York International Pte Ltd *v* Voltas Limited
[2013] SGHC 124

Case Number : Originating Summons No 123 of 2013

Decision Date : 01 July 2013

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Ng Kim Beng, Hazel Tang and Zheng Sicong (Rajah & Tann LLP) for the plaintiff; Nakul Dewan and Loong Tse Chuan (Allen & Gledhill LLP) for the defendant.

Parties : York International Pte Ltd — Voltas Limited

CREDIT AND SECURITY

1 July 2013

Andrew Ang J:

Introduction

1 This was an application by the plaintiff, York International Pte Ltd, pursuant to s 31(1)(*d*) of the Arbitration Act (Cap 10, 2002 Rev Ed), for an injunction to restrain the defendant, Voltas Limited, from receiving payment from Citibank NA, Singapore ("the Bank") on a performance bond *until (and unless) the plaintiff is adjudged to be liable in the arbitration proceedings between the plaintiff and the defendant*. I granted the plaintiff's application. I now set out the grounds for my decision.

Background

2 The plaintiff and the defendant entered into a purchase agreement dated 3 April 2008 ("the Purchase Agreement") under which the plaintiff was to supply, deliver, test and commission five chillers for a district cooling plant in Sentosa Island.

3 Clause 26 of Appendix 2 of the Purchase Agreement ("Clause 26") obliged the plaintiff to provide a performance bank guarantee. I set out the relevant parts of Clause 26: [note: 1]

> 26. Performance Bond:
>
> a) A Performance Bank Guarantee totalling 10% (ten-percent) of the Price shall be provided by [the plaintiff] in the Employer's format.: [*sic*] The Performance Bank Guarantee shall be valid from the date of delivery until 180 days after the end of the Defects Liability Period (DLP). DLP shall end 18 months from the date of Substantial Completion
>
> b) The Performance Bank Guarantees shall be **unconditional, without any demur, without recourse to [the plaintiff] and with a provision for automatic renewal as stated in the Employer's format.** The Performance Bank Guarantees shall be in the Employer's format and the bank should have presence in Singapore. ...
>
> [emphasis added]

4 In October 2008, the parties engaged in discussions on the terms of the performance bond to be executed. Towards the end of the discussions, the defendant vetted the terms of the performance bond to be executed and made some corrections. This is evidenced in an e-mail dated 17 October 2008 from the defendant to the plaintiff, wherein the regional financial controller of the defendant wrote: "Attaching the PB with the corrections required. Kindly arrange to issue the PB to us with the corrections immediately." [note: 2]

5 The plaintiff duly procured the issuance of a letter of guarantee ("the Guarantee") from the Bank dated 4 November 2008. [note: 3] The material terms of the Guarantee as last renewed are as follows:

> …
>
> And whereas [the plaintiff] is required under the contract to pay 10 per cent of the total value of the [Purchase Agreement] as a security deposit for the performance of his obligations under the contract.
>
> *Now in consideration of [the defendant] not insisting on [the plaintiff] paying ten (10) per cent of the total value of the [Purchase Agreement] as a security deposit for the said contract*, [the Bank] hereby agree[s] as follows:
>
> > 1) In the event of [the plaintiff] failing to fulfil any of the terms and conditions of the said [Purchase Agreement], we shall indemnify [the defendant] against all losses, damages, costs, expenses or otherwise [sic] sustained by [the defendant] thereby up to the sum of Singapore Dollars five hundred twenty three thousand only (SGD523,000.00) ("the guaranteed sum") upon receiving your written notice of claim for payment made pursuant to clause 4 hereof.
> >
> > …
> >
> > 3) Our liability under this guarantee shall continue and this guarantee shall remain in full force and effect from the date hereon until 31 January 2013.
> >
> > 4) This guarantee is conditional upon a claim as specified herein being made by you by way of a notice in writing addressed to us and the same being received by us at [the Bank's address] within 90 days from the expiry of this guarantee. …
> >
> > 5) We shall be obliged to effect the payment required under such a claim within 30 business days of our receipt thereof. We shall be under no duty to inquire into the reasons, circumstances or authenticity of the grounds for such claim or direction and shall be entitled to rely upon any written notice thereof received by us (within the period specified in clause 4 hereof) as final and conclusive.
> >
> > …
>
> [emphasis added]

6 There was initially some dispute as to when substantial completion occurred. Nevertheless, in a letter dated 5 October 2011 from the defendant to the plaintiff, the defendant conceded that the date of substantial completion was 31 October 2009. [note: 4]

7 A remaining ten percent of the purchase price was due upon completion of the Defects Liability Period ("DLP"). The plaintiff alleged that this was not paid (hereinafter "the non-payment claim").

