Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd
[2009] SGCA 34

Case Number : CA 134/2008

Decision Date : 28 July 2009

Tribunal/Court : Court of Appeal

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

Counsel Name(s) : Toh Kian Sing SC, Winston Kwek and Charmaine Lim (Rajah & Tann LLP) for the appellant; Ian de Vaz and Joyce Ng (Wong Partnership LLP) for the respondent

Parties : Alliance Concrete Singapore Pte Ltd — Comfort Resources Pte Ltd

Contract – Breach – Both parties in breach – Whether one party could terminate contract for repudiatory breach by other party if party was itself in breach

Contract – Breach – Grounds for termination of contract – Whether party could rely on ground for termination which existed at time of termination but which was not relied on by that party at time of termination of contract

Contract – Discharge – Breach – Party to contract failing to perform obligations – Situations where innocent party entitled to terminate contract – Whether there was wrongful termination of contract by one party

28 July 2009 Judgment reserved.

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

Introduction

1 The present appeal concerns a dispute over a contract for the supply of sand between two Singapore companies. Alliance Concrete Singapore Pte Ltd ("the Appellant") manufactures and supplies ready-mixed concrete to the construction industry. The Appellant is a joint venture between Asia Cement (Singapore) Pte Ltd, Supermix Concrete Pte Ltd and Sinhengchan Concrete Pte Ltd. Comfort Resources Pte Ltd ("the Respondent") is a supplier of sand. It is a family business headed by Tan Seng.

2 By a contract evidenced in a letter from the Appellant to the Respondent dated 27 January 2006 and which the Respondent countersigned by way of acceptance on 6 February 2006 ("the Contract"), the Appellant agreed to purchase sand from the Respondent while the Respondent agreed to supply sand to the Appellant's seven plants.

3 On 15 September 2006, the Respondent commenced Suit No 601 of 2006 against the Appellant. The Respondent claimed a sum of $401.448.79, being the price of sand sold and delivered by the Respondent to the Appellant. The Respondent further claimed for loss of profits for sand that the Appellant had allegedly under-ordered. The Respondent alleged that the Appellant's repeated failure to order the requisite contractual quantities every month as well as its failure to pay for the May to July 2006 deliveries evinced an intention on the part of the Appellant to be no longer bound by the terms of the Contract. Therefore, the Respondent also claimed for the loss of the profit which it would have made had the Contract not been prematurely terminated by the Appellant's breach.

4 On the same day, the Appellant commenced Suit No 604 of 2006 claiming a sum of $1,162,984.87 or, alternatively, damages for losses incurred by the Appellant. The Appellant claimed

that the Respondent had repeatedly breached the Contract by failing to supply the contracted quantities of sand to the Appellant and subsequently terminating the supply altogether. The Appellant alleged that the Respondent had repudiated the contract through its letters dated 8 September 2006[note: 1] and 14 September 2006.[note: 2] The Appellant claimed to have accepted this repudiation through a letter dated 15 September 2006[note: 3] that it subsequently sent to the Respondent. Therefore, it also claimed damages for the loss it had suffered because of the premature termination of the Contract by the Respondent.

5 The Respondent then applied for summary judgment in respect of its claim for the price of sand delivered to the Appellant in May, June and July 2006. The Appellant similarly applied for interlocutory judgment with damages to be assessed. Both applications were heard by an assistant registrar ("the AR"). The Respondent's application was partly successful as the AR granted the Respondent final judgment in the sum of $287,430.27 for sand delivered to the Appellant in May and June 2006, but she granted the Appellant unconditional leave to defend with respect to a sum of $114,018.52 which was the sum the Appellant claimed for alleged short delivery by the Respondent. The AR granted the Respondent unconditional leave to defend with respect to the Appellant's application.

6 Both parties appealed against the AR's decisions. At the hearing of both appeals, the judge reduced the judgment sum of the Respondent from $287,430.27 to $237,752.12 to take into account the Appellant's defence of set-off. The Appellant was also granted leave to defend the balance sum of $163,696.67 ($401,448.79 – $237,752.12) claimed by the Respondent, provided it paid the amount into court. The Appellant has since paid the judgment sum to the Respondent as well as the sum of $163,696.67 into court.

7 Thereafter, both suits were consolidated. This is an appeal against the decision of the trial judge ("the Judge") in which the Judge awarded the Respondent final judgment in Suit No 601 of 2006 with damages to be assessed and dismissed the Appellant's claim in its cross-suit in Suit No 604 of 2006 (see *Comfort Resources Pte Ltd v Alliance Concrete Singapore Pte Ltd* [2008] 4 SLR 848 ("the GD")).

The factual background

8 The material clauses of the Contract are set out below (in the Contract, "the Purchaser" refers to the Appellant and "the Sub-Contractor" refers to the Respondent):[note: 4]

> The Sub-Contractor shall sell and the Purchaser shall buy the quantity of concreting sand at the price and to be delivered as follows:-
>
> **1. Price**

	Location	**Price per m/ton delivered**
(i)	Sungei Kadut	S$12.40
(ii)	Kaki Bukit Plant	S$11.40

(iii)	Tampines	S$11.00
(iv)	Tanglin Halt (Queenstown)	S$12.20
(v)	Toa Payoh Rise	S$12.00
(vi)	Keppel	S$13.60
(vii)	Sentosa	S$14.00

The prices shall be held firm during the duration of this contract and no variations of [*sic*] whatsoever shall be entertained.

2. Quantity

The Sub-Contractor shall supply and deliver to the aforesaid plants an aggregate total quantity of 40,000 +/- 25% metric ton per month.

The Purchaser reserves the rights to adjust the quantity in any manner it deems fit to suit the production requirements/demand.

3. Contract Period

From 1 February 2006 to 31 January 2007 (1 year).

...

8. Terms of Payment

60 days from end of each month supply.

