JBE Properties Pte Ltd *v* Gammon Pte Ltd
[2010] SGCA 46

Case Number	: Civil Appeal No 63 of 2010
Decision Date	: 03 December 2010
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Chelva R Rajah SC (Tan Rajah & Cheah) and Edwin Lee and Dawn Noeline Tan (Eldan Law LLP) for the appellant; Ho Chien Mien and Lim Dao Kai (Allen & Gledhill LLP) for the respondent.
Parties	: JBE Properties Pte Ltd — Gammon Pte Ltd

Credit and Security

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2010] 3 SLR 799.]

3 December 2010

Chan Sek Keong CJ (delivering the grounds of decision of the court):

Introduction

1 This is an appeal by the appellant, JBE Properties Pte Ltd ("JBE"), against the decision of the High Court judge ("the Judge") to grant an interim injunction restraining JBE from receiving any money under a performance bond numbered "00001BGG0601600" ("the Bond") on the ground that JBE's call on the Bond was unconscionable. The Judge's decision is reported in *Gammon Pte Ltd v JBE Properties Pte Ltd (SCDA Architects Pte Ltd, third party)* [2010] 3 SLR 799 ("the GD"). After hearing the parties, we dismissed JBE's appeal against the grant of the aforesaid interim injunction ("the Interim Injunction"), but set aside certain ancillary orders made by the Judge ("the Ancillary Orders"). We now give the reasons for our decision.

Background

2 The background to the present proceedings is as follows. JBE is the developer of an eight-storey residential building at Handy Road, Singapore ("the Building"). JBE awarded the construction of the Building to the respondent, Gammon Pte Limited ("Gammon"), on 19 January 2006. On 3 August 2006, JBE and Gammon entered into a building contract ("the Building Contract"). The value of the Building Contract was $11,515,000.

3 There were various defects in the construction of the Building, and it was in respect of the alleged cost of rectifying some of these defects that JBE made a call on the Bond. Gammon then applied (via Summons No 1224 of 2009 ("SUM 1224/2009")) for an interim injunction to restrain JBE from receiving any payment under the Bond from the issuing bank, BNP Paribas Singapore ("the Bank").

4 In the court below, Gammon argued that the Bond was not an on-demand performance bond, but was instead an indemnity performance bond, and, thus, payment under it could only be made upon proof of loss, and not at this interim stage of the proceedings when its (Gammon's) alleged

liability for failing to rectify construction defects had yet to be determined. JBE, in contrast, contended that the Bond was an on-demand performance bond. The Judge decided (at [5] of the GD) that the Bond was an on-demand performance bond, and proceeded to consider whether JBE should be restrained from receiving payment thereunder on the grounds of either fraud or unconscionability, the two established grounds under Singapore law for restraining the receipt of payment made under a performance bond (or, as is commonly said, for restraining a call on a performance bond). He held that Gammon had shown "a strong *prima facie* case of unconscionability" (see the GD at [10]) and, accordingly, granted Gammon the Interim Injunction. He also made the Ancillary Orders, which were set out in the GD (at sub-paras (b) and (c) of [17]) as follows:

> (b) All rectification works to be completed by [Gammon] within six months. Inspection of rectification work[s] to be carried out in the month of October 2010.
>
> (c) Any dispute on the quality of the rectification works in accordance with the warranty will be determined by the court. If the court determines that the rectification works in accordance with the standard set out in the warranty is not satisfied, the court may direct that, subject to [a] call on the [B]ond, a joint tender be carried out in order to rectify the balance of the unrectified defects as determined by the court. The completion of the balance of [the] rectification works, through the joint tender, shall be deemed to be in accordance with the standard set out in the warranty. The specifications for the contractors for the joint tender … shall be the original specifications for the works.

