Precise Development Pte Ltd v Holcim (Singapore) Pte Ltd
[2009] SGHC 256

Case Number : Suit 424/2008

Decision Date : 17 November 2009

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Tan Liam Beng, Tan Kon Yeng Eugene and Soh Chun York (Drew & Napier LLC) for the plaintiff; N Sreenivasan and Shankar s/o Angammah Sevasamy (Straits Law Practice LLC) for the defendant

Parties : Precise Development Pte Ltd — Holcim (Singapore) Pte Ltd

Contract

17 November 2009 Judgment reserved.

Lai Siu Chiu J:

1 This dispute arose out of a contract for the supply of ready-mixed concrete by Holcim (Singapore) Pte Ltd ("the defendant") to Precise Development Pte Ltd ("the plaintiff"). The plaintiff is a construction company while the defendant is a manufacturer and supplier of concrete to the construction industry.

The facts

2 By a Contract dated 10 November 2006 ("the Contract"), the plaintiff engaged the defendant to supply ready-mixed concrete ("concrete") for a warehouse project located at No. 24 Penjuru Road" ("the project").

3 The Contract required the defendant to supply 90,000 cubic metres (+/- 15%) of concrete to the plaintiff for the project. Amongst the grades of concrete included in the Contract was Grade 30 for which the defendant quoted a price of $65 per cubic metre. The Contract contained the following salient terms:

> Clause 3
>
> The Purchaser must provide sufficient advance notice in confirming each order. The Supplier shall be under no obligation to supply the concrete if the said supply has been disrupted by virtue of inclement weather, strikes, labour disputes, machinery breakdowns, riots, and shortage of material, Acts of God or any other factors arising through circumstances beyond the control of the Supplier.
>
> Clause 10
>
> The Supplier reserves the right to terminate the Contract giving one month's written notice to the Purchaser stating the reasons for the termination.

4 In January 2007, the Indonesian Government suddenly announced a ban on the export of sand ("the sand ban"), which was to take effect on 6 February 2007. On 26 January 2007, the defendant

sent a letter informing the plaintiff of the sand ban. In that letter, the defendant informed the plaintiff that the supply of sand to Singapore for concrete manufacturers was reliant solely on sand imports from Indonesia and that the sand ban would lead to a scarcity of materials. The defendant also cautioned the plaintiff that it might not be able to supply concrete should it run out of sand. However, the defendant also indicated that it was meeting the Building & Construction Authority ("BCA") to discuss alternative options and that it would update the plaintiff on developments thereto.

5 On 1 February 2007, the defendant sent a letter to the plaintiff informing the latter that it was unable to supply concrete based on the prices in the Contract because of a shortage of sand caused by the sand ban. The defendant informed the plaintiff that the BCA would be releasing sand from the national strategic stockpile and sand would be available with effect from 1 February 2007. Attached to the letter was a quotation ("the 1 February quotation") which the defendant required the plaintiff to sign. The prices of concrete stated in the 1st February quotation were about 30% to 50% higher than those in the Contract. In particular, the quoted price for Grade 30 concrete was $90 per cubic metres, an increase of $25 on the Contract price.

6 The plaintiff refused to sign the 1 February quotation. In a letter to the defendant dated 5 February 2007, the plaintiff took the view that clause 3 of the Contract only released the defendant from its contractual obligations if the supply of materials was disrupted by circumstances beyond the defendant's control. The plaintiff asserted that there was no disruption of sand supply within the meaning of clause 3 because BCA would be releasing the government's stockpile of sand from 1 February 2007 onwards.

7 On 26 February 2007, the defendant sent another letter to the plaintiff to say that the supply of aggregates to Singapore had been stopped by the Indonesian navy. It cautioned the plaintiff that its aggregates supply was limited and that it may not be able to supply concrete to the plaintiff.

8 On 1 March 2007, the defendant sent yet another letter to the plaintiff. In this letter, the defendant informed the plaintiff that the supply of sand and aggregates from Indonesia had ceased entirely and BCA had imposed a price of $60 per ton for sand and $70 per ton for aggregates. Attached to the letter was a quotation ("the 1 March quotation") which the defendant required the plaintiff to sign. The prices stated in the 1 March quotation were about 200% higher than those in the Contract. In particular, the quoted price for Grade 30 concrete was $185 per cubic metres, an increase of $123 on the Contract price. The defendant also indicated to the plaintiff that if the plaintiff was able to obtain sand and aggregates, it would credit back to the plaintiff the value of the sand and aggregates at $63 and $73 per ton respectively.

9 On 19 March 2007, a meeting was arranged between the plaintiff's and defendant's representatives. The meeting was attended by

(a) Ong Yan Wah ("Ong" known as Oliver) a representative of the employer that had awarded the plaintiff the project;

(b) Peh Soon Li, the plaintiff's project manager;

(c) Oh Beng Hwa, the plaintiff's project director;

(d) Soh Kee Yong ("Soh") the defendant's marketing manager; and

(e) Leong Chee Chow, one of the defendant's employees.

10 It is common ground that the subject matter of the 19 March meeting ("the meeting") was to resolve the dispute between the defendant and the plaintiff. However, the plaintiff and the defendant disagreed on what transpired at the meeting.

