IN THE APPELLATE DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2025] SGHC(A) 18

Appellate Division of the High Court / Civil Appeal No 97 of 2024

Between

DJY

… *Appellant*

And

(1) DJZ
(2) DKA

… *Respondents*

In the matter of Originating Application No 530 of 2022

Between

DJY

… *Applicant*

And

(1) DJZ
(2) DKA

… *Respondents*

JUDGMENT

[Banking — Performance bonds — Restraining beneficiary from calling on standby letter of credit on ground of discrepancies in documents tendered]
[Banking — Performance bonds — Restraining beneficiary from calling on standby letter of credit on ground of unconscionability]

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v
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[2025] SGHC(A) 18

Appellate Division of the High Court — Civil Appeal No 97 of 20241
Steven Chong JCA, Kannan Ramesh JAD and Hri Kumar Nair J
18 July 2025

12 September 2025 Judgment reserved.

Steven Chong JCA (delivering the judgment of the court):

Introduction

1 This appeal arose from the decision of a Judicial Commissioner (the "Judge") in dismissing an application for an injunction to restrain a call on a standby letter of credit. He held that the standby letter of credit was analogous to a performance bond and on that premise, found that there was no unconscionability on the evidence before the court to justify the grant of the injunction.

2 On the appellant's own case, the nature of a standby letter of credit requires all parties to the transaction, *ie*, the applicant, the beneficiary and the issuing bank, to know with certainty whether the demand is valid just by considering its terms. It should follow from that proposition that any non-compliance should be apparent by considering the documents presented with

reference to the terms of the standby letter of credit, and any such non-compliance should be raised in a timely manner. In that regard, legal arguments as regards alleged non-compliance which evolve and metamorphose to resist a call on the standby letter of credit in the course of the proceedings would invariably attract scepticism and caution, especially since it is incumbent on the applicant and the issuing bank to raise any alleged non-compliance within a stipulated time frame in order to provide the beneficiary with the opportunity to remedy the non-compliance prior to the expiry of the standby letter of credit.

3 Despite placing emphasis on this proposition, the appellant's case, as elaborated below, underwent several material and belated changes in the course of the proceedings here and below. While it is for the appellant to establish unconscionability to justify the grant of the injunction, it may be tempting to describe the evolving nature of the appellant's arguments as bordering on being "unconscionable", particularly since the inordinate and inexplicable delay in raising some of the arguments had caused irreparable prejudice to the first respondent. For starters, the appellant's failure or omission to raise the alleged discrepancies deprived the first respondent of the opportunity to rectify the call on the standby letter of credit in question ("SBLC"). This was highly prejudicial, especially since the alleged discrepancies, as we will explain below, could easily have been rectified if they had been raised earlier and certainly prior to the expiry of the SBLC.

4 For the reasons set out below, we agree with the Judge that there was no legal or evidential basis to justify the grant of the injunction. The appeal is thus dismissed with costs.

Facts

Background to the dispute

5 The appellant is a company that is involved in the business of the construction, fabrication and repair of offshore production facilities. The first respondent is a company involved in acquiring, owning, leasing, and renting material and equipment for oil and gas exploration and production. The second respondent was the bank that issued the SBLC.

6 On 19 December 2003, the appellant and first respondent entered into a contract ("Contract") for the appellant to construct and assemble a semi-submersible production platform ("Rig") for the production of oil and gas in Country X. The Contract was for approximately US$774m and expressly stipulated that no adjustment was to be made to the contract price on account of any changes in the value of any currency. Whilst the Contract was in effect, the US currency suffered a significant depreciation. At the same time, the cost of Country X's goods and services (which included those being used in the construction of the Rig) experienced an increase. To alleviate these difficulties, the appellant and first respondent incorporated "Amendment No 3" to the Contract on 30 May 2006, under which the Contract sum was increased by about US$52.8m. Amendment No 3 was purportedly introduced to restore economic and financial balance in the Contract.

7 In 2007, the Federal Audit Court of Country X ("FAC") began an inquiry to investigate the legitimacy of the Contract and Amendment No 3. The FAC also initiated an investigation into a similar contract between the first respondent and another company ("Company Z") for the construction of a separate rig. The FAC determined that the first respondent should preliminarily stop making further payments to the appellant and Company Z under the

respective contracts. But because it was impossible for the appellant and Company Z to carry out their respective works without receiving payment from the first respondent, the FAC permitted the first respondent to continue making payments under the respective contracts ("Interim Decision"), provided that the appellant and Company Z furnished guarantees to refund the payments made under Amendment No 3 if ordered by the FAC in a final decision.

8 The appellant accordingly procured a standby letter of credit to stand as security for the appellant's obligation to refund the payments made by the first respondent under Amendment No 3. The standby letter of credit was extended and the amount covered increased over the years as the first respondent made more payments to the appellant under Amendment No 3. The current version of the standby letter of credit, the SBLC, was issued by the second respondent on 28 March 2022 for a maximum amount of US$126,569,231.12. The SBLC expressly provided that payment will be available against presentation of a "copy of the notification receipt by [the first respondent] from [the FAC] with the final decision issued by [the FAC] declaring the payment is null and void" and the "beneficiary's duly signed statement".

9 On 7 December 2011, the FAC released its first instance decision ("First Instance Decision"), which ordered that the parties calculate and update the amounts paid "as economic-financial rebalancing due to exchange variation and heating of the domestic market" and "liquidate the bank letters of guarantee". On 27 July 2022, the FAC dismissed the appeals against the First Instance Decision ("Appeal Decision"). The appellant and Company Z thereafter each filed a motion for clarification ("MFC") against the Appeal Decision. The FAC dismissed the appellant's MFC on 15 August 2022, while Company Z's MFC remained pending then.

10 On 22 August 2022, the first respondent called on the SBLC and demanded payment. In addition to the beneficiary's duly signed statement, the first respondent presented a copy of the notification receipt dated 1 August 2022 from the FAC, which stated that the Appeal Decision could be accessed on the FAC's portal with the "additional information" provided to access the portal. The second respondent informed the appellant on 6 September 2022 that the second respondent had received a SWIFT message containing the first respondent's written demand for payment.

Subsequent legal developments and the parties' arguments before the High Court

11 In order to properly appreciate the veracity and legitimacy of the appellant's arguments on appeal, it is crucial to trace the various legal proceedings initiated by the appellant to restrain the first respondent from calling on the SBLC and how its arguments morphed over time.

12 The appellant's case is essentially centred on non-compliance with a key term in the SBLC which requires the first respondent to present (a) a copy of the notification receipt by the first respondent from the FAC *with* a final decision of the FAC declaring the payment to be null and void and (b) a signed confirmation by the first respondent to certify that the FAC has determined the payment to be null and void, *ie*, the beneficiary's duly signed statement. There is no dispute over the beneficiary's duly signed statement. Equally, it is not disputed that the first respondent only presented the notification receipt and the beneficiary's duly signed statement. It is unclear to us as to whether the requirement as regards a copy of the notification receipt by the first respondent from the FAC *with* a final decision of the FAC contemplates one or two documents, *ie*, whether a copy of the Appeal Decision of the FAC should be

presented *independently* of the notification receipt. That said, until the issue as to whether the Appeal Decision of the FAC should be independently presented to the second respondent was raised by the Judge during the hearing in October 2024 (*ie*, more than *two years* after the call was made on the SBLC), this aspect of the alleged non-compliance was not raised by the appellant at all though the appellant claimed in its reply submissions that it only became aware that the Appeal Decision was not independently presented in June 2024. More will be said about the evidence as regards the appellant's state of knowledge at the time when the call was made on the SBLC.

13 On 8 September 2022, the appellant applied to a state court of Country X for a preliminary injunction to restrain the first respondent from taking any action to execute on the SBLC pending the FAC's determination of Company Z's MFC and also sought a final injunction ordering the first respondent to withdraw its call on the SBLC. The preliminary injunction was granted about a week later. After the FAC dismissed the appellant's second MFC against the Appeal Decision (see [16] below), the first respondent applied to the state court of Country X to discharge the injunction. The injunction was eventually discharged on the basis that the FAC had dismissed the appellant's second MFC.

14 Also on 8 September 2022, the appellant filed a writ of mandamus against the FAC, seeking a declaration that the Appeal Decision was null and void and a preliminary injunction to suspend the Appeal Decision's effects pending "final judgment" of the claim. The appellant argued that the FAC could not declare the Contract and Amendment No 3 to be void such that the FAC could not also order the first respondent to liquidate the guarantee. The appellant eventually applied – as it was entitled to do so – to withdraw the writ of mandamus. The writ of mandamus was eventually withdrawn on 5 May 2023.

