Ryobi-Kiso (S) Pte Ltd *v* Lum Chang Building Contractors Pte Ltd and another [2013] SGHC 86

Case Number : Originating Summons No 720 of 2012/G

Decision Date : 24 April 2013

Tribunal/Court : High Court

Coram : Quentin Loh J

Counsel Name(s) : Irving Choh and Lim Bee Li (RHTLAW Taylor Wessing LLP) for the Plaintiff; Chew Yee Teck Eric (JLim & Chew Law Corporation) for the 1st Defendant.

Parties : Ryobi-Kiso (S) Pte Ltd — Lum Chang Building Contractors Pte Ltd and another

Building and construction law – Building and construction related contracts – Guarantees and bonds

Credit and security – Performance bond

24 April 2013

Quentin Loh J:

Introduction

1 The case before me concerned an application by way of originating summons for an injunction against a call on a performance bond under a construction contract. After the hearing on 1 October 2012, I dismissed the application with the usual consequential costs orders. As the plaintiff applicant has appealed against my decision, I set out the grounds for my decision.

Facts

The parties

2 The plaintiff is a piling specialist ("the Plaintiff") while the first defendant is a civil and building contractor ("the 1st Defendant"). The second defendant is an insurance company ("the 2nd Defendant") which issued the performance bond that is the subject of this application.

3 The 1st Defendant is the main contractor for Contract 912 *viz* the "Design and Construction of Station at Bukit Panjang and Tunnels for Downtown Line Stage 2 at Woodlands Road and Upper Bukit Timah". The employer of the 1st Defendant for Contract 912 is the Land Transport Authority ("LTA"), pursuant to a contract dated 17 June 2009 which the latter entered into with the 1st Defendant ("the Main Contract").

4 The Plaintiff was engaged by the 1st Defendant under a sub-contract dated 11 February 2010 ("the Sub-Contract"). The Sub-Contract was for part of the works under the Main Contract.

The Performance Bond under the Sub-Contract

5 Pursuant to cl 3(a) of the Sub-Contract, [note: 1] the Plaintiff provided the 1st Defendant with

an unconditional performance bond in the sum of $1.88m which was issued by the 2nd Defendant on 1 June 2010 ("the Performance Bond"). The Performance Bond was 10% of the Sub-Contract price of $18.8m.

The Sub-Contract Works

Donuts & Peanuts and Zone 2 Station Box

6 The scope of the works covered by the Sub-Contract is detailed in cl 1 of Part 1 of the Schedule in the Sub-Contract: [note: 2]

> The Sub-Contract Works to be executed by the Sub-Contractor shall be the Construction and Completion of Foundation, Kingposts/Deckposts, Secant and Contiguous Bored Piles for Station Box (known as "Zone 2") and under BPLRT [Bukit Panjang Light Rail Transit] Viaduct (known as "Donuts & Peanuts") to Downtown Line Stage 2 for Contract 912 in compliance with the Sub-Contract and the Main Contract.
>
> In essence, the Sub-Contract scope of works shall be deemed to include, but not limited to, the following description of the major items:
>
> ...

The works therefore involved carrying out piling and associated works under the existing Bukit Panjang Light Rail and alongside or nearby busy road junctions and a station box for a future MRT line and station. The road junctions involved busy traffic intersections of Upper Bukit Timah, Woodlands, Bukit Panjang and Choa Chu Kang Roads.

7 I shall refer to the general scope of the Plaintiff's works as "the Sub-Contract Works". The two locations where the Sub-Contract Works were to be performed are described as Donut & Peanuts and Zone 2 Station Box. The completion times for the Sub-Contract Works are spelt out in Part 3 of the Schedule. [note: 3] Work for Donuts & Peanuts was to be completed within 1 April 2010 to 30 September 2010, while work for Zone 2 Station Box was to be completed within 1 March 2010 to 31 May 2011. Clause 5 of Part 3 of the Schedule sets out the liquidated damages for delay in completion of works for Donuts & Peanuts and Zone 2 Station Box.