8 On or about 25 May 2011, the defendant informed the plaintiff that some of the motors in the chillers had ceased to function, and requested the plaintiff to undertake urgent repairs. The plaintiff duly performed and completed extensive work in reinstating the functionality of the motors. The plaintiff and defendant could not agree on what caused the chillers to fail.

9 The defendant wrote to the plaintiff on 12 March 2012: [note: 5]

> In the interest of an amicable resolution and without prejudice to the respective parties' positions, we propose the joint appointment of an Independent Expert to investigate and report, on a non-binding basis, the root cause of the Chiller Motor failures in respect of the Project on which all concerned parties have different views. …

10 In its reply dated 16 March 2012, the plaintiff alleged that the chillers satisfied the requirements of the Purchase Agreement, and that the malfunction in the chillers was not attributable to any breach by the plaintiff: [note: 6]

> We would highlight that two rounds of tests have in fact already been conducted on a similar basis, the objective results of which consistently supported certain findings. …
>
> As matters stand, we are satisfied that the earlier tests establish that our equipment were [*sic*] not at fault. ...

Consequently, the plaintiff alleged that the defendant was liable for the cost of repair (hereinafter "the repair claim").

11 Both the non-payment claim and the repair claim are the subject of ongoing arbitral proceedings, and need not be canvassed further here.

12 On 19 October 2012, the defendant requested for a renewal of the Guarantee as it was due to expire on 31 January 2013, taking the position that the plaintiff had agreed to automatic renewal (pursuant to Clause 26(b)). [note: 7] The defendant explicitly stated: "Please let us know within 7 days of the date of this letter if you are agreeable to renewing the [Guarantee], failing which, we reserve our right to call on the [Guarantee]". [note: 8] The plaintiff replied on 1 November 2012 and refused to extend the Guarantee, taking the position that the parties had agreed that the Guarantee would only be extended if the DLP was extended. [note: 9]

13 On 24 January 2013, the defendant again requested for a renewal of the Guarantee, stating "you are under an obligation to extend the guarantee failing which we have no option but to invoke the same". The plaintiff replied on 29 January 2013, and repeated the objections stated in the 1 November 2012 letter.

14 On 29 January 2013, the defendant proceeded to invoke the guarantee. In a letter to the Bank, the defendant wrote: "Please be notified that [the plaintiff] has failed to fulfill certain terms and conditions of the Purchase Agreement dated April 3, 2008 and we therefore invoke the guarantee".

15 In response, the plaintiff filed an originating summons on 6 February 2013 seeking the aforementioned injunction. I pause now to make an observation. The plaintiff was merely seeking to

restrain the defendant from receiving payment from the Bank *pending the outcome of arbitral proceedings* (see the text in italics at [1] above). The plaintiff had not taken the more far-reaching step of seeking a declaration that the defendant's call on the Guarantee was invalid. Such a declaration, if granted, would have had the effect of depriving the defendant entirely of the security provided by the Guarantee (because the Guarantee has since expired). The plaintiff had, in actuality, taken a position that was eminently reasonable. If the plaintiff were to be found to be liable in arbitral proceedings, the defendant would still be able to receive payment from the Bank in satisfaction of any award rendered. Put simply, the defendant is not prejudiced (except for the time value of money, if at all) by the grant of the injunction.

Issues arising

16 Two issues arise for my consideration:

(a) First, is the Guarantee conditional or unconditional in nature?

(b) Second, was there unconscionable behaviour on the defendant's part?

Both issues are considered below.

