IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 33

Originating Summons No 631 of 2017
Summons No 2625 of 2017

Between

Milan International Pte Ltd

… *Applicant*

And

(1) Cluny Development Pte Ltd
(2) Etiqa Insurance Pte Ltd

… *Respondents*

GROUNDS OF DECISION

[Building and construction law] — [Building and construction related contracts] — [Guarantees and bonds]
[Credit and security] — [Performance bond]

TABLE OF CONTENTS

Milan International Pte Ltd
v
Cluny Development Pte Ltd and another

[2018] SGHC 33

High Court — Originating Summons No 631 of 2017 and Summons No 2625 of 2017
Hoo Sheau Peng J
19 July; 4 October 2017

13 February 2018

Hoo Sheau Peng J:

Introduction

1 On 20 May 2016, Cluny Development Pte Ltd ("Cluny") engaged Milan International Pte Ltd ("Milan") to build six units of strata detached houses at Jalan Harom Setangkai and Cluny Park Road ("the Project"). The Project was to be completed by 19 May 2018. This 24-month contract period included a four-month mobilisation period in which Milan was to obtain various permits to commence work from the Building and Construction Authority ("the BCA") and the Land Transport Authority ("the LTA").

2 As things panned out, the permit applications were substantially delayed and were only made between November 2016 and January 2017, some two to four months after the expiry of the mobilisation period. Eventually, Cluny discovered that the application for a permit to commence work in respect of

permanent structural works was rejected by the BCA because Milan's particulars were irregular. Specifically, Milan's General Builder Class 1 Licence ("GB1 Licence") had expired on 8 October 2016, which meant that Milan was not authorised to carry out any building works. Cluny terminated Milan's employment on 22 February 2017, relying on Milan's failure to renew its GB1 Licence, failure to proceed with diligence and failure to maintain the contractually-stipulated minimum sum in its project account.

3 On 29 May 2017, Cluny made a demand on a performance guarantee dated 22 November 2016 ("the PG") furnished by Etiqa Insurance Pte Ltd ("Etiqa") in relation to Milan's performance in this Project. On 7 June 2017, Milan applied for an injunction to restrain Cluny from receiving the sum of $991,883.60 from Etiqa based on the call on the PG. Milan also applied for an interim injunction of the same nature.

4 I heard both matters and dismissed the applications on 4 October 2017. In my view, Milan failed to establish a strong *prima facie* case of fraud and/or unconscionability on Cluny's part. In fact, the documentary evidence contradicted Milan's position in material ways. Milan has appealed against my decision and I now set out my full grounds.

Background facts

The Contract and the PG

5 As mentioned, the Project was for the construction of six units of strata detached houses. On 9 April 2015, Cluny obtained written permission from the Urban Redevelopment Authority ("the URA") for the proposed development. On 25 April 2016, the BCA approved Cluny's building plans.

6 By way of a letter of award dated 20 May 2016 ("the Contract"), Cluny engaged Milan as its main contractor for the Project for the lump sum price of $9,918,836 ("the Contract Sum").[1] The Contract incorporated the Singapore Institute of Architects' Articles and Conditions of Building Contract – Lump Sum Contract (9th ed, September 2010) ("the SIA Conditions").[2] The scope of Milan's works under the Contract included, but was not limited to, site clearance and demolition of existing structures; detection and protection of existing underground services and cables; excavation for a basement with a depth of about 4.8m; construction of a reinforced concrete structure for two-storey strata detached houses with attic and roof; roofing and canopy, architectural finishes, installation of mechanical and electrical services; and external works including roadways and landscaping.

7 Liu & Wo Architects Pte Ltd ("the Initial Architect") were engaged as Cluny's architect until they ceased employment on 1 October 2016 and were replaced by AGA Architects Pte Ltd ("the Architect") on 1 November 2016. Cluny engaged JIB Specialist Consultants Pte Ltd as the Project's structural engineer (the Structural Engineer"). Milan engaged its own professional engineer, GNG Consultants Pte Ltd ("Milan's PE"), to act as a Qualified Person ("QP") in relation to matters falling within its scope of works.

8 Clause 9.1 of the Contract required Milan to provide Cluny with a performance bond amounting to 10% of the Contract Sum in the form of a Banker's Guarantee. However, cl 5 of the Terms and Conditions in Appendix A of the Contract stated that Milan "may not need to submit the Performance bond (Demand Bond) during [the] mobilisation period".[3] Milan was only asked

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1 Defendant's Core Bundle ("DCB"), Tab 1.

2 DCB, Tab 1 cl 4.0.

3 DCB, Tab 1 at Appendix A.

to furnish the PG after the mobilisation period had expired. On 22 December 2016, Milan submitted the PG dated 22 November 2016 to Cluny at a site meeting for the sum of $991,883.60.[4] The relevant terms of the PG are as follows:

> In consideration for the Employer [*ie*, Cluny] not insisting on the Contractor paying cash as a Security Deposit for the Contract the Guarantor [*ie*, Etiqa] hereby undertakes as follows:
>
> 1. The Guarantor [*ie*, Etiqa] unconditionally and irrevocably undertakes and covenants to pay in full forthwith upon demand in writing any sum or sums that may from time to time be demanded by the Employer [*ie*, Cluny] up to a maximum aggregate sum of **Singapore Dollars Nine Hundred Ninety One Thousand Eight Hundred Eighty Three and Cents Sixty Only (S$991,883.60)** 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 the Guarantor unconditionally, without any deductions 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 work thereunder or as to any amount or amounts payable thereunder and notwithstanding that such differences or disputes have been referred to arbitration or are the subject of proceedings in Court or is in the midst of any other means of dispute resolution.

Delays in obtaining statutory approvals

9 The circumstances leading up to Cluny's termination of Milan and subsequent call on the PG mainly revolve around Milan's alleged failure to obtain the requisite permits to commence works and delay in commencing works (apart from preliminary works that do not require statutory approval). It is undisputed that as at the time of Milan's termination on 22 February 2017,

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4 Affidavit of Ng Giok Beng, pp 243–245; Affidavit of John Seah, Tab 2-75.

only preliminary works or part thereof had been carried out and none of the structural works, whether temporary or permanent, had been commenced.

