BS Mount Sophia Pte Ltd *v* Join-Aim Pte Ltd
[2012] SGCA 28

Case Number	: Civil Appeal No 143 of 2011
Decision Date	: 09 May 2012
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Lawrence Teh, Melvin See and Daniel Tay (Rodyk & Davidson LLP) for the appellant; Tan Chee Meng SC and Quek Kian Teck (WongPartnership LLP) for the respondent.
Parties	: BS Mount Sophia Pte Ltd — Join-Aim Pte Ltd

Credit and security

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2012] SGHC 3.]

9 May 2012

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

1 This was an expedited appeal against the decision of the first instance judge ("the Judge"), ordering that an interim injunction restraining the Appellant from calling on a performance bond provided by the Respondent, which was granted on an *e x parte* basis, was to stand pending arbitration between the parties. The appeal was expedited because the performance bond was due to expire on 26 February 2012, before the arbitration between the parties, which was scheduled for late April 2012. The Judge had ordered the interim injunction to stand pending arbitration in Originating Summons No 643 of 2011 ("OS 643/2011") on the basis that the Appellant's call on the bond was unconscionable. The Judge's decision can be found in *Join-Aim Pte Ltd v BS Mount Sophia Pte Ltd and another* [2012] SGHC 3 ("the GD"). After hearing the parties on 7 February 2012, we dismissed the appeal and allowed the injunction to remain. However, our reasons for so doing differed somewhat from those of the Judge. We now set out the detailed grounds for our decision.

The background

2 The Appellant was a property developer and the Respondent was a contractor. Pursuant to a building contract dated 28 February 2008 ("the Contract"), the Appellant employed the Respondent to construct a residential condominium development at 95 Sophia Road, Singapore. The contract had a value of $9,688,800. As required by the Contract, the Respondent provided the Appellant with a performance bond ("the Bond") to secure the performance of the Respondent's obligations under the Contract. The Bond was for the sum of $484,440, or 5% of the value of the Contract, and was provided by Liberty Insurance Pte Ltd ("Liberty") who was not a party to the present appeal. The Bond was addressed to the Appellant from Liberty, and the relevant provisions of the Bond are as follows: [note: 1]

> 1. In consideration of you [the Appellant] not insisting on the [Respondent] paying SINGAPORE DOLLARS FOUR HUNDRED EIGHTY FOUR THOUSAND FOUR HUNDRED AND FORTY ONLY (S$484,440/-) as a security deposit for the Contract, we [Liberty] hereby irrevocably and unconditionally undertake[s] ... to pay to you on demand any sum or sums which from time to

time may be demanded by you up to a maximum aggregate of SINGAPORE DOLLARS FOUR HUNDRED EIGHTY FOUR THOUSAND FOUR HUNDRED AND FORTY ONLY (S$484,440/-)...

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 [Respondent] and *notwithstanding any dispute or difference* which may have arisen under the Contract *or any instruction which may be given to us by the [Respondent] 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, or

(b) the respective rights, obligations and/or liabilities of yourselves and the [Respondent] under the Contract...

[emphasis added]

3 The parties did not dispute that the Bond was in the nature of an on-demand performance bond (hereafter, all references to "performance bonds" will be to such bonds, *viz*, on-demand performance bonds), and we agreed that this was so based on the true construction of the instrument. As was held by this court in *JBE Properties Pte Ltd v Gammon Pte Ltd* [2011] 2 SLR 47 ("*JBE*") at [17]:

> The threshold question for the purposes of ascertaining the nature of the Bond is whether, on a true construction of that instrument, the Bank was liable to pay on demand, or only later, upon proof of breach by [the contractor-obligor] and loss by [the employer-beneficiary]. The construction process looks to the substance of the parties' rights and obligations under the Bond; *the label adopted by the parties is inconclusive*. [emphasis added]

The substance of the parties' rights and obligations under the Bond was that Liberty was obliged to pay the Bond sum immediately upon demand by the Appellant, and was not under a duty to inquire into the circumstances underlying the demand. In particular, Liberty would not concern itself with any instruction given by the Respondent to withhold payment on the Bond. Therefore, the only way the Respondent could restrain a call on the Bond was to apply to the court for an injunction.

4 The Appellant made a partial call on the Bond for the sum of $360,084.62 on 27 July 2011, and the Respondent applied in OS 643/2011 for an injunction pending arbitration. Before this application was heard, the Respondent successfully applied for an *ex parte* interim injunction by way of Summons No 3360 of 2011 on 2 August 2011, to restrain the Appellant from calling on the Bond until the hearing of OS 643/2011. On 11 October 2011, OS 643/2011 was heard *inter partes*, and on the same day the Judge ordered that the interim injunction be allowed to stand pending arbitration of certain contractual disputes between the parties, which order was the subject of the present appeal.

5 The circumstances surrounding the Appellant's call on the Bond and the contractual disputes between the parties related to the time for completion of the construction works under the Contract ("the works") and the consequent alleged liability of the Respondent to pay the Appellant liquidated damages.

6 The framework contained in the Contract for determining the time for completion was as

follows. The Contract provided that the Respondent had to complete the works by 1 January 2010 ("the contractual completion date"). The Architect engaged for this project was Ronny Chin & Associates, and it was the Architect who would determine if the Respondent had completed the works, and the date the works were completed ("the actual completion date"). The Architect would then issue a Completion Certificate. The Respondent could be entitled to extensions of time to complete the works if it sought the Architect's approval, and, if the Architect granted such extensions, the contractual completion date would be modified to take the extensions into account. Crucially, it was the Architect who determined both the actual completion date and the grant of any extensions of time.

7 If the actual completion date was later than the contractual completion date (taking into account periods of extension), then the Architect would issue a Delay Certificate which would certify that the Respondent was in default. This Delay Certificate would entitle the Appellant to recover liquidated damages at the rate of $6,000 from the Respondent for every day of delay.

8 The Appellant called on the Bond on 27 July 2011 because it allegedly believed that it was entitled to liquidated damages from the Respondent for delay in the completion of the works allegedly caused by the Respondent.

The proceedings below

9 Before the Judge, the Respondent's case was that the Appellant's call on the Bond was unconscionable because the Appellant called on the Bond despite not being entitled to any liquidated damages. The Respondent relied on its interpretation of the events prior to the call on the Bond in support of its claim. The sequence of events just prior to the Appellant's 27 July 2011 call on the Bond, in so far as it was supported by documentary evidence, was as follows; and, in summary, there were three strands to the sequence which could be teased out from the longer yarn.

