IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1995] SGCA 51

CA 132/1994

Between

Bocotra Construction Pte Ltd

… *Appellant*

And

Attorney General

… *Respondent*

GROUNDS OF DECISION

Arbitration — Arbitral tribunal — Jurisdiction; Arbitration — Arbitral tribunal — Powers; Arbitration — Award — Interim award; Civil Procedure — Judgments and orders; Words and Phrases

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Bocotra Construction Pte Ltd and Others v Attorney General

[1995] SGCA 51

CA 132/1994
Karthigesu JA; L P Thean JA; Yong Pung How CJ
23 May 1995

1 Cur Adv Vult

2 This is an appeal against the order of Goh Joon Seng J made on 25 July 1994. By this order, Goh Joon Seng J declared that an interim arbitration award dated 25 February 1994 in relation to the letter of guarantee No 957/88/875 made by Tun Mohamed Suffian (the arbitrator), was not binding on the respondent because the order was invalid or void. In a related matter, OS No 266 of 1994, which also came before this court of Appeal as CA 168/94, Goh Joon Seng J dismissed the appellants` application for declarations as to certain of their rights arising out of the same arbitration. The judgment of Goh Joon Seng J is reported at [1995] 1 SLR 567 . The factual background to both appeals is similar.

3 **The facts**

4 On 27 November 1987 the appellants entered into an agreement (the contract) with the Director-General of Public Works, whereby the Public Works Department (PWD) were appointed as contractors for the engineering survey and investigation, design, construction and maintenance of the then-proposed

Central Expressway (CTE) Phase II from Bukit Timah Road to Chin Swee Road. The Director-General of Public Works represented in these proceedings by the Attorney General will be referred to as `the respondent`. The contract price was $312,888,888, including a contingency sum of $25m. The contract provided for the respondent to appoint a person (referred to as `the engineer` in the contract and hereinafter) who would be responsible for administering the contract and supervising the construction, completion and maintenance of the works. The engineer was also required to play a certifying role in relation to the performance of various specified contractual obligations.

5 By cl 9 of the conditions of contract, the appellants were required to provide a bank guarantee for the amount of $31,288,888.80, being 10% of the contract price, as security for their due performance of the works. This was duly obtained from the Standard Chartered Bank (the bank). The bank guarantee (the guarantee) was interchangeably referred to by the parties as a performance bond. It provided under cl 4 that it would remain valid up to the date the engineer issues the maintenance certificate in accordance with cl 55 of the conditions. The guarantee was conditional upon a written claim being made by the government within six months from its expiry. The issue of the maintenance certificate itself was dependent on the issue of the completion certificate under cl 47(1) of the conditions. The material portions of cl 47(1) provided that the appellants may request the engineer to issue a completion certificate when they consider that the whole of the works has been substantially completed and has satisfactorily passed any final test that may be prescribed by the contract.

6 The works involved were scheduled to be completed on 25 January 1991. This deadline was not met and a substantial portion of the works, including the CTE tunnels, was completed only by September 1991. The tunnels were opened for use on 21 September 1991. On 24 September 1991, the

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engineer issued a partial completion certificate under cl 47(3) of the conditions certifying completion of the bulk of the works, including the tunnels, with effect from 5 September 1991. To date, only this partial completion certificate has been issued. There were outstanding works left uncompleted by the appellants, such as the removal of the cofferdam in the Singapore River, construction of the river wall, completion of certain ramps, staircases and underpasses and other miscellaneous items. The maintenance certificate has not been issued.

7 Disputes had arisen between the parties in the meantime since April 1991 and these were referred to arbitration pursuant to cl 60 of the conditions. On 19 January 1993, the parties appointed the arbitrator. On 12 February 1993, with the consent of the parties, he directed that rules (the rules) modelled on the Singapore International Arbitration Centre Rules would govern the conduct of the arbitration. By their points of claim, the appellants alleged that there were errors in the respondent`s tender documents relating to the highway alignments and flood level requirements as provided in the respondent`s drawings and specifications, and maladministration of the contract by the respondent. They contended that as the respondent had caused delays in their work, they would be entitled to an extension of time totalling 384 days as against only 73 days granted by the engineer. They also contended that the works were substantially completed on 15 August 1991, more than two weeks before the certified date of partial completion. For these reasons, the appellants claimed a sum of $138,448,900.

8 The respondent served the points of defence on 17 September 1993, disputing liability. In November 1993, the respondent counterclaimed for the costs of remedial works owing to defects in the construction of the tunnels and liquidated damages for delay amounting to $87m. The appellants did not file any defence to the counterclaim, contending that the counterclaim was a nullity.

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They argued that the counterclaim was not within the primary reference to arbitration as the respondent had not referred the counterclaim to the engineer for his decision in accordance with cl 60 of the conditions. Consequently, the respondent indicated that the counterclaim would be referred to the engineer with a view to making it the subject of a separate reference to arbitration. The counterclaim which had been filed was, however, not withdrawn by the respondent from the ongoing arbitration proceedings.

