KS Energy Services Ltd *v* BR Energy (M) Sdn Bhd
[2014] SGCA 16

Case Number	: Civil Appeal No 46 of 2013
Decision Date	: 26 February 2014
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Alvin Yeo SC, Chan Hock Keng, Alma Yong and Benjamin Fong (WongPartnership LLP) for the appellant; Philip Jeyaretnam SC, Ling Tien Wah, Koh Kia Jeng, Ng Hui Min and Germaine Tan (Rodyk & Davidson LLP) for the respondent.
Parties	: KS Energy Services Ltd — BR Energy (M) Sdn Bhd

CONTRACT

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2013] 2 SLR 1154.]

26 February 2014 Judgment reserved.

V K Rajah JA (delivering the judgment of the court):

Introduction

1 This is an appeal against the decision of the High Court in *BR Energy (M) Sdn Bhd v KS Energy Services Ltd* [2013] 2 SLR 1154 ("the Judgment"), in which the judge ("the Judge") found the appellant, KS Energy Services Ltd ("KSE"), liable for breaching a joint venture agreement which it had entered into with the respondent, BR Energy (M) Sdn Bhd ("BRE"). Specifically, the Judge found that KSE had breached its obligation to use "all reasonable endeavours" to procure the construction and delivery of an oil rig known as a workover pulling unit ("WPU") by a prescribed deadline (see the Judgment at [137]).

2 This case provides an opportunity to clarify the content of provisions which impose an obligation on a party to exercise "endeavours" in a particular regard ("'endeavours' clauses" or "'endeavours' obligations" for short). It also illustrates how a party bound by such a provision might satisfy its obligations in the face of dynamic (and often unforeseen) circumstances, unfamiliar settings and sometimes intransigent third parties. "Endeavours" clauses are often found in contracts, but infrequently considered by the courts here. To facilitate our discussion of these clauses, we shall, where appropriate in this judgment, refer to: (a) a party who is bound by such a clause as an "obligor"; (b) a party who is to receive the benefit of such a clause as an "obligee"; and (c) the outcome which the obligor is to exercise "endeavours" to procure as the "contractually-stipulated outcome".

3 "Endeavours" clauses are often of considerable importance in commercial settings. As this court noted in *Ng Giap Hon v Westcomb Securities Pte Ltd and others* [2009] 3 SLR(R) 518, the doctrine of good faith remains a fledging doctrine in both English and Singapore contract law. Until and unless the theoretical foundations and architecture of the doctrine are settled, our courts cannot imprecisely endorse an implied duty of good faith in the local context (at [47]–[60]). Parties to a contract governed by Singapore law therefore do not ordinarily have either the burden or the benefit of a general obligation to conduct themselves in accordance with an ascertainable standard of commercial

behaviour. To address this lacuna, express "endeavours" clauses are often introduced into written contracts to regulate the parties' obligations. However, as will be seen, notwithstanding the relative prevalence of such clauses, there remains a degree of uncertainty as to what legal responsibilities they might entail. As our discussion in this judgment will illustrate, the wealth of case law from across the various common law jurisdictions provides some degree of insight, but ultimately, each case will have to be resolved on its own facts. The same "endeavours" formulation, when used in different factual matrices, does not *necessarily* have the same or a similar meaning or implication.

The background

4 The facts of this case are as follows. BRE is a Malaysian company which provides services in the oil and gas industry. On or around 11 August 2005, BRE submitted a tender to Petronas Carigali Sdn Bhd ("PCSB") for the provision of a WPU. BRE was supported in this tender submission by an oilfield services provider known as China Oilfield Service Limited ("COSL"), for which it was the exclusive Malaysian representative. The WPU was to be based on an existing design, and was to be constructed by a rig construction company known as RG Petro-Machinery Co Ltd ("RG"). The construction of this WPU will hereafter be referred to as "the WPU project" where appropriate.

5 BRE's tender submission was successful. On 21 November 2005, PCSB issued a letter of award to BRE ("the Letter of Award"), and a contract between them ("the PCSB contract") came into existence. Under the terms of the Letter of Award, the WPU was to be delivered to PCSB in Labuan, East Malaysia, no later than 120 days from the date of award, *ie*, by 21 March 2006. Unbeknownst to PCSB, COSL and RG had pulled out of the WPU project sometime in October 2005 because RG would not have been able to fulfil the order. BRE was still keen on pursuing the WPU project, but needed a new partner which could arrange for a rig builder to replace RG. COSL's Director of Marketing, Lim Hong Khun ("LHK"), sought to assist BRE in his private capacity. He contacted a business acquaintance, Tan Fuh Gih ("TFG"), an Executive Director of KSE, to seek KSE's assistance to find a rig builder for BRE.

6 KSE is in the business of chartering capital equipment in the oil and gas industry. It would appear that BRE and KSE (collectively referred to hereafter as "the Parties" where appropriate) did not have a pre-existing relationship, and KSE's involvement in the WPU project was solely the result of LHK's introduction. The Parties searched for alternative rig builders in October and November 2005, but these efforts came to nought. There was a great demand for rigs at the time, and it was difficult to find a rig builder which could build the WPU within the time frame imposed by PCSB at a viable cost. A rig builder known as Oderco Inc ("Oderco") was eventually identified by one of KSE's Middle Eastern contacts sometime in late November 2005 after the Letter of Award was issued. On 29 November 2005, TFG e-mailed LHK to tell him that he had just returned from Oderco's yard in the United Arab Emirates, and that Oderco had given a quotation with delivery in Abu Dhabi estimated at five months. Other rig builders had estimated delivery within eight to ten months.

7 On 30 November 2005, BRE's Chief Executive Officer, Abdul Yazid ("Mr Yazid"), wrote to PCSB. He informed PCSB that RG was no longer involved in the WPU project and nominated Oderco as an alternative rig builder. PCSB was assured that the WPU would be constructed according to the specifications in the tender, and was also informed that construction and delivery would take six months. PCSB replied on 8 December 2005 acceding to the variation of the deadline for delivery to 180 days from 21 November 2005, *ie*, by 21 May 2006, effectively giving BRE five months and 13 days from 8 December 2005 to perform. For each day thereafter, liquidated damages of US$4,000 per day (up to a maximum of 30 days) were payable. Further, PCSB could terminate the PCSB contract for late delivery after 20 June 2006.

8 The pressure of time appears to have been a major concern for the Parties right from the outset, as the correspondence between them indicates unease by both of them about the short time frame for completing the WPU as well as the liquidated damages which PCSB was entitled to impose under the PCSB contract. Nevertheless, the Parties were committed to pursuing the WPU project and entered into a joint venture agreement ("the JVA") on 13 December 2005. The structure of their relationship was described in the preamble to the JVA as follows: [note: 1]

BACKGROUND

(A) BRE has been awarded a contract by [PCSB] to provide a [WPU]. …

(B) BRE and [KSE] intend to incorporate a company in Labuan, Malaysia, under the name "BR Offshore Services Limited" (JVC) and hold shares in the JVC.

(C) [KSE] will arrange for the construction of the [WPU] and sell it to the JVC which will in turn charter it to BRE for BRE to fulfil the contract from [PCSB].

…

9 Under clause 3 of the JVA, the first order of business for the Parties was to secure the incorporation of the joint venture company mentioned in the preamble to the JVA, BR Offshore Services Ltd ("BRO"). The Parties defined the incorporation of BRO as "Completion" [note: 2] in clause 1.1 of the JVA. Under clause 7, KSE was to next proceed to procure financing for BRO to acquire the WPU. Clause 6 sets out the details of the Parties' subsequent obligations as follows: [note: 3]

PROCUREMENT OF WPU, CHARTER AGREEMENT AND [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 [BRO] 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 the WPU is constructed and ready for delivery in Abu Dhabi or other location specified by [KSE] within six months after the Charter Agreement is executed.***

6.3 [KSE] shall sell the WPU to [BRO] and [BRO] 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 [BRO] to [KSE] upon [BRO] taking delivery of the WPU.

6.4 …

6.5 BRE shall at all times comply with its obligations under the Charter Agreement and the [PCSB contract] and shall ensure the [PCSB contract] remains valid, binding and enforceable on [PCSB].

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 [PCSB contract] and their respective performance.

[emphasis added in bold italics and underlining]

It is this "all reasonable endeavours" provision in clause 6.2 of the JVA that the Parties vigorously join issue over.

10 On 18 December 2005, five days after the JVA was entered into, Mr Yazid signed a document ("the Authorisation Document") authorising KSE to proceed to contract with Oderco for the construction of a WPU with "Delivery – 6 months ex works". [note: 4] On 21 December 2005, KSE entered into a contract with Oderco ("the Oderco contract"). Clause B(3) of the Oderco contract provided that the time of shipment of the WPU would be "Ex-works basis within 165 days from date of Contract", [note: 5] *ie*, by 4 June 2006. This was well after the deadline of 21 May 2006 under the PCSB contract and immediately exposed BRE to liquidated damages under that contract even if Oderco performed as agreed.

11 BRO was only incorporated on 3 March 2006. On 10 March 2006, KSE and BRO entered into a contract under which KSE agreed to sell and BRO agreed to buy the WPU ("the BRO contract"). Clause B(3) of the BRO contract provided that the time of shipment of the WPU would be "Ex-works basis within 6 calendar months from 18th December 2005", [note: 6] *ie*, by 17 June 2006.

12 Also on 10 March 2006, BRE entered into the charter agreement with BRO that was provided for by clause 6.1 of the JVA ("the Charter Agreement"). Clause 3.3 of the Charter Agreement was *inconsistent* with both the Oderco contract and the BRO contract in that it provided that "[BRO] shall use all reasonable endeavours to procure the WPU is constructed and ready for delivery in Abu Dhabi or another location specified by [BRO] within six months after the date of this agreement", [note: 7] *ie*, by 9 September 2006. However, that clause was *consistent* with clause 6.2 of the JVA, which provided that "[KSE] shall use *all reasonable endeavours* to procure the WPU is constructed and ready for delivery in Abu Dhabi or other location specified by [KSE] within six months after the Charter Agreement is executed" [note: 8] [emphasis added].

13 To summarise, the various deadlines are as follows:

(a) under the PCSB contract, BRE had an absolute obligation to deliver the WPU to PCSB in Labuan no later than 21 May 2006 in order to avoid liquidated damages, and no later than 20 June 2006 in order to avoid termination;

(b) under the JVA, KSE had to use all reasonable endeavours to procure the construction and delivery of the WPU (in Abu Dhabi or at a location of its choosing) within six months of the Charter Agreement being executed (*ie*, by 9 September 2006);

(c) the Authorisation Document provided for delivery "6 months ex works"; [note: 9]

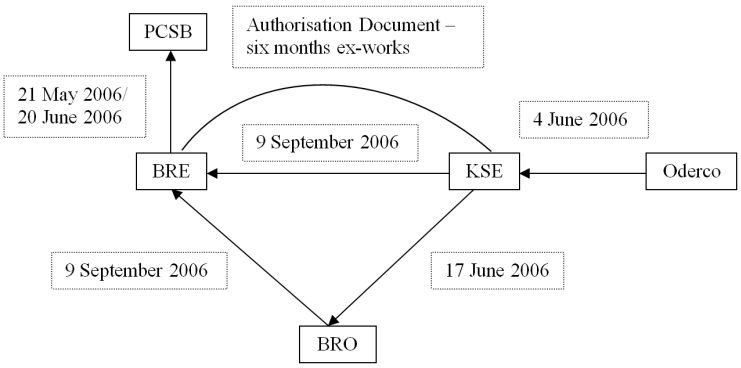
(d) under the Oderco contract, Oderco had an absolute obligation to have the WPU ready for shipment on an ex-works basis by 4 June 2006;

(e) under the BRO contract, KSE had an absolute obligation to have the WPU ready for shipment on an ex-works basis by 17 June 2006; and

(f) under the Charter Agreement, BRO had to use all reasonable endeavours to procure the

construction and delivery of the WPU by 9 September 2006.

These deadlines are illustrated in the diagram below:



14 Oderco was unable to meet the 4 June 2006 deadline stipulated in the Oderco contract. PCSB granted numerous extensions of time for the completion of the WPU, namely:

(a) from 21 May 2006 to 25 July 2006;

(b) from 25 July 2006 to 4 September 2006;

(c) from 4 September 2006 to 6 October 2006; and

(d) from 6 October 2006 to 26 October 2006.

15 Oderco did not meet any of these revised deadlines. PCSB eventually wrote to BRE to terminate the PCSB contract on 12 April 2007. Notwithstanding PCSB's termination, the Parties continued with the construction of the WPU. On 20 August 2007, KSE terminated the Oderco contract with BRE's consent, with a view to moving the partially-completed WPU to its own yard in Dubai, which it had recently acquired. This was accomplished in early November 2007.

16 The Parties' relationship soured sometime in the latter half of 2007. BRE wished to sell its shares in BRO to a company owned by BRE's founder and financier, Wee Khen Peng, but KSE would not allow BRE to do so unless it satisfied an obligation under clause 3.6A of the JVA to provide a shareholders' loan of US$400,000 to BRO. On 19 December 2007, KSE wrote to BRO seeking payment of US$7,784,385, which it claimed was due as a milestone payment under the BRO contract. In response, BRO wrote to BRE seeking the US$400,000 shareholders' loan and a further loan of US$3,700,000 to enable it to make payment to KSE. BRE replied to BRO on 26 December 2007 declining to extend either loan and expressing the view that KSE was not entitled to seek payment because it had breached the JVA by failing to complete the WPU. On the same day, BRE wrote to KSE purporting to terminate the JVA for KSE's failure to deliver the WPU "on time" [note: 10] under the terms of the JVA and the BRO contract.

Summary of the Parties' pleadings

BRE's statement of claim

17 Contrary to the express wording of clause 6.2 of the JVA, BRE pleaded in its statement of claim that the relevant date by which KSE was to deliver the WPU was 17 June 2006, and not 9 September 2006: [note: 11]

13. The effect of the Authorisation [Document] being executed on 18 December 2005 and of Clause B(3) of the [BRO contract] was to fix the delivery date for the WPU as 17 June 2006, and/or to vary by implication the calculation for delivery set out in Clause 6.2 of the JVA. The calculation in Clause 3.3 of the Charter Agreement of the delivery date as being in effect in September 2006 was a mistake. It was the common intention of the parties at all material times up to and including the execution of the Charter Agreement that the WPU was to be delivered by 17 June 2006. In the circumstances, the Charter Agreement should be rectified by deleting from Clause 3.3 the words "*within six months after the date of this agreement*" and substituting the words "*within six months from 18 December 2005*". [emphasis in original]

18 BRE asked for the Charter Agreement to be rectified to reflect a deadline of 17 June 2006, but did not do so for the JVA. BRE also pleaded that KSE's obligation to use "all reasonable endeavours" was a continuing one: [note: 12]

14. In the premises, [KSE] was obliged to use all reasonable endeavours to procure that the WPU was constructed and ready for delivery within 6 months of 18 December 2005 i.e. by 17 June 2006 (alternatively, if the Charter Agreement is not rectified, by 9 September 2006). Further, it was an implied term that in the event of a delay in delivery, [KSE] would continue to use all reasonable endeavours to procure delivery of the WPU.

19 BRE then pleaded that in breach of clause 6.2 of the JVA, KSE "failed to use all reasonable endeavours to procure the construction and delivery of the WPU by 17 June 2006, or by 9 September 2006, or by the extended delivery dates, in particular by the final delivery date of 26 October 2006", [note: 13] in that: [note: 14]

i. The entire project was poorly organised, mismanaged, and lacking in proper professional supervision on the part of [KSE].

ii. [KSE] failed to take any or any reasonable steps to select a rig builder that had or would deploy adequate resources, including manpower, management and supervision, to construct the WPU on time.

iii. [KSE] failed to take any or any reasonable steps to monitor and/or ensure that all necessary equipment, e.g. Blow out Preventer ("**BOP**"), Variable Frequency Drive ("**VFD**") and Top Drive, choke and kill components, and high pressure piping, were ordered by Oderco and/or delivered to the construction yard in a timely manner.

iv. [KSE] failed to take any or any reasonable steps to monitor the progress of the construction of the WPU by Oderco and/or to ensure that the construction of the WPU was proceeding on schedule and would be delivered on time.

v. [KSE] failed to take any or any reasonable steps to ensure that the rig manager appointed by [KSE] was getting the necessary information and/or updates from Oderco on Oderco's progress.

vi. [KSE] failed to take any or any reasonable steps to ensure that adequate and/or qualified staff were committed or sent to monitor and/or supervise Oderco and/or had the necessary experience to monitor and/or supervise Oderco.

vii. [KSE] failed to take any or any reasonable steps to ensure that Oderco provided the

necessary man power [*sic*] and/or resources to support and complete the construction of the WPU on schedule and ensure its timely delivery.

viii. [KSE] failed to take any or any reasonable steps to require Oderco to catch up or otherwise remedy its delays.

ix. [KSE] failed to take any or any reasonable steps to find another rig builder to construct and deliver the WPU when it became obvious that Oderco was likely not to be able to deliver the WPU on schedule.