10 The first strand relates to the parties' dispute on the completion date. The Architect issued a Delay Certificate [note: 2] dated 4 March 2011 (it should be noted that the Delay Certificate was only sent by the Architect to the parties on 24 June 2011) [note: 3] certifying that the Respondent was entitled to 93 days' extension time and that the contractual completion date was to be extended to 4 April 2010. The Delay Certificate further stated that the Respondent was in default for not having completed the works by 4 April 2010. The Architect also issued a Completion Certificate dated 4 March 2011 [note: 4] certifying that the works had been completed on 27 August 2010. However, the Respondent disputed the Architect's findings. In a letter dated 31 March 2011 to the Architect, the Respondent stated that it did not agree that the works had been completed on 27 August 2010. [note: 5] The Architect responded by letter on the same day and stated that it maintained that the works had been completed on 27 August 2010 because the works had only been cleared by the authorities on that date. [note: 6]

11 The Respondent later made a further request for an extension of time. In a letter dated 24 May 2011 to the Architect, [note: 7] the Respondent requested an extension of 298 days, which, if granted, would bring the extended contractual completion date to 27 August 2010, indicating that the Respondent would not need to pay liquidated damages. The Architect denied this request, and replied in a letter dated 22 June 2011 [note: 8] that the "revised completion date shall indicatively be 4th April 2010".

12 On 15 July 2011, the Respondent referred the dispute on the completion date and the extension

of time to arbitration, pursuant to cl 37(1) of the Contract which stated, *inter alia*, that all disputes arising out of the Contract or relating to the Architect's directions, instructions and certificates *shall* be referred to arbitration. There was no response to this from the Appellant, and on 27 July 2011 the Appellant called on the Bond.

13 The second strand relates to the Respondent's claim for a progress payment. On 16 May 2011, the Respondent submitted Progress Claim No 30 (Revision 4) to the Appellant for the sum of $1,197,669.68. The Respondent maintained that this sum remains outstanding (see the GD at [20]). [note: 9]

14 The third strand relates to a demand made by the Appellant that the Respondent extend the validity of the Bond. On 21 June 2011, the Architect sent the Respondent an "Architect's Direction" with reference number AD-40. [note: 10] This document referred to Architect's Direction AD-38 dated 6 June 2011 and reminded the Respondent that AD-38 required that the Respondent extend the validity of the Bond to 26 February 2012, failing which the Appellant would not hesitate to call on the Bond. It should be noted that, as at 6 June 2011, the Bond was due to expire on 30 November 2011. [note: 11] By a letter dated 5 July 2011 from the Respondent's lawyers to the Appellant, the Respondent stated that it maintained its opposition to the 27 August 2010 completion date and that it was taking steps to extend the validity of the Bond on a "without prejudice" basis. [note: 12] On 7 July 2011, the validity of the Bond was extended to 26 February 2012. [note: 13]

15 Relying primarily on the first and second strands of the sequence of events set out above, the Respondent claimed before the Judge in the proceedings below that the Appellant was not entitled to any liquidated damages because the Delay Certificate was not issued in accordance with the Contract and that any delays were caused by the Appellant or its consultants. The Respondent also submitted that the call on the Bond was made in bad faith and for a collateral purpose because it was made in retaliation to the Request for Arbitration. The Respondent further submitted that it was unfair for the Appellant to call on the Bond and receive payment when the sum of $1,197,669.68 under Progress Claim No 30 (Revision 4) remained due and outstanding.

16 At the hearing of 11 October 201l, the Judge was of the view that the issues raised by the Respondent in support of its case should be characterised as "run of the mill construction disputes which were properly the subject of the arbitration" (see the GD at [29]). The Judge thus did not make any findings on the above issues and preferred, instead, to base his decision on an email that had been adduced by counsel for the Respondent at the hearing of 11 October 2011 itself and which was subsequently admitted into evidence. This email was sent by one Elfren Turiano, an associate of the Architect, and was addressed to the Respondent, the Appellant, the Project Consultant, the Quantity Surveyor and the Structural Engineer. The email ("the 4 October 2010 email") stated: [note: 14]

> Monday 4 October 2010
>
> [Subject:] 95 Sophia Road – Completion Cert
>
> ...
>
> Dear All,
>
> We are currently preparing the Completion Cert and we came up to finalised [sic] the date on *July 19th* as the practical completion date.

Please revert back to us if you have any comment or objections before 8th October.

Regards,

Elfren Turiano

Architectural Associate

RONNY CHIN ARCHITECTS PTE LTD

...

[emphasis added]

17 Based on the above email, the Judge reasoned as follows. The 4 October 2010 email appeared to demonstrate that the contractual completion date was backdated from 19 July 2010 to 4 April 2010. As a result of this backdating, the Respondent was liable for $700,000 in liquidated damages which formed the basis of the Appellant's call on the Bond. This backdating was alleged to have been the result of an understanding between the Architect and the Appellant, the gist of which was to increase the amount of liquidated damages payable by the Respondent. If established, this would clearly militate against the *bona fides* of the Appellant's call on the Bond. Therefore the Judge found the 4 October 2010 email to be the most robust peg on which to hang a finding of a strong *prima facie* case of unconscionability justifying the grant of the injunction. It seems clear that the Judge was of the view that the evidence contained in the 4 October 2010 email and the subsequent use of 4 April 2010 as the completion date were sufficient to dispose of the matter before him.

The applicable legal principles

The rationale for unconscionability as a ground for relief

18 It is settled law that unconscionability, as distinct from fraud, is a ground upon which the court can grant an injunction restraining a beneficiary of a performance bond from calling on the bond (see, *eg*, the decisions of this court in *Bocotra Construction Pte Ltd and others v Attorney-General* [1995] 2 SLR(R) 262 ("*Bocotra*") and *JBE*). In so far as the *rationale* for adopting unconscionability as a relevant ground is concerned, the following observations by this court in *JBE* (at [10]–[13]) bear repeating:

> 10 The Singapore courts' rationale in applying unconscionability as a separate and independent ground for restraining a call on a performance bond (especially one given by the contractor-obligor in a building contract) is that a performance bond serves a different function from a letter of credit. The latter performs the role of payment by the obligor for goods shipped to it by the beneficiary (typically via sea or air from another country), and "has been the life blood of commerce in international trade for hundreds of years" (see [*Chartered Electronics Industries Pte Ltd v Development Bank of Singapore* [1992] 2 SLR(R) 20 ("*Chartered Electronics*")] at [36]). Interfering with payment under a letter of credit is tantamount to interfering with the *primary* obligation of the obligor to make payment under its contract with the beneficiary. Hence, payment under a letter of credit should not be disrupted or restrained by the court in the absence of fraud. In contrast, a performance bond is merely security for the *secondary* obligation of the obligor to pay damages *if* it breaches its primary contractual obligations to the beneficiary. A performance bond is not the lifeblood of commerce, whether generally or in the context of the construction industry specifically. Thus, a less stringent standard (as compared to the standard

applicable *vis-à-vis* letters of credit) can justifiably be adopted for determining whether a call on a performance bond should be restrained. We should also add that where the wording of a performance bond is ambiguous, the court would be entitled to interpret the performance bond as being conditioned upon facts rather than upon documents or upon a mere demand, contrary to the *dictum* of Staughton LJ in *IE Contractors Ltd v Lloyds Bank Plc and Rafidain Bank* [1990] 2 Lloyd's Rep 496 at 500.