The matters considered in the present appeal

5 On appeal, Gammon did not pursue its argument that the Bond was not an on-demand performance bond (in this regard, before this court, JBE maintained its position that the Bond was an on-demand performance bond). Thus, strictly speaking, the only question which we had to decide in the present appeal was whether the Judge was right to grant the Interim Injunction on the ground of unconscionability. Nevertheless, as the issue of the nature of the Bond (*viz*, whether it was an on-demand performance bond or an indemnity performance bond) was of considerable importance to the construction industry, we raised it with counsel during the hearing of the appeal, and we propose to make some observations on it in these grounds of decision. Before we do so, however, we wish to first reiterate a crucial difference between our law and English law *vis-à-vis* the circumstances in which the court may restrain a call on a performance bond. For ease of discussion, we shall hereafter (where appropriate) use the term "beneficiary" to refer to the party in whose favour a performance bond or a letter of credit is issued, the term "obligor" to refer to the party upon whose instructions a performance bond or a letter of credit is issued, and the term "paying bank" to refer to the bank (whether it be the issuing bank or the confirming bank) which is required to make payment under a performance bond or a letter of credit.

The law as to when the court may restrain a call on a performance bond

6 It is now well established that, under our law, apart from fraud (which is the traditional ground for restraining a call on a performance bond), unconscionability is a *separate and independent* ground for the court to grant an interim injunction restraining a beneficiary from making a call on a performance bond (see, *inter alia*, *Bocotra Construction Pte Ltd and others v Attorney-General* [1995] 2 SLR(R) 262 at [53] and *GHL Pte Ltd v Unitrack Building Construction Pte Ltd and another* [1999] 3 SLR(R) 44 at [16] and [20]; see also the GD at [6]–[7]). This is wider than the English position, which requires fraud to be clearly proved before a call on a performance bond can be restrained.

The English position

The English position

7 The English position was first laid down by the English Court of Appeal in *Edward Owen Engineering Ltd v Barclays Bank International Ltd and Another* [1978] QB 159 ("*Edward Owen Engineering*"), which concerned a performance bond that was expressed to be "payable on demand without proof or conditions" (at 166). Lord Denning MR, delivering the leading judgment, held that an on-demand performance bond "[stood] on a similar footing to a letter of credit" (at 171), and, thus, the paying bank (at 171):

> … is not concerned in the least with the relations between the supplier [*viz*, the obligor] and the customer [*viz*, the beneficiary]; nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The [paying] bank must pay according to its guarantee, on demand, if so stipulated, without proof or conditions. The only exception is when there is … clear fraud of which the [paying] bank has notice.

8 In setting out the above principles, Lord Denning was obviously influenced by the well-established autonomy principle applicable to letters of credit, which he acknowledged to be the lifeblood of international trade (see *Edward Owen Engineering* at 171). The autonomy principle entails that the paying bank must pay under a letter of credit so long as conforming documents are tendered to it. The only exception recognised by the English courts is that of fraud – specifically, the paying bank need not pay "only where there is clear evidence as to the fact of fraud and as to the [paying] bank's knowledge" (see Peter Ellinger & Dora Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing, 2010) ("*Ellinger & Neo*") at p 316).

The position in Singapore

9 The Singapore courts first cast doubt on whether the strict test of "clear fraud" (*per* Lord Denning in *Edward Owen Engineering* at 171) was the only test consistent with or permitted by existing law for the purposes of restraining calls on performance bonds (especially those given in connection with building contracts) in *Royal Design Studio Pte Ltd v Chang Development Pte Ltd* [1990] 2 SLR(R) 520 in 1990. These reservations were elaborated on in *Chartered Electronics Industries Pte Ltd v Development Bank of Singapore* [1992] 2 SLR(R) 20 ("*Chartered Electronics*"), where it was suggested that clear fraud need not be shown and that "a strong *prima facie* case of fraud" (at [40]) would be sufficient. This subsequently led to the development by this court of unconscionability as an alternative ground, *separate from and independent of fraud*, for restraining a call on a performance bond (see the discussion in *Ellinger & Neo* at pp 319–323).

