IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 191

Suit No 800 of 2017
(Summons No 4313 of 2017)

Between

Bintai Kindenko Private Limited

… *Plaintiff*

And

(1) Samsung C&T Corporation
(2) DBS Bank Ltd

… *Defendants*

GROUNDS OF DECISION

[Injunctions] — [Interlocutory Injunction]

TABLE OF CONTENTS

Bintai Kindenko Pte Ltd
v
Samsung C&T Corp and another

[2018] SGHC 191

High Court — Suit No 800 of 2017 (Summons No 4313 of 2017)
Aedit Abdullah J
20, November 2017, 1 December 2017, 19 January 2018;

3 September 2018

Aedit Abdullah J:

Introduction

1 This case concerns an interim injunction restraining the 2nd defendant from paying out on a banker's guarantee issued in favour of the 1st defendant and to prevent the 1st defendant from receiving payment of the same. The banker's guarantee was procured by the plaintiff pursuant to its obligation under the subcontract with the 1st defendant. Following alleged breaches of the subcontract between the plaintiff and the 1st defendant, the latter called on the guarantee on 28 August 2017. Subsequently, on 29 August 2017, the plaintiff sought and obtained an interim injunction against the demand and payment on an *ex parte* basis. The present application was brought by the 1st defendant to lift the injunction, among other things. I lifted the injunction following an *inter partes* hearing. The plaintiff has appealed against my decision. Leave to appeal

has since been granted by the Court of Appeal. I now set out the grounds of my decision.

Background

2 As the matter is presently at the interim stage and given the existence of multiple contractual documents, I would refer to the general contractual arrangement between the plaintiff and 1st defendant as the "subcontract" and leave specific references to documents where necessary.

3 The genesis of the present application stems from a subcontract entered into by the 1st defendant and the plaintiff for the supply and installation of mechanical, electrical and plumbing works in December 2012; the plaintiff being the subcontractor. A banker's guarantee of about $4.3m, issued by the 2nd defendant-bank, was granted in favour of the 1st defendant pursuant to the subcontract. After certain delays and alleged contractual breaches, the 1st defendant imposed liquidated damages and sought to call on the guarantee. The circumstances leading up to that demand are as follows.

4 The completion dates for the various phases of the works to be done spanned March 2013 to April 2014. The plaintiff, however, only achieved actual completion of the last phase in February 2015. Thereafter, various letters were exchanged from the period of May 2015 to January 2016, where the 1st defendant sought to pin responsibility for the delay on the plaintiff and notified the plaintiff of potential liquidated damages to be paid.

5 Payment claims filed by the plaintiff, and responses from the 1st defendant detailing reasons for withholding payments and indicating liquidated damages payable by the plaintiff were then exchanged between February 2017 and July 2017. Notably, the 1st defendant addressed the plaintiff's request for

the release of the first half of retention monies, variation order claims and back charges in the responses.

6 On 7 July 2017, the plaintiff lodged an adjudication application against the 1st defendant in relation to the first half of the retention monies. An adjudicator was appointed on 11 July 2017. Further payment claims and responses continued to be filed after the appointment of the adjudicator. The adjudication determination was granted on 15 August 2017 in favour of the plaintiff; no determination was made on the variation order claims and back charges. Shortly after, the plaintiff requested for payment of the amount due under the adjudication determination. The 1st defendant replied with a payment response on 24 August 2017 explaining why payments were withheld.

7 On 28 August 2017, the 1st defendant made a demand on the banker's guarantee on the basis that the plaintiff owed it liquidated damages. Due to the urgency of the matter, the plaintiff applied for, and obtained, an interim injunction restraining the 1st defendant's call on the guarantee on 29 August 2017. This interim injunction was then discharged following an *inter partes* hearing before me; that discharge is now the subject of the appeal.