15 On 9 September 2022, the appellant commenced HC/OA 530/2022 ("OA 530"), which formed the basis of these proceedings, to restrain the first respondent from calling on the SBLC pending a final decision of the FAC. In HC/SUM 3369/2022 of OA 530, the appellant sought an *ex parte* injunction to restrain the first respondent from calling on the SBLC. To support its application for the *ex parte* injunction, the appellant contended that Company Z's pending MFC before the courts in Country X meant that the Appeal Decision was not a final decision from the FAC. Not only was the first respondent's call on the SBLC therefore defective, the first respondent's alleged knowledge that it had no basis for calling on the SBLC rendered the call unconscionable. On 14 September 2022, the General Division of the High Court granted the *ex parte* injunction.

16 On 5 October 2022, Company Z's MFC against the Appeal Decision was dismissed. On 24 October 2022, the appellant filed a second MFC against the Appeal Decision. On 22 November 2023, the FAC dismissed the appellant's second MFC (see [13] above).

17 On 14 December 2023, the state court of Country X dismissed the appellant's application for the final injunction (see [13] above). On the same day (*ie*, 14 December 2023), the appellant commenced a lawsuit in the federal court of Country X seeking (a) a preliminary injunction to "halt the effects" of the Appeal Decision; and (b) a declaration that the Appeal Decision was null and void (the "Lawsuit"). The basis of this Lawsuit was: (a) the occurrence of an intercurrent statute of limitation; (b) the FAC being unable to regulate the Contract; and (c) the FAC being unable to directly determine the definitive recovery of amounts. The appellant's application for the preliminary injunction was dismissed on 15 December 2023. The final appeal against this decision is pending judgment.

18 On 21 December 2023, the appellant commenced arbitration against the first respondent (the "Arbitration"). On 18 January 2024, the appellant filed HC/OA 60/2024 ("OA 60") for an injunction to restrain the first respondent from calling on the SBLC pending the conclusion of the Arbitration. The appellant contended that it was forced to do so since the first respondent had intimated that it would take active steps to discharge the interim injunction and prematurely liquidate the SBLC, notwithstanding that there was an agreement between the parties to refer any dispute under the Contract (including the first respondent's entitlement to the sum under the SBLC) to arbitration. The appellant therefore sought an injunction until the full and final determination of the arbitral tribunal or until any further order from the tribunal. OA 60 was eventually withdrawn when the arbitral tribunal ruled that it was competent to adjudicate on any claim for declaratory relief or damages under the Contract and Amendment No 3, including those arising from the consequences (anticipated or otherwise) of the operation of the SBLC. This was notwithstanding that the tribunal did "not have jurisdiction to order injunctive relief to prevent a demand from being made on the SBLC".

19 During the oral arguments in the court below, the Judge raised the point that the Appeal Decision was not attached with the notification receipt when the first respondent presented it for payment under the SBLC. This inspired counsel for the appellant, Ms Wendy Lin ("Ms Lin"), to advance a new argument that the call on the SBLC was discrepant because the decision referred to in the notification receipt did not include the Appeal Decision but, instead, only stated that the requests for review were dismissed. Counsel for the first respondent, Ms Blossom Hing *SC* ("Ms Hing"), objected to the appellant belatedly raising this argument, stating that the appellant had not raised any issue with the notification receipt since the call on the SBLC was made in 2022.

20 The second respondent was absent and unrepresented, and did not make any submissions nor file any affidavits.

Decision below

21 The Judge dismissed OA 530, reasoning that the appellant had failed to establish any valid ground to restrain the first respondent's call on the SBLC. The Judge reasoned as follows:

(a) The SBLC was properly characterised as a performance bond instead of a letter of credit. Consequently, in determining whether to restrain the call on the SBLC, the applicable test was whether there was fraud or unconscionability on the part of the first respondent in calling on the SBLC (see *DJY v DJZ and another* [2024] SGHC 301 ("Judgment") at [14] and [29]).

(b) There was strict compliance with the terms of the SBLC. In this regard, the Judge interpreted the SBLC as requiring a declaration from the FAC to the effect that the first respondent was to be repaid the payments made to the appellant under Amendment No 3 following the Interim Decision. The Judge also held that the Appeal Decision was a final decision of the FAC (Judgment at [41], [48] and [52]).

(c) It was sufficient that the notification receipt made a clear and explicit reference to the Appeal Decision through a link (Judgment at [50]), and as such, it was not necessary to present the Appeal Decision separately.

(d) The appellant failed to establish a strong *prima facie* case of unconscionability on the first respondent's part. Since the appellant

failed to demonstrate unconscionability on the facts, it followed that there was no fraud (Judgment at [60] and [67]).

22 As a consequence of the dismissal of OA 530, the Judge awarded the first respondent $14,000 in costs all-in.

23 Dissatisfied with the Judge's decision, the appellant appealed against the Judge's findings that there was strict compliance with the terms of the SBLC and that the appellant had failed to make out a strong *prima facie* case of unconscionability on the part of the first respondent.

The parties' arguments on appeal

24 In addition to the arguments raised before the Judge, the appellant advances *yet* another new argument on appeal, *ie*, that the first respondent's demand does not comply with rr 3.06 and 4.04 of the International Standby Practices, International Chamber of Commerce Publication No. 590 (1998) ("ISP98"). The appellant asserts that the Appeal Decision cannot be presented by the link in the notification receipt because r 3.06(b) of the ISP98 requires the Appeal Decision to be presented as a *paper document*. In addition, under r 4.04 of the IPS98, the Appeal Decision was discrepant as it was not in the language of the SBLC, *ie*, the English language.

25 The appellant requires this court's permission to pursue these new arguments on appeal (see *BCBC Singapore Pte Ltd and another v PT Bayan Resources TBK and another* [2024] 1 SLR 1 ("*BCBC*") at [34]). The first respondent contends that the appellant should not be permitted to raise the new arguments on appeal and that the first respondent's demand strictly complied with the terms of the SBLC. The first respondent further rejects any allegation of unconscionable conduct.

26 The first respondent also challenges the Judge's characterisation of the SBLC as a performance bond instead of as a letter of credit. But since the first respondent did not file a cross-appeal, it is not permitted to raise this argument (see *Sapura Fabrication Sdn Bhd and others v GAS and another appeal* [2025] 1 SLR 492 at [50]).

27 The second respondent was, as with the case during the hearing before the Judge, absent and unrepresented. It did not file any submissions or affidavits for the purposes of the appeal.

Issues to be determined

28 Based on the parties' submissions, the following issues arise for our determination in this appeal:

(a) Should the appellant be permitted to raise the new arguments pertaining to rr 3.06 and 4.04 of the ISP98?

(b) Is there any merit in the new arguments even if permission is granted to raise the new arguments?

(c) Should an injunction be granted to restrain the first respondent's call on the SBLC?

Our decision

Should the appellant be allowed to rely on rr 3.06 and 4.04 of the ISP98 in this appeal?

An observation on the manner in which the Appeal Decision was presented and the applicable principles when seeking permission to raise new arguments on appeal

29 As alluded to earlier, all of the appellant's arguments in support of the injunction are directed at the Appeal Decision. In the court below, the appellant's arguments challenged the *legal effect* of the Appeal Decision. First, by claiming that the Appeal Decision was not final due to the pending MFC by Company Z and subsequently that it did not declare that the payment was null and void (which will be addressed below at [82]–[97] when examining whether the first respondent's call on the SBLC was unconscionable). The appellant only raised *non-compliance* with the SBLC *after* the point was raised by the Judge during the hearing below, the non-compliance being that the Appeal Decision was not presented *with* the notification receipt as it was referred to only by the link. On appeal, the appellant's case has evolved further in seeking permission to rely on rr 3.06 and 4.04 of the ISP98 to assert *another aspect of non-compliance* in that the Appeal Decision was not presented in English as a paper document.

30 Before deciding whether the appellant should be permitted to raise the new arguments on appeal, we make a general observation on the first respondent's presentation of the Appeal Decision through the link.

31 The SBLC requires the first respondent to present the notification receipt from the FAC *with* the Appeal Decision "declaring the payment [to be] null and void". As mentioned earlier (see [12] above), it is unclear to us whether this

requirement contemplated one or two documents. Put another way, it is unclear to us whether the copy of the Appeal Decision should have been presented *independently* of the notification receipt.

