Sports Connection Pte Ltd v Deuter Sports GmbH
[2009] SGCA 22

Case Number : CA 114/2008

Decision Date : 01 June 2009

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Francis Xavier SC, M Reza, Tang Hui Jing (Rajah & Tann LLP), Shahiran Ibrahim (Samuel Seow Law Corporation) for the appellant; Aqbal Singh, Josephine Chong (UniLegal LLC) respondent

Parties : Sports Connection Pte Ltd — Deuter Sports GmbH

Contract – Breach – Breach of non-competition clause – Non-competition clause was not a condition – Whether breach was sufficiently serious so as to permit innocent party to terminate contract

Contract – Remedies – Damages – Award and calculation of damages when both parties were in breach

1 June 2009 Judgment reserved.

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

Introduction

1 This is an appeal against the decision of the trial judge ("the Judge") in Suit No 280 of 2005 (see *Sports Connection Pte Ltd v Deuter Sports GmbH* [2008] SGHC 109 ("the GD")). In his decision, the Judge dismissed the claim of Sports Connection Private Limited ("the Appellant") against Deuter Sports GmbH ("the Respondent") for wrongful termination of a letter of agreement dated 28 November 2002 ("the Distributorship Agreement"). The Judge also granted interlocutory judgment in favour of the Respondent with respect to its counterclaim for breach of the Distributorship Agreement, with damages to be assessed.

The parties

2 The Appellant is a Singapore company that engages in the import, export, retail and wholesale of both local and foreign brands of backpacks as well as other outdoor, camping and athletic products. The Respondent is a well-known German-registered company that engages in the manufacture, export and sale of backpacks and outdoor products under the "Deuter" trade mark. From 1992 to 27 January 2005, the Appellant was the exclusive distributor of Deuter products in Singapore, as well as other countries in the region. During this period, both the Appellant and the Respondent entered into a number of written agreements.

Background facts

3 In a letter of intent dated 25 May 1995 ("the 1995 Letter"), the Respondent expressed its intention to use the Appellant as its "sole distributor" of Deuter backpack products "in Singapore and Malaysia for three years".[note: 1] The 1995 Letter also stipulated that it should "be the intent of [the Appellant] to place all orders directly with [the Respondent], advertise and promote Deuter packs and place preseason orders".

4 The parties entered into another agreement in December 1999 ("the 1999 Agreement"), which gave the Appellant "exclusive rights to distribute Deuter products in Brunei, Indonesia and Thailand" for a period of three years, beginning on 1 January 2000 and ending on 31 December 2002.[note: 2] The 1999 Agreement also stated:[note: 3]

> During this time [the Appellant] shall make every effort to promote and sell the Deuter products to achieve market penetration and high quality brand positioning. Each year (or more often if appropriate) both parties agree to an annual meeting to discuss the progress and business strategies in these markets.

An addendum to the 1999 Agreement ("the 1999 Agreement Addendum) was entered into on 29 March 2001 to expand the Appellant's exclusive distributorship of Deuter products to "Singapore, East/West Malaysia, Thailand and Brunei". In the 1999 Agreement Addendum, the Respondent also agreed to the following:[note: 4]

> [The Respondent] agrees not to directly or indirectly execute any conflicting business with the current staff of [the Appellant] during their employment or within a period of two (2) years after their employment.

5 The parties entered into another agreement on 28 November 2002, *ie*, the Distributorship Agreement (see [1] above). Pursuant to the Distributorship Agreement, the Appellant was given "exclusive rights to distribute Deuter products in Singapore, East/West Malaysia, Brunei, Thailand and Indonesia" for a period of three years, ending on 31 December 2005. Both parties also, for the first time, agreed upon a non-competition clause which stated that "[p]roducts which are in competition with Deuter range of products may not be sold by [the Appellant] without prior written consent from [the Respondent]" ("the Non-Competition Clause"). The Judge accepted that there was an "understanding" between the parties that the Non-Competition Clause in the Distributorship Agreement would not be activated if the Appellant purchased US$1m worth of Deuter products annually ("the Purchase Target"). This understanding is not in dispute between the parties for the purposes of the present appeal.

6 For the sake of completeness, and because this is a crucial document, we set out the body of the Distributorship Agreement in full:[note: 5]

> Beginning January 1st, 2003, and for the next three years we hereby agree to give [the Appellant] the exclusive rights to distribute Deuter products in Singapore, East/West Malaysia, Brunei, Thailand and Indonesia.
>
> During this time [the Appellant] shall make every effort to promote and sell the Deuter products to achieve market penetration and high quality brand positioning. Each year (or more often if appropriate) both parties agree to an annual meeting to discuss the progress and business strategies in these markets.
>
> *Products which are in competition with Deuter range of products may not be sold by [the Appellant] without prior written consent from [the Respondent]*.
>
> [The Respondent] agrees not to directly or indirectly execute any conflicting business with the current staff of [the Appellant] during their employment or within a period of two (2) years after their employment termination.

This agreement continues until December 31st, 2005 and can be renewed, with signed confirmation, for continuous distribution rights no later than one month prior to this date. This agreement can be terminated by consent of both parties or if there is an essential change in the running of or financial situation of one of the businesses, which has the effect of influencing the results which the other party could legitimately expect from the execution of this agreement.

It is the intention of both parties to work together for the next three years towards a mutually beneficial business relationship.

[emphasis added]

7 The relationship between the Appellant and the Respondent continued pursuant to the Distributorship Agreement until 2004, when cracks (unfortunately) began to develop in it. On the evidence, there were three main reasons why the relationship started to sour. First, the Respondent viewed the Appellant's discounting of Deuter products over a period of time as excessive. Second, the Respondent was unhappy that there had been a reduction of the Appellant's wholesale business from 500 retailers' accounts to 50 retailers' accounts. Finally, the Respondent took issue with the Appellant's sale of competing products in its retail stores.

8 Consequently, there was a lengthy exchange of e-mails between Mr Terry Yee ("Mr Yee"), the Appellant's managing director, and Mr William Hartrampf ("Mr Hartrampf"), the Respondent's export manager, between 18 November 2004 and 20 January 2005. Both parties endeavoured to settle their differences, and, subsequently, on 17 January 2005, an amendment to the Distributorship Agreement ("the Amendment Agreement"), which was agreed to take effect from 28 November 2002, was entered into. Pursuant to the Amendment Agreement, the Appellant agreed "not to publicly advertise any discount on Deuter products" and that "[a]ny public advertisement to discount Deuter products can be made only after receiving prior written consent from [the Respondent]".[note: 6]

9 In this regard, Mr Hartrampf confirmed during cross-examination that the Amendment Agreement had indeed resolved the disputes between the parties relating to the discounting of Deuter products and the reduction in the number of retailers' accounts. It is, therefore, common ground (and, in fact, undisputed) that these two issues cannot be used by the Respondent as grounds for the termination of the Distributorship Agreement. Indeed, the Judge held that the discounting of Deuter products by the Appellant prior to the Amendment Agreement could not have been a breach of the Distributorship Agreement. The Judge further held that the Respondent could not rely on the discounting issue to terminate the Distributorship Agreement as the Amendment Agreement had settled and resolved the parties' differences pertaining to this particular issue. Indeed, we are of the view that the evidence fully supports the Judge's findings with regard to both these issues.

10 Accordingly, and this is not disputed by the parties in the present appeal, the sole remaining ground which the Respondent can rely on in order to terminate the Distributorship Agreement is the Appellant's sale of competing products in its retail outlets in breach of the Non-Competition Clause (see [5] above). That said, the following are, in fact, the more significant e-mails which were exchanged between the parties on the remaining issue relating to the sale of competing products.

(a) E-mail from Mr Hartrampf to Mr Yee, dated 11 December 2004:[note: 7]

Dear Terry [*ie*, Mr Yee],

Paragraph 3 of [the Distributorship Agreement] says: "Products which are in competition with Deuter range of products may not be sold by [the Appellant] without prior written consent

from [the Respondent]." We have never given you written consent to sell competing products.

For many years you have achieved nearly U$1.0 million in annual purchases. This year (2004) your current purchases plus pending shipments amount to U$750,000. In your Dec.3rd e-mail you propose for 2005 another drop to $500,000. *One of the reasons must be because you are carrying so many competing products from the above mentioned brands*.

We have hydration packs, big sized packs like 50, 60, 70, 80L packs, accessories, ladies bags and trolley bags. (See Deuter catalog). Please, confirm with a fixed date when you [will] stop selling the competing products from: Osprey, Eagle Creek, Camelbak, High Sierra, Cerro Torre, Outdoor Products, Vertikal, Urban Equipment and Overland.

Regards, Bill [*ie*, Mr Hartrampf]

[emphasis added, underlined emphasis in original]

(b) E-mail from Mr Yee to Mr Hartrampf, dated 16 December 2004:[note: 8]

Dear Bill,

I don't deny, what you alleged here. It is more true in Martin's days compared to now, since I don't practise duplication of goods.

Can you spare Eagle Creek and High Sierra, once I confirm dropping Osprey and CamelBak? I hope so, since there is no U$500,000 intention, as concurred earlier. This U$500,000 was briefly mentioned when you insisted on zero discounts for Deuter [products]. I forsee [*sic*] serious drop in Deuter's purchase [*sic*] if I maintain your prices without any discounts.

As for Cerro Torre, Vertikal, Urban Equip and Overland, they are non issues, as Cerro Torre was stopped months ago, and Vertikal, Urban Equip and Overland are mainly cheap tents, cheap tropical sleeping bags and foorwears, that we wholesaled to hyper stores in large quantities for local applications / usages.

The reason for my disinterest in Deuter's trolley bags, is they don't compete well in terms of quality and price. As for Deuter's hydration bags, Israel made [*sic*] bladders and the high prices [it] is just impossible to be successful (we still have last year's hydration bags in our 3 countries [*sic*] stores).

I am glad, you vehemently disapprove U$500,000 purchase for '05, as that was never my intention, even though I briefly mentioned it. This will not happen once I [get] the new POS [point of sales system] up, which is being applied since Dec 01, as we will be able to order more accurately, which was demonstrated to you, we are lacking the faster selling Deuter items.

With better financial control, and our concurrence to stopping Deuter's 40% discounts in our stores and our U$1.1 million purchases, let's put this episode behind us, as we move on with '05. Attach[ed] please see what the store supervisor wanted for immediate delivery and what's for 4 months deliveries / forecast in '05.

Regards,

Terry Yee

[emphasis added]

(c) E-mail from Mr Hartrampf to Mr Yee, dated 21 January 2005:[note: 9]

Dear Terry,

Will you stop selling the competing products (to [the Respondent]) of the international and private label brands you are carrying?

