Oakwell Engineering Ltd v Energy Power Systems Ltd
[2003] SGHC 241

Case Number : Suit 997/2002/V

Decision Date : 16 October 2003

Tribunal/Court : High Court

Coram : Lai Kew Chai J

Counsel Name(s) : Philip Jeyaretnam SC (Counsel), Herman Jeremiah, Joshua Wong and Jennifer Ng Shi Wei (Rodyk and Davidson) for the plaintiffs; Randolph Khoo and Bernette Meyer (Drew & Napier) for the defendants

Parties : Oakwell Engineering Ltd — Energy Power Systems Ltd

Contract – Breach – Whether defendants in breach of obligations to achieve financial closure of project and pay plaintiffs – Whether Settlement Agreement frustrated and defendants' obligations thereunder discharged.

Contract – Breach – Whether plaintiffs in breach of Settlement Agreement.

By a Joint Venture Agreement dated 18 June 1997 ("the JV Agreement") the plaintiffs and the defendants agreed to develop a joint venture project to generate electricity by two barge-mounted power plants in the State of Andhra Pradesh, India. The State government's plan is to provide more electricity to its people by allowing independent power providers ("IPPs") to build, own and operate power plants. The joint venture project company, known as EPS Oakwell Power Limited ("EOPL") was owned as to 87.5% by the defendants and as to the remaining 12.5% by the plaintiffs. Difficulties or to put it neutrally new developments emerged in the course of the implementation of the joint venture and parties entered into a revised Co-operation Agreement ("Co-operation Agreement") and a revised Shareholders Agreement both dated 17 October 1997. During the ensuing period of about 12 months, disputes arose between the parties, to which I shall refer later in this judgment. Those disputes were dealt with and fully resolved by a Settlement Agreement ("the Settlement Agreement") between the plaintiffs and defendants and dated 29 December 1998.

2 Under the Settlement Agreement, the defendants would own EOPL in respect of 100% of it shareholdings (to the extent permitted under Indian law). The defendants for its part agreed to pay the plaintiffs US$3,015,000.00. Payment was in the form of the issue to the plaintiffs of 1,850,000 defendants' shares, which were listed in Canada. The defendants further agreed to pay the plaintiffs the sum of US$2,790,000.00 which would have been payable within 30 days after the drawdown of funds on financial closure of the project. The financial closure refers to the procurement of financing by EOPL to complete and operate the power plants, as I will elaborate shortly. On the basis that the joint venture would continue after the power plants become commercially operational, the defendants also agreed to the payment of an annual sum equivalent to 6.25% p.a. of the actual cash flow for foreign repatriation in the first five years of commercial operation (as defined in the Settlement Agreement ("the 6.25% Annual Sum").

3 The defendants failed to achieve financial closure after the expiry of a reasonable time. The defendants recognized its inability to complete the Project and sold out part of its interest to The VBC Group which comprised, amongst other companies, Koneseema Power Corporation Limited ("KPCL") and VBC Ferro Alloys Limited, all of which are incorporated in India. The sale to the VBC Group was under a Memorandum of Agreement dated 16 July 1999. Oakwell was also sanguine enough to realize that the defendants were not making any progress in the implementation of the Project. It therefore welcomed VBC Group's entry on condition that its rights and entitlements under the Settlement Agreement were clearly preserved on an express indemnity from the defendants. That

indemnity related to the bonds, which the plaintiffs had given to both APSEB (later known as "APTRANSCO" and the Government of Andhra Pradesh ("GOAP")) to complete and operate the Project**.** There was an arrangement under which the defendants had agreed to pay the plaintiffs the sum of US$500,000.00 out of what the VBC Group had agreed to pay the defendants. The defendants did not pay the plaintiffs and nothing turn in these proceedings in relation to that understanding.

4 By an agreement dated 10 August 2000 entered into between the defendants and the VBC Group, which revised their earlier MOA dated 16 July 1999, the defendants agreed to transfer its entire interest in EOPL to the VBC Group for the price of US$4,463,000.00. In spite of the plaintiffs' interest in the Project, and its proprietary status as the Original Promoter, the defendants deny any liability to pay the plaintiffs on two principal grounds. First, it claims that the plaintiffs were in breach of the Settlement Agreement in that it had undermined the interest of the joint venture by writing to APTRANSCO and others. The plaintiffs had also allegedly interfered with the defendants' relationship with the VBC Group which resulted in disputes between the VBC Group and the defendants. Secondly, the defendants claims that the Settlement Agreement was frustrated by a change of circumstances which materially affected the Project as a result of which the defendants, it claims, was discharged from any liability under the Settlement Agreement.

5 The plaintiffs reject these allegations. It claims that it is entitled under clause 1.3.1 of the Settlement Agreement to receive under the Settlement Agreement the sum of US$2,790,000 within 30 days from the fist draw-down of funds by the defendants and/or EOPL after the Financial Closure of the Project. Under this claim for a liquidated sum, the plaintiffs say it is prepared to give a discount of US$790,000 if proof were furnished that a payment of INR 30 million had been made on the plaintiffs' behalf. The plaintiffs deny that any proof of such payment has been established in these proceedings. In the further alternative, the plaintiffs are also prepared to give credit for the sum of US$350,000.00 in circumstances I will allude to later.

6 It further claims that under clause 1.4.1 of the Settlement Agreement the defendants agreed to pay to the plaintiffs the equivalent of 6.25% of the actual Cash Flow For Foreign Repatriation for each of the first 5 years after the Commercial Operation Date of the Project. The Settlement Agreement set out the formula by which the Cash Flow For Foreign Repatriation is to be calculated. As the defendants had divested all its interest in EOPL to the VBC Group, it would not be operating the power plants and there would be no Cash Flow for any calculation under the Settlement Agreement. Alternatively, the plaintiffs claim damages under this head of damages to be assessed on a number of bases, to which I will return later in this judgment.

7 In these premises, the plaintiffs rely on the principle of law that where a person is under an express obligation to pay money on a certain event, he cannot by his own act be the means by which his obligation can be avoided or reduced. Accordingly, the defendants, who had made it impossible for the occurrence of the event or events, cannot rely on the non-happening of the event as an excuse for non-payment. The plaintiffs rely on *Bournemouth & Boscome Athletic Football Club & Co Ltd v Manchester United Football Club Ltd* [1980] Unreported, to which I shall return later.

The facts

8 I will now set out the facts as I find them after evaluating the massive documentary evidence and the oral evidence of 21 witnesses whose evidence I heard over 13 days.

9 The plaintiffs, as explained by Mr Low Beng Tin ("Mr Low"), its Managing Director at all material times, have been in the business of supplying engineering products and engineering services

in the oil, gas and marine industries. In 1994 it was listed on the secondary board of the SGX. In 1995 it was looking into power development activities, which led it to explore power development projects in India which was seen to be in some need for electrical power. It engaged a consultancy firm known as Aarken Consultants Pvt Limited ("Aarken") to identify potential projects and assist in the preparation of bids for such projects.