[emphasis in bold in original]

20 BRE further alleged that it was put in breach of its own obligation to deliver the WPU under the PCSB contract because of KSE's failure to satisfy clause 6.2 of the JVA, leading to PCSB's termination of the PCSB contract. Consequently, BRE claimed damages for the following losses: [note: 15]

i. Loss of profits and/or dividend payouts and/or incurred expenses which would have been paid to and/or earned by [BRE] under the terms of the PCSB Contract, the Charter Agreement and the JVA, … namely:

a. 35% of [the] revenue from the PCSB Contract less maintenance and operating expenses of the WPU …

b. 40% (rising to 50% after two years) of the net profit after tax … of BRO for the duration of the PCSB Contract …

ii. Loss of [BRE's] 50% share of the residual value of the WPU at the conclusion of the PCSB Contract.

KSE's defence

21 KSE denied BRE's claim that the relevant delivery date under clause 6.2 of the JVA had been varied and that it was under a continuing obligation to use all reasonable endeavours to procure the construction and delivery of the WPU even after the deadline for completing the WPU had lapsed. It maintained that the relevant delivery date was six months from the execution of the Charter Agreement. KSE also denied breaching clause 6.2 of the JVA. It pleaded that:

(a) it was not solely responsible for the organisation, management and/or supervision of the construction of the WPU;

(b) it had not made any representations about Oderco's suitability;

(c) it had sent constant reminders to Oderco to expedite the construction of the WPU and to ensure that the WPU would be completed on time;

(d) it would not have been possible to engage another rig builder in place of Oderco when it became obvious that Oderco was unlikely to be able to deliver the WPU on schedule;

(e) it had made the necessary milestone payments to Oderco;

(f) it had made payments directly to Oderco's suppliers to ensure that all equipment and

materials necessary for the construction of the WPU ("critical equipment") were delivered to Oderco for the construction of the WPU; and

(g) it had arranged for some of the critical equipment to be airfreighted to Oderco to shorten the delivery time.

22 KSE further pleaded that in any event, it was indemnified against all claims by clause 6.6 of the JVA. It also pointed out that PCSB had cited other reasons in addition to late delivery for the termination of the PCSB contract, and it therefore could not be concluded that its alleged breach of clause 6.2 of the JVA caused the termination.

KSE's counterclaim

23 KSE averred that BRE was itself in breach of the JVA on the following bases:

(a) BRE's termination of the JVA was wrongful and constituted a repudiatory breach of the JVA;

(b) BRE breached clause 6.5 of the JVA in failing to: (i) comply with the PCSB contract; and (ii) ensure that the PCSB contract remained valid, binding and enforceable on PCSB; and

(c) BRE breached clause 3.6A of the JVA in failing to contribute the sum of US$400,000 to BRO as a shareholders' loan.

Accordingly, KSE pleaded for damages to be assessed for the losses arising from these breaches.

BRE's defence to KSE's counterclaim

24 In response to KSE's counterclaim, BRE denied being in breach of the JVA. It addressed the issue of the US$400,000 shareholders' loan by averring that neither of the Parties had contributed the loan at Completion as required by clause 3.6A of the JVA, and that neither of them had considered the other party's failure to contribute the loan to be a breach of the JVA.

25 BRE also denied that its alleged breaches had caused KSE loss and damage. Moreover, it claimed that even if it was in breach of the JVA, KSE had waived the alleged breaches by not terminating the JVA and/or had affirmed the JVA by continuing to procure the construction and delivery of the WPU at all material times.

The decision below

26 As the trial was bifurcated, the Judge only had the issue of liability before her.

27 The Judge first held that in the circumstances of the case, there was little or no relevant difference between the standard imposed by "all reasonable endeavours" clauses and that imposed by "best endeavours" clauses. Accordingly, she applied the "best endeavours" standard set by this court in *Travista Development Pte Ltd v Tan Kim Swee Augustine and others* [2008] 2 SLR(R) 474 ("*Travista*") to clause 6.2 of the JVA, and framed the question which she had to decide in these terms: "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" (see the Judgment at [69]).

28 The Judge then turned to the date by which KSE was obliged to procure the construction and

delivery of the WPU. She noted the discrepancies in the various contracts as to when the WPU was to be delivered, and held (at [59] of the Judgment):

> … [I]t 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. …

It was therefore found that "[t]he overall contractual objective of the 'all reasonable endeavours' obligation in cl 6.2 of the JVA was … to procure the construction and delivery of the WPU in June 2006" (see the Judgment at [75]). While the Judge did not expressly consider what obligations KSE would have been under beyond this date, she found, with reference to events in October 2006, that "KSE was already in breach of cl 6.2 of the JVA prior to the June 4 [2006] date, and … the breach was ongoing" (see the Judgment at [125]). This indicates that the Judge was of the view that KSE had to exercise all reasonable endeavours to procure the construction and delivery of the WPU even after 20 June 2006 had passed.

29 The Judge then found that the evidence, looked at cumulatively, showed that KSE had failed to discharge its obligation to use all reasonable endeavours to procure the construction of the WPU for delivery in June 2006. She found that the evidence demonstrated that construction of the WPU had already been irremediably delayed by 21 May 2006 because of KSE's failure to use all reasonable endeavours, such that KSE's subsequent efforts from July to October 2006 to catch up on the delays in construction were belated and futile. She further held that it was because of KSE's mismanagement of the Oderco contract that the WPU was not completed.

30 Turning to the specifics of KSE's breach, the Judge found that: (a) the Parties knew that the delivery date under the PCSB contract was very difficult to meet; and (b) it was KSE, and not BRE, which had control over the construction of the WPU. The Judge also found that KSE had actively sought such control and had, in doing so, undertaken to manage the construction and delivery of the WPU by Oderco by 4 June 2006 so as not to fall foul of PCSB's termination date of 21 June 2006. Therefore, "cl 6.2 of the JVA required KSE to not only put pressure on Oderco, but … also put its available resources to bear on Oderco in order to realise KSE's right … to have the WPU delivered by the June 4 [2006] date" (see the Judgment at [86]). She accepted the evidence of BRE's expert that KSE should have provided onsite supervision of the construction of the WPU from the outset.

31 The Judge found that there were many signs that the construction of the WPU was not progressing well. In particular:

(a) Oderco was slow in responding to KSE's queries and demands for information and key documents;

(b) there were signs that Oderco lacked manpower;

(c) the construction schedules provided by Oderco suggested that key components of the WPU had not even been purchased as late as April 2006;

(d) Oderco's estimated date of delivery was continually being postponed;

(e) Oderco was unable to produce purchase orders for key components of the WPU; and

(f) Oderco was not making claims for milestone payments according to the dates on which it should have made those claims had the construction of the WPU been proceeding on schedule.

32 In these circumstances, the Judge held, KSE should not have confined itself to sending e-mail chasers and making telephone calls to Oderco. Instead, it should have taken active steps to ascertain the cause of Oderco's delays and determine why critical equipment had yet to be purchased. Where it was apparent that it was taking longer than was acceptable for such equipment to be delivered, KSE should have pressed for shorter delivery periods.

33 As regards KSE's argument that there was no causal link between its alleged breach of the JVA and BRE's alleged loss arising from the termination of the PCSB contract, the Judge relied on the decision of the British Columbia Supreme Court in *Atmospheric Diving Systems Inc v International Hard Suits Inc and Can-Dive Services Ltd* [1994] 5 WWR 719 ("*Atmospheric Diving Systems*") and held that this was a matter of causation in the context of damages, which did not excuse KSE from liability. Also relying on *Atmospheric Diving Systems*, the Judge found that the onus was on KSE to prove that the PCSB contract would inevitably have been terminated notwithstanding its efforts.

34 The Judge held that KSE's breach had assumed a gravity that went to the root of the JVA and deprived BRE of substantially the whole benefit of the JVA which the Parties had intended to confer upon themselves. Accordingly, BRE was entitled to rescind the JVA and KSE's counterclaim against BRE for (*inter alia*) wrongful termination of the JVA failed. The Judge therefore found in favour of BRE on liability and dismissed KSE's counterclaim.

The Parties' respective cases on appeal

KSE's case

35 Before this court, KSE did not take issue with the Judge's finding that an "all reasonable endeavours" clause could impose as onerous an obligation as a "best endeavours" clause. However, it argued that such clauses must not be considered in isolation, but should instead be considered in the context of the whole document in which they appeared. Since the Parties had used three different formulations of non-absolute obligations (namely, "reasonable endeavours", "all reasonable endeavours" and "best endeavours") in different parts of the JVA, there was a presumption that they had adopted "tiered-obligations" for the three types of "endeavours" clauses, with each type of "endeavours" clause imposing a different standard of conduct. KSE submitted that the principles applicable to clause 6.2 of the JVA were as follows:

(a) an undertaking to use "all reasonable endeavours" was not a warranty to procure the contractually-stipulated outcome;

(b) where there was an insuperable obstacle to procuring the contractually-stipulated outcome, it was irrelevant that there might be other obstacles which could be overcome, or in respect of which the obligor had not done all that it could reasonably be expected to have done in order to try to overcome; and

(c) the obligor was entitled to take into account its own interests.

In any event, KSE submitted that it had satisfied both the "all reasonable endeavours" and the "best endeavours" standards.

36 Turning to the issue of breach, KSE argued that the Judge erred in finding that the situation was one of "immense urgency" (at [90] of the Judgment) and, consequently, wrongly imposed on KSE the obligation to act as a project manager. KSE submitted that its obligations should be determined by reference to the terms of the Oderco contract, which merely provided for site visits and not onsite

supervision during the construction of the WPU. In monitoring the construction of the WPU in accordance with the level of access provided for in the Oderco contract, KSE's efforts were in line with the Parties' intentions. KSE also submitted that the root of Oderco's problems was a lack of funds. KSE had remedied this by loaning money to Oderco and making direct payments to Oderco's suppliers.

37 On the issue of causation, KSE argued that even if it had breached clause 6.2 of the JVA, BRE had to prove that but for such breach, the WPU would have been built by 12 April 2007 and the PCSB contract would not have been terminated. KSE submitted that the Judge's reliance on *Atmospheric Diving Systems* was incorrect and at odds with precedent. Further, if it could not be said that KSE's alleged breach of clause 6.2 had caused the termination of the PCSB contract, it followed that this alleged breach was not such as to have deprived BRE of substantially the whole benefit of the JVA. Accordingly, BRE would not have been entitled to terminate the JVA. On the facts, KSE contended, Oderco's tardiness was such that onsite supervision would not have made a difference anyway. Moreover, some of the delay could be attributed to the changes made to the design of the WPU as construction progressed. In addition, anything KSE might have done would also ultimately have been futile for the simple fact that a crucial piece of critical equipment, which arrived only on 23 January 2007, could not have been procured by an earlier date.

BRE's case

38 BRE, on its part, submitted that an obligor who was bound by an "all reasonable endeavours" or "best endeavours" clause had to continue using such endeavours until they had all been exhausted and going on would have been mere repetition. Further, account would have to be taken of events as they occurred. Although BRE accepted that an obligor was not expected to sacrifice its interests in performing its obligations, it submitted that an obligor could not satisfy its obligations merely through financial expenditure.

39 BRE rejected KSE's contention that its obligations were to be determined by reference to the provisions of the Oderco contract. BRE asserted that KSE should have: (a) deployed an onsite supervision team from the outset; (b) put in place a recovery plan once it became clear that Oderco was not performing as agreed; (c) procured critical equipment itself; and (d) sent additional help to ensure that the WPU was completed on time. BRE submitted that the evidence showed that the WPU could have been completed within a year, and denied that it was design variations that had caused the delay.

40 As regards causation, BRE submitted that loss occurred upon non-delivery of the WPU and it was not necessary to consider whether the PCSB contract would have been terminated if KSE had not been in breach of clause 6.2 of the JVA. However, it would be open to KSE to argue, at the assessment of damages, that BRE had suffered little or no loss as a result of KSE's breach.

The issues before this court

41 The following issues arise for consideration in this appeal:

(a) the correct interpretation of "endeavours" clauses in general, and of "all reasonable endeavours" in clause 6.2 of the JVA in particular;

(b) whether KSE breached clause 6.2 of the JVA;

(c) if KSE did indeed breach clause 6.2 of the JVA, whether such breach caused BRE loss; and

(d) KSE's counterclaim.

These issues will now be considered *seriatim*.

Interpretation of "endeavours" clauses

The approach to interpreting "endeavours" clauses

42 A contract will usually impose an obligation on a party to do something. The obligation may be absolute or non-absolute (*ie*, qualified). An example of an absolute obligation in a contract is: Party A shall deliver a pen to me by tomorrow. An example of a non-absolute obligation is: Party A shall use reasonable endeavours to deliver a pen to me by tomorrow. In the latter example, the obligation is qualified by the phrase "reasonable endeavours". A party under an absolute obligation undertakes to achieve a result, whereas a party under a non-absolute obligation merely undertakes to try to achieve a result in accordance with a particular standard of conduct (*eg*, reasonable endeavours). Non-absolute obligations may be desirable where the obligation requires the party concerned to procure the doing of something by a third party over whom he may not be able to exercise absolute control. Another situation where non-absolute obligations may be desirable is where a party is unwilling to undertake an absolute obligation to do something by a specific time.

43 Various phrases such as "reasonable endeavours", "all reasonable endeavours" and "best endeavours" are widely used to formulate non-absolute obligations. The usage of these phrases seems to suggest that each of these phrases connotes a different standard of conduct which the obligor has to meet. However, there seems to be no consensus on the meaning of these phrases.

44 At the outset, it should be noted that where phrases such as "reasonable endeavours", "all reasonable endeavours" and "best endeavours" are used in written agreements, the court's role is to interpret these phrases. Contractual interpretation denotes "the process of uncovering meaning in and seeking to understand a [written contract] where there is some doubt or room for a difference of opinion" (see *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [41]). In this regard, the general principle is that the court will ascertain the meaning which the expressions used in the contract in question would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties at the time of the contract (see, *eg*, *Sandar Aung v Parkway Hospitals Singapore Pte Ltd (trading as Mount Elizabeth Hospital) and another* [2007] 2 SLR(R) 891 at [35]–[37], citing *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912–913).

45 Since any contract is a consensual arrangement between particular parties made against the background of particular circumstances, it is not difficult for the court to distinguish a previous court decision on the meaning of a particular phrase when a similar phrase is used in a different contract based on a different set of circumstances. Notwithstanding this, decisions on the meaning and effect of certain commonly-used phrases provide authoritative guidance on the *prima facie* meaning of similar phrases when they are used in documents that are intended to have legal effect. This is especially so because the contracting parties would have taken into account the general law in reaching their agreement. Furthermore, attributing such *prima facie* meanings to similar phrases (*ie*, phrases similar to commonly-used phrases) promotes commercial certainty. Hence, unless there is a contrary and objectively-ascertained intention on the part of the parties, the court will generally assume that in using similar phrases in their contract, the parties intended these phrases to bear their *prima facie* meaning. It is against this backdrop that we proceed to review the case law on "reasonable endeavours", "all reasonable endeavours" and "best endeavours" clauses.

Review of the case law

The standard imposed by "best endeavours" clauses

46 The phrase "all reasonable endeavours" has not previously been considered by this court. However, the interpretation of the phrase "best endeavours" was authoritatively set out by this court in *Travista* (at [22]):

> … 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. …
>
> [emphasis and inserted text in square brackets in original]

47 *Travista* lays down the following propositions regarding a "best endeavours" obligation:

(a) The obligor has a duty to do everything reasonable in good faith with a view to procuring the contractually-stipulated outcome within the time allowed. This involves taking all those reasonable steps which a prudent and determined man, acting in the interests of *the obligee* (see further [52] below) and anxious to procure the contractually-stipulated outcome within the available time, would have taken.