11 Even where a performance bond is expressed to be payable "on first demand without proof or conditions" (as in *Edward Owen Engineering* ([[1978] 1 QB 159] at 170)), which, strictly speaking, means the paying bank is contractually obliged to pay the beneficiary once it makes a call on the performance bond, there is no reason why fraud (which is often difficult to prove) should be the sole ground for restraining the beneficiary from receiving payment. To adopt such a position is to "apply a standard of proof which will virtually assure the beneficiary [of] ... immediate payment ... and ... does nothing more than to transfer the security from the [paying bank] ... to the beneficiary" (see *Chartered Electronics* at [37]). This may in turn cause undue hardship to the obligor in many cases. For instance, where a call is made in bad faith, especially a call for payment of a sum well in excess of the quantum of the beneficiary's actual or potential loss, the beneficiary will gain more than what it has bargained for. Furthermore, if the amount paid to the beneficiary pursuant to a call is subsequently proved to be in excess of the quantum of its actual loss, the obligor runs the risk of being unable to recover any part of the excess amount should the beneficiary become insolvent. Yet another relevant consideration is that an excessive or abusive call can cause unwarranted economic harm to the obligor. This is particularly relevant in the context of the construction industry, where liquidity is frequently of the essence to contractors. In this regard, while the sum stipulated to be paid under a performance bond is usually pegged at only 5% to 10% of the contract price, this typically amounts to one or more progress payments under a building contract. In very large building contracts, the deprivation of a whole progress payment might well be fatal to the contractor-obligor's liquidity. These concerns are by no means fanciful, as evidenced by the mechanisms evolved by the construction industry to ensure the quick settlement of disputes relating to progress payments.

12 In [Peter Ellinger & Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing, 2010)] (at p 326), the authors argue, in the context of the construction industry, that where the employer-beneficiary has sacrificed a stronger position for a weaker one (*eg*, where it has accepted a performance bond in substitution for security in the form of a cash deposit, which is the position in the present case … , it would be justifiable to apply the autonomy principle to the performance bond and treat it as though it were a letter of credit. We find it difficult to agree with this argument for several reasons. First, as a matter of principle, the utilisation of a cash deposit provided as security for the performance of the contractor-obligor's obligations under a building contract should be treated no differently from the making of a call on a performance bond, which is "third-party" security in that it is always provided by an entity other than the contractor-obligor. It is true that it will be more difficult (if not impossible) in practice to restrain the use of a cash deposit than it will be to restrain the (third-party) paying bank from paying out on a performance bond. But, this will be the case no matter what test is adopted for restraining a call on a performance bond. Moreover, the greater ease, in practical terms, of restraining a call on a performance bond (as compared to restraining the utilisation of a cash deposit provided as security for contractual performance) is a factor which the employer-beneficiary must be taken to have considered and accepted in preferring a performance bond to a cash deposit. In other words, the employer-beneficiary would have a reason for accepting, as security for the contractor-obligor's contractual performance, a performance bond rather than a cash deposit. One reason could be that the contractor-obligor might have priced its bid for the building contract differently if it had to provide a cash deposit as security for its performance of the

contract. In our view, the mere fact that the employer-beneficiary agreed to accept a performance bond in lieu of a cash deposit should not be material in determining whether a call on a performance bond should be restrained.

13 In our view, the Singapore position on the circumstances in which the court may restrain a call on a performance bond is justified for the functional and commercial reasons mentioned earlier (at [10]–[12] above). The juridical basis for adopting unconscionability as a relevant ground (separate from and independent of fraud) lies in the equitable nature of the injunction. Considerations of conscionability are applicable in relation to the use of the injunction in other areas of the law, and there is no reason why these considerations should not be applied for the purposes of determining whether a call on a performance bond should be restrained so as to achieve a fair balance between the interests of the beneficiary and those of the obligor.

[emphasis in original]

19 The elements of unconscionability are also fairly uncontroversial, and have been variously stated to include elements of abuse, unfairness and dishonesty (see, *eg*, the decision of this court in *GHL Pte Ltd v Unitrack Building Construction Pte Ltd* [1999] 3 SLR(R) 44 ("*GHL*") and *Dauphin Offshore Engineering & Trading Pte Ltd v The Private Office of HRH Sheikh Sultan bin Khalifa bin Zayed Al Nahyan* [2000] 1 SLR(R) 117 ("*Dauphin*") as well as below at [42]–[45]). We pause to observe, parenthetically, that, although the unconscionability exception is apparently only firmly established in the Singapore context, there is a similar scope for the exercise of such an exception – albeit from a *statutory* standpoint – in Australia *via* (in particular) s 51AA of the Trade Practices Act 1974 (No 51 of 1974) (Aust) (see now s 20(1) of the Australian Consumer Law (Vol 3, Sch 2 of the Competition and Consumer Act 2010) (Cth)); and see generally Nelson Enonchong, "The problem of abusive calls on demand guarantees" [2007] LMCLQ 83 ("*Enonchong's article*") at pp 99–100 and also Nelson Enonchong, *The Independence Principle of Letters of Credit and Demand Guarantees* (Oxford University Press, 2011) ("*Enonchong's book*") at paras 7.37–7.49 as well as Thanuja Rodrigo, "Theoretical justifications for restraining "unconscionable" demands under on-demand guarantees" (2012) 40 ABLR 5. The position in Malaysia appears to be in a state of flux (see Poh Chu Chai, *Law of Pledges, Guarantees and Letters of Credit* (LexisNexis, 5th Ed, 2003) at pp 933–936 as well as Low Kee Yang, Eugene Ooi & Elizabeth Wong, "Unconscionable Calls on Performance Bonds: A Bold New Exception" in ch 21 of *Singapore Academy of Law Conference 2006 – Developments in Singapore Law between 2001 and 2005* (Teo Keang Sood gen ed) (Singapore Academy of Law, 2006) at pp 845–847; though *c f Enonchong's article* at p 100 and *Enonchong's book* at paras 7.56–7.58). It is also noteworthy that the unconscionability exception in Singapore has also been referred to (and even substantially discussed) in established textbooks by leading foreign writers (see, *eg*, Geraldine Mary Andrews QC & Richard Millett QC, *Law of Guarantees* (Sweet & Maxwell, 6th Ed, 2011) at paras 16-027–16-028 and *Benjamin's Sale of Goods* (M Bridge gen ed) (Sweet & Maxwell, 8th Ed, 2010) at para 24-033).