10 Mr Amarchand Shrishrimal ("Mr Amarchand") of Aarken gave evidence for the plaintiffs. He dealt with all matters which had to be handled in India. Mr Eric Leow ("Mr Leow"), who was the first to give evidence for the plaintiffs, handled the Singapore end of things. Mr Leow had substantial experience in respect of barge mounted power projects, having being involved from 1993 to 1996 in several power projects in different countries such as the Philippines, Nicaragua, Peoples' Republic of China and India, which were barge mounted power projects.

11 In early 1995, the Indian State of Andhra Pradesh invited bids through an international competitive bid. The plaintiffs were awarded by the Andhra Pradesh State Electricity Board ("APSEB") to set up two 100MW internal combustion diesel engine technology barge mounted power plants at Andhra Pradesh ("the Project"). The Project was modified from time to time. The tariffs included a levellised capacity charge comprising a foreign debt charge of US$0.0233 per unit of energy for 7 years and other fixed charges of INR0.80 per unit of energy, making a total of about INR1.5 (at the then prevailing rate of exchange).

12 Following the award of the Project, the plaintiffs and APSEB entered into two power purchase agreements dated 31 March 1997 ("the PPAs") in respect of the Project. It was provided under the PPAs that the plaintiffs would incorporate a company in India. That was understood to be the special purpose company which would undertake the Project. Such a company was later incorporated and named EPS Oakwell Power Limited ("EOPL") or what is sometimes referred to as the Project Company.

13 APSEB and all concerned intended the Project to be of short gestation. It was intended that it should be set up and running quickly and initially, the time frame was 13 months. Later, it was extended to a 15 month period, i.e. by the end of June 1998.

14 I shall refer, for illustration, to the PPA dated 31 March 1997 entered into between APSEB and the plaintiffs for power purchase in relation to the Barge Mounted Power Project at Kakinda, Andhra Pradesh, India. The plaintiffs agreed to a number of undertakings under Article 7 of the PPA. By that Article, it covenanted and agreed with the APSEB to:

"(a) use all reasonable efforts to construct the Project

in accordance with the construction contract and to

operate the Project in accordance with Prudent Utility

Practices;

(b) …..

(e) use all reasonable efforts to cause the date of Financial Closing to occur within Six (6) months of the date of signing of this Agreement and furnish to the Board periodic progress reports (not less than monthly) regarding the same and in any case cause

Financial Closing to occur not later than twelve (12) months from the date of signing of this Agreement". (emphasis added)

15 As the original promoter of the Project, the plaintiffs were required to provide an indemnity bond in respect of the Project to the Government of Andhra Pradesh ("GOAP"). It bound itself to indemnify the APSEB if the Project Company shall fail to complete the Project in accordance with the several agreements.

16 The estimated cost of the Project was about US$217 million. It was within the contemplation of the plaintiffs that the Project would require an equity share of between 20%-30% of the total estimated costs and it was projected that the remaining costs could be financed by loans from financial institutions. Due to the scale of the projected costs, the plaintiffs had to find one or more third parties to participate with it in the equity portion.

Defendants' entry into the Project

17 The plaintiffs were in the course of discussions with various potential equity participants, which Mr Leow was tasked to procure, when Aarken informed it about the defendants' interest in participating in the Project. Serious negotiations followed. The defendants' representatives were Mr James Cassina ("Mr Cassina"), initially a director of the defendant and who later became its Chairman, Mr John Howard Brake ("Mr Brake"), Mr Roland Mauger and Mr Ramuji Nandiga ("Mr Ramuji"). They met Mr Low and Mr Leow at the plaintiffs' office in Singapore over a few days in June 1997. Mr Amarchand was also present. The two parties discussed the broad principal terms of co-operation. They were later joined by Mrs Rita Mukerji (Mrs Mukerji") and Mr Ramesh Kumar Naroola ("Mr Naroola"). Both of them are directors of Aarken. Mr Naroola was at the material times also a consultant and legal adviser of Aarken. Subsequently, Mrs Mukerji was a consultant to the Project from July 1996 and was also a director of EOPL and an alternate director to Mr Cassina on the board of EOPL. Mrs Mukerji was scheduled to have given evidence on behalf of the defendants on the developments of the Power Project from July 1996 to August 2000 and on the legitimate use of the Project funds. She did not give viva voce evidence and her affidavit evidence was expunged from the records.

18 In the course of their presentation, the representatives of the defendants impressed the plaintiffs' top management. They spoke about the defendants' technical and resources. They impressed Mr Low and Mr Leow that they were very knowledgeable about the business of generating electrical power in Andhra Pradesh and that they knew the relevant authorities and personnel involved and the criteria for selection process by APSEB for power projects.

19 Mr Brake, who was at the material time the President of the defendants, made a presentation at the meeting about the defendants' ability to arrange the financing for the Project. He stated that he had already spoken to the financial institutions and consultants before meeting the plaintiffs and he expressed confidence in being able to achieve Financial Closure within a short time frame. He went further and assured the plaintiffs' representatives that in case of delay the defendants were able do balance sheet financing.

20 In the end, the plaintiffs and the defendants agreed to develop the Project jointly with the defendants having the majority equity and control in the Project company. It was also agreed that the Engineering and Procurement Contract be awarded to Atlantic Seaboard Industries Ltd ("ASIL"), a subsidiary of the defendants. The parties entered into a Joint Venture Agreement dated 18 June 1997. They also entered into another agreement of the same date. Both agreements are referred to as "the June Agreements".

21 Under the June agreements it was expressly agreed that if the Government of Andhra Pradesh guarantee and/or the Fuel Linkage Licence shall not be issued by the Government of Andhra Pradesh Government and/or APSEB within 60 days from the date of the June Agreements, "both parties will use their best endeavours to procure their issue." It was clear that the issue of the Fuel Linkage Licence was extensively discussed by the parties during the negotiations and that they had resolved this important issue by agreeing to do their best to obtain it.

22 Under the June Agreements the defendants agreed to pay the plaintiffs certain amounts including an amount of over US$5.42 million after financing closings under the engineering, procurement and construction ("EPC") agreements and to procure the financing documents and over agreements to be executed within 120 days from 18 June 1997.

23 In addition to the June Agreements, several other side agreements were entered into on 18 June 1997. The plaintiffs agreed to award to ASIL the project management contract in the sum of US$1.0 million. Secondly, they also agreed in respect of the sharing of savings from the EPC Contract and other matters including a provision for an allowance of US$250,000 for project administration in India. Thirdly, the plaintiffs and ASIl agreed, in respect of the sharing of the difference in cost of US$4,000,000 per Barge Mounted Power Plant amounting to an entitlement of the plaintiffs to claim a sum of US$4,000,000.00.

