Dauphin Offshore Engineering & Trading Pte Ltd v The Private Office of HRH Sheikh Sultan bin Khalifa bin Zayed Al Nahyan
[2000] SGCA 4

Case Number : CA 62/1999

Decision Date : 17 January 2000

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; L P Thean JA

Counsel Name(s) : Asokan Govindarajalu and Henry Heng (Rodyk & Davidson) for the appellants; P Jeya Putra and Derek Tan (Joseph Tan Jude Benny) for the respondents

Parties : Dauphin Offshore Engineering & Trading Pte Ltd — The Private Office of HRH Sheikh Sultan bin Khalifa bin Zayed Al Nahyan

Banking – Performance bonds – Guarantee payable on demand – Ex parte interim injunction restraining call on guarantee – Whether injunction should be discharged – Whether call on guarantee unconscionable – Whether unconscionability a ground for granting injunctive relief – Standard of proof of unconscionability

Civil Procedure – Injunctions – Ex parte interim injunction restraining call on guarantee – Failure by ex parte applicant to make material full and frank disclosures – Discretion of court to discharge or continue injunction

(delivering the judgment of the court): This is an appeal against the decision of the High Court discharging an ex parte interim injunction which was granted to the plaintiff (the appellant herein and whom we shall refer to as `Dauphin`), and under which the defendant (the respondent herein and whom we shall refer to as `HRH`) is restrained from demanding payment under a bank guarantee issued in favour of the defendant.

The facts

Dauphin is a private limited company incorporated in Singapore and is in the business of, inter alia, shipbuilding. HRH is a corporation organised and established under the laws of the United Arab Emirates (`UAE`).

By a contract dated 2 August 1998 (`the contract`) HRH engaged Dauphin to build a 55-metre twin-screw luxury motor yacht at the price of US$5,850,000. The contract provides that HRH shall make payment for the construction of the yacht by instalments. For the purpose of this action only the terms governing the first and second instalment payments are relevant and they are as follows:

> *First instalment*
>
> *The sum of US$877,500, equivalent to 15% of the contract sum, shall be paid within five days of the effective date of the contract by telegraphic transfer of the amount into Dauphin`s bank account.*
>
> *Second instalment*
>
> *The sum of US$1,462,500, equivalent to 25% of the contract sum shall be paid upon the keel being laid. This instalment shall be paid by telegraphic transfer as aforesaid within ten working days after the receipt of fax notice from Dauphin of the keel of the yacht having been laid and confirmed by the Classification*

Society.

To secure payment, HRH was required under the contract to furnish Dauphin with an irrevocable letter of credit for the full amount of the contract price.

On the part of Dauphin, the contract required it to provide, upon receiving payment of the first instalment, an irrevocable confirmed bank guarantee for US$877,500 and this guarantee shall be a guarantee `for the repayment to (HRH) over the period until the 3rd instalment payment date.` The guarantee `shall be payable/encashable on first demand by (HRH) if (Dauphin) does not fulfil.` The contract also set out in an exhibit the precise terms of the bank guarantee to be furnished by Dauphin, the pertinent part of which reads as follows:

> *In consideration of your making advance payment of the first instalment to (Dauphin) ... we ... hereby absolutely and irrevocably and unconditionally guarantee that we will pay to you or your assignee immediately on demand the full amount of all sums paid by you to the builder as the said instalments in United States dollars together with interest thereon at the rate of ... upon our receipt of a written demand from you, accompanied by a statement to the effect that such sum become refundable to you from the builder (accompanied by a copy of a demand made by you to the builder not less than 14 days before ...*

HRH duly paid the first instalment and also opened the letter of credit in favour of Dauphin. In turn, Dauphin procured the issue by the Bank of America of a performance guarantee in favour of HRH.

On 25 October 1998 the keel of the yacht was laid and on 27 October 1998, Dauphin gave a fax notice of the same to HRH, together with a stage certificate confirmation from Lloyd`s Register of Shipping. On 10 November 1998 HRH acknowledged receipt of the notice (with enclosures) but did not make any payment in respect of the second instalment, which was due on 22 November 1998 (ten working days from 10 November 1994).