(b) The test for determining whether a "best endeavours" obligation has been fulfilled is an objective test.

(c) In fulfilling its obligation, the obligor can take into account its own interests.

(d) A "best endeavours" obligation is not a warranty to procure the contractually-stipulated outcome.

(e) The amount or extent of "endeavours" required of the obligor is determined with reference to the available time for procuring the contractually-stipulated outcome; the obligor is not

required to drop everything and attend to the matter at once.

(f) Where breach of a "best endeavours" obligation is alleged, a fact-intensive inquiry will have to be carried out.

48 The position taken by this court in *Travista* is generally in line with the English position. However, the test laid down in *Travista* ("the *Travista* test") allows the obligor to take into account its own interests and represents a slight departure from some English cases in so far as those cases appear to suggest that the obligor is in a *quasi*-fiduciary position *vis-à-vis* the obligee and must therefore completely align its interests with the latter's interests. Two such cases shall be discussed.

49 The first is *Sheffield District Railway Company v Great Central Railway Company* (1911) 27 TLR 451 ("*Sheffield District Railway*"). In that case, the lessee of a railway line agreed to use its "best endeavours" to develop traffic on the leased railway line. The lessee operated two other railway lines that were apparently of greater length and importance than the leased railway line. The lessor charged that the lessee had favoured the other railway lines to the detriment of traffic on the leased railway line. The court stated (at 452 *per* A T Lawrence J):

> … We think "best endeavours" means what the words say; they do not mean second-best endeavours. … They do not mean that the Great Central [the lessee of the railway line] must so conduct its business as to offend its traders and drive them to competing routes. *They do not mean that the limits of reason must be overstepped with regard to the cost of the services; but short of these qualifications the words mean that the Great Central Company must, broadly speaking, leave no stone unturned to develop the traffic on the [leased railway] line.*
>
> The Great Central has assumed a *quasi*-fiduciary position towards the [lessor of the railway line], a position similar to that of a bailiff or agent, and they are bound to treat the [lessor] at least as well as they treat themselves. …
>
> [emphasis added]

50 *Sheffield District Railway* is in line with the *Travista* test in so far as the injunction to "leave no stone unturned", subject to the qualifications mentioned in the above quotation, mirrors the standard of "all those reasonable steps which a prudent and determined man, acting in his own [*ie*, the obligee's] interests and anxious to [procure the contractually-stipulated outcome within the available time], would have taken" (see *Travista* at [22], citing *IBM United Kingdom Ltd v Rockware Glass Ltd* [1980] FSR 335 ("*IBM United Kingdom*") at 345). However, *Sheffield District Railway* appears to go somewhat further than *Travista* in that the obligor was held to have assumed a *quasi*-fiduciary position towards the obligee such that the obligor could not subordinate the obligee's interests to its own interests. That said, in clarifying that the obligor did not have to exceed "the limits of reason" in terms of the costs incurred in performing its obligations and could have regard to its relationship with its other business partners, *Sheffield District Railway* allows the obligor to take into account its own interests. Thus, any divergence between *Travista* and *Sheffield District Railway* is more apparent than real.

51 The second case which appears to take the *quasi*-fiduciary approach is the English Court of Appeal decision of *IBM United Kingdom*, upon which the *Travista* test is based. In that case, the purchaser of a property ("IBM") was obliged by the sale and purchase agreement to use its best endeavours to obtain planning permission for the development of the property. Such permission was sought and refused, but there was recourse to an appeal to the Secretary of State. IBM did not pursue such an appeal, and sought a declaration as to the extent of its obligation to use best

endeavours. The English Court of Appeal held that "best endeavours" should be understood to mean that "the purchaser is to do all he reasonably can to ensure that the planning permission is granted" (at 339). As to what steps IBM should have taken to obtain planning permission, Buckley LJ (with whom Geoffrey Lane and Goff LJJ agreed) set the standard in the following terms (at 343):

> … In my judgment the test must be: what would an owner of the property with which we are concerned in this case, who was anxious to obtain planning permission, do to achieve that end? … [The obligors] are bound to take all those steps in their power which are capable of producing the desired results, namely the obtaining of planning permission, being steps which a prudent, determined and reasonable owner, acting in his own interests and desiring to achieve that result, would take. …

52 Importantly, Buckley LJ clarified (at 349) that the phrase "acting in his own interests" in the above quotation meant acting in *the obligee's* interests, and not the interests of "somebody who is under a contractual obligation", *ie*, the obligor. As can be seen from [46]–[47] above, the test applied in *IBM United Kingdom* was largely adopted in *Travista*: an obligor under a "best endeavours" obligation is to take all those reasonable steps which a prudent and determined man, acting in the interests of *the obligee* and anxious to procure the contractually-stipulated outcome within the available time, would have taken. However, the *Travista* test adds that the obligor can take into account its own interests in fulfilling its "best endeavours" obligation. We do not think that the English Court of Appeal set out to state in *IBM United Kingdom* that the obligor is to act *only* in the interests of the obligee and cannot take into account its own interests. In any case, to the extent that *IBM United Kingdom* may be interpreted as such, the *Travista* test has departed from it.

53 On the facts of *IBM United Kingdom*, the English Court of Appeal held that if planning permission were at first refused and if an appeal to the Secretary of State would have a reasonable chance of success, it could not be said that best endeavours had been used to obtain planning permission if no appeal were made. This indicates that the obligor must pursue all courses of action with a reasonable likelihood of success in procuring the contractually-stipulated outcome.

Do "all reasonable endeavours" clauses impose the same standard as "best endeavours" clauses?

54 As stated earlier, the phrase "all reasonable endeavours" has not previously been considered by this court. There is some suggestion in a number of English cases that "all reasonable endeavours" clauses do not impose the same standard of conduct as "best endeavours" clauses. Two such cases shall be referred to here.

55 The first is *UBH (Mechanical Services) Ltd v Standard Life Assurance Co* The Times (13 November 1986) ("*UBH*"), which involved a "reasonable endeavours" clause. Rougier J opined in *obiter dicta* that the three types of "endeavours" clauses – namely, "reasonable endeavours", "all reasonable endeavours" and "best endeavours" clauses – ranked in increasing levels of onerousness:

> … [I]f I had to decide the matter I would have been prepared to say that the phrase "all reasonable endeavours" is probably a middle position somewhere between the other two, implying something more than reasonable endeavours but less than best endeavours.

However, Rougier J did not explain how and why the three types of "endeavours" clauses differed. He also proceeded to refer to cases on "*best* endeavours" clauses for the proposition that the obligor, in exercising *reasonable* endeavours to procure the contractually-stipulated outcome, was entitled to weigh its contractual obligation against all the relevant commercial considerations which prevailed.

56 The second case which suggests that "all reasonable endeavours" clauses and "best endeavours" clauses differ in standard is *Jolley v Carmel Ltd* [2000] 2 EGLR 153 ("*Jolley (HC)*"), where an implied obligation to use "reasonable endeavours" was alleged. Kim Lewison QC (the notable author of Kim Lewison, *The Interpretation of Contracts* (Sweet and Maxwell, 5th Ed, 2011), whose name surfaces repeatedly in the relevant cases), sitting as a deputy judge of the English High Court, opined in *obiter dicta* that the phrases "reasonable efforts", "all reasonable efforts" and "best endeavours" denoted a spectrum of obligations, with "reasonable efforts" being at "the lowest end of the spectrum" (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 …, to use all reasonable efforts to obtain it … or to use reasonable efforts to do so. The term alleged in this case [*viz*, "reasonable endeavours"] is at the lowest end of the spectrum.

Once again, the distinctions and the reasons for the distinctions between the three different types of "endeavours" clauses were not explained.

57 On the other hand, three other UK cases (two English and one Scottish) suggest that there is no meaningful difference between "all reasonable endeavours" obligations and "best endeavours" obligations.

58 The first in this series of cases is *Oversea Buyers Ltd v Granadex SA* [1980] 2 Lloyd's Rep 608, where a party attempted to fault an arbitral tribunal for making a finding that the obligor had done "all that could reasonably be expected of [it]", instead of determining whether the obligor had used its "best endeavours". In response, Mustill J observed (at 613) that he could:

> … frankly see no substance at all in this argument. Perhaps the words "best endeavours" in a statute or contract mean something different from doing all that can reasonably be expected – although I cannot think what the difference might be. (The unreported decision of the Court of Appeal in *I.B.M. United Kingdom Ltd. v. Rockwell Glass Ltd.*, upon which the buyers relied, does not to my mind suggest that such a difference exists; see p. 7 of the transcript.)

59 The second case is the decision of the Outer House of the Scottish Court of Session in *EDI Central Ltd v National Car Parks Ltd* [2011] SLT 75 ("*EDI*"), where Lord Glennie opined (at [20]):

> … I accept the submission that the obligation to use "all reasonable endeavours" is a more onerous obligation than one simply to use "reasonable endeavours". I do not have to consider whether or not it is the same as one to use "best endeavours", though 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. …

60 The third case is *Rhodia International Holdings Ltd & Anor v Huntsman International LLC* [2007] 1 CLC 59 ("*Rhodia*"). There, Julian Flaux QC, sitting as a deputy judge of the English High Court, held (at [33]):

> I am not convinced that (apart from that decision of Rougier J [in *UBH*]) any of the judges in the cases upon which [counsel] 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 is essentially what Mustill J is saying in [*** **Oversea Buyers v Granadex SA** ***[1980] 2 Lloyd's Rep 608]. One has a similar sense from a later passage at the end of the judgment of Buckley LJ in*** **IBM v Rockware Glass** ***at 343*** , to which [counsel] drew my attention. [original emphasis in italics; emphasis added in bold italics]

61 Although Mr Flaux QC was of the view that an obligation to use "reasonable endeavours" was clearly distinct from one to use "best endeavours", he was open to the possibility that an "*all* reasonable endeavours" obligation might impose the same standard of conduct as a "best endeavours" obligation. However, he did not settle on a definite view on the matter, and merely made reference to that section of *Jolley (HC)* quoted at [56] above (see [34] of *Rhodia*):

> That there is a distinction between best endeavours and reasonable endeavours and that the latter is less stringent than the former is not only supported by the decision of Rougier J in *UBH* but by the decision of Kim Lewison QC sitting as a deputy High Court judge in *Jolley v Carmel Ltd* [2000] 2 EGLR 154 … At p 159 the judge said:
>
> > '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 …, to use all reasonable efforts to obtain it … or to use reasonable efforts to do so. The term alleged in this case [to use reasonable efforts] is at the lowest end of the spectrum.'
>
> …

62 Notwithstanding the fact that the cases do not speak with one voice as to whether an "all reasonable endeavours" obligation imposes the same standard of conduct as a "best endeavours" obligation, we are of the view that the Judge was correct to hold that "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'" (see [55] of the Judgment). Like the Judge, we do not find it useful to distinguish an "all reasonable endeavours" obligation from a "best endeavours" obligation. Perhaps, lawyers may occasionally perceive an apparent spectral difference between these two types of "endeavours" obligations due to the difference in their wording. However, without the parties specifying how these two types of "endeavours" obligations differ and what steps are required to fulfil each type of "endeavours" obligation, any attempt to draw a distinction between them would merely be a pointless hair-splitting exercise. Any differences between "all reasonable endeavours" obligations and "best endeavours" obligations are likely to be more metaphysical than practical (see above at [59]). We therefore hold that the test for determining whether an "all reasonable endeavours" obligation has been fulfilled should ordinarily be the same as the test for determining whether a "best endeavours" obligation has been fulfilled, *ie*, the *Travista* test (see above at [46]–[47]) should apply in both situations. This test should ordinarily apply even if the parties use a variation of the phrase "all reasonable endeavours" or "best endeavours" (as the case may be). However, the test may not be entirely applicable where the parties expressly stipulate the steps which are to be taken by the obligor to discharge its "all reasonable endeavours" or "best endeavours" obligation. In that scenario, the inquiry would be centred on whether the stipulated steps have been taken. It also bears emphasis that whether an "all reasonable endeavours" or "best

endeavours" obligation has been fulfilled can only be ascertained through a fact-intensive inquiry.

63 We accept that an "all reasonable endeavours" obligation is ordinarily more onerous than a "reasonable endeavours" obligation. This is because the latter might require the obligor to take only one reasonable course of action, and not all of them. A "reasonable endeavours" obligation is also not subject to the standard laid down in *Travista* (at [22]) of "all those reasonable steps which a prudent and determined man, acting in [the obligee's] interests and anxious to [procure the contractually-stipulated outcome within the available time], would have taken". An obligor under a "reasonable endeavours" obligation merely has to act reasonably to procure the contractually-stipulated outcome, and we do not find it helpful to define the applicable standard any further than that. Such an obligor may well (depending on the circumstances) have to take steps which the prudent and determined man posited in the *Travista* test would take, but it need not necessarily do so as long as whatever it does to procure the contractually-stipulated outcome is reasonable.

64 At this juncture, we observe that the position which we have taken at [62] above is similar to the Australian position in that the Australian courts do not appear to draw any real distinction between a "best endeavours" obligation and an "all reasonable endeavours" obligation, even though the Australian test for determining whether a "best endeavours" obligation has been satisfied seems to be slightly different from the *Travista* test. We shall now turn to two Australian cases.

65 The first is *Transfield Pty Ltd v Arlo International Ltd* (1980) 144 CLR 83 ("*Transfield Pty Ltd*"), where a licensee covenanted to "at all times … use its best endeavours in and towards the design fabrication installation and selling of the ARLO PTL pole [a piece of equipment used for erecting power transmission lines] throughout the licensed territory" (at 87). The licensee submitted a tender to the Electricity Commission of New South Wales for the construction of a high-voltage transmission line for part of a larger project between Wallerawang and Sydney. The Electricity Commission expressed doubts about the use of ARLO poles because difficulties had previously been encountered when such poles were last used in Australia. The licensee decided to overcome these apprehensions by using a substitute pole of its own devising. The Australian High Court had to consider the narrow issue of whether the "best endeavours" clause in question prevented the licensee from using its own substitute for the ARLO pole, for the clause would be void for falling foul of two Australian statutory provisions if that were indeed its correct interpretation.

66 Mason J referred to the English High Court decision of *Terrell v Mabie Todd & Coy Ld* (1952) 69 RPC 234 ("*Terrell*"), where it was held (at 237) that a "best endeavours" clause required the obligor to "do what [it] could reasonably do in the circumstances". He concluded (at 101 of *Transfield Pty Ltd*):

> … A "best endeavours" clause thus prescribes a standard of endeavour which is measured by what is reasonable in the circumstances, having regard to the nature, capacity, qualifications and responsibilities of the licensee viewed in the light of the particular contract. So understood, cl 7 of the Agreement required the [licensee] to use *all its efforts* and skills towards the design, fabrication, installation and selling of the ARLO pole *to the extent that it was reasonable to do so in the circumstances* … [emphasis added]

67 Wilson J likewise relied upon English cases (at 107 of *Transfield Pty Ltd*):

> It is true, of course, that the obligations undertaken by the [licensee] under these covenants were substantial: cf. *Terrell v. Mabie Todd & Co. Ltd.* (1952) 69 RPC 234. It was obliged to do all that could reasonably be expected of it having regard to the circumstances of its business operations: *B. Davis Ltd. v. Tooth & Co. Ltd.* [1937] 4 All ER 118, at p 128. In the circumstances

of this case, the clause required the [licensee] to do its best honestly to advance to the Electricity Commission of New South Wales the claims of the Arlo pole as a suitable and desirable product for the Wallerawang project. It should not have held back any consideration which might attract a decision in its favour. But it remained free to submit a tender based on the use of its own pole. It was not obliged to deny to the Electricity Commission a choice of poles, nor to keep secret the virtues of its own product. I see no reason why it was not possible for the [licensee] honestly to use its best endeavours in favour of the Arlo pole while at the same time making it possible for the prospective purchaser to choose its own. The test is whether it has given the Arlo pole every chance consistent with its merits.

