IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC(I) 01

Suit No 1 of 2015

Between

BCBC SINGAPORE PTE LTD
(RC No. 200614677R)

BINDERLESS COAL BRIQUETTING COMPANY PTY LIMITED
(Australia RC No. 11-111-821-044)

… *Plaintiffs*

And

PT BAYAN RESOURCES TBK
(Indonesian RC No. 09.03.1.46.46643)

BAYAN INTERNATIONAL PTE LTD
(RC No. 200409274C)

… *Defendants*

Between

PT BAYAN RESOURCES TBK
(Indonesian RC No. 09.03.1.46.46643)

… *Plaintiff (By Counterclaim)*

And

BCBC SINGAPORE PTE LTD
(RC No. 200614677R)

WHITE ENERGY COMPANY LTD
(Australia RC No. 62-071-527-083)

… Defendants (By Counterclaim)

JUDGMENT

[Contract] – [Contractual terms] – [Express terms]

[Contract] – [Contractual terms] – [Implied terms]

[Contract] – [Illegality and public policy] – [Illegality under international and foreign law]

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v
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Singapore International Commercial Court — Suit No 1 of 2015
Quentin Loh J, Vivian Ramsey IJ and Anselmo Reyes IJ
16-20, 23-26 November 2015; 14 January 2016

12 May 2016 Judgment reserved.

Quentin Loh J, Vivian Ramsey IJ and Anselmo Reyes IJ:

Introduction and the parties

1 These proceedings in the first case before the Singapore International Commercial Court ("SICC") concern a joint venture between parties in Australia and Indonesia, with associated companies in Singapore.

2 The joint venture sought to exploit a technology developed in Australia for the upgrading of coal known as the Binderless Coal Briquetting Process ("BCB Process") in conjunction with a supply of sub-bituminous coal from mines in Tabang, East Kalimantan ("the Project").

3 The second plaintiff, Binderless Coal Briquetting Company Pty Ltd ("BCBC"), a company incorporated in Australia, holds the exclusive

worldwide licence of the BCB Process from a consortium led by the Commonwealth Scientific and Industrial Research Organisation ("CSIRO"). The first plaintiff, BCBC Singapore Pte Ltd ("BCBCS"), is a company incorporated in Singapore. BCBC and BCBCS are indirect wholly-owned subsidiaries of the second defendant by Counterclaim, White Energy Company Ltd ("WEC"), a public-listed company incorporated in Australia. These companies are collectively referred to as "the Plaintiffs" or "the WEC parties".

4 The first defendant, PT Bayan Resources TBK ("BR"), is a public-listed company incorporated in Indonesia that owns subsidiaries which operate sub-bituminous coal mines in Tabang, Indonesia, including PT Bara Tabang ("Bara") and PT Fajar Sakti Prima ("FSP"). The second defendant, Bayan International Pte Ltd ("BI"), is a company incorporated in Singapore and is an associated company of BR. These companies are collectively referred to as "the Defendants" or "the Bayan parties".

5 BCBC and BI were the original parties to the joint venture but BCBCS and BR were subsequently substituted as the joint venture parties. WEC undertook certain guarantee obligations in relation to BCBC and BCBCS.

6 These proceedings were transferred to the SICC on 4 March 2015. At subsequent Case Management Conferences, pursuant to discussions with counsel, directions were given for the trial of certain issues as to the true meaning of a number of provisions in various agreements. The parties were able to agree on the formulation of those issues which related to funding obligations, coal supply obligations and certain implied terms (see [88] below).

Background

7 At a conference in Lexington, Kentucky, in early May 2005, Mr Keith Clark ("Mr Clark"), the then general manager of BCBC, presented a paper entitled "Thermal Drying and Binderless Briquetting of Sub-bituminous Coals". He described the development and basic concept of the BCB Process – processing raw coal into briquettes with higher calorific value and lower moisture content – as well as some general economics and product properties. In his paper, referring to the development of the BCB process, he said:

> The final, and arguably the most challenging, stages of development of this process were performed on a 12 ton per hour plant built in Western Australia by Griffin Coal to demonstrate the binderless briquetting of Collie sub-bituminous coal. Scale-up of the process to this plant proved to be far more complex than had been anticipated and the exercise became a 6 year development project in which key features of the BCB process were developed and the design of commercial scale elements, particularly the briquette presses, were proven.
>
> …
>
> Approximately 10,000 tonnes of briquettes have been produced at the BCB pilot/demonstration plant at Collie. Most of these have been produced from Collie coal but significant tonnages of both high rank bituminous coal and very low rank brown coal have also been processed.
>
> Although Powder River coals have not been available in sufficient tonnages to conduct trials on the Collie plant around one tonne of Powder River coal has been subjected to the BCB process using a smaller 0.2 tph pilot plant at CSIRO's laboratory in Sydney (now moved 160km North to Newcastle). These tests showed that the Powder River coals could be formed into low moisture briquettes with properties very similar to those produced from the Collie coal.

8 After he had presented his paper, Mr Clark was approached by Mr Darcy Wentworth ("Mr Wentworth"), a mining engineer of the Bayan parties, Mr Lim Chai Hock ("Mr Lim") and Mr David Low ("Mr Low"), directors of BR, who introduced themselves as representatives of PT Gunungbayan

Pratamacoal and part of the group of Indonesian companies known as the Bayan Resources Group. There followed a discussion about the possibility of using the BCB Process to upgrade coal for the Bayan parties.

9 Following exchanges of emails and a meeting in late May 2005, Mr Clark proposed that testing of coal from the Bayan parties be carried out first at the CSIRO pilot plant and then, if the first coal testing proved to be satisfactory, a larger sample could be processed at the Collie plant to verify the suitability of the coal for the BCB Process.

10 The first sample of coal was received in early June 2005 and tested at the CSIRO pilot plant. This led to Mr Clark preparing a report dated 19 July 2005 entitled "Evaluation of Coal from PT Gunungbayan Pratamacoal's Tabang Mine for Binderless Coal Briquetting". After receiving a copy of that report, Mr Wentworth contacted Mr Clark to discuss the next stage of testing. A meeting then took place between Mr Travers Duncan ("Mr Duncan"), the current Chairman of WEC and a director of both BCBC and BCBCS, Mr John Langley ("Mr Langley"), BCBC's Business Development Director and Mr Clark, representing the WEC parties on the one hand, and Mr Lim, Mr Low and Mr Wentworth representing the Bayan parties on the other, to discuss the further testing and the negotiation of a commercial agreement.

11 On 11 October 2005, Mr Clark sent the Bayan parties a draft proposal and this led to further exchanges and telephone calls. In January 2006, BCBC provided the Bayan parties with a report entitled "Engineering Assessment of the Binderless Coal Briquetting Process" produced by Sinclair Knight Merz ("SKM") dated 4 November 2005. That report had been produced for WEC, which was at that time known as Amerod Resources Ltd, as part of its due

diligence exercise before it made the decision to acquire all the issued capital of BCBC.

12 Following exchanges of drafts, BCBC and BR signed the Heads of Agreement and a Confidentiality Agreement on 16 February 2006. Under the Heads of Agreement, the parties proposed to set up various joint ventures.

13 In the meantime, a further sample of coal had arrived in Australia at the end of October 2005 and was processed at the Collie plant on or about 16 December 2005. That test had to be discontinued prior to processing the entire coal sample because of issues with the dust control and release system. There are issues between the parties as to the cause and significance of the dusty nature of the sample. In an email of 19 December 2005, Mr Clark noted:

> …
>
> Unfortunately the "Demo" plant, with its recent temporary changes to the coal delivery and product receival sections, was satisfactory for handling the Collie coal but the very dusty nature of the Tabang sample did cause some problems. The re-routed delivery system for the milled coal was not set up with suitable sealing and dust control which resulted in dust levels being too high for continued safe operation. It was decided to discontinue the operation until the issues causing the release of dust were corrected.
>
> I should emphasise that, as I explained before we visited the site, the Collie plant was not built as, and should not really be considered as, a demonstration plant. It does not have the layout, the presentation and the components (particularly dust control), that are include[d] in the commercial design. …
>
> …

14 Ultimately, the second test was considered to have provided satisfactory briquettes. A report dated 28 December 2005 was prepared on behalf of BCBC with the title "Assessment of PT Gunungbayan Pratamacoal's Tabang Coal in the Collie BCB Demonstration Plant".

15 Following the signing of the Heads of Agreement, meetings took place in Jakarta between 21 and 23 February 2006 involving the parties, lawyers and other advisers.

16 Drafts of various agreements were then exchanged between the parties leading to the execution of a Coal Briquette Joint Venture Deed ("the JV Deed") between BCBC and BI on 7 June 2006. The obligations under the JV Deed, together with various subsequent agreements form the subject matter of the issues in this Judgment.

17 Under cl 2 of the JV Deed, there were conditions precedent to completion and there was a Completion Date defined as "the date that the parties decide to proceed with the Project…". Pursuant to cl 3.1, "the Project" was defined as including, *inter alia*, the construction and commissioning of a coal briquette processing plant which employed the BCB Process. This plant was to be located in Tabang, Indonesia, and will be referred to as "the Tabang Plant" in this Judgment. The conditions precedent of completion were set out in cl 2 of the JV Deed and cl 2.1 provided that:

> The parties must arrange for a Feasibility Study to be undertaken and then make a decision, based on the results of the Feasibility Study, whether or not to proceed with the Project.

The Feasibility Study was defined as "a technical and economic study to assess the viability of the Project".

18 Two documents forming the Feasibility Study were produced initially as drafts and then in final form. First, SKM produced a report entitled "Technical Feasibility Study on the Tabang Mine Coal Upgrade Project" ("the SKM Technical Feasibility Study") on 25 August 2006. Secondly, Hyde Park

Consultants produced a report entitled "Report on the Financial Viability of the Tabang Binderless Coal Briquette Project" ("the HPC Economic Feasibility Report") on 6 September 2006.

19 The SKM Technical Feasibility Study identified the key technical risks for the Project as capital cost, plant capacity, plant availability and briquetting machine roller life. It provided an initial capital cost estimate for the Tabang Plant based on preliminary engineering and designs of US$36,970,000 (as at 30 June 2006), to an accuracy of ±25%.

20 The HPC Economic Feasibility Report contained a preliminary risk assessment of the Project which included technology risk because the "binderless coal briquetting technology [had] not yet been demonstrated in a commercially sized plant".

21 On 24 August 2006, BI wrote to BCBC under cl 2.1 of the JV Deed saying "we have reviewed the results of the Draft Feasibility Studies provided to us and believe that on the merits of such we are keen to proceed with the development of this project". On 4 September 2006, BCBC wrote to BI, referring to BI's letter of 24 August 2006 and to cl 2.1 of the JV Deed and stating "…likewise we are ready to proceed to the next phases of the project…".

22 On 14 September 2006, cl 3.2 of the JV Deed was amended through another deed to state that it was the intention of the parties to increase the capacity of the Tabang Plant from 1 million metric tonnes per annum ("MTPA") to 5 MTPA (an increase from the original 3 MTPA) if the Project was successful. The parties also amended cl 3.8(b)(ii) of the JV Deed, which related to the delivery of the coal briquettes.

23 The parties continued to discuss and prepare drafts of the various documents required as part of the joint venture. On 11 January 2007, the parties established the joint venture company, PT Kaltim Supacoal ("KSC") in Indonesia with BCBCS holding 51% and BI holding 49% respectively of the issued shares.

24 On 16 April 2007, BCBCS and BI entered into separate shareholders' loan agreements with KSC, each granting a loan of US$25m to KSC to finance its capital expenditure and working capital requirements.

25 In March 2007, a draft business plan for the Project was prepared. At KSC's board meeting on 9 May 2007, that plan was accepted with minor changes. The plan was subsequently issued in its approved form on 1 June 2007 ("the Business Plan").

26 On 26 November 2007, Mr Darron Hitchings ("Mr Hitchings"), a consultant of WEC who was involved in the Project, sent an email to Mr Chin Wai Fong, commonly referred to as "Eddie Chin" ("Mr Chin"), the President Director and Chief Executive Officer of BR, setting out a summary of the overall forecast costs of the Tabang Plant, which were estimated at US$49.279m. He stated:

> Original Feasibility Study estimate for the Plant located at the Gunung Sari site was $36,969,434 plus 25% which equates to $46,211,792. Add to this estimate (costs not allowed in [Feasibility Study] estimate) additional costs for locating plant at alternative site at the mine of $2,975,000 which equates to an amended estimate of $49,186,792
>
> [emphasis in original omitted]

27 In response to that email, Mr Chin wrote on 28 November 2007 and said:

> … We are very concerned about the way the project is being handled without involving us in the negotiations for most of the major contracts. …
>
> Your explanation that the project now cost US$ 49 million and is still within reasonableness as per the [Feasibility Study] is not acceptable to us. The business plan that [has] been approved by the shareholders still stands at US$ 37 million. We will not be approving any spending beyond the approved business plan until the shareholders meet and approve any revision. …

28 Mr Hitchings replied to Mr Chin on 30 November 2007 and agreed that the shareholders of KSC should hold a board meeting to approve the "revised budget forecast". This led to a KSC board meeting on 12 December 2007 at which item 4 on the agenda was "Discussion of revised forecast completion budget and approval". The minutes of that meeting indicate that there was an agreement in principle on there being a cap on the costs and a discussion of the figure for the cap. Mr Duncan tabled a sheet with a revised cost estimate for the Project which showed a figure of US$50.624m.

29 Following that meeting, Mr Hitchings sent Mr Chin a draft memorandum of understanding ("the draft MOU") reflecting the agreement reached at the meeting on 12 December 2007. Mr Chin provided his comments on the draft MOU on 18 December 2007. On 8 January 2008, Dato Low Tuck Kwong, the Chairman of BI, wrote to Mr Duncan in relation to the terms of the draft MOU and said:

> …
>
> We wish to convey to you our ongoing frustration with the way this joint venture is being managed. We need to jointly work together to find a mutually agreeable position and these disagreements are contrary to what the joint venture is trying to achieve. Until we can get some sort of consensus on the MOU and the outstanding joint venture agreements we do not wish to make any more financial contributions to the joint venture. We therefore suggest [that] a teleconference or

> another meeting be held where these issues can be finali[s]ed.
> …

30 BCBC and BI eventually entered into a memorandum of understanding dated 23 January 2008 ("the Jakarta MOU"). It was agreed in cl 1 that "PT Thiess Contractors Indonesia ("Thiess") would be appointed to construct the Project pursuant to a D&C Alliance Contract with KSC". Clause 3 provided that "[t]he revised cost estimate for construction of the Project tabled at the meeting in Jakarta on 12 December 2007 was US$50.624m (the Project Cost)". Clauses 4, 5 and 6 provided as follows:

> 4. BCBC and BI have agreed that they will each fund cash calls made by KSC in relation to the funds required to construct the Project in the ratio of 51% BCBC and 49% BI up to a maximum Project Cost of US$50 million and to the extent that the Project Cost exceeds US$50 million BCBC will be solely responsible for the cost of the Project in excess of the said US$50 million.
>
> 5. The cost cap referred to in clause 4 above will only apply to cash calls made for the funding of the Project Cost with the intent that the funding required for any other purpose of KSC's operations will continue to be borne on the basis of BCBC funding 51% of such costs and BI funding 49% of such costs.
>
> 6. In the event that the Plant has not reached practical completion to receive coal for commissioning by 31st March 2009, BCBC will pay a penalty fee to BI of US$145,000 per month for each month after 31st March 2009 until the Project has reached practical completion to receive coal for commissioning in accordance with the Contract provided that the maximum penalty which BCBC will be obliged to pay will be US$870,000. For the avoidance of doubt the said penalty fee of US$145,000 per month will be pro rated for any portion of a calendar month.

31 On 7 February 2008, KSC entered into the D&C Alliance Contract with Thiess with a target completion date of 1 March 2009.

32 On 3 April 2008, the parties entered into a number of agreements:

(a) First, KSC entered into a coal supply agreement with Bara ("the 2008 CSA"). Under cl 8.2 of that agreement, Bara agreed to supply coal to KSC at a base price of US$8.60 per tonne for the first four years.

(b) Secondly, KSC and BR entered into an Upgraded Coal Briquette Sale Agreement ("the Briquette Sale Agreement") pursuant to which KSC agreed to sell 500,000 tonnes of upgraded coal briquettes each year to BR for each 1m tonnes of installed capacity up to a maximum of 1.5m tonnes at US$46.25 per tonne (see cll 3.1 and 7.2).

(c) Thirdly, a further amendment was made to the JV Deed.

(d) Fourthly, BCBC and KSC entered into a Technology Services Agreement.

33 On 19 May 2008, MS Taxes, a tax consultancy firm engaged to provide tax advice to KSC, pointed out that the Indonesian Tax Office might assess value added tax ("VAT") and corporate income tax on the sale of the sub-bituminous coal and the upgraded coal briquettes at the market prices instead of the agreed prices of US$8.60 per tonne and US$46.25 per tonne in the 2008 CSA and the Briquette Sale Agreement because these agreed prices could be seen as transfer pricing and as transactions which were not performed at arm's length.

34 On 29 August 2008, following a visit to Jakarta earlier that month to audit the KSC accounts for the year ended 30 June 2008 and meetings with Mr Alastair McLeod ("Mr McLeod"), a Director and Chief Financial Officer of BR and a director of BI, and Mr Russell Neil ("Mr Neil"), a Director and

Chief Development Officer of BR and a Director of BI, Mr Ivan Maras ("Mr Maras"), the Chief Financial Officer ("CFO") of WEC, reported on various financial matters. He noted that KSC had incurred and was likely to incur, substantial additional costs which were not part of the US$50m cap. He also identified that the total forecast cash to spend to project completion was now US$72.1m, which when corporate costs of US$2.1m were deducted gave a US$20m additional capital spend over the cap of US$50m in the Jakarta MOU.

35 Mr Maras noted that the figure of US$20m was made up of US$13.2m for items not included in the SKM Technical Feasibility Study and US$6.8m which mainly related to Thiess cost increases. Based on his conversations with the Bayan parties, Mr Maras considered that it was reasonable to assume that BCBC would obtain agreement for BI to contribute their 49% share of the US$13.2m but in relation to the sum of US$6.8m he said "it would appear the most of this cost reflects Thiess cost increases which will be difficult to convince [Bayan] to share". He also referred to commissioning costs and said that BCBC needed to formulate a detailed budget for these costs which were not included in any of the cost estimates but were estimated to be in the order of US$2m to US$3m.

36 This led to discussions in Jakarta on 16 and 17 September 2008, which culminated in an agreement signed by the parties on 17 September 2008 ("the September 2008 Agreement") which provided at cll 2 to 6, as follows:

> **B Forecast cash expenditures**
>
> 2. The following forecast cash expenditures to completion of the Project are not included as part of the cap of US$50M (**Cap**) referred to in the MOU dated 23 January 2008 (**MOU**):
>
> a. 300T outloading facility US$0.8M;

b.	VAT (timing difference only)*	US$7.1M;
c.	Permit Fee	US$1.2M;
d.	Operating Spares	US$1.0M;
e.	Dam**	US$0.5M.
Total:		US$10.6M

*excluding VAT on the forecast costs to completion referred to in section 4 and 5 unless otherwise agreed.

**provided that the inclusion of the Dam in this section 2 is subject to BCBC providing the Golder & Associates Report to BI for its review and the approval of BI.

3. The actual cost of each of the items in section 2 above is to be paid by cash calls to be met by BCBC and BI in the respective proportions of 51%/49%. It is acknowledged that the above forecast cash expenditures are forecasts only and may be subject to cost reconciliations at the time of payment. The parties acknowledge that there may be other cost items in addition to those items listed in section 2 above which are not included as part of the Cap and the cost of such items will be met by cash calls by BCBC and BI in the respective proportions of 51%/49%.

