IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 100

Originating Summons No 933 of 2019

In the matter of section 31(1)(D) of the Arbitration Act (Cap 10, Rev Ed 2002)

And

In the matter of a letter of award dated 4 May 2017 for the proposed erection of strata landed housing development comprising 6 units of strata detached houses with attic and basement, each with roof terrace and swimming pool at attic level on lots 01497V & 01494C MK 02 at Jalan Harom Setangkai, CEY Park Road (Tanglin Planning Area)

And

In the matter of a performance guarantee (DBPB17S019663) dated 15 June 2017 for the sum of S$1,063,000.00 issued by Ergo Insurance Pte Ltd in favour of CEY Development Pte Ltd

Between

CEX

… *Applicant*

And

(1) CEY
(2) CEZ

… *Respondents*

GROUNDS OF DECISION

[Building and Construction Law] – [Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed)] – [Setting aside adjudication determination] – [Unconscionability]

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Lee Seiu Kin J:

Introduction

1 CEY is the unfortunate developer for six strata detached houses at [redacted] ("the Project"). It has faced numerous delays in construction works and the present application is not the first one that it has resisted. Given its misfortunes, CEY could have been forgiven for being anxious, frustrated and even impatient with further delays in the construction. But when it pushed CEX, its main contractor, to proceed with illegal construction works and terminated CEX's employment for its failure to do so, any sympathy for CEY quickly evaporated. In the circumstances, I found that CEY had let its impatience get the best of it and that it had acted unconscionably in calling on the performance bond. Accordingly I granted CEX an injunction, restraining CEY from calling on the performance bond. Though CEX brought this application on both

grounds of fraud and unconscionability, I based my decision primarily on the unconscionability exception. I now set out my reasons in full.

Facts

2 CEX took over the project as its main contractor on 9 May 2017[1] when it accepted a letter of award dated 4 May 2017.[2] Pursuant to cl 9.1 of the letter of award,[3] CEX procured a performance bond from CEZ in favour of CEY.[4]

3 It suffices at this juncture to say that the project was beset with delays. CEY took the view that the delays were attributable to CEX's persistent failure to carry out the contract with due diligence and expedition. CEX argued that many of the delays were beyond its control and pointed to, amongst other things, the hospitalisation and subsequent death of Mr. John Seah, the architectural qualified person for the Project ("Mr. Seah").

4 Mr. Seah took ill and was hospitalized on 7 January 2019. [5] In a letter dated the same day, he attempted to authorise one Mr. Ng Hoe Theong ("Mr Ng") to "cover [his] duties".[6] On that authority, Mr. Ng issued a notice to proceed with due diligence and due expedition ("the Notice to Proceed") to CEX. Mr. Seah himself would later pass away on 24 January 2019.[7] There was no new architectural qualified person formally appointed until

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1 Lee Boon Huat's 1st Affidavit dated 23 July 2019 ("LBH1") p 148

2 LBH1 p 143

3 LBH1 p 145

4 LBH1 p 92

5 LBH1 p 611

6 LBH1 p 611

7 AWS p 8 para 16

27 February 2019.[8]

5 Notwithstanding Mr. Seah's demise on 24 January 2019, Mr. Ng would later issue a termination certificate "on behalf of [Mr. Seah]"[9] on 19 February 2019, stating that CEX had "failed and [was] still failing to proceed with due diligence or expedition in its Works". Relying on the termination certificate and on account of "[CEX's] persistent failure to carry out the Contract works with due diligence and expedition",[10] CEY issued a notice of termination on 20 February 2019.[11] CEX denied any breaches[12] and promptly served a notice of arbitration the following day, claiming that, amongst other things, its employment had been wrongfully terminated.[13]

6 CEY later sought to recover losses arising from CEX's alleged breaches of contract. These complaints were collated and conveyed in a letter of demand seeking S$3,921,039.68, such sum being CEY's estimated expenses for hiring a replacement contractor.[14] CEX refused to pay the sum[15] and CEY subsequently called on the performance bond on 19 July 2019.[16]

Issues to be determined

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8 LBH1 p 1505

9 SKK p 130

10 SKK p 134

11 SKK p 134

12 SKK p 162 - 164

13 LBH1 p 106

14 SKK p 138 - 139

15 SKK p 159 - 161

16 LBH1 p 95

7 The first issue concerns the statutory interpretation of s 6(5) of the Building Control Act (Cap 29, 1999 Rev Ed) ("the Act"). In particular, the question is whether the holder of a permit to carry out structural works ceases to be a qualified person should the permit holder take ill and become otherwise incapacitated ("The Interpretation Issue"). This is relevant in ascertaining whether it was illegal for CEX to carry on construction works when Mr. Seah took ill on 7 January 2019.

8 The second issue is whether the call on the performance bond should be restrained ("The Performance Bond Issue"). The nature of the performance bond and its terms were not disputed. This was an on-demand performance bond. There was no contention that the demand was being technically defective. The issue was whether an injunction restraining the call ought to be granted on the ground of unconscionability.

Applicable legal principles

The unconscionability exception

9 For a while, there was some uncertainty about the unconscionability exception in Singapore. Following *Bocotra Construction Pte Ltd and others v Attorney-General* [1995] 2 SLR(R) 262 at [46], [48] and [53] ("*Bocotra"*), the authorities splintered into two separate branches. The first line of cases concluded that *Bocotra*'s reference to unconscionability had simply been a case of loose language and that "unconscionability" had been used as an interchangeable synonym for fraud – the original and only ground for restraining calls on performance bonds: *New Civilbuild Pte Ltd v Guobena Sdn CEX and another* [1998] 2 SLR(R) 732 at [43] ("*New Civilbuild*") and *Dauphin Offshore Engineering & Trading Pte Ltd v The Private Office of His Royal Highness Sheikh Sultan bin Khalifa bin Zayed Al Nahyan* [1999] SGHC 201 at

[36] ("*Dauphin HC"*). The second line of cases took the view that unconscionability was indeed a separate ground for restraining calls on performance bonds (see for example, *Min Thai Holdings Pte Ltd v Sunlabel Pte Ltd and another* [1998] 3 SLR(R) 961 at [35] and *Raymond Construction Pte Ltd v Low Yang Tong and another* [1996] SGHC 136 at [5] ("*Raymond Construction"*)).

