IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2025] SGHC 114

Originating Application No 83 of 2025

Between

Tradesmen Pte Ltd

… *Applicant*

And

Ten-League Corporations Pte Ltd

… *Respondent*

JUDGMENT

[Building and Construction Law — Building and construction related contracts — Guarantees and bonds]
[Credit and Security — Performance bond]
[Contract — Contractual terms — Rules of construction]
[Contract — Contractual terms — Parol evidence rule]

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Tradesmen Pte Ltd
v
Ten-League Corporations Pte Ltd

[2025] SGHC 114

General Division of the High Court —Originating Application No 83 of 2025
Tan Siong Thye SJ
21 April 2025

24 June 2025 Judgment reserved.

Tan Siong Thye SJ:

Introduction

1 Tradesmen Pte Ltd ("the Applicant"), a contractor, was engaged by Ten-League Corporations Pte Ltd ("the Respondent"), to complete the works for the following project: "Proposed Addition and Alteration of Converting Existing Single Storey Warehouse and 2-Storey Office Block to Single Storey Factory and 3-Storey Office Block on Lot 01121A MK07 at 7 Tuas Avenue 2 (Tuas Planning Area)". Under the contract, the Applicant was required to furnish a performance bond in lieu of the 10% retention sum by the Respondent.

2 The Respondent called on the performance bond, demanding the entire guaranteed sum to be released to the Respondent. The Applicant now seeks, among other things, an injunction to restrain the Respondent from calling on the performance bond or alternatively to prevent the Respondent from receiving the

moneys guaranteed by the performance bond. The central issue of the dispute concerns how the performance bond ought to be construed. Is the performance bond an on-demand bond (as the Respondent contends) or an indemnity performance bond (as the Applicant contends)?

Facts

Background

3 On 6 March 2024, the Respondent engaged the Applicant as its main contractor to undertake design and construction works for a building project, by way of a letter of acceptance ("the Tradesmen LOA").[1] The Tradesmen LOA novated an earlier contract between the Respondent and its previous contractor ("the Previous Contractor") entirely to the Applicant.[2]

4 The contract between the Applicant and the Respondent ("the Contract") incorporated, among other documents:

(a) the Tradesmen LOA;

(b) the letter of acceptance between the Respondent and the Previous Contractor; and

(c) the Real Estate Developers' Association of Singapore Design and Build Conditions of Main Contract (4th Ed, 2022) ("the REDAS Conditions").[3]

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1 Ahsik Mirsha's affidavit dated 24 January 2025 ("Applicant's affidavit") at para 6.

2 Applicant's affidavit at para 7; Foo Xin Yin's affidavit dated 11 March 2025 ("Respondent's affidavit") at para 15.

3 Applicant's affidavit at para 8; Respondent's affidavit at para 17.

The performance bond

5 Under cl 3(7) of the Tradesmen LOA, the Applicant had to provide a performance bond in favour of the Respondent. This clause read:[4]

> … you must further agree to … [p]rovide a Performance Bond up to a maximum aggregate sum of **Singapore Dollars Five Hundred Seventy Thousand (S$570,000.00) Only** with wordings subject to final agreement between you and [the Respondent]. [emphasis in original]

6 The REDAS Conditions, which were binding on the parties, also contained clauses regarding the provision of a performance bond. The relevant clauses are as follows:

(a) Clause 2.1.1[5] provided that the Applicant shall place a cash deposit with the Respondent "for the due performance and observance by [the Applicant] of all stipulations, conditions and agreements contained in the Contract". However, cl 2.1.1 also stated that, "in lieu of" this cash deposit, "[the Respondent] may (but shall not be obliged to) consider accepting an unconditional on-demand bond from a Bank".

(b) Clause 2.1.1 also referred to Appendix 6 of the REDAS Conditions,[6] which contained a "specimen" of the abovementioned unconditional on-demand bond, "for [the Applicant's] reference and compliance".

(c) Clause 2.1.3[7] stated the purpose of the performance bond. It provided:

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4 Applicant's affidavit at p 35.

5 Applicant's affidavit at p 217.

6 Applicant's affidavit at pp 279–281.

7 Applicant's affidavit at p 218.

> [The Respondent] 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 Applicant's] failure to perform or observe any stipulations, terms and/or conditions under the Contract. If the amount of the cash proceeds utilised by [the Respondent] to set-off any such loss or damage is found to be greater than the amount of loss or damage actually incurred by [the Respondent], then [the Respondent] shall pay the balance to [the Applicant] or the bank, as the case may be, upon issue of the Maintenance Certificate.

7 On 27 March 2024, the Applicant obtained a performance bond ("the Performance Bond") from Liberty Insurance Pte Ltd ("Liberty") in favour of the Respondent, for a guaranteed sum of $570,000.[8]

(a) Clause 1 of the Performance Bond stated:[9]

> In consideration of [the Respondent] not insisting on [the Applicant] paying ten per cent (10%) of the Contract Sum as security deposit for the Contract, we hereby irrevocably and unconditionally undertakes [*sic*] and covenants [*sic*] to pay in full immediately upon demand in writing any sum or sums that may from time to time be demanded by [the Respondent] up to a maximum aggregate sum of SINGAPORE DOLLARS FIVE HUNDRED AND SEVENTY THOUSAND ONLY (S$570,000.00). (hereinafter called 'the Guaranteed Sum').

