Court of Queen's Bench of Alberta

Citation: Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 2007 ABQB 616

Date: 20071024
Docket: 0203 03768
Registry: Edmonton

Between:

Karaha Bodas Company, L.L.C.

Plaintiff (Respondent)

- and -

Perusahaan Pertambangan Minyak Dan Gas Bumi Negara and P.T. PLN (Persero)

Defendants (Applicants)

Memorandum of Decision
of the
Honourable Mr. Justice Robert A. Graesser

Introduction

[1] Karaha Bodas Company, L.L.C. obtained an arbitral award for approximately U.S. $260 million against Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) and P.T. PLN (Persero). Pertamina and PLN are sister corporations, each being owned by the Indonesian Government. Pertamina is taking the lead on this appeal. KBC applied some years ago to register the award in Alberta by way of a summary judgment application.

[2] Master Breitkreuz granted summary judgment in December 2004, allowing the award to be registered as a judgment in Alberta against Pertamina and PLN.

[3] Pertamina filed this appeal on March 11, 2005.

[4] This appeal was dormant until sometime in 2006 when it was initially set to be heard in October 2006.

[5] Alberta is not the only jurisdiction in which these parties litigated over recognition and enforcement of the arbitration award. However, by October 2006, Pertamina had exhausted all avenues of appeal in the United States and the award was satisfied in full by the application of monies which had been garnisheed in United States by KBC.

[6] In January 2007, Wachowich C.J.Q.B. directed that the issue of whether Pertamina's appeal was moot should be heard prior to the rescheduling of the appeal on the merits of the case.

[7] This application deals only with the issue of mootness.

Facts

[8] A timeline of the major events in this matter is necessary for this application to be put in proper context.

[9] In November 1994, KBC contracted with Pertamina and PLN with respect to the exploration, construction and operation of a geothermal electricity plant in West Java, Indonesia. KBC claims to have invested approximately U.S. $94,000,000 on the exploration and development of the project.

[10] In January 1998, the Indonesian government, through a presidential decree, postponed the project indefinitely.

[11] KBC served a notice of arbitration on Pertamina and PLN in April 1998.

[12] The arbitration hearing took place in Switzerland in June 2000, and the arbitral tribunal issued an award on December 18, 2000 awarding KBC U.S. $261,100,000.

[13] KBC immediately applied to the U.S. District Court for the Southern District of Texas for recognition and enforcement of the award in the United States, believing Pertamina and PLN had assets there. At the same time, Pertamina applied to the Swiss Supreme Court to set aside the arbitral award.

[14] Because Pertamina failed to make a required deposit on time, the Swiss courts refused to hear the setting-aside application on its merits.

[15] Pertamina then applied to the Central Jakarta District Court in Indonesia to set aside the award, and it did so. However, KBC's appeal to the Indonesian Supreme Court from that decision was successful, and the lower court decision was set aside.

[16] The district court in Texas then granted KBC's application for recognition and enforcement of the award. That decision was upheld by the Court of Appeals for the Fifth Circuit following an appeal by Pertamina. An application for *certiorari* to the United States Supreme Court by Pertamina was denied in October 2004. Master Breitkreuz, who had been waiting for finality in the U.S. enforcement proceedings, issued his decision granting summary judgment in December 2004.

[17] KBC also sought to register the award in Singapore, Hong Kong and Alberta. KBC applied *ex parte* and obtained orders for recognition and enforcement in Singapore and Hong Kong, but Pertamina appealed those orders. The appeal in Singapore was set to be heard, but KBC withdrew their *ex parte* order before the appeal could be heard. The Hong Kong appeal is still pending.

[18] In the meantime, KBC had begun proceedings in the U.S. District Court for the South District of New York to garnishee funds of Pertamina. The New York Court ordered that monies sufficient to satisfy the award be turned over to KBC. That order was affirmed by the Court of Appeals for the Second Circuit in March 2006, and Pertamina's application for *certiorari* to the U.S. Supreme Court was unsuccessful. That denial effectively ended Pertamina's opposition to the award and to collection proceedings in the United States.

