Alliance Concrete Singapore Pte Ltd *v* Sato Kogyo (S) Pte Ltd
[2013] SGHC 127

Case Number : Suit No 465 of 2007

Decision Date : 05 July 2013

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : Winston Kwek Choon Lin, Avinash Pradhan and Istyana Ibrahim (Rajah & Tann LLP) for the plaintiff; Tan Liam Beng, Tan Kon Yeng Eugene and Soh Chun York (Drew & Napier LLC) for the defendant.

Parties : Alliance Concrete Singapore Pte Ltd — Sato Kogyo (S) Pte Ltd

Contract – Frustration

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 82 of 2013 was allowed by the Court of Appeal on 30 May 2014. See [2014] SGCA 35.]

5 July 2013 Judgment reserved.

Tan Lee Meng J:

1 The plaintiff, Alliance Concrete Singapore Pte Ltd ("Alliance"), a manufacturer of ready-mixed concrete ("RMC"), sued the defendant, Sato Kogyo (S) Pte Ltd ("SK"), a building contractor, for money due for the supply of RMC to the latter. SK disputed the amount owed to Alliance and counterclaimed for losses incurred when it had to purchase RMC from other suppliers because of Alliance's alleged failure to supply RMC to it.

Background

2 In January 2007, SK was the main contractor for the following three construction projects in Singapore ("the Projects"):

(a) an extension to the Boon Lay MRT ("the Boon Lay project");

(b) a teaching and laboratory facility at the Nanyang Technological University ("the NTU project"); and

(c) a six-storey building at Telok Blangah Road ("Harbourfront project").

3 Pursuant to three separate agreements in 2006 ("the Contracts") for the Projects, Alliance agreed to supply RMC to SK. The quantity of RMC to be supplied to SK under the contract for the NTU project was disputed, with Alliance contending that it was 35,000m^3 whereas SK claimed that Alliance had agreed to supply 51,000m^3 of RMCto it.

4 On 23 January 2007, the Indonesian authorities announced a ban on the export of sand to Singapore ("the Sand Ban") as from 5 February 2007.

5 Sand is an essential ingredient for the production of RMC. On 24 January 2007, the Building and

Construction Authority of Singapore ("the BCA") stated that the impact of the Sand Ban on construction work in Singapore would not be significant as there were alternative sources of sand to meet the needs of the construction industry. The BCA announced that it would, in the meantime, release sand from its stockpile of sand to meet the needs of the construction industry.

6 On 31 January 2007, the BCA announced that sand would be released from its stockpile as from 1 February 2007, a few days before the Sand Ban took effect. It stated that the release of sand from its stockpile will "give the industry price and supply stability for the next few months to allow the industry to make the necessary adjustments". The BCA, which expected the price of sand to rise due to higher transportation costs in shipping sand from more distant sources, pointed out that building contractors and RMC suppliers with on-going projects may not be contractually protected against this sudden increase in price. As such, it urged developers of building projects to work out a cost-sharing arrangement with their contractors and RMC suppliers. The BCA stated that Government agencies would take the lead in bearing part of the increase in the cost of sand for its existing projects by absorbing 75% of the increase *in the cost of sand*, with the balance of 25% to be shared between the main contractor and the RMC supplier in a ratio to be agreed upon between the two parties. Those involved in private sector construction work were encouraged by the BCA to adopt the same cost-sharing arrangement for public sector projects ("the cost-sharing arrangement").

7 On 1 February 2007, the BCA announced that to ensure the orderly release of sand from its stockpile, it would release sand only to main contractors with on-going projects. The contractors were expected to pass the sand released to them to their RMC suppliers for the latter to produce RMC for their building projects. Contractors applying for the sand had to use the official BCA form and the amount of concrete, grade of concrete and concreting sand required on a weekly basis by a contractor had to be certified by the professional engineer of the building project. These measures were intended to ensure that sand for RMC was released only to those who required it for on-going projects and to prevent the hoarding of sand.

8 Notwithstanding the BCA's moves to calm the construction industry, Alliance decided that it was no longer bound by the Contracts. On 29 January 2007, it wrote to SK as follows:

> It was reported in the media, The Jakarta Post and Straits Times on 24 and 26 January 2007 respectively, that the Indonesian Government has issued a regulation to ban the export of sand effectively from 6 February 2007.
>
> In view of the sharp prices in raw materials, we will be adjusting the prices of concrete to you.

9 On 2 February 2007, Alliance informed SK that as the previously agreed prices of RMC were no longer applicable, the parties should discuss SK's needs on a case-by-case basis. At various meetings in January and early February 2007, SK reiterated that the Contracts remained in force. SK contended that while sand had become more expensive to procure, it was still available for the production of RMC. SK also made it clear that it would obtain sand from the BCA stockpile to ensure that Alliance had enough sand to produce the RMC required for the Projects.

10 Alliance was prepared to supply RMC for the Projects only if SK signed new agreements allowing it to increase the price of its RMC. On 9 February 2007, Alliance sent SK a quotation with new terms for the supply of RMC. SK did not accept the new terms as it was only interested in sharing the increased cost of sand in accordance with the BCA's cost-sharing arrangement and not in rewriting the Contracts.

11 Initially, there was some confusion in SK's orders for RMC, with some project managers noting in

their orders that a surcharge for sand had been requested by Alliance.

12 On 16 February 2007, Alliance informed SK that it was no longer bound by the Contracts. In a letter dated 23 February 2007, SK reiterated its position that the Contracts remained in force and asked Alliance to furnish a proposal for sharing the increased cost of sand. SK also warned Alliance that a unilateral decision to stop the supply of RMC for its Projects would cause it serious loss, for which the latter would be held responsible.

13 After the Sand Ban came into effect, Alliance supplied RMC to SK intermittently but the supply eventually stopped in late February 2007.

