

INJUNCTING CALLS ON PERFORMANCE BONDS: RECONSTRUCTING UNCONSCIONABILITY

Introduction

1 At English common law, fraud is the sole ground for restraining a beneficiary from calling on a performance bond or a surety from paying out on the same.¹ The position in Singapore diverges from the English position. The most authoritative assertion of the divergence emanated from the Court of Appeal in *GHL Pte Ltd v Unitrack Building Construction Pte Ltd and Another*,² where LP Thean JA (delivering the judgment of the Court) held unequivocally³ that unconscionability exists as a separate ground (the other being fraud) for restraining a beneficiary of a performance bond from enforcing it.⁴

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¹ *Edward Owen Engineering Ltd v Barclays Bank International Ltd and Another* [1978] QB 159, *Bolivinter Oil SA v Chase Manhattan Bank NA* (Practice Note) [1984] 1 Lloyd's Rep 251. The same principle applies whether it is to restrain the beneficiary or the surety: *Group Josi Re v Walbrook Insurance Co Ltd and Ors* [1996] 1 Lloyd's Rep 345, 361, per Staughton LJ, as well as the line of authorities that he cites *ibid*; although cf. *Themehelp Ltd v West & Ors* [1996] QB 84, 106, per Balcombe LJ. For a more recent emphatic reiteration of the orthodoxy, see *Cargill International SA v Bangladesh Sugar and Food Industries Corp* [1996] 4 All ER 563, per Morrison J; affirmed by the Court of Appeal: [1998] 1 WLR 461.

² [1999] 4 SLR 604 (CA).

³ "We should add that the concept of 'unconscionability' was adopted after deliberation, and was not inadvertently inserted as a result of a slip; nor was it intended to be used synonymously or interchangeably with 'fraud'.... We accept that to that extent, *Bocotra* is a departure, and if we may respectfully say so, a conscious departure, from the English position" (*Supra* note 2, at 610). *Bocotra Construction Pte Ltd & Ors v Attorney General* (No. 2) [1995] 2 SLR 733 (CA) was the first Singaporean case which indicated that unconscionability *might* exist disjunctively with fraud to ground an injunction.

⁴ *Supra* note 2, at 610.

2 It is evident that the additional limb of ‘unconscionability’ plays a pivotal role in the decision-making processes of those who would call on (or resist such calls on) performance bonds. It has taken on added practical significance in the recent regional economic downturn, the precursor of an increased number of calls on performance bonds in the construction industry.⁵

3 As such, the divergence has interested both practitioners and academics. However, the Singaporean courts have not provided enough concrete guidance on what constitutes unconscionability and commentators have similarly failed to do so in sufficient depth or to provide a sound normative basis to guide the divergence to maturity.

4 The purpose of this article is to provide a basic framework for evaluating the proper scope of unconscionability. Ancillary to this objective, it offers a reasoned case for the circumscribing of this new ground to instances of patently oppressive calls. This article approaches these tasks in two parts. Part I reviews the causes that have prompted the Singapore judiciary on the road to divergence, as well as the critiques of the divergence. It then shows that both the judicial pronouncements and the current critical commentary may have missed the point in that both have based themselves on two inconsistent frames of reference that should have been considered in their totality. A comprehensive treatment would have taken into account the full spectrum of possible call situations, from the patently abusive call on the one end to the call that has already been anticipated and the risk factored into the contract price on the other.

5 Part II shows that the divergence is critical only when fraud is absent and that the scope of unconscionability therefore has to be elucidated in tandem with that of fraud. This is a subtle dimension that has been missed in the debate thus far. On this analysis, it takes the debate a step forward and considers what unconscionability

⁵ For cases post-GHL, see for instance *Anwar Siraj and Anor v Teo Hee Lai Building* (2002) RAS No. 6 of 2002 (Unreported) (CA); *W.W. Welding and Construction Pte Ltd v Multiplex Construction Pty Ltd* (2001) RAS No. 44 of 2001 (Unreported) (Sub Ct); *Global Façade (S) Pte Ltd v Eng Lim Construction Co Pte Ltd* (2001) RAS No. 41 of 2001 (Unreported) (Sub Ct); *Marinteknik Shipbuilders (S) Pte Ltd v SNC Passion* (2001) OS No. 1203 of 2000 (Unreported) (HC). For the main reported cases, see *infra* at nn 25, 26, 28 and 32.

should actually entail. The analysis also draws comparative lessons from Australia, where the Victorian Supreme Court in *Olex Focas Pty Ltd v Skodaexport Co Ltd*⁶ had in effect laid down similar grounds for granting injunctions. Drawing on commentary of that case, it then suggests that both the courts and their critics can be reconciled if unconscionability is treated not as a broad policy factor underlying a cause of action, but as a ground pertaining narrowly to clearly oppressive calls.

I Divergence of Singapore Law: Causes and Commentary Reviewed

6 It is not within the scope of this article to go into an exposition of the line of cases bringing about the divergence. This has been carried out comprehensively elsewhere,⁷ and for the purposes of its remit, this article isolates the causes for such divergence, and thereafter, briefly reviews the major lines of criticism of the case-law. Such an analytic trajectory would be more instructive in understanding why the Singaporean judiciary embarked on this enterprise, and in aiding critical evaluation of the divergence.