The nature of the Guarantee

17 Performance bonds are broadly of two types: conditional performance bonds and on demand performance bonds. *Chitty on Contracts*, vol 2 (Sweet & Maxwell, 31st Ed, 2012) at para 37-127 summarises the main features of the two categories:

> Conditional performance bonds exist where the guarantor only becomes liable to the party entitled to claim the bonded sum (the beneficiary), on proof of breach of the terms of the underlying building contract, or on proof of both breach and loss as a result of the breach. Unconditional or (more usually) "on demand" bonds exist where, on a true construction of the words used in the bond, the guarantor is liable to pay the beneficiary the bonded sum when the demand is made in the manner provided for in the bond, without the need for the beneficiary to prove breach of the underlying building contract or damage (or both). …

18 It is immediately evident that there is a potential conflict between the underlying Purchase Agreement and the Guarantee. Clause 26(b) of the former obliges the plaintiff to furnish a performance bond that is "unconditional" and "without any demur". On the other hand, the Guarantee contains no words to such effect, with cl 1 merely stating that, in the event of the plaintiff failing to fulfil the terms of the Purchase Agreement, the defendant shall be indemnified "against all losses, damages, costs, expenses or otherwise [*sic*] sustained". This poses the question as to whether the Purchase Agreement and the Guarantee ought to be interpreted as a whole, or whether the Guarantee should be interpreted on its own without regard to the Purchase Agreement.

Should the underlying contract be used to interpret the Guarantee?

19 In this regard, the principles enunciated in the Court of Appeal case of *Master Marine AS v Labroy Offshore Ltd* [2012] 3 SLR 125 ("*Master Marine*") are directly on point. V K Rajah JA applied *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich*"), and held that performance bonds are a type of document where the court should be restrained in its examination of the external context and extrinsic evidence. This is because of two reasons:

(a) The primary role of a performance bond in commerce is to ensure expediency in payment. When a call is made, both the beneficiary and the bank need to be able to determine quickly if the demand is valid simply by looking at the bond instrument itself, without having to cross-refer to the underlying contract (at [35] of *Master Marine*) (hereinafter "the expediency principle").

(b) As performance bonds are most commonly used in commercial contexts, parties are more often than not experienced commercial men who are able to appreciate that the underlying contract and the bond are independent contracts with different obligations vis-à-vis different parties (*ibid*) (hereinafter "the independence principle").

The bottom-line: it would be reasonable to expect that parties ordinarily intend all of the terms of the agreement to be contained in the performance bond. At this point, it is apposite to state that the expediency and independence principles are intimately linked: the independence of the performance bond contract from the underlying contract is, in actuality, a *sine qua non* for expediency. If the contracts were not independent, there would be a need to cross-refer, and this cross-referencing would detract from expediency.

20 The earlier Court of Appeal case of *JBE Properties Pte Ltd v Gammon Pte Ltd* [2011] 2 SLR 47 ("*JBE*") also appears directly applicable. I set out the material parts of the guarantee in *JBE* (at [16]):

1. In the event of [Gammon Pte Ltd ("Gammon")] failing to fulfil any of the terms and conditions of the said contract, BNP Paribas Singapore [("BNP")] shall indemnify [JBE] against all losses, damages, costs, expenses or [*sic*] otherwise sustained by [JBE] thereby up to the sum of Singapore Dollars One Million, One Hundred and Fifty One Thousand and Five Hundred Only (S$1,151,500.00) ('the Guaranteed Sum') upon receiving your written notice of claim made pursuant to Clause 4 hereof.

...

4. This guarantee is conditional upon a claim or direction as specified herein being made by [JBE] by way of a notice in writing addressed to [BNP] and the same being received by [BNP] ...

5. [BNP] shall be obliged to effect the payment required under such a claim or direction within 30 business days of [its] receipt thereof. [BNP] shall be under no duty to inquire into the reasons, circumstances or authenticity of the grounds for such claim or direction and shall be entitled to rely upon any written notice thereof received by [it] ... as final and conclusive.

[emphasis and underlining in original omitted]

21 Most pertinently, the language of the guarantee in *JBE* is *identical* to the language of the Guarantee (save for differences in the numerical figures and the parties named). Chan Sek Keong CJ held that the performance bond in *JBE* was a conditional guarantee for three reasons:

(a) Clause 1 of the guarantee in *JBE* stated that BNP Paribas Singapore ("BNP") was obliged to indemnify JBE Properties Pte Ltd ("JBE") only against "all losses, damages, costs, expenses or [*sic*] otherwise *sustained* by [JBE]" [emphasis in original]. The corresponding provision in the underlying contract stated that JBE could use the guarantee to make good "any loss or damage sustained or likely to be sustained as a result of any breach of contract whatsoever by [Gammon]". The omission of the phrase "likely to be sustained" indicated that the obligation of BNP under the guarantee was limited to indemnifying JBE against actual losses which it sustained due to Gammon Pte Ltd's ("Gammon") breach of the underlying contract (at [19] of *JBE*).

