Shanghai Electric Group Co Ltd *v* PT Merak Energi Indonesia and another [2010] SGHC 2

Case Number : Originating Summons No 273 of 2009

Decision Date : 06 January 2010

Tribunal/Court : High Court

Coram : Lee Seiu Kin J

Counsel Name(s) : Christopher Chuah, Cindy Lim and Joanna He (WongPartnership LLP) for the plaintiff; Hri Kumar Nair SC, Tham Feei Sy and Kristine Ang Li Shan (Drew & Napier LLC) for the first defendant.

Parties : Shanghai Electric Group Co Ltd — PT Merak Energi Indonesia and another

Conflict of Laws

6 January 2010 Judgment reserved.

Lee Seiu Kin J :

1 This is an application by the first defendant ("PT Merak") to set aside an *ex-parte* injunction ("the Injunction") that I granted on 9 March 2009 to the plaintiff ("Shanghai Electric"). The Injunction ordered that PT Merak be restrained from receiving any monies from the second defendant ("the Bank") pursuant to a call made on 6 March 2009 ("the Demand") by PT Merak on the Advance Payment Security No 065-311-1-00479-0(001) ("the Bond") issued by the Bank in favour of PT Merak, and from making any further calls thereon until further order.

2 This case involves an interesting point of law that has not arisen in previous decisions of the courts pertaining to on-demand bonds: whether Singapore law is the applicable law in an application to restrain a call on an on-demand bond which provides that English law is the governing law.

Background

3 Shanghai Electric is a company incorporated in China and is in the business of designing, manufacturing, sale and supply of, *inter alia*, equipment used in the generation, transmission and distribution of power. PT Merak is an Indonesian company with plans to commence operations in power plant development and management in 2010.

4 By a contract dated 10 August 2007 ("the Contract"), Shanghai Electric was engaged by PT Merak for the design, engineering, manufacturing, procurement, construction, start-up, testing, commissioning and completion of a 2 x 60 MW coal fired electricity and steam generating power plant ("the Power Plant") located in West Java, Indonesia, for the sum of US$108m ("the Contract Price"). On 22 January 2008, PT Merak and Shanghai Electric (referred to collectively as "the Parties") entered into an addendum to the Contract ("the Addendum") which amended several clauses of the Contract.

5 The Contract provided for PT Merak to pay Shanghai Electric an advance payment of 10% of the Contract Price ("the Advance Payment") amounting to US$10.8m. The Advance Payment was a condition precedent for the issuance of the notice to proceed. In turn, s 7.7(a) of the Contract required Shanghai Electric to procure the Bond for the sum of US$10.8m in favour of PT Merak. This

was performed on 20 November 2007 with the issue of the Bond for the sum of US$10.8m by the Singapore branch of the Bank. On 1 April 2008, PT Merak effected payment of the sum of US$10.8m to Shanghai Electric. With this, Shanghai Electric commenced work under the Contract.

6 Under the Bond, the Bank undertook to pay to PT Merak the sum of up to US$10.8m (which is the amount of the Advance Payment) upon receipt of:

the Owners' first written demand stating

(1) the amount to be paid to the Owner,

(2) that such amount is due to the Owner pursuant to the Agreement, and

(3) that notice of default was previously given to the Contractor.

Essentially, the substantive condition for payment was a letter by PT Merak to the Bank stating the amount to be paid, that this was due to PT Merak pursuant to the Contract and that Shanghai Electric had been given notice of default. This is the nature of an on-demand bond: that it is payable upon demand, often accompanied by a statement by the beneficiary as to the existence of a certain set of facts.

7 On 2 February 2009, PT Merak issued to Shanghai Electric a "Notice of Contractor Default" pursuant to s 19.2.2(b) of the Contract. PT Merak alleged that since 10 August 2007 (the date of the Contract), "very little progress was made on the construction of the Power Plant. Apart from the temporary site office, temporary warehouse, temporary site roads, test pilings, excavation and some lean concrete (levelling concrete) for the foundations of the Boiler and Turbine Buildings, there is nothing else on site. Significantly, [Shanghai Electric] failed to complete the work in respect of Payment Milestones 1 to 5. Further, [PT Merak] also encountered numerous difficulties with [Shanghai Electric]. Although [PT Merak] tried to resolve these difficulties through meetings and correspondence, this proved futile".

8 On 11 February 2009, Shanghai Electric sent a letter ("the first Letter") to PT Merak stating that:

(a) Shanghai Electric required more than the 10 days from receipt of the Notice of Contractor Default to prepare the full Contractor Remedial Plan, due to the length of the Notice of Contractor Default;

(b) a detailed reply from Shanghai Electric in respect of the Contractor Defaults set out in the Notice of Contractor Default will be furnished to PT Merak within 2 days from 11 February 2009; and

(c) the portion of the Contractor Remedial Plan relating to the "NCR and Remedial proposal" is set out in the attachments to the letter of 11 February 2009.

9 This was followed by a second letter from Shanghai Electric dated 13 February 2009 ("the second Letter") setting out its response to various items of alleged "Contractor Defaults" contained in the notice of contractor default. On 16 February 2009, PT Merak replied – acknowledging receipt of the "Contractor Remedial Plan" attached to the letter of 11 February 2009 and stating that it was "currently reviewing the Contractor Remedial Plan and will revert with [its] response in accordance with s 19.2.2(b) of the Contract".

