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

[2024] SGHC 5

Originating Application No 876 of 2023

In the matter of Order 13 Rule 1 of the Rules of Court 2021

Between

Shanghai Chong Kee Furniture
& Construction Pte Ltd

… *Claimant*

And

Church of St Teresa

… *Defendant*

GROUNDS OF DECISION

[Building and Construction Law — Performance bond — Injunction]
[Injunctions — Unconscionability]
[Injunctions – *Erinford* injunctions]
[Building and Construction Law — Statutes and regulations — Covid-19 — Reliefs under the COVID-19 (Temporary Measures) Act 2020]

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11 January 2024

Wong Li Kok, Alex JC:

Introduction

1 This was an application by the claimant for a declaration that the defendant had acted unconscionably in making a call on the whole of the performance bond (the "Bond") issued by Lonpac Insurance Bhd ("Lonpac") in the amount of $629,998.70 for a project to conduct restoration works (the "Project") at the premises of the defendant church (the "Church"). The claimant was the contractor for the Project pursuant to a contract (the "Contract") signed with the defendant. Consequently, the claimant applied for an injunction to restrain the defendant from receiving payment under the Bond. In the alternative, the claimant also prayed for an order that the amount which the defendant was entitled to receive under the call on the bond be assessed and reduced to reasonably account for retention sums that were already held by the

defendant in the sum of $233,116.67. An interim injunction had been granted by the court on 30 August 2023. I dismissed the claimant's application and the claimant has appealed against the decision.

Further background

2 On 19 August 2019, the claimant and the defendant entered into the Contract for the Project.[1]

3 The Contract incorporated the Articles and Conditions of Contract for Minor Works 2012, First Edition, December 2012 published by the Singapore Institute of Architects (the "Conditions of Contract").[2]

4 Clause 26 of the Conditions of Contract required the claimant to provide a performance bond, in the name of the defendant, for an amount equal to 10% of the contract sum (the "Contract Sum") of $6,299,987.00.[3] I set out Clause 26 in full for reference:

> **26. PERFORMANCE BOND (OPTIONAL CLAUSE)*delete if not applicable**
>
> (1) The Contractor shall within 14 days from the Commencement Date under **Clause 16.(2)** provide a Performance Bond in the form of an approved banker's guarantee or insurance bond, in the name of the Employer, for an amount equal to 10% of the original Contract Sum (unless otherwise stated in the Appendix), as security for the Contractor's due performance under the Contract.
>
> (2) If the Contractor fails to provide the Performance Bond, the Architect may certify retention of a sum equal to the value of the Performance Bond in an Interim Certificate pursuant to

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1 Affidavit of Harry Tan Chin Choon dated 29 August 2023 ("HTCC-2023 08 29") at para 2.1.3.

2 Affidavit of John Joseph Fenelon dated 4 October 2023 ("JJF-2023 10 04") at para 9.

3 HTCC-2023 08 29 at pp 47 and 73.

> **Clause 17.(3)**. Such sum shall be released to the Contractor upon receipt of a conforming Performance Bond, or upon issuance of the Final Certificate or Cost of Termination Certificate, subject to **sub-clause(3)**. The Contractor shall not be entitled to any claim for interest in respect of any sum so retained.
>
> (3) The Employer may deduct from any sum retained under **sub-clause (2)** or call upon all or part of the Performance Bond to:
>
> (a) offset any sums due from the Contractor to the Employer as certified by the Architect; and/or
>
> (b) compensate the Employer for any loss or damage suffered as a result of the Contractor's failure to fulfil his contractual obligations. The Architect shall have no certifying powers as to such sum due to the Employer.
>
> (4) The Performance Bond shall remain in full force until four months after the expiry of the Maintenance Period pursuant to **Clause 21.(1)**.
>
> [Emphasis in original]

5 In discharge of the claimant's obligation to furnish a performance bond for an amount equal to 10% of the Contract Sum, the claimant delivered the Bond dated 9 October 2019 to the defendant.[4] Parties are agreed that the Bond is an unconditional performance bond,[5] with Lonpac binding itself to "unconditionally and irrevocably undertake, covenant and firmly bind ourselves to pay in full forthwith upon demand in writing any sum or sums that may from time to time be demanded by [the defendant] up to a maximum aggregate of [$629,998.70] …".[6] The original validity period for the Bond was 3 September

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4 HTCC-2023 08 29 at para 2.2.1; JJF-2023 10 04 at para 12.

5 HTCC-2023 08 29 at para 2.2.3; JJF-2023 10 04 at para 16.

6 HTCC-2023 08 29 at p 1003, para 1.

2019 to 2 September 2021[7], but the Bond was subsequently extended until 31 July 2023.[8]

6 The Contract further made provision for Jiudong LLP to serve as the architect (the "Architect") for the Project. Clause 3 of the Contract sets out the Architect's functions and obligations:[9]

> **3. ARCHITECT**
>
> (a) The Architect in this Contract shall mean [*sic*] of the firm Jiudong LLP whose address is [address of Architect]
>
> The Architect shall administer the Contract as agent of the Employer, except where the Contract requires him to act independently between the Employer and the Contractor in exercising discretion and professional judgement, he shall be impartial under the Architects Act, Architects Rules, The Schedule (Code of Professional Conduct and Ethics), Part I, Rule 3.-(1), particularly in regard, but not limited, to the following:
>
> (i) in issuing Architect's Instructions pursuant to **Clause 7.(6)(a)**, **15.(4)**, **(5)** or **(6)**;
>
> (ii) in assessing defective work pursuant to **Clause 13**;
>
> (iii) in issuing Interim Certificates and the Final Certificate, and all associated valuations,

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7 HTCC-2023 08 29 at p 1003, para 2.

8 HTCC-2023 08 29 at p 1007; JJF-2023 10 04 at para 15.

9 HTCC-2023 08 29 at p 48.

retention and deductions, pursuant to **Clauses 17.(3)** and **17.(9)**;

(iv) in assessing and granting Extensions of Time pursuant to **Clauses 16.(6)** and **16.(7)**;

(v) in issuing Certificates of Liquidated Damages Entitlement pursuant to **Clause 16.(8)**;

(vi) in issuing the Completion Certificate pursuant to **Clause 20**;

(vii) in issuing the Maintenance Certificate pursuant to **Clause 21.(4)**;

(viii) in issuing the Termination Certificate pursuant to **Clause 23.(2)**; and

(ix) in issuing the Cost of Termination Certificate, and all associated valuations and deductions, pursuant to **Clause 23.(1)(c)**, **23.(5)** or **24.(4)**.

(b) The Architect shall certify strictly in accordance with the terms of the Contract and issue all certificates to the Contractor with a copy to the Employer, unless otherwise stated. Both parties shall be bound by the Architect's certificates which, in the absence of fraud or improper pressure or interference by either party, shall have full effect by way of Summary Judgment or Interim Award, until such time as final judgment or award is made, or a legally binding decision is made in an alternative dispute resolution mechanism.

