IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA(I) 6

Civil Appeal No 154 of 2017

Between

(1) PT BAYAN RESOURCES TBK
(2) BAYAN INTERNATIONAL PTE LTD

… Appellants

And

(1) BCBC SINGAPORE PTE LTD
(2) BINDERLESS COAL BRIQUETTING COMPANY PTY LIMITED

… Respondents

In the matter of Singapore International Commercial Court — Suit No 1 of 2015

Between

(1) BCBC SINGAPORE PTE LTD
(2) BINDERLESS COAL BRIQUETTING COMPANY PTY LIMITED

… Plaintiffs

And

(1) PT BAYAN RESOURCES TBK
(2) BAYAN INTERNATIONAL PTE LTD

… Defendants

And

PT BAYAN RESOURCES TBK

… Plaintiff in Counterclaim

And

(1) BCBC SINGAPORE PTE LTD
(2) WHITE ENERGY COMPANY LIMITED

... Defendants in Counterclaim

JUDGMENT

[Contract] — [Breach]

[Contract] — [Contractual terms] — [Interpretation]

[Contract] — [Remedies] — [Damages]

[Evidence] — [Proof of Evidence] – [Onus of proof]

PT Bayan Resources TBK and another
v
BCBC Singapore Pte Ltd and another

[2018] SGCA(I) 6

Court of Appeal — Civil Appeal No 154 of 2017
Sundaresh Menon CJ, Judith Prakash JA and Dyson Heydon IJ
7–8 February 2018

29 August 2018 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 In 2006, the parties to the present appeal entered into a joint venture in the hope of exploiting a new technology to upgrade coal and then sell it commercially. In the ensuing years, their relationship came under increasing strain and eventually collapsed, leading the respondents to commence Suit No 1 of 2015 ("the Suit") against the appellants. The trial was conducted before Quentin Loh J, Vivian Ramsey IJ and Anselmo Reyes IJ (collectively, "the Court"), and they ordered that it be heard in separate tranches, each dealing with specific issues. The Court rendered its decision in the first tranche in 2016 and in the second tranche in 2017: see respectively, *BCBC Singapore Pte Ltd and another v PT Bayan Resources TBK and another* [2016] 4 SLR 1 ("*First Tranche Judgment*") and *BCBC Singapore Pte Ltd and another v PT Bayan Resources TBK and another* [2017] 5 SLR 77 ("*Second Tranche Judgment*").

No appeal was filed against the *First Tranche Judgment*, which primarily concerned the determination of the scope and content of the parties' obligations under the joint venture. This appeal concerns only the *Second Tranche Judgment*, which dealt largely with whether the parties had breached those obligations, and if so, what consequences flowed from such breaches.

Background facts

2 The facts relevant to the dispute are detailed in the two aforementioned judgments of the Court. It therefore suffices for us to set out just the relevant facts pertinent to the present appeal.

3 The appellants are PT Bayan Resources TBK ("BR") and Bayan International Pte Ltd ("BI"). BR is a public-listed Indonesian company that owns a number of subsidiaries operating coal mines in Tabang, Indonesia, including PT Bara Tabang ("Bara") and PT Fajar Sakti Prima ("FSP"). BI is a company registered in Singapore and associated with BR. We refer to BR and BI collectively as "the Appellants".

4 On the other side of the dispute are the respondents, BCBC Singapore Pte Ltd ("BCBCS") and Binderless Coal Briquetting Company Pty Limited ("BCBC"). BCBC is an Australian company that holds the exclusive worldwide licence for a coal-upgrading process known as the binderless coal briquetting process ("the BCB Process"), and BCBCS is a Singaporean company associated with it. Both BCBC and BCBCS are indirect wholly-owned subsidiaries of White Energy Company Ltd ("WEC"), a public-listed Australian company. These three companies are referred to in this judgment as "the WEC Parties", while BCBCS and BCBC (the respondents in this appeal) are referred to as the "the Respondents".

Inception of the joint venture

5 In 2005, the parties envisioned using the BCB Process to upgrade and then sell the Appellants' coal. This eventually led to the execution of a joint venture deed ("the JV Deed") between BCBC and BI in June 2006. Under the JV Deed, the parties agreed to construct and commission a coal briquette processing plant in Tabang, Indonesia ("the Tabang Plant"). The construction and commissioning of this plant will be referred to hereafter as "the project" where appropriate to the context. A deed of novation was executed in 2009, the effect of which was that BCBCS and BR were substituted for BCBC and BI respectively as the parties to the JV Deed.

6 In 2007, the parties incorporated an Indonesian joint venture company, PT Kaltim Supacoal ("KSC"), with BCBCS holding 51% and BI, 49% of the issued shares. With the execution of the JV Deed and the incorporation of KSC, the joint venture was underway, but friction between the parties started to develop by November 2007, when they realised that they had underestimated the costs of the Tabang Plant. To exacerbate matters, in the years following the execution of the JV Deed, the Indonesian government passed legislation that had the effect of adding to the cost of operating the Tabang Plant and KSC's business. Of particular note is a piece of legislation known as "the HBA Regulations", which came into force in October 2010 and which set the benchmark price for the sale of minerals and coal in Indonesia ("the HBA Price").

7 These developments led the parties and KSC to enter into a series of funding agreements and memoranda of understanding in the years after the JV Deed was executed. For our purposes, the following are noteworthy:

(a) In March 2009, the parties entered into two memoranda of understanding: first, a "Memorandum of Understanding (KSC Funding Arrangements)" ("the Funding MOU"), which set out the parties' funding obligations; and second, a "Memorandum of Understanding (Expansion of joint venture)" ("the Expansion MOU"), which concerned the future expansion of the joint venture.

(b) In September 2009, KSC entered into an agreement with Standard Chartered Bank for a US$10m working capital loan facility ("the SCB Loan Facility").

(c) In December 2010, KSC, BR and BCBCS entered into a "Priority Loan Funding Agreement" ("the PLFA"), which was backdated to April 2010. Under the PLFA, it was agreed that BCBCS would advance a revolving working capital facility of up to US$20m to KSC; while BR would provide KSC with a "Coal Advance", which entailed BR supplying coal (through Bara and FSP) to KSC at the market price (approximately US$15 per tonne in March 2010) but requiring payment of only US$8 per tonne upon delivery, with the balance that remained due constituting the advance. The parties' obligations under the PLFA were originally intended to last until June 2011, but this was later extended to 31 December 2011 by way of an addendum, which also increased the facility limit from US$20m to US$40m.

(d) Between March and June 2011, KSC entered into coal supply agreements ("the 2010 CSAs") with BR's coal mining subsidiaries, Bara and FSP. The agreements were backdated to October 2010 when the HBA Regulations came into force, and the effect of this was that the obligation on Bara's and FSP's part was to supply coal to KSC at the

HBA Price. Pursuant to the "Coal Advance" under the PLFA, however, KSC only had to pay US$8 per tonne upfront for the coal.

8 In October 2011, the Tabang Plant was shut down for modification works to take place. It was anticipated that the modification works would be completed around June 2012.

Deterioration of the parties' relationship

The KSC board meeting in November 2011

9 Things came to a head in the last quarter of 2011. On 28 October 2011, the WEC Parties sent an information package to the Appellants, which revealed that KSC had exceeded its 2011 budget by nearly US$7m as at 30 September 2011.

10 On 2 and 3 November 2011, a KSC board meeting ("the November 2011 Board Meeting") was held. Two sets of handwritten notes recording the discussions were in evidence, one taken by the WEC Parties and the other by the Appellants. These sets of notes are generally consistent. They record that BR's shareholders had instructed BR's management to address serious concerns over the feasibility of the joint venture. The Appellants indicated that they wanted to exit the joint venture, and that they were willing to sell their shares in KSC (as represented by BI's 49% shareholding therein) to the WEC Parties. The Appellants were happy for the WEC Parties to continue with the joint venture on their own, and while BR remained willing to supply coal to KSC, this would have to be on arms' length terms and "at commercial rates".

Cessation of coal supply to KSC on 9 November 2011

11 Following the November 2011 Board Meeting, the Appellants informed the WEC Parties on 4 November 2011 that as an interim measure, BR would continue supplying coal to KSC at the HBA Price. On 7 November 2011, KSC sought coal from Bara and FSP, informing them that it still needed "a lot of coal". In total, KSC received some 8,000 tonnes of coal from Bara and FSP from 3 to 8 November 2011.

12 On 9 November 2011, WEC made a public announcement on the Australian Stock Exchange to the effect that BR had formed the view that the joint venture might not be economically viable, and that the price of the coal supplied to KSC had to be "substantially higher" than what had been agreed on under the 2010 CSAs. The announcement also stated that BR believed that it could generate much higher margins by selling the coal directly into the export market, and that these issues "[went] directly to the economic viability of [the Tabang Plant] and the willingness of each of the shareholders to continue with their investment in KSC".

13 On the same day, after WEC's announcement, BR e-mailed Bara and FSP instructing them to stop supplying coal to KSC. BR's e-mail, the contents of which were eventually conveyed to KSC and WEC, was in the following terms:

> You may or may not be aware that Bayan has decided to withdraw from the KSC joint venture (see [WEC's] press release attached). At this time we are still working out some of the commercial details surrounding this and therefore do not want to supply them any more coal until this has been resolved. In this regard, please stop all supply to them until further notice.

The meeting on 17 November 2011

14 The cessation of coal supply to KSC was followed by a meeting on 17 November 2011 ("the 17 November 2011 Meeting") attended by a few representatives from each side to discuss the "impasse relating to KSC". The only record of the meeting consisted of a set of handwritten notes taken by Mr Brian Flannery ("Mr Flannery"), who represented the WEC Parties. His notes reflected the WEC Parties' desire to bring the Tabang Plant to completion, and also KSC's need for coal in order to bring the plant up to its design capacity.

15 During the meeting, the Appellants reiterated their desire to exit the joint venture, and again raised the possibility of the WEC Parties buying out their share of the joint venture for US$45m, which was the amount that they had invested in the project up to that point in time. Mr Flannery's notes ended with a statement that "Bayan will only agree to supply coal if [the WEC Parties] pay $45m for their equity. [The WEC Parties] will not pay $45m for their equity". Nothing further was recorded. This suggests that the understanding between the parties was that BR would not resume the supply of coal to KSC until the Appellants' shares in KSC were bought out ("the Buyout Condition"), although the Appellants deny that they imposed such a condition.

Allegations of breach

16 In the days following the 17 November 2011 Meeting, the parties exchanged a flurry of correspondence, with each side alleging that the other had breached its obligations under the JV Deed.

17 On 21 November 2011, BCBCS wrote to BR accusing it of breaching a number of clauses under the JV Deed. Among other things, BCBCS alleged that

BR had breached its coal supply obligation by imposing the Buyout Condition, and demanded that this be remedied within seven days by BR directing the supply of coal to KSC to recommence in accordance with the 2010 CSAs.

18 On the same day, WEC released another public announcement through the Australian Stock Exchange. In this announcement, WEC set out its understanding of what had happened during the 17 November 2011 Meeting. It stated that it had requested BR to continue supplying coal to KSC up to the end of June 2012 in order to enable KSC to complete the testing of the Tabang Plant's modifications, but BR had indicated that it would only supply coal at the HBA Price if WEC agreed to buy out the Appellants' 49% stake in KSC for US$45m. WEC further stated that its board had concluded that it would not be in its shareholders' interests to buy out the Appellants' stake in KSC at that price, and that a notice had been issued to BR to rectify the breach stemming from its failure to meet its coal supply obligation.

19 The next day, on 22 November 2011, KSC ordered the short-term contractors working at the Tabang Plant to cease the modification works and demobilise immediately. The e-mail containing the instructions explained that the modification works were to stop because of the dispute between the parties. This order did not, however, apply to KSC's regular employees, who continued working on the modifications in addition to carrying out their regular operational and maintenance work at the plant.

20 On 24 November 2011, BR replied to BCBCS's notice of breach of 21 November 2011 (see [17] above), stating that the notice was "misconceived" because the Appellants had not linked their intention to withdraw from the joint venture to the question of coal supply to KSC. BR maintained that the Appellants' desire to exit the joint venture stemmed from their view that the

joint venture was "no longer feasible, both from a technical and commercial point of view". It also stated that Bara would continue supplying coal to KSC pursuant to the 2010 CSAs and at the HBA Price in compliance with the HBA Regulations.

21 On 29 November 2011, the WEC Parties replied to BR. They maintained that the Appellants had imposed the Buyout Condition, but that they would be proceeding on the basis that the Appellants had withdrawn that condition. Further, they informed BR that KSC had exceeded its existing funding facilities under the PLFA and would require additional funding of up to US$20m through to the end of June 2012. They asked BR to confirm that it would provide 49% of the said funding in accordance with its obligations under the JV Deed and the Funding MOU.

22 On 2 December 2011, BR replied to the WEC Parties. It rejected the WEC Parties' request for funding, and added that it had never suggested that "[Bara] would not comply with the [2010 CSAs]". Nothing more was said about the Buyout Condition, and BR stated that it would not correspond further in the light of an extraordinary general meeting of KSC's shareholders that was scheduled to be held on 6 December 2011 ("the 6 December 2011 EGM").

The 6 December 2011 EGM

23 The proceedings of the 6 December 2011 EGM were captured in a set of draft minutes of meeting which incorporated input from both sides. At the meeting, the Appellants reiterated their intention to exit the joint venture because they considered that the project was no longer viable. They also intimated their desire to liquidate KSC unless their stake in KSC was bought out. In addition, they denied having imposed the Buyout Condition, and maintained that BR would continue supplying coal to KSC at the HBA Price. It

is undisputed that the meeting also touched on the possibility of putting the Tabang Plant into care and maintenance, with the plant's operations suspended and only a limited number of workers retained onsite to maintain the plant's facilities, although the parties are divided as to whether there was an *agreement* to do so.

