Comfort Resources Pte Ltd v Alliance Concrete Singapore Pte Ltd and Another Suit [2008] SGHC 122

Case Number : Suit 601/2006, 604/2006

Decision Date : 05 August 2008

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : John Seow and Lim Ming Yi (Drew & Napier LLC) for the plaintiff in Suit 601/2006 and defendant in Suit 604/2006; Winston Kwek and Eileen Lam (Rajah & Tann LLP) for the defendant in Suit 601/2006 and plaintiff in Suit 604/2006

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

Contract – Breach – Sale of goods – Plaintiff contracting to sell sand to defendant buyer – Buyer failing to make timely payment and failing to order minimum quantities of sand – Buyer claiming seller short delivered sand – Whether buyer or seller in repudiatory breach of contract – What was test for repudiation – Section 31(2) Sale of Goods Act (Cap 393, 1999 Rev Ed)

5 August 2008 Judgment reserved.

Lai Siu Chiu J:

1 These actions concern a dispute over a contract for the supply of sand between two Singapore companies. Comfort Resources Pte Ltd ("Comfort") is a sand supplier and has its principal place of business at 51, Shipyard Road, Singapore. It is a family business of the Tans (headed by Tan Seng) who have another company called Sin Tung Resources Pte Ltd ("Sin Tung") in the shipping business. Alliance Concrete Singapore Pte Ltd ("Alliance") which is a joint venture between three parties, manufactures and supplies ready-mixed concrete and has its place of business at 72, Sungei Kadut Street I, Singapore. Alliance was a major customer of Comfort at the material time. Comfort obtains its sand from its quarry at Dabo-Singkep ("the quarry") in the Riau Islands, Indonesia.

2 In Suit No. 601 of 2006 ("the first suit") Comfort sued Alliance for $401,448.79 for sand sold and delivered to Alliance in 2006 and for loss of profits totalling $567,690.49 for sand Alliance under-ordered, pursuant to a contract evidenced in a letter from Alliance to Comfort dated 27 January 2006 and which Comfort countersigned as acceptance on 6 February 2006 ("the contract").

3 In Suit No. 604 of 2006 ("the second suit"), Alliance sued Comfort for the sum of $1,162,984.87 alternatively for damages, for losses incurred by Alliance as a result of Comfort's failure to supply contracted quantities of sand to Alliance. Alliance alleged that Comfort had, by its letter dated 14 September 2006 stating it would not make further deliveries of sand, repudiated the contract, which repudiation Alliance purportedly accepted by its solicitors' letter dated 15 September 2006.

4 On 15 January 2007, Comfort applied for summary judgment in respect of its claim for the price of sand delivered to Alliance in May, June and July 2006 ("Comfort's application"). Alliance similarly applied on 19 January 2007 for (interlocutory) judgment with damages to be assessed ("Alliance's application") for Comfort's alleged repudiation of the contract. Both applications came on for hearing on the same day before the Assistant Registrar ("AR"). Comfort's application was partly successful as the AR granted the company final judgment in the sum of $287,430.27 for sand delivered to Alliance in May and June 2006, but she granted Alliance unconditional leave to defend $114,018.52 as that was the sum Alliance claimed for alleged short-delivery by Comfort. The AR granted Comfort unconditional leave to defend on Alliance's application.

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

6 Thereafter both suits were consolidated. The trial before me lasted seven days and it was only to determine liability for which 18 witnesses testified. In this judgment, I shall deal with the first suit as its outcome will decide the fate of the second suit.

The facts

7 Under the contract, Alliance appointed Comfort as its subcontractor to supply sand to its seven plants *viz* (i) Sungei Kadut, (ii) Kaki Bukit, (iii) Tampines, (iv) Queenstown, (v) Toa Payoh Rise, (vi) Keppel and (vii) Sentosa ("the seven plants") at prices that ranged from $11.00 to $14.00 per metric ton.

8 The material clauses of the contract are the following:

> **Clause 2 – Quantity**
>
> [Comfort] shall supply an aggregate and deliver to [the seven plants] an aggregate total quantity of 40,000 +/- 25% metric ton [sic] of sand every month
>
> **Clause 3 – Contract period**
>
> 1 February 2006 to 31 January 2007 ("the contract period").
>
> **Clause 8 – Terms of payment**
>
> 60 days from end of each month supply.
>
> **Clause 10 – Liquidated damages**
>
> In the event of failure by [Comfort] to deliver the quantity of aggregate as stated in Clause 2 when conveyed by [Alliance] either orally or in writing within the stipulated time of delivery, [Alliance] shall be entitled to purchase the shortfall from the open market and any price difference plus administration fee shall be charged to the account of [Comfort].
>
> **Clause 11 – Force Majeure**
>
> 11.1 – [Comfort] shall not be liable for any failure to sell, deliver the said aggregate or any loss, damage, injury or delay due to any cause beyond its control including (without prejudice to the generality of the foregoing expression) act of Government on the prohibition in the said operation and export of aggregate by the Authorities on [Comfort]. strikes, fire, floods, riots, loss at sea, or any act of God…

9 It emerged from the evidence adduced in court that besides ordering sand from Comfort, Alliance also ordered sand during (part of) the contract period from another supplier Lim Chye Heng Sand & Granite Pte Ltd ("LCH') under a similar contract (dated 23 February 2006 albeit for a shorter

period of six months until 31 August 2006) at 40,000 mt +/- 25% per month,. Alliance was therefore contractually bound to order a minimum of 30,000 mt and a maximum of 50,000 mt from *both* Comfort and LCH every month, between 1 March and 31 August 2006 when the two contracts overlapped. It was also not in dispute from the evidence that only five of the seven plants in [7] ordered sand from Comfort, unlike LCH's contract. The Keppel and Sentosa plants of Alliance never ordered sand from Comfort.

10 Contrary to clause 8 of the contract, Alliance did not pay Comfort for supplies of sand within the stipulated 60 days of delivery. While deliveries of sand were made every day (save for Sundays and public holidays), Alliance was only invoiced weekly. In fact, for deliveries made in February, March and April 2006, Comfort only received payment in 78, 91 and 82 days respectively and even then it was only after repeated chasers by Comfort. Alliance's poor payment record was not only a cause for complaint by Comfort but allegedly caused the latter to suffer severe cash-flow problems as Comfort paid its suppliers and workers on cash and advance terms.

11 As a result, Comfort's executive director, Tan Wan Fen ("Ms Tan") instructed Patrick Chua ("Chua"), Comfort's marketing manager to meet Alliance to press for payment of the outstanding invoices. In fact there were two meetings between the parties, one held on 7 June 2006 ("the first meeting") and the other on 20 July 2006 ("the second meeting").

12 The first meeting was attended by Ms Tan's brother Tan Wei Leong ("Wei Leong") and Chua while Alliance was represented by its operations manager Lincoln Lim ("Lincoln"). The parties had conflicting versions of what transpired at the first meeting. According to Wei Leong (who had just completed his law degree at National University of Singapore and who was learning the ropes of the business from Chua), Chua (after introducing Wei Leong to Lincoln as "the boss' son") inquired if Lincoln could do anything about the late payments. Lincoln replied that Alliance was a merger of three ready-mix concrete companies and were having problems merging their computerised accounting systems. Lincoln then turned to Wei Leong (who was/is not Comfort's employee or director) and said "What are you going to do about the shortage of delivery? " Not being any the wiser, Wei Leong decided to placate (he thought) an irate customer. Consequently, he did not deny the accusation but expressed surprise and assured Lincoln that if there were short deliveries, his father Tan Seng would make up for them.

13 Lincoln responded that Alliance could not absorb the losses. Instead of Comfort making-up for the short-deliveries, Lincoln then suggested that the contractual period be extended and added that he could offer another contract to Comfort at a higher price. However, Lincoln said he could only make the offer if he was told what the problems Comfort faced. When Wei Leong responded he did not know, Lincoln apparently turned quite nasty and accused Comfort of diverting supplies of sand to higher paying customers, which Wei Leong denied. When Lincoln insisted that Comfort must have supply problems, Wei Leong (in desperation according to him) placated Lincoln by saying he had overheard that Comfort had encountered delay in starting a new quarry. The answer seemed to please Lincoln who repeated his offer of a new but overlapping contract with the contract. (Wei Leong's written testimony also denied Lincoln's subsequent allegations [in support of Alliance's application] that he had promised a committed schedule of deliveries, nor had Wei Leong asked to roll-over the contract).

