused by the First Defendant and the Consultants. The Plaintiff made substantive applications for extensions of time on 7 March 2013 and 22 October 2013. The First Defendant was of the view that the Plaintiff was responsible for the delays. The First Defendant did not grant any substantive extension of time. However, based on a request dated 10 June 2013, the Plaintiff was granted an

extension of time of nine days for the works due to exceptionally adverse weather, and the completion date was revised from 28 February 2014 to 9 March 2014.

7 The Plaintiff also encountered financial difficulties. From September 2011 to June 2014, the Plaintiff submitted 35 monthly payment claims. The Plaintiff alleged that the First Defendant certified and paid amounts which were consistently lower than the claims, contributing substantially to the Plaintiff's financial predicament. According to the First Defendant, the payments to the Plaintiff were made in accordance with the Contract, after valuation of the works by the Surveyor and the Architect's due certification of claims. Moreover, on two occasions, the Plaintiff requested the First Defendant for advance payments. The First Defendant paid $500,000 and $1,300,000 on 15 August 2013 and 3 March 2014 respectively to the Plaintiff to alleviate the Plaintiff's financial problems.

8 The delays persisted. In June 2014, the resident engineer for the Project observed in an email that there was little construction activity at the site. On 1 July 2014, the Architect issued a written notice to the Plaintiff, under cl 32(3)(d) of the SIA Conditions ("the Written Notice"), requiring the Plaintiff to take effective steps to proceed with the Project diligently and expeditiously. Further, cl 32(3)(d) provided that after the expiry of one month from the date of the Written Notice, if the Plaintiff failed to comply with the Written Notice, the Architect would be entitled to issue a termination certificate to the Plaintiff, upon which the First Defendant might terminate the Plaintiff's Contract under cl 32(2) of the same.

9 On 8 July 2014, the Plaintiff wrote to the Architect, objecting to the Written Notice on the basis that the certifications of the progress payments were consistently lower than the amounts which the Plaintiff claimed. The Plaintiff stated that "[t]hese gaps in certifications had further led to difficulties in meeting payment due to our suppliers, subcontractors, our related cost, expenses and time lost" [*sic*]. On 9 July 2014, the Plaintiff again requested for an extension of time with a new completion date of 30 May 2015.

The Supplemental Agreement

10 After discussions between the parties, on 1 August 2014, the Plaintiff and the First Defendant entered into a supplemental agreement ("the Supplemental Agreement"). It was intended to, *inter alia*, resolve the existing disputes between the parties and also to provide the Plaintiff with additional sums to complete the Project. Under the Supplemental Agreement, the parties agreed to extend the completion date for the works from 9 March 2014 to 31 May 2015, with works to proceed based on a new master programme.

11 More importantly, the Supplemental Agreement provided the following scheme of payment arrangements:

(a) The shareholders of the Plaintiff would inject $1m into the Plaintiff by 6 August 2014. The Plaintiff would fully use the amount to pay the outstanding debts due to the Plaintiff's sub-contractors and suppliers, as well as the outstanding wages of its workers ("the Outstanding Debts").

(b) Thereafter, the First Defendant would pay the Plaintiff $680,000, an amount due to the Plaintiff under Progress Claim No 35, which the Plaintiff was also contractually obliged to use fully to pay off the Outstanding Debts.

(c) When the above two sums had been used fully by the Plaintiff to pay off the Outstanding Debts, the First Defendant would provide the Plaintiff with a further $1.3m as a goodwill amount

("Goodwill Sum") to carry out and complete the construction works.

12 Clause 3 of the Supplemental Agreement obliged the Plaintiff to submit a detailed account of how the sums above were used to the First Defendant. Any failure by the Plaintiff to use the full amounts to make payment for the Outstanding Debts would constitute a "fundamental breach of the Supplemental Agreement".

13 It should be noted that pursuant to cl 20 of the Supplemental Agreement, the terms and conditions of the Supplemental Agreement were additions and/or variations to the Contract, and neither discharged nor affected the parties' rights and obligations under the Contract. In particular, cl 12 of the Supplemental Agreement stated the First Defendant retained the right to terminate the Contract under cl 32 of the SIA Conditions.

14 The Plaintiff raised a sum of $1.1m on 18 August 2014, well after the deadline of 6 August 2014. Thereafter, disputes arose between the parties concerning to whom payments should be made, with the First Defendant contending that the Plaintiff had not made payment solely towards the Outstanding Debts. After discussions, on 8 to 9 September 2014, the Plaintiff injected a further sum of about $300,000 to make payments towards wages of workers involved in the Project. It was only then that on 10 September 2014, the First Defendant released the payment of $680,000 under Progress Claim No 35 to the Plaintiff.

15 Once again, as required under the Supplemental Agreement, the Plaintiff was to use the sum of $680,000 to pay off the Outstanding Debts, and duly issued cheques to various sub-contractors and suppliers. However as the Inland Revenue Authority of Singapore ("IRAS") had instructed the Plaintiff's bank to withhold a sum of $150,237.77 arising from IRAS's claim for goods and services tax ("GST"), cheques amounting to around $95,308.01 to two companies did not clear.

Termination

16 On 19 September 2014, the Architect issued a termination certificate to the Plaintiff in accordance with cl 32(4) of the SIA Conditions ("the Termination Certificate"). On the same day, the First Defendant terminated the Plaintiff's employment via a notice of termination sent by their then solicitors, KhattarWong LLP ("KhattarWong") to the Plaintiff's solicitors, CTLC Law Corporation ("CTLC") ("the Notice of Termination").

