Holcim (Singapore) Pte Ltd v Kwan Yong Construction Pte Ltd
[2008] SGHC 231

Case Number : Suit 291/2007

Decision Date : 11 December 2008

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Chandra Mohan with V Jesudevan (Rajah & Tann LLP) for the plaintiff; Chung Khoon Leong John and Jasmin Yek (Kelvin Chia Partnership) for the defendant

Parties : Holcim (Singapore) Pte Ltd — Kwan Yong Construction Pte Ltd

Contract – Contractual terms – Express terms – Force majeure – Contract for supply of ready-mixed concrete – Increase in price of ready-mixed concrete due to ban on export of sand to Singapore – Whether sand ban amounted to force majeure

Contract – Duress – Economic – Contract for supply of ready-mixed concrete – Increase in price of ready-mixed concrete due to ban on export of sand to Singapore – Subsequent agreements by parties to vary price of concrete originally supplied – Whether agreements were made under economic duress and hence unenforceable at law

Contract – Frustration – Contract for supply of ready-mixed concrete – Increase in price of ready-mixed concrete due to ban on export of sand to Singapore – Whether contract was frustrated by sand ban so that supplier was discharged from further performance

Contract – Variation – Contract for supply of ready-mixed concrete – Increase in price of ready-mixed concrete due to ban on export of sand to Singapore – Subsequent agreements by parties to vary price of concrete originally supplied – Whether agreements were entered into without valuable consideration and was unenforceable at law

Damages – Mitigation – Contract – Contract for supply of ready-mixed concrete – Increase in price of ready-mixed concrete due to ban on export of sand to Singapore – Whether reasonable steps taken to mitigate damages caused

11 December 2008 Judgment reserved

Lai Siu Chiu J:

1 This was a dispute concerning the supply of ready-mix concrete ("concrete") by Holcim (Singapore) Pte Ltd ("the plaintiff") to Kwan Yong Construction Pte Ltd ("the defendant"). The plaintiff is a manufacturer and supplier of concrete to the construction industry while the defendant, as its name implies, is a local construction company.

2 On 17 August 2006, the defendant was awarded a contract by the Ministry of Education ("MOE") to rebuild Pei Tong Primary School located at Clementi Avenue 5, Singapore ("the project") at a contract sum of $16.8m. The commencement date was 28 August 2006 while the contractual completion date was 27 February 2008. In the event of delay in completion of the project, the defendant was liable to pay liquidated damages to the MOE at $3,150 per day for each day of delay.

3 On 28 August 2006, the plaintiff and the defendant entered into an agreement for the supply of concrete by the plaintiff to the defendant. The terms of the contract are set out in the plaintiff's quotation dated 25 August 2006 ("the Quotation") and contained the following salient clauses:

3 The Purchaser must provide sufficient advance notice in confirming each order. 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 materials, Acts of God or any other factors arising through circumstances beyond the control of the Supplier.

…

12 The Supplier reserves the right to suspend the concrete supply without notice in the event of exceeding or default in payment of the agreed credit terms and recover such outstanding payment plus legal costs, expenses and interest accrued thereon.

…

21). Default in supply

Where the order is duly made and the Supplier failed (*sic*) to deliver to site within the stipulated time, the contractor shall be entitled to seek other source for the supply and the difference in cost shall be borne by (*sic*) Supplier by way of offset from the account.

Standard Terms and Conditions

All prices are fixed till 31st December 2006, thereafter, an increase of $2.0/m3 for period of Jan '07 to Jun '07 and additional increase of $2.0/m3 for period of Jul '07 to Dec '07 for all grade (*sic*) of concrete.

Payment Terms ~~30~~ 60 days.

Clause 21 was a handwritten insertion by the defendant. Amongst the grades, the plaintiff quoted a pump price of $68 per cubic metre ("m³") for grade 40 concrete.

4 Pursuant to the Quotation, the plaintiff delivered concrete to the defendant between 1 June 2006 and 25 January 2007 for which invoices were issued. The invoices totalled $175,142.66 and these sums were not paid by the defendant.

5 On 24 January 2007, the Indonesian authorities announced the ban of sand exports to Singapore with effect from 5 February 2007 ("the sand ban"). This caught the construction industry as well as the Building and Construction Authority ("the BCA") off guard. All sand used in the building industry had been sourced from Indonesia.

6 On 26 January 2007, the plaintiff notified the defendant of the possible stoppage of supply of sand due to the above reason.

7 As a consequence of the sand ban, the parties agreed on 29 January 2007 to vary the price of the concrete supplied under the Quotation by increasing it by $35 for all grades ("the January Agreement"). Pursuant to the January Agreement, the defendant continued to order concrete from the plaintiff who continued to supply the same between 29 January 2007 and 1 November 2007. The total value of concrete supplied under the January Agreement was $60,843.30 which the defendant admitted it failed to pay.

8 On 1 February 2007, the BCA announced that it would release sand from the government

stockpile at $25 per tonne ("the government price") but only to contractors for their onward delivery to concrete suppliers such as the plaintiff. The government price was much higher than the price the plaintiff had paid for sand from Indonesia previously. Accordingly, the plaintiff wrote to the defendant (at AB57) on the same day to advise that it was unable to supply concrete based on the Quotation and it would be revising its prices with immediate effect.

9 The BCA then announced to members (including the defendant) of the Singapore Contractors Association Ltd ("SCA") on 3 February 2007 that to assist contractors, there would be a cost-sharing initiative for public projects in that the government would absorb 75% of the price increase of concrete with the remaining 25% to be shared between contractors and concrete suppliers. Hoarding of sand was not allowed.

10 On 1 March 2007, the BCA increased the price of sand from $25 to $60 per tonne. The price of 20mm aggregate was increased from $25 to $70 per tonne after some 13 barges transporting aggregate to Singapore were detained by the Indonesian authorities in late February. By March 2007, there was a granite embargo by Indonesia.

