IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2019] SGCA 39

Civil Appeal No 95 of 2018

Between

Bintai Kindenko Pte Ltd

… *Appellant*

And

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

… *Respondents*

GROUNDS OF DECISION

[Credit and Security] — [Performance bond] — [Interim injunction restraining call on performance bond]

[Civil Procedure] — [Injunctions] — [Burden of proof]

[Building and Construction Law] — [Sub-contracts] — [Incorporation of main contract terms]

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v
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1 April 2019

30 May 2019

Tay Yong Kwang JA (delivering the grounds of decision of the Court):

Introduction

1 The court will only intervene to prevent a beneficiary from calling on a performance guarantee if it can be shown that the call was either fraudulent or unconscionable (*BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352 ("*BS Mount Sophia*") at [18]; *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd and another and another appeal and another matter* [2015] 3 SLR 1041 ("*CKR Contract Services*") at [15]). These two grounds for intervention have been termed the fraud and unconscionability exceptions respectively.

2 In recent years, it is becoming more common for parties to agree to exclude the right of the provider of the performance guarantee to rely on the unconscionability exception to prevent the beneficiary's call on the performance guarantee. In *CKR Contract Services*, this Court held that the parties could do

so, subject to the ordinary legal constraints on exclusion clauses (at [23]). The Court also observed that it would be open to parties to argue that such an exclusion clause was not incorporated into the contract in the first place (*CKR Contract Services* at [22]).

3 This appeal was brought against the decision of a High Court Judge ("the Judge") to discharge an *ex parte* interim injunction which restrained a call on a banker's guarantee. The Judge's grounds of decision can be found at *Bintai Kindenko Pte Ltd v Samsung C&T Corp and another* [2018] SGHC 191 ("the GD"). We dismissed the appeal after hearing the appellant and the first respondent on 1 April 2019. The Second Respondent, DBS Bank Ltd, which issued the banker's guarantee, did not participate in these proceedings as it needed only to comply with the Court's directions. These are the grounds of our decision for dismissing the appeal.

Background facts

4 The first respondent, Samsung C&T Corporation ("the First Respondent"), was appointed by HSBC Institutional Trust Services (S) Limited ("the Employer") as the main contractor for a project to upgrade the Suntec City Convention Centre and its retail podium ("the Project").

5 Having been appointed the Project's main contractor, the First Respondent then appointed the appellant, Bintai Kindenko Pte Ltd ("the Appellant"), as the Project's mechanical and engineering sub-contractor through a tender process. In June 2012, the First Respondent sent a Letter of Acceptance ("the First LOA") to the Appellant which contained various contractual terms. However, the Appellant did not sign or accept the terms of the First LOA. Instead, it proposed various amendments to the terms stated therein. Eventually, the First Respondent issued another Letter of Acceptance

dated 3 December 2012 ("the Second LOA") to the Appellant which contained various amendments to the terms of the First LOA. The Second LOA also provided that all of its terms were to have retroactive effect from 1 June 2012.

6 The Appellant accepted the terms and conditions stated in the Second LOA. Its representative, who was the Appellant's President, Chief Executive Officer and Managing Director, signed below a paragraph in the Second LOA which stated as follows:

> On behalf of **BINTAI KINDENKO Pte Ltd**, we the undersigned hereby acknowledge receipt of this Letter of Acceptance, the documents and confirm acceptance of all the terms and conditions stated herein.

The relevant clauses of the Sub-Contract

7 It was undisputed that the Appellant and the First Respondent were contractually bound by the terms of the Second LOA. The following clauses of the Second LOA were most relevant to this appeal.

8 The first, cl 3 ("Clause 3"), provided as follows:

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

9 A provision similar to Clause 3 was also contained in the First LOA.

10 The next clause of the Second LOA which is relevant here is cl 6 ("Clause 6"), which concerned the performance bond. This clause provided:

> **6. Performance Bond**
>
> [The Appellant] is to submit the Performance Bond (issued by an approved Bank) equivalent to Five (5%) percent of the Sub-Contract Sum within 14 days from the date hereof as required under the terms of the Sub-Contract.

The relevant clauses of the Main Contract

11 As stated in Clause 3, the Main Contract was based on the 9th edition of the Singapore Institute of Architects' Lump Sum Contract (the "SIA Lump Sum Contract").

12 Additionally, Clause 3 also made reference to the "Particular Conditions as set out in the Main Contract". There were two documents before us that fell within this description. The first was a document that was entitled the "Particular Conditions of Main Contract" (the "MC Particular Conditions") which contained various amendments and additions to the SIA Lump Sum Contract and as agreed upon between the Employer and the First Respondent. The MC Particular Conditions document was signed by both the Employer and the First Respondent. The second document was entitled the "Particular Conditions of Sub-Contract" (the "SC Particular Conditions"). This document purported to incorporate various additional terms or amendments to the SIA Conditions of Sub-Contract, 4th edition (September 2010). It was not signed by the Appellant or by the First Respondent. However, express reference was made to the SC Particular Conditions in the preliminaries of the Main Contract.

13 Both the MC Particular Conditions and the SC Particular Conditions purported to add similarly-worded exclusion clauses into the Main Contract and the Sub-Contract respectively. Clause 13 of the MC Particular conditions provided that a new cl 5A was to be added to the Main Contract's conditions. Sub-clause (5) of this new cl 5A ("Clause 5A(5)") stated as follows:

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

14 Likewise, cl 8 of the SC Particular Conditions purported to add a new cl 14A(5) to the SIA Conditions of Sub-Contract ("Clause 14A(5)"), which provided that:

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

15 We shall refer to Clauses 5A(5) and 14A(5) collectively as the "Exclusion Clauses".

The banker's guarantee

16 In accordance with Clause 6 of the Second LOA (see above at [10]), the Appellant furnished the First Respondent with a banker's guarantee ("BG") for

a sum of about $4.3 million (the "guaranteed sum") which was issued by the Second Respondent.

