CKR Contract Services Pte Ltd *v* Asplenium Land Pte Ltd and another and another appeal and another matter
[2015] SGCA 24

Case Number	: Civil Appeals Nos 204 and 206 of 2014 and Summons No 197 of 2015
Decision Date	: 22 April 2015
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Chao Hick Tin JA; Andrew Phang Boon Leong JA
Counsel Name(s)	: N Sreenivasan SC, Shankar A S, Vithyashree and Lim Min (Straits Law Practice LLC) for the appellant in Civil Appeal No 204 of 2014 and the first respondent in Civil Appeal No 206 of 2014; Christopher Chuah, Kua Lay Theng, Candy Agnes Sutedja, Lydia Bte Yahaya and Amanda Lim Qian Wen (WongPartnership LLP) for the first respondent in Civil Appeal No 204 of 2014 and the appellant in Civil Appeal No 206 of 2014; Tham Hsu Hsien (Allen & Gledhill LLP) for the second respondent in Civil Appeals Nos 204 and 206 of 2014.
Parties	: CKR Contract Services Pte Ltd — Asplenium Land Pte Ltd and another

Credit and Security – Performance bonds – Unconscionability exception

22 April 2015

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

Introduction

1 These appeals arose out of an application by a main contractor ("CKR") to restrain a call on an on-demand performance bond by a developer ("Asplenium") on the ground that the call was made unconscionably. The contract between Asplenium and CKR ("the main contract"), however, contained a clause stipulating, *inter alia*, that CKR was not (except in the case of fraud) entitled to restrain a call on the performance bond on any ground, including the ground of unconscionability. The central question before us was whether this clause was invalid and unenforceable because it was contrary to public policy as an ouster of the jurisdiction of the court.

2 The judge in the court below ("the Judge") held that the clause was unenforceable because it ousted the jurisdiction of the court. He held, however, that the high threshold necessary to invoke a restraint on the ground of unconscionability was not satisfied on the facts. He therefore dismissed CKR's application to restrain Asplenium's call. Both CKR and Asplenium appealed against the Judge's decision in *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd and another* [2015] 1 SLR 987 ("the Judgment"). CKR appealed against the Judge's finding that Asplenium did not make the call unconscionably. Asplenium cross-appealed against the Judge's holding that the clause was unenforceable.

3 We held that the clause was enforceable and allowed Asplenium's appeal. As there was no suggestion that there was any fraud involved in the call on the performance bond by Asplenium, we dismissed CKR's appeal. We now give the detailed grounds for our decision.

Background

The main contract and performance bond

4 Asplenium employed CKR as the main contractor for the construction of a condominium along Seletar Road. The main contract was for a two-year period commencing 21 January 2013. The completion date was 20 January 2015. The contract sum was $88,063,838.00. The main contract was based on the amended Singapore Institute of Architects Articles and Conditions of Building Contract (9th Ed, Reprint, August 2011).

5 The main contract required CKR to furnish an on-demand performance bond in Asplenium's favour for 10% of the contract sum. Clause 3.5.8 of the preliminaries to the main contract ("the Preliminaries") stated that CKR was not entitled to restrain Asplenium from calling on the performance bond on any ground, except in the case of fraud. There was no dispute that the Preliminaries were incorporated into and formed part of the main contract. We set out the material portions of cl 3.5 for ease of reference:

> **3.5 Performance bond**
>
> 3.5.1 Within fourteen days from the date of the Letter of Award, the Contractor shall at his own expense provide a cash payment as a security deposit or in lieu of the cash deposit, an on-demand performance bond which shall be in the form attached as an Appendix to the Contract Documents ... as security for the proper and due performance and observance by the Contractor of his obligations under the Contract. ... Should any performance bond issued pursuant to this Clause cease in any way to be valid, the Contractor shall immediately deposit with the Employer the cash deposit or procure that a new performance bond be issued in the same form prescribed by and in accordance with the terms of this Clause. ...
>
> 3.5.2 The Employer may use the Security Deposit to make good any cost, expense, loss or damage sustained or likely to be sustained as a result of any breach of or default under the Contract by the Contractor, or in satisfaction of any liquidated damages payable under the Contract or any sum due from the Contractor to the Employer under the Contract ... If the amount of the Security Deposit used to make good any cost, expense, loss or damage is greater than the amount of the cost, expense, loss or damage actually incurred by the Employer, the Employer shall pay the difference, interest free, to the Contractor or the issuer, as may be appropriate within ninety (90) days after the date the Maintenance Certificate is issued pursuant to the Contract.
>
> ...
>
> 3.5.8 In keeping with the intent that the performance bond is provided by the Contractor in lieu of a cash deposit, the Contractor agrees that except in the case of fraud, the Contractor shall not for any reason whatsoever be entitled to enjoin or restrain:
>
> (a) the Employer from making any call or demand on the performance bond or receiving any cash proceeds under the performance bond; or
>
> (b) the obligor under the performance bond from paying any cash proceeds under the performance bond
>
> on any ground including the ground of unconscionability.