10 On 19 February 2009, PT Merak sent a second letter to Shanghai Electric, stating, amongst other things, that "until such time as [PT Merak has had] the opportunity to evaluate [Shanghai Electric's] Contractor Remedial Plan, [Shanghai Electric's] request for a meeting is unnecessary". By a letter dated 27 February 2009 ("the third Letter"), Shanghai Electric furnished further details of the Contractor Remedial Plan to PT Merak.

11 On 6 March 2009, three events occurred: first, PT Merak delivered a notice of termination to Shanghai Electric to terminate its appointment under the Contract ("the Notice of Termination"); second, Shanghai Electric wrote to PT Merak, accepting the termination and alleging that such termination amounted to a repudiation of the Contract by PT Merak; third, after delivery of the notice of termination to Shanghai Electric, PT Merak delivered a letter of demand to the Bank calling for payment under the Bond ("the Demand").

12 On 9 March 2009, Shanghai Electric filed the Injunction application on an *ex parte* basis, which I heard and granted on the same day. On 26 March 2009, PT Merak filed the present application to set aside the Injunction.

The Issue of Law

13 As alluded to at the outset of this judgment, there is an issue as to the applicable law governing the restraint on the calling of an on-demand bond. The Contract itself is governed by English law, it being an express provision in s 26.8 thereof. Section 25.1 provides for disputes to first be attempted to be resolved by good faith negotiations. Failing this, s 25.2.1 provides such dispute to be submitted to arbitration at the Singapore International Arbitration Centre ("SIAC") to be conducted in accordance with the ICC Rules. It is also expressly provided in the Bond that the governing law is English law. Although the Bond is an agreement between the Bank and PT Merak, it was given pursuant to s 7.7(b) of the Contract which required Shanghai Electric to procure an advance payment security in the form annexed in exhibit N-2 of the Contract. The terms of the Bond essentially mirrored the form in exhibit N-2. The governing law clause in the Bond – which also provides that Singapore courts have non-exclusive jurisdiction over any proceedings arising out of it – states as follows:

> This [Bond] shall be governed by and construed in accordance with the laws of England. We hereby irrevocably submit to the non-exclusive jurisdiction of the courts of [Singapore] for the purposes of any … proceedings arising out of this [Bond].

14 PT Merak submitted that, as the Contract and, especially, the Bond expressly provide that English law is the governing law, this court should apply English law in relation to the decision whether to restrain PT Merak from making a demand under the Bond. Shanghai Electric, on the other hand, submitted that notwithstanding that English law is the governing law of the Bond, this application was governed by the procedural law of the forum and therefore Singapore law would apply. This is an important point as Singapore law and English law diverge on whether fraud is the only basis upon which the court would restrain a call on an on-demand bond.

15 This divergence was brought about by the decision of the Court of Appeal in *Bocotra Construction Pte Ltd v Attorney-General (No 2)* [1995] 2 SLR 733 ("*Bocotra*"). I would note that nowhere in the judgment in *Bocotra* was it said that the court had departed from English law. Indeed, *Bocotra* cited the leading English precedents on the issue without any suggestion that Singapore law was different. The expression "fraud or unconscionability" appeared three times in *Bocotra* without any explanation for the inclusion of the latter word or elaboration as to what it meant. I had pointed this out in my decision in *New Civilbuild Pte Ltd v Guobena Sdn Bhd* [1999] 1 SLR 374 ("*New Civilbuild*"), in which I argued at [33] that the court in *Bocotra* had, in all likelihood, used the

expression "unconscionability" interchangeably with "fraud" because it could not have made such a drastic departure from English law without giving any reason for it. I pointed out at [45] of *New Civilbuild* that, while the fraud exception was justified on the ground that it must be presumed that the caller must always act in good faith (I add here that this is also the doctrine that *fraud unravels all*: see *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168 at 184), there was no basis for the introduction of the ground of unconscionability to frustrate the clear intention of the parties that the issuer would pay the beneficiary upon written demand. However, in the subsequent Court of Appeal decision of *GHL Pte Ltd v Unitrack Building Construction Pte Ltd* [1999] 4 SLR 604 ("*GHL*"), the court – having been referred to *New Civilbuild* – stated that the Court of Appeal in *Bocotra* had made a conscious departure from English law on this issue. This appears at [16] of the judgment in *GHL*, as follows:

> It is abundantly clear from [*Bocotra*] that the court expressly held that 'fraud or unconscionability' was a ground on which the court would interfere and restrain the enforcement of a performance bond. It is significant that in that judgment the court on no less than three occasions referred consistently to 'fraud or unconscionability' as a ground for the grant of an injunction. We should add that the concept of 'unconscionability' was adopted after deliberation, and was not inadvertently inserted as a result of a slip; nor was it intended to be used synonymously or interchangeably with 'fraud'. There is nothing in that judgment which can be said to indicate or suggest that the court did not decide that 'unconscionability' alone is not a separate ground as distinct from fraud. We accept that to that extent, *Bocotra* is a departure, and if we may respectfully say so, a conscious departure, from the English position.

