RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and Another Appeal
[2007] SGCA 39

Case Number : CA 151/2006, 152/2006

Decision Date : 29 August 2007

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Por Hock Sing Michael and Siva Sambo Krishnasamy (Tan Lee & Partners) for the appellant in Civil Appeal No 151 of 2006 and respondent in Civil Appeal No 152 of 2006; Tan Yew Cheng (Leong Partnership) for the appellant in Civil Appeal No 152 of 2006 and respondent in Civil Appeal No 151 of 2006

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

Contract – Discharge – Breach – Party to contract failing to perform obligations – Situations where innocent party entitled to terminate contract – Whether breach of warranty by one party entitling innocent party to terminate contract

Contract – Frustration – Party in breach of contract invoking force majeure clauses in contract – Construction and effect of force majeure clauses – Distinction between doctrine of frustration and force majeure – Whether force majeure clauses applicable – Whether doctrine of frustration excluded by force majeure clauses

Contract – Remedies – Damages – Costs incurred from breach of contract by one party sought as damages by innocent party – Whether such costs flowing directly and naturally from breach

29 August 2007 Judgment reserved.

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

1 The Mass Rapid Transit ("MRT") Circle Line is a massive project that involves the linking of the present North-South Line, East-West Line and North-East Line. It will cost approximately $6.7bn to build and will consist of 29 stations spanning some 33.3km. In June 2003, Sato Kogyo (S) Pte Ltd ("the Plaintiff") was appointed by the Land Transport Authority ("LTA") as the main contractor for one of the 29 stations, namely, the Lorong Chuan Station ("the Project"). The present litigation arises in relation to the construction of that station.

2 The Plaintiff invited several suppliers to submit quotations for the supply and delivery of ready-mixed concrete for the Project. The Plaintiff eventually contracted with RDC Concrete Pte Ltd ("the Defendant"), an established local supplier of ready-mixed concrete, for the supply of concrete at stipulated rates for the Project. It was not disputed that the Defendant's revised quotation dated 1 September 2003 and the Plaintiff's letter of intent dated 16 September 2003 formed the contract between the parties. These two documents will hereafter be collectively referred to as "the Contract".

3 Under the Contract, the Defendant was to supply approximately 70,000m^3 of concrete to the Plaintiff at the stipulated prices between 1 September 2003 and 30 June 2006. This was in accordance with cl 2 of the Defendant's revised quotation, which provides:

> **2. CONTRACT PERIOD AND CONCRETE QUANTITY**

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

4 In May and June 2004, several tests were conducted on the specific strength of the concrete supplied by the Defendant and it was found that there was an unacceptable amount of cube failure. As a result, on 3 July 2004, the LTA instructed the Plaintiff to suspend the Defendant's concrete supply for *structural* elements. The LTA stipulated that the only approved concrete supplier during the suspension period was Pan United Concrete Pte Ltd ("Pan United"). The Defendant continued to supply concrete for *non-structural* elements during the suspension period.

5 On 17 November 2004, the LTA approved the Plaintiff's request to allow the Defendant to resume concrete supply. Supply was, however, restricted to concrete produced at the Defendant's Kaki Bukit plant. In addition to the Kaki Bukit plant, the Defendant also had plants at Kallang and Gay World. In its letter to the Plaintiff dated 17 November 2004, the LTA stated that it was to be informed in advance if the need to use other plants arose.

6 The trial judge ("the Judge") found that the period of suspension effectively lasted from 7 July 2004 to 17 November 2004 (see *Sato Kogyo (S) Pte Ltd v RDC Concrete Pte Ltd* [2006] SGHC 213 ("the GD") at [27]). During this period, the Plaintiff obtained all its concrete from Pan United. The rates charged by Pan United were higher than those stipulated in the Contract. By way of letters written on 3 July 2004 and 12 July 2004, the Plaintiff notified the Defendant that it would charge the Defendant for the cost differentials of obtaining concrete from alternative suppliers during the suspension period.

7 When the Defendant was allowed to resume supply from 18 November 2004 onwards, it was undisputed that the Defendant failed, on no fewer than 42 occasions, to supply concrete ordered by the Plaintiff under the Contract. The Defendant was either wholly unable to meet the Plaintiff's orders or could only supply part of the volume of concrete ordered. The Defendant would give various reasons for its failure to supply the concrete. These reasons can be broadly categorised into two classes: (a) shortage of raw materials, namely, aggregates and cement; and (b) plant breakdowns. Of the 42 occasions of non- or short supply, there were also instances where the Defendant did not provide a reason for its failure to supply.

8 As a result, the Plaintiff's construction schedule was disrupted and it was subjected to delay and inconvenience. The Plaintiff had to purchase concrete from alternative suppliers, in particular, Pan United, at rates higher than those stipulated in the Contract. Pursuant to cl 8 of the Plaintiff's letter of intent, the Plaintiff deducted all the cost differentials incurred from the outstanding amounts due to the Defendant. Clause 8 provides as follows:

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

9 The Defendant maintained that it was not liable for the cost differentials as the

circumstances that gave rise to the non-or short supply fell within the ambit of the *force majeure* clauses in the Contract. Clause 3 of the Defendant's revised quotation provides as follows:

> **3. FORCE MAJEURE**
>
> In the event of any circumstance constituting Force Majeure, which is defined as act of God, or due to any cause beyond the supplier's control, such as market raw material shortages, unforeseen plant breakdowns or labour disputes, the duty of the affected party to perform its obligations shall be suspended or limited until such circumstance ceases.

Clause J of Appendix 1A of the Defendant's revised quotation (incorporated by cl 5 of the same) similarly provides as follows:

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

10 The Defendant repeatedly pursued the Plaintiff for the outstanding amounts due and payable to it for the concrete that it had already supplied. The Defendant maintained that it was not liable for the cost differentials and that the Plaintiff's deduction of the same from the outstanding amounts due to the Defendant was unjustified and wrongful. As a result of the Plaintiff's non-payment, the Defendant suspended supply of concrete on 5 April 2005. This was pursuant to cl K of Appendix 1A of the Defendant's revised quotation (incorporated by cl 5 of the same), which provides:

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

Clause 4 of the Defendant's revised quotation also provides as follows:

> **4. PAYMENT TERM**
>
> The term of payment is **30 days.**
>
> [emphasis in original]

11 On 30 May 2005, pursuant to cl 8 of the Plaintiff's letter of intent (set out at [8] above), the Plaintiff terminated the Contract on two grounds: (a) persistent failure to supply concrete when ordered; and/or (b) failure to comply with the LTA's requirements. It was a term of the Contract that the concrete supplied by the Defendant had to comply with the LTA's requirements. In particular, cl 3 of the Plaintiff's letter of intent provides as follows:

> Not withstanding [*sic*] the Terms and Conditions of Supply in your quotation, you are fully aware and will comply with LTA's latest revision of Materials and Workmanship Specification for Civil and Structural Works at no extra cost.

Clause 4 of the same provides as follows:

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

12 The Plaintiff's complaint was that the concrete supplied by the Defendant did not pass the tests at 28 days strength and peak core temperature of 70°C. The Defendant maintained that the LTA's requirements of 70°C and 28 days strength were mutually exclusive and proposed to change the peak core temperature to 80°C. The LTA rejected the Defendant's proposal.

13 The Plaintiff then instituted the present action to claim damages for breach of contract. The Defendant counterclaimed for the amounts due under outstanding invoices in respect of concrete that it had already supplied to the Plaintiff.

Issues and findings in the trial court

14 The following five issues were raised in the trial court:

(a) Was the Contract an "exclusive" or "sole supplier" contract?

(b) Did the failure of the cube tests allow the Plaintiff to claim the cost differentials of obtaining concrete from an alternative supplier incurred during the suspension period (between 7 July 2004 and 17 November 2004)?

(c) After supply was resumed, did the *force majeure* clauses in the Contract apply so as to exempt the Defendant from liability for the non- or short supply of concrete between 18 November 2004 and 5 April 2005?

(d) Was the Defendant entitled to suspend the supply of concrete on 5 April 2005?

(e) Was the Plaintiff entitled to terminate the Contract on 30 May 2005?

15 The Judge allowed the Plaintiff's claim in part. In so far as issue (a) was concerned, the Judge held that the parties had not agreed to enter into an exclusive or sole supplier contract. The main reason for this holding lay in the fact that there was no express term stating that the Contract was exclusive. Further, the absence of a priority term in the Contract indicated that the Plaintiff was not entitled to priority in supply by the Defendant at the expense of the Defendant's other customers. The Judge also found that the Plaintiff was at liberty to obtain concrete from Pan United even when the Defendant was able to supply the same.

16 In so far as issue (b) was concerned, the Judge found that the Plaintiff could not claim the cost differentials incurred during the suspension period. This stemmed from her finding that cl 8 of the Plaintiff's letter of intent required the Plaintiff to *first* terminate the Contract before it could claim the cost differentials. As the Plaintiff only terminated the Contract on 30 May 2005, the Judge reasoned that the Plaintiff was precluded from claiming the cost differentials of obtaining concrete from an alternative supplier prior to that date. Secondly, the Judge also held that the cost differentials did not fall within the meaning of the term "direct cost" in cl 8.

17 In so far as issue (c) was concerned, the Judge held that the *force majeure* clauses applied to justify non- or short supply due to shortage of raw materials, but did not exempt the Defendant from liability arising from unforeseen plant breakdowns. Accordingly, the Defendant was liable only for the cost differentials incurred as a result of non- or short supply arising from plant breakdowns.

18 In so far as issue (d) was concerned, the Judge held that the Defendant was entitled to suspend supply on 5 April 2005 as some payments were made by the Plaintiff later than the 30-day credit term allowed under the Contract. Further, the Judge found that some of the deductions made by the Plaintiff from the outstanding amounts due to the Defendant were unjustified.

19 In so far as issue (e) was concerned, the Judge held that the Plaintiff had discharged its burden of proving that it was entitled to terminate the Contract both on the grounds of the Defendant's non- or short supply as well as its failure to supply concrete that adhered to the LTA's specifications.

20 In addition, the Judge also entered judgment for the Defendant on its counterclaim of $236,802.64. The counterclaim was not disputed by the Plaintiff and is not an issue in this appeal.

21 In Civil Appeal No 152 of 2006 ("CA 152"), the Plaintiff appealed against the Judge's findings on issues (a), (b), (c) and (d). In Civil Appeal No 151 of 2006 ("CA 151"), the Defendant appealed on the Judge's findings with respect to issues (c) and (e). These issues will now be considered in turn.

Issue (a) – Was the Contract an "exclusive" or "sole supplier" contract?

22 The Plaintiff contended that it was an implied term of the Contract that the Contract was to be an "exclusive" or "sole supplier" contract. As a result, the Plaintiff was obliged to obtain all its concrete from the Defendant during the contract period. The implication of this argument is that the Plaintiff would be entitled to look to the Defendant for the cost differentials incurred as a result of obtaining concrete from alternative suppliers if the Defendant was unable to meet the Plaintiff's orders and the *force majeure* clauses did not apply to relieve the Defendant of its obligations.

23 It was not disputed that the Defendant was free to supply concrete to other contractors during the contract period. The only issue in contention was whether the Plaintiff was contractually obliged to purchase all its concrete *solely* from the Defendant.

24 The Judge held that the Contract was *not* an exclusive or sole supplier contract for the following reasons (see the GD at [25]):

(a) There was no term stating that the Contract was exclusive.

(b) The absence of a priority term in the Contract indicated that the Plaintiff was not entitled to priority supply by the Defendant at the expense of its other customers.

(c) A project plant was not specifically set up to supply the Plaintiff with concrete for the Project.