14 In the meantime senior management of both parties tried to break the deadlock on new prices for RMC. At a meeting on 6 March 2007, Alliance insisted that SK accept its new prices for RMC. On 16 May and 30 May 2007, the parties met again but could not resolve their differences.

15 SK claimed that between February 2007 and May 2007, it obtained approval for the release of 7,980.63 tonnes of sand from the BCA stockpile for the Projects. However, only 3,824.17 tonnes of sand were delivered to Alliance and the remainder of the sand was either forfeited or delivered to SK's alternative supplier, Pan United Concrete Pte Ltd ("Pan United"), after Alliance allegedly failed to respond to SK's orders for RMC.

16 On 4 June 2007, SK forwarded to Alliance its proposal for sharing the increased cost of sand and a list tabulating its alleged loss as a result of Alliance's alleged breach of contract in failing to supply RMC for the Projects. On 21 June 2007, Alliance denied any liability to compensate SK. On the next day, it sued SK for failing to pay for RMC already supplied under the Contracts. In its counterclaim, SK alleged that Alliance had breached and/or repudiated the Contracts by failing to supply RMC for the Projects after the Sand Ban.

17 As the trial was bifurcated, this judgment is only concerned with the question of liability.

The parties' positions

18 Alliance's claim is for the price or value of RMC supplied and delivered to SK for the Projects. It contended that it was no longer bound by the Contracts because of frustration arising from the Sand Ban and in the case of the contracts for the NTU and Harbourfront projects, the application of *force majeure* clauses.

19 Alliance's alternative claim for the value of RMC supplied to SK is premised on the soundness of its position that the Sand Ban had frustrated the Contracts or that the *force majeure* clauses that were allegedly in the contracts for the Harbourfront and NTU projects had been triggered by the Sand Ban.

20 SK, which asserted that Alliance was trying to take advantage of the Sand Ban to make massive profits, submitted that the increased price of sand did not frustrate the Contracts. It added that the Contracts did not contain any *force majeure* clause and that even if two of them did, the said clauses had not been triggered by the Sand Ban. SK contended that Alliance evinced an intention not to be bound by the Contracts by:

(i) refusing or failing to deliver RMC to the Projects shortly after the Sand Ban despite receiving orders for the RMC;

(ii) stating at the meeting on 6 March 2007 that it was unable to honour its contracts with SK for the supply of RMC;

(iii) issuing a letter dated 20 April 2007 to the effect that it would not supply RMC for both the Boon Lay and Harbourfront projects unless SK agreed to the revised quotation attached thereto, which sought to impose new terms and prices for the RMC; and

(iv) issuing a facsimile dated 28 February 2007 stating that it would not be able to supply RMC for the NTU project because of an alleged shortage of 20mm granite from Indonesia.

21 SK submitted that it accepted Alliance's repudiation of the Contracts and that the latter was responsible for the losses arising from its purchase of RMC from alternative sources at higher prices. Evidently, if SK's position is upheld, the amount due from Alliance to SK may exceed the amount due to Alliance for the RMC supplied to SK.

22 Alliance's response to SK's counterclaim was that it was not obliged to supply SK any RMC because the latter had not accepted its new terms and increased prices for the supply of RMC following the alleged termination of the Contracts. It also asserted that the Contracts had been varied by subsequent agreements, an assertion vehemently denied by SK.

Whether the Contracts had been superseded by fresh agreements

23 Alliance asserted that it was not liable to supply RMC to SK under the old prices because the Contracts had been superseded or varied by fresh agreements between it and SK after the Sand Ban. It alleged that after the Sand Ban, SK had readily agreed to Alliance's surcharges on the RMC for the Projects. SK pointed out that prior to the amendment by Alliance of its pleadings in June 2009, the latter had never taken the position, whether at meetings or in correspondence, that the Contracts had been varied or superseded by new agreements. It added that while its staff may have taken note of Alliance's demand for a surcharge on the old prices for RMC, there was no proof of its unqualified acceptance of Alliance's surcharges. This was not surprising as Alliance knew that SK regarded the Contracts as still binding while the senior management of both parties tried without success to resolve their differences on new prices for the RMC required for the Projects after the Sand Ban.

24 When cross-examined, Alliance's Sales Director, Mr Patrick Hong Chim Chew ("Patrick Hong"), effectively scuttled Alliance's position that the Contracts had been superseded by new agreements as he testified that even as late as May 2007, the parties were still trying to settle the new price for Alliance's RMC. The relevant part of the proceedings is as follows:

Q: The ... 6 March 2007 meeting, it did not come out successfully, it was a failure?

A: Yes.

Q: It was a failure because the parties could not resolve ... the price of the concrete; right?

A: Yes.

...

Q: Anyway, on 16 May meeting, nothing came of it; am I right to say that?

A: We cannot conclude.

...

Q: So essentially, pricing could not be agreed upon?

A: Yes, as one of the items.

25 Alliance's invoices to SK also did not support the assertion that the Contracts had been superseded. Patrick Hong testified as follows:

Q: [T]he invoices rendered by you for concrete supply throughout the whole month of February was by way of two separate invoices; one set for it under the original contract and another set for surcharges; is that correct?

A: Yes.

26 I thus find that the Contracts had not be superseded or varied by subsequent contracts between Alliance and SK.

Whether Indonesian sand was required for Alliance's RMC

27 There was no proof of a term, express or implied, that sand for the RMC required for the Projects had to come from Indonesia although it was common knowledge that Indonesia was the cheapest source of sand at the material time. As such, the lack of Indonesian sand did not, without more, excuse Alliance from performing its obligations under the Contracts to supply RMC for the Projects.

28 Alliance's witnesses accepted that what mattered was whether the sand intended for manufacturing RMC met the requisite specifications and not where the sand came from. When cross-examined, Patrick Hong stated as follows:

Q: So really, looking at the evidence here, the sieve analysis that one has to go through, and you really need to pass that regardless of where the sand comes from ... when the stockist supplies you sand you don't really care where the source comes from so long as it passes this test: right? It can come from Indonesia, and if it fails that test, you can't accept it. So if it comes from Myanmar or Philippines or other countries, if it passes the test, you don't really care, isn't it?