10 The Singapore courts' rationale in applying unconscionability as a separate and independent ground for restraining a call on a performance bond (especially one given by the contractor-obligor in a building contract) is that a performance bond serves a different function from a letter of credit. The latter performs the role of payment by the obligor for goods shipped to it by the beneficiary (typically via sea or air from another country), and "has been the life blood of commerce in international trade for hundreds of years" (see *Chartered Electronics* at [36]). Interfering with payment under a letter of credit is tantamount to interfering with the *primary* obligation of the obligor to make payment under its contract with the beneficiary. Hence, payment under a letter of credit should not be disrupted or restrained by the court in the absence of fraud. In contrast, a performance bond is merely security for the *secondary* obligation of the obligor to pay damages *if* it breaches its primary contractual obligations to the beneficiary. A performance bond is not the lifeblood of commerce, whether generally or in the context of the construction industry specifically. Thus, a less stringent standard (as compared to the standard applicable *vis-à-vis* letters of credit) can justifiably be adopted for determining whether a call on a performance bond should be restrained. We should also add that

where the wording of a performance bond is ambiguous, the court would be entitled to interpret the performance bond as being conditioned upon facts rather than upon documents or upon a mere demand, contrary to the *dictum* of Staughton LJ in *IE Contractors Ltd v Lloyds Bank Plc and Rafidain Bank* [1990] 2 Lloyd's Rep 496 at 500.

11 Even where a performance bond is expressed to be payable "on first demand without proof or conditions" (as in *Edward Owen Engineering* (at 170)), which, strictly speaking, means the paying bank is contractually obliged to pay the beneficiary once it makes a call on the performance bond, there is no reason why fraud (which is often difficult to prove) should be the sole ground for restraining the beneficiary from receiving payment. To adopt such a position is to "apply a standard of proof which will virtually assure the beneficiary [of] … immediate payment … and … does nothing more than to transfer the security from the [paying bank] … to the beneficiary" (see *Chartered Electronics* at [37]). This may in turn cause undue hardship to the obligor in many cases. For instance, where a call is made in bad faith, especially a call for payment of a sum well in excess of the quantum of the beneficiary's actual or potential loss, the beneficiary will gain more than what it has bargained for. Furthermore, if the amount paid to the beneficiary pursuant to a call is subsequently proved to be in excess of the quantum of its actual loss, the obligor runs the risk of being unable to recover any part of the excess amount should the beneficiary become insolvent. Yet another relevant consideration is that an excessive or abusive call can cause unwarranted economic harm to the obligor. This is particularly relevant in the context of the construction industry, where liquidity is frequently of the essence to contractors. In this regard, while the sum stipulated to be paid under a performance bond is usually pegged at only 5% to 10% of the contract price, this typically amounts to one or more progress payments under a building contract. In very large building contracts, the deprivation of a whole progress payment might well be fatal to the contractor-obligor's liquidity. These concerns are by no means fanciful, as evidenced by the mechanisms evolved by the construction industry to ensure the quick settlement of disputes relating to progress payments.

12 In *Ellinger & Neo* (at p 326), the authors argue, in the context of the construction industry, that where the employer-beneficiary has sacrificed a stronger position for a weaker one (*eg*, where it has accepted a performance bond in substitution for security in the form of a cash deposit, which is the position in the present case (see cl 11(b) of the Building Contract, which is reproduced at [15] below)), it would be justifiable to apply the autonomy principle to the performance bond and treat it as though it were a letter of credit. We find it difficult to agree with this argument for several reasons. First, as a matter of principle, the utilisation of a cash deposit provided as security for the performance of the contractor-obligor's obligations under a building contract should be treated no differently from the making of a call on a performance bond, which is "third-party" security in that it is always provided by an entity other than the contractor-obligor. It is true that it will be more difficult (if not impossible) in practice to restrain the use of a cash deposit than it will be to restrain the (third-party) paying bank from paying out on a performance bond. But, this will be the case no matter what test is adopted for restraining a call on a performance bond. Moreover, the greater ease, in practical terms, of restraining a call on a performance bond (as compared to restraining the utilisation of a cash deposit provided as security for contractual performance) is a factor which the employer-beneficiary must be taken to have considered and accepted in preferring a performance bond to a cash deposit. In other words, the employer-beneficiary would have a reason for accepting, as security for the contractor-obligor's contractual performance, a performance bond rather than a cash deposit. One reason could be that the contractor-obligor might have priced its bid for the building contract differently if it had to provide a cash deposit as security for its performance of the contract. In our view, the mere fact that the employer-beneficiary agreed to accept a performance bond in lieu of a cash deposit should not be material in determining whether a call on a performance bond should be restrained.