(b) Clauses 2 and 4 of the Performance Bond stated:[10]

> 2 In the event of [the Applicant] failing to fulfil any of the terms and conditions of the said Contract, we shall indemnify [the Respondent] against all losses, damages, costs, expenses or otherwise sustained by [the Respondent] up to the sum of the Guaranteed Sum upon receiving [the Respondent's] written notice of claim for payment made pursuant to Clause 4 hereof.

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8 Applicant's affidavit at p 1026.

9 Applicant's affidavit at p 1026.

10 Applicant's affidavit at p 1027.

> …
>
> 4 … This Performance Bond is conditional upon a claim or direction as specified herein being made by [the Respondent] by way of a notice in writing addressed to us and the same being received by us within thirty (30) days from the expiry of this Performance Bond. Thereafter this Performance Bond shall become null and void notwithstanding that this Performance Bond is not returned to us for cancellation except for any claim(s) or direction submitted to us in writing not later than 30 days from the expiry of this Performance Bond.

Events leading up to the call on the Performance Bond

Certification of the sum payable to the Applicant

8 On 30 April 2024, the Applicant submitted a payment claim of $1,487,511.90 (excluding Goods and Services Tax ("GST")) for work done up to the end of April 2024.[11] However, on 10 May 2024, the designated employer's representative for the building project ("the ER") assessed the claim. The Applicant did not accept this assessment.[12] Following this, the parties held discussions in May and June 2024. The ER issued reassessments on 13 May 2024 and 6 June 2024. The Applicant did not accept either of them.[13]

9 Subsequently, the Respondent sought to persuade the Applicant to accept a certified sum of $876,834.12 (excluding GST). The Applicant accepted this proposal.[14] Accordingly, on 14 June 2024, the ER issued a revised interim payment certificate for $876,834.12 (excluding GST) to be paid to the Applicant ("the Payment Certificate").[15] On 18 June 2024, the Applicant issued to the

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11 Applicant's affidavit at para 12.

12 Applicant's affidavit at para 13.

13 Applicant's affidavit at paras 14–17.

14 Applicant's affidavit at paras 18–19.

15 Applicant's affidavit at para 19.

Respondent an invoice for $876,834.12 (excluding GST) or $955,749.19 (including GST), based on the Payment Certificate.[16] On the Respondent's request, the Applicant submitted a revised invoice to the Respondent on 20 June 2024 to include the name of the authorised signatory and affix the Applicant's company stamp on the invoice.[17]

10 On 10 July 2024, the ER wrote to the Applicant stating that the Respondent had until 19 July 2024 to make payment.[18]

The Respondent's termination of the Contract

11 On 17 July 2024, the Respondent wrote to the Applicant rejecting the revised invoice that the Applicant had submitted, as it did not reflect the actual date of submission. The Respondent requested that the Applicant amend the date of the revised invoice and correct another typographical error in the title of the building project as set out in the revised invoice.[19]

12 No payment was received by the Applicant on the payment due date of 19 July 2024.[20] The next day (*ie*, 20 July 2024), the Respondent terminated the Contract.[21] The Respondent claimed that it was entitled to terminate the Contract because the Applicant had breached the Contract in, among others, the following ways:

(a) failing to comply with the ER's written instructions to rectify the

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16 Applicant's affidavit at para 20.

17 Applicant's affidavit at para 22.

18 Applicant's affidavit at para 23.

19 Applicant's affidavit at para 25.

20 Applicant's affidavit at para 29.

21 Applicant's affidavit at para 26; Respondent's affidavit at paras 27 and 34–45.

defects and complete outstanding work items ("Defect Lists"); and

(b) failing to show that it had employed sufficient design capability in the design of the works to achieve completion within the scheduled date of completion.[22]

The Respondent also claimed, in its notice of termination, that it was not liable to make further payments to the Applicant until all the costs incurred by the Respondent (*eg*, rectification costs for defects, liquidated damages for delays, and costs incurred because of the termination) had been ascertained.[23]

The adjudication determination ("AD")

13 On 26 July 2024, the Applicant lodged an adjudication application against the Respondent under the Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) in respect of the Respondent's termination, which it alleged was invalid.[24]

14 The adjudicator released his AD on 13 August 2024. He determined that the Respondent had wrongfully terminated the Contract and was liable to pay the Applicant the sum of $955,749.19, which was stated on the revised invoice dated 20 June 2024 (see [9] above).[25]

15 The adjudicator determined that the Respondent was not entitled to terminate the Contract on the ground of the alleged non-compliance with the Defect Lists, as the Respondent had not informed the Applicant that it would

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22 Respondent's affidavit at para 33.

