

Holcim (Singapore) Pte Ltd v Precise Development Pte Ltd and another application
[2011] SGCA 1

Case Number : Civil Appeal No 160 of 2009 and Summons No 697 of 2010
Decision Date : 19 January 2011
Tribunal/Court : Court of Appeal
Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s) : Francis Xavier SC, Mohammed Reza and Low Yi Yang (Rajah & Tann LLP) for the appellant; Tan Liam Beng, Tan Kon Yeng Eugene and Soh Chun York (Drew & Napier LLC) for the respondent.
Parties : Holcim (Singapore) Pte Ltd — Precise Development Pte Ltd

Contract – Interpretation of force majeure clause – Meaning of word “disrupted” – commercial practicability

Contract – Interpretation of force majeure clause – Event beyond the control of affected party – When requirement to take reasonable steps arises

[LawNet Editorial Note: The decision from which this appeal arose is reported at [\[2010\] 1 SLR 1083.](#)]

19 January 2011

Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 This is yet another case in a series of cases arising from the Indonesian sand ban of 2007 (“the Sand Ban”). Not surprisingly, the crux of the present appeal turns on the interpretation of a *force majeure* clause. More generally, however, it is important to note at the outset that, save where the relevant contractual terms concerned in the case at hand are identical to the corresponding terms in a previous decision, previous decisions would be of limited assistance. This is however, subject to the situation where general points of legal principle are involved. It follows that the court must pay particular regard to the specific terms and the relevant context in question in arriving at its decision.

2 This is an appeal by the Appellant against the decision of the trial judge (“the Judge”) in *Precise Development Pte Ltd v Holcim (Singapore) Pte Ltd* [2010] 1 SLR 1083 (“the Judgment”). The present appeal centres, in the main, on a specific term in the contract between the parties as well as on a few crucial pieces of correspondence between the parties (all of which will be set out in more detail at the appropriate junctures in the present judgment).

3 Briefly stated, the Appellant and the Respondent had entered into a contract (“the Contract”) for the supply of ready-mixed concrete (“RMC”) from the former to the latter. The Contract was entered into before the Sand Ban came into effect on or about 6 February 2007. [\[note: 1\]](#)

4 The Sand Ban created a shortage of sand and aggregates (which constituted materials required for the manufacture of RMC). The Appellant’s position was that, as a consequence of the Sand Ban, it could no longer supply RMC at pre-Sand Ban prices. Citing the Sand Ban, the Appellant informed the Respondent that it could supply RMC only if the Respondent was willing to pay a price higher than the

contract price. The Respondent's case was that the Appellant had breached the Contract by evincing an intention not to supply concrete at the prices stipulated in the contract. The Respondent sued the Appellant for breach of contract and asked for damages in the sum of \$5,074,411.43. The Appellant raised three defences, one of which was based on the *force majeure* clause found in the Contract (the two remaining defences will be dealt with below). The *force majeure* clause was contained in cl 3 of the Contract ("cl 3"), and provided as follows:

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*. [emphasis added]

5 The Judge rejected all three defences and held that the Appellant, in refusing to supply RMC to the Respondent at the contract price, was in breach of the Contract. Interlocutory judgment was awarded in favour of the Respondent, with damages for the Respondent to be assessed by the Registrar.

6 The Appellant has not pursued the defence relating to an alleged discharge of the Contract by mutual agreement in the present appeal (see also below at [\[26\]](#)). We find the Judge's reasoning as well as decision in relation to the issue of termination pursuant to cl 10 of the Contract ("cl 10") to be persuasive and correct (see also below at [\[33\]](#)–[\[34\]](#)). *In the circumstances, the only issue before this court centres on whether or not cl 3 (the force majeure clause) applies in order to afford the Appellant a defence against the Respondent's claim.*

7 It should, however, also be noted that the Appellant also sought, in the present appeal, to amend its defence to include an alternative defence that the Contract had been frustrated. If the application is allowed, this would constitute a second issue before this court. However, we are not persuaded that the Appellant ought to be permitted to amend its defence, not least because (as the Respondent argues) new evidence would be required (our detailed reasons on this issue are set out below at [\[102\]](#)–[\[105\]](#)). We turn then to the substantive issue in this appeal (centring on the interpretation of cl 3). However, before proceeding to do so, we set out the relevant factual (including documentary) matrix.

Factual background

Introduction

8 Turning to the relevant factual background (which is crucial to the interpretation as well as application of cl 3), the Appellant entered into the Contract with the Respondent on 10 November 2006 for the supply of RMC for a warehouse project. [\[note: 2\]](#) The Respondent is the main contractor for the project. The Appellant is in the business of manufacturing and supplying RMC to construction companies, and it uses concreting sand and aggregates as source materials to manufacture RMC.

9 The Contract consists of a quotation dated 10 November 2006 and a page of Terms and Conditions. The Contract required the Appellant to supply 90,000 cubic metres (+/- 15%) of concrete to the Respondent for the project. Amongst the grades of concrete included in the Contract was Grade 30, for which the Appellant quoted a price of \$65 per cubic metre. In the quotation dated 10 November 2006, paragraph 3 states as follows:

All prices fixed till 31st Dec 2007.

10 The salient clauses in the Terms and Conditions of the Contract included cl 3 (set out above at [\[4\]](#)), and cl 10 and cl 15 which read as follows:

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.

Clause 15

For concrete order that exceed 100[*cu m*], two day[s] advance booking is required. *All bookings are to be accepted by the Supplier.* In no event shall the Supplier be liable for any liquidated damages arising from any cause whatsoever loss of profits consequential or otherwise.

[emphasis added]

Announcement of the Sand Ban

11 The Indonesian government suddenly announced on or about 23 January 2007 [\[note: 3\]](#) that it would impose a Sand Ban from 6 February 2007. This had an immediate impact on the availability and prices of sand. The Appellant wrote to the Respondent on 26 January 2007 to inform it of the Sand Ban, and that this would lead to a shortage of materials to manufacture RMC. [\[note: 4\]](#) The Appellant stated that it was meeting the Building & Construction Authority ("the BCA") to discuss alternative options for the supply of sand. The Appellant stated that it might have to cease the supply of concrete and advised the Respondent to seek alternative avenues of supply.

12 Subsequently, in a Circular dated 1 February 2007, [\[note: 5\]](#) the BCA announced that it would release sand from its stockpiles, priced at \$25 per tonne. *However, only main contractors such as the Respondent* would have access to the BCA's sand stockpiles, and under which system the BCA would supply sand directly to the main contractors (such as the Respondent) for "onward delivery" to RMC suppliers (such as the Appellant). *It is therefore common ground that the Appellant had no access to the BCA's stockpiles.* The same Circular stated that the amount of concrete, grade of concrete, and *concreting sand* required for the February weekly demand would have to be certified by the Professional Engineer of the project. It is pertinent to note that there is *no mention of manufactured sand in this Circular.*

The Appellant's Letter and Quotation of 1 February 2007

13 The Appellant informed the Respondent by way of a letter dated 1 February 2007 that: [\[note: 6\]](#)

the sudden announcement by Indonesia of the ban on sand, soil and topsoil exports to Singapore resulted in an immediate scarcity of materials and escalating prices that were totally beyond [the Appellant's] control.

The letter also mentioned a meeting with the Minister of National Development on 30 January 2007, where the Minister had apparently stated that the Sand Ban was an abnormal situation that was beyond anyone's control. The Appellant stated that it had been notified by the BCA that sand would be released from the BCA's stockpile from 1 February 2007 and that there should be *concreting sand* available, albeit at higher prices. [\[note: 7\]](#) The Appellant informed the Respondent in this letter that it

was unable to supply RMC at the prices agreed upon in the Contract ("the contracted prices") due to the shortage of sand caused by the Sand Ban. In addition, the letter of 1 February 2007 stated that:

In light of all the factors mentioned above that is beyond our control, we have no alternative but to revise our concrete prices. Please find attached our quotation for the supply of concrete effective 1 February 2007 for your consideration.

14 The quotation referred to in this letter and attached ("the 1 February Quotation") [\[note: 8\]](#) quoted prices of RMC which were 30% to 50% higher than the contracted prices. The Respondent, however, did not agree to the prices stated in the 1 February Quotation, and hence did not sign the quotation.

Events leading up to the implementation of the Sand Ban

15 On 5 February 2007, a day before the Sand Ban came into effect, one of the Appellant's sand suppliers, Huat Shua Company Pte Ltd ("Huat Shua"), informed the Appellant that it was unable to supply sand to the Appellant, and that the supply agreement between Huat Shua and the Appellant had been terminated under its *force majeure* clause with immediate effect. [\[note: 9\]](#) It is noteworthy that the Appellant's other sand supplier, Bibright Shipping Pte Ltd ("Bibright"), had informed the Appellant on 2 February 2007 that Bibright's sand stockpile had been taken over by the BCA, and that Bibright could only release their concreting sand supply based on the BCA's approval. Bibright also ceased its obligation to supply sand to the Appellant based on the *force majeure* clause in their supply agreement. [\[note: 10\]](#)

16 By a letter dated 5 February 2007 from the Respondent to the Appellant, the Respondent stated that there would be *no disruption to the supply of RMC within the meaning of cl 3*, since the BCA would be releasing sand from its stockpiles in the following terms: [\[note: 11\]](#)

Clause 3 of the ... supply contract provides that you shall be under no obligation to supply if the said supply has been disrupted by factors arising through circumstances beyond your control.

However, as BCA would be releasing the government sand stock pile from 1 February 2007, there would be no disruption in supply within the meaning of Clause 3.

The Respondent insisted in this letter that the Appellant was therefore still obliged to supply RMC at the contracted prices.

The Appellant's letter dated 9 February 2007

17 By a letter dated 9 February 2007, the Appellant informed the Respondent that it had no access to BCA's sand stockpiles, as follows: [\[note: 12\]](#)

... the Indonesian Government's decision to ban sand exports to Singapore was totally beyond our control resulting in an immediate scarcity of materials and escalating prices. Our production was severely curtailed by the immediate shortage of materials following the announcement [of the Sand Ban] ...

In our effort to extend support to a good customer, we offered to try and source the sand from the open spot market. The increase in price of the concrete was to enable us to source for alternative supplies at higher prices and we sent to your company a revised quotation ... on

1 February 2007 [the 1 February Quotation (above at [\[14\]](#))] for consideration but to date have not received your acceptance.

Even with the announcement by BCA on the release of national stockpiles from 1 February 2007, *the mechanism implemented does not permit us to order any sand directly*, further complicating our production planning.

It is not our intention to disrupt supply but this is an abnormal situation that is totally beyond our control ...

[emphasis added]

18 In that same letter, the Appellant explained that the increase in the prices of concrete as stated in the 1 February Quotation (see above at [\[14\]](#)) was to allow the Appellant to source for alternative supplies of sand at higher prices. It is common ground that the Respondent did not reply to this letter. The Appellant contended that this failure to reply demonstrates clearly that the Respondent was not willing to help the Appellant procure sand from the BCA.

