# BR Energy (M) Sdn Bhd *v* KS Energy Services Ltd
# [2013] SGHC 64

**Case Number** : Suit No 900 of 2009

**Decision Date** : 20 March 2013

**Tribunal/Court** : High Court

**Coram** : Belinda Ang Saw Ean J

**Counsel Name(s)** : Ling Tien Wah, Koh Kia Jeng, Ng Hui Min and Germaine Tan (Rodyk & Davidson LLP) for the plaintiff; Chan Hock Keng, Jiang Ke-Yue, Alma Yong, Sim Hui Shan and Benjamin Fong (WongPartnership LLP) for the defendant.

**Parties** : BR Energy (M) Sdn Bhd — KS Energy Services Ltd

*Contract – Joint Venture Agreement*

*Contract – "All reasonable endeavours" clause*

20 March 2013 Judgment reserved.

**Belinda Ang Saw Ean J:**

**Introduction**

1 In this action, the plaintiff, BR Energy (M) Sdn Bhd ("BRE"), claims damages against the defendant, KS Energy Services Limited ("KSE"), for breach of a joint venture agreement made on 13 December 2005 that was subsequently amended on 28 April 2006 ("the JVA").

2 BRE had been awarded a contract to charter to Petronas Carigali Sdn Bhd ("PCSB") a type of rig known as a Workover Pulling Unit ("WPU") that was to be custom-built to fit the technical requirements and platform drawings of PCSB ("the PCSB project"). As BRE's joint venture partner, KSE was to procure the construction and delivery of the WPU for the purposes of the PCSB project. Accordingly, KSE contracted with a rig builder, Oderco Inc ("Oderco"), to custom-build the WPU. There were massive delays in the construction of the WPU, with the consequence that no WPU was delivered to PCSB at all and the charter arrangement was called off.

3 It was in these circumstances that the dispute between the parties arose. BRE terminated the JVA on 26 December 2007 on the basis of KSE's repudiatory breach. BRE blamed KSE for the loss of the contract to charter the WPU to PCSB. KSE denied liability, arguing that it was only obliged to use all reasonable endeavours to procure the construction and delivery of the WPU, and that it had discharged this obligation; it was not contractually bound to procure the WPU at all costs. KSE has duly counterclaimed for damages on account of BRE's wrongful termination of the JVA and failure to, *inter alia*, contribute a shareholder's loan of US$400,000 to the joint venture company ("JVC"), BR Offshore Services Limited ("BRO").

4 Tan Lee Meng J had earlier ordered the trial to be bifurcated on 20 September 2010. Hence, the trial before me is only on issues of liability, with the quantum of damages to be awarded (if liability is established) to be determined another time.

**The relevant contracts**

5 The rig building contract made between KSE and Oderco, the letter of intent ("LOI") dated 9 December 2005 made between KSE and BRE and the JVA made between KSE and BRE must be understood in the context of the underlying contract between BRE and PCSB described below ("the PCSB Contract").

***The PCSB Contract***

6 BRE is a company incorporated in Malaysia. At the material time, BRE was in the business of providing services to the oil and gas industry, and was licensed by Petroliam Nasional Berhad ("Petronas") to provide such services in Malaysia.

7 PCSB is one of the corporate vehicles used by Petronas to award contracts for the exploitation of petroleum resources in Malaysia.

8 On 11 August 2005, BRE submitted a bid for the charter to PCSB of one custom-built WPU for PCSB's use only. The duration of the charter of the WPU was for a fixed period of two years, with three options to extend the charter for one year each. BRE's tender was supported by China Oilfield Services Limited ("COSL"), a public listed company in Hong Kong, which was described in BRE's tender letter as "the leading and largest fully integrated oilfield services provider in the Asia Pacific region". [note: 1] COSL was to provide all the relevant technical support services needed for the operation of the WPU. At that time, BRE nominated RG Petro-Machinery Co Ltd ("RG") as the rig builder.

9 Unfortunately for BRE, both COSL and RG pulled out of their collaboration with BRE in October 2005. PCSB was not informed of the withdrawals at that stage. On 26 October 2005, BRE received unofficial news that its tender for the PCSB project was successful. It is common ground that there was no second-hand WPU that met PCSB's technical requirements and platform drawings, and given the high demand for rigs at the material time, many rig builders did not have the capacity to construct a customised WPU unit within the short time required by PCSB.

10 Meanwhile, COSL tried to search for a replacement rig builder and a new party to collaborate with BRE for the PCSB project. In October 2005, COSL's Director of Marketing, Lim Hong Khun ("LHK"), approached KSE's Executive Director, Tan Fuh Gih ("TFG"), to assist in the search for a replacement builder for the WPU. Around November 2005, LHK introduced Wee Khen Peng ("WKP"), a director of BRE, to TFG and KSE's Managing Director, Chew Thiam Keng ("CTK"), with a view to negotiating a joint venture with BRE for the PCSB project.

11 KSE is a company incorporated in Singapore and listed on the main board of the Singapore Exchange ("SGX"). At the relevant time, KSE was a leading one-stop energy services provider to the global oil, gas, marine and petrochemical industries, having been involved in more than eight rig projects from 2004 to 2006. In 2006, KSE part-owned and chartered out three rigs in China and the Gulf of Mexico. KSE had also been involved in the management of an offshore accommodation rig and a project to upgrade a rig in Shajar.

12 On 21 November 2005, BRE received PCSB's official letter of award ("Letter of Award"), which stipulated, amongst other things, that the WPU was to be delivered to Labuan, East Malaysia, by 120 days from the date of award, *ie*, 21 March 2006. [note: 2] On 30 November 2005, BRE wrote to PCSB proposing Oderco as the replacement rig builder. Oderco, a rig builder based in Abu Dhabi, was willing to build the customised WPU within six months. In its letter, BRE also sought: (a) an extension of the delivery date by six months; and (b) an upward adjustment of the rates from its original pricing.

13 On 8 December 2005, PCSB advised BRE that there was already a binding contract in place with

the issuance of the Letter of Award on 21 November 2005 to BRE. PCSB rejected the proposal for a price change, but, without prejudice to its rights, revised the delivery date of the WPU to no later than 180 days from 21 November 2005, *ie*, 21 May 2006 ("the PCSB first delivery date"). [note: 3] BRE tried to persuade PCSB to give it 180 days from 9 December 2005, but this request was turned down. BRE signed the Letter of Award on 9 December 2005 with the delivery date of the WPU revised to 21 May 2006. For each day of late delivery, liquidated damages of US$4,000 per day (up to a maximum of 30 days, *ie*, up to 20 June 2006) were payable. PCSB could terminate the PCSB Contract for late delivery after 20 June 2006.

***The rig building contract between Oderco and KSE***

14 The Managing Director of Oderco was Samir Ghalayini ("Samir"). The other person with whom KSE communicated was Hedian Ghalayini ("Hedian"), who was Samir's wife and the Office Manager of Oderco. The rig building contract between KSE and Oderco was signed by TFG on behalf of KSE and by Samir on behalf of Oderco.

15 The exact relationship between KSE and COSL was unclear. Some references in the documents suggested a possible business relationship involving the charter of KSE's liftboat, the *Dixie Patriot*, in the PCSB project at the time COSL was in the picture.

16 There is a dispute as to who found and recommended Oderco. KSE said that LHK recommended Oderco to TFG. BRE's pleaded case is that KSE found Oderco and that KSE's Executive Director, TFG, had strongly recommended Oderco to BRE. WKP testified that BRE had relied on KSE's recommendation in the belief that Oderco was qualified and able to construct the WPU within five months, with an additional one month for delivery of the WPU to Labuan. Consequently, on 30 November 2005, which was BRE's deadline for responding to PCSB's Letter of Award of 21 November 2005, BRE wrote to PCSB advising it that Oderco would be the replacement builder for the WPU, and asked for a longer delivery date (see [12] above).

17 It is also not disputed that the initial intention of the parties was to incorporate BRO and to have it sign the rig building contract with Oderco. However, in December 2005, BRO was not yet incorporated, and there was a pressing need to confirm Oderco's appointment. Under the circumstances, one of the joint venture partners would have to contract with Oderco, and KSE put itself forward. On 12 December 2005, CTK sent an internal e-mail to KSE's Chief Business Development Officer, Goh Boon Chye ("GBC"), copied to TFG, stating that KSE, and not BRE, should issue the purchase order for the WPU to Oderco so that KSE would not "lose control over the process". [note: 4] On 18 December 2005, BRE agreed to KSE entering into the rig building contract with Oderco.

18 KSE duly signed the rig building contract with Oderco on 21 December 2005 ("the Oderco Contract"). Delivery of the WPU ex-Abu Dhabi was 165 days (*ie*, five and a half months) from 21 December 2005, *ie*, by 4 June 2006 ("the June 4 date").

19 It is worth bearing in mind that the June 4 date was two weeks later than the PCSB first delivery date. Moreover, by the time the Oderco Contract was signed, one month had already passed under the PCSB Contract, which came into existence on 21 November 2005 when PCSB issued the Letter of Award to BRE.

***The JVA***

20 As mentioned at [5] above, BRE and KSE signed a LOI on 9 December 2005. By this LOI, the parties agreed to negotiate the terms of a joint venture to provide the WPU to fulfil the PCSB

Contract.

21 The JVA was signed on 13 December 2005. It was later amended by a supplemental agreement on 28 April 2006. Under the JVA, the JVC (*ie*, BRO) was to be incorporated in Labuan, and both BRE and KSE were to hold shares in it.

22 The business of the JVC was for the "acquisition and chartering out of the WPU and the provision of related services" (see clause 2.1 of the JVA). By clause 2.2, each party was "to use its reasonable endeavours to promote and develop the business of the JVC to the best advantage of the JVC".

23 The WPU was defined in clause 1.1 of the JVA as the "workover pulling unit to be constructed in accordance with clause 6.1". The governing law of the JVA was Singapore law.

24 KSE's role as a joint venture partner can be found in the preamble of the JVA under the heading "Background". Clause (C) provided as follows: [note: 5]

> (C) [KSE] will arrange for the construction of the workover pulling unit and sell it to the JVC [*ie*, BRO] which will in turn charter it to BRE for BRE to ***fulfil*** the contract from [PCSB].
>
> [emphasis added in bold italics]

25 BRE's role is spelled out in clause 6.5 of the JVA (see [26] below). Counsel for KSE, Mr Chan Hock Keng ("Mr Chan"), confirmed at the trial that BRE was not contractually obliged under the JVA to provide technical support in the course of the construction of the WPU.

26 The main obligations in contention are set out in clause 6 of the JVA, which relates to the "Procurement of WPU, Charter Agreement and Petronas Contract [*ie*, the PSCB Contract]":

> **6 PROCUREMENT OF WPU, CHARTER AGREEMENT AND PETRONAS CONTRACT [ *ie* , the PCSB Contract]**
>
> 6.1 After Completion and after the financing in clause 7.1 is available for immediate drawdown, BRE and [KSE] shall procure that a charter agreement for the WPU is executed between the JVC and BRE. ***Upon the Charter Agreement being executed, [KSE] shall proceed to arrange for the construction of the WPU, on terms acceptable to [KSE]. The specifications, equipment and inventory of the WPU is as set-out in the Charter Agreement.***
>
> 6.2 ***[KSE] shall use all reasonable endeavours to procure [that] the WPU is constructed and ready for delivery in Abu Dhabi or another location specified by [KSE] within six months after the Charter Agreement is executed.***
>
> 6.3 [KSE] shall sell the WPU to the JVC and the JVC shall buy the WPU from [KSE]. The price of the WPU is [KSE's] cost of construction plus 3% which price is to be paid by the JVC to [KSE] upon the JVC taking delivery of the WPU.
>
> 6.4 ...
>
> 6.5 BRE shall at all times comply with its obligations under the Charter Agreement and the Petronas Contract and shall ensure the Petronas Contract remains valid, binding and

enforceable on Petronas.

6.6 BRE shall indemnify [KSE] against all claims, proceedings, liabilities, losses, damages, costs and expenses (including legal costs on a full indemnity basis) arising in connection with the Charter Agreement and the Petronas Contract and their respective performance.

[emphasis added in bold italics]

27 The initial intention was for all the contracts required under the JVA to be signed on 13 December 2005 at the same time as the JVA itself, but BRO was not yet incorporated. After BRO was incorporated on 3 March 2006, the following contracts were signed. On 10 March 2006, BRO entered into a contract with KSE ("the Purchase Contract") for BRO to buy the WPU from KSE. Clause B(3) of the Purchase Contract provided for delivery of the WPU within six months from 18 December 2005, *ie*, by 17 June 2006. On 10 March 2006, BRE also entered into an agreement with BRO to lease the WPU from BRO ("the Charter Agreement"). Clause 3.3 of the Charter Agreement provided, *inter alia*, that BRO was to procure the delivery of the WPU within six months of the date of the agreement, *ie*, six months from 10 March 2006, which was 9 September 2006. The apparent discrepancies in the delivery dates will be discussed in due course.

**Termination of the PCSB Contract and the JVA**

28 As stated above, the PCSB first delivery date was 21 May 2006. BRE's pleaded case is that the WPU was not delivered despite three extensions of time granted by PCSB for the WPU to be delivered by 25 July 2006, 4 September 2006 and 26 October 2006 respectively. [note: 6] Eventually, by its letter to BRE dated 12 April 2007, PCSB terminated the PCSB Contract on the grounds that, *inter alia*, BRE had failed to deliver the WPU by 26 October 2006 ("the PCSB last delivery date").

