IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1999] SGCA 60

CA 20/1999

Between

GHL Pte Ltd

… *Appellant*

And

Unitrack Building
Construction Pte Ltd
Another

… *Respondent*

GROUNDS OF DECISION

Building and Construction Law — Building and construction related contracts

Version No 1: 20 Nov 2026 (01:16 hrs)

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GHL Pte Ltd v Unitrack Building Construction Pte Ltd and Another

[1999] SGCA 60

CA 20/1999
Lai Kew Chai J; L P Thean JA
14 August 1999

1 (delivering the grounds of judgment of the court): This was an appeal against the decision of Rubin J in which he declined to set aside an interim injunction obtained by the first respondents, Unitrack Building Construction Pte Ltd (`Unitrack`), restraining the appellants, GHL Pte Ltd (`GHL`), from seeking or claiming any payment from the second respondents, AGF Insurance (Singapore) Pte Ltd (`AGF`) on the performance bond issued by the latter until further order. We dismissed the appeal and now give our reasons.

2 ***Facts***

3 GHL were at all material times the owner and developer of the property known as Lots 331-17 to 331-26 of Mukim 24 situate at Lorong 17 Geylang, Singapore and were desirous of constructing a five-storey boarding house thereon (`the project`). Unitrack were a company engaged in the business of building construction. By a letter dated 14 April 1997 Unitrack tendered for the project and in response Ben Design Architects (`Ben Architects`) on behalf of GHL, by a letter dated 24 April 1997, awarded the project to Unitrack for a lump sum of $5,781,400.00. Following that, a document in the form of articles and

Version No 1: 20 Nov 2026 (01:16 hrs)

conditions of building contract published by the Singapore Institute of Architects (collectively called `the SIA terms`) was executed by Unitrack and GHL. Thus, the contract for the project consisted of the tender by Unitrack dated 14 April 1997, the letter of award dated 24 April 1997 and the SIA terms. We shall refer to these three documents together as `the contract`.

4 The contract sum for the project was $5,781,400.00 and consisted of the following:

Main Contract Works	$1,900,000.00
Prime costs and provisional	
(Sub-contract Works)	$3,820,000.00
Profit and Attendance	$ 61,400.00
Total tender sum	$5,781,400.00

5 It was then contemplated by the parties that Unitrack would enter into sub-contracts with sub-contractors nominated by Ben Architects in respect of the works under prime costs and provisional sums stated above.

6 It was a term of the contract that Unitrack would provide GHL with a performance bond for an amount equal to 10% of the contract sum prior to the commencement of the work by Unitrack. Accordingly, pursuant to the contract, on or about 26 June 1997, Unitrack arranged for AGF to issue a performance bond in favour of GHL in the amount of $578,140, which was 10% of the contract sum. The bond provided, inter alia, as follows:

> 1 In consideration of you not insisting on the Contractor paying ... S$578,140.00 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 S$578,140.00 (`the said sum`) ....

Version No 1: 20 Nov 2026 (01:16 hrs)

> 2 Should you notify us in writing, at any time prior to the expiry of this Bond, by notice purporting to be signed for and on behalf that you require payment to be made of the whole or any part of the said sum, we irrevocably and unconditionally agree to pay the same to you immediately on demand without further reference to the Contractor and notwithstanding any dispute or difference which may have arisen under the Contract or any instruction which may be given to us by the Contractor not to pay the same.
>
> 3 We hereby confirm and agree that we shall be under no duty or responsibility to inquire into:
>
> (a) the reason or circumstances of any demand hereunder,
>
> (b) the respective rights, obligations and/or liabilities of yourselves and the Contractor under the Contract,...

7 After the execution of the performance bond, AGF handed it to Unitrack together with a duplicate copy. However, neither the original bond nor the duplicate copy was ever delivered by Unitrack to GHL, although apparently GHL at some point in time obtained a photocopy of it. The bond at all material times remained in the hands of Unitrack.

8 Unitrack commenced work on the project at the end of April 1997, and the works progressed quite uneventfully for about a year until 30 April 1998. On that day, Unitrack and GHL executed a written variation of the contract. They agreed that the sub-contractors of the project would receive payment directly from GHL, and that the contract sum would be revised downwards to $1,961,400. It appeared that this sum was arrived at by deducting the total sum of $3,820,000 earmarked for prime costs and provisional sums from the original contract sum of $5,781,400. At that point in time no sub-contracts had as yet been made between Unitrack and the sub-contractors nominated by Ben Architects. Thenceforth, GHL dealt direct with sub-contractors for the project.