4. The following forecast cash expenditures to completion of the Project are to be discussed by the Board of Directors of KSC which will determine the extent, if any, to which these costs will be borne in accordance with section 3:

a.	Power station incremental	US$5.1M;
b.	Thiess design changes	US$0.3M.

5. The Board of Directors of KSC are to discuss and agree the extent, if any, to which BI will contribute to forecast costs to completion, in excess of the Cap and those items referred to in section 4 above, which at this time is forecast to be US$7.1M to completion.

6. The corporate and running costs of KSC, including any costs associated with KSC's operations, will continue to be borne by the parties in proportion to their shareholding interest in KSC, as provided in clause 5 of the MOU.

[emphasis in bold in original]

It will be seen that the forecasted cash expenditure to be borne by BCBC and BI in their 51% to 49% proportions had increased by US$10.6m from US$50m to US$60.6m.

37 On 18 September 2008, Mr Maras sent an internal email reporting on the result of the discussions in Jakarta on 16 and 17 September 2008. In addition to relating matters contained in the September 2008 Agreement, he added this:

> A tax/transfer pricing review has been initiated, and it was acknowledged by [Mr McLeod] that this was likely to conclude that the [the Briquette Sale Agreement] needs to be terminated;
>
> We discussed at length where [the Bayan parties] were coming from in terms of "preservation of their economic benefit" versus what our view was. This will be the main issue to be debated by the KSC Directors at the Board meeting, especially in light of potential increases in [KSC's] operating costs as the impact that these increases have on [KSC's] economic returns. The good news is that both parties now clearly understand each other's position on this issue which means we can agree [on] a clear strategy for dealing with this issue ahead of the Board meeting[.]

38 On 3 November 2008, Mr Maras sent an email to Mr McLeod in relation to "KSC Outstanding Matters". He said that there were two critical deadlines which were fast approaching: 7 November 2008 when KSC was obliged to meet the next Thiess progress payment and 14 November 2008, which was the date of WEC's annual general meeting when they would have to provide a public report on the progress of the Project. He also attached a document setting out issues that needed to be resolved at the next KSC board meeting. The issues included the question of how they should deal with KSC's project costs, which would be in excess of the US$60.6m that had been agreed under the September 2008 Agreement, and how they should deal with "revised KSC economics" resulting from changes to Indonesian tax legislation and

potential operating cost increases. It was indicated in the attached document that the Project was forecast to overrun by a sum of US$12.5m. The parties' positions and possible solutions were also set out.

39 In addition, Mr Maras said this:

> Like many businesses around the globe, [WEC] is feeling the effects of the current world financial crisis, and our ability to access equity and debt markets for required business funding is likely to be a lot more difficult than was the case only a few months ago. As a result, we are operating on a very tight cashflow budget, which is based on the assumption that [the Bayan parties] will fund its 49% share of the Tabang plant on the basis outlined in our proposal. That is, of the US$12.5m in forecast expenditure outstanding, [WEC] proposes to pay approximately 75% of this amount and [the Bayan parties] 25%. Given the situation, we believe that this represents a fair compromise for all and clears the path for a much more productive relationship going into the future. As you are aware, we have in the past tried to be very accommodating in funding [the Bayan parties'] share of commitments at various times. Unfortunately our own limited financial resources do not enable us to do this again.

40 A KSC board meeting then took place in Jakarta on 18 November 2008. In relation to issues of tax and transfer pricing, it was noted in the minutes of that meeting that, in respect of KSC economics, "[b]oth parties agreed that an acceptable formula had to be devised to take into account the fact that it was unlikely that the current coal off-take and coal supply arrangements could continue due to changes to tax laws". The KSC board also ratified the September 2008 Agreement relating to the addition of US$10.6m to the working capital of the Project. The issue of how the additional US$12.5m would be funded was not resolved at the meeting.

41 In relation to the commissioning of the plant, Mr Duncan tabled a draft commissioning/operation plan for review and comment by the Bayan parties

ahead of the next board meeting where it was agreed that this would be discussed in more detail.

42 On 25 November 2008, BCBCS and BR (not BI) each executed a loan agreement with KSC, in which BCBCS and BR each agreed to loan up to US$15m to finance KSC's working capital and other corporate activities. This was the second loan agreement which the Bayan parties and the WEC parties executed with KSC (see [24] above). The agreed loan amounts were later increased to US$25m in addenda dated 11 December 2008.

43 On 12 January 2009, the Indonesian Government passed *Law No 4 of 2009 on Mineral and Coal Mining*, which, among other things, imposed the requirement that permits known as Izin Usaha Pertambangan Operasi Produksi ("IUP"), had to be obtained before parties could mine or sell Indonesian coal.

44 A KSC board meeting was held at Cessnock, New South Wales on 20 January 2009. In the minutes of that meeting, it was noted that MS Taxes in Jakarta had issued a final tax advice which highlighted potential issues for KSC in respect of related party transactions and that Mr McLeod and Mr Maras were asked to provide a joint recommendation at the next board meeting on the most appropriate way to deal with this issue. The Board was also advised by Mr Hitchings that the Project capital cost was now forecast at US$82m (which was higher than the forecast of US$75m in September 2008). BR expressed dissatisfaction with the latest cost estimate. It was agreed that BR would put forward a proposal to WEC, subject to receiving a detailed analysis of the cost increases. There was a discussion about the draft commissioning proposal (see [41] above) and it was agreed that a meeting would be arranged to address specific questions raised by BR.

45 On 5 February 2009, Mr McLeod wrote to WEC saying that BR was "continually disappointed and disillusioned regarding the ever growing cost to complete the plant". He then continued:

> After listening to [Mr Maras] regarding your funding position and reviewing available data from the stock exchange we have serious concerns that WEC does not have sufficient cash to comply with its contractual obligations and *finish* the plant especially as we have no confidence in the latest estimated cost to complete which *continue* to escalate at an alarming rate and after taking into account the commissioning and operating costs. We believe there is a significant risk that, especially in the current market, WEC will … have no other sources of funding.
>
> This has led us to be very concerned about the overall viability of this project and we would request that a face-to-face meeting occur in Jakarta [as soon as possible] to fully discuss this matter…
>
> [emphasis added]

46 After a KSC board meeting on 11 and 12 February 2009, the parties entered into a Deed of Novation of the JV Deed, dated 12 February 2009, in which it was agreed that BR would be substituted for BI as a party to the JV Deed and that BCBCS would be substituted for BCBC as a party to the JV Deed. In the result, BR and BCBCS became the new parties to the JV Deed.

47 On 17 February 2009, Mr John McGuigan ("Mr McGuigan"), who was the Chairman of WEC at the time, wrote to Mr Chin to document the matters that had been agreed on at the KSC board meeting that had been held on 11 and 12 February 2009 and to address other unresolved issues. He attached two draft memoranda, one covering the future relationship between the Bayan parties and the WEC parties in Indonesia and the other dealing with various funding issues in relation to KSC.

48 This led to an exchange of correspondence between the parties, which eventually culminated in the parties entering into two documents on 16 March 2009: a Memorandum of Understanding (KSC Funding Arrangements) ("the Funding MOU") and a Memorandum of Understanding (Expansion of joint venture).

49 In an internal email dated 31 March 2009, Mr Maras noted that the Bayan parties' contribution of US$9.1m for February and March meant that by early April, the Bayan parties would have fully funded their share of capital for the "Production Module/Power Station" for the completion of the Project, leaving only their 49% share of the commissioning budget outstanding "which [WEC] hope[d] they will agree [to] during meetings scheduled in Jakarta Monday - Wednesday next week".

50 Meetings took place in Jakarta on 14 and 15 April 2009. In minutes of the meeting under Commissioning Proposal it was noted:

> Commissioning Budget (excluding year one operating and [maintenance] still to be agreed) approved by Bayan as presented - both parties to work together through the process to reduce costs wherever possible.

51 On 30 April 2009, a Certificate of Practical Completion was issued in relation to the work carried out by Thiess under the D&C Alliance Contract.

52 A KSC board meeting took place in Jakarta on 4 June 2009. The minutes record that Mr Duncan presented a construction and commissioning update in which he said that 500 tonnes of coal had been delivered to site and that 1,000 tonnes was to be delivered on 20 June 2009. The forecast of cost to complete was US$84.2m, including US$1.3m for the cost of land acquisition as well as obtaining the building permit. Under an item with the title

"Commissioning budget ratification", the Board noted that there were meetings on 14 to 16 April 2009, during which commissioning budgets were discussed and approved and stated that "[c]ommissioning budget (US$5.3m) approved subject to any adjustment for SKM & gensets".

53 On 16 September 2009, KSC entered into an agreement with Standard Chartered Bank ("SCB") for a US$10m working capital loan facility ("the SCB Loan Facility").

54 Another KSC board meeting took place on 1 December 2009 in Jakarta. The financial report tabled by Mr Maras stated that the forecasted cost to completion of the production module and power station as at 30 September 2009 was US$89.5m. This was an increase of US$5m from the figure presented at the board meeting in June earlier that year. It was also recorded that Mr Chin requested a forecast of the cash required up to 30 June 2010. The minutes also stated:

> **... KSC Economics**
>
> - It was agreed to maintain economic benefits per [Mr Chin's] proposal at prior Board meeting, in respect of the first 3 MTPA.
> - Terminate off-take agreement and amend coal supply agreement feedstock price to US$15/t.
> - Side letter to be drafted to reflect agreed position on preservation of economics for first 3 MTPA.

55 On 15 December 2009, KSC made the first draw down of US$6m under the SCB Loan Facility.

56 On 1 February 2010, *Government Regulation No 23 of 2010 on the Implementation of Mineral and Coal Mining Business Activities* ("Regulation 23 of 2010") came into effect, stipulating that business entities which dealt

with the processing and refining of coal now had had to apply for a permit, termed as an IUP OP Khusus Pengolahan & Pemurnian ("IUP-OPK"), in order to continue their business.

57 On 7 April 2010, Mr Maras sent Mr McLeod the KSC cash flow to August 2010 and made funding proposals. This led to an exchange of correspondence in which by the end, Mr Maras said that the WEC board had approved a US$6m Priority Funding loan to KSC from WEC, through BCBCS. Mr McLeod said that the Bayan parties would "provide the feed coal and be paid US$8/mt and defer US$7/mt until Commercial Production starts".

58 This led to the Priority Loan Funding Agreement ("PLFA"), which was signed by KSC, BR and BCBCS on 17 December 2010 but backdated to 22 April 2010. The PLFA provided as follows:

> Article 1
>
> **DEFINITIONS**
>
> …
>
> **"Availability Period"**
>
> The period up to and including 30 June 2011 or as mutually agreed by the Parties;
>
> …
>
> **"Coal Advance"**
>
> The Priority Coal Supply enables the Company to procure the feedstock coal from FSP at Market Price of which US$8 per tonne would be payable immediately by the Company while the deferred balance shall be payable to FSP pursuant to the provisions herein relating to Priority Loan. The deferred balance will result in the establishment of the Coal Advance between the Company and BR (through FSP);
>
> **"Coal Supply Agreement"**
>
> Means the Coal Supply Agreements between the Company with FSP and [Bara] (as the case may be);

…

"Feedstock Coal"

Means coal as defined in the Coal Supply Agreement.

…

Article 2

PRIORITY FACILITY

Subject to the terms of this Agreement BCBCS hereby makes available to the Company a revolving working capital facility in an aggregate amount of up to US$20,000,000 (Twenty Million United States Dollars) during the Availability Period.

…

Article 7

Priority Coal Supply

7.1 During the Availability Period, BR shall ensure that FSP supplies Feedstock Coal to the Company. Other than the deferred balance payment for the Feedstock Coal, all other mechanics associated with the supply of coal to the Company by BR are in accordance with the Coal Supply Agreement.

7.2 The deferred balance of the Market Price less US$8 per tonne of Feedstock Coal supplied to the Company during the Availability Period represents BR's contribution to the Priority Loan being made to the Company, and this is reflected in the amount of the Coal Advance.

…

Article 9

PAYMENT

…

9.7 For the avoidance of doubt, in terms of seniority in the Priority Loan only ranks behind the Standard Chartered Bank loan facility which is to be entered into by KSC. This Agreement does not alter any of the terms under the existing shareholder loan or MOU Funding Agreements between the Company, BCBCS and BR.

[emphasis in original]

In essence, BCBCS would make available a revolving working capital facility of up to US$20m ("the Priority Facility") and BR would make a "Coal

Advance" to KSC which involved KSC paying Bara US$8 per tonne for feedstock coal with the balance US$7 per tonne being looked after by BR.

59 On 7 June 2010, Mr Chin wrote to Mr Maras, referring to discussions held in December 2009 at which the Bayan parties suggested the immediate suspension of the Project to allow a detailed review of the Project, an assessment of the cost to complete and a review of the overall future of the Project. He also mentioned that WEC had presented projections which showed no new injections of cash would be required by shareholders up to the commencement of commercial production by 31 July 2010. He further stated that it was on this basis that the Bayan parties agreed to continue without suspension of the Project so long as additional funds would not need to be injected and that if funds were required, WEC would need to fund them initially.

60 In response on 7 June 2010, Mr Maras referred to an agreement by WEC to provide the necessary funds to KSC to cover the temporary repayment of US$5m and US$3m on the SCB Loan Facility due on 11 June 2010 and 23 June 2010 respectively. He asked Mr Chin or Mr McLeod to confirm by return that the Bayan parties would ensure that WEC would be repaid by KSC immediately when the reciprocal redraw on the SCB Loan Facility occurred on 11 and 23 June 2010 respectively.

61 This correspondence led to further exchange between Mr Maras and Mr McLeod on 7 to 9 June 2010, which is considered under Issues 1 and 3 below.

62 On 23 September 2010, *Regulation 17 of 2010 on Procedures to Determine the Benchmark Price for the Sale of Minerals and Coals* ("the HBA

Regulations") was introduced to determine the benchmark price for the sale of minerals and coal in Indonesia ("the HBA prices" or "the HBA benchmark price"). The HBA Regulations came into force on 1 October 2010.

63 On 12 October 2010, a KSC Board Meeting was held in Jakarta. The minutes record that a total of US$110.4m had been advanced by shareholders as at 31 August 2010 of which WEC, via BCBCS, had advanced US$69.6m (63%) and the Bayan parties had contributed US$40.8m (37%). It stated that a further US$1.9m was advanced by BCBCS during September 2010 as part of the Priority Facility and that a total of approximately US$14m had been advanced to date by BCBCS as part of the Priority Facility. In addition, it was stated that a schedule was presented by Mr Maras outlining further funding requirements of approximately US$7m to 31 December 2010.

64 On 3 March 2011, a further KSC board meeting was held in Jakarta. In that meeting, the Bayan parties continued to state that their position "[had] not changed and they [would] not contribute until the plant [was] fully commissioned".

65 On 29 March 2011, BCBC, BR, Bara and KSC entered into the first Side Letter. On 5 April 2011, BCBC, BR, Bara and KSC entered into the second Side Letter ("the April 2011 Side Letter"). The April 2011 Side Letter superseded the first Side Letter.

66 Between March and June 2011, KSC entered into two coal supply agreements ("the 2010 CSAs") with Bara and FSP respectively. The 2010 CSAs replaced the 2008 CSA. These agreements were backdated to 1 October 2010, the date when the HBA Regulations came into force.

67 On 29 June 2011, the parties entered into an addendum to the PLFA extending the Availability Period (defined at [58] above) to 31 December 2011.

68 On 18 October 2011, Mr Neil circulated a draft agenda for a KSC board meeting planned for 2 November 2011. The agenda items were:

> 1. Update of current progress of site/plan for rest of year
>
> 2. 2012 Budget and production cost estimate approval
>
> 3. Presentation of estimated capital cost of 2nd, and possibly 3rd [p]lants
>
> 4. Finalization of any issues relating to outstanding agreements

69 On 2 and 3 November 2011, there was a KSC board meeting in Jakarta. Mr Maras' notes record that Mr Chin raised the issue of the future feasibility of the Project and that the major shareholders of BR had instructed its management to find a solution, which Mr McLeod said was to "get out of [the] project" and Mr Chin said was to "'sell' [the] project back to WEC".

70 On 9 November 2011, WEC made a public announcement on the Australian Stock Exchange:

> [BR] has advised that based on the current export prices of coal, they have formed the view that the cost associated with upgrading the Tabang run of mine coal may no longer deliver acceptable economic returns for KSC. The key factor in arriving at this position is [BR's] insistence that the contract price for Tabang run of mine coal must be increased to price substantially higher than that incorporated in the original coal supply agreement entered into between the parties.
>
> In this regard, [BR] has advised that it can generate much higher margins by selling Tabang run of mine coal directly into the export market, given that the current Indonesian government coal reference price (HBA) for 4,200 Kcal/kg GAR coal is approximately US$60/tonne FOB, which equates to approximately US$40/tonne ex-mine.

> These issues go directly to the economic viability of the existing plant located at the Tabang site and the willingness of each of the shareholders to continue with their investment in KSC.
>
> Following a request from [BR], both shareholders will determine the appropriate steps to be taken in relation to KSC and the operation of the Tabang plant by no later than 31 December 2011.

71 On 21 November 2011, BCBCS wrote to BR stating that it considered that BR had breached the terms of the JV Deed as amended and novated and requesting that the breach be remedied. It was stated that at a meeting on 17 November 2011, BR had said that Bara was only prepared to supply coal to KSC on condition that WEC repaid in full loans of approximately US$45m made by BR to KSC and that Bara intended to cease supplying coal immediately unless WEC agreed to pay BR that amount.

72 On 24 November 2011, BR responded to the letter from BCBCS saying that the letter was misconceived. It stated that BR had maintained that the supply of coal by Bara to KSC must be at HBA prices and that Bara "will supply coal based on the [2010 CSAs] which supersedes the [2008 CSA]." It also stated that "at no point in time did we link the issue of [the Bayan parties]' intention to withdraw from the joint venture to an issue of cessation of coal supply". It then demanded the retraction of the letter of 21 November 2011.

73 On 29 November 2011, WEC responded to BR and stated:

> … We note that you say you will now procure that [Bara] supply coal to KSC in accordance with the [2010 CSAs]. However, your obligation is to procure Bara to supply coal to KSC in accordance with the [2010 CSAs] as amended on 5 April 2011 and your letter is silent about this issue.
>
> …

> Further, KSC requires further funding for its operations. As KSC has already exceeded its existing funding facilities (and is now above the limit of its facility with BCBCS under the [PLFA]), KSC needs to confirm this funding. Given that third party funding is not available, BCBCS and BR will need to provide funding to KSC in accordance with their obligations under the JV Deed and paragraph 4 of the [Funding MOU]. 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. …
>
> We request your confirmation that BR agrees to provide funding … by 2:00 pm Singapore time on 2 December 2011.
>
> We note for the record that we are very clear in our recollection that in our meeting of 17 November 2011, you conditioned the continued supply of coal by Bara to KSC on the White Energy group paying BR around $45 million, corresponding to the amount owing to BR by KSC. We are proceeding on the basis that your letter of 24 November 2011 withdraws that demand. …

74 On 2 December 2011, BR replied to WEC and stated:

> In relation to paras 2 and 3 of your letter, we repeat the contents of our reply dated 24 Nov 2011 and reiterate that [Bara] has entered into [the 2010 CSAs] and have not given any notice to suggest that it would not comply with the said coal supply agreement. We have no knowledge of what 5 Apr 2011 amendment you are referring to and ask that you furnish us a copy thereto.
>
> Your request in paras 4 and 5 are rejected and we would refer you to the numerous memorandums that have been executed by the parties subsequent to the JV Deed which have overtaken and amended/varied the original provisions on funding the joint venture under the JV Deed, the provisions of which you are well aware. Your selective reliance on the joint venture documents demonstrates the absence of *bona fides* in your claims.
>
> The parties have already agreed to a shareholders' meeting on 6 Dec 2011 and we will not entertain any further litigation via correspondence.