29 On 17 April 2007, BRE asked PCSB to reconsider its cancellation of the PCSB Contract. However, BRE's appeal was rejected by PCSB on 4 May 2007. BRE subsequently terminated the JVA on 26 December 2007 for KSE's failure to deliver the WPU for more than a year and for the loss of the PCSB Contract.

**Overview of BRE's case**

30 Counsel for BRE, Mr Ling Tien Wah ("Mr Ling"), contended that KSE was in repudiatory breach of the JVA for its failure to procure the construction and delivery of the WPU. As such, BRE's termination of the JVA was not wrongful. KSE was in breach of clause 6.2 in that it had failed to use all reasonable endeavours to procure the construction and delivery of the WPU, whether by 17 June 2006 (being the date stipulated in the Purchase Contract), or by 9 September 2006 (being six months after the Charter Agreement was executed), or by the other revised delivery dates granted by PCSB, in particular, the PCSB last delivery date, or within a reasonable time thereafter. As a result, BRE failed to deliver the WPU to PCSB, which terminated the PCSB Contract in April 2007.

31 KSE had not discharged its obligation to use all reasonable endeavours to procure the construction and delivery of the WPU by reason of the following matters: [note: 7]

(a) the entire rig building project was poorly organised, mismanaged, and lacked proper professional supervision by KSE;

(b) in recommending Oderco as the builder of the WPU, KSE failed to take reasonable steps to select an appropriate rig builder;

(c) KSE failed to take reasonable steps to monitor and ensure that the necessary equipment for the WPU ("WPU equipment") was ordered by Oderco and delivered in a timely manner;

(d) KSE failed to take reasonable steps to ensure that the WPU manager whom it appointed was getting the necessary information and updates from Oderco regarding the progress of the project;

(e) KSE failed to take reasonable steps to ensure that adequate or qualified staff were sent to monitor or supervise Oderco;

(f) KSE failed to use reasonable endeavours to ensure that Oderco provided the necessary manpower and resources to support the rig building project in a timely manner;

(g) KSE failed to take reasonable steps to require Oderco to catch up on or otherwise remedy its delays; and

(h) KSE failed to take reasonable steps to find another rig builder to construct and deliver the WPU when it became obvious that Oderco was not likely to deliver the WPU on time.

32 Arguments (b) and (h) can be dealt with quickly. *Vis-à-vis* argument (h), the factual [note: 8] and expert [note: 9] witnesses all agree that terminating the Oderco Contract before termination of the PCSB Contract was never a realistic option as it was difficult to find a suitable alternative rig builder given the prevailing industry conditions. There is thus no merit in BRE's claim apropos argument (h). Besides, termination of the Oderco Contract was never contemplated. As such, the contention (implicit in argument (h)) that the feasibility of terminating the Oderco Contract was an option which should have been explored by KSE in consultation with BRE and PCSB was illusory. With regard to argument (b) that no reasonable steps (*eg*, conduct due diligence) were carried out before the appointment of Oderco as the rig builder, that contention is equally untenable for the same reason as argument (h). It is not disputed that Oderco was the only replacement rig builder available at that time (after RG pulled out of its collaboration with BRE) that was willing to construct and deliver the WPU within six months.

**Overview of KSE's case**

33 Mr Chan, on behalf of KSE, challenged BRE's contentions on a number of grounds. He argued that contractually, there was no absolute obligation on the part of KSE to deliver the WPU by certain dates. The parties had entered into the joint venture fully aware of the risks involved, including the risk that Oderco might not deliver the WPU and/or that PCSB might terminate the PCSB Contract for late delivery. Clause 6.2 of the JVA had to be understood in this commercial context. Furthermore, Mr Chan submitted, the legal test for "best endeavours" was not the same as that for "all reasonable endeavours"; the latter obligation did not require KSE to procure the construction and delivery of the WPU at all costs. KSE was not obligated to take over and carry out the obligations of Oderco. The JVA provided for three different non-absolute obligations: "reasonable endeavours" in clause 2.2, "best endeavours" in clause 18.5 and "all reasonable endeavours" in clause 6.2. It was therefore the parties' clear intention that different standards would apply for each formulation, and effect should be given to the parties' intention. Mr Chan submitted that KSE had used all reasonable endeavours and was not in breach of clause 6.2 of the JVA. KSE had merely agreed to liaise with Oderco during the course of the construction of the WPU and to facilitate communications between Oderco and BRE on technical matters. [note: 10] In fact, KSE had done more than what was required of it under the "all reasonable endeavours" clause. It had extended financial assistance in the form of direct advance

payments or loans amounting to US$2.14m to Oderco to ease Oderco's cashflow problems, and after each extension of time granted by PCSB, KSE had exercised all reasonable endeavours to meet the extended completion date. KSE argued that it had paid for change orders approved by PCSB, especially the change order for a multi-tier modular system (which change order PCSB was unwilling to pay for), and in doing so, had in effect bought more time for the joint venture to deliver the WPU.

34 Furthermore, Mr Chan argued, even if KSE were in breach of the JVA, the breach did not cause BRE's alleged loss in that there was no causal link between KSE's alleged breach and the cancellation of the PCSB Contract. In addition, Mr Chan relied on the indemnity in clause 6.6 of the JVA to absolve KSE from BRE's claim for damages.

35 As regards its counterclaim, KSE alleged that BRE's termination of the JVA was wrongful. The counterclaim was for damages for wrongful termination of the JVA and BRE's failure to contribute a shareholder's loan of US$400,000 to BRO.

**Issues**

36 The issues which arise for determination are as follows:

(a) Was KSE in breach of clause 6.2 of the JVA in the manner pleaded by BRE?

(b) If so, was KSE's breach repudiatory?

(c) If BRE was not entitled to rescind the JVA, would BRE be liable to KSE on the latter's counterclaim?

37 There are two further issues relating to question (a), namely: (i) what standard the parties intended to set by the "all reasonable endeavours" provision in clause 6.2 of the JVA; and (ii) the application of that standard in the circumstances of the case (see Angela Swan & Jakub Adamski, *Canadian Contract Law* (LexisNexis, 3rd Ed, 2012) ("*Canadian Contract Law*") at para 8.95).

38 In this judgment, I will be considering the following questions, namely:

(a) is an obligation to use "all reasonable endeavours" less stringent than one to use "best endeavours";

(b) what does an "all reasonable endeavours" clause actually require; and

(c) how far must KSE actually go to meet the required standard to discharge this obligation to use "all reasonable endeavours".

**The legal principles on non-absolute obligations**

39 The phrases "reasonable endeavours", "all reasonable endeavours" and "best endeavours" are various formulations of a contractual obligation to do something, and are often seen in commercial contracts. Each formulation, properly worded, usually imposes an obligation to do something and is capable of giving rise to a legally binding obligation (hereafter known as a "non-absolute obligation"). The difficulty, however, is to determine in any given case whether there has been a breach of such an obligation. Under a non-absolute obligation in a contract, the party who has to fulfil the obligation (the obligor) agrees to *try* to achieve the result stipulated, as opposed to an absolute obligation, where the obligor agrees to achieve a result (such as to complete work by a particular date). In the latter scenario, in general terms, it is usually not difficult to determine whether or not the absolute

obligation in question has been satisfied. However, where the contractual obligation is to use "reasonable", "all reasonable" or "best" endeavours, things are likely to be more complicated in that the parties have incorporated into their contracts standards of conduct which may have to be tested. This brings me to the two related issues identified at [37] above, *viz*: (a) the standard which the parties intended to set by the "all reasonable endeavours" provision in clause 6.2 of the JVA; and (b) the application of that standard in the circumstances of this case.

40 Generally, an obligation requiring the use of "best endeavours" denotes a higher standard than one requiring the use of "reasonable endeavours" (see the English High Court decision of *Jolley v Carmel Ltd* [2000] 2 EGLR 153 ("*Jolley*"), which was affirmed by the appellate court in [2000] 3 EGLR 68; see also the decision of Julian Flaux QC (sitting as a Deputy Judge) in *Rhodia International Holdings v Huntsman International* [2007] 2 All ER (Comm) 577 ("*Rhodia*")). The "reasonable endeavours" formulation is also different from the "all reasonable endeavours" formulation. An obligation to use "reasonable endeavours" only requires the obligor to take one reasonable course of action and not all of them, unlike in the case of an obligation to use "all reasonable endeavours". In *Jolley*, three different standards depending on the formulation of the obligation were recognised. Kim Lewison QC (sitting as a Deputy Judge) held (at 159):

> Where a contract is conditional upon the grant of some permission, the courts often imply terms about obtaining it. There is a spectrum of possible implications. The implication might be one to use best endeavours to obtain it (see *Fischer v Toumazos* [1991] 2 EGLR 204), to use all reasonable efforts to obtain it (see [*Hargreaves Transport Ltd v Lynch* [1969] 1 All ER 455, [1969] 1 WLR 215]) or to use reasonable efforts to do so. The alleged term in this case [to use reasonable efforts] is at the lowest end of the spectrum.

41 Our courts have examined the obligation to use "best endeavours". Our Court of Appeal in *Travista Development Pte Ltd v Tan Kim Swee Augustine and others* [2008] 2 SLR(R) 474 ("*Travista*") has this to say on the standard of obligation imposed by a "best endeavours" clause (at [22]):

> The law is well established. ***A best endeavours clause in a contract obliges the covenantor to "take all those reasonable steps which a prudent and determined man, acting in his own interests and anxious to obtain planning permission [or to perform such other applicable obligation], would have taken"*** (see *IBM United Kingdom Ltd v Rockware Glass Ltd* [1980] FSR 335 ("*IBM v Rockware*") at 345; referred to in *Justlogin Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2004] 1 SLR(R) 118 at [47]). As Kan Ting Chiu J stated succinctly in *Ong Khim Heng Daniel v Leonie Court Pte Ltd* [2000] 3 SLR(R) 670 ("*Ong Khim Heng Daniel*") at [42]:
>
> > A covenant to use best endeavours is not a warranty to produce the desired results. It does not require the covenantor to drop everything and attend to the matter at once; the promise is to use the best endeavours to obtain the result *within the agreed time*. Nor does it require the covenantor to do everything conceivable; *the duty is discharged by doing everything reasonable in good faith with a view to obtaining the required result within the time allowed*.
>
> ***The test to determine whether a party has exercised its best endeavours is an objective one. But, it is also a composite test in that the covenantor may also take into account its own interests.*** While the covenantor has a duty to use its best endeavours to perform its contractual undertaking within the agreed time, the duty is discharged upon the covenantor "doing everything reasonable in good faith with a view to obtaining the required result within the time allowed" (*per* Kan J in *Ong Khim Heng Daniel* at [42]). ***This test also involves a question of fact.***

[original emphasis in italics; emphasis added in bold italics]

42 It will be useful to summarise the applicable principles from the above passage in the following manner:

(a) An undertaking to use best endeavours is not a warranty to produce the desired results, nor does it require the obligor to make heroic efforts to do everything conceivable. However, it does require the obligor to do everything known to be usual, necessary and proper for ensuring the success of the endeavour (see *Canadian Contract Law* at para 8.96.1).

(b) A "best endeavours" clause obliges the obligor to take all those reasonable steps in good faith which a prudent and determined man, acting in his own interests and anxious to obtain the required result within the time allowed, would have taken. It has been said that the obligor must leave "no stone unturned" (see *Sheffield District Railway Company v Great Central Railway Company* [1911] Times LR 451 at 452), subject to the limits of reason, to achieve the objective or carry the process to its logical conclusion.

(c) Whether the "best endeavour" test has been satisfied is a question of fact in each case.

(d) The test to determine whether an obligor has exercised its best endeavours is an objective one. It is, however, also a composite test in that the obligor may also take into account its own interests.

43 It is useful to add, by way of amplification to the principles summarised above in [42], other statements of principle summarised by the British Columbia Supreme Court in *Atmospheric Diving Systems Inc v International Hard Suits Inc and another* [1994] 5 WWR 719 ("*Atmospheric Diving Systems*") and conveniently reproduced in *Canadian Contract Law* at para 8.96.1:

...

4. The meaning of "best efforts" [which is the same thing as "best endeavours"], is, however, not boundless. It must be approached in the light of the particular contract, the parties to it and the contract's overall purpose as reflected in its language.

5. While "best efforts" of the defendant must be subject to such overriding obligations as honesty and fair dealing, it is not necessary for the plaintiff to prove that the defendant acted in bad faith.

6. Evidence of "inevitable failure" is relevant to the issue of causation of damage but not to the issue of liability. The onus to show that failure was inevitable regardless of whether the defendant made "best efforts" rests on the defendant.

7. Evidence that the defendant, had it acted diligently, could have satisfied the "best efforts" test is relevant evidence that the defendant did not use its best efforts.

44 The parties here have not referred to any local cases where the obligation to use "all reasonable endeavours" was considered. Thus, the question in the present case is whether the test articulated by the Court of Appeal in *Travista* of what is required to satisfy a "best endeavours" obligation is directly applicable to the obligation to use "all reasonable endeavours". This determination depends on whether "best" endeavours may be equated with "all reasonable" endeavours in the circumstances of a particular case.