The BCA's Circular dated 15 February 2007

19 On 15 February 2007, the BCA announced that the price of sand from the stockpile would be increased to \$60 per tonne from 1 March 2007. [\[note: 13\]](#) There was a *fixed limit* on the amount of sand that could be released from the BCA's stockpile because, as the BCA's Circular stated, there was a *weekly quota* for the BCA's sand stockists. The Circular stated that the sand would be released on a "first come first serve" basis, and that once the weekly quota of sand had been reached, the BCA would *stop* releasing sand *immediately*. The Circular stated that only main contractors of projects with concreting works to be carried out in the month of February 2007 were allowed to request for sand to be released from the stockpile from February. Again, there was no mention of manufactured sand in this Circular.

20 On 26 February 2007, the Appellant wrote a letter to inform the Respondent that the supply of aggregates (another material required to manufacture RMC) had stopped. Subsequently, the BCA announced on 28 February 2007 that RMC companies (including the Appellant) could purchase aggregates from the BCA's stockpile at a fixed price of \$70 per tonne. [\[note: 14\]](#)

The Appellant's letter and quotation dated 1 March 2007

21 On 1 March 2007, the Appellant wrote to the Respondent to inform it that the BCA had increased the price of sand and aggregates to \$60 per tonne and \$70 per tonne, respectively. [\[note: 15\]](#) The Appellant stated that they were taking steps to look for other sources of sand and aggregates, and that, "for the time being", they had no choice but to revise the prices of RMC. The same letter informed the Respondent that the Appellant was willing to credit back to the Respondent the cost incurred for procuring sand and aggregates from the BCA, in the following terms: [\[note: 16\]](#)

If you [the Respondent] are *able to provide the sand* and 20 mm aggregate, we will *credit back to you* the sand at S\$63 per tonne delivered and 20 mm aggregate at S\$73 per tonne delivered, in accordance to the BCA price. [emphasis added]

22 Attached to the same letter was a quotation ("the 1 March Quotation"). [\[note: 17\]](#) The price for normal mix Grade 30 concrete was stated to be \$185.00 per cubic metre (about a 180% increase from

the contracted price of \$65.00 per cubic metre for normal mix Grade 30 concrete). The unit price of Grade 40 Normal Mix Concrete and Grade 50 Normal Mix Concrete were offered in the quotation at \$190.00 and \$199.00, respectively. *It is important to note that these were the same prices that the Respondent paid when it bought RMC from Buildmate (Singapore) Pte Ltd ("Buildmate") in March 2007* (see below at [\[86\]](#)). The quoted prices (found in the 1 March Quotation) are reproduced, as follows:

Grade 15 Normal Mix concrete at Unit Price of \$179.00

Grade 30 Normal Mix concrete at Unit Price of \$185.00

Grade 35 Normal Mix concrete at Unit Price of \$187.00

Grade 40 Normal Mix concrete at Unit Price of \$190.00

Grade 50 Normal Mix concrete at Unit Price of \$199.00

The Respondent's purchase of sand through Buildmate

23 *It was revealed at the trial that the Respondent had actually supplied sand to Buildmate.* Buildmate's director, Mr Peh Ah See ("Mr Peh"), admitted that the Respondent had used Buildmate to purchase RMC from the Appellant. [\[note: 18\]](#) *It was revealed by Mr Peh that Buildmate was not itself a source of RMC. The Respondent would supply sand to Buildmate, whereupon Buildmate would (in turn) supply the sand to the Appellant. The Appellant would buy the sand from Buildmate at the same price offered to the Respondent, viz, at \$63 per tonne.* [\[note: 19\]](#) *The Appellant would then use the sand to make RMC and sell it to Buildmate.* [\[note: 20\]](#) *Buildmate would (in turn) sell the RMC and deliver it to the Respondent at the same price at which they had bought it from the Appellant, with no extra charge.* [\[note: 21\]](#)

24 In addition, Mr Peh Chong Eng, the Respondent's project manager, gave evidence that the Respondent had purchased Grade 40 Normal Mix concrete and Grade 50 Normal Mix Concrete from Buildmate at the unit price of S\$190.00 [\[note: 22\]](#) and S\$199.00, [\[note: 23\]](#) respectively. *These were exactly the same prices that the Appellant had quoted in the 1 March Quotation.*

25 There was no evidence adduced on the commercial motivations for the Respondent to obtain RMC through Buildmate. It was undisputed that there were common directors between the Respondent and Buildmate. It was also revealed at the trial that Buildmate did not pay the Appellant for the RMC supplied by the Appellant. [\[note: 24\]](#) *Buildmate had owed the Appellant approximately \$600,000 for RMC supplied.* [\[note: 25\]](#) *However, instead of making payment, Buildmate offered to supply sand to the Appellant as a substitute for payment,* [\[note: 26\]](#) *which the Appellant refused to accept. The Appellant's claim against Buildmate has since been settled.* [\[note: 27\]](#)

The meeting of 19 March 2007

26 The Appellant and Respondent had a meeting on 19 March 2007. The Respondent's position is that there was no agreement arrived at between the parties at this meeting. The Appellant's original position was that the parties had agreed to discharge the Contract and had entered into a new arrangement in which the Respondent would supply sand and aggregates to the Appellant free of charge, and in which the Appellant would supply RMC to the Respondent at a reduced price. [\[note: 28\]](#) The Appellant contended that the quotation dated 2 April 2007 (see below at [\[28\]](#)) was sent to the

Respondent pursuant to what had been agreed to between the parties at the meeting of 19 March 2007. However, the Appellant has since *shifted* from this position by stating that “the meeting (of 19 March 2007) failed to resolve the differences of the parties”. [\[note: 29\]](#) Hence, it is now common ground between the Appellant and the Respondent that there had been *no new agreement* arrived at between the parties during the meeting of 19 March 2007. *In the circumstances, this particular issue (or, rather, defence raised by the Appellant) at the trial is no longer an issue in the present appeal* (see also above at [\[6\]](#)).

27 On 20 March 2007, the Respondent replied to the Appellant’s letter of 1 March 2007 and the 1 March Quotation. [\[note: 30\]](#) The Respondent stated that the Appellant was bound by the price agreed in the Contract. Nevertheless, the Respondent accepted, *under protest*, the prices of concrete in the 1 March Quotation in the following terms: [\[note: 31\]](#)

... in order to avoid disruption to the project...we [the Respondent] shall pay you [the Appellant] under protest, the increased price of the concrete mix as set out by you [in the letter dated 1 March 2007] without prejudice to all our rights and objections against the increased price.

28 The Appellant sent another quotation dated 2 April 2007 (“the 2 April Quotation”) to the Respondent. [\[note: 32\]](#) The quoted prices were lower than the contracted prices (the normal mix Grade 30 concrete was quoted at \$55.00 per cubic metre). *However*, cl 2 of the Standard Terms & Conditions of this particular quotation stated that: [\[note: 33\]](#)

The above [quoted] prices exclude the cost of *Concreting Sand* and 20mm Aggregates which are to be supplied by [the Respondent] to [the Appellant] batching plants *free of charge*. [emphasis added]

29 The Respondent did not reply to the 2 April Quotation. Instead, the Respondent wrote to the Appellant a letter dated 26 April 2007, [\[note: 34\]](#) which stated that Mr Oh Beng Hwa (one of the Respondent’s directors) had proposed in the meeting of 19 March 2007 that the Respondent would supply the sand and aggregates based on “the same old rate as that agreed” for the Appellant to supply RMC at the contracted prices. The same letter stated that, unless the Appellant agreed to this particular proposal by 27 April 2007, the Respondent would hold the Appellant liable for all damage suffered.

30 The Appellant replied on the same day (by a letter dated 26 April 2007), and clarified that the meeting on 19 March 2007 was to discuss the possibility of the supply of *manufactured sand* (as opposed to concreting sand) and aggregates. [\[note: 35\]](#) The Appellant did not agree with the Respondent’s proposal and reiterated that the Sand Ban was an abnormal situation covered by the terms of the Contract (pursuant to cl 3, quoted above at [\[4\]](#)).

The decision of the court below

31 The Appellant relied on three defences to the Respondent’s claim. First, the Appellant claimed that the Contract had been discharged by mutual agreement at the meeting of 19 March 2007. Second, the Appellant claimed that cl 10 permitted it to terminate the Contract upon giving one month’s written notice and that it had given such notice by its letter to the Respondent dated 1 February 2007. Third, the Appellant claimed that its obligation to supply concrete at the prices stipulated in the Contract was discharged under cl 3 when the Sand Ban disrupted its supply of raw materials.

32 As also noted above (at [\[6\]](#) and [\[26\]](#)), there is no need to deal with the first defence. It is now common ground between both parties that there had been no new agreement made at the meeting of 19 March 2007.

33 In so far as the second defence is concerned, we have already noted, at the outset of this judgment (above at [\[6\]](#)), that we find the Judge's reasoning as well as decision in relation to the issue of termination pursuant to cl 10 to be persuasive and correct. Put simply, we agree with the Judge's finding that the Appellant's letter of 1 February 2007 could not amount to a notice of termination within the meaning of cl 10. The Judge was clearly correct to find that the requirement of unequivocal communication from the Appellant of its intention to terminate the Contract was not satisfied, as the letter of 1 February 2007 had only made it known to the Respondent that the Appellant had "no alternative but to revise [the] concrete prices". This phrase was ambiguous as it could have meant that the Appellant was exercising its right to suspend the supply of RMC under cl 3, and not cl 10. Indeed, the same letter of 1 February 2007 had used language which parallels that in cl 3. Paragraph 1 of the letter dated 1 February 2007 (also reproduced in part above at [\[13\]](#)) states as follows: [\[note: 36\]](#)

As we have notified you ... the sudden announcement by Indonesia of the ban on sand...resulted in an immediate *scarcity of materials* and escalating prices that were totally *beyond our control*. [emphasis added]

And, at paragraph 5 of the same letter, the Appellant stated, in a similar vein, thus: [\[note: 37\]](#)

In light of all the factors mentioned above that is *beyond our control*, we have *no alternative but to revise our concrete prices*. [emphasis added]

34 The language just reproduced in the preceding paragraph suggests strongly that the Appellant was, in fact, referring to cl 3. The use of the phrase "scarcity of materials" parallels the phrase "shortage of material" in cl 3, while the phrase "beyond our control" is found in the language of cl 3 itself. The use of the phrase "revise our concrete prices" suggests an offer to vary contractual terms, not to terminate the contractual relationship. A reasonable interpretation would be that the Appellant was, in fact, relying upon the *force majeure* clause (*viz*, cl 3) to cease supplying RMC to the Respondent.

35 This leaves us with the remaining defence based upon cl 3 itself which, because of its vital importance to the outcome of the present appeal, is reproduced again as follows:

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*. [emphasis added]

36 The Judge was of the view that the Appellant could only rely on cl 3 if the following two conditions had been met:

- (a) the Appellant's ability to supply concrete had been disrupted by any of the events mentioned in cl 3; and
- (b) the event arose through circumstances beyond the Appellant's control.

