Alliance Concrete Singapore Pte Ltd *v* Sato Kogyo (S) Pte Ltd [2014] SGCA 35

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Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Francis Xavier SC, Muthu Arusu, Winston Kwek Choon Lin, Avinash Pradhan, Istyana Ibrahim and Tng Sheng Rong (Rajah & Tann LLP) for the appellant; Cavinder Bull SC, Chia Voon Jiet, Colin Liew and Rajaram Vikram Raja (Drew & Napier LLC) for the respondent.
Parties	: Alliance Concrete Singapore Pte Ltd — Sato Kogyo (S) Pte Ltd

Contract – Frustration

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2013] SGHC 127.]

30 May 2014 Judgment reserved.

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

Introduction

1 This is an appeal against the decision of the judge ("the Judge") in *Alliance Concrete Singapore Pte Ltd v Sato Kogyo (S) Pte Ltd* [2013] SGHC 127 ("the Judgment"). This constitutes yet another case in the long series of "sand ban" cases which have come before the Singapore courts. The Appellant is Alliance Concrete Singapore Pte Ltd ("ACS"), a supplier of ready-mixed concrete ("RMC"). The Respondent is Sato Kogyo (S) Pte Ltd ("SK"), a contractor in the construction industry. The main issues to be decided in this appeal are whether ACS was discharged from its contractual obligation to supply RMC to SK by way of the doctrine of frustration and whether ACS was in breach of the relevant contracts.

The background

2 In January 2007, SK was engaged as the main contractor for three construction projects ("the Projects"), namely: (a) an extension to the Boon Lay MRT Station ("the Boon Lay Project"); (b) a facility at Nanyang Technological University ("the NTU Project"); and (c) a six-storey development at Harbourfront ("the Harbourfront Project"). ACS agreed to supply RMC to SK in respect of each of the Projects, pursuant to three separate contracts, namely, "the Boon Lay Contract", "the NTU Contract" and "the Harbourfront Contract" (collectively, "the Contracts").

3 The documentation and the exact terms of the NTU Contract and the Harbourfront Contract are disputed. SK argues that the parties entered into the NTU Contract and the Harbourfront Contract by way of two purchase orders ("the Purchase Orders"). On the other hand, ACS argues that the NTU Contract and the Harbourfront Contract were embodied in two quotations ("Quotation 109" and "Quotation 980", respectively). The Judge agreed with SK that the NTU Contract and the Harbourfront Contract were embodied in the Purchase Orders since they were signed by both parties, whereas Quotation 109 and Quotation 980 were not signed by SK (see the

Judgment at [61]).

4 In general, whenever SK required RMC for each of the Projects, it would place an order with ACS one day in advance of the day that the RMC was required to be delivered. The orders would be confirmed by telephone calls from SK's construction managers or site supervisors on the morning of the day of delivery. In the telephone calls, SK's representative would communicate to ACS the volume of RMC required and the times at which the RMC was required for that day.

5 On 23 January 2007, the Indonesian government announced a ban on the export of concreting sand ("the Sand Ban"), such that sand exporters in Indonesia could no longer export sand to Singapore. However, the Indonesian government provided a grace period up to 5 February 2007 for sand exporters to honour existing sand export contracts. As the Judge noted, sand is one of the main ingredients for the production of RMC. At the relevant time, Singapore was one of the largest importers of sand from Indonesia.

6 To alleviate any shortfall in the supply of sand arising from the Sand Ban, the Building and Construction Authority ("the BCA") announced on 31 January 2007 that sand would be released from its stockpile ("the BCA Stockpile") with effect from 1 February 2007. However, only main contractors with ongoing projects such as SK could draw on the BCA Stockpile, and not RMC suppliers such as ACS. The contractors could then pass on the sand to their RMC suppliers to produce RMC for their building projects. The cost of sand obtained from the BCA Stockpile was fixed at $25 per tonne for February 2007. This was an increase from the cost of sand prior to the Sand Ban, which was about $20 per tonne.

7 Although SK procured sand from the BCA Stockpile and passed it on to ACS to produce RMC, by end-February 2007, there was a significant shortfall between the amount of sand required by ACS to meet SK's orders and the sand supplied by SK from the BCA Stockpile. SK argued that ACS had failed to take delivery of the sand which it had procured from the BCA Stockpile. On the other hand, ACS argued that SK had failed to deliver the sand in a reasonable manner.

8 During this period in February 2007, ACS sent several letters and new quotations to SK indicating that the original contract prices should not apply because the Sand Ban gave rise to a *force majeure* event, and that there ought to be higher prices for the supply of RMC. SK's position was that the original contract prices applied, but it was prepared to enter into a cost-sharing framework with ACS. SK also informed ACS that if the supply of RMC to the Projects was suspended, SK would source for alternative sources of supply and would hold ACS accountable for the price difference.

9 ACS's supply of RMC to SK stopped from 25 February 2007 onwards, and SK begun ordering RMC from other RMC suppliers from 27 February 2007. From 1 March 2007, SK ceased all supply of sand to ACS. On 6 March 2007, representatives from both parties had a meeting in an attempt to break the deadlock on new prices for RMC, but no resolution was reached.

10 On 28 March 2007, SK wrote to ACS to acknowledge that there had been a sand shortfall of 585 tonnes arising out of SK's February 2007 orders of RMC, and SK offered to deliver the sand that was in shortfall. The sand shortfall was made up on 13 April 2007, and ACS informed SK that it was able to resume the supply of RMC to SK. In its letter dated 19 April 2007, SK acknowledged ACS's intention to resume RMC supply, and referred to a telephone conversation where ACS allegedly agreed to supply RMC based on the original contract prices.

11 On 20 April 2007, ACS sent a quotation to SK, revising the prices of RMC for the Boon Lay

Project and the Harbourfront Project. SK's project manager for the Harbourfront Project objected to what he perceived to be ACS's unilateral revision of its RMC prices, and informed ACS that he would be ordering RMC from alternative sources and holding ACS responsible for the damages. Thereafter, SK stopped ordering RMC from ACS for the Harbourfront Project, but ordered from another RMC supplier instead.

12 On the other hand, in his letter dated 27 April 2007, SK's project manager for the Boon Lay Project, whilst not making any reference to the quotation dated 20 April 2007, acknowledged ACS's intention to resume RMC supply and reiterated that the original contract prices applied. The letter also stated that the Land Transport Authority ("the LTA"), which was SK's employer for the Boon Lay Project, had agreed to bear 75% of the increased cost of sand for the Boon Lay Project, and that SK had agreed to share the remaining 25% of the increase in sand costs with ACS.

13 Throughout the month of May 2007, SK ordered and received RMC from ACS for the Boon Lay Project. SK delivered some sand to ACS, but there was still a sand shortfall.

14 On 16 May 2007, representatives from both parties met again. During that meeting, ACS made a proposal for increased RMC prices for all three projects in respect of the months of May to July 2007. SK mentioned that it needed to review the proposal and agreed to revert in a week's time.

15 On 29 May 2007, ACS informed SK that it was temporarily unable to supply RMC to SK for the Boon Lay Project because SK's credit limit had been exceeded. ACS also requested that SK make some payment soon. Thereafter, SK stopped placing orders for RMC from ACS.

16 On 4 June 2007, SK sent ACS a proposal which included how the increased costs should be shared and claimed the additional cost of obtaining RMC from alternative suppliers from March 2007 to May 2007. On 21 June 2007, ACS replied that it was unable to accept SK's claim for the additional cost of obtaining RMC from alternative suppliers, and that ACS would commence legal action.

17 On 27 July 2007, ACS commenced the present proceedings against SK for the price or value of RMC supplied and delivered to SK for the Projects. SK disputed ACS's claim and counterclaimed for the losses incurred because of ACS's alleged failure to supply RMC to it.

The decision in the court below

18 As the trial below was bifurcated, the decision of the Judge was only concerned with the question of liability.

19 The Judge held, among other things, that the Contracts were not frustrated by the Sand Ban because:

(a) It was not a term of the Contracts that sand for the RMC required for the Projects had to come from Indonesia. What mattered was whether the sand met the requisite specifications and not where the sand came from (see the Judgment at [27]–[28]).

(b) ACS had surplus stocks of sand as seen from the fact that it initially agreed to supply RMC to SK on the basis that SK would subsequently return the quantities of sand used (see the Judgment at [33]). Moreover, ACS's quotation to its clients in early February 2007 stated that if its clients failed to provide sufficient quantities of sand for the production of RMC, the cost of procuring additional sand would be borne by them. ACS did not state in the said quotation that RMC would not be supplied if insufficient sand was supplied to ACS. By late April 2007, there was

no need for a contractor to supply sand to ACS before RMC could be supplied (see the Judgment at [38]).

(c) ACS could have sourced for sand from other countries. ACS was offered Vietnamese sand in May 2007, but it rejected the offer because it thought that the price was not competitive. Moreover, that sand was available from other sources was evidenced by the dwindling number of applications for the release of sand from the BCA Stockpile after February 2007 (see the Judgment at [39]).