17 The BG, an on-demand guarantee, provided in Clauses 2 and 3 that:

> 2 Upon your demand of the whole or any part of the Guaranteed Sum made in writing addressed to us and sent by hand or by AR registered post to our Banker's Guarantee Section … and made at any time on or before the expiry of 90 days after the Termination Date of this Bond, we shall immediately pay the sum demanded to you notwithstanding the existence of any dispute or differences which may have arisen in relation to the Sub-Contract or any amount payable under the Sub-Contract or any defences which the Sub-Contractor may have, or any request or instruction which may have been given to us by [the Appellant] not to pay the same.
>
> 3 We shall not be obliged to inquire into the reasons, grounds or circumstances or any demand made by you nor into the respective rights, obligations and/or liabilities between you and [the Appellant] under the Sub-Contract, or into the authenticity of your notice or the authority of the persons signing such notice but shall immediately pay to you the Guaranteed Sum (or any part as stated in your demand) on your written demand made in the manner as set out in Clause 2 herein.

18 The Appellant did not dispute that the BG was valid when the First Respondent called on it on 28 August 2017.

The dispute between the parties

19 We now set out the relevant background facts for the purposes of this appeal.

20 It turned out that various phases of the Sub-Contract works were not completed on time and disputes arose between the parties as to whether the Appellant was liable for these delays. Between March 2014 and December 2015, the Appellant wrote various letters to the First Respondent seeking extensions of time to the contractual deadlines for the respective phases of the

Sub-Contract works. These requests were all rejected by the First Respondent in a letter to the Appellant dated 18 December 2015. In that letter, the First Respondent also stated that it would hold the Appellant responsible for the delays allegedly caused by it, which included liability for liquidated damages and claims for any additional costs incurred by the First Respondent.

21 On 27 January 2016, the First Respondent substantiated its reasons for rejecting all of the Appellant's requests for extensions of time. It also computed the delays for the respective phases of the Sub-Contract works as follows:

Phase	**Duration of inexcusable delay**
1B1	71 days
1B2	104 days
2	84 days
3	39 days

22 On 20 February 2017, the Appellant lodged Payment Claim ("PC") No 56, claiming $13,479,366.43 for the value of work done under the Sub-Contract up to February 2017. The First Respondent responded to these claims in Payment Response ("PR") No 56 dated 13 March 2017, where it rejected the Appellant's claims in PC 56. However, the First Respondent did not raise any claims for liquidated damages against the Appellant in PR 56.

23 Subsequently, the Appellant repeated its claims for the sum of $13,479,366.43 in PC Nos 57, 58 and 59. These claims were likewise rejected by the First Respondent in PR Nos 57, 58 and 59. Just as in PR 56, the First Respondent did not raise any claim for liquidated damages against the Appellant in these subsequent PRs.

24 On 3 July 2017, the Appellant lodged PC 60 in which it claimed the sum of about $28 million for the value of work done up to June 2017. A few days later on 7 July 2017, it also commenced Adjudication Application No 190 of 2017 ("AA 190/2017") for the release of the first half of the retention monies held by the First Respondent which amounted to about $2.1 million.

25 In a letter dated 22 July 2017, the First Respondent informed the Appellant that it was thereby issuing a delay certificate to the latter for its delays in completing the various phases of the Sub-Contract works on time ("the Delay Certificate"). The First Respondent also stated that it was entitled to recover liquidated damages from the Appellant for delays caused by the Appellant and that the claim for liquidated damages would be reflected in the First Respondent's next Payment Response. The First Respondent also set out its calculation of the liquidated damages, which totalled $26,422,000.

26 Two days after the Delay Certificate was issued, the First Respondent lodged PR No 60 in which it claimed that the Appellant owed it $26,422,000 in liquidated damages.

27 The Appellant eventually highlighted in a letter dated 19 October 2017 that the First Respondent's computation of the periods of delay for two sub-phases, 1B1 and 1B2, was erroneous. This was because the First Respondent had sought to claim 71 and 104 days' worth of liquidated damages when there were only 52 calendar days for the relevant periods. The First Respondent did not dispute that its initial calculation of the periods of delay for these two sub-phases was erroneous, and it eventually "re-assessed" the period of inexcusable delays for these two sub-phases to be 52 days. It also reduced its liquidated damages claim for these sub-periods by around $3.68 million.

28 On 15 August 2017 the Appellant's claim in AA 190/2017 was allowed by the adjudicator ("the Adjudication Determination") who issued written grounds for his decision. As the First Respondent did not make payment of the sum awarded to the Appellant in the Adjudication Determination, the Appellant filed Originating Summons No 975 of 2017 ("OS 975") on 28 August 2017 for leave to enforce the Adjudication Determination in the same manner as a judgment or an order under s 27(1) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed). Subsequently, the First Respondent applied successfully to set aside the Adjudication Determination (see: *Bintai Kindenko Pte Ltd v Samsung C&T Corp* [2018] 2 SLR 532), though nothing in this appeal turns on this point.