8 At issue between the parties were the circumstances of the *ex parte* hearing and the basis for the call on the guarantee; whether full disclosure had been given then; whether the contract between the parties excluded unconscionability as a basis to bar the call on the guarantee; and whether fraud was made out.

9 For completeness, the 1st defendant eventually filed an application to set aside the adjudication determination. The matter was heard on 14 November 2017 by Foo Chee Hock JC. The judge found that the adjudication

determination was made in breach of natural justice as it failed to take into account other essential issues of back charges for scaffolding and re-assessed variation works, and consequently set aside the adjudication determination. The matter was thereafter appealed by the plaintiff. The appeal was dismissed in *Bintai Kindenko Pte Ltd v Samsung C&T Corp* [2018] SGCA 39.

The 1st defendant's case

10 The plaintiff's interim injunction application was on the basis that it would be unconscionable, in the circumstances, for the 1st defendant to have called on the guarantee. The 1st defendant argued that the plaintiff's application was fundamentally flawed as the ground of unconscionability was not available to the plaintiff in the first place. The subcontract incorporates a clause which expressly stipulates that except in the case of fraud, the plaintiff shall not for any reason whatsoever be entitled to enjoin or restrain the 1st defendant on making any call or demand on the guarantee ("Exclusion Clause"). Such a clause was upheld in *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd and another and another appeal and another matter* [2015] 3 SLR 1041 ("*CKR*"); parties are entitled to contract out of the ground of unconscionability. The burden lay on the plaintiff to make out non-incorporation of such a clause on a clear case.

11 In any event, the subcontract contained an arbitration clause. The parties expressly agreed to refer disputes relating to a demand on the guarantee to arbitration.

12 There were also material facts not disclosed to the court. An applicant in an *ex parte* application is under a duty to make full and frank disclosure of all material facts even if these facts are prejudicial to him. Apart from the non-disclosure of the existence of the Exclusion Clause and arbitration clause, the

plaintiff also did not disclose material facts such as the adjudicator's decision that the Exclusion Clause was applicable and the plaintiff's own submissions in the adjudication application referencing the provision in the subcontract which incorporated the Exclusion Clause. Instead, the plaintiff's conduct was particularly egregious as it made certain active misrepresentations as to the validity of its application for an injunction on the ground of unconscionability.

13 Additionally, the *ex parte* application was brought without notice to the 1st defendant's solicitors. This was contrary to para 41(2) of the Supreme Court Practice Directions which provides that even in cases of extreme urgency, notice must be given to the other party. Further, it would have been clear to the plaintiff's solicitors that any notification ought to have been sent to the 1st defendant's solicitors since the latter were already on the record for the adjudication application. Yet when the plaintiff's solicitors sought the interim injunction, they did not inform the 1st defendant's solicitors of the application and simply sent a letter to the 1st defendant itself.

14 If there was to be any challenge to the call on the guarantee, the only ground available was fraud. There was not even a shred of an allegation of fraud in the supporting affidavits, nor was this raised to the court in argument. In any event, fraud cannot be made out:

> (a) Aside from liquidated damages of $26m, there were other outstanding claims by the 1st defendant. There were claims for re-evaluation, further back charges, omissions on the plaintiff's part and liability for water ingress, among others. The plaintiff remained generally liable for these sums even after the adjudication determination. The total sum claimed by the 1st defendant, excluding liquidated

charges, exceeded the sum guaranteed and this justified the call on the banker's guarantee for $4.3m.

(b) The plaintiff has no basis to say that the call on the guarantee was made with reckless indifference to the truth. As opposed to the sort of conduct considered by the court in *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352 ("*BS Mount Sophia*"), where there was call on the guarantee despite there being a complete absence of allegations of delay, the liquidated damages claim which formed the basis of the 1st defendant's call arose out of the plaintiff's actual delay. The call was not a retaliation against the plaintiff's adjudication application. Further, at the point the call was made, there were already damages and back charges as well. There was no fraudulent behaviour. Any allegation of fraud was not even made out on a *prima facie* level.

