IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 11

Originating Summons No 726 of 2018

Between

Ryobi Tactics Pte Ltd

… *Plaintiff*

And

(1) UES Holdings Pte Ltd
(2) AXA Insurance Pte Ltd

… *Defendants*

Originating Summons No 727 of 2018

Between

Ryobi Tactics Pte Ltd

… *Plaintiff*

And

(1) UES Holdings Pte Ltd
(2) Tokio Marine Insurance Singapore Ltd

… *Defendants*

GROUNDS OF DECISION

[Building and Construction Law] — [Building and construction related contracts] — [Guarantees and bonds]

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27 November 2018

22 January 2019

Kannan Ramesh J:

Introduction

1 Originating Summons No 726 and 727 of 2018 ("OS 726" and "OS 727" respectively) were applications by the plaintiff for injunctions to restrain the first and second defendants from calling on various performance bonds or from making payment under those performance bonds, as the case may be. The first defendant was the beneficiary and the second defendants were the issuers of the relevant performance bonds. The questions for determination in both applications essentially related to: (a) whether the relevant performance bond could extend to projects under subcontracts other than the subcontract pursuant to which the performance bond was given, and (b) whether the calls were unconscionable.

2 After hearing submissions from the parties, I allowed the plaintiff's applications in both OS 726 and OS 727, save with respect to performance bond GH000284 in OS 727. The first defendant has since filed appeals against the outcome of both applications, and I now give the grounds for my decision.

Background facts

3 The plaintiff was engaged by the first defendant as a subcontractor for three different construction projects, for which a total of four subcontracts were entered into between the plaintiff and the first defendant. Under cl 5.2 of the respective subcontracts, the plaintiff was required to furnish the first defendant with a performance bond in lieu of a cash deposit. Eventually four performance bonds were issued by the second defendants in OS 726 and OS 727, AXA Insurance Pte Ltd ("AXA") and Tokio Marine Insurance Singapore Ltd ("Tokio Marine") respectively. A summary of these projects and the relevant performance bonds is as follows:

Project	**Performance Bond**	**Sum insured**	**Issuer**	**Application**
Second Changi NEWater Plant ("the Changi project")	P1589424	$722,683.89	AXA	OS 726
	GG017457	$130,000.00	Tokio Marine	OS 727
Jurong Water Reclamation Plant Project ("the Jurong project")	GG017454	$503,332.80	Tokio Marine	

Chestnut Avenue Waterworks Project ("the Chestnut project")	GH000284	$234,000.00	Tokio Marine	

The Changi project had two performance bonds because there were two subcontracts.

4 All the performance bonds were on-demand bonds and in the form prescribed by the first defendant, containing in all material aspects the following clause:

> AND WHEREAS the Sub-Contractor is required under the Sub-Contract to pay … of the total value of the Sub-Contract as a Security Deposit for the performance of his obligations under the Sub-Contract.
>
> Now in consideration of the Main Contractor not insisting on the Sub-Contractor paying … of the total value of the Contract as a security deposit for the said Sub-Contract, we [AXA/Tokio Marine] (at the request of the Sub-Contractor) hereby agree as follows:
>
> 1. We unconditionally and irrevocably undertakes and covenants [*sic*] to pay in full forthwith upon demand in writing any sums or sums that may from time to time be demanded by the Main Contractor up to a maximum aggregate sum of … without requiring any proof that the Main Contractor is entitled to such sum or sums under the Sub-Contract or that the Sub-Contractor has failed to execute the Sub-Contract or is otherwise in breach of the Sub-Contract. Any sum or sums so demanded shall be paid forthwith by us unconditionally, without any deductions whatsoever and notwithstanding the existence of any differences or disputes between the Main Contractor and the Sub-Contractor arising under or out of or in connection with the Sub-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.

5 On 14 May 2018, the first defendant wrote to both AXA and Tokio Marine to call on the four performance bonds. The calls were for the full value of the performance bonds.

Parties' cases

Plaintiff's case

6 The plaintiff firstly argued that the calls on the performance bonds were fraudulent and/or unconscionable. The calls were fraudulent and unconscionable because the real reason for the calls on the performance bonds was the first defendant's dire financial situation, and not because there were defects with the plaintiff's work. The plaintiff emphasised that it was engaged to carry out temporary earth works for the three projects. The temporary earth works had been replaced subsequently by permanent structures. Accordingly, with the erection of the permanent structures and the removal of the plaintiff's temporary works, there could no longer be any defects relating to the work performed by the plaintiff.