The high threshold for establishing unconscionability

20 Of greater significance in the context of the present appeal is the necessary threshold of unconscionability that has to be established before the court will exercise its discretion to grant an injunction. Indeed, as we shall see, it is precisely this threshold that constitutes the key to resolving the relevant tension that exists, which tension we will address in a moment (see generally below at [26]–[46]). It is important to note, at the outset, that the law in this regard is settled. Simply put, the threshold is a high one, and the burden that the applicant has to discharge is to demonstrate a strong *prima facie* case of unconscionability (see, for example, *Dauphin* at [57]). The question in this appeal is really a question of defining the contours of that burden, having regard to the relevant

facts.

21 When determining if a strong *prima facie* case has been made out, the entire context of the case must be thoroughly considered, and it is only if the entire context of the case is particularly malodorous that such an injunction should be granted. We must emphasise that the courts' discretion to grant such injunctions must be sparingly exercised and it should not be an easy thing for an applicant to establish a strong *prima facie* case.

22 The reason for setting the barrier at such a high level is that the equitable remedy of the interim prohibitive injunction is a very harsh one. It restricts the person in whose favour the performance bond was issued ("the beneficiary") from doing that which he was entitled by agreement of the parties to do, and which he in all probability had bargained for during the negotiations leading up to the contract concerned. In essence, he would be prevented from enforcing a substantive right which he had contracted for.

23 The availability of unconscionability, as a ground for relief for obligors of performance bonds from oppressive calls on the bonds by beneficiaries, does not necessarily make it any easier for such obligors to obtain such relief. This availability merely signifies the recognition that relief should be warranted in situations where the facts support a finding of unconscionability but not necessarily a finding of fraud. Unconscionability is a distinct and separate ground from fraud, and as stated earlier (at [19]), includes conduct such as unfairness and abuse that are broader than the conduct that would constitute fraud. In other words, the availability of unconscionability acknowledges that conduct exhibited by the beneficiary other than fraud might be sufficiently reprehensible to justify relief on the part of the obligor. For example, unfairness is an element of unconscionability, but it would not make logical sense to say that a beneficiary had thereby acted in such an egregiously unfair manner as to amount to fraud. This is because the concept of unfairness admits of other dimensions beyond the fraudulent dimension, and is assessed on different parameters from those with which we assess fraud. The most we can say is that such conduct does not necessarily constitute fraud.

24 Hence, the availability of unconscionability as a ground for relief does not necessarily mean that it would be easier for an obligor of a performance bond to obtain injunctive relief from an oppressive call on the bond by a beneficiary. As mentioned earlier, the high threshold for unconscionability is established law and in this appeal we are merely reinforcing this and explaining why this is so. The reasons for requiring a high threshold for unconscionability relate to the need to strike the appropriate balance between the conflicting positions of the obligor and beneficiary of a performance bond, which we have termed the "perennial tension". Tied up in this balance is the underlying need to preserve the *raison d'être* of performance bonds – that they are to provide security for the performance of the obligor's obligations – which stems from broader policy reasons. If calls on this security by the beneficiary are too liberally subject to injunctive relief from the courts, this security loses its efficacy and the *raison d'être* of performance bonds would be eroded or even wholly undermined.

25 Furthermore, the courts should be slow to upset the status quo and disrupt the allocation of risk which the parties had decided upon for themselves in a building contract (see, *eg*, the decisions of this court in *Anwar Siraj and another v Teo Hee Lai Building Construction Pte Ltd* [2003] 1 SLR(R) 394 at [16] and *Eltraco International Pte Ltd v CGH Development Pte Ltd* [2000] 3 SLR(R) 198 ("*Eltraco*") at [30]). The bid price or other terms of the contract would in all probability have been influenced by the mode of provision of security, *viz*, a performance bond as opposed to a cash deposit. As with all contracts, the parties should abide by the bargain that they have struck.

The perennial tension

26 As alluded to above, what we term the "perennial tension" characterises the (at least potential) diametrically opposed relationship between the beneficiary and the obligor in the context of performance bonds.

27 On the one hand, there is ample reason for allowing injunctive relief for the obligor on the grounds of unconscionability. Calls made in bad faith on a performance bond would result in the beneficiary receiving something that he was not entitled to, and would, instead, damage the liquidity of *the obligor* who would have to compensate the issuer of the bond. It was in part this concern that a performance bond could be used as an instrument of oppression that prompted the development of unconscionability, as distinct from fraud, as a ground justifying the grant of injunctions restraining a beneficiary of a performance bond from calling on that bond. Indeed, in the context of the construction industry, in addition to the observations set out by this court in *JBE* (at [11], and which were reproduced above at [18]), the following observations of this court in *GHL* (at [24]) may also be usefully noted:

> We agree that performance bonds are used frequently in the construction industry; that they are provided by and to parties 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 Electronics Industries Pte Ltd v Development Bank of Singapore* [1992] 2 SLR(R) 20] at p 31 of the transcript [see [20] *supra* at [37]]).