Please, answer yes or no.

Regards, Bill

[emphasis added]

(d) E-mail from Mr Hartrampf to Mr Yee, dated 27 January 2005:[note: 10]

Dear Terry,

We must have your clear answer to this question. We can not accept any new orders or ship anything until this issue is clear.

Regards, Bill

(e) E-mail from Mr Yee to Mr Hartrampf, dated 27 January 2005:[note: 11]

Dear Bill,

…

I refer to your e-mails. *I regret to note that you seem to not understand my stance in this matter and that I would not be able to "simply give you a "yes or no" to the question you raised in your e-mail dated 21 Jan 2005. This is simply because I do not consider my local and foreign brands in existence for more than 10 years and with [the Respondent]'s knowledge as competing at all. I truly believe that even [the Respondent] throughout the years never considered these brands or products as competing products until the matter was raised for some inexplicable reasons only recently and after thirteen (13) years of business and despite full knowledge of them being marketted [*sic*] by me in Singapore & Malaysia and Thailand. How do you expect me to give you a "simple yes or no"?*

However, if you still require me to give up these brands which you only now (and more than 13 years late and with full knowledge of [their] existence) allege as "competing" then I have no alternative but [to] say that my only answer to your question is a "No". I would emphasize that I only say it because you don't seem to want [to] accept any explanation or reasons but are insisting on such an answer and at the same time not releasing [*sic*] the goods which [are] overdue for more than 1 month.

I regret to note [the Respondent]'s stance in this matter which I must admit I find very unreasonable and inexplicable. I would however, emphasize that [the Appellant] do[es] not in

anyway intend by my answer to in anyway [*sic*] affect [the Distributorship Agreement] we have with [the Respondent] and tarnish the good rapport we have with [the Respondent] for the last 13 years. We intend to continue and carry on with in expanding with [*sic*] the relationship with [the Respondent] for posterity and work towards an amicable resolution of this rather "unhappy" state which is raised abruptly.

…

*Please note and I do emphasize that I do not think that there is any issue as to "competing" product for these brands and product (both local and foreign) have been marketted [*sic*] by [the Appellant] along with Deuter [products] in all my 18/19 retail shops and to my wholesalers in Singapore, Malaysia and Thailand and [the Respondent] is fully aware of the same throughout. I am amazed that my practise [*sic*] which you are fully aware of all of a sudden become[s] an issue as "competing" brands and inexplicably [*sic*].*

Last but not least I urge [the Respondent] to consider having the matter resolved amicably and not to let this matter escalate into unnecessary litigation, You know that I have always had [the Respondent's] interest at heart throughout the 13 years of business and made Deuter a premier brand in Singapore, Malaysia and Thailand despite the local and foreign brands which you now issue [*sic*] being sold together.

I trust that my reply will resolve the matter and please let me know what we could do to resolve any impasse in this matter.

[emphasis added]

11 Upon receiving Mr Yee's e-mail dated 27 January 2005, the Respondent issued, on the *very same day*, a notice of termination ("the Termination Notice") and terminated the Distributorship Agreement on the following four grounds:[note: 12]

(a) the reduction of the Appellant's wholesale business from 500 retailers' accounts to 50 retailers' accounts;

(b) the Appellant's excessive discounting of Deuter products over an extended period of time;

(c) the sale of competing products without obtaining the Respondent's written consent; and

(d) an essential change in the running of the Appellant's business and financial situation had occurred, and this had the effect of influencing the results which the Respondent could legitimately expect.

12 As already noted at [9] above, in view of the fact that the Amendment Agreement had conclusively resolved the excessive discounting and reduction of wholesale accounts issues, the Judge held that the first, second and fourth grounds could not be relied upon by the Respondent in order to terminate the Distributorship Agreement. The Respondent has accepted that finding, and the only ground left for the purposes of this appeal is the third one – the breach of the Non-Competition Clause.

13 An elaboration of the third ground can be found in the Termination Notice itself, which states:

A further intention of the [the Distributorship Agreement] is that we give you exclusivity for your

> territories and you in return will give us exclusivity regarding our products. However, in your email dated 27th January 2005, you informed us that you have sold competing products for some time without our written consent, and that you will continue to sell competing products now and in the future. You have failed to undertake to us to-date that you will definitely cease selling competing products. That is not acceptable to us.

In response to the Termination Notice, the Appellant's then solicitors, M/s Netto & Magin LLC, on 21 March 2005, wrote to the Respondent to inform it that the Appellant did "not accept [the] wrongful repudiation" and elected to "affirm the [Distributorship Agreement] and shall look towards [the Respondent] for full damages and loss of profits for [the] wrongful repudiation".[note: 13]

14 Finally, on 27 April 2005, the Appellant commenced legal proceedings against the Respondent, claiming damages for the Respondent's wrongful termination of the Distributorship Agreement.

Findings of the trial court

15 The first issue which the Judge addressed was one of excessive discounting. The Respondent's complaint was that the Appellant's excessive discounting of Deuter products over an extended period of time was contrary to its obligation to position Deuter as a "high quality brand". In this regard, the Judge observed that the Amendment Agreement "had put to rest the parties' differing views over the matter" (at [11] of the GD). In addition, the Judge observed that it was "patently clear to both the parties that the Amendment [Agreement] was limited only to the discounting and retailer issues" (at [23]). As mentioned earlier (see [9] above), it is common ground and undisputed that both the discounting and retailer issues cannot be used by the Respondent as grounds for the termination of the Distributorship Agreement. Quite rightly, the Respondent has not contested both issues during the appeal, and there is therefore no need to consider these issues further.

16 As mentioned at [5] above, the Judge accepted that there was an "understanding" between the Appellant and the Respondent that the Non-Competition Clause would *not* be activated as long as the Appellant met the Purchase Target (see the GD at [13]). Further, the Judge also held (see [12] above) that the only ground which the Respondent could rely on in order to terminate the Distributorship Agreement was the breach of the Non-Competition Clause. In this regard, the Judge found that the Purchase Target was *not* met for the year 2004 (see the GD at [17]) and that, therefore, the Non-Competition Clause was activated. The Judge also held that the Respondent enforced the Non-Competition Clause and that the Appellant's refusal to comply with the clause constituted a breach of the Distributorship Agreement (at [24] of the GD). In so far as the Appellant's allegation that the parties' act of entering into the Amendment Agreement constituted a waiver of the Appellant's obligations under the Non-Competition Clause was concerned, the Judge (after considering the correspondence between the Appellant and the Respondent in some detail) held (at [24] of the GD) that it did not. The Appellant has not disputed these findings. In any event, it bears emphasising that, in our view, these findings cannot be impugned on the evidence.

17 Having established that the Appellant had breached the Non-Competition Clause, the Judge addressed the second issue, which is whether the breach was one that would entitle the Respondent to terminate the Distributorship Agreement. In this regard, the Judge referred to the High Court decision of *Singapore Tourism Board v Children's Media Ltd* [2008] 3 SLR 981 (recently affirmed by this court in *Children's Media Ltd v Singapore Tourism Board* [2009] 1 SLR 524), where Lai Siu Chiu J stated (at [32]):

> To constitute repudiation, the threatened breach must be such as to deprive the injured party of a substantial part of the benefit to which he is entitled under the contract. The applicable test is

whether the consequences of the breach are such that it will be unfair to the injured party to hold it to the contract and leave it to its remedy in damages as and when a breach occurred (*Highness Electrical Engineering Pte Ltd v Sigma Cable Co (Pte) Ltd* [2006] 3 SLR 640 at [11]).

Further, the Judge noted the following observations in the English Court of Appeal decision of *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 WLR 361 where Buckley LJ stated (at 379–380):

> Each party to an agreement is entitled to performance of the contract according to its terms in every particular, and any breach, however slight, which causes damage to the other party will afford a cause of action for damages; but not every breach, even if its continuance is threatened throughout the contract or the remainder of its subsistence, will amount to a repudiation. To constitute repudiation, the threatened breach must be such as to deprive the injured party of a substantial part of the benefit to which he is entitled under the contract.

18 The Judge highlighted the following aspects of the relationship between the Appellant and the Respondent in arriving at the conclusion that the Appellant's unequivocal refusal to cease selling competing products had deprived the Respondent of a substantial part of the benefit to which it was otherwise entitled. First, the Appellant was the exclusive distributor for the Respondent. Secondly, the purpose of the Non-Competition Clause (which would be triggered by the inability to meet the Purchase Target) was to ensure that the Appellant would look after the interests of the Respondent. In particular, the interests sought to be protected by the Non-Competition Clause included market penetration and brand building objectives (reference may, in this regard, be made to the second paragraph of the Distributorship Agreement, reproduced above at [6]). To elaborate, the Judge found (at [27] of the GD) that:

> [T]he purpose of the [N]on-[C]ompetition [C]lause (along with the US$1m understanding) was to ensure that the [Appellant] would continue to look after the interests of the [Respondent] (having regard to the former's other conflicting brands and interests). This is especially so as the [Appellant] acted as an exclusive distributor for the [Respondent].

Further, the Judge was of the view that the Non-Competition Clause was "closely allied" to the objectives of market penetration and brand building (see the GD at [28]).

Issues on appeal

19 In its written submissions to this court, the Appellant contended that the Respondent had wrongfully terminated the Distributorship Agreement as:

> (a) The Appellant had met the Purchase Target for 2004 and the Respondent was accordingly not entitled to prospectively activate the Non-Competition Clause in the Distributorship Agreement.
>
> (b) Alternatively, even if the Non-Competition Clause had been activated for 2005, the Appellant's non-compliance with this clause was not so serious as to entitle the Respondent to terminate the Distributorship Agreement.

20 However, during oral submissions to this court, the Appellant did not pursue its first submission relating to the Purchase Target. The Appellant, in other words, decided to proceed only with the second (alternative) submission, namely, that the Appellant's continued sale of competing products did not amount to a breach entitling the Respondent to prematurely bring the Distributorship

Agreement to an end.

21 There are two consequences flowing from the Appellant's decision to proceed with this appeal on the basis that the Appellant had not met the Purchase Target for 2004. First, we need not discuss the arguments that were made in relation to the Appellant's first submission. Secondly, it became unnecessary for the Appellant to proceed with its application to amend its pleadings to accommodate the Judge's express finding that there was an understanding between the parties that the Non-Competition Clause in the Distributorship Agreement would be inactive if the Appellant met the Purchase Target for 2004.

22 Hence, the only issue before us was whether or not the Appellant's continued sale of competing products in contravention of the Non-Competition Clause constituted a breach which entitled the Respondent to terminate the Distributorship Agreement. Before proceeding to address this issue, it would be apposite to consider the applicable principles of law first.