10 It is common ground that, to comply with the Building Control Act (Cap 29, 1999 Rev Ed), building works may only commence after obtaining a permit from the BCA to carry out the proposed structural works, also known as a permit to commence work ("the BCA Permit"). In addition, due to the nature of the proposed works, some specific permissions had to be obtained before work could commence:[5]

(a) As the scope of works included excavation to a depth of 4.8m, the BCA had to approve the plans for the Earth Retaining or Stabilising Structures ("ERSS") and grant a permit to commence work (collectively referred to as "the BCA-ERSS Permit") (see ss 5–6 and 7(2) of the Building Control Act); Regs 4(1) and 21 of the Building Control Regulations 2003 (GN No S666/2003)).

(b) As the site for the Project was situated directly above tunnels servicing the Circle Line Mass Rapid Transit, a permit to carry out works ("the LTA-Rail Permit") had to be obtained from the LTA (see Rapid Transit Systems (Railway Protection, Restricted Activities) Regulations (Cap 263A, Reg 3, 1997 Rev Ed)). It appears from the parties' documents that for this purpose, the ERSS plans and engineering plans had to be submitted to the LTA as well.[6]

11 The Contract provided for a mobilisation period of about four months until 12 September 2016 "to obtain the Permit to Commence Work from BCA ERSS and LTA (Rail) DBS".[7] Under cl 7 of the Terms and Conditions in

5 Affidavit of John Seah, paras 19–20.

6 Affidavit of John Seah, Tab 2-89; Affidavit of Ng Giok Beng, para 41.

Appendix A of the Contract, the value of Milan's work done within the mobilisation period was deemed to be not more than $30,000.[8] The parties disputed what other approvals had to be obtained prior to or concurrently with the BCA Permit. They also disputed who was responsible for obtaining the various permits and whose fault it was that the permits had not been obtained by the time that the Contract was terminated.

12 During a site meeting on 2 June 2016, Milan reported that it was making progress with the design of the ERSS. Milan targeted submitting the ERSS application to the BCA in early July 2016.[9] In subsequent site meetings, this target was shifted to 1 August 2016 and then to 10 August 2016.[10] However, by the end of the mobilisation period, Milan had not made ERSS submissions to the BCA or the LTA. Milan did not formally apply for an extension of the mobilisation period.

13 On 1 October 2016, the Initial Architect ceased to act as the architect for the Project.[11] The Architect came on board on 1 November 2016. As of that date, none of the three permits set out above had been obtained. The Architect also assessed that there were delays in other aspects of Milan's initial works, such as the construction of the site office, the supply of electricity and water facilities, and the furnishing of the performance bond and other documents, among other things. Therefore, on 17 November 2016, the Architect issued Architect's Direction No 1 requiring Milan to take specific steps to secure compliance with

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7 DCB, Tab 1 p 16 at para 1.

8 DCB, Tab 1 at Appendix A.

9 Affidavit of John Seah, para 68 and Tab 2-2 (Item 3.2).

10 Affidavit of John Seah, para 68, Tab 2-23 (Item 4.1) and Tab 2-38 (Item 4.1.4).

11 Affidavit of John Seah, Tab 1-34.

the Contract.[12] These specific steps included the obtaining of the "Permit to Commence Work from BCA, ERSS and LTA (Rail)".

LTA-Rail Permit submission

14 On 24 November 2016, Milan's PE submitted the ERSS plans and an application for the LTA-Rail Permit to the LTA.[13] The LTA responded on 7 December 2016 stating they would not process the submission until the Architect resubmitted a fresh notice of approval of the development proposal since the Initial Architect was no longer supervising the Project.[14] On 9 December 2016, the Architect duly notified the LTA and the BCA that it was the new architect for the Project and assumed responsibility for the previous architect's approvals.[15] According to the Architect's email update to Milan, the LTA noted the change in Architect and allowed Milan to proceed with the LTA-Rail Permit submission concurrently. Milan's PE resubmitted the application to the LTA on 19 January 2017.[16]

15 In the meantime, the Architect continued throughout November and December 2016 to remind Milan that structural works were to commence no later than 20 December 2016.[17] Amongst the outstanding tasks by Milan set out in the correspondence were the ERSS submission to the BCA and LTA Rail, the BCA Permit and LTA-Rail Permit.[18] On 21 December 2016, the Architect issued a further letter to notify Milan that the contract would be terminated if

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12 DCB, Tab 5.

13 Affidavit of John Seah, para 27 and Tab 2-89.

14 Affidavit of Ng Giok Beng, p 251.

15 Affidavit of Ng Giok Beng, pp 258–259, 264.

16 Affidavit of Ng Giok Beng, para 45 and p 311; cf Affidavit of John Seah, Tab 2-89.

17 Affidavit of John Seah, Tab 1-81–1-82.

18 Affidavit of John Seah, Tab 1-82.

Milan continued to fail to fulfil the conditions of the Contract ("the 21 Dec 2016 Letter").[19] The Architect highlighted that despite reminders, Milan had failed to submit all necessary documentation to expedite the works, in particular the performance bond and the master programme.

BCA-ERSS Permit submission

16 On 30 December 2016, Milan's PE submitted its application for the BCA-ERSS Permit. The BCA responded with a written direction dated 23 January 2017[20] requiring more documentation, including a soil investigation report and the LTA's clearance letter for the design of the ERSS. In other words, it seems that without the LTA's prior clearance of the ERSS, which was still pending, the BCA would not grant the BCA-ERSS Permit. Based on the evidence before me, it is not clear whether Milan's PE managed to submit this additional documentation by the BCA's deadline of 6 February 2017 or whether the application was allowed to lapse.

BCA Permit submission

17 On 20 January 2017, the Structural Engineer applied for the BCA Permit. On 23 January 2017, the BCA rejected this application because the "Builder, [Milan] has an on-going application and changes have not been updated yet".[21] It was discovered shortly after that Milan's GB1 Licence had expired on 8 October 2016. A GB1 Licence is required for a builder to undertake any project of any value, including projects above $6m in value. Milan does not dispute that it is an offence under Part VA of the Building Control Act for builders to carry out building works without a valid licence. Instead, Milan

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19 DCB, Tab 7.