(d) The Defendant fulfilled orders on a first come, first served basis.

(e) The Plaintiff was at liberty to use Pan United even at times when the Defendant was able to supply concrete.

25 We affirm the Judge's finding that the Contract was not an exclusive or sole supplier contract. Most importantly, and as the Judge had noted, this was not an express term of the Contract. This should be contrasted with the contract subsequently entered into between the Plaintiff and Island Concrete Pte Ltd on 1 August 2005 wherein cl 2.1 expressly provided that the "prices are ***specially quoted*** based on the condition that we will be the ***sole supplier*** of ready-mixed

concrete to your above jobsite" [emphasis in original].

26 We reject the Plaintiff's argument that a sole supplier term could be implied into the Contract. It is established law that a court will only imply terms into a contract where such terms are necessary to give business efficacy to the contract or where the term represents the obvious, but unexpressed, intention of the parties (see, for example, the Singapore High Court decision of *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR 927 at [29]–[41]). In order to uphold the concept of sanctity and freedom of contract, courts have generally been reluctant to imply terms into contracts, especially contracts entered into between two commercial parties. Based on the argument that the quotation for 70,000m^3 of concrete was a *bona fide* estimate of the total volume required for the Project, the Plaintiff sought to imply a term that only *one* supplier was required for the entire Project. In particular, the Plaintiff argued that the commercial objectives of both parties would be achieved with the implication of such a term as the Plaintiff could get better fixed rates for bulk purchase and the Defendant would be able to supply a substantial volume of concrete to keep its production arm in operation.

27 It is appropriate to commence the analysis of this issue by revisiting cl 2 of the Defendant's revised quotation, which provides as follows:

> **2. CONTRACT PERIOD AND CONCRETE QUANTITY**
>
> The above quoted prices shall be held firm **from 1st September 2003 to 30th June 2006** and the concrete quantity to be supplied to the project is estimated to be approximately **70,000m^3.** This contract shall cease to be valid upon the expiry of the contract period or the supplied concrete quantity, whichever is earlier.
>
> [emphasis in original]

28 On a literal interpretation of cl 2, the Defendant is obliged to supply approximately 70,000m^3 of concrete to the Plaintiff at the stated prices during the contract period. Conversely, the Plaintiff's obligation is to obtain up to 70,000m^3 of concrete from the Defendant at the stated rates during the contractual period. Where the Plaintiff orders more than 70,000m^3 of concrete, the stated prices no longer apply and the parties are free to engage in further negotiations for fresh rates.

29 At this juncture, it is appropriate to refer to the Singapore High Court decision of *Nam Kee Asphalt Pte Ltd v Chew Eu Hock Construction Co Pte Ltd* [2000] SGHC 45.

30 In that case, the court was concerned with a contract for the supply of aggregates. The contract provided that the "estimated quantity" to be supplied under the contract was 40,000 tonnes. On the facts, the defendant ordered and paid for only 8,643.42 tonnes. The plaintiff sought to recover the loss of profits *vis-à-vis* the unsold balance and argued that it was an implied term of the contract that the defendant should purchase from the plaintiff *all* the aggregates it required in respect of the contract, *ie*, that the contract was exclusive in nature. Lee Seiu Kin JC (as he then was) rejected this argument, observing thus (at [15]):

> Considering the factors above, firstly there is nothing in the language of the contract nor in the circumstances under which it was entered into that raises an inference that the parties had intended that there be an exclusivity clause. Such a clause is neither necessary to give business efficacy to the contract nor does it represent the obvious intention of the parties. It is common for a vendor to give an open quotation to a purchaser for the latter to make orders as he deems

necessary. Implying the exclusivity clause does not make the contract any more efficacious; instead it alters the nature of the bargain considerably. As such, I cannot see how it can pass the "officious bystander" test. I therefore do not see any basis whatsoever to imply the exclusivity term into the Aggregates Contract.

31 In a similar vein, it is difficult to see how the implication of a sole supplier term on the present facts would lend business efficacy to the Contract or would satisfy the test of the officious bystander. In fact, implying such a term would considerably alter the nature of the bargain as the Plaintiff would be deemed to be in breach of the Contract whenever it obtained concrete from alternative suppliers during the contract period, *even if* it had already purchased the requisite 70,000m^3 of concrete from the Defendant. This result could hardly have been intended by the parties. In fact, Yew, the Plaintiff's project manager, testified that more than 70,000m^3 of concrete would be needed for the entire Project. Indeed, if the Project had proceeded along faster than expected and resulted in the Plaintiff requiring more than 70,000m^3 of concrete during the contract period, counsel did not suggest that the Plaintiff would be in breach had it then purchased concrete from alternative suppliers. Of significance, too, is the fact that the Judge had accepted the evidence that the Plaintiff had obtained concrete from Pan United even when the Defendant was able to supply.

32 We were fortified in our conclusion by noting the conspicuous absence of a "priority term" in the Contract. Notably, a priority term would entail the dedication of a project plant to supplying concrete for a project and would ensure that the customer had priority of supply. In such cases, the project plant could only supply other customers after the project customer's requirements had been fully satisfied. The Plaintiff must have understood that it would obtain its supply from a "commercial plant" (which would entail the Defendant's supply of concrete being distributed amongst its many customers), and not from a dedicated project plant. When the Plaintiff required more than the contract quantity, it was always open to the Plaintiff to purchase concrete from other suppliers.

33 We therefore reject the Plaintiff's argument that the Contract is an exclusive or sole supplier contract and dismiss the Plaintiff's appeal on this particular issue.

Issue (b) – Could the Plaintiff claim for the cost differentials incurred during the suspension period (between 7 July 2004 and 17 November 2004)?

Background and issues

34 Due to the failure of several cube tests conducted between May to June 2004 on the concrete supplied by the Defendant, the LTA suspended the Defendant's supply of concrete to the Plaintiff from 7 July 2004 to 17 November 2004. During this period, the Plaintiff obtained concrete from Pan United. The Plaintiff claimed that the Defendant was liable for the resulting cost differentials and deducted the same from the outstanding payments due to the Defendant.

35 This claim is based on cl 8 of the Plaintiff's letter of intent, which will be set out once again for ease of reference:

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

36 The Plaintiff argued that the first sentence of cl 8 conferred on it *dual rights* in the event of the Defendant's inability to meet the LTA's requirements and/or to continue its supply, *viz*, the right to terminate the Contract and/or the right to seek for alternative supply and recover the cost differentials from the Defendant, respectively. Thus, the Plaintiff could choose to exercise either or both of these rights and, consequently, could claim the cost differentials without first terminating the Contract. The Plaintiff also argued that the cost differentials fell within the ambit of the term "direct cost" in the second sentence of cl 8.

37 In reply, the Defendant contended, first, that cl 8 would only apply where the Plaintiff had first terminated the Contract. Since the Plaintiff terminated the Contract only on 30 May 2005, the Defendant argued that the Plaintiff could not claim the cost differentials incurred between 7 July 2004 and 17 November 2004. Secondly, the Defendant denied that the cost differentials were a "direct cost". The Defendant argued that it was, instead, a "consequential loss" and that the Defendant's liability for such loss was therefore excluded by cl D of Appendix 1A of the Defendant's revised quotation (incorporated by cl 5 of the same), which provides as follows:

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

38 To recapitulate, the Judge held that the Plaintiff was *not* entitled to claim the cost differentials incurred during the suspension period for two reasons:

> (a) Under cl 8, it was a precondition that the Plaintiff had first to terminate the Contract before it could claim the cost differentials. Since the Plaintiff did not terminate the Contract until 30 May 2005, it was precluded from claiming the cost differentials of purchasing concrete from alternative suppliers prior to that date.
>
> (b) The cost differentials of purchasing concrete from an alternative supplier were not a "direct cost" and therefore the Defendant was not liable for the same.

The two sub-issues will be discussed separately.

First sub-issue – Whether termination of the Contract by the Plaintiff under clause 8 was a precondition to recovery of the cost differentials

39 The determination of this issue hinges on the proper construction of cl 8. On a literal interpretation, it is clear that in the event where the Defendant's supply is unable to meet the LTA's requirements or the Defendant is unable to continue its supply, the Plaintiff expressly "reserves" two rights: (a) the right to terminate the contract and retain and use both the retention and outstanding payments due to the Defendant to seek alternative sources of supply; *and/or* (b) the right to seek any direct costs incurred by the Plaintiff due to the Defendant's non-compliance. These two rights are disjunctive inasmuch as the right to recover direct costs is "[i]n addition" to, and not dependent on, the right to terminate the Contract. This means that while the Plaintiff's right to apply the retention and outstanding sums due to the Defendant towards the cost differential of obtaining concrete from an alternative supplier was contingent on the Plaintiff's termination of the Contract, its right to seek direct costs was not subject to such a precondition. In other words, the Plaintiff could claim direct costs incurred as a result of the Defendant's breach *even if it had not terminated the*

Contract. We therefore respectfully disagree with the Judge's construction of cl 8.

40 More importantly, the *general position at common law* is clear beyond peradventure: even if the innocent party (here, the Plaintiff) is not entitled to terminate the contract or, if so entitled, chooses nevertheless not to terminate the contract, it will, generally speaking, *always* be entitled to claim *damages as of right* for loss resulting from the breach (or breaches) of contract: see the House of Lords decision of *Raineri v Miles* [1981] AC 1050. It is, of course, always open to the parties to contractually modify the common law position by the use of clear and unambiguous words in their contract.

41 Returning to the facts, it is clear that the second sentence of cl 8 did not modify the common law position and is, instead, *entirely consistent* with it. In the absence of clear words, therefore, the common law position that a plaintiff is entitled to damages upon a defendant's breach was preserved and operated as a *separate* right which was referred to in [39] above. The Plaintiff is therefore entitled to claim for direct costs incurred due to the Defendant's inability to meet the LTA's requirements even though the Plaintiff had not terminated the Contract. We turn now to the issue of whether the cost differentials of obtaining concrete from alternative suppliers fall within the definition of the term "direct cost".

Second sub-issue – Whether the cost differentials fall within the definition of "direct cost" under clause 8

42 The law in this area is well settled. Direct loss (here, in the form of direct costs) is loss that flows directly, naturally and in the ordinary course of events from the defendant's breach, without any intervening cause and independently of special circumstances: see the decision of this court in *Singapore Telecommunications Ltd v Starhub Cable Vision Ltd* [2006] 2 SLR 195 at [59] and the English High Court decision of *Saint Line Limited v Richardsons, Westgarth & Co, Limited* [1940] 2 KB 99 at 103. This constitutes, in fact, the *first* limb of the test propounded in the seminal English decision of *Hadley v Baxendale* (1854) 9 Exch 341; 156 ER 145, which relates to "natural" or "ordinary" damage. This is to be contrasted with the *second* limb in that case, which relates to "special" or "non-natural" damage.

43 In situations relating to *direct loss* (and, correspondingly, the *first* limb of *Hadley v Baxendale*), the crucial question is whether, on the information available to the defendant when the contract was made, the defendant should, as a reasonable person, have realised that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach and, therefore, that the loss should have been within the defendant's contemplation: see the oft-cited House of Lords decision of *C Czarnikow Ltd v Koufos, The Heron II* [1969] 1 AC 350 at 385, *per* Lord Reid. Thus, the court is not concerned with *actual knowledge* on the part of the defendant. The defendant is taken to know, under the concept of *imputed* knowledge, that such damage would *ordinarily* ensue as a result of the breach of contract: see the Singapore High Court decision of *CHS CPO GmbH v Vikas Goel* [2005] 3 SLR 202 at [82].

