IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC 1

Originating Summons No 335 of 2021

Between

Goldbell Engineering Pte Ltd

… *Plaintiff*

And

Etiqa Insurance Pte Ltd

… *Defendant*

And

Range Construction Pte Ltd

… *Third Party*

Originating Summons No 745 of 2021

Between

Range Construction Pte Ltd

… *Plaintiff*

And

(1) Goldbell Engineering Pte Ltd
(2) Etiqa Insurance Pte Ltd

… *Defendants*

JUDGMENT

[Abuse of Process] — [Inconsistent positions]
[Res Judicata] — [Issue estoppel]
[Res Judicata] — [Extended doctrine of res judicata]
[Contract] — [Contractual terms]
[Banking] — [Performance bonds]
[Credit and security] — [Guarantees and indemnities] — [Contracts of indemnity]

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Goldbell Engineering Pte Ltd
v
Etiqa Insurance Pte Ltd
(Range Construction Pte Ltd, third party) and another matter

[2022] SGHC 1

General Division of the High Court — Originating Summons No 335 of 2021 and Originating Summons No 745 of 2021
Ang Cheng Hock J
12 November 2021

5 January 2022 Judgment reserved.

Ang Cheng Hock J:

1 The two sets of proceedings before me are a continuation of a dispute concerning an *ex parte* interim injunction that a construction company obtained on 29 November 2019 which restrained the employer from requesting an extension of a performance bond from the bond issuer and also from receiving any money under that bond. In February 2021, I had set aside the interim injunction pursuant to an application made by the employer. In the course of the setting aside hearing, I was informed by counsel that the employer and the construction company were already engaged in arbitration over their various disputes. But, in these present proceedings, parties are yet again before me on matters relating to the interim injunction, and re-treading familiar territory as to the effect and the proper construction of the performance bond. One of the questions that is posed to me is whether I should grant a fresh injunction in

relation to the performance bond to restrain the payment out of the bond sum to the employer, despite having set aside the previous injunction. All this may sound rather confusing, so I shall start by explaining how parties ended up in this rather perplexing situation.

Background to the dispute

The parties

2 The plaintiff in Originating Summons No 335 of 2021 ("OS 335") and the first defendant in Originating Summons No 745 of 2021 ("OS 745") is Goldbell Engineering Pte Ltd ("Goldbell"). It is the employer of a project known as "Proposed Design and Erection of a 6-Storey Single-user Workshop with Ancillary Office on Lots 01642A & 01880P (Plot A) Mukim 07 at No. 8 and 10 Tuas Avenue 18 Singapore" ("the Project").[1]

3 By a letter of award dated 19 April 2017, Goldbell entered into a $19m contract ("the Contract") with Range Construction Pte Ltd ("Range") to appoint it as the Project's main contractor.[2] Range is the third party in OS 335 and the plaintiff in OS 745.

4 Under the Contract, Range had an option of providing Goldbell with a cash deposit of 20% of the contract price, *ie*, $3.8 million, or a performance bond of that same amount, to secure the due performance of its contractual obligations.[3] Range opted to procure the issuance of a performance bond. This was duly issued by Etiqa Insurance Pte Ltd ("Etiqa") in favour of Goldbell on

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1 Affidavit of Vincent Teh Eng Huat in Originating Summons No 335 of 2021 ("Mr Teh's OS 335 Affidavit") at para 5.

2 Mr Teh's OS 335 Affidavit at para 7.

3 Mr Teh's OS 335 Affidavit at pp 581–582.

21 June 2017 ("the Bond").[4] Etiqa is the defendant in OS 335 and the second defendant in OS 745.

Relevant terms of the Bond

5 Clause 4 of the Bond provided that it would expire upon the first of either (a) the original of the Bond being returned by Goldbell to Etiqa, accompanied by a written notice from Goldbell that it is to be cancelled, or (b) 30 November 2019, unless further renewed or extended by Etiqa in writing.

6 Clause 1 of the Bond deals with the situation where Goldbell may make a call for payment under the Bond for sum or sums up to the maximum aggregate amount of $3.8m, which is the secured amount, and for Etiqa to make payment on an "on demand" basis. Clause 1 provides:[5]

> In consideration of [Goldbell] not insisting on [Range] paying **twenty per cent (20%)** of the Contract Sum as security deposit for the Contract, [Etiqa] hereby irrevocably and unconditionally undertakes and covenants to pay in full immediately upon demand in writing any sum or sums that may from time to time be demanded by [Goldbell] up to a maximum aggregate sum of **Singapore Dollars Three Million and Eight Hundred Thousand Only (S$3,800,000.00)** without requiring any proof that [Goldbell] is entitled to such sum or sums under the Contract or that the Contractor has failed to execute the Contract or is otherwise in breach of the Contract.
>
> [emphasis in original]

7 Clause 6 of the Bond, which was the main subject of contention in the various proceedings before me, both present and past, provides that:[6]

> Without prejudice to the other provisions of [the Bond], [Goldbell] shall be at liberty to demand at any time that [Etiqa]

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4 Mr Teh's OS 335 Affidavit at pp 583–584.

5 Mr Teh's OS 335 Affidavit at p 583.

6 Mr Teh's OS 335 Affidavit at pp 584.

> either extend the validity period of [the Bond] or, **in lieu of such extension by [Etiqa], make payment forthwith**. In the event that [Etiqa] chooses to extend the validity period of [the Bond], [Etiqa] shall, forthwith and in any event not later than 5 days of [Goldbell's] demand, issue to [Range] a fresh performance bond in the same terms and conditions as [the Bond] including this clause for extension, save and except that the validity period of such fresh performance bond shall be that a [*sic*] stated in the said demand by [Goldbell].
>
> [emphasis added in underline and bold underline]

8 Hence, if Goldbell makes a request pursuant to cl 6 of the Bond for it to be extended, Etiqa may either extend the validity period of the Bond or, if Etiqa chooses not to so extend, pay the secured sum to Goldbell.

The disputes under the Project

9 The Project was beset by disputes between Goldbell and Range over the delay in the completion of the works and allegations of defective work which failed to comply with contractual requirements. The allegations of defective work included: the installation of electrical systems that were non-compliant with the contractual and statutory requirements, functional problems with the fire protection system which rendered it non-compliant with statutory requirements, water seepage issues caused by failure of waterproofing systems, poor workmanship that chronically plagued the Project, and unsatisfactory polyurethane flooring that was defective and failed to comply with contractual specifications.[7] In an affidavit filed for earlier proceedings, Goldbell claimed that all of these defects remained unrectified.[8]

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7 Affidavit of Evidence-in-Chief of Vincent Teh Eng Huat in Suit No 1235 of 2019 ("Mr Teh's Suit 1235 AEIC") at paras 98–130.

8 Mr Teh's Suit 1235 AEIC at para 102.

10 The works were not completed by the contractual completion date of 7 September 2018, which had been extended from the initial contractual completion date of 31 August 2018.[9] Goldbell took the position that Range was in delay and that liquidated damages started to accrue from 8 September 2018 (inclusive) onwards.[10] Goldbell eventually took over the building in February 2019, but it claimed that this was without prejudice to its claim that the works were not completed in accordance with the Contract and that liquidated damages continued to accrue.[11]

11 Eventually, there was a meeting on 14 February 2019 between Mr William Chua, the chairman of the Goldbell group, and Mr Tan Yeow Khoon, the chairman of the Soon Hock Group (of which Range is a part), to discuss matters.[12] There is some evidence that, at this meeting, the two chairmen had agreed out of goodwill to fix the completion date on that day, *ie* 14 February 2019, so as to "freeze" the accruing of liquidated damages due from Range, but on the condition that Range would expeditiously carry out rectification works for all outstanding defects.[13]

12 With the deemed completion date being 14 February 2019, Goldbell's case is that the maintenance period for the Project ran for its stipulated one year until 13 February 2020, according to the terms of the Contract.[14] At a meeting between Goldbell's and Range's representatives on 22 October 2019 ("the 22

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9 Mr Teh's Suit 1235 AEIC at paras 35–38.

10 Mr Teh's Suit 1235 AEIC at paras 149–152.

11 Mr Teh's Suit 1235 AEIC at paras 43–44.

12 Mr Teh's Suit 1235 AEIC at para 158.

13 Mr Teh's Suit 1235 AEIC at para 158.

14 Mr Teh's Suit 1235 AEIC at para 158.

Oct 2019 Meeting"), it appears from the minutes of that meeting that there was a consensus between the two sides that the maintenance period was still ongoing, and that Range would follow up with the rectification of the defects during this period.[15] The minutes also recorded that Range had agreed to extend the validity period of the Bond, which was due to expire on 30 November 2019, to cover the length of the maintenance period, *ie*, until 13 February 2020.[16]

13 After the 22 Oct 2019 Meeting, Range followed up with its insurance brokers, Acorn International Network Pte Ltd ("Acorn"), to ask for the premium that was payable for an extension of the Bond's validity period to 13 February 2020.[17] Eventually, though, it appears that Range decided not to agree to any extension of the validity period of the Bond. It follows from this that Etiqa would not have extended the Bond's validity period, given that Etiqa would have had to obtain a fresh indemnity from Range before it would agree to any extension of the Bond.

The interim injunction

14 From 4 November 2019 to 25 November 2019, Goldbell chased Range to confirm that the Bond's validity period would be extended.[18] Save for an email reply from Range's representative Mr Dave Soh ("Mr Soh") sent on 4 November 2019 that he will "check … and revert … [as soon as possible]",[19] Range subsequently did not respond to these chasers until 28 November 2019,

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15 Mr Teh's Suit 1235 AEIC at paras 163–166.

16 Mr Teh's Suit 1235 AEIC at paras 165–166.

17 Mr Teh's Suit 1235 AEIC at para 169.

18 Mr Teh's Suit 1235 AEIC at paras 171–175; 5th Affidavit of Vincent Teh Eng Huat in Suit No 1235 of 2019 ("Mr Teh's 5th Suit 1235 Affidavit") at paras 27–31.

19 Mr Teh's Suit 1235 AEIC at para 171 and p 1034.

when Mr Soh sent an email to Goldbell's representative Mr Vincent Teh in terms which Goldbell described as an obvious rejection of any notion that the Bond would be extended.[20]

15 On 29 November 2019, the day before the Bond was due to expire, Goldbell wrote to Etiqa to request for an extension of the Bond ("the Extension Request").[21] This was a short letter, which simply stated:[22]

> [p]usuant to paragraph 6 of [the Bond], we require [Etiqa] to extend the validity of [the Bond] to 13th February 2020. In lieu of the extension, you can make payment of Singapore Dollars Three Million Eight Hundred Thousand (S$3,8000,000.00) in favour of [Goldbell].

