IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1998] SGHC 214

Suit 46/1998, SIC 614/1998

Between

New Civilbuild Pte Ltd

… Plaintiff

And

Guobena Sdn Bhd
another

… Defendant

GROUNDS OF DECISION

Building and Construction Law — Building and construction related contracts — Guarantees and bonds; Civil Procedure — Injunctions

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New Civilbuild Pte Ltd v Guobena Sdn Bhd and Another

[1998] SGHC 214

Suit 46/1998, SIC 614/1998
Lee Seiu Kin JC
29 June 1998

Judgment:

LEE SEIU KIN JC

On 19 January 1998, the plaintiffs obtained an ex parte injunction restraining the first defendants from calling on or receiving the proceeds of a performance bond issued by the second defendants to the first defendants in the sum of $1,642,045. The injunction also restrained the second defendants from making payment to the first defendants pursuant to the performance bond. The injunction was to continue until trial or further order.

2.The first defendants took out this summons on 23 January 1998 to discharge the injunction. On 23 April 1998, after hearing the parties, I discharged the injunction with costs. The plaintiffs have appealed against my order and I now give my grounds of decision. [Editorial Note: The plaintiffs withdrew their appeal.]

3.The first defendants were the main contractor for the Tanglin Regency condominium project. By a contract dated 21 September 1995 (the `sub-

contract`), the first defendants sub-contracted part of the works of the project to the plaintiffs. According to the title of the sub-contract document, these works were the structural and architectural works for the main and ancillary building, and external works. The contract price was a lump sum of $16,413,047.88, subject only to such variations as were ordered by the developer. The period for completion was specified to be 19 months from 21 September 1995, ie the completion date was 21 April 1997. There was provision for liquidated damages for delay, at $20,000 per day. The plaintiffs would be paid on a monthly basis within 14 days of the first defendants receiving payment from the employer, with a 10% retention, subject to a maximum of 5% of the contract amount. Half the retention would be released to the plaintiffs upon issuance of the completion certificate by the architect and the balance upon settlement of the final account or at the end of the defects liability period or upon the completion of rectification of defects, whichever is the latest. Clause 10 of the contract provides for the performance bond and states as follows:

> 10.1 Performance bond shall be 10% of the whole contract sum. (A specimen is enclosed in Appendix `E`.)
>
> 10.2 The bond shall include a provision for extension of the validity of the said bond if the sub-contractor delays in completing the works. Provided always that all cost and expense with respect to such extension shall be solely borne by the sub-contractor.
>
> 10.3 The bond shall be demand bond and be so arranged such that it is capable of being invoked by the main contractor at any time on demand without obligation to accord any reason.
>
> 10.4 The sub-contractor shall deposit with the main contractor a performance bond from a financial institution approved by the main contractor.
>
> 10.5 It shall be a condition precedent to the commencement of any interim payment that the bond must be submitted and accepted by the main contractor at the respective times specified for submission stated above.

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4.Appendix `E` to the sub-contract contains the specimen form for the performance bond. The plaintiffs arranged for the second defendants to issue the bond, which conformed with the specimen form.

5.On 17 December 1997 the first defendants wrote to the second defendants to demand payment of $1,642,045 under the bond. This was a simple demand and the first defendants did not state any grounds for it. The plaintiffs were advised of this letter, no doubt by the second defendants, and wrote to the first defendants on 18 December 1997 expressing their surprise at the demand and asserting that they had completed their scope of works before 27 October 1997 and were not in delay. The first defendants` solicitors replied to the plaintiffs on 22 December, saying that the plaintiffs had `failed to perform and/or breached [its] obligations under the sub-contract`. The plaintiffs` solicitors replied to this letter on 31 December 1997, asking for particulars of the alleged breach on an urgent basis. The first defendants` solicitors replied on 2 January 1998 to say that the breaches included the plaintiffs` failure to carry out certain works and delay in the completion of the sub-contract works.

6.Meanwhile, on 30 December 1997 the first defendants wrote a second letter to the second defendants to demand payment under the bond. This time the first defendants advised that they were of the opinion that the plaintiffs had committed breaches of their obligation under the sub-contract. On 5 January 1998 the solicitors for first defendants sent a letter of demand to the second defendants and threatened to commence legal action if payment was not made within three days.

7.On 14 January 1998 the plaintiffs filed the writ in this suit in which the substantial remedy was an injunction restraining the first defendants from calling on the performance bond. Then on 19 January the plaintiffs took out

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Summons-in-Chambers 420/98 for an interlocutory injunction pending trial. The application was made ex parte before Lai Siu Chiu J who granted the injunction.

8.In their ex parte application, the plaintiffs claimed that they had fulfilled all their obligations under the sub-contract and that only rectification and minor works remained. The plaintiffs also pointed out that prior to the first demand letter of 17 December 1997, the first defendants had not indicated to the plaintiffs that they would be calling on the bond.