8 According to the 1st Defendant, the works for Donuts & Peanuts and Zone 2 Station Box exceeded the maximum time stipulated for completion by 152 days and 332 days respectively. [note: 4] If the Plaintiff is liable for the total number of days which exceeded the relevant completion dates, its total liability would be $7.26m. The 1st Defendant's Project Director filed an affidavit setting out the delays caused by the Plaintiffs. [note: 5] These include delays in submitting Method Statements and drawings (which were required before approvals could be obtained from the various authorities for works to be carried out), poor planning and mobilisation, 3-months delay in the foregoing for the LTA Development & Building Control Division clearance for works under the Bukit Panjang Light Rail viaduct, using less powerful and slower low-headroom piling equipment where there were no headroom restrictions. Of course, the Plaintiff denied liability for the late completion. [note: 6]

Termination of the Sub-Contract and Stage 4 Works

9 In or about May 2012, the 1st Defendant's project manager, Mr K S Rao ("Mr Rao"), called the

Plaintiff twice, asking them to submit a programme for the next phase of the Sub-Contract Works ("the Stage 4 Works"). [note: 7] Under cl 22(a) of the Sub-Contract, [note: 8] the Plaintiff was obliged to provide information, or programmes, of the arrangements and sequence which it proposed to adopt for the execution of the Sub-Contract Works. It should be noted that the 1st Defendant had already previously asked the Plaintiff for such a programme, for instance, by a letter dated 12 April 2012. [note: 9] The Plaintiff's reply then was that pursuant to a letter by the 1st Defendant dated 12 July 2011 ("the 12 July 2011 Letter"), the Stage 4 Works had been deleted from the Sub-Contract Works. [note: 10] A series of correspondence then followed in April in which the 1st Defendant insisted that there was no deletion and the Plaintiff insisted the converse. [note: 11] However, at the time of Mr Rao's telephone calls, the Plaintiff stood by its position that it was not carrying out the Stage 4 Works as those works had been deleted from the Sub-Contract Works unless they were treated as a variation for which additional payment would be required (see [11] below).

10 I digress for the moment to explain the significance of the 12 July 2011 Letter. That letter was sent by the 1st Defendant to remind the Plaintiff to complete certain piles by 30 September 2011. This was just another letter in a series of letters from the 1st Defendant to the Plaintiff recording the poor performance of the Plaintiff which was causing delays. The 12 July 2011 Letter ended with: [note: 12]

> Lastly, please note that *in order to reduce your load*, we have piles in front of Ten Mile Junction be carried out (*sic*) by Zap Piling behalf (*sic*) of Ryobi Kiso to avoid further delay to the piling works and subsequent activity. ...
>
> [emphasis added]

The Plaintiff treated the 1st Defendant's employment of Zap Piling Pte Ltd ("ZPPL") pursuant to the 12 July 2011 Letter to do part of the Sub-Contract Works as a breach of contract. [note: 13] Nevertheless, the Plaintiff and ZPPL continued to carry out their respective parts of the Sub-Contract Works.

11 However, some 10 months later, when it came to the Stage 4 Works (which were part of the Sub-contract Works), the Plaintiff told the 1st Defendant that the scope of the Sub-Contract Works had been varied as a result of the 1st Defendant's employment of ZPPL such that the Stage 4 Works would be considered a variation for which additional payment was required. [note: 14] The Plaintiff forwarded to the 1st Defendant its proposed quote and schedule of the programme for the Stage 4 Works on 4 June 2012 which showed that the works would extend to mid-August 2012. On the same day, the 1st Defendant terminated the Sub-Contract with the Plaintiff. The Plaintiff commenced the first adjudication application on 7 June 2012 for security of payments of $5.37m as the total sum of Progress Payment No 27 under the Sub-Contract ("AA SOP 52"). The Plaintiff commenced a second adjudication application for another $4.52m in relation to payments for another subcontract relating to the construction of diaphragm walls ("AA SOP 53"). I shall refer to AA SOP 52 and AA SOP 53 collectively as "the Adjudications".

