Alliance Concrete Singapore Pte Ltd *v* Sato Kogyo (S) Pte Ltd [2010] SGHC 338

Case Number	: Suit No 465 of 2007 (Registrar's Appeal No 264 of 2010)
Decision Date	: 15 November 2010
Tribunal/Court	: High Court
Coram	: Tay Yong Kwang J
Counsel Name(s)	: Mark Tan and Low Yi Yang (Rajah & Tann LLP) for the plaintiff; Eugene Tan and Soh Chun York (Drew & Napier LLC) for the defendant.
Parties	: Alliance Concrete Singapore Pte Ltd — Sato Kogyo (S) Pte Ltd

Civil Procedure

15 November 2010

Tay Yong Kwang J:

Introduction

1 This was the plaintiff's appeal against the decision of an Assistant Registrar ("AR") in Summons No 2389 of 2010 ("Sum 2389") granting the defendant's application for discovery of certain specified documents. I dismissed the appeal with costs fixed at $1,000 (inclusive of disbursements) to be paid by the plaintiff to the defendant. The plaintiff has now appealed to the Court of Appeal.

Background

2 The plaintiff is a manufacturer and supplier of ready-mixed concrete ("RMC") and the defendant is a building and construction company which, at the material time between January 2007 to May 2007, was the main contractor for the following projects:

(a) the construction and completion of the Boon Lay Mass Rapid Transit Extension (the "Boon Lay MRT Project");

(b) the construction of a proposed 4/5/6-storey teaching and laboratory facility at Nanyang Link, Nanyang Technological University, Singapore (the "NTU Project"); and

(c) the construction of a proposed 6-storey development at Telok Blangah Road – Harbourfront, Singapore (the "Harbourfront Project").

The plaintiff was to have supplied the defendant with up to 135,000 cubic metres of RMC for use in the three projects listed above. Its obligations to supply and deliver RMC were contained in three separate contracts. The plaintiff and defendant were original parties to only two of these; in the case of the third, the plaintiff only became a party as a result of a novation of the contract that took place after its conclusion between the defendant and another manufacturer.

3 RMC is manufactured by mixing cement, water, aggregates, ad-mixtures and concreting sand. Prior to January 2007, most (if not all) of the concreting sand used in the manufacture of RMC in Singapore originated from Indonesia. The plaintiff was not itself an importer of concreting sand from

Indonesia. It claims, however, that the sand procured by its suppliers was sourced entirely from that country.

4 On 22 January 2007, the Indonesian Government issued a prohibition on the export of concreting sand from Indonesia to Singapore (the "Sand Ban"). The ban took effect on 6 February 2007 and it became illegal to obtain sand from Indonesia. In order to ameliorate the sudden shortage of supply of sand that resulted, the Building and Construction Authority of Singapore (the "BCA") and the Singapore Contractors Association Limited ("SCAL") devised a scheme on or about 3 February 2007 for the release of sand from the Singapore government stockpiles to construction companies and main contractors (the "BCA Procedure") for use in their projects. Under the BCA Procedure, contractors working on ongoing projects would have to fill in a weekly usage requirement form and submit it to the BCA. The latter would then designate a stockpile from which sand could be allocated and released to the contractor. A statement on 2 February 2007 from the BCA on "Obtaining Sand from the Stockpile" also made it clear that it was for main contractors to arrange for the sand released under this Procedure to be collected and transported [note: 1]. While the BCA Procedure provided a general framework for sand to be obtained, it left several issues to be resolved between contractors and RMC manufacturers privately. These included:

(a) the protocol and workflow for administering the weekly usage requirement form;

(b) the contractual ramifications of adopting the BCA Procedure; and

(c) the issue of who should bear the additional costs arising from both the shortage of supply of sand resulting from the ban and the cost of transporting the allocated sand from government stockpiles to RMC manufacturers.

It appears that RMC manufacturers had no role to play in the BCA Procedure. Their only responsibility was to ensure that their batching plants and/or stockyards were ready to receive any sand transported to them [note: 2].

4 Following the announcements above, the parties used the BCA Procedure to obtain sand from government stockpiles. The defendant requisitioned the sand, paid for it and delivered the same to the plaintiff. The latter, in turn, intermittently supplied RMC to the defendant's worksites until May 2007, when the defendant ceased to place orders for RMC with the plaintiff entirely. The plaintiff then commenced this action on 27 July 2007, where it claims the sum of $2,055,670.65 for RMC that it supplied to the defendant's worksites following the Sand Ban and for which it claims it was not paid. The defendant, on its part, filed a Defence denying the plaintiff's claim and making a counterclaim for damages consisting of the additional costs of purchasing replacement RMC and for the delay and disruption caused to its three projects as a result of the plaintiff's failure to supply RMC.

