IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 148

Originating Summons No 1340 of 2016
(Summons No 362 of 2017)

Between

LQS Construction Pte Ltd

… Plaintiff

And

(1) Mencast Marine Pte Ltd

(2) First Capital Insurance Ltd

… Defendants

GROUNDS OF DECISION

[Credit & Security] — [Performance Bond]

TABLE OF CONTENTS

LQS Construction Pte Ltd
v
Mencast Marine Pte Ltd and another

[2017] SGHC 148

High Court — Originating Summons No 1340 of 2016 (Summons No 362 of 2017)
Hoo Sheau Peng JC
25 January 2017, 27 February 2017, 2 March 2017

29 June 2017

Hoo Sheau Peng JC:

Introduction

1 Summons No 362 of 2017 was an application by the first defendant, Mencast Marine Pte Ltd ("Mencast"), to discharge an *ex parte* injunction obtained by the plaintiff, LQS Construction Pte Ltd ("LQS"), against Mencast's call on an on-demand performance bond on the ground of unconscionability ("the discharge application"). I discharged the *ex parte* injunction, and made consequential orders. LQS has appealed against my decision. I now set out my reasons.

Background

2 LQS is a construction company incorporated in Singapore. By way of a letter of award dated 10 January 2014 ("the Letter of Award") which was duly

accepted by LQS, Mencast engaged LQS as its main contractor for the construction of a four-storey factory and an 11-storey office building at 42A Penjuru Road ("the Project"). The Letter of Award stated that the contract sum for the entire Project was $61.6m ("the Contract Sum").

3 Pursuant to cl 6 of the Letter of Award, LQS was to submit a performance bond amounting to 10% of the Contract Sum to secure the performance of its obligations under the Contract. Accordingly, a performance bond dated 11 February 2014 was issued by the second defendant, First Capital Insurance Ltd ("FCI"), in favour of Mencast for the sum of $6.16m ("the Performance Bond"). LQS provided FCI $500,000 as cash collateral to secure the Performance Bond. Clauses 1 and 2 of the Performance Bond provided that this was an unconditional, on-demand bond, *ie*, that FCI agreed to immediately and unconditionally pay any sum demanded by Mencast in writing up to $6.16m without requiring any proof of breach or Mencast's entitlement to such a sum. Clause 4 stated that the Performance Bond was to remain in force until 24 January 2017 unless cancelled, renewed or extended.

4 LQS and Mencast subsequently entered into a formal contract for the Project on 27 May 2014 ("the Contract"). The Contract incorporated the Real Estate Developers' Association of Singapore Design and Build Conditions of Contract (3rd Ed, 2010) in full.

5 Thereafter, LQS commenced construction work, and submitted monthly progress payment claims to Mencast. These claims were certified by Mencast's quantity surveyor, stating the certified amounts due from Mencast to LQS for work done for the Project.

6 According to the Contract, LQS was to complete construction on the

Project by 24 January 2016. There was a delay to the completion. Mencast agreed to grant LQS an extension of time to 21 March 2016. However, there was a further delay beyond that, and there was disagreement as to the reasons for such delays.

7 Eventually, on 4 August 2016, the Building and Construction Authority issued the Temporary Occupation Permit ("TOP") for the Project. On 27 August 2016, LQS sent Mencast an e-mail attaching a form for partial handover of the premises, and claimed to have handed over to Mencast all of the keys to the premises on 2 September 2016. On 5 September 2016, Mencast responded to LQS by e-mail stating that it could not accept LQS's partial handover. Mencast further mentioned that it had previously informed LQS that it wished to move its machinery into the premises in mid-June 2016, and set out a list of incomplete and defective aspects of LQS's construction work as recorded during a joint site inspection conducted with LQS's site engineer and supervisors. Mencast's e-mail also reminded LQS that it was required to submit the complete set of as-built drawings, manuals and warranties, as provided in the Contract.

8 On 9 November 2016, LQS wrote a letter informing Mencast that the TOP had been obtained, and requested that Mencast issue a handing-over certificate in respect of the Project. Mencast did not respond to LQS's request, as it was of the view that LQS did not include a complete set of as-built drawings, manuals and warranties in its application.

9 Pursuant to cl 30.2.1 of the Contract, Mencast issued a written notice to LQS on 16 November 2016 to proceed with diligence and expedition ("the Notice to Proceed"). Included at Appendix A of the Notice to Proceed was a substantial list of construction work still outstanding by LQS. LQS replied by

letter and e-mail on 7 December 2016, acknowledging that at least some of the works highlighted by Mencast were outstanding or defective.

