

Case Note

THE INTERPRETATION OF ENDEAVOURS CLAUSES

KS Energy Services Ltd v BR Energy (M) Sdn Bhd
[2014] 2 SLR 905

Electricity Generation Corp v Woodside Energy Ltd
[2014] HCA 7

Jet2.com Ltd v Blackpool Airport Ltd
[2012] EWCA Civ 417

Contractual clauses to use “best endeavours”, “all reasonable endeavours” and “reasonable endeavours” have never received much academic attention, even though they are commercially important as flexible alternatives to absolute contractual obligations. The Singapore Court of Appeal recently considered the interpretation of endeavours clauses in the case of *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 (“*KS Energy Services*”). This case note discusses the significance and implications of *KS Energy Services*, in the light of two related judicial decisions from the High Court of Australia and the English Court of Appeal.

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I. Introduction

1 The interpretation of contractual clauses to use “best endeavours”, “all reasonable endeavours” and “reasonable endeavours” has come to the forefront of judicial analyses lately with the recent Singapore Court of Appeal judgment of *KS Energy Services Ltd v BR Energy (M) Sdn Bhd*¹ (“*KS Energy Services*”). Though endeavours clauses have never received significant academic attention, being a specific instance of contractual interpretation, they are of considerable commercial importance in Singapore and other common law jurisdictions. Endeavours clauses are common features in international loan contracts,² distributorship agreements,³ employment contracts and

1 [2014] 2 SLR 905.

2 For example, a provision stating that the creditor shall, in the event of a currency turmoil or the enactment of adverse governmental regulations, endeavour to use
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construction contracts, as they can be interpreted flexibly to adapt to various commercial situations. It has been suggested that the popularity of such clauses can be attributed to the absence of a common law duty to negotiate in good faith, and a “contracting party’s aversion towards absolute contractual duties and potential liability, where the contractually-stipulated outcome[s] are not entirely within his control”.⁴

2 The High Court of Australia and the English Court of Appeal have also recently discussed the interpretation of endeavours clauses in *Electricity Generation Corp v Woodside Energy Ltd*⁵ (“*Electricity Generation Corp*”) and *Jet2.com Ltd v Blackpool Airport Ltd*⁶ (“*Jet2.com Ltd*”), respectively. This case note will focus on the reasoning and implications of the Singapore Court of Appeal’s judgment in *KS Energy Services*, in light of the Australian and English approaches to interpretation espoused in *Electricity Generation Corp* and *Jet2.com Ltd*.

II. Summary of facts in *KS Energy Services*

3 In *KS Energy Services*, KS Energy Services Ltd (“KSE”) contracted with BR Energy (M) Sdn Bhd (“BRE”), under cl 6.2 of a joint venture agreement, to use “all reasonable endeavours” to procure the construction and delivery of an oil rig within six months after a charter agreement was executed. KSE subsequently engaged a third-party rig builder, Oderco Inc (“Oderco”), to complete the work. Oderco ultimately failed to deliver the oil rig on the stipulated deadline despite the fact that the deadline had been revised a number of times. The joint venture agreement between KSE and BRE was later terminated.

4 BRE alleged that KSE breached cl 6.2 of the agreement, and that KSE had failed to take reasonable steps to ensure the timely completion of the project. The Singapore Court of Appeal held that KSE did not breach cl 6.2, since it had monitored the goings-on at Oderco and, amongst other things, deployed its own employee to Oderco’s yard to supervise the project, assisted in the procurement of pieces of critical

best efforts to find a solution that will be mutually acceptable to the parties. See Lars Gorton, “Best Efforts” [2002] JBL 143 at 149–150.

3 In distributorship agreements, the distributor often has a duty to sell a certain minimum quantity of the goods during a certain period of time. A “best endeavour” clause, which imposes a further obligation on the distributor to reach a better result than the minimum, is often tied to the duty. See Lars Gorton, “Best Efforts” [2002] JBL 143 at 150–151.

4 Tony Martino, “‘Best Endeavours’ Clauses in Entertainment Industry Contracts” (2009) *Entertainment Law Review* 134 at 135.

5 [2014] HCA 7.

