Mcconnell Dowell Constructors (Aust) Pty Ltd v Sembcorp Engineers and Constructors Pte Ltd (formerly known as SembCorp Construction Pte Ltd)
[2002] SGHC 8

Case Number : Suit 379/2001, SIC 753/2001

Decision Date : 15 January 2002

Tribunal/Court : High Court

Coram : Woo Bih Li JC

Counsel Name(s) : Kenny Chooi and Kelvin Fong (Yeo-Leong & Peh) for the plaintiff; Quentin Loh SC and Leonard Yeoh (Rajah & Tann) for the defendant

Parties : Mcconnell Dowell Constructors (Aust) Pty Ltd — Sembcorp Engineers and Constructors Pte Ltd (formerly known as SembCorp Construction Pte Ltd)

Banking – Performance bonds – Bank guarantee – Application for interim injunction to restrain call and receive payment under bank guarantee – Whether defendants' right to call on bank guarantee depends on bank guarantee's terms or underlying contract between parties – Whether call unconscionable – Whether to grant injunction

Judgment

GROUNDS OF DECISION

Introduction

1. The Plaintiff is McConnell Dowell Constructors (Aust) Pty Ltd ('McConnell'). It is a major Australian-based construction company with operating entities carrying out construction activities in Australia, New Zealand, South East Asia, the Pacific Region and the Middle East.

2. The Defendant is Sembcorp Engineering and Constructors Pte Ltd ('SE'). It is a wholly-owned subsidiary of Singapore Technologies Industrial Corporation Ltd which is in turn a wholly-owned subsidiary of Sembcorp Industries Ltd.

3. An Indian company known as Indian Gas Limited ('IGL') held the licence or licences to carry out a proposed development of a project in Manappad in the state of Tamil Naidu, India. The project is known as the IGL Manappad Port, LNG Re-Gas Import Terminal and Gas Pipeline Project ('the Works').

4. The chief executive officer of IGL was one Thaburaj Mohan. In about March 2000, he was introduced to Ho Kiam Kheong of SE by a business acquaintance Henrik Gomex of Vineyard Financial Services Limited.

5. Mr Gomez informed Mr Ho that IGL required financing for the project estimated to be US$475m. Mr Gomez had told Mr Mohan that he would be willing to assist to obtain financing for the project if SE was the main contractor and Mr Mohan was agreeable to this. SE agreed to assist IGL to obtain financing on the basis that SE would be appointed the main contractor for the project either singly or as part of a consortium.

6. In late June 2000, another company CB & I Eastern Anstalt ('CBI') met up with SE to seek an appointment by the latter of CBI as one of the sub-contractors for the project. CBI is a company incorporated in Dubai U.A.E and specialise in the design and construction of storage tanks for industrial fuels in cryogenic conditions. SE did not give CBI any commitment as it had not yet been appointed the main contractor for the project.

7. Subsequently in about September 2000, McConnell met up with SE to seek a similar commitment from the latter to appoint it as one of the latter's sub-contractors for the project. Again no commitment was given by SE.

8. On or about 1 November 2000, Mr Mohan met with representatives of CBI and McConnell. He also met with Mr Ho of SE at a separate meeting. He introduced these parties to a company called Ficon Limited ('Ficon') as the party which would obtain financing for the project. Ficon had proposed that it would raise the financing with the use of a US$125m standby letter of credit. This letter of credit was to be procured by SE.

9. SE subsequently learned that the letter of credit would be discounted for cash of about US$118m and the cash placed by Ficon into a non-interest bearing account with an agreed financial institution for a period of at least one year. The deposit would be used as leverage to raise up to US$600m to finance the project. The entire scheme was supposed to be sanctioned by the United States Federal Reserve Bank to raise funds for humanitarian projects in Third Word countries. After the US$600m was raised and disbursed to IGL, Ficon would be entitled to keep the US$118m and SE would have to recover the costs and value of the letter of credit from IGL.