32 At the appeal hearing before us, Ms Hing submitted that this requirement was satisfied because that was precisely the manner in which the Appeal Decision was communicated to the first respondent. Since the first respondent received the Appeal Decision by way of the link embedded in the notification receipt, Ms Hing argued that it sufficed for the first respondent to forward the notification receipt itself to the advisory bank, which in turn forwarded the notification receipt to the issuing bank. But Ms Hing's argument overlooks the fact that the notification receipt did not on its face explicitly declare that the payment obligation was null and void as required under the SBLC.

33 At the same time, we find it curious that until the point was raised by the Judge below, neither the appellant nor the second respondent thought that the Appeal Decision was required to be independently presented. As will be detailed later, this has a material bearing as to whether the parties contemplated the SBLC as requiring the Appeal Decision to be independently presented (see [92]–[94] below).

34 The Judge, however, found that the presentation was compliant. Tapping on the doctrine of incorporation by reference for contracts (see, in this regard, *Bintai Kindenko Pte Ltd v Samsung C&T Corp and another* [2019] 2 SLR 295 at [59]), the Judge reasoned that since the notification receipt made a clear and explicit reference to the Appeal Decision through the link, this sufficed to incorporate the Appeal Decision into the notification receipt. It therefore followed that he could refer to the Appeal Decision in determining whether the

requirement of strict compliance had been met here (Judgment at [50]). Hence, the Judge was of the view that the Appeal Decision did not need to be independently presented.

35 This is undoubtedly an interesting point of contractual interpretation but ultimately, the outcome of this appeal will be no different, irrespective of whether the requirement contemplated one or two separate documents. The above discussion, however, has an important bearing on whether permission should be granted to raise the new arguments – in particular, the appellant's reliance on r 3.06 of the ISP98 because that argument is predicated on the requirement for the Appeal Decision to be independently presented.

36 Having explained how the new arguments came to be made, we turn to examine the factors which the court will consider in deciding whether permission should be granted: (a) the nature of the parties' arguments before the Judge; (b) whether the lower court considered and provided any findings and reasoning in relation to these new arguments; (c) whether further submissions, evidence or findings would have been necessary if the new points had been raised below; and (d) any prejudice caused to the other party if permission is granted to raise the new arguments (*BCBC* at [35]–[36]).

The appellant should be denied permission to raise the new arguments on appeal

37 In our judgment, the appellant should not be permitted to raise the new arguments on appeal.

38 First, the appellant's arguments continuously evolved throughout the hearing before the Judge and on appeal. Specifically, the basis for the injunction sought by the appellant shifted from Company Z's pending MFC against the

Appeal Decision (which was subsequently dismissed), to the Appeal Decision not declaring the first respondent's payment obligation to be null and void, to the Appeal Decision not being presented with the notification receipt when the first respondent called on the SBLC, and finally, to its reliance on rr 3.06 and 4.04 of the IPS98. The appellant has not provided any satisfactory reason as to why the new arguments could not have been raised below, especially since it is alleging that the discrepancies were obvious on the face of the presentation.

39 In this regard, the appellant has alleged in its *reply submissions* for the hearing below that it only became aware that the Appeal Decision was not presented with the notification receipt when the first respondent filed and served its factual affidavits in OA 60 in June 2024. Not only was this allegation not raised in *any* of the appellant's affidavits, the state of the evidence as to whether the appellant received the documents which were presented to the second respondent when the first respondent called on the SBLC was plainly unsatisfactory. During the hearing before this court, Ms Lin attempted to explain that the poor state of the appellant's evidence was due to the fact that the point regarding the delay in raising the argument that the Appeal Decision was not presented with the notification receipt was only raised by Ms Hing in the First Respondent's Case.

40 At the outset, we would observe that the first respondent *did* highlight the delay before the Judge. As alluded to earlier, Ms Lin, in her reply submissions before the Judge, claimed that the delay was due to the appellant only having sight of the documents tendered when the first respondent filed its affidavits in OA 60. When Ms Lin raised the argument that the Appeal Decision had to be independently presented with the notification receipt, Ms Hing objected, stating that the appellant had failed to raise this argument when it first called on the SBLC in 2022. Hence, it is plainly incorrect for Ms Lin to claim

that Ms Hing only raised this delay point for the first time in the First Respondent's Case.

41 Further, the appellant has only itself to blame for the state of its evidence because the burden was on the *appellant* to raise the non-compliance (see s 103 of the Evidence Act 1893 (2020 Rev Ed); Jeffrey Pinsler *SC*, *Evidence and the Litigation Process* (LexisNexis, 18th Ed, 2024) at para 12.003). It certainly does not lie in the mouth of the appellant to cast blame on the first respondent as Ms Hing was merely reacting to the appellant's delay in raising the new argument *during the hearing below*. Having failed to raise the argument earlier, the appellant must face the consequences of its delay in doing so. Finally, even if the appellant only learned in *June 2024* that the Appeal Decision had not been independently presented (which we do not accept (see [55] below)), it still does not account for the fact that the point was not raised by the appellant *prior to* the Judge mentioning it during the hearing in *October 2024*. The inference that the appellant did not believe that the Appeal Decision had to be independently presented is irresistible.

42 Second, had the appellant raised the new arguments pertaining to rr 3.06 and 4.04 before the Judge, further submissions would have been necessary for the Judge to make a finding on whether the appellant had waived compliance with rr 3.06 and 4.04 given the indisputable delay in raising them.

43 It appears to us that the first respondent may not suffer *any additional* prejudice *per se* from the new arguments *on appeal*. This is because the SBLC has long since expired. The SBLC expired on 16 April 2023 unless the Appeal Decision was released first, in which case the SBLC would expire 30 days after the date on which the Appeal Decision was released. The Appeal Decision was released on 27 July 2022 while the appellant only made the new arguments in

its Appellant's Case filed on 19 March 2025. To be clear, we are merely stating that the first respondent would not suffer *any additional* prejudice *from the new arguments being raised for the first time on appeal*. As we elaborate later (see [69] below), this is because the first respondent has suffered prejudice from the appellant's failure to raise these arguments at a much earlier time, *ie*, when the first respondent first called on the SBLC. By failing or omitting to raise these arguments when the call on the SBLC was first made, the first respondent was deprived of the opportunity to rectify the initial call on the SBLC. Indeed, if the alleged discrepancies had been raised earlier, they could have been easily rectified by simply presenting the Appeal Decision as a paper document. Nevertheless, for the purposes of considering whether to allow the appellant to raise the new arguments on appeal, we are of the view that the first respondent would not suffer *any additional* prejudice should the appellant be permitted to raise them on appeal. However, this point does not affect our ultimate decision to refuse permission to raise these new arguments on appeal.

44 On balance, however, the evolving nature of the appellant's arguments and the need for further submissions had these arguments been raised before the Judge below indicate that the appellant never believed that the Appeal Decision needed to be presented independently of the notification receipt. Instead, the appellant only adopted the argument *after the Judge raised it in the hearing below*. In its written submissions before the Judge, the appellant's arguments proceeded on the basis that the Appeal Decision did not declare the first respondent's payment obligation to be null and void. It is clear that up to the point when the Judge raised the point, the appellant did not believe that the Appeal Decision needed to be presented with the notification receipt. It appears to us that the appellant's conduct throughout these proceedings was simply to conceive new arguments in its efforts to resist the call on the SBLC whenever

its previous argument failed to find traction with the Judge. As alluded to earlier (see [3] above), the appellant's conduct borders on being unconscionable. In the circumstances, we are of the view that permission should be denied to the appellant to raise the new arguments on appeal.

The new arguments would have failed in any event

45 In any event, we are satisfied that the appellant's case, premised on rr 3.06 and 4.04 of the ISP98 (and, in fact, the other alleged discrepancies), would have failed.

The appellant has no legal basis to restrain the call on the SBLC solely on the basis of discrepancies in the documents presented to the second respondent

46 In our judgment, the applicant has no available avenue to restrain the first respondent's call on the SBLC *solely* on the basis of the documents which were presented to the second respondent. This is because the second respondent had indicated to the appellant that it was going to pay the first respondent unless the appellant obtained an order of court to restrain the payment. To fully flesh out this point, it is important first to understand the structure of the ISP98, which the parties do not dispute is incorporated into the SBLC. The ISP98 governs two sets of contractual relationships under the SBLC. The first relationship is that between the first respondent as the beneficiary and the second respondent as the issuing bank. Rule 5.01(a) of the ISP98 provides that if the documents presented are non-compliant, the second respondent must give a notice of dishonour to the first respondent within a reasonable time. Notice given within three business days is deemed reasonable, whereas notice given after seven business days is deemed unreasonable (see r 5.01(a)(i) of the ISP98). If the second respondent fails to give timely notice of a discrepancy in a notice of dishonour, the second respondent is precluded from asserting that discrepancy in any document

containing the discrepancy (see r 5.03(a) of the ISP98). If the second respondent fails to give timely notice of dishonour, it must then honour the presentation and make payment in a timely manner (see r 2.01(a) and r 2.01(c) of the ISP98).

