Downeredi Works Pte Ltd (formerly known as Works Infrastructure Pte Ltd) v Holcim (Singapore) Pte Ltd
[2008] SGHC 203

Case Number : Suit 235/2007

Decision Date : 11 November 2008

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Sadique Marican and Anand Kumar (Frontier Law Corporation) for the plaintiff; Tan Jee Ming and Florence Chew (Ruth Chia & Co) for the defendant

Parties : Downeredi Works Pte Ltd (formerly known as Works Infrastructure Pte Ltd) — Holcim (Singapore) Pte Ltd

Civil Procedure – Jurisdiction – Jurisdiction of High Court judge to hear further arguments – Jurisdiction to hear further arguments before order extracted – Jurisdiction to hear further arguments after order extracted – Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 34(1)(c)

Contract – Contractual terms – Interpretation – Whether clause allowed defendant to stop supplying ready-mixed concrete because of price increases – Whether clause applied to exclude liability for any consequential loss under the terms of the various agreements

Courts and Jurisdiction – Court judgments – Binding force – Interlocutory judgments – Nature of interlocutory judgments

Courts and Jurisdiction – Jurisdiction – High Court – Judges – Jurisdiction of High Court judge to hear further arguments – Jurisdiction to hear further arguments before order extracted – Jurisdiction to hear further arguments after order extracted – Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 34(1)(c)

Statutory Interpretation – Construction of statute – How time for making further arguments under Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 34(1)(c) was to be calculated – Whether Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 3 r 2(5) applied – Whether Interpretation Act (Cap 1, 2002 Rev Ed) s 50 applied

Time – Computation – Construction – Expressions limiting time – Prescribed period of time for making further arguments – Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 34(1)(c) – Whether Rules of Court (Cap 322, R 5, 2006 Rev Ed) O 3 r 2(5) applied – Whether Interpretation Act (Cap 1, 2002 Rev Ed) s 50 applied

Time – Sundays and public holidays – Whether Sundays and public holidays were to be included in calculation for period for making further arguments – Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 34(1)(c) – Whether Rules of Court (Cap 322, R5, 2006 Rev Ed) O 3 r 2(5) applied – Whether Interpretation Act (Cap 1, 2002 Rev Ed) s 50 applied

11 November 2008

Woo Bih Li J:

Introduction

1 The plaintiff Downeredi Works Pte Ltd, formerly known as Works Infrastructure Pte Ltd ("WI"), was at all material times the main contractor of various works at various sites in Singapore. The defendant Holcim (Singapore) Pte Ltd ("Holcim") was at all material times WI's sub-contractor

supplying ready-mixed concrete ("RMC") for five projects ("the Projects"). They were:

Project	Contract Ref No.
(i) Widening of Telok Paku Road and Nicoll Drive	HSPL/Q/0172/0 dated 1st February 2007
(ii) Construction of road, drains, sewers and soil improvement works at Jurong Island Highway between Sakra Road and Sakra Avenue, Jurong Island	HSPL/Q/0172/0 dated 1st February 2007
(iii) Construction of Brickland Road at Choa Chu Kang Town	HSPL/Q/0172/0 dated 1st February 2007
(iv) Sembawang Shipyard/Tuas Cresent/Pandan Road	HSPL/Q/0172/0 dated 1st February 2007
(v) Widening of Seletar Expressway from Upper Thomson Road to East of Lentor Avenue	HSPL/Q/1745/06 (PR01/07) dated 21st December 2006

2 WI's claim against Holcim was for Holcim's failure to supply and deliver RMC for the Projects. Holcim's defence was that it was entitled to stop supplying RMC because of price increases and that in any event, it was not liable for any consequential loss under the terms of the various contracts.

3 I eventually decided in favour of Holcim. WI has appealed to the Court of Appeal.

Background

4 The action was initially fixed for trial commencing 20 May 2008. However, on 20 May 2008, counsel agreed that the action could proceed on the issue of liability first and that there was no need for oral evidence on this issue.

5 On 22 May 2008 (Thursday), I heard arguments on the issue of liability and granted interlocutory judgment ("IJ") in favour of WI with damages to be assessed.

