IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2024] SGCA 30

Court of Appeal / Civil Appeal No 9 of 2024

Between

Star Engineering Pte Ltd

… *Appellant*

And

(1) Pollisum Engineering Pte Ltd
(2) Great Eastern General Insurance Limited

… *Respondents*

In the matter of Originating Application No 1135 of 2023

Between

Star Engineering Pte Ltd

… *Applicant*

And

(1) Pollisum Engineering Pte Ltd
(2) Great Eastern General Insurance Limited

… *Respondents*

JUDGMENT

[Arbitration — Stay of court proceedings]

Star Engineering Pte Ltd
v
Pollisum Engineering Pte Ltd and another

[2024] SGCA 30

Court of Appeal — Civil Appeal No 9 of 2024
Sundaresh Menon CJ and Steven Chong JCA
10 June 2024

19 August 2024

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 This is an appeal that arises out of a dispute between the appellant, Star Engineering Pte Ltd ("Star Engineering"), and the first respondent, Pollisum Engineering Pte Ltd ("Pollisum Engineering"), in HC/OA 1135/2023 and in a related appeal, HC/RA 4/2024 ("OA 1135" and "RA 4" respectively). The second respondent in OA 1135 and RA 4 is Great Eastern General Insurance Ltd ("Great Eastern").

2 Pollisum Engineering engaged Star Engineering as its contractor for the design, construction, and maintenance of the works for a construction project. As required under the terms of the contract, Star Engineering furnished Pollisum Engineering an unconditional on-demand performance bond that was issued by Great Eastern. Arising from disputes between the parties, Pollisum Engineering

made a demand for payment under the bond. In response, Star Engineering commenced OA 1135, seeking, amongst other things, an order that Pollisum Engineering be restrained from receiving payment pursuant to the demand it had made under the performance bond and from making any further demand for payment under the bond. In HC/SUM 3408/2023 ("SUM 3408"), an application made without notice to Pollisum Engineering, Star Engineering obtained a temporary restraining order. In response to this, Pollisum Engineering commenced HC/SUM 3431/2023 ("SUM 3431"), seeking a stay of OA 1135 in favour of arbitration. We will return to this later, but note here that Pollisum Engineering did not attempt to set aside the temporary restraining order and press its demand for immediate payment under the bond. The learned assistant registrar (the "AR") dismissed the stay application. Pollisum Engineering then filed RA 4, appealing against the decision of the learned AR in SUM 3431. In his grounds of decision given on 24 May 2024 (the "GD"), the High Court judge below (the "Judge") allowed that appeal and granted a stay of OA 1135 in favour of arbitration in relation to the dispute between Star Engineering and Pollisum Engineering and a case management stay of OA 1135 in relation to Great Eastern. The present appeal is brought by Star Engineering against the decision of the Judge.

Facts

Background facts

3 Star Engineering and Pollisum Engineering are both companies incorporated in Singapore.

4 On or around 25 September 2019, Pollisum Engineering engaged Star Engineering for the design, construction, and maintenance of a construction project.

5 The engagement was based on the REDAS Design and Build Conditions of Contract (3rd Ed, October 2010) (the "REDAS Conditions") with agreed variations found in the Particular Conditions of Contract (the "Particular Conditions") (collectively, the "Contract").

6 Under cl 2.1.1 of the REDAS Conditions, Star Engineering was to provide "an unconditional on-demand bond … in lieu of the cash deposit" for the sum of $856,000. Star Engineering duly provided Pollisum Engineering with an unconditional on-demand performance bond, namely Performance Bond No 2019-A0688351-GPB dated 15 November 2019 (the "PB"), which was issued by Great Eastern.

7 The Contract and the PB each contained different dispute resolution clauses:

(a) Clause 9 of the PB provided that "the parties agree to submit to the non-exclusive jurisdiction of the Singapore Courts".