37 The Judge had no doubt that the Sand Ban was beyond the Appellant's control. The question that the Judge focused on was whether there had been a "disruption" within the meaning of cl 3. The Judge interpreted the word "disrupt" by reference to its ordinary meaning, as well as by considering the need to achieve a commercially viable and reasonable result (see [34] of the Judgment). On this basis, the Judge held (see [42] of the Judgment):

[T]here 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*. [emphasis added]

38 The Judge held that a price rise of raw materials was immaterial to the issue whether the supply of concrete was disrupted by a shortage of material (here sand) by reference to English case law (which will be dealt with at [51]–[52] below).

39 The Judge further held on the evidence that it was not difficult for the Appellant to supply concrete to the Respondent as it did not ask the Respondent to assist it by requesting for sand from the BCA stockpiles. In failing to make the request, the Appellant had failed to make reasonable efforts to ensure that the supply of concrete would not be disrupted. In other words, the proximate cause of the disruption in the supply of concrete was not the Sand Ban but the Appellant's own failure to source the supply of sand from or through the Respondent. Accordingly, there was no disruption beyond the control of the Appellant within the meaning of cl 3.

40 The Judge found that the Respondent had been *willing to assist* the Appellant in this regard based on two facts, *viz*:

- (a) the Respondent knew that, as between the parties, only it had access to BCA's stockpiles;
- (b) the Respondent had stated in its letter (to the Appellant) dated 5 February 2007 (see above at [16]) that there was no disruption of supply because sand was available from the BCA stockpiles.

41 The Judge found that the fact that the Respondent had reminded the Appellant that sand was available from the BCA stockpile despite knowing that the Respondent had access to the BCA sand, and not the Appellant, demonstrated that the Respondent was willing to help the Appellant procure sand from the BCA. Further, the Judge found that the Appellant had not taken any steps to ask the Respondent to request for sand from the BCA. In the circumstances, the Judge found that the Appellant could not (unlike the Singapore High Court decision in *Holcim (Singapore) Pte Ltd v Kwan Yong Construction Pte Ltd* [2009] 2 SLR(R) 193 ("*Kwan Yong*") which related, *inter alia*, to an identical clause) rely on cl 3, and therefore held that the Appellant was in breach of the Contract when it failed to supply RMC to the Respondent at the contracted prices.

Our decision

Issues raised

42 There is one main – or umbrella – issue in respect of the present appeal, *viz*, whether or not the Appellant can avail itself of cl 3 in order to defeat the Respondent's claim against it for breach of contract. The interpretation of cl 3 – as well as its application to the facts of the present case – raise (in turn) two sub-issues, both of which must be satisfied.

43 The first sub-issue is whether any of the events stated in cl 3 had "*disrupted*" the supply of

concrete. The meaning of the word “disrupted” has to be ascertained before the first sub-issue can be fully determined by applying that meaning to the facts of the present proceedings.

44 The second sub-issue is whether the event (or events concerned) were “*beyond the control of*” the Appellant. This raises the question of whether the Appellant is required to take all reasonable steps to avoid the operation of cl 3. The Appellant bears the burden of proof with respect to both sub-issues.

45 We will commence by setting out the *general legal principles* relating to the construction and interpretation of *force majeure* clauses in relation to each of the two sub-issues set out above.

46 We will then proceed to apply the general legal principles to both the construction and interpretation of the language of cl 3 itself as well as its application to the specific facts at hand. For ease of analysis and understanding, we will apply the relevant general legal principles to the specific facts in *two stages – which correspond to the two sub-issues, respectively*.

A preliminary point – the need to adopt a holistic interpretation of both sub-issues

47 This preliminary point arises, in no small part, because the Appellant had sought to argue that the last part of cl 3 (centring on the phrase “arising through circumstances beyond the control of the Supplier”) ought to be read *separately* from the rest of that particular clause so that a disruption of supply because of shortage of material whether within the control of the Appellant or not would bring cl 3 into operation. If the phrase was indeed to be read separately from the rest of cl 3, no issue would arise with regard to whether the Appellant is required to take all reasonable steps to avoid the operation of that particular clause (which, it will be recalled, is in fact the second sub-issue (see above at [\[44\]](#))).

48 With respect, we are unable to accept the Appellant’s argument as it is not only inconsistent with a plain reading of cl 3 itself but is also contrary to the general intent of that clause as well (reference may also be made to the English High Court decision of *Frontier International Shipping Corp v Swissmarine Corporation Inc (The “Cape Equinox”)* [2005] 1 Lloyd’s Rep 390 as well as *Chitty on Contracts* vol 1 (Sweet & Maxwell, 30th Ed, 2008) (“*Chitty on Contracts*”) at para 14-138). In this last-mentioned regard, it flies against all notions of commercial intent as well as commonsense to interpret cl 3 in the manner that the Appellant has just argued because it would mean that the parties intended, *inter alia*, even a “disruption” that was created by the Appellant itself to permit the Appellant to avail itself of the benefit of cl 3. It would take only a moment’s reflection to conclude that this could not, objectively speaking, have been the intention of the parties at the time they entered into the Contract. In the circumstances, therefore, a *holistic* interpretation ought to be adopted with regard to both sub-issues.

The governing or umbrella principle relating to the construction and interpretation of force majeure clauses

49 Stripped to its essence, the *governing* legal principle in the context of the construction and interpretation of *force majeure clauses* is a simple – albeit not simplistic – one that is embodied within the following statement of principle by this court in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413 (“*RDC Concrete*”) as follows (at [54]):

The most important principle with respect to *force majeure* clauses entails, simultaneously, a rather specific factual inquiry: the *precise construction* of the clause is paramount as it would define the *precise scope and ambit* of the clause itself. The court is, in accordance with the

principle of freedom of contract, to give full effect to the intention of the parties in so far as such a clause is concerned. [emphasis in original]

The first sub-issue: whether or not any of the events stated in cl 3 itself had "disrupted" the supply of RMC within the meaning of that clause

(1) Interpretation of the word "disrupted"

50 In order to invoke cl 3, the Appellant must demonstrate that the supply of concrete has been "disrupted" by the shortage of material. In the circumstances, therefore, the meaning of the word "disrupted" must first be ascertained. Although there is, to the best of our knowledge, no case law in the Commonwealth (apart from the decision in the court below) with respect to the meaning of the word "disrupted", it is nevertheless useful to have regard to prior decisions which have interpreted *similar* words used in the context of *force majeure* clauses (for example, the word "hindered"). These decisions are helpful in so far as they furnish guidance on the *general meaning* not only of the word itself but also of *other* words (in this latter respect, from a comparative perspective). The ascertainment of such general meaning itself is *not*, of course, conclusive simply because the *application* of that meaning to the *overall language* of the *force majeure* clause *as well as to the precise factual context* is of signal importance.

51 In the recent Hong Kong Court of Final Appeal decision of *Goldlion Properties Limited v Regent National Enterprises Limited* [2009] HKCFA 58 ("*Goldlion Properties*"), the appellant, in order to invoke the *force majeure* clause, had to demonstrate that it was unable to complete the sale of the property concerned due to any matter which in the appellant's reasonable opinion "materially hinders, prevents or obstructs" the completion of the sale. Ribeiro PJ (with whom Nazareth and Brennan NPJJ agreed, Bokhary and Chan PJJ delivering a joint (and separate) concurring judgment), endorsed the House of Lords decision of *Tennants (Lancashire), Limited v C S Wilson and Company, Limited* [1917] AC 495 ("*Tennants*"). Ribeiro PJ cited with approval (at [82]) a passage from *Tennants* to the effect that "[p]reventing' delivery means ... rendering delivery impossible" and "hindering' delivery means something less than this, namely, rendering delivery more or less difficult, but not impossible" (*per* Lord Atkinson, at 518). Ribeiro PJ further observed that:

[a]s a matter of language, it is clear that the word "hinders" sets a substantially lower threshold than the word "prevents" (with the word "obstructs" occupying a position perhaps somewhere in between)

(See also *Goldlion Properties* at [94]). Ribeiro PJ did, however, also refer (at [82]) to the observations of Earl Loreburn in *Tennants* (at 510), observing that the learned law lord "put the bar somewhat higher, interpreting 'hindering' to mean "interposing obstacles which it would be really difficult to overcome"; however, the learned judge proceeded to observe (also at [82]) that, nevertheless, "'hindering' was *on any view not* a concept requiring the supplier to show that some contingency had *prevented* delivery" [emphasis added]. We agree that the word "prevented" connotes a much higher degree in relation to obstacles to performance of the contract compared to the word "hindered".

52 We also note that *Tennants* also laid down the (related) general principle to the effect that even a great or huge increase in price would *not*, in and of itself, constitute a "hindrance". It is not, however, altogether irrelevant. As Lord Dunedin observed in *Tennants* (at 516):

Price may be evidence, but it is only one of many kinds of evidence as to shortage. If the appellants had alleged nothing but advanced price they would have failed. But they have shown much more. They have shown a total failure of what after all was the main source of supply to

their business ...

All these principles were also endorsed and applied in another English decision that has often been cited together with *Tennants*, viz, the English Court of Appeal decision of *Peter Dixon & Sons, Limited v Henderson, Craig & Co, Limited* [1919] KBD 778 ("Peter Dixon").

53 We pause to observe, in this regard, that whilst a mere increase in price is generally insufficient (in and of itself) to constitute a "hindrance" or "prevention", we leave open the issue as to what the legal position would be if the increase in price is *astronomical* (cf the reference by Denning LJ in the English Court of Appeal decision of *Brauer & Co (Gt Britain), Ltd v James Clark (Brush Materials), Ltd* [1952] 2 Lloyd's Rep 147 at 154 ("*Brauer*") to the fact that, if in that case, the price increase was *one hundred times* as much as the contract price, then "that would be a "fundamentally different situation" which had unexpectedly emerged, and he [the seller] would not be bound to pay [for the licence concerned]"). Indeed, the general legal principle in relation to a mere increase in price in the context of whether or not a "hindrance" or "prevention" has occurred *vis-à-vis* a *force majeure* clause mirrors the general principle in relation to the common law doctrine of frustration (under which, generally speaking, a mere increase in price will *not* constitute a frustrating event (cf also *RDC Concrete* (at [70]–[74])). Indeed, even in so far as the latter general principle is concerned, at least two judges in the House of Lords decision of *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] AC 93, viz, Lord Reid and Lord Hodson, appeared to at least briefly hint that increased costs might constitute a possible ground for frustration where they were so extreme as to be "astronomical" (at 118 and 128–129, respectively) – a proposition that, in fact, appears to find some support in the local context in the decision of this court in *Glahe International Expo AG v ACS Computer Pte Ltd* [1999] 1 SLR(R) 945 (especially at [24]).

54 As mentioned above, the crucial word in the context of the present proceedings is "disrupt". From linguistic as well as logical and contextual perspectives, it is clear, in our view, that, like the word "hinder", the word "disrupt" does *not* mean "prevent". In the same vein, an increase in costs alone will not constitute a "disruption". More specifically, however, what (general) meaning ought to be attributed to the word "disrupt", bearing in mind the fact that the particular factual matrix and context will also need to be considered by the court before arriving at a final decision in any given case?