24 Thereafter, on the same day, the Appellants instructed Bara and FSP to supply KSC with coal if KSC so requested. This, however, was not made known to either KSC or the WEC Parties, and it appears that they continued to operate under the impression that BR would supply coal to KSC, but only at the HBA Price, rather than on the terms set out under the PLFA.

The aftermath of the 6 December 2011 EGM

25 The 6 December 2011 EGM was followed by a further exchange of correspondence between the parties and KSC. On 8 December 2011, KSC e-mailed BCBCS and BR setting out the cost estimates in relation to the care and maintenance program discussed during the 6 December 2011 EGM.

26 On 12 December 2011, the WEC Parties sent a letter to BR stating that BR's refusal to provide 49% of KSC's funding requirements amounted to a breach of BR's obligations under the JV Deed and the Funding MOU. The WEC Parties gave BR until 13 December 2011 to confirm that it would meet 49% of KSC's funding needs, and threatened to commence proceedings in Singapore if BR failed to do so.

27 On 13 December 2011, BR replied to the WEC Parties by way of a letter captioned "RE: DEFAULT NOTICE". That letter incorporated a default notice pursuant to cl 13.1(b) of the JV Deed (the "Default Notice"), and accused BCBCS of the following breaches of the JV Deed:

(a) breach of cl 7.1(s) and/or cl 7.1(bb) by unilaterally causing KSC to exceed its budget by about US$7m ("the Excess Expenditure"), and to exceed the PLFA facility limit of US$40m by extending a further loan of about US$6m to KSC ("the Excess Debt"); and

(b) breach of cl 16.3, in that WEC had made public announcements about the joint venture without BR's consent.

28 On 15 December 2011, the Tabang Plant was put into care and maintenance.

29 On 20 December 2011, the WEC Parties sent another letter to BR. They maintained that BR was in breach of its obligation to meet 49% of KSC's ongoing funding requirements, and stated that "one of the consequences of BR's refusal to provide funding in accordance with its obligations is that KSC will need to suspend its operations and implement a care and maintenance program". In that regard, the WEC Parties also asked BR to confirm that it would provide 49% of the funding needed for the care and maintenance program.

30 On 22 December 2011, BR replied to the WEC Parties and again maintained that it had no funding obligations. As to funding the care and maintenance program, BR asked for "an exhaustive and detailed list of each and every item which [the WEC Parties] allege is required for the care and maintenance of the Project, together with the costs of each and every item" [underlining in original omitted] in order to consider its position.

31 On 23 December 2011, the WEC Parties replied to BR. In their letter, the WEC Parties reiterated their position on BR's funding obligations, and noted that the breakdown requested by BR in relation to the costs of the care and maintenance program had already been provided to BR in KSC's e-mail of

8 December 2011. The next day, on 24 December 2011, the WEC Parties sent another letter to BR asking it to withdraw its Default Notice.

The commencement of the Suit and the termination of the JV Deed

32 On 27 December 2011, the Respondents initiated the Suit against the Appellants. Approximately two months later, on 20 February 2012, BCBCS wrote to BR, reiterating that BR had breached its coal supply and funding obligations and demanding that BR rectify some of its alleged breaches of the JV Deed. However, BCBCS did not require BR to recommence the supply of coal to KSC in this letter. Instead, BCBCS's focus was on having BR meet its alleged funding obligations.

33 A day later, on 21 February 2012, BR wrote to BCBCS purporting to terminate the JV Deed. Among other things, BR reiterated its position that BCBCS had breached the terms of the JV Deed, highlighting the Excess Expenditure and the Excess Debt (see [27] above). BCBCS replied on 2 March 2012, stating that BR's purported termination constituted a wrongful repudiation of the JV Deed, which it accepted.

The Court's decisions

The First Tranche Judgment

34 The first tranche of the trial concerned the scope and content of the parties' obligations under the joint venture. There were three categories of issues before the Court, namely: (a) funding issues; (b) coal supply issues; and (c) counterclaim issues.

35 With regard to the funding issues, the Court found that BR was not obliged to fund KSC during the period from November 2011 to 2 March 2012

("the Relevant Period"). It found that the Funding MOU did not override the JV Deed, which entitled the parties to withhold consent to any call for funding. Further, the good faith obligation under the JV Deed did not require BR to approve all additional expenditure thought to be needed by BCBCS. The Court also held that BR had no obligation to consent to KSC drawing on the SCB Loan Facility to repay BCBCS a temporary loan of approximately US$3m which BCBCS had advanced in November 2011. However, contrary to what the Appellants contended, the Court held that BCBCS had not undertaken to fund the Tabang Plant until it achieved commercial production, save to the extent that BCBCS had agreed to provide such funding.

36 In respect of the coal supply issues, the Court held that the parties' arrangements for the supply of coal were neither illegal nor tainted by illegality, in that the 2010 CSAs complied with the HBA Regulations. As for whether BR was obliged to ensure a supply of coal to KSC, the Court deferred its decision on this issue to the second tranche of the trial. It considered that there was insufficient evidence before it to ascertain the stage of commissioning which the Tabang Plant was at in November 2011, and whether it had sufficient coal for the commissioning process.

37 In relation to the counterclaim issues, the Court held that BCBCS was not under an obligation to provide technical assistance to KSC in relation to the design, building or operation of coal preparation and briquetting plants, nor was it under an implied contractual duty to use the reasonable skill and care expected of a competent designer, builder or operator of such plants. It also held that BCBCS was neither expressly nor impliedly obliged to ensure that the Tabang Plant would produce one million metric tonnes per annum ("1 MTPA") of upgraded coal briquettes, which was the initial production target set out in cl 3.2 of the JV Deed, within a reasonable time.

38 As we mentioned at [1] above, no appeal was brought against the Court's decision in the *First Tranche Judgment*.

The Second Tranche Judgment

39 In the *Second Tranche Judgment*, the Court was confronted with a list of 11 issues that again fell into three groups, namely: (a) coal supply issues; (b) repudiation issues; and (c) causation and loss issues.

The coal supply issues

40 The coal supply issues presented the Court with questions that essentially dealt with BR's obligation to ensure a supply of coal to KSC under the JV Deed and the PLFA.

Issue 1: BR's coal supply obligation

41 The first issue was whether BR had a *prima facie* obligation to ensure a supply of coal to KSC under Art 7.1 of the PLFA and/or cl 3.8(b)(iii) of the JV Deed. If so, a related question arose as to the precise scope of BR's obligation in the light of cl 3.9 of the 2010 CSAs (*Second Tranche Judgment* at [69]).

42 The Court held that BR did have the aforesaid *prima facie* obligation. It noted that Bara and FSP were obliged under cl 3.9 of the 2010 CSAs to supply sufficient coal to KSC for testing the Tabang Plant up to the point where commissioning was achieved (*Second Tranche Judgment* at [73]–[74]). Under Art 7.1 of the PLFA, BR had a *prima facie* obligation to ensure that Bara and FSP supplied coal to KSC in accordance with cl 3.9 of the 2010 CSAs, although this obligation extended only to 31 December 2011 (*Second Tranche Judgment* at [77(a)]). And under cl 3.8(b)(iii) of the JV Deed, BR had a similar *prima facie* obligation to ensure that Bara and FSP fulfilled their coal supply obligations

under cl 3.9 of the 2010 CSAs; but unlike the obligation under the PLFA, the obligation under the JV Deed persisted until the JV Deed was terminated (*Second Tranche Judgment* at [77(b)]).

Issue 2: The Tabang Plant and its supply of coal

43 The second issue was divided into several sub-issues, all of which related to the Tabang Plant and whether it had sufficient coal for testing.

44 The first sub-issue concerned the stage of commissioning that the Tabang Plant had reached by November 2011 (*Second Tranche Judgment* at [78]). In this regard, the Court found that there were four stages of commissioning, namely: (a) modification works after construction; (b) commissioning to check the Tabang Plant's individual components without a load; (c) load commissioning; and (d) ramping-up to commercial production (*Second Tranche Judgment* at [80]). The last two stages would have involved testing the Tabang Plant's production module with coal, and the Court found that these two stages were imminent in November 2011. The modifications to the plant, which were part of the commissioning process, were on their way to being completed in either November or December 2011, and the plant remained in the commissioning phase until 15 December 2011, when it was put into care and maintenance (*Second Tranche Judgment* at [83]–[85]).

45 The second sub-issue that the Court had to address was whether the Tabang Plant had sufficient coal during the Relevant Period for testing purposes (*Second Tranche Judgment* at [86]). The Court found that the plant did not have sufficient coal. It required 40,000 tonnes of coal; and as matters stood in November 2011, it had a stockpile of only about 15,500 tonnes of coal, which would have allowed its production module to run for only approximately eight days (*Second Tranche Judgment* at [87] and [93]–[94]).

46 The third sub-issue was whether KSC made a request for coal in accordance with the 2010 CSAs during the Relevant Period (*Second Tranche Judgment* at [95]). The Court held that it did, rejecting the Appellants' argument that under the 2010 CSAs, KSC had to ask for coal in a specific format by providing Nominated Monthly Quantity ("NMQ") notices to Bara and FSP. In this regard, the Court found that under cl 3.9 of the 2010 CSAs, the obligation to supply coal to KSC for testing the Tabang Plant was triggered "as and when" KSC made a request for coal; KSC was not obliged to specify any particular quantity of coal for there to be a valid request. It was only when the Tabang Plant went into production, and was thus in need of large quantities of coal, that NMQ notices would have been needed. Therefore, when KSC made a request for coal on 7 November 2011 (see [11] above), it did not have to comply with the NMQ procedure set out in cll 3.1 to 3.5 of the 2010 CSAs. KSC's coal request was a valid request, and Bara's and FSP's obligations to supply coal under the 2010 CSAs were thereby triggered (*Second Tranche Judgment* at [102]–[106]).

47 The fourth sub-issue was whether BR was under an obligation to ensure a supply of coal to KSC even if BCBCS and BR had not unanimously agreed to provide KSC with further funding, and where BCBCS was not prepared to further fund KSC on its own (*Second Tranche Judgment* at [107]). The Court answered this in the affirmative, noting that the essential question was whether Bara's and FSP's coal supply obligations under cl 3.9 of the 2010 CSAs were dependent on KSC being willing and able to perform its obligation to pay for the coal (*Second Tranche Judgment* at [112]). The Court held that Bara's and FSP's coal supply obligations were independent of KSC's payment obligation (*Second Tranche Judgment* at [111]–[115]). Accordingly, even if KSC could not have paid for the coal, Bara and FSP were contractually obliged to supply coal to KSC under cl 3.9 of the 2010 CSAs. Further, under Art 7.1 of the PLFA

and cl 3.8(b)(iii) of the JV Deed, BR had an obligation to ensure that Bara and FSP fulfilled their coal supply obligations (*Second Tranche Judgment* at [117]).

48 The fifth sub-issue was whether BR's coal supply obligation continued to subsist during the Relevant Period in circumstances where: (a) the Tabang Plant was not operational; (b) KSC lacked funds and could not continue to operate; and (c) the Tabang Plant had been put into care and maintenance (*Second Tranche Judgment* at [118]–[119]). The Court answered this in the affirmative. With respect to (a), the Court held that BR's coal supply obligation did not abate simply because the Tabang Plant was not operational during the Relevant Period (*Second Tranche Judgment* at [121] and [125]). In relation to (b), the Court found that BCBCS had expressed a willingness to fund KSC by itself, and noted again that BR's coal supply obligation was in any event independent of KSC's ability to pay for the coal (*Second Tranche Judgment* at [123]–[124]). As for (c), the Court found that the Tabang Plant had been placed into care and maintenance on 15 December 2011 by agreement. Although the modification works at the plant had yet to be completed at that time, this did not affect Bara's and FSP's coal supply obligations under the 2010 CSAs and BR's obligation to ensure that Bara and FSP fulfilled those obligations. KSC had properly made a request for coal for testing the Tabang Plant; and although testing might have been delayed due to the plant having been put into care and maintenance, the obligation to supply coal for testing "as and when requested" continued to apply (*Second Tranche Judgment* at [126]).

49 The last sub-issue was whether BCBCS had caused KSC to cease its business without BR's consent by unilaterally putting the Tabang Plant into care and maintenance. The Court decided that this question did not arise in the event, given its finding that the parties had *agreed* to put the plant into care and maintenance (*Second Tranche Judgment* at [128]–[129]).

Issue 3: The scope of BR's coal supply obligation

50 The third issue was whether there were any limitations on BR's coal supply obligation, and whether the procedure governing how a request for coal was to be made under the 2010 CSAs had been done away with by the parties. In this regard, the Court reiterated its findings on the second issue, and held that there were no limitations on BR's coal supply obligation (*Second Tranche Judgment* at [132]). As for the procedure for requesting for coal under the 2010 CSAs, the Court noted that if cll 3.1 to 3.5 of the 2010 CSAs had stipulated a formal procedure for making requests for coal even before the Tabang Plant went into production, the parties had agreed to do away with that procedure in June 2010 and had replaced it with an informal procedure (*Second Tranche Judgment* at [134]).

Issue 4: Breaches of BR's coal supply obligation

51 The fourth issue was essentially whether BR had breached its coal supply obligation. The Court held that it had done so by instructing Bara and FSP to cease their supply of coal to KSC on 9 November 2011, noting again Bara's and FSP's obligations under cl 3.9 of the 2010 CSAs to supply coal to KSC for testing the Tabang Plant, and BR's obligation under cl 3.8(b)(iii) of the JV Deed and cl 7.1 of the PLFA to ensure that Bara and FSP fulfilled their coal supply obligations (*Second Tranche Judgment* at [137] and [140]). The Court also found that BR had imposed the Buyout Condition during the 17 November 2011 Meeting, and that this too constituted a breach of BR's coal supply obligation (*Second Tranche Judgment* at [143]–[144]).

