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

[2023] SGHC 210

Originating Application No 518 of 2022

In the matter of Section 18(2) and the First Schedule of the Supreme Court of Judicature Act (Cap 322)

And

In the matter of Order 13 Rule 1 of the Rules of Court 2021

And

In the matter of a Performance Bond No Z/18/BP00/047925Between

Chian Teck Realty Pte Ltd

… *Applicant*

And

(1) SDK Consortium
(2) Lonpac Insurance Bhd

… *Respondents*

JUDGMENT

[Building and Construction Law — Building and construction related contracts — Guarantees and bonds]
[Building and Construction Law — Terms — Implied terms]
[Contract — Contractual terms — Implied terms]
[Credit and Security — Performance bond]

TABLE OF CONTENTS

INTRODUCTION **1**

FACTS **4**

THE PARTIES 4

BACKGROUND TO THE DISPUTE 5

EVENTS LEADING UP TO THE CALL ON THE BOND 6

THE PARTIES' CASES **8**

THE VALIDITY OF THE CALL 8

IMPLIED TERM 9

ISSUES TO BE DETERMINED **11**

ISSUE 1: THE VALIDITY OF THE CALL **11**

THE LAW 11

WHETHER THE CALL ON THE BOND WAS MADE PURSUANT TO CL 1 OR CL 3 12

ISSUE 2: THE FRAUD EXCEPTION **19**

ISSUE 3: THE IMPLIED TERM **20**

THE LAW 20

THE DECISION 21

CONCLUSION **25**

Chian Teck Realty Pte Ltd
v
SDK Consortium and another

[2023] SGHC 210

General Division of the High Court — Originating Application No 518 of 2022
Lee Seiu Kin J
13 February, 28 March, 4 May 2023

4 August 2023 Judgment reserved.

Lee Seiu Kin J:

Introduction

1 The performance bond has assumed an essential role in the building and construction industry, serving as an instrument to facilitate cash flow while managing risks. In the course of the performance of a construction contract, the employer (or main contractor) makes periodic progress payments to the contractor (or sub-contractor), even when the work is far from complete. This arrangement reduces the cash flow requirement for the contractor. The employer benefits from being able to sub-contract work at lower prices due to the resultant lower financing costs for the contractor, and from the availability of a larger pool of contractors to bid for the job. The risk, of course, is in the contractor going under and the employer may be saddled with additional costs to complete the works with little recourse against the insolvent contractor. At one time,

employers required contractors to pay a cash deposit to secure performance, but this increased the costs to the contractor and affected the price he could offer. Subsequently, the performance bond came into the picture, in which, for a comparatively small fee, financial institutions such as banks or insurance companies gave the beneficiary (the employer) an undertaking to pay a certain sum of money under certain conditions. The most common condition is a simple demand for payment made by the beneficiary. A performance bond drafted with this condition is known as a "first demand" or "on demand" bond. Such a performance bond has been described as "as good as cash" (*Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia and another* [2010] 2 SLR 329 at [16]) because it provides certainty of payment from a reputable financial institution. The latter would, of course, secure its liability by way of a lien on some property belonging to the contractor or its directors.

2 The perennial tension is this—under what circumstances would an employer be entitled to make a demand on a performance bond, and when would the courts be moved to injunct such a demand or order the financial institution not to make payment pursuant to the demand? Performance bonds, because they are imposed by the employer, are often drafted in such a way that the financial institution is obliged to pay the beneficiary upon written demand of the beneficiary. The courts have upheld such demands on the ground that the performance bond is a contract between the beneficiary and the financial institution, and as between them, the underlying contract is not relevant (*Master Marine AS v Labroy Offshore Ltd and others* [2012] 3 SLR 125 ("*Master Marine*") at [26]). The court will only grant an injunction where the demand is made fraudulently, on the ground that "fraud unravels all" (*Arab Banking Corp (B.S.C.) v Boustead Singapore Ltd* [2016] 3 SLR 557 at [64] ("*Arab Banking*")). If the beneficiary does not have an honest belief that the contractor has defaulted

and become liable to him in damages, then the demand must be fraudulent. The practical difficulty is in proving fraud, as the burden of proof falls on the contractor, and the courts have set a high standard of proof for this: *Bocotra Construction Pte Ltd and others v Attorney-General* [1995] 2 SLR(R) 262 ("*Bocotra*") at [48]; *Sunrise Industries (India) Ltd v PT OKI Pulp & Paper Mills and another* [2018] SGHC 145 at [33]. However, this does not detract from the principle that the beneficiary must have an honest belief of the facts grounding its right to make the demand.