The applicable principles of law

When is the innocent party entitled to terminate the contract?

The principles set out in RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd

23 It is axiomatic that not every breach of contract will entitle the innocent party to terminate the contract concerned. As this court put it in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR 413 ("*RDC Concrete*") at [90]:

> [I]t 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). [emphasis in original]

24 Indeed, *RDC Concrete* dealt with the applicable principles as to when the innocent party would be entitled to terminate the contract in some detail (see generally at [89]–[113] of *RDC Concrete*). An extremely brief summary of those principles was in fact set out by this court in its subsequent decision in *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR 663 ("*Man Financial*"), as follows (at [153]–[158]):

> 153 As stated in *RDC Concrete*, there are four situations which entitle the innocent party ... to elect to treat the contract as discharged as a result of the other party's ... breach.
>
> 154 The *first* ("Situation 1") is where the contractual term in question clearly and unambiguously states that, should an event or certain events occur, the innocent party would be entitled to terminate the contract (see *RDC Concrete* at [91]).
>
> 155 The *second* ("Situation 2") is where the party in breach of contract ("the guilty party"), by its words or conduct, simply *renounces* the contract inasmuch as it clearly conveys to the innocent party that it will not perform its contractual obligations at all (see *RDC Concrete* at [93]).
>
> 156 The *third* ("Situation 3(a)") is where the term breached ... is a *condition* of the contract. Under what has been termed the "condition-warranty approach", the innocent party is entitled to terminate the contract if the term which is breached is a condition (as opposed to a warranty):

see *RDC Concrete* at [97]. The focus here, unlike that in the next situation discussed below, is not so much on the (actual) consequences of the breach, but, rather, on the *nature of the term* breached.

157 The *fourth* ("Situation 3(b)") is where the breach of a term deprives the innocent party of substantially the whole benefit which it was intended to obtain from the contract (see *RDC Concrete* at [99]). (This approach is also commonly termed the "*Hongkong Fir* approach" after the leading English Court of Appeal decision of *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26; see especially *id* at 70.) The focus here, unlike that in Situation 3(a), is not so much on the nature of the term breached, but, rather, on the *nature and consequences of the breach*.

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

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

[emphasis in original]

25 By way of some further elaboration, the concept of a "condition" as well as the concept of a "warranty" (pursuant to the "condition-warranty approach") have both been described in *RDC Concrete*, as follows (at [97]–[98]):

97 In the *second* situation (Situation 3(a)) [*viz*, the "condition-warranty approach"; see also [24] above], 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 … nevertheless be entitled to all the damages that it can establish in law.

[emphasis in original]

26 The "*Hongkong Fir* approach", on the other hand, has been described (also in *RDC Concrete* at

[99]), as follows:

> 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 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). [emphasis in original]

A critique of RDC Concrete

(1) The critique

27 Two learned commentaries relating to *RDC Concrete* have been published since that decision was released (see J W Carter, "Intermediate Terms Arrive in Australia and Singapore" (2008) 24 JCL 226 ("Carter's Critique") and Goh Yihan, "Towards a Consistent Approach in Breach and Termination of Contract at Common Law: RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd" (2008) 24 JCL 251 ("Goh's Critique")). The latter article, as its title suggests, focuses wholly on *RDC Concrete*, whereas the former also considers the recent (and significant) High Court of Australia decision of *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited* (2007) 233 CLR 115 ("*Koompahtoo*") (which decision is also noted in Kanaga Dharmananda and Anthony Papamatheos, "Termination and the Third Term: Discharge and Repudiation" (2008) 124 LQR 373 as well as in P G Turner, "The *Hongkong Fir* Docks in Australia" [2008] LMCLQ 432 ("Turner on *Hongkong Fir*")). It might be observed, parenthetically, that the majority of the judges in *Koompahtoo* (Gleeson CJ, Gummow J, Heydon J and Crennan J) did not (in a joint judgment) rest their decision on the ground that the terms concerned comprised conditions (see *Koompahtoo* at 140 and 147), but held, instead, that pursuant to the *Hongkong Fir* approach, the breaches had been serious enough to entitle the innocent party to terminate the contract. (This was in contrast to the view of Kirby J, who, whilst arriving at the same *result* as the majority, was nevertheless of the view that the *Hongkong Fir* approach ought *not* to be part of Australian law – a somewhat controversial view which, however, is not relevant for our present purposes and which, in any event, does not (in our view) represent Singapore law).

28 A common point of critique of *RDC Concrete* in both Carter's Critique and Goh's Critique centres on the failure in that case to exclude the *Hongkong Fir* approach where the parties have in fact agreed that the term breached is a "warranty". In other words, the argument is that where parties are found to have intended (presumably, either expressly or as a matter of construction) a term to be a warranty (hereinafter "a warranty intended by the parties"), their intention *should* be given effect to and the term concerned should be conferred the legal effect of a warranty (pursuant to the condition-warranty approach) (reference may also be made to Donal Nolan, "*Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd, The Hongkong Fir* (1961)" in ch 9 of *Landmark Cases in the Law of*

Contract (Hart Publishing, 2008) (Charles Mitchell & Paul Mitchell gen eds), ("Nolan on *Hongkong Fir*") at pp 293–294). This particular critique is not unpersuasive but, as will be seen (as well as elaborated upon shortly), the approach taken in *RDC Concrete* is in fact premised on the preference for an outcome arrived at quite *independently of* the parties' intention (in situations where the term concerned is *not* a condition pursuant to the condition-warranty approach). In this respect, therefore, this particular critique proceeds on an entirely different basis altogether. The key to answering the critique obviously lies in the continued validity of the concept of a warranty intended by the parties (pursuant to the condition-warranty approach). Let us now elaborate on this particular category of term.

(2) The legal effect of a warranty intended by the parties

(A) A MATTER OF OBJECTIVE CONSTRUCTION AND TWO SITUATIONS

29 As a preliminary point, we would also observe that the mere fact that the parties have designated a particular term as a "warranty" (without more) may not necessarily be dispositive of the matter. For example, in the House of Lords decision of *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 ("*Schuler*"), it was held by the majority of the House that, despite the fact that the parties concerned had expressly utilised the word "condition", the word was utilised merely in a lay sense, and not as a legal term of art. However, in *Man Financial*, we did express the view (reproduced below at [59]) to the effect that the majority in *Schuler* were, in substance and effect, applying the *Hongkong Fir* approach (as opposed to the condition-warranty approach). Whilst that is one interpretation of the decision in *Schuler*, it nevertheless does not detract from the general principle just noted to the effect that the facts and context may cast doubt on whether or not the parties intended, even in the situation where there is an express use of the word "warranty", the term to be a "warranty" in the manner utilised under the condition-warranty approach. In summary, the matter is one of *objectively construing* the contract concerned.

30 The objective construction of the contract concerned leads to the possibility that a term can be a warranty (as defined under the condition-warranty approach) in at least *two* possible situations.

31 The *first* situation is where the court finds that the term concerned is *not* a condition pursuant to the condition-warranty approach. If so, such a term must, *ex hypothesi*, be a warranty pursuant to that same approach. We assume that, in such a situation, the parties have not *expressly* stated that the term concerned is a warranty. We would characterise such a term as "a warranty *impliedly* intended by the parties". *Secondly*, a term can be a warranty in a situation where the parties concerned *expressly* intend it to be a warranty (hereinafter "a warranty *expressly* intended by the parties").

(B) A WARRANTY EXPRESSLY INTENDED BY THE PARTIES LIKELY TO BE RARE OR AT LEAST UNCOMMON

32 In our view, a warranty *expressly* intended by the parties is, however, likely to be rare (or at least uncommon) in practice. For this reason, we are of the view that the critique in the articles (above at [27]) is, in the main, of theoretical interest and should not (in the nature of things) raise matters of significance in practice (*cf* also Carter's Critique ([27] *supra*) at 247 and Nolan on *Hongkong Fir* ([28] *supra*) at p 294).

33 Indeed, such a situation is likely to be rare (or at least uncommon) if we assume (as we must) that the concept of the "warranty" is that which is embodied within the condition-warranty approach (as to which, see above at [25]). Put simply, a term is a warranty in the sense just mentioned if any breach of it would *never* entitle the innocent party to terminate the contract, even if the

consequences of the breach were so serious as to deprive the innocent party of substantially the whole benefit of the contract which it was intended that the innocent party should have. Such a situation (as already alluded to above) will be rare (or at least uncommon) simply because most parties would be concerned about whether or not they would be legally justified in *terminating* the contract in the event of a breach of the term concerned. However, that having been said, we cannot rule out the possibility that parties might nevertheless be concerned to ensure that the contract *continues in spite of* the *breach* of a term therein (by way of a warranty *expressly* intended by the parties). Nevertheless, such a situation – it is important to reiterate – is likely (in the nature of things) to be rare (or at least uncommon). Let us now proceed to consider that situation in general and the applicable legal test in particular. However, *before* proceeding to do so, it would be appropriate, in our view, to consider, first, the situation where a warranty is, instead, *impliedly* intended by the parties.

(C) A WARRANTY IMPLIEDLY INTENDED BY THE PARTIES

34 Turning, first, to the situation where the parties did *not expressly* designate the term concerned as a warranty, it is our view that, if the court finds that the parties did not intend a particular term to be a condition (pursuant to the condition-warranty approach), it would necessarily follow that the parties must have intended that term to be a warranty instead. At this juncture, we are back – full circle, as it were – to the condition-warranty approach in its "purest" form. More importantly, the result of such an approach is that there is *no scope whatsoever* for any application of the *Hongkong Fir* approach – at least in cases where the factual matrix is such that the application of both approaches would yield different results. This would be the case, for example, where the term which is breached is classified as a warranty under the condition-warranty approach but where the *consequences* of the breach are so serious as to deprive the innocent party of substantially the whole benefit that it was intended that the innocent party should have. Another obvious example would be where the term which is breached is classified as a *condition* under the condition-warranty approach but where the *consequences* of the breach are *not* so serious as to deprive the innocent party of substantially the whole benefit that it was intended that the innocent party should have (reference may also be made to *RDC Concrete* ([23] *supra*) at [102]–[103]).

35 In summary, therefore, there is, in our view, *only one* of two conclusions possible if one were to apply the condition-warranty approach: the term concerned is *either a condition or a warranty*. There is no middle ground. Further, it cannot be argued that the court is unable to objectively ascertain the parties' intention as to whether a term is to be a condition or warranty in its legal sense. We indicated in *RDC Concrete* that, in so far as Singapore law is concerned, the court would give effect to the parties' intention where they have very clearly and unambiguously indicated that a term is to have the effect of a *condition* (*ie*, "Situation 1"; see [24] above) *or* where the court concludes that that term is a *condition*, having applied the condition-warranty approach (pursuant to "Situation 3(a)"; see [24] above).