5 5 *The Oxford English Dictionary* (2nd Ed, Clarendon Press, Oxford, 1989) ("*OED*") defines the word "*disrupt*" (at p 832) as follows: "To break or burst asunder; to break in pieces, shatter; to separate forcibly". The same work defines the word "*hinder*" (at p 242) in various ways, including the following: "To put or keep back"; "To do harm to; to injure, impair, damage"; and "To keep back, delay, or stop in action; to put obstacles in the way of; to impede, deter, obstruct, prevent". Although there is, in the last-mentioned phrase, a reference to the word "*prevent*", that word itself is defined in the *OED* quite differently (as is to be expected since the presumption is that no word in the English language ought to be redundant) and, *inter alia*, as follows (at p 445): "To forestall, balk, or baffle by previous or precautionary measures"; "To cut off beforehand, debar, preclude (a person or other agent) *from*, deprive *of* a purpose, expectation, etc."; and (perhaps, most appropriately, having regard to the legal context as well as case law considered above) "To frustrate, defeat, bring to nought, render void or nugatory (an expectation, plan, etc.)" [emphasis in original].

56 The definitions of the words "disrupt" and "hinder" are – at a general level at least – not dissimilar. Both words connote a lower degree of negativity compared to the word "prevent". And, perhaps more importantly, both words suggest a datum measure of difficulty that interferes with the successful completion of the transaction concerned. However, unlike a situation involving "prevention", the "disruption" or "hindrance" does not render further performance by one party (or

both parties) impossible (which would be akin to a situation of (legal) frustration). It is also clear that difficulty that manifests itself in the form of an increase in costs is – in and of itself – insufficient to result in a finding of “disruption” or “hindrance”. However, the level of guidance at this point is, unfortunately, not very helpful. One can explain this, in part, by the fact that there are myriad situations of “disruption” or “hindrance”. Nevertheless, we are of the view that a further (if minimal) attempt at defining what might constitute a “disruption” or “hindrance” would be helpful. In this regard, where a *commercial transaction* is involved, the process of ascertaining whether or not a particular set of circumstances constitutes a “disruption” or “hindrance” within the meaning of the *force majeure* clause concerned ought to be informed by considerations of *commercial practicability* (bearing in mind, of course, the particular *context* in which the contract had been entered into (*including any relevant commercial practice in the trade and/or resultant dislocation in the trade*)). Hence, if, for example, events occurred which, whilst not preventing *literal* performance of the contract as such, were such as would render continued performance commercially impractical, there would, in our view, generally be a “disruption” or “hindrance” within the meaning of the *force majeure* clause in question. Still less would those events need to render further performance of the contract *impossible*, which would be more akin to a situation of “prevention” (as explained above).

57 The following observations by Earl Loreburn in *Tennants* (at 510–511) may also be usefully noted:

To place a merchant in the position of being unable to deliver unless he dislocates his business and breaks his other contracts in order to fulfil one surely hinders delivery.

In my view this hindered delivery. It did not prevent delivery or make it impossible, but it hindered delivery within the meaning of the contract now under consideration ...

[emphasis added]

58 In a similar vein, we would also note the following observations by Swinfen Eady MR in *Peter Dixon* (at 785):

[I] think in substance the question is this: Having regard to the facts as set out in the award, was there evidence upon which the arbitrators as reasonable men could come to the conclusion at which in fact they arrived? *Having regard to the general dislocation of trade, to the need for entering into fresh contracts to obtain tonnage, to the fact that all standing contracts by all parties in the trade were no longer able to be carried out, I am of opinion that upon these facts much more than merely an increase in price was proved, and it is no answer to say to the sellers: "It was possible to carry out your contract and you could have got rid of the obstacle or difficulty by obtaining tonnage at an increased price, or by paying Beckers an increased sum for them to supply you."* In my judgment there was ample evidence before the arbitrators on which they could arrive at the conclusion, at which they did in fact arrive, that the sellers were hindered in the delivery of the pulp within the meaning of the contract. [emphasis added]

And the following observations by Bankes LJ in the same case (at 786) are also helpful:

I think two rules were certainly laid down in that case [*viz, Tennants*]. One was that *a rise in price would not in itself constitute a hindrance* to delivery within the meaning of such a contract as this; and I think the *second rule may be gathered from the language of Lord Dunedin* [in *Tennants*; see also above at [52]], where, in speaking of the judgment of Neville J., *he says ... that the learned judge read the word "hinder" "in the general sense of in any way affecting to an appreciable extent the ease of the usual way of supplying the article...."* [emphasis added]

59 Another illustration may be found in the House of Lords decision of *Owners of Steamship Matheos v Louis Dreyfus and Company* [1925] AC 654 ("*Louis Dreyfus*"). Although this particular decision related to a prohibition clause, the same general points of principle would be applicable. In *Louis Dreyfus*, the plaintiff shipowner brought a claim against the defendant charterer for demurrage. The charterer was unable to load goods onto the vessel owing to a severe frost which had caused the dock to be completely frozen over. The charterer relied upon a clause in the charterparty which effectively suspended the charterer's obligation to load goods under circumstances where there had been "detention by frost or ice". The shipowner argued that that clause could not be invoked by the charterer as it was still possible to load the goods onto the vessel by the use of *manual labour*. The House rejected this argument. In particular, Viscount Cave LC was of the view (at 660) that, given the icebound conditions, "loading by hand during the frost was in the commercial sense impracticable". Indeed, the expenses of manual loading were prohibitive, the charterers would run the risk of losing the goods and no insurer would have been willing to cover such a dangerous method of loading. More generally, however, this is merely an illustrative situation and much would (as was already alluded to above) depend upon the precise factual matrix. However, the *general principle* as such seems to us to be not only sound but also just and fair.

(2) Whether the present circumstances, seen in its commercial context, present sufficient difficulty to constitute a "disruption" within cl 3

60 The circumstances in the present case did present considerable difficulties for the Appellant. First, it is undisputed that, since the Indonesian Government announced the Sand Ban, the BCA had implemented a system that only entitled contractors (such as the Respondent) to have access to the BCA's sand stockpiles (see also above at [\[12\]](#)). The Appellant had *no* access to these stockpiles. Secondly, when the Sand Ban came into effect, the Appellant's own sand suppliers, Bibright and Huat Shua, stopped supplying sand to the Appellant and relied upon the *force majeure* clauses found in their respective supply contracts (see above at [\[15\]](#)). The situation was exacerbated by the fact that Bibright's sand stockpile at the Tuas Aggregate Terminal had been *taken over by the BCA*, [\[note: 38\]](#) with the result that Bibright Shipping could only release sand with the BCA's approval and could no longer supply sand to the Appellant.

61 Thirdly, even if the Respondent were to help procure sand from the BCA's sand stockpiles, there was *no guarantee* that the Respondent would have received the requisite quantities of sand. This was confirmed by Mr Ng Cher Cheng, the deputy director of procurement policies department at the BCA. [\[note: 39\]](#) Further, there was a *fixed limit* on the amount of sand that could be released from the BCA's sand stockpiles. The BCA's circular dated 16 February 2007 [\[note: 40\]](#) stated that there was a *weekly quota* for the BCA's sand stockists. The circular stated that the sand would be released on a "first come first serve" basis, and that once the weekly quota of sand had been reached, the BCA would *stop* releasing sand *immediately* (see also above at [\[19\]](#)). In addition, the BCA circular dated 1 February 2007 [\[note: 41\]](#) stated that only projects with concreting works to be carried out in the month of February 2007 were allowed to request sand to be released from stockpile from February.

62 Given the above circumstances, there can be no doubt that there were sufficient difficulties to constitute a "disruption" within the meaning of cl 3. The Appellant's traditional sources of sand from Indonesia were effectively cut off by the system implemented by the BCA as well as by the reliance by its own suppliers upon the *force majeure* clauses in their respective contracts with the Appellant (noting that the BCA had in fact taken over one of the supplier's sand stockpiles). Given that the BCA only granted access of sand supplies to main contractors, these contractors (including the Respondent) would be in a "monopolistic" position. The Respondent could take advantage of its

position to charge an exorbitant price for its services in assisting to procure sand from the BCA. Under these circumstances, the Appellant was faced with two stark choices. If it had chosen to stop performing the Contract, it would have been liable for damages to the Respondent (assuming that cl 3 did not apply). If it had chosen to perform the Contract by supplying concrete at the contracted prices, it would have fallen prey to any potential exorbitant demands of main contractors who had access to sand supplies. This left the Appellant in the unsatisfactory situation in which the Respondent could insist that the Appellant adhere to the Contract (thus obtaining RMC at pre-Sand Ban prices) and, at the same time, earn a profit for its services of procuring sand from the BCA. If the Appellant was to adhere to its contractual obligations, it would have had no choice but to seek sand supplies from the Respondent for whatever price the Respondent might have charged for it. Such a commercially impracticable situation constituted, in our view, a “disruption” within the meaning of cl 3. It must be cautioned that this analysis is not focused on the prices of sand but, rather, on the difficulties faced by the Appellant in the present overall commercial context. Further, it did not matter whether the Respondent did in fact seek exorbitant prices for its services in procuring sand (in this regard, and as will be seen below, the Respondent did not even offer to help procure sand from the BCA for the Appellant). It was sufficient that the Appellant was placed in a commercially impracticable situation, as explained above.

63 The Respondent did contend (in passing and without argument or evidence) [\[note: 42\]](#) that the Appellant *could have* obtained sand from countries other than Indonesia. Although it can be said that it was *possible* for the Appellant to procure sand from non-traditional sources, it would have been commercially impracticable to do so, given that cl 15 of the Contract (“cl 15”) (see above at [\[10\]](#)) envisaged orders exceeding 100 cubic metres of concrete to be delivered *within two days* after the order has been placed, and the Appellant would not have been able to do so if it had had to seek supplies of sand from non-traditional sources. This commercial impracticability is reinforced by the fact that cl 15 provided that the Appellant must accept all orders for concrete. Indeed, the present situation may have gone beyond that of commercial impracticability. Given that it would be *impossible* to deliver concrete to the Respondent within two days even if the Appellant had sought alternative sources of sand from non-traditional sources, a case of frustration would have been made out had it been pleaded and argued in the Court below. We surmise that this was perhaps why the Appellant sought to amend its pleadings to include an alternative defence in frustration (although this has not been allowed for the reasons stated in [\[103\]](#)–[\[105\]](#) below).

64 We are therefore, of the view that the clear shortage of sand resulting from the Sand Ban had created genuine difficulties so as to constitute a “disruption” within the scope and meaning of cl 3. However, as already noted above, this is not an end to the matter in so far as the present appeal is concerned. We need now to turn to consider *the second sub-issue*, viz, whether or not the event (or events concerned) were “*beyond the control of*” the Appellant.

The second sub-issue: whether or not the event was “beyond the control of” the Appellant

(1) Is there an independent legal principle ***inherent in all force majeure*** clauses to the effect that the affected party, in order to avail itself of the benefit of the *force majeure* clause, must have taken all reasonable steps to avoid the *force majeure* effects of the event in question?