47 The second relationship that the ISP98 governs is that between the second respondent and the appellant as the applicant. Rule 5.09(a) of the ISP98 provides that if the second respondent intends to honour a non-complying presentation (which was the case here) and the appellant seeks to assert any non-compliance, it must give timely notice by prompt means to the second respondent. The appellant would be acting in a timely manner if, within a reasonable time after receiving the documents presented, it sends a notice to the second respondent stating the discrepancies on which the objection is based. If the appellant fails to give a timely notice of objection by prompt means (as was the case here), it would be precluded from asserting against the second respondent any discrepancy or other matter apparent on the face of the documents received (see r 5.09(c) of the ISP98). This rule exists to safeguard the appellant's position *vis-à-vis* the second respondent for making payment on a non-compliant presentation and to protect the second respondent *vis-à-vis* the appellant if the objection is not timeously raised.

48 The ISP98 therefore does not directly govern the relationship between the appellant and the first respondent since there is no privity between these two parties insofar as the SBLC was concerned. Where the appellant is of the view that the documents presented by the first respondent do not strictly comply with the terms of the SBLC, it must rely on the second respondent as the issuing bank to reject the documents for non-compliance. This is precisely why the appellant is required to give timely notice of any objection by prompt means to the second respondent (see r 5.09(c) of the ISP98) so that the second respondent can raise these objections (if valid) to the first respondent and reject the discrepant

documents (see r 5.01(a) of the ISP98). In this regard, we think it is important to clarify the nature of the relationship between the appellant and the second respondent. We caveat this by saying that these are general principles and their applicability is ultimately fact-specific.

49 While there is some suggestion that the nature of the relationship between an issuing bank and an applicant for a letter of credit would be characterised as that of agent and principal (see *Midland Bank Ltd v Seymour* [1955] 2 Lloyd's Rep 147 at 153, col 1), this characterisation has been criticised for not appreciating the dual aspects of an agency relationship (see Peter Ellinger & Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing, 2010) ("*Letters of Credit*") at 83–84). Indeed, agency in its fullest sense encompasses both an external and an internal aspect. The external aspect empowers the agent to affect the principal's legal position *vis-à-vis* third parties. The internal aspect concerns the relationship between principal and agent, under which the agent has special duties *vis-à-vis* the principal and which empowers the agent to act on the principal's behalf (see Peter Watts *KC* & FMB Reynolds *KC*, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 23rd Ed, 2024) at paras 1-019 and 1-024). In the context of a standby letter of credit, the issuing bank is unable to affect the applicant's legal position *vis-à-vis* third parties. It therefore seems inappropriate to characterise the relationship between the appellant and the second respondent here as that of principal and agent.

50 Instead, it has been suggested that the better approach would be to view the issuing bank as acting under an internal mandate from the applicant (*Letters of Credit* at 84). We agree. In the context of a documentary letter of credit for the sale of goods, where the applicant buyer instructs the issuing bank to open a letter of credit, the issuing bank gives the undertaking to the beneficiary seller

as *principal* rather than as the buyer's *agent*. Consequently, the buyer has no *locus standi* to interpose itself directly into the letter of credit contract and instruct the issuing bank to refuse payment under the credit. If the issuing bank pays out against non-conforming documents, it has acted in breach of its mandate. The buyer's recourse is not against the seller, but rather, against the issuing bank in contract (*ie*, the contract between the buyer and the issuing bank for the opening of the credit) (see Ewan McKendrick, *Goode on Commercial Law* (LexisNexis, 6th Ed, 2020) at para 35.58).

51 We note that in *Letters of Credit*, the authors contend that acceptance of non-conforming documents by the issuing bank will prejudice the applicant because the applicant will lose the right against the beneficiary to reject the documents for non-compliance (at 89). To the extent that *Letters of Credit* suggests that the applicant has a right *vis-à-vis* the beneficiary to reject documents tendered to the bank for non-compliance, with respect, that would not be entirely accurate. It is unclear on what basis can an applicant assert a right *vis-à-vis* a beneficiary to reject documents tendered to the issuing bank for non-compliance. Indeed, the authors themselves take the view that an issuing bank is *not* the applicant's agent (*Letters of Credit* at 83–84). If the issuing bank is *not* acting as the applicant's agent, then it is not clear on what basis can the applicant, as against the beneficiary, reject for non-compliance documents tendered to the issuing bank. In our view, there is no legal basis unless the *nature* of the alleged non-compliance (*ie*, the discrepancy) rendered the call unconscionable or fraudulent.

52 In sum, the nature of the relationship between an applicant and the issuing bank is best characterised as that of the issuing bank acting under a *mandate* from the applicant (*Letters of Credit* at 84). These principles apply equally in the context of an applicant contracting with an issuing bank to procure

a standby letter of credit or a performance bond in favour of a beneficiary (*Letters of Credit* at 301). As a result, where an issuing bank accepts the tender of non-conforming documents and pays the beneficiary under a standby letter of credit, the applicant has no right against the beneficiary to reject the documents solely for non-compliance. As a corollary, when an issuing bank fails to raise any discrepancy to the presented documents, it can be inferred that it did not consider the presentation to be discrepant. Likewise, an applicant has no right as against the beneficiary to reject the documents tendered to the issuing bank for non-compliance. Instead, assuming that the Judge correctly treated the SBLC as akin to a performance bond, an applicant can only rely on fraud or unconscionability to restrain the payment out under a standby letter of credit.

53 In the present case, the second respondent did not issue *any* notice of dishonour to the first respondent. On the contrary, the second respondent explicitly informed the appellant that it was going to pay the first respondent unless the appellant obtained an order of court to restrain the payment. Since the second respondent did not raise any discrepancies, the appellant has lost the only available avenue it had to restrain payment under the SBLC solely based on the discrepancies in the documents. As we have highlighted at [51] above, the only way the appellant can seek an injunction based on the discrepancies is to demonstrate that the *nature* of the alleged discrepancy rendered the call unconscionable or fraudulent. In short, there is no legal basis on which the appellant can seek an injunction premised *solely* on the purported non-compliance, including the new arguments pertaining to rr 3.06 and 4.04 of the ISP98.

The appellant, in any event, is estopped by representation from raising the discrepancies relating to rr 3.06 and 4.04 of the ISP98

54 It is thus strictly unnecessary for us to determine whether the appellant was estopped by representation from raising the discrepancies in relation to rr 3.06 and 4.04 of the ISP98. For completeness, we shall express our view that the appellant is estopped by representation from raising them.

(1) Knowledge is irrelevant for the purposes of estoppel by representation

55 Our examination of this issue is premised on the appellant having the right to raise the discrepancies to the first respondent (which we have decided otherwise at [46]–[53] above). When Ms Lin was questioned on the state of knowledge necessary for waiver, she submitted that in order for the appellant to be considered to have waived the discrepancies, the appellant must first have been aware of the discrepancies. In other words, knowledge of the discrepancies is necessary for waiver to operate against the appellant. In its reply submissions for the hearing before the Judge, the appellant asserted that it did not receive the presented documents until the first respondent filed its affidavits in OA 60 in June 2024 and hence was not aware of the discrepancies in those documents. In the first place, we are not satisfied that the appellant did not receive the presented documents from the second respondent. We would expect such material assertions to be stated on affidavit. But as alluded to earlier (see [39] above), it is significant that the appellant has not stated in any affidavit that it did not receive from the second respondent the documents presented by the first respondent. We should add that there could be no conceivable reason why the second respondent would have withheld those documents from the appellant. We also observe that the second respondent has not come forward to state that the presented documents were not provided to the appellant.

56 For a person to successfully rely on estoppel by representation, that person must show that the representor made a material, clear and unambiguous representation by words or conduct with the intention (whether actual or presumptive) and result of inducing the person to alter his position to his detriment (see *United Overseas Bank Ltd v Bank of China* [2006] 1 SLR(R) 57 at [18]–[19]; *Yong Ching See v Lee Kah Choo Karen* [2008] 3 SLR(R) 957 at [73]; *Yokogawa Engineering Asia Pte Ltd v Transtel Engineering Pte Ltd* [2009] 2 SLR(R) 532 at [8]). Assessing intention is an objective rather than subjective inquiry (see *Trane (UK) Ltd v Provident Mutual Life Assurance* [1995] 1 EGLR 33 at 38). It must be shown that a reasonable person in the position of the representee would take the representation to be true and believe that it was meant to act upon the representation (see *Lowe v Lombank Ltd* [1960] 1 WLR 196 at 205).