6 On 30 May 2008 (Friday), Holcim's solicitors submitted a request for further arguments. They say they did so at 5.33pm by fax and 5.46pm by electronic filing system. They served the same on WI's solicitors by email on the same day at 6.57pm.

7 I acceded to the request for further arguments and such arguments were fixed for further hearing on 10 September 2008. On that day, Mr Marican, counsel for WI, raised the objection that the court was *functus officio* even though the IJ I had granted had not yet been extracted. His point was that the IJ was an interlocutory order and therefore, Holcim had to comply with s 34(1)(*c*) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("s 34(1)(*c*)") by making a request to me, within seven days from the date of the IJ, for further arguments which Holcim had allegedly failed to do. As Holcim's counsel needed more time to address the case-law authorities which his opponent was referring to, I adjourned the hearing to a date to be fixed.

8 The matter was fixed for hearing on 23 September 2008. After hearing arguments, I decided that I had jurisdiction to hear further arguments. After hearing further arguments, I also decided to reverse my earlier decision on the substantive issue and ruled instead in favour of Holcim.

Jurisdiction

9 It is important to bear in mind that before s 34(1)(*c*) (or its predecessor) was enacted, it was clear that the court had jurisdiction to hear further arguments before its order or judgment was extracted, see *Re Harrison's Share under a Settlement* (1955) Ch 260 and *Thomson Plaza Pte Ltd v The Liquidators of Yaohan Department Store Pte Ltd* [2001] 3 SLR 248.

10 The predecessor of s 34(1)(*c*) was first enacted in 1993 as s 34(2) of the 1970 Revised Edition. S 34(1)(*c*) states:

> **Matters that are non-appealable or appealable only with leave**
>
> **34**.—(1) No appeal shall be brought to the Court of Appeal in any of the following cases:
>
> (*c*) subject to any other provision in this section, where a Judge makes an interlocutory order in chambers unless the Judge has certified, on application within 7 days after the making of the order by any party for further argument in court, that he requires no further argument;

11 There are some differences between s 34(1)(*c*) and its predecessor but they are not material for present purposes.

12 S 34(1)(*c*) requires a party who wishes to appeal against an interlocutory order made by a judge in chambers to first apply to the judge for further arguments within seven days after the making of the order. Case-law authority also establishes that the Court of Appeal has no jurisdiction to hear an appeal filed against such an order if s 34(1)(*c*) has not been complied with.

13 Two questions arose before me on the application of s 34(1)(*c*):

(a) whether the IJ I had granted was a final or an interlocutory order in nature; and

(b) how the seven day period was to be calculated.

14 In *Lim Chi Szu Margaret v Risis Pte Ltd* [2005] SGHC 206, Andrew Phang JC appeared to prefer the view that an interlocutory judgment is final in nature as it finally disposes of the substantive rights of the parties insofar as liability is concerned. I found such a view persuasive but in *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR 525, the Court of Appeal decided that an interlocutory judgment is indeed interlocutory in nature. That decision was binding on me. I should also mention that the earlier decision of the Court of Appeal in *Ling Kee Ling and anor v Leow Leng Siong and others* [1996] 2 SLR 438 appeared to favour the view that such a judgment is interlocutory in nature (see [13] and [14] of that judgment).

15 As for the calculation of the seven day period, Order 3 rule 2(5) of the Rules of Court (Cap 322, 2006 Rev Ed) provides that:

> "Where, … , the period in question, being a period of 7 days or less, would include a day other than a working day, that day shall be excluded."

16 Since my initial decision was given on 22 May 2008 and there was no dispute that Saturday and Sunday were not working days, the seven day period would expire on 2 June 2008, if O 3 r 2(5) were applicable.

17 However, s 50 of the Interpretation Act (Cap 1, 2002 Rev Ed) ("s 50") provides a different way of calculation. S 50 states:

> **50.** In computing time for the purposes of any written law, unless the contrary intention appears –
>
> (*a*) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;
>
> (*b*) if the last day of the period is a Sunday or a public holiday (which days are referred to in this section as excluded days) the period shall include the next following day not being an excluded day;
>
> (*c*) when any act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;
>
> (*d*) when any act or proceeding is directed or allowed to be done or taken within any time not exceeding 6 days, excluded days shall not be reckoned in the computation of the time.