44 The Judge held that the Defendant was not liable for the cost differentials because it would be "straining the language to say the price differential of an alternative supplier would come under the meaning of 'direct cost'" (see the GD at [52]). With respect, we are unable to agree with the Judge's conclusion. In our view, the cost differentials were a direct cost or loss that flowed directly and naturally from the Defendant's inability to supply concrete that met with the LTA's requirements. Since the Project was a major project of a public nature, the Defendant would or should have known that it would be stringently regulated by the LTA. It should have been within the Defendant's reasonable contemplation that, had the concrete it supplied not satisfied the LTA's requirements, the

LTA would suspend its supply for an indefinite period. In fact, the Defendant should have been well aware of the manner in which the LTA operated since it was an experienced participant in the field and would have been previously involved in similar large-scale construction projects. In circumstances where the Defendant's supply was suspended, it was reasonable for both parties to contemplate that construction should continue and that the Plaintiff would therefore have to seek alternative sources of concrete elsewhere. This was particularly so because, *at the material time*, the parties did not know how long the suspension would last. In addition, the Plaintiff was liable for a huge amount of liquidated damages to the tune of $100,000 per day for delay. It would also have been in the reasonable contemplation of both parties that concrete, which would then have to be purchased from the market on an *ad hoc* basis, would necessarily be more expensive than the rates charged by the Defendant. After all, the Defendant itself had argued that the only reason why it was able to offer "rock-bottom rates" was because the Plaintiff had purchased the concrete in bulk.

45 The Plaintiff is therefore entitled to claim the cost differentials of obtaining concrete from Pan United incurred between 7 July 2004 and 17 November 2004 because this was a direct cost that naturally resulted from the Defendant's inability to meet with the LTA's requirements. The Plaintiff's appeal on this particular issue is therefore allowed.

Issue (c) – Did the *force majeure* clauses in the Contract apply so as to exempt the Defendant from liability to the Plaintiff for non-supply of concrete between 18 November 2004 and 5 April 2005?

Background and issue

46 After the LTA suspension order was lifted on 17 November 2004, the Defendant resumed supply of concrete to the Plaintiff. It was, however, not disputed that from 18 November 2004 to 5 April 2005, there were numerous occasions on which the Defendant was unable to supply *all* of the Plaintiff's requirements. The Defendant attributed this to two main causes: (a) a shortage of raw materials (in particular, cement and aggregates); and (b) plant breakdowns. On these occasions, the Plaintiff had to seek alternative sources of supply which were invariably procured at a higher price. The Plaintiff claimed the cost differentials of obtaining alternative supplies of concrete during this period.

47 The Plaintiff's claim for the cost differentials incurred during this period was based on cl 8. The construction of cl 8 as discussed above would similarly apply here. The Plaintiff was thus *prima facie* entitled to claim the direct costs incurred as a result of the Defendant's non- or short supply. The only issue to determine is whether the *force majeure* clauses applied so as to exempt the Defendant from liability.

48 The *force majeure* clauses in the Contract have already been set out at [9] above. The effect of both the clauses is the same: If the circumstances stated therein are satisfied, the Defendant's obligation to supply concrete will be suspended. The practical implication is, of course, that the Defendant will, as a result, not be liable for any cost differentials incurred during this period.

49 The Judge held that while the Defendant could invoke the *force majeure* clauses to justify non-supply to the Plaintiff due to a market shortage of raw materials, it could not do so for non-supply due to unforeseen plant breakdowns. The Defendant was therefore held liable for the cost differentials incurred on occasions when the non- or short supply was due to plant breakdowns, but *not* on other occasions when the non- or short supply was due to the market shortage of raw materials.

The issue of pleadings

50 In our view, this particular issue can be easily resolved on the ground that the Defendant had not even pleaded *force majeure* in its defence to begin with. In its defence and counterclaim filed on 15 August 2005, the Defendant only made passing reference to the fact that it could not meet the Plaintiff's requests for supply due to unavailability of materials or plant breakdowns. Thus, para 7 pleaded as follows:

> The Defendants shall aver that under the Contract, especially under Paragraph 2 of the Defendants' Letter, the Defendants merely had to supply the Plaintiffs ready-mixed concrete in bulk to the extent of approximately 70,000m^3 during the Contract Period. There was no stipulation for specific date and / or volumes for supply during the Contract Period. *The Defendants shall aver that on occasions when they could not meet the Plaintiffs' requests for supply for whatever reason (such as for insufficient notice, unavailability of materials or breakdown of plant), they would propose alternative supply dates or volumes based on their constraints.* However, it was the Plaintiffs who would not accept such alternative proposals, choosing to go to alternative suppliers instead. [emphasis added]

51 This is insufficient to enable the Defendant to rely on the defence of *force majeure* as embodied in the clauses set out at [9] above. In our view, the doctrine of *force majeure* is a matter that must be specifically pleaded before it can be relied on by a party. In this regard, O 18 r 8(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) stipulates matters that must be specifically pleaded as follows:

> A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, *release*, any relevant statute of limitation, fraud or any fact showing illegality —
>
> (*a*) which he alleges makes any claim or defence of the opposite party not maintainable;
>
> (*b*) which, if not specifically pleaded, might take the opposite party by surprise; or
>
> (*c*) which raises issues of fact not arising out of the preceding pleading.
>
> [emphasis added]

52 It is trite law that the court is not entitled to make a decision on an issue which has not been raised by the parties in their pleadings: see, for example, the Malaysian High Court decision of *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 and the Singapore High Court decision of *Multi-Pak Singapore Pte Ltd v Intraco Ltd* [1992] 2 SLR 793, both of which have often been cited as authority for this important proposition in the local context. It is sufficient, on this ground alone, to dispose of this issue. However, we should add that although the courts do not generally countenance the raising of arid and technical procedural objections that would hinder the attainment of justice in the case at hand, they would, equally, reject arguments (such as that now proffered) where there has been such a breach of procedural justice that countenancing it would result in substantive prejudice and injustice to the innocent party (which would be the case in the present appeal in so far as the Plaintiff was concerned). However, as the Judge had found that the *force majeure* clauses applied to partially exempt the Defendant from liability, and there is a dearth of local case law in relation to the doctrine of *force majeure*, it would be useful to discuss this issue in greater detail (assuming, *arguendo*, that the defective pleadings were not fatal to the Defendant's case on this particular

point). To this end, it would be appropriate to first set out some of the basic principles applicable to *force majeure* clauses.

Some general principles relating to force majeure clauses

53 The principal purpose of a *force majeure* clause is to *contractually* allocate the risks between the contracting parties with regard to the occurrence of future events in specific circumstances, all of which are stipulated within the clause itself.

54 The most important principle with respect to *force majeure* clauses entails, simultaneously, a rather specific factual inquiry: the *precise construction* of the clause is paramount as it would define the *precise scope and ambit* of the clause itself. The court is, in accordance with the principle of freedom of contract, to give full effect to the intention of the parties in so far as such a clause is concerned.

55 Turning to more specific principles, an appropriate starting point would be the following observations by Prof Sir Guenter Treitel, one of the leading academic commentators on contract law in the Commonwealth, in the leading work in this particular area of the law (see Sir Guenter Treitel, *Frustration and Force Majeure* (Sweet & Maxwell, 2nd Ed, 2004) at para 12-001):

> Two main themes or policies underlie the law relating to the discharge of contracts by supervening events [under the doctrine of frustration]. The first is that the purpose of the doctrine of discharge is to find a satisfactory way of allocating the loss caused by such events. The second is that the doctrine should not be so widely applied as to undermine the sanctity of contract and that it should therefore be applied only where the change brought about by the supervening event is a fundamental one. *Both these policies are, however, subject to the general principle of freedom of contract,* which in the present context can operate in two ways. First, it can *exclude the doctrine of discharge* where the parties have contracted on terms *which indicate that the contract is to remain in being in spite of the occurrence* of an event which would, but for such a provision [*viz*, the *force majeure clause*], have discharged it. Secondly, it can enable the parties *to provide for discharge*, or some other form of relief, on the occurrence of any event which, *but for the provision, would have had no effect on their legal rights and duties because the change of circumstances brought about by the event was not sufficiently serious or fundamental to discharge the contract under the general common law doctrine. Contractual provisions for supervening events may therefore, on the one hand, exclude frustration and, on the other, provide relief for non-frustrating events*. [emphasis added]

56 *Conceptually*, it is true that a *force majeure* clause operates differently from the doctrine of frustration. Whereas a *force majeure* clause is an agreement as to how outstanding obligations should be resolved upon the onset of a *foreseeable* event, the doctrine of frustration concerns the treatment of contractual obligations from the onset of an *unforeseeable* event: see the decision of this court in *Glahe International Expo AG v ACS Computer Pte Ltd* [1999] 2 SLR 620 ("*Glahe*") at [26]. The prevalent practice of incorporating *force majeure* clauses into commercial contracts today stems largely from the blunt nature of the doctrine of frustration as a tool to allocate loss. It has often been said that the juridical basis for the doctrine of frustration is unclear, the doctrine is difficult to invoke and the consequences of its operation are drastic, in the sense that the contract is automatically brought to an end. Parties therefore often include *force majeure* clauses in their contracts to avoid the uncertainty and hardship that might otherwise result from relying on the common law doctrine of frustration. Uncertainty and inconvenience are avoided by incorporating a well-drafted clause that clearly defines the events or circumstances that constitute *force majeure.* Hardship is also minimised in so far as a *force majeure* clause can be crafted to provide a more nuanced response to events of

force majeure. For example, it may be provided that, in circumstances constituting *force majeure*, an extension of time may be granted to the party in default, there may be cancellation of the contract at the option of one party, or the defaulting party's duty to perform the contract will be suspended. The contract is thus not automatically brought to an end.

57 Despite this conceptual distinction, we are of the view that the principles relating to the doctrine of frustration are, in the vast majority of cases, still relevant to the construction and interpretation of *force majeure* clauses. In this regard, it is important to note that, by their *very nature and function*, *force majeure* clauses would – in the ordinary course of events – be triggered only where there was a radical external event that supervened and that was not due to the fault of either of the contracting parties. It will be immediately noticed that this is *also* a pre-requisite to the invocation of the doctrine of frustration. However, this, admittedly, is not invariably the case. There might, for instance, be *force majeure* clauses, the language of which falls *short* of meeting the criteria required with respect to the doctrine of frustration at common law (this is clearly envisaged, for example, by Prof Treitel in the passage quoted in [55] above and see also *Frustration and Force Majeure* ([55] *supra*) at para 12-017). We should think, however, that this would not be common, especially if one accepts the basic premise that the doctrine of frustration centres (in large part at least) on the absence of reasonable control on the part of the contracting parties. As S Rajendran J observed in the Singapore High Court decision of *Magenta Resources (S) Pte Ltd v China Resources (S) Pte Ltd* [1996] 3 SLR 62 at 78, [60] ("*Magenta Resources*") (affirmed in *China Resources (S) Pte Ltd v Magenta Resources (S) Pte Ltd* [1997] 1 SLR 707, but without apparent consideration of this particular point):

> What is referred to as force majeure in our law (as opposed to French law from which that term originates) is really no more than a convenient way of referring to contractual terms that the parties have agreed upon to deal with situations that might arise, *over which the parties have little or no control*, that might impede or obstruct the performance of the contract. There can therefore be no general rule as to what constitutes a situation of force majeure. Whether such a (force majeure) situation arises, and, where it does arise, the rights and obligations that follow, would all depend on what the parties, in their contract, have provided for. [emphasis added]

58 Everything depends, in the final analysis, on the precise language *and* actual facts of the case at hand (as pointed out both in the quotation above as well as at [54] above). In the present appeal, for example, the *force majeure* clauses in the Contract (reproduced at [9] above) refer to causes that are "beyond the supplier's control". Depending on the precise facts before the court, the cause or event in question could be beyond the supplier's (here, the Defendant's) control and, yet, not beyond the other party's control (here, the Plaintiff).

