

Contract Law

Performance bond – Grounds of fraud and unconscionability – Clause limiting grounds to restrain from calling on performance bond – Whether amounts to ouster clause – Whether such clause valid and enforceable – Whether contrary to public policy

CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd and another appeal

[2015] SGCA 24, Court of Appeal, Singapore

Facts The developer, Asplenium, employed the respondent, CKR as the main contractor for the construction of a condominium. The main contract required CKR to furnish an on-demand performance bond in Asplenium's favour for 10% of the contract. According to clause 3.5.8 ("the clause"), CKR was not entitled to restrain Asplenium from calling on the performance bond except in case of fraud, including the ground of unconscionability. When disagreements arose, Asplenium terminated the main contract and made a call on the performance bond for the full sum secured. CKR applied and obtained an injunction restraining Asplenium from receiving such payment. The High Court held that the clause was unenforceable as it ousted the jurisdiction of the court. However, it was held that the high threshold necessary to invoke a restraint on the ground of unconscionability was not satisfied. CKR's application to restrain Asplenium's call was, therefore, dismissed. CKR appealed against that ruling. Asplenium, on the other hand, cross-appealed against the decision that the clause was unenforceable.

Issues The issue before the Court of Appeal was whether the clause is in fact an ouster clause, and hence, void and unenforceable as being contrary to public policy.

Held It was held by the Court of Appeal that the clause is not an ouster clause. It did not oust the jurisdiction of the court, but instead is more of an exclusion clause, as it merely seeks to restrict the right of the obligor to apply for an injunction to restrain the beneficiary from calling on that bond. Thus the clause merely seeks to limit the right to an equitable remedy, as opposed to one that ousts the jurisdiction of the court.