(b) The Contract contained a typical widely worded arbitration agreement between Star Engineering and Pollisum Engineering. Clause 33.2.1 of the REDAS Conditions stated that "[i]n the event of any dispute between the [p]arties in connection with or arising out of the Contract or the execution of the [w]orks … the [p]arties shall refer the dispute for arbitration". Clause 2.1.3C.2 of the Particular Conditions was added to provide that "[a]ny dispute which the Contractor has in relation to such call, demand, receipt, payment … shall be resolved in accordance with clause 33 [of the REDAS Conditions]". Accordingly, any disputes between Star Engineering and Pollisum Engineering relating to the PB were also to be referred to arbitration.

8 After disputes had arisen between the parties, on 28 March 2023, Pollisum Engineering gave notice to terminate the Contract.

9 On 30 October 2023, Pollisum Engineering made a demand for payment under the PB (the "Payment Demand") on the basis that it had incurred rectification costs and significant losses and expenses due to alleged breaches of the Contract by Star Engineering. Pollisum Engineering alleged that there were substantial and numerous defects in Star Engineering's works, and that Star Engineering had failed to obtain the Temporary Occupation Permit on time.

10 We digress to make some observations here in relation to the nature of the PB, which we will return to later, and which in our judgment was regretfully overlooked by the parties in this case:

(a) There is no real dispute between the parties that the PB was an unconditional bond payable on demand. There was certainly no argument or suggestion at any time that the presence of cl 2.1.3C.2 of the Particular Conditions, that has been referred to at [7(b)] above, had the effect of rendering the bond something other than an on-demand bond or somehow affected the principles that governed attempts to interfere with the payment obligation under the PB as an on-demand bond. Pollisum Engineering refers to the bond as an unconditional on-demand bond in its submissions, and Star Engineering does not contest this. Star Engineering's essential contention is that the Payment Demand had been made fraudulently.

(b) On a true construction of the PB, we are satisfied that it was an unconditional bond payable on demand and that Great Eastern as the issuer of the PB was not under any duty to inquire into the circumstances

underlying the demand. The key inquiry in this context was not in relation to any disputes that might exist in relation to *the Contract* but rather with the substance of the parties' rights and obligations under *the PB*.

(c) In coming to the correct interpretation of the PB, it is relevant to consider its contractual context, and that may be found in cl 2.1.1 of the REDAS Conditions, which states that "[t]he Employer may (but shall not be obliged to) consider accepting an unconditional on-demand bond from a Bank in lieu of the cash deposit". Clause 2.1.3 further specifies that

> The Employer may utilise the cash deposit or the cash proceeds of any or all demands on the Bond to set-off any loss or damage incurred or likely to be incurred by him as a result of the Contractor's failure to perform or observe any of the stipulations, terms and/or conditions under the Contract. If the amount of the cash proceeds utilised by the Employer to set-off any such loss or damage is found to be greater than the amount of loss or damage actually incurred by the Employer, then the Employer shall pay the balance to the Contractor or the bank, as the case may be, upon issue of the Maintenance Certificate.

It is evident from this that the proceeds of a demand made on the PB is intended to operate as the equivalent of the cash deposit.

(d) In line with this, the Particular Conditions insert additional clauses, including the following:

> 2.1.3B. Where the Contractor has provided the Employer with a Bond pursuant to clause 2.1.1 above, the Contractor agrees that except in the case of fraud, it shall not, for any reason whatsoever, be entitled to enjoin or restrain:
>
> 2.1.3C.1: the Employer from making any call or demand on the Bond or receiving any cash proceeds under the Bond; and/or

> 2.1.3C.2: the bondsman under the Bond from paying any cash proceeds under the Bond to the Employer,
>
> on any other ground including the ground of unconscionability. Any dispute which the Contractor has in relation to such call, demand, receipt, payment or the Employer's utilisation of the cash proceeds shall be resolved in accordance with clause 33 below. In the event that it is subsequently determined by any arbitrator or court that the Employer has received cash proceeds greater than the amount of loss or damage actually incurred by the Employer, the Employer shall refund the over-payment to the Contractor but shall not, for any reason whatsoever, be liable for any interest on the over-payment, including but not limited to any interest under Section 12 of the Civil Law Act (Cap. 43).

It is evident from this that the parties had in fact contractually limited the grounds on which a demand on the PB could be restrained to fraud only, and had excluded unconscionability, which, as we later note (see [33] below), is an additional ground for interference that may otherwise have been available under Singapore law for restraining a demand for payment under such a bond.