9.On 23 January 1998 the first defendants took out this summons to discharge the injunction. Counsel for the first defendants, Mr Tan, submitted that the injunction ought to be discharged on two grounds: (i). the application for the injunction was flawed because:

(a). it should have been made inter partes;

(b). there was no full and frank disclosure; and

(c). there was no cause of action disclosed in the writ of summons; and

(ii). no fraud had been alleged by the plaintiffs.

(i) Application for injunction flawed

10. **(a) Application should be made inter partes**

Mr Tan submitted that the plaintiffs` application for the injunction should have been made inter partes because there was no particular urgency. The first defendants had made a demand as early as 17 December 1997. The second

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defendants had not paid up immediately although they were obliged to. No doubt they had informed the plaintiffs of the call in order to give them an opportunity to resolve the matter with the first defendants, as is usual in such cases. The first defendants followed this up with a second letter of demand on 30 December 1997 and finally with their solicitors` letter of 5 January 1998 which contained a threat of legal action if payment was not made within three days, ie by 8 January. Notwithstanding this, no payment was made by 19 January, some 11 days after the expiry of the deadline. Therefore the application was not of such urgency that notice of the summons could not be extended to the first defendants` solicitors, who were on record, so that they had an opportunity to attend the hearing. Furthermore, the affidavit of Gee Kim Fah, filed on 19 January 1998 in support of the application, did not state that the application was urgent nor did it contain any ground for not making an inter partes application.

11.Order 29 of the Rules of Court deals with, inter alia, interlocutory injunctions and rule 1(2) provides that such applications may be made ex parte where the case is one of urgency. Mr Tan cited the case of Castle Fitness Consultancy Pte Ltd v Manz [1989] SLR 896, [1990] 1 MLJ 141 for the proposition that an injunction obtained ex parte should be discharged where there were no grounds for notice not to be given to the defendant. In that case, Coomaraswamy J, in discharging an interim injunction, cited the practice of the Chancery and Queen`s Bench Divisions of the English High Court which required a party making an ex parte application to state cogent reasons for not notifying the defendant of the application. The learned judge was of the view that the opponent should be given notice of the ex parte application and invited to attend unless the circumstances justify it, such as where the purpose of the order would be defeated if the opponent had prior knowledge. However I do not understand

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him to go so far as to hold that he had discharged the ex parte injunction on the basis that notice ought to have been given to the opponent. Indeed, he was concerned with whether he could discharge the injunction on an ex parte application made by the defendants. He held that he could as in that case, the defendants had given notice of the application to the plaintiffs who declined to appear. The injunction was in fact discharged on its merits. Another ground for discharge was that the plaintiffs had failed to make full and frank disclosure to the court in their application.

12.Mr Tan also cited **Png Siaw Luan v Wong Tui San** [1990] SLR 643 [1990] 3 MLJ 340 in support of the same proposition. The High Court there discharged the injunction on various grounds. In relation to the ground that the application for the injunction was made ex parte when it should have been made inter partes, the court said ([1990] SLR 643 at p 662, [1990] 3 MLJ 340 at p 351):

> *The attorneys further submitted that at the time the plaintiff made her ex parte application, ie after the competitive bidding, there was no urgency which justified an ex parte application. There was also no justification for the plaintiff applying ex parte without notifying the attorneys or the solicitors for the fourth defendant. The plaintiff and her solicitors were aware that the parties had solicitors and who they were.*
>
> *The foregoing submissions of the attorneys are well founded and supported by the twin cases of* ***Tunas (Pte) Ltd v Mayer Investment Pte Ltd & Ors*** *and* ***Castle Fitness Consulting Pte Ltd v Manz****. I would accordingly and notwithstanding that I have already discharged the said injunction order made on 22 May 1990 as varied by the order of court dated 28 May 1990 discharge the said injunction on these grounds as well and order an inquiry into damages to be assessed by the registrar.*

13.It can be seen that the court there had relied on the authority of **Tunas (Pte) Ltd v Mayer Investment Pte Ltd** [1989] SLR 280 [1989] 2 MLJ 132 and the ***Castle Fitness*** case. I have dealt with ***Castle Fitness*** . In the ***Tunas*** case the injunction, which was obtained ex parte, was discharged on the ground that the

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applicant had failed to make full and frank disclosure of all material facts. It was not one of the grounds for discharge of the injunction that the application ought to have been made inter partes. It is noteworthy that Mr Tan did not cite the ***Tunas*** case for this proposition. Therefore, I would read the ***Png Siaw Luan*** case as deciding on the facts of that case that the court would discharge the injunction because the applicant had failed to notify the opponent of the application. In the absence of clear authority to that effect, I am unable to hold that the court would always discharge an injunction obtained in an ex parte application when it turns out that the application ought to have been made inter partes. It is at the stage when a party applies for an injunction that the court would ask for the basis that it is made ex parte. The court having given that injunction, it is invidious for the next court to discharge that order solely on the basis that it ought to have been made inter partes, unless there is something in the circumstances of the case that warrant it. I do not find that to be the situation in the case before me and therefore disagree that the injunction should be discharged on this basis.