18 So, under s 50, Saturdays and Sundays are included in the calculation of the seven day period stipulated in s 34(1)(*c*). Therefore, under s 50, Holcim had to apply for further arguments by 29 May 2008 but it did not do so until 30 May 2008, after 5pm.

19 In *Thomas & Betts (SE Asia) Pte Ltd v Ou Tin Joon & anor* [1998] 1 SLR 913, the Court of Appeal decided that s 50 applies to s 34(1)(*c*) and not O 3 r 2. With respect, I agreed since the stipulation of the seven day period in question is found in s 34(1)(*c*) and not in the current Rules of Court. Previously, O 56 r 2 provided that "[a] party dissatisfied with an interlocutory order made by a Judge in Chambers may within seven days of the making of such order, apply to the Judge for further arguments in Court in accordance with practice directions for the time being issued by the Registrar". The first part of that provision is no longer applicable under the current O 56 r 2. For completeness, I mention that while the current O 56 r 2 of the Rules of Court refers to practice directions being made in respect of s 34(1)(*c*), it is stated expressly to be subject to s 34(1)(*c*).

20 Therefore, if Holcim was pursuing an appeal to the Court of Appeal, it had failed to comply with s 34(1)(*c*).

21 However, in my view, that did not necessarily mean that I had no jurisdiction to hear further arguments. Mr Marican had assumed that since Holcim had not complied with s 34(1)(*c*), it must necessarily follow that I had no such jurisdiction. He cited a number of cases to me but those were cases involving an appeal to the Court of Appeal.

22 Mr Marican also stressed the rationale for s 34(1)(*c*) as was espoused in *Singapore Press Holdings Ltd v Brown Noel Trading Pte Ltd & Ors* [1994] 3 SLR 151 ("*SPH v Brown Noel*") in p 166:

> The intent and purpose of s 34(1)(c) of the re-enacted Supreme Court of Judicature Act and O 56 r 2 of the Rules of the Supreme Court is to us abundantly clear and free from doubt. It is to

prescribe a procedure for appeals in interlocutory matters heard by a judge-in-chambers being brought to this court, which may have arisen from full arguments not being presented to the judge-in-chambers due to the shortness of time available for the hearing of such applications or due to the judge-in-chambers having to decide on an issue without the time available to him for mature consideration. As was said by Chan Sek Keong J (as he then was) in the unreported case of *JH Rayner (Mincing Lane) Ltd v Teck Hock & Co (Pte) Ltd & ors*:

> Section 34(2) (*ie* s 34(2) of the repealed Supreme Court of Judicature Act) contemplates a situation where a party who is adversely affected by an interlocutory order may wish to appeal against that order but before so doing would like the judge to reconsider the order in the light of such further arguments as he may be able to put forward. If a judge agrees to hear further arguments, it must mean that he is prepared to change his mind if on hearing further arguments he comes to the conclusion that the original decision is wrong wholly or in some respects. In other words, until he has heard such arguments, his decision must remain *tentative*.'

23 I did not agree that the stated purpose of s 34(1)(*c*) means that the High Court has no jurisdiction to hear further arguments before an interlocutory order is extracted. There is nothing in the passage cited which alludes to such a conclusion. Indeed, there is no logical reason why the jurisdiction to hear further arguments should be fettered in the absence of clear words stating so. If a judge is prepared to hear further arguments, it must mean he is prepared to consider changing his mind. If he is prepared to consider changing his mind, he should not be constrained unless finality kicks in and finality is achieved only when the order is extracted. This, of course, does not mean that his order is not binding until it is extracted. It remains binding unless and until it is reversed, whether by a subsequent order from him or on an appeal.

24 I accepted that *SPH v Brown Noel* is authority for the proposition that a judge in chambers still has jurisdiction to hear further arguments, even if his interlocutory order has been extracted, so long as the request for further arguments is made within seven days after his order is given. However, this jurisdiction is based on s 34(1)(*c*). The converse is not necessarily true, *ie*, the case does not mean that just because the request is made outside of seven days, the judge has no jurisdiction to hear further arguments even though the order has not yet been extracted.