14 When Wei Leong conveyed to his elder sister what transpired at the first meeting, Ms Tan was agitated and angry; she informed him the allegation of short delivery by Lincoln was both ridiculous and untrue as Comfort had spare/idle capacity at its quarry and was desperate to sell more sand instead of withholding supplies. Ms Tan explained that Comfort's delay in starting a new quarry had nothing to do with the contract as the quarry had more than a year of supply left. However, Comfort

could not carry out feasibility studies for other quarry sites because of its tight cash-flow due to Alliance's failure to pay invoices promptly.

15 Ms Tan decided that Comfort would stop deliveries of sand to Alliance on 20 July 2006 before the second meeting, in order to put pressure on Alliance to pay the outstanding invoices.

16 The second meeting was attended by Ms Tan and Shirley Chan Siew Kim ("Shirley"), Comfort's accountant. Alliance was again represented by Lincoln. According to Comfort's version of what transpired thereat, both ladies raised the issue of the overdue invoices to Lincoln who merely said he would discuss the matter with his management. Lincoln then accused Comfort of not delivering enough sand to Alliance but in the next breath he said Alliance could not absorb 40,000 mt per month and he requested Comfort to rollover the quantities by extending the contract period. Lincoln then repeated his proposal of a new contract for additional quantities of sand for another year, to run concurrently with the contract (although it would end later) and for which he was prepared to pay a higher price. However, he required written confirmation first from Comfort on the alleged shortfalls as well as a schedule of deliveries for the coming months.

17 Ms Tan was not interested in Lincoln's proposals and demanded immediate payment of the outstanding invoices. Lincoln replied Alliance had problems with its own customers. Ms Tan threatened to publicise Alliance as a bad paymaster in the market. Tempers flared as a result, Lincoln raised his voice and countered that he too could be nasty. Ms Tan and Shirley then left. According to Shirley, Alliance paid the April 2006 invoices on 21 July 2006 after the second meeting and only after she telephoned Lincoln to chase for payment and after her warning that no further deliveries of sand would be made to Alliance otherwise.

18 On or about 18 August 2006, Lincoln attempted to speak to Ms Tan. As she was not available, he spoke to Shirley instead. Lincoln asked for written confirmation on the alleged short supply and a committed schedule of supply from Comfort. He asked for a meeting to thrash things out. Shirley suggested he talked to Ms Tan instead. She pressed him on the May 2006 invoices which were then already overdue by three weeks. Lincoln said he would look into the matter and revert. He never did and Alliance did not pay the outstanding invoices for May 2006 until directed to do so by order of court.

19 On 6 September 2006, Alliance wrote to Comfort (signed by Lincoln) alleging the latter had short-delivered sand. The letter claimed that Comfort had short-delivered sand from the inception of the contract and that the total shortfall for the period February 2006 to January 2007 was 392,656 mt (based on the contract quantity of 40,000 mt less the actual quantities delivered of 87,344 mt). The letter enclosed an earlier letter dated 2 August 2006 Alliance had written to Comfort alleging short-deliveries.

20 Ms Tan acknowledged Alliance's letter in Comfort's letter dated 8 September 2006 but she did not respond to the allegation of short-delivery. Instead, she repeated what she had said at the second meeting (and on the telephone in numerous conversations) *viz* that Alliance would not be making further deliveries of sand until and unless Alliance paid for the deliveries already made from May to July 2006 totalling $401,448.78 ("the outstanding sum"). She concluded her letter with a warning that Comfort would treat Alliance's conduct as an intention not to perform the contract if it failed to pay the outstanding sum by 12 September 2006.

21 Following upon the threat contained in Comfort's letter in [19], Ms Tan wrote to Alliance on 14 September 2006 to say it considered Alliance as having repudiated the contract by its failure to pay the outstanding sum.

22 Comfort's letter in [20] drew an immediate response from the solicitors for Alliance whose letter dated 15 September 2006 denied that Alliance failed to make payments promptly and alleged Comfort had short-delivered contracted quantities of sand every month. The letter added that when they met, the representatives of Comfort had apologised to his counterpart from Alliance for the shortfall and had attributed it to delays in the commissioning of a new quarry. The letter concluded with the assertion that Comfort was in repudiatory breach of the contract in stopping deliveries of sand since August 2006 and that Alliance would be commencing proceedings forthwith against the former.

23 Both companies commenced proceedings on the same date (15 September 2006) although Comfort's action (the first suit) was filed first.

The pleadings

(i) The first suit

24 In the first suit, Comfort alleged that Alliance's repeated failure to order the requisite contractual quantities every month under cl 2 and its failure to pay for the May to July 2006 deliveries within the 60 day credit terms under cl 8 evinced an intention to be no longer bound by the terms of the contract. In the alternative, Comfort alleged that it had given Alliance (by its letter dated 8 September 2006) a grace period until 12 September 2006 to make payment and Alliance had failed to do so. Comfort therefore accepted Alliance's breach by its letter dated 14 September 2006 (in [21]).

25 In the defence that it filed, Alliance not unexpectedly denied Comfort's allegations of short-orders and late payments. Alliance alleged it was Comfort that had breached the contract by short deliveries. Alliance cited numerous letters it had written to Comfort between March and September 2006 to support its allegation.

26 Alliance alleged that at a meeting on 12 June 2006 (wrong date) which was called for Chua's introduction of Wei Leong to Lincoln, Alliance had raised the subject of Comfort's short deliveries, Wei Leong had apologised for the problem, given the reason therefor (delay in the opening of a new quarry), and he had promised to make up for the short deliveries as well as deliver contracted quantities of sand in future. However, Comfort failed to keep its word and was again in breach of contract. Alliance claimed that Comfort neither mentioned nor pressed for payment at that first meeting.

27 Alliance alleged that the second meeting was also held to address Comfort's failure to deliver contracted quantities and that Comfort promised thereat to again make up for the shortfall and to provide a written schedule of deliveries of the shortfall quantities. In exchange, Alliance promised to pay for quantities of sand delivered in April 2006 which it did pay promptly on 21 July 2006. However, Comfort failed to honour its agreement subsequently.

28 Alliance denied receiving Comfort's letters variously dated in April, May and June 2006 demanding payment of outstanding invoices. Alliance contended that as at 21 July 2006, only the April 2006 deliveries of sand were due for payment and that Comfort was not entitled at law to suspend deliveries for late payment (which Alliance denied). Alliance asserted that at the date of commencement of the first suit, payment for July 2006 deliveries was not yet due.

29 Alliance pleaded a setoff against Comfort's claim of so much of its own claim in the second suit as was sufficient to extinguish Comfort's claim. Finally, in the event Alliance was found to be liable to Comfort in the first suit, Alliance contended that Comfort's claim for loss of profits should be limited to a contractual base quantity of 30,000 mt (relying on cl 2 of the contract).

30 In its Reply, Comfort averred that the fact Alliance sent the letters in [25] to Comfort did not prove that Alliance had placed orders for the contracted quantities of sand every month and that Comfort had short-delivered. Comfort added that Alliance's letters were no more than attempts to roll-over the supplies, contrary to cl 2 of the contract. Comfort referred to the first and second meetings in which Lincoln had admitted that Alliance did not have the capacity to take delivery of the contract quantities every month and had attempted to persuade Comfort to extend the delivery period in the contract or enter into a new agreement to allow Alliance to spread the deliveries over an additional year.

(ii) The second suit

31 The parties' roles in the second suit were reversed as Alliance was the plaintiff while Comfort was the defendant. It would not be necessary to refer to the pleadings in the second suit as essentially, it was a rehash of the parties' pleadings and positions in the first suit.

The issue

32 The main issue that required the court's determination in both suits is, which party was in repudiatory breach of the contract? Was it Comfort because it short-delivered (as Alliance claimed) or was it Alliance because it under -ordered (as Comfort asserted)? Two subsidiary issues relate to whether Alliance was in repudiatory breach of the contract for its failure to pay for sand delivered in May to July 2006 and whether Comfort had the right to suspend deliveries because of such non-payment by Alliance.

The evidence

33 In order to prove that it did not short-deliver contracted quantities of sand, Comfort called its weighbridge clerk Golam Mushid Moslem Uddin ("Golam") to testify. To support its contention that the quarry had enough capacity to fulfil the contract, Comfort also called witnesses from Indonesia in particular the plant supervisor of the quarry as well as a surveyor Andrew Yap Chee Meng ("Andrew") and the landlord of its rented place, where sand was stored after it was discharged onto a jetty from barges that arrived from Indonesia. From the jetty, the sand was trucked to and stockpiled on part of plot A2 at Lorong Halus in Pasir Ris ("the yard"),which Comfort had subleased from Sing Lian Huat Sand Quarry Pte Ltd ("SLH"). According to the evidence of SLH's executive director, Teo Hock Koon ("Teo"), SLH had in turn leased plot A2 from the Building & Construction Authority ("BCA").