The present proceedings

17 On 22 September 2014, the First Defendant wrote to the SecondDefendant, demanding payment within seven days of the sum of $4.7m in accordance with cl 2 of the Performance Bond. Upon being informed by the SecondDefendant of the First Defendant's call on the Performance Bond, on 24 September 2014, the Plaintiff commenced the present proceedings to restrain the First Defendant from receiving payment under the Performance Bond. The *ex parte* injunction was granted by Lee Seiu Kin J on 26 September 2014. Thereafter, the First Defendant applied to set aside the *ex parte* injunction.

Parties' arguments

The Plaintiff's case

18 The Plaintiff's case was that the First Defendant's call on the Performance Bond was unconscionable for these broad reasons:

(a) The First Defendant's conduct in the course of the Contract caused financial and other difficulties to the Plaintiff in performing its obligations. In particular, the First Defendant persistently certified and paid amounts that deviated significantly from what the Plaintiff originally claimed, and also caused the delays to the works.

(b) The First Defendant's conduct in the course of the Supplemental Agreement was unjustified, with pressure exerted on the Plaintiff to comply with the First Defendant's demands. Despite its financial woes, the Plaintiff put in its best efforts to adhere to the terms of the Supplemental Agreement. In fact, the Plaintiff had exceeded its obligations under the Supplemental Agreement, with its shareholders pumping in $1.4m into the Plaintiff, instead of $1m as required under the Supplemental Agreement. Yet, the First Defendant had "nit-picked", and unduly withheld the two payments under the Supplemental Agreement. The First Defendant also continued to make it difficult for the Plaintiff to continue with the works, impeding the progress of the works during the term of the Supplemental Agreement.

(c) The First Defendant had also routinely used the threat of non-payment to control the Plaintiff.

(d) Flowing from the above, the termination of the Supplemental Agreement, and the removal of the Plaintiff from the Project, was unjustified.

The First Defendant's case

19 The First Defendant's case was that there was no evidence that it had acted unconscionably. It was clear that the Plaintiff had breached the terms of the Contract and Supplemental Agreement, and the First Defendant was therefore entitled to terminate the Contract, and call on the Performance Bond. Throughout, the First Defendant had been reasonable with the Plaintiff, and attempted to assist the Plaintiff with its financial and other difficulties. At the highest, the Plaintiff had only shown genuine contractual disputes between the parties, which would not amount to unconscionable conduct.

20 It was also submitted that the amount that the First Defendant had called for under the Performance Bond represented a reasonable assessment of the expenses, damages or losses that the First Defendant has incurred or is likely to incur as a result of the Plaintiff's breaches. Therefore, the First Defendant's call on the full amount of the Performance Bond was not unconscionable.

21 The First Defendant also argued in the alternative that the Plaintiff did not make full and frank disclosure of the material facts during the *ex parte* hearing before Lee J, and that the injunction should be set aside for that reason.

The Applicable Legal Principles

22 It was not disputed that the Performance Bond was in the nature of an on-demand performance bond. In calling upon an on-demand performance bond, there is no requirement that the beneficiary (*ie*, the First Defendant) establishes any breach on the part of the obligor (*ie*, the Plaintiff) of the underlying contract on which the bond is based before the issuer (*ie*, the Second Defendant) comes under an obligation to pay out under the bond.

23 It is also well-established that the court may grant an injunction to restrain a beneficiary from calling on a performance bond on the ground of unconscionability (see the Court of Appeal in *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352 ("*BS Mount Sophia*")). Unconscionability is

an amorphous concept that is easily identifiable, but difficult to define. The Court of Appeal in *BS Mount Sophia* observed that the doctrine is "not a formulaic doctrine with definite elements" (at [41]). Similarly, the Court of Appeal in *Dauphin Offshore Engineering & Trading Pte Ltd v The Private Office of HRH Sheikh Sultan bin Khalifa bin Zayed Al Nahyan* [2000] 1 SLR(R) 117 noted at [42] that there is no pre-determined categorisation of unconscionable situations. Therefore, what constitutes unconscionability depends on the facts of each case.

24 That said, the Singapore courts have made observations on the types of conduct which might fall within the ambit of unconscionability. In *Raymond Construction Pte Ltd v Low Yang Tong and another* [1996] SGHC 136, the High Court stated that (at [5]):

> … The concept of "unconscionability" to me involves unfairness, as distinct from dishonesty or fraud, or conduct of a kind so reprehensible or lacking in good faith that a court of conscience would either restrain the party or refuse to assist the party. Mere breaches of contract by the party in question … would not by themselves be unconscionable …

25 In relation to the above passage, the Court of Appeal in *Eltraco International Pte Ltd v CGH Development Pte Ltd* [2000] 3 SLR(R) 198 ("*Eltraco*"), remarked (at [30]):

> … Lai Kew Chai J said that the concept of "unconscionability" involves unfairness. We agree. … In every instance of unconscionability there would be an element of unfairness. But the reverse is not necessarily true. It does not mean that in every instance where there is unfairness it would amount to "unconscionability". That is a factor, an important factor no doubt in the consideration. It is important that the courts guard against unnecessarily interfering with contractual arrangements freely entered into by the parties. The parties must abide by the deal they have struck.

The Court of Appeal also noted that the existence of genuine disputes between the parties did not make a call by a beneficiary on a performance bond unconscionable (at [32]).