3 In the mid-nineties, a line of authorities latched onto certain words in the judgment of the Court of Appeal in *Bocotra*, and developed the concept of unconscionability as being another ground for restraining such demands. This marked a conscious departure from English law. In *Dauphin Offshore Engineering & Trading Pte Ltd v The Private Office of His Royal Highness Sheikh Sultan bin Khalifa bin Zayed bin Zayed Al Nahyan* [1999] SGHC 201 at [35]–[43], I traced the development of this line of authorities. Unconscionability was confirmed as a ground to restrain demands on performance bonds in the decision of the Court of Appeal in *GHL Pte Ltd v Unitrack Building Construction Pte Ltd and another* [1999] 3 SLR(R) 44. Employers (or their legal advisors) continued to work their way around this by tweaking the language of the performance bonds. One way was to provide that the performance bond was governed by English law: see *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia and another* [2010] 2 SLR 329. Another way was to agree that the performance bond cannot be restrained on the ground of unconscionability: *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd and another and another appeal and another matter* [2015] 3 SLR 1041 at [24]. The parties before me agree that the performance bond in the present case contains such a

provision and therefore unconscionability was not a ground for restraining a demand made on it.[1]

4 Having set out the background, I now proceed to the facts of this case.

Facts

The parties

5 The first respondent is SDK Consortium ("SDK"), a consortium consisting of three companies incorporated in either Singapore or Korea and in the business of construction. The companies are: (a) Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd; (b) SsangYong Engineering & Construction Co Ltd; and (c) Daewoo Engineering & Construction Co Ltd.[2] SDK is the main contractor for a construction project at Woodlands Health Campus (the "Project").[3]

6 The applicant is Chian Teck Realty Pte Ltd ("Chian Teck"), a Singapore-incorporated company in the business of reinforced concrete and precast installation works.[4] Chian Teck was a subcontractor of SDK for the Project.

7 The second respondent is Lonpac Insurance Bhd ("Lonpac"), a foreign insurance company registered in Singapore. Lonpac issued a performance bond

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1 Mr Mak's affidavit dated 14 November 2022 at para 9; Mr Tong's affidavit dated 9 January 2023 at paras 6–7.

2 Applicant's written submissions dated 6 February 2023 at para 7; Mr Tong's affidavit dated 6 September 2022 at para 30.

3 Mr Mak's affidavit dated 14 November 2022 at para 15; Mr Tong's affidavit dated 6 September 2022 at para 30.

4 Applicant's written submissions dated 6 February 2023 at para 7.

in favour of SDK, which was procured by Chian Teck in accordance with its subcontract obligations with SDK.

Background to the dispute

8 On 29 August 2018, by way of a letter of acceptance issued by SDK, Chian Teck was awarded the subcontract to carry out reinforced concrete works and precast installation works for the Project (the "Subcontract").[5] Chian Teck was obliged to procure a performance bond in favour of SDK of an amount equal to 5% of the total value of the Subcontract.[6] On 23 November 2018, Lonpac issued Performance Bond No Z/18/BP00/047925 in favour of SDK (the "Bond"), for the sum of S$1,123,152.55 (based on the Subcontract sum of S$22,463,051.00).[7]

9 By 2020, the relationship between Chian Teck and SDK had deteriorated. That year, Chian Teck commenced adjudication proceedings against SDK pursuant to the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed). The proceedings related to, among other things, SDK's certification of Chian Teck's payment claim.[8] Parties also became embroiled in a dispute in relation to the performance of the Subcontract. This resulted in Chian Teck serving its notice on SDK to terminate the contract on 11 November 2020, on the basis that SDK had unilaterally decided to reduce

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5 Mr Mak's affidavit dated 14 November 2022 at para 16; Mr Tong's affidavit dated 6 September 2022 at para 33.

6 Mr Mak's affidavit dated 14 November 2022 at para 17; Mr Tong's affidavit dated 6 September 2022 at para 14.

7 Mr Mak's affidavit dated 14 November 2022 at para 17; Mr Tong's affidavit dated 6 September 2022 at para 14.

8 Mr Mak's affidavit dated 14 November 2022 at para 18; Mr Tong's affidavit dated 6 September 2022 at paras 78–90.

the scope of the Subcontract substantially and had falsely accused Chian Teck of causing delay to the Subcontract works.[9]

Events leading up to the call on the Bond

10 One of the main issues in the present dispute is whether SDK made a valid call on the Bond on 29 July 2022 in accordance with the terms of the Bond. The terms relating to SDK's entitlement to call on the Bond are found in cll 1, 3 and 4 of the Bond:[10]

> 1. [Lonpac] shall unconditionally pay to [SDK] any sum or sums up to a maximum aggregate sum of Singapore Dollars One Million One Hundred Twenty Three Thousand One Hundred Fifty Two and cents Fifty Five Only (S$1,123,152.55)("the Guaranteed Sum") upon receiving [SDK's] written notice of claim for payment made pursuant to Clause 4 of this Guarantee without any proof of actual default on the part of [Chian Teck] and without need to satisfy any other condition.
>
> …
>
> 3 [Lonpac's] liability under this [Bond] shall continue and this [Bond] shall remain in full force and effect from 01/07/2018 until 01/08/2022 provided always that the expiry date of this [Bond] and [Lonpac's] liability under this [Bond] shall be automatically extended for successive periods of **6 months** unless [Lonpac] give[s] [SDK] 90 days' written notice prior to the expiry of [Lonpac's] liability (the "Notice Period") of [Lonpac's] intention not to extend this [Bond] in respect of any future extension and provided further that [SDK] shall be entitled,
>
> (a) upon receiving such notice of [Lonpac's] intention either to:
>
> (i) make a claim under this [Bond]; or
>
> (b) direct [Lonpac] (within the Notice Period) to extend the validity of this [Bond] for a further period not

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9 Mr Mak's affidavit dated 14 November 2022 at para 19; Mr Tong's affidavit dated 6 September 2022 at paras 41–74.