9 The Appellant also ordered sand from another supplier, Lim Chye Heng Sand & Granite Pte Ltd ("LCH"), under a similar contract (dated 23 February 2006, for a shorter period of six months until 31 August 2006) at 40,000 metric tonnes ("mt") +/- 25% per month. The Appellant was therefore contractually bound to order (between 1 March 2006 and 31 August 2006) a minimum of 30,000mt and a maximum of 50,000mt of sand from both the Respondent and LCH, when the contracts with both these parties overlapped. The prices of sand supplied by the Respondent and LCH to each of the Appellant's seven plants varied. The respective prices are set out in the table below:

	Plants	**Respondent's price**	**LCH's price**
(a)	Sungei Kadut	$12.40	$13.00

(b)	Kaki Bukit	$11.40	$12.40
(c)	Tampines	$11.00	$11.90
(d)	Queenstown	$12.20	$13.10
(e)	Toa Payoh	$12.00	$12.80
(f)	Keppel	$13.60	$13.10
(g)	Sentosa	$14.00	$13.70

10 While deliveries of sand were made every day (save for Sundays and public holidays), the Appellant was only invoiced weekly by the Respondent. Contrary to cl 8 of the Contract, the Appellant did not make payment within the stipulated 60 days from the end of each month of supply. The table below shows the due dates of the respective amounts and the payment dates.

Month (2006)	**Amount Payable**	**Due Date**	**Payment Date**
February	$229,934.49	29 April 2006	17 May 2006 (18 days late)
March	$246,605.13	30 May 2006	30 June 2006 (31 days late)
April	$197,136.07	29 June 2006	21 July 2006 (22 days late)
May	$171,786.78	30 July 2006	Unpaid
June	$174,125.88	29 August 2006	Unpaid
July	$55,536.13	29 September 2006	Unpaid

11 Payments by the Appellant for all the months were late and the Respondent received payment only after it had sent reminders to the Appellant. As a result, the Respondent's executive director, Tan Wan Fen ("Ms Tan"), instructed Patrick Chua ("Chua"), the Respondent's marketing manager, to meet with the Appellant's representatives to press for payment of the outstanding invoices. There were two meetings between the parties, one held on 7 June 2006 ("the first meeting") and the other on 20 July 2006 ("the second meeting").

12 The Appellant, on the other hand, alleged that the Respondent consistently supplied less than

the contracted quantity of sand from February 2006. The Appellant claimed that it had placed orders for the contracted quantity of 40,000mt per month but that the Respondent had failed to supply the requisite quantity of sand. The Appellant claimed to have sent various letters to the Respondent asking it to increase its supply of the sand.

13 During the first meeting, the Respondent was represented by Ms Tan's brother, Tan Wei Leong ("Wei Leong"), and Chua while the Appellant was represented by its operations manager, Lincoln Lim ("Lincoln"). Not surprisingly, the parties proffered conflicting versions of what had transpired at the first meeting.

14 According to Wei Leong, after Chua had introduced him to Lincoln as the boss's son, Chua inquired if Lincoln could do anything about the late payments. Lincoln replied that the Appellant was a merger of three ready-mix concrete companies and that they were having problems merging their computerised accounting systems. Lincoln then asked Wei Leong what he was going to do about the short deliveries of sand. Wei Leong, who was not an employee of the Respondent, was unaware of the actual situation. Consequently, he did not deny the accusation but expressed surprise and assured Lincoln that if there were short deliveries, his father would make up for them.

15 According to Lincoln, he had raised the issue of short deliveries at the first meeting. He alleged that Wei Leong apologised for the shortfall and explained that the reasons for the shortfall were delays in the commissioning of the Respondent's new sand quarry and other logistics issues such as the non-availability of trucks. Lincoln claimed that Wei Leong had promised to deliver the contracted quantities in future and also requested that the Respondent be allowed to make up the shortfalls beyond the contracted period. Lincoln agreed to this on condition that the Respondent furnish a committed schedule of delivery in writing.

16 Wei Leong, on the other hand, explained that when Lincoln insisted that the Respondent must have supply problems, Wei Leong, in desperation, placated Lincoln by saying he had overheard that the Respondent had encountered delay in starting a new quarry.

17 Wei Leong then told Ms Tan about the meeting. Ms Tan was agitated and angry and informed him that the allegation of short delivery by Lincoln was both ridiculous and untrue as the Respondent had spare or idle capacity at its quarry and was, instead, desperate to sell more sand instead of withholding supplies.

18 Ms Tan then decided that the Respondent would stop deliveries of sand to the Appellant on 20 July 2006 before the second meeting in order to put pressure on the Appellant to pay the outstanding invoices.

19 The second meeting was attended by Ms Tan, the Respondent's accountant, Shirley Chan Siew Kim ("Shirley"), and Lincoln.

20 According to the Respondent, it had, at this second meeting, raised the issue of the overdue invoices to Lincoln who had merely said that he would discuss the matter with his management. It was also said that, while Lincoln had then accused the Respondent of not delivering enough sand to the Appellant, he had also claimed that the Appellant could not absorb 40,000mt per month and had requested the Respondent to roll over the quantities by extending the contractual period. He had then apparently suggested an alternative proposal of a new contract to allow the Appellant to spread the deliveries over an additional year. However, he wanted a written confirmation first from the Respondent on the alleged shortfalls as well as a schedule of deliveries for the coming months. Ms Tan stated that she was not interested in Lincoln's proposals and demanded immediate payment of

the outstanding invoices.

21 After the second meeting, the Appellant paid the April 2006 invoices on 21 July 2006. On 6 September 2006, the Appellant wrote to the Respondent alleging that the latter had short-delivered sand. In the letter, the Appellant claimed that the Respondent had short-delivered sand from the inception of the Contract and that the total shortfall for the period from February 2006 to January 2007 was 392,656mt (based on the contractual quantity of 40,000mt per month less the actual quantities delivered of 87,344mt). The letter enclosed an earlier letter from the Appellant to the Respondent dated 2 August 2006 which also alleged short deliveries.

22 However, the Respondent subsequently sent a letter dated 8 September 2006 to the Appellant, which read as follows:[note: 5]

> As we had indicated to you during our meeting on 20 July 2006 (and also on several other occasions over the telephone), we will not be making any further deliveries until you settle the outstanding payment for deliveries made by us from May to July 2006 totalling **S$401,448.78**.
>
> In fact, our standard payment terms have always been 30 days, but you have caused this contract to be concluded on your terms and conditions with payment terms of 60 days. And even then, you have been persistently late in making payment for the February to April deliveries. Further, it was only after our meeting on 20 July 2006 when we demanded that you make all outstanding payments that you remitted payment for the April deliveries.
>
> We have made it very clear to you that we have stopped the August deliveries altogether due to your failure in settling the outstanding sum of **S$401,448.78** to date. Moreover, we should make it clear that there is no provision in the contract for the rollover of any shortfall quantities for any particular month.
>
> We can no longer accept your persistent failure in making payments for the deliveries received whilst at the same time making demands for future deliveries.
>
> Please note that if we do not receive full payment of the above sum by **12 September 2006**, we have no choice but to treat your conduct as intention not to perform the contract according to its terms and we will treat your conduct as bringing this contract to an end.
>
> [emphasis in original]

23 Following the threat to terminate the Contract contained in the Respondent's letter of 8 September 2006, Ms Tan wrote to the Appellant on 14 September 2006 to say that it considered the Appellant as having repudiated the Contract by its failure to pay the outstanding sum.