20 Affidavit of Ng Giok Beng, pp 306–309.

21 Affidavit of John Seah, Tab 1-136.

claims that the GB1 Licence was not important until works commenced and that it could have renewed its licence in two weeks if it had been alerted.[22]

18 The Structural Engineer forwarded the BCA's rejection letter to Milan on 23 January 2017 and requested Milan's updated company registration with the BCA.[23] On 4 February 2017, the Structural Engineer reminded Milan to follow up with the BCA immediately and to provide them with the information required to update Milan's particulars and proceed with the application for the BCA Permit.[24] Milan responded on 9 February 2017, providing only its bizfile profile.[25] In response, the Structural Engineer reiterated its earlier request for Milan's certificate of registration issued by the BCA.

19 On 17 February 2017, the Structural Engineer informed Cluny by way of letter that the application for a BCA Permit was rejected by the BCA because Milan had an ongoing application with the BCA and changes had not been updated.[26] As Milan had yet to provide the relevant documentation, the application could not be regularised.

Termination of Milan's employment

20 On 21 February 2017, the Architect issued a Termination Certificate[27] to Milan, certifying that Cluny was entitled to terminate Milan's employment on the grounds that Milan had "failed and [was] still failing to proceed with due diligence or expedition in its [w]orks, in that it [had] to date failed to obtain the

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22 Affidavit of Ng Giok Beng, para 96.

23 Affidavit of John Seah, Tab 1-137.

24 Affidavit of John Seah, Tab 1-167.

25 Affidavit of John Seah, Tab 1-192.

26 Affidavit of John Seah, Tab 1-270–271.

27 1st Affidavit of Ng Giok Beng, p 365; DCB, Tab 17.

Permit to Commence Works and [had] also failed to commence mobilization of its [w]orks at the site". The Termination Certificate cited cl 32(3)(d) of the SIA Conditions as the ground of default.

21 The next day, Cluny gave Milan a Notice of Termination pursuant to cl 32(2) of the SIA Conditions.[28] As an alternative ground for termination, Cluny alleged that Milan had repudiated the Contract in the following ways:

> 4.1 Allowing your [GB1] licence to lapse and failing to renew the licence till today;
>
> 4.2 Failing to maintain a minimum sum of $300,000 in the project account with the bank for this Project;
>
> 4.3 Failing to proceed with due diligence in your Works in that you have till today failed to obtain the Permit to Commence Works and failed to commence mobilization of your works at the site.

Cluny thereby accepted Milan's repudiation and terminated the Contract under the common law.

22 Following the termination of Milan's employment, on 4 May 2017, Cluny engaged another contractor, BHD Construction Pte Ltd ("BHD"), to complete Milan's outstanding work for the sum of $10,630,000.[29] On or about 18 May 2017, the Architect and the Project's Quantity Surveyor jointly issued a Cost of Termination Certificate pursuant to cl 32(8)(e) of the SIA Conditions.[30] The Cost of Termination Certificate states that Cluny has incurred or will incur an amount of $10,694,968.75 in completing the works in the Project previously undertaken by Milan. It also states that the difference between the Contract Sum and the price of the contract with BHD, *ie*, $776,132.75, is due and owing by

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28 DCB Tab 18.

29 DCB, Tab 19.

30 DCB, Tab 20.

Milan to Cluny. In all Cluny alleges that it will suffer additional costs and damages of $3,431,132.75 from the termination of Milan's employment, being $776,132.75 plus liquidated damages of $2,655,000.[31]

23 Cluny issued a written call on the PG on Etiqa on 29 May 2017. Milan disputed Cluny's right to make a demand on the PG and commenced the present applications on 7 June 2017.

Parties' arguments

24 Milan claimed that Cluny's call on the PG ought to be restrained because it was fraudulent and/or unconscionable for the following reasons:

(a) Cluny, the Architect and the Structural Engineer had prevented Milan from commencing works through their own delays in providing Milan with documentation required for the BCA-ERSS and LTA-Rail Permit applications and in obtaining other permits that were necessary to commence work. Therefore, Cluny was responsible for the delays in the Project. Cluny did not honestly believe that Milan had breached the Contract and should not be entitled to rely on its own default to call on the PG.

(b) Cluny had shown through its actions that it did not want to be bound by the terms of the contract between the parties, and was in repudiatory breach of the Contract. In this regard, Milan relied on Cluny's alleged attempts to reduce the Contract Sum by $600,000.

(c) Cluny had unlawfully terminated the Contract because Cluny had not issued a written notice as required by cl 32(3)(d) of the SIA

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[31] Affidavit of Sum Kwok Khuen, paras 40–43.

Conditions. Further, Milan had not committed the breaches alleged against it. Therefore, Cluny did not honestly believe that it had grounds to terminate the Contract.

(d) Finally, Cluny has not suffered any damages and the figures stated in the Cost of Termination Certificate are unsubstantiated.

25 In response, Cluny argued that Milan's failure to commence works at the site was due to Milan's own delay in applying for the BCA-ERSS Permit and LTA-Rail Permit and Milan's poor financial standing. Milan's permit applications were not hampered or stalled by Cluny. Second, Cluny refuted the allegation that it was in repudiation for offering a supplementary agreement for a lower contract price. As for the validity of the termination, Cluny relied on Milan's failure to proceed with due diligence, the lapsing of Milan's GB1 Licence, and Milan's failure to maintain the requisite sum in the project account as grounds for termination under cl 32 of the SIA Conditions and/or the common law. Cluny claimed to have satisfied the procedural requirements for termination under cl 32 of the SIA Conditions. Lastly, Cluny asserted that it had a valid claim against Milan in excess of the sum guaranteed in the PG.

26 At the hearing, Cluny's counsel, Mr Raymond Chan, sought to impress upon me that the most material factor in the round was the lapse of Milan's GB1 Licence on 8 October 2016, for which Milan had no good explanation. The lapse of the GB1 Licence was a fundamental breach entitling Cluny to terminate the Contract and would have caused all permit applications to be rejected in any event. Mr Chan also clarified that Cluny was relying upon Milan's failure to obtain only the BCA-ERSS and LTA-Rail Permits, and not any other permits. Therefore, I considered only Cluny's allegations that Milan failed to obtain

those two permits and Milan's rebuttals in that regard in support of its case for an injunction.