[19] As of February 2007, U.S. $319,611,161.03 has been recovered by KBC (including some monies which had been recovered by garnishment proceedings in Hong Kong). KBC acknowledges that they have received full payment of the award.

[20] In September 2006, Pertamina commenced action in the Grand Court of the Cayman Islands, where KBC had been incorporated, alleging fraud and deceit in the procuring of the award. KBC obtained an anti-suit injunction from the U.S. District Court for the Southern District of New York against the Cayman Island proceedings. Judge Griesa's order of December 19, 2006 enjoins Pertamina from proceeding with the action in the Cayman Islands, and from making a claim or commencing an action in any court or tribunal claiming injury resulting from the arbitration award.

[21] Pertamina alleges that KBC obtained the award by fraud. They claim to have discovered documents indicating that KBC misled them and the arbitral tribunal by putting forward allegations KBC knew to be untrue, and by failing to disclose documents which would have disclosed that they were putting forward untrue allegations.

[22] Pertamina seeks to introduce new evidence (i.e. the evidence of fraud which it says was only discovered during the Singapore enforcement proceedings). The issue of fraud was not dealt with in the U.S. recognition and enforcement proceedings. The alleged fraud relates to newly-discovered documents questioning the viability of the project. This is relevant because a determination of viability was necessary to KBC's entitlement to damages.

[23] Pertamina claims that the award should not be recognized in Alberta because enforcement of an award obtained by fraud would be contrary to the public policy of this jurisdiction under Article V(2)(b) of the New York Convention and Article 36 of the UNCITRAL Model Law.

[24] KBC denies that it has committed fraud.

[25] Pertamina alleges that it has a potential counterclaim against KBC in the underlying action based on their allegation that the award was obtained by fraud, but they are not (yet) proceeding with that claim because of the anti-suit injunction.

[26] Pertamina also alleges that KBC's failure to disclose that one of its joint ventures had a $75 million political risk insurance policy on the project and collected on it remains a live issue, even though this issue was raised in the Texas recognition and New York enforcement proceedings.

[27] Despite having paid the full amount of the award, albeit involuntary, Pertamina wishes to proceed with the appeal of Master Breitkreuz's order. Pertamina has appealed the anti-suit order in New York. The lawsuit in the Cayman Islands is pending, subject to the result of the anti-suit order appeal. Pertamina's appeal recognizing and enforcing the award in Hong Kong is pending.

Why Pertamina Wants the Appeal to Proceed

[28] Pertamina takes the position that this appeal should proceed for a number of reasons:

A. Master Breitkreuz awarded approximately $112,000 in costs against them;

B. They have posted approximately $70,000 as security for costs for the appeal;

C. A ruling by the Alberta Court of Queen's Bench based on Pertamina's allegations of fraud may have a practical effect on proceedings in Hong Kong and the Cayman Islands;

D. A successful appeal on the basis that the award was obtained by fraud may have "important practical effects as to whether the award or judgments based on it can stand, or whether KBC may be liable in damages or otherwise to Pertamina";

E. There is a public policy issue relating to allegations that a party to an arbitration has misled the opposing party and the tribunal thereby depriving the party of its ability to present its case and obtain a fair hearing;

F. Pertamina is concerned about the stigma created by "recognition" of the award;

G. Pertamina, being a major international petroleum company, wishes to vindicate itself in the eyes of businesses and governments around the world, including Canada; and

H. Pertamina claims that it should be credited with U.S. $75 million being the proceeds of a political risk insurance policy.

Issues

[29] This application raises two main issues:

(1) Is Pertamina's appeal moot?

(2) If so, should the Court exercise a discretion to allow the appeal to proceed, notwithstanding the "mootness"?