On 12 April 1999, HRH, through its solicitors in Singapore, gave Dauphin notice of termination of the contract, citing without limiting themselves to these only, 19 instances of breach of contract on the part of Dauphin, and the more pertinent breaches alleged are the following:

(i) failing to design and provide for fire-fighting equipment in compliance with SOLAS requirements;

(ii) failing to provide stability calculations despite undertaking to do so;

(iii) failing to design a yacht and/or engine room capable of accommodating the contractually specific Caterpillar 3516B engines;

(iv) failing to provide for a sufficiently large freezer and/or cold room as required for such a luxury yacht;

(v) failing to design and provide for suitable mechanisms dealing with exhaust fumes and sewerage odour as required for such a luxury yacht;

(vi) failing to consult HRH on modifications and to keep HRH, or its Singapore representatives,

informed of the modifications;

(vii) unilaterally changing the keel thickness from 12mm to 10mm;

(viii) failing to keep HRH (or its Singapore representatives) informed of the progress of the construction;

(ix) failing to furnish information requested by HRH and to provide adequate drawings and detailed plans;

(x) failing to provide an acceptable schedule of construction and/or a time-table of construction and/or a specific itemised schedule of HRH`s supply items despite repeated requests; and

(xi) causing undue delay in the construction of the yacht by reason of the aforesaid failures.

Between 22 November 1998 and 12 April 1999 there were three meetings in UAE between HRH`s and Dauphin`s representatives to discuss various matters, including those which formed the subjects of the complaints set out in HRH`s solicitors` letter of 12 April 1999.

On 20 April 1999, Dauphin was informed by the Bank of America that HRH had made a demand/call on the guarantee. Thus, on that very day Dauphin took out a writ and, in view of the urgency, made an ex parte application for an injunction to restrain HRH from demanding/calling on the bank guarantee and receiving the sum or any part thereof. The High Court granted the ex parte application.

On 27 April 1999, HRH applied to have the ex parte interim injunction discharged. This was heard on 30 April 1999, at the conclusion of which Lee Sieu Kin JC discharged the injunction and ordered an inquiry as to damages. Pending the hearing of this appeal, the discharge order has been stayed.

The learned judge below discharged the ex parte injunction on the following grounds:

(i) there was a lack of full and frank disclosure;

(ii) Dauphin has not shown that there was any fraud on the part of HRH in calling on the guarantee, fraud here meaning a lack of bona fides on the part of HRH that it was entitled to call on the guarantee;

(iii) although he did not think there is a separate concept of `unconscionability` as a ground to restrain a call on an `on demand` performance guarantee, he held that even if there was, there was nothing unconscionable in the circumstances of this case for HRH to call on the guarantee.

On the subject of full and frank disclosure the learned judge found Dauphin wanting in the following respects:

(i) the statement that the stability calculations of the yacht could not be provided until the lightship characteristics of the yacht had been finalised by HRH is not true because in accordance with para 22 of the minutes of the meeting on 9 January 1999, Dauphin had agreed to carry out those calculations;

(ii) the statement that Dauphin had made the necessary consultations with HRH and/or its Singapore representatives, Germanischer Lloyd Singapore (GLS), is not true as GLS had written several letters to HRH complaining that Dauphin had not been cooperative in relaying information to GLS;

(iii) the statement that the proposed increase in the capacity of the freezer was only a request made by the HRH, did not give a full and accurate picture when in fact Dauphin had expressly agreed at the meeting on 9 January 1999 to increasing the same;

(iv) that there was a failure to explain why HRH had to accept Dauphin`s proposed switch of engine make for the yacht from that of Caterpillar (CAT) to MTU.

He held he would discharge the ex parte injunction solely on the ground that Dauphin had breached its duty to make a full and frank disclosure.

On the merits of the application the learned judge held that as the only ground which would disentitle HRH to call on the performance guarantee was fraud, Dauphin must demonstrate that in making the demand HRH did not have a bona fide belief that it was entitled to do so. This burden Dauphin failed to discharge. The judge also went on an extensive survey of the local case law and came to the conclusion that `unconscionability` was not a distinct and separate ground from fraud which would restrain a beneficiary from calling on such a guarantee. He thought it was inappropriate in principle to have `unconscionability` as a separate ground. In any case, he held that even if there is in law such a separate ground, there was nothing to show that the call by HRH was unconscionable.