11 On 1 March 2007, the parties agreed to vary the terms of the January agreement by a second quotation no. HSPL/Q/387/07 ("the March agreement") the salient terms of the second quotation were as follows:

> B. Standard Terms & Conditions
>
> …
>
> 3 This quotation supersedes all previous quotations.
>
> C. Terms of payment
>
> 14 days from the date of invoice
>
> …
>
> 13 Any overdue interest at the rate of 1% per month shall be imposed on the portion of debt that remains unpaid upon expiry of the agreed credit term.

12 Together with the March agreement, the plaintiff forwarded a letter also dated 1 March 2007 (at AB 83) to the defendant in which it explained the circumstances for the price increase and indicated that it was prepared to give credit to the defendant if the latter could supply sand and aggregates (two major components in the manufacture of concrete) to the plaintiff. Such credit would be in accordance with the price guidelines set by the BCA, *viz* $63 per tonne for sand and $73 per tonne for 20mm aggregate.

13 The defendant responded with a purchase order dated 2 March 2007 ("the PO") to the plaintiff for 440 m^3 of G40 pump mix concrete at the plaintiff's quoted price of $191 per m^3. It also supplied the plaintiff with 401 tonnes of sand to enable the plaintiff to fulfil its order which the plaintiff did on 6 March 2007. The plaintiff took the precaution of writing to the defendant on 2 March 2007 to say that the prices of concrete would be those as reflected in the March agreement.

14 The plaintiff issued two invoices totalling $93,857.40 to the defendant for concrete it had delivered in March 2007. The defendant did not pay these invoices. The plaintiff suspended supplies

of sand to the defendant as a result. The total amount due and outstanding from the defendant for concrete supplied between December 2006 and March 2007 was $330,935.36.

15 On 13 March 2007 (AB94-95), the defendant wrote to the plaintiff (apparently after taking legal advice) referring to the defendant's letters dated 1 February 2007 (at [8]) and 1 March 2007 (at [11]) and protested that the plaintiff's price increase was in breach of the contract in [3]. The defendant contended that the plaintiff's aforesaid two letters and its refusal to supply the defendant with concrete at previously agreed prices evinced an intention not to be bound by the terms of the contract and amounted to a repudiatory breach which breach the defendant accepted. The defendant gave notice it would claim for loss and damages resulting from the disruptive effects caused by the plaintiff's refusal to supply any more concrete to the former.

16 The plaintiff sent a letter of demand to the defendant on 19 March 2007 (at AB99-100) for sums totalling $330,935.36 for concrete supplied (not including interest for late payment). Notwithstanding its failure/refusal to pay the plaintiff's outstanding claim, the defendant placed orders with the plaintiff on 22 and 27 March 2007 for grade 40 concrete to be delivered. The plaintiff did not accede to the defendant's requests.

17 The defendant replied on 4 April 2007 (at AB109) to the plaintiff's letter of demand in [15] to say that due to the plaintiff's wrongful repudiation of the Quotation, the defendant intended to set off its claim for damages for breach of contract against the plaintiff's claim. Accordingly, no payment was due to the plaintiff.

18 The plaintiff's solicitors sent a letter of demand to the defendant on 16 April 2007 (AB110) for the sum of $305.153.40. The defendant's solicitors replied on 19 April 2007 (at AB113) to deny the plaintiff's claim and alleged that it was the plaintiff who was in breach of contract.

The pleadings

19 Not surprisingly, the plaintiff commenced these proceedings on 9 May 2007 claiming the sum of $305,153.40. The claim amount was $330,935.36 but the defendant was credited with $25,781.96 (inclusive of GST) for 389.75 metric tons (@$63 per metric ton) of sand it had delivered to the plaintiff in March 2007 (see [12]).

20 The plaintiff relied on cl 3 of the Quotation at [3] to say it was entitled to suspend performance of its obligations under the contract from or around the time of the sand ban.

21 The plaintiff then pleaded (in para 23B of the statement of claim) as an alternative that due to the sand ban, the plaintiff's obligations were rendered radically different from what was originally undertaken in the Quotation, performance had become impossible without the fault of the plaintiff, the contract was frustrated and the plaintiff was discharged from further performance.

22 In the defence (Amendment No. 3), the defendant denied it had entered into the January agreement in [7]. The defendant alleged that its site manager Lee Kong Honn ("Lee") had no alternative but to agree to the surcharge imposed by the plaintiff's account manager Pek Leng ("Pek") of $35 per m^3 in order to ensure a supply of concrete for the project. Consequently, the defendant pleaded, the January agreement was made under duress and was unenforceable at law. In the alternative, the defendant alleged that the January agreement was entered into without valuable consideration and was unenforceable at law.

23 The defendant raised the same defences for the March agreement in [9]. It then

counterclaimed for the plaintiff's breach of the Quotation in [3] which the defendant had accepted on 13 March 2007.

24 The defendant's counterclaim was for the sum of $418,149.87, being the difference between the price of concrete in the Quotation and the price it actually paid the plaintiff, less the government subsidy of $331,936.63. In the alternative, the defendant pleaded it had to purchase concrete at higher prices from other sources and suffered loss and damage amounting to $418,149.87. I should point out that the defendant admitted owing the plaintiff the sum of $330,935.36 but averred it was entitled to set off and extinguish the plaintiff's claim by its counterclaim.

25 In its reply and defence to the counterclaim (Amendment No. 2), the plaintiff denied that the two agreements in dispute had been entered into under duress. If (which was denied) the plaintiff was in breach of the Quotation, the plaintiff denied the defendant had suffered loss and damage as claimed. It added that the defendant had failed to take reasonable steps to mitigate its loss.

The issues

26 The first question the court has to determine in this case is, which party was in breach? Was it the plaintiff (as the defendant contended) who was in repudiatory breach because it failed to honour the prices for concrete in the Quotation or, was it the defendant (as the plaintiff asserted) for failing to pay timeously, the price of concrete delivered by the plaintiff? Second, did the defendant sign the January and March agreements under economic duress and the same are therefore unenforceable? As the defendant's pleadings admitted the plaintiff's claim in full (see [24]), the court only needs to focus on the issue of liability for the counterclaim. If the court rules in the defendant's favour, the Registrar will then assess damages due to the defendant.