12 The 1st Defendants point out that they were initially forced to take some work out of the Plaintiff's hands and engage ZPPL as the Plaintiff was seriously delayed in the performance of their obligations. When it came to the Stage 4 Works, it was due to commence on the 11 June 2012. There was a planned major road diversion, arranged with the various authorities, from 10 June 2012 which involved the busy Upper Bukit Timah, Woodlands, Bukit Panjang and Choa Chu Kang road junction. It

appears that these works around this diversion had to be completed by July 2012. Yet, at this crucial point in time, according to the 1st Defendant's case, the Plaintiff held them to ransom by making a claim that the Stage 4 Works was a variation and which they said would extend into mid-August 2012.

13 As a result of the above circumstances, the 1st Defendant engaged ZPPL to do the Stage 4 Works. The contract with ZPPL was formally entered into on 24 July 2012 at a cost of $1.27m. [note: 15] This was an additional $0.64m more than what the 1st Defendant would have had to pay the Plaintiff had the latter performed the Stage 4 Works. [note: 16] ZPPL appears to have completed the Stage 4 Works by 29 July 2012. [note: 17]

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14 On 13 July 2012, the 1st Defendant called on the Performance Bond ("the Call") on the grounds of the Plaintiff's breaches of the Sub-Contract. [note: 18] The Plaintiff then commenced these proceedings to restrain the 1st Defendant from receiving the proceeds of the Call.

15 On 27 July 2012, the Plaintiff commenced the present proceedings seeking, *inter alia*, a declaration that the 1st Defendant be restrained from receiving payment under the Call, and that the 2nd Defendant be restrained from making payment pursuant to the Call. I should just add that the substantive dispute(s) between the parties is subject to an ongoing arbitration which was commenced on 27 September 2012. When I dismissed the application, I did say to counsel that the substantive dispute(s) in this matter has to be resolved by arbitration.

Parties' respective cases

Plaintiff's case

16 The Plaintiff contended that the Call was unconscionable as there was a genuine dispute as to whether the 1st Defendant had breached the Sub-Contract either by removing part of the works under the Sub-Contract Works to be performed by ZPPL, or by terminating the Sub-Contract altogether. The Call, in the Plaintiff's view, was not in good faith, clearly oppressive, and should be construed as a bullying tactic. Even though the Plaintiff insisted that it did not know the reason why the 1st Defendant issued the Call, [note: 19] it speculated that the Call appears to be vindictive. The Plaintiff pointed to the decisions from the Adjudications on 10 and 12 July 2012 in which the 1st Defendant was ordered to pay the Plaintiff $1.86m as a possible trigger for the Call which happened on 13 July 2012, the day after the second adjudication decision.

1st Defendant's case

17 The 1st Defendant agreed that unconscionability is a ground upon which the court can grant an injunction restraining the beneficiary of a performance bond from calling on the bond. [note: 20] However, it denied that it had acted unconscionably. The 1st Defendant claimed that the Plaintiff's allegations of, *inter alia*, bad faith, oppression, bullying, are speculative, bare and unsupported by evidence. On the 1st Defendant's part, they have exhibited evidence in relation to the Plaintiff's delays and breaches. The 1st Defendant's case was that it did not breach the Sub-Contract by

engaging ZPPL or by terminating the Sub-Contract. It pointed to the 12 July 2011 Letter where it was said that ZPPL would do the works on the Plaintiff's behalf. As for termination, the 1st Defendant contended that it did so because the Plaintiff refused to carry out the Stage 4 Works. At the same time, the 1st Defendant also pointed out that it had genuine claims against the Plaintiff in liquidated damages for late completion, the extra costs incurred by having to engage ZPPL, and overpayments made to the Plaintiff. [note: 21] In these circumstances, the 1st Defendant was merely protecting its own interest by calling on the Performance Bond, [note: 22] an act which was done *bona fide*.