65 An interesting legal issue that arises in the context of the present proceedings in general and the second sub-issue in particular is whether or not there is, as Ribeiro PJ put it in *Goldlion Properties* (at [98]), “a free-standing legal principle” to the effect (as counsel for the respondents argued, relying on the English decision of *Channel Island Ferries Ltd v Sealink UK Ltd* [1988] 1 Lloyd’s Rep 323 (“*Channel Island Ferries*”)) that:

... there is ***inherent*** in the concept of a *force majeure* clause the principle that the person who seeks to rely upon it must prove that, even if a qualifying event had occurred which could materially impede or hinder completion, *such person had taken all reasonable steps to avoid the force majeure effects of that event.* [emphasis added in italics and bold italics]

The learned judge was of the view – in no uncertain terms – that such a legal principle did *not* exist; as he observed (at [99]):

I am unable to accept that argument. I see no juridical basis for positing any free-standing legal principle of the type urged. What conditions must be satisfied for a party to bring himself within a force majeure clause depends simply on its construction and, properly understood, *Channel Island Ferries* says nothing different.

66 We agree with these observations of Ribeiro PJ in *Goldlion Properties* that there cannot be any blanket principle to the effect that there is a requirement to take all reasonable steps before the *force majeure* clause can be relied on (which language embodies the intention of the parties themselves). In this regard, we note that the proposition stated in *Chitty on Contracts* (at para 14-140) supports such a blanket principle:

It is for a party relying upon a force majeure clause to provide the facts bringing the case within the clause ... He must further prove ... that there were no reasonable steps that he could have taken to avoid or mitigate the event or its consequences.

In our view, this proposition is too wide. Whether the affected party must have taken all reasonable steps before he can rely on the *force majeure* clause depends, in the final analysis, on the precise language of the clause concerned. Nevertheless, it might well be the case that, *at least where the clause in question relates to events that must be beyond the control of one or more of the parties, then the party or parties concerned ought to take reasonable steps to avoid the event or events stipulated in the clause.* In such a situation (as is in fact the case in the present proceedings), there is, in our view, a persuasive case for requiring the affected party to take reasonable steps to avoid the effects of the event in question. The rationale for this approach is a simple and commonsensical one: *to the extent that the party or parties concerned do not take reasonable steps to avoid the event or events in question, it cannot be said that the occurrence of the event or events was beyond the control of the party or parties concerned – in which case the clause would not apply.* In this regard, it is pertinent to note that in cases where it was held that the affected party was required to take reasonable steps to avoid the effects of the event in question before it could rely on the *force majeure* clause (see, for example, *RDC Concrete* at [64]; *Channel Island Ferries Ltd v Sealink UK Ltd* [1987] 1 Lloyd's Rep 559 at 570; and the English Court of Appeal decision of *B & S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419), the legal issue that arose centred on *force majeure* clauses which related to events specified therein that were *beyond the control of the party concerned*. It should also be noted that these cases were also decided with respect to the precise factual matrix concerned in general and on the construction of the precise language of each *force majeure* clause in particular. We would observe, parenthetically, that there are resonances here with the principle under the doctrine of frustration that there can be *no self-induced frustration*. Indeed, the proscription against self-induced frustration has a similar rationale inasmuch as it is necessary, in order for the doctrine of frustration to operate, that *neither* contracting party is at fault.

67 However, the focus ought to be on the substance as opposed to the form. Hence, in the English High Court decision of *Trade and Transport Incorporated v Iino Kaiun Kaisha Ltd (The Angelia)* [1973] 1 WLR 210, for example, the court held, *inter alia* (and, as it turned out, by way of *obiter*

dicta), that the party concerned ought to have taken steps to ascertain (and therefore discovered) the non-availability of vehicles before the contract was concluded and could not avail itself of the *force majeure* clause as a consequence. The *force majeure* clause itself referred, *inter alia*, to “unavoidable hindrances” as well as to “hindrances happening *without the fault of the charterer* [the party seeking to rely on the *force majeure* clause in this particular case], *shippers or suppliers of cargo*” [emphasis added] (reference may also be made to the English High Court decision of *Bolckow, Vaughan, and Co v Compania Minera de Sierra Manera* (1916) 114 LT 758).

68 In so far as the exception referred to above (at [66]) is concerned, one might argue that it is *inherent* within the meaning of concepts such as “hinder” and “prevent” in the context of *force majeure* clauses that such concepts would only operate in a situation where the event or events concerned are *beyond the control* of the party or parties concerned. Alternatively, it might be argued that the requirement to take reasonable steps ought to be established based on the *interpretation of the precise language of the clause itself* (cf, for example, *Brauer*). The former is analogous (albeit not identical to) a “term implied in *law*”, whilst the latter is analogous (albeit, again, not identical to) a “term implied in *fact*” (and see generally the local decisions of *Forefront Medical Technology (Pte) Ltd v Modern-Pak Private Ltd* [2006] 1 SLR(R) 927 (at [29]–[44]) and *Jet Holding Ltd v Cooper (Singapore) Pte Ltd* [2006] 3 SLR(R) 769 (at [89]–[91]) with regard to the relationship between these two categories of implied terms). Indeed, the latter argument is consistent with the more general approach adopted by Ribeiro PJ in *Goldlion Properties* (see above at [65]). However, we do not need to express a concluded view on the former argument in the present appeal, particularly in the light of the view we have just expressed – in the preceding paragraph – with regard to the *narrower* situation (where there *is* an *express* reference to the event or events concerned being *beyond the control* of the party or parties concerned). It is interesting, however, to note that Ribeiro PJ, in *Goldlion Properties*, was of the view (at [100]) that *Channel Island Ferries* was distinguishable on the basis that that case related to the “*prevention*” – and *not* the “*hindrance*” – of the contractual performance; in the learned judge’s words (at [102]):

One can readily accept that if the wording of a *force majeure* clause makes it operative only if the qualifying event has prevented performance it is necessarily implicit that the clause does not apply if performance could in fact have been rendered by the taking of reasonable steps. Such a clause justifies a construction which places an obligation on the party relying on it to show that he has taken all reasonable steps to render performance. But no such obligation is implicit in the proposition that a particular matter has materially *hindered* performance. [emphasis in original]

69 With respect, although the above reasoning is not unpersuasive, we are of the view that such an approach is too narrow and that, even in a situation where there is merely “hindrance” of performance, the party relying on the *force majeure* clause concerned ought also to be required to show that it has taken all reasonable steps to avoid the event or events concerned *if* there is the requirement that the event or events must be “*beyond the control*” of that particular party.

70 We pause to observe – parenthetically – that it might well be the case that the majority of *force majeure* clauses would incorporate (in substance and/or form) the requirement that the event or events concerned must be *beyond the control* of the party or parties concerned. If so, then the requirement to take reasonable steps might well be the rule rather than (as alluded to above at [66]) the exception. However, whatever the *actual* position, the *general principle* is, in our view, clear. To reiterate, *where the clause in question relates to events that must be beyond the control of one or more of the parties, then the party or parties concerned ought to take reasonable steps to avoid the event or events stipulated in the clause. However, absent this particular situation, this requirement to take reasonable steps is not a blanket one as such and whether or not such a requirement obtains in the particular situation at hand would depend on the precise language of the*

clause itself (which language embodies the intention of the parties themselves).

71 Where the affected party seeking to rely upon the *force majeure* clause must take *reasonable steps* to avoid the event or events stipulated in the *force majeure* clause, whether he has done so will, of course, be a *question of fact*; it is also *not* an *absolute duty* as *only reasonable steps* need to be taken. We are here in the sphere of the *application* of the law to the precise factual matrix concerned. Hence, in the Singapore High Court decision of *Magenta Resources (S) Pte Ltd v China Resources (S) Pte Ltd* [1996] 2 SLR(R) 316, for example, it was held that there was no duty to mitigate; as S Rajendran J observed (at [96]–[97]):

96 The present case is clearly one where arrangements by a supplier higher up the string to ship the goods had already been made when the delay by reason of *force majeure* happened. There was, therefore, no obligation on the part of the plaintiffs to try and obtain the requisite urea through an alternative source.

97 But even apart from the fact that this was a case where the contract with the suppliers higher up the chain had been entered into at the time of the *force majeure*, this was not a contract under which the sellers were at liberty to buy goods afloat. The plaintiffs here were not merely obliged to deliver prilled urea of USSR origin but were in addition required to (a) mark the goods with specific shipping marks provided by the defendants; (b) ship the goods only in certain vessels not specifically prohibited by the contract; and (c) ship the goods from a specified port. I agree with the submission of the plaintiffs that, in such a situation, there was no question of buying goods afloat. This is further reinforced by the fact that the contract here was not a CIF contract since, by the contract, the defendants were to provide insurance for the goods from the port of loading.

(2) Application to the facts of the present appeal

(A) The Issue

72 The issue is, in essence, a simple one. Given the fact that cl 3 expressly stipulates that the shortage of material (here, sand to manufacture concrete) must have arisen through circumstances beyond the Appellant's control in order for the clause to operate, the burden is on the Appellant to show that it had taken all reasonable steps to avoid the operation of cl 3. We are of the view that there is sufficient evidence to demonstrate that the Appellant had, on the balance of probabilities, taken reasonable steps to avoid the operation of cl 3. Let us elaborate.

(B) Reasonable steps taken by the Appellant but rejected by the Respondent

73 It is common ground that when the Sand Ban came into effect, the BCA implemented a mechanism in which only main contractors (such as the Respondent) would have access to BCA's sand stockpiles. The Appellant had no access to the BCA's sand stockpile. The Appellant took the effort to notify the Respondent of this fact, by way of its letter dated 9 February 2007 (reproduced above at [17]), [note: 43] which clearly informed the Respondent that the mechanism implemented by the BCA meant that the Appellant could not have access to the BCA's stockpiles. However, the Respondent's lack of willingness to assist the Appellant is demonstrated by the fact that the Appellant's letter of 9 February 2007 was ignored. It is undisputed that there was no response to this letter. If the Respondent had been willing to help procure sand from the BCA, it would have replied to this letter. This is in stark contrast to the mechanism implemented by the BCA in which it had encouraged contractors to assist in the procurement and supply of sand to RMC companies, by way of its "onward delivery" mechanism as stated in the BCA's Circular dated 1 February 2007.

74 In addition, the Appellant had written a letter dated 1 March 2007 (see above at [21]) in which it had offered to credit back to the Respondent the cost of the sand, calculated at \$63 per tonne of sand in accordance to the BCA price, if the Respondent was able to provide the Appellant with sand ("the Appellant's offer"). [note: 44] This was, *in substance, as good as a request* for the Respondent to help procure sand from the BCA stockpiles. However, the Respondent simply ignored the Appellant's request.