26 Also, in *BS Mount Sophia* at [52], the Court of Appeal found on the facts that the beneficiary of the performance bond did not genuinely believe that the obligor was in breach of the underlying contract. The Court of Appeal was of the view that even if the beneficiary was mistaken in adopting the position that the obligor was in breach of the underlying contract, its call on the bond could still be legitimate if the mistake was genuinely made and the beneficiary honestly believed that the obligor was in breach.

27 In the final analysis, although a call on a performance bond may cause an obligor to suffer financial hardship, the deprivation of the beneficiary's right to call on the bond may equally be detrimental to its prospects and liquidity. Therefore, mere breaches of contract by the beneficiary, or genuine disputes between the parties, are insufficient to constitute unconscionability. The beneficiary is entitled to protect its commercial interests, and parties are expected to abide by the bargain they struck. To balance the conflicting interests of the beneficiary and the obligor, the obligor must show that there is a strong *prima facie* case of unconscionability (see *BS Mount Sophia* at [20]–[31]). In this regard, the court is not required to engage in a protracted consideration of the merits of the case (see *BS Mount Sophia* at [52]).

The Decision

28 At the outset, it is worth stating that this is not an appeal against the decision to grant the *ex parte* injunction. In this *inter partes* application to discharge an existing *ex parte* injunction, the role

of the court is to determine on the full facts and arguments presented by both parties as to whether the injunction should continue or be discharged, or if a fresh injunction should be issued (*Tay Long Kee Impex Pte Ltd v Tan Beng Huwah (trading as Sin Kwang Wah)* [2000] 1 SLR(R) 786 at [19]). The law, as distilled above, is undisputed. Thus, what the Plaintiff must show was a strong *prima facie* case of unconscionable conduct on the First Defendant's part such that the First Defendant should continue to be restrained from calling upon the Performance Bond.

Conduct in the course of the Contract

29 It was one of the Plaintiff's core contentions that it would be unconscionable for the First Defendant to call on the Performance Bond when the First Defendant, by its conduct in the course of the Contract, had substantially contributed to the Plaintiff's financial and other difficulties. There were two main areas which caused the Plaintiff concern. Each of these will be addressed in turn.

The under-certification of claims

30 First, the Plaintiff alleged that for the 35 progress claims submitted between September 2011 and June 2014, the First Defendant had consistently certified and paid significantly lower amounts than those claimed. The Plaintiff pointed to correspondence including one dated 29 October 2012 that it had sent to the Surveyor and Architect, expressing its dissatisfaction and seeking a review of the valuation method.

31 In reply, the First Defendant explained that the certification of the work, especially for preliminaries, was done in accordance with the Contract, and that the valuation of the work done was conducted jointly by the Plaintiff's site staff, the Surveyor, as well as the resident engineer and resident technical officer on site. In submissions before me, counsel for the First Defendant, Mr Christopher Chuah ("Mr Chuah"), clarified that out of the 35 progress claims amounting to $25m, the discrepancy between the claims and their certification was around $932,000, or about 4% of the claims. The First Defendant also stated that based on pending litigation suits against the Plaintiff as of 23 September 2014, the claims against the Plaintiff arising from other matters amounted to about $5m, outstripping the claims in relation to the Project which stood at $1m. It was mischievous of the Plaintiff to blame its financial predicament on the Project.

32 Having perused the evidence, I was not persuaded that the Plaintiff had demonstrated that the First Defendant had conducted itself unfairly, improperly or in bad faith.

33 Under cl 31(3) of the SIA Conditions, the Architect was responsible for certifying the payments. For this purpose, the Surveyor was responsible for assessing and valuing the works done by the Plaintiff. When making payments, the First Defendant relied on the Architect's certificates based on the Surveyor's assessments. By cl 31(13) of the SIA Conditions, all certifications and decisions made by the Architect were to be temporarily binding on the parties, "save only that, in the absence of fraud or improper pressure or interference by either party, full effect by way of Summary Judgment or Interim Award or otherwise shall … be given to all decisions and certificates of the Architect". At no time did the Plaintiff allege that the First Defendant was fraudulent, had exerted improper pressure, or had interfered in any way with the Architect or Surveyor (as the case may be). As such, I agreed with Mr Chuah that the Architect's certificates were temporarily binding on the parties.

34 Further, as submitted by Mr Chuah, under the Contract, these disputes concerning the under-certification could have been referred to adjudication under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed), which would have been the appropriate forum for the Plaintiff to air its grievances. Throughout the term of the Contract, the Plaintiff did not choose to

do so.

35 Significantly, the Plaintiff had, in a meeting conducted on 3 March 2014, with the First Defendant, the Architect and the Surveyor, expressly acknowledged that the progress payments to that date were certified in accordance with the amount of works completed on site. The Plaintiff also conceded that notwithstanding such properly certified payments, the Plaintiff experienced cash-flow problems. Paragraph 2 of the minutes of that meeting reads:

> [*The Plaintiff*] *acknowledged the progress payments to-date by the consultants are certified in accordance with the amount of works completed on site.* However, [the Plaintiff] would like to appeal to [the First Defendant] for a 2nd advance payment of $1.3 million to ease their cash flow. [The Plaintiff] promises to use this advance payment to pay the outstanding sums owed to its subcontractors and [the Plaintiff's] site staffs.
>
> [emphasis added]

36 The Plaintiff's response to this was that it had agreed to the certification in order to maintain a good relationship with the First Defendant and to ensure the early release of the Goodwill Sum of $1.3m. This was, however, a mere assertion on the Plaintiff's part. Even if I were to accept the Plaintiff's response at face value, this simply pointed to disputes between the parties as to the certification of the claims.