14.I should add that where a party makes an ex parte application, he takes upon himself the often onerous burden of making full and frank disclosure. He runs the risk of failure to discharge this burden whereupon the court could discharge the injunction - see ***Kok Seng Chong v Bukit Turf Club*** 2 SLR 388 at p 414. But I do not think, for the reason given in the previous paragraph, that the fact that the application was made ex parte when it ought to have been made inter partes would, in itself, require that the injunction be discharged.

15. **(b) No full and frank disclosure**

Mr Tan submitted that there were material facts not disclosed by Mr Gee in his affidavit in support of the plaintiffs` application for the injunction. In particular

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he had failed to disclose that: (i). there was a provision in the sub-contract for liquidated damages for late completion and that under the sub-contract, the completion date was specified to be 21 April 1997;

(ii). the first defendants had, on 29 September 1997, written to the plaintiffs asserting delay; and

(iii). the first defendants had, in their letter of 2 January 1998, asserted that the plaintiffs had delayed in completing the sub-contract works.

16.Miss Koh agreed that there was such a duty but submitted that those facts were not material. She also made the surprising submission that Mr Gee had made numerous references to those facts in his second affidavit which was filed in response to the first defendants` affidavit in support of their application to discharge the injunction. With respect, I do not see how the disclosure of those facts after the ex parte injunction had been granted helps the plaintiffs` case at all. Therefore I need only to consider whether the facts in question were material.

17.In **Poon Kng Siang v Tan Ah Keng** [1992] 1 SLR 562 , Warren LH Khoo J discharged an ex parte injunction on the ground that there was material non-disclosure. In relation to materiality, he said:

> *`Material`, in this context, does not mean decisive or conclusive. What is required is that the applicant should make full and frank disclosure of all facts and matters which could or would reasonably be taken into account by the judge in deciding whether to grant the application. This includes any defence that the applicant has reason to believe may be advanced by the other side. He has in general to put his case fairly before the court.*

18.I respectfully agree with those comments of the learned judge. The present case involves a performance bond. With the decision of the Court of Appeal in

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Bocotra Construction Pte Ltd v A-G (No 2) [1995] 2 SLR 733 , it is clear law that an injunction will be granted only where fraud is alleged. Therefore it is important that, in the ex parte application, the fact that the defendants might have a claim against the plaintiffs should be put before the court. Whether or not the court would, notwithstanding the information, have granted the injunction is irrelevant. A strict duty is placed on the applicant in such instances because of the ex parte nature of the application and the risk of injustice to the other party who is not represented. Although it is true that the court will not automatically discharge an injunction in every case of material non-disclosure and will look at all the circumstances before exercising its discretion, I am of the view that the burden generally rests on the plaintiffs to persuade the court that it should not do so. This attitude is reflected in the words of Bingham J in **Siporex Trade SA v Comdel Commoditites Ltd** [1986] 2 Lloyd`s Rep 428 at p 437 where he said:

> *The scope of the duty of disclosure of a party applying ex parte for injunctive relief is, in broad terms, agreed between the parties. Such an applicant must show the utmost good faith and disclose his case fully and fairly. He must, for the protection and information of the defendant, summarize his case and the evidence in support of it by an affidavit or affidavits sworn before or immediately after the application. He must identify the crucial points for and against the application, and not rely on general statements and the mere exhibiting of numerous documents. He must investigate the nature of the cause of action asserted and the facts relied on before applying and identify any likely defences. He must disclose all facts which reasonably could or would be taken into account by the judge in deciding whether to grant the application. It is no excuse for an applicant to say that he was not aware of the importance of matters he has omitted to state. If the duty of full and fair disclosure is not observed the court may discharge the injunction even if after full enquiry the view is taken that the order made was just and convenient and would probably have been made even if there had been full disclosure.*

19.In the present case, I found that the plaintiffs ought to have placed those facts before the court in their ex parte application and there were no circumstances

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that justify their not doing so. This ground alone would have been sufficient for me to discharge the injunction.

20. **(c) No cause of action disclosed in the writ of summons**

Mr Tan submitted that the writ of summons did not disclose any cause of action and therefore the injunction, which is a relief available only in relation to a valid cause of action, must be discharged.