13 In our view, the Singapore position on the circumstances in which the court may restrain a call on a performance bond is justified for the functional and commercial reasons mentioned earlier (at [10]–[12] above). The juridical basis for adopting unconscionability as a relevant ground (separate from and independent of fraud) lies in the equitable nature of the injunction. Considerations of conscionability are applicable in relation to the use of the injunction in other areas of the law, and there is no reason why these considerations should not be applied for the purposes of determining whether a call on a performance bond should be restrained so as to achieve a fair balance between the interests of the beneficiary and those of the obligor.

The nature of the Bond: an on-demand performance bond or an indemnity performance bond?

14 We turn now to consider the nature of the Bond, specifically, whether it was an on-demand performance bond or an indemnity performance bond. As mentioned at [5] above, although Gammon did not challenge the Judge's ruling that the Bond was an on-demand performance bond, we think this ruling merits some discussion in view of its potential ramifications for the construction industry.

15 To ascertain the nature of the Bond, it is necessary to first consider the relevant provisions of the Building Contract, namely, cll 7.5, 7.6 and 11(a)–11(c). These clauses provide as follows: [note: 1]

> 7.5 If, at the time of the issue of the Final Certificate there is any outstanding claim by the Employer [*ie*, JBE] against the Management Contractor [*ie*, Gammon], the Employer shall be entitled to withhold money or release … so much of the undertaking as represents its fair estimate of the amount in dispute.
>
> 7.6 *Save in the case of fraud or unconscionability*, the Management Contractor accepts that the Employer may call upon the banker's undertaking or any other security held by it at any time and the Management Contractor shall not seek an injunction against the Employer or the issuer of any such security preventing, restricting or conditioning any demand for payment or payment under any such security or preventing, restricting or conditioning the application of such security or the proceeds thereof.
>
> …
>
> **11. PERFORMANCE BOND**
>
> (a) Within 14 days of the Letter of Acceptance, the Management Contractor shall deposit with the Employer an amount specified in the Schedule as and by way of security for the due performance of and observance by the Management Contractor of [its] obligations under the [Building] Contract.
>
> (b) The Management Contractor may, in lieu of the cash deposit in Clause 11(a) and for the same purposes, provide a guarantee for an equivalent amount from a bank approved by the Employer and in the prescribed form.
>
> (c) The term "Security Deposit" shall hereafter refer to:
>
> (i) the cash deposited under Clause 11(a); or
>
> (ii) the cash proceeds of any or all demands on the guarantee provided pursuant to Clause 11(b).

> The Employer may utilise the Security Deposit to make good any loss or damage sustained or likely to be sustained as a result of any breach of contract whatsoever by the Management Contractor, including any liquidated damages. If the amount of the Security Deposit utilised by the Employer to make good any such loss or damage is found to be greater than the amount of loss or damage actually sustained by the Employer, then the Employer shall pay the balance of the amount utilised by the Employer without the addition of interest to the Management Contractor or to the bank or insurer, as the case may be, upon [the] issue of the Final Certificate. Where the Security Deposit is made in cash, the Employer shall pay to the Management Contractor the unutilised amount without interest upon the issue of the Final Certificate.
>
> …
>
> [emphasis added]

16 In compliance with its obligation under cl 11 of the Building Contract, Gammon procured the Bank to issue the Bond, which was for a sum of $1,151,500 (*viz*, 10% of the value of the Building Contract, which was $11,515,000 (see [2] above)). The material parts of the Bond read as follows: [note: 2]

