

Court File No.: 33354

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

BETWEEN:

FIELDSTON TRADERS LIMITED

**Applicant
(Appellant)**

- and -

OAKWELL ENGINEERING LIMITED

**Respondent
(Respondent in Appeal)**

**RESPONSE TO APPLICATION FOR LEAVE TO APPEAL
(OAKWELL ENGINEERING LIMITED, RESPONDENT)
(Pursuant to Rule 27 of the Rules of the Supreme Court of Canada)**

VOLUME II (pp. 229- 410)

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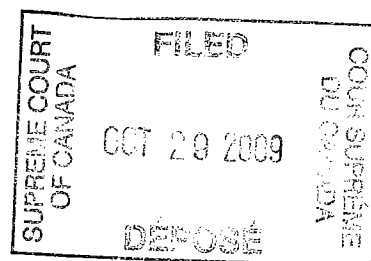
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**Applicant
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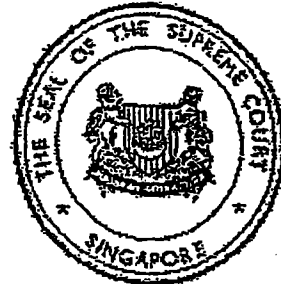
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JUDGMENT

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

Case No. : S997/2002/V
 Document No. : JUD22/2004 / W
 Date Of Filing : 14/01/2004
 Time Of Filing : 15:28:10
 Doc Control No. : 675404/H
 Date Of Judgment : 16/10/2003
 Made By : LAI KEW CHAI



A handwritten signature in black ink, appearing to read "Rocky".

PHILIP JEYARETNAM S.C /
 HERMAN JEREMIAH / JENNIFER NG
 Solicitors for the Plaintiff

A handwritten signature in black ink, appearing to be a stylized name.

(Assistant Registrar/ Registrar's Name)
 (Assistant Registrar/Registrar)
 Supreme Court
 Singapore

Between

OAKWELL ENGINEERING LIMITED
 (RC No. 198403368H)

... Plaintiff

And

ENERGY POWER SYSTEMS LIMITED (FORMERLY KNOWN
 AS ENGINEERING POWER SYSTEMS GROUP INC. AND
 ENGINEERING POWER SYSTEMS LIMITED
 RESPECTIVELY)
 (Ontario, Canada RC No. 1186693)

...Defendant

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

Suit No. 997 of 2002/V

Between

OAKWELL ENGINEERING LIMITED
(RC No. 198403368H)

... Plaintiff

And

ENERGY POWER SYSTEMS LIMITED
(FORMERLY KNOWN AS ENGINEERING
POWER SYSTEMS GROUP INC. AND
ENGINEERING POWER SYSTEMS LIMITED
RESPECTIVELY)
(Ontario, Canada RC No. 1186693)

... Defendant

JUDGMENTThe 15th day of October 2003

This action having been tried before the Honourable Justice Lai Kew Chai on 5 May 2003 to 9 May 2003, 12 May 2003 to 14 May 2003, 16 May 2003, 19 May 2003 to 22 May 2003, IT IS ADJUDGED THAT:-

1. the Defendant pays the Plaintiff the sum of US\$2,790,000.00 less the sums of US\$790,000.00 and US\$350,000.00 with interest at the rate of 8% per annum on the sum of US\$1,650,000.00 from 30 July 1999 to date of Judgment;
2. the Defendant pays damages to the Plaintiff in respect of the 6.25% Annual Sum under the Settlement Agreement in the sum of

US\$2,560,210.00 assessed as at the date of the 10 August 2000 Agreement with interest at the rate of 8% per annum on the sum of US\$2,560,210.00 from 10 August 2000 to date of Judgment;

3. costs of the Plaintiff's claim be taxed on an indemnity basis and paid by the Defendant to the Plaintiff;
4. the Counterclaim be dismissed with costs;
5. the costs of the Counterclaim be taxed on an indemnity basis where there is an overlap between issues raised in the Defence and that raised in the Counterclaim and on a standard basis in respect of the rest of the Counterclaim.

Dated this 16th day of October 2003

ASSISTANT REGISTRAR

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

Civil Appeal No. 129 of 2003/Y

Between

ENERGY POWER SYSTEMS LIMITED
(Ontario, Canada RC no. 1186693)

... Appellants

And

OAKWELL ENGINEERING LIMITED
(RC No. 198403368H)

... Respondents

In the Matter of Suit No. 997 of 2002/Y

Between

OAKWELL ENGINEERING LIMITED
(RC No. 198403368H)

... Plaintiffs

And

ENERGY POWER SYSTEMS LIMITED
(Ontario, Canada RC No. 1186693)

... Defendants

APPELLANTS' CASE

Filed the 19th day of January, 2004**RANDOLPH KHOO**
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A

APPELLANT'S CASE

Reference to record of
Appeal (RA) or Core
Bundle (CB) or
Appellants' Bundle of
Authorities (ABA)

I. THE CIRCUMSTANCES OUT OF WHICH THE APPEAL ARISES

B

A. Nature of the Appeal

1. The Appellant, Energy Power Systems Limited ("EPS"), appeals against the whole of the decision of the Honourable Justice Lai Kew Chai given on 16 October 2003 ("Judgment").

Judgment, Vol 1
RA 1-47; 1 CB 1-46

C

2. In the Judgment the Court held that the Appellant had breached a contract, being a Settlement Agreement made with the Respondent on 29 December 1998 ("Settlement Agreement"), in the following manner and awarded the Respondent payment of US\$2,790,000 (less some set-offs) and damages of US\$2,560,210 for these breaches:

Settlement
Agreement, Vol V
P1 F RA 8731-8756
2 CB at 260-266

Para 108,
Judgment, Vol 1 RA
1-47 at 46, 1 CB 45

D

- (i) That the Appellant had failed to procure financing by the end of June, 1999 to enable a company, ("Project Company") formed to construct two power plants in Andhra Pradesh, India, to do so;

Judgment, para 87,
Vol 1 RA 1 at 36; 1
CB 35

E

- (ii) That the Appellant had repudiated the Settlement Agreement and its obligation to cause the Project Company to pay the Respondent a royalty fee ("Royalty") as defined in clause 1.4 of the Settlement Agreement;

Judgment, paras
91-92, Vol 1 RA 1
at RA 38-39; 1 CB
at 37-38

Cl 1.4, Settlement
Agreement at Vol V
P1 F RA 8730 at
8737; 2 CB 267

Core Bundle ("CB") or
Appellant's Bundle of
Authorities ("ABA")

- A 3. The Court below also dismissed the Appellant's counter-claim in which it sought damages for the Respondent's breach of the Settlement Agreement.

Judgment, para
109; Vol 1 RA 1 at
46; 1 CB at 45

4. In this appeal the Appellant submits that the Court below made the following errors:

B

- (i) The Court erroneously held that in the Settlement Agreement, the Appellant had promised that it would procure the necessary financing to enable the Project Company to construct the two power plants. In fact, the Appellant had done no such thing. Rather, by its express terms, the Settlement Agreement discharges the Appellant's prior contractual undertakings to obtain such financing;

Judgment, para 77
Vol 1 RA 1 at 32; 1
CB 31

C

CI 3.2, Settlement
Agreement, Vol V
P1 F RA 8730 at
8740, 2 CB 270

D

- (ii) The Court erroneously held that the Appellant had repudiated the Settlement Agreement, including its obligation to cause the Project Company to pay the Respondent the Royalty. In fact, the Appellant had satisfied this obligation by the method prescribed in clause 1.4.2(a) of the Settlement Agreement. Even if this was not done, the Appellant could also have paid the Respondent the Royalty directly under clause 1.4.3 of the Settlement Agreement had the Respondent not wrongfully terminated the Agreement;

Judgment, para 77
Vol 1 RA 1 at 32; 1
CB 31

E

CI 1.4.2(a),
Settlement
Agreement, Vol V
P1 F RA 8730 at
8737-8738, 1 CB
267-268

CI 1.4.3 Settlement
Agreement, *ibid* at
RA 8738, 1 CB 268

- (iii) His Honour erroneously failed to hold that even if the Appellant had breached the Settlement Agreement, (which is denied), the Respondent had fully mitigated its losses by entering into contracts directly with the Project

A Company and its shareholders, that provided the Respondent with greater economic benefits than those found in the Settlement Agreement; and

(iv) His Honour erroneously failed to grant the Appellant's counter-claim at least to the extent of requiring the Respondent to disgorge the benefits it obtained from or rights it retained, if any, in the Project Company and its property after the date of the Settlement Agreement, and in breach of that contract.

Judgment, para
109 Vol 1 RA 1 at
46; 1 CB 45

B

B. Summary of the Relevant Facts

C (i) The Power Purchase Agreements

5. In 1995, the State of Andhra Pradesh, India, invited tenders for the building, owning and operation of short gestation power plants in the State to supply electricity which the State would then purchase. The Respondent, Oakwell Engineering Limited ("Oakwell" or "OEL"), successfully bid for two such projects. In July 1996, it was awarded the contracts.

Letter of Intent
(24.7.96); Vol V P1
ARA-6797 - 6799
1CB 154-156

D

6. On 31 March 1997 the Andhra Pradesh State Electricity Board ("APSEB") entered into two contracts with Oakwell permitting a company to be established in India (the future "Project Company") to build, own and operate two such plants and to sell the electricity generated from these plants to APSEB. These contracts are known as Power Purchase Agreements ("PPAs" in the plural and "PPA" in the singular).

PPA extract Vol V
P1B RA 6858-
6967; 1 CB 157-
198

E

7. The PPAs contained a number of terms and conditions that

A form the backdrop to the disputes that later arose between the parties to this appeal. These terms and conditions are as follows.

8. The two power plants to be built and operated pursuant to the PPAs were to be mounted on barges located at Kakinada in Andhra Pradesh. They were to be comprised of diesel generating units. For fuel, they were to use furnace oil. Each power plant was to generate 100 Mega Watts of electricity. Each PPA applied to one of these power plants which was defined in the relevant PPA as the "Project" (hereafter "Projects" in the case of both PPAs).

PPA Cl 1.1 (47)
(definition of
"Project"); Vol V Pt
B: RA 6858 at
6871; 1CB 167

9. APSEB agreed to purchase all the capacity and all the electricity generated by the plants from the Projects at the tariff rates specified in the PPAs for 15 years from the date the power plants became operational. Thus, the Project Company was locked into a supply agreement with a pre-determined price for 15 years. And APSEB was locked into a purchase agreement for all the electricity that could be generated by the plants (even if it was not needed) at a fixed price for this term as well.

PPA Cls 2.1, 2.2,
6.1; 2AB 297, 314;
Vol V Pt B RA 6858
at 6874 and 6891;
1 CB 169

10. The Project Company was to use "all reasonable efforts" to cause the "date of Financial Closing" to occur within 6 months of the date the PPAs were signed (i.e. by 31 September 1997) and in any case by no later than 12 months from the date the PPAs were signed (i.e. by 31 March 1998). Financial Closing was a defined term in the PPAs and referred to the signing of all financing documents and their approvals by the relevant

PPA Cls 7.1(e) Vol
V Pt B RA 6858 at
6893; 1 CB 185

Cl 1.1(23)
(Financial
Closing); Cl
1.1(24) (Financing
Documents); Vol V

Applicants' Bonds of
Authorities (ABAs)

A authorities, and the fulfilment or waiver of all conditions precedent necessary to satisfy the requirements of the Projects' lenders so as to permit the financing to be drawn upon.

Pt B RA 6858 at
6867, 1 CB 164

B 11. The power plants were to be constructed within 13 months after the PPAs were signed (i.e. by 31 April 1998) and were to be operational no later than six months following this date (i.e. by 31 October 1998). If the Project Company failed to meet these dates or otherwise defaulted in the performance of its obligations, APSEB had the right to commence procedures to terminate the PPAs.

PPA Cl 1.1 (54);
Vol V Pt B RA 6858
at 6872; 1 CB 168

Cl 9.2 (e) (i), 9.4,
9.5(b)(i) at RA
6801-6806, 1 CB
183-194

C 12. APSEB had to provide the Project Company with a number of forms of security, securing APSEB's payment obligations for the electricity it was required to purchase over the term of the PPAs. First, APSEB had to provide a revolving letter of credit issued by an Indian scheduled bank equal to one month's generating capacity from each power plant. Second, it had to open an escrow account at an Indian scheduled bank in favour of the Project Company, to be funded from payments made by APSEB's customers for the power they purchased from APSEB equal to 120% of the value of the letter of credit. Third, APSEB had to "make all reasonable efforts" to obtain from the Government of Andhra Pradesh guarantees of performance by APSEB of its obligations to purchase the power under the PPAs ("Guarantees").

PPA Cls 6.9 (letter
of credit); Vol V Pt
B RA 6858 at
6867-6868; 1 CB
179-180

PPA Cl 5.10
(Escrow account);
ibid. at RA 6868; 1
CB 180

PPA cl 7.2(f); ibid
at RA 6895; 1 CB
187

E 13. Furthermore, APSEB agreed to "make all reasonable efforts" to assist the Project Company to obtain from the Government of

PPA Cls 7.2 (g);
ibid. at RA 6895-6;
1 CB 187-188

A India the required permits allocating to the Project Company the right to obtain the fuel (furnace oil, in this case) necessary to generate electricity at a Plant Load Factor of 100% (i.e. at the plants' full generating capacity). This is known as the "Fuel Linkage". These permits were required because fuel was a restricted commodity in India. The right to purchase the fuel to operate the power plants was granted by the Central Government of India, not by the Government of Andhra Pradesh or APSEB.

14. Due to the importance of the Fuel Linkage and the Guarantees to the viability of the Projects, APSEB agreed that all performance deadlines, such as those described above, would be "extended day-for-day for each day of delay reckoned from 61st day (sic)" in the issuance of either the Fuel Linkage or the Guarantees. However, these provisions, and all other clauses of the PPAs, were subject to the over-riding right of APSEB and of the Project Company to terminate the PPAs on 30 days' notice in the "event that Financial Closing has not occurred within 12 months" of the signing of PPAs, unless Financial Closing occurs within the 30-day period. Therefore, no matter what, if the Project Company had not obtained financing for the construction of the power plants by 31 March 1998, either the Project Company or APSEB could cancel the PPAs "without liability or obligation whatsoever".

PPA Cl 7.2(f) and
g); Vol V Part B
RA 6858 at 6895-6;
1 CB 187-188

PPA cl 6.3; *Id.* at
RA 6892; 1 CB 184

PPA cl 6.3 *Id.*

15. Both Oakwell and APSEB acknowledged at the time the PPAs were signed that Oakwell intended to assign its rights and obligations under the PPAs to a company to be incorporated in India that was to build, own and operate the power plants. In

PPA Third
Preamble and Cl
15.3; Vol V Part B RA
6858 at 6893,
6925; 1 CB 182,
185, 195

Core Bundle (CB), or
Appetite Bundle of
Authorities (ABA)

A India that was to build, own and operate the power plants. In the PPAs this company was defined as the "Proposed Company". That company became the Project Company. Accordingly, subject to one exception, upon transfer to it, the Project Company, and no other company, held all the rights and obligations granted or imposed by the PPAs.

PPA; Second
Preamble/ibid at
RA 6862; 1 CB 161

B 16. The one exception is this. Without the consent of APSEB the Project Company agreed that it would not "reduce the amount paid in at Financial Closing by the Promoter Group" which was defined in the PPAs as Oakwell, "its assigns" and "other associated firms and companies".

PPA C17.1 (f) Vol
VP1 B RA 6858 at
RA 6893; 1 CB 185
PPA C1.1(49)
ibid at RA 6871; 1
CB 167

C (ii) *EPS gets Involved*

D 17. On 18 June 1997, Oakwell and EPS entered into the first of what was to become a number of contracts relating to the Projects with each subsequent contract replacing the earlier one. The first contract was a Joint-Venture Agreement in which Oakwell and EPS agreed to co-operate either by themselves or with third parties for the implementation of the PPAs. This was to be accomplished by having Oakwell and EPS subscribe to shares in a company that Oakwell had formed to carry out the PPAs. The Joint-Venture Agreement described the Project Company as the "Special Purpose Company". Oakwell or its nominees was to receive 24.25% of the share capital of this company and EPS was to receive the balance.

J.V. Agreement
(18.6.97),
Preambles (A), (B),
(E) and C12: Vol V,
P1B, RA 7070:
7880; 1 CB 199,
201

C11.1: ibid at RA
7072; 1 CB 200

C12.6 of the JV
Agreement: ibid at
RA 7073; 1 CB 201

E 18. Under the Joint-Venture Agreement, both Oakwell and EPS were required to do a number of things. Oakwell was to transfer

J.V. Agreement,
Chs 3.2, 3.3, 4.1 (B),
(D), (A) Vol V, P1 B,

- A were required to do a number of things. Oakwell was to transfer unconditionally all of its rights, interests and obligations under the PPAs to the Project Company and EPS was required to make certain payments to Oakwell. EPS was to pay Oakwell approximately US\$1,656,329.00 within 14 days of execution of the Joint-Venture Agreement. And EPS was to pay Oakwell US\$5,424,500.00 within 30 days after Financial Closing was obtained for the construction of the two power plants:
- B

RA 7070 at 7074; 1
CB 202

CI 4.1(f) and (g);
Aid 1 CB 202

19. EPS also was required to "undertake" to "cause" the documents and agreements necessary to finance the construction of the power plants to be executed within 120 days of the date of the Joint-Venture Agreement and to lend or cause to be lent to the Project Company within 90 days of the agreement the approximate sum of US\$177 million, being 85% of the budget of approximately US\$210 million, for the development of the Projects. Accordingly, in the Joint-Venture Agreement EPS had expressly warranted that it would provide the financing, from either its own sources or through third parties, to enable the Project Company to pay for the construction of the power plants and otherwise develop the Projects.
- C
- D

J.V. Agreement,
Cis 1.1
(Interpretation), and
A2: Aid at RA
7072 and 7075; 1
CB 200 and 203

CI 5.1(f); Aid at RA
7075; 1 CB 203

20. Around July 1997 the Project Company was formed. An application was made for it to be a 100% foreign owned corporation under the India Companies Act, 1956. At that time it was known as EPS Oakwell Power Ltd. ("EOPL"). In September 1997 the Government of India gave permission for Oakwell "and its associate/nominees" to subscribe to 100% of the share capital in EOPL, thereby permitting the Project Company to be 100% foreign owned. In October 1997 the
- E

OEL letter
informing APSEB
of incorporation of
Project Company,
dated 29.7.97; Vol
VP1B RA 7172;

Approval of
29.7.97; Vol VP1C
RA 7290, 7361

in Appendix (A) or
Core Bundle (CB) or
Appendix Bundle of
Authorities (ABA)

Recognition
(27.10.97): Vol V P1
VRA 7412

OEL Letter
(23.10.97): Vol V
P1 C RA 7403; 1
CB 237

A Company to be 100% foreign owned. In October 1997 the Government of Andhra Pradesh recognised EOPL as the generating company for the Project. Also in October of that year, Oakwell executed a letter confirming that EPS is Oakwell's "Nominee/Associate" for taking up equity in EOPL.

B 21. On 17 October 1997, Oakwell and EPS replaced the Joint-Venture Agreement with two new agreements: a Co-operation Agreement and a Shareholders' Agreement.

Co-operation
Agreement: Vol V
P1 C RA 7374 -
7384; 1 CB 217-
224 &
Shareholders'
Agreement: *Ibid* at
RA 7385-7398; CB
225-236

C 22. The Co-operation Agreement expressly superseded the Joint-Venture Agreement and was deemed to have been effective as of 18 June 1997, the date of the Joint-Venture Agreement. The Co-operation Agreement recognised that the PPAs were in the process of being assigned to EOPL. Accordingly, Oakwell and EPS agreed to subscribe to shares in EOPL, with EPS holding 87.5% of the share capital and Oakwell holding the remaining 12.5%.

Co-operation
Agreement,
Preamble, C17.3;
Ibid at RA 7375,
7380; 1 CB 217,
222

Co-operation
Agreement, C13.1;
Ibid at RA 7377; 1
CB 219
C12.5; *Ibid* at RA
7377; 1 CB 219

D 23. In the Co-operation Agreement, Oakwell acknowledged that EPS had paid it US\$1,656,329. EPS undertook to pay Oakwell US\$5,424,500 within 30 days after the financing and related approvals were obtained to permit the construction of the two power plants. And again, EPS undertook to obtain such financing and related approvals. However, the terms of EPS's undertaking to obtain financing in the Co-operation Agreement were different from the terms in the Joint-Venture Agreement.

Co-operation
Agreement, C14.1;
Vol V P1 C RA
7374 at 7379; 1
CB 221

C14.5; *Ibid* at RA
7378; 1 CB 220

E 24. In the Joint-Venture Agreement, EPS had undertaken itself to lend or to cause third parties to lend the funds necessary to

J-V Agreement C1
1.1 "Financing
Documents"; C8

Core Bundle (CB) or
Appellants' Bundle of
Authorities (ABA)

- A lend or to cause third parties to lend the funds necessary to finance the Project. EPS had also agreed to pay fixed monetary penalties if it failed to finance or procure the financing on time. In the Co-operation Agreement, however, EPS undertook only to procure financing and then only on a non-recourse basis. And EPS agreed only to indemnify Oakwell for any liabilities it incurred under the PPAs if it (EPS) failed to obtain the financing on time. Nevertheless, in both the Joint-Venture Agreement and the Co-operation Agreement EPS agreed that its undertaking to obtain or procure financing was a continuing undertaking, notwithstanding its failure to obtain or procure such financing within the prescribed time.
- B
- C

4.2, 5.1(b)(b); Vol V
P1B RA 7070 p1
RA 7072, 7075; 1
CB 200, 203

c.1, Co-operation
Agreement, C1 1.1
"Financial Closure"
and "Financing
Documents", 4.4,
4.5 (Indemnity); Vol
VP1 C RA 7376,
7378, 1 CB 218,
220

C1.4.2 JV
Agreement; Vol V
P1B RA 7075; 1
CB 203

C1.4.5 Co-
Operation
Agreement, Vol V
P1C RA 7378; 1
CB 220

25. The Shareholders' Agreement, naturally, was an agreement between Oakwell and EPS to regulate their respective interests in EOPL and to limit EPS' powers as majority shareholder in the manner defined in the agreement. However the Shareholders' Agreement did another thing too. In it EPS undertook to lend or cause to be lent to EOPL approximately US\$177 million for the construction of the two power plants and to procure financing for the Projects. EPS' undertakings related to financing were to be delayed by any delay attributable to delays in obtaining both a fuel linkage for the Projects and the Guarantees.
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- E

Shareholders'
Agreement, C1 5.1;
Vol V P1 C RA
7393; 1 CB 231

(iii) *The Projects Cannot Get Financing*

26. On 21 July 1997, the Government of India granted approval for a fuel linkage to the Project for furnace oil, the fuel required to operate the power plants' diesel generators. To obtain this linkage, the Projects had to be financed within 6 months (i.e. by

Fuel Linkage
(21.7.97); Vol VP1
B, RA 7164-7165;
1 CB 209-210

Ibid at RA 7162
and 7164 para (9)

of Appeal (RA) or
Core Bundle (CB) or
Appellate's Bundle of
Authorities (ABA)

of Fuel Linkage
Letter: 1 CB 209

CI 6.1 PPAs (15
year term): Vol V Pt
B RA 6891; 1 CB
183
Referred to in para
(f) of the Fuel
Linkage letter: Vol
V, Pt B, RA 7164, 1
CB 209

A 21 January 1998).

27. Despite the 15 year term of the PPAs, the fuel linkage granted by the Government of India was limited to 7 years and to 80% of the Plant Load Factor (i.e. to 80% of the generating capacity of the power plant). By limiting the fuel linkage to a Plant Load Factor of 80% the power plants could only produce 160 MW of electricity, not the 200 MW they were supposed to produce (i.e. 80% of 200 MW=160 MW). And by limiting the term of the fuel linkage to 7 years, the Projects were only guaranteed to have revenue, against which the financing would be secured, for this period. Based on the tariffs prescribed in the PPAs, the revenue from the electricity generated by the power plants operating at 80% capacity for 7 years would not be sufficient to repay the approximately US\$177 million in loans that were required to get the Project operational. Accordingly the fuel linkage that was granted by the Indian Government prevented the Projects from being financed.

- D 28. Oakwell knew this. Immediately after the fuel linkage was granted, Oakwell wrote to APSEB and stated that it was "shocked and surprised" that such an allocation was given. In this letter, Oakwell also stated that this allocation "undermines project viability". Oakwell further claimed that such a linkage was inconsistent with the terms of the PPAs. And in a letter of 25 August 1997 to APSEB, Oakwell reiterated that a fuel linkage on such terms "created serious complications and objections from lenders".

Letter (28.7.97): Vol
V Pt B RA 7170-
7171; 1 CB 211-
212

Letter (25.8.97):
Vol V Pt B RA
7211; 1 CB 213 at
214

- E 29. The Government of India never did grant a furnace oil fuel linkage for 15 years at a 100% Plant Load Factor. In addition,

Core Bundle (CB) or
Applicants' Bundle of
Authorities (ABA)

- A to not receiving an adequate fuel linkage, the Project Company also did not receive in a timely fashion, or in some cases at all, the security that it or its lenders were entitled to receive under the PPAs. Without this security, the Projects could not be financed either. The Government of Andhra Pradesh, for example, did not deliver the Guarantees to the Project Company until 2 December 1997. APSEB refused to provide acceptable terms for the escrow account.
- B

Letter (2.32.97):
Vol V, Pt C, RA
7594
CMS Letter
(16.3.98): Vol V Pt
D RA 7917-7918, 1
CB 239-240
Guarantees: 3 AB
832, 837.
APSEB letter
(31.3.98): Abid at
RA 7966

30. In accordance with its undertakings in the Co-operation and Shareholders' Agreements, EPS attempted to obtain financing for the Projects. It arranged a lenders' syndicate involving export credits from Canada's and France's export credit agencies and underwritten by a Canadian investment house. And by early 1998, a major international power generating company, CMS Generation Co. of Michigan ("CMS") had expressed interest in investing in the Projects. CMS is a public company and is listed on the New York Stock Exchange. It has over US\$10 billion in assets and operates power plants in 18 countries, including Andhra Pradesh. CMS was not prepared to make a financial commitment, however, whilst the viability of the Projects was in question. On 20 March 1998, EPS received correspondence from SNC-Lavalin Equity, a Canadian investment entity, confirming their interest in investing in the Projects.
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- E

HB Capital letter
(3.3.98), Vol V, Pt
D RA 7902-7904;
Taurus Capital
Markets Ltd letter
(9.3.98), Vol V, Pt
D RA 7880-7883
Letter from CMS
Generation to EPS
(4.2.98), Vol V, Pt
D RA 7860, 1 CB
238

Letter from SNC
(20.3.98), Vol V, Pt
D RA 7928 1 CB
241

31. On 16 March 1998, CMS identified the major issues that needed to be resolved before the Projects could be financed. At the top of the list was a "bankable" escrow agreement from APSEB and amendments to the PPAs changing the fuel and the power plants' technology to avoid the problem with the

Letter (16.3.98):
Vol V Pt D RA
7917-7918; 1 CB
239-240

A truncated furnace oil fuel linkage that had been allotted by the Indian Government.

32. Between December 1997 to May 1998, the Project Company applied to the Government of Andhra Pradesh and APSEB to change the generating technology from diesel generators to combined cycle gas turbines ("CCGT") and to extend the gestation period from 13 months to 16 months. The change in generating technology was required to enable the power plants to operate with different fuels and to operate even if diesel fuel was not available, as would happen, for example, were the fuel linkage not renewed after seven years. The change in gestation period was required to enable the revised Projects to be completed. To improve the likelihood that these amendments would be approved, the Project Company agreed to reduce the tariff that ABSEB would pay for the electricity under the PPAs.

33. Much to the surprise and consternation of EPS and the Project Company, then, on 6 May 1998, APSEB sent the Project Company a letter notifying it that the Projects had to be financed within two weeks, by 20 May 1998. APSEB advised that should the Project Company fail to obtain financing by this date, APSEB would consider this failure a serious breach of the PPAs and APSEB could elect to terminate the PPAs, presumably under Article 6.3 of the PPAs. ABSEB demanded that the Project Company confirm within 7 days that it would be able to finance the Projects by this date, failing which, "action deemed fit will be taken by the Board in accordance with the terms of [the PPAs]."

For instance, see
Letters (17.3.98):
Vol V P1 D RA
7920; (29.3.98):
Vol V, P1 D, RA
7951-7952, 1 CB
242-243,
(14.5.98) Vol V P1
D, RA 8048-8049

Letter dated 6.5.98:
Vol V, P1 D RA
8024-8025; 1 CB
244-245; re-typed.
copy at Vol V P1 D
RA 8035, 1 CB 248

Core Bundle ("CB") or
Appellate Bundle of
Authorities ("ABA")

A 34. Despite the 6 May 1998 letter from APSEB, the Government of Andhra Pradesh then informed the Project Company on 22 May 1998 that its proposal to change the technology had been favourably received.

Letter (22.5.98); 4
AB-1465 Vol V-P1 D
RA 8050, 1 CB 247

B 35. In the same 22 May 1998 letter, the Government of Andhra Pradesh requested APSEB to make the necessary amendments in the PPAs to permit the Project Company to change the technology of its power plants from diesel fuel to CCGT, to reduce the tariff and revise the gestation period, and to "take the necessary action to obtain the written agreement from the company".

Letter (22.5.98);
Vol V-P1 D RA
8050, 1 CB 247

C 36. Naturally the Projects could not be financed until new PPAs were agreed, as is evident from CMS's letter of 4 February 1998 referred to earlier.

See para 30 above.

1 CB 238

D 37. Two months later, on 16 July 1998, APSEB finally provided the Project Company with proposed draft amendments to the PPAs incorporating EOPL by name as the Project Company and reflecting the change in power plant technology. But APSEB wanted to amend the PPAs in another way as well. It wanted to change the deadlines by which the Project Company had to perform certain activities. For instance, APSEB proposed changing the completion date for Financial Closing to occur from "within six (6) months of the date of signing of this Agreement ... and in any case ... not later than twelve (12) months from the date of signing of this Agreement" to "within six (6) months from 31.3.97...and in any case... not later than twelve (12) months from 31.3.97". Far from extending the

Letter dated
16.7.98; 5 AB
1533, Vol V-P1 E
RA 8123, 1 CB 248
Draft Amendments:
1534-1548; *Ibid.*, at
RA 8124-8132, 1
CB 249-257

Proposed
amendments to art.
6.3: *ibid.* at RA
8130, 1 CB 255

A gestation period, as sought by the Project Company, APSEB proposed to reduce it then.

38. Had the changes proposed by APSEB been accepted by the Project Company, the company would have been required to have financed the Projects by 31 March 1998, and to have completed the Projects by 31 July 1998. Consequently, under the terms of the PPAs proposed by APSEB, the Project Company would have been required to have completed its financing 157 days before the date on which APSEB provided the draft PPAs to the Project Company (which was on 16 July 1998) and to have built and completed the power plants within

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15 days after this date. To have met the completion deadline, the Project Company would have been required to have delivered to the fabrication yard the major components of the power generating equipment months before the specifications for these components had been determined in the amended PPAs. Thus, APSEB was proposing that the Project Company agree to an impossibility: to have already arranged for the financing and construction of power plants whose specifications were not yet agreed. APSEB, in other words, wanted the Project Company to agree to PPAs that would have been in default from the moment they were signed and from that moment to have been subject to cancellation upon a mere 30-day notice.

39. On 1 July 1998, EPS and CMS executed a Memorandum of Agreement for co-operation in evaluating barge-mounted power projects on a worldwide basis, and to "pursue jointly the development and ownership of such projects".

Proposed
amendments: Vol
V, PLE, RA 8132-
8138, 1 CB 249-
257

Vol V, PLE RA
8072-8090

Coe Bundle (CB) or
Applicants' Bundle of
Authorities (ABA)

- A 40. On 14 August 1998, APSEB accepted that further amendments to the PPAs were required but rejected making any changes to the financing and other deadlines in the existing PPAs, which were already past due. In that letter, however, APSEB advised the Project Company that due to changes to the liquid fuel policy of the Government of India that it was "perhaps" now open to the Project Company to import furnace oil under an "actual user licence".
- B

Letter (14.8.98); 5
AB 1615-1618, Vol
V P1 E RA 8205-
8208

ibid., at RA 8205

(iv) *Oakwell Terminates the October 1997 Agreements*

- C 41. On 7 August 1998, Oakwell terminated the Co-operation and Shareholders' Agreements, or at least purported to do so. Its stated reason for serving its notice of termination was that EPS had failed to procure financing for the Projects in the time available for doing so. EPS strongly resisted the purported termination, setting out its position a few days later. EPS' position, of course, was that delays in the GOAP Guarantee, problems with the fuel linkage, a "completely uncooperative and sometimes malignant State Electricity Board" and other factors, all played a part in the delays of the Project. EPS also pointed out a few of Oakwell's material misrepresentations which EPS had relied on, to its detriment.
- D

Oakwell's letter
(7.8.98); Vol V, P1
E RA 8186-8189

EPS's letter
(11.8.98); Vol V P1
E, RA 8194-8197

ibid., at RA 8194-
8197

- E 42. Notwithstanding EPS' letter, Oakwell commenced arbitration proceedings before the Singapore International Arbitration Centre on 2 September 1998 seeking damages, including amounts it claimed were owing under the Co-operation and Shareholders' Agreements. EPS again denied all of Oakwell's claims that it (EPS) had breached these agreements and asserted

Notice of
Arbitration dated
6.9.98, Vol V, P1 E
RA 8246-8252

Response: EPS's
letter dated 14.9.98
(Vol V, P1 E RA
8256-8257); EPS'

Case Document 1-10
Appellate Bundle of
Authorities (ABA)

A that instead Oakwell was in repudiatory breach. The damages EPS sought from Oakwell, included reimbursement for all amounts it had paid to date in relation to the Projects.

Solicitors' letter
dated 19.9.98: Vol
V, P1 E, RA 8261-
8262

(v) *The Settlement Agreement is Negotiated*

B 43. Between 21 September and 29 December 1998 Oakwell and EPS engaged in settlement discussions in an attempt to resolve their disputes. These discussions involved many proposals and counter-proposals. They began with EPS offering to "transfer" its 87.5% interest in the Project Company to Oakwell on certain financial terms and concluded with Oakwell "relinquishing" its 12.5% interest to EPS on other terms. These negotiations and the various draft agreements resulting from them leading to the Settlement Agreement took up over 300 pages of the Agreed Bundle at trial.

1st Settlement
Offer, dated
21.9.98: 5 AB
1675; Vol V, P1 E
RA 8265-8267

ibid, at RA 8266
Vol V, P1 E RA 8265-
67; 8271-8288, 8299-
8324; 8326-8368,
8371-8373, 8376-
8390, 8396, 8410-
8414, Vol V, P1 F RA
8421-8438, 8440-
8443, 8449-
8452, 8456-8461,
8463-8468, 8494-
8495, 8504-8521,
8527-8529, 8541-
8549, 8551-8576,
8629-8729 (note not
included in CB)

D 44. Therefore, the Settlement Agreement was a heavily negotiated document. Indeed, it says so itself. Clause 18, under the heading "Construction and Interpretation", states that the "terms, conditions, clauses and provisions of this Settlement Agreement are the product of joint negotiation and shall not be constructed as having been authored by one party rather than another".

Settlement
Agreement: 6 AB
2140, at 2156 Vol
V, P1 F RA 8730 at
8746, 2 CB 276

E 45. The terms and conditions of the Settlement Agreement that are relevant to the current litigation are as follows.

46. Pursuant to clauses 1.1, 1.1.1 and 1.1.3 (b) of the Settlement Agreement, EPS was required to issue and deliver to Oakwell 1,850,000 shares of EPS that would be freely tradable after 6

Settlement
Agreement
(29.12.98), Vol V,
P1 F, RA 8730 at
8733-8734, 2 CB
263-264

Core Bundle (CB) or
Appellate's Bundle of
Authorities (ABA)

A months. Issue and delivery of these shares were agreed to be in lieu of payment by EPS to Oakwell of US\$3,015,000.

47. Also pursuant to clause 1.1.1, Oakwell agreed to the "relinquishment" to EPS of all of its (Oakwell's) "rights, title and interest (if any) in EOPL and the PPAs, to the extent permissible under Indian laws." In furtherance of Oakwell's obligation under this clause, in clause 1.1.2 it agreed to discuss with EPS and jointly to take all necessary steps to resolve any issues which may arise pertaining to the relinquishment to EPS of all such rights, title and interest. In an email discussing the press release to mark the signing of the Settlement Agreement, Oakwell's Mr Eric Leow, whose testimony on the background to the agreement was accepted, wrote:

Ibid. at RA 8733-8734, 2 CB 263-264

B. C. We do not wish to be announced as being bought out by EPS for a price of US\$3 million. We do not wish to be seen as already out of the project completely (although legally it is) ...