10. After further discussions, SE was prepared to provide funds of US$125m rather than procure a standby letter of credit. It wanted to place these funds into an interest-bearing account to be operated by SE.

11. Ficon was receptive to this but wanted the money to be placed in a non-interest bearing account allegedly to facilitate the operation of the scheme. It also wanted (a) a power of attorney from SE to authorise it or its representatives to deal with the deposited funds and (b) SE to enter into a placement/investment agreement under which Ficon could carry out placements or investments on behalf of SE.

12. However, SE required the money to be put into an interest bearing account and was not agreeable to either of the other two requirements of Ficon. It was alleged by SE that:

> (a) On or about 4 or 5 November 2000, Ficon orally agreed that the US$125m was to be put by SE in an interest-bearing fixed deposit account for not less than ten months and Ficon dispensed with the other two requirements. The deposit of US$125m would be in the sole name and under the sole control of SE. Ficon would use the presence of the funds to raise at least US$475m. The funds to be raised by Ficon would be paid into an account in accordance with a payment schedule.
>
> (b) Before placing US$125m into a fixed deposit account, SE obtained a letter of confirmation dated 17 November 2000 from IGL that it would be awarded the main contract. The letter said IGL would advance US$79m and US$46m in two tranches provided the US$125m was placed into a fixed deposit account by 30 November 2000.
>
> (c) In the meantime, SE and Ficon were supposed to enter into a written Project Venture Agreement but Ficon required SE to place the US$125m in a fixed deposit account first.
>
> (d) SE were concerned that a huge sum would be locked up for a considerable period of time in a low-yield interest-earning fixed deposit account. It was also

concerned that if Ficon failed to deliver on its end of the bargain, then SE might wish to terminate the fixed deposit before maturity to put the US$125m to more profitable use. This might incur a pre-mature termination penalty/loss of 1% i.e US$1.25m.

(e) Accordingly SE discussed with CBI and McConnell about their sharing some of the risk of the loss since these two parties wanted to be appointed exclusive sub-contractors for the project. Both these parties were agreeable and negotiated with SE with a view to each of them covering SE for US$625,000 making a total of US$1.25m.

(f) On 5 December 2000, SE placed US$125m in an interest-bearing fixed deposit account with Societe Generale in Singapore.

(g) On 6 December 2000, CBI and SE signed an Exclusive Sub-Contract Pre-Bid Agreement in which CBI would pay US$625,000 to SE if Ficon failed to arrange for US$158m (not US$475m) to be paid into a Project Escrow Account by 31 March 2001. This undertaking was to be secured by the provision of a bank guarantee for US$625,000 in favour of SE.

(h) On 16 December 2000, McConnell and SE signed an Exclusive Sub-Contract Pre-Bid Agreement. Its terms were substantially similar but not identical to the agreement dated 6 December 2000 between CBI and SE.

(i) Pursuant to these Exclusive Sub-Contract Pre-Bid Agreements ('PBAs'), CBI and McConnell procured bank guarantees to be issued each for US$625,000 and in favour of SE.

13. It is common ground that Ficon was unable to obtain the US$158m or any part thereof by 31 March 2001 or at all.

14. Indeed, prior to 31 March 2001, it became clear that Ficon was not going to obtain the anticipated funds. CBI and McConnell then entered into some negotiations with SE. Eventually SE made a call on the bank guarantee issued to secure McConnell's liability to SE.

15. McConnell disputed that SE was entitled to make such a call and sought an interlocutory injunction to restrain SE from making a call and from receiving any monies under the bank guarantee. After hearing arguments, I dismissed McConnell's application with costs and made certain consequential orders. McConnell has appealed against my decision.