10 On 25 November 2016, one of LQS's creditors, Peri Asia Pte Ltd ("Peri Asia"), filed a winding-up application against LQS, on the ground that LQS was unable to pay its debts. LQS acknowledged that at some point, it had at least 22 sub-contractors and suppliers chasing it for payment, and that it had borrowed money to see the Project through to the TOP stage. LQS alleged that its financial woes was due to Mencast's conduct, and I explain this in greater detail at [26(d)] below.

11 In a letter to LQS dated 13 December 2016, Mencast noted that LQS had not taken any steps to complete the outstanding works despite the issuance of the Notice to Proceed, and that LQS did not have any workers on-site since early November 2016. Mencast's letter reiterated that the works were due to have been completed by 21 March 2016, and that Mencast was thus entitled to seek $2.67m in liquidated damages from LQS under cl 19.1 of the Contract at the prescribed rate of $10,000 per day multiplied by 267 days of delay (as of 13 December 2016).

12 On 20 December 2016, Mencast issued a notice of termination ("the Notice of Termination") based on LQS's failure to comply with the Notice to Proceed within 28 days as required under cl 30.2.2.1 of the Contract, and also on LQS's purported insolvency under cl 30.2.2.6.

13 On 21 December 2016, LQS filed Originating Summons No 1312 of 2016 ("OS 1312/2016") against Mencast and its parent company Mencast Holdings Ltd, asserting that it was entitled to a balance sum of $3,298,712.08 due under the Contract, $1,527,500 in retention monies to be released to LQS

upon expiry of the Project's defects liability period, and a potential sum of $4,249,030.36 in light of variations made to the Project by Mencast.

14 On 22 December 2016, Mencast sent FCI a letter calling on the Performance Bond. On 28 December 2016, Mencast's solicitors served another letter on FCI demanding that the full sum of $6.16m guaranteed under the Performance Bond be paid to Mencast or its solicitors by 30 December 2016 at noon.

The present proceedings

15 On 29 December 2016 at 4.17pm, LQS commenced the present proceedings for an injunction restraining Mencast from calling on the Performance Bond and receiving any sum from FCI, and against FCI from paying out pursuant to Mencast's call on the Performance Bond. By way of Summons No 6204 of 2016, LQS also applied for an *ex parte* injunction on an urgent basis ("the *ex parte* injunction application"). LQS served the relevant documents on the defendants between 9pm and 10pm that evening.

16 The defendants were absent at the hearing the next morning for the *ex parte* injunction application. In light of the fact that Mencast had called upon FCI to pay out by noon of that very day, I proceeded to hear LQS. LQS argued that Mencast had acted unconscionably, making various allegations which I set out in greater detail at [26] below. I granted the *ex parte* injunction against Mencast, with costs of the application reserved to the main action.

17 On 20 January 2017, as set out in [1], Mencast filed the discharge application, seeking to discharge the *ex parte* injunction granted on 30 December 2016, in order to call on FCI to pay out the sum of $6.16m guaranteed under the Performance Bond.

18 Before the discharge application was served by Mencast, on 25 January 2017, LQS filed Summons No 354 of 2017, seeking, *inter alia*, that the Performance Bond between LQS and FCI be declared inoperative, and that the $500,000 cash collateral be returned by FCI to LQS. LQS asked for an urgent hearing on the basis that it required the funds to pay salaries to its workers before Chinese New Year which fell on 28 January 2017.

19 Upon seeing all the parties on 25 January 2017, I directed Mencast to serve the papers for the discharge application by 26 January 2017. I also directed LQS to file its reply affidavits within three weeks of 26 January 2017, *ie*, by 16 February 2017, and for Mencast to file any final affidavits two weeks thereafter, *ie*, by 2 March 2017. The discharge application was fixed to be heard on 6 March 2017.

20 As for LQS's application for a return of the cash collateral, I heard the parties on 27 January 2017. I found no basis to grant the orders sought by LQS, and dismissed its application.

21 On 15 February 2017, by way of Summons No 695 of 2017, LQS's counsel, Mr Lau See-Jin Jeffrey ("Mr Lau"), applied to discharge himself from acting for LQS due to his health ("the application to discharge solicitor"). In the meantime, Mencast wrote to request that the hearing date of the discharge application be brought forward to a date before 3 March 2017, which was when the winding-up application by Peri Asia was to be heard. Thereafter, both the discharge application and the application to discharge solicitor were fixed before me on 27 February 2017.

22 At the hearing on 27 February 2017, Mr Lau stated that he had informed LQS in early February 2017 that he would be unable to continue acting for them,

and had thereafter filed the application to discharge solicitor. The managing director of LQS, Mr Li Qi Sheng ("Mr Li"), was also present at the hearing. He indicated that LQS consented to Mr Lau being discharged as solicitor, and asked for time to engage new solicitors. I adjourned both matters to 2 March 2017, and informed LQS to engage counsel on an urgent basis.