57 It is irrelevant, for the purposes of establishing estoppel by representation, for the appellant to have had knowledge of the alleged defects pertaining to rr 3.06 and 4.04 of the ISP98 when the first respondent first called on the SBLC. This is because knowledge for the purposes of estoppel by representation is irrelevant. When the issue of waiver was raised during the appeal hearing, Ms Lin submitted that actual knowledge of the discrepancies is necessary to establish a case of waiver. In aid of her submission, she referred this court to the decision in *BMO v BMP* [2017] SGHC 127 ("*BMO*"). There, the High Court observed that the element of knowledge required for the purposes of establishing *waiver by election* is actual knowledge and not constructive knowledge (at [79]–[81]). In our judgment, *BMO* does not assist the appellant. This is because waiver by election is a different legal creature from estoppel by representation, the latter of which is relevant here. It is clear that for the purposes of establishing waiver by election, actual knowledge is

necessary. This was explained in *Chai Cher Watt (trading as Chuang Aik Engineering Works) v SDL Technologies Pte Ltd and another appeal* [2012] 1 SLR 152 at [33] because:

> the principle of election applies when a state of affairs comes into existence in which one party becomes entitled to exercise a right, and has to choose whether to exercise the right or not. *His election has generally to be an informed choice, made with knowledge of the facts giving rise to the right.*
>
> [emphasis added]

58 That actual knowledge is required for the purposes of waiver by election was also recently reiterated by the Court of Appeal in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 ("*Audi Construction*") at [54]. For completeness, we would add that *BMO* was overturned on appeal, although the Court of Appeal did not address the High Court's observation on the type of knowledge required for waiver by election (see *Marty Ltd v Hualon Corp (Malaysia) Sdn Bhd (receiver and manager appointed)* [2018] 2 SLR 1207).

59 However, the essence of estoppel by representation is whether the representor has through *his words or conduct* induced the representee to act in a certain way, with the intention that the representee relies on it. As such, it seems to us that the representor's actual knowledge of the facts giving rise to the estoppel is strictly irrelevant. The inquiry into the representor's intention is entirely objective. This is borne out by the authorities. In *Bremer Handelsgesellschaft mbH v C Mackprang Jr* [1979] 1 Lloyd's Rep 221 ("*Mackprang*") (the facts of which are set out in greater detail in *Bremer Handelsgesellschaft mbH v C Mackprang Jr* [1977] 2 Lloyd's Rep 467), the sellers sold to the buyers 1,200 tonnes of US solvent extracted toasted soya bean meal. Shipment was to be at the rate of 200 tonnes per month from April to

September 1973. The US Department of Commerce imposed a partial embargo on the export of soya bean meal. In respect of the June shipment, the buyers accepted 40.5 tonnes of the shipment and accordingly waived any damages for this amount. A dispute subsequently arose between the parties as to the balance shipment of 159.5 tonnes of soya bean meal. It is relevant for present purposes to note that the shipping documents in respect of 40 tonnes of that shipment ("Defective Documents Shipment") were defective because they did not comply with the terms of the contract. The buyers, however, did not raise this defect until at least two days after the documents were tendered. The dispute was referred to the Board of Appeal of the Grain and Feed Association. The Board made an award ruling that the sellers were in default in respect of the full 159.5 tonnes. Robert Goff J upheld the award and the sellers appealed.

60 The majority of the English Court of Appeal (comprising Lord Denning MR and Lord Justice Shaw) allowed the appeal to the extent that the buyers were not allowed to recover damages in respect of the Defective Documents Shipment. This was because the telexes sent by the buyers, along with the delay in rejecting the documents, indicated that the buyers had waived their right to treat the sellers as being in default (at 225–226 and 230–231). The buyers were nevertheless allowed to claim damages for the remaining 119.5 tonnes of the shipment as this amount was never delivered (at 225–226 and 231). In coming to these conclusions, Lord Denning MR cited Lord Salmon in *Bremer Handelsgessellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109 ("*Vanden*") and held that "[i]f a buyer, who is entitled to reject goods or documents on the ground of a defect in the notices or the timing of them, so conducts himself as to lead the seller reasonably to believe that he is not going to rely on any such defect – *whether he knows of it or not* – then he cannot afterwards set up the defect as a ground for rejecting the goods or

documents when it would be unfair or unjust to allow him to do so" [emphasis added] (at 225, col 2–226, col 1). Shaw LJ concurred with Lord Denning MR's opinion that knowledge was not necessary (at 230, col 2–231, col 1). On the other hand, Stephenson LJ, writing the dissenting judgment, disagreed with Lord Denning MR's interpretation of Lord Salmon's opinion in *Vanden* in that Lord Salmon's reference to the buyers waiving any defect in the notice "whether aware of it or not" was not intended as laying down any principle that there can be waiver or estoppel even in the absence of knowledge of infringement or obvious means of knowing the infringement. Instead, Stephenson LJ explained that Lord Salmon was referring to "a patent defect which could only be missed by not reading the notice or not knowing the law" and as such, there could not be any waiver by equitable estoppel if the representor did not know that his rights had been infringed or, at the very least, have such obvious means of knowing that his rights had been infringed that the representee could reasonably assume that the representor was acting with knowledge of the infringement (at 229, col 1).

61 *Mackprang* was subsequently cited with approval by the Queen's Bench Division (Commercial Court) in *Cerealmangini SpA v Alfred C Toepfer, The Eurometal* [1981] 3 All ER 533, a case which was cited by Ms Hing during the appeal hearing. There, the buyers agreed to purchase 10,000 tonnes of Spanish barley at $132 per tonne for delivery. The sellers were obliged on arrival of the vessel to tender documents entitling the buyers to obtain delivery of the barley. The sellers did not tender the documents on arrival of the vessel. The buyers declined to accept delivery on the ground that the barley was infested with live weevils. When the sellers tendered the shipping documents late, the buyers again rejected the barley on the ground that it was infested. The buyers did not reject the documents on the ground that they were discrepant in that they had

been forwarded late. The sellers eventually sold the barley to a third party and sought to recover from the buyers the loss suffered on the resale. The buyers refused to pay. Holding that the buyers were obliged to make good the seller's loss on the resale, Lloyd J cited *Mackprang* and reasoned that whether he relied on the majority's or Stephenson LJ's formulations, the buyers had conducted themselves in a way which was wholly inconsistent with an intention to exercise any present right to reject the documents on the ground that they were not presented on arrival of the vessel. The buyers therefore could not now raise the issue of the documents not being presented on the arrival of the vessel as a basis for rejecting the documents (at 538 and 539e–g).

62 The Court of Appeal's decision in *Mackprang* therefore requires us to take a closer look at what the House of Lords in *Vanden*, especially Lord Salmon, decided in relation to estoppel. In *Vanden*, the House of Lords was faced with a similar contract for the sale and purchase of US solvent extracted toasted soya bean meal that was affected by the embargo imposed by the US Department of Commerce. When the sellers failed to deliver 280 tonnes of soya bean meal, the buyers claimed damages for non-delivery. When the matter came before the House of Lords, it unanimously held that the sellers were not liable for the non-delivery. In reaching this conclusion, the House of Lords first unanimously held that the notice given under the *force majeure* clause was given in time (at 116, 118, col 2, 125, col 1 and 129, col 2–130, col 1). Next, it held, by a 3:2 majority, that the notice given under the *force majeure* clause was bad because it did not state the port or ports from which the goods were intended to be shipped following the occurrence of the *force majeure* event (as required by the contract) (at 116, col 1, 119, col 2 and 131). At the same time, the House of Lords unanimously took the view that the telexes between the parties showed that the buyers had accepted the notice given pursuant to the *force majeure*

clause in the contract and had thereby waived the right to challenge its validity on account of the purported defects as to the failure, contrary to the requirements of the *force majeure* clause, to state the port(s) from which the goods were intended to be shipped following the occurrence of the *force majeure* event and the purported late delivery of the notice (at 116, col 2–117, col 1, 120, col 2–121, col 1, 126, col 1–127, col 2, 130, col 2 and 131).