The Bank Guarantee

16. The bank guarantee that McConnell had procured was dated 5 January 2001 and was issued by Australia and New Zealand Banking Group Limited. In this bank guarantee ('BG'), SE was referred to as 'the Principal' and McConnell was referred to as 'the Customer'. The material terms of the BG stated:

> 'Australia and New Zealand Banking Group Limited (the Bank) asks the Principal to accept this Undertaking in connection with the exclusive subcontract pre-bid agreement dated 16 December 2000 between the Principal and Customer:-

for the design and construction of the gas pipeline for I.G.L Manappad Port, LNG re-gas import terminal and gas pipeline project, Manappad, India.

In consideration of the Principal accepting this Undertaking, the Bank undertakes unconditionally to pay the Principal on written demand from time to time any sum or sums to an aggregate amount not exceeding USD625,000.00 (United States Dollars Six Hundred and Twenty-Five Thousand Only).

The Bank will pay this amount or any parts of it to the Principal on demand without reference to the Customer and even if the Customer has given the Bank notice not to pay the money, and without regard to the performance or non-performance of the Customer or Principal under the terms of the contract or agreement.

Any alteration to the terms of the contract or agreement or any extensions of time or any other forbearance by the Principal or Customer will not impair or discharge the Bank's liability under the undertaking.'

McConnell's contentions

17. McConnell relied primarily on unconscionability. Mr Kenny Chooi, Counsel for McConnell, submitted that although the BG appeared to be payable on demand, it was not an on-demand guarantee.

18. He referred to an e-mail dated 4 December 2000 from Mr Ho of SE to Alan Black of CBI and Mark Twycross of McConnell. It stated:

'Subject: Pre-Bid Agreement & Bank Guarantee Drafts

….

Dear Alan & Mark,

I am pleased to enclose herewith the drafts of the above-mentioned documents for your review.

Pse let me try to capture the spirit of the revision. We are all agreeable that if FICON fails to deliver USD158m by 31 Mar 2001, CBI and MacDow will pay SCC USD625,000 each in cash. These are made very clear in the proposed Pre-bid agreement. To ensure that the payments of USD625,000 are made, SCC needs some form of guarantees and this is provided by BG from banks of CBI and MacDow. <u>The condition for calling on the BG is written in the Pre-Bid agreement but not in the BG</u>.

This is not unlike a contractor's performance bond to a client. The contractor's bank issues a guarantee to the client and if for some reason the contractor fails to perform, the client calls on the BG unconditionally. Any dispute will have to be settled based on the construction contract.

> Pse note that we are proposing it in this manner so that the BG makes legal sense. We have not deviated from the original understanding.
>
> ….'
>
> [Mr Chooi's emphasis.]

19. Mr Chooi also referred to another e-mail. This was dated 12 December 2000 and was from Mr Twycross to Mr Ho. It said:

> 'KK,
>
> McConnell Dowell have had extensive discussions, internally and with CBI, regarding the agreement to an exclusive subcontract for the pipeline portion of the Manappad IGL project.
>
> We attach an Agreement between SCC and McConnell Dowell which we consider truly reflects the intent and actions of each party.
>
> These issues are;
>
> 1) The bank guarantee is to act as surety for the costs involved with the non performance of the Funder, not because of actions by SCC or IGL to frustrate the signing of a contract.
>
> ….'

20. Mr Chooi then referred to McConnell's PBA. He submitted that McConnell's obligation to pay US$625,000 was premised on there being in the first place a funding agreement between SE and Ficon. He described that premise as a condition precedent to the parties entering into the PBA. A call on the BG could only be made if Ficon breached that funding agreement.

21. According to Mr Twycross, Mr Ho had represented to him that SE and Ficon had reached such an agreement. Mr Twycross was relying, inter alia, on:

> (a) an e-mail dated 20 November 2000 from Mr Ho to him. The material portion reads, 'On the separate issue of project funding, Sembcorp has arrived at an arrangement with FICON and Mohan',
>
> (b) an e-mail dated 30 November 2000 from Mr Ho to him, stating, at the bottom thereof, 'As you are aware, we have cleared with FICON all the paperwork'.