…

[Emphasis in original]

7 The Contract provided for a commencement date of 3 September 2019, with a completion date of 2 September 2020.[10] Unfortunately, restrictions related to the COVID-19 pandemic impacted the works and progress was delayed.[11] Around 9 January 2022, the claimant submitted a Notification for Relief under s 9 of the Covid-19 (Temporary Measures) Act 2020 (Act 14 of

10 HTCC-2023 08 29 at p 74.

11 JJF-2023 10 04 at para 18.

2020) ("COTMA") to the defendant to seek COTMA relief.[12] More will be said on this below.

8 The claimant also encountered other difficulties in its business, and by way of an Order of Court (HC/ORC 1912/2023) dated 19 April 2023, the claimant was placed under a moratorium pursuant to s 64 of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed), which restrained the commencement and continuation of legal proceedings against the claimant for six months until 20 September 2023.[13] The claimant had sought moratorium relief to facilitate ongoing restructuring of the claimant's business.[14]

9 On 20 July 2023, the defendant, having lost patience with the claimant for the delays in completion and with works still outstanding, made a call on the Bond.[15] According to the Parish Priest of the Church, the Reverend Father John Joseph Fenelon ("Father Fenelon"), the defendant was making a claim for the following sums which make up the Bond sum:

(a) a claim for liquidated damages imposed for the claimant's alleged delay which was estimated to be $345,000;

(b) outstanding warranties not yet received which were estimated to be valued at $87,000;

(c) outstanding rectification works which were estimated to cost $393,660; and

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12 HTCC-2023 08 29 at para 2.4.1.

13 HTCC-2023 08 29 at para 2.1.1.

14 HTCC-2023 08 29 at para 2.1.1.

15 JJF-2023 10 04 at para 46.

(d) further anticipated costs which the claimant's alleged delay would continue to incur.

On the defendant's calculation, the total of these sums add up to $825,660 excluding further anticipated costs yet to be determined.

10 On 29 August 2023, the claimant took out the present originating application ("HC/OA 876/2023") seeking a declaration that the defendant's call on the Bond was unconscionable in whole or in part and an injunction to restrain the defendant from receiving payment from Lonpac on the Bond. The claimant also prayed, in the alternative, for a reduction in the Bond sum that the defendant is allowed to call on and receive in order to account for the retention sum of $233,116.67 which is currently held by the defendant.[16] Pending the final disposal of HC/OA 876/2023, the claimant also took out HC/SUM 2627/2023 on 29 August 2023 for a related interim injunction. On 30 August 2023, Chan Seng Onn SJ granted the requested interim injunction restraining the defendant from receiving payment from Lonpac under the Bond until the hearing of HC/OA 876/2023.[17]

Parties' cases

11 There were four issues on which the claimant relied to demonstrate unconscionability on the part of the defendant. I went through each of those issues in turn and the parties' arguments with respect to the same.

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16 HC/OA 876/2023.

17 HC/ORC 4098/2023.

Entitlement to Liquidated Damages

12 The claimant asked me to infer unconscionability on the part of the defendant on the basis that the Architect's certification of liquidated damages payable by the claimant ("LDs") was wrong, the defendant knew the certification was wrong and that was the reason why there had not been any clear claims for LDs on the part of the defendant against the claimant until after the Bond had been called.[18] One of the bases for the claimant's assertion that the LDs certification was wrong was based on s 6(5) of COTMA.[19] The claimant argued that it had rightly made applications under COTMA for time relief in relation to COVID-19-related delays which fell within the prescribed periods set out in the COTMA (and the defendant had not contested these through the prescribed COTMA mechanisms).[20] The claimant was consequently entitled to not just the time relief sought under the COTMA but also relief from liability for LDs pursuant to s 6(5) COTMA.

13 The COTMA was enacted to provide temporary measures to alleviate the impact of the COVID-19 pandemic on society. Two key reliefs offered by the COTMA are of relevance for this dispute.

(a) Firstly, Part 8A of the COTMA creates a framework for extensions of time for construction contracts. In gist, ss 39A and 39B COTMA provide that for constructions contracts:

(i) which were entered into before 25 March 2020;

(ii) which remain in force on 2 November 2020; and

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18 Claimant's written submissions dated 27 October 2023 ("CWS") at para 52.

19 CWS at paras 42–44.

20 CWS at paragraph 49(a).

(iii) where the construction works under the contract have not been certified as complete as at 7 April 2020,

the completion date for those works is extended by up to 122 days from and including the original contractual completion date.

(b) Secondly, s 6(5) COTMA reduces the liability of contractors to pay LDs under a construction contract impacted by the COVID-19 pandemic. In gist, s 6(5) COTMA, read with Order 3(*a*) of the COVID-19 (Temporary Measures) (Extension of Prescribed Period) (No. 4) Order 2021 and ss 5(1) and 6(1) COTMA, provides that for the purpose of calculating the LDs payable under the construction contract, where:

(i) the contractor was unable to perform its obligation under the contract due to COVID-19 restrictions;

(ii) the contractor had served a notification for relief; and

(iii) the contractor suffered an inability to perform due to COVID-19 restrictions for a period of time (the "Inability Period"),

the portion of the Inability Period that fell within the period of 1 February 2020 to 28 February 2022 is to be disregarded in determining the period of delay in performance by the contractor when calculating LDs. In other words, referring to Example 2 to clause 6 in the Explanatory Statement to the COVID-19 (Temporary Measures) Bill, the contractor is not liable for liquidated or other damages for the period of delay so long as the delay occurs within the prescribed period (1 February 2020 to 28 February 2022) and in so far as the delay was

caused to a material extent by the disruptions caused by the COVID-19 pandemic.

14 The claimant asked me to make the inference of unconscionability referred to at [12] above on the basis that the defendant knew as early as August 2022 that they intended to make an LDs claim,[21] as seen from an e-mail from the defendant to the Architect dated 3 August 2022 expressing the defendant's wish to assert its entitlement to claim LDs.[22] According to the claimant, it was then telling that in subsequent certificates of payment issued by the Architect (Certificates of Payment 31 and 32 dated 10 October 2022 and 10 November 2022 respectively),[23] the issue of LDs was not mentioned.

15 Further, the claimant argued that it had properly applied for COTMA relief for an extension of time.[24] However, the defendant had not only neglected to dispute the claimant's entitlement to such relief,[25] but the defendant also knew that s 6(5) COTMA afforded the claimant relief against LDs during the COTMA relief period. The inference I was asked to draw was that, based on the defendant's and the Architect's conduct, they knew full well that the defendant was not entitled to the LDs claimed or a substantial portion of the LDs claimed (and that explains why the LDs had not been addressed in Certificates of Payment 31 and 32).[26] The defendant had thus acted unconscionably by subsequently making the call on the Bond and retrospectively justifying it in a

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21 CWS at para 52(b).

