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Easier Now to Restrain a Call on a Bank Guarantee

It is settled law that an unconditional “on-demand” performance bond or bank guarantee (“Guarantee”) is independent of any underlying contract between the parties. It is not open to the court to impart into the Guarantee a requirement to have regard to, or to inquire into, any breach of any obligation of such underlying contract.¹

An injunction will not be granted against a bank to restrain it from paying the beneficiary, pursuant to a Guarantee, upon a valid written demand.²

However, an injunction to restrain the beneficiary from making a call on or receiving payment under a Guarantee may be obtained if one succeeds in establishing fraud.³ Two recent decisions of the Malaysian Court of Appeal have expanded the exception to include “unconscionability” on the part of the beneficiary in making a demand on a Guarantee as a ground for the court to intervene.⁴

Although the Court of Appeal has not defined “unconscionability”, it said that to establish “unconscionability” there must be placed before the court manifest or strong evidence of the alleged unconscionable conduct, and not merely a bare assertion. This means the person seeking to injunct the beneficiary must establish a prima facie case of lack of *bona fides*.

Examples of “unconscionability” may include, but are not limited to, the following:

- (a) Where an unfair advantage has been gained by an unconscientious use of power by a stronger party against a weaker one;⁵
- (b) Unfairness, as distinct from dishonesty or fraud, or conduct so reprehensible or lacking in good faith that a court of conscience would either restrain the party or refuse to assist the party;⁶
- (c) An act which is not consistent with equity or good conscience;⁷
- (d) Where the beneficiary made a call based on a breach induced by their own default.⁸

These decisions of the Court of Appeal are a welcome development of the law. Relief can now be obtained on a wider basis as opposed to the high standard of proof that is required to establish fraud.

¹ *Eso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149; [1995] 1 CLJ 283; [1995] 1 AMR 189 (SC)

² *Ibid*

³ *Ibid*

⁴ *Malaysian Refining Company Sdn Bhd v Sumatec Engineering and Construction Sdn Bhd* [2011] 7 CLJ 21 (CA); *Kejuruteraan Bintai Kindenko Sdn Bhd v Nam Fatt Construction Sdn Bhd & Anor* [2011] 7 CLJ 442 (CA) (pending appeal to the Federal Court)

⁵ *Lloyds Bank Ltd v Bundy* [1975] QB 326 (CA)

⁶ *Min Thai Holdings Pte Ltd v Sunlabel Pte Ltd & Anor* [1999] 2 SLR 368

⁷ *Commercial Bank of Australia Ltd v Amadio and Another* (1983) 46 ALR 402

⁸ *Kvaerner Singapore Pte Ltd v UDL Shipbuilding (Singapore) Pte Ltd* [1993] 3 SLR 350

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