22. Mr Twycross rejected Mr Ho's explanation (in Mr Ho's affidavit) that he was referring to the oral agreement of 4 or 5 November 2000 between SE and Ficon and not a written one.

23. Mr Chooi then went through various e-mail between Ficon and SE after 5 November 2000 to demonstrate that there was no agreement on 4 or 5 November 2000 between Ficon and SE because these parties were still negotiating on the terms of the agreement.

24. He also stressed that at no time in this subsequent e-mail did SE say to Ficon that there was already an agreement between them. For example, in an e-mail dated 7 November 2000, Mr Ho was

thanking Ficon for draft documents when they contained terms which were repugnant to the oral agreement. Mr Ho's excuse was that he had sent the e-mail without reading the drafts.

25. To reinforce his argument that the parties entered into the PBA on the premise of a binding agreement between SE and Ficon, Mr Chooi relied on certain provisions in the PBA dated 16 December 2000: clauses 2.1, 2.2, 2.3, 2.4 and 3.1b.

26. These provisions stated:

> '2.0 Financing, Deposit and Expenses
>
> 2.1 The Sub-Contract Tenderer acknowledges that the Funder has committed or shall be committing to make payment of funds according to a payment schedule (the "Payment Schedule") and other terms of payment as may be agreed under an agreement between Sembcorp and other parties with the Funder in respect of such financing.
>
> 2.2 In the event that the Funder fails to make payments amounting to an aggregate of US$158,000,000.00 into the Project Escrow Account (as defined in the agreement referred to in Clause 2.1) by 31 March 2001, the Sub-Contract Tenderer shall, in consideration of Sembcorp inviting it to submit the Sub-Contract Tender and considering the Sub-Contract Tender, pay to Sembcorp within 24 hours of such failure a non-refundable deposit of US$625,000.00 (six hundred and twenty five thousand US Dollars) by cash into such bank account as may be notified in writing by Sembcorp to the Sub-Contract Tenderer. Provided that in the event that the said amount of US$158,000,000.00 is partially paid by the said date, the said deposit of US$625,000.00 shall be reduced in the proportion which the amount paid bears to the full amount of US$158,000,000.00. The Sub-Contract Tenderer shall forthwith upon execution of this Agreement provide Sembcorp with a bank guarantee in the form attached at the Appendix hereto issued by a bank located in Singapore which is acceptable to Sembcorp.
>
> 2.3 If the Funder fails in his obligation as per Clause 2.2 above and Sembcorp calls for the deposit under the guarantee, the said deposit shall belong absolutely to Sembcorp.
>
> 2.4 If the Funder has fully funded his obligations under clause 2.2 above, no call can be made under the guarantee.
>
> 2.5 ….
>
> 2.6 ….
>
> 2.7 ….
>
> 3.0 Determination of Pre-Bid Agreement
>
> 3.1 Save for clause 5 this Agreement shall terminate on the first to occur of:-
>
> a) ….

b) a breach by the Funder to pay the funds in accordance with the payment schedule and other terms of payment as may be agreed between Sembcorp and other parties with the Funder, as referred to in clause 2.1 above; and

c) …. ’

27 Although the Funder was not identified in the PBA, it was common ground that Ficon was the Funder. Mr Chooi submitted that the reference in clause 2.3 to the Funder failing in its obligations must mean that there was a binding agreement with Ficon in the first place otherwise no obligation could arise which would entail a failure thereof. Likewise for clause 2.4 which referred to the Funder’s obligations and clause 3.1b which referred to a breach by the Funder. He submitted that a payment schedule of the Funder’s obligations and other terms which were to be agreed were less material.

28. Mr Chooi also pointed out that Mr Ho of SE had admitted in an affidavit that the ‘agreement’ referred to in clause 2.1 was an existing binding agreement, although Mr Ho had said it was the oral one on 4 or 5 November 2000.