Applicable legal principles

27 The applicable legal principles were not disputed. The parties did not dispute that the PG was in the nature of an on-demand performance bond, and I agreed that this was so based on the construction of the PG. Thus, in calling upon the PG, Cluny was not required to establish or prove any breach by Milan before Etiqa was obliged to pay under the PG.

28 To obtain an injunction to restrain Cluny from calling on the PG, Milan must establish a strong *prima facie* case that Cluny has engaged in fraudulent or unconscionable conduct (*BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352 ("*BS Mount Sophia*") at [20]–[21]). This is a high threshold, and calls on performance bonds will be restrained only in a narrow class of cases (*BS Mount Sophia* at [24] and [31]). A high threshold is required because the courts have recognised a perennial tension in determining if a call on a performance bond should be restrained. On the one hand, calls made in bad faith would result in the beneficiary receiving something he is not entitled to and would damage the liquidity of the obligor who must compensate the bond issuer (*BS Mount Sophia* at [27]). On the other hand, depriving the beneficiary of its right to call on the performance bond could be detrimental to its liquidity and its prospects pending the resolution of the substantive dispute (*BS Mount Sophia* at [29]). Since the parties must abide by the bargain they have struck and the allocation of risk they have decided upon for themselves, the burden lies on the obligor to show why the beneficiary should be restrained.

29 It is well established that unconscionability and fraud are separate and independent grounds for restraining a call on a performance bond under

Singapore law. Since Milan has alleged both grounds, and unconscionability is the lower standard of the two, Milan's case turns on showing strong *prima facie* proof of unconscionability. What amounts to unconscionable conduct depends on the facts of each case. Unconscionability has been described as involving abuse, unfairness or dishonesty (*BS Mount Sophia* at [19]), 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" (*Raymond Construction Pte Ltd v Low Yang Tong* [1996] SGHC 136 at [5]). The existence of genuine disputes and mere breaches of contract do not amount to unconscionable conduct.

30 To put the principle in more concrete terms, where it can be said that the beneficiary under the performance bond did not honestly believe that the obligor whose performance is guaranteed by the bond has failed or refused to perform his obligations, the court may find that a demand was made dishonestly and in bad faith. Similarly, if the beneficiary has made a call for payment of a sum well in excess of the quantum of his actual or potential loss and could not have justified the demand for that amount, the beneficiary may be found to be acting unconscionably and in bad faith (see *JBE Properties Pte Ltd v Gammon Pte Ltd* [2011] 2 SLR 47 ("*JBE*") at [11]). This is because a performance bond is merely security for the secondary obligation of the obligor to pay damages if the obligor breaches its primary contractual obligations to the beneficiary (*JBE* at [10]).

31 Lastly, it should be borne in mind that in hearing such an application, the court is not required to decide on the substantive entitlements of the parties and or to engage in a protracted consideration of the merits of the substantive disputes between the parties (*BS Mount Sophia* at [40]). In other words, the court is not concerned with whether Milan was in fact in default or not. This makes it important that the overall tenor and entire context of the parties' conduct leading

up to the call on the PG supports a strong *prima facie* case of unconscionability (*BS Mount Sophia* at [40]).

Analysis

32 Having reviewed the affidavits filed by the parties, the chronology of events and the documents produced – particularly the minutes of the site meetings and the correspondence between the parties – I am of the view that Milan had not established a strong *prima facie* case of fraud and/or unconscionability on Cluny's part. In fact, I find that the documentary evidence contradicted Milan's position in various ways. I shall analyse each of Milan's grounds for asserting fraud and/or unconscionability (set out at [24] above) in turn.

Whether Cluny had prevented Milan from commencing works

33 I begin with Milan's allegation that Cluny had prevented Milan from commencing works through their own delays in providing Milan with documentation required for the permit applications and in obtaining other permits that were also necessary to commence work. Specifically, Milan alleged that Cluny was responsible for delays in the Project in the following ways:

(a) First, Milan's initial position was that it was not responsible for applying for and obtaining the BCA-ERSS and LTA-Rail Permits.[32] Subsequently, Milan appeared to accept that it was responsible, and claimed instead that Cluny hampered the BCA-ERSS submission and LTA-Rail Permit submission in two ways. First, the Structural Engineer only obtained approval for the sub-structure scheme on 24 November 2016. Milan claimed the sub-structural plans were required for Milan's

[32] Affidavit of Ng Giok Beng, para 49.

PE to prepare the submissions for the BCA-ERSS and LTA-Rail Permits because the proposals for ERSS or excavation works had to mirror and make calculations based on the sub-structural plans.[33] Second, the Architect or Structural Engineer did not issue construction drawings for the permanent basement works and Mechanical and Engineering drawings ("M&E drawings") which were required for Milan's PE to prepare calculations for its BCA-ERSS submission.[34] Cluny had only issued preliminary drawings.

(b) Second, Milan alleged that Cluny hampered the application for the BCA Permit and the BCA-ERSS Permit, which had to be jointly submitted by the developer, QP (for structural and architectural works), builder and site supervisor. Cluny failed to endorse on the application forms even though Milan had sent the forms to Cluny as early as August 2016.[35] Cluny also failed to endorse on a document titled "Request for Consent for Access", which was allegedly to be submitted with the application for the BCA Permit. This document was meant to seek the consent of the owners of neighbouring properties for Milan to gain access to carry out pre-construction surveys, install monitoring instruments, plaster and paint walls, and erect scaffolding.[36]

(c) Third, Cluny hampered the applications for statutory permits because there was no QP (Architectural) lodged with the BCA for the Project between 1 October 2016 and 22 December 2016 after the Initial Architect discharged itself.[37] Though the new Architect was appointed

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33 Milan's Submissions, paras 29–30 and 36.

34 Milan's Submissions, paras 54–56.

35 Milan's Submissions, para 41.

36 Milan's Submissions, paras 42–43.

on 1 November 2016, Milan claimed that the BCA only formally recognised the Architect as the QP for the Project on 22 December 2016.