(b) Arguably, cl 5 of the guarantee would not affect the requirement that JBE could only call on the bond *if and when it actually suffered loss arising from any breach* by Gammon of its obligations under the underlying contract (*ibid*).

(c) Where the wording of a performance bond was ambiguous, the court was entitled to interpret the performance bond as being conditioned upon facts rather than upon documents or upon a mere demand (at [10] of *JBE*, analysed further below at [28]–[38]).

22 It is immediately apparent that *Master Marine* and *JBE* seem to be inconsistent. In *JBE*, the court compared the language of the underlying contract to the language used in the performance bond, and held that the omission of the words "likely to be sustained" in the performance bond indicated that it was conditional in nature. This ostensibly departed from the independence principle.

2 3 *Master Marine*, which was decided after *JBE*, only mentioned *JBE* in passing as an example where a conditional bond was found. In my view, the cases are reconcilable. *Master Marine* itself states (at [36]):

> That being said, in situations where the wording of the bond instrument is patently ambiguous, and it cannot be readily determined from the internal context of the document how to read the disputed provision, the court's only recourse is to refer to extrinsic evidence for a better understanding of the parties' objective intentions and/or commercial purpose. … As for the form of extrinsic evidence to admit in both situations, the most immediately relevant material (in the sense that it affects the way in which the language of the document would be understood by a reasonable person: see *Zurich* at [125]) would ordinarily be the underlying agreement that necessitates the procurement of the performance bond.

24 *JBE* is eminently a case where the wording of the performance bond is patently ambiguous, and thus falls within the exception enunciated in *Master Marine*. Clauses 1, 4 and 5 (see [20] above) read together are susceptible to four possible interpretations: first, that nothing more than a written claim is required; second, that the written claim must assert a breach of the underlying contract; third, that the written claim must assert a breach of the underlying contract *and* sustained loss; and fourth, that there must *in fact* have been a breach of the underlying contract *and* sustained loss. The distinction between the first three interpretations on the one hand, and the fourth interpretation on the other, is that the former was conditioned on documents (and would mean that the bond is of the on demand type) while the latter is conditioned on extant facts (and would mean that the bond is conditional in nature). There is thus no conflict between *JBE* and *Master Marine*.

25 The language of the Guarantee is identical in all material respects to that of the performance bond in *JBE*; it goes without saying that the words used in the Guarantee are also patently ambiguous and are susceptible to the same four interpretations listed above at [24]. In accordance with the exception enunciated in *Master Marine*, I shall now construe the language of the Guarantee in light of the underlying Purchase Agreement.

26 Clause 26 of Appendix 2 of the Purchase Agreement explicitly states that: "The Performance Bank Guarantees shall be unconditional". However, the word "unconditional" is nowhere to be found in the terms of the Guarantee. This is analogous to *JBE*, where the omission of the phrase "likely to be sustained" was held to be a strong indicator that the performance bond in that case was conditional in nature. The omission of the unequivocal word "unconditional" here is an even stronger indicator (than the equivocal phrase in *JBE*) that the Guarantee is conditional in nature. This is also fortified by the parties having had discussions on the terms of the Guarantee, and the defendant having had the opportunity to vet the terms of the Guarantee and suggest changes, which were subsequently

adopted (see [4] above). Notably, the defendant did not suggest the retention of the stipulation in Clause 26 that the Guarantee was to be unconditional.

27 The defendant contends that *JBE* does not assist in interpreting the Guarantee because the instant facts show an express evincing of intent (in the form of the phrase "unconditional, without demur, without recourse to Vendor" in the Purchase Agreement), and not an omission. This is a disingenuous argument. The Bank was not a party to the Purchase Agreement. Additionally, the fact remains that the phrase "unconditional, without demur, without recourse to Vendor" was, in actuality, omitted from the wording used in the Guarantee. The clear omission of the term "unconditional" is thus fatal to the defendant's contention that the Guarantee is of the on demand type, and was sufficient for me to hold that the Guarantee was conditional in nature. Nevertheless, for the sake of completeness, I shall proceed to analyse the proposition that a court is entitled to construe any ambiguity against the beneficiary of the performance bond.

