[2020] 1 LNS1 479

KNM PROCESS SYSTEMS SDN BHD v. LUKOIL UZBEKISTAN OPERATING COMPANY LLC
COURT OF APPEAL, PUTRAJAYA
ABDUL RAHMAN SEBLI JCA; MARY LIM THIAM SUAN JCA; HASNAH MOHAMMED HASHIM, JCA
[CIVIL APPEAL NO: W-02(C)(A)-1504-07/2018]

Case(s) referred to:

Legislation referred to:
Arbitration Act 2005, ss. 10, 11(1)(f) and (h), 19(2)
Federal Constitution, art. 17(2)

Counsel:
For the appellant - Cyrus Das, Michael Chow & Wendy Yeong; M/s Michael Chow
For the respondent - Jack Yeow, Daphne Koo, Kwong Chiew Ee & Melvin Ng M/s Rahmat Lim & Partners

Case History:
High Court : KNM PROCESS SYSTEMS SDN BHD v. LUKOIL UZBEKISTAN OPERATING [2018] 1 LNS 1913

IN THE COURT OF APPEAL, MALAYSIA
(APPELLATE JURISDICTION)
[CIVIL APPEAL NO: W-02(C)(A)-1504-07/2018]

BETWEEN

KNM PROCESS SYSTEMS SDN BHD **... APPELLANT**
(Company No: 200140-X)

AND

LUKOIL UZBEKISTAN OPERATING COMPANY LLC **... RESPONDENT**

[In the Matter of the High Court of Malaya at Kuala Lumpur
Originating Summons No: WA-24C(ARB)-5-01/2018

In the Matter of Contract No. UZ-10-8009-0706 dated 3.12.2010 between KNM Process Systems Sdn Bhd (Company No: 200140-X) and Lukoil Uzbekistan Operating Company LLC

And

In the Matter of Contract No. UZ-10-8009-0649 dated 3.10.2011 between KNM Process Systems Sdn Bhd (Company No: 200140-X) and Lukoil Uzbekistan Operating Company LLC

And

In the Matter of Bank Guarantee No: 5789031 dated 21.2.2011 by Malayan Banking Berhad (Company No: 3813-K) in favour of Lukoil Uzbekistan Operating Company LLC

And

In the Matter of Bank Guarantee No: 5789175 dated 21.2.2011 by Malayan Banking Berhad (Company No: 3813-K) in favour of Lukoil Uzbekistan Operating Company LLC

And

In the Matter of Warranty Guarantee No: 5842339 dated 21.10.2011 by Malayan Banking Berhad (Company No: 3813-K) in favour of Lukoil Uzbekistan Operating Company LLC

And

In the matter of sections 41 and 50 and other relevant provisions of the Specific Relief Act 1950

And

In the matter of sections 11(1)(f), (h) and section 50 of the Arbitration Act 2005

And

In the matter of Order 7, Order 28, Order 29, Order 69 and Order 92 of the Rules of Court 2012

Between

KNM Process Systems Sdn Bhd (Company No: 200140-X) ... **Plaintiff**

And

Lukoil Uzbekistan Operating Company LLJ ... **Defendant]**

CORAM:
ABDUL RAHMAN SEBLI, JCA
MARY LIM THIAM SUAN, JCA
HASNAH MOHAMMED HASHIM, JCA

JUDGMENT OF THE COURT

[1] The appellant was unsuccessful in its application made pursuant to section 11(1)(f) and (h) of the Arbitration Act 2005 [Act 646] for an interim injunction to restrain the respondent from calling on the bank guarantees and performance bonds pending arbitration. The learned judge did not find the grounds for such order made out. After hearing the parties and upon due consideration of the written submissions, grounds of decision and the records of appeal, we were unanimous in our decision in holding that appellate intervention was warranted in this appeal. Accordingly, we allowed the appeal and set aside the order of the High Court and granted the injunction on terms.

The guarantees

[2] There are two underlying contracts between the parties:

i. Contract No. UZ-10-8009-0706 dated 3.12.2010 where the respondent appointed the appellant as a contractor to supply technical documentation and equipment for the construction of gas-condensate fields of Adamtash, Gumbulak and Djharkuduk- Yangi Kizilcha in the Republik of Uzbekistan [Gissar Main Contract];

ii. Contract No. UZ-11-8009-0649 dated 3.10.2011 where the respondent appointed the appellant for the development of detailed design and supply of equipment for the "Booster Compressor Station in Khauzak Site" in the Republik of Uzbekistan [Khauzak Main Contract];

[3] Both contracts contain provisions for guarantees of different total amounts as follows:

i. Gissar Main Contract [totaling USD37 million]: Performance Guarantee No: 5789031; and

Guarantee for Refund of Advance Payment No: 5789175

ii. Khauzak Main Contract [USD3 million]:

Warranty Guarantee No: 5842339

[collectively referred to as "the guarantees"]

[4] On 27.11.2017, the respondent issued simultaneous demands on all three guarantees. This caused the appellant to file Civil Suit No: 22C- 110-12/2017 at the High Court at Kuala Lumpur against both the respondent and Malayan Banking Berhad, the issuing Bank, seeking in substance to restrain any payments being made out or received under the guarantees. The appellant claimed that the demands were fraudulent and unconscionable.

[5] On 6.12.2017, the High Court granted an *ex parte* injunction against both the respondent and the issuing Bank.

[6] The respondent approached the Court to stay the appellant's claim relying on section 10 Arbitration Act 2005 since both contracts respectively provided for resolution of any dispute, controversy or claim arising out of or in connection with either contract to be finally settled by arbitration in accordance with the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce - see clause 16.

[7] The order of stay was granted by consent. We understand that the arbitration somewhat stalled, with the parties unresolved as to who exactly was responsible for initiating the arbitration, the respondent or the appellant, with both parties pointing to the other. The appellant has since initiated the arbitration.

[8] By agreement, the present Originating Summons was then filed to determine the matter of whether interim injunctive orders may be granted on the calls on the guarantees under section 11 of the Arbitration Act 2005. The appellant relied on the same grounds that were relied on in the civil action, and more, as the basis for why it alleges that the calls were fraudulent and unconscionable. Those grounds may be summarised as follows:

i. the Guarantee for Refund of Advance Payment under the Gissar Main Contract was not an unconditional demand bond;

ii. the calls were not in compliance with the terms of the Gissar Main Contract;

iii. in any event, the call was only available upon termination and that did not arise in the instant case;

iv. contemporaneous evidence and conduct of the parties, especially the respondent show that there was no objective entitlement on the part of the respondent to make a call on the guarantees and that the respondent in fact knew that it was not entitled to make the call;

v. in relation to the Khauzak Main Contract, the respondent had already agreed that following multiple extensions of the Warranty Guarantee with the last extension until 31.10.2017 pending the appellant attending to some miscellaneous matters under the warranty period, there would be no further extensions and the Warranty Guarantee would be returned to the appellant;

vi. the fact of simultaneous calls on the guarantees issued under 2 unrelated and independent contracts.

[9] The application was opposed by the respondent who contended that the application was an abuse of the process of the Court; that the principles for the grant of an interim injunction pending arbitration were not met; and that the respondent must not be prevented from enjoying its rights to the payments under the guarantees.

