

## CKR v Asplenium – The Vanguard For Restrictive Performance Bond Clauses?

*Danna Er, MPillay\**

In contrast with English law, the law in Singapore has long allowed calls on on-demand performance bonds to be restrained on the ground of unconscionability. While this has generally been welcomed by contractors, as they only need to fulfil a lower threshold of unconscionability as opposed to the higher threshold of fraud in restraining calls on such bonds, the tide may be turning in the employers' favour with the recent Singapore Court of Appeal case of *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd and another and another appeal and another matter* [2015] SGCA 24.

### Facts

The facts of the case are briefly as follows. Asplenium, the developer had employed CKR as the main contractor for the construction of a condominium on Seletar Road for some \$88 million for a two-year period from January 21, 2013.

The contract between parties unusually provided that the contractor could restrain the call of the performance bond *only* on grounds of fraud. The salient terms are set out below:

#### 3.5 Performance bond

*3.5.1 Within fourteen days from the date of the Letter of Award, the Contractor shall at his own expense provide a cash payment as a security deposit or in lieu of the cash deposit, an on-demand performance bond which shall be in the form attached as an Appendix to the Contract Documents ... as security for the proper and due performance and observance by the Contractor of his obligations under the Contract. ... Should any performance bond issued pursuant to this Clause cease in any way to be valid, the Contractor shall immediately deposit with the Employer the cash deposit or procure that a new performance bond be issued in the same form prescribed by and in accordance with the terms of this Clause. ...*

*3.5.2 The Employer may use the Security Deposit to make good any cost, expense, loss or damage sustained or likely to be sustained as a result of any breach of or default under the Contract by the Contractor, or in satisfaction of any liquidated damages payable under the Contract or any sum due from the Contractor to the Employer under the Contract ... If the amount of the Security Deposit used to make good any cost, expense, loss or damage is greater than the amount of the cost, expense, loss or damage actually incurred by the Employer, the Employer shall pay the difference, interest free, to the Contractor or the issuer, as may be appropriate within ninety (90) days after the date the Maintenance Certificate is issued pursuant to the Contract.*

...

*3.5.8 In keeping with the intent that the performance bond is provided by the Contractor in lieu of a cash deposit, the Contractor agrees that except in the case of fraud, the Contractor shall not for any reason whatsoever be entitled to enjoin or restrain:*  
*(a) the Employer from making any call or demand on the performance bond or receiving any cash proceeds under the performance bond; or*



(b) the obligor under the performance bond from paying any cash proceeds under the performance bond;  
on any ground including the ground of unconscionability. [Emphasis added]

Disagreements arose between Asplenium and CKR after the commencement of the construction project. Asplenium complained of substandard work and slow progress. The disagreements culminated in Asplenium's purported termination of the main contract.

Asplenium subsequently made a call on the performance bond. Asplenium's call was for the full sum secured by the performance bond, viz, \$8,806,383.80 which was later reduced to \$7,697,687.51. CKR applied for an injunction restraining Asplenium from receiving payment under the performance bond.

### **High Court's Decision**

Before the High Court, CKR argued that clause 3.5.8 ousted the jurisdiction of the courts and was therefore unenforceable. It then argued that Asplenium had acted unconscionably in the call of the performance bond.

The High Court agreed with the contractor's argument that the clause in the contract was unenforceable as (1) there was an attempt to oust the jurisdiction of the court by interfering with the court's freedom to grant injunctive relief on the ground of unconscionability; (2) the court's power to grant injunctions could not be circumscribed or curtailed by contract; and (3) the unconscionability exception was based on policy reasons which could not be interfered by contract. However, the High Court found that there was no unconscionability on Asplenium's part and therefore dismissed CKR's application to restrain Asplenium's call on the performance bond.

### **Court of Appeal's Decision**

Dissatisfied with the High Court's decision, both parties filed appeals. Asplenium's position was that clause 3.5.8 was enforceable because (1) clauses which restricted or excluded equitable remedies, even if strictly construed, have been held to be enforceable; (2) clause 3.5.8 was not an ouster clause - it merely restricted, and not removed the grounds of relief sought from the court; and (3) clause 3.5.8 should be upheld in order to give effect to party autonomy. CKR's position was that clause 3.5.8 was unenforceable because (1) it fettered the court's power; and (2) there was a public policy of protecting contractors from oppressive calls on performance bonds in Singapore.

The Court of Appeal allowed Asplenium's appeal and dismissed CKR's appeal against the High Court's decision albeit on different grounds from the High Court. The Court of Appeal considered that parties are free to contract and that clause 3.5.8 was drafted merely to restrict or limit the remedy available to the contractor. It did not oust the jurisdiction of the court. The Court of Appeal also clarified that while the development of the doctrine of unconscionability was a matter of policy to deal with abusive calls on the performance bond, that concept of policy is different from the concept of public policy which underpins void and unenforceable contracts that seek to oust the jurisdiction of the court. The Court therefore decided that clause 3.5.8 was an enforceable provision. As there was no suggestion of fraud involved in the call of the performance bond by Asplenium, the Court considered CKR's argument of unconscionability irrelevant, in light of the Court's view on clause 3.5.8.



Interestingly, the Court of Appeal considered that the performance bond clause in the contract might come within the purview of the Unfair Contract Terms Act ("UCTA") and might potentially lend itself to the objection of unreasonableness pursuant to for example, section 3 of the UCTA. However, because this argument was not specifically raised before the Court of Appeal, the Court did not decide on it and left the issue open.

## Conclusion

This decision makes clear that while there is a recognised judicial policy of guarding against unconscionable calls on performance bonds, that policy will not override parties' freedom to regulate their business relationships contractually. Employers will no doubt receive this development with interest, and want to re-look their standard form contracts and bonds.

Nevertheless, it remains to be seen how an argument based on UCTA would play out should another contract purporting to exclude unconscionability come before the Singapore courts.



### **Danna Er**

Danna is a Senior Associate with MPillay in Singapore. She is admitted to practice law in New York and Singapore and specialises in dispute resolution, with a particular emphasis on construction and commercial disputes. Danna has represented clients in complex arbitrations, court proceedings, mediations and adjudications under the Building and Construction Security of Payment Act. Her non-contentious work experience includes drafting, reviewing and advising on contract documentation for large-scale infrastructure projects.

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