23 Applicant's affidavit at para 27.

24 Applicant's affidavit at para 29; Respondent's affidavit at para 29.

25 Applicant's affidavit at para 29; Respondent's affidavit at para 30.

terminate the Contract for the non-compliance. Further, the Applicant had agreed to comply with them, albeit not fully.[26] The adjudicator also rejected the Respondent's claim that the Applicant had failed to employ sufficient design capability. In his view, despite the Respondent claiming that the Applicant was late in procuring certain notices of approval, the Applicant had ultimately succeeded in procuring them.[27] Moreover, the Contract completion date was five months after the termination date. Thus, although the Respondent might have been able to show that there was some delay to the progress of the works, this did not necessarily mean that the Contract completion date would also be delayed eventually.[28]

Proceedings to enforce the AD

16 After receiving the AD, the Applicant sought and was granted permission by the court in HC/OA 851/2024 to enforce the AD. In response, the Respondent filed HC/SUM 2668/2024 ("SUM 2668") to set aside the AD and stay its enforcement pending arbitration.[29] The Respondent deposited the sum of $955,749.19 with the court, as required by law, pending determination of SUM 2668.[30]

17 On 28 November 2024, the court dismissed SUM 2668.[31]

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26 Adjudication determination ("AD") at [73]–[76], exhibited in the Applicant's affidavit at pp 794–796.

27 AD at [69], exhibited in the Applicant's affidavit at pp 791–792.

28 AD at [66], exhibited in the Applicant's affidavit at pp 789–799.

29 Applicant's affidavit at paras 30–31; Respondent's affidavit at paras 29 and 31.

30 Applicant's affidavit at para 32.

31 Applicant's affidavit at para 31; Respondent's affidavit at para 31.

The call on the Performance Bond

18 On or around 20 December 2024, the Respondent called on the Performance Bond, demanding payment of the entire guaranteed sum of $570,000 ("the Bond Call").[32] The letter to Liberty calling on the Performance Bond is as follows:

> We refer to the Performance Bond … dated 27 March 2024 issued by [Liberty], in favour of [the Respondent].
>
> Pursuant to Clause 1 of the Bond, we hereby give you notice of our claim and demand full payment of the Guaranteed Sum (as defined in the Bond) of $570,000.00.
>
> Please make payment of the said sum of $570,000.00 as soon as possible.
>
> Our rights remain fully reserved.

19 Three days after the Bond Call, on 23 December 2024, the Applicant received the sum of $955,749.19 that the Respondent had paid into court for SUM 2668.[33]

Overview of the law on performance bonds

20 A performance bond may take the form of an on-demand bond or a conditional bond. The difference between them is explained in *York International Pte Ltd v Voltas Ltd* [2013] 3 SLR 1142 ("*York International*") at [17]:

> (a) Under an on-demand bond, the guarantor must pay the beneficiary the bonded sum when the demand is made in the manner provided for, and the beneficiary need not prove a breach of the underlying contract or that it has suffered loss.

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32 Exhibited in the Applicant's affidavit at p 1030.

33 Applicant's affidavit at para 32.

(b) Conversely, under a conditional bond, the guarantor only becomes liable to the beneficiary for the bonded sum on proof of a breach of the underlying contract, or on proof of both breach and loss resulting from the breach, depending on the terms of the performance bond. The latter type of conditional performance bond has been termed an indemnity performance bond (see, *eg*, *JBE Properties Pte Ltd v Gammon Pte Ltd* [2011] 2 SLR 47 ("*JBE*") at [19]).

21 Although the beneficiary of an on-demand bond does not have to prove a breach of contract or loss resulting from the breach, a call on an on-demand bond may still be restrained on the grounds of fraud and unconscionability (*JBE* at [6]; *GHL Pte Ltd v Unitrack Building Construction Pte Ltd and another* [1999] 3 SLR(R) 44 at [16]).

Issues to be determined

22 The present case revolves around the construction of the Performance Bond and the circumstances in which it was called. This gives rise to two issues:

(a) Is the Performance Bond an on-demand bond or an indemnity Performance Bond?

(b) If it is an on-demand Performance Bond, was the Bond Call fraudulent or unconscionable?

The parties' cases

The Applicant's case

23 The Applicant argues that the Performance Bond is an indemnity Performance Bond, as it is phrased very similarly to the performance bond in *JBE*, which the Court of Appeal (at [19]) had held to be an indemnity

performance bond. The Applicant submits that cll 1 and 2 of the Performance Bond (at [7] above) are materially similar to cll 5 and 1 (respectively) of the performance bond in *JBE*, which read (*JBE* at [16]):[34]

> 1. In the event of [Gammon] failing to fulfil any of the terms and conditions of the said contract, [the Bank] shall indemnify [JBE] against all losses, damages, costs, expenses or [sic] otherwise sustained by [JBE] thereby up to the sum of Singapore Dollars One Million, One Hundred and Fifty One Thousand and Five Hundred Only (S$1,151,500.00) ('the Guaranteed Sum') upon receiving your written notice of claim made pursuant to Clause 4 hereof.
>
> …
>
> 5. [The Bank] shall be obliged to effect the payment required under such a claim or direction within 30 business days of [its] receipt thereof. [The Bank] shall be under no duty to inquire into the reasons, circumstances or authenticity of the grounds for such claim or direction and shall be entitled to rely upon any written notice thereof received by [it] … as final and conclusive.