45 In *Rhodia*, Deputy Judge Flaux opined that "best" endeavours might be equated with "all reasonable" endeavours. He said at [33]:

> I am not convinced that (apart from that decision of Rougier J ([in *UBH (Mechanical Services) v Standard Life*, The Times (13 November, 1986)]) any of the judges in the cases upon which Mr Beazley relied were directing their minds specifically to the issue whether 'best endeavours' and 'reasonable endeavours' mean the same thing. As a matter of language and business common sense, untrammelled by authority, one would surely conclude that they did not. This is because there may be a number of reasonable courses which could be taken in a given situation to achieve a particular aim. An obligation to use reasonable endeavours to achieve the aim probably only requires a party to take one reasonable course, not all of them, whereas an obligation to use best endeavours probably requires a party to take all the reasonable courses he can. In that context, it may well be that an obligation to use *all* reasonable endeavours equates with using best endeavours and it seems to me that that is essentially what Mustill J is saying in the *Overseas Buyers* case. One has a similar sense from a later passage at the end of the judgment of Buckley LJ in the *IBM United Kingdom* case [1980] FSR 335 at 343, to which Mr Edwards-Stuart QC for Huntsman drew my attention.
>
> [emphasis in original]

46 In *Jet2.com Ltd v Blackpool Airport Ltd* [2012] 2 All ER (Comm) 1053, the two "endeavours" obligations there dealt with the level of support which Blackpool Airport had to give to low-costs airlines operating from the airport, namely: (a) to "use their best endeavours to promote Jet2.com's low-cost services from Blackpool Airport"; and (b) to "use all reasonable endeavours to provide a cost base that will facilitate Jet2.com's low-cost pricing". It was conceded by counsel on both sides that "best" endeavours and "all reasonable" endeavours meant the same thing (at [16]).

4 7 *CPC Group Ltd v Qatar Diar Real Estate Ltd* [2010] All ER (D) 222 was a case involving the redevelopment of the Chelsea Barracks site in London. The court, amongst other issues, was required to consider the nature of the obligation requiring the obligor to use "all reasonable but commercially prudent endeavours" to secure planning permission for the proposed redevelopment. Vos J made clear that an obligation to use "all reasonable endeavours" did not represent the same thing as "best endeavours" in every case (even without the "commercially prudent" proviso in the contractual clause concerned):

> 252 ***It seems to me, therefore, that the obligation to use "all reasonable endeavours" does not <u>always</u> require the obligor to sacrifice his commercial interests.*** In this case, the matter is, however, clearer, because the contract itself, as I have already said, contains other indications that QD [the obligor] was not to be required to sacrifice its commercial interests. ***Indeed the words of clause 7.1 itself make that clear by using the added words "but commercially prudent" in the phrase "all reasonable but commercially prudent endeavours".***
>
> 253 Lord Grabiner accepts that the words "*but commercially prudent*" provide a brake on the lengths to which QD had to go in using "*all reasonable endeavours*". But in my judgment, his acceptance does not go far enough. ***Clause 7.1 and paragraph 5(a) <u>are not equivalent to a "best endeavours" obligation</u>, and they do not require QD to ignore or forego its commercial interests. Instead, they allow QD to consider its own commercial interests alongside those of CPC, and require it to take all reasonable steps to procure the Planning Permission, provided those steps are commercially prudent.*** In the context of the facts of this case, this distinction is important, because when QD came to consider how to respond to the

Prince of Wales's intervention, it was, in my judgment, permitted to consider its own commercial interests in deciding how to respond. The clauses do not, as it seems to me, allow QD to consider its own political interests, insofar as they are different from its commercial interests or insofar as they require commercially imprudent measures.

[original emphasis in italics; emphasis added in bold italics and underlining]

48 Mr Ling referred to the Australian case of *Centennial Coal Company Limited v Xstrata Coal Pty Ltd* (2009) 76 NSWLR 129. In that case, the court treated both phrases (*ie*, "best" endeavours and "all reasonable" endeavours) identically. See also *Waters Lane & Another v Sweeney & Others* [2007] NSWCA 200 (16 August 2007).

49 I now come to the comments of Richard Christou, *Boilerplate: Practical Clauses* (Sweet & Maxwell, 6th Ed, 2012) at paras 2-123–2-129 on the apparent inconsistent English decisions. The author made the following observations:

**2-123** The possible existence of a three-tier hierarchy of obligations has proved attractive to commercial practitioners. Judicial recognition of an intermediate layer of "all reasonable endeavours" appears, superficially, to offer a ready opportunity for resolving a tricky negotiating issue. On closer examination, however, it is not clear, that this so-called mid-way compromise between best and reasonable endeavours is as mid-way as the parties might believe. Courts have now begun to wrestle with the meaning of the phrase. Settled principles have yet to emerge, but the following trends seem to be developing.

**2-124** First, it seems "all reasonable endeavours" is much closer to best endeavours than reasonable endeavours. As noted in Flaux J's judgment in *Rhodia International Holdings Ltd v Huntsman International LLC* above, the boundary between best and "all reasonable" endeavours may be difficult to discern. Further support for that view can be found in *EDI Central Ltd v National Car Parks Ltd* [2010] SCOH 141 where Lord Glennie opined, obiter, that:

> "I would have thought that any difference is likely to be metaphysical rather than practical. It is difficult to conceive that an obligation to use 'best endeavours' requires a party to take steps which are ex hypothesi unreasonable."

**2-125** Secondly, drawing on Lloyd LJ's observations in *Yewbelle Ltd v London Green Developments* [[2007] EWCA Civ 475], Lord Glennie considered that "all reasonable endeavours" might require the party on whom the obligation is based to inform the other party of any difficulties he is encountering and, in an appropriate case, to see whether that party has a possible solution to the problem. Furthermore, if it becomes clear that one obstacle is insurmountable, there is no obligation to carry on trying to overcome different obstacles.

**2-126** Thirdly, in assessing whether the obligation had been discharged, the court should undertake a detailed examination of what did or did not happen and take an overall view of the situation (*CEP Holdings Ltd and CEP Claddings Ltd v Steni AS* [2009] EWHC 2447 (QB)).

**2-127** Fourthly, an obligation to use "all reasonable endeavours does not always require the obligor to sacrifice its commercial interests" (per Vos J in *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch)), although the use of "always" invites even more questions concerning when such sacrifices might be required.

**2-128** In all cases, therefore, it is better, where possible, following the point made in Flaux J's

caveat to the principle stated in *Jolley v Carmel*, to specify the standard to which specific obligations are to be discharged in more detail, even if a catch-all phrase is also used. For instance, take the obligation to pay money (or at least a significant sum) to bring a particular result about. The use of "reasonable endeavours" has traditionally been supposed to exclude this, and "best endeavours" to impose it. However, given the cases above it is certainly unclear whether "best endeavours" actually imposes this obligation (and if so to what extent – i.e. payment of a reasonable sum, or any sum that is required even if this is a substantial amount in comparison with the resources of the payor, provided its payment would not lead to the payor's financial ruin) or whether "reasonable endeavours" does not. In these circumstances it is best to make clear the extent (if any) of any liability to pay sums of money to bring about the desired result.

**2-129** Finally it should be noted that the cases make no distinction between the use of the term "efforts" and the term "endeavours". They are treated as identical. (See *Frost v Walker* [1994] N.P.C. 60 and *Rhodia*.)

50 The caveat mentioned in para 2-128 of *Boilerplate: Practical Clauses* is Deputy Judge Flaux's caveat in *Rhodia*, which is discussed at [35] of that judgment. The caveat states as follows:

> The caveat is that, where the contract actually specifies certain steps have to be taken (as here the provision of a direct covenant if so required) as part of the exercise of reasonable endeavours, those steps will have to be taken, even if that could on one view be said to involve the sacrificing of a party's commercial interests.

51 For now, there is no hard and fast rule as to when an obligation that is couched in terms of "all reasonable endeavours" is as onerous as a "best endeavours" obligation. The discernible approach is to decide the matter on a case-to-case basis as each case would invariably turn on its own facts and circumstances. As such, previous decisions on the effect of the same words used in a different context must be viewed with caution. The emphasis should be on the objective of the "endeavours" clause in question, as gathered from the clause, the contractual context (*ie*, the circumstances in which the obligation was imposed and/or undertaken) and such other relevant terms as may exist in the contract (see point (4) of para 8.96.1 of *Canadian Contract Law* (reproduced at [43] above)).

52 Whether the relevant standard in a contractual obligation has been met is a question of fact in each case. The Court of Appeal in *Chan Ah Beng v Liang and Sons Holdings (S) Pte Ltd* [2012] 3 SLR 1088 reiterated (at [35]):

> It ought, however, to be noted that, whilst the relevant test [for "best endeavours"] is now well-established in the local landscape (see also, for example, the Singapore Court of Appeal decision [in] *Oversea-Chinese Banking Corp Ltd v Justlogin Pte Ltd* [2004] 2 SLR(R) 675 at [21] (affirming *Justlogin Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2004] 1 SLR(R) 18) and the Singapore High Court decisions of *Macarthur Cook Property Investment Pte Ltd v Khai Wah Development Pte Ltd* [2007] SGHC 93 at [61] *and Indulge Food Pte Ltd v Torabi Marashi Bahram* [2010] 2 SLR 540 at [64]), the actual decision arrived at by the court as to whether or not the contracting party concerned had in fact satisfied the duty to use best endeavours depends, in the final analysis, upon the precise factual matrix in question (see also [*Group Exklusiv Pte Ltd v Diethelm Singapore Pte Ltd* [2003] 4 SLR(R) 582] at [11] (cited above at [33]). Indeed, this is inherent in the very nature of the test itself. Put simply, whilst the test is relatively easy to state, the actual decision itself is anchored heavily in the sphere of application.

**Discussion and decision**

53 Before considering in detail the parties' rival submissions as to whether, on the facts, KSE did use all reasonable endeavours to procure the construction and delivery of the WPU, there are two matters that have to be addressed first, namely: (a) the standard which the parties intended to set in clause 6.2 of the JVA; and (b) the date by which KSE was obliged to procure the construction and delivery of the WPU.

### *(1) The standard imposed by the "all reasonable endeavours" obligation in clause 6.2 of the JVA*

54 Mr Ling submits that in the context of clause 6.2 of the JVA, there is little or no difference in standard between the formulations "best" endeavours and "all reasonable" endeavours. In contrast, Mr Chan's contention is that the parties' intention was to treat clause 6.2 as less onerous than a "best" endeavours obligation in the light of the three-tier hierarchy of obligations set out in the JVA (see [33] above). With the commentaries in *Boilerplate: Practical Clauses* at paras 2-124 and 2-128 in mind (see [49] above), from a legal standpoint, the use of three different formulations in the JVA is not in itself determinative of the standard imposed by the "all reasonable endeavours" obligation in clause 6.2, and the chosen formulation is still susceptible to review by the court. The surer way for parties to define the nature of the obligation imposed by an "all reasonable endeavours" clause is to actually specify the steps to be taken as part of the process of exercising "all reasonable endeavours".

55 I hold that to all intents and purposes in this case, there is little or no relevant difference between the standard constituted by the formulation "all reasonable endeavours" and that constituted by the formulation "best endeavours". This view is reinforced by the circumstances in which the JVA was entered into, the circumstances in which KSE entered into the Oderco Contract, the critical importance of the PCSB Contract to the parties and the fact that the purpose of the JVA was to fulfil the specific requirements of the PCSB Contract within known time constraints imposed by PCSB for the construction and delivery of the WPU. Put another way, in the present case, the obligation to use "all reasonable endeavours" is as onerous as an obligation to use "best endeavours". It follows that in the present case, the test articulated by Chan Sek Keong CJ in *Travista* of what is required to satisfy the obligation to use "best endeavours" is directly applicable to KSE's obligation to use "all reasonable endeavours" under clause 6.2 of the JVA.

### *(2) The date by which KSE was obliged to procure the construction and delivery of the WPU*

56 Clause 6.2 of the JVA provided that KSE was to use all reasonable endeavours to procure the construction and delivery of the WPU within six months after the Charter Agreement was executed, *ie*, by 9 September 2006. In this action, BRE has also sought rectification of clause 3.3 of the Charter Agreement by deleting the words "within six months after the date of this agreement" and replacing them with the words "within six months from 18 December 2005". I pause here to refer to Mr Ling's explanation in BRE's closing submissions (at para 48) on the significance of the date 18 December 2005:

> The significance of the 18 December 2005 date is this – this is the date when [BRE] executed an authorised document by which it approved and agreed on all the technical requirements, scope of work and the price quotation proposed by Oderco for the WPU and authorised [KSE] to proceed with the purchase contract with Oderco for the WPU ("the Authorisation").

57 BRE contends that it was the common intention of both KSE and BRE that the actual delivery date of the WPU was to be 17 June 2006, and not 9 September 2006, and that there was a mistake in clause 3.3 of the Charter Agreement. As explained at [27] above, the initial intention was for all the

contracts required under the JVA to be executed at the same time as the JVA. However, BRO executed the Charter Agreement only on 10 March 2006, and by clause 3.3 thereof, six months from the date of that agreement would be 9 September 2006. On 10 March 2006, BRO also contracted to buy the WPU from KSE. Clause B(3) of the Purchase Contract provided for delivery of the WPU to be within six months from 18 December 2005, which was 17 June 2006.

58 KSE's pleaded case and answer to the interrogatories served by BRE was that the relevant date by which KSE had to procure the construction and delivery of the WPU was 9 September 2006. Mr Chan argued that the rectification sought by BRE was misconceived. KSE was not a party to the Charter Agreement, which was entered into between BRE and BRO. More importantly, a rectification of clause 3.3 of the Charter Agreement did not assist BRE, whose case against KSE was predicated solely on clause 6.2 of the JVA. Any rectification would also require clause 6.2 of the JVA to be corrected by deleting the words "within six months after the Charter Agreement is executed" and substituting them with the words "within six months from 18 December 2005". BRE had not, however, sought to rectify clause 6.2 of the JVA in this manner.

