IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 122

Originating Summons No 1323 of 2019

Between

Sulzer Pumps Spain, SA

… *Applicant*

And

(1) Hyflux Membrane Manufacturing (S) Pte Ltd
(2) Deutsche Bank AG

… *Respondents*

JUDGMENT

[Credit and Security] — [Performance bond] — [Unconscionability]
[Injunctions] — [Discharge] — [Full and frank disclosure]
[Injunctions] — [Jurisdiction to award]

TABLE OF CONTENTS

Sulzer Pumps Spain, SA
v
Hyflux Membrane Manufacturing (S) Pte Ltd and another

[2020] SGHC 122

High Court — Originating Summons No 1323 of 2019
Aedit Abdullah J
23 October 2019, 27 February 2020

17 June 2020 Judgment reserved.

Aedit Abdullah J:

Introduction:

1 This is an application to discharge an *ex parte* injunction obtained by the applicant, Sulzer Pumps Spain, S.A.[1] The injunction restrained the first respondent, Hyflux Membrane Manufacturing (S) Pte Ltd, from calling on a bond made by the second respondent, Deutsche Bank AG, in favour of the first respondent.[2] The bond was meant to be a guarantee to ensure that the applicant fulfilled its contractual obligations to the first respondent.[3] The second respondent did not participate in these proceedings.

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1 First Respondent's written submissions dated 30 January 2020 ("RS") at para 3

2 Applicant's written submissions dated 30 January 2020 ("AS") at para 1

3 AS at para 13

2 Having heard the parties at the *inter partes* hearing, I am persuaded that the injunction should be discharged.

Background

3 The first respondent was the sub-contractor for its related company, Hydrochem Pte Ltd, for a project concerning the design and construction of a desalination plant in Oman (the "project").[4] The owner of the project is a company owned by the Oman government (the "project owner").[5] The first respondent in turn engaged the applicant as its sub-contractor, through two purchase orders in 2015, which incorporated a term sheet, a document entitled "Section 2 - General Terms and Conditions" (the "General Terms and Conditions"), and some exhibits (collectively the "contract").[6] Pursuant to the contract, the applicant was to supply and install pumps for the first respondent.[7]

4 Clause 10 of the General Terms and Conditions is titled "Warranty" and sets out the warranty obligations of the applicant. Under cl 10.6 of the General Terms and Conditions, the applicant was to provide an unconditional first demand bank guarantee to the first respondent as security for its warranty obligations owed to the first respondent.[8] In September 2017, the applicant obtained the guarantee from the second respondent in favour of the first

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4 RS at paras 5 to 6

5 RS at para 5

6 RS at para 7; Daniel Spaeti's Affidavit dated 22 October 2019 ("Spaeti's Affidavit") at Tab 3

7 RS at para 8; AS at para 9

8 Spaeti's Affidavit at p 35

respondent, and delivered the guarantee to the first respondent.[9] The guarantee took the form of an unconditional first demand bond.[10]

5 The applicant manufactured the pumps, delivered them to the first respondent, and installed them under the first respondent's supervision.[11] However, the first respondent soon encountered difficulties with the pumps, which repeatedly failed between November 2017 and May 2019.[12] The first respondent alleges that the recurring failure of the pumps was caused by design flaws which were only rectified by the applicant in May 2019, and that the applicant was hence in breach of its warranty obligations.[13] In contrast, the applicant denies the existence of such design flaws, contending instead that the failures were caused by the first respondent's use of the pumps outside of the recommended and permitted flow and speed range.[14]

6 In October 2019, the first respondent called on the bond.[15] The applicant tried to negotiate with the first respondent by suggesting that the first respondent withdraw its call on the bond in exchange for an extension of the same. However, the first respondent did not respond favourably to this proposal.[16] The

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9 RS at para 10

10 Spaeti's Affidavit at p 123 at para 2

11 AS at para 16; RS at para 14

12 RS at para 15

13 RS at paras 16 to 17

14 AS at paras 26 to 27

15 AS at para 36

16 AS at paras 37-38; RS at paras 22 to 23

applicant thus made an *ex parte* application for an injunction to prevent the first respondent calling on the bond.[17]

The *ex parte* injunction application

7 I heard the applicant's *ex parte* application for an injunction on 23 October 2019.[18] The applicant argued that the injunction was urgent and hence although they had already informed the first respondent of the application, notice had not been given.[19] It was argued that the injunction was urgent as the first respondent had already made the call on the bond and there was an impending payout.[20] Further, the first respondent is part of the Hyflux group of companies which is presently involved in restructuring proceedings before me, and it was feared that any payment made would be irretrievable due to Hyflux's financial difficulties.[21] Due to the circumstances, I granted the injunction; it was to be in force only until the next hearing and/or until another order of court was made.[22] This was in the expectation that an *inter partes* hearing would be held fairly soon after.

8 However, parties did not come back before me until several months later. A part of the lapse of time was presumably caused by the first respondent's change in solicitors.[23] It is unclear if the delay might have been caused by issues arising out of Hyflux's restructuring.

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17 AS at paras 37 to 38

18 Certified Minutes dated 23 October 2019 ("Certified Minutes")

19 Certified Minutes at p 1, lines 37 to 38

20 Certified Minutes at pp 1 and 2

21 Oral argument on 23 October 2019

22 Order of Court dated 23 October 2019

23 Notice of change of solicitors dated 31 January 2020

The first respondent's arguments to discharge the injunction

9 The first respondent raises some jurisdictional and preliminary arguments against the injunction.

10 First, an injunction cannot be free standing but there must be an underlying cause of action; here, the applicant's originating summons contained no underlying cause of action.[24]

11 Second, the applicant breached its duty to make full and frank disclosure of all material facts to the court at the *ex parte* hearing (*Tay Long Kee Impex Pte Ltd v Tan Beng Huwah (trading as Sin Kwang Wah)* [2000] 1 SLR(R) 786 ("*Impex*") at [21] and [24]).[25] Suppression of such information should lead to discharge of the injunction (*Impex* at [35]).[26] Furthermore, the applicant had suppressed the fact that the dispute between the parties was subject to an arbitration agreement.[27] This was material as the court would then have had to consider the requirements under s 12A of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") in deciding whether to grant the injunction.

12 In addition, the applicant had blatantly misrepresented a number of material facts, including: that the applicant knew the basis of the first respondent's calling on the bond; that the first respondent failed to challenge the applicant's technical findings for the malfunctioning of the pumps; that the first respondent's emails did not explain why the pump failures were due to the

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24 First respondent's supplementary submissions dated 25 February 2020 ("RSS") at paras 5 and 6

25 RS at para 113

26 RSS at para 9

27 RSS at paras 7 to 13

applicant's fault; and that the first respondent had accepted that the pump failures were not covered by the applicant's warranty obligations.[28] The first respondent argues that all of these allegations were untrue.

13 Third, under s 12A of the IAA, the court may grant an interim injunction if it is for the purpose of or in relation to an arbitration.[29] However, there was no arbitration commenced at the time the *ex parte* injunction was sought, and no arbitration had been commenced even at the time of the *inter partes* hearing, four months after the *ex parte* hearing.[30]

14 Fourth, the applicant did not come to court with clean hands as it commenced the proceedings in repudiatory breach of the arbitration agreement.[31]

15 Fifth, no notice of the *ex parte* hearing was given to the first respondent, contrary to para 41(2) of the Supreme Court Practice Directions.[32] This was not a case of extreme urgency such that no notice was required; there was thus no reason for the applicant not to have given notice to the respondents.[33]

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28 RS at para 119

29 RSS at para 14; IAA s 12A(2)

30 RSS at para 14

31 RSS at para 15

32 RS at para 120

33 RSS at paras 16 to 17

16 Based on the above, the first respondent argues that the injunction should be discharged even before dealing with the substantive merits of the injunction.[34]

17 Further or alternatively, the first respondent argues that the injunction should also be discharged for substantive reasons.[35] The first respondent argues that it is undisputed that the bond is an unconditional first demand bond.[36] Such bond has to be paid on demand by the obligor to the beneficiary, even without proof of default.[37] The courts should be slow to interfere with contractual arrangements freely entered into by the parties (*Eltraco International Pte Ltd v CGH Development Pte Ltd* [2000] 3 SLR(R) 198 ("*Eltraco*") at [30]; *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352 ("*Mount Sophia*") at [25]).[38] While unconscionability is a ground to seek an injunction to prevent the calling on an unconditional first demand bond, the applicant must show a strong *prima facie* case of unconscionability and the entire context of the case must be particularly malodorous (*Mount Sophia* at [20], [21] and [40]).[39] Calling on the bond where there is a genuine dispute between the parties does not meet the unconscionability threshold (*Eltraco* at [32]; *Mount Sophia* at [52]).[40]