24 The Applicant alleges that the Bond Call did not state that the Applicant had breached the Contract or that the Respondent had suffered any actual loss. Thus, the Bond Call was defective and the Respondent could not receive the guaranteed sum.[35]

25 The Applicant submits that even if the Performance Bond is an on-demand bond, the Bond Call was fraudulent or unconscionable because the Respondent must have known that it did not have a valid claim against the Applicant. This was especially so after the adjudicator found that the Respondent's termination of the contract was invalid and the court dismissed the Respondent's setting aside of the AD application in SUM 2668.[36] The Bond

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34 Applicant's Written Submissions dated 15 April 2025 ("AWS") at para 10.

35 AWS at paras 21–24.

36 AWS at paras 31–33 and 40.

Call was also unconscionable because it was actuated by the Respondent's ulterior motive of retaliation against the Applicant's refusal to accept a settlement offer from the Respondent or the Applicant's successful enforcement of the AD.[37]

The Respondent's case

26 The Respondent argues that the Performance Bond is an on-demand bond. It submits that cll 1 and 2 of the Performance Bond should be read disjunctively, such that the Performance Bond contains an on-demand bond in cl 1, and, *additionally*, an indemnity performance bond in cl 2.[38]

27 The Respondent argues that if the Performance Bond is an on-demand bond, the Bond Call was not unconscionable as the Respondent had suffered losses due to the Applicant's conduct, and was thus entitled to reimburse itself for:[39]

(a) the unpaid portion of the advance payment of $570,000;

(b) losses incurred in completing the works following the termination of the Contract;

(c) losses incurred in completing the defective and outstanding work items stated in the Defect Lists that the Applicant failed to rectify and complete; and

(d) the loan of $150,000 that the Respondent had made to the

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37 AWS at para 36.

38 Respondent's Written Submissions dated 15 April 2025 ("RWS") at para 64.

39 RWS at para 90.

Applicant towards the payment for the Performance Bond.[40]

Issue 1: Is the Performance Bond an on-demand bond or indemnity performance bond?

28 When interpreting a contract, the court's primary role is to give effect to the parties' intentions, as objectively ascertained, based on a holistic reading of the documents embodying the contract, and informed by the surrounding context (*Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [125]–[126] and [131]).

29 Objectively ascertained, the intention of the parties in this case was for the Performance Bond to be an indemnity Performance Bond, rather than an on-demand Performance Bond.

30 At first blush, cl 1 of the Performance Bond (at [7(a)] above) seems to give the Performance Bond the effect of an on-demand Performance Bond. It substantially resembles the clause found in *Eltraco International Pte Ltd v CGH Development Pte Ltd* [2000] 3 SLR(R) 198 ("*Eltraco*") at [10], which the court in *York International* (at [36]) said was an on-demand bond worded in "clear and unequivocal language". For ease of comparison, the clause in *Eltraco* read:

> In consideration of you not insisting on the Contractor paying Singapore Dollars Two Million Four Hundred And Thirty Eight Thousand and Eight Hundred Only (S$2,438,800) as a security deposit for the Contract, we hereby irrevocably and unconditionally undertake, covenant and firmly bind ourselves to pay to you on demand any sum or sums which from time to time may be demanded by you up to a maximum aggregate of Singapore Dollars Two Million Four Hundred And Thirty Eight Thousand and Eight Hundred Only (S$2,438,800 ['the said sum']).

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40 RWS at paras 91–94.

In the present case, despite the apparent effect of cl 1, cl 2 of the Performance Bond (at [7(b)] above) pulls in the opposite direction, as it is worded almost identically to cl 1 of the performance bond in *JBE* (see [23] above). This clause had led the Court of Appeal to construe the performance bond in *JBE* as an indemnity performance bond, even though that bond contained another clause (*viz*, cl 5) that similarly "appeared to have some of the characteristics of an on-demand … bond" (*JBE* at [18]; see [23] above).

31 Given the contradictory effects of cll 1 and 2, the parties' intention appears ambiguous based on the language of the Performance Bond. This is thus a situation where it is necessary to turn to extrinsic evidence (such as the Contract) and to consider the conduct of the parties when they procured the Performance Bond. The extrinsic and circumstantial evidence could be admitted to shed light on the parties' intention (*Master Marine AS v Labroy Offshore Ltd and others* [2012] 3 SLR 125 at [36]).