Causes

7 Of all the Singaporean decisions that have come from the High Court and the Court of Appeal in this area, the most candid and substantial indication of the reasons for the divergence is to be found in the LP Thean JA's cost-benefit analysis in the Court of Appeal's decision in *GHL Pte Ltd v Unitrack Building Construction Pte Ltd and Another*, which merits quoting in full:

“We agree that performance bonds are used frequently in the construction industry; that they are provided by and to parties who deal at arm's length; that the use of performance bonds has resulted in substantial benefits to the parties and also in savings; that the courts should give effect to the intention of the parties; and that the law in relation to performance bonds should be placed on ‘a clear and unambiguous footing’ so that they could be accepted by parties whether in Singapore or abroad. [a] *But, with respect, these are not the points involved with which we are concerned.* [b] *We are concerned with abusive calls on the bonds.*”

⁶ [1998] 3 VR 380.

⁷ Adrian SP Wong, “Restraining a Call on a Performance Bond: Should ‘Fraud or Unconscionability’ be the New Orthodoxy?” (2000) 12 SAclJ 132.

It should not be forgotten that a performance bond can operate as an oppressive instrument, and in the event that a beneficiary calls on the bond in circumstances, where there is prima facie evidence of fraud or unconscionability, the court should step in to intervene at the interlocutory stage until the whole of the circumstances of the case has been investigated. [c] It should also not be forgotten that a performance bond is basically a security for the performance of the main contract, and as such we see no reason, in principle, why it should be so sacrosanct and inviolate as not to be subject to the court's intervention except on the ground of fraud. [d] We agree that a beneficiary under a performance bond should be protected as to the integrity of the security he has in case of non-performance by the party on whose account the performance bond was issued, but a temporary restraining order does not prejudice or adversely affect the security; it merely postpones the realisation of the security until the party concerned is given an opportunity to prove his case...⁸

8 It encapsulates the two major concerns of the courts in recent years: first, the possibility of abusive and oppressive calls: [b] and [c], and second, the commercial context of the construction industry, where the owner would commonly provide finance to the contractor only when a performance bond was given as *quid pro quo*, and the parties cannot be said to have been dealing at arm's length.⁹

⁸ *Supra* note 2, at 615; letters in parentheses and emphasis added.

⁹ Writing extra-judicially, LP Thean JA opined that 'In the construction industry where performance bonds are widely used, it is unhelpful to invoke propositions enunciated in cases where performance bonds are given in the international trade, such as *RD Haxbottle, Edward Owen, Bolivinter Oil and Intraco*. One must look at the position of the parties to the underlying contract. On this point I refer to the following illustration given by Eveleigh LJ in *Potton Home* (sic): For a large construction project the employer may agree to provide finance (perhaps by way of advance payments) to enable the contractor to undertake the works. The contractor will almost certainly be asked to provide a performance bond. If the contractor were unable to perform because the employer failed to provide the finance, it would seem wrong to me if the court was not entitled to have regard to the terms of the underlying contract and could be prevented from considering the question whether or not to restrain the employer by the mere assertion that a performance bond is like a letter of credit.' (LP Thean JA, "The
[continued next page]

9 The first concern apparently is the primary and overriding one. Unconscionability is very much a matter within a court's equitable jurisdiction and hinges largely on the facts particular to each case. By definition, the clarity and unambiguity His Honour speaks of at [a] would undoubtedly be reduced, thereby suggesting that these countervailing factors are secondary to protection of abused and oppressed debtors.¹⁰

10 The second, alluded to at [d], underlies a theme that courts and commentators have long grappled with, – whether there is indeed symmetry between letters of credit and performance.¹¹ Orthodoxy states that injunctions to restrain calls on obligations assumed by banks are granted only when fraud exists because they are not only collateral to,¹² but independent of¹³ the underlying obligations between merchants. This has been held by the English Court of Appeal to apply with equal force to performance bonds in *Edward Owen Engineering Ltd v Barclays Bank International Ltd and Another*¹⁴ on the premise that 'the performance guarantee stands on a similar footing to a letter of credit'.¹⁵ It is outside the

Enforcement of a Performance Bond: The Perspective of the Underlying Contract" (1998) 19 *Singapore Law Review* 389, 417; citation of *Potton Homes Ltd v Coleman Contractors Ltd* from (1984) 28 BLR 19, 29.).

¹⁰ His Honour's extra-judicial pronouncements published a year before this ruling reinforces this view: "At the end of the day the court has to do justice. As Hunter JA in *Tins' Industrial Co Ltd v Kono Insurance Ltd* [[1988] 2 HKLR 36, 39] said, a performance bond is, in most cases, no more than 'the mere "say-so" or *ipse dixit* of the beneficiary under the bond. [It] can be [an] oppressive instrument'." (LP Thean JA, n 9 above, 421).

¹¹ Quentin Loh SC and Tang Hang Wu, "Injunctions Restraining Calls on Performance Bonds – Is Fraud the Only Ground in Singapore?" (2000) LMCLQ 348, 350, 352.

¹² "They are the lifeblood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts." (*RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd & Ors* [1978] QB 146, 155; per Kerr J.).

¹³ 'It is well established that a letter of credit is independent of the primary contract of sale between the buyer and the seller. The issuing bank agrees to pay upon presentation of documents, not goods. This rule is necessary to preserve the efficiency of the letter of credit as an instrument for the financing of trade.' (*Sztejn v J Henry Schroder Banking Corporation* (1941) 31 NYS 2d 631, 633, per Shientag J.).