52 We pause here to note that the Court also found that BR had committed multiple repudiatory breaches of the PLFA (*Second Tranche Judgment* at [145]). These breaches arose from BR's representations during the November

2011 Board Meeting, in its letter dated 24 November 2011 and during the 6 December 2011 EGM that Bara and FSP would only supply coal to KSC at the HBA Price, when Bara and FSP were only entitled to upfront payment of US$8 per tonne under the terms of the PLFA (*Second Tranche Judgment* at [29(d)], [46] and [51(b)]).

The repudiation issues

53 The repudiation issues concerned the question of whether either BCBCS or BR had repudiated the JV Deed. It bears emphasis that this category of issues concerned only the JV Deed and not the PLFA, which, as we have just noted, was found to have been repudiated by BR. In relation to BCBCS, the focus was principally on the Excess Debt and the Excess Expenditure, which BCBCS had allegedly caused KSC to incur without BR's consent. As for BR, the question of repudiation arose from its breach of its coal supply obligation under the JV Deed, its expressed desire to exit the joint venture as well as its purported termination of the JV Deed by way of its letter of 21 February 2012.

Issue 5: BCBCS's repudiation of the JV Deed

54 At the heart of the fifth issue was whether BCBCS had repudiated the JV Deed by unilaterally causing KSC to incur the Excess Expenditure (*Second Tranche Judgment* at [147]) and the Excess Debt (*Second Tranche Judgment* at [163]), and by unilaterally having KSC put the Tabang Plant into care and maintenance (*Second Tranche Judgment* at [173]). The Court answered all three questions in the negative.

55 With regard to the Excess Expenditure, the Court noted that the members of KSC's board of directors and management and operations team were all appointed in accordance with the agreed arrangements under the joint

venture. Even if it were the case that the WEC Parties' representatives comprised KSC's management and operations team, it was up to both parties, as joint venture parties, to ensure that KSC did not exceed its budget (*Second Tranche Judgment* at [154]). Additionally, the Court found that BR had a nominated signatory, Mr Lim Chai Hock ("Mr Lim"), in KSC. Mr Lim was a senior member of BR's management and had the power to veto payments out of KSC's bank accounts by withholding signature of KSC's cheques. This co-signatory mechanism had been approved at a meeting between the parties on 22 November 2006, and its effect was that KSC could not spend without BR's consent. It therefore could not be said that BR had no control over KSC's expenditure (*Second Tranche Judgment* at [155]). The Court further highlighted that BR had been aware by late April 2011 that KSC had been spending in excess of its budget and could easily have acted to stop KSC from incurring further expenditure by instructing Mr Lim to stop signing KSC's cheques. BR had not, however, done so (*Second Tranche Judgment* at [158]).

56 In relation to the Excess Debt, the Court found that it did not automatically follow that KSC had incurred a debt simply because BCBCS had advanced an additional US$6m to it on top of the US$40m facility under the PLFA. A debt would only have been incurred by KSC if the parties had subsequently ratified the additional US$6m funding by a shareholder loan agreement or a further addendum to the PLFA. It was not disputed that there was no such ratification. Therefore, BCBCS could not have recovered the US$6m from KSC, and KSC on its part could not be said to have incurred a corresponding debt to BCBCS (*Second Tranche Judgment* at [168]).

57 As for the Tabang Plant being put into care and maintenance, the Court found that the parties had *agreed* to this during the 6 December 2011 EGM. The Court also noted that while BR might have reserved its position as to how much

was to be spent on the care and maintenance program, it was clear that BR had agreed to the implementation of such a program (*Second Tranche Judgment* at [176]–[177]).

Issue 6: Whether BR accepted BCBCS's repudiation

58 The sixth issue was whether BR had accepted BCBCS's repudiation of the JV Deed by way of its letter to BCBCS dated 21 February 2012. This issue fell away given the Court's holding that BCBCS had not repudiated the JV Deed (*Second Tranche Judgment* at [178]–[179]).

Issue 7: BR's repudiation of the JV Deed

59 The seventh issue was whether BR had repudiated the JV Deed: (a) by breaching its coal supply obligation; (b) by its words and conduct during the November 2011 Board Meeting and the 6 December 2011 EGM, where it intimated an intention to exit the joint venture; and/or (c) by purporting to terminate the JV Deed in its letter dated 21 February 2012 (*Second Tranche Judgment* at [180]).

60 The Court held in the affirmative, finding that (a) and (c) were repudiatory breaches of the JV Deed. The Court found that cl 3.8(b)(iii) of the JV Deed, which provided that BR must "assist in procuring Coal for the operation of the Business", was a condition of the JV Deed. It noted that the joint venture had been entered into in order to upgrade coal supplied by Bara and FSP, and therefore, BR's obligation to procure the supply of coal to KSC was a matter of fundamental importance. By failing to meet this obligation, BR was in repudiatory breach of the JV Deed (*Second Tranche Judgment* at [181]–[182]). As for the termination notice issued by BR on 21 February 2012, the Court found that BR had no grounds to issue that notice given that BCBCS was

not in breach of the JV Deed; BR's conduct in issuing that notice was therefore itself repudiatory of the JV Deed (*Second Tranche Judgment* at [193]).

61 However, in relation to (b), the Court did not agree with the Respondents for several reasons (*Second Tranche Judgment* at [187]–[191]). First, although BR had stated at the November 2011 Board Meeting and the 6 December 2011 EGM that it wished to exit the joint venture, this did not amount to an assertion that it would not perform its obligations under the JV Deed. Second, BR had proposed two exit options to BCBCS which were consistent with cll 11 to 13 of the JV Deed. These provided for the termination of the joint venture by consent and for the resolution of deadlocks. Third, BR's repudiation of the PLFA did not entail that it had thereby repudiated the JV Deed as well because the PLFA did not refer to the JV Deed at all, unlike the 2010 CSAs. Fourth, while BR's representatives had made statements at the November 2011 Board Meeting and the 6 December 2011 EGM which could be construed as indicating that BR no longer considered itself bound by the JV Deed, those statements did not unambiguously convey a settled and irrevocable decision on the part of BR that it would not perform its obligations under the JV Deed.

Issue 8: Whether BCBCS accepted BR's repudiatory breaches

62 The eighth issue was whether BCBCS had accepted BR's repudiation of the JV Deed by way of its letter dated 2 March 2012. The Court answered this in the affirmative. It held that BR had repudiated the JV Deed by (among other things) issuing its termination notice of 21 February 2012 when it had no basis to do so, and BCBCS had validly accepted that repudiatory act by way of its letter dated 2 March 2012, which had the effect of terminating the JV Deed (*Second Tranche Judgment* at [195]).

The causation and loss issues

Issue 9: Whether BR caused loss to BCBCS

63 The ninth issue, which was raised by the Appellants, was whether BCBCS should, in any event, be entitled to only nominal damages given that the Tabang Plant allegedly could not reach commercial production without further funding (*Second Tranche Judgment* at [202]–[206]). In addition, the Appellants contended that any claim by BCBCS for lost profit would contravene the principle against claims for reflective loss because it was KSC (and not BCBCS) that had suffered the loss flowing from BR's breaches (*Second Tranche Judgment* at [228]). In this connection, the Appellants also argued that BCBCS ought not to be allowed to rely on what might have happened pursuant to the Expansion MOU in its claim for damages against BR (*Second Tranche Judgment* at [232]). It may be noted that these arguments by the Appellants raised questions pertaining to damages, and on one view, it might have been thought that they were not appropriate for determination at the second tranche of the trial, which was essentially concerned with questions of breach. However, having regard to how these questions were framed by the Appellants, resting as they did largely on issues of law, the Court described them as being akin to "a strike-out argument" (*Second Tranche Judgment* at [202]).

64 The Court declined to find, in any event, that only nominal damages could be awarded to BCBCS. Among other things, it found that it was not open to it, at that stage, to exclude the possibility of the Tabang Plant reaching commercial production within a reasonable time. Although the short-term contractors at the plant had been asked to suspend the modification works there on 22 November 2011, more than 300 regular employees of KSC continued to carry out the modification works. Further, while the plant had been put into care

and maintenance on 15 December 2011, it could have been reactivated within a matter of days (*Second Tranche Judgment* at [210]–[212]).

65 The above factors were not, however, conclusive because a critical element of BR's case in this respect was that KSC would not have been funded to the point where the testing and commissioning of the Tabang Plant was completed, and this in fact rendered the question of damages theoretical. As to this, the Court found that on the evidence before it, it appeared likely that BCBCS would have been prepared to fund KSC unilaterally, and that BR would not have objected to such funding by BCBCS (*Second Tranche Judgment* at [223]). Indeed, BR had known since at least June 2010 that BCBCS was funding KSC on its own and had not objected to such unilateral funding by BCBCS (*Second Tranche Judgment* at [217]–[219]). The Court, however, concluded that there was insufficient evidence before it to determine whether BCBCS was indeed in a financial position to continue funding KSC on its own all the way until the completion of the testing and commissioning of the Tabang Plant. It therefore reserved its decision on this question to the next tranche of the trial, which it observed would be "specifically devoted to causation of damage and quantum" (*Second Tranche Judgment* at [223]–[224]).

66 As for the Appellants' arguments in relation to the reflective loss principle, the Court observed that BR had not properly pleaded the issue and so had unfairly denied BCBCS the opportunity to adduce evidence to show that the loss which it was claiming was either not reflective loss or fell within the exception to the principle barring recovery for reflective loss. The Court hence deferred that issue to the next tranche of the trial as well (*Second Tranche Judgment* at [230]). Similarly, the question of whether BCBCS could claim damages predicated on what might have happened under the Expansion MOU was deferred to the next tranche so as to give BCBCS the chance to make such

submissions and adduce such evidence as it deemed appropriate (*Second Tranche Judgment* at [232]).

Issues 10 and 11: The quantum of damages and the costs orders

67 Flowing from its decision on the ninth issue, the Court held that the issues relating to the quantum of damages and the costs orders to be made should be dealt with at the next tranche of the trial (*Second Tranche Judgment* at [235]).

The issues on appeal

68 The Appellants have appealed against the whole of the Court's decision in the *Second Tranche Judgment*, save for the issue on which the Court did not rule against them. That issue was whether BR had repudiated the JV Deed by its words and conduct at the November 2011 Board Meeting and the 6 December 2011 EGM, which the Court determined in favour of the Appellants (see [61] above). The crux of this appeal turned on four main issues which were identified by the Appellants as follows:

(a) first, whether BR was obliged to procure and/or ensure the supply of coal to KSC during the Relevant Period ("the Obligation Issue");

(b) second, if BR was under such an obligation, whether BR breached that obligation, and if so, whether that breach constituted a repudiation of the JV Deed ("the Breach Issue");

(c) third, whether BR repudiated the JV Deed by issuing the termination notice in its letter of 21 February 2012 ("the Repudiation Issue"); and

(d) fourth, if BR were guilty of repudiating the JV Deed, whether such repudiation caused any loss to BCBCS, and if so, what is the period for which BCBCS is entitled to damages ("the Causation Issue").

69 Some of these issues encompass sub-issues which we will address in the course of dealing with each of these issues in turn.

The Obligation Issue

The parties' cases

70 The Appellants' case on the Obligation Issue is that during the Relevant Period, BR was not contractually obliged to procure and/or ensure the supply of coal to KSC under cl 3.8(b)(iii) of the JV Deed and/or Art 7.1 of the PLFA.

71 In support of their position, the Appellants first argue that the "Business" defined in cl 1.1 of the JV Deed ("the business") was not in operation from November 2011 onwards, and they were thus not obliged to "assist in procuring Coal for *the operation of the Business*" [emphasis added] under cl 3.8(b)(iii) of the JV Deed. They point out that the Tabang Plant was put into care and maintenance on 15 December 2011, and that it was the Respondents' pleaded case that this was driven by the lack of funding, which brought an end to KSC's business operations and BR's coal supply obligation. They also contend that KSC had no funds, and without this, the business could not have continued to operate. As against this, the Respondents aver that the Tabang Plant was put into care and maintenance by agreement, and not because KSC suffered from a lack of funding. They also point out that KSC had funding arrangements in place as at 3 November 2011, given BCBCS's willingness to fund KSC on its own until the Tabang Plant achieved commercial production.

72 Second, dealing specifically with the PLFA, the Appellants contend that Art 7.1 of the PLFA did not impose a separate free-standing obligation on BR to ensure that Bara and FSP would supply coal to KSC under the 2010 CSAs. To this end, they submit that there was no need for Art 7.1 of the PLFA to impose such an obligation on BR because BR was already under a similar obligation pursuant to cl 3.8(b)(iii) of the JV Deed, and that the purpose of the PLFA was merely to oblige BR to ensure that KSC did not have to pay more than US$8 per tonne upfront for the coal supplied. In response, the Respondents note that the Court had already determined the nature of BR's obligation under Art 7.1 of the PLFA in the *First Tranche Judgment* at [167(b)], and it is no longer open to the Appellants to now contend in this appeal that this provision has a different meaning. They also submit that it is incongruous for the Appellants to contend that they had a duty to provide KSC with a "Coal Advance" under the PLFA by ensuring that KSC only had to pay part of the stipulated price of the coal upfront without also having an obligation to procure and/or ensure the supply of coal to KSC.

73 Third, dealing with the 2010 CSAs, the Appellants argue that Bara and FSP were not obliged to supply coal to KSC thereunder. As to this:

(a) The Appellants contend that Bara's and FSP's obligations to supply coal were inextricably linked to KSC's obligation to pay for the coal, and because KSC could not pay, Bara's and FSP's coal supply obligations did not arise. The Respondents dispute this, saying that the obligation to supply coal and the obligation to pay for it were independent of each other.