22 Claimants bundle of documents ("CBOD") at p 1923.

23 CBOD at pages 1262 and 1280 respectively.

24 CWS at para 47; CBOD at page 1026.

25 CWS at para 49.

26 CWS at para 52.

much later letter of 16 August 2023[27] which the claimant submitted was the first time that LDs had been mentioned to them.

16 The claimant also pointed to the "Certificate of Liquidated Damages (LD) Entitlement" document dated 6 September 2022 ("Certificate of LD Entitlement")[28] which was addressed to the defendant from the Architect (but also copied to the claimant) as further evidence that there was unseemly conduct between the two in that the Certificate of LD Entitlement precedes the Certificates of Payment 31 and 32 and the footnote at the bottom of the Certificate of LD Entitlement showed that the Architect was hesitant to explicitly say that LDs were payable, bearing in mind s 6(5) COTMA.[29] That footnote is reproduced in full below:

> Note
>
> Pursuant to **Clauses 16.(8) and 16.(9)(a)** of the Conditions of Contract, the Employer shall be entitled, but not obliged, to deduct or recover LD from the Contractor in the amount stated in the Certificate of LD Entitlement issued by the Architect, from any balance due from the Employer to the Contractor.

17 The defendant took the opposite view with respect to the Certificate of LD Entitlement. The defendant submitted that the claimant's argument was a convenient way to dispose of a document that clearly shows contemporaneous intentions on the part of the defendant to impose LDs.[30] The footnoted words at the bottom of that certificate were likely standard text that parrots the defendant's entitlement to LDs as set out in the Contract rather than a

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27 CBOD at page 1333.

28 CBOD at page 1644.

29 CWS at para 52(a).

30 Defendant's written submissions dated 27 October 2023 ("DWS") at paras 29–33; Minute Sheet for hearing on 7 November 2023 ("Minute sheet").

convoluted inference of guilt on the part of the Architect. The defendant further submitted that the Architect had gone through the claimant's extension of time entitlements carefully (including the COTMA entitlements – pointing to a circular issued by the Building and Construction Authority dated 3 March 2022)[31] before arriving at the final extension of time entitlements.[32]

18 The defendant did not make any submission on the interpretation of s 6(5) COTMA with respect to the LDs claim but asserted that they were entitled to and did rely on the Architect's interpretation of and approach to the issue of extensions of time and LDs.[33] The defendant added that, pursuant to clause 3 of the Contract (see [6] above), the Architect was obligated to act independently with respect to extensions of time and LDs so the defendant relied on the Architect's decisions on those issues.[34] The defendant also submitted that the claimant was far from an innocent party in that, notwithstanding any COTMA relief to which the claimant was entitled,[35] the claimant was nonetheless in constant delay in completing the works and there was e-mail correspondence that clearly pointed to this,[36] along with cogent evidence of this as described in the affidavit of 4 October 2023 of Father Fenelon at paragraphs 17 to 21.[37]

19 Finally, the defendant also pointed to the Completion Certificate of 31 August 2022 (the "Completion Certificate")[38] which they contend further

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31 CBOD at page 1491.

32 DWS at para 29.

33 DWS at paras 67–70.

34 DWS at paras 65–66.

35 DWS at para 12.

36 CBOD at pages 1461 to 1465.

37 JJF-2023 10 04 at paras 17–21.

38 CBOD at pages 1106–1108.

demonstrated the tardiness of the claimant's work. In particular, the defendant pointed to the conditions attached to the Completion Certificate[39] which required the retention sum (typically released in full upon issue of the completion certificate) to be released in two tranches bearing in mind significant defects still to be rectified by the claimant.[40]

Repair Works to the Tarmac

20 This brings us to two disputed parts of the work (the tarmac and the dome) which the claimant argued did not accurately represent the actual work the claimant had agreed to carry out.[41] The claimant pointed to the quote the defendant obtained from Roman Builders Pte Ltd ("RBPL") as demonstrating a claim from the defendant that was out of proportion to what the defendant should be entitled to, hence pointing to unconscionability on the defendant's part.[42] It was noted that the quote from RBPL was in the middle of three quotes obtained by the defendant to carry out the outstanding work which the defendant alleges had not been completed by the claimant[43] and these quotations had been made available to the claimant contemporaneously.[44]

21 The tarmac issue relates to the tarmac of the driveway of the Church. The claimant's case was that the original scope of work only required the claimant to carry out resurfacing work to the driveway which did not require

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39 CBOD at page 1108.

40 Minute sheet.

41 CWS at paras 55 and 60.

42 CWS at paras 56–57.

43 CBOD at page 1837.

44 JJF-2023 10 04 at paras 109 and 110.

work to the substrata (or underlying foundation works) of the driveway.[45] The claimant pointed to the original quotes provided for making good the "driveway affected by the works" of about $16,000 to $21,000[46] compared to the claim in the RBPL quote for the driveway amounting to $227,000 for tarmac milling and repair.[47] In short, the claimant stated that the staggering difference in pricing must point to unconscionability.

22 Further, the claimant avers that the defendant had in fact expressly excluded the driveway works from further work required by the claimant in amendments made to the Completion Certificate issued by the Architect on 31 August 2022 (pointing to the deletion of "Driveway Tarmac levelling" from the list of major outstanding works as set out in the Completion Certificate – see full extract from the Completion Certificate below)[48] as further evidence of unconscionability on the part of the defendant.[49]

> **COMPLETION CERTIFICATE CLAUSE 20(2)**
>
> Pursuant to Clause 20(2) of the Conditions of Contract, I hereby certify that:
>
> 1) On **1 October 2021**, the Works appear to be substantially completed and to comply with the Contract in all respects, except the outstanding works listed in the Schedule to this Certificate.
>
> …
>
> **Schedule of Minor Outstanding Works Pursuant to Clause 20(2)(a) of Articles and Conditions of Contract for Minor Works 2012**

45 CWS at para 56(a).

46 CBOD at page 567.

47 CWS at para 56; CBOD at page 1837.

48 CBOD at page 1107.

49 CWS at para 55(a).

> 1) ~~4~~ 3 major outstanding and urgent defective works listed below to be completed latest by **31 October 2022**:
>
> a) Shanghai Plaster Repair Works on Exterior Façade
>
> ~~b) Driveway Tarmac levelling~~
>
> c) Replacement of Waterproofing System at South Facing Flat Roof
>
> d) Repair Waterproofing work to Dome
>
> …
>
> [Emphasis in original]

23 The claimant sought to buttress this argument further by pointing to the Architect's Instructions 23 ("AI 23")[50] which was issued after the Completion Certificate, and which made no mention of the tarmac works consistent with the position in the Completion Certificate.[51]

24 The defendant disagreed. It argued that the claimant had damaged the driveway significantly in the course of their work (as evidenced by potholes (into which some worshippers had tripped and fallen))[52] and that if the repair to that damage required substrata work, then this had to be carried out.[53] The quote obtained by RBPL was in the mid-range of three quotes obtained by the defendant and so represented a reasonable sum reflecting the work required.[54]

25 The defendant also denied that the tarmac works had been excluded from the claimant's scope through the deletion in the Completion Certificate and that a formal omission of these would require a formal Architect's instruction and

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50 CBOD at page 1282.