> 1. In the event of [Gammon] failing to fulfil any of the terms and conditions of the said contract, [the Bank] shall indemnify [JBE] against all losses, damages, costs, expenses or [*sic*] otherwise sustained by [JBE] thereby up to the sum of Singapore Dollars One Million, One Hundred and Fifty One Thousand and Five Hundred Only (S$1,151,500.00) ("the Guaranteed Sum") upon receiving your written notice of claim made pursuant to Clause 4 hereof.
>
> …
>
> 4. This guarantee is conditional upon a claim or direction as specified herein being made by [JBE] by way of a notice in writing addressed to [the Bank] and the same being received by [the Bank] …
>
> 5. [The Bank] shall be obliged to effect the payment required under such a claim or direction within 30 business days of [its] receipt thereof. [The Bank] shall be under no duty to inquire into the reasons, circumstances or authenticity of the grounds for such claim or direction and shall be entitled to rely upon any written notice thereof received by [it] … as final and conclusive.
>
> [emphasis and underlining in original omitted]

17 The threshold question for the purposes of ascertaining the nature of the Bond is whether, on a true construction of that instrument, the Bank was liable to pay on demand, or only later, upon proof of breach by Gammon and loss by JBE. The construction process looks to the substance of the parties' rights and obligations under the Bond; the label adopted by the parties is inconclusive.

18 The Bond appeared to have some of the characteristics of an on-demand performance bond in that cl 5 provided that the Bank: [note: 3]

> … shall be under no duty to inquire into the reasons, circumstances or authenticity of the grounds for [a] claim [on the Bond] … and shall be entitled to rely upon any written notice thereof received by [it] … as final and conclusive.

However, immediately preceding that part of cl 5 just quoted was the provision that the Bank was "obliged to effect the payment required under … a claim … within 30 business days of [its] receipt [of the claim]". [note: 4] This suggested that the Bond was not an on-demand performance bond, but a 30-business day deferred demand performance bond. The question that arises is why JBE chose to accept such a performance bond. No evidence was led by JBE on this matter. One possible inference is that the parties contemplated that once a call on the Bond was made, Gammon would effectively be compelled to take immediate steps to rectify defects in the Building. Another possible inference is that this intervening period was intended to allow Gammon to apply to the court to stop payment under the Bond if it considered JBE's call to be either fraudulent or unconscionable. In this connection, reference may be made to cl 7.6 of the Building Contract, which expressly provided, *vis-à-vis* payment on "the banker's undertaking or any other security held by [JBE]", [note: 5] that Gammon could intervene "in the case of fraud or unconscionability". [note: 6] However, and this point was not argued either before the Judge or before us, it is not clear whether cl 7.6 of the Building Contract was intended to apply generally to all situations, or only in the context of cl 7.5 thereof (*ie*, only in the event of "any outstanding claim by [JBE] against [Gammon]"). [note: 7]

19 In our view, the crucial determining factor *vis-à-vis* the nature of the Bond was cl 1 thereof, which stated that the Bank was obliged to indemnify JBE only against "all losses, damages, costs, expenses or [*sic*] otherwise *sustained* by [JBE]" [note: 8] [emphasis added] as a result of Gammon's breach of the Building Contract. The provision in cl 11(c) of the Building Contract – *viz*, that JBE could use the Security Deposit (as defined in cl 11(c)) to make good "any loss or damage sustained or *likely to be sustained* as a result of any breach of contract whatsoever by [Gammon]" [note: 9] [emphasis added] – was omitted from the Bond. Therefore, the obligation of the Bank under the Bond was limited to indemnifying JBE against *actual* losses which it sustained due to Gammon's breach of the Building Contract. Since the payment obligation of the Bank was so limited, the Bond, in our view, had the character of a true indemnity performance bond. In this regard, it is arguable that cl 5 of the Bond (*viz*, the provision that the Bank was "under no duty to inquire into the reasons, circumstances or authenticity of the grounds [of any call on the Bond]") [note: 10] would not affect the requirement that JBE could only call on the Bond if and when it actually suffered loss arising from any breach by Gammon of its obligations under the Building Contract. At the very least, the Bond could be said to be ambiguous as to whether payment under it was conditioned upon demand or upon proof of actual loss arising from Gammon's breach of contract, and, therefore, the court should construe it as a true indemnity performance bond (see [10] above on the effect of ambiguity in the terms of a performance bond).