7 The Changi project in particular had been completed in August 2016, and the plaintiff had not been notified of any breach of its obligations under the two subcontracts. The plaintiff's works in relation to the Jurong project had similarly been completed sometime in February 2018, and the first defendant had made no claims save for requests that the plaintiff reinstate the road curbs and paint the road surface. The plaintiff had tried to comply with those requests but could not do so, as the first defendant had failed to respond to certain queries from the plaintiff. Further, even if the plaintiff was required to pay the first defendant for any reinstatement works in relation to the Jurong project, this would only be in the sum of $79,077.02, rendering the call on the full value of the performance bond (GG017454) unconscionable.

8 As for the Chestnut project, the plaintiff objected to the first defendant's claim that the plaintiff had breached its obligations and caused losses estimated at over $4.5m, as the works that the first defendant had required the plaintiff to carry out were beyond the scope of the Chestnut project subcontract. The alleged losses caused to the Chestnut project were also a result of the collapse of sheet piles on site, which was caused by the first defendant's own breaches. In any case, the first defendant still owed the plaintiff a sum of at least $158,502.79 for outstanding invoices and a further $234,000.00 in retention moneys, and as such the call on GH000284 for its full value was unconscionable.

9 The plaintiff also argued that to the extent the first defendant was seeking to call on all four performance bonds to set off its claims against the plaintiff in respect of the Chestnut project, it was not entitled to do so, as the three subcontracts for the Changi and Jurong projects did not confer on the first defendant the right to call on the performance bonds issued under those subcontracts for losses suffered in relation to other projects. Thus, the first defendant was not entitled to call on the performance bonds for the Changi and Jurong projects to recover losses suffered in relation to the Chestnut project, even though the four subcontracts for all three projects were similarly worded. The first defendant's reliance on cl 17.1 of the Special Conditions of the subcontracts ("cl 17.1", see below at [31]) was equally misguided, as the right to set-off therein was limited to moneys due to the plaintiff under the subcontract or other contracts but did not extend to calling on the performance bonds.

10 Further, the plaintiff argued that the terms of the performance bonds also made clear that they were only meant to secure performance of the plaintiff's obligations under the respective subcontracts. The plaintiff relied on the

decision of the Court of Appeal in *Chip Hua Poly-Construction Pte Ltd v Housing and Development Board* [1998] 1 SLR(R) 544 ("*Chip Hua Poly-Construction*") to argue that performance bonds must be construed within their four corners, and could not extend to other subcontracts between the plaintiff and first defendant. The plaintiff also pointed to AXA and Tokio Marine's confirmation that they did not as a matter of practice provide cross-guarantee performance bonds.

11 The second defendants, AXA and Tokio Marine, took positions that seemed to be largely aligned with that of the plaintiff's. AXA and Tokio Marine pointed out that when the plaintiff approached them to obtain the performance bonds, the proposal pertained to only the specific projects concerned, and as such the performance bonds were issued pursuant to the specific subcontracts for those projects. In other words, the performance bonds were project-specific. AXA also argued that the first defendant's reliance on cl 17.1 was misplaced, as it was a clause in the subcontracts, to which AXA was not a party, and not the performance bonds. Thus, the first defendant could not rely on cl 17.1 as against AXA and Tokio Marine.

First defendant's case

12 The first defendant argued that the calls on the four performance bonds were not unconscionable or fraudulent, and emphasised that they were on-demand bonds, which should be treated as good as cash.

13 As regards the Chestnut project where the plaintiff was a specialist subcontractor for earth retaining stabilising structure works, the first defendant highlighted that the plaintiff's incomplete backfilling had caused a sheet pile collapse which in turn led to the Building and Construction Authority issuing

an immediate stop-work order that was lifted only about three months later. This caused a delay of at least five months to the Chestnut project. Thus, the plaintiff was liable to compensate the first defendant for all losses flowing from the sheet pile collapse, including liquidated damages for delay and rectification costs, the sum total of which was at least $4,581,463.24.

14 The first defendant's argument in substance appeared to be as follows. An on-demand performance bond was as good as or equivalent to cash. The calls on the four performance bonds therefore had the effect of converting the bonds into cash. Pursuant to cl 17.1 of the subcontracts, the first defendant had a right of set-off against any moneys due from the first defendant to the plaintiff under any contract between them. The cash resulting from the calls on the performance bonds therefore enabled the first defendant to exercise its right of set-off under cl 17.1 against the same, as they were moneys due to the plaintiff from the first defendant. In short, the first defendant argued that the plaintiff's complaint that each performance bond must expressly allow for a demand to be made for a default on another subcontract, or cross-guarantee liabilities thereunder, was misguided, because the calls *were not made* pursuant to the default of another subcontract, but instead to facilitate the set-off under cl 17.1 by turning each bond into cash. I had grave difficulty with first defendant's argument.