59 Notwithstanding the discrepancies described as to when the WPU was to be delivered, it was repeatedly demonstrated in numerous contemporaneous documents and by the conduct of KSE that the parties had carved out and embarked upon a different course of action in December 2005 before the Oderco Contract was signed. The sequence of the scheme in clause 6.1 of the JVA could not be followed in December 2005 for two reasons. First, BRO was not yet incorporated, and it was imperative to secure a confirmed contract with Oderco. Second, the unity of purpose in terms of the aim of BRE and KSE was undeniably to fulfil (on an "all reasonable endeavours" basis on KSE's part) the PCSB Contract as early as possible in June 2006 (and, at the latest, on a date prior to the PCSB cancellation date of 21 June 2006), and not by the 9 September 2006 date prescribed in the Charter Agreement. That was why the ex-works delivery date of the WPU under the Oderco Contract was set as 4 June 2006. For convenience, all subsequent references hereafter to delivery of the WPU "in June 2006" should be understood to mean delivery in June 2006 on a date prior to the PCSB cancellation date of 21 June 2006.

60 I find no evidence pointing to the parties, after 10 March 2006, reverting to and applying the scheme set out in clause 6.1 of the JVA. Significantly, in the witness box, GBC (KSE's Chief Business Development Officer) confirmed that it was the intention of both BRE and KSE to deliver the WPU to PCSB in June 2006. [note: 11] Under the circumstances, an order for rectification is quite unnecessary to resolve the main dispute between the parties.

61 It is helpful to highlight certain salient contemporaneous documents that address the delivery of the WPU being scheduled for June 2006. First, KSE's final draft SGX announcement sent to BRE on 4 January 2006 expressly confirmed that the WPU would be delivered in mid-June 2006 (the actual announcement was not produced at the trial and the parties treated the final draft as the actual version of the announcement that both parties had previously approved): [note: 12]

> [KSE] ... has established a joint venture ("the JV Company") with [BRE] to provide a workover pulling unit ("workover rig") to [PCSB]. ...
>
> ... *[KSE] will procure a workover rig for the JV Company and delivery of the workover rig to [PCSB] is expected by mid 2006*.
>
> [emphasis added]

62 Second, I note that the minutes of site meetings at Oderco's yard in Abu Dhabi attended by

representatives from PCSB, KSE and BRE indicated that KSE was aware that the construction and delivery of the WPU was to meet PCSB's delivery schedule. For instance, there were meetings during PCSB's first site visit on 8 and 9 February 2006 for PCSB's representatives to review the construction schedule and the delivery schedule. The minutes recorded the following discussion: [note: 13]

> **(c) Progress of the WPU Project**
>
> Dr Samir led the review of the update construction schedule and highlighted the following critical issue:-
>
> ...
>
> Dr Samir advised that due to the buoyant oil and gas market, Oderco faced delivery problem on BOP [*ie*, the blow-out preventer] (about 7 months delivery period) and top drive [*ie*, the top drive system].
>
> ...
>
> He has 80% confidence to get the delivery period of the top drive reduced to 5 months and above all the BOP is most critical.
>
> ...
>
> Dr Samir advised that he is currently working with various suppliers. [GBC] suggested to Dr Samir to give top priority on the BOP supply and report to [KSE] on the situation within the next 5 days (14 February 2006).

The discussion on a five-month instead of seven-month delivery period for certain critical WPU equipment was in connection with the delivery of the WPU being in June 2006.

63 Third, there were inquiries about shipping the WPU to Labuan around the end of May 2006. Gwen Toh ("Gwen"), KSE's General Manager, made inquiries on 13 February 2006 for freight rates with a view to shipping the WPU from Abu Dhabi to Labuan around the end of May 2006. [note: 14] On 22 February 2006, Gwen sought Oderco's confirmation that the construction schedule that she had received complied with the agreed five-month delivery date. [note: 15]

64 Fourth, the expiry date of the letter of credit which KSE instructed KBC Bank NV to issue in favour of Oderco was on 12 June 2006.

65 Fifth, there were related communications on the subject of building the WPU to PCSB's specifications. Any change to the specifications would have been a variation of the PCSB Contract that had to be approved by PCSB, and would also have impinged on the construction schedule of the PCSB project and the PCSB first delivery date. I begin with an e-mail of 26 January 2006 where KSE reminded BRE's Managing Director, Abdul Yazid bin Aziz ("Yazid"), that KSE's responsibility was to build the WPU according to the specifications given by BRE. On behalf of KSE, GBC wrote: [note: 16]

> [KSE] is building the WPU according to specs given by [BRE]. If [PCSB] or [BRE] want to change specs, there will be variation orders.

66 A few months later, in early April 2006, a possible change to PCSB's approved specifications

was raised and discussed at a site meeting attended by representatives from PCSB, KSE, BRE and Oderco. After that meeting, Yazid wrote to GBC on 11 April 2006 to report on the outcome of his further discussions with PCSB's representatives on the subject of a change to PCSB's specifications. He clarified: [note: 17]

> Dear Mr Goh,
>
> Details of my meeting with Mr TC Vun and Mr Norazan yesterday on the subject matter as follows:
>
> 1. [PCSB] had denied asking for any modifications on the existing drawings as they are not the approving authority on drawings. They only approved based on specifications as per T-5A "Exhibit II". The builder is supposed to have a drawings [*sic*] based on the specifications and build a practical and suitable rig that will work on [PCSB]'s platforms.
>
> 2 . *[PCSB]'s [m]ain concern is the delivery schedule and the project schedule that keeps on changing. We must deliver the WPU as stipulated in the [PCSB] [C]ontract*.
>
> ...
>
> 5. My suggestion: if there is any cost impact and [PCSB] is not willing to absorb. We should deliver a WPU that meets Technical Specifications of T-5A "Exhibit II".
>
> [emphasis added]

67 On the same date, GBC wrote to inform Samir that Oderco was to continue building the WPU based on the existing approved drawings. [note: 18] On 13 April 2006, GBC reminded Samir not to stop work on the WPU based on the existing specifications unless instructed otherwise by KSE. [note: 19]

68 There are other relevant e-mails on the parties' aim to deliver the WPU in June 2006. However, to avoid repetition, I propose to comment on their relevance in another part of the judgment.

### *(3) Did KSE discharge its contractual obligation to use all reasonable endeavours?*

69 With the various principles set out above in mind, I turn now to examine whether KSE discharged its obligation under clause 6.2 of the JVA to use "all reasonable endeavours" to procure the construction and delivery of the WPU in June 2006. The answer to this question turns on the facts of this case. In considering BRE's contentions listed at [31] above in relation to KSE's alleged failure to use all reasonable endeavours in this regard, I have to determine on the facts whether KSE took all reasonable steps in good faith which a prudent and determined company, acting in its own commercial interests and anxious to obtain the required result within the time allowed, would have taken (*ie*, the test set out in *Travista* at [41] above). As stated earlier, BRE is not required to show that KSE did not act in good faith (see [43] above). The test is to be applied in the context of what KSE was being confronted with at the material time as that was the context in which all reasonable endeavours had to be directed. KSE had alleged that Samir was a difficult individual to work with. In KSE's dealings with Samir, Samir was found to be uncooperative and unprofessional in his work ethics. He was a source of frustration to KSE. Be that as it may, the question of KSE's liability is not answered by Samir's intransigence, limited cooperation or lack of professionalism, but by the answer to the question whether KSE used "all reasonable endeavours" in the particular circumstances of this case.

70 Mr Ling submitted that after taking an overall view of the situation, the very fact that Oderco missed the June 4 date was evidence of KSE's failure to use all reasonable endeavours during the critical period from January 2006 to May 2006 (see [91] below).

71 In my judgment, although no particular aspect is conclusive, the evidence looked at cumulatively shows that KSE failed to discharge its obligation to use all reasonable endeavours to procure the construction of the WPU for delivery in June 2006. Significantly, the evidence demonstrated that construction of the WPU was already irremediably delayed by the time of the PCSB first delivery date (*ie*, 21 May 2006) because of KSE's failure to use all reasonable endeavours, such that KSE's subsequent efforts from July 2006 to October 2006 to catch up on the delays in construction (which efforts, according to KSE, included paying for the change order approved by PCSB in respect of the multi-tier modular system (see [33] above)) were belated and futile. It was due to KSE's mismanagement of the Oderco Contract that BRE missed the two critical delivery dates imposed by PCSB (*ie*, the PCSB first delivery date and the PCSB last delivery date) and the WPU was never completed by Oderco. Alas, even when the PCSB Contract was terminated on 12 April 2007, some sixteen months after that contract was awarded to BRE, the WPU was not completed or ready for delivery ex-works Abu Dhabi.

72 What follows are my detailed reasons for holding that KSE failed to discharge its "all reasonable endeavours" obligation on the facts and circumstances of this case.

*KSE's role in the contractual context*

73 There are several important undisputed factual matters to bear in mind. Both KSE and BRE knew that the PCSB first delivery date (*ie*, 21 May 2006) was very difficult to achieve. Yet, KSE agreed to joined forces with BRE and they signed the LOI on 9 December 2005. Again, after KSE decided to be BRE's joint venture partner, KSE wanted control over the subject matter of the venture (*ie*, the PCSB project involving a purpose-built WPU for the PCSB Contract), and control included entering into the Oderco Contract as the buyer of the WPU to be custom-built.

74 KSE's discharge of its obligation to use all reasonable endeavours to procure the construction and delivery of the WPU must be examined and assessed with this control over the construction of the WPU in mind. KSE was able to get Oderco to agree to the June 4 date as the delivery date ex-works Abu Dhabi knowing that the WPU would have to be completed and delivered to Labuan before the PCSB cancellation date of 21 June 2006. Again, it must not be forgotten that KSE contracted with Oderco because it wanted to give itself and not BRE "control over the process" [note: 20] (see [17] above). I find no credence in KSE's submission that "[a]s BRO could not be incorporated in time, *in the interest of the joint venture*, KSE proceeded to contract with Oderco first and fulfilled its obligations under Clause 6.1" [note: 21] [emphasis added].

75 The overall contractual objective of the "all reasonable endeavours" obligation in clause 6.2 of the JVA was therefore to procure the construction and delivery of the WPU in June 2006.

76 The prevailing state of affairs in December 2005 was that time had already started to run under the PCSB Contract, *ie*, from 21 November 2005, when PCSB issued the Letter of Award to BRE. One month had already passed under the PCSB Contract before the Oderco Contract was signed between KSE and Oderco on 21 December 2005, and the parties were aware that any extra time beyond 20 June 2006 (the last day of the liquidated damages period) would have to come from or be due to change orders approved by PCSB. [note: 22] I pause here to make two points. First, I do not and cannot see how KSE's reference to extra time for change orders in an e-mail of 17 December 2005

warranted KSE's assertion that this e-mail pointed to a discussion or the existence of a strategy between the joint venture partners to "persuade PCSB … to initiate change orders (as required) to buy extensions of time". [note: 23] Second, this strategy as described was not KSE's pleaded defence.

77 It is now appropriate to mention the relevant e-mails in question.

78 I refer to an internal e-mail dated 12 December 2005 with the subject heading "Petronas Workover Pulling Unit". This internal e-mail was sent by CTK to GBC, copied to TFG, only one day before the JVA was signed. CTK wrote: [note: 24]

> Boon Chye, please liaise with Fuh Gih [*ie*, TFG] on the sending out the PO to Oderco. I have discussed with Hong Khun [*ie*, LHK] and agree that thte [*sic*] *PO will be from [KSE] as the JV company is not ready yet. It is also not appropriate for [BRE] to issue the PO as we will lose control over the process.* He has put the full spec into a file enclosed above. We must also work out the charter contract and the shareholders agreement when they are here tomorrow or Wednesday and ink the deal the next few days.
>
> [emphasis added]

79 This is an important internal e-mail which KSE papered over in its submissions. On 18 December 2005, BRE agreed to KSE entering into the rig building contract (*ie*, the Oderco Contract) with Oderco.

80 Another e-mail indicated that KSE was fully aware of the time pressure and wanted more time for the construction and delivery of the WPU, seeing that the PCSB first delivery date started to run from the date of the Letter of Award issued by PCSB to BRE. TFG's e-mail of 9 December 2005 to LHK of COSL with the subject heading "Workover Pulling Unit Project – LOI" reads: [note: 25]

> Dear Lim:
>
> My concern is the delivery time which links us to the penalty. We can accept 6 months from the date of contract signed instead of from the date of award.
>
> The rest is manageable among [BRE] and [KSE]. Can you talk to [PCSB] as soon as possible.

81 As alluded to earlier (at [13] above), BRE's letter of appeal dated 9 December 2005 to PCSB for an extension of the delivery date was rejected. Significantly, even before receiving PCSB's reply to its request for an extension of the delivery date, BRE proceeded to sign the LOI with KSE on 9 December 2005. On the same day, Yazid (on behalf of BRE) also signed the Letter of Award issued by PCSB to BRE.

82 On 16 December 2005, three days after the JVA was signed, TFG sent an e-mail to LHK about the two main risks in the PCSB Contract that had to be managed and taken into consideration in the Oderco Contract that KSE was going to sign on 21 December 2005: first, the possibility of late delivery that could result in up to 50 days' worth of liquidated damages in the sum of US$200,000; and second, the risk of cancellation of the PCSB Contract. PCSB had allowed 30 days for late delivery, subject to payment of liquidated damages, and PCSB could cancel the PCSB Contract for delay exceeding 30 days from 21 May 2006, *ie*, for delay beyond 20 June 2006. TFG stressed that Oderco's delivery date ex-works must not be later than 21 June 2006. TFG's e-mail to LHK, which was copied to WKP, CTK, GBC and Gwen, reads: [note: 26]

Dear Mr. Lim:

As you know that the builder can only deliver the WPU 6 month ex work from Abu Dhabi yard after we sign the contract.