The evidence

27 The plaintiff called three witnesses to prove its case, including a representative from the BCA while the defendant had two witnesses.

(i) the plaintiff's case

28 The plaintiff's first witness was its chief executive officer Sujit Ghosh ("Ghosh") whose affidavit of evidence-in-chief ("AEIC") deposed to the background leading to the signing of the January and March agreements and the dispute thereafter with the defendant. Ghosh at the material time was also the president of the Ready-Mixed Concrete Association of Singapore ("RMCA") in which capacity he had frequent discussions/meetings with the BCA, especially after the sand ban was implemented.

29 Ghosh revealed that almost immediately after the sand ban, the plaintiff had difficulties obtaining sand from its suppliers whose source was commonly Indonesia. He deposed that prior to the sand ban, the plaintiff paid between $11 and $12 per ton for sand. After the ban, the plaintiff's suppliers demanded between $48 and $53 per ton (on cash terms) for sand, an increase of $37 to $41 per ton. Hence, the average increase in the price of sand was $39 per ton. Approximately 0.9 tons of sand is required to produce one m^3 of concrete. The cost increase to manufacturers like the plaintiff was $35.10 (0.9 x 39) per m^3. That was why the plaintiff informed the defendant in January 2007 that it would have to pay a premium of $35 for all grades of concrete supplied by the plaintiff. Because the defendant did not accept the plaintiff's revised prices for February 2007 and it did not supply sand from the government stockpile to the plaintiff, the plaintiff did not supply concrete to the defendant in February 2007 either.

30 The price of sand and aggregate went up drastically on 1 March 2007, prompting the plaintiff to again revise its price of concrete in its March quotation to the defendant, and which formed the basis of the March agreement. What Ghosh knew of the defendant's agreeing to the plaintiff's price was told to him by Pek as he had no direct contact with Lee or anyone else in the defendant's organisation.

31 Ghosh deposed that the plaintiff believed in good faith that the defendant had accepted the consensual agreements reached in January and March 2007 and that was why the plaintiff supplied concrete to the defendant based on those agreements.

32 Ghosh noted that notwithstanding the defendant's stand in March 2007 that the January and March agreements were not valid and/or enforceable and that the plaintiff had repudiated the contract in [3], the defendant placed orders for concrete with the plaintiff almost immediately thereafter.

33 Ghosh denied that the plaintiff was in breach of the contract. Indeed, he said, it was the defendant who was in breach, relying on cl 12 of the contract in [3], which breach entitled the plaintiff to suspend supply of concrete to the defendant on 15 February 2007 when the latter failed to pay the outstanding $175,142.66 in [4], which by then had exceeded the 60 days contractual credit term.

34 Ghosh revealed that the plaintiff had sent demands to the defendant for payment of $107,425.52 on 15 February 2007 and when the defendant failed to respond, a further demand was sent on 26 February 2007 and yet again on 19 March 2007 (see [15]).

35 On the plaintiff's pleaded case that the defendant failed to mitigate its loss (assuming it was entitled to damages), Ghosh pointed out that the defendant apparently purchased concrete from other suppliers (such as Island Concrete Pte Ltd ["ICPL"]) from as early as March 2007 at prices higher than those the plaintiff had quoted to the defendant. (The plaintiff pointed out that the March agreement quoted a price of $191 per m^3 whereas ICPL charged the defendant $207-$208 for the same product). In fact, the defendant contracted with Island Concrete Pte Ltd to supply concrete even earlier, in February 2007. For those alternative supplies of concrete, the defendant was expected to, and did, utilise its allocation of sand from the government stockpile. That explained why the plaintiff did not receive sand from the defendant in February 2007.

36 The facts narrated by Ghosh have been adequately set out earlier in [3] to [14] and there is no necessity to repeat them. I turn instead to look at the evidence adduced from him during cross-examination.

37 In cross-examination, Ghosh revealed that although over the years members of the RMCA had encountered problems in obtaining sand supplies from Indonesia, the RCMA had never raised the subject with the BCA, until his letter on behalf of the RCMA dated 18 August 2006 (at AB26-27). Although his said letter complained of the shortage of sand supplies from Indonesia and he requested the BCA to look into the problem, Ghosh denied counsel's suggestion that he was aware of the possibility of a ban on sand from Indonesia or that he knew the possibility of a ban was reasonably foreseeable. The sand ban was totally unexpected. He explained that sand used in the manufacture of concrete was land sand.

38 Ghosh revealed that the plaintiff had two main sand suppliers and a few back-up suppliers but they were all from Indonesia and the plaintiff had no other sources of sand (Malaysia having banned sand exports to Singapore in 1997 followed by Thailand). Although the plaintiff improvised by using

(with BCA'a approval) manufactured sand (known as M sand) obtained from quarries in Malaysia (which did not come within the Malaysian government's ban), the quantities were insufficient. The plaintiff also imported shiploads of (river) sand from Cambodia after the sand ban but the BCA found that the quality did not meet its specifications. Similarly, sea sand was not suitable while sand from Vietnam was very expensive. After the sand ban, even when the plaintiff was willing to pay the price demanded by sand suppliers, there was no guarantee that it would get the quantities it ordered. Because of the acute shortage of sand at the time, the plaintiff was forced to close down two of its plants because no concrete could be produced.

39 When he took the stand, Pek (who was known to the defendant as Alvin Pek) explained the background to the signing of the January and March agreements. Pek (PW3) deposed that he received a call from Lee on 29 January 2007 inquiring into the defendant's order for 512 m^3 of sand placed on 25 January for delivery that day. Pek said he explained to Lee there was a severe shortage of sand at that time and the plaintiff was unable to locate and purchase sand from its suppliers who by then had stopped supplying. Lee asked for Pek's suggestion on how the defendant could obtain concrete. Pek replied that if the defendant was willing to pay sand suppliers a premium, the plaintiff might be able to procure sand on the defendant's behalf although no guarantee was offered. Pek indicated a figure of $35 per ton as the increase in cost for concrete as a result of paying the premium.