10 Mr Tong's affidavit dated 6 September 2022 at pp 417–419.

> exceeding **6 months** (and this [Bond] shall then expire at the end of such further period).
>
> 4. This [Bond] is conditional upon a claim being made by [SDK] at any time and as many times as [SDK] may deem fit by way of a notice in writing addressed to [Lonpac] and the same being received by [Lonpac] at 300 Beach Road #17-04/07 The Concourse Singapore 199555 before the end of 90 days from the expiry of this [Bond].
>
> [emphasis in original]

11 The material events preceding the call on the Bond are as follows. On 28 April 2022, Lonpac sent a letter to SDK by AR-registered post, stating that it was giving SDK "90 days written notice from the expiry of the Bond of [Lonpac's] intention not to extend the Bond", pursuant to cl 3 of the Bond (the "28 April Notice"). The 28 April Notice also stated that the Bond was due to expire on 1 August 2022.[11] However, SDK claimed that it did not receive the 28 April Notice because it was sent to the old office address of SDK. On 19 July 2022, Lonpac sent a second letter informing SDK of the same ("the 19 July Notice"). It is undisputed that the 19 July Notice was received by SDK.[12] Subsequently, on 29 July 2022, by way of a letter to Lonpac, SDK issued a demand for payment of the entire amount secured under the Bond, *ie,* S$1,123,152.55 ("SDK's Demand"). SDK's Demand stated that the claim for S$1,123,152.55 was made "[p]ursuant to Clause 4 of the [Bond]" and that the letter constituted SDK's written notice "pursuant to Clauses 4 and 5 of the [Bond]".[13]

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11 Mr Mak's affidavit dated 14 November 2022 at para 20 and MKC-1 at Tab 8; Mr Tong's affidavit dated 6 September 2022 at para 23(a) and p 994.

12 Mr Tong's affidavit dated 6 September 2022 at para 23(b) and p 995; Suliana Binte Sudh's affidavit dated 27 February 2023 at paras 7–8.

13 Mr Mak's affidavit dated 14 November 2022 at para 20 and MKC-1 at Tab 9; Mr Tong's affidavit dated 6 September 2022 at para 24 and pp 996–999.

The parties' cases

The validity of the call

12 In relation to whether SDK made a valid call on 29 July 2022, the fundamental dispute between parties is whether SDK made the call pursuant to cl 1 or cl 3 of the Bond.

13 Chian Teck's position is that the call was based on cl 3 of the Bond, and that the condition precedents set out in cl 3 were not met when SDK made the call. Therefore, the call was invalid. According to Chian Teck, the chain of correspondence between SDK and Lonpac leading up to 29 July 2022 shows that SDK called on the Bond on the basis that it was about to expire.[14] Therefore, the call must conform with the terms set out in cl 3. Chian Teck argues that the call was made in breach of cl 3(a)(i) of the Bond because both the 28 April Notice and the 19 July Notice were invalid, such that SDK did not receive notice of Lonpac's intention not to extend the Bond 90 days prior to the expiry of Lonpac's liability. Consequently, SDK's entitlement to make a call on the Bond pursuant to cl 3 had not been triggered, and the call on the Bond was invalid.[15] Further, Chian Teck submits that another ground for the injunction was SDK's conduct in making the call in breach of cl 3, and attempting to pass off the call as compliant with the Bond, is tantamount to a fraudulent call.[16]

14 Conversely, SDK avers that it called on the Bond pursuant to cl 1 of the Bond. This is evident from the language used in SDK's Demand, which mirrors

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14 Chian Teck's written submissions dated 27 April 2023 at paras 13–17.

15 Chian Teck's written submissions dated 27 April 2023 at paras 18–23.

16 Chian Teck's written submissions dated 27 April 2023 at paras 24–26.

that of cl 1.[17] SDK argues that cl 1 entitles SDK to, at any point in time, make an unconditional demand on the Bond, provided that SDK makes a written demand pursuant to cl 4 of the Bond.[18] Therefore, the validity of Lonpac's notice of non-extension has no bearing on the validity of the call on the Bond. Aside from a finding of fraud, nothing can restrain SDK's call on the Bond.[19]

Implied term

15 In the alternative, Chian Teck submits that there is an implied term in the Subcontract between Chian Teck and SDK, that SDK should not call on the Bond so long as Chian Teck extends the validity of the Bond (the "Implied Term"). Chian Teck argues that the Implied Term would satisfy the three-step requirement for the implication of contract terms set out in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp Marine*"). This is because the absence of the Implied Term renders cll 8.1 and 8.3 of the Subcontract nugatory and meaningless. Further, Chian Teck relies on the English case of *Cargill International SA v Bangladesh Sugar and Food Industries Corp* [1996] 4 All ER 563 for the proposition that terms can be implied into the underlying contract between contractor and sub-contractor which would circumscribe the buyer's (*ie*, the contractor's) rights under his collateral guarantee with the guarantor, notwithstanding that the guarantee and underlying contract are independent at law.[20] Finally, Chian Teck avers that SDK's call was in breach of the Implied Term in the Subcontract and

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17 SDK's written submissions dated 23 March 2023 at paras 20–27.