68 The second Australian case which we wish to draw attention to is *Hospital Products Limited v United States Surgical Corporation and others* (1984) 156 CLR 41, a decision of the High Court of Australia on an implied term to use "best efforts" to promote the sale of certain goods. Gibbs CJ made the following observations (at 64):

> The implied obligation to use best efforts to promote the sale of the goods necessarily imported the obligation not to take any deliberate steps to damage the market for those goods in Australia. *The meaning of terms of this kind has been considered in a number of cases, but it is trite to say that the meaning of particular words in a contract must be determined in the light of the context provided by the contract as a whole and the circumstances in which it was made, and that decisions on the effect of the same words in a different context must be viewed with caution*. On the one hand, an express promise by an agent to use his best endeavours to obtain orders for another and to influence business on his behalf "necessarily includes an obligation not to hinder or prevent the fulfilment of its purpose": *Shepherd v. Felt and Textiles of Australia Ltd.* [(1931) 45 CLR 359]. On the other hand, an obligation to use "best endeavours" does not require the person who undertakes the obligation to go beyond the bounds of reason; he is required to do all he reasonably can in the circumstances to achieve the contractual object, but no more: *Sheffield District Railway …*; *Terrell* … [emphasis added]

69 Mason J elucidated the rational for "best efforts" clauses as follows (at 91–92):

> A best efforts clause is not an uncommon feature of a distributorship agreement. However, it is unusual to include in the clause a provision that the promissor [*sic*] will use his best efforts for the common benefit of both parties. It is a clause ordinarily inserted in a contract between parties at arm's length, designed to give protection to one party by imposing an obligation on the other to promote the sales of the first party's products. The extent of the obligation thereby imposed is governed by what is reasonable in the circumstances: *Transfield Pty. Ltd. v. Arlo International Ltd.* … In *Transfield* a tender by a licensee based on its use of its own product instead of the product of its licensor was held not to be a breach of a best efforts clause. However, in other cases sale of competing products has been regarded as a breach: see, e.g., *Randall v. Peerless Motor Car Co.* [(1912) 99 NE 221]; *Paige v. Faure* [(1920) 127 NE 898)]. *To say that the promise was to be performed to or for the common benefit of both parties is to overlook the qualification of reasonableness usually associated with a best efforts promise. The qualification itself is aimed at situations in which there would be a conflict between the obligation to use best efforts and the independent business interests of the distributor* [*ie*, the promisor] *and has the object of resolving those conflicts by the standard of reasonableness.* Its effect here is to modify the obligation to distribute (and service) [the promisee's] surgical stapling products and to build up the market for them by reference to what is reasonable in the circumstances, in particular the situation of the distributor. It therefore involves a recognition that the interests of [the promisee] could not be paramount in every case and that in some cases the interests of the distributor would prevail. This qualification of the promise, unlike the

common benefit qualification, does not attribute to the distributorship the characteristics of a joint venture. [emphasis added]

The operation and extent of "all reasonable endeavours" obligations

70 With the foregoing points in mind, we now turn to some cases which shed light on the operation and extent of an "all reasonable endeavours" obligation. These cases also show that the prevailing approach to "all reasonable endeavours" obligations has generally been indistinguishable from the approach of this court to "best endeavours" obligations in *Travista*.

71 The first case which we wish to discuss in this regard is *A P Stephen v Scottish Boatowners Mutual Insurance Association (The "Talisman")* [1989] 1 Lloyd's Rep 535 ("*The Talisman*"), a decision of the House of Lords involving the interpretation of an "all reasonable endeavours" clause. The claimant was the owner of a fishing vessel and the defendant, his insurer. One of the clauses in the insurance contract stated that "[t]he Association shall not be liable for any claim for loss or damage when the insured making such claim has not used all reasonable endeavours to save his vessel from such loss or damage" (at 536).

72 The claimant's fishing vessel sank after taking on water. The defendant refused to indemnify the claimant on the basis that he should have: (a) closed the valves through which water was pumped into the vessel; and (b) sent a mayday call. The House of Lords unanimously held that the standard by which the claimant's conduct was to be assessed was that of what an ordinarily competent fishing boat skipper might reasonably be expected to do in the same circumstances (at 539 *per* Lord Keith of Kinkel):

> The question whether the taking of a particular course of action would have constituted a reasonable endeavour to save the vessel is essentially one for the judgment of the Court, to be arrived at upon an evaluation of all the evidence, which where appropriate may include expert evidence. The test is an objective one, directed to ascertaining what an ordinarily competent fishing boat skipper might reasonably be expected to do in the same circumstances. …

73 This approach is somewhat different from that taken in *Travista*, in that the House of Lords had regard to an ordinarily competent fishing boat skipper without any mention of the attributes which he was deemed to have. There was no mention that the ordinarily competent fishing boat skipper was deemed to be a prudent and determined man, acting in the interests of the obligee and anxious to procure the contractually-stipulated outcome within the available time. There was also no mention of the degree to which such a skipper would have desired to save his vessel from loss or damage. There was, therefore, less of an attempt to align the obligor's interests with the obligee's interests. However, it need hardly be said that the ordinarily competent fishing boat skipper would naturally have desired to save his vessel, subject to his other duties to, say, his crew and other vessels in the area (as can be seen from *Terrell* and *Rackham v Peek Foods Ltd* [1990] BCLC 895, an individual obliged to exercise "best endeavours" is nevertheless entitled to have regard to his pre-existing duties). In other words, it was implied in *The Talisman* that the steps which an ordinarily competent fishing boat skipper would have taken to save his vessel would be the same as those steps which a prudent and determined man, acting in the interests of the obligee and anxious to procure the contractually-stipulated outcome within the available time, would have taken. If that is the correct understanding, *Travista* and *The Talisman* are not inconsistent.

74 *The Talisman* also stands for two other propositions. First, the use of "an ordinarily competent fishing boat skipper" – in essence, the prudent and determined man described at [22] of *Travista* – as the relevant benchmark indicates that the obligor is to be held to an objective standard. Second, the

House of Lords stated that in asking whether an ordinarily competent fishing boat skipper would reasonably be expected to have attempted to close the vessel's valves, it "has to be considered first whether such a skipper would have appreciated that such action would offer a significant prospect of saving the vessel" (at 540). Thus, the obligor need only do that which has a significant prospect of success in procuring the contractually-stipulated outcome. This is consonant with the standard imposed by a "best endeavours" obligation, inasmuch as an obligor who is prudent, determined, acting in the interests of the obligee and anxious to procure the contractually-stipulated outcome within the available time would not do that which is futile. It may be added that the likelihood of success must be balanced against the costs of the endeavour: a course of action with a low likelihood of success but only a negligible cost would be pursued by the reasonable person. Similarly, an action with a significant prospect of success need not be pursued if it would, for example, increase the risk of casualties being suffered. We endorse these two propositions.

75 The second case discussing the operation and extent of an "all reasonable endeavours" obligation is the English High Court's decision in *Yewbelle Limited v London Green Developments Limited, Knightsbridge Green Limited* [2007] 1 EGLR 137 ("*Yewbelle (HC)*"). That case involved the sale of a property which was conditional on the seller entering into an agreement with the local authority on a stated set of terms ("the prescribed agreement"). The seller was obliged to use "all reasonable endeavours" to obtain that agreement. The prescribed agreement was not concluded with the local authority, and the seller was accused of failing to meet its obligations. It should be noted that Lewison J appeared to have used the words "reasonable endeavours" and "all reasonable endeavours" interchangeably in his judgment, even though the clause in question in *Yewbelle (HC)* was an "all reasonable endeavours" clause.

76 On the issue of whether the obligor was obliged to sacrifice its commercial interests in fulfilling its obligations, Lewison J referred to the decision of the English Court of Appeal in *Phillips Petroleum Co UK Ltd & Ors v Enron Europe Ltd* [1997] CLC 329 ("*Phillips Petroleum*"). The contract in *Phillips Petroleum* was a gas sales agreement under which the sellers and the buyer were to use "reasonable endeavours" to agree to the date on which the sellers would commence deliveries of gas to the buyer. It was argued that each party was under an obligation to reach agreement, having regard only to criteria of technical and operational practicability and without regard to selfish or commercial motives. The English Court of Appeal rejected that argument. Kennedy LJ said (at 342):

> … I find it impossible to say that they [*ie*, the contractual terms] impose on the buyer a contractual obligation to disregard the financial effect on him, and indeed everything else other than technical or operational practicality, when deciding how to discharge his obligation to use reasonable endeavours to agree to a commission date prior to 25 September 1996. If the obligation were to be strait-jacketed in that way, that is something which to my mind would have been expressly stated …

77 Potter LJ referred to the extensive negotiations and careful drafting behind the contract in question, and opined (at 342) that there was:

> … no reason to suppose that it was the expectation, let alone the obligation, of the parties that, in any area of activity in which room was left for manoeuvre or further negotiation, they were not at liberty to take into account their own financial position and act in the manner most beneficial to them, short of bad faith or breach of an express term of the contract.

On the strength of *Phillips Petroleum*, Lewison J held in *Yewbelle (HC)* that an obligor was not required to sacrifice its own commercial interests in performing its obligations (at [122]). *Yewbelle (HC)* therefore supports the proposition that regardless of whether an obligor owes a "reasonable

endeavours" obligation or an "all reasonable endeavours" obligation, it need not sacrifice its own commercial interests in at least one situation, namely, where the parties are obliged to come to an agreement. We note here that an obligor's commercial interests can be equated with its financial interests, and we shall use these two terms (*viz*, "commercial interests" and "financial interests") interchangeably in this judgment.

78 In *Yewbelle (HC)*, Lewison J also accepted that an "all reasonable endeavours" obligation required the obligor to use endeavours to the point where *all* reasonable endeavours had been exhausted (at [123]):

> … [T]he obligation to use reasonable endeavours [as noted above, the learned judge omitted the word "all" even though the clause before him was an "all reasonable endeavours" clause] requires you to go on using endeavours until the point is reached when all reasonable endeavours have been exhausted. You would simply be repeating yourself to go through the same matters again.

However, he also added the qualification that account must be taken of events as they unfolded, including extraordinary events (at [123]). Moreover, Lewison J accepted that an obligor need not take any particular step unless that step had "a real prospect of success" (at [128]) in procuring the contractually-stipulated outcome. He listed various matters which, on the facts of *Yewbelle (HC)*, could have been raised with the local authority to persuade it to enter into the prescribed agreement, and held that "I do not think that I can conclude that a reasoned protest would have had no real chance of achieving the result" (at [128]).

7 9 *Yewbelle (HC)* was pursued on appeal in *Yewbelle Limited v London Green Developments Limited, Knightsbridge Green Limited* [2007] 2 EGLR 152 ("*Yewbelle (CA)*"). The case of *The Talisman* was resurrected on the seller's behalf for the proposition that the test for determining whether a particular step was within the scope of an "all reasonable endeavours" obligation was whether it would, if taken, offer a *significant* chance of success in procuring the contractually-stipulated outcome, and that Lewison J had therefore posed the wrong test in setting the standard at "a real prospect of success". The English Court of Appeal rejected this argument, observing that the case at hand was a long way removed from *The Talisman* both on the facts as well as in terms of the content and context of the "all reasonable endeavours" obligation concerned. The English Court of Appeal also doubted that Lord Keith had intended to lay down a general rule in *The Talisman* as to "the standard by reference to which it is to be tested whether a party had undertaken all reasonable endeavours, under whatever kind of contract" (see *Yewbelle (CA)* at [32]). Further, it expressed doubt (likewise at [32]) that Lewison J would have considered the words "substantial", "significant" and "real" to have any different meaning. Accordingly, the English Court of Appeal did not accept that Lewison J had applied the wrong legal test in judging whether all reasonable endeavours had been used (at [33]). The English Court of Appeal can therefore be taken to have held that an obligor under an "all reasonable endeavours" obligation need only pursue those endeavours with a real chance of success in procuring the contractually-stipulated outcome, and that there is no significant difference in meaning between "real", "significant" and "substantial".

80 Ultimately, the English Court of Appeal found that the seller did not lack bargaining strength with the local authority, and observed (at [93]) that "there would have been cards for [the seller] to play" in persuading the local authority to agree to the stated set of terms provided for in the prescribed agreement. Accordingly, Lewison J's finding that the seller had not exhausted all reasonable endeavours to obtain the execution of the prescribed agreement was upheld.

81 However, the English Court of Appeal differed from Lewison J on the separate issue of whether, when there was an insuperable obstacle to procuring the contractually-stipulated outcome, the

obligor had to overcome other obstacles which also stood in the way. There was, adjoining the land subject to the conditional sale agreement, another parcel of land. Under the prescribed agreement, this piece of land was also to be developed. However, the land was discovered to belong to a third party instead of to the local authority as initially assumed. The English Court of Appeal held that if there was an insuperable obstacle to procuring the contractually-stipulated outcome, it was not relevant that there might have been other obstacles which could have been overcome. In such circumstances, the obligor would not have to do anything more to overcome other obstacles which also stood in the way, but which might have been resolved (at [103]). In our view, this is really just another way of saying that the endeavour undertaken must have a significant prospect of achieving the contractually-stipulated outcome, rather than merely address an associated obstacle. As the third party would not have agreed to participate without substantial payment, and as the seller was not obliged to lay out its own money in such sums as would have been required for that purpose, there was nothing more for the seller to do in regard to the third party's land. Accordingly, the English Court of Appeal reversed Lewison J's decision on this point.

82 The third case discussing the operation and extent of an "all reasonable endeavours" obligation, specifically relating to whether an obligor is required to sacrifice its own commercial interests in fulfilling its obligation, is *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch) ("*CPC Group*"). One of the parties advanced the argument that an obligation to use "all reasonable endeavours" was to be equated with an obligation to use "best endeavours", such that a party subject to an "all reasonable endeavours" obligation *must*, if necessary, subordinate its own financial interests to procure the contractually-stipulated outcome. As a matter of the established interpretation of "best endeavours" as set out in *Travista* and of "all reasonable endeavours" as set out in *Yewbelle (CA)*, this argument, in our view, goes too far. It is clear that such obligations do not require the obligor to subordinate its financial interests in all cases. Instead, the obligor is entitled to take its own financial interests into account, and certainly need not pursue any course of action that would be prohibitively expensive or ruinous. Unsurprisingly, Vos J rejected the above argument, citing *Yewbelle (CA)* with approval (at [251] of *CPC Group*):

> [Counsel] did not, however, refer to the Court of Appeal's decision in [*Yewbelle (CA)*], which is also footnoted in the passage of [Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 4th Ed, 2007)] to which he referred. There, Lloyd LJ said at para 29 that:
>
> > "Mr Dowding challenged the judge's … interpretation of the obligation to use reasonable endeavours. The judge dealt with this in a passage in his judgment starting at para 118. He accepted that, in using its reasonable endeavours, ***the Appellant was not required to sacrifice its own commercial interests*** : para 122",
>
> and went on to hold at para 33 that: "I do not accept that the judge applied the wrong legal test in judging whether the Appellant had used all reasonable endeavours under the contract".
>
> [emphasis added in bold italics and underlining]

83 Vos J concluded (at [252]) that "[i]t seems to me, therefore, that the obligation to use '*all reasonable endeavours*' does not ***always*** require the obligor to sacrifice his commercial interests" [original emphasis in italics; emphasis added in bold italics]. There may be a subtle difference between *Yewbelle (CA)* and *CPC Group*, in that the former held that an obligor was "not required to sacrifice its own commercial interests" (see *Yewbelle (CA)* at [29]), whereas Vos J qualified this by saying (at [252] of *CPC Group*) that the obligation to use "all reasonable endeavours" did not "always require" the sacrifice of commercial interests. In so far as there is a difference between these two cases, we are of the view that Vos J's approach is to be preferred. Although an obligor is entitled to take into

account its own interests, including its financial interests, in performing its obligations, there is no particular reason why it should, as a rule, never have to sacrifice its commercial interests. Such sacrifice may be negligible or, even though substantial, reasonable in the circumstances. For the purposes of determining whether the sacrifice arising from a particular course of action is reasonable, it will generally be the case that the endeavours entailed by that sacrifice will be capable of being assessed for reasonableness in monetary terms, even if they are not expressly spelt out in such terms in their original form. It would be arbitrary to draw a distinction between different types of endeavours based on whether they were expressed in monetary terms in the first instance.