32 In this case, the terms of the Contract indicate that the parties intended for the Performance Bond to operate as an indemnity performance bond for the following reasons:

> (a) Clause 2.1.1 of the REDAS Conditions (at [6(a)] above) explicitly provided for the possible procurement of an on-demand bond. The REDAS Conditions even provided a specimen performance bond in Appendix 6, which, *per* cl 2.1.1, was "for the Contractor's reference and compliance". The parties could thus be taken as having had knowledge of the specimen on-demand bond in Appendix 6. This specimen

performance bond was unequivocally worded as an on-demand bond. For instance, it contained a clause (*viz,* cl 2), which stated that:[41]

> … [a]ny sum … so demanded shall be paid immediately by the Bank unconditionally, without any deductions whatsoever and notwithstanding the existence of any differences or disputes between [the Respondent] and [the Applicant] …

Despite this specimen performance bond, the parties chose not to use the specimen on-demand bond and decided to word the Performance Bond differently. Among other things, they omitted to include cl 2 of the specimen performance bond, and instead inserted a new cl 2 into the Performance Bond (at [7(b)] above). This has the effect of an indemnity performance bond and it was not found in the specimen performance bond of the REDAS Conditions. This suggests that the parties intended for the Performance Bond not to have an effect like that of the specimen performance bond in Appendix 6 of the REDAS Conditions. Instead, the deliberate insertion of cl 2 into the Performance Bond suggests that the parties intended for the Performance Bond to operate as an indemnity performance bond rather than an on-demand bond.

(b) Clause 2.1.3 of the REDAS Conditions also stated that the Respondent could use the moneys obtained from a bond call to:[42]

> … set-off any loss or damage incurred or *likely to be incurred* by [the Respondent] as a result of [the Applicant's] failure to perform or observe any stipulations, terms and/or conditions under the Contract … [emphasis added]

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41 Applicant's affidavit at p 279.

42 Applicant's affidavit at p 218.

This clause envisioned that the on-demand performance bond could be used to set-off *actual* losses (as captured by the phrase "any loss or damage incurred") as well as *potential* losses (as captured by the phrase "any loss or damage … likely to be incurred"). This differs from the wordings in an indemnity performance bond, which could only be called upon when the Respondent actually incurred loss. Despite cl 2.1.3 of the REDAS Conditions, the parties in this case deliberately omitted to state that the bond moneys could be used to make good losses that were "likely to be incurred", but were not yet incurred, in the Performance Bond. This omission suggests that the parties intended to limit the effect of the Performance Bond, to only indemnify actual losses (*ie*, to operate as an indemnity performance bond). This situation is analogous to that in *JBE*. In that case, a clause in the building contract between the parties stated that the security deposit was to make good "any loss or damage sustained or *likely to be sustained* as a result of any breach …" [emphasis in original]. However, the performance bond omitted the phrase "likely to be sustained" and stated that the bank only had to indemnify the appellant against "all losses, damages, costs, expenses … *sustained* by [the appellant]" [emphasis in original] (*JBE* at [19]). Because of this difference between the terms of the building contract and the performance bond, the Court of Appeal held that the performance bond was "limited to indemnifying [the appellant] against *actual* losses which it sustained due to [the respondent's] breach of the Building Contract" [emphasis in original], meaning the performance bond "had the character of a true indemnity performance bond" (*JBE* at [19]). Similarly, in this case, while cl 2.1.3 of the REDAS Conditions provided that the performance bond would indemnify the Respondent against "any loss or damage incurred or likely to be incurred", the phrase "likely

to be incurred" was omitted from the Performance Bond itself. Hence, following the reasoning in *JBE* at [19], it can be inferred that the parties intended for the Performance Bond to be an indemnity Performance Bond.

(c) It is also significant that the Performance Bond was given in lieu of cash that would have served as a 10% security deposit or retention sum (see cl 1 of the Performance Bond (at [7(a)] above) and cl 2.1.1 of the REDAS Conditions (at [6(a)] above)). The purpose of such a retention sum was to indemnify the Respondent against actual losses, as is evident from cl 2.1.3 of the REDAS Conditions (at [6(c)] above) – while the retention sum could be used to set-off any loss "incurred or likely to be incurred", if the amount of cash used to set-off such loss was "found to be greater than the amount of loss … actually incurred", the Respondent had to "pay the balance to [the Applicant] or the bank". Since the retention sum was, practically speaking, meant to indemnify against actual losses, the performance bond given in lieu of it would also serve a similar purpose. It is only because of the clear wording of the specimen performance bond in Appendix 6 that the performance bond provided for in the REDAS Conditions ultimately had the effect of an on-demand bond. In this case, the Performance Bond does not contain clear and unequivocal language providing for an on-demand bond, as in Appendix 6 of the REDAS Conditions. This lends further support to the conclusion that the parties intended for the Performance Bond to operate as an indemnity performance bond.