16 With the decision of the Court of Appeal in *GHL*, there was no longer any question that Singapore law had, since the *Bocotra* decision, departed from English law in that, in addition to fraud, unconscionability is also an exception. It must be borne in mind that an on-demand term of a similar nature to that in the Bond in the present case is usually specified as a requirement in the underlying contract for the purpose of obtaining security for the performance of the contract by one party. In the building industry it was usually provided by the contractor to the employer, or sub-contractor to the main contractor. Before the practice of providing an on-demand bond became common – in *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] 1 QB 159 at 169A, it was described by Lord Denning MR as "a new creature" – such security was often in the form of cash. However this raised the capital requirement of the contractor or sub-contractor, resulting in higher costs. The giving of an on-demand bond that is "as good as cash" was found by the industry to be a good alternative, presumably because contractors could utilise lines of credit on the security of their immovable property, high-value equipment or other acceptable assets without drawing down cash. As the underlying contracts are invariably drawn up by the party requiring the security, it is not surprising that such contracts provide for maximum ease of conversion of the bond into cash. Therefore it is not unexpected that as soon as Singapore law departed from English law on this issue, a party drawing a contract that called for an on-demand bond would prefer to have it governed by English law rather than Singapore law as it would be more difficult to obtain an injunction, fraud being a higher threshold to clear than unconscionability. It is not known whether this was the consideration in the present case, but there was certainly no disadvantage to PT Merak in specifying English law in the Bond even though it provided for arbitration under the Singapore Industrial Arbitration Centre ("SIAC") and for the non-exclusive jurisdiction of Singapore courts. In *Marinteknik Shipbuilders (S) Pte Ltd v SNC Passion* [2001] SGHC 140 ("*Marinteknik*") I had foreseen just such a case when I made the following observation at [31]:

> As unconscionability is not an exception in English law, there is the question as to whether the Plaintiffs may rely upon this ground in addition to fraud because the relevant contracts, i.e. the [underlying contract] and the [on-demand bond], are governed by English law. However this

> issue is not necessary for my decision and I did not have the benefit of submissions from counsel. Therefore I will be content to merely raise it here and leave this question to be decided elsewhere.

It appears that I have to pick up the gauntlet from where I threw it.

17 Returning to the issue of the applicable law in this originating summons, it is trite legal principle that procedural matters are governed by the *lex fori*, while substantive matters are governed by the law to which the court is directed by its choice of law rule: see *Dicey, Morris and Collins on the Conflict of Laws*, 14th Ed (Sweet & Maxwell, London, 2006) ("*Dicey*") at [7-002]–[7-003]. The difficult question is whether the restraining of a demand on an on-demand bond in the present circumstances is a substantive or procedural matter.

18 In *Star City Pty Ltd v Tan Hong Woon* [2002] 2 SLR 22 ("*Star City*"), the Court of Appeal had to consider whether s 5(2) of the Civil Law Act (Cap 43, 1999 Rev Ed) was a substantive or procedural provision. The court said that (at [12]):

> … one must look at the effect and purpose of that provision. If the provision regulates proceedings rather than affects the existence of a legal right, it is a procedural provision.

19 In *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 ("*John Pfeiffer*"), the plaintiff suffered personal injury in New South Wales but took out a suit in the Australian Capital Territory ("ACT"). Unlike New South Wales, the ACT did not have a statutory limit on the amount of damages that could be awarded for non-economic loss. The High Court of Australia held that the assessment of damages was governed by the *lex loci delicti* as it was not directed to governing or regulating the mode or conduct of court proceedings and therefore was a matter of substance rather than procedure. While this question is not settled in Singapore (see *Goh Suan Hee v Teo Cher Teck* [2009] SGCA 52 at [19]–[22]), the following part of the judgment in *John Pfeiffer* at [99] is apt:

> … matters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters that, on their face, appear to be concerned with issues of substance, not with issues of procedure …

20 The essence of Shanghai Electric's submissions is that an injunction takes the form of a judicial remedy that is of an equitable nature, and acts *in personam*. Further, all matters relating to the nature of a claimant's remedy invokes questions of procedure, and should therefore be governed by the *lex fori* – as stated in *Halsbury's Laws of England* vol 8(3) (LexisNexis, 4th Ed Reissue, 2003) at para 21:

> All matters relating to the nature of the claimant's remedy, such as whether the claimant is entitled to an injunction or to an order for specific performance or for an account of profits, are for the lex fori. A claimant bringing an action in England to enforce a foreign right will not be defeated merely because English remedies are greater or less than, or otherwise different from, those in the foreign country …

The above quotation is uncontroversial to the extent that it concerns the availability of a remedy to the claimant. Indeed, the *lex fori* must regulate remedies to a certain extent because the court can only give its own remedies as opposed to alien remedies. As Lord Pearson stated in *Chaplin v Boys* [1971] AC 356 ("*Chaplin*") at 394C:

> The lex fori must regulate procedure, because the court can only use its own procedure, having

no power to adopt alien procedures. To some extent, at any rate, the lex fori must regulate remedies, because the court can only give its own remedies[,] having no power to give alien remedies. For instance, the English court could not make provision in its order to enable the plaintiff, in the event of a possible future incapacity materialising, to come back and recover in respect of it. That is alien procedure or an alien remedy and outside the powers of an English court. On the other hand, an English court may sometimes be able to give in respect of a tort committed in a foreign country a remedy which the courts of that country would be unable to give. For instance, the foreign courts might have no power to grant an injunction or to make an order for specific performance or for an account of profits.