75 On 6 December 2011, an Extraordinary General Meeting ("EGM") of KSC shareholders took place in Jakarta. In the draft minutes produced by Mr

Oliver Khaw ("Mr Khaw"), BR's legal counsel, with revisions by Ms Andromeda Neale ("Ms Neale"), WEC's Business Development Counsel, it was noted that Mr Chin had reiterated "BR's intention to quit the joint venture as the [P]roject [was] no longer viable and offer to sell its 49% in KSC to BCBCS [or] WEC".

76 On 12 December 2011, the WEC parties wrote to BR asking it to "confirm that [it would] fund 49% of KSC's funding requirements … by no later than 10am Jakarta time Tuesday 13 December 2011, being the time at which it was agreed that the EGM of 6 December 2011 would be adjourned". They added that if BR failed to do so, they would be "commencing proceedings in Singapore to recover damages arising from BR's breach of its funding obligation, and from its breach of [its] obligation to procure [Bara] to supply coal to KSC in accordance with the [2010 CSAs] between Bara and KSC dated 1 October 2010 as amended on 5 April 2011…"

77 In reply on 13 December 2011, BR sent a "Default Notice" to WEC and BCBCS in which it alleged breaches of the JV Deed by BCBCS and total failure of consideration and purpose of the JV Deed. It also gave notice that the Plaintiffs were to remedy all the defaults within 30 days.

78 On 20 December 2011, the WEC parties replied to BR, maintaining their position on BR's breach of its funding obligation, requesting confirmation that BR would fund 49% of payments to SCB amounting to US$3.92m relating to the SCB loan and requesting confirmation that BR would provide 49% of the funding necessary for the care and maintenance of the Project.

79 BR replied to WEC and BCBCS on 22 December 2011, agreeing to transfer certain funds relating to the SCB Loan Facility, solely for the purposes of mitigating any further loss and damage and without any admission of liability and on the basis that BR reserved its rights. In relation to the funding for the care and maintenance of the Project, BR said:

> … 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. …
>
> [emphasis in original omitted]

80 On 27 December 2011, BCBCS and BCBC commenced the High Court action against BR and BI.

81 On 4 March 2015, the High Court transferred the action to the SICC.

82 The hearing of the agreed issues took place from 16 to 26 November 2015, with oral closing submissions being heard on 14 January 2016.

Witness evidence

83 The Plaintiffs called the following witnesses to give evidence:

(a) Mr Duncan (see above at [10]) – He is the current Chairman of WEC and a civil engineer with over 60 years' experience in project management of large international mining and infrastructure development projects as well as the development and operation of ten coal mines. As Chairman, he was the driving force for WEC, through BCBC, to use the BCB Process in coal markets throughout the world. He recounted the history of the Project from 2005 until 2011.

(b) Ms Neale (see above at [75]) – She was the Business Development Counsel of WEC from June 2007. Her role was to assist in various areas relating to WEC's business development and legal activities. She explained her involvement in the various meetings and discussions starting with the Jakarta MOU and ending in the breakdown of relations in November and December 2011.

(c) Mr Maras (see above at [34]) – He was the CFO of WEC from July 2006. He also assumed responsibilities as CFO of BCBC and BCBCS and worked part-time for WEC until April 2008 when he commenced working full-time. He gave evidence of his involvement in the various meetings and financial dealings from 2006 until 2011.

(d) Mr Clark (see above at [7]) – Apart from being the general manager of BCBC from 2004 to 2010, he was also a director of technology of WEC from 2006 till his retirement in 2010. He has a degree in metallurgy and has written extensively on issues relating to mineral agglomeration, drying, coal liquefaction, fluid dynamics, briquetting and coal cleaning. He is the originator of eight patents. Between 1969 and 2002 he was employed by the CSIRO, Australia's national science agency, and from 1991 to 1996, he was the Project Manager of CSIRO's coal briquetting programme. He managed the coal briquetting programme, including a joint development programme with K R Komarek Inc (USA), one of the major world producers of briquetting and agglomeration equipment, Tra-Det Inc, an internationally recognised leader in thermal coal dryer design and optimisation and later introduced Griffin Coal Mining Company Pty Ltd, a subbituminous coal mining company in Western Australia to the programme. This led to the BCB Process. Subsequently from 1996

until his departure from CSIRO in 2002, he was the group manager of the Coal Treatment Group.

(e) Mr Hitchings (see above at [26]) – He was the Manager of Engineering of WEC and Director of Operations and Infrastructure of BCBC from July to October 2011. He has some 44 years' experience of civil engineering in the international mining and construction industries. From 2006 to 2011, he worked for WEC as a consultant and was involved in the Project. He gave evidence of his involvement from 2006 until about April 2010.

84 The Defendants called the following witnesses:

(a) Mr Neil (see above at [34]) – As a director and Chief Development Officer of BR and a director of BI, he explained his involvement in the agreements entered into between the parties from the 2006 Heads of Agreement until the 2011 Side Letters, as well as his involvement up to the end of 2011.

(b) Mr McLeod (see above at [34]) – As a director and the CFO of BR and a director of BI, he dealt with various financial matters in which he had been involved from 2007 until early 2012.

(c) Mr Chin (see above at [26]) – He is a shareholder, the President Director and Chief Executive Officer of BR and a director of BI. He detailed his involvement in the December 2007 KSC board meeting leading to the Jakarta MOU and to meetings and events after November 2011.

(d) Mr Lim (see above at [8]) – He is a director and the Chief Operating Officer of BR and also a director of BI. He gave evidence of

his involvement in discussions at, and following, the Lexington Conference in May 2005 and his visit to the Collie plant in December 2005.

85 In addition to filing an initial affidavit of evidence-in-chief ("AEIC"), all witnesses except Mr Lim also filed a reply witness statement.

The issues

86 By agreement, the parties asked the Court to decide, in a first tranche, issues relating to the contractual obligations of the parties without going into whether these obligations had been breached or not; those and further issues will be decided in later tranches. The nine issues that the parties had initially agreed on can be broadly grouped into three categories:

(a) funding issues;

(b) coal supply issues; and

(c) counterclaim issues.

87 Whilst those issues need to be considered in context, the scope of admissible evidence was limited. Much of the evidence was put forward to explain the position of the parties and the way in which the Project progressed until the events of late 2011/early 2012 and, although not directly relevant to the issues, assisted in putting the issues in the context of the overall dispute between the parties.

88 The parties formulated a list of 9 issues for Tranche 1 as follows:

The Claim

Funding

(1) Whether, in the period between November 2011 and 2 March 2012, BR was under any express and/or implied obligation to provide funding to KSC, and if so, what was the scope of such obligation.

(2) Whether in or around November 2011, BR was obliged to consent to KSC obtaining a further advance from SCB of US$3.033 million for the purpose of repayment to BCBCS and/or to reimburse BCBCS for BR's 49% portion of the original repayment of about US3.033 million to SCB.

(3) Whether, in or around the period between 20 December 2011 and 20 February 2012, BR was under an obligation to:

(a) Reimburse BCBCS for 49% of KSC's costs in terminating the employment of KSC's expatriate personnel;

(b) Contribute 49% of expenses incurred in respect of the care and maintenance of KSC (including outstanding KSC insurance premium);

(c) Reimburse BCBCS for 49% of the fees charged by KSC's external auditor for performing the annual audit of KSC; and/or

(d) Contribute 49% of the amounts owing to all external creditors of KSC (which expenses have therefore not been paid).

Coal Supply and Illegality

(4) Whether BR was under an obligation to supply and/or assist in procuring coal to be supplied to KSC on the basis set out in the JV Deed, PLFA and/or the 5 April 2011 Side Letter, in around the period between early November 2011 to 2 March 2012.

(5) Whether, in around the period between early November 2011 to 2 March 2012, the supply of coal under the 5 April 2011 Side Letter and the Coal Supply Agreements was and/or would have been illegal and/or entered into for an illegal purpose under Indonesian law by virtue of Regulation No. 17 of 2010 on Procedures to Determine the Benchmark Price for the Sale of Minerals and Coal.

The Counterclaim

Claim of failure to exercise skill and care

(6) Whether it was an implied term of the JV Deed that in providing technical assistance to KSC in the development of

> the Patented Briquetting Process, BCBCS was under a contractual duty to use the reasonable skill and care to be expected of a competent designer, builder and operator of coal preparation and briquetting plants.
>
> *Claim of Production of 1 MTPA of Upgraded Coal Briquettes within a reasonable time*
>
> (7) If in the period between November 2011 and 2 March 2012, BR was under any obligation to provide funding to KSC, then whether it was an implied term of the JV Deed and/or Funding MOU that BCBCS was under a contractual obligation to procure that KSC produce 1 MTPA of Upgraded Coal Briquettes within a reasonable period of time.
>
> *Claim against WEC for BCBCS' breaches of the JV Deed and/or Funding MOU*
>
> (8) Whether WEC had an obligation under Clause 10 of the Funding MOU to guarantee BCBCS' performance of its obligations under the JV Deed.
>
> (9) Whether BCBCS entered into the Deed of Novation as WEC's agent and by doing so, assumed the obligations under the JV Deed on behalf of WEC?

89 At various stages, the Plaintiffs withdrew or made concessions on Issues 3(a), (c), (d) and Issue 8. As a result of an agreed framing of WEC's guarantee obligations set out in Exhibit P-7, Issue 9 also fell away. The agreed issues for the decision of this Court in this tranche of the trial are thus Issues 1, 2, 3(b), 4, 5, 6 and 7 ("the Agreed Issues").

90 As we have stated at [16] above, the original parties to the joint venture were BI and BCBC. Subsequently, through the Deed of Novation, BI was substituted by BR and BCBC was substituted by BCBCS (see [46] above). Through the course of the trial and during submissions, the parties seemed willing to refer to these entities interchangeably. Therefore, for ease of reference, we will hereafter refer to the joint venture parties as BR and BCBCS. For the avoidance of doubt, our references to "BR" and "BCBCS" are also, where relevant, references to BI and BCBC respectively.

Funding issues

91 There are three funding issues to be determined: Issues 1, 2 and 3(b). As earlier noted, since the Plaintiffs are no longer pursuing Issues 3(a), (c) and (d), for ease of reference, we will simply refer to Issue 3(b) as "Issue 3". There have been slightly differing formulations of the three issues in the course of these proceedings. We will adopt the formulation of the issues as set out in the Plaintiffs' Closing Submissions. The three issues are thus:

(a) Issue 1: In the period between November 2011 and 2 March 2012, was BR obliged to provide funding for the commissioning, operations and maintenance of the Tabang Plant in accordance with cl 4 of the Funding MOU and (if so) what was the scope of the obligation?

(b) Issue 2: In or around November 2011, was BR obliged to consent to KSC obtaining a further advance of US$3.033m from SCB to repay BCBCS' temporary loan to KSC?

(c) Issue 3: In the period between November 2011 and 2 March 2012, was BR obliged to contribute to 49% of KSC's care and maintenance costs and (if so) what was the scope of the obligation?

Issues 1 and 3

Overview

92 Just as the Plaintiffs did in their Closing Submissions, we will consider Issues 1 and 3 together since they are related.

93 Mr Francis Xavier SC ("Mr Xavier"), counsel for the Plaintiffs, distinguished Issue 1 from 3 by reference to the EGM of KSC's shareholders

on 6 December 2011. By a letter dated 29 November 2011, BCBCS informed BR that, in BCBCS' assessment, KSC would require funding of about US$20m to the end of June 2012. BR refused to fund 49% of that US$20m. In light of BR's refusal, it was decided at the EGM that KSC would suspend its operations and go into a care and maintenance programme. Issue 1 concerns BR's alleged obligation to fund 49% of the US$20m assessed by BCBCS prior to the EGM. Issue 3 concerns BR's refusal to fund 49% of KSC's care and maintenance expenses following the EGM.

Parties' arguments

94 The essence of the Plaintiffs' argument is that cl 4 of the Funding MOU imposed an obligation on BR to fund 49% of the US$20m. According to the Plaintiffs, BR's obligation to fund was regardless of amount or duration and regardless of whether BR consented to the expenditure being incurred by KSC.

95 In response, the Defendants say that any obligation on their part arising out of the Funding MOU was subject to their overriding rights under cl 7.1 of the JV Deed. The Defendants submit that, in any event, whether construing the Funding MOU in its plain and ordinary meaning or reading the document contextually, cl 4 did not give rise to the funding obligation alleged by the Plaintiffs.

96 In further response to the Plaintiffs' argument, the Defendants claim that BCBCS gave an enforceable undertaking to BR that BCBCS alone would be solely responsible for funding KSC until the Tabang Plant achieved commercial production. The Plaintiffs deny having given such an undertaking and contend that, in any case even if there had been any such undertaking, it

would have been premised on the Defendants ensuring a continuous supply of coal to KSC.

97 The Plaintiffs accept that the alleged funding obligation on BR's part was modified by the PLFA, but argue that it only did so temporarily. They submit that once the Priority Facility had been completely drawn down or, alternatively, upon expiry of the Availability Period of the Priority Facility, BR's obligation was reinstated.

98 We will discuss Issues 1 and 3 by construing the relevant provisions of the JV Deed before examining the proper construction of cl 4 of the Funding MOU. Thereafter, we will deal with the effect (if any) of the PLFA on BR's rights and obligations. Finally, on Issues 1 and 3, we will consider the allegation that the Plaintiffs undertook to fund the Tabang Plant until it achieved commercial production.

Contractual interpretation under Singapore law

99 The JV Deed and the Funding MOU are expressly governed by Singapore law. It will be convenient at the outset to summarise the principles of contractual construction under Singapore law.

100 Singapore law adopts a contextual approach to the interpretation of contracts (see *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*") at [132]). This means that the Court ascertains the intention of the parties at the time when they entered into a contract based on all "relevant" evidence.

101 The starting point should be the text of the contract to be construed (see *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd*

(formerly known as Soup Restaurant (Causeway Point) Pte Ltd) [2015] 5 SLR 1187 at [32]). But extrinsic evidence is admissible to interpret the words of an agreement, provided the evidence is "relevant, reasonably available to all the contracting parties and relates to a clear or obvious context" (see *Zurich Insurance* at [132(d)]).

102 Extrinsic evidence is "relevant" to the extent that the material sought to be adduced demonstrably affected the way in which the parties understood specific terms of a contract. Thus, extrinsic material must "always go towards proof of what the parties, from an objective viewpoint, ultimately agreed upon" (*Zurich Insurance* at [132(d)]). For this reason, evidence of a subjective intention that has not been clearly communicated to the other party at the time of contracting will usually be inadmissible. At all times, the Court should be "careful to ensure that extrinsic evidence is used to explain and illuminate the written words, and not to contradict or vary them" (see *Zurich Insurance* at [125] and [132(f)]).

103 The Singapore Court of Appeal has not closed the door to subsequent conduct being used as an aid towards the construction of a contract. However, the Court has indicated that such evidence is unlikely to be admissible in many cases due to non-compliance with the tripartite requirements of relevance, reasonable availability and the presence of a relation to a clear or obvious context (see *Zurich Insurance* at [132(d)] and more recently the decision of *Hewlett-Packard Singapore (Sales) Pte Ltd v Chin Shu Hwa Corinna* [2016] 2 SLR 1083 at [56]).

The JV Deed

104 Clause 7.1 of the JV Deed provides as follows:

> 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];
>
> …
>
> (s) approve any other matter that financially or contractually binds any or all of the Members;
>
> …
>
> (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;
>
> …

Clause 7.1 has to be read in conjunction with cll 8 and 20.13 of the JV Deed.

105 Clause 8.1 provides that any Relevant Amount, defined as any amount in excess of KSC's own resources to satisfy its needs under the Business Plan, will "[u]nless agreed in advance by each of the Members, be raised by borrowing from third parties without the need for any guarantees from the Members". Where the requisite amount could not be raised on reasonable terms by borrowing from third parties, cl 8.2 provided for the shareholders to provide the same to KSC through loans.

106 Clause 8.4 states as follows:

> No Member is obliged to provide any loan to [KSC] nor to give any guarantee, security or indemnity for any of the liabilities or obligations of [KSC] other than as provided in the Business Plan or this clause 8. In the event that a Member agrees to

> provide any guarantee, security or indemnity for any of the liabilities or obligations of [KSC], the proportion in which each Member shall be required to provide any guarantee, security or indemnity for any of the liabilities or obligations of [KSC] shall not exceed their respective Share percentage holding.

107 Clause 8.5 deals with the situation where a Member undertakes to contribute towards an amount required by KSC, but later fails to provide the same. In such a situation, the other Member may pursue the remedies specified in cl 8.5, including terminating the JV Deed under the provisions of cl 13.

108 Clause 20.13 stipulates as follows:

> A party may give its consent conditionally or unconditionally or withhold its approval or consent in its absolute discretion unless this Deed expressly provides otherwise.

109 In their natural and ordinary meaning, the combined effect of cll 7, 8 and 20.13 of the JV Deed may consequently be encapsulated as follows:

(a) Any funding required by KSC has to be unanimously agreed by BCBCS and BR (cl 7.1).

(b) BCBCS and BR could refuse to provide additional funding for KSC in their absolute discretion (cl 20.13).

(c) BCBCS and BR could consent to provide additional funding by an agreement to such effect or by approving a Business Plan calling for the provision of the additional funding (cl 8).

(d) If BCBCS or BR agreed to provide additional funding for KSC, their respective maximum obligations would not exceed 51% and 49% of the Relevant Amount (cl 8.4).

(e) If BCBCS or BR agreed to provide additional funding for KSC, they were bound by such consent so that, if a party defaulted in its obligation to provide funding, the other party would be entitled to enforce the obligation to fund by means of the remedies in cll 8 and 13 (cl 8.5).

110 We do not understand the Plaintiffs to be contending differently from what has just been summarised. It is instead their case that, pursuant to cl 8 of the JV Deed, by entering into the Funding MOU, BR undertook to provide 49% of KSC's funding requirement without limit as to amount or duration and without need for further consent to be obtained from BR.

111 As we have alluded to above at [25], the Business Plan was approved in May 2007 at a KSC board meeting. The Business Plan was premised on an estimated project cost (as set out in the SKM Technical Feasibility Study (at [19] above)) of US$36.9m ±25%. It is the Plaintiffs' case that the Business Plan ceased to be operative from December 2007, when the KSC Board engaged a D&C Alliance-type contractor to manage construction of the Tabang Plant. With the change in the contract management paradigm, the original cost estimate of US$36.9m ±25% adopted by the Business Plan was revised to US$50.624m (see [28] above).

The Funding MOU

112 The Funding MOU provides as follows:

> …
>
> This MOU represents the full agreement of the Parties with respect to the various matters contemplated herein and is legally binding. The Parties will incorporate the matters agreed to in this MOU as amendments to the [JV] Deed and Ancillary Agreements as required and any terms and conditions of the

[JV] Deed not specifically amended by this MOU shall remain valid and shall continue to be in force.

….

The Parties agree to the following matters with respect to the funding of the Project:

1. Notwithstanding the funding arrangements agreed to in clause 2 and 3 below, BR will fund the cash requirements of the Project for the months of February and March 2009 up to a maximum of US$9.1 million. BR agrees to fund such February cash calls within 5 business days of the date of signing of this MOU and the March cash call within 5 business days after BR has funded the February cash calls. For the avoidance of doubt none of these funds can be applied towards payment of amounts owing by KSC to either the WEC group or BR.