Whither ambiguity?

2 8 *JBE* also held that the court is entitled to interpret a performance bond as being conditioned upon facts rather than upon documents, and declined to follow *IE Contractors Ltd v Lloyds Bank plc* [1990] 2 Lloyd's Rep 496 ("*IE Contractors*"), where Staughton LJ held (at 500) that "there is a bias or presumption in favour of the construction which holds a performance bond to be conditioned upon documents rather than facts". Staughton LJ cited *Esal (Commodities) Ltd v Oriental Credit Ltd* [1985] 2 Lloyd's Rep 546, where it was held (at 549) that:

> ... if the performance bond was so conditional, then unless there was clear evidence that the seller admitted that he was in breach of the contract of sale, payment could never safely be made by the bank except on a judgment of a competent Court of jurisdiction and this result would be *wholly inconsistent with the entire object of the transaction, namely to enable the beneficiary to obtain prompt and certain payment*. [emphasis added]

29 *JBE* is at odds with the passage quoted above, and instead holds (at [10]) that:

> … 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*]. ... [emphasis in original]

30 The foregoing raises the question whether ambiguity should be construed in favour of or against the beneficiary. *IE Contractors* stands for the proposition that ambiguity should be resolved in favour of the beneficiary, and buttresses this by stating that prompt and certain payment is the *raison d'être* of the performance bond. *JBE* stands for the contrary proposition that ambiguity should be construed against the beneficiary because performance bonds are not the lifeblood of commerce and are merely security for secondary obligations to pay damages. It is pertinent to analyse the role of performance bonds in commerce to determine if ambiguity should be construed in favour of or against a beneficiary.

31 Geraldine Andrews and Richard Millett, *Law of Guarantees* (Sweet & Maxwell, 6th Ed, 2011)

opine that (at para 16-003):

> Performance bonds (or similar instruments) have assumed an extremely important status in modern commerce. They perform the role of an effective safeguard against non-performance, inadequate performance or delayed performance. The underlying commercial purpose of a performance bond is to provide a security which is readily, promptly and assuredly realisable when the prescribed event occurs.

32 Martin Coleman, "Performance Guarantees" [1990] LMCLQ 223 (at 238) makes an apposite observation:

> Insofar as the performance guarantee is a device to ease payment, there is a strong argument in favour of a less restrictive fraud standard. *However, the instrument is more than a payment mechanism, it is a risk redistributing device*. The risk of default — including the risk of the other contracting party's acting in bad faith — is transferred from the beneficiary to the account party [*ie*, the procurer of the performance bond]. The account party retains his right to claim against the beneficiary in respect of breach of contract. *Such claims are usually settled by negotiation out of court and the performance guarantee in effect redistributes negotiating power*. ... [emphasis added]

I would like to add that the risk of the beneficiary's insolvency is also redistributed to the procurer of the performance bond (hereinafter "the account party"). While the account party does have a right to recover from the beneficiary payments made under the performance bond if it can be shown that the beneficiary's claim was not justified under the terms of the underlying contract, the account party risks not being paid in full if the beneficiary is insolvent.

33 While benefits undoubtedly accrue to both the beneficiary and the account party, the benefits are mostly one-sided in favour of the beneficiary. Martin Coleman, "Performance Guarantees" (at 230) lists the benefits to the beneficiary (in the context of an on demand performance bond):

> (a) the element of the contract price reflecting the cost of the security will be reduced because the bank is not required to expend time and resources investigating the validity of a claim;
>
> (b) if contract performance is unsatisfactory, the beneficiary knows he will obtain immediate compensation without the need to resort to the courts or extensive negotiations;
>
> (c) the possession of funds pending ultimate resolution of the underlying claim strengthens the beneficiary's position; and
>
> (d) the beneficiary avoids the risk that a court will find that an honest demand was made unjustifiably.

In contrast, the benefits accruing to the account party are paltry in comparison (*ibid*):

> (a) the account party shares with the beneficiary the lower cost of this form of security; and
>
> (b) if the alternative to providing a performance guarantee is the provision of a cash deposit or placing funds in an escrow account controlled jointly by the beneficiary and the account party, the performance guarantee enables the account party to retain control of his assets.