¹⁴ [1978] QB 159.

¹⁵ *Ibid*, 171; see also the development of this premise by Lord Denning MR at 170-171.

scope of this paper to evaluate the appropriateness of this analogy.¹⁶ The point to be made is that the *GHL* case has repudiated this premise: it holds that unlike letters of credit, performance bonds are not fully autonomous from their underlying contracts, but essentially securities for the latter.

The Current Commentary

11 The main analytical divide in the commentary to date pertains to the necessity and wisdom of the addition of the unconscionability ground. The divide is based on two considerations that are seemingly incommensurable with each other: equity and commercial certainty.

12 Hence while some felt that the courts were indeed fulfilling their mandate of doing justice to the parties before it,¹⁷ others expressed grave doubts as to the wisdom of introducing the notion of unconscionability when the very *raison d'être* of performance bonds was to provide immediate secured payment for contractual damages: would this not herald a return to the days of other forms of security that the performance bond was meant to supersede?¹⁸ They further argue that often, the debtor, who has taken legal advice and understands the risks involved, has actually freely undertaken to grant the bond; it would be unwise, and unsupported by legal principle, for the courts to 'intervene and assist him

¹⁶ For an excellent critique, see C Debattista, "Performance Bonds and Letters of Credit: A Cracked Mirror Image" [1997] JBL 289.

¹⁷ "As any practitioner can attest to, achieving a sufficient level of proof of fraud at an interlocutory stage is very difficult except in an exceptional minority of cases. The acknowledged danger of abusive calls is the very reason why the courts should intervene even if the conduct of the beneficiary falls short of fraud but achieves such a level of unconscionability that would offend the notions of justice for a court to stand by and do nothing, fearful of a thrombosis in the market place or interrupting the life blood of commerce.... The Singapore Court of Appeal's recognition of the fallacy of the symmetry argument and rejection of the argument that the underlying contract is irrelevant to the performance bond under all circumstances should be welcomed. The law cannot be so straitjacketed that it is constrained to stand by and watch, powerless to intervene, while an unconscionable call on a bond or a call that represents conduct which is so reprehensible or lacking in good faith that it offends all notions of justice is made." (*Supra* note 11, pp 354, 358).

¹⁸ 'Clearly, not giving effect to the commercial purpose of a performance bond cannot be the function of the courts. If the courts adopt a liberal approach towards the restraint of calls on performance bonds, what residual utility can be left of the performance bond as an immediate form of secured payment usually for contractual damages? More likely than not, such liberalism may well force the construction industry and others who rely on the convenience and benefits of the performance bond to recoil and revert to greater use of security deposits or retention of progress payments in cash – a practice from which the performance bonds evolved in the first place.' (*Supra* note 7, at 187).

to go back on his promise when circumstances become unfavourable to him and he decides to go against what he originally contracted with the [beneficiary] to do'.¹⁹

13 On the practical dimension, three points have been made regarding the alternative ground. Firstly, it presents the danger of the court having to make an assessment on the basis of affidavit evidence, and in the absence of corroborative evidence, it would be most difficult to choose which of the conflicting versions of the factual matrix in the affidavits it ought to believe. If the courts were to conduct a full inquiry, which is time-consuming by definition, it would be antithetical to one of the most important purposes of the bond – that of letting the beneficiary immediately realise the moneys secured under it.²⁰

14 Secondly, its practical advantage is attenuated when one considers that the fears of oppression and unjust enrichment are unjustified in the light of the fact that implicit in the nature of a bond that there would be an ‘accounting’ between the parties, such that payment under the bond would be commensurate to the actual loss suffered by the beneficiary.²¹

15 Thirdly, even those who agree, in principle, with the introduction of unconscionability as a separate ground and feel that the divergence would promote equitable outcomes have nevertheless expressed reservations as to the lack of clarity of the ‘core or umbral ambit of “unconscionability”’, and call for delineation so as to prevent unnecessary proliferation of challenges and uncertainty.²²

Reappraising the Causes and Commentary

16 It is submitted that both the decisions and the commentary, while raising very sound practical issues, have missed the point insofar as they have been based on an equity-commercial certainty dichotomy. The divergence should have been developed only in light of a holistic appreciation of the full spectrum of all possible call situations.

¹⁹ *Supra* note 7, at 185.

²⁰ Chan Tan and Partners, “Editorial Comment”, *Construction Law Focus* (Issue 4 of 1999), at http://www.chantan.com.sg/articles/clf1999_4.pdf

²¹ *Supra* note 7, pp 188-192; *Cargill International SA v Bangladesh Sugar and Food Industries Corp*, *supra* note 1.

²² *Supra* note 11, pp 359, 362.

17 Turning first to the proponents of commercial certainty, they have failed to appreciate that oppressive calls do indeed exist, and to require the courts to uphold commercial certainty in such cases is to require them to ignore their mandate to do their conception of equity to both sets of litigants before it. It is also arguable that the positing of the additional ground of unconscionability serves to enable the courts to do so at the first possible instance, and also serves to cut down litigation costs, thereby benefiting both parties. It is not a finding of unconscionability *in itself* that is undesirable, but the *uncertainty as to what it entails*.