Two learned commentators have also perceptively observed, in a similar vein, thus (see Quentin Loh & Tang Hang Wu, "Injunctions restraining calls on performance bonds – is fraud the only ground in Singapore?" [2000] LMCLQ 348 (at p 353)):

> ***In the construction industry, the provision of a performance bond can leave the principal at the mercy of an unscrupulous beneficiary. In certain cases, it is not unforeseeable that an abusive call may effectively cripple the principal financially.*** Arbitration or litigation is expensive business. ***An abusive call may render the principal insolvent or incapable financially to proceed to arbitration or litigation*** ,*a fortiori* if the principal's directors have executed counter indemnities in their personal capacities and these have also been called upon by the guarantor. The principal would have to give up legitimate claims due to the fact that it is financially incapable of mounting an arbitration or litigation proceedings to recover what is due to him. ***A tactical call on a performance bond would probably force the principal either to give up his claim entirely or to settle the claim unfavourably.*** [emphasis in italics in original; emphasis added in bold italics]

28 It might be thought that since such an injunction is only meant to subsist until resolution of the substantive issues by a court or arbitral tribunal, that the harshness of the remedy can be mitigated by its reversibility, should the merits of the case shift in favour of the beneficiary at the substantive hearing. In any event, it would appear that the beneficiary is not bereft of a substantive remedy and, if he has a good claim to relief, he would receive it eventually. In this respect, Chan Sek Keong J held in the important Singapore High Court decision of *Chartered Electronics Industries Pte Ltd v Development Bank of Singapore* [1992] 2 SLR(R) 20, as follows (at [37]):

> A temporary restraining order does not affect the security nor the beneficiary's rights in it. It merely postpones the realisation of the security until the plaintiff is given an opportunity to prove his case.

This is probably true of other interim injunctions to restrain calls on performance bonds, but we should not be so quick to say that the same reasoning can be applied in its entirety to the context of performance bonds in the construction industry. Liquidity, or cash flow, is particularly important to participants in the construction industry, and, as we observed in *JBE* at [11] (reproduced above at [18]), the construction industry has developed several mechanisms to effect the quick resolution of disputes related to progress payments.

29 Looking at the *other side of the coin*, so to speak, whilst we noted in that case that considerations of liquidity were often of crucial significance to *the obligor*; the deprivation of *the beneficiary's* right to call on the performance bond could *equally well* be very detrimental to its liquidity as well as detrimental to its prospects pending the resolution of the substantive dispute.

30 The perennial *tension* that exists (as set out in the preceding paragraphs) has been succinctly captured in the following observation in a leading work (see Peter Ellinger & Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing, 2010) ("*Ellinger & Neo*") at pp 325–326):

> *… The right message should be communicated: that the courts will not condone any form of dishonesty or unconscionable behaviour on the part of beneficiaries.*
>
> *On the other hand, much has been said in the courts about the importance of the principle of autonomy in international commerce. It is vital that contracting parties in international and national transactions should be able to rely on the integrity of a bank's promise to pay upon an independent guarantee regardless of disputes in the underlying contract.* The argument that the principle of autonomy is not as important in performance bonds as in commercial credits might appear an attractive one, but it must be examined with caution. A counter-argument is that an injunction should not be granted lightly even in relation to an independent guarantee as this would put the beneficiary in precisely the position he sought to avoid by asking for an independent guarantee in the first place – that he can be paid first and talk later. It should be noted that the beneficiary might sometimes have sacrificed a stronger position when he agreed to take an independent guarantee. An example might be in the case of a repayment guarantee or a warranty guarantee in the construction industry, where the beneficiary might have been entitled to hold on to the retention money had he not been persuaded to substitute this for an independent guarantee. When the primary rationale for procuring an independent guarantee in the beneficiary's favour is considered, it would seem that autonomy is equally important in independent guarantees as in commercial credits, and that *a case can be made for the law to confine exceptions to the autonomy principle to a narrow limit.*
>
> [emphasis added]

31 It is clear from the perceptive observations just quoted in the preceding paragraph that a *balance* needs to be struck. Hence, whilst there are persuasive reasons why, in addition to fraud, unconscionability may, in an appropriate case, result in the grant by the court concerned of an injunction restraining a beneficiary of a performance bond from calling on that bond, the *actual grant* of such injunctions should be kept within *a very narrow compass*. In this regard, the following observation by the writers just quoted is particularly apposite (see *Ellinger & Neo* at p 325):

> The decisions suggesting unconscionability and lack of faith as an exception to the autonomy principle in cases involving independent guarantees have done so in the context of an application for an injunction to restrain a claim on the guarantee. This leaves to *the courts the responsibility* for assessing the presence of these factors, a task which, *though uncertain, the courts are more equipped to perform than the issuer*. [emphasis added]

Critique of the unconscionability exception

32 Prof Enonchong has pointed to a number of possible pitfalls with the unconscionability exception (see generally *Enonchong's article* at pp 104–105 and *Enonchong's book* at paras 7.32–7.35) and has therefore concluded that, notwithstanding the advantages that it brings (see *Enonchong's article* at pp 103–104 and *Enonchong's book* at paras 7.30–7.31), the English courts ought *not* to adopt such an exception. The learned writer has three main arguments. These arguments are important as, if they are persuasive, the task of the courts in applying the unconscionability exception would be rendered invidious at best and impossible at worst.

33 The first argument is that "recognition of the exception may lead to easy availability of injunctions restraining calls on demand guarantees" and that there would be a concern "that easy availability of injunctions would destroy confidence in [performance] bonds as the equivalent of cash in hand and undermine their utility as the lifeblood of commerce" (see *Enonchong's article* at p 104 and *Enonchong's book* at para 7.34). This is a very valid concern that has already been referred to and which we addressed above at [23]–[24] (see also below at [37]–[40] in the context of our view that unconscionability must be *applied in a nuanced manner*). Indeed, the learned writer proceeds to observe that "[i]t is perhaps for this reason that the courts in Singapore now appear to be attempting to roll back the ground covered by the unconscionability exception" (see *Enonchong's article* at pp 104–105 and *Enonchong's book* at para 7.34). With respect, this *fact* of a *limited* application of the unconscionability exception is itself ambiguous. The key question is whether or not such limited application has been arrived at in *a principled manner, having regard to the facts of the case at hand* – a crucial point to which we shall return below (see [39]–[40]). Reference may also be made to a recent article, where the learned writer observes, as follows (see Kelry C F Loi, "Two Decades of Restraining Unconscionable Calls on Performance Guarantees – From *Royal Design* to *JBE Properties*" (2011) 23 SAcLJ 504 ("*Loi*") at pp 508–509):

> One could conceivably suppose that [the] response [to Prof Enonchong's objection] might have been that a performance guarantee (unlike a letter of credit which comprises the mode of payment of *price* for goods or services) is *not* the lifeblood of commerce as it merely security against damages for defective performance. In any case, although the recognition of unconscionability as an *additional* ground of relief (apart from fraud) means relief would be more readily available, that is not to say that injunctive relief would be *easily or readily* available – not unless unconscionable behaviour were rampant amongst beneficiaries of performance guarantees and provable on *strong* evidence. Furthermore, confidence in, and utility of, commercial instruments such as performance guarantees cannot possibly be promoted by habitual judicial enforcement of unconscionable payment demands made under oppressive circumstances. [emphasis in original]