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34 RSS at para 18

35 RS at para 3

36 RS at para 32

37 RS at para 25

38 RS at paras 28 to 31

39 RS at paras 38 to 40

40 RS at paras 45 to 48

18 On the facts, there was no unconscionability.[41] The correspondence and other documentary evidence showed that the first respondent genuinely and consistently believed that the applicant had breached its warranty obligations;[42] the first respondent had consistently maintained that the pump failures were due to design flaws caused by the applicant. There was no evidence of *mala fide* or reprehensible conduct.[43] At best, the applicant is only able to show that there is a genuine dispute between the parties.[44]

The applicant's arguments to maintain the injunction

19 The applicant accepted that it is settled law that the courts would only intervene to prevent a beneficiary from calling on a performance guarantee if it could be shown that the call was either fraudulent or unconscionable (*Bintai Kindenko Pte Ltd v Samsung C&T Corp and another* [2019] 2 SLR 295 ("*Bintai*") at [1]).[45] However, it argued that a less stringent standard should be adopted for determining when a call on a performance bond can be restrained, as compared to a letter of credit; this is because a letter of credit is fulfilment of the obligor's primary obligation under the contract, whereas the performance bond is only security for the secondary obligation of the obligor to pay damages if it breaches its primary obligations (*JBE Properties Pte Ltd v Gammon Pte Ltd* [2011] 2 SLR 47 ("*JBE*") at [10]).[46]

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41 RS at p 22

42 RS at pp 22 to 42

43 RS at para 88

44 RS at pp 42 to 52

45 AS at para 39

46 AS at para 48

20 Under the unconscionability exception, an injunction should be granted if it would be unfair for the beneficiary to realise his security pending the resolution of the substantive dispute (*Arab Banking Corp (B.S.C.) v Boustead Singapore Ltd* [2016] 3 SLR 557 ("*Arab Banking*") at [104]). The unconscionability exception thus protects the obligor from the beneficiary taking the secured sum when there has not been a final determination as to whether he is entitled to that sum (*Arab Banking* at [104]), and prevents the performance guarantee from being used as an instrument of oppression (*Mount Sophia* at [27]).[47] The court should consider all the circumstances of the case in making this determination.[48]

21 On the facts, the first respondent's tenuous financial predicament meant that the applicant would have little recourse against the first respondent even if it ultimately succeeded at trial on the issue, and this was prejudicial to the applicant.[49]Furthermore, the first respondent's call on the bond was unconscionable as there has been no breach of the applicant's warranty obligations under cl 10 of the General Terms and Conditions: the contract did not require the applicant to design the pumps for a "slow ramp-up"; the first respondent had notice that they were not so designed and had accepted and approved of this; and the primary and underlying root cause of the pump failures was the operation of the pumps outside the permitted speed and flow ranges.[50] In any case, all issues concerning the pumps were resolved in compliance with and beyond what was required by the warranties.[51] The first respondent had

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47 AS at paras 41 to 45

48 AS at paras 49 to 50

49 AS at para 82

50 AS at paras 51 to 52

51 AS at para 52

made the call in bad faith to reduce its overall cash outlay towards the project and/or to improve its profitability.[52]

The decision

22 Having considered the arguments and evidence, I am satisfied that the applicant fails to show a strong *prima case* of unconscionability and the injunction should therefore be set aside. Alternatively, it can be set aside due to the applicant's failure to give full and frank disclosure at the *ex parte* hearing.

Issues

23 This judgment considers the following issues in turn:

(a) In relation to the substantive issue of unconscionability:

(i) The nature of the bond in the present case;

(ii) The law on injunctions restraining the call on a demand bond; and

(iii) Whether unconscionability is made out such that the injunction can be maintained.

(b) In relation to the procedural and jurisdictional issues (see [9] to [16] above):

(i) Whether the injunction should be discharged for lack of an underlying claim;

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52 AS at para 52

(ii) Whether the injunction should be discharged for lack of full and frank disclosure at the *ex parte* hearing;

(iii) Whether the injunction can be maintained despite the arbitration agreement;

(iv) Whether the injunction should be discharged for the applicant's lack of clean hands; and

(v) Whether the injunction should be discharged due to the applicant's failure to give the first respondent notice of the *ex parte* hearing.

Substantive issues

The nature of the present bond

24 The validity and terms of the bond are not disputed by the parties.[53] The bond is clearly an unconditional first demand bond, as shown by cl 2 of the bond:[54]

> [Deutsche Bank AG] undertake[s] irrevocably and unconditionally to pay to [the first respondent] the sum demanded by [the first respondent]… on [the first respondent's] first written demand… without any reference to [the applicant] and notwithstanding any dispute which may have arisen in connection with the Contract and notwithstanding any defence which [the applicant] may have, or any request from [the applicant] to us not to pay the same.

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53 RS at para 10; AS at para 1; Spaeti's Affidavit at pp 123 to 124

54 Spaeti's Affidavit at p 123

25 An unconditional first demand bond, such as the present one set out above, is required by cl 10.6 of the General Terms and Conditions of the contract between the first respondent and the applicant, which provides that "the [applicant] shall deliver to the [first respondent] a warranty bond… in the form of an unconditional first demand bank guarantee…".[55]

26 The terms "demand bond", "bank guarantee" and "performance guarantee" are almost used synonymously in practice. The bond here was described as an unconditional first demand bank guarantee. A valid call on such bond is not premised on any breach of contract, and payment would normally follow from a call. However, payment on the bond would trigger repayment by the account party to the bank or financial institution giving the bond, and the account party would want to stop payment if it felt it had grounds to do so.

The law on injunctions against calls on bonds

27 The general approach to the granting of injunctions to prevent a call has been comprehensively expounded on in several Court of Appeal cases. There are competing policy considerations in determining whether to grant an injunction: on one hand, there is a need to protect the beneficiary's right to call on the bond to protect its liquidity; on the other hand, calls made in bad faith would result in the beneficiary receiving something he was not entitled to and damage the liquidity of the obligor, making the bond susceptible to usage as an instrument of oppression (*Mount Sophia* ([17] *supra*) at [26] to [31]).

28 In general, the court should be slow to disrupt the status quo by granting an injunction as parties should abide by the contractual bargain that they have

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55 Spaeti's Affidavit at p 35

struck (*Mount Sophia* at [25]). The provision of the bond by the obligor as security may have had influenced the terms of the contract and the court should be slow to upset this allocation of risk which the parties themselves have undertaken (*Mount Sophia* at [25]).

29 Importantly, the court does not determine whether to grant an injunction based on the merits of the case (*Mount Sophia* at [45]). However, an injunction may be granted on grounds of fraud or unconscionability (*Mount Sophia* at [18]); only the latter is relied on by the applicant in the present case.

Unconscionability

30 The reason that the courts have allowed the exception of unconscionability apart from the fraud exception is to cater for situations where the conduct of the beneficiary was sufficiently reprehensible to justify an injunction, but where the conduct did not amount to fraud (*Mount Sophia* at [23]).

31 The Court of Appeal in *Mount Sophia* at [20] noted that there is a high threshold for establishing unconscionability, and the applicant bears a burden of proof of showing a strong *prima facie* case of unconscionability. When determining if a strong *prima facie* case has been made out, the entire context of the case must be thoroughly considered, and it is only if the entire context of the case is particularly malodorous that such an injunction should be granted; the courts' discretion to grant such injunctions must be sparingly exercised and it should not be an easy thing for an applicant to establish a strong *prima facie* case (*Mount Sophia* at [21]). This high threshold strikes the right balance between the competing policy interests highlighted at [27] above, and prevents unnecessary interference with the parties' contractual arrangements (*Mount Sophia* at [39]).

32 The Court of Appeal found that it was impossible to define unconscionability but gave some broad indications as to when conduct would be found to be unconscionable (*Mount Sophia* at [44]). According to the Court of Appeal, unconscionability involves conduct of a kind so reprehensible or lacking in good faith that a court of conscience would restrain the party (*Raymond Construction Pte Ltd v Low Yang Tong and Another* [1996] SGHC 136 at [5], cited in *Mount Sophia* at [42]). Unconscionability also refers to conduct so lacking in *bona fides* that an injunction is warranted (*Mount Sophia* at [45]). While these formulations of unconscionability are not identical, they are of the same theme. For the purposes of this judgment, unconscionable conduct will be broadly described as conduct lacking *bona fides*, but this is meant to cover the various formulations of unconscionability.