(b) The Appellants also contend that in any case, the Tabang Plant had sufficient coal for the commissioning process. The Respondents, on

the other hand, seek to uphold the Court's finding that the Tabang Plant was approaching a stage of commissioning that required coal for testing.

(c) Finally, the Appellants contend that KSC's request for "a lot of coal" on 7 November 2011 did not trigger BR's coal supply obligation because that request was too "vague and open-ended". As to this, the Respondents contend that the request was wholly in keeping with what had been agreed on at the operational level with regard to requests for coal.

Our decision

Whether the business was operational during the Relevant Period

74 In our judgment, the business was operational during the Relevant Period, and BR remained obliged to procure the supply of coal to KSC "for the operation of the Business" under cl 3.8(b)(iii) of the JV Deed. We begin by noting that the "Business" is defined widely in cl 1.1 of the JV Deed as follows:

> ***Business*** means the business of:
>
> (a) acquiring Coal from the Tabang Concession in accordance with the Coal Supply Agreement or from some other party;
>
> (b) production of Upgraded Coal Briquettes by upgrading the Coal using the Patented Briquetting Process; and
>
> (c) marketing and selling Upgraded Coal Briquettes to Utilities including sale of Upgraded Coal Briquettes under the Upgraded Coal Briquette Sale Agreement.

75 In our judgment, on a proper construction of the JV Deed as a whole, the business did not cease to operate simply because the Tabang Plant was put into care and maintenance on 15 December 2011.

76 We begin with cl 7.1(x) of the JV Deed, which required BCBCS's and BR's *unanimous* consent to (among other things) "cease the Company's business". We also highlight cl 11 of the JV Deed, which provided a mechanism to break deadlocks. The latter is significant because this was the agreed mechanism that would apply if the parties disagreed on whether KSC should stop its business, instead of either party acting unilaterally to force this outcome by starving KSC of funding. It is significant that the definition of "deadlock" under the JV Deed contemplated impasses on *any* of the matters under cl 7.1, including the cessation of the business.

77 The foregoing undercuts the Appellants' position that they were able to unilaterally bring about the cessation of KSC's operations and business simply by withholding consent to provide further funding. We therefore agree with the Respondents that the business was in operation during the Relevant Period.

Whether Art 7.1 of the PLFA obliged BR to ensure a supply of coal to KSC

78 In respect of the Appellants' arguments on the PLFA, leaving aside the question of whether the Appellants are in effect contesting a finding made in the *First Tranche Judgment* as to the nature of BR's obligation under Art 7.1 of the PLFA, we are satisfied that this provision contractually obliged BR to ensure that Bara and FSP supplied coal to KSC. This obligation is distinct from that under the JV Deed.

79 We note that Art 7 of the PLFA dealt with *more* than just the obligation to ensure a supply of coal to KSC, which was the precise obligation that arose under cl 3.8(b)(iii) of the JV Deed. Under Art 7 of the PLFA, BR's coal supply obligation was refined to include an obligation to ensure that KSC was liable to pay only US$8 per tonne upfront for the coal supplied, with the difference between this price and the market price (which was given the same meaning as

that under the 2010 CSAs) being treated as the "Coal Advance" that constituted BR's contribution under the PLFA. This was a significant factor that assured the viability of the joint venture, and it is inconceivable that BR could be said not to have an independent and continuing obligation to ensure the supply of coal to KSC in accordance with this.

80 Indeed, as noted in the *First Tranche Judgment* (at [57]–[58]), the PLFA was entered into essentially for BCBCS to advance funds to KSC, while BR would make a "Coal Advance" to KSC. And as the Respondents point out, it is difficult to see how BR could have advanced coal to KSC at a stipulated upfront payment price that was less than the full contractual price without also simultaneously having an obligation to ensure the supply of coal to KSC. Accordingly, the Appellants' argument that Art 7.1 of the PLFA did not give rise to a separate and free-standing obligation on BR's part to ensure coal supply to KSC fails.

Whether Bara's and FSP's coal supply obligations were dependent on KSC's payment obligation

81 BR's obligation under cl 3.8(b)(iii) of the JV Deed and Art 7.1 of the PLFA to procure and/or ensure the supply of coal to KSC was not affected by whether KSC was in a position to pay Bara and FSP for the coal supplied under the 2010 CSAs.

82 In *Tan Jin Sin and another v Lim Quee Choo* [2009] 2 SLR(R) 938, the Court of Appeal held at [17] that the issue of whether a contractual obligation was "dependent" or "independent" was "a question of construction". Construing the 2010 CSAs as a whole, we are satisfied that Bara's and FSP's coal supply obligations and KSC's payment obligation were independent obligations. Clause 10.8 of the 2010 CSAs provided that interest would be imposed in cases

of late payment, which suggests that the parties specifically contemplated that KSC might fail to pay for the coal supplied within 30 days of receiving the invoice as stipulated in cl 10.4. More importantly, cl 10.14 of the 2010 CSAs expressly provided that both sides "must continue to perform" their respective obligations "[d]espite any dispute as to any amount owed by any party to any other party". It is therefore clear that Bara's and FSP's coal supply obligations, and, in turn, BR's obligation to ensure that Bara and FSP fulfilled those obligations, were independent of KSC's payment obligation.

Whether the Tabang Plant had sufficient coal for testing

83 We turn now to consider the Appellants' contention that KSC had sufficient coal for testing the Tabang Plant. This issue raises two related questions: first, whether the Tabang Plant was close to the stage of commissioning that required coal for testing as at November 2011; and second, whether the Tabang Plant in fact had sufficient coal for testing at that time.

84 We see no reason to disturb the Court's findings that as at November 2011, the Tabang Plant did require coal imminently for testing, and that it had insufficient coal for this purpose. We analyse both questions in turn, starting with the state of the Tabang Plant at that time.

(1) The state of the Tabang Plant as at November 2011

85 The state of the Tabang Plant as at November 2011 is directly related to the question of whether KSC had sufficient coal for testing the plant at that time. If the plant were in no condition to undergo commissioning, then any request for more coal might seem to have been pointless. In reaching its decision that in November 2011, the Tabang Plant was close to a stage of commissioning that required coal for testing, the Court preferred the evidence of Mr John Reilly

("Mr Reilly"), KSC's site operations manager, over the opinion of Mr John Kipling Alderman ("Mr Alderman"), the Appellants' expert witness. It placed emphasis on the fact that Mr Reilly was able to give first-hand evidence as to the state of the Tabang Plant in November 2011, whereas Mr Alderman's evidence was restricted to the conclusions that he drew from his review of the documents that were given to him when he was engaged in connection with this dispute (*Second Tranche Judgment* at [82]).

86 According to Mr Reilly, a series of modifications to the Tabang Plant were scheduled to take place in the period between September 2011 and November 2011. These modification works were later postponed to commence in late October 2011 because the construction materials only arrived at the Tabang Plant on around 21 October 2011. On 22 November 2011, the modification works that were carried out by external contactors were stopped (see [19] above). Mr Reilly asserted that this did not mean that all work on the modifications stopped. Instead, KSC's regular employees at the plant took over the modification works in addition to discharging their regular duties. At the trial, Mr Reilly accepted that the demobilisation of the external contractors inevitably slowed the progress on the modification works, but he maintained that it remained possible to get the plant up and running by mid-December 2011.

87 In contrast, Mr Alderman painted a relatively bleak picture. In his report, he concluded that the commissioning of the Tabang Plant was not even close to completion in November 2011. In fact, he contended that the plant was effectively still under construction at that time. He also considered that the plant needed to undergo major modifications that would take two to three years to complete. In this regard, it is important to note the structure of Mr Alderman's

report on the state of the Tabang Plant, which was divided into three sections as follows:

(a) Under a section titled "Design, mechanical and engineering problems", Mr Alderman assessed the state of the Tabang Plant as at November 2011 based on certain documents. From these documents, he found seven performance issues which remained unresolved in November 2011. He concluded that there were "serious design, mechanical, and engineering problems with the machines at the Tabang Plant", which meant that the plant was incapable of achieving commercial production in November 2011.

(b) Under a section titled "Quality of the briquettes being produced between January 2011 and November 2011 and the shutdown of the Tabang Plant in November 2011", Mr Alderman discussed the moisture content of the coal briquettes produced by the Tabang Plant. He found that the coal briquettes never reached the target moisture levels, and that the modifications intended to address this problem were typically to be "undertaken during the construction stage of a plant".

(c) Under a section titled "State of the Tabang Plant as of March 2013", Mr Alderman went further to discuss his findings based on his inspection of the plant in March 2013. During this inspection, he "identified a number of plant design elements that could adversely impact the production of strong briquettes". In a later part of this section, Mr Alderman moved beyond discussing the state of the Tabang Plant as it had been designed, and proceeded to consider how the plant's design could be improved.

88 The Appellants level two main contentions against the Court's finding as to the state of the Tabang Plant in November 2011, both of which stem from the Court's alleged failure to address Mr Alderman's site inspection in March 2013. First, they submit that the Court failed to note that Mr Alderman had in fact inspected the Tabang Plant in March 2013. Second, they say that the Court, in finding that the stage of commissioning which required coal for testing was imminent in November 2011, failed to address the section of Mr Alderman's report which suggested that it would have taken two to three years to get the Tabang Plant to an acceptable state.

89 In our judgment, these arguments are ill-conceived. To begin with, it is necessary to examine what precisely the issue before the Court was, and it is clear that that pertained to the state of the Tabang Plant in November 2011 as it had been designed. In short, no issue was going to be taken with the adequacy of the plant's design. This is clear from the discussion at the case management conference ("CMC") that took place prior to the second tranche of the trial. In the course of that CMC, the parties specifically agreed to proceed on the assumption that the Tabang Plant was capable of producing 1 MTPA of coal (the initial production target set out in cl 3.2 of the JV Deed) in November 2011 so as to avoid having to adduce technical evidence as to whether the plant, as it was designed, would have worked. Counsel for the Appellants, Mr Davinder Singh SC ("Mr Singh"), agreed to proceed on this basis, and asked only that he be allowed to argue that the WEC Parties did not subjectively believe that the plant would be working as soon as the parties had intended. This is evident from the following extract from the transcript of the CMC:

> Ct(VR): … If we have to deal with whether plant would have at some stage reached 1MTPA, that is matter for expert evidence and quite some disclosure. But if we look only at what parties were saying in November and December, that would be much narrower.

…

FX: I agree that issue of whether 1MTPA would have been reached is fraught with expert evidence.

But our positive case on causation/damage is had coal supply not been disrupted, plant would have hit 1MTPA at end-November 2011 (or June 2012), which would have allowed plant to have made profits.

…

Ct(AR): If we assume 1MTPA would have been reached by those dates, can we then deal with causation?

FX: Yes.

DS: Justice Loh and Justice Ramsey have expressed concerned [*sic*] that entering technical issues would take time. Some merit in moving discrete point to another stage by adopting AR's assumption. But I would ask to be allowed to run argument that having regard to events in November, etc., *it was clear to KSC/[the WEC Parties] that this was not going to work as soon as we want it to*. This would not require evidence on technical aspects of plant.

As long as I have liberty to do this, I have no difficulties with proposal.

FX: Yes. My Learned Friend is entitled to do that.

…

Ct(VR): I agree. If we make assumption on technical issue but *leave [the Appellants] to say subjective intention was somewhat different*, that deals with both points.

…

[emphasis added]

90 A close examination of the section of Mr Alderman's report mentioned at [87(c)] above reveals that his site inspection in March 2013 was concerned less with the actual state of the Tabang Plant as it had been designed, than it was with the *deficiencies* in the plant's existing design in terms of producing the required quantity and quality of upgraded coal briquettes. This can be seen from the following paragraphs of this section of the report:

> 57. My inspection of the Tabang Plant revealed several areas of serious concern. … [T]he *designs* of process hoppers are likely to produce inconsistent flows and particle size segregation in the feed to the briquetters. …
>
> 58. I also observed that the plant crushing system was not *designed* to produce a product with a particle size distribution that could provide dense particle packing. The dried coal collection and distribution was also *designed* in a manner that further degraded the feed particle size distribution to the briquette machines, thereby diminishing the strength of the briquettes.
>
> 59. … [I]t appears likely the coal dryer at the Tabang plant was *significantly undersized for the intended application*.
>
> [emphasis added]

91 These observations on the deficiencies in the Tabang Plant's design led Mr Alderman to propose a number of "major modifications" to the design of the plant as it stood in March 2013. He also estimated that such proposed modifications would take "two to three years". On the back of these views, the Appellants argue that in November 2011, the Tabang Plant was nowhere near the stage of commissioning that would require coal for testing.

92 However, as we have noted above, the deficiencies in the Tabang Plant's design were not the issue before the Court. It was therefore correct for the Court to ignore those parts of Mr Alderman's report where he essentially suggested ways in which the design of the plant could be improved. We also see no reason to disturb the Court's preference of Mr Reilly's evidence over Mr Alderman's views as to the actual state of the plant in November 2011. As the Court noted, Mr Reilly was present at the site at the material time in November 2011, whereas Mr Alderman's assessment of the state of the plant as at that time was based on the documents given to him when he was engaged in connection with the present dispute. The probative value of Mr Alderman's report was therefore limited when compared to Mr Reilly's first-hand account of how the modification works at the plant were progressing in November 2011. In contrast

to Mr Reilly's inspection of the plant in November 2011 in his capacity as KSC's site operations manager, Mr Alderman's inspection of the plant only took place in March 2013, and was directed not at the actual state of the plant in November 2011, but at what he considered to be problems in the design of the plant as it stood in March 2013 in relation to the production of strong coal briquettes.

93 Accordingly, we see no reason to disturb the Court's conclusion that in November 2011, the Tabang Plant was close to the stage of commissioning that required coal for testing. We next consider whether it had sufficient coal for this purpose.