(c) The 1st defendant's call on the bond contained sums which were not dealt with in the adjudication. This was the very reason for the 1st defendant's position that the adjudication determination was a breach of natural justice. Since these sums were not part of the adjudication, it can hardly be said that the claims forming the basis of the call on the guarantee were contrived.

(d) All the categories of claims invoked by the 1st defendant were in existence at the time of the call, and not fabricated.

(e) It was acknowledged that there were discrepancies in some of the figures relating to certain claims. However, the 1st defendant's call on the guarantee was nonetheless justified. These discrepancies were corrected upon revision and a reduction of the amounts claimed had been

made. Even taking the plaintiff's case at its highest, the reduction on the amount claimed should not affect the call on the guarantee.

15 In the present application, the plaintiff has sought to change their position from unconscionability to fraud. The 1st defendant is surprised by the fraud arguments.

The plaintiff's case

16 The plaintiff began by stating that its primary case was that the call on the banker's guarantee was fraudulent. This was borne out in the relevant supporting affidavit and the notes of evidence in relation to the interim injunction. In any event, there was a significant overlap between unconscionability and fraud; the factual elements relied on for one ground apply with equal force to the other.

17 The actions of the 1st defendant showed that the liquidated damages claim was contrived and there was no honest belief in calling on the guarantee:

(a) The project under the subcontract was substantially completed by 10 February 2015. The Architect had issued the completion certificate, and the contract completion date had passed. The 1st defendant should have issued the subcontract completion certificate and released the first half of retention monies to the plaintiff. At that time, there was still no issuance of a delay certificate or imposition of liquidated damages, even though any genuine claim for liquidated damages would have clearly accrued and be quantifiable then. The 1st defendant unreasonably withheld the first half of the retention monies and gave excuses to deny payment to the plaintiff despite the substantial

completion of the project. This compelled the plaintiff to commence the adjudication determination for the first half of the retention monies.

(b) Curiously, the 1st defendant initially accepted that the plaintiff did not owe it any money. Subsequently, however, in April 2017 the 1st defendant reduced the value of variation works and imposed back charges without any basis.

(c) Much of such works had in fact been agreed on and paid by the 1st defendant's employer in 2016, and the back charges were actually withdrawn by the 1st defendant in 2014. Despite these baseless allegations, the 1st defendant maintained its position that it was entitled to make a call on the guarantee.

(d) The liquidated damages claim, which forms the basis of the 1st defendant's call on the guarantee, was a retaliation. When the 1st defendant realised that it would have to release the retention monies, it included its claim in payment responses as set off against the plaintiff's account. Taking into account the fact that the adjudication determination would need to be issued by the latest in 15 August 2017, the 1st defendant issued a delay certificate for the first time on 22 July 2017 to inform that plaintiff that it was imposing liquidated damages of $26.4m in retaliation against the plaintiff's adjudication application. The 1st defendant therefore deducted that amount from the monies owed to the plaintiff. The 1st defendant then awaited the adjudication determination; once the determination was released, the 1st defendant added back charges and other damages to its liquidated damages claim. Subsequently, on 28 August 2017, the same day that the plaintiff filed its application for enforcement of the adjudication determination, the 1st defendant called on the maximum sum under the guarantee.

(e) The question of liquidated damages was also not raised throughout the project. Instead, it was the plaintiff who was pursuing acceleration costs against the 1st defendant. Further, no delay certificate was issued prior to 22 July 2017. This was crucial as a delay certificate would have been the basis of liquidated damages. In any event, there were obvious errors in the calculation on the face of the delay certificate issued by the 1st defendant.

(f) The back charges, and reduction of variation works were all contrived as well, and had been rejected by the adjudicator.