23 By the hearing of 2 March 2017, LQS had not appointed new solicitors. Instead, Mr Lau requested for a further adjournment for LQS to do so. Mr Ong Ying Ping ("Mr Ong"), who had been briefed by OTP Law Corporation, attended the hearing, and informed the court that LQS was in the midst of formally appointing OTP Law Corporation to act in this matter. For the reasons which I set out below at [24], I denied Mr Lau's request for a further adjournment for LQS. Then, I granted the application by Mr Lau to discharge himself from acting for LQS. Mr Lau elected to leave the hearing on 2 March 2017 on the basis that he was no longer in the position to submit on behalf of LQS. Mr Ong also left the hearing.

24 As I found it expedient to do so, I continued with the hearing in LQS's absence pursuant to O 32 r 5(1) of the Rules of Court (Cap 322, R5, 2014 Rev Ed) ("ROC"). In this regard, I note that the present proceedings were lodged by LQS, and that the *ex parte* injunction had been granted on the basis that LQS need only be given five clear working days' notice of any application to discharge. In other words, at all times, LQS should have been well-prepared to meet any application to discharge made by Mencast. On 25 January 2017, considering Mr Lau's request for more time, I granted LQS three weeks instead of two weeks to file its reply affidavits, *ie*, by 16 February 2017. Yet, even by the hearing of 2 March 2017, LQS had not filed its reply affidavit. Despite having been given notice by Mr Lau in early February 2017 that he intended to discharge himself, LQS took no steps to arrange for new solicitors to come on

board by 27 February 2017. LQS still failed to do so by the adjourned hearing date of 2 March 2017. Although the hearing of the discharge application had been brought forward at the request of Mencast, the adjourned hearing date of 2 March 2017 was barely two working days from the original hearing date of 6 March 2017. Taking into account these circumstances, and given the winding-up application by Peri Asia scheduled for 3 March 2017, there was no reason for delaying the hearing any further. In any case, I indicated to Mr Lau and Mr Ong (prior to them leaving the hearing) that it was open to LQS to apply for a rehearing of the matter pursuant to O 32 r 5(3) of the ROC. As no representative from LQS was present, I directed Mr Lau and Mr Ong to inform LQS accordingly. After hearing Mencast and FCI, I discharged the *ex parte* injunction with consequential orders.

25 More than two weeks later, on 21 March 2017, LQS, having appointed DG Law LLC as its new solicitors, applied for a re-hearing of the discharge application under O 32 r 5(3) of the ROC *vide* Summons No 1321 of 2017 ("the re-hearing application"). Before the matter could be dealt with, on 3 April 2017, LQS filed an appeal against my decision in the discharge application. While I have doubts about the course of action taken by LQS, I shall not dwell on this. For now, it suffices for me to state that, on 27 May 2017, I dismissed the re-hearing application, *inter alia,* on the ground that LQS had failed to show any reason for the court to re-hear the matter. I shall discuss this further at [64] below. I now turn to my decision in the discharge application.

The parties' cases

26 Given that LQS was absent at the hearing for the discharge application, I set out its position in the *ex parte* injunction application. There, LQS relied on the ground of unconscionability to restrain Mencast from calling on the

Performance Bond. According to LQS's supporting affidavit filed by Mr Li ("Mr Li's first affidavit") and the submissions by Mr Lau, there were essentially five main ways in which Mencast had acted unconscionably:

(a) *Failure to notify LQS of the necessary repairs*: First, Mencast did not notify LQS of the repairs they had undertaken at their own expense, nor the cost of these repairs. This deprived LQS of the opportunity to verify these repairs and the costs claimed, as well as to pay for the cost of any justified repairs instead of allowing Mencast to call on the Performance Bond. It was thus premature and unconscionable for Mencast to call on the Performance Bond at that juncture.

(b) *Refusal to issue the handing-over certificate and make payment*: LQS averred that it had substantially completed its work on the Project and duly handed over the keys to the premises. However, Mencast had refused to give LQS the handing-over certificate or pay LQS the balance sum due under the Contract. Mencast's non-committal responses to LQS's requests for the issuance of the handing-over certificate were "delaying tactics" to avoid having to pay the retention monies to LQS.