2. On 12 December 2007 (as evidenced by a written agreement dated 23 January 2008) between BR and BCBC, it was agreed that cash calls made by KSC in relation to the funds required to complete the Project will be funded in the ratio of 51% BCBCS and 49% BR up to a maximum Project Cost of US$50 million ("Agreed Cap"). Subsequent to that arrangement, on 17 September 2008 and as evidenced by the minutes of a meeting dated 17 September 2008 ("said Minutes"), BCBC and BR agreed to vary this arrangement to the extent of including such additional forecast expenditure outside of the Agreed Cap identified in Paragraph 2 of the said Minutes which should be borne by the parties in the proportion of 51% BCBCS and 49% BR. The additional forecast expenditures are as outlined in Paragraph 2 of the said Minutes together with the Agreed Cap is referred to as the "Revised Amount". Any further expenditure (if any) to be added to the Revised Amount as provided under Paragraph 3 of the said Minutes must be subject to mutual agreement of the Parties which shall be done as soon as practicable but in any event should not be later than 15 April 2009. It is agreed that the Revised Amount will be funded in the ratio of 51% by BCBCS and 49% by BR.

3. With respect to expenditure required to be incurred by KSC to complete the Project over and above the Revised Amount referred to in paragraph 2 above (the "Excess Amount"), it is agreed that BCBCS will be responsible for

> funding 75% of the Excess Amount and BR will be responsible for funding 25% of the Excess Amount).
>
> 4. For the avoidance of doubt, the Excess Amount does not include the cost of commissioning, operation and maintenance of the first 1MTPA plant. It is acknowledged that all such costs are costs to KSC and will be funded 51% by BCBCS and 49% by BR.
>
> ….

113 The Plaintiffs put their case on cl 4 of the Funding MOU in several ways.

114 First, they submit that, in its ordinary meaning, cl 4 constitutes an agreement on BR's part to fund 49% of commissioning, operation and maintenance costs *without ceiling*. They contrast cl 2 where any funding over and above the "Revised Amount" was expressly subject to "mutual agreement". In cl 4 nothing is said about commissioning, operation and maintenance costs being "subject to mutual agreement". According to the Plaintiffs, it follows that the provision of funding for the latter costs were not subject to obtaining BR's prior consent and cl 4 superseded cll 7.1 and 8 of the JV Deed.

115 With respect, we disagree.

116 The preamble to the Funding MOU explicitly states that "any terms and conditions of the [JV] Deed not specifically amended by this MOU shall remain valid and shall continue to be in force". One would have expected that if the parties were intending to give up their significant rights under cll 7.1 and 8 to withhold consent to any call for funding, they would have clearly said so. But nothing is said in cl 4 of the Funding MOU about overriding cll 7.1, 8 and

20.13 of the JV Deed. The presumption must be that the latter provisions remained in force.

117 Further, nothing in the cost-sharing ratio acknowledged in the second sentence of cl 4 of the Funding MOU impliedly contradicts the requirement in cl 7.1 of the JV Deed that there be unanimous consent among shareholders on funding for KSC. There is nothing unworkable about BCBCS and BR being entitled under cl 7.1 of the JV Deed to approve or disapprove of any funding and then being obliged to fund any approved funding according to the 51:49 sharing ratio in cl 4 of the Funding MOU. Absent clear words modifying the parties' rights under cl 7.1 of the JV Deed, cl 4 of the Funding MOU must be read as still subject to cl 7.1 of the JV Deed. The initial words of cl 4 ("[f]or the avoidance of doubt") support this conclusion. Those words indicate that cl 4 was only intended to clarify ambiguities (if any) in the preceding clauses of the Funding MOU.

118 Secondly, the Plaintiffs refer to an email of 6 March 2009 from BR's legal counsel, Mr Khaw. They say that the email shows that the expression "subject to the mutual agreement of the Parties" in cl 2 of the Funding MOU was inserted at BR's request. This allegedly bolsters the submission that the omission of the same expression in cl 4 was deliberate. The Plaintiffs reason that the expression was not inserted into cl 4 because BR was knowingly giving up its right to veto further funding requests.

119 We do not find this argument to be compelling. Clause 2 of the Funding MOU refers to an "Agreed Cap" of US$50m which was later increased by some US$10.6m (forecasted expenditure) to become a "Revised Amount". Clause 2 also refers to para 3 of the minutes which acknowledges firstly, that these sums were but "forecasts" and may be subject to cost

reconciliation at time of payment and secondly, that there may be other additional cost items. It was quite understandable therefore for BR to make clear that the incurring of any expenditure beyond the "Revised Amount" could only be "by mutual agreement".

120 Clause 4 of the Funding MOU on its face, makes it clear, "for the avoidance of doubt", that the costs in cll 2 and 3 for completing the Project, *ie*, the Tabang Plant, do not include the costs of commissioning and the operation and the maintenance of the first 1m tonnes by the plant. Given that context, it is difficult to see how it could have been thought to be relevant to add the words "subject to the mutual agreement of the Parties" in cl 4.

121 The Plaintiffs also rely on the evidence of Mr Maras as to his understanding of cl 4. But we do not find Mr Maras' subjective understanding of cl 4 to be of assistance in its construction. As the Defendants note, there is no contemporary document or other evidence that shows that Mr Maras' subjective understanding was communicated to anyone on BR's side prior to the execution of the Funding MOU.

122 Thirdly, the Plaintiffs point to certain extrinsic matters as contextually establishing that cl 4 of the Funding MOU was intended to override cll 7.1 and 8 of the JV Deed. Those extrinsic matters and the Plaintiffs' arguments may be encapsulated as such:

(a) The failure to issue a revised business plan following the engagement of Thiess. The Plaintiffs say that such a failure is evidence that BCBCS and BR had decided to no longer follow the procedure of preparing a business plan for the approval of funding under cll 4.2 and 7.1 of the JV Deed. They infer from such a decision that from

December 2007, funding was to be in accordance with some other mechanism, such as that in cl 4.

(b) The entry of the parties into the September 2008 Agreement (see [36] above). By this document, the parties agreed to raise the project cost expenditure cap from US$50m to US$60.6m. The Plaintiffs draw attention to cl 6 of the September 2008 Agreement which states:

> The corporate and running costs of KSC, including any costs connected with KSC's operations, will continue to be borne by the parties in proportion to their shareholding interest in KSC, as provided in clause 5 of the [Jakarta MOU].

The Plaintiffs observe that, in the agendas and minutes of KSC meetings on 18 November 2008 and 4 June 2009, KSC's operating expenditure was not tabled for discussion or for agreement between BCBCS and BR. From these indications, they infer that shareholders' consent was never required for operating costs and the agreement between the parties had always been that such costs would be funded on a 51% to 49% ratio. They conclude that, if so, the parties must have, by cl 4, done something more than agree on a sharing ratio.

(c) BR's adverse reaction to BCBCS' proposal in February 2009 that, because BCBCS was experiencing cash-flow difficulties, work on the power plant (which formed part of the Project) should be suspended. By email dated 5 February 2009, BR responded:

> …
>
> Regarding your separate request that we agree to your proposal to suspend the work on the power plant to conserve your cash we regret to inform you that at this stage we cannot agree as currently under our agreement it is your obligation to complete the project

> and there are significant commercial implications that need to be considered and discussed prior to that decision being made.

BR's response shows, according to the Plaintiffs, that BR itself did not regard BCBCS as having the right to unilaterally exit from (and cease to fund) the Project simply because it wished to do so.

123 We do not think that the extrinsic evidence detailed above is "relevant" in the sense as explained in *Zurich Insurance*. The evidence does not unequivocally point to the Plaintiffs' suggested conclusions. The material does not provide a clear contextual framework from which it may objectively be deduced that, at the time, the parties regarded cl 4 as having the meaning and consequences which the Plaintiffs now contend.

124 Fourthly, the Plaintiffs also rely on subsequent conduct in support of their reading of cl 4. For example, they highlight BR's omission in December 2011 to mention cll 7.1 or 8 of the JV Deed when informed by BCBCS that KSC required a further US$20m in funds. There was no mention of any undertaking by BCBCS to fund KSC's cash requirement until the Tabang Plant was commissioned. There was also no counter that cl 4 merely specified a funding ratio. Instead, all that BR did was to seek "clarification" of the cost items involved. That "silence" on BR's part, according to the Plaintiffs, "speaks volumes" and "demonstrates that BR was aware of its legal obligation to contribute to these costs pursuant to [cl] 4".

125 We are not persuaded that BR's subsequent conduct is relevant contextual evidence. We do not see how the fact that BR sought "clarification" of the cost items involved in the US$20m logically implies that BR considered cll 7.1 and 8 of the JV Deed as having been superseded by cl 4 of the Funding MOU. BR could simply have been considering its options, before deciding

definitively whether or not to exercise the right to withhold consent under cll 7.1 and 8 of the JV Deed.

126 Fifthly, the Plaintiffs submit in the alternative that cl 7.1 should be read as being qualified by the obligation of good faith in cl 17.3 of the JV Deed. Clause 17 provides:

> **17 Mutual Co-operation**
>
> **Primary obligation**
>
> 17.1 Each of the Members agrees that it will use all reasonable endeavours to promote the Business and the profitability of [KSC].
>
> **Obligations of parties**
>
> 17.2 Each of the Members must do and execute or cause to be done and executed all acts, deeds, documents and things within its power, including, for the Members, the passing of resolutions (whether by the Board or in general meeting of [KSC]) to give full effect to this Deed and to ensure that all provisions of this Deed are observed and performed.
>
> **Obligations of Members**
>
> 17.3 Each of the Members agrees with the other that this Deed is entered into between them and will be performed by each of them in a spirit of mutual cooperation, Good Faith, trust and confidence and that it will use all means reasonably available to it (including its voting power whether direct or indirect, about [KSC]) to give effect to the objectives of this Deed and to ensure that [KSC] complies with its obligations.
>
> [emphasis in original]

127 Clause 1.1 of the JV Deed defines "Good Faith" as follows:

> ***Good Faith*** means:
>
> (a) being fair, reasonable and honest;
>
> (b) doing all things reasonably expected by any other party in order to give effect to this Deed; and
>
> (c) not impeding or restricting any other party's performance of this Deed[.]

[emphasis in original]

128 The Plaintiffs submit that, in light of cl 17.3, even if BR's consent was required for KSC's funding of its operations up to June 2012, BR was obliged to consider the additional funding requested for KSC in a fair, reasonable and honest manner that would not impede or restrict the performance of the JV Deed.

129 We accept that cl 7.1 must be read in the context of the entire JV Deed (including cl 17.3). But that alone would not assist the Plaintiffs' case.

130 As mentioned above, in arguing for its construction of cl 4, the Plaintiffs have submitted that BR acted inconsistently with its supposed rights under cl 7.1 by initially seeking "clarification" of the cost expenditure of US$20m assessed by BCBCS. If there was a good faith obligation as the Plaintiffs contend in their alternative argument, it would have been understandable for BR to have first sought "clarification" of the additional expenditure in order to better consider the same. The good faith obligation would prevent BR from simply refusing to contribute to the US$20m expenditure outright without due consideration of how the US$20m was calculated.

131 The obligation of "good faith" as narrowly defined in cl 1.1 would not have precluded BR, having considered BCBCS' clarification, from then deciding in light of BR's own situation not to contribute further funding. The requirements (1) to be "fair, reasonable and honest"; (2) to act reasonably to give effect to the JV Deed; and (3) to not impede BCBCS' performance of its obligations, would not by themselves have restricted the absolute discretion given to BR by cl 20.13 of the JV Deed. In other words, the good faith

obligation in cl 17.3 did not mean that BR was constrained to approve any and all additional expenditure assessed by BCBCS.

Effect of the PLFA

132 We turn to consider the effect (if any) of the PLFA on BR's rights and obligations.

133 The Plaintiffs' case on the PLFA is that it was only a short-term arrangement and was not intended to completely supersede BCBCS' existing arrangements with BR (including those under the Funding MOU). In support of their submission on the temporary nature of the PLFA, the Plaintiffs refer to two provisions in the document. Article 9.7 provides that the PLFA did "not alter any of the terms under the existing shareholder loan or MOU Funding Agreements between [KSC], BCBCS and BR". Article 11 provides that the PLFA was "a short term priority funding facility which [may be] extended by mutual agreement of both Parties".

134 The Availability Period for the Priority Facility of US$20m was initially to last until 30 June 2011. The Priority Facility was later increased to US$40m and the Availability Period extended to 31 December 2011 by an addendum dated 29 June 2011 (see [67] above). Although the PLFA did not expressly state what was to happen once the Priority Facility was exhausted (as it did in August 2011), the Plaintiffs submit that in light of Arts 9.7 and 11, the parties intended the arrangements under the Funding MOU to be reinstated.

135 The Plaintiffs' case on the PLFA was advanced to counter the Defendants' argument that, if cl 4 of the Funding MOU obliged BR to fund KSC's commissioning, operation and maintenance costs without limit as to

amount or duration, such obligation on BR's part had been permanently altered by the PLFA. Given our conclusion on the limited effect of cl 4 of the Funding MOU (in particular that cl 4 did not override the parties' rights under cll 7.1 and 8 of the JV Deed), it is unnecessary to rule in detail on the Plaintiffs' argument on the PLFA.

136 We would simply indicate our agreement with the Plaintiffs that, in light of Arts 9.7 and 11 of the JV Deed, the PLFA was only intended to have temporary effect. Upon exhaustion of the Priority Facility or upon expiration of the Availability Period, the parties' obligations under the Funding MOU resumed. Nonetheless, in light of our conclusion on the limited effect of cl 4 of the Funding MOU, the exhaustion of the Priority Facility or the expiration of the Availability Period would not have affected the Defendants' rights under cll 7.1 and 8 of the JV Deed.

Whether there was a binding undertaking by BCBCS to pay costs up to commercial production

137 We turn to discuss the Defendants' allegation that the Plaintiffs had undertaken to fund the Tabang Plant until it achieved commercial production.

138 We briefly set out the chronology of events giving rise to the alleged undertaking by BCBCS (via WEC):

(a) By a letter dated 7 June 2010, BR wrote:

> …
>
> [O]ur view remains that [WEC] need[s] to fund KSC with sufficient cash to complete the plant and get it up and running including any temporary cash injections to allow KSC to repay SCB or other events. This advance to KSC would be temporary as once KSC

> repaid SCB it would be able to re-draw the fund from SCB and repay [WEC].
>
> ….
>
> We [ie, BR] trust that [WEC] will continue to fund KSC with whatever cash KSC requires up to the commencement of commercial production.

(b) By a letter on the same day, the Plaintiffs (through Mr Maras) responded:

> …
>
> Following my discussion with [Mr McLeod] last week, I had discussions with members of the [WEC] Board and hereby confirm that we will provide the necessary funds to KSC to cover the temporary repayment of US$5m and US$3m on the SCB facility due on 11 June 2010 and 23 June 2010 respectively. In this regard, … please:
>
> 1. confirm by return email/letter that [BR] will ensure that [WEC] will be repaid by KSC immediately the reciprocal redraw on the SCB facility occurs (on 11 and 23 June respectively). This essentially means that [BR] will undertake to immediately sign any electronic transfer request or cheque that may be necessary to ensure that [WEC] is repaid the temporary funding advance.
>
> …

(c) By an email dated 9 June 2010, BR sought an undertaking that BCBCS would provide additional funds (over and above the US$6m obtained from the Priority Facility) in the event that KSC needed such funding. BR wrote:

> [Mr Maras], thanks for your written response, however we believe it misses the point and doesn't address [BR] main concern. We agreed to the project continuing based on the shareholders not being required to commit any additional funds and if additional fund[s] were required then [WEC] would provide them. Whilst we accept that you have committed an additional

> USD6 million [WEC] has not agreed to provide additional funds (over and above the USD 6 million) should KSC need them. It is this undertaking that [BR] is looking for.
>
> Regarding the SCB facility we confirm that if the facility becomes due and payable that [BR] will fund KSC 49% to allow KSC to repay the loan. On the temporary advances (to allow KSC to repay and redraw the SCB facility) [BR] will immediately release the payment to [WEC] so long as KSC has sufficient cash.

(d) By an email of the same day, WEC (through Mr Maras) stated that WEC was "conscious" of BR's position that:

> [BR would] not be providing further funding to KSC … until it reaches the point of commercial production.
>
> This is clearly evidenced by the fact that [WEC] has provided 100% of KSC's cash requirements over the past few months via the US$6m priority loan facility, with the only contribution made by [BR] being a "deferral" of a portion of the feedstock coal payments.
>
> Given the above facts, it is quite obvious that any further funding required by KSC until commercial production will only be met by one of its shareholders – [WEC]. I assume this [is] the undertaking that you were looking for?
>
> However, given that [WEC] is the sole shareholder willing to continue to provide KSC with the ongoing funding necessary to complete its near term objectives, our intention to manage KSC's cash funding contributions very carefully and provide KSC with funding on an "as needs" basis, but without hampering ongoing operational needs. Obviously, the objective of this approach is to limit the amount of fresh funding contributions required – particularly given the impending VAT refund of US$4.5m and coal sales revenues expected to be generated soon. I trust that you will agree that this is no different to the approach that [BR] would adopt if it were also providing further funding to KSC.
>
> This is precisely the reason that we require that the US$5m and US$3m that we have undertaken to provide to KSC in temporary "24 hour" funding on

> 11/6/10 and 23/6/10 respectively, to enable the repayment of the SCB working capital loans to be met, to be repaid to [WEC] immediately the subsequent redraw from SCB is effected. Given our undertakings above, I would once again ask you to confirm by return email that [BR] will ensure that [WEC] is repaid immediately upon the redraw of the SCB facility occurring.

(e) By an email of the same day, BR (through Mr McLeod) responded:

> Dear [Mr Maras], regarding how [WEC] fund KSC and doing it on a just in time basis we have no issue with and we would do the same.
>
> On the basis of [WEC] continuing to fund KSC we agree that the SCB redraw will immediately be transferred back to [WEC] and will use best efforts to ensure this happens.

139 We are unable to read the email correspondence as giving rise to an unambiguous undertaking on BCBCS' part (given via WEC) that it would fund the joint venture until commercial production. It is also not apparent from the correspondence that Mr McLeod understood Mr Maras to have given such an undertaking.

140 The sentence "I assume this [is] the undertaking that you were looking for?" in Mr Maras' email of 9 June 2010 ends with a question. Mr Maras thus seems to be asking Mr McLeod whether the undertaking sought is related to the "obvious" fact highlighted in the previous sentence that "any further funding required by KSC until commercial production will only be met by one of its shareholders – [WEC]". It is clear, in this regard, that though *WEC* was referred to in the correspondence between Mr McLeod and Mr Maras, the parties were in substance referring to BCBCS as it was BCBCS, and not WEC, that was the relevant *shareholder* of KSC and the entity through which funds were injected into KSC.

141 Mr Maras refers in a later paragraph of the same email to "our undertakings above". But this appears to be a reference to "the US$5m and US$3m that we have *undertaken* to provide to KSC in temporary "24 hour" funding on 11/6/10 and 23/6/10" [emphasis added] in the immediately preceding sentence.

142 It is possible that Mr Maras was deliberately vague about whether he was giving an undertaking of the nature sought by BR. Mr Maras may have wanted to appear as if he was giving an undertaking when in fact he was not doing so. This would be consistent with Mr Maras' evidence in cross-examination that he did not regard the email as "a legal document" giving rise to a legally binding undertaking. At one stage in cross-examination, Mr Maras conceded that he did provide an undertaking of the nature sought by BR. But he qualified the concession by saying that he was under the impression that the undertaking would not be legally binding since it had not had prior board approval.