(d) In considering the demands of justice of the case, it was noteworthy that ACS, unlike SK, was unwilling to follow the BCA's cost-sharing arrangement to cope with the increased price of sand. In February 2007, ACS sought to impose a surcharge of $24 for 1m^3 of RMC when the corresponding increase in cost of sand was only $4. The very high prices for its concrete after the Sand Ban allowed ACS to reap huge profits in 2007, in stark contrast to the losses made in previous years (see the Judgment at [44]–[48]).

(e) ACS could have obtained sand from the BCA Stockpile via SK. There was insufficient evidence that it was impossible for ACS to accept SK's deliveries of sand (see the Judgment at [55]).

(f) ACS was in a position to continue supplying RMC to SK but was unwilling to do so unless SK agreed to a higher price for the RMC. Accordingly, the Sand Ban had merely made it more expensive for ACS to manufacture RMC for the Projects and did not frustrate the Contracts (see the Judgment at [57]).

20 The Judge held that since ACS refused to supply RMC to SK under the prices fixed in the Contracts, SK was entitled to treat the Contracts as repudiated and obtain RMC from other sources (see the Judgment at [85]). The Judge held that SK had to pay ACS the unpaid amount for the supply for RMC based on the terms of the Contracts (see the Judgment at [86]). The Judge noted that the damages allegedly suffered by SK would have to be assessed and that SK would have to prove, among other things, that ACS had actually failed to supply the quantities of RMC ordered by SK (see the Judgment at [87]).

The parties' respective cases on appeal

ACS's case

21 ACS first argued that the Contracts were frustrated by the Sand Ban because: (a) it was fundamental to the parties' agreements that Indonesian sand would be used; and (b) the Sand Ban and SK's failure to supply sand radically altered the nature of ACS's obligations.

22 In the alternative, ACS argued that the *force majeure* clauses in Quotation 109 and Quotation 980 were validly incorporated into the Contracts and were triggered as a result of the Sand Ban and SK's failure to deliver sand to ACS, and that ACS had taken all reasonable steps to avoid the consequence of the Sand Ban. In the hearing before us, however, this argument was ultimately (and correctly, in our view) not pursued.

23 Finally, ACS argued that in any event, it was not in repudiatory breach of the Contracts because, amongst other things: (a) SK failed to prove the existence of any specific order for RMC; and (b) SK failed to prove that ACS's conduct evinced a clear intention not to be bound by the Contracts.

24 As such, ACS claimed the following reliefs on appeal: (a) the original contract price of RMC supplied up to the date of frustration, and the cost of RMC supplied after the date of frustration to be assessed on a *quantum meruit* basis; (b) that SK's counterclaim be dismissed; and (c) costs.

SK's case

25 SK argued that the Contracts were not frustrated by the Sand Ban because:

(a) It was not fundamental to the Contracts that Indonesian sand be used to manufacture RMC.

(b) The Sand Ban did not result in a radical change of obligations because: (i) sand could have been obtained from other countries; (ii) SK could have provided ACS with sufficient sand from the BCA Stockpile; and (iii) sand was available to ACS.

(c) It would be unjust to hold that the Contracts were frustrated because: (i) ACS refused to accept sand or share costs; (ii) ACS sought to turn the Sand Ban to its advantage; and (iii) SK's behaviour was not unreasonable.

26 On the *force majeure* issue, SK argued that no *force majeure* clauses were incorporated into the NTU Contract or the Harbourfront Contract, which were concluded on the terms of the Purchase Orders (see above at [3]). Even if such clauses had been incorporated, SK submitted that they were not triggered since ACS's ability to perform the Contracts was not "disrupted" and the relevant circumstances were at all material times within ACS's control.

27 As for the issue of repudiatory breach, SK argued, *inter alia*, that it need not prove that it had placed specific orders for RMC with ACS because ACS had repudiated the Contracts by renouncing its obligation to supply RMC in accordance with the terms of the Contracts. Moreover, and in any event, the precise amounts of RMC ordered by SK and the amounts delivered by ACS was a matter for assessment of damages, given the bifurcation of the proceedings below.

The issues

28 Both parties framed the two issues before this court simply and directly – focusing on the twin issues of frustration and repudiatory breach as follows:

(a) Whether the Contracts were discharged by frustration ("Issue 1").

(b) If the Contracts were not discharged by frustration, whether ACS was in repudiatory breach of the Contracts ("Issue 2").

29 Given the manner in which the parties have framed the issues before us, it would be helpful to set out, at the outset, the relevant conceptual and doctrinal frameworks which would enable this court to understand and resolve the two main issues (centring, respectively, on the doctrine of frustration and the doctrine of discharge by breach) that are the focus of this appeal.

The relevant conceptual and doctrinal frameworks

Sanctity of contract as norm

30 It is axiomatic that the courts should – as far as it is possible – endeavour to uphold the

validity of contracts and ensure that they are performed according to their terms. Put simply, sanctity of contract is the norm. This is only to be expected, lest the idea of freedom of contract degenerate into an instrument of abuse which would (in turn) engender unpredictability and chaos not only in the transactional context but in the wider society as well.

The need and rationale for exceptions

31 Nevertheless, it is acknowledged that, in the occasional case where injustice would otherwise result, courts can – and, in fact, do – depart from the norm just mentioned. This ensures that justice and fairness are not sacrificed at the altar of purely mechanistic certainty. Hence, there is a tension which is one to be found in virtually all other areas of the law as well. That tension is mediated by ensuring that the norm (here, ensuring the sanctity of contract) is departed from *only* in the *exceptional* case and then only where such departure can be justified in a *principled* manner. This justification has taken the form of a number of mitigating doctrines in the context of the common law of contract.

Exceptions and fault – vitiating factors

32 A number of such doctrines fall under the umbrella heading of "vitiating factors". These include the doctrines of misrepresentation, duress and undue influence, unconscionability (at least in a more limited form), as well as illegality and public policy. As the very heading of this section suggests, the doctrines just mentioned involve some element of *wrongdoing* on the part of the contracting party against whom the contract is sought to be rendered either void or voidable (though *cf* the doctrine of mistake, in particular, the test for the doctrine of common mistake at common law which was, in the English Court of Appeal decision of *Great Peace Shipping Ltd v Tsavliris (International) Ltd* [2003] QB 679, based on the test of *frustration* (indeed, the difference is one of *timing* inasmuch as the doctrine of common mistake relates to the *formation* of the contract, whereas the doctrine of frustration relates (as we shall see) to the *discharge* of the contract)).

An exception sans fault – the doctrine of frustration

The doctrine of frustration

33 The doctrine of frustration is yet another doctrine which permits a contracting party to argue successfully that the parties ought no longer to be bound by their contract. That involves a situation where there is *no wrongdoing* on the part of either of the parties. The justification for departing from the norm of the sanctity of contract lies *outside* the contract (and the parties thereto). It is *not fault*-based; it discharges *both* parties *automatically by operation of law*. Under the doctrine of frustration, both parties are automatically *discharged* from their contract *by operation of law* because, *without* the default of either party, *a supervening event* that has occurred *after* the formation of the contract renders a contractual obligation *radically or fundamentally different* from what has been agreed in the contract.

34 This is what has often been referred to as the "radical change in obligation" test embodied in the oft-cited words of Lord Radcliffe in the leading House of Lords decision of *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 ("*Davis Contractors*") at 729:

> [F]rustration occurs whenever the law recognizes that *without default of either party* a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing ***radically different*** from that which was undertaken by the contract. … [emphasis added in italics and bold italics]

35 In the subsequent case of *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 ("*National Carriers*"), Lord Simon of Glaisdale restated the test as follows (at 700):

> … Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance.

36 The "radical change in obligation" test has been accepted in Singapore by this court: see, for example, *Chiang Hong Pte Ltd v Lim Poh Neo (trading as Tai San Plastic Factory)* [1983-1984] SLR(R) 346 at [21]; *Glahe International Expo AG v ACS Computer Pte Ltd and another appeal* [1999] 1 SLR(R) 945 at [27]; and *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413 ("*RDC Concrete*") at [59].

37 The "radical change in obligation" test involves a multi-factorial approach, as articulated by Rix LJ (with whom Wall and Hooper LJJ agreed) in the English Court of Appeal decision of *Edwinton Commercial Corporation and another v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The "Sea Angel")* [2007] 2 Lloyd's Rep 517 (at [111]):

> In my judgment, the application of the doctrine of frustration requires a multi-factorial approach. Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances. Since the subject matter of the doctrine of frustration is contract, and contracts are about the allocation of risk, and since the allocation and assumption of risk is not simply a matter of express or implied provision but may also depend on less easily defined matters such as "the contemplation of the parties", the application of the doctrine can often be a difficult one. In such circumstances, the test of "radically different" is important: it tells us that the doctrine is not to be lightly invoked; that mere incidence of expense or delay or onerousness is not sufficient; and that there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstances.