(c) *The UOB letter and the Advance Payment letter*: There were two occasions when Mencast drafted letters with LQS's company letterhead, and expected LQS to sign them even when LQS disagreed with their contents. The first was a draft letter addressed to United Overseas Bank Ltd ("UOB") on 6 May 2016 ("the UOB letter"), stating that the Contract Sum had been reduced from $61.6m to $58.42m, and that contingency work of $3.18m had been awarded to Excellent Constructors Pte Ltd ("Excellent Constructors") on the ground that LQS was unable to complete its work. LQS averred that none of this was true, and that it did not want to help Mencast to deceive UOB. The second

instance was on 24 October 2016 when Mencast drafted a letter ("the Advance Payment letter") stating that it would agree to give LQS $941,101.85 as an "advance payment", as long as LQS agreed to certain conditions. One such condition was that LQS would have to be fully liable for a claim against Mencast by a sub-contractor, Innovision Façade Ltd ("Innovision"). LQS's position was that the sum of $941,101.85 was not an "advance payment", but that LQS was entitled to this sum for having undertaken some minor outstanding work under the Contract. LQS did not sign either letter despite Mencast's alleged coercion.

(d) *The progress payment claim certifications*: LQS disputed certain monthly progress payment claims certified by Mencast's quantity surveyor, as being absurd, erroneous and unfair. Notably, the claims for the months of May and June 2016 were for negative sums, and the claim for September 2016 was for a nil sum. LQS averred that this could not have been correct, and suggested that Mencast had improperly instructed its quantity surveyor to under-certify LQS's claims after LQS had refused to sign and send the UOB letter according to Mencast's instructions.

(e) *The call on the Performance Bond*: Finally, Mencast's very act of calling on the Performance Bond was unconscionable for a few reasons:

(i) First of all, Mencast's actions set out in (a) to (d) above amounted to breaches of the Letter of Award and/or the Contract, and it would be unfair to allow Mencast to rely on its own breach to gain a benefit by calling on the Performance Bond.

(ii) The letter from Mencast to FCI calling on the Performance Bond was sent one day after LQS had filed OS 1312/2016 against Mencast and its parent company Mencast Holdings Ltd. LQS thus characterised Mencast's call on the Performance Bond as a retaliatory move against LQS for having commenced legal proceedings.

(iii) Moreover, it was unjustified for Mencast to call on the entire sum of $6.16m guaranteed under the Performance Bond, when any amount in dispute was likely to be much less.

27 In seeking to discharge the injunction, Mencast submitted that LQS had failed to make full and frank disclosure of the material facts in the *ex parte* injunction application. In particular, LQS did not disclose that the Contract had already been terminated on 20 December 2016, and that Mencast was entitled to do so in light of LQS's failure to complete the outstanding works within 28 days of the Notice to Proceed: see [11]–[12] above. Mencast presented evidence showing that LQS had not completed its work under the Contract nor handed over all of the keys to the premises, and was instead in gross delay despite a time extension. Mencast also provided explanations as to the UOB letter and the Advance Payment letter, the monthly progress payment claims and its refusal to issue a handing-over certificate, in order to show that its conduct had not been unconscionable as LQS had claimed. Mencast submitted that at best, these were contractual disputes, which did not suffice to meet the high threshold of unconscionability.

The applicable legal principles

Full and frank disclosure of all material facts

28 It is settled law that an applicant for an *ex parte* interlocutory injunction

has the duty to make full and frank disclosure to the court of all material facts: *Tay Long Kee Impex Pte Ltd v Tan Beng Huwah (trading as Sin Kwang Wah)* [2000] 1 SLR(R) 786 ("*Tay Long Kee Impex*") at [21]. The Court of Appeal in *Tay Long Kee Impex* noted that "[a]ny definition of 'materiality' has to be, by its very nature, general", and described "material facts" as "those which it is material for the judge to know in dealing with the application" (at [21]). It was further stated at [21] that these facts need not be "decisive or conclusive": see also *Singapore Civil Procedure 2017* vol 1 (Foo Chee Hock JC gen ed) (Sweet & Maxwell, 2017) at para 32/6/6.

29 When faced with an *inter partes* application to discharge an existing *ex parte* injunction, the role of the court is to determine whether on the full facts and arguments presented by both parties, the injunction should be continued or discharged, or if a fresh injunction should be issued: *Tay Long Kee Impex* at [33] and [35]. If it is shown that there was misrepresentation, suppression of material facts or material non-disclosure in relation to the initial application for the injunction, the court has the discretion to discharge the injunction without looking into the merits: *Tay Long Kee Impex* at [25]. The Court of Appeal in *Tay Long Kee Impex* further remarked at [35] that "[w]here there is suppression, instead of innocent omission, it must be a special case for the court to exercise its discretion not to discharge the *ex parte* injunction."

Unconscionability

30 The Performance Bond was in the nature of an on-demand performance bond. In calling upon an on-demand performance bond, there is no requirement for the beneficiary (*ie*, Mencast) to establish any breach by the obligor (*ie*, LQS) of the underlying contract on which the bond is based, before the issuer (*ie*, FCI) comes under an obligation to pay out under the bond.