Ibid. at RA 8734, 2 CB 264

D 48. Under clause 1.3.1, EPS agreed to pay Oakwell the following:

a net sum of US\$2,790,000 within 30 days from the date of the first draw-down of the funds by EPS and/or EOPL (including its successors and/or nominees) after the Financial Closure of the Project, failing which the net sum of US\$2,790,000 shall become due and owing to OEL, and shall be payable by EPS to OEL, forthwith.

Email (24.12.98) at Vol V Pt F RA 8657-28, 1 CB 258-259, at 258; Judgment, paras 39-40, Vol I RA 1 at 17-18, 1 CB 16-17

Cl 1.3.1 Settlement Agreement (29.12.98); Vol V Pt F at RA 8737, 2 CB 267

E 49. Under clause 1.4.1 EPS agreed to do the following:

with the assistance of OEL on OEL's best efforts basis, cause EOPL to pay to OEL an annual sum equal to 6.25% of the actual Cash Flow for Foreign Repatriation as defined by the Financial Analysis Model (annexed to the agreement as "Appendix A") for each of the first five (5) years after the Commercial Operation Date of the Project...

Ibid. at RA 8737, 2 CB 267

corrupt (NAC) or
Core Bundle (CB) or
Appellate Bundle of
Authorities (ABA)

A 50. EPS's obligation under clause 1.4.1, described in the preceding paragraph, was, pursuant to clause 1.4.2, to be deemed to be satisfied in one of two ways. EPS could either (a) cause EOPL to issue and deliver to Oakwell shares with the following characteristics: 1000 cumulative redeemable preference shares with a par value of 100 Indian Rupees each, at a price of 100

CI 1.4.1: BM, at RA
8737, 2 CB 267
CI 1.4.2: BM, at RA
8737-8738; 2 CB
267-268

B Indian Rupees each, that entitle Oakwell to receive an aggregate annual dividend equal to the 6.25% Royalty of the actual Cash Flow available for Foreign Repatriation for each of the first 5 years after the commercial operation date of the Projects in US Dollars, within 75 days of the last month of the financial year of EOPL; or (b) cause EOPL to pay to Oakwell "as technical and

C consultancy fees" an annual sum equal to the 6.25% cash flow described above.

51. If the parties were unable to achieve either of the options above within 60 days of the signing of the Settlement Agreement, and no extension of time has been agreed, then EPS or the Project Company was to pay Oakwell the Royalty for each of the first 5 years after the Commercial Operation Date of the Project.

Settlement
Agreement, CI
1.4.3: BM, RA
8738; 2 CB 268

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52. Importantly, Appendix A to the Settlement Agreement defined the Cash Flow available for Foreign Repatriation to mean "the actual cash available for repatriation based on actual conditions during the actual operation" of the Projects at the end of each of EOPL's financial years. By virtue of the emphasis on the "actual" cash conditions and the "actual" operation of the Projects, Oakwell accepted that should the Project Company not actually have any cash flow for foreign repatriation, it would not be entitled to a royalty payment.

BM, at RA 8748; 2
CB 278

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- A 53. In addition to relinquishing its right to common shares and all its other rights in EOPL, under clause 2.1.1 Oakwell agreed to issue "irrevocable" instructions confirming to the Board of Directors of EOPL that EPS are the "associates and/or nominees" of Oakwell in terms of the approval of the Government of India's Foreign Investment Promotion Board. And under clause 2.1.2 Oakwell agreed to issue "irrevocable" instructions confirming to EOPL and its Board of Directors that Oakwell "has no objections to EOPL issuing shares to EPS at any time and from time to time". This clause confirmed that EPS could capitalise EOPL however it saw fit, including by issuing additional equity in the company, and that it was acting as Oakwell's associate and nominee in terms of Indian foreign investment legislation in doing so.
- B
- C
54. Finally, in clause 2.2.1, Oakwell agreed that if "necessary" and if "required by EOPL" it would jointly discuss with EPS and take the necessary steps to facilitate the subscription by Oakwell of any shares needed in order to comply with Indian law, "on terms to be mutually agreed upon in writing between EPS and Oakwell". This clause confirmed that should Indian law require Oakwell to retain any equity in EOPL, that Oakwell would retain or acquire such equity *but only on terms agreed by EPS*.
- D
- E 55. Pursuant to clause 3.1, both parties agreed that the Settlement Agreement constituted "the full, final and complete agreement and resolution of all disputes, differences and all claims of the parties". Furthermore, pursuant to clause 3.2 the parties agreed and confirmed that upon execution of the Settlement Agreement, the Co-operation Agreement and the Shareholders'

CI 2.1.1: Vol V, Pt F
FRA 8730 at 8739;
2 CB 269

Id. at 2 CB 269

Id., 2 CB 269

CI 3.1: Vol V, Pt F,
FRA 8730 at 8740; 2
CB 270

CI 3.2: *Id.*, 2 CB
270

A Agreement of 17 October 1997 "stand terminated" and the parties "unconditionally" released and discharged each other from "all obligations, rights and conditions contained in and arising under or in connection with the Agreements." Only the definitions of terms found in the 17 October 1997 agreements continued into the Settlement Agreement, and then only if the Settlement Agreement did not itself define them (clause 18.2 of the Settlement Agreement). Clause 3.2 confirmed that any obligations EPS owed Oakwell in the Co-operation Agreement or the Shareholders' Agreement had been discharged and released. Accordingly, EPS's obligations in those agreements to finance or procure financing for the Projects were discharged.

CI 18.2; Rld at RA
8748, 2 CB 276

C 56. One of the notable features of the Settlement Agreement is what it did *not* contain. It did not contain any promise by EPS that it would finance or procure financing for Projects (i.e. obtain Financial Closure). Consequently, in the Settlement Agreement, EPS was not guaranteeing Oakwell that the Projects would ever be developed. This aspect of the Settlement Agreement thus stands in contrast to the Joint-Venture Agreement, the Co-operation Agreement and the Shareholders' Agreement, each of which imposed on EPS *both* the obligation to pay Oakwell a sum of money *and* the concomitant obligation to finance or obtain such financing.

Cf. CA 4.5 and 8.1
of the Co-
Operation
Agreement and the
Shareholders'
Agreement
respectively: CI 4.5
Vol V, Pt C, RA
7374 at 7378, 1 CB
220; CI 8.1: Vol V
Pt C RA 7385 at
7393, 1 CB 231
respectively

D E 57. The differences between the Settlement Agreement, on the one hand, and all the other agreements between the parties, on the other, are commercially sensible as well as deliberate. When the Settlement Agreement was negotiated, unlike when the other agreements were, there were no valid PPAs for the

Core Bundle (CB) or
Applicants' Bundle of
Authorities (ABA)

Letter dated 6.5.98:
Vol V, P1D RA
8024-8025, 1 CB
244-245;
typewritten copy of
Vol V P1D RA
8035, 1 CB 246

A Projects, and APSEB, in its letter of 6 May 1998, had noted the Project Company would be in 'serious breach' of the PPAs if Financial Closure was not obtained by 20 May 98. APSEB also advised the Project Company that it could elect to terminate the PPAs if Financial Closure was not obtained by this time. APSEB further advised (under its letter of 14 August 1998) the

B Project Company that it was under a GOAP order to change the terms governing equipment technology, gestation period and tariff in the PPAs, yet it also told the Project Company that it would not negotiate amendments to the PPAs extending the deadlines for financing, purchasing equipment, commencing construction and commercial operation of the power plants.

Letter (14.8.98): 5
AB 1615-1618, Vol
V P1E RA 8205
Letter containing
GOAP order:
(22.5.98): 4 AB
1465 Vol V P1D
RA 8050, 1 CB 247

C Moreover, APSEB's notices were issued and correspondence written despite APSEB's own failures to provide the Project Company with documentation that was acceptable to lenders and that would allow the Projects to be financed (such as appropriately amended PPAs).

D 58. Therefore, the present and future viability of the Projects was in doubt at the time the Settlement Agreement was negotiated but not when the other agreements were. For this reason it would not have been commercially sensible for EPS, a public company, to have warranted in the Settlement Agreement that it would finance or obtain financing for the Projects or that the Project Company would be able to earn any cash flow that could be repatriated.

E 59. Therefore, in the Settlement Agreement, and in exchange for giving up all its rights, title and interest in the PPAs and in a company developing power plant projects that might never reach fruition, Oakwell received US\$3.015 million worth of

Receipt of
shares: C13.1.1.
Settlement

- A EPS's shares. Oakwell also obtained the right to receive money if and when the Project achieved Financial Closure and the right to a percentage of the cash flow of the Project Company that could be paid to foreigners. But there was no guarantee in the Settlement Agreement that financing would be obtained or that the Project Company would have any cash flow or that if it had any cash flow, that it could be paid to foreigners. Only if EPS actually secured such financing in a reasonable time and only if the Project Company actually had cash flow from its actual operations that could be repatriated to foreigners under Indian law would Oakwell actually receive any benefits from these components of the Settlement Agreement. Thus, Oakwell was not guaranteed to receive any payments from EPS or the Project Company beyond the initial US\$3.015 million sum, to be paid in the form of shares in EPS.
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- C

Settlement
 Agreement, Vol V,
 Pt F, RA 8730 at
 8733, 2 CB 263;
 right to payment
 upon Financial
 Closure, cl 1.3.1;
Ibid., at 8737, 2 CB
 287

See Appendix A,
 Settlement
 Agreement, Vol V,
 Pt F, RA 8730 at
 8748, 2 CB 278

(vi) *EPS complies with the Settlement Agreement but the Projects Still Cannot get Financing*

- D 60. In the present litigation, Oakwell denied that EPS² had fulfilled its obligations in respect of the 6.25% Royalty. Oakwell also contended that EPS breached the Settlement Agreement by failing to use reasonable diligence to procure Financial Closure within a reasonable time. However EPS fulfilled the 6.25% Royalty by one of the methods prescribed in the Settlement Agreement and was never able to obtain project financing in a reasonable time, despite its reasonable diligence.
- E

Re-Amended Reply
 & Defence to
 Counterclaim, para
 5(b); Vol II RA 161-
 163, 1 CB 75-81

Re-Re-Re-
 Amended
 Statement of Claim
 ("STC"), para 24;
 Vol II RA 67 at 70,
 1 CB 70

61. First EPS fulfilled the Royalty obligation by causing EOPL to issue preference shares that satisfied the terms for the Royalty described in clause 1.4.2(a) of the Settlement Agreement.

Cl 1.4.2(a), Vol V,
 Pt F RA 8737-
 8738, 2 CB 267-
 268

- A 62. On 13 February 1999, the Board of Directors of EOPL resolved to issue and allot to Oakwell shares with the following characteristics: 1000 redeemable preference shares with a par value of 100 Indian Rupees carrying an "aggregate annual dividend equal to 6.25% of the net cash flow with right to foreign repatriation for each of the first 5 years after commercial operation date of the Project, payable in US dollars within 75 days of the last month of each financial year of EOPL". These are precisely the characteristics found in clause 1.4.2 (a) of the Settlement Agreement (see paragraph 50 above). Also on 13 February 1999, the Board of Directors of EOPL wrote to Oakwell informing it of the allotment of shares and asking it to remit 100,000 Indian Rupees (number of shares times par value) to pay for the shares. Oakwell never tendered this sum, however.

Resolution of
EOPL (13.2.99):
Vol V Pl G, RA
8876-8879, 2 CB
307-307A

Cl 1.4.2(a)
Settlement
Agreement: Vol V,
Pl F, RA 8730 at
8737, 2 CB 267
Letter to OEL
(13.2.99): Vol V Pl
G, RA 8880, 2 CB
308

- D. 63. Second, EPS attempted to obtain from APSEB PPAs with terms that would permit the Projects to be financed. Obtaining an amended PPA with terms acceptable to the lenders was key to satisfying lender requirements; and obtaining financing for the Projects. Oakwell was well aware of the importance of procuring these amendments, and of EPS' efforts in this regard.

Eric Leow e-mails
dated 1.2.99,
2.2.99 & 7.2.99:
Vol V Pl G RA
8860-8861; 2 CB
299-300; Vol V Pl
G RA 8865-8868, 2
CB 301-302; and
Vol V Pl G RA
8874-8875, 2 CB
305-306

- E 64. On 15 February 1999, EPS' United States' securities counsel, Pollet Law of Los Angeles, advised APSEB about the changes that had to be made to the PPAs to permit the Projects to be financed. Pollet Law informed APSEB that the "[l]enders, underwriters and prospective investors (and their counsel) have repeatedly stated their concern that, based on certain language in the PPAs either (i) the PPAs will expire under their own terms, or (ii) that the Board might declare a default by EOPL.

Pollet Law Letter
(15.2.99): Vol V Pl
G RA 8888-8889, 2
CB 316-317

Asd, at RA 8888, 2
CB 316

- A and terminate the agreements." Secondly, Pollet Law informed APSEB that a solicitor's advice would certainly be required to opine to the lenders that the PPAs were "in force and without an existing default". Such an opinion was a condition of financing. Pollet Law told APSEB that such an opinion could not be rendered, based on the current state of the PPAs. They accordingly advised APSEB that "as a practical matter, none of the lenders will be willing to finance the projects if there is a chance that either the Board could declare a default or that the PPAs expire under their terms."
- B

 Ibid, at RA 8889, 2
 CB 317

 Ibid, at RA 8889, 2
 CB 317

65. Pollet Law described for APSEB the changes that were required to the PPAs in order to enable the Projects to be financed. They told APSEB that it was "imperative" that the modified PPAs not require that the completion date for the Projects be 16 months from 31 March 1997 (a date that had already expired) and stated that "the right of termination [found in clause 6.3 of the modified PPAs] must arise only "in the event that Financial Closing has not occurred 12 months after the signing of [the Modified PPAs]" and must be subject to the tolling provisions otherwise provided in the PPAs. Only if these changes were made, Pollet Law advised, could they render the opinion they were required to give to the lenders.
- C
- D

 Vol V, P1 G RA
 8889, 2 CB 317
 Completion date
 amendments, art
 1.1.54; See Draft
 Amendments: Vol
 V P1 E RA 8123 at
 8128, 1 CB 248
 "Tolling provisions":
 art 7.2(f) and
 7.2(g), PPAs: Vol V
 P1 B RA 6858 at
 6855; 1 CB 187

- E 66. Pollet Law's letter should not have been necessary. APSEB ostensibly wanted the Projects to be foreign financed, developed and owned. This was the original idea when the Board sought bids for such projects in 1995, after all. It is obvious and beyond debate that project lenders will not lend US\$177 million, without recourse, to a project that is in default.

 APSEB
 correspondence on
 PPA amendments:
 APSEB Letter
 dated 30.1.99; Vol
 V, P1 G RA 8848 -
 8849; Draft
 amendments
 (proposed by EPS);
 Vol V P1 G RA
 9025-9033, 2 CB
 324-332; EOPL

A Therefore, the amendments sought in Pollet Law's letter should have been granted by APSEB naturally and at once. But APSEB did not do so. It would not change its position. It would only agree to amendments that by their own terms put the PPAs in immediate default and subject to termination by the Board with a mere 30-day notice.

Letter (5.6.99) Vol V
P1 G, RA 9034-
9035

B 67. The Project Company sought a change in fuel from furnace oil to Ultra Light Furnace Oil (ULFO) under their letter of 22 February 1999 to the Government of India. In response, the Ministry advised that the request had to be made by the Government of Andhra Pradesh, not the Project Company. The Project Company then wrote to the Government of Andhra Pradesh requesting that they make the necessary application to the Government of India. But the Government of Andhra Pradesh never did this. EPS' representatives were forced to travel to Delhi and seek their own response for KEOPL from the Government of India, Ministry of Power. The Government of India informed them that permission to use the fuel in question had been publicly granted since October 1998. The inescapable conclusion is that EPS was deliberately being given the run-around by the authorities.

Letter to GOI
(22.2.99); Vol V P1
G RA 8884-8886, 2
CB 318-319

C The Project Company then wrote to the Government of Andhra Pradesh requesting that they make the necessary application to the Government of India. But the Government of Andhra Pradesh never did this. EPS' representatives were forced to travel to Delhi and seek their own response for KEOPL from the Government of India, Ministry of Power. The Government of India informed them that permission to use the fuel in question had been publicly granted since October 1998. The inescapable conclusion is that EPS was deliberately being given the run-around by the authorities.

EOPL Letter
(24.2.99); Vol V P1
G RA 8907-8908; 2
CB 321-322

D The Project Company then wrote to the Government of Andhra Pradesh requesting that they make the necessary application to the Government of India. But the Government of Andhra Pradesh never did this. EPS' representatives were forced to travel to Delhi and seek their own response for KEOPL from the Government of India, Ministry of Power. The Government of India informed them that permission to use the fuel in question had been publicly granted since October 1998. The inescapable conclusion is that EPS was deliberately being given the run-around by the authorities.

GOI letter
(13.3.99); Vol V P1
G RA 8947, 2 CB
323; and MOP
resolution,
15.10.98 at Vol V
P1 K at RA 10504-
10505, 2 CB 442-
443

E 68. EOPL, under the management of EPS, expended significant time, energy, effort and expense in attempting to obtain the necessary amendments to the PPAs. EOPL's representatives, at the constant urging of EPS, met with and discussed the issue of amendments to the PPAs with representatives of APSEB. Letters were written to APSEB by EPS, its subsidiary, ASIL and EPS's solicitors, Pollet Law, emphasising the critical need to get amendments.

Examples (all in
Vol V P1 G): E-mail
of 13.1.99 at 2 CB
287; e-mail of
16.1.99 at 2 CB
288; e-mail of
17.1.99 at 2 CB 282
; e-mail of 19.1.99
at 2 CB 290; Fax
of 22.1.99 2 CB
291; Faxes of
22.1.99 at 2 CB
292, RA 8835; fax
of 22.1.99, at 2 CB
293-294; fax of
23.1.99 at 2 CB

Core Bundle (CB) or
Applicant's Bundle of
Documents (ABA)

295; letter of
21.1.99 at 2CB
296-298; fax of
22.9.99 at 2CB 303;
letter of 15.1.99 at
2CB 312; letter of
15.2.99 at 2 CB
315

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69. The then President of EPS, Mr John Brake, and Mr Rollic Manger, President of ASIL (EPS' subsidiary), went to India from February to March 1999 and met with the Chief Engineer and the Chairman of APSEB and even the Chief Minister of Andhra Pradesh. Messrs Brake and Manger left only when assured by senior APSEB representatives that their desired modified PPA would soon be drafted and forwarded to EOPL. This was not, however, to be.

B

Para 30, AEC of
John Brake, Vol III,
Pt I, RA 3919, 1
CB 109

C

70. Nothing was heard from APSEB after March 1999. It appeared that APSEB (which by this time had been re-formed as the Andhra Pradesh Transmission Company, or "APTRANSCO" for short) had 'gone back on its words'. It later emerged that the reason for APTRANSCO's inaction was its desire to put off any independent power project ("IPP") attaining Financial Closure until reserves of natural gas, only just discovered in early 1999, could be finalised and a policy decision taken on its supply and allocation. In the meantime, EOPL — and all other IPPs that had yet to obtain Financial Closure — was stalled.

D

Eric Leow's e-mail
of 16.6.99 at Vol V:
Pt G RA 9045, 2CB
339; EPS Closing
Submissions, pp
26-42, Vol VI, Pt 6
RA 12063-12079, 2
CB 444 to 460,
IOBI Memo
(29.3.01); Vol V Pt I
RA 9656-9660, 2
CB 376-379

R K Haroola's
AEC, para 32, p
12; Vol III Pt I RA
3456; 1 CB 102-
103, Mr
Mammohan's
testimony at p 430,
lines 4-26, p 431,
lines 1-5; Vol III Pt I
L RA 4622-4623; 1
CB 140-141

E

71. By the end of June 1999, CMS told EPS that it had elected not to participate in the Projects. CMS's decision was recorded in a letter dated 27 July 1999 from CMS to EPS.

Letter (27.6.99): 11
AB 3904; Vol IV, Pt I
L RA 10546-10547.

Use Bundle (CB) or
Applicable Bundle of
Authorities (ABA)

- A 72. By July 1999, EPS had incurred significant amounts of money on Project-related expenses.

See Scott
Hargreaves' AEC,
para 26, Vol III, B
J RA 3930-4, 1 CB
117; supporting
docs in EPS's 2nd
Supplementary List
of Documents, at
Items 118-204;
207-343; 346-357.

(vi) *VBC Takes Over the Project Company*

- B 73. VBC Ferro Alloys Limited ("VBC") is an Indian conglomerate headquartered in Andhra Pradesh. On 21 June 1999, the managing director, a Mr. Rama Rao, wrote to the Project Company. He said "[w]e will be interested in taking up the project [i.e. the Projects], possibly with ultimate takeover." He asked EOPL to send to VBC the relevant information about the Projects, including details about the fuel linkage, whether "project validity" had been extended and whether an Amended PPA had been signed.

VBC letter dated
21.6.99; Vol V Pt G
3, RA 9052, 2 CB
335

- D 74. Subsequently, on 5 July 1999, VBC and its associated company, Konaseema Power Corporation Limited ("Konaseema"), made a proposal to acquire the Project Company.

VBC Proposal
(5.7.99); Vol V Pt G
RA 9061-2, 2 CB
336-7

- E 75. Konaseema's proposal to take up the Projects was based on the fact that it had been allocated enough natural gas to run a CCGT power plant of a capacity in excess of 200 MW. It proposed to acquire the Project Company, change the Projects from two 100 MW barge-mounted power plants to one 200 MW land-based plant, obtain from APTRANSCO the necessary regulatory approvals and changes to the PPAs, and rename the Project Company Konaseema EPS Oakwell Power Limited ("KEOPL"). It offered EPS/Oakwell 7% of the equity

VBC Letter
(5.7.99); Vol V Pt G
RA 9061-9062 at
9062 (para 5), 2
CB 337

Id., at paras 5 & 6;
RA 9062, 2 CB 337

Para 6(b), *Id.* at
RA 9062, 2 CB 337

A. in the proposed KEOPL. It advised that the offer had to be finalised by 15 July 1999.

76. On 16 July 1999 the Board of the Project Company met at Oakwell's office in Singapore to consider Konaseema's offer. Oakwell had two representatives on the Board of the Project Company, each of whom attended the meeting. The Board

Board Resolution:
Vol V P1 G RA
9100-9105, 2 CB
353-357A

B. unanimously (although at trial Oakwell's representatives claimed to have left the meeting by this point) resolved to accept Konaseema's and VBC's proposal as outlined in two documents, a Memorandum of Understanding ("MOU") and a Memorandum of Agreement ("MOA"). The Board further

Id. at RA 9102, 2
CB 355
MOU: Vol V P1 G,
RA 9098-9099, 2
CB 344-345

C. resolved to apply to APTRANSCO and the Government of Andhra Pradesh for approval to convert the Projects to one 200MW land-based power project with natural gas as the primary fuel.

MOA: Vol V P1 G
RA 9085-9093, 2
CB 340-348

Id. 2 CB 353-
357A

77. Essentially, the MOA gave VBC the right to subscribe for 75% of the equity of the Project Company and managerial control over the (re-named) Project Company. In exchange, VBC had to provide the Project Company with 79% of the financing it required to develop the Projects. EPS was to retain 4% of the equity in the Project Company as 'earned equity' and had the right to subscribe for up to an additional 21% equity by providing 21% of the financing required. Furthermore, in

Art 6(A), MOA: *Id.*
at RA 9096, 2 CB
341

Art 5(C), MOA: *Id.*
2 CB 341

E. accordance with milestones that were appended to the agreement, VBC agreed to compensate EPS for certain development expenditures it had made by and on behalf of the Project Company. Oakwell had no equity in the Project Company and no financing obligation, and no known unpaid development expenditure. VBC, EPS and the Project Company

Art 6(B) MOA *Id.*
at RA 9087, 2 CB
342

Exhibit A, MOA,
Id. at RA 9082, 2
CB 347-348; Art
5(A), MOA, at RA
9086, 2 CB 341

Core Bundle (CB) or
Appointments Bundle of
Authorities (ABA)

A

executed the MOA. Oakwell did not.

78.

Under the MOU the parties agreed to re-name the Project Company "KEOPL", and agreed that the Project Company would obtain all consents necessary to develop the new project, including necessary amendments to the PPAs. In the MOU the parties agreed to pass the appropriate resolutions as directors or shareholders, as the case may be, of KEOPL with regard to the size of the equity, shareholding, directors of KEOPL. VBC, EPS, the Project Company and Oakwell signed the MOU. To secure Oakwell's signature on the MOU, EPS gave it a side-letter indemnifying it against any liability arising out of the MOU and agreeing that Oakwell's acceptance of the MOU was without prejudice to its rights under the Settlement Agreement. VBC also indemnified Oakwell. Further, Oakwell received early payment of \$790,000, out of the \$2.79m that was actually only due on Financial Closure under clause 1.3.1 of the Settlement Agreement.

Arts 2 & 3, MOU;
Vol V P1 G RA-
9098-9099 at 9099;
2 CB 351-2

Arts at 9099, 2 CB
352

EPS Indemnity
(4.7.01); Vol V P1 G
RA 9094-9095, 2
CB 349-350

VBC Indemnity
(4.7.01); Ards RA
9096-9097

Cl 1.3.1 Settlement
Agreement, Vol V,
P1 F, RA 8730 at
8737, 2 CB 267

D

79.

As a consequence of the MOU and the MOA, ownership and control of the Project Company was ceded from EPS to VBC/Konaseema with the knowledge and consent of Oakwell and under indemnifications to Oakwell from EPS and VBC. These agreements would, however, effectively permit the Project Company to develop and finance a land-based natural gas power plant.

E

80.

Almost a year later, on 1 May 2000, the Government of Andhra Pradesh directly gave its approval to convert the Projects to a land-based power project of 359 MW capacity in the Konaseema area of East Godavari district. A month later, on 7

Letter (1.5.00); RA
9284, 2 CB 358

Core Bundle (CB) or
Appellate Bundle of
Authorities (ABA)

A June 2000, the Government of India approved an additional allocation of natural gas to the Project Company to enable it to power its 359 MW project.

Letter (7.6.00): Vol
VPI H RA 9305, 2
CB 360

81. On 10 August 2000, VBC and EPS entered into a revised agreement to permit the Project Company to allot shares to VBC and EPS. In this agreement, VBC and EPS agreed that a portion of EPS's expenditures of about US\$10,000,000 on behalf of the Project Company in the amount of US\$4,463,000 would be capitalised and the shares subject to the Agreement allocated to EPS as consideration for those expenditures, as VBC had not made the related payments to EPS in accordance with milestones that were appended to the MOA. The portion of EPS's expenditures to be capitalised were summarised in a letter from EPS dated 21 July 2000. VBC's expenditures on behalf of the Project Company were also capitalised and the shares subject to the Agreement allocated to VBC as consideration for those expenditures. Oakwell, at that time, had no outstanding unpaid expenditure to be capitalised. The Agreement also provided, *inter alia*, for VBC to purchase shares of EPS in KEOPL by 30 June 2002 if EPS notified VBC of its intention to sell such shares. The Agreement also provided that J.C. Cassina, President of EPS, would be a full-time director of the Project Company until commissioning of the Project. The 10 August 2000 Agreement did not significantly change the agreement between VBC and EPS found in the MOA.

10 August 2000
Agreement: Vol V
PI H RA 9371-
9373, 2 CB 261-
369

Arts 3, 4, 10 Aug
Agmt: *Ibid* at RA
9373, 2 CB 363

EPS Letter
(21.7.00): Vol V PI
H RA 9355-9357
Art 5, Vol V PI H
RA 9371 at 9373, 2
CB 361 at 363

Art 7-7.3.1, *Ibid* at
RA 9374-9375, 2
CB 364-365

Art 8.1, *Ibid* at RA
9375, 2 CB 365

82. In August 2000, the Government of India gave its approval to permit the Project Company to capitalise EPS' expenditures. Importantly, in this letter the Government accepted that EPS:

GOI Letter
(25.8.00): Vol V PI
H RA 9382

A was Oakwell's "associate/nominee" in relation to the Government's foreign investment guidelines.

83. On 15 December 2000, the Government of Andhra Pradesh approved the Project Company's application to increase the capacity of its project to 445 MW.

GOAP Approval
(15.12.00): Vol V Pt
HRA 9482-9493

B

(vi) *Oakwell Breaches the Settlement Agreement*

84. On 5 March 2001 Oakwell wrote to the Power Secretary of the State of Andhra Pradesh and to the Chairman of APTRANSCO. In the letter Oakwell made a number of claims. It claimed to have a legal and an economic interest in the Project Company.

OEL Letter
(53.01): Vol V Pt 1
RA 9572-9575, 2
CB 370-373

C

It claimed to be "the Promoter Group" under the PPAs. It claimed not to have "assigned, devolved, subrogated, divested or in any matter diluted or altered this position to the benefit of any other person or entity". It claimed to have an "enshrined, unquestionable and absolute right" to participate in the management of the power project (which, of course, was now

Para 1(a), *ibid* at
RA 9573, 2 CB 371

Para 1(a)(b), *ibid*,
2 CB 371

Para 1(b)(c), *ibid*, 2
CB 371

D

the land-based project developed under the management of VBC). It claimed, by implication, to have spent the money that EPS had capitalised in the Project Company and for which it had obtained foreign investment permission in August 2000. Its claims, of course, contradicted the Settlement Agreement

Para 1(b), *ibid*, 2
CB 371.

E

Oakwell had made with EPS. In that agreement Oakwell had relinquished all of its rights (if any) in the Project Company or the PPAs to EPS.

Cl. 1.1.1 and 1.1.2,
Settlement
Agreement, Vol V
Pt F RA 8733,
8734, 2 CB
263, 264

85. Also in this letter Oakwell attempted to interfere with the 445 MW land-based project that KEOPL was attempting to develop and finance. Oakwell asked the Government and

OEL Letter
(53.01): Vol V Pt 1
RA 9572-9575, 2
CB 370-373

Core Bundle (CB) or
Appellants' Bundle of
Authorities (ABA).

- A APTRANSCO not to permit without Oakwell's permission the Project Company to be recognised as a generating company, the project capacity of the power plants to be altered, any approvals of any sort to be given to the Project Company, or the fuel linkage to be amended. Furthermore, Oakwell also asked the Government and APTRANSCO not to amend the PPAs without Oakwell's permission. Finally, Oakwell then threatened to sue the Government or APTRANSCO should it not accede to Oakwell's demands. The letter was largely repeated on 16 April 2001.

Para 3, *Ibid* at RA
9574, 2 CB 372

Para 3(p), *Ibid* 2 CB
372

Para 5, *Ibid* 2 CB
372

OEL Letter
(15.4.01): Vol V P11
RA 9737, 2 CB
384-385

36. A month after Oakwell sent its second letter to the Government of Andhra Pradesh and APTRANSCO, Oakwell had a number of meetings with VBC, the Project Company and Konaseema. The meetings were kept secret from EPS. However the meetings were recorded in minutes dated between 30 May and 2 June 2001. The purpose of the meetings was to get Oakwell to retract its correspondence to the Government of Andhra Pradesh and APTRANSCO (the second paragraph of the minutes). To get Oakwell to do so, VBC, the Project Company and Konaseema agreed to pay Oakwell US\$2,000,000. Para 2 of the minutes of the meetings records:-

Minutes of
Meetings: Vol V P1
1 RA 9749-9750, 2
CB 387-388; OBI
Project Analysis:
Ibid at RA 9655, 2
CB 375

Para 2 of minutes,
Ibid at RA 9750, 2
CB 388

- E In view of the above [i.e. the VBC agreement to pay US\$2 million to Oakwell] OEL will retract all such correspondence made after 10 August 2000, to GOAP, APTRANSCO and other agencies bearing upon the project and indicating at the possibility of an incipient dispute between the parties"

37. Subsequently, on 4 July 2001, Oakwell entered into another agreement with VBC, the Project Company and Konaseema (Agreement of Mutual Understanding and Indemnity or "AMUI"). This agreement was expressed to supersede all other

AMUI: Vol V P11
RA 9759-9764,
2CB 389-394

of Appeal (RA) or
Core Bundle (CB) or
Appellate Bundle of
Authorities (ABA)

A

agreements between the parties, in particular the MOU and the Settlement Agreement (even though VBC, the Project Company and Konaseema were not parties to it) or any other relationship that might be derived from any document or agreement between them. Oakwell agreed that it was not entitled to make any claim relating to the power plant project and agreed to withdraw

CI 1, AMUT, *ibid* at
RA 9766, 2 CB 396

B

any claims it had made against VBC, the Project Company and Konaseema relating to the power plant project and release them from such claims. Oakwell indemnified the Project Company and VBC for all prior and future acts and claims made in the financing and development of the Projects. Oakwell also agreed to appoint VBC and Konaseema as its "associates,

CI 2, *ibid* at 2 CB
396

C

assigns and nominees" in relation to the power plant projects, despite having already appointed EPS the same. In exchange for the above obligations, Oakwell agreed to accept a payment of US\$2,000,000 as a "technical service or base fee".

CI 3, *ibid* at 2 CB
396

CI 11, *ibid* at RA
9763, 2 CB 393

CI 4, *ibid* at RA
9761, 2 CB 391

D

88. Also on 4 July 2001, Oakwell entered into a Technology Transfer, Collaboration and Licence Agreement ("TTCLA") directly with the Project Company to receive the US\$2,000,000 payment as "Technical Fees". The TTCLA also afforded Oakwell the opportunity to obtain another US\$4,000,000.

TTCLA (4.7.01):
Vol V Pt 1 RA 9765-
9772, 2 CB 395-
401A

CI 11.2 at RA 9769,
2 CB 399

E

89. Lastly, on this day, Oakwell entered into a shareholders' agreement with VBC over the Project Company and in relation to the company's development of the power plants. In this agreement, Oakwell was to subscribe to 11,348,200 shares in the Project Company.

Shareholders'
Agreement: Vol V
Pt 1 RA 9773-
9784, 2 CB 402-
412A

CI 2.3.1, *ibid* at RA
9776, 2 CB 405

90.

The main negotiator and principal officer of Oakwell involved

in Appendix 1 (A) for
Core Bundle (CB) or
Appellants' Bundle of
Authorities (ABA)

A in arriving at the Settlement Agreement, Mr Léow, testified at trial that under the Settlement Agreement, Oakwell intended that any shares obtained by it in the future, such as those obtained as a result of meeting any 11% promoter group outlay requirement for the Project, "would have to be beneficially owned by EPS as part of the relinquishment of rights, title and interest". He also agreed it was intended that "EPS was to get the benefit of any further shares issued in EOPL even though in OEL's name." However, inconsistently with this, Oakwell agreed with VBC in the shareholders agreement of 4 July 2001 that, "OEL shall not transfer its share to any party other than VBC without the prior written consent of VBC". Accordingly, in each of the agreements Oakwell had made with VBC and its associated entities, it obtained valuable benefits in exchange for interests in the Project Company and its property (being the PPAs) that it had purportedly already relinquished (or was under a continuing obligation to relinquish) to EPS in the Settlement Agreement and thus no longer possessed.

Léow's testimony
at p 116, lines 7-
12; p 117, lines 3-
5, Vol III PLK RA
4300, 4301, 1 CB
125, 126

Shareholders
Agreement, Cl
3.2.3 at Vol V Pt 1
RA 5776, 2 CB 405

D 91. In a letter dated 4 July 2001 to VBC, Oakwell confirmed that under the arrangements on 4 July 2001 it had "transferred and assigned all" its rights, title and interests in the "power project, PPAs and project company" such that it had "no further rights, titles, benefits or interests in the project company... or under the PPAs except those issues in respect of which OEL is required to take action as Promoter".

Letter (4.7.01): Vol
V, Pt 1 RA 9819-
9822 at 9821, 2 CB
413-416 at 415

E 92. At trial, Oakwell attempted to argue that it was required by the laws of India to retain at least 11% of the equity in the Project Company because it was the "original promoter". This contention, however, was not supported by Oakwell's own

Dr Agarwal's
testimony at p 264-
266, Vol III PLH RA
4453-4455, 1 CB
130-132; Mr
Misra's testimony
at p 325-329, lines

A

contention, however, was not supported by Oakwell's own experts. They agreed that there was no such definition under Indian law. The concept in Indian law referred to the "promoter group", which was defined in the PPAs to mean Oakwell, its successors and assigns. This definition included EPS.

307 RA RA 4515-4519, 1 CB 133-137; Mrs Chidambaram's testimony at pp 462-3, 465, lines 2-8, *ibid* of RA 4655-4656, 4658, 1 CB 142-143, 144

B

Moreover, they also agreed that Indian law referred only to the obligations of the promoter group, not its rights. Oakwell was thus entitled under Indian law to relinquish its rights to the Project Company and the PPAs to EPS, which, of course, it did.