Decision of the High Court

[10] Broadly, the High Court disagreed with the appellant on all fronts; finding that there was no strong *prima facie* case of fraud or unconscionability made out as the appellant had failed to show manifest and strong evidence of fraud and unconscionable conduct on the part of the respondent. The High Court also found the guarantees to be unconditional and on demand in nature and that the respondent was entitled to call on them without proof of the underlying default; that the complaints raised by the appellant were contractual issues to be determined in arbitration; that there was no representation by the respondent that it will not make a call on the guarantees upon extension of the same.

[11] The learned judge further found that damages would be an adequate remedy as the respondent had demonstrated its ability to pay damages, and that the balance of convenience leaned in the respondent's favour.

The allegations of unconscionability

[12] The appellant's first complaint is that the learned judge failed to consider or properly consider the terms of the underlying contracts on two fronts. Quite aside from the fact that the two contracts are distinct and discrete from each other, the appellant claimed that there is a material distinction between the two guarantees in the Gissar Main Contract itself; that these guarantees serve different purposes and objectives, thus impacting on the right to call on the respective bonds. Under the Gissar Main Contract, there is a Performance Guarantee and a Guarantee for Refund of Advance Payment totaling USD37 million. This material distinction is said to have been overlooked by the learned judge.

[13] Further, under clauses 8 and 12 of the Gissar Main Contract, the appellant pays the respondent liquidated damages in the event it fails to meet its obligations under the contract [specifically clause 12.1.10 as amended by Addendum 35]. Under clause 12.4, this liability to pay liquidated damages crystallizes within 30 days from the date of receipt of the respondent's written claim with supporting documents. Where the appellant fails to meet the demand to pay liquidated damages within the stipulated time, the respondent has "discretion ...to collect the amounts of penalties subject to payment by using the guarantee provided by the contractor..."

[14] The appellant argued that not only is the guarantee mentioned necessarily the Performance Guarantee given under clause 8 and not the Guarantee for Refund of Advance Payment, there was also no notice demanding payment of any liquidated damages issued. Consequently, clause 12.4 was not triggered.

[15] It was further argued that though clause 5.4.11 of the Gissar Main Contract allows for compensation to be paid by the appellant to the respondent "of expenses for elimination of defects if the plaintiff fails to remedy such defects by the time specified by the defendant provided that the plaintiff should be given reasonable notice of such due time"; this clause was similarly not triggered, again due to lack of notice from the respondent.

[16] Yet another argument raised in this respect is the right of recourse to this Guarantee for Refund of Advance Payment. According to the appellant, under clause 17.4.2 read with clause 17.5.2, the respondent can only have recourse to this Guarantee for Refund of Advance Payment after the Gissar Main Contract has been terminated. Even then, the respondent can only do so for the purpose of recoupment of the Advance Payment that the respondent had given to the appellant. There is no such right as there was no termination.

[17] The appellant also contended that the Guarantee for Refund of Advance Payment is not even an unconditional demand bond entitling the respondent to act in the manner that it did. It is actually a conditional guarantee for a refund of advance payment subject to proof that the appellant had "received Advance Payment, cannot start to fulfill own obligations under the contract or to continue with it, or refuse to return or will not return in reasonable time Advance Payment..." The decision in *Satriadesa Corporation Sdn Bhd v. Tenaga Nasional Berhad [2010] 4 CLJ 877* was cited in support.

[18] The same conditions and circumstances are said to have presented in the instant appeal rendering the call premature, fraudulent and unconscionable. Despite all these differences and despite being aware of them, the respondent made the simultaneous calls on all the guarantees; giving credence to the appellant's allegation of the presence of unfairness, injustice and unconscionability.

[19] The second ground of complaint pertains to the contemporaneous evidence and conduct of the parties, especially the respondent's, which show that there was no objective entitlement on the part of the respondent to make a call on the guarantee; and that the respondent was aware or knew that it was not entitled to make the calls; and that the respondent gave no notice or indications of its intention to make the calls. The appellant relied on letters dated 22.6.2017, 21.8.2017 and 16.10.2017 in support, including the correspondence relied on by the respondent to justify their calls *ex post facto* .

[20] According to the appellant, the calls on the guarantees came almost like "a bolt out of the blue"; that on a true reading of the respondent's letters, there was nothing disclosed of any impending threat of calls on the guarantees. There was also no indication of such an intent at a meeting held on 27.11.2017 and attended by the parties' representatives. The meeting was apparently cordial with the parties discussing miscellaneous and minor matters for the purpose of closing off the contract, and this is reflected in the emails exchanged.

[21] The appellant alluded to the respondent's attempts to justify how the demanded sums were derived after the event as further evidence of bad faith on the respondent's part. The appellant then challenged each and every justifications, showing that the respondent had either acted prematurely and is now attempting to justify its unlawful acts; or that the respondent's figures representing its losses were without basis.

[22] As for the call on the guarantee under the Khauzak Main Contract, the appellant argued that it was also done in bad faith. This contract was already at the tail end with the appellant attending to warranty obligations which it valued at no more than USD50,000.00. Yet, the respondent called on the entire guarantee worth USD3 million. The correspondence exchanged between the parties further revealed that the respondent had insisted the appellant extend the Warranty Guarantee and after the final extension to 31.10.2017, this guarantee would be returned to the appellant. Consequently, the call on this guarantee under these circumstances are clear acts of bad faith and unconscionability.

[23] The respondent, on the other hand, submitted that the appellant had failed to show strong *prima facie* substantive evidence of fraud or unconscionability; that the appellant has failed to show any *bona fide* issue to be tried. The appellant's entire submission raised only questions relating to the performance, interpretation and breaches of the Gissar Main Contract and the Khauzak Main Contract. And even in that respect, the evidence revealed the appellant to be in breach as evidenced by letters dated 22.6.2017, 30.7.2017, 31.8.2017, 26.10.2017 and 22.11.2017. The breaches being the appellant's failure to deliver the fuel gas packages and component parts for chemical injection packages and pump stations; and the de-scoping milestones of works and preparation of Technical Documentation. The appellant was also alleged to be in delay in the completion of the supply of Technical Documentation and Equipment as evidenced in letters dated 29.6.2016, 15.7.2016 and 9.9.2016. All these matters are really matters to be resolved in arbitration but insofar as an application for an interim injunctive relief in relation to guarantees and performance bonds, the respondent say that the appellant has not met the threshold set.

[24] The respondent further denied that the appellant had completed its obligations under the Gissar Main Contract; that there was evidence of the appellant's failure to provide marketing survey results for some of the Equipment items which were not supplied by the appellant. The respondent had to conduct such a survey itself and had provided the appellant with its results. The market survey results show that the market value of the Equipment to be de-scoped was USD5,132,732.55; hence the call on the guarantees.

[25] As for the matter of whether the guarantees were irrevocable and unconditional, the respondent cited clause 8.4.1 of the Gissar Main Contract and clause 8.4.1 of the Khauzak Main Contract as well as the contents of each of the guarantees as proof of the fact that the guarantees are unconditional and irrevocable guarantees where the respondent was not required to terminate the underlying contracts before calling on the guarantees.

[26] On the issue of conduct and representation, the respondent submitted that no fraud or unconscionability was demonstrated by its conduct, whether before or after the calls were made. In fact, the warranty guarantee was called for the very reason that it was provided in the first place, that is, where the appellant's warranty obligations under the Khauzak Main Contract had not been fulfilled and/or completed. Apart from denying the giving of any representation, the respondent submitted that it did not make commercial and business common sense to request for an extension of the guarantee and at the same time waive its right to make a call on the guarantee. The law further does not require the respondent to notify the appellant in advance of its intention to call upon the guarantees.