10 The judicial dichotomy was settled by the Court of Appeal in *GHL Pte Ltd v Unitrack Building Construction Pte Ltd and another* [1999] 3 SLR(R) 44 ("*GHL"*) which ruled unequivocally that unconscionability is a separate and distinct ground for granting an injunction to restrain the enforcement of a performance bond. The jurisprudence then developed on the concept and scope of unconscionability. Cases such as *Dauphin Offshore Engineering & Trading Pte Ltd v The Private Office of HRR Sheikh Sultan bin Khalifa bin Zayed Al Nahyan* [2000] 1 SLR(R) 117 ("*Dauphin CA*") and *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352 ("*BS Mount Sophia"*) clarified and justified the legal threshold for establishing the unconscionability exception. Nothing short of a *strong prima facie case* suffices (see *Dauphin CA* at [57] and *BS Mount Sophia* at [20], [21] and [39]). Others defended the unconscionability exception and explained its rationale (see *JBE Properties Pte Ltd v Gammon Pte Ltd* [2011] 2 SLR 47 at [10] – [13] ("*JBE Properties*") and *BS Mount Sophia* at [18] – [38]). The main policy concerns guiding restraints of a call on a performance bond, have also been extensively and lucidly canvassed. In summary, they are:

(a) respecting the intention of the parties: *GHL* at [24] and *BS Mount Sophia* at [25];

(b) upholding the commercially valuable autonomy principle: Peter Ellinger & Dora Neo, *The Law and Practice of Documentary*

Letters of Credit (Hart Publishing, 2010) ("*Ellinger & Neo*") at pp 325–326, adopted in *BS Mount Sophia* at [30]); and

(c) preventing abusive and oppressive calls on performance bonds, particularly in the construction industry: *GHL* at [24] and *JBE Properties* at [11].

11 Instructive as these propositions are, uncertainty still lingers in the jurisprudence. The precise scope of unconscionability remains undefined. The courts have of course, sensibly, refused to provide an exhaustive definition: *Dauphin CA* at [42]. To do so would limit the discretion of the courts to address the multifarious forms that unconscionability may take and, on a more cynical view, provide counsel with an instruction manual for evading the unconscionability exception. But the case law has developed substantially since *Dauphin CA*. I am therefore of the view that unconscionability may be mapped in more concrete terms than abstract propositions. From an analysis of the authorities, the following framework may be discerned for evaluating whether an injunction restraining a performance bond should be granted on the ground of unconscionability:

(a) Identify the nature of the performance bond, applying the principles enumerated in *Master Marine AS v Labroy Offshore Ltd and others* [2012] 3 SLR 125 at [34]–[42] ("*Master Marine*").

(b) Ascertain whether the call falls within the terms of the bond (see for example, *York International Pte Ltd v Voltas Ltd* [2013] 3 SLR 1142 at [39] – [42] ("*York International"*) and *BWN v BWO* [2019] 5 SLR 215 at [22] ("*BWN*")).

(c) Evaluate whether the "overall tenor and entire context of the conduct of the parties support a strong *prima facie* case of unconscionability" (*BS Mount Sophia* at [40]), unconscionability having been broadly (but not exhaustively) described to involve elements of unfairness and conduct lacking in good faith: *Raymond Construction* at [5]. These elements have most commonly manifested in the following manner:

(i) calls for excessive sums;

(ii) calls based on contractual breaches that the beneficiary of the call itself is responsible for;

(iii) calls tainted by unclean hands, *eg,* supported by inflated estimates of damages or mounted on the back of selective and incomplete disclosures;

(iv) calls made for ulterior motives; and

(v) calls based on a position which is inconsistent with the stance that the beneficiary took prior to calling on the performance bond.

12 I pause to clarify three things about the factual matrices I have just described in the paragraph above. First, this is not an exhaustive list of circumstances where unconscionability arises. The list is not and will probably never be closed. Indeed, the present case involves a factor that is not captured by any of the above listed categories (see [68]). These factors are simply circumstances that have recurred often enough. Second, no single factor is dispositive. The weight attached to each factor will vary from case to case depending on the strength of the evidence. Every case must be examined with

careful regard to the *entire* context, rather than devolve into a pedantic inquiry into each and every factor. The corollary to this is that the factors listed above should not be taken as a checklist to be ritually attended to. These are not a set of conjunctive requirements to satisfy before unconscionability is made out. Third and finally, a factor may go towards establishing unconscionability but the absence of a given factor does not necessarily whitewash the beneficiary's conduct. For example, calls for sums which are disproportionate to the actual or potential losses claimed may be unconscionable. It does not follow, however, that a call for a sum which correspond reasonably with the losses claimed is, of itself, conscionable.

13 I now elaborate further on the framework I have set out above at [11]. For ease of reference, I shall refer to the party calling on the bond as the beneficiary. The party who procured the performance bond in favour of the beneficiary shall be referred to as the obligor. The beneficiary/obligor relationship is typically that of the developer and its main contractor, or the contractor and its sub-contractor.

Step 1: Identify the nature of the bond

14 The preliminary question is whether the bond is an on-demand performance bond to begin with. This is a matter of contractual interpretation and the inquiry naturally begins with the document itself. That is, courts should be slow to consider extrinsic evidence or the external context when interpreting the contractual document outlining the performance bond. This is for two reasons, as set out in *Master Marine* at [35]. Andrew Ang J has eloquently summarised them in *York International* at [19]. I gratefully adopt and reproduce his summary here:

> (a) The primary role of a performance bond in commerce is to ensure expediency in payment. When a call is made, both the beneficiary and the bank need to be able to determine quickly if the demand is valid simply by looking at the bond instrument itself, without having to cross-refer to the underlying contract (at [35] of *Master Marine*) ….
>
> (b) As performance bonds are most commonly used in commercial contexts, parties are more often than not experienced commercial men who are able to appreciate that the underlying contract and the bond are independent contracts with different obligations vis-à-vis different parties (at [35] of *Master Marine*) …