37 By the foregoing, I was of the view that the First Defendant had dealt with the claims in accordance with the Contract, with the necessary input from the Architect and the Surveyor. On the other hand, the Plaintiff did not raise challenges to the Architect's certificates, or refer the matters to adjudication as required by the Contract. At best, the Plaintiff had shown that there remained genuine disputes to be tried between the parties.

Delays in the works

38 Secondly, the Plaintiff argued that the First Defendant had caused certain delays to the Project, which caused the Plaintiff to incur great losses as it had continued to expend costs such as worker's salaries and operating expenses notwithstanding that works could not progress. This included the works at the seventh storey of the Tower block and the Carpark Podium block, the lift walls and substation, amongst others. In essence, the Plaintiff complained of discrepancies between or lack of detail in construction drawings, and the failure by the First Defendant and or its Consultants to obtain regulatory approvals on time.

39 The First Defendant responded that under the Contract, it was the Plaintiff's responsibility to coordinate the drawings for all aspects of the works by all parties (see Section 1 General Conditions and Preliminaries, Shop Drawings and Co-ordination Drawings LA/234). In the event of any discrepancies, the Plaintiff should have resolved these with the Architect. No additional time should be claimed for this purpose. Even if the regulatory approvals were obtained late, the Plaintiff could have carried out works in other areas of the Project. The Plaintiff was simply not in the position to comply with the original schedule. Despite being paid by the First Defendant, the Plaintiff failed to pay its sub-contractors, suppliers and workers so as to ensure smooth operations on site.

40 I note that the Plaintiff did not dispute that the progress of works in the Project was slow. From the documentary evidence, it appeared that the delays began in or around March 2012. This was documented in the minutes of a meeting, conducted on 5 April 2012 at the Plaintiff's site office and attended by representatives of the Plaintiff, the First Defendant, and the Consultants, where it

was recorded that the Plaintiff was to submit a catch-up programme to mitigate the delays in the works. These delays appeared to persist and, about a year later on 28 March 2013, it was recorded in a similar meeting that the Plaintiff was in delay of 143 days. It is material to note that there was no indication in these minutes that the First Defendant was responsible for the delay.

41 As noted above at [6], the Plaintiff also made various requests for extensions of time. One of these requests was made on 7 March 2013, where the Plaintiff requested that the completion date for the Project be extended from 28 February 2014 to 30 May 2014. Both the Structural Engineer and the Architect took the view that the delay in the Plaintiff's work progress was not caused by a regulatory approval being obtained late. On 18 April 2013, in rejecting the Plaintiff's application for an extension of time, the Architect highlighted that the Plaintiff had in cl 17 of the Letter of Award undertaken not to claim for an extension of time on the basis of late regulatory approvals. Clause 17 of the Letter of Award stated:

> … [The Plaintiff] also [undertakes] not to claim for any cost, expenses, *time* whatsoever for:-
>
> a Compliance with all current and future practices, design guidelines, codes and requirements, etc., of the relevant authorities to obtain [the Temporary Occupation Permit] and Certificate of Statutory Completion (CSC) in accordance to [*sic*] the design intent of this project.
>
> b Any alterations, modifications, changes whatsoever by [the 1st Defendant] and/or the [Consultants] to the contract, including but not limited to architectural, civil and structural (C&S), mechanical and electrical (M&E) matters, which are incidental and necessary to meet the original design intent or requirements which can be derived or deduced from all the tender documents, tender addenda and corrigenda, the sale brochure and sale model, and/or any other related and relevant documents.
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> …
>
> [emphasis added]

42 Indeed, the Plaintiff later appeared to accept that the position taken by the Architect was accurate when signing the Supplemental Agreement in August 2014. Paragraph 2 of the pre-amble to the Supplemental Agreement stated:

> During the course of the Project, [the Plaintiff] submitted various progress claims which included variation claims for incidental and necessary alterations, changes etc. that [the Plaintiff] has expressly undertaken not to claim as set out in paragraph 17 of the Letter of Award dated 21 June 2011.

43 The Plaintiff made another request for extension of time or around October 2013, on the grounds of delays in obtaining regulatory approvals, and the lack of coordination and discrepancies in the construction drawing. The Structural Engineer responded in February 2014, stating its position that it was the Plaintiff's responsibility to ensure that alternative design proposals did not affect the site progress. Notably, the Structural Engineer also observed that "it is perceived that the contractor is facing issues of non-payment to subcontractors which had invariably led to the … delays".

44 Be that as it may, at all times, it was open to the Plaintiff to have these disputes referred to arbitration under cl 37 of the SIA Conditions. There was no evidence that the Plaintiff had sought to utilise the dispute resolution mechanism under the Contract. The matters in [40]–[43] threw some doubt on the Plaintiff's claim that the First Defendant should be held accountable for the delays.

Casting aside the substantive merits of the allegations, I was of the opinion that the most that could be said was that the Plaintiff had shown that there were genuine disputes to be tried as to which party bore the contractual responsibility for the delays.

Advance payments

45 Before moving to the matters relating to the Supplemental Agreement, it is appropriate to deal with the issue of the advance payments. Two substantial advance payments were made by the First Defendant to the Plaintiff amounting to $1.8m, in August 2013 and March 2014, with $100,000 returned by the Plaintiff to the First Defendant subsequently. These advance payments were made from the retention sums, which under cl 31(8) of the SIA Conditions, the First Defendant was entitled to withhold.