[27] There is also the matter of the existence of US sanctions. At paragraph 49, the learned judge had held that the sanction imposed under Directive 4 under Executive Order 13662 against the transfer of goods, services, technology to support exploration or production of oil for deep- water, Arctic offshore or shale projects in the Russian Federation had no bearing in the case as it was only in respect of projects initiated on or after 29.1.2018. Furthermore, the projects between the parties were in Uzbekistan and not Russia and were in respect of natural gas in 2010 and not in oil in 2018.

[28] The appellant contended that the learned judge had misunderstood the sanctions; that such sanction was not territorial and was aimed at Russian entities of which the respondent was one. The risk of the appellant not obtaining their monies back is also real as the currency of the proceeds of the guarantees is denominated in US Dollars which means that all payments will have to be routed through the United States. If payment is made under the guarantees, there is a real likelihood that recovery by the appellant would be prevented by the imposition of such sanctions. On the other hand, the appellant claimed that it is a solvent and listed company on Bursa Saham Malaysia with the respondent still owing the appellant a substantial amount of money for work done by the appellant. Lastly, if the arbitration concludes in the respondent's favour, funds are readily available for the respondent to draw upon. Hence, there are indeed serious questions to be tried at the arbitration and the balance of convenience favours the appellant in that *status quo* ought to be preserved pending final determination of the Stockholm arbitration between the parties.

[29] The respondent in response argued that damages would be an adequate remedy for all the appellant's concerns; that it is able to compensate the appellant in the event any damage is suffered and ordered to be paid since the respondent is a subsidiary of PJSC LUKOIL Russia, apparently the world's largest private oil company with more than USD73 billion in oil revenue; and that it is fully funded by LUKOIL. As for the sanctions, the respondent argued that the appellant had been receiving around USD95,437,087.17 out of a total of USD249,323,685.29 under the Gissar Main Contract, even after the sanctions were announced by the United States in 2014 showing that the sanctions either have no impact on the respondent or have no material adverse effect on LUKOIL. The balance of convenience is thus said

to be in the respondent's favour, that the respondent need not wait till the end of arbitration to call on the guarantees since these instruments are the "lifeblood of commerce".

Our decision

[30] The appellant was in Court for an interim remedy, invoking section 11(1)(f) and (h) of the Arbitration Act 2005. Principally, the appellant was seeking to restrain the respondent from making any call on any of the guarantees and/or from receiving any of the proceeds under the guarantees, pending final determination at arbitration. The appellant was also seeking a declaration that the calls made on 30.11.2017 was wrong in law, fraudulent, unconscionable and/or null and void.

[31] Section 11 was amended in 2018 *vide* Arbitration (Amendment) (No.2) Act 2018 [Act A1569/2018]. These amendments have brought section 11 substantially in line with Article 17(2) of the 2006 UNCITRAL Model Law on International Commercial Arbitration. These measures are also reflected in section 19(2) of the Arbitration Act 2005 in relation to the interim measures that may be granted by an arbitral tribunal.

[32] Prior to its amendment, section 11 reads as follows:

> **Arbitration agreement and interim measures by High Court**
>
> **11.** (1) A party may, before or during arbitral proceedings, apply to a High Court for any interim measure and the High Court may make the following orders for:
>
> (a) security for costs;
>
> (b) discovery of documents and interrogatories;
>
> (c) giving of evidence by affidavit;
>
> (d) appointment of a receiver;
>
> (e) securing the amount in dispute whether by way of arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court;
>
> (f) the preservation, interim custody or dale of any property which is the subject-matter of the dispute;
>
> (g) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and
>
> (h) an interim injunction or any other interim measure.

[33] Following the amendment in 2018, section 11 now reads as follows:

> **Arbitration agreement and interim measures by High Court**
>
> **11.** (1) A party may, before or during arbitral proceedings, apply to a High Court for any interim measure and the High Court may make the following orders for the party to—
>
> (i) maintain or restore the *status quo* pending the determination of the dispute;
>
> (ii) take action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process;
>
> (iii) provide a means of preserving assets out of which a subsequent award may be satisfied, whether by way of arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court;
>
> (iv) preserve evidence that may be relevant and material to the resolution of the dispute; or
>
> (v) provide security for the costs of the dispute.

[34] Under the old law, the type of interim measures that may be granted by the Court was substantially spelt out; it is otherwise under the new law. The focus is no longer on the type of interim measure but the effect or intent of the measure, that the measure that is moulded or ordered by the Court achieves the intended effect as found in section 11(1)(i) to (v). In the instant appeal, the interim remedies were sought for the purpose of maintaining the *status quo* pending determination of the dispute at arbitration.

[35] Regardless the position, pre or post amendment, section 11 confers discretion upon the Court to grant any interim measure. There is some helpful discussions by Lord Mustill on how the Courts should approach these applications for these sort of interventions in his dissenting judgment in the House of Lords decision of *Coppe'e-Lavalin SA/NV v. Ken-Ren Chemicals and Fertilisers Ltd (in liq); Voest-Alpine AG v. Ken-Ren Chemicals and Fertilisers Ltd (in liq)* [1994] 2 All ER 449. Lord Mustill opined that parties approach the Court for interim measures partly because of the time taken of the arbitral processes itself whilst another reason is "*plain fact, palatable or not, that it is only a court possessing coercive powers which can rescue the arbitration if it is in danger of foundering,...* " At page 469, Lord Mustill categorised

interim measures into three groups, the object of all three "*is to support the agreement to arbitrate, but their effects are not all the same* ":

> "With the first group the national court lends its support by ordering purely procedural steps which the arbitrators either cannot order or cannot enforce; such as requiring an inspection of the subject matter immediately the dispute has arisen or compelling the attendance of an unwilling witness. The second group seeks to maintain the *status quo* pending the making of an award, so as to prevent one party from bringing about a change of circumstances adverse to the other which the arbitrators cannot adequately remedy. An interlocutory injunction is the most characteristic of these remedies. The third group consists of remedies designed to make sure that the award has the intended practical effect by causing one party to provide a fund to which recourse can be made by the other party if the first fails to honour an adverse award spontaneously. Saisie conservatoire and Mareva injunctions are typical of this kind of relief.
>
> My Lords, it is I believe clear that the frame of mind in which a national court should approach the grant of such measures must be substantially influenced by the category into which they fall. In the case of the first group the court is concerned only to fill a gap which it can do without encroaching on the agreed procedure or the substantive decision-making process of the arbitrators. With the third group an application for relief may call for some trespassing on the arbitrator's territory, since in some legal systems the court may be required to assess the apparent strength of the claim in order to decide whether it is just to make an order which interferes with the defendant's right to make free use of his funds. The second group potentially involves the greatest encroachment, for at the lowest the court will often find it necessary to consider whether a particular state of affairs which the arbitrators are being asked to create or declare (for example whether one party is obliged to do a certain act or abstain from doing another) is likely in the event to be created or declared by the award, in order to decide whether it is just to order holding relief in the shape of an injunction; and the intrusion will of course be even greater where (as in *Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd* [1993] 1 All ER 664, [1993] AC 384) the interim measure takes the shape of an order that the party shall perform in advance of an award the very obligation the existence of which the arbitrators are in the course of deciding. It is my judgment clear that the approach of the national courts to the grant of interim relief should be conditioned to an important extent by the degree to which the particular remedy encroaches on the agreement that the arbitrators shall be the sole judges of the merits."