51 CWS at para 55(d).

52 JJF-2023 10 04 at para 94.

53 Minute sheet.

54 JJF-2023 10 04 at paras 113–114.

there was no such instruction.[55] The defendant noted that this deletion in the Completion Certificate only reflected the fact that the claimant did not have to complete the tarmac works within the same period of time (31 October 2022) as the other works stated in the schedule of outstanding works in the Completion Certificate because the tarmac works can only be started after the claimant's heavy equipment had been removed from the site.[56] The defendant referred to the following condition of the Completion Certificate as evidence of this:[57]

> 3. In accordance with Clause 20(2)(b) of the Articles and Conditions of Contract, the first half of the retention sums is SGD157,499.68. [The claimant] agrees that the sum of SGD75,617.00 shall be withheld by [the defendant] for the purpose of completion of the outstanding items 1(a), (c) and (d) on page 2 herein, as stated further in paragraph 5 below;

26 Further, the defendant made the point that correspondence following the Completion Certificate clearly showed that the claimant was well aware of the required work on the tarmac that they had to complete.[58] In an e-mail from the claimant to the defendant dated 17 October 2022 (some months after the Completion Certificate was issued), the claimant had expressly acknowledged that work on tarmac would start in November 2022.[59] The defendant's consultants (Studio Lapis) had also included tarmac works in their outstanding defects list issued in April 2023[60] and the defendant submitted that this was not denied by the claimant.[61]

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55 DWS at paras 41–48.

56 DWS at para 42; JJF-2023 10 04 at para 86.

57 HTCC-2023 08 29 at p 1097.

58 DWS at paras 45–46.

59 CBOD at page 1775.

60 CBOD at page 1754.

61 DWS at para 45.4.

Repair Works to the Dome

27 The repair works to the dome of the Church was another area where the claimant sought to adduce evidence of unconscionability on the part of the defendant. The claimant made the case that the works on the dome were clearly excluded by omission in Architect's Instruction 18 ("AI 18") which had referred to the omission of "Provisional sum for the structural repair work to Rotunda, Dome and Tower"[62] and any work that was to be carried out on the dome was clearly excluded from the claimant's scope of work and had to be the subject of additional costs or a variation order.[63] The claimant contended that a Method Statement dated 26 October 2022 (the "Method Statement") the claimant had prepared for repair works on the dome[64] was without prejudice to the fact that such repair works required a separate engagement (although the claimant conceded that there was no correspondence or other written evidence to demonstrate such separate engagement).[65]

28 The claimant also pointed to the fact that there was no separate line item in the RBPL quote[66] for repairs to the dome, which shows that these repairs were not contemplated by the defendant as part of the claimant's work scope.[67]

29 The defendant pointed out that the omission set out in AI 18 was with respect to a provisional sum allocated towards structural works to the dome.[68]

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62 CBOD at page 1020.

63 CWS at paras 59–63.

64 CBOD at page 1796.

65 CWS at paras 60–61.

66 CBOD at page 1837.

67 CWS at para 62.

68 CBOD at page 533.

There was a separate requirement in the claimant's original work scope to repair and make good the dome following waterproofing and other works carried out on the dome[69] so it was incongruous to suggest that the Method Statement was prepared for a separate engagement or variation works to the dome when the claimant knew they had to carry out and complete certain works to the dome as part of the original work scope. The defendant stated that this is further supported by the fact that the e-mail attaching the Method Statement referred to in [27] acknowledged that this work had to be done[70] and the claimant had never denied that they had to carry out this work.

30 In response to the point that the RBPL quote had no specific line item for the dome repair works, the defendant pointed out in their oral submissions that the quotes sought by the defendant for outstanding works (including the RBPL quote) were not meant to be comprehensive and there were also substantial other items that were excluded from the RBPL quote.[71] In that regard, the fact that the dome repairs were not included as a line item here was not definitive of the fact that the dome repair works were not part of the claimant's work scope.[72]

Outstanding Warranties and other claims

31 The defendant alleged that another reason for the call on the Bond was that certain warranties under the Contract had not been provided by the claimant (such as the waterproofing warranties).[73] The claimant's counsel asserted in

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69 CBOD at page 543.

70 CBOD at page 1795.

71 Minute sheet.

72 DWS at paras 49–54.

73 DWS at paras 34–38.

written submissions that they had instructions that the claimant had submitted a "10-year Waterproofing and Water Tightness for Rising Damp" warranty on 10 October 2023.[74] The defendant complained that the warranties provided by the claimant did not comply with the contractual requirement that they had to be provided jointly by the claimant and the relevant subcontractors furnishing those warranties (based on the form of warranties under the Contract).[75] No copies of the warranties in question were provided in evidence and the claimant fairly submitted orally that there was a limit to which they could rely on this argument bearing in mind the warranties that had supposedly been provided were not in evidence.[76]

32 A mention should also be made with respect to a claim made by the defendant for consultancy work from the defendant's consultants, Studio Lapis, for a monthly fee of $7,500 to carry out supervision work for the additional works required for, amongst other things, the dome and the tarmac now that these remain to be completed by RBPL or other third parties as the claimant was no longer carrying out work and had vacated the site.[77] The claimant takes the view that this claim is not sustainable bearing in mind the dome and the tarmac works claimed by the defendant were not within the claimant's scope of work.[78]

33 In the course of their arguments, the parties took to justifying or admonishing the call on the Bond (as the case may be) on the basis of the contingent loss that the defendant would suffer as against the amount of the

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74 CWS at para 65.

75 CBOD at page 823.

76 Minute sheet.

77 CBOD at page 1840.

78 CWS at paras 68–69.

security held by the defendant (in the form of the amount of the call on the Bond and the retention sums under the Contract). For example, the claimant took the view that the value of the warranties claimed by the defendant ($87,000) was well below the value of the retention sums that the defendant still held in the amount of $233,116.67[79] (and bearing in mind the claimant's position that the defendant was not entitled to any LDs or any claims pursuant to the tarmac and dome works). The defendant presented its own calculation of how a call on the Bond combined with the retention sums under the Contract would be insufficient to cover the likely damage the defendant would suffer as a result of the claimant's actions.[80]

Issues to be determined

34 The sole issue to be determined was whether the defendant had acted unconscionably when it made the call on the Bond. A related supplementary issue is, even if I find that the defendant had not acted unconscionably, whether the amount of the call on the Bond should be reduced in light of the fact that the defendant had sufficient security to cover any damages that they may suffer as a result of the claimant's acts under the Contract.

Law

35 The law on unconscionability in the context of calls on performance (on-demand) bonds in construction contracts is most helpfully summarised by the Court of Appeal in the leading case of *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352 ("*BS Mount Sophia*").