25 As already mentioned, s 34(1)(*c*) starts with the words, "No appeal shall be brought to the Court of Appeal …".

26 I was of the view that s 34(1)(*c*) only precluded Holcim from proceeding with an appeal to the Court of Appeal, unless Holcim obtained an extension of time to comply with that provision. However, as far as the High Court's common-law jurisdiction to hear further arguments was concerned, this was still unaffected by s 34(1)(*c*). So long as the IJ was not extracted, I had jurisdiction to hear further arguments.

27 I should also address the case of *Kunal Gobind Lalchandani & anor v Konduri Prakash Murthy* [2005] SGHC 94. In that case, the High Court rejected a request for further arguments in respect of an interlocutory order as the request was made outside of the seven day period stipulated in s 34(1)(*c*). However, with respect, the High Court in that case appears to have assumed that there was no jurisdiction to hear further arguments just because the request was made outside of the seven days. That decision was not binding on me and, for the reasons I have given, I declined to follow it.

28 There was one more argument I should mention. Mr Marican submitted that by my agreeing to hear further arguments, I had effectively extended the time for Holcim to comply with s 34(1)(*c*)

should I maintain my initial decision after hearing further arguments. He submitted that this would allow Holcim to circumvent s 34(1)(*c*).

29 While I agreed that in such a scenario, Holcim would in a sense be getting a second bite at the cherry, I was of the view that the more important and substantive question was whether I was prepared to consider changing my initial decision. If so, then I should not be constrained from doing so just because it might mean that Holcim would get a second chance to comply with s 34(1)(*c*) should I maintain my initial decision. The fact that I was prepared to hear further arguments meant that there was some merit in a prospective appeal by Holcim and that would, in any event, be one of the factors which would have had to be considered if Holcim had to apply for an extension of time to comply with s 34(1)(*c*). Furthermore, as Chan J had said in J *H Rayner (Mincing Lane) Ltd v Teck Hock & Co (Pte) Ltd & ors* in Suit No 1219 of 1987 ("*Rayner*"), if a judge is prepared to hear further arguments, his decision remains tentative (although still binding) (see [22] and [23] above).

30 I should also mention that neither side drew my attention to the facts in *Rayner*. However, as I was writing the present grounds of my decision, I read the judgment of Chan J and some of the documents in *Rayner*. It seems that *Rayner* is actually authority supporting the decision I had reached on my jurisdiction to hear further arguments. In *Rayner*, A had applied to set aside an order (obtained by P) for substituted service of notice of P's writ outside Singapore. On 20 January 1988, A's application was dismissed. His solicitors then applied for further arguments and the court acceded to this application. 16 May 1988 was fixed for the hearing of the further arguments. Before that hearing, P's solicitors sent a letter dated 10 May 1988 to the Registrar of the Supreme Court. That letter had two purposes. The first was to address A's further arguments. The second was to request leave to present further arguments in respect of a particular ruling made in the course of the 20 January 1988 decision. On 16 May 1988, A's counsel said her firm had applied to be discharged for lack of instructions. She also applied to adjourn the hearing so that A could be given an opportunity to put forward its further arguments through such other counsel as A might appoint. Chan J adjourned the matter *sine die* after informing A's counsel that he might be obliged to hear P's counsel on its further arguments even if no counsel appeared for A at the next hearing for further arguments. On 11 July 1988, A's solicitors obtained an order for their discharge. On 13 July 1988, P's solicitors applied for the matter to be restored for hearing. The further arguments were fixed for hearing on 11 September 1988. Chan J decided that he could and would hear further arguments from P's solicitors even though the 10 May 1988 request was made long after the period prescribed under s 34(2), *ie*, the predecessor of s 34(1)(*c*) and even though P was the successful party under the judge's initial decision. I would add that as far as I could ascertain, the order of 20 January 1988 had not been extracted when Chan J agreed to hear further arguments.

31 I was also of the view that it was not so much a question of Holcim circumventing s 34(1)(*c*). No one would deliberately want to be out of time. Holcim had made two genuine errors, first, in thinking that the IJ was final in nature and, second, in calculating the seven days according to the Rules of Court instead of the Interpretation Act. Furthermore, Holcim could not be certain that I would have acceded to its request for further arguments. Had I not done so, it would still have been caught by s 34(1)(*c*) if it wanted to appeal.