21 In the present case, what is in issue is not whether the remedy of an injunction is available to Shanghai Electric: there is no doubt that it is. The true question is whether the grant of an injunction in the present application is a substantive right, in which case it would be governed by the governing law of the Bond, or a matter of procedure in which case it would be governed by the *lex fori*. To determine this issue it is necessary to consider the purpose of the Bond. It was issued by the Bank at the behest of Shanghai Electric who procured it pursuant to the Contract. The issue of the Bond was a pre-condition for the Advance Payment by PT Merak to Shanghai Electric of the sum of US$10.8m, and its purpose was to provide security to PT Merak in the same amount in the event that Shanghai Electric was unable to perform its obligations under the Contract. Under the Bond, the Bank undertook to pay PT Merak up to US$10.8m upon written demand. When PT Merak made the written demand, Shanghai Electric applied to this court for an injunction to restrain the Bank from paying and to restrain PT Merak from receiving payment. What is the nature of this right to the remedy of an injunction?

22 In the case of the fraud exception, as alluded to in [15] above, it is based on the presumption of good faith. Although it is often characterised as an interim measure to preserve the *status quo* pending final resolution of the dispute between the parties, the true position must be that a fraudulent call by a beneficiary on an on-demand bond would not be valid under the contract between the issuer and the beneficiary on account of the presumption of good faith. Thus the beneficiary would not be entitled to receive the proceeds that the issuer would be otherwise be obliged to pay pursuant to the call and so the injunction is final on the matter. If the parties then proceed to final resolution of the dispute between them and the party that procured the bond is found to be liable to the beneficiary for a certain sum, the beneficiary can then make another call on the on-demand bond for that sum and the procuring party would not be able to prevent the payment as he would not be able to make out a case of fraud.

23 In the case of unconscionability, there have been various expositions on the nature of the exception in several cases decided after *Bocotra*. I set out below the various authorities that have dealt with it.

24 In *Raymond Construction Pte Ltd v Low Yang Tong* [1996] SGHC 136 ("*Raymond Construction*"), Lai Kew Chai J ("Lai J") referred to *Bocotra* and observed at [5]–[6] that:

> 5. … The concept of "unconscionability" to me involves unfairness, as distinct from dishonesty or fraud, or conduct of a kind so reprehensible or lacking in good faith that a court of conscience would either restrain the party or refuse to assist the party. Mere breaches of contract by the party in question (in this case, the first defendant) would not by themselves be unconscionable. Where breaches are alleged, there would generally be (counter-allegations and) disputes when the case is before the court. Therefore the first defendant's breaches alone would not have sufficed. In my view, *Royal Design Studio* (Thean J as he then was) and *Kvaerner Singapore* (Selvam J) are illustrations of the circumstances where payments would have been

unconscionable.

6. … on the authorities considered, the court was elaborating on what would amount to unconscionability sufficiently grave and serious for equity to intervene. That proceeded on the basis that equity would step in to prevent the enforcement of any legal right if such enforcement would have been unjust. Any allegation of fraud was put aside. Secondly, learned counsel for the first defendant contended that mere allegations of breaches of contract by the first defendant did not amount to unconscionability. I agreed with him.

25 In *Dauphin Offshore Engineering & Trading Pte Ltd v The Private Office of HRH Sheikh Sultan bin Khalifa bin Zayed Al Nahyan* [2000] 1 SLR 657 ("*Dauphin*"), the Court of Appeal elaborated more fully on what would constitute unconscionability at [42]–[47] in the following manner:

42 We do not think it is possible to define 'unconscionability' other than to give some very broad indications such as lack of bona fides. What kind of situation would constitute unconscionability would have to depend on the facts of each case. This is a question which the court has to consider on each occasion where its jurisdiction is invoked. There is no pre-determined categorisation.

43 The genesis for the line of local cases applying the concept of unconscionability as a separate ground to restrain a call on a performance bond is to be found in the judgment of Everleigh LJ in *Potton Homes Ltd v Coleman Contractors Ltd* (supra) at p 28 where he said (obiter):

> Moreover, in principle I do not think it possible to say that in no circumstances whatsoever, apart from fraud, will the court restrain the buyer. The facts of each case must be considered. If the contract is avoided or if there is a failure of consideration between the buyer and the seller for which the seller undertook to procure the issue of the performance bond, I do not see why, as between seller and buyer, the seller should not [sic — delete] be unable to prevent a call upon the bond by the mere assertion that the bond is to be treated as cash in hand. … If the contractor were unable to perform because the employer failed to provide the finance, it would seem wrong to me if the court was not entitled to have regard to the terms of underlying contract and could be prevented from considering the question whether or not to restrain the employer by a mere assertion that a performance bond is like a letter of credit.