11 According to the plaintiff, it had proposed supplying manufactured sand and aggregates to the defendant at pre-sand ban prices and in exchange the defendant would supply concrete to the plaintiff at the Contract prices. There was no agreement reached at the meeting because the defendant's representatives had to discuss the proposal with its head office.

12 The defendant claimed on the other hand that the parties concluded a new agreement at the meeting, the terms of which were encapsulated in a quotation it sent to the plaintiff on 2 April 2007. What transpired at the meeting is of crucial importance to this case and needs to be closely examined. I will do so at a later stage of this judgment.

13 The discussions that had taken place at the meeting were soon overshadowed by a series of letters between the parties that seemed to be at cross purposes.

14 To elaborate, the plaintiff wrote to the defendant on 20 March 2007 in reply to the defendant's letter of 1 March 2007. In the letter, the plaintiff informed the defendant that it disagreed that the latter was entitled to revise the prices of concrete as set out in the Contract. However, the plaintiff also indicated that due to its urgent needs, it would be willing to pay the revised prices (based on the 1 March quotation) without prejudice to its rights under the Contract.

15 On 2 April 2007, the defendant sent another quotation ("the 2 April quotation") to the plaintiff. This quotation was different from the 1 March quotation which the plaintiff had indicated that it was willing to pay (albeit under protest) in its letter dated 20 March 2007. Here, the defendant quoted a price of $55 per cubic metre for Grade 30 concrete, which was lower than that in the Contract. This price however came with a catch: the defendant required the plaintiff to supply sand and aggregates to the former without charge.

16 Not unexpectedly, the plaintiff did not (totally) accept the 2 April quotation. Instead, it sent another letter to the defendant on 9 April 2007 wherein the plaintiff indicated that it would be willing to accept the 2 April quotation with additional terms. The terms were that the defendant was required to purchase aggregates from the plaintiff at $50 per ton for a minimum period of 6 months at approximately 15,000 tons per month. Further, the plaintiff reserved to itself the right to set up its own concrete mixing facilities or to obtain concrete from other sources. In other words, the plaintiff wanted the right but not the obligation, to purchase concrete from the defendant at the prices stated in the 2 April quotation.

17 The defendant did not agree to the plaintiff's proposal of 9 April 2007. Finally, on 26 April 2007, the plaintiff issued an ultimatum to the defendant. In this ultimatum, the plaintiff indicated that it

would supply sand and aggregates to the defendant at pre-sand ban prices so that the defendant could manufacture and supply concrete to the plaintiff at the Contract prices (without prejudice to its rights). It also stated that if the defendant did not accept this proposal, the plaintiff would claim all damages from the defendant.

18 The defendant rejected the plaintiff's ultimatum on the same day it was sent. The defendant reiterated its position that it was not required to supply concrete to the plaintiff because the sand ban amounted to an abnormal situation that was covered by clause 3, and that any new proposals would be subject to mutual agreement.

19 The defendant's stand ended all negotiations between the parties and the plaintiff commenced this suit on 19 June 2008.

The pleadings

20 The plaintiff's case was that the defendant had breached the Contract by evincing an intention not to supply concrete at the prices stipulated in the Contract. The plaintiff asserted it had accepted this repudiation when its ultimatum of 26 April 2007 at [17] was rejected by the defendant.

21 The defendant on its part raised three defences to deny liability. First, the defendant claimed that its obligation to supply concrete at the prices stipulated in the Contract was discharged under clause 3 of the Contract when the sand ban disrupted its supply of raw materials. Second, the defendant claimed that the Contract had been discharged by mutual agreement at the meeting. Third, the defendant claimed that clause 10 of the Contract allowed it to terminate the Contract upon giving one month's written notice and it had given such notice by its letter to the plaintiff dated 1 February 2007

The issues

22 Accordingly, the court was required to determine these issues:

(a) Did clause 3 of the Contract discharge the defendant from its obligation to supply concrete to the plaintiff?

(b) Did the parties reach an agreement on 19 March 2007 to mutually discharge the Contract?

(c) Did the defendant effectively exercise its right to terminate the Contract under clause 10 of the Contract?

Did clause 3 of the Contract discharge the defendant from its obligation to supply concrete?

23 The determination of this issue requires the court to interpret clause 3; it states:

> The Purchaser must provide sufficient advance notice in confirming each order. The Supplier shall be under no obligation to supply the concrete if the said supply has been disrupted by virtue of inclement weather, strikes, labour disputes, machinery breakdowns, riots, and shortage of material, Acts of God or any other factors arising through circumstances beyond the control of the Supplier.

24 At law, clause 3 is commonly referred to as a force majeure clause. The purpose of a force majeure clause is to suspend or discharge the contractual obligations of one or more parties to a contract, upon the occurrence of a stipulated event. In many instances, the events that trigger off a force majeure clause are similar to those that would also attract the operation of the common law doctrine of frustration. However, it is important to note that frustration and force majeure are two conceptually different doctrines. Frustration applies by operation of law when the law deems that a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract (see [27] of *Glahe International Expo AG v ACS Computer Ltd* [1999] 2 SLR 620 quoting Lord Radcliffe in *Davis Contractors Ltd v Fareham Urban District Council* [1956] A.C. 696 at 729).