The award letter and the latest letter from [PCSB] stated very clearly that:

(1) The delivery schedule is 180 days from the date of award, the date of award is 21st Nov 2005;

(2) Any delay after the 180 days will carry a US$4,000.00 per day;

Based on these information, I would like you to take note on the following and reply:

1. If we sign the purchase contract with the builder on 21st Dec, we have 180 days from this date. The delivery at ex work shall not be later than 21st June 2006;

2. If you calculate carefully on [PCSB's] latest letter, they want the WPU unit to reach the site not more than 180 days from 21st Nov 2005. The delivery at site shall be 21st May 2006;

3. Based on the above, we already late for 30 days before adding on the delivery time which is subjected to flight schedule and weather. If we are lucky, we can have 20 days to get it done. The total penalty will be 50 days. This will cost US$200,000.00;

4. According to [PCSB], they can cancel the contract if the delay is more than 30 days. This is another risk you have to consider.

Can you please reply me as soon as possible.

Best regards,

Tan FG

83 At the risk of repetition, by clause 3 of the Oderco Contract, the delivery date ex-works was stated as "within 165 days from date of Contract" [note: 27], *ie*, by 4 June 2006.

84 As mentioned earlier, KSE's desire to have control over the PCSB project led to its entering into the Oderco Contract to ensure that Oderco kept to its promise to deliver the WPU on time. A reasonable inference to be drawn from the contemporaneous documentary evidence is that KSE became involved in the PCSB project because of the possibility of earning US$5m in net profit from the WPU (GBC confirmed this figure on the stand) as well as the possibility of hiring out its liftboat, the *Dixie Patriot*, for use with the WPU. On 22 November 2005, LHK wrote to TFG in these terms: [note: 28]

The Letter of Award from [PCSB] was out yesterday. Right now we haven't got anything to support it. The Canadian company that Wee [*ie*, WKP] is trying to build the unit has indicated that it needs 6–8 months and we are still waiting for their quotation. We can stall but I am not sure how far this can get us.

The sad part is if there is a delay in the WPU, then there will be a delay in the Liftboat. Without a

WPU there is nothing for the Liftboat to work on.

The Liftboat is the "crown jewels" and our interest is not just one Dixie Patriot only ... to build up a liftboat business in Asia Pac region.

Therefore, your assistance in the WPU is very critical to the overall success.

The Canadian company that built Wee's land rig is www.hyduke.com.

85 The tight delivery schedule, coupled with the strong demand for rigs and oil and gas equipment, meant that fabrication of the structure of the WPU and procurement of critical WPU equipment must be undertaken in tandem. The need to ensure prompt supply of such equipment was noted in TFG's e-mail of 25 October 2005 to LHK. TFG wrote: [note: 29]

Dear HK,

I trust your number. *The problem is the delivery under the current market situation.*

Furthermore, if COSL decided not to go ahead with this project, Dixie will [no] longer be required.

I would of course try my best to get this project otherwise how to settle the Dixie's issue?

*I am currently checking how to speed up the equipment supply so that we can go along with your proposal*.

[emphasis added]

86 Having regard to the overall undisputed facts and the circumstances described above, there is little to commend in KSE's contention that its role under clause 6.2 of the JVA was merely to liaise with Oderco during the course of the construction of the WPU and to facilitate communications between Oderco and BRE on technical matters. For the same reason, I do not accept KSE's submission that its role as BRE's joint venture partner was only to negotiate and sign the Oderco Contract and to act as a liaison with Oderco. [note: 30] There is also no credence in KSE's contention that it was only the financier in the joint venture. KSE further argued that it was *not* required to act as "Project Managers" during the construction process. [note: 31] It is clear that KSE's assertions as to its roles are not supported by the contemporaneous documentary evidence. In my view, in the context of what KSE was being confronted with at the material time, which was the context in which all reasonable endeavours were to be used by KSE, the discharge of the "all reasonable endeavours" obligation in clause 6.2 of the JVA required KSE to not only put pressure on Oderco, but to also put its available resources to bear on Oderco in order to realise KSE's right (as the buyer of the WPU under the Oderco Contract) to have the WPU delivered by the June 4 date.

87 As stated, KSE's idea of control over the PCSB project was to contract with Oderco. By doing so, KSE clearly undertook to manage the construction and delivery of the WPU by Oderco within 165 days from the date of the Oderco Contract, *ie*, by 4 June 2006, so as not to fall foul of the PCSB cancellation date of 21 June 2006. In the circumstances, KSE could not simply take a hands-off approach and leave Oderco to fulfil the Oderco Contract, especially when, amongst other things, KSE was repeatedly confronted with signs that Oderco was not performing the contract as expected. For instance, Oderco was not responsive to queries, and KSE received questionable reports on the actual progress of the construction of the WPU that showed constant changes to the delivery schedule.

*The urgency confronting the parties in this case*

88 GBC was the person to whom the task of overseeing the Oderco Contact was delegated. He was assisted by Gwen, who did not testify at the trial. Francis Tan ("Francis"), who was appointed by KSE as Country Manager in charge of Business Development (see further [109] below), was called as a witness of fact for KSE, but his involvement came very much later in December 2006. GBC was the main witness of fact for KSE.

89 I should mention here that BRE's witnesses of fact were Yazid, WKP and Andrias Ewat ("Andrias"), the WPU manager appointed by BRE on 17 February 2006 (see further [108] below). It was Yazid who liaised with PCSB and he was also in contact with GBC.

90 The state of affairs confronting KSE at the time it signed the Oderco Contract on 21 December 2005 was one of immense urgency. One month had already passed under the PCSB Contract by the time Oderco came on board. Despite having secured the June 4 date as the delivery date ex-works Abu Dhabi under the Oderco Contract, KSE did not manage the Oderco Contract properly and the June 4 date passed without Oderco delivering the WPU.

91 Between January 2006 and May 2006, one particular factual circumstance facing KSE was Oderco's lack of or slow response to KSE's queries and demands for information and key documents. As early as 13 January 2006, Gwen complained that she was unable to contact Oderco as Samir's phone had been switched off and she did not have Hedian's telephone number. It was also apparent to KSE that Oderco was consistently late in producing key documents and drawings. The evidence showed that GBC and Gwen continued to send e-mails and make telephone calls to Oderco to chase it for items such as the construction schedule, weekly progress reports and the status report on the top drive system ("TDS") and the blow-out preventer ("BOP"). Mr Ling submitted that the evidence pointed to February and March 2006, when it became clear that KSE was unable to get the purchase orders for the TDS and the BOP, as the period when the question of whether the purchase orders had even been placed should have been asked. He further submitted that by March 2006, the PCSB project was in trouble. In cross-examination, Mr Ling questioned GBC whether more should have been done in March 2006, for example, by placing someone at Oderco's yard to get better information from Oderco. GBC's answer was astonishing:

> At that point in time was still early in the stages, so I guess, you know, ***it was not so urgent*** . And also our joint venture partner BRE did not also mention anything on this. [note: 32]
>
> [emphasis added in bold italics]

92 GBC's answer exemplified the typical lackadaisical attitude of KSE towards the management and administration of the Oderco Contract. GBC lacked the urgency of a prudent and determined director-in-charge who was under time pressure to use all reasonable endeavours to procure the construction and delivery of the WPU in June 2006. Contemporaneous documentary evidence confirmed that GBC knew of the limited amount of time which the joint venture partners had to construct and deliver the customised WPU to PCSB. Given these circumstances, it is inexplicable that GBC adopted a "soft" approach towards Oderco, and did not change tack to overcome Oderco's unresponsiveness by taking other measures.

93 The same approach of only sending e-mail chasers and making telephone calls to Oderco continued despite uneasy news from Woo Peng Kong ("PK Woo"), a former Executive Director of KSE, of the following: (a) manpower shortage in Oderco's office in March 2006; [note: 33] and (b) doubts as

to whether Oderco had provided the correct construction schedule. PK Woo's e-mail dated 3 April 2006 to GBC and Gwen highlighted likely errors in the construction schedule which Oderco had sent on 2 April 2006. Whilst Samir had confirmed previously that he had placed the order for the BOP, the construction schedule for the BOP system as at 2 April 2006 showed 0% completion, meaning that the item had not even been purchased yet. Similarly, the construction schedule for the TDS also showed 0% completion status as at 2 April 2006. [note: 34] At the same time, Gwen was alerted by Andrias in an e-mail dated 3 April 2006 [note: 35] that most of the percentages in Oderco's weekly progress schedules "were going backwards and time has dragged towards end May or early June 2006". PCSB made the same point as Andrias and sought an explanation. [note: 36]

94 The fact remains, and I so find, that for the longest time, KSE was content to confine and limit its efforts to sending e-mail chasers and making telephone calls to Oderco despite the time pressure to meet the June 4 date and ostensible signs that the PCSB project was not progressing well.

95 From February 2006 onwards, at least after the site meetings on 8 and 9 February 2006, it would have been obvious to GBC and Gwen that things were not going according to plan for a June 2006 delivery. For instance, Oderco's report of 25 February 2006 showed delivery in Week 24, *ie*, in end-June 2006. [note: 37] As early as 18 March 2006, Samir was talking about completion of the WPU only in Week 26, *ie*, by July 2006. In the month of April 2006, it was again apparent that Oderco was going to miss the June 4 date. On 21 April 2006, Oderco's updated construction schedule showed that delivery had moved to the third week of July 2006. [note: 38] Later, on 3 May 2006, Oderco's updated construction schedule showed that delivery had slipped behind by another two weeks to 10 August 2006, [note: 39] which was well after the ex-works delivery date of 4 June 2006. On the same day, PK Woo highlighted to GBC that the updated construction schedule still showed "procurement of TDS" as zero. [note: 40] On 4 May 2006, Gwen asked Oderco why the updated construction schedule showed delivery only on 10 August 2006, which was after the original delivery deadline of 4 June 2006. It was then that GBC wrote to Oderco on 5 May 2006 requesting that Samir attend a meeting in Singapore on 9 and 10 May 2006. [note: 41] Although this initiative and GBC's subsequent site visit to Oderco between 27 June and 3 July 2006 were further steps taken by KSE to monitor the construction of the WPU apart from sending e-mails and making telephone calls to Oderco, these initiatives were taken rather late in the day, and were ineffective to procure delivery of the WPU in June 2006. In fact, the delivery dates in Oderco's subsequent updated construction schedules moved further into September 2006 and beyond.

96 GBC claimed that he took Oderco's progress reports at face value. [note: 42] All the more, the alarm bells should have started to ring in February 2006 and should have continued ringing as the delivery date ex-works Abu Dhabi moved further and further away from the June 4 date. I accept (and KSE's expert witness, Mr Matthew Jonathan Wills ("Mr Wills"), agreed), [note: 43] that one of the steps that KSE ought to have taken was to try to find out what was actually causing the delay. Yet, GBC allowed precious months to slip by without attempting to discover the cause of the delay.

97 Another sign that the PCSB project was not progressing well came from the procurement of critical WPU equipment. KSE had asked Oderco for purchase orders for such equipment, but had not received them. The experts on both sides said that they had not seen purchase orders, but reckoned that they would have been very few. [note: 44] BRE's expert witness, Mr Ian Craven ("Mr Craven"), opined that purchase orders for critical WPU equipment should have been placed in January 2006 so that there would be a chance of the WPU being completed in June 2006. KSE should have questioned whether purchase orders had even been placed when it was unable to obtain the purchase orders

from Oderco, and this should have been obvious to KSE in February and March 2006. [note: 45] Besides the matter of the purchase orders, there is also evidence that Oderco's progress reports, which gave the impression that the project was at an advanced stage, did not tally with the schedule of multiple milestone payments to be made by KSE for the WPU. I will deal with the multiple milestone payments below (see [110]–[116]).

98 Given the situation in February and March 2006, KSE should and could have taken other steps then to chase Oderco on the construction of the WPU. I will elaborate on these steps in due course. Suffice it to say at this point that in practical terms, the obligation to use all reasonable endeavours in this case may be benchmarked against the actions expected of a reasonably competent director in GBC's position endeavouring to "claw the project schedule back" on track in an endeavour to save the PCSB project from the time already lost. Metaphorically speaking, KSE was faced with the same pressure as the captain of a sinking ship. KSE was required to, but did not, take steps that were necessary and proper to maximise its chance of procuring the completion and delivery of the WPU ex-works by the June 4 date. As a result of KSE doing nothing more than sending e-mail chasers and making telephone calls between January 2006 and May 2006 coupled with KSE's contentment to wait, the PCSB project became irremediably delayed as a consequence.