32 Before I move onto the substantive dispute, I would like to express my concern about s 34(1)(*c*) and the manner in which the seven days is calculated. S 34(1)(*c*) has caused many litigants and/or their solicitors to stumble resulting in not a few time-consuming and costly applications for extension of time to comply with it. One reason is that litigants or their solicitors are unaware of s 34(1)(*c*). Another reason is that the order in question was wrongly considered to be a final one whereas it turned out to be interlocutory instead.

33 While one may have less sympathy for the first reason since there have been various cases on s 34(1)(*c*), I have more sympathy for the second reason as the distinction between interlocutory and final orders is not always easy to make. True, prudence will dictate that a request for further arguments be made in any event but, quite often, the counsel might not have entertained any doubt at the material time.

34 It seems to me that the difficulties created by s 34(1)(*c*) outweigh its benefit and, for my part, I hope it will be repealed.

35 As for the manner in which the seven days is calculated, there is no reason why there should be different formulae in two general pieces of legislation (primary or subsidiary) for calculating time. I could well understand how the mistake by Holcim's solicitors came about. Indeed, Mr Marican intimated that he himself had made a similar mistake before. I hope that the different formulae will be rationalised into one as soon as possible.

The substantive issues

36 In the present case, a contract for a project would be in the form of a quotation from Holcim which was accepted by WI. The first four projects tabulated above were eventually covered by one and the same quotation, *ie*, HSPL/Q/0172/07 dated 1 February 2007. On the front of this quotation, there is a clause 2 under the heading "Standard Terms and Conditions" ("clause 2"). Clause 2 states:

> "The above prices may change based on *material price movement* and operational cost increases". [emphasis added]

As intimated above, the quotation for the fifth project does not have this provision.

37 However, the quotations for all five projects have a clause 15 on the reverse side under "Terms and Conditions" ("clause 15"). Clause 15 states:

> For concrete order that exceed 100m^3, two day advance booking is required. All bookings are to be accepted by the Supplier. *In no event shall the Supplier be liable for any liquidated damages arising from any cause whatsoever loss of profits consequential or otherwise.*
>
> [emphasis added]

38 The Agreed Statement of Facts ("ASOF") stipulated as follows:

> **<u>The Indonesian ban</u>**
>
> 8. On or around January 2007, the government of Indonesia,which was at all material times, a major supplier of sand, soil and topsoil, announced a ban on sand, soil and topsoil exports to Singapore. The BCA intervened and released sand from the national stockpile on 1st February 2007 to ease the import scarcity of sand at S$25 per ton, ex stockpile.
>
> 9. The average cost of sand to the Defendant, per ton, to the Defendant's plant, rose from S$14.30 per ton in January 2007 to an average of S$28 per ton in February 2007.
>
> 10. In March 2007, the BCA increased the cost of sand to S$60 per ton, ex stock pile. The cost to the Defendant to site was S$63 per ton.

11. On or around end February 2007, the Indonesia navy also disrupted the supply of aggregates by suspending the movement of barges carrying the material from Indonesia to Singapore. The BCA responded by releasing aggregates from the national stockpile at S$70 per ton, ex stock, to ease the shortage. The cost to the Defendant was $73 per ton, to the Defendant's plant.

12. The Defendant's purchase price for aggregates prior to the aggregates ban was S$14 per ton, to the Defendant's plant.

Plaintiffs' refusal to sign Quotation ref no. HSPL/Q/0466/07 dated 1 March 2007

13. On 1st March 2007, Defendants wrote to the Plaintiffs in the following terms:

> "As you are aware the BCA has imposed a sand price of S$60 per tonne ex-stockpile with effect from 1 March 2007 as a result of the sand ban from Indonesia. Unfortunately due to the embargo on aggregates shipments from Indonesia, the 20 mm aggregates has also been placed under BCA control and the price ex-stockpile is S$70 per tonne for the period 1 March 2007 to 7 March 2007."
>
> "While we do not think such high prices are sustainable in the long run and are taking steps to look for other sources of sand and aggregates, we regret that for the time being we have no choice but to revise our prices to take into account the steep jump in the prices of sand and 20mm aggregates and have attached a revised quotation for your reference."
>
> "If you are able to provide the sand and 20mm aggregate, we will credit back to you the sand at *S$63 per tonne* delivered and *20mm aggregate at S$73 per tonne* delivered, in accordance to the BCA price."
>
> "For our operations planning purposes, we would appreciate if you can confirm your concrete requirements as soon as possible to avoid any disruption to work underway at your job sites."
>
> "We regret this abnormal situation and look forward to your support and understanding during this difficult time."