75 The Judge, however, was unconvinced that the Respondent's rejection of the Appellant's offer meant that the Respondent was unwilling to help supply sand to the Appellant. In particular, the Judge was concerned that the Appellant's offer to credit back the costs of procuring sand had a catch – the offer included a rise in the price of concrete found in the 1 March Quotation. [note: 45] In this regard, the Judge observed as follows (see the Judgment at [50]–[52]):

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

51 I reject the [Appellant's] argument. The [Appellant's] offer of crediting back the cost of any sand and aggregates provided by the [Respondent] was premised on the assumption that the [Respondent] 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 [Respondent] rejected, I would have regarded it as strong evidence that the [Respondent] was unwilling to help the [Appellant] apply for sand from the BCA stockpile. *However, the [appellant'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 [Appellant] had no right to impose higher prices of concrete on the [Respondent]. 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 [Respondent] was willing to assist the [Appellant] by applying for BCA sand (where the [Appellant] pays for the BCA sand), the [Appellant] was obliged to accept the sand and perform the Contract without imposing further conditions*

[emphasis added]

76 In our view, and with respect, we find (from the Judge's observations quoted in the preceding paragraph, in particular, those portions that have been emphasised) that the Judge *conflated* several questions. There are in fact three separate questions raised in the Judge's observations:

- (a) Whether the Appellant has the right to impose higher prices for concrete;
- (b) Whether a rise in the price of sand is sufficient to trigger a *force majeure* clause; and
- (c) Whether the Respondent had demonstrated its willingness to assist the Appellant to procure sand.

As we will elaborate upon in a moment, the only question that ought to have been addressed by the Judge was the one in (c) above.

77 In our view, whether the Appellant *has the right* to impose higher prices for concrete (see [76(a)] above) is irrelevant at this particular stage. This question is only *consequential* upon the *real* inquiry, which is whether the Appellant can invoke cl 3 in the first place (see [76(b)] above). If the Appellant can invoke cl 3, the Respondent and Appellant are discharged from performing their contractual obligations under the Contract and are free to form a new contract with new prices. Hence, whether the Appellant has a right to impose higher prices for concrete cannot assist us in determining whether the Appellant can avail itself of the benefit of cl 3, for that is the very question which the present inquiry seeks to answer.

78 As explained earlier (at [42]–[44]), whether the Appellant can avail itself of the benefit of cl 3 is dependent on whether the circumstances constituted a “disruption” within the meaning of cl 3, *and* whether the shortage of material was beyond the appellant’s control. We have already explained (at [50]–[53]) that a mere increase in price is insufficient to trigger cl 3 in so far as it is ordinarily insufficient to constitute a “disruption”. We have, however (at [53]), left open the issue as to what the legal position would be if the increase in price was *astronomical*. In addition, we have determined earlier (at [60]–[64]) that the present circumstances were sufficiently difficult to constitute a “disruption” within the meaning of cl 3.

79 In so far as the second sub-issue as to whether the shortage of material was beyond the Appellant’s control is concerned, a vital question would be whether the Appellant had taken reasonable steps to avoid the effects caused by the shortage of material. In this regard, one specific question is whether the Respondent was willing to assist the Appellant to procure sand from the BCA (see [76(c)] above). As is evident from the Judge’s observations above (at [75]), the Judge was concerned that the Appellant’s offer had included a 1 March Quotation with increased prices of concrete. We would be inclined to agree with the Judge if the Respondent had rejected *both* the increased prices offered in the 1 March Quotation *as well as* the Appellant’s offer to credit back the cost of obtaining sand. If the Respondent had indeed rejected the 1 March Quotation, it would have been consistent with the Judge’s concern that the Respondent did not agree to the Appellant’s offer because it would have been forced to accept the increased prices in the quotation. *However*, the Judge did *not*, with respect, consider the fact that the Respondent had *indeed accepted* the prices in the 1 March Quotation as evidenced in the Respondent’s letter dated 20 March 2007 [note: 46] in which the Respondent agreed to pay the increased prices set out in the 1 March Quotation. Even though the Respondent had accepted the increased prices, it *did not respond* to the Appellant’s offer in the 1 March 2007 letter to *credit back* the Respondent the costs of procuring sand from the BCA. The 1 March Quotation was *attached to* the 1 March 2007 letter which contained the Appellant’s offer. [note: 47] Having accepted the prices offered in the 1 March Quotation, the only reason why there was no response to the Appellant’s offer, read together with the similar “silence” from the Respondent after receiving the Appellant’s letter of 9 February 2007, [note: 48] is that the Respondent had been unwilling to help the Appellant procure sand from BCA.

80 It is important to emphasise that the Appellant’s offer to credit the cost of obtaining the sand from BCA at the price of \$63 per tonne of sand back to the Respondent, demonstrates the lengths to which the Appellant was prepared to go in order to ensure its continued ability to manufacture RMC. The price of \$63 per tonne of sand was \$3 *more* than the price at which the Respondent could obtain sand from the BCA. This means that for every tonne of sand that the Respondent procured for the Appellant, the Respondent would obtain an extra \$3.

81 Further, since the price of Grade 30 RMC quoted by the Appellant was \$185 per cubic metre (see above at [22]), the effective selling price of RMC was \$182 per cubic metre (*viz*, the quoted

price of \$185 – \$3 reimbursement to the Respondent for procurement of sand). This is *below* the cost price of the RMC which was \$183.85 per cubic metre (the cost price was revealed at a meeting between the Construction Industry Joint Committee and the BCA held on 25 April 2007 [\[note: 49\]](#)). This again emphasises the efforts that the Appellant was willing to make in order to meet its obligation to manufacture and supply RMC to the Respondent. This also demonstrates that the Appellant was not attempting to profiteer from the shortage of sand caused by the Sand Ban.

82 The above analysis is also reinforced by further evidence which will be dealt with in detail below (at [\[83\]](#)–[\[90\]](#)).

(C) The Respondent had been unwilling to supply sand to the Appellant

83 There was no documentation evidencing the fact that the Respondent had offered to help supply sand to the Appellant. Whilst the Respondent had obtained sand from the BCA from as early as February 2007, it had chosen, instead, to give the sand to a third party – an entity known as “Group Industries at Sungei Kadut”. The director of the Respondent, Mr Peh Chong Eng, admitted in the court below that “somewhere [*sic*] in February”, the Respondent had applied for sand from the BCA and *had indeed obtained some supply of sand*. [\[note: 50\]](#) Since the Respondent had known that, as between the parties, *only it* had access to the BCA’s stockpiles, it ought to have informed the Appellant that it had obtained sand from the BCA. Instead of thus informing the Appellant, the Respondent ignored the Appellant’s letter of 9 February 2009, in which (as we have seen) the Appellant made it clear that it could not obtain sand from the BCA.

84 It was further revealed in the court below that Respondent had supplied sand to Buildmate. Mr Peh, Buildmate’s director, revealed that the Respondent would supply sand to Buildmate, and Buildmate would (in turn) supply sand to the Appellant at the same price as that offered by the Appellant to the Respondent (see above at [\[23\]](#)) at \$63 per tonne. The Appellant would use the sand to manufacture RMC and sell it to Buildmate, whereupon Buildmate would (in turn) supply the same RMC to the Respondent. Unfortunately, it was not placed on record as to what the commercial reasons were behind this strange and roundabout way for the Respondent to obtain RMC.

85 There was however, some hint that Buildmate was used as an entity to obtain RMC from the Appellant without payment: it was revealed that Buildmate did not pay the Appellant for the RMC supplied to it [\[note: 51\]](#) (which RMC was, in turn, supplied by Buildmate to the Respondent). Buildmate owed the Appellant approximately \$600,000 for RMC supplied [\[note: 52\]](#) and, instead of making payment, Buildmate had offered to supply sand to the Appellant as substitute payment, [\[note: 53\]](#) which the Appellant refused to accept. Since only contractors such as the Respondent could have access to sand at that particular point in time, and Buildmate had offered to use sand as substitute payment for the RMC, there is a suggestion that the Respondent had been using Buildmate to obtain RMC without payment. At the same time, the Respondent refused to supply sand to the Appellant and had chosen to supply it to Buildmate instead; the Appellant’s hands were tied inasmuch as it could not manufacture RMC pursuant to the Contract. If so, the Respondent would be having its cake and eating it: by obtaining RMC without payment, and by insisting on claiming against the Appellant for its breach of contract for failure to provide RMC under its contract. Given that this is not a pleaded issue, and in view of the fact that the prior dispute between Buildmate and the Appellant has been settled, we shall, however, refrain from making any determination on this matter.

86 Notwithstanding the above, one thing remains clear from this puzzling arrangement. It reinforces the finding that the Respondent was unwilling to assist in supplying sand to the Appellant. This is because Mr Peh Chong Eng, the Project Manager, revealed that the Respondent had purchased

Grade 40 Normal Mix Concrete and Grade 50 Normal Mix Concrete from Buildmate at the unit price of S\$190.00 and S\$199.00, respectively; these were *exactly the same prices* for RMC as those offered by the Appellant in the 1 March Quotation. Since the Respondent had accepted the prices offered by the Appellant, there is no explicable reason why it had chosen to supply sand to a third party (Buildmate) and not to the Appellant, except for the fact that the Respondent had been *unwilling* to supply sand to the Appellant, whatever the underlying commercial motivations might have been.

87 Apart from supplying sand to “Group Industries at Sungei Kadut” and Buildmate (instead of the Appellant), Mr Peh Chong Eng actually gave evidence that the Respondent did not inform the Appellant that it was willing to help because it believed that the Appellant was already sourcing for alternative supplies of sand. [\[note: 54\]](#) This demonstrates, in fact, that the Respondent had *thought*, rightly or wrongly, that there was *no need* to help the Appellant.

88 The Respondent also sought to argue that it had, by virtue of its letter to the Appellant dated 26 April 2007 [\[note: 55\]](#) (see also above at [\[29\]](#)), offered to supply sand to the Appellant. The letter stated that Mr Oh Beng Hwa (the Respondent’s director) had proposed *during the meeting of 19 March 2007* that the Respondent would “supply *the sand* and aggregate” to the Appellant at pre-sand ban prices in exchange for the Appellant to supply RMC at contracted prices. The material parts of the Respondent’s letter of 26 April 2007 are reproduced below, as follows: [\[note: 56\]](#)

On 19th Mar[*ch*] 2007, our Mr Oh [Beng Hwa] met with your Mr Leong and Mr Soh ...to discuss the matter of your demand for increase in price of concrete mix ...

Our Mr Oh [Beng Hwa] proposed, without prejudice, that to resolve the matter, we supply *the sand* and aggregate to you based on the same old rate as that agreed by you, for you to supply the concrete mix at the same fixed price as in the aforesaid contract contained in [the] quotation dated 10 November 2006 ...

[emphasis added]

89 However, this letter does not advance the Respondent’s case in this particular regard simply because it was conditional on the Appellant supplying concrete to the Respondent at the contracted prices. Indeed, this particular letter was no more than an ultimatum issued by the Respondent to the Appellant, which the latter rejected (see also [\[30\]](#) above).