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79 CWS at para 66.

80 DWS at Annex A.

36 It is settled law that unconscionability is a ground upon which the court can grant an injunction restraining a beneficiary of a performance bond from calling on the bond: *BS Mount Sophia* at [18]. The case law has shown that a finding of unconscionability is a conclusion applied to conduct which the court finds to be so lacking in *bona fides* such that an injunction restraining the beneficiary's substantive rights is warranted: *BS Mount Sophia* at [45]. Unconscionability includes elements of abuse, unfairness and dishonesty: *BS Mount Sophia* at [19]. The Court of Appeal emphasised at [20] of *BS Mount Sophia* that the threshold of unconscionability "is a high one, and the burden that the applicant has to discharge is to demonstrate a strong *prima facie* case of unconscionability". The Court of Appeal went on to say, at [21]–[22]:

> 21 When determining if a strong *prima facie* case has been made out, the entire context of the case must be thoroughly considered, and it is only if the entire context of the case is particularly malodorous that such an injunction should be granted. We must emphasise that the courts' discretion to grant such injunctions must be sparingly exercised and it should not be an easy thing for an applicant to establish a strong *prima facie* case.
>
> 22 The reason for setting the barrier at such a high level is that the equitable remedy of the interim prohibitive injunction is a very harsh one. It restricts the person in whose favour the performance bond was issued ("the beneficiary") from doing that which he was entitled by agreement of the parties to do, and which he in all probability had bargained for during the negotiations leading up to the contract concerned. In essence, he would be prevented from enforcing a substantive right which he had contracted for.

37 Importantly, the Court of Appeal also provided guidance in respect of calls on performance bonds on *mistaken* premises. The Court of Appeal stated at [52] that even if the bond beneficiary called on the bond on the basis of a mistakenly held belief that the counterparty was in breach, "the call could still be legitimate if this position was genuinely adopted and the [beneficiary] honestly believed that the [counterparty] was in breach." The Court of Appeal

emphasised that it "is not the court's role in such proceedings to appraise the merits of the parties' decisions; but, rather, *it is the court's role to be alive to the lack of* bona fides *in those decisions*." Implicit in the Court of Appeal's holding – that a *mistaken* but *bona fide* call on a performance bond would not fall foul of the doctrine of unconscionability – is the notion that the court examines the bond beneficiary's decision at the time the decision to call on the bond was made to determine the *bona fides* or lack thereof in that decision. Applying the Court of Appeal's guidance, the court in *JK Integrated (Pte Ltd) v 50 Robinson Pte Ltd and another* [2015] SGHC 57 at [72] opined that even if the court took the injunction applicant's case at its highest and found that the applicant did not commit contractual breaches, so long as the bond beneficiary had the honest but mistaken belief that the applicant had done so, the call on the bond would still have been legitimate.

Decision

No strong prima facie *case of unconscionability*

38 Looking at the conduct of the parties as a whole, I found the evidence pointing to a distracted claimant who seemed preoccupied by wider (solvency) issues surrounding the company (see [54] below). Notwithstanding the relief provided by the COTMA, the claimant still appeared to be in delay and behind the curve in their undertaking of the project. The defendant seemed frustrated (and even exasperated at times) by the claimant's lack of progress. Against this background, the claimant had not made out their case and satisfied their burden of proof that there was a a strong *prima facie* case of unconscionability on the part of the defendant.

39 The starting point for my decision had to be the fact that the claimant had a high burden to overcome to demonstrate unconscionability. A high degree of strictness had to be applied to the claimant's case, with the claimant required to establish a clear case of fraud or unconscionability, and mere allegations are insufficient: *Dauphin Offshore Engineering & Trading Pte Ltd v The Private Office of HRH Sheikh Sultan bin Khalifa bin Zayed Al Nahyan* [2000] 1 SLR(R) 117 at [57], citing *Bocotra Construction Pte Ltd and others v Attorney-General* [1995] 2 SLR(R) 262 at [48]. I had to be satisfied that the defendant's conduct was so lacking in good faith that unconscionability was demonstrated and hence an injunction on the call on the Bond would be justified: *BS Mount Sophia* at [45].

40 There is good reason for such a strict standard to be applied. A performance bond in the context of a construction contract is a contractual bargain between the parties to that contract allowing the beneficiary to call on that bond as a safeguard for the contractor's performance. The Bond was required under the Contract *per* Clause 26 of the Conditions of Contract, as reproduced above at [4]. The Bond was part of the parties' bargain in this case and, putting it crudely, was as good as cash. I needed to be very careful before I interfered in this contractual bargain, and I also needed to be very careful not to set a precedent which expanded the scope of the court's interference in these bargains such that greater commercial uncertainty in their application was created.

The LDs claim

41 Looking at the specific issues in turn and starting with the LDs, I was not convinced that an inference of unconscionability should be found because of the Architect's supposed error in the calculation of the LDs and the

defendant's hesitancy in failing to expressly demand for those LDs. There was no express written evidence pointing to any bad faith on the part of the Architect and the defendant, but I was asked to make an inference based on their conduct. Whilst I agree that the Architect and the defendant were not as cogent as they could have been with respect to an explicit claim for LDs, that does not amount to unconscionability. I failed to infer any unconscionable conduct on the part of the defendant in its dealings with the Architect (as described at [14] and [16]). In fact, the claimant had been aware of the defendant's LD entitlement as certified by the Architect as early as September 2022 (through the Certificate of LD Entitlement – see [16]) even if an express claim for such LDs had not been made until later (see [16]). I also agreed with the defendant's assertion that the notes found at the bottom of the Certificate of LD Entitlement were most likely to be stock language used together with this form of certificate (see [17]) as the Architect (acting independently) would have been more explicit if there was an honest belief that they knew of any error with their LD calculation.

42 In that regard, the claimant felt that it had a stronger case with respect to its submission that the Architect had either erred in their interpretation of s 6(5) of the COTMA or was unaware of its existence (see [12] and [15]), thus resulting in some sort of collusive unconscionable conduct as between the Architect and the defendant. I am not required to rule on the merits of whether the LDs claim was contractually and legally justified as part of this application, so I was not required to rule on the interpretation of s 6(5) of the COTMA. The Architect may well have been mistaken in not taking this into account when LDs were certified but the Architect's error does not equal unconscionability on the part of the defendant. In *Anwar Siraj and another v Teo Hee Lai Building Construction Pte Ltd* [2003] 1 SLR(R) 394 ("*Anwar Siraj*"), one of the issues before the Court of Appeal was whether the appellants ought not to have made

a demand for payment under a performance bond as they had sufficient security in their hands for the cost of rectification work (*Anwar Siraj* at [13]). It was argued that the appellants held a substantial sum of the contractor's money because the latter's claim for a progress payment, which amounted to $265,190.17, had not been certified by the architect. The Court of Appeal held at [13] of *Anwar Siraj* that it was not the court's task to determine which party's estimated cost for the rectification of defects is more realistic, nor was it the court's task to determine whether or not the architect should have certified the contractor's claim for $265,190.17. Ultimately, the Court of Appeal was not convinced that it was unconscionable for the appellants to make a demand under the terms of the performance bond because they had sufficient security. The court does not engage in a detailed merits review when hearing an application to injunct the call on a performance bond. Such applications for an injunction are interlocutory proceedings, so the court would not be equipped to undertake a full, detailed, and exhaustive review of the merits of the parties' respective allegations.