The appeal

Three main issues arise in this appeal and they are substantially the same as those canvassed below. The first is whether Dauphin had made a full and frank disclosure in their ex parte application. The second is whether even if there was a breach of duty to make full and frank disclosure, was it material enough to warrant discharging the injunction. The third is whether in spite of all that, the continuance of the injunction is nevertheless warranted on the ground of unconscionability.

Full and frank disclosure

(i) The stability calculations

We will now examine briefly, in turn, the four instances in which the judge below held Dauphin to have fallen short of the duty to make full and frank disclosure.

On the matter of the stability calculations, Madam Tan Wah Leng (`Tan`), a director of Dauphin and who affirmed the affidavit in support of the ex parte application, stated that `calculations are being made and cannot be finalised until the lightship characteristic of the vessel has been finalised which (HRH has) yet to do.` The judge quite correctly took this averment to mean that the stability calculations could not be completed until HRH had finalised the lightship characteristics of the Yacht, which the latter had not done. Lightship characteristics encompass the steel structure, machinery and all necessary equipment and fittings inclusive of full cooling water and lubricating oil systems. But from para 22 of the minutes of the 9 January 1999 meeting we note that the appellants had agreed to carry out these calculations. It is common ground that the reference in those minutes to the stability calculations meant the preliminary stability calculations based on assumptions made about the lightship characteristics.

The question is whether, as at the date of the ex parte application, the statement is fair and

accurate. In the light of the fact that at the meeting of 9 January 1999 Dauphin agreed to provide preliminary stability calculations, Tan ought to have amplified and explained the exact position. Furthermore by March 1999, most of the lightship characteristics were known. It has not been shown that HRH had failed to provide anything else which impeded preliminary stability calculations from being effected. Viewed in this light, the statement is not correct, as it sought to place the blame for the unavailability of the stability calculations on HRH. It would leave an ordinary reader (and of course the court too) with the impression that HRH was unjustified to complain that Dauphin had not prepared the stability calculations.

Another argument of Dauphin on the point is that there was no obligation on its part to provide the stability calculations until the completion and delivery of the yacht. That may be so. But it had agreed, ostensibly in variation of the contract, to provide the preliminary calculations. And it seems to us that there were good reasons why HRH would want to have the preliminary calculations at that stage. This is apparent from the minutes of the 22-24 November 1998 meeting, where the following was recorded:

> *... the capacity plan provided by the Builder at the meeting was preliminary only and meant for discussion and initial review by the parties concerned. It is produced based on the* ***structural layout*** *at the first instance and is the* ***maximum available****. But as the whole matter is* ***subjected to the stability calculations*** *as well as freeboard regulations, the Builder reserves the right to provide a suitable figures [sic] as per contractual obligation. Mr Held have [sic] expressed `* ***surprise*** *` that the Builder have `provided` a much bigger capacity than contractually required, fuel oil of 140m3 instead of 90 m3 and freshwater of 50m3 instead of 20m3. Mr Held was also concerned that with the `extra fuel and water` the vessel may not achieve the desired speed...*
>
> *Mr Held to revert how much extra fuel and water (if any) are desired for the Builder to consider. Note that there is no obligation for the Builder to accede to this request subjected to stability criteria and/or freeboard regulations and/or any other matters concerned. [Emphasis added.]*

Later, on 31 December 1998, HRH wrote to Dauphin in respect of this matter stating:

> *Item E.7- We cannot understand your suggestion for modifying the capacity of the (Strength of the water tank) which was handed over to us during the meeting and expect your explanation (Stability calculation) ...*
>
> *Please forward the class approved stability form datas [sic]. Contract Datas Article 1, item 2 indicates very clearly the dimension and characteristics as well as the information given in Section 1, Item 1.05 [principal particulars], 1.08 [range], 1.09 [displacement] and 1.10 [performance] and enlargement of maximum available capacity will have impact of the above mentioned item.*
>
> *You are requested to confirm the stability of the yacht in all circumstances, ie when using sea fuel capacity. You did not revert to our requested information about permanent Ballast water tanks.*
>
> *You are requested to confirm the stability of the yacht when the Helicopter is approaching for Park (on the Yacht) or take off under all conditions.*

This probably explains why at the meeting on 9 January 1999 Dauphin agreed to furnish preliminary stability calculations to HRH. It showed that Dauphin accepted the need for such calculations at the stage of the design and construction of the Yacht`s hull. HRH was concerned of the impact of the design of the fuel and water tanks on the range and performance of the yacht.