15 Should there be patent ambiguity or if the plain wording of the contract "suggests a meaning inconsistent with the obvious external context" (*Master Marine* at [36]), the court may then consider the external context and other extrinsic evidence. As for the extrinsic evidence to be considered, the most natural candidate is the contract underlying the performance bond: *Master Marine* at [36]. When the underlying contract is examined, the courts have expressly adopted a contextual approach to interpretation. A fuller exposition may be found in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [109]–[132] but the relevant principles of interpretation were helpfully summarised in *Master Marine* at [41]:

> (a) first, the aim of the exercise of construction is to ascertain the meaning the document would convey to a reasonable business person;
>
> (b) secondly, the courts are concerned with the objective expressed intention of the parties and not their actual intentions;
>
> (c) thirdly, the courts will not excessively focus on particular phrases or words. The emphasis is on the document as a whole;
>
> (d) fourthly, the courts are prepared to look to the legal, regulatory and factual matrix constituting the background in which the document was drafted to inform them on how to interpret the document;

> (e) fifthly, the courts will give regard to the overall commercial purpose of the parties in entering into the transaction;
>
> (f) sixthly, preference will be given to an interpretation that makes the contract and its performance lawful and effective;
>
> (g) seventhly, where the contract appears to be one-sided or onerous, it will be construed strictly against the party seeking to rely on it;
>
> (h) eighthly, an interpretation that leads to very unreasonable results will be avoided unless it is required by clear words and there is no other tenable construction;
>
> (i) ninthly, a specially agreed provision should override an inconsistent standard provision which has not been individually negotiated; and
>
> (j) tenthly, a more precise provision should override an inconsistent general provision.

Step 2: Ascertain whether the call comes within the terms of the bond

16 An on-demand performance bond may stipulate formal requirements for it to be called upon. A demand for payment must comply with these terms and conditions that have been set out in the bond document. These terms vary from bond to bond. A beneficiary may, for example, be required to state the term of the underlying contract which had been allegedly breached (*BWN* at [22]) or it may be required to assert in its demand that there was both a breach of contract and that loss had been sustained as a result of that breach: *York International* at [40] and [42]. Whatever the requirement is, strict compliance with the terms is necessary: Poh Chu Chai, *Guarantees and Performance Bonds* (LexisNexis, 2008) at pp 306–307 and *Master Marine* at [32]. Defective demands risk invalidating the entire call on a performance bond.

17 There is one last thing to note. While it is uncontroversial that individual terms may spell out requirements for a call on a performance bond, contractual terms may also *cumulatively* give rise to an entirely *separate* requirement. This

was exactly what happened in *Ryobi Tactics Pte Ltd v UES Holdings Pte Ltd and another and another matter* [2019] 4 SLR 1324 ("*Ryobi Tactics*").

18 There, the beneficiary had engaged the obligor as a subcontractor for three different construction projects, under four different subcontracts. Each of the subcontracts in turn, necessitated a performance bond. The beneficiary claimed that it had suffered losses in relation to only *one* of the projects but called on all four performance bonds. The issue was whether the terms of the performance bonds allowed for a call to be made for the consolidated liabilities under all four subcontracts.

19 Although there was no explicit term to that effect, Kannan Ramesh J took the view that the parties must have contemplated a requirement that performance bonds could only be called in connection with matters arising out of the corresponding subcontract. The learned judge came to this conclusion after a careful examination of the *entire* contract including the preamble of the contract, the subject matter of the contract, the sums guaranteed under the performance bonds and finally the dates on which the performance bonds were signed: *Ryobi Tactics* at [27]–[28]. The learned judge relied on the fact that each performance bond made repeated references to the specific subcontract and project which it was related to and ultimately ruled that, according to the terms of the contract, a beneficiary could not justify its demand for payment on the basis of breaches in separate, albeit related, subcontracts.

Step 3: Evaluate whether a strong prima facie case of unconscionability has been made out

20 As stated earlier, the threshold to meet before the court will exercise its discretion to grant an injunction is a high one. The obligor has to establish a strong *prima facie* case of unconscionability, having regard to the entire context

of the case: *BS Mount Sophia* at [20]–[21]. Being of an interlocutory nature, these applications will not involve a protracted consideration of the merits of the case. The court is simply not in a position to determine the reliability and probative value of the evidence, nor does it have the benefit of full argument which would place the evidence in its proper context. Accordingly, it does not assess the substantive entitlements of the parties: *BS Mount Sophia* at [40] (hereinafter "the merits principle").

21 While this is theoretically attractive, I acknowledge that the merits principle is difficult to apply in a consistent and disciplined manner. Indeed at first glance, some of the authorities seem very much to delve into the merits of the cases before them. Some cases for example, have discussed whether a beneficiary's termination of its contract with the obligor was unlawful (see *Milan International Pte Ltd v Cluny Development Pte Ltd and another* [2018] SGHC 33 ("*Milan International*") from [47] to [60]) while others have examined whether the obligors had been in breach of the underlying contract in the first place (see *Newtech Engineering Construction Pte Ltd v BKB Engineering Constructions Pte Ltd and others* [2003] 4 SLR(R) 73 at [27] ("*Newtech Engineering*")). Some authorities have gone further, relying on "credible *prima facie* evidence of defects in the works" in establishing unconscionability: *Hup Seng Lee Pte Ltd v Jaclyn Patrina Reutens* [2018] SGHC 249 at [14] ("*Hup Seng*"). These authorities discussed the *substantive* allegations of breach of contract and ostensibly departed from the merits principle.

22 Nevertheless, in my view, the authorities are still very much in line with the merits principle. Those cases simply stand for the proposition that "if [the obligor] were able to demonstrate conclusively that there had in fact been no breach, then that would lend weight to its assertions that [the beneficiary] had

acted unconscionably": *Leighton Contractors (Singapore) Pte Ltd v J-Power Systems Corp and another* [2009] SGHC 7 at [9]. Put another way, if the beneficiary's basis for calling on the bond was baseless, an inference may be raised that the call on the bond was unnecessary and abusive. The court however, is not obliged to always draw this inference. A beneficiary may be mistaken about its contractual entitlement and have called on the performance bond owing to an honest mistake. If so, the call would be legitimate: *BS Mount Sophia* at [52]. The only caveat is that a beneficiary should at all times examine its entitlement and conduct prior to calling on the bond. Any situation where it is less than certain about its entitlement could form the basis for a restraint on the call: *BS Mount Sophia* at [37]. This brings me neatly to the factual matrices where the elements of unconscionability have most frequently manifested (see [11(c)] above). For convenience, I reproduce them here:

(a) calls for excessive sums;

(b) calls based on contractual breaches that the beneficiary of the call itself is responsible for;

(c) calls tainted by unclean hands, *eg,* supported by inflated estimates of damages or mounted on the back of selective and incomplete disclosures;

(d) calls made for ulterior motives; and

(e) calls based on a position which is inconsistent with the stance that the beneficiary took prior to calling on the performance bond.