16 On that same day, 29 November 2019, Range commenced Suit No 1235 of 2019 ("Suit 1235") in the High Court against Goldbell and Etiqa.[23] At the same time, Range also filed an *ex parte* application for an interim injunction, which was supported by a 987-page affidavit from Mr Soh ("Mr Soh's Affidavit").[24] Range's counsel managed to get an urgent hearing before the duty judge at 5.00 pm that same day. A few hours' notice of the *ex parte* application was given to Goldbell.

17 At the hearing before the duty judge, which was attended only by counsel for Range, counsel was able to convince the court of the need for the interim injunction. The duty judge, Andrew Ang SJ, thus ordered, *inter alia*,

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20 Mr Teh's Suit 1235 AEIC at para 175 and p 1040; Mr Teh's 5th Suit 1235 Affidavit at para 31.

21 Mr Teh's 5th Suit 1235 Affidavit at para 18.

22 Mr Teh's 5th Suit 1235 Affidavit at p 220.

23 Mr Teh's OS 335 Affidavit at para 15.

24 1st Affidavit of Dave Soh Chong Wee in Suit No 1235 of 2019 ("Mr Soh's 1st Suit 1235 Affidavit").

that (a) Goldbell was restrained from "renewing or extending" the validity of the Bond and from receiving any sum under the Bond, and (b) Etiqa was restrained from "renewing or extending" the validity of the Bond and from paying any sum under the Bond to Goldbell, pending the determination of Range's and Goldbell's liability towards each other under the Contract.[25]

18 As mentioned, Range had filed a writ of summons and commenced Suit 1235, instead of simply filing an originating summons as one might have expected. In Suit 1235, the relief sought was a permanent injunction to restrain Goldbell and Etiqa from extending or making payment under the Bond, pending the determination in arbitration of the substantive disputes between Goldbell and Range.[26] The basis of Range's relief was that the Extension Request was unconscionable and/or fraudulent.

19 Goldbell defended Suit 1235. It denied that the Extension Request was unconscionable or fraudulent. It claimed that it had a proper basis to make the Extension Request given that the maintenance period under the Contract was still ongoing.[27] As for Etiqa, it did not file any pleadings or otherwise participate in the action, as it claimed that the dispute was one between Goldbell and Range. Etiqa stated that it would abide by any orders made by the court.[28]

20 In spite of the "circuit-breaker" period from April to June 2020 due to the COVID-19 pandemic, Suit 1235 proceeded expeditiously. By August 2020, the court had given directions for the trial dates for the suit to be fixed in March

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25 Mr Teh's OS 335 Affidavit at p 94.

26 Mr Teh's OS 335 Affidavit at pp 96–97.

27 Mr Teh's OS 335 Affidavit at pp 138–144.

28 1st Affidavit of Choo Choy Hoong in Originating Summons No 335 of 2021 ("Mr Choo's 1st OS 335 Affidavit") at para 8.

2021. Parties were also due to file and exchange their affidavits of evidence-in-chief ("AEICs") of both their factual and expert witnesses in December 2020.

21 Then, on 21 September 2020, Goldbell filed its application in Summons No 4065 of 2020 ("SUM 4065") to set aside the interim injunction. Goldbell also included in SUM 4065 a prayer for a declaration that Goldbell is entitled to be paid by Etiqa, and Etiqa is obliged to pay Goldbell, the sum of $3.8m ("Prayer 2"). SUM 4065 was fixed to be heard before me on 25 January 2021.

22 On 23 October 2020, Goldbell also made an application in Summons No 4652 of 2020 ("SUM 4652") for Range to provide security for costs for Suit 1235. This was on the basis that Range was allegedly insolvent. In its supporting affidavit for SUM 4652, Goldbell referred to Range's audited financial statements filed on 2 January 2020 (that it had obtained with the assistance of its solicitors) which indicated that Range had suffered losses in the financial year ending 30 June 2018, which were significantly in excess of its assets, and so Range was balance-sheet insolvent and current-asset insolvent. According to Goldbell, Range's auditors opined that this was a "material uncertainty which may cast significant doubt about [Range's] ability to continue as a going concern".[29]

23 Given that it was of the view that Range was insolvent, Goldbell also made an application in Summons No 4660 of 2020 ("SUM 4660") for Range to fortify its undertaking to pay damages, which had been given when it applied for the interim injunction.

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[29] 6th Affidavit of Vincent Teh Eng Huat in Suit No 1235 of 2019 ("Mr Teh's 6th Suit 1235 Affidavit") at paras 17–19.

24 Goldbell's application for security for costs was granted by an assistant registrar ("AR"), who ordered Range to furnish security in the amount of $250,000 for the costs of the action. Range filed Registrar's Appeal No 286 of 2020 ("RA 286") against that decision. RA 286 was fixed together to be heard with SUM 4660. Both matters were heard by me on 2 December 2020.

The hearing on 2 December 2020

25 At the start of the hearing on 2 December 2020, lead counsel for Goldbell, Mr Jimmy Yim SC ("Mr Yim"), informed me that he had obtained the oral confirmation of Etiqa's counsel, Mr Charles Phua ("Mr Phua"), that Etiqa would be releasing the secured sum under the Bond, *ie* $3.8 million, to Goldbell, in the event that it was either successful in SUM 4065, which was Goldbell's application to set aside the interim injunction, or if Goldbell successfully defended Suit 1235.[30] Mr Yim had also written to the court earlier that same day (2 December 2020) to enclose an exchange of correspondence between himself and Mr Phua regarding Etiqa's position on the Bond.[31] Mr Yim also stated that this would have some impact on Goldbell's application for fortification of Range's undertaking to pay damages in SUM 4660.[32]

26 As neither Mr Phua nor any other counsel acting for Etiqa was present at the hearing on 2 December 2020, and because I was of the view that Etiqa's position on the Extension Request was relevant to Goldbell's application to set aside the interim injunction, I thus directed Goldbell and Range to inform Mr

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30 Transcript, 2 Dec, p 1 lines 29–31; p 2 lines 1–5 in Mr Teh's OS 335 Affidavit at pp 231–232.

31 Mr Teh's OS 335 Affidavit at pp 38–39.

32 Transcript, 2 Dec, p 2 lines 23–26 in Mr Teh's OS 335 Affidavit at p 232.

Phua to attend the hearing for the setting aside application,[33] which was scheduled for 25 January 2021.

27 Counsel then proceeded with their arguments for the various matters fixed before me on 2 December 2020.

28 For the arguments on RA 286, which was Range's appeal against the order that it furnish security for costs for Suit 1235, counsel for Range, Mr Tan Chee Meng SC ("Mr Tan"), argued that the AR had erred in exercising her discretion to order security for costs. Mr Tan made some submissions that there was insufficient evidence to show that Range was insolvent. I was not impressed with these arguments.

29 What was more persuasive, however, was Mr Tan's main argument in RA 286 that, since Goldbell would be assured that the sum of $3.8m would be paid under the Bond if it were to succeed in defending Suit 1235, the court should not exercise its discretion to order any security for costs, even if the court was of the view that Range was insolvent. This is because Goldbell was more than adequately secured. In this regard, Mr Tan specifically referred to Etiqa's confirmation, through Mr Phua, and as conveyed to the court by Mr Yim earlier, that it would pay the sum of $3.8m under the Bond to Goldbell if the application to set aside the interim injunction succeeded, or if Suit 1235 was eventually dismissed.[34]

30 When I queried Mr Tan whether, if the interim injunction was set aside, Range might make the argument some lesser sum than $3.8m should be paid by

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[33] Transcript, 2 Dec, p 2 lines 9–18 in Mr Teh's OS 335 Affidavit at p 232.

[34] Transcript, 2 Dec, p 39 lines 17–27 in Mr Teh's OS 335 Affidavit at p 269.

Etiqa under the Bond, instead of the full secured sum of $3.8m, his reply to me was: "It's all or nothing as far as we are concerned and I can state that firmly as our position, alright".[35] Mr Tan also confirmed that Range would not take any objection to the payment of $3.8m by Etiqa to Goldbell, even if the court found that Goldbell's claims against Range under the Project fell below $3.8m, and even if Goldbell was seeking to apply the difference to the payment of legal costs of Suit 1235.[36] Mr Tan was quite emphatic; he stated: "I honestly cannot see why the issue of [$3.8m] is limited to damages and [liquidated damages]".[37]

31 Mr Christopher Chong ("Mr Chong"), who appeared with Mr Yim, was counsel who made the oral arguments for Goldbell for RA 286. Given the unequivocal position taken by Mr Tan that Goldbell's claims under the Project and its legal costs if it succeeded in Suit 1235 were fully secured by sum of $3.8m, Mr Chong had to accept in the course of his submissions that: "if Mr Tan holds that position … in that sense we are secured for the money".[38]

32 Given the position taken by both counsel, and with their consent, I deferred my decision on RA 286, until 25 January 2021, which had been fixed as the date for the hearing of SUM 4065, when I could hear directly from Etiqa's counsel as to whether Etiqa would indeed make payment of the secured sum of $3.8m to Goldbell if the interim injunction was indeed set aside or if Suit 1235

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35 Transcript, 2 Dec, p 41 lines 28–30; p 42; p 43 lines 1–5 in Mr Teh's OS 335 Affidavit at pp 271–273.

36 Transcript, 2 Dec p 43 lines 24–30; p 44 lines 1–7; p 45 lines 5–19 in Mr Teh's OS 335 Affidavit at pp 273–275.

37 Transcript, 2 Dec, p 50 lines 4–6 in Mr Teh's OS 335 Affidavit at p 280.

38 Transcript, 2 Dec, p 51 lines 22–23 in Mr Teh's OS 335 Affidavit at p 281.

was dismissed.[39] In the meantime, I granted a stay on the order by the AR that security was to be provided by Range.

33 Counsel then turned their attention to SUM 4660, which was Goldbell's application for fortification of Range's undertaking in support of the interim injunction. Mr Yim, on behalf of Goldbell, submitted that it had been fully justified in filing the application for fortification of Range's undertaking to the court to pay damages, given the evidence that had recently become available about Range's precarious financial position.[40] However, given Mr Phua's confirmation to him that Etiqa would pay on the Bond if the interim injunction was set aside, or if Suit 1235 was dismissed, Mr Yim accepted that it was no longer necessary for Goldbell to pursue the application for fortification.[41] Thus, the only issue before me was the question of costs.