40 At the conclusion of their conversation, Lee said he understood the sand ban had disrupted the supply of concrete, he indicated the defendant was willing to pay the price premium imposed by sand suppliers and urged the plaintiff to do its best to obtain sand to fulfil the defendant's orders. Pek thought that Lee sounded reasonable and that he understood the difficulties both concrete suppliers and contractors were facing at that point in time. Lee did not insist to Pek that the plaintiff was to supply concrete at the prices stated in the Quotation.

41 Pek requested Lee's written confirmation of his verbal agreement to bear the premium on the price of sand and the concrete produced thereto. Accordingly, Lee faxed to Pek that day itself (at AB 55) confirmation that the defendant agreed to the surcharge of $35 per m^3.

42 After receipt of the defendant's fax of 29 January 2007, the plaintiff supplied concrete to the defendant based on its order dated 31 January 2007.

43 After the BCA released the government stockpile of sand at $25 per ton, the plaintiff forwarded to the defendant on 1 February 2007 a revised quotation for the supply of concrete to take into account the increased price of sand. As compared with the price in the Quotation, the increase in price for concrete was between $26 to $29 per m^3, less than the $35 Pek had informed Lee on 29 January 2007. There was no response from the defendant. Pek had also informed Lee that the defendant must get sand from the BCA if Lee wanted the plaintiff to deliver concrete to the defendant but no sand was delivered by the defendant to the plaintiff. Consequently, the plaintiff did not deliver concrete to the defendant based on the 1 February 2007 quotation, notwithstanding Lee's faxes to him dated 2 and 5 February 2007 (at AB 60 and AB 71) complaining of non-delivery. (Pek clarified in re-examination that the plaintiff's delivery of concrete to the defendant on 1 February 2007 was based on orders placed under the January agreement).

44 On 1 March 2007, the BCA increased the price of sand from $25 to $60 per ton while the price of aggregates was revised to $70. Consequently, the plaintiff forwarded a revised quotation to the defendant with a letter to explain the price increase of concrete. On the same day, Pek received a call from the defendant's contracts' manager Kwan Kam Choy ("Kwan") who indicated he was unable to sign the plaintiff's March quotation but did not give a reason. Pek explained the price increase of

concrete was due to corresponding increases in the price of sand and aggregates, and referred Kwan to the plaintiff's letter that day to the defendant . He further informed Kwan that the plaintiff would give the defendant credit for any sand and aggregates that the defendant supplied to the plaintiff to manufacture concrete for the defendant, based on the prices set by BCA which for March 2007 would be $63 and $73 per ton for sand and aggregate respectively. Pek suggested to Kwan that the defendant could simply forward its order for concrete to the plaintiff indicating the price and the defendant should arrange for sand from the BCA to be sent to the plaintiff.

45 Subsequent thereto, the plaintiff received from Kwan the defendant's purchase order dated 2 March 2007 in [12] (at AB805) and the defendant's request to Common Machinery Co Pte Ltd to release 401 tons of sand from the BCA stockpile to the plaintiff with BCA's approval. (The defendant's purchase order reflected the price of $191 m^3 in the plaintiff's March quotation for grade 35/20 concrete). The plaintiff fulfilled the order and delivered 468 m^3 of concrete to the defendant.

46 In accordance with Pek's offer to Kwan in [44], the plaintiff gave a rebate of $25,781.96 to the defendant for the sand supplied by the defendant from the government stockpile.

47 Pek expressed surprise at the defendant's allegation in its letter dated 13 March 2007 in [15] that the plaintiff had repudiated the Quotation, noting that thereafter (see [16]) the defendant still placed orders for concrete for the project by sending faxes to the plaintiff on 13 and 27 March 2007.

48 During cross-examination, Pek explained that his job as an account manager (to service certain customers or 'accounts') did not require him to know the source of the plaintiff's raw materials (including sand) from which concrete was produced; he was not in charge of/involved in procurement. Consequently, he was unaware that Indonesia was the source of the plaintiff's sand supply.

49 Pek revealed that the Quotation was not the plaintiff's standard quotation/ contract but was negotiated between the parties especially for the project although it was based on market prices as well as the plaintiff's price guidelines. The defendant changed the payment terms from 30 to 60 days but the plaintiff did not object to the amendment. The defendant had also amended the plaintiff's standard terms and conditions stated on the reverse of the Quotation. For quantities in excess of 100 m^3, customers must give more than two days' advance notice of their orders as stated under cl 15 of the conditions. For orders of less than 100 m^3, customers were required to give one day's advance notice to ensure orders were executed. Otherwise, under cl 3 of the conditions, the plaintiff was not obliged to supply to the concrete ordered. Equally, the plaintiff was not obliged to supply concrete if there was disruption due to inclement weather, strikes, labour disputes, machinery breakdowns and shortage of material etc. At times, customers placed telephone orders in the morning for deliveries in the same afternoon but delivery of such orders was not a certainty as it would be subject to the plaintiff's production for the day.

50 Pek disagreed that his account of his conversation with Lee was inaccurate. He distinctly recalled that Lee asked for the plaintiff's assistance to make sure concrete was delivered to the defendant because the latter intended to cast big piles that day. What Pek told Lee that day was exactly what Pek told all his other customers (as well as Kwan) – that there was no sand available from sand suppliers due to the sand ban and that sand could be obtained only if customers were willing to pay a premium of approximately $35 per ton of concrete. Even then, supply of sand was not guaranteed.

51 The plaintiff's final witness was Ng Cher Cheng ("Ng"), the deputy director of the Strategic Materials Department from the Business Development Division of the BCA. Ng's testimony merely repeated what was stated by Ghosh in his AEIC as well as in his oral testimony vis-a-vis the sand ban

and the action taken by BCA to alleviate the consequence of that ban by releasing sand from the government stockpile to contractors involved in public projects and sharing the cost increase with such contractors on a 75:25 basis. Consequently, Ng (DW2) was hardly subject to cross-examination.