A: Yes.

29 Clearly, Alliance had to perform its obligations under the Contracts after the Sand Ban came into effect unless the Contracts were frustrated or there were *force majeure* clauses in the Contracts which were triggered by the Sand Ban.

Whether the Contracts were frustrated by the Sand Ban

30 The courts have referred to the circumstances under which a contract would be frustrated on innumerable occasions. In *Glahe International Expo AG v ACS Computer Pte Ltd and another appeal* [1999] 1 SLR(R) 945 ("*Glahe*"), the Court of Appeal explained at [26]:

... The law on frustration is well settled. A contract is considered frustrated when a supervening event (which has not been expressly provided for in the contract) takes place, the consequence

> of which is that the nature of the parties' (or one party's) obligations is so fundamentally or radically altered that the contract can no longer justly be said to be the same as that which was originally entered into by the parties.

The court in *Glahe* also approved of the following statement by Lord Simon of Glaisdale in *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] 1 AC 675 at 700:

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

31 Alliance emphasised that the Sand Ban was unforeseen and unexpected and that this was not denied by SK. However, what matters is whether or not the Sand Ban radically altered the nature of Alliance's obligations under the Contracts or merely made it more expensive or onerous for it to fulfil its obligations to SK.

32 SK asserted that notwithstanding the Sand Ban, Alliance was in a position to fulfil its obligations under the Contracts. It added that Alliance initially had surplus stocks of sand and that sand was readily available for the Projects from the BCA stockpile. Furthermore, Alliance had other sources for the supply of sand.

33 Alliance surplus stocks of sand in February 2007 must have been quite sizeable because it initially agreed to supply RMC to SK on the basis that the latter would subsequently return the quantities of sand used by his company for batching RMC for the Projects. Patrick Hong explained in his affidavit of evidence-in-chief ("AEIC") (at para 56) as follows:

> This was in the context of a series of telephone conversations between on or about 1 February 2007 and 6 February 2007 between the [SK's] Mr Tanaka Hitoshi and me when we agreed that [Alliance] would continue to supply ready-mixed concrete to [SK] *from the surplus sand in [Alliance's] stockpiles* on the basis that [SK] would quickly return the quantities used to [Alliance] with sand obtained under the BCA Procedure. [emphasis added]

34 When cross-examined, Patrick Hong explained why Alliance was prepared to use its surplus stocks of sand to supply RMC to SK. The relevant part of the proceedings is as follows:

> Q: [S]o my question to you is that you agreed to this mechanism where you advanced sand to the defendant on the basis that they will quickly return the quantities; right? You were agreeable to this procedure because you knew sand would be returned to you from the BCA stockpile; agree?
>
> A: On the promise that [SK] would give me back the sand, yes.
>
> ...
>
> Q: Yes, but if you are not confident that sand will be returned to you, ... you would not agree to this procedure; right?

A: I would rather put it this way. I have the confidence – because I'm dealing with a lot of Japanese in 1985 until now. I have ... confidence in dealing [with] Japanese ... customer that say they will do it. That one, I have the confidence.

35 Obviously, the fact that sand was obtainable from the BCA stockpile by SK and not by Alliance did not bother the latter as SK had made it clear all along that it was prepared to comply with the BCA procedure for obtaining sand from the stockpile to enable Alliance to manufacture RMC for the Projects. SK's project manager, Mr Takahiro Maruyama ("Maruyama"), had written to Patrick Hong on 5 February 2007 as follows:

> While we do appreciate that the sand exports ban may increase the cost of concrete production, thereby affecting your profit margins under your existing supply contract with us, you must appreciate that this is a commercial risk that you have undertaken. You are therefore clearly not entitled to demand an increase in the contract price for the supply of concrete under your existing supply contract with us.
>
> *Be that as it may and in the spirit of moving things forward, we are prepared to purchase and provide you with the sand needed for your production of the concrete purchased by us.*
>
> However, this has to be on the understanding and condition that the concrete price under your existing sub-contract with us is to be adjusted accordingly and reduced by the original price of sand prior to the imposition of the sand exports ban.
>
> Please let us know whether you are agreeable to our proposal herein...
>
> [emphasis added]

36 Crucially, the BCA did not intend to hinder the production of RMC by RMC manufacturers by releasing sand only to contractors. BCA's Senior Executive Development Officer, Ms Jean Lau Seo Leng ("Jean Lau"), testified as follows:

Q: I would be right ... to say that this statement of yours here:

> 'Only main contractors with ongoing projects were entitled to draw down sand from the stockpiles'
>
> It was a policy decision that ... was discussed and agreed between the SCAL and RMCA. Now would I be right to say it was not meant to deprive the [RMC companies] from getting sand to manufacture that concrete?

A: Yes, you are right.

37 Patrick Hong did not disagree with Jean Lau as he testified as follows:

Q: Would I be right to say that when the government decided to channel the dissemination of the sand through the main contractor, it was not meant to deprive other industry players from getting the sand, like yourself?

...

A: I can get it through the main contractor, yes.

...

Q: Because the government released [sand], and you are aware that you can get the sand through the main contractor, there is no shortfall in sand.

A: Yes, but the contractor has to give me the sand...

...

Q: ...[T]here will be no shortfall if the contractor gives you the sand, right?

A: If the contractor can get from BCA stockpile, yes.

38 That Alliance had surplus stocks of sand in its hands in the period following the Sand Ban was also evident because its quotations to its clients in early February 2007 included a term that if the latter provided insufficient quantities of sand for the production of RMC required by them, the cost of procuring additional sand would be borne by them. Patrick Hong accepted that Alliance did not state in the said quotations that RMC would not be supplied if insufficient sand was supplied to his company. He also confirmed that by late April 2007, there was no need for a contractor to supply sand to Alliance before RMC could be produced by his company for them.