29. To augment his argument about misrepresentation from Mr Ho, Mr Chooi submitted that Recital 2 of the PBA mentioned that SE was in the course of preparing a tender but in fact SE had already been awarded the main contract on 8 December 2000 by IGL’s letter dated 8 December 2000. This was not disclosed to McConnell when it signed the PBA.

30. Lastly, Mr Chooi submitted that there was no evidence of SE’s loss as a result of Ficon not obtaining the funds envisaged. To reinforce this point, Mr Chooi pointed out that Mr Mohan (of IGL) had sent an e-mail dated 2 April 2001 to Mr Ho to say that all costs incurred by the parties with respect to Ficon’s funding plan may be charged to the project.

SE’s contentions

31. Mr Quentin Loh SC, for SE, submitted that the BG was clearly payable on demand.

32. As for the alleged misrepresentation about a binding agreement between SE and Ficon, Mr Loh pointed out that Mr Twycross’ second affidavit had emphasized that McConnell had been misled into thinking that there was a binding written agreement between SE and Ficon, and not just an oral one (see paras 17, 18(e), (g), 19, 26(h), 28(E)(a), 60, 63 of that affidavit).

33. Mr Loh submitted that there was no representation about a binding written agreement. For example, clause 2.1 of the PBA used words like, ‘has committed or shall be committing … and other terms of payment as may be agreed …’. The PBA had been drafted by McConnell, perhaps with the help of its in-house counsel.

34. As for the oral agreement alleged by Mr Ho to have been reached on 4 or 5 November 2000 and the e-mail subsequent thereto, Mr Loh submitted that the subsequent e-mail showed that SE had rejected Ficon’s attempts to vary the oral agreement.

35. Mr Loh also submitted that the other intended exclusive sub-contractor, CBI, had no complaints about the alleged premise or misrepresentation. He informed me that CBI had paid the US$625,000 and this was not disputed by Mr Chooi. Also, Alan Black of CBI had executed an affidavit for SE.

36. Mr Loh submitted that if there had indeed been a misrepresentation about a binding written

agreement and if Mr Twycross had indeed been shocked to learn about the misrepresentation in a subsequent meeting on 19 March 2001, when the parties realised that the funds to be obtained by Ficon was not forthcoming, then Mr Twycross would surely have mentioned this in his subsequent e-mail to Mr Ho when CBI, McConnell and SE were discussing the extension of the respective bank guarantees during that time.

37. However, nothing of the sort was mentioned in the next e-mail from Mr Twycross to Mr Ho dated 26 March 2001 or in another dated 27 March 2001. The allegation of a misrepresentation was made for the first time only in an e-mail from Mr Twycross dated 28 March 2001.

38. As for the alleged non-disclosure about the award of the main contract by IGL to SE, Mr Loh said that although IGL's letter dated 8 December 2000 stated that the award was unconditional, it also stated that, 'The terms and conditions of the EPC Contract with technology and detailed specifications shall be finalised upon signing of the EPC Contract'. The EPC Contract was the intended main contract for engineering, procurement and construction and there were still terms and specifications to be agreed.

39. Mr Loh also submitted that the existence of a written binding agreement between SE and Ficon was not as crucial as McConnell was alleging because it never once asked to have sight of the same or for a copy.

40. As for SE's loss, Mr Loh submitted that I should take judicial notice that banks would impose a penalty for pre-mature termination of a fixed deposit. In any event, the US$625,000 from McConnell was a pre-determined sum for SE's damages or loss in having to provide the US$125m. There was therefore no necessity for SE to establish its actual loss.

41. As for Mr Mohan's e-mail dated 2 April 2001 that all costs incurred by the parties with respect to Ficon's funding plan may be charged to the project, Mr Loh submitted that IGL had no money. That is why it required 100% financing.