9 Some time in early July 1998, it became clear to the parties that the contractual completion date of 28 July 1998 would not be met. There was

Version No 1: 20 Nov 2026 (01:16 hrs)

disagreement between them as to the cause of the delay and who should be blamed for it. On 13 July 1998, GHL and Unitrack agreed to extend the project completion date to 4 September 1998. However, Unitrack did not complete the construction works by the extended date. At this point in time, the relationship between Unitrack and GHL began to worsen rapidly and became very strained. At the end of September 1998, the dispute came to a head and Unitrack suspended work. On 6 October 1998, Ben Architects informed Unitrack by a letter that if they failed to `rectify the situation` within one month, GHL would issue a `Termination Certificate` under the contract. On the same day, GHL wrote to AGF demanding the payment of the total sum of $578,140 under the performance bond. Also on the same day or thereabouts, Unitrack wrote to Ben Architects informing them that as the contract sum for the project had been revised from $5,781,400 to $1,961,400 the original performance bond issued by AGF to GHL should be cancelled and treated as null and void and should be replaced by a fresh performance bond for $196,140, being 10% of the then contract sum. The letter went on to say that the performance bond which was in their possession would be forwarded to AGF `for cancellation in exchange for a fresh performance bond for $196,140`. Unitrack sent a copy of this letter to AGF, enclosing the original performance bond, which was received by AGF on 13 October 1998.

10 On 23 October 1998, Unitrack commenced an action against GHL and AGF, claiming (a) a declaration that the performance bond was invalid and unenforceable, (b) a declaration that GHL were not entitled to make any demand on the performance bond, (c) an injunction to restrain GHL from seeking or claiming payment from AGF on the performance bond, and (d) an injunction to restrain AGF from making any payment to GHL on the performance bond.

Version No 1: 20 Nov 2026 (01:16 hrs)

11 On 6 November 1998, GHL terminated the contract. On 13 November 1998, they commenced proceedings in Suit No 2080 of 1998 against AGF for the sum of $578,400 under the performance bond.

12 On 13 January 1999, Unitrack applied for an interim injunction to prevent GHL from claiming payment on the performance bond. The application came first before Lim Teong Qwee JC. The learned judge adjourned the application to a special hearing date and in the meantime granted `an interim injunction` restraining GHL from seeking or claiming any payment from AGF on the performance bond until further order. On 26 January 1999, the application was heard before Rubin J. He made an order in the following terms:

13 (1) the interim injunction granted by Lim Teong Qwee JC be continued until further order;

14 (2) that AGF be restrained from cancelling the performance bond until further order;

15 (3) costs of the application be costs in the cause.

16 [See [1999] 3 SLR 621.]

17 ***The appeal***

18 Before us, two main issues were raised. The first relates to the operation of the performance bond. It was not disputed that the bond was expressed to be executed under seal and that after execution thereof by AGF, it was handed to Unitrack and all throughout it remained with the latter, and it was never delivered to GHL. It was argued on behalf of both Unitrack and AGF that the bond had therefore never been `delivered` to GHL as a deed, and as such it had

never come into operation. As this appears to be one of substantive defences which would be raised by Unitrack and AGF in resisting the claim of GHL at the trial, we would leave it to be decided by the trial judge and refrain, at the moment, from expressing any opinion thereon.

19 We now turn to the second issue. In the court below, the learned judge found that there was no evidence of fraud, and counsel for Unitrack, rightly in our view, did not take issue with this. But the learned judge found that in all the circumstances it was unconscionable on the part of GHL to call on the bond, although the learned judge did not expressly use the word `unconscionable` in relation to the circumstances in which he decided to continue the injunction. He said at [para] 17:

> *In my opinion, having regard to the affidavits filed and arguments advanced, it was an undisputed fact that the bond under reference which was issued in June 1997 was not handed over at all to GHL. There was absolutely no explanation in the affidavits filed on behalf of GHL as to why it did not demand its delivery especially when the significance of the original bond had been highlighted in cl 6 therein. The excuse offered by GHL`s counsel that it was due to an oversight, sounded feeble and lacked conviction. In my view, the probabilities were that there was a reluctance on the part of GHL to demand delivery of the bond as issued on account of the substantial reduction of the contract sum. Whilst I was prepared to accept the submissions advanced on behalf of GHL, that the allegations of fraud had no substance, GHL`s inexplicable inactivity and indifference for more than a year to demand and take possession of the bond, led me to conclude that there was substance in the plaintiffs` argument that the parties were content in keeping the bond issued in abeyance and that there was an expectation to have the bond amount revised. Given this scenario and GHL`s noticeable failure to explain why there was no demand issued by them requiring the plaintiffs to deliver the bond since June 1997, I was persuaded that principles of fairness warranted the continuation of the injunction order. As a result, I dismissed GHL`s application and allowed the interim injunction granted by Lim Teong Qwee JC to continue until further order and in the meantime prohibited AGF from cancelling the bond.*

Version No 1: 20 Nov 2026 (01:16 hrs)

20 This conclusion of the learned judge was challenged by GHL before us, and the central issue in this appeal was whether a case of unconscionability on the part of GHL had been made out on the facts. Before we turn to the facts of this case it is necessary, in view of the decision of the High Court in **New Civilbuild Pte Ltd v Guobena Sdn Bhd & Anor** [1999] 1 SLR 374 , to address the question whether unconscionability alone is a ground for restraining a beneficiary of a performance bond such as GHL from enforcing it.

21 ***Unconscionability as separate from fraud***

22 The starting point is this court`s decision in **Bocotra Construction Pte Ltd v A-G (No 2)** [1995] 2 SLR 733 . The facts of that case are well known and may be summarised briefly as follows. The Director-General of the Public Works Department (`PWD`) appointed the plaintiffs as contractors to construct and maintain Phase II of the Central Expressway from Bukit Timah to Chin Swee Road. A dispute arose between them. The plaintiffs claimed damages for breach of contract alleging that the PWD, in breach of contract, prevented them from completing their part of the contract on time. The PWD denied the breach and counterclaimed the costs of remedial works required to be carried out for alleged defects in the plaintiffs` works and liquidated damages for the delay. The matters in dispute were referred to arbitration. While that was pending, the PWD notified the plaintiffs that they intended to call on the performance guarantee issued by Standard Chartered Bank which the plaintiffs had provided under the contract. Thereupon, the plaintiffs immediately initiated proceedings against the PWD (represented by the Attorney General) seeking, ***inter alia*** , a declaration that the PWD was not entitled, until the dispute was finally resolved by arbitration, to claim or receive any sum under the performance guarantee. The consideration for granting such relief is the same as that for granting an interlocutory injunction. The question was therefore whether, if the defendant

Version No 1: 20 Nov 2026 (01:16 hrs)

were a private person, an interlocutory injunction would be granted restraining the defendant from calling on the bond.

23 The application for the declaration was dismissed by the High Court. The plaintiffs appealed, and this court dismissed their appeal. Karthigesu JA delivered the judgment of the court, and at p 746 after referring to various authorities, he concluded thus:

> *In our opinion, whether there is fraud or unconscionability is the sole consideration in applications for injunctions restraining payment or calls on bonds to be granted. Once this can be established, there is no necessity to expend energies in addressing the superfluous question of `balance of convenience`. It does not lie in the mouth of the defendant to claim that damages would still somehow be an adequate remedy.*

24 Later, in rejecting the application of the test of balance of convenience in a case such as the one before the court (although it was applied by Roskill LJ in **Howe Richardson Scale v Polimex-Cekop & Anor** [1978] 1 Lloyd`s Rep 161, 165) Karthigesu JA further said, at p 747:

> *To allay these concerns, we need only note that dispensing with consideration of the balance of convenience does not make an injunction any easier to obtain. Indeed, a higher degree of strictness applies, as the applicant will be required to establish a clear case of fraud or unconscionability in interlocutory proceedings. It is clear that mere allegations are insufficient.*

25 Further, in the concluding part of his judgment at p 748, where he held that this court could not interfere with the exercise of discretion by the High Court, he repeated what he had said earlier as follows:

> *We are unable to find any apparent error to justify interfering with the judge`s exercise of discretion. We are of the opinion that the trial judge had concluded correctly that declaratory relief in terms of prayer 1 should not be granted. While s 27 of the GPA [Government Proceedings Act] permits a declaration to be granted in lieu of any injunction, the appellants had not established their entitlement to an injunction restraining the respondent from*