21.A statement of claim was filed with the writ. The first seven paragraphs set out the facts of the case, ie the main terms of the sub-contract, the provision for the performance bond and the first defendants` letter of demand on the bond. Paragraphs 8 to 10 set out facts that show that the first defendants have no cause to make the demand. Paragraph 11 contains, inter alia, a prayer that the first defendants be restrained from calling on the bond or receiving payment under it, and a prayer in effect for a declaration that the second defendants need not pay under any such demand. Both prayers are expressed to be valid `until trial or further order`.

22.While I would agree that the statement of claim is not drafted in the clearest manner possible - no doubt the plaintiffs` solicitors were somewhat rushed in preparing it - I would not go so far as to say that no cause of action is disclosed at all. The plaintiffs might need some amendments to get it right, but it is clear enough that their cause of action is in contract, ie that the first defendants had breached a term by making a demand on the performance bond when the circumstances did not entitle them to do so. Accordingly I did not agree with Mr Tan`s submission on this point.

23. ***(ii) No fraud alleged***

Miss Koh submitted that the works were completed on or before 27 October 1997. In support of this, she referred to the plaintiffs` letter to the first defendants dated 10 November 1997. However I note that this was a letter from the plaintiffs to the first defendants advising that they had completed the works and, while it evidences that the plaintiffs had claimed that the works had been completed, it does not evidence any acceptance of that position by the first defendants. Indeed in his affidavit filed in support of the application for the injunction, Mr Gee said that the letter elicited no response from the first defendants. It is significant that the plaintiffs had not pointed to any letter from the first defendants confirming that they had completed the works. Mr Gee also said that evidence that the plaintiffs had completed the works is found in the letter from the quantity surveyors dated 11 December 1997. This letter is entitled `Interim Payment NR 28` and is a covering letter for the surveyors` interim payment certificate. Mr Gee said that the certification attached to that letter showed that most of the works within the sub-contract had been certified as 100% completed. For the other areas which were not so certified, Mr Gee said that the balance works were either not within their original scope of works or had been omitted by the first defendants. I should point out that even on Mr Gee`s affidavit, he had accepted that works which he considered to be within the plaintiffs` responsibility were not fully completed in the following instances: (i). For the item `Wall Finishes` he explained that the reason it was certified as 98% completed was because there was touch up work in the bracket area. The fact remains that he did not dispute that it was not completed.

(ii). For the item `Ceiling Finishes`, he again gave the reason for non-completion as `touch up work`.

(iii). For the item `Sub-Station`, he gave the reason for non-completion as `some hairline cracks which we could touch up easily`.

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24.The first defendants claimed that they had good grounds for the allegation that the plaintiffs had breached their obligations under the sub-contract and were liable to the first defendants in damages. In support of this the first defendants exhibited various documents showing that since early 1997 the plaintiffs were experiencing financial difficulties and had failed to pay their own suppliers and sub-contractors. Consequently the plaintiffs requested the first defendants to place orders with suppliers on the plaintiffs` behalf and deduct the cost of these supplies from their progress payments. The plaintiffs also requested the first defendants to omit certain works from the sub-contract and make direct payments to their sub-contractors from the progress payments. In order to mitigate loss the first defendants agreed to do this. The first defendants also alleged on affidavit that they had to take over some of the works abandoned by the plaintiffs as the latter`s workers and sub-contractors had failed to show up at the site from September 1997.

25.Mr Tan submitted that the plaintiffs, who did not challenge the validity of the performance bond, had not alleged fraud and, on the authority of **Bocotra Construction Pte Ltd v A-G (No 2)** [1995] 2 SLR 733 , the injunction must be discharged. Miss Koh agreed that there was no plea of fraud, but submitted that the facts showed that it was unconscionable for the first defendants to call on the performance bond and, on the same authority, as well as on the authority of **Royal Design Studio Pte Ltd v Chang Development Pte Ltd** [1990] SLR 1116 [1991] 2 MLJ 229 and **Potton Homes Ltd v Coleman Contractors Ltd** [1984] 28 BLR 19, the injunction ought to be upheld.

26.The Bocotra case involved a call by the Public Works Department (`PWD`) on a demand bond on the ground that the plaintiffs, ie the contractor, had committed various breaches of contract as confirmed in a report of a firm of consulting engineers engaged by the PWD. The contractor did not allege that

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the PWD had acted without honest belief in its entitlement to make a call on the bond. The Court of Appeal held that the weight of authority suggested that fraud was the sole exception to the principles that: (i). the guarantee (or bond) constituted a separate contract from the underlying transaction; and

(ii). the bond was to be treated as `cash in hand`, reflecting the importance of promoting commercial efficacy and certainty.

The court also held that it was well established that there was no distinction between cases where the injunction was to restrain a bank and to restrain the beneficiary.