6 The performance bond was duly issued by DBS Bank Ltd ("DBS"), the second respondent in both appeals. The performance bond was for the sum of $8,806,383.80 and it was due to expire on

18 October 2016. DBS, though a party to the proceedings below and in these appeals, took a neutral position and did not make any submissions.

The purported termination of the main contract and call on the performance bond

7 Disagreements arose between Asplenium and CKR after the commencement of the construction project. Asplenium complained of substandard work and slow progress. The disagreements culminated in Asplenium's purported termination of the main contract on 24 October 2014. Asplenium based its termination on two termination certificates issued by the architect for the project the previous day, 23 October 2014. The disputes under the main contract have been submitted to arbitration in accordance with an arbitration clause in the main contract.

8 On 4 November 2014, Asplenium made a call on the performance bond. Asplenium's call was for the full sum secured by the performance bond, *viz*, $8,806,383.80. The next day, CKR applied for and obtained an injunction restraining Asplenium from receiving payment under the performance bond pursuant to an *ex parte* application before a High Court judge.

9 The *inter partes* hearing before the Judge was held on 11 November 2014. At the hearing, and for reasons that are not material to our analysis, Asplenium reduced its call on the performance bond to $7,697,687.51. The Judge gave judgment on 18 December 2014, dismissing CKR's application to restrain Asplenium's call on the performance bond.

10 On 22 December 2014, CKR filed Civil Appeal No 204 of 2014 ("CA 204/2014"), which was its appeal against the Judge's decision. On the same day, CKR also applied for and obtained an *Erinford* injunction, preventing Asplenium from receiving payment under the performance bond pending the resolution of the appeal. CA 204/2014 was directed to be conducted on an expedited basis. Asplenium filed its cross-appeal against the Judge's decision in Civil Appeal No 206 of 2014 ("CA 206/2014") on Christmas Eve of 2014.

11 Also before us was Summons No 197 of 2015 ("SUM 197/2015"). This was CKR's application to adduce fresh evidence on appeal – evidence which CKR claimed assisted in proving unconscionability. SUM 197/2015 was heard together with the substantive appeals.

The decision below

12 The Judge held that there were three reasons why cl 3.5.8 of the Preliminaries was unenforceable. First, cl 3.5.8 was an attempt to oust the jurisdiction of the court. In his view, it was a severe incursion into the court's freedom to grant injunctive relief on the significant ground of unconscionability. Secondly, the power to grant injunctions emanated from the court's equitable jurisdiction which could not be circumscribed or curtailed by contract. Thirdly, the unconscionability exception was based on policy considerations which could not be brushed aside by agreement. The acceptance by the Singapore courts of the unconscionability exception was a "considered and deliberate" balance struck between party autonomy and regulating dishonest and unconscionable behaviour (see the Judgment at [24]). Each of these reasons will be addressed in greater detail in our analysis below.

The arguments on appeal

13 Asplenium's position was that cl 3.5.8 was enforceable. In this regard, it proffered three arguments. First, clauses which restricted or excluded equitable remedies have been held to be enforceable, even if they were to be construed strictly. Asplenium gave clauses that excluded the

right to equitable set-off and specific performance as examples. Secondly, Asplenium argued that cl 3.5.8 was not an ouster clause. It restricted the grounds on which relief may be sought from the court, rather than remove access to the court completely. Thirdly, Asplenium argued that cl 3.5.8 should be upheld in order to give effect to party autonomy. The clause did not fall into any of the established categories of public policy that rendered it invalid.