Accordingly, we agree with the judge below that there was a misrepresentation or lack of full disclosure of the relevant facts relating to the stability calculations. The statement in Tan`s affidavit did not portray a true picture of the actual position. Instead it sought to shift the blame to the other side by suggesting that the calculations had not been provided because of the fault of HRH. It was a material mis-statement.

(ii) The failure to consult

The learned judge found that Dauphin was not truthful when it stated in its affidavit that it did make the necessary consultations with HRH (or HRH`s Singapore representatives, GLS) when making modifications to the design. The basis for this finding was that GLS wrote several letters in December 1998 to HRH complaining that Dauphin had not been cooperative in relaying information. But all the letters of complaint written by GLS to HRH were not copied to Dauphin, which party remained unaware of those complaints. Although GLS did write a letter of 22 December 1998 to Dauphin there was no complaint in the letter as such as the pertinent paragraph only stated:

> *Please note that we have to be noticed [sic] in advance before any inspection carried out by the LR Surveyor, as per requirement of the contract.*

Accordingly the reason given by the learned judge for making this finding is not satisfactory.

Nevertheless the task still falls on this court to determine if there was any breach of the duty to make full and frank disclosure. We note on 31 December 1998 HRH wrote to Dauphin, stating that:

> *`our local representative is reporting that you are not responding to any request and not cooperating.`*
>
> *`You are not complying in respect to the submission of the documents to the local representative and inspection of the representatives.`*
>
> *`Requested information concerning specification, drawings and record of works carried out are not forwarded to our local.`*
>
> *`until now you did not approach our representative for any discussion or clarification.`*

Although this letter of 31 December 1998 was exhibited in Tan`s affidavit, she chose to deal only with the aspect relating to the failure to consult on modifications.

As regards the alleged failure to provide drawings and plans to GLS, Dauphin contended that it was agreed that all plans were to be forwarded to HRH. It was only after the 9 January 1999 meeting that

Dauphin was required to forward a copy to GLS. But this cannot be true as the minutes of the 22 November 1998 meeting specifically recorded that Dauphin would forward a set of plans approved by the Classification Society to GLS.

Dauphin also relied upon a fax of 24 December 1998 from GLS, where the latter stated that GLS would only visit Dauphin`s yard again after the issue of the outstanding second instalment payment had been settled. In view of this, Dauphin sought to question the bona fides of GLS in writing those letters of complaint to HRH.

All said, Dauphin`s main contention is that it did work closely with HRH when making modifications and Tan even made three visits to UAE for consultations and related purposes. Considering that the complaints made by HRH about non-cooperation by Dauphin were not precise, and as Tan had exhibited all relevant correspondence, we do not think too much should be made of the fact that Tan did not give a more detailed account in the main body of her affidavit. So on this point we are inclined to think there was really no material non-disclosure or mis-statement.

(iii) The freezer

In respect of the proposed increased capacity of the freezer, Tan stated the contract provided that the capacity of the freezer and cold room were to be approximately 2,500 litres each. She said HRH had changed its mind and wanted a larger freezer. But she failed to add that at the meeting on 9 January 1999, Dauphin agreed that the size of the freezer would be increased as Dauphin`s design for the freezer would only allow the door to be opened inwards, thus effectively reducing the capacity of the freezer. She should have referred to both the request for an increase and the concern expressed by Dauphin that the freezer as designed was incapable of meeting the contractual specifications. Therefore, her statement gave the impression that HRH unilaterally, and for its own purposes, wished to make a change to the contract design. It did not give a fair view of the position. This is a material non-disclosure.

The respondents` letter dated 27 December 1998

The last point relates to the change of the engine from CAT to MTU. Tan described how the change of the engine came about in this way in her affidavit:

> *The yacht was initially designed to accommodate the Caterpillar 3516B engines but the defendants were advised by the plaintiffs that MTM [sic] engines would be more compatible engines. The final decision is ultimately that of the defendants and they have made such a decision.`*

While Tan did exhibit the letter of 27 December 1998 from HRH to Dauphin, wherein HRH complained about the manner of the change, she did not refer to it at all in the body of her affidavit. That letter was just buried among so many other documents. The court`s attention was not drawn to it. To get a flavour of what was troubling HRH we will set out the letter, which reads as follows:

> *Having studied the drawings provided by you with our advisor, we found no alternative but to accept the Brand MTU 12V 4000 M70 HP 2000 RPM while we clearly stated our wish for Caterpillar. This was specified and repeatedly declared that is what we want for our Yacht.*

Now we move to our fax ref No OSK/58/12/98 dated 17.12.98 and the following reminders verbally and written to which we have no input or response from you todate. Twice we have attempted to emphasis the importance of dealing with these ... totally ignored except by calling to say that you will deal with them.