Standard of Review

[30] As this is an appeal from the decision of the Master in Chambers, what is the appropriate standard of review? Appeals from a Master to the Court of Queen's Bench are governed by s. 12 of the *Court of Queen's Bench Act*, R.S.A. c. C-31, and Rules 499 and 500 of the *Alberta Rules of Court*, Alta. Reg. 390/68. The applicable standard of review is correctness (***Dickey v. Pep Homes Ltd.*** [2007] 401 A.R. 149 (C.A.), 2006 ABCA 402, ***United Utility Workers Association of Canada v. TransAlta Corp.*** [2004], 354 A.R. 58 (C.A.), leave to appeal to S.C.C. refused, [2004] S.C.C.A. 386, 371 A.R. 401. I am essentially entitled to treat the matter as an application *de novo* (as new) and am not bound by any exercise of discretion on the part of the Master.

[31] Because the appeal from a Master may proceed as a hearing *de novo*, the parties are not limited by the Record or materials that were before the Master. They are entitled without leave to put new or additional factors before the Court, and the judge on appeal is entitled to consider matters that were not before the Master.

[32] Here, the allegations of fraud, including those relating to suppressed documents, were not before the Master. The affidavits of Simson Panjaitan, Malcolm Grant, Paul Bixley, and Bambang Kustono have been filed with respect to this appeal, setting out and explaining the facts respecting the alleged fraud and exhibiting the "newly discovered" documents.

[33] The materials before me also set out the events that have taken place since the Master's decision of December 8, 2004. There is no question that I am entitled to consider this new material in firstly deciding on mootness and secondly, on the merits of the appeal if it is allowed to proceed.

Is Pertamina's appeal moot?

[34] KBC alleges that Pertamina's appeal has been made moot because the award has been recognized and enforced in the United States, the proceedings in the United States are final, and all monies to be paid under the award have been collected by the KBC.

[35] As a result, KBC says that setting aside the Master's order recognizing the award and permitting enforcement of it would be entirely academic and moot. Nothing was ever collected in Alberta and all that occurred here is this litigation over recognition of the award, payment of costs in relation to KBC's summary judgment application, and matters surrounding this appeal.

[36] The only connection either party has to Alberta, according to the Record before me, is that KBC thought that Pertamina or PLN might have assets in Alberta and thus sought to have the arbitration award registered here for the purposes of enforcement.

[37] The sole purpose of KBC's action in Alberta – to collect on its arbitration award – has been fully realized.

[38] It is clear that, subject to the issue of costs, it does not matter to KBC whether the judgment in Alberta remains, or is set aside.

[39] There is no counterclaim in the Alberta action. Mr. Redmond, on behalf of Pertamina, argues that Pertamina and PLN have causes of action against KBC relating to the conduct of the arbitration proceedings, namely their allegations of fraud relating to suppression and concealment of relevant documentation and the allegations of non-disclosure of political risk insurance.

[40] Nevertheless, no formal counterclaim has been advanced to date, despite the fact that the new documents were discovered in the summer of 2005. Pertamina is under an anti-suit injunction granted by Judge Griesa of the District Court for the Southern District of New York, but that was not granted until December 2006. Pertamina says that while it is challenging that order, they are respecting it. Indeed, the anti-suit injunction is aimed specifically at proceedings commenced by Pertamina in the Cayman Islands which appear to seek remedies in relation to the same causes of action described by Mr. Redmond which may be pursued here.

[41] Pertamina took no steps to advance a counterclaim in Alberta in the period from discovery of the documents until the anti-suit injunction was granted – a period of at least 15 months.

[42] Apart from Pertamina's defences to recognition of the arbitration award, there are no other issues in the litigation in Alberta as it is presently constituted.

[43] At the outset, I do not consider it appropriate to consider that Pertamina has a legitimate interest in keeping the Alberta proceedings "alive" so that in the event the New York anti-suit injunction is set aside, they might file a counterclaim in Alberta. They had plenty of time to do so before they were affected by the injunction, and a possible counterclaim with no connection to

Alberta other than being responsive to KBC's claim against them, is not a valid consideration in this application.