(a) 11% of total outlay requirement: 11 AB 3842, para 2.1 of a Ministry of Power Resolution of 22.10.91

Resolution (22.10.91): Vol V P1 K RA 10465-10467 at 10466, 2 CB 440

C

(b) The term "Promoter Group" is set out in art 1.1.49 PPAs

Vol V P1 B RA 6871, 1 CB 167

(c) The point that obligations, as opposed to rights, not being transferred under Indian law, was accepted by Mrs Chidambaram, in her testimony.

Mrs Chidambaram's testimony at Vol II P1 L RA 4658, lines 19-25; & RA 4659, lines 1-8, 7 CB 144, 144-1

D

(d) The fact that no prohibition on relinquishment of rights by Oakwell exists under Indian law was stated by EPS's expert: Mr K Ramamoorthy.

Mr Ramamoorthy's AEC, paras 10, 12: Vol II P1 J RA 4047, 4048, 1 CB 120

(viii) *The Project Company gets the Draft PPA it sought*

E

93. On 29 November 2001 APTRANSCO finally agreed to the terms of a draft PPA with the Project Company. However, this draft PPA was for a single land-based plant located at Deverapalli generating 445 MW of electricity from natural gas, not for two barge-mounted diesel generator power plants located at Kakinada each generating 100 MW of electricity

Excerpts of draft initial PPA: Vol V P1 J RA 9931-10033, 2 CB 420-435

Preamble 22 of *ibid*, RA 9937, 2 CB 426

in Appendix (PA) or
Core Bundle (CB) or
Appellants' Bundle of
Authorities (ABA)

A from furnace oil.

94. Nevertheless, these draft amendments contained all the amendments that EPS had sought three years before and been refused. The promoter group consisted of Oakwell, EPS and VBC. The project described in the Settlement Agreement was the actual project being developed. The deadlines ran from the date the revised, amended PPA was to be executed. The security to be granted by APTRANSCO or the Government of Andhra Pradesh was defined. Fuel linkages were in existence for the life of the project.

E.g. Draft PPA, at 7.1(e); *Andhra RA* 9965, 2 CB 434; "Financial Closure to occur within six (6) months of the date of signing of this Agreement."

95. But even so, the project had still not been financed. All it had received was some form of financing approval "in principle". Whatever financing "in principle" is, it is not Financial Closure within the meaning of the PPAs or the Settlement Agreement. As Oakwell's witness, Mr Leow testified:

D Q All right, but that's not the focus. The point is, Financial Closure-In Principle is not the same as Financial Closure for purposes of the PPA. You agree?

Mr Leow's testimony, Vol III Pt. K RA 4334, lines 21-26; RA 4335, lines 1-6, 1 CB 127-128

A Yes, I agree.

Q All right. So even though VBC secured Financial Closure In Principle in five months, doesn't mean that automatically it will be expected that EPS should achieve actual Financial Closure also in five months. There's no comparison. We're comparing apples and oranges. Won't you agree?

E

A (Witness nods)

Q Right.

HIS HONOUR: You must say.

A Yes, your Honour

Case Bundle (CB) or
Appellants' Bundle of
Authorities (ABA)

- A 96. Actual financing was not expected before 30 June 2003. Indeed, by the date of the draft PPA only one of the seven projects awarded by tender six years earlier by APSEB had been financed and that Project had obtained a full linkage for the entire term of its PPA and did not need to negotiate for amendments to its PPA before Financial Closure.

Mr Kishore's
testimony, at Vol
II, P1 L RA 4556,
line 24 - p 368, RA
4557 line 12, 1 CB
138, 139

B (ix) *Oakwell terminates the Settlement Agreement*

97. On 22 July 2002, Oakwell claimed that EPS had breached the Settlement Agreement. Oakwell then rescinded the agreement. On 26 August 2002 Suit No. 997 of 2002 was commenced. This claim was, of course, made after Oakwell had conveyed its interest in the Project Company and its property a second time, to VBC and its associated entities, and after it had agreed (in the AMUI) to indemnify the Project Company from any further claims against it under the MOU and the Settlement Agreement.

Letter (22.7.02);
Vol V P1 K RA
1016A, 2 CB 438-
439

- D 98. Therefore, as of 22 July 2002, Oakwell accepts that the Settlement Agreement has been discharged.

Letters (22.7.02 &
26.8.02 Vol V P1 K
RA 1016B-70 &
10252, 2 CB 438-
439

- E 99. Oakwell has done very well for itself in relation to the Projects. Oakwell has a known initial investment in the Projects of approximately US\$450,000. This comprised mainly payments to consultants and seed money. Consequently, for this initial investment, prior to the Judgment, it received of US\$ 8,956,376.00, comprised of:-

See Scott
Hargreaves' AEIC,
para 26, Vol III P1 J
RA 3930, 1 CB
117; supporting
docs in EPS's 2nd
Supplementary List
of Documents, at
Items 118-204

(a) Cash from EPS (30 June 1997) of US\$1,656,329;

(b) Cash from EPS (17 March 1998) of US\$700,000;

Vol V P1 D RA
7913-7914

of Appeal (RA) or
Core Bundle (CB) or
Appellate Bundle of
Authorities (ABA)

A

(c) Cash from EPS (17 March 1998) of US\$400,000

(d) Clause 1.1 Settlement Agreement, US\$3,015,000

(e) Cash from EPS (August 1999) of US\$790,000

B

(f) Cash from VBC (4 July 2001 agreements) of US\$350,000

(g) Due under 4 July 2001 agreements of US\$1,650,000

C

(h) Interim interest of \$395,047 from 1 January 2002 till payment from VBC at 12% per annum on US\$1,650,000.

100. Under the Judgment, as it stands, Oakwell has also been awarded at least a further US\$4,210,000, payable by EPS. This is comprised of the sums of US\$1,650,000 and US\$2,560,000.

D

Interest of 8% p.a. has also been awarded to Oakwell on the stated sums from 30 July 1999 and 10 August 2000 respectively.

E

101. The Judgment therefore, in effect, confers on Oakwell benefits totalling US\$13,166,376, which follows from Oakwell being allowed to retain the benefits under the 4 July 2001 agreements, and earlier agreements, amounting to US\$8,956,376, and the amount of US\$4,210,000 which EPS had been ordered to pay Oakwell. Moreover, under the TTCLA with VBC, Oakwell has a further opportunity of earning US\$4,000,000. All of this for a project that has yet to generate a watt of electricity.

Vol V PIERA
8271-8272, at
8272, para 3, i
Settlement
Agreement
[29.12.98], Vol V,
PI F, at RA 8733-
8734, 2CB 263-264

Judgment, para
100, Vol I RA 43, 1
CB 42

Judgment, para 71,
ibid at RA 29, 1 CB
28

ibid, 1 CB 28

CI 5.4, Vol V PI I
RA 9759 at 9762, 2
CB 389 at 392

Judgment, at RA
48-1 to 48-2, 1 CB
47-48

A

102. As stated above, EPS had incurred expenditure on the Projects amounting to over US\$10,000,000. EPS expended or gave value of US\$6,561,329 in payments to Oakwell before this action was started. As a result of the Judgment, EPS stands to pay a total of over US\$10,000,000 to Oakwell. In contrast, EPS has so far capitalised US\$4,463,000 of its expenditure under its 10 August agreement with VBC. EPS still has shares in KEOPL although when the Projects will ever reach fruition is unknown.

See para 81 above.

Comprising
amounts in paras
99 (a)-(e) above.
The US\$10m
comprising
US\$8.56m +
US\$1.65m +
US\$2.56m

B

C. Judgment

C

103. The Judgment revolves around two findings that correspond to the two orders the Court below made:

D

- (a) That EPS breached an obligation under the Settlement Agreement to "achieve Financial Closure" of the Projects by the end of June 1999. Based on this finding, the Court below ordered EPS to pay Oakwell the sum of US\$2.79 million which EPS was to have paid only upon Financial Closure.

Judgment paras.
77-78 and 87, Vol 1
RA 32; 1 CB 31

Judgment, para
108(1), *ibid* at RA
46, 1 CB at 45

E

- (b) That by entering into the agreement dated 10 August 2000 with VBC, EPS repudiated the Settlement Agreement. Based on this finding, the Court ordered EPS to pay Oakwell damages for the non-payment of the Royalty assessed as of 10 August 2000.

Judgment, paras
91 & 92, *ibid* at RA
38, 1 CB 37

Judgment, para
108(2), *ibid* at RA
46, 1 CB 45.

104. The Court based its first finding on an assumption. The assumption was that in the Settlement Agreement EPS

Judgment, para 77,
ibid at RA 32, 1 CB
at 31

A promised that it would procure financing to enable the Project Company to develop the Projects. Relying on this assumption, the Court then asked itself this question: "by when does this promise have to be fulfilled?" The Court answered the question by holding that EPS had to obtain Financial Closure (i.e. procure the financing) within a reasonable time from the date of the Settlement Agreement, which the Court held was by the end of June 1999, a period of about 6 months. Therefore, the Court implied into the Settlement Agreement a term that EPS was obligated to obtain Financial Closure by the end of June 1999.

Judgment, paras
78 & 87, *ibid* at RA
32, 36; 1 CB 31, 35

B

C 105. The Court's only finding in regard to whether EPS promised to procure financing is where the trial judge said this: "It is unquestionable that the defendants (sic) when it held 87.5% of the shares in EOPL, and certainly when it held 100% under the Settlement, it had agreed to achieve Financial Closure." No reason is given for why it is "unquestionable" that EPS had "agreed to achieve" Financial Closure. No analysis of the relevant clause of the Settlement Agreement (cl 1.3.1.) is performed. Unlike the agreements that were discharged by the Settlement Agreement (the Co-operation Agreement and the Shareholders' Agreement), the Settlement Agreement contains no express term obligating EPS actually to procure financing for the Projects.

D

E

Judgment, paras
78 & 82, *ibid* at RA
32, 34; 1 CB at
31, 33

Judgment, para 77,
ibid at RA 32, 1 CB
31

cl 1.3.1. of the
Settlement
Agreement; Vol V
Pl. F, RA 8731-
8737 at 8737; 2 CB
267

106. Furthermore, the Court did not give any reasons for why a promise by EPS to procure financing should be implied into the Settlement Agreement. The Court did not find that it was necessary to imply such a promise in order to give the

A Settlement Agreement business efficacy. The Court did not find that such a promise represented the obvious but unexpressed intentions of *both* EPS and Oakwell. The Court did not find that such a promise was equitable and reasonable to *both* EPS and Oakwell.

B 107. In its Judgment, the Court seems to have been of the view that unless this promise was implied into the Settlement Agreement then clause 1.3.1 of the agreement had no contractual meaning.

cf. Judgment para 77, *ibid* at RA 32; 1 CB 31

C But this is not so. Clause 1.3.1 is a classic example of a 'contingent condition'. When the performance of an obligation depends on the happening of an event that is not within the control of either party, and no party has promised that the event will occur, then the event is a contingent condition. Unlike a warranty or a promissory condition, then, a contingent condition contains no promise that that the contingent event will actually happen. Nevertheless, Courts may imply into a

See Part III Issue 2(A) below, p 57

D contract containing a contingent condition the obligation that one of the parties to the contract make *reasonable efforts* to make the event happen within a reasonable time. An obligation to make reasonable efforts to make an event happen within a reasonable time is of course a very different thing than an obligation to procure the event within a reasonable time.

See Part III Issue 2(B) below, p 60

E 108. Thus, the only relevant inquiries in relation to Oakwell's claim on this point were these: (i) determining whether EPS had to make reasonable efforts to make the financing occur within a reasonable time of the Settlement Agreement; (ii) determining what the reasonable time was; and (iii) determining whether EPS' obligation to make Oakwell's financing was obtained.

A EPS' obligation to pay Oakwell after financing was obtained was discharged or suspended if financing was not obtained within the reasonable time so determined. In relation to this last point, it is also relevant to consider:-

B (a) whether financing was not obtained within the specified time because EPS had acted negligently or unreasonably; and

Part III Issue 2(C),
p 63 below.

(b) whether Oakwell had wrongfully repudiated the Settlement Agreement on 22 July 2002, thereby discharging any obligations EPS might have had to continue to seek financing.

Part III Issues (D)
(p 65) & (E) (p 69)
below.

C 109. The Court below held that a reasonable time to obtain Financial Closure was the end of June 1999. Yet, no evidence was led at trial that financing was *actually* available to EPS or the Project Company for the Projects in the state they were in at the end of June 1999. The court made no finding that Financial Closure had not occurred by this date as a result of EPS having acted negligently or unreasonably in regard to obtaining financing. Instead, the Court irrelevantly assessed whether or not EPS had failed to discharge an absolute obligation to bring about Financial Closure by the end of June 1999.

Judgment, para 87,
Vol I RA 1 at 36; 1
CB 35

D Judgment, paras
77-8, deal with the
question the court
framed as "did
defendants
breach (sic) its
obligations
to
achieve Financial
Closure?" (Vol I RA
1 at 32; 1 CB 31)

E 110. By holding that EPS had breached an obligation to finance the Projects by the end of June 1999, the Court below thus turned EPS' contingent condition to pay Oakwell US\$2.79 million after the Projects are financed into a warranty to pay Oakwell US\$2.79 million by the end of July 1999. In doing so, the

A Court imposed on EPS the very obligation (to obtain financing for the Projects) that in the Settlement Agreement EPS had bargained away.

111. The Court below based its second finding on an assumption too: that by its entry into the 10 August 2000 agreement, EPS disabled itself from being able to perform the Settlement Agreement. The Court's finding on this point is encapsulated

cf. para 1030) above.

B by the Judgment as follows:

Judgment, paras 91 & 92; Vol I RA 1 at 38-39; 1 CB 37-38

C By its divestment for the consideration of about US\$4.6 million, the defendants had unilaterally and entirely on its own volition disabled itself from being able to pay from the Project Funds — I also accept the submission of the plaintiffs that the defendants, having divested its interest in KEOP1 and the Project to the VBC Group and made it impossible for it to effect Financial Closing and achieve the targeted Commercial Operation Date, is in breach of the Settlement Agreement and is precluded from relying on the non-happening of the event as an excuse for not making the payments under the Settlement Agreement.

112. The only obligation that EPS could have breached on 10 August 2000 was the obligation to ensure that Oakwell got paid the Royalty (since the Court held that EPS had by this date already breached the obligation to obtain Financial Closure). But EPS could not have breached the Royalty provisions of the Settlement Agreement by entering into the agreement with VBC on 10 August 2000. Under clause 1.4 of the Settlement Agreement Oakwell could get paid the Royalty in one of three ways:

Judgment paras 91, 93-5; *ibid* at RA 39-40; 1 CB 38-39

E (a) the Project Company could issue it preference shares based on terms defined in the Settlement Agreement (cl 1.4.2 (a)); or

Cl 1.4 Settlement Agreement; Vol V PI F RA 8731-8787 at 8737-8738; 2 CB 267-268

- A (b) the Project Company could enter into a contract with Oakwell for certain fees on terms set out in the Settlement Agreement (cl 1.4.2 (b)); or
- (c) EPS could pay Oakwell the Royalty directly as specified in the Settlement Agreement (cl 1.4.3).

B None of these options were affected by the agreement between EPS and VBC of 10 August 2000.

113. The Court below never found that the terms of the preference shares allotted Oakwell pursuant to clause 1.4.2 (a) of the Settlement Agreement were inconsistent with the terms specified in this clause, nor could the Court have made this finding since the terms of the preference shares were identical to the terms specified in that clause. And the Court never explained how the terms of the 10 August 2000 agreement would have prevented EPS from paying Oakwell under clause 1.4.3 after the commencement of the commercial operation date of the Projects, which had not occurred by the date of trial, in any event.

Cl 1.4.2(a)
Settlement
Agreement: Vol V
Pl F at RA 8737-
8738, 2 CB 267-
268

Cl 1.4.3: *Id* at RA
8738, 2 CB 268

- D 114. The Court below associated retention of shares by EPS in the Project Company with EPS' ability to pay Oakwell under the Settlement Agreement. Nothing in the Judgment explains this supposed connection.

cf. Judgment,
paras 91-92; Vol I
RA-1 at 38-39; 1
CB 37-39

- E 115. The Court below also never explained the basis for its conclusion that following the Settlement Agreement Oakwell had any legal or equitable interest in the Project Company or its property (the PPAs), or any interest in the Settlement

- A property (the PPAs); or any interest in the Settlement Agreement itself, that were affected by the 10 August 2000 agreement between EPS and VBC. The Settlement Agreement clearly states that Oakwell was to relinquish all its rights, title and interest in EOPL and the PPAs to EPS. Indeed, in the Judgment, the Court held that, 'both sides accepted that in principle the settlement would take the shape of the defendants' buying out the plaintiffs' entire interest in the' Projects.
- B

CI 1.1.1 and 1.1.2
of the Settlement
Agreement at Vol V
PI F RA 8731-8787
at 8732; 2 CB 262

Judgment, para 38,
Vol I RA 17; 1 CB
37

116. Although the Court below placed a great deal of emphasis on EPS' agreement with VBC on 10 August 2000, the Court, inexplicably, paid little regard to Oakwell's agreements with VBC and the Project Company on 4 July 2001. In the July agreements, Oakwell obtained from VBC or the Project Company essentially the same benefits it claims it was owed by EPS under the Settlement Agreement. In particular, Oakwell obtained directly from the Project Company the same type of contract (one for technical/ consultancy fees) that EPS was permitted to cause the Project Company to issue Oakwell, in satisfaction of the Royalty under clause 1.4.2(b) of the Settlement Agreement. It obtained these benefits, *inter alia*, by purporting to convey to VBC the same rights and interests in the Project Company and its property that it had relinquished or had to continue to relinquish to EPS under the Settlement Agreement.
- E

See Judgment
paras 88-95; Vol I
RA 1 at 36-40; 1
CB 35-39

Judgment, para 69,
(*ibid* at RA 28, (1
CB 27) noting that
Oakwell entered
into a Technology
Transfer,
Collaboration &
Licence Agreement
of 4.7.01,
CI 1.4.2(b)
Settlement
Agreement at Vol V
PI F RA 8738, 2
CB 268

117. By awarding damages to Oakwell under the Settlement Agreement whilst simultaneously permitting Oakwell to retain the benefits of its agreements with VBC and the Project

Under Judgment,
para 108(2), Vol I.
RA 46; 1 CB 45.

A Company, the Court below permitted Oakwell twice to sell its interest in the Project Company and the PPAs (once to EPS and once to VBC) claiming the full payment for both from each. Therefore, had EPS breached the Settlement Agreement before 4 July 2001 (which it denies doing), Oakwell had fully mitigated its losses by entering into the 4 July agreements with VBC and the Court should not have found EPS liable to pay Oakwell for those losses.

B 118. On the other hand, had EPS not breached the Settlement Agreement, then the Court below should not have dismissed EPS's counter-claim which, amongst other things, claimed entitlement to the benefits Oakwell derived under the 4 July 2001 agreements. In dismissing EPS's counter-claim, the Court never found that Oakwell was entitled to the benefits it obtained under the 4 July 2001 agreements with VBC *et al.*

Counterclaim No. 4; Vol II RA 133

c.f. Judgment para 108(1) ordering a set-off of such benefits, at Vol I RA 46, 1 CB 45

D II. THE ISSUES ARISING IN THE APPEAL

119. The appeal raises the following issues:

(i) In the Settlement Agreement did EPS warrant that it would finance or obtain financing to enable EOPL to develop the Projects?

Section III Issue 1 below

(ii) What, in law, happened to EPS' obligations under the Settlement Agreement if Financial Closure for the Projects was not obtained within a reasonable time?

Section III Issue 2 below

(iii) Did EPS breach its obligation to pay the Royalty under clause 1.4 of the Settlement Agreement?

Section III Issue 3 below

or Appeal (RA) or
Core Bundle (CB) or
Appellants' Bundle of
Authorities (ABA)

A (iv) If EPS did repudiate the Settlement Agreement on or before 10 August 2000, did Oakwell mitigate its losses between May and July 2001 by entering into the 4 July 2001 agreements with VBC and its associated entities?

Section III Issue 4
below

B (v) Have the damages awarded for breach of Clause 1.4 of the Settlement Agreement been correctly assessed based on the actual operating conditions of the Project?

Section III Issue 5
below

(vi) If EPS did not breach the Settlement Agreement, did Oakwell do so by its agreements with VBC and its associated entities in July 2001?

Section III Issue 6
below

C EPS is not appealing in respect of the findings as to its defence of frustration, raised at trial.

III. THE APPELLANT'S CONTENTIONS

Issue 1: In the Settlement Agreement EPS did not Warrant that it would Finance or Procure Financing for the Projects

D A. *The Settlement Agreement is to be given its plain and literal interpretation.*

120. The golden rule of contractual interpretation is to give the words of the contract their plain and literal meaning and to adduce the mutual intentions of the parties as to the legal obligations each were to assume by examining the contractual words used to express those intentions.

K. Lewison, *The Interpretation of Contracts*, [2nd ed.] (London: Sweet & Maxwell, 1997) at 1 to 3; Vol 1 ABA Tab 1 at pp 2-4

E 121. Absent a claim for rectification, a court ought to give effect to the words chosen by the parties to express their agreement. The court should give effect to those words regardless of whether

A they contain a discernable commercial purpose or conflict with the court's own opinion of commercial sense:

K. Lewison, *The Interpretation of Contracts*, (2nd ed., London: Sweet & Maxwell, 1997) at 17-19

ABA Tab 2 at 6-6B

MFI Properties Ltd. v. BICC Group Pension Trust Ltd., [1986] 1 All E.R. 974 at 976 (Ch. Div.)

ABA Tab 3 at 9

B

122. In this case, EPS' sole obligation in the Settlement Agreement upon Financial Closure is to pay US\$2.79 million to Oakwell within 30 days from the first draw-down of funds after Financial Closure (i.e. after the Projects have been financed).

CI 13.1 Settlement Agreement at Vol V Pt F RA 8731-8787 at 8737, 2 CB 267

C

The Settlement Agreement does not contain any promise by EPS that it will finance or obtain financing to enable the Project Company to develop the Projects. EPS gave no warranty that it would do so.

D

123. As stated above (in para 56), the Settlement Agreement stands in contrast to the Joint Venture Agreement of 18 June 1997 and the Co-operation Agreement and Shareholders' Agreement both dated 17 October 1997, in which EPS expressly warranted that it would procure financing for the Projects. These 1997 agreements also stipulated payment of liquidated damages and penalties to Oakwell if EPS failed to do so. The Settlement Agreement does not contain any such stipulation of penalties or liquidated damages for any delay or failure in EPS procuring Financial Closure. This stark omission is one of the clearest factors militating against the imposition of an absolute warranty in the Settlement Agreement by EPS to procure Financial Closure.

At cl 4.5(b) Co-Operation Agreement (Vol V Pt V RA 7374-7384 at 7378, 1 CB 220) and B.1(b) Shareholders' Agreement (Vol V Pt B RA 7070-7080 at 7075, 1 CB 203)

E

At cl 4.2 of the Joint Venture Agreement (Vol V Pt B, RA 7070-7080 at 7075, 1 CB 203) and cl 4.5 Co-Operation Agreement (Vol V Pt C RA 7376-7384 at 7378, 1 CB 220)

A 124. Indeed, Oakwell itself accepts that the plain and literal meaning of the Settlement Agreement is that EPS did not promise to procure financing for the Projects. That is why in paragraph 13 of its Re-Re-Re-Amended Statement of Claim, Oakwell asks the Court to *imply* into the Settlement Agreement an obligation by EPS "to procure Financial Closure of the Project within a reasonable time".

At Vol 2 RA 68, 1
CB 60

B 125. Furthermore, one of Oakwell's witnesses, Mr Amarchand Shrishrimal, gave evidence in his Affidavit of Evidence-in-Chief that:

Mr Amarchand's
AEC, Vol III, Pt C,
at RA 1380, 1 CB
86

C I recall that the guiding principle in the negotiations as stated by Jim [Cassina] and agreed by B.T. [Low] and Eric [Leow], was that neither the Plaintiff nor the Defendants would be paid if the Project fails.

D 126. At its heart, a contract is a risk allocation device. Through their bargain, the parties to a contract allocate amongst themselves the risk of future events. This allows the parties to act with predictable consequences. The risk allocation aspect of contracts is recognised in both England and the United States:

William Sindall plc. v. Cambridge County Council, [1994] 3 All ER 932, at paras. 87-89

Vol 2 ABA Tab 32;
at p 452

E *Kel Kim Corporation et al. v. Central Markets, Inc.* 70 N.Y. 2d 900, 902 (N.Y.C.A., 1987)

Vol 1 ABA Tab 4, p
12

Karan Kapur v. Stiefel, 264 A.D. 2d 602, 605-606 (N.Y. App. Div., 1999)

Vol 1 ABA Tab 5 at
p 17

Craig S. Warkol, "Resolving the Paradox between Legal Theory and Legal Fact: The Judicial Rejection of the Theory of Efficient Breach", 20 Cardozo L. Rev. 321, 347 (1998)

Vol 1 ABA Tab 6 at
47

- A 127. In the Settlement Agreement, as in all of their prior agreements (the Joint Venture Agreement, the Co-operation Agreement and the Shareholders' Agreement), EPS and Oakwell allocated the risk that EPS could not finance the Projects. In the prior agreements they allocated this risk solely on EPS. In the Settlement Agreement they allocated this risk jointly on themselves. The risk that EPS could not procure financing had to be allocated somewhere. There is nothing wrong with the parties agreeing to allocate the risk on EPS in earlier contracts and jointly in the later one.

At cl 4.5(f) Co-
Operation
Agreement (Vol V
Pt C, at RA 7378, 1
CB 220) and 8.1(b)
Shareholders'
Agreement (Vol V
Pt C at RA 7393, 1
CB 231).

At cl 4.2 of the
Joint Venture (Vol
V Pt B RA 7075, 1
CB 203)
Agreement and cl
4.5 Co-Operation
Agreement, (Vol V
Pt C at RA 7378, 1
CB 220) at CB

- C 128. The earlier contracts allocate the risk that the Projects would not get financed on EPS because at the time these contracts were made project financing appeared likely. The Project Company had valid PPAs. At the time of the Settlement Agreement, the difficulties of financing the Projects were clear to see. The Project Company did not have valid PPAs. As a result, in the Settlement Agreement, the parties agreed that if EPS could not finance the Projects, Oakwell would get paid only the initial US\$3.015 million it received from EPS but EPS had to pay this amount even if the Projects never bore fruit. If the Projects got financed, then Oakwell would be paid additional amounts whilst EPS stood to enjoy profits from the Projects. This result is the consequence of the bargain the parties made.
- E

See paras 37-38,
64-66 above.

Cl 1.1 Settlement
Agreement at Vol V
Pt F, RA 8731-
8787 at 8733, 2 CB
283

129. By holding that EPS was obligated to procure financing for the Projects by the end of June 1999, the Court below imposed solely on EPS the risk that it could not finance the Projects by that date. Therefore, the Court re-wrote the parties' contract,

A replacing the bargain the parties made with a different one. In doing so, the Court erred.

B. *There was no necessity to imply into the Settlement Agreement a term warranting that EPS would procure financing for the Projects by 31 June 1999 or any other date*

B 130. The implication by a court of terms into a written contract is at odds with the strong presumption that a written contract represents an apparently complete bargain between the parties to the contract.

K. Lewison, *The Interpretation of Contracts*, supra at 125; Vol 1 ABA Tab 7 p 55 at para 5.02.

C 131. Courts are therefore reluctant to imply a term into a contract which is comprehensive and has been the subject of extensive negotiations between the parties. Such a contract, like the Settlement Agreement in the current case, is presumed to reflect the bargain between the parties and their respective intentions at the time of its execution.

Al et al v. Christian Salvesen Food Services Ltd., [1997] 1 All E.R. 721 (C.A.) at 725, 726; Vol 1 ABA Tab 8 at pp 62-63.

D 132. Courts are likewise reluctant to imply a term into a contract negotiated by the parties with a view to resolving a dispute between them. In *Nicholson v. Marfham*, the English Court of Appeal approved of a trial court's interpretation of a settlement agreement where he held that,

(1997) 75 P. & C.R. 428 at 432, 434 (C.A.); Vol 1 ABA Tab 9 at 69 and 72.

E ... [i]n this case, the agreement arises out of an endeavour to settle an unfortunately very bitter and contentious dispute between the parties. In these circumstances, it seems to me in the highest degree unlikely that the words used are intended to incorporate any implied term which goes beyond the written words of the memorandum.

Also, see G. H. Treitel, *The Law of Contract*, (11th ed.) (London: Sweet & Maxwell 2003) at pp 201-208 at 204; Vol 1 ABA Tab 10 at 78.

133. Sometimes, however, courts will imply a term into a written contract. But there are strict tests that have to be met before they will do so. Courts will only imply a term into a contract where it is reasonable and necessary to do so in order to give

Liverpool City Council v. Irwin, [1977] A.C. 239 (H.L.) at 253, 254, 258, 266; Vol 1 ABA Tab 11 at pp 95-96, 100.

- A where it is reasonable and necessary to do so in order to give business efficacy to the transaction between the parties or where the term implied represents the obvious, but unexpressed, intention of the parties.

Hop Hong & Co Pte Ltd v Hong Hual Development Co. (Pte) Ltd, [2001] 2 S.L.R. 454 (C.A.) at 465; Vol 1 ABA Tab 12 at p 120

134. B Necessity means that the whole transaction between the parties would become futile, ineffectual and absurd without implying the term. It does not mean that the contract would be made better or made to reflect what, in the court's opinion, the contract ought to have included. It does not mean that it might be reasonable in all the circumstances to do so:

Tai Hing Ltd v Liu Chong Hing Bank, [1986] A.C. 80 (P.C.) at 104, 105

Vol 1 ABA Tab 13 at pp 153, 154

- C *Liverpool City Council v Irwin*, [1977] A.C. 239 (H.L.) at 258:

Vol 1 ABA Tab 11 at 100

Hughes v Greenwich London Borough Council, [1994] A.C. 170 (H.L.) at 177, 178

Vol 1 ABA Tab 14 at pp 170, 171

135. D As Lord Cross in *Liverpool City Council v Irwin* stated:

Sometimes, however, there is not a question of laying down a *prima facie* rule applicable to all cases of a defined type but what the court is being in effect asked to do is to rectify a particular – often a very detailed – contract by inserting in it a term which the parties have not expressed. Here it is not enough for the court to say that the suggested term is a reasonable one the presence of which would make the contract a better or fairer one; it must be able to say that the insertion of the term is necessary to give – as it is put – “business efficacy” to the contract and that if its absence had been pointed out at the time both parties – assuming them to be reasonable men – would have agreed without hesitation to its insertion.

[1977] A.C. 239 (H.L.) at 258; ABA Tab 4 at p 100

- E 136. Furthermore, courts will not imply any term into a contract that runs contrary to the express provisions or the general tenor of the written agreement between the parties or a term which is not equitable and reasonable for both parties:

Duke of Westminster v Guild, [1985] 1 Q.B. 683 (C.A.) at 699.

Vol 1 ABA Tab 15

A

700

Appellate (CB) or
Appellate (ABA)

at pp 183,184

Broome et. al. v. Pardess Cooperative Society of Orange Growers (Est. 1900), Ltd., [1940] 1 KB 603 at pp 611F-612D

Vol 2 ABA Tab 17
at pp 200F-201D

Hiap Hong & Co Pte Ltd v. Hong Huat Development Co (Pte) Ltd., *supra* at 465

Vol 1 ABA Tab 12
at p 120

K. Lewison, *The Interpretation of Contracts*, *supra*, at 136, 137

Vol 2 ABA Tab 16
at pp 190-191

B

137. The English Court of Appeal stated in *Broome et. al. v. Pardess Cooperative*, *supra*:

Broome et. al. v. Pardess Cooperative Society of Orange Growers (Est. 1900), Ltd., [1940] 1 All ER 603 at 612 (CA); Vol 2 ABA Tab 17 at 201D

[Where the parties have made an express provision as regards some matter with regard to the contract, it is, and must be, extremely difficult for either of them to say in regard to that subject-matter, as to which there is an express provision, that there is also an implied provision or condition in the contract.

C

138. Finally, when considering whether it is necessary to imply a term, courts are precluded from considering anything the parties said or did after the contract was made about what the contract means. As Lord Reid stated in *James Miller & Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd.*, at p 603E:

[1970] A.C. 583 (H.L.) at 603; Vol 2 ABA Tab 18 at 223E

I must say that I had thought it now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later.

E

139. In this case, the Court below disregarded all of the tests that have to be met before terms can be implied into an apparently complete written contract.

140. The Court below implied a term to the effect that EPS had to procure financing for the Projects within six months of the

Judgment, para 77 & 87, Vol 1 RA 32, 36, 1 CB 31,35

A Settlement Agreement, by 31 June 1999. The Court made no finding that such a term was *necessary* to give business efficacy to the transaction.

141. The Court below implied this term to resolve a dispute between the parties in a manner that was desirable for *Oakwell* only.

B The Court did not consider the commercial necessity to EPS of having to pay Oakwell from financing that was never obtained. Indeed, under the circumstances prevailing in December 1998, there was no reason for EPS to have found such a weighty term acceptable to it. Treitel writes that:

The Law of
Contract, *supra* at
pp 204-205 at Vol 1
ABA Tab 10 at 78-
79

C "...attempts to imply terms in fact may fail for one of two further reasons ... parties may have different views with regard to the alleged term. Where their interests are opposed, an implication that may be regarded as obvious by one party may well be unacceptable to the other. For example, in *Luxor v Cooper* the defendant had employed an estate agent to sell two cinemas and promised to pay him a commission "on completion of sale". Before the agent had effected a sale, the defendant sold the cinemas himself. It was held that no term could be implied to the effect that the defendant should not (except for good cause) refuse to sell to a person introduced by the agent, since it was not clear that both parties would have agreed to such a term ... Even where both parties accept that some term should be implied, an implication in fact may still fail because they disagree as to the exact formulation of that term ...

D 142. The term the Court below implied into the Settlement Agreement is contrary to other express terms of the agreement. The Settlement Agreement expressly states (in cl 15.1) that it,

Vol V Pt F at RA
8746, 2 CB 276

E "... sets forth the entire agreement and understanding of the parties with respect to the subject matter contained herein and supercedes all prior discussions and agreement, whether written or oral relating to the subject matter herein.

143. The agreement expressly terminates, discharges and releases the parties from their obligations under the previous agreements, such as the obligation on EPS to procure financing for the Projects (cl. 3.2). Therefore, by implying into the Settlement

Cl 3.2, Settlement
Agreement : Vol V
Pt F at RA 8740, 2
CB 270

A Projects (cl. 3.2). Therefore, by implying into the Settlement Agreement a term that EPS would procure Financial Closure of the Projects, the Court below incorporated into the Settlement Agreement a warranty that the parties had expressly discharged.

Judgment, para 77
& 87, Vol I RA 32,
38, I CB 31,35

144. The implied term also nullifies the express term it purports to aid. By requiring EPS to pay Oakwell even if EPS does not procure financing for the Projects by 31 June 1999, the Court has logically made Financial Closure irrelevant. According to the Court, EPS *had* to procure financing by the end of June 1999 and then *had* to pay Oakwell US\$2.79 million. The implied term amounts to an absolute promise by EPS to pay Oakwell US\$2.79 million by 31 July 1999. It amounts to this because, under the lower Court's reasoning, EPS has to pay this sum to Oakwell *even* if the Projects are never financed. Therefore, whether or not EPS procures financing for the Projects is irrelevant since it has to pay Oakwell in any event.

Judgment, para 87
and 108(1), Vol I
RA 36 and 48, I
CB 35 and 45

D 145. On the other hand, when the tests that have to be met before a term can be implied into an apparently complete written contract are applied to the facts of this case, then there is no basis for implying into the Settlement Agreement a term with the effect that EPS must procure financing for the Projects within six months of the date of the agreement.

See Lewison,
supra, at Vol I ABA
Tab 7, p 56, para
5.03

E 146. The Settlement Agreement was to discharge the parties' respective rights and obligations under the Co-operation Agreement and the Shareholders' Agreement and to replace those obligations with new ones based on the business conditions then prevailing. Those business conditions included the fact that APSEB had asserted that the PPAs were in default,

See factual matters
in paras 26-38
above.

A the fact that APSEB had asserted that the PPAs were in default, had refused to amend the PPAs to correspond to the Projects it had agreed be developed (and in doing so failed to comply with the relevant government order), and that the Projects had not by the date of the Settlement Agreement been financed.

B 147. Since the only thing the implied term does is to shift the risk that the Projects would not get financed, and hence developed, from a risk borne jointly by EPS and Oakwell to a risk borne solely by EPS, there is no business necessity requiring that such a term be implied into the Settlement Agreement. The Settlement Agreement works quite well without such a term, and indeed, it operates in the way that makes the most commercial sense in the circumstances.

C 148. For all of these reasons, the Court erred by implying into the Settlement Agreement a term that EPS must have procured Financial Closure for the Projects by the end of June 1999.