36 If the condition-warranty approach is treated as admitting of only one of two possibilities, *ie*, that a term is either a condition or a warranty, then (as already noted above) there is logically no place for the *Hongkong Fir* approach. We are of the view, therefore, that the approach adopted in *RDC Concrete* is the only one which permits the *Hongkong Fir* approach to be accommodated in any meaningful sense without simultaneously going to the other extreme of completely effacing (in substance at least) the condition-warranty approach. Indeed, in this last-mentioned regard, the *very nature* of an *intermediate* term is such that giving *precedence* to the *Hongkong Fir* approach would invariably result in the court looking *only* at the *consequences* of the breach since *virtually every term would be an intermediate term*, simply because it could almost always be argued that the breach of *any* term could result in *either serious or trivial consequences*. In our view, this is not

desirable. Returning to the central point made at the outset of this paragraph, "legal space" must be made for the application of the *Hongkong Fir* approach, which itself embodies its own conception of fairness (see also the analysis of F M B Reynolds, "Warranty, Condition and Fundamental Term" (1963) 79 LQR 534 (where it is argued that the focus should be on the nature of the breach, rather than the nature of the term broken); Prof Treitel's inaugural lecture delivered on 7 March 1980 before the University of Oxford in G H Treitel, *Doctrine and Discretion in the Law of Contract* (Clarendon Press, 1981) at p 6 (where it is pointed out that the law relating to discharge for breach was focused, *originally*, on the *seriousness* of the breach although it later developed to focus on the nature of *the term* (pursuant to the condition-warranty approach); and Nolan on *Hongkong Fir* ([28] *supra*) at pp 270–276 as well as p 294). Stated simply, the fairness in this regard would lie in avoiding the potentially grave injustice which could be occasioned to the innocent party who could potentially suffer the serious consequences of the breach but is unable to terminate the contract because the term is given the legal status of a "warranty" (pursuant to the condition-warranty approach).

37 The conception of *fairness* referred to in the preceding paragraph must, by definition and logic, be an *objective* one. However, it has been argued by Goh that the court would, pursuant to the approach adopted in *RDC Concrete* and (in particular) by insisting on applying the *Hongkong Fir* approach as a *general* rule, be "wanting to do 'justice' on its own terms'" (see Goh's Critique ([27] *supra* at 267)). Indeed, the author proceeds to elaborate thus (*ibid*):

> In the present context, this means that even if the outcome is sufficiently serious from an objective point of view, this should not detract from the parties' intentions that no termination is possible, if this is decipherable from the contract.

38 In our view, it is clear that, compared to the condition-warranty approach, the *Hongkong Fir* approach embodies a somewhat *different* conception of the concept of fairness. However, this does not, *ipso facto*, render *this* particular conception an arbitrary one. We do not (in fairness to the learned author) assume him to be arguing that the *Hongkong Fir* approach embodies (and/or leads to) arbitrariness (see, in particular, his reference to "an objective point of view" in the quotation above).

39 Indeed, it is also apposite to note, at this juncture, that Diplock LJ's analysis in the English Court of Appeal decision of *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 ("*Hongkong Fir*") (which is the root source of the *Hongkong Fir* approach (see also above at [26])) has received the highest praise. In the leading House of Lords decision of *Bunge Corporation, New York v Tradax Export SA, Panama* [1981] 1 WLR 711, Lord Wilberforce referred to it (at 714) as a "seminal judgment" whilst Lord Roskill expressed the view (at 725) that "the judgment of Diplock L.J. in the *Hongkong Fir* case is, if I may respectfully say so, a landmark in the development of one part of our law of contract in the latter part of this century".

40 It is also apposite to note that, to the best of our knowledge, all the major Commonwealth jurisdictions have endorsed the *Hongkong Fir* approach (these include Australia (see, for example, *Koompahtoo* ([27] *supra*); Canada (see, for example, the Alberta Supreme Court decision of *Dow Chemical of Canada Limited v R V Industries Ltd* (1979) 9 Alta LR (2d) 129; the Ontario Court of Appeal decision of *Jorian Properties Ltd v Zellenrath* (1984) 46 OR (2d) 775; the Ontario High Court of Justice decision of *First City Capital Ltd v Petrosar Ltd* (1987) 61 OR (2d) 193; the British Columbia Court of Appeal decision of *Lehndorff Canadian Pension Properties Ltd v Davis Management Ltd* (1989) 59 DLR (4th) 1; the Alberta Court of Appeal decision of *First City Trust Co v Triple Five Corp Ltd* (1989) 57 DLR (4th) 554; the British Columbia Court of Appeal decision of *Ramrod Investments Ltd v Matsumoto Shipyards Limited* (1990) 47 BCLR (2d) 86; and the Alberta Provincial Court decision of *Krawchuk v Ulrychova* [1996] 8 WWR 183 (and *cf* the Supreme Court of Canada decision of *Field v Zien* (1963) 42 DLR (2d) 708 as well as the Ontario Court of Appeal decision of *968703 Ontario Ltd v*

Vernon (2002) 58 OR (3d) 215)); and Hong Kong (see, for example, the Hong Kong Court of Final Appeal decision of *Mariner International Hotels Ltd v Atlas Ltd* (2007) 10 HKCFAR 1; the Hong Kong Court of Appeal decisions of *Leung Yee v Ng Yiu Ming* [2001] 1 HKC 342 and *Creatiles Building Materials Co Ltd v To's Universe Construction Co Ltd* [2003] 2 HKLRD 309; the Hong Kong Court of First Instance decisions of *Samsung Hong Kong Ltd v Keen Time Trading Ltd* [1998] 2 HKLRD 341 (affirmed in the Hong Kong Court of Appeal decision of *Samsung Hong Kong Ltd v Keen Time Trading Ltd* [1999] 2 HKC 447), *Okachi (Hong Kong) Co Ltd v Nominee (Holding) Ltd* [2005] 4 HKLRD 447 (affirmed in the Hong Kong Court of Appeal decision of *Okachi (Hong Kong) Co Ltd v Nominee (Holding) Ltd* [2007] 1 HKLRD 55) and *Secretary for Justice v Yu's Tin Sing Enterprises Co Ltd* [2008] HKCU 1391; [2008] HKCFI 768; as well as Stephen Hall, *Law of Contract in Hong Kong – Cases and Commentary* (LexisNexis, 2nd Ed, 2008) at ch 10).

41 Unfortunately (and, again, to the best of our knowledge), none of these decisions actually deals (expressly at least) with the *precise relationship* between the condition-warranty approach and the *Hongkong Fir* approach. We attempted to do so in *RDC Concrete* ([23] *supra*) and now are attempting to deal with at least one remaining issue that has arisen from the critique in the articles cited earlier (at [27] above).

42 It is appropriate, at this juncture, to consider the powerful argument proffered in Goh's Critique ([27] *supra*) to the effect that the approach adopted by this court in *RDC Concrete* does not give full effect to the intentions of the parties inasmuch as if the parties' intention was that the term breached was to be a *warranty*, then the court ought to give effect to that intention. *However*, to do this would be to *return fully to the condition-warranty approach and (more importantly) to leave no scope for application of the* Hongkong Fir *approach*, which (as we have already explained above) is undesirable. It is true that the author does argue that the *Hongkong Fir* approach can still apply where the parties' intention is *not objectively ascertainable*. However, whilst theoretically attractive, such an argument does not, with respect, recognise (as we mentioned above at [35]; see also below at [44]) the fact that in a situation where the term concerned has been ascertained by the court to be a *condition*, the intention of the parties has, *ex hypothesi*, been *ascertained. Indeed, it is difficult to envisage or even imagine a situation where the intention of the parties cannot be objectively ascertained by the court*. Goh is, however, correct in arguing that the court has, on the approach adopted in *RDC Concrete*, gone further and imputed (albeit not, as we explain below, as an irrebuttable presumption) an intention to the parties in nevertheless proceeding to apply the *Hongkong Fir* approach in a situation (it is important to emphasise) where the court has decided that the term was not intended by the parties to be a "condition"; as the author put it (see Goh's Critique at 264):

> The court [in *RDC Concrete*] evidently saw that *even if* the parties had intended a term to be a warranty, that ought still to be subject to the *Hongkong Fir* approach. *Such an approach would not be in line with any conceptual basis other than the court's (important, it must be said) desire to do 'justice'*. [emphasis added]

43 However, as we have already pointed out above, if the court decides that the parties did not intend the term concerned to be a "condition", it would necessarily follow (if Carter's Critique and Goh's Critique as well as their proposed approach are accepted) that the parties must have intended that term to be a warranty. If so, as also pointed out above, this would leave no scope whatsoever for the application of the *Hongkong Fir* approach. In our view, it is difficult (perhaps even impossible) to effect a perfect integration between both these approaches. That is why this court, in *RDC Concrete*, observed thus with regard to the effective fate of the "warranty", as follows (at [107]–[108]):

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.

[emphasis in original]

44 As already mentioned (above at [42]), Goh is correct in pointing out that the court is, in effect, applying the *Hongkong Fir* approach as "imputed" to the parties as a *general* rule (provided that it has decided that the term is *not* a condition), although it is important to note that this general rule is subject to *a limited exception* (see below at [48]–[50] and [57]). In contrast, the learned author argues, on the other hand, that the *Hongkong Fir* approach ought to be applied as "a *fallback* rule" [emphasis added] instead (see Goh's Critique, especially at 261). However, as we have already emphasised a number of times during the course of this judgment, the approach adopted by Goh would *not*, with respect, be *practically* viable inasmuch as there would be *virtually no* situation where the court could (on his approach) turn to the *Hongkong Fir* approach by way of a fallback position. It is important to reiterate the important point that the court would *necessarily* (from *both* practical *as well as* theoretical perspectives) have ascertained that the parties intended the term concerned to be *either* a condition *or* a warranty. To elaborate, if the court decides that the parties intended the term concerned to be a condition, that is an end to the matter (even under the approach adopted in

RDC Concrete) inasmuch as the innocent party is entitled to terminate the contract. If, however, the court decides that the parties did *not* intend the term to be a condition, it must *necessarily follow* (leaving aside the *Hongkong Fir* approach for the moment) that the parties must have intended the term to be a warranty instead. Put simply, either the parties intended the term concerned to be an important one (in which case it would be a condition) *or* they did not (in which case it would be a warranty). If so, then there is no need (or even justification) for the court to go any further and apply the *Hongkong Fir* approach; that particular approach has, in effect, become moribund.