24 The Appellant, in turn, sent a letter dated 15 September 2006 denying that it (the Appellant) had failed to make prompt payments and alleging that the Respondent had short-delivered contracted quantities of sand every month. This particular letter concluded with the allegation that the Respondent was in repudiatory breach of the Contract in stopping deliveries of sand.

The Judge's decision

25 The Judge held that the Appellant had repudiated the Contract in two ways. First, the Appellant had consistently failed to pay for the sand on time. The Respondent had put the Appellant on notice that timely payment of its invoices was made the essence of the Contract notwithstanding

that the Contract was silent on the point. Yet, the Appellant failed to pay for the sand on time. This amounted to a repudiation of the Contract which the Respondent accepted by a letter to the Appellant. Secondly, the Appellant was in repudiation of the Contract by its continuous and persistent under-ordering of sand from the Respondent.

26 The Judge awarded the Respondent interlocutory judgment against the Appellant on its claim for breach of contract. Damages were to be assessed on the basis of 40,000mt since the Appellant's claim for damages in Suit No 604 of 2006 was based on 40,000mt of sand as the monthly quantity the Respondent should have delivered under the Contract.

27 The Judge found that, on a balance of probabilities, the Appellant had failed to show that the Respondent had short-delivered its orders. The Appellant had failed to produce any credible evidence to prove its case of short delivery against the Respondent. The documentary evidence that was actually produced by the Appellant was found to have been tampered with by the Appellant. The Appellant did not appeal against this part of the decision.

The applicable legal principles

28 This is a classic – and unfortunate – instance where *both* parties were in *breach* of contract. As counsel for the Appellant, Mr Toh Kian Sing SC, put it in his skeletal submissions to this court:[note: 6]

> The irony in this entire dispute is that each party acted in breach of the Contract in the hope that would induce the other … [to] perform the terms of the Contract.

29 Indeed, in oral arguments before us, counsel for both parties candidly – and correctly, in our view – admitted that this appeal involved *mutual breaches* by *both* parties. Further, the Respondent had attempted to utilise the threat of terminating the Contract to encourage the Appellant to perform its obligations.

30 The question which arises for decision in the present appeal is whether either party or both parties had the right to terminate the Contract. The right to terminate a contract can have considerable practical value because it allows a party to legitimately escape from an unsatisfactory commercial situation.

31 However, the actual termination of a contract is always *legally* "dangerous". This is due, in part, to the fact that if a party terminates the contract *without legal justification*, it will *itself* be in *breach* of contract. Even more germane is the fact that *not every* breach of contract will *automatically* entitle the innocent party to terminate the contract (see, for example, the decision of this court in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* ("*RDC Concrete*") [2007] 4 SLR 413 at [90]), although *every* breach of contract *will always* entitle the innocent party to claim damages *as of right* (see *RDC Concrete* at [40] and [114]).

32 Whether or not the innocent party is legally justified in terminating the contract depends on whether one of the situations set out in *RDC Concrete* has been satisfied. These situations were, in fact, summarised by this court 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]

33 Before we examine the issues in this appeal, it is appropriate to highlight that the Judge found (and both parties appear to have assumed) that s 31(2) of the Sale of Goods Act (Cap 393, 1999 Rev Ed) ("the Act") was applicable on the facts of this case. Section 31(2) reads as follows:

> Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

34 Indeed, in the (contrasting) situation where there has been no prior agreement between the parties that the buyer is bound to accept delivery of the goods concerned by instalments or that it

(the buyer) is entitled to call for delivery by instalments, s 30(1) of the Act would apply instead. Section 30(1) itself reads as follows:

> Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered, he must pay for them at the contract rate.

35 Where, however, there has been an agreement to provide for delivery of the goods concerned by "*stated* instalments" (either expressly or where such an agreement can be inferred from the language used in the contract of sale or from the circumstances of the case), s 30(1) is not applicable and s 31(2) would apply instead. The application of the latter provision ensures that, where the agreement in fact provides for delivery of the goods by instalments, a breach relating to one or more instalments would be considered in the light of its effect on the contract as a whole, thus ensuring that an innocent party is legally entitled to treat the entire contract as repudiated only in certain circumstances (and see the leading English Court of Appeal decision of *Maple Flock Company, Limited v Universal Furniture Products (Wembley), Limited* [1934] 1 KB 148 ("*Maple Flock*")).

36 Whilst, therefore, both ss 30(1) and 31(2) apply to contracts for the sale of a fixed amount of goods, they differ inasmuch as the former applies to situations where delivery is by way of a lump sum whereas the latter applies to situations where delivery is by way of instalments. Turning to the facts of the present case, it is clear, in our view, that the parties had *not* contracted for the supply of a *fixed* amount of sand which was to be delivered in instalments. Orders had to be placed by the Appellant before deliveries were made throughout the course of the Contract. But did this mean that s 31(2) of the Act was not applicable because delivery was not by way of "*stated* instalments"? On the other hand, whilst it is clear that the amounts were not fixed, could it nevertheless be argued that s 31(2) of the Act was still applicable because there had to be a *minimum* order of 30,000mt of sand per month delivered by the Respondent to the Appellant (see also below at [60])? Unfortunately, these difficulties of interpretation as well as application centring on s 31(2) of the Act do not appear to have been addressed by the parties, who (as we have pointed out above) merely assumed that the provision applied in this case. In any event, it is unnecessary to resolve these difficulties for the purpose of the present appeal as it is clear (having regard to the reasons which we set out below) that the Respondent was *not* legally justified in terminating the Contract (taking into account, *inter alia*, the principles laid down in *Maple Flock*).