6 [2012] EWCA Civ 417.

equipment, and paid salaries of Oderco's staff. The court held that these sufficed to discharge the "all reasonable endeavours" obligation.

5 In its judgment, the Singapore Court of Appeal provided helpful clarification on the interpretation of endeavours clauses. First, it held that there was little or no relevant difference between the standard of conduct constituted by the formulation "all reasonable endeavours" and that constituted by the formulation "best endeavours", but that "all reasonable endeavours" clauses were ordinarily more onerous than "reasonable endeavours" clauses. Second, it held that "all reasonable endeavours" and "best endeavours" clauses required the obligor to take "all those reasonable steps which a prudent and determined man, acting in the interests of the *obligee* and anxious to procure the contractually-stipulated outcome within the available time, would have taken" [emphasis in original],⁷ though it was not necessary for the obligor to disregard his own commercial interests. This case note will discuss these observations in turn.

III. Discussion

A. *No distinction between "all reasonable endeavours" and "best endeavours"*

6 In *KS Energy Services*, the Singapore Court of Appeal clarified that there was no meaningful difference between an obligation to use "all reasonable endeavours" and "best endeavours". The court noted that UK case law was inconclusive on the issue, before going on to hold that, "any attempt to draw a distinction between them would merely be a pointless hair-splitting exercise"⁸ if the parties did not expressly specify the differences between the two types of endeavours obligations. The competing approach, set out in the English cases of *UBH (Mechanical Services) Ltd v Standard Life Assurance Co*⁹ and *Jolley v Carmel Ltd*,¹⁰ is that the terms "reasonable endeavours", "all reasonable endeavours" and "best endeavours" represent a spectrum of obligations, with "best endeavours" being the most onerous and "reasonable endeavours" being the least onerous. Under this approach, there would be a marked difference between an obligation to use "all reasonable endeavours" and "best endeavours".

7 *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 at [52].

8 *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 at [62].

9 *UBH (Mechanical Services) Ltd v Standard Life Assurance Co* *The Times* (13 November 1986).

10 [2000] 2 EGLR 153.

7 It is submitted that the approach taken by the Singapore Court of Appeal is more desirable in this instance as it embodies the contextual approach towards contractual interpretation set out in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*¹¹ (“*Sembcorp Marine*”) and *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd*.¹² In *Sembcorp Marine*, the Singapore Court of Appeal noted that Singapore courts had adopted the “contextual approach” to interpretation. Under the contextual or purposive approach to interpretation, a judge seeks to determine the common intention of the parties from the commercial context. The gist of this is that the interpretation of any particular contractual term must accord with business common sense;¹³ the literal or ordinary meaning of words, though starting points for analyses, are no longer of paramount importance.

8 By contrast, the English cases which draw categorical distinctions between the different types of endeavours clauses seem to adopt the traditional view of contractual interpretation, under which a relatively strict or formal approach to language is adopted. Under the traditional approach to contractual interpretation, the common intentions of the parties are to be discerned from the “‘plain’ or ‘natural and ordinary meaning’ of the language which [the parties] have employed”.¹⁴ It is submitted that the contextual approach is more appropriate for endeavours clauses, which evolved in response to a need for commercial flexibility in the first place. Businessmen may not consciously intend any difference between “best endeavours” and “all reasonable endeavours”, and an overly literal approach towards contractual interpretation is inappropriate.

9 In essence, the Singapore Court of Appeal’s position is that “all reasonable endeavours” and “best endeavours” will be construed in a similar fashion unless contracting parties expressly describe the differences between the content of those obligations. This is in line with the contextual approach to interpretation. Further, the Singapore Court of Appeal noted that contracting parties “would be well advised to specify the objective to which all reasonable endeavours are to be directed and the criteria by which the endeavours are to be judged, even if the ‘endeavours’ clause in question is enforceable in the absence of such specifications”.¹⁵ This approach incentivises contracting parties to

11 [2013] 4 SLR 193.

12 [2008] 3 SLR(R) 1029.

13 This point was made vigorously by Lord Diplock in *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191 at 201: “[I]f detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.”

14 Gerard McMeel, *The Construction of Contracts: Interpretation, Implication, and Rectification* (Oxford University Press, 2nd Ed, 2011) at para 1.29.