(e) In this light, we turn to consider the effect of cl 2.1.3C.2 of the Particular Conditions, which as we have noted (see [7(b)] above), states that any dispute which the Contractor has in relation to a call or demand on the PB, receipt, payment or the Employer's utilisation of the cash proceeds shall be resolved in accordance with cl 33 of the REDAS Conditions, meaning arbitration. In our judgment, this did not change or alter the character of the PB such that it became a conditional bond. Indeed, the correct interpretation of all the provisions taken together is that interference with a demand for payment under the PB was only permitted on the ground of fraud and any such interference should be sought from the court pursuant to the dispute resolution clause in the PB. However, as between Star Engineering and Pollisum Engineering, if

there were disputes as to the amounts to which the latter was entitled, having regard to the differences between the parties in relation to the Contract, this would be resolved by arbitration, and if it should *subsequently* be determined that there was any over-payment, then there would be repayment of such amount to Star Engineering. In short, "any dispute" in relation to the call, demand, receipt, payment or utilisation of the cash proceeds would be resolved by an arbitrator (under cl 33 of the REDAS Conditions) who would determine whether Pollisum Engineering had received cash proceeds from Great Eastern greater than the amount of loss or damage actually incurred by it *after* it had received the cash proceeds. This is also reflected in cl 2.1.3 of the REDAS Conditions, which states that if the amount of the cash proceeds utilised by the Employer to set-off any such loss or damage is found to be greater than the amount of loss or damage actually incurred, then the Employer shall pay the balance to the Contractor or the bank. This interpretation is wholly consistent with the express agreement of the parties that payment under the PB may only be interfered with if fraud is shown.

(f) Although not directly relevant, we think reference to our recent decision in *Kuvera Resources Pte Ltd v JPMorgan Chase Bank, NA* [2023] 2 SLR 389 is helpful. That case concerned payment under what was said to be a confirmed letter of credit, but which also included a clause excluding the liability of the bank to make payment if doing so would offend the regulations it was subject to under US law in relation to sanctions. We held first that, absent a finding of fraud, there would be no basis to enjoin the issuing bank (and by extension the confirming bank) from paying under the letter of credit or the confirmation (at [30]). We also noted that the various contracts constituting a compound letter of credit transaction operate independently of each other (at [29]), and

> that, as a result, when considering liability under one contract, it will generally be unhelpful to examine whether there is any other underlying dispute in the suite of contracts (at [30]). We also observed (at [71]) in relation to whether the incorporation of the sanctions clause was incompatible with the nature of irrevocable documentary credit transactions, that it might be problematic for a bank to have it both ways by representing to a beneficiary that payment was conditioned only on a complying demand being made, while at the same time reserving the right to dishonour the demand if it was unsure of its legal liabilities. In general, on-demand performance bonds are treated as being akin to letters of credit and it seems to us that in the context of the clauses at issue in this case, having satisfied ourselves that this was in fact an on-demand bond, the only sensible way to construe the arbitration clause in a way that is consistent with that character of the PB is as we have set out above.

11 Having said this, we also observe that none of these points appear to have been picked up by the parties or canvassed before the Judge. We did not invite the parties to submit further on these issues because we think, as we explain below, that by reason of the decisions and choices they have already made, it is too late in the day to return to this. But this has greatly contributed to needless complexity, delay and expense being incurred in this case.

Procedural history

12 On 4 November 2023, Star Engineering filed OA 1135, seeking the following orders: (a) that Pollisum Engineering be restrained from receiving payment of the sum of $856,000 or any part thereof from Great Eastern pursuant to the Payment Demand; (b) that Great Eastern be restrained from making any

payment under the PB of the sum of S$856,000 or any part thereof to Pollisum Engineering pursuant to the Payment Demand; (c) that Pollisum Engineering be restrained from making any further demand to Great Eastern for payment under the PB; and (d) that in the event that Pollisum Engineering receives the sum of $856,000 or any part thereof from Great Eastern, it be restrained from using, depleting and/or disposing the sums received, and for those sums to be repaid to Great Eastern.