18 Looking next at the courts' point of view, it is submitted that the causes do not obtain in every call. Their fundamental concern was with the possibility of abuse and oppression, which presupposes a dominant owner-beneficiary and a weaker contractor-debtor. But this is by no means true in *all* instances – for example, there could be cases where the increased risk posed by a call has already been factored into the contract price.²³

19 In these circumstances, the criticism that the prior allocation of risk would be upset is a cogent one. As the High Court of Australia trenchantly states, albeit in the context of penalty clauses;

“Indeed, by denying relief except on terms that compensation be paid for the loss actually sustained, equity had from the first recognised that it would be at least as unjust or unconscionable to deprive one party of compensation for the true loss caused by the event for which the parties had agreed that compensation was to be paid (e.g. non-performance of an act upon the performance of which the defeasance of a money bond was conditioned) as it would be to force the other party to pay an amount which was demonstrably and unconscionably excessive.”²⁴

20 To be sure, the Singapore courts have, to an extent, addressed this situation along two broad lines. Firstly, they have not taken an all-or-nothing approach, and allowed for restraints only on part of the call. For

²³ As recommended by Lord Denning MR in the *Edward Owen* case, *supra* note 1, at 170.

²⁴ *AMEV UDC Finance Ltd v Austin* (1986) 68 ALR 185, 20, per Deane J.

instance, where the beneficiary was holding on to some retention moneys and other sums were due and owing to the debtor for some undisputed variation works, it had been held at first instance that a full call for approximately S\$2.4 million should be disallowed, and a sum of S\$1.6 million substituted.²⁵ This was further reduced to S\$600,000 on appeal in light of the fact that the debtor had submitted a progress claim for S\$1.2 million that was yet to be certified.²⁶ The decision was justified in the following terms:

“It must be borne in mind that the court in restraining a beneficiary from calling on a bond on the ground of unconscionability is exercising an equitable jurisdiction. We are unable to see why in the exercise of this jurisdiction the court may not limit the restraint to only that part which was clearly excessive and allow the other part which would not be unconscionable to remain, bearing in mind that under the terms of the bond, the beneficiary is entitled to make calls from time to time and for such sums as may be appropriate.... The object of this jurisdiction is not to punish the beneficiary for making an excessive call but to achieve equity and justice.”²⁷

21 Secondly, the courts have pegged the standard of unconscionability at ‘a strong *prima facie* case’,²⁸ and in practice, they generally err on the side of caution, refusing to find unconscionability where the merits of the case are uncertain. As an illustration, consider a case where the beneficiary was apparently in breach of its obligation to pay an instalment and had asserted repudiatory breach on the part of the contractor-debtor (pursuant to which the call was made), the latter averred that the former was deliberately trying to find an excuse not to make the second payment. The Court of Appeal accepted that the contractor ‘has done substantial work on the construction of the yacht and yet effectively will have received no payment at all if the call on the guarantee is not restrained’.²⁹ However, the Court took cognisance of the fact that the

²⁵ *Eltraco International Pte Ltd v CGH Development Pte Ltd* [2000] 3 SLR 177 (HC).

²⁶ *Eltraco International Pte Ltd v CGH Development Pte Ltd* [2000] 4 SLR 290 (CA).

²⁷ *Supra* note 26, at 300, per Chao Hick Tin JA.

²⁸ *Dauphin Offshore Engineering & Trading v Private Office of HRH Sheikh Sultan bin Khalifa bin Zayed Al Nahyan* [2000] 1 SLR 657 (CA), followed in *McConnell Dowell Constructors (Aust) Pty Ltd v Sembcorp Engineers and Constructors Pte Ltd* [2002] 1 SLR 199 (HC).

²⁹ *Dauphin*, *supra* note 28, at 672.

contractor-debtor had by its own choice proceeded with the work notwithstanding the non-payment of the second instalment and that they were not obliged to do so under the contract, and held that unconscionability was not made out.³⁰

22 But the safeguards cannot always ensure justice. The first result could not have been achieved had the wording of the bond itself not allowed for part-calls, and in such circumstances, the whole call has to be restrained if unconscionability were to be found.³¹ In such cases, only the debtor benefits; the beneficiary would be deprived of part of the sum that it should have been entitled to. The second is not always easy to achieve, especially when the court relies on affidavit evidence, and there is the danger that good drafting may be able to tilt the balance when the facts in themselves may not have been as persuasive.

23 In any event, the level of subjectivity is too high given that commercial certainty needs to be ensured, and indeed two different courts can render inconsistent readings of the evidence.³² In addition, the very fact that the courts have found it necessary to attenuate the force of their own expansionism in itself suggests systemic unsoundness with the divergence, and this will be further considered in Part II.³³

24 The facts in the majority of actual calls in practice are not clear-cut, and it could very well be that *both* the contractor-debtor and the owner-beneficiary have not fully discharged their obligations or may

³⁰ *Supra* note 28, at 672.

³¹ See Chao Hick Tin JA's reasoning at *Eltraco*, *supra* note 26, pp 300-301.