D Issue 2: The obligation to pay Oakwell after Financial Closure was a contingent condition which, in the circumstances of this case, was discharged upon non-happening of Financial Closure by 31 June 1999 or Oakwell's rescission of the Settlement Agreement on 22 July 2002

E A. *Clause 13.1 of the Settlement Agreement contains a contingent condition*

149. Clause 13.1 of the Settlement Agreement contains no promise by EPS that it would actually procure Financial Closure. Therefore this clause is neither a warranty nor a promissory condition.

A 150. Clause 13.1 of the Settlement Agreement also depends on the happening of a future uncertain event: that the Projects will obtain financing. The happening of this event, in turn, depended on the actions of a number of third parties (including APSEB, the Government of Andhra Pradesh, the Government of India, the underwriters for the financing and the lenders) all of whom were outside the control of both EPS and Oakwell.

B 151. If clause 13.1 is neither a warranty nor a promissory condition, and if for its operation it depends on an uncertain future event outside of the control of both parties to the contract, then, what in law is the clause? And what is the effect on the Settlement Agreement if the uncertain future event (Financial Closure) does not happen? The answers are these. The clause is a contingent condition; the contingency is the happening of Financial Closure. If Financial Closure does not happen, and its non-happening is due to factors other than EPS' negligent or unreasonable acts, then the obligation which follows from the happening of the contingency (that EPS pays Oakwell US\$2.79 million) is either discharged or is suspended until the contract is otherwise terminated.

Reply to Defence
to Counterclaim
para-11(e), Vol II,
RA 219, 1 CB 82

D 152. The House of Lords resolved these points in *Total Gas Marketing v. Arco British Ltd.* The contract in issue in that case was a long-term supply contract for gas. In the contract, the seller was required to use best efforts to obtain various approvals and consents from third parties and to become a party to a specific agreement. The obligation to supply the gas was conditional on the happening of these events. No time was specified for when the approvals needed to have been obtained and the agreement concluded. There was no express provision

[1998] HJ No. 22,
2 LL Rep. 209; at
Vol 2 ABA Tab 19

For full account of
the facts, see Lord
Slynn's judgment
at pp 240-243;
facts summarised
at headnote on p
238.

- A that the contract would be terminated upon the non-happening of these events. The seller was making efforts to procure the third party approvals and consents. In the meantime, there was a downturn in gas prices. The buyer of the gas wanted to rid itself of its contract with the sellers as it had become unfavourable to it. Their Lordships were required to determine
- B the date by which the seller was to have become a party to the third party agreement and the consequence of the non-happening of this event.

153. Their Lordships unanimously accepted that the condition of supplying fuel in that case was a contingent condition. A
- C contingent condition, their Lords held, is a provision that on the happening of some uncertain event an obligation shall come into force or that an obligation shall not come into force until such an event happens. This is to be contrasted with a promissory condition the breach of which may lead to discharge and damages. The reason why the law accepts that contracts
- D may contain such non-promissory terms is obvious. It is untenable to impose on a party to a contract a legal obligation that the party did not voluntarily assume to ensure the happening of an event (like the actual financing of the Projects by EPS in this case) that is not within the party's control to procure.

- E
154. Their Lordships concluded that upon the non-happening of the contingent uncertain event there were two options: either the contract was discharged (or terminated) or it was suspended. The applicability of either option was held to be a matter of construction of the contract in question. In that case, their Lordship's accepted the buyers' argument that the contract was

Total Gas Marketing supra at para 30; at Vol 2 - ABA Tab 19, pp 245, col 2 (per Lord Slynn), 248 col 2 (per Lord Nolan), p 250 col 2 - 251 col 2 (per Lord Steyn) Holding on contingent condition: *Ibid* at p 245, col 2, p 251, col 1 Promissory condition: *Ibid* at p 244 col 2

Total Gas Marketing, Ibid at p 245, col 1 (per Lord Slynn) and at p 256 col 2 89 (per Lord Hutton), and at p 251 col 1 (per Lord Steyn)

A discharged.

155. Subsequently the Court of Appeal for England and Wales confirmed that a contingent condition does *not* include a promise that the condition will be fulfilled. This proposition can be put another way too. If a condition does not contain a promise that it will be fulfilled it is a contingent condition.

Koch Highlex GmbH v. New Millennium Experience Co. [1998] EWJ No. 5870 (CA); Vol 2 ABA Tab 33 at p 458

- B
156. Clause 13.1 does not call itself a "condition", but this does not matter. Contractual terms have to be classified as either warranties, conditions or intermediate terms. The question of which is which is determined not by how the parties define the term in their contract, but rather by how the court does, usually after considering the consequences of a breach, or non-happening of an event, to the over-all bargain.

Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaisha, [1962] All E.R. 474 (CA) (Vol 2 ABA Tab 20 at pp 2680-2690), as refined by *Dunlop Corp v. Newbold & Carter Ltd*, [1963] 2 All E.R. 513 (HL) (Vol 2 ABA Tab 21 at pp 302-303, 303-304h)

157. Since, the payment obligation in clause 13.1 is dependant on the happening of a contingency, not under the control of either party, and which EPS has not promised will occur, the clause is a contingent condition.

CI 1.1.1: Vol V Pt. F, RA 8731-8737 at 8737; 2 CB 267

- D
- B. *In clause 13.1 EPS' only obligation was to make reasonable efforts to obtain Financial Closure within a reasonable time and not to prevent Financial Closure due to its negligent or unreasonable acts*

- E 158. Courts will imply into contracts containing contingent conditions, (such as contracts dependent upon planning permission) the obligation to use reasonable efforts to cause the event to happen within a reasonable time. Contrary to what the trial Judge held in this case, courts do not imply into such contracts an absolute obligation to cause the event to happen.

Jolley v. Carmel Ltd [2000] 2 EGLR 153 (CA) at para 15; at Vol 2 ABA Tab 22 at p 418 b-c

- A 159. In *Jolley v. Carmel Ltd*, [2000] 2 EGLR 153, a plaintiff sold land to a defendant. Completion of the sale was stipulated to be on expiry of a specified period after planning permission was obtained. There was no longstop date for planning permission to be secured. The plaintiff claimed that there were two implied terms: that the defendant would obtain planning permission in a reasonable time; and that it would make reasonable efforts to do so. Kim Lewison QC (sitting as deputy judge of the High Court) held (as affirmed by the Court of Appeal):

Vol 2 ABA Tab 22

EGLR at p 414D col 1

EGLR at p 414D, col 1

EGLR at p 417

- B. It was common ground that a term can only be implied into a contract if it is necessary to give business efficacy to the contract or if it is so obvious that it goes without saying. As originally pleaded, Mr Jolley's case was that the contract contained an implied term that obliged the buyer to obtain planning permission within a reasonable time. That would have imposed upon the buyer an absolute obligation to obtain planning permission. In my judgment, it is an impossible term to imply. The grant of planning permission was not within the buyer's control, and no sensible businessman would give an absolute promise to do something that was not within his control (emphasis added).

[CA] [2000] 3
EGLR 68; Vol 2
ABA Tab 22 at 319

- C. 160. In *Jolley*, the Court held that the contract contained an implied obligation, on the buyer in that case, to take reasonable steps to obtain planning permission in a reasonable time. The House of Lords in *Total Gas, supra* came to the same conclusion in that case too, *supra*.

Vol 2 ABA Tab 31
at p 418 B col 1Vol 2 ABA Tab 19
at p 221 col 1, 246,
col 2, 247, col 2

- D 161. The amount of time that must pass before the obligation to make best efforts varies with the contract. In *Total Gas*, the House of Lords fixed that time with precision, by looking to a contractual marker. In *Jolley*, the court held that:

Vol 2 ABA Tab 19
at p 247, col 2Vol 2 ABA Tab 31
at p 420C

If, as I have held, there was an implied obligation on the part of the buyer to take reasonable steps to obtain planning permission, it might be said, that for as long as the buyer continued to perform that obligation, time for satisfaction of the condition was still running. This would, in my judgment, be closer to what the parties

A

expressly agreed than the imposition on them of some arbitrary time-limit. If the approach of Cross J. (in *Re Longlands Farm*) is followed to the letter, it seems to me to involve the proposition that the court must select, by reference to circumstances prevailing at the date of the contract, a fixed period of time that would constitute reasonable time. Suppose that the court decides that one year would have been a reasonable time. The effect of this is that the court is not implying a term that the planning permission had to be obtained within a reasonable time, but that it had to be obtained within one year.

B

162. In *Hick v. Raymond & Reid* [1893] AC 22, the House of Lords held that the obligation to use reasonable efforts to obtain approvals of third parties within a reasonable time is not breached if the party procuring such approvals is not responsible for delays not occasioned by negligent or unreasonable conduct on its part. The House held,

Vol 2 ABA Tab 24

C

... the condition of reasonable time has been frequently interpreted; and has been invariably held to mean that the party upon whom it is incumbent duty fulfils his obligation, notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control, and he has neither acted negligently nor unreasonably

Vol 2 ABA Tab 24
at p 336-337

D

163. The decision in *Jolley* applied *Hick v Raymond & Reid* to arrive at the conclusion that "the buyer would not be in breach of the implied term so long as any delay in obtaining planning permission was attributable to causes beyond its control, and so long as it had not acted negligently or unreasonably".

Vol 2 ABA Tab 31
at p 418E col 1

E

164. These are essentially the same principles the Court below adverted to in the judgment from the unreported case *Bournemouth and Boscombe Athletic Football Club and Co Ltd v. Manchester United Football Club Ltd* (Unreported, English Court of Appeal, 1980). However, because the Court implied into the Settlement Agreement an absolute obligation on EPS to finance the Projects by 31 June 1999, the Court did not actually

Judgment paras 7
& 93, Vol 1 RA 6 &
39, 1 CB 5 & 38

A consider these principles at all.

C *Financial Closure failed to happen by 30 June 1999, but this was not due to EPS' negligent or unreasonable acts*

B 165. In the present case, the payment to be made under clause 1.3.1 was contingent on financing. Financing, in turn, was contingent on a variety of third party actions. The Court below held that a reasonable time for these things to have happened was by the end of June 1999. They did not happen by then.

Vol V: Pt F, RA
8731-8737 at 8737;
2 CB 267

Judgment, para 87
at Vol I RA 38, 1
CB 35

C 166. Accordingly, EPS could only be liable under the Settlement Agreement if financing had not happened by the end of June 1999 due to negligent or unreasonable conduct on its part. But:-

*Hick v Raymond &
Feldt* [1893] AC 22
at Vol 2 ABA Tab
24
Jolley, supra, Vol 2,
ABA Tab 31 at
418E col 1

(a) there was no finding at trial that EPS acted negligently or unreasonably in relation to obtaining financing for the Projects;

D (b) there was no finding at trial that EPS was negligent or unreasonably when it sought to have the amended PPAs executed so that they conformed to the nature of the Projects that both EPS and APSEB intended be developed and financed and the prevailing government order;

E (c) there was no finding at trial that EPS was negligent or unreasonably when it sought to have the PPAs amended so that they would not be immediately in default upon execution of the amendments;

(d) there was no finding at trial that EPS was negligent or unreasonably when it entered into financing

of Appeal (TA) or
Case Bundle (CB) or
Appellate Bundle of
Authorities (ABA)

- A commitments for a project costing an estimated US\$217 million that required a solicitor's opinion that the Projects were in good standing and not in default.

Costing at US\$217 million, at Judgment, para 16 Vol I RA 9.

167. Furthermore, no evidence was led at trial that between 29 December 1998 and 3 June 1999:-

- B (a) any lender was ready, willing and able to lend against PPAs that APSEB had represented were then in default;
- (b) any lender was ready willing and able to lend against PPAs that did not correspond to the type of project that was contemplated to be constructed;
- (c) EPS' solicitors, Pollet Law, falsely stated that they could not render a solicitor's opinion to the lenders that the Projects were in good standing and not in default unless APSEB agreed to the changes they requested to the PPAs;
- C (d) that the lenders required anything less than what Pollet Law told APSEB the lenders needed before they would advance financing for the Projects.
- D

Letter of 15.2.99, at Vol V Pt (G) RA 888-889; 2 CB 316-317

168. Indeed, the only thing Oakwell could point to at trial in support of their contention that EPS failed in any respect was that physical construction of the Projects and acquisition of land had not been commenced before June 1999 — but why would it have been? There was no financing, after all and nor was there a valid contract in place to define what project should be constructed.
- E

Judgment, paras 83, 84; Vol I RA 9, 1 CB 8

169. So, then, what did the Court below look to to support its view that the Projects could have been financed by 30 June 1999? There was not much. The Court held that there were sufficient

Judgment, paras 81-82; Vol I RA 34.

A local and foreign lenders "willing to lend and invest in power projects in India generally and in Andhra Pradesh in particular". However, the Court did not find there were any such local or foreign lenders willing to lend to the Projects in particular, to do so by 30 June 1999, and to do so with the PPAs in the condition they were in at that time.

1 CB 33

B 170. Instead, evidence was presented showing that the subsequent Indian lenders to the VBC Group, the Industrial Development Bank of India ("IDBI"), had issued a letter on 11 November 1999 setting out pre-conditions for it to provide the financing that would allow Financial Closure to occur. Amongst other things, these conditions required that the PPAs be amended in a form satisfactory to IDBI. Such an amended restated draft PPA was initialled between KEOPIL (which, was under VBC's control) and APSEB (then known as APTRANSCO) on 29 November 2001, 2½ years after the date on which the Court below held EPS had to have procured Financial Closure. This PPA contained the type of amendments that EPS and the Project Company had sought before June 1999 and had been denied. There was no evidence given at trial as to whether this PPA was eventually signed.

At Vol V Pt G RA
9231-9233; 2 CB
357B-GVol V Pt J RA
9231-9266; 2 CB
420-435cf EPS efforts to
get amendments to
arts 6.3 / 7.2(g), at
para 63-72 above

E 171. The Court below held that "contrary to Mr Cassina's assertion, the PPAs did not expire under their own terms". With respect, this finding was misplaced: it was the lenders (CMS) which made this assertion and it was EPS' solicitors who reasonably took the view that they (the solicitors) could not provide the lenders with an opinion that the PPAs were in force and not in default whilst APSEB maintained its position that the PPAs in fact were in default.

Judgment, para 85;
Vol I RA 35, 1 CB
34See CMS' letter of
4.2.98 at Vol V Pt
(D) RA 7660, 1 CB
238See, Pollet, Law's
letter of 15.2.99, at
Vol V Pt (G) RA
8888-8889; 2 CB
316-317

- A 172. In fact, plentiful evidence existed of EPS' having expended immense time, energy and effort in reasonable efforts towards Financial Closure, as narrated above. In *Group Exclusiv Pte Ltd v. Diethelm Singapore Pte Ltd*, Choo Han Teck J dealt with the question of a purchasers' obligation to apply for planning approval on a "best endeavours" basis. After reviewing a number of authorities, the learned Judge held:-
- ... these authorities do not stand for the proposition that the purchaser was required to make a heroic effort in order to comply with a 'best endeavours' clause ... the agreement must be viewed as a contract that both parties were happy with and desired full performance and that the purchaser will ... "take all those reasonable steps which a prudent and determined man, would have taken" ...
- B
- C 173. Consequently, EPS did not breach clause 1.3.1 of the Settlement Agreement by not procuring Financial Closure for the Projects by the end of June 1999.
- D D. Since Financial Closure did not happen by 30 June 1999, EPS' obligations under the Settlement Agreement were either discharged on that date or on 22 July 2002 when Oakwell rescinded the contract
- E 174. Financial Closure did not happen by 30 June 1999. At trial, EPS contended that the parties had not agreed on a date for when financing had to happen when they entered into the Settlement Agreement, and that the date Oakwell asked the Court to accept, 30 June 1999, was not a reasonable one. EPS' contention at trial is very similar to the view accepted in the case of *Jolley v. Carmel Ltd* where the court recognised the probable inability of the buyer and seller in that case to have agreed on "reasonable time" at the time they made their

See paras 68-70 above.

[2003] 4 SLR 582, at Vol 2 ABA, Tab 30; M.R. decision under appeal vide CA 133/2003

Ibid at pp 407-408

Defence para 12(h); Vol II RA 104-105, 4 CB 78A-78B; EPS' Closing Submissions, para 95, p 78; RA 12115, 2 CB 474

Jolley v Carmel Ltd [2000] 2 EGLR 153 Vol 12 ABA Tab 31; *aff'd* [2000] 3 EGLR 68, CA

Core bundle (CB) of
Appellate's Bundle of
Authorities (ABA)

Vol 2 ABA Tab 31
at p 414E col 1

A *contract.* It may be recalled that the contract in question in *Jolley* was silent on a long-stop date for planning permission to be secured. The court held,

B

I conclude, therefore, that the buyer would not be in breach of the implied term so long as any delay in obtaining planning permission was attributable to causes beyond its control, and so long as it had not acted negligently or unreasonably ... if the parties had been asked by the officious bystander whether they agreed that if no planning permission were obtained within one year (rather than 11 or 13 months) the contract would lapse, would they have unhesitatingly ~~have~~ agreed? The truth is that if the parties had given any conscious thought to the question of how long it might take to obtain planning permission, they would not have been able to do more than make an educated guess. And if, in addition, the buyer had been told that if, for whatever reason, the grant of planning permission was delayed beyond the period arrived at by an educated guess, the contract would automatically lapse and he would lose his investment of time and money in the planning process, I cannot think that he would have unhesitatingly agreed ...

Vol 2 ABA Tab 31
at

C

D 175. Against the backdrop of events and myriad problems in December 1998, none of the parties obviously could foretell in December 1998 when Financial Closure could in fact occur for the Projects. Furthermore, nowhere in Oakwell's pleadings nor in further and better particulars sought from them, was Oakwell able to specify what exactly was the time frame they contended that "reasonable time" comprised of.

Para 13(b),
Statement of
Claim, and Answer
to Request 3(b) of
Particulars dated
18.12.02; Vol II RA
69, 260-261; 1 CB
61, 83-84

E

176. The Court below appears to have referred to VBC obtaining Financial Closure "in Principle" on 30 December 1999 (6 months after its entry into the Projects) as a basis to construe "the reasonable period it would take for [EPS] to achieve Financial Closure" as expiring in June 1999. The Court did not take into account the fact that Financial Closure in principle is

Judgment, para 86;
Vol I RA 35, 1 CB
34

A not the same as actual Financial Closure. As noted in para 95 above, Oakwell's witness, Mr Eric Leow, accepted that comparing these concepts was tantamount to making comparisons "between apples and oranges".

B 177. EPS claimed at trial, in effect, that the Settlement Agreement did not require it to have obtained Financial Closure by any date at all. This was a safe and appropriate interpretation of clause 13.1 of the Settlement Agreement, based on the principles from *Jolley v Carmel Ltd*. Therefore, there was no basis for the Court to hold that EPS had breached the Settlement Agreement by not procuring Financial Closure by the time Oakwell had repudiated it, on 22 July 2002.

C 178. In fact, even after VBC had control of the Projects from July 1999, Financial Closure had not taken place up till the time the Judgment was rendered (16 October 2003), more than 4 years later. This was notwithstanding an allusion in the Judgment that the Projects were "poised to take off".

D 179. Nevertheless, if reasonable time for EPS to procure Financial Closure had expired by the end of June 1999 without Financial Closure happening, then one of two things follow: either EPS's payment obligations in clause 13.1 are discharged or they are suspended. Which one is selected is a matter of construction.

E In this case it does not matter which one is selected because neither choice results in EPS having breached the Settlement Agreement:-

- (a) if EPS' payment obligations were discharged, then after 30 June 1999 EPS had no further obligations to make

Closing
Submissions para
95; Vol 10 P18 RA
12029 at 12113;
EPS Re-re-re
Amended Defence
(Defence) para
12(4) at Vol 10 RA
104-105, 1 CB
784-788

[2000] 2 EGLR 153
A [2000] 3 EGLR
68; Vol 2 ABA Tabs
22 & 31

Judgment, para
107; Vol 1 RA 45, 1
CB 44

Total Gas
Marketing v. Arco
British Ltd. *ibid* at
p 245 col 1 (per
Lord Slynn), p 251
col 1 (Lord Slynn)
and p 256 col 2
(per Lord Hutton);
Vol 2 ABA Tab 19

- A best efforts to obtain financing for the Projects; or
- (b) if EPS' obligations to make such best efforts were suspended after 30 June 1999 these obligations terminated upon the rescission of the Settlement Agreement following Oakwell's repudiation of it in July 2002.

B

180. Accordingly, it does not matter which of the three options is selected (EPS did not have to obtain financial closure for the Projects by any date; EPS had no obligation to do so after 30 June 1999; or EPS' obligation was suspended after 30 June 1999) since none of these options make EPS liable for not having obtained Financial Closure by the time Oakwell repudiated the Settlement Agreement on 22 July 2002.

C

E. EPS did not repudiate the Settlement Agreement prior to 22 July 2002

D

181. If EPS' obligation to make reasonable efforts did not expire on 30 June 1999, then Oakwell wrongfully and prematurely sought termination of the Settlement Agreement on 22 July 2002. Besides implying a term as to procuring Financial Closure, the Court below also surmised that there were implied terms requiring EPS to remain a shareholder of the Project Company until Financial Closure and that it had to pay Oakwell from funds coming into the Project Company on Financial Closure.

Vol V Pt K RA
10168 - 10170, 2
CB 436-438

Judgment, Paras
91 and 92, Vol I RA
38-39, 1 CB 37-38

E

182. As EPS had no duty to bring about Financial Closure as contended above, it could not have "repudiated" such a non-existent contractual duty. There was also no consideration of

Issue 1 above.

Law Centre (LC) or
Appellate Board of
Authorities (ABA)

- A business efficacy, reasonableness or necessity which demanded that EPS must have impliedly undertaken to remain a shareholder of the Project Company, to manage it or to pay Oakwell from Project Company funds. Payment from project funds lent to the Project Company on a non-recourse basis could not have been used to pay Oakwell. As was held in *Jolley*:-

EPS Closing
Submissions Vol VI
P1B RA 12096-
12107, 2 CB 461-
462

An obligation to take reasonable steps to obtain planning permission is a contractual obligation that may be performed in a variety of different ways. Where a contractual obligation may be performed in a variety of different ways, the choice of method of performance is that of the promisor.

[2000] 3 EGLR
153; Vol 2 ABA
Tab 31 at p 418

- C 183. EPS views the entry of the VBC Group into the Projects as fulfilment of any obligation it had to make reasonable efforts towards procuring of Financial Closure. Indemnities were extended by both EPS and VBC to Oakwell in relation to this. Oakwell's representatives on the board of EOPL gave their assent to the takeover of the Projects by VBC. The court below noted that the Plaintiffs were "positively responsive" to VBC's entry into the Projects. Indeed, the court below held that "Oakwell was also sanguine enough to realize that [EPS was] not making any progress in the implementation of the Project. It therefore welcomed VBC Group's (sic) entry" into it.

Defence para
21(a); Vol II RA
122, 1 CB 780

Para 78 above.

EOPL Board
minutes (18.7.99),
Vol V P1 G RA
9100-9105, 2 CB
353-357A, Aaker
letter (25.8.99); Vol
V P1 G RA 9138-
9139, OEL letter
(27.8.99); Vol V P1
G RA 9142

Judgment, para 3,
1 CB 2-3, para 50 1
CB 21

- E 184. By July 1999, the parties had therefore clearly envisaged Financial Closure being achieved, if at all possible, through the direct efforts of a third party, who would substantially own the Projects. The 10 August 2000 agreement made little practical difference to the question of who substantively owned and managed the Projects from then on. Oakwell was well aware

Core Bundle ("CB") of
Applicable Bundle of
Authorities ("ABA")

A since 1999 that VBC's entry into the Projects in fact enhanced its prospects of achieving Financial Closure. In fact, VBC's entry into the Projects brought the contingent condition closer to fulfilment. Oakwell's witness, Mr Eric Leow testified as follows:-

Eric Leow's
testimony at pp 71-
74, Vol III P1K RA
4254-4257. 1 CB
121-124

B Q. All right. Now, will you therefore agree also that by doing so, Oakwell on 16th July had also no objection to the majority control of the Project being from that day onwards with the VBC Group?

A. The answer to that is Oakwell basically wants whatever that's in the settlement agreement, obligations of EPS to be fulfilled by EPS and *how EPS made that happen* to Oakwell is not the key focus of or the objection or agreement of Oakwell to do that under this MOA. (emphasis added)

C

185. Oakwell even sent a letter dated 4 July 2001 to the Government of Andhra Pradesh, stating:-

OEL letter (4.7.01):
Vol V P11 RA 5824-
5826; 2 CB 417-
419

D

We also wish to state and confirm that your good self may deal directly and exclusively with VCB / KPCL / [KEOPL], in respect of all matters relating to the Power Project, *without referring to us on any matter at all*, since VBC / KPCL / [KEOPL] have full, exclusive and complete control and management over the Power Project, PPAs and the Generating Company. [emphasis added].

E

186. Inexplicably, the agreement of 10 August 2000 was treated by the Court below as an act which was inimical to attainment of Financial Closure or, if necessary, payment of the Royalty after attainment of the date of commercial operation. No account or explanation was given in the grounds of decision as to why VBC, which had undertaken a project involving an estimated cost accepted by the court below of US\$217 million, would fritter away all prospects of bringing the Projects to fruition and,

Judgment, para 91-
92, Vol I RA 38-39,
1 CB 37-38

Idid, at para 16, at
RA 9, 1 CB 8

A as a necessary corollary, achieving the contingent condition.

187. As there was no basis for EPS to be treated in repudiation of the Settlement Agreement, Oakwell's actions on 22 July 2002 would itself amount to its repudiation of the Settlement Agreement. This was accepted by EPS on 27 September 2002.

Vol V Pl K RA
10168-10170, 2 CB
436-438

B The rescission of the Settlement Agreement by Oakwell and the acceptance of this termination by EPS therefore discharged any obligations EPS had, past 30 June 1999 to seek to obtain financing for the Projects.

EPS letter
[27.9.02]; Vol V Pl
K RA 10262-10265

Issue 3: EPS did not breach clause 1.4 of the Settlement Agreement to pay Oakwell the Royalty

C 188. Pursuant to clause 1.4. of the Settlement Agreement, EPS had to cause EOPL to pay Oakwell the Royalty of 6.25% of the actual cash flow available for foreign repatriation from the Projects. Pursuant to Appendix A to the agreement, the Royalty was to be calculated based on the actual cash available for repatriation based on the actual conditions during the actual operation of the Project. There was no guarantee that the actual operations of EOPL would actually generate any cash flow that actually could be repatriated.

Cl 1.4 Settlement
Agreement at Vol V
Pl F RA 8737; 2
CB 267

Appendix A
Settlement
Agreement at Vol V
Pl F RA 8748; 2
CB 278

D 189. EPS was able to satisfy this obligation under clause 1.4.2 (a) of the Settlement Agreement by causing EOPL to issue preference shares to Oakwell with specified terms and conditions within 60 days of 29 December 1998. On 13 February 1999 (i.e. within this 60 day period) EPS caused EOPL to allot to Oakwell preference shares with the appropriate terms and conditions.

Cl 1.4.2(a)
Settlement
Agreement at Vol V
Pl F RA 8737; 2
CB 267

See para 62 above.

E 190. At trial, the Court accepted the authority of *Mackay v. Dick*, for the proposition that where a contract requires something to be

[1880-1881] 6 App.
Cas. 251 (H.L.)
Vol 2 ABATab 25

A the proposition that where a contract requires something to be done that cannot be done unless both parties concur in doing it, then each party is required to do all that is necessary to be done on his part to carry out that thing. Following this authority, then, Oakwell was required to do everything in its power to ensure that it obtained these shares. It could not refuse to subscribe to them. Yet it did.

B 191. Although Oakwell led evidence at trial that the shares did not effectively give it a claim to 6.25% of BOFL's cash flow as a reason for why it refused to subscribe to the shares, the Court did not rule on this evidence and EPS led evidence to the contrary.

C 192. The reason Oakwell gave in evidence for why it refused to subscribe to the preference shares had nothing to do with the terms of the preference shares themselves, however. Rather the reason was how the amount of the Royalty, if any, was calculated in the notional cash flow model appended to the Settlement Agreement, and the perceived low yield from such shares. In any event, the preference shares allotted to Oakwell corresponded with the terms of the Settlement Agreement. Oakwell's complaint, in effect, was with the terms of the agreement they negotiated, not with EPS' compliance with those terms.

D E 193. Therefore, at trial Oakwell did not meet its burden of demonstrating that EPS had failed to fulfil the clauses 1.4.1 and 1.4.2 (a) of the Settlement Agreement. For this reason, the Court erred by awarding Oakwell damages for the breach of

A clause 1.4.

194. Alternatively, pursuant to clause 1.4.3, EPS was required to pay Oakwell the Royalty only after the Projects achieved their commercial operation date. This date had not yet arrived by 22 July 2002 when Oakwell repudiated the Settlement Agreement.

Cl 1.4.3 Settlement
Agreement, Vol V
Pl F RA 8738, 2
CB 268

B There was no evidence that whilst the Settlement Agreement was extant EPS would not have paid the Royalty in the event that it had to do so after the commercial operation date. For this reason too, the Court erred by awarding Oakwell damages for the breach of clause 1.4.

Vol V Pl K RA
10168 -- 10170, 2
CB 46-48

C Issue 4: If EPS did repudiate the Settlement Agreement on or before 10 August 2000, Oakwell mitigated its losses.

195. Oakwell's case was that by 10 August 2000 at the latest (the date of the agreement between EPS and VBC), EPS had repudiated the Settlement Agreement. In its Judgment, the Court accepted that EPS had repudiated the Settlement Agreement by this date.

STC, para 21, Vol
II RA 72-73, 1 CB
64-65

D
196. EPS' position, of course, is that it did not repudiate the Settlement Agreement by this date or at all. If its first three contentions above are accepted, then it could not have repudiated the Settlement Agreement on 10 August 2000 because it had fulfilled all terms it was required to have fulfilled under the Settlement Agreement or was discharged from further performance by virtue of the non-happening of Financial Closure under clause 1.3.1.

Judgment, para 91-
92; Vol I RA 38-39,
1 CB 37-38

E
197. Nevertheless had EPS repudiated the Settlement Agreement by

Defence para 21:
Vol II RA 121-122,
1 CB 78C

at Appeal (RA) or
Core Bundle (CB) or
Appellate Bundle of
Authorities (ABA)

A 10 August 2000, then it could only have done so in respect of the Royalty, since by that day, EPS had either fulfilled its obligation under clause 1.3.1 (as it contends) or had already breached that clause (as Oakwell contends).

B 198. Therefore, after 10 August 2002 Oakwell had the duty to take all reasonable steps to mitigate its damages and losses, if any, in relation to the Royalty. Where Oakwell does mitigate its damages it cannot obtain recovery from EPS for those damages too. Likewise, where Oakwell fails to act reasonably in mitigation it cannot look to recover its loss from EPS.

*Halsbury's Laws of
England* (London:
Butterworths, 1999)
(Vol. 12(1)) at par.
1041, Vol. 2 ABA
Tab 28 at 366

C 199. The House of Lords has described this duty as follows:

[T]he fundamental basis is thus compensation for pecuniary loss flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.

[1912] A.C. 673 at
689 (H.L.); Vol. 8
ABA Tab 27 at p
388

D *British Westinghouse Electric and Manufacturing
Company, Limited v. Underground Electric Railways
Company of London, Limited*

E 200. One of ways that Oakwell agreed to receive the Royalty under clause 1.4.2 of the Settlement Agreement was by entering into an agreement directly with the Project Company whereby the company would pay Oakwell "as technical or consultancy fees" an amount equal to the Royalty. One of the agreements Oakwell entered into on 4 July 2001 was an agreement with the Project Company whereby Oakwell would receive a lump sum as a "Technical Fee". Accordingly, Oakwell contracted directly with the Project Company for the very thing it had agreed to

CI 1.4.2(b) RA
8738, 2 CB 268

TTCLA: Vol VP1
RA 9765-9772 at
9769, 2 CB 399

A accept from the Project Company under the Settlement Agreement.

201. Therefore, even if EPS had breached the Settlement Agreement on 10 August 2000, in respect of the Royalty, Oakwell had fully mitigated its losses by directly entering into the very contract with the Project Company that under the Settlement Agreement it had agreed to accept as payment for the Royalty.

Defence para
31(g), Vol 8 RA
131, 1 CB 78E

202. On 4 July 2001, Oakwell entered into a series of agreements with the new controlling shareholder of the Project Company, VBC, and its associated entities, including the Project Company. Essentially, in these agreements VBC agreed to pay Oakwell some US\$2 million in instalments, and up to US\$6 million in total. The consideration for these payments was Oakwell's rights in the Project Company and its contributions to the development of the Projects. This is the same consideration that Oakwell gave to EPS in exchange for the Settlement Agreement. Therefore, if EPS had repudiated the Settlement Agreement, then Oakwell has, in effect, sold its interests in the Project Company and the PPAs to VBC for greater consideration than Oakwell had agreed to accept from EPS in the Settlement Agreement.

Refer to paras 87-
89 above.

E 203. Oakwell, in other words, had a duty to mitigate its (claimed) losses arising out of EPS' repudiation of the Settlement Agreement (if indeed that is what EPS did) and Oakwell did in fact mitigate its losses by conveying the interests it had relinquished to EPS under the Settlement Agreement to VBC for valuable consideration. Therefore, the Court erred by

Defence para 31(g)
Vol 8 RA 131, 1 CB
78E

A awarding damages to Oakwell in these circumstances and in effect gave Oakwell double recovery.

Issue 5: Even if EPS has correctly been found to be liable to pay Oakwell damages, the damages awarded have not been correctly assessed

B 204. The Court below has ordered that EPS pay damages to Oakwell equal to the 625% Royalty defined in clause 1.4.1 of the Settlement Agreement. The Court assessed the damages at US\$2,560,210, as at the date of the 10 August 2000 Agreement. In determining damages, the Court appears to have accepted evidence tendered by Oakwell's witness, Mr. Kishore of what the damages assessed as at this date would amount to (Para. 82(b) of Mr Kishore's AEIC). In arriving at his figures, Mr Kishore made a number of assumptions as to the date of commercial operation and the date the payments of the Royalty would begin. (Annexure VI-A of Mr Kishore's AEIC).

Judgment para
106(2), Vol I RA
46, 1 CB 45

C
D 205. By accepting Mr Kishore's methodology for calculating damages, the Court made two errors. First, the Court discounted the future payments to the date of breach (10 August 2000) not the date the payments were due. Second, the Court calculated the damages based on assumptions that were known not to be true at the date of trial.

Vol III P11 RA
3357, 3435-7,
3439-3441, 1 CB
93, 95-97, 98-100

E 206. In assessing damages in the context of anticipatory breach, where the time of performance had yet to arrive (as in the present case), damages are assessed as at the date of performance of the contract, and not at the date the contract is repudiated. Treitel, *The Law of Contract* (11th Ed, 2003) states, in relation to the assessment of damages for anticipatory

Vol 2 ABA Tab 28
at 393

A breach-

Assuming that subsequent events have not deprived the injured party of his right to damages, the general rule is that those damages will be assessed by reference to the time when the contract ought to have been performed and not by reference to the time of repudiation.

- B 207. This means that, using Kishore's assumption about when the Projects should have become operational, each of the Royalty payments are to be assessed at the date each were to have been paid, i.e. on 24 July 2001, 2002, 2003, 2004 and 2005. Therefore as at 10 August 2000, none of the Royalty payments were due to have been made. However, Kishore calculated damages based on the "Net Present Value" of receiving the accumulated Royalty payments on 10 August 2000. By accepting this date, rather than the dates the payments were due, for calculating the damages the Court erred.
- C

- D 208. In the context of sales of goods, Baillhache J held, in *Melachrino v Nickoll and Knight* [1919] 1 KB 693, at 699:-

Vol 2 ABA Tab 29
at 400

In my opinion the true rule is that where there is an anticipatory breach by a seller to deliver goods for which there is a market at a fixed date the buyer without buying against the seller may bring his action at once, but that if he does so his damages must be assessed with reference to the market price of the goods at the time when they ought to have been delivered under the contract. If the action comes to trial before the contractual date for delivery has arrived the Court must arrive at that price as best it can.

- E 209. Mr Kishore calculated each of the Royalty payments using the assumptions found in the notional financial model appended to the Settlement Agreement in Appendix A. These were that the power plants would have a combined capacity of 200 MW and the Project Company would receive the tariff anticipated when

Kishore AEG Vol
III Pt H RA 3387 at
para 820; 1 CB
93; assumptions in
RA 3435-37, 1 CB
95-97; calculations
in RA 3439-3441, 1
CB 98-100

- A the Settlement Agreement was entered into. In Appendix A of the Settlement Agreement, however, it is clearly stated that the Royalty is to be based on the "actual cash available for repatriation based on actual conditions during the actual operation of the Project at the end of each Financial Year of EOPL, for each of the first five (5) years after the Commercial Operation Date of the Project" [Emphasis added].
- B

210. As at the date parties went to trial, the project had not commenced commercial operation. However, the actual conditions of the project were known to be significantly different from the assumptions that were found in the notional financial models of Appendix A to the Settlement Agreement.
- C

- (a) The capacity of this project had increased to 445 MW, which meant a much higher capital cost.