(1) Calls for excessive sums

23 Turning to the first scenario, calls for excessive sums are unconscionable and warrant injunctions restraining them. "Excessiveness" may be measured either by reference to (a) the total cost of the project or (b) the actual or potential losses allegedly suffered by the beneficiary. *GHL* for example, took reference from the contract price in determining whether the sums called upon were excessive. There, the obligor procured a performance bond guaranteeing a sum that was a percentage of the contract price (as is the industry practice). The contract price was later revised downwards by approximately 65%. The Court of Appeal ruled that the sum guaranteed should be a percentage of the *new* contract's price. To peg it to the old contract's price would have been unconscionable. Indeed, if it had been pegged to the old contract's price, the bond sum would have been some 30% of the new contract's price: *GHL* at [30]

24 Courts may also compare the bond sum with the actual or potential losses alleged. The starting point of course, is that on-demand performance bonds do not typically require beneficiaries to prove their losses before being entitled to call on the bond: *AES Façade Pte Ltd v Wyse Pte Ltd and another* [2018] SGHC 163 at [29] (*"AES Façade*"). But when a beneficiary simply cannot point to any loss suffered, the courts may be prompted to infer that the call had been abusive and lacked *bona fides*. Accordingly, the call may be restrained: *Eltraco International Pte Ltd v CGH Development Pte Ltd* [2000] 3 SLR(R) 198 at [37]–[38] (*"Eltraco*"), discussing *Cargill International SA v Bangladesh Sugar & Food Industries Corporation* [1996] 4 All ER 563 ("*Cargill International*").

25 In *Cargill International*, the obligor claimed that the market for sugar had fallen and the beneficiary had obtained replacement at a cheaper price. The

beneficiary had therefore suffered no loss and was not entitled to make any calls on the performance bond or to retain any money so received, so the argument went. The court in *Eltraco* observed that while the English courts had refused to restrain the call in that case, there might well be a restraint on the call if the fact situation in that case were to recur in a Singaporean case: *Eltraco* at [38]. This seems to be not only right in principle but also supported by a host of authorities that have considered the actual and potential losses claimed by the beneficiaries in deciding whether the call had been excessive: *Sunrise Industries (India) Ltd v PT OKI Pulp & Paper Mills and another* [2018] SGHC 145 at [80]; *Milan International* at [61]; and *Ryobi-Kiso (S) Pte Ltd v Lum Chang Building Contractors Pte Ltd and another* [2013] SGHC 86 at [26] (*"Ryobi-Kiso"*).

26 That being said, I acknowledge that unequivocal evidence of losses is unlikely to be before the courts, since these applications are interlocutory in nature. When evidence of losses is found to be wanting, beneficiaries are generally *not* restrained from calling on the bond, even when the sums claimed seem excessive: *Liang Huat Aluminium Industries Pte Ltd v Hi-Tek Construction Pte Ltd* [2001] SGHC 334 at [68]–[78] (*"Liang Huat*"). This is because the burden of proving a strong *prima facie* case ultimately lies on the obligor. It is for the obligor to produce cogent evidence that the sums are indeed excessive. The courts, at this stage of the proceedings, should not be expected to delve into details at length, initiating investigations into whether the sums were indeed excessive: *Liang Huat* at [79]. Indeed, courts do not take these applications as exercises in quantifying damages with pedantic precision: *Eltraco* at [32].

27 I should also point out that even if the court is convinced that the sum called was excessive, it may not restrain the call in its entirety. The injunction

is ultimately an exercise of the court's equitable jurisdiction and the object of that jurisdiction is to achieve justice, not punish beneficiaries for making excessive calls. The courts may accordingly order that the amount of the bond called be reduced, restraining only the excessive (and therefore unconscionable) amounts: *Eltraco* at [36]. This is provided, of course, that the terms of the bond allow for a partial call: *Eltraco* at [34].

(2) Alleged contractual breaches by the obligor which the beneficiary itself is responsible for

28 The second scenario involves situations where the beneficiary called on the bond, relying on alleged contractual breaches by the obligor which were in truth, caused by or substantially connected to the beneficiary's own conduct. The principle behind this is simple. It lies foul in the mouth of the beneficiary to complain of a breach of contract if it had itself been responsible for the breach. The present case is an example of this scenario (see [68] below).

29 This is most clearly exemplified by the facts of *Raymond Construction.* There, the beneficiary had interfered with the work of the architect, prevented the obligors from making rectifications during the defects liability period and had ultimately seized upon the defects discovered to call upon the performance bond. Some 30% of the contract sum remained outstanding by the time the application made its way to court, and the architect himself had resigned in protest. It was clear that the defects complained of could have been rectified "but for the obduracy of the [beneficiary]": *Raymond Construction* at [37]. In those circumstances, Lai Kew Chai J concluded that it "was against the court's conscience to [allow the beneficiary] to insist on his pound of flesh" (*Raymond Construction* at [35]). This same reasoning is evident in the pre-*Bocotra* cases of *Royal Design Studio Pte Ltd v Chang Development Pte Ltd* [1990] 2 SLR(R)

520 at [21] (*"Royal Design Studio*") and *Kvaerner Singapore Pte Ltd v UDL Shipbuilding (Singapore) Pte Ltd* [1993] 2 SLR(R) 341 at [6] (*"Kvaerner*").