14. The Plaintiffs did not confirm the aforesaid quotation ("the 1st March 2007 Quotation").

15. The Plaintiffs continued to insist that the Defendants continued with their supply of RMC to them on the terms of the 1st February 2007 Contract.

16. By a letter dated 4 April 2007 the Defendants wrote to the Plaintiffs putting on record that they have not received the Plaintiffs' acceptance of the 1st March 2007 Quotation.

17. The Defendants also commenced proceedings against the Plaintiffs in DC Suit No. 3801/2007D filed 28 November 2007 for the sum of S$195,201.25 being the price of RMC sold and delivered by the Defendants to the Plaintiffs.

39 Sand and aggregate make up RMC. Mr Marican submitted that the fax dated 1 March 2007 from Holcim was an attempt to introduce a new contract rather than to revise prices pursuant to clause 2 because the revised quotation (which was sent with the said fax) had also contained a new term for payment, *ie*, 14 days, instead of 60 days, from the date of invoice.

40 Mr Tan, counsel for Holcim, submitted that it was for WI to decide whether to accept the change in payment term. In the past, WI would unilaterally change the credit term (by amending on the quotation) and then return the quotation to Holcim who would usually receive the quotation, as amended, without further ado. Mr Tan's second argument on this point was that the change in the credit term was not the reason for WI's refusal to accept the revised prices. He referred to the affidavit of evidence-in-chief ("AEIC") by Khor Yew Chai, a director of WI, in which Mr Khor complained only about the astronomical price difference.

41 I was of the view that the fact that WI had itself in the past amended the credit term when accepting a quotation from Holcim did not mean that Holcim could unilaterally amend the same after a quotation had been accepted by WI.

42 Nevertheless, I agreed that when WI received a new quotation with revised prices and the new credit term, it could have corrected the credit term if it so wished. Had Holcim then insisted on the new credit term, that would have been a different matter.

43 In any event, as the pleadings and Mr Khor's AEIC did not suggest that the new credit term was in issue, I did not think that WI could rely on it in arguments.

44 As for the price increase itself, Mr Tan submitted that clause 2 allowed Holcim to vary prices if Holcim itself was faced with any price increase. He submitted that the reference to "material" in the phrase "material price movement" did not mean a significant price increase but any increase in the price of materials. This was to be contrasted with the next phrase in clause 2 which referred to "operational cost increases". Mr Tan stressed that clause 2 had been deleted in some of the previous quotations and it was included in the February 2007 quotation because of the difficult circumstances then prevailing.

45 Mr Tan further submitted that in any event, there was a significant price increase in the cost to Holcim.

46 Mr Marican submitted that the phrase "material price increase" refers to a significant price increase. He relied on clause 19 of the Terms and Conditions on the reverse side of the quotation ("clause 19") which states:

> 19. The Supplier reserves the rights to suspend or terminate the supply of concrete without notice if it is of the opinion that a material adverse change has occurred in the financial conditions, results, operations or business of the Purchaser and its subsidiaries (if any) taken as a whole.

47 As can be seen, the word "material" in clause 19 clearly means a significant adverse change and not just any adverse change.

48 Mr Marican also submitted that if there was any ambiguity, the *contra proferetum* rule should apply against Holcim.

49 As for the argument that there was in any event a significant price increase to Holcim, Mr Marican submitted that it was not open to Holcim to rely on this point because para 22(ii) of the Defence ("para 22(ii)") relies only on a change, but not a significant change, in price movements of materials. Para 22(ii) states:

> 22) Further and in the alternative the Defendants say that in accordance to the agreed terms

and conditions:

i) …

ii) they were not obliged to supply any ready mixed concrete to the Plaintiffs in accordance to the prices as stated in the quotations as there was a change in material price movements.