13 On the same day, Star Engineering filed SUM 3408, seeking temporary restraining orders on the same terms against the respondents pending the resolution of OA 1135. On 7 November 2023, Chan Seng Onn SJ allowed SUM 3408 and temporarily restrained the respondents.

14 On 6 November 2023, Pollisum Engineering filed SUM 3431, seeking a stay of OA 1135 in favour of arbitration. The learned AR dismissed the stay application.

15 On 5 January 2024, Pollisum Engineering appealed against the decision of the learned AR in SUM 3431, by RA 4.

Decision below

16 The Judge allowed the appeal and granted a stay of OA 1135: GD at [23].

17 Preliminarily, the parties agreed that cl 33 of the REDAS Conditions was a domestic arbitration agreement. It was therefore undisputed that the Arbitration Act 2001 (2020 Rev Ed) (the "AA") applied. The parties also agreed that in these circumstances, the court had a discretion as to whether to stay court

proceedings in favour of arbitration, having regard to various factors including considerations of practical case management: GD at [9].

18 The Judge granted the stay of OA 1135 as sought by Pollisum Engineering, pursuant to s 6 of the AA. First, he was satisfied that the dispute over the Payment Demand fell within the scope of the arbitration agreement. The Judge thought it was clear from the Contract that the parties intended any disputes between the parties, including those arising out of the PB, to be referred to arbitration notwithstanding the non-exclusive jurisdiction clause in the PB, which was in favour of the Singapore courts: GD at [24].

19 Second, there was "sufficient reason" to stay the court proceedings. Although there were related disputes under the Contract and under the PB, this was not a decisive factor and something more had to be shown. The risk of inconsistent findings was not a sufficient factor because this risk could be obviated by granting a stay and having the parties deal with the entire issue in arbitration: GD at [31]. In any case, arbitration was the more appropriate forum for deciding the overlapping issue of whether Pollisum Engineering's Payment Demand under the PB was made fraudulently, because the real dispute in OA 1135 was between Star Engineering and Pollisum Engineering and that ultimately turned on determining what their respective rights and liabilities were under the Contract. Great Eastern was a "mere functionary" in this context and the PB itself was a mechanical agreement that was ancillary to the primary obligations under the Contract: GD at [32]. Relatedly, the supposed urgency in the case did not entitle Star Engineering to unilaterally disapply the arbitration agreement because, even in a situation of urgency, the emergency arbitration option was open to it: GD at [34]. Although Star Engineering argued that OA 1135 should proceed in court, this would perpetuate its wrongful decision not to have its primary dispute with Pollisum Engineering resolved pursuant to

the arbitration agreement. Any loss of efficiency arising from not having all the parties resolve their dispute in a single set of proceedings was outweighed by the need to secure a fair resolution of the dispute: GD at [38]. Finally, the factors of relative prejudice to the parties and the possibility of an abuse of process were relevant and weighed in favour of the stay: GD at [39].

20 Third, the Judge was satisfied that Pollisum Engineering was ready and willing to arbitrate. There was nothing untoward in Pollisum Engineering invoking its contractual rights to demand payment under the PB without specifying and quantifying its losses: GD at [44].

21 The Judge also granted a stay in relation to Great Eastern pursuant to the court's inherent power of case management. First, there was an overlap in the parties to the putative arbitration between Star Engineering and Pollisum Engineering on one hand, and OA 1135 between Star Engineering and Great Eastern on the other: GD at [49]. Second, the two sets of proceedings raised a real risk of overlapping issues being ventilated before different fora among different parties: GD at [50]. As the outcome of OA 1135 in relation to Great Eastern would follow from the determination in the arbitration, it made sense to grant a stay in relation to Great Eastern, pending the conclusion of the arbitration: GD at [51]. Third, a case management stay would give effect to the higher-order concern of upholding a valid arbitration agreement between Star Engineering and Pollisum Engineering: GD at [55].

