Sato Kogyo (S) Pte Ltd v RDC Concrete Pte Ltd
[2006] SGHC 213

Case Number : Suit 530/2005

Decision Date : 24 November 2006

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Tan Yew Cheng (Leong Partnership) for the plaintiff; Por Hock Sing Michael (Tan Lee & Partners) for the defendant

Parties : Sato Kogyo (S) Pte Ltd — RDC Concrete Pte Ltd

Contract – Contractual terms – Exclusion clauses – Clause excluding liability for "consequential and/or other damages" – Whether exclusion clause precluding plaintiff's claim for loss that arose from stop order – Whether requisite actual knowledge existing on part of defendant of loss

Contract – Contractual terms – Force majeure clause – Whether defendant liable for non-supply due to shortage of raw materials, plant breakdown and truck breakdown

Contract – Contractual terms – Whether plaintiff entitled to withhold payment – Whether defendant entitled to suspend supply of concrete

Contract – Discharge – Stipulated event – Whether plaintiff entitled to terminate the contract – Whether defendant continually falling short in supply of concrete – Whether defendant's supply unable to meet requirement

Contract – Remedies – Damages – Clause allowing plaintiff to claim for "any direct cost" – Whether delay in construction schedule amounting to "direct cost" – Whether price differential of alternative supplier amounting to "direct cost"

24 November 2006 *Judgment reserved.*

Lai Siu Chiu J

Facts

1 This was a claim for non-delivery of ready-mixed concrete ("the concrete" or "concrete") ordered by the plaintiff from the defendant and a counterclaim by the defendant for the price of concrete it had already delivered to the plaintiff.

2 The plaintiff Sato Kogyo (S) Pte Ltd was and still is the main contractor for the construction of the Lorong Chuan station ("the project"), on the new Circle Line of the Mass Rapid Transit ("the MRT") subway system. The plaintiff was awarded the contract by the Land Transport Authority ("LTA") in June 2003. The plaintiff required a huge volume of concrete estimated at 70,000 cubic metres and of various grades, to be supplied and delivered to the site.

3 The defendant RDC Concrete Pte Ltd was the plaintiff's supplier of concrete for the project. After receiving quotations from various suppliers, the plaintiff accepted the defendant's revised quotation dated 1 September 2003 and issued the defendant a letter of intent dated 16 September 2003. The plaintiff's award of the contract to the defendant was subject to approval by the LTA which was subsequently given.

4 It is common ground that the defendant's revised quotation dated 1 September 2003 (at

1AB1-3) and the plaintiff's letter of intent dated 16 September 2003 (at 1AB4-5) formed the contract between the parties.

5 On 5 April 2005, the defendant suspended supply of the concrete to the plaintiff citing non-payment. On 30 May 2005, the plaintiff terminated the contract because the concrete supplied by the defendant failed to meet the LTA requirements and delivery was not prompt when the plaintiff placed its orders.

6 The trial before me was confined to liability. In the event that I rule in favour of the plaintiff on its claim, damages if any, will be assessed by the Registrar.

The issues

7 The issues which called for determination were:

(a) Was the contract an exclusive contract?

(b) Would the failure of cube tests allow the plaintiff to claim the price differential of an alternative supplier of the concrete, if the plaintiff did not terminate the contract?

(c) Would the defendant be liable to the plaintiff in circumstances of force majeure?

(d) Was the defendant entitled to suspend the contract?

(e) Was the plaintiff entitled to terminate the contract?

Was the contract an exclusive contract?

8 I start by looking at the relevant clause *viz* cl 2 of the defendant's revised quotation, it states:

> **Contract period and concrete quality**
>
> The above quoted prices shall be held firm from 1 September 2003 to 30 June 2006 and the concrete quality to be supplied to the project is estimated to be approximately 70,000 m³. This contract shall cease to be valid upon the expiry of the contract period or the supplied concrete quality, whichever is earlier.

There was no specific provision in the contract stipulating that the contract between the parties was an exclusive arrangement.

9 Yew Eng Piow[note: 1] ("Yew"), the project manager was the plaintiff's main witness. In cross-examination, he maintained that the exclusive clause was "not stated but it's implied" in the contract. He also agreed that in contrast, the quotation from another supplier of the plaintiff Island Concrete Pte Ltd ("Island Concrete") clearly stipulated that it would be the sole supplier.

10 Yew opined that the plaintiff was not contractually bound to take more than 70,000 cubic metres of concrete from the defendant. If the plaintiff wanted more than that quantity, the parties would renegotiate for the additional supply. The defendant's obligation was thus to supply 70,000 m³ of concrete over the entire contract period (NE 54).

11 Yew said that there was only one supplier in all of the plaintiff's projects and in this case, the sole supplier was the defendant. As long as the plaintiff's supply was not disrupted, the defendant could supply to other people. He acknowledged that the plaintiff was aware that the defendant would be supplying concrete to other customers during the contract period as well and therefore the plaintiff would not be the sole customer. He also accepted that there was no priority term in the contract that entitled the plaintiff to priority supply at the expense of other customers of the defendant.

12 Yew accepted that the overall schedule as to when the defendant had to supply concrete was not found in the contract. Neither did the contract say that the defendant had to supply to the plaintiff as and when the plaintiff called for the concrete (NE 78).

13 According to Yew, the plaintiff appointed Pan United Concrete Pte Ltd ("Pan United") on an ad hoc basis when the defendant was unable to supply concrete. From 2 to 21 December 2004, the defendant was able to supply and the plaintiff did not use Pan United. However and which Yew conceded, there was no evidence that the defendant was unable to supply concrete between 16 and 22 November 2004. Yet, the plaintiff continued to use Pan United (NE 65/67).

14 When Ho Seow Phuan[note: 2] ("Ho"), the defendant's former assistant general manager was cross-examined, he acknowledged that the contract did not contain an express term to the effect that the defendant was to be the sole supplier of concrete for the project. The reasons Ho gave for the absence of such a term included the fact that there was no guarantee that the defendant could supply on a particular day due to unforeseen factors and the defendant had friendly arrangements with other suppliers to assist the defendant in the event of the defendant's inability to supply (NE 119).

15 Jonathan Seow Swee Leng[note: 3] ("Seow"), the plaintiff's project engineer, testified that the plaintiff had no priority in its orders and "takes its place in its queue" together with the defendant's other customers. He conceded that although the defendant was the "only one supplier"(NE 175), "this was not an exclusive contract solely to supply the plaintiff as and when orders are placed" (NE 171).

16 The plaintiff's stand was that the contract was exclusive and therefore it could (and did) claim for the costs incurred in obtaining supply from alternative sources, at the time when the defendant could not fulfil the plaintiff's orders due to the defendant's suspension by LTA.

17 Kevin Paul Nobes[note: 4] ("Nobes") was the defendant's general manager and the President of the Ready Mix Concrete Association ("RMCA") at the material time. He said that if the contractual quantity was less than or equal to 70,000 m^3, the plaintiff was obliged to obtain *all* the concrete it required from the defendant (NE 244).

18 In his affidavit of evidence-in-chief, Nobes said (at para 23):

> "[T]he contract was **not** on an "**exclusive**" basis. Hence, whilst the Plaintiffs would be free to procure supply from any RMC supplier [Ready Mix Concrete] without breaching the Contract, the Defendants could similarly supply other customers besides the Plaintiffs. There was also no "Priority Term" expressly set out in the contract whereby the Plaintiffs would be accorded priority in supply when compared to other customers of the Defendants."