38 Although the doctrine of frustration is an established one in the common law of contract, it is an exception to the norm of sanctity of contract and therefore is to be applied to discharge the parties from their contract in only *exceptional* circumstances. At this juncture, it is important to note that the doctrine of frustration *itself* embodies *an equally valid* idea of *justice and fairness*. This idea of justice and fairness is that it would be unjust and unfair to hold the parties to their contract where a n *external* event has rendered further performance of their contract something *radically or fundamentally different* from that which they had originally contemplated at the time they entered into that contract. This last-mentioned point is important inasmuch as it is *not* some *general (still less, subjective) idea of justice and fairness* that is within the scope of the doctrine. To this end, we endorse the following passage in *Chitty on Contracts* vol 1 (Sweet & Maxwell, 31st Ed, 2012) at para 23-017:

> … As we have noted, some judges have maintained that the doctrine seeks to give effect to the demands of justice, but these statements cannot be invoked to justify the conferral upon the

courts of a wide-ranging discretion to re-write the parties' bargain in the name of "fairness and reasonableness".

39 In the circumstances (and in order to ensure that the doctrine of frustration operates only in truly exceptional situations), the courts have been careful to apply the doctrine strictly. So, for example, a mere increase in cost *per se* will not result in a frustrating event, although it might if that increase is astronomical (see, for example, the decision of this court in *Holcim (Singapore) Pte Ltd v Precise Development Pte Ltd and another application* [2011] 2 SLR 106 at [53]).

40 This leads to another closely related point: given the fact that the doctrine of frustration is an *exception* and must be strictly applied, the *precise facts* become of the first importance. Indeed, even on a more general level, the precise facts are always important – if nothing else, because the general rules and principles of law are never applied in the abstract. They are only relevant and practical in so far as they are *applied* to the relevant *facts* of the case at hand.

The mechanics of discharge in frustration and breach

41 One other important point *is particularly relevant to the issues as framed before this court in the present appeal*: although both the doctrine of frustration and the doctrine of breach relate to the *discharge* of the contract concerned, the mechanics of discharge are not quite the same. Under the doctrine of *frustration*, the contract is discharged with respect to *all* the contracting parties because of a (frustrating) event that has occurred *externally* (*ie*, through no fault of any of the parties). As already noted above, such discharge is therefore *automatic* (coming about by *operation of law*).

42 In the doctrine of discharge by *breach*, however, the contract is discharged at the *election of* the *innocent party* because of a breach of contract by the *other party*. It is, of course, true that *not every* breach will entitle the innocent party to elect to treat the contract as discharged. The circumstances (in law) where this will be permitted have been laid down by this court in previous decisions (see, for example, *RDC Concrete* at [90]–[113] and Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David [2008] 1 SLR(R) 663 ("*Man Financial*") at [153]–[158]), and this will be elaborated upon briefly below (at [58]–[59]).

Application to the present appeal

43 In so far as the relevant conceptual and doctrinal frameworks just set out above are concerned, the two issues as framed above (at [28]) are closely related in so far as if ACS succeeds in demonstrating that the Contracts were frustrated (Issue 1), then *both* parties are discharged from the contract by operation of law from the date of the frustrating event. *Importantly*, this would *also* mean that *ACS* would *not* be found to have committed a *repudiatory breach* (as alleged by SK) (Issue 2) after the date of the frustrating event, let alone any breach post-frustration for failing to deliver RMC ordered by SK.

4 4 *However*, it should be noted that the *converse* does *not necessarily follow*. Even if ACS does *not* succeed on Issue 1, ACS could *still succeed if* it demonstrates that it was *not* in *repudiatory breach* of the Contracts (Issue 2). This result is wholly consistent with the analysis already referred to (see above at [41]–[42]) inasmuch as a finding that the contract concerned has not been frustrated does not resolve the (quite separate and distinct) issue as to whether or not a contracting party was indeed in repudiatory breach, thereby entitling the innocent party to elect to treat the contract as discharged. As we have already seen, this is a *discrete* issue that needs to be decided in accordance with the applicable legal rules and principles (see above at [41]–[42] and below at [58]–[59]).

45 Given the focus by the parties as well as the Judge on the doctrine of frustration, we will consider Issue 1 first.

46 With these preliminary (albeit important) points in mind, we can now proceed to analyse the issues raised in the present appeal. However, before proceeding to do so, it would, in our view, be apposite to briefly recapitulate the applicable legal principles.

The applicable legal principles

Discharge by frustration

47 The doctrine of frustration has already been touched on above (at [33]–[40]). To recapitulate, the doctrine discharges both parties from their contract automatically *by operation of law* because, without default of either party, *a supervening event* that has occurred *after* the formation of the contract renders a contractual obligation *radically or fundamentally different* from what has been agreed in the contract. This "radical change in obligation" test (embodied in the words of Lord Radcliffe in *Davis Contractors*, quoted above at [34]) is premised on the rationale of fairness. The underlying idea is a simple one: No party should be held liable for not being able to perform a contractual obligation which is radically different owing to an event which is not its fault and which originated wholly from an external source which was never in the contemplation of the parties. The difficulty, however, is with the *application* of the doctrine, particularly given the very factual nature of the inquiry itself. It is clear, as already noted (above at [38]–[40]), that the doctrine of frustration will only be applied in *exceptional* circumstances.

48 One instance of when a contractual obligation will be rendered radically or fundamentally different from what has been agreed in the contract is a situation of supervening impossibility. In such a situation, circumstances have arisen such as to render the performance of a contract impossible (even though literal impossibility is usually not required). Specifically relevant to the present case is the scenario where the unavailability of a particular source from which the subject-matter of the contract is derived may operate to frustrate the contract, depending on whether one or both of the contracting parties intended or contemplated that particular source. Prof Treitel has helpfully distinguished three groups of cases as follows: (a) where the source is expressly referred to in the contract ("Scenario (a)"); (b) where only one party intended an unspecified source ("Scenario (b)"); and (c) where both parties contemplated an unspecified source ("Scenario (c)") (see Sir Guenter Treitel, *Frustration and Force Majeure* (Sweet & Maxwell, 3rd Ed, 2014) ("*Treitel*") at paras 4-051–4-059).

Scenario (a): Where the source is expressly referred to in the contract

49 Where the source is referred to in the contract, and that source fails through no fault of either party, the contract is generally discharged by the doctrine of frustration. In the English Court of Appeal decision of *Howell v Coupland* (1876) 1 QBD 258 ("*Howell*"), a farmer contracted with a merchant to sell the latter potatoes grown "on [the defendant's] land in Whaplode". The farmer's crops subsequently failed due to disease and he was unable to supply the full quantity contracted for. The court, affirming the court below, held that the contract was discharged because the performance to sell specific things had become impossible.

5 0 *Howell* has been explained by subsequent cases as being based on the failure of a condition precedent, *ie*, the contract being conditional on the coming into existence of the requisite quantity of potatoes from the specified location: see, for example, the English decisions of *In re Wait* [1927] 1 Ch 606 at 631 and *H R and S Sainsbury Ltd v Street* [1972] 1 WLR 834 at 837. On this view, the failure

of the specified source to produce the requisite quantity of goods amounts to a failure of a condition precedent. Therefore, the doctrine of frustration does not operate since the contract does not even arise. However, *another* view regards *Howell* as authority for the common law rule that a contract for the sale of goods will be discharged if that contract expressly provides for the goods to be taken from a particular source and that source fails without the fault of either contracting party (see *Treitel* at para 4-054). We endorse this latter view.

Scenario (b): Where only one party intended an unspecified source

51 Where only one of the contracting parties intended for a particular source such that the source is not provided for in the contract, then the contract will not be discharged when that source fails. This is illustrated by the oft-cited English Court of Appeal decision of *Blackburn Bobbin Co Ltd v TW Allen & Sons Ltd* [1918] 2 KB 467. In that case, the seller contracted to sell "Finland Birch timber". The seller did not keep stocks of "Finland Birch timber" in England but usually got such timber by shipping it through the Baltic. However, the outbreak of World War One disrupted the seller's usual supply of such timber. It was held that the contract was not discharged since the buyer did not know that the seller had to ship the timber through the Baltic and that the seller's supply would be disrupted by the war.

52 This principle is similarly illustrated by the English Court of Appeal decision of *Intertradex SA v Lesieur-Tourteaux SARL* [1978] 2 Lloyd's Rep 509, which concerned a sale of Mali groundnut expellers. The seller knew that these were produced by only one supplier, but the buyer did not know this. This source of supply failed because of a mechanical breakdown at the sole supplier's factory. It was held that the seller was not discharged.

Scenario (c): Where both parties contemplated an unspecified source

53 As for the scenario where the source is not referred to in the contract but both parties contemplated that unspecified source, there is no conclusive English authority. The English High Court decision of *Re Badische Co Ltd* [1921] 2 Ch 331 appears to support the proposition that where both parties contemplated an unspecified source and that source fails, the contract would be discharged. In that case, Russell J held that the contract was discharged by illegality on the outbreak of World War One because both parties contemplated that the goods be obtained from Germany, which was prohibited. However, the case is not directly relevant because it dealt with a supervening illegality under English law where questions of the forum's public policy were relevant, instead of a supervening impossibility where the court is only concerned with loss-allocation between the parties (see *Treitel* at para 4-058).