46 At [35], I had referred to para 2 of the minutes of the meeting held on 3 March 2014, where the Plaintiff acknowledged its financial difficulties despite the Plaintiff receiving payments from the First Defendant in accordance with the works done. The Plaintiff then asked for the second advance payment to assist with the Plaintiff's cash flow. I should add that in granting the Plaintiff's first request for more funds, the First Defendant, in a letter dated 15 August 2013 addressed to the Plaintiff, wrote:

> 2 In the meeting of 26 July 2013 & 31 July 2013, our directors had *expressed their concerns on* [*the Plaintiff's*] *non-payment to the various sub-contractors that was brought to their attention*. Further to that, they are deeply concern [*sic*] that this non-payment will affect the progress of the said work.
>
> 3 [*The Plaintiff*] *had expressed their financial problem and requested for an advanced payment of $500,000 from the project retention sum so as to easy* [*sic*] *their cash flow problem and to ensure a smooth operation of the project.*
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> …
>
> 5 In view of [the Plaintiff's] request and as a matter of good will to ensure the smooth operation of the said project, our management had decided to accede to the request …
>
> [emphasis added]

47 In my view, the documentary records of the context in which the advance payments were made lent weight to the First Defendant's position that the Plaintiff's failure to make payments to the sub-contractors, suppliers and workers, and any resulting delays in the works, was not attributable to the First Defendant. More importantly, the advance payments formed very persuasive evidence that militated against any finding that the First Defendant had acted unconscionably in the course of the Contract.

Conduct in the course of the Supplemental Agreement

48 Next, I turn to the Plaintiff's grievances with the First Defendant's conduct in the course of the Supplemental Agreement. Once again, the disputes centred on two key areas, and I shall deal with each in turn.

Compliance with scheme of payment arrangements

49 Before discussing the parties' contentions over the payment obligations under the Supplemental Agreement, I set out further details of what transpired. Under cl 2 of the Supplemental Agreement, the Plaintiff was obliged to provide evidence that its shareholders had injected $1m to the First Defendants within five calendar days of the execution of the Supplemental Agreement. It is undisputed that the Plaintiff failed to do so. From the email correspondence between the parties, the First Defendant had sent many reminders to the Plaintiff to fulfil its obligations under cl 2 to provide evidence of the injection of $1m. It was only on 18 August 2014, 17 calendar days after the Supplemental Agreement was signed, that the Plaintiff furnished this information.

50 The Plaintiff was to use the money injected to make payments towards the Outstanding Debts. In the payment schedule provided to the First Defendant, a sum of $431,847.04 was used to pay the Plaintiff's sub-contractors and suppliers, another sum of $640,837.25 was used to make payment for administrative and salary related debts, and the remaining sum of $27,315.71 was used to pay for "on site material". The First Defendant found this contrary to the intention behind the Supplemental Agreement, and on 20 August 2014, the First Defendant's then solicitors, KhattarWong, notified CTLC by letter that the Plaintiff had breached its obligations under the Supplemental Agreement. In particular, KhattarWong highlighted that the payments made by the Plaintiff for, *inter alia*, rent, utility charges and the levies imposed by the authorities were in breach of cl 2 of the Supplemental Agreement, which required that the sum of $1m injected by the Plaintiff be used "for the Project". KhattarWong also took the view that by virtue of the Plaintiff's breach, no payments under the Supplemental Agreement were due, and accordingly declined to release the sum of $680,000 under Progress Claim No 35.

51 The Plaintiff then replied in a letter dated 25 August 2014, stating:

> We may have some different understanding on the [Supplemental Agreement's] condition on the payout of our funding. We accept, with the hope of amicably settling this dispute, that it could be due to our *misunderstanding* and we hereby apologized [*sic*] …
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> …
>
> The allocation and distribution of our payout from the $1.1 million may not had [*sic*] met your expectation, of which we are in the view that such priority is necessary to maintain the workforce and for the related project supporting operation. Major portion of the payout are made for Staffs, workers, compliance to regulatory requirements, and some essential subcontractors and suppliers.
>
> At all time [*sic*], we only paid what we thought we were supposed to pay and required to pay and did not realize your dissatisfaction with how it was paid. …
>
> [emphasis added]

52 After some discussion between the parties, it was agreed on 27 August 2014 that the First Defendant would release payment of $680,000 under Progress Claim No 35 if the Plaintiff paid its site staff their outstanding salaries. This was confirmed in a letter from KhattarWong to CTLC on 28 August 2014. On 8 and 9 September 2014, the Plaintiff confirmed that it had used a sum of $299,628.67 to pay for its workers' salaries. The sum of $680,000 under Progress Claim No 35 was then released on or about 10 September 2014.

53 After the funds from Progress Claim No 35 were credited into the Plaintiff's bank account, the Plaintiff paid out all the sums under Progress Claim No 35 in accordance with the Supplemental

Agreement. However, as IRAS had instructed the bank to withhold about $150,000 for IRAS's GST claims, cheques to two of the Plaintiff's sub-contractors and suppliers of amounting to about $95,000 failed to clear. In the First Defendant's submissions, this was "the final straw that broke the camel's back".

54 Counsel for the Plaintiff, Mr Koh Kok Kwang ("Mr Koh") submitted that the First Defendant exerted undue pressure on the Plaintiff to comply with its demands. It was clear that the Plaintiff had used the sum of $1.1m to make payments towards the Outstanding Debts. The First Defendant imposed an additional requirement that the Plaintiff pay off the salaries of its staff before the sum under Progress Claim No 35 would be released. Despite its financial woes, the Plaintiff's shareholders had to put in about $1.4m in total before Progress Claim No 35 was released, $400,000 more than the parties had originally intended under the Supplemental Agreement. Further, the First Defendant's unreasonable delay in paying out the sum under Progress Claim No 35 exacerbated the Plaintiff's delay in carrying out the works for the Project.