Version No 1: 20 Nov 2026 (01:16 hrs)

> *calling on the guarantee. In particular, they had not shown, and indeed had conceded that they could not show, that fraud or unconscionability was present on the facts.*

26 It is abundantly clear from the judgment that the court expressly held that `fraud or unconscionability` was a ground on which the court would interfere and restrain the enforcement of a performance bond. It is significant that in that judgment the court on no less than three occasions referred consistently to `fraud or unconscionability` as a ground for the grant of an injunction. We should add that the concept of `unconscionability` was adopted after deliberation, and was not inadvertently inserted as a result of a slip; nor was it intended to be used synonymously or interchangeably with `fraud`. There is nothing in that judgment which can be said to indicate or suggest that the court did not decide that `unconscionability` alone is not a separate ground as distinct from fraud. We accept that to that extent, ***Bocotra*** is a departure, and if we may respectfully say so, a conscious departure, from the English position.

27 After ***Bocotra*** the first case on performance bonds decided purely on the ground of unconscionability was **Raymond Construction Pte Ltd v Low Yang Tong & Anor** (Unreported) . This was also a construction case. The brief facts are as follows. Under a construction contract, the plaintiffs who were contractors undertook to build a double storey detached house for the first defendant, the owner of the land. Pursuant to the contract, the plaintiffs were required to procure for the first defendant a performance guarantee. This they duly did, and a performance guarantee in the amount of $40,419.05 was furnished by the second defendants, AGF Insurance (Singapore) Pte Ltd (which incidentally are also the second defendants in the present case). Subsequently, disputes arose between the plaintiffs and the first defendant, which eventually came to a head when the house was practically completed. The first defendant complained of breaches of contract in that the plaintiffs had failed to rectify

Version No 1: 20 Nov 2026 (01:16 hrs)

certain defects, and the plaintiffs complained of the failure or refusal by the first defendant to pay the sums certified as due. The first defendant called on the performance guarantee and the plaintiffs immediately initiated proceedings against the first defendant, joining AGF as the second defendants. The plaintiffs obtained, ex parte, an interim injunction restraining the second defendants from paying on the guarantee and the first defendant from receiving any payment. The first defendant subsequently applied to discharge the injunction. The application was dismissed by Lai Kew Chai J thus continuing the injunction. In his judgment, the learned judge said at [para] 5:

> ***Bocotra Construction Pte Ltd v AG (No 2)*** *[1995] lays down the rule of law that there must be compelling evidence capable of proving* ***fraud*** *or* ***unconscionability*** *before an injunction may be granted restraining payment under instruments which contain unconditional and irrevocable obligations to pay on demand. The concept of `unconscionability` to me 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. Mere breaches of contract by the party in question (in this case, the first defendant) would not by themselves be unconscionable ... In my view,* ***Royal Design Studio*** *[LP Thean J as he then was] and* ***Kvaerner Singapore*** *[GP Selvam J] are illustrations of the circumstances where payments would have been unconscionable.*

28 Later, the learned judge added the following remarks at [para] 6:

> *So as to place the context in which these remarks were made, there were really two matters which the court was addressing. First, on the authorities considered, the court was elaborating on what would amount to unconscionability sufficiently grave and serious for equity to intervene. That proceeded on the basis that equity would step in to prevent the enforcement of any legal right if such enforcement would have been unjust. Any allegation of fraud was put aside. Secondly, learned counsel for the first defendant contended that mere allegations of breaches of contract by the first defendant did not amount to unconscionability. I agreed with him.*

29 and came to the following conclusion at [para] 35:

Version No 1: 20 Nov 2026 (01:16 hrs)

> *Having considered all the evidence, I was driven to the conclusion that evidence was strongly suggestive that the conduct of the first defendant from first to last was most unfair and it was against the court`s conscience to have allowed him to insist on his pound of flesh. Plainly he could not be allowed to get at the money and add insult to injury until trial. There [was] strong evidence that he would postpone meeting his financial commitments by tactics of all sorts. The way he drew his cheques and the delays in his payments were legendary and habitual, if one took into account the fact that he has the unusual hallmark of being the subject of bankruptcy notices and suits for defaults in meeting his commitments ...*