18 SDK's written submissions dated 23 March 2023 at para 15.

19 SDK's written submissions dated 23 March 2023 at paras 25 and 27.

20 Chian Teck's written submissions dated 23 March 2023 at paras 31–41; Chian Teck's written submissions dated 27 April 2023 at para 27.

fraudulent, because SDK was of the view that the Bond had been extended until at least 1 February 2023 and yet decided to make the call.[21]

16 Conversely, SDK is of the view that the term that Chian Teck seeks to imply cannot satisfy the three-step test espoused in *Sembcorp Marine.* The Implied Term is plainly inconsistent with cl 8.4 of the Subcontract, which stipulates that SDK will not be restrained from making any call on the Bond except in the case of fraud.[22] Further, SDK submits that the Implied Term would open the floodgates to a multitude of similar challenges to calls on unconditional performance bonds, because there are standard form contracts that are similar in substance and effect to cl 8.3 of the Subcontract insofar as they provide for the extension of the validity of the security until the contractor's obligations are completed.[23]

17 Based on its arguments, Chian Teck seeks the following orders, pending the determination of Chian Teck and SDK's liability towards each other under the Subcontract:[24]

(a) That SDK be restrained from making, claiming, receiving and/or directing Lonpac to make payment or transfer of the sum of $1,123,152.55 or any other sum under the Bond.

(b) That Lonpac be restrained from making payment or transfer of the sum of $1,123,152.55, or any other sum under the Bond to SDK and/or its nominee.

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21 Chian Teck's written submissions dated 23 March 2023 at paras 31–61.

22 SDK's written submissions dated 13 April 2023 at paras 8–21.

23 SDK's written submissions dated 13 April 2023 at paras 27–29.

24 HC/OA 518/2022 filed 6 September 2022.

(c) Costs.

(d) Such further or other relief as the court deems fit and just.

Issues to be determined

18 I will consider the following issues. First, whether the call on the Bond was invalid. This depends on whether the call on the Bond was made pursuant to cl 1 or cl 3 of the Bond. If the call was made pursuant to cl 3 of the Bond, I will inquire whether the conditions stipulated in cl 3 were satisfied.

19 Second, I will consider whether SDK's call on the Bond, if made in breach of cl 3, was made fraudulently.

20 Third, I will consider whether a term to the effect that SDK shall not call on the Bond so long as Chian Teck extends the validity of the Bond may be implied into the Subcontract (*ie*, the Implied Term as pleaded by Chian Teck). If so, whether a call on the Bond in breach of the Implied Term is fraudulent and justifies restraining the call.

Issue 1: The validity of the call

The law

21 An unconditional performance bond commonly refers to a performance bond where payment is not made subject to any conditions other than a simple demand for payment by a beneficiary: Poh Chu Chai, *Guarantees and Performance Bonds* (LexisNexis, 3rd Ed, 2017) at para 13.1.2. However, in both conditional and unconditional performance bonds, a demand can be made subject to: (a) the fulfilment of various condition precedents; and/or (b) compliance with the stipulated form. The doctrine of strict compliance equally

applies to condition precedents and stipulated forms (*Master Marine* at [31]). This means that a call on the performance bond which stipulates such requirements would be restrained in the absence of strict compliance (*Ryobi Tactics Pte Ltd v UES Holdings Pte Ltd and another and another matter* [2019] 4 SLR 1324 at [23]). However, the doctrine of strict compliance does not undermine the *raison-d'être* of on-demand performance bonds as readily realisable security. Instead, it gives effect to the intention of the contracting parties and upholds commercial certainty.

Whether the call on the Bond was made pursuant to cl 1 or cl 3

22 In this case, notwithstanding that parties agree that the Bond is unconditional and on-demand, SDK must nonetheless make a claim on the Bond in accordance with the terms set out in the Bond. As mentioned earlier, these condition precedents and/or stipulated forms are set out in cll 1, 3 and 4 of the Bond. Clause 1 of the Bond provides that the Bond is unconditional without any proof of actual default on the part of Chian Teck and without the need to satisfy any other condition, except that the claim must be made in the form stipulated in cl 4. Clause 3 is a more complicated provision. It appears to provide for the Bond to be automatically extended for successive periods of six months. However its main effect is as a termination clause which only Lonpac may exercise upon provision to SDK of written notice of the intention to terminate at least 90 days before expiry of the Bond.

23 There are thus two bases under which SDK is entitled to make a claim under the Bond. The first is under cl 1, where there is a default on the part of Chian Teck, or an honest belief on the part of SDK that Chian Teck is in default. In this situation, SDK is entitled to make a claim and cl 1 states that it may do so "without any proof of actual default". Chian Teck can only obtain an

injunction to restrain payment under such a claim if it can prove that the call was fraudulent, *eg,* that there was no honest belief on the part of SDK that Chian Teck was in default. The second basis is under cl 3 of the Bond. This is the situation where Lonpac has given 90 days' written notice prior to the expiry of the Bond of its intention not to extend the Bond. Upon such written notice, SDK can elect to (a) make a claim under the Bond; or (b) direct Lonpac to extend its validity for a further period not exceeding six months, *ie,* SDK can force a final six-month extension of the Bond. If SDK elects to make a claim under cl 3, there is no requirement for there to be any default on the part of Chian Teck as the clear purpose of this provision is to preserve the security, either by way of obtaining a final extension or converting it to cash.