54 On the other hand, the position in the United States appears to be clearer (see *Treitel* at para 4-058). In Comment 5 to § 2–615 of the Uniform Commercial Code, for example, it is stated that the seller may be discharged where "a particular source of supply is shown by the circumstances to have been contemplated or assumed by the parties".

55 In our view, the unavailability of a particular source from which the subject-matter of the contract is derived may operate to frustrate the contract where both parties contemplated or could reasonably have contemplated that unspecified source (see also Andrew B L Phang & Goh Yihan, *Contract Law in Singapore* (Kluwer Law International, 2012) at para 1384). This position is consistent with the "radical change in obligation" test (see above at [34]). Where both parties contemplate that a source was to be used, and the source fails, that would generally result in a radical change in the obligation of the obligor because it would have to have recourse to another source which was not contemplated by both parties in order to perform the strict obligation in the contract. Even though

that source is not specified as a term in the contract, and strict performance of the contract is technically still possible, the contract can no longer justly be said to be the same as that which was originally entered into by the parties.

56 This position is also consistent with the restatement of the test by Lord Simon in *National Carriers* (see above at [35]) as the unavailability of a mutually contemplated source would radically change the nature of the contractual obligation from "what the parties could reasonably have contemplated at the time of its execution". It should be noted, however, that the precise facts are, of course, of the first importance and that the doctrine of frustration must be strictly applied (see above at [40]).

57 We do not think that the above approach offends the parol evidence rule embodied in ss 93 and 94 of the Evidence Act (Cap 97, 1997 Rev Ed) ("the Evidence Act"). Essentially, s 93 provides that no evidence extraneous to the contractual document may be relied upon as proof of the terms of the contract, whilst s 94 provides that, where the terms of the contract are reduced to a document, that contract cannot be varied, contradicted, added to or subtracted from unless one of the exceptions to s 94 applies. The above approach does not contravene ss 93 and 94 because the evidence admitted does not go towards proving the terms of the contract. Instead, the evidence, which is admitted for the purpose of establishing that the contract is discharged by frustration, only goes towards proving what the parties contemplated to be the source from which the subject-matter of the contract is derived. In other words, evidence relating to the source contemplated by the parties falls outside the scope of the parol evidence rule embodied in ss 93 and 94 of the Evidence Act.

Discharge by breach

58 A useful summary of the applicable legal principles with respect to when an innocent party can elect to treat itself as discharged from the contract may be found in *Man Financial* (at [153]–[158]), as follows:

> 153 As stated in *RDC Concrete*, there are four situations which entitle the innocent party (here, the appellant) to elect to treat the contract as discharged as a result of the other party's (here, the respondent's) breach.
>
> 154 The *first* ("Situation 1") is where the contractual term in question clearly and unambiguously states that, should an event or certain events occur, the innocent party would be entitled to terminate the contract (see *RDC Concrete* at [91]).
>
> 155 The *second* ("Situation 2") is where the party in breach of contract ("the guilty party"), by its words or conduct, simply *renounces* the contract inasmuch as it clearly conveys to the innocent party that it will not perform its contractual obligations at all (see *RDC Concrete* at [93]).
>
> 156 The *third* ("Situation 3(a)") is where the term breached (here, Clause C.1) is a *condition* of the contract. Under what has been termed the "condition-warranty approach", the innocent party is entitled to terminate the contract if the term which is breached is a condition (as opposed to a warranty): see *RDC Concrete* at [97]. The focus here, unlike that in the next situation discussed below, is not so much on the (actual) consequences of the breach, but, rather, on the *nature of the term* breached.
>
> 157 The *fourth* ("Situation 3(b)") is where the breach of a term deprives the innocent party of substantially the whole benefit which it was intended to obtain from the contract (see *RDC*

Concrete at [99]). (This approach is also commonly termed the "*Hongkong Fir* approach" after the leading English Court of Appeal decision of *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26; see especially *id* at 70.) The focus here, unlike that in Situation 3(a), is not so much on the nature of the term breached, but, rather, on the *nature and consequences of the breach*.

158 Because of the different perspectives adopted in Situation 3(a) and Situation 3(b), respectively (as briefly noted above), which differences might, depending on the precise factual matrix, yield different results when applied to the fact situation, this court in *RDC Concrete* concluded that, as between both the aforementioned situations, the approach in Situation 3(a) should be *applied first*, as follows (*id* at [112]):

If the term is a *condition*, then the innocent party would be entitled to terminate the contract. *However*, if the term is a *warranty* (instead of a condition), then the court should nevertheless proceed to apply the approach in Situation 3(b) (*viz*, the *Hongkong Fir* approach). [emphasis in original]

[emphasis in original]

59 The test for renunciation was stated by this court in *San International Pte Ltd (formerly known as San Ho Huat Construction Pte Ltd) v Keppel Engineering Pte Ltd* [1998] 3 SLR(R) 447 at [20] in the following terms:

… A renunciation of contract occurs when one party by words or conduct evinces an intention not to perform or expressly declares that he is or will be unable to perform his obligations in some material respect. Short of an express refusal or declaration *the test is to ascertain whether the action or actions of the party in default are such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions*. The party in default may intend in fact to fulfil the contract but may be determined to do so only in a manner substantially inconsistent with his obligations, or may refuse to perform the contract unless the other party complies with certain conditions not required by its terms[.] … [emphasis in original]

Our decision

Issue 1

ACS's pleaded case

60 In relation to the issue of frustration, ACS pleaded that, in the light of the Sand Ban, ACS's obligations under the Contracts were rendered radically different from what was originally undertaken by ACS. Accordingly, ACS argued that the performance of the Contracts had become impossible without any fault on its part.

Our decision

61 It is our view that the Contracts were discharged by frustration. Let us elaborate.

(1) Effect of the Sand Ban

62 It is clear that the Sand Ban was a supervening event that was not within the reasonable control of the parties. It was also neither foreseen nor reasonably foreseeable at the time the

Contracts were entered into. On 30 January 2007, the Singapore Contractors Association Ltd ("the SCAL") acknowledged that the Sand Ban had taken SCAL and contractors "completely by surprise with no prior warning" and had also created problems for the supply of RMC. On 31 January 2007, the BCA issued a media statement announcing that it would release sand from its stockpiles from 1 February onwards to make up for any immediate shortfall in sand supply. The BCA stated that it expected the price of sand to rise due to higher transportation cost involved in shipping sand from distant sources, and urged developers to work out a cost-sharing arrangement with their contractors and concrete suppliers.

63 ACS's operations director, Mr Lincoln Lim En-Lai ("Mr Lincoln Lim"), gave evidence that upon the announcement of the Sand Ban, there was an immediate scarcity of sand because the BCA immediately commenced the requisition of sand stockpiles in Singapore, including those belonging to ACS's private sand suppliers. Mr Lincoln Lim also gave evidence that even ACS's private sand suppliers had completely ceased to supply ACS with sand by 16 February 2007. We note that this was consistent with the position taken by SK, which adduced quotations from various local suppliers showing that ACS was able to purchase sand shortly after the announcement of the Sand Ban only up to 16 February 2007. We are therefore satisfied that there did not seem to be a viable alternative source of sand from 16 February 2007 until the end of April 2007.

64 It appears that it was only in May 2007 that alternative sources of sand became available. In particular, an e-mail dated 17 May 2007 showed ACS rejecting an offer for Vietnamese sand as it thought that the price was not competitive. Although the Ministry of National Development's press release dated 24 January 2007 stated that the Housing and Development Board ("the HDB") "has started procuring concreting sand from other sources in the region, outside Indonesia", it is unclear when the HDB did that, and the press release does not provide any details in this regard. Ms Jean Lau Seo Leng ("Ms Jean Lau"), a senior officer of the BCA, agreed that applications to the BCA for the release of sand from the BCA Stockpile started to dwindle "as the month [went] on from February", but it remains unclear when the applications started to dwindle. Moreover, Ms Jean Lau testified that there were still applications from April 2007 to November 2007, and she did not know whether RMC suppliers were getting sand from sources other than the BCA Stockpile in April 2007.

65 The Judge found that ACS had sizeable surplus stocks of sand in February 2007 because ACS initially agreed to supply RMC to SK on the basis that SK would subsequently return the quantities of sand used for batching RMC for the Projects (see the Judgment at [33]). However, it should be noted that this surplus sand was from other contractors who had obtained their sand from the BCA Stockpile. As noted above at [63], even though ACS could still purchase some sand from the market prior to 16 February 2007, the supply of sand was dwindling up to 16 February 2007 when it eventually dried up. Moreover, there was a shortfall of sand that SK was required to deliver to ACS for the RMC to be supplied by ACS to SK. Therefore, even if ACS did have some surplus sand to act as a buffer, that does not detract from the fact that sand supplies were dwindling up to 16 February 2007, when it eventually became impossible to obtain sand on the open market.