24 There was some delay in the choice of Project Company in the Joint Venture under the June Agreements. Eventually it was decided to have a company named EPS Oakwell Power Limited ("EOPL") as the Project Company. The PPAs were then assigned to EOPL. Unfortunately, the delay caused the delay in the issue of the GOAP Guarantee.

25 Notwithstanding the delay, during which the plaintiffs had to deal directly with APSEB, GOAP and other authorities, it was also clear on the evidence that from the defendants' entry in June 1997 into the joint venture, the plaintiffs were dealing out of necessity with the third party relevant authorities on behalf of the joint venture which, during that relevant period, was effectively under the control of the defendants.

26 Unfortunately, the defendants did not meet the deadlines in the June Agreements.

The 17 October 1997 Agreements

27 Both parties gave evidence of their perceptions of the difficulties which they had encountered since the June Agreements. I need not traverse those areas of differences, in which allegations and counter-allegations are made, as they entered into two agreements known as the Co-operation Agreement and the Shareholders' Agreement both dated 17 October 1997 (" the Agreements").

28 Under the 1997 Agreements, the defendants agreed to subscribe for 87.5% of the shares in EOPL , the Indian generating company. The plaintiffs would subscribe for 12.5% shares in the company.

29 The highlights of the Agreements, which were emphasized during the hearing, are these. First, under clause 4.2, the defendants agreed to replace the deposit that secured the bank guarantee issued by the plaintiffs in favour of the APSEB ("the Bank Guarantee") by 31 October 1997 and subsequently cause renewals of the Bank Guarantee.

30 Secondly, under clause 4.4, the defendants, as partial consideration for (i) the reimbursement

of the plaintiffs' expenses in the development of the Power Purchase Agreements signed between the plaintiffs and APSEB on 31 March 1997 ("PPAs") and the Project; (ii) the plaintiffs' covenants and undertakings in the Agreement, agreed to pay to the plaintiffs the sum of US$5,424,500.00 as soon as possible after the date of the Financial Closure under the EPC Agreements but in any event not later than 30 days from that date.

31 The third highlight of the Agreements is this. Under clause 4.5, the defendants agreed that it would within 120 days of the date of the Co-operation Agreement, i.e. 17 October 1997, cause the Financial Documents, the Shareholders' Agreement and the EPC Agreements to be executed; and procure the Financial Closure of the Project. It was further agreement that if the defendants failed to fulfill the undertaking given in Clause 4.5 it would pay to the plaintiffs all such liquidated damages and penalties as the plaintiffs may become liable to pay under the terms of the PPAs. It should be noted that the payment of any liquidated damages did not relieve the defendants from its obligation to cause the Financing Documents, the Shareholders' Agreement and the EPC agreement to be executed.

32 I should now draw attention to some of the terms of the Shareholders Agreement. First, the defendants agreed that it shall within 120 days of the date of the Shareholders' Agreement (i) lend or cause to be lent to EOPL, and on a non-recourse basis with respect to the other Shareholders, the sum of US$176,859,500 being 85% of the agreed budgeted costs for the performance of the EPC Agreements; and (ii) procure the Financial Closure of the Project. It was also agreed that the aforesaid undertakings by the defendants would be delayed by the number of days of any delay attributable to either (a) delays in obtaining Fuel Linkage Allocation from the appropriate third parties and/or (b) delays in obtaining the duly executed Government of Andhra Pradesh Guarantee, provided such delay is not caused by the defendants.

33 In December 1997, the plaintiffs by way of accommodation agreed with the plaintiffs' suggestion to the change of fuel from furnace oil to naptha and for change of technology from Diesel Generating Set to Combined Cycle Gas Turbine system.

34 On 13 February 1998 the parties signed an agreement in which it was agreed that in view of the defendants' failure to procure Financial Closure of the Project, the defendants be granted a 30 day extension. The plaintiffs' rights were reserved. Further extensions were reluctantly agreed to by the plaintiffs up to 1 September 1998.

Disputes and the Settlement Agreement

35 Disputes arose between the parties on the Agreements. On 8 July 1998, the defendants formally requested the plaintiffs to reduce its compensation under the Co-operation Agreement by 50% stating that the defendants were concerned about its own ability to achieve Financial Closure of the Project without the participation of CMS Asia ("CMS"). It cited a number of reasons. For example, the defendants referred to the need to change the technology from diesel sets to gas turbines was due to the requirements of the potential financiers of the Project, who parties had identified to be Canada's Export Development Corporation and Fance's Coface. Secondly, the defendants. The defendants also mentioned that it was keen to get the agreement of CMS, whose group was at that time the only independent power producer in the world generating electricity in India, to share a 50% interest in all of the defendants' present and future projects. In response, the plaintiffs pointed to the defendants' failure to achieve the Financial Closure of he Projects as required by Clause 4.5 of the Co-Operation Agreement and Clause 8.1.(b) of the Shareholders Agreement. Under the Co-operation Agreement the defendants had agreed to provide a replacement security for the cash deposit/guarantees maintained by the plaintiffs as collateral for the Bank Guarantees issued in favour

of APSEB for the guarantee of due performance of the obligations under the two Power Purchase Agreements both dated 31 March 1999 ("PPAs"). The defendants had failed to do so as late as August 1998.

36 By its letter of 7 August, 1998 the plaintiffs gave notice that the defendants had repudiated the Agreements.

37 The matter was to proceed to arbitration. In the midst of the claims and cross claims, Mr Cassina, the then CEO of the defendants, broached the subject of a settlement.

38 Negotiations began. Each party had its own perceptions of the factors which were in operation before the Settlement Agreement. I should start by stating that around the end of September, l998 both sides accepted that in principle the settlement would take the shape of the defendants buying out the plaintiffs' entire interest in the Power Project. Both sides took steps to consider the plaintiffs' 12.5% interest in EOPL, the PPAs and the plaintiffs' expenditure for the Power Project.

39 According to Mr Leow, who dealt with Mr Cassina on the implementation of the several agreement between the parties on behalf of the plaintiffs, he computed that a total aggregate of about US$13.75 million was due from the defendants. It was from this sum that the method of payment by the defendants was worked out. The last tranche of US$7.544 million was to be paid from the cash flow, defined as "net profit after tax plus depreciation and reserves", from the Project. According to Mr Leow, and I accept his evidence, both parties did a computation based on this amount and calculating the financial projections of the Project they worked backwards to arrive at an annual sum of about 6.25% of the projected cash flow from a period of 5 years. That approach would produce the aggregate of US$7.544 million.