63 In his opinion, Lord Salmon addressed the argument that the notice was bad because the notice did not state the port(s) of loading from which the goods were intended to be shipped after the delay and the notice was purportedly given late. Lord Salmon was of the view that it was immaterial that the sellers or buyers did not realise this defect when the notice was given. Because the buyers – by their telexes and conduct – had led the sellers to believe that the buyers had accepted the notice as being good, the buyers had necessarily waived any defect in the clause, whether they were aware of it or not (at 127, col 1):

> I do not imagine that the "multiple ports" point which, I think, was not raised until some years later, nor the time of giving notice point had ever occurred to the sellers or to the buyers. But I do not consider that this matters. If the buyers, by their telexes or by their conduct lead the sellers to believe that they accepted the July 3 notice as a good notice under cl. 22, they necessarily waived any defect it might contain *whether they were aware of it or not.*
>
> [emphasis added]

64 In our judgment, Lord Salmon accepted that even though the buyers might have been unaware of the defects in the notice, because they had conducted themselves in a manner so as to lead the sellers to believe that there were no defects, the buyers would be taken to have waived them. In using the term "waiver", it is clear that the House of Lords in *Vanden* and Lord Denning MR in *Mackprang* were referring to what is sometimes referred to as waiver by estoppel. However, as the Court of Appeal pointed out in *Audi Construction*,

"waiver by estoppel" is not, strictly speaking, a form of waiver. This is because the doctrine of estoppel is premised on inequity rather than choice (the latter of which is relevant for waiver by *election*) (at [57]). At the same time, there is support for the view that the House of Lords in *Vanden* and Lord Denning MR in *Mackprang* were essentially referring to promissory estoppel as opposed to waiver by election (see Piers Feltham, Daniel Hochberg & Tom Leech, *The Law Relating to Estoppel by Representation*, (LexisNexis UK, 4th Ed, 2004) at paras IV.3.9 and V.5.1.2). There is no reason why the principles would be different for estoppel by representation.

65 In our judgment, the authorities are therefore clear that knowledge is irrelevant for the purposes of estoppel by representation.

66 In the context of a standby letter of credit as in the present case, if an applicant for a standby letter of credit conducts itself in a manner (in failing to raise the alleged discrepancies to the attention of the issuing bank) so as to lead the beneficiary to reasonably believe that there are no discrepancies in the demand and thereby cause the beneficiary not to rectify the discrepancies before the expiry of the standby letter of credit, it would be quite inequitable to allow the applicant to subsequently rely on any alleged discrepancy to prevent the beneficiary from calling on the standby letter of credit. This is simply because the beneficiary would be deprived of the opportunity to rectify the demand before the expiry of the standby letter of credit. The applicant for a standby letter of credit cannot be permitted to profit from its own omission to timeously raise the discrepancies with the issuing bank until it is too late for the beneficiary to rectify the demand. The applicant would, in these circumstances, be estopped by representation from raising the new discrepancies.

(2) The appellant is estopped by representation from relying on rr 3.06 and 4.04 of the ISP98 in this appeal

67 Before examining this issue, it is important to bear in mind our views at [46]–[53] above that the appellant has no legal basis to restrain the call on the SBLC *solely* based on the discrepancies in the documents unless the *nature* of the alleged discrepancy rendered the call unconscionable or fraudulent.

68 Even taking the appellant's case at its highest that, for some inexplicable reason, the second respondent failed or omitted to provide the presented documents to the appellant, the appellant would, in any event, have been estopped by representation from relying on rr 3.06 and 4.04 of the ISP98.

69 When the first respondent called on the SBLC, the appellant represented to the first respondent that there were no discrepancies pertaining to rr 3.06 and 4.04 of the ISP98 as the appellant merely claimed that the only defect with the demand was that Company Z's pending MFC meant that the Appeal Decision was not a final decision of the FAC. The appellant then conceded that the first respondent's right to draw on the SBLC would remain unaltered once Company Z's MFC was dismissed. By failing to raise the purported discrepancies relating to rr 3.06 and 4.04 then, irrespective of *whether it was aware of them or not*, the appellant had represented to the first respondent that there were no such discrepancies. The appellant through its conduct, intended (whether actually or presumptively) for the first respondent to believe that the only obstacle standing in the way of its call on the SBLC was Company Z's pending MFC. The first respondent relied on this representation to its detriment by not making any fresh demand to correct any purported defects in the documents tendered. Having only raised the arguments pertaining to rr 3.06 and 4.04 in this appeal, the first respondent is prejudiced by its inability to rectify

the demand, the SBLC having expired. It would therefore be unjust to allow the appellant to raise the discrepancies pertaining to rr 3.06 and 4.04 of the ISP98. We should add that the same conclusion would follow even on Stephenson LJ's formulation in that the discrepancies, based on the appellant's own case, would have been obvious on the face of the presented documents, *ie*, patent defects.

The appellant's reliance on r 4.04 of the ISP98 is also misconceived

70 Finally, we would add that the appellant's reliance on r 4.04 of the ISP98 is misconceived. The appellant argues that even if it were accepted that the Appeal Decision could be presented through a link, the Appeal Decision, when accessed, was in Country X's native language. This supposedly ran contrary to r 4.04 of the ISP98, which provides that the language of all documents issued by the first respondent has to be that of the SBLC, *ie*, in English. To buttress the point, the appellant relies on the official commentary to r 4.04 (James E. Byrne, *The Official Commentary on the International Standby Practices* (Institute of International Banking Law & Practice, Inc, 1998) ("*Official Commentary*") at 149–150).

71 In our view, the appellant's argument stems from a misunderstanding of r 4.04 of the ISP98. It provides that the language of all documents *issued* by the beneficiary is to be that of the standby letter of credit. It is clear that r 4.04 of the ISP98 in the present context refers to documents that are issued by the first respondent. The first respondent, however, did not issue the Appeal Decision. It was the FAC which issued the Appeal Decision. Consequently, r 4.04 of the ISP98 is completely irrelevant.

72 Our conclusion is, in fact, *buttressed* by the *Official Commentary,* which Ms Lin placed much emphasis on at the hearing of the appeal. In this regard,

Ms Lin relied on para 4 of the commentary to r 4.04 of the ISP98, which provides that if third-party documents are presented in a language that is different from that of the standby letter of credit, the examiner is not under any obligation under the ISP98 to translate the documents:

> 4. **Duty to Translate.** Where third party documents are presented in a language different than that of the standby, the examiner has no duty under these Rules to translate the documents. If the examiner translates the document under its own internal practices (as, for example, in situations where the document is issued in the language ordinarily spoken in the examiner's office but the standby is in a different language), the accuracy of the translation would be at issue if the examiner dishonored the presentation based on a discrepancy revealed by the translation.

73 Ms Lin then argued that this meant that the presenter had the obligation of translating the third-party issued document into the same language as the standby letter of credit.

74 This argument, however, conveniently ignores para 2 of the official commentary to r 4.04 of the ISP98, which states that the rule allows any third-party documents to be in *any* language unless otherwise stipulated by the standby letter of credit.

> 2. **Third Party Documents.** While the Rule requires that documents issued by the beneficiary be in the language of the standby, it *permits third party documents to be in any language unless the standby otherwise states*. Under ISP98 Rule 3.11(b)(ii) (Issuer Waiver and Applicant Consent to Waiver of Presentation Rules), the issuer may waive the requirement that beneficiary-issued documents be in the language of the standby if that requirement results only from application of this Rule of the ISP but not if the language requirement is stated in the standby itself. It has proven difficult to formulate an internationally satisfactory general rule as to the language of third party documents in part because *the language in which they are issued may not be within the control of the beneficiary. For example, an official document of a government or organization is likely to be written in the language of that country*

> *or organization regardless of the language of the standby and any translation of it would not be an original.*
>
> [emphasis added]

75 Contrary to Ms Lin's submission, the first respondent was therefore not under any obligation to translate the Appeal Decision into English. Indeed, since the Appeal Decision was issued by an administrative body in Country X, it would be written in the native language of that country, such that there could be no expectation for the Appeal Decision to be presented in English.

76 The appellant is thus precluded from seeking an injunction solely on account of discrepancies in the documents presented unless it can show that the nature of the discrepancy was such that it would be unconscionable or fraudulent for the first respondent to call on the SBLC. While the appellant contends in its reply to the first respondent's submissions that the first respondent's call on the SBLC was fraudulent, the appellant has not, in its notice of appeal, appealed against the Judge's finding that the first respondent's conduct was not fraudulent. The appellant, therefore, strictly speaking, can only contend in this appeal that the first respondent's call on the SBLC was unconscionable. It is to this inquiry that we now turn.

Should the first respondent's call on the SBLC be restrained on the grounds of unconscionability?