84 The fourth and fifth cases which we shall discuss in this section concern the same issue of the extent to which an obligor is required to sacrifice its own commercial interests in performing its obligations, albeit in the context of a "best endeavours" obligation. These cases are *Jet2.com Limited v Blackpool Airport Limited* [2011] EWHC 1529 (Comm) ("*Jet2 (HC)*") and *Jet2.com Ltd v Blackpool Airport Ltd* [2012] 1 CLC 605 ("*Jet2 (CA)*"). The claimant in *Jet2 (HC)* ("Jet2") entered into an agreement with the defendant airport operator ("BAL") to "co-operate together and use their *best endeavours* to promote [Jet2's] low cost services from … Blackpool Airport" [original emphasis omitted; emphasis added in italics] (see *Jet2 (HC)* at [9]). The agreement was silent about the hours during which BAL would accept aircraft movements to and from Blackpool Airport. The airport's normal operating hours were from 7.00am to 9.00pm. However, for over four years, Jet2 had operated regular departures and arrivals outside those hours, causing BAL to incur additional costs in providing support services for those flights. Following a change in its ownership, BAL gave Jet2 seven days' notice, following which it would cease accepting flights to and from Blackpool Airport beyond the normal operating hours.

85 Jet2 sought damages for breach of contract and a declaration that BAL was obliged to accept aircraft movements outside Blackpool Airport's normal operating hours. In contrast, BAL argued that it was entitled to take into account its own commercial interests when considering what steps to take in satisfaction of its obligations, such as the losses which it had incurred in operating Blackpool Airport beyond its usual operating hours. It was common ground that "best endeavours" and "all reasonable endeavours" meant the same thing. At first instance, Mr Mackie QC, sitting as a judge of the English High Court, found a breach of contract. However, he declined to grant the declaration sought in view of the fact sensitivity of the issue. He perceptively observed, "[t]he meaning of the expression remains a question of construction not of extrapolation from other cases … the expression will not always mean the same thing" (at [46]).

86 On appeal, Mr Mackie QC's finding of breach was upheld by a majority of the English Court of Appeal. Moore-Bick LJ held (at [31]–[32] of *Jet2 (CA)*):

> 31. In my view ***the obligation to use best endeavours to promote Jet2's business obliged BAL to do all that it reasonably could to enable that business to succeed and grow*** and I do not think the object of the best endeavours is too uncertain to be capable of giving rise to a legally binding obligation. In my view the promotion of Jet2's business did extend to keeping the airport open to accommodate flights outside normal hours, ***subject to any right it might have to protect its own financial interests*** . Accordingly, I think the judge's decision on that aspect of the matter was correct. …
>
> 32. It was a central plank of BAL's argument before the judge that the obligation to use best endeavours did not require it to act contrary to its own commercial interests, which, in the context of this case, amounts to saying that BAL was not obliged to accept aircraft movements outside normal hours if that would cause it financial loss. Some support for that conclusion can be found in the cases, … but I think the judge was right in saying that ***whether, and if so to***

what extent, a person who has undertaken to use his best endeavours can have regard to his own financial interests will depend very much on the nature and terms of the contract in question . … I approach with some caution the submission that BAL was entitled to refuse to accept aircraft movements outside normal opening hours if that caused it to incur a loss, because on the judge's findings ***the ability to schedule aircraft movements outside those hours was essential to Jet2's business and was therefore fundamental to the agreement. In those circumstances one would not expect the parties to have contemplated that BAL should be able to restrict Jet2's aircraft movements to normal opening hours simply because it incurred a loss*** each time it was required to accept a movement outside those hours, or because keeping the airport open outside normal hours proved to be more expensive than it had expected. ***On the other hand, I can see force in the argument that if, for example, it were to become clear that Jet2 could never expect to operate low cost services from Blackpool profitably, BAL would not be obliged to incur further losses in seeking to promote a failing business*** .

[emphasis added in bold italics]

87 Longmore LJ indicated that the criteria for assessing the reasonableness of the sacrifice required of the obligor might also be affected by how the agreement was in fact performed (at [70]):

It is in the context of [situations in which the parties have provided no criteria on the basis for assessing whether best endeavours have been or can be used] that it may be relevant to consider the extent to which a party can be obliged to act against his own interests. ***The fact that he has agreed to use his best endeavours pre-supposes that he may well be put to some financial cost, so financial cost cannot be a trump card to enable him to extricate himself from what would otherwise be his obligation*** . As AT Lawrence J said in the *Sheffield District Railway Co* case, best endeavours does not mean second best endeavours. ***But I would agree with Moore-Bick LJ (para. 32) that, if it became clear that Jet2 could never expect to operate low cost services profitably from Blackpool, BAL could not be expected themselves to incur losses after that time in seeking to promote (or effectively propping up) a failing business*** . [emphasis added in bold italics]

88 It can be discerned from Moore-Bick and Longmore LJJ's judgments in *Jet2 (CA)* that there are no hard-and-fast rules as to whether an obligor must sacrifice its financial interests in fulfilling its obligations. The test is whether the nature and terms of the contract in question indicate that it is in the parties' contemplation that the obligor would have to sacrifice its financial interests, and if so, to what extent the obligor is to sacrifice its financial interests.

89 A further point to note is that although the parties in *Jet2 (HC)* and *Jet2 (CA)* agreed that "best endeavours" and "all reasonable endeavours" meant the same thing, such that the court was not called upon to make any pronouncements on the matter, Moore-Bick LJ held (at [31] of *Jet2 (CA)*) that BAL's obligation to use its "best endeavours" obliged it to do "all that it reasonably could", effectively equating a "best endeavours" obligation with an "all reasonable endeavours" obligation. Such language has recurred numerous times in the cases, and indicates that the gap between "best endeavours" and "all reasonable endeavours", in so far as one even exists conceptually, is a small one.

90 It is noteworthy that Lewison LJ, the dissenting judge in *Jet2 (CA)*, was of the view that the trial judge and the majority of the English Court of Appeal had gone beyond interpreting the contract to construing the contract in the sense of making a contract which the parties had not themselves made. He was unwilling to find an obligation for BAL to allow flights to and from Blackpool Airport outside the airport's normal operating hours in the absence of an express agreement. Although

Lewison LJ found himself in the minority in *Jet2 (CA)*, we are of the view that his concerns are sound. Contracting parties would be well advised to specify the objective to which all reasonable endeavours are to be directed and the criteria by which the endeavours are to be judged, even if the "endeavours" clause in question is enforceable in the absence of such specifications. What may be readily apparent to the parties at the time of their contract may not be so apparent to a court, and it would be helpful for them to set out those obligations that they consider important. We note with some interest that Lewison LJ did not express any view on the appropriateness of equating "best endeavours" with "all reasonable endeavours".

91 The last case which we wish to discuss in relation to the operation and extent of "all reasonable endeavours" obligations is *EDI* (also referred to earlier at [59] above). We think there is merit in Lord Glennie's view that it may well be part of an "all reasonable endeavours" obligation for the obligor to inform the obligee of any difficulties it is encountering so as to ascertain whether the obligee has a possible solution (at [21]):

> … Lloyd LJ … emphasises [in *Yewbelle (CA)* at [105]] that it may well be part of the obligation to use all reasonable endeavours for the party on whom the obligation is placed 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. That must be right*. A party cannot just sit back and say that he could not reasonably have done more when, if it had had asked the other party to the transaction, it might have discovered that there were other steps which could reasonably have been taken. But all will depend upon the circumstances.* [emphasis added]

We should point out here that it is not an ironclad rule that the obligor under an "all reasonable endeavours" obligation must always inform the obligee of any difficulties it is encountering so as to see whether the latter has any possible solution. Rather, whether the obligor has informed the obligee in this regard is a matter that the court may (depending on the circumstances) take into consideration in determining whether the obligor has satisfied its "all reasonable endeavours" obligation.

92 On the issue of the burden of proof, we also generally agree with Lord Glennie that (at [22]):

> … NCP [the obligee] led at proof. This was because they accepted that the burden was on them to show that EDI [the obligor] were in breach, so as to give a basis for the mutuality argument. But it does not seem to me that the burden necessarily remains throughout on NCP. *My tentative view is that if NCP can point to steps which could have been taken, by evidence (or possibly by pleading), the evidential burden* ***may*** *shift to EDI to show, as the case may be, that they took those steps, that they could not reasonably have been expected to take them or that such steps would have been bound to fail. It is EDI who are likely to have the evidence on these points and, once a sufficient case has been raised by NCP, the burden must ultimately be on EDI to establish that they used all reasonable endeavours as required by the agreement*: c f [Mactaggart & Mickel Homes Ltd v Hunter [2010] CSOH 130] at para. 58 in which Lord Hodge refers to the onus of proof being on the party asserting that he has used reasonable endeavours. However, the point was not argued before me and, in the conclusions I have reached, it makes no difference to the outcome. [emphasis added in italics and bold italics]

In this regard, we go further than Lord Glennie in that we are of the view that once the obligee points to certain steps which the obligor could have taken to procure the contractually-stipulated outcome, the burden *ordinarily* shifts to the obligor to show that it took those steps, or that those steps were not reasonably required, or that those steps would have been bound to fail.

Summary of the guidelines applicable to "all reasonable endeavours" and "best endeavours"

Summary of the guidelines applicable to "all reasonable endeavours" and "best endeavours" clauses

93 The foregoing cases are the more significant cases to have originated from the English and Scottish courts on "all reasonable endeavours" clauses and "best endeavours" clauses. The available commentaries in this area of the law (and these tend to be professional rather than academic) tend to agree that there is a great deal of uncertainty surrounding the obligations imposed by the various "endeavours" clauses. The typical advice in these commentaries is for the parties to expressly specify the criteria by which satisfaction of such clauses is to be assessed. This lack of certainty is unfortunate. Be that as it may, following on our holding (at [62] above) that the test for determining whether an "all reasonable endeavours" obligation has been satisfied should ordinarily be the same as the test for determining whether a "best endeavours" obligation has been satisfied (*ie*, the *Travista* test), we also endorse the guidelines below *vis-à-vis* the operation and extent of both "all reasonable endeavours" and "best endeavours" clauses:

(a) Such clauses require the obligor "to go on using endeavours until the point is reached when all reasonable endeavours have been exhausted" (see *Yewbelle (HC)* at [123] and *Yewbelle (CA)*), or "to do all that it reasonably could" (see *Jet2 (CA)* at [31]).

(b) The obligor need only do that which has a significant (see *The Talisman*) or real prospect of success (see *Yewbelle (HC)* and *Yewbelle (CA)*) in procuring the contractually-stipulated outcome.

(c) If there is an insuperable obstacle to procuring the contractually-stipulated outcome, the obligor is not required to do anything more to overcome other problems which also stood in the way of procuring that outcome but which might have been resolved (see *Yewbelle (CA)*).

(d) The obligor is not always required to sacrifice its own commercial interests in satisfaction of its obligations (see *CPC Group*), but it may be required to do so where the nature and terms of the contract indicate that it is in the parties' contemplation that the obligor should make such sacrifice (see *Jet2 (CA)*).

(e) An obligor cannot just sit back and say that it could not reasonably have done more to procure the contractually-stipulated outcome in cases where, if it had asked the obligee, it might have discovered that there were other steps which could reasonably have been taken (see *EDI*).

(f) Once the obligee points to certain steps which the obligor could have taken to procure the contractually-stipulated outcome, the burden ordinarily shifts to the obligor to show that it took those steps, or that those steps were not reasonably required, or that those steps would have been bound to fail (see *EDI*).

94 Given our ruling at [62] and [93] above, in the Singapore context, an "all reasonable endeavours" obligation is ordinarily as onerous as a "best endeavours" obligation. In our view, this approach is sensible. Non-absolute obligations are often intended to deal with the scenario where an obligor is to procure the contractually-stipulated outcome through the assistance or efforts of a third party. An obligor in such a situation will typically not be in a position to ensure that the contractually-stipulated outcome will be successfully procured. Thus, save where some other concession is extended to compensate such an obligor for shouldering the risk of failure on its own, it would not be viable to impose an absolute obligation on the obligor to procure the contractually-stipulated outcome. At the same time, however, the obligee would require some assurance that its interests are protected, since the obligor may find it in its interests to prioritise other goals. The obvious solution would be to ensure that the obligor's interests and the obligee's interests are aligned by contract.

The approach taken in *Travista* – namely, using the standard of a prudent and determined man, *acting in the obligee's interests and anxious to procure the contractually-stipulated outcome within the time allowed*, as a benchmark – pragmatically addresses this issue, and adequately protects unsophisticated parties. Where an obligor does not wish to be held to such a high standard, it would be well advised to stipulate the specific steps required to discharge its "all reasonable endeavours" or "best endeavours" (as the case may be) obligation.

95 What of KSE's argument that parties who use both "all reasonable endeavours" clauses and "best endeavours" clauses in the same contract must have intended to ascribe different meanings to them? While that may be the case in certain situations, we are of the view that the use of both types of clauses in the same contract, without specifying how the standards imposed by the two types of clauses differ, will not be sufficient to indicate an intention to depart from the approach taken in *Travista*. This is because it would not be practicable for either the parties or the court to determine on a clause-by-clause basis what "all reasonable endeavours" or "best endeavours" (as the case may be) means in the context of each individual clause. Should the parties wish to finely calibrate their obligations, they may do so by expressly defining the obligations under each clause, or by carving out obligations that would otherwise be imposed by the clause in question.

Interpretation of "all reasonable endeavours" in clause 6.2 of the JVA

96 In the present case, we are of the view that there is insufficient basis to conclude that clause 6.2 of the JVA should be interpreted in a less onerous fashion than a "best endeavours" clause. The interpretation proffered by KSE (see [35] above) is, to our minds, indistinguishable from the approach taken in *Travista*. Clause 6.2 therefore imposed on KSE the obligation to take all those reasonable steps which a prudent and determined company, acting in BRE's interests and anxious to procure the construction and delivery of the WPU within the available time, would have taken.

97 This brings us to the question of the relevant time frame for procuring the construction and delivery of the WPU. At para 13 of its statement of claim, BRE pleaded: [note: 16]

> The effect of the Authorisation [Document] being executed on 18 December 2005 and of Clause B(3) of the [BRO contract] was to fix the delivery date for the WPU as 17 June 2006, and/or to *vary by implication the calculation for delivery set out in Clause 6.2 of the JVA*. … [emphasis added]

BRE appeared to be saying that the Authorisation Document constituted an offer to KSE to, among other things, procure the completion of the WPU by 17 June 2006 instead of by the deadline stipulated in clause 6.2 of the JVA (*viz*, six months after the execution of the Charter Agreement). However, the contents of the Authorisation Document do not support the existence of such an offer: [note: 17]

> **PURCHASE CONTRACT FOR WORKOVER PULLING UNIT (WPU) FOR THE [PCSB] CONTRACT PER JV AGREEMENT DATED 13 DECEMBER 2005**
>
> We, [BRE], hereby approve and agree on all the below technical requirements, scope of work and the price quotation based on the e-mail dated 3rd Dec 2005 from [Oderco] for the above Contract and authorise [KSE] to proceed on the Purchase Contract with [Oderco]:
>
> 1] Technical requirements, scope of work and specifications included in section TB 5 and other sections of the tender documents …

…

2] Total price – Ex works for US$7.9 million (+ -) and transportation estimated at US$500,000.

3] Delivery – 6 months ex works

…

98 It is clear from the Authorisation Document that all that BRE was doing was to authorise KSE to enter into an agreement with Oderco whereby Oderco was to construct a WPU for delivery six months ex-works. The Authorisation Document did not indicate that KSE had to procure the construction and delivery of the WPU within six months of the date of that document. As regards the BRO contract, BRE appeared to be saying that KSE accepted its offer for KSE to procure the completion of the WPU by 17 June 2006 by contracting with BRO to have the WPU ready for shipment to BRO by that date. However, the artificiality of this analysis is made plain by the fact that the Authorisation Document and the BRO contract were executed almost three months apart, with the incorporation of BRO as well as the execution of the Oderco contract and the Charter Agreement taking place in between. Timing-wise, the BRO contract was too remote from the Authorisation Document to constitute acceptance of the offer alluded to in para 13 of BRE's statement of claim.