25 In contrast, a force majeure clause derives its force solely from the intention of the contracting parties, and the relief it provides is available regardless of whether the triggering event would have been sufficient to frustrate the contract. Furthermore, in so far as frustration tends to have the effect of discharging the contract altogether and releasing the parties from all their contractual obligations, the force majeure clause may provide for a different kind of relief such as suspension of the obligations, extension of time for performance, or some other variation to the contract. The ambit and effect of every force majeure clause differs from case to case, and must be determined by construing the words used within the clause, as well as by looking at the contract as a whole. (see *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR 413 ["*RDC Concrete*"] at [56-58]).

26 In the present case, the defendant can only rely on clause 3 if two conditions are met;

(a) the defendant's ability to supply concrete had been disrupted by any of the events mentioned in clause 3; and

(b) the event arose through circumstances beyond the defendant's control.

27 It is common ground that the Indonesian sand ban in January 2007 was an event that arose through circumstances that were beyond the defendant's control. What the parties disagreed on was whether the sand ban caused a shortage of materials that disrupted the defendant's ability to supply concrete.

28 The parties' submissions focused mainly on whether there was a shortage of sand. The defendant's main argument was that the main supply of sand to Singapore emanated from Indonesia, and the sand ban clearly caused a shortage of sand in so far as it forced even the BCA to release its sand stockpile through a rationing scheme. It referred to this court's earlier decision in *Holcim (Singapore) Pte Ltd v Kwan Yong Construction Pte Ltd* [2008] SGHC 231 ["*Kwan Yong*"] at [77] (which was upheld on appeal) to support its argument. On its part, the plaintiff argued that there was no shortage of sand precisely because the BCA started releasing sand from its stockpile for the

production of concrete after the sand ban came into effect.

29 While the determination of whether there was a shortage of sand is important, the key issue turns on how the word "disrupt" should be interpreted. Under clause 3, a disruption of the defendant's ability to supply concrete was the general difficulty that was provided for. A shortage of materials (including sand) was merely a particular illustration of how the general difficulty may arise. Further, the list of events that was capable of causing a disruption in the defendant's ability to supply concrete is really open-ended since it includes a catch-all phrase "every other factor." Hence, the focus of clause 3 should be on whether there was a disruption of the defendant's ability to supply concrete that was caused by any event not within its control.

30 Undoubtedly, the sand ban created a shortage of sand not only for the defendant but for every manufacturer of concrete in Singapore. However, the fact that there was a *general* shortage of sand did not necessarily mean that the shortage had the effect of disrupting the defendant's own ability to supply concrete to the plaintiff under the Contract. Clause 3 would only operate if the defendant's ability to supply concrete to the plaintiff had been disrupted by the general shortage of sand.

31 The word "disrupt" in clause 3 is capable of covering a wide variety of situations. At its broadest, it can be construed to cover even an event such as a minor breakdown in the defendant's manufacturing facilities even though this would not prevent the defendant from continuing to supply concrete to the plaintiff if it was so inclined. On the other hand, it is also possible to construe the word narrowly such that it operates only when the disruption is such that it is impossible for the defendant to supply concrete to the plaintiff.

32 One possible way to determine the meaning of "disrupt" in clause 3 is to look at the intentions of the parties when they entered into the Contract. In *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 ["*Zurich Insurance*"], the Court of Appeal held that the purpose of contractual interpretation is to ascertain and give effect to the intentions of the parties. Although this is primarily an objective exercise, the court can also consider extrinsic evidence that may shed light on what the parties intended at the time they entered into the contract. Needless to say, the extent to which this approach can be used depends greatly on the availability of evidence to ascertain the parties' intentions.

33 Here, I did not think that it was possible to fully employ the contextual approach to the interpretation of the word "disrupt" in clause 3. The Contract between the parties was based on the defendant's standard form contracts and clause 3 itself was a standard boilerplate clause. As such, it was highly unlikely that the plaintiff would have addressed its mind to the question of the ambit of the word "disrupt", let alone share a common intention with the defendant as to how it should be interpreted. Further, the parties did not adduce any evidence nor did they make any submissions, on how the parties may have intended clause 3 to be interpreted. It would be an artificial exercise for the court to attribute to the parties an intention that never existed.

34 Accordingly, I would interpret the word "disrupt" by reference to its ordinary meaning, as well as by considering the need to achieve a commercially viable and reasonable result. In this regard, I would also refer to past precedents dealing with similar force majeure clauses, in so far as they are relevant.

35 In my opinion, the phrase "disrupting supply" must be distinguished from other common triggering phrases such as "preventing supply" or "making supply impossible". The latter two phrases are more absolute because they suggest that the impediment must be something that cannot be overcome before the force majeure clause can be successfully invoked. Hence, "disrupt" has to be

interpreted at a threshold that is lower than an absolute impediment. At the same time, commercial sense dictates that the alleged impediment must reach a certain threshold before it can qualify as a "disruption" within the meaning of clause 3. One can easily think of situations such as a temporary breakdown in machinery, or a delay in the supply of materials, which may plausibly be regarded as "disruptions" in every sense of the word. It does not make commercial sense to say that any disruption, regardless of how minor or inconsequential it is, is sufficient to trigger the force majeure clause.