(ii) the defendant's case

52 As stated earlier at [27], the defendant had only two witnesses -Lee and Kwan. Kwan (who was known to the plaintiff as Kevin Kwan) heads the defendant's quantity surveying department besides being the contracts manager. (He was instrumental for the insertion of cl 21 at [3] into the Quotation). Kwan (DW1) gave a different version of his conversation with Pek on 1 March 2007. He claimed he told Pek that the plaintiff was bound by the prices stated in the Quotation but Pek was adamant that unless the defendant agreed to the price increase of $35 m³ Pek demanded, the plaintiff would not supply any more concrete to the defendant. He alleged this put the defendant into a quandary and left him with no choice but to look for alternative sources of concrete which he did by going to ICPL after 8 March 2007.

53 Kwan disputed the plaintiff's contention that it could not obtain supplies of sand after the sand ban. Kwan pointed out that after the sand ban, the defendant still managed to obtain their own sand for minor concreting and plastering works albeit at a higher price, up to the end of February 2007. Consequently the plaintiff could if it wanted to, have obtained sand from the open market by paying a higher price, after the sand ban but it was unwilling to do so. It was when sand supplies finally ran out that the only source of supply would be from the government stockpile. (In cross-examination, Kwan admitted his statement was untrue as only contractors not concrete manufacturers, had access to the government's stockpile).

54 Kwan blamed the plaintiff's delay or failure to deliver concrete for the defendant's corresponding delay in the concreting works for the project. Cross-examined on why the defendant did not offer to deliver sand from the government stockpile to the plaintiff in February 2007, Kwan explained the plaintiff never asked for it, unlike ICPL. However, it is noted that the media announcement on the cost-sharing initiative in [9] by BCA was made on 31 January 2007 and the procedure for contractors to obtain sand from the government stockpile was circulated by the Singapore Contractors Association Ltd ("the Association") to its members (including the defendant) on 3 February 2007. Further, on 1 February 2007 (see [8]), the plaintiff had notified the defendant that the BCA would release sand from the government stockpile effective that day. Kwan's excuse would appear to be lame at best and at worst untrue as he admitted in court (at N/E 18 on 5.8.08) that he knew on 3 February 2007 that the government would absorb 75% of the sand price increase.

55 It was only during cross-examination that Kwan revealed the defendant had obtained an *ex-gratia* subsidy from the government of $304,264.31 (at AB151) for the price increase in sand and granite. This fact was not disclosed in the AEIC of either Kwan or Lee. Kwan's excuse in this regard (at N/E 15 on 5.8.078) was that the subsidy did not equate with the plaintiff's price increase. Although the defendant only received the subsidy on 14 August 2007, the project's consultants had notified the defendant in its letter dated 8 May 2007 (at AB128) that the government would be making an *ex-gratia* payment. Yet, as counsel for the plaintiff pointed out, Kwan expected the plaintiff to abide by the prices in the Quotation, when even the government recognised (to quote from the Minister of National Development's statement on 30 January 2007) that the sand ban 'was an abnormal situation that [was] totally beyond anyone's control'.

56 Knowing the defendant would get a subsidy from the government, Kwan still insisted on the plaintiff's strict compliance with the prices stated in the Quotation instead of making attempts to negotiate on the revised prices of the plaintiff. Neither did he negotiate with the plaintiff on the cost-

sharing for the balance 25% increase in the price of sand, after the government's absorption of the other 75%.

57 I should point out that the first formal mention of the government subsidy by the defendant was on 31 July 2008 when it filed its defence and counterclaim (Amendment No. 2). (The plaintiff's solicitors were earlier informed of the proposed amendment on 23 July 2007). The subsidy reflected in the pleading was a higher figure ($331,936.63) than what was paid to the defendant on 14 August 2007, suggesting (which Kwan confirmed) that the defendant received further government subsidies thereafter. I would add that Kwan's explanation to the court (at N/E 55 on 5 August 2008) for his late disclosure to the defendant's counsel of the subsidy was highly unsatisfactory if not unconvincing. My only conclusion from his professed ignorance that he was unaware the plaintiff should be given credit for the subsidy in the defendant's counterclaim is that the defendant was not above taking advantage of the sand ban if it could.

58 Interestingly enough, where the Association was concerned, it took the view that the sand ban constituted an unforeseen circumstance amounting to a *force majeure* event that would entitle contractors to extensions of time under construction contracts. This can be seen from Appendix B to the Association's circular dated 3 February 2007 (see [54]), which was a draft letter it had prepared for members to send to employers to explain the impact on construction costs as a result of the sand ban.

59 Kwan confirmed that by 13 March 2007 when the defendant wrote its letter in [15] to the plaintiff, the company had sought legal advice. It was obvious from the language in which the letter was couched, that a lay person like Kwan albeit a contracts manager, could not have drafted the same. Yet, no mention was made in the letter that the defendant had signed the January and March agreements under economic duress. For that matter, neither did the defendant's solicitors' letter dated 19 April 2007 in [18]. It was equally revealing from Kwan's testimony, that the defendant waited until it had finished its crucial casting for blocks C and D of the project, before its letter dated 13 March 2007 was sent to the plaintiff.

60 It was also noteworthy that documents which the court directed Kwan to produce (in the defendant's bundle of documents) showed that as early as 26 January 2007 (at DB1), the defendant took the precaution of notifying the project's consultants of the lack of concrete supply, in anticipation of the delay. Indeed, in Kwan's own letter dated 2 February 2007 (DB7) to the project's consultants (copied to the MOE), he went further to say:

> 2) The national shortage of sand prevailing in Singapore has caused the short supply of sand related products and coupled with the exorbitant is termed force majeure which is beyond our control.
>
> 3) We will submit the fluctuation cost and time implication in due course.

61 Confronted with his letter, Kwan agreed that if the defendant could say the shortage of sand was beyond its control, the same excuse should be available to the plaintiff. Questioned why he did not disclose his above letter earlier to the defendant's solicitors, Kwan's explanation (at N/E 89 on 5.8.08) was that he thought it was a matter between the defendant and the project's consultants and not 'relevant' to the plaintiff.