The issue for decision in this appeal: Was the Judge right to restrain JBE from making a call on the Bond?

20 We now turn to address the issue arising for decision in this appeal, *viz*, whether the Judge was correct in restraining JBE from receiving payment under the Bond (see [5] above). Given our ruling that the Bond should be construed as a true indemnity performance bond (which meant that JBE was not entitled to call on the Bond unless and until it had suffered actual loss as a result of Gammon's breach of the Building Contract), the correctness or otherwise of the Judge's decision would depend on the evidence adduced by JBE to prove its alleged actual loss. In this regard, the only evidence that JBE relied on before both the Judge and this court was the fact that it had to appoint a company called Weng Thai Construction ("WTC") to rectify defects in the cladding of the Building ("the Cladding Defects") at the price of $2,200,800.

21 The circumstances surrounding JBE's employment of WTC to rectify the Cladding Defects were

as follows. On 12 February 2008, the superintending officer for the Building Contract ("the Superintending Officer") issued a completion certificate ("the Completion Certificate") stating that "on 16th January 2008, the Works have been completed and appeared to comply with the [Building] Contract in all respects (save and except [for] the minor outstanding works listed in Part 1 of the Schedule to this Certificate)". [note: 11] These "minor outstanding works" [note: 12] included works to rectify the Cladding Defects ("the Rectification Works").

22 During the defects liability period, the Superintending Officer notified the parties of a number of defects in the Building. There was a considerable amount of friction between the parties with regard to the rectification of these defects and other issues under the Building Contract. What is pertinent for present purposes is the Superintending Officer's instruction to Gammon on 8 January 2009 to rectify specific defects in the Building. [note: 13] That instruction ("SOI 271/09"), which included 37 pages of photographs, identified 104 defects, most of which consisted of the Cladding Defects.

23 Before Gammon could take any steps to rectify the defects listed in SOI 271/09 (the majority of which were, as just mentioned, the Cladding Defects), JBE proceeded on 10 January 2009 to solicit quotations from other contractors, purportedly for the Rectification Works (as defined at [21] above). Quotations were received from the following contractors (collectively, "the Contractors"):

(a) Millionbuilt Pte Ltd ("Millionbuilt"), which quoted a price of $2,165,000; [note: 14]

(b) WTC, which quoted a price of $2,200,800; [note: 15]

(c) Jan Façade Technology Pte Ltd ("Jan Façade"), which quoted a price of $2,741,600; [note: 16] and

(d) WHA Engineering Pte Ltd ("WHA Engineering"), which quoted a price of $2,170,000. [note: 17]

On 10 February 2009, JBE awarded the Rectification Works to WTC at the latter's quoted price, *viz*, $2,200,800.

24 Based on WTC's quoted price for the Rectification Works, together with the alleged costs of curing other defects in the Building, JBE claimed that the outstanding sum due to it from Gammon amounted to $2,966,402.90 (see [8] of the GD). On that basis, JBE called on the Bond for the entire sum of $1,151,500. In response, Gammon applied (via SUM 1224/2009) for an interim injunction to prevent JBE from receiving payment under the Bond on the basis that the Bond was not an on-demand performance bond, or, alternatively, on the basis that JBE's call was unconscionable.

25 Before the Judge, and likewise on appeal, the issue of unconscionability focused on the award of the Rectification Works to WTC at the price of $2,200,800. It will be readily seen that, shorn of this sum, the amount of $2,966,402.90 allegedly due from Gammon to JBE would be reduced to $765,602.90, which was far less than the amount owed by JBE to Gammon (that amount was estimated by JBE to be $1,146,204.31 (see the GD at [8]) and by Gammon to be $1,704,912.64 (see the GD at [12])). In other words, if the alleged cost of rectifying the Cladding Defects were not taken into account, JBE would owe money to Gammon on a net basis and, accordingly, would not be entitled to call for payment of the entire sum of $1,151,500 due under the Bond.