39 Alliance could also have sourced for sand from other countries. It knew that the Housing and Development Board had already looked into importing sand from other countries. There was evidence that Alliance had been offered Vietnamese sand in May 2007 by Sin Heng Chan Pte Ltd but it rejected the offer because it thought that the price of $54 per ton of Vietnamese sand was not competitive. That sand was available from sources other than the BCA stockpile was also evidenced by the dwindling number of applications for the release of sand from the BCA stockpile shortly after the Sand Ban. Indeed, BCA's Jean Lau testified that to the best of her recollection, the applications for the release of sand from the BCA stockpile started to dwindle after February 2007.

40 Evidently, Alliance had not been rendered incapable of performing its obligations under the Contracts at the material time and nothing had occurred that radically altered the obligations undertaken by it under the Contracts. Admittedly, Alliance would have had to incur higher costs if it continued to supply RMC to SK for the Projects but a party who agrees to supply goods or services for a fixed price would, in the absence of terms to the contrary, be deemed to have taken the risk of any increase in the costs of supplying those goods or services. That is why it has been held that increased costs of performing contractual obligations do not, without more, frustrate a contract. In *British Movietonews v London and District Cinemas* [1952] 1 AC 166, Viscount Simon explained (at 185):

> ... The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate – *a wholly abnormal rise or fall in prices*, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet this does not in itself affect the bargain they have made. If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point – not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation. ... [emphasis added]

In similar vein, in *Glahe*, the Court of Appeal said (at [39]):

> In our opinion, the mere change in the profitability of a contract, or an increase of the burden upon a party under a contract is not enough to discharge him from performance of the contract. The obligation must be fundamentally altered. ...

41 The truth was that although Alliance knew that sand was available at the material time, it had wanted fresh contracts with SK as it was concerned about the increase in the price of sand as well as other components of RMC, such as granite aggregates, which also had to be released from the BCA's granite stockpile in late February and March 2007. After all, if sand was really unavailable, increasing the price of RMC will not solve the problem of unavailability of sand. This was conceded by Alliance's Dolly Hwa, who testified as follows:

> Q: If sand is not available, [even if] you increase prices, you cannot supply [RMC]. *That fact that you are increasing the price ... shows that sand is available. You will supply them the concrete based on the adjusted price. That is what this letter is saying, isn't it?*
>
> A: *Yes.*
>
> [emphasis added]

42 Alliance was so concerned about the rising cost of raw materials for RMC that it claimed that the Contracts had been frustrated even before the Sand Ban took effect. Patrick Hong testified that the Contracts ceased to apply at the end of January 2007. This cannot be so because Alliance accepted that sand was then still available for the production of RMC because of the BCA's efforts. This was acknowledged by Dolly Hwa in her letter of 16 February 2007 to SK, part of which is as follows:

> At the moment, *sand may be available because of government efforts*. This is only temporary and is at the discretion of the government. There is no assurance that sand will remain available as it will affect government's stockpile. [emphasis added]

43 While there may be no assurance that sand will remain available in the future, it is only when the unavailability of sand radically alters the obligations undertaken by Alliance under the Contracts that the question of frustration will arise. In any case, Patrick Hong could not have believed that the Contracts had been frustrated by the end of January 2007 as he testified that the Contracts were still subsisting after the Sand Ban. The relevant part of the proceedings is as follows:

> Q: Although you supplied in February, in February, you still charged them under the original contract price but you have the additional document where you put in a surcharge ...?
>
> A: Yes.
>
> ....
>
> Q: So the figure you actually based on the unit rate of the old contract and then put on a surcharge; right? *It shows that in the plaintiff's mind, the original contract was still subsisting after the Sand Ban, except that you vary the price by way of a surcharge; right?*
>
> A: *Yes.*
>
> Q: Thank you. *And that goes on even until April, right*, Mr Hong?

A: *Yes.*

[emphasis added]

44 Alliance asserted that in determining whether or not its obligations under the Contracts had been radically altered by the Sand Ban, note ought to be taken of *Edwinton Commercial Corporation v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] 2 Lloyd's Rep 517, where Rix LJ, who outlined a multi-factorial approach for the doctrine of frustration, explained as follows (at [111]-[112]):

> 111 In my judgment, the application of the doctrine of frustration requires a multi-factorial approach. Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances.
>
> ...
>
> 112 What the "radically different" test, however, does not in itself tell us is that the doctrine is one of justice, as has been repeatedly affirmed on the highest authority. Ultimately the application of the test cannot safely be performed without the consequences of the decision, one way or the other, being measured against the demands of justice. ... Since the purpose of the doctrine is to do justice, then its application cannot be divorced from the considerations of justice. Those considerations are among the most important of the factors which a tribunal has to bear in mind.

45 When considering the demands of justice in the present case, it is noteworthy that while Alliance claimed to have based its prices for its RMC on the BCA's suggested prices, it, unlike SK, was unwilling to follow the BCA's cost-sharing arrangement to cope with the increased price of sand. Whatever may have been the BCA's suggested prices, it cannot be overlooked that the BCA had specifically noted that building contractors and RMC suppliers with on-going projects may not be contractually protected against this sudden increase in price and that was why it proposed the cost-sharing arrangement to cope with increases in the price of sand. In any case, the BCA issued a clarification on 3 February 2007 that it did not intend to override contractual considerations.

46 Crucially, Alliance's attempt to increase its prices for its RMC immediately after the Sand Ban left much to be desired. Although the price of sand increased in February 2007 by only around $4 for $1m^3$ of RMC, Alliance sought to impose a surcharge of more than $24 for $1m^3$ of RMC. Patrick Hong, conceded this when he testified as follows:

> Q: Therefore the increase in cost of sand in the month of February 2007 was $5 per tonne ... Do you agree with me on that?
>
> A: Yes.
>
> Q: ... One cubic metre of concrete required 0.81 tonne of sand...
>
> A: Yes

...