90 Even more crucially, the Respondent’s purported offer to supply sand was in fact only an offer to supply *manufactured sand*. There was no offer to supply *concreting* sand. This was confirmed by Mr Oh Beng Hwa when he gave evidence that the Respondent had proposed at the 19 March 2007 meeting (referred to in the Respondent’s letter dated 26 April 2007) to supply manufactured sand, as opposed to concreting sand. [\[note: 57\]](#) The Respondent re-confirmed this position that it had offered the Appellant manufactured sand at the meeting of 19 March 2007 in its closing submissions. [\[note: 58\]](#)

(D) The Respondent had offered to supply manufactured sand to the Appellant but this was not a viable alternative

91 The Appellant did not accept the Respondent’s offer to supply sand. In a letter dated 26 April 2007, the Appellant highlighted that the Respondent’s offer was confined only to the supply of *manufactured sand*. [\[note: 59\]](#) We note that the Judge did not consider this a material aspect of the Appellant’s letter of 26 April 2007 (see [18] of Judgment); neither was there any discussion on the

issues relating to manufactured sand in the Judgment. In our view, if manufactured sand had been a viable alternative to concreting sand available to the Appellant for use in the manufacture of RMC, and there was no good or justifiable reason why the Appellant did not accept the Respondent's offer to supply this viable alternative, it cannot be said that the Appellant had taken reasonable steps to avoid the operation of cl 3. *However*, the *undisputed* evidence adduced in the proceedings in the court below demonstrates that the Respondent's offer to supply manufactured sand was a contrived one. There was in fact, at the time when the offer was made on 19 April 2007 (which was reiterated in the Respondent's letter of 26 April 2007), no approval granted to use manufactured sand as part of the sand component to produce RMC. In any event, the undisputed evidence demonstrates that it has never been the case that manufactured sand could constitute 100% of the sand component to manufacture RMC. This means that *concreting sand would still be required in any event*. In so far as the offer to supply manufactured sand simply evades the pertinent questions of how and from where the Appellant could obtain *concreting* sand, without which the Appellant is *unable* to produce RMC, we are of the view that the Respondent's offer to supply only manufactured sand cannot be said to be a genuine offer. We now turn our attention to the specific evidence.

92 First, the evidence from the *Respondent's own witnesses* shows that there was, in fact, *no approval* to use *manufactured* sand. The Respondent's Project Manager, Mr Peh Chong Eng, gave evidence that approval of the Qualified Person had to be obtained before manufactured sand can be used to manufacture RMC. [\[note: 60\]](#) As such, it follows that such approval to use manufactured sand *should* have been obtained at the very latest by the meeting of 19 March 2007 when the Respondent had offered to supply manufactured sand to the Appellant. On the contrary, the evidence shows that no such approval had been obtained at the material time. When Mr Oh Beng Hwa (the Respondent's director) was asked whether the use of manufactured sand was approved only in *December 2007*, he at first answered that he was unsure, [\[note: 61\]](#) after which he made reference to the concrete mix design dated 22 November 2006 exhibited in his AEIC. [\[note: 62\]](#) However, Mr Oh Beng Hwa admitted that the words "manufactured sand" were not found in that design. [\[note: 63\]](#) As such, the reference to that design is of no relevance to show that there had been approval to use manufactured sand before the meeting of 19 March 2007.

93 Second, the Respondent's offer to supply sand on 19 March 2007 (reiterated in the Respondent's letter dated 26 April 2007) was made *more than eleven weeks before approval was granted* to use *manufactured* sand. Mr Oh Beng Hwa admitted, in cross-examination, [\[note: 64\]](#) that the request for approval to use manufactured sand was actually found in the concrete mix design proposal dated *1 June 2007* attached with a letter dated *8 June 2007*, [\[note: 65\]](#) which had been sent to the Qualified Person, Mr Lai Kin Sin. Clearly, this request for approval to use manufactured sand came too late; there was no such approval to use manufactured sand at the time when the Respondent had made an offer to supply manufactured sand at the meeting of 19 March 2007.

94 Third, *even if* there was approval to use manufactured sand, it was common ground that the approved use of manufactured sand was *only up to 50%* of the sand component in RMC, as shown in paragraphs 5.5 and 5.6 of the concrete mix design proposal dated 1 June 2007. [\[note: 66\]](#) In other words, there was no approval for manufactured sand to be used as the 100% sand component to manufacture RMC. There was therefore still a need to obtain concreting sand to make up the other 50% of the sand component required to manufacture RMC.

95 Fourth, there is substantial undisputed evidence that, although the industry did use manufactured sand even before the Sand Ban, it was *never used as a 100% sand component* to produce RMC. Concreting sand would still be required in any event. In other words, manufactured

sand has never been used as a *full* substitute for concreting sand. In particular, Dr Ghosh (the Appellant's Chief Executive Officer with a Canadian PhD degree in concrete technology and civil engineering materials [\[note: 671\]](#)) testified that the quality of the RMC suffers when a greater percentage of manufactured sand is used in its production. Dr Ghosh's evidence is that as a general practice in the construction industry, in manufacturing RMC, the use of manufactured sand would not exceed 20% to 30% of the sand component; it was never used as a 100% substitute for concreting sand. [\[note: 68\]](#) Dr Ghosh's evidence is strongly corroborated by the supporting evidence, not least of which was Mr Oliver Ong Yan Wah's (the Project Director's) revealing evidence that at the material time, it was "*unknown*" whether the use of manufactured sand as a 100% sand component for RMC was allowed. [\[note: 69\]](#) Further, it is clear that the two BCA Circulars dated 1 and 15 February 2007, released after the news of the Sand Ban was made known, make *no* mention of manufactured sand. Before the Sand Ban was announced, the BCA encouraged the construction industry to use alternative materials to *reduce the need* for concreting sand, in its media release dated 29 January 2007 ("BCA's media release"), in the following terms: [\[note: 70\]](#)

... we [the BCA] strongly encourage the [construction] industry to adopt alternative construction materials to *reduce the need* for concreting sand. [emphasis added]

96 The BCA's media release shows that alternative construction materials were not meant to be full substitutes for concreting sand, but had played the role of reducing the need for concreting sand. This supports Dr Ghosh's evidence that manufactured sand has not been used as a full replacement of concreting sand to manufacture RMC. The contents of BCA's media release have been confirmed by Mr Ng Cher Cheng, the Deputy Director of procurement policies department at the BCA. [\[note: 71\]](#) We are also aware that the letter dated 13 June 2007 by the materials specialist, [\[note: 72\]](#) MAPEI, stated that at that particular point in time, all commercial RMC suppliers were using only *approximately 50%* of manufactured sand to manufacture concrete. The other 50% required concreting sand, which the Respondent had failed to offer to procure from the BCA.

97 In view of the evidence set out above, it is clear that *manufactured* sand was *not* a viable alternative. Put simply, the Appellant simply *could not have used* manufactured sand to produce RMC without the requisite approval to do so. The Respondent's offer to supply manufactured sand was therefore a mere *empty gesture* as there was in fact no approval for the use of manufactured sand at the time of the offer, and, even assuming that approval had been granted, *concreting* sand was still required in any event for about 50% of the sand component to produce RMC. The Respondent was presumably more than aware of the futility of its own offer as it kept silent and did not reply to the Appellant's letter dated 26 April 2007. We conclude this part of the judgment by observing that there was a disingenuous attempt by the Respondent to utilise the pleadings in a "creative" fashion in order to bolster its case on this particular issue. In particular, the Respondent made averments in paras 9 and 11 of its statement of claim that created the misleading impression that a proper offer to supply (*concreting*) sand had been made to the Appellant, as follows:

9. To persuade the Defendant to honour its obligations under the Contract, the Plaintiff's Peh Chong Eng *proposed to the Defendant's Messrs Leong and Soh to supply sand* and aggregate to the Defendant. This proposal was communicated to the Defendant at a meeting on 19 March 2007. The Defendant did not agree to this proposal.

...

11. By a letter dated 26 April 2007, the Plaintiff *reiterated its previous proposal to supply sand* and aggregate to the Defendant. The Plaintiff gave the Defendant until 2pm 27 April 2007 to

accept the proposal, failing which it would accept its repudiation of the Contract ...

[emphasis added]

98 The averments made in the statement of claim (set out in the preceding paragraph) are obviously very different from the actual proposal (as is the Respondent's present argument) to supply *only manufactured* sand. Indeed, we surmise that the Judge was (unfortunately) under the (erroneous) impression that the Respondent was making an argument based on the former (as opposed to the latter), as it was stated in the Judgment that the Respondent had offered to *supply sand* to the Appellant (see [17] and [53] of the Judgment), in which *no mention* was made of manufactured sand. We add here, parenthically, that the Respondent had not pleaded that an offer of manufactured sand constituted a fair and reasonable offer.

(E) The Appellant took other reasonable steps to avoid the operation of Cl 3

99 Before the BCA has made the announcement under which the Appellant would be denied access to the BCA sand stockpiles, the Appellant had, in fact, met other concrete suppliers and the BCA to discuss alternative supplies of sand. [\[note: 73\]](#) On 30 January 2007, the Appellant had a meeting with the Ministry of National Development to discuss the sand ban situation. In addition, the Appellant stated in its letters to the Respondent dated 9 February 2007 and 1 March 2007 that the Appellant had been sourcing for supplies of sand and aggregates.

(F) Conclusion

100 Based on the totality of the evidence, we conclude that Appellant *had* taken reasonable steps to avoid the operation of cl 3. In the final analysis, it is important to emphasise that the reasonable steps that the Appellant could have taken to avoid the operation of cl 3 were limited, in the particular context, to a situation where only the Respondent had access to the BCA's sand stockpiles. The Appellant had done what it could in the difficult circumstances it found itself placed in: it had informed the Respondent of its inability to procure sand from the BCA and it had offered to credit back to the Respondent the price of sand at a price higher than the cost of procuring sand from the BCA. However, time and again, the Respondent had been unwilling to assist to procure sand from the BCA. In addition, the Respondent did not adduce any evidence that there were alternative supplies of concreting sand from local or overseas sources (apart from its failed contention with regard to manufactured sand). Since the Appellant's inability to perform the Contract was due largely to the Respondent's unwillingness to assist, it follows that the triggering of cl 3 is not insubstantially due to the Respondent's own actions. As such, it does not lie in the Respondent's mouth to insist that the Appellant is unable to rely upon cl 3. In the circumstances, cl 3 applies in the context of the present proceedings as we had earlier found that there had indeed been a "disruption" within the meaning of the clause itself. Consequently, the Appellant is not in breach of contract as cl 3 discharged the Appellant from its obligation to supply RMC to the Respondent.

101 We would like conclude with the following observation. This case illustrates the importance of drafting contractual clauses in general and *force majeure* clauses in particular with clarity and precision. Although *force majeure* clauses often take the form of "boilerplate" clauses, lawyers and their clients would do well to pay more attention to the precise language used in drafting the clause(s) concerned. In the present case, for example, cl 3 was phrased too generally; the dispute between the Appellant and Respondent could have been efficaciously resolved if there had been a more specific clarification of its terms found in cl 3, not least with regard to the meaning of the word "disrupted".