[36] The exercise of discretionary power under section 11 requires a careful examination of the relevant material facts against the allegations made, with a cautious restrain of determining the dispute in any definitive manner since that is a matter for determination at the arbitration and not for the Court. The Court is only approached to grant an interim remedy which will ultimately support or aid that arbitration.

[37] Similar views were expressed in *Metrod (Singapore) Pte Ltd v. GEP II Beteiligungs GmbH & Anor [2013] 1 LNS 324*, that an application for interim reliefs are intended to be interim in nature and not permanent, and that they are intended to support, assist, as well as facilitate the arbitration proceedings. See also *Jiwa Harmoni Offshore Sdn Bhd v. Ishi Power Sdn Bhd [2009] 1 LNS 849*; *Cobrain Holdings Sdn Bhd v. GDP Special Projects Sdn Bhd [2010] 1 LNS 1834*; *Interactive Brokers LLC v. Neo Kim Hock & Ors [2014] 8 CLJ 747*. In *Obnet Sdn Bhd v. Telekom Malaysia Berhad*, the Court of Appeal had held:

> 26. It must then follow that in principle s. 11 of AA 2005 is designed to support and facilitate the arbitral process and not to displace it. The approach, in the context of s. 11, must be not to encroach on the procedural powers of the arbitrators bit to reinforce them ... As stated by s. 11 itself, the relief sought must be of an interim nature and, by implication, not permanent. It is plain that the interim measures are not intended to displace the powers of the arbitrator. They are certainly not there for the High Court to exert some supervisory function over the arbitral process...

[38] Therefore, in the exercise of discretion of whether to grant the interim measure sought, the High Court must consider whether such interim measure will aid, support or facilitate the arbitral proceedings, that such measure will not impede the arbitral proceedings.

[39] In this appeal, the appellant had, on 6.12.2017, filed an action against the respondent [and the issuing bank] challenging the simultaneous calls on the guarantees on the basis that the calls are fraudulent and/or unconscionable and seeking both injunctive and declaratory reliefs. The details of that claim [High Court Civil Action WA- 22C-110-12/2017] may be seen at pages 135 to 143 of the record of appeal.

[40] The respondent invoked section 10 of the Arbitration Act 2005 for a stay of that civil action. The order was granted by consent, and the injunctive reliefs were then sought by the appellant as interim measures under section 11(1)(f) and (h). The reliefs were sought for the primary purpose of maintaining *status quo* between the parties since the disposal of the substantive dispute of the parties, that is, whether the

respondent's call on the guarantees was fraudulent and/or unconscionable call [the subject matter of the claim in High Court Civil Action WA-22C-110- 12/2017] would now be resolved or finally determined by way of arbitration. We note that the parties relied on, amongst others, the affidavits and affidavits in reply that were filed in relation to the stay application for the purpose of the application for the present interim injunctive measures.

[41] We are of the view that this factual backdrop against which the present application for interim reliefs was filed is material and relevant to the issues in this appeal and which ought to have been taken into consideration or at least, appreciated by the learned judge.

[42] The basic claim, in fact, the whole claim of the appellant was about an alleged fraudulent, unconscionable and/or unlawful call on the guarantees. That was the dispute. The respondent had moved the Court to direct that dispute be referred to arbitration, this was in keeping with the arbitration agreement in the underlying contracts. The appellant then moved for an interim injunction on the calls so that *status quo* may be maintained pending arbitration. The application was refused not on the ground that *status quo* was not made out, but because a strong *prima facie* case was not established.

[43] We are of the view that since section 11 has itself set the parameters upon which interim measures may be granted, those principles must be given due and proper regard and application. The interim injunctive measure that the appellant was seeking falls within the second category of cases that Lord Mustill talked about and discussed above; that is, to maintain the *status quo* pending arbitration so as to prevent one party from bringing about a change of circumstances adverse to the other which the arbitrators cannot adequately remedy.

[44] In the case of an interim injunctive relief pending arbitration, the applicant must first show why *status quo* needs to be maintained or restored, as the case may be. There are nevertheless tests that must be met before the Court will exercise its discretion in granting the particular order sought, that such order ought to be granted as it will ultimately aid or support the arbitration that is either pending or yet to take place.

[45] The tests that must be met are as set in *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah [1995] 1 CLJ 293*; [1995] 1 MLJ 195:

i. whether there is any *bona fide* serious issue to be tried;

ii. whether damages are an adequate remedy; and

iii. where the balance of convenience lies.

[46] We would see the third requirement as material in that the appellant must show that the balance of convenience lies in maintaining or restoring *status quo* pending arbitration. However, where the injunctive relief concerns performance bonds, guarantees and warranties, the applicant must in addition, show a strong *prima facie* case of fraud or unconscionability but the merits and substantive arguments of such an allegation is to be determined at the arbitration, and not by the Court. The Court in fact, must avoid engaging or being caught up in protracted consideration of the merits of such dispute.

[47] In this appeal, the complaint focused on a complaint of misapprehension of the applicable principles as well as an erroneous application of the relevant principles to the critical facts which too, were misapprehended; and for the purpose of this appeal, those principles are as set down by the Federal Court in *Sumatec Engineering & Construction Sdn Bhd v. Malaysian Refining Company Sdn Bhd [2012] 3 CLJ 401* endorsing the approach earlier adopted by the Court of Appeal in *Kejuruteraan Bintai Kindenko Sdn Bhd v. Nam Fatt Construction Sdn Bhd [2011] 7 CLJ 442*, dealing specifically with injunctions in relation to performance bonds, guarantees or warranties or instruments of like nature. Due to the peculiar nature of such instruments, an injunction will not be granted to restrain a call on the guarantee, bond or warranty unless the applicant establishes a seriously arguable or strong *prima facie* case for the grant of such an interim remedy through manifest or strong evidence of fraud or unconscionability. This was pronounced in *Sumatec Engineering & Construction Sdn Bhd* [*supra*].

[48] Prior to this Federal Court decision, an injunction to restrain a call on an on-demand performance bond or guarantee would only be granted where fraud is established on the basis of the maxim *ex turpi causa non oritur actio* ; that it is "*only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood of international commerce* ..." as opined by Kerr J in *Harbottle v. National Westminster Bank* [1978] QB 146; and that banks ought to be "*left free to honour its contractual obligation* " as held by Sir John Donaldson MR in *Edward Owen Engineering Ltd v. Barclays Bank International Ltd* [1978] QB 159. This approach was adopted by the Federal Court in *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd [1995] 1 CLJ 283*.

[49] However, in *Sumatec Engineering & Construction Sdn Bhd* , the Federal Court recognised unconscionability as a "separate and independent ground" to allow for a restraining order on the beneficiary", that this equitable exception stems from the "*general underlying notion... of equity's traditional jurisdiction to grant relief against unconscientious conduct namely, that a person should not be permitted to use or insist upon his legal rights to take advantage of another's special vulnerability or misadventure*

for the unjust enrichment of himself ..." [see *Stern v. McArthur* [1988] 165 CLR 489]. The Federal Court further agreed with the "*seriously arguable and realistic inference test* " as being equally applicable in the extended exception of unconscionability. This test was expressed in Focal Asia Sdn Bhd & Anor v. Raja Noraini binti Raja Datuk Nong Chik & Anor [2009] 1 LNS 913, that the "*integrity and autonomy of the document will not be compromised, since the paying bank will not be directly prevented from acting on the document. It is the beneficiary that is prevented from making a call on the document on these grounds. Nonetheless, the evidence allowing intervention by the Court must be clear. I accept the test of "seriously arguable that the only realistic inference is fraud" as good law in an interlocutory application such as the present* ."