40 Mr Leow said that at the point in time when parties were about to conclude the Settlement Agreement, he had computed the basis of the total computation that the plaintiffs expected to receive under the Settlement Agreement to be as follows. First, there would be the cash upfront payment of US$3,015,000 plus US$2,790,000.00 cash payment which would be pegged to Financial Closure. In addition, the plaintiffs would receive the sum of about US$5 million over the firs 5 years under the royalty arrangement arising out of the 6.25% per annum computation of the projected cashflow of the Project. The total amount was US$11 million. This amount was communicated to Mr Cassina on 25 November 1998. To meet the difficulties of making cash payments of the defendants, which were often repeated during the negotiations, the defendants indicated that they were willing to accept the defendants' shares in lieu, which in the event they did. The cashflow projections for the five possible scenarios at the time of the Settlement Agreement, which formed the basis of the 6.25% computation, were eventually annexed to the Settlement Agreement. It was contemplated by both parties that the defendants would be able to pay the plaintiffs in cash under the EPC contract which had been awarded to the defendants' subsidiary, ASIL. I accept the account of these matters as recorded by Mr Low and Mr Leow

41 The plaintiffs also knew that as the Original Promoter of the Project, it could not totally relinquish its interest in the Project. Therefore, it always maintained that it had to comply with Indian laws which required the Original Promoter of the Project to retain some interest in the Project. As stated in terms in the Settlement Agreement, it was clearly accepted by the defendants that the plaintiffs could only relinquish its interest, entitlements and rights to the extent permitted under Indian laws. Those 'interest, entitlements and rights' included the obligations the plaintiffs to which it was subject as Original Promoter of the Project and which could not be relinquished under Indian laws.

42 The significant terms of the Settlement Agreement are as follows.

43 By clause 1.2.4 the defendants were to cause the replacement of the Bank Guarantee on or before 31 March 1999 and which the plaintiffs, as between the two parties, had no obligation to renew upon expiry on that date.

44 By clause 1.3.1 the defendants shall pay to the plaintiffs a sum of US$2,790,000.00 within 30 days from the date of the first drawdown of the funds by the defendants and/or EOPL after the Financial Closure of the Project, failing which the net sum of US$2.79 million shall become due and payable and owing to the plaintiffs and shall be payable by the defendants to the plaintiffs forthwith.

45 By clause 1.4.1 the defendants shall cause (with the assistance of the plaintiffs on its best efforts) EOPL to pay to the plaintiffs an annual sum equal to 6.25% of the actual cash available for foreign repatriation, as defined by the Financial Analysis Model which along with the 5 possible scenarios are annexed as Appendix A to the Settlement Agreement, based on the actual conditions during the actual operation of the Project at the end of each financial year of EOPL for each of the 5 years after the Commercial Operation Date ("COD") of the Project in US dollars within 75 days of the last month of each financial year of EOPL ("the 6.25% Annual Sum").

46 The payment of the 6.25% Annual Sum was to be by way of either of the two options set out. Firstly, the defendants were to cause EOPL to issue preference shares to the plaintiffs which would enable the plaintiffs to obtain the said payment or, secondly, the defendants were to cause EOPL to pay to the plaintiffs as the said sum s technical and consultancy fees. By the same clause, the option to be exercised must be mutually agreed to in writing and determined within 60 days from the date of the Settlement Agreement or within such extended period as may be mutually agreed.

47 By clause 3.1, subject to the fulfillment by each of the parties of their respective obligations under the Settlement Agreement and the terms and conditions contained therein, the parties agreed that the Settlement Agreement shall constitute the full, final and complete agreement and resolution of all disputes arising from the plaintiffs' notice of arbitration dated 6 September 1998 and the defendants' letter to the plaintiffs of 19 September 1998.

48 In the afternoon of the first day of trial, on 5 May 2003, parties before me, after some encouragement from me, agreed to narrow the issues. As it turned out, the defendants were constrained to agree because its exaggerated counter releases were without merit. Their agreement was also stated in the correspondence between their respective firms of solicitors. Both parties agreed that in view of the agreement, the disputes will assume that the Settlement Agreement was operative and that all cross examination would be confined to post Settlement Agreement issues. This approach confirmed parties would only seek to rely on what was agreed under the Settlement Agreement. By clause 3.2 parties had agreed that upon execution of the Settlement Agreement, the Agreements stood terminated and they unconditionally released and discharged each other from all obligations, rights and conditions contained in and arising under or in connection with the Agreements.

49 I turn to the post Settlement Agreement events. The defendants continued to manage and control the Project, as it did after the June Agreements. Although the defendants were to issue and deliver 1,850,000 of its shares to the plaintiffs in lieu of the payment of US$3,015,000.00, by the time the said shares were delivered to the plaintiffs, their market value was about US$2 million. Not that anything in issue turn on this fact, the plaintiffs stressed to me the fact that by the time the plaintiffs managed to sell the shares, they only fetched approximately US$255,000.00. Shareholders must accept that value of their shareholdings could rise, stagnate or fall.

50 On or about 21 June 1999, some 6 months after the Settlement Agreement, Mr Low was informed by Mr Amarchand that he had been approached by an Indian entity, known as Konaseema Power Corporation Ltd ("KPCL", which is an entity within the VBC Group. By a letter of that date, Mr Rama Rao ("Mr Rao") wrote a letter under the letterhead of VBC Ferro Alloys Ltd, part of the VBC Group, to Mr Amarchand expressing interest in taking up the Project, "possibly with ultimate takeover." He asked for some crucial information about the project, such as the tariff details finally accepted. Mr Cassina representing the defendants accepted that any consideration by the defendants about the offer could not move ahead with the plaintiffs to be "by (their) side". The plaintiffs were positively responsive, as it had been waiting for Financial Closure by the defendants which had long passed the due date.

51 On or about 16 July 1999, representatives from the plaintiffs being Mr Low and Mr Leow, Mr Cassina from the defendants met for the first time with Mr Raoand Mr Janga Kamesware Sarma ("Mr Sama") of the VBC Group together with Mr Amarchand who was then Managing Director of EOPL. Perhaps, it should be noted in parenthesis that Mr Sarma later gave evidence on behalf of the plaintiffs about the negotiations leading to the July 2001 Agreements between the plaintiffs and the VBC Group, the status of the Project as at the date of this trial and the factual evidence in relation to the plaintiffs' bid for the Project.

52 On 16 July 1999 the plaintiffs signed a Memorandum of Understanding with the defendants, EOPL and KPCL ("the MOU"). The plaintiffs signed the MOU against the indemnity from the defendants of even date that expressly made clear that the defendants' obligations to the plaintiffs under the Settlement Agreement was to remain unaffected. The MOU recorded the desire of parties to join in the development of the Project with EOPL to be renamed Konseema Oakwell Power Ltd ("KEOPL") as the vehicle for the development and ownership of the Project. VBC Ferro Alloys Limited also gave the plaintiffs an indemnity to the like effect.

53 Following the entry of the VBC Group into the Project, the defendants only wrote to the plaintiffs twice to inform the plaintiffs about the progress of the Project. In October and September 2000 Mr Low wrote to Mr Rao to ask for information.