55 I was not convinced that this amounted to unconscionable conduct on the part of the First Defendant. In and of itself, the Supplemental Agreement was an opportunity given by the First Defendant for the Plaintiff to continue with the Project, and would be evidence against any finding of unfair conduct. Further, the First Defendant extended time till 18 August 2014 for the Plaintiff to inject additional funds of $1m into the Plaintiff.

56 Given the history of the Project, the fact that the First Defendant was close to terminating the Contract, and the reciprocal obligations under the Supplemental Agreement, the First Defendant was entirely entitled to question whether the payments were made towards the Outstanding Debts. This was buttressed by the Plaintiff's acknowledgment that it might have misunderstood the intention of the Supplemental Agreement. Significantly, during oral submissions, Mr Koh also conceded that the payment made for utilities of around $15,000 included expenses which arose from its other projects. While Mr Koh argued that this was a trivial sum, I preferred Mr Chuah's submission that at that stage, any breach, even if seemingly minor, would be of concern to the First Defendants. It was also provided for under the Supplemental Agreement that any breach be treated seriously. In these circumstances, I did not accept that there was anything reprehensible on the First Defendant's part.

57 Furthermore, the fact that the cheques to the Plaintiff's sub-contractors and suppliers failed to clear would have led to a legitimate inference that the Plaintiff had not used the funds in accordance with the Supplemental Agreement. Simply put, at that stage, it was not unreasonable for the First Defendant to expect the Plaintiff to closely manage the financial situation, and ensure compliance with the Supplemental Agreement. In all the circumstances, I found that the First Defendant's position that the Plaintiff had breached the payment obligations under the Supplemental Agreement was reasonably taken and could not be said to be lacking in *bona fides*.

Compliance with the new master schedule

58 The Plaintiff was also aggrieved by the First Defendant's allegations that it had failed to comply with the new master schedule. Under cl 9 of the Supplemental Agreement, the Plaintiff was to submit a revised detailed master programme, to the satisfaction of the First Defendant, and to ensure completion by the new completion date of 31 May 2015. By cl 10, the Plaintiff was to adhere strictly with the new master programme. The Plaintiff argued that it did not breach cl 10 of the Supplemental Agreement because its delay in executing the works according to the timelines under the new master programme was caused by the First Defendant's unreasonable withholding of Progress Claim No 35 under the Supplemental Agreement. The Plaintiff also contended that in any event, the timelines under the new master programme had not been finalised.

59 In response, the First Defendant produced an email dated 15 August 2014 in which the First Defendant expressed satisfaction with the new master schedule. The First Defendant was of the view that the Plaintiff's continued default in paying its suppliers and sub-contractors contributed to the disruption of the progress of work. Further, the frequent movement of the Plaintiff's site staff led to the loss of continuity in work progress, and the inability of the Plaintiff to replace its key staff was yet another factor causing delays.

60 In response, the Plaintiff stated that in relation to the replacement of key staff, the Plaintiff had put much effort into finding the appropriate replacements, but that the First Defendant had rejected these personnel, claiming a lack of experience and qualification.

61 Given that I am only undertaking a *prima facie* inquiry, I was not able to come to a conclusion either way as to whether the new master programme had been finalised. Each side presented a plausible story. As for the issue of the First Defendant withholding payments under the Supplemental Agreement, I have already expressed the view at [57] that it was not unreasonable conduct. While not deciding on the merits of this dispute, I was of the view that the reasons provided by the Architect for the rejection of the Plaintiff's proposed replacement personnel were taken logically and reasonably and that the rejection of the personnel was not *mala fide*. Again, at best, there were genuine disputes between the parties on the continued lack of progress of the works, and whether there was an agreed new master agreement. However, there was no basis to suggest unconscionable conduct by the First Defendant.

Threat of non-payment to control the Plaintiff

62 Next, the Plaintiff raised the issue that Mr Ong Teck Khim ("Mr Ong"), the First Defendant's project manager, had routinely used the threat of non-payment to control the Plaintiff and that this showed that the First Defendant had acted unconscionably. The Plaintiff alleged that there were three incidents whereby such threats had been made.

63 According to the Plaintiff, the first incident occurred on 11 March 2014 where Mr Ong had pressured the Plaintiff to retract an email in relation to a meeting conducted on 3 March 2014 (set out at [35] above). However, it was not apparent from the correspondence exhibited by the Plaintiff that Mr Ong placed any undue pressure on the Plaintiff. Rather, it indicated that the Plaintiff's retraction of the email was in consideration of another meeting being set to discuss the contents of the minute. The documents also showed that the Plaintiff eventually affixed its company stamp, signifying its agreement to the minute. It would be disingenuous of the Plaintiff to allege undue pressure now.

64 The second incident was in relation to the payment of Progress Claim No 35. The Plaintiff alleged that Mr Ong had demanded that the Plaintiff send him an email to request that the First Defendant withhold payment under Progress Claim No 35. I have perused the documents, and I do not find that the Plaintiff had been thus pressurised. Taken at face value, the correspondence in fact indicated that the First Defendant had withheld the payment under Progress Claim No 35 upon the request of the Plaintiff, due to a garnishee order obtained by one of the Plaintiff's sub-contractors, PPI Engineering Pte Ltd, which was served on the First Defendant. These were events which took place in July 2014 before the Supplemental Agreement was entered into.