The parties' cases on appeal

The appellant's case

22 Star Engineering submits that the overlapping issue in the dispute between Star Engineering and Pollisum Engineering and the dispute between

Star Engineering and Great Eastern, which is said to be the entitlement of Pollisum Engineering to make the Payment Demand, constitutes sufficient reason to refuse a stay in favour of arbitration. This allegedly significant overlap gives rise to a real prospect of inconsistent findings being arrived at by the two fora. As Great Eastern will not be bound by the arbitral tribunal's findings, there is said to be a risk of undermining confidence in the administration of justice if the tribunal and the court were to come to inconsistent findings on the same evidence in relation to the overlapping issue. Moreover, Star Engineering submits that Pollisum Engineering is not ready to commence arbitration and has not even formulated its claims, quantified its losses or filed any notice of arbitration. In terms of the case management stay, Star Engineering argues that such a stay does not cure the risk of inconsistent findings. Once a stay in favour of arbitration is granted, the risk of inconsistent findings arises and cannot be mitigated by a case management stay.

23 Star Engineering also argues that the court has the power to grant injunctions at any time in aid of arbitration, and especially when no tribunal has been constituted. Given the urgency of OA 1135, it was impractical for Star Engineering to have made an application for an emergency arbitrator. Crucially, Great Eastern will not be bound by an injunction granted by an emergency arbitrator as the Payment Demand had already triggered Great Eastern's payment obligation.

24 In addition, Star Engineering argues that it will suffer prejudice if OA 1135 is stayed and the interim injunctions lifted. Conversely, Pollisum Engineering will not be prejudiced by the preservation of the status quo between the parties, since it continues to withhold a retention sum of $428,000 and owes Star Engineering at least $2,198,917.44.

25 Finally, Star Engineering maintains its position that the validity of the Payment Demand is not a dispute within the scope of the arbitration clause. Clause 33.2.3 of the Contract states that the arbitration clause may only be invoked upon completion, alleged completion, termination or alleged termination of the Contract. However, the purpose of a performance bond is usually to secure performance of an ongoing contract, and it thus must have been contemplated by the parties that the issues under the PB would not fall within the arbitration clause.

The first respondent's case

26 Pollisum Engineering submits that Star Engineering's objection to the Payment Demand and/or payment of moneys under the PB falls squarely within the arbitration agreement between Star Engineering and Pollisum Engineering. The wording of the Contract makes it clear that any dispute over the validity of a demand made under the PB should be referred to arbitration.

27 Pollisum Engineering also argues that it is immaterial that Great Eastern is not a party to the arbitration agreement because it is a mere functionary and has no direct interest in the outcome of the dispute between the parties to the Contract. As such, no order against Great Eastern is necessary. There is no need for a restraining order to be made against Great Eastern, since it would suffice to restrain Pollisum Engineering from making any further calls or demands, receiving payment under the PB and/or utilising any moneys paid under the PB if such payment has been made.

28 Pollisum Engineering submits that there is no sufficient reason why the matter should not be referred to arbitration. There was no urgency that would prejudice Star Engineering to the extent that it would warrant a breach of the

parties' arbitration agreement. Even if OA 1135 is stayed, this will not result in the automatic lifting of all interim injunctions. The Judge correctly determined that the risk of inconsistent findings could be obviated by granting a stay. The hearing of OA 1135 would involve going into the merits of the dispute between the parties and having the substantive defects claim fully ventilated in order to ascertain fraud (which is the sole ground relied on to restrain a call on the PB), and these issues could be dealt with in arbitration.

29 Finally, Pollisum Engineering contends that the real dispute in OA 1135 is between Star Engineering and Pollisum Engineering in respect of the Payment Demand. Since Star Engineering is the party dissatisfied with the Payment Demand and is seeking injunctive relief, it bears the onus of proving fraud in the correct forum. Based on cl 2.1.1 of the REDAS Conditions, it is clear that the PB was intended to be unconditional. Pollisum Engineering is not required to justify its demand under the PB and does not need to commence arbitration to establish that it is entitled to call on the PB.

The second respondent's case

30 Great Eastern did not take a position in the present appeal and thus did not file any submissions.

Decision

31 In our judgment, as we have already foreshadowed, this matter has become needlessly tangled because of erroneous positions taken on both sides. We explain.