The issues

37 The main issue in this appeal is a simple one: Was the Respondent entitled to terminate its contract with the Appellant on 14 September 2006? However, the surrounding factual matrix engenders not a few legal complications in so far as the application of the relevant principles set out above is concerned. The salient facts have already been set out above. In so far as the relevant facts in relation to the issue of breach of contract are concerned, they can be summarised as follows.

38 There were *initial breaches* of contract by the *Appellant* in the form of persistent failures to pay sums due under the Contract to the Respondent. At the time the Respondent terminated the Contract (on *14 September 2006*), however, only outstanding payments for two months were still owing to the Respondent under the Appellant's obligations pursuant to cl 8 of the Contract (*viz*, for the months of May and June 2006, all the other payments due having been paid by 21 July 2006). One issue that arises is whether or not the Respondent was entitled to terminate the Contract either on the basis of the persistent late payments which (collectively) amounted to a renunciation of the Contract by the Appellant (Situation 2 set out in *RDC Concrete* (see above at [32])) *or* on the basis of non-payment of the sums then owing (for the months of May and June 2006) (either on the basis of Situation 3(a)

or Situation 3(b) set out in *RDC Concrete* (see above at [32]).

39 It should, however, be mentioned that the Respondent had a *second* legal string to its bow in so far as its justification for terminating the Contract was concerned. This centred on the alleged *under-ordering* of sand by the Appellant throughout the duration of the Contract (prior to its termination by the Respondent on 14 September 2006); this, counsel for the Respondent, Mr Ian de Vaz, argued, was *yet another breach* of contract which entitled the Respondent to terminate the Contract on 14 September 2006. This particular alternative proffered by the Respondent is not without threshold (as well as other) difficulties although these were not canvassed before the Judge. We shall elaborate upon them in due course (below at [49] and [62]–[72]).

40 *However*, as already alluded to above, the *Respondent* was *also* in breach of contract inasmuch as it had *suspended the supply of sand* to the Appellant (with effect from *20 July 2006*) in order to pressurise the Appellant to pay it the sums owed under the Contract – despite repeated requests by the Appellant that it be supplied with sand. The Respondent, whilst legally entitled to damages (see above at [31]), was not entitled to suspend the supply of sand to the Appellant. If it had felt that it had a case, the Respondent could, instead, have *sought to terminate* the Contract at that particular point in time on the basis that, as at 20 July 2006, the Appellant had breached the term with respect to payment in the Contract (cl 8) pursuant to either Situation 3(a) or Situation 3(b) set out in *RDC Concrete* (see above at [32]); whether or not the Respondent would indeed have been entitled to do so is, of course, a separate issue which is, of course, moot for the purposes of the present appeal in the light of the fact that no attempt was in fact made by the Respondent to terminate the Contract at that particular point in time. Instead, it responded to the breach of contract by the Appellant in relation to the non-payments just mentioned by what was a *breach of contract of its own* (in suspending the supply of sand to the Appellant); the Respondent was, in fact, in breach of cl 2 of the Contract. At *this* particular juncture, the *Appellant*, whilst also entitled to damages (see, again, above a t [31]), could have chosen whether or not to *terminate* the Contract (presumably, as just mentioned, on the basis of either Situation 3(a) or Situation 3(b)). *However*, it, *too*, did *not* do so. Hence, this was the situation that faced the parties when the *Respondent did, in fact, terminate* the Contract on *14 September 2006*.

41 It should also be noted that the Respondent had, in demanding payment of outstanding sums owed to it by the Appellant under the Contract, demanded payments owed not only for the months of May and June 2006 but also for July 2006 as well. It was not, in fact, entitled to demand the payment of this last-mentioned sum as it was not due to the Respondent at that particular point in time. In other words, the Respondent had "over demanded" payment from the Appellant. However, although this was improper conduct on the part of the Respondent, we are more concerned with its suspension of the supply of sand that was referred to in the preceding paragraph, for *that* (as we have already noted) clearly constituted a breach of contract by the Respondent.

42 We now return to the main issue at hand: Was the Respondent legally entitled to terminate the Contract on 14 September 2006 (bearing in mind, as already pointed out above, that *both* parties were entitled to damages *vis-à-vis* their respective breaches of the Contract)? A related question that arises is this: What was the legal position in the context of the precise factual matrix of the present case, given the fact that the *Respondent* was *itself* in breach of the Contract at the time it terminated the Contract (on 14 September 2006) for the *Appellant's* breach of the Contract?

43 It may be appropriate to consider *the last-mentioned question* posed in the preceding paragraph *first* because if the Respondent was not entitled to terminate the Contract because of its own breach, then that would be an end to the matter (with the appeal being allowed). In other words, it *would not matter* whether or not the Respondent was entitled (pursuant to the principles

laid down in *RDC Concrete* (and see above at [32])) to terminate the Contract on the *assumption* that it (the Respondent) had *not* been in breach of contract; *even if* the Respondent *had* been so entitled, it could not avail itself of this right (on 14 September 2006) *if* it was *not* entitled to do so owing to *its own breach* of contract.

Did the Respondent's own breach of contract disentitle it from terminating the Contract?

44 There appears to be a dearth of case law authority with regard to the situation where *both* parties are in breach of contract *and one* party seeks to *terminate* the contract.

45 In the leading work on breach of contract in the Commonwealth, Prof John Carter, dealing with the effect of a breach of contact by the terminating party on its right to terminate the contract concerned, observed thus (see J W Carter, *Breach of Contract* (The Law Book Company Limited, 2nd Ed, 1991) at para 1033):

> **Breach not necessarily an impediment**.
>
> Article 57. (1) The fact that a party who has elected to terminate performance of the contract was, at the relevant time, in breach of contract, or not ready and willing to perform contractual obligations, does not necessarily operate to impede the effectiveness of the election.
>
> (2) In deciding whether a breach of contract or absence of readiness or willingness precluded termination[,] regard may be had to:
>
> (a) the terms of the contract; and
>
> (b) all relevant circumstances, including–
>
> (i) the nature of the breach; and
>
> (ii) the extent to which the party in question was not ready and willing to perform.
>
> Breach by the promisee may or may not be an impediment to termination. Similarly, the fact that the promisee was not ready and willing to perform, whilst not always an impediment to termination, may operate as such.