9 By a letter dated 5 February 1994, the respondent notified the appellants and the bank of its intention to call for payment on the guarantee on 19 February 1994. This was apparently actuated by the results of the respondent`s consulting engineers` report which confirmed breaches of contract by the appellants. Counsel for the appellants wrote to the arbitrator on 9 February 1994 requesting ex parte for an order restraining the respondent from making a call upon the guarantee until the matter could be heard by the arbitrator on 25 February 1994. On 14 February 1994, the arbitrator issued an ex parte interim order restraining the respondent from making a call upon the guarantee, thereby preserving the status quo between the parties until 25 February 1994.

10 Representations were immediately made by the respondent to the arbitrator, pointing out that he had no power to grant injunctions under the rules, the Arbitration Act (Cap 10) or at common law. In particular, s 27(1) of the Government Proceedings Act (Cap 121) (the GPA) expressly precluded an injunction to be issued against the government in any proceedings to which it was a party. On 16 February 1994, the arbitrator withdrew his interim order dated 14 February 1994. After considering further written submissions by the appellants, the arbitrator directed on 18 February 1994 that the respondent `do preserve the bank guarantee dated 13 August 1988 by desisting from making a call on it ... otherwise it would cause injustice to the (appellants).` On 25

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February 1994, the arbitrator made the following ruling after hearing the parties` submissions:

> *I hereby declare that the respondent is not entitled to demand or otherwise take any steps to call for payment of any sum under the letter of guarantee No 957/88/875 dated 13 August 1988 until such time as the respondent`s entitlement to make such or any call for payment under the said letter of guarantee has been determined in this arbitration.*

11 The respondent filed an originating summons for, inter alia, a declaration that this interim declaratory order was invalid or void. The arbitrator`s reasons for the order, delivered on 7 March 1994, disclosed two main considerations: first, he did not view the declaration as an injunction or an order of specific performance; it was `merely an order declaratory of the rights of the parties which the (Government Proceedings) Act allows a court to make.` Second, the money payable under the guarantee is `property or thing under the control of the PWD; and r 18(g) of SIAC Rules (sic) expressly allows an arbitrator to make an order for its preservation.`

12 **The decision below**

13 In the proceedings below, Goh Joon Seng J declared that the order of the arbitrator did not bind the PWD. The appellants contended on appeal that Goh Joon Seng J had erred in law on all the three grounds stated in his grounds of decision. The first contention was that Goh Joon Seng J had erred in finding that the arbitrator was not seised of any matters relating to the guarantee. Goh Joon Seng J found that only the points of claim and points of defence had been validly placed before him. The guarantee was obtained to secure due performance by the appellants of their contractual obligations. The intended call on the guarantee arose out of alleged breaches by the appellants which properly formed the subject matter of counterclaim. The learned judge stated:

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> *These alleged breaches on the part of the (appellants) forming the subject matter of the counterclaim were thus not before the arbitrator. Neither had the enforceability and the construction of the bond been referred to the arbitrator for his decision. Accordingly he had no jurisdiction to grant the order of the 25 February 1994 for the interim preservation of the bond.*

14 Second, it was contended that Goh Joon Seng J had erred in holding that an interim declaration was a relief unknown in law. The order made purported to be merely declaratory of the parties` rights. In substance, however, the order was made to preserve the status quo pending the arbitrator`s eventual determination of the respondent`s entitlement to call on the guarantee. Goh Joon Seng J held that it was quite impossible to invent an interim declaration which did not finally determine the rights of the parties but was only meant to preserve the status quo, adopting Upjohn LJ`s reasoning in . Finally, the appellants contended that Goh Joon Seng J had erred in his analysis of r 18(g) of the rules, under which the arbitrator purported to act. Rule 18(g) provides:

> *Unless the parties at any time agree otherwise, and subject to any mandatory limitations of any applicable law, the Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a proper opportunity to state their views, to ... order the preservation, storage, sale or other disposal of any property or thing under the control of any party.*

15 Goh Joon Seng J opined that the scope of r 18(g) was logically and necessarily limited to preservation, storage, sale or other disposal of physical items which form the subject matter of the arbitration or are otherwise relevant thereto. He found the case of instructive as it dealt with the court`s powers under the analogous O 29 r 2(1) of the Rules of the Supreme Court (the RSC). Order 29 r 2(1) provides for interim `detention, custody or preservation` of property which is the subject matter of the cause or matter, or as to which any question may arise therein. In , the court held that O 29 r 2(1) was designed to enable the court to preserve until trial the subject matter of the litigation in specie. It could

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not be used to freeze cash in the hands of a party, even though the source of that cash can readily be identified and is directly connected with the other claims and counterclaim in the action. We shall deal with each of these three grounds in turn.

16 **The appeal**

17 **(1) Jurisdiction**

18 Numerous arguments were put forward by the appellants to refute the learned judge`s reasoning that the arbitrator did not have jurisdiction to grant the interim declaratory order. The main contention was that the learned judge had erred in ignoring the fact that the counterclaim remained filed and was therefore validly before the arbitrator. It was common ground that the intended call on the guarantee arose from the allegations as to defective work raised in the counterclaim. On 12 January 1994, the respondent`s applications which had been made on 23 December 1993 in respect of the counterclaim were withdrawn. The nature of these applications is immaterial for present purposes. The respondent`s counsel also indicated that the counterclaim would be referred to the engineer for his decision under cl 60 of the conditions. These steps were taken in response to the appellants` counsels` contentions that the counterclaim was a nullity and not within the jurisdiction of the arbitrator since there had been no prior reference to the engineer. From this turn of events, it was clear that the respondent had conceded the merit of the appellants` contentions, although the counterclaim was not withdrawn. The arbitrator apparently made no order on the appellants` submissions relating to the nullity of the counterclaim. The respondent`s chosen course of action did not apparently meet with outright objections from the arbitrator or the appellants. On their part, the appellants were prepared to deem the counterclaim to have been validly placed before the

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arbitrator, provided the respondent was agreeable to certain proposed terms of settlement. No such agreement for an ad hoc reference materialized.