59 In this regard, it should be emphasised that the doctrine of frustration can be successfully invoked only if the alleged frustrating event is an *external* one that is, *ex hypothesi*, beyond the control of *both* contracting parties (also bearing in mind the important complementary principle that there can be *no self-induced* frustration). In the oft-cited words of Lord Radcliffe in the House of Lords decision of *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 at 729:

> [F]rustration occurs whenever the law recognizes that *without the 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]

Similarly, in the construction of a *force majeure* clause (similar to those found in the present case), the courts will apply "the presumption that the expression force majeure is likely to be restricted to

supervening events which *arise without the fault of either party* and for which neither of them has undertaken responsibility" [emphasis added]: see the English High Court decision of *The Kriti Rex* [1996] 2 Lloyd's Rep 171 at 196, *per* Moore-Bick J (as he then was).

60 However, whatever the precise content of a *force majeure* clause (which, coupled with the precise facts of the case, would determine, in turn, the precise relationship between that clause and the doctrine of frustration), it is important to emphasise that where a *force majeure* clause *excludes* the doctrine of frustration, the principal effect and difference between the two is with respect to the *nature of the relief*. The relief available under a *force majeure* clause will, of course, be determined by the specific content of that clause itself. In a situation where the doctrine of frustration is sought to be excluded, the clause concerned would expressly stipulate that the contract is *not* to be discharged *despite* the fact that the situation would otherwise be one that would have frustrated the contract.

61 The *force majeure* clauses in the Contract in the present appeal are a paradigm illustration. Whilst they are triggered or catalysed only if the relevant event is "beyond the supplier's control" and, to that extent, appear to embody some of the common law principles relating to the frustration of a contract, the *crucial difference* lies, as mentioned in the preceding paragraph, in the *nature of the relief* that will be granted. If these clauses apply, the Contract "shall be *suspended or limited until* such circumstance ceases" [emphasis added]. In *contrast*, where a contract is *frustrated* under the common law, it is *automatically discharged by operation of law and* the precise relief would be determined by the provisions of the Frustrated Contracts Act (Cap 115, 1985 Rev Ed) ("the Act") instead (and see generally Andrew Stewart & J W Carter, "Frustrated Contracts and Statutory Adjustment: The Case for a Reappraisal" [1992] CLJ 66). It should also be noted that s 3(3) of the Act itself clearly stipulates thus with respect to its very limited applicability in the context of *force majeure* clauses (this provision was in fact referred to in the Singapore High Court decision of *Chan Buck Kia v Naga Shipping & Trading Co Ltd* [1963] MLJ 159 at 160):

> Where any contract to which this Act applies contains any provision which, upon the true construction of the contract, is intended to have effect in the event of circumstances arising which operate, or would but for that provision operate, to frustrate the contract, or is intended to have effect whether such circumstances arise or not, the court shall give effect to that provision and shall only give effect to section 2 to such extent, if any, as appears to the court to be consistent with that provision.

62 On the *other hand*, where the *force majeure* clause concerned does *not exclude* the doctrine of frustration, then, if the supervening event is indeed a frustrating event that, *ex hypothesi*, lies *beyond* the boundaries of that clause, the legal consequences as described above (*ie*, which flow from an application of the common law doctrine of frustration and which entail an application of the relevant provisions of the Act) would follow instead. It is important, however, to note that there is no need to canvass the issue of relief in the present appeal as the only issue before us is whether or not the *force majeure* clauses in the Contract apply to the facts at hand. Indeed, no attempt was, in any event, made to argue that the doctrine of frustration applied to the present case.

63 As we have already seen, it is clear that a *force majeure* clause can seek to *exclude* the doctrine of frustration. It is important, in this regard, to reiterate the basic proposition that contracting parties are, of course, free to exclude the doctrine and, as emphasised above, the court must give full effect to such an agreement on the basis that these parties are at liberty to allocate the possible risks between them in any manner they see fit. Nevertheless, it is clear that in order to actually exclude the doctrine of frustration, the clause concerned must be clear and unambiguous. It should be noted, however, that the case law suggests that courts will construe *force majeure*

clauses *strictly*: see, for example, the oft-cited House of Lords decisions of *Metropolitan Water Board v Dick, Kerr and Company, Limited* [1918] AC 119 ("*Metropolitan Water Board*") and *Bank Line, Limited v Arthur Capel and Company* [1919] AC 435. In other words, what often appears, at first blush at least, to be an express provision covering the event concerned is often interpreted by the courts as not intended by the contracting parties to cover so drastic an event as a frustrating event; hence, the doctrine of frustration would continue, with the attendant consequences or relief briefly outlined in the paragraphs above. Indeed, it has been observed as follows (see Ewan McKendrick, *Force Majeure and Frustration of Contract* (Lloyd's of London Press Ltd, 2nd Ed, 1995) at p 36):

> It is, therefore, extremely difficult, if not impossible, to draft a *force majeure* clause which shuts out the doctrine of frustration completely, because even the widest of clauses may be held not to cover a particular catastrophic event [such as in *Metropolitan Water Board*]

64 Another general principle to note is that a party who relies on the *force majeure* clause must show not only that it has brought itself within the clause concerned (a separate and extremely important point in itself: see below at [65]) but also that it has taken all reasonable steps to avoid its operation, or mitigate its results: see the English Court of Appeal decision of *Channel Island Ferries Ltd v Sealink UK Ltd* [1988] 1 Lloyd's Rep 323 ("*Channel Island Ferries*") at 327. This principle is not only commonsensical but is also consistent with (and may even be a corollary of) the very nature and function of a *force majeure* clause which we have in fact elaborated upon above (at [53]). To briefly recapitulate, such a clause presupposes that events falling within its scope and ambit are beyond the control of the contracting parties and that language to this effect will invariably be utilised in the clause itself. Thus, in the English High Court decision of *Continental Grain Export Corporation v STM Grain Ltd* [1979] 2 Lloyd's Rep 460 ("*Continental Grain Export*"), Robert Goff J (as he then was) said (at 473) that a seller who invoked a "prohibition of export" clause (where the rubric of "impossibility" was utilised) had to prove that: (a) no goods of the contract description were available to him to fulfil his contract; and (b) he could not, following notice of the event, obtain any such goods "by the exercise of any means reasonably open to him". This was approved (in relation to a similar clause) by the English Court of Appeal in *Andre & Cie SA v Tradax Export SA* [1983] 1 Lloyd's Rep 254 at 258.

65 Finally, it should also be noted that a party who relies on a *force majeure* clause has the burden of bringing himself squarely within that clause: see *Channel Island Ferries* (at 327); *Magenta Resources* ([57] *supra* at 86, [98]); and *Chitty on Contracts* (Sweet & Maxwell, 29th Ed, 2004) vol 1 at para 14-140.

66 Bearing the above principles in mind, we now turn to consider whether, had circumstances of *force majeure* been specifically pleaded, the *force majeure* clauses in the Contract would apply, in the first instance, to exempt the Defendant from liability for the cost differentials incurred where the non- or short supply was caused by market raw material shortages, in particular, aggregates and cement. The applicability of these clauses with respect to the non- or short supply caused by plant breakdowns will be considered later. It is also important to reiterate that no argument centring on the doctrine of frustration was proffered before either the Judge or this court and that, therefore, our only task, as just mentioned, is to ascertain whether or not the *force majeure* clauses in the Contract would, based on the facts before us, apply in the present appeal.

Market raw material shortages

67 In our view, the facts allegedly giving rise to market raw material shortages were insufficient to fall within the ambit of the *force majeure* clauses in the Contract. Consistent with the general principle set out above (at [54]), the precise language and intent of the clauses are crucial as they define (in turn) the precise scope of the clauses themselves. It would therefore be appropriate to set

out the clauses once again. As the clauses (set out at [9] above) are word-for-word the same, it would suffice to set out the contents of the clause just once, as follows:

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

68 Turning to the analysis of the clause proper, we note, first, that the Defendant failed to produce sufficient evidence proving that there was, in fact, a market shortage of *cement*. The only evidence before the court was the oral evidence of the Defendant's general manager who testified in re-examination that a drastic increase in freight charges in late 2004 had led to the reluctance of cement suppliers to commit to shipping cement. This was woefully insufficient.

69 Secondly, in so far as the alleged shortage of *aggregates* is concerned, there is evidence that, sometime in mid-2004 to early 2005, there was an acute shortage of aggregates in Singapore from traditional sources in Indonesia. This was due, *inter alia*, to: (a) a ban by the Indonesian government on the use of explosives for blasting, thereby severely restricting quarry operations; (b) unexpected operational problems by one of the larger Indonesian operators; and (c) suspension of supply by the Building and Construction Authority ("BCA") from one of the Indonesian operators due to suspected alkali-silica reactivity. As a result, the overall output of the quarries was reduced and stockpiles were depleted to practically zero. Concrete producers were not always able to obtain aggregates in sufficient quantity and at the exact time to produce concrete to meet their customers' casting schedules. All these facts were documented in a letter written by the Ready-Mix Concrete Association of Singapore to the BCA.

70 Despite the presence of the above facts, we find that the Defendant had *not* discharged its burden of proving that the *force majeure* clauses applied *vis-à-vis* the shortage of *aggregates*. It is important, in this regard, to note the precise language utilised in the *force majeure* clauses concerned which have been reproduced at [67] above. In particular, the phrase "beyond the supplier's control" is of crucial significance. This phrase applies, *inter alia*, to market raw material shortages, as evidenced by the phrase "such as" which is interposed between that particular phrase and the rest of the clause which refers to "market raw material shortages". In other words, "market raw material shortages" are but one instance of a "cause *beyond the supplier's control*" [emphasis added]. That being the case, it is clear that "market raw material shortages" would not constitute an event of *force majeure* within the meaning of the clause *unless* such shortages were "beyond the supplier's control" (here, beyond the Defendant's control). This is *clearly not* the case in the present appeal, as it was still *within* the Defendant's power to purchase aggregates from the market, *albeit at a higher price*. It will also be recalled that a defendant who wishes to invoke a *force majeure* clause must prove, *inter alia*, that it could not obtain the goods "by the exercise of any means reasonably open to [it]" (*per* Robert Goff J (as he then was) in *Continental Grain Export* ([64] *supra*) at 473). In our view, it was open to the Defendant to obtain aggregates from the market at a higher price. The Contract had merely become more *onerous* for the Defendant to perform, but the circumstances certainly did not constitute *force majeure* within the meaning of the relevant clauses in the Contract.

71 This conclusion is consistent with the earlier decision of this court in *Glahe* ([56] *supra*). In that case, the parties had entered into a contract for the sale and delivery of computers to Moscow. The court had to consider whether the imposition of customs duty and/or the Russian inflation were events that fell within the *force majeure* clause, which provided as follows:

> Neither Party shall be responsible for the complete or partial non-performance of any of its

> obligations, if the non-performance results from such circumstances as flood, fire, earthquake, and other Acts of God, as well as war, military operations, blockade, act or actions of state authorities, or any other circumstances beyond the Parties' control that have arisen after the conclusion of the Contract (except for failure to pay any sum which has become due under the provisions hereof).

72 In so far as the imposition of customs duty was concerned, the court held (at [24]) that the imposition of a mere 15% tax was not so huge or astronomical as to constitute an event of *force majeure*. The court found (at [25]) that the two events, taken together or singly, did not prevent the appellant from performing the contract; they only made the performance of the contract more expensive and costly. As a result, the court held that the appellant was not exempted from liability under the *force majeure* clause.