[50] At the Court of Appeal, reported in Malaysian Refining Company Sdn Bhd v. Sumatec Engineering & Construction Sdn Bhd [2011] 7 CLJ 21, the ground of "unconscionability" was explained in the following terms:

> 24. On the issue of "unconscionability" as raised by the respondent, even assuming the principle is to be applied and adopted in the present case, it must clearly be established and proven by evidence in the circumstances of the case. As in the case of fraud, to establish "unconscionability" there must be placed before the court manifest or strong evidence of source degree in respect of the alleged unconscionable conduct complained of, not a bare assertion. Hence, the respondent has to satisfy the threshold of a seriously arguable case that the only realistic inference is the existence of "unconscionability" which would basically mean establishing a strong *prima facie* case. In other words, the respondent has to place sufficient evidence before the court so as to enable the court to be satisfied, not necessarily beyond reasonable doubt, that a case of "unconscionability" being committed by the beneficiary (the appellant) has been established to an extent sufficient for the court to be minded to order injunction sought. **This additional ground of "unconscionability" should only be allowed with circumspect where events or conduct are of such degree such as to prick the conscience of a reasonable and sensible man** .
>
> 25. The principle concerning "unconscionability" was initially propounded by Lord Denning in the case of *Lloyds Bank v. Bundy* [1975] QB 326 where it was held that unconscionable transaction between parties may be set aside by the court of equity. This "unconscionable" category is said to extend to all cases where unfair advantage has been gained by an unconscientious use of power by a stronger party against a weaker (See also: Halsbury's Law of England, 3rd ed. Vol. 17 [1956] at p. 682).
>
> 26. On an application for relief against unconscionable conduct, the court looks to the conduct of the party attempting to enforce, or retain benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so (See: *Commercial Bank of Australia Ltd v. Amadio and Anothe* r [1983] 46 ALR 402).
>
> ...
>
> ...
>
> 47. It is not possible to define "unconscionability" other than to give some very broad indications such as lack of *bona fides* . What kind of situation would constitute "unconscionable conduct" 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 (see: *Dauphin Offshore Engineering and Trading Pte Ltd v. The Private Office of HRH Sheikh Sultan bin Khalifa bin Zayed Al-Nahyan* [2000] 1 SLR (R) 117; and *Shanghai Electric Group Co Ltd v. PT Merak Energi Indonesia & Anor* [2010] 2 SLR 329).
>
> 48. Based on the above considerations, we are of the view that there is no simple formula that would enable a court to ascertain whether a party had acted unconscionably in making a call or demand on an "on demand" performance bond. In the final analysis, whether or not "unconscionability" has been made out is largely dependent on the facts of each case. **In every case where "unconscionability" is made out, there would always be an element of unfairness or some form of conduct which appears to be performed in bad faith** ."
>
> **[emphasis added]**

[51] How unconscionability or fraud is established thus depends on the facts and that would call into question the underlying contractual arrangements between the parties. That crucial document and its terms must be examined. This was done in ***Kejuruteraan Bintai Kindenko*** where the Court of Appeal held that the call on the bond by the beneficiary was subject to the agreed terms of the underlying contract; and having examined clause 24(c) of the underlying contract, the Court concluded that there was no evidence of its compliance. Consequently, "*the beneficiary is not entitled to make any demand on both the performance bonds. The demands are premature and they must be restrained from making such*

demands...the Court is satisfied that the demands ...are invalid and of no effect; and must be restrained by an injunction " [see paragraphs 79, 101, 102]. This proposition and approach was also agreed to by the Federal Court in ***Sumatec*** .

[52] Although ***Sumatec*** and the cases discussed thus far do not concern calls and injunctive reliefs in the context of interim measures pending arbitration invoked under section 11 of the Arbitration Act 2005, we are of the view that the principles apply with equal force but with the caveat that the Court must now weigh into consideration the question of whether status quo pending arbitration ought to be maintained or restored; whether some current or imminent harm to the arbitral process needs to be prevented; or any other similar considerations as found in section 11(1)(a) to (e). In fact, as seen from the decisions of *Metrod (Singapore) Pte Ltd* [*supra*]; *Jiwa Harmoni Offshore Sdn Bhd v. Ishi Power Sdn Bhd* [*supra*]; *Cobrain Holdings Sdn Bhd v. GDP Special Projects Sdn Bhd* [*supra*] and *Obnet Sdn Bhd v. Telekom Malaysia Berhad* [*supra*] the courts have already taken that approach; that the grant of the particular interim measure must be in aid or support of or to facilitate the arbitration.

[53] The tests laid down in ***Sumatec*** have since been applied in a long line of cases including *Maxwell Accent JV Sdn Bhd v. Kuala Lumpur Aviation Fuelling System [2017] 1 LNS 990*; *Target Resources Sdn Bhd v. THP Bina Sdn Bhd [2019] 7 CLJ 633*; *Bauer (Malaysia) Sdn Bhd v. Hundred Vision Construction Sdn Bhd [2015] 1 LNS 1290*; *Bella Builders Sdn Bhd v. Kerajaan Malaysia & Another [2017] 1 LNS 557*; *Ranhill E&C Sdn Bhd v. Thyssenkrupp Industries (M) Sdn Bhd & Another [2016] 6 CLJ 290*; [2016] 9 MLJ 703; *Dunggon Jaya Sdn Bhd v. Aeropod Sdn Bhd & Anor [2017] 1 LNS 1401*; [2017] MLJU 1225.

[54] This Court further held in *Target Resources Sdn Bhd v. THP Bina Sdn Bhd* [*supra*] that the allegation of unconscionability is "fact sensitive". This, too, is consistent with the approach in ***Sumatec Engineering and Construction Sdn Bhd*** where the Federal Court agreed on the other holdings of the Court of Appeal:

> (i) In my view, consonant with the principle as laid down by my learned brother, unconscionability is a doctrine which allows courts to deny enforcement of a contract because of abuses arising out of the contract;
>
> (ii) In my view the principle underlying the unconscionability doctrine is the prevention of oppression and unfair conduct; and because the determination of unconscionability is fact specific, courts must consider such a claim on a case by case basis and assess the totality of the circumstances;
>
> (iii) A distinction must be drawn between an injunction to restrain a bank/issuer from making payment out on a performance bond (which is governed by the performance guarantee agreement) and an injunction to restrain a beneficiary from making a demand on the bond (which is governed by the underlying contract between the parties);
>
> (iv) All the facts and circumstances surrounding the demands made by the first respondent on both the performance bonds were so lacking in good faith and amounted to unconscionable conduct that it warranted court intervention by way of injunction to avoid injustice. The demands on the bonds were premature, invalid and of no effect.

[55] Even before ***Sumatec*** , Prasad Abraham JC [as His Lordship then was] in *Satriadesa Corporation Sdn Bhd v. Tenaga Nasional Berhad [2010] 4 CLJ 877* examined the on-demand bond in question against its terms and found that there were two parts to the bond. Despite the first part of the bond described as an "on demand bond", the second part of the bond qualified the first part by the words "the contractor fails to perform and observe all terms, provisions, conditions and stipulations of the contract on the contractor's part to be performed and observed according to the true purport, intent and meaning thereof or in default by the contractor". This meant that the bond may not be an unconditional "on demand" bond; or at the very least, it posed a serious issue to be tried in terms of the construction of the language of the bond and whether a demand simpliciter would attract liability.