19 Contrary to their initial stand, the appellants executed a volte-face for the purposes of this appeal, contending that their underlying position was that the reference of the counterclaim was valid. Having reviewed all these circumstances, we agree with the learned judge that the non-withdrawal of the counterclaim did not lead to the conclusion that the arbitrator was validly seised of it. The arbitrator`s jurisdiction depends on reference by the parties. If the reference is invalid, or if there has been no reference at all, prima facie he has no jurisdiction. This might have been remedied had the parties subsequently arrived at an ad hoc agreement to confer jurisdiction on him. An ad hoc reference on terms was in fact proposed in the present case. There was no such reference. It follows from this analysis that the counterclaim was never validly placed before the arbitrator to begin with. Notwithstanding the fact that the counterclaim remained filed, it was never within the arbitrator`s jurisdiction as the parties had regarded the preliminary reference to the engineer as a precondition for its validity. This was the ineluctable consequence when the counterclaim was not withdrawn and no ad hoc reference had been made. The dispute arising from the intended call on the guarantee was not before the arbitrator since on a prima facie level, the counterclaim was never within his jurisdiction in the first place. Accordingly, we see no reason to differ from the learned judge`s conclusion that the arbitrator had no jurisdiction to grant the order he did.

20 It is misleading and erroneous to suggest, as the appellants did, that the counterclaim was validly before the arbitrator simply because they had filed their points of defence to the counterclaim on 14 June 1994. While doing so, the appellants reserved their rights to contend that the counterclaim was not validly

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referred to arbitration. Their purported act of `waiver` of their initial jurisdictional objection to the counterclaim eventually took place only on 23 August 1994, when they withdrew their reservations. This was well after the proceedings before Goh Joon Seng J had been concluded. By then, the appellants had already filed their notice of appeal against Goh Joon Seng J`s decision. We have also noted that the appellants had never been prepared to serve their points of defence to the counterclaim unless the parties reached an ad hoc agreement on terms. They changed their tune only midway through the proceedings before the learned judge. There can be no retrospective effect in their purported act of waiver. The only relevant time for consideration of these factors would be when the arbitrator made the order, on 25 February 1994.

21 The appellants advanced an alternative submission: that the dispute relating to the underlying validity and enforceability of the guarantee was already before the arbitrator by way of an `implicit` reference. Put another way, the appellants` argument was that the dispute relating to the guarantee was intimately connected with the disputed points already referred under the primary reference to arbitration. Even assuming the counterclaim had not been validly referred, an `implicit` reference had already been made. The eventual determination of issues raised in the primary reference would undoubtedly have an impact on the validity and enforceability of the guarantee. If the arbitrator should find that the completion and maintenance certificates ought to have been issued according to the appellants` contentions, the consequential effect is that the guarantee may well be emasculated. It would be premature to permit a call on the guarantee before the arbitrator has determined the question when the maintenance certificate ought to have been issued.

22 The persuasiveness of this submission is blunted somewhat upon consideration of the respondent`s submission. This involved some examination

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of the nature and purpose of the guarantee and the locus standi of the appellants. As a matter of basic contract, the appellants were never privy to the guarantee. Once the guarantee had been issued by the bank in favour of the respondent, any disputes arising thereunder could not be referred to arbitration because the appellants were not parties to this guarantee. Moreover, as a general rule, the bank would not be concerned with any underlying disputes between the parties as long as the necessary conditions existed to justify payment pursuant to a call on the guarantee. The leading case from which this principle derives is . Viewed in this light, the guarantee was, on its true contrctual interpretation as well as by nature, an independent contract between the bank and the respondent.

23 The appellants` argument of `connection` between the guarantee and the matters under arbitration is somewhat tenuous and unconvincing. The arbitrator had jurisdiction, no doubt, to determine when the maintenance certificate ought to have been issued. With this determination, there will only indirectly be a `decision` on the validity of the guarantee, since under the primary reference to arbitration, no reference had been made relating to the issue of the validity of the guarantee. A determination by the arbitrator will therefore only have a consequential impact on the validity of the guarantee. Whether the guarantee was valid bore no real significance to the determination of the disputed points raised in the primary reference. We entertain some doubt as to whether the appellants could have validly referred the dispute relating to the guarantee for arbitration at all since they were not privy to the guarantee. Nevertheless, a ruling on this latter question is not essential to our decision. In the present case, our decision is founded on the consideration that there was no relevant or sufficient connection between the dispute arising from the intended call on the guarantee and the matters constituting the primary reference to the arbitrator. Consequently, we find that the appellants have not shown any grounds to

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suggest either that such an `implicit` reference was in fact permissible within the boundaries of the arbitration or that the parties could have contemplated such a mode of reference.