143 Whatever Mr Maras may have subjectively thought at the time he was writing, it is far from clear that Mr McLeod understood him to be giving an undertaking.

144 Mr McLeod emailed back: "On the basis of [WEC] continuing to fund KSC we agree that the SCB redraw will immediately be transferred back to [WEC] and will use best efforts to ensure this happens." On its face, the reply merely states that, provided WEC (via BCBCS) continues to fund the joint venture, BR agrees to allow monies from the SCB Loan Facility to be immediately used to pay back the funds injected by WEC (via BCBCS) on 11 and 23 June 2010.

145 Mr McLeod's email does not then address the question of an undertaking. Nor does it confirm an understanding that BCBCS would continue to fund the joint venture until commercial production. Indeed, given the vague nature of Mr Maras' email of 9 June 2010, as we have pointed out at [142] above, it is hard to see how Mr McLeod could reasonably have concluded that BCBCS had given any clear-cut undertaking. Under cross-examination, Mr McLeod himself accepted that "I *think* I got [the undertaking] from Ivan Maras but I still thought it was a topic that was needing [*sic*] discussion at the senior level" [emphasis added]. This buttresses our conclusion that there was no clear understanding between the parties that an undertaking had been given by BCBCS.

146 In our judgment, the issue of an undertaking on the part of BCBCS to fund until commercial production was left in abeyance, the parties having reached a stalemate in their 9 June 2010 correspondence.

Issue 2

147 We move on to Issue 2, which was framed as such: in or around November 2011, was BR obliged to consent to KSC obtaining a further advance of US$3.033m from SCB to repay BCBCS' temporary loan to KSC?

148 On 4 November 2011, BCBCS advanced a loan of US$3.033m to KSC to enable it to repay the SCB Loan Facility. When BCBCS asked BR to consent to KSC drawing on the SCB Loan Facility to repay BCBCS for the US$3.033m loan, BR refused.

149 The Plaintiffs submit that that BR was wrong to have refused. The Plaintiffs say that by the email correspondence of 7 and 9 June 2010 already set out above, BR agreed to allow KSC to immediately draw on the SCB Loan

Facility to pay back loans from BCBCS. In response, the Defendants claim that BR only agreed that the SCB Loan Facility could be drawn on to repay BCBCS for monies loaned to KSC on 11 and 23 June 2010, but did not agree to a further advance being made from the SCB Loan Facility to repay the loan from BCBCS on 4 November 2011

150 As an alternative argument, the Plaintiffs submit that BR is estopped from denying that KSC could use the SCB Loan Facility to repay the loan of US$3.033m to BCBCS.

151 Further, the Plaintiffs also say that BR was obliged to repay 49% of the US$3.033m loan in any event. This is because, if the Plaintiffs' monies had not been used to pay off the US$3.033m, BR would have had to bear 49% of the US$3.033m under the JV Deed as modified by the Funding MOU.

152 In oral submissions, Mr Xavier frankly accepted that his argument on Issue 2 was difficult. We agree that there are difficulties:

(a) The email correspondence that took place in June 2010, fairly read, shows that BR only agreed to the SCB Loan Facility being used for immediate re-payments of BCBCS' 11 and 23 June 2010 loans. Nothing is unambiguously said in the email correspondence about how later injections of cash into KSC by BCBCS would be handled insofar as immediate repayment was concerned.

(b) The immediate reimbursement of the 11 and 23 June 2010 BCBCS loans, are only two instances, and can hardly constitute a representation that future cash injections will be dealt with in a similar fashion. In the absence of a clear representation to that effect, there cannot be an estoppel.

(c) Whether or not BR was under a separate obligation (under the JV Deed and/or the Funding MOU) to pay 49% of the US$3.033m would have no logical bearing on whether BR was obliged to consent to the SCB Loan Facility being used to repay BCBCS.

153 Accordingly, we conclude that BR was not obliged to consent to the SCB Loan Facility being used to repay BCBCS' loan of US$3.033m to KSC.

Conclusion on Funding Issues

154 We would answer the three Funding Issues as follows:

(a) On Issue 1, BR was not obliged to provide funding. Clause 4 of the Funding MOU did not override cll 7.1 and 8 and of the JV Deed.

(b) On Issue 2, BR was not obliged to consent to KSC obtaining a further advance of US$3.033m from SCB to repay BCBCS' temporary loan to KSC on 4 November 2011.

(c) On Issue 3, BR was not obliged to provide funding. There was no clear undertaking by BCBCS at the time to provide funding until commercial production.

Coal supply issues

Issue 4

155 We now turn to Issue 4: whether BR was under an obligation to supply and/or assist in procuring coal to be supplied to KSC on the basis set out in the JV Deed, PLFA and/or the April 2011 Side Letter, in around the period between early November 2011 to 2 March 2012.

156 Clause 2.6(b)(vi)(A) of the JV Deed obliged BR to use its voting power and other rights, and to take any necessary steps, to give full effect to the JV Deed and to ensure that KSC executed an agreement for the supply of coal with its subsidiaries. Clause 3.8(b)(iii) also provides that BR "must assist in procuring [c]oal for the operation of the Business". The "Business" was defined as "acquiring [c]oal from the Tabang Concession in accordance with the Coal Supply Agreement or from some other party; production of Upgraded Coal Briquettes by upgrading Coal using the [BCB] Process, and marketing and selling Upgraded Coal Briquettes to Utilities including sale of Upgraded Coal Briquettes under the Upgraded Coal Briquette Sale Agreement".

157 Pursuant to these provisions, KSC entered into the 2008 CSA with Bara. As noted above (at [66]), the 2008 CSA, was subsequently replaced by two agreements – one with Bara and another with FSP (collectively referred to as the 2010 CSAs). For convenience we will refer to "Bara" as including FSP as the parties accept that both Bara and FSP were under similar obligations under the 2010 CSAs to deliver coal to KSC. In the PLFA, only obligations relating to FSP appear in Art 7.1 but in light of the Recital, the parties accept, as is evidently the case, that the obligations to supply coal extended to Bara as well.

158 The provisions of the 2008 CSA to supply feedstock coal included at cl 3.8 a provision that Bara "must supply to [KSC], as and when requested by [KSC], on the same terms and conditions as are set out in this Agreement with respect to price and quality, sufficient [c]oal to allow testing of the: (a) Coal Briquette Processing Plant up to the point where [its] Commissioning is achieved; and (b) each Electricity Generator up to the point where the Electricity Generator Commissioning is achieved".

159 The recital to the PLFA, which was signed by KSC, BCBCS and BR on 17 December 2010 but backdated to 22 April 2010, reads:

> …
>
> WHEREAS, [BR] … hereby agrees to cause its coal producing subsidiaries, [FSP] and [Bara] to supply [KSC] with feedstock coal at Market Price, of which US$8 per tonne would be payable immediately by [KSC] while the balance amount shall be payable to [FSP] pursuant to the provisions herein relating to Priority Loan, during the Availability Period ("Priority Coal Supply"). The Priority Coal Supply will result in the establishment of the Coal Advance.
>
> …

160 Article 7 of the PLFA dealt with the supply of feedstock coal to KSC (see above at [58]):

(a) Article 7.1 of the PLFA provides that "[d]uring the Availability Period [defined as the period up to 30 June 2011 or as mutually agreed between the Parties], BR shall ensure that FSP supplies Feedstock Coal to [KSC]".

(b) Article 7.2 of the PLFA provides that "the deferred balance of the Market Price less US$8 per tonne of Feedstock Coal supplied to [KSC] during the Availability Period represents BR's contribution to the Priority Loan being made to [KSC], and this is reflected in the amount of the Coal Advance".

(c) "Coal Advance" is defined as "[t]he Priority Coal Supply enables [KSC] to procure the feedstock coal from FSP at Market Price of which US$8 per tonne would be payable immediately by [KSC] while the deferred balance shall be payable to FSP pursuant to the provisions herein relating to [the] Priority Loan".

> (d) "Priority Coal Supply" is defined as "[t]he supply of feedstock coal to [KSC] by FSP at Market Price of which US$8 per tonne would be payable immediately by [KSC] while the deferred balance shall lead to the establishment of the Coal Advance".

161 The 2010 CSAs contained similar provisions to the 2008 CSA save that amendments were effected for the sale of feedstock coal by Bara to KSC to comply with the new legislation and the HBA Regulations. The 2010 CSAs contained an identically worded clause, numbered cl 3.9, to cl 3.8 of the 2008 CSA referred to above (at [158]).

162 The April 2011 Side Letter, signed by BCBC, BR, Bara and KSC, agreed that Bara and KSC entered into the 2010 CSAs in order to comply with the Indonesian legislative requirements in connection with the calculation of the price of coal to be supplied by Bara to KSC. It also contained provisions leading to a "payments reconciliation" to deal with the changes in the price of coal ("the Payments Reconciliation").

The Plaintiffs' case

163 The Plaintiffs rely on cl 3.8(b)(iii) of the JV Deed and Art 7.1 of the PLFA to establish BR's obligation to supply or assist in the supply of coal to KSC in November 2011. They submit that so long as the joint venture was alive, cl 3.8(b)(iii) of the JV Deed and Art 7.1 of the PLFA operated to impose an obligation on BR to ensure the supply of feedstock coal to the joint venture.

164 In making its submissions on this issue, the Plaintiffs avoided making points or adducing evidence relating to whether, and what, coal was required in November 2011 or relating to BR's alleged conduct in: (a) instructing Bara and FSP's mines to cease supplying coal on 9 November 2011; and (b)

conditioning the continued supply of coal to KSC on the Plaintiffs' buy out of BR's 49% share in KSC for US$45m. This was because they felt that these matters related to the issue of breach, which would be more appropriately dealt with in the next tranche rather than in the present one.

The Defendants' case

165 The Defendants do not deny the existence of the obligation to supply coal pursuant to the JV Deed for the purpose of commissioning. However, they take the view in their closing submissions that the PLFA "was never intended to give rise to a free-standing obligation on [BR]'s part to ensure the supply of raw coal to KSC" but only served as "a means by which [BR] could provide a limited amount of funding to KSC through the Coal Advance, instead of having to contribute further cash to KSC".

166 Moreover, the Defendants further argue that notwithstanding that BR had a broad obligation to supply coal under cl 3.8(b)(iii) of the JV Deed, such an obligation did not arise at the material time in November 2011. To establish this, the Defendants submit as follows:

(a) First, cl 3.9 of the 2010 CSAs required BR to procure:

> … *sufficient [c]oal* to allow testing of the:
>
> (a) Coal Briquette Processing Plant up to the point where Coal Briquette Processing Plant Commissioning is achieved; and
>
> (b) each Electrical Generator up to the point where Electricity Generator Commissioning is achieved.
>
> [emphasis added]

On this basis, they argue that the Tabang Plant was still in its testing phase leading up to commissioning in November 2011 and that it had not been proved that KSC required coal for the testing and

commissioning of the Tabang Plant in November 2011. Consequently, BR was not under any obligation to supply coal at the time.

(b) Secondly, the request for coal made in November 2011 did not comply with what was required under the 2010 CSAs. Thus, there was no obligation for BR to supply coal to KSC.

Our decision

167 In our view, the provisions of the JV Deed, the 2010 CSAs, the PLFA and the April 2011 Side Letter we have referred to above are clear and unambiguous. In or around the period between early November 2011 to March 2012, commercial production had not yet begun and consequently:

(a) the obligation under the 2010 CSAs was that BR and Bara "must supply to [KSC], as and when requested by [KSC], … sufficient [c]oal to allow testing of the [Tabang Plant and each Electrical Generator] up to the point where [their] Commissioning is achieved";

(b) the obligation under Art 7.1 of the PLFA was that "[d]uring the Availability Period, BR shall ensure that [Bara] supplies Feedstock Coal to [KSC]";

(c) the obligations in relation to the payment of the feedstock coal up to the achievement of the commissioning of the Tabang Plant was provided for in the 2010 CSAs and the PLFA; and

(d) the April 2011 Side Letter contained provisions leading to the Payments Reconciliation to deal with the changes in the price of coal.

168 Whilst we note that it was recorded in the KSC board minutes of 4 June 2009 that 500 tonnes of coal had been delivered to site and 1,000 tonnes were to be delivered on 6 June 2009, from the scant evidence available, it appears the commissioning process was only beginning around that time.

169 The term "Coal Briquette Processing Plant Commissioning" is defined in the JV Deed as:

> … completion of the construction of the Coal Briquette Processing Plant so that it is capable of producing Upgraded Coal Briquettes, which must be evidenced by the relevant construction contractor providing the Buyer with a *certificate from a qualified engineer engaged by the relevant construction contractor* (not being an employee of either the construction contractor or any of the construction contractor's related bodies corporate) certifying that, in the engineer's professional opinion, the Coal Briquette Processing Plant has been tested and commissioned in accordance with the construction contract which relates to the Coal Briquette Processing Plant.
>
> [emphasis added]

170 As noted at [51] above, a certificate of Practical Completion was issued on 30 April 2009 in relation to the work carried out by Thiess under the D&C Alliance Contract. The term "Practical Completion" is defined in the D&C Alliance Contract between KSC and Thiess as the time when the works under the contract are complete and the Tabang Plant is ready to take coal for processing, except for minor omissions and defects; and when "all Acceptance Tests and all commissioning tests specified in is D&C Alliance Contract have been carried out and passed".

171 We find that insufficient evidence has been placed before us to answer the question of what coal KSC required in early November 2011 to 2 March 2012. What does appear to be fairly clear is that the Tabang Plant had not started commercial production of upgraded coal briquettes at that time.

However, what stage the commissioning had reached by early November 2011 and whether there was sufficient coal for the commissioning process during the relevant period are two important factual issues that cannot be answered on the inadequate evidence placed before us. We therefore decline to answer this question at this stage of the proceedings and will instead reserve it for the later tranche when the necessary facts can be placed before us and fully explored.

Issue 5

172 We now turn to Issue 5: whether in or around the period between early November 2011 and 2 March 2012, the supply of coal under the April 2011 Side Letter and coal supply agreements (*ie*, the 2008 CSA and the 2010 CSAs) was and/or would have been illegal and/or was entered into for an illegal purpose under Indonesian law by virtue of *Regulation 17 of 2010 on Procedures to Determine the Benchmark Price for the Sale of Minerals and Coals*.

173 A further related issue raised by the Defendants is that the April 2011 Side Letter should be void for uncertainty. We address the issues of illegality and uncertainty in turn.

Foreign illegality

174 Although the subject of foreign illegality raises a host of difficult issues and is a fertile ground for academic discourse, the doctrine of foreign illegality in Singapore comprises two separate strands: see *Peh Teck Quee v Bayerische Landesbank Girozentrale* [1999] 3 SLR(R) 842 ("*Peh Teck Quee*").

175 The first, based on *Foster v Driscoll* [1929] 1 KB 470 ("*Foster v Driscoll*") and *Regazzoni v K C Sethia (1944) Ltd* [1958] AC 301 ("*Regazzoni v Sethia*"), is a principle of domestic public policy that a Singapore court will not enforce a contract or award damages for its breach, if its object or purpose would involve doing an act in a foreign and friendly state which would violate the law of that state. In *Foster v Driscoll*, the agreements were to smuggle whisky from Scotland to the United States of America in contravention of the Prohibition then in force. In *Regazzoni v Sethia* a contract, governed by English law, for the sale of Indian jute c.i.f. Genoa and thence to South Africa, by an English company (with an Indian director), to a Swiss company, was held unenforceable because the object of one of the parties, known to the other, was to evade an Indian prohibition of export of Indian goods to South Africa. Both these cases have been cited with approval in Singapore: see *Patriot Pte Ltd v Lam Hong Commercial Co* [1979-1980] SLR(R) 218, *Singapore Finance Ltd v Soetanto and others* [1992] 1 SLR(R) 645 ("*Singapore Finance*") and *Peh Teck Quee*.

176 The second, based on *Ralli Brothers v Compania Naviera Sota y Aznar* [1920] 2 KB 287 ("*Ralli Bros*"), has been said to be an independent conflict of laws principle, *viz*, a contract is, in general, invalid in so far as the performance of it is unlawful by the law of the country where the contract is to be performed, *ie*, the *lex loci solutionis*. This principle in *Ralli Bros* was cited with approval and described as "settled law" in *Shaikh Faisal (trading as Gibca) v Swan Hunter Singapore Pte Ltd* [1994] 2 SLR(R) 605 ("*Shaikh Faisal*") at [49] although it was held not applicable on the facts there. In *Ralli Bros*, under a contract governed by English law, Spanish shippers contracted with English charterers to ship goods from Calcutta to Barcelona, agreeing to pay freight at £50 per ton upon arrival in Barcelona. After the voyage had

commenced, but before the vessel arrived in Barcelona, Spain passed a law prohibiting the charging of freight above £10 per ton. The charterers refused to pay more than £10 per ton. In English proceedings, the shipowners failed to recover the balance from charterers as the charging of a freight rate above the legal limit was illegal at the place of performance, the *lex loci solutionis*.

177 We note that the principle to be derived from *Ralli Bros* has been subject to much debate. Academic writers have questioned whether *Ralli Bros* is in fact authority for an independent conflict of laws principle that states that a contract is, in general, invalid in so far as its performance is unlawful by its *lex loci solutionis* or whether on its true *ratio*, it is a rule of domestic English law of contract, which regards the supervening illegality as a frustrating event: see F M B Reynolds, "Enforcement of Contracts Involving Corruption or Illegality" [1997] SJLS 371 ("Enforcement of Contracts Involving Corruption or Illegality") at p 375. Our courts have also acknowledged the existence of this controversy: see *Peh Teck Quee* at [44].

178 We note some academic writers, and judicial decisions, opine or see a unified basis for these two principles, because both "spring from the root principle of comity": see *Toprak Mahsulleri Ofisi v Finagrain Cie Commerciale Agricole et Financière SA* [1979] 2 Lloyd's Rep 98, per Robert Goff J (as he then was) at 107 and Enforcement of Contracts Involving Corruption or Illegality. We also note the approach in *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] QB 448 ("*Lemenda*"), which seems to combine both the *lex fori* and the *lex loci solutionis* doctrines into an apparently new principle (see Andrew Grubb and Michael Furmston, *The Law of Contract*, (LexisNexis, 4th Ed, 2010) at para 5.236). In *Lemenda*, Phillips J said (at 461):

> In my judgment, the English Courts should not enforce an English law contract which falls to be performed abroad where: (i) it relates to an adventure which is contrary to a head of English public policy which is founded on general principles of morality, and (ii) the same public policy applies to the country of performance so that the agreement would not be enforceable under the law of that country.
>
> In such a situation international comity combines with English domestic policy to militate against enforcement.

The English Court of Appeal in *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd and others* [2000] QB 288 ("*Westacre*") interpreted *Lemenda* at 302–303 as having held that:

> (a) there are some rules of public policy which when infringed lead to non-enforcement whatever the proper law or wherever the contract is to be performed (*eg*, terrorism, drug trafficking, prostitution, paedophilia), but others are based on considerations which are purely domestic;
>
> (b) contracts for the sale of influence, as distinct from bribery or corruption, are not of the former category; and
>
> (c) such contracts if to be performed in England will not be enforced as contrary to English domestic policy but if they are to be performed abroad will not be enforced only if performance would be contrary to the domestic public policy of that country as well.