73 Similarly, the English Court of Appeal in *Brauer & Co (Gt Britain), Ltd v James Clark (Brush Materials), Ltd* [1952] 2 Lloyd's Rep 147 held that a 20% to 30% increase in prices merely made it more unprofitable for the sellers to perform their contractual obligations, but did not constitute circumstances of *force majeure*.

74 In our view, the shortage of aggregates in the market merely made it more *expensive* and *costly* for the defendant to perform the Contract. In addition, we wonder whether the Defendant may have consciously opted to supply concrete to other purchasers who were willing to pay higher rates and who, unlike the Plaintiff, were not locked into fixed-price contracts. This would, of course, be unacceptable. In a related vein, we note that the Judge had also observed as follows (see the GD at [137]):

> It was Nobes'[the Defendant's general manager's] evidence that the defendant was keen to secure the plaintiff's order, even at a (calculated) loss. Hence, the defendant's various quotations which led up to the eight[h] and final quotation dated 1 September 2003 gradually lowered the prices of concrete mixes across the board but for incrementally higher volumes. Ho [the Defendant's assistant general manager] had earlier revealed that the defendant took a 'budgeted loss' on the contract … In re-examination … Nobes explained the rationale for the defendant's willingness to give rock bottom prices to the plaintiff. He said it was because the defendant wanted to retain its market share in the ready-mix concrete industry to keep its plant running. It could only do that if its order books generated sufficient volume for the capacity of its plant. *That would further explain the defendant's reluctance to absorb the plaintiff's direct and consequential losses relating to non and or late delivery.* [emphasis added]

75 Be that as it may, on a consideration of all the circumstances, we find that the alleged shortage of aggregates did not, in any event, fall within the scope and ambit of the *force majeure* clauses in the Contract. The Plaintiff's appeal on this issue therefore succeeds. We now turn to the issue of whether non- or short supply resulting from *plant breakdowns* falls within the ambit of the *force majeure* clause (assuming that it had been specifically pleaded).

Plant breakdowns

76 The Judge held that the non- or short supply due to plant breakdowns did not fall within the scope and ambit of the *force majeure* clauses in the Contract because in the event that the Kaki Bukit plant broke down, the Defendant had two back-up plants and two friendly suppliers to accommodate the supply of concrete to the Plaintiff (see the GD at [95]). The Judge also found that the Defendant was estopped from arguing plant breakdowns to avoid liability because it had represented to the Plaintiff during negotiations that back-up plants were available (see the GD at

[98]).

77 On appeal, the Defendant's main argument was that there was no contractual requirement to provide a back-up plant and, further, that at the time of the breakdowns, only the Kaki Bukit plant had been approved by the LTA for the supply of concrete for the Project.

78 We agree with the Judge's finding that in so far as plant breakdowns were concerned, the *force majeure* clauses in the Contract do not apply and the Defendant is accordingly liable for the cost differentials incurred during these occasions. In the first instance, the Defendant has to show (as with the alleged market raw material shortages) that the plant breakdowns were something "beyond the supplier's control". Indeed, this requirement is driven home by the fact that in the *force majeure* clauses themselves, there is the additional appellation "unforeseen" that qualifies "plant breakdowns". We also reiterate that in order for a defendant to rely on a *force majeure* clause, it has to show that it has taken all reasonable steps to avoid its operation, or to mitigate its results.

79 On the facts, we find that the Defendant was unable to prove that the plant breakdowns were unforeseen and beyond its control. Indeed, it also had *not* taken reasonable steps to avoid or mitigate the consequences of a plant breakdown. After the LTA had allowed the Defendant to resume supply of concrete in November 2004, the LTA stipulated that only concrete from the Kaki Bukit plant may be supplied. More importantly, however, the LTA also stated that it should be informed in advance in the event that the need to use other plants belonging to the Defendant should arise. It was thus open to the Defendant, very early on, to avoid or mitigate the consequences of any breakdown in the Kaki Bukit plant by seeking the LTA's approval to use the Gay World and Kallang plants. It also followed, therefore, that the opportunity to avoid the event that happened (*viz*, the plant breakdowns) was *clearly within the defendant's control*. However, the Defendant failed to take any steps in this direction and opted, instead, to rely solely on the operation of the Kaki Bukit plant. This was not a reasonable cause of action to adopt since a plant breakdown must have been a foreseeable event, especially when only one plant was being utilised.

80 The Defendant's argument that there was no contractual requirement to provide a back-up plant is misconceived. Where a party seeks to rely on a *force majeure* clause, the law places a burden on it to satisfy the court that it falls within the scope and ambit of that clause. In a related vein, the party must also show that there was truly nothing it could have done to avoid the operation of the event or to mitigate its results. This is merely an extension of the general principle that a party must be strictly held to its contractual obligations and should only be released from them where supervening events make it *impossible*, and not merely *onerous*, to fulfil them. As noted at [57] above, the words "frustration" or "*force majeure*" typically connote some sort of *impossibility* on the defendant's part to perform his contractual obligations. More importantly, this general principle has been clearly embodied within the *force majeure* clauses in the Contract – in particular, by the need for the Defendant to show that the plant breakdowns were not only "unforeseen" but also (and this, in fact, follows logically) that such breakdowns were "beyond the supplier's [the Defendant's] control". In this regard, the fact that the Contract may not have provided for all possible eventualities in the event of the Defendant's breach does not, and cannot, extinguish the Defendant's duty to mitigate the results of the supervening event.

Conclusion

81 In sum, *even if* the Defendant had specifically pleaded circumstances of *force majeure*, it would nevertheless not have been exempted from liability under the Contract. The Defendant's appeal on this issue is therefore dismissed, whilst the Plaintiff's appeal is allowed. In the result, we find that the Defendant is liable for *all* the cost differentials incurred as a result of non- or short supply

between 18 November 2004 and 5 April 2005.

Issue (d) – Was the Defendant entitled to suspend supply of concrete on 5 April 2005?

82 On 5 April 2005, the Defendant suspended its supply of concrete to the Plaintiff due to non-payment for all concrete supplied up to February 2005 and this included the non-payment of the 5% retention sum. This suspension of supply was effected pursuant to cl K of Appendix 1A of the Defendant's revised quotation (incorporated by cl 5 of the same), which provides as follows:

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

Clause 4 of the Defendant's revised quotation provides as follows:

> **4. PAYMENT TERM**
>
> The term of payment is **30 days**.
>
> [emphasis in original]

83 It is necessary to examine the various deductions made by the Plaintiff. They consisted of the following items (as set out in the GD at [111]):

No.	Item
1	Safety fine imposed on 11 May 2004
2	T Y Lin design check cost for poor concrete
3	LTA cost omission of poor concrete supplied for 16 panels affected by low cube strength
4	Cost differentials from obtaining concrete from alternative suppliers: (a) from 7 July 2004 to 17 November 2004 (b) from 18 November 2004 to 5 April 2005
5	6% administrative charge imposed by the Plaintiff
6	Standby cost of batching plant due to non-delivery of concrete on 27 February 2005
7	Retention sum of 5%

84 We have already held above that the Plaintiff is entitled to claim, and accordingly deduct, the cost differentials incurred between 7 July 2004 and 5 April 2005 (Item 4 in the above table). The Defendant also does not dispute that the Plaintiff is entitled to deduct Item 2 and withhold Item 7. In particular, cl 7 of the Plaintiff's letter of intent allows the Plaintiff to retain 5% of all payments due to the Defendant until two months after 30 June 2006.

85 However, the Defendant strongly disputed liability for the 6% administrative charge unilaterally imposed by the Plaintiff (Item 5). In a letter sent on 6 April 2005 from the Plaintiff to all its sub-contractors, the Defendant was notified that the Plaintiff would impose a 6% administrative charge for additional administrative and accounting work undertaken by the Plaintiff. The Plaintiff then proceeded to retrospectively impose the 6% administrative charge on the cost differentials incurred between 7 July 2004 and 5 April 2005 and deducted the same from the outstanding payments owed to the Defendant.

86 In our view, the Plaintiff was *not* entitled to *unilaterally* or *retrospectively* impose the 6% administrative charge on the Defendant. Such an administrative charge was not provided for in the Contract and it was not suggested that it operated as an implied term of the Contract. Further, no evidence was tendered that the unilateral imposition of such charges was a market practice. In sum, there was absolutely no basis for the imposition of the administrative charge. As a result, the Plaintiff had wrongfully withheld this sum from the Defendant. On this basis alone, we find that the Defendant was entitled to suspend its supply, and it is therefore unnecessary to consider Items 1, 3 and 6 which were not, apparently and in any event, dealt with expressly by the Judge in the GD. The Plaintiff's appeal on this issue is therefore dismissed.

Issue (e) – Was the Plaintiff entitled to terminate the Contract on 30 May 2005?

Background and issues

87 On 30 May 2005, pursuant to cl 8 of the Plaintiff's letter of intent (set out at [8] above), the Plaintiff terminated the Contract on two grounds:

(a) that the Defendant had continuously fallen short in supply and/or was unable to supply the concrete when ordered by the Plaintiff; and/or

(b) that the Defendant's supply was unable to meet the LTA's requirements.

88 The Judge held that the Plaintiff was entitled to terminate the Contract on both grounds. The Defendant appealed on both findings. We propose to discuss each ground separately. Before proceeding to do so, however, it would be helpful to first briefly outline the *general legal position* with respect to a *breach of contract* at *common law* – not least because this is a confused and confusing area of contract law. It is nevertheless one of the key areas of the law of contract that often arises – and in a practical context as well. It therefore stands in urgent need of clarification, not least in the local context.

General position at common law

89 We consider, first, the general right to terminate a contract for breach and, secondly, the right to claim damages.

The general right to terminate a contract for breach

(1) The various situations

90 Turning to the first issue, it is important to note, at the outset, that, in the event of a breach of contract, there is *no automatic* legal right conferred on the innocent party to the contract (*viz*, the party who is not in breach of contract) to elect to treat the contract as discharged (*ie*, to terminate the contract). The circumstances under which such a party is entitled to elect to terminate the contract at common law depends on which particular situation exists. These situations (*shorn of more specific and difficult legal issues, as well as special rules with respect to certain specific types of contracts*) can be classified into two broad categories. The first broad category is clear and comprises one situation only. The second comprises three situations, the last two of which (whilst distinct) may (depending on the precise facts of the case at hand) conflict with each other. The two broad categories as well as the specific situations therein may be summarised as follows:

(A) WHERE THE CONTRACT CLEARLY AND UNAMBIGUOUSLY PROVIDES FOR THE EVENT OR EVENTS PURSUANT TO WHICH THE INNOCENT PARTY IS ENTITLED TO TERMINATE THE CONTRACT

91 The *first broad category* (**Situation 1**) deals with the situation where the contract clearly and unambiguously states that, in the event of a certain event or events occurring, the innocent party will be entitled to terminate the contract. A *clear* example of this is, in fact, cl 8 of the Plaintiff's letter of intent in the present appeal (set out at [8] above). Hence, the other situations are not directly applicable in the present appeal. However, for the sake of completeness and, more importantly, because this entire area is, as already mentioned, one of the more significant (yet complex) areas of the law of contract and there is little by way of clarification in the local case law, we set out briefly the remaining situations as well.