15 In the alternative, the first defendant argued that even if it had misinterpreted cl 17.1, that did not necessitate drawing an inference of unconscionability such as would warrant the court's intervention, as the call on an on-demand performance bond should not be restrained simply because of a genuine dispute as to whether a clause in the underlying contract applied. Whether cl 17.1 allowed the first defendant to apply a set-off in the manner that it had done was a matter of genuine contractual dispute that was for the arbitrator

to decide. Courts should only interfere with the machinery of irrevocable obligations assumed by financial institutions in exceptional circumstances as such obligations are the life-blood of international commerce.

16 Lastly, the first defendant also argued that injunctive relief, being an equitable remedy, should not be granted as the plaintiff did not come with clean hands. The plaintiff had failed to make full and frank disclosure and had omitted to mention in the affidavits various pertinent facts such as the stop-work order issued by the Building and Construction Authority. The first defendant also alleged that the plaintiff was disingenuous in not drawing any distinction between the call on the performance bond for the Chestnut project, which was entirely uncontroversial, and the call on the three performance bonds for the other projects.

Legal principles and issues for determination

17 It is settled law that a call on a performance bond can be restrained on the basis of unconscionability. The Court of Appeal has in the case of *BS Mount Sophia Pte Ltd v Join-Am Pte Ltd* [2012] 3 SLR 352 ("*Mount Sophia*") established various guiding principles on what might justify a finding of unconscionability. Thus, it has been said that the concept of unconscionability generally covers acts involving abuse, unfairness, and dishonesty, but is broader than the notion of fraud (*Mount Sophia* at [19], [23]).

18 The parties had spent a significant portion of their written submissions on the issue of unconscionability and had framed their arguments based on the threshold of unconscionability. However, there was a prior crucial issue which had to be resolved before one even considered the question of unconscionability, and that was whether the performance bonds in question

were engaged in the first place. This was squarely an issue of construction of the terms of the performance bonds. It was pertinent that the first defendant had conceded, and indeed it was common ground, that the calls on the four performance bonds were in relation to the purported losses that the first defendant had suffered on the Chestnut project. In other words, the calls on the performance bonds issued under the subcontracts for the Changi and Jurong projects were made *not* for any losses suffered on those projects, but instead *solely for losses in relation to the Chestnut project*. Thus, the first question that had to be answered was whether the terms of the performance bonds allowed for a call to be made for the consolidated liabilities under all four subcontracts for the Changi, Jurong and Chestnut projects. It could not be seriously disputed that if the performance bonds were not meant to be triggered in such circumstances, then the first defendant would have no entitlement to call on the performance bonds, and an injunction restraining that call ought to be granted. In such circumstances, the issue of unconscionability does not even enter the picture. On the flipside, if the terms allowed for the amalgamation or consolidation of liabilities, then there would be no real basis for the plaintiff to argue that the calls were unconscionable.

19 Thus, before any analysis of unconscionability is undertaken, the prior question was whether on a true construction of the performance bonds, the first defendant was entitled to call on each of them for the consolidated liabilities in relation to the three projects. This analysis should, for reasons which I will explain below, be distinct from a construction of the terms of the underlying subcontracts.

My decision

The call on GH000284 and the Chestnut project

20 Whereas the plaintiff had not distinguished in its written submissions between the four performance bonds that formed the subject matter of OS 726 and OS 727, it was clear that GH000284 stood apart from the other three performance bonds, as it was issued pursuant to the subcontract for the Chestnut project, over which the parties had a genuine dispute as to whether damages were owed (see above at [8] and [13]). The plaintiff conceded this during the hearing in response to a specific question from the court. There was thus no issue of cross-guarantees or cross-defaults on consolidation of liabilities in relation to other projects. The plaintiff had no room to argue that the call on GH000284 did not extend to losses suffered under the relevant subcontract, *ie* the Chestnut project. It is trite that the existence of genuine disputes between the parties is not sufficient to constitute unconscionability (*Mount Sophia* at [42]; *Eltraco International Pte Ltd v CGH Development Pte Ltd* [2000] 3 SLR(R) 198 ("*Eltraco"*) at [32]; *LQS Construction Pte Ltd v Mencast Marine Pte Ltd and another* [2018] 3 SLR 404 at [32]). It should also be kept in mind that a court hearing an application to restrain the call on an on-demand performance bond is not obliged to undertake a protracted examination of the merits of the case or to decide on substantive entitlements of the parties to enforce their rights, but rather it should consider whether the overall tenor and context of the parties' conduct point to a strong *prima facie* case of unconscionability (*Mount Sophia* at [40]).