15 *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 at [90].

draft their contracts in more specific terms, enhancing legal certainty whilst retaining commercial flexibility.

B. Distinction between “all reasonable endeavours” and “reasonable endeavours”

10 Even though the Singapore Court of Appeal declined the proposition that there was a difference between “best endeavours” clauses and “all reasonable endeavours”, it acknowledged that there was a distinction between an obligation to use “all reasonable endeavours” and “reasonable endeavours”,¹⁶ the former being more onerous than the latter.

11 In *Electricity Generation Corp*, the High Court of Australia went further, drawing no distinction between “reasonable endeavours” and “best endeavours” clauses, even though this was somewhat the result of the litigants’ failure to argue that the clauses ought to be interpreted differently. The High Court of Australia noted that:¹⁷

Contractual obligations framed in terms of ‘reasonable endeavours’ or ‘best endeavours (or efforts)’ are familiar. Argument proceeded on the basis that *substantially similar obligations* are imposed by either expression. [emphasis added]

12 If one accepts, as the Singapore Court of Appeal did, that there is no material difference between “all reasonable endeavours” and “best endeavours”, the High Court of Australia’s *obiter dicta* in *Electricity Generation Corp* implies that there is no difference between “all reasonable endeavours” and “reasonable endeavours” either. The same can be said of the view articulated by the Hong Kong Court of First Instance in *Tin Shui Wai Development Ltd v Attorney General*¹⁸ that “best endeavours” connoted no greater degree of endeavour than “reasonable endeavours”.¹⁹ This view is inconsistent with the Singapore Court of Appeal’s finding that “all reasonable endeavours” clauses are ordinarily more onerous than “reasonable endeavours” clauses.

13 It may be argued that the Singapore Court of Appeal was justified in finding a distinction between the standards of conduct required by contractual terms to exercise “all reasonable endeavours” and “reasonable endeavours” since the term to exercise “all reasonable endeavours” entailed exhausting *all* the “reasonable” options that were available; taking *some* but not *all* of the available options would not

16 *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 at [63].

17 *Electricity Generation Corp v Woodside Energy Ltd* [2014] HCA 7 at [40].

18 [1992] HKCFI 96.

19 *Tin Shui Wai Development Ltd v Attorney General* [1992] HKCFI 96 at [44].

suffice to discharge the contractual obligation.²⁰ However, such reasoning evinces an inclination towards the traditional, literal approach to contractual interpretation and is a departure from the contextual approach.

14 Additionally, it is submitted that little meaningful insight can be gained from attempts to demarcate the precise boundaries between “reasonable endeavours”, “all reasonable endeavours” and “best endeavours”.²¹ The Court of Appeal had taken the right step in rejecting a categorical difference between “all reasonable endeavours” and “best endeavours” clauses, but seemed hesitant in adopting the same approach towards the interpretation of “reasonable endeavours” and “all reasonable endeavours” clauses. With all due respect, its reticence was probably unnecessary. What these phrases mean will inevitably differ on a case-by-case basis, since there is no singular quantitative test for what constitutes “best”, “reasonable” and “all reasonable” endeavours. Each set of facts is unique and potentially incommensurable with another. Without any justified theoretical bases for categorical divisions, the meaning of each type of endeavours clause is fluid and context-specific. Given this, it is sufficient as long as there are general guidelines clarifying the meaning of endeavours clauses that can be modified slightly to suit the particular contractual and factual context. The law can be streamlined by removing arbitrary distinctions between the respective obligations to use “reasonable endeavours”, “all reasonable endeavours” and “best endeavours” to procure contractually-stipulated outcomes.

C. Nature of the contractual obligation to use “all reasonable endeavours” and “best endeavours”

(1) Guidelines set out in *KS Energy Services*

15 In *KS Energy Services*, the Singapore Court of Appeal concluded that the test for determining whether an “all reasonable endeavours” clause had been fulfilled was ordinarily the same as the test for whether a “best endeavours” clause had been fulfilled, *ie*, the test in *Travista Development Pte Ltd v Tan Kim Swee Augustine*²² (“*Travista*”), which was whether the obligor had taken “all those reasonable steps which a

20 This was the explanation given by the Singapore Court of Appeal in *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 at [63].