36 In *Tennants (Lancashire), Limited v. C. S. Wilson and Company, Limited* [1917] A.C. 495 ["*Tennants*"], the House of Lords was faced with the question of the interpretation of a force majeure clause that read as follows:

> Deliveries may be suspended pending any contingencies beyond the control of the sellers or buyers (such as fire, accidents, war, strikes, lock-outs, or the like) causing a short supply of labour, fuel, raw material, or manufactured produce, or otherwise preventing or hindering the manufacture or delivery of the article.

37 The House of Lords held that the word "hinder" had to be given its ordinary meaning to connote a lower threshold than the word "prevent'. Lord Dunedin accepted Neville J's interpretation of the word "hinder" to mean "affecting to an appreciable extent the ease of the usual way of supplying the article" (at 514). Similarly, Earl Loreburn said (at 510):

> By 'hindering' delivery is meant interposing obstacles which it would be really difficult to overcome

38 Finally, Lord Atkinson held (at 518) that:

> "Preventing" delivery means, in my view, rendering delivery impossible; and "hindering" delivery means something less than this, namely, rendering delivery more or less difficult, but not impossible

3 9 *Tennants* has been followed by subsequent English cases such as *Peter Dixon & Sons, Limited v. Henderson, Craig & Co., Limited* [1919] 2 K.B. 778 and *Westfalische Central - Gennossenschaft v Seabright Chemicals Ltd*, (Unreported) 22 July 1980 ["*Westfalische Central*"].

40 In *Westfalische Central*, the English Court of Appeal found the House of Lords' interpretation of the word "hinder" in *Tennants* to have "compelling force", and applied it to the force majeure clause in that case. The Court of Appeal justified its decision to set a minimal threshold before the clause could be evoked Lawton LJ held:

> In my judgment, the hindering of deliveries does not come about merely because there is a difficulty. It only comes about if the difficulty is of such a nature as to be really difficult to overcome. In both industry and commerce difficulties in the performance of contracts constantly arise, and it is only if, to follow what Lord Loreburn said, the difficulty is of such a nature as to be likely to dislocate the running of a business that there has been "hindering" under this type of clause.

41 Apart from the setting of a minimal threshold, the English cases also establish conclusively that a rise in price will rarely be sufficient to trigger a force majeure clause. In *Tennants*, Lord Shaw held (at p 521) that "a mere fluctuation of price would not constitute such a hindrance." This was echoed by Bankes LJ in *Peter Dixon* (at p 786) who opined that one of the rules of construction laid down in

Tennants was that "a rise in price would not in itself constitute a hindrance to delivery within the meaning of such a contract as this." The underlying reason for this seems to be that one of the purposes of entering into a fixed price contract is for the purchaser to hedge against the risk of an increase in the price of raw materials, and it would be commercially nonsensical to allow the supplier to suspend his obligation for the very same reason.

42 The reasoning used in the English cases with regard to the definition of the word "hinder" in a force majeure clause is logical and persuasive. I am of the view that it would be equally applicable to the word "disrupt" in clause 3. Accordingly, I hold that there will be a "disruption" within the meaning of clause 3 only when an event occurred that made it difficult for the defendant to supply concrete to the plaintiff but it excluded a rise in the price of the raw materials used by the defendant to produce concrete.

Was the defendant's ability to supply concrete to the plaintiff disrupted by the sand ban?

43 Shortly after the sand ban was announced, the BCA set up a mechanism to release sand from its own strategic stockpile to all projects that required it. This included sand for the manufacture of concrete.

44 According to the testimony of Ng Cher Cheng ('Ng"), BCA's Deputy Director of its Procurement Policy Department, the mechanism set up by BCA was as follows:

(a) Only main contractors (such as the plaintiff) were allowed to apply for sand from the BCA stockpile.

(b) Concrete manufacturers and suppliers were not entitled to apply for BCA sand.

(c) Any main contractor who wanted to apply for sand from the BCA stockpile was require to complete and submit to the BCA the sand requisition form. Upon approval, the main contractor could then make arrangements with BCA to collect the sand.

(d) If the main contractor required sand for concrete, it could deliver the sand it had obtained from the BCA direct to the concrete manufacturer. Alternatively, it was also possible for the main contractor to assign its sand allotment (obtained from the BCA) to the concrete manufacturer, who would then collect the sand from BCA personally.

(e) The price at which BCA's sand was sold to contractors in February 2007 and March 2007 was $25 per ton and $60 per ton respectively.

45 There is little doubt that both parties were aware that the plaintiff could have obtained sand from the BCA stockpile under the above mentioned mechanism. BCA had held a meeting with members of the construction industry to brief them on the effects of the sand ban as well as the method by which they could obtain sand from the BCA stockpile. The Chief Executive Officer of the defendant, Dr Sugit Ghosh ("Ghosh") was present at the meeting. Ghosh also admitted in paragraph 10(b) of his AEIC that he was aware of the procedure that had to be complied with in order to obtain sand from the BCA stockpile. He said:

> The BCA would only release sand to contractors but not to RMC suppliers such as the Defendant. It was for the contractors to inform the BCA of the amount of sand that the contractors required for their existing projects, and to then arrange for the delivery of such sand to the project sites. Accordingly, RMC suppliers could only obtain sand from the contractors if they were involved in the particular project.