³² *Samwoh Asphalt Premix Pte Ltd v Sum Cheong Piling Pte Ltd* [2001] 3 SLR 447 (HC); [2002] 1 SLR 1 (CA). The High Court and the Court of Appeal came to diametrically opposite views as to whether there was unconscionability in this case. At the High Court stage, it was found on the facts that the beneficiary had not acted unconscionably; rather the debtor had: "It was unconscionable because in order to procure the contract they arranged for the PG [performance guarantee]. Without the PG they would not have been awarded the contract. Having procured the contract they acted in a manner that would have left SC Piling in a lurch in a situation where time was very important." (*loc cit*, at 451; per GP Selvam J). The Court of Appeal, reversing, held that the lower court had omitted to consider the fact that "It is significant that at the time when the performance guarantee was called, SC Piling [the beneficiary] had not made any claim against Samwoh [the debtor] for any damage or loss occasioned by either any breach of the principal sub-contract or any breach of the subsidiary sub-contract. They then took steps to prevent Samwoh from removing their plant and equipment from the site. They also refused to pay Samwoh the sum due for work done under the temporary arrangement." (*loc cit*, at 7; per LP Thean JA).

³³ See text at nn 40-41.

even be in breach of some of these. The decisions and commentary have focused narrowly on the cases at the extreme ends, that is, the oppressive call and the perfectly justified call that has been factored into the contract price. The continuum of possible scenarios between these ends has not been taken into sufficient consideration.

II Redefining the Ambit of ‘Unconscionability’

25 Let us take a step back and reconsider the problem from the perspective of the different outcomes under the old law and the new. For ease of reference a truth-table is set out in Table 1.

Table 1

| Fraud Alone | | Fraud or Unconscionability | | |
|--------------------------|------------------------|----------------------------|--------------------------------------|-------------------------------|
| <i>Does fraud exist?</i> | <i>Outcome</i> | <i>Does fraud exist?</i> | <i>Does unconscionability exist?</i> | <i>Outcome</i> |
| Yes | Injunction granted | Yes | Yes | Injunction granted |
| Yes | Injunction granted | Yes | No | Injunction granted |
| No | Injunction not granted | No | Yes | Injunction granted |
| No | Injunction not granted | No | No | Injunction not granted |

Table 1: A Comparison of the Different Effects under the Old (English) Law and the New (Singapore) Law when Findings of Fraud are the Same

26 It will be observed that where fraud is found to exist, it does not matter in the least whether unconscionability is also found to exist; an injunction will be granted. In such cases, the divergence is not material. The divergence is significant only in the situations where *fraud is not found*. Analysis of the proper ambit of unconscionability hence has to take into account the scope of fraud and its interaction with and effect on the former.

27 It is convenient to start with unconscionability. As it stands, the Court of Appeal is of the view that it is not possible to define unconscionability *a priori*; only broad guidelines can be given and much

depends on the facts of the case.³⁴ The most comprehensive statement of the contents of unconscionability, often cited in subsequent decisions, is as follows:

“The concept of “unconscionability” to me involves unfairness, as distinct from dishonesty or fraud, or conduct of a kind so reprehensible or lacking in good faith that a court of conscience would either restrain the party or refuse to assist the party. [1] Mere breaches of contract by the party in question ... would not by themselves be unconscionable. Where breaches are alleged, there would generally be (counter allegations and) disputes when the case is heard before the court”.³⁵

28 Apart from abusive or oppressive calls, calls based on a breach induced by the beneficiary’s own default³⁶ and calls stemming from non-delivery due to natural disasters despite a ‘force majeure’ clause³⁷ in the underlying contract have also variously been held to be unconscionable. This account suggests that the ambit of unconscionability is an amorphous and, as shown in [1] above, a circular one.

29 Turning next to fraud, it is noteworthy that the Singapore courts have left its ambit at just common law fraud, and does not include equitable fraud, congruent with the English position.³⁸ Equitable fraud has been explained by Lord Evershed MR as follows:

“What is covered by equitable fraud is a matter which Lord Hardwicke did not attempt to define 200 years ago, and I shall certainly not attempt to do so now, but it is, *I think clear that the*

³⁴ *Supra* note 28, at 668.

³⁵ *Raymond Construction Pte Ltd v Low Yang Tong and Anor* (1996) Suit No. 1715 of 1995 (Unreported) (HC), at para. 5; per Lai Kew Chai J; number in parentheses added.

³⁶ *Kvaerner Singapore Pte Ltd v UDL Shipbuilding (Singapore) Pte Ltd* [1993] 3 SLR 350 (HC); *Royal Design Studios v Chang Development Pte Ltd* [1990] SLR 1116 (HC).

³⁷ *Min Thai Holdings Pte Ltd v Sunlabel Pte Ltd & Anor* [1999] 2 SLR 368.

³⁸ *Rajaram v Ganesh t/a Golden Harvest Trading Corp & Ors* [1995] 1 SLR 159 (HC), 163. This decision has not been overruled by any of the cases that take the ‘fraud or unconscionability’ line. The English authorities are *GKN Contractors Ltd v Lloyds Bank plc* (1985) 30 BLR 53; *State Trading Corp of India v ED & F Man (Sugar)* [1981] Com LR 235.

phrase covers conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other."³⁹

30 While this explanation was given in a case pertaining to fraud for the purposes of the law on limitation, there is nothing to suggest that it is not equally applicable to 'equitable fraud' in our context. If this argument is accepted, the observation that immediately follows is that equitable fraud is conceptually equivalent to unconscionability, and on this analysis, two different possible conceptions of 'unconscionability' arise.