33 Guidance can also be drawn from *CEX v CEY and another* [2020] SGHC 100, which has helpfully undertaken a survey of the cases where a bond has been restrained on grounds of unconscionability, and found that unconscionability has manifested in the following non-exhaustive forms (at [11], [22] to [40]):

(a) calls for excessive sums;

(b) calls based on contractual breaches that the beneficiary of the call itself is responsible for;

(c) calls tainted by unclean hands, *eg*, supported by inflated estimates of damages or mounted on the back of selective and incomplete disclosures;

(d) calls made for ulterior motives; and

(e) calls based on a position which is inconsistent with the stance that the beneficiary took prior to calling on the performance bond.

34 In addition, the following cases illustrate certain factual matrices where the court had found that the beneficiary's conduct was unconscionable:

(a) In *Mount Sophia*, the Court of Appeal found that the entire chronology of events seen as a whole showed that there was unconscionability (at [54]): prior to the call there had been no complaint or allegation by the beneficiary to the obligor about any delay which could have had justified the calling on the bond (at [7], [48]); the beneficiary was silent in response to an email by the obligor proposing a revised date of completion, which seemed to constitute acquiescence to the conditions, or at the very least had misled the obligor that this was the case (at [49]); there was a serious question whether the obligor was in breach of its obligations even on a *prima facie* basis (at [51]); the evidence showed that the beneficiary did not genuinely believe that the obligor was in breach (at [52]); and there was a threat made by the beneficiary to the obligor, through the architect for the project, to call on the bond if the validity of the bond was not extended (at [53]).

(b) In *JBE* ([19] *supra*), the evidence showed that that the beneficiary had grossly exaggerated the costs of rectification which he had suffered as a result of the obligor's breach (at [29]). This was fatal to the beneficiary's claim as the bond was an indemnity performance bond that could only be called based on actual loss (at [30]). Nevertheless, even if the bond had been an on demand bond, the call would still have had been unconscionable as: the price for the rectification works was grossly inflated; the contractor for rectification

works did not appear to have had any expertise in that area; the letter of award did not contain details as to the scope of rectification works; and other forms of abusive conduct on the part of the beneficiary circumstances (at [26] to [30]).

(c) In *Soon Li Heng Civil Engineering Pte Ltd v Samsung C&T Corp and another* [2019] SGHC 267, the court found that the beneficiary's call on the bond was for the purposes of fulfilling claims which had already been rejected by an adjudicator, which would have the effect of undermining the temporary finality of the adjudication determination. This was regarded as an improper purpose, and was hence unconscionable (at [79] to [81], [91]).

(d) In *Ryobi Tactics Pte Ltd v UES Holdings Pte Ltd and another and another matter* [2019] 4 SLR 1324 ("*Ryobi Tactics*"), the beneficiary sought to call on the bond to cover losses under other contracts, even though he did not have reason to believe that the corresponding underlying contract of the bond had been breached; this was found to be unconscionable (at [36] to [37]).

(e) In *GHL Pte Ltd v Unitrack Building Construction Pte Ltd* [1999] 3 SLR(R) 44 ("*GHL*"), the contract required a performance bond of 10% of the contract price. The contract price was subsequently revised downwards by about 65%. The court found that the call on the old bond was unconscionable as it was based on the original contract sum and represented 30% of the new contract price (at [26] to [31]).

The applicant's arguments on the law

(1) The threshold for an injunction

35 The applicant argues for a lower threshold for granting an injunction.

36 First, the applicant argues that the threshold for granting an injunction to restrain a call on a performance bond should be lower than that for a letter of credit, as the former is security for a secondary obligation, whereas the latter is a primary obligation (above at [19]). The applicant relied on *JBE* ([19] *supra*) at [10] for this proposition:

> The Singapore courts' rationale in applying unconscionability as a separate and independent ground for restraining a call on a performance bond… is that a performance bond serves a different function from a letter of credit. The latter performs the role of payment by the obligor for goods shipped to it by the beneficiary (typically via sea or air from another country), and "has been the life blood of commerce in international trade for hundreds of years" (see *Chartered Electronics* at [36]). Interfering with payment under a letter of credit is tantamount to interfering with the *primary* obligation of the obligor to make payment under its contract with the beneficiary. Hence, payment under a letter of credit should not be disrupted or restrained by the court in the absence of fraud. In contrast, a performance bond is merely security for the *secondary* obligation of the obligor to pay damages *if* it breaches its primary contractual obligations to the beneficiary. A performance bond is not the lifeblood of commerce, whether generally or in the context of the construction industry specifically. Thus, a less stringent standard (as compared to the standard applicable *vis-à-vis* letters of credit) can justifiably be adopted for determining whether a call on a performance bond should be restrained. We should also add that where the wording of a performance bond is ambiguous, the court would be entitled to interpret the performance bond as being conditioned upon facts rather than upon documents or upon a mere demand, contrary to the dictum of Staughton LJ in *IE Contractors Ltd v Lloyds Bank Plc and Rafidain Bank* [1990] 2 Lloyd's Rep 496 at 500. [emphasis in original]

37 However, the passage relied on by the applicant has to be understood in its proper context. The Court of Appeal in *JBE* had been trying to establish

unconscionability as a ground to grant an injunction restraining a call on a performance bond. In the UK, such injunctions were only allowed in circumstances where fraud was proven (*JBE* at [7] to [8]). This strict position taken in the UK was influenced by the similarly strict UK position taken in relation to letters of credit (*JBE* at [8]). The Court of Appeal, in trying to depart from the UK position and adopt a broader position allowing unconscionability as grounds for injunction, explained that a less stringent threshold should be imposed for performance bonds instead of letters of credit (*JBE* at [10]). Allowing unconscionability as grounds for injunction was in itself the lower threshold proposed by the Court of Appeal.

38 Hence, the reasoning in *JBE* in no way contradicted the findings in *Mount Sophia* (above at [31]) that unconscionability requires a high threshold: the former dealt with whether unconscionability should even be allowed as grounds for injunction, while the latter dealt with the threshold (*ie*, a strong *prima facie* case) required for proving unconscionability.

39 Second, the applicant also relied on *GHL* ([34(e)] *supra*) to argue for a lower threshold for the injunction.[56] In my view, this case does not assist the applicant. *GHL* was a 1999 decision of a two-judge Court of Appeal which dealt with the issue of whether unconscionability was a separate ground from fraud for issuing an injunction to restrain a call on a bond (at [14] to [24]). The court found that it was, where a *prima facie* case of unconscionability could be proven (at [24]). This seems to be a lower standard as compared to the high threshold of a strong *prima facie* case required in *Mount Sophia* (above at [31]).

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[56] Applicant's Bundle of Authorities dated 30 January 2020 ("ABOA") at Tab 6

40 However, *GHL* focused primarily on whether unconscionability should even be allowed as grounds for injunction, without discussing the standard of proof in much detail. It was also decided 13 years earlier than the Court of Appeal decision in *Mount Sophia*, which was heard by a three-judge panel and specifically went into great detail discussing the requisite standard of proof for unconscionability. *Mount Sophia* considered the previous case law from the past 13 years and beyond, emphasising the policy reasons why the court should be slow to disturb the contractual status quo, and found that a high threshold of unconscionability was needed. The principles in *Mount Sophia* hence provide a more accurate, recent and comprehensive exposition of the approach to be taken towards injunctions for the restraint of calls on performance bonds, and should be applied herein.

(2) Unfairness as a separate ground

41 Next, the applicant argues that an injunction should be granted if it would be unfair for the beneficiary to realise his security pending the resolution of the substantive dispute (above at [20]). This argument seems to be establishing unfairness as a standalone ground for an injunction, or equating unfairness to unconscionability.

42 However, it is clear that unfairness is not a separate standalone ground for an injunction restraining a call on a performance bond. Nor is unfairness equal to unconscionability. To introduce unfairness as a standalone criterion would be to broaden the scope of these injunctions to such an extent that the bond's role as security would be significantly undermined. Unfairness is only one factor amongst other factors, albeit an important one, in determining unconscionability. The Court of Appeal in *Mount Sophia* at [43] cited the Court of Appeal in *Eltraco* ([17] *supra*) at [30], stating:

> 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.