Grounds for my decision

The relevant legal principles

18 Whatever label the Plaintiff attached to the 1st Defendant's conduct in making the Call, it is clear that the Plaintiff's case is founded on unconscionability. The concept of unconscionability in the context of restraining calls on performance bonds, as accepted in Singapore by the Court of Appeal in *Dauphin Offshore Engineering & Trading Pte Ltd v The Private Office of HRH Sheikh Sultan bin Khalifa bin Zayed Al Nahyan* [2000] 1 SLR(R) 117 ("*Dauphin Offshore*") at [45], 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 in original]

19 Instances of when it would be considered unconscionable to call on a performance bond were helpfully summarised by the Court of Appeal in *Dauphin Offshore* (at [46]):

> ... (a) in *Kvaerner Singapore Pte Ltd v UDL Shipbuilding (Singapore) Pte Ltd* ... the beneficiary made a call based on a breach induced by their own default and was not permitted to do so; (b) in *Royal Design Studio Pte Ltd v Chang Development Pte Ltd* ... 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; (c) in *Min Thai Holdings Pte Ltd v Sunlabel Pte Ltd* ... 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.

In the cases cited above where the call of the bond was considered unconscionable, either the beneficiary of the performance bond had by its own default contributed to the circumstances which founded the call, or both parties were wholly innocent. Evidently, it takes more than a *mere* default (*ie* mere breaches of contract) by the beneficiary to sustain an argument on unconscionability. In this regard, I note the high and strict standard of proof required of the applicant seeking the injunction which has been consistently applied by the Court of Appeal (*Anwar Siraj and another v Teo Hee Lai Building Construction Pte Ltd* [2003] 1 SLR(R) 394 at [11] citing *Dauphin Offshore* at [57]):

> ... 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 our opinion, what must be shown is a *strong prima facie case* of unconscionability. ...

[emphasis in original omitted; emphasis added]

20 That said, I am cognisant of the severity of calls on performance bonds, and how the court must be mindful of abuse. In *GHL Pte Ltd v Unitrack Building Construction Pte Ltd and another* [1999] 3 SLR(R) 44, the Court of Appeal said (at [24]):

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

21 Ultimately, the juridical basis for an injunction to restrain a performance bond on the ground of unconscionability lies in equity. The key consideration in ascertaining whether a call on a performance bond should be restrained is achieving a fair balance between the interests of the beneficiary and those of the obligor: *JBE Properties Pte Ltd v Gammon Pte Ltd* [2011] 2 SLR 47 at [13].

Application of legal principles

22 In the present case, having regard to what is a fair balance between the interests of the beneficiary 1st Defendant and the obligor Plaintiff, I took the view that there was no unconscionability on the part of the 1st Defendant in making the Call. The 1st Defendant provided evidence to support its case, *inter alia*, that the Plaintiff was in serious delay, was using inappropriate equipment outside the appropriate reserve areas which slowed them down, were late in their submissions of Method Statements and drawings, had over-bored some holes and had gone far beyond the contract periods allowed for their Sub-Contract Works. Further, the 1st Defendant showed that the Plaintiff had, in AA SOP 52, made an extravagant claim for of $5.37m for Progress Claim No 27 as the adjudicator only determined a sum of $0.98m due (less than 20% of the claim). Whilst I am not making any decision on these allegations, it does appear to me that there were genuine construction disputes of the type that do arise in such contracts between the parties.

Terms of the Performance Bond and Sub-Contract

23 At the outset, I find that the Call falls squarely within the key terms of the Performance Bond read with the Sub-Contract. Clauses 1 and 2 of the Performance Bond provides that it is an unconditional bond which is payable on demand by the 1st Defendant:

> 1. The Insurer hereby *unconditionally* undertakes and covenants to pay *on demand* any sum or sums which may from time to time be demanded in writing by the Main Contractor ... to be held by the Main Contractor as security for and until the performance and completion by the Sub-Contractor of all the conditions of the Sub-Contract in all respects.
>
> 2. The liability of the Insurer under this Deed shall not be discharged or impaired by reason of ... any breach or breaches of the Sub-Contract by the Sub-Contractor...
>
> [emphasis added]

24 Clause 5 further provides:

> ... The Insurer shall be under no duty to inquire into the reasons, circumstances or authenticity of the grounds for such claim or direction...