34 On its part, Alliance called employees from its various plants to substantiate its defence that Comfort short-delivered sand. These were:

(a) Low Swee Nam (DW2), logistics manager of the Kaki Bukit plant;

(b) Or Kiam Heng (DW3), operator of the Sungei Kadut plant;

(c) Chong Kwee Yong (DW4), supervisor of the Paya Lebar plant;

(d) Chu Kok Heng (DW5), foreman of the Paya Lebar plant;

(e) Tan Chze Huang (DW6), operations manager of the Tampines and eastern sector plants.

(f) Tee Tiam Liong (DW7), foreman of the Tampines plant;

(g) Koh Boon Wah (DW8), superintendent of the Queenstown plant;

(h) Ng Yong Peng (DW9), foreman of the Queenstown plant;

(i) Lam Dar Ynan (DW10), superintendent of the Toa Payoh plant.

(j) Teh Boon Lai (DW11) foreman from the Toa Payoh plant.

Lincoln (DW1) testified along with the deputy director from the Strategic Materials Department of the BCA. Alliance attempted unsuccessfully to call Chua to testify on its behalf.

Comfort's case

35 Golam (PW2) was stationed at the yard from which he accepted orders for and despatched sand to customers. As Golam's testimony was crucial to Comfort's defence (in the second suit) that it was not guilty of short-delivery, his evidence merits detailed consideration. In his affidavit of evidence-in-chief ("AEIC"), Golam explained his modus operandi. He would take telephone orders from Comfort's customers every morning. Orders were placed by the truckloads and each truck carried on average 16 mt of sand. Golam would record the orders in a standard form called the Daily Order Form ("the order forms") which comprised of a table with columns setting out the plants of various customers (eg Sungei Kadut and Kaki Bukit in the case of Alliance) and rows to represent the number of trucks required by the respective customers' plants. When he received an order for 20 truckloads, Golam would place a hex symbol at row 21 to signify that 20 loads were required. Later, as each loaded truck left the site, Golam would note the licence plate. When Alliance cancelled orders after placing them, Golam would note the cancellations by making a slash in the order form against the loads ordered. Further, Golam would put another hex symbol in the order form against the original load ordered to show the actual number of loads that were delivered to Alliance. Based on Golam's records of Alliance's cancellations, Comfort's plant manager Tan Lee Chin would use a computer to generate a cancellation list.

36 It was Golam's testimony that Comfort would have a stockpile of 60,000 to 70,000 mt of sand at any time at the yard. Based on the records that he maintained, Alliance was found to have under-ordered sand and it never attained the contract quantities as can be seen from the following figures:

Month in 2006	Quantities ordered or despatched
Feb	18,875.45
Mar	20,346.04
Apr	16,128.75
May	13,888.56
June	13,949.70
July (up to 20 July)	4,501.47

Based on Comfort's figures, Alliance was far off from the monthly contract quantity of 40,000 mt

stipulated under cl 2 of the contract (see [8]).

37 The fact that Alliance did sometimes cancel its orders was not only not disputed but confirmed by some of Alliance's own witnesses (eg Tan Chze Huang). Cancellations served to further reduce the quantities of sand ordered by Alliance.

38 In its closing submissions, Alliance sought to discredit Golam's testimony by arguing *inter alia* that the order forms were unreliable as they were not contemporaneous records, there were erasures therein and the documents had been tampered with. The erasures related to scribblings in the margins of the order forms which (according to Golam) were personal notes that he or Tan Lee Chin made. As the scribblings had nothing to do with the order forms, Golam testified that he erased the telephone numbers or writings although some of the scribbles were still visible in the order forms and were clearly irrelevant.

39 Golam's original order forms were produced for the court's inspection and one such erased scribbling seen therein was in Tan Lee Chin's handwriting and contained the words "total limit 75 loads" which Golam was unable to explain. During cross-examination, counsel for Alliance suggested to Golam (which he denied) that those words meant there were limits placed on the amount of sand that was delivered. (This suggestion was repeated in Alliance's closing submissions).

40 In its closing submissions, Alliance also sought to draw an adverse inference against Comfort for its failure to call Tan Lee Chin as a witness to explain his above scribbling. Comfort countered that Alliance could equally have subpoenaed Tan Lee Chin to testify if Comfort failed to do so, if it was Alliance's case that Comfort placed limits on deliveries of sand from the yard (which Ms Tan denied). Comfort also submitted that it was unnecessary to call Tan Lee Chin as a witness in any case because it was Golam's evidence that Tan Lee Chin only "filled in" for him (Golam) for brief periods when Golam was away from his desk (eg for toilet breaks).

41 Alliance had also made much of a discrepancy – entries made on 18 February 2006 and 9 May 2006 by Golam in the order forms in relation to its Kaki Bukit plant. The original order forms contained a slash against those dates for the Kaki Bukit plant. However, in the copy exhibited in Ms Tan's affidavit (for Comfort's application in [4]) the slash was missing. Comfort submitted that there was nothing sinister in the discrepancy. It did not detract from the fact that there were cancellations on those two dates, as verified by Comfort's cancellation list which showed there were indeed cancellations by that plant on those days. Alliance suggested that the missing slash in the copy exhibited in Ms Tan's affidavit meant that the rows between the two hexes represented short deliveries by Comfort.

42 Comfort argued that Alliance could have substantiated its allegation of short delivery by producing its delivery records known as the Material Intake Record Book ("the intake book") for its Kaki Bukit and other plants but it did not. I shall return to the issue of the intake book later.

43 Yet another accusation made by Alliance was that Comfort had generated at least three sets of the order forms to support its contention of under-ordering on the part of Alliance. As there was no evidence at all to support this allegation it merits no further consideration.

44 To prove Comfort had adequate stocks of sand, staff from the firm of Comfort's local surveyor Andrew [33] measured the capacity of the yard and confirmed the quantity of sand in Comfort's stockpile at the yard as of 30 December 2005 and as of 29 December 2006 to be 43,314.7 and 52,124.7 cubic metres respectively. Andrew's Indonesia counterpart Nurhadi Budi Santoso ("Nurhadi"), a marine manager from PT Vasco Bahari Inspection carried out a similar survey on the stockpile at

Dabo-Singkep on 27 December 2005 and 29 December 2006. It showed Comfort had 79,250 mt and 119,250 mt of sand at Dabo-Singkep on 27 December 2005 and 29 December 2006 respectively. Alliance had objected to Andrew's testimony because he was not the maker of the two survey reports that were prepared by his colleagues. However, Andrew testified he had attended the December 2006 survey even though he did not prepare the survey report.

45 One final attempt by Alliance to disprove Comfort's claim that it had enough stocks of sand to fulfil the contract was to subpoena BCA's deputy director Ng Cher Cheng ("Ng") as its witness. At the material time there was a regulation imposed by BCA on all its sand licensees to maintain a certain minimum stockpile of sand for a period of at least 30 days. This requirement equally applied to SLH whose licence from BCA contained a clause that it had to maintain a stockpile of 135,000 mt of sand. Ng (DW12) confirmed that if the stockpile size was not maintained for any 3 consecutive months, BCA would impose a fine on SLH. He revealed that as SLH failed to maintain the stockpile in the months of February to April 2006, BCA imposed a fine of $40,991.77 on the company (see exhibit D2).

46 Ng's testimony contradicted that of the executive director of SLH (Teo) when the latter was cross-examined. Teo (PW7) had then said SLH was not fined in 2006. Counsel for both parties traded arguments and counter arguments on whether Teo lied and whether Comfort's closing submissions were misleading in that regard. Alliance in my view made (unnecessarily) a mountain out of a molehill.

47 Alliance sought to prove that the mandatory requirement of a stockpile of 135,000 mt of sand meant that Comfort could not/would not have had enough stock to deliver 40,000 mt of sand every month to Alliance. In fact, Alliance went so far as to question the existence and the legality of Comfort's sublease from SLH because of lack of documentation.

Alliance's case

48 As stated earlier [34], Alliance called employees from each of its five plants that ordered sand from Comfort, to testify to the latter's short-deliveries. Each and every one of those seven witnesses gave the same testimony on the common operating procedure practised by Alliance at its plants. It would not be necessary therefore to review the individual testimonies of these witnesses. I have singled out the evidence of three employees because their evidence involved documentation, unlike the other witnesses.

49 I refer in particular to the evidence of Tan Chze Huang ("Tan") who at the material time was the operations manager of Alliance and whose responsibilities covered the Tampines plant as well as the overseeing of the operations of its other plants in the eastern sector.