46 The evidence of Ng and Ghosh clearly showed that there was a general shortage of sand in Singapore that had the potential to disrupt the defendant's ability to manufacture and supply concrete to its customers. However, notwithstanding this fact, the question of whether the sand shortage disrupted the defendant's ability to manufacture and supply concrete to any particular customer would depend on the extent to which the defendant and its customers could work together to obtain sand from the BCA for a particular project.

47 Accordingly, the key question to ask is this: did the plaintiff make reasonable efforts to help the defendant apply for sand from the BCA stockpile? If the plaintiff had done so, the defendant would not be able to rely on clause 3 because the availability of the BCA sand would mean that the general sand shortage did not affect the defendant's ability to manufacture and supply concrete to the plaintiff. On the other hand, if the plaintiff had refused to help the defendant apply for sand from the BCA stockpile, the defendant would be able to rely on clause 3 because the general sand shortage had disrupted its ability to supply sand to the plaintiff. The burden was on the defendant to prove that clause 3 applied (see *RDC Concrete* supra [25] at [64-65]).

48 The case of *Kwan Yong* fell squarely within the second situation mentioned above. The dispute in that case was similarly over a contract for the supply of concrete between the plaintiff manufacturer and the defendant buyer. In that case, the defendant buyer had refused to assist the plaintiff supplier to apply to the BCA for sand, and the plaintiff was unable to find alternative sources of sand for the manufacture of concrete. It was for that reason that this court found that the contract had been frustrated due to a shortage of sand for the manufacture of concrete.

49 The facts of the present case however are entirely different from those in *Kwan Yong*. Looking at the chain of letters between the parties, I was convinced that the defendant took no steps to request the plaintiff to apply for BCA sand. On 5 February 2007, the plaintiff had written to the defendant indicating its position that there was no disruption of supply within the meaning of clause 3 because of the availability of sand from the BCA stockpile. The plaintiff was well aware that BCA sand could only be obtained if it applied personally for it. Hence, the very fact that it reminded the defendant of this possibility indicated that it was willing to help the defendant to procure the sand.

50 In its closing submissions, the defendant claimed that it had made an offer to the plaintiff on 1 March 2007 indicating that it would credit back to the plaintiff the cost of any sand and aggregates that the plaintiff was able to provide at $63 per ton and $73 per ton respectively. The gist of the defendant's argument seemed to be that the plaintiff's rejection of its offer showed that the plaintiff was unwilling to help the defendant apply for BCA sand for the manufacture of concrete.

51 I reject the defendant's argument. The defendant's offer of crediting back the cost of any sand and aggregates provided by the plaintiff was premised on the assumption that the plaintiff would obtain the supplies from the BCA, since its offer price of $63 and $73 tracked the BCA price ($60 and $70 respectively excluding the cost of delivery). Had this been a standalone offer which the plaintiff rejected, I would have regarded it as strong evidence that the plaintiff was unwilling to help the defendant apply for sand from the BCA stockpile. However, the defendant's offer had a catch – it included a rise of almost 200% in the price of concrete as compared to the prices stated in the

Contract.

52 The defendant had no right to impose higher prices of concrete on the plaintiff. The common thread that ran through the cases cited earlier is that a rise in the price of raw materials is not sufficient to trigger a force majeure clause like clause 3. If the plaintiff was willing to assist the defendant by applying for BCA sand (where the defendant pays for the BCA sand), the defendant was obliged to accept the sand and perform the Contract without imposing further conditions. Failure to do so would mean that the defendant could not bring itself within the ambit of clause 3, since that meant that its inability to supply concrete to the plaintiff was self-induced. It was caused by the defendant's own wilful refusal to accept sand from an alternative source.

53 In any case, the plaintiff had written to the defendant on 26 April 2007 offering to supply the latter with sand and aggregates at pre-sand ban prices in return for the defendant's supply of concrete at the Contract price(s). This was a reasonable and fair offer because it required the plaintiff to absorb the entire rise in the prices of sand and aggregates. There was no reason for the defendant to reject this offer. Having rejected this offer, it did not lie in the mouth of the defendant to claim that the shortage of sand was an event outside its control that disrupted its ability to supply concrete to the plaintiff.

54 Accordingly, I find that clause 3 of the Contract did not discharge the Defendant from its obligation to supply concrete to the plaintiff.

Did the parties reach an agreement at the meeting to discharge the Contract?

55 A stated earlier (at [10]), the plaintiff and the defendant disagreed on what transpired on 19 March 2007.

56 According to the plaintiff, it had proposed supplying manufactured sand and aggregates to the defendant at pre-sand ban prices, while the defendant would supply concrete to the plaintiff at the Contract price(s). There was no agreement reached because the defendant's representatives had to revert to its head office to discuss the proposal.

57 The defendant however claimed that the parties had concluded a new agreement during that meeting, the terms of which were contained in a quotation it sent to the plaintiff on 2 April 2007. Under the agreement, the defendant would supply concrete to the plaintiff at $55 per cubic metre for Grade 30, which was a price lower than that in the Contract. The sand and aggregates that had to be used for the manufacture of the concrete would be supplied by the plaintiff without charge. In return, the defendant would purchase 15,000 tons of aggregates per month from the plaintiff at $50 per ton. This would allow the plaintiff to make a profit since the plaintiff was able to procure the aggregates at a cheaper price. Essentially, the defendant would make some profit by selling concrete to the plaintiff (without having to incur the cost of sand and aggregates) while the plaintiff would gain by selling aggregates to the defendant.