179 Although *Westacre* was decided after *Peh Teck Quee*, the binding decision on us remains the Court of Appeal's ruling in *Peh Teck Quee* (at [55]) that until the exact scope of *Ralli Bros* has been determined in a later case on similar facts, the two principles should be regarded as separate. As we have not had the benefit of full argument and because we take the view that this

issue can be answered without having to decide the true juridical basis of foreign illegality under Singapore law, we decline to embark on that endeavour.

180 It is sufficient for present purposes to make three points.

(a) First, the JV Deed, originally between BCBC and BI, but now between BCBCS and BR after the Deed of Novation was entered into, is governed by Singapore law and the parties have agreed to submit to the non-exclusive jurisdiction of the Singapore Courts.

(b) Secondly, the 2010 CSAs are agreements between KSC and Bara and FSP respectively who are all Indonesian corporations. The governing law of these agreements is Indonesian law and the place of performance of these agreements is in Indonesia.

(c) Thirdly, the April 2011 Side Letter was signed by BCBC, an Australian corporation, BR, KSC and Bara, which are Indonesian corporations. The parties have agreed that Singapore law is its governing law. BCBCS and BI are Singapore corporations. We note that the parties are not in agreement as to the place of performance of the April 2011 Side Letter. The Defendants assert that it is Indonesia whereas the Plaintiffs suggest that it need not be Indonesia, although they do not then go on to submit on what the place of performance is. As will be evident below, this disagreement is ultimately inconsequential to our determination.

181 For the Defendants' argument that the 2010 CSAs and April 2011 Side letter are unenforceable on the basis of illegality to gain any traction, they must first be able to establish that these agreements are illegal under

Indonesian law. The parties' submissions are focused on answering this question and it is to this which we now turn.

The Defendants' case

182 The Defendants raise two bases for illegality. They first contend that the April 2011 Side Letter amended the 2010 CSAs such that Bara was obliged to supply coal to KSC at a price below the HBA minimum price; if that was the contractual obligation and effect, then the April 2011 Side Letter would have been entered for an illegal purpose and the performance of the 2010 CSAs (as allegedly amended by the April 2011 Side Letter) would have been illegal under the Indonesian law as it had the effect of circumventing the HBA Regulations by lowering the transacted price of coal below the legally permissible price. The Defendants allege the Payments Reconciliation mechanism in the April 2011 Side Letter was to allow KSC to purchase coal from Bara below the HBA prices.

183 During their Closing Submissions, the Defendants raised a second and new basis of illegality – because the 2010 CSAs and April 2011 Side Letter were only executed in English and were not accompanied by a copy in Bahasa Indonesia, they were accordingly illegal under Indonesian law. They say that *Law No 24 of 2009 on Flag, Language, and Coat of Arms and National Anthem* requires any agreement involving Indonesian private entities to be executed in Bahasa Indonesia, or otherwise accompanied with an executed copy in Bahasa Indonesia.

184 To support their contention that the Parties' arrangement was illegal under Indonesian law, the Defendants put forward two experts on Indonesian law:

(a) Mr Sutisna Prawira, who is the former Head of the Legal and Public Relations Bureau in the Ministry of Energy and Mineral Resources in Indonesia between 2003 and 2012 and currently a legal consultant qualified to provide legal advice and an opinion on Indonesian law.

(b) Ms Arfidea Dwi Saraswati ("Ms Saraswati"), who is a member of the Indonesian Bar who has been in practice since 1997, specialising in, amongst others, general mining (including trading and smelting companies), mergers and acquisitions, capital investment, power producer projects, infrastructure and financing.

The two experts presented a joint report and Ms Saraswati made oral submissions before us under O 110 r 25 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

185 With respect to the first basis of illegality, the Defendants' Indonesian law experts explain that under Indonesian law, the 2010 CSAs and the April 2011 Side Letter have to be considered together and not in isolation. This is because the April 2011 Side Letter contemplated that the Payments Reconciliation would be carried out with reference to the 2010 CSAs. The Defendants also rely on references made to these two agreements in the Plaintiffs' pleadings stating that the Defendants were obliged to supply coal in accordance with the 2010 CSAs "as *amended* by the mechanism contemplated under the … April 2011 Side Letter" [emphasis added].

186 The Defendants' experts submit that there is no room under the HBA Regulation for parties to enter into private arrangements to set the price of coal at a price that is not in accordance with the HBA prices. Thus, the Indonesian

Government is concerned with the true nature of the transaction, which includes the true price at which coal is being supplied. This is why parties who wish to enter into an agreement for the sale of coal are required, under the HBA Regulation, to first obtain approval from the Indonesian Government for their proposed coal sale price before selling their coal. According to the Defendants' experts, that is why parties are required, when applying for a licence such as the IUP to mine and sell coal, to submit supporting documents which show the price at which coal is being supplied.

The Plaintiffs' case

187 The Plaintiffs also put forward two experts on Indonesian law:

(a) Mrs Kunarti Santoso ("Mrs Santoso") – a member of the Indonesian Bar since 1953, specialising in civil and commercial law, corporate, finance and banking and capital markets and who has given expert evidence on Indonesian law before arbitral tribunals and the courts in Indonesia, Singapore and the United States of America.

(b) Professor Hikmahanto Juwana ("Prof Hikmahanto") – a Professor of Law at the Faculty of Law of Universitas Indonesia and who has lectured there since 1988 and who specializes in International Law, Indonesian Business Law, Contract Law, Competition Law and Mining Law.

Mrs Santoso and Prof Hikmahanto put in separate Expert's Reports. Prof Hikmahanto, who was chosen by the Plaintiffs to make oral submissions, was not a member of the Indonesian Bar and did not qualify under O 110 r 25 of the Rules of Court to make oral submissions before us. However by agreement of the parties, Prof Hikmahanto was allowed to do so by way of oral evidence

as a witness without being subject to cross-examination but with the reservation that not everything he submitted was necessarily accepted by the Defendants.

188 With respect to the first basis of illegality, the Plaintiffs argue that the 2010 CSAs are entirely separate and distinct from the April 2011 Side Letter and should not be read together. This is because the two documents govern two entirely distinct transactions between different parties and should not be conflated. The Plaintiffs submit that:

(a) The 2010 CSAs relate to the supply of feedstock coal from Bara to KSC for which KSC would pay the market price, in conformity with the HBA Regulations, to Bara. The place of performance of the coal supply is Indonesia and the agreements expressly provide that they are governed by Indonesian law. Under Indonesian law, the 2010 CSAs are properly characterised as sale and purchase agreements, and directly govern the sale of coal from Bara to KSC.

(b) The April 2011 Side Letter merely sets out the method by which the joint venture parties, *ie*, BR and BCBCS, had agreed to allocate the economic benefits of the joint venture transactions as between themselves so that the original economics of the joint venture are preserved. This is expressly provided for at cl 7 of the April 2011 Side Letter.

189 With respect to their pleadings, the Plaintiffs explained that the reference to the 2010 CSAs being "amended by the mechanism contemplated under the … April 2011 Side Letter" was not an admission that the 2010 CSAs were indeed amended by the April 2011 Side Letter. Instead, they submitted

that what was meant was that as between the shareholders of the joint venture, BR is obliged to:

(a) ensure the supply of coal to KSC in accordance with the 2010 CSAs; and

(b) carry out the Payments Reconciliation to preserve the original economics of the joint venture.

190 The Plaintiffs' experts state that it is permissible under Indonesian law for joint venture partners to agree on a re-allocation of the economic benefits of a joint venture between themselves provided it does not undermine the purpose of the HBA Regulations. Such a rule finds expression, they contend, in Arts 26 and 27 of the HBA Regulations which allow parties to re-negotiate and make adjustments to existing coal supply contracts so as to achieve compliance with HBA Regulations. Further the principle of freedom of contract enshrined in Indonesian law gives parties the freedom to agree on how to allocate the profit or burden arising from the HBA Regulations.

191 As for the second basis of illegality, the Plaintiffs submit that this new argument should be rejected because it did not form a part of the Defendants' pleaded case, no evidence in relation to the breach of the regulation had been adduced, and their witnesses have not been given an opportunity to respond to this argument.

Our decision

(1) The first basis of illegality

192 Having considered the experts' reports and having heard their submissions, we find they are on common ground on the following points under Indonesian law:

(a) an agreement which is entered into for a purpose that is prohibited by law or violates public order is not a valid agreement and is unenforceable;

(b) any agreement which is entered into for the purpose of contravening, circumventing, avoiding or getting around an Indonesian Regulation will be regarded as an agreement with a "prohibited cause" under the Indonesian Civil Code, and will be invalid and unenforceable;

(c) compliance with the HBA Regulation is mandatory, and sanctions will be imposed against parties who do not supply coal in accordance with the HBA prices; and

(d) under the HBA Regulations, Bara's sale of feedstock coal to KSC and KSC's sale of upgraded coal briquettes must be transacted at the HBA prices, and failure to conform to this price would render the contract illegal.

193 Both sets of experts are also in agreement as to the main objectives of the HBA Regulations:

(a) to stabilise coal prices in Indonesia; and

(b) to optimise revenue for the Indonesian Government through the collection of royalties.

The Defendants' experts put forward an additional objective, *viz*, to prevent transfer pricing. However, as will be explained below, nothing turns on this.

194 The experts differ in their interpretation of the arrangements entered into by the parties and whether they ran foul of these objectives. The main differences in opinion between Prof Hikmahanto and Ms Saraswati boil down to two issues:

(a) they disagreed on whether the April 2011 Side Letter and the 2010 CSAs should be read together or should be regarded as separate transactions; and

(b) they disagreed on whether the effect of reading the April 2011 Side Letter and 2010 CSAs together gave rise to a contravention of the HBA Regulations.

195 To deal with the parties' arguments, it will be necessary to set out the factual matrix within which the 2010 CSAs and the April 2011 Side Letter were entered into. The background facts set out in [7] to [82] will not be repeated save where it is necessary to explain our decision.

196 It is not disputed that when the parties entered into the joint venture, the economic model envisaged was that Bara would supply feedstock coal to KSC at a fixed price of US$8.60 per tonne. It was estimated that it would take 1.5m to 1.6m tonnes of feedstock coal to produce 1m tonnes of upgraded coal briquettes. Half of the briquettes produced would be sold by KSC to BR at a

fixed price of US$46.25 per tonne and BR would be free to on-sell the briquettes. KSC could do likewise with the other half.

197 However, sometime in or before early May 2008, there were concerns that this economic model would not work because of transfer pricing and tax considerations. A tax consultant, MS Taxes, was engaged and as noted at [33] above, they rendered their advice on 19 May 2008.

198 MS Taxes' advice is minuted at a KSC board meeting held on 18 November 2008. KSC was advised to cancel the Briquette Sale Agreement and amend the 2008 CSA to reflect the market price of feedstock coal as it was likely that the Indonesian Tax Office would view the agreed prices of coal under the Briquette Sale Agreement and the 2008 CSA as a transfer pricing arrangement because the transactions were not at the market price. It was decided that BR's Mr McLeod and WEC's Mr Maras would present a joint recommendation at the next board meeting on the most appropriate way to deal with this issue.

199 This issue also found expression in the September 2008 Agreement; cl 13 provided that the KSC Board will discuss potential amendments required to the [2008 CSA] between Bara and KSC and the [Briquette Sale Agreement] between BR and KSC "in light of the advice of MS Taxes".

200 At a KSC board meeting on 4 June 2009, the parties agreed that "[f]rom a tax point of view", some changes to the current arrangements had to be made. The suggested amendments were:

(a) amending the 2008 CSA to reflect KSC's purchase of coal from Bara at the then market price of US$15 per tonne;

(b) terminating the Briquette Sale Agreement; and

(c) performing a year-end reconciliation to maintain the economic benefit to BR (this reconciliation mechanism was referred to as the "Chin Reconciliation Method").

201 Subsequently, at the KSC board meeting of 1 December 2009, the parties agreed to implement the suggestions made at the meeting of 4 June 2009 and to draft a side letter to reflect the parties' agreed position on the preservation of economics for the first 3 MTPA in accordance with the Chin Reconciliation Method (see [54] above).

202 Following upon the KSC board meeting of 1 December 2009, Ms Neale prepared a draft deed of termination of the Briquette Sale Agreement, a draft deed of amendment of the 2008 CSA and a side letter in the form of a draft "Memorandum of Understanding (Payments)" setting out the Chin Reconciliation Method. These documents were sent to BR on 4 March 2010 but none of the documents was ultimately finalised.

203 Up to this point in time, we note the market price of the sub-bituminous coal supplied by Bara had risen to US$15 per tonne. Consequently it was no longer feasible for KSC to purchase such coal at US$8.60 per tonne because of transfer pricing issues and taxation. The sale of upgraded coal briquettes to BR at the fixed price of US$46.25 per tonne was also not viable for the same reasons.

204 As noted above, in 2010, the Indonesian Government introduced two further measures affecting the mining industry:

(a) Regulation 23 of 2010, introduced in February 2010, under which KSC, who operated a processing and refining coal plant, had to apply for an IUP-OPK permit.

(b) The Minister of Energy and Mineral Resources enacted the HBA Regulations on 23 September 2010 which came into force on 1 October 2010. The HBA Regulations mandated minimum benchmark prices for various kinds of coal.

205 In 2010, the issues surrounding the funding of KSC continued to cause disagreement between the parties. Sometime around 17 December 2010, the parties' differences over funding of KSC were settled through the execution of the PLFA which was backdated to 22 April 2010 because that was the date when the Priority Facility was first drawn down. With the PLFA, the position, in essence, was that to bring the Tabang Plant to commercial operation, WEC would make available to KSC a revolving working capital facility of up to US$20m (*ie*, the Priority Facility) to do so and BR would make a 'Coal Advance' to KSC, *ie*, KSC would pay US$8 per tonne to Bara for the feedstock coal and the balance US$7 per tonne, (US$15 per tonne being the then market price), would be looked after by BR. That 'Coal Advance' would be booked as an amount between KSC and BR: see the PLFA and in particular Art 7.2. These two components, the facility under the PLFA and the Coal Advance, were the short term priority loans (collectively the "Priority Loan") extended to KSC under the PFLA by mutual agreement (see Art. 11) of its shareholders, which, subject to the SCB Loan Facility, ranked ahead and had to be paid before any other shareholder loans made by WEC and BR to KSC. The Coal Advance was to be settled at the Repayment Date (defined as "[t]he date when the Priority Loan is due and payable on or before 31 December 2011 unless extended"). Under Art 9, the Priority Loan was to be repaid to BR

and BCBCS in proportion to the funding ratio which under Art 9.5 was to be obtained by dividing the Coal Advance by the Priority Loan for BR and dividing the Priority Facility by the Priority Loan for BCBCS.

206 It is within that factual matrix, having reached an agreement on the more urgent and critical issue of funding KSC, that the parties then turned to drawing up the 2010 CSAs and the 2011 April Side Letter in 2011.

207 The first side letter, signed on 29 March 2011, was superseded by the April 2011 Side Letter. The 2010 CSAs were signed between March and June 2011 but were backdated to 1 October 2010 to comply with the HBA Regulations. It will be convenient to first consider the 2010 CSAs before the April 2011 Side Letter.

208 The parties to the 2010 CSAs are Bara (and FSP) and KSC. An examination of the 2010 CSAs will show that they were drafted to fully comply with the HBA Regulations. Thus cl 8.2 provided that the Base Price for the first year was calculated in accordance with Arts 6.2 to 6.7 of the HBA Regulations, *ie*, US$29.70 per tonne at the delivery point. Base Price for the years thereafter was to be calculated in accordance with Arts 8.3 to 8.8 of the HBA Regulations. Clause 8.3 of the 2010 CSAs provided that the Base Price was subject to the Mine Department's approval and the parties acknowledged that Bara was required to comply with the laws of Indonesia and the HBA Regulations in relation to the sale of its coal. Clause 8.3 went on to provide that in the event the agreed selling price of coal fell below the minimum selling price fixed by the Government of Indonesia, then the coal would be sold at the Government's fixed minimum selling price. Under cl 10, Bara was to invoice KSC fortnightly and payment was due within 30 days of the receipt of the invoice. Clause 11 dealt with withholding taxes and VAT and cl 14

provided that each party must comply with all the relevant laws and authorisations in relation to and carrying out their respective obligations under the agreement and the parties' obligations were subject to any applicable laws. The governing law was Indonesian law and the parties submitted to the non-exclusive jurisdiction of the courts of Indonesia.

209 We therefore find that there is nothing on its terms, whether express or implied, that would allow performance other than that which is fully compliant with the Indonesian laws and the HBA Regulations in relation to the sale of coal. We also note some contemporaneous evidence by way of invoices issued by FSP to KSC during the period February to December 2011 which reflected the supply of coal at the HBA benchmark price of $29.70 per tonne. The 2010 CSAs cannot be said to be tainted with any illegality.

210 The April 2011 Side Letter was signed by BCBC, BR, Bara and KSC. We note a typographical error in cl 6 where it refers to cl 9, instead of cl 8, for the purpose of determining the average selling price over the relevant period. This is a transposition error arising from the first Side Letter entered into on 29 March 2011. We treat this accordingly.

211 The April 2011 Side Letter starts with a reference to meetings held on 4 and 5 April 2011 which, it should be noted, were KSC meetings held by *the representatives of the shareholders of KSC*. The Side Letter goes on to reference the 2010 CSAs and the Briquette Sale Agreement between KSC and BR dated 3 April 2008. The relevant clauses then go on to provide as follows:

> (a) Clause 1: Bara and KSC entered into the 2010 CSAs in order to comply with Indonesian legislative requirements in connection with the calculation of the price of the coal to be supplied by Bara to KSC.

(b) Clause 2: The parties acknowledge that the 2008 CSA dated 3 April 2008 was entered into between Bara and KSC.

(c) Clause 3: To the extent that the Base Price calculated under the terms of the 2010 CSAs (the Benchmark Base Price) is higher than the Base Price which would have been payable by KSC to Bara under the terms of the 2008 CSA (the Earlier Base Price), then such amount (the Coal Supply Amount) will be credited to KSC as part of the Payments Reconciliation to be conducted between the parties .

(d) Clause 5: The parties agree that the Briquette Sale Agreement entered into between BR and KSC in April 2008 is to be terminated and will enter into a Deed of Termination to this effect. The parties agree that the economic benefit that would have accrued to BR arising from the Briquette Sale Agreement will be credited to BR as part of the Payments Reconciliation.

(e) Clause 6: For the purposes of cl 5 above, this reconciliation will be calculated as follows: to the extent that the average selling price over the relevant period as referred to in cl 8 below is higher than the sale price of $46.25 provided for in the Briquette Sale Agreement, then this amount will be credited to BR (Offtake Amount). The Offtake Amount will be paid on 50% of the actual number of tonnes of upgraded coal sold by KSC in the relevant period as referred to in cl 8 below.

(f) Clause 7: The parties acknowledge that the purpose of the Payments Reconciliation is to preserve the original economics of the transaction for the parties.

(g) Clause 8: The Payments Reconciliation will only apply in respect of the first 3m tonnes of installed capacity.

212 We agree with the Plaintiffs that the April 2011 Side Letter and the 2010 CSAs are different agreements involving different parties and concerning different matters. Whilst the April 2011 Side Letter did make reference to the 2010 CSAs, it did not amend the 2010 CSAs or their operation in any way. Further, there was no conflicting terms between the April 2011 Side Letter and the 2010 CSAs such that an ambiguity or conflict has to be resolved by favouring a term in the April 2011 Side Letter over one in the 2010 CSAs. Accordingly, we find that the April 2011 Side Letter did not have the effect of amending the 2010 CSAs.

213 However, this does not dispose of the illegality issue. Although they are independent agreements, it remains to be considered whether the *effect* of reading the April 2011 Side Letter with the 2010 CSAs, in particular the Payments Reconciliation, frustrates or undermines the underlying objectives of the HBA Regulations.