(g) Furthermore, the 1st defendant introduced additional claims only after the plaintiff sought to resist the demand on the guarantee. The timing of the 1st defendant's additional claims is significant as it is the 1st defendant's position that these claims were incurred early on in the project. The 1st defendant belatedly included the additional claims to justify its demand on the banker's guarantee *ex post facto*. For instance, damages for water ingress and damages to other works were not charged until much later until in 2017.

(h) There was also an offer from the 1st defendant at one point for payment of $500,000 to close the account. If there was truly a claim for $26m in liquidated damages, there was no reason for this offer to have been made.

18 As regards the operation of the Exclusion Clause, the plaintiff argued that it was premature to determine its incorporation at this stage.

19 As regards the allegation of material non-disclosure, the Court nonetheless had the power under s 18 of the Supreme Court of Judicature Act

(Cap 322, 2007 Rev Ed) to make orders to preserve the injunction. In dealing with the contention that the Exclusion Clause was not raised at an earlier juncture, the plaintiff argued that the Exclusion Clause is set out in the main contract between the ultimate employer and the 1st defendant. The plaintiff has never had sight of this clause despite the 1st defendant claiming that it was incorporated into the subcontract. In any event, even if the 1st defendant were able to establish material non-disclosure, the plaintiff has established fraud on the 1st defendant's part in calling on the banker's guarantee, such that the interim injunction should be continued.

20 As regards the circumstances of the *ex parte* hearing, the plaintiff argued that urgency existed at the time of the interim injunction application as the bank had indicated that the funds would be released. The 1st defendant was informed, by email and by hand, of the injunction application. As the plaintiff's solicitors had not acted for the plaintiff previously, they did not know that the present solicitors for the 1st defendant were on record. Further, the 1st defendant had indicated a certain person in its management to contact once payment under the banker's guarantee is released.

The court's decision in summary

21 I was satisfied that unconscionability was precluded by the subcontract between the parties; fraud was the only basis by which the plaintiff could prevent the call. Fraud was, however, not established on the facts.

22 There was no real argument as to how the Exclusion Clause could be construed in any other manner apart from it being an express exclusion of unconscionability as a ground for resisting a call on the guarantee. Any such argument would have faced an uphill battle given the plain words used. Rather,

the outcome turned on whether the clause was incorporated, or applied to the contract or relationship between the plaintiff and 1st defendant.

23 At the interlocutory stage, there is a question of the appropriate level of scrutiny to be applied in approaching the issue of incorporation: whether the test was one of a clear case, as argued by the 1st defendant; or a *prima facie* case, as argued by the plaintiff. I was of the view that it was at least plausible that that the appropriate test is actually whether there is a serious issue to be tried. On this note, I do not regard *Bocotra Construction Pte Ltd and others v Attorney-General* [1995] 2 SLR(R) 262 ("*Bocotra*") as laying down a definitive ruling on the applicable threshold in deciding issues unrelated to fraud and unconscionability. At [46] of *Bocotra*, the Court of Appeal simply excluded the use of the test espoused in *American Cyanamid Co Ltd v Ethicon Ltd* [1975] AC 396 in determining whether a call was unconscionable or fraudulent. The Court of Appeal did not exclude the use of the normal interlocutory standard where the issue in contention is one not of fraud or unconscionability. Regardless of the standard, the plaintiff has not shown that the relevant contractual clause is inapplicable. I shall say no more on the standard to be applied.

24 Once it was found that the Exclusion Clause precluded allegations of unconscionability, the plaintiff was only left with fraud as a ground for resisting the 1st Defendant's call on the guarantee. It could not, however, be said that fraud was established: it was not shown that the 1st defendant's call on the guarantee amounted to deceit. Whether unconscionability would have been made out on the facts is another matter which lies outside the present case.