34 Mr Tan, on behalf of Range, argued, *inter alia*, that Goldbell should have clarified with Etiqa much earlier as to the latter's position on the Bond. He argued that Goldbell should have checked with Etiqa *before* taking out the application for fortification and, if that had been done, the application would not have been necessary. Since the application had been needlessly taken out by Goldbell, Mr Tan argued that it should pay for Range's "costs thrown away".[42]

35 In response, Mr Yim suggested that I hold back my decision on the costs of the application for fortification until the next hearing on 25 January 2021,

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39 Transcript, 2 Dec, p 53 lines 21–30; p 54 lines 1–8 in Mr Teh's OS 335 Affidavit at pp 283–284.

40 Transcript, 2 Dec, p 56 lines 22–24 in Mr Teh's OS 335 Affidavit at p 286.

41 Transcript, 2 Dec, p 60 lines 23–30; p 61 lines 1–10 in Mr Teh's OS 335 Affidavit at pp 290–291.

42 Transcript, 2 Dec, p 67 lines 1–19 in Mr Teh's OS 335 Affidavit at p 297.

when I could hear directly from Mr Phua on Etiqa's position.[43] That would also allow Goldbell to confirm its stand that there was no need for any requirement of fortification given that Etiqa would pay on the Bond if the interim injunction was eventually set aside. Mr Tan agreed to this suggestion.[44] As such, I deferred my decision on the costs of SUM 4660 until 25 January 2021.

The hearing on 25 January 2021

36 Parties appeared before me on 25 January 2021, which was the date fixed for the hearing of SUM 4065, *ie*, Goldbell's application to set aside the interim injunction.

37 Mr Phua attended the hearing as counsel for Etiqa. At the start of the hearing, I called upon Mr Phua to inform the court of Etiqa's position. I reproduce the relevant excerpt from the transcript of the hearing below:[45]

Court:	Alright, so Mr Phua, can you tell me what is [ETIQA's] position?
Mr Phua:	Yes, Your Honour. [ETIQA's] position is that they have issued an unconditional bond, so when the bond is called, then they are liable to pay. So in this instance, they are not paying because---
Court:	Wait, wait, wait. What do you mean by they have issued an unconditional bond, they are liable to pay? The request by [Goldbell] was for an extension and your option---your client's option, if they don't want to extend is to pay. So what do you mean by that they have made a call on the bond?

43 Transcript, 2 Dec, p 69 lines 5–25 in Mr Teh's OS 335 Affidavit at p 299.

44 Transcript, 2 Dec, p 70 line 8 in Mr Teh's OS 335 Affidavit at p 300.

45 Transcript, 25 Jan, p 2 lines 7 to 32; p 3; p 4 line 1 in Mr Teh's OS 335 Affidavit at pp 405–407.

Mr Phua: No, my starting premise is that the bond that was issued by [ETIQA] to [Goldbell] is an unconditional bond.

Court: Yes

Mr Phua: **What has happened was that [Goldbell] had made a request for an extension of the bond or in lieu of the extension, payment for the sum under the bond, which is 3.8 million**. Once that notice was sent, then the injunction was obtained, and so my clients were restricted in terms of extending or making any payment under the bond. So that's [ETIQA's] position. Now obviously, **if the injunction is set aside, then the obligation under the bond to make payment becomes material**.

Court: Okay. No, but my question is the way the [order for the interim injunction] is phrased, it sort of says that, if I recall correctly, that [Goldbell] is prevented or restrained from asking for any extension.

…

So what is the position? I mean does ETIQA take the position that, you know, once it's expired, that's the end of it, there's nothing to extend because it expired or does ETIQA take the position that if the injunction is set aside, they will either extend or pay?

Mr Phua: That's correct. That's the position that [ETIQA] [is] taking. If the injunction is set aside, then they will have the right to either extend or to pay pursuant to Clause 6 of the bond.

Court: No, but extend until when?

Mr Phua: Okay, this current---in the letter seeking for extension, they have requested for the extension be until 13th of February, but that date has clearly passed.

Court: Yes.

Mr Phua: **So, but as it stands the position [ETIQA] is that there was already a notice put in for an extension of a call. So, given that the time for the extension sought has already passed, then if the injunction is set aside, then I**

> **think [ETIQA's] position would be they have to pay under the bond**.
>
> Court: What do you mean by you think? I mean what is the position? Can we have a confirmed position?
>
> Mr Phua: **The position of [ETIQA] is that if the injunction is set aside, then they will make payment of 3.8 million to [Goldbell]**.
>
> Court: And you have your client's instructions to convey that to the Court?
>
> Mr Phua: Yes, I have already spoken to them about this and I told them that Your Honour request a position to be taken today.
>
> Court: Okay. Alright, so anything else you want to add, Mr Phua? I mean I wanted to understand where ETIQA is, and I think you have clarified that.
>
> Mr Phua: No, nothing else.
>
> [emphasis added in underline and bold underline]

38 Hence, it is quite clear that Etiqa had, through its counsel, undertaken to the court that, if the interim injunction was set aside, it would make payment of the secured sum of $3.8m under the Bond to Goldbell pursuant to the Extension Request which it had made on 29 November 2019.

39 On that basis, I subsequently allowed Range's appeal in RA 286 against the AR's decision to order security for costs. I discharged the order that Range had to pay security for the costs of Suit 1235 in the amount of $250,000. I also granted leave to Goldbell to withdraw its application in SUM 4660 for fortification of Range's undertaking, with no order as to costs.

40 On 25 January 2021, I also heard Goldbell and Range on their respective cases as to whether the interim injunction should be set aside. The application in SUM 4065 presented three main issues for me to decide. The first was whether it had been unconscionable for Goldbell to have made the Extension

Request on 29 November 2019. The second was whether Goldbell had behaved fraudulently by issuing the Extension Request. The third was whether Range had been guilty of failure to make full and frank disclosure when it applied for the interim injunction on an *ex parte* basis. The arguments took a full day, after which I reserved judgment.

The decision on SUM 4065

41 I gave my decision on the application to set aside the interim injunction by way of an oral judgment, which I delivered on 18 February 2021 ("Judgment").[46]

42 I rejected the arguments made by Range that the Extension Request was in truth a call on the Bond in full (see Judgment at [5]). In my view, all Goldbell had done was to request for an extension of the Bond's validity period until 13 February 2020. This was in accordance with the terms of cl 6 of the Bond, which granted Goldbell the contractual right – as between itself and Etiqa – to "be at liberty to demand at any time … that [Etiqa] either extend the validity period of [the Bond] or, in lieu of such extension by [Etiqa], make payment forthwith". It was then up to Etiqa to choose to decide whether to extend, or make payment of that secured sum to Goldbell, which would then be held as security by Goldbell until the end of the maintenance period. As such, I could not agree with Range's argument that Goldbell had made a call on the Bond via the Extension Request.

43 I also did not accept Range's arguments that Goldbell had acted fraudulently or unconscionably (see Judgment at [13]). On the strength of the

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[46] Mr Teh's OS 335 Affidavit at pp 556–574.

affidavit evidence before me, there was support for Goldbell's case that the completion date had been agreed with Range to be on 14 February 2019 so as to "freeze" the accruing of liquidated damages due from Range for the delay in the completion of the Project. This agreement was subject to the condition that Range would expeditiously carry out rectification of all outstanding defects (see [11] above). There was therefore some basis for Goldbell's belief that the maintenance period for the Project ran from 14 February 2019 to 13 February 2020, according to cl 20.1 read with Appendix 1 of the "REDAS Design and Build Conditions of Main Contract", which was incorporated as part of the Contract's terms.[47]

44 Goldbell also referred to the minutes of the 22 Oct 2019 Meeting (see [12] above), where there appeared to be consensus between Goldbell and Range that the maintenance period was still ongoing, and that was why Range stated at the meeting that it was prepared to procure an extension of the Bond. Under the terms of the Contract between Range and Goldbell, the Bond was required to remain in place until one month after the completion of the maintenance period. It was also disclosed in the affidavits that, subsequent to the meeting of 22 October 2019, Range had approached Acorn, its insurance brokers, to ask for the premium that was payable to Etiqa for an extension of the Bond's validity period to 13 February 2020 (see [13] above). This extended validity date was the same as that in the Extension Request made by Goldbell on 29 November 2019. Those facts lent credence to Goldbell's arguments that the parties had indeed agreed to extend the Bond's validity period until the end of the maintenance period (see Judgment at [14]).

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47 Mr Teh's Suit 1235 AEIC at pp 157 and 179–181.

45 I also noted that it was not open to Range to argue that the maintenance period had ended sometime in September 2019 because the Project had been completed in September 2018 (see Judgment at [15]). This was because of adjudication proceedings between Goldbell and Range that took place after the grant of the interim injunction. In SOP/AA 180 of 2020 ("SOP 180") determined on 28 July 2020,[48] the adjudicator determined that the maintenance period for the project ended either on 14 February 2020 or 22 March 2020 as the handing over certificate ("HOC") ought to have been issued by Goldbell on 14 February 2019 or 22 March 2019, and not at an earlier time in 2018 as claimed by Range. In SOP/ARA 8 of 2020 ("ARA 8") determined on 1 September 2020,[49] which was an adjudication review lodged in respect of the determination in AA 180, the review panel found that the maintenance period expired on 22 March 2020, as the HOC should have been issued on 22 March 2019.

46 There was no question that Goldbell and Range were bound by this determination because of s 21(1) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed). Under that section, the binding effect of an adjudication determination on the parties includes a form of issue estoppel binding the parties in relation to the issues determined by the adjudicator, as the Court of Appeal confirmed in *Samsung C&T Corp v Soon Li Heng Civil Engineering Pte Ltd* [2020] 2 SLR 955 (at [58]).

47 In relation to the status of the defects in the Project, I stated as follows (see Judgment at [22]–[24]):

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48 Mr Teh's 5th Suit 1235 Affidavit at p 1809.