19 The defendant at the time had a main plant at Kaki Bukit and two back-up plants at Gay

World and Kallang. Nobes explained that the Gay World and Kallang plants were project plants that were erected to "supply only one customer"(NE 282). More significantly Nobes added, an exclusive contract was characterised by (i) a project plant and (ii) the contract expressly stating that the plant only supplied concrete for that particular project. A project plant was only allowed to supply to other customers after the project customer had been fully serviced or at the commission of the project customer. He also emphasised that the contract between the plaintiff and the defendant did not contain a priority term (NE 341). The two characteristics of exclusivity were absent in the contract.

20 James Lee Eng Kiat[note: 5] ("Lee"), the defendant's sales manager, reiterated the lack of a priority term in the contract. He understood a priority term to mean "a project with a site plant"(NE 363) in which the customer had priority of supply. Clearly, this was not the case here as the defendant could supply to other customers besides the plaintiff.

21 The defendant's position was that the non-exclusive nature of the contract allowed the plaintiff to engage alternative suppliers at its own expense to supply concrete when the defendant failed to supply as and when required by the plaintiff. As long as the plaintiff obtained 70,000 m^3 of concrete from the defendant by the end of the contract period, the defendant was not in breach. In addition the defendant submitted, "supply by the defendant, under the contract, was subject to any scheduling clashes between the plaintiff's orders and those from the defendant's other customers."(NE 78).

22 In *Nam Kee Asphalt Pte Ltd v Chew Eu Hock Construction Co Pte Ltd* [2000] SGHC 45, the aggregates contract contained the following terms:

> (a) the Defendants must purchase at least 40,000 tonnes of graded aggregates from the Plaintiffs [the plaintiffs alleged that this was "the minimum quantity clause"]; and
>
> (b) the Defendants must purchase all the graded aggregates that they require in respect of the MRT contract from the Plaintiffs [the plaintiffs alleged that this was "the exclusivity clause"].

23 Lee Seiu Kin JC held (at [15]) that:

> Considering the factors above, firstly there is nothing in the language of the contract nor in the circumstances under which it was entered into that raises an inference that the parties had intended that there be an exclusivity clause. Such a clause is neither necessary to give business efficacy to the contract nor does it represent the obvious intention of the parties. It is common for a vendor to give an open quotation to a purchaser for the latter to make orders as he deems necessary. Implying the exclusivity clause does not make the contract any more efficacious; instead it alters the nature of the bargain considerably. As such, I cannot see how it can pass the "officious bystander" test. I therefore do not see any basis whatsoever to imply the exclusivity term into the Aggregates Contract. [emphasis added]

24 Even with the alleged exclusivity clause in *Nam Kee Asphalt Pte Ltd v Chew Eu Hock Construction Co Pte Ltd* which stated that "the Defendants must purchase all the graded aggregates that they require in respect of the MRT contract from the Plaintiffs", Lee JC found that there was no basis to imply any exclusivity term, let alone our case where there was no clause with such a stipulation.

25 There was no term stating that the contract between the parties was exclusive. The absence of a priority term in the contract indicated that the plaintiff was also not entitled to priority

supply by the defendant at the expense of its other customers. A project plant was not specifically set up to supply the plaintiff with concrete for the project. The defendant fulfilled orders on a "first come first served" basis. This negated the existence of an exclusive contract. Moreover, the plaintiff was at liberty to use Pan United even at times when the defendant was able to supply the concrete.

26 Consequently, I find that the plaintiff and the defendant did not agree to enter into an exclusive contract. The contract merely stated that the plaintiff had to order 70,000 m³ of the concrete from the defendant within the contract period; the plaintiff was not precluded from ordering more concrete from other suppliers. When Yew stated that the defendant was the sole supplier [11], it meant that the defendant was the sole supplier for up to 70,000 m³ of the concrete for the project. As long as the plaintiff ordered 70,000 m³ of concrete from the defendant during the contract period and the defendant supplied such an amount, both parties fulfilled their contractual obligations. My interpretation of the contract is consistent with the Court of Appeal decision in *Turner (East Asia) Pte Ltd v Pioneer Concrete (Singapore) Pte Ltd* [1994] 3 SLR 735, a case relied on by both parties in their submissions. In its final submissions [79.12] however, the defendant attempted to make a claim against the plaintiff for the difference between the contract quantity (70,000.m³) and what it actually took (53,473.50 m³) from the defendant, amounting to $320,841, at $6.00 per m³. This claim is without merit in the light of my finding, and was not pleaded in any case.

Would the failure of the cube test allow the plaintiff to claim for the price differential from an alternative supplier although the plaintiff did not terminate the contract?

27 In May-June 2004, several strength tests were conducted on the concrete supplied by the defendant for bored piles and diaphragm walls; the tests failed. Remedial measures had to be carried out for the concrete already used in the casting of those structures. The LTA instructed the plaintiff to stop taking concrete for structural elements from the defendant because of the unacceptable number of test cube failures. In a letter dated 14 March 2006 from the LTA's senior project manager Cheong Yew Seng ("Cheong") to Yew (1AB623), Cheong confirmed that the period of suspension of concrete supplied by the defendant was effective from 7 July 2004 to 18 November 2004." The LTA allowed the plaintiff to resume taking concrete from the defendant by another letter from Cheong to Yew (at 1AB156) dated 17 November 2004. As the letter stated that the plaintiff could resume taking concrete from the defendant with immediate effect, the LTA's stop order was effectively from 7 July to 17 November 2004 and not 3 July to 17 July, 2004 as alleged by the plaintiff.

28 I turn next to other clauses in the contract that are relevant to the issue. First, there is cl 5 of the defendant's revised quotation headed **Terms and conditions of supply**. That clause referred to Appendix 1A which states:

> D. All cube strength results must be made known to The Supplier within 7 days after the 28 days test result. Should there be cube failure, The Purchaser is to inform The Supplier in writing within 14 days, otherwise The Supplier shall not be held responsible for any such failure. Should the concrete supplied fail to meet all compliance tests, The Supplier undertakes to supply to The Purchaser, free of charge, the volume of concrete judged defective. The Supplier shall <u>not be liable</u> for any claims whatsoever for <u>consequential and/or other damages</u>.(Emphasis added.)

29 Then there is cl 3 of the plaintiff's letter of intent, it states:

> Notwithstanding the Terms and Conditions of Supply in your quotation, you [the defendant] are fully aware and will comply with the LTA's latest revision of Materials and Workmanship Specification for Civil and Structural Works at no extra cost.

30 Clause 4 of the plaintiff's letter of intent stipulates:

> You guarantee that the temperature control criteria will be met with the use of PBFC concrete with chilled water as offered in your quotation, whether it is for 28 or 56 days strength mix. Layer concreting to meet the criteria is not acceptable.

while cl 8 says:

> In the event that your supply is unable to meet LTA's requirements, or you are unable to continue your supply, Sato Kogyo (S) Pte Ltd reserves the right to terminate your contract and retain and use both the retention sum and any outstanding payment due to you and seek for alternative source of supply. In addition, Sato Kogyo (S) Pte Ltd also reserves the right to seek from you any direct cost incurred due to your non-compliance.

31 Clause D of Appendix 1A of the defendant's revised quotation provided that the defendant "undertake(s) to supply…the volume of concrete judged defective" and were not liable for "consequential and/or other damages". Yew testified in cross-examination that cl D limited the defendant's liability to replace the rejected concrete. However, as the defendant was instructed by the LTA to stop its supply, the defendant could not replace the rejected concrete (NE 85 & 103). Hence Yew contended, the defendant must be liable for any consequential loss including the price differential of alternative suppliers during the stop order period (NE 86).

32 Yew's affidavit of evidence in chief (at para 16) read:

> On or around 5 July 2004, at a meeting held with us, LTA's project manager Mr Cheong Yew Seng stated that LTA would accept concrete supply from Pan United Concrete Pte Ltd [("Pan United")] during the interim period of suspension of supply by the Defendants. Pan United is the supplier of concrete for another site in the construction of the Circle Line MRT system.