26 At [14] of the GD, the Judge ruled that JBE's call on the Bond on the basis of the award of the

Rectification Works to WTC was "clearly unconscionable, abusive and bordered on being fraudulent". The main reasons which he gave for his decision were as follows:

(a) The letter of award issued by JBE to WTC for the Rectification Works was a one-page document devoid of detail as to WTC's scope of work (see the GD at [10]).

(b) WTC did not appear to have any expertise in designing, fabricating and installing cladding on buildings, as evidenced by its supposed intention to appoint another entity, CLK Systems Pte Ltd, to carry out the Rectification Works (see the GD at [10]).

(c) The subcontractor originally appointed by Gammon to carry out cladding works on the Building, Seiko Architectural Wall Systems Pte Ltd, had charged only $371,664 for designing, fabricating, supplying and installing cladding for the whole of the Building. In contrast, WTC's quoted price was "a hefty six times more" (see the GD at [10]).

(d) It would be "most surprising" (see the GD at [13]) for the Superintending Officer to have issued a completion certificate for a project priced at $11,515,000 if rectification works costing $2,200,800 (as JBE alleged) remained outstanding.

(e) Pursuant to a direction made by the Judge in the course of the hearing, Gammon sought quotations for the Rectification Works so that a comparison could be made with the price quoted by WTC. The highest quotation obtained by Gammon was $560,000, based on a total replacement of the defective cladding, and the next highest quotation was $335,000, based on repairing the defective cladding. Both of these quotations indicated that WTC's quoted price of $2,200,800 for the Rectification Works was "grossly inflated" (see the GD at [16]).

27 To rebut the Judge's ruling that JBE had made an unconscionable call on the Bond, JBE's counsel argued that the Judge's assessment of unconscionability, which was based on WTC's quoted price for the Rectification Works, was wrong for several reasons, namely:

(a) WTC's quotation was the lowest of the four quotations obtained by JBE, the highest of which was $2,741,600 (this argument by counsel was factually wrong as WTC's quotation was the second highest of the four quotations (see [23] above), but we shall not take issue with it in these grounds of decision as it is not a material point);

(b) the other three quotations obtained by JBE for the Rectification Works were not impugned; and

(c) the cost of carrying out the cladding work entailed by the Rectification Works had increased since the Building Contract was entered into.

28 We did not accept JBE's argument as it did not address the main factor which cast doubt on the accuracy and validity of WTC's quotation for the Rectification Works, namely, the basis on which WTC made that quotation. It may be recalled that the Rectification Works were for the Cladding Defects, which were the defects (among others) that Gammon had to rectify pursuant to SOI 271/09. According to the Completion Certificate, the Cladding Defects were "minor". [note: 18] However, to rectify these defects, WTC proposed the "*removal*, supply & *re-install [sic]* of … aluminium composite panels" [note: 19] [emphasis added]. Similarly, the other three quotations for the Rectification Works were based on the removal of the defective cladding and the installation of new cladding for the whole of the Building. Specifically:

(a) Millionbuilt proposed the "[d]esign, supply & installation of aluminium cladding to *replace existing cladding panel[s]*" [note: 20] [emphasis added], with the total cladding area estimated to be 4,900m^2;

(b) Jan Façade proposed the "*[r]emoval* of existing aluminium composite panel[s] and its associate works" [note: 21] [emphasis added] and the "[s]upply and *installation of new aluminium composite panel[s]* … [i]ncluding all necessary sub-frames and fixing accessories" [note: 22] [emphasis added] (Jan Façade also stated that "[d]ue to the *complexity* of this project, [it would] not accept partial replacement works" [note: 23] [emphasis added]); and

(c) WHA Engineering proposed the "re-alignment, *removal and replacement* of damaged panel[s]" [note: 24] [emphasis added], with the area to be repaired estimated to be 5,200m^2.