29 On the same day that OS 975 was filed (*ie*, 28 August 2017), the First Respondent wrote to the Second Respondent to demand payment on the BG for the guaranteed sum. It appeared that the Second Respondent had informed the First Respondent that payment would take one week. On 29 August 2017, the First Respondent's solicitors wrote to the Second Respondent to demand immediate payment of the guaranteed sum according to the terms of the BG. Apart from the $26,422,000 liquidated damages claim, the First Respondent's solicitors also claimed that the Appellant owed it over $4 million for claims involving damages in respect of the other trades' works, omissions from the Appellant's scope of Sub-Contract works and damage from water ingress to a lift shaft caused by the Appellant.

30 At this juncture, we note that there was no evidence of the Employer having commenced any formal claim against the First Respondent for the delays in completing the Project. Counsel for the First Respondent confirmed this at the hearing. He also informed the Court of his instructions that there were some

discussions between the First Respondent and the Employer on liability for the delays but they eventually agreed on a confidential settlement of the matter.

Procedural history

31 The Appellant became aware of the First Respondent's call on the BG on 28 August 2017 and it commenced Suit No 800 of 2017 the next day. The Appellant also took out Summons No 3934 of 2017 ("SUM 3934"), an *ex parte* application for an interim injunction to restrain the First Respondent from calling on the BG and the Second Respondent from paying out on the BG. On 29 August 2017, the Judge granted an *ex parte* interim injunction to that effect ("the Interim Injunction").

32 Subsequently, the First Respondent applied for the discharge of the Interim Injunction via Summons No 4313 of 2017 ("SUM 4313"). On 30 November 2017, the Judge granted the application and discharged the Interim Injunction.

33 Dissatisfied, the Appellant sought the Judge's leave to appeal against his decision in SUM 4313. The Judge dismissed the application. Subsequently, the Appellant obtained this Court's leave to appeal against the Judge's decision in SUM 4313 ("the CA leave application").

34 Pursuant to the leave granted, the Appellant appealed against the Judge's decision to discharge the *ex parte* Interim Injunction.

The decision of the High Court

35 At the hearing of SUM 4313 to discharge the Interim Injunction, the Appellant argued that the First Respondent's call on the BG was fraudulent and/or unconscionable. The Appellant asserted that the First Respondent's

claims against it were contrived or that the First Respondent had no honest belief in its claims. The First Respondent denied these allegations. It also submitted that Clause 14A(5), which it alleged was incorporated into the Sub-Contract, excluded the Appellant's right to rely on the unconscionability exception when applying for the Interim Injunction. Finally, the First Respondent also argued that the Appellant had failed to fulfil its duty to make full and frank disclosure of material facts as it had failed to disclose the potential applicability of Clause 14A(5) at the *ex parte* hearing of SUM 3934 on 29 August 2017 when the Judge then granted the Interim Injunction.

36 First, the Judge considered that the court was entitled to consider the incorporation of Clause 14A(5) at that interim stage, though it should not arrive at a conclusive ruling on it (GD at [27] and [33]). The Judge held that the Appellant bore the burden of showing that it was not disentitled from relying on the unconscionability exception and that it would be able to discharge this burden if it showed that there was a serious question to be tried as regards the incorporation of Clause 14A(5) (GD at [28]–[29]).

37 Following from that, the Judge found that the Appellant's right to rely on the unconscionability exception was contractually excluded (GD at [21] and [26]–[33]). This was because Clause 14A(5) had been incorporated into the Sub-Contract by reference via Clause 3 of the Second LOA (GD at [31] and [36]). Given Clause 3's express reference to the SC Particular Conditions, there was little room for the Appellant to argue that Clause 14A(5) was not incorporated into the Sub-Contract (GD at [31]–[33]). Nevertheless, the Judge also observed that he would have arrived at the same conclusion if the burden fell on the First Respondent instead (GD at [29]). The Judge also found that the circumstances surrounding Clause 14A(5) were not so unreasonable as to render it unenforceable under the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed)

("the UCTA") (GD at [35]–[36]).

38 Second, the Judge held that the Appellant had failed to show that there was a strong *prima facie* case of fraud in order to be entitled to the Interim Injunction. Although he noted that the First Respondent had not been entirely consistent or conclusive about its claims against the Appellant, he observed that the First Respondent did nonetheless maintain those claims against the Appellant before it called on the BG. Thus, this did not justify the inference that the First Respondent's claims were contrived at the material time (GD at [38]–[41]).

39 Finally, the Judge observed that the injunction should not be discharged solely on the basis that the Appellant had failed to give full and frank disclosure at the *ex parte* hearing of SUM 3934. He found that the Appellant should have disclosed some matters earlier but accepted that those omissions were innocent and were therefore not fatal to the grant of an injunction (GD at [48]).

The parties' cases

The Appellant's case

40 In this appeal, the Appellant maintained its claim that the First Respondent's call on the BG was tainted by fraud and/or unconscionability because the First Respondent had relied on contrived claims against the Appellant. In particular, the Appellant emphasised (i) the lateness of the First Respondent's counterclaims against it, (ii) the proximity of the call to the outcome of AA 190/2017 and (iii) the First Respondent's inconsistent position with regard to the counterclaims. At the hearing before us, the Appellant also pointed to the fact that the First Respondent had not commenced any proceedings against it for the counterclaims.

41 In relation to the question of whether it was entitled to rely on the unconscionability exception in this case, the Appellant submitted that:

(a) First, the Court should not disallow the Appellant from relying on the unconscionability exception at this interim stage as it has raised triable issues relating to the issue of whether the Exclusion Clauses were incorporated into the Sub-Contract. To do otherwise would curtail the Appellant's ability to raise various claims or defences against the First Respondent in arbitration or at trial. This triable issue arose from the fact that the SC and MC Particular Conditions were not provided to the Appellant and could not therefore have been incorporated into the Sub-Contract without the Appellant's notice. The Appellant also submitted that the balance of convenience test would be highly relevant if the potential effect of the interlocutory order would have the effect of striking out a plausible defence or claim that should be resolved at trial.