45 However, might it be also argued that there could be situations where whilst the parties did not intend the term to be a condition, they might have intended that the term be an *intermediate* one instead of a warranty? Whilst *theoretically* attractive, such an argument fails, in our view, to take into account the fact (noted above at [36]) that an *intermediate* term will, by *its very nature*, always tend to cover the entire "field", so to speak (see also above at [43]). More importantly, this result stems, in the final analysis, from the *conceptual incompatibility* of the condition-warranty approach on the one hand and the *Hongkong Fir* approach on the other. It is true that, on a *practical* level, both approaches often yield the *same* result. *However*, as we have already pointed out (above at [34]), *certain fact situations* could also yield *radically different* results which are arrived at as a result of the conceptual incompatibility just mentioned. Put simply, the condition-warranty approach entails looking at the *nature* of the term concerned *whereas* the *Hongkong Fir* approach entails looking at the *actual consequences* of the breach instead (see also *RDC Concrete* ([23] *supra*) at [99], reproduced above at [26]). This is an important point because it means that, on both *theoretical as well as practical* levels, a court *must necessarily commence* with the application of *either* the condition-warranty approach *or* the *Hongkong Fir* approach.

46 Indeed, in *RDC Concrete*, this court commenced with the *condition-warranty approach* (pursuant to Situation *3(a)*). This being the case, then the concept of the "*intermediate* term", which is the quintessential product of the *Hongkong Fir* approach, only operates *later* (pursuant to Situation *3(b)*). Such an approach is, in our view, both eminently just and fair as well as practical. As already mentioned (at [36] above), the application of the *Hongkong Fir* approach right at the outset would leave no "legal space" for application of the condition-warranty approach. On the other hand, as we have explained in some detail above, application of the condition-warranty approach must nevertheless also leave "legal space" for application of the *Hongkong Fir* approach. Most importantly, the approach adopted (pursuant to Situation 3(a) and Situation 3(b) in *RDC Concrete*, and in that particular order of priority) achieves, in our view, a just and fair outcome, balancing both approaches in the process.

47 It is, however, important, at this juncture, to note (indeed, emphasise) that the *intermediate* term is *not* thereby *without legal significance*: The combined legal effect as a result of the application of, first, Situation 3(a) and *then* Situation 3(b) is that if a term is not a condition under the condition-warranty approach (Situation *3(a)*), the court will *then* consider whether the innocent party is nevertheless legally justified in terminating the contract under the *Hongkong Fir* approach (Situation *3(b)*); in other words, if the term is not a condition, it is *presumed* to be an *intermediate* term instead. In this regard, the concept of the "warranty" has been effectively effaced (see also above at [43]). The issue that now arises is whether or not that effacement is (or ought to be) a *total* one. If, in other words, a term is not a condition (pursuant to Situation 3(a)), is it (at least in substance and effect) *irrebuttably presumed* to be an *intermediate* term (pursuant to Situation 3(b))? *Or*, could it be argued, on the contrary, that the presumption just mentioned is *rebuttable*? In particular, could it be argued that, where the parties *expressly* designate the term concerned as a "warranty" in clear and unambiguous terms (*viz*, a warranty *expressly* intended by the parties), the presumption is thereby *rebutted*? This is an important issue to which our attention must now turn.

(D) A WARRANTY EXPRESSLY INTENDED BY THE PARTIES

48 Although we observed earlier in this judgment (above at [32]–[33]) that a situation in which the parties *expressly* agree a term to be a warranty is likely to be in practice rare (or at least uncommon), we would *not* categorically hold that the parties can *never* agree that a particular term should have the *legal effect* of a "*warranty*" in the sense the word is understood and utilised pursuant to the condition-warranty approach (*cf* also the English High Court decision of *M & J Polymers Ltd v Imerys Minerals Ltd* [2008] 1 Lloyd's Rep 541 at 547). In this regard, we are envisaging a possible situation where the parties state this *not only clearly but also in no uncertain terms* – in other words, *the parties, expressly state that any breach of a particular term, no matter how serious and regardless of the consequences of the breach, would never entitle the innocent party to terminate the contract* (this is, in fact, the "reverse" or "mirror" image of Situation 1 (as to which, see below at [51])). As opposed to simply stating expressly, without more, that the term concerned is a "warranty", such a stipulation by the parties does, in no uncertain terms, in fact convey their intention that a term is to be a warranty, as that is defined under the condition-warranty approach. The potential difficulties introduced by *Schuler* ([29] *supra*) – where there was some ambiguity as to the objective meaning of a term – would therefore not arise in such a situation.

49 It is significant to note, at the outset, that Diplock LJ himself in *Hongkong Fir* ([39] *supra*) acknowledged (at 70) that:

> [T]here may be other simple contractual undertakings of which it can be predicated that *no* breach can give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract; and such a stipulation, unless the parties have agreed that breach of it shall entitle the non-defaulting party to treat the contract as repudiated, is a "warranty." [emphasis in original]

The type of term described in the preceding paragraph would, in fact, be of the nature described by Diplock LJ in the above quotation. Indeed, it is also significant to note that the learned judge also acknowledged (*ibid*) that what we have described as the *Hongkong Fir* approach was *subject to express provision in the contract* (which would, again, include the type of term described in the preceding paragraph).

50 We have also raised (above at [45]–[47]) the issue as to whether a *presumption* that a term is an *intermediate* term (under Situation 3(b)) is an irrebuttable one that is writ in stone. We are of the view that the answer to this particular issue must be in *the negative*. Consistently with Diplock LJ's views, which were noted in the preceding paragraph, it must surely be open to the parties to *expressly agree (in clear and unambiguous language)* that the term concerned can *never* give rise to a legal right to terminate the contract, *regardless of the consequences of the breach* of that particular term (*viz*, to agree to a warranty *expressly* intended by the parties). Such an agreement would, in our view, *clearly rebut* the *(initial) presumption* that the term is an intermediate term. We also note that such a term is (as we have observed above (at [32]–[33])) likely to be *rare (or at least uncommon)* to begin with. We would add that, in such circumstances, the conception of fairness embodied in the ideal of the sanctity of contract should be given effect to (indeed, priority) in *this* particular situation.

51 A similar approach (which also, in fact, embodies the ideal of the sanctity of the contract) is to be found in Situation 1. One issue that arises in relation to Situation 1 is whether it could be said that Situation 1 and Situation 3*(a)* are, in effect, the same – at least in so far as the issue of *termination* is concerned. *Situation* 1 itself was, in fact, described in *RDC Concrete* ([23] *supra*) in the following terms (at [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 ... 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. [emphasis in original]

(Reference may also be made, in this regard, to *Man Financial* ([24] *supra*) at [154].)

52 It is important, at this point, to reiterate that Situation 1 relates to a situation where there is a *clear and unambiguous* statement that, in the event of a breach and/or a certain event or events occurring, the innocent party will be entitled to terminate the contract. Much will, of course, depend on the precise language as well as the context concerned (*cf*, for example, the recent English Court of Appeal decision of *Rice v Great Yarmouth Borough Council* [2003] TCLR 1 (critiqued by Simon Whittaker, "Termination Clauses" in ch 13 of *Contract Terms* (Oxford University Press, 2007) (Andrew Burrows & Edwin Peel eds) at pp 277–283) and the New South Wales Court of Appeal decision of *Hewitt v Debus* (2004) 59 NSWLR 617 ("*Hewitt*") with the New South Wales Court of Appeal decision of *Honner v Ashton* (1979) 1 BPR 9478 ("*Honner*") (which Meagher JA, who dissented in *Hewitt*, in fact followed)).

53 Turning to Situation *1* proper, its *basis* is founded on giving effect to the parties' intention by way of a termination clause that may *not necessarily* involve a breach of contract *but nevertheless has the legal effect (in substance) of a condition* (pursuant to the condition-warranty approach) (see also *per* Lord Diplock in the House of Lords decision of *Afovos Shipping Co SA v Romano Pagnan and Pietro Pagnan* [1983] 1 WLR 195 at 203 ("*Afovos Shipping*"); though *cf per* Glass JA in *Honner* (at 9483); reference may also be made to J W Carter, "Termination Clauses" (1990) 3 JCL 90 at 104–105 ("Carter on Termination Clauses") as well as to the recent English Court of Appeal decision of *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] 1 Lloyd's Rep 461 ("*Stocznia Gdynia SA*") (where it was held (it appears as a matter of construction) that the termination clause concerned furnished the same right, as that contained under the common law, to treat the contract as discharged)).

54 Situation *3(a)*, on the other hand, relates to the breach of a *condition* proper (pursuant to the condition-warranty approach). Viewed in this light, *Situation 1* in *RDC Concrete* might (and this is a very important point) be regarded (having regard to the preceding paragraph) as a more *explicit* way of characterising (from the perspective of legal effect) a situation that falls (in substance) within the purview of Situation 3(a). Put simply, there is *no difference (in substance)* between Situation 1 and Situation 3(a).

55 It should, however, be noted, at this juncture, that whilst Situation 1 entails (in substance) the same legal effect as a condition (pursuant to the condition-warranty approach), this is *only* with regard to the *termination* of the contract. However, this does *not necessarily* mean that, from a *remedial* perspective, the innocent party is *also* entitled to the *full* measure of *damages if* there has, in fact, been no breach which would have entitled it to terminate the contract at common law (see the English Court of Appeal decision of *Financings Ltd v Baldock* [1963] 2 QB 104 ("*Financings*") as well as the High Court of Australia decision of *Shevill v The Builders Licensing Board* (1982) 149 CLR 620; but *cf Afovos Shipping* and (more importantly) the English Court of Appeal decision of *Lombard North Central Plc v Butterworth* [1987] QB 527 ("*Lombard*") (which demonstrates that the effect of *Financings* could be avoided by appropriate drafting and which is noted in G H Treitel, "Damages on

Rescission for Breach of Contract" [1987] LMCLQ 143 as well Hugh Beale, "Penalties in Termination Provisions" (1988) 104 LQR 355); reference may also be made to *Stocznia Gdynia SA* as well as Carter on Termination Clauses ([53] *supra*) and Brian R Opeskin, "Damages for Breach of Contract Terminated Under Express Terms (1990) 106 LQR 293); indeed, even if the contract itself stipulates the damages recoverable, the term concerned might still be unenforceable as constituting a penalty clause (see, for example, *Financings* and *Lombard*).

56 There are also further issues raised with respect to possible legal mechanisms for the control of termination clauses pursuant to Situation 1 (as well as with respect to non-termination clauses under the "mirror" or "reverse" image of Situation 1, which we have termed warranties *expressly* intended by the parties), which need not, however, concern us in the present judgment (and see generally Whittaker ([52] *supra*) as well as Beale ([55] *supra*)).