[56] We agree with the respondent's submissions that the threshold is high as the underlying disputes between the parties are essentially contractual in nature and those disputes are to be determined in arbitration. Thus, the court must guard against abuses of process where contractual disputes are elevated and disguised as claims of fraud or unconscionability.

[57] With the above principles in mind, it was therefore necessary to take into consideration the identity of the rivalling parties before the Court. Where those parties are the contracting parties themselves, regard must be given to the terms of the underlying contract between the parties, in particular those dealing with the provision of the guarantee, bond or warranty as the case may be, why they are required and how they are to interface with the other provisions or how they may be invoked; and not just to look at the labels given to such instruments [see also *China Taiping Insurance (Singapore) Pte Ltd (formerly known as China Insurance Co (Singapore) Pte Ltd v. Teoh Cheng Leong* [2012] 2 SLR 1; *BS Mount Sophia Pte Ltd v. Join-Aim Pte Ltd* [2012] 3 SLR 352; *LQS Construction Pte Ltd v. Mencast Marine Pte Ltd & Another* [2017] SGHC 148]. There must be a thorough consideration of the relevant facts as viewed in the context of the case, taking into account the competing allegations weighed against the conduct of the parties leading up to the calls on the guarantees in order to determine whether there is a strong *prima facie* case

of abuses arising out of the contract or unconscionability, that there is lack of good faith or unfairness, and that the totality of circumstances warrant a restrain on the call to avoid injustice. Context is critical. That is only logical as a case of fraud or unconscionability is almost invariably premised on the understanding and agreement as reflected in the underlying contract between the contracting parties; and that was precisely what was picked out in ***Kejuruteraan Bintai Kindenko*** and endorsed in ***Sumatec*** in the first place.

[58] The learned judge examined clauses 12.1.10, 12.4, 12.5, 12.7 of the Gissar Main Contract together with clauses 8.4.1 and 8.4.2 and disagreed with the appellant. Clause 12.4 gave the respondent the right to first demand or pursue its right to claim for liquidated damages under clause 12.1.10 while clause 12.5 gave the respondent the right to utilize the guarantees. Her Ladyship was of the opinion that these terms did not mandate the respondent to pursue a particular course of action first before making a call on the guarantees; that it was not a precondition for the respondent to call on the guarantees, and this was fortified by the terms of clause 12.7. As for the complaints on the conduct of the respondent before and after the calls, the learned judge held that since the contracts did not require any prior notification to be given to the appellant or that the appellant had to be told the reasons for its actions or the calculations of the loss suffered, the complaints were without merit. Similarly, the complaints on simultaneous calls and the extension of the warranty guarantee under the Khauzak Main Contract.

[59] Having examined the guarantees and the underlying contracts, the correspondence and other similar evidence presented against the principles as set down in ***Sumatec*** , we find the appellant's arguments of strong persuasive force and not without basis, and that balance lay in the appellant's favour to maintain status quo pending arbitration of the substantive dispute between the parties.

[60] In the first place, the three guarantees were not on demand unconditional and irrevocable guarantees despite the labels appearing; and this was not sufficiently appreciated by the learned judge. The Guarantee for Refund of Advance Payment No: 5789175 provided under the Gissar Main Contract certainly does not bear such characteristics while the guarantee under the Khauzak Main Contract was actually a warranty.

[61] As for the Performance Guarantee provided under the Gissar Main Contract although described as "unconditional and irrevocable", on the contrary it is a conditional guarantee. The guarantee, *inter alia* states that "From the date of this Guarantee stated above..." payment of the whole guaranteed amount will be in full "upon first written request of the Client, **if** the Contractor cannot fulfil the conditions of the Contract", thus qualifying and rendering the guarantee from a seemingly unconditional and irrevocable guarantee to one which is conditional - see page 180 of CBD. We agree with learned counsel for the appellant that the call thus cannot be made unless and until breach of the underlying contract has been established as held in ***Sumatec*** .

[62] This brings us to clause 12.1.10 of the Gissar Main Contract, the appellant's argument being that the parties had agreed that all breaches by the appellant are to be treated as delay breaches and to be calculated as part of LAD - see page 61 of CBD. Clauses 12.1.10, 12.4, 12.5, 12.7 read as follows:

> 12.1.10 In the case of infringement of conditions of Contract the Contractor undertakes:
>
> > (a) For infringement of time for submission of the Part to be Approved or Working Documentation under the Preliminary Project Schedule (Appendix 4-1) - to pay to the Customer penalty at a rate of 0.1 (zero point one) percent of the price of Part to be approved of the Working Documentation or Working Documentation for every day of delay.
> >
> > For failure to meet timescales of delivery of Equipment specified in Attachment 4-1, Preliminary Project Schedule - to pay to the Customer penalty at a rate of 0.1 (zero point one) percent of the price of delayed Equipment per every day of delay.
> >
> > Supply of incomplete Equipment or incomplete Technical Documentation as well as supply of Equipment without the supporting documentation required by the Contract shall also be considered as delay in supply of Technical Documentation or Equipment.
> >
> > (b) ...
> >
> > (c) If after 90 (ninety) calendar days after elimination of reasons of non-achievement of Guarantee Figures, the Guarantee Figures are not achieved again during carrying out of repeated Guarantee Tests - to pay to the Customer penalty at rate of 0.1 (zero point one) percent of Contract Price for every one) (1) percent of decrease for each non-achieved values in comparison with Guarantee Figures, but not more than 10% of Contract Price. Guarantee Figures will be agreed by the Parties pursuant to procedure specified in Clause 8.3.1.
>
> 12.4 The Contractor shall pay liquidated damages under Clause 12.1.10 within 30 (thirty) calendar days, unless otherwise agreed by the Parties, from date of receipt of Customer's

written claim with supporting documents.

> 12.5 In case of avoidance or non-payment by the Contractor of penalties specified in Clause 12.1.10, the Customer at its discretion will have the right to collect the amounts of penalties subject to payment by using the guarantee provided by the Contractor, or to reduce payments due under this Contract for the amount of claimed penalty, paid in excess by offset of the similar counter claim by forwarding a notification on offset. At that, the penalty shall be recognized as a claim similar to payment for the performed Work and supplied Equipment.
>
> ...
>
> 12.7 Nothing in this Article shall limit the right of the Customer to receive compensation according to conditions of the Contract.

[63] The above terms of the Gissar Main Contract do indeed give the respondent the right to liquidated damages for breaches by the appellant and that such damages may be deducted from the relevant guarantee after certain conditions have been met. Consequently, the respondent can only call on the Performance Guarantee after LAD is calculated and the 30 day or extended period notice given by the respondent has lapsed and the appellant fails to pay the LAD imposed. In other words, despite the label appearing on the Performance Guarantee, the guarantee is actually a conditional guarantee. See clauses 12.4 and 12.5 which further supports this construction. This renders thus the call on the Performance Guarantee a call which was in breach of the underlying contract, that is, the Gissar Main Contract.

[64] We find merit in these arguments of the appellant, especially when we see the respondent issuing on 12.12.2017, the LAD claim or LAD demand following its calls on the Performance Guarantee and the other guarantees on 27.11.2017 [see page 513 of CBD]; almost as an after- thought, suggesting that at the time of the calls, the respondent lacked good faith or there was unfairness on its part, and that its claim was actually contractually bad in law.