21 See also Yip Man & Goh Yihan, “Default Standards for Non-Absolute Obligation Clauses?” [2014] LMCLQ 320 at 328: “[T]he vague distinctions between the different types of non-absolute obligation should be discarded in favour of a more explicit approach which ... encourages parties to spell out the extent of their obligations more clearly.”

22 [2008] 2 SLR(R) 474.

prudent and determined man, acting in the interests of *the obligee* and anxious to procure the contractually-stipulated outcome within the available time, would have taken” [emphasis in original].²³ Further, the court endorsed the following guidelines *vis-à-vis* the operation and extent of both “all reasonable endeavours” and “best endeavours” clauses:²⁴

- (a) Such clauses require the obligor ‘to go on using endeavours until the point is reached when all reasonable endeavours have been exhausted’, or ‘to do all that it reasonably could’.
- (b) The obligor need only do that which has a significant or real prospect of success in procuring the contractually-stipulated outcome.
- (c) If there is an insuperable obstacle to procuring the contractually-stipulated outcome, the obligor is not required to do anything more to overcome other problems which also stood in the way of procuring that outcome but which might have been resolved.
- (d) The obligor is not always required to sacrifice its own commercial interests in satisfaction of its obligations, but it may be required to do so where the nature and terms of the contract indicate that it is in the parties’ contemplation that the obligor should make such sacrifice.
- (e) An obligor cannot just sit back and say that it could not reasonably have done more to procure the contractually-stipulated outcome in cases where, if it had asked the obligee, it might have discovered that there were other steps which could reasonably have been taken.
- (f) Once the obligee points to certain steps which the obligor could have taken to procure the contractually-stipulated outcome, the burden ordinarily shifts to the obligor to show that it took those steps, or that those steps were not reasonably required, or that those steps would have been bound to fail.

[internal citations omitted]

16 These guidelines are generally quite helpful in so far as they provide a rough outline of how endeavours clauses should be interpreted. That said, the interpretation of contractual clauses is, at base, a contextual exercise, and what is considered “reasonable” will differ from case to case. A number of guidelines will be briefly considered in this article, followed by a discussion on the extent to which a contracting party is required to sacrifice its own commercial interests in performing endeavours obligations, a point that was considered extensively in *KS Energy Services*.

23 *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 at [47].

24 *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 at [93].

(2) *Significant or real prospect of success/insuperable obstacle*

17 In *KS Energy Services*, the Singapore Court of Appeal clarified that “all reasonable endeavours” or “best endeavours” clauses only required an obligor to perform acts that had a “significant or real prospect” of success in procuring the contractually-stipulated outcome. Further, the exercise of “all reasonable endeavours” or “best endeavours” would not require an obligor to overcome an “insuperable obstacle”.²⁵ Overall, this narrows the ambit of endeavours clauses appropriately and strikes a suitable balance between the interests of both contracting parties.

18 What amounts to a “significant” or “real” prospect of success or an “insuperable obstacle” will depend ultimately on the facts in a particular situation. *Yewbelle Ltd v London Green Developments Ltd*²⁶ (“*Yewbelle*”) provides a starting point for the analysis. In *Yewbelle*, the seller of a certain property was obliged to use “all reasonable endeavours” to obtain the local authority’s agreement to a particular proposed contract. The seller failed to obtain the local authority’s agreement. The English Court of Appeal found that the seller had not exhausted all reasonable endeavours in persuading the local authority to accept the terms set out in the proposed agreement, as it had sufficient bargaining power to carry out such negotiations. In the court’s words, there had been “cards for the [seller] to play”.²⁷

19 *Yewbelle* is also authority for the proposition that an “insuperable obstacle” includes a third party’s refusal or inability to co-operate, where the third party has no obligation to do so. In *Yewbelle*, the English Court of Appeal held that the fact that the agreement required the redevelopment of a piece of land belonging to a third party constituted an “insuperable obstacle”. In holding that KSE was not in breach of its contractual obligation to use “all reasonable endeavours” to procure the construction of the oil rig (where construction involved subcontracting the work to Oderco), the Singapore Court of Appeal appears to have followed the reasoning in *Yewbelle*, extending it to a situation where a third party refuses or is unable to co-operate even where it is obliged to do so under a separate contract.