(b) Second, even if the Court was to determine that the Exclusion Clauses had been incorporated, it should nevertheless find that the clauses were unenforceable pursuant to ss 3 and 11 of the UCTA as such clauses were inherently unreasonable.

42 Finally, the Appellant submitted that it had not failed to make full and frank disclosure of material facts at the *ex parte* hearing of its injunction application. It also submitted that there was no deliberate suppression of material facts before the Judge and any omissions were innocent in any case.

The First Respondent's case

43 The First Respondent submitted that its call on the BG was neither fraudulent, because it had a genuine belief in the counterclaims, nor unconscionable since it had notified the Appellant of these counterclaims way in advance of the call on the BG. It had also maintained those claims consistently.

44 In addition, the First Respondent submitted that the Appellant should not be allowed to rely on the unconscionability exception. This was because the Appellant was bound by Clause 14A(5) which was incorporated into the Sub-Contract via Clause 3 of the Second LOA which the Appellant had signed. Since the Appellant had signed the Second LOA, it did not matter whether the Appellant had a copy of the SC Particular Conditions. Although this Court did not need to determine the question of incorporation at this stage, it was entitled to come a view on the quality of the Appellant's case on this issue. It also submitted that the Appellant should not be allowed to argue that the Exclusion Clauses were unenforceable pursuant to the UCTA in this appeal because it would prejudice the First Respondent. This was because the Appellant failed to raise that argument in the High Court, thereby depriving the First Respondent of the opportunity to adduce evidence on the reasonableness of the Exclusion Clauses. In any case, the First Respondent submitted that ss 3(1) and 11 of the UCTA did not apply in this case since neither of the parties was dealing on the other's written standard terms of business.

45 Finally, the First Respondent also submitted that the Judge was wrong in refusing to discharge the injunction on the basis that the Appellant had not failed to provide full and frank disclosure of material facts and that his decision should be varied in that respect. This is because the Appellant had failed to

disclose various material facts, including Clause 3, as well as the adjudicator's determination in AA 190/2017 that the SC Particular Conditions were incorporated into the Sub-Contract. The First Respondent submitted that these omissions were highly material to the question of whether the Appellant should have been allowed to rely on the unconscionability exception and they were not innocent but intentional.

Issues to be determined

46 The issues that arose for determination in this appeal can be broadly stated as follows:

(a) Whether the Judge erred in holding that the Appellant's right to rely on the unconscionability exception was contractually excluded in this case?

(b) Whether the Judge erred in finding that the First Respondent's call on the BG was not fraudulent?

(c) Whether the Judge erred in declining to discharge the Interim Injunction solely on the basis that the Appellant had failed to provide full and frank disclosure of all material facts?

47 Before setting out our analysis of the various issues, we must emphasise that the conclusions which we express at this stage are not meant to be binding on any court or tribunal which may be called upon to resolve the parties' underlying disputes in this case. These conclusions are meant for the disposal of this appeal only.

Issue 1: Whether the Judge erred in deciding that the Appellant was contractually precluded from relying on the unconscionability exception?

The burden of proof

48 The Judge held that the Appellant bore the burden of proving that it was not disentitled from relying on the unconscionability exception as it was the party seeking the Interim Injunction to prevent payment out on the BG. He contrasted this to the normal course of events where the party seeking to resist a claim bears the burden of proving its defence (GD at [28]).

49 We respectfully disagreed with the Judge on this issue. In our view, on the facts of this case, it was the First Respondent, as the party seeking to rely on the Exclusion Clauses, that bore the burden of showing that the Appellant's right to rely on the unconscionability exception was contractually excluded.

50 First, the Judge's ruling would be contrary to this Court's decision in *Bocotra Construction Pte Ltd and others v Attorney-General* [1995] 2 SLR(R) 262 ("*Bocotra Construction*") where we held that an applicant who sought an injunction to restrain a call on a performance guarantee only needed to show that the fraud or unconscionability exceptions were made out (*Bocotra Construction* at [46]). These two exceptions are available to all applicants and there is no additional requirement for a party to show that it was not disentitled to rely on them. We were not aware of any cases that have imposed such an additional requirement.

51 The burden therefore lay on the First Respondent to show that there were circumstances which justified a departure from the general position that we have expressed above. By virtue of ss 103 and 105 of the Evidence Act Act (Cap 97, 1997 Rev Ed) (the "Evidence Act"), the burden of proof fell on the First Respondent since the party that asserts the affirmative must prove its case: *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank International), Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR

63 ("*Cooperatieve Centrale*") at [30]–[31]. For convenience, s 103 of the Evidence Act states:

> **103.**—(1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Section 105 of the Evidence Act provides:

> **105.** The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

52 This position makes practical sense since it would be impracticable for the Appellant to prove a negative (*ie*, that it is not disentitled from relying on the unconscionability exception) (*Cooperatieve Centrale* at [31], citing *Phipson on Evidence* (Hodge M Malek gen ed) (Sweet & Maxwell, 17th ed, 2009) at para 6-06). However, the fact that the burden was on the First Respondent did not exempt the Appellant from its duty to draw the Judge's attention to this issue as part of its duty to make full and frank disclosure. We shall say more on this below at [78]–[84].

Whether the Appellant was contractually precluded from relying on the unconscionability exception

53 In our view, the First Respondent had to show credible evidence that the Appellant was contractually precluded from relying on the unconscionability exception. As Clause 14A(5) that the First Respondent relied on in this case was contained in a separate document, it had to show credible evidence that the Exclusion Clause was incorporated into the Sub-Contract, thereby disentitling the Appellant contractually from relying on the unconscionability exception.