14 CKR's position was that cl 3.5.8 was unenforceable, and proffered two arguments in this regard. First, cl 3.5.8 was an ouster of the jurisdiction of the court because it had the effect of fettering the court's power, rather than curtailing the parties' rights. Secondly, Singapore law had "developed a public policy" of protecting contractors from oppressive calls on performance bonds. CKR submitted that there was a need to balance the policy of freedom to contract with other competing policy considerations.

Our decision

15 It is well established that, under Singapore law, a court will grant injunctive relief to restrain a call on an on-demand performance bond in two situations. The first situation is where the call is made fraudulently. However, fraud was not at issue in these appeals. The second situation is where the call is made unconscionably.

16 The issue before us, broadly stated, is whether parties can agree to exclude the unconscionability exception as a ground for restraining a call on a performance bond. This will in turn depend on the crucial issue in the present appeal, as alluded to at the outset of this judgment, which is whether or not cl 3.5.8 is one that ousts the jurisdiction of the court and is, hence, one that is void and unenforceable as being contrary to public policy. In our view, cl 3.5.8 does *not* oust the jurisdiction of the court. Let us elaborate.

17 We should begin – at a general level – by stating what is an obvious (albeit important) point: whilst freedom of contract is the norm, courts are, on occasion, prepared to override the contractual rights of the parties concerned if to do so would give effect to the greater public good. However, given the inherently nebulous nature of public policy, such occasions will be the (rare) exception. One category of contracts which has been held to be contrary to public policy concerns contracts that oust the jurisdiction of the courts. This is not surprising for, as a leading author put it, "[t]he right of access to the courts has always been jealously guarded by the common law, and the general principle remains that contracts which seek to oust the jurisdiction of the courts are invalid" (see R A Buckley, *Illegality and Public Policy* (Sweet & Maxwell, 3rd Ed, 2013) ("*Illegality and Public Policy*") at para 8.02).

18 However, given the fact that contracts will be held to be void and unenforceable as being contrary to public policy on only rare occasions, courts must be careful not to apply this particular category of illegality and public policy to every (or even most) contracts in which there are limitations placed on the rights and remedies of the contracting parties concerned. Indeed, this category of public policy appears thus far to have manifested itself in only two relatively narrow spheres of application (see, for example, *The Law of Contract in Singapore* (Academy Publishing, 2012) ("*The Law of Contract in Singapore*") at paras 13.086–13.091; *Illegality and Public Policy* at para 8.02 and *Chitty on Contracts* vol 1 (Hugh Beale gen ed) (Sweet & Maxwell, 31st Ed, 2012) at paras 16-044–16-047). The first area is where parties have agreed to exclude recourse to the court in favour of a dispute over their rights being adjudicated by a private tribunal or expert (see, for example, the oft-cited English decisions of *Scott v Avery* (1856) 5 HLC 811; *Lee v The Showmen's Guild of Great Britain* [1952] 2 QB 329 and *Leigh v National Union of Railwaymen and another* [1970] Ch 326). The second area is where a wife covenants not to apply to court for maintenance for herself, her child, or

both (see, for example the oft-cited English decisions of *Hyman v Hyman* [1929] AC 601 and *Bennett v Bennett* [1952] 1 KB 249).

19 On the other hand, limitations placed on the rights and remedies available to the parties have not been treated as an ouster of the court's jurisdiction. For example, parties are at liberty to seek to limit or even exclude altogether an innocent party's right to *damages* in the event of a *breach of contract* by the other party. Clauses which attempt to do so are (as the case may be) termed either limitation clauses or exclusion clauses. More importantly, they seek to *restrict or exclude* a ***common law*** *remedy* (since an innocent party is entitled, as of right at common law, to damages for breach of contract). What is clear, however, is that such clauses have ***never*** been treated as being void and unenforceable as clauses seeking to *oust the jurisdiction of the court*; after all *neither* party has been denied *access* to the court as such.

20 This is *not*, however, to state that the innocent party is without any remedy inasmuch as it must always abide by the limitation or exclusion clause. Herein is illustrated (once again) the organic genius of the common law (as complemented, where appropriate, by statute). In particular, there exist doctrines at common law which may aid the innocent party in arguing that such clauses do not apply (see, generally, Pearlie Koh and Andrew Phang Boon Leong, "Regulation of Terms – With Particular Reference to Exception Clauses" in ch 7 of *The Law of Contract in Singapore* ("*Koh and Phang*") at paras 07.004–07.063). The innocent party can *also* pray in aid (where applicable) the relevant provisions of the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) ("the UCTA") (see also, generally, *Koh and Phang* at paras 07.064–07.0161).