[44] I intend to deal with the application on the basis of the pleadings and issues as they are now before me, rather than what they might become at some future date. Whether KBC has exposed itself to counter-proceedings in Alberta as a result of seeking to register and enforce its arbitration award here is for another day.

Status of Litigation Between the Parties

[45] KBC sought to collect a debt in Alberta. It obtained a judgment allowing them to enforce an arbitration award issued by an arbitration panel in Switzerland. The proceedings before that arbitration tribunal are final. The tribunal refused to set aside or vary their award. Proceedings in Switzerland to set aside or vary the award are final. The Swiss courts refused to intervene. The proceedings in Indonesia, the jurisdiction with the closest connection to the parties and the underlying dispute, are at an end. The Indonesian courts have refused to set aside or vary the arbitration award. Proceedings in the United States to set aside or vary the arbitration award are final. The debt declared owing by the arbitration award has been collected in full in the United States. Proceedings in relation to the enforcement of the award in United States are final, the United States Supreme Court having refused the last possible application for *certiorari* before it in October 2006.

[46] The only "live" proceeding in the United States relates to the anti-suit injunction issued by the New York District Court.

[47] There remain Pertamina's action in the Cayman Islands, their appeal from recognition of the award in Hong Kong, and this appeal.

[48] Nothing this Court can do on this appeal will have the effect of varying or setting aside the underlying arbitration award. Nothing this Court can do on this appeal will have the effect of restoring any money or property to Pertamina or PLN. All this Court can do on this appeal is set aside recognition of the award in Alberta.

[49] Because nothing was collected in Alberta, the only consequence in Alberta of setting aside the judgment would be to open up the question of costs. Pertamina paid nearly $120,000 in costs to KBC as a result of the Master's decision.

Legal Tests

[50] The Supreme Court of Canada outlined the doctrine of mootness in ***Borowski v. Canada (A.G.)***, [1989] 1 S.C.R. 342:

> The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the

> parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case.

[51] Here, a favourable result for Pertamina will not have the effect of resolving some controversy which affects or may affect the rights of the parties. The best Pertamina can hope for is a determination that recognition or enforcement of the award would be contrary to the public policy of Alberta (*International Commercial Arbitration Act*, R.S.A. 2000 c. I-5, Schedule 1, Article V (2)(b)). The public policy of Alberta has nothing to do with the dispute, other than the ability of KBC to enforce its award in Alberta.

[52] The "practical effects" argued by Pertamina are at best potential indirect consequences of setting aside the award.

Insurance Issues

[53] Pertamina argued the political risk insurance issue before the Master. That issue, as framed by the Master, is that "KBC did not disclose political risk insurance and this is an act of bad faith that warrants refusal to recognize and enforce the award." (paragraph 46) He noted that:

> The arbitral tribunal dealt extensively during the hearing with KBC's ability to carry on and found that there were other investors besides the one who was covered by insurance. In addition, a Mr. McCutcheon was asked about insurance at the hearing, and said he wasn't sure, and the tribunal specifically gave an opportunity to respondents' counsel to follow this up and he declined. It would appear that if counsel for the respondents had regarded this issue as relevant they would surely have thoroughly explored it at the arbitration hearing (paragraph 48).

The insurance issue was raised by Pertamina in the recognition proceedings in Texas. The Master noted that the U.S. Fifth Circuit Court of Appeals determined:

> KBC's failure to produce evidence of political risk insurance, given Pertamina's decision not to pursue the subject, does not violate public policy (paragraph 49).

[54] The insurance issue is a factual issue. Regardless of what may have been decided by the U.S. Fifth Circuit Court of Appeals as to public policy in Texas or New York, it is certainly open to the Alberta courts to consider the issue in the context of Alberta's public policy. The Master did not separately address the insurance issue and appears to have relied on its treatment in the U.S.