27.Miss Koh submitted that the Bocotra case held that injunctions restraining payments or calls on bonds may be granted on grounds not only of fraud but also unconscionability. She further submitted that the first defendants` conduct was unconscionable in this case and therefore the court ought to restrain the payment.

28.I first examine the legal position in relation to unconscionability. In that part of the ***Bocotra*** case dealing with the merits of the injunction application, the Court of Appeal first made the following comments in relation to the respondent`s submission (at p 744):

> *The respondent undertook a comprehensive and judicious survey of the relevant case law on restraint of calls or payment on bonds from a variety of common law jurisdictions. Of the various propositions of law suggested by the respondent, four principles may be extracted:*
>
> (a) The `autonomy` principle - the guarantee constitutes a separate contract from the underlying transaction. The appellants are not privy to the guarantee.

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> (b) The `cash in hand` principle - reflecting the importance of promoting commercial efficacy and certainty in the use of letters, guarantees and bonds. This ties in with the `autonomy` principle.
>
> (c) The `fraud` exception - the sole exception to the `autonomy` and `cash in hand` principles arises where the plaintiff can establish fraud in the circumstances of the call or payment. This permits injunctive relief.
>
> (d) There is no distinction between cases where an injunction is to restrain a bank (on payment) or the beneficiary under the guarantee (on calling for payment).
>
> *Principles (a) to (c) above were all alluded to and supported by the judge below. The weight of authority suggests that these principles are well-entrenched. It is important to establish at the outset principle (d) above: contrary to the appellants` submissions, there is no distinction between the principles to be applied in cases dealing with attempts to restrain banks from making payment or those dealing with restraint of callers from calling for payment. This principle has been consistently endorsed in the English authorities, right up to recent cases such as* ***Deutsche Ruckversicherung AG v Walbrook Insurance Co Ltd*** *[1994] 4 All ER 181. It was similarly endorsed by our Court of Appeal in* ***Brody, White & Co Inc v Chemet Handel Trading (S) Pte Ltd*** *[1993] 1 SLR 65 .*

29.The judgment then discussed the question of whether an injunction might issue if there were a challenge of the validity of the bond. The court considered the case of **Bolivinter Oil SA v Chase Manhattan Bank** [1984] 1 Lloyd`s Rep 251, and decided that it would not, adding (at p 745):

> *Contrary to what the appellants suggested, we do not think that the mere fact that the validity of the guarantee was substantially challenged in other proceedings will automatically provide a basis for an injunction to be obtained restraining an intended call for payment. It will still be in the `wholly exceptional case` of fraud that an injunction can be granted.*

30.The Court of Appeal went on to consider the dicta of Eveleigh LJ in **Potton Homes Ltd v Coleman Contractors Ltd** [1984] 28 BLR 19 and the decision of the High Court in **Royal Design Studio Pte Ltd v Chang Development Pte**

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Ltd [1990] SLR 1116 [1991] 2 MLJ 229 and commented, in relation to the latter case, that:

> *On the evidence, however, there was no allegation or finding that the circumstances were such as to establish fraud on the defendant`s part. In this connection, there was a conscious departure from principle (c) outlined earlier - that the sole exception to the general rule denying injunctions in such circumstances is where fraud is established.*

This was followed by a consideration of **Kvaerner Singapore Ltd v UDL Shipbuilding (Singapore) Ltd** [1993] 3 SLR 350 , in which GP Selvam J opined that the `fraud` exception was not `an immutable principle of universal application` and, relying mainly on Eveleigh LJ`s dicta in ***Potton Homes*** , the learned judge found the defendant`s conduct to be `utterly lacking in bona fides` and refused to discharge the injunction. The Court of Appeal next considered the question whether the balance of convenience test applied in such cases and held that it did not, citing its earlier decision in **Brody, White & Co Inc v Chemet Handel Trading (S) Pte Ltd** [1993] 1 SLR 65 .

31.Following this, the Court of Appeal said, and this is what the plaintiffs rely on (at pp 746 and 747):

> *In our opinion, whether there is fraud or unconscionability is the sole consideration in applications for injunctions restraining payment or calls on bonds to be granted. Once this can be established, there is no necessity to expend energies in addressing the superfluous question of `balance of convenience`. It does not lie in the mouth of the defendant to claim that damages would still somehow be an adequate remedy.*
>
> *The `double-barrelled` test may have been employed by Roskill LJ in* ***Howe Richardson Scale v Polimex-Cekop & Anor*** *[1978] 1 Lloyd`s Rep 161 but this appears to be an isolated instance where the court actually addressed its mind to this question. In any case, Roskill LJ`s statement on the balance of convenience was strictly obiter. In* ***Rajaram v Ganesh t/a Golden Harvest Trading Corp & Ors*** *[1995] 1 SLR 159 , Kan Ting Chiu J suggested that Lai Kew Chai J`s comments in* ***Brody*** *were not*