62 Subsequent letters written by the defendant to the project's consultants were all designed to protect the defendant in the event the project was delayed. It was to enable the defendant to claim for extensions of time and additional costs pursuant to cll 14 and 23 respectively, of the Public Sector

Standard Conditions of Contract for Construction Works 2005, which applied to the project.

63 Nothing turns on the testimony of Lee who was the defendant's site manager, with Kwan as his superior. Lee's AEIC focussed on the orders placed by the defendant for and the deliveries of concrete by the plaintiff. He took his instructions from Kwan whenever he sent letters or faxes to the plaintiff. Lee knew nothing about nor was he involved in the negotiation for, the terms of the Quotation (or the January and March agreements) but he had heard about the sand shortage from the plaintiff and people in the construction industry. Like Kwan, Lee denied that Pek had told him in their telephone conversation that the plaintiff was unable to obtain sand from its suppliers – he was only told about the sand ban and that the defendant would have to pay a premium of $35/m³if it wanted concrete to be supplied by the plaintiff to which condition he agreed on 29 January 2007, after obtaining Kwan's approval.

64 What was apparent from Lee's testimony is, he (like Kwan) used the plaintiff's letters as excuses to explain away the defendant's delay in casting/concreting works to the project's consultants, valid or otherwise. I should add that I was not impressed by the veracity of either Kwan or Lee. They were not truthful witnesses unlike the plaintiff's witnesses Ghosh and Pek.

The findings

(i) economic duress

65 I shall first address the issue of economic duress. At the outset, it should be made clear (as the plaintiff submitted) that the burden is on the defendant to prove it signed the January and March agreements under economic duress. As for the law, both parties relied on *Chitty on Contracts* (Sweet & Maxwell 29th Edition 2004), vol 1 ("*Chitty*") in this respect. Page 520, paras 7-028 to 7-030 of *Chitty* contain the following passages:

> **Threat to commit an unlawful act**
>
> …it is clear that not all threats can be regarded as improper or illegitimate, and it is necessary in the law of duress to distinguish between legitimate and other forms of pressure or threats. Prima facie it is thought to be clear that a threat to commit an unlawful act will constitute an improper threat for the purposes of the law of duress….
>
> **Threat to break a contract**
>
> In contrast, when the threatened wrong is a breach of contract it seems that the victim will not necessarily be entitled to relief even if he would not have agreed "but for" the threat and had no reasonable alternative. As was suggested earlier, the decisions in *Occidental Worldwide Investment Corpn v Skibs A/S Avanti* and *Pao On v Lau Liu Long* suggests that something more than this is required. In *B & S Contracts & Designs Ltd v Victor Green Publications Ltd* the Court of Appeal stressed that it is not "on every occasion when one party unwillingly agrees to a variation of a contract that the law would consider that he had acted by reason of duress. It is possible that in cases where the threat is one of breach of contract, some additional factor is required. As we saw earlier, one possible "additional factor" is that the combination of the threat and commercial pressures were overwhelming. An alternative possibility is that the additional factor that may be required is that the threatened breach of contract must be regarded as "illegitimate pressure" and that in some circumstances a threat of a breach of contract may be regarded as not illegitimate.

Can a threatened breach be legitimate?

> This possibility is suggested by American cases. Where unexpected difficulties arise in the performance of a contract (even if they do not amount to frustrating circumstances) it is often commercially reasonable for one party to claim extra remuneration, or some other extra-contractual concession, as the price of his continuing with performance. In these circumstances, a threat to break the contract unless the extra consideration is forthcoming may well be regarded as a legitimate form of commercial pressure, certainly where the unanticipated difficulty means that he is genuinely unable to perform without an extra payment, and possibly if the threatening party acts in the bona fide belief that he is entitled to some extra payment or if the demand is in some sense 'fair' ……

66 Before I consider some of the English cases cited by *Chitty* and relied on by the plaintiff in their submissions, I shall first look at a local case cited by both parties, *viz Sharon Global Solutions Pte Ltd v LG International (Singapore) Pte Ltd* [2001] 3 SLR 368, which facts were somewhat similar to our case.

67 There, the plaintiff/seller sold steel goods to the defendant/buyer who then entered into a back-to-back agreement to sell the goods to its own customer. The plaintiff had underestimated the cost of procuring a vessel to ship the goods and was unwilling to charter a vessel for the shipment unless the defendant agreed to share the additional cost involved. Otherwise, the plaintiff was prepared to face the consequences of breach and the resulting forfeiture of the performance bond it had issued to the defendant. The defendant felt it had no choice but to agree to the plaintiff's demand in order to meet the deadline of its customer. The defendant paid the first 25% of the charter hire but failed to pay the balance and proceeded to demand a refund of its payment. The plaintiff sued for the outstanding charter hire. The plaintiff succeeded in its claim while the defendant's defence (based on economic duress) was dismissed along with its claim (as a counterclaim to the plaintiff's claim) to recover the payment it had made. Kan J held the defence of economic duress had not been made out, relying on the same passages from *Chitty* set out in [65] above.

68 Rather than review the many cases cited by the plaintiff and referred to by *Chitty*, I shall refer to the *locus classicus* on economic duress *viz Pao On v Lau Liu Long* [1979] 3 WLR 435 ("*Pao On"*), a Privy Council decision on appeal from the Hong Kong Court of Appeal. The facts in *Pao On* are not relevant. Suffice it to say for our purpose that in *Pao On,* the plaintiffs who owned shares in a private company which they sold to the defendants who were shareholders of a public company, brought an action to enforce a guarantee that had been furnished to them by the defendants. The defendants claimed the guarantee had been given under economic duress. The trial judge allowed the plaintiffs' claim but the decision was reversed on appeal. The plaintiffs' appeal to the Judicial Committee was allowed.