(3) Conclusion

57 We would therefore reaffirm the approach laid down in *RDC Concrete* for the reasons set out above, subject to the *extremely limited exception* that, where the term itself states *expressly (as well as clearly and unambiguously)* that *any* breach of it, *regardless* of the seriousness of the consequences that follow from that breach, will *never* entitle the innocent party to terminate the contract, then *the court will give effect to this particular type of term* (*viz*, a warranty *expressly* intended by the parties). It bears noting that the specific reasons for this particular exception (see above at [48]–[50]) as well as the fact that such a term may be subject to control *via* possible legal mechanisms (see above at [56]) have, in fact, already been set out above.

58 We turn now to a complementary set of applicable principles that is equally important for the purposes of the present appeal, *viz*, the relevant factors in ascertaining whether or not a given contractual term is a condition.

The condition-warranty approach – relevant factors in ascertaining whether a given contractual term is a condition

59 This court, in *Man Financial* ([24] *supra*) set out, in some detail, the relevant factors which a court should consider in ascertaining whether or not a given contractual term is a condition, bearing in mind that there is, in the final analysis, no magical formula as such. In the circumstances, we can do no better than to set out, *in extenso*, the relevant part of that judgment, as follows (at [160]–[174]):

> (a) Introduction
>
> …
>
> 160 It is important to note at the outset that there is no magical formula (comprising a certain fixed number of factors or criteria) that would enable a court to ascertain whether or not a given contractual term is a condition. This is not unexpected, given the very nature of the inquiry itself (which would include a countless number of permutations and variations, depending on the respective factual matrices and, more importantly, the intentions of the respective contracting parties themselves). However, as is inherent within the very nature of common law development, certain factors that might (depending, as just mentioned, on the precise factual matrix concerned) *assist* the court in this regard have been developed.
>
> 161 At *bottom*, the focus is on *ascertaining the intention of the contracting parties*

themselves by construing the actual contract itself (including the contractual term concerned) in the light of the surrounding circumstances as a whole (see the classic exposition on this point by Bowen LJ (as he then was) in the oft-cited English Court of Appeal decision of *Bentson v Taylor, Sons & Co (No 2)* [1893] 2 QB 274 at 281).

(b) The first factor: Where a *statute* classifies a specific contractual term as a "condition"

162 The *first* of the established factors mentioned above (at [160]) is *very specific*: Where a *statute* (or, more often, a particular provision within a statute) classifies a specific contractual term as a "condition", then that term will, of course, be a condition.

163 The paradigm model is the Sale of Goods Act 1979 (c 54) (UK) ("the UK Act"), which is applicable in Singapore by virtue of the AELA [Application of English Law Act (Cap 7A, 1994 Rev Ed)] (… see s 4(1) read with Pt II of the First Schedule to the AELA). Indeed, the UK Act has been reprinted in the local context as the Sale of Goods Act (Cap 393, 1994 Rev Ed). This last-mentioned Act is, in fact, the classic statutory embodiment of the condition-warranty approach inasmuch as it classifies various contractual terms as conditions and warranties, respectively.

164 However, as alluded to above (at [162]), this is a very specific factor and would not cover any contractual terms that fall outside the particular ambit of the statute (or statutory provision) concerned.

(c) The second factor: Where the contractual term itself expressly states that it is a "condition"

165 The *second* factor is an ostensibly obvious one: Where the contractual term itself *expressly states* that it is a "condition", then that term would generally be held by this court to be a condition.

166 *However*, we have added the word "ostensibly" because, even in what appear to be very clear-cut situations, there is case law that suggests that the express use of the word "condition" might (on occasion, at least) be insufficient to render that term a condition in law. In this regard, the House of Lords decision of *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 ("*Schuler*") comes readily to mind. In that case, the majority of the House held that, although the word "condition" was expressly utilised, that word was being utilised not as a term of legal art, but, rather, in a lay sense.

167 At first blush, the approach adopted by the majority in *Schuler* is not a wholly untenable one. After all, it is true that the same word (here, "condition") can take on different meanings depending on the context in which it is used. With respect, however, a close analysis of the reasoning of the majority in *Schuler* demonstrates a preoccupation with the *consequences* of the breach of contract in that case, rather than a focus (in accordance with the condition-warranty approach in Situation 3(a)) on the *nature of the term* breached. Indeed, there is a reference by Lord Kilbrandon (who was one of the majority judges) to the "grotesque consequences" (*id* at 272) of holding the term breached to be a "condition" in the strict legal sense of the word.

168 It is our view that the majority of the House in *Schuler* were, *in substance and effect*, applying the *Hongkong Fir* approach instead (which, it will be recalled, falls under Situation 3(b) and, more importantly, relates to the actual *nature and consequences of the breach* instead). Indeed, there is a very powerful (and, in our view, persuasive) dissenting judgment by Lord Wilberforce (see *Schuler* at 262–263), who warned against rewriting, in effect, what was the

clear intention of the contracting parties that the term concerned be a "condition" in the strict legal sense of the word (in accordance with the substance and spirit of the condition-warranty approach under Situation 3(a)).

169 Indeed, it might well have been the fact situation in *Schuler* which prompted the majority of the House to adopt what was, in substance and effect, the *Hongkong Fir* approach instead. With respect, however, the intention of the parties (pursuant to the condition-warranty approach) ought to take precedence for, as we pointed out in *RDC Concrete* … at [100], although the *Hongkong Fir* approach is conventionally associated with a sense of fairness (in that it allows termination of a contract only if the nature and consequences of the breach are so serious as to deprive the innocent party of substantially the whole of the benefit of the contract which it was intended to obtain from the contract), it is *equally* true that a sense of fairness (albeit from a different perspective) *also* features when the condition-warranty approach is applied inasmuch as it is fair to hold the contracting parties to their original bargain.

170 We also observed in *RDC Concrete* (especially at [110]) that general House of Lords decisions *after Schuler* in fact supported the approach that we adopted in that case (in particular, our stance that the condition-warranty approach in Situation 3(a) should take precedence over the *Hongkong Fir* approach in Situation 3(b) in so far as it ought to be ascertained, first, whether or not the contractual term concerned is a condition): see, for example, *Bunge Corporation, New York v Tradax Export SA, Panama* [1981] 1 WLR 711 ("*Bunge*") and *Torvald Klaveness A/S v Arni Maritime Corporation* [1994] 1 WLR 1465.

(d) The third factor: The availability of a prior precedent

171 The *third* factor is whether a prior precedent is available. An oft-cited illustration in this regard is the English Court of Appeal decision of *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH* [1971] 1 QB 164 ("*The Mihalis Angelos*"), where the court held (at 194, 199–200 and 205–206) that an "expected readiness" clause was a condition on the ground, *inter alia*, that the same conclusion had been reached in by its own previous decision (in *Finnish Government v H Ford & Co, Ltd* (1921) 6 Ll L Rep 188).

172 With respect, reliance on a prior precedent, whilst convenient when viewed from a practical perspective, does not really address the issue of *principle* inasmuch as there would, in our view, still need to be an inquiry as to whether or not the *analysis and reasoning in the prior precedent* passed muster *in principle*. Indeed, this court is, in certain exceptional circumstances, permitted (as the final appellate court) to depart from its own prior decisions pursuant to the criteria set out in this court's *Practice Statement (Judicial Precedent)* [1994] 2 SLR 689. This court is, *a fortiori*, free not to follow prior *English (or other foreign)* decisions if finds the analysis and reasoning therein unpersuasive, or if the prior foreign decision in question is not applicable to the circumstances of Singapore (see, in this last-mentioned regard, s 3(2) of the AELA ...; alternatively, the prior foreign decision concerned can be subject to the necessary modifications, if so required by the circumstances of Singapore (see, again, s 3(2) of the AELA).

(e) The fourth factor: Mercantile transactions

173 The *fourth* factor centres on the importance placed on *certainty and predictability* in the context of *mercantile* transactions. Case law suggests that courts are more likely to classify contractual terms as conditions in this particular context, especially where they relate to *timing* (see, for example, *Bunge* and *The Mihalis Angelos*).

(f) Summary of the relevant factors under the condition-warranty approach

174 The aforementioned factors are important. But, they are not exhaustive and, to use a familiar phrase (albeit in a somewhat different context), the categories of factors are not closed. The actual decision as to whether or not a contractual term is a condition would, indeed, depend very much on the particular factual matrix before the court. It also bears repeating that there is no magical formula. In the final analysis, the focus is on *ascertaining the intention of the contracting parties themselves by construing the actual contract itself (including the contractual term concerned) in the light of the surrounding circumstances as a whole* (see also [161] above).

[emphasis in original]

60 We now turn our attention to the final set of applicable principles that is relevant for the present appeal (and which has not, apparently, been canvassed in previous local decisions), *viz*, the relevant factors in ascertaining whether or not the breach is sufficiently serious such that the innocent party is entitled to terminate the contract pursuant to the *Hongkong Fir* approach.

Relevant factors in ascertaining whether there was substantial deprivation of benefit (pursuant to the Hongkong Fir approach)

61 In ascertaining how serious the breach must be before the innocent party is entitled to terminate the contract, various formulations have been suggested in the case law. Examples of such formulations (which relate to both the condition-warranty approach and the *Hongkong Fir* approach, bearing in mind that the former deals with hypothetical consequences and the latter with actual consequences that occur upon a breach of contract) include the following: "fundamental breach" (see generally the House of Lords decision of *Suisse Atlantique Société d'Armement SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 ("*Suisse Atlantique*")); "breach going to the root of the contract" (see also generally *Suisse Atlantique* and *Koompahtoo* ([27] *supra*) (see below at [63])); breaches that "go so directly to the substance of the contract" (see the English Court of Appeal decision of *Wallis, Son & Wells v Pratt & Haynes* [1910] 2 KB 1003 at 1012 (affirmed, *Wallis, Son & Wells v Pratt & Haynes* [1911] AC 394)); and "frustrate the commercial purpose of the venture" (which is the terminology commonly attributed to the English Court of Exchequer Chamber decision of *Jackson v The Union Marine Insurance Company, Limited* (1874) LR 10 CP 125, although the case itself does not use this precise wording). In our view, it would appear, with respect, that there is no real difference (in *substance*) amongst this as well as the other formulations (although they are obviously phrased, linguistically speaking, in different ways). What *is* difficult is ascertaining whether or not the consequences of the breach are sufficiently serious based on the *precise facts concerned*.