33 In that regard Yew had written to Nobes on 15 July 2004 (at 1AB-495) as follows:

> **Contract 852A**
>
> **Construction and Completion of Lorong Chuan Station – Failed Cube Test Result by RDC Concrete**
>
> …
>
> You have also kindly agreed that in the interim, Pan United Concrete will supply structural concrete to the site pending the result of the above trial.

34 Re-examined, Yew explained that the plaintiff did not terminate the defendant's contract during the stop order period because of the parties' long working relationship and the fact that the loss incurred by the defendant would be lower if the defendant found an alternative supplier in the meantime (NE 104). Consequently, the plaintiff was entitled to claim the cost difference of an alternative supplier during the stop order period even if it did not terminate the contract.

35 Yew said (N/E 24/25) that the plaintiff:

> **"drafted this clause 8 in a sense that if they cannot supply**, we have two rights. We have the right to terminate and then we also have the right to claim for the difference if they have

alternative supplier. Whether I impose both right or each right by itself, I have the right to deduct. **That's what we meant when we drafted this clause to RDC. So, when they did not supply, even though I did not terminate, we have the right to deduct."** [emphasis added]

36 The plaintiff subsequently employed Pan United on an ad hoc basis (NE 106) to concrete supply. This was because during the stop order period the LTA specified that "the only approved concrete supplier is Pan United Concrete Pte Ltd" (see 1AB502).

37 The plaintiff claimed that it put the defendant on notice that the plaintiff would source for alternative supply of concrete to ensure continuity of construction work. It referred to a letter dated 4 January 2004 (1AB184) from Yew to Nobes which reads (also at NE 58):

"Although you have submitted Jurong Ready Mix Concrete Supplier as your proposed back up, the design mix has not been submitted and no trial mix was conducted…It is almost a month since your proposal on a back-up supplier in the meeting on 8 Dec 04."

38 The cube test results showed that the concrete had a lower strength than that required by the LTA. The LTA advised the plaintiff to stop obtaining its supply of concrete from the defendant until a comprehensive quality system was in place. Yew's letter dated 3 July 2004 (1AB464) to Nobes gave notice that the plaintiff would source for alternative concrete supply to ensure continuity of work and that any additional cost incurred thereon would be deducted from the defendant's progress claim.

39 This was followed by another letter dated 12 July 2004 (1AB44) to Nobes in which Yew attached the rates charged by Pan United. Yew added that if the defendant had any other alternative supplier, it should seek LTA's approval of the same. Subsequently, the plaintiff deducted from the defendant's progress payments the difference between the contract rates and the higher rates charged by Pan United, for the concrete the plaintiff obtained from the latter during the stop order period.

40 Nobes stated that it was reasonable for the plaintiff to use an alternative supplier during the stop order period in order to continue its construction work. He further accepted that the plaintiff could claim the price difference of an alternative supplier from the defendant under cl 8 of the plaintiff's letter of intent, *provided* the plaintiff terminated the contract (NE 259-260) which the plaintiff did not.

41 Nobes disagreed that the cost differential of an alternative supplier during the stop order period was a direct cost that the defendant should bear. He opined (NE 261) that it was a consequential loss (like loss of profit and liquidated damages) not a direct cost (such as cost of removal and replacement of defective structures); cl D of Appendix 1A of the defendant's revised quotation covered only direct cost.

42 This dispute necessitates an interpretation of two clauses in the contract – cl 8 of the plaintiff's letter of intent and cl D of Appendix 1A of the defendant's revised quotation. Does cl 8 require the plaintiff to terminate the contract with the defendant before it can claim for the price differential of alternative suppliers during the stop order period?

43 In its Opening Statement at [19] the defendant said:

"Despite LTA's initial rejection of the RMC [ready mixed concrete] supplied, the [plaintiffs] did not exercise any right under the termination term to terminate the [defendants'] services….. The

Termination Term had no application for the stoppage of supply during the Stop Period and there was therefore no contractual right to claim any difference in supply rates charged by Pan United from the defendants thereunder."

44 The relevant part of cl 8 of the plaintiff's letter of intent provided that "Sato Kogyo (S) Pte Ltd reserves the right to *terminate* your contract *and* retain and use both the retention sum and any outstanding payment due to you *and seek for alternative source of supply*." [emphasis added]. The clause expressly referred to a 'right', not dual rights, as alleged by the plaintiff in [30].

45 I am of the view that the plaintiff must terminate the contract as and when the defendant was unable to supply concrete in order to claim the price difference of the alternative supplier. The purpose of cl 8 of its letter of intent was to provide an escape route for the plaintiff in the event the non-supply by the defendant proved to be disruptive to the plaintiff's construction schedule. If the plaintiff did not terminate the contract when there was non-supply (e.g. during the LTA's stop order) it could not claim the price difference of alternative suppliers. Otherwise, the plaintiff could use alternative suppliers who charged high prices and *retrospectively* pass the cost burden onto the defendant whenever it decided to terminate the supply. This would be unfair to the defendant.

46 The wording of cl 8 is clear and unequivocal. It was a precondition that the plaintiff must first terminate the contract before it can claim the price difference. As the plaintiff did not terminate the contract until 30 May 2005, it was precluded from claiming the cost differential of alternative suppliers prior to that date.

Was the price differential a 'direct cost' covered under clause 8 of the plaintiff's letter of intent or, a consequential cost under cl D of Appendix 1A of the defendants' revised quotation?

47 A recent case that examined the definitions of direct and consequential loss was *Singapore Telecommunications Ltd v Starhub Cable Vision Ltd* [2006] 2 SLR 195, a case cited by the defendant. In that case, Article 8.5(a) of the agreement in question read:

> Notwithstanding any other provisions of this Agreement and regardless of any fault or negligence of [SCV] or [SingTel], *neither Party shall be liable to the other for any indirect, incidental, consequential, or special damages* (including, without limitation, damages for harm to business, lost revenues, or lost profits) regardless of the form of action or whether such Party had reason to know of such damages... [emphasis added]

48 The Court of Appeal observed (at [52]):

> The focus on the purpose of the contract and the circumstances in which it was made is particularly apt where exemption clauses are concerned. The general rule should be applied that if a party otherwise liable is to exclude or limit his liability or to rely on an exemption, he must do so in clear words; any ambiguity or lack of clarity must be resolved against that party: *per* Lord Hobhouse in *Homburg Houtimport BV v Agrosin Private Ltd* [2004] 1 AC 715 at [144]. The principle that exemption clauses must be construed strictly entails, as this court held in *Hong Realty (Pte) Ltd v Chua Keng Mong* [1994] 3 SLR 819 ("*Hong Realty*") at 825, [19], that the application of such clauses must be restricted to the *particular circumstances* the parties had in mind at the time they entered into the contract. [original emphasis added]

49 Although the Court of Appeal held that Article 8.5(a) did not apply because it would be astonishing to attribute to the parties an intention to exclude a liability for tapping, a subject matter which the parties did not consider, the principles relating to direct and consequential loss are equally

applicable here. The Court of Appeal found (at [59]):

> Direct loss is loss that flows directly, naturally and in the ordinary course of events, from the defendant's breach (the first limb of the rule in *Hadley v Baxendale*), while "indirect" or "consequential" loss falls within the second limb of the rule…[w]e find it helpful to set out the following summary from *Halsbury's Laws of England* vol 12(1) (Butterworths, 4th Ed, 1998 Reissue) at para 812:
>
> > 'Consequential' damage or loss usually refers to pecuniary loss consequent on physical damage, such as loss of profit sustained due to fire damage in a factory. … When used in an exemption clause in a contract, 'consequential' refers to damage which is only recoverable under the second head in *Hadley v Baxendale*, and does not preclude recovery of loss of profits under the first head in that case.