24 I therefore have to first determine whether the demand on the Bond in SDK's letter of 29 July 2022 ("the Demand Letter") was made under cl 1 or cl 3 of the Bond. The letter itself does not, on its face, answer the question. It states as follows:

> 1. We refer to performance bond no. Z18BP00047925, which is an irrevocable and unconditional on-demand guarantee issued by you in favour of us (the "Performance Bond"). A copy of the Performance Bond is enclosed[.]
>
> 2. Pursuant to Clause 4 of the Performance Bond, we hereby make a claim for the sum of S$1,123,152.55. Please treat this letter as our notice in writing of our claim pursuant to Clauses 4 and 5 of the Performance Bond.
>
> 3. Pursuant to Clause 5 of the Performance Bond, kindly let us have payment of the above-mentioned sum within 30 business days of your receipt of this notice. Kindly acknowledge receipt of this letter by signing and returning a duplicate copy to us.
>
> 4. This letter does not set out our full position at law and all of our rights and remedies remain expressly reserved.
>
> [emphasis in original omitted]

25 The Demand Letter merely asserts that the claim was made "pursuant to Clause 4". However, cl 4 is not a ground for making a demand. It sets out how the demand is to be made, *ie*, by notice in writing to the address specified and by receipt of the same, before the end of 90 days prior to the expiry of the Bond. These requirements apply equally to a claim under cl 1 and cl 3. To determine the intent of SDK, it is necessary to examine the events prior to the Demand Letter, which I set out below.

26 On 6 July 2022, SDK's Contracts Manager Mak Kam Chin ("Mak") telephoned Lonpac's Serene Ang ("Ang") to "convey SDK's request for a confirmation from Lonpac that the Bond would be automatically extended pursuant to Clause 3 of the Bond".[25] Ang told Mak that Lonpac had already issued the 28 April 2022 letter to notify SDK that the Bond would not be extended upon expiry on 1 August 2022.[26] Mak responded that SDK had not received the letter and, on the same day, Ang emailed to Mak a copy of that letter. Upon reading it, Mak realised that it was sent to SDK's old address and that could be the reason SDK had not received it. On 13 July 2022, by way of a letter, SDK informed Lonpac that the 28 April 2022 letter was not received by SDK and noted that it was sent to an old address. SDK highlighted the 90-day written notice requirement in cl 3 of the Bond and requested Lonpac to serve a new notice at the correct address (as SDK had since changed its registered address).[27] Subsequently, SDK received the 19 July Notice which states that Lonpac "hereby give you 90 days written notice … not to extend the Bond."

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25 Mr Mak's affidavit dated 21 March 2023 at para 9.

26 Mr Mak's affidavit dated 21 March 2023 at para 10.

27 Mr Mak's affidavit dated 21 March 2023 at paras 11–13 and p 21.

27 In an email to SDK dated 18 July 2022 and conveying a copy of the 19 July Notice, Lonpac pointed out that the 28 April 2022 letter was sent to SDK's last known address by AR Registered Mail.[28] The combined effect of this email and the 19 July Notice suggests that Lonpac took the position that its service of the 28 April 2022 was valid and that, therefore, the 90-day requirement under cl 3 had been satisfied for the Bond to expire on 1 August 2022. That this was Lonpac's position is confirmed in an email dated 28 July 2022 from Lonpac to SDK, which stated that Lonpac had "duly served the Notice not to extend the Bond … on 28 April 2022 via AR Registered Mail to [SDK's] last known registered address."[29] In that email, Lonpac reiterated that the Bond would expire on 1 August 2022.[30] One day later, on 29 July 2022, SDK sent the Demand Letter to make a claim on the Bond.

28 Based on the foregoing, it is evident that, at least from 6 July 2022, SDK's concern was whether the Bond would be extended beyond the original expiry date of 1 August 2022. It is clear from the evidence of Mak that he contacted Lonpac on 6 July 2022 with the intention that the Bond would be automatically extended by an additional period of six months pursuant to cl 3 of the Bond. Indeed, Mak pointed out to Lonpac that there was a requirement of a 90-day written notice, which presumably Mak felt had not been given. Even after Lonpac sent the 19 July Notice, which on its face was unequivocal about the expiry date of the Bond, Mak telephoned Lonpac's representative on 26 July 2022 for confirmation of Lonpac's position that it would expire on 1 August 2022. It was only after Lonpac sent the email of 28 July 2022 that Mak

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[28] Mr Mak's affidavit dated 21 March 2023 at para 14 and MKC-2 at Tab 4.

[29] Mr Mak's affidavit dated 21 March 2023 at para 17 and MKC-2 at Tab 6.

[30] Mr Mak's affidavit dated 21 March 2023 at para 17 and p 30.

was resigned to Lonpac's position, as can be seen in para 18 of his affidavit of 21 March 2023 in which he stated as follows, after referring to that email:

> In view of the above, I believe that Lonpac has made its position on the expiry of the Bond clear and unequivocal to SDK. Since July 2022 (when I first initiated the telephone call with Ms. Ang on the expiry of the Bond …), and notwithstanding the 28 April Notice and/or the 19 Jul Notice, Lonpac's position to SDK has always been that the Bond will expire on 1 August 2022.