54 The Appellant argued that it should not be precluded from relying on the unconscionability exception so long as there was a triable issue as to whether the Appellant was bound by the Exclusion Clauses. Contrary to the Appellant's suggestion, it would not be precluded from raising substantive claims or defences when the underlying dispute is eventually heard simply because the court arrived at a preliminary conclusion on the merits of the First Respondent's case in respect of the incorporation of the Exclusion Clauses. There is nothing unusual about courts making preliminary conclusions on the merits of a party's case for the purposes of determining the outcome of interlocutory applications. As we have emphasised (see above at [47]), our conclusions are only preliminary and would not bind any court or tribunal that is eventually tasked with adjudicating on the parties' substantive claims. We therefore rejected the Appellant's submissions that the attendant effect of the interlocutory decision results in it being deprived of a possible defence at trial because the Appellant would not be so deprived. In any case, even if the Appellant needed only to show a triable issue at this stage, we did not think that the Appellant would be able to show a triable issue by merely alleging that the Exclusion Clauses could not have been incorporated into the Sub-Contract because the Appellant was not provided with the SC Particular Conditions at the time of contracting.

55 The Judge found that Clause 3 of the Second LOA incorporated the SC Particular Conditions into the Sub-Contract by reference, thereby causing the parties to be bound by Clause 14A(5) (GD at [31]–[33]). The Appellant submitted that the Judge erred in so holding for the following reasons:

> (a) First, the "back to back" reference in Clause 3 was only meant to incorporate the Main Contract's scope of works. As Clause 14A(5) did not concern the Main Contract's scope of works, it was not incorporated into the Sub-Contract through Clause 3.

(b) Second, Clause 14A(5) could not have been incorporated into the Sub-Contract because the Appellant was not provided with the SC Particular Conditions at the time of contracting.

56 In our view, contrary to the Appellant's submissions, the Judge did not decide that the SC Particular Conditions were incorporated into the Sub-Contract because of the "back to back" reference to the Main Contract in Clause 3. Instead, the Judge's decision was based on the interpretation that the first sentence of Clause 3 incorporated the SC Particular Conditions by express reference (GD at [33]). Since the Judge also found that there would have been "little room" for any argument that the SC Particular Conditions were not incorporated into the Sub-Contract (GD at [33]), we were satisfied that he would have found in the First Respondent's favour even if he had applied our views on the burden of proof set out above. Thus, we saw no reason to disturb his conclusion on this issue.

57 Even if the Judge was wrong to interpret Clause 3 as having made reference to the SC Particular Conditions, this would not have made any difference to the outcome of this case. In our view, the only alternative interpretation of Clause 3's reference to the "Particular Conditions as set out in the Main Contract" would have meant that Clause 5A(5) of the MC Particular Conditions was incorporated into the Sub-Contract, thereby contractually precluding the Appellant from relying on the unconscionability exception. The fact that Clause 5A(5) only referred to the Employer and First Respondent did not prevent it from being incorporated into the Sub-Contract since the court is permitted to interpret the clause with the appropriate modifications such that it applied *mutatis mutandis* to the Appellant and First Respondent (*Northrop Grumman Mission Systems Europe Ltd v BAE Systems (AL Diriyah C4I) Ltd* (2015) 161 ConLR 1 at [17]–[20], [23]–[24]; *Skips A/S Nordheim and others v*

Syrian Petroleum Co Ltd and another [1984] 1 QB 599 *per* Sir John Donaldson MR at 616B, *per* Oliver LJ at 619D–E).

58 We were also not persuaded by the Appellant's second submission that the Exclusion Clauses could not have been incorporated into the Sub-Contract because the Appellant was not given a copy of either the SC or MC Particular Conditions at the time of contracting. In our view the Appellant could not claim that it was not bound by terms contained in a separate document if those terms were incorporated into the Sub-Contract by reference. As a matter of law, it did not matter whether the SC Particular Conditions or the MC Particular Conditions were actually given to the Appellant or whether the Appellant had any knowledge of what those terms were. This was because Clause 3 of the Second LOA incorporated those terms into the Sub-Contract by express reference. It is a well-established principle that in the absence of fraud or misrepresentation, a party is bound by all the terms of a contract that it signs, even if that party did not read or understand those terms: *L'Estrange v F. Graucob Ltd* [1934] 2 KR 394 at 403 and 406; *Amiri Flight Authority v BAE Systems plc* [2004] 1 All ER (Comm) 385 at [16]; see also: *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at paras 07.015–07.020; Gerard McMeel, *The Construction of Contracts: Interpretation, Implication, and Rectification* (Oxford University Press, 2nd Ed, 2011) at paras 15.62–15.66; *The Law of Contract* (Michael Furmston gen ed) (LexisNexis, 6th Ed, 2017) at paras 3.8–3.9.

59 Therefore, if a term in a signed contract incorporated some or all the terms of a separate document by making reference to those terms, the parties to the contract would be bound by those separate terms even if they did not have any knowledge of what those terms were at the time of contracting. This principle holds true even if the terms of the separate document sought to be

incorporated contain exclusion clauses like in the present case. In the High Court's decision in *Press Automation Technology Pte Ltd v Trans-Link Exhibition Forwarding Pte Ltd* [2003] 1 SLR(R) 712 ("*Press Automation*"), the plaintiff, a machine owner, sought a tender from the defendant freight forwarder to transport a machine from Singapore to Bangkok. The freight forwarder provided three quotations to the owner, each of which was accompanied by a document called a "Confirmation of Acceptance" ("CoA") which contained the following clause (at [8]):

> "All business is only transacted in accordance with the Singapore Freight Forwarders Association (SFFA) Standard Trading Conditions. Copy is available upon application."