29 The descriptions given by the Contractors as to the proposed scope of the Rectification Works show that each of them contemplated the replacement of the cladding of the whole of the Building, even though the Cladding Defects were described in the Completion Certificate as "minor" [note: 25] defects. Counsel for JBE contended that the Cladding Defects were not in fact minor, but he was unable to refer to any evidence to support his argument. We also note that, for reasons which it did not explain and also did not offer to explain, JBE failed to disclose to the court the letters which it sent to the Contractors inviting them to submit quotations for the Rectification Works. That said, JBE's non-disclosure in this regard was, in our view, relatively inconsequential. Instead, what was material was the nature of the Cladding Defects. We have already pointed out that those defects were said to be "minor" [note: 26] in the Completion Certificate. The Judge likewise held at [11] of the GD that the Cladding Defects were "relatively minor". After examining the evidence on record, we agreed with this finding. Given the nature of the Cladding Defects, and assuming that the quotations obtained by JBE from the Contractors were genuine, it was incongruous for JBE to have relied on quotations for *replacing* the existing cladding of the whole of the Building and *installing new cladding*, as opposed to quotations for *rectifying* the Cladding Defects. Further, even if the Contractors' quotations were indeed for the rectification of the Cladding Defects, they were *prima facie* grossly inflated and exorbitant, given that the highest quotation for the Rectification Works which Gammon obtained pursuant to the Judge's direction was only $560,000. Viewed as a whole, the evidence adduced by JBE of its alleged actual loss arising from Gammon's breach of the Building Contract indicated, as the Judge rightly held, that "there was gross exaggeration of the costs of rectification … in support of [JBE's] call on the [B]ond" (see the GD at [14]).

30 For the above reasons, we were of the view that JBE had failed to show that, at the date of its call on the Bond, it had suffered actual loss arising from Gammon's breach of the Building Contract – proof of such actual loss was essential in the present case, given our ruling (at [19] above) that the Bond should be construed as a true indemnity performance bond. We should add that even if the Bond were construed as an on-demand performance bond (*cf* our ruling), JBE's call on it was unconscionable for the reasons given by the Judge (see [26] above).

The Ancillary Orders

31 Before we conclude these grounds of decision, there is one final matter which we should address, namely, the Ancillary Orders. In essence, these orders: (a) directed Gammon to rectify (*inter alia*) the defects listed in SOI 271/09 within six months; and (b) required JBE and Gammon to call a joint tender for a contractor to make good any of the defects not rectified by Gammon. The Ancillary Orders were not sought by either party, and we did not think it was proper for the Judge to have

made those orders, even if they might have represented the best way to resolve the outstanding issues between the parties. We thus set aside those orders.

Conclusion

32 In the result, we dismissed the present appeal against the Judge's decision to grant the Interim Injunction, and set aside the Ancillary Orders. We ordered the costs here and below to be costs in the cause, and also made the usual consequential orders.

[note: 1] See the Core Bundle filed on 27 May 2010 ("CB") at vol 2, pp 25–29.

[note: 2] See CB at vol 2, pp 46–47.

[note: 3] See CB at vol 2, p 47.

[note: 4] *Ibid*.

[note: 5] See CB at vol 2, p 25.

[note: 6] *Ibid*.

[note: 7] *Ibid*.

[note: 8] See CB at vol 2, p 46.

[note: 9] See CB at vol 2, p 29.

[note: 10] See CB at vol 2, p 47.

[note: 11] See the Supplemental Core Bundle filed on 28 June 2010 ("SCB") at vol 1, p 25.

[note: 12] *Ibid*.

[note: 13] See CB at vol 2, pp 49–87.

[note: 14] See CB at vol 2, pp 151–152.

[note: 15] See CB at vol 2, p 153.

[note: 16] See CB at vol 2, pp 154–155.

[note: 17] See CB at vol 2, p 156.

[note: 18] See SCB at vol 1, p 25.

[note: 19] See CB at vol 2, p 153.

[note: 20] See CB at vol 2, p 152.

[note: 21] See CB at vol 2, p 154.

[note: 22] *Ibid*.

[note: 23] See CB at vol 2, p 155.

[note: 24] See CB at vol 2, p 156.

[note: 25] See SCB at vol 1, p 25.

[note: 26] *Ibid*.