29 It should be noted that nowhere in any affidavit from SDK is there an assertion that the claim was made because of a default on the part of Chian Teck. Indeed, Mak had indirectly admitted that the impending expiry of the Bond was a reason for SDK's Demand. This is found in para 20 of his affidavit of 14 November 2022 in which he stated that:[31]

> *On 28 April 2022, Lonpac wrote to SDK to inform SDK that the Bond was not extended and was due to expire on 1 August 2022 … It was against this backdrop* and the long running dispute between the parties *that SDK went on to issue a demand* for the full sum of the Bond …
>
> [emphasis added]

Although Mak also refers to "the long running dispute between the parties" which he had set out in that affidavit, it is clear that the proximate cause of the claim on the Bond was the belief by SDK of its imminent expiry. If SDK had intended to base its claim on the existence of a default by Chian Teck, there would not have been any need for SDK to go through several rounds of telephone calls, emails and letters with Lonpac to argue that the Bond had been extended because of the lack of the 90-day written notice and to seek clarification on the expiry date on more than one occasion.

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[31] Mr Mak's affidavit dated 14 November 2022 at para 20.

30 I therefore find that SDK had made the claim on the Bond on the basis of cl 3, *ie*, that Lonpac had given notice of non-renewal and SDK elected to make a claim on it.

Whether Lonpac provided valid notice of non-extension

31 In my judgment, Lonpac did not validly provide notice of its intention not to extend the Bond in accordance with cl 3 of the Bond.

32 I find that Lonpac had posted the 28 April Notice. However, as the Bond does not contain a provision to deem postage or delivery at a prescribed address as good service, Lonpac and SDK cannot rely on this finding. I also find that SDK did not receive the 28 April Notice because it was addressed and sent to 152 Beach Road, #15-01, Gateway East, Singapore 189721, the address of SDK's previous office and hence there is no finding of delivery of the 28 April Notice. My earlier decision of *1L30G Pte Ltd v EQ Insurance Co Ltd* [2017] 5 SLR 1106 ("*EQ Insurance*") is instructive. In *EQ Insurance*, the performance bond contained a clause that is *pari materia* with cl 3 of the Bond. In that case, the sticking point was whether the expiry of the performance bond under that clause was triggered upon the posting of the letter or upon actual receipt. I held that the postal acceptance rule did not apply to the clause, and that the clause was only satisfied when the plaintiff in that case had actually received the notice of non-renewal (*EQ Insurance* at [35]). This was because the plain text of the clause, such as the emphasis on the word "notice", did not indicate the parties' intention that the postal rule should apply to the giving of notice (*EQ Insurance* at [25]). Further, the defendant's notice of non-renewal would vest in the plaintiff the right to respond in order to protect its interests; the plaintiff thus needed actual notice to exercise those rights (*EQ Insurance* at [34]). In my judgment, this analysis also applies to cl 3 of the Bond. Accordingly, as SDK

did not receive the 28 April Notice, it did not constitute valid notice of Lonpac's intention not to extend the Bond.

33 As regards the 19 July Notice, I find that it was defective because it did not fulfil the 90 days' written notice requirement stipulated in cl 3 of the Bond. The 19 July Notice merely reaffirms the 28 April Notice by stating that the Bond was to expire on 1 August 2022. However, as of 19 July 2022, Lonpac would have only given 13 days' notice of the expiry of the Bond. As such, by the operation of cl 3, the Bond was automatically extended for a successive period of six months (*ie*, until 1 February 2023). For completeness, I also find that the 19 July Notice did not validly serve as notice that the Bond would not be renewed upon the subsequent expiry date of 1 February 2023 because of its explicit reference to the date "1 August 2022". This clearly showed that the intent of the 19 July Notice was to notify SDK of the non-renewal of the Bond on 1 August 2022 and not any other date.

34 Therefore, as of 3 May 2022, which was 90 days prior to 1 August 2022, no valid notice of non-extension had been served by Lonpac on SDK, pursuant to cl 3 of the Bond. Consequently, the Bond was automatically extended by six months from 1 August 2022 to 1 February 2023. Further, as SDK has not since received any further notices of non-extension from Lonpac since 1 February 2023, the Bond continues to be valid until at least 1 August 2023.

35 As I have found that SDK had made the claim on the Bond on the basis of cl 3, but the condition under cl 3 that Lonpac validly serve a notice of non-renewal did not exist, that basis falls and the claim is not valid.