44 In *GHL v Unitrack* (supra) this court addressed an instance where the call would be unconscionable:

> We are concerned with *abusive calls* on the bonds. It should not be forgotten that a performance bond can be used as an oppressive instrument, and in the event that a beneficiary calls on the bond in circumstances, where there is *prima facie* evidence of fraud or unconscionability, the court should step in to intervene at the interlocutory stage until the whole of the circumstances of the case has been investigated. [Emphasis added]

45 In *Raymond Construction Pte Ltd v Low Yang Tong & Anor* (supra), Lai Kew Chai J opined:

> The concept of 'unconscionability' to me involves unfairness, as distinct from dishonesty or fraud, or *conduct of a kind so reprehensible or lacking in good faith* that a court of conscience would either restrain the party or refuse to assist the party. *Mere breaches of contract by the party in question would not by themselves be unconscionable*. [Emphasis added]

46 Other instances where unconscionability was held to apply are: (i) in *Kvaerner Singapore Pte Ltd v UDL Shipbuilding (Singapore) Pte Ltd* (supra), the beneficiary made a call based on a breach induced by their own default and was not permitted to do so; (ii) in *Royal Design Studios v Chang Development Pte Ltd* (supra), an injunction was granted where the beneficiary's call on the bond was based on delays in construction that were caused by the beneficiary's own default in failing to make timely payments on the interim certificates issued by the architect and a considerable sum due to the account party under the joint venture agreement was retained by the beneficiary; (iii) in *Min Thai Holdings Pte Ltd v Sunlabel Pte Ltd & Anor* (supra), the defendant-buyer was restrained from calling on the performance guarantee when the non-delivery of rice was due to floods caused by typhoon and there was a 'force-majeure' clause in the contract, as the court felt that it was unconscionable, in the circumstances, for the defendant-buyer to receive payment under the performance guarantee.

47 As for the argument that the efficacy and integrity of the performance guarantee should not be undermined by a concept such as unconscionability, which is less than precise, we would repeat the answer given in *GHL v Unitrack* (at ¶24):

> It should also not be forgotten that a performance bond is basically a security for the performance of the main contract, and as such we see no reason, in principle, why it should be so sacrosanct and inviolate as not to be subject to the court's intervention except on the ground of fraud. We agree that a beneficiary under a performance bond should be protected as to the integrity of the security he has in case of non-performance by the party on whose account the performance bond was issued, but a temporary restraining order does not prejudice or adversely affect the security; it merely postpones the realisation of the security until the party concerned is given an opportunity to prove his case.

26 In *Eltraco International Pte Ltd v CGH Development Pte Ltd* [2000] 4 SLR 290 ("*Eltraco*"), the Court of Appeal said at [30] and [36]:

> 30 … Lai Kew Chai J said [in *Raymond Construction*] the concept of 'unconscionability' involves unfairness. We agree. That would be so. In every instance of unconscionability there would be an element of unfairness. But the reverse is not necessarily true. It does not mean that in every instance where there is unfairness it would amount to 'unconscionability'. That is a factor, an important factor no doubt in the consideration. It is important that the courts guard against unnecessarily interfering with contractual arrangements freely entered into by the parties. The parties must abide by the deal they have struck.
>
> …
>
> 36 It must be borne in mind that the court in restraining a beneficiary from calling on a bond on the ground of unconscionability is exercising an equitable jurisdiction …

27 The origin of the unconscionability exception in Singapore appears to be the decisions of the High Court in *Royal Design Studio Pte Ltd v Chang Development Pte Ltd* [1990] SLR 1116 and *Kvaerner Singapore Pte Ltd v UDL Shipbuilding (Singapore) Pte Ltd* [1993] 3 SLR 350. As noted by the Court of Appeal in *Dauphin* at [45], both High Court cases relied on an *obiter dictum* by Everleigh LJ in *Potton Homes v Coleman Contractors* (1984) 28 BLR 19 at 28, to the effect that as between the parties to the underlying contract, the situation is not as straightforward as between the issuing bank and the beneficiary. It would appear from the foregoing authorities that in restraining a call on an on-demand bond on the ground of unconscionability, the court is exercising its equitable jurisdiction based on some notion of fairness.

28 I return to the question posed earlier at [21], whether the grant of an injunction in the present application is a substantive right. This issue was before the High Court in *Econ Corporation International Limited v Ballast-Nedam International BV* [2003] 2 SLR 15 ("*Econ*"). The defendants there had sub-contracted construction work to the plaintiffs who in turn procured a performance bond and advance payment guarantee in favour of the defendants. The plaintiffs applied for, *inter alia*, an injunction to restrain the defendants from calling on the bond and guarantee. The plaintiffs also obtained leave to serve the originating summons outside the jurisdiction on the defendants in the Netherlands. The defendants applied, *inter alia*, to set aside the order granting leave for service outside jurisdiction. In support of its application, the defendants argued that the court had no jurisdiction because no substantive relief was being sought by the plaintiffs in the proceedings. The defendants relied on the case of *Mercedes-Benz AG v Leiduck* [1996] 1 AC 284 ("*Mercedes-Benz*"), where the Privy Council, on appeal from Hong Kong, held that the Hong Kong court had no jurisdiction to grant an order for service outside the jurisdiction solely for a *Mareva* injunction, because such injunction did not decide any substantive rights and did not call into existence any process upon which the court could work. The plaintiffs distinguished *Mercedes-Benz* on the ground that the relief sought there was akin to an attachment of the defendants' assets pending the determination of proceedings in another jurisdiction, which was unlike the injunction they sought. Lai J agreed with the plaintiffs and held at [16] that:

> ... in this case the injunction sought by the plaintiffs is a substantive relief and it determines the rights of the defendants under the Bond and the Advance Payment Guarantees as to his entitlement to moneys thereunder and the amount payable …

29 I would respectfully agree with Lai J that the right to injunction in the case of an on-demand bond pertains to a substantive right. The essence of an on-demand bond is that the bank must pay according to its guarantee, on demand, without proof or conditions. In *Bocotra*, the Court of Appeal had this to say about a performance bond which possessed the nature of an on-demand bond (at 741H):

> … It is important to bear in mind the commercial role that performance bonds are intended to perform. The underlying purpose of a performance bond is to provide a security which is to be readily, promptly and assuredly realisable when the prescribed event occurs ...