(B) WHERE THE CONTRACT DOES NOT CLEARLY AND UNAMBIGUOUSLY PROVIDE FOR THE EVENT OR EVENTS PURSUANT TO WHICH THE INNOCENT PARTY IS ENTITLED TO TERMINATE THE CONTRACT

(I) INTRODUCTION

92 The *second broad category* deals with the situation where the contract does *not* clearly and unambiguously refer to the right to terminate the contract (*unlike* Situation 1 above). Under this broad category, there are at least *three possible situations* under which the innocent party may elect to terminate the contract. The first (Situation 2) is separate and distinct from both Situation 1 above as well as the other two situations under this broad category (Situations 3(a) and 3(b), respectively). The two last-mentioned situations (*viz*, Situations 3(a) and 3(b)), although separate and distinct, may (under certain fact situations) conflict with each other.

(II) SITUATION 2

93 In the *first* situation under this broad category (**Situation 2**, overall), where a party, by his words or conduct, simply *renounces* its contract inasmuch as it clearly conveys to the other party to the contract that it *will not perform its contractual obligations at all*, that other party (*viz*, the innocent party to the contract) is entitled to terminate the contract.

94 It should be noted that we do not consider here the more complex situation where the party allegedly renouncing the contract *bona fide* (albeit *erroneously*) concludes that it was justified in not proceeding with the contract (for a recent discussion of this specific issue, see the Singapore High Court decision of *GIB Automation Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd* [2007] 2 SLR 918, especially at [76]–[77] (and the authorities cited therein – in particular, the leading House of Lords

decision of *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277)).

95 There is also a suggestion in a leading textbook that where a contracting party *deliberately* chooses and is, indeed, "determined" to perform its part of the contract "only in a manner substantially inconsistent with his obligations" (*per* Lord Wright in the House of Lords decision of *Ross T Smyth & Co, Ltd v T D Bailey, Son & Co* [1940] 3 All ER 60 at 72, which is termed "substantial breach" by the author) then that, too, will also justify the innocent party's termination of the contract (see Sir Guenter Treitel, *The Law of Contract* (Sweet & Maxwell, 11th Ed, 2003) at p 809 (and the authorities cited therein)). With respect, however, and having regard to the substance of (and, more importantly, controversy in relationship between) *Situations 3(a) and 3(b)* below, the preferable view, in our opinion, appears to be that whether or not the innocent party is entitled to terminate the contract concerned will depend, in the final analysis, upon whether or not the tests pursuant to *Situations 3(a) and 3(b)* below are satisfied *and in the manner or order proposed below*.

96 We acknowledge, however, that there is some merit in Prof Treitel's suggestion inasmuch as it can be argued that if the defaulting party chooses to perform the contract in a manner substantially inconsistent with its contractual obligations, it is, in *substance and effect*, renouncing the contract concerned. However, not having heard detailed arguments on this point, we will leave it open for further consideration should a suitable occasion arise in the future. It is interesting to note, however, that if the approach proffered below is adopted, the *same* result would, in *substance*, be achieved. In other words, and anticipating somewhat in advance the analysis that is to follow, if the party in breach had breached a condition of the contract, the innocent party would be entitled to terminate the contract but if the party in breach had breached a warranty instead, the innocent party would still be entitled to terminate the contract if there had been a *substantial breach*.

(III) SITUATION 3(A) – CONDITION/WARRANTY APPROACH

97 In the *second* situation (**Situation 3(a)**), the focus is on the *nature of the term* breached and, in particular, whether the *intention of the parties* to the contract was *to designate that term* as one that is *so important* that *any* breach, *regardless* of the *actual consequences* of such a breach, would *entitle* the innocent party to *terminate* the contract (this is, however, not to say that the consequences of breach are irrelevant inasmuch as the parties have, *ex hypothesi*, envisaged, in *advance*, *and hypothetically*, *serious* consequences that could ensue in the event of the breach of that particular term). In traditional legal terminology, such a term would be termed a "*condition*".

98 If, *however*, the intention of the parties to the contract was to designate that term as one that is *not so important* so that *no* breach will *ever* entitle the innocent party to terminate the contract (*even if* the *actual* consequences of such a breach are *extremely serious*), then such a term would be termed a "*warranty*" (see also, and in a more general vein, the classic exposition by Bowen LJ (as he then was) in the leading English Court of Appeal decision of *Bentsen v Taylor, Sons & Co* [1893] 2 QB 274 at 281). This "condition-warranty approach" is in fact (in so far as the sale of goods context is concerned) enshrined within the Sale of Goods Act (Cap 393, 1994 Rev Ed). It should be mentioned, at this juncture, that the innocent party would (as we shall see below at [114]) nevertheless be entitled to all the damages that it can establish in law.

(IV) SITUATION 3(B) – THE HONGKONG FIR APPROACH

99 In the *third* situation (**Situation 3(b)**), the focus is *not* (as in the second (Situation 3(a) above)) on the nature of the term breached (*ie*, whether it is a "condition" or a "warranty") but, rather, on *the nature and consequences of the breach*. In particular, where the breach in question will "give rise to an *event* which *will deprive* the party not in default [*viz*, the innocent party] of

substantially the whole benefit which it was *intended* that he should obtain from the contract" [emphasis added], then the innocent party is entitled to terminate the contract. The words just quoted are from the oft-cited judgment of Diplock LJ (as he then was) in the seminal English Court of Appeal decision of *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 at 70 ("*Hongkong Fir*"). Not surprisingly, perhaps, this approach has been termed "the *Hongkong Fir* approach". It is an approach under which the innocent party is entitled to terminate the contract if the nature and consequences of the breach are so serious as to "go to the root of the contract" (see the House of Lords decision of *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 422, *per* Lord Upjohn) and constitutes a "fundamental breach" of contract (see also *per* Lord Diplock in the House of Lords decision of *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 ("*Photo Production*") at 849, where the learned law lord also referred to the concept of the "condition" in the sense referred to in Situation 3(a) above).

100 One main difference between the condition-warranty approach in Situation 3(a) and the *Hongkong Fir* approach in Situation 3(b) should be highlighted. Under the condition-warranty approach, the paramount aim of the court is to ascertain the parties' intention in relation to the nature of the contractual term *in advance*, *viz*, at the time of contracting. The innocent party's right to terminate the contract upon breach depends wholly on whether the term is classified as a "condition" or a "warranty". In contrast, the *Hongkong Fir* approach requires a confirmation of the right on the part of the innocent party to terminate the contract *after the fact* inasmuch as the parties have to "wait and see" *what the nature and consequences of the breach actually are* (and see the reference by Lord Lowry in the House of Lords decision of *Bunge Corporation, New York v Tradax Export SA, Panama* [1981] 1 WLR 711 ("*Bunge*") at 719 to "[t]he 'wait and see' method"). Conceptually, at least, the condition-warranty approach in Situation 3(a) above tends more towards (especially commercial) certainty and predictability whilst the *Hongkong Fir* approach (on the other hand) tends more towards fairness. This is essentially because the *Hongkong Fir* approach prevents a party from terminating the contract on excessively technical grounds in a bid to escape from unfavourable bargains. However, it should also be noted that it is *also fair* to hold the contracting parties to their bargain (under the condition-warranty approach) and that, therefore, there is no sharp dichotomy as such between certainty and predictability on the one hand and fairness on the other in so far as the two approaches just mentioned are concerned. We will, in fact, elaborate on this more below (at [102]–[110]). Further, as we have noted above, the condition-warranty approach does not dispense with the concept of consequences altogether (although that particular approach views the concept of consequences of breach *in advance* and, necessarily, therefore, from a hypothetical perspective).

101 Notwithstanding the summary in the preceding paragraphs, and even leaving aside the more specific legal difficulties that might arise (see, for example, (a) the issues mentioned in Situation 2 above at [94]–[96]; (b) the criteria to be utilised in ascertaining whether or not a particular term is a "condition" under the condition-warranty approach; (c) some remaining issues relating to the application of the *Hongkong Fir* approach (see the recent article by J W Carter, G J Tolhurst & Elisabeth Peden, "Developing the Intermediate Term Concept" (2006) 22 JCL 268); as well as (d) the legal position applicable to the situation where *both* of the contracting parties have breached the contract (as to which, see this court's decision in *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2006] 3 SLR 769, especially at [94]–[99], and where the observations by Kerr LJ in the English Court of Appeal decision of *State Trading Corporation of India Ltd v M Golodetz Ltd* [1989] 2 Lloyd's Rep 277 at 286 were cited and applied (at [98]))), there is, nevertheless, a more *general* difficulty that stems from the relationship (or potential tension, rather) between Situation 3(a) and Situation 3(b) which has been alluded to in the preceding paragraph. To this extent, the above summary is *not* a *final* one, although it is very close to it. The *final* summary will in fact be set out

later (at [111]–[113] below). It will, however, not differ much from the one set out in the preceding paragraph, save that it would embody clarification of the relationship between Situation 3(a) and Situation 3(b). It is, in fact, to that specific issue that our attention must now turn.

(2) The relationship between Situation 3(a) and Situation 3(b)

102 Notwithstanding the potential difficulties alluded to above (particularly in Situation 3(b)), it should be noted that the approaches in Situations 3(a) and 3(b) (comprising the condition-warranty approach and the *Hongkong Fir* approach, respectively) are not necessarily incompatible with each other. Indeed, there could be fact situations where the application of either approach would make *no difference*. Take, for example, a situation where there is a breach of a *condition* which *simultaneously* results in *the deprivation vis-à-vis the innocent party of substantially the whole benefit* that it was intended that the innocent party should obtain from the contract. Take another example at the opposite end of the factual continuum – where there is a breach of a *warranty* which *simultaneously* results in *very trivial consequences only*.

103 *However*, there could be situations where the application of either approach could produce *different* (indeed, *diametrically opposed*) results. Take, for example, a situation where there is a breach of *condition* (which would entitle the innocent party to terminate the contract under the condition-warranty approach) *but* which *simultaneously* results in *very trivial consequences only* (which would *not* entitle the innocent party to terminate the contract under the *Hongkong Fir* approach). In contrast, take another situation where there is a breach of *warranty* (which would *not* entitle the innocent party to terminate the contract under the condition-warranty approach) *but* which *simultaneously* results in *the deprivation vis-à-vis the innocent party of substantially the whole benefit* that it was intended that the innocent party should obtain from the contract (which *would* entitle the innocent party to terminate the contract under the *Hongkong Fir* approach).

104 The added complexity is that the *Hongkong Fir* approach is often thought of as applying to a term which is *neither* a condition *nor* a warranty, but which is (instead) an *intermediate or hybrid* term (hereafter referred to as an "*intermediate*" term, although, on other occasions, the nomenclature "*innominate*" term is used: see, for example, the House of Lords decisions of *Bunge* ([100] *supra* at 726); *Torvald Klaveness A/S v Arni Maritime Corporation* [1994] 1 WLR 1465 ("*The Gregos*") at 1476; as well as the English Court of Appeal decisions of *Alfred McAlpine Plc v BAI (Run-Off) Ltd* [2000] 1 Lloyd's Rep 437 at [32] and *The Seaflower* [2001] 1 Lloyd's Rep 341 at [13] and [63]). On occasion, the nomenclature "intermediate" term and "innominate" term are used interchangeably (see, for example, *Bunge* (at 717) and *The Seaflower* (at [15]); as Lord Lowry aptly put it in *Bunge* (at 719):

> It is "intermediate" because it lies in the middle *between* a condition and a warranty (just as the remedy for its breach lies somewhere between the remedies for breach of a condition and breach of a warranty), and it is "innominate" because it is not *called* a condition or a warranty but assumes the character of each in turn. [emphasis in original]

105 An *intermediate* term is, as an integral part of the *Hongkong Fir* approach, defined (unlike the condition or warranty) *not* by reference to the *nature of the term breached* but, rather, by reference to the *actual consequences of the breach* (what Lord Wilberforce termed in *Bunge* (at 716) as "the 'gravity of the breach' approach"). More specifically, an intermediate term is defined as one which is *neither* a condition *nor* a warranty simply because a breach of it *could give rise to either very substantial or to very trivial consequences*. Unfortunately, however, such an approach *effectively and practically obliterates* the distinction between a condition and a warranty because the breach of *virtually any term* could give rise to either very substantial or to very trivial consequences (and see

the observations by Megaw LJ at the Court of Appeal stage of *Bunge* in *Bunge Corpn v Tradax SA* [1981] 2 All ER 513 at 537). In other words, a wholesale adoption of the *Hongkong Fir* approach in the manner just described would result in its *complete eclipse* of the condition-warranty approach. We are of the view, however, that this should *not* be the case. There is an appropriate legal role for *both* approaches. Let us elaborate.