31 The first is that unconscionability is posited as a ground on the same level with fraud. While this is the upshot of the *GHL* case, it is submitted that at the same time, it is inconsistent with the continued endorsement – or at the very least, absence of disavowal – of the restriction of the scope of fraud to *common law* fraud by the Singapore courts. It is also inconsistent with the courts' attempts to limit the scope of unconscionability – in tandem with the expansionism of the courts in asserting the divergence, an interesting countervailing dynamic exists: the findings often are tempered with a qualification that the purpose is not to disturb the commercial arrangements that are entered into.⁴⁰ This shows that the courts are generally highly aware of the dilemma that they are placed in; of their conflicting duties to ensure that parties stick to their bargain on the one hand and to come to equitable decisions on the other. It is instructive to note the narrow interpretation of 'unfairness' given by the Court of Appeal:

"In every instance of unconscionability there would be an element of unfairness. But the reverse is not necessarily true. It does not mean that in every instance where there is unfairness it would amount to 'unconscionability'. That is a factor, an important factor no doubt in the consideration. It is important that the courts guard against unnecessarily interfering with contractual

³⁹ *Kitchen v Royal Air Force Association* [1958] 2 All ER 241, 249; emphasis added. This decision has been distinguished on other grounds in Singapore in *Ng Choon Hoo t/a Overseas Union Radio & Electric Co v The Nippon Fire & Marine Insurance Co Ltd* [1996] 3 SLR 180 (HC), but Lord Evershed MR's explanation of equitable fraud has not been disapproved and indeed, appears to have been applied in the Court's determination of the existence of fraud (at 214-215).

⁴⁰ See for example, the text at note 41.

arrangements freely entered into by the parties. The parties must abide by the deal they have struck.”⁴¹

32 The second, and better, conception, is that the ground of unconscionability was enunciated as a *narrow* ground for an injunction, not as a *broad* policy factor underlying a cause of action. This distinction had been drawn by commentators in the Australian context,⁴² where the Victoria Supreme Court decision in *Olex Focas Pty Ltd v Skodaexport Co Ltd*⁴³ had brought the law governing similar injunctions to a position that in effect⁴⁴ mirrored the Singaporean one. The salient facts of that case were that the first defendant (the main contractor) threatened the plaintiffs (subcontractors) that the former would call up on bank guarantees extended by the plaintiffs unless the plaintiffs accepted within three days an offer by the first defendant to pay the outstanding invoices of the plaintiffs less 25% of the value of two invoices submitted for payment and less a further 25% of the value of two invoices previously fully paid by the first defendant. The plaintiffs sought an injunction, alleging that the first defendant in so doing had engaged in unconscionable conduct, firstly under the general law, and secondly under section 51AA of the (Australian) Trade Practices Act 1974, the material part of which states:

“A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time of the States and Territories.”

33 Batt J found that while under the general law a clear case of fraud needs to be established, and unconscionability is not a ground at general law, there were serious questions to be tried as to the second contention.⁴⁵ As Professor Buckley points out, ‘unconscionable’ in section 51AA has thus been interpreted *broadly* to mean “grossly unfair or extremely inequitable”, a policy reason underpinning other causes of action.⁴⁶ He points out that this is an incorrect interpretation; the correct one should be that the section was intended merely to import into the Trade Practices Act

⁴¹ Per Chao Hick Tin JA, *supra* note 26, at 299.

⁴² Ross P Buckley, “Unconscionability Amok, or Two Readily Distinguishable Cases?” (1998) 26 ABLR 323.

⁴³ *Supra* note 6.

⁴⁴ The same position, however, was reached via different reasoning, as we shall soon see.

⁴⁵ His Honour had treated the two types of guarantees that were given in that case differently, *viz.* performance guarantees and mobilisation/advance guarantees, and only the calls on the second were found to be unconscionable. However, this distinction is not material for our purposes.

⁴⁶ *Supra* note 42, at 325.

the *narrow* equitable cause of action for unconscionable conduct, which 'requires one party to be under a special disability which was sufficiently evident to the stronger party to make it unconscientious for that party to accept the weaker party's assent to the impugned transaction'.⁴⁷

34 The reasons for Professor Buckley's preferred interpretation, while highly cogent, will not be discussed here for they are based largely on the construction of the Trade Practices Act, and hence are not relevant to the Singapore context. However, the *ramifications* of preferring the narrower interpretation are applicable to our argument. It will be recalled that a proper evaluation of the divergence has to take into account the full spectrum of possible scenarios, from the oppressed debtor (where considerations of equity are paramount) to the debtor who had freely negotiated the terms of the performance bond and factored the costs into the contract price (where commercial certainty would be desirable). A narrow interpretation, requiring the existence of a 'special disability',⁴⁸ is sufficient to do justice to the debtors faced with oppressive calls, or those obliged to grant bonds in return for finance, that the courts were primarily concerned with.

35 It would not extend to the freely bargained bonds at the other end of the spectrum. In the cases where elements of *both* oppression *and* justification for the call exists, it is suggested that the maxim 'he who comes to equity must come with clean hands' should be applied and unconscionability should not be found; this would be consistent with the narrow conception.

⁴⁷ *Supra* note 42, at 324; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 474.