30 Any restraint on the right of the beneficiary to receive immediate payment upon a demand on the Bond would effectively deprive him of such right to immediate payment. The application by Shanghai Electric for an injunction therefore concerns a substantive right vested in PT Merak under both the Contract it had with Shanghai Electric and the terms of the Bond. It follows therefore that English law governs the restraint on the calling of the Bond.

Whether the Demand was regular and valid

31 I turn now to consider the issues of fact. The first issue is whether the Demand made by PT Merak was regular and valid. The Bond states, *inter alia*, as follows ("the Conditions"):

> WE HEREBY AGREE TO MAKE PAYMENT TO THE OWNER UPON OUR RECEIPT OF THE OWNER'S FIRST WRITTEN DEMAND STATING:
>
> 1. THE AMOUNT TO BE PAID TO THE OWNER,
>
> 2. THAT SUCH AMOUNT IS DUE TO THE OWNER PURSUANT TO THE CONTRACT, AND

3. THAT NOTICE OF DEFAULT WAS PREVIOUSLY GIVEN TO THE CONTRACTOR.

32 It is not disputed that the International Chamber of Commerce Uniform Rules for Demand Guarantees ("ICC URDG") and English law governs the regularity and validity of the Demand. Indeed, this is expressly provided for in the terms of the Bond:

> THIS GUARANTY SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF ENGLAND.
>
> …
>
> THIS GUARANTY SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH URDG 458 OF ICC, SAVE THAT IN THE EVENT OF ANY INCONSISTENCY BETWEEN THIS GUARANTY AND URDG 458 OF ICC, THIS GUARANTY SHALL PREVAIL.

33 The question here is whether the Conditions have been duly fulfilled. The answer, in my view, must be in the affirmative. Turning to the Demand, it is evident that the Conditions have been met. The material portions of the Demand are as follows:

> 1.1 We refer to the Advance Payment Security No 065-311-4-000479-0(001) for USD10,800,000.00 issued by the [Bank], Singapore branch on 20 November 2007, as amended by the Advance Payment Security issued on 5 February 2008, in favour of PT Merak Energi Indonesia ("the Owner").
>
> 1.2 The Owner hereby demands payment of USD10,800,000.00 (the "Amount").
>
> 1.3 The Owner confirms that:
>
> (a) The amount to be paid to the Owner is USD10,800,000.00;
>
> (b) The Amount is due to the Owner pursuant to the Contract; and
>
> (c) Notice of default was previously given to the Contractor.
>
> …
>
> 1.5 In accordance with the Uniform Rules of Demand Guarantees of the International Chamber of Commerce Rules (ICC Publication No. 458), the Owner confirms that the Contractor has breached the Contract by, among others:
>
> (a) Appointing subcontractors without approval;
>
> (b) Procuring the manufacture of major items of Equipment without the Owner's approval;
>
> (c) Failing to complete Payment Milestones by the dates required by the Contract; and
>
> (d) Failing to implement a quality assurance program as required by the Contract.
>
> 1.6 The Owner has terminated the Contract for Contractor Default. The Advance Payment made to the Contractor is due for repayment to the Owner and remains outstanding, notwithstanding the Owner's demand for repayment.

34 It is apparent that the Demand satisfied both the Conditions and Art 20 of the ICC URDG. Firstly, the Demand is obviously a "written demand". Secondly, the Demand stated "the amount to be paid to [PT Merak]". Thirdly, the Demand stated "that such amount is due to [PT Merak] pursuant to the Contract". Fourthly, the Demand stated "that Notice of Default was previously given to [Shanghai Electric]". Fifthly, PT Merak had complied with the requirements of Art 20 of the ICC URDG by stating: (a) that Shanghai Electric was in breach of the Contract, and (b) by setting out, in general terms, the respects in which Shanghai Electric was in breach. It is therefore my view that the Demand is regular and valid, and I am unable to agree with Shanghai Electric's submission that PT Merak had failed to adequately particularise the breaches and to identify the "Notice of Default" given under the Contract upon which the Demand was made.

Whether PT Merak acted fraudulently and/or unconscionably in making the Demand

35 That, however, is not the end of the matter as Shanghai Electric contended that PT Merak had acted fraudulently and/or unconscionably in making the Demand. I had held in [30] that English law governs the restraint on the calling of the Bond. Fraud therefore remains the only ground on which an injunction will be granted to restrain PT Merak from calling on the Bond and the Bank from making payment. However, for the sake of completeness I will also make my finding on whether, even if Singapore law applied to this application, PT Merak had acted unconscionably in making the Demand.

The law on Fraud

36 Singapore law is no different from English law on this issue. For fraud to be established, the party who is applying for the injunction must show that the party who made the call (*ie* the beneficiary) had presented "a claim which he *knows* at the time to be an invalid claim, representing to the bank that he believes it to be a valid claim" (see *GKN Contractors Ltd v Lloyds Bank plc* (1985) 30 BLR 53 at 63 ("*GKN Contractors*", emphasis added)) or that "the beneficiary has no honest belief in the validity of the call on the performance guarantee" (see *United Trading Corporation SA v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep 554 at 561 ("*United Trading*")). For the fraud exception to be established, it must be shown that the beneficiary was privy to the fraud.