(d) Finally, Cluny failed to promptly obtain other approvals that were necessary to commence work. Cluny only obtained approval of the building plans from the Public Utilities Board ("PUB") on 24 March 2017.[38] Further, Cluny failed to liaise with the occupant of the neighbouring plot of land about its request for a higher height of hoarding so that Milan could commence tree felling works.[39] Milan explained that tree-felling works had been halted by the National Parks Board ("NParks"), which had been in discussions with Cluny and the neighbouring residents about how to proceed.[40]

34 At the outset, I should state that it was clear from the Contract and the site meeting minutes that Milan was responsible for applying for and obtaining the BCA-ERSS and LTA-Rail Permits. Clause 1 of the Terms and Conditions in Appendix 1 of the Contract provides for a four-month mobilisation period "to obtain the Permit to Commence Work from BCA ERSS and LTA (Rail) DBS".[41] The preparation and submission of ERSS works by Milan's PE was priced into the "Bill No 3 – Schedule of Works" in Milan's tender submission.[42] As early as 11 May 2016, Milan had informed the Initial Architect that they would be engaging their own PE for the purposes of the ERSS and LTA-Rail

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37 Milan's Submissions, paras 52–53.

38 Milan's Submissions, para 38.

39 Milan's Submissions, paras 47–49.

40 Affidavit of Ng Giok Beng, paras 51–52.

41 DCB, Tab 1 (p 1-16).

42 Affidavit of Ng Giok Beng, p 411.

submissions.[43] In the same letter, Milan confirmed that they would "be using 4 months or less to obtain [LTA-Rail] and BCA ERSS permit". At the site meetings, it was invariably Milan which was tasked to provide updates on the BCA-ERSS and LTA-Rail Permit applications and follow up accordingly.[44] There is therefore no basis for Milan to suggest that it was Cluny's responsibility to obtain the permits.

Whether Cluny hampered the permit applications by failing to provide plans and drawings

35 Turning to the first allegation that Cluny hampered the BCA-ERSS and LTA-Rail Permit applications by failing to provide plans/drawings to Milan, the evidence shows that either the plans/drawings had been provided, or they were not necessary for the applications.

(a) While it is true that the plans for permanent sub-structural works were only approved by the BCA on 24 November 2016, there was no evidence that Milan required these plans for the permit applications. Milan did not pursue Cluny, the Architect or the Structural Engineer for the approved permanent sub-structural plans, which it would reasonably have done if the plans were critical to its submissions. Nor did Milan cite Cluny's failure to provide the approved permanent sub-structural plans as an explanation for its delays in any correspondence.

(b) Next, based on the site meeting minutes, the Initial Architect and the Structural Engineers issued construction drawings and preliminary structural drawings to Milan on 2 and 23 June 2016.[45] Given that Milan

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43 Affidavit of John Seah, Tab 1-8 at paras 1 and 5.

44 Affidavit of Ng Giok Beng, pp 64 (at 4.1 and 7.1.1), 71 (at 4.1), 81 (at 4.1 and 4.3), 249 (at 4.2 and 4.4), 267 (at 2.3(a)), 268 (at 4.2 and 4.4).

45 Affidavit of John Seah, p 3 and Tabs 2-3 (Item 5.11) and 2-14 (Item 5.11).

also did not pursue the Architect and Structural Engineer for any further drawings, I accepted Cluny's submission that Milan could have relied on the drawings already issued to prepare its calculations for the BCA-ERSS and LTA-Rail applications.

(c) As for the M&E drawings, Milan referred to letters dated 26 and 30 September 2016 in which Milan requested for them and alleged that the lack of M&E drawings delayed their "planning and coordination works".[46] However, none of these letters stated that Milan was unable to proceed with the applications for the BCA-ERSS and LTA-Rail Permit applications without the M&E drawings. Milan did not challenge the evidence of Mr John Seah (on behalf of the Architect) that it was premature for M&E drawings to be issued because the excavation and substructure works had not even commenced.[47]

Whether Cluny's failure to endorse on documents hampered the permit applications

36 Second, in relation to Cluny's alleged failure to endorse on documents required for the BCA Permit and BCA-ERSS Permit applications, I accepted that the joint permit application forms were handed to Cluny on 25 August 2016,[48] and that Cluny did not promptly endorse the forms. However, Milan did not actively pursue Cluny for its signature at any time between 25 August 2016 and 11 November 2016. After Cluny issued a notice of compliance on 9 November 2016, Milan pointed out in a letter dated 11 November 2016 that Cluny had held back the applications for the BCA Permit and BCA-ERSS Permit by failing to endorse on the joint application form which had been

46 Affidavit of Ng Giok Beng, pp 191–192.

47 Affidavit of John Seah, para 31.

48 Affidavit of Ng Giok Beng, pp 148 and 238.

handed to Cluny.[49] On 15 November 2016, Cluny replied to state that they were not aware that their signature was critical to the BCA-ERSS submission. Cluny noted that "if it was that important [Milan] should have [made] it known and [Cluny] would have reverted".[50] In my view, it is not unconscionable for Cluny to attribute the substantial delay in the BCA-ERSS submission to Milan. Cluny's signature did not affect the substance of the BCA-ERSS submission and Milan's preparation of the supporting documents. If Milan had prepared the application in all other respects without delay, Cluny's endorsement could have been promptly obtained. It was a fair inference from the evidence that the real delay was because Milan had not prepared the application expeditiously.

37 As for the "Request for Consent for Access" forms, Cluny did not endorse them because it had been advised by the BCA that these forms were not required. This view was made known to Milan in correspondence.[51] I considered it to be a genuine dispute between Cluny and Milan whether this contributed to the delays.

Whether Cluny's change in architect hampered the permit applications

38 Third, I was not convinced that Milan's permit applications were stalled by the change in the architect appointed by Cluny. The Initial Architect ceased its employment on 1 October 2016, by which time the four-month mobilisation period had expired. At that point, Milan had still not applied for any permits. Cluny appointed the new Architect a month later on 1 November 2016 and notified Milan on 10 November 2016. Milan's PE was present at the site

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49 Affidavit of Ng Giok Beng, p 238.