31 Nonetheless, it is well-established that the court may grant an injunction to restrain a beneficiary from calling on a performance bond on the ground of unconscionability: *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352 ("*BS Mount Sophia*") at [18]. As the Court of Appeal in *BS Mount Sophia* observed at [41], unconscionability is "not a formulaic doctrine with definite elements". What constitutes unconscionability will depend on the facts of each case.

32 Our courts have made observations on the types of conduct which might fall within the ambit of unconscionability. Unconscionability has been described to involve "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": *BS Mount Sophia* at [42], quoting *Raymond Construction Pte Ltd v Low Yang Tong and another* [1996] SGHC 136 at [5]. While unfairness is indubitably an important factor, the Court of Appeal in *Eltraco International Pte Ltd v CGH Development Pte Ltd* [2000] 3 SLR(R) 198 ("*Eltraco*") remarked at [30] that this "does not mean that in every instance where there is unfairness it would amount to 'unconscionability'." In particular, mere breaches of contract by the beneficiary, and the existence of genuine disputes between parties, are not sufficient *per se* to constitute unconscionability: *BS Mount Sophia* at [42]; *Eltraco* at [32].

33 The courts have underscored the "perennial tension" between preventing abusive calls on performance bonds on the one hand, and on the other, recognising that beneficiaries are entitled to protect their commercial interests and that parties should be expected to abide by the bargain they have struck: see *BS Mount Sophia* at [24]-[27]. To balance the conflicting interests of the beneficiary and the obligor, an obligor must establish a strong *prima facie* case

of unconscionability before the court will grant or continue an injunction restraining the beneficiary from calling on the bond: see *BS Mount Sophia* at [39]. In this regard, the court is not required to engage in a protracted consideration of the merits of the case: *BS Mount Sophia* at [52].

My decision

34 At the outset, I note that the discharge application was commenced *inter partes* as all parties were served, but heard in LQS's absence and without a reply affidavit by LQS or any submissions: see [21]-[25] above. While *Tay Long Kee Impex* involved an *inter partes* application to discharge an existing *ex parte* injunction, I did not find LQS's absence in this case to be any reason to diverge from the legal principles articulated by the Court of Appeal in *Tay Long Kee Impex*. In my view, the role of the court is still to determine whether the injunction should be continued or discharged, or if a fresh injunction should be issued, on the facts and arguments before the court. Although I appreciated that LQS was unable to respond the facts and arguments presented by Mencast in the discharge application, LQS had every opportunity to do so. In any event, LQS had made its position clear in its initial application, in which it should really have disclosed all material facts.

35 In summary, it was clear to me that LQS had not made full and frank disclosure of all material facts in its initial application. In fact, it had suppressed or effectively misrepresented certain crucial facts. I therefore found it proper to discharge the *ex parte* injunction on the basis of material non-disclosure. Further, looking briefly into the merits of the case, I was satisfied with Mencast's explanations as to its conduct, and more importantly, found its position to be largely supported by the documentary evidence. Even taking LQS's case at its highest, this matter involved no more than genuine disputes

between the parties. As the facts did not establish a strong *prima facie* case of unconscionability, this formed a separate basis for the injunction to be discharged.

Whether LQS had made full and frank disclosure of all material facts

36 I begin with the issue of whether LQS had fulfilled its duty to make full and frank disclosure of all material facts in its initial application to restrain Mencast from calling on the Performance Bond. *Tay Long Kee Impex* (at [25]) makes clear that the court has the discretion to discharge the injunction if there was misrepresentation, suppression of material facts or material non-disclosure in relation to the initial application. After hearing from Mencast during the discharge application and having sight of the correspondence between the parties and other documentary evidence, it was clear to me that LQS had suppressed or misrepresented a number of material facts, which I shall now discuss.

Completion of work on the Project

37 First, in Mr Li's first affidavit, it was stated in no uncertain terms that LQS had "faithfully completed all of the work of the Project", and the contents sought to create the impression that Mencast had unreasonably refused to proceed with making payment and issuing the handing-over certificate. Based on the correspondence between LQS and Mencast, however, this was evidently not the case.

38 In fact, LQS was significantly behind schedule despite having obtained an extension of time to complete the Project by 21 March 2016. In messages sent from LQS's Senior Project Manager Mr Jordan Ngui ("Mr Ngui") to a Mencast representative, exhibited in Mencast's affidavit filed for the discharge

application, LQS requested further funds from Mencast as it had "exhausted [its] resources for building to progress". These messages were sent on 27 September 2016, which was substantially after the Project's completion date of 21 March 2016. In e-mails between Mr Ngui and Mencast from 29 September 2016 to 7 October 2016, LQS continued to request further funds from Mencast for the completion of certain outstanding works.