⁴⁸ To be sure, there is currently a debate on what constitutes 'special disability', with the Australian courts and the English courts adopting different positions. The English courts require that the person who is said to be suffering from such disability to be 'poor and ignorant' (see *Cresswell v Potter* [1978] 1 WLR 255). The Australian courts take a more liberal approach: 'The adverse circumstances which may constitute a special disability for the purposes of the principles relating to relief may take a wide variety of forms and are not susceptible to being comprehensively catalogued.' (*Commercial Bank of Australia Ltd v Amadio*, *supra* note 47, at 474). The Singaporean courts have not indicated definitively which interpretation is to be preferred in the Singaporean context (see *Rajabali Jumabhoy & Ors v Ameerli R Jumabhoy & Ors* [1997] 3 SLR 802). It is not the purpose of this article to consider which interpretation is to be preferred. The main purpose in raising the point of 'special disability' is conceptual rather than doctrinal: it emphasises that such disability must *at least* be present before unconscionability is found; hence in the cases where there was free bargaining between the parties and the risk of a call already factored into the contract price, there would be no such disability.

36 Not only would this narrow conception of unconscionability be consistent with the judicial concerns enunciated in the *GHL* case, it would also be consistent with the line of cases that the Court of Appeal had considered when holding that unconscionability was a ground under Singapore law. The most direct precursors of the divergence in *GHL* were the cases of *Bocotra Construction Pte Ltd & Ors v Attorney General* (No. 2)⁴⁹ and *Raymond Construction Pte Ltd v Low Yang Tong*,⁵⁰ both of which had in their turn referred to other cases, which shall also be considered here.

37 The most noteworthy feature of *Bocotra* was that Karthigesu JA (speaking for the Court) had used the phrase ‘fraud or unconscionability’ thrice,⁵¹ although nothing in that judgment expressly indicates that unconscionability was ever considered as a separate ground.⁵² However, the Court of Appeal in *GHL* thought otherwise, and it is submitted that while this finding is not inconsistent with Karthigesu J’s reasoning in *Bocotra*, it is more appropriate to see the reasoning as support for a narrowly circumscribed unconscionability ground than the expansive one endorsed in *GHL*. The most plausible explanation for the addition of the alternative ground in *Bocotra* appears to be that His Honour was influenced by several English and Singaporean decisions he had considered,⁵³ where it was suggested that ‘fraud’ may not have the sole basis for an injunction to be granted: *Potton Homes v Coleman Contractors*,⁵⁴ *Royal Design Studio v Chang Development*,⁵⁵ and *Kvaerner Singapore Ltd v UDL Shipbuilding (Singapore) Ltd*.⁵⁶ The second and third were based on Eveleigh LJ’s *dicta* in the first case that

“As between buyer and seller the underlying contract cannot be disregarded so readily.... Moreover, in principle I do not think it possible to say that in no circumstances whatsoever, apart from fraud, will the court restrain the buyer. The facts of each case must be considered.”⁵⁷

⁴⁹ *Supra* note 3.

⁵⁰ *Supra* note 35.

⁵¹ *Supra* note 3, pp 746, 747, 748.

⁵² See also *New Civilbuild Pte Ltd v Guobena Sdn Bhd* [1999] 1 SLR 374 (HC), 385-389.

⁵³ *Supra* note 3, pp 745-746.

⁵⁴ *Supra* note 9.

⁵⁵ *Supra* note 36.

⁵⁶ *Ibid.*

⁵⁷ *Supra* note 9, at 28.

38 This observation was taken up by the Singapore High Court in the second and third case to move away from a strict adherence to the fraud exception, and to examine the relationship between the parties under the underlying contract in order to decide the question of whether an injunction should be granted or discharged. However, in all three cases, unconscionability was never explicitly laid down as a ground; indeed, in *Potton Homes*⁵⁸ and *Kvaerner*,⁵⁹ the final decisions hinged on whether fraud existed.⁶⁰ It is submitted that fundamentally, the courts in these cases were disturbed by the very narrow scope of the fraud exception which had constrained their ability to look at the underlying contracts. This is borne out in general by judicial attempts in other cases at lowering the standard of proof required to establish fraud,⁶¹ by pegging it at ‘a strong *prima facie* case’⁶² rather than ‘a good arguable case’;⁶³ as well as pegging a finding of what is arguably fraud in equity to common law fraud.⁶⁴

39 This trend reached its pre-*GHL* zenith in *Raymond Construction Pte Ltd*, where Lai Kew Chai J had relied on and, it is respectfully submitted, read into *Bocotra*, *Royal Design Studio* and *Kvaerner* a proposition that is wider than that which they had stood for. His Honour held:

⁵⁸ “It cannot be said that the plaintiffs have proved that there are no breaches of the original contract and that a demand would therefore be fraudulent. We must therefore proceed on the basis that, apart from the state of account between the parties, the plaintiffs can raise no objection to a demand upon the bond.” (Per Eveleigh LJ, *Supra* note 9, at 30).

⁵⁹ See note 64.

⁶⁰ In *Kvaerner*, apart from fraud being found, it was also held that the injunction would be granted because the defendants failed to open a line of credit, which was a condition precedent to a call on the particular bond to that case (*Supra* note 36, pp 352-353).

⁶¹ *Chartered Electronics Industries Pte Ltd v Development Bank of Singapore* [1999] 4 SLR 655 (HC).