[65] Absence or "lack of good faith" has long been accepted as a basis to restrain a beneficiary from calling a bond or guarantee; and this was acknowledged in *TTI Team Telecom International Limited & Anor v. Hutchinson 3G UK Limited* [2003] EWHC 762. We are of the view that the above circumstances display a seriously arguable and realistic inference case of want of good faith on the part of the respondent such that an interim injunction restraining the respondent's substantive rights is warranted.

[66] In *Bauer (Malaysia) Sdn Bhd v. Hundred Vision Construction Sdn Bhd* [*supra*], a decision of the High Court which was affirmed on appeal, it was inter alia held at paragraphs 40 and 44 that "...the details regulating the bond are to be found in clause 32 of the conditions of the subcontract. The defendant will have to come within the terms of that clause in order to make that call"; and "if the underlying contract provides for a pre-condition which must first be fulfilled before a demand can be made, then that precondition must indeed be met before the beneficiary is entitled to make the call." Not meeting those pre-conditions, or retreating to them after making the call, as was done in this case, show the presence of "elements of unconscionability that question the real purport of the call".

[67] These circumstances as described above and relied on by the appellant fall clearly within the meaning and understanding of "unconscionability" as settled in ***Sumatec*** and, also as explained by the Singapore Court of Appeal in *BS Mount Sophia Pte Ltd v. Join-Aim Pte Ltd* [2012] 3 SLR 352:

> "36 ...broadly speaking, unconscionability is a label applied to describe unsatisfactory conduct tainted by bad faith. A precise definition of the concept would not be useful, because the value of unconscionability is that it can capture a wide range of conduct demonstrating a lack of bona fides. The beneficiary of a performance bond is in a position of strength in relation to the obligor. From the beneficiary's point of view, its position is similar to having cash in hand, since the bank is compelled to pay the beneficiary upon the beneficiary's call. But, from the obligor's point of view, the importance of liquidity to the construction industry and the spectre of an unexpected call on the performance bond would appear to leave it in an arguably more uncertain position than if it had given cash up front. Had the obligor given cash up front, it would be out of pocket, but it would not be faced with the insecurity of a call on the performance bond by the beneficiary at an unspecified time. Therefore it is particularly important that the concept of unconscionability be flexible enough to capture a range of conduct, all of which share the common undertones of bad faith. The beneficiary, notwithstanding that he had bargained for the performance bond, is uniquely placed to inflict economic harm on the obligor if acting in bad faith.
>
> **[37]** Although unconscionability itself may not carry a precise definition, from the beneficiary's point of view, what constitutes unconscionable conduct should be reasonably apparent. It is probably very difficult to negligently act in bad faith, especially where positive action is required for a call on a performance bond. If the beneficiary's call on the bond is motivated by improper purposes, or such a call cannot be justified with clear evidence; or in any other situation where the beneficiary is less than certain about his entitlement to call on the bond and for what amount, the beneficiary ought to take a step back and reexamine its entitlement

and conduct prior to calling on the bond. Unfairness is also an element of unconscionability ..., and the question as to whether or notice was afforded to the obligor of his alleged breach before the beneficiary's call on the bond would also be a relevant consideration."

[68] These material distinctions as evidenced by the terms of the underlying contract are quintessential and relevant requisites when dealing with applications for interim injunctions between the contracting parties as opposed to applications involving the issuing bank where the commercial viability of such instruments are paramount considerations, were unfortunately not appreciated or properly considered by the learned judge. This is evident from paragraph 25 of the grounds where the learned judge referred to the Court of Appeal decision in *LEC Contractors (M) Sdn Bhd (formerly known as Lotteworld Engineering & Construction Sdn Bhd) v. Castle Inn Sdn Bhd [2000] 3 CLJ 473*; [2000] 3 MLJ 339; a decision before the Federal Court's decision in ***Sumatec*** , and which must now be understood as peculiar to its facts and more relevant where the application concerns the issuing bank and the contracting party.

[69] The learned judge had read clause 12.1.10 against clauses 8.4.1, 8.4.2 and 8.4.5 and had concluded at paragraph 26 of the judgment that the respondent had the option to call on the guarantee whether in full or in part. With respect, we agree with the appellant that there has been some misreading of those terms of the Gissar Main Contract, that all th terms and conditions of the underlying contract need to be examined instead of looking at particular clauses almost in isolation of each other. Be that as it may, that is a matter for substantive determination at the arbitration; but for the purpose of the interim injunction, we find that the appellant had met the threshold for an interim injunctive order restraining the call on the Performance Guarantee.

[70] Moving next to the Guarantee for Refund of Advance Payment [page 182 of CBD and the call is at page 482 of CBD]. This guarantee is quite different from a performance bond or guarantee. It is an advance payment bond or guarantee "under which a third party (such as a bank) promises to pay to a party who has advance money to a contractor for the performance of work such amount as represents the value of work not performed, but in respect of which payment has been made, in the event of the contractor not performing all of its works" - see ***Construction Law*** , ***Julian Bailey*** [Volume II 2nd Edition page 1073].

[71] The essence of such a guarantee is that there has to be a calculation of works not performed before a call can be made. The calculation of the amount under the call is dependent on and adjusted according to the value of works unperformed and proof of an advance from or by the respondent. This is evident from the terms of this guarantee itself - see page 182 CBD; which clearly shows that this is not even an unconditional and irrevocable on demand guarantee to begin with.

[72] But, for all that to happen, there must be a trigger event, that is, there must be a termination of the underlying contract, as provided under clause 17.4.1 of the Gissar Main Contract. In this appeal, there was no termination; the respondent did not terminate the Gissar Main Contract. This is supported by correspondence from the respondent dated 24.11.2017, calling for the appellant to provide marketing survey results for certain equipment by 1.12.2017. Hence, there was no trigger event.

[73] Clause 17 provides for matters of termination, by either party. Clause 17.4 deals with termination by the respondent as 'Customer' whereas clause 17.5 deals with termination by the appellant, as 'Contractor'. These clauses read as follows:

Termination by the Customer

17.4.1 The Customer may terminate the Contract in unilateral manner (entirely or in the part of individual Works or supply of individual Equipment without reimbursement of any costs and losses of the Contractor in cases of:

a) ...

k) ...

17.4.2 After the termination notice comes into force on the basis of Clause 17.4.1 (if the Contract is terminated entirely):

a) The Contractor will within 30 days refund to the Customer the advance payment amounts not deducted under Acceptance Certificates for Milestones. If the Contractor refuses or avoids to refund the relevant amounts, the Customer, **at its discretion will collect it at account of the guarantees for refund of advance payment submitted by the Contractor pursuant to Clause 8.5 or deduct it from any payment due to the Contractor in accordance with the Contract** ;

b) The Customer will pay to the Contractor only the price for the Milestones duly completed by the Contractor and accepted by the Customer.

Termination by the Contractor

17.5.1 The Contractor may terminate the Contract in a unilateral manner without reimbursement of any costs and losses to the Customer in cases of:

a) ...

b) ...