42. Mr Loh did not dispute that the court could restrain a call on a guarantee or restrain a beneficiary from receiving monies thereunder if it was unconscionable for the beneficiary to do so. However, he submitted that McConnell had failed to discharge its burden of adducing compelling evidence to establish a strong prima facie case of unconscionability.

McConnell's rebuttal

43. Mr Chooi's response was that CBI's PBA with SE was very different from that between SE and McConnell. He stressed that McConnell had been very careful and that is why it negotiated and obtained better terms from SE in its PBA with SE. It had placed importance on the existence of a funding agreement between SE and Ficon.

44. In addition, CBI subsequently entered into another agreement with SE in which clauses 2.2 to 2.4 of the existing agreement had been replaced. It was unknown whether CBI would have paid under its original PBA with SE.

45. He submitted that Alan Black's affidavit did not specifically deny Mr Twycross' assertions. In any event, CBI's views did not represent that of McConnell.

46. Mr Chooi also submitted that even if McConnell had agreed to SE receiving US$625,000

irrespective of SE's actual loss, it would be inequitable for SE to keep the US$625,000 if it actually suffered no loss or its loss was less than US$625,000. As for IGL, he submitted that while it may not have the money for the entire project, there was no evidence to show that it was not good for US$625,000.

My decision

47. In my view, the right of SE to make a call and receive money under the BG depends on the terms of the BG itself and not the underlying contract pursuant to which the BG was issued, unless the terms of the BG stipulated otherwise. Here, the terms of the BG did not stipulate otherwise.

48. As for the e-mail from SE to McConnell dated 4 December 2000, it referred to drafts of the PBA and BG. The drafts were not exhibited. Even assuming that the draft of the BG was the same as the executed BG, there was no evidence that McConnell had agreed with SE's view on the intended bank guarantee or that it had relied on such a view before signing the PBA and procuring the issuance of the BG. Furthermore, with all its experience, it was not likely that McConnell could have been unaware of the nature and effect of an on-demand guarantee.

49. Even if the terms of the PBA should be considered, clause 2.1 is the first of the provisions in clause 2 which Mr Chooi was relying on. I reiterate its terms:

> '2.1 The Sub-Contract Tenderer acknowledges that the Funder has committed or shall be committing to make payment of funds according to a payment schedule (the "Payment Schedule") and other terms of payment as may be agreed under an agreement between Sembcorp and other parties with the Funder in respect of such financing.'
>
> [Emphasis added.]

50. It was arguable that McConnell and SE were acting on the basis that either Ficon had committed or would be committed to obtaining the funds and that it did not matter which. Even the payment schedule for Ficon to pay over the funds had not yet been agreed.

51. It is true that Mr Ho of SE had said in an affidavit that the reference to 'agreement' in clause 2.1 was to the oral agreement of 4 or 5 November 2000 which he had alleged. This would mean that there was at least an existing agreement with Ficon, even if it was not in writing. However, I was not bound by Mr Ho's evidence which appeared to be his interpretation of clause 2.1.

52. The rest of the provisions like clauses 2.2, 2.3 and 3.1b referring to a failure or a breach by the Funder or clause 2.4 which refers to the Funder's obligations must be read in context. They did not necessarily mean that there was an existing agreement already and could mean a breach or failure of an obligation if and after the Funder had committed to raising the funds.

53. For example, clause 3.1(b) did not refer only to a breach by the Funder. It said:

> '3.1 Save for clause 5 this Agreement shall terminate on the first to occur of:-
>
> a) ….
>
> b) a breach by the Funder to pay the funds in accordance with the payment

schedule and other terms of payment as may be agreed between Sembcorp and other parties with the Funder, as referred to in clause 2.1 above; and

c) …. ’

[Emphasis added.]

54. Also, the recitals of the PBA did not refer to an existing agreement between SE and Ficon, whether oral or in writing.

55. As for Mr Ho’s e-mail dated 20 November 2000 stating that, ‘… Sembcorp has arrived at an arrangement with FICON and Mohan’, there was no contemporaneous evidence that McConnell had relied on this as constituting a representation of an existing binding agreement between SE and Ficon. Likewise for Mr Ho’s e-mail dated 30 November 2000.