99 The Judge did not base her finding that the deadline in clause 6.2 of the JVA had been varied on BRE's pleadings as such. As noted above at [28], she found that the Parties had embarked on a course of action at odds with clause 6.2 by seeking to fulfil the PCSB contract as early as possible in June 2006. However, the same problem of identifying an offer to vary the deadline stipulated in clause 6.2 and acceptance of such offer arises. It would also be difficult to find, based on the Parties' course of action alone, an intention on their part to be legally bound by the June 2006 deadline referred to by the Judge (at [75] of the Judgment).

100 More to the point, the Parties' conduct was not necessarily at odds with the JVA. The JVA was entered into on 13 December 2005. At that point in time, the completion date under the PCSB contract, as varied by PCSB on 8 December 2005 (see [7] above), was 21 May 2006, with PCSB's right of termination arising on 21 June 2006. This left BRE with five months and eight days from 13 December 2005 to procure the WPU for PCSB in order to avoid liquidated damages, and six months and eight days from that same date to avoid the risk of PCSB terminating the PCSB contract altogether. Yet, the Parties, by clause 6.2 of the JVA, agreed to give KSE six months to procure the construction and delivery of the WPU, with the time to begin running only from an event (*viz*, the execution of the Charter Agreement) that would still take some days or weeks to occur. Further, no provision was made in clause 6.2 (or any other part of clause 6) for a failure to meet the deadline stipulated in the PCSB contract. Clause 2 of the JVA, which concerns the business of BRO, likewise made no reference to the PCSB contract: [note: 18]

2.1 The business of [BRO] is in the acquisition and chartering out of the WPU and the provision of related services.

2.2 Each party shall use its reasonable endeavours to promote and develop the business of [BRO] to the best advantage of [BRO].

…

Clause 2 tacitly recognises the possibility that the PCSB contract could be lost after KSE had already committed itself to procuring the construction and delivery of a WPU based on the specifications in

BRE's tender submission. In such circumstances, the Parties could not have founded the JVA on the PCSB contract alone, with KSE left to bear the risk of a partially-completed WPU designed to meet PCSB's specific needs but no ready alternative buyer in the event that the PCSB contract was indeed lost. Rather, the Parties were to remain committed to the business of chartering out the WPU after its completion and to sharing the risk of its construction.

101 All this suggests that although the PCSB contract was the genesis of the JVA, it was not its *raison d'être*. Naturally, that contract would have been very much on the Parties' minds at the time they entered into the JVA. It would have been their aim to fulfil the PCSB contract as the best-case scenario for their joint venture. Thus, the Parties proceeded to act with despatch to procure the construction of the WPU, notwithstanding that KSE's obligation to do so under the JVA had not arisen yet as the Charter Agreement had not been executed. However, one should not too readily infer from this fact alone an intention to depart from the deadline stipulated in clause 6.2 of the JVA for the construction and delivery of the WPU.

102 How then is clause 6.2 of the JVA to be understood where the deadline for procuring the construction and delivery of the WPU is concerned? In our judgment, the deadline stipulated therein – *viz*, six months after the execution of the Charter Agreement, *ie*, 9 September 2006 – indicates the upper limit of KSE's obligations. That is, bearing in mind that *Travista* makes clear that a party's non-absolute obligations are to be determined with reference to the time allowed for procuring the contractually-stipulated outcome, KSE need not have tried any harder than to procure the construction and delivery of the WPU within six months of the Charter Agreement being executed. For example, should there have been a need for a readily-available piece of critical equipment that required three months for delivery and installation, KSE need not have been overly exercised by Oderco's failure to place an order for that piece of critical equipment by the end of March 2006 as there would still have been a reasonable buffer. However, matters would have been of utmost urgency should Oderco have continued to neglect to place an order by the end of May 2006, and exercising all reasonable endeavours would probably have required KSE to endeavour to avoid such a situation unless Oderco were a proven master of logistics management.

103 We are also of the view that the Judge was correct to hold that KSE's obligation to exercise all reasonable endeavours continued beyond the relevant deadline, should KSE have failed to procure the construction and delivery of the WPU by then. *Patel v Brent LBC* [2004] EWHC 763 (Ch) is pertinent in this regard. The defendant in that case ("the Council") was under an obligation to use reasonable endeavours to complete certain works, which were to be paid for by a deposit from the claimant, before the issuance of a certificate. The certificate was issued on 21 October 1994, but the stipulated works were not completed by that date. The claimant's case was that since those works had not been completed, there remained an obligation on the Council to continue using reasonable endeavours after 21 October 1994 to complete the works, such a term being implied as a matter of business efficacy. Hart J accepted this argument, observing (at [64]):

> … I also accept the argument on behalf of the [claimant] that, in order to give business efficacy to the agreement, it is necessary to imply a term that the Council would continue to use its reasonable endeavours after 21st October 1994 to complete the works within a reasonable time. It is simply a nonsense to suggest that the Council was under an obligation until that date but thereafter was at liberty simply to sit on the money until either it chose to do something or the [claimant] made an application to discharge the planning obligation … Even the most unofficious of bystanders would, it seems to me, have roused himself to protest that that cannot have been intended.

104 We agree, although we prefer to see the Council's continuing obligation after 21 October 1994

to use reasonable endeavours to complete the stipulated works as part of the "reasonable endeavours" continuum rather than as an implied term. It stands to reason that if procuring the construction and delivery of the WPU within six months of the execution of the Charter Agreement marked the upper limit of KSE's obligations, the obligation to use all reasonable endeavours to procure that outcome within a reasonable time after the expiry of the said six-month period should be the lower. It would not make any sense for KSE to be under no obligations at all, whether absolute or not, beyond the target date of six months from the execution of the Charter Agreement. The Parties would have contemplated some possibility of salvaging the situation should that deadline not be met.

Did KSE breach clause 6.2 of the JVA?

The Parties' respective roles

105 Having dealt with the interpretation of "endeavours" clauses in general and the "all reasonable endeavours" obligation in clause 6.2 of the JVA in particular, we now turn to the issue of whether KSE breached that clause. Each of the Parties has each sought to characterise itself as a peripheral partner in the joint venture, with the other as the prime mover. In our judgment, the JVA makes plain that responsibility was shared: it was KSE's responsibility to procure the construction and delivery of the WPU on its own and then sell it to BRO, while BRE's role was to manage the PCSB contract and charter the WPU from BRO after the latter had purchased it from KSE.

106 The evidence also suggests that both BRE and KSE stood to gain from the joint venture, which was the result of a purely rational decision by each of them to cooperate with the other. In the context of BRE's lack of a rig builder following RG's decision to pull out of the WPU project, Mr Yazid testified that BRE "[was] not desperate" [note: 19] and "would have given back the [PCSB] contract to [PCSB]" [note: 20] if Oderco had not been identified as an alternative rig builder. However, PCSB's 8 December 2005 letter to BRE responding to the latter's proposal to substitute Oderco for RG and vary the deadline for delivering the WPU under the PCSB contract indicates that a binding agreement between PCSB and BRE had already come into being with the issuance of the Letter of Award: [note: 21]

> When [PCSB] issued the [L]etter of [A]ward on 21 November 2005, a binding contract between [PCSB] and [BRE] is established under the law of contract. …
>
> [BRE's] request for changes to the Local Mobilization Date and Contract Price on 30 November 2005 tantamounts to non-compliance with the terms and conditions specified in the [L]etter of [A]ward and a breach of the Contract.

It seems fairly likely that BRE was not at liberty to simply back out of the PCSB contract, and Mr Yazid's testimony in this regard rings hollow. KSE also did not enter into the joint venture out of goodwill. Both BRE and KSE stood to benefit from the profits generated by the WPU under the PCSB contract through charter fees paid by PCSB to BRE and onward to BRO.

107 At the trial, there was also an issue of whether KSE wanted control of the WPU project to the exclusion of BRE. This arose from an internal KSE e-mail dated 12 December 2005 from KSE's Managing Director, Chew Thiam Keng ("CTK"), to TFG and Goh Boon Chye ("GBC"), an Executive Director and Chief Business Development Officer of KSE. In that e-mail, CTK stated: [note: 22]

> Boon Chye, please liaise with [TFG] on the sending out of the PO to Orderco. I have discussed with [LHK] and agree that *[the] 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. … [emphasis added]

The Judge found that KSE's idea of control over the WPU project was to contract with Oderco, and that KSE had, by doing so, undertaken to manage the construction and delivery of the WPU by Oderco (see the Judgment at [87]). We do not agree with this analysis. While CTK's 12 December 2005 e-mail might illuminate KSE's subjective intentions behind the structure of the JVA, it does not contribute to the interpretation of KSE's obligations under that agreement.

Indications that construction was not progressing well

108 BRE asserted, and the Judge accepted, that there were a number of indications that Oderco was not handling the construction of the WPU in a satisfactory manner. These include the following:

(a) Oderco did not make claims for milestone payments when it should have done. Apart from the initial 10% down payment made in January 2006, no further milestone payments were made until 14 June 2006, after the scheduled completion date under the Oderco contract had already passed. This would have indicated that Oderco was well behind time.

(b) Oderco was not purchasing critical equipment in a timely manner, or at all. BRE's expert witness, Ian Craven ("Mr Craven"), stated that there should have been several hundred purchase orders issued by Oderco for critical equipment by February 2006. Instead, Oderco was only willing/able to reveal 12 purchase orders to PCSB during a site visit on 8 and 9 February 2006. Given that time was tight, and that some of the critical equipment which needed to be ordered from third-party suppliers was specialised and complex and needed long delivery times, it should have been obvious to KSE that this would have an impact on the completion date of the WPU.

(c) Oderco was unreliable and difficult to work with. KSE realised this very early on when it had problems contacting the management team of Oderco, Samir Ghalayini ("Dr Samir") and his wife, Hedian. Oderco was also consistently late in producing key documents and drawings, and its estimates of the completion date of the WPU constantly moved backward. Oderco's reports on the progress of construction were obviously incorrect. For example, Oderco reported that the WPU was at an advanced state of construction when critical equipment had not even been ordered yet. All this would have indicated a need for KSE to take an active hand in managing the construction of the WPU.

109 The Judge found that KSE should have been alerted of the need to do more to manage the construction of the WPU, and that its obligation to use all reasonable endeavours was engaged.

What KSE did

110 Let us first consider the steps that KSE took in the face of indications that the construction of the WPU was not progressing satisfactorily. Its first response was to pressure Oderco to perform. An example of this approach, as well as of the difficulty of working with Oderco, can be seen from an attempt to obtain various documents from Oderco over some months. During a visit by PCSB, BRE and KSE to Oderco's yard on 8 and 9 February 2006, it was agreed that Oderco would, by 16 February 2006: (a) provide documents relating to the specifications of the WPU (known as "T5-A" and "T5-B"), technical drawings and the construction schedule; and (b) procure a piece of critical equipment known as a blow-out preventer ("BOP"), which Oderco was facing problems acquiring. On 16 February 2006, KSE's General Manager of Projects, Gwen Toh ("Ms Toh"), wrote to Oderco: [note: 23]

Dear Hedian,

We are very afraid that you are so silence.

We try calling you everyday but your telephone ringing nobody pick-up or the line is not open.

How to communicate promptly in this way. …

Hedian replied to say that she had been ill and had no knowledge of KSE's attempts to reach her. Ms Toh communicated KSE's difficulties to Mr Yazid on 17 February 2006: [note: 24]

Dear Yazid

We are disappointed with O[d]erco they promised to provide documents but still not receive. I think you have to inform [PCSB] for this matter. [GBC] is chasing them very hard hopefully can get by tomorrow.

111 Oderco still had not provided the requisite documents by 23 February 2006, and Ms Toh updated Mr Yazid in these terms on that day: [note: 25]

We have been chasing Dr. Samir everyday calling morning … till evening to remind him to provide [the] documents he promised in the MM [presumably the minutes of a meeting held on 9 February 2006].

Yesterday, he promised to send us but still not receive.

Chasing him since this morning. Hope he can send today.

Sorry for the delay.

Let you know later in the afternoon.

On 9 March 2006, Ms Toh wrote to Oderco to say: [note: 26]

Dear Samir/Hedian,

Please reply, cannot keep quiet.

Try calling you alway your secretary pick up the call, cannot talk to you, Why?

Later that afternoon, GBC wrote: [note: 27]

VERY URGENT!

Dear Dr. Samir,

WE NEED YOU TO PROVIDE THE INFO PER ATTACHED QUESTIONS FROM [PCSB] ASAP.

YOUR DELAY IN PROVIDING INFO AND REPLY IS CAUSING BIG PROBLEMS FOR [KSE] WITH [PCSB]!!!!

...

WE LOOK FORWARD TO YOUR INFO ON THE BOP AND MUD PUMPS TODAY.

112 Although not expressly mentioned in these two e-mails, it seems likely that KSE was chasing Oderco for the same documents that had been owed since 16 February 2006. On 10 March 2006, Mr Yazid replied: [note: 28]

Dear [GBC],

Thank you for trying. In a few hours I will be meeting [t]he CEO of [PCSB] and his management team to discuss amongst others the progress of the WPU construction.

It is a bit disappointing when [PCSB] had to ask for info via a few emails for ***what had been promised them few weeks ago*** . Please get all pending information from Dr Samir as we are losing their confidence in us. The least we can do is update them with the progress as promised.

[emphasis added in bold italics]

113 Even on 2 May 2006, two and a half months after the 16 February 2006 deadline had passed, not all the documents requested for had been provided. On that day, Ms Toh wrote to Oderco: [note: 29]

Dear Dr Samir,

Please be informed [PCSB] is requesting Oderco to provide T5-B (capital rig inventory)

We have been chasing this long time ago. Please send us by today.

On 9 June 2006, Ms Toh was still following up on the matter: [note: 30]

Dear Dr. Samir,

Very quiet from you. Despite send you many email you did not reply.

How is this project getting on?

We are so worry?

What happened to the documents you are supposed to provide?

[PCSB] needs the T5B documents by today.

Please send today.

On 14 August 2006, GBC wrote to Oderco saying: [note: 31]

Dear Raymond,

Kindly assist in completing the T5 A and T5 B schedule TODAY (YOUR TIME) as promised by Samir.

[PCSB] needs the 2 schedules tomorrow. VERY URGENT AS IT IS LONG OVERDUE.

…

114 It is apparent from the correspondence that KSE's representatives were clearly communicating the urgency of the situation to Oderco. It appears that they were doing this multiple times a day. However, the fact that the documents mentioned at [110] above were not obtained even six months after they were due suggests that this was not a very successful approach.

115 KSE's second response was to deploy representatives to Oderco's yard to monitor the construction of the WPU. This initially took the form of visits by KSE's officers approximately once a month as provided for in the Oderco contract. Eventually, on 2 July 2006, KSE deployed a permanent representative named Michael Connolly ("Mr Connolly") to monitor Oderco's progress. His role was "to submit progress report[s] and to co-ordinate with Oderco's staff on the required drawings, data and other info for the WPU", [note: 32] and "to assist us to chase and follow up with Samir on the various reports/info required to furnished [*sic*] to [PCSB]". [note: 33] Mr Connolly subsequently resigned in December 2006 and was replaced by Francis Tan ("Francis").

116 According to GBC, Dr Samir revealed to KSE on 20 September 2006 that Oderco was facing cash-flow problems. KSE's third approach was to help Oderco address those problems by paying Oderco's suppliers directly and airfreighting critical equipment to Oderco's yard. With BRE's knowledge, KSE paid US$200,000 to the BOP manufacturer on 29 September 2006, after which the BOP was delivered on 23 October 2006. On 10 November 2006, KSE paid a further US$690,000 to the manufacturer of the variable frequency drive ("VFD"), a piece of critical equipment that was to supply electricity to the WPU. The VFD was eventually delivered around 23 January 2007.

117 Oderco's financial problems did not just affect its ability to procure critical equipment. On 27 February 2007, Francis reported that Oderco's workers had gone on strike and had "demanded for Oderco to pay them full three months overdue salary instead of a month". [note: 34] Startlingly, Francis reported that Hedian only "managed to influence some 60% of workers who have families commitment, to continue their work". [note: 35] Oderco also required assistance to procure certification of the WPU's seaworthiness from Det Norske Veritas, which was demanding premium rates in January 2007 due to a high demand for its services. Consequently, KSE loaned Oderco US$300,000 and US$400,000 on 2 February 2007 and 2 March 2007 respectively to deal with these issues.

Should KSE have done more?