43 This passage makes it clear that unconscionability is not a free ranging inquiry of fairness in a loose sense; such a position would go against the strictures on protection of the sanctity of the agreement entered into the parties. Also, as indicated above at [32], unconscionability refers to conduct lacking *bona fides*, and not unfairness in a loose sense as contended by the applicant.

(3) Relevance of a genuine dispute

44 The applicant also argues that where there is a genuine dispute, the court should grant an injunction to protect the obligor from unfairness. The applicant cites *Arab Banking* ([20] *supra*),[57] and *Min Thai Holdings Pte Ltd v Sunlabel Pte Ltd and another* [1998] 3 SLR(R) 961 ("*Min Thai*") in support of these propositions.[58]

45 However, the mere existence of a dispute pending resolution of the substantive matter cannot *ipso facto* support an injunction on grounds of unfairness or unconscionability. Firstly, this would flip the settled approach to unconscionability on its head; the burden lies on the applicant to prove a strong *prima facie* case of unconscionability and if it fails to meet that burden, then the appropriate course is to lift the injunction (above at [31]). Further, it is well

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57 Applicant's Bundle of Authorities dated 30 January 2020 ("ABOA") at Tab 4

58 AS at para 81

established that calling on the bond where there is a *genuine* dispute does not amount to unconscionability (*Eltraco* at [32]; *Mount Sophia* at [52]). Where such genuine disputes exist, a call on the bond cannot be described as abusive and the beneficiary is entitled to protect its own interests (*Eltraco* at [32]).

46 *Arab Banking* at [104], as cited by the applicant, does not support the applicant's proposition that calling on the bond where there is a genuine dispute would be unconscionable. The paragraph states:

> … Essentially, it seems to us that the unconscionability exception exists because we recognise that in certain circumstances, even where the account party cannot show that the beneficiary had been fraudulent in calling on the bond, it would nevertheless be unfair for the beneficiary to realise his security *pending resolution of the substantive dispute*. In other words, on one view, the unconscionability exception serves to protect the account party from unfair demands by the beneficiary to have the secured sum in hand in circumstances where there has not yet been a final determination as to whether he is actually entitled to that sum. On this view, it would be doubtful whether the unconscionability exception has any relevance where the substantive dispute under the primary contract has been finally resolved. In that situation, the account party's liability (or lack thereof) to the beneficiary would already have been assessed. Therefore there would no longer be any question of whether it would be fair to allow the beneficiary to receive payment under the performance bond. The only question remaining is whether there is an entitlement to such payment. [emphasis in original]

47 The applicant seems to be relying on the phrase in the paragraph which states: "it would nevertheless be unfair for the beneficiary to realise his security pending resolution of the substantive dispute".

48 However, this must be understood in context. This paragraph was part of a discussion on the issue of whether the unconscionability exception can still apply to restrain the call where the substantive dispute had been fully determined. The paragraph found that the unconscionability exception applies

pending resolution of the substantive dispute, and that its relevance was doubtful where the dispute was resolved.

49 The Court of Appeal in *Arab Banking* did not find that unconscionability or unfairness would definitely be made out if the bond was called upon pending resolution of the substantive dispute. It merely recognised that this could be so "in certain circumstances", which should be understood as referring to the requirement of a strong *prima facie* case of unconscionability as required by previous case law. Further, *Arab Banking* did not modify the previous approach, and does not stand for the proposition that unfairness, as distinct from unconscionability, is a separate ground for granting an injunction; it also did not purport to depart from the approach in previous cases on what unconscionability entails. The applicant's reliance on *Arab banking* was hence misplaced.

50 As stated at [44] above, the applicant also relied on *Min Thai* to argue that an injunction should be granted where there was a genuine dispute. *Min Thai* involved a three-party contractual arrangement where the seller of rice would sell the rice to an intermediary who would in turn sell the rice to the buyer; the contract between the intermediary and the buyer required the seller to give a performance bond to the buyer to guarantee the delivery of rice (at [5] to [17]). Problems with the delivery of rice arose due to flooding, and the buyer called on the bond (at [19] to [23]). The court noted that there were many genuine issues in dispute, such as: whether the International Chamber of Commerce's *force majeure* conditions applied; whether performance of the contract was affected by *force majeure*; and whether the seller was even privy to the contract between the intermediary and the buyer, such that the seller could restrain payment under the bond (at [32] to [34]). Ultimately, the High Court held that the call was unconscionable and that the buyer should have waited for the dispute to be resolved.

51 Although *Min Thai* seems to support the applicant's position, I am not sure that *Min Thai* would necessarily be decided the same way post-*Mount Sophia.* It was a High Court decision made in 1998, 14 years before the Court of Appeal decision in *Mount Sophia*. The court in *Min Thai* did not have the benefit of examining the detailed policy considerations set out in *Mount Sophia* and the high threshold for unconscionability established therein. To the extent that *Min Thai* suggests that calling on a bond where there is a genuine dispute amounts to unconscionability, it contradicts the Court of Appeal authorities at [45] above and should not be followed. I note that 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 at [46] had referred to *Min Thai* as an example of unconscionability; however, the existence of the genuine dispute in *Min Thai* was not examined by the Court of Appeal there.

(4) Relevance of restructuring proceedings

52 The applicant argues that if there is any doubt about the existence of unconscionability, an injunction should be granted, considering the financial state of the first respondent.[59] In this regard, it was emphasised that the first respondent is presently undergoing restructuring and that any payment made by the applicant would be difficult to recover due to the first respondent's financial difficulties, making such payment unfair.[60]

53 However, the fact that the first respondent is in the midst of restructuring, or even if hypothetically on the verge of insolvency, would not be

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59 AS at paras 79 to 82

60 AS at paras 81 to 82

reason to grant an injunction if unconscionability is not made out. The rationale for the strict threshold espoused at [31] above bears repeating: a performance bond is a security that has been bargained for, and the court should not disrupt the status quo unless the applicant meets the threshold of proving either unconscionability or fraud. Parties calling on bonds are not to be treated differently merely because they are in the midst of a restructuring. The fact that the obligor may be exposed to the financial constraints of the beneficiary is not good enough reason to bar the call if no other reason exists. This is part and parcel of the contractual arrangement that they have made between themselves in arranging for the performance bond.

Whether the present call was unconscionable

54 In the present case, the primary issue is whether the conduct of the first respondent as the beneficiary of the bond was unconscionable, lacking *bona fides* or so reprehensible that the call should be restrained.

The applicant's arguments

55 As set out above at [21], the applicant argues that the first respondent's call on the bond was unconscionable.

56 First, it is contended that there was no breach of the applicant's warranty obligations.[61] Clause 10.8 of the General Terms and Conditions provides that the applicant makes no warranty except specified in cl 10, and excludes all other warranties to the extent permitted by law.[62] This means that the first respondent

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61 AS at p 23

62 AS at paras 62 to 63

is precluded from implying terms into the contract.[63] Hence, the applicant only needed to meet the express technical specifications prescribed in the contract,[64] and the applicant only had the obligation to provide pumps which would be fit for the purposes of the contract.[65]

57 The applicant points out that there is no express stipulation in the contract that the pumps had to be designed to be compatible with a reverse osmosis membrane or to be used in a reverse osmosis plant; the slow ramp up requirement was also not stipulated.[66] No credible evidence was given for the first respondent's contention that a slow ramp up is a standard performance parameter in a reverse osmosis plant.[67] The applicant denies that it had represented that its pumps were specially designed for a reverse osmosis plant;[68] indeed, the technical parameters of reverse osmosis plants were not within the applicant's expertise.[69] It was the first respondent who was the expert on reverse osmosis plants and the onus should have had been on the first respondent to inform the applicant of any technical requirements of reverse osmosis plants so that the applicant could manufacture the pumps to meet these requirements.[70] However, the first respondent failed to communicate any requirement for a slow ramp up.[71] Further, the Operation and Maintenance Manual ("OM Manual") for

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63 AS at para 66

64 AS at para 63

65 AS at paras 56 to 58

66 AS at paras 56 to 58

67 AS at para 59

68 AS at paras 59 to 60

69 AS at para 60

70 AS at para 60

71 AS at para 61

the pumps were approved without reservation by the first respondent nearly a year before any pump failure had occurred, and the OM Manual clearly reflected that the pumps were not compatible with a slow ramp up.[72]

58 In response to the first respondent's argument that the pump failure was caused due to design flaws in the balance discs, the applicant argues that such allegations are simplistic and unsubstantiated.[73] According to the applicant, the wear and tear to the balance discs were caused by the first respondent's use of the pumps outside the permitted speed and flow ranges.[74] The applicant had recommended changing the balance discs so as to accommodate use of the pumps outside the ranges and such recommendation was not an admission that the balance discs were flawed.[75]

59 The applicant also argues that the remedial works to the pumps done by the applicant were outside the scope of its warranty obligations (implying that the first respondent had no right to call on the bond to cover the costs of remedial works). It argues that this is supported by the following facts: [76] the first respondent has not denied that it had notice of the contents of the OM Manual; the first respondent did not deny operating the pumps outside the permitted speed and flow ranges; the first respondent did not challenge the applicant's findings that the root cause of the pump failures were the use of the pumps outside the permitted ranges; and the first respondent issued purchase orders for the remedial works and subsequently made full payment for them.