50 In Tan's written testimony (as well as in the AEICs of the other plant personnel of Alliance), he deposed that Lincoln would email to each plant its monthly material quota, setting out the percentage of raw materials that the particular plant would order from suppliers. The printout of Lincoln's email would then be forwarded to the foreman (who was Tee Tiam Liong in the case of Tampines plant) for the actual ordering to be done. The plant operator would telephone the supplier's weighbridge clerk at around 9am every morning to place orders for sand; the quantity purchased varied depending on the remaining stockpile from the previous night's/day's production as well as the orders for concrete placed by Alliance's customers and the projected production volume for the particular day. If the sand ordered was not delivered by lunch time, Alliance would chase the supplier's weighbridge clerk. If the supplier failed to deliver at all, Tan would be informed by Tee Tiam Liong and in turn he would inform Lincoln if the failure persisted.

51 Tan (DW6) deposed that he was informed by his subordinates that since early 2006, Comfort

had consistently failed to supply quantities of sand ordered by Alliance and/or make up for shortfalls in quantities delivered. He claimed to have called up Chua (Comfort's sales manager) who purportedly told Tan that the short-deliveries were due to Comfort not having enough trucks. Tan also claimed to have written countless letters to Comfort on the short-deliveries of sand and having asked the company to increase its supply but he received no response. As a result (so Tan alleged), Alliance was forced to buy more sand from its other supplier LCH [9] so as to be able to fulfil orders for ready-mixed concrete from its customers. In support of his allegations, Tan's AEIC exhibited copies of Alliance's materials receipt book ("the receipt book") and daily despatch records of its Tampines plant.

52 I turn next to the evidence adduced during Tan's lengthy cross-examination. Together with Lincoln's testimony, Tan's cross-examination was a crucial determinant on the bona fides of Alliance's defence and/or claim.

53 Questioned on how he knew Comfort had short-delivered sand, Tan explained that at the end of every month, he would consolidate the figures for both Comfort and LCH. Based on the sand they had supplied and compared with Lincoln's quota for the month, he would be able to tell who had under-delivered.

54 Counsel for Comfort drew Tan's attention to the many letters he wrote on Alliance's behalf to Comfort in [50]. The letters variously dated between 15 March 2006 and 24 May 2006 merely stated that Comfort had "failed to fulfil [Alliance's] daily required quantity of sand since [month] 2006". In none of the correspondence was the quantity allegedly short-delivered by Comfort stated; neither was Tan told the quantities by his staff. The first mention of the shortfall was in Tan's letter dated 13 July 2006 where he complained that Comfort had only delivered 544 mt of sand in June 2006 as compared to an average of 4,000 mt in previous months. In Comfort's closing submissions for the second suit however (para 100), it was pointed out that in the order forms for the period 1- 22 June 2006, Golam's records showed that the Tampines plant placed no orders at all save for one truckload on 8 June 2006. Yet Comfort was delivering sand to Alliance's other plants during the same period. It made no commercial sense for Comfort to deliver only 544 mt or not deliver sand at all to the Tampines plant, unless in truth Alliance only ordered 544 mt or did not order at all.

55 Tan was referred by Comfort's counsel to entries from the receipt book of Tampines (which original was produced in court). One entry therein was for 24 April 2006 which recorded that Alliance received 101.04 tons of sand from Comfort (equivalent to about 6 truckloads @ 101.04 ÷ 16 tons per truck). However, in the orders column, the number 15 appeared. The original receipt book showed that the number 6 had been blanked out with corrective fluid and the number 15 substituted. Furthermore, while the original entries were written in blue ink, the number 15 was written in black ink. Far more interesting was the fact that the original number 6 corresponded with Golam's entry for 24 April 2006 in the order forms.

56 Counsel for Comfort highlighted other entries in the original receipt book. It did not need a forensic scientist to confirm there had been tampering and alteration of the original entries – the handwriting of the alterations and/or the ink used was different from the original. Invariably, the original numbers were substituted by higher figures. One example was the entry for 27 April 2006 (at DB 4334) where the original order of 21 trucks had been altered to 30. The numeral 21 corresponded to Golam's record in the order form for 27 April 2006. The same method of tampering was repeated in other entries brought to the court's attention (see N/E 362 to 375) including but not limited to those for 15, 23, 25, 28 May, 1-10 June and 1, 5, 7, 10, 27 July 2006. Tan was not aware (until he was informed by counsel for Comfort) that 28 May 2006 was a Sunday. Yet Alliance's records showed (at DB 4251) that Comfort had failed to deliver 20 trucks of sand purportedly ordered that Sunday. This should be contrasted with the order forms of Comfort exhibited in Golam's AEIC (as GMU-1) which

contained no entries whatsoever for any Sundays. It was also Golam's testimony (which was not challenged) that there were no deliveries of sand on Sundays as the yard would be closed.

57 Despite being confronted with the above fabricated evidence and notwithstanding two warnings from the court (at N/E 370-373), Tan (at N/E 375) maintained his denial that the receipt book for the Tampines plant had been tampered with in order to support Alliance's case against Comfort. I would add that Tan was not the maker of the receipt book which entries were made by Tan Peng Leong (and confirmed by Tee Tiam Liong) who was not called to testify. Indeed, Tan had no direct knowledge of Comfort's short deliveries save for what Tan Peng Leong told him.

58 In re-examination, counsel for Alliance attempted to repair the damage to his client's case by pointing out that LCH delivered sand on Sundays. This evidence (as the court pointed out to counsel), did nothing to reinforce Alliance's allegation of short-delivery against Comfort for the reason that LCH's practice was irrelevant to how Comfort conducted its own business.

59 When counsel for Alliance (Mr Kwek) addressed the court (after Tan had been cross-examined), he sought to justify the "corrections" to the receipt book (he disagreed it was tampering) on the basis (at N/E 379) that "the corrections reflect the dynamic and fluid nature of the verbal ordering process". Counsel then referred to some order forms prepared by Golam (in exhibit GMU-1) to prove his point – that Golam's records tallied with the figures in the receipt book and there was nothing sinister in the first digit of number being outside the column for "numbers". Unfortunately, Mr Kwek's explanation overlooked Golam's testimony (at N/E 26 and see [35]) that Alliance would cancel orders it had placed in the morning and the cancellations would be reflected in the order forms in the reduced number of trucks delivered by Comfort to the various plants including Tampines. In other words (as the court pointed out to Tan at N/E 376), cancellations due to rain or other factors would result in a *decrease* not an *increase* in the orders placed with Comfort for the day, let alone double digit increases. One need not be a Sherlock Holmes to see that the first digit of the two digit numbers had been added on to the existing number *outside* the columns for "numbers". As I had commented earlier [56], the tampering of the receipt book was invariably to increase the truckloads ordered.

60 I turn next to Lincoln's testimony. Lincoln's testimony (in cross-examination) necessitated close scrutiny because of the pivotal role he played in the events leading up to and in, Alliance's claim. As Alliance's operations manager, Lincoln was responsible for deciding the amount of materials the various plants should order from suppliers including Comfort. Further, he wrote the letter of 6 September 2006 on behalf of Alliance to Comfort alleging the latter had short-delivered 392,656 mt of sand between February and September 2006. Surprisingly, despite his crucial role, Lincoln's written testimony was barely 18 pages long, was sorely lacking in details (on Comfort's alleged short deliveries) and it was exhibits (most of which were of no assistance to the court) that took up the remaining pages of his 225 page AEIC.

61 It was equally noteworthy that Lincoln's own table (at p 31 of his AEIC) showed that Alliance was tardy in its payment of Comfort's invoices. On the average, Alliance paid Comfort's invoices four months or later, after the invoicing dates, never 60 days from the end of the supply month as stipulated under cl 8 of the contract [8]. Lincoln's excuse was that in the previous course of dealings between Supermix Concrete Pte Ltd ("Supermix") (who was one of the three parties in the joint-venture of Alliance), Supermix (not Comfort) extended the terms of payment from 60 to 90 days. During cross-examination (at N/E 245), Lincoln claimed that it was industry practice to pay within 90 days notwithstanding that the contract stipulated 60 days. I reminded him (at N/E 253) this argument had been canvassed by Alliance in the courts below and had been rejected.

62 In his AEIC (para 9), Lincoln had also claimed that 0.85 mt of sand was a component required

for every cubic metre of ready-mix concrete but had no evidence to corroborate his statement. Similarly, apart from Lincoln's bare statement, Alliance did not produce any documents to support his claim that Alliance required an average of 66,597.89 mt of sand per month based on Lincoln's computation 0.85 mt. It was also Lincoln's testimony that Alliance looked to LCH to make up for Comfort's shortfall in deliveries.