43 Furthermore, the parties had agreed in the Contract for the Architect to act independently and to exercise its judgment on the certification of LDs and the defendant was entitled to and did rely on the Architect's decision in this regard (see [18]) even if the Architect had acted in error. I found no unconscionable conduct in that reliance as there was no explicit impropriety in the behaviour of the Architect or the defendant and I could not infer any such unconscionability based on the circumstantial evidence the claimant had placed before me in their submissions ([12] to [16]). In this regard, the decision of *CEX v CEY and another* [2021] 3 SLR 571 ("*CEX (Judgment)*") provides useful guidance. In *CEX (Judgment)*, the court found that when the architect is called on to exercise his independent judgment and issue certificates, he cannot be the

agent of the employer (*CEX (Judgment)* at [61]). At [62], the court further found that in so far as the architect was expected to act independently, his alleged errors were not attributable to the employer and his conduct in issuing his certificates was "simply irrelevant in determining whether [the employer] had acted unconscionably". The court caveated its holding by noting that if the employer had been put on notice about something improper about the architect's certification process and had proceeded to call on the bond regardless, there may be an argument that the employer had acted unconscionably.

44 In this case, as noted above at [6], the Architect had a duty under the Contract to act independently and impartially, in accordance with professional codes of conduct, when issuing certificates relating to liquidated damages and assessing and granting extensions of time. When executing these duties, the Architect was not acting as the defendant's agent: *CEX (Judgment)* at [61], citing *Hiap Hong & Co Pte Ltd v Hong Huat Development Co (Pte) Ltd* [2001] 1 SLR(R) 458 at [35]. There is no evidence to suggest that the defendant had been put on notice about something improper about the Architect's certification process and had proceeded to call on the bond regardless. In fact, there is evidence of meeting minutes[81] recording a discussion held on 11 April 2023 between the defendant, the restoration consultant, the Architect, and the quantity surveyors where the issue of COTMA reliefs were expressly discussed. The quantity surveyor "confirmed that COTMA claims have already been taken into account in the draft Statement of Final Account" and that "valid COTMA relief claims have already been taken into account". The architect agreed to issue a letter stating that "valid COTMA relief claims have already been taken into account, and stating there are no more valid EOT claims to be assessed". Faced with such advice from their advisors, there is nothing that would put the

[81] JJF-2023 10 04 at p 260–263.

defendant on notice that their architect had not considered the COTMA reliefs, or had done something improper. The defendant should not be put in a position where it had to second guess the decisions of an independent architect in the absence of knowledge of a clear error.

Dome and tarmac issues

45 I tackled the dome and tarmac issues together as both involved disputes on issues of the interpretation of the Contract and disputes of fact as to whether works had been omitted. The claimant had fundamentally disagreed that the dome and tarmac works were within the claimant's work scope (see [21], [22], [27] and [28] above) and thus asked me to conclude that when these works were taken away from the claimant's responsibilities, it was impossible to conclude that the defendant was entitled to the damages that they sought and had thus acted unconscionably. The claimant's arguments however lost their shine when the defendant pointed to correspondence which showed clear acknowledgement by the claimant that it was to undertake the tarmac and dome repair works (see [26] and [29] above respectively). The defendant's explanation as to why the tarmac repairs were supposedly struck out from the Completion Certificate (when read in context with the conditions set out in the Completion Certificate) were also convincing (see [25] above).

46 The defendant's arguments were by no means always cogent. It was not clear to me whether the cost of the tarmac repair works (within the claimant's work scope) consisted of just the repairs to the tarmac damaged by the claimant's heavy lifting equipment or wider works to other parts of the tarmac as well. The defendant pointed to the latter and, in particular, to the defects list

of 6 April 2023[82] which the defendant mentioned in its oral submissions as "undisputed". However, looking at this document, it was not clear to me whether this was as conclusive as the defendant made it out to be. The claimant's argument on the disparity between the cost of tarmac works in the Contract as compared to the quote from RBPL (see [21] above) also deserves an answer. Looking at the range of three quotes obtained by the defendant,[83] it is noted that RBPL is the middle of the three quotes (looking at the totality of works quoted) and yet the most expensive of the three quotes (by totality of works quoted) only quoted $36,120 for the tarmac works, compared to $227,040 from RBPL (for the tarmac works) and $81,700 for the tarmac works (from the lowest of the three quotes by totality of works quoted). The only conclusion to be drawn from this wide range of quotes seems to be that the quotes provided were likely on a "desktop" basis and not based on a detailed study of the work involved. Unfortunately for the claimant, looking at the quotes obtained by the defendant as a whole (rather than cherry picking the specific quote for tarmac works from RBPL), this lessens the impact of its argument that there was impropriety in an excessive claim for tarmac works whilst making the defendant's argument that the quotes sought were rough and incomplete even more plausible..

47 Ultimately, the conduct of the parties, the correspondence, the Architect's instructions and whether and to what extent the dome and tarmac works were within the claimant's work scope are clearly issues in dispute that would need to be addressed by the tribunal taking charge of the substantive dispute. For the purposes of this application, which is interlocutory in nature, I am not engaged to delve deeply into those disputes and to determine the merits

82 CBOD at page 1754.

83 CBOD at page 1837.

of the parties' respective cases on each of their disputes. I was asked to consider if the conduct of the defendant reflected a strong *prima facie* case of unconscionability. I found that there was no such unconscionable conduct.

Warranties

48 Given there was no cogent evidence to allow for a proper examination of the warranty issue, I had to conclude that the claimant did not make out an element of unconscionability on the part of the defendant with respect to this issue.

Should the defendant's call on the Bond be reduced?

49 The claimant had also complained about the difference between (a) the total amount claimed by the defendant and (b) the sum of the amounts called on the Bond plus the retention sum. The claimant alleged that the sums in (b) still showed an excess in favour of the defendant and it should not be entitled to benefit from this excess (see [33] above). In the claimant's written submissions, the claimant had further argued that the court should apply a reduction to the quantum of the Bond call to take into account the value of the claims for "Additional Preliminaries amounting to SGD 600,000, which the Claimant has submitted to the Architect".[84]

50 In making my decision on this point, I was guided by the Court of Appeal's decisions in *Eltraco International Pte Ltd v CGH Development Pte Ltd* [2000] 3 SLR(R) 198 ("*Eltraco*") and in *Anwar Siraj* (canvassed above at [42]). In *Eltraco*, the Court of Appeal had reduced the amount that the employer was permitted to call and receive from the bond from $1.6m to $600,000

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[84] CWS at para 73(b).