24 The appellants` alternative argument of `incorporation by reference` relied heavily on the fact that the guarantee made various references in its terms to the contract. Taken to its logical conclusion, the appellants in effect suggested that the entire contract had to be read as adjunct to the guarantee. In the absence of an express `incorporation` clause within the guarantee, this argument is not persuasive. In any event, it is insufficient to bring all and any disputes relating to the guarantee within the primary reference. We need not overemphasize the fact that the arbitrator`s jurisdiction depends on reference by the parties. Disputes relating to the guarantee, being purely peripheral to the primary reference, cannot `implicitly` fall within the arbitrator`s jurisdiction.

25 The appellants further contended that the issues arising on the counterclaim had already arisen by way of defence and set-off. It is an established rule of procedure that not every set-off will automatically also be a counterclaim. In the present case, the counterclaim related to alleged defective work on the tunnels. The proposed call for payment only came after the respondent had received the consulting engineers` report. The report was dated October 1993 and the points of defence were served on 17 September 1993. There is nothing to suggest that the points of defence have been substantially repeated in the counterclaim. The appellants therefore have little basis to contend that the dispute relating to the guarantee had already been brought (implicitly) before the arbitrator by way of the points of defence.

26 Yet another contention raised by the appellants was that the respondent`s election to present submissions on the merits in the proceedings before the

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arbitrator, without express reservation of their rights to challenge the arbitrator`s jurisdiction, amounted to a waiver of jurisdictional objections. The rules do not provide any special machinery for appearance under protest or conditional appearance, let alone one for reservation of rights. Nevertheless, the appellants contended that it was incumbent on the respondent to have expressly reserved its rights to object to the arbitrator`s exercise of jurisdiction. It is somewhat curious that the appellants sought to support their arguments with the case of . This case concerned an attempt by a party to the arbitration to challenge the arbitrator`s jurisdiction only after an award adverse to the applicant had been made. No objection as to jurisdiction had been raised at all during the proceedings proper. In the present case, the respondent`s conduct was clear and unambiguous. The arbitrator`s jurisdiction to entertain any dispute relating to the guarantee was always challenged. We find no merit in the appellants` submissions in this respect.

27 The appellants raised some additional issues in support of their arguments on jurisdiction which were not jurisdictional issues in reality. We do not find it necessary to address each of them as they have no bearing on our decision. One of these arguments was that the learned judge had failed to consider the fact that partial completion certificates had been issued, leading to the opening of the tunnels for public use. The appellants contended that there had been substantial performance of their contractual obligations and that the respondent was not entitled to allege that there was no `due performance` under the contract. In our opinion, this consideration has no bearing on the question of the arbitrator`s jurisdiction. Notwithstanding the fact that the partial completion certificates had been issued, cl 48(2) of the conditions does not absolve the appellants from liability in respect of defects within the period of

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maintenance. Even if the maintenance certificate had already been issued, cl 55(2) of the conditions, titled `Unfulfilled obligations`, provides thus:

> *The issue of the maintenance certificate shall not be taken as relieving either the contractor (the appellants) or the employer from any liability the one towards the other arising out of or in any way connected with the performance of their respective obligations under the contract.*

28 As such, even if there might have been substantial performance, this would not affect the respondent`s entitlement to call for payment on the guarantee. There was no allegation that the intended call was fraudulent or lacking in bona fides. In any event, the appellants did not deny that there were outstanding works remaining. We do not see how these works, which included among them the removal of the cofferdam in the Singapore River, construction of the river wall, completion of ramps, staircases and underpasses, could be deemed so minor or insubstantial as to support the appellants` contention that there had already been substantial performance of the contract. All in all, there is nothing to suggest that the respondent`s intended call was improperly motivated.

29 Having considered all the arguments as to arbitrator`s jurisdiction to entertain the dispute relating to the guarantee, we are of the opinion that Goh Joon Seng J had correctly found that the counterclaim was not validly placed before the arbitrator. Questions as to the enforceability and construction of the terms of the guarantee had never been referred for the arbitrator`s decision. The dispute relating to the guarantee was thus not properly before the arbitrator and accordingly, he had no jurisdiction to grant the order which he did. This ruling is sufficient to dispose of the present appeal. Nevertheless, we shall also consider the appellants` other submissions on the substantive merits of the case

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as these are relevant to our decision in the related appeal, CA 168/94. Our reasons are as follows.

30 **(2) Interim declaratory relief**

31 The appellants contended that the learned judge had erred in holding that the arbitrator`s order was in the nature of an interim declaration intended to preserve the status quo pending the adjudication of the respondent`s entitlement to call on the guarantee. It was asserted that the order would be a `final` order, finally determining the parties` interim rights. It was not susceptible to review or reversal by a subsequent tribunal, except on appeal. In a narrow and rather novel sense, therefore, the appellants contended that the order was a `final` order, notwithstanding that the fact that it was meant to remain effective only until the arbitrator`s eventual determination of the disputed issues in the primary reference.