Defendants' entry into the VBC Agreement

54 An interesting piece of information was furnished by one Mr Ramesh Kumar Naroola ("Mr Naroola"). Mr Naroola was at all material times the consultant and legal advisor of Aarken Consultants Pvt Ltd. After having served the plaintiffs, it transpired that later, as from October, 1999, he became a director of the defendants.

55 Mr Naroola informed Mr Low that a sum of US$500,000.00 would be offered towards satisfaction of the defendants' obligations to the plaintiffs under the Settlement Agreement provided the plaintiffs agree to give a release and indemnity to the defendants and the VBC Group. The plaintiffs were at that time rather strapped for cash and Mr Low agreed if the amount was paid in advance and subject to the plaintiffs' prior approval of the drafts of the requested release and indemnity in favour of the defendants and the VBC Group.

56 It was not in dispute that the plaintiffs were not paid and it must be concluded that this was a passing distraction.

57 The defendants entered into an agreement dated 10 August 2000 with the VBC Group ("the VBC Agreement"). A copy of the VBC Agreement was made available to the plaintiffs only on 22 November 2002 after the plaintiffs had given notice of production of the document.

58 In December, 2000 Mr Cassina and Mr Naroola visited Mr Low in the plaintiffs' office in Singapore. Mr Low was expecting payment, pursuant to the offer conveyed by Mr Naroola, as well as details of the agreement entered into between the defendants and the VBC Group. Mr Cassina offered neither. Mr Low terminated the meeting and asked the two gentlemen to leave.

59 In January 2001 Mr Low discovered from the financial statements of the defendants, a listed company, that the company had divested or agreed to divest their interest in the Project Company and in the Project. In the published Consolidated Financial Statements of the defendants for the years ended June 30, 2000, 1999 and 1998. The Consolidated Statement of Loss and Deficit disclosed that the end of year deficits for 1998, 1999 and 2000 were Canadian $6.5 million, $14.5 million and $17 million respectively.

60 The following notes to the Consolidated Financial Statements are noteworthy.

61 In respect of the acquisition of KEOPL it was recorded that effective February 25, 1999 the defendants acquired a 100% interest in KEOPL, a power Project in Andhra Pradesh, India.

62 The power Project had changed to a 459 Mega Watt ("MW") combined cycle natural gas powered land based project being developed in the State of Andhra Pradesh, India. "At June 30, 2000 the development of the Project was sponsored by (defendants') 100% owned subsidiary KEOPL. Financial and operation support is being provided by the VBC Group…, an Indian power producer, under the terms of VBC Agreement dated July 16, 19999. The VBC Agreement outlined the terms under which VBC would cause to finance the construction of the Project, reimburse (defendants) for its development costs and replace (defendants') performance guarantee, lodged with the Andhra Pradesh State Electricity Board. The VBC Agreement also outlined how VBC would have the right to subscribe for 75% of KEOPL by funding 79% of the required equity at financial closing of the Project." (brackets and substitutes are added, in this and the following paragraph).

63 The next paragraph stated thus: "On August 10, 2000, the Company (i.e. the defendants), VBC and KEOPL replaced the VBC Agreement with a revised agreement (the "Revised VBC Agreement") under which KEOPL would capitalize Indian Rupees ("INR" 204,227,000, approximately $6,600,000, by the issue of 15,847,200 equity shares at INR 10 per share and 4,575,000 preference shares at INR 10 per share to the defendants for expenses incurred by the (defendants) for and on behalf of KEOPL."

64 Under the terms of the Revised VBC Agreement, KEOPL is committed to redeem the (defendants') 4,575,000 preference shares at INR 10 per share and VBC is committed to purchase 5,195,000 equity shares of KEOPL owned by the (defendants) at INR 10 per share on or before December 31, 2000, for a total cash consideration of approximately Canadian $3,100,000. After the payment of this amount (the defendants) will have been diluted to a 30% minority interest in the Project.

65 Under events subsequent to the latest year ended financial statements, it was noted that on 10 November 2000 the defendants recovered Canadian $1.7 million related to the Andhra Pradesh Project.

66 The plaintiffs lodged its written protest with the defendants for not having involved and informed its management of the Revised VBC Agreement, a copy of which it asked the defendants to provide. The plaintiffs did not receive any substantive reply from the defendants.

67 On 5 March 2001 and 16 April 2001 the plaintiffs wrote to the Andhra Pradesh Power

Transmission Corporation ("APTRANSCO"), formerly known as APSEB and the Government of Andhra Pradesh ("GOAP"). It asked that as promoter of the Project it be kept apprised of developments in the Project and pointed out that the plaintiffs' consent as the original promoter should be obtained before the 5 items mentioned in its letter of 5 March 2001 to both APTRANSCO and GOAP. It is not necessary to dwell into these collateral matters save to note that neither authority responded in any way which conceivably damaged or injured the interest of the defendants in the Project Company or in the Project. In my view, the plaintiffs were perfectly entitled to complain of the conduct of various parties since they had acted without regard to the interest of the plaintiffs.

The Agreements with the VBC Group/KEOPL

68 Not unexpectedly, the VBC Group began to talk to the plaintiffs. They held meetings on 30 May, 31 May, 1 June and 2 June of 2001. Both sides signed the minutes of the several meetings. Several items were agreed upon.

69 Both the VBC Group and the plaintiffs entered into the Agreement of Mutual Understanding and Indemnity ("AMUI"), Technology Transfer, Collaboration and Licence Agreement ("TTCLA"), Shareholders Agreement and other documents all dated 4 July 2001. The claim against the VBC Group was to be settled by the payment of a sum of US$2 million in respect of past technical services and any ongoing technical services and advice, if required, which the plaintiffs rendered for the benefit of the Project Company since 1995. The other US$4 million was payable in respect of technical services in the event that they were to be required for the Project Company after the signing of the TTLCA. The Shareholders Agreement between the two parties acknowledged the entry of the VBC Group into the Project and to record that the plaintiffs remained as Original Promoter of the Project. It was required by APTRANSCO before it gave its assent to the amended PPAs.

70 As part of the deal, the plaintiffs assigned to Metcomp Engineering (Singapore) Pte Limited ("Metcomp") the right to sue the defendants as an agent/nominee of the VBC Group and KEOPL. Mr Rao represented to Mr Low that Metcomp was the agent/nominee of the VCB Group and KEOPL.

71 In the event, KEOPL only paid the sum of US$350,000 to the plaintiffs. Up to date, it has defaulted in the repayment of the remaining sum. The plaintiffs declared that KEOPL was in breach of the AMUI and demanded payment of the entire balance sum of US$1.65 million.

72 By mutual agreement made on 1 July 2002 between the VBC Group, the agent/nominee Metcomp and the plaintiffs, the assignment was treated by the parties as if it was never entered into. It was acknowledged by Metcomp that the assignment "lapsed in its entirely due to various acts of omission and commission by KEOPL, KPCL and the VCB Group". The plaintiffs claim that there is an outstanding amount for the sum of US$1,650,000 plus interest due and owing from KEOPL to the plaintiffs. But that is not a matter before me.