39 In the Notice to Proceed dated 16 November 2016, Mencast comprehensively set out a list of outstanding works due from LQS with accompanying photographs. In its response letter on 7 December 2016, LQS disputed that some of the works listed by Mencast were "additional works", but conceded that most of the other listed works were indeed either "outstanding works" or "defects". The continued lack of progress on the outstanding works was also recorded in Mencast's letter dated 13 December 2016, as well as the Notice of Termination on 20 December 2016.

40 The Notice to Proceed and the Notice of Termination were documents that were key to the dispute. However, these were not included in Mr Li's first affidavit. Further, LQS did not mention that Mencast had terminated the Contract for LQS's failure to complete the outstanding works within 28 days of the Notice to Proceed. The irresistible inference from LQS's omissions was that it had intentionally failed to make full disclosure in order to further the erroneous impression that it had "faithfully completed all of the work of the Project".

Handing over of keys

41 LQS also claimed that it had "handed over *all keys* to the premises to Mencast on 2 September 2016" [emphasis added]. Again, the correspondence between the parties demonstrated that this was not true. In the list of outstanding

works attached to LQS's letter in response to the Notice to Proceed, LQS conceded that keys to the office building's front doors, balcony doors and pantry doors had not been handed over to Mencast. This showed that LQS's averment that it had handed over all of the keys was a misrepresentation.

42 As Mencast had not received all of the keys to the premises, it rejected LQS's "partial handover" by e-mail on 5 September 2016, and thus did not issue the handing-over certificate or release any retention monies to LQS. Mencast's refusal to issue the handing-over certificate was further premised on the fact that LQS had not submitted a complete set of as-built drawings, manuals and warranties to Mencast, a point which LQS conceded in its letter on 7 December 2016. These points were not mentioned during LQS's initial application.

Variations to the scope of the Project

43 In Mr Li's first affidavit, LQS expressed the view that the negative or nil value claim certifications for May, June and September 2016 by Mencast's quantity surveyor were "ridiculous" and "absurd". However, LQS did not make any mention of variations to the scope of the Project, which would likely have accounted for the negative and nil certifications. Two major variations to the scope of the Project were a reduction in reinforced concrete structure loading which led to a reduction of $1,814,556.56 in payment to LQS, and a reduction in the number of overhead cranes to be deployed for the Project which led to a reduction of $4,357,656. Letters from LQS dated 28 April 2014 and 26 June 2014 showed that it was LQS that had proposed these exact figures for the reduction of payment, which Mencast had then accepted. While I appreciated that there were disputes between LQS and Mencast on the valuation of the variations, LQS nevertheless must have known that these variations would

likely have accounted for the negative certifications. LQS failed to mention any of this in its initial application.

44 As such, I found that LQS had not only suppressed information during the initial application, but had also blatantly misrepresented facts in Mr Li's first affidavit. The omitted facts would have provided a reasonable explanation for the negative claim certifications, as well as Mencast's refusals to make certain payments and issue the handing-over certificate, all of which LQS sought to characterise as unconscionable conduct. These facts were material, and likely even decisive, to the grant of the *ex parte* injunction. I therefore found it appropriate to discharge the injunction on the basis of LQS's material non-disclosure.

Whether Mencast had acted unconscionably

45 In my view, the above suffices to dispose of the matter. For completeness, I shall now deal with the merits of the case, *ie*, whether Mencast should continue to be restrained from calling on the Performance Bond on the ground of unconscionability. Without delving into a protracted examination of the merits (see *BS Mount Sophia* at [52]), I was satisfied with Mencast's explanations regarding its conduct which was complained of in LQS's initial application. Even taking LQS's case at its highest, there was nothing more than a genuine dispute between the parties, which did not suffice to show unconscionability: see *BS Mount Sophia* at [42]. I shall address each of LQS's five main allegations as to Mencast's unconscionable conduct (as set out at [26] above) in greater detail.

Failure to notify LQS of the necessary repairs

46 First, LQS submitted that it was premature and unconscionable for

Mencast to call on the Performance Bond without having first given LQS the opportunity to verify and pay for any repairs which Mencast had undertaken on its own. This was premised on LQS's interpretation of the Performance Bond as being intended "to secure the amounts that may fall due from [LQS] in relation to the costs of repairs of replacements".

47 Mencast, on the other hand, took the position that cl 2.1.3 of the Contract, which allows Mencast to call on the Performance Bond "to set-off any loss or damage incurred or likely to be incurred by a result of [LQS]'s failure to perform or observe any of the stipulations, terms and/or conditions under the Contract", did not confine the purpose of the Performance Bond to only satisfying repair costs. Indeed, Mencast did not call on the Performance Bond solely to recover the costs of repairs undertaken, but also to recover the liquidated damages under cl 19 of the Contract arising from LQS's delay, and the value of the uncompleted works under the Contract. This would appear to fall within the ambit of cl 2.1.3. I similarly rejected LQS's argument that Mencast's call on the Performance Bond was premature as "no amount [had] fallen due", as any damages and payments would certainly have fallen due by 22 December 2016, after the Contract had already been terminated.