30 When determining whether the beneficiary itself had been responsible for the breaches complained of, there are two main principles to bear in mind. First, mere breaches of contract by a beneficiary to a performance bond do not *per se* amount to unconscionable conduct: *Raymond Construction* at [5], affirmed in *BS Mount Sophia* at [42]. Crucially, the beneficiary's actions must have "induced, or [been] connected to, the alleged breaches raised by [the beneficiary]": *Dauphin CA* at [54]. Secondly, the courts have professed an aversion towards overtly technical analysis at this stage of the proceedings: *Anwar Siraj and another v Teo Hee Lai Building Construction Pte Ltd* [2003] 1 SLR(R) 394 at [14] (*"Anwar Siraj*").

31 In *Anwar Siraj,* the obligor argued that the architect's designs had been defective to begin with and any breaches complained of were not the fault of the obligor but that of the architect. The obligor therefore sought an injunction restraining the beneficiary from calling on the bond. The Court of Appeal did not entertain this argument, stating that it was simply "in no position to conclude that there [had] been defective designing by the architect": *Anwar Siraj* at [14]. Presumably, the court was not prepared to make such a technical assessment without the benefit of further evidence such as expert evidence or a cross-examination of the architect himself. This is nothing controversial. If anything, it is the application of the larger merits principle I have described above at [20].

(3) Unclean Hands

32 The third scenario relates to calls tainted by unclean hands. This is fundamentally different from the second scenario, *ie,* situations where the

beneficiary is complaining of breaches which it was itself responsible for. In this third scenario, beneficiaries engage in gross impropriety that beckons equity to intervene. This may manifest in less than full and frank disclosure during a hearing for an *ex parte* injunction (*Bintai Kindenko Pte Ltd v Samsung C&T Corp and another* [2019] 2 SLR 295 at [80]–[84]) or losses which are inflated to justify calling on the performance bond (*Newtech Engineering* at [26]). Indeed, Dr. Tang Hang Wu found that it is a "common tactic" in the industry to inflate the alleged damages when calling on performance bonds: Tang Hang Wu, "Equity in the marketplace: Reviewing the use of unconscionability to restrain calls on performance bonds" in *Equity, Trusts and Commerce* (Paul S Davies & James Penner eds) (Hart Publishing, 2017) at p73 (*"Tang*"). This practice cloaks bond calls with a false legitimacy, masking a beneficiary's true motives for calling on the bond.

33 Such dishonesty, to my mind, may very well qualify as fraud rather than unconscionability. Indeed, this raises the theoretical question of the precise boundaries demarking the fraud and unconscionability exceptions. The problem is that the same elements which have established unconscionability (*eg,* dishonesty and lack of *bona fides*) are also traditionally the hallmarks of fraud. I note the Court of Appeal's well-placed reluctance to draw bright lines between fraud and unconscionability (*BS Mount Sophia* at [23]) but would also point out that pleadings in this case and elsewhere (such as in *Milan International*) suggest a startling tendency to use the two grounds interchangeably.

34 The same arguments are recycled in support of both grounds and the same facts are pleaded in the same manner in support of both. Loose language and looser reasoning prevail. Conceptual tidiness may sometimes be worth less than the trouble taken to achieve it, but given that the Court of Appeal has explicitly sanctioned the use of exemption clauses to exclude the

unconscionability exception (*CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd and another and another appeal and another matter* [2015] 3 SLR 1041 at [24] and [41]), the fraud exception may resume a prominence that has waned in the past two decades. Accordingly, greater clarity may be required.

(4) Ulterior Motives

35 The fourth scenario relates to calls made for ulterior motives. Such calls would naturally be objectionable for lack of *bona fides*, and should accordingly be restrained: *Newtech Engineering* at [27] and *Soon Li Heng Civil Engineering Pte Ltd v Samsung C&T Corp and another* [2019] SGHC 267 at [61] to [81] (*"Soon Li Heng*"). In *Newtech Engineering*, "[t]he entire circumstances of the case suggested strongly that the [beneficiary] had an ulterior motive in calling on the bonds… The calls on the bonds appeared to have been made to ameliorate their cash flow problems.": *Newtech Engineering* at [27]. *Soon Li Heng*, likewise, involved a performance bond which the beneficiary called on for ulterior motives. There, Ang Cheng Hock J concluded that the beneficiary had "simply [been] dissatisfied with the adjudication determination in [an earlier adjudication] and [had been] looking to claw back some portion of it by calling on the [performance bond]": *Soon Li Heng* at [81]. Proving that the bond had been called for an ulterior motive is ultimately a fact-sensitive inquiry involving reference to factors such as the timing of the call (*AES Façade* at [26] and *LQS Construction Pte Ltd v Mencast Marine Pte Ltd and another* [2018] 3 SLR 404 at [60] ("*LQS Construction"*)) and the beneficiary's pre-call conduct (*Ryobi-Kiso* at [29]).

36 I would also, in principle, regard tactical calls aimed at putting contractors under financial pressure to compromise, to be unconscionable as well. These bond calls "seem to be aimed at causing insolvency so that the

contractor cannot pursue its claims in Court/Arbitration [*sic*]": *Tang* at p73. A performance bond after all, is security for the secondary obligation of the obligor to pay damages if it breaches its primary obligations arising from the underlying contract: *JBE Properties* at [10]. It is not intended to be a bargaining chip or a tool to obtain strategic leverage against the other party.

37 The Court of Appeal came to the same conclusion in *Samwoh Asphalt Premix Pte Ltd v Sum Cheong Piling Pte Ltd and another* [2001] 3 SLR(R) 716 at [18] ("*Samwoh Asphalt*"). There, the beneficiary was engaged in negotiations with the obligor for the obligor to take over as the main contractor when it (the obligor) had previously only been nominated as the sub-contractor. When the negotiations turned sour, the beneficiary called on the performance bond, seeking to pressure the obligor into surrendering to its terms. This was patently unconscionable and the court accordingly granted an injunction restraining the call on the performance bond. A similar line of reasoning can be seen in *BS Mount Sophia*. At [53], the Court of Appeal observed that "[it] did not seem proper for the [beneficiary] to demand that the [obligor] extend the validity of the [performance bond], and threaten to call on the [performance bond] in order to enforce this demand." It therefore seems that there is ample authority for this proposition. I would only add that such allegations will probably be difficult to prove in practice.