Issue 2: The fraud exception

36 Chian Teck also submits that SDK's call was made fraudulently, as SDK attempted to pass off the call as compliant with cl 3 of the Bond, when it was in fact non-compliant. Therefore, the call on the Bond should be restrained on the ground of fraud.[32]

37 The fraud exception is generally regarded as a difficult exception to invoke (*Halsbury's Laws of Singapore* vol 12 (Buttersworths Asia, 2022 issue) at para 140.646). In order to avail itself of the fraud exception, the subcontractor must establish a strong *prima facie* case that the beneficiary called on the bond: (a) with the knowledge that its demand was invalid; (b) without belief in the validity of its demand; or (c) with indifference to whether the demand was valid or not (*Bintai Kindenko Pte Ltd v Samsung C&T Corp and another* [2019] 2 SLR 295 ("*Bintai Kindenko*") at [74]; *Arab Banking* at [61]–[63]). The Court of Appeal in *Arab Banking* has also held that the standard proof for fraud requires the plaintiff to show that *the only realistic inference* to be drawn on the available evidence was that the beneficiary had no honest belief that it was entitled to receive payment or was recklessly indifferent as to whether it had a right to receive payment (*Arab Banking* at [82]).

38 I find that Chian Teck has not met the high standard of proof necessary for showing fraud. SDK's actions in calling on the Bond were not *mala fide* and were in fact reasonable in the circumstances. On 6 July 2022, when SDK first queried whether the Bond was to be automatically extended, Lonpac informed SDK that the Bond was due to expire on 1 August 2022. This position was reaffirmed by Lonpac in the 19 July Notice. Subsequently, when SDK sought

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32 Chian Teck's written submissions dated 27 April 2023 at para 24.

confirmation again on the expiry date of the Bond, Lonpac once again reaffirmed on 28 July 2022 that "[t]he expiry of the Bond remains as 1 Aug (*sic*) 2022" [emphasis in original]. Notwithstanding the *actual* state of affairs that Lonpac had not in fact provided valid notice of the non-renewal of the Bond 90 days prior to 1 August 2022 (see [32]–[33] above), what was relevant was the impression given by Lonpac that the Bond would expire on 1 August 2022. In my view, it cannot be said that SDK had made the call recklessly with indifference to whether the demand was valid or not (*Bintai Kindenko* at [74]). On multiple occasions, SDK had sought confirmation on the expiry date of the Bond, and Lonpac unequivocally made its position clear to SDK – that the Bond would expire on 1 August 2022. The present case is unlike the facts of *Arab Banking*, as suggested by Chian Teck, where the calls on the performance bonds were held to be made fraudulently in the reckless sense. In that case, one critical consideration was that the calls were made notwithstanding that the notices seeking to extend the validity term of the performance bonds were *obviously and manifestly non-compliant* with the requirements for making a valid call (*Arab Banking* at [87]). Among other matters, the notices did not state that the sub-contractor was in breach of its obligations under the main contract let alone particularise the respect in which the sub-contractor was said to be in breach of the said obligations (*Arab Banking* at [23]). In the present case, I found that it was totally reasonable for SDK to have acted as it did as that would have been the prudent thing to do and therefore there was no fraud.

Issue 3: The Implied Term

The law

39 The law on the implication of terms is set out in the seminal case of *Sembcorp Marine*. From the outset, I emphasise that the threshold for implying

a term is a high one, *ie,* that of necessity (*Sembcorp Marine* at [100]). The Court of Appeal in *Sembcorp Marine* held that the implication of terms is to be considered using a three-step process (at [101]):

(a) First, the court must discern that a gap in the contract arose because parties did not contemplate the gap.

(b) Second, the court considers whether it is necessary in the business or commercial sense to imply a term in order to give the contract efficacy. The business efficacy test is applied to identify gaps in the contract that need to be filled for it to be commercially workable; a term will not be implied merely to improve the contract (*Sembcorp Marine* at [84]).

(c) Third, the court considers the specific term to be implied. A term is only to be implied if it passes the "officious bystander" test – *ie,* the contracting parties, having regard to the need for business efficacy, would have responded "Oh, of course!" had the proposed term been put to them at the time of the contract.

The decision

40 Chian Teck avers that the court should imply a term into the Subcontract to the effect that SDK may not call on the Bond so long as Chian Teck extends the validity of the Bond. According to Chian Teck, cl 8.1 and cl 8.3 of the Subcontract prescribe that the Bond is to be valid at least until the expiry of the Defect Liability Period or the Maintenance Period, so a proper construction of

the Subcontract does not envisage a call being made on the Bond unless the security is threatened.[33] Clause 8.1 and cl 8.3 of the Subcontract are as follows:

> 8.1. Within 14 days of the Sub-Contract Effective Date, the Sub-Contractor shall provide a cash deposit or in lieu thereof, a performance bond ("Performance Bond") in the Main Contractor's favour in exact accordance with the prescribed form in Appendix H of the Conditions of Sub-Contract Documents for an amount equivalent to the percentage stipulated in Appendix A of the Conditions of Sub-Contract (or 5% of the Sub-Contract Sum if no percentage/amount has been stipulated in Appendix A). *The Performance Bond shall be validity until at least the expiry of the Sub-Contract Defect Liability Period or Maintenance Period.* The Performance Bond shall in the form of an unconditional demand bond obtained from a licensed bank having a place of business in Singapore.
>
> …
>
> 8.3 *If the Sub-Contractor has not fulfilled all its obligations under the Sub-Contract by expiry date specified in the Performance Bond, the Sub-Contractor shall, prior to the expiry date, arrange for the extension of the validity of such Performance Bond by such period or periods as is considered necessary by the Main Contractor in order to meet the requirements of this entire Clause 8.*
>
> [emphasis added]

According to Chian Teck, cl 8.3 of the Subcontract suggests that the Bond was intended to act as a form of security for SDK, and that the Bond be extended if Chian Teck has not fulfilled all its obligations under the Subcontract. If SDK were allowed to call on the Bond, that would render cl 8.3 of the Subcontract nugatory and redundant against cl 8.1 of the Subcontract.[34] Chian Teck submits that cl 8.3 "implies an equal and opposite exchange – if the Bond is valid, SDK should not call on the Bond".[35] Consequently, Chian Teck submits that the call

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33 Chian Teck's written submissions dated 23 March 2023 at para 26.