50 Affidavit of John Seah, Tab 1-74.

51 Affidavit of John Seah, Tab 1-202.

meeting with the Architect on 10 November 2016 and could have begun working with the Architect.[52]

39 I note that Milan had to re-submit its application for the LTA-Rail Permit because the new Architect had to submit a fresh notice of its approval, as a QP, of the development proposal (see [14] above). However, the Architect promptly submitted the requisite notice on 9 December 2016 after learning of this requirement on 7 December 2016.[53]

40 Milan contended that the LTA-Rail submission was delayed because the LTA only approved of the change in architect in its letter dated 22 December 2016.[54] In my view, this did not show that Cluny or the Architect was responsible for the delay because the Architect had acted promptly. Further, the Architect had informed Milan on 12 December 2016 that the Architect had spoken to the LTA. The LTA had noted the change in QP and it was possible for Milan to re-submit the LTA-Rail Permit application concurrently whilst the Architect's notice was pending the LTA's acceptance.[55] Yet, Milan only re-submitted the LTA-Rail Permit application more than a month later on 19 January 2017. There was no explanation for this delay. Hence, Milan failed to show that Cluny's change in architect was a cause of the delay in obtaining the LTA-Rail Permit.

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52 Affidavit of John Seah, Tab 2-50.

53 Affidavit of Ng Giok Beng, pp 258–259.

54 Affidavit of Ng Giok Beng, p 264.

55 Affidavit of Ng Giok Beng, p 258.

Whether Cluny prevented Milan from commencing work by failing to obtain other statutory approvals

41 Finally, even if, as Milan alleges, Cluny had failed to obtain approvals from the PUB, NParks, and the neighbouring property owner, these other approvals are separate from Milan's independent failure to obtain the two permits within its scope of work and to commence work expeditiously. Milan has not proved that these other approvals were necessary for the BCA-ERSS and LTA-Rail Permit applications. To the contrary, Milan in fact applied for the BCA-ERSS and LTA-Rail Permits *before* the PUB approved of the building plan on 24 March 2017 and the NParks issues were resolved. At no point did Milan highlight to Cluny that delays on those fronts were holding up the BCA-ERSS and LTA-Rail Permit applications, both of which were necessary to commence work.

Conclusion

42 Given my views on Milan's allegations, it followed that Milan has failed to show a strong *prima facie* case that Cluny acted unconscionably or fraudulently in alleging that Milan failed to commence works with diligence and expedience.

Whether Cluny was in repudiatory breach of the Contract

43 Milan's next allegation was that Cluny had no intention of abiding by the Contract and was in repudiatory breach because Cluny had attempted to reduce the Contract Sum by $600,000 on three different occasions. In my view, the evidence did not show that Cluny intended to repudiate the Contract.

44 First, Milan alleged that in May 2016, Cluny had proposed that the Contract Sum would be inclusive of Goods and Services Tax ("GST") such that

Milan would have to absorb the GST component amounting to $694,318.52.[56] Milan rejected this proposal. Cluny's director, Mr Sum Kwok Khuen, denied that this took place.[57] There is no documentary evidence of such a proposal by Cluny.

45 Next, Milan claimed that Cluny attempted once again to obtain a discount when in May 2016, Mr Sum proposed that an architectural firm of which he was the sole proprietor provide Milan with design and consultancy services in relation to the Project for a price of $600,000.[58] Milan alleged that this consultancy proposal was merely a "sham" for Cluny to obtain a lower Contract Sum. In my view, this consultancy proposal was unrelated to Cluny's obligations under the Contract. It was put forward independently by Mr Sum and ultimately was not carried out.[59]

46 Finally, on 26 January 2017, Cluny sent Milan a supplementary letter of award in which the Contract Sum was reduced by about $600,000 to $9,300,000, and the value of work done during the mobilisation period was capped at $70,000 instead of the original $30,000.[60] Milan refused to sign the supplementary letter and formally rejected it in a letter dated 8 February 2017.[61] In my view, this appeared to be but an attempt by Cluny to procure Milan's agreement to vary the Contract Sum in exchange for more liquidity for Milan prior to the commencement of works. When Milan rejected the proposed variation, Cluny acknowledged its rejection in a letter dated 11 February 2017,

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56 Affidavit of Ng Giok Beng, paras 55–57.

57 Affidavit of Sum Kwok Khuen, para 15.

58 Affidavit of Ng Giok Beng, paras 58–65.

59 Affidavit of Sum Kwok Khuen, para 25.

60 Affidavit of Ng Giok Beng, para 75 and pp 345–347; DCB, Tab 10.

61 DCB, Tab 12.

and noted that the terms of the original Contract would stand.[62] Cluny's conduct did not disclose a strong *prima facie* case that Cluny repudiated the Contract.

Whether Cluny's termination of the Contract was unlawful

47 Milan's allegation that Cluny's termination was unlawful was two-pronged: (a) that Cluny failed to comply with the procedural requirements for termination under the SIA Conditions; and (b) that Cluny did not have a valid basis for termination. On both grounds, Milan claimed that Cluny did not honestly believe that it had grounds to terminate the Contract and was therefore acting unconscionably in making a demand on the PG.

Cluny's compliance with procedural requirements for termination

48 I deal first with the procedural requirements for termination. The SIA Conditions provide as follows at cl 32(2):[63]

> **32. TERMINATION BY EMPLOYER**
>
> …
>
> **Termination for Default**
>
> 32.(2) Without prejudice to any right of the Employer in an appropriate case to treat the Contract as repudiated by the Contractor under the general law, the Employer may at any time within 1 month of the receipt of a certificate of the Architect (in this Contract called a "Termination Certificate") give Notice of Termination of the employment of the Contract, which Notice shall take immediate effect. In such a case the Notice of Termination shall identify any relevant Termination Certificate upon which it is based, and the date of its receipt by the Employer. The reliance upon a Termination Certificate in the Notice of Termination may take effect additionally or as an alternative to reliance by the Employer upon any alleged repudiation by the Contractor which is also stated in the Notice, or which is the subject of any other notice or contemporary letter or document passing between the Employer and the

62 DCB, Tab 14.

63 Affidavit of Ng Giok Beng, p 527.

> Contractor. A Termination Certificate shall be issued to the Employer with a copy to the Contractor, who shall be informed by the Architect in writing of the date of its receipt by the Employer.