21 Turning to cl 3.5.8, whilst this particular clause does *not* attempt to restrict or limit an innocent party's right to *damages* at *common law*, it *does* attempt to restrict or limit a contracting party's right to an ***injunction*** in ***equity*** – albeit in the much *more specific* context relating to calls on performance bonds. Put simply, cl 3.5.8 seeks to restrict the right of the obligor under the performance bond to apply for an injunction to restrain the beneficiary from calling on that bond, except in a situation of fraud. This is, in effect, the restriction of an ***equitable*** *remedy* in a particular situation.

22 Looked at in this light, such a clause is more in the nature of an *exclusion or exception clause* (*as opposed to* a clause seeking to *oust the jurisdiction of the court*). Indeed, such a clause might itself be potentially subject to common law principles (for example, to the argument that the clause was not incorporated into the contract in the first place or to the argument that the language of the clause did not cover the situation in question to begin with) – although this would be unlikely in the present case, having regard to the specific language and context of cl 3.5.8 of the Preliminaries itself.

23 Such a clause might also be at least potentially subject to the UCTA and might be unenforceable if held unreasonable pursuant to, for example, s 3 of that Act. Nevertheless, as this last-mentioned argument was not run in the present case, we say no more about it – save to note that the policy underlying the operation of performance bonds (which was also referred to by the Judge) does point (on a *prima facie* level at least) in favour of the reasonableness of such clauses (subject, of course, to the precise language and context of the clause concerned since the reasonableness of a clause under the UCTA is dependent on a number of factors as well as facts (see, for example, the recent decision of this court in *Koh Lin Yee v Terrestrial Pte Ltd and another appeal* [2015] 2 SLR 497 at [37] and [54]–[57])).

24 What *is* important for the purposes of the present appeal is that cl 3.5.8 is *not* (contrary to what the Judge had held) a clause which seeks to *oust the jurisdiction of the court*. At this juncture, it is important to emphasise a point which is in fact relatively obvious from the analysis thus far: a

clause such as cl 3.5.8 is one which seeks to *limit* the *right* to an *equitable remedy* (as opposed to one that seeks to oust the jurisdiction of the court). Whilst it is true that CKR did argue that cl 3.5.8 was a clause that sought to exclude the discretion of the court to order an injunction in the context of an alleged unconscionable call on a performance bond, this was *not* an *ouster* of the *jurisdiction* of *the court* as such. On the *contrary*, such a clause could, as already noted, be (at least potentially) *subject to* the scrutiny of the court pursuant to, *inter alia*, the relevant provisions of the UCTA and, looked at in this light, *neither* party has been denied *access* to the court as such (see also above at [23]).

25 Following on from this point, we now turn to address the Federal Court of Malaysia decision of *AV Asia Sdn Bhd v Measat Broadcast Network Systems Sdn Bhd* [2014] 3 MLJ 61 ("*AV Asia*"). The Judge and CKR on appeal both relied on *AV Asia* in support of the position that cl 3.5.8 was void and unenforceable as an ouster of the jurisdiction of the court. In *AV Asia*, the appellant, who provided television support equipment, was engaged by the respondent to reduce interruptions in the respondent's satellite transmission. They entered into a mutual non-disclosure agreement ("the MNDA") which prohibited the respondent from disclosing confidential information that it obtained from the appellant. Clause 15 of the MNDA provided that in the case of disclosure or unauthorised use of confidential information, damages would "not be sufficient" to compensate for the breach and that "injunctive relief would be appropriate to prevent any actual or threatened use of disclosure" of the confidential information (see *AV Asia* at [4]). The appellant relied on alleged breaches of the MNDA by the respondent and sought an interlocutory injunction. The appellant argued that the court was *obliged* to give effect to cl 15 and should therefore grant the injunction. The appellant argued that if the court exercised its discretion without regard to cl 15, it would be tantamount to the court rewriting the agreement between the parties.

26 The Federal Court rejected the appellant's argument. It stated that cl 15 of the MNDA did not fetter the discretion of the court. The Federal Court cited two cases in support of this proposition, *viz*, *Jet Print Inc v Cohen* [1999] OJ No 2864 ("*Jet Print*"), a decision of the Ontario Superior Court of Justice; and *First Health Group Corp v National Prescription Administrators, Inc and David W Norton* 155 F Supp 2d 194 (2001) ("*First Health Group*"), a decision of the Pennsylvania District Court.