21 In the circumstances, and without undertaking a protracted examination of the merits of the parties' respective claims on the Chestnut project, I was of the opinion that the plaintiff had not shown that there was a strong *prima facie*

case of unconscionability in the call of GH000284. The first defendant asserted that it had suffered losses in excess of $4.5m in relation to the Chestnut project, and the plaintiff did not draw my attention to anything that suggested this figure was unwarranted. There was no evidence before me that suggested that the call on GH000284 was motivated by anything other than the first defendant's desire and entitlement to recuperate its perceived losses in relation to the Chestnut project. The rest of the analysis that follows hereafter thus pertains to the remaining three performance bonds, which related to the Changi and Jurong projects.

Was the first defendant entitled to call on the remaining three performance bonds?

22 As I mentioned earlier, the prior question relating to the scope and applicability of the remaining three performance bonds must first be answered, notwithstanding the fact that the performance bonds were on-demand bonds. Thus, for example, if an on-demand performance bond was stipulated to be effective only during a particular time frame, then calls made after the expiry of that time frame would be ineffective and ought to be restrained. Similarly, where a performance bond expressly related to a contract between the beneficiary and party X, that beneficiary would not be entitled to call on the performance bond for the breach of a contract between the beneficiary and parties X and Y jointly (see *eg*, *Chip Hua Poly-Construction)*. In such circumstances, the court need only apply usual contractual principles in determining the scope and applicability of the relevant performance bond, and need not engage in an analysis of unconscionability.

23 For the avoidance of doubt, this approach should not be taken as undermining the principle that on-demand performance bonds are generally

seen as readily realisable security and that courts should be slow to disturb the allocation of risk bargained for by commercially-minded parties (*Mount Sophia* at [25]; *Eltraco* at [30]). However, where a performance bond arises expressly out of a particular contractual relationship, calls made on the basis of other contractual relationships would clearly fall outside of the scope of the performance bond as this would not have been within the contemplation of parties at the time of contracting unless the terms specifically allowed for it. Such a call should be restrained on the basis that it is invalid, just as a call on a performance bond which stipulates formal requirements would be restrained in the absence of strict compliance with those requirements (see *eg*, *Pender Development Pte Ltd v Chesney Real Estate Group LLP and another and another suit* [2009] 3 SLR(R) 1063 ("*Pender Development"*); *Master Marine AS v Labroy Offshore Ltd and others* [2012] 3 SLR 125 ("*Master Marine"*) at [31]; *China Resources (S) Pte Ltd v Magenta Resources (S) Pte Ltd* [1997] 1 SLR(R) 103). This does not undermine the *raison-d'être* of on-demand performance bonds as readily realisable security, but gives effect to the intention of the contracting parties and upholds commercial certainty.

Did the performance bonds in question extend to losses under other subcontracts?

24 In this regard, the first port of call in determining whether the first defendant had any recourse under the respective performances bonds should be the terms of the performance bonds themselves, as distinct from the terms of the underlying contract. Thus, the Court of Appeal in *Chip Hua Poly-Construction* opined as follows at [13]:

> Whatever may be the construction that is placed on cl 14 [of the underlying contract], on which we express no opinion, the fact remains that the bond had been provided in lieu of the deposit as security for the performance of the contract, and the terms

> of the bond should be construed, where the words are clear, within the four corners and in the context of that instrument.

This is consistent with the principle that an issuer of a performance bond must honour the bond according to its terms, and is not concerned with the parties' underlying contract (see *eg*, *Edward Owen Engineering v Barclays Bank International* [1978] QB 159 at 171, discussed in Low Kee Yang, *The Law of Guarantees in Singapore and Malaysia* (LexisNexis Butterworths, 2nd Ed, 2003) at pp 362–363; Poh Chu Chai, *Guarantees and Performance Bonds* (LexisNexis, 2nd Ed, 2012) at pp 575–576). Further, the Court of Appeal has held in *Master Marine* (at [35]) that the first demand performance bond is "one such document where the court should be restrained in its examination of the external context and extrinsic evidence":

> …First, like a standard form contract, "the presumption [is] that all the terms of the agreement between the parties are contained in the contract": see *Zurich* at [110]. As already mentioned at [26] above, the primary role of a performance bond in commerce is to ensure expediency in payment. At the time the call is made, both the beneficiary and bank need to be able to determine quickly if the demand is valid simply *by looking at the bond instrument itself*. There should not be a need for cross-references to be made to the underlying contract to determine the ambit of the condition precedents, *etc*. Secondly, performance bonds are most commonly used in commercial contexts, particularly in the construction industry and in the area of international trade. Parties to these transactions 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. It would thus be reasonable to expect that parties ordinarily intend for each of these contracts to contain *all* the terms of the respective parties' agreements.
>
> [emphasis in original]