30 Thus, in this case the interim injunction was granted purely on the ground of unconscionability.

31 We now turn to the recent decision of the High Court in ***New Civilbuild Pte Ltd v Guobena Sdn Bhd & Anor*** (supra). That case too involved a construction contract. The first defendants (`Guobena`) were main contractors for the Tanglin Regency condominium project. They sub-contracted the external structural and architectural works for the main and ancillary buildings to the plaintiffs. Under the sub-contract, the plaintiffs were obliged to provide a performance bond equal to 10% of the contract price, which amounted to approximately $1.6m. This they duly did. Subsequently, disputes arose between them and the first defendants made a demand on the performance bond on the insurance company, which issued the bond. The plaintiffs denied that they had breached their obligations under the contract, and obtained ex parte an interim injunction restraining the first defendants from calling on the bond. The first defendants thereupon applied to discharge the injunction, and at the inter partes hearing the learned judge discharged the injunction on two grounds: first, that there was a non-disclosure of material facts by the plaintiffs, and secondly, that there was no evidence of fraud on the part of the second defendants and that unconscionability alone was not a separate ground for an injunctive relief. His

Version No 1: 20 Nov 2026 (01:16 hrs)

decision on the first ground was eminently right, and no issue arose in that respect.

32 The learned judge went on to deal with the second ground. In deciding on that ground the learned judge considered the question whether since ***Bocotra*** there existed a separate ground of `unconscionability`, apart from that of `fraud`, which could prevent the defendants from enforcing the bond. After quoting extensively passages from the judgment in ***Bocotra*** , he said at [para] 33-35:

> 33 I have set out in detail the judgment of the Court of Appeal in the ***Bocotra*** case so as to better appreciate the context in which the term `unconscionability` ought to be understood. At no point did the court discuss the scope of this concept of `unconscionability`. As shown above, the court first stated (at p 744) that the weight of authority suggested that the sole exception permitting injunctive relief was fraud and held that there was no difference between the principles to be applied in dealing with attempts to restrain banks from paying and callers from calling for or receiving payment. It is well established that banks cannot be restrained other than for fraud. Therefore the Court of Appeal had held in the ***Bocotra*** case that the same position obtains where the application is in respect of the caller.
>
> 34 The term `unconscionability` first appeared after a discussion of the question whether the balance of convenience test applied in such applications, the court holding that once it is found that `fraud or unconscionability` is established, there is no need to address the question of balance of convenience. Thereafter, the word `unconscionability` appeared alongside the word `fraud` in two other places …
>
> 35 Given that the Court of Appeal had stated that the weight of authority had suggested that fraud as the sole exception was well entrenched, I do not understand the court as having changed the law without a discussion of the basis for it. Indeed, upon an examination of the cases cited to the court, there is no doubt that such is the overwhelming weight of authority.

33 The learned judge then considered the leading English cases: **Howe Richardson Scale Co v Polimex-Cekop** [1978] 1 Lloyd`s Rep 161, **RD Harbottle (Mercantile) v National Westminster Bank** [1978] QB 146, **The**

Version No 1: 20 Nov 2026 (01:16 hrs)

Bhoja Trader; Intraco v Notis Shipping Corp of Liberia [1981] 2 Lloyd`s Rep 256, **State Trading Corp of India v ED & F Man (Sugar)** [1981] Com LR 235 and **Potton Homes v Coleman Contractors** [1984] 28 Build LR 19 and concluded at [para] 43:

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

34 With respect, for the reasons we have given in [para] 16 above we are unable to agree with the learned judge that this court did not in ***Bocotra*** decide that `unconscionability` is a separate exception permitting injunctive relief. True, as the learned judge said, the court `did not discuss the scope of this concept of unconscionability`, but then, nor did the court discuss the scope of `fraud`, and the concept of `unconscionability` is not a novel one, indeed no more novel than `fraud`. It should be noted that in ***Bocotra*** , this court considered not only the English authorities but the Singapore authorities as well: **Royal Design Studio v Chang Development** [1990] SLR 1116 ; **Kvaerner Singapore Ltd v UDL Shipbuilding (Singapore) Ltd** [1993] 3 SLR 350 ; and **Chartered Electronics Pte Ltd v Development Bank of Singapore Ltd** [1999] 4 SLR 655 , although this last case was not expressly referred to in the judgment. ***Royal Design Studio*** was decided on the ground of unconscionability, although the word `unconscionability` was not expressly used there; but the circumstances in which the injunction was continued were clearly those warranting the description of unconscionability. ***Kvaerner Singapore*** was decided partly on the ground of unconscionability and did not