33 Additionally, where the language 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"

(*JBE* at [10]), and "any ambiguity in the language of a performance bond should be construed against the beneficiary" (*York International* at [35]). This principle of construction further bolsters the conclusion that the ambiguous Performance Bond in this case ought to be construed as an indemnity Performance Bond. For the sake of completeness, I should also mention that although *York International* at [35] stated that the principle expressed therein is "in line with the *contra proferentem* rule", the Court of Appeal in *JBE* made no mention of the *contra proferentem* rule when discussing this principle for the first time. The *contra proferentem* rule would not have applied to the present case, as the Performance Bond was a negotiated contract by the parties, and the *contra proferentem* rule generally does not apply to such contracts (*LTT Global Consultants v BMC Academy Pte Ltd* [2011] 3 SLR 903 at [58]–[59]).

34 For the above reasons, the Performance Bond should be construed as an indemnity Performance Bond and not an on-demand bond. This holding is dispositive of the case, as it means that the Respondent did not validly call on the bond. In *York International* at [40], the court interpreted a clause that was substantially similar to cl 2 of the Performance Bond (at [7(b)] above) and held that, pursuant to such a clause, "the written notice of claim must, at the bare minimum, contain allegations that: (a) the plaintiff has failed to fulfil any of the terms of the underlying contract; and (b) that the defendant has thereby suffered loss". In the present case, the Bond Call (at [18] above) did not state that the Applicant had breached the Contract, or that the Respondent had suffered loss because of the breach. Accordingly, the Bond Call did not meet the conditions stated in cl 2 and was thus invalid.

35 I, therefore, grant the Applicant an injunction restraining the Respondent from receiving any part of the guaranteed sum under the Performance Bond pursuant to its Bond Call dated 20 December 2024. I also order that, should the

Respondent receive any part of the guaranteed sum under the Performance Bond pursuant to its Bond Call dated 20 December 2024, it must immediately repay those moneys, without requirement of further demand, to Liberty and/or the Applicant (as the case may be).

Issue 2: Was the Bond Call fraudulent or unconscionable?

36 For completeness, I shall now deal with the scenario if the Performance Bond is instead construed as an on-demand bond. In such a case, the Bond Call should not be restrained, as it was neither fraudulent nor unconscionable.

37 A call on an on-demand bond can be restrained on the grounds of fraud and unconscionability (*JBE* at [6]) as follows:

(a) To prove that a bond call was fraudulent, the party seeking to restrain the call must show that the beneficiary made the call knowing it to be invalid, or having no honest belief in the validity of the call (*Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia and another* [2010] 2 SLR 329 at [36]). The latter includes a case where a beneficiary presents an invalid bond call recklessly, *ie*, with indifference as to whether the bond call was valid or not (*Arab Banking Corp (B.S.C.) v Boustead Singapore Ltd* [2016] 3 SLR 557 at [61]–[63]). The standard of proof for allegations of fraud in civil proceedings is the balance of probabilities, but because of the serious implications of fraud, cogent evidence is required before a court will be satisfied that the allegation of fraud is established (*Alwie Handoyo v Tjong Very Sumito and another and another appeal* [2013] 4 SLR 308 at [158]–[161]).

(b) Unconscionability is another ground on which a bond call may be restrained (*JBE* at [6]). It "involves unfairness, as distinct from

dishonesty or fraud, or conduct of a kind so reprehensible or lacking in good faith that a court of conscience would either restrain the party or refuse to assist the party" (*Raymond Construction Pte Ltd v Low Yang Tong* [1996] SGHC 136 at [5], cited in *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352 ("*BS Mount Sophia*") at [42]). Whether a situation constitutes unconscionability depends on the facts of each case (*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 [42]). Some examples of unconscionability include where a beneficiary: (a) does not honestly believe that the obligor whose performance is guaranteed by the bond has failed or refused to perform his obligations (*Milan International Pte Ltd v Cluny Development Pte Ltd and another* [2018] SGHC 33 at [30]); (b) calls on the performance bond for payment of a "sum well in excess of the quantum of [its] actual or potential loss" (*JBE* at [11]); or (c) was actuated by an ulterior motive in calling on the performance bond, *eg*, to ameliorate cash flow difficulties (*Newtech Engineering Construction Pte Ltd v BKB Engineering Constructions Pte Ltd and others* [2003] 4 SLR(R) 73 at [27]). The burden is on the claimant seeking to restrain the performance bond call to establish a strong *prima facie* case of unconscionability, and this "should not be an easy thing" to show (*BS Mount Sophia* at [20]–[21]).