27 In *Jet Print*, a clause in an employment contract stated that any actual or threatened breach of the restrictions in the employment contract "will cause irreparable injury to the Employer and that money damages will not provide an adequate remedy to the Employer". Nordheimer J held (at [27]) that:

> … The granting of an injunction is an equitable remedy. I do not believe that the parties to a contract can obviate or waive the usual requirements on which a court would need to be satisfied before exercising its equitable jurisdiction. …

2 8 *First Health Group* also concerned a clause in an employment contract. The clause stated as follows:

> In the event [the employee] breaches or threatens to breach [restrictive covenants relating to confidentiality, non-competition and non-solicitation], [the employer] shall be entitled to injunctive relief, enjoining or restraining such breach or threatened breach. [The employee] acknowledges that [the employer's] remedy at law is inadequate and that [the employer] will suffer irreparable injury if such conduct is not prohibited.

Kane J observed that injunctive relief was "extraordinary". He held that it would only be granted where the plaintiff was likely to succeed on the merits and likely to experience irreparable harm

without an injunction. Kane J said (at 235):

> It would represent an extraordinary variance from this basic principle for a court to recognize that the parties to a suit at equity have contracted around one of these fundamental elements. …

29 The Judge thought that while the clause in *AV Asia* was different from cl 3.5.8, "the general principle expressed in *AV A sia* [was] relevant" (see the Judgment at [20]). However, with respect, there are material distinctions between this strand of authorities and the present case. First, *AV Asia*, *Jet Print* and *First Health Group* were focused on the weight to be given to such clauses in the exercise of the court's discretion when deciding whether or not to grant an injunction, and not the contractual validity or enforceability of those terms. Secondly, and more importantly, parties cannot by agreement force the hand of the court to grant an injunction where one would not ordinarily have issued. To borrow the words of Branson J in the English High Court decision of *Warner Brothers Pictures, Incorporated v Nelson* [1936] 1 KB 209 at 221, "[o]f course, parties cannot contract themselves out of the law". The court cannot be *obliged* to exercise its discretion in a way that gives effect to an agreement between parties in a manner that is contrary to principles it would ordinarily apply to the grant of injunctive relief. That, however, does not preclude parties from agreeing to limit their right to seek certain remedies or reliefs from the court, which is the effect of cl 3.5.8.

30 We pause to note that *AV Asia*, *Jet Print* and *First Health Group* did *not expressly* refer to the category of public policy relating to contracts that oust the jurisdiction of the courts. More importantly, this particular series of decisions could equally well, in our view, be – as is the case in the present appeal with regard to cl 3.5.8 – considered as involving clauses which seek to impose an equitable remedy on the party against whom the clause concerned is invoked, thereby *excluding or restricting* a possible (alternative and, more importantly, contrary) right or remedy which that other party desires instead (*cf*, in particular, s 13(1)(*b*) of the UCTA). This might, in turn, subject the clause concerned to the possible scrutiny of the court pursuant to, *inter alia*, the relevant provisions of the UCTA. However, as this particular issue was not before us, we do not arrive at a definitive view as such.

31 Returning to the present appeal, it bears noting a pertinent point which was raised during the course of oral submissions before this court; it is an intensely practical one and serves to buttress the analysis proffered thus far. This particular point centres on the fact that Asplenium could have asked for *a cash deposit* instead of a performance bond. This very point is made plain in the wording of cl 3.5.8 itself, which states that the intent is that "the performance bond is provided by [CKR] *in lieu of a cash deposit*" [emphasis added] (see above at [5]). If so, then there is no pressing reason in either principle or policy why a clause such as cl 3.5.8 should be considered as somehow being contrary to public policy (in particular, in the context of purporting to oust the jurisdiction of the court). Counsel for CKR, Mr N Sreenivasan SC ("Mr Sreenivasan"), argued that, if Asplenium had required a cash deposit, CKR would not have entered into the agreement with it. However, whilst this might well have been the case, this is, with respect, neither here nor there when viewed from the perspective of *general principle* which is what presently concerns us.