17.5.2 After coming into force of the Contract termination notice on the basis of the Clause 17.5.1:

a) The Contractor will within 15 days refund to the Customer the advance payment amounts not deducted under Acceptance Certificates for Milestones. If the Contractor refuses or avoids to refund the relevant amounts, the Customer, at its discretion will collect it at account of the guarantees for refund of advance payment submitted by the Contractor pursuant to Clause 8.5 or deduct it from any payment due to the Contractor in accordance with the Contract;

b) The Customer will pay to the Contractor only the price for the Milestones duly completed by the Contractor and accepted by the Customer;

c) The Customer will pay to the Contractor the reasonable documented expenses for the commenced but not completed supply of Equipment or Works, in the range of Milestone to be executed at the time of sending the Contract termination notice. The Contractor will hand over such "not completed" supply/Works to the Customer.

[**emphasis added**]

[74] Thus, the appellant's contention that this call was in fact premature and in breach of the underlying contract was also of merit. The trigger event for such call, whether clause 17 or any other provisions of the Gissar Main Contract has been fulfilled is a matter of strict construction of the demand and of the contract as was held in *Sea-Cargo Skips AS v. State Bank of India* [2013] 2 Lloyd's Rep 477, 484; a case involving the issuing bank and the party supplying the guarantee; *a fortiori* in the present appeal where the contracting parties are involved. This issue of the validity of the call on such a refund guarantee stands unresolved and is for determination in the arbitration.

[75] At this point, it would be fair to say that a premature call not made in accordance with the agreed terms of contract amounts to a seriously arguable case with strong *prima facie* evidence of unfairness and unconscionability has been made out in respect of the Guarantee for Refund of Advance Payment for which the demand must be restrained - see *Simon Carves Ltd v. Ensus UK* [2011] EWHC 657; and *Kejuruteraan Bintai Kindenko* [*supra*] at paragraph 79, adopted and endorsed by the Federal Court in ***Sumatec*** . This guarantee is actually a conditional guarantee which is not subject to the same considerations as the other two guarantees; yet was treated in like manner by the respondent and erroneously agreed to by the learned judge without more.

[76] Finally, the Warranty Guarantee under the Khauzak Main Contract - see page 813 CBD. The appellant's complaint here is that the respondent had been requesting for multiple extensions of this warranty, with the last extension agreed to 11.12.2017 pending the appellant attending to certain miscellaneous matters under the warranty, and thereafter the respondent was to return the Warranty Guarantee. The call on this warranty was also made on 27.11.2017.

[77] Learned counsel for the appellant highlighted that this guarantee contained an unusual feature not present in the earlier two guarantees, and that is the guarantee itself contains an arbitration clause [see page 814 CBD]:

This Guarantee (and any non-contractual obligations arising out of or in connection with it) shall be governed by and construed with the laws of England and Wales and any dispute arising out of it or in connection with it (including disputes relating to negotiation validity or enforceability of this Guarantee) shall be referred to and finally resolved in accordance with the Rules of the London Court of Arbitration, which are deemed to be incorporated by reference into this Guarantee. The place of arbitration shall be London, England. The language of the arbitration shall be the English language.

[78] The warranty period is for a total period of 15 months commencing upon the completion of the Khauzak Main Contract and the issuance of an Acceptance Protocol. This occurred on 14.3.2015 which means the warranty period will expire in June 2016. Upon the respondent's requests, the Warranty Guarantee was extended a few times to deal with any remedial works. On 17.3.2017, the respondent requested the appellant to extend the guarantee till 30.6.2017, failing which "we will have to recover the full amount of the Bond."

[79] The guarantee was subsequently extended a few times with the appellant imposing an additional term that the Warranty Guarantee "shall be returned to KNM for cancellation, when it expires". The final extension was till 30.11.2017 [see page 946]. However, on 27.11.2017, the respondent called on the full amount under the Warranty Guarantee. The appellant claimed that the respondent rushed to make this call in which case, the call was invalid.

[80] Having considered the full circumstances and the terms of the guarantee against the Khauzak Main Contract, we agree with the submissions of the appellant. The extensions of the Warranty Guarantee were obtained under threat, and the call was made just shortly before the guarantee expired without the respondent first calculating the amount due. As was pronounced in ***Kejuruteraan Bintai Kindenko*** [paragraph 98, pages 474]; *Bauer (Malaysia) Sdn Bhd v. Hundred Vision Construction Sdn Bhd* @ paragraph 52; and Court of Appeal decision in *Maxwell Accent JV Sdn Bhd v. Kuala Lumpur Aviation Fuelling System [2017] 1 LNS 990*; [2019] MLJU 254, reversing decision of the High Court, such call under such conditions raises strong questions of unconscionability on the respondent's part which ought to have weighed with the learned judge in favouring an exercise of discretion granting an interim injunction restraining the call pending final determination at the arbitration.

[81] The above are more than satisfactory reasons for the intervention by this Court to allow this appeal. In any event, we found even more compelling reasons, again meeting the applicable tests.

[82] We note that the simultaneous calls on all three guarantees were made on a date when and where the parties were still meeting at the appellant's office in Kuala Lumpur, ironing out details on the completion of works, the minutes of which are at page 508 CBD, and under conditions that did not suggest any breakdown or apprehension. The parties had met at least thrice for this purpose, on 8th, 11th and 13th of November. Evidence of the discussions held at these meetings are to be found at pages 455 and 456 of CBD. At none of those meetings nor in the correspondence exchanged was there any intimation that the calls would be made; that the respondent was dissatisfied with works under both the underlying contracts; that relationship between the parties had broken down and that disputes had arisen between the parties.

[83] We further understand that although the calls were made on 27.11.2017, the appellant did not know till 4.12.2017. During the intervening period, much had been exchanged between the parties with the appellant apparently blissfully unaware of the calls.

[84] The two underlying contracts are completely unrelated, made at different times and for different purposes and this is a material fact which was not considered by the learned judge; quite aside from the different nature and purpose of the three guarantees themselves. There were different start times and schedules with both contracts being substantially if not entirely completed. In the case of the Gissar Main Contract, the respondent had forwarded the appellant a draft "Mechanical Completion Certificate" for the appellant's comments vide its letter dated 11.11.2017 whilst in the case of the Khauzak Main Contract, the works had already been completed, commissioned and put into operation on 14.3.2015 as evidenced by a "Preliminary Acceptance Protocol" dated 14.3.2015 which was mentioned earlier and which was issued by the respondent to the appellant. We note that this Protocol is issued when the guarantee test has been successfully completed and the Facilities and Equipment operate in accordance with the guarantee indicators as per clause 8.3.4 of the Khauzak Main Contract.

[85] With respect, we cannot agree with the submissions of the respondent that the circumstances and conditions when the calls were made were really contractual disputes for determination at arbitration and which do not impact or colour the call. Contrary to the respondent's position, we are firmly of the view that whether taking each of the three guarantees on their own or collectively, it is plain that the high threshold as laid down in ***Sumatec*** has been met by the appellant and a strong *prima facie* case of unconscionable call on the guarantees has been established by the appellant. We unanimously agree that the learned judge had not exercised discretion correctly on the facts and on the law when refusing to grant the interim injunction on the terms sought by the appellant. The balance of convenience leans in granting a restraining order on all three calls so that the validity of the calls may be finally determined at the arbitration. Such a restraining order will in our regard, surely aid, support and facilitate the arbitration of the substantive dispute that started before the High Court in the first place.

[86] Accordingly, we allow the appeal and set aside the decision of the High Court with costs. We further grant prayer (2) as appearing in the Originating Summons at page 35 of the record of appeal.

Dated: 21 JANUARY 2020

(MARY LIM THIAM SUAN)
Judge
Court of Appeal Malaysia

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