38 Furthermore, I would note that even a finding that there was an ulterior motive in calling on the performance bond does not necessarily result in an injunction. In *Ryobi-Kiso*, Quentin Loh J reasoned that even if the obligor had proven that the beneficiary had called on the bond for retaliatory purposes, the beneficiary would still be entitled to exercise the call if it was also reasonably of the view that the obligor had breached the underlying contract: *Ryobi-Kiso* at [33]. There, the question was whether the beneficiary had called on the bond as

a retaliatory move following some unfavourable adjudication awards. The learned judge found that those allegations were unsubstantiated but went further, reasoning that even if the calls had been made as a form of "retaliation", the beneficiary was entitled to exercise the call, since it could have "reasonably … taken the view that it was entitled to terminate the Sub-Contract": *Ryobi-Kiso* at [32]–[33]. It would seem that reasonable conviction as to one's contractual entitlements, even if laced with a certain measure of vindictiveness, is sufficient to defeat an application to restrain a call on a performance bond.

(5) Inconsistent positions of the beneficiary

39 The final scenario arises when the beneficiary's position at the time of the bond call is objectionably inconsistent with its position pre-call. This inconsistency raises the inference that the call lacked *bona fides*. In *BS Mount Sophia*, the court found the complete absence of complaints by the beneficiary prior to the call to be deeply troubling. The court reasoned that "[i]t could be taken to suggest that the [beneficiary] did not honestly believe that there was a delay until the point in time just prior to its call on the [performance bond]": *BS Mount Sophia* at [48]. Likewise, the court in *Samwoh Asphalt* found it "significant that at the time when the performance guarantee was called, [the beneficiary] had not made any claim against [the obligor] for any damage or loss occasioned by either any breach of the principal subcontract or any breach of the subsidiary subcontract": *Samwoh Asphalt* at [17]. In both cases, an injunction restraining the performance bond was granted.

40 I turn now to analyse the facts of the present case.

Issue 1: The Interpretation Issue

41 One of the main planks of CEX's arguments was that it could not have been expected to carry out construction works that were illegal.[17] The fact that CEY expected them to and ultimately penalised them for failing to carry out such construction works, was part of CEX's case that CEY had acted unconscionably.

42 Under s 20(1)(*b*) of the Act, building works can only be carried out when there is a valid permit issued under s 6. Permits automatically lapse when one of the conditions stated under s 6(5) is satisfied:

> **6.**—(5) Any permit to carry out structural works in any building works granted under this section shall not be transferable, and shall automatically lapse if any of the following permit holders ceases to be:
>
> (a) the developer of those building works;
>
> (b) the builder whom the developer has appointed in respect of those building works; or
>
> (c) the qualified person whom the developer or builder has appointed under section 8 or 11 to supervise those building works.

43 The relevant provision is s 6(5)(*c*) of the Act which relates to the situation where the permit holder "ceases to be … the qualified person whom the developer or builder has appointed under section 8 or 11 to supervise those building works". Sections 8 and 11 pertain to duties of developers and builders respectively. In particular, both sections have similar provisions regarding the appointments of qualified persons in respect of building works.

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17 AWS p 40 paras 93-101

44 Mr Seah was the architect appointed to be the qualified person under s 8(1) of the Act. If he is unable to carry out his duties under the Act, the developer is required, under s 8(2), to forthwith appoint a replacement and notify the commissioner of building control ("the Commissioner"). Section 8(2) states as follows:

> **8.**— (2)If any *qualified person*, builder, specialist builder, accredited checker or specialist accredited checker appointed under subsection (1) in respect of building works *becomes unwilling to act or unable,* whether by reason of the termination of his appointment or *for any other reason, to carry out his respective duties under this Act,* the developer shall —
>
> > (*a*) without delay appoint under subsection (1) another qualified person, builder, specialist builder, accredited checker or specialist accredited checker, as the case may be, in his place; and
> >
> > (b) within 7 days thereafter, notify the Commissioner of Building Control of that substitute appointment.
>
> [emphasis added]

45 It can be seen from ss 6 and 8 of the Act that the intention of the Act is to ensure that there is a qualified person for building works at all times. This is because the duties placed upon a qualified person are important ones, *eg,* in s 9(1), the qualified person has to ensure compliance with the Act and building regulations and notify the Commissioner of any breach, and ensure proper supervision of the building works. The Act ensures that in the event a qualified person does not or is unable to act as such, the developer is to appoint a replacement and notify the Commissioner immediately. Accordingly, under s 6(5) of the Act, any permit to carry out structural works granted lapses when the qualified person appointed under s 8 or s 11 to supervise the building works ceases to be such.

46 Turning to the facts of the present matter, Mr. Seah's hospitalisation meant that he had been unable to carry out his duties. In fact, he had been so

incapacitated that he appointed and authorised Mr. Ng to take over.[18] It goes without saying that when he passed away, he was most definitely unable to carry out his duties. Therefore the permit to carry out structural works lapsed on 7 January 2019 when Mr Seah was hospitalised. It would have been illegal for CEX to continue with building works until a new qualified person was appointed and a new permit obtained.

47 Before moving on to the next issue, I am minded to address three counterarguments raised by CEY.

48 First, CEY contended that Mr. Ng was appointed by Mr. Seah to take over on 7 January 2019. Mr. Ng was a fully qualified and registered architect in his own right.[19] There was therefore an architectural qualified person administering the contract at all times, so the argument goes. I disagreed. Section 6(5) of the Act explicitly states that permits are not transferable (refer to [42] above). Mr. Seah could not have simply asked someone to take over. In fact, there are specific procedures outlined under s 8(2) of the Act for the appointment of another qualified person to replace the existing one. The developer, rather than the previous qualified person, must appoint a replacement. The developer must then inform the Commissioner of that substitute appointment within seven days thereafter. None of these were done. The substitute appointment was therefore not valid according to the requirements under the Act.

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18 SKK p132

19 RWS p38 para 80(a)

49 Second, CEY took the position that it had hired AGA Architects Pte Ltd ("AGA") to administer the contract. Mr. Ng, like Mr. Seah, was employed by AGA.[20] Therefore, AGA had retained oversight of the administration of the Project, whether through Mr. Seah or Mr. Ng, at all times until a new architectural qualified person had been properly appointed on 27 February 2019. I rejected this argument as well.