50 The threshold for the defendant to be liable to the plaintiff for direct loss is imputed knowledge. In *CHS CPO GmbH (in bankruptcy) and Another v Vikas Goel and Others* [2005] 3 SLR 202, Andrew Phang Boon Leong JC (as he then was) observed at [82]:

> …What is of vital legal significance is that in so far as such "natural" or "ordinary" damage is concerned, there is *no need* for the plaintiff to prove *actual* knowledge on the part of the defendant: the defendant (in this particular case, the plaintiffs) must be *taken to know* (under the concept of imputed knowledge) that such damage would *ordinarily* ensue as a result of the breach of contract concerned. [original emphasis added]

51 A case in point is *Saint Line Limited v Richardsons, Westgarth & Co, Limited* [1940] 2 KB 99 which concerned the supply of defective ship's engines. The contract in question excluded liability for "any indirect or consequential damages or claims whatsoever". The shipowners claimed loss of profits during the time they were deprived of the use of the ship, expenses thrown away and expert superintendents' fees. They recovered all three. On the meaning of "direct loss", Atkinson J said at 103:

> What does one mean by "direct damage"? Direct damage is that which flows naturally from the breach without other intervening cause and independently of special circumstances, while indirect damage does not so flow. The breach certainly has brought it about, but only because of some supervening event or some special circumstances…

52 Using the facts in *Saint Line Limited v Richardsons, Westgarth & Co, Limited* as an analogy, the plaintiff here was delayed in its construction schedule as the LTA stopped the defendant from supplying concrete for a period of time. As such, the plaintiff should be allowed to claim for loss of profits, expenses thrown away and design check fees, if these were suffered. However, it would be straining the language to say the price differential of an alternative supplier would come under the meaning of "direct cost". Accordingly, the defendant is not liable for the price differential.

53 Clause D of Appendix 1A of the defendants' revised quotation states:

> The Supplier shall not be liable for any claims whatsoever for **consequential and/or other damages.'**

Andrew Phang JA in *CHS CPO GmbH (in bankruptcy) and Another v Vikas Goel and Others* ([50] supra) followed the seminal decision of *Hadley v Baxendale* (1854) 9 Exch 341 and stated (at [83]):

In fairness to the defendant, in order for him or her to be fixed with liability for such "special" or "non-natural" damage, he or she must have had *actual* knowledge of the aforementioned special circumstances.

54 The judge adopted (at [83]) the observations of Robert Goff J in *Satef-Huttenes Albertus SpA v Paloma Tercera Shipping Co SA (The Pegase)* [1981] 1 Lloyd's Rep 175 at 183:

> [T]he test appears to be: have the facts in question come to the defendant's knowledge in such circumstances that *a reasonable person in the shoes of the defendant* would, if he had considered the matter at the time of the making of the contract, have contemplated that, in the event of a breach by him, such facts were to be taken into account when considering his responsibility for loss suffered by the plaintiff as a result of such breach. The answer to that question may vary from case to case … [emphasis added]

55 Further, the judge (at [84]) quoted Lai Kew Chai J in *Teck Tai Hardware (S) Pte Ltd v Corten Furniture Pte Ltd* [1998] 2 SLR 244 at [17]):

> The second rule [*ie*, the second limb in *Hadley v Baxendale*, as to which see [81] above] caters for the situation where the contract breaker knows or ought in certain circumstances to have known more than what every reasonable man is presumed to know. If his contracting party tells him something outside the ordinary course of things before or at the time the contract is made, the second rule would apply.

56 The tried and tested principles in *Hadley v Baxendale* limit the damages that may be claimed to that which are within the parties' reasonable contemplation at the time of contracting. On our facts, the requisite actual knowledge on the part of the defendant, at the time of the making of the contract, of any consequential loss to the plaintiff that can arise from a stop order is absent. The plaintiff's loss was too remote and hence not recoverable.

Would the defendant be liable to the plaintiff in circumstances of force majeure?

57 According to Yew, between 8 November 2004 and 23 March 2005, the defendant failed to supply concrete after the plaintiff placed their orders by 6pm on the day before the scheduled delivery.

58 According to Seow, the sequence for ordering concrete from the defendant was follows:

(a) The plaintiff had to fax a booking or order form by 1800 hours on the day before the order. These were the plaintiff's projected orders at projected times;

(b) It took 1–2 hours for the concrete to be delivered to site in time for casting;

(c) The supervisor in charge of that particular casting operation would normally call the defendant's batching plant in the morning. On average, it was around 10.00am;

(d) At times, the placement of firm orders may be in the late afternoon;

(e) If there was any delay for the scheduled delivery due to unforeseen circumstances, the defendant would inform the plaintiff before 1730 hours on the day of the casting.

59 The defendant's position was that it was not liable for non-supply through the force majeure

clause under cl 3 of the defendant's revised quotation and cl J of Appendix 1A of the defendant's revised quotation due to:

(a) Shortage of raw materials

(i) Shortage of cement

(ii) Shortage of aggregates

(b) Plant breakdown

(c) Truck breakdown

60 Clause 3 of the defendant's revised quotation states:

> Force Majeure
>
> In the event of any circumstance constituting Force Majeure, which is defined as act of God, or due to any cause beyond the supplier's control, such as market raw material shortages, unforeseen plant breakdowns or labour disputes, the duty of the affected party to perform its obligations shall be suspended or limited until such circumstance ceases.

while cl 5 of the defendant's revised quotation reads:

> **Terms and conditions of supply (Appendix 1A)**
>
> J. In the event of any circumstance constituting Force Majeure, which is defined as act of God, or due to any cause beyond The Supplier's control, such as market raw material shortages, unforeseen plant breakdowns or labour disputes, the duty of the affected party to perform its obligations shall be suspended or limited until such circumstance ceases. In any event, The Supplier shall not be liable in any way for loss or damage arising directly or indirectly through or in consequence of such events or happenings.

61 The defendant's non-supply was one of the reasons used by the plaintiff for the termination of the contract as well by the defendant to raise the defence of force majeure.

(a) Shortage of raw materials

62 In cross-examination, Yew stated that the contract was for a fixed term, with a fixed price and a fixed quantity. The defendant could not change the price, regardless of whether the price of raw materials increased. The risk of any increase in the price of raw materials had to be borne by the defendant because the defendant was aware it was entering into a fixed price contract and could have protected itself from the risk of any shortage or price hikes by stockpiling raw materials or signing fixed price contracts with its suppliers (NE 94).

63 Yew's affidavit at para 31 read:

> Moreoever the defendants were awarded the contract of supply in September 2003, and ought to have put in place arrangements to ensure that they would be able to meet the plaintiffs' orders of concrete for the construction project. In addition, when we did a check, we found out that the defendants were supplying concrete to other projects after we were informed that they could not supply due allegedly to shortage of materials.

64 It was clear from the evidence that the plaintiff did not have any problems getting concrete supplied by Pan United at short notice, after it was informed by the defendant that its orders could not be met. In his affidavit, Chan Ying Wah's[note: 6] (the General Manager of Pan United Concrete Pte Ltd) deposed (at para 3):

> Pan United was able to meet customers' requirements throughout the period from the last quarter of 2004 and throughout 2005. We also accepted orders placed at short notice from Sato Kogyo as they are our priority customer. Sato Kogyo is paying market rates for the concrete.

65 Yew revealed that the defendant was still able to supply 6,688 m³ of concrete to the plaintiff from November 2004 to April 2005. The plaintiff contended that there was no cement shortage as alleged by the defendant.

66 While the prices of aggregates had gone up in the market during the material period, the defendant could still obtain the aggregates in the market. The defendant did not do so to meet the plaintiff's orders because it could not pass on the increase to the plaintiff, being bound by the fixed price quotation.