Analysis

25 In *JBE Properties Pte Ltd v Gammon Pte Ltd* [2011] 2 SLR 47 ("*JBE*") the Court of Appeal recognised both fraud and unconscionability as separate

bases for restraining a call on a performance bond (at [6]). Fraud can be established by conduct that shows that the call was invalid, and the party knowing the call to be such represented the call to the paying bank as being valid: *GKN Contractors v Lloyds Bank plc* (1985) 30 BLR 48 ("*GKN*") at 63. In comparison, unconscionability is broader. It takes into account unfair or reprehensible conduct, or that which lacks good faith: *Raymond Construction Pte Ltd v Low Yang Tong and another* [1996] SGHC 136 at [5] and [35]. As the incorporation of the Exclusion Clause is a precursor to the question of fraud (or any of the grounds for resisting a call on a guarantee for that matter), the former would be examined first.

Unconscionability

Incorporation of Exclusion Clause

26 I was satisfied that the Exclusion Clause was incorporated into the subcontract between the plaintiff and the 1st defendant. The plaintiff essentially argued that it would be premature for a determination on the question of incorporation at this stage since the suit proper has not progressed far. The point should be taken up only at the trial. This point is misconceived.

27 Incorporation is both a factual as well as a legal issue. In the application for an interim injunction, the court must necessarily consider the material facts of a dispute. The concern is not so much that the court cannot consider the question of incorporation at all but that the court should not come to a conclusive ruling at the interim stage. The court is therefore entitled to consider the issue of incorporation at present.

28 In any event, given that the effect of the Exclusion Clause was to preclude unconscionability from being a ground for an injunction against

payment, it would have to be construed at the interim stage if it were to be given any practical effect. Leaving the determination of its validity and effect to the trial would be to rob the clause of its purpose. That said, there is some uncertainty as to the question of whose burden it is to show either incorporation or non-incorporation in the present case. In the normal run of matters, the party seeking to resist a claim bears the burden of proving its case. This is typically by way of a defence. However, given that what was sought was an interim injunction to prevent payment out, the legal burden should lie on the plaintiff to establish that it was not disentitled to make such an application.

29 Turning to address the threshold needed to establish non-incorporation, the plaintiff argued that it was sufficient to make out a *prima facie* case of non-incorporation, whereas the 1st defendant argued that the plaintiff had to show a clear case. I would have thought it sufficient to raise a serious issue to be tried as regards the proposition that the clause was not incorporated. But even then, I did not consider it at all arguable that the Exclusion Clause was not incorporated. I would have reached the same conclusion even if the burden to address the issue of incorporation had been on the 1st defendant rather than the plaintiff.

30 In a nutshell, if the question of the incorporation of the terms can be answered at this stage, then it should be so answered. This goes to the heart of the basis for the plaintiff's entitlement to an injunction. It should be answered by the plaintiff, even though the standard may not be that of a final determination.

31 I accepted the arguments of the 1st defendant that the Exclusion Clause was incorporated into the subcontract. This is plain on the language of the contractual provisions in question. There is no dispute that the subcontract

between the parties comprise the Letter of Acceptance dated 3 Dec 2012 ("LOA") and documents referred in that LOA. Indeed, the plaintiff relied on the LOA as being the basis of the contractual relationship between the parties. Para 3 of the LOA states that the Sub-Contract is to be in the form of the Singapore Institute of Architects ("SIA") Conditions of Sub-Contract 4th Edition 2010, and references Particular Conditions set out the in the Main Contract. Notably, the subcontract is to be executed on a back-to-back basis in accordance with the relevant clauses within the Main Contract:[1]

> **3. Form of Sub-Contract**
>
> The Form of our Main Contract with the Employer is the Singapore Institute of Architects ("SIA") Lump Sum Contract (9th Edition) and the Sub-Contract shall be SIA Conditions of Sub-Contract 4th Edition, 2010, including all Particular Conditions set out in the Main Contract.
>
> This Sub-Contract shall be executed on a "back-to-back" basis in accordance with the relevant clauses within the Main Contract.