Plaintiffs' acceptance of Breach

73 The plaintiffs accepted the breach by the defendants and treated the Settlement Agreement as terminated. In their letter of 22 July 2002 sent to the defendants, it reiterated that in January 2001, it came to know of an agreement concluded between the defendants and the VBC Group on 10 August 2000, or referred to earlier as the VBC Agreement. The plaintiffs noted that the defendants under the VBC Agreement would dilute its interest in KEOPL to a minority 30% upon receipt of a total cash consideration of Canadian $3.1 million from the VBC Group before 31 December 2000. The mechanism of payments to the defendants included the capitalisation of approximately Canadian $6.6 million by the issue of equity and preference shares in KEOPL.

74 The plaintiffs further asserted that by virtue of the VBC Agreement, the defendants evinced an intention not to perform its obligations under the Settlement Agreement. By effectively disengaging itself from KEOPL and the Project, it would no longer be in the position to ensure Financial Closure of the Project, to draw down funds or have any control of it. The plaintiffs pointed out that since the defendants rendered itself incapable and/or were unwilling to discharge its obligations to the plaintiffs under the Settlement Agreement, its liability to make payment to the plaintiffs pursuant to clauses 1.3 and 1.4 of the Settlement Agreement had arisen. The plaintiffs, as noted earlier, expressly accepted the defendants' repudiation of the Settlement Agreement. It therefore demanded from the defendants the payment of US$2.70 million and the 6.25% Annual Sum.

The defendants' counterclaim

75 In response, the defendants alleged that the Settlement Agreement had become "impossible of performance or otherwise frustrated", due to unilateral measures taken by the Government of Andhra Pradesh and/or its State bodies. They therefore sought the return of US$3,015,000 being the value of the shares transferred to the plaintiffs in accordance with the terms of the Settlement Agreement. The defendants also sought the return of all moneys paid to the plaintiffs pursuant to or in connection with the Settlement Agreement. This included the sum of US$750,000.00 paid to the order of the plaintiffs to discharge certain debts owing from the plaintiffs to various 3rd parties in Andhra Pradesh, India in July 1999.

76 In the alternative, the defendants contended that even if the Settlement Agreement has not been frustrated, it disputed the plaintiffs' claims on the ground that the plaintiffs had plainly by its conduct and its letters to various parties repudiated the Settlement Agreement. The defendants alleged that the plaintiffs after the Settlement Agreement had no right to determine how the Project and/or KEOPL should be run. At the same time, the plaintiffs were under an implied duties to meet its formal legal requirements under Indian law and not to jeopardise the Project, nor to interfere in any way with how the defendants had chosen to run KEOPL and/or the use of the PPAs. Those obligations continued despite the entry of the VBC Group into the Project and the Project Company. It therefore complained about the plaintiffs' letters written to the VBC Group asserting claims against the defendants. The defendants also complained against the letters written by the plaintiffs to the GOAP and APSEB (later known as "APTRANSCO") in which the plaintiffs recited their disputes with the defendants and in which it asserted and reserved its rights as the original Promoter of the Project. It seems to me difficult to see how those letters, which asserted the rights of the plaintiffs, albeit rather forcefully, could 'jeopardise' the Project or the relationship between the VBC Group and the defendants and the attitude of the relevant Indian authorities. The plaintiffs were entitled to keep the Indian authorities informed as it was still bound to ensure the proper performance of the Project and the PPAs.

The Issues:

(1) Did defendants breached its obligations to achieve Financial Closure?

77 The first issue I will address is the question whether the defendants had breached its obligation to achieve Financial Closure. It is unquestionable that the defendants, when it held 87.5% of the shares in EOPL, and certainly when it held 100% under the Settlement, it had agreed to achieve Financial Closure. Upon the happening of that event, the defendants would be obliged to make the payments under the Settlement Agreement.

78 In my view of the evidence, the defendants had a reasonable time within which to achieve Financial Closure. The operational context of the Project in December 1998 was basically as follows.

Andhra Pradesh had been "a state which is more of the role of independent power producers". Mr Murthy (DW7), the expert witness called by the defendants, agreed. The Government of India had also been liberalising the power sector. Furnace Oil was de-controlled in July 1998. The limit on the amount of financing from Indian financial institutions was removed. I accept Mr Kishore's (PW9's) evidence on the state of the power sector in India. He opined as follows. The parameters of the initial PPAs made the Project viable. The request by the defendants through EOPL for a change of technology was approved by APSEB in May 1998. The changed parameters were designed to solve the concerns about the fact that it was only for the initial 7 year period that the Fuel Linkage had been granted. In his opinion, which I accept, the changed parameters were plainly viable.

79 He made the important point that the impact of there being Fuel Linkage for only 7 years ended (on the worst case) with the de-control in July 1998, and so had no effect in the first half of 1999. The defendants had at all material managed this disappoint, which was overcome, and I do not see any force in their repeated harking back about the shorter Fuel Linkage Licence.

80 Mr Kishore further opined that the re-organisation of APSEN into APSTRANSCO and APGENCO (responsible for the power generation side of things) was in fact a positive move and could not have impeded the Project.

81 He also confirmed that there wee enough Indian and foreign lenders and investors willing to lend and invest in power projects in India generally and in Andhra Pradesh in particular.

82 Mr Kishore therefore concluded that "there was no valid reason why the defendants could not achieve Financial Closure within a reasonable period of the date of the Settlement Agreement, i.e. by 29 June 1999. By then the defendants would have had from October 1997 to about 279 June 1999 i.e. a period of 2 years to do so." I am of the view that this conclusion by the total effect of the evidence led before me.

83 What had transpired was this. From 29 December 1998 until the entry of the VBC Group into the Project on 16 July 1999 it did not do anything at all to move the physical progress of the Project forward. Mr Naroola (DW4) accepted in the course of his cross examination that the land was not acquired nor was the construction of the barges commenced in this period. In this Project, land had to be purchased although Barge-Mounted Power Plants were involved. I do not accept the excuse of the defendants that it did not take any of these steps pending the signing of the modified PPAs.

84 The defendants also did not ensure or cause the commence construction of the barge which EOPL was required to do within 8 months from 31 March 1997. Mr Brake of defendants admitted that construction of the barges never started. It was remarkable that APSEB was told before 10 November 1998 about visits of the company officials to the dockyard in Canada to inspect the barges. It was not surprising that the claim was dismissed as "bogey" by the Secretary (Energy, GOAP. In a report dated 29 July 1998 from EOPL to all its foreign directors, Mr Amarchand reported that EOPL was in default of fulfilling that obligation under the PPAs. He noted that APSEB's perception of the progress made by EOPL to implement the Project was very poor. At the same time, Mr Amarchand reported that the Project might not suffer if EOPL was able to prove substantial progress in Financial Closure and construction of the barges before 31 July 1998.