46 The applicable legal principles were, in fact, considered by this court in *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2006] 3 SLR 769 ("*Jet Holding*"), as follows (at [98]–[99]):

> 98 This situation (where both parties are in breach of contract) has not, to the best of our knowledge, received much treatment in the case law. However, the following observations by Kerr LJ in the English Court of Appeal decision of *State Trading Corporation of India Ltd v M Golodetz Ltd* [1989] 2 Lloyd's Rep 277 at 286 are apposite:
>
> > The fact that in the present case both parties had committed breaches before one of them elected to treat the contract as repudiated appears to me to make no difference whatever; nor the fact that (assumedly) both had been breaches of condition. *If A is entitled to treat B as having wrongfully repudiated the contract between them and does so, then it does not avail B to point to A's past breaches of contract, whatever their nature*. A breach by A would only assist B if it was still continuing when A purported to treat B as having repudiated the contract *and* [this emphasis is in the original text] if the effect of A's subsisting breach was such as to preclude A from claiming that B had committed a repudiatory breach. In other

words, B would have to show that A, being in breach of an obligation *in the nature of a condition precedent*, was therefore not entitled to rely on B's breach as a repudiation. [emphasis added]

99 The observations just quoted are both logical and principled.

[emphasis in original]

47 In the English Court of Appeal decision of *Lidl UK GmbH v Hertford Foods Ltd* [2001] EWCA Civ 938 ("*Lidl*"), a dispute arose with respect to a contract for the supply of corned beef in 340g tins or units. The seller agreed to supply 1,036,800 units to the buyer between March and end of June 1997. The seller delivered 11,700 units by 25 April 1997. However, the seller failed to make any further deliveries after 25 April 1997 due to a severe shortage of raw materials. On the basis that invoices became payable within 50 days, the first of the invoices raised by the seller became due for payment on 9 May 1997. However, the buyer refused to make payment by relying on a clause in the contract which allowed the buyer to deduct from outstanding payments any loss and expenses incurred by the buyer due to the seller's failure to deliver the goods at the stipulated time. The buyer further withheld payment to cover any potential further costs which might be incurred although this was not provided for in the contract. The seller refused to resume deliveries until all moneys owing for goods already delivered had been paid in full. The seller then purported to terminate the contract on the grounds of non-payment by the buyer. The Court of Appeal disposed of the argument that the seller's breach of contract in not making sufficient deliveries disentitled it from terminating for the buyer's breach by non-payment by relying on the principle enunciated by Kerr LJ in *State Trading Corporation of India Ltd v M Golodetz Ltd* [1989] 2 Lloyd's Rep 277 ("*Golodetz*")(as set out in *Jet Holding* (see above at [46])). However, on the facts, it was held that the seller was not entitled to terminate the contract. This was because the breach by the buyer did not amount to a repudiation of the contract and the seller did not have the right to terminate the contract even if the seller had not itself been in breach of contract.

48 Applying the principles set out above in *Jet Holding*, and turning to the breach centring on the *non-payments* by the Appellant, it would appear that the *first* prerequisite has been satisfied inasmuch as the breach by the Respondent *is* a *continuing* one as it had not furnished any sand to the Appellant since 20 July 2006. *However*, the *second* prerequisite has *not* been satisfied. Although there were, indeed, mutual breaches by both parties, they do not appear to be related such that it could be stated that the Respondent was "in breach of an obligation in the nature of a condition precedent" (*per* Kerr LJ in the English Court of Appeal decision of *State Trading Corporation of India Ltd v M Golodetz Ltd* [1989] 2 Lloyd's Rep 277 at 286 (as applied, above, in *Jet Holding*)).

49 Turning to the breach centring on the alleged under-ordering by the Appellant, it would appear that (once again) the first prerequisite has been satisfied. However, the *second* prerequisite has *not* been satisfied. Any breach by the Appellant with respect to under-ordering could not have lasted beyond 20 July 2006. This is because when the Respondent refused to supply sand from 20 July 2006 onwards (which itself constituted a breach of the Contract by the Respondent), any order for sand placed by the Appellant would, *ex hypothesi*, have been an exercise in futility. In the circumstances, any breach by the Appellant with respect to under-ordering would have occurred prior to the Respondent's breach (which, as just noted, consisted in a failure to supply sand from 20 July 2006 onwards). Put simply, there was no relationship between the two breaches and, hence, the second prerequisite was not satisfied.

50 Given our holdings above, it therefore becomes relevant (indeed, important) to consider whether or not the Respondent was entitled (in law) to terminate the Contract on 14 September

2006. This would (as already pointed out above at [38]) entail considering whether or not the breach of contract by the Appellant fell within Situation 2, Situation 3(a) or Situation 3(b) of *RDC Concrete* (see above at [32]). The Respondent, as already noted, argued that there had been *two distinct breaches* of contract by the Appellant which entitled it to terminate the Contract – the *non-payments* by the Appellant of amounts owing to the Respondent with respect to the sand delivered to it by the latter and the alleged *under-ordering* of sand by the Appellant, respectively. Mr de Vaz argued before us that either breach or (*a fortiori*) both breaches combined entitled the Respondent to terminate the Contract on 14 September 2006. We turn now to consider, first, whether or not the *non-payments* by the Appellant entitled the Respondent to terminate the Contract.

Did the non-payments by the Appellant entitle the Respondent to terminate the Contract?

51 The Appellant did not dispute that it was in breach of contract inasmuch as it had been in arrears of the amounts owed to the Respondent in May and June 2006 at the time the Respondent terminated the Contract (on 14 September 2006). As noted above, the Respondent had, indeed, expressly stated non-payment to be a ground on which it would terminate the Contract in its letter of demand to the Appellant dated 8 September 2006. However, Mr Toh argued that this breach of contract did *not* entitle the Respondent to terminate the Contract. In particular, he argued that there had been no renunciation of the Contract (which would fall within Situation 2 of *RDC Concrete*). He also argued that cl 8 of the Contract (which related to the obligation of payment) was not a "condition" and, hence, a breach of it did not entitle the Respondent to terminate the Contract (within the meaning of Situation 3(a) of *RDC Concrete*). Mr Toh further argued that the non-payments of the May and June 2006 amounts (which were owed to the Respondent) did *not* deprive it (the Respondent) of substantially the whole benefit of the Contract which it was intended that the Respondent should obtain (within the meaning of Situation 3(b) of *RDC Concrete*).