60 The owner eventually accepted one of the three quotations by signing the accompanying CoA and sending the CoA back to the freight forwarder. This was the parties' first transaction and the freight forwarder did not send the SFFA conditions, which were contained in a separate document, to the owner, nor did it draw the owner's attention to the abovementioned clause. Subsequently, the machine was damaged while in the freight forwarder's custody. The owner sued the freight forwarder in negligence. However, the freight forwarder argued, among other things, that its liability for negligence was limited under an exclusion clause contained in the SFFA conditions and that the owner's claim was also time-barred contractually under that same clause. In response, the owner contended that the exclusion clause was not properly incorporated into the parties' contract because the exclusion clause was not fairly or reasonably brought to its attention. The owner's contention was rejected by Judith Prakash J (as she then was) who held that the requirement of reasonable notice did not apply in a case where terms contained in a separate document were specifically incorporated into a contract that was signed by the party that was sought to be bound. Thus, Prakash J observed, at [39]–[40], that:

> Having considered the authorities, I am of the opinion that the fact that the incorporating clause here was contained in a document that was signed by [the owner], resulted in the conditions being incorporated as part of the contract between the parties notwithstanding that [the owner] did not have a copy of them and had not read them. I hold that the conditions were incorporated as a whole and that the line of authorities that decides that onerous and unusual conditions cannot be incorporated unless the attention of the party sought to be bound has been specifically drawn to them does not apply to a case like this where there is a signed contract with an explicit incorporating clause. …
>
> … Where a party has signed a contract after having been given notice, by way of a clear incorporating clause such as the one used in the present case, of what would be included among the contractual terms, that party cannot afterwards assert that it is not bound by some of the terms on the ground that the same are onerous and unusual and had not been drawn specifically to its attention. Contracting parties must have a care for their own legal positions by ascertaining what terms are to be part of a contract before signing it. If they do not do so, they will be bound by those terms except to the extent that the UCTA offers them relief. In *AEG (UK) Ltd v Logic Resource Limited* [1996] CLC 265, Hobhouse LJ expressed the opinion that whilst in the past there may have been a tendency to introduce more strict criteria in relation to the question of whether particular terms had been incorporated into a contract by reference:
>
> > … this is no longer necessary in view of the Unfair Contract Terms Act. The reasonableness of clauses is the subject matter of the Unfair Contract Terms Act and it is under the provisions of that Act that problems of unreasonable clauses should be addressed and the solution found.

61 These propositions are consistent with the well-established common law position that we have expressed above and we adopt Prakash J's analysis here. We also note that Prakash J's decision in *Press Automation* has been cited with approval in successive High Court decisions (see, *Wartsila Singapore Pte Ltd v Lau Yew Choong and another suit* [2017] 5 SLR 268 (at [126]), *Huationg (Asia) Pte Ltd v Lonpac Insurance Bhd* [2016] 1 SLR 1431 (at [72]–[73]) and *Abani Trading Pte Ltd v BNP Paribas and another appeal* [2014] 3 SLR 909 (at [86])).

62 Accordingly, the Appellant could not claim that it was not bound by the SC Particular Conditions (or MC Particular Conditions) on the basis that it was not given a copy of those terms at the time of contracting. All that the Appellant needed to do was to request a copy of those Particular Conditions from the First Respondent or to ask what terms were being incorporated by reference. If it signed the contract without doing so, then it had to bear the risks and the consequences of its omission.

63 At the hearing before us, the Appellant tried to distinguish *Press Automation* on the basis that the terms sought to be incorporated in that case were industry standard terms, whereas the SC or MC Particular Conditions contained terms that were specifically negotiated between the Employer and the First Respondent. We found this distinction unpersuasive. Regardless of whether the terms sought to be incorporated were standard or non-standard terms, the onus was always on the Appellant to ascertain what those terms were before agreeing to them. Indeed, counsel for the Appellant candidly accepted that his clients should have asked for the SC or MC Particular Conditions before signing the Second LOA. Having signed and accepted the terms of the Second LOA, the Appellant could not now seek to escape from what it perceived to be a bad bargain by disclaiming any knowledge of those terms at the time of contract.

64 Whether the incorporating clause in question (in this case, Clause 3) had the effect of incorporating the terms which were in a separate document is a matter of contractual interpretation: *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2014] 1 SLR 130. For the reasons that we have given above, we were satisfied that Clause 3 incorporated either Clause 14A(5) or Clause 5A(5). The Appellant did not dispute that the Exclusion Clauses, if incorporated, had the effect of precluding it from relying

on the unconscionability exception. The Judge was therefore justified in holding that the Appellant was precluded contractually from relying on the unconscionability exception.

Whether the Exclusion Clauses were unenforceable pursuant to the UCTA

65 The Appellant argued that in the event that the Exclusion Clauses were incorporated into the Sub-Contract, they should nevertheless be considered unenforceable pursuant to the UCTA. As alluded to earlier, this was a point that the Appellant did not raise before the Judge. It also did not seek this Court's leave to raise this new point on appeal. The First Respondent submitted that it would be prejudiced if the Appellant was allowed to raise this new argument on appeal. This was because it would be deprived of the opportunity to adduce all the relevant evidence on this issue.