118 The Judge agreed with BRE's assertion that KSE should have deployed its own personnel to Oderco's yard to supervise the construction of the WPU from the outset. She found that KSE's failure to do so was a breach of clause 6.2 of the JVA. This conclusion was, in her view, supported by the evidence given by the expert witnesses of both BRE and KSE. Mr Craven, BRE's expert witness, stated in his expert report: [note: 36]

> … [A]ny prudent Owner wanting to ensure a successful construction and wishing to ensure he protects his own and end-user interests would put some supervisory expertise in place at the construction yard from the very beginning of the project. … For a project like the present one, I would have expected a Project Team to be made up of the following:
>
> a. A full time (experienced) Project Manager on site, i.e. Oderco's yard;

b. A full time (experienced) Project Administrator, who should be also experienced in materials and drilling equipment, also on site, i.e. Oderco's yard;

c. Local inspectors, surveyors and third party technical expertise could be hired part time or on a when needed ("call out") basis …

Mr Matthew Wills ("Mr Wills"), KSE's expert witness, testified that having one project manager and one commercial or contracts manager on site would be a reasonable level of supervision for the construction of a WPU.

119 In our judgment, the JVA did not require KSE to go so far. The Parties contracted on the footing that KSE would procure a third party to construct the WPU. Clause 6.1 of the JVA provides: [note: 37]

6.1 … 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.

120 The Parties could have expressly stipulated in the JVA the terms on which KSE would contract with the builder of the WPU, in particular, that KSE should be allowed to have onsite supervision of the construction of the WPU. However, the Parties chose to make provision for only the specifications, equipment and inventory of the WPU. In so doing, BRE left it to KSE to negotiate the terms on which the WPU would be constructed by a third party. It could not have been assumed that KSE would have to secure so intrusive a right *vis-à-vis* the third party as to station its representatives in the latter's compound throughout the construction of the WPU, nor that it would be entitled to supervise the construction. Indeed, all that the Oderco contract provided for, as far as supervision was concerned, was: [note: 38]

Others:

- Technical visit/inspection to Oderco fabrication yard in Abu Dhabi to monitor progress of the construction.

- To provide monthly progress report with effect from the signing of this contract.

121 If it were to be taken as a given that KSE could have a permanent representative at Oderco's yard while the WPU was being built, it would not have been necessary for KSE and Oderco to specify the extent to which KSE could supervise the construction of the WPU, and in such a limited fashion too. To put it another way, any presumed entitlement of an employer to station its representatives at the builder's premises cannot survive an express term delineating its right to monitor the progress of construction. We are of the view that BRE cannot assert that KSE was bound to have put in place onsite supervision from the outset when the terms of the Oderco contract suggest that KSE was not entitled to have its representatives stationed at Oderco's yard while the WPU was being built.

122 We note that Mr Craven dismissed the proposition that the level of supervision expected of KSE should be determined in accordance with what was provided for in the Oderco contract. Mr Craven testified: [note: 39]

Q. You recognise that under the contract between Oderco and KSE, they had no right to supervise the construction of the WPU?

…

A. No, I disagree with that. I disagree. It isn't a question of right. If you look at the construction contracts that all of us in the drilling business have with shipyards or fabrication yards, there generally is no fixed – no fixed requirement made in those contracts for supervision by the owner. There is a very strong fixed requirement made by the owner of what the shipyard or the fabrication yard should provide in the way of project management. It's left to the owner to decide himself what project management strength he should have there. …

…

A: I have been involved in quite a few projects, yes, and I haven't had one of them where we had no supervision on site. Because you can't trust the shipyard or the fabrication yard to deliver exactly what you want without being there to check on it.

123 We did not have before us the relevant contracts from the projects that Mr Craven had in mind, nor evidence of the level of supervision that the employers in those cases maintained. It may be the case that, as Mr Craven testified, those contracts left it to the employer to decide what degree of project management it would have on site. But, this was not the case here because only technical visits and inspections by KSE were provided for under the Oderco contract. Consequently, we find that KSE was not entitled to have onsite supervision throughout the construction of the WPU.

124 Another one of BRE's complaints was that KSE should have acted more expeditiously to forestall problems, and that it failed to do so because it did not have its eye on the ball. According to BRE, the site visit on 8 and 9 February 2006 was an early indication that all was not well. Oderco produced only 12 purchase orders for critical equipment when there should have been several hundred by that time. However, it was not only KSE that was represented at this visit. BRE was represented by Mr Yazid and PCSB, by three members of its technical team. None of these individuals appeared to have been concerned by the lack of purchase orders. Further, they were also aware that difficulties were being faced by Oderco in acquiring a BOP, a crucial piece of critical equipment, as Dr Samir reported that delivery would take seven months. Yet, no one appears to have been exercised by the fact that this would entail that the WPU would be completed well after the deadline stipulated in the PCSB contract. In our view, this indicates that there was some flexibility in the deadline under the PCSB contract, and contradicts the Judge's finding (at [90] of the Judgment) that "[t]he state of affairs confronting KSE at the time it signed the Oderco [c]ontract on 21 December 2005 was one of immense urgency".

125 If KSE was not remiss in the early days of the Oderco contract, need it have done more as construction progressed and the difficulties of working with Oderco became apparent? As a general proposition, we are of the view that KSE need only act reasonably within the context in which the Parties contracted. According to Mr Craven, the following active steps should have been taken by KSE once things started to go awry: [note: 40]

Once there is obvious and serious slippage impacting final delivery, KSE should put in place a reasonable recovery programme. This required KSE to find out the reasons for the delay and to take steps to recover progress to be in line with the construction schedule. Possible actions that I would expect to be taken are:

a. Find out what needs to be done and what's outstanding

b. Realistic & close professional monitoring of progress

c. KSE to consider taking over of procurement of equipment

d. KSE to review the purchase orders … to ensure that equipment was purchased

126 But, KSE did do all of those things. The evidence shows that KSE kept close tabs on the goings-on at Oderco. It asked for recovery schedules as construction fell behind schedule. When periodic inspections coupled with constant and robustly-worded correspondence proved ineffective, Mr Connolly was deployed to Oderco's yard (the fact that Oderco allowed Mr Connolly to be present does not detract from our previous point on the Parties' omission to stipulate that KSE should, in its contract with the builder of the WPU, make provision for onsite supervision as that relates to the provisions in the JVA). KSE also assisted with the procurement of key pieces of critical equipment, going to the extent of arranging for expedited transport and paying in advance for such equipment, not to mention paying the salaries of Oderco's employees as well as the fee for the certification of the WPU, none of which KSE was obliged to do under the Oderco contract. BRE could not have had any complaints on this score.

127 This brings us to our next and more general point: nowhere in the evidence was it suggested that BRE was at any time unhappy with KSE's performance of its obligations. We asked BRE's counsel, Mr Philip Jeyaretnam SC ("Mr Jeyaretnam"), to refer us to any correspondence where BRE had indicated to KSE that its conduct was not satisfactory. In response, Mr Jeyaretnam directed us to an e-mail dated 19 September 2006, wherein Mr Yazid exclaimed to GBC: [note: 41]

> MY GOD! We are struggling to meet the deadline even with airfreighting the mud pumps and the BOP … now SEAFREIGHT??? What are these guys doing? have they no sense whatsoever about the importance of completing this job on TIME?? This WPU is supposed to be delivered in 180 days. [PCSB] was kind enough to extend till Mid-September and now we really got on their nerve. The last date to deliver in LABUAN, Malaysia is 25th October. JUST COMPLETE THE RIG!!! [original emphasis omitted]

128 This e-mail was sent in response to an e-mail from GBC to Dr Samir, which was also copied to Mr Yazid, pointing out that Oderco's project manager had mistakenly arranged for the mud pumps needed for the WPU to be sent by sea freight instead of airfreight. In our view, it is clear that Mr Yazid was not complaining about KSE. Instead, he was expressing disbelief at the lack of urgency exhibited by Oderco and its employees. *It is also striking that Mr Jeyaretnam could not direct us to any earlier item of correspondence, as this e-mail was sent late in the day indeed.* Moreover, the evidence suggests that BRE was in fact satisfied with KSE. Pertinently, on 15 November 2006, Mr Yazid wrote to GBC: [note: 42]

> Dear BC,
>
> Todate we are six (6) months behind time for the delivery of this WPU. We were given 180 days to deliver this project and todate a slippage of 180 days has been sustained. *At this late stages of the project the builder is holding us by the bxxxx*. We do not have time to negotiate with the builder. I believe we really need to incur this cost [a US$350,000 change order proposed by Oderco] as to expedite the time loss and to save whatever is left of [BRE's] reputation with the client.
>
> *I appreciate all the effort that you on behalf of [KSE] had done to deliver this project.*

Thank you and regards.

[emphasis added]

129 This e-mail illustrates Oderco's opportunistic behaviour, which the Parties had to deal with. More importantly, it indicates that far from being dissatisfied with KSE, Mr Yazid was in fact appreciative of its efforts. Indeed, at the trial, Mr Yazid testified: [note: 43]

Q. Did you feel on 15 November [2006] that [KSE] was not fulfilling their part of the bargain with you – with BRE?

A. Not at any point.

Q. You never felt that they were not doing their part?

A. No.

Q. So –

A. *I always feel they are doing their part*.

[emphasis added]

130 While we accept Mr Jeyaretnam's argument that Mr Yazid's opinion of KSE's conduct is not determinative of the matter, it is nevertheless weighty evidence of what was reasonable for KSE to do in the circumstances. *If no one from BRE had expressed unhappiness with KSE, and a key individual of BRE had gone so far as to convey his compliments, one wonders what omission KSE can now be accused of being culpable of.* This point is reinforced by the fact that there is no reason to believe that BRE and its employees were novices in the oil and gas industry who did not know any better.

131 We turn to our third point, which is that an obligor may have to choose between different reasonable courses of action, and in so choosing, will have to exercise its judgment to determine which would be the most efficacious in the circumstances. The obligor is not to be faulted for making a choice that was only revealed to be ineffective after the fact. This is not to say that the obligor need not take *all* those reasonable steps which a prudent and determined individual, acting in the obligee's interests and anxious to procure the contractually-stipulated outcome within the available time, would take, or that the obligor need not do everything reasonable in good faith with a view to procuring the contractually-stipulated outcome within the time allowed. As indicated in *Travista* as well as above at [47] and [62], the obligor must do all of those things. However, it will often be faced with conflicting tacks or strategies which it must choose between. In this case, BRE effectively persuaded the Judge that KSE was obliged by clause 6.2 of the JVA to adopt a *hardline* approach in dealing with Oderco, for example, by deploying onsite supervision from the outset, or by threatening to employ an alternative rig builder or commence legal proceedings when Oderco would not comply with its obligations. While that is certainly one approach that could have been taken, we do not think it was the only approach that was available, or even the approach that was most likely to succeed. Our reasons are as follows.

132 First, although Oderco eventually revealed itself to be a partner that was very difficult to work with, the Parties would not have known this from the outset. Oderco was a consensual choice and KSE need not have been unduly suspicious that Oderco would not uphold its end of the bargain.

Second, as the difficulties of working with Oderco became more apparent, it was eminently sensible for KSE to apply increasing pressure on Oderco by ratchetting upward the vigour of its objections. It will not be in every case that the obligor is required to progress directly to a hardline approach, if at all.

133 Third, a hardline approach might not have been advisable in the circumstances; an obligation to use all reasonable or best endeavours is not an injunction to behave as a bull in a china shop. The Parties both operated in Southeast Asia, while Oderco was based in the Middle East. It is unlikely that the Parties would have been familiar with the operating environment or the bounds of acceptable business dealings there. There might have been cultural sensitivities that would have rendered a hardline approach inadvisable. It will often be necessary to give an obligor the benefit of the doubt where it exercises circumspection in circumstances where business practices are unfamiliar or unclear.

134 On a related note, KSE might quite reasonably have thought that it was in too weak a position to make demands of Oderco. Oderco had KSE over the figurative barrel. KSE did not have an existing business relationship that it could use as leverage to motivate Oderco. The Oderco contract only provided for liquidated damages of US$5,000 per day to be paid to KSE for late delivery, subject to a maximum of US$150,000. This was less than 2% of the sum which KSE was to pay Oderco under the Oderco contract. It was also known to all involved that rig builders with spare capacity were hard to come by at the material time, given the heated state of the market then. Even if an alternative rig builder had been available, KSE would have had to take into account the time necessary to transfer the partially-completed WPU to another yard and resume construction. As noted at [15] above, it eventually took KSE around three months to effect the transfer to its own yard. Moreover, Mr Yazid's e-mail of 15 November 2006 quoted at [128] above illustrates in graphic fashion that it was Oderco which held all the cards.

135 Even if KSE had not been subject to all these disadvantages, we have some reservations about overstating the extent to which KSE could have intervened in the construction of the WPU. Mr Craven stated that given that it became reasonably clear that Oderco could not deliver the WPU on time and that PCSB had no confidence in Oderco, KSE should have considered alternatives to speed up progress and instil confidence in PCSB, such as taking over the operations of Oderco's yard or its critical operations so that KSE could effectively manage progress. We have already noted that KSE had no entitlement to do so. Further, we do not think that was a realistic proposition. We find Mr Wills' view that KSE could only increase its involvement to a limited degree persuasive: [note: 44]

> Q. Given the critical situation as at 10 May 2006, what steps, in your view, should [KSE] have taken to try and salvage this critical situation?
>
> A. There would obviously be the supervision side which we've discussed earlier. We have talked about possible paying for vendors, *but there is, obviously, there's only a limited amount you can do in someone else's fabrication yard. You are constrained by, I suppose, the rules and regulations, however unusual, that you have in that fabrication yard. So you can't go around opening doors and kicking doors down because it's not your yard*.
>
> So, supervision side, yes, [KSE] could have, but you are limited that you are only there as a supervisor.
>
> …
>
> Q. Was an option of sending a project team down to the Oderco yard to take over the operations of the yard a feasible option, Mr Wills?

A. No, I don't think so. Dealing with any shipyard or fabrication yard, it would be highly unusual for a team of people to walk in to that yard – someone else's property – and say "We are taking over that yard".

Almost certainly, what would happen is the owner of the yard – whoever he may be – would be very disgruntled, and more than likely he would cause an awful lot of problem for the project that you have said you are going to take over his yard on, and a likely scenario would be, he would tell all his labour and all of his workforce not to cooperate.

So you may well have the biggest supervision team in the world, but if you don't have any labour to do the work, you are not going to complete the project.

[emphasis added]

136 Indeed, we saw no evidence of BRE urging KSE to take a hardline approach with Oderco before this dispute arose. Next, we observe that KSE's behaviour bore all the hallmarks of a prudent and determined company acting in BRE's interests and anxious to procure the contractually-stipulated outcome within the time allowed. KSE's employees were persistent in pushing Oderco to perform. They stepped in to the extent that was reasonable when persuasion proved ineffective – deploying Mr Connolly (and subsequently, Francis) to Oderco's yard, assisting with the procurement of critical equipment and making sizable payments on behalf of Oderco. Most tellingly, KSE eventually took over the construction of the WPU itself. It obviously wanted to have the WPU completed.

137 In the final analysis, a distinction must be drawn between an obligation to use all reasonable endeavours to have a third party do a thing (which was the position KSE was in) and an obligation to use all reasonable endeavours to do that thing on one's own. Neither BRE nor the Judge drew a line based on this critical distinction. For all the foregoing reasons, we find that KSE did not breach clause 6.2 of the JVA.

Did KSE's breach cause BRE loss?

138 This necessarily disposes of BRE's claim against KSE, and means that the substantive appeal must be allowed. However, we shall deal with the issue of causation out of deference to the extensive submissions of counsel on this issue and also for completeness.

Must causation be proved?