34 The second argument is that "recognition of the unconscionability exception may lead to the courts getting involved in disputes arising from the underlying contract when such disputes should be resolved in separate proceedings and in accordance with any arbitration or jurisdiction clause in the underlying contract" (see *Enonchong's article* at p 105 and *Enonchong's book* at para 7.35). This possible pitfall was precisely what the Judge anticipated in the present case and he dealt with it – if we may say so – in a very appropriate and practical manner (see the GD, especially at [29]). We must also emphasise the *prima facie* nature of the inquiry, as elaborated on below in [40]. In addition, reference may also be made to the article cited in the preceding paragraph, in which the learned author observes, as follows (see *Loi* at pp 510–511):

> However formidable this objection [by Prof Enonchong] might originally have been, it must have lost all traction when Anglo-American law took that first step upon the slippery slope, many decades ago, when recognising fraud as an exception to the autonomy principle. Whatever commercial value might be attached to the autonomy principle, just as the courts will not countenance the law and the court's own offices being perverted into instruments of fraud, the courts will likewise not allow the law or its offices to become instruments of unconscionable conduct.

In *Enonchong's book*, the learned author argues (at para 7.35) that the whole point of a performance bond is to "provide the beneficiary with payment pending resolution of disputes" and is therefore "a mechanism of risk allocation". This may be true, but as we observed on numerous occasions (see above at [27]–[29] and below at [39]; see also *JBE* at [11] and *GHL* at [24]), the lack of liquidity can have very drastic consequences on parties in the construction industry. Therefore, if an unconscionable call on a performance bond is made pending the resolution of the substantive dispute between the parties, ostensibly to provide the beneficiary with cash in hand in the meantime, that call itself might suffice to leave the obligor high and dry, and cripple its ability to defend itself in the resolution of that substantive dispute.

35 The third argument is that "unconscionability is an imprecise and vague ground for relief" and that "[i]f recognized it will inject considerable uncertainty in [an] area of commercial activity where clarity and certainty are highly valued", with the result that "[s]uch uncertainty [would] increase litigation on the enforceability of demand bonds and deprive them of their unique quality as the equivalent of cash" (see *Enonchong's article* at p 105 and *Enonchong's book* at para 7.33). This concern, whilst a valid one, is, in our view, far too pessimistic. As has already been pointed out above (see *Ellinger & Neo* at p 325, and quoted above at [31]), the courts are equipped to ascertain whether or not there has been unconscionability (though *cf Loi* at pp 512–514 and 515–516). While it is generally desirable to have crisp definitions of legal doctrines to guide behaviour, we do not think that relief for unconscionable conduct should be categorically rejected simply because a neat and tidy definition of the same is not forthcoming.

36 As will be discussed below (at [41]), broadly speaking, unconscionability is a label applied to describe unsatisfactory conduct tainted by bad faith. A precise definition of the concept would not be useful, because the value of unconscionability is that it can capture a wide range of conduct demonstrating a lack of *bona fides*. The beneficiary of a performance bond is in a position of strength in relation to the obligor. From the beneficiary's point of view, its position is similar to having cash in hand, since the bank is compelled to pay the beneficiary upon the beneficiary's call. But from the obligor's point of view, the importance of liquidity to the construction industry and the spectre of an unexpected call on the performance bond would appear to leave it in an arguably more uncertain position than if it had given cash up front. Had the obligor given cash up front, it would be out of pocket, but it would not be faced with the insecurity of a call on the performance bond by the beneficiary at an unspecified time. Therefore it is particularly important that the concept of

unconscionability be flexible enough to capture a range of conduct, all of which share the common undertones of bad faith. The beneficiary, notwithstanding that he had bargained for the performance bond, is uniquely placed to inflict economic harm on the obligor if acting in bad faith.

37 Although unconscionability itself may not carry a precise definition, from the beneficiary's point of view, what constitutes unconscionable conduct should be reasonably apparent. It is probably very difficult to negligently act in bad faith, especially where positive action is required for a call on a performance bond. If the beneficiary's call on the bond is motivated by improper purposes, or such a call cannot be justified with clear evidence; or in any other situation where the beneficiary is less than certain about his entitlement to call on the bond and for what amount, the beneficiary ought to take a step back and re-examine its entitlement and conduct prior to calling on the bond. Unfairness is also an element of unconscionability (see below at [42]–[43]), and the question as to whether or not notice was afforded to the obligor of his alleged breach before the beneficiary's call on the bond would also be a relevant consideration.

38 In any event, Prof Enonchong's concern that unconscionability is a vague ground of relief is not an argument for the proposition that unconscionability *should not* be a ground of relief. Everything hinges on the manner of its *application*. As mentioned above (at [33]), the unconscionability exception must be applied in a principled manner, having regard to all the facts of the case at hand. This brings us back full circle to the crucial point which we have already referred to and to which we now turn – that unconscionability must be *applied in a nuanced manner in order that a balance may be struck between preventing the abusive calling on performance bonds on the one hand and the undermining of the very* raison d'être *of performance bonds on the other*.

Resolving the tension – the importance of a high threshold for establishing unconscionability

39 In the final analysis, it is a fact of commercial life that the tide of liquidity needs to wash both ways, and financial droughts can be equally detrimental to both the beneficiary and the obligor. Bearing this in mind, and also the fact that the parties had, by the performance bond, themselves allocated the burden of risk, we think that the appropriate *balance* should be struck in the manner referred to above (at [20]–[22]). Put simply, there ought to be a high threshold which requires a strong *prima facie* case of unconsionability to be established before an injunction would be granted by the court to restrain a beneficiary of a performance bond from calling on that bond. As this court observed in *Eltraco* (at [30]), "[i]t is important that the courts guard against unnecessarily interfering with contractual arrangements freely entered into by the parties" as "[t]he parties must abide by the deal they have struck". In this regard, we would emphasise, once again, that *the whole context* of the case must support such a finding (see also above at [21]). It was also observed by this court in *Eltraco* (at [31]) that "[i]n determining whether a call on a bond is unconscionable, the entire picture must be viewed, taking into account all the relevant factors". This is undoubtedly true, as it is also for most areas of the law; but this present appeal throws into sharp relief the reasons why this should be so. Simply put, the nuanced *application* of unconscionability will enable the court to avoid using it as a blunt legal instrument that would erode or undermine the very *raison d'être* of performance bonds.