85 I find that after July 1998 the Fuel Linkage was no longer an issue after the decontrol of furnace oil in July 1998. Contrary to Mr Cassina's assertion, the PPAs did not expire under their own terms. The position was that either party under Article 6.3 may give notice in writing to terminate the PPA if Financial Closure did not occur within 30 days of the notice.

86 In the event, for the Project itself, the VBC Group was able to achieve Financial Closure in Principle on 30 December 1999 on the basis of the PPAs as approved and agreed in May 1998 with a revised gestation period of 16 months. This approval from the Industrial Development Bank of India, albeit in principle, demonstrated the reasonable period it would take for the defendants to achieve Financial Closure.

87 In my judgment, by the end of June 1999 the defendants were in breach of its obligations to achieve Financial Closure. It was therefore a matter of immense relief to the defendants that the VBC Group took an interest in the Project and took on the lead role in the Project following the Agreement of 16 July 1999.

(2) Did the defendants breach the Settlement Agreement by its entry into the VBC Agreement of 10 August 2000?

88 On the evidence, it was quite clear that Mr Cassina on behalf of the defendants had obtained the agreement of the VBC Group to increase the payment to US$4.463 million. He told the VBC Group that the defendants had to pay off the plaintiffs in satisfaction of the latter's right, title and interest under the Settlement Agreement. PW10 Mr Sama, a director of KEOPL and a former member of APSEB, gave evidence on the negotiations leading to the entry of the VBC Group into the Project, the July 2001 Agreement between the plaintiffs and the VBC Group and the current status of the Project. He stated as follows:

> "Under the MOA, the VBC Group was to pay a sum of INR 141,000,000 to the defendants for the acquisition of all of the defendants' equity and majority control of KEOPL. The defendants' Mr Cassina, in or around May 2000, started insisting for an additional amount apparently to pay to the plaintiffs in satisfaction of the defendants' payment obligations to the plaintiffs under the Settlement Agreement executed between them. The specific payment obligations, which the defendants had towards the plaintiffs, were never revealed to the VBC Group. Eventually, a total sum of INR 211,000,000 was to be paid to the defendants and my understanding was that this would enable the defendants to pay the plaintiffs and procure the indemnity/release in favour of the VBC Group and KEOPL from the plaintiffs."

89 Mr Cassina, however, in dealing with the plaintiffs, strung them along by a serious of untruthful statements. He told both Mr Low and Mr Leow that the VBC deal was a lousy deal, and taking advantage of the financial difficulties which the plaintiffs were facing, he caused an invitation to treat to be staged by Mr Naroola. The defendants, through Mr Low, was prepared to accept $500,000 and conclude the matter, once and all, provided payment was prompt. Mr Cassina turned back on this approach. No agreement between them on the proposed payment of $500,000 was made.

90 Then Mr Cassina, who has some legal background, came upon the argument that the change in the Project with the reduced tariff and the various modifications to the Project, since the VBC Group came on board, were material changes of circumstances that had frustrated the Settlement Agreement. I shall shortly deal with this defence. Suffice it to say at this stage that before this about-turn of Mr Cassina, Mr Low and Mr Leow in all fairness had expected to reduce what was due to them under the Settlement Agreement, thinking that the defendants after its divestment to the VBC Group would get less than what it had expected had it continued to control and operate the Project post the Settlement Agreement. The parties never got round to any discussion down that route because Mr Cassina insisted that frustration of the Settlement Agreement had occurred in the circumstances I will address later. His uncompromising attitude was that the defendants could receive all it will receive under the VBC Agreement, the plaintiffs must disgorge the shares in the defendants

which it had received in part payment under the Settlement Agreement, and the plaintiffs must make restitution of the sum of US$350,000 which it had received from the VBC Group.

91 I accept the plaintiffs' submission that the defendants repudiated the Settlement Agreement by entering into the 10 August 2000 Agreement with the VBC Group. It did not make provision to ensure that the plaintiffs' right, title and interest under the Settlement Agreement and in the Project were satisfied. In its Financial Statements referred to earlier it asserted that the Settlement Agreement had been affected by a change of circumstances and also that the responsibility to pay the sums under the Settlement Agreement was that of the Project and not defendants'. As noted earlier, the defendants stated that the Project was required to pay the plaintiffs the 6.25% Annual Sum. By its divestment for the consideration of US$4., the defendants had unilaterally and entirely on its own volition disabled itself from being able to pay from the Project Funds, following the Financial Closure which they had failed to bring about.

92 I also accept the submission of the plaintiffs that the defendants, having divested its interest in KEOPL and the Project to the VBC Group and made it impossible for it to effect Financial Closing and achieve the targeted Commercial Operation Date, is in breach of he Settlement Agreement and is precluded from relying on the non-happening of the event as an excuse for not making the payments under the Settlement Agreement.

93 I was referred to the decision of the English Court of Appeal in *Boscome Athletic Football Club & Co Ltd v Manchester United Football Club Ltd* (supra). Its judgment was delivered on 21 May 1980. In that case, the football club Manchester United had bought a player from Bournemouth. The transfer price of £200,000 of which £175,000 was payable immediately on transfer and the remaining £25,000 was payable only after the player had scored 20 goals for Manchester United. Manchester United sold the player before he could score the 20 goals. Manchester United was ordered to pay the balance of the transfer fee because it was in breach of an implied term that Manchester United would afford the player a reasonable opportunity of scoring the 20 goals. The sale had deprived him of that opportunity and Manchester United could not rely on the fact that he had not scored 20 goals as the ground to resist payment.

94 In any case, the plaintiffs further relies on the express term contained in clause 14 of the Settlement Agreement, whereby both parties agreed to do or procure to be done all such further acts or things as might be necessary to give effect to the terms of the Settlement Agreement. In *Mackey v Dick* [1880-1881] 6 App. Case 251, a seller sold a digging machine to the buyer on condition that the buyer would test the machine on an open surface in a designated place to ascertain if it had the warranted rate of digging capacity. It was found as a fact that the buyer had refused to let the machine be tested at the designated "open surface cutting". Lord Blackburn construed the condition in the following terms at p. 263: "I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectively be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on this part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on the circumstances."

95 In my judgment, the defendants were in breach of the condition to do everything necessary to bring about Financial Closing so that the plaintiffs would be duly paid according to the Settlement Agreement. The defendants are not allowed to walk away from his obligations by selling his rights under the Settlement Agreement, making it impossible for it to achieve Financial Closing and then relying on it as not triggering the obligation to pay the plaintiffs.

Frustration

96 It is not disputed that the test of frustration is what is described in Chitty On Contract (28th Ed 1999) at para 24-012: "If the literal words of the contractual promise were to be enforced in the changed circumstances, would performance involve a fundamental or radical change from the obligation originally undertaken?" The promisor should be in a position to say that "It was not this that I promised to do" and it must be shown that there must be a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for: see *Davis Contractors Ltd v Fareham UDC* [1956] AC 696.