Q: *So you were increasing the cost of the concrete by about $24.20 to $26.20 for the Harbourfront Project notwithstanding that the cost increase of sand was only $4.50*; do you see that there?

A: *Yes*.

...

Q: Is there anything unreasonable in my calculation?

A: No.

[emphasis added]

47 Patrick Hong accepted that the increase in the price of sand was the *only* subject matter of the BCA's price cost-sharing arrangement. When pressed further on the justification of Alliance's price increases, Patrick Hong could not give a satisfactory answer. The relevant part of the proceedings is as follows:

Q: *So based on this co-sharing*, ... grade 40 pump mix original price was $71.80. *You are entitled to increase it by $4.05 to $75.85; right? On the sand component alone and not $97 as you have charged?*

A: The $97 that I have charged for grade 40 pump is actually based on the recommendation by BCA.

Q: That is not my question...

A: Not quoted by me; recommended by the BCA.

Ct: You are not answering his question. He did not ask you who recommended it.

A: *Okay. Based on this, if you put it that way, it is "yes".*

Q *That is correct, right?*

A: *Yes.*

[emphasis added]

48 SK alleged that Alliance was guilty of profiteering, a charge vehemently denied by Alliance. There is no need for me to consider SK's allegation of profiteering. As was rightly pointed out by Alliance, this serious charge was not pleaded. All the same, Alliance's imposition of very much higher prices for its concrete after the Sand Ban allowed it to reap huge profits in 2007. This was in stark contrast with the losses made in previous years. Dolly Hwa confirmed that Alliance had a record of making losses and that in 2004, 2005 and 2006, its losses were $3.26m, $2.77m and $1.95m respectively. However, in 2007, Alliance made a profit of $22.49m despite claiming that it was doing "national service" by selling its RMC below cost. I thus find that the demands of justice do not persuade me that the Contracts had been frustrated.

49 In seeking to justify its refusal to supply RMC to SK without the latter agreeing to its increased prices for RMC, Alliance relied on two cases, namely *Holcim (Singapore) Pte Ltd v Kwan Yong Construction Pte Ltd* [2009] 2 SLR(R) 193 ("*Kwan Yong*") and *Holcim (Singapore) Pte Ltd v Precise Development Pte Ltd and another application* [2011] 2 SLR 106 ("*Precise (CA)*"). However, each case on frustration depends on its own facts and these two cases are easily distinguishable from the present case.

50 In *Kwan Yong*, where the High Court held that the contract between the plaintiff RMC supplier and the defendant contractor had been frustrated by the Sand Ban, an important fact to note was that the contractor had refused to assist the RMC manufacturer by applying for the release of sand from the BCA stockpile. In these circumstances, the RMC manufacturer had no sand to produce RMC for the contractor.

51 In *Precise Development Pte Ltd v Holcim (Singapore) Pte Ltd* [2010] 1 SLR 1083 ("*Precise (HC)*"), which was heard by the same judge in *Kwan Yong* and which also concerned a contract for the supply of RMC to a building contractor, the RMC supplier based its defence on a *force majeure* clause and did not plead frustration. The judge held that the defence of *force majeure* failed. In distinguishing the facts in *Precise (HC)* from those in *Kwan Yong*, the trial judge stated (at [47]–[49]:

> 47 Accordingly, the key question to ask is this: did the plaintiff make reasonable efforts to help the defendant apply for sand from the BCA stockpile? If the plaintiff had done so, the defendant would not be able to rely on cl 3 because the availability of the BCA sand would mean that the general sand shortage did not affect the defendant's ability to manufacture and supply concrete to the plaintiff. On the other hand, if the plaintiff had refused to help the defendant apply for sand from the BCA stockpile, the defendant would be able to rely on cl 3 because the general sand shortage had disrupted its ability to supply sand to the plaintiff....
>
> 48 The case of *Kwan Yong* ... fell squarely within the second situation mentioned above. The dispute in that case was similarly over a contract for the supply of concrete between the plaintiff manufacturer and the defendant buyer. In that case, the defendant buyer had refused to assist the plaintiff supplier to apply to the BCA for sand, and the plaintiff was unable to find alternative sources of sand for the manufacture of concrete. It was for that reason that this court found that the contract had been frustrated due to a shortage of sand for the manufacture of concrete.
>
> 49 The facts of the present case however are entirely different from those in *Kwan Yong*. Looking at the chain of letters between the parties, I was convinced that the defendant took no steps to request the plaintiff to apply for BCA sand. On 5 February 2007, the plaintiff had written to the defendant indicating its position that there was no disruption of supply within the meaning of cl 3 because of the availability of sand from the BCA stockpile. The plaintiff was well aware that BCA sand could only be obtained if it applied personally for it. Hence, *the very fact that it reminded the defendant of this possibility indicated that it was willing to help the defendant to procure the sand.*
>
> [emphasis added]

52 Admittedly, the decision in *Precise (HC)* was overruled by the Court of Appeal, which opined that had frustration been pleaded, this defence would have succeeded. It is noteworthy that the *dicta* of the Court of Appeal in *Precise (CA)* in relation to frustration rested on its finding that it was impossible for the supplier to meet orders exceeding 100m^3 of RMC within two days after the order had been placed, as required by the contract. The court highlighted the following facts (at [60]–

[61]):