34 Chian Teck's written submissions dated 23 March 2023 at paras 28–30.

35 Chian Teck's written submissions dated 23 March 2023 at para 30.

on the Bond should be restrained on the ground of fraud because SDK knowingly breached the Implied Term.

41 In my judgment, there is no room to imply the Implied Term into the Subcontract. I say this for several reasons.

42 First, the Implied Term flies in the face of a contrary express term, cl 8.4 of the Subcontract. Where an express term of the contract governs the legal relationship between the parties, there is no scope for the implication of a term: *Golden Harvest Films Distribution (Pte) Ltd v Golden Village Multiplex Pte Ltd* [2007] 1 SLR(R) 940 at [47]. I set out cl 8.4 in full:

> 8.4 Pursuant to the intent set out in the Clause 8.1 above, that the Performance Bond is to stand in lieu of a cash deposit, the Sub-Contractor agrees that *except in the case of fraud, the Sub-Contractor shall not for any reason whatsoever be entitled to enjoin or restrain*:
>
> > a) The Main Contractor from making any call or demand on the Performance Bond or receiving any cash proceeds under the Performance Bond; and/or
> >
> > b) The obligor under the Performance Bond from paying any cash proceeds under the Performance Bond;
>
> *on any other ground including the ground of unconscionability.*
>
> [emphasis added]

43 The Subcontract prescribes the nature and form of the performance bond to be provided by Chian Teck in SDK's favour if Chian Teck opts to provide a performance bond in lieu of a cash deposit. Clause 8.4 sets out the circumstances where SDK is entitled to restrain a call on the Bond. In particular, cl 8.4 provides that "[Chian Teck] agrees that except in the case of fraud, [Chian Teck] shall not for any reason whatsoever be entitled to … restrain [SDK] from making any call … on the [Bond] … on any other ground …". Based on the express wording of cl 8.4, parties have clearly agreed that SDK is entitled to call on the Bond in

all other circumstances except fraud. In contrast, the Implied Term would impose an additional restraint on when SDK is entitled to call on the Bond, *ie,* when the validity of the Bond is extended. I therefore agree with SDK's submission that the Implied Term clearly goes against the express agreement of the parties in cl 8.4.

44 Second, the inclusion of cl 8.4 in the Subcontract means that there is no "true" gap in the Subcontract, in the sense that parties have not contemplated the issue of when SDK should be restrained from calling on the Bond (*Sembcorp Marine* at [94]). Based on cl 8.4, parties have clearly contemplated the circumstances under which SDK would be entitled to call on the Bond.

45 Third, Chian Teck's arguments that cll 8.1 and 8.3 create a redundancy in the Subcontract that warrants the implication of the Implied Term are unconvincing. In this respect, I am in agreement with SDK's submissions. Clause 8.1 and cl 8.3 serve different functions. Clause 8.1 provides for the minimum validity period of the Bond, namely that it be valid "until at least the expiry of the Sub-Contract Defects Liability Period or Maintenance Period". Conversely, cl 8.3 provides an express requirement for the continual extension of the performance bond in the event that there is a delay in the execution of the Subcontract. It does not imply that SDK is not allowed to call on the Bond after its validity is extended. Otherwise, that would defeat the purpose of extending the Bond to provide security for the completion of Chian Teck's obligations and prevent SDK from accessing the security that SDK had contracted for. As I have alluded to earlier, there is a distinction between a claim under cl 1 and cl 3 of the Bond. Under cl 1, there must be a default on the part of Chian Teck, or SDK has an honest belief that there is one (although the burden of proof falls on Chian Teck to prove otherwise). However under cl 3, there is no requirement for any default, and the right to call is triggered by Lonpac's notice of intention of non-

renewal. Looked at in this light, it is clear that SDK is entitled to make a call under cl 1 at anytime a default has occurred, whether or not the Bond is due to expire and this is not inconsistent with cl 8.3 of the Subcontract which merely operates to extend the validity of the Bond.

46 Based on the foregoing, there is no basis to imply the Implied Term into the Subcontract.

Conclusion

47 In conclusion, given that SDK's Demand was invalid, there will be an order for Lonpac to be restrained from making payment of the sum of $1,123,152.55 to SDK, pursuant to the claim on the Bond made on 29 July 2022. Correspondingly, SDK is also restrained from claiming or directing Lonpac to make said payment. The Bond remains valid, at least until 1 August 2023. For the avoidance of doubt, this order does not restrain SDK from making a fresh call under the terms of the Bond. I will hear parties on costs.

Lee Seiu Kin
Judge of the High Court

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Mahendra Prasad Rai (Cooma & Rai) for the second respondent.