99 My conclusion is reinforced by an undisputed e-mail report of 18 September 2006. This is the report which GBC received on 18 September 2006 from Michael Connolly ("Connolly"), who had been employed by KSE on 2 July 2006 as its representative at Oderco's yard. Connolly had described himself in one of his e-mails as "Client's Rep" and his presence at Oderco's yard was said to "protect the interest of KSE/BRO". [note: 46] Earlier, Connolly had reported on 4 September 2006 that Oderco did not have all the necessary WPU equipment and had yet to issue the requisite purchase orders to local suppliers as it was still sourcing for such equipment at this late stage of the construction. [note: 47] Following on from this, Connolly's e-mail report of 18 September 2006 similarly indicated that Oderco had started working on the WPU too late and was so much behind schedule that it was not possible to meet the PCSB last delivery date of 26 October 2006. The relevant part of Connolly's e-mail report reads: [note: 48]

> ...
>
> As I mentioned to you, last time you were here, it is my opinion after working on construction projects for many years, that the delivery date [*ie*, 26 October 2006] will not be met, even though Oderco *are* applying all their resources. It is to do with the physical amount of work remaining. ***If they had worked on this job from long before July, then they may have finished by now. This week, they should be in the middle of testing and commissioning.*** Having other projects, and thinking they would not be paid for a very substantial redesign, they chose not to fast track the WPU until recently. They and I *are* trying for this, but are under no illusions as to when this will be finished. Again this is in no way condoning what has occurred, only to be realistic, and to keep you informed of what I perceive to be the real situation.
>
> [original emphasis in italics; emphasis added in bold italics]

100 Connolly's report was not disputed by KSE back then or at anytime thereafter, including at the trial proper. Significantly, Connolly's report discloses the reason for the unsatisfactory state of affairs in September 2006: had Oderco done most of the work on the WPU before July 2006, the construction of the WPU would have reached the testing and commissioning stage by September 2006 and Oderco would have been able to meet the PCSB last delivery date of 26 October 2006. This tied in with my finding (at [71] above) that the construction of the WPU was already irremediably delayed

by the time of the PCSB first delivery date of 21 May 2006 because of KSE's laissez-faire attitude towards the management and administration of the Oderco Contract between January 2006 and May 2006 such that its efforts after June 2006 to claw back the time lost were too late and futile.

101 I have summarised the limited steps taken by KSE to procure the construction and delivery of the WPU in June 2006. I now come to other efforts that KSE could have taken earlier, but did not, to satisfy its obligation under clause 6.2 of the JVA.

*KSE's failure to adequately supervise and manage the PCSB project via monitoring the Oderco Contract*

102 The experts on both sides agreed that if Oderco could not manage the PCSB project suitably well, on-site supervision would be needed. [note: 49] It was not seriously disputed that after the first site meeting on 8 and 9 February 2006, Oderco was found to be disorganised, and was failing to manage the construction of the WPU properly. Although the Oderco Contract did not expressly provide for on-site supervision, given the pressing circumstances of this case, I accept the opinion of BRE's expert, Mr Craven, that on-site supervision should have been provided by KSE from the outset regardless of the contractual requirements set out in the Oderco Contract as on-site supervision was necessary to safeguard KSE's investment and ensure that Oderco kept to the tight construction schedule. Mr Craven's explanation, which I accept as eminently sensible, was as follows: [note: 50]

> A: You [KSE] are the owner. Surely you have the right to do what you want with regard to ensuring that the project is underway and being kept moving forward as it is supposed to in compliance with the contract to build the rig. I mean this makes complete sense to have someone there to ensure that the shipyard was doing what it was supposed to do. I accept it's may be not written in the contract because the contract is not a particularly good one. It is extremely short compared with mist contracts I've seen for projects such as this.
>
> ...
>
> A: But it just makes very much ... a lot of sense to be on site to make sure that something is going along as it should. The result of course is what we've seen in ... the project has taken more than a year to move on.

103 KSE's expert witness, Mr Wills, also agreed that on-site supervision from the outset would have been ideal in this case, especially after the February 2006 site visit by PCSB. [note: 51] Yet, KSE only appointed Connolly on 2 July 2006, well after the June 4 date had passed. As Connolly's e-mail of 18 September 2006 revealed, it was difficult to catch up on construction in September 2006 when work (*viz*, fabrication of the structure of the WPU and procurement of WPU equipment) that should have been done before July 2006 had not yet been done (see [99] above).

104 As a prudent and determined buyer, KSE ought to have appointed qualified personnel to closely monitor and supervise the rig building project on-site. KSE should have been anxious to ensure that the customised WPU was constructed and delivered on time so as not to jeopardise the PCSB Contract, which could be cancelled after 20 June 2006. On-site monitoring would have been necessary to, *inter alia*: (a) monitor and verify the actual progress of the construction against Oderco's progress reports; (b) monitor and verify that the necessary WPU equipment (especially the critical items) was ordered at the earliest possible time and that the deliveries were on schedule; [note: 52] and (c) ensure that payment was disbursed to Oderco in accordance with the milestones set out in the Oderco Contract. [note: 53]

105 In fact, the evidence showed that KSE was reluctant to appoint someone to supervise the construction of the WPU on-site. The first occasion when on-site supervision was mentioned was shortly after the 8 and 9 February 2006 site visit. GBC, reporting on that visit, wrote in his e-mail to TFG: [note: 54]

> *[PCSB] wanted a technical contact person from [KSE] – to get [BRE] to appoint their rig manager* (starting w*ork on 1* March 2006) as the contact person.
>
> [emphasis added]

This e-mail demonstrates that KSE did not want to appoint its own personnel to supervise the construction of the WPU at Oderco's yard and chose to deflect this responsibility to BRE instead.

106 That KSE was not prepared to appoint a qualified representative on-site to manage the Oderco Contact is also evident from an internal e-mail dated 22 March 2006, where TFG chastised GBC for his earlier recommendation to Samir that an employee of BRE be stationed at Oderco's yard as the Project Manager. TFG wrote: [note: 55]

> I am lost of [*sic*] what you are doing on this. You rea [*sic*] putting [KSE] in trouble. You knew that we have a markup and you use [BRE's] people to be their project manager. He can come to know the actual price and you will put all our 300 staff in trouble ... Just imagine how much effort you have to put in latter [*sic*] to repair damage if this guy come [sic] to know and inform our partner?

107 One argument raised by KSE was that since BRE had appointed a representative to monitor Oderco, there was no need for KSE to do so. BRE's appointment of a WPU manager (this terminology was used interchangeably with the expression "Rig Manager" in the documents) was intended to be KSE's answer for not stationing a representative at Oderco's yard. With respect, this argument misses the point. The WPU manager appointed by BRE was required under the PCSB Contract, and had nothing to do with the discharge of KSE's "all reasonable endeavours" obligation under clause 6.2 of the JVA. In fact, the WPU manager was not supposed to be appointed before the delivery of the WPU; the appointment was accelerated only to appease PCSB, which had queried BRE on 6 February 2006 on the absence of COSL in the PCSB project contrary to BRE's tender (see [8] above). Yazid had then suggested appointing a WPU manager to assuage PCSB after the latter's discovery of the collaboration between BRE and KSE.

108 The fact that Andrias was employed as the WPU manager did not relieve KSE of its contractual obligation under the JVA. Andrias was employed as the WPU manager by BRE on 17 February 2006 and PCSB was notified of his appointment on 6 March 2006. Andrias was responsible for providing "technical advice and running of the operation of the WPU under construction", and had to familiarise himself with the WPU. In addition, Andrias was to act as a bridge between PCSB and BRE in respect of the construction of the WPU, and also assist in the coordination of the shipping of the WPU from the Oderco's yard in Abu Dhabi to Labuan. [note: 56] However, the obligation to manage the PCSB project via monitoring the Oderco Contract continued to rest upon KSE, and it is not sufficient for KSE to argue that BRE had also appointed a representative to monitor Oderco's progress.

109 KSE eventually appointed Connolly and, later, Francis to monitor the construction of the WPU on-site. However, this came much later in the day, after the construction of the WPU had already become irremediably delayed. Connolly's appointment was first mentioned on 30 June 2006 when GBC visited Oderco's yard, and GBC's intention then was only to engage Connolly for one month initially

and to decide later if KSE needed his services for a longer period. [note: 57] Connolly was only appointed on 2 July 2006 after the June 4 date had passed. Francis was appointed in December 2006 after Connolly resigned. Francis explained that his role was to update KSE's management on the progress of the construction, and to help expedite the PCSB project in terms of delivery of the necessary WPU equipment. Between December 2006 and March 2007, to a certain extent, Francis chased Samir down on the delivery of cable plugs and high-pressure values equipment. [note: 58] This evidence demonstrates that on-site representation had some effect on Samir.

*KSE's failure to notice that milestone payments under the Oderco Contract were not triggered*

110 Under the Oderco Contract, KSE agreed to make the following milestone payments under clause M:

> M) PAYMENT TERMS
>
> 1) 10% downpayment by T/T within 10 working days from the date of Contract signed.
>
> Balance Payment: 90% L/C at sight by Milestone as follows:
>
> 1) 15% issuing fabrication drawings for Mast, Sub Structure, Skid Beam.
>
> 2) 25% Completion of fabrication of Mast Sub Structure, Skid Beam and Drill floor.
>
> 3) 20% Rigging of Mast, Sub Structure and Mud Tanks.
>
> 4) 10% Completion of Pump, Drawwork and VFD [variable frequency drive].
>
> 5) 10% BOP and all handling equipment.
>
> 6) 7.5% Rig Completion, Rig-Up and Rig Acceptance in Abu Dhabi.
>
> 7) 2.5% Upon presentation of Signed Protocol Acceptance.

111 Apart from the 10% down payment, the other milestone payments were based on the actual progress of the construction of the WPU in accordance with the milestones as described. Based on KSE's own evidence the following sums were disbursed: [note: 59]

(a) The 10% down payment was made on 3 January 2006.

(b) The next milestone payment of 15% corresponding to the issuance of the fabrication drawings for the mast, sub-structure and skid beam of the WPU was made on 14 June 2006.

(c) The third milestone payment of 25% was also made on 14 June 2006.

(d) The fourth milestone payment of 20% was made on 1 September 2006.

(e) The payment of 10% for "BOP and all handling equipment", amounting to a total of US$300,000, was advanced as loans to Oderco on 22 and 29 September 2006.

(f) The 10% payable on "Completion of Pump, Draw-work and VFD [variable frequency drive]", amounting to a total of US$690,000, was paid directly to Oderco's suppliers on 24 November

2006.

(g) The 7.5% payable upon "Rig Completion, Rig-Up and Rig Acceptance in Abu Dhabi", amounting to US$300,000, was advanced as a loan to Oderco on 2 February 2007, and a further US$400,000 was advanced as a loan on 2 March 2007.

112 I digress to mention Mr Craven's explanation that there are three phases in the construction of a WPU. The first phase is the fabrication of the structure of the WPU itself. The second phase entails the purchasing, delivery and installation of the necessary WPU equipment. The third phase is commissioning. [note: 60] The first two phases have to be borne in mind when reading Oderco's progress reports. Hence, even if Oderco had fabricated the structure of the WPU as at 17 April 2006 (which was what Oderco claimed it could do (see [115] below)), it was still necessary to have the requisite WPU equipment purchased, delivered and installed (*ie*, the second phase).

113 The progress made on the first two phases in the construction of the WPU was clarified by the parties' experts by looking at the photographs of the structure of the WPU. Mr Craven opined that as at around 21 March 2006, less than 5% of the overall construction (*ie*, the first and second phases of construction) had been completed, and that as at 15 April 2006, about 5 to 10% of the overall construction (*ie*, the first and second phases of construction) had been completed. [note: 61] The experts on both sides opined that in April 2006, fabrication of the structure of the WPU based on the original specifications (*ie*, the first phase of construction) was about 60% completed, and Mr Wills further opined that this phase of construction was about 95% completed in July 2006. [note: 62]

114 Returning to the schedule of milestone payments to be made by KSE to Oderco under the Oderco Contract, the timing of the instalment payments set out at [110] above should have alerted KSE that things were not proceeding according to plan for the delivery of the WPU in June 2006. It is apparent from the above schedule of instalment payments that apart from the 10% down payment made in January 2006, milestone payments (b) to (d) were all made *after* Oderco had already missed the June 4 date (see [111] above). Given that the deadline for Oderco to deliver the WPU was 4 June 2006, red flags should have been raised when no milestone payments were made to Oderco for more than four months after the January 2006 10% down payment. If KSE had investigated and queried Oderco as to why it had not asked for any of the subsequent milestone payments after that 10% down payment, KSE would have discovered the discrepancies in Oderco's progress reports, such as the 15 April 2006 progress report where Oderco stated that "the WPU [was] going to be completed soon", that "Oderco [was] a bit ahead of schedule", that "the project was 75% complete" and that the WPU should be finished by 31 May 2006". [note: 63]

115 Notably, PK Woo commented to GBC on 17 April 2006 that Oderco's 15 April 2006 progress report did not mention the progress of procurement of the necessary WPU equipment, nor did it confirm the placement of an order for the TDS despite KSE's queries. [note: 64] Prior to that, on 3 April 2006, Oderco had sent Progress Report No 4 dated 2 April 2006. [note: 65] In that report, Oderco had stated that the assembly of the mast and sub-structure of the WPU would be completed by 17 April 2006, and that most of the necessary WPU equipment had been procured or ordered, but it did not disclose the delivery date of these items to Abu Dhabi. It was therefore incomprehensible that over a 13-day period (*viz*, from 2 April 2006 to 15 April 2006), 75% of the overall construction of the WPU could have been completed. Yet, GBC did not take issue with this discrepancy in Progress Report No 4 (nor with the discrepancies in Oderco's other progress reports).

116 It is plain that KSE was not closely monitoring the progress of the construction of the WPU via the various milestone payments which it was to make under the Oderco Contract. If KSE had done so,

it would have found out about the delay in construction and should have assisted as quickly as possible so as to try to meet the planned delivery of the WPU in June 2006.