32 A separate document titled Particular Conditions of Sub-Contract opens with the stipulation that the Particular Conditions of Subcontract is to be regarded as part of the SIA Conditions of Sub-Contract. The Exclusion Clause, namely, clause 14A(5) of the Particular Conditions of Sub-Contract provides:[2]

> (5) Pursuant to the intent set out in Sub-Clause (1) above that the performance bond is to stand in lieu of a cash deposit, the Contractor agrees that except in the case of fraud, the Sub-Contractor shall not for any reason whatsoever be entitled to enjoin or restrain:
>
> (a) the Contractor from making any call or demand on the performance bond or receiving any cash proceeds under the performance bond; and/or
>
> (b) the obligor under the performance bond form paying any cash proceeds under the performance bond,

---

1 1 Affidavit of JYS (SUM 3934), p 79.

2 1 Affidavit of KJH (SUM 4313), p 196.

> on any other ground including the ground of unconscionability...

Clause 14A(5) then refers to clause 15.1 which concerns the parties' chosen mode of dispute resolution.

33 Given the express reference in the LOA to the Particular Conditions, there was little room, particularly at this stage in the proceedings, for any argument that the term excluding unconscionability was not incorporated. I thus find that the clause excluding the ground of unconscionability was incorporated into the subcontract.

Is the Exclusion Clause valid

34 Parties are generally free to order their affairs to exclude specific remedies or claims, especially in commercial contracts. In *CKR* it was held that save for limited circumstances (*eg*, where the clause in question is contrary to public policy), the court would generally uphold the bargain of the parties: at [17]. The Court of Appeal found that the clause at issue in the case was not contrary to public policy as it did not oust the jurisdiction of the court. The clause simply limited the right to an equitable remedy. Indeed, clauses that merely place limitations on the rights and remedies available to the parties would generally not be found to be an ouster of the court's jurisdiction: at [24]. Here, the Exclusion Clause is not one that ousts the court's jurisdiction.

35 Apart from public policy, it was certainly open to the plaintiff to argue against the enforceability of the Exclusion Clause. I understood the plaintiff to be alluding to this in its arguments on prematurity above. In this relation, the Court of Appeal in *CKR* noted the applicability of the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) as well as other common law restrictions on clauses in the same nature as the one at hand: at [23]. The Court of Appeal, however,

declined to make a decision as regards the clause in *CKR* as no arguments on this point were made in the court below. The Court of Appeal nonetheless expressed the view that given the policy reasons underlying performance bonds, it is perhaps more probable than not that such clauses would be found reasonable. I was not persuaded that the circumstances surrounding the Exclusion Clause in this case were so unreasonable as to render it unenforceable.

36 Ultimately, the effect of the Exclusion Clause is that the plaintiff could not raise unconscionability as a ground for resisting a call on the guarantee. I do note that given the local case law on unconscionability, this exclusion deprived the plaintiff of a substantive and probably easier basis for obtaining and maintaining the injunction. Be that as it may, that is the parties' bargain. The clause in question is clear in its effect and should be given effect to.

Fraud

Standard of proof

37 Apart from the issue of incorporation, there is a question regarding the applicable standard of proof to be applied in assessing fraud. On this note, there is force in the argument that the appropriate standard of proof to be applied is one of a strong *prima facie* case of fraudulent or unconscionable conduct; as can be derived from *BS Mount Sophia* at [20]–[21]; *JBE* at [9]. The entire context of the case has to be considered thoroughly and an injunction granted only if the entire context was particularly malodorous: *BS Mount Sophia* at [21].

38 Having said that, there is to my mind not a significant difference, if any, between the phrases "clear case" of fraud and a "strong prima facie case". While the Court of Appeal in *JBE* noted some doubts as to the use of the

language "clear case of fraud", such concern was directed at explaining the distinction between fraud and unconscionability that is now the law in Singapore: at [10]–[13]. In the final analysis, the court has to be satisfied that the evidence shows the possible existence of fraud; though fraud need not be probable, conclusive or determinative. I thus used the term "clear case'" in my oral remarks accompanying my decision, but for the avoidance of doubt, I was satisfied that there was no strong *prima facie* case (or even a *prima facie* case) of fraud on the present facts.