38 The Applicant argues that the Bond Call was fraudulent because, at the minimum, the Respondent either had no genuine belief that it had a valid claim against the Applicant, or was indifferent as to whether this was so.[43] The Applicant's case is that the Respondent's claim is premised on its legitimate

[43] AWS at para 34.

termination of the Contract, but the AD had already determined that the Contract was wrongfully terminated, and the court had later dismissed SUM 2668 (the Respondent's application to set aside the AD).[44] On this basis, the Applicant also argues that the Bond Call was unconscionable, as the Respondent could not have honestly believed that the Applicant had caused it any loss arising from its termination of the Contract.[45]

39 The categories of losses as alleged by the Respondent are set out at [27] above. The Respondent may not be entitled to call on the bond to recoup the losses set out in item (b) of the list in [27] above (*ie*, losses incurred in completing the works following the termination of the Contract) as the termination was wrongful. However, it was not unreasonable or unfair for the Respondent to call on the bond to recoup the losses set out in items (a), (c), and (d) (*ie*, the unpaid portion of the advance payment; the losses incurred in completing outstanding or defective works that the Applicant was supposed to complete; and the $150,000 the Respondent had loaned the Applicant). These losses exceed the sum of $570,000 guaranteed by the Performance Bond, and so the Respondent had not acted unconscionably by calling on the entire guaranteed sum.

Losses incurred in completing the works after terminating the Contract

40 The Respondent claims that it had incurred losses amounting to $1,207,582.84 in trying to complete the works following its termination of the Contract. This amount comprises the additional cost incurred for engaging a new contractor to continue the works (amounting to $1,095,932.67),[46] and the

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44 AWS at para 33.

45 AWS at para 40.

46 Respondent's affidavit at paras 83–88.

cost for engaging an accredited checker, design consultant, and quantity surveyor for the continuation of the works ($111,650.17).[47]

41 It was unconscionable for the Respondent to recoup these alleged losses by calling on the bond because these losses stemmed from its own wrongful termination of the Contract. If it had not terminated the Contract, it would not have needed to engage a new contractor or incur additional costs for continuing the works. Crucially, the Respondent was not entitled to terminate the Contract, and it had no reasonable basis for believing otherwise. The AD had determined that the Respondent's termination of the Contract was wrongful,[48] and the court, in its dismissal of SUM 2668, was likewise "not satisfied that the [C]ontract was properly terminated".[49] In these circumstances, it was unfair for the Respondent to insist that its termination of the Contract was valid to hold the Applicant liable for the losses that resulted from it. It is true that a bond call is not unconscionable just because the beneficiary was not entitled to call on the bond. The call may be valid if the beneficiary genuinely believed that it was entitled to call on the bond (*BS Mount Sophia* at [52]). But this principle did not apply to the present case, as the decisions of the AD and the court had both clearly stated that the Respondent's termination of the Contract was wrongful. With this knowledge in mind, it was unfair or unreasonable for the Respondent to believe it was entitled to call on the bond to recoup the losses it had incurred from the wrongful termination of the Contract.

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47 Respondent's affidavit at paras 91–102.

48 Applicant's affidavit at para 29 and AD at [79], exhibited in the Applicant's affidavit at p 797.

49 Applicant's affidavit at para 31 and pp 816–817.

The Respondent's other alleged losses

42 However, the Bond Call was not fraudulent or unconscionable as a whole. With respect to the other alleged categories of losses (items (a), (c), and (d) in [27] above), I am satisfied that the Respondent had an honest and genuine belief that it was entitled to call on the bond to recoup those losses, and that this belief was fair or reasonable.

Unpaid portion of the advance payment

43 Before the works began, the Respondent issued a cheque for $570,000 to the Previous Contractor as advance payment for the project, on the condition that the sum was to be used for the project. The Applicant and the Respondent agreed that this sum was eventually transferred to the Applicant, to be used as an advance payment for the Contract.[50] The sum of $955,749.19 (which was payable by the Respondent to the Applicant under the Payment Certificate) was eventually paid to the Applicant when it enforced the AD (see [19] above). This included the sum of $114,000 being set-off against the advance payment.[51] Thus, the unpaid portion of the advance payment was $456,000.

44 It was fair and reasonable for the Respondent to try and recoup this sum through the Bond Call. Even though it had wrongfully terminated the Contract, it was reasonable for it to recoup the remainder of the advance payment, as the Applicant was no longer obliged to continue the works for the project and thus no longer had to be paid out of the advance payment. While the Applicant may potentially be entitled to compensation for the Respondent's wrongful termination of the Contract, it would not have been entitled to retain the

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50 Applicant's affidavit at para 11; Respondent's affidavit at para 14 and p 240.

51 Applicant's affidavit at para 17.

remainder of the advance payment when it was no longer carrying out works for the Respondent. Accordingly, it was not fraudulent or unconscionable for the Respondent to seek the return of the remainder of the advance payment through its Bond Call.

Losses incurred to complete the Applicant's uncompleted work items on the Defect Lists

45 The Respondent puts forward $215,922.50 as the cost of completing the defective and outstanding work items stated in the Defect Lists that the Applicant had failed to complete. This sum was quantified by the ER, which had in turn derived it by considering the work items on the Defect Lists that the Applicant had not fully completed.[52] According to the Respondent, these defective and incomplete works were not part of the balance of works in the tender it had called following its termination of the Contract.[53]

46 It was fair and reasonable for the Respondent to take the view that the Applicant had failed to complete the works. Consequently, the Respondent had the right to recoup its losses by calling on the bond even when the termination was wrongful. Although the adjudicator had determined that the Respondent was not entitled to terminate the Contract on the basis of the Applicant's non-compliance with the Defect Lists (see [15] above), the adjudicator did not find that the Applicant had fully complied with the Defect Lists, or that the Applicant was innocent of the breach of the Contract. In fact, the adjudicator acknowledged that the Applicant was obliged to comply with the Defect Lists. The adjudicator had proceeded with his determination on the basis that the Applicant had not fully or properly carried out the works under the Defect

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52 Respondent's affidavit at pp 1341–1342.