67 There was a letter dated 18 January 2005 (1AB201) from Yew to Nobes which said:

> "…we were informed on 17 Jan 05 that you were not able to supply concrete as you do not have aggregates. On the same day, a check with your Gay World and Kaki Bukit Plants show that both were supplying concrete to other job sites…"

68 Nobes said that "during the period of raw material shortages, the defendants were unable to supply all the requirements of all their customers", "[t]here were situations when the defendants had zero supply" and "there may be specific periods during a day when there was zero material available."(NE 264-265)

69 The defendant's defence was that in the event of force majeure, it was not liable for any price differential claim of alternative suppliers by the plaintiff. Nobes felt that the force majeure clause applied as long as there was a shortage of raw material, even if the defendant could still deliver concrete to the plaintiff and their other customers.

70 A letter dated 19 January 2005 (at 1AB204) from Nobes to Yew was revealing; it stated:

> **Contract 852A – Unavailability of Concrete Supply**
>
> …If these are unacceptable to your company and you choose to source from an alternative supplier, then it will be at your cost."

71 When questioned as to why Pan United was able to supply 4,900 cu. m. of concrete to the plaintiff during this alleged period of cement shortage and the defendant could not, Nobes replied that "customers [who] had to take concrete in the morning end up with a larger supply than those that take in the evening so I think it's a question of timing"(NE 346). He reiterated that there was no priority term in the contract. As the defendant had a limited supply for the demand, it had to batch concrete for its customers on a "first come first served" basis.

72 The defendant's source of aggregates was from Karimun Island, Indonesia. In comparison, the plaintiff's ad hoc alternative supplier Pan United, had its own quarry to supply

aggregates and its own cement plant to supply concrete.

73 The RMCA (through Nobes) had issued a letter dated 21 September 2004 to the Building and Construction Authority raising the industry's concerns on the shortage of aggregates. The relevant portion of the letter read:

> "The impact of these events has been to reduce the overall output of the quarries and to deplete stockpiles to practically zero. Concrete aggregate is being consumed as fast as it is produced. As a result on a daily basis, readymix concrete producers are not always able to obtain aggregates in sufficient quantity and at the exact time that they need in order to meet their customers' casting schedules."

74 Coupled with the shortage of aggregates, the raw material shortages had seriously hampered the defendant's ability to meet all of its orders, including those from the plaintiff. Nobes agreed that even if the prices of aggregates rose, the defendant could not pass on the increase to the plaintiff (NE 285).

75 There was a letter dated 19 January 2005 (1AB207) from Nobes to Yew which read:

> "We are currently experiencing difficulty in obtaining suppliers of aggregates in the quantity and at the same time we need them. This is due to a market shortage which is affecting all suppliers to some degree.
>
> Specifically with regard to the allocation of scarce resources, it is our policy to give priority to orders already commenced."

76 Clause 3 of the defendants' revised quotation and cl J of Appendix 1A of the defendants' revised quotation set out earlier [60] dealt with instances of force majeure.

77 Since cll 3 and J are not in conflict, there is no necessity to decide which clause should prevail. In any event, "[i]n construction, all parts of a document must be given effect (see *Lewison on Interpretation of Contract* paras 6.03, 6.06 and 6.07 and *Lim Kim Yiang and Another v Foo Suan Seng and Others* [1992] 1 SLR 573 at [9]. It would seem that cl 3 dovetailed with cl J. The effect of the two clauses is that the defendant's duty to supply concrete was suspended in the event of force majeure; it would not be liable for non-supply due to the triggering event.

78 The Privy Council in *Hong Guan & Co Ltd v R Jumabhoy & Sons Ltd* [1960] MLJ 141 observed:

> So far as the clause deals with *force majeure* it appears to be designed to protect the respondents from liability in the event of their being prevented from performing the contract by circumstances beyond their control…There may be cases where *words in a contract will in certain events provide an excuse for a vendor who fails to deliver*. Thus in *Tennants (Lancashire) Ltd v CS Wilson & Co Ltd* [1917] AC 495 there was a condition in the contract which provided that "deliveries may be suspended pending any contingencies beyond the control of the sellers or buyers (such as...war...) causing a *short supply* of labour, fuel, *raw material*, or manufactured produce, or otherwise preventing or hindering the manufacture or delivery of the article". So in *Pool Shipping Co Ltd v London Coal Co of Gibraltar Ltd* [1939] 2 All ER 432 there was an exceptions clause in wide terms under which the Court felt entitled to look beyond the buyer and seller and to consider the sellers' commitments under contracts with other buyers. There are no words in the present contract which enable the respondents to excuse their failure to deliver by reference to their other commitments. [emphasis added]

79 The issue is whether in the events that took place and on a proper construction of cl 3 of the defendant's revised quotation and cl J of Appendix 1A of the defendant's revised quotation, the defendant's predicament came within the ambit of the clauses so that it was discharged from performing the contract.

80 Looking at the events as a whole, I am of the opinion that the defendant can use the force majeure clause to justify non-supply to the plaintiff due to shortage of raw materials, but *not* for unforeseen plant breakdown. This is because during re-examination, Yew said that in his negotiations with Ho, "the issue of backup supplier was never discussed", but the issue of "backup plants were discussed."

81 Although it is arguable that the defendant undertook the risk of a fixed price contract and should bear the consequences, the force majeure clauses are clear; the parties intended for them to operate to cover shortage of the raw materials.

(b) Plant breakdown

82 In his written testimony (para 34), Yew had deposed that "In the QA/QC Manual, the defendant had submitted their other plants at Kallang and Gay World as back-up plants in the event of breakdown and capacity shortage at the main Kaki Bukit plant". Ho testified that "normally it is not stated in the contracts"(NE 120) what sort of back-up plants the defendant may have for the purposes of supplying this project. However, he conceded that he had mentioned some plants to Yew during their discussion over the back up plant issue that (NE 134):

> "…during that time our main plant was Kaki Bukit, and Kallang and Gay World were the back up. I also mentioned the so-called friendly ready-mix which were Eastern Concrete and Oriental."

83 When cross-examined, Yew stated that "it is not stated in the contract but it's a practice that you must have a backup supplier." (NE56, 82) Yew agreed "that the defendant as a matter of prudence ought to have a backup plant…at least one backup plant for supply under the contract". He did not agree that "similarly the plaintiff ought to have a backup supplier of their own instead of having one supplier for this contract". Yew also disagreed that "since the plaintiff chose to appoint only one supplier for this project…to get better contract rates, [it] will have to take the risks of any inability by this sole supplier to supply."(NE 99)

84 There was a letter dated 27 December 2004 (1AB183) from Yew to Nobes the relevant portions of which read:

> "We have ordered G35 Normal Mix concrete of volume 21 m³ at 1450 hours on 27 December 2004 for our capping beam casting. Your Plant Supervisor has informed my supervisor that RDC needs about an hour plus to deliver the concrete. However, at about 1550 hours, my supervisor was told by your plant supervisor that RDC's Kakit Bukit Plant broke down and therefore would not be able to supply the concrete.
>
> As a result, we had to order the concrete from Pan United.
>
> The cost difference in the supply rates between you and Pan United will be charged and deducted from your claims. "

85 In yet another letter dated 17 January 2005 (1AB194) from Yew to Nobes, the former said:

"We had on 27 Dec 04 put an advance order of 110 m³ of G45 concrete for each of the 2 diaphragm wall panels and 9 m³ of G35 of the drain wall casting on 28 Dec 04.

However, on 28 Dec 04, after ordering 110 m³ of G45 at around 12.00 noon and started casting the 1st diaphragm wall panel at about 1325 hrs, we were informed by your plant supervisor that your plant has broken down, at about 1445 hrs. Your Mr Goh confirmed this to my engineer, Jonathan. At about 1530 hrs, your Mr Goh called [to say] that your plant has resumed supply but will not be able to support the remaining concrete for the 2nd diaphragm wall panel and the drain wall and advised my engineer to divert the order to Pan United."