37 The standard of proof that Shanghai Electric must meet is a high one. Indeed, Ackner LJ in *United Trading* opined on the standard of proof of the fraud exception at 561 as follows:

> The evidence of fraud must be clear, both as to the fact of fraud and as to the bank's knowledge. The mere assertion or allegation of fraud would not be sufficient (see *Bolivinter Oil S.A. v. Chase Manhattan Bank N.A.*, [1984] 1 Lloyd's Rep. 251 per Sir John Donaldson, M.R., at p. 257). We would expect the Court to require strong corroborative evidence of the allegation, usually in the form of contemporary documents, particularly those emanating from the buyer. In general, for the evidence of fraud to be clear, we would also expect the buyer to have been given an opportunity to answer the allegation and to have failed to provide any, or any adequate answer in circumstances where one could properly be expected. If the Court considers that on the material before it the only realistic inference to draw is that of fraud, then the seller would have made out a sufficient case of fraud.
>
> …
>
> The first question is therefore … Have the plaintiffs established that it is seriously arguable that, on the material available, the only realistic inference is that [the beneficiary] could not honestly have believed in the validity of its demands on the performance bonds?"

The law on Unconscionability

The law on unconscionability

38 It is settled law in Singapore that in addition to fraud, a bond injunction may be granted on the ground of *unconscionability*. The difficulty is what constitutes "unconscionability". In [24] to [27] above I had set out various expositions on the concept of unconscionability found in the authorities. As was observed by Chao Hick Tin JA in *Eltraco* at [31] however:

> In determining whether a call on a bond is unconscionable, the entire picture must be viewed, taking into account all the relevant factors …

39 There is therefore no simple formula that would enable a court to ascertain whether a party had acted unconscionably in making a call on an on-demand bond. In the final analysis, whether or not unconscionability has been made out is largely dependent on the facts of each case. Having said that, in every case where unconscionability is made out, there would always be an element of unfairness or some form of conduct which appears to be performed in bad faith (see further *Raymond Construction*). A mere breach of contract, by itself, is insufficient to constitute unconscionability. Further, it is significant to note that where there are genuine disputes between the plaintiff and the defendant, a call on the bond cannot be termed as abusive as the defendant is entitled to protect their own interest (see *Eltraco* at [32]).

40 The Court of Appeal in *Dauphin* set out the standard of proof to establish unconscionability in the following manner at [57]:

> In coming to this view we have borne in mind the standard of proof required of the alleged unconscionability. In *Bocotra* this court stated that "a higher degree of strictness applies, as the applicant will be required to establish a clear case of fraud or unconscionability in the interlocutory proceedings. It is clear that mere allegations are insufficient." In *GHL v Unitrack* this court implicitly endorsed the strong prima facie standard propounded by the High Court in *Chartered Electronics Industries v Development Bank of Singapore Ltd* [1999] 4 SLR 655. In our opinion, what must be shown is a *strong prima facie case of unconscionability* … [emphasis added]

Application of the law to the facts

41 I now turn to examine the bases upon which Shanghai Electric contended that the Demand was fraudulent or unconscionable. In this regard, Shanghai Electric's factual allegations on the various instances of fraudulent or unconscionable behaviour (on the part of PT Merak) are as follows:

(a) PT Merak stated in its Demand that it had made a prior demand for repayment of the Bond when it had not in fact done so.

(b) PT Merak's Notice of Termination was flawed and/or issued prematurely.

(c) PT Merak was not entitled to call on the full amount of US$10.8m secured under the Bond.

(d) PT Merak failed and/or refused to certify the completion of Payment Milestone 5.

(e) The Addendum was executed for the avoidance of tax by PT Merak.

(f) PT Merak committed defaults under the Contract.

(g) PT Merak unreasonably/unconscionably withheld approval of subcontractors/subsuppliers.

(h) PT Merak failed to certify and/or make payment to Shanghai Electric expeditiously.

(i) PT Merak refused to accept receipt of the Section 5.8 Certificate when it was allegedly delivered to their "office" on 2 March 2009.

42 In respect of allegation (a), I find that PT Merak in fact made a prior demand for repayment from Shanghai Electric in para 9.2 of the Notice of Termination, where PT Merak informed Shanghai Electric that "[t]he Advance Payment made by [PT Merak] to [Shanghai Electric] is due for immediate repayment to [PT Merak]". I note that the Notice of Termination containing the prior demand was issued at 9.18am (Jakarta time) (*ie* 10.18am Singapore time), and the Demand was made on the Bank just after 11:00am (Singapore time). In the circumstances, there clearly was a demand for repayment made prior to the Demand. Hence, I see no merit in Shanghai Electric's contention.