The dispute before the court

5 The parties do not dispute the fact that the BCA Procedure was used. What they disagree about is the reason why the BCA Procedure was utilised and the implications thereof. According to the plaintiff, the original contracts between the parties were frustrated by the imposition of the Sand Ban, rendering the plaintiff's obligations under the said contracts radically different from what were originally undertaken. The defendant, however, claims that no such frustration occurred and that the plaintiff had, following the announcement of the Sand Ban, repudiated the original contracts. In the face of this repudiation, the defendant utilised the BCA Procedure to obtain government sand, supplied the plaintiff with the sand and obtained some RMC in return as an interim measure to mitigate its damages while negotiations over the terms of the original contracts were underway.

6 This, therefore, was the context in which Sum 2389 was brought for discovery of the following documents:

S/n	Description
1.	The defendant's email dated 5 February 2007 referred to in paragraph 10C(i)(b) of the Plaintiff's Statement of Claim (Amendment No. 2) filed on 1 June 2009
2.	The plaintiff's quotations of 9 February 2009, 23 February 2009 and 8 March 2009 referred to in paragraph 4C of the plaintiff's Reply and Defence to Counterclaim (Amendment No. 3) filed on 15 January 2010
3.	Monthly Material Status records from January 2007 to May 2007 of all the plaintiff's batching plants (except for Tuas and Penjuru Batching Plants)
4.	With respect to the plaintiff's Penjuru Batching Plant, the Monthly Material Status records for the months of March 2007 to May 2007
5.	With respect to the plaintiff's Tuas Batching Plant, the Monthly Material Status records for the month of January 2007
6.	The plaintiff's agreement(s) with Sin Heng Chan in January 2007 to May 2007 for the supply of sand
7.	The plaintiff's booking lists for orders of ready mixed concrete received during the period January 2007 to May 2007

The AR allowed the defendant's application in respect of all the items listed above. The plaintiff appealed against the decision only in respect of items 3 to 7 above. Discovery for items 1 and 2 was not contested at the hearing below and is not an issue in this appeal.

The applicable legal principles

7 Under O 24 r 5 of the Rules of Court (Cap 322, Rule 5, 2006 Rev Ed), the court may order discovery of any document which is relevant to the matters in dispute insofar as the document could adversely affect a party's own case, adversely affect another party's case or support another party's case. The question of relevance is, quite naturally, determined by reference to the issues raised by the parties' pleadings: *Tan Chin Seng v Raffles Town Club Pte Ltd* [2002] 2 SLR(R) 465, at [18]. At this interlocutory stage, the court should not enter into an in-depth analysis as to the document's exact degree of relevance. Instead, what is required is to determine only whether the document in question may reasonably be expected to assist in proving or disproving the fact in issue: *Management Corporation Strata Title Plan No 2297 v Seasons Park Ltd* [2004] SGHC 142, at [15].

8 Of course, relevance is not the only consideration. Once relevance in established, the court will order a document's discovery unless it is shown that discovery is not necessary – either at that stage of the matter or at all – to dispose fairly of the case or matter or for saving costs: O 24 r 7; *Tan Chin Seng v Raffles Town Club Pte Ltd*, *supra*, at [15].

Application to the facts

Items 3 to 5

9 The documents sought in items 3 to 5 in the list enumerated above are the Monthly Material Status records of the plaintiff's various batching plants. These records refer to the plaintiff's inventories of its stocks of sand. On 24 October 2008, the plaintiff had, pursuant to an Order of Court dated 3 October 2008 in Registrar's Appeal No 242 of 2008, filed a Supplementary List of Documents giving discovery of, among other documents:

(a) the Monthly Material Status records for the plaintiff's Tuas Plant for the period between February 2007 and May 2007; and

(b) the Monthly Material Status records for the plaintiff's Penjuru Plant for the period between November 2006 and February 2007.

Items 4 and 5 above, therefore, seek discovery of those missing records between January and May 2007 while item 3 seeks to expand the scope of the previous discovery order to include the other six of the plaintiff's eight batching plants.

10 The defendant submits that these documents are relevant for determining whether it really was "impossible [for the plaintiff] to perform" its obligations under the contracts with the defendant. The records would show if the plaintiff had sufficient inventories of sand to continue the production of RMC following the announcement of the Sand Ban at the end of January 2007 and thus would be relevant for demonstrating whether the Sand Ban really made it impossible for the plaintiff to continue performing its obligations under the contracts without any fault on its part.