*Lack of purchase orders and delay in procuring WPU equipment*

117 This part of my judgment relates to the second phase of construction explained by Mr Craven (see [112] above). The second phase entailed the purchasing, delivery and installation of the equipment needed for the WPU. Mr Craven opined that purchase orders for such equipment should have been placed in January 2006 so that there would be a chance of the WPU being completed for the planned delivery in June 2006. Given the high demand for oil and gas equipment at the material time, it was imperative that all critical equipment for the WPU was ordered as soon as possible. At the trial, GBC conceded that it was "crucial for Oderco to procure rig critical items at the earliest possible time to ensure that the WPU would be completed on schedule". [note: 66]

118 KSE must have noticed that the necessary WPU equipment was not being purchased in a timely manner, or not even being purchased at all. Indeed, at the first site visit by PCSB on 8 and 9 February 2006, Oderco purportedly showed copies of only 12 purchase orders for the WPU equipment needed. At the meetings held during that February 2006 site visit, delivery of the TDS and the BOP was flagged as a potential problem (see [62] above). On 15 February 2006, KSE had even written to Oderco to inquire if Samir was interested in a BOP from China, and had informed him that if he was interested, he would have to discuss with the manufacturer immediately in order "to meet the delivery deadline".

119 Mr Ling questioned whether the 12 purchase orders shown to PCSB at its first site visit on 8 and 9 February 2006 were even for the PCSB project since the documents disclosed revealed that only four purchase orders were issued before that site visit. The purchase order for the variable frequency drive ("VFD") was dated 12 February 2006 ("the 12 February PO"), and was presumably issued *after* PCSB's first site visit. GBC was present at the meeting during that site visit where Oderco promised to get the delivery period for the TDS reduced to five months after PCSB expressed concerns over a possible seven-month delivery period (*ie*, delivery in September 2006). Knowing the situation with the TDS, KSE ought to have picked up on and queried Oderco about the seven-month delivery period stated in the 12 February PO for the VFD, but KSE failed to do so. Mr Chan submitted that there was no evidence as to when KSE saw the 12 February PO. But, GBC testified that KSE would have received a copy of that purchase order sometime at the end of February 2006. [note: 67] I find that at that point or shortly thereafter, KSE must have known that the plan for a June 2006 delivery of the WPU was in trouble, and should have taken steps to press for a shorter delivery period for the VFD as Samir had suggested *vis-à-vis* the TDS at the meetings held during PCSB's site visit on 8 and 9 February 2006.

120 As mentioned at [117] above, given the high demand for oil and gas equipment at the material time, it was imperative that all critical equipment for the WPU was ordered at the earliest possible time. KSE should have started to question why there were copies of only 12 purchase orders as at February 2006 when, for a project of this size and nature, there should have been at least hundreds of purchase orders by that time. KSE did not pick this up. Significantly, Mr Craven opined that by that time (*ie*, February 2006), the number of purchase orders should have been in the hundreds.

121 On 18 April 2006, KSE asked Oderco for a status report on the delivery of the WPU equipment needed (*eg*, the mud pumps, the VFD and the TDS), and copies of the purchase orders for all equipment. Mr Wills confirmed that there were no purchase orders for the mud system equipment, air compressors, mud mixers, choke manifold, choke and kill lines, valves, rotary hoses, stand pipes,

cementing high-pressure valves, paint, tubular and handling equipment, and mud hopper. [note: 68] GBC attempted to excuse himself by alleging that small items like cables and lights could be conveniently purchased at corner electrical shops in Jebel Ali, Dubai. [note: 69]. However, KSE's own expert, Mr Wills, testified that items such as the explosion-proof H2S gas detection system could not be bought from such corner electrical shops and could only be purchased from electrical suppliers serving the oil and gas industries. Mr Wills also testified that the long lead times for some of the WPU equipment needed were due to Oderco's late placement of orders. [note: 70]

*Untruth in Oderco's progress reports on the delivery date of WPU equipment and the actual progress of construction*

122 Oderco made numerous misstatements regarding both the delivery dates of the WPU equipment needed and the actual progress of construction. For instance, the 12 February PO for the VFD (which apparently also covered generators, motors and drilling equipment) indicated that the delivery date was September 2006 ex-Texas. This would have been months after the planned delivery of the WPU in June 2006. I have already referred to PK Woo's e-mail dated 3 April 2006 to GBC and Gwen (see [93] above). That e-mail stood in stark contrast to Oderco's progress report of 15 April 2006, where Oderco stated that "the project was 75% completed", with Samir even declaring that Oderco was "a bit ahead of our schedule in accordance to our Engineering work schedule" (see [114] above).

123 Although GBC claimed that KSE took "a lot of steps" in verifying the accuracy of Oderco's progress reports, he admitted in cross-examination that he took these reports at face value and did not verify them. [note: 71] That aside, I have come across e-mails where PK Woo commented on some of Oderco's progress reports, and it was only in response to his comments that Gwen or GBC came to send e-mail queries to Oderco. Those were the e-mails which GBC alluded to as the steps taken by KSE to monitor the progress of the construction of the WPU. Those steps were clearly insufficient given the realities of the situation confronting the parties, and I have no hesitation in holding that KSE had not used all reasonable endeavours for the purposes of clause 6.2 of the JVA. [note: 72]

*The PCSB last delivery date*

124 The date 26 October 2006 was agreed to by PCSB as the last delivery date for the WPU after it approved a change in its original order to accommodate the multi-tier modular system (also referred to by the parties as the "pipe rack module") in August 2006. This agreement to 26 October 2006 as the PCSB last delivery date came well after the PCSB first delivery date of 21 May 2006, and also well after the June 4 date under the Oderco Contract had passed.

125 Despite the change order for the multi-tier modular system which allowed for a time extension to 26 October 2006, I find that KSE was already in breach of clause 6.2 of the JVA prior to the June 4 date, and that the breach was ongoing. As such, the change order for the multi-tier modular system did not excuse KSE from liability. In my view, it would be illusory to take into account the possibility of an extension of the delivery date from the PCSB first delivery date to beyond the PCSB cancellation date (*ie*, 21 June 2006) in assessing KSE's actions (or lack thereof) in the months of April to June 2006. [note: 73] A possible change in design to the multi-tier modular system was only discussed from April 2006 (see [66] above) to June 2006, at which period in time, construction of the WPU based on the original specifications had already fallen behind schedule.

126 After the site meeting in early April 2006 (see [66] above), on 13 April 2006, KSE told Oderco not to stop work on the construction of the WPU based on the original specifications unless there were further instructions (see [67] above). A layout design for a modular-type WPU was subsequently

broached by Oderco at a meeting on 3 May 2006. [note: 74] On 3 May 2006, Oderco's updated construction schedule showed that delivery had already slipped behind by another two weeks to 10 August 2006 based on the original specifications (see [95] above), and this date was well after the ex-works delivery date of 4 June 2006 stipulated in the Oderco Contract. Samir submitted drawings for the revised modular-type WPU design on 16 May 2006. [note: 75] Oderco's weekly report dated 27 May 2006 showed completion in mid-September 2006 based on the original specifications. [note: 76] On 28 May 2006, one week before the June 4 date, Oderco sent seven concept modular design drawings to KSE. [note: 77] Nothing more was heard from Oderco after 30 May 2006, and the original deadline for Oderco to complete the WPU (*ie*, 4 June 2006) slipped by. In these circumstances, it would be illusory as at May 2006 to take into account the possibility of an extension of the delivery date to beyond the PCSB cancellation date of 21 June 2006.

127 At the risk of repetition, it is clear that until PCSB gave its approval on the change in design to the multi-tier modular system in August 2006, the standing instructions to Oderco since the 13 April 2006 were not to stop work (see [67] above). Put another way, KSE did not instruct Oderco on the change in design to the multi-tier modular system until after PCSB gave its approval in August 2006. GBC's e-mail of 16 June 2006 is clear on this point. The e-mail trail showed that GBC started e-mailing Oderco again on 7 June 2006. On 10 June 2006, Oderco claimed that nothing was outstanding from it and that the construction of the WPU was progressing well. Oderco also stated that the "changes made following its last meeting in Singapore resulted in an additional sum of US$800,000". On 16 June 2006, KSE wrote to object to the alleged changes: [note: 78]

> What is the change order letter for? This was never brought up in our meeting as we did not ask for any change except for the mast design. This is ridiculous.
>
> We agree to mast change to telescopic design as discussed during the meeting in Singapore.

128 On 19 June 2006, Oderco's updated construction schedule showed the delivery date as 21 August 2006 based on the original specifications. [note: 79] GBC visited Oderco's yard between 27 June 2006 and 3 July 2006. During that site visit, Oderco updated its construction schedule to show delivery on 4 September 2006, and that prompted Gwen to ask GBC to check with Oderco for an explanation. [note: 80] On 20 August 2006, Oderco corrected the delivery date to end-August 2006 based on the original specifications. [note: 81]

129 Two change orders were approved by PCSB. The first, which pertained to the bootstrap mast, was made on 9 July 2006; [note: 82] the second, which was for the multi-tier modular system, was approved by PCSB in August 2006.

130 As stated, the change order for the multi-tier modular system in August 2006 did not excuse KSE's earlier breach of its "all reasonable endeavours" obligation, which was then still ongoing. *Keating on Construction Contracts* (Sweet & Maxwell, 9th Ed, 2012) at para 9-051 explains:

> Extras ordered after the contractor is already in culpable delay will not normally deprive the employer of its right to damages since,
>
> > "if a contractor is already a year late through his culpable fault, it would be absurd that the employee should lose his claim for unliquidated damages just because, at the last moment, he orders an extra coat of paint [*per* Lloyd LJ in *McAlpine Humberoak v McDermott International* (1992) 58 BLR 1 at 35].

131 KSE's expert, Mr Wills, referred to his critical path analysis to try to persuade the court that KSE was not at fault. According to him, even though KSE did not do anything to shorten the September 2006 delivery date of the VFD (see [119] above), this was not consequential because the multi-tier modular system had to be constructed first before the VFD could be installed. Mr Wills is a contract planning expert in the rig construction business and is very familiar with the use of critical path analysis for contract planning purposes. However, contract planning is different from doing a retrospective delay analysis, and there is no evidence of Mr Wills' expertise or experience in *retrospective* critical path analysis. I find the commentary by Robert Fenwick Elliot ("Mr Elliot"), *Building Contract Litigation* (Longman Group UK Ltd, 4th Ed, 1993) on the use of critical path analysis as evidence of retrospective delay to be helpful. Mr Elliot commented (at p 214) that in order to identify what matters were causative of the delay, it was necessary to make some sort of retrospective critical path analysis. He further observed (at p 204):

> There is a danger of assuming that those proficient in planning will necessarily have any experience in the different task of retrospective delay analysis.

132 In addition to requiring the services of a planning expert with expertise in retrospective delay analysis, retrospective critical path analysis also requires, as Mr Elliot pointed out (at pp 204–205): (a) extensive factual details, which will have to be provided by the people who were involved with the contract at the material time; and (b) legal expertise to ensure that the analysis is carried out in a way which is acceptable to the courts.

133 Extensive factual details from the people involved with the contract at the material time (Mr Elliot's point in (a) above) was not information that was available to Mr Wills. Extensive factual details are required because any change could affect the critical path of a project. Take, for instance, the situation where, upon a site inspection, material on site is found to be defective and has to be sent back, with new material having to be ordered and delivered to the site. In such a scenario, this activity would have to be inserted in the project plan, thereby changing the route of the critical path of the project, with the new material to be delivered being on the critical path instead.

134 For the reasons stated above, I do not accept Mr Wills' opinion that the change order for the multi-tier modular system was on the critical path since May 2006. Besides, this opinion contradicts KSE's consistent position taken on 13 May 2006 and 16 June 2006 on the same matter. In May 2006, KSE's standing instructions to Oderco were to continue to construct the WPU based on the original specifications. KSE's position was still the same in June 2006. That was why when Oderco submitted a "change order letter" in relation to the multi-tier modular system, KSE wrote to Oderco on 16 June 2006 to object (see [127] above). Instead of Mr Wills' opinion, I accept Mr Craven's evidence that the delay in the construction of the WPU was due to the late ordering and delivery of critical WPU equipment rather than due to the second design change in relation to the multi-tier modular system. I should clarify that *vis-à-vis* the first design change involving the bootstrap mast (see [129] above), both parties' experts agreed that this design change had limited overall delay impact. The last change order for skidding jacks was made in November 2006, and for this, Oderco required two additional months after November 2006 for completion. This last change order did not result in a further time extension from PCSB. All the same, even after two months (counting from November 2006), the WPU was still nowhere near completion for delivery to PCSB.

135 Mr Chan's submission – *viz*, that KSE's commercial sacrifice in agreeing to pay for the multi-tier modular system (PCSB had refused to pay for this change) was tantamount to KSE buying more time from PCSB to complete the construction and delivery of the WPU – does not assist KSE's case. I find that the extra two months required for the multi-tier modular system change order given in August

2006 was a neutral delay factor. This delay factor was "neutral" in the sense that the extra time needed made little difference to the overall delay because the PCSB project was already delayed by KSE's breach of clause 6.2 of the JVA, which breach commenced even before the PCSB first delivery date of 21 May 2006 and persisted thereafter. The effective cause of delay to the PCSB project was KSE's breach of clause 6.2 by reason of its delay in appointing a qualified person to be stationed at the Oderco's yard from the outset (especially after PCSB's first site visit on 8 and 9 February 2006) to manage the PCSB project (via monitoring the Oderco Contract) as well as its failure to monitor and follow up on Oderco's procurement of critical WPU equipment.

136 The PCSB last delivery date, *ie*, 26 October 2006, was also missed. PCSB did not terminate the PCSB Contract until almost six months later on 12 April 2007. It is apparent from the documents that the cancellation of the PCSB Contract took place shortly after a site meeting that was scheduled in April 2007 at Oderco's yard was called off.