25 Clause 3(c) of Sub-Contract provides the purpose for which the proceeds of the Performance Bond may be utilised: [note: 23]

> (c) The Main Contractor may *utilise the cash deposit or the proceeds of any call or demand on the performance bond to* ***make good any loss or damage sustained or likely to be sustained by the Main Contractor as a result of any breach whatsoever of this Sub-Contract by the Sub-Contractor or the termination of the employment of Sub-Contractor*** , ***including any liquidated damages*** or any sum due to the Main Contractor under clause 18 of these Sub-Contract Conditions.
>
> [emphasis added in italics and bold italics]

26 The 1st Defendant has compiled a list of its losses which it says it has suffered as a result of, *inter alia*, the Plaintiff's delays in the performance of the Sub-Contract Works and refusal to perform the Stage 4 Works. The total value of these losses, $8.59m, far outstrips the value of the Performance Bond *viz* $1.88m. Based on the particulars provided in the 1st Defendant's affidavit evidence, there is no reason for me to disbelief the accuracy of the 1st Defendant's quantification of its losses. The Plaintiff has alleged that some of these losses, such as the liquidated damages claims, have not crystallised as there is no evidence that the LTA has claimed liquidated damages from the 1st Defendant. Be that as it may, cl 3(c) explicitly states that the performance bond may be used to make good not just losses that have been sustained, but also losses that are "likely to be sustained". Given that the works were indeed delayed, and that the LTA did not grant any extensions of time, [note: 24] there was no basis for me to infer that the 1st Defendant was not likely to be exposed to a claim for liquidated damages from the LTA.

Unconscionability

27 Certainly, notwithstanding the terms of the Performance Bond and the Sub-Contract, if the Call was actuated under unconscionable circumstances, it may still be restrained. However, I was not

convinced that the making of the Call was unconscionable.

28 The Plaintiff's allegations of bad faith, oppression, bullying by the 1st Defendant are, even by the Plaintiff's own case, guesswork. This plainly fails the high and strict standard of proof required of the Plaintiff applicant of the injunction. The strongest allegation by the Plaintiff, *viz*, that the Call was a retaliatory move by the 1st Defendant following the decision of the adjudicator in the Adjudications to award the Plaintiff a total of $1.86m, was unsubstantiated. While the timing of the Call calls for closer scrutiny, that alone cannot support a claim of unconscionable conduct. More evidence is required. On that premise, I did not find the circumstances, particularly the conduct of the 1st Defendant in the lead up to the Call, to be, in the words of the Court of Appeal in *Dauphin Offshore*, so "reprehensible or lacking in good faith" (see [18] above).

29 First, I did not accept that the 1st Defendant's engagement of ZPPL or the subsequent termination of the Sub-Contract was unfair or lacking in good faith. While I am not making a judgment on the merits of whether the Plaintiff or 1st Defendant had through their respective actions breached the Sub-Contract, I would nevertheless state that on the facts, the 1st Defendant was, as a rational business-minded party, commercially justified in engaging ZPPL to perform a portion of the Sub-Contract Works in the light of the Plaintiff's numerous and repeated delays in completing the works at Donuts & Peanuts and Zone 2 Station Box. I also bear in mind the obvious restrictions working around an existing viaduct carrying the Bukit Panjang Light Rail and the large traffic junctions and the obvious difficulties in obtaining traffic diversion clearances which would have been subject to strict periods of diversion. I shall refer to a handful of correspondence which is representative of the genuine frustration that the 1st Defendant was experiencing prior to the Call as a result of what it perceived to be the Plaintiff's untimely performance of its obligations.