49 As mentioned at [20] above, the Architect's Termination Certificate identified cl 32(3)(d) as the ground for termination. Clause 32(3)(d) provides as follows:[64]

> **Grounds of Termination for Default**
>
> 32.(3) The Architect may issue a Termination Certificate on any one of the following grounds:
>
> …
>
> (d) If the Contract has wholly suspended work without justification or is failing to proceed with diligence and due expedition, and following expiry of 1 month's written notice from the Architect to that effect has failed to take effective steps to recommence work or is continuing to proceed without due diligence or expedition, as the case may be;
>
> …

50 Reading cll 32(2) and 32(3)(d) together, the procedure to be followed when terminating a contractor on the ground of failure to proceed with diligence and due expedition is as follows:[65]

> (a) The architect must issue a notice to the contractor that the contractor has failed to proceed with diligence and due expedition;
>
> (b) If, *one month after the issue of the written notice in (a)*, the contractor continues to proceed without due diligence or expedition, there would be grounds for termination for default under cl 32(3)(d);

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64 Affidavit of Ng Giok Beng, pp 527–528.

65 Affidavit of Ng Giok Beng, p 528.

(c) If the architect assesses that there are grounds for termination for default, the architect must issue a Termination Certificate to the employer. The architect must issue a copy to the contractor and inform the contractor of the date of receipt of the Termination Certificate by the employer.

(d) *Within one month of receipt of the Termination Certificate* from the architect, the employer may give the contractor a Notice of Termination. The Notice of Termination must identify the Termination Certificate upon which it is based and the date when it was received by the employer.

51 Milan complained that the Architect did not issue a notice more than one month before the Termination Certificate was issued (*ie*, a lapse in step (a)). Cluny relied on Architect's Direction No 1 dated 17 November 2016 and the 21 Dec 2016 Letter as the requisite notice under step (a) above. Architect's Direction No 1 stated:[66]

> **Compliance to Conditions of Contract**
>
> Your immediate attention and actions are required to fully comply to Terms and Conditions of Contract as stated therein the Letter of Award … :
>
> 1. To Obtain Permit to Commence Work from BCA, ERSS and LTA (Rail);
>
> 2. To erect Site Office immediately;
>
> 3. To complete 3m high hoarding and 6m high sound barrier fronting French Embassy;
>
> 4. To submit Construction Master Programme for approval;
>
> 5. Commencement of works shall not [be] later than 20th November 2016;

66 DCB, Tab 5.

> 6. To submit Performance Bond equivalent to 10% value of contract sum;
>
> 7. To submit proof of minimum operational sum of $300k;
>
> 8. To apply for electricity, water and sanitary facilities connection.

The 21 Dec 2016 Letter stated:[67]

> We wish to highlight that despite our requests and reminders to submit all necessary documentation to expedite works on site, we are disappointed that these actions have not been carried out. In particular, you have failed to submit the Performance Bond and Master Programme.
>
> We wish to reiterate that failure to fulfil the full conditions stated in the LOA and your obligations under the Contract would leave us no further choice but to terminate your contract.
>
> We hereby give you seven (7) days' notice to meet all requirements as stated, failing which the contract would be terminated without further reference to you.

52 Cluny's position was that in spite of these notices and reminders, Milan continued to fail to proceed with diligence, and the Architect was thereby entitled in February 2017 to issue a Termination Certificate on the ground of cl 32(3)(d) of the SIA Conditions. Milan's position was that neither the Architect's Direction No 1 nor the 21 Dec 2016 Letter could constitute the notice under cl 32(3)(d). This was because, after the receipt of Architect's Direction No 1, Milan had taken steps to comply with the Contract by completing the construction of hoarding, submitting the master programme and performance bond, showing proof of a minimum operational sum in its project account, and applying for electrical, water and sanitary facilities.[68] However, Cluny disagreed that Milan had accomplished these tasks with due expedition. Specifically, by 21 February 2017, Milan had not obtained the BCA-ERSS and

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67 DCB, Tab 7.

68 Affidavit of Ng Giok Beng, para 110.

LTA-Rail Permits and had not applied for electricity, water and sanitary facilities.

53 Thus, the parties dispute to what extent the tasks listed in Architect's Direction No 1 were behind schedule and were outstanding on the date of the Termination Certificate.[69] It is, however, clear that *some* of the steps outlined in Architect's Direction No 1 were accomplished, if not by the contractually-stipulated time, then at least by 21 February 2017 when the Termination Certificate was issued. For example, Mr Seah accepted in his affidavit that the PG was tendered on 22 December 2016, the construction programme was submitted on 5 January 2017, and a container site office was erected on or about 17 November 2016.[70]

54 In my view, there is some merit in both sides' contentions. In Milan's favour, the Architect's Direction No 1 did not give notice of a breach under cl 32(3)(d) specifically or give notice that termination would follow if the lapses were not rectified within a month. The 21 Dec 2016 Letter did not particularise the failure to obtain the BCA-ERSS and LTA-Rail Permits but instead cited the failure to furnish the PG and the master programme, both of which were subsequently furnished before February 2017. On the other hand, Milan does not deny that Architect's Direction No 1 was a notice of non-compliance with the Contract. The Architect's Direction No 1 is, on its face, a notice that Milan was behind schedule in relation to the specified tasks, at least some of which remained outstanding on the date of the Termination Certificate.

55 On balance, I find that Milan failed to prove a strong *prima facie* case that Cluny terminated Milan without the prior written notice required under

69 Affidavit of John Seah, para 99.

70 Affidavit of John Seah, p 7 (first row) and paras 66–67.

cl 32(3)(d). The correspondence also showed that the deadline for commencement of works was postponed multiple times and Milan was reminded at numerous junctures that the BCA-ERSS and LTA-Rail Permit applications were late and had to be expedited.