62 In our view, the focus must be on the formulation laid down by Diplock LJ in *Hongkong Fir* ([39] *supra*) itself: The innocent party must establish deprivation of "substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration" (see *Hongkong Fir* (at 66)) for the performance of the innocent party's own obligations. At bottom, the focus is on determining *what exactly constituted the benefit* that it was intended the innocent party should obtain from the contract (which, looked at in one sense, is a question of construction, but not in the sense utilised in the context of ascertaining whether a term is a condition pursuant to the condition-warranty approach (*cf* also *Koompahtoo* (especially at [55], reproduced below at [63]) as well as Turner on *Hongkong Fir* ([27] *supra*) at 435–436, although Turner was probably referring to construction in the latter sense just mentioned)), *and then* examining very closely the *actual consequences* which have occurred as a result of the breach *at the time at which the innocent party purported to terminate the contract in order to ascertain whether the*

innocent party was, in fact, deprived of substantially the whole benefit of the contract that it was intended that the innocent party should obtain. We would emphasise here that regard should be had only to the *actual* consequences and events resulting from the breach.

63 The broad approach mentioned in the preceding paragraph is broadly consistent with that adopted by the majority of the court in the High Court of Australia decision of *Koompahtoo* (which also contains some helpful factors (particularly at [54]) which, however, cannot (in the nature of the inquiry) be exhaustive, let alone conclusive). In that case, the majority of the court (comprising Gleeson CJ, Gummow J, Heydon J and Crennan J) observed thus (at [54]–[56]):

> We add that recognition that, at the time a contract is entered into, it may not be possible to say that any breach of a particular term will entitle the other party to terminate, but that some breaches of the term may be serious enough to have that consequence, was taken up in *Ankar* [*Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549]. *Breaches of this kind are sometimes described as "going to the root of the contract", a conclusory description that takes account of the nature of the contract and the relationship it creates, the nature of the term, the kind and degree of the breach, and the consequences of the breach for the other party. Since the corollary of a conclusion that there is no right of termination is likely to be that the party not in default is left to rely upon a right to damages, the adequacy of damages as a remedy may be a material factor in deciding whether the breach goes to the root of the contract*.
>
> A judgment that a breach of a term goes to the root of a contract, being, to use the language of Buckley LJ in *Decro-Wall International SA v Practitioners in Marketing Ltd* [[1971] 1 WLR 361 at 380], "such as to deprive the injured party of a substantial part of the benefit to which he is entitled under the contract", *rests primarily upon a construction of the contract*. Buckley LJ attached importance to the consequences of the breach and the fairness of holding an injured party to the contract and leaving him to his remedy in damages. *These, however, are matters to be considered after construing the agreement the parties have made. A judgment as to the seriousness of the breach, and the adequacy of damages as a remedy, is made after considering the benefit to which the injured party is entitled under the contract*.
>
> A question as to contractual intention, considered in the light of the language of the contract, the circumstances in which the parties have contracted and their common contemplation as to future performance, is *different from* a question as to the intention evinced by one of the parties at the time of breach, such as arises in cases of alleged renunciation. That difference is exemplified by the way in which the majority in the Court of Appeal dealt with the decision of the primary judge in this case.
>
> [emphasis added]

General reference may also be made to J W Carter, *Breach of Contract* (The Law Book Company Limited, 2nd Ed, 1991) ("*Breach of Contract*") at paras 655–684.

64 There is, in fact, no magical formula that would enable a court to ascertain whether or not the breach is sufficiently serious so as to permit the innocent party to terminate the contract pursuant to the *Hongkong Fir* approach. There are certainly a number of general formulations (some of which have been set out above at [61]). However, as we have noted above (at [61]), these general formulations are, in fact, similar in substance. More specifically, there are also particular factors which can be found in the case law (such as those set out by the majority of the court in *Koompahtoo* (at [54], reproduced in the preceding paragraph). However, as we have also noted above (at [63]), they are

by no means either exhaustive or conclusive. In the final analysis, the actual decision as to whether or not the breach concerned is sufficiently serious so as to permit the innocent party to terminate the contract is largely dependent on the precise factual matrix of the case itself (see also *Breach of Contract* at para 655 and Ewan McKendrick, *Contract Law – Text, Cases, and Materials* (Oxford University Press, 3rd Ed, 2008) at p 795).

Our decision

Introduction

65 We turn now to apply the above principles to the facts of the present appeal, commencing (in accordance with the approach set out in *RDC Concrete* (above at [23]–[26]) as well as the factors set out in *Man Financial* (above at [59])) with an inquiry as to whether or not the Non-Competition Clause is a condition.

Whether the Non-Competition Clause is a condition

66 In so far as this particular issue is concerned, the Appellant submitted that the Non-Competition Clause was not a condition. Support for this submission was derived mainly from the evidence adduced during cross-examination of the Respondent's sole witness, Mr Hartrampf. The Appellant further submitted that the Non-Competition Clause was a warranty, and that the breach of the Non-Competition Clause did not deprive the Respondent of substantially the whole benefit that it intended to obtain from the Distributorship Agreement.

67 As stated above (at [59]), it cannot be over-emphasised that it is impossible to formulate a magical set of criteria which one can apply in every situation to ascertain whether or not a particular term is a condition. It is therefore important to bear in mind the fact that the primary focus should be centred on ascertaining the intention of the contracting parties themselves by construing the actual contract itself (including the contractual term concerned) in the light of the surrounding circumstances as a whole.

68 We agree with the Appellant that the Non-Competition Clause is *not* a condition. The learned Judge had applied the *Hongkong Fir* approach in determining whether the breach was one that would entitle the Respondent to terminate the Distributorship Agreement. As such, it is quite clear that the Judge had (at least implicitly) made a finding of fact that the Non-Competition Clause was not a condition and, on that basis, had then applied the *Hongkong Fir* approach. On the totality of the evidence, which we will elaborate upon in a moment, it cannot be said that such a finding was wrong.

69 In particular, we note that the parties (in particular, the Respondent) had no intention of treating the Non-Competition Clause as a strict prohibition. Indeed, it is, in our view, clear beyond peradventure that the Respondent had *always known throughout* (*ie*, both before as well as after the Distributorship Agreement had been entered into) that the Appellant not only sold competing products but also that that was the Appellant's *business strategy* which (paradoxically) actually ensured the *maximum* exposure as well as sales of the *Respondent's* own products. In so far as the former point is concerned, this is evident even from the objective documentation. For example, in an e-mail (dated 1 December 2002) sent by Mr Hartrampf to Mr Yee shortly after the Distributorship Agreement had been entered into, the former stated thus:[note: 14]

> As you know we are dependent on you for good sales success in southeast Asia. *So far it has worked with you selling competitive brands and we are not saying that we want you to stop. Potentially it poses a risk and could cause [the Respondent] to lose what it has gained. That is*

why we want the benefit of you asking our approval. It will keep us confident that your interest and commitment are still with us. [emphasis added]

70 It is true that this particular e-mail was sent after the Distributorship Agreement had been signed and ought not (strictly speaking) to be taken into account in ascertaining the parties' intentions *vis-à-vis* the Non-Competition Clause. However, in this court's decision in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 ("*Zurich Insurance*"), it was observed (at [132(d)]) that "there should be no absolute or rigid prohibition against evidence of previous negotiations or subsequent conduct, although, in the normal case, such is likely to be inadmissible" where, for example, a party attempts to trawl through evidence in an attempt to favour its subjective interpretations of the contract and/or where a party attempts to persuade the court to adopt a different interpretation from that suggested by the plain language of the contract in a situation where the context of the contract concerned is *not* clear and obvious.

71 Although we do not purport to lay down a general principle of sorts (given this court's view in *Zurich Insurance* (*ibid*) that "the relevance of subsequent conduct remains a controversial and evolving topic that will require more extensive scrutiny by this court at a more appropriate juncture"), on the *specific facts* before us (in particular, the fact that the e-mail just set out at [69] above not only referred to the Non-Competition Clause but was also sent by Mr Hartrampf to Mr Yee *very soon after* the Distributorship Agreement had been signed), this is an occasion when this particular e-mail sheds valuable light on the *context* surrounding the intention of the parties when they entered into the Distributorship Agreement in general and agreed upon the Non-Competition Clause in particular. More specifically, this e-mail clearly reveals that the parties were aware not only of the Appellant's practice of selling competing products but also (and perhaps more importantly) of the *Respondent's acquiescence in* this practice *provided that* such a practice did not "cause [the Respondent] to lose what it has gained".

72 This last-mentioned statement is best understood in the light of the understanding (already referred to earlier in this judgment) to the effect that both parties were ultimately concerned with achieving the Purchase Target, *viz*, that the Appellant purchase at least US$1 m worth of the Respondent's goods annually (see [5] above). Indeed, that is also why there was an understanding (also referred to at [5] above) to the effect that the Non-Competition Clause would *not be invoked provided that the Purchase Target was met*. The upshot is that *the parties never intended the Non-Competition Clause to be a condition inasmuch as any breach of it, regardless of the seriousness of the consequences of the breach concerned, would entitle the Respondent to terminate the Distributorship Agreement*. Put simply, the central aim and focus of the Non-Competition Clause was to encourage and incentivise the Appellant to reach the Purchase Target.

73 We also note that Mr Hartrampf agreed, under cross-examination, that the Non-Competition Clause was not a "cast iron prohibition against competing products" but was, rather, a "way of saying" that the Respondent wanted to ensure that the Appellant purchased at least US$1 m worth of its goods annually.[note: 15] This lends further weight to our conclusion that the Non-Competition Clause is not a "condition" and that the main focus of that particular clause was to ensure that the Purchase Target was achieved. In summary, there is simply insufficient evidence to indicate that the parties had evinced any intention that the Non-Competition Clause was to have the legal status of a condition.

The consequences flowing from the breach of the Non-Competition Clause

74 Having established that the Non-Competition Clause is not a condition, it becomes necessary to consider (in accordance with the approach set out in *RDC Concrete* (at [24] above)) whether or not

the Respondent was nevertheless still entitled to terminate the Distributorship Agreement pursuant to the *Hongkong Fir* approach. We pause to note that the Non-Competition Clause did not expressly set out in clear and unambiguous terms whether or not the innocent party would be entitled to terminate the Distributorship Agreement in the event of a breach and/or a certain event or events occurring and, hence, Situation 1 in *RDC Concrete* (see above at [24]) was *not* applicable in the context of the present appeal.

75 In so far as the *Hongkong Fir* approach is concerned, this court in *RDC Concrete* noted (at [107]; see also above at [35]) as follows:

> [I]f 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. [emphasis in original]

76 The resolution of the present issue therefore turns on this single question: Has the Respondent been deprived of substantially the whole benefit that it was intended that the Respondent should obtain from the Distributorship Agreement?