32 Mr Sreenivasan also relied on a decision of the Western Australia Supreme Court, *Bateman Project Engineering Pty Ltd and others v Resolute Ltd and others* [2000] WASC 284 ("*Bateman*"), in support of his argument that cl 3.5.8 was void and unenforceable as an ouster of the jurisdiction of the court. In *Bateman*, the plaintiffs, who were engineering service contractors, entered into a contract with the defendants for the design, engineering and construction management of a process plant at a nickel and cobalt mine in Western Australia. The contract required the plaintiffs to provide security for the performance of their obligations. The security was to be furnished either in cash or in the form of a bank's unconditional irrevocable guarantee. The operative provisions of the contract in

Bateman are set out below:

> 6. SECURITY AND PERFORMANCE UNDERTAKINGS
>
> 6.1 Purpose
>
> Security, retention monies and performance undertakings are for the purpose of ensuring the due and proper performance of the Contract.
>
> 6.2 Provision of Security
>
> The [plaintiffs] will ... provide two securities to the [defendants] in a form acceptable to the [defendants] as follows
>
> (a) A security for an amount of $2,000,000 in order to secure [certain of the plaintiffs' obligations];
>
> (b) A security for an amount of $5,000,000 in order to secure the [plaintiffs'] obligations with regards to overruns of the Target Capital Cost pursuant to Clause 1.5.3 of Appendix D of the Contract;
>
> *In the event that the Target Capital Cost has been overrun* ... :
>
> (i) The [defendants] will notify the [plaintiffs] in writing the amount of the [plaintiffs'] liability.
>
> (ii) The [plaintiffs] shall have 14 days after receipt of notification to resolve the claim to the [defendants'] satisfaction.
>
> (iii) Failing resolution by the [plaintiffs] [within] the 14-day period, *the [defendants] shall be entitled to proceed with the conversion of the security for the amount claimed and the [plaintiffs] shall not hinder, obstruct, restrain or injunct the Principal from so doing* and the [plaintiffs] will not exercise [their] rights under Clause 32 prior to the [defendants] drawing down the securities. The [defendants] shall not be liable for any loss occasioned by conversion pursuant to the Contract.
>
> ...
>
> 6.5 Conversion of Security
>
> *If the* [defendants] *become entitled to exercise any right under the Contract in respect of the security* ("Form of Security, Schedule A") the [defendants] may, in accordance with Clause 6.2, convert the whole or part of the security into money and draw down such money.
>
> [emphasis added]

33 Disputes arose between the plaintiffs and the defendants, and the defendants sought to call on the guarantee. The plaintiffs applied to court for an injunction restraining the defendants from doing so. The plaintiffs argued that cl 6.2(b)(iii) was invalid as an ouster of the jurisdiction of the court. Owen J accepted this argument.

34 What was crucial to Owen J's conclusion was his view that the defendants' entitlement to call on the guarantee *only accrued upon the satisfaction of certain preconditions*. There were unresolved disputes as to whether those preconditions were satisfied. The prohibition in cl 6.2(b)(iii) therefore affected contractual rights arising under the contract, namely, "*the entitlement of the defendants to call on the Guarantee* and *the right of the plaintiffs to have the Guarantee called on only in strict accord with the relevant terms of the Contract*" [emphasis added] (see *Bateman* at [23]). Clause 6.2(b)(iii) effectively foreclosed the determination or enforcement of these entitlements or rights by the court. As a consequence, the learned judge concluded that what cl 6.2(b)(iii) did was to "take from a party to whom a right actually accrues ... his power of invoking the jurisdiction of the courts to enforce it" (see *Bateman* at [24], citing the High Court of Australia decision of *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643 at 652).

35 In the present case, however, Asplenium's right to call on the performance bond is not contingent on the satisfaction of any preconditions. The Preliminaries (see above at [5]) make clear that Asplenium is entitled to use the sums secured under the performance bond to "make good any cost, expense, loss or damage sustained or likely to be sustained as a result of any breach of or default under [the main contract]" (see cl 3.5.2, above at [5]). The general law thus entitles Asplenium to make a call on the performance bond subject to the unconscionability or fraud exceptions. CKR agreed, by virtue of cl 3.5.8, to restrict its right to seek relief on the ground of unconscionability. This is quite different from a situation where (as in *Bateman*) a right was conferred on CKR but its enforcement was prevented by virtue of CKR's being precluded from invoking the jurisdiction of the court in the first place.