Interference with payment under an unconditional performance bond

32 The present case concerns an interference with payment under an unconditional on-demand performance bond. Under such a bond, a financial institution, such as a bank or insurance company, undertakes to pay a certain sum of money under certain conditions, the most common of these being a simple demand for payment made by the beneficiary of the bond (see *Chian Teck Realty Pte Ltd v SDK Consortium and another* [2024] 3 SLR 1031 ("*Chian Teck*") at [1]). An on-demand bond has been described as being "as good as cash" because it is intended to provide certainty of payment (*Chian Teck* at [1], citing *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia and another* [2010] 2 SLR 329 at [16]). In this case, as we have already noted (see [10(c)] above), this was essentially expressly provided for in the Contract. The nature of an on-demand, or first demand, performance bond was correctly summarised as follows in *Master Marine AS v Labroy Offshore Ltd and others* [2012] 3 SLR 125 ("*Master Marine*") at [25]–[26]:

> 25 Essentially, a first demand performance bond is an undertaking by the bond issuer (usually a bank) to pay a specified sum to the beneficiary immediately on receipt of a compliant demand. It is essentially a promissory note payable on demand. The bank issues such a bond on the instructions of its customer (the bond applicant and account holder) who, in turn, furnishes security to the bank for the full amount. The account holder procures such a bond to act as good security for due performance of the underlying contract between itself and the beneficiary. As such, a performance bond acts as a "risk distributing device" which transfers the risk of default from the beneficiary to the account holder: see G Andrews and R Millett, *Law of Guarantees* (Sweet & Maxwell, 6th Ed, 2011) ("*Andrews & Millett*") at paras 16-003 and 16-007.
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> 26 The enormous advantage to the beneficiary of this tripartite arrangement is that the beneficiary has the assurance of *immediate* payment from the bank, subject only to a compliant demand being made on it. This is because the bank's obligation to pay in accordance with the terms of the agreement is entirely independent of the underlying contract between the bank's customer and the beneficiary; the two are autonomous

> contracts *vis-à-vis* different parties (albeit with obligations that are closely related). As a general rule, the bank will not concern itself with the merits of any underlying dispute between the beneficiary and its customer, or with the factual accuracy or otherwise of any statement made to it by the beneficiary or the genuineness of any document presented to it in order to obtain payment: see *Andrews & Millett* at para 16-001. When payment is to be made against documents, there is no requirement that any assertion in the documents be correct in law: see *Meritz Fire and Marine Insurance Co Ltd v Jan de Nul NV* [2011] 2 Lloyd's Rep 379 at [26] …
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> [emphasis in original]

33 In general, the courts have upheld demands made under a performance bond on the ground that the performance bond is a contract between the beneficiary and the financial institution, and hence a dispute between the parties to the underlying contract will typically be irrelevant to whether payment is to be made pursuant to a demand under such a bond (*Chian Teck* at [2], citing *Master Marine* at [26]). The court will only grant an injunction interfering with the obligation of the financial institution to honour the demand where the demand is made *fraudulently*, on the ground that "fraud unravels all" (*Arab Banking Corp (B.S.C.) v Boustead Singapore Ltd* [2016] 3 SLR 557 ("*Arab Banking*") at [64]), or where it would be *unconscionable* for the party to make a demand under the performance bond (*GHL Pte Ltd v Unitrack Building Construction Pte Ltd and another* [1999] 3 SLR(R) 44 at [16] and [20]). As we have noted (see [10(d)] above), in this case, the latter ground was contractually excluded. The burden of proof falls on the party seeking to restrain payment being made pursuant to a demand to establish a clear case of fraud or unconscionability and mere allegations will not suffice (*Bocotra Construction Pte Ltd and others v Attorney-General* [1995] 2 SLR(R) 262 ("*Bocotra*") at [48]).