(*Eltraco* at [42]). This was because the Court of Appeal was satisfied that the main contractor was owed moneys under a progress claim ("progress claim No 32") that was quantified by the main contractor at around $1,253,240 (*Eltraco* at [40]). The Court of Appeal reasoned as follows at [41]:

> … Notwithstanding this uncertainty, progress claim No 32 is a factor which ought to have been taken into account. Bearing in mind that *we are not here involved in an exercise in quantifying damages but only in ensuring that the amount of the bond called for is not unconscionable and taking a broad approach*, we think there should be a reduction of $1m from the sum which the court below had directed that the respondents should be entitled to call. That should give the respondents *ample security, without being that inordinate as to be unconscionable.*
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> [emphasis added]

51 In *Anwar Siraj*, the Court of Appeal had considered and cited its earlier decision in *Eltraco*. As noted above at [42]), the Court of Appeal in *Anwar Siraj* declined to go into a detailed merits review of the parties' dispute.

52 Ultimately, taking guidance from *Eltraco* and *Anwar Siraj*, I was cognisant that my task for the present application is *not* to engage in "an exercise in quantifying damages" (*Eltraco* at [41]). I was called upon to take a "broad approach" and I had to decide whether the present call on the Bond gave the defendant "ample security, without being that inordinate as to be unconscionable" (*Eltraco* at [41]). I was ultimately unconvinced that the present call on the Bond was that inordinate as to cross the unconscionability threshold. The defendant had quantified their claims against the claimant at a total sum of $825,660.00, taking into account the claims for liquidated damages, outstanding warranties and outstanding works.[85] I have found above that the defendant did not lack *bona fides* when making their claims for these sums. Adding the Bond

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85 DWS at paras 24–25.

sum of $629,998.70 and the retention sum of $233,116.67, the resulting total of $863,115.37 is not incommensurate with the total claim of $825,660.00. I take the defendant's point that as of the date of the call on the Bond, the Statement of Final Account has not been issued, so the claim estimates are rough estimations, and there is some uncertainty in the quantification of the claims.[86] *Prima facie*, looking at the figures in the round and taking a broad approach, I do not find the defendant's call to be inordinate relative to the *bona fide* claims that they had.

53 I deal briefly with the claimant's submission that "Additional Preliminaries amounting to SGD 600,000" should be taken into account in reducing the Bond call. The claimant flagged in its written submissions that on 11 October 2023, the claimant submitted a "Claim for Additional Preliminaries Cost for 8 months extension of time" to the Architect by way of e-mail.[87] I was unable to give any weight to this argument. The present originating application was filed on 29 August 2023. The defendant's call on the Bond was on 20 July 2023. This "Claim for Additional Preliminaries", having been raised nearly three months after the Bond call and one-and-a-half months after this originating application was filed, is not relevant to the assessment of the defendant's *bona fides* at the time the Bond call was made.

Other issues

54 For the sake of completeness, it should also be noted that the claimant's managing director, Mr Harry Tan Chin Choon ("Mr Tan"), filed a second affidavit in this application to explain that a number of allegations made against

86 DWS at paras 74–76.

87 CWS at para 29.

the defendant in Mr Tan's first affidavit (which was used to obtain the interim injunction) were inaccurate. Harry Tan's first affidavit had failed to disclose that the Architect had in fact issued a certificate of LDs and its assessment as to the extension of time claims made by the claimant.[88] The claimant had used these alleged omissions by the Architect to bolster its case on unconscionability on the part of the defendant during the hearing for the interim injunction. In Mr Tan's second affidavit, he conceded that, because of staff turnover and the fact that he was preoccupied with the moratorium issues concerning the claimant, he had inadvertently forgotten that the Architect had in fact made these certifications and assessments. Whilst my decision on this application did not turn on Mr Tan's forgetfulness, these were glaring and material omissions on his part (even if innocent) and helped to corroborate the defendant's position that the claimant was not well organised in their carrying out of the project.

Conclusion

55 Ultimately, an applicant seeking to injunct a call on an unconditional performance bond bears a high burden. Such an applicant has to convince the court that it is just and fair for the court to assist him in reneging on a contractual promise that he has made. This is why, as the Court of Appeal emphasised at [20] of *BS Mount Sophia*, "the burden that the applicant has to discharge is to demonstrate a strong *prima facie* case of unconscionability". The claimant in the present case has not discharged this high burden. Upon a review of all the evidence, I found *bona fide* disputes between the parties, and I found that the defendant had justifiably relied on its advisors' advice in calling on the Bond. I did not find the defendant's behaviour unconscionable. I therefore dismissed the claimant's application.

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88 Affidavit of Harry Tan Chin Choon dated 13 October 2023 ("HTCC-2023 10 13") at paras 2.2–2.4.

Costs

56 Costs were ordered for the defendant in the amount of $22,000 (excluding disbursements), which included costs for the earlier hearing on the interim injunction.

Post-judgment addendum – *Erinford* injunction

57 On 17 November 2023, I delivered my oral decision dismissing the claimant's application for an injunction. On 22 November 2023, the claimant filed a notice of appeal against my decision, and on the same day, the claimant's counsel wrote to court seeking an order for an *Erinford* injunction in the following terms:[89]

> Subject to the Claimant's usual undertaking as to damages, the Defendant be restrained, whether by itself or by its agents or howsoever otherwise from calling on, demanding or receiving payment from Lonpac Insurance Bhd under [the Performance Bond] until the determination of the Claimant's appeal of the decision in OA 876.

58 The claimant argued that:

(a) There was a reasonable likelihood that the appeal would succeed because the court, in dismissing the originating application, did not consider the claimant's reasons for bringing the application to be completely untenable.[90] Moreover, in respect of the LDs issue, the claimant contended that there was a reasonable argument that the defendant's reliance on the LD claim, in the light of the COTMA, was unconscionable.[91] As for the tarmac and dome works, the claimant

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89 Letter from claimant dated 22 November 2023 at para 3.

90 Letter from claimant dated 22 November 2023 at para 5(d)(i).

91 Letter from claimant dated 22 November 2023 at para 5(d)(ii).

submitted that the documentary evidence was sufficient to show that the defendant's reliance on these matters to call on the Bond was unconscionable.[92]

(b) The appeal would be rendered nugatory if the *Erinford* injunction was not granted.[93] The claimant asserted that it was in the process of seeking investors to restructure its debts. Should Lonpac pay out on the Bond, Lonpac would look to the claimant to reimburse the payment and this significant debt on the claimant's balance sheet might deter potential investors.

(c) The claimant added that the defendant would not be unduly prejudiced by the *Erinford* injunction as any prejudice can be quantified in damages.[94] The claimant also pointed out that Lonpac might be placed in a disadvantageous position if it paid out on the Bond and the claimant thereafter became insolvent, leaving Lonpac as an unsecured creditor proving in the claimant's insolvency.[95]

(d) If the *Erinford* injunction was not granted, there would be a negative perception created on the claimant's case, particularly in light of the investment prospects being sought.