69 Lord Scarman in delivering the judgment of the law lords cited with approval the judgments of Kerr J in *Occidental Worldwide Investment Corporation v Skibs A/S Avanti* [1976] 1 Lloyd's Rep 293 and Mocatta J in *North Ocean Shipping Co. Ltd v Hyundai Construction Co Ltd* [1979] 3 WLR 419, in recognising that commercial pressure may constitute duress the pressure of which can render a contract voidable. His lordship continued (at p 451):

> Both stressed that the pressure must be such that the victim's consent to the contract was not a voluntary act on his part. In their Lordships' view, there is nothing contrary to principle in recognising economic duress as a factor which may render a contract voidable, provided always that the basis of such recognition is that it must amount to a coercion of will, which vitiates

consent. It must be shown that the payment made or the contract entered into was not a voluntary act.

70 A more recent English case where *Pao On* was followed is *B&S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419 while a local case that applied *Pao On* is *Third World Development Ltd v Atang Latief* [1990] SLR 20. There the appellate court applied the tests set out by Lord Scarman (at p 450):

> ….In determining whether there was a coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are, as was recognised in *Maskell v Horner* [1915], relevant in determining whether he acted voluntarily or not.

71 It had been adduced from Kwan in cross-examination (see [59]) that the defendant did not complain that it was forced to sign the January and March agreements under duress prior to these proceedings. Further, as Ghosh commented (see [32]), despite its letter dated 13 March 2007 [15] to the plaintiff complaining of the unjustified price increase, the defendant placed two orders for concrete with the plaintiff that month. It is also not in dispute that the defendant took no steps to avoid the contract before it was sued (see Lord Scarman's dictum from *Pao On* in [70] and the third paragraph from *Chitty* in [65]). Coupled with the fact that the defendant capitalised on the sand ban by applying for extensions of time from the project's consultants on the basis it was *force majeure* and it has not to-date, been penalised in liquidated damages by MOE for any delays in the project, I find that the defence of economic duress has not been made out.

72 To quote from the same passage from *Chitty*, the plaintiff genuinely believed it was unable to perform its obligation to supply the defendant with concrete without extra payment, because it knew it needed to source (without any certainty of success) for sand at exceptional cost, from whatever suppliers it could find. In its stubborn belief that it was entitled to hold the plaintiff to the original bargain set out in the Quotation, the defendant made no efforts whatsoever to help the plaintiff by offering to obtain sand for the project from the government stockpile for its orders from the plaintiff (save for its 2 March 2007 order), even though it well-knew the government was the only source of sand after the market supply ran out. I reject in this regard Kwan's excuse (observed earlier in [54]) that the plaintiff did not ask for sand to be supplied for the defendant's February 2007 orders. Contrary to their denials, he and Lee must have been told by Pek of the plaintiff's predicament in their telephone conversations with the latter. What was obvious from the events that took place after the sand ban is, that the defendant made no efforts to help the plaintiff in order to help itself to obtain supplies of concrete for the project. In other words, it failed to mitigate its losses as the plaintiff pleaded in the reply and defence to the counterclaim (see [25]). Worst, rather than assist the plaintiff to perform its contract, the defendant decided to source for concrete from a third party (ICPL) at prices higher than what the plaintiff had quoted in March 2007 (see [35]), a move that can only be construed as calculated to form the basis of a claim against the plaintiff. It bears noting that the defendant had started obtaining concrete from ICPL in February 2007 (supplying the company with sand obtained from the government stockpile), while still negotiating with the plaintiff on the February quotation.

(ii) frustration

73 I next turn to the issue of frustration raised in the statement of claim (see [21]). This issue

was omitted in the plaintiff's submissions but was addressed by the defendant who contended that the sand ban did not cause the contract to be frustrated. The defendant relied on the local case *Glahe International Expo AG v ACS Computer Pte Ltd* [1999] 2 SLR 620 ("*Glahe*") to support its argument.

74 The appellate court in *Glahe* had referred to *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 ("*Davis Contractors*") where the test of a radical change in obligations was spelt out for frustration to apply. In *Davis Contractors*, the plaintiffs agreed to build 78 houses for the defendants at a fixed price, the work to be completed in eight months. The plaintiffs made known to the defendants that their tender was subject to adequate supplies of labour being available but the condition was not incorporated into the contract. Due partly to bad weather but also to an unforeseen shortage of labour, the work took 22 months to complete and cost the plaintiffs some £17,000 more than they anticipated. The plaintiffs claimed that the shortage of labour and the delay had frustrated the contract, so that they were entitled to sue for the £17,000 on a *quantum meruit* basis. The House of Lords unanimously held that the unexpected turn of events which rendered the contract more onerous than had been contemplated did not frustrate the contract. Lord Reid said (at p 729):

> ...frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do….There must be….such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.

75 The appellate court in *Glahe* adopted the test in *Davis Contractors* and similarly held in the case that the Swiss plaintiffs' contract with the Singapore defendants to purchase (in US dollars) computers for delivery to a Soviet company in Moscow, was not frustrated by the sharp drop in the value of the rouble against the US dollar between December 1990 and June 1991.

76 Would *Glahe* and *Davis Contractors* preclude the plaintiff from relying on the doctrine of frustration? The *ratio decidendi* of the two cases on their facts was undoubtedly correct – performance of contractual obligations at greater expense than had been anticipated did not amount to impossibility of performance. Is our case similar? Undoubtedly, the plaintiff would not be discharged from performance of the Quotation merely because it turned out to be too difficult or onerous. However, I do not view the plaintiff's inability to fulfil the Quotation as being categorised as such. Even a government minister had recognised that the sand ban (see [55]) was an abnormal situation that was totally beyond anyone's control. The sand ban was sudden and unexpected. I reject as absurd in this regard the defendant's submission (which was also put to Ghosh) that the sand ban was foreseeable – it was not.

77 The premise for the performance of the contract evidenced in the Quotation was that the plaintiff would be able to obtain sand at the prices they had been paying ($11-$12 per ton) to produce concrete. It also envisaged that the plaintiff would have a ready supply of sand at all times. The situation changed completely after the sand ban, that premise no longer held. Sand was no longer easily available or available at all, even if the plaintiff was willing to pay any price. Added to that, the defendant refused to assist the plaintiff to obtain sand, when it was well within the defendant's power to do so by drawing on the government stockpile. It has to be emphasised in this regard that the defendant as a contractor of public projects, was entitled to obtain sand from the government stockpile <u>not</u> the plaintiff. The plaintiff could no longer perform the contract because of the non-availability of sand, an event outside its control and which caused it to close down two

plants. The contract evidenced in the Quotation was accordingly frustrated.