66 SK argued that ACS did not state in its quotations dated 9 February 2007 and 23 February 2007 that it would not be able to supply RMC if insufficient sand was supplied by SK. Instead, ACS stated that the purchaser would reimburse ACS the "cost difference". SK argued that this showed that obtaining sand was merely a matter of the right price being paid. However, it should be noted that ACS did state first and foremost in those quotations that the quotations were based on SK's undertaking to supply sand to ACS:

Special conditions

1) Prices are subjects [*sic*] to changes without prior notice

2) Concrete delivered are subjected to availability of raw materials

3) Prices given are based on *contractor undertaking to supply us sand through BCA appointed suppliers*. The above rates for concrete are based on the cost of sand at $25/- per ton delivered to our yard. Supply of concrete will not commence until the required sand is at the batching plant.

4) Should there be insufficient sand to cover the off-take of concrete, the contractor undertakes to reimburse us the cost differences.

[emphasis added]

67 Therefore, it seems that the basis of the quotations was SK's undertaking to deliver sand to ACS to enable ACS to produce RMC. If SK failed to supply sufficient sand, ACS reserved the right to explore the option of procuring sand from other sources, and would claim the cost difference from SK. This does not go so far as to demonstrate that ACS was of the view that it could, as a viable alternative to SK's supply of sand, obtain sand from other sources and that price was the only concern.

68 SK also argued that sand was available to ACS because, by 20 April 2007, ACS no longer needed SK to deliver sand to ACS in order for ACS to supply SK with RMC. SK pointed out that ACS's quotation dated 20 April 2007 no longer contained the "Special conditions" referred to above (at [66]); specifically, it no longer contained the condition that SK was to supply sand to ACS in order for ACS to supply RMC to SK. ACS's sales director, Mr Hong Chim Chew ("Mr Patrick Hong"), appears to have admitted that as at 20 April 2007, ACS did not require sand from SK in order for ACS to supply RMC to SK in the following exchange:

Q: Just before that, just to put ourselves in the correct perspective, by late April when you gave the quotation of 20 April 2007, there was no need for the contractor to actually bring sand to you already. There is no need, you have seen that quotation. You did not say that, agreed?

A: Yes.

69 *However*, the *documentary* evidence suggests *otherwise*. On 8 May 2007, ACS wrote to SK to inform SK that ACS had not received sand from SK and was drawing on other contractors' sand to fulfil SK's RMC orders:

We must highlight to your goodself that we have not received your sand requisition advice and the concreting sand corresponding to the above booking period. We are now drawing into the sand from other projects for your supply, and this cannot be a protracted solution.

Kindly advise us on the quantum of sand requisited by your esteem project [*sic*] to us for this week's supply and the expected delivery to our plants.

70 Moreover, ACS's quotation dated 20 April 2007 did state that prices were "subject to changes without prior notice" and that concrete delivered was "subjected [*sic*] to availability of raw materials". These qualifications are consistent with the arrangement between the parties that SK was to supply ACS with sand from the BCA Stockpile in order for ACS (in turn) to supply RMC to SK.

Therefore, we find that ACS did not have other sources of sand to supply RMC to SK.

(2) Both parties contemplated the use of Indonesian sand

71 In our view, the present case falls under Scenario (c) (see above at [53]) because the facts suggest that both parties contemplated that Indonesian sand would be used in the preparation of RMC by ACS for several reasons.

72 First, ACS's operations director, Mr Lincoln Lim, gave evidence that the whole market knew that Indonesia was the only source of sand. Ms Jean Lau of the BCA also stated in her affidavit of evidence-in-chief that the BCA was aware that importers mainly imported sand from Indonesia. SK does not seem (correctly, in our view) to be challenging this. Instead, SK's main contention was that it was not fundamental to the fulfilment of the Contracts that sand from Indonesia be used to manufacture RMC because what mattered was whether the sand met the requisite technical specifications.

73 In this vein, we observe that previous cases dealing with the Sand Ban have similarly observed that at the relevant time, Indonesia was the primary, if not the sole, source of concreting sand used in Singapore (see, for example, the High Court decision of *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2007] SGHC 64 at [5]; affirmed on appeal in *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR(R) 565 at [8]). The High Court in *Holcim (Singapore) Pte Ltd v Kwan Yong Construction Pte Ltd* [2009] 2 SLR(R) 193 ("*Kwan Yong*"), which involved a case of a RMC supplier who was successful in showing frustration of the supply contract due to the Sand Ban, also stated (at [5]) that "[a]ll sand used in the building industry had been sourced from Indonesia" (the appeal from the decision of the High Court in *Kwan Yong* was dismissed by this court on 20 May 2009, although, agreeing with the trial judge's reasoning, no written grounds of decision were issued (see the Editorial Note at [2009] 2 SLR(R) 193 at 197).

74 Secondly, SK's client for the Boon Lay Project, the LTA, preferred Indonesian sand to be used for the RMC. This was acknowledged by SK's project manager for the Boon Lay Project, Mr Ishii Yoichiro ("Mr Yoichiro"), in his cross-examination:

> Q: You see here there is another decision sheet from the LTA. You can see at the comment, you see that the LTA says: "Please provide a letter to confirm the source of supply is from which part of Indonesia." Correct?
>
> A: Page 81?
>
> Q: Yes. Let me just see whether we've got the right document. So you see the title subject is, "Material Submission for Concrete Mix (Pan United)". And the date is 15 August 2006, and then the transmittal date is 21 July 2006. If you look at the comments, it says: "We have the following comments ..." And then the first comment is: "Sand/aggregates: please provide a letter to confirm the source of supply is from which part of Indonesia."
>
> A: Yes.
>
> Q: And then the second is: "Please provide samples of aggregate, sand and cement." The third is: "As the contrete [*sic*] appearance is of great important, you are required to cast a mock-up sample to view the colour, texture and finishes."
>
> A: Yes.

Q: Paragraph 1, you see the LTA is saying that it knows of course that the sand is going to come from Indonesia, but they want to know which part of Indonesia; right?

A: Yes.

Q: If you go to page 83, and you'll see at subparagraph (1) in the comments, and it says: "We noted that a letter written by Pan United is attached to confirm sand and coarse aggregates are supplied from Bintan and Karimun, Indonesia respectively." Yes?

A: Yes.

Q: And that's because for this particular project they were very concerned about the finishes, so they wanted to know specifically which part of Indonesia the sand was coming from; right?

A: Yes.

75 Mr Yoichiro also stated that he believed that the main contract specified that sand for RMC had to come from Indonesia:

Q: Now, yesterday during cross-examination, you were brought to these documents and questioned on LTA's request to confirm that the source of supply is from Indonesia, specifically Bintan and Karimun. Do you remember that?

A: Yes.

Q: Can you explain to the court why LTA was concerned where the sand came from? Where the sand for the manufacture of RMC came from?

A: Basically, Alliance Concrete, all the granite and sand was from Indonesia and Indonesia aggregate and sand in the market we know is getting higher strengths compared with others. So the tonnality also was much more lighter grade, which is preferred by the client, which is LTA. So they were very concerned, and also which part of Indonesia? Kalimantan is more stronger on aggregates, so they prefer to be more in that location to get all the sources.

Q: Were there any other concerns or considerations LTA had, apart from what you've mentioned?

A: For concrete, I mention that for us, it's very important, is the strengths for 7 days, 14 days and 28 days and of course the tonnality. This category is only.

Q: Was there a contractural [*sic*] requirement in the main contract that sand for RMC had to come from Indonesia?

A: I'm sorry, I couldn't recall.

Q: You cannot recall?

A: ***I believe there was. Definitely, it was not a specific location in Indonesia, but was specified.***

Q: It was specified in the contract, the main contract?

A: In the main contract specification.

[emphasis added in bold italics]

76 SK argued that the main contract was not in evidence. However, we are of the view that there is no need to admit the main contract into evidence as Mr Yoichiro has admitted that the main contract specified that sand for RMC had to come from Indonesia.

77 Thirdly, the source of the sand used to produce RMC was important and had to be consistent since it would affect the design of the mix and in turn, whether the mix would be approved for supply. Mr Yoichiro gave evidence that a change in the origin of sand would involve ACS redesigning the mix and having to wait for 28 days for tests on its strength, and that SK would need another 7, 14 and 28 days for the trial mix to be tested and approved by its client, the LTA:

Q: … In order to get approval from the LTA for a particular concrete supplier, you need to give them a trial mix; correct?

A: Yes.

Q: And it takes 28 days at the very least for the trial mix to be approved; yes?

A: Not only 28 days.

Q: It's longer than that, right?

A: No. There's another -- we have another construction for pre-stressing. So there was another case on 7, 14 and 28 days.

Q: So 7, 14, and 28. So there are three different periods of time?

A: Yes, that’s right.

Q: But you need to obviously do all three tests?

A: That’s right.

Q: The test is specific to a mix from a specific plant; right?