58 Having reviewed the evidence carefully, I find that the parties did not come to an agreement on the 19 March 2007 to discharge the Contract. I shall elaborate on my findings.

59 First, the subsequent correspondence between the parties was inconsistent with the existence of any agreement that was allegedly concluded by the parties that day.

60 On 20 March 2007, a day after the meeting, the plaintiff wrote to the defendant insisting that the defendant had to honour the Contract. If there was indeed an agreement reached a day earlier to

discharge the contract, there would be no reason for the plaintiff to take a contrary stance a day later.

61 Further, the letters written by the defendant after 19 March 2007 did not make any mention of the alleged agreement. The quotation sent by the defendant on 2 April 2007 merely stated that the defendant would supply the concrete to the plaintiff if the latter would supply the sand and aggregates. It made no mention of any agreement reached on 19 March 2007, neither did it include the terms of that alleged agreement (that the defendant would purchase aggregates from the plaintiff for its other projects). Additionally, some of the terms in the 2 April 2007 quotation were inconsistent with any agreement being reached between the parties on 19 March 2007. For example, clause 3 of the 2 April 2007 quotation allowed the defendant to revise the concrete prices unilaterally. It beggars belief that the plaintiff would have agreed to such a term on 19 March 2007.

62 In the defendant's letter dated 26 April 2007 in reply to the plaintiff's ultimatum, the defendant made no mention of the 19 March 2007 agreement. All that the defendant did was to re-state its position that it was discharged from its obligation to supply concrete due to the sand ban. Further, it stated at clause 4 that "Any new proposals will be subject to mutual agreement." The entire chain of correspondence was inconsistent with there being an agreement reached on 19 March 2007.

63 Second, the testimonies of the witnesses for both parties tended to suggest that no agreement was reached by the parties on 19 March 2007. The plaintiff's representatives at the meeting *viz* Peh Soon Li and Oh Beng Hwa, testified to the effect that no agreement was reached between the parties at the meeting of 19 March 2007 because the defendant's representatives had no power to commit the defendant to any deal. This was corroborated by Ong the representative (see [9] above) of the plaintiff's employer. Ong had deposed in his AEIC that

> 11. During that meeting, there were several proposals raised. I cannot remember exactly what was discussed. I recall that the gist of the discussion was for the Plaintiff to supply sand and aggregate to the Defendant. In return, the Defendant would stick with the Contract prices.
>
> 1 2 . *There was no agreement reached between the Plaintiff and Defendant at this meeting*. I am sure of that because I recall that both parties appeared to be talking in circles during the meeting despite my efforts to get both parties to reach some form of consensus. My concern was to get the Project going without the Employer having to fork out extra monies.
>
> (emphasis mine)

64 During cross-examination, it transpired that the contract between Ong's company and the plaintiff did not make provision for any price increases even if the plaintiff incurred an increase in the price of concrete.

65 Counsel for the defendant sought to downplay the importance of Ong's testimony by emphasizing that Ong could not remember the proposals discussed at the meeting. However, I was of the view that Ong was an independent third party. To Ong, it was not important how the plaintiff and the defendant resolved their dispute. What mattered most to him was that there was an agreement that allowed the plaintiff to carry on working on the project. Hence, it was only for Ong to focus his attention on whether an agreement was reached rather than on the substantive terms of the agreement between the parties. Accordingly, I gave due weight to Ong's testimony that no agreement was reached on the 19 March 2007.

66 The testimonies of the defendant's witnesses also militated against a finding that an agreement was reached on 19 March 2007. Soh (see [9]) had stated in his AEIC

> 33. Leong Chee Chow and myself met Oliver [Ong] and Oh Beng Hwa, Peh Soon Li and Peh Chong Eng at Macdonald's on 19th March 2007. At the meeting, Oliver requested that the Plaintiff supply sand and aggregate for free to the Defendant with the Defendant reducing the rate of RMC to $55/m3. The Defendant would also buy aggregate at $50/m3 from the Plaintiff for its other customers. All parties agreed to this proposal.
>
> 34. I was keen on it and told Oliver that *I would have to get the approval of Dr Ghosh and the management*.
>
> 35. Dr Ghosh was agreeable to the suggestion and this was told to Oliver.
>
> (emphasis mine)

67 Soh's lack of authority to enter into an agreement with the plaintiff was bolstered by the testimony of his superior Ghosh. According to Ghosh in his AEIC:

> 23. Soh Kee Yong and Leong Chee Chow met Oliver, Oh Beng Hwa , Peh Soon Li and Peh Chong Eng. Soh subsequently informed me that *Oliver proposed that the Plaintiff to supply sand and aggregate free to us so that the Defendant could continue the supply of RMC*. In return, the Defendant would supply RMC as a reduced rate of $55/m3. Also the Defendant would buy aggregate from the Plaintiff for supply of RMC to the Defendant's other customers.
>
> 24. This was a reasonable proposal *and I agreed and told Soh Kee Yong to inform Oliver accordingly*.
>
> (emphasis mine)

68 According to the common testimony of Soh and Ghosh, Soh had no power to conclude a new agreement with the plaintiff's representatives without the approval of Ghosh. That being the case, it was not possible for there to have been an agreement concluded between the parties on 19 March 2007. The earliest date when an agreement could be reached would be after that date when Soh had obtained the approval of Ghosh. However, this argument is premised on the plaintiff having made a legally binding offer to the defendant on 19 March 2007, which the latter then accepted after Ghosh gave his approval. I did not consider this alternative possibility because it was not pleaded by either party.