> 60 The circumstances in the present case did present considerable difficulties for the Appellant. ... [I]t is undisputed that, since the Indonesian Government announced the Sand Ban, the BCA had implemented a system that only entitled contractors (such as the Respondent) to have access to the BCA's sand stockpiles (see also above at [12]). The Appellant had *no* access to these stockpiles...
>
> 61 ...[E]ven if the Respondent were to help procure sand from the BCA's sand stockpiles, there was *no guarantee* that the Respondent would have received the requisite quantities of sand. This was confirmed by Mr Ng Cher Cheng, the deputy director of procurement policies department at the BCA. Further, there was a *fixed limit* on the amount of sand that could be released from the BCA's sand stockpiles. The BCA's circular dated 16 February 2007 stated that there was a *weekly quota* for the BCA's sand stockists. The circular stated that the sand would be released on a "first come first serve" basis, and that once the weekly quota of sand had been reached, the BCA would *stop* releasing sand *immediately* (see also above at [19]). In addition, the BCA circular dated 1 February 2007 stated that only projects with concreting works to be carried out in the month of February 2007 were allowed to request sand to be released from stockpile from February.
>
> [emphasis in original]

53 The evidence before the court in *Precise (CA)* on the availability of sand from the BCA stockpile following the Sand Ban was apparently quite different from the evidence presented in the present case. The BCA's Jean Lau testified that so long as the requisite forms required by the BCA were properly filled, sand was disbursed from the BCA stockpile. The relevant part of the proceedings is as follows:

> Q: ... [I]n February 2007, were there any applications that were properly and correctly filled out rejected by BCA on the basis that there is not enough sand to be given to them?
>
> A: Not that I can recall.
>
> Q: What about March? Was there any turning away ... because there was shortage of sand to be given?
>
> A: Not that I can recall also.
>
> Q: In May 2007? Same question.
>
> A: No.

54 Jean Lau's evidence was supported by Mr Simon Lee Fun, the executive director of the Singapore Contractors' Association at the material time, who stated in his AEIC (at para 17) as follows:

> I further wish to add that, as far as I am aware, all the contractors had been able to draw down the necessary quantities of sand from the strategic stockpiles, for on-delivery to their ready mix concrete suppliers. I am not aware of any instance where a contractor could not obtain sufficient sand for the completion of its construction works.

55 It was not established that SK did not obtain or could not have obtained the required sand for Alliance to manufacture RMC for the Projects. Alliance complained that SK had failed to give it sufficient notice as to when sand will be delivered to its batching plants and that it had rejected SK's sand because of logistical difficulties. It asserted that there were long queues for the delivery trucks, which had to wait three hours to offload sand. However, there was insufficient evidence that it was impossible for Alliance to accept SK's deliveries of sand. As such, this case can be distinguished from *Kwan Yong*.

56 Alliance sought to bring its case within the facts of *Precise (CA)* by pointing out that the Contracts envisaged that orders exceeding $100m^3$ or $200m^3$ of RMC were to be delivered within two days of the order. Its operations director, Mr Lincoln Lim, deposed in his AEIC that Alliance would not have been able to deliver such quantities of RMC within two days. However, Alliance's basis for this assertion was unclear and there was insufficient evidence that the Sand Ban made it impossible for Alliance to meet SK's orders. The facts in the present case are thus quite different from the facts in *Precise (CA).*

57 To sum up, previous cases on the Sand Ban, like *Precise (CA)* and *Kwan Yong*, were decided on their own particular facts and need not be followed where, as in the present case, the circumstances were different. Alliance was in a position to continue supplying RMC to the SK but was unwilling to do so unless SK agreed to a higher price for the RMC. For the reasons stated, the Sand Ban had merely made it more expensive for Alliance to manufacture RMC for the Projects and did not frustrate the Contracts.

Force Majeure

58 In relation to Alliance's reliance on *force majeure* to excuse its performance of the Contracts, two questions arise. First, were there *force majeure* clauses in the Contracts? Secondly, if Contracts had *force majeure* clauses, were these clauses triggered by the Sand Ban?

59 Alliance did not plead *force majeure* in relation to the Boon Lay Project. However, it claimed that there were *force majeure* clauses in Contract No ACS 109/106/Q/TT-rev2 ("Contract No 109") for the NTU project ("the NTU FM Clause") and in Contract No ACS 980/0906/QD-rev3 ("Contract No 980") for the Harbourfront project ("the Harbourfront FM Clause").

60 SK asserted that Contract No 109 and Contract No 980 had nothing to do with the NTU and Harbourfront projects respectively. It pointed out that as it found Alliance's terms in Contract No 109 and Contract No 980 unacceptable, it did not sign these documents. Instead, SK made a counter-offer by issuing separate purchase orders, namely PO-009 and PO-013 ("the Purchase Orders"), which did not contain any *force majeure* clauses. These two Purchase Orders were signed by both parties and are binding on it and Alliance.

61 Alliance accepted that Contract No 109 and Contract No 980 were not signed by SK and were not referred to in the Purchase Orders. However, it pointed out that the Purchase Orders could not have been intended to embody all of the parties' rights and obligations and that SK's Mr Hitoshi Tanaka had admitted that the Purchase Order for the NTU Project was not the contract but the most "important document to make [the] contract" in question. Even so, it was not Alliance's pleaded case that Contract Nos 109 and 980 had been signed or modified by SK. In any case, even if the Purchase Orders omitted certain details that does not mean that the parties had intended that Contract Nos 109 and 980 and all the terms therein were applicable to them. As such, I find that in the "battle of forms" in relation to offer and acceptance, SK fired the last shot. As its Purchase Orders were signed by both parties, I find that the NTU and Harbourfront contracts did not include *force majeure*

clauses.

Whether the force majeure clauses were triggered by the Sand Ban

62 I will, for the sake of completeness, consider the position if the *force majeure* clauses were incorporated into the contracts for the NTU and Harbourfront projects.