65 The last incident was relation to a text message sent by Mr Ong to Mr Siew Wui Seong ("Mr Siew"), an employee of the Plaintiff. In response to an email dated 9 September 2014 sent by Mr Bernard Tan of the First Defendant ("Mr Tan"), wherein Mr Tan requested the Plaintiff to prepare a live statement of financial accounts evidencing the payments made under the Supplemental

Agreement, Mr Siew had asked for the parties meet to discuss if it was possible to reduce the paperwork to allow the matters to proceed more efficiently. Mr Ong replied:

> U mean u want me to stop the cheque exchange as u have problem proceeding?
>
> Do not understand u. If u have a problem, I will stop the cheque till the matter is resolved.

This did not appear to me, in and of itself, to constitute threatening behaviour on Mr Ong's part. Indeed, in light of the relationship between the parties, as well as the terms of the Supplemental Agreement, the First Defendant was entitled to demand that the Plaintiff produce sufficient documentary evidence of its payments.

Termination of the Supplemental Agreement, and removal from the Project

66 Finally, the argument put forth by the Plaintiff was that the First Defendant's termination of the Contract, and removal of the Plaintiff from the Project, was unconscionable or unjustified. The gravamen of the Plaintiff's complaint was that the First Defendant terminated the engagement almost immediately after the Plaintiff had pumped in substantial funds of $1.4m into the Project, and without the Plaintiff being in substantial breach of the Supplemental Agreement.

67 As stated in the Notice of Termination dated 19 September 2014, the First Defendant terminated the Plaintiff's engagement on two bases. First, pursuant to cl 32(2) of the SIA Conditions, the First Defendant was entitled to terminate the Contract via a Notice of Termination within one month of the Architect's issuance of a termination certificate. The Architect issued the Termination Certificate on 19 September 2014, upon which the First Defendant issued the Notice of Termination on the same day. Second, the First Defendant also terminated the Contract as it was of the view that the Plaintiff had fundamentally breached the Supplemental Agreement. Clause 12 of the Supplemental Agreement provided that a fundamental breach of the Supplemental Agreement by the Plaintiff entitled the First Defendant to, *inter alia*, issue a Notice of Termination under cl 32(2) of the SIA Conditions, and to call on the Performance Bond.

68 Paragraph 3 of the Notice of Termination, which sets out the grounds of termination based on breach of the Supplemental Agreement, is produced here:

> 3 We are instructed that despite all our clients' efforts to assist your clients to carry out and complete the works of the Project, your clients are and continue to be in fundamental breach of [the Supplemental Agreement], which include but are not limited to the following:
>
> 3.1 In breach of clause 2 of [the Supplemental Agreement] your clients failed to furnish evidence that your clients' shareholders have injected $1 million into their company within 5 calendars [*sic*] days of 1 August 2014.
>
> 3.2 In breach of clause 3 of [the Supplemental Agreement], your clients failed to use the full amounts of (a) the sum of $1 million injected by your clients' shareholder(s) and (b) our clients' payment for Progress Claim No. 35 to make payment for (i) the outstanding debts due to the Contractor's subcontractors and/or suppliers and/or (ii) the outstanding wages of its workers. We are instructed that some of your clients' cheques which were presented by subcontractors for payment were not honoured, and the subcontractors have refused to provide any services or goods for the Project. We are instructed that these subcontractors' works are considered as a critical activity in the Revised Master Programme. As a result, the progress of concreting works for the main area of works has come to a virtual stand-still.

3.3 In breach of clause 10 of [the Supplemental Agreement], your clients have failed to comply with the New Master Programme or a part thereof.

69 As for the Termination Certificate, the Architect stated that he issued it after establishing that the requirement of the Written Notice for the Plaintiff to take effective steps to carry out the works diligently and expeditiously had not been met. In particular, the Architect pointed out, *inter alia*, three reasons for the continued delays as follows:

(a) the Plaintiff's non-payment to its suppliers and sub-contractors contributed to the disruption of the progress of work, and remained unresolved;

(b) the frequent movement of the Plaintiff's site staff led to the loss of continuity in work progress; and

(c) the inability of the Plaintiff to replace its staff as the proposed replacements were lacking in experience.

70 I have stated my views on the allegations in relation to the delays in the works during the period of the Supplemental Agreement (see above at [61]). Termination in reliance on the Termination Certificate was in accordance with the Contract, this right being expressly preserved in the Supplemental Agreement. Essentially, the First Defendant relied on both the Architect's views that the Plaintiff continued to be in delay in carrying out the works and its view that the Plaintiff had breached its payment obligations under the Supplemental Agreement.

71 At this juncture, it is appropriate to set out the Court of Appeal's comments in *BS Mount Sophia* (at [52]):

… The Appellant called on the Bond because it took the position that the Respondent was in breach of its obligations under the Contract. **Even if the Appellant was mistaken in adopting this position, the call could still be legitimate if this position was genuinely adopted and the Appellant honestly believed that the Respondent was in breach. Had there been a genuine dispute apropos the issue of the Respondent's breach, then a call under those circumstances may not have amounted to a lack of bona fides on the part of the Appellant.** However, from the evidence in this case, it seemed to us that the Appellant did not genuinely believe that the Respondent was responsible for the delay. In coming to this conclusion, we are not substituting our view as to whether the Respondent was in breach for that of the Appellant's. **It is not the court's role in such proceedings to appraise the merits of the parties' decisions; but, rather, it is the court's role to be alive to the lack of bona fides in those decisions.**

[emphasis in original in italics; emphasis added in bold]

72 Thus, even if I took the Plaintiff's case at its highest and found that it did not breach the Contract and or the Supplemental Agreement, so long as the First Defendant had the honest but mistaken belief that the Plaintiff had done so, the First Defendant's call on the Performance Bond would still have been legitimate. In my view, the position taken by the First Defendant was an entirely honest, reasonable and genuine one. While it may well be that there remained disputes between the parties, in doing so, the First Defendant could not be said to be acting in bad faith.