We feel that the way you are dealing with them is unfortunately the same way you dealt with the engine, we thought we have Caterpillar while you all along designed and fabricated for MTU.

This is not a matter of comparison between two engine makes: it is a matter of Builder ignoring the wishes of the Buyer, who at the end of the day is paying the bill.

Furthermore, now we are faced with unanswered questions of all the calculations related to the stability and the centre of gravity, Helicopter take off and landing, parking on Helideck additional capacity of fuel tanks, etc, etc ...

We will not set a new deadline, as obviously the previous ones were ignored, which compels us to continue to hold the second payment, something we do not wish to do.

In conclusion, the new year is stipulating a new dead-line after which, if all matters are not resolved, and to our satisfaction, we will seek an alternative action.

The judge below considered Dauphin`s failure to refer to this letter specifically in the body of the affidavit of Tan as having altered the complexion relating to HRH`s failure to pay the second instalment. The impression given by Tan in her affidavit was that Dauphin had not pressed for payment of the second instalment because they were seeking to accommodate the respondents` unnecessary requests and deal with the premature problems. But if this letter of HRH were highlighted, the court would have appreciated that HRH was alleging that Dauphin had not satisfactorily performed the contract and HRH was hence withholding payment of the second instalment.

While it is true that by the time of the ex parte application, the make of the engine for the yacht had been changed from CAT to MTU with HRH`s concurrence, we would have to agree with HRH that the court hearing the application was not appraised as to the circumstances under which HRH`s consent was given. Had the contents of the letter of 27 December 1998 been drawn to the attention of the court, not only would it know how the engine change came about but also the fact that HRH had decided, for reasons, to withhold payment of the second instalment as early as December 1998 and Dauphin was notified of the same. It goes to the question of the bona fides of HRH in withholding the payment of the second instalment. These would have been material facts which would have influenced the court`s decision on the ex parte application.

Is there a separate `unconscionability` exception?

We now turn to the question whether there is an `unconscionability` exception, separate from that of fraud. The judge below found that there was no fraud when HRH made the call on the guarantee.

Indeed, Dauphin did not allege that there was fraud when HRH made the call. Even though the judge below did not think there was a separate exception of unconscionability apart from fraud, he also found there was no unconscionability as HRH had a bona fide belief it was entitled to make the call on the guarantee.

In Dauphin`s case, it made extensive submission on the scope of the `fraud` exception, stating that it encompasses `constructive or equitable fraud or unconscionability.` We feel that this submission was due largely in response to the views of the court below that `unconscionability` does not exist as another separate exception to the autonomy of a performance guarantee. However, counsel for HRH has conceded that there is a separate `unconscionability` exception. For reasons which would be apparent later, we do not propose to go into an examination of the scope of the fraud exception and the extent to which it overlaps with unconscionability. What we can confidently say is that while in every instance where there is fraud there would have been a lack of bona fides, it does not follow that in every instance where the beneficiary of a performance guarantee lacks bona fides there is necessarily fraud.

In **Bocotra Construction Pte Ltd v A-G (No 2)** [1995] 2 SLR 733 this court, after reviewing the existing case law on the subject, and recognising that the weight of the authorities would apparently indicate that fraud was the only exception to restrain payment on an on-demand guarantee, went on to observe that in **Royal Design Studio v Chang Development** [1990] SLR 1116 [1991] 2 MLJ 229 the High Court in reliance on **Potton Homes v Coleman Contractors** [1984] 28 Build LR 19 made a conscious departure from the principle that `fraud` was the only exception when it held that all the relevant facts of the case must be considered. The court also noted that in **Kvaerner Singapore Ltd v UDL Shipbuilding (Singapore) Pte Ltd** [1993] 3 SLR 350 GP Selvam JC (as he then was) opined that the fraud exception is not an immutable principle of universal application. This court then concluded that `whether there is fraud or unconscionability is the sole consideration in applications for injunctions restraining payment or calls on bonds to be granted.`