214 We find that as Bara was selling feedstock coal to KSC at the HBA benchmark price (see [209] above), no issue of transfer pricing or contravention of Indonesian taxation laws arose as the taxable income base of Bara and KSC, as related companies, was not artificially being inflated or deflated. As noted at [209], the contemporaneous evidence of the invoices FSP issued to KSC establishes this as a fact. The Defendants' bare assertion that the Indonesian Government would be deprived of tax is without any basis and is contrary to the evidence in this case.

215 We also find that in terms of royalty payments, the Indonesian Government will be receiving the appropriate amount of royalty payments based on the HBA benchmark price for the quantity of coal being transacted between KSC and Bara as stated in the 2010 CSAs. Even though the Defendants control and own the Bara mine, there is no basis to say that the Defendants had manipulated the price of coal sold by Bara to KSC. In fact, the PLFA makes it clear that while BCBCS was putting up US$20m to fund KSC over this critical period, BR's contribution would be in the form of the "Coal Advance", *ie*, settling the difference between the HBA benchmark price over US$8 per tonne and having its (BR's) account with KSC credited with this difference.

216 We turn now to consider the Payments Reconciliation under the April 2011 Side Letter. First, the difference between the price of feedstock coal under the HBA Regulations/the 2010 CSAs and the 2008 CSA *was not* going to be credited *from Bara to KSC*. This is significant because if there was a credit from Bara to KSC, it would have the effect of reducing the price of feedstock coal below the HBA benchmark price. This construction is supported by contemporaneous evidence. During the negotiations leading up to the conclusion of the April 2011 Side Letter, Mr Neil sought Mr McLeod's views on a draft of the April 2011 Side Letter being circulated. In response, Mr McLeod expressed in an email dated 21 March 2011 the view that there could not be a credit between Bara and KSC as it would have "the effect of reducing the price below the minimum price". Further, under cross-examination, Mr Neil accepted that the parties did not contemplate a credit from Bara to KSC.

217 There is therefore nothing, express or implied, in the April 2011 Side Letter and 2010 CSAs that obliges Bara to sell feedstock coal to KSC or

allows KSC to buy feedstock coal from Bara at anything less than the HBA benchmark price. Nothing in the April 2011 Side Letter impinges on the sale of feedstock coal by Bara to KSC otherwise than as stated in the 2010 CSAs. On the contrary, cl 1 of the April 2011 Side Letter acknowledges that the 2010 CSAs was entered into to comply with Indonesian law. Given the above, we find that feedstock coal *was* being sold to KSC at US$29.70 in accordance with the HBA benchmark price at the material time.

218 Secondly, cl 3 of the April 2011 Side Letter provides that the difference between the price of feedstock coal under the 2010 CSAs and the 2008 CSA will be *credited to KSC and will form part* of the *Payments Reconciliation* between "the parties". Although "the parties" is not spelt out in the April 2011 Side Letter, it is clear from cll 5, 6, 7 and 8 that this is a reference to BR and BCBC, certainly not Bara (see [216] above). Clause 5 refers to the cancelled Briquette Sale Agreement between BR and KSC and states that the economic benefit, *ie*, profit, BR would have made thereunder *will be credited* to BR *as part of the Payments Reconciliation*. Clause 6 spells out the calculation of the "reconciliation" for the purposes of cl 5; it is the difference between the HBA prices of the coal briquettes and the agreed price of US$46.25 provided for under the terminated Briquette Sale Agreement multiplied by 50% of the coal briquettes sold by KSC in respect of the first 3m tonnes of installed capacity (which is a reference to a phrase used and defined in the Briquette Sale Agreement). Clause 7 provides that "the parties" acknowledge the "purpose of the Payments Reconciliation is to preserve the *original* economics" [emphasis added] of the transaction for the parties. These clauses clearly show an agreement between the joint venture parties to adjust for changes to their original economic model (see [196] above). Hence the Payments Reconciliation operated by recognising the additional cost of

feedstock coal, *ie*, a credit by KSC of BR's account, and the loss of BR's profits by the cancellation of the Briquette Sale Agreement. These were clearly expenditure and profit adjustments being made between shareholders of a venture. It certainly did not amend or change the price of feedstock coal being bought or sold by KSC and Bara respectively.

219 Our conclusion that the Payments Reconciliation should simply be viewed as an arrangement between the shareholders of KSC is further buttressed by the fact that the meetings of 4 and 5 April 2011 which led to the conclusion of the April 2011 Side Letter had been described in the minutes as "a meeting of representatives of [WEC] and [BR]", both of whom are either directly, or through their subsidiaries, shareholders of the joint venture. It is also apposite to note that all the discussions about maintaining the economics of KSC were conducted at KSC meetings between its shareholders and their representatives (see above at [38], [40], [44] and [54]).

220 KSC, being a joint venture vehicle, was a corporation which the shareholders had to fund to enable it to fulfil the purpose of their joint venture. This can be seen right from the start of this joint venture where KSC had to be funded by its shareholders. These shareholders were entitled to decide how the expenses would be met and how the profits of their joint venture would be shared and to make adjustments in view of these changes. The April 2011 Side Letter should be rightly regarded as an arrangement entered into between the joint venture parties and shareholders of KSC with the intention of appropriately responding to the price changes arising from taxation and implementation of the HBA benchmark price. The Payments Reconciliation method stated in the April 2011 Side Letter, incomplete as its actual mechanics are concerned, is appropriately characterised as an realignment of the joint venture parties' financial contributions or investment into KSC and

did not amount to a manipulation of the price of coal transacted between KSC and Bara.

221 We have noted Mr Neil's evidence under cross examination that there was an issue of transparency and substantiation such that "[t]here was no practical mechanism" and that "no one knew how to record" the Payments Reconciliation under the April 2011 Side Letter, including Mr Maras and Mr McLeod. However, we note that it was never clearly articulated what exactly the difficulty was and Mr Maras told the court in cross-examination that "it was a simple reconciliation" which was to take place either "between BR and KSC" or at "a shareholder level".

222 Although the parties have not yet worked out how they would effect the Payments Reconciliation as between KSC and its shareholders, they have acknowledged (see [216] above) that it would not be by Bara providing any such credit to KSC. That much is clear on the facts. In that regard, under any conceivable permutation of the Payments Reconciliation mechanism, *ie*, whether it was BR providing the credit to KSC solely or jointly together with BCBCS, we cannot see how it would amount to an illegal arrangement.

223 One further point to address is the Defendants' reliance on an email of 18 March 2011 from Ms Neale to Mr Neil and Mr Maras where she stated that the parties would "sign a "pro forma" coal supply agreement which will be used for the purpose of the IUP application and also a side letter acknowledging the intentions of the parties". According to the Defendants, this evidenced that the 2010 CSAs would only be "for show" and did not accurately reflect the true price at which coal would be supplied to KSC. In our judgment, this argument is without merit. The reference to a "pro forma" coal supply agreement cannot, without more, evince an intention on the part of

the parties to circumvent the HBA Regulations. The term "pro forma" is a neutral one with a number of possible meanings. In this case it is likely that it simply represented the fact that the parties were to use the 2008 CSA as a *pro forma* or template for the 2010 CSAs. While the parties had already agreed upon the main terms of the 2010 CSAs, they still had to formally execute the agreement in writing. As earlier noted, the need to replace the 2008 CSA was evident and had been agreed for some time before the parties got down to drafting and executing the 2010 CSAs. The minutes of the KSC board meetings of 4 June and 1 December 2009 are evidence of this. The parties had always been clear that they were seeking to comply with the HBA Regulations when entering into the 2010 CSAs and the April 2011 Side Letter.

224 The Defendants have also sought to rely on the omission to submit the April 2011 Side Letter as part of KSC's IUP application to argue that the Side Letter was concealed from the authorities. In this regard, the Defendants point to Arts 34 and 35 of the *Regulation of the Minister of Energy and Mineral Resources No 32 of 2013* and Art 8(2) of the *Regulation of the Director General of Mineral and Coal of the Republic of Indonesia No 714K/DJB/2014* to demonstrate that:

(a) applicants for an IUP were required to submit documents, which showed the prices at which they were transacting mineral and coal, from as early as the introduction of the HBA Regulation on 1 October 2010; and

(b) the Indonesian Government is concerned about the true nature of the transaction (namely the "true price" of coal being supplied).

225 The Plaintiffs' responses, which we accept, are as follows:

(a) The alleged concealment of the April 2011 Side Letter from the IUP authorities is not pleaded. It was raised for the first time in Mr Neil's AEIC filed on 16 October 2015.

(b) More importantly, the April 2011 Side Letter was not submitted because it did not fall into any category of documents required for KSC's IUP application. KSC had in fact received Indonesian lawyers' advice on the documents to be submitted for its IUP application and had scrupulously followed the terms of that advice. The key documents there were the 2010 CSAs.

(c) The regulations relied upon have not been pleaded by the Defendants nor raised in the Defendants' AEICs or Opening Statement and thus this submission should be rejected. In any event, the Plaintiffs argue that these regulations were not in force during the material period to which the present dispute relates, and do not have retrospective effect.

226 Accordingly, we find that the arrangement under the April 2011 Side Letter, read with the 2010 CSAs, is entirely in keeping with the objectives of the HBA Regulations and does not give rise to any illegality.

(2) The second basis of illegality

227 We also reject the second basis of illegality raised by the Defendants, *viz*, that the 2010 CSAs and the April 2011 Side Letter are illegal because they were not accompanied by a copy in Bahasa Indonesia. This basis of illegality was raised belatedly in the Defendants' Closing submissions and we uphold the Plaintiffs' objections that they have not had an opportunity to respond.

Conclusion on the illegality issue

228 Accordingly, we find that the 2011 April Side Letter and the 2010 CSAs are neither illegal nor tainted with any illegality.

Whether the April 2011 Side Letter was void for uncertainty

229 We now consider the question of whether the April 2011 Side Letter is void for uncertainty. It should be noted that this argument is mutually exclusive from, and is an alternative argument to, the Defendants' submission that the April 2011 Side Letter and 2010 CSAs are unenforceable due to illegality. As alluded to earlier, the exact mechanics of the Payments Reconciliation are incomplete. As discussed above, cll 3, 5, 6, 7 and 8 spell out the principles upon which the Payments Reconciliation are to be based but they do not spell out exactly how these expenses and profits will be allocated between the shareholders. We also note that there appear to be differences over the monetary contributions by the shareholders and the incurring and allocation of expenses in relation to the Project. There were calls for a full audit of the joint venture.

230 The Defendants therefore argue that the April 2011 Side Letter left unresolved the question of how exactly the Payments Reconciliation would be structured and could amount to no more than an agreement to agree, *viz*, to further discuss and explore what the appropriate formula and mechanism would be. The Defendants also rely on the fact that during the meetings of 4 to 5 April 2011, the parties were still wrestling with "difficulties with transparency and substantiation" of the Payments Reconciliation. According to the Defendants, these difficulties highlight the fact that the April 2011 Side Letter was too uncertain and incomplete to amount to an enforceable agreement.

231 The Plaintiffs, on the other hand, submit that the "difficulties" referred to above simply related to how the payments would be categorised in the respective shareholders' books. According to them, these difficulties were issues which could be easily overcome and did not render the April 2011 Side Letter to be unworkable such that it would be void for uncertainty.

232 With respect to the law on uncertainty of contracts, in *Rudhra Minerals Pte Ltd v MRI Trading Pte Ltd (formerly known as CWT Integrated Services Pte Ltd)* [2013] 4 SLR 1023 ("*Rudhra*"), the Singapore High Court affirmed (at [27]) the views of Lloyd LJ in *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601 that:

> (a) Parties may intend to be bound forthwith by an agreement even though there were further terms to be agreed or some further formality to be fulfilled.
>
> (b) If the parties fail to reach agreement on such further terms, the existing contract would not be invalidated unless the failure to reach agreement on such further terms renders the contract unworkable or void for uncertainty.
>
> (c) There is no legal obstacle which stands in the way of parties agreeing to be bound now while deferring important matters to be agreed later. It is for the parties to decide whether they wish to be bound, and if so, by what terms, whether important or unimportant.

The above observations of Lloyd LJ has also been cited with approval by the Singapore Court of Appeal in *The "Rainbow Spring"* [2003] 3 SLR(R) 362 at [20]. In *Rudhra*, it was further noted that a contract would be incomplete where "there is no objective or reasonable method of ascertaining how the

term of agreement is to be carried out, thus rending the agreement unworkable". The High Court also accepted that there is a "countervailing policy of endeavouring to uphold contracts where possible rather than striking them down".

233 In our judgment, while it was not settled between the parties as to how exactly the Payments Reconciliation would be made and in what proportion they would be borne by the shareholders, the April 2011 Side Letter does not amount to an "unworkable" agreement. We first take into account the fact that the parties had evinced a clear intention to be bound by the terms of the April 2011 Side Letter. The extensive discussions which preceded the signing of the April 2011 Side Letter bear testimony to that. Secondly, there was a formula in place for determining the amounts to be credited or debited to KSC and BR as part of the Payments Reconciliation (see cll 3 and 6 of the April 2011 Side Letter). Thirdly, there was the understanding that how the Payments Reconciliation would be eventually effected was to be guided by the consideration of "preserv[ing] the original economics of the transaction for the parties" (see cl 7). Therefore, while the granularity of the Payments Reconciliation had not yet been agreed upon, a broad overarching framework was put in place which renders the April 2011 Side Letter workable.

234 We further accept the Plaintiff's submission that the difficulties with "transparency and substantiation" of the Payments Reconciliation was essentially a matter of how to characterise the payments in the books of the parties. It is clear, and had already been agreed upon, that the "substantiation" or basis of the payments was to preserve the original economics of the joint venture and therefore the parties simply had to resolve how to appropriately label these reconciliation payments in their respective accounts.

235 We accordingly find that the "gaps" present in the April 2011 Side Letter were not of such a nature that we should strike the entire contract down for uncertainty.

Counterclaim issues

236 We turn to address the final two issues, which concern the Defendants' counterclaim. These issues concern questions of implied terms of the JV Deed. The Defendants contend that BCBCS was under an implied obligation, first, to exercise the reasonable skill and care of a competent designer, builder and operator of coal preparation and briquetting plants and, secondly, to procure that KSC produce 1 MTPA of upgraded coal briquettes within a reasonable period of time, *if* BR was under an obligation to provide funding to KSC between November 2011 and 2 March 2012 (see our decision on Issues 1 to 3 above).

Implied terms under Singapore law

237 The question of whether there are implied terms under Singapore law depends on the three-step test set out by the Court of Appeal in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp Marine*") at [93]–[101].

238 For there to be implied terms, the court must, as a first step, ascertain how the gap in the contract arises; implication will be considered only if the court discerns that the gap arose because the parties did not contemplate the gap. Under the second step, the court considers whether it is necessary in the business or commercial sense to imply a term in order to give the contract efficacy. Finally, the court considers the specific term to be implied. This must be one which the parties, having regard to the need for business efficacy,

would have responded "Oh, of course!" had the proposed term been put to them at time of the contract. If it is not possible to find such a clear response, then, the gap persists and the consequences of that gap ensue.

Issue 6

239 Issue 6 relates to whether BCBCS was under an implied contractual duty to use the reasonable skill and care to be expected of a competent designer, builder and operator of coal preparation and briquetting plants in providing technical assistance to KSC.

The Defendants' case

240 The Defendants submit that it was an implied term of the JV Deed that in providing technical assistance to KSC under Clause 3.8(a)(iii) of the JV Deed, BCBCS was under such a contractual duty.

241 Clause 3.8(a)(iii) of the JV Deed states:

> (a) [BCBCS] must:
>
> ...
>
> (iii) provide *technical assistance* to [KSC] in the *development of the [BCB] Process*;
>
> [emphasis added in italics]

242 The Defendants contend that the technical assistance to be provided included the provision to KSC of designs and other technical information required to enable the construction, procurement and commissioning of the Tabang Plant. According to the Defendants, this meant that, as stated by Mr Duncan, BCBCS would provide the technology necessary to bring the Project to fruition, and BR would provide the coal. The Defendants rely on various points to demonstrate this.

243 First, the Defendants rely on Mr Clark's evidence that the WEC Parties' role was to "make available all information … [they] had on the existing state of the BCB [Process], and where improvements in the technology are made during the course of the joint venture, this information was also to be made available to the joint venture". The Defendants also refer to cl 3.1 of the Heads of Agreement and Mr Clark's evidence that in 2005, there were two concerns, first, whether the coal from the Tabang concessions was suitable for upgrading using the BCB Process and, secondly, whether the coal could be upgraded economically. The Defendants say that the tests on samples of coal, as Mr Clark said, showed that the Tabang coal "could be upgraded to a quality product" and was "a particularly satisfactory coal for upgrading". On this basis, the Defendants submit that, at the time of the JV Deed, the real issue facing the joint venture was whether the coal could be upgraded economically by scaling up the BCB Process in a plant which was commercially viable. Hence, they say that cl 3.8(a)(iii) of the JV Deed provided that BCBCS was to "*provide* technical assistance" to KSC in the "development of the [BCB] Process", consistent with this pilot scaling up of the BCB Process.

244 Secondly, the Defendants submit that the reference to the "*development*" of the BCB process in light of the fact that the process had not been implemented on a commercial scale before meant that technological advances had to be made to bring the plant into operation. The Defendants rely on the outcome of the demonstration of the Collie plant as showing that the development of the plant required things such as dust control and that, as identified in the report prepared by SKM dated 4 November 2005 (see [11] above) the technology risk lay mainly in the scaling up to a commercially viable plant size. The Defendants say that this shows that the BCB Process

could not be implemented for a scaled-up, commercial plant without further advances in the technology, and that was why BCBCS' technical assistance was required to develop the process.

245 Thirdly, the Defendants say that, as shown by cl 1.6 of the Business Plan which sets out the delivery method of the plan, the Plaintiffs were more than just a consultant which was involved in the project management and instead, took responsibility for the "*information required to enable the construction, procurement and commissioning*" [emphasis added] of the Tabang Plant. In turn, KSC and the design consultant that KSC was to hire would take responsibility only for the "*[b]alance of plant design*" [emphasis added]. To show this, the Defendants submit that the Plaintiffs had undertaken design and construction responsibilities in respect of the Tabang Plant by engaging SKM to carry out the design of the Tabang Plant, and through WEC personnel's involvement in relation to the core process during the design stage.

246 Finally, the Defendants rely on Recital A of the JV Deed, which stated that BCBCS "designs, builds and operates binderless briquetting plants", to argue that BCBCS had consistently held themselves as having the expertise to design, build and operate a coal briquetting plant. According to BR, this was "critical to [BR]'s decision to enter into the joint venture with [BCBCS]".

247 Accordingly, the Defendants submit that BCBCS was not only responsible for giving KSC information about the BCB Process, but also to assist KSC in the development of that technology and to implement it in the plant. Consequently, on a true construction of cl 3.8(a)(iii) of the JV Deed, BCBCS was obliged to assist KSC with the design, construction and commissioning of a plant in Tabang that would use the BCB Process. On such

a construction, the Defendants submit that there was a gap in the JV Deed, in that the parties did not contemplate, and the JV Deed did not contain a term which addressed, the standard of skill and care that BCBCS was obliged to use in providing technical assistance to KSC in the development of the BCB Process. In that respect, they say that unlike cl 3.8(a)(v) of the JV Deed, which applied "Good Industry Practice" to *the operation and maintenance* of the Tabang Plant, there was no express standard to govern BCBCS' obligations relating to the *design, construction, procurement and commissioning* of the plant.