Judgment para 62
Vol 1 RA 26, 1 CB
25

- (b) The tariff had been reduced significantly.

Judgment para 97
Vol 1 RA 41, 1 CB
40

- (c) The gestation period was changed to 16 months under the state government order of 22 May 1998. Assuming Financial Closure by 30 June 1999, the Commercial Operation Date should have been 30 October 2000.

Government order
22.598 in Vol V Pt
D RA 8050, 1 CB
247

- E 211. Accordingly, even if the damages were to be assessed as if commercial operation had commenced and the Royalty was due commencing 14 June 2001, damages should have been based on the actual capacity and tariff, not on assumptions that were not true at the date of trial and never will be true. By calculating the damages based on assumptions known not to be true, the

14 June 2001
being 75 days after
the last month of
the 1st financial
year in which COD
occurred: see
below para 212.

A Court erred.

212. Further, Kishore appears to have ignored provisions of the Settlement Agreement having an impact on the calculations for the Royalty:

B

- (a) No deduction for 'depreciation' which Oakwell's expert, Mrs Nalini Chidambaram had opined would have to be accounted for in the actual Royalty computations.

AEC at Vol III P11
RA 3185, 1 CB 90

C

- (b) Under clause 1.4.1 of the Settlement Agreement, EPS was to pay Oakwell the Royalty within 75 days of the last month of each financial year of the Project Company. The Project Company's financial year ends on 31 March.

C 1.4.1: Vol V P11
RA 8737, 2 AB 267

See: Kishore AEC
at Vol III P11 RA
3435-37, 1 CB 95-
97.

D

- (c) Royalties should therefore be paid by approximately 14 June of each year for 5 years from 14 June 2001.

E

- (d) The Royalties were to be paid based on the actual cash flow under actual operating conditions of the Project Company. The company's financial year, ends on 31 March each year. Assuming the Projects started Commercial Operation in October 2000, the period of assumed operations for the Project Company ending with the first financial year following the start of Commercial Operation (i.e. 31 March 2001) would only have been five months. Hence, there would have been only 4 years and 5 months of actual operations for

Oct 2000 being
after a 16 months
gestation period
from assumed FC
on 30.6.99.

Core Bundle (CB) or
Appellate Bundle of
Authorities (ABA)

A which Royalties would have been payable under clause
1.4 of the Settlement Agreement.

213. The financial parameters of the project currently in
development lead to a significantly lower cash flow available
for repatriation than the cash flow from which the judgment is
based. Using the actual project parameters, and assuming the
same for the future, the Royalty on 14 June 2001, 2002, 2003,
2004, and 2005 amounts to US\$291,472. The net present value
of this payment stream, as at the date of termination of the
Settlement Agreement on 22 July 2002, using the 17.5%
Discounted Cash Flow factor applied by Industrial
Development Bank of India in its project appraisal report is
US\$187,900 or even using the 4% Discounted Cash Flow factor
applied by Kishore the net present value as at the date of
termination of the Settlement Agreement on 22 July 2002, is
US\$261,800. It is also open to the Honourable Court to direct
an assessment of the damages, if any, in view of the
deficiencies in the information used by Oakwell's expert
witness.

See: KEOPL 445
MAY Financial
Model, dated
9.10.01, at Vol IV
PLA RA 5117 at
5118, 5122-5123,
(1 CB 145-146-
153).

See details of
US\$291,472 in
Annex A: Item (2)

IDBI Memo of
29.3.01 at Vol V Pt
1 RA 9641(2 CB
374), 9677-79 (2
CB 381-383), esp.
9679 (2 CB 383),
giving discount
factor approx.
17.5%; details of
US\$187,900 in
Annex A: Item (4)

CL: Kishore AEIC at
RA 3435 (1 CB 95)

Details of the
US\$261,800 in
Annex A: Item (3)

Issue 6: Oakwell breached the Settlement Agreement
when it entered into the agreements with VBC
and its associated entities in July 2001

214. Under the Settlement Agreement, Oakwell relinquished all of
its rights, title and interest in the Project Company and the
PPAs. Accordingly, after having entered into the Settlement
Agreement, Oakwell no longer had any interest in the Project
Company or the PPAs which could logically be sold to anyone

Amended Reply to
Defence to
Counterclaim Vol II
RA 218-219, paras
11(a)-(d) (1 CB
61A-62)

A else.

215. The only basis Oakwell had to enter into the agreements with VBC and its associated entities in July 2001 is if Oakwell had rights in the Project Company and the PPAs. The only basis on which Oakwell could claim ownership of such rights is if EPS had repudiated the Settlement Agreement and Oakwell had accepted EPS' repudiation thereby permitting Oakwell to claim entitlement to those rights it had in the Project Company and the PPAs prior to the Settlement Agreement. Indeed, the AMUI of 4 July 2001 recited the existence of the Settlement Agreement, affirming that it was not terminated at that time.

AMUI Vol V Pt I
 RA 5759 (2 CB
 389)

C Oakwell also did not issue any notice under the Settlement Agreement to EPS prior to 22 July 2002, asserting the existence of any dispute arising from alleged repudiation by EPS.

D 216. Therefore, on the assumption that EPS did not breach the Settlement Agreement, Oakwell had no right to convey its interests to VBC and its associated entities in July 2001. In doing so Oakwell breached its obligation under clause 1.1.2 of the Settlement Agreement "to take necessary steps" with EPS to resolve issues pertaining to Oakwell's relinquishment of its rights, title and interest in EOPL and the PPAs.

CI 1.1.2 Vol V Pt I
 RA 5734 (2 CB
 264)

E 217. Instead of taking steps with EPS, Oakwell entered into the July 2001 agreements with VBC—which were to be kept secret from EPS' representative on the Board of Directors of the Project Company—in which Oakwell received valuable consideration from VBC in exchange for conveying to VBC Oakwell's alleged interest in the Project Company and the

of Appeal (RA) or
 Court Bundle (CB) or
 Appellants' Bundle of
 Authorities (ABA)

Counterclaim Vol II
 RA 137-138, para
 35 (9) (1 CB 78F-
 78G)

A PPAs. Accordingly, to the extent that Oakwell received any consideration from VBC for such rights, title and interest, that consideration belongs to EPS.

218. On the other hand, even if EPS had repudiated the Settlement Agreement on 10 August 2000, as the Court held, Oakwell did not accept that repudiation until 22 July 2002. Therefore, in the period between 10 August 2000 and 22 July 2002 the Settlement Agreement remained open for performance by either party. This proposition was best encapsulated by Asquith J.J. in *Howard v. Pickford Tool Co. Ltd.*, [1951] 1 K.B. 417 (C.A.) at 421 where this Lord Justice accepted that an unaccepted repudiation is "a thing writ in water and of no value to anybody".

Vol 2 ABA Tab 34 p
 468

Fercometal S.A.R.L. v. Mediterranean Shipping Co. S.A., [1989] A.C. 788 (H.L.) at 799

Vol 2 ABA Tab 35
 p 479

D *Universal Cargo Carriers Corp v. Citati* [1957] 2 Q.B. 401 (Q.B.) at 433, 436

Vol 2 ABA Tab 37

Domicile Developments Inc. v. MacTavish (1999), 45 O.R. (3d) 302 (Ont. C.A.) at 308

Vol 2 ABA Tab 36
 p 489

E 219. This means that until 22 July 2002, when Oakwell says it "accepted" EPS' repudiation, Oakwell had to be ready willing and able to honour the Settlement Agreement. But it could not do so. On 4 July 2001, a year before its "acceptance" of EPS' repudiation, Oakwell sold to VBC the very assets (its interests in the Project Company and the PPAs) that it was to have sold to EPS and for which it was seeking payment in the action.

Vol V Pt K RA
 10168-10170 (2 CB
 436-438)

A Oakwell cannot receive payment under its theory of an "unpaid vendor", when it has not actually conveyed to EPS the "property" for which it claims payment.

220. Oakwell cannot claim damages from EPS for EPS' not having paid Oakwell the agreed price for the property when, on the

B date it alleges EPS repudiated the agreement of purchase and sale (the Settlement Agreement), it had not delivered and could not deliver up the property it claims to have sold. In other words, Oakwell breached the Settlement Agreement before 22

Counterclaim paras
35-40, RA 137-138;
1 CB 78F-G

C July 2002 by selling the property subject to the agreement to a third party. It therefore it cannot claim damages after 22 July 2002 based on an allegation that EPS breached the agreement too by not having paid for the property.

221. Accordingly, if EPS was in fact not in breach of the Settlement Agreement on 22 July 2000 (which EPS maintains is the case), the Court erred by dismissing the entirety of EPS' counter-claim.

D

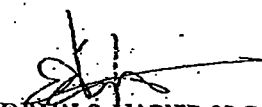
IV. REASONS FOR THE APPEAL

222. In the Settlement Agreement, EPS and Oakwell agreed on the terms whereby EPS would acquire full ownership and control of the Project Company and the PPAs. Those terms included immediate unconditional payment to Oakwell of US\$3.015 million (by way of shares in EPS) and future payments contingent upon Financial Closure of the Projects and if the Project Company actually had cash flow from which a Royalty to Oakwell could be paid. EPS honoured that agreement. It paid Oakwell the US\$3.015 million (in EPS shares). It caused

E

- A the Project Company to issue Oakwell preference shares in accordance with the terms of the Settlement Agreement. It acted reasonably and without negligence in respect of the efforts to procure financing for the Projects.
223. Oakwell did not honour the Settlement Agreement, however. It wanted to receive more than what it had agreed to accept under
- B the Settlement Agreement. When it did not get more, it wrongfully sold the "assets" that EPS had acquired under the Settlement Agreement yet again, this time to VBC.
224. At trial Oakwell alleged that it was entitled to get paid for the property it sold to EPS under the Settlement Agreement. No one contests that proposition. However, Oakwell is not entitled to get paid more. The Judgment gave it more. Indeed, in the Judgment the Court below ordered EPS to pay Oakwell more than what the Settlement Agreement required be paid. It also allowed Oakwell to sell the assets it relinquished to EPS under that agreement to VBC and keep the proceeds.
- C
- D 225. Accordingly, EPS asks that the Judgment be set aside and EPS' counter-claim granted to the extent of awarding EPS all benefits that Oakwell has received and may in the future receive from, in relation to, or arising out of any
- E interest in the Project Company its assets or Projects.

Dated this 19th day of January, 2004.


DREW & NAPIER LLC
Counsel for the Appellants

KEOPL & EOPL \$ = US\$

(1) Cash flow for foreign repatriation
Millions - Undiscounted

Se 5 - 94th Kishore	2000	2001	2002	2003	2004	Total
	\$ 7.19	\$ 10.16	\$ 9.89	\$ 9.55	\$ 8.24	\$ 46.02
445 MW model	Mar-04	Mar-05	Mar-06	Mar-07	Mar-08	Total
	\$ (16.15)	\$ (2.03)	\$ 0.41	\$ 2.36	\$ 5.00	\$ 7.76

Se 5 - Salt Kishore - adj	31-Oct-00	31-Mar-01	31-Mar-02	31-Mar-03	30-Mar-04	31-Mar-05	Total
	\$	2.88	\$ 8.42	\$ 10.04	\$ 8.75	\$ 9.42	\$ 40.60

445 MW model - adj	31-Oct-00	31-Mar-01	31-Mar-02	31-Mar-03	30-Mar-04	31-Mar-05	Total
		\$ (8.86)	\$ (10.31)	\$ (1.02)	\$ 1.21	\$ 3.46	\$ 4.66

(2) 6.25% Royalty - Undiscounted
Millions

Se 5 - 94th Kishore	2000	2001	2002	2003	2004	Total
	\$ 0.45	\$ 0.63	\$ 0.82	\$ 0.80	\$ 0.68	\$ 2.66
445 MW model	Mar-04	Mar-05	Mar-06	Mar-07	Mar-08	Total
	\$ -	\$ -	\$ 0.03	\$ 0.15	\$ 0.31	\$ 0.485032

Se 5 - 94th Kishore - adj	31-Mar-01	31-Mar-02	31-Mar-03	30-Mar-04	31-Mar-05	Total
	\$ 0.19	\$ 0.53	\$ 0.83	\$ 0.81	\$ 0.59	\$ 1.926864

445 MW model - adj	31-Oct-00	31-Mar-01	31-Mar-02	30-Mar-03	31-Mar-04	31-Mar-05	Total
	\$ -	\$ -	\$ -	\$ -	\$ 0.08	\$ 0.22	\$ 0.291472
(3) 6.25% Royalty - Discounted @ 6% to July 22, 2002	14-Jun-03	14-Jun-04	14-Jun-05	14-Jun-06	14-Jun-07	14-Jun-08	Total
	\$ 0.53	\$ 0.53	\$ 0.53	\$ 0.53	\$ 0.53	\$ 0.53	\$ 3.165000
	\$ 2.4022	\$ 2.0894	\$ 2.0894	\$ 2.0894	\$ 2.0894	\$ 2.0894	\$ 12.8482
	\$ 0.2618	\$ 0.2618	\$ 0.2618	\$ 0.2618	\$ 0.2618	\$ 0.2618	\$ 1.5690

(4) 6.25% Royalty - Discounted @ 17.6% to July 22, 2002
Millions

Se 5 - 94th Kishore - adj		\$ 2.4022
445 MW model - adj		\$ 0.2618

(4) 6.25% Royalty - Discounted @ 17.6% to July 22, 2002
Millions

Se 5 - 94th Kishore - adj		\$ 2.0804
445 MW model - adj		\$ 0.1879

Gross profit	248.73	245.70	242.62	239.49	240.83
-Interest on working Capital	11.97	12.22	12.48	12.75	13.18
-RTL interest	151.77	95.85	85.20	74.35	63.90
-FTL interest+ (Rupee Depreciation)	24.87	37.44	32.45	27.46	22.47
RTL repayment	32.27	64.55	64.55	64.55	64.55
FTL repayment	45.39	45.39	45.39	45.39	45.39
Cash flow	-77.53	-9.75	2.55	14.80	31.34
15% withholding tax	0.00	0.00	0.38	2.22	4.70
Net	-77.53	-9.75	2.17	12.58	26.64
Reserve @ 10%	0.00	0.00	0.22	1.28	2.68
Cash flow for foreign repat	-77.53	-9.75	1.95	11.32	23.96

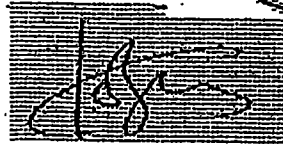
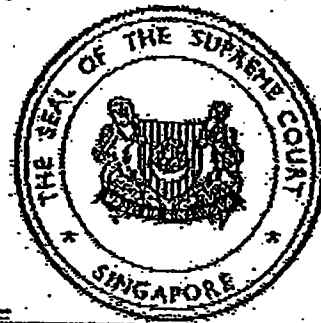
Exchange rate	48.00	48.00	48.00	48.00	48.00
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359 MW model	01-01-01	04-01-02	04-01-03	04-01-04	04-01-05
Profit	889.23	497.69	663.22	742.51	837.96
Depreciation	776.34	776.34	776.34	776.34	776.34
Profit before deprec	1665.57	1274.02	1439.56	1518.85	1614.30
Less: Debt service					
Foreign Debt Repayment	779.85	826.66	876.28	928.88	984.63
Rupee Debt Repayment	139.27	139.27	139.27	139.27	139.27
Cash flow	746.46	308.10	424.01	450.71	490.40
15% withholding tax	111.97	46.21	63.60	67.61	73.58
Net	634.49	261.88	360.41	383.10	416.84
Reserve @ 10%	63.45	26.19	36.04	38.31	41.68
Cash flow for foreign repat	571.04	235.69	324.37	344.79	375.15

Exchange rate	47.84	50.71	53.76	58.98	60.40
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ORDER OF COURT
IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

Case No. : CA129/2003/Y
 Document No. : ORC2889/2004 / C
 Date Of Filing : 04/05/2004
 Time Of Filing : 17:47:28
 Doc Control No. : 757807/E
 Date Of Order : 27/04/2004
 Made By : YONG PUNG HOW



(Assistant Registrar/ Registrar's Name)
 (Assistant Registrar/Registrar)
 Supreme Court
 Singapore

Roddyk
 PHILIP JEYARETNAM S.C /
 HERMAN JEREMIAH / LOH KIA MENG
 Solicitors for the Respondents

Between

ENERGY POWER SYSTEMS LIMITED
 (Ontario, Canada RC No. 1186693)

... Appellants

And

OAKWELL ENGINEERING LIMITED
 (RC No. 198403368H)

... Respondents

In the matter of Suit No. 997 of 2002/V

Between

OAKWELL ENGINEERING LIMITED
 (RC No. 198403368H)

... Plaintiffs

ENERGY POWER SYSTEMS LIMITED
 (Ontario, Canada RC No. 1186693)

Defendants

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

Civil Appeal No. 129 of 2003/Y

Between

ENERGY POWER SYSTEMS LIMITED
(Ontario, Canada RC No. 1186693)

... Appellants

And

OAKWELL ENGINEERING LIMITED
(RC No. 198403368H)

... Respondents

In the matter of Suit No. 997 of 2002/V

Between

OAKWELL ENGINEERING LIMITED
(RC No. 198403368H)

... Plaintiffs

And

ENERGY POWER SYSTEMS LIMITED
(Ontario, Canada RC No. 1186693)

... Defendants

ORDER OF COURT

CORAM

THE HONOURABLE
CHIEF JUSTICE YONG PUNG HOW

THE HONOURABLE
JUDGE OF APPEAL CHAO HICK TIN

THE HONOURABLE
JUSTICE JUDITH PRAKASH

IN OPEN COURT

THIS APPEAL having on the 27th day of April 2004 been called on for hearing before the Honourable Chief Justice Yong Pung How, the Honourable Judge of Appeal Chao Hick Tin and the Honourable Justice Judith Prakash in the presence of Counsel for the Appellants and Counsel for the Respondents AND UPON READING the Record of Appeal, the Appellants' Case filed herein on the 15th day of January 2004, and the Respondents' Case filed herein on the 18th day of February 2004, AND UPON HEARING Counsel for the Appellants and Counsel for the Respondents,

IT IS ORDERED THAT:

1. The Appeal be and is hereby dismissed with costs;
2. The sum of S\$10,000.00 held by the Appellants' solicitors as security for the Respondents' costs of the Appeal herein be released, without set off, to the Respondents or its solicitors, Messrs Rodyk & Davidson.

Dated this 27th day of April 2004.

ASSISTANT REGISTRAR

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

Civil Appeal No. 129 of 2003/Y

Between

ENERGY POWER SYSTEMS LIMITED
(Ontario, Canada RC No. 1186693)

... Appellants

And

OAKWELL ENGINEERING LIMITED
(RC No. 198403368H)

... Respondents

In the matter of Suit No. 997 of 2002/V

Between

OAKWELL ENGINEERING LIMITED
(RC No. 198403368H)

... Plaintiffs

And

ENERGY POWER SYSTEMS LIMITED
(Ontario, Canada RC No. 1186693)

... Defendants

ORDER OF COURT

Solicitors for the Respondents/Plaintiffs

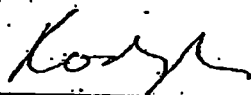
Philip Jeyaretnam S.C.J
Herman Jeremiah /
Loh Kia Meng
Messrs Rodyk & Davidson
80 Raffles Place
#33-00 UOB Plaza 1
Singapore 048624
Tel: 6225 2522
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Ref: PJ/HJ/LKM/15469.5

Filed this 4th day of May 2004

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

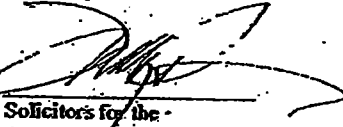
Civil Appeal No. 129 of 2003/Y

Draft for Approval



Solicitors for the
Respondents/Plaintiffs
Rodyk & Davidson

Draft for Approval



Solicitors for the
Appellants/Defendants
Drew & Napier LLC

Between

ENERGY POWER SYSTEMS LIMITED
(Ontario, Canada RC No. 1186693)

... Appellants

And

OAKWELL ENGINEERING LIMITED
(RC No. 198403368H)

... Respondents

In the matter of Suit No. 997 of 2002A/

Between

OAKWELL ENGINEERING LIMITED
(RC No. 198403368H)

... Plaintiffs

And

ENERGY POWER SYSTEMS LIMITED
(Ontario, Canada RC No. 1186693)

... Defendants

ORDER OF COURT

CORAM

THE HONOURABLE CHIEF JUSTICE
YONG PUNG HOW

THE HONOURABLE JUDGE OF APPEAL
CHAO HICK TIN

THE HONOURABLE JUSTICE
JUDITH PRAKASH

IN OPEN COURT

THIS APPEAL having on the 27th day of April 2004 been called on for hearing before the Honourable Chief Justice Yong Pung How, the Honourable Judge of Appeal Chao Hick Tin and the Honourable Justice Judith Prakash in the presence of Counsel for the Appellants and Counsel for the Respondents AND UPON READING the Record of Appeal, the Appellants' Case filed herein on the 19th day of January 2004, and the Respondents' Case filed herein on the 18th day of February 2004, AND UPON HEARING Counsel for the Appellants and Counsel for the Respondents,

IT IS ORDERED THAT:

1. The Appeal be and is hereby dismissed with costs;
2. The sum of S\$10,000.00 held by the Appellants' solicitors as security for the Respondents' costs of the Appeal herein be released, without set off, to the Respondents or its solicitors, Messrs Rodyk & Davidson.

Dated this 27th day of April 2004

ASSISTANT REGISTRAR

Court File No. 04-CV-271121CM3

Court File No. 04-CV-274860CM2

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

OAKWELL ENGINEERING LIMITED

- and -

ENERNORTH INDUSTRIES INC. (Formerly known as Energy Power
Systems Limited, Engineering Power Systems Group Inc.
and Engineering Power Systems Limited respectively)

Respondent
(Applicant)

AFFIDAVIT OF JAMES CARMEN CASSINA
SWORN 30 AUGUST 2004

I, James Carmen Cassina, of the City of Toronto, Province of Ontario, MAKE
OATH AND SAY AS FOLLOWS:

1. I am the Chairman of EnerNorth Industries Inc. ("Enernorth"), the Respondent in the within proceedings and Applicant by way of cross-application which Enernorth intends to file as part of this proceeding (together "Application"), and as such I have knowledge of the matters to which I hereinafter depose.
2. At the time of the events recounted in this affidavit and the Application, Enernorth was known as Energy Power Systems Limited and before that as Engineering Power Systems Limited and Engineering Power Systems Group Inc. In this Affidavit, when I describe Enernorth's activities under its previous names, I shall refer to it by the acronym "EPS". When I am referring to Enernorth in the present tense I shall refer to it as Enernorth. Enernorth is a public company which trades on the American Stock Exchange under the symbol "ENY".

Overview

3. In the Application, Oakwell Engineering Limited ("Oakwell") has applied to this Court to enforce a Judgment ("Judgment") granted in its favour by the High Court of the Republic of Singapore and confirmed by the Court of Appeal of the Republic of Singapore against Enemorth. Enemorth has been ordered to pay damages to Oakwell for what the High Court held was EPS' "breach" of an agreement made on 29 December 1998 ("Settlement Agreement") pursuant to which EPS and Oakwell settled their disputes under previous contracts that had led to arbitration. The Settlement Agreement had expressly set aside EPS' obligation under the previous contracts to complete, on a non-recourse basis, the financing required to construct two barge-mounted power plants to be located in the State of Andhra Pradesh in India ("Project"). The act of completing financing is described in the relevant contracts and other documentation as "financial closure".

4. In the Judgment, Justice Lai Kew Chai held, *inter alia*, that in the Settlement Agreement EPS had promised to procure financial closure by the end of June, 1999 and that EPS breached the Settlement Agreement because it had not done so by that date. EPS' evidence at trial was that it had been unable to complete financing for the Project because the relevant government bodies in India had failed to provide the approvals and documentation that were a pre-condition to financial closure. For its part, Oakwell did not adduce any evidence at trial that financial closure could have been achieved without the requisite documentation from the relevant governmental authorities in India. Furthermore, Justice Lai Kew Chai assessed Oakwell's damages in a way that gave Oakwell an enormous windfall at the expense of EPS since Oakwell has received (or has a judgment for) millions of dollars of profit on a power project that has never produced a watt of power. EPS, on the other hand, has suffered millions of dollars of losses on the same Project.

5. Having testified at the trial and having witnessed the subsequent appeal, it is my firmly held view that neither at the trial nor on appeal did Enemorth receive a hearing in front of impartial judges. Rather, I believe that both levels of Court were biased and partial in favour of Oakwell. I do not believe that impartial courts would have made the factual and legal determinations the Courts of Singapore made against Enemorth. In this Affidavit I explain the basis for this belief.

EPS

6. At all the times material to the litigation with Oakwell, EPS was comprised of a group of companies, the activities of which were focussed on engineering, construction, ship building and power generation. Annexed hereto as Exhibit "A" to this my Affidavit is a copy of EPS' corporate structure as of 1997.

7. One of the companies owned by EPS is M & M Engineering Limited ("M&M"). M&M is one of the major business and industrial employers in Newfoundland & Labrador. It has a major role in the maintenance of off-shore oil drilling platforms and associated equipment. Annexed here as Exhibit "B" to this my Affidavit is a copy of a summary of a KPMG study on Newfoundland & Labrador which refers to M & M at page 14 as one of the twenty-seven major employers in the province. Another company owned by EPS is ASI Holdings Inc. ("ASI"). This is another significant Newfoundland Corporation with a large fabricating plant with "ocean load-out" capabilities. A third corporation owned by EPS is Merlin Engineering AS ("Merlin"). This is a Norwegian company that has a significant presence in designing and constructing platforms for ocean based activities.

The Project

8. In 1995, the State of Andhra Pradesh, India, invited tenders to permit private parties to build, own and operate power plants in the State to supply electricity which the State would then purchase and resell to end-users. The idea was that these projects would be both "short-gestation" and foreign financed and owned. In response to the invitation, Oakwell offered to build, own and operate two such plants at Kakinada, Andhra Pradesh. In July 1996, Andhra Pradesh awarded seven contracts to six of the bidders for the construction and private ownership of power plants in the State that would produce a total of 1623 mega watts ("MW") of electricity. Oakwell was awarded two of these contracts. At the same time, the State awarded five other such contracts to five other bidders. Annexed hereto as Exhibit "C" to this my Affidavit is a copy of the invitation to tender. Annexed hereto as Exhibit "D" to this my Affidavit is a copy of the award of contract by the Andhra Pradesh State Electricity Board ("APSEB") to Oakwell for its contracts.

9. The contracts awarded to Oakwell required it to build and operate at its own expense power plants that were to be mounted on barges and located in the river near Kakinada in Andhra Pradesh. Each plant was to supply 100 MW of power and use furnace oil as fuel. APSEB agreed to purchase the power produced by these plants for 15 years at the tariff agreed to in the award.

10. Approximately eight months after the contracts were awarded, on 31 March 1997, Oakwell and the other successful bidders entered into formal Power Purchase Agreements ("PPAs" in the plural and "PPA" in the singular) with APSEB to implement the projects they had been awarded. The PPAs described the nature of the relevant project, the financial terms on which APSEB would purchase the electricity produced by the plants, the security that the Government of Andhra Pradesh ("GOAP") would provide to ensure APSEB's purchase commitments would be met, development milestones, and other matters. Annexed hereto as Exhibit "E" is a copy of one of the PPAs for the Project awarded Oakwell (the PPAs for each 100 MW project were identical).

11. Around June 1997, EPS initiated discussions with Oakwell about having EPS develop the Project in exchange for an interest in it. EPS was interested in the Project because the economics of the Project were favourable, in large part due to the tariff, and because the construction of barge-mounted power plants was an attractive component to M&M's and ASI's businesses. The terms and conditions of the PPAs made the Project "bankable" in the sense that the developer of the Project would be able to obtain financing on the strength of these terms and conditions, assuming they were met.

12. Between June and October 1997 Oakwell and EPS entered into a number of agreements, with the latter agreements replacing the earlier ones, to facilitate the construction and ownership of the power plants that were to be built and operated pursuant to the terms of the PPAs. The first of these agreements was a joint venture agreement dated 18 June 1997. This agreement was superseded on 17 October 1997 by a Co-Operation Agreement and Shareholders' Agreement. Annexed hereto as Exhibit "F" is a copy of the Co-Operation Agreement. Annexed hereto as Exhibit "G" to this my Affidavit is a copy of the Shareholders' Agreement.

13. Pursuant to the Co-Operation Agreement, Oakwell and EPS agreed to subscribe to shares in a company known as ESP Oakwell Power Ltd. ("EOPL") that was formed in India to own and operate the Project. This is known as the Project Company and I will refer to it by that name or by the acronym EOPL as the context requires. EPS was to hold 87.5% of the share capital of EOPL, and Oakwell to hold the remaining 12.5%.

14. The Co-Operation Agreement set out the terms and conditions upon which EPS would acquire an interest in the Project. Essentially, as consideration for acquiring rights in the Project, EPS paid Oakwell US \$1,656,329 and agreed to pay Oakwell a further \$5,424,500 within 30 days after financial closure and related approvals were obtained to permit the construction of the two power plants. Furthermore, EPS undertook to obtain the necessary financing on a non-recourse basis. EPS' undertaking, however, was limited to procuring the financing (i.e. EPS did not have to provide the financing itself).

15. Also on 17 October 1997, Oakwell and EPS entered into a Shareholders' Agreement to regulate their respective interests in EOPL. In this agreement, EPS undertook to lend or cause to be lent to EOPL approximately US \$177,000,000 for the construction of the two power plants. EPS' undertakings relating to financing in this agreement were to be delayed by any delay attributable to delays in obtaining the fuel linkage for the projects and any delay in obtaining guarantees from APSEB.

Development of Project

16. After entering into the agreements with Oakwell, EPS began its work on implementing the project. One of the first things it did was to acquire a controlling interest in Merlin, which had expertise in the design of barges and experience in the installation of power plants. EPS also arranged for the design of such plants. Amongst the steps EPS took in this regard was (through its subsidiary ASI) entering into project management contract, and eventually an engineering, procurement and construction contract, with SNC Lavalin Inc., a Canadian company with extensive expertise in the project management of large construction and power projects throughout the world. Annexed hereto as Exhibit "H" to this my Affidavit is a copy of EPS' news release dated 17 February 1998, announcing the appointment of SNC-Lavalin

inc. as project managers. Annexed hereto as Exhibit "I" to this my Affidavit is a copy of the design for the Project and annexed as Exhibit "J" is a copy of blue prints for the Project.

Project Financing

17. Since the financing for the Project was to be non-recourse third party financing, the lender to the Project could look only to the Project itself for repayment of the loans. Accordingly, financing was dependant on a number of Project-related factors, such as whether the revenue from the power plants would be sufficient to pay for the fuel, maintenance and other operational costs, be sufficient to re-pay the debt incurred in constructing the plants, and whether there were adequate guarantees from the GOAP that the purchaser of the power, in this case APSEB, would pay for the power at the agreed tariff over the life of the Project. These issues were within the sole control of the state and national governments of India and these issues were not ever resolved in a manner that would have permitted non-recourse project lending.

18. The PPAs specified that the Project had to use furnace oil to power the diesel generators. Furnace oil was, at that time in India, a restricted commodity. In order to obtain furnace oil, the Project Company needed a license, which was known as a fuel linkage, which could only be granted by the National Government of India, not a State Government, such as the GOAP. Between 6 and 7 May 1997, the Ministry of Petroleum of the Government of India held meetings at which approval for a fuel linkage for furnace oil for the Project was sanctioned. Subsequently, the Government of India granted its approval for the fuel linkage on the terms sanctioned by the Ministry.

19. The fuel linkage sanctioned by the Ministry of Petroleum and granted by the Government of India was limited to seven years and to 80% of the Plant Load Factor. The PPAs, however, had a term of fifteen years and APSEB had agreed to purchase a total of 200 MW of power from these plants. By limiting the fuel linkage to a Plant Load Factor of 80%, the power plants could only produce 160 MW of electricity, not the 200 MW they were supposed to produce (i.e. 80% of 200 MW=160 MW). And by limiting the term of the fuel linkage to seven years, the Project was only guaranteed to have revenue, against which the financing would be secured, for less than half the term of the PPAs. Based on the tariffs prescribed in the PPAs, the revenue from the electricity generated by the power plants operating at 80% capacity for seven

years would not be sufficient to repay the approximately US \$177 million in loans that were required to get the Project operational.

20. Accordingly the fuel linkage that was granted by the Government of India prevented the Project from being financed.

21. Although I did not know this at the time, I subsequently became aware that Oakwell knew while it was negotiating the first of the agreements with EPS (the Joint Venture Agreement of 18 June 1997) that the Government of India was not going to grant a fuel linkage appropriate to the needs of the Project. Oakwell did not tell EPS this. In fact, Oakwell lied to EPS about the status of the fuel linkage and tried to limit the flow of information to EPS on this point by insisting that all communications relevant to this issue be directed to Oakwell, despite EPS' having the majority interest in the Project.

22. Annexed hereto as Exhibit "K" to this my Affidavit is a letter dated 8 May 1997 to Oakwell from its Indian advisors informing Oakwell that the Ministry of Petroleum had sanctioned a fuel linkage for only seven years. Point #4 of that letter thus reveals that by 8 May 1997 Oakwell knew that the Indian Government was intending to grant a fuel linkage that was insufficient for the needs of the Project.

23. Annexed hereto as Exhibit "L" is a further letter to Oakwell from its Indian advisors dated 13 May 1997. Point #1 of that letter restates the earlier advice given to Oakwell about the inadequate fuel linkage and requests instructions.

24. Annexed here as Exhibit "M" to this my Affidavit is a letter from Oakwell to its Indian advisors dated 17 May 1997. Point #3 of this letter also reveals that well before the Joint Venture Agreement with EPS was signed, Oakwell knew that the fuel linkage would be granted for only seven years and that such a linkage would not be acceptable for the needs of the Project. At point #7 of this letter Oakwell asked that all correspondence between outside parties be "coursed" through it in Singapore, thereby ensuring that this correspondence would not come to EPS' attention.

25. Annexed hereto as Exhibit "N" to this my Affidavit is a letter from Oakwell to EPS dated 24 June 1997 in which Oakwell falsely informs EPS that it (Oakwell) has not yet

heard about the status of the fuel linkage. Oakwell's statement to EPS was made six days before EPS made its initial payment (in the approximate amount of US \$1,650,000) to Oakwell in order to acquire its interest in the Project.

26. There can be no doubt that Oakwell knew that if the Project did not have a fuel linkage for a fifteen year term at the full plant load factor, the Project could not be financed. Immediately after the fuel linkage was granted, Oakwell wrote to APSEB and stated that it was "shocked and surprised" that such an allocation was given. In this letter, Oakwell also stated that this allocation "undermines project viability". Oakwell further claimed that such a linkage was inconsistent with the terms of the PPAs. Annexed hereto as Exhibit "Q" to this my Affidavit is a letter from Oakwell to APSEB dated 28 July 1997. And in a letter of 25 August 1997 to APSEB, Oakwell reiterated that a fuel linkage on such terms "created serious complications and objections from lenders". Annexed hereto as Exhibit "P" to this my Affidavit is the 25 August 1997 letter.

27. The Government of India never did grant a furnace oil fuel linkage for 15 years at a 100% Plant Load Factor.

28. In addition to not receiving an adequate fuel linkage, the Project Company also did not receive in a timely fashion, or in some cases at all, the security that it or its lenders were entitled to receive under the PPAs. Without this security, the Projects could not be financed either. The GOAP, for example, did not deliver the required guarantees to the Project Company until 2 December 1997, which was after the initial milestone by which the Project was to have been financed under the PPAs. And APSEB refused to provide an Escrow Agreement that would allow the Project Company to collect its tariffs directly from the ultimate purchasers of the power. The Escrow Agreement was another component of the financial security package found in the PPAs and which was necessary in order to obtain financing for the Project.

29. Oakwell also knew that financing could not be obtained for the Project unless adequate financial guarantees were in place. Annexed hereto as Exhibit "Q" to this my Affidavit is a copy of a memorandum from Oakwell to APSEB. Point #5.5 of the memorandum states that the Project Company "has faced several critical obstacles in its process of securing financing for

the Project due to the unavailability of security document [sic] such as Letter of Credit...GOAP guarantee...etc."