139 KSE has cited a number of authorities for the proposition that causation is an essential element of liability, and that the burden is on the plaintiff to prove it (see, *eg*, *Asia Hotel Investments Ltd v Starwood Asia Pacific Management Ptd Ltd and another* [2005] 1 SLR(R) 661 at [41] and [147], and *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR(R) 782 at [71]). It suffices to reproduce the excerpt from *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) relied upon by KSE (at para 22.014):

It seems almost too obvious to state as a principle, but damages may only be awarded if the promise[e]-claimant *proves* that the defaulting promisor's breach of contract *caused* the loss sustained by the promisee. As the Court of Appeal put it in *Salcon Ltd v United Cement Pte Ltd* [[2004] 4 SLR(R) 353], "[t]hat causation must be established before the question of quantification of damages arises is obvious". [emphasis in original]

140 BRE, on the other hand, continued to contend before this court that causation was an issue for

the assessment of damages. However, it did not entirely align itself with the Judge's reasoning at [144]–[145] of the Judgment. Instead, it argued: [note: 45]

> KSE's argument that the learned Judge failed to consider causation in the context of liability is misconceived. ***Loss occurred upon non-delivery of the WPU*** , and the learned Judge repeatedly held that this was caused by KSE's breach. KSE's submission that it could not be liable to BRE for the cancellation of the PSCB Contract because such cancellation would have occurred "regardless" was correctly identified by the learned Judge as a matter for the assessment of damages … [original emphasis omitted; emphasis added in bold italics]

We do not agree that loss occurred immediately upon non-delivery of the WPU. This is at odds with the non-absolute character of clause 6.2 of the JVA (reproduced at [9] above). Since BRE seeks damages for the termination of the PCSB contract, it must prove on a balance of probabilities that KSE's breach of clause 6.2 of the JVA led to that termination. More specifically, BRE must prove that had KSE used all reasonable endeavours, it could have procured the construction and delivery of the WPU by 12 April 2007 so as to avoid PCSB's termination.

Causation on the facts

141 In this regard, assuming (contrary to our finding at [137] above) that KSE did breach clause 6.2 of the JVA, we are of the view that there is a lack of direct evidence that but for such breach, the WPU could have been completed and delivered to PCSB in Labuan by 12 April 2007. The Parties' experts were not asked to opine on this matter, and counsel did not construct a possible chain of events that could have led to the delivery of the WPU by that date. However, in our judgment, the weight of the evidence lies against such a finding.

142 The WPU should have been completed sometime before 12 April 2007 if it were to be delivered to PCSB in Labuan by that date. Instead, construction continued until August 2007 and was not completed even then. KSE eventually had to transfer the partially-completed WPU to its own yard, and that was accomplished in early November 2007. BRE had to prove that earlier and more extensive supervision on KSE's part would have expedited the construction of the WPU by at least approximately seven months (taking the period from 12 April 2007 to early November 2007, when the partially-completed WPU was moved to KSE's yard), roughly half of the time taken for construction as at 12 April 2007. In this regard, Mr Craven testified: [note: 46]

> Depending very much on equipment deliveries, ***the construction of a similar [WPU] would be expected to take about 9 to 12 months*** – to say Oderco could provide this in 6 months (including transport to Malaysia) is very optimistic and should have been recognized as such by KSE at the time of signing the Oderco Contract. … [emphasis added in bold italics]

When Mr Craven made the estimate of nine to 12 months for the construction of a WPU, he must have had in mind a competent and committed rig builder. Instead, KSE had Oderco, which Mr Wills described in unvarnished language as "a sometimes frustrating, obstinate and badly organized builder". [note: 47] Even the 15 and a half months between 21 December 2005 (the date on which the Oderco contract was entered into) and 12 April 2007 might not have been adequate for Oderco.

143 It is also not clear what would have been achieved by extensive onsite supervision of Oderco from the outset. Supervision by experts who could identify lapses and propose solutions would have been useful had KSE been working with an earnest rig builder interested in constructing the WPU as quickly as possible and in accordance with its obligations. However, as Mr Craven observed: [note: 48]

… [O]n the basis of the documents reviewed by me, it is my professional opinion that the entire project was poorly organized, mismanaged and lacking in proper professional supervision both on the part of Oderco (the construction yard) and KSE. ***Especially culpable is Oderco who did not appear to be concerned at the significant delays and appear[ed] to have been intransigent*** but this does not excuse KSE from its obligation to monitor progress and make all reasonable endeavours to ensure the target delivery date was met and to take timely action when it was obvious that the project was running very significantly behind schedule. [emphasis added in bold italics]

Moreover, it should not be too readily assumed that onsite supervision would even have revealed what was wrong. Mr Wills observed: [note: 49]

Q. Would I be correct to say that one of the steps [KSE] ought to have taken was to try and find out what was causing the delay?

A. Yes. But again, that would have to – in order to find out what was causing the delay, you would obviously need some sort of cooperation from Dr Samir in this case, and if Dr Samir is unwilling to give this information, then it would create problems and make the task even more difficult.

144 Further, as construction of the WPU progressed, it became abundantly clear to KSE that Oderco was apparently unconcerned by time pressures. How would knowing in greater detail what Oderco's inadequacies were have been helpful? The chain of e-mails reproduced above indicates that Oderco was not a partner with whom one could cooperate to solve problems. Moreover, as noted above at [135], Mr Wills testified that there was only so much which an employer's representatives could do at a builder's yard. An employer would also be well advised to be sensitive to a builder's desire to control its own operations and safeguard potentially confidential information. The benefit of onsite supervision, then, should not be overstated. This was all the more so considering that the company to be supervised was Oderco.

145 Mr Connolly reported to KSE on 18 September 2006 that Oderco was applying all its resources, and that "[i]f they had worked on this job from long before July [2006], then they may have finished by now. This week, they should be in the middle of testing and commissioning". [note: 50] It is tempting to conclude that pervasive onsite supervision and properly-applied pressure might have secured the completion of the WPU by mid-September 2006, as Mr Connolly estimated, but we are of the view that this should not be assumed. Reading between the lines, it is likely that Oderco was prioritising other projects, given the strong demand for rig builders at the material time. A WPU is a small and relatively basic rig. This might have been one reason why Oderco was not interested in building the WPU for KSE in earnest.

146 Moreover, it is necessary to focus on the operative cause of Oderco's delays. Relying on Mr Craven's evidence, the Judge explained that the construction of a WPU had three stages: (a) fabrication of the WPU's structure; (b) delivery and installation of critical equipment; and (c) commissioning. On the basis of photographs of the construction of the WPU, Mr Craven testified that the first stage was 95–100% complete by June or July 2006, and Mr Wills agreed that it was 95% complete by July 2006. Expediting the first stage of construction would not have been helpful if there was no critical equipment to install thereafter. Onsite supervision would therefore not just have had to procure the quicker fabrication of the WPU's structure, but would also have had to ensure that critical equipment was ordered in a timeous manner. The evidence indicates that onsite supervision would not have been very useful in this regard. The Judge accepted that there should have been

hundreds of purchase orders for critical equipment by February 2006, and found that KSE was remiss in not having seized upon the fact that Oderco was only prepared to reveal 12 purchase orders. In fact, KSE did not even get to see those 12 purchase orders. GBC testified that Oderco was concerned with confidentiality and did not want KSE to know who their suppliers were and how much was being paid for the critical equipment ordered. During the visit to Oderco's yard on 8 and 9 February 2006, the purchase orders were shown to PCSB but not KSE. If KSE did not know what had been ordered and from whom, it would not really have been in a position to expedite matters, save to keep urging Oderco to provide the purchase orders.

147 Leaving the issue of onsite supervision aside, it will be recalled that Mr Craven said that a recovery programme should have been put in place once it became clear that Oderco was behind schedule. Again, such a programme would only have been viable with a committed rig builder with the capacity to implement it. Mr Wills observed: [note: 51]

> Q. Should [KSE] have also considered a recovery programme to ensure that Oderco was able to catch up on the construction schedule?
>
> A. Yes, if my memory serves me correctly, there were actually requests for recovery schedules, but as we have also discussed between myself and Mr Craven, *the project schedules produced by Oderco were very unreliable*. So even – that probably stems from the fact that their planning engineer was frequently changed, and obviously didn't seem to know how to use the software appropriately.
>
> *So even providing a recovery schedule, it might have some difficulties interpreting what is in that recovery schedule. Just like – I think Oderco issued about 10 schedules during the duration of the project, and many of them were completely unreliable.*
>
> [emphasis added]

If KSE could not have compelled Oderco to stick to a recovery programme, putting in place such a programme would have been a pointless exercise.

148 We are also persuaded by KSE's argument that the effective cause of delay beyond 12 April 2007 was the time taken for the delivery, installation and commissioning of the VFD. Oderco issued the purchase order for the VFD on 12 February 2006. This provided for a delivery date of seven months ex-works, *ie*, by 12 September 2006. On 25 August 2006, Oderco received notice from the manufacturer that the ex-works delivery date would be postponed to the end of October or early November 2006 due to a shortage of materials. On 4 November 2006, Mr Connolly reported to GBC that the VFD was complete, but would not be released for airfreight until Oderco received funds. The payments were made later in November 2006, but the VFD only left the manufacturer on 11 January 2007, ostensibly because of further testing. The VFD eventually arrived at Oderco's yard on 23 January 2007, but delays continued at the yard, and by July 2007, the VFD had yet to be commissioned. On 16 July 2007, Mr Connolly's replacement, Francis, told GBC that the manufacturer's subcontractor said that the VFD had not been tested at the factory because the equipment had to be airfreighted urgently. This resulted in a long time being spent setting up the VFD on site.

149 Would the procurement of the VFD have been within KSE's control? It has already been said that KSE had limited access to Oderco's purchase orders and would not have known that the VFD was scheduled for delivery to Oderco only on (originally) 12 September 2006. Even if KSE had known about this, it is not clear that KSE could have done anything about it. When questioned by the Judge, Mr Wills testified as follows: [note: 52]

Court: If this is a firm purchase order, can the supplier keep changing the delivery date?

A. Unfortunately, your Honour –

Court: Without any penalty?

A. – with this type of equipment it's very much the vendors and suppliers who call the shots, because they are quite specialised in the equipment they provide. So, typically, drilling rig manufacturers will stick to their preferred VFD, their preferred equipment. And furthermore, if one manufacturer is having difficulty in delivering, the likelihood is [its] equivalent or a competitor will be having the same problems.

So it's unfortunate – it's an unfortunate part of the industry at this point in time.

…

Court: Really, at the end of the day, this is a one-year order in advance, right?

A. Essentially, yes, your Honour.

…

Court: Yes, all right.

Is that normal?

A. In an active market, yes, unfortunately. It's one of those things that happens.

150 Thus, the late original delivery date of 12 September 2006 for the VFD was normal in an active market, and it is not likely that a shorter delivery period could have been arranged by any efforts on KSE's part. Moreover, rig builders and customers alike are at the mercy of specialised equipment manufacturers such as VFD manufacturers, and any difficulties faced by one manufacturer are likely to also be faced by other manufacturers. If Mr Wills is correct, even if KSE had intervened at the outset, it is unlikely that the delivery of the VFD could have been expedited. Consequently, the WPU could not have been completed by 12 April 2007 even if KSE had exercised all reasonable endeavours.

KSE's counterclaim

151 Turning to KSE's counterclaim, KSE averred that BRE was in breach of the JVA on the following bases:

(a) BRE's termination of the JVA was wrongful and constituted a repudiatory breach of the JVA;

(b) BRE breached clause 6.5 of the JVA in failing to: (i) comply with the PCSB contract; and (ii) ensure that the PCSB contract remained valid, binding and enforceable on PCSB; and

(c) BRE breached clause 3.6A of the JVA in failing to contribute the sum of US$400,000 to BRO as a shareholders' loan.

152 KSE pleaded for damages to be assessed for losses arising from these breaches. However, we are of the view that KSE suffered no quantifiable loss that may be assessed. While it is true that BRE's purported termination of the JVA was wrongful because KSE had not breached its contractual obligations to BRE, we cannot see what losses flowed from this breach. Even if BRE had not

terminated the JVA, there was a separate contract between KSE and BRO (*viz*, the BRO contract), whose terms KSE had to comply with. Under the BRO contract, KSE had an absolute obligation to provide BRO with a WPU by 17 June 2006. KSE had breached this obligation by a wide margin by the time BRE terminated the JVA on 26 December 2007. Although time was not stated to be of the essence in the BRO contract, it is likely that that contract would have been at an end once KSE missed the 17 June 2006 deadline and BRO would not have been obliged to accept delivery of the WPU thereafter. The WPU would then have been KSE's to do with as it pleased, but would have been no concern of BRE's. It would have remained for the Parties to promote the business of BRO. But, with BRO having no capital equipment and no customers, what loss can be said to have been caused by BRE's failure to do this? Accordingly, we are of the view that only nominal damages, if at all, should be awarded to KSE for BRE's wrongful termination of the JVA.

153 Similarly, we cannot see what loss was caused to KSE by BRE's omission to extend the US$400,000 shareholders' loan to BRO. Being only a loan and not an injection of capital, this sum would have had no overall impact on BRO's balance sheet and, hence, no impact on KSE as a shareholder. Given also that BRO was to pay for the WPU through bank financing procured by KSE, KSE cannot claim that BRE's failure to advance the said loan caused BRO to be unable to pay for the WPU. We further note that KSE itself similarly failed to extend the shareholders' loan stipulated in clause 3.6A of the JVA.

154 Turning to basis (b) of KSE's counterclaim (see [151] above), we are of the view that clause 6.5 of the JVA cannot be read as imposing an obligation on BRE's part to keep the PCSB contract alive once PCSB exercised its right of termination. Further, BRE managed its relationship with PCSB well enough in that the PCSB contract was terminated only on 12 April 2007, almost ten months after PCSB's right to terminate arose. Thus, BRE cannot be said to have breached clause 6.5 of the JVA.

Conclusion

155 In summary, we allow KSE's appeal and find that it did not breach clause 6.2 of the JVA. The Judge's order for damages to be assessed by the Registrar is annulled. We also find that BRE was not entitled to terminate the JVA. However, as we further find that no substantive loss was caused by this wrongful termination, we make no order as to damages in favour of KSE.

156 KSE is to have the costs of the proceedings here and below, which costs are to be taxed if not agreed. The usual consequential orders are to apply.

[note: 1] Appellant's Core Bundle II(A) p 7.

[note: 2] Appellant's Core Bundle II(A) p 8.

[note: 3] Appellant's Core Bundle II(A) pp 17–18.

[note: 4] Record of Appeal ("RA") III(I) p 297.

[note: 5] Appellant's Core Bundle II(A) p 44.

[note: 6] Appellant's Core Bundle II(A) p 51.

[note: 7] RA III(K) p 64.

[note: 8] Appellant's Core Bundle II(A) p 17.

[note: 9] RA III(I) p 297.

[note: 10] Appellant's Core Bundle II(A) p 223.

[note: 11] RA II p 16.

[note: 12] RA II pp 16–17.

[note: 13] RA II p 18.

[note: 14] RA II pp 19–20.

[note: 15] RA II pp 21–22.

[note: 16] RA II p 16.

[note: 17] RA III(I) p 297.

[note: 18] Appellant's Core Bundle II(A) p 10.

[note: 19] Respondent's Supplemental Core Bundle I p 26.

[note: 20] *Ibid*.

[note: 21] Appellant's Core Bundle II(A) p 186.

[note: 22] Respondent's Supplemental Core Bundle II p 18.

[note: 23] Respondent's Supplemental Core Bundle II p 24.

[note: 24] RA III(L) p 221.

[note: 25] RA III(L) p 223.

[note: 26] RA III(L) p 229.

[note: 27] RA III(L) p 228.

[note: 28] RA III(L) p 228.

[note: 29] RA III(L) p 231.

[note: 30] RA III(L) p 233.

[note: 31] RA III(L) p 241.

[note: 32] RA III(R) p 79.

[note: 33] RA III(R) p 80.

[note: 34] RA III(R) p 101.

[note: 35] RA III(R) p 101.

[note: 36] Respondent's Supplemental Core Bundle I p 8.

[note: 37] Appellant's Core Bundle II(A) p 17.

[note: 38] Appellant's Core Bundle II(A) p 43.

[note: 39] RA III(CC) pp 21-22.

[note: 40] Respondent's Supplemental Core Bundle I p 12.

[note: 41] Respondent's Supplemental Core Bundle I pp 244–245.

[note: 42] Appellant's Core Bundle II(B) p 34.

[note: 43] Appellant's Core Bundle II(A) p 131.

[note: 44] RA III(CC) pp 98-100.

[note: 45] Respondent's Case at para 106.

[note: 46] RA III(A) p 167.

[note: 47] RA III(P) p 236.

[note: 48] RA III(A) p 166.

[note: 49] RA III(CC) p 90.

[note: 50] Respondent's Supplemental Core Bundle II p 72.

[note: 51] RA III(CC) pp 91–92.

[note: 52] RA III(CC) pp 112-114.