59 The defendant resisted the claimant's application for an *Erinford* injunction by arguing:[96]

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92 Letter from claimant dated 22 November 2023 at para 5(d)(iii).

93 Letter from claimant dated 22 November 2023 at para 5(e).

94 Letter from claimant dated 22 November 2023 at para 5(f).

95 Letter from claimant dated 22 November 2023 at para 5(g).

96 Letter from defendant dated 24 November 2023.

(a) The claimant's application made via letter was in breach of the Rules of Court 2021, which required such applications to be made by summons supported by affidavit.[97]

(b) The claimant's arguments for why there was a reasonable likelihood that the appeal would succeed traversed the same ground as that in the originating application before this court, and there is no basis to argue that these arguments will succeed on appeal.[98]

(c) The appeal would not be rendered nugatory if the *Erinford* injunction was not granted as the defendant could repay the amounts received from Lonpac if the appeal was successful.[99]

(d) It was irrelevant that a successful call on the Bond might deter potential investors from assisting the claimant with restructuring its debts as this point did not relate to the appeal or the dispute between the parties.[100] A lack of prejudice to the defendant from the grant of an *Erinford* injunction is also not a relevant factor for the court's consideration.[101] Similarly, any alleged prejudice to Lonpac from the Bond call is also completely irrelevant.[102]

60 On the form of application for the *Erinford* injunction, I noted that in *SH Design & Build Pte Ltd v BD Cranetech Pte Ltd* [2018] SGHC 133 ("*SH Design*

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97 Letter from defendant dated 24 November 2023 at para 3.

98 Letter from defendant dated 24 November 2023 at para 5.

99 Letter from defendant dated 24 November 2023 at para 6.

100 Letter from defendant dated 24 November 2023 at para 7(b).

101 Letter from defendant dated 24 November 2023 at para 7(c).

102 Letter from defendant dated 24 November 2023 at para 7(d).

& Build"), the application was made via an oral application (*SH Design & Build* at [78]) and in *Sin Herh Construction Pte Ltd v Hyundai Engineering & Construction Co Ltd and another* [2017] SGHC 3 ("*Sin Herh*"), the application was made via letter (*Sin Herh* at [27]). In the spirit of O 3 r 1 of the Rules of Court 2021, I took the view that the courts should adopt a practical approach to such applications and I allowed the claimant to proceed with this application made by way of letter. A formal application by summons is not discouraged or wrong but *Erinford* injunctions, by their nature, are often sought as a matter of urgency, so there should be no rule disallowing an oral application or an application by letter following a court's decision on a particular matter where the applicant can demonstrate that the practicalities of the case demands such an approach.

61 Following *SH Design & Build* at [92]–[93], which quoted the seminal authority in *Erinford Properties Ltd and Another v Cheshire County Council* [1974] 2 WLR 749, the grounds on which an *Erinford* injunction should be granted are:

(a) First, whether there is a likelihood that the appeal will succeed.

(b) Second, whether the appeal will be rendered nugatory if a stay was not granted.

62 I accepted the claimant's arguments that there was a likelihood that the appeal would succeed. The claimant's submissions were not frivolous or a bare denial and disagreement with the reasons behind my decision. There was a fair argument that I should have gone behind the architect's decision with respect to s 6(5) of the COTMA and there was an equally fair submission that my judgment to dismiss the claims relating to the tarmac and the dome repairs as

bona fide contractual disputes was too hasty. The standard should not be set so strictly that there must be a high likelihood of success in the appeal, but the applicant for an *Erinford* injunction should be ready to state with sufficiently detailed particulars the reasons why its arguments on appeal will succeed based on a fair and objective standard.

63 I however disagreed that the appeal will be rendered nugatory if an injunction was not granted.

64 Firstly, the negation test must stand on its own two feet and the test for whether an appeal will be rendered nugatory cannot depend on other issues outside the four corners of this case. As the court stated at [30] of *Sin Herh*, "[f]or an Erinford Order to be granted, the risk of negation must relate to the appeal or the dispute between the parties". In *Sin Herh*, the applicant for the *Erinford* injunction had submitted that it would suffer prejudice without the injunction because the disclosure of a successful call on the bond would prejudice its chances of securing other projects. The court held that this potential prejudice to the applicant in securing other projects was not related to either the appeal or the dispute between the parties (*Sin Herh* at [30]). In the present case, the fact that the claimant was in a precarious commercial position was outside the control of the defendant and it cannot be the case that the claimant's solvency issues were used as an excuse not to comply with its contractual obligations – whether with the defendant or otherwise.

65 The substance of the dispute between parties would survive whether the claimant survived their solvency woes, or if they are placed under liquidation or judicial management. In other words, if it is found that the amounts called under the Bond by the defendant are excessive, those amounts can be recovered by the claimant, its liquidators or judicial managers. Put yet another way, the

amounts called under the Bond would be reflected in the claimant's accounts in insolvency as a contingent liability (even if the *Erinford* injunction was granted). From the perspective of an investor or other interested party looking at the claimant's accounts, there is likely little difference between an actual liability due to the bond issuer, Lonpac (once the bond amounts are released to the defendant) and a contingent liability to Lonpac pending the appeal. Indeed, I note that in *Sin Herh* at [29], the court then was equally untroubled by this point as it held that the plaintiff would not be denied its primary remedy in the event its appeal is successful since the success of the appeal would come with the grant of an interim injunction such that any sum received by the bond beneficiary pursuant to the bond call would have to be paid back.

66 Finally, and with respect to the perception point, the application for an injunction on the payment under the Bond has already been dismissed. The negative perception of that dismissal is already present and the denial of an *Erinford* injunction pending the appeal will do little to worsen those perceptions.

67 In relation to the claimant's argument on the lack of irreparable prejudice caused to the defendant from the grant of the *Erinford* injunction, I was not convinced by this argument. Referring to the grounds for the grant of an *Erinford* injunction as stated at [61] above, prejudice to the defendant is not one of the grounds. As for the claimant's argument that Lonpac would be prejudiced from having to pay out on the Bond, this is plainly irrelevant. Lonpac, as bond issuer, had participated in a commercial bargain where it agreed to undertake unconditionally and irrevocably to pay on demand the Bond sum (see [5] above). Undoubtedly, the commercial risks associated with such a business would have been priced in. There is nothing untoward with holding Lonpac to this bargain it had made.

68 I therefore dismissed the claimant's application for an *Erinford* injunction. I ordered costs to the defendant in the sum of $1,500 (including disbursements).

Wong Li Kok, Alex
Judicial Commissioner

Lim Chong Guang Charles, Ryan Mark Lopez and Nilesh Khetan (Shook Lin & Bok LLP) for the claimant;
Tan Spring and Farahna Alam (Withers KhattarWong LLP) for the defendant.