11 The plaintiff's objections to disclosure were premised on two grounds. First, it argues that the issue of whether the contracts may be deemed to be frustrated hinges on whether the Sand Ban had rendered the plaintiff's obligations under the contracts radically different from what the plaintiff had originally undertaken. The state of the plaintiff's sand inventories was therefore irrelevant to the question of frustration. Moreover, the defendant had not pleaded a positive case to say that the plaintiff had sufficient amounts of sand in its possession to carry out its obligations under the contracts. The records so requested in items 3 to 5 were therefore irrelevant to the pleaded issues. The second objection was premised on the principle of necessity. The plaintiff argued that even if the records showed that the plaintiff had sufficient sand in its inventories at the time, the records would not show if there were sufficient quantities for the defendant's projects as the plaintiff was also receiving government sand from its other customers for use in their projects. The Material Monthly Status reports, therefore, would not answer the question whether the plaintiff's obligations had been rendered so radically different by the Sand Ban and the BCA Procedure as to deem the contracts frustrated. The documents were, therefore not necessary either for disposing fairly of the issues at hand or for saving costs.

12 The plaintiff's insistence that the issue of whether the contracts may be deemed to be frustrated hinges solely on the question whether the plaintiff's obligations were rendered radically different from what they had originally undertaken is artificially narrow, even within the scope of its own pleaded case. The plaintiff's Statement of Claim (Amendment No. 2) dated 1 June 2009 states:

K. Following the Sand Ban, it became illegal for the Plaintiff's sand suppliers as well as any other party (including the Plaintiff) to procure sand from Indonesia. The BCA became the only source of sand available after the Sand Ban.

L. The San Ban was an unforeseeable and unforeseen event which was not brought about by the act/default of the Plaintiff, and was an event that was beyond the Plaintiff's control.

M. In the circumstances, the Plaintiff's performance of the Contracts was rendered radically different from what was originally undertaken by the Plaintiff *and/or had become impossible without any fault of the Plaintiff*.

[emphasis added]

Impossibility of performance was pleaded not once in the Statement of Claim, but several times. The same words may be found at paragraphs 4A, 10B and 15B of the Statement of Claim (Amendment No. 2) and the defendant, by denying those paragraphs and putting the plaintiff to strict proof thereof (at paragraphs 5A, 11A and 15 of their Defence and Counterclaim(Amendment No. 2)), has ensured that there was joinder on the issue. It is true that the words "had become impossible without any fault of the Plaintiff" were phrased both conjunctively and disjunctively with the element of "radical difference" and the plaintiff may therefore ultimately choose to argue that impossibility of performance need not be established where a radical change in the obligations undertaken in a contract is proven. That, however, is a matter that may only be addressed after hearing the facts relevant to the pleaded case. The plaintiff is not entitled, at this stage of the proceedings, to deny discovery on an element of its pleaded case even if it chooses, in the end, not to rely on the particular pleaded fact in order to establish its case.

13 In my view, therefore, the Monthly Material Status reports of all of the plaintiff's batching plants between January and May 2007 are both relevant and necessary in order to establish whether the Sand Ban rendered the plaintiff's performance of its obligations under the contracts impossible without fault on its part. I accept the defendant's submission that the records would show whether the plaintiff had sufficient inventories of sand to continue the production of RMC following the announcement of the Sand Ban at the end of January 2007. If the records show that there was sufficient sand in the plaintiff's inventories to meet the defendant's RMC needs then, *prima facie*, it was not impossible for the plaintiff to perform its obligations under the contracts even if the Sand Ban and BCA Procedure rendered the obligations under the contract radically different from what they were before. If, as the plaintiff submits, the inventoried sand was obtained under the BCA Procedure and belonged to other customers, then it would be the plaintiff's onus to disclose and adduce further evidence to show that to be the case. If the sand did not belong to other customers, then the fact that it was used to fulfil the orders of other customers may indicate that the failure to perform was due to some fault on the part of the plaintiff. The fact that the documents sought by the defendant will not conclusively prove the point it hopes to establish at trial is no reason to deny discovery of the same at this stage of the proceedings.

14 A final objection made by the plaintiff is premised on the argument that the defendant's application for discovery of all the documents in item 3 of the list above considerably widens the scope of discovery requested. It then relies on the dicta of Belinda Ang J in *Bayerische Hypo-und Vereinsbank AG v Asia Pacific Breweries (Singapore) Pte Ltd and other applications* [2004] 4 SLR(R) 39 at [38] ("*Asia Pacific*"), where the judge said:

> ... The wider the range of documents requested the more difficult it is for the court to decide whether the documents are necessary for "disposing fairly" of the matter or cause before proceedings are commenced or for "saving costs"...