30 The 1st Defendant (either directly or through their solicitors) had written to the Plaintiff on the following occasions, highlighting the former's concerns over the latter's delays and the consequences of those delays:

> 28 February 2011 [note: 25]
>
> ... You were thus 147 calendar days late in completing this section [Donuts & Peanuts] of your work, making you liable for a total Liquidated Damages sum of $2,205,000.00. We record that your late completions were entirely of your own making and were due to, but not limited to, the following reasons ...
>
> 9 April 2011 [note: 26]
>
> We would like to bring to your attention the delay in completion of piling work at Zone 2 (West) ... As a result, the overall completion of the piling schedule for Zone 2 weste has been delayed since 25 March 2011 ... All of the above delays are accumulating and affecting our traffic diversion work. As such, we shall hold you directly responsible for these delays.
>
> 16 June 2011 [note: 27]
>
> ... We have recorded many delays you have caused due to poor performance, poor management, inadequate equipment and low productivity and hold you responsible for the subsequent delays ...

29 May 2012 [note: 28]

> ... Kindly note that the timely progress of works on site is crucial and our clients [1st Defendant] are subject to extensive liquidated damages for delay. If such damages are imposed on our clients as the result of your clients' [Plaintiff] refusal to comply with the obligations under the Contract, our clients will not hesitate to claim such damages together with any other consequential losses against your clients. ...

These pieces of correspondence, which are by no means exhaustive, demonstrate that the 1st Defendant had consistently taken the view that the Plaintiff was not meeting its obligations on time, and that the Plaintiff was liable to the 1st Defendant for the consequences of delayed completion. The 1st Defendant's engagement of ZPPL to carry out the piling works on behalf of the Plaintiff (see [10] above) and termination of the Sub-Contract following the Plaintiff's refusal to perform the Stage 4 Works must be seen in this context, as must the Call.

31 Secondly, it ought also to be mentioned that the Plaintiff's allegation [note: 29] – that the 1st Defendant's conduct in disallowing the Plaintiff's extension of time claims is evidence of the 1st Defendant's bad faith – is contrary to the evidence before me. The Plaintiff's claims for extension of time in its Claim Report dated 3 May 2011 ("the Claim Report") were not accompanied with the relevant details, and despite being given time by the 1st Defendant to substantiate its Claim Report, the Plaintiff did not appear to have submitted any further details. This was not the first time that the Plaintiff was reminded to substantiate its claims for extension of time. [note: 30] In any event, the 1st Defendant had evaluated the Claim Report and found that the Plaintiff was not entitled for extension of time for all 16 items in the Claim Report. [note: 31]

32 Thirdly, in the face of the Plaintiff's insistence initially on not performing the Stage 4 Works and subsequently only on the condition that those works would constitute a variation, the 1st Defendant could reasonably have taken the view that it was entitled to terminate the Sub-Contract. Even if the 1st Defendant was misapprehended and had wrongfully terminated the Sub-Contract, the law is clear that generally mere breaches of contract by the beneficiary of the performance bond are not, by themselves, unconscionable: *Raymond Construction Pte Ltd v Low Yang Tong* [1996] SGHC 136 at [5].

33 Fourthly, even if I had accepted (which I do not) the Call was indeed a "retaliation" by the 1st Defendant following the outcome of the Adjudications, the fact is that the 1st Defendant was entitled to exercise the Call in consequence of its view that the Plaintiff had breached the Sub-Contract. The Plaintiff did not bring to my attention any authority which stands for a proposition that even if a beneficiary is ordinarily entitled to call on a performance bond, it would be unconscionable to do so *after* the beneficiary has been ordered to pay certain sums to the obligor for other matters arising out of the same contractual relationship. In fact, I cannot see how a call on a performance bond in such circumstances can be considered to be so reprehensible. Taking the Plaintiff's argument to its logical conclusion, the beneficiary's right to call on a performance bond is extremely restricted. Not only would it be unconscionable if it the call is made after the beneficiary has been ordered to pay certain sums to the obligor, it could also be unconscionable before such sums were ordered. As long as the obligor had taken some steps to claim certain sums or payments from the beneficiary, the obligor would, if the Plaintiff's proposition is accepted, be equally justified in asserting that a call then by the beneficiary would be unconscionable on the basis that it is "retaliatory" for the *potential* sums which

the beneficiary *might* be liable to pay the obligor. I cannot think this is correct.