⁶² *Supra* note 61, pp 668-669, following the Divisional Court of Ontario in *CDN Research & Development Ltd v Bank of Nova Scotia* (1982) 136 DLR (3d) 656.

⁶³ The ‘Ackner standard’; *United Trading Corp v Allied Arab Bank* [1985] 2 Lloyd’s Rep 554.

⁶⁴ ‘In circumstances where it can be said that the buyer had no honest belief that the seller has failed or refused to perform his obligation, a demand by the defendants/buyers in my view is a dishonest act which would justify a restraint order. On the facts of the case a demand made by the buyer was utterly lacking in bona fides.’ (per GP Selvam JC, *Kvaerner*, *Supra* note 36, at 354). The first sentence is a statement of common law fraud (see *GKN Contractors Ltd v Lloyds Bank plc*, *Supra* note 38, at 63); whilst the second is pegged at the lower level of absence of *bona fides*, which is fraud in equity (see generally R P Meagher, W M C Gummow, J R F Lehane, *Equity: Doctrines and Remedies* (3rd Ed, 1992), at 335-351).

“*Bocotra Construction Pte Ltd v AG* (No. 2) (1995) lays down the rule of law that there must be compelling evidence capable of proving fraud or unconscionability before an injunction may be granted restraining payment under instruments which contain unconditional and irrevocable obligations to pay on demand.... In my view, *Royal Design Studio ...* and *Kvaerner Singapore ...* are illustrations of the circumstances where payments would have been unconscionable.”⁶⁵

40 But as we have shown above, the highest that can be said about the upshot of these three cases is that the underlying relationship can be examined, but this does not necessarily extend to allowing an injunction on a broad ground of unconscionability. A narrower ambit of unconscionability would have sufficed, as we have shown earlier, and this would be consistent with the upshot of these cases.

Conclusion

41 This article has sought to establish that the current conception of the ground of unconscionability by the Singapore courts may be disproportionately wide in light of the causes that have led to it being introduced as a disjunctive ground for injuncting a call on a performance bond. A narrowly circumscribed ambit, such as one that pertains only to patently oppressive calls, is sufficient, in light of the whole spectrum of possible call scenarios and varying bargaining powers of contractor-debtors and owner-beneficiaries.

42 The arguments in no way suggest that unconscionability as a ground should be discarded. The point to be reiterated is that the ambit of ‘unconscionability’ should be narrowly circumscribed *given that* there is a distinction between common law fraud and equitable fraud, the latter being conceptually akin to unconscionability. If the courts choose to exclude equitable fraud from the conception of fraud *qua* ground, it is submitted that it is logically inconsistent to then admit the contents of the same via the ground of ‘unconscionability’. Unconscionability as a

⁶⁵ *Supra* note 35, para 35.

concept is not fixed, but has crystallised into narrower and better-defined doctrines in other contexts,⁶⁶ such as economic duress. The same circumscribing and crystallising should be applied here to narrow the ambit of unconscionability, *a fortiori* given the other concerns raised at various places in this article.

43 It is conceded that there is nothing in principle that mandates circumscribing the ambit of unconscionability to the circumstances suggested, *viz.* where patently oppressive calls obtain. This test was suggested to concretise and instantiate the argument that the ambit of unconscionability should be reined in. It follows the spirit of LP Thean JA's calls, both hortatory⁶⁷ and mandatory,⁶⁸ to take into account the possibility that the contractor might not have obtained the contract without providing for the bond and the fact that the courts are concerned with abusive calls. It is readily admitted that there is room for more refined tests to be put forth either by subsequent commentators with a superior understanding of the industry dynamics, or by the courts. The main purpose of this article is to show *why* the current ambit should be narrowed. The '*how*' is offered as a necessary illustration.⁶⁹

44 It is perhaps appropriate to end with a reminder of the proper scope of the equitable jurisdiction in the commercial context:

"Equitable principles are, I think, perhaps rather too often bandied about in common law courts as though the Chancellor still had only the length of his own foot to measure when coming to a conclusion. Since the time of Lord Eldon anyhow the system of equity for good or evil has been a very precise one, and equitable jurisdiction is exercised only on well-known principles....

Similarly I rather deprecate the attempt to urge the Court on what are called equitable principles to dissolve contracts which are thought to be harsh, or which have turned out to be

⁶⁶ See generally G Dal Pont, "The Varying Shades of "Unconscionable" Conduct — Same Term, Different Meaning" (2000), 19 *Aust. Bar Rev.* 135; Ross McKeand, "Economic Duress - Wearing the Clothes of Unconscionable Conduct" (2001), 17 *JCL* 1; K N Scott, "Evolving Equity and the Presumption of Undue Influence" (2002), 18 *JCL* 236.

⁶⁷ *Supra* note 9.

⁶⁸ *Supra* note 8.

⁶⁹ In this connection, see note 48.

disadvantageous to one of the parties. It is pointed out in one of the cases cited to us yesterday (and Lord Nottingham's observation in *Maynard v Moseley* (1676) 3 Swanst 651 at 655 is still true) that: 'the Chancery mends no man's bargain'...⁷⁰

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⁷⁰ Per Harman LJ, *Bridge v Campbell Discount Co Ltd* [1961] 2 WLR 596, 605.

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