32 The common law approach towards interim declaratory relief is enshrined in (the ***GE*** case)1, which the court below adopted. In this case, the Customs and Excise detained goods marked `GE` belonging to the plaintiffs, a company incorporated under the law of New York, on the ground that they had infringed the trade mark of the British company GEC. Section 21(1)(a) of the Crown Proceedings Act 1947, which is in pari materia with our s 27(1) GPA, prohibited the plaintiffs from obtaining an injunction requiring the release of the goods. The plaintiffs thus moved ex parte for an interim declaration. In the Court of Appeal, Upjohn LJ (following Romer J in) stated that it was `perfectly plain that the courts ... could not grant some form of interlocutory relief in the sense of some interim declaration` (at p 789). He took the view, with the concurrence of Diplock LJ, that there was no such animal as an interim declaration. This has since been resoundingly endorsed by the courts in subsequent cases (eg , at p 81

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per Sir Robert Megarry VC; , at p 648, per Lord Denning MR; and most notably, , before the House of Lords). The underlying reason for this approach might be found in the courts` adherence to the principle that they only have power to award `declarations of right`. Such rights must mean final legal rights, it being illogical to suggest that a person`s legal rights can be X one day and Y the next.

33 In this appeal, bearing in mind the restrictions imposed by s 27(1) GPA, one of the primary issues which fell to be determined was whether a declaration could be fashioned as a general interim remedy to fulfil the same function as an interim injunction. If not, the preservation of the status quo could only be achieved by way of an interim injunction. This was essentially the same question which was addressed by the court in the ***GE*** case1, which appeared to us to be prima facie very persuasive. The appellants, however, urged this court to consider that the order sought here was a final order declaratory of the interim rights of the parties and was res judicata, at least as far as these interim rights were concerned.

34 It is critical not to lose sight of the nature of declaratory relief. A declaration pronounces upon the existence or nonexistence of a legal state of affairs. It does not have any coercive force as it does not contain any order which can be enforced against the defendant (Zamir & Woolf, ***The Declaratory Judgment*** (2nd Ed, 1993). Where an injunction (final or interim) cannot be granted on account of the express prohibition in s 27(1) GPA, a declaration in lieu thereof may be granted. A declaration may, in appropriate cases, achieve the same purpose as an injunction, without the coercive or restraining element which attaches primarily to an injunction. To illustrate this point, Upjohn LJ suggested in the ***GE*** case1 that a declaratory order could be made in lieu of a final injunction as it would finally determine and declare the rights of the parties. Section 27(1) GPA does not, however, go to the extent of sanctioning

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the wholesale substitution of declarations in place of injunctions in each and every instance where injunctions might have been granted as between private persons. Some legal basis for the grant of the declaration must exist. It is therefore important to observe a distinction between a declaration of rights and an interim injunction. The latter remedy may be appropriately obtained in order to preserve the status quo. We were required to consider whether an interim declaration was available as a form of substitutionary relief where an interim injunction could not be granted. The vital question raised was whether interim declaratory relief was available in law, since such a declaration did not declare the legal rights of the parties once and for all, but only sought to preserve the status quo pending final adjudication.

35 Referring once again to the arbitrator`s order, he stated:

> *... I hereby declare that the respondent is not entitled to demand or otherwise take any steps to call for payment of any sum under the letter of guarantee No 957/88/875 dated 13 August 1988 until such time as the respondent`s entitlement to make such or any call for payment under the said letter of guarantee has been determined in this arbitration.*

36 This order purportedly dealt with the question of the parties` interim rights. In reality, the order was fashioned to preserve the status quo. The order was evidently not a pronouncement of the legal rights of the parties inter se. This was clear not only from its terms, but also from the arbitrator`s stated grounds for his order as well. It is difficult to see what `interim legal rights` which could be ascribed to the appellants were being declared. Moreover, the source of these amorphous `interim rights` was ambiguous. They could not have derived from the contract, much less the guarantee, since the appellants were not privy to the latter agreement. In effect, the arbitrator had couched an interim injunction in declaratory terms, resulting in the grant of a novel form of interim injunctive declaratory relief.

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37 The primary purpose of granting a declaration is that the controversy between the parties may be resolved and become res judicata. This would be rendered illusory if the original `resolution` was merely a stopgap measure designed to preserve the status quo. It may transpire from subsequent proceedings that the interim declaration should not have been granted, and consequently there would only be a transient and anomalous state of `interim res judicata`. The reality is that such a declaration would not determine the parties` rights in the dispute once and for all. In the premises, the interim declaration could not be a `final` order. As established in , a final order must be one which finally disposes of the rights of the parties. Adopting the Court of Appeal`s reasoning in , the phrase `the rights of the parties` refers to the substantive rights in dispute in the particular action. The order had purported to determine the interim rights of the parties, but the crucial test is whether the order as made had finally disposed of the substantive rights in dispute in the action. The order as made was never a conclusive determination of the parties` substantive rights in dispute in the action. These rights would still be considered and determined at a later point in time. Contrary to the appellants` submissions, we are impelled to conclude that the order was in reality an interim order which was interlocutory in nature.

38 Having considered the appellants` arguments and the reasoning of Upjohn LJ in the ***GE*** case1, we see no reason to differ from Upjohn LJ`s views. We do not think that interim declarations could exist in law as final legal rights were not being declared. It is not enough to maintain that simply because injunctions are not available in proceedings against the government, the courts should therefore freely adapt the device of a declaratory order to attain a desired result which might only be properly achieved through the grant of an injunction. This is not what s 27(1) GPA sanctions on its true construction. Section 27(1)

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GPA enables the court to exercise its discretion to grant a declaration in lieu of an injunction. It does not enable the creation of an interim declaration when such an animal does not exist in law. It does not empower the court to undertake bold extensions of the nature of declaratory relief. The law as it stands does not permit the appellants to circumvent the effect of s 27(1) GPA by employing the device of an interim declaration in a thinly-veiled injunctive fashion to suit their purpose. Accordingly, we agree with the learned judge that an interim declaration could not be granted in lieu of an injunction to preserve the status quo in the present case.