48 Mencast then cited *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd and another and another appeal and another matter* [2015] 3 SLR 1041 at [35] for the proposition that its right to call on an on-demand performance bond was not subject to any preconditions, such as first giving notice to LQS as to the nature and cost of repairs to be undertaken. I agreed. Moreover, I should add that Mencast did in fact provide LQS with a comprehensive list of outstanding work and repairs by way of the Notice to Proceed, as well as an opportunity to undertake the repairs over the next 28 days before the Notice of Termination was issued.

49 In any event, it was plain that these issues amounted to no more than a genuine dispute between the parties as to their respective rights and obligations under the Contract. Accordingly, I found no sign of unconscionability.

Refusal to issue the handing-over certificate and make payment

50 Second, LQS argued that it was unconscionable for Mencast to refuse to issue the handing-over certificate to LQS. Under cl 11.1.1 of the Contract, a contractor may request a handing-over certificate if it has procured the TOP and considers that it has fully completed the works according to contractual and statutory requirements. However, cl 11.1.2 further provides that such an application "must be accompanied by the as-built drawings and warranties…, the operation and maintenance manuals for the Works… and a Written undertaking (if necessary) to finish any outstanding work or tasks". Thus, the completion of the works (or at least an undertaking to finish all outstanding tasks) and the submission of the as-built drawings, manuals and warranties were preconditions under the Contract to the issuance of a handing-over certificate.

51 As discussed above at [37]-[41], the correspondence between the parties made it evident that LQS had not completed its work on the Project; nor handed over all of the keys to the premises; nor submitted all of the as-built drawings, manuals and warranties to Mencast. While LQS's letter on 7 December 2016 might have sufficed as an undertaking to finish the outstanding work on the Project, the other requirements under cl 11.1.2 did not seem to have been met. Therefore, I did not find Mencast to have acted unfairly in taking the position that it was not obliged to issue the handing-over certificate under the circumstances.

52 For similar reasons, I did not agree with LQS's allegation that Mencast was, in so doing, employing "delaying tactics" to avoid payment of the retention

monies or the balance sum under the Contract. Clause 30.3.1 of the Contract provides that upon termination of the Contract, Mencast "shall not be liable to make any further payments to [LQS] until such time when the costs of the design, execution and completion of the incomplete Works, rectification costs for remedying any defects, liquidated damages for delay and all other costs incurred by [Mencast] as a result of the termination has been ascertained." In my view, there was some basis for Mencast to hold onto the balance sum until the damages and costs payable by LQS could be ascertained.

The UOB letter and the Advance Payment letter

53 In Mr Li's first affidavit, LQS alleged that Mencast had "draft[ed] letter[s] with contents that suit their ends and means" and "coerce[d]" LQS to sign these letters. LQS stated that they refused to sign the UOB letter and the Advance Payment letter as they were untrue. In response, Mencast maintained that the contents of both letters were factual and accurate.

54 I turn to the UOB letter first. Mencast submitted that the Contract Sum was in fact reduced from $61.6m to $58.42m, with $3.18m in contingency work awarded to Excellent Constructors, just as the UOB letter had stated. Mencast produced a price quotation letter and a progress payment claim from Excellent Constructors indicating that there was indeed such a contract for $3.18m for interior design works. Although LQS claimed that they would have been able to "fulfil all or any contingency work", Mencast's position was that the parties shared the understanding that these interior design works were not part of the Contract. According to Mencast, the real reason why LQS refused to sign the UOB letter was because it wanted to claim a percentage of the costs for the interior design works.

55 As for the Advance Payment letter, Mencast reiterated that the sum of

$941,101.85 was meant to be an advance payment all along, and not payment due to LQS for work done under the Contract. In Mencast's view, LQS was not legally entitled to the advance payment. Thus, Mencast was only willing to make such payment if LQS agreed to a list of proposed conditions such as accepting sole responsibility for a sub-contract dispute with Innovision. Innovision had at all material times been engaged by LQS directly to carry out certain works on the Project, and there was no contractual relationship between Innovision and Mencast. When LQS failed to pay Innovision for its work, Innovision sent a letter to Mencast demanding payment for sums owed by LQS. Mencast thus explained that it was reasonable to expect LQS to pay its own sub-contractor. As LQS did not sign the letter, the advance payment was not made.