Version No 1: 20 Nov 2026 (01:16 hrs)

strictly follow the `fraud` exception principle laid down in the English cases. GP Selvam J said at p 353:

> *The defendants invoked the principle in* ***Edward Owen Engineering Ltd v Barclays Bank International Ltd*** *[1978] QB 159 that except in cases of established fraud known to the issuer of the performance guarantee he cannot be restrained from making payment on the ground that the party to the underlying contract disputes liability. Later cases show that it is not an immutable principle of universal application. And in my view it has no application where the injunction is sought against a party to the underlying contract who seeks to take advantage of the performance guarantee where by his own volition he fails to perform a condition precedent in the sense I have described ...*
>
> *Furthermore, a demand under the performance guarantee can be made only when `the seller has failed or refused to fulfil his obligations under the contract`. The seller`s failure or refusal is a condition precedent to the buyer making a demand. An assertion to that effect is implied in a demand made by the buyer. In circumstances where it can be said that the buyer had no honest belief that the seller has failed or refused to perform his obligation, a demand by the defendants/buyers in my view is a dishonest act which would justify a restraint order. On the facts of the case a demand made by the buyer was utterly lacking in bona fides. For all these reasons I continued the injunction until further order.*

35 In ***Chartered Electronic Industries*** (supra), Chan Sek Keong J (as he then was) also did not strictly follow the English cases of established fraud, in particular in the application of the standard of proof of fraud. In that case, the plaintiffs entered into a contract with overseas buyers for the supply of certain articles and as security for the performance of the contract, the defendant bank at the instance of the plaintiffs issued a performance guarantee. After the contract had been substantially performed by the plaintiffs, dispute arose between them and the buyers. While the dispute was in progress, the buyers called on the bond and the plaintiffs obtained, ex parte, two interim injunctions against the bank, restraining them from paying on the bond. At the inter partes hearing, Chan Sek Keong J continued the injunctions until trial on the ground

Version No 1: 20 Nov 2026 (01:16 hrs)

of a strong prima facie case of fraud on the part of the buyers. The learned judge said at [para] 45:

> *In the circumstances, there was strong evidence that the demands for payment of US$407,040 under the performance guarantee was not made bona fide. There was no way that the buyers could have justified the demand for that amount since they had retained the second shipment valued at US$759,740.16 (with interest thereon at 4% per annum payable after 12 months from date of presentation of documents). On these materials and having regard to the circumstances of the demands for payment, and the form and substance of such demands, I formed the view (a) that the plaintiffs had more than satisfied the test of a strong prima facie case of fraud, and (b) that if the Ackner standard were applicable, the only realistic or reasonable inference to be drawn from the materials before me was that the buyers could not have honestly believed that they were entitled to the amount of the damages they had demanded.*

36 It seems to us that Chan Sek Keong J used the term fraud in a somewhat broad sense (when he characterised the claim as not being made bona fide) and not strictly in the sense applied in the English cases, such as ***RD Harbottle*** , ***Howe Richardson*** , and ***Edward Owen Engineering*** (supra). Fraud in the common law sense implies more than a mere absence of bona fides in the claim. It implies an element of deceit on the part of the beneficiary, that is to say, a case where the beneficiary presents a claim on the performance bond which he knows at the time to be invalid or false: **GNK Contractors Ltd v Lloyds Bank plc & Anor** [1985] 30 Build LR 48, 63.

37 This court in ***Bocotra*** did not overrule or disapprove any of these local cases. At pp 744-776 of the judgment, after expressly referring to the English cases and the local cases (except ***Chartered Electronics***) and also the obiter dictum of Everleigh LJ in **Potton Homes v Coleman Contractors (Overseas)** [1984] 28 Build LR 19, 28, the court came to the concluding paragraph at p 776 which we have quoted above. Thereafter, the court referred expressly to the ground of `fraud or unconscionability` at pp 747 and 748, which, again, we have

Version No 1: 20 Nov 2026 (01:16 hrs)

quoted above. In our opinion, the court made a conscious decision and advisedly used the words `fraud or unconscionability`.