Whether fraud was established

39 To put matters in perspective, the present case is one where both sides assert that they are owed a certain sum by the other. Hence, the crux of the dispute is whether, having taken into account the sums due to each side, there remains a foundation for the 1st defendant to call on the guarantee. As a result, much of the contentions focused on showing that the conduct of the respective parties in either claiming payment, or reducing or withholding payment, was justified. According to the plaintiff's primary position, the 1st defendant could not have justifiably called on the guarantee as its claims against the plaintiff were contrived. The conduct of the 1st defendant was therefore fraudulent as the 1st defendant was effectively representing to the 2nd defendant, the bank, that its call on the guarantee was valid when it knew that there was no foundation to the call.

40 The circumstances and threshold to be met before fraud is invoked is exemplified and elaborated in a number of cases and commentaries:

(a) The clearest case of fraud would be where an invalid call is made by a beneficiary with the knowledge that the call was invalid, and

accompanied by a representation to the bank that the call is valid: *GKN* at 63.

(b) The presentation of obviously non-conforming documents to support a claim, without any explanation being proffered, may be sufficient to give rise to a finding of fraud: *Arab Banking Corp (B.S.C.) v Boustead Singapore Ltd* [2016] 3 SLR 557 ("*Arab Banking Corp*") at [86]–[87].

(c) A mere assertion of fraud is not sufficient; corroborative evidence would be required: Geraldine Andrews & Richard Millett, *Law of Guarantees* (Sweet & Maxwell, 7th Ed, 2015) at para 16-028.

(d) A key consideration is the state of the alleged wrongdoer's mind. There has to be a hint of dishonesty in the calling on the guarantee or a recklessness of indifference to the truth: *Arab Banking Corp* at [60]–[67].

41 Here, there was insufficient evidence showing fraud in relation to the call on the guarantee. The circumstances invoked by the plaintiff fell short of showing that there was a misrepresentation made by the 1st defendant to the bank that the call was valid, when the 1st defendant knew that it was not. While the 1st defendant had not been entirely consistent or conclusive about its claims against the plaintiff (*ie*, adjusting the quantum of certain claims, among others), the more pertinent point is that it did nonetheless maintain claims against the plaintiff before the call. The upshot of this conclusion meant that it could not be inferred that the basis of the 1st defendant's call on the guarantee was entirely contrived at the material time.

42 There are several category of claims the 1st defendant asserts that it has against the plaintiff, some of which are for alleged breaches by the plaintiff whereas others are in the nature of revising the payment claims submitted by the plaintiff: liquidated damages for the plaintiff's delay, re-evaluation works, back charges and damages for water ingress to name a few. It is unnecessary to go into the details of each claim at this stage. For the purposes of present discussion, I shall categorise the claims into two broad categories: the first being the "liquidated damages claim" and the second being the "other claims".

43 The plaintiff sought to show that a number of the claims the 1st defendant relied on for the call on the guarantee were contrived. The plaintiff also hinted at a lack of good faith on the call. The detailed positions of the parties are recorded above at [14]–[17] and I will not repeat them here. The starting point of the plaintiff's position is that the retention sum (or a least the first half of it) was indisputably owed to the plaintiff as the necessary works had substantially been completed. The 1st defendant had made adjustments to its claims or added further claims against the plaintiff to reduce the amount eventually owed. The call on the guarantee was also a retaliation against the plaintiff's application for adjudication over the first half of the retention sum held by the 1st defendant.