15 There is a big difference between the range of documents sought in this case and in *Asia Pacific*. It is true that the defendant sought, in this case, to expand its discovery of the plaintiff's Monthly Material Status reports to include all eight batching plants (rather than the original two for which it was granted discovery in Registrar's Appeal No 242 of 2008). However, this was nowhere as wide a range of documents as that sought in *Asia Pacific*, where the banks were seeking discovery of

a very broad range of documents from those relating to the employment of Chia Teck Leng to the organisation charts of the companies APBS and APBL and to all the documents relating to the bank accounts and loans of APBS between 1999 and 2003. Here, the defendant is only seeking discovery of four months of documents, not four years. It should also be noted that Belinda Ang J's remarks were made in the context of an application for pre-action discovery. Once the action is commenced, the question of necessity may not be so limiting a requirement and the wide range of documents that the applicant was denied discovery of at the pre-action stage may well be both relevant and necessary at the later stage.

Item 6

16 Item 6 on the list at [6] above relates to the plaintiff's contract(s) with the company Sin Heng Chan – one of the plaintiff's sand suppliers. The plaintiff was previously ordered by Belinda Ang J in Registrar's Appeal No 242 of 2008 to disclose its contracts with its sand suppliers and, pursuant to that order, the plaintiff did disclose its contracts with a number of its sand suppliers in its Supplementary List of Documents filed on 24 October 2007. The contracts with Sin Heng Chan, however, were omitted and, according to the defendant, it only discovered the omission when reviewing the inventory records for the Tuas Plant after they were disclosed by the plaintiff.

17 The plaintiff objected to the application for discovery of its contract with Sin Heng Chan on the basis that it was irrelevant to the question of frustration. The Sand Ban occurred in January 2007. According to the Monthly Material Status reports from the plaintiff's Tuas Plant, however, Sin Heng Chan only delivered sand to the plaintiff in May 2007. This was three months after the Sand Ban commenced and it was also the month in which the defendant purported to accept what it says was the plaintiff's repudiation of the contracts between them. Thus, the plaintiff argued, the contract with Sin Heng Chan would not show whether the plaintiff had sufficient concreting sand in order to manufacture RMC for the defendant's projects at or about the time the Sand Ban came into effect.

18 I note that in Registrar's Appeal No 242 of 2008, Belinda Ang J specifically stated that she was ordering discovery of all the agreements between the plaintiff and its sand suppliers who were supplying sand to the plaintiff between the announcement of the sand ban in January/February 2007 and *the end of May 2007*. The plaintiff was therefore already obliged to disclose this contract with Sin Heng Chan by virtue of the said judge's order and it could not now object to discovery on the basis of irrelevance.

Item 7

19 Item 7 relates to the plaintiff's booking lists for orders of RMC received between January and May 2007. These documents would show the orders received by the plaintiff for the specified period and the quantities of RMC that it was supplying to its customers. The defendant argues that these documents are relevant to the issue of impossibility of performance because if the booking list showed the plaintiff supplying RMC in large quantities to its other customers and not the defendant, it would go towards showing that it was not impossible for the plaintiff to supply RMC during the relevant period. The plaintiff, however, argues that while the documents might show whether the plaintiff was capable of supplying RMC to its other customers, they would not show whether the plaintiff was capable of supplying RMC to the defendant. Any RMC supplied to the plaintiff's other customers would have been RMC manufactured using sand obtained under the BCA Procedure and would belong to those customers who had placed orders for the sand under the BCA Procedure. Thus, the plaintiff argued, the documents in item 7 were neither relevant nor necessary to the issue at hand.

20 I did not accept the plaintiff's submissions on relevance and necessity. The documents sought

by the defendant in item 7 are both relevant and necessary in order to provide a full picture of whether it was really impossible for the plaintiff to continue supplying the defendant with RMC during the material time. The Monthly Material Status reports in items 3 to 5 and the booking lists in item 7 appear to me to be two sides of the same coin in this respect. If the Monthly Material Status reports show that there was sufficient sand in the plaintiff's inventories to meet the defendant's RMC needs then, *prima facie*, it was not impossible for the plaintiff to perform its obligations under the contracts even if the Sand Ban and BCA Procedure rendered the obligations under the contract radically different from what they were before. If, as the plaintiff submits, the inventoried sand was sand obtained under the BCA Procedure and belonged to other customers, then the onus would be on the plaintiff to disclose and adduce further evidence to show that to be the case. If the sand did not belong to other customers, then the fact that it was used to fulfil the orders of other customers may indicate that the failure to perform was due to some fault on the part of the plaintiff. The booking lists sought by the defendant in item 7 would be relevant and necessary for these issues. Whether the documents would demonstrate the points conclusively is a matter of weight, not relevance.

Conclusion

21 For these reasons, I dismissed the plaintiff's appeal and ordered the plaintiff to pay the defendant costs of $1,000 (inclusive of disbursements) for the appeal.

[note: 1] Statement of Claim (Amendment No. 2), 1 June 2009, pg 64

[note: 2] Statement of Claim (Amendment No. 2), 1 June 2009, pg 62

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