A: Yes.

Q: In fact, that is the way things generally work, is the understanding of the industry that this is how you get approval for a concrete supply; yes?

A: Yes.

78 This was consistent with Mr Lincoln Lim’s evidence that the source of the sand had to be consistent and any change in the source of sand would lead to significant delays in the supply of RMC:

A: I’m trying to tell the court that sand was only from Indonesia and without Indonesia sand,

there is no way we can perform our contract at that point of time.

COURT: What if I were to issue sand from Myanmar which pass [*sic*] the sieve test? Can you use that for concrete?

A: I can use to concrete but we have on redesign the mix design. So because the concrete it is -- you know the warranty, I have to give a strength warranty. … So we have to redesign the mix. It can pass the sieve test because the sand sieve test has a very wide envelope so it will not fail up, put it his way. But the characteristic of the sand is different, as a result we have to redesign the mix. So I have to do my own internal design and I have to wait for 28 days to get the strength. After I get the strength, I propose to the customer -- then he has to do another 28 days --

79 The evidence above suggests that SK and ACS contemplated this particular source of sand which passed the various tests, which was Indonesian sand, to be used to make RMC. A change in the source of the sand would entail delays in the supply of RMC because of the tests required to be done. Hence, SK (and the LTA) must have contemplated that sand from the same source would be used throughout to make the RMC to be supplied.

80 The fact that the source of the sand did not feature at all during the parties' negotiations and that ACS did not tell its sand suppliers to supply only Indonesian sand is consistent with the common assumption that the sand would come from Indonesia.

81 We are therefore satisfied that both parties contemplated that Indonesian sand would be used in the preparation of RMC by ACS, and that the Sand Ban was a supervening event which cut off ACS's direct access to Indonesian sand. This resulted in ACS not being able to produce and supply RMC to SK.

(3) The parties' conduct in relation to the BCA Stockpile

82 One argument raised by SK was that the Contracts were not frustrated since SK could have provided ACS with sufficient sand from the BCA Stockpile. According to SK, the BCA approved SK's applications for the release of sand from the BCA Stockpile from 5 February 2007 onwards; however, ACS unreasonably refused to take delivery of the sand from SK. On the other hand, ACS argued that it was SK which failed to deliver sand reasonably, and later failed to deliver sand at all. In the proceedings below, the Judge found that it was not established that SK did not obtain or could not have obtained the required sand for ACS to manufacture RMC for the Projects (see the Judgment at [55]).

83 SK's argument was essentially that ACS's conduct amounted to self-induced frustration. As stated by Lord Radcliffe in *Davis Contractors* (quoted above at [34]), the doctrine of frustration only operates without the default of either party. Arguably, if ACS failed to act reasonably in relation to the release of sand from the BCA Stockpile, that would amount to self-induced frustration such that ACS will not be entitled to rely on the doctrine of frustration (see also generally, for example, the House of Lords decision of *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435 at 452). The burden of proving self-induced frustration lies on the party who asserts that this is the case (see, for example, the House of Lords decision of *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154). In this case, the burden of proving self-induced frustration falls on SK.

84 Given our findings below (at [96]–[102]) on Issue 1 and in particular, the operative date of frustration (namely 6 February 2007), it is not strictly necessary for us to determine the issue of self-

induced frustration and the reasonableness of the parties' conduct in relation to the BCA Stockpile, which mainly arose only after the operative date of frustration. Nevertheless, we will examine this issue briefly for the sake of completeness.

85 In our view, SK has not discharged the burden of showing that ACS acted unreasonably; and neither has ACS shown that SK acted unreasonably. In the circumstances, it seemed to us that neither party had proved its case on this particular issue (*cf* the concept of "not proved" in s 3 of the Evidence Act as well as the observations of this court in *Loo Chay Sit v Estate of Loo Chay Loo, deceased* [2010] 1 SLR 286 at [16]–[23]).

86 As noted above at [6], although the BCA did release sand from the BCA Stockpile, only main contractors with ongoing projects then were entitled to draw down sand from the BCA Stockpile. RMC suppliers were not entitled to draw down sand from the stockpile. Hence, ACS could not obtain sand from the BCA Stockpile directly, and had to rely on SK to apply to BCA for drawing down sand from the stockpile, and then deliver the sand to ACS. According to SK, from February to May 2007, it obtained the BCA's approval for the release of about 7,980 tonnes of sand, out of which about 3,824 tonnes were delivered to ACS.

87 It is clear that ACS had logistical problems accepting SK's sand deliveries. It appears that these logistical problems gave rise to a shortfall in the amount of sand required by ACS to supply RMC to SK. Peng Chuan Engineering Construction Pte Ltd ("Peng Chuan") was engaged by SK to deliver sand to ACS for the Boon Lay and Harbourfront Projects. Mr Peh Tian Swee ("Peh"), a director of Peng Chuan, gave evidence that, on certain days, ACS could not accept any deliveries at all. Peng Chuan's truck drivers would sometimes have to wait some three hours before they could offload the sand at the Tuas batching plant, given the queue of trucks from other contractors also waiting to offload sand. After Peng Chuan completed the permitted deliveries, it would call ACS's liaison person again to ask if it could make more deliveries. However, ACS would reject such requests on the basis that the batching plant was full and ACS could not take in more sand.

88 While SK argued that ACS was unwilling to collect sand from the BCA Stockpile, the evidence does not go so far as to show that ACS was unwilling to assist. Mr Takahiro Maruyama ("Mr Maruyama"), SK's project manager for the NTU Project, merely stated in his affidavit of evidence-in-chief that that it "appeared to [SK] that [ACS] was reluctant to provide arrangements to transport the sand". In any case, it appears that, since only main contractors such as SK could apply for the drawdown of sand from the BCA Stockpile, it would not be unreasonable for SK to arrange for the collection and delivery of sand from the BCA Stockpile. We note that SK eventually agreed to arrange for transportation of sand from the BCA Stockpile to ACS.

89 SK also argued that Peng Chuan was willing to make round-the-clock deliveries and that SK had suggested to ACS that ACS extend the operating hours of its batching plants, but ACS did not respond to this request. However, that remains merely an allegation because there is a lack of evidence as to whether ACS could reasonably have extended the operating hours. In any event, it is doubtful whether extending the operating hours of ACS's plants would have been of much (if any) assistance. It appears that ACS could not accept SK's sand because its batching plants were full of sand (see above at [87]), presumably delivered by its clients who had also drawn down sand from the BCA Stockpile and had to deliver the sand to ACS or otherwise forfeit their sand (just as some of SK's sand had been forfeited). It should also be borne in mind that the capacity of each of ACS's batching plants was limited, and the sand had to be replenished on a daily basis, depending on the orders placed every day. Mr Patrick Hong, ACS's sales director, gave evidence to that effect:

> Q: In the month of January/February, do you replenish and top up your stock daily?

A: We have to, because the stockpile is so small, so what we normally do in the morning, the supervisor will assess, take the estimated stock and he will compare against whatever he has on bookings that he has on hand, so there is always that communication. So for example he has 500 tonnes in the stockpile, but he has bookings on hand that day that requires maybe 800 tonnes. So he will call the sand supplier to say, "Okay I need maybe 500 tonnes for that day", but this 800 tonnes that is required, the booking, the concrete, may not be 800. It may be more or it may be less, because although the customers book verbally or through fax, we still have to wait for a call to confirm. If it does not confirm the order we cannot supply the concrete. You know, sometimes engineer – if the inspection does not pass or it rains, then the plant cannot just send out the concrete, even though with the booking it says, "Booking I want on today". But today what time? What kind of interval? So we still have to wait for site's instructions. So that is where you have to coordinate with the sand supplier at the same time, "Okay, the order started, you can deliver your sand now".

90 Although ACS's batching plants were closed during the Chinese New Year period from 17 to 20 February 2007, SK only informed ACS of any difficulty in the delivery after the Chinese New Year period on 23 February 2007. That was the first time SK highlighted to ACS its difficulty in delivering sand to ACS.

91 SK argued that its sand deliveries in February 2007 were no less prompt than those of ACS's other customers. SK seems to have arrived at this conclusion by looking at the dates the deliveries were made to ACS, and by noting that the dates SK delivered sand were not later than the dates ACS's other customers delivered sand. With respect, this misses the point because the issue before us is not whether SK delivered sand on dates later than ACS's other customers. Without more, the fact that SK's deliveries were no less prompt than ACS's other customers does not show that ACS acted unreasonably.

92 Conversely, the facts suggest that ACS did act reasonably. First, on 14 February 2007, ACS was proactive in alerting SK that there were shortfalls in the sand deliveries from SK, and requested that SK deliver sand to ACS expeditiously. ACS also alerted SK of a shortfall on 1 March 2007. Second, ACS did accept a lot of sand from SK in a short period of time in the end of February. On 23 February 2007, SK requested ACS to accept SK's delivery of sand from 23 to 28 February 2007, with an "expected average of 18 loads each day". By 28 February 2007, SK had delivered 1,796 tonnes of sand to ACS. This is an average of 449 tonnes of sand delivered every day, which is about 25 truckloads' worth.