56. In addition, if the existence of a written binding agreement with Ficon was as crucial as McConnell was alleging, it was surprising that it did not ask to have sight of it before signing the PBA with SE. This was a glaring omission.

57. Even if McConnell was relying on the existence of an oral, as opposed to a written, agreement with Ficon, there was no clear contemporaneous evidence that it had relied on the existence of the oral agreement.

58. If there was no reliance by McConnell on the existence of a binding agreement with Ficon, whether written or oral, when McConnell executed the PBA, then it would not matter whether the alleged representation about it was true or not.

59. Accordingly, it was unnecessary for me, especially at this stage of the proceedings, to dwell on the various e-mail after 5 November 2000 which Mr Chooi drew my attention to with a view to establishing that there was no agreement between SE and Ficon as at 5 November 2000.

60. Furthermore, although CBI’s position did not bind McConnell, it was a factor which I could not ignore.

61. If the basis of each of the PBAs was premised on the existence of a binding agreement with Ficon or a misrepresentation, CBI would have complained. It did not and has paid on its PBA.

62. It was true that Alan Black’s (of CBI) affidavit did not specifically contradict McConnell’s allegations but it was not intended to be a point by point rebuttal of such allegations. This was understandable since CBI is not a litigant in the present proceedings. In any event, the thrust of his affidavit was that:

> ‘…. If FICON failed to deliver the funds by 31 March 2001, the Defendant was entitled to call on our bank guarantee, i.e., we would each pay US$625,000 to cover our share of the risk and losses.’
>
> [Paragraph 17 thereof.]

There was no suggestion by Mr Black that the PBAs were entered into on the alleged premise or misrepresentation raised by McConnell.

63. As regards the submission that CBI’s original PBA was different from that of McConnell’s, it was

true that McConnell had two additional provisions i.e clauses 2.6 and 2.7. These provisions stated:

> '2.6 Should the Funder provide funds later than expiration of the 31st March date and Sembcorp are subsequently awarded the Main Contract by I.G.L. then Sembcorp shall return the full amount of any call made against the bank guarantee pursuant to clause 2.2 less McConnell Dowell's agreed share of the costs in respect of the $US125 million deposit from 1st April to the date of funding, and Sembcorp shall negotiate in good faith with the Sub-Contract Tenderer the Subcontract and Sembcorp will enter into the Subcontract with the Sub-Contract Tenderer as originally intended in Recital 4.
>
> 2.7 Other than provided for in clause 2.2 above, whether or not the Main Contract is awarded to Sembcorp, each party shall be separately and solely liable for all costs and expenses it may have expended or incurred in connection with the preparation, submission and negotiation of the Tender and the Sub-Contract Tender.'

64. However, I could not see how the inclusion of these provisions made the two PBAs so different in respect of the alleged premise and misrepresentation that McConnell was relying on. These provisions were equally consistent with the expectation that Ficon was to obtain funds and did not add anything else as to whether there was already a binding agreement or not with Ficon.

65. As for the argument that CBI had subsequently entered into an amended PBA with SE, without reference to funding to be obtained by Ficon, I was of the view that this did not necessarily mean that the original PBA with CBI was premised on the existence of a binding agreement with Ficon. It was arguable that the amended agreement was entered into simply because Ficon was no longer expected to obtain the funds.

66. As for the argument that SE had not suffered any loss, I was of the view that in the absence of any evidence from SE, at least for the time being, I should infer that SE did not suffer any loss. The question was not whether I should take judicial notice that banks do impose pre-maturity termination penalties but whether in fact the bank in question, Societe Generale, did and, if so, how much the penalty was.