25 There were certain parallels between the present case and the case of *Pender Development,* although neither party referred to it in submissions. In *Pender Development,* the parties had entered into a series of oral and written

agreements for the exclusive marketing of a property that was to be redeveloped. The parties also entered into a separate loan agreement which included a condition precedent that the borrower procures an insurance bond. The insurance bond provided by the bank however made no express reference to the loan agreement, but rather made reference in its preamble to an agreement relating to the property redevelopment project. When the loan agreement was breached, the beneficiary of the insurance bond claimed against the issuer bank under the insurance bond. The court held that as the insurance bond expressly referred to an agreement other than the loan agreement, the bank's obligation to pay under the insurance bond was not triggered by the alleged breach of the loan agreement, and opined at [17] as follows:

> 17 Counsel for Chesney LLP [*ie,* the beneficiary] submitted that "[o]n plain reading, the Insurance Bond is shown to be in respect of the Loan Agreement". With respect to learned counsel, I am unable to agree. *It is important in* [*sic*] bear *in mind that, save in exceptional circumstances, it is necessary to observe strict compliance with the conditions stipulated in a performance bond which trigger the financial institution's obligation to pay. This is so as to ensure a high degree of certainty necessary for the functioning of such institutions* (see Poh Chu Chai, *Law of Pledges, Guarantees and Letters of Credit* (LexisNexis, 5th Ed, 2003) at p 867). In this instance, *on a plain reading of the wording of the Insurance Bond, it is clear that there is no direct reference to the Loan Agreement.* Instead, in the recital, reference is made to an agreement entered into between Bravo and Chesney LLP on 3 July 2007. This could not have been the Loan Agreement (for it was not even in existence on that date) or any other agreement for that matter (for it was common ground that there was no agreement between Chesney LLP and Bravo dated 3 July 2007). Second, the agreement referred to in the Insurance Bond was not described as a loan agreement. Instead, it was described in cl 1 as an agreement for the "Design & Build for New Erection of Condominium Development … On Lot 01904X MK1 [Pender Court]". For these reasons, *ex facie*, there was no reference to the Loan Agreement…
>
> [emphasis added]

26 In the present case, it was clear that the performance bonds were each issued in respect of a particular project and a particular subcontract entered into for that project. Thus, each performance bond had as its subject the project name of the particular project to which it related, and started with a preamble pertaining to that project and subcontract. For example, GG017457 began as follows:

> RE: Mobilization Of Equipment, Supply Of Materials, Installation, Extraction And All Related Works Of Earth Retaining Structure System (ERSS) In Area 1 For Second Changi NEWater Plant Design-Build-Own-Operate Project
>
> …
>
> WHEREAS on the 18th day of October 2015 (Two Thousand and Fifteen) an Agreement (hereinafter called "the Sub-Contract") was made between [the plaintiff] (hereinafter called "the Sub-Contractor") of the one part and [the first defendant] (hereinafter called "the Main Contract") of the other part whereby the Sub-Contractor agreed to execute and complete the Mobilization Of Equipment, Supply Of Materials, Installation, Extraction And All Related Works Of Earth Retaining Structure System (ERSS) In Area 1 For Second Changi NEWater Plant Design-Build-Own-Operate Project for the sum of Singapore Dollars One Million And Three Hundred Thousand Only (S$1,300,000.00).
>
> AND WHEREAS the Sub-Contractor is required under the Sub-Contract to pay ten percent (10%) of the total value of the Sub-Contract as a Security Deposit for the performance of his obligations under the Sub-Contract.
>
> Now in consideration of the Main Contractor not insisting on the Sub-Contractor paying ten percent (10%) of the total value of the Contract as a security deposit for the said Sub-Contract, we Tokio Marine Insurance Singapore Ltd. (at the request of the Sub-Contractor) hereby agree as follows…

27 It was clear from the preamble of each performance bond that the "Sub-Contract" was defined as the subcontract for a particular project. The operative clause of the performance bond (quoted above at [4]) then continued to make reference to that "Sub-Contract". Further, the guarantee period under each performance bond took reference from the date on which the respective

subcontract was entered into, or the date on which the performance bond was signed. Crucially, the guaranteed sum was also clearly a percentage of the total value of the specific subcontract (5% for the Chestnut project and 10% for the rest), as follows:

Project	**Performance Bond**	**Sum insured**	**Subcontract value**	**Guarantee Period**	**Date of Subcontract**
Changi project	P1589424	$722,683.89	$7,226,838.95	9/3/2015 – 30/9/2018	26/1/2015
	GG017457	$130,000.00	$1,300,000.00	18/9/2015 – 30/11/2018	18/10/2015
Jurong project	GG017454	$503,332.80	$5,033,328.00	29/7/2015 – 12/7/2018	29/7/2015
Chestnut project	GH000284	$234,000.00	$4,680,000.00	25/11/2015 – 31/10/2019	25/11/2015

28 Not only were there repeated references to the specific subcontract and project to which each performance bond related, there was also clearly no mention of any right of the first defendant to call on the bond in satisfaction of sums due under other subcontracts. The decision of the Court of Appeal in *Chip Hua Poly-Construction* once again provided guidance in this regard. In that case, the terms of the performance bond stipulated that the beneficiary could call on the bond in satisfaction of moneys due from the contractor to the beneficiary under the provisions of any contract made between the contractor and the beneficiary. The Court of Appeal granted the appeal to restrain the call

on the performance bond, as the beneficiary sought to recover losses on contracts which the contractor had entered into *jointly* with another company. In doing so, the Court of Appeal held that "clear words must be used" if the bond was intended to extend to *joint liability*. Similarly, in the present case, clear words would have to be used if the performance bonds were intended to extend to liability arising from other subcontracts.

29 Further, it did not appear to be in dispute that as far as AXA and Tokio Marine were concerned, the performance bonds were issued only for the projects mentioned in the performance bonds.

30 The above pointed to one inevitable conclusion – that it was clear on the terms of the performance bonds that they related to particular subcontracts for the respective projects, and not to other subcontracts for other projects. Thus, it was clearly contemplated by the parties that the first defendant would only be able to call on a particular performance bond in connection with matters arising out of the corresponding subcontract.

Did the underlying subcontracts allow for the calling on the bonds of other subcontracts?

31 As the performance bonds were unambiguous in that they were made in relation to specific subcontracts and specific projects, I did not think that it was necessary to look to the terms of the subcontracts. The first defendant has relied extensively on cl 17.1 of the subcontracts, which provided as follows:

> 17. Right of Set-off
>
> 17.1 The Main Contractor shall notwithstanding anything contained in this Sub-Contract Agreement be entitled to deduct from or set-off against any monies due or become due to the Sub-Contractor under the Sub-Contract (including without limitation any Retention Sum) or under any other contract whatsoever between the Main Contractor and the Sub-

> Contractor for any sum or damage…, charges, expense…, liability, debt or financial loss suffered by the Main Contractor due to or arising from the negligence, default, breach or omission of the Sub-Contractor arose [*sic*] under the Sub-Contract or any other contract whatsoever between the Main Contractor and the Sub-Contractor.

However, since the performance bonds were not ambiguous, there was no room to expand the scope of those performance bonds by reference to cl 17.1 or other provisions in the underlying subcontracts (see above at [24]).

32 In any case, even if cl 17.1 were relevant and could in any way widen the scope of the terms of the performance bonds, I did not think it helped the first defendant's case in justifying the call on the three performance bonds. Clause 17.1, on a plain reading, entitled the first defendant to apply a set-off, for losses suffered under any contract between the first defendant and the plaintiff, *against moneys due or becoming due to the plaintiff*. I did not agree that this meant that the first defendant could call on all four performance bonds to set off its perceived losses under the Chestnut project. The sums insured under each performance bond were not moneys due or becoming due to the plaintiff. In fact, it might even be said that the inverse is true – as the first defendant was the beneficiary of the performance bonds, the sums thereunder were sums that might become due *to the first defendant*, if a legitimate call was made on those bonds. Hence, it made no sense to speak of the sums insured under the bonds as being moneys due or becoming due *to the plaintiff*, against which the first defendant could exercise a right of set-off pursuant to cl 17.1. In this regard, the first defendant's argument that the sums insured under the performance bonds were cash substitutes, against which such right of set-off could be exercised, was equally unconvincing. Not only would this argument fail at the same hurdle that any such cash substitute was a sum due *to the first defendant*, this argument in this particular context also puts the cart before the

horse – if there was no right to call on the performance bonds in the first place, then the sums insured thereunder could not in any meaningful sense be seen as cash against which a right of set-off could be exercised. Indeed, the first defendant's argument could only be rationalised, if at all, on the basis that the payment was to be treated as wrongly made. In such a situation, the first defendant would be obliged to refund the payment under the bond. It seemed quite extraordinary to read cl 17.1, as the first defendant did, as facilitating the first defendant's right of set-off on the basis of a wrongful call on the bond. Apart from a matter of contractual interpretation, this would surely raise related issues of unconscionability. I discuss this at [36] below.