50 Mr Marican also submitted that in fact, there was no price increase to Holcim after 2007. He referred to two contracts which Holcim had with its suppliers.

51 The first was a contract between Bibright Shipping Pte Ltd and Holcim dated 29 September 2006 for the supply of concrete sand. The contract period was from 1 October 2006 to 30 June 2007.

52 The second was a contract between Holcim and Mount Kawi (Pte) Ltd dated 1 June 2006 for the supply of 20mm aggregate and manufactured sand. The period for this contract was 1 June 2006 to 31 December 2007.

53 Hence, Mr Marican submitted that Holcim itself had a fixed price for RMC when it sent its fax of 1 March 2007.

54 I was of the view that although the word "material" in clause 19 meant "significant", I should construe "material" in clause 2 according to its context. Although, on first reading, it seemed to me that "material" in clause 2 referred to a significant price movement only, I agreed that when the phrase "material price movement" was considered with "operational cost increases" in the same clause, the reference to "material" was to contrast against "operational" costs. I also did not think that "material" was an adjective to qualify both a price movement and operational cost increases. Therefore, notwithstanding my initial reading, I did not think that the *contra proferentem* should be applied against Holcim.

55 If I were wrong on the interpretation issue, there was, in any event, Mr Tan's argument that Holcim had in fact faced significant price increases in its cost of procuring RMC. On this point, Mr Marican had submitted that, in fact, Holcim did not face any increase, let alone any significant increase.

56 I had understood that it was not disputed that Holcim had faced an increase in its cost of procuring RMC. That was why parties had agreed to proceed on the issue of liability without the need for witnesses.

57 The ASOF sets out, in [8] to [12], how the price of sand and aggregates had increased from January and February 2007 and the consequential increase in cost "to the Defendant" or "to the Defendant's plant".

58 If there was no consequential increase to Holcim for either sand or aggregates, then WI should not have agreed to [8] to [12] of the ASOF without any qualification.

59 Furthermore, as Holcim's premise was that it was facing an increase in its own cost of procuring RMC, the position taken by Mr Marican would mean that it would be necessary to cross-examine various persons but WI had agreed that cross-examination was not necessary.

60 In the circumstances, I was of the view that it was not open to Mr Marican to submit that

Holcim did not face any increase at all. Were the increases significant? Based on the ASOF, they were.

61 I come back now to the pleading point raised by Mr Marican. Para 22(ii) of the Defence (see [49] above) referred to a change in material price movements. True, it did not refer to a significant change explicitly but neither did it exclude a significant change. In my view, it was general enough to extend to a significant change.

62 It was not as though para 22(ii) was responding to a specific allegation by WI in its statement of claim that clause 2 refers only to a significant change in price. There was no such specific allegation by WI in its statement of claim and there was no reply from WI to make such a specific allegation.

63 Accordingly, I was of the view that Holcim was not precluded by para 22(ii) from raising the point that there were in fact significant increases in its costs of procuring the sand and aggregate which, in turn, allowed it to raise its prices to WI under clause 2.

64 I would add that the arguments over para 22(ii) could have been avoided if Mr Tan had made an oral application to amend it, without prejudice to his position that an amendment was not, strictly speaking, necessary. However, for reasons best known to him, no such application was made.

65 I come now to clause 15 (see [37] above). It was not in dispute that the orders from WI exceeded 100 cubic metres. However, Mr Marican submitted that the sentence excluding liability for liquidated or consequential damages would apply only if two days' advance booking was not given by WI.

66 I did not agree with this submission. The opening phrase of the sentence in question was "In no event". In my view, the exclusion of liability applied.

67 In the circumstances, I dismissed WI's claim with costs of $30,000 plus reasonable disbursements to be agreed or taxed. The $30,000 figure was suggested by Mr Marican while Mr Tan asked for $50,000 plus disbursements. It must be remembered that some wasted getting up was attributable to Holcim because it had initially relied on a *force majeure* provision only to abandon it in the course of arguments.