The judge below in the present action (as he did in **New Civilbuild Pte Ltd v Guobena Sdn Bhd & Anor** [1999] 1 SLR 374 where he thought that the Court of Appeal in ***Bocotra*** did not intend to create `unconscionability` as a separate ground of relief) thought that this court in ***Bocotra*** had used the two terms `fraud` and `unconscionability` interchangeably. With respect, we do not see how that could be so in the light of the fact that the court in that case was clearly conscious that fraud as a ground was quite distinct from that where you had to examine the circumstances surrounding the underlying contract.

Indeed, subsequent to the decision in ***Bocotra*** , there were three other cases where the High Court held that `unconscionability` was a separate ground, apart from `fraud`, for restraining calls on performance guarantees, namely, **Raymond Construction Pte Ltd v Low Yang Tong & Anor** (Unreported) and **Min Thai Holdings Pte Ltd v Sunlabel Pte Ltd & Anor** [1999] 2 SLR 368 and **Sin Kian Contractor Pte Ltd v Lian Kok Hong** (Unreported) . The first two cases were those of Lai Kew Chai J and the third, Lim Tiong Qwee JC. The decision in ***Min Thai Holdings*** came up on appeal and it was affirmed by this court. In ***Sin Kian Contractor*** , Lim Tiong Qwee JC, having reviewed the cases, including ***New Civilbuild*** , came to the conclusion that the court would restrain a call on a performance bond not only on the ground of `fraud` but also `unconscionability`, although on the facts of the case he found there was no unconscionability.

It is quite unnecessary for us to traverse this area of the law all over again, for as recently as on 14 August 1999 this court in **GHL Pte Ltd v Unitrack Building Construction Pte Ltd & Anor** [1999] 4 SLR 604 went through the English and local case law on the subject and came to the conclusion at p 610 [para] 16 that in ***Bocotra*** :

> *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`. There is nothing in that judgment which can be said to indicate or suggest that the court did not decide that `unconscionability` alone is not a separate ground as distinct from 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.*

LP Thean JA, who delivered the judgment of the court, further elaborated (at p 613 [para] 20) on the reasons why it could not agree with the High Court`s view in ***New Civilbuild*** , as follows:

> *With respect, for the reasons we have given in [para] 16 above we are unable to agree with the learned judge that this court did not in* ***Bocotra*** *decide that `unconscionability` is a separate exception permitting injunctive relief. True, as the learned judge said, the court `did not discuss the scope of this concept of unconscionability`, but then, nor did the court discuss the scope of `fraud`, and the concept of `unconscionability` is not a novel one, indeed no more novel than `fraud`. It should be noted that in* ***Bocotra****, this court considered not only the English authorities but the Singapore authorities as well:* ***Royal Design Studio v Chang Development*** *[1990] SLR 1116 ;* ***Kvaerner Singapore Ltd v UDL Shipbuilding (Singapore) Ltd*** *[1993] 3 SLR 350 ; and* ***Chartered Electronics Pte Ltd v Development Bank of Singapore Ltd*** *(Unreported) [subsequently reported at [1999] 4 SLR 655], although this last case was not expressly referred to in the judgment.* ***Royal Design Studio*** *was decided on the ground of unconscionability, although the word `unconscionability` was not expressly used there; but the circumstances in which the injunction was continued were clearly those warranting the description of unconscionability.* ***Kvaerner Singapore*** *was decided partly on the ground of unconscionability and did not strictly follow the `fraud` exception principle laid down in the English cases.*

Accordingly, we would reaffirm the views expressed in ***GHL v Unitrack*** that in Singapore `unconscionability` has been accepted as and is a separate ground in itself for granting injunctive relief in so far as a performance guarantee is concerned.

What would constitute unconscionability?

We do not think it is possible to define `unconscionability` other than to give some very broad indications such as lack of bona fides. What kind of situation would constitute unconscionability would have to depend on the facts of each case. This is a question which the court has to consider on each occasion where its jurisdiction is invoked. There is no pre-determined categorisation.

