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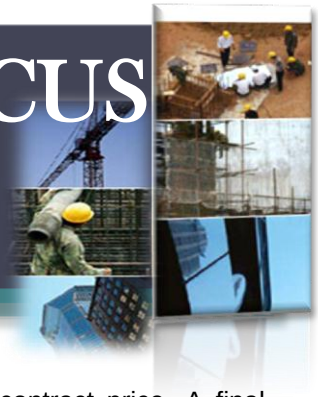

Holcim (Singapore) Pte Ltd v Precise Development Pte Ltd and another application [2011] SGCA 1 [Chan Sek Keong CJ, Andrew Phang Boon Leong JA and V K Rajah JA] (19 January 2011)

Interpretation of force majeure clause

This is an appeal by the Appellant (Holcim (Singapore) Pte Ltd) ("Holcim") against the decision of the trial judge in *Precise Development Pte Ltd v Holcim (Singapore) Pte Ltd* [2010] 1 SLR 1083 ("the Judgment") and arises from the Indonesian sand ban of 2007 (the "Sand Ban").

Briefly stated, Holcim and the Respondent (Precise Development Private Limited) ("Precise") had entered into a contract dated 10 November 2006 ("Contract") for the supply of ready mixed concrete ("RMC") by Holcim to Precise for a building project. The Contract comprised of, *inter alia*, clause 3 (the "force majeure clause"), which stated as follows: "The Purchaser must provide sufficient advance notice in confirm 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 material [,acts] of God or other factors arising **through circumstances beyond the control of the Supplier**." [Emphasis added]

The Indonesian government's announcement that it would impose a Sand Ban from 6 February 2007 had an immediate impact on the availability and prices of sand. This prompted the Building & Construction Authority ("BCA") to announce that it would release sand from its stockpile only to main contractors (such as Precise in this case) and on a "first come first serve" basis subject to a weekly quota.

Holcim informed Precise that due to the Sand Ban, it could not supply RMC at the contract price. Subsequently, Holcim requested Precise to procure sand from BCA on its behalf but Precise refused as the revised costs for RMC quoted by Holcim was substantially higher than the contract price. A final ultimatum was offered by Precise to Holcim in which Precise would supply the sand and aggregates at pre sand ban prices for Holcim to supply RMC to it at the contracted price. No agreement could be reached between the two parties and Precise claimed against Holcim in the High Court for breach of contract in refusing to supply RMC at the contract price.

One of the defences raised by Holcim was that its obligation to supply RMC at the contract price had been discharged by virtue of the force majeure clause when the San Ban disrupted its supply of raw materials. The Trial Judge rejected Holcim's defences and held that Holcim, in refusing to supply RMC to Precise at the contract price was in breach of the Contract.

The principle issue before the Court of Appeal (CA) was whether Holcim could avail itself of the force majeure clause to defeat Precise's claim against it for breach of contract. In this regard, the CA had to decide if any of the events stated in the force majeure clause had "disrupted" the supply of RMC and if that event arose from circumstances that were "beyond the control" of Holcim. The CA had to also determine if Holcim was required to take all reasonable steps to avoid the operation of the force majeure clause.

HELD: Appeal allowed with costs.

1. **The supply was disrupted.** The CA defined the limitations of the word "disrupted" and concluded that an increase in the cost alone will not constitute a "disruption" and that a "disruption" does not entail the impossibility of further performance by one party (i.e. the word "disrupt" does *not* mean "prevent"). The CA found that the Sand Ban did indeed cause a "disruption" as it rendered it commercially impractical for Holcim to obtain sand. This was evidenced by several factors such as the fact that Holcim had no access to BCA sand stockpile and that its own

suppliers relied on their respective force majeure clauses in their supply contracts to stop supplying sand to Holcim. There was also no guarantee that Precise would receive requisite quantities of sand from BCA to supply Holcim. All these factors were seen by the CA as sufficient difficulties that "disrupted" Holcim's obligation to supply RMC to Precise.

2. **Reasonable steps were taken.** The CA established that there is no blanket legal principle requiring a party to take all reasonable steps to avoid the force majeure effects of the event in question. This requirement is dependent on the precise language of the clause in question. However, reasonable steps have to be taken when the clause in question relates to events that were "beyond the control" of one party (such as in this case). However, the burden is on that party to show that it had taken all reasonable steps to avoid the operation of the force majeure clause. In the present case, Holcim was deemed to have taken such steps as evidenced by its conduct. It had notified Precise of its impending inability to supply sand and had offered to credit back to Precise the costs of the sand provided by the latter at a higher price than what they would have paid BCA.

3. **Unwillingness of Precise.** The Trial Judge held that the shortage of sand was not an event that was "beyond the control" of Holcim and that the events that ensued did not make it difficult for Holcim to procure sand. The CA commented that the Trial Judge had erred in considering whether Holcim had the right to impose higher price for concrete and whether a rise in the price of sand was sufficient to trigger a force majeure clause. The CA was of the view that these questions could only be asked after determining if Holcim could invoke the force majeure clause in the first place. The relevant question was whether Precise had demonstrated its willingness to assist Holcim to procure sand. The CA found that Precise had been unwilling to do so as it failed to respond to Holcim's previous offers and had in fact supplied sand to a third party instead. The CA saw no merit in Precise's offer to supply sand to Holcim at pre sand ban prices as the offer was for *manufactured* sand, not *concreting* sand and this was held not to be a viable alternative.

EDITORIAL COMMENT

We concur with the CA's interpretation of the word "disrupted" and agree that the supply of RMC had indeed been "disrupted". However, we humbly disagree with the dictum of the CA that Precise had been unwilling to assist Holcim simply because it had rejected Holcim's request for help to procure sand from BCA with the condition of a higher sale price. It seems to us that it would not be of any advantage for Precise or make any commercial sense to assist Holcim in this endeavor if it meant that it had to pay a higher price for the RMC. In this sense, we think that the Trial Judge was right to hold that Precise, by rejecting this request, did not thereby show that it was unwilling to assist the supplier. In our view, the obligation of Precise to assist Holcim should not be at its expense or detriment, otherwise an unfair burden would be placed on Precise as a party under a force majeure clause.

We also find it unusual for the CA to hold that the supply of concrete had been disrupted "through circumstances beyond the control" of Holcim on the ground that *inter alia*, Precise had not been able to adduce any evidence that "there were alternative supplies of concreting sand from local or overseas sources." With respect, the burden should have been on Holcim to prove to the Court that it had been unable to obtain alternative supplies of sand from local or overseas sources. It seems rather onerous to lay this burden of proof on Precise instead of Holcim since Precise may not be in a position or have the resources to obtain evidence to show that there were indeed alternative supplies of sand from local or overseas sources.

This protracted dispute could have been avoided if the force majeure clause had been more specific and not phrased so generally. The CA remarked that "lawyers and their clients would do well to pay more attention to the precise language used" in drafting such clauses.

Readers with any questions or comments on the contents of this article are welcome to write to us at CHAN NEO LLP, 133 Cecil Street, Keck Seng Tower, #16-01, Singapore 069535, or send us an email to our internet address at admin@channeo.sg. Contact: Mr. Raymond Chan, Tel: 62231218.