86 Seow had testified (NE 171) that the plaintiff confirmed its orders two to three hours before casting and the plaintiff had to wait for more than two hours for the concrete whenever there was a plant breakdown. This was not acceptable to the plaintiff as the defendant was supposed to have stand-by plants. However, he accepted that had the plaintiff agreed to wait for a few hours, the concrete would have been delivered at "4pm to 5pm" (NE 176). Assuming Seow's estimation of time was correct and it took the plaintiff two hours to complete a casting operation of 50 m³. of concrete, the concrete would still be in time by 7pm when the plaintiff had to stop all casting operations under building regulations.

87 However, Richard Ang Eng Teck [note: 7] ("Ang"), the plaintiff's senior site supervisor, stated that the waiting time during a plant breakdown ranged "from two to five" hours (NE 182). This meant that the casting would not meet the 7pm deadline. Hence the plaintiff placed orders with Pan United.

88 Ang disagreed that the defendant did not have to supply when it could not do so. "[O]n many occasions, an alternative timetable was offered by the defendant and the plaintiff was not able to take it up" because "we need[ed] to comply with NEA regulation of the noise decibel."(NE 180-181) Yew had explained that "once we start casting we must complete the same day."(NE 74-75)

89 A letter dated 8 November 2004 (1AB533) from Yew to Nobes voiced the plaintiff's unhappiness with the non-supply of concrete, it said:

"[t]he reasons given were either that the plant has broken down or lack of trucks. In many occasions, we were asked to wait for more than 2 hours. This is not acceptable as you are supposed to have stand-by plants. As a result, we have to order from Pan United. You are aware that all extra cost incurred by SKS due to any order to Pan United will be back charged to RDC."

90 The plaintiff alleged that the defendant did not offer them alternative dates when the plaintiff was told no concrete was available. In a letter dated 22 January 2005 (1AB219) from Yew to Nobes, the plaintiff said:

"On 20 Jan, my engineer, Mr Alwin called and was informed that the plant would not be opened on 21 Jan 05 with no answer for the order for 22 Jan 05 as well. No alternatives and alternative delivery time was offered.

On the morning of 22 Jan 05, my engineer messaged Mr Goh in the morning and was informed that we would be given 50 m³ of concrete for the day. *No alternatives and alternative delivery times were given for the remaining orders*." [emphasis added]

91 The defendant's stand was that the plant breakdown was unforeseen. Nobes clarified that 'unforeseen' meant, in his view, "not expected or can be predicted"(NE 288). All three plants, namely,

Kaki Bukit, Gay World and Kallang, were affected by the stop order of the LTA.

92 When the stop order was lifted, the LTA only permitted concrete to be supplied by the Kaki Bukit plant.

93 Cross-examined (NE 293-294), Nobes stated that the Kaki Bukit plant had the production capacity to service its projected volume, including the project. At the Kaki Bukit plant, there were two discrete production units and one production unit was used as back-up for the other.

94 Nobes 's testimony was that he was unaware that Eastern Concrete and Oriental were proposed as backup suppliers in the event the defendant could not deliver on the orders (NE 247). There was no contractual requirement for a "back-up" plant as alleged by the plaintiff. Nobes was also unaware that Ho had assured the plaintiff that the defendant would have two back-up plants (Kallang and Gay World) but agreed that "for this project, the defendant had indeed provided two backup plants" after being referred to the Concrete QA/QC Manual dated November 2003 prepared by the defendant.

The decision

95 I find there were no events which constituted force majeure with respect to plant breakdown. The plaintiff cannot be faulted in relying on the defendant as the sole supplier. The defendant cannot use its status as the plaintiff's sole supplier as an excuse to justify non-supply as it had claimed to have two back-up plants and two friendly suppliers to accommodate the supply of concrete to the plaintiff, in the event the main Kaki Bukit plant broke down.

96 Ho said (NE133):

> "You see, this Mr Yew was--his main concern was whether can we perform. So during the discussion, I gave him the assurance that, er, we should be able to and he actually wanted to know where're our plants. So I told him we have this plant and that plant, and he actually asked us—asked me, "In case all your plants break down, what do you do?" And I told him that "*You don't call for other company. I will arrange the back up myself*." [emphasis added]

97 Yew testified he was not told that the Gay World and Kallang plants were project batching plants set up to support specific projects (NE 79). In re-examination, Yew clarified that the basis of his disagreement that "the supply by the defendant is subject to scheduling clashes with their other customers" was the fact that "we were told that they have enough plants, even better plants, to cater to out needs."(NE 105)

98 I find that the defendant is estopped from arguing plant breakdown to avoid liability. "It is settled law that for a person to successfully raise the defence of estoppel by representation, three elements must be satisfied, namely, representation, reliance and detriment": *United Overseas Bank Ltd v Bank of China* [2006] 1 SLR 57at [18]. These three elements were satisfied in our case. The defendant had made representations to the plaintiff which the plaintiff had relied on to its detriment.

99 Moreover, the LTA left it open to the defendant to make a request if it needed to use its other plants. A letter dated 17 November 2004 from Cheong Yew Seng, LTA's project manager to Yew said as much:

> "You may resume concrete supply from RDC with immediate effect. As stated in your letter only Kaki Bukit plant is approved for the time being. You are requested to inform us in advance, if

there is a need to use other plants belonging to RDC…"

There was no evidence that the defendant approached the LTA to approve the use of its other plants.

100 Nobes recalled "receiving the monthly sales forecast for all projects, this one included" (NE 251). In addition, the plaintiff confirmed its orders a few hours before batching was required. The defendant's argument that the plaintiff would obtain less supply because it required the concrete to be delivered in the afternoon is unmeritorious. The plaintiff's order should be based on the time confirmation was done which was usually in the morning of batching. One would reasonably expect the defendant to reserve the quantity of the concrete required for delivery to the plaintiff in the afternoon.

101 Where there was a plant breakdown, the defendant should pay the cost differential of the plaintiff's alternative supplier as the defendant was aware that the plaintiff could not wait for late delivery of the concrete; its construction schedule would have been disrupted.

Was the defendant entitled to suspend the supply?

102 After the LTA stop order was lifted on 17 November 2004, the plaintiff withheld payment resulting in the defendant suspending supply on 3 December 2004. On 10 December 2004, the defendant resumed supply of the concrete after receiving payment of $104,685.18 from the plaintiff. As of February 2005, the plaintiff owed the defendant $225,362.24 for concrete already supplied. On 5 April 2005, the defendant again suspended supply to the plaintiff due to non-payment. The defendant issued a notice of suspension to the plaintiff due to an outstanding payment of $272,900.00. As of 30 April 2005, the plaintiff was indebted to the defendant in the aggregate sum of $236,802.64 for concrete supplied pursuant to the contract.

103 This issue requires a consideration of cl 4 of the defendants' revised quotation which states:

> Payment term
>
> The term of payment is 30 days.

as well as of cl 5 of the defendants' revised quotation which states:

> TERMS AND CONDITIONS OF SUPPLY
>
> The terms and conditions of supply shall be in accordance with Appendex 1A (Attached).

The relevant clause in Appendix 1A is clause K which states:

> The Supplier reserves the right to suspend the supply of concrete to the Purchaser without notice in the event of the Purchaser exceeding the credit limit or defaulting on payment beyond the credit term and in recovering such outstanding payment, plus all resulting legal costs and expenses and interest accrued.

104 Clause 7 of the plaintiff' letter of intent is also relevant, it states:

> All payments are subject to retention of 5% to be released 2 months after 30 June 2006.