63 During cross-examination, counsel for Comfort produced (see document "A" which revised version then became exhibit P5) a table he had assiduously prepared, showing deliveries of sand by Comfort and LCH to the five plants in question at the material time. The table in exhibit P5 was based *entirely* on the documents of either Alliance or LCH, including the receipt book in [54] and incorporated the figures in para 19 of Lincoln's AEIC. As Counsel pointed out, exhibit P5 was a convoluted way of showing the amount of sand that Alliance needed; it was a retrospective calculation based on the quantities of ready-mix concrete actually produced and relied on Lincoln's bare assertion that (approximately) 0.85 mt of sand was required for every cubic metre of ready-mix concrete. It would have been simpler had Alliance produced its records to show the *actual* quantities of sand used in production but this was never done.

64 Even so, based on exhibit P5, Lincoln's claim that Alliance needed an average of 66,597.89 mt sand per month was not borne out – instead, it was clear therefrom that Alliance only used on average 48,116.70 mt every month for the five plants in question. Lincoln gave an incoherent explanation (at N/E 224) that Alliance had also used M sand or manufactured sand and such usage lowered/affected the quantities ordered from Comfort and/or LCH. I was sceptical of Lincoln's explanation -- there was little doubt on the figures Comfort extracted from Alliance' own records, that Alliance consistently breached its contractual obligation to order 60,000 to 100,000 mt of sand from *both* Comfort and LCH between February and June 2006. What was even more remarkable was Lincoln' admission during cross-examination (at N/E 214) that he did not track what the various plants received from each supplier! That was surprising. Without such vital information, how could Alliance know that Comfort had short delivered its orders of sand?

65 Mr Seow had earlier informed the court that Alliance had strenuously resisted Comfort's prior application for discovery of the raw data (*viz* the receipt records) for the quantities of sand received from Comfort. Lincoln's lame explanation to the court was that the receipt book was not "relevant" even though Alliance relied on the information contained therein to prepare (in spreadsheet format) the monthly summaries of materials purchased by the five plants (as exhibited at pp 53 to 111 in Lincoln's AEIC).

66 As to why Alliance did not have records like the receipt book at its other plants (apart from Toa Payoh, Tampines and Queenstown), Lincoln's excuse was it did not occur to Alliance to retain the records (other than keeping records for three months for ISO classification) because the company did not foresee there would be any dispute between the parties. Pressed by counsel on why Alliance destroyed some but not all of the daily reports of material ordering forms ("the F-10 forms") as the company kept those for Toa Payoh and Queenstown from February to July 2006 but discarded those from August 2006 for all five plants, Lincoln was unable to give any satisfactory answer. It should be noted that discarding the documents was against Alliance's interests as, if its claim in the second suit was bona fide, the evidence would have supported its contention that Comfort short-delivered its orders of sand.

67 Comfort informed the court that in Alliance's first supplementary list of documents filed on 10 December 2007, Alliance claimed that the rest of the F-10 forms for Toa Payoh and Queenstown plants for the period 1 August 2006 to 31 January 2007 and the F-10 forms for the other three plants for the period 1 February 2006 to 31 January 2007 were last in their possession before 1 May 2007.

However Alliance had commenced the second suit earlier (on 15 September 2006). Yet, Lincoln denied counsel's suggestion that the documents were deliberately destroyed so that Alliance's failure to order contracted quantities of sand from Comfort would not be discovered.

68 Despite repeated questioning by Comfort's counsel as well as the court (at N/E 231- 235) not to mention pointing out to him that Alliance bore the burden of proof, Lincoln was unable to explain why in all Alliance's letters to Comfort as well as in Alliance's own records, there were no figures evidencing short deliveries. It was equally significant that Alliance never once notified Comfort in its letters of the additional cost Alliance allegedly incurred in procuring make-up quantities of sand from LCH. Lincoln's excuse that it was because he only wanted the sand (N/E 236) was lame and unconvincing.

69 Mr Seow had prepared a second table (exhibit P4) to reinforce his point in [65]. Exhibit P4 was based on Alliance's daily purchase summaries as shown in pages 53 to 111 of Lincoln's AEIC. Again, the figures showed that between February and July 2006, the greatest quantity of sand that Alliance ordered was in July 2006 (of 53,177.04 mt) with a monthly average of 46,835.37 mt which was nowhere near the 60,000 to 100,000 mt it should have ordered from both suppliers (see [9] above). An interesting fact that emerged from the table was that Alliance consistently ordered more sand from LCH than from Comfort. I found this strange as a quick comparison of the prices charged by Comfort and LCH in their respective contacts with Alliance showed the following:

	Plants	Comfort's price	LCH's price
(a)	Sungei Kadut	$12.40	$13.00
(b)	Kaki Bukit	$11.40	$12.40
(c)	Tampines	$11.00	$11.90
(d)	Queenstown	$12.20	$13.10
(e)	Toa Payoh	$12.00	$12.80
(f)	Keppel	$13.60	$13.10
(g)	Sentosa	$14.00	$13.70

70 While it was perfectly understandable for Alliance to order sand from LCH for its Keppel and Sentosa plants (as LCH's pricing was lower than Comfort's), it made no commercial sense for Alliance to order more sand from LCH for its other five plants when Comfort's prices were lower – in the case of Kaki Bukit, the price differential was $1.00. According to exhibit P4, in the months of April, May and June 2006, Alliance ordered a total of 22,688.79 mt of sand for its Kaki Bukit plant from LCH as against 10,605.01 mt from Comfort; the difference of 12,083.78 mt translated into extra cost of $12,083.78 for Alliance.

71 Alliance's inexplicable decision to buy sand from LCH instead of from Comfort for its five plants directly contradicted Lincoln's AEIC where he said (in para 14):

> As there will be differences in the prices contracted by the various suppliers, we will, as a

business decision, order more sand from the supplier contracted at lower prices. It does not stand to business economics or reason for Alliance to do otherwise.

72 It would be appropriate at this juncture to turn my attention to Alliance's claim pertaining to additional purchases of sand from LCH arising out of Comfort's alleged breach. Lincoln had exhibited to his AEIC (at p 159) an alleged "quotation" from LCH dated 10 July 2006 stating prices would be increased from 1 July 2006 for deliveries to all seven plants of Alliance, over and above the contracted 40,000 mt. Mr Seow pointed out that LCH's contract (at [9]) entitled Alliance to order up to 50,000 mt until 31 August 2006; hence LCH's purported price increase for orders after 40,000 tons was unjustified. Lincoln was unable to offer any explanation for this discrepancy and finally took refuge in the excuse that he could not remember.

73 Alliance's case was not improved by the testimony of the superintendent of its Toa Payoh plant, Lam Dar Ynan ('Lam"). Lam (DW10) produced the Toa Payoh plant's F-10 forms as well as the plant's intake book, which was similar to the receipt book of the Tampines plant and purportedly showed Comfort's short-deliveries.

74 Lam testified that the F-10 forms for the Toa Payoh plant captured all the orders placed by the plant but not cancellations. However, he was unable to say where cancellations were recorded. Nor could he explain or produce documentation pertaining to extra quantities of sand his plant ordered to cover Comfort's repeated default, although there were numerous entries in the F-10 forms indicating Comfort short-delivered which shortfalls were covered by LCH. Cross-examined, Lam also insisted (at N/E 442-443) that Comfort operated on Sundays; there were entries in the F-10 forms indicating Comfort failed to make deliveries on two Sundays 12 March 2006 and 28 July 2006 as well as on 14 April 2006 which was a public holiday (Good Friday). Although Golam's order form for 18 April 2006 showed the Toa Payoh plant did not order sand at all, the F-10 forms recorded that 25 trucks were ordered that day but Comfort only delivered 10 trucks.

75 What was even more remarkable was the fact that the Toa Payoh plant appeared not to have placed any orders for sand with LCH – all supplies that came from LCH were purportedly to compensate for Comfort's short deliveries. Mr Seow drew Lam's attention to Lincoln's email dated 12 July 2006 addressed to all plants' foremen/supervisors (including Lam) stating that for the month of July 2006, the Toa Payoh plant should order sand 40:60 in favour of Comfort and LCH respectively. Yet, according to the F-10 forms (which Comfort's counsel condensed into exhibit P2), Lam had sometimes placed no orders with LCH or had ordered less than 10% of Lincoln's quota from LCH with the balance 90% being supposedly ordered from Comfort.