93 In our view, therefore, SK has not sufficiently shown that ACS was at fault for not accepting SK's delivery of sand from the BCA Stockpile. It appears that ACS's inability to accept SK's delivery of sand was due to the logistical problems that arose from the Sand Ban itself. ACS is hence not prevented from relying on the doctrine of frustration.

(4) SK did not act unreasonably

94 For completeness, we would like to point out that we do not accept ACS's argument that it could not take SK's delivery of sand because SK failed to abide by the delivery schedule which it provided to ACS. SK correctly pointed out that ACS did not plead that there was a sand delivery schedule, that SK failed to comply with it, or that SK did not give ACS enough notice before SK attempted to deliver sand. Consistent with this, the Judge accepted SK's objection during cross-examination and stopped ACS when it tried to go into a line of questioning which was directed at establishing that ACS was not able to take delivery of the sand because no advance notice of deliveries were given by SK.

95 In any event, we do not find ACS's argument persuasive. SK forwarded a BCA requisition form indicating the collection period of sand from the BCA Stockpile to ACS on 9 February 2007 and asked ACS "to advise on delivery schedule asap" because the last day of collection was 13 February 2007. ACS replied that its operations manager would liaise with SK for the delivery. In response to SK's statement that the last day of collection was 13 February 2007, ACS stated that the "window period for delivery is not of great concern". This demonstrates that ACS was not strictly relying on the collection dates stated in the BCA forms as the delivery schedule. Instead, the actual details relating to the delivery of sand by SK would be determined when ACS's operations manager liaised with SK. Peh, a director of Peng Chuan (which was tasked with delivering SK's sand to ACS), gave evidence that he would call the liaison person at ACS's batching plant each morning to confirm the timings and the numbers of deliveries that it could make for that particular day.

(5) Conclusion on Issue 1

96 For the above reasons, we find that the Contracts were discharged by frustration. The next question relates to the operative date of frustration. Determining the point in time when the Contracts were discharged by frustration is important for two reasons. First, ACS may still be liable to SK for a breach of the Contracts if SK can show that such breach took place before the point in time when the Contracts were frustrated. Secondly, this would have an impact on the quantum of relief claimed by ACS (see above at [24]), given that the original contract prices would apply up to the date of frustration for any RMC supplied by ACS.

97 ACS first submitted that the date of frustration ought to be 5 February 2007, the date the Sand Ban purportedly took effect. Alternatively, ACS identified the date of frustration as 16 February 2007, this being the date from which sand was not available on the open market. In the further alternative, ACS identified the date of frustration as 1 March 2007, this being the date from which SK ceased to deliver sand to ACS. In so far as SK was concerned, it took issue with the fact that ACS had submitted three different dates on which the Contracts were said to have been frustrated, despite ACS's pleaded case in its statement of claim that the Contracts were frustrated on or about 1 February 2007, which SK pointed out was before the Sand Ban took effect. We note, however, that neither party really addressed why the dates put forth should be taken as the operative date of frustration.

98 In our view, there are at least four possible points in time when the Contracts can be said to be discharged by frustration: (a) on 23 January 2007 when the Sand Ban took effect such that sand exporters in Indonesia could no longer enter into sand export contracts to export sand to Singapore; (b) on 6 February 2007 when the grace period for sand exporters to honour existing sand export contracts ended such that any export of sand from Indonesia to Singapore ceased completely; (c) on 16 February 2007 when it eventually became impossible to obtain Indonesian sand from the open market; or (d) in around end-February 2007 to 1 March 2007 when SK ceased all supply of sand to ACS and there was a significant shortfall in the sand that SK was required to deliver to ACS to account for the sand used to produce the RMC ACS had supplied SK.

99 On one view, the time in which the Contracts were discharged was, at the latest, 16 February 2007, when it eventually became impossible to obtain Indonesian sand from the open market. Arguably, it was only then that one could say that ACS's source of Indonesian sand failed totally. From that point onwards, ACS had to rely on SK to deliver sand from the BCA Stockpile and it could not really be said that Indonesian sand was available to ACS because only main contractors with ongoing projects then were entitled to draw down sand from the BCA Stockpile. It is clear that ACS had logistical problems accepting SK's sand deliveries and these problems arose from the Sand Ban.

100 While the doctrine of frustration will only discharge a contract in exceptional circumstances, as noted above at [48], we do not think that absolute or literal impossibility is required in order to determine whether the Contracts were frustrated. Whether a seeming impossibility fulfils the "radical change in obligation" test requires an evaluation of the degree of impossibility that we are concerned with.

101 In our view, the appropriate point in time when the Contracts were discharged in the present case was on 6 February 2007 when the Sand Ban took its full effect because that resulted in the actual curtailment (and consequent dwindling availability) of Indonesian sand in Singapore as ACS's sand suppliers could not procure sand from Indonesia. We note that the Sand Ban took effect on 23 January 2007 such that sand exporters in Indonesia could no longer enter into sand export contracts to export sand to Singapore and the BCA immediately commenced the requisition of sand stockpiles in Singapore, including those belonging to ACS's sand suppliers. However, the Indonesian government furnished a grace period up to 5 February 2007 for sand exporters to honour the then existing sand export contracts. Hence, the Sand Ban was only complete from 6 February 2007 onwards. The dwindling availability of sand culminated on 16 February 2007 when it eventually became absolutely impossible to obtain Indonesian sand from the open market, but this result was a direct consequence of the completion of the Sand Ban on 6 February 2007.

102 We recognise that it is arguable that the Contracts were discharged on 23 January 2007 because that was when the Sand Ban started to take effect and sand exporters in Indonesia could no longer enter into sand export contracts to export sand to Singapore. We also recognise that it is arguable that the Contracts were discharged on 16 February 2007 when it eventually became impossible to obtain Indonesian sand from the open market, and from which point onwards, ACS had to rely on SK to deliver sand from the BCA Stockpile (and hence it could not really be said that Indonesian sand was available to ACS, especially given ACS's logistical problems in accepting SK's sand, also caused by the Sand Ban). However, we find that the necessary threshold degree of impossibility was reached on 6 February 2007. On balance (having regard to all the arguments proffered and the fact that the issue now before us concerned the operative date of *the Sand Ban*), we are of the view that the point in time when the Contracts were frustrated was when the Sand Ban was complete, *ie*, on 6 February 2007.

Issue 2

103 Given our finding that the Contracts had been discharged by frustration on 6 February 2007, we will now turn to consider whether there is any issue of breach (repudiatory or otherwise) on the part of ACS prior to that date. We note, however, that parties' cases before us were largely focused on whether there was a repudiatory breach of the Contracts by ACS (hence the manner in which the issues were framed above at [28]). SK did not really address the issue of whether, in the event that there was frustration of the Contracts, SK should be entitled to damages for any breaches of the Contracts taking place *prior to* the date of frustration; SK merely stated that the precise amounts of RMC ordered by SK and whether such amounts were delivered by ACS were matters for assessment of damages, given the bifurcation of the proceedings below.

104 Before we deal with this particular issue, we observe, with respect, that, having arrived at a different conclusion to this court on Issue 1 in the court below, the Judge ought to have articulated his reasons for finding that ACS was in repudiatory breach of the Contracts and that SK had in fact accepted the alleged breach. He appeared to merely assume that ACS was indeed liable for repudiatory breach (see above at [20]). As already noted, this is not *necessarily* the case and would depend very much on the precise facts and circumstances themselves.

105 In the first place, we are not satisfied that there is anything in the relevant correspondence between the parties prior to 6 February 2007 which evinces a clear intention on the part of ACS to breach the Contracts. The numerous letters exchanged between the parties at that time have to be read and interpreted in context. On a more general level, it appears to us that, given the difficult situation which the parties suddenly found themselves in, they were in fact negotiating (or at least feeling their way towards) a definitive resolution. As it turns out, that definitive resolution did not (unfortunately) materialise. But that is not to the point. What is material is that ACS was attempting to negotiate for the best (and highest) price it could obtain for its supply of RMC to SK, whilst SK was attempting to negotiate, albeit in precisely (and not surprisingly) the *opposite* direction (*ie*, for the lowest price that it should pay for the RMC supplied by ACS to it, knowing that, in any event, it already possessed the considerable advantage of the price already fixed in the Contracts themselves). Put another way, ACS was trying its level best to foist upon SK a *variation* of the Contracts in relation to the price *which SK steadfastly resisted throughout*. In short, there was an irreducible (and understandable) tension which the parties were attempting to resolve. They were in a state of uneasy negotiations which, unfortunately, never came to a successful conclusion but morphed into the present legal proceedings instead.

106 As for the issue of possible non-repudiatory breach(es) by ACS prior to 6 February 2007, SK's pleadings stated that ACS allegedly breached the Contracts since 26 January 2007 by refusing and/or failing to deliver RMC to the Projects despite receiving SK's orders and/or requests. SK's case, in so far as it is premised on specific breaches alleged in its pleadings, must, in our view, fail for the simple reason that there has been insufficient evidence adduced by SK to prove its case on a balance of probabilities.