The Appellant's application to amend its pleadings

102 As mentioned above (at [7]), the Appellant sought to amend its pleadings (by way of SUM 697/2010) in order to raise – for the first time before this court – the argument that, in any event, the Contract had been *frustrated*. Given our decision with regard to the two sub-issues, the Appellant need not in fact have made this application.

103 The legal principles governing an application of this nature have been set out in a number of recent local decisions. In particular, in the recent decision of this court in *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52, Chan Sek Keong CJ, delivering the judgment of the court, set out a comprehensive overview of this area of the law, as follows (at [110]–[114]):

110 ... O 20 r 5(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) gives the court a wide discretion to allow pleadings to be amended at any stage of the proceedings on such terms as may be just. Order 20 r 5(1) reads:

Subject to Order 15, Rules 6, 6A, 7 and 8, and this Rule, the Court may *at any stage of the proceedings* allow the plaintiff to amend his writ, or any party to amend his pleading, *on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct*. [emphasis added]

111 In *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] 1 SLR 502 (“*Chwee Kin Keong*”), this court said at [101]:

Under O 20 r 5(1) of the Rules of Court (Cap 322, R 5, 2004 Rev Ed), the court may grant leave to amend a pleading at *any stage of the proceedings*. *This can be before or during the trial, or after judgment or on appeal*. [emphasis added]

112 Indeed, local case law shows that our courts have allowed amendments to be made to pleadings even:

(a) at the final stages of a trial after the parties have made their closing submissions (see *Chwee Kin Keong* at [101]–[103] and *Lee Siew Chun v Sourgrapes Packaging Products Trading Pte Ltd* [1993] 2 SLR 297 at 323–325, [91]–[96]);

(b) after summary or interlocutory judgment has been obtained (see *Invar Realty Pte Ltd v Kenzo Tange Urtec Inc* [1990] SLR 791 at 797–798, [21]–[22]); and

(c) pending an appeal or in the course of an appeal itself (see *Soon Peng Yam v Maimon bte Ahmad* [1996] 2 SLR 609 at 618, [25]–[30], *Asia Business Forum Pte Ltd v Long Ai Sin* [2004] 2 SLR 173 (“*Asia Business Forum*”) at [17] and *Susilawati v American Express Bank Ltd* [2009] 2 SLR 737 (“*Susilawati*”) at [56]; see also O 57 r 13(1) of the Rules of Court, which states that “the Court of Appeal shall have all the powers and duties as to amendment and otherwise of the High Court”).

...

113 The guiding principle is that amendments to pleadings ought to be allowed if they would enable the real question and/or issue in controversy between the parties to be determined... However, an important caveat to granting leave for the amendment of pleadings is that it must be just to grant such leave, having regard to all the circumstances of the case. Thus, this court

held in *Asia Business Forum* that the court, in determining whether to grant a party leave to amend his pleadings, must have regard to “the justice of the case” (at [12]) and must bear in mind (at least) two key factors, namely, whether the amendments would cause any prejudice to the other party which cannot be compensated in costs and whether the party applying for leave to amend is “effectively asking for a second bite at the cherry” (at [18]). These two key factors were endorsed recently again by this court in *Susilawati* at [58].

114 It cannot be over-emphasised that all the relevant circumstances of the case at hand should be considered by the court in deciding whether or not to allow an amendment to pleadings, and that delay in bringing the application for leave to amend *per se* does not constitute prejudice to the other party. As this court stated in *Wright Norman* at [23]:

... In our opinion, at the end of the day, the most important question which the court must ask itself is, are the ends of justice served by allowing the proposed amendment. Pleadings should not be used as a means to punish a party for his errors or the errors of his solicitors. All relevant issues should be investigated, provided the other party will not be prejudiced in a way which cannot be compensated by costs. All relevant circumstances should be considered by the court before it exercises its discretion [as to] whether it would allow an amendment. *While the time at which an amendment is made is a relevant consideration it is not necessarily decisive. Delay per se does not equal prejudice or injustice.* We do not think any rigid rule should or can be laid down on this. [emphasis added]

104 Reference may also be made to the decision of this court in *Hwa Lai Heng Ricky v DBS Bank Ltd* [2010] 2 SLR 710, which cited and applied the abovementioned principles.

105 Having regard to the principles set out in the preceding paragraphs, we are of the view that the Respondent’s argument to the effect that, if the doctrine of frustration had been canvassed in the court below, more evidence would need to have been called and that it would now be prejudiced if the Appellant’s application were to succeed, is persuasive. The principles as well as rationale governing *force majeure* clauses on the one hand and the doctrine of frustration on the other are – notwithstanding possible overlaps – quite different. And, when we add to this the fact that it would appear that the Appellant has a strong *prima facie* case in the context of the doctrine of frustration (see *Kwan Yong* (especially at [76]–[77])), it is clear, in our view, that it would be unfair to the Respondent to grant the Appellant’s application to amend its pleadings at this late stage. That having been said, the Appellant did not need (in the light of our decision on both sub-issues above) to rely upon the doctrine of frustration. In the event, we dismiss the Appellant’s application with costs.

Conclusion

106 For the reasons stated above we allow the appeal with costs and with the usual consequential orders. However, we reject the application in SUM 697/2010 with costs.

[note: 1] See *The Jakarta Post* dated 24 January 2007 in the Record of Appeal (“ROA”) vol III Part M, p 4860.

[note: 2] See the Appellant’s Core Bundle, vol II (“2ACB”), pp 33–34.

[note: 3] See *The Straits Times* dated 25 January 2007 at ROA vol III Part M (“ROA(3M)”), p 4861.

[note: 4] 2ACB, p 35.

[\[note: 5\]](#) *Ibid*, p 36.

[\[note: 6\]](#) *Ibid*, p 39.

[\[note: 7\]](#) *Ibid*, p 39, para 4.

[\[note: 8\]](#) *Ibid*, pp 40–41.

[\[note: 9\]](#) *Ibid*, p 37.

[\[note: 10\]](#) *Ibid*, p 38.

[\[note: 11\]](#) *Ibid*, p 42.

[\[note: 12\]](#) *Ibid*, p 43.

[\[note: 13\]](#) *Ibid*, p 44.

[\[note: 14\]](#) *Ibid*, p 46.

[\[note: 15\]](#) *Ibid*, p 47.

[\[note: 16\]](#) *Ibid*.

[\[note: 17\]](#) *Ibid*, pp 48–49.

[\[note: 18\]](#) See the Notes of Evidence (“NE”) (7 July 2009), p 47.

[\[note: 19\]](#) See Peh Ah See’s Affidavit of Evidence-in-Chief (“AEIC”) in ROA(3M), p 4831.

[\[note: 20\]](#) See NE (7 July 2009), pp 20–21.

[\[note: 21\]](#) See Peh Ah See’s AEIC in ROA(3M), p 4830.

[\[note: 22\]](#) See Peh Chong Eng’s AEIC in ROA(3A), pp 199–202.

[\[note: 23\]](#) See Peh Chong Eng’s AEIC in ROA(3A), p 203.

[\[note: 24\]](#) See NE (7 July 2009), p 85.

[\[note: 25\]](#) See NE (7 July 2009), p 85, and NE (8 July 2009), pp 118 and 120.

[\[note: 26\]](#) See NE (8 July 2009), p 120, lines 22–27.

[\[note: 27\]](#) See NE (7 July 2009), pp 20 and 67 and NE (8 July 2009), p 120.

[\[note: 28\]](#) See the Defence (Amendment No 1), ROA vol 2, p 53, para 9.

[\[note: 29\]](#) See the Appellant's Case, p 21, para 29.

[\[note: 30\]](#) See 2ACB, p 50.

[\[note: 31\]](#) *Ibid.*

[\[note: 32\]](#) *Ibid*, pp 51–52.

[\[note: 33\]](#) *Ibid*, p 51.

[\[note: 34\]](#) *Ibid*, p 53.

[\[note: 35\]](#) *Ibid*, p 48, para 2.

[\[note: 36\]](#) See 2ACB, p 39.

[\[note: 37\]](#) *Ibid.*

[\[note: 38\]](#) *Ibid*, p 38 (where Bibright Shipping declared a *force majeure* event on the appellant. Bibright Shipping had also explained that its sand supplies had been taken over by BCA).

[\[note: 39\]](#) See the Supplemental Core Bundle, p 26.

[\[note: 40\]](#) See 2ACB, p 44.

[\[note: 41\]](#) *Ibid*, p 36.

[\[note: 42\]](#) See Plaintiff's Closing Submissions dated 14 August 2009 found in ROA Vol IV at p 5393.

[\[note: 43\]](#) *Ibid*, p 43, para 3.

[\[note: 44\]](#) *Ibid*, p 47, para 3.

[\[note: 45\]](#) See 2ACB, p 48.

[\[note: 46\]](#) *Ibid*, p 50.

[\[note: 47\]](#) *Ibid*, pp 48–49.

[\[note: 48\]](#) *Ibid*, p 43.

[\[note: 49\]](#) See ROA(3M), p 4992.

[\[note: 50\]](#) See NE (7 July 2009), p 32, lines 3–6.

[\[note: 51\]](#) See NE (7 July 2009), p 85, lines 27–29.

[\[note: 52\]](#) See NE (7 July 2009), p 85, and NE (8 July 2009), p 118 and 120.

[\[note: 53\]](#) See NE (8 July 2009), p 120, lines 22–27.

[\[note: 54\]](#) See NE (7 July 2009), p 43, lines 21 and 28–29.

[\[note: 55\]](#) See 2ACB, p 53.

[\[note: 56\]](#) CB Vol 2 at p CB-53.

[\[note: 57\]](#) Oh Beng Hwa’s AEIC at ROA, Vol 3(A) at p 79, para 20.

[\[note: 58\]](#) ROA Vol 4 at p 5394, para 38 and p 5417, para 64.

[\[note: 59\]](#) CB Vol 2 at p CB-54.

[\[note: 60\]](#) See NE (7 July 2009), p 11, line 22.

[\[note: 61\]](#) See NE (7 July 2009), p 19, line 9.

[\[note: 62\]](#) ROA Vol 3(A) at p 52.

[\[note: 63\]](#) See NE (7 July 2009), p 79, line 11.

[\[note: 64\]](#) See NE (8 July 2009), p 95.

[\[note: 65\]](#) See CB vol 2, p CB-77 and CB-78.

[\[note: 66\]](#) See CB vol 2, p CB-78.

[\[note: 67\]](#) See NE (8 July 2009), p 107, lines 5–6.

[\[note: 68\]](#) See NE (8 July 2009), p 110.

[\[note: 69\]](#) See NE (Day 2), p 99, line 14.

[\[note: 70\]](#) See 1AB at p 4726, para 4, found in ROA Vol V part K, at p 10313.

[\[note: 71\]](#) See NE (10 July 2009), p 189, lines 3–6.

[\[note: 72\]](#) ROA Vol 4 at p 5499(32), para 6.

[\[note: 73\]](#) See the letter dated 26 January 2007, 2ACB, p 35, para 4.

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