25 This originates from the English High Court and Court of Appeal decisions in *Yewbelle Ltd v London Green Developments Ltd* [2007] 1 EGLR 137 (HC), [2007] 2 EGLR 152 (CA).

26 [2007] 1 EGLR 137 (HC), [2007] 2 EGLR 152 (CA).

27 *Yewbelle Ltd v London Green Developments Ltd* [2007] 2 EGLR 152 at [93].

(3) *Obligor's duty of enquiry*

20 One who agrees to exercise “best endeavours” or “all reasonable endeavours” to procure certain contractually-stipulated outcomes has a duty to enquire about the steps that can reasonably be taken in furtherance of his or her contractual objectives. However, the Singapore Court of Appeal’s formulation of this principle is unclear as to when the duty of enquiry arises. In *KS Energy Services*, the Singapore Court of Appeal suggested that the duty would arise where the obligor encounters difficulties in contractual performance, agreeing with Lord Glennie’s judgment in *EDI Central Ltd v National Car Parks Ltd*²⁸ (“*EDI*”):

[I]t may well be part of the obligation to use all reasonable endeavours for the party on whom the obligation is placed to *inform the other party of any difficulties he is encountering* and, in an appropriate case, to *see whether that party has a possible solution to the problem*. That must be right. A party cannot just sit back and say that he could not reasonably have done more when, if it had asked the other party to the transaction, it might have discovered that there were other steps which could reasonably have been taken. [emphasis added]

21 However, it is not immediately obvious what suffices to be considered a “difficulty” for this purpose. Upon first blush, what counts as a “difficulty” is a matter of subjective judgment. The threshold will have to be developed through further judicial analysis. Some contracting parties may be more sensitive to problems that arise during contractual performance than others. For example, a risk-inclined construction project manager may not find a temporary manpower shortage a “difficulty” as he is of the belief that he will be able to find workers at a later stage of the project to complete it on time. Someone who is more conservative or risk-averse may think of it as a “difficulty”. A related question is whether the duty of enquiry can be imposed on someone who is oblivious or wilfully blind to the challenges in contractual performance. Given the possible variations in personal subjective judgment, it may be helpful for the court to use an objective standard to assess whether a “difficulty” had arisen, *ie*, to ask whether a reasonable person in the position of the contracting party would have thought that there was a “difficulty”.

(4) *Extent to which contracting party is required to sacrifice own commercial interests in performing endeavours obligations*

22 How far is one required to go when exercising “all reasonable endeavours” or “best endeavours” to procure a contractually-stipulated

28 [2011] SLT 75 at [21].

outcome? Apart from the points discussed above,²⁹ the extent to which such endeavours clauses require a contracting party to sacrifice its own commercial interests is central to the interpretation of endeavours clauses. This issue was explored extensively in *KS Energy Services, Jet2.com Ltd* and *Electricity Generation Corp*. In *KS Energy Services*, the Singapore Court of Appeal held that obligors are *not always required* to sacrifice their own commercial interests, unless this is so required upon a construction of the contract:³⁰

Although an obligor is entitled to take into account its own interests, including its financial interests, in performing its obligations, *there is no particular reason why it should, as a rule, never have to sacrifice its commercial interests*. Such sacrifice may be negligible or, even though substantial, reasonable in the circumstances. For the purposes of determining whether the sacrifice arising from a particular course of action is reasonable, it will generally be the case that the endeavours entailed by that sacrifice will be capable of being assessed for reasonableness in monetary terms, even if they are not expressly spelt out in such terms in their original form. [emphasis added]

23 The general tenor of the Singapore Court of Appeal's approach – that contracting parties *may not* have to sacrifice their own commercial interests – must be correct, since endeavours clauses aim to soften the harsh effect of absolute obligations. In general, the decisions in *Jet2.com Ltd* and *Electricity Generation Corp* support this point. If endeavours clauses required contracting parties to sacrifice their own commercial interests to procure the contractually-promised performance, the distinction between absolute and non-absolute obligations (worded as endeavours clauses) would be blurred and endeavours clauses would cease to serve their purpose. That said, the courts adopted strikingly different views as to when the performance of endeavours clauses would require the sacrifice of commercial interests in *KS Energy Services, Jet2.com Ltd* and *Electricity Generation Corp*, respectively.