248 The Defendants say that it is therefore necessary, as a matter of business efficacy, to imply a duty of skill and care into the JV Deed. The understanding among the parties, when they entered into the JV Deed and stipulated that BCBCS was to provide technical assistance, must have been that this technical assistance be of a certain, useful, standard. The Defendants submit that the provision of technical assistance is in the nature of a supply of services and that, as the Plaintiffs accept, the law recognises that where a contract is for the supply of services, a term should be implied that the provider of the services will exercise reasonable skill and care in rendering those services (see *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 at [24]). In those circumstances, the Defendants submit that there is an implied term in the JV Deed that BCBCS had a contractual duty to use the reasonable skill and care to be expected of a competent designer, builder and operator of coal preparation and briquetting plants.

The Plaintiffs' case

249 The Plaintiffs contend that such a term should not be implied either in fact or as a matter of law. They submit that there was no true gap in the JV

Deed as to the level of skill and care expected of BCBCS in providing technical assistance to KSC. Further and in any event, the Plaintiffs submit that it was not necessary in the business or commercial sense to imply an obligation on BCBCS to exercise the necessary skill and care as a designer, builder and operator of a binderless coal briquetting plant.

250 The Plaintiffs submit that, under Singapore law, it is only appropriate to imply a term where the parties did not contemplate the issue at all and a gap persists. In this case, they say that the JV Deed expressly identified the ambit of BCBCS' technical assistance obligation in cl 3.8(a)(iii). Properly construed, they submit that cl 3.8(a)(iii) only imposes an obligation on BCBCS to provide technical assistance in the development of the "core process design". In that regard, the Plaintiffs submit that the process of implication is part of the process of construction of the contract as a whole, and that cl 3.8(a)(iii) of the JV Deed plainly and unambiguously limits BCBCS' obligation to "provide technical assistance to [KSC] in the development of the [BCB] Process". To show this, the Plaintiffs rely on the Recital A of the JV Deed which defines "Patented Briquetting Process" (*ie*, the BCB Process) as "a patented technology that generates closer bonding between coal particles with the effect that the resultant coal has a higher energy content, can be transported more cost effectively due to a significant reduction in moisture content and minimi[s]es episodes of spontaneous combustion". Thus, the Plaintiffs submit that this definition refers only to technical assistance for the core process, rather than in respect of the briquetting plant.

251 The Plaintiffs argue that the Defendants' contention that the obligation extends beyond the core process to the "provision to KSC of designs and other technical information required to enable the construction, procurement and commissioning of the Tabang Plant" goes against the express words of cl

3.8(a)(iii). They also rely on the evidence of Mr Clark who said that cl 3.8(a)(iii) was "limited to providing the joint venture with the core process flow design (as encapsulated in the BCB Patent), and with its knowledge and expertise of the existing state of the BCB Technology" and that the obligation was to provide the core process for that *technology* and not to "provide a working plant".

252 The Plaintiffs therefore say that the skill and care which BCBCS was obliged to exercise in fulfilling its obligation under cl 3.8(a)(iii) of the JV Deed was only in respect of the development of the core process. It submits that there was no true gap in the contract in respect of the level of skill and care required by BCBCS in performing its obligations under cl 3.8(a)(iii).

253 Further, the Plaintiffs say that, even if there were a gap, it would not be necessary in the business or commercial sense to imply an obligation on BCBCS to exercise the skill and care as a "competent designer, builder and operator of coal preparation and briquetting plants" in order to give the contract efficacy. The Plaintiffs say that it was known to the Defendants at the time of entering into the JV Deed that the Plaintiffs were not designers, builders and operators of coal preparation and briquetting plants and that they did not specifically undertake to, and did not actually, design, build or operate the Tabang Plant.

254 The Plaintiffs question the assertion that the Defendants had relied on the statement in Recital A of the JV Deed. The Plaintiffs say that the statements in the recitals to the Heads of Agreement and the JV Deed that BCBCS "designs, builds and operates binderless briquetting plants" was merely a forward-looking, aspirational statement and that BR was aware that BCBCS had not previously operated, built or designed any commercial coal

upgrading plant. Therefore, the Plaintiffs say that BR could not have placed any reliance on Recital A of the JV Deed as being a statement of past conduct on the part of BCBCS in entering into the joint venture.

255 The Plaintiffs say that BCBCS did not undertake to, and did not actually, design, build and operate the Tabang Plant. In those circumstances, they submit that to imply an obligation on BCBCS to exercise the skill and care of a designer, builder and operator of coal briquetting plants would be onerous and illogical, given that BCBCS had no relevant expertise or capability to design, build and operate the Tabang Plant, and did not undertake any contractual obligation to perform such services. Further, they say that, at no point did BCBCS hold itself out to possess the particular skills of a designer, builder or operator of binderless coal briquetting plants, or undertake to provide these services to BR and/or KSC. The Plaintiffs say that, on the contrary and as accepted by Mr Neil in his evidence, it was understood by the parties that SKM and Thiess would be the third parties responsible for the design and construction of the Tabang Plant.

256 In response to the Defendants' case that the WEC Parties had undertaken design and construction responsibilities in respect of the Tabang Plant by engaging SKM to carry out the design of the Tabang Plant, and through WEC personnel's involvement in relation to the core process during the design stage, the Plaintiffs give two responses:

(a) First, they argue that they had proposed that SKM be engaged to carry out the design at their expense, rather than the joint venture's, so that they would own the design and the Defendants had agreed to this proposal at a meeting on 22 November 2006, as explained by Mr Hitchings.

(b) Secondly, they submit that the fact that WEC personnel, Mr Clark, Mr Clive Pearson and Mr Matthew Crawford, who had prior experience at the CSIRO pilot plant and the Collie Plant and assisted SKM in process related aspects of the design did not change BCBCS' role from that of a client to a designer.

257 In relation to the Defendants' assertion that, because the premise of the joint venture was the development of a coal briquetting plant, it was incumbent on the party responsible for the design and construction of the Tabang Plant to exercise reasonable skill and care, the Plaintiffs say that this is misconceived. The Plaintiffs say that it was never a premise of the joint venture that BCBCS would undertake responsibility for the design and construction of the Tabang Plant as BCBCS' obligation was solely to provide the core process design and the existing knowledge and expertise on the process. In that regard, the Plaintiffs say that the parties' understanding at the time of entering into the JV Deed was that the Tabang Plant would be the first ever commercial-scale binderless coal briquetting plant and involved a degree of risk and that both parties would share the risk and rewards of this venture as 51:49 shareholders. On this basis, the Plaintiffs submit that it cannot be said to be necessary in the business or commercial sense to imply the onerous obligation on BCBCS and that to do so would fundamentally alter the premise of the joint venture, and parties' intentions in entering into the JV Deed.

258 The Plaintiffs also say that the parties' conduct after the execution of the JV Deed is irrelevant to the question of whether an implied term exists and that, in determining whether there is an implied term, the correct reference point is the time when the parties entered into the JV Deed on 7 June 2006. They refer to *Sembcorp Marine* at [127] in support of this proposition.

259 Finally, the Plaintiffs say that the Defendants cannot rely on s 1.6 of the Business Plan which stated that "[the Plaintiffs] ha[d] developed the technology, design and detailed engineering for the production module" to argue that such an implied obligation exists because the Business Plan came much later in time and was produced by the then KSC Project Manager, Mr Robert Hill, and not by BCBCS.

260 The Plaintiffs submit that therefore, on a true construction of cl 3.8(a)(iii) and an examination of the parties' intentions at the point of entering into the JV Deed, the Defendants' late amendment to plead the alleged implied term should fail.

The Defendants' response to the Plaintiffs' case

261 The Defendants say that the involvement of other contractors who were responsible for the design and construction of the Tabang Plant does not affect the obligation that BCBCS had under the JV Deed to provide the requisite technical assistance to enable KSC to construct, procure and commission the Tabang Plant. They say that the Plaintiffs supervised and had oversight of the design, construction and commissioning of the Tabang Plant. The Defendants argue that although the Plaintiffs may have engaged the assistance of contractors such as SKM, they had the most knowledge and expertise in relation to the BCB Process.

262 In relation to the Plaintiffs' contention that the Defendants were aware that the Tabang Plant was the first ever commercial-scale plant and they had recognised that there were technological risks involved in the commercial exploitation of the technology and the scaling-up to a commercial plant, the Defendants say that this is irrelevant. They point out that their case is simply

that BCBCS was obliged to use *reasonable skill and care* in providing technical assistance to KSC in the design, construction and commissioning of the Tabang Plant. Further, the Defendants say that, given that the premise of the joint venture was the development of a coal briquetting plant to implement a novel technology, it was incumbent on the party responsible for the design and construction of the Tabang Plant to exercise reasonable skill and care.

Our decision

263 We first consider the nature of the obligation under cl 3.8(a)(iii) of the JV Deed.

264 Clause 3.8 of the JV Deed commences with the words "[t]he Members intend that their roles include the following". The provisions in that clause therefore reflect the roles to be played by BCBCS and BR in the Joint Venture. Under cl 3.8(a)(iii), BCBCS "must … provide technical assistance to [KSC] in the development of the [BCB] Process".

265 We consider that the obligation to provide technical assistance does not go as far as the Defendants contend it does. The Defendants say that it includes the provision to KSC of designs and other technical information required to enable the construction, procurement and commissioning of the Tabang Plant. That goes much further than "technical assistance" and seeks to impose an obligation on BCBCS to design the Tabang Plant and provide a wide range of technical information, which we do not think can be spelled out of an obligation to provide technical assistance.

266 We also do not consider that the Defendants' reliance on Recital A of the JV Deed (or the equivalent provision in cl 1 of the Heads of Agreement) to extend technical assistance is well founded. That provision states that BCBCS

"designs, builds and operates binderless briquetting plants". Whether or not that is factually correct, we find it difficult to see how this could enlarge the obligation to provide technical assistance from what is set out in cl 3.8(a)(iii) of the JV Deed and extend it to designing the Tabang Plant any more than to building or operating that plant.

267 The scope of the technical assistance is "in the development of the [BCB] Process". As the Plaintiffs rightly point out, Recital A also contains the definition of the BCB Process as "patented technology that generates closer bonding between coal particles with the effect that the resultant coal has a higher energy content, can be transported more cost effectively due to a significant reduction in moisture content and minimi[s]es episodes of spontaneous combustion". It also states that BCBCS is the "exclusive world wide licensee and markets the [BCB] Process".

268 In our view, this shows that it is technical assistance in the development of this patented technology which forms the basis of the obligation under cl 3.8(a)(iii) and not the much wider obligation which the Defendants seek to derive from that provision. To the extent that the patented technology is the "core process design", then this better reflects the scope of the obligation.

269 The attempt by the Defendants to use subsequent conduct to interpret cl 3.8(a)(iii) into a much wider obligation than was ever envisaged by the parties fails. This is because that evidence does not fulfil the tripartite requirements of being relevant, reasonably available and relating to a clear and obvious context for it to be admissible (see above at [103]). The fact that SKM and Thiess were engaged by the Plaintiffs or that the Plaintiffs became involved in the process by which the Tabang Plant was designed, built or

commissioned, cannot change the limited obligation which the parties entered into under cl 3.8(a)(iii). In any case, as Mr Xavier points out in his closing submissions, in *Sembcorp Marine* at [127], the Court of Appeal expressed the view that the reference point for the implication of a term should be at the time of contracting and therefore subsequent conduct was of little or no relevance when considering whether to imply a term.

270 Given that we have found that BCBCS was not under an obligation to provide technical assistance to KSC relating to the design, building or operating of coal preparation and briquetting plants, we do not consider that BCBCS was under an implied contractual duty to use the reasonable skill and care to be expected of a competent designer, builder or operator of coal preparation and briquetting plants.

271 We thus answer Issue 6 in the negative.

Issue 7

272 The final issue, Issue 7, relates to whether there was an implied term in the JV deed and/or the Funding MOU that BCBCS was under a contractual obligation to procure that KSC produce 1 MTPA of upgraded coal briquettes within a reasonable period of time.

273 Having reached the decision that there was no obligation on the part of BR to fund KSC between November 2011 and March 2012, the question of whether there was an implied term under Issue 7 does not arise. Nevertheless, for completeness and in any event, we provide our observations and analysis on Issue 7.

The Defendants' case

274 The Defendants submit that if, as the Plaintiffs contend, BR was under an obligation to provide funding to KSC between November 2011 and 2 March 2012, there was an implied term in the JV Deed and/or the Funding MOU that BCBCS was obliged to procure that KSC produce 1 MTPA of "commercially viable" upgraded coal briquettes within a reasonable period of time.

275 To establish this, the Defendants say that, in general where a contract does not expressly, or by necessary implication, fix any time for the performance of a contractual obligation, the law implies that it shall be performed within a reasonable time. On this basis, they argue that if it is found that BR agreed to commit to providing unlimited funding for an indefinite period to KSC for its commissioning, operation and maintenance costs, then it could only have been on the basis that, with those funds, BCBCS must be taken to have agreed to achieve the commissioning within a reasonable time. The Defendants submit that BR could not be the source of endless funding with no obligation for BCBCS to deliver anything to BR.

276 The Defendants refer to the evidence of Mr Maras that at the time of the Funding MOU "[i]t was in both parties' interest at that point in time to have the [Tabang Plant] commissioned and operating as soon as possible". In that respect, the Defendants say that if BR had an obligation to fund, then its provision of funding must be on the basis that the Tabang Plant would be commissioned and operating "*as soon as possible*". The Defendants say that two and a half years later in November 2011, the Tabang Plant was still shut down for repairs.

The Plaintiffs' case

277 The Plaintiffs submit that no such term is to be implied. It says that, first, such a term is tantamount to granting a performance guarantee which had been specifically considered and rejected by BCBCS and, secondly, that it would not be reasonable or equitable to imply this obligation on BCBCS given that the parties were well aware of the risks involved in scaling up the plant to commercial production.

278 The Plaintiffs say that the Defendants' case is premised upon BCBCS being responsible for procuring KSC to successfully exploit the BCB Process in the Tabang Plant but the Defendants have not identified any proper basis for this apart from BCBCS being the only party to the JV Deed with access to the requisite "technical expertise". The Plaintiffs refer to cl 3.8(a) of the JV Deed and note that there is no obligation on BCBCS to procure commercial exploitation of the BCB Process either in that clause or elsewhere in the JV Deed.

279 The Plaintiffs also submit that the alleged implied obligation would be tantamount to BCBCS providing a performance guarantee to BR to achieve the production of 1 MTPA of upgraded coal briquettes within a reasonable period of time. On that point, the Plaintiffs say that the issue of a guarantee had been specifically considered and rejected by BCBCS, prior to the entry into of the JV Deed. In particular, they refer to BR seeking to insert a cl 3.1.4 into a draft copy of the Heads of Agreement on 7 February 2006 providing for a "[p]erformance guarantee that the [BCB] Process is commercially and technically viable on the scale envisaged in this Heads of Agreement" but this was subsequently removed from the revised draft on 14 February 2006 and the executed copy.

280 The Plaintiffs also refer to meetings between 21 and 23 February 2006 when the parties met in Jakarta to negotiate the joint venture agreements and Mr Chin again asked for BCBC to provide a performance guarantee but this was rejected by BCBC's Business Development Director, Mr Langley.

281 The Plaintiffs also say that, even if there were a "true" gap in the contract, it would not be reasonable, equitable or necessary in the business sense to imply the term proposed by BR in circumstances where an express term was rejected and the parties entered into the Project as joint venture partners sharing risk and reward. Such a term would effectively mean that BCBCS would bear sole responsibility for the commercial exploitation of the technology contrary to the fundamental premise of the joint venture.

282 The Plaintiffs submit that the parties were fully aware that the plant was a first of its kind commercial-scale plant, and that there was a significant amount of risk involved in scaling up the technology and had specifically made provision in cl 7.2 of the Technology Services Agreement dated 3 April 2008 and the Sub-Licence Agreement between BCBCS and KSC dated 28 March 2008 for a possible situation where the Plant may run at a reduced capacity.

Our decision

283 In our view, we do not consider that there was a gap which the parties did not contemplate or that it is necessary in the commercial or business sense to imply a term which would impose a guarantee of performance on one party to the joint venture for a project which had risks in achieving capacity. Nor is this a case where the parties would have said that such a terms should "of course" be imposed (see [101(c)] of *Sembcorp Marine*).

284 The obligations of the parties are contained in cl 3.8 of the JV Deed and as the Plaintiffs point out, there is no express reference to BCBCS having to achieve a particular output by a particular time. We note that this was in light of the fact that such express terms had been proposed in the drafting of the JV Deed but were eventually rejected. Reference was also made to the Funding MOU but, again, the fact that it is silent on any obligation to supply a particular output within a period of time, indicates that the parties did not seek to impose an obligation.

285 Further, we find that the joint venture was entered into on the basis that there were risks in scaling up the plant to achieve commercial production. In fact, in the Defendants' own opening statement, they accept that the BCB Process was "an unproven technology and the parties knew that there were risks that the technology could not be scaled up to enable commercial production in an economical manner". In those circumstances, it is difficult to impose an implied term which amounts to a guarantee of particular performance by KSC, by a particular date.

286 Finally, the reference to an obligation to fund between November 2011 and March 2012 is understood to be a reference to the particular period of funding. However, if there was an obligation under the JV Deed or the Funding MOU, it is clear that it would have to have arisen before November 2011 and any implied term could not depend on a funding obligation over a limited period of time.

287 Accordingly, we do not consider that it was an implied term of the JV Deed and/or the Funding MOU that BCBCS was under a contractual obligation to procure that KSC produce 1 MTPA of upgraded coal briquettes within a reasonable period of time.

Conclusion

288 In conclusion, we summarise our determination on each of the Agreed Issues:

(a) Issue 1: BR was not obliged to provide funding. Clause 4 of the Funding MOU did not override cll 7.1 and 8 and of the JV Deed.

(b) Issue 2: BR was not obliged to consent to KSC obtaining a further advance of US$3.033m from SCB to repay BCBCS' temporary loan to KSC on 4 November 2011.

(c) Issue 3: BR was not obliged to provide funding. There was no clear undertaking by BCBCS at the time to provide funding until commercial production.

(d) Issue 4: We decline to answer this question at this stage of the proceedings as insufficient facts have been adduced to enable us to do so.

(e) Issue 5: The April 2011 Side Letter and the 2010 CSAs are not tainted with illegality and are not void for uncertainty.

(f) Issue 6: BCBCS was not under an implied contractual duty to use the reasonable skill and care to be expected of a competent designer, builder and operator of coal preparation and briquetting plants in providing technical assistance to KSC.

(g) Issue 7: This issue does not arise as there was no obligation on BR to fund the joint venture between November 2011 and March 2012. However for completeness, there was no implied term of the JV Deed and/or the Funding MOU that BCBCS was under a contractual

obligation to procure that KSC produces 1 MTPA of upgraded coal briquettes within a reasonable period of time.

289 We will hear parties as to the further conduct of this case as well as the issue of costs for this first tranche after they have had the opportunity to consider this judgment. A Case Management Conference will be held 30 days from the date of this judgment unless the parties write in for an earlier date.

Quentin Loh Judge	Vivian Ramsey International Judge	Anselmo Reyes International Judge

Francis Xavier SC, Jeremy Gan, Alina Chia, Tng Sheng Rong, Ang Tze Phern, Tee Su Mien, Tan Hai Song and Joseph Lau (Rajah & Tann Singapore LLP) for the 1st and 2nd plaintiffs;
Davinder Singh SC, Tony Yeo, Jaikanth Shankar, Zhuo Jia Xiang, Fong King Man, Chan Yong Wei, Hannah Ng and Lazatin Pablo Benedicto (Drew & Napier LLC) for the 1st and 2nd defendants.