40 It is the *prima facie* nature of the burden that adds thickness to the thin normativity of the *Eltraco* statement in the realm of injunctions restraining calls on performance bonds. It is precisely because the court is not required to decide on the substantive entitlements of the parties to enforce their rights and not required to engage in a protracted consideration of the merits of the case, that it is all the more important that the overall tenor and entire context of the conduct of the parties support a strong *prima facie* case of unconscionability. A *prima facie* strong piece of evidence does not make a strong *prima facie* case, since the court in interlocutory proceedings is not in a position

to determine the reliability and probative value of that piece of evidence at the point of granting the injunction. Furthermore, without the benefit of full argument on the merits, the court would be hard pressed to place the seemingly strong piece of evidence in its correct location in the overall picture of the case. Therefore, although we arrived at the same conclusion as the Judge, and were of the opinion that the injunction should remain, we only came to this decision after considering and taking into account a far broader set of facts than the Judge had at his disposal. It is in this respect that, with respect, our reasoning differed somewhat from that of the Judge's. The 4 October 2010 email *per se*, no matter how robust a peg it was, was not, in our view, sufficient to establish a finding of unconscionability. It was far more important to read the 4 October 2010 email in the *context* of the sequence of events at the time as well as in relation to the exchange of correspondence between the parties in order to ascertain whether a strong *prima facie* case of unconscionability existed in the context of the present appeal.

41 What room, if any, then, does this leave for a "smoking gun", as the 4 October 2010 email was perceived to be in the proceedings below? The answer is "very little", and the reason for this lies in the nature of the inquiry into the *bona fides* of the beneficiary's (here, the Appellant's) call on the bond. Unconscionability in the context of performance bonds is a conclusion applied to describe certain types of conduct in certain contexts in the execution of a contract. It is not a formulaic doctrine with definite elements and must be distinguished from the *general contract law doctrine* of unconscionability, which is concerned with conduct at the time of the formation of the contract, and which can vitiate consent to a contract on the grounds that the terms of the contract are unfair and the contract was entered into in an unfair manner (see also *Enonchong's article* at p 97 and *Enonchong's book* at para 7.02 (it is interesting, in this regard to note, parenthetically, that the same writer has authored the leading text which deals with, *inter alia*, the general contract law doctrine of unconscionability (see Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (Sweet & Maxwell, 2006)))). That could be why it is a concept that has proven impossible to comprehensively define, and previous case law has instead preferred to indicate the elements of behaviour that would be caught by the label of unconscionability. Indeed, even the *general contract law doctrine* of unconscionability itself is, as the Singapore courts have observed, in a state of flux, at least in the Commonwealth context (see the Singapore High Court decision of *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR(R) 117 at [72] and the decisions of this court in *Sandar Aung v Parkway Hospitals Singapore Pte Ltd (trading as Mount Elizabeth Hospital) and another* [2007] 2 SLR(R) 891 at [39]; *Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 at [112] and [114]; and *Chua Chian Ya v Music & Movements (S) Pte Ltd (formerly trading as M & M Music Publishing)* [2010] 1 SLR 607 at [17] and [24]).

42 Returning to the concept of unconscionability in the context of performance bonds, Lai Kew Chai J, in the Singapore High Court decision of *Raymond Construction Pte Ltd v Low Yang Tong and another* [1996] SGHC 136 observed as follows (at [5]):

> 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 … would not by themselves be unconscionable.

43 And, in *Eltraco*, this court observed thus (at [30]):

> The appellants would appear to suggest that based on this opinion, unfairness, *per se*, could constitute "unconscionability". We do not think it necessarily follows. Lai Kew Chai J said the concept of "unconscionability" involves unfairness. We agree. That would be so. In every instance of unconscionability there would be an element of unfairness. But the reverse is not

necessarily true. It does not mean that in every instance where there is unfairness it would amount to "unconscionability". That is a factor, an important factor no doubt in the consideration. [emphasis in original]

44 However, this court was also of the view, in *Dauphin*, that it would be impossible to define "unconscionability", and observed as follows (at [42]):

> We do ***not*** think it is ***possible to define*** "unconscionability" ***other than to give some very broad indications such as*** lack of *bona fides*. What kind of situation would constitute unconscionability would have to ***depend on the facts of each case*** . This is a question which the court has to consider on each occasion where its jurisdiction is invoked. There is ***no pre-determined categorisation*** . [emphasis in original; emphasis added in bold italics]

45 As can be seen from the case law, a finding of unconscionability is a conclusion applied to conduct which the court finds to be so lacking in *bona fides* such that an injunction restraining the beneficiary's substantive rights is warranted. Sufficient reasons must be given to the court to enable it to come to such a conclusion, and it is necessary that these reasons are drawn from a thorough consideration of the relevant facts as viewed in the entire context of the case, taking into account the parties' conduct leading up to the call on the bond. This should not be confused with a consideration of the merits of the case, for the inquiry here is concerned with breadth rather than depth and remains a *prima facie* inquiry. With all that said, we reiterate that it is very difficult for a single piece of evidence, read without the benefit of the context surrounding its making, to be definitive proof of a strong *prima facie* case of unconscionability.

46 At the risk of taking Lord Steyn's statement in the House of Lords decision of *Regina (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 (at [28]) itself out of context (for he was talking about the intensity of judicial review in different fact situations), his words nevertheless possess a universality that still rings true, particularly in relation to the present appeal: "In law context is everything".

Our decision

47 Returning to the facts of the present appeal, perhaps the Judge's reliance on the 4 October 2010 email could be understood as emblematic of the unconscionability inherent in the context of the case itself. This context emerged, in fact, in even sharper relief during the hearing before us (see [48]–[52] below). All this fortified the Judge's conclusion, and although we upheld the Judge's decision, we were of the view that this conclusion could and should only have been reached with the benefit of a view of the fuller picture. In this regard, it would be preferable if the entire context had been considered in the proceedings below. As mentioned above, the examination is merely a *prima facie* one, and a consideration of the disputes between the parties does not necessitate a substantive determination of them.

48 The most important inquiry in this case ought, in our view, to be centred on the chronology of events leading up to the Appellant's call on the Bond. The focus here is on the *entire* chronology of events, and no one particular event necessarily carried more weight than the others. Prior to the Appellant's call, there had been no complaints or allegations, whether in writing or otherwise, of any delay on the part of the Respondent that would have justified the Appellant's call on the bond. We found this complete absence of allegations of delay by the Appellant odd and, indeed, troubling. It could be taken to suggest that the Appellant did not honestly believe that there was a delay until the point in time just prior to its call on the Bond. Put simply, the Appellant's silence spoke volumes.