107 As noted above at [4], SK would order RMC from ACS for its projects by placing an advance order the day before the RMC was required to be delivered. The order would then be completed by a telephone call from SK's construction managers or site supervisors on the morning of the day of delivery. In the telephone calls, SK's representative would communicate to ACS the details of the RMC required.

108 SK's project manager for the Harbourfront Project, Mr Keizo Shoji ("Mr Shoji"), stated in his affidavit of evidence-in-chief the practice of placing the specific order by telephone for the Harbourfront Project:

> I did from time to time personally liaise with the Plaintiff's representatives for the supply of sand and orders for ready mix concrete. However, most times, my construction manager, Desmond Lee would be the one attending to these matters. As a matter of practice, Desmond Lee would place the order with the Plaintiff for the supply of ready mix concrete one day in advance. On the morning of the day the ready mix concrete was to be delivered, our site supervisor, Murugesan Rakkapan, would follow up on Desmond Lee's orders. He would contact the Plaintiff's batching plant manager by telephone to confirm the volume and schedule of ready mix concrete to be supplied for the day in question.

109 Similarly, Mr Maruyama, SK's project manager for NTU project, stated in his affidavit of evidence-in-chief the practice of placing the specific order by telephone for the NTU Project:

> … Under the terms of [the NTU Contract], the Plaintiff was obliged to deliver the ready mix concrete in accordance with the Defendant's programme. In practice, this meant that when the Defendant required ready mix concrete for the NTU Project, we would call the Plaintiff to place our orders.

> We would give the Plaintiff at least ½ day notice to allow them sufficient time to supply and deliver the ready mix concrete. If the ready mix concrete was required the next morning, we would call the evening before if not earlier to place the order. If the ready mix concrete was required in the afternoon or evening, we would call earlier the same morning if not earlier to place the orders for ready mix concrete. The Plaintiff would then supply and deliver the ready mix concrete within the aforementioned timeframe.

110 Similarly, SK's project manager for the Boon Lay Project, Mr Yoichiro, stated in his affidavit of evidence-in-chief the practice of placing the specific order by telephone for the Boon Lay Project:

> The usual procedure when ordering RMC from the Plaintiff was for the Defendant's site supervisors to telephone and inform the Plaintiff's operation manager, Goh Teik Hock ("Goh") or its batching plant supervisors, of the quantity and the grades of RMC required. This was usually done on the day before casting and/or during the course of the day itself. The Plaintiff would supply and deliver the RMC to the Project site within a few hours.

111 In order to succeed in its counterclaim that ACS refused and/or failed to deliver RMC despite SK having placed orders for the same, SK would have to prove that the telephone orders were in fact placed by SK pursuant to the Contracts and that ACS has indeed failed to supply the quantities of RMC ordered. This much was acknowledged at [87] of the Judgment:

> SK claimed that it was entitled to set off against the amount owed to Alliance damages for its losses arising from for [*sic*] the latter's breach of contract. The damages allegedly suffered by SK will have to be assessed. SK's claim for damages will undoubtedly be strenuously resisted by Alliance. *During the assessment of damages, SK will have to prove, among other things, that Alliance had actually failed to supply the quantities of RMC ordered by it pursuant to the Contracts.* Alliance contended that SK has to date not adduced sufficient evidence that it had actually failed to comply with orders by the latter for RMC for the Projects. Alliance pointed out that SK's project managers had testified that their orders for RMC had been made by way of a phone call on the day the RMC was needed and as the said project managers did not themselves make the phone calls, their evidence on whether the phone orders for RMC had been made to Alliance's staff was hearsay. This assertion and the effect of recent amendments to the Evidence Act (Cap 97, Rev Ed, 1997) in relation to hearsay will no doubt be considered by the court when damages are assessed. [emphasis added]

112 We agree with the Judge that the precise quantities of RMC allegedly ordered by SK would have to be proved during the assessment of damages. However, with respect, this does not detract from the fact that SK had to prove at trial that the orders (without necessarily having to prove the precise quantities) were indeed made by SK and ACS refused and/or failed to meet those orders. Specifically, SK bore the burden of proving that the orders, by way of telephone calls, were made, and that ACS failed to deliver RMC pursuant to those orders.

113 In our view, SK has not done so. We note that although SK's pleadings did attempt to particularise the specific instances after the announcement of the Sand Ban where ACS allegedly refused and/or failed to deliver RMC despite receiving SK's requests or orders, these were not supported by any compelling evidence. The affidavits of evidence-in-chief of Mr Shoji and Mr Yoichiro, SK's project managers for the Harbourfront Project and the Boon Lay Project, respectively, contained statements that ACS failed to meet SK's orders for RMC from 26 January 2007 to 30 January 2007. However, these statements did not provide the particulars of the orders made, such as the number of orders, the dates of those orders, and the quantities of RMC requested. Also, as was pointed out by ACS and not contested by SK in the submissions in the proceedings below, Mr Shoji and Mr Yoichiro

had no personal knowledge of the specific orders being made to ACS via telephone; the actual personnel who made the various telephone calls were not called as witnesses. Moreover, it is not sufficient for SK merely to allege in general terms that ACS had failed to meet SK's orders for RMC. An argument that ACS had generally renounced its contractual obligations is a different argument which would relate to SK's pleaded case that ACS's quotation dated 20 April 2007 amounted to a renunciation of the Contracts. In the circumstances, we are of the view that SK has not sufficiently proven that ACS had breached the Contracts prior to the date of frustration (*ie*, 6 February 2007).

Conclusion

114 For the reasons set out above, we allow the appeal with costs here and below. SK is to make payment to ACS for all the RMC supplied by ACS, but the cost of SK procuring sand for ACS to produce RMC should be deducted from any such sums which SK owes ACS. The Judge found that the Contracts were not superseded or varied by any subsequent contracts between ACS and SK (see the Judgment at [26]), and ACS did not appeal against this finding. Any RMC supplied by ACS to SK prior to 6 February 2007 will be assessed at the rates stipulated in the Contracts. We note that ACS continued to supply RMC to SK even after 6 February 2007 when the Contracts were discharged, the consequence of which is that the original prices stated in the Contracts would cease to apply from that date. With respect to the RMC supplied by ACS after the Sand Ban and from 6 February 2007 onwards, we grant ACS's prayer for payment from SK of a reasonable sum, to be assessed on a restitutionary *quantum meruit* and/or *valebat* basis. All the aforementioned sums should be assessed by the Registrar. Interest on the assessed sums is awarded at the rate of 3% per annum from the date of filing of the writ to the date of assessment.

115 The usual consequential orders are to follow.

Coda

116 On the occurrence of what may seem like a supervening event, it would be natural for the seller to insist on the contract being frustrated, and for the buyer (on the contrary) to insist that the original contract stands. In the present case, both parties were understandably dissatisfied with each other.

117 From *ACS's* perspective, it faced difficulties with its supply of sand, continued to supply some RMC despite the shortage, and was not paid by SK for the RMC supplied. ACS thought that it had been relieved of its obligations under the Contracts due to the Sand Ban, and therefore attempted to submit fresh quotations to SK for the supply of RMC. The tipping point was reached when, despite ACS's purported efforts to maintain its commercial relationship with SK through its continued supply of RMC to SK, SK submitted its claim for the price difference for the RMC it obtained from alternative suppliers. Soon thereafter, ACS commenced the present suit.

118 From *SK's* perspective, it stated that it was willing to share in the increase in the price of sand even though it maintained that ACS was under a legal obligation to supply RMC at the original contract prices. SK took the trouble to arrange for transport of sand from the BCA Stockpile and tried to make delivery of the sand to ACS, but ACS could not accept the sand. SK was of the view that the Contracts were not frustrated, and that it was entitled to seek RMC supplies from alternative RMC suppliers in the face of ACS's insistence of higher prices for RMC, and ACS's inability to accept SK's deliveries of sand. From its point of view, it was entitled to claim from ACS the cost difference in obtaining RMC from alternative suppliers.

119 The parties did engage in negotiations throughout the relevant period. Unfortunately, there

was no happy ending to the story. It appears that communications broke down and both parties viewed each other as being unreasonable.

120 This court was faced with the unenviable task of disentangling and piecing together the conflicting strands of evidence from the past events that had occurred between January 2007 and June 2007. Despite the findings of this court above, we do not view any one party to be clearly unreasonable in the context of a messy situation that flowed from the Sand Ban.

121 Additionally, we would observe that, given the longstanding relationship between the parties, these proceedings were particularly unfortunate. More importantly, however, it might well be in the (long-term) interest of the parties to close the door on this unfortunate episode and, in the spirit of reconciliation, arrive at a satisfactory resolution of the matters that had led to these proceedings in the first place. Nothing in life (and, especially, business) is writ in stone. There is no reason why the parties cannot resume amicable business relations again. But that is, of course, a choice that only they can make.