49 Mr Teh's 5th Suit 1235 Affidavit at p 1880.

22 [Range] has also set out a number of lengthy submissions as to the nature of the defects in the Project. Essentially, [Range] argues that the number and severity of defects at the time, and the costs of rectification involved, were not such as to justify a request for an extension of the validity period of the bond. This is hotly contested by [Goldbell]. I noted that parties have filed lengthy AEICs, including from experts, to deal with the nature and severity of the defects, and the estimated costs of rectification. However, I find that [Range's] submissions about the defects miss the crucial point. Given that parties are bound to accept the finding in ARA8 that the maintenance period would not have ended until 22 March 2020, the nature of the defects and the estimated costs of their rectification are not critical to my determination of this application. This is because, under [the Contract] with [Goldbell], [Range] had an option of providing [Goldbell] a cash deposit of 20% of the contract value or a performance bond of that same amount. Whichever course of action was taken, that security was to remain in place until one month after the end of the maintenance period. In fact, as I have already mentioned, [Range] was obliged to ensure that [the Bond] remained valid until *at least* the end of the maintenance period, which would be 22 March 2020. That being the case, I cannot see how the … Extension Request on 29 November 2019 for [the Bond's] validity to be extended until 13 February 2020 can be construed to be conduct which is lacking in good faith.

23 The fact that [Etiqa] might choose to pay the secured sum to [Goldbell] instead of extending the validity of the bond simply brings the parties back to the position under [the Contract], in that any sum paid over will be held as cash security by [Goldbell]. It is of little use for [Range] to complain about such an outcome because that was what the parties had bargained for in [the Contract] as a possible way in which security would be held by [Goldbell]. If [Range] is of the view that the secured sum paid over is then wrongfully retained by [Goldbell] *after* the period to which it is entitled to hold that sum, then the onus is on [Range] to seek recovery of that sum (or any lesser amount) from [Goldbell] in the arbitration that it has now commenced. That was the allocation of risks to which the parties had agreed in their contractual bargain.

24 In this regard, I noted the respective parties' positions in relation to their claims and counterclaims against each other that will be raised in the arbitration. [Range's] position is that it is not obliged to pay liquidated damages to [Goldbell] because there was no delay in the completion of the Project and that the costs of rectification any defects are not substantial. On the other hand, [Goldbell] has a potential claim for over S$5m in liquidated damages for delay in completion of the Project, which

> it is argued had been reinstated by Mr William Chua's letter of 11 October 2019 because [Range] failed to rectify all the outstanding defects by then, allegedly in breach of the 'in principle' agreement reached on 14 February 2019. Added to this, [Goldbell] also has a claim for damages for rectification of defects. These various contentions will be resolved in the arbitration, which is the contractually agreed dispute resolution process. In the arbitration, all the findings in the previous adjudications can be re-visited. My point here is that, from my review of the chronology of events and the correspondence between the parties from the period of September 2018 to November 2019, I am far from being able to conclude that [Goldbell's] conduct and complaints throughout this period leading to the Extension Request had a whiff of malodorousness, or that the high threshold for showing a lack in *bona fides* had been met.

In short, I noted that there were claims and counterclaims between Goldbell and Range about defects and delay. The claims by Goldbell were substantial, and I was of the view that these issues between the parties should be fully and finally resolved in the ongoing arbitration proceedings.

48 In sum, I was not convinced by Range's arguments that the high threshold of showing fraud or unconscionability has been demonstrated.

49 Aside from the above, I also accepted Goldbell's arguments that Range had not made full and frank disclosure of all material facts in its possession when it appeared before the duty judge on 29 November 2019 to argue its application for the interim injunction (see Judgment at [38]). It is trite that an *ex parte* applicant has a duty to make full and frank disclosure of all material facts in its possession at the time of the application. Any fact which the court should take into consideration in making its decision is material (see *The "Vasiliy Golovnin"* [2008] 4 SLR(R) 994 ("*Vasiliy Golovnin*") at [86]). This duty of full and frank disclosure extends as well to defences that might be reasonably raised by the defendant (*Vasiliy Golovnin* at [87]). Mere disclosure of material facts and documents without more or devoid of the proper context

is also insufficient; it is for the applicant's counsel to draw the judge's attention to them in a fair manner (*Vasiliy Golovnin* at [91]–[94]).

50 Upon a review of Mr Soh's Affidavit (see [16] above), which Range filed in support of its *ex parte* application for the interim injunction, counsel's written submissions and the notes of hearing before the duty judge, I found that Range had not set out fairly Goldbell's side of the story in relation to the maintenance period, *ie* that there was an "in principle" agreement to deem completion as having taken place on 14 February 2019, and that the maintenance period was thus still ongoing until 13 February 2020. This was despite Range recognising that the maintenance period issue was material to the question of whether there was a proper request to extend the validity period of the Bond. Counsel for Range also omitted to highlight to the duty judge the relevant contractual clauses which obliged Range to maintain the validity of the Bond until the end of the maintenance period.

51 I also found that certain critical documents were not disclosed in Mr Soh's Affidavit. Chief amongst these was the minutes of the 22 Oct 2019 Meeting. Those minutes record at para 2.1.11 that Range "is prepared to extend the Bond … and will discuss further with [Goldbell] and [Etiqa]". In his oral arguments before me, Mr Tan, on behalf of Range, had candidly acknowledged that these minutes were material, and that it might have been an oversight that the document was not disclosed (see Judgment at [35]).

52 I also found it significant that Mr Soh's Affidavit did not disclose a WhatsApp message from Mr ES Tang, the quantity surveyor for the Project, dated 15 November 2019, reminding Mr Soh to get the Bond extended because at the "last meeting [referring to the 22 Oct 2019 Meeting] [he] mentioned he will extend [the Bond]" (see Judgment at [36]). Further, while a series of email

exchanges from 24 September to 28 November 2019 between Range's staff and its insurance broker, Acorn, was exhibited to Mr Soh's Affidavit (which ran to 987 pages), there was no reference or mention of these email exchanges with Acorn at all in the main body of Mr Soh's Affidavit. I was of the view that Range's counsel ought to have specifically highlighted to the duty judge that these email exchanges indicated that Range had initially considered extending the Bond until 13 February 2020, and explained why that was the case (see Judgment at [36]). In other words, I found that these material facts should been drawn to the attention of the duty judge for his consideration.

53 I should add that I did not accept the omissions in relation to Range's duty of full and frank disclosure were due to inadvertence (see Judgment at [38]). This was because many of the material documents that were not disclosed dealt with the central issue of whether the Bond's validity period ought to be extended, and that was at the forefront of the parties' discussions in the period leading up to Range's *ex parte* application for an interim injunction.

54 For the above reasons, I decided that the interim injunction ought to be set aside, and did so order accordingly.

55 I did not make any order for Etiqa to make payment of the secured amount under the Bond (*ie*, Prayer 2 of SUM 4065: see [21] above). This was only because of Etiqa's undertaking, conveyed by Mr Phua to the court on 25 January 2021, that it would make payment under the Bond to Goldbell if the interim injunction is set aside (see [37] above). In my view, it had been unnecessary for me to make any further order for Etiqa to make payment.

56 After receiving the oral judgment, counsel for Range immediately informed me that they had instructions to file an appeal, and they made an oral

application for an *Erinford* injunction (see *Erinford Properties Ltd and another v Cheshire County Council* [1974] 2 WLR 749 at 755) to restrain any reliance on my decision in SUM 4065 pending the resolution of its appeal. I declined to grant an *Erinford* injunction based on an application that was made orally.

The events after the interim injunction was set aside

Suit 1235 is discontinued

57 As it indicated, Range filed an appeal against my decision to set aside the interim injunction. However, shortly thereafter, it withdrew its appeal.

58 On 10 May 2021, parties appeared before me and I granted Range leave to discontinue Suit 1235 against Etiqa. Range also wanted to discontinue the suit against Goldbell, but there was no agreement between parties on whether costs should be payable by Range to Goldbell, and if so, how much. I thus gave directions for parties to file their respective submissions on costs. On 16 August 2021, after hearing arguments, I granted Range leave to discontinue the action against Goldbell. I also ordered Range to pay Goldbell costs and disbursements for Suit 1235, and fixed those amounts.

Etiqa fails to pay the secured amount under the Bond

59 In the meantime, on 18 February 2021, after the court gave its decision ordering that the interim injunction be set aside, Goldbell's solicitors sent a demand for payment under the Bond to Etiqa's solicitors.[50] However, Etiqa did not make payment despite its undertaking to the court, conveyed on 25 January

[50] Mr Teh's OS 335 Affidavit at para 39.

2021, that it would make payment under the Bond if the interim injunction was set aside (see [37]–[38] above).[51]

60 It now appears that the reason for Etiqa's change of position was a letter that its solicitors received from Range's solicitors, Wong Partnership, that same day, on 18 February 2021 ("the 18 Feb 2021 Letter").[52] In that letter, Wong Partnership referred to the Judgment that I had delivered that morning and stated that the court had not ordered Etiqa to make payment of the sum of $3.8m under the Bond (see also [55] above). Then, Wong Partnership proceeded to state in the 18 Feb 2021 Letter that:

> [w]e hereby put your client, [Etiqa], on notice that in the light of the outcome of SUM 4065, Ang J's Oral Judgment, and the position taken by [Goldbell] that it did not make a call for payment of any monies guaranteed under [the Bond], your client should **not** make any payment to Goldbell. In addition, as your client has never received a call from Goldbell for payment of the monies secured under [the Bond], which has since expired (even assuming [the Extension Request] had been granted), there is therefore no basis for any payment to Goldbell.
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> [emphasis in original]

61 Wong Partnership then proceeded to inform Etiqa's solicitors that, if Etiqa were to make payment under the Bond of any amount to Goldbell, Range would resist any attempt by Etiqa to seek an indemnity from it. In their words, any payment under the Bond by Etiqa would be "at its own risk".

62 As I will explain later (see [107] below), the position taken by Range, as communicated by the 18 Feb 2021 Letter, led to Etiqa deciding not to make payment under the Bond to Goldbell. On 22 February 2021, Etiqa's solicitors,

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51 Mr Teh's OS 335 Affidavit at para 40.