(2) The Tabang Plant's stockpile of coal in November 2011

94 The Appellants' argument is simple: contrary to the Court's decision that the Tabang Plant had insufficient coal for testing, the plant in fact had ample coal for this purpose, and therefore, neither Bara nor FSP were obliged to supply KSC with coal under the 2010 CSAs. We disagree, and are satisfied that the Court was entitled to prefer Mr Reilly's evidence in reaching the conclusion that the 15,500 tonnes of coal in the stockpile of the Tabang Plant on 9 November 2011, when Bara and FSP stopped delivering coal to KSC, was insufficient.

95 As the Court noted, Mr Alderman's calculations of the production rate and, in turn, the daily raw coal consumption at the Tabang Plant were based on historical data *prior* to the commencement of the modification works, which "had the express purpose of improving the characteristics of the Tabang Plant" (*Second Tranche Judgment* at [91]). In contrast, Mr Reilly's calculations took into account the estimated improved production capacity that the modifications were estimated to achieve (*Second Tranche Judgment* at [89]). In this regard, it was Mr Reilly's evidence that after these modifications, the Tabang Plant could

have operated at between 50% and 75% of its targeted production capacity, if not even higher. By proceeding on the basis that the plant would have achieved 50% of its targeted production capacity, the Court essentially adopted the most conservative basis for estimating the quantity of coal that would be required, and found that 60,000 tonnes of coal would be needed for 30 days of operations (*Second Tranche Judgment* at [89]).

96 The Appellants contend that the Court was wrong to have preferred Mr Reilly's calculations in the absence of evidence that the modifications to the Tabang Plant would have allowed it to achieve 50% of its targeted production capacity. But, as we noted above at [89], the parties agreed to proceed on the assumption that the plant as designed was capable of reaching the initial production target of 1 MTPA of coal in November 2011, subject only to the reservation that the Appellants could attempt to mount a case that the *WEC Parties did not subjectively believe* that the plant was going to achieve this so soon. In any case, we agree with the Court that Mr Reilly's evidence as a site operations manager having a direct role in the modifications to the Tabang Plant would be more relevant to the issue than Mr Alderman's calculations, which were predicated on the assumption that the plant would continue to be plagued by problems.

97 Accordingly, we do not disturb the Court's findings on the insufficiency of coal at the Tabang Plant in November 2011.

Whether KSC's request for coal on 7 November 2011 was too vague and open-ended

98 As for the Appellants' contention that KSC's request for coal on 7 November 2011 was too "vague and open-ended" to trigger Bara's and FSP's coal supply obligations under the 2010 CSAs, we find that this argument is

without merit. Most crucially, as the Court held in the *Second Tranche Judgment* at [103], cl 3.9 of the 2010 CSAs did not require KSC to specify a particular quantity in its requests for coal for testing purposes (see [46] above). Accordingly, Bara and FSP were not entitled to withhold coal simply because KSC asked for "a lot of coal" on 7 November 2011 without specifying the precise quantity of coal needed.

Conclusion on the Obligation Issue

99 For these reasons, we dismiss the Appellants' arguments in relation to the Obligation Issue.

The Breach Issue

The parties' cases

100 Moving on to the Breach Issue, this pertains to whether BR breached its coal supply obligation under the JV Deed, and if so, whether such breach constituted a repudiation of the JV Deed. As we noted earlier (at [51] above), the Court found that BR breached its coal supply obligation by instructing Bara and FSP to cease supplying coal to KSC on 9 November 2011, and by imposing the Buyout Condition at the 17 November 2011 Meeting for any further supply of coal to KSC.

101 The Appellants first contend, in relation to BR's instruction to Bara and FSP on 9 November 2011 to cease coal supply to KSC, that this instruction was justified because the parties were at an impasse as to the price at which coal was to be supplied. But the Respondents reject this, pointing out that there was both an agreed price (namely, US$29.70 per tonne) as reflected in FSP's invoices to KSC for the coal supplied in 2011, as well as a price determination mechanism under the 2010 CSAs.

102 Next, the Appellants contend that the Court was wrong to find that BR, whether at the 17 November 2011 Meeting or at any other time, had made any further supply of coal to KSC conditional on the Buyout Condition. They refer in this regard to the evidence of BR's President Director and Chief Executive Officer, Mr Chin Wai Fong ("Mr Chin"), and also to positions taken by BR in correspondence. As against this, the Respondents rely on the contemporaneous records of the 17 November 2011 Meeting and the 6 December 2011 EGM.

Our decision

Whether there was an impasse as to price that entitled BR to cease the supply of coal

103 In our judgment, there is no merit in the Appellants' argument that BR was justified in instructing Bara and FSP to cease supplying coal to KSC on 9 November 2011 due to an impasse as to the price of coal. The documentary evidence makes it clear that Bara and FSP were instructed to cease the supply of coal to KSC on the basis that "Bayan has decided to withdraw from the KSC joint venture" (see [13] above), and not because of any impasse on price. This was a breach of BR's coal supply obligation under the JV Deed.

104 Further, it is clear from FSP's monthly invoices (from February 2011 to December 2011) that there was no impasse on price because the price had been set at US$29.70 per tonne. Even assuming that there had indeed been no agreement as to price, cl 8.2 of the 2010 CSAs provided a price setting mechanism. In our judgment, even if there had been any impasse on price, it would not have justified the cessation of coal supply to KSC, but ought instead to have been resolved in accordance with the applicable contractual mechanism.

Whether BR imposed the Buyout Condition for any further supply of coal to KSC

105 As for whether the Buyout Condition was made a condition of any further supply of coal to KSC at the 17 November 2011 Meeting, we are satisfied that the Court was correct to find that it was.

106 We first deal with the evidence of Mr Chin, who represented the Appellants at that meeting. Mr Chin claimed that he did not impose the Buyout Condition, and that he was simply responding to a question as to whether coal would still be supplied to KSC if BR's shares in KSC were acquired. But Mr Chin's evidence is inconsistent with Mr Flannery's contemporaneous record of the meeting, which the Court described as "the one contemporaneous record of the meeting" (*Second Tranche Judgment* at [37]). The first thing recorded there as having been said at the meeting is Mr Chin expressing the desire to have BR's 49% stake in KSC bought out for US$45m:

> (EC) We don't believe the WEC technology is economical for us and we would like to sell our 49% shareholding in KSC to WEC for the loan amount approx US$45m.

107 The parties then discussed the question of supplying coal to KSC, and the following exchange is recorded as having taken place between Mr Chin and the WEC Parties' representatives, Mr Flannery and Mr Travers Duncan:

> (BF) We need supply and offtake until say mid 2012 approx 6 months and we need it at cost as per our agreement. Reminded Bayan of side letter.
>
> (EC) They would supply coal but only at the market price.
>
> (BF) You mean $40 or more.
>
> (EC) Yes. But we would only supply coal *provided* we had agreement on how WEC would repay the Bayan loan to KSC.
>
> …

> (TWD) So Bayan will *only* agree to supply coal if we pay $45m for their equity. We will not pay $45m for their equity.
>
> [emphasis added]

108 The contemporaneous record of the 17 November 2011 Meeting contradicts Mr Chin's evidence as to what transpired at the meeting. That record is also consistent with the letter dated 21 November 2011 which BCBCS sent to BR just after the meeting. In that letter, BCBCS set out its understanding that the Buyout Condition had been imposed during the meeting, and stated that it considered this to be a breach of the JV Deed. The relevant part of the letter reads as follows:

> At a meeting on 17 November 2011, attended by Travers Duncan and Brian Flannery (as representatives of [the WEC Parties]), and Eddie Chin and Dato Low Tuck Kwong (as representatives of [the Appellants]), the representatives of the BR interests stated that:
>
> - Bara was only prepared to supply coal to KSC on the condition that [WEC] repay in full loans of approximately USD $45 million made by BR to KSC; and
> - Bara intended to cease supplying coal immediately unless [WEC] agreed to pay BR that amount.

109 As against this, there is some evidence going the other way. In the letter dated 24 November 2011 which BR sent to BCBCS in response to the latter's aforesaid letter of 21 November 2011, BR asserted that "at no point in time did [it] link the issue of [its] intention to withdraw from the joint venture to an issue of cessation of coal supply". Similarly, during the 6 December 2011 EGM, Mr Chin was recorded as having denied saying at the 17 November 2011 Meeting that BR's fulfilment of its coal supply obligation was premised on the buyout of its stake in KSC. He explained that he had been responding to Mr Flannery's question as to whether coal supply to KSC would continue under the 2010 CSAs if WEC bought out BR's stake in KSC. He also maintained that the coal supply issue and BR's withdrawal from the joint venture were not

linked, and emphasised that this point had been made clear in BR's letter dated 24 November 2011.

110 In our judgment, notwithstanding the evidence referred to in the previous paragraph, the Court was correct to find that BR did condition the further supply of coal to KSC on the Buyout Condition. First, the relevant factual matrix at that time was that BR had ceased the supply of coal to KSC. Although the Appellants subsequently instructed Bara and FSP on 6 December 2011 that they could supply coal to KSC if the latter so requested (see [24] above), this instruction was not communicated to either KSC or the WEC Parties, who would therefore have remained under the impression that the earlier proscription stood. Second, BR's offer to continue supplying coal to KSC in its letter to BCBCS dated 24 November 2011 (see [20] above) and during the 6 December 2011 EGM (see [23] above) was an offer to supply coal at the HBA Price, which was in breach of its obligation under Art 7 of the PLFA to provide a "Coal Advance" to KSC by ensuring the supply of coal to KSC on the basis of the latter having initially to pay only US$8 per tonne upfront for the coal. Third, it strikes us as incongruous for the Appellants to aver that the Buyout Condition was not imposed when Mr Chin maintained during the 6 December 2011 EGM that BR would insist on liquidating KSC if its stake in KSC were not bought out. Put simply, the only way for the WEC Parties to continue with the project by themselves was for them to buy out BR's stake in KSC. If they did not do so, BR would insist on liquidating KSC, making the question of BR's willingness to supply coal to KSC purely academic. Taking all this in the round, we are satisfied that BR did impose the Buyout Condition, and that this constituted a breach of its obligation to ensure and/or procure the supply of coal to KSC.

Whether BR's breach of its coal supply obligation was a repudiatory breach of the JV Deed

111 This leaves the question of whether BR's breach of its coal supply obligation was repudiatory in nature. Since, as the Court noted, "BCBCS did not purport to accept BR's breaches of its coal supply obligations and terminate the JV Deed" (*Second Tranche Judgment* at [183]), it appears unnecessary for us to decide this point. Nevertheless, for completeness, we agree with the Court that cl 3.8(b)(iii) of the JV Deed was a condition of the agreement, and that BR's breach of its coal supply obligation under this clause was a repudiatory breach (*Second Tranche Judgment* at [182]).

112 The parties do not dispute that the test for determining whether a contractual term is a condition is to ascertain whether the parties intended to "designate that term as one that is so important that any breach, regardless of the actual consequences of such a breach, would entitle the innocent party to terminate the contract" [emphasis in original omitted] (*RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal* [2007] 4 SLR(R) 413 at [97]). It is clear that the purpose of the joint venture could never have been achieved if BR had ceased the supply of coal to KSC since it was the Appellants' coal that was meant to be treated and upgraded. It follows that BR's coal supply obligation under cl 3.8(b)(iii) the JV Deed was fundamental to the joint venture, and its breach of this obligation entitled the innocent party – namely, BCBCS – to terminate the agreement.

Conclusion on the Breach Issue

113 For these reasons, we dismiss the Appellants' arguments in relation to the Breach Issue.

The Repudiation Issue

The parties' cases

114 We turn now to the Repudiation Issue, which centres on whether BR was justified in issuing the termination notice in its letter to BCBCS dated 21 February 2012. As indicated at [32] above, the JV Deed was still afoot in February 2012, although the PLFA had expired on 31 December 2011. Notwithstanding that BR had committed a repudiatory breach of the JV Deed by failing to meet its coal supply obligation thereunder, BCBCS did not elect to terminate the agreement. By that time, however, the relationship between the parties had become increasingly strained.

115 On 21 February 2012, *BR* issued a notice of termination, alleging that BCBCS had breached the JV Deed and that this entitled BR to terminate the agreement. BCBCS contended that this was an ill-founded notice, and that by purporting to discharge itself from further performance of the JV Deed on an ill-conceived basis, BR had repudiated the agreement, which BCBCS was entitled to and did accept. The termination notice issued by BR rested on many alternative grounds, but before us, Mr Singh narrowed the Appellants' case down to saying that BCBCS had repudiated the JV Deed by unilaterally causing KSC to incur the Excess Debt and the Excess Expenditure, and by unilaterally causing the Tabang Plant to be put into care and maintenance on 15 December 2011.

116 First, in relation to the Excess Debt, the Appellants' argument, which we will refer to as the "Excess Debt argument" where appropriate to the context, is that BCBCS breached cll 7.1(f) and 7.1(bb) of the JV Deed by causing KSC to incur the Excess Debt. The Appellants claim that the Court erred in finding that KSC had not incurred the Excess Debt on the ground that the debt had not

been ratified by BCBCS and BR. According to the Appellants, the Court's decision effectively means that cll 7.1(f) and 7.1(bb) could never have been breached. As against this, the Respondents maintain that BCBCS could never have recovered any sum that it advanced to KSC unless BR ratified the indebtedness. In the absence of such ratification, there was simply no question of KSC having incurred any indebtedness.