30. In accordance with its undertakings in the Co-operation and Shareholders' Agreements, EPS attempted to obtain financing for the Projects. Canada has a policy of encouraging and facilitating Canadian companies' export activities. Annexed hereto as Exhibit "R" to this my Affidavit is a copy of the Corporate Plan of the Export Development Corporation. Annexed hereto as Exhibit "S" to this my Affidavit is a copy of the 2004 Canadian Government's International Market access priorities programme. Annexed hereto as Exhibit "T" to this my Affidavit is a copy of Canada's Trade Policy Strategy. Accordingly, EPS contacted the Export Development Corporation and arranged a lenders' syndicate involving export credits from that agency which was underwritten by a Canadian investment house. My understanding is that the Export Development Agency was interested in providing financing for the Project so long as ASI and SNC Lavalin Inc. were to build and outfit the power barges at ASI's plant in Port Aux Basques, Newfoundland & Labrador, because such a project would generate over two-hundred jobs in one of Canada's most economically depressed regions.

31. Furthermore, in early 1998 a major international power generating company, CMS Generation Co. of Michigan ("CMS"), agreed to provide financing for the Project. CMS is a public company and is listed on the New York Stock Exchange. It has over US\$10 billion in assets and operates power plants in 18 countries, including Andhra Pradesh. Annexed hereto as Exhibit "U" to this my Affidavit is a copy of the 1997 Annual Report of CMS. Annexed hereto as Exhibit "V" to this my Affidavit is a copy of an agreement between CMS and EPS dated 1 July 1998. Annexed hereto as Exhibit "W" to this my Affidavit is a copy of a CMS news release of 2 July 1998 announcing an agreement with EPS.

32. On 16 March 1998, CMS identified the major issues that needed to be resolved before the Projects could be financed. At the top of the list was a "bankable" Escrow Agreement from APSEB and amendments to the PPAs changing the fuel and the power plants' technology to avoid the problem with the truncated furnace oil fuel linkage that had been allotted by the Indian Government. Annexed hereto as Exhibit "X" to this my Affidavit is a copy of a letter dated 16 March 1998 from CMS.

33. For over four months, the Project Company had been attempting to secure amendments to the PPAs that would permit the power generating technology to be switched from diesel generators to gas turbines. This change would permit a variety of fuels (and not just furnace oil) to be used to power the plants; thus designing the power plan to operate if the furnace oil fuel linkage was not amended as the Project Company required, but another form of fuel linkage became available. The Project Company also needed the development milestones for constructing the Project to be changed to accommodate the delays caused by the fuel linkage issue and failure of the government and APSEB to provide the required security, *et cetera*.

34. On 6 May 1998, however, APSEB sent EOPL a letter notifying it that the Project had to be financed *within two weeks*, by 20 May 1998. APSEB informed EOPL that should the Project fail to obtain financing by this date, APSEB would consider this failure to be a serious breach of the PPAs and APSEB could elect to terminate the PPAs, presumably under Article 6.3 of the PPAs. APSEB demanded confirmation within seven days that the Project would be financed by this date, failing which, "action deemed fit will be taken by the Board in accordance with the terms of [the PPAs]." Annexed hereto as Exhibit "Y" to this my Affidavit is a copy of the letter from APSEB to the Project Company dated 6 May 1998. The relevant sections of the letter are found at Points #4 and #5.

35. On 22 May 1998, the GOAP directed APSEB to amend the PPAs as requested by the Project Company.

36. Naturally the Projects could not be financed until new PPAs were agreed. The PPAs establish the project parameters and hence the project economics against which the financing would be secured. Unless the parameters were embodied in an agreement binding on APSEB, the Project could not be financed or otherwise developed.

37. APSEB provided the Project Company with proposed amendments on 16 July 1998. In the proposed amendments, however, APSEB wanted to *reduce* the deadlines by which the Project Company had to perform certain activities. For instance, APSEB proposed shortening the completion date for obtaining financial closure to "... not later than twelve (12) months from 31.3.97."

38. Had the changes proposed by APSEB been accepted, the Project would have had to have been financed by 31 March 1998, and to have been completed by 31 July 1998. Consequently, under the terms of the PPAs proposed by APSEB, the Project Company would have been required to have completed its financing 107 days *before* the date on which APSEB provided the draft PPAs to the Project Company and to have built and completed the power plants within 15 days after 16 July 1998.

39. This was a practical (as well as logical) impossibility. To have met the completion deadline, the Project Company would have been required to have financed and delivered to the fabrication yard gas turbines and steam generators, the major components of the power generating equipment, months *before* the specifications for these components were known.

40. In short, APSEB wanted the Project Company to agree to PPAs that would have been in default from the moment they were signed and from that moment to have been subject to cancellation upon a mere 30-day notice.

41. Naturally, no lender would provide non-recourse financing in these circumstances.

Oakwell Terminates the October 1997 Agreements

42. On 7 August 1998, Oakwell terminated the Co-operation and Shareholders' Agreements, or at least purported to do so. Its stated reason for serving its notice of termination was that EPS had failed to procure financial closure for the Project in the time available for doing so. EPS strongly resisted the purported termination, setting out its position a few days later. EPS' position, of course, was that delays in the GOAP guarantee, problems with the fuel linkage, a "completely uncooperative and sometimes malignant State Electricity Board" and other factors, cause delays of the Project. Annexed hereto as Exhibit "Z" is a copy of Oakwell's letter of 7 August 1998 terminating the Co-Operation and Shareholders' Agreements. Annexed hereto as Exhibit "AA" to this my Affidavit is a copy my response dated 11 August 1998.

43. On 2 September 1998, Oakwell commenced arbitration proceedings before the Singapore International Arbitration Centre seeking damages, including amounts it claimed were

owing under the Co-operation and Shareholders' Agreements. EPS denied all of Oakwell's claims and in response asserted that Oakwell was in repudiatory breach of these Agreements and had induced EPS to sign the agreements by misrepresentation. The damages EPS sought from Oakwell included reimbursement for all amounts it had paid to date in relation to the Projects and lost profits.

The Settlement Agreement is Negotiated

44. Between 21 September and 29 December 1998, Oakwell and EPS engaged in settlement discussions in an attempt to resolve their disputes. I was the lead negotiator on behalf of EPS. The negotiations involved many proposals and counter-proposals. They began with EPS offering to "transfer" its 87.5% interest in the Project Company to Oakwell on certain financial terms and concluded with Oakwell "relinquishing" its 12.5% interest to EPS on other terms. These negotiations and the various draft agreements resulting from them leading to the Settlement Agreement exceeded over 300 pages of documentation.

45. Ultimately, EPS and Oakwell agreed to the Settlement Agreement annexed hereto as Exhibit "BB" to this my Affidavit.

46. Pursuant to clauses 1.1, 1.1.1 and 1.1.3 (b) of the Settlement Agreement, EPS was required to issue and deliver to Oakwell 1,850,000 shares of EPS that would be freely tradable after six months. Issue and delivery of these shares were agreed to be in lieu of payment by EPS to Oakwell of US \$3,015,000.

47. Also pursuant to clause 1.1.1, Oakwell agreed to the "relinquishment" to EPS of all of its (Oakwell's) "rights, title and interest (if any) in EOPL and the PPAs, to the extent permissible under Indian laws." In furtherance of Oakwell's obligation under this clause, in clause 1.1.2 it agreed to discuss with EPS and jointly to take all necessary steps to resolve any issues which may arise pertaining to the relinquishment to EPS of all such rights, title and interest.

48. Under clause 1.3.1, EPS agreed to pay Oakwell the following:

a net sum of US \$2,790,000 within 30 days from the date of the first draw-down of the funds by EPS and/or EOPL (including its successors and/or nominees) after the Financial Closure of the Project, failing which the net sum of US \$2,790,000 shall become due and owing to OEL, and shall be payable by EPS to OEL, forthwith.

49. Under clause 1.4.1 EPS agreed to do the following:

with the assistance of OEL on OEL's best efforts basis, cause EOPL to pay to OEL an annual sum equal to 6.25% of the actual Cash Flow for Foreign Repatriation as defined by the Financial Analysis Model [annexed to the agreement as "Appendix A"] for each of the first five (5) years after the Commercial Operation Date of the Project...

50. Under the Settlement Agreement, the royalty obligation could be satisfied in a number of ways. One way was by issuing preference shares in the EOPL that satisfied the royalty terms described in clause 1.4.1. EPS caused EOPL to allot such shares to Oakwell, but Oakwell refused to accept them. Annexed hereto as Exhibit "CC" to this my Affidavit is a copy of a letter dated 13 February 1999 from EOPL to Oakwell.

51. In any event, Appendix A to the Settlement Agreement defined the Cash Flow available for Foreign Repatriation as "the actual cash available for repatriation based on actual conditions during the actual operation" of the Project at the end of each of EOPL's financial years. By virtue of the emphasis on the "actual" cash conditions and the "actual" operation of the Projects, it is clear that should the Project Company not actually have any cash flow for foreign repatriation, Oakwell would not be entitled to a royalty payment.

52. Pursuant to clause 3.1, of the Settlement Agreement, both EPS and Oakwell agreed that the Settlement Agreement constituted "the full, final and complete agreement and resolution of all disputes, differences and all claims of the parties". Furthermore, pursuant to clause 3.2 the parties agreed and confirmed that upon execution of the Settlement Agreement, the Co-operation Agreement and the Shareholders' Agreement of 17 October 1997 "stand terminated" and the parties "unconditionally" released and discharged each other from "all obligations, rights and conditions contained in and arising under or in connection with the Agreements." Only the definitions of terms found in the 17 October 1997 agreements continued into the Settlement Agreement, and then only if the Settlement Agreement did not itself define

them (clause 18.2 of the Settlement Agreement). Clause 3.2 confirmed that any obligations EPS owed Oakwell in the Co-operation Agreement or the Shareholders' Agreement had been discharged and released.

53. In the Settlement Agreement, Oakwell received US \$3,015,000 worth of EPS' shares in exchange for giving up all its rights, title and interest under the previous agreements. Oakwell also obtained the right to receive money if and when the Project achieved financial closure and received the right to a percentage of the *actual* cash flow of the Project Company that could be paid to foreigners. But there was no guarantee in the Settlement Agreement that financing would be obtained or that the Project Company would have any cash flow or that if it had any cash flow, that it could be paid to foreigners. Only if EPS actually secured such financing and only if the Project Company actually had cash flow from its actual operations that could be repatriated to foreigners under Indian law would Oakwell actually receive any benefits from these components of the Settlement Agreement. Thus, Oakwell was not guaranteed to receive any payments from EPS or the Project Company beyond the initial US \$3,015,000 million sum, to be paid in the form of shares in EPS.

54. Accordingly, the Settlement Agreement discharged EPS' obligations in the earlier agreements to obtain financial closure for the Project. Since the Settlement Agreement itself did *not* contain any promise by EPS that it would finance or procure financing for Project, following execution of the Settlement Agreement, EPS had no obligation to obtain financial closure.

55. This result was intended. The Co-operation and Shareholders' Agreements had been negotiated at a time when it appeared (to EPS at least) that the Project was viable. The Settlement Agreement was negotiated at a time when it appeared the Project was not viable because, unlike when the earlier agreements were negotiated, the Project was not supported by valid PPAs and APSEB had advised the Project Company that it would be in 'serious breach' of the PPAs if financing was not obtained by 20 May 1998.

The Projects Still Cannot get Financing

56. Following execution of the Settlement Agreement, EPS worked diligently to obtain the necessary documentation from the relevant government bodies to enable the Project to

move forward. For example, the presidents of M&M and ASI, both of whom are engineers, and a group of technical people from Merlin, travelled to India and over a two month period met with various government officials to try to secure the necessary documentation from the various levels of government in India.

57. On 15 February 1999, EPS' United States' counsel, Pollet Law of Los Angeles, advised APSEB about the changes that had to be made to the PPAs to permit the Projects to be financed. Pollet Law informed APSEB that the "[l]enders, underwriters and prospective investors (and their counsel) have repeatedly stated their concern that, based on certain language in the PPAs either (i) the PPAs will expire under their own terms, or (ii) that the Board might declare a default by EOPL and terminate the agreements." Secondly, Pollet Law informed APSEB that a solicitor's opinion would certainly be required to opine to the lenders that the PPAs were "in force and without an existing default". Such an opinion was a condition of financing. Pollet Law told APSEB that such an opinion could not be rendered, based on the current state of the PPAs. They accordingly advised APSEB that "as a practical matter, none of the lenders will be willing to finance the projects if there is a chance that either the Board could declare a default or that the PPAs expire under their terms." Annexed hereto as Exhibit "DD" to this my Affidavit is a copy of the Pollet Law letter.

58. Pollet Law also described for APSEB the changes that were required to the PPAs in order to enable the Project to be financed. They told APSEB that it was "imperative" that the modified PPAs not require that the completion date for the Projects be 16 months from 31 March 1997 (a date that had already expired) and stated that "the right of termination [found in clause 6.3 of the modified PPAs] must arise only "in the event that Financial Closing has not occurred 12 months after the signing of [the Modified PPAs]" and must be subject to the tolling provisions otherwise provided in the PPAs. Only if these changes were made, Pollet Law advised, could they render the opinion they were required to give to the lenders.

59. Pollet Law's letter should not have been necessary. APSEB ostensibly wanted the Project to be foreign financed, developed and owned. This was the original idea when the Board sought bids for such projects in 1995, after all. Obviously lenders will not lend US \$177 million, without recourse, to a project that is in default. Therefore, the amendments sought in Pollet

Law's letter should have been accepted by APSEB. But APSEB did not do so. It would not change its position. It would only agree to amendments that by their own terms put the PPAs in immediate default and subject to termination by the Board with a mere 30-day notice.

60. Six weeks after Pollet Law sent its letter to APSEB, the State of Andhra Pradesh completely reformed its electricity management policies and programmes through the *Andhra Pradesh Electricity Reform Act, 1998*. This Act established a new commission to govern the electricity supply and generation in the state, the Andhra Pradesh Electricity Reform Commission ("APERC"). As part of this reform, APSEB was replaced by two different state agencies, one which administered electricity generation ("APGENCO") and the other which administered electricity transmission ("APTRANSCO"). Independent power projects, like the Project at Kakinada, were now to be administered by APTRANSCO. Annexed hereto as Exhibit "EE" to this my Affidavit is a copy of the *Andhra Pradesh Electricity Reform Act, 1998*. Annexed hereto as Exhibit "FF" to this my Affidavit is a copy of the APERC Power Procurement Policy.

61. After the establishment of APERC all power projects in the State that had not been financed were put on hold while APERC commenced a review of Andhra Pradesh's electricity needs and matters relating to consumer protection and costs. Furthermore, natural gas had recently been discovered in Andhra Pradesh and the Government did not want any independent power project finalised until the extent of the natural gas reserves was known and a policy developed on its supply and allocation. Natural gas is the most efficient fuel with which to operate power plants and by changing the fuel for projects that had not yet been developed to natural gas the GOAP would save significant amounts of money. For example, the GOAP would have saved more than US \$300 million over the life of the Project were natural gas used instead of furnace oil. Since the Project had not been financed, and indeed had not even received PPAs with the requisite commercial terms, it too was stalled, as were all other projects of this nature.

62. At the end of June 1999, CMS told EPS that it was no longer interested in participating in the Project.

VBC Takes Over the Project Company

63. VBC Ferro Alloys Limited ("VBC") is an Indian conglomerate headquartered in Andhra Pradesh. On 21 June 1999, its managing director, a Mr. Rama Rao, wrote to the Project Company. He said "[w]e will be interested in taking up [the Project], possibly with ultimate takeover." Subsequently, on 5 July 1999, VBC and its associated company, Konaseema Power Corporation Limited ("Konaseema"), made a proposal to acquire the Project Company. Annexed hereto as Exhibit "GG" to this my Affidavit is a copy of the 5 July 1999 proposal.

64. Konaseema made this proposal because it had been allocated a natural gas concession by the Government of India providing it with enough natural gas to run a natural gas-powered plant that could produce more than 200 MW of electricity. Konaseema proposed to acquire EOPL, change the Project from two 100 MW barge-mounted power plants to one 200 MW land-based plant, obtain from APERC the necessary regulatory approvals and changes to the PPAs, and rename the Project Company Konaseema EPS Oakwell Power Limited ("KEOPL"). It offered EPS/Oakwell 7% of the equity in the proposed KEOPL. It advised that the offer had to be finalised by 15 July 1999.

65. On 16 July 1999 the Board of the EOPL met at Oakwell's office in Singapore to consider Konaseema's offer. Oakwell had two representatives on the Board each of whom attended the meeting. The Board unanimously resolved to accept Konaseema's and VBC's proposal as outlined in two documents, a Memorandum of Understanding ("MOU") and a Memorandum of Agreement ("MOA"). The Board further resolved to apply to APTRANSCO and the Government of Andhra Pradesh for approval to convert the Projects to one 200MW land-based power project with natural gas as the primary fuel.

66. Under the MOU the parties agreed to re-name the Project Company "KEOPL", and agreed that KEOPL would obtain all consents necessary to develop the new project, including necessary amendments to the PPAs. In the MOU the parties agreed to pass the appropriate resolutions as directors or shareholders, as the case may be, of KEOPL with regard to the size of the equity, shareholding and directors of KEOPL. VBC, EPS, Oakwell and EOPL signed the MOU. To secure Oakwell's signature on the MOU, EPS gave it a side-letter

indemnifying it against any liability arising out of the MOU and agreeing that Oakwell's acceptance of the MOU was without prejudice to the Settlement Agreement. VBC also indemnified Oakwell. Further, Oakwell received payment of US \$790,000, out of the US \$2,790,000 that was actually due on only financial closure under clause 1.3.1 of the Settlement Agreement. Annexed hereto as Exhibit "HH" is a copy of the MOU.

67. Essentially, the MOA gave VBC the right to subscribe for 75% of the equity of the KEOPL and obtain managerial control over it. In exchange, VBC had to provide 79% of the financing required by KEOPL to develop the new project. EPS was to retain 4% of the equity in KEOPL as 'earned equity' and had the right to subscribe for up to an additional 21% equity by providing 21% of the financing required. Furthermore, in accordance with milestones that were appended to the agreement, VBC agreed to compensate EPS for certain development expenditures it had made for and on behalf of the Project Company. Oakwell had no equity in the Project Company and no financing obligation, and no known unpaid development expenditure. VBC, EPS and the Project Company executed the MOA. Oakwell did not. Annexed hereto as Exhibit "II" is a copy of the MOA.

68. In February 2000, the GOAP again changed the parameters governing the power sector in State. In addition to requiring that all new power projects operate only with natural gas, it demanded that any previously approved project would have to significantly reduce its tariffs or else be cancelled. KEOPL accordingly reduced the tariff and on 1 May 2000, the GOAP gave its approval to convert the Project to a land-based power project of 359 MW capacity in the Konaseema area of East Godavari district, using natural gas. A month later, on 7 June 2000, the Government of India approved an additional allocation of natural gas to the Project Company to enable it to power its 359 MW project. Later, on 15 December 2000, the Government of Andhra Pradesh approved KEOPL's application to increase the capacity of its project to 445 MW.

69. The project that was to be developed by KEOPL in 2000 was, therefore, completely different from the Project which had been awarded to Oakwell in 1996 and that EPS had been trying to develop. The Project was to be located at Kakinada. KEOPL's project was located at Deverapalli over two-hundred kilometres away. The Project was to be mounted on barges in the river near Kakinada. KEOPL's project was to be located on land. The Project was

for 2 x 100 MW generating plants. KEOPL's project was for 1 x 445 MW generating plant. The Project was to use furnace oil. KEOPL's project used natural gas. The tariffs and capital costs for the two projects were completely different: KEOPL's project had a *higher* capital cost and a *lower* tariff than the Project.

70. Although Oakwell, by the Settlement Agreement, gave up any interest it had in the Project and although it did not subscribe for equity in KEOPL, it acquired an interest in KEOPL's project through a number of side deals that it made with VBC on 4 July 2001 and which it kept secret from EPS. Essentially, in these agreements VBC agreed to pay Oakwell some US \$2,000,000 in instalments, and up to US \$6,000,000 in total. The consideration for these payments was Oakwell's rights in the Project Company and its contributions to the Project. This is the same consideration that Oakwell gave EPS in exchange for the Settlement Agreement. In effect, Oakwell sought and obtained the same financial benefits from VBC/KEOPL as it had obtained under the Settlement Agreement with EPS. Annexed hereto as Exhibit "JJ" to this my Affidavit is a copy of the Agreement of Mutual Understanding and Indemnity dated 4 July 2001. Annexed hereto as Exhibit "KK" to this my Affidavit is a copy of the Technology, Transfer, Collaboration and Agreement dated 4 July 2001. Annexed hereto as Exhibit "LL" to this my Affidavit is a copy of a Shareholders' Agreement dated 4 July 2001.

71. On 29 November 2001 APTRANSCO finally agreed to the terms of a draft PPA for KEOPL's project. But even this project, at the time of the trial in Singapore, had not been financed. All it had received was some form of financing approval "in principle" which was, in concept, the same as the financing that EPS had arranged for the Project.

72. I have recently become aware that in India an investigation is underway over allegations that bribes were paid by KEOPL (in other words, by VBC) to the Chief Minister of the GOAP in order to secure the necessary consents to the development of KEOPL's project. Although I have no direct evidence that bribery played a role in KEOPL's ability to obtain the amendments it needed for its project to be developed, I am suspicious that the only reason it obtained the consents it did was because it paid bribes. Annexed hereto as Exhibit "MM" to this my Affidavit is a copy of news reports from Indian newspapers describing the investigations into the allegations of bribery.

Oakwell terminates the Settlement Agreement and sues EPS

73. On 22 July 2002 Oakwell claimed that EPS breached the Settlement Agreement. Oakwell then rescinded the Agreement. A month later, on 26 August 2002, it commenced its action in the High Court of the Republic of Singapore.

74. Oakwell thus commenced its action against EPS three years after it had agreed to allow VBC to take over the Project Company and therefore long after it had accepted (as had EPS) that the Project had ceased to be viable. Furthermore, Oakwell commenced its action a year after it had secretly entered into the 4 July 2002 agreements with VBC to acquire an interest in the project being developed by KEOPL.

75. The trial revolved around the question of whether the Settlement Agreement obligated EPS to have completed financial closure for the Project within six months of the date of the agreement, i.e. by 29 June 1999. As described above, the Settlement Agreement does not say that EPS was required to do this and the Settlement Agreement sets aside earlier agreements where EPS did have an obligation to procure financial closure. No evidence was led at trial that the GOAP or APSEB would have provided the requisite amendments to the PPAs had the commercial terms been negotiated in a different way.

76. The trial judge, however, implied into the Settlement Agreement an obligation on EPS to have completed financing for the Project by 29 June 1999 and hence the obligation to pay Oakwell US \$2,790,000 within 30 days of the end of June 1999 *whether or not* financing was actually obtained for the Project. The trial judge then held that the project being developed by KEOPL was the same as the Project for the purposes of calculating damages based on the royalty payment Oakwell was entitled under the Settlement Agreement in the Project.

77. Thus, Oakwell, in effect, got to have its cake and eat it too, all at the expense of EPS. First, Oakwell received damages from EPS (on account of EPS' breach of a financing obligation) as if the Project had failed. Second, Oakwell received damages (on account of EPS' breach of a royalty obligation) as if the Project could have continued in its original form, when this had been made impossible by changes in Government regulations and policy. Third,

... got to keep the benefit of its agreements with VBC/KEOPL as if the KEOPL project was different from the Project, which it had sold to EPS in the Settlement Agreement (thereby allowing Oakwell to sell the same interest twice).

78. I do not believe that a trial judge, acting impartially, would have reached the conclusions Justice Lai Kew Chai came to in the Judgment.

79. I have described earlier in this Affidavit how, in 1996, six bidders had been awarded seven power projects to develop. Despite each bidder being awarded different project sizes and configurations all six bidders received PPAs at the same time (31 March 1997 or thereabouts). All the PPAs were structured with the same economic premises, *i.e.* the tariff was configured to cover the costs of operations, maintenance, fuel and debt service; the security provisions comprised an "Escrow Agreement" and GOAP guarantee; the term of the power supply and power purchase obligations was the same (15 years); the modality of applying to the Government of India for a fuel linkage after signing the PPAs was the same; and while the gestation period or time to commence generation was different depending on the size of the power plant, the period of twelve months from signing the PPA to achieve financial closure, was the same for each project. Notwithstanding the fact that evidence was led at trial that not one of the projects executing PPAs on 31 March 1997 achieved financial closure in the twelve months contemplated by the PPAs, the trial judge found that 6 months was a 'reasonable time' for EPS to achieve financial closure of the Project.

80. Furthermore, to my knowledge, no independent power project in the Republic of India initiated in the manner of the Project has ever achieved financial closure in six months.

81. Therefore, the Judgment not only implied a term into the Settlement Agreement that was intentionally omitted, but the Judgment went further and implied as the period of "reasonable" time a period of time that has never been sufficient in the context of such developments to have obtained financial closure.

82. Furthermore, no evidence was led at trial that between 29 December 1998 and 29 June 1999:

- (a) any lender was ready, willing and able to lend against PPAs that APSEB had represented were then in default;
- (b) any lender was ready, willing and able to lend against PPAs that did not correspond to the type of project that was contemplated to be constructed;
- (c) EPS' solicitors, Pollet Law, falsely stated that they could not render a solicitor's opinion to the lenders that the Projects were in good standing and not in default unless APSEB agreed to the changes they requested to the PPAs;
- (d) that the lenders required anything less than what Pollet Law told APSEB the lenders needed before they would advance financing for the Projects.

83. Indeed, the only thing Oakwell could point to at trial in support of their contention that EPS failed in any respect was that physical construction of the Projects and acquisition of land had not been commenced before June 1999 — but why would EPS have done this? There was no financing, after all, and nor was there a valid contract in place with APSEB defining the project that should be constructed.

84. Evidence was presented showing that the subsequent Indian lenders to the VBC Group, the Industrial Development Bank of India ("IDBI"), had issued a letter on 11 November 1999 setting out pre-conditions for it to provide the financing that would allow financial closure to occur. Amongst other things, these conditions required that the PPAs be amended in a form satisfactory to IDBI. Such an amended restated draft PPA was initialled between KEOPL (which, was under VBC's control) and APTRANSCO on 29 November 2001, two and half years *after* the date on which the Court below held EPS had to have procured Financial Closure. This PPA contained the type of amendments that EPS and the Project Company had sought before June 1999 and had been denied. There was no evidence given at trial as to whether this PPA was eventually signed.

85. The trial Judge did, however, indicate that to obtain financial closure within this time, EPS ought to have bribed officials of the State Government of Andhra Pradesh. Annexed hereto as Exhibit "NN" is a copy of pages 157 to 159 of the transcript where this view is expressed.

86. In relation to the royalty payment the trial judge determined that EPS had to pay Oakwell, the judge assessed that royalty based on different financial parameters than those that pertained to the project that was being developed.

87. Oakwell calculated each of the royalty payments using the assumptions found in the notional financial model appended to the Settlement Agreement in Appendix A. These were that the power plants would have a combined capacity of 200 MW and the Project Company would receive the tariff anticipated when the Settlement Agreement was entered into. In Appendix A of the Settlement Agreement, however, it is clearly stated that the Royalty is to be based on the "*actual* cash available for repatriation based on *actual* conditions during the *actual* operation of the Project at the end of each Financial Year of EOPL, for each of the first five (5) years after the Commercial Operation Date of the Project" [Emphasis added].

88. As at the date parties went to trial, KEOP's project had not commenced commercial operation. The actual conditions of that project, however, were known to be significantly different from the assumptions that were found in the notional financial models of Appendix A to the Settlement Agreement - relating to the Project.

- (a) The capacity of this project had increased to 445 MW, which meant a much higher capital cost.
- (b) The tariff had been reduced significantly.
- (c) The gestation period was changed to 16 months under the state government order of 22 May 1998. Assuming Financial Closure by 29 June 1999, the Commercial Operation Date should have been 30 October 2000.
- (d) Based on the financial model in Appendix A of the Settlement Agreement there would be no cash flow for foreign repatriation from the new tariffs imposed on the Project by the GOAP.

89. Accordingly, even if the damages were to be assessed as if commercial operation had commenced and the royalty was due commencing 14 June 2001, damages should not have been based on assumptions that were not true at the date of trial and never will be true.

90. EPS appealed the Judgment to the Court of Appeal. The appeal is based on most of the same facts as I have recounted in this Affidavit and was based on the application of, what I understood to be, well established principles of law in Singapore and elsewhere to the effect that the trial Judge could not in law have interpreted the Settlement Agreement as he did. Annexed hereto as Exhibit "OO" to this my Affidavit is a copy of the law portion of EPS' submissions on appeal.

91. The Court gave perfunctory treatment to the appeal. After hearing from our counsel and then from Oakwell's counsel, the three members of the Court of Appeal caucused in the court room for a few minutes. I heard one of the Judges, Justice Judith Prakesh, say to the other Judges "they are going to think that we rushed to a decision" after which they all laughed out loud. Following that comment the Chief Justice announced that the appeal was dismissed.

Benefits to Oakwell

92. Oakwell has done very well for itself in relation to the Projects. Oakwell has a known initial investment in the Projects of approximately US \$450,000 expended to obtain the award of the Project in 1996. This is comprised mainly of payments to consultants and seed money. Consequently, for this initial investment, prior to the Judgment, it received of US \$ 8,956,376 comprised of:

- (a) Cash from EPS (30 June 1997) of US \$1,656,329;
- (b) Cash from EPS (17 March 1998) of US \$700,000;
- (c) Cash from EPS (17 March 1998) of US \$400,000;
- (d) Clause 1.1 Settlement Agreement, US \$3,015,000;
- (e) Credits from EPS (August 1999) of US \$790,000;
- (f) Cash from VBC (4 July 2001 agreements) of US \$350,000;
- (g) Due under 4 July 2001 agreements of US \$1,650,000;

- (h) Interim interest of \$395,047 from 1 January 2002 until payment from VBC at 12% per annum on US \$1,650,000.

93. Under the Judgment, as it stands, Oakwell has also been awarded at least a further US \$4,210,000, payable by Enernorth. This is comprised of the sums of US \$1,650,000 and US\$2,560,000. Interest of 8% *per annum* has also been awarded to Oakwell on the stated sums from 30 July 1999 and 10 August 2000 respectively.

94. The Judgment therefore, in effect, confers on Oakwell benefits totalling US \$13,166,376. This follows from Oakwell's being allowed to retain the balance of benefits under the 4 July 2001 agreements, and earlier agreements, amounting to US \$8,956,376, and the amount of US \$4,210,000 which EPS had been ordered to pay Oakwell. Moreover, Oakwell has a further opportunity of earning US \$4,000,000 for the Project being developed by KEOPL. These benefits accrue to Oakwell even though no electricity will ever be generated from the power project which was awarded to Oakwell in 1996.

95. EPS had incurred expenditure on the projects amounting to over US \$10,000,000. EPS expended or gave value of US \$6,561,329 in payments to Oakwell before this action was started. As a result of the Judgment, EPS stands to pay a total of over US \$10,000,000 to Oakwell. EPS still has shares in KEOPL representing expenditures of approximately US \$2,500,000 which EPS capitalised under its 10 August agreement with VBC.

96. The existence of the Judgment harms the ability of Enernorth and its subsidiaries from obtaining bonding for construction projects, thereby threatening a vicious downward cycle in their business opportunities. Furthermore, should the Judgment be enforced in Ontario there is a real possibility that Enernorth will be rendered insolvent which will risk the employment of people in a number of regions, most significantly, in Newfoundland & Labrador.

Conclusion

97. I believe that in Singapore EPS received a hearing at trial and on appeal before judges who were biased and partial towards Oakwell. I do not believe that, given all the

circumstances, an unbiased and impartial court would have imposed an obligation on EPS to procure financial closure of the Project within six months of executing the Settlement Agreement. Nor do I believe that such a court would have awarded Oakwell damages that provides it with such a windfall at Enernorth's expense. For these reasons, Enernorth requests that this court deny Oakwell's application to enforce the Judgment in Ontario and instead order that the Judgment is not enforceable in this Province.

98. This affidavit is sworn in support of the within application and for no other or improper purposes.

SWORN before me at the City of Toronto,)

this 30th day of August 2004.)



Commissioner For Taking Affidavits)


JAMES CARMEN CASSINA

OAKWELL ENGINEERING LIMITED
Applicant (Respondent)

- and -

ENERNORTH INDUSTRIES INC.
Respondent (Applicant)

Court File No. 04-CV-27112 (CM3)
Court File No. 04-CV-274860 (CM2)

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

AFFIDAVIT OF JAMES CARMEN CASSINA
SWORN 30 AUGUST 2004

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COURT FILE NO.: 04-CV-271121CM3
DATE: 20050627

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

OAKWELL ENGINEERING LIMITED

APPLICANT

) *Edward J. Babin & Matthew I. Milne Smith,*
) *for Oakwell*

- AND -

ENERNORTH INDUSTRIES INC.
(FORMERLY KNOWN AS ENERGY POWER
SYSTEMS LIMITED, ENGINEERING POWER
SYSTEMS GROUP INC. AND ENGINEERING
POWER SYSTEMS LIMITED, RESPECTIVELY)

RESPONDENT

) *David R. Wingfield, M. Kate Stephenson &*
) *Paul D. Guy,*
) *for the Respondent*

) HEARD: December 6, 7, 8 & 9, 2004

DAY J.

Introduction

[1] The applicant, Oakwell Engineering Ltd. ("Oakwell"), has brought an application to enforce a judgment of the High Court of Singapore in Ontario. The defendant, Enernorth Industries Inc. ("Enernorth"), opposes recognition and enforcement of the judgment on the basis that that the Singapore legal system does not conform to the Canadian concept of justice.

Facts

[2] Oakwell is a Singapore corporation that supplies engineering works and products to the marine industry. Enernorth is an Ontario corporation engaged in engineering, construction, shipbuilding and power generation around the world.

[3] In 1995, Oakwell successfully tendered to build and operate two barge-mounted plants in the state of Andhra Pradesh, India. Oakwell then entered into a joint venture agreement with Enernorth in June 1997. Oakwell and Enernorth formed a project company that would finance, construct and operate the project. Enernorth owned 87.5% of the project company and Oakwell owned the remaining 12.5%.

[4] The project did not progress as the parties had hoped. To resolve various disputes between them, the parties entered into a settlement agreement (the "Settlement Agreement") in December 1998. The Settlement Agreement provided that any disputes that were to arise in the future would be governed by Singapore law and subject to the non-exclusive jurisdiction of the Singapore courts.

[5] Under the Settlement Agreement, Enernorth bought out Oakwell's rights in the project in exchange for (1) shares in Enernorth, (2) a promise to pay US \$2.79 million when the project obtained successful financing (called "Financial Closure") and (3) royalty payments once the project became operational.

[6] Enernorth did not achieve Financial Closure, nor has it paid Oakwell the US \$2.79 million or the royalties. In August 2000, Enernorth entered into an agreement with VBC, an Indian company, to sell virtually all of its interest in the project. Oakwell entered into negotiations for its own agreement with VBC, which concluded in July 2002.

[7] In August 2002, Oakwell sued Enernorth in Singapore for the disputed sums.

The Proceedings in Singapore

[8] There is no evidence that Enemorth contested the jurisdiction of the Singapore courts. In fact, Enemorth defended the action and brought a counterclaim against Oakwell in the Singapore Superior Court in the same action for US \$175 million.

[9] The trial judge allowed Oakwell's claim and dismissed Enemorth's counterclaim. Enemorth was ordered to pay the disputed sums in full, plus costs and interest.

[10] Enemorth appealed the trial judge's decision to the Singapore Court of Appeal. Enemorth argued that the trial judgment was legally incorrect because the term that it implied into the contract (i.e. the obligation to get financing) was a contingent condition and as such the only obligation that could be implied was to make reasonable efforts to obtain such financing. The trial judge had imposed what Enemorth characterized as an unconditional obligation to get financing for the project within six months of the Settlement Agreement.

[11] The appeal was heard before a panel of three judges who dismissed the appeal from the bench.

[12] Oakwell has now brought an application for enforcement of the Singapore judgment in Ontario. Enemorth has brought a cross-application for a declaration that the Singapore judgment, affirmed on appeal, is not enforceable in Ontario.

The Law

Recognition & Enforcement of a Foreign Judgment

[13] Enemorth has urged that recognition and enforcement of the foreign judgment should be considered separately (Enemorth's Factum at Paragraph 26). Enemorth relies on *Morguard Investments v. De Savoye*, [1990] 3 S.C.R. 1077 [*Morguard*] to state that there are two requirements for a judgment to be recognized. First, there must be a real and substantial

connection between the foreign court and the underlying cause of action. Second, the Canadian court must be satisfied that there are no concerns about the quality of justice in the foreign system. The Respondent refers to *Beals v. Seldanha*, [2003] 3 S.C.R. 416 [*Beals*] which did not explicitly require consideration of the "quality of justice" of the foreign jurisdiction; nor was it explicitly required for recognition and enforcement. The reason was because that judgment was from the State of Florida, "a jurisdiction which does not raise such concerns". The Respondent argues that in the present case, the two-step test from *Morguard* must be applied in order for the judgment to be recognized and enforced.