52 Mr Choo's 1st OS 335 Affidavit at pp 24–25.

PKWA Law Practice ("PKWA"), replied to Goldbell's demand for payment ("the 22 Feb 2021 Letter").[53] In that letter, PKWA claimed that Etiqa's previous confirmations to Goldbell's solicitors and to the court that Etiqa would make payment under the Bond was premised on the belief that the Extension Request of 29 November 2019 was "a formal demand for payment under [the Bond]". However, since Goldbell had confirmed at the hearing of SUM 4065 was that it had only made a request for an extension of the Bond's validity period, this meant that Goldbell's position was now different. PKWA proceeded to state in the 22 Feb 2021 Letter that:

> [i]n the circumstances, it is clear that [Goldbell] did not make a call on [the Bond] for payment on 29 November 2019 but merely made a request for an extension of [the Bond] to 13 February 2020. However, by reason of the interim injunction, our clients [Etiqa] were not able to consider [Goldbell's] request for an extension.
>
> Given the fact that [Goldbell] did not take immediate steps to set aside the interim injunction before the expiry of [the Bond], and no call was in fact made under [the Bond] for payment before 30 November 2019, our clients' position is that [the Bond] had since lapsed. Consequently, there is no basis for [Goldbell] to make a demand for payment under [the Bond] now.
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> [emphasis added]

63 Further exchanges of correspondence between Goldbell's and Etiqa's solicitors took place, but Etiqa's position remained the same.[54] It is pertinent to note that Etiqa never denied that PKWA's Mr Phua had confirmed with Goldbell's solicitors prior to the hearing on 2 December 2020 that, if the interim injunction were set aside, Etiqa would make payment under the Bond to Goldbell (see [25] above). Also, Etiqa never denied in any of its correspondence that Mr Phua had conveyed Etiqa's undertaking to the court on 25 January 2021

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53 Mr Teh's OS 335 Affidavit at pp 66–68.

54 Mr Teh's OS 335 Affidavit at pp 69–93.

that Etiqa would make payment under the Bond, if the interim injunction was set aside (see [37]–[38] above).

The present applications

64 On 12 April 2021, Goldbell commenced OS 335 to seek an order that Etiqa make payment under the Bond. In turn, Etiqa applied for and obtained leave to commence third party proceedings against Range, pursuant to which Etiqa seeks an indemnity in the event that Etiqa is ordered to make payment to Goldbell.

65 On 21 July 2021, after being served with the third party notice in OS 335, Range then commenced OS 745. In the latter action, Range applied for a permanent injunction against Goldbell and Etiqa. Specifically, it seeks orders that Goldbell be restrained from receiving any moneys under the Bond, and that Etiqa be restrained from paying any moneys under the Bond.

66 Both matters were fixed to be heard together before me on 12 November 2021.

The parties' cases

Goldbell's submissions

67 Goldbell's case is that it is plain from the language used in the Extension Request, and the position which it had taken consistently in Suit 1235, that all it had sought was an extension of the Bond's validity period under cl 6 of the Bond. As such, Etiqa could have had no doubt as to Goldbell's intentions.[55] In

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[55] Goldbell's Written Submissions for Originating Summons No 335 of 2021 ("Goldbell's OS 335 Submissions") at paras 14–19.

that context, Etiqa had elected not to extend the Bond and instead pay the secured sum of $3.8m to Goldbell.[56] That Etiqa had made such an election was clear from its confirmation given through its counsel, Mr Phua, to Goldbell's lawyers just prior to the hearing on 2 December 2020 (see [25] above), and also when Mr Phua conveyed Etiqa's undertaking to the court on 25 January 2021 that it would pay the secured sum under the Bond to Goldbell if the interim injunction was set aside (see [37]–[38] above).[57] Goldbell argues that it is an abuse of process for Etiqa to attempt to resile from its undertaking to the court.[58]

68 In so far as Range's application for a permanent injunction is concerned, Goldbell argues that Range is precluded by issue estoppel[59] or the extended doctrine of *res judicata*[60] from re-litigating issues such as whether the Extension Request was a call on the Bond, and whether Goldbell is entitled to hold the Bond moneys, if paid to it, as security for its claims since that was the nature of the contractual bargain between Goldbell and Range.

Etiqa's submissions

69 Etiqa argues that, by virtue of the fact that no order was made in SUM 4065 that Etiqa had to pay the secured sum under the Bond to Goldbell, this meant that the court had decided that there was no basis for Prayer 2 in SUM

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56 Goldbell's OS 335 Submissions at paras 28–31.

57 Goldbell's OS 335 Submissions at para 9.

58 Goldbell's OS 335 Submissions at paras 32–38.

59 Goldbell's Written Submissions for Originating Summons No 745 of 2021 ("Goldbell's OS 745 Submissions") at paras 13–22.

60 Goldbell's OS 745 Submissions at paras 23–28.

4065. As such, Goldbell is estopped by the doctrine of *res judicata* from seeking such an order in OS 335.[61]

70 Etiqa also argues that its undertaking to the court on 25 January 2021 is not binding on it because the undertaking was made on its mistaken, but reasonably held, belief that the Extension Request was a call on the Bond, *ie*, one made pursuant to cl 1 of the Bond. Since Goldbell had argued SUM 4065 on the basis that it never made a call on the Bond, but only a request for an extension of the Bond's validity period under cl 6, it follows that Etiqa cannot be held to its undertaking, which had been given on a wholly different premise.[62] Further, now that the Bond has expired, Goldbell can no longer make a call under cl 1 of the Bond, even if it wanted to do so.[63]

71 As for its third party proceedings against Range, Etiqa argues that the court should order Range to fully indemnify it, if an order is made in OS 335 for Etiqa to pay the Bond moneys to Goldbell. Etiqa's claim is made pursuant to the terms of an indemnity that Range had provided to Etiqa in consideration for the latter agreeing to issue the Bond in favour of Goldbell.[64]

Range's submissions

72 Range argues that Goldbell is guilty of approbation and reprobation by arguing it is now entitled to payment under the Bond pursuant to the Extension Request, when it had previously argued in SUM 4065 that it merely requested

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61 Etiqa's Written Submissions for Originating Summonses Nos 335 and 745 of 2021 ("Etiqa's Submissions") at paras 75–84.

62 Etiqa's Submissions at paras 115–121.

63 Etiqa's Submissions at para 105.

64 Etiqa's Submissions at paras 122–124.

for an extension of the Bond's validity period.[65] Range also submits that, on a proper construction of cl 6 of the Bond, that clause provides Etiqa a "true" or "business" option to make payment of the secured amount under the Bond, if it could not extend the Bond. Since Etiqa's "primary obligation" to extend the Bond was "impeded or frustrated" by reason of the grant of the interim injunction before the Bond expired, Etiqa was no longer obliged to exercise its choice to make payment of the secured sum given that the Bond has now expired.[66]

73 Range also argues that the Bond would have long expired, even if Goldbell had been granted the extension it sought.[67] It says Goldbell only has itself to blame for not having taken steps to set aside the interim injunction before the expiry of the period of the extension that it had been seeking.[68] Range also argues that, given that the maintenance period had lapsed sometime in March 2020, Goldbell was now no longer entitled to hold any sum paid under the Bond as security for the due performance of Range's contractual obligations.[69] Range also alleges that it would be unconscionable for Goldbell to be paid the sum of $3.8m under the Bond because, *inter alia*, its claims in the arbitration do not add up to so much.[70]

74 As for Etiqa's claim for an indemnity, Range argues that, if Etiqa is required to make payment under the Bond to Goldbell because of its

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65 Range's Written Submissions for Originating Summonses Nos 335 and 745 of 2021 ("Range's Submissions") at paras 28–36.

66 Range's Submissions at paras 42–61.

67 Range's Submissions at paras 62–67.

68 Range's Submissions at paras 68–70.

69 Range's Submissions at paras 71–87.

70 Range's Submissions at paras 88–120.

undertaking given to the court, then Range should not be required to indemnify Etiqa. This is because any such payment by Etiqa would not be "in connection with [the Bond]" and would not trigger the indemnity that had been given by Range to Etiqa.[71]

The issues

75 As can be seen from the parties' submissions, a number of different issues have been raised. These span from the effect of *res judicata* to the proper construction of cl 6 of the Bond. All these issues, however, are subordinate to the main question which the court must answer. To my mind, that central question is this – should a party who has taken a certain position before the court in relation to a dispute, which led to certain steps being taken by the other parties to the dispute, and which also led to certain decisions made by the court, be permitted to resile from that position in related proceedings, and take a diametrically different position instead?

76 Range argues that Goldbell is taking such inconsistent positions and should be precluded from doing so by the doctrine of approbation and reprobation. In its oral submission in reply, counsel for Goldbell contends that, on the contrary, it is in fact Range that is approbating and reprobating. I also have to consider whether Etiqa is attempting a *volte-face* in respect of its undertaking to the court about its decision to pay over the secured sum under the Bond to Goldbell.

77 It is to this issue of whether the parties are approbating and reprobating that I will first turn. If and when it becomes necessary to do so, I will also deal

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[71] Range's Submissions at paras 128–131.

with the various other issues raised by the parties. However, before I continue, I should add that it is undisputed that Goldbell's demand for payment follows from the Extension Request of 29 November 2019 and what transpired thereafter; it was not a call on the Bond under cl 1 – this was made clear by Goldbell and acknowledged by Range in the affidavits which the parties have filed for these proceedings.[72] This is a point of significance, when considering the parties' submissions, especially in relation to the position which Range seeks to adopt in the present applications.

Approbation and reprobation

The legal principles

78 The doctrine of approbation and reprobation, which is also known as the equitable doctrine of election, precludes a person who has exercised a right from exercising another right which is alternative to and inconsistent with the right he has exercised and the benefits which he has taken before (*Treasure Valley Group Ltd v Saputra Teddy and another (Ultramarine Holdings Ltd, Intervener)* [2006] 1 SLR(R) 358 at [31]). It originates from the principle of equity that a person who accepts a benefit under an instrument must adopt it in its entirety, giving full effect to its provisions and, if necessary, renouncing any other rights which are inconsistent with it (Piers Feltham, Daniel Hochberg & Tom Leech, *Spencer Bower: Estoppel by Representation* (LexisNexis, 4th Ed, 2004) ("*Spencer*") at para XIII.1.10). As the Court of Appeal noted in *BWG v BWF* [2020] 1 SLR 1296 ("*BWG*"), this doctrine has extended into the context of litigation to preclude the adoption by a party of inconsistent positions asserted

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72 Mr Teh's OS 335 Affidavit at paras 3 and 39–44; 1st Affidavit of Dave Soh Chong Wee for Originating Summons No 335 of 2021 ("Mr Soh's 1st OS 335 Affidavit") at para 33.

against the *same* party or *different* parties in *different* proceedings, as long as that party has received an actual benefit as a result of an earlier inconsistent position (at [103] and [118]). While the doctrine does not – unlike the common law doctrine of election – necessarily require the electing party to make a conscious choice between alternative rights and remedies (see *Spencer* at para XIII.1.15), a party's election which gives rise to a prior position must still be reasonably clear to be effective (*Aries Telecoms (M) Bhd v ViewQwest Pte Ltd* [2018] 1 SLR 108 at [5]).