117 Second, with respect to the Excess Expenditure, the Appellants contend that the Court erred in finding that BR's ability to have its nominated signatory in KSC, Mr Lim, refuse to sign KSC's cheques was functionally equivalent to having a power to prevent KSC from incurring further expenditure. They observe that cheques were sent to Mr Lim to be signed only after KSC had entered into contracts for goods and services, and after the relevant goods and services had been provided. Hence, even if Mr Lim had refused to sign the cheques, KSC would still have incurred the expenditure. The Respondents challenge this, noting that BR had in the past vetoed the incurring of expenditure by Mr Lim's refusal to sign a cheque for the payment of KSC's insurance premium in November 2011. Further, they submit that the relevant question in relation to the Excess Expenditure pertains to KSC's position and whether KSC had been *made to* incur that expenditure. They contend that KSC's expenditure decisions were made by its own management in accordance with its own protocols, and BCBCS did not have full control over KSC's finances so as to be able to unilaterally "cause" KSC to incur the Excess Expenditure.

118 Third, in relation to the Tabang Plant being put into care and maintenance, the Appellants argue that BCBCS repudiated the JV Deed by unilaterally deciding to implement the care and maintenance program, and that the Court erred in finding that the parties had agreed to this. The Appellants point out that in fact, on 22 December 2011, BR had asked for "an exhaustive

and detailed list of the items allegedly required for the care and maintenance program, along with the costs of each and every item" in order to "*consider*" [emphasis added] its position on putting the Tabang Plant into care and maintenance. This is disputed by the Respondents, who rely on, among other things, the draft minutes of the 6 December 2011 EGM to support their contention that the decision to put the Tabang Plant into care and maintenance was "a joint one".

Our decision

Whether BCBCS unilaterally caused KSC to incur the Excess Debt

119 We are satisfied that BCBCS did not unilaterally cause KSC to incur the Excess Debt, but we arrive at this conclusion for reasons that differ slightly from those of the Court.

(1) Principles of contractual interpretation

120 In our judgment, the crux of this issue lies in the proper construction of cl 7.1 of the JV Deed. The principles of contractual interpretation are well-established (*CIFG Special Assets Capital I Ltd (formerly known as Diamond Kendall Ltd) v Ong Puay Koon and others and another appeal* [2018] 1 SLR 170 at [19] and [23]):

(a) the starting point is to look to the text of the contract;

(b) the court may have regard to the relevant context if that is clear, obvious and known to both parties;

(c) examples of the relevant context include the entirety of the contract, and the entirety of the commercial documents entered into as part of the transaction which is the subject matter of the contract; and

(d) generally, the meaning ascribed to the contractual terms must be one that the expressions used by the parties can reasonably bear.

(2) Clause 7.1 of the JV Deed

121 We turn to the text of cll 7.1(f) and 7.1(bb) of the JV Deed, which BCBCS allegedly breached by causing KSC to incur the Excess Debt without BR's consent:

> 7.1 Matters requiring unanimous consent
>
> The Members agree that despite anything to the contrary in this Deed, or in the Constitution, the unanimous consent of the Members or the Directors (as appropriate as the case may be in accordance with the Applicable Law) is required for [KSC] to do any of the following, unless such act, matter or thing is dealt with in an approved Business Plan:
>
> …
>
> (f) make any decision about the requirements for, and the raising of, further finance or working capital for [KSC];
>
> …
>
> (bb) permit [KSC] to incur any indebtedness in excess of $100,000 in total outstanding, or increase the total amount of its borrowings to a figure greater than that provided in the Business Plan;
>
> …

We note here that cl 7.1 of the JV Deed refers to "Members", who are defined in cl 1.1 of the JV Deed as the shareholders of KSC. At all material times, KSC's shareholders were BCBCS (on the Respondents' side) and BI (on the Appellants' side). However, the parties seemed content, in so far as their rights and obligations were concerned, to equate the "Members" of KSC with the parties to the JV Deed after it was novated in 2009 (that is to say, with BCBCS and BR), and we will therefore do likewise in our analysis of cl 7.1.

122 On the face of cll 7.1(f) and 7.1(bb), it would appear that these two clauses would be breached once either BCBCS or BR unilaterally decided to raise further finance or working capital for KSC (cl 7.1(f)), or unilaterally caused KSC to incur a debt that exceeded $100,000 (cl 7.1(bb)). However, both clauses must be read in the light of cl 7.1(hh), which provides as follows:

> (hh) *create any contract or obligation to pay money or money's worth to any Member or its Related Bodies Corporate or to any person as a nominee or associate of any such person* (including any renewal of or any variation in the terms of any existing contract or obligation) other than as set out in this Deed … [emphasis added]

Reading these three clauses together, it seems to us, as we will explain below (at [130]–[133]), that cl 7.1 of the JV Deed distinguishes between *member* funding and *third party* funding.

(3) The parties' further submissions on cl 7.1(hh) of the JV Deed

123 The parties initially made no submissions on the interpretation of cll 7.1(f) and 7.1(bb) of the JV Deed in the light of cl 7.1(hh). We therefore invited further submissions on this after the hearing before us.

124 In their further submissions, the Appellants contend that cl 7.1(hh) of the JV Deed does not apply to prohibit the creation of contracts or obligations for KSC to pay money or money's worth to a member (or an entity associated with a member) unless the payment obligation created is "other than as set out in this Deed", in other words, is contrary to other provisions in the JV Deed which deal with the payment of money or money's worth to a member (or an entity associated with a member). The Appellants highlight cll 8.3(b) and 14.1(a), both of which concern loans from members, as examples of the latter type of provisions, and submit that if a member were to cause KSC to create any contract or obligation to repay a member's loan in a manner contrary to

what is provided for in cll 8.3(b) and/or 14.1(a), that would be a breach of cl 7.1(hh). In short, the Appellants' position is that cl 7.1(hh) is "restricted to the provisions within the JV Deed which deal specifically with how payments to [members] are to be made", and does not concern the raising of further finance and the incurring of indebtedness by KSC. The latter two situations are governed instead by cll 7.1(f) and 7.1(bb) respectively, which apply to funding extended by members and non-members alike.

125 The Respondents dispute this, pointing out that cll 8.3(b) and 14.1(a) do not concern the creation of contracts or obligations to pay money or money's worth to members, which is what cl 7.1(hh) is concerned with. They submit that cl 7.1(hh) applies where a member unilaterally extends funding to KSC above the US$40m facility limit under the PLFA, and that unless the parties unanimously consent to such funding, KSC would not have a legally enforceable obligation to repay the member who provides the funding. Put very simply, according to the Respondents, the effect of cl 7.1(hh) is that BCBCS's and BR's unanimous consent was required for KSC to become legally obliged to repay the Excess Debt to BCBCS. Their position as to how cll 7.1(f), 7.1(bb) and 7.1(hh) operate together is summarised as follows:

> Cl 7.1(bb) refers to KSC's "indebtedness in excess of $100,000" on a broader level and would largely relate to indebtedness to third parties. Cl 7.1(hh) would cover the specific situation where KSC's indebtedness is to a Member such that an obligation to pay money or money's worth arises. However, where there is unanimous consent to raising of further finance or working capital (Cl 7.1(f)) specifically by way of Member loans, both Cll 7.1(bb) and 7.1(hh) may be engaged. [emphasis in original omitted]

(4) The correct interpretation of cl 7.1 of the JV Deed

126 In our judgment, both parties are mistaken in their interpretation of cl 7.1 of the JV Deed. With respect to the Appellants' interpretation, it cannot be the

case that cl 7.1(hh) concerns only those provisions in the JV Deed that regulate the payment of money or money's worth to members (such as cll 8.3(b) and 14.1(a)). Such an interpretation would render cl 7.1(hh) unnecessary, and it would also run against the disjunction between provisions such as cll 8.3(b) and 14.1(a), which are not concerned with the *creation* of contracts or obligations to pay money or money's worth to a member, and the plain wording of cl 7.1(hh), which appears explicitly to be concerned with precisely that.

127 But so too are the Respondents mistaken in contending that the effect of cl 7.1(hh) is that KSC will not come under an enforceable obligation to repay a member unless there is unanimous consent to its undertaking such an obligation. Such an interpretation seems to us to be untenable because KSC was never a party to the JV Deed. If a member unilaterally causes KSC to accept funds from it, at its highest, that member might be in breach of cl 7.1(hh), but it does not necessarily follow that KSC would not have incurred an obligation to repay that member.

128 Having said that, we consider that cl 7.1(hh) is the relevant provision that sheds light on the position where a member unilaterally extends funds to KSC. Unilateral funding from a *member* to KSC would not necessarily constitute a breach of cl 7.1(hh) unless such funding gives rise to an obligation on KSC's part to repay the funds advanced. In our judgment, cl 7.1(f), which is concerned with the raising of further finance or working capital, and cl 7.1(bb), which is concerned with the incurring of indebtedness above $100,000, both deal with situations where the funds advanced to KSC come from a *third party*. Where the funds advanced come from a member, we consider that this is dealt with by cl 7.1(hh).

129 We begin with the text of cll 7.1(f) and 7.1(bb). On the face of these two clauses, the JV Deed would appear to be breached *once a decision to raise further finance or working capital is made* unilaterally (cl 7.1(f)), or where one party *unilaterally causes KSC* to incur a debt that exceeds $100,000 (cl 7.1(bb)). This may be compared to the scenario delineated in cl 7.1(hh), which addresses *the creation of a contract or obligation* on KSC's part to pay money or money's worth to any member.

130 While cl 7.1(f) has a somewhat distinct sphere of application, we note that there is some overlap between cll 7.1(bb) and 7.1(hh). Both clauses are concerned with the situation where KSC receives funding and incurs a liability to repay the money that it receives. But, it is also clear to us that they are intended to apply in different situations. Most obviously, while cl 7.1(bb) is triggered where the indebtedness incurred by KSC exceeds $100,000, cl 7.1(hh) applies regardless of the amount that KSC is obliged to pay. More importantly for our purposes, whether it is cl 7.1(bb) or cl 7.1(hh) that is engaged seems to us to depend on the *entity* extending the funding. Specifically, cl 7.1(hh) pertains to the creation of "any contract or obligation to pay money or money's worth to any *Member*" [emphasis added], and the overlap between it and cl 7.1(bb) in particular suggests that cl 7.1(bb) (and by extension, cl 7.1(f)) is not intended to apply where a party causes KSC to receive funding from *members*.

131 To interpret cl 7.1 otherwise would effectively render cl 7.1(hh) redundant, and it is relevant in this connection to have regard to the observation of the Court of Appeal in *Travista Development Pte Ltd v Tan Kim Swee Augustine and others* [2008] 2 SLR(R) 474 at [20] that in contractual interpretation, there is a "presumption against redundant words". It has been noted by some commentators that the presumption is a weak one in the context

of standard form contracts, which typically have redundancy drafted into them (Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 6th Ed, 2015) at para 7.03). But the JV Deed was far removed from a standard form contract. The parties here are of comparable bargaining weight; and as the Court observed, the JV Deed was a contract that saw multiple drafts being exchanged between them (*First Tranche Judgment* at [15]–[16]).

132 Moreover, the rest of the JV Deed supports the distinction that we have drawn above. Thus, cl 8 too differentiates between member loans and third party loans, and sets out how the different loans would rank against each other in terms of priority.

133 Having regard to these matters, we are satisfied that cl 7.1 of the JV Deed differentiates member funding from third party funding. Where a party unilaterally causes KSC to receive *member* funding, cl 7.1(hh) would be the applicable clause. There would be a breach of this provision only if the member concerned *creates an obligation on KSC's part* to repay any or all of the money advanced to KSC. Here, we pause to note that our finding that cl 7.1(hh) is the relevant clause does not fundamentally change the key question that lies at the heart of the Appellants' Excess Debt argument as identified by the Court, which is whether the fact that BCBCS advanced US$6m to KSC meant that KSC incurred a corresponding debt to BCBCS (*Second Tranche Judgment* at [168]). But we consider it important to identify the applicable provision with precision, which has also put into sharp focus the key question just mentioned.

(5) Whether KSC incurred an obligation to pay money to BCBCS upon receiving the US$6m

134 As we have just noted, the key question in respect of the Appellants' Excess Debt argument is whether KSC came under an obligation to pay money

to BCBCS upon receiving the US$6m comprising the Excess Debt. In our judgment, the Appellants have failed to show that KSC came under such an obligation.

135 Of particular note in this regard is the PLFA, which was entered into by KSC, BCBCS, and BR. The key point to highlight is that KSC was a party to the PLFA. In its letter to the WEC Parties dated 13 December 2011, BR alleged that the PLFA facility limit of US$40m had been exceeded, and that this constituted a breach of the JV Deed on BCBCS's part:

> … Furthermore, during the recent shareholders' meeting on 6 Dec 2011, we were advised by you that the Priority Loan Funding Agreement threshold sum of $40 million had been exceeded by approximately $6 million without the prior consent of BR and thus further compounds your breach …

136 This allegation is repeated in the Appellants' Defence and Counterclaim (Amendment No 5). There, it is pleaded that: (a) the loan facility under the PLFA was subject to a limit of US$40m; (b) BCBCS had provided KSC with a loan of US$46m instead of the agreed US$40m; (c) BCBCS had failed to obtain BR's consent to loan an additional US$6m to KSC; and (d) BCBCS was thus in breach of the JV Deed by unilaterally extending to KSC US$6m more than what had been agreed on under the PLFA.

137 The PLFA lies at the heart of the Appellants' Excess Debt argument. As the Respondents have pointed out, under the PLFA, KSC never had an obligation to repay anything in excess of the facility limit of US$40m. Although there is nothing in the PLFA that expressly provided for the situation where the US$40m limit was exceeded, it is clear to us that BCBCS could not have recovered from KSC anything in excess of that limit. This is because Art 9.1 of the PLFA provided that KSC "shall be obliged to pay all [its] Obligations under the Priority Loan to BCBCS", and Art 1 of the PLFA defined the "Priority

Loan" to include BCBCS's loan facility, which was capped at US$40m. This meant that under the PLFA, BCBCS could not have sought repayment of any sum advanced in excess of the US$40m facility limit.