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72 AS at paras 17 and 64

73 AS at paras 65 to 66

74 AS at para 66

75 AS at paras 65 to 66

76 AS at p 29

60 Finally, the first respondent's conduct surrounding the call lacked *bona fides*, with the call being made in bad faith.[77] In *Mount Sophia* ([17] *supra*) at [48], it was found that the beneficiary's failure to voice its complaints to the obligor prior to making the call suggested that it lacked *bona fides*; similarly, the first respondent here had admitted that the issues were resolved in May 2019, but it only made the call more than six months after the issues were resolved, and nearly two years after they first arose.[78] The first respondent has not provided any reasonable explanation for its significant delay in making the call.[79] Further, prior to making the call on the bond, no other attempt was made to recover the money which had been paid to the applicant for the remedial works,[80] with the call being only made immediately prior to its expiry.[81] These circumstances suggest *mala fides* and that the first respondent simply wanted to cash in quickly to reduce its overall cash outlay to the project.[82]

The first respondent's arguments

61 As set out at [17] to [18] above, the first respondent argues that there was no unconscionability. This is evinced by the overall tenor and entire context of the case, as shown through the objective documentary evidence, which instead demonstrated that the applicant was in breach of its warranty obligations.[83]

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77 AS at p 30

78 AS at paras 74 to 75

79 AS at para 75

80 AS at para 77

81 AS at para 78

82 AS at para 78

83 RS at para 50

62 According to the first respondent, the documents showed that problems had first surfaced in late 2017, and that they were urgently and repeatedly highlighted by the first respondent to the applicant.[84] These problems persisted despite replacement of damaged parts.[85] The first respondent disputed the applicant's root cause analysis,[86] and had informed the applicant of its technical basis for such dispute via emails in January 2018.[87] The same month, the first respondent informed the applicant that the applicant had breached their warranty obligations, and that the first respondent would enforce its rights, including by calling on the bond.[88] This was followed up on in February 2018, where the first respondent again wrote to the applicant to provide comprehensive reasons explaining why the failure of the pumps was due to, *inter alia*, the applicant's inadequate, deficient, and incompatible design, failure to ensure proper alignment during installation, and failure to provide the needed technical information from the start.[89] The same letter also reiterated that the pumps continued to fail despite the first respondent having taken steps to address the root causes alleged by the applicant.[90] This letter also warned that the bond would be called unless the applicant took immediate steps to rectify the defects and supervise the rectification works.[91]

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84 RS at paras 52 to 53

85 RS at para 53

86 RS at paras 54 to 55

87 RS at paras 55 to 56

88 RS at para 57

89 RS at para 58

90 RS at para 58

91 RS at para 58

63 The first respondent alleges that subsequently, despite the applicant's remedial plan, the pumps still failed.[92] Further monitoring showed that there was no significant evidence that heat was generated during start up, refuting the applicant's allegation that operation of the pumps outside the permitted flow ranges caused excessive heat to be generated during start up.[93] The first respondent posited in its email to the applicant in April 2018 that the reason for the failures could be the applicant's flawed design of the balance discs.[94]

64 The applicant proposed yet another remedial plan in June 2018, involving the design and supply of new balance discs, which was targeted at fixing the very root cause that the first respondent had previously identified.[95] As the project owner expressed concerns about possible delay of the rectification of the pumps due to payment issues, the first respondent issued a purchase order to the applicant for the remedial works, but stated in the remarks in the purchase order that the purchase order did not constitute a waiver of its contractual rights.[96] The applicant demanded advance payment which the first respondent duly paid.[97] Nevertheless, the first respondent continued to have concerns about the efficacy of the applicant's remedial plan;[98] these concerns stretched into August 2018.[99] The remedial works were further delayed due to

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92 RS at paras 59 to 60 and 62

93 RS at para 61

94 RS at para 61

95 RS at para 63

96 RS at paras 65 to 66

97 RS at paras 67 to 68

98 RS at para 69

99 RS at para 70

the applicant ordering the wrong discs.[100] In September 2018, damage was found in one pump, with damage suspected in others, and the first respondent again communicated to the applicant that there was a design flaw in the pumps.[101] There were further delays in the delivery of the new balance discs and the remedial works were only completed by the applicant in May 2019.[102] Since then, the operation of the pumps has generally stabilised.[103] From May 2019 until September 2019, the first respondent continued to monitor the plant to ensure that the pump failures were fully and finally resolved.[104] In October 2019, the first respondent called on the bond.[105]

65 Based on the above, the first respondent argues that the call was validly made, in the *bona fide* exercise of its rights under the contract between the parties, and that there was no evidence of any unconscionable conduct on its part.[106]

66 The first respondent also refutes the applicant's arguments. According to the first respondent, the applicant's case for unconscionability rests on two grounds: first, that there was no breach of warranty obligations; and second, that there was inexplicable delay in the making of the call.[107] In relation to the breach issue, the first respondent argues that the court should not consider the merits of

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100 RS at paras 71 to 72

101 RS at paras 73 to 74

102 RS at paras 76 to 83

103 RS at para 83

104 RS at para 84

105 RS at para 85

106 RS at para 88

107 RS at para 89

whether there was any breach of warranty obligations at this stage; in any event, the applicant's determination of the root cause was only its own subjective view.[108] At best, the applicant has only shown that there is a genuine dispute between the parties.[109] In relation to the delay in making the call, such delay was not undue as it was made before the expiry period, and the call could only have had been made after remedial works were concluded as the applicant threatened not to conduct the works unless it received the advance payment.[110] After the call was made, the applicant had also threatened to withdraw its services to the first respondent even for other projects if the call was not withdrawn, which validated the above-mentioned first respondent's concern that it could not have had made the call earlier.[111] A period of time was also needed by the first respondent post-May 2019 to ensure that no further problems arose after the remedial works.[112]

Whether unconscionability is made out

67 I am satisfied that looking at the entire context of the case, the applicant has failed to meet its burden of showing a strong *prima facie* case of unconscionability (see [31] above). I accept that the evidence and arguments raised by the first respondent from [61] to [66] above sufficiently demonstrate that there is a genuine dispute between the parties, and that the call on the first demand bond did not lack *bona fides*. It is not necessary to weigh the strength

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108 RS at para 92

109 RS at para 92

110 RS at paras 107 to 112

111 RS at para 110

112 RS at para 111

of both sides' arguments as it is not for the court to go into the merits of this dispute but it suffices for the court to determine that the dispute is genuine.

68 As shown from the parties' arguments above, there is a clear genuine dispute between the parties as to the root cause of the pump failures. This in turn affects whether the applicant had breached its warranty obligations. In essence, the applicant insists that the root cause was the first respondent's improper use of the pumps outside the permitted ranges, while this is vehemently denied by the first respondent, who had sent the applicant several emails stating so. The first respondent asserts that the root cause was design flaws in the pumps. There is nothing to show that this dispute was contrived, minor, or fully resolved to everyone's satisfaction. There is also no evidence that the first respondent did not genuinely believe that there is such a dispute, and/or did not genuine believe that the applicant had breached its warranty obligations. While the applicant pointed to the terms of the OM Manual to show that the first respondent accepted the pump design and the incompatibility of a slow ramp up, the first respondent denies this, arguing that the needed technical information was not conveyed to it, and also denies whether the slow ramp up was even the root cause of the failures in the first place (above at [57] and [62]). It may be that more evidence will be needed to fully substantiate and decide the substantive dispute, perhaps even through a trial, but the above suffices to show that these concerns and issues were genuinely in the mind of the first respondent.