34 The fraud exception is regarded as difficult to invoke (*Chian Teck* at [37], citing *Halsbury's Laws of Singapore* vol 12 (Butterworths Asia, 2022 issue) at para 140.646). The requirements to make out the fraud exception are summarised in *Chian Teck* at [37]:

> … In order to avail itself of the fraud exception, the subcontractor must establish a strong *prima facie* case that the beneficiary called on the bond: (a) with the knowledge that its demand was invalid; (b) without belief in the validity of its demand; or (c) with indifference to whether the demand was valid or not (*Bintai Kindenko Pte Ltd v Samsung C&T Corp and another* [2019] 2 SLR 295 ("*Bintai Kindenko*") at [74]; *Arab Banking* ([2] *supra*) at [61]–[63]). The Court of Appeal in *Arab Banking* has also held that the standard of proof for fraud requires the plaintiff to show that *the only realistic inference* to be drawn on the available evidence was that the beneficiary had no honest belief that it was entitled to receive payment or was recklessly indifferent as to whether it had a right to receive payment (*Arab Banking* at [82]).
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> [emphasis in original]

35 It is equally impermissible to interfere with payment under a performance bond by seeking an injunction against the financial institution, as it would be to interfere by restraining the beneficiary from seeking or receiving payment. In *Bocotra*, the appellants suggested that there was a distinction between the principles that were applicable to cases where a restraining order was sought to restrain a bank from making payment, and those where the intended restraint was directed to the beneficiary receiving payment under the bond, relying on Eveleigh LJ's observations in *Potton Homes Ltd v Coleman Contractors Ltd* (1984) 28 Build LR 19 at 28 (at [32]). Eveleigh LJ's observations had been followed by L P Thean J (as he then was) in *Royal Design Studio Pte Ltd v Chang Development Pte Ltd* [1990] 2 SLR(R) 520 at [15]. However, in *Bocotra*, the Court of Appeal held, contrary to the appellants' submissions, that "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" (at [35]).

36 Where a temporary restraining order is sought, often without notice to the other party, which interferes with the performance of the rights and obligations arising under an unconditional bond, the burden falls on the party seeking the restraining order to show that it has grounds for so interfering. We reiterate that those grounds are strictly limited and require proof of the matters set out at [33]–[34] to a strong *prima facie* standard (see *Chian Teck* at [37], citing *Bintai Kindenko Pte Ltd v Samsung C&T Corp and another* [2019] 2 SLR 295 at [74] and *Arab Banking* at [61]–[63]; *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352 at [20]–[21]). That standard is adopted in this context because it is emphatically not the function of the court faced with such an application to make an ultimate determination of the substantive entitlement of the party demanding payment to receive and retain the money in question. That will depend on the resolution of the merits of the underlying dispute between the parties to the underlying contract.

37 However, where a restraining order is sought that interferes with payment under a bond, the court is not concerned at all with that underlying dispute. It is rather concerned with the separate question of whether there is sufficient ground to interfere at all, even temporarily, with the beneficiary's right to be paid under the bond. The presumptive position is that there will be no such interference unless sufficient evidence is adduced of the possibility of the demand itself being fraudulent or, where applicable, unconscionable in the sense described above.

38 It follows that when Star Engineering sought and obtained the temporary restraining order that was issued by Chan SJ on 7 November 2023 (see [12]–

[13] above), Pollisum Engineering ought to have applied to set aside that injunction unless it accepted that there was strong *prima facie* evidence that it had acted fraudulently or unconscionably in making the demand. As we explain below, it does not seem to us that Pollisum Engineering accepted this. Rather, it seems to us that its response was shaped by its failure to appreciate the distinction between its substantive dispute with Star Engineering under the Contract, and the quite separate issue of its right to be paid pursuant to its Payment Demand under the PB.

39 Because of this confusion, Pollisum Engineering did not challenge Star Engineering's attempted interference with the payment under the PB in OA 1135. We have said that we do not think that this was the case because it took the position that the Payment Demand was potentially fraudulent or unconscionable. This is because Pollisum Engineering argues in this appeal that based on the REDAS Conditions, the PB was intended to be unconditional, that Star Engineering bears the onus of proof to establish fraud in the correct forum and that it (meaning Pollisum Engineering) does not have to commence arbitration against Star Engineering to show that it is entitled to call on the PB (see [29] above). This is in response to Star Engineering's submission that Pollisum Engineering was not ready to commence arbitration and had not even formulated its claims, quantified its losses or filed any notice of arbitration (see [22] above). However, in the proceedings below, Pollisum Engineering did not canvass the argument that there was no basis for restraining its call on the PB and did not challenge OA 1135 on that ground, instead choosing to seek a stay of the action in favour of arbitration. Pollisum Engineering now seeks to refer the matter to arbitration to determine the precise issue of whether it is entitled to call on the PB. By doing so, it seems to us that Pollisum Engineering has in effect converted its position from that of a party holding an unconditional on-