77 In accordance with the broad approach which we have set out above (at [62]–[64]), what is required to be done in the present appeal, as in any other case where one party to a contract relies upon a breach by the other party as giving him a right to elect to terminate the contract pursuant to the *Hongkong Fir* approach, is to examine the *actual* consequences which have occurred as a result of the breach of the Non-Competition Clause at the time at which the Respondent purported to terminate the Distributorship Agreement (bearing in mind that this must be effected in relation to the substance and the context of the contract itself) and to decide whether the consequences have deprived the Respondent of substantially the whole benefit which it was the intention of the parties as expressed in the Distributorship Agreement that the Respondent should obtain.

78 In this regard, the consequences which resulted from the breach of the Non-Competition Clause are two-fold. First, the amount of purchases by the Appellant dropped from over US$1 m to US$788,031.45. Secondly, the objectives of "market penetration" and "high quality brand positioning" might possibly have been compromised.

79 In so far as the drop in purchases by the Appellant is concerned, it is clear, in our view, that, notwithstanding the fact that the drop was not insignificant, the Respondent has not thereby been deprived of substantially the whole benefit which it was the intention of the parties that the Respondent should obtain under the Distributorship Agreement.

80 However, this is not an end to the matter. As we have alluded to above, the Distributorship Agreement also referred to the objectives of "market penetration" and "high quality brand positioning". In this regard, it would be helpful, in our view, to set out the actual context in which these objectives were utilised; these are to be found in the second paragraph of the Distributorship Agreement, as follows (reproduced above at [6]):

> During this time [the Appellant] shall *make every effort to promote and sell* the Deuter products *to achieve market penetration and high quality brand positioning*. Each year (or more often if appropriate) both parties agree to an annual meeting to discuss the progress and business strategies in these markets. [emphasis added]

81 It is clear that whilst one of the means by which "market penetration" and "high quality brand positioning" were to be achieved by the Appellant on behalf of the Respondent was by the sale of the latter's products, the "*promotion*" of those products was equally important. That having been said, it is artificial, in our view, to draw a sharp distinction or dichotomy between the promotion of the Respondent's products on the one hand and the sale of them on the other. Both, in fact, go hand in glove. Indeed, there is more than a rough correlation between the two. Looked at in this light, it would appear that, although sales of the Respondent's products by the Appellant had presumably dropped (drawing this inference from the Appellant's reduced purchases of the Respondent's products), this did not mean that there had been little or no "market penetration" or "high quality brand positioning" of the Respondent's products. Indeed, the fact that there had been fairly substantial sales of these products suggests that there had been some "market penetration" as well as "high quality brand positioning" of the same. In this regard, it should be noted that the Respondent had acknowledged in the e-mail dated 1 December 2002 that "good sales success" had hitherto been achieved in spite of the Appellant selling competitive brands (see [69] above).[note: 16] We do note, however, that, in so far as there might have been excessive discounting of the Respondent's products, this would have militated against "high quality brand positioning" even in the face of satisfactory sales of the said products. In this regard, though, we also note that the issue of excessive discounting is, in any event, no longer a live one between the parties (see below at [84]).

82 Even if we draw a sharp distinction between promotion of the Respondent's products on the one hand and the sale of them on the other, it is clear, in our view, that the objectives of "market penetration" and "high quality brand positioning" could still be fulfilled *despite* the fact that *competing* products were being sold by the Appellant. Indeed, it was a main plank of the Appellant's case that the sale of competing products was, in fact, an integral part of its *strategy* to actually *maximise* the sale of the Respondent's products. Although there was no conclusive evidence before us as such, what evidence there was suggested that the Respondent was not only aware of the Appellant's business strategy but also accepted it – a point that was driven home not only in the responses by Mr Hartrampf during cross-examination but also by the apparently successful commercial relationship between the parties for more than a decade. Indeed, in so far as the last-mentioned point is concerned, the 1999 Agreement did not contain any non-competition clause. Such a non-competition clause only materialised in the Distributorship Agreement, which was entered into on 28 November 2002, *by which time (as just mentioned) the parties had already been in an apparently successful commercial relationship for the past decade*. Indeed, prior to the Distributorship Agreement, the Respondent never had to rely on any non-competition clause, even though the Appellant was obligated to "make every effort to promote and sell the Deuter products to achieve market penetration and high quality brand positioning", as seen from the 1999 Agreement.[note: 17] Further, it was *not*, in our view, an inevitable or forgone conclusion that the sale of competing products by the Appellant was necessarily incompatible with the objectives of "market penetration" as well as "high quality brand positioning". For example, effective and aggressive advertisement in the various mediums of communication, promotions, strategic marketing of Deuter products and loyalty benefits for regular customers of Deuter products were just some of the alternative means that could have been harnessed by the Appellant in order to meet the aforementioned objectives.

83 The Termination Notice (see [11] above) was also significant; it listed *three specific* "grievances", as follows:[note: 18]

> 1 . ***By reducing your wholesale business*** from 500 retailers' accounts to 50 retailers' accounts ***you did quite the opposite*** of what was intended in [the Distributorship Agreement], *that you should* ***"achieve market penetration"***. **In fact you have changed from selling to a broad base of dealers to focusing on selling through your own 19 retail outlets**.

2. By excessive discounting of Deuter's products over an extended period of time, you did the opposite of positioning Deuter as a high quality brand.

3. *A further intention* of the [Distributorship Agreement] is that we give you exclusivity for your territories and you in return will give us exclusivity regarding our products. *However, in your e-mail dated 27th January 2005*, you informed us that you have *sold competing products for some time without our written consent, and that you will continue to sell competing products now and in the future. You have failed to undertake to us to-date that you will definitely cease selling competing products. This is not acceptable to us*.

[emphasis added in italics and bold italics, emphasis in bold in original]

84 The above extract from the Termination Notice is, as already mentioned, of no mean significance. Most importantly, perhaps, it gives us an insight into what *the Respondent* felt constituted "market penetration" as well as "high quality branding position" (or, more precisely, a failure thereof). In particular, the allegations in paras 1 and 2 to the effect that the Appellant had failed in these two particular respects were *in fact linked to conduct that had (as we have already noted) been the subject of settlement between the parties as a result of the Amendment Agreement* (see [9] above). Indeed, this is *confirmed by* the contents of an e-mail from Mr Hartrampf to Mr Yee dated 23 November 2004[note: 19] which was sent before the Amendment Agreement was entered into on 17 January 2005. It should also be noted that, in another (and later) e-mail dated 15 December 2004[note: 20] (again, from Mr Hartrampf to Mr Yee), Mr Hartrampf appeared to go *further* and *equated excessive discounting with* a failure to achieve *both* "market penetration" *as well as* "high quality brand positioning". In this regard, it is important to remind ourselves, once again, that the issue of excessive discounting had been settled as a result of the Amendment Agreement.

85 Returning to the Termination Notice (the material parts of which have been reproduced above at [83]), this leaves us with the allegation in para 3, which, although centring on the sale of competing products (in breach of the Non-Competition Clause), is not linked (directly) at least to a failure *vis-à-vis* "market penetration" and/or "high quality branding position". On the contrary, para 3 appears to be phrased by way of a kind of tailpiece to the main complaints which are the subject of paras 1 and 2. In fairness to the Respondent, however, it is true that in an earlier e-mail dated 15 December 2004 (which has been referred to in the preceding paragraph), Mr Hartrampf did equate the violation of the Non-Competition Clause with "the effect of limiting market penetration in both wholesale and retail business" [underlined emphasis in original].[note: 21] However, it is significant, in our view, that, notwithstanding this particular e-mail, the Respondent did not repeat this "equation" in para 3 of the Termination Notice.

86 Returning to para 3 of the Termination Notice proper, it is also telling, in our view, that the said paragraph refers to an e-mail of *the same date* (*ie*, 27 January 2005). More importantly, there is *no reference whatsoever* in that paragraph to the *relevant context* which we have, in fact, considered in some detail above, *viz*, that *the Respondent knew that the Appellant was selling competing products throughout their more than decade-long business relationship and had acquiesced in such a practice*; *neither* was there any reference to *the Purchase Target* which (as we have explained at [72]–[73] above) was *inextricably linked to* the genesis as well as function of the Non-Competition Clause in the Distributorship Agreement.

87 In any event, even if the objectives of "market penetration" and "high quality brand positioning" might have been compromised as a result of the Appellant selling competitive products, there has been *no evidence* before us of such a *substantial* deprivation of benefit which, of course, needs to be

demonstrated if the Respondent is to succeed pursuant to the *Hongkong Fir* approach.

88 In the circumstances, the non-compliance by the Appellant with the Non-Competition Clause did *not* entitle the Respondent to terminate the Distributorship Agreement.

Conclusion

89 Having regard to the reasons set out above, we are of the view that the Respondent was *not* entitled to terminate its contract with the Appellant. In the circumstances, we allow the appeal.

90 However, one other issue remains and this relates to the award of damages for breach of contract. As this court observed in *RDC Concrete* ([23] *supra*) at [40]:

> [T]he *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. [emphasis in original]

And, in a similar vein, the court also observed thus (at [114]):

> [E]ven 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. [emphasis in original]

91 As the Respondent was not entitled to terminate its contract with the Appellant, it was itself in breach of contract. The Appellant is therefore entitled to damages which flow from the breach with respect to the unexpired period of the Distributorship Agreement (subject, of course, to the applicable legal conditions or constraints referred to in the preceding paragraph). Likewise, as the Appellant was in breach of the Non-Competition Clause, the Respondent is entitled to damages which flow from that breach and which we hold consist in the loss of profits resulting from the Appellant's failure to meet the Purchase Target for the year 2004 (subject, again, to the applicable legal conditions or constraints). We hope, however, that, in the circumstances, the parties will be able to resolve these remaining issues amicably between themselves, failing which the assessment of damages will be undertaken by the Registrar.

92 Having regard to all the circumstances, the Appellant is entitled to the costs of the present appeal as well as three quarters of its costs in the court below. The usual consequential orders are to follow.

[note: 1] Appellant's Core Bundle ("ACB") p 258

[note: 2] ACB p 259

[note: 3] ACB p 259

[note: 4] ACB p 260

[note: 5] ACB p 261

[note: 6] ACB p 262

[note: 7] ACB p 210

[note: 8] ACB p 212

[note: 9] ACB p 229

[note: 10] ACB p 228

[note: 11] ACB p 231

[note: 12] ACB p 189

[note: 13] ACB p 192

[note: 14] ACB p 235

[note: 15] 15 ACB p 184

[note: 16] ACB p 235

[note: 17] ACB p 259

[note: 18] ACB p 103

[note: 19] ACB p 205

[note: 20] ACB pp 216–217

[note: 21] ACB p 217

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