138 In this vein, it is noteworthy that the situation giving rise to the Excess Debt argument was not the first time that the PLFA facility limit had been exceeded. In an e-mail dated 28 June 2011, the WEC Parties informed the Appellants that the then existing limit of US$20m had been exceeded. Because of this, the WEC Parties needed to amend the PLFA to increase the facility limit as part of their audit process, and they proposed to increase it to US$40m. In our view, this is consistent with the fact that BCBCS could not have treated any advance to KSC in excess of the PLFA facility limit as a loan unless BR had approved such advance. This is also consistent with Mr Flannery's evidence that the US$6m that constituted the Excess Debt "would not form part of KSC's debt unless and until BR ratified the debt by executing a further loan agreement or a 2nd Addendum to the PLFA".

139 Accordingly, as far as the PLFA is concerned, it did not impose on KSC any obligation to repay BCBCS the Excess Debt.

140 As against this, the Appellants maintain that KSC's obligation to repay BCBCS does not fall within the terms of the PLFA. Instead, relying on the decision of the English Court of Appeal in *Seldon v Davidson* [1968] 1 WLR 1083 ("*Seldon*"), they contend that since the Respondents had acknowledged in their pleadings that KSC had incurred the Excess Debt, the onus is on them to show that KSC had no obligation to repay BCBCS.

141 In *Seldon*, the plaintiff advanced the defendant a sum of money for him to purchase a house. In his pleadings, the defendant admitted that he had

received the money, but asserted that the plaintiff had intended it as a gift. The English Court of Appeal held that the burden was on the defendant to prove that the money received was a gift. In so deciding, Willmer LJ stated at 1088 that "[p]ayment of the money having been admitted, prima facie that payment imported an obligation to repay in the absence of any circumstances tending to show anything in the nature of a presumption of advancement".

142 We note that *Seldon* has been cited with approval in *Wee Kah Lee v Silverdale Investment Pte Ltd* [2000] 2 SLR(R) 838 at [42] for the proposition that "[i]n ordinary circumstances, payment of money imports a *prima facie* obligation to repay money in the absence of circumstances from which a presumption of advancement can or may arise". *Seldon* has also been accepted as having been correctly decided by the Court of Appeal in *Lai Meng v Harjantho Johnny* [1999] 2 SLR(R) 738.

143 But *Seldon* has also been criticised, for instance, by the Hong Kong Court of Final Appeal in *Big Island Construction (HK) Ltd v Wu Yi Development Co Ltd & Anor* [2015] 6 HKC 527, where Sir Anthony Mason NPJ opined that *Seldon* had been wrongly decided, and that the English Court of Appeal had erred in finding that the defendant had pleaded a confession and avoidance defence (at [91]):

> … [T]he Court of Appeal was mistaken in thinking that the defence pleaded amounted to a confession and avoidance. As Jenkinson J pointed out in *Joaquin v Hall* [[1976] VR 788 at 789], the defence in *Seldon v Davidson* denied the loan alleged by S which was an essential ingredient in her cause of action as pleaded. The fact that the defence pleaded was gift or, in the alternative, a loan on different terms cannot alter the onus of proof arising from the denial of the loan alleged by S.

144 In our judgment, there is force in this criticism of *Seldon*, and we respectfully agree that the English Court of Appeal mistook the defendant's

pleading in *Seldon* as being in the nature of a confession and avoidance. In *SCT Technologies Pte Ltd v Western Copper Co Ltd* [2016] 1 SLR 1471, we explained at [23] that a confession and avoidance defence is one where a defendant expressly or impliedly "confesses" the truth of what is alleged against him (such as that a debt was incurred), but proceeds to "avoid" the effect of the allegation (such as by stating that he had repaid the debt). Applying this to *Seldon*, it becomes clear that the English Court of Appeal was mistaken in its reasoning. The defendant in *Seldon* did not admit that he had incurred a *debt*. On the contrary, that was the very thing he *denied*. What he did admit was that he had received a sum of money, but he averred that the money was intended as a gift (*Seldon* at 1084).

145 In the present case, the Appellants argue that the Respondents' pleaded case is that both parties agreed to the incurring of the Excess Debt by KSC (see also the *Second Tranche Judgment* at [165]), and it is therefore not open to the Respondents to now contend that the Excess Debt had not been incurred. In this regard, we note that the Respondents' Statement of Claim (Amendment No 5) ("SOC") states that "[b]y consenting to KSC incurring the alleged $7 million excess, [BR] had consented to [KSC] incurring additional *debt*" [emphasis added]. But the SOC must be read in the light of the Respondents' Reply and Defence to Counterclaim (Amendment No 5), in which the Respondents specifically address the Appellants' pleadings in relation to the Excess Debt. There, the Respondents *deny* the Appellants' Excess Debt argument, and once this is denied, the factual hypothesis is then that there was no joint decision for KSC to incur the Excess Debt. And while the Respondents admit that BCBCS gave US$6m in funding to KSC, the US$6m is characterised not as a *debt* but as *funding*, and at no point do the Respondents admit that BCBCS created an obligation on KSC's part to repay the US$6m to it.

146 The effect of this is that the Court was correct to hold in the *Second Tranche Judgment* that the Appellants "bore the burden of proving that KSC incurred the Excess Debt" (at [169]). Having regard to the terms of cl 7.1(hh) of the JV Deed, which we have found to be the applicable clause, the Appellants bear the burden of proving that BCBCS created an obligation on KSC's part to repay the US$6m comprising the Excess Debt, and this, they have not done. As we have analysed above, the PLFA did not enjoin KSC to repay BCBCS anything in excess of the US$40m facility limit under the PLFA, and the Appellants have not pointed us to any other agreement under which KSC could have incurred such an obligation.

(6) Conclusion on the Appellants' Excess Debt argument

147 In sum, we find that cl 7.1(hh) is the applicable provision where a member unilaterally extends funding to KSC. The provision of such funding would not amount to a breach of the clause unless it imposes an obligation on KSC to pay money to the member who advances the funds. The Excess Debt argument fails because the Appellants are unable to show that KSC was obliged to repay BCBCS the US$6m that constituted the Excess Debt, and therefore, cl 7.1(hh) was not breached.

Whether BCBCS unilaterally caused KSC to incur the Excess Expenditure

148 We turn to the next limb of the Appellants' submissions on the Repudiation Issue, which pertains to whether the Court was correct in finding that BCBCS did not unilaterally cause KSC to incur the Excess Expenditure. To be clear, the Excess Expenditure is distinct from the Excess Debt. Whereas the latter relates to a loan of about US$6m that was extended to KSC by BCBCS in excess of the US$40m facility limit under the PLFA, the former concerns KSC

spending in excess of its budget by about US$7m, which the Appellants claim was caused by BCBCS's unilateral management of KSC's expenditure.

149 The principal difficulty that the Appellants have failed to overcome is that KSC was itself responsible for making decisions on its expenditure. The Appellants have not pointed to any evidence that weighs against the Court's finding that "[t]he members of [KSC's] structure, including its board of directors and management and operations team, were all appointed in accordance with the *agreed* arrangements under the joint venture" [emphasis added] (*Second Tranche Judgment* at [154]; see also [55] above). Without overcoming this fundamental difficulty, we do not see how the Appellants can maintain that BCBCS *unilaterally* caused KSC to incur the Excess Expenditure.

150 The Appellants contend that the Court erred in finding that BR's power to refuse to sign KSC's cheques meant that it could prevent KSC from incurring expenditure. Much reliance is placed in this context on the fact that cheques were sent to BR's nominated signatory, Mr Lim, for signature only *after* KSC had entered into contracts for goods and services, and after the goods and services had already been provided. We disagree with the Appellants, simply because BR's ability to prevent payment by KSC was self-evidently a form of control over expenditure. In fact, the Court correctly found that the co-signatory mechanism was set up by both parties precisely "to control KSC's expenditure" (*Second Tranche Judgment* at [155(a)]).

151 In this light, we do not think it is open to the Appellants to argue, in essence, that the expenditure control mechanism that they had earlier agreed to was unsatisfactory or inadequate to protect their interests. As the Court observed in the *Second Tranche Judgment* at [157], "[w]hat is vital is that BR had the

power to veto payments out of KSC's accounts. How they chose to exercise that power is a matter that lies at their doorstep, not BCBCS'[s] nor WEC's."

Whether BCBCS unilaterally caused the Tabang Plant to be put into care and maintenance

152 The third and last limb of the Appellants' submissions on the Repudiation Issue concerns the putting of the Tabang Plant into care and maintenance on 15 December 2011, a decision which the Appellants claim was made by BCBCS unilaterally (see [118] above). On this, we agree with the Court that at the 6 December 2011 EGM, the parties *agreed* to put the Tabang Plant into care and maintenance.

153 We base this primarily on our reading of the draft minutes of the 6 December 2011 EGM, which recorded that the WEC Parties expressed the concern that KSC would have to suspend operations and put the Tabang Plant into care and maintenance if BR were unwilling to provide its 49% share of KSC's funding requirements. In response, BR proposed that KSC "stop its operations to avoid incurring further costs", and the WEC Parties agreed to this. For completeness, we set out the salient portions of the draft minutes below:

> 44. BF noted that *if BR is not willing to fund, then KSC will need to suspend its operations and go into a care and maintenance program*. EC then asked if BCBCS agreed to liquidate KSC. TD did not agree to this request and stated that there is no agreement to liquidate and BCBCS will meet its 51% share of funding obligations to creditors.
>
> 45. EC reiterates that BR's intention is to withdraw from the joint venture and does not see why it has to continue to put good money after a bad project. *KSC cannot keep incurring costs and BR proposes that KSC stop its operations to avoid incurring further costs.*
>
> 46. *BF agreed to suspend KSC operations and maintain a limited number of people on site for the security of the plant and the continued upkeep.* BF will procure KSC to

> provide proposals for BR's approval on crew required to implement a care and maintenance program on a monthly cost basis.
>
> 47. BR agrees that *employee salaries and severance pay* must be paid by KSC.
>
> 48. BR will respond on the above issues before 15 Dec 2011 to avoid any rollover of the employee severance pay entitlement after 15 Dec 2011.
>
> [emphasis added]

154 Relying on the last paragraph of the passage quoted above, the Appellants contend that there was in fact an impasse at the 6 December 2011 EGM as to whether the Tabang Plant was to be put into care and maintenance. We disagree. When the draft minutes are read in context, it is clear that the statement that "BR will respond on the above issues" related to the issue of employee salaries and severance pay, which BR agreed had to be paid by KSC. Hence, there was no dispute that the Tabang Plant was to be put into care and maintenance, with possibly only the apportionment of the costs of the care and maintenance program left open. But that does not detract from the fact that the parties agreed that the Tabang Plant should be put into care and maintenance.

155 The Appellants also rely on BR's letter to the WEC Parties dated 22 December 2011 in support of their contention that there was no agreement to put the Tabang Plant into care and maintenance. In that letter, BR stated as follows:

> With regard to the "*funding necessary for the care and maintenance of the Project*", in order to consider our position, please provide an exhaustive and detailed list of each and every item which you allege is required for the care and maintenance of the Project, together with the costs of each and every item. Please also provide us with a copy of the proposed insurance policy and a breakdown of the premiums payable for each item under the policy. We shall revert on these matters once we have had an opportunity to review the aforementioned documents. These requests are made strictly without any admission of

> liability or confirmation of payment by BR. [emphasis in italics and underlining in original]

We do not think this letter changes the foregoing analysis because all it shows is that BR was seeking details as to the *costs* of the care and maintenance program, and not that it was objecting to the Tabang Plant being put into care and maintenance.

156 Moreover, that letter must be read in the light of KSC's e-mail dated 8 December 2011, which was sent two days after the 6 December 2011 EGM. In that e-mail, KSC provided BCBCS and BR with the cost estimates in relation to the care and maintenance program (see [25] above). We note that this e-mail is consistent with the WEC Parties' statement during the 6 December 2011 EGM that they would "procure KSC to provide proposals for BR's approval on crew required to implement a care and maintenance program on a monthly cost basis".

Conclusion on the Repudiation Issue

157 For these reasons, we find that the grounds on which BR's termination notice of 21 February 2012 rested are not made out. It follows that BR, by issuing that notice when it was not entitled to do so, repudiated the JV Deed. In this regard, we note that the Appellants are not challenging the Court's finding that BR's repudiatory act was accepted by BCBCS, and that the JV Deed was thereby terminated.

The Causation Issue

The parties' cases

158 We turn finally to the Causation Issue. The Appellants argue that any breaches of the JV Deed found to have been committed by BR did not cause

BCBCS any loss. First, they argue that KSC could not have continued operating without further funding from the parties. And because, so they maintain, KSC would not have been funded and thus would not have been able to get the Tabang Plant to the point where it could undertake commercial production, no loss can be said to have been caused to KSC by BR's alleged breaches. This contention ultimately turns on whether BCBCS was able and willing to continue funding KSC. In response, the Respondents say that there were "extant funding arrangements in place at the material time", and that "BCBCS would have continued to fund KSC *by itself* on an as needs basis had BR not breached its coal supply obligation" [emphasis in original]. Second, the Appellants argue that even if KSC had suffered any loss as a result of BR's alleged breaches of the JV Deed, the proper plaintiff should be KSC, and not BCBCS. They contend that the Court erred in characterising their argument on this point as "an argument on reflective loss" and in deferring this issue to the third tranche of the trial. Third, they argue that the Court erred in also deferring to the third tranche the issue of whether BR was obliged under the Expansion MOU to expand the capacity of the joint venture and the Expansion MOU's effect on BCBCS's claim for damages because the Expansion MOU clearly "did not impose any obligation on BR to expand the capacity of the joint venture". The Respondents, on the other hand, contend that it was entirely correct of the Court to defer its decision on these issues to the third tranche in the circumstances since that tranche has been reserved for the assessment of damages.