demand bond into something akin to that of a party holding a conditional bond payable only upon proof of its entitlement to receive payment thereunder. This is a consequence of its having sought a stay of OA 1135 in favour of arbitration, seemingly to determine the question of its entitlement to be paid all or part of the sum demanded under the PB. Having taken that position, it seems to us that it is now too late for Pollisum Engineering to change course.

40 However, it is incumbent on a party seeking a stay of proceedings to show that it stands ready to arbitrate the matter. Pollisum Engineering, having sought a stay of OA 1135 in order to have the dispute over its entitlement to be paid under the PB determined in arbitration, seems to us to have then added to the confusion of its situation by now saying in this appeal that it is for Star Engineering to commence proceedings in arbitration. In doing so, it, as a practical consequence, further delays any entitlement it may have to receive payment under the PB.

Whether OA 1135 should be stayed in favour of arbitration

41 As for Star Engineering, its appeal against the Judge's orders seems to us to be wholly illogical and baseless. The situation now facing Star Engineering is that, by the action of Pollisum Engineering, the PB is in effect being treated by the parties as a conditional bond, payable upon proof that Pollisum Engineering is actually entitled to payment of the sum demanded. There is in truth no longer any live dispute in relation to Great Eastern. In line with this, Great Eastern has not taken any position in these proceedings and has not filed any submissions.

42 If Star Engineering succeeds in the arbitration, by establishing that no part of the sums demanded are due to Pollisum Engineering, that will be the end

of the matter. Pollisum Engineering will likely be restrained from demanding any payment and Great Eastern will not make any payment. If, on the other hand, Star Engineering is found to owe part or all of the sums demanded, that will be when Great Eastern may be called on to make payment. There is therefore no real risk of inconsistent findings. Given that the substantive dispute is only between Pollisum Engineering and Star Engineering, and because of the stance taken by the former, there is no ground at all for the matter not to proceed to arbitration.

43 It is no longer relevant whether the dispute over the Payment Demand falls within the scope of the arbitration agreement in the Contract. That is because, for whatever reason, Pollisum Engineering does not seek immediate payment under the PB and instead, is agreeable to having its ultimate entitlement resolved in arbitration. That entitlement is clearly within the scope of the arbitration agreement in the Contract (see cl 33.2.1 of the REDAS Conditions and cl 2.1.3C.2 of the Particular Conditions at [7(b)] above). Star Engineering's contentions fail in the face of the clear language in cl 33 of the REDAS Conditions, which is the overarching dispute resolution provision referring disputes under the Contract to arbitration, and cl 2.1.3C.2 of the Particular Conditions, which deliberately modified the REDAS Conditions to specifically refer all disputes between the parties to the Contract relating to any demand on the PB to arbitration.

44 Turning finally to the seeming impasse as to who should commence the arbitration, this again is a needless tempest in a teacup. If Pollisum Engineering wishes to be paid the amount it has demanded, it should commence the proceedings seeking a declaration that it is entitled to be paid, and in defence, Star Engineering will have to adduce evidence to show that is not the case. On

the other hand, if Star Engineering is out of pocket, as it claims, it has every reason to commence the arbitration expeditiously.

Conclusion

45 On either footing, there is no reason to interfere with the decision of the Judge and we therefore dismiss the appeal.

46 We will hear the parties on costs, observing at this stage that much time and costs seem to us to have been wasted because of the ill-advised positions that have been taken on both sides.

Sundaresh Menon
Chief Justice

Steven Chong
Justice of the Court of Appeal

Wong Hin Pkin Wendell, Tay Eu-Yen, Lee Pei Hua Rachel and Hsu Bi-Wei Timothy Homer (Drew & Napier LLC) for the appellant;
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respondent
Julia Emma Dcruz and Li Shunhui Daniel (Ramdas & Wong) for the second respondent.