Cluny's substantive grounds for termination

56 I turn to the allegation that Cluny had no valid basis for termination. I deal first with the ground under cl 32(3)(d) of the SIA Conditions. I was of the view that whether and to what extent Milan had complied with Architect's Direction No 1 in substance – and thus whether Cluny had grounds for termination under cl 32(3)(d) of the SIA Conditions – was a matter of genuine dispute between the parties. This is borne out by my summary of the parties' positions at [52] above. Further, it follows from my earlier examination of the delay in the BCA-ERSS and LTA-Rail Permit applications (at [35]–[42] above) that Cluny's claim that Milan failed to obtain the BCA-ERSS and LTA-Rail Permits with diligence and due expedition was not a baseless one. Thus, Milan has not shown that Cluny did not honestly believe that it had grounds to terminate the Contract.

57 Besides cl 32(3)(d) of the SIA Conditions, Cluny also claimed that it was entitled to terminate the Contract under the common law on the basis of fundamental breaches by Milan, namely: (a) Milan's failure to carry out works and obtain permits to commence work; (b) Milan's failure to renew its GB1 Licence which expired on 8 October 2016; and (c) Milan's failure to maintain a minimum stipulated sum in its project account.

58 I was of the view that Milan failed to demonstrate a strong *prima facie* case that Cluny had no grounds to assert these fundamental breaches against Milan. I deal briefly with each ground in turn:

(a) As regards Milan's failure to carry out works and obtain permits, I have addressed Milan's failure to obtain the BCA-ERSS and LTA-Rail Permits at [35]–[42] above.

(b) As regards the GB1 Licence, Milan did not dispute that as at the date of termination, it had not had a valid GB1 Licence since 8 October 2016. Milan claimed that the licence could have been easily renewed within two weeks if it had been notified. However, the evidence showed that Milan had in fact been notified of this lapse. The BCA had informed Milan by way of letter dated 1 July 2016 that its GB1 Licence would be expiring on 8 October 2016 and expressly stated that there would be no subsequent reminder.[71] It was entirely within Milan's responsibility to ensure the GB1 Licence was renewed. Later, when the application for a BCA Permit was rejected on 23 January 2017 because Milan had "an ongoing application",[72] the Structural Engineer became aware that Milan's particulars lodged with the BCA were not in order. Milan was duly notified (see [18] above). The Structural Engineer did not seem to be aware that the lapse was with regard to the GB1 Licence specifically.[73] However, the Structural Engineer pointedly inquired about Milan's BCA certificate of registration.[74] This ought to have been sufficient to prompt Milan to ensure that all its licencing and registration details were in order.

(c) As regards the minimum sum in the project account, cl 10 of the Terms and Conditions in Appendix A of the Contract required Milan to

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71 DCB, Tab 2.

72 Affidavit of John Seah, Tab 1-136.

73 Affidavit of John Seah, Tab 1-168.

74 Affidavit of John Seah, paras 81–82, Tab 1-137 and 1-192.

> *maintain* a minimum sum of $300,000 in the project account. Milan claimed that the project account was topped up to $300,000 on two different occasions, on 28 July 2016 and 29 December 2016.[75] However, this was clearly not representative of the whole picture. The account statement adduced by Milan in relation to the deposit on 28 July 2016 shows that later that same day, Milan withdrew the bulk of those deposits, causing the project account to dip far below $300,000.[76] The account statement that related to the 29 December 2016 was for a different joint account between Milan and a company named Westcom Solutions Pte Ltd; it is not clear on its face that this was a designated project account.[77]

59 Therefore, Milan has failed to establish a strong *prima facie* case that Cluny has no valid basis for asserting these breaches. In the event that these breaches are established at a hearing, the question of whether any or all of these breaches constitutes a fundamental breach entitling Cluny to terminate the Contract is, again, a matter of genuine dispute. Cluny's position was not so clearly untenable as to prompt an inference that Cluny was acting unconscionably.

60 Thus, even if I am mistaken regarding Cluny's compliance with the procedural requirements of cl 32(3)(d) of the SIA Conditions, I am of the view that Milan has not established a strong *prima facie* case that Cluny has no grounds for termination under the common law and was thereby acting unconscionably in asserting breach and termination.

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75 Affidavit of Ng Giok Beng, para 100 and pp 78–79 and 276–280.

76 Affidavit of Ng Giok Beng, pp 78–79; Affidavit of John Seah, para 94.

77 Affidavit of Ng Giok Beng, pp 276 and 278; Affidavit of John Seah, para 95.

Whether Cluny has suffered loss

61 Finally, Milan alleged that Cluny has not suffered any damages and the figures stated in the Cost of Termination Certificate are unsubstantiated, such that Cluny is acting unconscionably in making a demand on the sum guaranteed under the PG. In Mr Sum's affidavit, Cluny estimated its damages to be $3,431,132.75. This comprised $776,132.75 (being the difference between the Contract Sum and the price of the replacement contract with BHD Construction Pte Ltd) and liquidated damages of $2,655,000 calculated at the contractual rate of $7,500 per day for 354 days.[78] Since a new builder has been engaged for a higher price and the completion of the Contract has indeed been delayed, there is no sign of unconscionability in Cluny asserting these sums as damages.

Conclusion

62 For the reasons explained above, I dismissed both applications for an interim and final injunction. Bearing in mind that the court's role in such an application is not to decide on the parties' substantive entitlements but to assess the overall tenor and entire context of the parties' conduct leading up to the call on the PG (*BS Mount Sophia* at [40]), I was not satisfied that a strong *prima facie* case was shown that Cluny acted unconscionably or fraudulently. Not only were there matters of genuine dispute between the parties, I found that the evidence materially supported Cluny's position, at least on a *prima facie* review. Having dismissed the applications, I awarded costs of $10,000 (all inclusive) to be paid by Milan to Cluny.

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78 Affidavit of Sum Kwok Khuen, paras 40–43.

Hoo Sheau Peng
Judge

Poonaam Bai d/o Ramakrishnan Gnanasekaran, Lawrence Tan Shien Loon and Ho Shao Hsien (Eldan Law LLP) for the applicant;
Raymond Chan and Soh Wan Cheng Denise (Chan Neo LLP) for the first respondent;
The second respondent unrepresented.