The genesis for the line of local cases applying the concept of unconscionability as a separate ground to restrain a call on a performance bond is to be found in the judgment of Everleigh LJ in ***Potton Homes Ltd v Coleman Contractors Ltd*** (supra) at p 28 where he said (obiter):

> *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. If the contract is avoided or if there is a failure of consideration between the buyer and the seller for which the seller undertook to procure the issue of the performance bond, I do not see why, as between seller and buyer, the seller should not [sic - delete] be unable to prevent a call*

> *upon the bond by the mere assertion that the bond is to be treated as cash in hand. ... 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 underlying contract and could be prevented from considering the question whether or not to restrain the employer by a mere assertion that a performance bond is like a letter of credit.*

In ***GHL v Unitrack*** (supra), this court addressed an instance where the call would be unconscionable:

> *We are concerned with* ***abusive calls*** *on the bonds. It should not be forgotten that a performance bond can be used 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. [Emphasis added.]*

In ***Raymond Construction Pte Ltd v Low Yang Tong & Anor*** (supra), Lai Kew Chai J opined:

> *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.* ***Mere breaches of contract by the party in question would not by themselves be unconscionable****. [Emphasis added.]*

Other instances where unconscionability was held to apply are: (i) in ***Kvaerner Singapore Pte Ltd v UDL Shipbuilding (Singapore) Pte Ltd*** (supra), the beneficiary made a call based on a breach induced by their own default and was not permitted to do so; (ii) in ***Royal Design Studios v Chang Development Pte Ltd*** (supra), an injunction was granted where the beneficiary`s call on the bond was based on delays in construction that were caused by the beneficiary`s own default in failing to make timely payments on the interim certificates issued by the architect and a considerable sum due to the account party under the joint venture agreement was retained by the beneficiary; (iii) in ***Min Thai Holdings Pte Ltd v Sunlabel Pte Ltd & Anor*** (supra), the defendant-buyer was restrained from calling on the performance guarantee when the non-delivery of rice was due to floods caused by typhoon and there was a `force-majeure` clause in the contract, as the court felt that it was unconscionable, in the circumstances, for the defendant-buyer to receive payment under the performance guarantee.

As for the argument that the efficacy and integrity of the performance guarantee should not be undermined by a concept such as unconscionability, which is less than precise, we would repeat the answer given in ***GHL v Unitrack*** (at [para] 24):

> *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. 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.*

Was the call on the bond unconscionable in the circumstances?

While a failure to make full and frank disclosures which are material may warrant the discharge of an ex parte injunction, the court nevertheless has the discretion to continue it or to grant a fresh injunction in its place, if the justice of the case so requires: see **Dormeuil Freres SA v Nicolian International (Textiles) Ltd** [1988] 3 All ER 197 and **Brink`s-Mat Ltd v Elcombe & Ors** [1988] 3 All ER 188.

This brings us to the last issue, which is whether the call on the performance guarantee in this instance is unconscionable. It will be recalled that the guarantee in this case is expressed to be for the purpose of guaranteeing the repayment of the first instalment over a period until the third instalment payment date if Dauphin does not fulfil its obligations under the contract. Here, HRH sought to terminate the contract pursuant to its common law rights upon a fundamental or repudiatory breach on the part of Dauphin. It also made a call on the guarantee.

Dauphin has advanced a number of arguments to contend that HRH`s call on the performance guarantee was made mala fide. Their first argument is that HRH`s allegation that Dauphin was in breach of their contractual obligations is wholly without merit. Dauphin said that the alleged issues or problems raised by HRH were premature or irrelevant in relation to the stage of the yacht`s construction. However, from the minutes of the various meetings and the correspondence it seems clear to us that HRH was clearly unhappy with various aspects of the construction of the yacht. There is nothing to suggest that these concerns were not real. We wish to stress that at this stage it is not necessary that either the court below, or this court, makes any definitive determination as to whether those concerns or complaints are meritorious.

From the discussion above on the points relating to the failure to make full and frank disclosure, it would be apparent that there were some complaints of HRH which prima facie appear to merit further investigation. There is also the point that Dauphin unilaterally made a modification to the thickness of the keel, from 12 mm to 10 mm, without seeking the written approval of HRH as required under art V of the contract. Dauphin claimed that this modification was required by the Classification Society but no evidence has been produced showing that the Society had made such a request. Again, prima facie, this is something which HRH was entitled to be concerned with. We do not wish to say anything more, as these and all the other complaints are matters which would have to be decided in due course by the arbitrator, there being an arbitration clause in the contract, and it must not be taken that this court has made any such determination.