52 We agree with the Appellant's arguments. There was, in the first instance, no evidence that the series of delayed payments by the Appellant (coupled with the non-payments *vis-à-vis* the amounts owed in May and June 2006) constituted a renunciation of the Contract by the Appellant (under Situation 2 of *RDC Concrete*). Indeed, we are of the view that the Respondent's argument would have been far more persuasive if the Appellant had *not paid the Respondent at all throughout the duration of the Contract*. The fact that the Respondent accepted (albeit late) payments from the Appellant suggests that it did not consider the conduct of the Appellant – taken as a whole – as constituting a renunciation of the Contract.

53 We are also of the view that cl 8 of the Contract was *not* a "condition" (within the meaning of Situation 3(a) of *RDC Concrete*). There was no evidence construing the Contract (including cl 8 therein) in the light of the surrounding circumstances as a whole that cl 8 was intended by the parties to be a condition. Indeed, most of the factors mentioned in the decision of this court in *Man Financial* ([32] *supra* at [160]–[174]) are not applicable to the facts of the present case – save with the exception of the fact that it could be argued that cl 8 ought to be a condition in order to furnish certainty in the context of a mercantile transaction. However, in so far as this last-mentioned argument is concerned, it was stated, in *Man Financial* (at [160]–[161]), as follows:

> 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.

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).

[emphasis in original; emphasis added in bold italics]

54 Looking at cl 8 of the Contract in the context of the Contract as a whole, we are of the view – particularly given the brevity of the clause itself (in which the heading is "Terms of Payment" and the body of the clause itself merely states "60 days from end of each month supply") – that it was *not* the intention of the parties that *any* breach of cl 8, *regardless of* the seriousness of the consequences flowing from the breach, would entitle the innocent party to terminate the Contract without more. On the contrary, it appears more likely that the parties would intend, *inter alia*, cl 8 to be applied with some flexibility and leeway. In any event, no evidence to the contrary was adduced by the Respondent.

55 In other words, time was not of the essence in the Contract (see also s 10(1) of the Act) and there was no evidence that the Respondent, in fact, made time of the essence *vis-à-vis* the non-payments concerned.

56 In this regard, we are of the view that the 8 September 2006 letter (see [22] above) could not have had the effect of making time of the essence. On this point, *Chitty on Contracts* (Sweet & Maxwell, 30th Ed, 2008) vol 1 at para 21-017 states as follows:

> Where, however, notice is given by one party purporting to make "time of the essence" in respect of a breach of a non-essential term of the contract, the consequences are altogether different. Such a notice does not serve to make time of the essence so far as the obligations in the original contract are concerned, because one party cannot unilaterally vary the terms of a contract by turning what was previously a non-essential term of the contract into an essential term: the notice "has in law no contractual import". The effect of the notice is rather to bring to an end the interference of equity with the legal rights of the parties so that the entitlement of the innocent party to terminate future performance of the contract is then governed solely by ordinary common law rules. Given that the notice cannot have the effect of turning the non-essential term of the contract into a condition, the party giving the notice can only terminate where the failure of the other party to comply with the terms of the notice goes to the root of the contract so as to deprive that party of a substantial part of the benefit to which he was entitled under the terms of the contract. Failure to comply with the terms of the notice can therefore only be used as evidence of a repudiatory breach; it is not repudiatory breach per se.

In fairness to the Respondent, it did not seek (despite a possible indication in the court below to the contrary (see the GD at [111])) to argue that the 8 September 2006 letter had this effect and, on the contrary, expressly disavowed (correctly, in our view) any reliance on such an argument.[note: 7]

57 Turning to Situation 3(b) of *RDC Concrete* (which embodies what is popularly characterised as the "*Hongkong Fir* approach" first mooted by Diplock LJ in the English Court of Appeal decision of *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26), it is clear that the failure by the Appellant to pay the arrears due pursuant to the May and June 2006 deliveries by the Respondent did *not* deprive the Respondent of substantially the whole benefit of the Contract that it

was intended that it (the Respondent) should obtain.

58 In the circumstances, it is clear, therefore, that the Respondent was *not* justified in terminating the Contract for this particular breach of contract by the Appellant (relating to non-payments by the Appellant pursuant to cl 8 of the Contract). If this were the only ground relied upon by the Respondent to terminate the Contract, the appeal would be allowed. However, as noted above (at [39]), the Respondent had a second string to its legal bow, *viz*, that the Appellant was *also* in *breach of contract* by *under-ordering* sand from the Respondent.

Did the alleged under-ordering of sand by the Appellant entitle the Respondent to terminate the Contract?

59 Mr Toh sought to negate the Respondent's argument that it (the Respondent) was entitled to terminate the Contract as a result of the under-ordering of sand by the Appellant right at the threshold. He argued that a true construction of the relevant clause of the Contract (*viz*, cl 2) demonstrated that the Appellant was under no obligation (whether express or implied) to order any sand from the Respondent pursuant to that clause, which reads as follows:

> **Quantity**
>
> The Sub-Contractor [*viz*, the Respondent] shall supply and deliver to the aforesaid plants [designated by the Appellant (see [8] above)] an aggregate total quantity of 40,000 +/- 25% metric ton per month.
>
> The Purchaser [*viz*, the Appellant] reserves the rights to adjust the quantity in any manner it deems fit to suit the production requirements/demand.

60 With respect, we cannot accept Mr Toh's argument. It is clear, in our view, that, having regard to the language of, as well as (more importantly) the *context* surrounding cl 2, the clause contemplated *a minimum monthly quantity of sand which the Appellant was to order from the Respondent* – which the Respondent was then under a corresponding obligation to supply to the Appellant. Indeed, it was clear from the context of the Contract as a whole that it was not intended to be an open one which depended upon the decision of the Appellant as to whether or not it wished to order sand from the Respondent or even not to order any sand at all.

61 The Judge found that the Appellant had, in fact, under-ordered sand from the Respondent in breach of cl 2 of the Contract.

62 Before dealing with the substantive issue proper, we note that the alleged under-ordering by the Appellant (whilst raised by the Respondent, albeit very close to the actual trial itself) was not expressed in the relevant correspondence by the Respondent to be a ground for termination of the Contract. As noted earlier in this judgment, the only ground referred to was the breach of cl 8 of the Contract in relation to the non-payment of sums owed by the Appellant to the Respondent (which was an issue we have already dealt with in the previous section of the present judgment).