76 As with the receipt book of the Tampines plant, the original F-10 forms (see N/E 454) showed initial figures had been blanked off by corrective fluid and substituted with other numbers. It transpired that Lam (who admitted to it at N/E 457) copied entries from another source and when he mistakenly repeated data of 2 March 2006 in the entries for 3 March 2006, he used corrective liquid to rectify his error.

77 Counsel had referred Lam to Lincoln's letter dated 6 September 2006 to Comfort (at 1AB46) wherein Alliance used 40,000 mt as the basis of calculating Comfort's alleged shortfalls in deliveries between February and September 2006. The court pointed out to Lam that under cl 2 of the contract [8], Alliance was entitled to order as little as 30,000 mt or as much as 50,000 mt per month. Consequently, there was no basis for Alliance to arbitrarily use 40,000 mt as the starting point to calculate Comfort's shortfalls. Alliance would need to use actual quantities it ordered from Comfort as the basis of calculation. However as in Lincoln's case, Lam (despite repeated questioning by Mr Seow and the court) could not produce records of the orders the Toa Payoh plant placed with Comfort

during the contract period (up to July 2006) nor could he provide any explanation for the omission.

78 Mr Seow had obtained discovery from Alliance of LCH's delivery orders (see PB1248-1483) based upon which he painstakingly prepared a summary (see exhibit P3) of deliveries made by LCH. He compared them with the records in the F-10 forms. Exhibit P3 showed that sand was delivered by LCH from as early as 8.48am. That being the case, the deliveries could not possibly have been to compensate for Comfort's shortfalls since logically, such deliveries would only have been made in the afternoons (see Tan's testimony in [51] above) after Alliance had pressed Comfort to deliver and the latter failed to do so by lunchtime. It is also noteworthy that save for the letter dated 11 August 2006 written by Tan, Alliance's monthly letters to Comfort never once mentioned it had procured the undelivered supplies from LCH.

79 The answers given by Lam during cross-examination on entries in the F-10 forms were highly unsatisfactory while the (original) book of the Toa Payoh plant containing the F-10 forms produced in court was in an usually pristine condition. I therefore find little probative value in the documents. My conclusion is reinforced by Lam's admission that he was asked by his management to pad up the numbers for Alliance's orders from Comfort. In fact, Lam finally admitted (at N/E 473) that not only were the F-10 forms fabricated in its entirety but that it was done at the behest of his "management". I surmise that "management" must mean Lincoln whom I found to be a wholly unreliable witness who consistently prevaricated when cross-examined and whose version of what transpired at the two meetings with Comfort in [12] and [16] I do not accept.

80 I should add that the testimony of Alliance's other witnesses from its plants was equally unsatisfactory. Low Swee Nam ("Low") and Or Kiam Heng ('Or"), Alliance's logistics manager and operator respectively, from its Sungei Kadut plant had similarly testified that the plant had no documents to evidence the quantity of sand ordered from Comfort. While Low testified that the Sungei Kadut plant never used F-10 forms at all since 2006, Or contradicted him by saying that during the relevant period, F-10 forms were used but they had since been discarded. Yet without any documentation, Low was able to recall from memory that Comfort delivered less to the plant than what Alliance ordered.

81 The Kaki Bukit plant similarly had no documentary evidence to prove that Comfort delivered less sand than Alliance ordered. In any case, Chong Kwee Yong and Chu Kok Heng, the plant's supervisor and foreman respectively who testified, were not the persons who placed orders for sand with Comfort; the task was assigned to Tay Teck Ching and/or David who were not called as witnesses. Golam's AEIC (at para 15) had identified "Mr Tay" and "David" as the persons who placed orders for sand from Kaki Bukit which evidence Alliance not only did not challenge, but appeared to corroborate by the plant's aforementioned personnel.

82 As for the Queenstown plant, Koh Boon Wah ("Koh"), its superintendent claimed that his F-10 forms were the only available contemporaneous records of the orders placed with Comfort. Unfortunately, as in the case of the Tampines plant's F-10 forms, Koh's documents were unreliable and their authenticity was questionable. The original F-10 forms produced in court (see N/E 425) were also in pristine condition. Notwithstanding Koh's denials, all the entries were written with the same pen and they did not appear to be contemporaneous records.

The findings

Did Comfort short deliver to Alliance or did Alliance under-order sand?

83 I had said more than once to Alliance's witnesses from its various plants (as well as to Lincoln),

that the only way the company could prove that Comfort had short delivered its orders of sand was to compare the orders it had *initially* placed with Comfort against the *actual* deliveries made by Comfort. However, not one of these witnesses was able to produce any credible evidence to this effect. The documentary evidence that was actually produced by way of the F-10 forms was manufactured in is entirety while the receipt book for the Tampines plant had been doctored along with the intake book from the Toa Payoh plant. That was why at the hearings below (and in the Registrar's Appeals therefrom) of the parties' applications for summary judgment, Alliance offered no evidence to support its allegation of short deliveries.

84 I found it strange that some documents survived for the contract period for the three plants when similar records for the other two plants had been destroyed. Lincoln's explanation for this misnomer was patently incredible. The testimony of the witnesses from the various plants was either based on hearsay or, in the case of Tan, Lam and Koh, discredited by the tampering of the documentary evidence they produced.

85 Further, despite Comfort's alleged failure to deliver in full the quantities Alliance ordered every month, not once in Tan's numerous letters to the company was there mention of the actual tonnages. There is therefore more than a ring of truth in Ms Tan's allegation (in para 45 of her AEIC) that Tan and Lincoln wrote the many self-serving letters to Comfort in order to leave a paper trial to prop up Alliance's case. I am certain that the contents of those letters were wholly untrue.

86 On the other hand, Comfort's records of the deliveries it made to Alliance by the order forms maintained by Golam were contemporaneous and accurately reflected the orders placed by all five plants of Alliance. Golam was forthright and steadfast in his testimony (albeit his command of English was limited) and his evidence was consistent with Alliance's own documents (*viz* the original receipt and intake books) before they were altered. Unlike Tan, Lam and Koh, Golam had a logical and credible explanation for erasures in the margins of the order forms (see [38]). In any case, unlike the tampered documents of Alliance, the erasures did not *affect* or *alter* the contents of the order forms. In this regard, I reject the submissions that the order forms had been tampered with and should not be given credence. Alliance had the gall to make this accusation when it was guilty of blatant tampering of its own records.

87 Consequently, I find that on a balance of probabilities, Comfort has proved its claim that it delivered to Alliance all quantities of sand the latter ordered. Conversely, Alliance has failed to discharge the burden to prove that Comfort short delivered its orders.

Did Comfort have sufficient supplies of sand to meet the contract?

88 While my above findings are sufficient to dispose of the first suit which would in turn determine the outcome of the second suit, I shall for completeness, deal with peripheral issues that arose in the course of the trial. One such issue was whether Comfort had sufficient quantities of sand to meet its contractual obligations.

89 There is no dispute that Comfort obtained its supply of sand from the quarry [44] which it claimed to own beneficially. Comfort's evidence was that surveys conducted at the quarry as well as at its yard in Singapore confirmed that the company had adequate stocks of sand (in excess of 100,000 mt) before the commencement and after the expiry, of the contract period. It was also Ms Tan's evidence that Comfort's sister company Sin Tung would ship in sand from the quarry by barges to replenish its stock in Singapore as and when required.

90 Alliance in its closing submissions (see paras 25 to 54) for the first suit raised a whole host of

reasons for its contrary submission (even to the extent of disregarding the actual evidence adduced in court when it submitted that Comfort must have purchased sand from other sand suppliers in a rising market). First, Alliance questioned Comfort's ownership of the quarry submitting no evidence was produced by way of proof. Next, Alliance contended that Comfort could not have had a stockpile at the yard because the survey report of Andrew did not show the sand belonged to Comfort (not to mention that his survey did not prove that Comfort had sufficient sand at the yard in the period February to April 2006). Even if Comfort stored its sand at the yard, Alliance argued that the company's stockpile could not be used to fulfil Comfort's contractual obligations given the requirement imposed by BCA for a minimum stockpile of 135,000 mt of sand to be maintained (see [45] above).

91 Alliance added that Comfort was not the lessee or sub-lessee of the yard in any event. Teo was described by Alliance as an untruthful witness and his evidence of an informal arrangement between Comfort and SLH for the former to stockpile its sand at the yard leased by the latter from BCA was said to be inherently incredible. Comfort countered Alliance's arguments by referring to Golam's testimony that 60,000 -70,000 mt of sand would be stockpiled at the yard and was available at any time.