69 Consequently, I find that the parties did not reach an agreement to discharge the Contract on 19 March 2007.

Did the defendant exercise its right to terminate the Contract under clause 10 of the Contract?

70 Clause 10 of the Contract states:

> The Supplier reserves the right to terminate the Contract giving one month's written notice to the Purchaser stating the reasons for the termination.

71 The defendant claimed that its letter dated 1 February 2007 was a letter of termination pursuant to clause 10 of the Contract. It argued that the same was accompanied by a new quotation for the price of concrete and that this was sufficient to indicate to the plaintiff that it was no longer willing to perform the Contract.

72 The plaintiff sought to undermine the defendant's argument in two ways. First, it claimed that the letter of 1 February 2007 was ineffective as a letter of termination because it did not observe the requirement of one month's notice period as required under that clause. Second, the plaintiff pointed out that the defendant had used the phrase "revise our concrete prices" in the letter. In the plaintiff's opinion, this showed that what the defendant was trying to do was to vary, not terminate the Contract under clause 10. Accordingly, the Contract was not terminated by that letter.

Did the defendant's failure to give one month's notice in its letter dated 1 February 2007 render the notice ineffective under clause 10?

73 Many contracts contain clauses entitling one or both parties to bring the contract to an end. Such a termination clause often requires the party seeking to rely on it to do certain things before the termination is accepted as valid.

74 Counsel for the plaintiff sought to advance the view that every failure to observe the *letter* of the termination clause rendered it ineffective. In support of his argument, he cited several cases such as *Afovos Shipping Co. S.A. v. Romano Pagnan and Pietro Pagnan* [1983] 1 W.L.R. 195 ["*Afovos*"] and *Central Provident Fund Board v Ho Bock Kee* [1981] 1 MLJ 162 ["*Ho Bock Kee*"].

75 In my opinion, the cases cited by the plaintiff did not support the broad proposition which its counsel advanced. In *Afovos*, a charterparty contained a termination clause that allowed the shipowner to withdraw the ship failing punctual and regular payment of the hire. The relevant clause read as follows:

> When hire is due and not received the owners, before exercising the option of withdrawing the vessel from the charterparty, will give charterers 48 hours notice, Saturdays, Sundays and holidays excluded and will not withdraw the vessel if the hire is paid within these 48 hours

76 The shipowner purported to give the notice for payment to the charterers before the hire was due. When payment was not made 48 hours after payment was due, the shipowner then sought to terminate the charterparty. The charterers claimed that the shipowner was not entitled to exercise the termination clause because the notice had been given before hire was due and was thus invalid.

77 The House of Lords held that the shipowner's exercise of the termination clause was invalid because notice had not been properly given in accordance with the clause. In their Lordships' view, the shipowner's obligation to give notice after hire was due and not received, was a condition precedent to the exercise of the termination clause itself. Since the shipowner had failed to fulfil the condition precedent, he was not entitled to rely on the termination clause.

78 The House of Lords reached its decision by considering the proper construction of the termination clause, as well as by looking at the policy considerations underlying the contract. Lord Hailsham held that the purpose of making the shipowner give 48 hours notice after hire was due and not received was to give the charterer notice that he was in default. Such a clause was necessary because there could be situations where, although the charterer thinks he has already made payment, there may be technical problems that prevented the shipowner from receiving

payment. If the shipowner was allowed to give notice of payment even before payment was due, it would be impossible for the charterer to know that his payment had somehow been intercepted and that he had to make a new payment in order to preserve the contract. In effect, the entire purpose of making the shipowner give notice would be undermined because the charterer would never know that his payment has been intercepted. Hence, the House of Lords held that the giving of notice after payment was due and not received was a condition precedent to the exercise of the termination clause.

79 In my opinion, the proposition that a party's failure to fulfil a condition precedent to the exercise of a termination clause prevents him from relying on that clause is correct. However, this is entirely different from saying that a party cannot rely on a termination clause unless he follows it to the letter. The law draws a distinction between conditions and non-conditions, and only non compliance with the former attracts the grave consequence of invalidity. In every case, the court must determine whether the particular stipulation that has not been complied with amounts to a condition precedent that renders the exercise of the termination clause invalid.

80 In *Ho Bock Kee* (*supra* [74]), the Court of Appeal held that a stipulation in a termination clause that required the notice of termination to be sent by registered post was a condition of its exercise, and failure to abide by the condition would render its exercise invalid. The Court of Appeal came to this decision on the basis that the method of service served two important purposes. First, it protected the contractor by giving him due warning that the determination procedure had been operated and that he had to take immediate steps to rectify any defects. Second, it was meant to avoid disputes between the parties as to whether the notice was given or received by providing for a mode of service that can be corroborated from an independent and official source. In the light of the importance which the clause placed on the method of service, the Court of Appeal held that it was a condition which could not be deviated from.