However, what does cause us some concern with regard to the call on the guarantee is that HRH is apparently in breach of its obligation to pay the second instalment, which is due upon notification of the keel having been laid being given together with the certification of the Classification Society. Dauphin alleged that by asserting repudiatory breach on the part of Dauphin, HRH was deliberately trying to find an excuse not to make the second payment.

It is true that HRH does not have any express contractual right to withhold the second instalment by reason of unresolved disputes over alleged design and other contractual breaches. However, art XI para 3(a) of the contract would automatically extend the delivery date of the yacht by the same period as the delay in making payment. Paragraph 3(b) confers upon Dauphin an option to rescind the contract if this default extends beyond 15 working days. Dauphin was not obliged to continue with the construction until the second instalment was forthcoming. Nevertheless it did not opt to rescind

the contract. It just continued with the work so much so that by the time of the alleged termination by HRH, Dauphin had completed 85% of the steel hull.

In any event, it has not been shown that the non-payment of the second instalment induced, or was connected to, the alleged breaches raised by HRH. There is nothing to suggest that the problems were raised by HRH as excuses for its non-payment of the second instalment. The due date for the payment was 22 November 1998 and that was also the day Tan was in Abu Dhabi to discuss with HRH on various matters. HRH decided to withhold payment because of what it perceived to be non-compliance by Dauphin.

and duly confirmed by opener There is one other matter which we would like to touch on here. It will be recalled that HRH has furnished to Dauphin an irrevocable letter of credit (LC) for the full amount of the contract price. Under the LC, the following documents are required to be presented to obtain payment of the second instalment:

(i) Sight draft.

(ii) Beneficiary`s signed commercial invoice (one original and two copies)

(iii) Progress certification from LRS Classification Society in Singapore certifying the job/assignment is in progress and confirming keel laying of the yacht.

(iv) Copy of beneficiary`s fax notice sent to openers confirming keel laying .

In his oral submission to us, counsel for Dauphin commented that to draw on the LC, Dauphin must obtain the confirmation of HRH that the keel had been laid. Presumably this understanding was based on the italicised portion of requirement (iv) above. But there is possibly another way of viewing requirement (iv) and it is this: that the confirmation required of the `opener` is not so much of the fact that the keel had been laid but of the receipt of the fax notice. The fact of the keel having been laid is already covered by requirement (ii): the certification by the Classification Society, an independent body. However, this is a point of construction and we have not heard full arguments on it, and we express no opinion on it.

Judgment

This court is conscious that up to this point in time, Dauphin 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. Dauphin had by its own choice decided to proceed with the work notwithstanding that the second instalment had not been paid. Having carefully weighed all the circumstances we hold, though not without some hesitation, that the call cannot be considered to be unconscionable.

In coming to this view we have borne in mind the standard of proof required of the alleged unconscionability. In ***Bocotra*** this court stated that `a high degree of strictness applies, as the applicant will be required to establish a clear case of fraud or unconscionability in the interlocutory proceedings. It is clear that mere allegations are insufficient.` In ***GHL v Unitrack*** this court implicitly endorsed the strong prima facie standard propounded by the High Court in **Chartered Electronics Industries v Development Bank of Singapore Ltd** [1999] 4 SLR 655 . In our opinion, what must be shown is a strong prima facie case of unconscionability. We do not think that that standard has been satisfied in the instant case.

We would like to stress that what we have decided in this appeal concerns only the question whether HRH should be restrained to make the call on the guarantee. The merits of the substantive issues would have to await the determination at arbitration. We would, in passing, mention that Dauphin has also made the point that should the stand taken by HRH be rejected by the arbitrator and Dauphin succeed in that proceeding, it would have difficulties in enforcing the award in UAE. There are two short answers to this. First, this point has nothing to do with the question whether unconscionability has been established. Second, Dauphin would have foreseen such problems when entering into the contract with a foreign entity like HRH.

In the premises, the appeal is dismissed with costs. The security for costs shall be paid out to the respondent or its solicitors, to account of its costs.

Outcome:

Appeal dismissed.