[55] However, it is not up to the Alberta courts on an application to register and enforce a foreign award to retry the matter. Alberta's *International Commercial Arbitration Act* adopts the New York Convention on the recognition and enforcement of foreign arbitral awards as well as the UNCITRAL Model Law. Article V of the Convention makes it clear that the validity of a

foreign award is presumed and recognition and enforcement is only to be refused if the party opposed to recognition and enforcement proves one of the bars to enforcement. As noted above, the only issue here is whether or not recognition or enforcement of the award would be contrary to the public policy of Alberta.

[56] The political risk insurance issue was dealt with factually by the Texas District Court. It found that Pertamina had decided not to pursue that subject before the arbitral tribunal.

[57] It is undoubtedly safe to say that the Convention and Model Law together constitute a very strong privative clause. The Convention and Model Law provide for review on the basis of the jurisdiction of the arbitral tribunal as well as procedural fairness. In the absence of evidence to the contrary, competence and indeed expertise should be presumed on the part of the arbitral tribunal.

[58] On the basis of standards of review, a high degree of deference is warranted with respect to arbitral awards.

[59] The Alberta *Act*, with the underlying Convention and Model Law, does not contemplate the local court tinkering with or second-guessing the arbitral tribunal. In my view, review of an issue such as the existence of political risk insurance, absence allegations of fraud in relation to this point, would require the domestic court to apply a patently unreasonable standard on the arbitration award. Enforcement of a patently unreasonable award would likely offend the public policy of the domestic jurisdiction. Short of that, the legislation requires recognition and enforcement.

[60] The evidence shows that the arbitral tribunal did not deal with issues relating to political risk insurance because they were consciously not pursued at that time by Pertamina. When Pertamina had a change of heart on the subject, its recourse was to go back to the tribunal. It cannot be patently unreasonable for a tribunal to fail to deal with issues that were not raised before them.

[61] The contractual issue relates to an argument as to whether KBC was either obliged to insure itself against the risk of the type of loss which occurred here, or having done so voluntarily, whether KBC was limited to pursuing its insurers and not Pertamina equating its political risk insurance to liquidated damages. Neither argument was apparently raised before the arbitral tribunal.

[62] The other insurance issue would at best relate to the quantum of the award. The arbitral tribunal assessed damages in excess of $200 million. The insurance was $75 million, which is argued to be at least a credit which should be applied against the award.

[63] The quantum of the award is, in my view, irrelevant at this stage. Whether KBC should have collected only $244 million in the United States instead of $319 million was for the U.S. courts to decide after the tribunal and Swiss courts had declined to intervene. It cannot make any

difference to Pertamina now whether the appeal results in summary judgment against them for $130 million instead of $200 million.

[64] The contractual issue could have been raised before the arbitral tribunal but was not. The quantum of the insurance could have been raised before the arbitral tribunal, but was not. Reconsideration and fresh evidence issues should be addressed by the arbitral tribunal, at least in the first instance. That was attempted, but failed. Those avenues have been exhausted in all competent jurisdictions relating to the initial arbitration award.

[65] As a result, I do not see that this Court should at this stage consider fresh evidence and deal with contractual issues that were not dealt with in the original arbitration proceedings. The insurance issues themselves are clearly moot in Alberta.

Reputation

[66] Pertamina and PLN place much emphasis on the notoriety this case has gained in the United States and in the petroleum industry. They cite a number of cases where reputation issues have been sufficient to persuade the Court that an otherwise moot matter should proceed. In ***Corbiere v. Hewson***, [1999] F.C.J. No. 1944 (Federal Court of Appeal), the Federal Court of Appeal considered only the first test under ***Borowski***, namely whether or not the issue had become academic. The Court held that setting aside a declaration that the Appellant, a professional politician, had not performed his duties in accordance with the *Indian Act*, was not moot. The Court noted that:

> the appellant seeks not to be returned to the office of Chief but rather to clear his reputation which he believes to be tarnished by an incorrect decision based on an inquiry process that he alleges to be flawed in several respects. The appellant has stated that he intends to run for elective office in his community in the future and he believes that the effect on his reputation may, affect his chances of success in future elections. Unlike those cases in which mootness has been found to exist, a live controversy still exists in this case (paragraph 21).