63 The difference between the application of doctrine of frustration and *force majeure* clauses was explained by the Court of Appeal in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal* [2007] 4 SLR(R) 413 ("*RDC Concrete*") as follows (at [56]):

> *Conceptually*, it is true that a *force majeure* clause operates differently from the doctrine of frustration. Whereas a *force majeure* clause is an agreement as to how outstanding obligations should be resolved upon the onset of a *foreseeable* event, the doctrine of frustration concerns the treatment of contractual obligations from the onset of an *unforeseeable* event... [emphasis in original]

64 In *RDC Concrete*, the Court of Appeal emphasised that the effect of a *force majeure* clause depends on its precise language and explained (at [54] and [58]):

> 54 The most important principle with respect to *force majeure* clauses entails, simultaneously, a rather specific factual inquiry: the *precise construction* of the clause is paramount as it would define the *precise scope and ambit* of the clause itself. The court is, in accordance with the principle of freedom of contract, to give full effect to the intention of the parties in so far as such a clause is concerned.
>
> ...
>
> 58 Everything depends, in the final analysis, on the precise language *and* actual facts of the case at hand (as pointed out both in the quotation above as well as at [54] above). ...
>
> [emphasis in original]

65 As the wording of the NTU FM Clause differs from the Harbourfront FM Clause, these two clauses will be considered separately.

The NTU FM Clause

66 The NTU FM Clause reads as follows:

> We shall be under no obligation to supply the ready-mixed concrete if the products have been disrupted by virtue of inclement weather, strikes, labour disputes, machinery breakdowns, riots, shortage of materials, acts of god or any other factors that could have arisen through circumstances beyond our control.

67 The wording of this clause is substantially similar to the *force majeure* clause that was considered in *Precise (CA)*, which reads as follows:

> The Supplier shall be under no obligation to supply the concrete if the said supply has been disrupted by virtue of inclement weather, strikes, labour disputes, machinery breakdowns, riots, and shortage of material, [act] of God or any other factors arising through circumstances beyond the control of the Supplier.

68 In interpreting the above *force majeure* clause, the Court of Appeal held that words "disrupt" and "hinder" connote a lower degree of negativity compared to the word "prevent" and the word "disrupt" suggests a datum measure of difficulty that interfered with the successful completion of the transaction concerned and unlike a situation involving "prevention", a "disruption" does not render further performance by one party, or by both, impossible. The court added (at [56]):

> [W]here a *commercial transaction* is involved, the process of ascertaining whether or not a particular set of circumstances constitutes a 'disruption' or 'hindrance' within the meaning of the *force majeure* clause concerned ought to be informed by considerations of *commercial practicality* (bearing in mind, of course, the particular *context* in which the contract had been entered into *(including any commercial practice in the trade and/or resultant dislocation in the trade*)". [emphasis in original]

69 A question arises as to whether Alliance is required to prove that it took all reasonable steps to avoid the *force majeure* effects of the event in question. In *Precise (CA)*, the Court of Appeal held (at [66]) that there is no blanket principle that the party relying on a *force majeure* clause must take all reasonable steps to avoid the disruption before it can rely on the *force majeure* clause and that much depends on the precise language of the clause concerned. The *force majeure* clause relied on by Alliance in the present case refers to circumstances "beyond our control". In *Precise (CA)*, the Court of Appeal held (at [69]) that the party relying on a *force majeure* clause ought to show that it has taken all reasonable steps to avoid the event or events concerned if there is the requirement that the event or events must be beyond the control of that particular party.

70 On the facts of *Precise (CA)*, the court found that the *force majeure* clause was triggered for the following reasons:

> (i) While a mere increase in price is ordinarily insufficient to constitute a "disruption", the circumstances of the case were sufficiently difficult to constitute a "disruption": at [78].
>
> (ii) The RMC supplier had taken reasonable steps to avoid the operation of the *force majeure* clause. In particular, it had informed the contractor of its inability to procure sand from the BCA and it had offered to credit back to the contractor the price of sand at a price higher than the cost of procuring sand from the BCA. However, time and again, the contractor had been unwilling to assist to procure sand from the BCA. In addition, the contractor did not adduce any evidence that there were alternative supplies of concreting sand from local or overseas sources: at [100].

71 The facts in the present case are quite different. First, unlike the supplier in *Precise (CA)*, Alliance appears to have had access to other sources of sand. Secondly, unlike the contractor in *Precise (CA)*, SK was willing and did procure sand from the BCA for Alliance, but Alliance had refused to take delivery because of alleged logistical difficulties.

72 Alliance argued that it had taken reasonable steps to avoid the consequences of the Sand Ban by complying with a "BCA Procedure Agreement", but SK refused to cooperate and reneged on this agreement. However, SK denied having made this agreement. Even assuming that such an agreement was made, Alliance's complaints as to the SK's lack of cooperation largely revolve around SK's refusal to agree on a revised price for the RMC that is in line with BCA recommendations and a deficit in the sand delivered by SK. However, the court in *Precise (CA)* had made it clear that a mere increase in costs does not constitute a "disruption". As for the alleged sand deficit, this would have been material had it actually disrupted Alliance's ability to supply RMC to SK. As stated earlier, SK was prepared to apply for the release of sand from the BCA stockpile and it appeared that Alliance still had

other sources of sand and was able to continue supplying RMC to SK had it wanted to. Alliance should have resorted to those sources of sand even if it had to pay higher prices, instead of insisting that SK provide all the sand for the RMC ordered.

73 In my view, there was no "disruption" within the meaning of the NTU FM Clause, nor were sufficient steps taken by Alliance to avoid the consequences of the Sand Ban.

The Harbourfront FM Clause

74 The Harbourfront FM Clause states:

> In the event of any circumstance constituting Force Majeure, which is defined as act of God, or due to any cause beyond ACS' control, such as market raw material shortages, unforeseen plant breakdown or labour dispute, the affected party to perform its obligations shall be suspended or limited until such circumstance ceases.

75 This clause is awkwardly drafted and difficult to understand. Alliance simply assumed that *Precise (CA)* had conclusively decided that the Sand Ban was an event of *force majeure*. As has been shown, however, this is a false assumption as the court in *Precise (CA)* had made it clear that much depends on the precise wording of the clause in question and the specific difficulties that the particular supplier faced.