105 Yew denied that "there was persistent late payment by the plaintiff." The plaintiff took the

position that there was no outstanding payment due to the defendant after deductions were made to take into account the higher rates for the concrete supplied by Pan United. The plaintiff relied on cl 8 of its letter of intent [29] to argue that it had the right to claim the price differential when the plaintiff used an alternative supplier. A letter dated 26 February 2005 (1AB308) from Yew to Nobes read:

> "Our records show that all payments have been paid to date. Deductions due to your non-supply of concrete had been made. There is no outstanding payment for December 04 and earlier."

106 Yew disagreed that the plaintiff withheld payment after the LTA stop order was lifted. He explained it was a delay in payment due to the plaintiff's dispute with the defendant over the period and time of payment. This was because the LTA did not pay the plaintiff during December 2004. His letter dated 6 December 2004 to Nobes made that clear:

> "You [the defendant] had suspended supply to my [the plaintiff] site since 3 Dec 04 in breach of your contract with us. This is unacceptable. You are responsible to SKS [the plaintiff] for LTA withholding our payment due to your cube failure. Your demand for payment when the issue has not been resolved is unreasonable and unacceptable."

107 Yew accepted that the "stop order only related to the affected structural elements" and "[i]n the meantime, the defendant had still continued to supply concrete for non-structural elements" (NE 96). As for the defendant's complaint on the plaintiff's non-payment for the unaffected non-structural elements, Yew testified that "we disagreed on the period of payment and the time of payment. It's not that we don't want to pay." The plaintiff wanted to combine the payment for the non-structural elements with the release of payment for the affected structural element (NE 96-97).

108 The defendants' position was that the stop order only pertained to structural elements. The defendant continued to supply concrete for the non-structural elements but the plaintiff did not make payment for the same.

109 In cross-examination, Nobes disagreed that the defendants' decision to suspend supply on 5 April 2005 was premised on the intention to minimise losses. He added that had the plaintiff made payment to the defendant, the defendant would have resumed its supply (NE 333).

110 Lee was involved in chasing the plaintiff for payment through the finance section. In his affidavit at [27] to [32], Lee deposed that "the plaintiff have been consistently late in paying the defendant since April 2004" (NE 374). It was Lee who signed the defendant's notice of suspension to the plaintiff.

111 Yew's affidavit tabulated the following items (with the defendant's comments) that the plaintiff wanted to deduct from payments to the defendant (for supply up to February 2005):

S/N	Deduction	Remarks
1	Safety fine	The defendant will not pay.
2	T.Y. Lin design check cost for poor concrete	The defendant will pay. "The cost of the design check is to be borne by RDC" (see letter dated 31 July 2004 from Yew to Nobes)

3	LTA cost omission of poor concrete supplied for 16 panels affected by the low cube strength	The defendant will pay.
4	Price difference from using Pan United concrete	The defendant will not pay as long as the plaintiff does not terminate the contract.
5	6% administrative handling charge	The defendant will not pay because the deduction is not valid. Even if it is valid, the quantum is excessive. Yew stated that the administrative cost was due to the extra work of liaising with Pan United, e.g. preparing accounts, billing the alternative supplier and deducting payment for cost differences. Nobes disagreed that this was an industry practice when the supplier cannot supply but he conceded that the plaintiff had to carry out additional work to locate an alternative supplier.
6	Standby cost of batching plant	The defendant will not pay.
7	Retention sum (5%)	The defendant agrees that the plaintiff can withhold this sum. Clause 7 of the plaintiff's letter of intent allows the plaintiff to retain the 5% due to the defendant until two months after 30 June 2006.

112 It seemed to me that the defendant was entitled to exercise the suspension term on 5 April 2005. Some payments made by the plaintiff were later than the 30 days credit term allowed under cl 4 of the defendant's revised quotation [103]. The plaintiff did not pay the full amount owed to the defendant at times because of certain deductions some of which were justified while others were not. Earlier [45] I had held that the plaintiff was not allowed to deduct the price difference of an alternative supplier because it failed to first terminate the contract; hence, the defendant's stand in item 4 in the column above was justified.

Was the plaintiff entitled to terminate the contract?

113 The plaintiff's position was that cl 8 of its letter of intent allowed it to terminate the contract because:

1) The defendant had continuously fallen short in supply and/or was unable to supply the concrete when ordered by the plaintiff and/or

2) The defendant's supply was unable to meet LTA's requirement.

(a) The defendant's non-supply

114 Clause 8 of the plaintiff's letter of intent states:

> In the event that your supply is unable to meet LTA's requirements, or you are unable to continue your supply, Sato Kogyo (S) Pte Ltd reserves the right to terminate your contract and retain and use both the retention sum and any outstanding payment due to you and seek for alternative source of supply. In addition, Sato Kogyo (S) Pte Ltd also reserves the right to seek from you any direct cost incurred due to your non-compliance.(emphasis added)

115 Earlier [95], I had held that the shortage of raw materials was a force majeure circumstance but not plant breakdown. Thus the defendant would be liable for non-supply due to plant breakdowns.

116 Yew did not agree "that the defendants were entitled to supply concrete on a first-come-first-served basis for all their customers every day, based on whatever raw materials they had."(NE 95)

117 Yew relied on his letter dated 20 January 2005 to Nobes that said:

> **Contract 852A**
>
> **Construction and Completion of Lorong Chuan Station – Unavailability of Concrete Supply**
>
> …
>
> As far as possible, we have assisted by pre-ordering the concrete 1day in advance to ease your planning. This was followed by the order 1 hour before the actual time of casting on the day. Based on our pre-order form submitted, we have never received any proposed alternative delivery times in return. At the time of order, we were also not given alternative delivery time. We were only told that there was no concrete.

118 The plaintiff's position was that nothing was said by the defendant about not being able to supply the plaintiff's orders. On many occasions of non or short supply, the defendant did not proffer any reason to the plaintiff's employees.

119 In cross-examination, Nobes disagreed that the plaintiff was entitled to terminate the contract under cl 8 of the plaintiff's letter of intent due to the defendant's inability to supply. However, he agreed that "if the defendant's schedule was full and there was no way to meet those orders of the plaintiff, [it] would notify the plaintiff". He testified it was the defendant's standing instruction to notify the plaintiff verbally, not by letters (NE 283). Nobes added that it "would be reasonable" for the defendant to take "into account the restrictions on casting time if the defendant had offered alternatives to the plaintiff."(NE 288)

120 My attention was drawn to a letter dated 4 February 2005 from the plaintiff to the defendant where Yew said to Nobes:

> "You [the defendant] have also been constantly reminded of the residential surrounding of this project and the need to complete construction works early and to comply with NEA noise control guidelines. As a reminder, concreting operation for bore pile and diaphragm wall must complete by 7.00pm. Concreting beyond 7.00pm risk infringing the NEA requirement."

121 Consequently, the defendant was aware of the plaintiff's site constraints and should have set aside concrete for the plaintiff when the latter's order was confirmed. Since the defendant would/should know if it was unable to fulfil the plaintiff's order on the day of casting itself, the onus was on the defendant to inform the plaintiff of non-supply when the plaintiff confirmed its orders. There were several instances where the defendant failed to provide alternative dates and timings to the plaintiff when it could not fulfil the plaintiff's orders.

(b) The defendants' failure to adhere to the LTA's specifications

122 I have earlier [29-30] set out cll 3 and 8 of the plaintiff's letter of intent. Another relevant clause therein is cl 4 which states:

> You guarantee that the temperature control criteria will be met with the use of PBFC concrete with chilled water as offered in your quotation, whether it is for 28 or 56 days strength mix. Layer concreting to meet the criteria is not acceptable.