34 James O'Donovan and John Phillips in *The Modern Contract of Guarantee* (Sweet & Maxwell, 2nd English Ed, 2010) at para 13-72 expound further on the one-sided nature of performance bonds and state that:

> As the beneficiary under the bond … can call upon the guarantor to pay without proving any default by the principal, the principal is placed at an immediate disadvantage. The principal has virtually no power to prevent payment by the bank/guarantor to the beneficiary and will eventually become liable for this amount by virtue of the counter-indemnity required by the bank guarantor. The pitfalls of such unconditional performance bonds have been well catalogued. …

35 As such, due to the mismatch in the benefits flowing to the beneficiary and the account holder, any ambiguity in the language of a performance bond should be construed against the beneficiary. This is in line with the *contra proferentem* rule. In the Court of Appeal case of *Tay Eng Chuan v Ace Insurance Ltd* [2008] 4 SLR(R) 95 at [34], the rule was stated as follows:

> [A] person who puts forward the wording of a proposed agreement may be assumed to have looked after his own interests, so that if the words leave room for doubt about whether he is intended to have a particular benefit there is a reason to suppose that he is not.

36 Thus, for a performance bond to be construed as being on demand in nature, clear and unequivocal language should be used. As an example, I refer to the language of the performance bond in *Eltraco International Pte Ltd v CGH Development Pte Ltd* [2000] 3 SLR(R) 198 at 202:

> … 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 sum] …

37 I therefore respectfully agree with the Court of Appeal in *JBE* that the court is entitled to interpret performance bonds as being conditioned upon facts rather than upon documents. *IE Contractors* held that construing ambiguous performance guarantees as conditional in nature would be inconsistent with the entire object of the transaction, namely, enabling the beneficiary to obtain prompt and certain payment. With respect, this is a *petitio principii* (*ie*, a logical fallacy). It is true that an on demand performance bond would enable the beneficiary to be paid promptly. But it is not to the point that a performance bond should be construed to be on demand in nature simply because it is alleged that the object of the transaction is prompt payment – this would be putting the cart before the horse.

38 In sum, the deliberate omission of the word "unconditional", coupled with the *contra proferentem* rule, led me to the inexorable conclusion that the Guarantee was conditional in nature and was premised on there *in fact* having been a breach of the underlying contract leading to loss.

Defective demand

39 Assuming *arguendo* that the Guarantee is not conditional in nature, the Guarantee is, at the bare minimum, of a type whereby the written claim must assert a breach of both the underlying contract and of loss incurred. I reiterate cl 1 of the Guarantee:

> 1) *In the event of* [the plaintiff] failing to fulfil any of the terms and conditions of the said [Purchase Agreement], *we shall indemnify* [the defendant] against all losses, damages, costs, expenses or otherwise [*sic*] sustained by [the defendant] thereby *up to the sum* of Singapore Dollars five hundred twenty three thousand only (SGD523,000.00) ("the guaranteed sum") upon

receiving your written notice of claim for payment made pursuant to clause 4 hereof. [emphasis added]

40 The use of "In the event of … we shall indemnify" clearly indicates that the written notice of claim must, at the bare minimum, contain allegations that: (a) the plaintiff has failed to fulfil any of the terms of the underlying contract; and (b) that the defendant has thereby suffered loss. This was not done. The defendant merely stated that the Purchase Agreement was breached but did not go on to further state that it had thereby suffered loss. I further note that an argument could be mounted that the defendant must also state a quantified amount of loss (in dollar figures) due to the phrase "shall indemnify … *up to* the sum" [emphasis added]. However, it is not necessary to decide on the merits of this argument and I shall proceed on the basis that the defendant had not, at the bare minimum, stated that it had suffered loss.

41 It is trite to state that the doctrine of strict compliance applies to performance bonds (see *Master Marine* at [31]–[32]). *Frans Maas (UK) Ltd v Habib Bank AG Zurich* [2001] Lloyd's Rep Bank 14 is directly on point. In that case, the performance bond stated: "Your claims should be received by us in writing stating therein that the Principals have failed to pay you under their contractual obligation." The beneficiary wrote to the bank in the following terms: "With reference to the above guarantee, we claim the sum of £500,000, [the account holder] having failed to meet their contractual obligations to us." The claimant in the case argued that the demand, in substance, complied with the performance bond. This was because any breach of a contractual obligation of performance necessarily creates a further secondary contractual obligation to pay damages. The court disagreed, and held that a failure to meet a contractual obligation is far from being the same as a failure to pay under a contractual obligation (at [62]). Specifically, the former concept is wide enough to cover unliquidated or unascertained sums, which would widen the scope of the guarantee beyond what the parties intended, namely, a failure to pay liquidated and ascertained sums.