50 Before s 6 permits are issued to developers like CEY, the application must specify the "names and particulars of the qualified person appointed under s 8 or 11 to supervise the carrying out of those building works": s 6(2)(*b*) of the Act. Section 2 of the Act provides that a qualified person is either an architect with a practising certificate issued under the Architects Act (Cap 12, 2000 Rev Ed) ("Architects Act") or a professional engineer who has in force a practising certificate issued under the Professional Engineers Act (Cap. 253, 1992 Rev Ed) ("Professional Engineers Act"). Practice certificates are only issued to architects and professional engineers if they are registered: s 18(1) of the Architects Act; s 18(1) of the Professional Engineers Act. Architects and professional engineers may only be registered if they have the relevant educational qualifications: s 15(1) or 15(2A) of the Architects Act; s 15(1) of the Professional Engineers Act. The registered architects and professional engineers referred to in the Architects Act and Professional Engineers Act are therefore natural persons as only such persons can possess academic qualifications. Accordingly, the qualified person referred to in s 2 of the Act (and by extension, in ss 6, 8 and 11 of the Act as well) is a natural person.

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20 SKK p21 para 48

51 Section 6 permits are therefore tied to natural persons like Mr. Seah, not firms like AGA. It follows that the permit lapsed when Mr. Seah took ill and was incapacitated on 7 January 2019. I should also note that it was wholly inconsistent for CEY to argue that Mr Seah could transfer his authority to Mr Ng (suggesting that the authority granted by the permit originally resided with Mr Seah) and also contend that AGA had administered the contract through both Mr Seah and Mr Ng (suggesting that the authority granted by the permit had resided with AGA all along).

52 Third, CEY argued that there were communications from the Building and Construction Authority ("BCA") and Land Transport Authority ("LTA") suggesting that it was perfectly legal for CEX to carry on building works. These correspondence, it was argued, suggested that CEX was entitled legally to proceed. I rejected this argument too. To begin with, the letters simply did not suggest that CEX was permitted to carry on the works. I reproduce both emails here in full. The email from the Building and Construction Authority ("the BCA Letter") stated as follows:[21]

> Dear [redacted],
>
> I refer to your fax dated 12 February 2019 as enclosed.
>
> As the current Architectural QP has passed away, a replacement Architectural QP needs to be appointed for the project.
>
> *To avoid unnecessary stoppage of work on site, a fresh permit application is required as soon as possible to regularise the change of QP.*
>
> I hope this answers your query.
>
> [emphasis added]

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21 SKK p 679

53 The BCA Letter did not permit CEX to continue works pending the appointment of a new architectural qualified person. BCA's position was clear – a new "Architectural QP" would have to be appointed "as soon as possible". Failure to do so would result in "stoppage[s] of work on site". Indeed, the letter seems to suggest that works would be halted until proper regularisation.

54 The letter from the Land Transport Authority ("the LTA Letter") did not assist CEY's case either. It stated as follows:[22]

> Hi [redacted]
>
> I'm sorry to hear the passing of Mr John Seah.
>
> Yes. The developer would require to appoint another QP Architect for the said project. The newly appointed QP Architect must write in to inform us and declare that he will take over the full responsibilities of the approved DP, BP & permit issued under Mr John Seah.
>
> We have no objection for you to continue construction works pending appointment of a new QP Architect.
>
> *Please advise also how is this regularised for URA & BCA?*
>
> [emphasis added]

55 Here, LTA recorded "no objection for [CEX] to continue construction works pending appointment of a new QP Architect." This seems at first glance, to suggest some sort of regulatory approval for CEX to continue building works. However, I would note that CEX's arguments (that it was illegal for it to proceed with construction works absent a valid permit under s 6 of the Act) simply have nothing to do with the LTA at all. If anything, it is the BCA's approval that would be required in this matter. Indeed, the LTA Letter itself suggests that the ultimate legality of CEX continuing with works in the interim, is dependent on

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22 SKK p 681

regulatory approvals from multiple agencies (see emphasised portions at [54]). CEY cannot rely on LTA's 'approval' alone to argue that it was legal for CEX to continue works.

56 In any case, I do not see how these emails could possibly have had the effect of transforming something illegal into a lawful act.

57 For the above stated reasons, I concluded that it had been illegal for CEX to carry on with works from 7 January 2019 onwards, when the relevant permits lapsed following Mr. Seah's hospitalisation.

Issue 2: The Performance Bond Issue

58 Applying the framework set out in [11], I found the call on the performance bond unconscionable. The first and second steps of the inquiry (see [14] and [16] respectively) were undisputed. This was certainly an on-demand performance bond and there was nothing defective about the demand itself. This brings me to step 3 of the inquiry (see [20]).

59 I begin by winnowing the chaff from the wheat. Firstly, the disputes about who was responsible for the delays faced by the Project were not relevant here. In their submissions, the parties discussed five different delays[23] and sought to ascribe responsibility for these delays to each other. These ranged from delays due to late permit approvals to delays due to alleged soil instability issues. I do not need to engage in a tedious examination of who is to blame for each of these delays. That is a genuine dispute between the parties and

[23] AWS Appendix 1 at p 75 and RWS pp 53 – 64 para 110

ultimately for the arbitration. The only delay that I will consider is the delay associated with Mr. Seah's passing. I will consider that below at [67].

60 Secondly, CEX submitted that assuming that Mr. Ng had been validly appointed as the architect, he had failed in his duties.[24] The breaches that CEY complained of were traceable to the architect's failure to carry out his duties, rather than CEX's own actions. Accordingly, it was unconscionable for CEY to base its bond call on delays which CEX was not responsible for. I found this argument to be irrelevant as well.

61 When restraining a call on a performance bond on the ground of unconscionability, a court must look at the *beneficiary's* conduct. An architect's actions are not relevant unless he is an agent of the beneficiary. Whether the architect is an agent of the developer (in this case, CEY) or not depends on the nature of the duty that the architect is exercising at the relevant time: *Hiap Hong & Co Pte Ltd v Hong Huat Development Co (Pte) Ltd* [2001] 1 SLR(R) 458 at [35] ("*Hiap Hong*"). Under the standard terms and conditions of the contract, the architect "acts as the servant or agent of the building owner [or developer] in supplying the contractor with the necessary drawings, instructions, levels and the like and in supervising the progress of the work and in ensuring that it is properly carried out.": *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51 at 78[25], as quoted in *Hiap Hong* at [32]. When the architect is called on to exercise his independent judgment and issue certificates however, he cannot be the agent of the developers/building owners: *Hiap Hong* at [35].