(iii) Was there consideration for the January and March agreements?

78 I shall now consider the alternative defence that the January and March agreements lacked consideration. Citing from *Chitty* (p 1298 at para 22-035), the defendant submitted that where one party undertakes an additional obligation but the other party is merely bound to perform his existing obligations, the agreement will not be effective to vary the contract because there is no consideration. Here, there was no good consideration to support the variation because the parties were in effect carrying out their existing obligations under the contract save that the plaintiff asked the defendant to pay more for the concrete. The 'promise' by the plaintiff to supply and deliver concrete after the January and March agreements was not good consideration as the 'promise' was not an unconditional promise to supply but conditioned on the plaintiff being able to obtain sand. There was no additional or practical benefit to the defendant as was found in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 ("*William's* case"). The plaintiff submitted otherwise, also relying on *Williams'* case as well as on *Sharon Global Solutions Pte Ltd v LG International (Singapore) Pte Ltd* [63].

79 In *Williams'* case, the defendants contracted to refurbish a flat at a fixed price of £20,000. They subcontracted the carpentry work to the plaintiff. The plaintiff got into financial difficulties because the subcontract price was too low to enable him to operate satisfactorily and to make a profit. If the plaintiff did not finish the carpentry work on time, the defendant would be penalised under a term in the main contract. The defendant therefore orally offered the plaintiff an additional £10,300 at the rate of £575 per flat for completion of the carpentry work. After the plaintiff had substantially completed eight more flats, he stopped work as the defendant had only made one payment of £1,500. The plaintiff then sued the defendant for the additional sum promised. The judge awarded the plaintiff judgment on his claim.

80 The English Court of Appeal dismissed the defendants' appeal and held that where a party to a contract promised to make an additional payment in return for the other party's promise to perform his existing contractual obligations and as a result secured a benefit or avoided a detriment, the advantage secured by the promise of additional payment was capable of constituting consideration provided it was not secured by economic duress. The defendants' promise to pay the plaintiff the additional sum of £10,300 in return for the plaintiff's promise to perform his existing contractual obligations on time resulted in a commercial advantage to the defendants and was sufficient consideration to support the defendants' promise to pay the additional sum.

81 Returning to our case, I had noted earlier at [59] that the defendant used the plaintiff's concrete to complete the casting for blocks C and D before it sent its letter of 13 March 2007 purportedly accepting the plaintiff's repudiatory breach. In other words, the January and March agreements benefited the defendant as it enabled the defendant to complete its crucial casting works and thereby avoid having to pay liquidated damages to MOE. It bears remembering that without casting works for structural works being completed, other construction works cannot proceed. As I have already found there was no economic duress involved in the signing of the two agreements, there was valuable consideration provided by the plaintiff for the increase in concrete prices set out in the two documents.

82 For completeness, I shall address two minor issues before I conclude this judgment.

(iv) Does clause 3 of the Quotation cover force majeure and did the sand ban amount to force majeure?

83 The defendant had submitted that cl 3 was ambiguous in that it seemed to suggest that upon the occurrence of an event specified thereunder, the plaintiff was no longer obliged to supply concrete and would be discharged completely from performance of its obligations. The defendant argued this cannot be the correct interpretation. Based on the plaintiff's own pleaded case, the plaintiff had contended that cl 3 entitled it to suspend not stop, the supply and delivery of concrete. However, its action suggested otherwise – that it could stop supply altogether after the sand ban was announced.

84 I do not think cl 3 at [3] is ambiguous at all. If any of the events therein specified occurs, the plaintiff simply has no obligation to deliver concrete to the defendant. In this case the sand ban arose through circumstances beyond the control of the plaintiff. A *force majeure* event occurs when it takes place without the fault of either party. Here, the sand ban would qualify as a *force majeure*. Unless it is lifted (which appears to be highly unlikely), the plaintiff cannot resume its obligation to supply concrete to the defendant without an alternative and continuous source of sand, at a reasonable cost. It bears repeating that the defendant relied on the sand ban as a *force majeure* in its own application to the consultants of the project for extensions of time.

(v) Was the plaintiff entitled to suspend supply of concrete to the defendant under clause 12?

85 The badly worded cl 12 has been set out earlier at [3]. Counsel for the defendant made much of the fact that Pek in cross-examination (at N/E 83 on 4.8.07) had admitted his mistake as the plaintiff had no right to suspend supply of concrete for February 2007, the defendant not having exceeded the 60 days' credit terms (see [3]). That defence would only hold good for two of the invoices ($16,472.93) which 60 days credit expired on 7 February 2007. Counsel's argument overlooked the fact that the defendant failed to pay even after 28 February 2007 the six invoices outstanding since December 2006 totalling $106,333.52, of the total sum owed to the plaintiff of $175,142.66 (see [4]). Instead, it alleged by its letter dated 13 March 2007 that the plaintiff was in breach of the Quotation.

(vi) Clause 21 of the Quotation

86 The defendant had relied on cl 21 which Kwan inserted into the Quotation. The clause has been set out earlier at [3]. That equally badly worded clause at first blush appears to allow the defendant without qualification to obtain alternative sources of supply of concrete once the plaintiff fails to deliver the orders it placed. That would be an absurd interpretation of the clause and would offend all sense of fair play and justice. Clause 21 must be read in the context of and subject to all the other clauses in the Quotation especially cll 3 and 12.

Conclusion

87 Based on my earlier finding at [71], the defendant has failed to discharge the burden to prove the January and March agreements were executed under economic duress. I find that there was consideration provided for the two agreements and in that respect I adopt the reasoning in *Williams'* case (see [80]).

88 Accordingly, I award judgment to the plaintiff on its claim for $305,153.40 with interest and costs and correspondingly dismiss the defendant's counterclaim for $418,149.87 with costs.