79 The "benefit" that triggers the doctrine is generally constituted by a judgment which that party has obtained in his favour in reliance on his prior (and now inconsistent) position, but there is no further requirement that the resulting judgment debt has to be satisfied in order for the requisite benefit to be conferred (*BWG* at [119]). The recent decision of the Court of Appeal in *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal and another appeal and another matter* [2021] 1 SLR 342 illustrates this point. The appellant ("RV1") was an assignee of debts of the respondent ("ICS"). RV1 had commenced proceedings against ICS in the Singapore courts to enforce the debt and obtained leave to serve the writ out of jurisdiction on ICS. Subsequently, on ICS's application, an AR set aside the leave order on the basis that RV1 was in breach of its duty to give full and frank disclosure. Meanwhile, ICS also commenced proceedings against RV1 in the Senegalese courts seeking a "Declaration to Extinguish Debt". RV1 appealed against the AR's decision, and the High Court allowed the appeal and restored the leave order. In particular, the High Court held that RV1 had satisfied the relevant jurisdictional gateway under O 11 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) for service out of jurisdiction and that Singapore was the *forum conveniens* to try the dispute.

80 Before the High Court, RV1 argued that its claim against ICS had become time-barred under Senegalese law, a point which the court then considered in the context of assessing the availability of Senegal as an alternative forum in the *forum non conveniens* analysis (at [96]–[97]). Before the Court of Appeal, however, RV1 advanced the position that its claim against ICS was no longer time-barred under Senegalese law, in order to refute ICS's submission on appeal that RV1's claim lacked sufficient merit for the purposes of obtaining the leave order (at [100]).

81 The Court of Appeal considered that the inconsistent positions taken by RV1 at first instance and on appeal would have attracted the doctrine of approbation and reprobation if the High Court had, in coming to its decision that Singapore was *forum conveniens*, accepted RV1's submission that Senegal was an unavailable forum by reason of the time bar (at [101]). A judgment on the *forum conveniens* issue in RV1's favour which the High Court arrived at after taking into account RV1's position on the time bar would constitute a "benefit" for the purposes of the doctrine of approbation and reprobation, and which would preclude RV1 from resiling from that position thereafter. On the facts, however, since the High Court had found that RV1 could not rely on the unavailability of Senegal to tilt the balance to Singapore as the *forum conveniens*, RV1 received no benefit as a result of its earlier position on the time bar, and so the doctrine of approbation and reprobation strictly speaking did not apply (at [101]).

Analysis

82 As already mentioned, both Range and Etiqa have argued that Goldbell took inconsistent positions before and during the hearing of the setting aside application in SUM 4065. They contend that Goldbell had effectively made a

call on the Bond by making the Extension Request, but then argued before the court in SUM 4065 that it did no more than to request for an extension of the validity period of the Bond.[73] Etiqa alleges that the initial position taken by Goldbell had caused it to be mistaken as to the nature of the Extension Request, in that it understood Goldbell as calling on the Bond and not merely requesting for an extension of the Bond's validity period, and that purportedly led to Etiqa giving an undertaking to the court at the hearing on 25 January 2021 based on its wrong impression of Goldbell's intentions.[74] According to Range's counsel, the other facet to this inconsistency is that Goldbell cannot now ask for the *payment* of the secured sum under the Bond since its case on the setting aside application was that, by the Extension Request, it was merely asking for an *extension* of the Bond's validity period.[75]

83 I start with the Extension Request of 29 November 2019 sent by Goldbell to Etiqa. In my view, this plainly stated that Goldbell was making a request for an extension of the validity period of the Bond until 13 February 2020 (see [15] above). The words used by Goldbell in the Extension Request mirror cl 6 of the Bond, and simply pointed out that, if Etiqa decided not to grant any extension, it was obliged to make payment of the secured sum to Goldbell. Try as I might, I am unable to comprehend how this could have been misconstrued by Etiqa as anything else but a request for an extension of the Bond's validity period under cl 6. Indeed, Etiqa's position at the hearing on 25 January 2021 (conveyed through Mr Phua) was that the Extension Request had been one made under cl 6 of the Bond, in respect of which Etiqa had the right to either extend or pay in lieu of extension, in the event that the interim

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73 Etiqa's Submissions at paras 75–76 and 94; Range's Submissions at para 25.

74 Etiqa's Submissions at paras 90–99.

75 Range's Submissions at para 31.

injunction was set aside (see [37] above). Etiqa was therefore well aware of its obligations under cl 6 of the Bond. At the hearing before me on 12 November 2021, Mr Phua informed me that Etiqa had decided, after receipt of the Extension Request, that it would not extend the Bond. He also informed me that Etiqa would have paid out the secured sum to Goldbell as required by cl 6 of the Bond, but for the intervention of the grant of the interim injunction obtained by Range on 29 November 2019. In fact, this is also confirmed by the contents of the 22 Feb 2021 Letter by PKWA (see [62] above), which stated:

> In the circumstances, it is clear that [Goldbell] did not make a call on [the Bond] for payment on 29 November 2019 but merely make a request for an extension of [the Bond] to 13 February 2020. However, by reason of the interim injunction, our clients [Etiqa] were not able to consider [Goldbell's] request for an extension.
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> [emphasis added]

In my view, therefore, there is no basis to suggest that Etiqa had in any way been mistaken as to the nature of the Extension Request.

84 As for Range, given the events leading to 29 November 2019, the issuance of the Extension Request would not have come as any surprise to Range, and neither could Range have been in any doubt that the Extension Request was a request for Etiqa to extend the Bond's validity period under cl 6, and not a call on the Bond under cl 1. The two parties had been in discussions about an extension of the Bond's validity period (see [11]–[14] above). As already mentioned, in October 2019, Range had indicated that it would be prepared to procure Etiqa to extend the Bond. Goldbell followed up with that with chasers for updates from Range as to whether the Bond had already been extended. At some point, Range must have decided that it would not agree to any extension of the Bond and started working with its lawyers on an application to restrain any request for an extension of, or any call, on the Bond. That is

why, even though the Extension Request was only sent by Goldbell to Etiqa at about 1pm on 29 November 2019,[76] Range's lawyers, Wong Partnership, had already filed Suit 1235 and its *ex parte* application for the interim injunction shortly before at 12.33pm that same day, supported by Mr Soh's Affidavit, which ran to 987 pages. In those circumstances, there can be no doubt at all that Range fully understood that the Extension Request was a request for an extension of the Bond's validity period, and it was up to Etiqa to extend the Bond or make payment. Since Range had not agreed with Etiqa to any extension, which was a prerequisite to Etiqa doing so (see [13] above), it follows that Etiqa would have decided to pay out the secured sum under the Bond to Goldbell pursuant to its obligations under cl 6. Range knew exactly that would happen under cl 6 of the Bond if a request was made by Goldbell for an extension and if it did not agree to an extension of the Bond – that was what parties had bargained for in the Contract as a possible way in which security would be held by Goldbell (see [47] above).

85 Goldbell's position in its pleadings in Suit 1235 are no different from the position which it presently takes. It had taken the position that the Extension Request was a request for an extension of the Bond's validity period, and that the effect of cl 6 was that, if Etiqa refused to extend, then Etiqa was required to pay over the secured sum for Goldbell to hold the amount as security (see, *eg*, para 15 of Goldbell's Defence in Suit 1235).[77] In fact, it was Range that tried in Suit 1235 to re-characterise Goldbell's actions as a call on the Bond, which had the same effect as a call under cl 1 of the Bond (see, *eg*, paras 7–13 of Mr Soh's AEIC in Suit 1235 and paras 28–32 of Range's Statement of Claim in

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[76] Mr Teh's OS 335 Affidavit at para 13.

[77] Mr Teh's OS 335 Affidavit at p 143.

Suit 1235).[78] I had rejected this argument in my Judgment delivered on 18 February 2021 (see [42] above).

86 In sum, I do not find that Goldbell has taken inconsistent positions in Suit 1235 and in the present originating summonses. I find that its position has been consistent, namely, that the Extension Request was a request for an extension of the Bond's validity period pursuant to cl 6, and that it is now entitled to be paid pursuant to cl 6 because Etiqa had elected to make payment in lieu of such extension pursuant to the undertaking which it had conveyed to the court at the hearing of SUM 4065 on 25 January 2021. As such, I do not agree with the submissions that Goldbell has approbated and reprobated. However, most regrettably, the same cannot be said for Range.

87 I had set out in some detail the position and arguments that Range's counsel had taken in the 2 December 2020 hearing of RA 286 and SUM 4660 (see [25]–[35] above). At that hearing, Range had categorically taken the position that, if the interim injunction was to be set aside or if Suit 1235 failed, then it was not in dispute that Etiqa would pay over the secured sum under the Bond to Goldbell. Counsel for Range referred to Etiqa's confirmation to Goldbell that such payment would be made. He argued that, in those circumstances, there was no necessity for any security for costs (even if Range was insolvent) because there was a sum of $3.8m which Goldbell would be holding as security, and from which it could claim its costs if it should succeed in Suit 1235. On that basis, Range persuaded the court to set aside the AR's decision to grant security for costs. Range's position also directly led to Goldbell's decision to withdraw its application in SUM 4660 for the

[78] Affidavit of Evidence-in-Chief of Dave Soh Chong Wee in Suit No 1235 of 2019 ("Mr Soh's Suit 1235 AEIC") at paras 7–13; Range's Statement of Claim in Suit No 1235 of 2019 at paras 28–32.

fortification of Range's undertaking to pay damages given in support of the interim injunction. Just like on the issue of costs, if Goldbell would be holding on to the sum of $3.8m as security in the event that the interim injunction was set aside, there would be no need for any further security to fortify the undertaking to pay damages that might arise if the court were to set aside the interim injunction.

88 In my judgment, Range is precluded by the doctrine of approbation and reprobation from resiling from the position that it had taken previously in Suit 1235, namely, that Goldbell would be paid the secured sum by Etiqa pursuant to the Extension Request if the interim injunction was set aside or if Goldbell succeeded in defending Suit 1235. That position was more than "reasonably clear" for all to see – it was the reason why Goldbell withdrew the fortification application in SUM 4660. In adopting that position, Range successfully persuaded the court that there was no necessity for any order for security for costs because Goldbell was adequately secured by its entitlement to the secured sum under the Bond pursuant to the Extension Request. Range therefore succeeded in RA 286. The court's decision to allow Range's appeal in RA 286 and discharge the order for security for costs made by the AR (see [39] above) was a "benefit" accruing to Range as a result of its prior position. Having obtained that benefit, Range is now precluded by the doctrine of approbation and reprobation from putting forth a diametrically different position, namely, that Goldbell has no entitlement to the secured sum under the Bond notwithstanding it having made the Extension Request within the Bond's validity period, for various other reasons which it did not earlier advance. I took a dim view of Range's attempt to make such arguments, which are in stark contrast to what its counsel had informed me repeatedly on 2 December 2020 when the arguments in RA 286 were made.