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24 AWS pp 44 – 53, paras 107 – 125

25 Applicant's Bundle of Authorities Tab 16

62 I first consider situations when the architect was acting as CEY's agent. CEX pointed to the architect's alleged failure to supply drawings and instructions to CEX in a timely manner. This alleged failure supposedly prevented CEX from discharging its contractual obligations. This is simply another expression of the same disputes outlined above at [59]. It returns to the question of who was responsible for the delays. That question is merely a genuine dispute between the parties and best left for arbitration. Insofar as the architect was expected to act independently, the architect's alleged errors are not attributable to CEY. As such, the architect's conduct in the following matters is simply irrelevant in determining whether *CEY* had acted unconscionably:

(a) issuance of the Termination Certificate on supposedly erroneous grounds; [26]

(b) issuance of Notice to Proceed on allegedly faulty factual bases;[27]

(c) allegedly unreasonable issuance of Notice to Proceed;[28] and

(d) allegedly reckless denials of extension of time.[29]

63 Of course, if CEY had been put on notice about something improper about the architect's certification process and had proceeded to call on the bond regardless, there may very well be an argument that CEY had acted unconscionably. That however, is not CEX's case. It argued merely that CEY

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26 AWS p 39 para 91

27 AWS pp 54-55 para 127

28 AWS pp 56 – 57 paras 131-133

29 AWS p 50 para 119(d); pp 66 – 67 paras 162–167.

did not "profess any direct knowledge of whether Mr. Ng had actually satisfied himself, and verified the facts of the matter. [CEY's managing director] only assumed that Mr. Ng had done so".[30] I see nothing wrong with that. In these circumstances, CEY is entitled to rely on the architect's certificates.

64 All this assumes that Mr. Ng was a validly appointed architect to begin with. He was not authorised at all. This brings me to a proper consideration of the factors that lead me to my finding that the bond call was unconscionable.

65 I first consider the allegations of collusion between Mr. Ng and CEY. To that end, CEX pointed to: (a) the timing of the Termination Certificate and the Notice of Termination;[31] and (b) the fact that Mr. Ng had not been visibly involved in the project in any manner prior to 7 January 2019.[32] I was not persuaded by these arguments.

66 As stated earlier at [5], the Notice of Termination was issued the day after the Termination Certificate was issued. While the dates were close to each other, it would be wildly speculative to say that this suggests some sort of conspiracy between CEY and Mr. Ng. In the same vein, I agree that Mr. Ng's role in the Project prior to 7 January 2019 (if any at all) was muted at best. But I fail to see how this suggests that he carried out his job recklessly and further, that he did it as part of a conspiracy with CEY. Even if I took all this circumstantial evidence in its totality, I am not convinced that there is even a *prima facie* case of conspiracy. The probative value of the evidence simply falls short. Of course, when further evidence is adduced at arbitration, there may very

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30 AWS p 51 para 122

31 AWS p 62 para 149

32 AWS p 61 para 146

well be proof of such a conspiracy. At this interlocutory stage however, this is simply not established on a *prima facie* level.

67 What made the bond call unconscionable was that CEY itself was responsible for at least part of the delays faced by the Project. It failed to appoint an architect as it was obliged to do under s 8(2)(*a*) of the Act. I have also established that when Mr. Seah took ill on 7 January 2019, the permits issued under s 6 of the Act automatically lapsed. CEX therefore had no valid permit under which it could continue works legally. CEY, having contributed to a delay it complained of, should be restrained from having the benefit of this performance bond.

68 More importantly, a beneficiary simply cannot rely on an illegality when calling on a performance bond. CEY cannot penalise CEX for failing to continue works when it was illegal to do so. I found this unconscionable and accordingly restrained the call.

69 I acknowledge CEY's arguments that CEX had carried on works even in the interim period before another architectural qualified person was appointed.[33] CEY contended that it therefore lies foul in CEX's mouth to now argue that it had been illegal to carry on with construction works during that interim period.

70 This argument seems attractive at first glance. However, I am not convinced that CEX had actually carried on works during the interim period, as CEY claimed. Indeed, CEY itself asserted that CEX had not done any work.

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33 RWS pp 85–86 paras 151–154

That is the whole basis for CEY's termination of CEX's contract. The termination was founded on allegations that CEX had *not* carried out works with proper diligence. Indeed, even the Termination Certificate which CEY relied on alleged that as of 19 February 2019, CEX had "failed and [was] still failing to proceed with due diligence or expedition in its Works".[34] In fairness, CEX's case is just as inconsistent as CEY's. On one hand, it argued that it could not have carried out the works since there was no valid permit subsisting at that time. On the other, it argued that "[f]rom 11 January 2019, CEX had, in compliance with the Notice to Proceed, been carrying out works as best as it could".[35] At best, it is simply unclear whether CEX had carried on works in the interim period or not. This would appear to be another question for the arbitration between the parties.

71 What *is* clear however, is that the permit had lapsed and that Mr. Ng had issued a Notice to Proceed on 11 January 2019. What is also clear is that the failure to comply with this notice, a notice that urged CEX to do something illegal, was relied on in Mr. Ng's Termination Certificate. This Termination Certificate was ultimately relied on when terminating CEX's employment and the employment termination was in turn, relied on when calling on the bond. The bond call was therefore rooted in illegality.

Conclusion

72 For the reasons above, I granted an injunction restraining the call and awarded costs to CEX.

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34 SKK p 130

35 AWS p 59 para 140

Lee Seiu Kin
Judge

Tan Shien Loon Lawrence, Chan Ying Keet Jasmine and Poonaam Bai (Eldan Law LLP) for the applicant;
Yeo Teng Yung Christopher (Legal Solutions LLC) for the 1st respondent;
Phua Cheng Sye Charles (Comlaw LLC) for the 2nd respondent.