38 Reverting to ***New Civilbuild*** , the learned judge there in the concluding part of his judgment made the following broad observations at [para] 45:

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

39 We are in general agreement with him. Of course, we are unable to accept that the `road may well be too far travelled now to admit of any such concept` as unconscionability. On the contrary, the cases which we have referred to show that such a concept has been applied over the recent years. Very recently, soon after ***New Civilbuild*** was decided, the High Court in another case on performance bonds, **Min Thai Holdings Pte Ltd v Sunlabel Pte Ltd & Anor** [1999] 2 SLR 368 , to which we shall advert in a moment, applied the concept of unconscionability. We agree that performance bonds are used frequently in the construction industry; that they are provided by and to parties

Version No 1: 20 Nov 2026 (01:16 hrs)

who deal at arm`s length; that the use of performance bonds has resulted in substantial benefits to the parties and also in savings; that the courts should give effect to the intention of the parties; and that the law in relation to performance bonds should be placed on `a clear and unambiguous footing` so that they could be accepted by parties whether in Singapore or abroad. But, with respect, these are not the points involved with which we are concerned. We are concerned with abusive calls on the bonds. It should not be forgotten that a performance bond can operate as an oppressive instrument, and in the event that a beneficiary calls on the bond in circumstances, where there is prima facie evidence of fraud or unconscionability, the court should step in to intervene at the interlocutory stage until the whole of the circumstances of the case has been investigated. It should also not be forgotten that a performance bond is basically a security for the performance of the main contract, and as such we see no reason, in principle, why it should be so sacrosanct and inviolate as not to be subject to the court`s intervention except on the ground of fraud. We agree that a beneficiary under a performance bond should be protected as to the integrity of the security he has in case of non-performance by the party on whose account the performance bond was issued, but a temporary restraining order does not prejudice or adversely affect the security; it merely postpones the realisation of the security until the party concerned is given an opportunity to prove his case (per Chan Sek Keong J in ***Chartered Electronic*** at p 31 of the transcript).

40 We now come to the case of ***Min Thai Holdings Pte Ltd v Sunlabel Pte Ltd & Anor*** (supra). The facts as found by the judge hearing the application for the discharge of the injunction were briefly these. There was, among other things, a contract between the plaintiff (`Min Thai`) and the first defendant (`Sunlabel`) whereby Min Thai agreed to source and supply rice from certain parts of China for Sunlabel. One of the terms of the contract was that Min Thai

Version No 1: 20 Nov 2026 (01:16 hrs)

would cause a performance guarantee to be issued in favour of Sunlabel and accordingly a performance guarantee was issued to Sunlabel by Allied Irish Bank plc at the instance of Min Thai. The contract also incorporated the `Force Majeure` conditions under the ICC rules and regulations. Some time after the performance guarantee was issued, China was subjected to exceptional rainfall, exacerbated by typhoons and floods in various parts of China which caused Min Thai to default in their delivery. Sunlabel subsequently made a demand on the performance guarantee. Min Thai commenced an action against Sunlabel and another party seeking a declaration that the contract for the delivery of the rice was no longer valid and binding by reason of force majeure and that Sunlabel were consequently not entitled to receive any money under the performance guarantee. At or immediately after the commencement of the suit, Min Thai applied ex parte for an interim injunction to restrain Sunlabel from calling on and receiving any sum under the performance guarantee. The application was heard before S Rajendran J, but it was heard as an opposed ex parte application. It appeared that before the learned judge counsel for Min Thai argued that in all the circumstances it was unconscionable for Sunlabel to call on the bond. The learned judge also heard argument from counsel for Sunlabel to the contrary. At the conclusion, the learned judge granted the interim injunction but with liberty to Sunlabel to apply for a discharge of the injunction. Soon thereafter, Sunlabel applied to discharge the injunction, and the inter partes hearing came before Lai Kew Chai J who dismissed the application. The learned judge found that it was unconscionable for Sunlabel to attempt to receive moneys under the performance guarantee. He said at [para] 28:

> *In those circumstances, I concluded that it was unconscionable for Sunlabel to attempt to receive payment under the performance guarantee. They were perfectly entitled to make a call on the guarantee, seeing that there was an expiry date, but they should have in all good conscience offered to let the money remain, say, in the Allied Irish Banks plc to be held to the orders of Sunlabel*

Version No 1: 20 Nov 2026 (01:16 hrs)

> *and Min Thai pending the resolution of disputes between Min Thai and Sunlabel and the disputes, if any, between Finorgan and Sunlabel.*