36 It will be recalled that the Judge set out three main reasons for arriving at his decision that cl 3.5.8 had sought to oust the jurisdiction of the court (see above at [12]). The first was his observation that "giving effect to cl 3.5.8 would severely curtail the court's jurisdiction and discretion to grant an injunction and would therefore be contrary to public policy" (see the Judgment at [19]). And, in a similar vein, he later observed that "cl 3.5.8 is an attempt to oust the court's jurisdiction on the significant ground of unconscionability and represents a severe incursion on the court's freedom to grant injunctive relief" (see the Judgment at [20]). With respect, however, for the reasons set out above, we do not think that cl 3.5.8 represents an ousting of the jurisdiction of the court. Indeed, the reference to the interference with the court's *jurisdiction* is – again, for the reasons set out above – incorrect inasmuch as the court's jurisdiction to hear the matter is not impacted, although the *remedy* it could grant has been sought to be limited or even excluded. Even then, this would be something the parties voluntarily agreed to and could, in any event, be (in appropriate circumstances) overseen by the court pursuant to, for example, the relevant provision(s) in the UCTA.

37 Secondly, the Judge also observed that "it should be borne in mind that the court's power to grant injunctions flows from its equitable jurisdiction and this cannot be circumscribed or curtailed by clauses in a contract" (see the Judgment at [21]). With respect, this particular reason is, in substance, similar to the first and is unpersuasive for the same reasons already referred to.

38 Thirdly, the Judge observed thus (see the Judgment at [22]):

> Third, there are ***important policy considerations*** underpinning the doctrine of unconscionability in this area of law which cannot be lightly brushed aside by an agreement made by parties. Although counsel for the plaintiff is correct in arguing that cl 3.5.8 is not a total ouster of jurisdiction and that the effect of this partial ouster seems to bring us back to the English position on this issue, the plaintiff's argument fails to consider the conscious choice made by our courts in moving *away* from the English position and ***the policy considerations*** involved in making that decision. [emphasis in italics in original; emphasis added in bold italics and underlined

bold italics]

39 The Judge also observed, in a similar vein, as follows (see the Judgment at [25]):

> Having regard to the clear statements in *BS Mount Sophia v Join-Aim* and the other authorities cited to me, I reach the inescapable conclusion that the courts are, ***o n policy grounds*** , concerned with scrutinising possible unconscionable conduct in the context of performance bonds and this supervisory role cannot, in my judgment, be summarily displaced by an agreement between the parties as found in cl 3.5.8. [emphasis added in bold italics and underlined bold italics]

40 It is, of course, true (as the Judge correctly observed in the two passages just cited) that the development of the doctrine of unconscionability in the context of (abusive) calls on performance bonds centred on considerations of *policy.* It was motivated by the recognition that a performance bond could be used as an "oppressive instrument" (see the decision of this court in *GHL Pte Ltd v Unitrack Building Construction Pte Ltd and another* [1999] 3 SLR(R) 44 at [24]), which may cause "undue hardship" or "unwarranted economic harm to the obligor" (see the decision of this court in *JBE Properties Pte Ltd v Gammon Pte Ltd* [2011] 2 SLR 47 at [11]).

41 It is important, however, to clarify the various conceptions of the concept of "policy" which were utilised both by the Judge as well as by this court – in order to clarify an ambiguity that has (unfortunately, in our view) arisen. The particular conception of policy that formed the basis for the unconscionability doctrine is *quite different from* the concept of ***public*** *policy* which underpins that category of contracts which are void and unenforceable as being contrary to public policy as such contracts seek to *oust the jurisdiction of the court*. Looked at in this light, the Judge's observations in this third respect do not really support his conclusion to the effect that cl 3.5.8 is contrary to public policy inasmuch as it sought to oust the jurisdiction of the court.

Conclusion

42 For the reasons set out above, we were of the view that cl 3.5.8 did *not* oust the jurisdiction of the court. In the premises, and given the fact that there was no suggestion by CKR that there was any fraud involved in the call on the performance bond by Asplenium, the effect of cl 3.5.8 was that Asplenium could indeed call on the performance bond and that the argument from unconscionability was, in light of that particular clause, immaterial for the purposes of the present case. In the circumstances, we allowed the appeal in CA 206/2014 and dismissed the appeal in CA 204/2014. We also dismissed SUM 197/2015.

43 We also ordered one set of costs as there was only one substantive appeal. Costs were to be taxed if not agreed. The usual consequential orders also followed.

Copyright © Government of Singapore.