The Federal Court considered his reputation in the context of mootness and not in the context of the exercise of discretion. That case involved declaratory relief, for which separate considerations apply. There may be many reasons for seeking declaratory relief. Here, there are no declarations sought. That case is, in my view, readily distinguishable.

[67] In ***Abbotsford (City) Police Department v. British Columbia (Police Complaint Commissioner)***, [2001] B.C.J. No. 2012 (B.C. Court of Appeal), the Court considered reputation in the context of the exercise of discretion. Justice Southin noted:

> But it is open to this Court, when the interests of justice require it, to address an appeal which is moot. I consider the interests of justice do so require in this case, first, because the findings of the adjudicator leave a stain on the reputation of a

> peace officer and, secondly, because this appeal raises an important issue of the interpretation of the Police Firearm Regulation . . .(paragraph 3).

[68] In ***Chong v. College of Physicians and Surgeons of Ontario***, [2004] O.J. No. 1081 (Ontario Superior Court of Justice Divisional Court), the Ontario Divisional Court concluded that a live controversy existed between the parties, but concluded in the alternative that even if the issue on appeal were moot, circumstances existed which would warrant the matter proceeding.

> Dr. Chong has been a respected professional member of his community for over thirty years. He wishes the opportunity to clear his reputation. (paragraph 7)

[69] There is a significant difference between a politician attempting to clear his reputation, a police officer attempting to remove a stain on his record, a physician wanting to challenge a finding that his practice should be restricted, and a large international petroleum company seeking to clear its reputation arising out of its attempts to set aside and avoid paying a large commercial judgment against it. In the circumstances of this case, reputation has not been proven to be of significant enough concern to warrant this appeal being allowed to proceed. All this Court could do is to decline to recognize the award based on Alberta's public policy. I need not speculate on the impact such a finding may have on Pertamina's reputation in the boardrooms of other large international oil companies or the public. However, I feel confident in saying that a determination on Alberta's public policy in the recognition of a foreign arbitral award is likely to be of little interest to anyone outside Canada, other than another person seeking to register a foreign award here.

[70] There may be cases where corporate reputation is impacted by an otherwise moot matter. But here, allowing Pertamina and PLN to attempt to clear their reputation by continuing these proceedings is an exercise in mootness.

[71] As a result of the above analysis, with the exception of consideration of costs, Pertamina has not established that there are any live issues, whether legal or practical, which may be affected by the present appeal. There is nothing convincing in the materials before me that success on the appeal would have any legal or practical effect on:

1. The existing proceedings in Hong Kong or the Cayman Islands;
2. Whether the existing satisfied award can stand in any relevant jurisdiction, or whether KBC might be liable to Pertamina for damages;
3. Precedent involving fraud or deceit in arbitration proceedings;
4. The stigma in Alberta because of recognition of the award here;
5. Pertamina's worldwide reputation; or
6. The insurance issues.

[72] In summary, Pertamina's appeal is clearly moot.

Should the Court exercise a discretion to allow the appeal to proceed, notwithstanding the "mootness"?

[73] If a matter has been determined to be moot, ***Borowski*** makes it clear that there is still a discretion to hear the case. ***Borowski*** sets out three rationalia which are to be considered in the exercise of the Court's discretion:

(1) whether an adversarial relationship will nevertheless prevail;
(2) the concern for judicial economy; and
(3) whether a proceeding may be viewed as intruding into the role of the legislative branch of government.

Adversarial Relationship

[74] It is clear that Pertamina does not intend to let go of its dispute with KBC. There is no ongoing commercial relationship. Indeed, KBC is (or was) a special purpose entity set up solely for the purpose of pursuing the hydroelectric project with Pertamina and PLN. KBC's role in the project has been terminated and indeed, there is evidence before me that steps have been taken to wind up KBC. Pertamina has two objectives remaining: one being to attempt to vindicate itself and clear its reputation and the second to attempt to recover some or all of the funds which have been collected by KBC.