39 The appellants contended, however, that the local courts may be guided by the winds of change sweeping through the present climate of administrative law in England. Cases such as and were said to have set in motion a trend towards reinstating the constitutional primacy of the rule of law. The apparent shift in thinking was strikingly characterized in Lord Woolf`s views in , where the House of Lords repudiated the notion that Crown officers enjoy immunity from injunctive relief under the Crown Proceedings Act 1947. This was based on the reinstatement of the principle that Crown officers do not partake of the Crown`s immunity. Their Lordships, relying on s 31 of the Supreme Court Act 1981 (the SCA 1981), made it clear that both final and interim injunctions were available against ministers and officials empowered in their own names. The relevant portions of s 31 SCA 1981 state:

> *(1) An application to the High Court for one or more of the following forms of relief, namely -*
>
> (a) an order of mandamus, prohibition or certiorari;
>
> (b) a declaration or injunction under subsection (2);
>
> …
>
> *shall be made in accordance with rules of court by a procedure to be known as an application for judicial review.*

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> (2) A declaration may be made or an injunction granted under this subsection in any case where an application for judicial review, seeking that relief, has been made and the High Court considers that, having regard to -
>
> (a) the nature of the matters in respect of which relief may be granted by orders of mandamus, prohibition or certiorari;
>
> (b) the nature of the persons and bodies against whom relief may be granted by such orders; and
>
> (c) all the circumstances of the case,
>
> *it would be just and convenient for the declaration to be made or the injunction to be granted, as the case may be.*

40 Lord Woolf, however, left open the possibility of the courts being able to grant interim declarations. Nevertheless, counsel for the appellants in the present case submitted that this was clear evidence of a change in the rigid judicial attitude which stood firmly against the grant of injunctions against the Crown or its officers.

41 The House of Lords in the first ***Factortame*** litigation () originally took the view that this type of injunctive relief could not be granted against officers of the Crown acting in their official capacity, and s 31 SCA 1981 could not be taken to have altered this position. Their Lordships recanted their views when the European Court of Justice ruled that the absence of such interim relief against the Crown was itself a breach of community law (C-213/89:). It was against this background that the decision in drew its strength and inspiration. Lord Woolf observed that it would be `regrettable if an approach which is inconsistent with that which exists in Community law should be allowed to persist if this is not strictly necessary`. Examining these decisions from our `non-Community` perspective, their relevance is greatly diluted by the Community law element common to them, as well as the express reliance placed on s 31 SCA 1981. We also note that these cases were decided in the context of administrative law, and judicial review in particular, whereas the present case

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concerned private law proceedings to which the government had been made a party. Lord Woolf himself, in , paid careful heed to the distinction to be drawn between such proceedings. This was clearly indicated in the following passage from Lord Woolf`s judgment (at 463):

> *So far as interim relief is concerned, which is the practical change which has been made, there is no justification for adopting a different approach to officers of the Crown from that adopted in relation to other respondents in the absence of clear language such as that contained in s 21(2) of the Act of 1947. ...* ***The restriction provided for in s 21(2) of the Act of 1947 does, however, remain in relation to civil proceedings****. [Emphasis added.]*

42 Section 21(2) SCA 1981 is in pari materia with our s 27(2) GPA. From the above statement, it was clear that his Lordship was not prepared to import his views freely into the context of civil proceedings involving the Crown. The appellants in the present case, no doubt inspired by the robust views currently espoused by various English academics, suggested that s 27(1) GPA should not present any obstacle to the grant of interim declaratory relief. It is pertinent to note, however, that Lord Woolf himself, for all his proclivities towards granting interim declarations, took a rather more conservative approach when wearing an academic`s hat as a co-editor of the text ***Declaratory Judgments*** (2nd Ed, 1993) by Zamir & Woolf. In their text, Zamir and Woolf expressed some plaintive concern as to the desirability that there should be some form of interim relief against the Crown particularly when injunctive relief is precluded. Nevertheless, they accepted that the weight of authority must mean that this area of law is settled and if there was to be some means of obtaining interim declarations, this appeared to be a matter for the legislature. These observations are apposite. Section 27(1) of our GPA stands, without the potential for any incursions from other legislation, as we do not have a provision in our statute books which reflects s 31 SCA 1981. The express prohibition against

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injunctions in s 27(1) GPA remains. Whatever may be the desirability of permitting interim relief to be granted in proceedings against the government, we are bound to give effect to the law as it stands, not the law as the appellants perceive it should be. In our opinion, the ***GE*** case1, as affirmed by a majority of the House of Lords in ***Rossminster*** , accurately reflects the state of the law in Singapore.