53 Respondent's affidavit at para 103.

Lists.[54] In these circumstances, it was not fraudulent or unconscionable for the Respondent to believe that the Applicant had breached the Contract by failing to complete the works listed in the Defect Lists, and to use the Performance Bond to make good its losses stemming from this breach.

Repayment of the $150,000 loan

47 The Respondent claims that it gave the Applicant a loan of $150,000, for it to obtain the Performance Bond.[55] The Applicant does not deny the existence of this loan or claim that it had repaid any portion of it. The Applicant's only averment is that it would not be recoverable under the Performance Bond, as it would not constitute a loss incurred due to a breach by the Applicant.[56] Hence, if the Performance Bond is instead construed as an on-demand bond (such that the Applicant's breach and loss resulting therefrom need not be proved for the bond to be called upon), it would have been fair and reasonable for the Respondent to recover its debt from the Applicant by calling on the bond.

Total quantum of ascertained losses

48 The three categories of losses stated in the foregoing paragraphs amount to $821,922.50 in total ($456,000 + $215,922.50 + $150,000). As this aggregated sum is well above the guaranteed sum of $570,000, it was not fraudulent or unconscionable for the Respondent to call on the entire guaranteed sum to recoup these losses.

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54 AD at [73] and [76], exhibited in the Applicant's affidavit at pp 794–796.

55 Respondent's affidavit at para 114 and p 1476.

56 AWS at para 16.5.

The Applicant's other arguments on fraud and unconscionability

49 The Applicant raises several other arguments seeking to show that the Bond Call was fraudulent or unconscionable, which I reject.

50 First, it argues that the Bond Call was unconscionable because it was actuated by the Respondent's ulterior motives of retaliation against the Applicant's refusal to accept a settlement offer that the Respondent had earlier made, or the Applicant's successful enforcement of the AD.[57] However, the only evidence the Applicant refers to in making this submission is the timing of the Bond Call, which was five months after works had stopped, following the Respondent's termination of the Contract. This evidence is insufficient to make out a finding of unconscionability, bearing in mind that it "should not be an easy thing" for the threshold of a strong *prima facie* case to be met (*BS Mount Sophia* at [21]; see [37(b)] above). There could have been many other reasons for the timing of the Bond Call, *eg*, a possible desire on the Respondent's part to exhaust its remedies through the AD and SUM 2668, or the possible need for time to calculate its losses. The evidence is thus equivocal on whether the Respondent had called on the bond to serve an ulterior motive.

51 Second, the Applicant refers to *Samsung C&T Corp v Soon Li Heng Civil Engineering Pte Ltd* [2020] 2 SLR 955 ("*Samsung C&T*") at [22] and argues that the Bond Call was unconscionable because its commercial and practical effect was to negate the AD prior to its final determination between the parties.[58] However, *Samsung C&T* is distinguishable from the present case. In *Samsung C&T*, the basis for the bond call was essentially identical to matters that the appellant had raised in its notice of dispute for the AD, and which had

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57 AWS at para 36.

58 AWS at paras 29.5 and 39.

already been adjudicated on (*Samsung C&T* at [15] and [22]). In this case, the Respondent called on the bond to recoup its losses stemming from incidents that were not canvassed in the AD, *eg*, the remainder of the advance payment and the $150,000 loan. Even for incidents that the AD discussed, such as the Applicant's non-compliance with the Defect Lists, the AD was concerned only with the question of whether the Respondent had been entitled to terminate the Contract, and did not make any firm finding on whether the Applicant had breached the Contract and whether the Respondent had suffered loss as a result. Accordingly, the Bond Call did not negate the AD, as it was meant to recoup losses amounting to $821,922.50 (see [42]–[48] above) that the AD had not canvassed or had made no determination on.

Conclusion

52 Having determined that the Performance Bond is an indemnity Performance Bond rather than an on-demand bond, I restrain the Respondent's call on the bond by granting the orders stated at [35] above. However, if the Performance Bond is to be construed as an on-demand bond instead, the Applicant has not shown that the Respondent acted fraudulently or unconscionably in making the Bond Call, and thus the Bond Call would have been legitimate.

53 I shall now hear parties on the issue of costs.

Tan Siong Thye
Senior Judge

Jeunhsien Daniel Ho and Lim Jia Ren (Wong & Leow LLC) for the applicant;
Koh Kok Kwang and Kenii Takashima (CTLC Law Corporation) for the respondent.