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> *an outright rejection of the balance of convenience test. Kan J reasoned thus:*
>
> *`The requirements for granting an injunction in such cases are more stringent than in a normal case, not less stringent. What (Lai J) said was that, unless a clear case of fraud is established, the matter would not proceed further to a consideration of the balance of convenience.`*
>
> *To allay these concerns, we need only note that dispensing with consideration of the balance of convenience does not make an injunction any easier to obtain. 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.` [Emphasis added.]*

32.The Court of Appeal then went on to discuss the position on the assumption that the balance of convenience test was applicable and held that the fact that to permit a call on the bond could damage the commercial reputation of the plaintiffs was not a valid consideration. Moreover the defendants were in a position to pay any damages. The court found no reason to interfere with the exercise of discretion by the judge in the court below to refuse relief, and said that (at p 748):

> *... the appellants had not established their entitlement to an injunction restraining the respondent from calling on the guarantee. In particular, they had not shown, and indeed had conceded that they could not show, that* ***fraud or unconscionability*** *was present on the facts. [Emphasis added.]*

33.I have set out in detail the judgment of the Court of Appeal in the ***Bocotra*** case so as to better appreciate the context in which the term `unconscionability` ought to be understood. At no point did the court discuss the scope of this concept of `unconscionability`. As shown above, the court first stated (at p 744) that the weight of authority suggested that the sole exception permitting injunctive relief was fraud and held that there was no difference between the principles to be applied in dealing with attempts to restrain banks from paying and callers from calling for or receiving payment. It is well established that

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banks cannot be restrained other than for fraud. Therefore the Court of Appeal had held in the ***Bocotra*** case that the same position obtains where the application is in respect of the caller.

34.The term `unconscionability` first appeared after a discussion of the question whether the balance of convenience test applied in such applications, the court holding that once it is found that `fraud or unconscionability` is established, there is no need to address the question of balance of convenience. Thereafter the word `unconscionability` appeared alongside the word `fraud` in two other places as set out above.

35.Given that the Court of Appeal had stated that the weight of authority had suggested that fraud as the sole exception was well entrenched, I do not understand the court as having changed the law without a discussion of the basis for it. Indeed, upon an examination of the cases cited to the court, there is no doubt that such is the overwhelming weight of authority. I need only refer to the five decisions of the English Court of Appeal on unconditional guarantees and performance bonds cited in the ***Bocotra*** case, viz: (1). **Howe Richardson Scale Co v Polimex-Cekop** [1978] 1 Lloyd`s Rep 161;

(2). **RD Harbottle (Mercantile) v National Westminster Bank** [1978] QB 146;

(3). **The Bhoja Trader; Intraco v Notis Shipping Corp of Liberia** [1981] 2 Lloyd`s Rep 256;

(4). **State Trading Corp of India v ED & F Man (Sugar)** [1981] Com LR 235; and

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(5). **Potton Homes v Coleman Contractors** [1984] 28 BLR 19.

36.In **Howe Richardson Scale Ltd v Polimex** [1978] 1 Lloyd`s Rep 161 the bank had guaranteed the return of an advance payment of 25,000 on first demand in the case of non-delivery of the goods. At first instance, Donaldson J refused to grant an injunction to restrain the defendants from claiming under the guarantee. The Court of Appeal dismissed the plaintiffs` appeal on the basis that it would be wrong to interfere with the defendants` right to call for payment and the bank`s obligations to make payment because the guarantee was to operate independently of the underlying contract.

37.In **RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd** [1978] QB 146 the plaintiffs sought injunctions against both the bank and the beneficiary. Kerr J said, at p 155:

> *The plaintiffs may well be right in contending that the buyers have no contractual right to payment of any part, let alone the whole, of the guarantee in any of these cases. In the third case, the bank concedes that this may be so, because no valid guarantee may be in existence. But all these issues turn on contractual disputes. They are a long way from fraud, let alone established fraud. secondly, the authorities are strongly against the plaintiffs` contentions. It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts. The courts are not concerned with their difficulties to enforce such claims; these are risks which the merchants take. In this case the plaintiffs took the risk of the unconditional wording of the guarantees. The machinery and commitments of banks are on a different level. They must be allowed to be honoured, free from interference by the courts. Otherwise, trust in international commerce could be irreparably damaged.*

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38.**The Bhoja Trader; Intraco v Notis Shipping** [1981] 2 Lloyd`s Rep 156 was a case in which the plaintiffs sought an injunction restraining the defendants from calling upon an unconditional bank guarantee. Failing at first instance before Staughton J (who did however grant a Mareva injunction which was subsequently discharged by the Court of Appeal), the plaintiffs appealed to the Court of Appeal. The Court of Appeal affirmed the conventional rule and dismissed the appeal. Donaldson LJ delivering the judgment of the court, said at p 257:

> *In refusing to interfere with the sellers` right to call upon the bank to make payment under its guarantee, the learned judge acted in conformity with the well-established principle that the court will not grant such an injunction unless fraud is involved ... We agree with him. Irrevocable letters of credit and bank guarantees given in circumstances such that they are the equivalent of an irrevocable letter of credit have been said to be the life blood of commerce. Thrombosis will occur if, unless fraud is involved, the courts intervene and thereby disturb the mercantile practice of treating rights thereunder as being the equivalent of cash in hand.*

39.In **State Trading Corp of India v ED & F Man (Sugar) Ltd** [1981] Com LR 235 the Court of Appeal dismissed an appeal from the order of Staughton J discharging an injunction preventing the defendants from calling upon a performance bond. It was argued that there was an implied term in the underlying contract to the effect that defendants would not call upon the bond other than where there was a reasonable and just cause for doing so. Lord Denning, with whom both Shaw and Griffiths LJJ agreed, said as follows:

> *It is an essential part of Mr Colman`s case to say that there is such an implied term in the sale contract in regard to a performance guarantee. I must say at once that - although this is only an interlocutory application - I see no justification for introducing such an implied term into a sale contract when there is a performance bond. It would strike at the efficacy of the performance bond and at the purpose for which it was given. It would mean that the bank could be prevented from paying on the bond on a mere assertion by the seller that he was not in default.*

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> *If there was a dispute - regardless of whether the seller was in default or not - this implied term could be introduced so as to hinder or prevent payment under the bond. I am quite clear that no such implied term is to be imported into the contract at all. The only term which is to be imported is that the buyer, when giving notice of default, must honestly believe that there has been a default on the part of the seller. Honest belief is enough. If there is no honest belief, it may be evidence of fraud. If there is sufficient evidence of fraud, the court might intervene and grant an injunction. But otherwise not. So long as the buyer honestly believes there is a default on the part of the seller, that is sufficient ground for a notice of default being given.*
>
> *...*
>
> *In accordance with all the requirements of international trade, it seems to me that these performance bonds must be honoured and implemented according to their terms.*
>
> *...*
>
> *I may say that performance bonds fulfil a most useful role in international trade. If the seller defaults in making delivery, the buyer can operate the bond. He does not have to go to far away countries and sue for damages, or go through a long arbitration. He can get the damages at once which are due to him for breach of contract. The bond is given so that, on notice of default being given, the buyer can have his money in hand to meet his claim for damages for the seller`s non-performance of the contract. If he receives too much, that can be rectified later at an arbitration. The courts must see that these performance bonds are honoured.*

40.In **Potton Homes v Coleman Contractors** [1984] 28 BLR 19 the English Court of Appeal also upheld the `cash in hand` principle. Miss Koh cites this judgment in support of the plaintiffs` position, primarily because it was relied upon in **Royal Design Studio v Chang Development** [1990] SLR 1116 [1991] 2 MLJ 229 . However a careful analysis of the ***Potton Homes*** case will reveal that its ratio is consistent with the other authorities I have just cited. In that case, after the defendants called on the bond the plaintiffs applied for and obtained an injunction. The defendants then took out O 14 proceedings against the bank for summary judgment pursuant to the bond. The judge at first instance gave judgment in favour of the defendants but ordered a freezing of the funds arising

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from the call under O 29 r 2(1) of the Rules of the Supreme Court. The Court of Appeal, comprising Eveleigh and May LJJ held that the learned judge was wrong and that no such order to freeze the proceeds ought to be granted. However there is a lengthy passage in which Eveleigh LJ made some remarks which are clearly obiter. Eveleigh LJ said at pp 28-29:

> *As between buyer and seller the underlying contract cannot be disregarded so readily. If the seller has lawfully avoided the contract prima facie, it seems to me he should be entitled to restrain the buyer from making use of the performance bond. 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 buyer and 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 be unable to prevent a call upon the bond by the mere assertion that the bond is to be treated as cash in hand.*
>
> *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.*
>
> *There are differences between a performance bond and a letter of credit. They operate from different directions. When a bank pays under a letter of credit upon receipt of documents, those documents provide some security, namely, title to the goods themselves. There is no such security in the case of the performance bond.*
>
> *I have made these observations in order to sound a note of caution. I would not wish in these interlocutory proceedings to say more than is necessary for the purpose of deciding the matter with which we have to deal. I particularly would not wish to add to the entrenched status of the bond beyond the limits set in the decided cases. I would wish at least to leave it open for consideration how far the bond is to be treated as cash in hand as between buyer and seller.*

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41.It is clear from the last paragraph above that the learned judge did not intend to alter the state of the law but had made the observations in order to `sound a note of caution`. Indeed, Eveleigh LJ himself stated the ratio for the decision at pp 30-31:

> *It cannot be said that the plaintiffs have proved that there are no breaches of the original contract and that a demand would therefore be fraudulent. We must therefore proceed on the basis that, apart from the state of account between the parties, the plaintiffs can raise no objection to a demand upon the bond. The judge has decided that this is not an appropriate case for a Mareva injunction. One of the objects of giving the bond is that the defendants shall be entitled to obtain the money without first establishing the breaches upon which they rely. I do not think that the considerations relied upon by the plaintiffs in this case make it right for the court to order what would in effect be a variation of the terms of the parties` agreement in relation to the bond. I therefore can see no grounds for saying that the defendants should not be entitled to obtain their money in accordance with the intention of the parties as expressed in their agreement.*

42.The other judge in the Court of Appeal, May LJ, relied upon the ***Harbottle*** case, the ***Polimex*** case, and ***The Bhoja Trader*** case in stating that performance bonds are to be treated as `cash in hand` and said at p 31:

> *The first point taken on behalf of the appellants herein, a point which is fundamental to the ultimate success of the appeal, is whether it is correct in law to treat first demand bonds, such as the one for 68,816.92 in the present case, in the same way as irrevocable letters of credit, and thus effectively as cash in hand. In my opinion such bonds are to be so treated. It may be that they have not been in use as a form of commercial paper for as long as letters of credit, but that they should be treated in the same way as the latter flows, in my opinion, from that irrevocable nature of the obligation assumed by the relevant bank in such cases.*

And towards the end of his judgment, May LJ reiterates his view that (at p 34):

> *[t]he proceeds of performance bonds of the kind given in this case are effectively to be treated as cash in hand. I think that proceedings under O 14 claims on such bonds are to be treated*

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> *in the same way as negotiable instruments based on architects` certificates in building contracts and not just as one of a number of claims and counterclaims arising out of the same subject-matter. Not to do so would negate the whole rationale of irrevocable obligations to which I have referred.*

43.It is clear from this analysis why the Court of Appeal had said in the ***Bocotra*** case that the weight of authority suggested that fraud was the sole exception permitting injunctive relief in these cases. I should add that none of the cases cited by the Court of Appeal in that case was decided on the basis of `unconscionability` as a distinct and separate concept from fraud. Indeed I am unable to find the term mentioned in any of those cases. I can only conclude that the Court of Appeal had used the term `unconscionability` interchangeably with `fraud`.

44.I do not rule out the possibility that the judgment of the Court of Appeal in the ***Bocotra*** case has left an opening for the concept of `unconscionability`, as distinct from `fraud`, to find its way into the law. However Miss Koh was unable to cite any authorities that dealt with this concept. She was also unable to develop this argument beyond submitting that in the circumstances of the case it was unconscionable conduct on the part of the defendants to call on the bond when they had adequate security so long as it remained valid. I should state that the facts of this case are no different from those in which the court had refused injunctions. Such cases invariably involve an assertion by the plaintiffs that they have no liability to the defendants and by the latter that they had suffered damage as a result of the plaintiffs` breach of contract. In these circumstances, and in the absence of fraud, the court would give effect to the terms of the bond and refuse to grant injunctions. To admit a distinct concept of `unconscionability`, it would be necessary to identify features that distinguish the case from those of the authorities cited. Miss Koh has not been able to do so and neither can I see any in this case.

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45.Indeed the road may well be too far travelled now to admit of any such concept. Performance bonds used in commercial situations are given by businessmen who deal at arms length and, if not with legal advice, at least with a full understanding of the risks and consequences. In the building industry, these performance bonds evolved from the practice of retention of a certain percentage of progress payments in cash. The industry developed the practice of substituting, in part or in full, this retention sum with a performance bond in circumstances where the beneficiary party insisted on the right to call on the bond in the event that he determined that the other party was liable to him, notwithstanding any dispute of such liability. This resulted in substantial benefits to the party giving the bond, in terms of his cash flow, which savings could be passed in part or in whole to the other party. The courts are only giving effect to the intention clearly expressed in such bonds. The fraud exception is justified on the basis that it is presumed that the caller must always act in good faith. Today performance bonds are given by Singaporean financial institutions not only for local projects but also for projects overseas, particularly in the region. It is important that the law in relation to such bonds be placed on a clear and unambiguous footing in order that they continue to be accepted by beneficiary parties whether in Singapore or abroad.

46.Therefore, there being no allegation of fraud, the injunction ought also to be dismissed on this ground alone.

Lee Seiu Kin JC

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Koh Geok Jen (Koh Ong & Partners) for the plaintiff
Tan Woon Tiang (Tan & Tan) for the first defendant
Brij Raj Rai (Tai Ping Insurance Co Ltd) for the second defendant

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