43 We do not propose to enter into an elaborate analysis of the Israeli Supreme Court decision of (reproduced from ***Zamir & Woolf*** at p 301). This is possibly the sole case authority emanating from any higher tribunal in which the court, consciously departing from the ***GE*** case1, granted an interim declaration against the government. We would, however, point out that the relevant empowering provisions of the Israeli Courts Law 5717-1957 (s 34) suggest that the court is vested with much wider powers to `grant a declaratory judgment, a mandatory or prohibitive order, an order of specific performance and any other relief, as it may think fit in the circumstances of the case`. Cohn J expressed his views on s 34 of the Israeli Courts Law as follows:

> *The heading of the section tells us that it contains `general` authorization to grant relief … . In effect, s 34 empowers the court to invent new, as yet unknown forms of relief, as required or justified by the changing times or circumstances. It follows that the fact that the courts in Israel have not so far granted interim declaratory relief does not prevent them from starting to grant it henceforth, if they deem it so fit in the circumstances.*

44 The Israeli Supreme Court may thus have found it appropriate to express its views as to the errors of the English decisions such as the ***GE*** or ***Rossminster*** cases, safe in the knowledge that there was some statutory basis for them to depart from these decisions. It was not an act of extravagant posturing for Cohn J to observe that `any person bearing the standard of justice should keep himself aloof from (the English decisions).` It is doubtful whether

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the same stance can be adopted in the local context. The local courts are creatures of statute, deriving their powers from legislation. The broad and sweeping terms of s 34 of the Israeli Courts Law have no equivalent or approximation in our Supreme Court of Judicature Act (SCJA) (Cap 322). A local court would thus be hard put to justify the `invention` of `new, as yet unknown forms of relief` which are not within the powers vested in it by any written law for the time being in force, or the powers set out in the First Schedule to the SCJA.

45 **(3) Rule 18(g) as the source of the arbitrator`s power to preserve property**

46 The appellants contended that the learned judge had relied on the wrong interpretation of and thereby concluded erroneously that r 18(g) was meant to apply to preservation of property or things, particularly of a perishable nature which form the subject matter of the arbitration or are otherwise relevant thereto. For convenient reference, we shall set out r 18(g) again:

> *[Unless the parties at any time agree otherwise, and subject to any mandatory limitations of any applicable law, the Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a proper opportunity to state their views, to] ... order the preservation, storage, sale or other disposal of any property or thing under the control of any party.*

47 was a case involving the interpretation of the scope of O 29 r 2(1) of the English Rules of the Supreme Court, which is in pari materia with our similarly numbered rule. Order 29 r 2(1) RSC states:

> *On the application of any party to a cause or matter the Court may make an order for the detention, custody or preservation of any property which is the subject matter of the cause or matter, or as to which any question may arise therein, or for the*

> *inspection of any such property in the possession of a party to the cause or matter.*

48 The plaintiffs in contracted under three separate contracts to supply the defendants prefabricated building units and provided performance bonds. Upon the plaintiffs claiming payment under the contract, the defendants alleged defective work in relation to one of the contracts and made a demand upon one of the performance bonds. The trial judge held that he had no power to restrain the defendants from making a call on the bond but ordered that the proceeds of the call on the bond be frozen and paid into a joint account. The defendants appealed successfully against this order, purportedly made under O 29 r 2(1), which confers powers as to interim preservation of property. May LJ ruled that the proceeds of a call on a first demand bond were to be treated as cash in hand. Order 29 r 2(1) was intended to enable the court to preserve until trial the subject matter of the litigation in specie. It could not be used to freeze cash in the hands of a party even though it might be directly concerned with claims and counterclaims in the action.

49 In the present case, the appellants suggested that ***Potton Homes*** could be distinguished on the basis that the defendants there had already exercised their right to call for payment. The proceeds thus became cash in hand and no longer property within the meaning of O 29 r 2(1). The appellants did not otherwise argue that there was any fundamental distinction in terms of policy or principle between O 29 r 2(1) and r 18(g). Instead, they anchored their arguments on the distinction that May LJ`s comments should be limited to the scenario where the defendants already had cash in hand. A right to call for payment under a bank guarantee or performance bond is a chose in action. In the present case, this right had not been exercised. Until the guarantee is realized, there is no cash in hand to speak of. Thus the appellants contended that

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a subsisting right to call for payment, being a chose in action, would remain property which could be preserved if one adopts a broad interpretation of r 18(g).

50 A chose in action can no doubt be termed `property` in a broad sense. We have our misgivings, however, as to the appellants` attempt to distinguish ***Potton Homes*** on the basis that the chose in action (ie the right to call for payment) remains property which can be preserved in the present case. We note that the arbitrator had justified his order on the basis that the ***money payable*** was what he was preserving. He made no reference to the right to call for payment. He reasoned thus:

> *The* ***money payable under the bank`s letter of guarantee is property or thing under the control of the PWD****; and r 18(g) of SIAC rules expressly allows an arbitrator to make* ***an order for its preservation, which my declaration is****. [Emphasis added.]*

51 The arbitrator apparently did not address his mind to preserving the chose in action or its physical manifestation, ie the letter of guarantee. The actual basis for his order was, unfortunately, somewhat obscure since he claimed to be making an interim declaration in lieu of an injunction, while invoking r 18(g) to justify a `preservatory` order to maintain the status quo. With respect to the learned judge, we note that there might also have been some confusion in his mind at one point, as he had initially referred to the order in question as one `for the interim preservation of the bond`, even though he later found that r 18(g) did not empower the arbitrator to order the preservation of the money payable under the guarantee.