33 For similar reasons, the first defendant's reliance on *Tactic Engineering Pte Ltd (in liquidation) v Sato Kogyo (S) Pte Ltd* [2017] SGHC 103 was equally unconvincing, as that case can clearly be distinguished from the present. In that case, the beneficiary called on a performance bond partly because the contractor owed money under a different contract. Crucially however, the performance bond in that case was issued specifically in consideration for the beneficiary releasing retention sums back to the contractor, and where the parties agreed to set off the money owed under that separate contract against the retention sums. There was thus some scope for the beneficiary to argue in that case that in calling on the performance bond, it was exercising its right to set off the money owed under the separate contract against the retention sums owing to the contractor.

34 Further, even if the subcontracts were relevant to the question of whether the first defendant was entitled to call on the performance bonds, cl 5.6(b) of the subcontracts suggested that the call on the performance bonds was intended to be in relation to the plaintiff's breach of the specific subcontract rather than the *other* subcontracts:

> 5.6 The Main Contractor
>
> …
>
> (b) shall be entitled to make a demand under the performance bond for such amount as the Main Contractor may deem appropriate at any time after the Sub-Contractor neglects or fails in any way to observe, carry out, fulfil or discharge any of its obligations *under this Sub-Contract* or any representation or warranty by the Sub-Contractor *under this Sub-Contract* is or becomes untrue or incorrect or is breached in any respect. Without prejudice to the foregoing, in the event that the Sub-Contractor shall neglect or fail in any way to observe, carry out, fulfil or discharge any of its obligations, the Main Contractor shall be entitled to make a demand under the performance bond… and to utilise such amounts at any time to settle any sum due from the Sub-Contractor to the Main Contractor *in connection with this Sub-Contract*.
>
> [emphasis added]

35 Thus, it was clear, both on the face of the performance bonds as well as the subcontracts, that the first defendant was not entitled to call on the three performance bonds for the Changi and Jurong projects for its alleged losses suffered in relation to the Chestnut project. The calls on the three performance bonds thus ought to be restrained purely on an application of contractual principles. For completeness, however, I shall address whether the calls should in any case be restrained on the ground of unconscionability.

Were the calls unconscionable in the circumstances?

36 Notwithstanding the independence of a performance bond from the underlying contract, it should be clear that if a call on the performance bond was made in breach of the underlying contract, such call could in the appropriate circumstances be restrained on grounds of unconscionability. This appears to be supported by the authority in *Kvaerner Singapore Ltd v UDL Shipbuilding (Singapore) Pte Ltd* [1993] 2 SLR(R) 341, wherein G P Selvam JC held (at [8]) that a party could be restrained from calling on a performance bond where he

had avoided the underlying contract and "seeks to take advantage of the performance guarantee where by his own volition he fails to perform a condition precedent". This has been interpreted by subsequent authorities as standing for the proposition that it would be unconscionable to allow a beneficiary to make a call based on a breach of an underlying contract induced by their own default (see *eg, Dauphin Offshore Engineering & Trading Pte Ltd v The Private Office of HRH Sheikh Sultan bin Khalifa bin Zayed Al Nahyan* [2000] 1 SLR(R) 117 at [46]). Thus, it has been said that an increasing corpus of common law authorities suggests that a call upon a performance bond ought to be restrained where "the principal contract itself imposes some precondition or limitation which has not been satisfied", and that such restriction in the underlying contract on the beneficiary's right to call upon the bond need not be an express one (see Wayne Courtney, John Phillips & James O'Donovan, *The Modern Contract of Guarantee* (Thomson Reuters, 3rd Ed, 2016) at paras 13-026–13-028). In the present case, given the express wording of cl 5.6(b) of the subcontracts which indicated that the parties intended the performance bonds to be called when the first defendant had reason to believe that the corresponding subcontract had been breached, allowing the call in other circumstances would be to condone the breach of the relevant subcontract.