44 I start with the liquidated damages claim. The point made by the plaintiff is that the delay certificate was issued belatedly midway through the adjudication process. While that may be the case, the significance of the belated issuance of the delay certificate should not be overstated. There had been an actual delay in the completion of the project back in 2015. Indeed, there were discussions over the costs incurred by other follow-on subcontractors due to the plaintiff's delays as evidenced in a letter from the 1st defendant dated 26 May 2015. What followed was a spate of exchanges between the parties concerning

responsibility for that delay. The 1st defendant gave the plaintiff adequate notice that liquidated damages were being calculated and would be imposed in due course. This occurred in the early part of 2017, before the adjudication application. Thus, while there 1st defendant might have been better advised to issue a delay certificate earlier, the liquidated damages claim could not be said to have been fabricated in anticipation of the adjudication application.

45 Moving to consider the other claims, a number of these claims arose prior to the adjudication application. Although the 1st defendant could be criticised for being inconsistent as to the quantum or existence of the sum of these claims, much of it can be explained on the basis that the parties were negotiating the liability for the sums. This is evident in the exchanges that parties had during the period leading up to the adjudication application.

46 The fact that the 1st defendant reduced one set of claims did not indicate that the call as a whole was without foundation. The 1st defendant had maintained that there were monies owing from the plaintiff. Against this context, the reduction would appear to indicate, at least, a good faith attempt on the part of the 1st defendant to ensure fairness and accuracy of its claim against the plaintiff. Further, the reassessment of those claims were taken at the plaintiff's request.

47 I am mindful that the court is not called upon to make a definitive ruling at this stage. On this note, I was not satisfied that the 1st defendant's claims against the plaintiff were contrived. On the whole, the 1st defendant's claims against the plaintiff would have risen above $4.3m, the maximum sum under the guarantee, and would have been in the region of about $22.7m in total as of the hearing. It therefore stands to reason that the call on the guarantee had a genuine foundation. There was nothing trumped up or fabricated in the claims

made by the 1st defendant which would have been a clear indication of fraud. There was sufficient explanation before me for the pursuit of the claims by the 1st defendant. The fact that the 1st defendant had modified and amended its claim did not establish, even on a *prima facie* level, that the initial claim was wholly without foundation and thus contrived. That said, even a baseless claim may be made in honest belief. What is needed, but was lacking here, is something to show that there was either knowledge of falsity or reckless indifference to the truth on the part of the 1st defendant. It could not be said that the 1st defendant's conduct amounted to sharp practice or even pressure. Accordingly, I was not persuaded that the ground of fraud was made out – whether on the basis of dishonesty, or recklessness or indifference to the truth. It may be that the conduct complained of would have justified an injunction on the basis of unconscionability, but that is a separate matter. The plaintiff was precluded by the Exclusion Clause from making any such claim.

Full disclosure

48 Issues were taken by the 1st defendant as to the plaintiff's lack of full disclosure at the time of the *ex parte* application for the injunction. While there were some matters that should have been disclosed earlier, I accepted that the plaintiff did not fail to do so because of any *mala fides* or ulterior motive. Innocent omissions are generally not fatal to the grant of an injunction: *Tay Long Kee Impex Pte Ltd v Tan Beng Huwah (trading as Sin Kwang Wah)* [2000] 1 SLR(R) 786 at [35]. I therefore did not find that the injunction should be discharged on this basis alone.

Orders in respect of arbitration

49 The 1st defendant included a prayer in its application in respect of the arbitration but this was not actively pursued in the end.

Stay and Erinford order

50 Following my decision discharging the injunction, the plaintiff sought a stay pending appeal and an Erinford order, both of which I declined to grant. I allowed, however, a stay pending leave to appeal being considered by the Court of Appeal. The Court of Appeal has since granted leave to appeal.

Aedit Abdullah
Judge

Josephine Choo Poh Hua, Lee Hui Min and Dynyse Loh Jia Wen (WongPartnership LLP) for the plaintiff;
Kelvin Aw Wei Keng, Lee Kok Wee, Eugene and Leonard Chew Wei Chong (Morgan Lewis Stamford LLC) for the first defendant;
second defendant not represented, not present.