52 The appellants took the stand that r 18(g) permits preservation of the subsisting chose in action. This was an implicit assertion that the arbitrator had erred and had made an order on the wrong grounds. In our opinion, the

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appellants have apparently misunderstood the learned judge`s grounds of decision and possibly the reasons for the arbitrator`s order as well. What the learned judge clearly said was that the proceeds of payment under the guarantee (addressing the arbitrator`s stated grounds that he was merely preserving the `money payable`) were not amenable to a preservation order as such proceeds were not the subject matter of the litigation in specie. Thus the appellants` attempt to distinguish ***Potton Homes*** proceeded on the wrong footing from the outset; they failed to appreciate the fact that the arbitrator`s order was one for preservation of the money payable rather than the chose in action represented by the right to call for payment.

53 On a plain reading of r 18(g), a chose in action should not fall within the scope of the phrase `property or thing` because of its non-physical nature. To hold otherwise would not only give rise to uncertainty but also potential absurdity. If the appellants` arguments for a liberal interpretation of `property` are accepted, this would mean that the phrase `property or thing` in the preceding ***r 18(f)*** may have to be given the same interpretation. Rule 18(f) reads:

> *[The Tribunal shall have the power to] order the parties, subject to the law and procedure relating to evidence as applicable in Singapore,* ***to make any property or thing available for inspection, in their presence****, by the Tribunal or any expert. [Emphasis added.]*

54 The consequence of adopting the appellants` suggested interpretation is that the Tribunal may order the parties to make available a chose in action for inspection, since a chose in action amounts to `property or thing`. This is a manifest absurdity. `Property or thing` in r 18(f) must, on any reasonable reading, refer to physical property in order that inspection can be ordered. Thus, the physical manifestation of the chose in action, ie the letter of guarantee can

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be inspected (or preserved). Rules 18(f) and 18(g), when read as composite rules, in fact appear to mirror O 29 r 2(1) of the RSC, which empowers the court to order `detention, custody or preservation` ***as well as inspection*** of any property which is the subject-matter of the cause or matter, etc. Consequently, rr 18(f) and 18(g) may well have much closer parallels with O 29 r 2(1) than may be apparent on a cursory reading.

55 There is no canon of construction requiring uniform and consistent interpretation of contractual words; words which appear twice or more in a contract need not necessarily be given the same meaning whenever they appear (Lewison, ***Interpretation of Contracts*** , p 125). Nevertheless, the following comments by Lindley MR, culled from ***Re Birks*** , are instructive:

> *I do not know whether it is law or a canon of construction but it is good sense to say that whenever in a deed or will or other document you find that a word used in one part of it has some clear and definite meaning, then the presumption is that it is intended to mean the same thing where, when used in another part of the document, its meaning is not clear.*

56 A word of caution in adopting this approach too freely was sounded by Lord Warrington of Clyde in . Nevertheless, his Lordship agreed that `a difficulty or ambiguity may be resolved by resorting to such a device, but it is only in such cases that it is necessary or permissible to do so.`

57 In the present context, the ambiguity arose in relation to r 18(g). The appellants were clearly unable to muster any support for their arguments that choses in action could be subject to a `preservation` order. Choses in action were obviously not contemplated as falling within the phrase `property or thing` in r 18(f); the phrase must refer only to physical items which are capable of inspection. Rule 18(g) should be construed similarly as relating only to physical items. In any event, we are unable to see how a chose in action can be the subject

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of a `storage` or `sale` order under r 18(g), even assuming that it can be `preserved` to begin with. Indeed, to accept the appellants` submissions would necessitate some stretch of the imagination.

58 The arbitrator evidently thought that he was empowered to order the preservation of the proceeds of payment under the guarantee. May LJ reasoned convincingly in ***Potton Homes*** that such proceeds cannot be frozen under O 29 r 2(1), as they were not the subject matter of litigation in specie. The same reasoning would apply to r 18(g), which, contrary to what the appellants suggested, is indeed closely analogous to O 29 r 2(1) RSC. We are of the opinion that r 18(g), like O 29 r 2(1) RSC, can only apply to enable the preservation of physical items which form the subject matter of arbitration in specie or are otherwise relevant thereto. The preservation of these items should be essential to rights of parties being determined under the arbitration. Whether the `property` was characterized as the right to call (ie a chose in action) or the proceeds of payment, we do not find the appellants` submissions persuasive. In the premises, we agree with the reasoning of the learned judge, who correctly held that r 18(g) applies only to physical items and not choses in action. We do not find it necessary to decide whether it was correct for the learned judge to add the qualification that r 18(g) operated particularly in respect of perishable property.

59 In the light of the above considerations, we find no reason to differ from the learned judge`s conclusions. Accordingly, we dismiss the appeal with costs to the respondent. There will also be the usual consequential order that the security for the costs of this appeal be paid out to the respondent to account of costs.

60 ***Appeal dismissed.***

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Karthigesu JA
L P Thean JA
Yong Pung How CJ

Michael Khoo, Josephine Low and Cheah Kok Lim (Michael Khoo and BB Ong) and Ho Chien Mien (Allen & Gledhill) for the appellants
Lee Seiu Kin and Lionel Yee (Attorney General's chambers) for the respondent

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