67. However, even if SE did not suffer any loss, I was of the view that it was arguable that the US$625,000 was the pre-determined sum to be paid should Ficon be unable to obtain the funds. Clause 2.2 of the PBA provided that in such an event, McConnell 'shall … pay to Sembcorp within 24 hours of such failure a <u>non-refundable deposit</u> of US$625,000 ….'. [Emphasis added.]

68. I was aware that under clause 2.2, part of the US$625,000 need not be paid if Ficon obtained some of the funds before 31 March 2001. Also, under clause 2.6, part or all of the US$625,000 could be returned if Ficon obtained some funds after 31 March 2001. However, these provisions did not provide for a reduction of the US$625,000 to be paid if SE's loss was less than US$625,000 or if SE did not suffer any loss.

69. As for the argument that it would be inequitable for SE to retain the US$625,000 if its loss was less or non-existent, I did not agree. It was open to the three parties, CBI, McConnell and SE, to agree that SE should only be compensated by CBI and McConnell for its loss up to a maximum of US$1.25m. For all its alleged caution in negotiating the terms of the PBA, McConnell did not insist on this term. Neither did CBI. Furthermore, as the PBA stood, it appeared that SE would not be able to claim anything from CBI or McConnell if its loss was greater than US$1.25m.

70. As for IGL, SE was not obliged to claim the US$625,000 from IGL, whether IGL was in a position to pay or not.

71. I will now cite some authorities in respect of an application for an injunction to restrain a call on or receipt of monies under an on-demand guarantee or bond.

72. In *Bocotra Construction Pte Ltd v A-G (No 2)* [1995] 2 SLR 733, Karthigesu JA, said, at p 747C:

> '…. Indeed, a higher degree of strictness applies, as the applicant will be required to establish a clear case of fraud or unconscionability in interlocutory proceedings. It is clear that mere allegations are insufficient.'

73. In *Star-Trans Far East Pte Ltd v Norske-Tech Ltd & Ors* [1995] 3 SLR 631, GP Selvam J said, at p 643A:

> 'First, the injunction would be granted only in exceptional circumstances; the court having regard to the purpose of the bond, will be disinclined to granting it. Secondly, … the party making the application must come up with compelling evidence to establish the exceptional circumstances.'

74. 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, Chao Hick Tin JA said, at para 57:

> '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 high 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 o u r opinion, what must be shown is a strong prima facie case of unconscionability. We do not think that that standard has been satisfied in the instant case.'

75. In *Eltraco International Pte Ltd v CGH Development Pte Ltd* [2000] 4 SLR 290, Chao Hick Tin JA said, at paras 29 and 30:

> '29 In *Raymond Construction Pte Ltd v Low Yang Tong & Anor* (Suit 1715/95, 11 July 1996, unreported) Lai Kew Chai J opined that:
>
> The concept of 'unconscionability' to me involves unfairness, as distinct from dishonesty or fraud, or conduct of a kind so reprehensive 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.
>
> 30 The appellants would appear to suggest that based on this opinion, unfairness, per se, could constitute 'unconscionability'. We do not think it necessarily follows. Lai Kew Chai J said 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.'

76. In my view, McConnell's case fell far short of a strong prima facie case of unconscionability. Both McConnell and SE disagreed on the alleged premise and misrepresentation. Pending final resolution of the dispute, SE was entitled to make a call upon the BG and receive monies under it.

77. I would add that the views I have expressed above regarding the alleged premise and misrepresentation and McConnell's PBA are not final bearing in mind the nature of the application before me.

78. I also note that the application for an interlocutory injunction was filed on 30 March 2001. The first substantive hearing thereof was on 30 October 2001 partly because of the time required by the parties to file and serve affidavits. I learned from Counsel that the parties had not travelled very far, if at all, on the road to arbitration, as provided in McConnell's PBA or, in any event, towards securing a final order. It seemed to me that undue time and resources have been spent in relation to an interlocutory application when they should have been better spent in securing a final order.

Sgd:

WOO BIH LI
JUDICIAL COMMISSIONER