63 However, Mr de Vaz argued that the Respondent was nevertheless entitled to rely on this particular ground to terminate the Contract because it was present at the time of termination itself (*viz*, 14 September 2006). Although the innocent party must justify an election to terminate for breach of contract by the other party, the authorities clearly establish that any ground of termination which existed at the time of election may be relied upon. In the English decision of *Taylor v Oakes, Roncoroni, and Co* (1922) 127 LT 267 ("*Taylor*"), Greer J stated the relevant legal principle (which

was, presumably, accepted on appeal), as follows (at 269):

> It is a long established rule of law that a contracting party, who, after he has become entitled to refuse performance of his contractual obligations, gives a wrong reason for his refusal, does not thereby deprive himself of a justification which in fact existed, whether he was aware of it or not.

64 Subsequent cases have endorsed this principle: see, for example, the English Court of Appeal decisions of *Heisler v Anglo-Dal Ld* [1954] 1 WLR 1273 ("*Heisler*") ; *Panchaud Frères SA v Etablissements General Grain Company* [1970] 1 Lloyd's Rep 53 ("*Panchaud Frères*"); and *Lidl* ([47] *supra*).

65 However, this right is *subject to qualifications*, one of which centres on the conduct of the party relying upon such a right. (see, for example, *Panchaud Frères*). In *Panchaud Frères*, it was suggested that a party who first gives one ground for his refusal to perform may, by his conduct, be precluded from setting up a different ground later where it would be unfair or unjust to allow him to do so. The precise rationale underlying this particular exception was not wholly clear at the time the case itself was decided (see, for example, the English Court of Appeal decision of *V Berg & Son Ltd v Vanden Avenne- PVBA* [1977] 1 Lloyd's Rep 499 at 502–503, 504 and 505 as well as the English High Court decision of *Procter & Gamble Philippine Manufacturing Corp v Peter Cremer GmbH & Co (The Manila)* [1988] 3 All ER 843 at 848–852; reference may also be made generally to Edwin Peel, *Treitel: The Law of Contract* (Sweet & Maxwell, 12th Ed, 2007) at para 17-063). Indeed, Winn LJ appeared to suggest a broader "inchoate doctrine stemming from the manifest convenience of consistency in pragmatic affairs, negativing any liberty to blow hot and cold in commercial conduct" (*Panchaud Frères* at 59), which doctrine was independent of the traditional doctrines of waiver and estoppel. However, in the subsequent English Court of Appeal decision of *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce* [1997] 4 All ER 514 ("*Glencore Grain*"), the court took the opportunity to clarify that such a broad approach ought *not* to be adopted, preferring to premise this exception on waiver and estoppel instead (see also the perceptive comment on this particular decision by J W Carter, "Panchaud Frères Explained" (1999) 14 JCL 239). There is also *another* exception (which, as we shall see, is relevant in the context of the present appeal), and to which our attention therefore now turns.

66 In *Heisler*, the English Court of Appeal refused to allow the defendant to argue that the absence of a Treasury permission in a guarantee provided by the plaintiff meant that the plaintiff had failed to meet its contractual obligation of providing a valid guarantee. Having approved of the principle in *Taylor* (see above at [63]), Somervell LJ explained the following exception to the rule, as follows (at 1278):

> If the point not taken is one which if taken could have been put right, the principle will not apply. This has, I think, clear application here. The plaintiff was producing his document before he was under any obligation to do so. If the defendants had accepted it subject to the provision of a Treasury permission it might have been obtained ...

67 In other words, the innocent party will not be entitled to rely on a ground not raised at the time of termination if the party in breach could have rectified the situation had it been afforded the opportunity to do so. In the subsequent English Court of Appeal decision of *Glencore Grain*, the court, having endorsed the principle in *Taylor* as the "[b]asic rule" (*Glencore Grain* at 526), set out two exceptions to that rule, one of which was the exception in *Heisler* (the other being embodied (as noted above at [65]) in *Panchaud Frères*). As Prof Carter succinctly put it (see Carter ([65] *supra*) at 241):

> The idea of *Heisler* is simple enough. It would be most unfair for a promisee to be able to rely on a basis for termination which the promisor could have removed had it been given an opportunity to do so. However, the qualification to the general principle is a narrow one. Generally, the promisor must be in a position to put itself right without breaching the contract.

68 The question which arises in the context of the present appeal is whether or not the Appellant would, indeed, have ordered the requisite amounts of sand pursuant to cl 2 of the Contract had it been afforded the opportunity to do so (in this regard, we accept the Judge's finding of fact that the Appellant had in fact under-ordered and was thereby in breach of the Contract up to 20 July 2006).

69 Mr Toh sought to argue that, given the rising market in sand at the material time, the Appellant would definitely have ordered the required amounts, thereby falling within this particular exception. There was no incentive for the Appellant to under-order from the Respondent when faced with a rising market. He submitted that it was the Respondent who stood to gain by selling to other customers at spot prices rather than supplying to the Appellant at contracted prices that were increasingly less profitable in the face of the rising prices in the market.

70 Indeed, the Building and Construction Authority price updates show that the spot price for concreting sand was on the rise at that time. In February 2006, the price was $14.25 per tonne. It had increased to $15.83 per tonne in August 2006 and rose to $19.50 per tonne in December 2006. During cross-examination, Ms Tan had agreed that there was an upward trend in spot prices of sand because of production costs as well as a rise in fuel prices. Ms Tan explained that spot prices were *ad hoc* prices and were subject to changes such as market fluctuations. In contrast, the prices quoted to the Appellant were contracted prices and were not subject to such fluctuations. When asked if this rising trend made the Respondent unhappy with the Contract, Ms Tan disagreed.

71 However, as pointed out earlier, the Appellant also ordered sand from another supplier, LCH. The Appellant was therefore contractually bound to order a minimum of 30,000mt and a maximum of 50,000mt from both the Respondent and LCH every month, between 1 March 2006 and 31 August 2006. Mr de Vaz sought to argue that the Appellant would not have placed the requisite order even if it had been afforded the opportunity to do so. He argued that the Appellant would rather have breached the contract with the Respondent than breach the contract with LCH. This was because the higher prices in the LCH contract would have led to the quantum of damages for a breach of the LCH contract being larger than the damages for a breach of the contract with the Respondent.