[75] Pertamina says that it has been unfairly vilified in various courts and in the business community, and it wants to set the record straight. It also wants to continue its efforts to recover the funds that have been collected from it, presumably through the action in the Cayman Islands.

[76] ***Borowski*** does not limit the factors to be considered by the Court in exercising a discretion to hear a moot matter. In considering the adversarial relationship between the parties, ***Borowski*** asks whether or not the underlying dispute is capable of repetition. It asks whether a decision will have any practical effect on the rights of the parties. It inquires as to whether a resolution of the issues may be necessary to settle the state of the law. It inquires as to whether a decision might be a useful precedent.

[77] In looking at each of these factors, the circumstances between these parties are unique. The dispute arises out of a highly specialized contract involving a unique project in Indonesia. Pertamina's challenges to the arbitration proceedings and award are entirely fact-specific. There is no possibility of repetition of these events between these parties. Any decision in Alberta on the issues before the Court will have no effect on the rights of the parties. As discussed above, a determination that enforcing this award in Alberta would be contrary to the public policy of Alberta will have no practical effect on Pertamina's rights. It is not suggested that the courts in New York, Hong Kong or the Cayman Islands are awaiting the results of this appeal. It is doubtful whether any of those courts have any interest in whether recognition of the award in Alberta is set aside at this stage.

[78] It is not argued that there are conflicting decisions in Alberta respecting recognition and enforcement of foreign arbitration awards or judgments. On the points raised in this appeal, there does not appear to be any uncertainty in the law which requires resolution.

[79] Additionally, it is difficult to see that a decision on the points involved in this appeal would create a useful precedent. Pertamina is proceeding primarily on the basis that the arbitration award was obtained by fraud. It is not disputed by KBC that there is ample precedent and authority for the proposition that fraud undoes everything : ***Campbell v. Edwards***, [1976] 1 All E.R. 785 (Eng. C of A)

[80] It is not disputed by KBC that one of the grounds for refusing to recognize or enforce a foreign award is fraud perpetrated on the arbitral tribunal or the other party: International Law Association London Conference (2001) at page 25, Model Law at paras. 296, 297. A determination of fraud, however, is fact-specific, and a decision on the facts is unlikely to result in a useful precedent where the facts are unlikely to be repeated.

[81] On these considerations, there is no compelling reason to exercise a discretion in favour of allowing the appeal to proceed.

[82] Another aspect of the adversarial relationship is whether or not there will be adequate argument on both sides of the debate, or whether there is an absence of an appropriate adversarial context surrounding the resolution of the dispute. It is preferable that there be full argument on both sides of a question before the Court decides an issue. Here, there appears to be no shortage of adversity between these parties and this factor would not prevent the exercise of a discretion to hear the appeal.

[83] However, adversity alone is not enough to exercise a discretion in favour of allowing this moot appeal to proceed.

Scarce Judicial Resources

[84] It is important that the Courts provide efficient and effective access to justice. There should be some deference given to a party's choice of the Courts as a forum in which to resolve a dispute. It is important that the Courts be, and be seen to be, a useful place for parties in dispute to turn. In matters such as International Commercial Arbitrations, it is also important for recognition and enforcement proceedings to be effective and fair for people and entities seeking the assistance of the Courts to enforce legitimately-obtained awards in foreign jurisdicitions. These principles hold true for plaintiffs and defendants alike.

[85] In this case, it is difficult to see how the resources of the courts in Alberta should be expended to resolve a case between parties with no connection to Alberta, over a dispute with no connection to Alberta, where a ruling one way or the other will have no effect on the laws of Alberta, and where the underlying subject matter of the proceedings in Alberta has been made moot because of events which occurred entirely outside Alberta.

[86] There is nothing unique in the arguments raised by Pertamina that would favour the Courts exercising a discretion to expend judicial resources on this moot appeal.