37 On an alternate analysis and without having regard to the terms of the subcontracts, I was also convinced that the calls on the three performance bonds were unconscionable because the first defendant was in essence attempting to dip into the security of other projects when it only had the belief that it had legitimate claims in respect of the Chestnut project. Allowing the first defendant to treat the separate performance bonds as parts of a bigger whole would be to allow it to circumvent the restrictions on quantum in the performance bond for the Chestnut project (GH000284). The calls on the three other performance

bonds ought thus to be restrained as the first defendant did not have an honest belief that there was any non-performance in respect of the underlying subcontract. In this regard, the observations of the Court of Appeal in *GHL Pte Ltd v Unitrack Building Construction Pte Ltd and another* [1999] 3 SLR(R) 144 at [24] (cited in *Mount Sophia* at [27]) were relevant:

> …We agree that performance bonds are used frequently in the construction industry; that they are provided by and to parties who deal at arm's length; that the use of performance bonds has resulted in substantial benefits to the parties and also in savings; that the courts should give effect to the intention of the parties; and that the law in relation to performance bonds should be placed on 'a clear and unambiguous footing' so that they could be accepted by parties whether in Singapore or abroad. But, with respect, these are not the points involved with which we are concerned. We are concerned with abusive calls on the bonds. It should not be forgotten that a performance bond can operate as an oppressive instrument, and in the event that a beneficiary calls on the bond in circumstances, where there is *prima facie* evidence of fraud or unconscionability, the court should step in to intervene at the interlocutory stage until the whole of the circumstances of the case has been investigated. *It should also not be forgotten that a performance bond is basically a security for the performance of the main contract,* and as such we see no reason, in principle, why it should be so sacrosanct and inviolate as not to be subject to the court's intervention except on the ground of fraud. We agree that a beneficiary under a performance bond should be protected as to the integrity of the security he has in case of non-performance by the party on whose account the performance bond was issued, but a *temporary restraining order does not prejudice or adversely affect the security; it merely postpones the realisation of the security until the party concerned is given an opportunity to prove his case…*
>
> [emphasis added]

38 The first defendant had sought to argue that it did have an honest and genuine belief that it was entitled to call on the performance bonds due to its right of set-off, and as such there should be no finding of unconscionability even if it turned out that the first defendant was mistaken as to its entitlement due to a misinterpretation of cl 17.1. However, I could not agree with this argument.

The proposition that genuine disputes did not render a call unconscionable refers to *genuine disputes as to whether the underlying subcontracts were breached*, not genuine disputes as to a *legal entitlement* to call. To hold otherwise would be to engage in fallacious reasoning. The first defendant did not honestly believe and had not asserted that the plaintiff had breached its obligations with regard to the Changi or Jurong projects. Indeed, it had conceded that the calls had everything to do with the Chestnut project only. Thus, there were no genuine disputes as to any breach of the Changi and Jurong project subcontracts. That the first defendant erroneously believed that it could call on the performance bonds of those other projects due to the plaintiff's breaches in respect of the Chestnut project could not justify the call, as it would render the justification entirely circular. Thus, it was clear that the first defendant could only avail itself of this argument if it had an honest belief that its entitlement to call on the performance bonds of the Changi and Jurong projects stemmed from the plaintiff's perceived breaches of the Changi and Jurong subcontracts. The following observations in *Mount Sophia* (at [52]), which similarly concerned an on-demand performance bond, are apposite:

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

[emphasis added in bold italics]

The observations in the above quote applied *a fortiori* in this case – this was not a case in which the first defendant purported to have had an honest belief that the plaintiff was in breach of its obligations in respect of the subcontracts for the Changi and Jurong projects. The evidence before me was that the parties were primarily in dispute over the plaintiff's purported breach of the subcontract for the Chestnut project. This was a case where the first defendant misread and misinterpreted the terms of the performance bonds and the subcontract. Such misinterpretation on the first defendant's part was not a genuine dispute.

Conclusion

39 In conclusion, for the foregoing reasons, I did not think that the first defendant was entitled to call on the three performance bonds for the Changi and Jurong projects for its alleged losses in respect of the Chestnut project. For completeness, I also did not find that the plaintiff had acted in bad faith as would justify denying it the remedy sought. I thus allowed the plaintiff's applications for injunctions restraining the call of those performance bonds. The injunction did not apply to GH000284, which was for the Chestnut project.

40 I ordered costs for OS 726 to be paid by the first defendant to the plaintiff and AXA, fixed at $6,000 and $4,000 respectively and reasonable disbursements. Costs of OS 727 were ordered to be paid by the first defendant to the plaintiff fixed at $3,000 and reasonable disbursements. No costs were awarded to Tokio Marine as it had largely adopted a neutral position at the hearing before me.

Kannan Ramesh
Judge

Steven John Lam Kuet Keng and Madeline Choong (Templars Law LLC) for the plaintiff;
Ang Minghao, Looi Ming Ming and Goh Ee Hua (Eldan Law LLP) for the first defendant;
Wu Lennon Leong Chong (Gurbani & Co LLC) for the second defendant in OS 726;
Daryl Ong Hock Chye (LawCraft LLC) for the second defendant in OS 727.