137 As stated above, the real criticism is with KSE's mismanagement of the PCSB project *via* the Oderco Contract. The PCSB project was already irremediably delayed by the time of the PCSB first delivery date of 21 May 2006, such that subsequent steps taken by KSE in July 2006 to meet the PCSB last delivery date, right until the time of BRE's termination of the JVA, were futile. In my judgment, on the balance of probabilities, KSE failed to use all reasonable endeavours to meet the relevant deadlines for the completion and delivery of the WPU.

***(4) KSE's arguments as to its purported efforts on the PCSB project***

138 For completeness, I will now address the list of purported efforts which KSE (in its closing submissions) claimed it expended on the PCSB project. KSE divided up the entire project into four periods, and provided a list of what it did for the project. KSE also argued that the present action by BRE was an afterthought, seeing that Yazid, BRE's Managing Director, had been appreciative of KSE's efforts, and that the criticisms levied against KSE were only raised in this action. I note that most of the efforts listed by KSE pertained to the financing of the PCSB project, and this came well *after* the June 4 date. Putting aside KSE's efforts in financing the project, it is evident that KSE did very little. I have already found that the PCSB project was irremediably delayed as a consequence by the time of the PCSB first delivery date of 21 May 2006.

139 KSE contended that in February 2006, it assisted Oderco to source for alternative suppliers for the BOP (see [118] above). However, KSE's supplier in China was not used in any case as Oderco replied on 22 February 2006 stating that it had found suppliers for the BOP. There is no admissible evidence as to when the purchase order for the BOP was issued since no evidence was led by KSE to prove this document despite BRE's objection on authenticity. Apart from helping Oderco to source for the BOP, there is no evidence that KSE also helped Oderco to source for the VFD. I have already mentioned (at [119] above) that the 12 February PO for the VFD disclosed a seven-month delivery period (*ie*, delivery in September 2006). Yet, KSE simply left that September 2006 delivery period alone.

140 I turn now to KSE's point that it hired Connolly on 2 July 2006, and Francis in December 2006 (after Connolly resigned), to go on site to Oderco's yard to "chase" Oderco. As stated earlier, Connolly was only hired very late in the day on 2 July 2006, which was *after* the June 4 date had passed. Moreover, both Connolly [note: 83] and Francis [note: 84] complained that they found their duties too heavy to cope with and asked for additional help. However, KSE failed to provide extra manpower to assist Connolly and Francis.

141 KSE also raised the point that it had insisted on air-freight delivery for some critical WPU

equipment so as to reduce delay. It had made several cash advances to ease Oderco's cashflow problems and expedite delivery of the WPU (see [111] above). In the result, the BOP and handling equipment were air-freighted and delivered to Oderco's site on 23 October 2006, [note: 85] which was earlier than if Oderco had been left to raise money on its own to purchase these items. Nonetheless, the BOP arrived a few days before the PCSB last delivery date. I also note that GBC was still being advised by Connolly on 26 October 2006 that a number of items of equipment needed for the WPU had still not been purchased by Oderco and that those that had been ordered were awaiting payment. Connolly did not think that Oderco had the funds to make payment and was thus trying hard to persuade GBC to release payment to Oderco so that Oderco could complete the purchases. Connolly also stated that Oderco had made a big effort in the PCSB project after receiving payment previously. Connolly stated in no uncertain terms that the project was in desperate need of financial injection. By then, KSE was fully aware that the PCSB last delivery date of 26 October 2006 was in jeopardy. GBC's response was that although he would advance US$500,000 to assist Oderco in its payment for the VFD, the choke and kill manifold and other small items, he would not release payment for the BOP and mud pump until all certification and documents were in accordance with the terms of the Oderco Contract.

142 While KSE might have made some efforts at some points in the PCSB project, these were too little and came too late, and thus ended up being futile. In fact, delays to the fabrication of the structure of the WPU and the procurement and installation of the necessary WPU equipment continued to occur even after PCSB cancelled the PCSB Contract in April 2007.

### *(5) KSE's arguments on "inevitable failure"*

143 KSE also raised the issue of causation and further argued "inevitable failure". Mr Chan submitted that there was no causal link between KSE's breach and BRE's alleged loss arising from the termination of the PCSB Contract. The authors of *The Law of Contract in Singapore* (Academy Publishing, 2012) have commented on the importance of causation in a claim for damages for breach of a non-absolute obligation as follows (at para 22.012):

> Where contractual obligations are found to be *relative* in nature, as with obligations to take "reasonable care" in the performance of a contractual promise, causation issues will come more obviously to the fore, just as they do in connection with establishing liability in torts such as the tort of negligence.
>
> [emphasis in original]

144 As stated earlier, the trial of this action has been bifurcated. Accordingly, causation in the context of damages for breach of contract is for another day. BRE has put forward various heads of claim. It is for BRE to prove that these heads of claim are recoverable and the quantum which should be awarded for them at an assessment of damages.

145 Turning to Mr Chan's argument on "inevitable failure" from a liability standpoint, his argument is as follows. While KSE had an obligation to use all reasonable endeavours, even the use of all reasonable endeavours would not have successfully procured the construction and delivery of the WPU by the relevant delivery dates or within a reasonable time thereafter. Mr Chan submitted that the onus of proof was on BRE to prove that the steps which it was said KSE should have taken would have succeeded in procuring the construction and delivery of the WPU in a timely manner. To illustrate his "inevitable failure" argument, Mr Chan submitted that even if KSE had appointed Connolly from the outset of the Oderco Contract, it would not have made any difference to the outcome because Samir was uncooperative. KSE could not be liable to BRE for the cancellation of the PCSB

Contract because such cancellation would have occurred *regardless* of Connolly's appointment, or otherwise, regardless of KSE's breach of clause 6.2 of the JVA. I make two points on Mr Chan's "inevitable failure" argument. First, it is quite clear on the persuasive authority of *Atmospheric Diving Systems* (see [43] above), which I adopt, that the inevitability of failure would not excuse KSE from its obligation under clause 6.2 of the JVA; rather this goes to the issue of damages. Put another way, evidence of inevitable failure is relevant to the issue of causation in the context of damages for breach of contract, but not to the issue of liability. The onus of proof is on KSE and not BRE to show that failure was inevitable (see *Atmospheric Diving Systems* at [64] and [70]). Second, my findings and conclusions on the issues of liability are an obstacle to KSE raising the defence of inevitable failure successfully.

### *(6) Repudiation*

146 KSE's breach of clause 6.2 of the JVA acquired a repudiatory character entitling BRE to rescind the JVA. It follows that BRE is entitled to succeed on the liability issue. The relevant test to apply in deciding whether a party's delay in fulfilling contractual obligations is so serious as to entitle the aggrieved party to rescind the contract is whether the delay was such as to frustrate the commercial purpose of the venture – (see *Universal Cargo Carriers Corporation v Citati* [1957] 2 QB 401).

147 On the findings made above, BRE's termination of the JVA was not wrongful. The delays resulting in the non-completion and non-delivery of the WPU assumed a gravity that went to the root of the JVA. I am also satisfied that BRE was deprived of substantially the whole benefit of the JVA which the parties intended to confer upon themselves. Accordingly, I hold that BRE was entitled to rescind the JVA.

### *(7) KSE's counterclaim*

148 Following my decision on liability in favour of BRE, KSE's counterclaim for wrongful repudiation is dismissed. I should add that there is nothing to KSE's point that the loss of the PCSB Contract was due to BRE's own breach. KSE was not able to rebut BRE's evidence refuting the allegations in PCSB's termination letter that BRE had not complied with the other provisions in the PCSB Contract (apart from the provisions relating to the delivery of the WPU).

149 I now turn to KSE's second argument that BRE was in breach of clause 6.5 of the JVA, which required BRE to ensure that the PCSB Contract was not cancelled, and clause 6.6 of the JVA, which required BRE to indemnify KSE for losses arising in connection with the PCSB Contract (see [26] above). This second argument is untenable for two simple reasons. First, the indemnity in clause 6.6 only applies to claims by a third party against KSE. Second, KSE's argument offends the fundamental principle that a person cannot be permitted to take advantage of his own wrong. To illustrate this principle, consider the following narrative which is culled from the second argument: KSE commits a breach of clause 6.2 of the JVA; as a consequence of this breach, BRE is unable to get PCSB to grant a further extension of time under the PCSB Contract and, hence, is said to have not performed its obligations under clause 6.5; at the same time, BRE commits a breach of contract in relation to PCSB for non-delivery of the WPU. The aforesaid principle does not permit KSE to assert that BRE has committed a breach of clause 6.5, or that KSE is entitled to be indemnified for loss arising from BRE's breach of the PCSB Contract as this latter breach is the result of KSE's own wrongdoing.

150 In the light of my decision accepting BRE's claim for repudiatory breach, KSE's counterclaim against BRE for the unpaid shareholder's contribution of US$400,000 to BRO (see [3] above) also fails.

**Conclusion**

151 For the reasons stated, there is judgment in favour of BRE on liability with costs. KSE's counterclaim is dismissed with costs. BRE's claim for damages is to be assessed by the Registrar. The question of interest, if any, is also reserved to the Registrar.

---

[note: 1] 2AB Part 1 at p 30.

[note: 2] 4AB 1461.

[note: 3] 5AB 1683.

[note: 4] 5AB 1742.

[note: 5] 3AB 901.

[note: 6] Statement of Claim at para 16.

[note: 7] Statement of Claim at para 18.

[note: 8] Transcripts of Evidence dated 15 November 2011, p 116.

[note: 9] Experts' Joint Statement p 5, Agreed Opinion at para 16; Transcripts of Evidence dated 28 March 2012 at pp 133–134 and p 58.

[note: 10] KSE's Opening Statement at para 45.

[note: 11] Transcript of Evidence dated 23 November 2011, pp 20–21; 23, 25–26.

[note: 12] 7AB 2488.

[note: 13] 7AB 2701.

[note: 14] 7AB 2724.

[note: 15] 8AB 3090.

[note: 16] 7AB 2657.

[note: 17] 10AB 3691.

[note: 18] 10AB 3682.

[note: 19] 10AB 3698.

[note: 20] 5AB 1742.

[note: 21] KSE's closing submissions at para 109.

[note: 22] 7AB 2370.

[note: 23] KSE's closing submissions at para 84.

[note: 24] 5AB 1742.

[note: 25] 5AB 1727.

[note: 26] 7AB 2361.

[note: 27] Exhibit D3.

[note: 28] 4AB 1464.

[note: 29] 4AB 1232.

[note: 30] KSE's closing submissions at p 16, paras 60–63.

[note: 31] KSE's closing submissions at p 26, para 114.

[note: 32] Transcripts of Evidence dated 26 March 2012 at p 37.

[note: 33] 9AB3465.

[note: 34] Transcripts of Evidence dated 26 March 2012 at p 36.

[note: 35] 10AB 3622.

[note: 36] 10AB 3644.

[note: 37] 8AB 3084.

[note: 38] 10AB 3824 at 3826.

[note: 39] 12AB 4111 at 4113.

[note: 40] 12AB 4128.

[note: 41] 12AB 4153.

[note: 42] Transcripts of Evidence dated 26 March 2012 at p 41.

[note: 43] Transcripts of Evidence dated 28 March 2012 at p 88

[note: 44] Transcripts of Evidence dated 28 March 2012 at pp 65–66.

[note: 45] Transcripts of Evidence dated 28 March 2012 at pp 38–40.

[note: 46] 18AB 6258.

[note: 47] 16AB 5583.

[note: 48] 16AB 5753

[note: 49] Expert' Joint Statement at p 4, Agreed Opinion 15.

[note: 50] Transcript of Evidence dated 28 March 2012 at p 24.

[note: 51] Transcripts of Evidence dated 28 March 2012 at pp 90–91.

[note: 52] Craven's AEIC at p 17 para 34.

[note: 53] Craven's AEIC at p 13 para 26.

[note: 54] 7AB 2707.

[note: 55] 9AB 3472.

[note: 56] Andrias' AEIC at para 7.

[note: 57] 13AB 4544.

[note: 58] Transcripts of Evidence dated 27 March 2012 at p 25.

[note: 59] Exhibit D5 tendered on 27 March 2012.

[note: 60] Transcripts of Evidence dated 28 March 2012 at p 37.

[note: 61] Transcripts of Evidence dated 28 March 2012 at pp 66–68.

[note: 62] 10AB 3708.

[note: 63] 10AB 3708.

[note: 64] 10AB 3722.

[note: 65] 10AB 3569 at 3572.

[note: 66] Transcripts of Evidence dated 26 March 2012 at p 28.

[note: 67] Transcripts of Evidence dated 28 March 2102 at p 124.

[note: 68] Transcripts of Evidence dated 28 March 2012 at p 114.

[note: 69] Transcripts of Evidence dated 26 March 2012 at p 26.

[note: 70] Mr Wills' report at p 66, [257], Bundle of AEICs, Vol 10 of 11.

[note: 71] Transcripts of Evidence dated 26 March 2012 at pp 39-40.

[note: 72] Transcripts of Evidence dated 26 March 2012 at p 43.

[note: 73] 12AB 4246.

[note: 74] 12 AB 4143.

[note: 75] 12AB 4243.

[note: 76] 12AB 4289.

[note: 77] 12AB 4304.

[note: 78] 12AB 4393.

[note: 79] 12AB 4419 at 4431.

[note: 80] 13AB 4519 and 4521.

[note: 81] 13AB 4442.

[note: 82] 13AB 4586.

[note: 83] 15AB 5381.

[note: 84] Transcripts of Evidence dated 27 March 2012, pp 37–42.

[note: 85] 17AB 6244.