41 Against this dismissal Sunlabel appealed, but the appeal was dismissed by this court.

42 ***The facts***

43 We now turn to the facts of the present case. The contract for the project was made on 24 April 1997 or thereabouts, and the contract sum was $5,781,400 which included sub-contact works. It was contemplated then that in respect of these works, sub-contracts would be entered into between Unitrack and sub-contractors nominated by Ben Architects, GHL`s architects. Under the contract, Unitrack were obliged to procure the issue of a performance bond for an amount equal to 10% of the contract sum. Pursuant to the contract, the performance bond was issued by AGF on 26 June 1997 but was kept by Unitrack at all material times and was not handed to GHL. The explanation given by Unitrack was that the delivery of the bond to GHL was initially held up owing to the delay by GHL`s architects in the nomination of the sub-contractors and the preparation of the sub-contract documents. This was disputed by GHL. Be that as it may, the fact remained that for well over 15 months GHL had never asked for the performance bond and it had remained with Unitrack right throughout.

44 On 30 April 1998, the position materially changed. The contract sum was drastically revised downwards to $1,961,400 by the exclusion therefrom of the entire amount of $3,820,000 for the sub-contract works to be carried out by sub-contractors. GHL then made contracts with the sub-contractors and dealt with them directly. It was submitted by counsel on behalf of GHL that the revision of contract sum did not ipso facto mean that the performance bond

Version No 1: 20 Nov 2026 (01:16 hrs)

would correspondingly be revised. He pointed out that under the contract there were provisions which specifically provided for the variation of the contract price under certain conditions and it could not be the intention that each time the contract price was varied, the performance bond would be correspondingly revised. We agreed with this proposition as a statement of general principle. However, the matter must be approached pragmatically considering all the facts. There was a drastic revision of the contract sum downwards by about 65% and after the revision the sub-contracts works were taken out of the contract and GHL entered into direct contracts with the sub-contractors. In consequence, there would be no sub-contracts entered into between Unitrack and the sub-contractors and Unitrack would not have the benefit of similar performance bonds from them to back up their performance bond to the extent originally contemplated.

45 As between GHL and Unitrack, the latter`s commitment under the contract was considerably reduced and similarly the security for such commitment would, in normal cases, be correspondingly reduced. GHL had not adduced any evidence to the effect that it was agreed that, notwithstanding the revision of the contract sum, the amount of performance bond would continue to be 10% of the original contract sum. It seems to us that in all probabilities after the revision of the contract on 30 April 1999 the parties contemplated that the amount of the bond would be correspondingly revised downwards to 10% of the revised contract sum and the bond that had been executed by AGF was not to be the bond issued pursuant to the contract.

46 It was further argued on behalf of GHL that even after the contract was revised, Unitrack continued to claim from GHL profit and attendance fees on the sub-contract works and they therefore continued to be responsible for the due completion of the entire project in their capacity as main contractor. This

Version No 1: 20 Nov 2026 (01:16 hrs)

argument is fallacious. In the absence of any contract to the contrary, we do not see how they could still be responsible for the due completion of the works by the sub-contractors with whom GHL had entered into contracts. At any rate, irrespective of whether the sub-contract works were part of the main contract or not, it is normal for the main contractors to charge a profit and attendance fees on the works performed by the sub-contractors.

47 Under cl 40 of the SIA terms, GHL was only entitled to a performance bond for an amount equal to 10% of the contract sum. The contract sum had been revised downwards by approximately 65% to $1,961,400, and 10% of the contract sum as revised would be $196,140. By calling on the performance bond for $578,140 GHL was, in effect, seeking to obtain the full face value which was based on the original contract sum of $5,781,400 and which represented about 30% of the revised contract sum.

48 In all the circumstances, like the learned judge below, we found that it was clearly unconscionable on the part of GHL to call on the performance bond. We therefore dismissed the appeal.

49 **Outcome:**

50 Appeal dismissed.

Lai Kew Chai J
L P Thean JA

Version No 1: 20 Nov 2026 (01:16 hrs)

GHL Pte Ltd v Unitrack Building Construction Pte Ltd and Another [1999] SGCA 60

Chong Yee Leong and Eileen Tay (Rajah & Tann) for the appellants
Tan King Kai (Tang & Partners) for the first respondent
Florence Koh Lee Kheng (Tan & Koh Partnership) for the second respondent

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Version No 1: 20 Nov 2026 (01:16 hrs)