76 The key differences between the Harbourfront FM Clause and the NTU FM Clause are that:

> (i) the Harbourfront FM Clause uses the phrase "the affected party" instead of "supply has been disrupted"; and
>
> (ii) the Harbourfront FM Clause specifies that Alliance's obligations are only suspended or limited until the event constituting *force majeure* ceases.

77 The use of the word "affected" instead of "disrupted" might suggest an *even lower* threshold of hindrance that would trigger the Harbourfront FM Clause. However, the parties could not have intended the said clause to be triggered whenever the supplier is affected in however small a way by a shortage of raw materials. Since the clause was drafted by Alliance, it should be narrowly construed, and the better view is that "affected" connotes the same level of hindrance as the word "disrupted". As noted in Sir Guenter Treitel, *Frustration and Force Majeure* (Sweet & Maxwell, 2nd Ed, 2004) at para 12-024:

> A similar distinction can be drawn between clauses which protect a seller where the specified events *prevent*, and those which protect him where they merely *hinder*, performance. ... ***The cases, however, make it clear that a mere increase in price will not of itself constitute even a hindrance.*** Much less will it amount to a prevention: thus a steep rise in freight rates has been held not to fall within a clause which allowed a seller to suspend performance if he should be prevented from shipping "under normal conditions". [emphasis in original in italics; emphasis added in bold italics]

78 For the same reasons given for the NTU FM Clause, the Harbourfront FM Clause had not been triggered by the Sand Ban.

SK's application for relief from its employers

79 I will now consider SK's application to its employers for the Projects for*, inter alia*, additional payments based on the changed circumstances arising from the Sand Ban. For instance, on 5 February 2007, Maruyama wrote to the contract administrator for the NTU project as follows:

> In light of the sudden unavailability of sand from Indonesia that is completely beyond our contemplation and control, we genuinely believe that we shall no longer be bound by the prices of all affected construction materials that may have been applicable prior to the Sand Ban. The sudden increase in the price of sand, granite etc cannot therefore be borne by us.

80 Alliance noted that SK was trying to hold it to the terms of the original contract while claiming extensions of time from its employers on the basis of the Sand Ban. However, SK pointed out that it had not claimed that its contracts with the employers for the Projects had been frustrated and that it had written to the employers shortly after the Sand Ban regarding the question of *force majeure* as a "protective measure". Maruyama explained in his AEIC (at para 90) as follows:

> To protect our position *vis-a-vis* the employer in event [Alliance was] correct, I had forwarded [Alliance's] letters to the SO of the NTU Project and tried to claim from the employer extensions of time for the completion of the NTU Project as well as the increase in the costs in materials. I did this ... soon after the announcement of the Indonesian Sand Ban and on or about 1 March 2007 soon after receiving [Alliance's] notice of alleged shortage of aggregate., On both occasions, the SO rejected [SK's] applications and denied that these incidents amounted to force majeure events.

81 SK's Project Manager for the Harbourfront Project, Mr Keizo Shoji, also defended his company's position in his AEIC (at para 90) as follows:

> 90 ... [A]t the point the submissions to the employer was made, the legal effect of the Indonesian Sand Ban was undecided. While I did not agree with [Alliance's] claims that the Indonesian Sand Ban frustrated the sub-contract and supply of ready made concrete, I wanted to preserve [SK's] rights *vis-a-vis* the employer in case the Indonesian Sand Ban did in fact entitle [SK] to extensions of time and asked them to share in the increased costs.

82 The above-mentioned applications by SK for relief from its employers thus cannot support Alliance's assertion that the performance of the Contracts after the Sand Ban had been so radically altered as to result in the frustration of the Contracts or triggering of the *force majeure* clauses in the contracts for the NTU and Harbourfront projects.

The agreed quantity to be supplied under the NTU contract

83 As mentioned, there was a dispute regarding the quantity of RMC Alliance had agreed to supply for the NTU project. While Alliance insisted that the agreed quantity was 35,000m^3, SK contended that it was 51,000m^3, as reflected in P0-009.The difference is significant because Alliance asserted that the RMC that it supplied for the NTU project had already reached the contractual target of 35,000$m^3$by early February 2007, in which case, it would have completed its obligation to supply RMC under the contract for this project and SK cannot claim to have suffered any loss in relation to this project.

84 I accept SK's evidence that the agreed quantity of RMC for the NTU contract was 51,000m^3 and that this figure in PO-009 was not a typographical error. If this figure had been an error, Alliance should have, as it had done in the past, pointed out this error in writing to SK. Patrick Hong said that

this was not done as he trusted SK's Maruyama but as an experienced supplier of RMC for decades, he ought to have known the legal implication of not noting in writing an obvious error in a document signed by him. Furthermore, in Alliance's own quotation dated 9 February 2007, there was a balance of 15,000$m^3$of RMC for the NTU project. By then, more than 35,000$m^3$of RMC had been supplied for the NTU project. If the agreed quantity to be supplied to this project was indeed 35,000m^3, there would have been no outstanding quantity of RMC to be supplied for the NTU project on 9 February 2007.

Conclusion

85 The events in the present case do not justify a conclusion that the Contracts had been frustrated or that Alliance was entitled to rely on *force majeure* clauses allegedly incorporated into the contracts for the NTU and Harbourfront projects. As such, Alliance was obliged to fulfil its contractual obligations under the Contracts and supply RMC to SK under the prices fixed in the Contracts. As it refused to do so, SK was entitled to treat the Contracts as repudiated and obtain RMC from other sources.

86 SK has to pay Alliance the unpaid amount due to the latter for the supply of RMC. The amount owed would be based on the terms of the Contracts but SK should be honourable enough to adhere to BCA's cost-sharing arrangement for increases in the price of sand as it had claimed all along that it had accepted the said arrangement after the Sand Ban.

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

Costs

88 SK is entitled to costs.

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