43 Turning to allegation (b), Shanghai Electric asserted that PT Merak had "seemingly not given due (or any) consideration to [Shanghai Electric's] proposed Contractor's Remedial Plan as required by s 19.2.2(b) of the Contract," had "unreasonably rejected" the Contractor Remedial Plan, and "abruptly terminated" the Contract. The salient portions of s 19 of the Contract are as follows:

19.2.1Contractor Defaults

The occurrence of any of the following events shall constitute a " ***Contractor Default*** ":

…

(b) Contractor otherwise fails adequately to perform any of its material obligations under this Contract;

…

19.2.2Rights of Owner upon Contractor Default

In addition to any other remedies Owner may have under this Contract:

…

(b) If a Contractor Default occurs under Section 19.2.1(b) Owner may provide notice of default to Contractor (a " ***Notice of Contractor Default*** "). Contractor shall have thirty (30) Days from its receipt of a Notice of Contractor Default in which to cure such Contractor Default. If a Contractor Default is capable of being cured, but not within thirty (30) Days from the receipt of a Notice of Contractor Default regarding such Contractor Default, Contractor shall deliver to Owner a plan (" ***Contractor Remedial Plan*** ") within ten (10) Days from the receipt of the Notice of Contractor Default (or within such longer time as Contractor may reasonably require as demonstrated to the satisfaction of Owner within such ten (10)-Day period), specifying what remedial actions Contractor plans to take and the number of Days Contractor reasonably believes are necessary to cure such Contractor Default. The Contractor Remedial Plan shall be subject to Owner's prior written approval, such approval not to be unreasonably withheld. If (i) the Contractor Default is not cured within such thirty (30)-Day period (or such longer period as Owner may have approved in writing in the Contractor Remedial Plan), (ii) Contractor is not at all times diligently proceeding to cure the Contractor Default, or (iii) Owner reasonably withholds its approval of the proposed Contractor Remedial Plan after not less than ten (10) Days following its submittal, Owner shall have the immediate right to terminate this Contract by delivering to

Contractor a notice of termination, which termination shall be effective as of the date of such notice.

…

[emphasis in original]

It was also in dispute as to which (if any) of the letters sent out by Shanghai Electric constituted the Contractor Remedial Plan.

44 In my view, this is a factual issue which is best resolved in arbitration. In any event, I find that a plain reading of s 19.2.2(b) of the Contract favours PT Merak's case more than Shanghai Electric's allegation. Indeed, PT Merak's submission that it is entitled to terminate the Contract *as soon as after 2 0 days* from Shanghai Electric's receipt of the Notice of Contractor Default accords with an unstrained reading of s 19.2.2(b) of the Contract. It is not obliged to wait until the end of the 30-day period. I therefore cannot agree with Shanghai Electric's contention that should PT Merak choose to reasonably withhold their approval of the Contractor Remedial Plan, Shanghai Electric would still have a *minimum* of 30 days from receipt of the Notice of Contractor Default to cure the Contractor Default(s).

45 Further, it is my view that only the first Letter constituted the Contractor Remedial Plan which was in the form of an attachment titled "Remedial proposal Rev. C". By no stretch of the imagination can one consider the second or the third Letters to be a part of the Contractor Remedial Plan.

46 As for allegation (c), Shanghai Electric argued that PT Merak failed to effect progressive reductions of the sum payable under the Bond with respect to Payment Milestones 6, 7 and 8. However PT Merak pointed out that as a consequence of the addendum, the parties reached an understanding that the sum under the Bond would be made only in relation to Payment Milestones for the "offshore" portion of the Work. Therefore these progressive reductions only apply to the "offshore" portion of the Work which included the procurement of equipment and materials and the performance of the services by Shanghai Electric, as more fully described in exhibit A and exhibit O of the Contract (pursuant to the definition of "Work" under the Contract).

47 In so far as allegations (d) to (i) are concerned, these clearly concern genuine disputes of fact between the Parties. Indeed, the best case that Shanghai Electric has is that all these allegations (from (a) to (i)) constitute genuine disputes of fact between the Parties which ought to be ironed out at the arbitration proceedings. In view of the foregoing, the Demand by PT Merak clearly cannot be considered as fraudulent. The only issue is whether it can be considered unconscionable. One important factor in the present case is the fact that PT Merak had already paid the Advance Payment of US$10.8m. By calling on the Bond, PT Merak is only effecting the return of the monies it had paid out in advance to Shanghai Electric. This feature of the case stands in stark contrast to the previous cases in which the Singapore courts have restrained calls on on-demand bonds on the ground of unconscionability. I do not see it as crossing the threshold of unconscionability in the present case for PT Merak to obtain the money it had advanced in the event of a dispute, as the parties had agreed to at the outset. I can do no better than to turn to *Potton Homes* which, according to the Court of Appeal in *Dauphin* at [43], is the origin of the unconscionability exception in Singapore. There, Eveleigh LJ had this to say about advance payments at 28:

For a large construction project the employer may agree to provide finance (perhaps by way of advance payments) to enable the contractor to undertake the works. The contractor will almost certainly be asked to provide a performance bond. If the contractor were unable to perform

because the employer failed to provide the finance, it would seem wrong to me if the court was not entitled to have regard to the terms of the underlying contract and could be prevented from considering the question whether or not to restrain the employer by the mere assertion that a performance bond is like a letter of credit.

In the present case, the situation is reversed. The employer has alleged that the contractor was unable to perform despite having been provided the finance. It does not seem to me that it would be unconscionable for the employer to make a call on the bond under these circumstances. Indeed it would appear to me to be unconscionable to restrain him from doing so.

Conclusion

48 For the reasons set out above, I am of the view that the Injunction should be set aside and so order. I will hear parties on the question of costs.