106 In determining whether an innocent party is entitled to terminate a contract upon breach, the *foremost* consideration is (and must be) *to give effect to the intentions of the contracting parties*. If so, then the condition-warranty approach must *take precedence* over the *Hongkong Fir* approach because (as we have seen at [100] above), it is premised on the intentions of the contracting parties themselves. Thus, in *Bunge* (at 716), Lord Wilberforce expressly cautioned that the *Hongkong Fir* approach would be *unsuitable* in cases where the parties had evinced an intention that the contractual obligation was to have the force of a condition. In such cases, regardless of the consequences of the breach, the innocent party would be entitled to terminate the contract.

107 If, however, the term breached is a *warranty*, we are of the view that the innocent party is not thereby prevented from terminating the contract (as it would have been entitled so to do if the condition-warranty approach operated *alone*). Considerations of *fairness* demand, in our view, that the *consequences* of the breach should *also* be examined by the court, *even if* the term breached is only a warranty (as opposed to a condition). There would, of course, be no need for the court to examine the consequences of the breach if the term breached was a *condition* since, *ex hypothesi*, the breach of a condition would (as we have just stated) entitle the innocent party to terminate the contract in the first instance. Hence, it is only in a situation where the term breached would otherwise constitute a *warranty* that the court would, as a question of *fairness*, go *further* and examine the *consequences* of the breach as well. In the result, if the consequences of the breach are such as to deprive the innocent party of *substantially the whole benefit* that it was intended that the innocent party should obtain from the contract, then the innocent party *would* be entitled to terminate the contract, *notwithstanding* that it only constitutes a *warranty*. If, however, the consequences of the breach are only *very trivial*, then the innocent party would *not* be entitled to terminate the contract.

108 It is true that the approach adopted in the preceding paragraph would, *in effect*, result in the concept of the *warranty*, as we know it, being effectively effaced since there would virtually *never* be a situation in which there would be a term, the breach of which would *always* result in *only trivial consequences*. In other words, if a term was not a condition under the condition-warranty approach, it would necessarily become an *intermediate* term, subject to the *Hongkong Fir* approach (see, in this regard, the perceptive observations by Robert Goff J (as he then was) in the English High Court decision of *The Ymnos* [1982] 2 Lloyd's Rep 574 at 583). In other words, the traditional three-fold classification of contractual terms (comprising conditions, warranties and intermediate terms, respectively) would be a merely theoretical one only. *However*, the concept of the intermediate term was itself only fully developed *many years after* the condition-warranty approach (in *Hongkong Fir*). Further, and more importantly (from a practical perspective), it should also be observed that the *spirit* behind the concept of the warranty would *still remain* in appropriate fact situations inasmuch as the innocent party would not be entitled to terminate the contract if the consequences of the breach were found to be trivial (although it would, as we shall see, be entitled to damages that it could establish at law). As importantly, this last-mentioned result, *viz*, the right to claim damages, is precisely that which would have obtained, in any event, had the court found that the term concerned was a warranty under the condition-warranty approach.

109 Most importantly, the approach which seems to us to be most appropriate (and as set out at [106]–[107] above) not only integrates the condition-warranty approach and the *Hongkong Fir*

approach in their formal aspects but also achieves a judicious balance between predictability and certainty on the one hand and fairness on the other. Indeed, as alluded to above (at [100]), the condition-warranty approach itself does *not* (contrary to popular perception) sacrifice fairness at the altar of certainty and predictability. On the contrary, by giving effect to the intentions of the contracting parties (as to whether or not a term ought to be a "condition" or a "warranty"), the condition-warranty approach is, looked at in this light, *itself* a manifestation of *fairness between the contracting parties* – whilst *simultaneously* achieving certainty and predictability, as far as the facts of the case at hand will allow. *Further*, by *integrating* the *Hongkong Fir* approach with the condition-warranty approach, rather than discarding the former out of hand, the aim of achieving *fairness* is *further enhanced* and, indeed, maximised by extending the inquiry and looking at the seriousness of the consequences of the breach *even where the term breached is not a condition*.

110 The approach which we have adopted in the present appeal also has support in decisions from the House of Lords: see, for example, *Bunge* ([100] *supra*) and *The Gregos* ([104] *supra*). Reference may, in addition, be made to the English Court of Appeal decisions of *The Seaflower* ([104] *supra*) and *Universal Bulk Carriers Ltd v Andre et Cie* [2001] 2 Lloyd's Rep 65; as well as the leading Commonwealth work on breach of contract, J W Carter, *Breach of Contract* (The Law Book Company Limited, 2nd Ed, 1991) at para 424 and the recent article by Carter, Tolhurst & Peden ([101] *supra*) at 270 and 272.

(3) Conclusion

111 To summarise, the situations under which an innocent party to a contract may elect to terminate the contract are set out at [91]–[101] above (and cover four distinct situations, *viz*, Situations 1, 2, 3(a) and 3(b), respectively).

112 In so far as any potential tension (arising from the precise facts of the case) between Situation 3(a) and Situation 3(b) is concerned, the approach in Situation 3(a) (*viz*, the condition-warranty approach) should be *applied first*. 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).

113 It may be useful to summarise the position diagrammatically as well, as follows:

SITUATIONS ENTITLING AN INNOCENT PARTY TO TERMINATE THE CONTRACT AT COMMON LAW

SITUATION	CIRCUMSTANCES IN WHICH TERMINATION IS LEGALLY JUSTIFIED	RELATIONSHIP TO OTHER SITUATIONS
I	*Express* Reference **to the Right to Terminate** and **What will Entitle the Innocent Party to Terminate the Contract**	

1	**The contractual term breached clearly states that, in the event of certain event or events occurring, the innocent party is entitled to terminate the contract.**	**None – it operates *independently of all other* situations. In other words —** **Situations 2, 3(a) and 3(b) (*ie*, all the situations in II, below) are *not* relevant.**

II *No* Express Reference **to the Right to Terminate** and **What will Entitle the Innocent Party to Terminate the Contract**

2	**Party in breach** *renounces* **the contract by clearly conveying to the innocent party that it** *will not perform* ***its contractual obligations*** *at all***.**	**None – it operates *independently* of *all other* situations. In other words —** **Situation 1 is *not* relevant.**
	Quaere **whether the innocent party can terminate the contract if the party in breach *deliberately* chooses to perform its part of the contract in a manner that amounts to a *substantial breach.***	**Situations 3(a) and 3(b) are *not* relevant.**
3(a)	**Condition-warranty approach – Party in breach has breached a *condition* of the contract (as opposed to a *warranty*).**	**Should be applied** *before* **the "*Hongkong Fir* Approach" in Situation (3)(b).** **Situation 1 is *not* relevant.** **Situation 2 is *not* relevant.**
3(b)	***Hongkong Fir* approach** – **Party in breach which has committed a breach, the** *consequences* **of which *will*** *deprive the innocent party of substantially the whole benefit* ***which it was intended that the innocent party should obtain from the contract*.**	**Should be applied only** *after* **the Condition-warranty approach in Situation (3)(a) *and* if the term breached is *not* found to be a *condition*.** **Situation 1 is *not* relevant.** **Situation 2 is *not* relevant.**

Damages are awarded as of right for every breach of contract

114 This principle has already been dealt with above (at [40] above) and was applied to issue (b)

(which, it will be recalled, related to whether the Plaintiff could claim for the cost differentials incurred during the suspension period (between 7 July 2004 and 17 November 2004)). It is nevertheless an important one which bears reiteration especially since it also completes the present analysis of the general law relating to breach of contract. To reiterate, even if the innocent party is not entitled to terminate the contract, it will *always* be entitled, subject to any applicable legal conditions or constraints (such as the need to prove substantive damage, as well as the legal rules and principles relating to mitigation, remoteness of damages and limitation), to claim *damages as of right* for loss resulting from the breach (or breaches) of contract. It is equally important to emphasise that the innocent party is entitled to claim damages as of right even if it is entitled to terminate the contract and in fact terminates it – subject, again, to any applicable legal conditions or constraints.

A preliminary analysis

115 We turn, now, to apply the abovementioned principles to the facts of the present appeal in relation to issue (e).

116 As already mentioned, the situation in the present case falls within the ambit of *Situation 1* above inasmuch as cl 8 of the Plaintiff's letter of intent *expressly* states, *inter alia*, that "*[i]n the event that* [the Defendant's] supply is unable to meet LTA's requirements, *or* [the Defendant is] unable to continue [its] supply, *[the Plaintiff] reserves the right to terminate [the Defendant's] contract* and retain and use both the retention sum and any outstanding payment due to [the Defendant] to seek for alternative source of supply" [emphasis added].

117 Significantly, there is *no* reference in cl 8 with respect to the seriousness of the *consequences* of the defendant's failure *vis-à-vis* either or both of the events mentioned therein. In any event, the *Hongkong Fir* approach in Situation 3(b) above is *not* relevant because of the express reference to the right to terminate in cl 8 itself.

118 It is also significant to note that, strictly speaking, cl 8 has the *same substantive* effect as a condition under the condition-warranty approach in Situation 3(a) above. *However*, it is *different* from a condition, strictly so called, because it *expressly provides* that the innocent party (here, the Plaintiff) is entitled to terminate the contract upon the happening of the stated events. In a typical situation where the condition-warranty approach is invoked, it is usually *unclear* what the contracting parties' intentions are with respect to the nature of that particular term, *viz*, whether, in the event of a breach of that term, the term is regarded by the parties as so serious as to entitle the innocent party to terminate the Contract (*ie*, that the term is to be a *condition*), or *vice versa* (in which case the term is to be a *warranty*). Clause 8 requires *no* such inquiry; it is *clear* that the innocent party can terminate provided that there has been a failure by the defendant *vis-à-vis* either or both of the events mentioned therein.

119 It remains to be observed that cl 8 does *not* fall within the ambit of Situation 2 above because the Defendant had clearly *not* renounced the Contract inasmuch as it had *not* announced to the Plaintiff that it would not perform its (the Defendant's) contractual obligations *at all*. Indeed, even after the Defendant suspended supply of concrete on 5 April 2005, it maintained that it was ready to resume supply as soon as the Plaintiff paid the outstanding amounts allegedly due to the Defendant.

120 We turn now to the specific grounds stipulated in cl 8 itself. As already noted above, if either or both of the grounds stipulated in that particular clause exist on the facts, the Plaintiff would clearly be entitled to terminate the contract (pursuant to *Situation 1* above).

The Defendant's inability to supply

121 Turning to the first ground, the Judge found, in essence, that there were several instances where the Defendant had failed to provide alternative dates and timings to the Plaintiff when it could not fulfil the Plaintiff's orders (see the GD at [121]). Since the Defendant would (or should) have known that it was unable to fulfil the Plaintiff's orders on the day of casting itself, the Judge held that the onus was on the Defendant to inform the Plaintiff of the non-supply when the Plaintiff confirmed its orders.