159 Alternatively, the Appellants argue that any damages awarded to BCBCS should be limited to one of the following periods, beginning on 9 November 2011 (the date on which BR instructed Bara and FSP to stop supplying coal to KSC) and ending on:

(a) 22 November 2011, this being the date of BCBCS's decision to demobilise the Tabang Plant owing to an alleged lack of funding, which then rendered the issue of BR's coal supply obligation irrelevant; or

(b) 24 November 2011, this being the date on which BR offered to continue supplying coal to KSC based on the 2010 CSAs, which offer BR repeated at the 6 December 2011 EGM and followed up on by instructing Bara and FSP on the same day to supply coal to KSC if the latter so requested, but which BCBCS rejected because it was unwilling to fund KSC by itself; or

(c) 29 November 2011, this being the date on which BCBCS stated that "its funding of KSC was subject to BR contributing 49% of KSC's costs of commissioning, operation and maintenance", warranting the finding that KSC would not have had the funds to continue operations from 29 November 2011 onwards even if BR had supplied coal to it; or

(d) 15 December 2011, this being the date on which BCBCS unilaterally put the Tabang Plant into care and maintenance because of a lack of funding.

160 Many of these contentions clearly overlap with points that have been dealt with elsewhere in this judgment.

Our decision

Whether BCBCS was willing to fund KSC unilaterally

161 In our judgment, at the heart of the Causation Issue is the question of whether BCBCS was willing *and* able to fund KSC by itself. We agree with the Court that BCBCS was *willing* to do so.

162 The Appellants rely on the WEC Parties' letter to BR dated 29 November 2011 (see [21] above) to show that the Court erred in finding that BCBCS was willing to fund KSC unilaterally. In that letter, the WEC Parties appeared to condition BCBCS's funding of 51% of KSC's expenses on BR's willingness to fund its 49% share of those expenses. The Appellants contend that this demonstrates that BCBCS was unwilling to fund KSC on its own. The salient portion of the letter is as follows:

> … Our assessment is that KSC will require funding of up to USD$20 million through to the end of June 2012. Please confirm BR will enter into a member loan with KSC to provide 49% of that funding in accordance with its JV Deed and MOU obligations. BCBCS confirms that it is willing to provide 51% of that funding. *Once you have provided that confirmation* we can then take steps to ensure that KSC enters into loan agreements accordingly with BCBCS and BR. … [emphasis added]

163 We do not think this letter brings the Appellants' case very far. We agree with the Court that "it does not logically follow that, if BCBCS (wrongly) believed that BR was legally obliged by the JV Deed to provide its share of funding, BCBCS was not prepared to fund KSC on its own in any circumstances" (*Second Tranche Judgment* at [227]). The real question is whether BCBCS was in fact *willing* to proceed to unilaterally fund KSC. In our judgment, the evidence shows on the balance of probabilities that it was.

164 BCBCS in fact continued funding KSC all the way to 29 March 2012, well after the Suit was commenced. Further, the KSC loan drawdown schedule shows that BCBCS continued funding KSC even after the November 2011 Board Meeting, which was when BR first expressed its desire to withdraw from the joint venture. BCBCS also continued to fund KSC after the WEC Parties' 29 November 2011 letter to BR, in which, according to the Appellants, the WEC Parties purportedly conditioned BCBCS's funding of KSC on BR's agreeing to co-fund KSC's operations. Such continued funding by BCBCS is also

consistent with Mr Flannery's evidence in his affidavit of evidence-in-chief dated 28 December 2016 that the success of KSC and the Tabang Plant was crucial to the WEC Parties:

> 164. … [T]he WEC Board was always confident in the potential for commercial exploitation of the BCB Technology. … WEC's core project was the Tabang Plant, and it was expected that after commissioning was completed, further plants would be constructed together with BR in Indonesia.
>
> …
>
> 166. The reality of the situation was that BCBCS was the sole shareholder which was cash funding the project after October 2009 for almost two years … WEC was willing to go above and beyond to fund BCBCS's share in KSC because of the importance of the project to the [WEC Parties'] commercial interests, and did in fact do so by funding the project in excess of the US$40 million loan facility in the PLFA beyond August 2011.

165 In this connection, while Mr Singh is correct in his submission that the WEC Parties' letters to BR towards the end of 2011 focussed to a very large extent on seeking funding from BR, it is clear from a close examination of the parties' correspondence that the seeming shift in focus from coal supply issues to funding issues emerges from 12 December 2011 onwards, which was just after the parties had agreed at the 6 December 2011 EGM that the Tabang Plant was to be put into care and maintenance. Thereafter, the question of coal supply became less pressing, and in that context, it is unsurprising that the WEC Parties would cease asking for coal to be supplied to KSC and instead address the underlying question of funding.

166 Separately, the Appellants also argue that the Respondents' pleaded case was that the Tabang Plant had been put into care and maintenance because of BR's failure to provide funding to KSC, a point that was also observed by the Court in the *Second Tranche Judgment* at [58]. But the relevant portion of the Respondents' SOC indicates that the care and maintenance program was

implemented for two reasons – BR's cessation of coal supply *and* its refusal to provide further funding:

> At an extraordinary shareholders' meeting of [KSC] held on 6 December 2011, representatives of [BR] communicated that [BR] would not be providing any further funding to [KSC]. In view of [BR's] refusal to provide any further funding, *and the cessation of coal supply* to [KSC] referred to at paragraph 47 below, [BCBCS] noted that [KSC] would need to suspend its operations and enter into a care and maintenance program if [BR] did not change its position. [emphasis added]

167 The short point is that by the end of November 2011, the project had reached a stage where some fundamental issues relating both to the supply of coal and the question of funding had arisen, and these needed to be resolved between the parties before matters could be taken further. It is unsurprising that the parties agreed to put the Tabang Plant into care and maintenance while these matters were being discussed. But this alone does not warrant the finding, which the Appellants urge upon us, that BCBCS was unwilling to fund KSC unilaterally.

Whether BCBCS was able to fund KSC unilaterally

168 This brings us to the question of whether BCBCS *could* have funded KSC by itself. As we noted earlier (at [65] above), the Court reserved its decision on this issue to the next tranche of the trial on the basis that there was insufficient evidence before it (*Second Tranche Judgment* at [223]). It also reserved to the next tranche its decision on whether BCBCS was in substance claiming KSC's reflective loss (*Second Tranche Judgment* at [230]–[231]), and whether BCBCS could rely on what might have happened pursuant to the Expansion MOU in its claim for damages (*Second Tranche Judgment* at [232]; see also [66] above).

169 The Appellants submit that the Court ought to have disposed of the three aforesaid issues instead of deferring them to the next tranche of the trial. They argue that the burden falls on the Respondents to establish causation and show that BCBCS would have suffered the loss that it is claiming. Thus, if the Court was of the view at the end of the second tranche of the trial that the evidence adduced was insufficient to establish causation, it ought to have found against the Respondents and held that either the loss claimed by BCBCS was not made out or the damages awarded for such loss should be limited to certain time periods. The Appellants submit that they have been prejudiced by the Court's failure to determine the three above-mentioned issues based on the evidence before it because the Respondents have effectively been given another chance to establish causation at the next tranche of the trial.

170 We agree that where an issue is squarely and properly placed before the court, the court ought to decide it. Where the evidence is found to be incomplete such that the court cannot make a finding one way or the other, the question of fact that has been raised is to be decided on the basis of who bears the burden of proof. In this regard, the Appellants referred us to the decision of the English Court of Appeal in *Morris v London Iron and Steel Co Ltd* [1988] 1 QB 493, in which May LJ observed at 504 that where the court is unable to prefer one side's story over the other, "the operation of the principle of the burden of proof comes into play and the plaintiff fails". A similar observation was also made by the House of Lords in *Rhesa Shipping Co SA v Edmunds* [1985] 1 WLR 948, where Lord Brandon of Oakbrook observed at 955 as follows:

> … [T]he judge is not bound always to make a finding one way or the other with regard to the facts averred by the parties. He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden. …

171 In our view, whether or not the Court correctly deferred its final determination on causation to the next tranche of the trial hinges on the precise question of causation that was before it. The parties could not agree on the formulation of this question, and it was therefore reflected as follows in the list of issues to be decided at the second tranche of the trial:

> C. **Causation**
>
> 9. The Parties are unable to agree on the framing of this issue:
>
> WEC Parties
> If BR is found to be liable for breach of its obligation(s) in respect of coal supply and/or repudiation of the JV Deed, and on the agreed assumption that the Tabang Plant would have achieved a production capacity of approximately 1 MTPA, whether, as a result of such breach, BCBCS suffered loss.
>
> Bayan Parties
> Having regard, among other things, to the Court's findings in [the *First Tranche Judgment*], including but not limited to its finding that BR was not obliged under the JV Deed or the Funding MOU to provide funding, and the matters pleaded in paragraph 178A of the [Appellants' Defence and Counterclaim (Amendment No 5)], if BR is found to have breached the Alleged Coal Supply obligation and/or repudiated the JV Deed, and on the agreed assumption that the Tabang Plant would have achieved a production capacity of approximately 1 MTPA, whether such breach and/or repudiation caused loss to BCBCS and if so, what is the period that BCBCS is entitled to claim damages for.

172 Regardless of the nuances of the formulation that was preferred by each party, distilled to its essence, the central question of causation that was before the Court was whether BR's breaches and repudiation of the JV Deed caused BCBCS to suffer any loss.

173 But the scope of the causation question before the Court also has to be assessed in the light of what was discussed at the CMC prior to the second tranche of the trial. From the CMC transcript, it is clear that the Respondents

were reluctant to deal fully with matters of causation at the second tranche because that would have required evidence on the technical aspects of the Tabang Plant, which would likely not have fit into the allocated time for that tranche. The Court thus suggested to the parties that they deal with the question of causation on the assumption that the Tabang Plant would have been able to reach a production level of 1 MTPA of coal in November 2011. As we noted above (at [89]), both sides agreed to this, save that Mr Singh reserved the right to run the case that the WEC Parties did not subjectively believe that the plant was going to become operational as soon as the parties had hoped. The following statement from Mr Singh at the CMC reveals some insight into the argument that he sought leave to run:

> [The Respondents] asserts need for experts. But [the issues concerning BR's alleged breaches of the JV Deed] would involve question of whether entire project doomed because there was no funding. *Once we decided not to fund (and court has found we were not obliged to fund), they chose not to fund it themselves. Project would not have gone anywhere. They may well have taken view at that time that plant was not worth taking further.* [emphasis added]

As the Respondents put it, the issue framed by Mr Singh was "whether BCBCS [itself] subjectively believed in November 2011 that the project would have failed, and thereafter would have stopped funding the project and/or ended the joint venture. If such belief is established, BCBCS cannot attribute its losses to BR's repudiation."

174 Given this, it seems to us that the causation question that was before the Court was narrower than what was eventually reflected in the list of issues to be decided at the second tranche of the trial. It would also explain why the Court deferred the issues relating to reflective loss and the relevance of the Expansion MOU to the third tranche. It was simply not contemplated by either the parties or the Court that the arguments pertaining to these two issues would be run as

part of the submissions on causation at the second tranche. Therefore, as far as these two issues are concerned, we find that the Court was correct to defer them to the third tranche because they were not before it. In our judgment, the Respondents would have been unduly prejudiced had they not been allowed to adduce the relevant evidence on these two issues.

175 Respectfully, however, we consider that the Court was not entitled to defer to the third tranche the issue of BCBCS's *ability* to fund KSC unilaterally. Given that this issue was intricately tied to the question of whether KSC had sufficient funds to keep operating the Tabang Plant, it seems to us to have been squarely before the Court. Moreover, looking at the Respondents' submissions for the second tranche of the trial, it is clear to us that they were happy to address this point based on the evidence that was adduced at that tranche. For example, the following argument was made in their written closing submissions:

> … [I]t is untrue that … BCBCS was not prepared to further fund KSC on its own. BCBCS was the sole shareholder cash funding the joint venture from October 2009 onwards, and had every intention to continue doing so had BR complied with its continuing obligation to supply coal to KSC. Far from not being prepared to further fund KSC on its own, from 19 August 2011, BCBCS had demonstrated that it was *willing and able* to further fund KSC of its own accord, beyond the US$40 million it had committed under the PLFA. Mr Flannery further testified that BCBCS was further *willing and able* to continue cash funding the project until the Tabang Plant reached commercial production. … [emphasis added]

176 Accordingly, while the Court was correct to defer the issues regarding the reflective loss principle and the Expansion MOU to the third tranche of the trial, it ought to have decided the question of whether BCBCS had the financial wherewithal to fund KSC by itself. To the extent that there was insufficient evidence to arrive at a finding on this issue, it should have been determined according to who bore the burden of proof.

Conclusion on the Causation Issue

177 For these reasons, we find that BCBCS was *willing* to fund KSC by itself. But we consider that the Court ought to have decided the issue of whether BCBCS had the *ability* to do so, and we remit this issue to the Court for its determination. Save as aforesaid, we dismiss the Appellants' submissions on the remaining aspects of the Causation Issue.

Conclusion on the appeal

178 In conclusion, we dismiss the Appellants' appeal in relation to all of the four main issues set out at [68] above, save only that in respect of the Causation Issue, we remit to the Court the question of whether BCBCS had the *ability* to fund KSC on its own.

179 Unless the parties are able to come to an agreement as to the appropriate order on costs within four weeks of the date of this judgment, they are to file and serve written submissions on this, limited to ten pages each, within six weeks of the date of this judgment.

Sundaresh Menon	Judith Prakash	Dyson Heydon
Chief Justice	Judge of Appeal	International Judge

Davinder Singh SC, Jaikanth Shankar, Chan Yong Wei, Lydia Ni Man Chuo, Phang Hwee Guang and Teo Li Fang (Drew & Napier LLC) for the appellants;
Francis Xavier SC, Alina Chia and Tee Su Mien (Rajah & Tann Singapore LLP) for the respondents.