Entire Chronology of Events

73 I have dealt with the specific allegations raised by the Plaintiff, and found that in respect the contentions, the Plaintiff has only managed to show areas of genuine disputes. It must be emphasised again that the test of unconscionability is to prevent abusive calls on performance bonds motivated by bad faith or improper purposes. On the flip side, it is necessary to uphold the contractual obligations entered into by the parties, as well as the utility of a performance bond as effective security. A strong *prima facie* case of unconscionability is not easily made out. Considering the entire chronology of events, I was of the view that the Plaintiff has not established that, in the words of the Court of Appeal in *BS Mount Sophia*, the First Defendant's conduct was so lacking in *bona fides* that an injunction restraining [the First Defendant's] substantive rights [was] warranted".

Whether the First Defendant should have called on the full amount of the Performance Bond

74 One further issue to consider is whether the First Defendant should have called on the full amount of the Performance Bond, or only a portion of it. In *Eltraco*, the Court of Appeal commented at [41] that in deciding how much of a performance bond should be called upon, the court is not involved in an exercise of quantifying damages, but only in ensuring that the amount of the bond called for is not unconscionable (at [54] above).

75 Pursuant to a tender called by the First Defendant, and the offers received, the additional sums the First Defendant would need to incur to see the Project to completion was estimated in excess of $10m. This does not include other costs, fees and or losses such as consultancy fees, salaries, financing charges and costs of calling the new tender. Moreover, if the Plaintiff is found to have breached its obligations under the Contract and Supplemental Agreement, it may owe further liquidated damages to the First Defendant.

76 Although the disputes between the Plaintiff and the First Defendant as well as the assessment of damages thereto are subject to a final assessment in the proper forum, I was of the view that taking a broad approach, the sum of $4,700,000 represented a fair estimate of the amount of damages or expenses that the First Defendant has incurred or would be likely to incur. The First Defendant's call on the full amount of the Performance Bond was not unconscionable.

Material non-disclosure

77 As I have found that the First Defendant's call on the Performance Bond was not unconscionable and therefore that the injunction should be set aside, there was no further need to delve into whether the injunction should be discharged because the Plaintiff failed to make full and frank disclosure when applying for the injunction.

Summons No 6043 of 2014

78 At the start of the hearing, I also dealt with Summons No 6043 of 2014 ("SUM 6043/2014"), an application by the Plaintiff for leave for Mr Tang Ing Hua ("Mr Tang"), its director, to file a further affidavit in response to an affidavit filed by Mr Gary Ng Wee Giap ("Mr Ng") on 13 November 2014 ("Mr Ng's affidavit"). Mr Ng was the managing director of the Structural Engineer for the Project.

79 By way of background, in Mr Tang's first affidavit, he alleged delays in works at the Level 7 Carpark Podium block. After Mr Ong responded to the allegations, in Mr Tang's third affidavit, he alleged delays in the works in the other parts of the Project caused by the First Defendant, apart from the works at the Level 7 Carpark Podium block. As such, Mr Ng replied in his affidavit to rebut the new allegations of delays. In the main, the Plaintiff wanted the opportunity to respond to Mr Ng's evidence on the delays to the works.

80 After hearing the parties, I dismissed SUM 6043/2014 and awarded the First Defendant costs fixed at $1,000 inclusive of disbursements. On 28 October 2014, the original date of the hearing, the First Defendant applied for leave to file affidavits in response to Mr Tang's third affidavit. I gave leave for the First Defendant to file their response affidavits by 17 November 2014. These affidavits, including that of Mr Ng's, were filed on 13 November 2014. On 20 November 2014, the Plaintiff requested the First Defendant for an extension of time until 26 November 2014 to file the Plaintiff's written submissions for the hearing. The First Defendant agreed. Pursuant to a further request by the Plaintiff, the First Defendant agreed that the Plaintiff's written submissions could be filed on 1 December 2014. Up till then, which was a clear two weeks from the last round of the First Defendant's affidavits filed on 13 November 2014, there was no mention of the need by the Plaintiff to file a further reply affidavit. The Plaintiff's intention was only made known on Thursday, 4 December 2014, one clear working day before the hearing on Monday, 8 December 2014.

81 I agreed with Mr Chuah that in the first place, the Plaintiff should have set out all matters relating to delays in Mr Tang's first affidavit, rather than raise new allegations in Mr Tang's third affidavit. Also, the Plaintiff should have applied for leave to file a further reply affidavit earlier. Be that as it may, I was also of the view that Mr Ng's evidence was not material as it merely raises further factual issues relating to the delays. In reaching my decision, I have not relied materially on Mr Ng's affidavit.

Conclusion

82 In respect of Summons No 5083 of 2014, I was of the view for the reasons above that the Plaintiff fell short of demonstrating a strong *prima facie* case of unconscionable conduct on the part of the First Defendant. I accordingly ordered the *ex parte* injunction to be set aside, with the undertaking as to damages given by the Plaintiff to be enforced, and other consequential orders. I also ordered costs of $10,000 (exclusive of disbursements to be taxed or agreed) to be paid by the Plaintiff to the First Defendant.