42 Similar (though not identical) reasoning applies to the facts of this case. A breach of the underlying Purchase Agreement does not *ipso facto* lead to a right to recover for substantial loss. This could be for many reasons – for instance, it could be a technical breach not resulting in any provable loss (see, *eg*, *Marzetti v Williams* (1830) 1 B & Ad 415 at 423); where the breach was not the "effective" or "dominant" cause of loss (see, *eg*, *The "Cherry"* [2003] 1 SLR(R) 471 at [68]); where the plaintiff has not adequately mitigated his loss (see, *eg*, *The "Asia Star"* [2010] 2 SLR 1154 at [22]–[32]); or where losses sustained are too remote (see, *eg*, *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR(R) 623 at [52]–[83]). At the bare minimum, regardless of whether the Guarantee is conditioned on facts, the defendant must assert that there was both a breach of contract and loss sustained as a result of the breach of contract. To reiterate, the defendant has only asserted the former, and not the latter. This constitutes an additional ground on which to grant an injunction restraining the defendant from receiving payment on the Guarantee unless and until the plaintiff is adjudged to be liable in arbitral proceedings.

Unconscionable conduct

43 It is well-settled that unconscionability is (apart from fraud) a separate and independent ground for the court to grant an interim injunction restraining a beneficiary from making a call on a performance bond (*JBE* at [6]). Further, the threshold for unconscionability is a high one, and the burden that the applicant has to discharge is the demonstration of a strong *prima facie* case of unconscionability (*BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352 at [21]). The high threshold is required because if injunctive relief is readily given, the security provided by performance bonds would be eroded (*ibid*, at [24]). Furthermore, the courts would be slow to disturb the status quo and disrupt the bargained-for allocation of risk as the terms of the contract (including prices

stipulated) would have been influenced by the mode of provision of security – *ie*, a performance bond as opposed to a cash deposit (*ibid*, at [25]).

44 Ultimately, unconscionability is a label applied to describe unsatisfactory conduct tainted by bad faith (*ibid*, at [36]). On the evidence, I am unable to hold that the defendant had acted unconscionably. The defendant, in light of Clause 26(b), genuinely believed that it had a right to ask for the Guarantee to be renewed. The plaintiff points to a letter from the defendant to DCP (Sentosa) Pte Ltd (the ultimate buyers of the chillers) dated 18 July 2011, in which the defendant averred that it was inappropriate for DCP (Sentosa) Pte Ltd to conclude that the motors in the chillers were sub-standard because the causes of the breakdown of the chillers were potentially manifold, as proof of the proposition that the defendant did not have a *bona fide* belief that the plaintiff was in breach of the Purchase Agreement.

45 This letter, taken in isolation, is insufficient to show unconscionability. It is not commercially realistic to expect that the defendant *qua* seller would readily admit that the chiller motors were defectively designed or sub-standard as that would be tantamount to an admission that it was liable to DCP (Sentosa) Pte Ltd for the breakdown.

46 I thus held that the defendant could not be said to have engaged in unconscionable conduct.

Conclusion

47 I thus ordered that the defendant be restrained from calling on and receiving payment under the Guarantee, unless and to the extent that the plaintiff is adjudged to be liable for sums pursuant to an award made in arbitral proceedings.

48 I also ordered that the defendant be liable for a fixed sum of $15,000 in costs and disbursements.

[note: 1] Roslee bin Abdullah's affidavit filed on 6 Feb 2013, p 353.

[note: 2] *Ibid.* p 707.

[note: 3] *Ibid.* p 375.

[note: 4] *Ibid.* p 381.

[note: 5] *Ibid.* p 690.

[note: 6] *Ibid.* p 691.

[note: 7] *Ibid.* p 715.

[note: 8] *Ibid.* p 716.

[note: 9] *Ibid.* p 718.

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