72 We find, however, on a balance of probabilities, that the Appellant would have ordered the requisite amount of sand if it had been given the opportunity to do so. Although Mr de Vaz's argument is a *possible* one, it contained an element of speculation. Weighed against this argument was the clear fact that there had been an upward trend in spot prices of sand at the material time and Mr Toh's argument to the effect that there had, in the circumstances, been no incentive for the Appellant to under-order from the Respondent when faced with a rising market was, in our view, the more persuasive one. We are therefore of the view that the Appellant is entitled to rely on this exception, and in the circumstances, therefore, we find that the Respondent *could not* have relied upon under-ordering as a ground for terminating the Contract. For the sake of completeness, however, we nevertheless proceed to consider, further, whether the Appellant's breach of cl 2 entitled the Respondent to terminate the Contract on 14 September 2006.

73 We note, first, that there is no evidence that the Respondent treated the under-ordering by the Appellant as a renunciation of the Contract (under Situation 2 of *RDC Concrete*). Indeed, as we have already noted, the Respondent had not relied on under-ordering as a ground for terminating the Contract; under-ordering became an issue only shortly before the trial itself.

74 There is also no evidence that cl 2 was a "condition" which would entitle the Respondent to terminate the Contract, regardless of the consequences of the breach (under Situation 3(a) of *RDC Concrete*). The reasons for arriving at this conclusion are similar to those we have set out with regard to the breach of cl 8 of the Contract (above at [54]). In particular, it seems to us, having regard to the context surrounding cl 8, that the parties intended there to be some flexibility and leeway in its implementation.

75 Further, although the Respondent made a persuasive case at first blush to the effect that the Appellant had, by under-ordering, deprived the Respondent of substantially the whole benefit of the Contract that it was intended that it (the Respondent) should have (under Situation 3(b) of *RDC Concrete*), there was, in the final analysis, no real evidence that this was the case. We should also mention, at this juncture, that we find below (at [78]–[81]) that the Appellant was obliged to order only 30,000mt of sand per month instead of 40,000mt per month (as the Judge had held). If so, this detracts further from the Respondent's case when viewed from the perspective of proportionality.

76 However, Mr de Vaz also argued that the Respondent had in fact been deprived of substantially the whole benefit of the Contract that it was intended that it should obtain because its *cash flow* was affected. With respect, we find this argument rather vague and general. Indeed, in ascertaining whether or not the innocent party has in fact been deprived of substantially the whole benefit of the contract that it was intended that it should obtain, one must, *inter alia*, construe the contract in order to ascertain what precisely was the benefit that it was intended that the innocent party should obtain from the contract (see also the decision of this court in *Sports Connection Pte Ltd v Deuter Sports GmbH* [2009] SGCA 22 at [61]–[64]).

77 In summary, therefore, we find that the Respondent was not justified in terminating the Contract for two (alternative, albeit non-cumulative) reasons. First, because the under-ordering was not a ground that the Respondent had in mind when it terminated the Contract on 14 September 2006, it was incumbent on the Respondent to afford the Appellant the opportunity to rectify the situation; had it done so, we have found above that the Appellant would, in fact, have rectified the situation. Secondly, there had, in any case, been no breach entitling the Respondent to terminate the Contract (pursuant to the potentially applicable situations set out in *RDC Concrete* (see above at [32])).

Quantum of damages

78 Finally, the Appellant argued that damages to the Respondent should be assessed based on 30,000mt of sand per month instead of (as the Judge had held) 40,000mt per month (the operative clause in the Contract being cl 2). Even though we have found that the Respondent was not entitled to terminate the Contract, the resolution of this issue is still relevant because the Appellant had, in fact, been in breach by under-ordering sand from the Respondent prior to 20 July 2006 (when the Respondent refused, thereafter, to supply the Appellant with sand in breach of *its* own obligations under the Contract).

79 However, Mr de Vaz argued that the "+/-25% margin" in cl 2 was operative only if it suited the Appellant's "production requirements/demand" (cl 2 is reproduced above at [59]). He then proceeded to argue that, because the Appellant had ordered sand in quantities varying between 40,320mt and 50,000mt, its production demand must be based on these quantities and that, in fact, the judgment below ought to be varied according to these quantities.

80 Mr Toh argued that such an argument by the Respondent was incorrect and had overlooked the broad language of cl 2 itself (in particular, the words "in any manner it deems fit"). He also argued

that the intention underlying the second paragraph in cl 2 of the Contract was to furnish the Appellant with a 25 per cent margin of tolerance as its requirements for sand might vary during the contractual period (of one year). Mr Toh argued further that there was nothing in cl 2 itself to require that the Appellant demonstrate that its requirements had varied before the Appellant could invoke it.

81 We agree with the Appellant's arguments. It is clear that cl 2 of the Contract was intended to furnish *the Appellant* with the necessary flexibility, albeit based on a core amount which had been clearly stated in cl 2 itself. A defendant is not liable in damages for not doing that which he is not bound to do. Therefore, damages should be assessed at the minimum amount that the Appellants were bound to order, which is 30,000mt.

Conclusion

82 For the reasons set out above, we find:

(a) that the Respondent was *not* entitled to terminate the Contract based on the non-payments by the Appellant pursuant to a breach of cl 8 of the Contract;

(b) that the Respondent was *not* entitled to terminate the Contract based on the under-ordering of sand by the Appellant pursuant to a breach of cl 2 of the Contract; and

(c) that damages to the Appellant as well as the Respondent (see below at [84]) should be assessed based on 30,000mt of sand per month instead of (as the Judge had held) 40,000mt per month.

8 3 In the circumstances, the appeal is allowed (subject to [84] below) with costs, and with the usual consequential orders.

84 However, as noted above (at [31]), the innocent party is always entitled to damages for breach of contract by the other party as of right. It therefore follows that the Appellant is entitled to damages for the Respondent's wrongful termination of the Contract. It also follows, however, that the Respondent is entitled to damages for the Appellant's under-ordering of sand from the Respondent (up to 20 July 2006). We hope, however, that, in the circumstances, the parties would be able to resolve these remaining issues amicably between themselves, failing which the assessment of damages will be undertaken by the Registrar.

[note: 1]See the Appellant's Core Bundle vol 2 ("2ACB") p 68.

[note: 2]See 2ACB p 69.

[note: 3]See 2ACB p 70.

[note: 4]2ACB pp 51–53.

[note: 5]2ACB p 68.

[note: 6]At p 19.

[note: 7]See the Respondent's Case pp 59–60 and the Respondent's Skeletal Arguments p 8.

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