97 The defendants alleged that performance under the Settlement Agreement became a radically different undertaking when the tariffs payable by APSEB under the PPAs were unilaterally reduced by the Government of India in late December 1999/ early January 2000. The Capacity Charge was reduced from INR 1.5 to INR 0.94. KEOPL was forced to accept lower tariffs or face cancellation. According to Mr Scott Hargreaves (DW6), who gave evidence on behalf of the defendants on the financial impact of a reduction in tariffs to project economics and the requirements of potential lenders and equity participants, said that by reason of the reduced tariff, the Project was no longer economically viable. He opined, for the reasons he gave, that the Project would be loss-making proposition for the next 11 years. In consequence, even if Financial Closing was achieved, the plaintiffs would have been entitled to nothing under the 6.25% Annual Sum, since there would be no "Cash Flow for Foreign repatriation".

98 The defendants referred to the consequent increase in capacity from 2 x 100 MW to first 359 MW and later 445 MW, which KEOPL implemented and contended that the Project "became even more of a venture not contemplated by the parties.

99 As a matter of law, the defendants further contended that the Frustrated Contracts Act (Cap 115) applies in this case, since the Settlement Agreement has "become impossible of performance or been otherwise frustrated": see section 2(1). The defendants rely on section 2(3) of the Act, which provides as follows:

> "Where any party to the contract has, by reason of anything done by any other party thereto in, or for the purpose of, the performance of the contract, obtained a valuable benefit (other than a payment of money to which subsection (2) applies) before the time of discharge, there shall be recoverable from him by that other party such sum (if any) not exceeding the value of that benefit to the party obtaining it, as the court considers just, having regard to all the circumstances of the case, and in particular -
>
> (a) the amount of any expenses incurred before the time of discharge by the benefited party in, or for the purpose of, the performance of the contract, including any sums paid or payable by him to any other party in pursuance of the contract and retained or recoverable by that party under subsection (2); and
>
> (b) the effect, in relation to that benefit, of the circumstances giving rise to the frustration of the contract."

100 The defendants by way of counterclaim sought to recover the value of all benefits received which it estimates at US$3,805,000.00, as well s all sums that may be due or available to the defendants as a result of frustration. These sums, it submitted, comprised the valuable benefit of US$3.015 million given to the plaintiffs under clause 1.1.1 of the Settlement Agreement and the sum of US$790,0000 paid as a result of the agreements of July 1999.

101 It should be noted that the defendants claimed that they "purchased" all rights, entitlements and interest in the entire Project from the plaintiffs with payment to be made in terms of the Settlement Agreement. In these proceedings, they claimed the Settlement Agreement had been frustrated in law. But it was the self-same "rights, entitlements and interest" which the defendants had sold to the VBC Group first under the MOA and later by the 10 August 2000 Agreement. Under the 10 August 2000 Agreement the defendants, during the trial of this action, was still claiming in the Arbitration against the VBC Group for sums allegedly owing to it under the 10 August 2000 Agreement. Frustration in law of the Settlement Agreement must similarly discharge the 10 August Agreement and it is clear that the defendants are not permitted to approbate and reprobate.

102 The allegations that the Project would be unprofitable and Financing Closing would not be achievable are not, in my judgement, made out. The change in tariff must not and should not be considered in isolation. It was agreed to by KEOPL, which was controlled by the defendants at all material times. KEOPL, in exchange for capacity increase from 200 to 445 MW, agreed to the lower tariff. In addition, it was proved that cheaper equipment would be used to operate natural gas. Contrary to the assertions of the defendants, the Industrial Development Bank of India and other lenders considered the Project (as modified) suitable for financing.

103 Even if the defendants were right about the change in tariffs causing the Project to be unprofitable, of which I am not persuaded, the defendants took the risk which passed to it and which it assumed to take at the time of the Settlement Agreement.

104 Further whatever happened to any aspect of the Project from the time of the Settlement Agreement, the defendants are bound to pay the plaintiffs in accordance with the terms of the Settlement Agreement.

105 The defendants placed reliance on the views of the Indian Central Electricity Authority ("CEA") which had advised the Government of India to advise GOAP to call for fresh competitive bidding for the Project as it was of the view that the Project should not continue as the old project with modifications. The views of CEA, in my judgment, do not confirm the existence of the alleged 'frustrating events'. CEA gave its views in its advisory capacity, having regard to the interest of the Government and the public; it was not pronouncing on the respective rights of the parties under the Settlement Agreement. It did not appear that the Government of India took to heart the views of CEA as it did not advise GOAP, and GOAP at its election, did not cancel the Project (as modified). The evidence of Mr VVRK Rao (PW4)l, the retired Chairman of CEA, formed the basis of these conclusions of the court.

106 In my judgment, there is nothing radically different about the obligation, before or after the change in tariffs. The Project that was originally awarded to the plaintiffs is still the same project (although with modifications) as that presently being developed by the VBC Group.

Conclusion

107 Before I deal with the damages and amounts payable to the plaintiffs by the defendants, I should set out the defendants' position in relation to KEOPL and the Project. The defendants had obtained the benefit under the Settlement Agreement and had on 10 August 2000 sold it to the VBC Group. The extent of the defendants' measure of loss (if any) is the remaining claim of INR113,482,000 less the value of the 11,348,200 shares in KEOPL in respect of the 10 August 2000 Agreement. The value of the shares in KEOPL derives its value from the Project, which by all accounts, is now "poised to take off".

108 In the premises, I make the following orders:

(1) the defendants pay the sum of US2.7 million less the sums of US$790,000 and US$350,000.00 which latter two sums I had referred to earlier;

(2) the defendants pay damages to the plaintiffs in respect of the 6.25% Annual Sum under the Settlement Agreement the sum of US$2,560,210, assessed as at the date of the 10 August 2000 Agreement.

109 The defendants' counterclaims are accordingly dismissed with costs.

110 The defendants has also prayed for interest from the date of breach to judgment, costs on an indemnity basis as set out in clause 8.3 of the Settlement Agreement.

111 Counsel for the plaintiffs further submitted that the plaintiffs are entitled to recover the costs in respect of the pre-Settlement Agreement claims that were dropped by agreement at the beginning of the trial. In this connection, it should be noted that the defendants had in its counterclaim filed on 8 November 2002 particularised its damages at a staggering US$174 million which included sums claimed in the dispute prior to the Settlement Agreement. The counterclaim was reduced to US$20 million. It was only on the second day of the trial that the issues were narrowed and what claims were dropped were indicated. I shall need further particulars and submissions on these issues. Parties are therefore directed to make further written submissions on these outstanding issues and also tender together, if possible, or separately, a draft Order of Court containing the terms which are already ordered by me in this judgment.

Plaintiffs' claims are allowed with costs
Defendants' counterclaims are dismissed with costs