(a) *Jet2.com Ltd*

24 In *Jet2.com Ltd*, Jet2.com Ltd (“Jet2”), a budget airline, and Blackpool Airport Ltd (“BAL”), a company that owned and operated an airport, agreed that they would use their “best endeavours” to promote Jet2’s low-cost services from Blackpool. In that case, the question was whether the “best endeavours” clause required BAL to accept Jet2 departures and arrivals scheduled outside normal hours, if this would cause BAL to incur additional costs in providing support services and render its business unprofitable. The English Court of Appeal held, by a 2:1 majority, that the clause required BAL to keep the airport open to

29 See paras 17–21 above.

30 *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 at [83].

accommodate flights outside normal hours, subject to any right that it might have to protect its own financial interests. The court found that the ability to operate flights outside of normal hours was central to Jet2's business and the agreement, and that BAL could not restrict Jet2's aircraft movements to normal opening hours merely because keeping the airport open outside normal hours proved to be more expensive than it had originally expected.

25 The English Court of Appeal seems to have imposed a rather onerous burden on BAL by holding that it was required to keep the airport open beyond normal hours, even though this meant that it incurred losses. However, it bears noting that the court agreed that BAL would not be obliged to incur further losses and prop up a "failing business" if "it were to become clear that Jet2 could never expect to operate low cost services from Blackpool profitably".³¹ This represents a slight departure from some older English cases³² which suggest that one who promises to use best endeavours is in the position of a *quasi-fiduciary* and must achieve the contractually-stipulated outcome at all costs. That said, *Jet2.com Ltd* is still convincing authority for the proposition that the exercise of "best endeavours" may sometimes require a significant sacrifice of one's own commercial interests.

(b) *Electricity Generation Corp*

26 By contrast, the decision of the High Court of Australia in *Electricity Generation Corp* set a very low standard of conduct for persons agreeing to "reasonable endeavours" clauses. In *Electricity Generation Corp*, Verve Energy ("Verve"), a major generator and supplier of electricity, contracted with the respondent gas suppliers (the "Sellers"), obliging them to use "reasonable endeavours" to make available to Verve a *supplemental maximum daily quantity* of gas ("SMDQ") daily. The contract also provided expressly that the Sellers could take into account "all relevant commercial, economic and operational matters" in determining whether they were able to supply SMDQ on a particular day. The question for the court was whether the Sellers' refusal to supply SMDQ and subsequent compulsion of Verve to purchase gas from them at a higher market price under new contracts constituted a breach of the "reasonable endeavours" clause. The factual background to the dispute was that there had been a sudden shortage of gas due to an explosion at a gas plant and an overnight increase in prices, and the Sellers wished to negotiate new contracts with Verve for the supply of gas.

31 See *Jet2.com Ltd v Blackpool Airport Ltd* [2012] EWCA Civ 417 at [32], per Moore-Bick LJ.

32 See *Sheffield District Railway Co v Great Central Railway Co* (1911) 27 TLR 451 and *IBM United Kingdom Ltd v Rockware Glass Ltd* [1980] FSR 335.

27 The High Court of Australia was of the view that the Sellers had not been in breach of their contractual obligation to use reasonable endeavours to supply SMDQ to Verve, since the higher market price available *dehors* the original agreement constituted a valid commercial consideration. The court effectively held, in a relatively brief and undetailed judgment, that a contracting party would be excused from contractual performance if non-performance allowed it to take advantage of new commercial opportunities that arose due to unforeseen circumstances.

28 It is surprising that the court did not find the Sellers to be in breach of the “reasonable endeavours” clause even though they were able to supply the gas and only wanted to sell it at a higher market price instead of the original contracted price. It was not suggested explicitly in the case that the Sellers had to go through extra efforts to procure the gas, or that the Sellers had any difficulty in obtaining the supply of gas. Under the judicial reasoning applied in *KS Energy Services* and *Jet2.com Ltd*, this would most likely have constituted exploitation or duress, and/or a *mala fides* act.