56 In my view, it was not necessary for me to make any findings as to the truth or falsity of either letter's contents. It was clear that the issues underlying the two letters amounted to genuine disputes between the parties that were related to the Contract. Again, this did not show that Mencast had acted unconscionably by calling on the Performance Bond.

The progress payment claim certifications

57 As stated in my findings at [43] above, LQS did not disclose information about the variations and omissions to the scope of the Contract in its initial application. Mencast submitted that these variations and omissions accounted for the negative and nil claim certifications for May, June and September 2016. There was no other evidence to support LQS's allegation that Mencast had instructed its quantity surveyor to under-certify LQS's claims as payback for LQS's refusal to sign the UOB letter. As such, I saw no unconscionability on the facts at hand – only a contractual dispute at best.

The call on the Performance Bond

58 Other examples of unconscionable conduct cited in LQS's initial application directly arose from Mencast's act of calling on the Performance Bond. In light of Mencast's explanations and the further documentary evidence, I did not see any merit in LQS's position.

59 First, LQS submitted that by calling on the Performance Bond, Mencast was relying on its own breaches of the Letter of Award and/or the Contract to gain a benefit. As discussed above, LQS's allegations of breach (*eg*, Mencast's failure to notify LQS of the repairs, refusal to issue the handing-over certificate or release the retention monies, and under-certification of progress payment claims) were challenged by Mencast during the discharge application. Regardless, mere breaches of contract by a beneficiary to a performance bond do not *per se* amount to unconscionable conduct: *BS Mount Sophia* at [42]. As such, even if Mencast's breaches of the Contract were established, these were mere breaches that did not meet the threshold of establishing a case of unconscionability.

60 Second, LQS sought to characterise Mencast's call on the Performance Bond as a retaliatory move against LQS for having filed OS 1312/2016. Having regard to Mencast's explanations, I disagreed. Given the significant delay in the Project and the uncompleted works, it was apparent that Mencast's motivations in calling on the Performance Bond was not to retaliate against LQS for filing OS 1312/2016, but to recover damages from LQS. I further note that Mencast's call on the Performance Bond was two days after the Notice of Termination, which suggested that Mencast was simply looking to recover its losses upon termination of the Contract. Once again, I found no evidence of unconscionability.

61 Finally, LQS submitted that it was unjustified for Mencast to call on the entire sum of $6.16m under the Performance Bond. The Court of Appeal in *Eltraco* remarked at [41] that in deciding how much of a performance bond should be called upon, the court is not involved in an exercise of quantifying damages, but only in ensuring that the amount of the bond called upon is not unconscionable. Based on a provisional estimate by Mencast's quantity surveyor, the total loss and damage recoverable from LQS was $6,009,598.74, not inclusive of defects rectification costs, consultants' fees, other costs associated with termination and $267,204.17 in negative claim certifications. Although the disputes as to the Contract and the assessment of damages are subject to a final assessment in a proper forum, I was of the view that taking a broad approach, Mencast's call on the full amount of the Performance Bond was not unconscionable.

Conclusion

62 For the above reasons, I discharged the *ex parte* injunction restraining Mencast from calling on the Performance Bond. Not only had LQS failed to make full and frank disclosure of all material facts in its initial application, based on the materials before me, there was no strong *prima facie* case of unconscionable conduct on Mencast's part.

63 At the hearing, Mencast agreed to FCI's request for two weeks to make payment of the amount guaranteed under the Performance Bond. Accordingly, I ordered FCI to make payment of the guaranteed sum in 14 days. I also ordered costs for the present proceedings and the discharge application to be fixed at $6,000 with reasonable disbursements to be paid by LQS to Mencast.

64 Before I conclude, I should add that I subsequently heard the parties on the re-hearing application. Under O 32 r 5(3) of the ROC, the court may re-hear

a summons heard in the absence of a party if it is just to do so. I found that it would not be just to re-hear this matter, whether on the basis of LQS's unsatisfactory and dilatory conduct throughout the proceedings, or on the merits of the case. In regard to the latter, I disagreed with LQS's submission that it had raised triable issues on unconscionability. LQS filed two new affidavits in support of the re-hearing application. However, these affidavits did not address the critical issue of whether this matter involved anything beyond genuine contractual disputes between the parties. Even based on the new supporting affidavits, I failed to see any merits to LQS's contentions that Mencast had acted unconscionably.

Hoo Sheau Peng
Judicial Commissioner

Lau See-Jin Jeffrey (Lau & Co) for the plaintiff;
Ong Kok Seng, Chermaine Tan Si Ning and Michael Nathanael Chee Guang Hui (Xu Guanghui) (Patrick Ong Law LLC) for the first defendant;
Anparasan s/o Kamachi and Wong Jing Ying Audrey (KhattarWong LLP) for the second defendant.