66 Since the Appellant did not seek our leave to raise this new point as required under O 57 r 9A(4) of the Rules of Court (Cap 322, R5, 2014 Rev Ed), its arguments on the enforceability of the Exclusion Clauses could be dismissed on this basis alone. In any event, we would not have granted the Appellant leave to raise this new point even if it had sought leave to do so.

67 When determining whether a party ought to be granted leave to introduce a new point on appeal, the court would consider the factors spelt out in *Grace Electrical Engineering Pte Ltd v Te Deum Engineering Pte Ltd* [2018] 1 SLR 76 at [38]): (a) the nature of the parties' arguments in the court below; (b) whether the court considered and provided any findings and reasoning in relation to the point; (c) whether further submissions, evidence or findings would have been necessitated had the points been raised in the court below; and (d) any prejudice that might result to the other party in the appeal.

68 Having taken all the circumstances into account, we agreed with the First Respondent that it would be prejudiced if the Appellant were allowed to raise this new point on appeal. Before a court can determine the reasonableness of an exclusion clause under the UCTA, the parties must be given an opportunity to adduce evidence relating to the relevant circumstances at the time of contracting. This is because the question whether an exclusion clause is unenforceable pursuant to ss 3(1) and 11 of the UCTA is a fact-centric enquiry: *CKR Contract Services* at [23]; *Koh Lin Yee v Terrestrial Pte Ltd and another appeal* [2015] 2 SLR 497 ("*Koh Lin Yee*") at [37]. Indeed, s 11 of the UCTA states specifically that the court must have regard to the circumstances that the parties know or ought reasonably to have known at the time of contracting. Although we only needed to reach a preliminary view on this issue, this did not justify depriving the First Respondent of an opportunity to adduce the relevant evidence.

69 Clearly, the First Respondent did not have the opportunity to adduce evidence relevant to the reasonableness of the Exclusion Clauses at the time of contracting. This was because the evidence adduced and the arguments raised by the Appellant were focussed on the question whether the First Respondent's call on the BG was fraudulent and/or unconscionable. These concerned a different factual inquiry from that which a court would have to undertake in determining whether an exclusion clause is unenforceable pursuant to the UCTA. The former involved questions that related to the attendant facts and the First Respondent's state of mind at the time of the call, while the latter involved questions relating to the parties' respective positions at the time of contracting.

70 We make some observations on the Appellant's submissions on the enforceability of the Exclusion Clauses under the UCTA. In essence, the Appellant submitted that all exclusion clauses which excluded an obligor's right

to rely on the unconscionability exception are "inherently unreasonable" because they exclude the court's ability to intervene in circumstances where intervention has already been deemed reasonable. However, this submission contradicted the clear principle laid down in *Koh Lin Yee* (at [37]) that "whether or not a clause is (or is not) reasonable under the UCTA would depend not only on the various factors enunciated in the UCTA itself as well as in the case law … but also (and perhaps more importantly) on the precise facts of the case itself".

71 For these reasons, we would not have been inclined to hold that exclusion clauses such as Clause 14A(5) are inherently unreasonable and unenforceable under the UCTA.

Issue 2: Whether the Judge erred in deciding that the call on the BG was not fraudulent?

The applicable standard of proof

72 The Appellant was therefore left with fraud as the only ground to maintain the Interim Injunction. The Judge observed (GD at [37]) that there was also the question regarding the applicable standard of proof to be applied in assessing fraud. He opined that there was force in the argument that the appropriate standard of proof to be applied was that of a strong *prima facie* case of fraudulent or unconscionable conduct as could be derived from *BS Mount Sophia* at [20] and [21] and *JBE Properties Pte Ltd v Gammon Pte Ltd* [2011] 2 SLR 47 at [9]. In any event, there was no significant difference to the Judge between the standard of a "clear case" or a "strong *prima facie* case" of fraud.

73 The Appellant proceeded on the premise that its standard of proof was to establish a strong *prima facie* case of fraud. The First Respondent did not

contest this premise. Accordingly, we proceeded on the premise that the standard of proof applicable to the fraud exception in cases involving performance guarantees is the same as that which applies to the unconscionability exception; *ie*, that of a strong *prima facie* case.

Whether the Judge erred in finding that a strong **prima facie** *case of fraud was not established*

74 In order to avail itself of the fraud exception, the Appellant had to establish a strong *prima facie* case that the First Respondent called on the bond: (i) with the knowledge that its demand was invalid; (ii) without belief in the validity of its demand; or (iii) was indifferent to whether the demand was valid or not (*Arab Banking Corp (B.S.C.) v Boustead Singapore Ltd* [2016] 3 SLR 557 at [61]–[63]). The focus of this inquiry was on the beneficiary's state of mind as to the validity of the demand.

75 An appellate court defers to the first instance judge's exercise of discretion and will not interfere with that decision merely because it would have exercised the discretion differently. However, appellate intervention may be warranted if the judge's decision was based on a misunderstanding of the law or the evidence before him.

76 In our view, the Appellant did not show that appellate intervention was warranted in this case. On the issue of fraud, the Appellant repeated essentially the same submissions that it had made before the High Court. The Judge was entitled to come to the conclusion that the Appellant had failed to establish a strong *prima facie* case that the First Respondent's call on the BG was fraudulent. In fact, the Judge was satisfied that there was not even a *prima facie* case of fraud on the facts of this case. The Appellant did not give us any compelling reason to disagree with the Judge's views.