The principles on unconscionability as a ground for restraining a call on the SBLC

77 Although the nature of the SBLC (*ie*, whether it is better characterised as a letter of credit or a performance bond) is not an issue that is before us in this appeal, it is undisputed that unconscionability is a ground for restraining a call on the SBLC, given the Judge's finding that it was a performance bond. In the context of restraining a call on a performance bond, the High Court in *CEX*

v CEY and another [2021] 3 SLR 571 ("*CEX*") distilled the following framework to be applied (at [11]):

> (a) first, identify the nature of the performance bond (*ie*, whether the performance bond is conditional or unconditional);
>
> (b) next, consider whether the demand falls within the terms of the performance bond; and
>
> (c) finally, evaluate whether the overall tenor and entire context of the parties' conduct supports a strong, *prima facie* case of unconscionability.

78 While this framework is helpful in guiding this court's assessment on whether to grant an injunction to restrain the first respondent from calling on the SBLC on the ground of unconscionability, we sound the following note of caution.

79 When applying this framework in the context of a dispute between an applicant for a performance bond and a beneficiary, a court must bear in mind that the mere fact that the conditions in the performance bond are unfulfilled (as in [77(a)]) or the demand does not fall within the terms of the performance bond (as in [77(b)]) does not in itself support a basis to grant an injunction. As elucidated earlier (see [50] and [52] above), an applicant for a performance bond ordinarily has no *locus standi* to interpose itself directly into the contract that is the performance bond. In cases where a party is claiming that a condition in the performance bond has not been fulfilled or that the documents presented did not strictly comply with the terms of the performance bond, that party would have to demonstrate that the *nature* of the non-compliance was such that it would be unconscionable for the beneficiary to call on the performance bond, and not the

non-compliance *per se*. Hence, while the framework in *CEX* is a useful one, it must be applied with this caution in mind.

80 Turning to the applicable principles that govern the unconscionability ground, the party seeking the injunction must demonstrate a strong *prima facie* case of unconscionability. An injunction will only be granted if the entire context of the case – when thoroughly considered – is particularly malodorous (see *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352 at [20]–[21]). Unconscionability, therefore, entails acting in bad faith and calling on the performance bond whilst being motivated by improper purposes; when such a call cannot be justified by clear evidence; and when the beneficiary is not sure as to whether he can call on the performance bond in the first place and for what amount (at [37]). In this regard, the following situations have been found to amount to an unconscionable call on a performance bond (*CEX* at [22]):

(a) calls for excessive sums;

(b) calls that are founded on contractual breaches which the beneficiary is responsible for;

(c) calls tainted by unclean hands or made with improper motives in mind; and

(d) calls based on a position that is contrary to the position taken by the beneficiary prior to calling on the performance bond.

81 We now turn to consider whether the first respondent's call on the SBLC can be restrained on the ground of unconscionability.

The first respondent's call on the performance bond was not unconscionable

82 As a preliminary point, we agree with the Judge that the SBLC only required a declaration to the *effect* that the first respondent was to be refunded the sums paid under Amendment No 3. There does not appear to be any dispute that the SBLC is unconditional in nature. Next, in construing a performance bond, a court will aim to ascertain the objective, expressed intention of the parties. This entails considering the meaning the document in question would convey to a reasonable businessperson. The court will consider the document as a whole and will not excessively focus on particular phrases or words (see *Master Marine AS v Labroy Offshore Ltd and others* [2012] 3 SLR 125 at [41(a)–(c)]). A court, however, will be reluctant to rely on external context and extrinsic evidence to construe the performance bond (at [35]).

83 Here, the ISP98 does not support the appellant's interpretation that the SBLC required the FAC to declare the first respondent's payment obligation to be "null and void" using those specific words. Rule 4.09(a) of the ISP98 explicitly states that if a standby letter of credit requires a statement without specifying precise wording, the wording in the documents presented only needs to convey the same meaning as that required in the standby letter of credit. Precise wording will only be required in the documents presented if the standby letter of credit requires such precise wording through the use of quotation marks, blocked wording or an attached exhibit or form (see r 4.09(b)–(c) of the ISP98). The words "null and void" as stated in the SBLC are not in quotation marks or block wording. It was therefore not necessary for the FAC to have specifically declared in its final decision that the first respondent's payment obligation was "null and void".

84 Next, we agree with the Judge that there was strict compliance in that the Appeal Decision declared the first respondent's payment obligation to be null and void. The reporting judge for the Appeal Decision found that there was "no legal substantiation" for the payments made by the first respondent to the appellant under Amendment No 3. In concluding that there was no legal substantiation for the first respondent's payments, the reporting judge was essentially stating that there was *no legal basis* for the payments made by the first respondent to the appellant. The effect of the Appeal Decision therefore was that the first respondent's payment obligation to the appellant under Amendment No 3 was null and void. Hence, when the Appeal Decision declared that there was no legal substantiation for the first respondent's payment obligation towards the appellant, the FAC essentially declared the first respondent's payment obligation to the appellant under Amendment No 3 as being null and void.

85 The appellant's argument that the phrase "no legal substantiation" does not carry the same meaning as "null and void" is devoid of merit. The appellant relies on paras 13.007 and 13.012 of *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2nd Ed, 2022) ("*Law of Contract*") for the proposition that an act done in contravention of law would not *ipso facto* render it null and void. But the appellant has taken the *Law of Contract* out of context. The authors there stated that the mere fact that a contract violates a statute does not necessarily mean that the contract is void on the ground of *statutory illegality* (at para 13.012):

> … while a contract may *breach a statutory regulation requiring it to be in a certain form, that is quite different from breaching a statutory provision which bars that very contract itself. The consequences that follow, to use the analogy referred to above, will inevitably be different…* The precise consequences (with regard to the legal status of the contract) will depend upon the seriousness of the contravention, for it is assumed that the

> more serious the contravention, the more likely the legislative intent would be to avoid the contract concerned. The underlying question, therefore, is always the ascertainment of the legislative intent. It is also important to note that *if a contract is, in fact, been found [*sic*] to be prohibited, the consequences that follow will (subject to exceptions) be draconian in nature…*
>
> [emphasis in original omitted; emphasis added in italics]

86 A distinction must therefore be drawn between a contract breaching a statutory regulation requiring the contract to be in a particular form and a statute barring a contract. Where a contract is prohibited by statute or common law, that contract is void and unenforceable (see *Ochroid Trading Ltd and another v Chua Siok Lui (trading as VIE Import & Export) and another* [2018] 1 SLR 363 at [22]). It is therefore overly simplistic to adopt the legal proposition put forward by the appellant that an act done in contravention of law does not *ipso facto* render it null and void. In fact, the *Law of Contract* supports the conclusion that since the first respondent's payment obligation towards the appellant is without legal substantiation (and therefore, without legal basis), it is prohibited by law and is thus void and unenforceable.

87 The appellant also argues that on the Judge's interpretation of the SBLC, it was necessary for the FAC to make a specific order for the first respondent to be paid back or reimbursed, but that the Appeal Decision made no such order. The appellant's argument is misconceived. To recapitulate, the Judge decided that a declaration from the FAC to the *effect* that the first respondent was to be paid back the sums it had paid to the appellant under Amendment No 3 was sufficient (Judgment at [48]). In *Sompo Insurance Singapore Pte Ltd v Royal & Sun Alliance Insurance plc* [2021] 5 SLR 934, one of the issues before Philip Jeyaretnam JC (as he then was) was whether the beneficiary, the Government of Singapore, was able to call on a performance bond through an agent underwriter, even though the Government did not provide any evidence of the

underwriter's authority. Jeyaretnam JC held that it was not necessary for the Government to provide any evidence of the underwriter's authority as the wording of the performance bond did not require this. The only requirement stipulated in the performance bond was that the demand had to be in writing and from "the Government". There was no requirement for there to be any accompanying evidence of authority (at [24]). Similarly, there is no requirement in the SBLC – and the Judge did not find as such – that the FAC had to make a specific determination or order for the first respondent to be paid back or reimbursed. All that the Judge required was a determination to the effect that the first respondent was to be repaid the sums paid under Amendment No 3, as this conveyed the same meaning as declaring the first respondent's payment obligation null and void.

88 The appellant further relies on *Frans Maas (UK) Ltd v Habib Bank AG Zurich* [2001] CLC 89 ("*Frans Maas*") to argue that the phrase "no legal substantiation" was ambiguous or vague from the second respondent's perspective. This argument is equally misplaced. In *Frans Maas*, Sir Christopher Bellamy QC observed that he would have found that the demand in question did not trigger the bank's liability under the guarantee because the demand did not make clear what contractual obligation it was said the company in question had failed to meet. In fact, it turned out that the contractual failure asserted did not even fall within the terms of the guarantee. In the circumstances, Bellamy QC found that the demand was ambiguous or potentially misleading (at [73]). In contrast, the phrase "no legal substantiation" as used here in the Appeal Decision was, in our view, not ambiguous. The phrase reflected the FAC's view that the payments made under Amendment No 3 were made without any legal basis. The phrase "no legal substantiation"

would not have confused the second respondent or called for any inquiry into precisely what the FAC had determined.