69 There was also no delay which rendered the first respondent's conduct unconscionable. While the applicant argues that the call was only made about two years after the pump failures began and about six months after the pumps were fixed (see [60] above), the first respondent explained that this was because it needed some time to verify if the pumps were fully fixed (see [66] above). I accept the first respondent's arguments. Given the long period of pump failure,

including repeated failure despite repeated attempts at remedial works, it was reasonable for the first respondent to monitor the pumps for some time to see how matters panned out. A six-month time lag does not *ipso facto* show unconscionable conduct or bad faith, especially where the correspondence between the parties showed an ongoing genuine dispute. *Mount Sophia* ([17] *supra*) can be distinguished as in that case, the beneficiary made no allegations nor complaints to the obligor either in writing or otherwise about any alleged breach (at [48]). This was not the case here.

70 There is no bright line that will distinguish an unconscionable delay from the usual lapse of time that may arise in commercial matters; this must be determined on the circumstances of each case. A short dispute which was quickly resolved, followed by just a few months' or possibly even a few weeks' passage of time, may be enough to show lack of *bona fides* and that the beneficiary did not genuinely believe that he had a right to call on the bond. However, a long-drawn dispute may require longer time for the beneficiary to monitor the situation and decide whether to call on the bond. The nature of the dispute and the depth of disagreement may also be material. Here, the six months' lapse did not render the dispute or controversy moot. Although the applicant claims that all matters were settled, that the first respondent had acquiesced that the pump failures were due to its improper use, and that the first respondent had signified this by paying for the remedial works (see [59] above), the first respondent's arguments are sufficient to show that this might not be true (see [64] above). The fact that the call was made just prior to expiry also does not *ipso facto* indicate any untoward conduct, unless something more exists to prove such; no such evidence was adduced here.

71 Finally, while the applicant argues that cl 10.8 of the General Terms and Conditions excludes other warranties such that a slow ramp up was not required,

it is conceivable that arguments and evidence may be adduced to allow the first respondent to circumvent cl 10.8, such as by an implied term or some other means; that would be a matter for trial. There may be situations in which no reasonable argument can be put forward, but there would have to be a very clear case to preclude the existence of a genuine dispute. This was not such a case.

Conclusion on the substantive issues

72 Due to the above, the applicant has failed to prove its burden of a strong *prima facie* case of unconscionability. The evidence and arguments raised by the respondent at the *inter partes* hearing significantly changes the one-sided picture painted by the applicant at the urgent *ex parte* hearing, showing that there was a genuine dispute, and that there was no unconscionable delay. This is sufficient to discharge the injunction, but the first respondent raises the following jurisdictional issues in its supplementary submissions which will be briefly addressed for completeness.

Preliminary Jurisdictional Issues

Underlying claim

73 The first respondent argues that it is trite that an injunction cannot be free standing but must be based on an underlying cause of action; however, the applicant's originating summons contained no underlying cause of action (see [10] above). The first respondent relied on *Fourie v Le Roux and others* [2007] 1 WLR 320 ("*Fourie*") and *Siskina (owners of cargo lately laden on board) and others v Distos Compania Naviera S.A.* [1979] 1 A.C. 210 ("*Siskina*") in support of this proposition.[113]

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113 RSS at para 5

74 The first respondent's contention is misplaced, and as will be shown below, these decisions do not assist the first respondent.

Nature and purpose of the present injunction

75 The present injunction is best characterised as a freestanding prohibitory injunction. It is a prohibitory injunction as it prohibits the first respondent from calling on the bond.

76 In addition, it is freestanding as it is not an interlocutory injunction. An injunction is not interlocutory if the sole and entire purpose of the originating process is to obtain the injunction, because once that application had been determined, the entire subject matter of that proceeding would have been spent (*Maldives Airport Co Ltd and another v GMR Malé International Airport Pte Ltd* [2013] 2 SLR 449 ("*Maldives Airport*") at [15]). In contrast, the interlocutory nature of an interlocutory injunction is derived from the fact that it is sought not as the main or substantive claim in and of itself, but only as ancillary relief to a separate substantive claim; in such situations, the substantive claims should appear on the writ or originating process served on the other party (*Bi Xiaoqiong (in her personal capacity and as trustee of the Xiao Qiong Bi Trust and the Alisa Wu Irrevocable Trust) v China Medical Technologies, Inc (in liquidation) and another* [2019] 2 SLR 595 ("*Bi Xiaoqiong*") at [118]).

77 This distinction is illustrated on the facts of *Maldives Airport*. There, the respondent argued that the Court of Appeal had no jurisdiction to hear the appeal as the injunction was an interlocutory one. The respondent argued that any injunction which sought to preserve the legal rights and obligations of the parties before the dispute was completely disposed of was an interlocutory order. This was rejected by the Court of Appeal (at [14] to [15]):

> 14 The Respondent raised a preliminary objection to the jurisdiction of this court. Counsel for the Respondent… submitted that the Judge's decision to grant the Injunction was a decision made on an interlocutory application and so, leave to appeal was required pursuant to s34(2)(*d*) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the SCJA"). As the Appellants had not sought leave from the High Court… the Court of Appeal therefore had no jurisdiction to hear the appeal. In support of the argument that the Judge's decision was given pursuant to an interlocutory application, Mr Pillay referred to *PT Pukuafu Indah v Newmont Indonesia Ltd* [2012] 4 SLR 1157 ("*PT Pukuafu*"), where Lee Seiu Kin J observed (at [20]) that an interim order which sought to preserve the legal rights and obligations of the parties before the dispute was completely disposed of was an interlocutory order. Lee J defined (likewise at [20]) an interlocutory order as "an order that [did] not decide the substance of the dispute or an order under s12 of the IAA during the pendency of arbitration proceedings".
>
> 15 The Respondent's jurisdictional objection is without merit. First, it is incorrect to characterise the Judge's decision as one made on an interlocutory application. The application for the Injunction was made by OS 1128; the sole purpose of OS 1128 was to seek the Injunction. It would be odd if OS 1128 were characterised as an interlocutory application when there was nothing further for the court to deal with once the Injunction had been either granted or refused. This was not a case where an interlocutory injunction was sought pending the resolution of a substantive dispute before the court. The sole and entire purpose of the originating process in this case was to obtain the Injunction. Once that application had been determined, the entire subject matter of that proceeding would have been spent.

78 Similar to the originating summons in *Maldives Airport*, the sole object of HC/OS 1323/2019 is to seek the injunction; once this application is determined, the proceedings are spent. No cause of action was disclosed in the originating summons. This shows that the present injunction is not interlocutory.

79 In addition, the present injunction is not an interlocutory injunction as its purpose is not to preserve the rights of parties pending any substantive proceeding. The purpose of the present injunction is solely to prevent the injustice of the beneficiary calling on the bond without *bona fides*. Whether the

beneficiary lacked *bona fides* is an issue that has to be decided by the judge issuing the injunction. The following example illustrates that injunctions restraining an unconscionable call on a bond can and should be issued despite the absence of an underlying cause of action.

80 A beneficiary calls on a bond issued by the obligor, although neither party had breached their contractual obligations to each other under the relevant contract. At this stage, neither party has any valid cause of action against each other. It is clear that the call was made in bad faith, since there is no breach and no dispute. The obligor applies to court to seek an injunction on grounds that the call was unconscionable. If the injunction was interlocutory in nature, the court would not be able to grant the injunction even though the call was clearly unconscionable, because the obligor has no cause of action against the beneficiary. This is clearly illogical. There is no reason to expect the obligor to lodge a cause of action against the beneficiary, where there is none. The court should not decline to issue an injunction preventing a clearly unconscionable call, just because the obligor has no cause of action against the beneficiary. Instead, in such cases, the cause of action was avoided precisely because of the injunction; if the injunction had not been granted and the call had been made, the obligor would then in that situation have a cause of action for restitution of the bond sum, since the beneficiary has no basis, contractual or otherwise, for calling on the sum. Indeed, the first respondent gave no authority to suggest that the obligor had a duty to file a substantive cause of action in order to seek an injunction against a call made unconscionably. The above explains that such injunction does not have to be based on a separate cause of action, but serves to protect pre-existing legal rights from an invasion, to prevent a potential cause of action from arising. It is also not necessary to require the applicant to seek a negative declaration that the beneficiary has no right to call on the bond; such declaration is not a cause of action.

81 A case in point is *Ryobi Tactics* ([34(d)] *supra*). An injunction was granted even though the obligor did not have any substantive proceedings against the beneficiary under the relevant contract; it was sufficient for the court to find that there was no breach under the relevant contract, and that the beneficiary was acting unconscionably by making the call to cover losses for breaches under another contract.