34 Finally, I stand guided by the Court of Appeal's holding in *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352 ("*BS Mount Sophia*") at [37]:

> *If the beneficiary's call on the bond is motivated by* ***improper purposes*** *, or such a call* ***cannot be justified with clear evidence*** *; or in any other situation where the* ***beneficiary is less than certain about his entitlement to call on the bond and for what amount*** , the beneficiary ought to take a step back and re-examine its entitlement and conduct prior to calling on the bond. Unfairness is also an element of unconscionability (see below at [42]-[43]), and the question as to whether or not notice was afforded to the obligor of his alleged breach before the beneficiary's call on the bond would also be a relevant consideration. [emphasis added in italics and bold italics]

In my view and in the light of the context which I have illustrated above, the 1st Defendant's conduct clearly did not fall into any of the above categories of potentially unconscionable conduct.

Conclusion

35 In sum, the Plaintiff did not even adduce a *prima facie* strong piece of evidence illustrative of the 1st Defendant's unconscionable conduct, much less a strong *prima facie* case required of it to justify the restraining of the Call (see *BS Mount Sophia* at [40]). Having regard to the overall tenor and context of the entire conduct of the parties, I am unable to conclude that the 1st Defendant's conduct was "so lacking in *bona fides*" (see *BS Mount Sophia* at [45]). I therefore dismissed the Plaintiff's application with costs.

36 I need only add, as a postscript, that in an unsuccessful application for a stay of the release of the monies under the Performance Bond pending appeal, Mr Irving Choh, counsel for the Plaintiff, very properly accepted that he could not in good conscience submit to me that if his client succeeds in its appeal, there would be a risk that his client could not recover the sum paid out under the Performance Bond.

[note: 1] Thung Chun Heng 1st Affidavit at p 24.

[note: 2] Thung Chun Heng 1st Affidavit at p 49.

[note: 3] Thung Chun Heng 1st Affidavit at p 53.

[note: 4] Rintu Chakravarthy 1st Affidavit at paras 29–30.

[note: 5] Rintu Chakravarthy 1st Affidavit at paras 9–30 and 32–37.

[note: 6] Thung Chun Heng 2nd Affidavit at pp 10–12.

[note: 7] Rintu Chakravarthy 1st Affidavit at para 42.

[note: 8] Thung Chun Heng 1st Affidavit at p 41.

[note: 9] Rintu Chakravarthy 1st Affidavit at p 83.

[note: 10] Rintu Chakravarthy 1st Affidavit at p 84.

[note: 11] Rintu Chakravarthy 1st Affidavit at pp 85–89.

[note: 12] Thung Chun Heng 1st Affidavit at p 187.

[note: 13] Thung Chun Heng 1st Affidavit at para 36.

[note: 14] Thung Chun Heng 1st Affidavit at para 46.

[note: 15] Rintu Chakravarthy 1st Affidavit at p 167.

[note: 16] Rintu Chakravarthy 1st Affidavit at p 176.

[note: 17] Rintu Chakravarthy 1st Affidavit at p 50.

[note: 18] Rintu Chakravarthy 1st Affidavit at para 5.

[note: 19] Thung Chun Heng 1st Affidavit at para 58.

[note: 20] 1st Defendant's submissions at para 5.

[note: 21] 1st Defendant's submissions at para 19.

[note: 22] 1st Defendant's submissions at para 23.

[note: 23] Thung Chun Heng 1st Affidavit at p 24.

[note: 24] Rintu Chakravarthy 1st Affidavit at para 39.

[note: 25] Rintu Chakravarthy 1st Affidavit at pp 65–66.

[note: 26] Rintu Chakravarthy 1st Affidavit at p 75.

[note: 27] Rintu Chakravarthy 1st Affidavit at p 76.

[note: 28] Rintu Chakravarthy 1st Affidavit at pp 96–97.

[note: 29] Thung Chun Heng 2nd Affidavit at para 42.

[note: 30] Rintu Chakravarthy 1st Affidavit at pp 67–74.

[note: 31] Thung Chun Heng 2nd Affidavit at pp 34–36.