89 The appellant suggests that the Appeal Decision is not a final decision of the FAC, as the FAC's decisions are all presently subject to challenge in the Lawsuit. The appellant further points out that its entitlement to the payments made by the first respondent is a live matter that will be decided in the Arbitration. The argument is that pending the conclusion of the Arbitration, the Appeal Decision cannot be considered to be final. We reject both of these arguments. The mere fact that the Appeal Decision is pending review in the Lawsuit does not detract from the point that the Appeal Decision is a final decision of the FAC. It is true that the FAC's decisions, as administrative decisions, may be challenged in court. But if the Appeal Decision were not regarded as final because of this avenue to challenge a decision of the FAC in court, the FAC would *never* be able to produce a final determination. The words "final decision issued by [the FAC]" as stated in the SBLC would be rendered otiose.

90 Instead, it seems to us that a "final decision issued by [the FAC]" refers to an appellate decision by the FAC that cannot be re-examined and reviewed by the FAC on the merits. In this regard, a Motion for Clarification does not serve to review the *merits* of a case; instead, it serves to clarify a decision of the FAC where there is any obscurity, omission or contradiction in the FAC's ruling. The Appeal Decision is therefore a final decision on the merits by the FAC. As for the Arbitration, this is a separate adjudicatory mechanism that is distinct from the FAC's legal processes. The appellant cannot rely on the pending arbitration proceedings and mount the argument that the Appeal Decision is therefore not a final decision of the FAC.

91 Since the Appeal Decision is a final decision of the FAC declaring the first respondent's payment obligation under Amendment No 3 to be null and void, the first respondent did not act unconscionably in calling on the SBLC in September 2022. Indeed, Ms Lin accepted at the hearing before us that if we find that the FAC had made a final decision declaring the first respondent's payment obligation to be null and void, the appellant's case on unconscionability would face serious difficulties.

92 In fact, it is clear that *all* parties involved in these proceedings (including the appellant) were not left in any doubt that the Appeal Decision was indeed a final decision of the FAC declaring the first respondent's payment obligation to be null and void. This is clearly borne out by the following pieces of evidence placed before this court:

(a) In an affidavit filed in support of the *ex parte* injunction dated 9 September 2022, Mr [Y], a director of the appellant, stated affirmatively that "the [FAC] *concluded* in a first instance decision that all payments made pursuant to Amendment No 3 are *null and void*" [emphasis added] and that this decision was affirmed by the Appeal Decision. Significantly, this reflected the appellant's clear understanding that the Appeal Decision declared the first respondent's payment obligation to be null and void even though these specific words do not appear in the Appeal Decision.

(b) The appellant's understanding of the effect of the Appeal Decision was clearly based on the advice of the appellant's lawyers in Country X. When the appellant applied for the *ex parte* injunction in Singapore, it submitted a legal opinion from its foreign counsel from Country X. In that legal opinion, the foreign legal counsel accepted that

the FAC had, in its Appeal Decision, upheld the First Instance Decision that the payments made to the appellant were null and void.

(c) The advisory bank involved in these proceedings also accepted that the Appeal Decision had declared the first respondent's payment obligation to be null and void. When the advisory bank forwarded the SWIFT message demanding payment to the second respondent, the email clearly stated that "[we, the advisory bank] hereby certify that the beneficiary has presented… [a] copy of the notification receipt by [DJZ] with the final decision issued by [the FAC] declaring the payment is null and void".

(d) It can also be inferred that the second respondent also accepted that the Appeal Decision declared the first respondent's payment obligation to be null and void. In fact, the second respondent indicated to the appellant that it would pay the sum demanded by the first respondent under the SBLC unless the appellant obtained a court order to restrain it from doing so. This suggests that the second respondent was of the view that the Appeal Decision was a final decision of the FAC that declared the first respondent's payment obligation to be null and void.

93 Given the appellant's own understanding of the Appeal Decision, which was shared by the advisory bank, the second respondent and the appellant's foreign lawyers, it was perhaps unsurprising that the appellant did not, when the first respondent first called on the SBLC in September 2022, raise the argument that the Appeal Decision was not a final decision declaring the first respondent's payment obligation to be null and void. Indeed, the evidence reflects the appellant's own view that once the FAC dismissed Company Z's MFC, the first

respondent would be able to draw down on the SBLC (see [69] above). In our view, it would be an understatement to describe the appellant's evolving arguments in this appeal as being opportunistic afterthoughts.

94 We would add that even if we accept the appellant's argument that the Appeal Decision had to be presented independently of the notification receipt, this would not have demonstrated any unconscionability on the part of the first respondent. This is because the appellant had represented that once Company Z's MFC was dismissed, there would have been no other obstacle standing in the way of the first respondent drawing on the SBLC. The parties never contemplated that the Appeal Decision had to be independently presented. There is therefore nothing to show that the first respondent was aware (or put on notice) that there was a problem with the demand pertaining to the presentation of the Appeal Decision. It follows that the appellant cannot argue that the first respondent has acted unconscionably in making the call on the SBLC.

95 It is also disingenuous for the appellant to argue that the FAC has expressly clarified that it did not declare the first respondent's payment obligation to be null and void. It is clear that before the FAC made this alleged clarification, the appellant and its foreign counsel had already – on 9 September 2022 – committed to the position that the Appeal Decision had declared the first respondent's payment obligation to be null and void (see [92(a)–92(b)] above). But when the appellant filed its writ of mandamus on 8 September 2022, the appellant argued that the FAC could not declare the Contract and Amendment No 3 to be void (see [14] above). Put another way, the appellant sought to equate a declaration that the payment obligation was null and void with a declaration that the Contract and Amendment No 3 were null and void. On 28 September 2022, *in response* to the appellant's writ of mandamus, the FAC clarified that it

did not declare the Contract and Amendment No 3 to be null and void. The FAC clarified that it did not have the power to suspend or annul administrative contracts. The FAC was therefore responding to a fallacious allegation that it had declared the Contract and Amendment No 3 to be null and void when it was clear that this was not the case.

96 Nonetheless, the fact of the matter is that when the appellant applied for the *ex parte* injunction in Singapore, it accepted that the FAC's Appeal Decision had declared the first respondent's payment obligation to be null and void. Indeed, the terms of the SBLC merely require a final decision from the FAC declaring that "the *payment* is null and void" [emphasis added]. By its own understanding, the appellant recognised the Appeal Decision to have that legal effect.

97 In the circumstances, it is clear that the first respondent did not act unconscionably in calling on the SBLC. The appellant therefore has no legal leg to stand on to restrain the first respondent's call on the SBLC.

Whether the SBLC was better characterised as a performance bond or a letter of credit

98 Before concluding, we make an observation on the Judge's characterisation of the SBLC as a performance bond (Judgment at [14]). Although the first respondent has challenged the Judge's characterisation and argues that the SBLC is better treated as a letter of credit, it has not filed a cross-appeal and so cannot raise the issue in this appeal (see [26] above).

99 The principal difference in treating a standby letter of credit as either a performance bond or a letter of credit concerns whether it is only possible to restrain a call on the ground of fraud or whether it is also possible to restrain a

call on the ground of unconscionability. Obviously, if there is no unconscionability on the facts of the case, it would follow that there would also be no fraud (although the converse is not true). In this particular case, given the finding that there was no unconscionability in the call on the SBLC on the part of the first respondent, the outcome would be no different even if the SBLC is to be construed as a letter of credit. Nonetheless, as the characterisation of the SBLC makes no difference to the outcome of the appeal, we shall say no more than to add that the point remains open for consideration in a future case.

Conclusion

100 For the above reasons, there is no basis on which to grant the appellant an injunction to restrain the first respondent from calling on the SBLC. The appeal is dismissed with costs fixed at $109,000 all-in in favour of the first respondent. The usual consequential orders shall apply.

Steven Chong
Justice of the Court of Appeal

Kannan Ramesh
Judge of the Appellate Division

Hri Kumar Nair
Judge of the High Court

Lin Weiqi Wendy, Jill Ann Koh Ying (Xu Ying), Leau Jun Li, Foo Hsien Weng and Wee Jong Xuan (WongPartnership LLP) for the appellant;
Hing Shan Shan Blossom *SC*, Lim Mingguan, Lu En Hui, Sarah and Desiree Chong Ci En (Drew & Napier LLC) for the first respondent;
The second respondent absent and unrepresented.