Whether the court has power to grant a freestanding injunction

82 The first respondent argues that it is trite that an injunction cannot be freestanding. No local authority was cited to support this proposition. Indeed, the injunction at issue in *Maldives Airport* itself was a freestanding prohibitory injunction; it prohibited the appellant from interfering with the respondent's performance of its obligations under the contract (at [8] to [9]), although it was not based on any pending resolution of substantive dispute before the court (at [15]). Although the injunction in *Maldives Airport* was eventually set aside on the basis that it did not satisfy the balance of convenience test (at [54]), the Court of Appeal did not hold that the injunction had to be discharged simply because of its freestanding character.

83 The first respondent's reliance on the foreign cases was misplaced because they dealt only with interlocutory injunctions but not freestanding injunctions. In particular, the cases were dealing with Mareva injunctions, the purpose of which is to preserve the assets so that the final judgment sum can be enforced against the assets. *Siskina* ([73] *supra*) stated at p 256:

> … That the High Court has no power to grant an interlocutory injunction except in protection or assertion of some legal or equitable right which it has jurisdiction to enforce by final judgment, was first laid down in the classic judgment of Cotton L.J. in *North London Railway Co. v. Great Northern Railway Co.* (1883) 11 Q.B.D. 30, 39-40, which has been consistently followed ever since.

84 Lord Scott in *Fourie* ([73] *supra*) stated at [33]:

> Whenever an interlocutory injunction is applied for, the judge, if otherwise minded to make the order, should, as a matter of good practice, pay careful attention to the substantive relief that is, or will be, sought. …

85 The above shows that the cases dealt only with interlocutory injunctions and did not deal with the separate question of whether the court has power to issue a freestanding injunction.

86 However, it is useful to note that Lord Scott in *Fourie*, sitting on the House of Lords, found that the court had power to issue injunctions (even interlocutory injunctions) even if there were no substantive proceedings. He stated at [30]:

> My Lords, these authorities show, in my opinion, that, provided the court has in personam jurisdiction over the person against whom an injunction, whether interlocutory or final, is sought, the court has jurisdiction, in the strict sense, to grant it. …

87 He found that the lower courts were wrong in finding that there was no power to grant such injunction (at [25]):

> … The references to jurisdiction made both by Sir Andrew Morritt V-C and by the deputy judge… read as though they had in mind jurisdiction in the strict sense. If they did, then I think they were wrong. It seems to me clear that Park J had jurisdiction, in the strict sense, to grant an injunction against Mr Le Roux and Fintrade. Both were within the territorial jurisdiction of the court at the time the freezing order was made. Both were, shortly after the freezing order had been made, served with an originating summons in which relief in the form of the freezing order was sought. There is no challenge to the propriety or the efficacy of the service on them… The issue is, in my opinion, not whether Park J had jurisdiction, in the strict sense, to make the freezing order but whether it was proper, in the circumstances as they stood at the time he made the order, for him to make it. …

88 To the extent that *Siskina* laid down a general rule that the court only had power to issue injunctions derived from substantive proceedings, this was departed from by Lord Scott in *Fourie* at [30]:

> … The practice regarding the grant of injunctions, as established by judicial precedent and rules of court, has not stood still since *The Siskina* [1979] AC 210 was decided and is unrecognisable from the practice to which Cotton LJ was referring in *North London Railway Co v Great Northern Railway Co* (1883) 11 QBD 30, 39–40 and to which Lord Diplock referred in *The Siskina*, at p 256. *Mareva* injunctions could not have been developed and become established if Cotton LJ's proposition still held good.

89 Lord Scott also explained that the court's power to grant injunctions, regardless of whether it was based on any substantive proceeding, was derived from the powers of the Chancery courts to grant injunctions (at [25]):

> … The power of a judge sitting in the High Court to grant an injunction against a party to proceedings properly served is confirmed by, but does not derive from, section 37 of the Supreme Court Act 1981 and its statutory predecessors. It derives from the pre-Supreme Court of Judicature Act 1873 (36 & 37 Victc 66) powers of the Chancery courts, and other courts, to grant injunctions…

90 This is consistent with the Court of Appeal's dictum in *Eltraco* ([17] *supra*) at [36] which explained that an injunction to restrain an unconscionable call is based on the court's exercise of its equitable jurisdiction, to achieve equity and justice:

> It must be borne in mind that the court in restraining a beneficiary from calling on a bond on the ground of unconscionability is exercising an equitable jurisdiction… to ensure that there is no injustice or abuse… The object of this jurisdiction is not to punish the beneficiary for making an excessive call but to achieve equity and justice.

91 Hence, it is clear that the court has the power to grant a freestanding injunction to prevent injustice, in exercise of its equitable jurisdiction. This

power is confirmed by (albeit not derived from) O 92 r 4(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed), which allows the court to make any order as necessary to prevent injustice:

> **Inherent powers of Court (O. 92, r. 4)**
>
> **4.** For the avoidance of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court. [emphasis in original]

92 Based on the above, I am satisfied that the court has the power to grant a freestanding injunction to restrain the unconscionable call on a bond, to prevent injustice, even if there are no underlying substantive proceedings.

93 For completeness, it should be noted that the Court of Appeal in *Bi Xiaoqiong* ([76] *supra*) found that a Mareva injunction should only be granted where the court has *in personam* jurisdiction over the defendant, and where the plaintiff has a reasonable accrued cause of action in Singapore (at [62]). This contradicts the House of Lords decision in *Fourie*, which held that the court has power, in the strict sense, to issue a Mareva injunction as long as there is *in personam* jurisdiction, even if there is no reasonable accrued cause of action ([86] above). Nevertheless, this finding in *Bi Xiaoqiong* was only in relation to Mareva injunctions, and did not deal with freestanding injunctions; *Fourie* remains useful to show that the court has equitable jurisdiction to issue freestanding injunctions even where there is no cause of action. Further, *Bi Xiaoqiong* relied on *Siskina* (at [64]), but did not consider *Fourie*, which was the more recent House of Lords decision which departed from *Siskina* ([88] *supra*).

Full and frank disclosure

94 The first respondent also sought to discharge the injunction on grounds that there was no full and frank disclosure by the applicant at the *ex parte* hearing (at [11] above).

95 The duty of full and frank disclosure to be met by the *ex parte* applicant has been elaborated on in various Court of Appeal cases. In *Bintai* ([19] *supra*) at [79] it was stated:

> A party seeking an *ex parte* interlocutory injunction has a duty to make full and frank disclosure of all material facts… This duty extends to the disclosure of facts that the applicant would have known if it had made proper inquiries although the extent of such inquiries would depend on the facts and circumstances of each case… It is insufficient for an applicant to merely exhibit documents pertaining to an issue without highlighting the issue to the court either in the text of the supporting affidavit or in oral submissions. An applicant is required to draw the judge's attention to the relevant documents, as well as to "identify the crucial points for and against the application" …

96 As seen from this, the applicant does not have to lay out the opponent's case or argue the opponent's position, but evident issues must be laid out, especially if the proceeding is made with no notice. Where there is some inkling from the correspondence that the other party takes a different position, this should be made clear at the *ex parte* hearing.

97 I agree with the first respondent that there had not been full and frank disclosure by the applicant at the *ex parte* hearing, constituting grounds for discharge of the injunction. As pointed out by the first respondent (see [12] above), the applicant had failed to disclose a number of material facts at the *ex parte* hearing:

(a) The applicant argued that the first respondent did not reveal to it the basis for the call.[114] This was not true as there was an email sent by the first respondent to the applicant on 17 October 2019 which explained that the call was to cover payment for replacement parts due to the pump failure.[115]

(b) The applicant argued that the first respondent did not provide any evidence to show that the pumps were due to poor design by the applicant.[116] However, this was untrue as the first respondent had sent multiple emails to the applicant comprehensively setting out its technical analysis as to why the pump failure was caused due to the pumps' design flaws.[117]

(c) The applicant argued that the first respondent made full payment for the spare parts, which demonstrated that the pump failure was not a breach of the applicant's warranty obligations.[118] However, the applicant failed to reveal to the court that the purchase orders included language to the effect that the first respondent did not waive its rights under the contract. The applicant also did not disclose correspondence showing that the first respondent believed that the failure was due to the applicant's design flaws, in breach of the applicant's warranty obligations.[119]

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114 Applicant's Skeletal Submissions dated 22 October 2019 ("*Ex parte* submissions") at para 7

115 RS at para 119(a); Antonio De La Torre's Affidavit dated 17 January 2020 at p 86

116 *Ex parte* submissions at para 16

117 RS at paras 119(b) and 119(c)

118 *Ex parte* submissions at para 21

119 *Ex parte* submissions at para 119(d)

98 The applicant's failure to give full and frank disclosure may have to be reflected in the costs allocations, although such suppression may not necessarily have had been intentional.