92 Alliance's submission in [91] conveniently overlooked Ms Tan's testimony. Granted, Teo said that Comfort's sublease of part of the yard was an informal arrangement (because of the friendship between Teo and Ms Tan's father Tan Seng). However, Ms Tan had testified (at N/E 121) that SLH would invoice and Comfort would pay for, half the rent and utilities incurred for the yard. The invoices of SLH as well as Comfort's payment vouchers were produced in court for inspection (see N/E 133 and documents at PB976-1122) and Alliance's counsel did not question them. Why would Comfort incur such expenses unless it did indeed rent half the yard from SLH?

93 As for the regulatory stockpile requirement, Comfort pointed out (quite rightly) that Comfort was under no constraints by the BCA to comply with the stockpile requirement which only applied to SLH as the official lessee of the yard. However, it was also Ms Tan's testimony (which I accepted) that if Comfort could assist SLH, it would do so to help maintain that mandatory stockpile; BCA took into consideration the whole of the yard for the stockpile requirement and not half the plot retained by SLH. In any case, Ms Tan pointed out (at N/E 152 and which was confirmed by the testimony of Ng from BCA [at N/E 492]) the stockpile requirement was not a daily necessity but spread over three months so that strictly speaking, SLH/Comfort could sell off their entire stock of sand at the yard one day and replenish it on the following day without being penalised by BCA. In my view, counsel for Alliance spent an unnecessary and inordinate amount of time in cross-examining Ms Tan on this issue which was a complete red herring as far as I was concerned.

94 It is a measure of Alliance's desperation that it clutched at straws in mounting arguments that were completely irrelevant to its obligation under cl 2 of the contract to order a minimum quantity of sand from Comfort every month during the contract period. Consequently, the fact that SLH was fined by the BCA for failing to maintain the regulatory stockpile has no relevance to and has no impact on Comfort's case that Alliance under-ordered sand.

95 Once Comfort had proven that Alliance was the party in breach, it was no answer for Alliance to say that Comfort would not have had the capacity to deliver the contracted quantities let alone raise extraneous and irrelevant arguments (in its closing submissions) that Comfort's obligation to do community work in 2006 at villages near the quarry hampered its quarry operations. Alliance had relied in this regard on the testimony of Billy Lugianto ["Lugianto"], the plant supervisor of the quarry. It was a quantum leap in logic for Alliance to say Comfort's production of sand was "hampered' by such community projects merely because Lugianto (PW4) deposed in his AEIC that Comfort found it difficult to refuse requests from community heads/leaders to assist in the construction of mosques and other

buildings.

96 Alliance (in another act of desperation) pounced on Lugianto's deposition in his AEIC (para 3) to contend that the quarry was not owned by Comfort but by an Indonesian company called PT Tri Ratna Sakti Perkasa ("PTRSK"). I note however that Lugianto identified PTRSK as the owner/operator of the quarry which he referred to as the plaintiff's (Comfort's) who was his employer. Further, (as Comfort submitted) it did not lie in the mouth of Alliance to take issue with Comfort's ownership of the quarry when the point was not pleaded nor was it raised with Ms Tan or any other witness of Comfort. I accept Comfort's submission (para 102) that Alliance was precluded by the rule in *Browne v Dunne* (1893) 6 R 67 from now raising the issue in its submissions. In other words, as Alliance failed to challenge Comfort's ownership of the quarry during cross-examination of Ms Tan, it is too late to do so now in its closing submissions. In any case, there is no necessity for Comfort to prove it must own a quarry before it can supply sand.

97 I conclude my findings with the observation that unlike Comfort's witnesses whom I found to be generally truthful and honest, Alliance's witnesses (save for Ng from BCA) had no scruples about lying on oath (to the extent that they filed identical AEICs) and were prepared to fabricate or alter documents for their employer, conduct which to say the least was deplorable. I reject as untrue Alliance's convenient defence (in [28]) that it did not receive Comfort's letters sent between April and June 2006 chasing for payment. It defies belief that our very efficient postal authorities would fail to deliver not one but all letters forwarded to a local addressee over a period of three months.

The law

98 It was Comfort's case that Alliance, by its repeated action of delaying payment to Comfort beyond the credit period of 60 days (see [8]) and its failure to order the minimum tonnage of 40,000 mt every month between February and June 2006 (see [36]) had evinced an intention to repudiate the contract.

99 Comfort relied on s 31(2) of the Sale of Goods Act Cap 393 1999 Revised Edition ("the Act") which states:

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

100 Comfort submitted the above test was equally applicable to default in delivery on the part of the seller and to a default in acceptance or payment on the part of the buyer (citing *Benjamin's Sale of Goods* 7th edition (2006) Sweet & Maxwell p 445 para 8-077 and 8-078).

101 To constitute repudiation, it is trite law that the breach by Alliance must be fundamental or go to the very root of the contract or it must have deprived Comfort of substantially the whole benefit it would have received under the contract. For this proposition to apply to failure to meet the term of payments promptly, Comfort relied on the UK Court of Appeal decision in *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 2 All ER 216 ("*Decro's* case").

102 Applying the principle in *Decro's* case, Comfort highlighted the pattern of Alliance's payments on

Comfort's invoices throughout the duration of the contract until 21 July 2006. Alliance was persistently late for the first three payments (see [10] above) and stopped payments altogether thereafter for deliveries made in and after May 2006. Even then, Comfort had to chase Alliance hard before it received the late payments. Despite the two meetings with Lincoln when Comfort again asked for payments to be expedited, Alliance's poor payment record not only did not improve but stopped altogether after 21 July 2006.

103 Alliance' counsel on the other hand relied on *Decro's* case to contend that Comfort was not entitled to repudiate the contract notwithstanding his client's late payments, which he submitted was on average about 22 days late. Counsel relied on *Brani Readymixed Pte Ltd v Yee Hong Pte Ltd* [1995] 1 SLR 205 ("*Brani's* case") where the delay in payment was about 22 days. He submitted such delay in that case did not entitle the seller to terminate the contract, also citing *Kool Team Marketing v Pacific Sunwear Pte Ltd* [2000] 2 SLR 243 ("*Kool Team*").

104 If the court agreed that Alliance persistently under-ordered sand (which I found to be the case), then Comfort relied on *Maple Flock Company Ltd v Universal Furniture Products (Wembley) Limited* [1934] 1 KB 148 ("*Maple Flock*") for its submission that it amounted to a fundamental breach that went to the root of the contract. At this juncture, it would be appropriate to look at the main authorities cited by the parties starting with *Decro's* case.

105 In that case, the French plaintiffs entered into an oral contract with the English defendants for the latter to sell the plaintiffs' products in the UK. The defendants promised not to sell goods that competed with the plaintiffs' products. The contract was terminable by reasonable notice on either side. The plaintiffs gave 90 days credit from the invoice dates. The defendants were persistently late (between 2-20 days) in paying the plaintiffs on bills of exchange, because they were cash-strapped having incurred heavy marketing expenses to promote the plaintiffs' products. After accepting 26 late payments on the bills of exchange from the defendants, the plaintiffs purported to terminate the contract without notice due to the defendants' late payments, appointed another company as its UK concessionaire and sued the defendants to recover outstanding bills of exchange. The trial judge gave judgment to the plaintiffs on its claim and awarded judgment to the defendants on its counterclaim for a declaration that they remained the plaintiffs' sole concessionaire in the UK.

106 In dismissing the plaintiffs' appeal, the Court of Appeal *inter alia* held that the defendants' failure to pay the bills of exchange promptly and the likelihood of similar delays in the future did not constitute a repudiation of the contract by the defendants. Such a breach could only amount to a repudiation which the plaintiffs would be entitled to accept as a cancellation of the contract if the breach went to the root of the contract. Since nothing expressed or implied in the contract suggested that the terms relating to time of payment were of the essence of the contract, the inference drawn from the practical consequences of the defendants' conduct was that the breaches did not go to the root of the contract.

107 In *Brani's* case, the defendants entered into a contract with the plaintiffs for the supply of ready mixed concrete. Under the contract, the defendants would obtain concrete from the plaintiffs but there was a clause that allowed the defendants to procure concrete from other sources and claim the difference in price from the plaintiffs in the event the plaintiffs were unable to supply the defendants with quantities of concrete requested. The defendants ordered 70 cubic metres of concrete from the plaintiffs late on 6 May 1991 knowing full well that the plaintiffs would be unable to deliver the same. The defendants then ordered the quantity from another supplier Rite-Mix, a company in which the defendants' directors had interests. From 11 May 1991, the defendants stopped placing orders with the plaintiffs. The plaintiffs wrote to the defendants on 30 May 1991 requesting a casting schedule which was still outstanding under the contract and sought payment of all their outstanding invoices.