81 Here, there are two ways to construe the requirement in clause 10 that one month's notice must be given to the plaintiff before the defendant can terminate the Contract. Under the first interpretation, the defendant's obligation to mention the exact date on which it purports to terminate the Contract (which will be one month after the letter of termination was sent) was a condition precedent to the invocation of clause 10. For example, since the letter of termination was sent on 1 February 2007, the defendant would have to expressly mention that it was giving the plaintiff one month's notice under clause 10, and that the Contract would be terminated on 2 March 2007. A failure to mention the notice period will render the entire letter of termination invalid.

82 Under the second interpretation, a month's notice period is not a condition precedent to the invocation of clause 10; it merely stipulates the effect of the termination letter. Hence, once the defendant has sent the plaintiff a termination letter stating its reasons for termination, the Contract will automatically terminate a month later, without the defendant having to stipulate the exact date of termination.

83 It is clear that the purpose of the one month notice period was to give the plaintiff some time to find alternative supplies of concrete before the Contract was terminated. The purpose can be served by either interpretation of clause 10. In *GYC Financial Planning Pte Ltd and Another v Prudential Assurance Company Singapore (Pte) Ltd* [2006] 2 SLR 865, the Court held that a failure to give the required period of notice in the termination letter did not render it invalid as long as the actual date of termination was longer than the required period. Judith Prakash J held at [26]:

> 26 Before I consider whether there was a valid ground for termination, I must consider whether proper notice of termination was given. In *Goh Kim Hai Edward v Pacific Can Investment Holdings Ltd* [1996] 2 SLR 109, I opined, albeit in a slightly different context, that a termination clause must be precisely observed by a terminating party. [The plaintiff] seems to have interpreted that observation to mean that if a termination clause provides for 14 days' notice of termination to be given, then exactly 14 days' notice must be given and even if the notice in fact given is more than 14 days, the purported termination would be wrongful. I do not agree. A proper construction of a clause like cl 14(c) would be that either party is entitled to terminate the agreement by giving to the other party at least 14 days' notice of termination in writing. That means that if the notice of termination is given more than 14 days before the actual termination occurs, it would be a valid termination. It would also not be necessary for the notice of termination to specify the number of days notice being given as long as the party receiving the notice has 14 or more days' notice that the agreement is to end

84 Similarly, I was not inclined to regard the express stating of one month's notice period as a condition precedent to the invocation of clause 10. In my opinion, a proper construction of clause 10 would be that the defendant was entitled either to:

> (a) terminate the contract by giving one month's written notice to the plaintiff stating the reasons for termination; or
>
> (b) terminate the Contract one month after it had given notice to the plaintiff stating the reasons for termination.

85 Hence, the defendant's failure to mention the one month notice period in its letter on 1 February 2007 would not necessarily render it invalid as a letter of termination. It simply meant that the Contract would be terminated on 2 March 2007 after the expiry of the one month period.

Was the letter of 1 February 2007 a termination letter?

86 I am of the view that the letter of 1 February 2007 could not amount to a notice of termination within the meaning of clause 10 of the Contract.

87 As stated earlier in [83], the purpose of the one month notice period was to give the plaintiff some time to find an alternative supplier before the Contract was terminated. This purpose can only be achieved if the plaintiff knew for certain that the defendant intended to terminate the Contract in a month's time. There was no need for the letter of termination to make express reference to clause 10. What is required is some form of unequivocal communication from the defendant that it intended to terminate the Contract in its entirety so that the plaintiff could start sourcing for alternative supplies of concrete.

88 The requirement of unequivocal communication was not satisfied in this case. The defendant's letter of 1 February 2007 reads:

> We regret that due to the above situation we were unable to supply concrete based on previous quoted prices…
>
> …In light of all the factors mentioned above that is beyond our control, we have no alternative but to revise our concrete prices…

89 The above extracts can be interpreted in two ways. On the one hand, it can be construed to mean that the defendant was exercising its right to terminate the contract under clause 10. On the other hand, it was also possible to construe it as the defendant's exercise of its right to suspend all further sales of concrete to the plaintiff under clause 3. The fact that the defendant proposed a new quotation in the letter does not change my analysis – the new quotation was simply a new contract for the supply of concrete to the plaintiff during the period when clause 3 suspended the defendant's obligations to supply concrete to the plaintiff at the Contract price(s).

90 The defendant's letter of 1 February 2007 put the plaintiff in an invidious position – it did not know whether the defendant was purporting to suspend its sales of concrete under clause 3 or whether the defendant was terminating the Contract under clause 10. This ambiguity frustrated the purpose of clause 10 by making it impossible for the plaintiff to seek alternative suppliers of concrete and was fatal to any claim by the defendant that the letter constituted a notice of termination pursuant to clause 10. Accordingly, I find that the defendant did not exercise its right under clause 10 to terminate the Contract.

Conclusion

91 In the light of my findings, the defendant was in breach of the Contract when it failed to supply concrete to the plaintiff. Consequently, I award interlocutory judgment to the plaintiff as claimed with costs on a standard basis to be taxed unless otherwise agreed. Damages for the plaintiff will be assessed by the Registrar with the costs of such assessment to be reserved to the Registrar.