123 It was a term of the contract that the concrete supplied should comply with the LTA's specification on materials. The LTA required concrete with peak temperature control of 70ºC at 28 days strength for thick sections of the Lorong Chuan station. Yew affirmed that a copy of LTA specifications was not given to the defendant when the contract was entered into but he emphasized that cl 3 of the plaintiff's letter of intent made reference to the LTA specifications (NE 24-27). The defendant was aware that it had to comply with the LTA specifications.

124 Clause 3 of the plaintiff's letter of intent had also referred to a document titled "Materials and Workmanship Specification" dated September 2001. Clause 11.5.5 of the document (under the subheading Requirements for Designed Mixes) according to Yew stipulated "28 [days strength] is the criteria for test." According to Yew, the plaintiff told the defendant that it must refer to this specification and the peak temperature control for concrete-mix design specified inside. (NE 27)

125 On cl 4 of the plaintiff' letter of intent, Yew said that 'temperature control' referred to the placing temperature when concrete was cast. He added that the placing temperature affected the peak core temperature (NE 41). Yew disagreed with the defendant's suggestion that cl 4 only related to the placing temperature and made no representation about meeting any peak core temperature. This was because the plaintiff's use of the phrase 'with chilled water as offered in your quotation' meant that that the defendant had offered and must comply with, 30ºC to 32ºC chilled water (NE 45).

126 The plaintiff's letter of intent stated that the defendant's concrete must satisfy both 28 days strength and 56 days strength. Separate tests were conducted for the trial mix strength and the mock-up temperature. Although the mock-up test for the defendant's concrete mixes for 56 days strength passed the requisite peak core temperature of 70ºC, the mixes failed to pass the 28 days' trial (NE 154). Questioned as to how one was able to tell if the separate tests used the same batch of concrete, Yew clarified that it would be found in the batching records which were "accepted by [the] LTA" (NE 149) and one "could request for the computer printout" (NE 148) to check. He added that "[t]he batching plant with the batching record do show the constituents being used to batch" (NE 163).

127 The defendant insisted that the requirements of 70ºC and 28 days were incompatible and not practical and wrote accordingly to the plaintiff on 8 December 2004. The defendant proposed to change the peak temperature to 80ºC but this was rejected by the LTA. By 31 January 2005, the defendant was still unable to submit a design mix that satisfied the LTA's specifications.

128 On the other hand, Pan United and Island Concrete (who were appointed to replace the defendant after the termination of the contract) had no problems complying with the two specifications of the LTA. Yew said that "it seems that only RDC cannot comply to this requirement, Pan-United can. Island also can…It is a sub-structure station underground. A lot of our element structure will be thick. So, to tell me that I can use it only for anything less than 300[mm], it's almost I cannot use." (NE 36)

129 The plaintiff' case was that up to 30 May 2005 when the plaintiff issued the letter of termination, the defendant was unable to comply with both requirements of LTA.

130 Nobes said he was under the impression that "[t]he LTA's specification required a peak temperature of 70ºC and a cube strength of 45 Newton. It did not specify whether it should be at 28 or 56 days."(NE 353) He asserted that the defendant was not obliged to meet the plaintiff's own requirements of a peak core temperature of 70ºC and 28 days concrete strength. Nobes added that "we were not able to comply with their requirements but we could still meet the LTA's specification."(NE 322) He had written to Yew on 3 February 2005 to say:

> "…the requirement for 45N at 28 days and a peak temperature of 70ºC in thick sections are mutually exclusive.
>
> We have provided a 45N mix which we understand complies with the 70 ºC requirement. This mix reaches 45N at 56 days.
>
> It is of course feasible to provide a mix that acquires a strength of 45N within 28 days, however, to avoid exceeding the peak temperature, it will be necessary to *limit its use to sections of less than 300mm*."

131 Cross-examined, Nobes conceded that although the trial mix passed the requirement of 28 days concrete strength, the production test calculated a higher failure rate than the acceptable failure rate of one out of 20. Therefore the defendant failed the production test. The 56 days strength concrete satisfied the peak core temperature of 70ºC but the 28 days strength concrete was slightly higher than the peak core temperature of 70ºC (NE 320).

132 The relevant portion of another letter dated 8 April 2005 from Nobes to Yew reads:

> "The subject of the particular G45 PBFC at 28 days has been discussed extensively with you. There are contradictory constraints within the specification which render it technically unviable."

133 Earlier [27], I had referred to the stop order by LTA which stemmed from the defendant's inability to meet the LTA requirements of the structural elements at peak core temperature of 70 degree Celsius and 28 days concrete strength. The LTA had to ensure that its stringent requirements were complied with because the construction involved an MRT station and the safety of users.

134 Therefore, even if the plaintiff was not entitled to terminate the contract due to the defendant's non-supply, the plaintiff could nonetheless do so because the defendant had not been able to satisfy the LTA requirements which formed part of the conditions of the contract.

135 On a balance of probabilities I am satisfied that the plaintiff had discharged the burden of proving that it was entitled to terminate the contract. Yew was a very credible witness for the plaintiff whose testimony remained unshaken throughout cross-examination. His prompt and prolific

letters to the defendant usually addressed to Nobes, were an accurate and reliable record of events which transpired at the material time.

136 Nobes had left the defendant's services in June 2005 and left Singapore shortly thereafter to work in the Middle East (Doha). Nobes initially had a dispute with the defendant over his salary and other outstanding payments but that dispute appeared to have been resolved by the time he took the stand. His testimony on the defendant's behalf was impartial but most of the documentation did not support the stand which he took on the defendant's behalf at trial.

137 I have one more observation to make before I conclude this judgment. It was Nobes' evidence that the defendant was keen to secure the plaintiff's order, even at a (calculated) loss. Hence, the defendant's various quotations which led up the eight and final quotation dated 1 September 2003 gradually lowered the prices of concrete mixes across the board but for incrementally higher volumes. Ho (PW2) had earlier revealed that the defendant took a 'budgeted loss' on the contract (NE 118). In re-examination (NE 337) Nobes explained the rationale for the defendant's willingness to give rock bottom prices to the plaintiff. He said it was because the defendant wanted to retain its market share in the ready-mix concrete industry and to keep its plant running. It could only do that if its order books generated sufficient volume for the capacity of its plant. That would further explain the defendant's reluctance to absorb the plaintiff's direct and consequential losses relating to non and or late delivery.

Conclusion

138 There will be interlocutory judgment for the plaintiff with costs on its claim. The plaintiff's claim of $1,685,395.66 by way of damages (reduced to $465,648.88 in Yew's supplemental affidavit in chief) must go for assessment with the costs of assessment to be reserved to the Registrar.

139 In the light of my earlier findings, the damages awarded to the plaintiff cannot include the cost differential of alternative suppliers of the concrete (including Pan United) before 30 May 2005 save where the reason for non/short supply was due to plant breakdown [101]. The assessing Registrar should also bear in mind the items in [111] for which I have indicated the defendant was justified in refusing to pay item 4. More evidence would have to be adduced at the assessment stage to determine who should be liable for the safety fine in item 1. Equally, the assessing registrar must determine whether and to what extent items 3, 5 and 6 are justifiable deductions on the plaintiff's part.

140 It was never the plaintiff's case that the defendant's claim for concrete delivered up to 4 April 2005 should not be paid; its defence to the counterclaim was one of set off. In fact no evidence was led on the counterclaim proper. Indeed counsel for the defendant should have applied for judgment on the counterclaim before the commencement of trial.

141 There will therefore be judgment for the defendant on its counterclaim of $236,802.64 with costs. The plaintiff is entitled to set off item 3 in [111] when assessed and deduct from the counterclaim other damages when quantified.

[note: 1]PW1.

[note: 2]PW2.

[note: 3]PW3.

[note: 4]DW1.

[note: 5]DW2.

[note: 6]PW5.

[note: 7]PW4.