The Arbitration Agreement

99 The first respondent argues that the applicant at the *ex parte* hearing failed to raise to the attention of the court that the contract is subject to an arbitration agreement (see [11] above); this caused the court to fail to consider the requirements under s 12A of the IAA before issuing the injunction (see [13] above). In particular, the court would have had to consider ss 12A(3), 12A(4) and 12A(6) of the IAA to see if the requirements of appropriateness, urgency and inability of the arbitral tribunal to act effectively for the time being were satisfied.[120]

100 For ease of reference, the relevant provisions of s 12A IAA provide:

> **Court-ordered interim measures**
>
> **12A.**—(1) This section shall apply in relation to an arbitration…
>
> (*a*) to which this Part applies; and
>
> (*b*) irrespective of whether the place of arbitration is in the territory of Singapore.
>
> (2) Subject to subsections (3) to (6), for the purpose of and in relation to an arbitration referred to in subsection (1), the High Court or a Judge thereof shall have the same power of making an order in respect of any of the matters set out in section 12(1)(*c*) to (*i*) as it has for the purpose of and in relation to an action or a matter in the court.
>
> (3) The High Court or a Judge thereof may refuse to make an order under subsection (2) if, in the opinion of the High Court or Judge, the fact that the place of arbitration is outside Singapore or likely to be outside Singapore when it is

120 RSS at para 11

> designated or determined makes it inappropriate to make such order.
>
> (4) If the case is one of urgency, the High Court or a Judge thereof may, on the application of a party or proposed party to the arbitral proceedings, make such orders under subsection (2) as the High Court or Judge thinks necessary for the purpose of preserving evidence or assets.
>
> …
>
> (6) In every case, the High Court or a Judge thereof shall make an order under subsection (2) only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.
>
> [emphasis in original]

101 I agree with the first respondent that there was lack of disclosure. Although the applicant's counsel had referred the court to the General Terms and Conditions, specifically to cl 10 about the warranty, I do not recall counsel drawing attention to the arbitration clause at cl 19.3 of the General Terms and Conditions, or to the possible effect of s 12A of the IAA.[121]

102 As noted by the Court of Appeal in *Bintai* (above at [95]), it is not sufficient for counsel to exhibit the documents; counsel must draw the court's attention specifically to the issue in the text of the supporting affidavit, and highlight the crucial points to the court. Even if the failure to disclose was not an intentional omission, the failure to meet their duty is good reason enough to discharge the injunction (*Bintai* at [81] to [82]). Nevertheless, as seen below, this failure was not material since the injunction would have had been granted even if there had been disclosure of the arbitration agreement.

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121 Minute Sheet of the *inter partes* hearing on 27 February 2020 ("Minute Sheet") at p 4

103 It is unclear if s 12A of the IAA even applies as the injunction was not sought "for the purpose of and in relation to an arbitration" (see s 12A(2) IAA); the first respondent itself pointed this out, arguing that the applicant had not commenced arbitration even four months after the injunction.[122] Nevertheless, assuming, but not deciding, that the requirements of s 12A had to be met, the injunction could still have had been granted as the requirements under s 12A of the IAA had been met. The application was urgent (see [110] below), fulfilling the requirement of s 12A(4) IAA. Further, since arbitration had not commenced, and owing to the urgency of the application, it would have been difficult for SIAC to issue the injunction in time, thus satisfying the requirement under s 12A(6) IAA.

104 Since the requirements were fulfilled in any case, the failure to refer to s 12A IAA or the arbitration agreement was not that significant, and I would not discharge the injunction based on these reasons.

Lack of clean hands

105 The first respondent also argues that the applicant should be disentitled from maintaining the injunction as it had not come to the court with clean hands, having committed repudiatory breach of the arbitration agreement (see [14] above). The first respondent relied on the following passage from *Marty Ltd v Hualon Corp (Malaysia) Sdn Bhd (receiver and manager appointed)* [2018] 2 SLR 1207 ("*Marty*") (at [54]):[123]

> We pause to observe that although Mr Jeyaretnam SC was content to accept that the commencement of the BVI Action alone was not sufficient to amount to repudiation and put his

122 RSS at para 14

123 RSS at para 15

> case on the basis that the respondent had commenced and maintained the BVI Action without qualification, it is strongly arguable that the commencement of court proceedings is itself a *prima facie* repudiation of the arbitration agreement. This is because parties who enter into a contract containing an arbitration clause can reasonably expect that disputes arising out of the underlying contract would be resolved by arbitration and indeed have a contractual obligation to do so. Thus, where court proceedings are commenced without an accompanying explanation or qualification and the relief sought will resolve the dispute on the merits, the defending party in the court proceedings is entitled to take the view that the party who commenced those proceedings ("the claimant") no longer intends to abide by the arbitration clause. It would, however, still be open to the claimant to displace this *prima facie* conclusion by furnishing an explanation for commencement of the court proceedings, either on the face of the proceedings themselves or by reference to events and correspondence occurring before the proceedings started which showed objectively that it had no repudiatory intent in doing so. But in the absence of any explanation or qualification, the commencement of court proceedings in the face of an arbitration clause is, in our view, sufficient to constitute a *prima facie* repudiation of the arbitration agreement.

106 However, the paragraph cited by the first respondent shows precisely why there is no repudiatory breach in the present case. In *Marty*, the action brought in the BVI courts was a substantive cause of action which sought determination of the "dispute on the merits" (see also *Marty* at [14]). This was naturally found to be in breach of the arbitration clause which required disputes to be resolved through arbitration.

107 In contrast, the injunction sought in the present case does not deal with the merits of the dispute, and in fact, does not even require a dispute. The injunction is premised solely on whether the call was unconscionable. The lack of a dispute will support that the call is unconscionable, whereas the presence of a dispute is merely one supporting factor showing that the call could be *bona fides*. As the first respondent itself argues, the court is not entitled to decide on the merits in issuing the injunction. The first respondent raises no authority to

show that the seeking of such injunction amounts to repudiation of an arbitration agreement.

108 Further, cl 19.3 of the General Terms and Conditions of the contract provides that the arbitration is to be governed by the arbitration rules of the International Chamber of Commerce ("ICC Rules"), and Art 29(7) of the ICC Rules provides that an urgent application for a court order is not a breach of the arbitration agreement:[124]

> The Emergency Arbitrator Provisions are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time prior to making an application for such measures, and in appropriate circumstances even thereafter, pursuant to the Rules. Any application for such measures from a competent judicial authority shall not be deemed to be an infringement or a waiver of the arbitration agreement.

109 The first respondent should have had known this as Art 29 of the ICC Rules was specifically extracted and included in its supplementary bundle of authorities. I am satisfied that there was no repudiatory breach.

Lack of notice

110 Finally, the first respondent complains that notice was not given before the *ex parte* hearing (see [15] above). This was noted by me during the *ex parte* hearing but the injunction was still issued due to the urgent circumstances set forth by the applicant then. At the hearing, the applicant stated that the call had been made on 9 October 2019, and that the second respondent had stated that it would pay out the bond sum on 17 October 2019, which was already one week

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[124] 1st Respondent's supplementary bundle of authorities dated 25 February 2020 ("RSBOA") at Tab 4

prior to the *ex parte* hearing on 23 October 2019.[125] The applicant had written to the second respondent to try to stall the payout, pending negotiations with the first respondent.[126] However, no agreement was reached and the payout was imminent.[127] I granted the injunction due to these urgent circumstances expressed by the applicant at the *ex parte* hearing, and I do not consider the lack of notice to be fatal to the injunction.

Conclusion

111 I am satisfied that the applicant has failed to show a strong *prima facie* case of unconscionability, and also failed to give full and frank disclosure at the *ex parte* hearing. The injunction is thus discharged. Directions on arguments as to costs will be given separately; time for any application or appeal, as the case may be, is extended.

Aedit Abdullah
Judge

125 Certified Minutes at pp 1 to 2

126 Certified Minutes at pp 1 to 2

127 Certified Minutes at pp 1 to 2

Anparasan s/o Kamachi and Sumyutha Sivamani (WhiteFern LLC)
for the applicant;
Sandosham Paul Rabindranath and Joan Peiyun Lim-Casanova
(Cavenagh Law LLP) for the first respondent;
the second respondent unrepresented.