The doctrine of *res judicata*

89 As mentioned, Range made a variety of arguments in support of its application in OS 745 for a permanent injunction to restrain Goldbell from receiving any payment under the Bond and to restrain Etiqa from paying on the Bond (see [72]–[73] above). I accept Goldbell's submissions that Range is precluded the doctrine of *res judicata*, both in its limited and extended sense, from challenging Goldbell's rights under cl 6 of the Bond to receive the secured sum.

The legal principles

90 The doctrine of *res judicata* operates to preclude litigants from making arguments that were previously rejected by a court or tribunal, or that they ought to have advanced on an earlier occasion, with the purpose of giving effect to the policy of finality in litigation and ensuring that litigants are not twice vexed in the same matter (*The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporate Advisory Pte Ltd and others, other parties) and another appeal* [2015] 5 SLR 1104 ("*TT International*") at [98]). It comprises three distinct but interrelated principles:

(a) cause of action estoppel, which prevents a party from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties (*TT International* at [99]);

(b) issue estoppel, which is of wider application than cause of action estoppel, prevents a party from re-arguing points of fact or law which have already been the subject of a previous judicial decision in earlier

proceedings between the same parties (*TT International* at [100]–[101]); and

(c) the "extended" doctrine of *res judicata* or the defence of abuse of process, which prevents a party from re-arguing points even when they have not been raised in earlier proceedings, provided that such points are those which belonged to the subject of former litigation and which the parties, exercising reasonable diligence, ought properly to have raised and argued then (*TT International* at [101]–[102]).

91 The following must be satisfied to establish a cause of action and/or issue estoppel: (a) there must be a final and conclusive judgment on the merits; (b) that judgment must be of a court of competent jurisdiction; (c) there must be identity between the parties to the two actions that are being compared; and (d) there must be an identity of causes of action (for cause of action estoppel) or of subject matter (for issue estoppel) in the two proceedings (*Lee Tat Development Pte Ltd v MCST Plan No 301* [2005] 3 SLR(R) 157 at [14]–[15]). On the other hand, in determining whether there is an abuse of process that attracts the extended doctrine of *res judicata*, the court looks at all the circumstances of the case and in particular, the following: (a) whether the later proceedings is in substance nothing more than a collateral attack on the previous decision; (b) whether there is fresh evidence that might warrant re-litigation; (c) whether there are *bona fide* reasons why an issue that ought to have been raised in the earlier action was not; and (d) whether there are some special circumstances that might justify allowing the case the proceed (*Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 ("*Goh Nellie*") at [53]). In this process, the court is guided by the balance to be found in the tension between the demands of ensuring that a litigant who has a genuine claim is allowed to press his case in

court and recognising that there is a point beyond which repeated litigation would be unduly oppressive to the defendant (*Goh Nellie* at [53]).

92 In *TT International*, the Court of Appeal accepted in *obiter* that issue estoppel admitted of an exception established in the UK House of Lords decision in *Arnold v National Westminster Bank plc* [1991] 2 AC 93 ("*Arnold*"), which operated only in rigidly demarcated categories of cases (at [186]–[187]). The court observed that the following *cumulative* requirements had to be met before the *Arnold* exception could apply to any case: (a) the decision said to give rise to the issue estoppel had to directly affect the future determination of the rights of the litigants; (b) the decision had to be clearly wrong; (c) the error in the decision had to stem from the fact that some point of fact or law relevant to the decision was not taken or argued before the court which made that decision and could not reasonably have been taken or argued on that occasion; (d) there had to not be any attempt to claw back rights that had accrued pursuant to the erroneous decision or otherwise to undo the effects of that decision; and (e) it had to be shown that great injustice would result if the litigant in question were estopped from putting forth the particular point which was said to be the subject of issue estoppel (at [190]).

Analysis

93 In oral submissions, counsel for Range emphasised that his arguments in OS 745 focus on whether Goldbell's demand for payment under the Bond (as opposed to Goldbell's request to extend Bond's validity period) is unconscionable. However, as I have mentioned earlier, it is undisputed that Goldbell's present demand for payment follows from the Extension Request (see [77] above). Any argument about the unconscionability of Goldbell's present demand for payment under the Bond is as much an argument about the

unconscionability of the Extension Request, an issue which had been conclusively determined in SUM 4065 (see [43] above). I therefore accept Goldbell's submissions[79] and find that Range is issue estopped from re-arguing this issue again. The court should be "exceedingly slow to permit the re-litigation of decided issues in civil cases in view of the importance of finality in civil litigation" (*TT International* at [140]). I also find that this is not a case in which the *Arnold* exception can apply.

94 I will also add that, by seeking to focus on Goldbell's demand for payment in the abstract, Range is effectively trying to characterise the Extension Request as in substance a call on the Bond. Such an argument had already been raised by Range in SUM 4065, and which I rejected when I held that the Extension Request was a request to extend the Bond's validity period pursuant to cl 6 and not a call on the Bond (see [42] above). I therefore find it completely disingenuous for Range to persist in those same arguments before me, which had already been raised at the hearing of SUM 4065 and disposed of.

95 The other arguments as to why Goldbell should not now be paid the secured sum under the Bond were points which Range could (and should) have raised in SUM 4065. Indeed, some of those arguments – namely, that Goldbell no longer has any right to hold security under the Contract given the expiry of the maintenance period on 22 March 2020 (according to the adjudication determination in ARA8, that was released on 1 September 2020)[80] and that Goldbell failed to act expeditiously to protect its rights under the Bond and allowed it to expire before making the setting aside application only on 21 September 2020 – are premised on a state of affairs identical to that which

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79 Goldbell's OS 745 Submissions at para 17(c).

80 Range's Submissions at para 80.

existed at the time when Goldbell made the setting aside application in SUM 4065 and when that application was heard before me. Accordingly, there is no reason why these arguments could not have been advanced by Range at the hearing of SUM 4065.

96 The fact that SUM 4065 had been concerned with a request to extend the validity period of the Bond under cl 6 rather than with a call on the Bond under cl 1 is immaterial. The plain words of cl 6 make it clear that Etiqa is obliged to pay Goldbell the secured sum if it declines to extend the Bond's validity period. Indeed, that was also recognised by Range, as is evident from the terms of the *ex parte* interim injunction and the reliefs that it had sought in Suit 1235, which restrain Goldbell from "making, claiming, receiving and/or directing [Etiqa] to extend and/or make payment … under [the Bond]" [emphasis added].[81] Therefore, Range's other argument as to why Goldbell should not *now* be paid – that cl 6 of the Bond provides Etiqa with a "true" or "business" option to make payment in lieu of extension so that Etiqa is no longer obliged to exercise that choice given that the Bond has already expired – is also one which it could and should have put forth in the course of earlier proceedings.

97 The fact that a matter could have been raised in earlier proceedings does not *per se* render the raising of that same matter in later proceedings an abuse of process to attract the extended doctrine of *res judicata* – the court adopts a broad, merits-based judgment and asks whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before (see *Goh Nellie* ([91] above) at [52], citing *Johnson v Gore Wood (a firm)* [2002] 2 AC 1 at 31). I am, however, satisfied that the threshold of showing an abuse of process has been crossed in

[81] Mr Teh's OS 335 Affidavit at pp 94–97.

this case. If Range had raised its cl 6 argument at an earlier stage of the proceedings, its earlier position that Goldbell would be entitled to payment of the secured sum once the interim injunction was set aside (see [29] above) would have been inconsistent and unsustainable. Having obtained a benefit from its prior position (see [88] above), it must surely be an abuse of process for Range to now advance an argument which contradicts that position.

98 As for the other arguments advanced by Range (including those about unconscionability), they focus on Goldbell's demand for payment in the abstract, notwithstanding Range's recognition that the demand follows from the Extension Request. As I have observed earlier, in doing so, Range is effectively seeking to characterise the Extension Request as being in substance a call on the Bond. Therefore, these are not only arguments which Range could have made in earlier proceedings, they are also premised on a basis which Range must know contradicts the earlier determination of the court in SUM 4065. That can hardly be anything but an abuse of process.

99 Further, and in any event, I find these arguments to be without merit. I first turn to Range's argument about the interpretation of cl 6. Where a contract gives one of the parties the right to choose between two or more specified modes of performance, it imposes an alternative obligation (see G H Treitel, *Frustration and Force Majeure* (Sweet & Maxwell, 3rd Ed, 2014) ("*Treitel*") at para 10-001). If one or more of the specified alternatives becomes impossible or illegal after the contract is made, the contract is not discharged so long as at least one of those alternatives remains possible and lawful (*Treitel* at para 10-001). However, an exception is made to this rule where the contract, on its true construction, provides for a "true" or "business" option, under which the relevant contractual obligation is to be performed in one way, unless the option holder chooses to substitute another way and does so by the effective exercise

of his option, which in so doing he is not bound to consider the convenience or interest of the other party (*Reardon Smith Line Ltd v Ministry of Agriculture* [1963] AC 691 ("*Reardon Smith*") at 730). In the latter situation, since the freedom of choice as to the mode of performance is intended solely for the benefit of the option holder (see *Reardon Smith* at 730–731), if the primary obligation has become incapable of performance, it will follow that he is not obliged to exercise his choice as to carry out performance in the alternative way; instead, the contract is discharged.

100 According to *Treitel*, the following two features distinguish a "true" or "business" option from an alternative obligation (at para 10-007). First, a "true" or "business" option provides for a *primary* mode of performance, until and unless the option holder exercises his option to perform in the alternative way. Conversely, in the case of alternative obligations, either mode of performance is possible until the option holder actually performs the contract. Second, in a "true" or "business" option, the freedom of choice must have been intended solely for the benefit of the option holder. Conversely, in the case of alternative obligations, the freedom of choice exists for the benefit of both parties.