[14] Oakwell asserts that the proper test for recognition and enforcement is to decide whether the foreign court had jurisdiction, and if the answer is yes, then to consider any defences alleged (Applicant's rebuttal submissions at p. 1).

[15] *Beals* is a leading case on recognition and enforcement of foreign judgments. Enernorth finds support in the dissent of Le Bel J. in *Beals* at paragraph 195:

It should be part of the plaintiff's burden in establishing a *prima facie* case of enforceability to prove that the system from which the judgment came is basically fair.

While it might be helpful to consider the nature of the system of justice at the stage of recognition and enforcement, this is a minority opinion. The majority opinion in *Beals* does not require such a consideration until defences are argued. The majority also makes no distinction between recognition and enforcement. Rather, the court makes the following statements at paragraphs 39 and 61, respectively:

Once the 'real and substantial connection' test is found to apply to a foreign judgment, the court should then examine the scope of the defences available to a domestic defendant in contesting the recognition of such a judgment.

[I]t is not the duty of the plaintiff in the foreign action to establish that the legal system from which the judgment originates is a fair one in order to seek

enforcement. The burden of alleging unfairness in the foreign legal system rests with the defendant in the foreign action.

[16] Enemorth points to a passage about the real and substantial connection in *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 [*Amchem*] at 932:

In most cases it will appear from the decision of the foreign court whether it acted on principles similar to those that obtain here, but, if not, then the domestic court must consider whether the result is consistent with those principles.

However, it would appear that *Amchem* does not apply directly to the case at bar, as *Amchem* is a case about anti-suit injunctions, not enforcement of a foreign judgment. *Beals* and *Morguard* appear to be the most prominent Canadian cases in this area.

[17] Enemorth also puts forward an article by Ivan F. Ivankovich, "Enforcing U.S. Judgments in Canada: 'Things Are Looking Up!'" (1995) 15 Nw. J. Int'l L. & Bus. 491, in which the author cautions that Canadian courts will soon have to address fairness issues in deciding whether to enforce judgments from foreign courts in jurisdictions with substantially different concepts of justice from our own. He argues that if *Morguard* is applied to foreign judgments other than those from the United States and Britain, it will soon become apparent that "Canadian courts are unable to make the same assumptions about procedural and substantive fairness and the quality of justice in the international context that they are able to make domestically" (at 518).

[18] This article was written before *Beals* was decided, and it would seem that *Beals* addressed such concerns about applying *Morguard* in the international context, at least to the extent of being cross-border.

[19] Furthermore, as MacPherson J.A. has observed for the court in *Great American Leasing Corp. v. Yates* (2003), 68 O.R. (3d) 225 (C.A.), referring to *Morguard* at 228,

[I]n a mobile society it is both necessary and desirable that governments and courts respect the orders made by courts in foreign jurisdictions with comparable legal systems.

[20] Based on the majority reasoning in *Beals*, the test to decide recognition and enforcement of the Singapore decision will be whether or not the foreign court properly assumed jurisdiction by applying the real and substantial connection test. If that test is met, the court will then decide whether or not Enemorth succeeds in proving any of its defences.

Should the foreign judgment be recognized and enforced?

[21] First of all, recognition and enforcement go together. For purposes of this Application, they are not distinguished, one from the other. For a foreign judgment to be recognized in Ontario and at the same time not be enforceable in Ontario would be a contradiction in terms.

[22] In order for the court to recognize and enforce the judgment, Oakwell must firstly prove a real and substantial connection, which "requires that a significant connection exist between the cause of action and the foreign court" (*Beals* at paragraph 32).

[23] Oakwell submits that there are two bases for finding that the Singapore court had jurisdiction to hear this action. First, Oakwell relies on the "Governing Law and Jurisdiction" clause in the Settlement Agreement:

19.1 This Settlement Agreement shall be governed by and construed in accordance with the laws of Singapore.

19.2 In relation to any legal action or proceedings arising out of or in connection with the Settlement Agreement, the parties submit to the non-exclusive jurisdiction of the courts of Singapore.

[24] Second, Oakwell submits that once the dispute between the parties arose, Enemorth submitted to the jurisdiction of the Singapore courts. It participated fully in the proceedings,

including launching and prosecuting its counterclaim and then appealing the trial judgment, all in Singapore.

[25] Enemorth does not dispute that there was a forum selection clause and that Enemorth participated fully in the Singapore proceedings. Rather, its arguments not to enforce the judgment focus on the quality of justice in Singapore. (Respondent's Factum at paragraph 190).

[26] It is clear from the forum selection clause and the fact that both parties attorned to the jurisdiction of Singapore that there was a real and substantial connection with Singapore, as contemplated in *Beals* at paragraph 37. As such, the judgment is *prima facie* enforceable.

[27] I will now turn to the defences alleged by Enemorth.

The Public Policy Defence

[28] The public policy defence is succinctly summarized in *Beals* at paragraph 71:

The third and final defence is that of public policy. This defence prevents the enforcement of a foreign judgment which is contrary to the Canadian concept of justice. The public policy defence turns on whether the foreign law is contrary to our view of basic morality. As stated in *Castel* and *Walker* at p. 14 - 28:

... the traditional public policy defence appears to be directed at the concept of repugnant laws and not repugnant facts ...

In the present case the asserted repugnancy is in the facts emanating out of Singapore, not the laws of Singapore.

[29] The Supreme Court strictly limits the use of the defence of public policy at paragraph 75 of *Beals*:

The use of the defence of public policy to challenge the enforcement of a foreign judgment involves impeachment of that judgment by condemning the foreign law on which the judgment is based. It is not a remedy to be used lightly. The expansion of this defence to include perceived injustices that do not offend our sense of morality is unwarranted. The defence of public policy should continue to have a narrow application.

In the circumstances of the case at hand, the defence of public policy should not be taken to apply based on the limits expressed above in *Beals*.

Reasonable Apprehension of Bias

[30] Enernorth alleges that it is enough to prove reasonable apprehension of bias to prevent the judgment from being enforced. The Supreme Court stated the test for reasonable apprehension of bias in *Wewaykum Indian Band v. Canada*; [2003] 2 S.C.R. 260 at 294-295: "What would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude?" The court remarked, first, that there must be serious grounds upon which to base this conclusion, as there is a strong presumption of judicial impartiality, and, second, that the inquiry is highly fact-specific (See also *R.D.S. v. The Queen*, [1997] 3 S.C.R. 484 at 531 and *Arsenault-Cameron v. Prince Edward Island*, [1999] 3 S.C.R. 851).

[31] Furthermore, in order to be a reasonable apprehension of bias, it must be *apprehended* and it must be *reasonable*. Here, Enernorth selected the jurisdiction and laws of Singapore. Enernorth attorned to the jurisdiction. If Enernorth apprehended bias at trial, or at appeal, Enernorth should have raised this issue earlier, at that point. The test is not met.

[32] Moreover, *Beals* at paragraph 72 indicates that bias must be proved. It mentions nothing about showing a reasonable apprehension of bias:

"... [t]he public policy defence against the enforcement of a judgment rendered by a foreign court, *proven* to be corrupt or biased".

[33] Therefore, if Enemorth is raising the issue now for the first time, Enemorth must prove actual bias. Reasonable apprehension of bias cannot apply.

Bias

[34] Enemorth alleges a number of factors that it maintains lead to a suspicion of bias in the Singapore decision. While putting aside the fact that anything less than actual bias is insufficient to impugn the decisions, I will outline Enemorth's allegations:

- (a) First Allegation: The trial judge is a long-time associate of Lee Kuen Yew, former Prime Minister of Singapore and alleged to remain active in ruling the country;
- (b) Second Allegation: A remark in the transcript means that the trial judge was confirming that Oakwell was owned by the Koh Brothers, who in turn have substantial ties to senior members of the executive associated with Lee Kuen Yew; and
- (c) Third Allegation: The appeal was perfunctory and presided over by the Chief Justice, who is a long-time associate of Lee Kuen-Yew and also well-known to have supported the executive in his or his court's rulings.

Elaboration is required regarding Enemorth's Second Allegation concerning Oakwell's connection with the Koh Brothers.

Evidence of Mr. Cassina on activity of the trial judge

[35] James Carmen Cassina represented Enemorth in negotiations with Oakwell, and participated in the Singapore trial. In his affidavit, he alludes to the following exchange between the trial judge and Mr. Low, a witness in the case, while he was being cross-examined by Mr. Khoo (Transcript of Mr. B.T. Low, Supplementary Application Record of the Applicant, Volume 3, page 967):

Page: 10

Mr. Low: ...Now, I mean, for your information, I lost control of Oakwell and now it's under—it's one of the subsidiary [sic] of Koh Brothers here.

Mr. Khoo: Right.

Mr. Low: So I am not —

His Honour: Hmm?

Mr. Low: We are under the subsidiary of G & W where it's a subsidiary of Koh Brothers, the listed company in Singapore.

His Honour: Ko, K-O, is it?

Mr. Low: K-O-H (spelt)

Mr. Khoo: K-O-H (spelt), I believe, Construction Company.

[36] Mr. Cassina, who observed this exchange, states that the judge was not simply asking how "Koh" is spelled; rather, the judge was asking for identification of the owners of Oakwell. Mr. Cassina made the following statement on December 10, 2004 in cross-examination on his Affidavits sworn August 30, 2004 and November 4, 2004 (Cross-Examination of James Carmen Cassina, Supplementary Application Record of the Applicant, Volume 3, page 765, in response to Question 135):

What the transcripts do not reflect is the judge leaned forward so that he had the full attention of B.T. Low, and as B.T. Low answered the question the judge made notes in his notebook. I saw the judge underline the notes. The judge took particular care to make sure that he got it right.

It struck me as unusual that the judge would have so much interest in who the major shareholder of Oakwell is. Who is this company that had 400 million dollars, maybe or maybe not.

It struck me very odd, for example, that B.T. Low not only answered the question about who the Koh brothers are, but he introduced the subject of G & W, which is a very powerful organization in Singapore. And, again, it struck me very odd that the judge was so attentive to this, attentive enough to actually lean forward, spell out the names, and take extensive notes.

Furthermore, what is not evident just by reading the transcripts is the pause while the judge made, what I consider to be, more than just simple notes.

[37] Mr. Cassina also felt that Enernorth's counsel was not treated fairly. In his affidavit he states that his concerns were solidified after receiving the High Court judgment, given the evidence and the facts that were heard. He states that it was at this point that Enernorth began investigating the independence of the Singapore judiciary.

[38] I cannot rely on Mr. Cassina's opinion to find that the judge was questioning the ownership of the company in order to ensure he would find for the side with "the right" connections. There would need to be much more specific and compelling evidence to prove bias or corruption. One surmise by Mr. Cassina to explain the trial judge's activity far from establishes a finding of bias at this level. See also *The Loewen Group et al. v. U.S.A.* (2003), Case No. ARB (AF)/98/3 at 39, an American arbitration case for similar reasoning.

[39] Mr. Cassina's affidavit evidence about why Enernorth began investigating the independence of the Singapore judiciary does not buttress Enernorth's assertion that there was not a fair trial. Rather, it prompts the question of why Enernorth's concerns about bias or corruption were not raised at trial or on appeal in Singapore. In answer to this question, Enernorth replied that it would be seditious to do so and cited section 3(1)(c) of the *Sedition Act* (Singapore, Cap. 290):

A seditious tendency is a tendency to bring into hatred or contempt or to excite disaffection against the administration of justice in Singapore.

I am not persuaded by this explanation. As will be discussed later, the courts of Singapore have a reputation for fairness in deciding cases between private commercial parties. Without cogent evidence that alleging bias or corruption in a court case would lead to charges of sedition, I have difficulty with the allegation that Enernorth was barred by the *Sedition Act* of Singapore from bringing objections until now.

[40] With respect to the First Allegation and the Third Allegation, above, concerning judicial association with Lee Kuen-Yew, Enemorth tendered expert reports to support the contention that there are connections in Singapore among the judiciary, the executive, and business; that these connections suggest that there is a real risk that judges in Singapore were biased in this case; and they suggest that the Singapore legal system is not sufficiently independent for its judgments to be recognized by Canadian courts. I will briefly discuss the expert witnesses' testimony in this respect.

The Expert Testimony on Alleged Oligarchy Penetrating the Judicial Process
Ross Worthington

[41] Enemorth relied upon the opinion of Ross Worthington, an Adjunct Professor of Governance at Griffith University in Australia and an associate of the Asia Research Centre on Social, Political and Economic Change at Murdoch University, also in Australia. Mr. Worthington has written on governance in Singapore and performed consultancy work in the area. He has been conducting empirical research in and on Singapore since 1988.

[42] He concludes that the judicial branch of the Government of Singapore is not independent from the executive branch. Mr. Worthington finds that "all aspects of governance in Singapore, including the judiciary, are carefully manipulated and ultimately controlled by the core executive of individuals who use their powers to maintain their own power and further their own political, economic, social and familial interests" (Affidavit of Ross Worthington, Compendium of the Respondent, Vol. I, Tab 4, at page 6, paragraph 22). Mr. Worthington goes into great detail in describing Singapore as an "oligarchy." Specifically, Mr. Worthington asserts the following at page 51, paragraph 130:

- (a) the traditional safeguards of judicial independence are either wholly absent or wholly undermined by conventional practice;

- (b) the court system is structured so as to maximize opportunities for executive influence in cases involving the interests of the executive, and to minimize opportunities for decisions being made by persons who might not favour those interests; and
- (c) there is an evident tendency for core executive interests to be favoured in judicial decisions.

[43] Oakwell challenges Mr. Worthington's testimony on a number of grounds.

[44] It is beyond dispute that Mr. Worthington has changed his mind about the Singapore judiciary; in earlier writings his opinion of the judiciary was much less critical. The reason and date for this change of opinion are in dispute. However, as Oakwell points out, at least parts of Mr. Worthington's affidavit are based on his previous writings, and on at least two occasions, he quotes passages from his book verbatim but then omits the next part of the passage that is more complimentary of the judiciary. An example noted by Oakwell follows, in which the part of the book omitted from his affidavit is included in italics (taken from Factum of the Applicant, page 37):

[The high salary paid to Singapore judges] is a strong incentive for judges to both resist monetary corruption, but also to conform to the oligarchic program...*but is equally a necessary strategy for recruiting talented lawyers to the bench. It would be unfair, however, to view this level of remuneration as excessive in the context of the income of senior practitioners in Singapore's legal profession[.]*

(Affidavit paragraph 140, p. 1091; cross-examination Exhibit 2, p. 122).

[45] More germane to the issue being decided, Mr. Worthington's opinion seems to come from the political cases and issues he has studied, rather than commercial cases. While he makes some assertions about the reason for the dearth of examples of questionable circumstances in commercial cases, the lack of evidence of corruption in private commercial cases remains.

Nihal Jayawickrama

[46] Enemorth also relied on the affidavit of Dr. Nihal Jayawickrama, the Co-ordinator and Lead Facilitator of the Programme on Strengthening Judicial Integrity, a program initiated by the

United Nations. While Dr. Jayawickrama is an expert in the area of judicial corruption, his affidavit, as he acknowledges, is on "the existence and nature of corruption in judicial processes around the world" (Affidavit of Nihal Jayawickrama, Compendium of the Respondent, Volume 2, Tab 1, paragraph 1). He does not appear to provide specific evidence of judicial corruption in Singapore.

Francis Seow

[47] Mr. Francis T. Seow is a former Crown Counsel and Solicitor General of Singapore. He is apparently now regarded as a dissident by the Singapore government because of political activities. Mr. Seow now resides in the United States.

[48] The following is the question he poses in his affidavit: "Is it reasonable to presume that the case at bar was heard by an independent judiciary in Singapore?" (Affidavit of Francis T. Seow, Compendium of the Respondent, Vol. I, Tab 3, paragraph 23). Mr. Seow answers in the negative, citing three factors: (i) the autocratic nature of the government, which exercises control of the judiciary where the government may have an interest; (ii) the judges hearing this case were known to be inclined toward the government and entities associated with the government and/or government-linked corporations; and (iii) this appears to be a case in which interests of government-linked companies were involved (Affidavit, paragraph 25).

[49] Although Mr. Seow goes into great detail about the system in Singapore, and possible links that could be made among the judges, Oakwell's associated and parent companies, and the government, this is not enough to impugn the proceedings or the decision. It is not specific or reliable enough to presume, let alone conclude, that there was not a fair trial in the case at bar.

Case Law

[50] Counsel on both sides advise that, to this point, there have not been any Canadian cases where it has been argued that a country's system of justice is so inherently corrupt or biased that

its judgments cannot be enforced by Canadian courts. Arguments of bias have been about specific instances of bias, not general ones. If this court were to accept the argument of general bias in this case, it would mean that no judgments from Singapore courts would be enforceable in Ontario.

[51] Oakwell has provided the court with a number of cases where a court has enforced a foreign judgment notwithstanding known corruption within the state institutions or specifically the judiciary. In *Clinton v. Ford* (1982), 37 O.R. (2d) 448 [*Clinton*], the Ontario Court of Appeal enforced a judgment in a contract dispute rendered by the Supreme Court of apartheid-era South Africa. This was a contracts case and had nothing to do with apartheid.

[52] Enemorth has pointed out that *Clinton* was decided before *Morguard* or *Beals*. However, there is nothing in either *Morguard* or *Beals* making it clear that enforcement of a specific decision can be denied based on allegations that a whole system is biased, when there is no cogent evidence that there was bias in the specific case.

[53] A Canadian court declined jurisdiction in favour of Iranian courts in *Sarafi v. "Iran Afzal" (The)*, [1996] F.C. 954 (T.D.). In that case, the plaintiff feared that even though the Iranian courts had the closest connection to the action, the Iranian courts would not allow him to pursue his claim there, which would deny him substantial justice. The Federal Court found that there was nothing to support that claim. The plaintiff argued that Iranian Courts leave no jurisdiction to sue the State. Justice Noël accepted in evidence a certified English translation of the *Administrative Justice Tribunal Act* of Iran. At paragraphs 34 and 35 of the judgment, Justice Noël states:

On the face of it, this Act does confer upon the courts of Iran jurisdiction to entertain suits against the state by state employees. There is no evidence before me establishing that the courts of Iran would refuse to exercise this jurisdiction, other than the bold assertion that Iranian courts "leave no jurisdiction to sue the State." More than this is required to, in effect, put into question the integrity of the judicial system of a foreign state. Nothing has been placed before me to

suggest that the courts of Iran will refuse to exercise the jurisdiction conferred by the laws of Iran.

The complaint of the plaintiff is not directed at Iranian law or its effect on him, but at the Iranian judicial system based on his belief that Iranian courts will not hear his claim. While the plaintiff may hold this belief, he has placed before me no evidence which would allow me to conclude that justice will not be done in Iran.

[54] To echo the inverse of Noël J's formulation, Enemorth in the present case has also failed to place any evidence before the court that justice *was not done* in Singapore.

[55] While not determinative, it is interesting to note that in *Creative Technology Ltd. v. Aztech System Pte. Ltd.* (1995), 61 F. 3d 696 (9th Cir.), an American court deciding the issue of *forum conveniens* considered Singapore to be an alternative forum and had no complaint about the court itself.

[56] In the British case of *Moduroglu v. T.C. Ziraat Bankasi*, [1986] Q.B. 1225, the plaintiffs brought an action in England, and the defendants sought a stay of the action based on Turkey being the natural forum. The plaintiffs opposed the stay and claimed, *inter alia*, that they could not get a fair trial in Turkey. The trial judge rejected this contention. In confirming the trial judge, the Court of Appeal made the following comment at page 1248:

On the one hand, the court must not adopt any line of reasoning which involves a finding or assumption of impropriety or unfairness on the part of an organ of a friendly foreign state, without solid evidence to support it. On the other hand, the court must not be too unworldly. It must recognize that there are parts of the world where things are badly wrong, and that by virtue of this very fact it may be impossible to obtain direct and complete evidence of the grounds of complaint. A balance must be struck.

[57] This comment may well apply equally to the case at bar. While Enemorth has presented much evidence to show that there could be connections between the judiciary and officials of the state, there has been nothing concrete to show actual bias or a reasonable apprehension thereof.

[58] *Moduroglu* is applicable to another aspect of Enemorth's argument. Enemorth has alleged that because there is an institutional bias in Singapore's courts, a fair trial is impossible. Oakwell, however, has drawn a distinction. While Oakwell acknowledges that Enemorth has tendered some evidence relating to possible government interference in trials, all of that evidence applies only to political cases. The case at bar is a commercial case. There is no evidence that Singapore courts are biased when deciding a commercial case between private parties.

[59] In *Moduroglu*, the Court of Appeal agreed with the trial judge's decision in this aspect as well, at page 1237:

In discussing the evidence, the judge drew a distinction between political trials, and trials before the military courts, and civil trials. He concluded that there was a perfectly satisfactory and mature legal system in Turkey, effective to deal with civil commercial cases, and no evidence of personal risk to the plaintiffs' directors or witnesses or lawyers. He was satisfied that if the matter went to Turkey the plaintiffs would receive a fair trial of their case.

[60] Here, I am satisfied that in Singapore, in this situation, the parties received a fair trial of the case. Historically, there is no evidence of bias or unfairness by the Singapore court in private commercial proceedings. I am satisfied that there is no reason to doubt the impartiality of the judges who heard the case in Singapore: *Re Provincial Court Judges*, [1997] 3 S.C.R. 3; *R. v. Valente*, [1985] 2 S.C.R. 673.

[61] So much the more, there is no evidence of bias or unfairness by the Singapore Court in this specific case. Herman Jeremiah, a partner of the Singapore law firm that represented Oakwell, described the trial in his affidavit. He concludes at paragraph 19 that to the best of his knowledge, information, and belief, "the Judgments were not obtained by fraud or any other improper means" (Affidavit of Herman Jeremiah, Application Record of the Applicant, Volume 4 of 6, Tab 5). Enemorth has not discharged its burden of proving unfairness in the foreign legal system (*Beals*, at paragraph 61).

Failure of Natural Justice

[62] Enemorth alleges that further and in the alternative, there was a failure of natural justice in the Singapore proceedings.

[63] In *Beals* at paragraph 64, the defence of natural justice is defined:

The defence of natural justice restricted to the form of the foreign procedure, to due process, and does not relate to the merits of the case. The defence is limited to the procedure by which the foreign court arrived at its judgment. However, if that procedure, while valid there, is not in accordance with Canada's concept of natural justice, the foreign judgment will be rejected.

[64] While it was stated in *Beals* that "the domestic court must be satisfied that minimum standards of fairness have been applied to the Ontario defendants by the foreign court," that court also observed that "the burden of alleging unfairness in the foreign legal system rests with the defendant in the foreign action." (*Beals* at paras. 60-61). Therefore, it is Enemorth's burden to prove, on a balance of probabilities, that there has been a failure of natural justice in the procedure used to reach the impugned decision.

Singapore Law

[65] Like Ontario, Singapore's legal roots are in the English Common Law. Until 1993, Singapore automatically received English law, both statutory and common law. This meant that "principles and rules of English common law and equity as well as pre-1826 English statutes of general application were applicable in Singapore, subject to the concepts of suitability and modification" (See Andrew Phang, "Cementing the Foundations: The Singapore Application of English Law Act 1993," (1994) 28 U.B.C.L. Rev. 205 at paragraph 7). Since 1993, section 3 of the *Application of English Laws Act* has provided that the English common law as it existed in November 1993 continues to be in force in Singapore, subject to modification. Section 4 of that *Act* explicitly adopted a number of English commercial law statutes.

[66] Singapore's procedural law is also derived from the common law. Singapore's *Evidence Act* was originally enacted as a codification of the common law, and its civil procedure dates back to nineteenth-century English procedure. There have been significant reforms, but its rules of evidence and procedure continue to be based broadly on English common law.

[67] Singapore's Constitution provides for the independence and impartiality of the judiciary. Court proceedings are held in open court, accessible to the public.

[68] Singapore also operates on similar principles of comity to Canada and other common law countries. For example, in enforcing a Canadian judgment in *Hong Pian v. Les Placements Germain Gauthier Inc.*, [2002] S.L.R. 81 at paragraph 12, the Singapore court, referring to English law, stated that:

... it is settled law that a foreign judgment in personam given by a foreign court of competent jurisdiction may be enforced by an action for the amount due under it so long as the foreign judgment is final and conclusive as between the same parties. The foreign judgment is conclusive as to any matter thereby adjudicated upon and cannot be impeached for any error, whether of fact or of law.

...

The local court will only refrain from enforcing a foreign judgment if it is shown that the plaintiff procured it by fraud, or if its enforcement would be contrary to public policy or if the proceedings in which the judgment was obtained were opposed to natural justice.

Comparison to Canadian Law by Enernorth

[69] Enernorth agrees that "Singapore clearly adheres to the first component of Canadian rule of law," which Enernorth quotes from *Reference re Manitoba Language Rights (Man.)*, [1985] 1 S.C.R. 721 (at 748-749) as "an order of positive laws which preserves and embodies the more general principle of normative order." (Respondent's Factum at para. 150).

[70] Enemorth lists two other elements that constitute the rule of law in Canada, from *Manitoba Language Rights* (at 748-749) and *Reference re Secession of Québec*, [1998] 2 S.C.R. 217 (at 257): "adherence to the principle that 'the law is supreme over officials of the government as well as private individuals,' and a requirement that all government authority be found in the law." (Respondent's Factum at paragraph 150)

[71] Enemorth then argues that Singapore's "extensive system of positive laws" only gives the appearance of meeting the second and third components of the rule of law. Its arguments centre around the allegation that the governing party uses and changes the law for its own ends without being held accountable. Furthermore, Enemorth alleges that the judiciary in practice is not independent.

[72] While Enemorth's experts, political scientists and lawyers, provide reports that aspects of the government of Singapore do not meet the standards of the rule of law in Canada, this evidence goes against Singapore's formal legal structure as evidenced in its constitution and laws. Furthermore, Oakwell has provided evidence to the contrary.

Concluding Comments

[73] As mentioned in the discussion of bias, Enemorth should have alleged a failure of natural justice at trial, or at least on appeal:

The objection that the foreign proceedings were contrary to natural justice cannot be taken in the enforcing court if it could have been or was taken before the foreign court. (J-G. Castel & J. Walker, *Canadian Conflict of Laws*, 5th ed., looseleaf (Toronto: Butterworths, 2001 at 14.1).

[74] As Feldman J.A. observed for the court in *Society of Lloyd's v. Meinzer* (2001), 55 O.R. (3d) 688 (C.A.) at 704, "natural justice is a very flexible concept, the basis of which is notice and an opportunity to be heard."

[75] There is no question that Enemorth received notice and participated fully in the legal proceedings. At trial and on appeal, Enemorth had the opportunity to raise objections about the system or the particular judges sitting. Enemorth did not do so.

[76] It is significant that there is no evidence in the case at bar that there was anything deficient in the process. In order for Enemorth to impeach the judgment, it must be shown that "fair process was not provided to the defendant" (*Beals* at paragraph 63). The evidence, taken as a whole, leads to the conclusion, on a balance of probabilities, that both parties enjoyed fair process in the Singapore action.

Findings

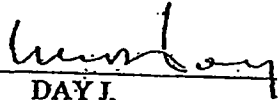
[77] I find that there was a real and substantial connection to Singapore. I also find that no defences to enforcement have been made out.

[78] The motion for enforcement of the Singapore judgment is granted.

Costs

[79] If the parties are unable to come to terms as to costs, I will be available to make a determination by appointment.

Date: June 27, 2005


DAY J.

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COURT FILE NO.: 04-CV-271121CM3
DATE: 20050627

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

OAKWELL ENGINEERING LIMITED

APPLICANT

- AND -

ENERNORTH INDUSTRIES INC.
(FORMERLY KNOWN AS ENERGY POWER SYSTEMS
LIMITED, ENGINEERING POWER SYSTEMS GROUP
INC. AND ENGINEERING POWER SYSTEMS LIMITED,
RESPECTIVELY)

RESPONDENT

REASONS FOR JUDGMENT

DAY I.

Released: June 27, 2005

COURT OF APPEAL FOR ONTARIO

LASKIN, MACFARLAND AND LAFORME J.J.A.

BETWEEN:

OAKWELL ENGINEERING LIMITED
Applicant (Respondent in appeal)

David R. Wingfield,
M. Kate Stephenson
and Paul D. Guy
for the appellant

- and -

ENERNORTH INDUSTRIES INC. (Formerly
known as Energy Power Systems Limited,
Engineering Power Systems Group Inc. and
Engineering Power Systems Limited
respectively)
Respondent (Appellant)

Edward Babin and
Matthew I. Milne-Smith
for the respondent

AND BETWEEN:

ENERNORTH INDUSTRIES INC. (Formerly
known as Energy Power Systems Limited,
Engineering Power Systems Group Inc. and
Engineering Power Systems Limited
respectively)
Respondent (Appellant)

Edward Babin and
Matthew I. Milne-Smith
for the respondent

- and -

OAKWELL ENGINEERING LIMITED
Respondent (Respondent in appeal)

Heard: April 10, 2006

On appeal from the judgment of Justice Gerald F. Day of the Superior Court of Justice dated August 2, 2005, reported at (2005), 76 O.R. (3d) 528.

MACFARLAND J.A.:

OVERVIEW

[1] This is an appeal by Enernorth Industries Inc. (Enernorth) from a judgment granting an application brought by Oakwell Engineering Limited (Oakwell) for an order recognizing and

enforcing in Ontario a judgment granted against Enernorth by the High Court of the Republic of Singapore on October 16, 2003 and affirmed by the Court of Appeal of the Republic of Singapore on April 27, 2004. The judgment under appeal also dismissed an application brought by Enernorth for a declaration that the Singapore judgment cannot be recognized or enforced in Ontario.

[2] The appellant's position is that the Singapore judgment was granted by a corrupt legal system, with biased judges, in a jurisdiction that operates outside the rule of law and, as such, ought not be enforced in Ontario.

[3] The respondent's position was accurately summarized in the application judge's reasons as follows:

While Oakwell acknowledges that Enernorth has tendered some evidence relating to possible government interference in trials, all of that evidence applies only to political cases. The case at bar is a commercial case. There is no evidence that Singapore courts are biased when deciding a commercial case between private parties.

[4] The Singapore proceedings arose out of Oakwell's successful tender in 1995 for a contract to build and operate power generation facilities in India. Because Oakwell lacked the financial resources to complete the project on its own, in 1997 it entered into a joint venture agreement with Enernorth. Under their agreement, together, they formed the "Project Company" to finance, construct and operate the project.

[5] Disputes arose between the two, which were eventually resolved in a December, 1998 Settlement Agreement. In addition to stating the parties' rights and obligations going forward, the Settlement Agreement provided that any disputes were to be governed by Singapore law and subject to the non-exclusive jurisdiction of the Singapore courts.

[6] Under that Settlement Agreement, Oakwell sold to Enernorth its interest in the Project Company and any claims it may have had under previous agreements between the parties. In return, Enernorth agreed to give Oakwell: (1) 1.85 million Enernorth shares; (2) U.S. \$2.79 million upon successful financing of the Project ("Financial Closure"); and (3) a royalty equal to 6.25% of the available cash flow from the first five years of the Project's commercial operation. Both parties agreed to do all things necessary to give effect to the Settlement Agreement.

[7] Ultimately, Enernorth did not achieve Financial Closure and, in August 2000, without informing Oakwell, Enernorth divested its interest in Project Company to a third party without in any way dealing with its second and third obligations, as set out above, to Oakwell. Oakwell took the position that Enernorth, in not providing for the disputed sums, had repudiated its obligations to Oakwell under the Settlement Agreement. Enernorth took the position that when it did not achieve Financial Closure, it was absolved of any obligation to pay Oakwell the disputed sums.

[8] When Oakwell learned of the repudiation, it sued Enernorth in Singapore in accordance with the attornment and choice of law clauses in the Settlement Agreement.

POSITIONS OF THE PARTIES

[9] The parties' positions are best articulated in their respective factums as follows:

The Appellant

Before its assets are seized under Canadian law to pay Oakwell's claims, Enernorth is seeking to have its defence to those claims adjudicated in a legal system that guarantees a trial before an independent and impartial judiciary and in a jurisdiction that operates under the rule of law. This will be had in Canada. What Enernorth is faced with, however, is having its assets seized under Canadian law to pay a judgment that was granted by a corrupt legal system before biased judges in a jurisdiction that operates outside the rule of law. Canadian law mandates the former. Justice Day imposed the latter.

This case concerns a judgment from the courts of Singapore. The uncontradicted evidence in this case, from leading international experts, reveals that Singapore is ruled by a small oligarchy who control all facets of the Singapore state including the judiciary, which is utterly politicised. The judiciary bends over backwards to support the government's and ruling elite's interests. Oakwell has close ties to the government. The trial judge held that Enernorth had breached a contract with Oakwell when Enernorth had done no such thing, and the Court of Appeal upheld the judgment, after a perfunctory hearing, despite the existence of manifest legal errors under Singapore law.

The Respondent

2. Justice Day correctly rejected Enernorth's attack on the Singapore legal system. In doing so, he carefully followed the test for enforcement of foreign judgments prescribed by the Supreme Court of Canada's recent decision in *Beals v. Saldanha*. First, he concluded that the Singapore courts had jurisdiction over the dispute. Enernorth has not contested this point. Second, Justice Day examined the various defences to enforcement advanced by Enernorth. He considered, and rejected, each defence that Enernorth now advances on appeal. He concluded that the Singapore courts are characterized by the rule of law and judicial independence; that Singapore's judiciary enjoys a demonstrated reputation for fairness in commercial matters; that the Singapore proceedings were conducted fairly in keeping with the principles of natural justice; that there was no evidence of a reasonable apprehension of bias against Enernorth, let alone actual bias, and that Enernorth's most important witnesses had contradicted themselves and their opinions could not be accepted [citation omitted].

ANALYSIS

[10] The application judge relied on the Supreme Court of Canada's decision in *Beals v. Saldanha*, [2003] 3 S.C.R. 416, and concluded:

[T]he test to decide recognition and enforcement of the Singapore decision will be whether or not the foreign court properly assumed jurisdiction by applying the real and substantial connection test. If that test is met, the court will then decide whether or not Enernorth succeeds in proving any of its defences.

He had no difficulty concluding that there was a real and substantial connection with Singapore, and his finding in this respect is not disputed in this court.

[11] Rather, the appellant argues that there are three pre-conditions, or "filters", for recognizing a foreign judgment and enforcing that judgment domestically. Those three factors are:

1. That the foreign court must have appropriately exercised jurisdiction based on the "real and substantial connection" test (first filter);

2. That the legal system of the court from which the judgment came must meet Canadian constitutional standards (second filter); and

3. That the foreign proceedings must not have been tainted by fraud or conflict with the law or public policy of Canada (third filter).

[12] The appellant relies on certain passages from the majority judgment in *Beals* to support its "second filter" argument. The passages cited are all found in that part of the majority judgment where the defence of natural justice is discussed. They are not isolated stand-alone passages.

[13] In my view, the majority judgment in *Beals* makes it clear that once an enforcing court is satisfied pursuant to the "real and substantial connection" test set out in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, that the foreign court properly took jurisdiction, it next must consider the defences available to a domestic defendant, who seeks to have a Canadian court refuse enforcement of a foreign judgment. As Major J., for the majority, noted at paragraph 40 of *Beals*:

The defences of fraud, public policy and lack of natural justice were developed before *Morguard*, *supra*, and still pertain.

[14] The majority then went on to consider these three defences and concluded, at paragraph 79:

Having properly taken jurisdiction, the judgment of that court must be recognized and enforced by a domestic court, provided that no defences bar its enforcement. None of the existing defences of fraud, natural justice or public policy have been supported by the evidence. Although the damage award may appear disproportionate to the original value of the land in question, that cannot be determinative. The judgment of the Florida court should be enforced.

[15] In my view, the only support that might be found in *Beals* for the appellant's "second filter" argument lies in the dissenting judgment of LeBel J. This court is bound by the majority opinion, which holds that, absent special or unusual circumstances which may require the creation of a new defence, the court's inquiry is limited to a consideration of three defences – fraud, public policy and natural justice – once jurisdiction is established.

[16] As to the "third filter" that the foreign proceedings must not have been tainted by fraud

or conflict with the law or public policy of Canada – the Supreme Court of Canada has defined this concept as a defence. It is not, as the appellant asserts, a precondition.

[17] The application judge carefully considered the evidence as it related to the defences of public policy, bias (as an aspect of the public policy defence) and natural justice. The defence of fraud was not raised.

[18] I will now turn to his consideration of each of those defences and assess his conclusion that they have not been made out.

THE PUBLIC POLICY DEFENCE

[19] In *Beals*, Major J. described the scope of the public policy defence at paragraphs 71 and 75:

The third and final defence is that of public policy. This defence prevents the enforcement of a foreign judgment which is contrary to the Canadian concept of justice. The public policy defence turns on whether the foreign law is contrary to our view of basic morality. As stated in *Castel and Walker*, *supra*, at p. 14-28:

.... the traditional public policy defence appears to be directed at the concept of repugnant laws and not repugnant facts...