49 Going back a little earlier in time, we come to the 4 October 2010 email relied upon by the Judge at the proceedings below and excerpted above at [16]. This particular email was dated 4 October 2010, and was written by an associate of the Architect's and addressed to *inter alia*, Mr Richard Goh ("Mr Goh") of the Respondent. On 5 October 2010, Mr Goh replied, copying his reply to several of the Appellant's consultants, stating that the Respondent was agreeable to the "practical completion date" of 19 July 2010 proposed in the 4 October 2010 email, on condition that the date proposed was to determine the maintenance period only; that it was not to be taken as the actual completion date; and that no liquidated damages would be incurred as a result of the agreement on the date. Crucially, there was no reply to this 5 October 2010 email from the Appellant or, for that matter, from anyone else. It appears that the silence from the Architect (or the Architect's associate) and the Appellant in response to the Respondent's conditions could have had the effect of leading the Respondent to believe that the aforementioned conditions had been accepted. The Appellant's silence on this point also seemed to us to constitute its acquiescence to those conditions. After all, if the Architect and Appellant disagreed on such an important issue, it would not have been too much trouble to have emailed a negative reply. However, even if this was not the case, it is our view that the Appellant's conduct in this regard had, at the very least, misled the Respondent.

50 Moving still earlier through time, we come to the events preceding 27 August 2010, which was the date at which the Architect had certified that the Respondent had completed the works. In relation to this particular point in time, an issue relating to what was known as "Powergrid unit testing" was forcefully put forward by counsel for the Respondent, Mr Tan Chee Meng SC ("Mr Tan") at the hearing before us. One of the preconditions that had to be fulfilled before the Architect would certify that the works were complete and issue a Completion Certificate, was that the electrical portions of the works had to pass certain tests. In order for the tests to be carried out, the proper electrical connections and cables were necessary. Mr Tan argued that there had been indecision as to the necessary power specifications on the part of the Appellant and its consultants. The approved electrical working load under the contract was 276kVA, but, following various inspections and recommendations from the Appellant's consultants, this was subsequently varied to 138kVA. As a result of the time taken for this variation, there was a delay in the installation of the particular electrical cables necessary to carry the specified electrical load. This in turn led to a delay in the subsequent testing of the Powergrid unit. Mr Tan submitted that the Respondent had no control over the circumstances leading up to this delay, and therefore should not be held liable for it. According to Mr Tan, the correct cables were only installed in July 2010, and that was why the 19 July 2010 date was mentioned in the emails of 4 and 5 October 2010. The Respondent's position was that it had done all it could do to complete the works sometime in May 2010, and that the dominant factor causing delay from May to July was this matter relating to the Powergrid unit testing.

51 Counsel for the Appellant, Mr Lawrence Teh, responded not by seeking to contradict Mr Tan's account of the events as set out above, but by arguing that the Powergrid unit testing issue was a hotly contested one, and that since it was not clear who was at fault, the court should be slow to base a decision on this matter. We agree that this court should not make any findings as to who was right or wrong in this matter, but we were of the view that, since the events relating to the Powergrid unit testing would undoubtedly have been known to the Appellant, these events cast a shadow over the Appellant's *bona fides* in so far as its call on the Bond was concerned. The Bond was provided to secure the Respondent's performance of obligations under the Contract, and the Appellant would be entitled to call on the Bond if the Appellant was of the view that the Respondent was in breach. As the facts relating to the Powergrid unit testing demonstrate, even on a *prima facie* basis, there was a serious question to be resolved as to the extent of control the Appellant exerted over the situation and whether the Respondent was in breach of its obligations under the Contract, in so far as this particular issue was concerned.

52 There is one point of clarification that we should make here. The Appellant called on the Bond because it took the position that the Respondent was in breach of its obligations under the Contract. Even if the Appellant was mistaken in adopting this position, the call could still be legitimate if this position was genuinely adopted and the Appellant honestly believed that the Respondent was in breach. Had there been a genuine dispute *apropos* the issue of the Respondent's breach, then a call under those circumstances may not have amounted to a lack of *bona fides* on the part of the Appellant. However, from the evidence in this case, it seemed to us that the Appellant did not genuinely believe that the Respondent was responsible for the delay. In coming to this conclusion, we are not substituting our view as to whether the Respondent was in breach for that of the Appellant's. It is not the court's role in such proceedings to appraise the merits of the parties' decisions; but, rather, *it is the court's role to be alive to the lack of* bona fides *in those decisions*.

53 Another issue which seemed curious to us ought also to be noted. This related to what was termed above (at [14]) as the third strand in the sequence of events just prior to the Appellant's call on the Bond. As mentioned above, the Architect sent the Respondent Architect's Directions AD-40 and AD-38 on or around 21 June 2011, which required the Respondent to extend the validity of the Bond, failing which the Appellant would call on the Bond. It did not seem proper for the Appellant to demand that the Respondent extend the validity of the Bond, and threaten to call on the Bond in order to enforce this demand. It seemed even less proper for this instruction to have come by way of an Architect's Direction.

Conclusion

54 For the reasons set out above, we were of the view that there was a strong *prima facie* case of unconscionability justifying the continuance of the injunction restraining the Appellant's call on the Bond pending arbitration. It bears emphasising that no single factor was conclusive. It was the entire chronology of the case, viewed in relation to all the relevant factors (set in their context (see above at [47]–[53])), that convinced us that a strong *prima facie* case of unconscionability had been established. We therefore dismissed the appeal with costs, albeit on different grounds from the Judge's. We also ordered that the usual consequential orders should apply.

[note: 1] Appellant's Core Bundle vol II ("2ACB"), p 59.

[note: 2] *Ibid*, p 104.

[note: 3] The Respondent claims that this was so at Respondent's Case ("RC"), pp 14–15. The Architect admits to this in his affidavit reproduced in 2ACB, p 116.

[note: 4] 2ACB, p 105.

[note: 5] *Ibid*, p 77.

[note: 6] *Ibid*, p 108.

[note: 7] *Ibid*, p 78.

[note: 8] *Ibid*, p 79.

[note: 9] RC at p 25.

[note: 10] Respondent's Supplemental Core Bundle ("RSCB"), p 94.

[note: 11] *Ibid*, p 92.

[note: 12] *Ibid*, p 95.

[note: 13] *Ibid*, p 93.

[note: 14] 2ACB, p 17.

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