101 With these principles in mind, I find that cl 6, on its proper construction, simply provides for an alternative obligation, and does not provide Etiqa a "true" or "business" option, as Range contends. As I have determined in the Judgment, under cl 6 of the Bond, Goldbell was at liberty to demand that Etiqa extend the Bond's validity period, and it was then up to Etiqa to choose to decide whether to extend, or, in lieu of such extension, make payment of the secured sum to Goldbell (at [5]). Very clearly, cl 6 specifies two modes of performance by Etiqa upon Goldbell making an extension request – to extend the Bond's validity period *or* make payment of the secured sum under the Bond. On its face, cl 6 provides for no primary mode of performance – there is no certainty

that Etiqa will necessarily extend the Bond on Goldbell's request. The very fact that cl 6 provides for Etiqa to make payment *in lieu* of extension leaves the prospect of any extension uncertain as it contemplates the possibility that Etiqa will decline to extend the Bond. Etiqa's mode of performing its obligations under cl 6 (whether to extend the Bond or make payment in lieu of extension) will not be known until Etiqa actually performs the contract. The freedom of choice in cl 6 is also one which is provided for the benefit of Etiqa *and* Goldbell. Clause 6 gives Etiqa the freedom of choice to not extend the Bond's validity period. The provision for payment in lieu of extension also ensures that Goldbell is not left out of pocket because it will necessarily receive payment of the secured sum if Etiqa chooses not to extend the Bond's validity period. As such, as long as Goldbell makes an extension request under cl 6 within the validity period of the Bond, even if the Bond subsequently becomes incapable of extension, Etiqa's obligation to make payment in lieu of extension, which exists as an alternative to Etiqa's obligation to extend the Bond's validity period, survives and is not discharged.

102 Indeed, to construe cl 6 in the way Range does runs contrary to the purpose of the Bond. If Etiqa is not bound to make payment in lieu of extension, simply because the Bond has become incapable of extension, that will mean that Goldbell may be deprived of security for Range's performance of its obligations under the Contract through no fault of its own, despite it having made an extension request within the validity period of the Bond. That would fundamentally alter the nature of Etiqa's obligations under the Bond and, in the absence of evidence otherwise, could not have been the intention of the parties to the contract. In my view, it is also important that one should bear in mind the circumstances in this case which gave rise to the inability of Etiqa to perform its obligation to extend or pay. That situation arose only as a result of the *ex*

parte interim injunction which Range had obtained on 29 November 2019 *in egregious breach of its duty of full and frank disclosure*. As such, if Range's submission about cl 6 is to be accepted, it would mean that it would be open to a contractor to deprive its employer of security simply by obtaining *ex parte* injunctions in the way Range did. That would gravely undermine the utility and value of performance bonds as security.

103 Range's argument that Goldbell is no longer entitled to hold any sum paid under the Bond as security for Range's due performance of the Contract because the maintenance period has already expired is also without merit. As I have emphasised, Goldbell's demand to payment follows from the Extension Request, which had been made within the validity period of the Bond. That in itself, coupled with Etiqa's election to not extend the Bond, triggered Etiqa's obligation to make payment under cl 6. There is nothing in cl 6 that provides that the obligation to pay, once triggered, comes to an end when the Contract's maintenance period has expired. Range's argument that Goldbell only has itself to blame for not applying to set aside the interim injunction before the expiry of the period of extension that it had sought also does not bring it very far. Goldbell's entitlement to be paid under cl 6 turns solely on whether it had made the extension request within the Bond's validity period (which it did by making the Extension Request on 29 November 2019). Exactly when Goldbell makes the setting aside application has no bearing on that issue.

Whether Etiqa has any justification to not make payment of the secured sum

104 As for Etiqa, I have already mentioned that there is no factual basis at all in its claim that it had made a mistake in construing the Extension Request as anything but what it expressly stated (see [83] above). Since contracting

parties' intentions are to be objectively ascertained, the court will nevertheless uphold a contract in spite of a mistake if a reasonable person would have understood the contract in a particular sense, so that the mistaken party remains bound (see *Halsbury's Laws of Singapore* vol 7 (LexisNexis, 2019 Reissue) at para 80.158). In this case, a reasonable person would not have construed the Extension Request as anything but a request to extend the validity period of the Bond, and so Etiqa must be bound to the undertakings which it had given to Goldbell.

105 I also find that Etiqa's conduct was no less poor when compared to Range's. It is clear that Etiqa was well aware of its obligations under cl 6, which was either to extend the Bond's validity period or to make payment in lieu of such extension. Etiqa's counsel, Mr Phua, confirmed at the hearing of these two originating summonses that his client would have made payment under cl 6 of the Bond to Goldbell. This was because there was no agreement between Etiqa and Range that the Bond should be extended. Since the only impediment to payment was the interim injunction obtained *ex parte* by Range on 29 November 2019, Etiqa was prepared to undertake to the court on 25 January 2021 that it would make payment if the interim injunction was set aside. Sensibly, Etiqa took the position that, even though the Bond had expired on 30 November 2019, it would still pay the secured amount under the Bond to Goldbell. This was because the Extension Request had been made before the expiry of the Bond, and Etiqa's obligations under cl 6 had been triggered. This was undoubtedly the correct legal position to take. Also, it was precisely because Etiqa had expressed its willingness to the court on 25 January 2021 that it would comply with its obligations under cl 6 that I felt it unnecessary to grant Prayer 2 of SUM 4065 (see [21] above) after I decided to set aside the interim injunction.

106 Having taken such an unequivocal position, I find it most troubling that Etiqa then decided not to honour its undertaking when Goldbell called on it to make payment on 18 February 2021, after the interim injunction was set aside. There was really no valid excuse in law for not making payment. Etiqa had not made any mistake as to the nature of the Extension Request or as to its legal obligations under the Bond arising from the Extension Request when it confirmed with Goldbell's counsel and then undertook to the court that it would make payment, if the interim injunction was set aside.

107 At the hearing of these two originating summonses, it emerged from the submissions of Mr Phua, on behalf of Etiqa, that his client had decided not to make payment only because of the 18 Feb 2021 Letter from Wong Partnership (see [60] above). In that letter, Range threatened not to indemnify Etiqa if the latter made any payment under the Bond. It appears then that Etiqa decided that it would be better for it, as a matter of legal strategy, not to make payment to Goldbell *unless* there was an order of court mandating such payment to be made. If such an order were made, Etiqa believed that it would be in a stronger position *vis-à-vis* Range as far as its claim to an indemnity was concerned. As a result, Etiqa decided to resist payment *without any proper legal basis*, and this led to Goldbell having to commence OS 335, and the consequent issuing of the third party proceedings by Etiqa against Range for an indemnity.

108 In my judgment, Etiqa has no legal justification not to make payment to Goldbell of the secured sum under the Bond pursuant to its undertaking given to the court on 25 January 2021. Its reasons for not making payment are not premised on any legal basis, but simply because it was concerned about getting into further litigation with Range over the enforcement of its indemnity and wanted to improve its position in the event of such litigation. That being the case, I find that it has no defence to Goldbell's claim in OS 335.

Etiqa's claim for an indemnity against Range

109 Etiqa's claim for an indemnity is a straightforward one. It is based on a written contract of indemnity between Etiqa and Range which was executed by Range in consideration of Etiqa having issued the Bond in favour of Goldbell. Etiqa relies on cl 1 of the indemnity, which provides that:[82]

> [t]he Sureties [which include Range] covenant and undertake … to indemnify [Etiqa] and irrevocably keep [Etiqa] indemnified against all demands, claims, actions, suits, liabilities, losses, costs and expenses whatsoever including all legal costs on a Solicitor and Client basis (Indemnity Basis) and other costs, charges and expenses that [Etiqa] may incur in connection with the Undertaking [to pay under the Bond] or in enforcing, or attempting to enforce [Etiqa's] rights under this indemnity.

110 Given that Etiqa will be ordered to make payment to Goldbell pursuant its undertaking to comply with cl 6 of the Bond in the event that the interim injunction was set aside, it is quite obvious that cl 1 of the indemnity will be triggered once Etiqa makes such payment. As such, Range will be required to indemnify Etiqa in respect the sums that it pays over to Goldbell. At the hearing, counsel for Range initially conceded that, if the court were to order Etiqa to make payment to Goldbell, then it would naturally follow that Range would be obliged to indemnify Etiqa. However, counsel subsequently changed his mind and took the position that Range should not be made to indemnify Etiqa because the latter should not have given any undertaking to the court to make payment under the Bond in the first place.

111 I find this argument quite impossible to accept. It was entirely in line with its legal obligations under the Bond for Etiqa to have made the undertaking to the court. By giving that undertaking, Etiqa was simply reiterating that it

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[82] Mr Choo's 1st OS 335 Affidavit at paras 24 and p 34.

would comply with its legal obligations under cl 6 of the Bond. As such, for the court to order Etiqa to comply with its undertaking is simply another way of ordering Etiqa to give effect to cl 6 of the Bond. That being so, Range's obligation to indemnify Etiqa has been properly invoked.

Conclusion

112 For the above reasons, I make the following orders in respect of OS 335:

(a) a declaration that Etiqa is in breach of cl 6 of the Bond by failing to pay Goldbell the sum of $3.8m after the interim injunction granted on 29 November 2019 was set aside on 18 February 2021;

(b) an order that Etiqa is to make payment of the sum of $3.8m to Goldbell, with interest at the rate of 5.33% from the date of the filing of OS 335 until the date of this order; and

(c) Range is to indemnify Etiqa of all sums paid by Etiqa to Goldbell as set out in (b) above.

113 As for OS 745, that application by Range for injunctions against Goldbell and Etiqa is entirely without merit, and I dismiss it accordingly.

114 I will deal with the issue of costs separately, including the question of any indemnity claimed by Etiqa from Range in respect of Etiqa's potential liability for costs.

Ang Cheng Hock
Judge of the High Court

Chong Chi Chuin Christopher, Teo Wei Xian Kelvin and Chester Su Yong Meng (Drew & Napier LLC) for the plaintiff in Originating Summons No 335 of 2021 and the first defendant in Originating Summons No 745 of 2021;
Phua Cheng Sye Charles and Ho Jun Yang Joshua (PKWA Law Practice LLC) for the defendant in Originating Summons No 335 of 2021 and the second defendant in Originating Summons No 745 of 2021;
Tan Chee Meng SC, Choo Poh Hua Josephine, Chin Yan Xun and Samuel Navindran (WongPartnership LLP) for the third party in Originating Summons No 335 of 2021 and the plaintiff in Originating Summons No 745 of 2021.