On 7 June 1991, the plaintiffs wrote to the defendants to say that the latter's failure to provide a casting schedule and to make payments constituted a repudiation of the contract and that this was accepted by the plaintiffs. The plaintiffs then brought an action for recovery of the outstanding sum and for damages for breach of contract. The defendants counterclaimed for the additional cost of obtaining concrete from Rite-Mix. The trial judge held that the plaintiffs had repudiated the contract by their letters dated 30 May 1991 and 7 June 1991 and the defendants had similarly repudiated the contract by their conduct. Accordingly, he dismissed both the claim and the counterclaim. Both parties appealed.

108 The Court of Appeal allowed the plaintiffs' appeal but dismissed the defendants' appeal. The Court held that the plaintiffs had not repudiated the contract by their letters dated 30 May and 7 June 1991 but the evidence supported the conclusion that the defendants had evinced an intention not to be bound by the contract and their repudiation was accepted by the plaintiffs' letter dated 7 June 1991. It found that the defendants had engineered a situation in which the plaintiffs were unable to supply the concrete ordered and thus provided justification to the defendants to look for alternative supplies and to stop placing further orders with the plaintiffs. Mere failure or delay in making payment per se would not amount to a repudiation. However, the defendants were not merely stalling for time to make payment but that they did not intend to pay the plaintiffs at all and perform the contract.

109 Alliance's submission argued that *Kool Team* should be followed because the facts were similar to this case. There, the contract in dispute was originally of one year's duration but from 1990 onwards the contract was renewed orally every year. The plaintiffs were the defendants' franchisees and rented a store from the defendants whose goods they bought at a discount. The defendants stopped supplying their goods to the plaintiffs in 1997. The plaintiffs treated the contract as repudiated and sued inter alia for loss of profits in lieu of three months' notice. The defendants argued the plaintiffs were the ones who had breached the contract by failing to pay for the goods on time. The court followed *Decro's* case and held that there was no term in the contract that allowed the defendants to stop supplying goods because of the plaintiffs' failure to make prompt payment.

110 I do not disagree with the reasoning or the decision in *Decro's* case. Further, on the facts in *Kool Team*, the judge was right to follow *Decro's* case. However, contrary to the submission of Alliance, our facts are not virtually on all fours with those in *Kool Team* or *Decro's* case. It bears remembering that Comfort through Shirley had sent repeated reminders to Alliance between April and 8 September 2006 for payment of overdue invoices but to no avail. In her letter dated 26 June 2006 (at AB 30) to Alliance, Shirley referred to Comfort's unpaid invoices totalling $349,012.25 and stated:

> Settlement of this account is now more than a month overdue. Therefore we must ask you either to send us your remittance within the next few days or at least offer an explanation of the delay in payment.

Alliance blithely ignored Shirley's inquiry just as it had ignored all her previous reminders for payment. Instead, Tan wrote to Comfort on 13 and 25 July 2006 repeating his earlier false allegation of short deliveries which was followed by Lincoln's letter dated 6 September 2006 alleging short deliveries by Comfort totalling 392,656 mt.

111 Any doubts that Alliance may have had that Comfort would not take action on its poor payment record would have been dispelled by Ms Tan's letter on Comfort's behalf dated 8 September 2006 (at AB 52) where she wrote in no uncertain terms:

> As we indicated to you during our meeting on 20 July 2006 (and also on several other occasions

over the telephone), we will not be making any further deliveries until you settle the outstanding payment for deliveries made by us from May to July 2006 totalling **S$401,448.78**.

In fact, our standard payment terms have always been 30 days, but you have caused this contract to be concluded on your terms and conditions with payment terms of 60 days. And even then, you have been persistently late in making payment for the February to April deliveries. Further, it was only after our meeting on 20 July 2006 when we demanded that you make all outstanding payments that you remitted payment for the April deliveries.

We have made it very clear to you that we have stopped the August deliveries altogether due to your failure in settling the outstanding sum of **S$401,448.78** to date. Moreover, we should make it clear that there is no provision in the contract for the rollover of any shortfall quantities for any particular month.

We can no longer accept your persistent failure in making payments for the deliveries received whilst at the same time making demands for future deliveries.

Please note that if we do not receive full payment of the above sum by 12 September 2006, we have no choice but to treat your conduct as intention not to perform the contract according to its terms and we will treat your conduct as bringing this contract to an end.

Comfort's threat of stopping deliveries was made crystal together with the reasons therefor. Hence, Alliance was given more than adequate notice of the consequences should Comfort's demand not be met. More importantly, Comfort had put Alliance on notice that timely payment of its invoices was made the essence of the contract notwithstanding that the contract was silent on the point.

112 Consequently, for Alliance to blindly apply the decisions in *Decro's* case and *Kool* Team without regard to the factual matrix was to ignore the realities of the situation. I am therefore of the view that Comfort was entitled to treat Alliance's continued refusal to pay Comfort's overdue invoices as conduct that evinced an intention not to be bound by the contract. Alliance had indeed repudiated the contract which repudiation Comfort accepted by its letter dated 14 September 2006 (at AB 53).

113 It was equally obvious from the facts that Alliance (for its own reasons) preferred to perform its contract with LCH notwithstanding it was commercially less advantageous than the contract with Comfort (see [70] above). Hence, Alliance persistently under-ordered as can be seen from Golam's records at [36] above. For the five months from February to June 2006 (July was an incomplete month), Alliance should have ordered a minimum of 150,000 mt of sand (@30,000 x 5) instead of which it only ordered 83,188.50 mt amounting to 55% of 180,000 mt. Alliance cannot seriously dispute Golam's total of 83,188.50 mt as its own figures (in Lincoln's letter to Comfort dated 6 September 2006) alleged that Comfort only delivered 87,344 mt. Alliance's own figures of Comfort's deliveries between February and July 2006 were in line with Golam's breakdown. If (as Alliance did in this letter and in its claim against Comfort) the monthly quantity that should have been ordered was 40,000 mt, it meant Alliance only ordered 42% or less than 50% of the quota.

114 Did Alliance's conduct deprive Comfort of substantially the whole benefit it would have received under the contract? Comfort submitted it did, relying on the tests spelt out in *Maple Flock*. That case focussed squarely on s 31(2) of the Act. Lord Hewart CJ in the UK Court of Appeal there held (at p 157) that the main tests to be considered in applying s 31(2) 0f the Act (at [99]) are:

(a) the ratio quantitatively which the breach bears to the contract as a whole;

(b) the degree of probability or improbability that such a breach will be repeated.

115 Applying the *Maple Flock* tests to our case, I entertain very little doubt that had Comfort not stopped deliveries and terminated the contract on 14 September 2006, Alliance would have persisted in its under-orders for the balance of the contract period (21 July to 31 January 2007).

116 As for the benefit Comfort lost by reason of Alliance's recalcitrant conduct, I refer to Ms Tan's testimony (at N/E 158) that contract prices for sand are always lower than spot prices. Ad-hoc customers paid higher prices than contract customers because Comfort was prepared to accept lower prices from long-term contract customers against the benefit of higher sales to them.

117 In Comfort's closing submissions in the second suit (at para 154), it was stated that economies of scale play an important role in determining profitability. If as was the case, Alliance consistently placed orders well below the contracted quantity for the entire duration of the contract, the implication would be that Comfort's profit margin would be substantially reduced due both to the quantities ordered and to the (lower) price charged. The obvious effect of Alliance's action would be to deprive Comfort of the whole benefit it would have received under the contract. I reject as absurd the submission by Alliance, that because Comfort had a substantial paid up capital and its sister company Sin Tung owned a fleet of tugs and barges, it could not have suffered cash flow problems due to Alliance's late payments as Ms Tan had claimed.

118 Consequently, I also hold that Alliance was in repudiation of the contract by its continuous and persistent under-orders of sand from Comfort.

119 Accordingly, I award Comfort final judgement in the first suit in the sum of $163,696.67. The said sum paid into court by Alliance shall be paid out to Comfort in satisfaction of the judgment sum. I further award Comfort interlocutory judgment against Alliance on its claim for breach of contract. Damages for such breach shall be assessed by the Registrar with the costs of such assessment reserved to the Registrar. Since Alliance's claim in the second suit was based on 40,000 mt of sand as the monthly quantity Comfort should have delivered under the contract, what is sauce for the goose is sauce for the gander. 40,000 mt shall therefore be the basis for calculating the damages due to Comfort.

120 In the light of my findings, I dismiss Alliance's claim in the second suit.

121 As I understand Offers To Settle were exchanged between the parties pursuant to O22A of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), I shall hear parties on the issue of costs on another day.