122 On appeal before us, the Defendant argued that the Plaintiff was not entitled to terminate the Contract because, *as at 30 May 2005*, the Defendant was in fact able to continue supply under the Contract, but did not do so because it had, on 5 April 2005, suspended supply *on the basis of the Plaintiff's non-payment*. Further, the plant breakdowns were only sporadic and temporary in nature, and lasted for a very short period each time. In essence, the Defendant argued that it could clearly continue its supply as long as the Plaintiff paid its outstanding debts.

123 The Defendant's argument is clearly misconceived because the Defendant's suspension of supply due to non-payment was *not* the basis on which the Plaintiff invoked cl 8. Instead, the Plaintiff relied on the fact that, between November 2004 and March 2005, there were numerous occasions on which the Defendant failed to supply concrete pre-ordered by the Plaintiff. Further, there were many instances in which the Defendant neither gave reasons for the non- or short supply nor provided alternative delivery dates and times. A quick perusal of the numerous complaints registered by the Plaintiff would show that the breakdowns were not as "temporary" or "sporadic" as the Defendant claimed. In fact, we have noted above that the Defendant had failed on *no fewer than 42 occasions* to supply the concrete ordered by the Plaintiff. Returning to the precise language of the Contract, cl 8 affords the right of termination to the Plaintiff when the Defendant was "unable to *continue*" [emphasis added] its supply. Clearly, the word "continue" connotes uninterrupted supply. In our view, the sporadic interruptions constituted non-continuous and interrupted supply that would therefore entitle the Plaintiff to terminate the Contract.

124 In reply, counsel for the Defendant, Mr Por, strenuously advanced the argument that the Defendant's *sole* obligation under the Contract was to supply 70,000m^3 of cement during the contract period. The implication of this argument is that the Defendant would be absolved from all liability arising from the occasions on which it was unable to supply the concrete ordered by the Plaintiff during the contract period. This was because, as Mr Por argued, there was no "priority term" in the Contract and thus the Plaintiff was not entitled to priority supply. The Plaintiff would have to take its place in the queue with the Defendant's other customers and would be supplied on a first come, first served basis. Mr Por argued that where the Defendant had insufficient concrete to supply to the Plaintiff, it was always open to the Plaintiff to purchase concrete from alternative suppliers *at its own cost*, and the Defendant should not be liable for any cost differentials resulting therefrom.

125 With respect, we are unable to accept this argument. At the outset, we note that scant evidence was tendered to demonstrate the existence of the alleged queue system and, even if it existed, whether it was strictly adhered to. In the trial court, only oral evidence was led and there was a conspicuous lack of documentary evidence as to how the Defendant processed its orders daily. We therefore entertain grave doubts with regard to the Defendant's argument, and question whether the Defendant had chosen, instead, to supply concrete to other customers who were willing to pay a higher price over supplying to the Plaintiff, who enjoyed preferential fixed rates under the Contract. Indeed, the Judge noted that the Defendant offered "rock bottom prices" to the Plaintiff and suffered a "budgeted loss" on the Contract (see the GD at [137], reproduced at [74] above). It is therefore unsurprising that the Defendant would be reluctant to absorb the Plaintiff's direct losses relating to non- or short supply.

126 Indeed, even if we accept the existence of a queue system, as a matter of business efficacy or based on the test of the officious bystander, it must have been an implied term of the Contract that, subject to circumstances of *force majeure* and notwithstanding the queue system implemented by the Defendant, the Defendant was contractually obliged to satisfy the orders placed by the Plaintiff for the purchase of concrete in a *timely* fashion. It could not have been the intention of the parties that the Plaintiff would literally be at the "mercy" of the Defendant's queue system and have to turn to alternative suppliers at its own expense each and every time the Plaintiff "lost" its priority in the Defendant's queue system, especially since the Plaintiff was working according to parameters laid down by the LTA. Indeed, we find it inconceivable that any party in the Plaintiff's position would enter into such a contract on such a basis.

127 As no unassailable objective evidence was tendered to prove that the Defendant truly could not supply the Plaintiff's requirements because the Plaintiff was at the "back of the queue", we express concern that the Defendant was allocating supply to the Plaintiff on an arbitrary basis. Indeed, in each of the 42 instances that the Defendant failed to supply the Plaintiff's orders, there was no documentary evidence showing the Plaintiff's position in the Defendant's queue. Indeed, if the Defendant's queue system was strictly implemented, there had to come a point in time when the Plaintiff's orders reached the front of the queue. Yet, no evidence was produced as to the outcome of the Plaintiff's orders that were at the "back of the queue" and were hence not fulfilled.

The Defendant's inability to meet the LTA's requirements

128 Turning to the second ground, it was a term of the Contract that the concrete supplied by the Defendant should comply with the LTA's standards. Clause 3 of the Plaintiff's letter of intent provides as follows:

> Not withstanding [*sic*] the Terms and Conditions of Supply in your quotation, you are fully aware and will comply with LTA's latest revision of Materials and Workmanship Specification for Civil and Structural Works at no extra cost.

129 The LTA's specifications are contained under ch 11 of the *Materials and Workmanship Specification for Civil and Structual Works* (Land Transport Authority, Revision A4, September 2001) ("LTA Materials Specification"). Clause 11.5.5 provides that cubes from the trial batches shall be tested at an age of 28 days. The average strength of the cubes tested at 28 days shall exceed the specified characteristic strength by at least $7N/mm^2$. Clause 11.12.3 provides as follows:

> The temperature differential between the warmer interior portion and the cooler surface portion of the thick element shall be limited to prevent early thermal cracking due to heat of hydration… The maximum temperature within the element shall not exceed 70°C.

130 The LTA therefore required concrete to pass the strength tests at 28 days and at a peak core temperature below 70°C.

131 In addition, cl 4 of the Plaintiff's letter of intent also provides as follows:

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

132 Tests conducted on concrete supplied by the Defendant for 56 days strength passed the requisite peak core temperature of 70°C. The mixes, however, failed to pass the test for concrete of

28 days strength. The Plaintiff's case was that, up till 30 May 2005, the Defendant was still unable to comply with the LTA's requirements. It therefore terminated the Contract on this ground. The Judge held that the Plaintiff had discharged its burden of proving that it was entitled to terminate the Contract (see the GD at [134] and [135]).

133 According to the Defendant, the requirements of 70°C and 28 days strength could only be achieved in concrete slabs of "normal" thickness (which was defined by the Defendant as being up to 500mm). The Defendant argued, first, that these requirements were incompatible and impractical for thick slabs which the Plaintiff required to be cast (about 2,000mm). It emphasised that it was only informed of the thickness of the slabs *after* the Contract was formed. Notably, the Defendant proposed to change the peak core temperature to 80°C but this was rejected by the LTA. Secondly, it also argued that, as the LTA had later agreed to accept concrete that passed the 56 days strength test, the Defendant was therefore no longer under any contractual obligation to meet the 28 days strength requirement.

134 We are unable to accept the Defendant's argument. The terms of the Contract are clear. Clause 3 incorporates the LTA's specifications, which specifically requires the Defendant to satisfy the strength test at 28 days and 70°C peak core temperature. It is trite that contractual liability is strict. In general, it is immaterial why the defendant failed to fulfil its obligation; it certainly could not plead the defence that it had done its best: see the House of Lords decision of *Raineri v Miles* ([40] *supra* at 1086). On the facts, we reject the Defendant's arguments that the LTA specifications were impractical or even impossible for three reasons.

135 Firstly, the evidence was that alternative concrete suppliers such as Pan United and Island Concrete Pte Ltd were able to comply with both of the LTA specifications. Chan Ying Wah, who was the general manager of Pan United, confirmed in his affidavit that:

> … Pan United was able to comply with LTA's specification for concrete strength 28 days and 56 days at peak temperature not exceeding 70 degree celsius. Pan United had supplied concrete complying wit this requirement to Sato Kogyo.

136 Secondly, the Defendant's argument that it was unaware that the concrete was to be used to construct thick slabs is, with respect, spurious. Paragraph 11.12 of the LTA Materials Specification (under which can be found para 11.12.3 which provides for a peak core temperature of 70°C) is titled "CONCRETING OF THICK SECTIONS". Further, the Defendant knew that the concrete was required for the construction of an underground MRT station and, as experienced participants in the industry, would have foreseen that concrete slabs of considerable thickness would need to be cast accordingly.

137 Thirdly, evidence was given during cross-examination that it was not standard industry practice for contractors to provide concrete suppliers with construction drawings showing the specific structural elements to be cast at the time the contract is signed. The usual terms discussed typically concern concrete volume, period of supply and temperature control requirements. The Defendant's excuse that it was not notified, at the time of contracting, of the thickness of the structural slabs is thus without basis as there was generally no practice or requirement for the Plaintiff to do so.

138 In summary, we affirm the Judge's decision that the Plaintiff was entitled to terminate the Contract on the grounds that the Defendant was unable to meet the LTA's requirements and that it was unable to continue its supply.

Conclusion

139 To summarise:

(a) In so far as issue (a) (at [14] above) is concerned, we affirm the Judge's decision that the Contract was not an exclusive or sole supplier contract. The Plaintiff's appeal on this issue is therefore dismissed.

(b) In so far as issue (b) (at [14] above) is concerned, we hold that, under cl 8 of the Plaintiff's letter of intent, the Defendant is liable for *all* the cost differentials incurred by the Plaintiff in obtaining concrete from an alternative supplier during the suspension period (between 7 July 2004 and 17 November 2004). In particular, the termination of the Contract is not a precondition to the Plaintiff's right to claim direct costs from the Defendant and the cost differentials concerned fall within the definition of the term "direct cost" in cl 8. The Plaintiff's appeal on this issue is therefore allowed.

(c) In so far as issue (c) (at [14] above) is concerned, we hold that the Defendant was not entitled to rely on the *force majeure* clauses in the Contract because this had not been specifically pleaded. Even if the defective pleadings were not fatal to the Defendant's case, the *force majeure* clauses nevertheless did *not* apply so as to exempt the Defendant from liability to the Plaintiff for the non-supply of concrete between 18 November 2004 and 5 April 2005. The Plaintiff's appeal on this issue is therefore allowed, whilst the Defendant's appeal on this issue is dismissed. In the result, the Defendant is liable to the Plaintiff for *all* the cost differentials incurred by the latter as a result of non- or short supply between 18 November 2004 and 5 April 2005.

(d) In so far as issue (d) (at [14] above) is concerned, as the Plaintiff is not entitled to unilaterally and retrospectively impose the 6% administrative charge, we find that the Defendant was entitled to suspend supply on 5 April 2005. The Plaintiff's appeal on this issue is therefore dismissed.

(e) In so far as issue (e) (at [14] above) is concerned, we affirm the Judge's decision that the Plaintiff was entitled to terminate the Contract on 30 May 2005 on the grounds that the Defendant was unable to meet the LTA's requirements and that it was unable to continue its supply. The Defendant's appeal on this issue is therefore dismissed.

Finally, the exact quantum of damages to be awarded to the Plaintiff is to be assessed by the Registrar if the parties are unable to agree thereon. The Plaintiff is also entitled to interest on this sum at 3% per annum with effect from 22 July 2005, which is the date the writ was filed.

140 In the circumstances, we dismiss CA 151 with costs and allow CA 152 in part (with 50% of the costs of CA 152 to be awarded to the Plaintiff). The costs orders of the Judge in the court below are to stand. Finally, the usual consequential orders are to follow.

Copyright © Government of Singapore.