How is this defence of assistance to a defendant seeking to block the enforcement of a foreign judgment? It would, for example, prohibit the enforcement of a foreign judgment that is founded on a law contrary to the fundamental morality of the Canadian legal system. Similarly, the public policy defence guards against the enforcement of a judgment rendered by a foreign court proven to be corrupt or biased.

The use of the defence of public policy to challenge the enforcement of a foreign judgment involves impeachment of that judgment by condemning the foreign law on which the judgment is based. It is not a remedy to be used lightly. The expansion of this defence to include perceived injustices that do not offend our sense of morality is unwarranted. The defence of public policy should continue to have narrow application [emphasis in original].

[20] The application judge concluded that "in the present case the asserted repugnancy is in the facts emanating out of Singapore, not the laws of Singapore" and, accordingly, he concluded that the defence of public policy is not available.

[21] Enemorth's attack on the judgment in question is not that it resulted from a law that is contrary to the fundamental morality of the Canadian legal system, but rather that it is the product of a corrupt legal system, with biased judges, in a jurisdiction that operates outside the rule of law.

BIAS

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[22] *Beals* makes it clear, in my view, that for a party to succeed on the bias aspect of the public policy defence, the party asserting bias must prove actual corruption or bias.

[23] The application judge carefully reviewed the evidence relied on by Encinorth in support of its bias argument. He considered the exchange between a witness and the Singapore trial judge concerning the correct spelling of the Koh Brothers Group's name, and the fact they now controlled Oakwell. He concluded that this evidence was insufficient to prove bias or corruption. He considered the evidence of the expert witnesses – Ross Worthington, Nihal Jayawickrama and Francis T. Seow – and concluded that their evidence was either unreliable (as in the case of Mr. Worthington) or too general to prove that there was not a fair trial in this case. He concluded there was a lack of evidence of corruption or bias in private commercial cases and no cogent evidence of bias in this specific case.

[24] In my view, the record supports his findings and they are owed deference in this court.

NATURAL JUSTICE

[25] The defence of natural justice is described in *Beals* at paragraph 60 and following:

The domestic court must be satisfied that minimum standards of fairness have been applied to the Ontario defendants by the foreign court.

The enforcing court must ensure that the defendant was granted fair process.

The burden of alleging unfairness in the foreign legal system rests with the defendant in the foreign action.

Fair process is one that, in the system from which the judgment originates, reasonably guarantees basic procedural safeguards such as judicial independence and fair ethical rules governing the participants in the judicial system.

The defence of natural justice is restricted to the form of the foreign procedure, to due process, and does not relate to the merits of the case. The defence is limited to the procedure by which the foreign court arrived at its judgment.

In Canada, natural justice has frequently been viewed to include, but is not limited to, the necessity that a defendant be given adequate notice of the claim made against him and that he be granted an opportunity to defend.

[26] At trial in Singapore, Encinorth did not contest the jurisdiction of the Singapore court, nor did it allege bias against the presiding judiciary. Encinorth argued that it would have been

impossible for it to raise in the Singapore action, the defences it raises here. It has suggested that in doing so, it would likely face charges of sedition there. I note, however, that Enernorth in the Settlement Agreement agreed that the agreement was to be governed by Singapore law and that the courts of Singapore were to have non-exclusive jurisdiction to hear disputes over the agreement. It advanced a U.S. \$175 million counterclaim against Oakwell. The trial lasted thirteen days. As is the practice in Singapore, evidence-in-chief was led by way of affidavits from the twenty-one witnesses. Both parties had full opportunity to cross-examine each other's witnesses and filed extensive written submissions of fact and law. Judgment was reserved for several months and, thereafter, the trial judge issued a forty-six page judgment. Enernorth was ordered to pay to Oakwell the disputed sums in full. Enernorth's counterclaim was dismissed.

[27] Enernorth then appealed the judgment to the Singapore Court of Appeal, solely on the merits of the decision. It did not challenge the conduct or fairness of the trial, the jurisdiction of the Singapore courts or the impartiality of the judiciary. The appeal was dismissed from the bench.

[28] From the time of the Settlement Agreement, Enernorth was at all times represented by a prominent Singapore law firm known to have had a "long record of affiliation with the People's Action Party", Singapore's ruling political party.

[29] The application judge considered both the substantive and procedural law of Singapore, as well as its constitution and compared those laws to the Canadian rule of law. He concluded that "while Enernorth's experts, political scientists and lawyers, provide reports that aspects of the government of Singapore do not meet the standards of the rule of law in Canada, this evidence goes against Singapore's formal legal structure as evidenced by its constitution and laws" and, importantly, "furthermore, Oakwell has provided evidence to the contrary". He concluded that, on a balance of probabilities, both parties enjoyed fair process in the Singapore courts.

CONCLUSION

[30] These cases are governed by their specific facts. The application judge found that Enernorth had failed to establish, on a balance of probabilities, any of the defences available to it and that, accordingly, the judgment should be enforced.

[31] In my view, the evidentiary record before the application judge supports his findings, which are entitled to deference in this court.

[32] Following the argument on this appeal, counsel for the appellant provided the court with a copy of the recent decision of Sachs J. in *State Bank of India v. Kothari Navarafna and Sayar Kothari*, [2006] O.J. 1125 (Sup. Ct. J.). As the motion judge noted, the factual issues raised in that case were not the same as the issues raised in this case.

DISPOSITION

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[33] For these reasons, I would dismiss the appeal.

[34] Costs of the appeal to the respondent are fixed in the sum of \$25,000.00 inclusive of disbursements and G.S.T. in accordance with the agreement of counsel.

RELEASED: June 9, 2006 "JL"

"I MacFarland J.A."

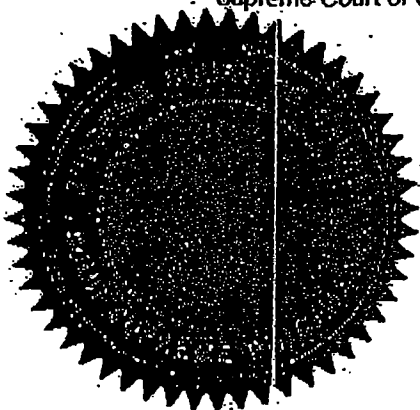
"I agree John Laskin J.A."

"I agree H.S. LaForme J.A."

Supreme Court of Canada



Cour suprême du Canada



No. 31620

January 18, 2007

Le 18 janvier 2007

Coram: McLachlin C.J. and Charron and
Rothstein JJ.Coram : La juge en chef McLachlin et les
juges Charron et Rothstein

BETWEEN:

ENTRE :

Enernorth Industries Inc. (Formerly known
as Energy Power Systems Limited,
Engineering Power Systems Group Inc. and
Engineering Power Systems Limited
respectively)Enernorth Industries Inc. (auparavant
connue sous Energy Power Systems
Limited, Engineering Power Systems Group
Inc. et Engineering Power Systems Limited
respectivement)

Applicant

Demanderesse

- and -

- et -

Oakwell Engineering Limited

Oakwell Engineering Limited

Respondent

Intimé

JUDGMENT

JUGEMENT

The application for leave to appeal from the
judgment of the Court of Appeal for Ontario,
Number C43898, dated June 9, 2006, is
dismissed with costs.

La demande d'autorisation d'appel de l'arrêt
de la Cour d'appel de l'Ontario, numéro
C43898, daté du 9 juin 2006, est rejetée avec
dépens.

BM
C.J.C.
J.C.C.

RSM Richter

**Fifth Report of RSM Richter Inc.
Re: EnerNorth Industries Inc., Great Northern
Oil & Gas Inc., EPS Karnataka Power Corp.
and CanPower Development Corp.**

**RSM Richter Inc.
Toronto, March 10, 2008**

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ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
IN BANKRUPTCY AND INSOLVENCY
IN THE MATTER OF
ENERNORTH INDUSTRIES INC.
FIFTH REPORT OF RSM RICHTER INC.
MARCH 10, 2008

1. INTRODUCTION

This report is filed by RSM Richter Inc. ("Richter"), in its capacity as trustee in bankruptcy ("Trustee") of EnerNorth Industries Inc. ("EnerNorth") and as interim receiver and receiver and manager ("Receiver"), pursuant to Section 47.1(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended ("BIA") and Section 101 of the *Courts of Justice Act*, R.S.O. 1990, C. C.43, as amended, of all of the property, assets and undertakings of EnerNorth and its direct or indirect wholly-owned subsidiaries, Great Northern Oil & Gas Inc. ("Great Northern"), EPS Karnataka Power Corp. ("EPS") and CanPower Development Corp. ("CanPower") (collectively the "Companies").

Richter was appointed as Trustee of EnerNorth effective March 21, 2007.

Richter was appointed Receiver of the Companies on June 21, 2007 by the Ontario Superior Court of Justice ("Court") ("Receivership Order"). A copy of the Receivership Order is attached as Appendix "A".

RSM Richter

1.1 Purpose of this Report

The purpose of this report is to:

- i. Provide an update on the receivership proceedings, including information on certain claims filed against EnerNorth;
- ii. Request that this Honourable Court issue an order:
 - Approving distributions to the secured creditors of EnerNorth as set out in Section 6;
 - Approving the Trustee's admission of the proof of claim of Oakwell Engineering Limited ("Oakwell") as a proven claim for the full amount thereof;
 - Approving the Receiver's activities as described in this report; and
 - Approving the fees and disbursements of the Receiver and its legal counsel, Chaitons LLP ("Chaitons") and Macleod Dixon LLP ("Macleod"), from the commencement of these proceedings to February 29, 2008, in the case of the Receiver, and January 31, 2008, in the case of Chaitons and Macleod.

1.2 Currency

All references to currency are in Canadian dollars unless otherwise noted.

1.3 Documents Filed in these Proceedings

The Receiver has posted all non-sealed documents filed with the Court in these proceedings on its website at <http://www.rsmrichter.com/restructuring.aspx>.

2. BACKGROUND

The primary business of EnerNorth and Great Northern was the exploration, development and production of petroleum and natural gas ("P&NG") in Western Canada. EnerNorth also held a minority interest, directly or through wholly-owned subsidiaries, in Konaseema Gas Power Limited ("KGPL") and currently holds, directly or through wholly-owned subsidiaries, an interest in Hassan Thermal Power Limited ("Hassan"). Both KGPL and Hassan are power generation companies registered in India.

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EnerNorth was listed on the American Stock Exchange.

Additional information with respect to the Companies is provided in previous reports to Court filed by the Receiver. Copies of the Third Report to Court dated December 5, 2007 and Fourth Report to Court dated December 13, 2007 ("Fourth Report"), without appendices, are attached as Appendices "B" and "C", respectively.

3. SALE OF ASSETS.

3.1 P&NG

Pursuant to an agreement of purchase and sale between the Receiver and Deep Creek Oil & Gas Inc. ("Deep Creek"), the majority of the Companies' P&NG assets were sold to Deep Creek for \$2,577,000. This sale was approved by this Honourable Court on September 19, 2007 and completed on October 10, 2007.

The remaining P&NG assets which were not included in the Deep Creek transaction were sold to Silverwing Energy Inc. ("Silverwing") for \$1,000 and a release of Silverwing's claim against EnerNorth, filed on a secured basis, in the amount of \$433,000.

3.2 Shares in KGPL

The Companies beneficially owned 12,348,200 shares in KGPL ("KGPL Shares"), which represents an interest of approximately 3% interest in KGPL.

The Receiver conducted a sale process in respect of the KGPL Shares in accordance with an order of this Honourable Court dated September 19, 2007. Q5 Capital India (Pvt.) Ltd. ("Q5"), an investment banking firm based in Mumbai, India, was retained to assist with the marketing and sale of the KGPL Shares.

On December 7, 2007, the Receiver accepted an offer from Oakwell, the Companies' largest creditor, for the purchase of the KGPL Shares. Oakwell submitted an offer for the KGPL Shares in the amount of US \$5,647,000, payable as 50% cash on closing and 50% as a reduction of any distribution due to it in the bankruptcy.

Pursuant to an order dated December 21, 2007, this Honourable Court approved the transaction with Oakwell. The transaction with Oakwell closed on January 28, 2008.

As part of the closing, the Receiver provided an undertaking to effect a transfer of the KGPL Shares to Oakwell. The Receiver understands that, in order to comply with Indian regulations, Oakwell is required to open various accounts in India in order to receive and register the KGPL Shares in its name. Oakwell is in the process of doing so.

The Receiver is currently in the process of preparing a capital gains income tax return in India related to the KGPL Shares transaction. The Receiver estimates that approximately \$500,000 will be payable to Indian taxing authorities.

3.3 Interest in Hassan

The Receiver's Second Report to Court dated September 10, 2007 ("Second Report") summarized the Companies' interest in Hassan. The Second Report referenced certain historical transactions that had the effect of diluting the Companies' interest from 97% to approximately 12% and also referenced certain advances made by the Companies to Hassan.

In the Second Report, the Receiver summarized its view as to the uncertainty with respect to the Companies' interest in Hassan and the value that could be realized for that asset. The Receiver proposed a realization process to offer the Companies' interest in Hassan for sale to Hassan's other shareholders and to other parties familiar with Hassan. As part of the realization process, the Receiver also proposed to solicit those parties' interest in an

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assignment of the right, title and interest of the Trustee, the Receiver and/or the Companies in any cause of action related to or against Hassan and its former, existing or future directors, officers and shareholders arising from the dilution of the Hassan shares or regarding the recovery of advances made by the Companies to Hassan.

As a result of positions taken by stakeholders of the Companies, including:

- Oakwell;
- Mr. James Cassina ("Cassina"), EnerNorth's former Chairman;
- Sandra Hall ("Hall"), the former President, Secretary and director of EnerNorth; and
- Fieldston Traders Limited ("Fieldston"), an unsecured creditor of EnerNorth,

all parties agreed to an adjournment of the Receiver's motion for approval of the Hassan realization process ("Hassan Motion"), and agreed to a schedule for the return of the Hassan Motion which would allow these parties to bring their own motions regarding Hassan and certain other issues.

Fieldston brought a motion ("Fieldston Motion") seeking, *inter alia*, an order requiring the Receiver to value the Companies' interests in Hassan and restraining any sale of any of the Hassan interests to Oakwell.

As part of the resolution of another motion brought by Hall and Cassina, Hall and Cassina agreed to be examined under oath as officers of EnerNorth pursuant to s.163(2) of the BIA by counsel for Oakwell. Fieldston and the Receiver agreed to an adjournment of Fieldston's motion until after the examinations of Hall and Cassina have been conducted, at which time the Hassan Motion and the Fieldston Motion are expected to be heard together.

As at the date of this report, the examinations of Hall and Cassina have not taken place due to outstanding issues between Hall and Cassina, and Oakwell, related to the conduct of that examination. Oakwell has now scheduled a motion returnable March 27, 2008 for directions in respect of the procedural conduct of those examinations.

A return date for the Hassan Motion and the Fieldston Motion will be determined after the hearing of Oakwell's motion.

4. SAN JUAN RESOURCES INC. ("SJR")

Prior to the Receiver's appointment, EnerNorth¹ had commenced an action against SJR in Alberta in 2005. The action resulted from a joint interest arrangement between EnerNorth and SJR regarding certain P&NG properties, where EnerNorth acted as the operator.

EnerNorth had claimed approximately \$300,000 from SJR regarding expenses that had not been paid by SJR since 2001. SJR had filed a statement of defence and counterclaim against EnerNorth, claiming on a net basis that it was a creditor of EnerNorth.

SJR, or related companies, had paid approximately \$50,000 to the Court of Queen's Bench of Alberta ("AB Court") as a result of interim relief granted by the AB Court. Pursuant to a Memorandum of Judgment of Madame Justice Kent dated July 28, 2006 ("Memorandum"), EnerNorth's application for summary judgment was denied. A copy of the Memorandum, which provides background information on the action, is attached as Appendix "D".

The matter was to proceed to trial, which would have required witness testimony, including testimony of EnerNorth's former President. EnerNorth's former counsel estimated the trial would last for five days. Before the trial, examinations for discovery were to occur.

¹ Known as Energy Power Systems Limited at the time the action was filed.

Given, among other things, the costs associated with proceeding to trial and the uncertain outcome, the Receiver considered offering for sale an assignment of its right, title and interest in the action. Cassina offered to pay \$25,000 for the assignment plus 10% of any amounts recovered from SJR (he did not specify if the 10% was based on gross or net recoveries). The Receiver did not expect interest from other parties.

The Receiver's counsel also engaged in settlement discussions with SJR's counsel. Those discussions resulted in a settlement of the action for \$58,794.30 payable to EnerNorth (representing the funds in the AB Court including accrued interest) and a dismissal of the claim and counterclaim.

The terms of the settlement were incorporated into an order of the AB Court which was issued January 30, 2008 ("Consent Order"). A copy of the Consent Order is attached as Appendix "E".

5. SECURED/PREFERRED CREDITORS

Seven creditors filed proofs of claim against EnerNorth on a secured basis. Also, Hall and Cassina brought a motion seeking a direction that the Receiver pay certain legal expenses in priority to all unsecured claims. Information on each of the claims, including security opinions from Chaitons and Macleod, where applicable, are set out and included below.

5.1 1211115 Alberta Ltd. ("121")

121 filed a secured claim in the amount of \$661,306.

121's claim arises from a proposed acquisition by EnerNorth of 121 pursuant to a Share Purchase Agreement between EnerNorth and 121 dated September 5, 2006 (the "SPA"). The SPA provided for an advance of \$650,000 by 121 to EnerNorth prior to completion of the transaction, and indicated that the \$650,000 was to be repaid by EnerNorth to 121 with

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interest at 10% per annum if the share purchase transaction did not proceed. The SPA also provided that, if EnerNorth was unable to repay the funds to 121, the obligation would be converted to a promissory note secured by all the unencumbered assets of EnerNorth.

The records of EnerNorth confirm that 121 advanced \$650,000 to EnerNorth on September 6, 2006, and that the funds were included in the amount EnerNorth posted into Court as security pending its application for leave to appeal to the Supreme Court of Canada related to the Oakwell claim.

For various reasons, the share purchase transaction under the SPA was not completed. On December 15, 2006, 121 demanded that EnerNorth issue a promissory note to 121 evidencing the indebtedness for \$650,000 and that it register a security interest pursuant to the SPA. EnerNorth signed a promissory note in favour of 121 effective as of December 15, 2006 and a General Security Agreement ("GSA") made as of the same date. 121 registered a financing statement pursuant to the *Personal Property Security Act* (Ontario) on January 3, 2007.

Chaitons' opinion on the 121 claim ("121 Opinion") is attached as Appendix "F". The 121 Opinion includes a discussion on 121's security documents and certain issues relating to the wording used therein. Subject to the assumptions and qualifications in the 121 Opinion, Chaitons concludes that 121's security creates a valid and enforceable security interest in favour of 121 in all of the property and assets of EnerNorth and in all proceeds thereof located in Ontario, but recommends that Richter seek approval from this Honourable Court for the distribution of any funds to 121 following disclosure of the above issues.

5.2 WeirFoulds LLP

WeirFoulds LLP ("WeirFoulds") filed a proof of claim² in the amount of \$434,444 on a secured basis, a copy of which is attached as Appendix "G". WeirFoulds was EnerNorth's corporate counsel.

The proof of claim disclosed that EnerNorth paid WeirFoulds \$274,990 on or after January 19, 2007. The statement of account attached to the WeirFoulds claim shows that the invoices subject to the claim were dated between July 31, 2006 and March 26, 2007.

WeirFoulds relies on a GSA signed by EnerNorth on or about December 18, 2006 but "made effective" as of October 18, 2006. WF Co. registered a PPSA financing statement against EnerNorth on October 18, 2006.

The corporate records of EnerNorth include draft minutes of a meeting of EnerNorth's Board of Directors held on November 10, 2006, during which the granting of a security interest to WeirFoulds was discussed.

On December 18, 2006, WeirFoulds wrote to EnerNorth referring to discussions dating back to July, 2006 with respect to unpaid accounts of WeirFoulds. The letter states, among other things, that "Since July 2006, we have advised you that WeirFoulds LLP will not continue to act for EnerNorth without some form of security for both our past and future fees". A resolution of the directors of EnerNorth authorizing and directing the company to enter into and sign the WeirFoulds GSA was signed on December 18, 2006.

On January 19, 2007, WeirFoulds and WF Co. each demanded immediate payment of all amounts due by EnerNorth on the basis that an event of default had occurred under the GSA.

² The proof of claim was filed by WeirFoulds "as assigned to 1200124 Ontario Inc." ("WF Co."). WF Co. took an assignment of the WeirFoulds GSA as of October 18, 2006.

The secured claim by WeirFoulds raises issues as to whether the granting of a security interest by EnerNorth to WeirFoulds was a preference under Section 95 of the BIA. The payment of \$274,990 raises similar issues. It is the view of the Trustee that the Date of the Initial Bankruptcy Event (as defined in the BIA) in respect of EnerNorth is the date it filed a Notice of Intention to make a Proposal, being February 9, 2007. Accordingly, the WeirFoulds General Security Agreement was signed by EnerNorth and the payment of \$274,990 was made within the 3-month period before the Date of the Initial Bankruptcy Event.

The Trustee (through its counsel) held discussions with WeirFoulds with respect to the issues related to its security. Subject to the approval of the Inspector in the bankruptcy estate, the Trustee and WeirFoulds agreed to a resolution on the basis that the WeirFoulds secured claim would be reduced by \$75,000, and that WeirFoulds would waive any unsecured claim for the \$75,000. The result is that WeirFoulds and/or WF Co. would be left with a secured claim against EnerNorth for \$359,444. The estate Inspector subsequently approved that settlement.

Chaitons reviewed the WeirFoulds GSA and related documents and provided an opinion to Richter, a copy of which is attached as Appendix "H". Subject to the assumptions and qualifications contained therein, Chaitons concluded that the security held by WeirFoulds and/or WF Co. creates a valid and enforceable security interest in their favour in all of the property and assets of EnerNorth and in all proceeds thereof located in Ontario.

5.3 Alberta Energy Utilities Board ("AEUB")

AEUB filed a proof of claim in the amount of approximately \$80,000, which included a secured component of approximately \$18,000. AEUB's claim is in respect of estimated crown royalties and other amounts payable to the Alberta government regarding P&NG revenues.

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AEUB holds a deposit from EnerNorth, which it received prior to the receivership date, of \$18,000.

On January 31, 2008, AEUB updated its claim against EnerNorth and estimated a balance owing of \$13,500, excluding the deposit. As noted, the deposit held by AEUB exceeds this amount. Accordingly, the Receiver is not proposing a distribution to AEUB at this time.

5.4 Central Alberta Midstream ("CAM"), Zapata Energy Corporation ("Zapata") and AltaGas Operating Partnership ("AltaGas")

CAM, Zapata and AltaGas filed claims in the amount of \$20,967, \$117,292³ and \$21,471, respectively. CAM, Zapata and AltaGas (collectively, the "Operators") were each third-party operators in respect of certain P&NG properties where EnerNorth owned a fractional interest. Each of these parties asserted Operator's Liens against the assets of EnerNorth that were subject to their respective operating agreements. Pursuant to the Sale Approval and Vesting Order granted by this Court on September 19, 2007 in connection with the sale of the Companies' P&NG assets to Deep Creek, the sale proceeds from that transaction are bound by and subject to the lien claims of the Operators.

Macleod's opinion on the CAM, Zapata and AltaGas claims is attached as Appendix "I". Subject to the assumptions and qualifications therein, Macleod concludes that CAM, Zapata and AltaGas each have valid Operator's Liens and should be paid.

5.5 Special Areas Board ("SAB")

SAB filed a proof of claim in the amount of \$2,195 on a secured basis related to certain outstanding municipal taxes. Macleod is of the opinion that SAB does not have a secured claim.

³ Zapata originally filed a claim for \$152,002.64 but then amended its claim on February 29, 2008.

The Trustee has admitted SAB's claim as a preferred claim in the amount of \$1,077 consistent with its statement of account. SAB has accepted the change in the priority ranking of its claim.

5.6 Hall and Cassina

Hall and Cassina brought a motion returnable December 11, 2007 seeking "an order directing [Richter] to pay all reasonably incurred legal expenses incurred by Ms. Hall and Mr. Cassina for claims made against them after 7 February 2007 on an ongoing monthly basis from the Estate's assets in priority to any unsecured claims ...". The Trustee opposed the motion on the grounds that, *inter alia*:

- The claims by Hall and Cassina were at best unsecured contingent obligations on the part of EnerNorth; and
- Payment of the fees in priority to unsecured creditors would represent a scheme of distribution and priorities that deviated from s. 136 of the BIA as well as the principles underlying the BIA generally.

On January 29, 2008, Justice Wilton-Siegel released his decision dismissing the motion by Hall and Cassina. The parties have exchanged submissions on the costs of the motion and are awaiting a decision from Justice Wilton-Siegel on that point.

To date, Hall and Cassina have not filed a proof of claim with the Trustee in respect of the legal expenses which were the subject of their motion.

6. DISTRIBUTION

Based on the foregoing, the Receiver recommends that this Honourable Court approve a distribution from EnerNorth as follows:

Creditor	Amount (\$)
121115 Alberta Ltd.	661,306
WeirFoulds LLP	359,444
Central Alberta Midstream	20,967
Zapata Energy Corporation	133,405
AltaGas Operating Partnership	21,471
Total	1,196,593

The above amounts reflect the proofs of claim, as filed. The final claim amounts are subject to change on account of accrued interest and/or pre-bankruptcy related adjustments, where applicable.

7. UNSECURED CREDITORS

In Section 3.4 of the Fourth Report, Richter indicated that it would be examining all claims and would seek approval of this Honourable Court prior to making any distributions to any unsecured creditors. This was done, among other reasons, to provide stakeholders a forum to raise objections with respect to claims filed with the Trustee.

7.1 Oakwell

Oakwell filed a proof of claim in EnerNorth's bankruptcy in the amount of approximately \$6.8 million, on an unsecured basis. A copy of Oakwell's proof of claim is attached as Appendix "J". As filed, Oakwell's claim represents approximately 96% of all unsecured claims filed to date. Oakwell is domiciled in Singapore.

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The Trustee has reviewed Oakwell's claim, including the calculations supporting the amount as filed, and the various court orders giving rise to the claim. The Trustee has also discussed the claim with and/or obtained information with respect to the claim from various parties including, among others, Cassina, counsel for Cassina and Fieldston, and Oakwell.

The Receiver's previous reports to Court outlined the acrimonious history between EnerNorth and Oakwell. A summary of the relationship between EnerNorth and Oakwell and the history of Oakwell's claim is provided below.

- In 1995, Oakwell successfully tendered to build and operate two barge-mounted power plants in the state of Andhra Pradesh, India. Oakwell then entered into a joint venture agreement with EnerNorth in June, 1997. Oakwell and EnerNorth formed a project company that would finance, construct and operate the project. EnerNorth owned 87.5% of the project company and Oakwell owned the remaining 12.5%;
- In December, 1998, EnerNorth and Oakwell entered into an agreement (the "Settlement Agreement") to resolve various disputes between them. The Settlement Agreement provided that any disputes that were to arise in the future would be governed by Singapore law and subject to the non-exclusive jurisdiction of the Singapore courts;
- In August, 2000, EnerNorth entered into an agreement with VEC, an Indian company, to sell virtually all of its interest in the project;
- Oakwell entered into negotiations for its own agreement with VEC, which concluded in July, 2002;
- In August, 2002, Oakwell sued EnerNorth in Singapore for the amounts owing under the Settlement Agreement;
- On October 16, 2003, the High Court of the Republic of Singapore decided in favour of Oakwell, which resulted in a US \$4.2 million plus interest and costs award ("Singapore Judgment"). The quantum awarded to Oakwell was based on the obligations set out in Sections 1.3 and 1.4 of the Settlement Agreement, which required payment of US\$2,790,000 after financial closure of the power plant project and a royalty stream related to the future cash flow of the project;
- On April 27, 2004, the Court of Appeal of the Republic of Singapore dismissed EnerNorth's appeal of the Singapore Judgment;
- In December, 2004, Oakwell brought an application to enforce the Singapore Judgment in Ontario. EnerNorth opposed recognition and enforcement of the

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Singapore Judgment on the basis that the Singapore legal system did not conform to the Canadian concept of justice. Pursuant to a decision released on August 2, 2005, Justice Day granted Oakwell's application. A copy of the decision of Justice Day is attached as Appendix "K". A copy of the order recognizing and enforcing the Singapore Judgment in Ontario ("Recognition Order") is attached as Appendix "L";

On April 10, 2006, the Court of Appeal for Ontario heard EnerNorth's appeal of the Recognition Order. On June 9, 2006, the Court of Appeal for Ontario dismissed the appeal ("Court of Appeal Judgment"). A copy of the Court of Appeal Judgment is attached as Appendix "M"; and

On January 18, 2007, the Supreme Court of Canada dismissed EnerNorth's application for leave to appeal from the Court of Appeal Judgment.

7.1.1 Allegations of Overstatement

At the first meeting of creditors, held on April 11, 2007, and in subsequent meetings between the Trustee and Cassina, allegations were made that Oakwell's claim, as filed, was overstated on the basis that:

- It did not reflect payments Oakwell may have received from third parties related to a Technology Transfer, Collaboration and Licence Agreement ("Licence Agreement") dated July 4, 2001, between Oakwell as licensor and Konaseema EPS Oakwell Power Limited (now known as KGPL) as licensee; and
- Oakwell holds or held approximately 6.4 million shares in KGPL which it received as security for the required payments under the Licence Agreement.

The Trustee made inquiries of Oakwell regarding these allegations. The Trustee's letter to Oakwell dated April 30, 2007 ("April Letter") is attached as Appendix "N".

Subsequent to the April Letter, Cassina met with the Trustee and provided additional documentation to support his allegations. The majority of the documentation pre-dates the Singapore Judgment. The documentation did not include evidence of a payment nor did it quantify the amounts of any payments to Oakwell.

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Cassina is also a creditor of the estate. In June, 2007, the Trustee advised Cassina of his rights under S. 135 (5) of the BIA to seek to reduce or expunge the quantum of a creditor's claim. To date, Cassina has not availed himself of his rights under S. 135 (5).

7.1.2 Oakwell's Response to Allegations

Oakwell has notified the Trustee on a number of occasions of its position that the allegations with respect to the overstatement of the quantum of its claim are without merit.

Firstly, Oakwell has relied on the doctrine of *res judicata* as its primary defense. Its position is that the allegations have been and/or could have been raised on any number of occasions and before the courts in Singapore and Canada that have dealt with Oakwell's claim.

Secondly, Oakwell states that it does not hold shares in KGPL and did not realize KGPL shares as security.

Finally, Oakwell states that "it did not receive the sum of US \$4 million from any party in satisfaction of the judgment debt (Singapore Judgment) owed by EnerNorth, partial or otherwise." The Trustee's understanding is that Oakwell takes the position that any funds it may or would have received from third parties would not constitute payments under the Singapore Judgment, in any event, and would not require Oakwell to reduce the quantum of its proof of claim.

Oakwell's response to the April Letter is attached as Appendix "O". The Trustee's further correspondence to Oakwell is attached as Appendix "P". Oakwell has not responded to that letter in writing, although subsequent discussions with respect to Oakwell's claim have taken place as between the Trustee, Oakwell's representatives, and counsel for the Trustee and Oakwell.

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7.1.3 Other Information Provided to the Receiver

During its meetings in India in July, 2007 related to the KGPL power project, the Receiver was provided with certain information related to the Oakwell claim by a director of KGPL and VBC. Specifically, the Receiver was informed that payments were made to Oakwell pursuant to the Licence Agreement sometime in 2004 but the same party indicated that those payments were unrelated to and independent of the Settlement Agreement and Singapore Judgment.

7.1.4 Proposed Admission of Oakwell Claim

Richter, in its capacity as Receiver or Trustee, has not been provided with any confirmable information that would allow the Trustee to reduce Oakwell's claim. Richter has also not been provided with any information that would warrant the disallowance of Oakwell's claim.

Accordingly, the Trustee proposes to admit Oakwell's proof of claim as a proven claim as filed.

7.2 Other Creditor Claims

Collectively, the claims as filed of all other unsecured creditors of EnerNorth are less than \$700,000. The Trustee has reviewed these claims and has, to date, either admitted or disallowed certain of the claims. The Trustee is in the process of completing its review of the claims.

The administration of these claims and distributions to unsecured creditors will be effected pursuant to the procedures under the BIA.

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8. GREAT NORTHERN

Pursuant to Section 4.1 of the Fourth Report and the Order of this Honourable Court dated December 21, 2007, the Receiver completed a Call for Claims process in respect of Great Northern.

Four creditors filed claims against Great Northern in an aggregate amount of \$9,489.

Following its review of the claims, and in accordance with the Call for Claims process, the Receiver issued payment to the creditors on account of their claims in full.

The Receiver is currently in the process of updating Great Northern's books and records, with the assistance of the former Chief Financial Officer of the Companies, in order to complete outstanding tax returns and issue a dividend to ErierNorth of the funds remaining in Great Northern.

9. RECEIVER'S ACTIVITIES

Since December 13, 2007, the date of the Fourth Report, the Receiver's activities have included:

- Agreeing to a final statement of adjustments with Deep Creek;
- Dealing with the Receiver's Indian counsel with respect to issues affecting the KGPL Shares; capital gains tax matters, legal proceedings in India, and other Indian legal matters;
- Obtaining approval of this Court for the sale of the KGPL Shares; completing the sale transaction, and dealing with Q5 related to all aspects of the KGPL Shares;
- Monitoring issues related to Hassan and the Cassina examination;
- Attending to settlement discussions with SJR;

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- Dealing with EnerNorth's secured creditors;
- Drafting this report; and
- Other matters pertaining to the administration of the receivership of the Companies.

10. FEES AND DISBURSEMENTS OF THE RECEIVER AND ITS LEGAL COUNSEL

Attached as Appendix "Q" are copies of the Receiver's statements of account for the period of June 1, 2007 to February 29, 2008.

Richter's accounts, in its capacity as Trustee of EnerNorth for the period up to May 31, 2007, have been approved by the Inspector in EnerNorth's bankruptcy. Those fees total \$150,289.12, including GST.

The Receiver's activities are detailed in its accounts and in previous reports to Court. A summary of the accounts follows:

RSM Richter Inc.	
Period Covered	Amount (incl. GST)
June 1 to August 31, 2007	\$ 141,021.55
September 1-30, 2007	31,689.39
October 1 to November 30, 2007	43,935.73
December 1-31, 2007	41,110.41
January 1 to February 29, 2008	36,691.56
Total	\$ 294,448.64

Attached as Appendices "R" and "S" are copies of the statements of account of Chaitons and Macleod, respectively, for the period March 22, 2007 to January 31, 2008. The Receiver has reviewed Chaitons' and Macleod's accounts and believes them to be reasonable. The Receiver is of the view that Chaitons' and Macleod's hourly rates are consistent with the hourly rates

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charged by other major Toronto and Calgary law firms providing insolvency and restructuring advice.

A summary of Chaitons' accounts follows:

Chaitons LLP	
Period Covered	Amount (incl. GST)
March 22 to September 30, 2007	\$ 60,318.68
October 1-31, 2007	4,846.32
November 1-30, 2007	13,934.50
December 1-31, 2007	23,553.32
January 1-31, 2008	3,765.00
Total	\$ 106,417.22

A summary of Macleod's accounts follows:

Macleod LLP	
Period Covered	Amount (incl. GST)
March 22, 2007 to May 31, 2007	\$ 8,284.41
June 1 to July 31, 2007	8,023.83
August 1-31, 2007	8,998.36
September 1-30, 2007	16,042.52
October 1-31, 2007	8,501.59
November 1-30, 2007	9,758.47
December 1-31, 2007	3,326.59
January 1-31, 2008	2,819.78
Total	\$ 65,755.55

In addition to the above, the Receiver retained counsel in India related to matters involving the KGFL Shares and proceedings that were ongoing as at the Trustee's appointment. To date, the Receiver has issued payment of approximately \$25,000 on account of Indian legal fees.

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The Receiver respectfully requests that this Honourable Court approve the fees and disbursements of the Receiver, Chaitons and Macleod, as detailed in Appendices "Q", "R" and "S", respectively.

II. CONCLUSION

Based on the foregoing, the Receiver recommends and requests that this Honourable Court issue an order granting the relief detailed in Section 1.1 of this report.

All of which is respectfully submitted,

RSM Richter Inc.

**RSM RICHTER INC.
IN ITS CAPACITY AS INTERIM RECEIVER AND RECEIVER AND MANAGER
OF ENERNORTH INDUSTRIES INC., GREAT NORTHERN OIL & GAS INC.,
EPS KARNATAKA POWER CORP. AND CANPOWER DEVELOPMENT CORP.
AND TRUSTEE IN BANKRUPTCY OF ENERNORTH INDUSTRIES INC.
AND NOT IN ITS PERSONAL CAPACITY**

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