29 Additionally, the court did not distinguish “reasonable endeavours” and “best endeavours” in that case, suggesting that it would have come to a similar decision even if the contractual term in that case involved the use of “best endeavours” to supply SMDQ. It may be argued that the High Court of Australia’s decision can be accounted for by the fact that the parties provided expressly that contractual performance was subject to the Sellers’ capacity to supply gas, having regard to “all relevant commercial, economic and operational matters”. It is unclear what the court would have decided in the absence of this clause, but the difference is unlikely to be significant, given the court’s indiscriminate interpretation of the phrase “reasonable endeavours”.

30 It is respectfully submitted that *Electricity Generation Corp* is not good authority for the interpretation of endeavours clauses in Singapore. The low standard of conduct required by the court in that case seems to render endeavours clauses ineffective and toothless. Instead, the approach taken in *Jet2.com Ltd* is preferred, notwithstanding the fact that it articulates an overly onerous interpretation of “best endeavours” and “all reasonable endeavours” and requires obligors to continue with contractual performance even though they may incur long-term financial losses in the process.

(c) *KS Energy Services*

31 The interpretation of endeavours clauses requires a balance between two competing interests. On one hand, an endeavours clause must be construed flexibly to accommodate commercial vicissitudes and

risks of non-performance. On the other hand, the interpretation of the clause cannot be overly flexible because this would render it ineffective in ensuring the contractually-stipulated outcome. The decision in *KS Energy Services* evinces a middle ground between *Jet2.com Ltd* and *Electricity Generation Corp*, though it reflects an inclination towards the legal reasoning in *Jet2.com Ltd*. In *KS Energy Services*, the Singapore Court of Appeal held that KSE did not have to deploy its employees to be stationed at Oderco's yard from the beginning of the project, and that it was sufficient since it had monitored the progress of the project closely, assisted with the procurement of key construction requirement and even paid the salaries of Oderco's staff. That said, what counts as sufficient to discharge "all reasonable endeavours" or "best endeavours" will vary in each factual context, and courts must, in each case, exercise judicial discretion to strike the appropriate balance between flexibility and legal certainty.

IV. Conclusion

32 In conclusion, the Singapore Court of Appeal's judgment in *KS Energy Services* has provided useful guidance on the meaning of contractual clauses to use "all reasonable endeavours" and "best endeavours" to procure certain contractually-stipulated outcomes. In general, the Singapore Court of Appeal's observations on the interpretation of endeavours clauses cohere with the flexible and contextual approach to interpretation articulated in *Sembcorp Marine*. A possible response to this is that the default rules of interpretation spelt out in *KS Energy Services* are inconsistent with the contextual approach towards contractual interpretation, since default rules apply seemingly fixed standards. This view should be qualified as the Singapore Court of Appeal's observations on the interpretation of endeavours clauses in *KS Energy Services* are not hard-and-fast rules. Rather, they are general guidelines that can, and probably should, be applied with necessary modifications to accommodate different factual contexts.

33 Additionally, the Singapore Court of Appeal's judgment in *KS Energy Services* promotes legal certainty by requiring contracting parties to specify exactly what they mean by "all reasonable endeavours" and "best endeavours", if they intend for there to be a difference between the two.

34 However, there are two areas that can be further developed. First, the guidelines to interpretation that the Singapore Court of Appeal set out³³ in *KS Energy Services* require additional clarification and

33 *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 at [93]; see also para 15 above.

refinement. Second, apart from “all reasonable endeavours” and “best endeavours” clauses, the Singapore Court of Appeal did not comprehensively address the interpretation of other variants of endeavours clauses, including “reasonable endeavours” clauses³⁴ and clauses only to “endeavour” towards a particular contractual outcome in *KS Energy Services*. In particular, clauses to “endeavour” to procure a certain stipulated outcome may seem extremely amorphous, since they seem to suggest that the obligor only needs to try, regardless of the level of effort he or she puts in. It is submitted that such variants of endeavours clauses are also commonly used in commercial contracts, and that our courts should clarify the meaning of these clauses, if opportunities to do so arise.

34 This was only mentioned in passing by the Singapore Court of Appeal, where it held that there was a difference between a contractual clause to exercise “all reasonable endeavours” and one to exercise “reasonable endeavours”.