77 We agreed that there was some merit in the Appellant's arguments about the validity of the First Respondent's claims against it although they were not sufficient to establish a strong *prima facie* case of fraud. In particular, we thought that the First Respondent's claims against the Appellant for liquidated damages reflected very poorly on it. The fact that there was no evidence of the Employer making any claims against the First Respondent for delays as well as the First Respondent's "errors" in computing some of the periods of delay in the First Respondent's letter dated 22 July 2017 (see above at [25]) suggested that the First Respondent had simply made up its liquidated damages claims in haste. Such lackadaisical attitude could lead a sub-contractor like the Appellant to suspect, and understandably so, that the First Respondent's claims were being concocted to justify its call on the BG. Nevertheless, the Judge was not persuaded that this evidenced fraudulent conduct and we saw no compelling reason to disagree with his view.

Issue 3: Whether the Judge erred in declining to discharge the Interim Injunction solely on the basis that the Appellant had failed to provide full and frank disclosure of all material facts?

78 We disagreed with the Judge's conclusion that the Interim Injunction should not be discharged on the basis that the Appellant had failed to fulfil its duty to make full and frank disclosure of all material facts at the *ex parte* hearing of SUM 3934.

79 A party seeking an *ex parte* interlocutory injunction has a duty to make full and frank disclosure of all material facts (*Tay Long Kee Impex Pte Ltd v Tan Beng Huwah (trading as Sin Kwang Wah)* [2000] 1 SLR(R) 786 ("*Tay Long Kee*") at [21]). This duty extends to the disclosure of facts that the applicant would have known if it had made proper inquiries although the extent of such inquiries would depend on the facts and circumstances of each case (*Tay Long*

Kee at [21]). It is insufficient for an applicant to merely exhibit documents pertaining to an issue without highlighting the issue to the court either in the text of the supporting affidavit or in oral submissions. An applicant is required to draw the judge's attention to the relevant documents, as well as to "identify the crucial points for and against the application" (*The "Vasiliy Golovnin"* [2008] 4 SLR(R) 994 at [94]).

80 Applying these principles to the facts, we were of the view that the Appellant failed to discharge its duty to make full and frank disclosure during the *ex parte* hearing because it did not draw the Judge's attention to the fact that there was an issue about whether the unconscionability exception was excluded by contract. It failed to draw the Judge's attention to: (i) the MC and SC Particular Conditions, (ii) Clause 3 of the Second LOA and, in particular, (iii) the adjudicator's determination in AA 190/2017 that the SC Particular Conditions were incorporated into the Sub-Contract. Since the Appellant relied on both the fraud and unconscionability exceptions at the *ex parte* hearing, the Judge would have proceeded on the assumption that both exceptions were applicable. This was significant because the unconscionability exception was regarded by the Judge to be broader in scope than the fraud exception (GD at [25]). It was apparent from his reasoning at the application to discharge the Interim Injunction that he had granted the *ex parte* injunction on the ground of unconscionability rather than fraud because for the application to discharge the Interim Injunction, he was "satisfied that there was no strong *prima facie* case (or even a *prima facie* case) of fraud" on the facts (GD at [38]).

81 The Appellant did not dispute that the existence of the Exclusion Clauses was a material fact and that it had omitted to draw the Judge's attention to the Exclusion Clauses. However, the Appellant submitted that it did not suppress any material intentionally. It claimed instead that its failure to disclose the

Exclusion Clauses was an innocent omission because of the urgency of the application, the voluminous documents involved in AA 190/2017, the fact that a different set of solicitors had acted for the Appellant in AA 190/2017 and the fact that AA 190/2017 involved only the question of whether the First Respondent should have released the retention sum to the Appellant. Additionally, the Appellant also claimed to have had no knowledge of the Exclusion Clauses, appearing to imply that it could not be expected to disclose something that it had no knowledge of.

82 We found these explanations unsatisfactory. Although we did not place personal blame on Mr Tan and his team of lawyers, it was clear that the Appellant's duty extended to disclosing material facts that it would reasonably have known about in the circumstances. The question of whether the MC or SC Particular Conditions were incorporated into the Sub-Contract was a live issue in AA 190/2017 and the adjudicator had found that they were so incorporated. In those circumstances, the Appellant should have been conscious of the terms contained in the MC and SC Particular Conditions, which included the Exclusion Clauses, and their significance at the time of the *ex parte* application.

83 Although the Court has the discretion to continue an interim injunction notwithstanding the lack of full and frank disclosure, that discretion has to be exercised sparingly (*Tay Long Kee* at [25] and [28]). Taking all the circumstances of this case into account, we did not consider that this was an appropriate case for the exercise of that discretion. An important consideration here was the materiality of the undisclosed fact to the issues that were to be decided at first instance (*Tay Long Kee* at [27]). The Exclusion Clauses were obviously highly material in the *ex parte* application and would have affected significantly the Judge's decision to grant an interim injunction. The Judge

granted the injunction on the ground of unconscionability when that ground was apparently excluded by agreement already.

84 We therefore held that the Interim Injunction should also have been discharged on the basis that the Appellant failed to make full and frank disclosure of material facts during the *ex parte* hearing of SUM 3934.

Conclusion

85 For the above reasons, we dismissed the appeal and ordered the Appellant to pay the First Respondent's costs. Taking into account the rather regrettable conduct of the First Respondent in relation to the issue of liquidated damages as explained above, we ordered the Appellant to pay the First Respondent's costs fixed at $30,000, which included the disbursements and the costs of the application to the Court of Appeal for leave to appeal.

Tay Yong Kwang
Judge of Appeal

Woo Bih Li
Judge

Tan Chee Meng SC, Josephine Choo Poh Hua, Dynyse Loh Jia Wen and Eugene Oh (WongPartnership LLP) for the appellant;
Kelvin Aw Wei Keng, Leonard Chew Wei Chong and Eugene Lee (Holborn Law LLC) for the first respondent;
The second respondent absent and unrepresented.