Intrusion into Legislative Role

[87] This factor is not a relevant consideration in this application. The appeal is a highly factual one and does not engage legislative policy. Under this factor there is no reason not to exercise a discretion to entertain the appeal.

Conclusion on Mootness

[88] But for issues relating to costs, the appeal has been rendered moot. There is nothing in the matters raised by Pertamina to warrant the exercise of a discretion in favour of allowing the appeal to proceed on the merits.

Costs

[89] KBC concedes that there may be a live issue as to costs, as the Master awarded them some $111,000 in costs as a result of their successful summary judgment application. They contend, however, that moot appeals should not be allowed to proceed where the only live issue is costs.

[90] KBC relies on ***British Columbia (Commissioner of Provincial Police) v. Dumont***, [1941] S.C.R. 317, ***Glasgow Navigation Company v. Iron Ore Company*** [1910] A.C. 293, and ***Atlas Lumber Co. v. Riehl,*** [1954] A.J. No. 14 (Alberta S.C.A.D.).

[91] In the ***Dumont*** case, the Supreme Court of Canada held:

> If an application had been made to quash the appeal at the outset we should have been compelled to say that, the appeal on the question as to the effect of this statute being entirely without merit and the judgment on that point having been acquiesced in, the sub-stratum of the litigation had disappeared and the appellant could not be allowed to prosecute the appeal for the purpose of raising a technical question which had become entirely academic and the question of costs. (paragraph 6)

[92] In the ***Glasgow Navigation*** case, the House of Lords dismissed the action when it appeared that it had been brought to try a hypothetical case. No costs were allowed to either side in the House of Lords, or in any of the courts (page 294).

[93] In ***Atlas Lumber***, the Court stated at paragraph 23:

> If we allowed the appeal the appellants would get nothing more except perhaps costs and an expression of opinion, which even if it should not later be considered obiter, would decide nothing more than the particular facts presently warrant and would be of little help as a precedent.

Borowski does not deal with the question of an appeal on costs alone, though the Court does cite the case of ***Coca-Cola v. Mathews*** to support the proposition that appeals have not been entertained where the appellant has agreed to pay the respondent the damages awarded regardless of the disposition of the appeal (paragraph 20). No such consideration arises here.

[94] KBC cites ***Elders Pastoral Ltd. v. Bank of New Zealand***, [1990] 1 W.L.R. 1090 (P.C.). In that case, a farmer had mortgaged his stock to the bank. Later, he instructed Elders to sell some of the stock. It did so and retained the proceeds of sale to satisfy a debt owed by the farmer to it. The bank claimed that they were entitled to the sum retained by Elders because of their security interest in the stock.

[95] The bank obtained summary judgment against Elders, and collected the principal amount, interest and costs. Subsequently, the farmer satisfied his debt to the bank in full and the bank refunded the principal amount to Elders. It declined to refund the costs and disbursements which had been recovered by them, as well as Elders' costs in connection with the proceedings and in the appeal to date. The bank sought an order dismissing the appeal without argument on the merits on the basis that the appeal had become academic.

[96] Initially, the appeal by Elders had been an appeal as of right. In New Zealand, appeals as to costs are discretionary.

[97] The Privy Council considered the decision of the House of Lords in ***Sun Life Assurance Company of Canada v. Jervis***, [1944] A.C. 111. There, Viscount Simon L.C. had noted that it was:

> 'a matter of complete indifference to the respondent whether the appellants win or lose. The respondent will be in exactly the same position in either case. He has nothing to fight for, because he has already got everything that he can possibly get, however the appeal turns out, and cannot be deprived of it. I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way.' (page 113)

[98] In ***Elders***, however, the Privy Council noted that :

> ... the question is not academic because if the appellant Elders win, then the bank will be obliged to refund Elders all the costs paid pursuant to the orders made by

> the New Zealand courts and to pay the costs incurred by Elders in the litigation and in the appeal. (page 1094)

The Court concluded:

> It appears from the authorities that even if the only effect of a successful appeal between the parties will be to reverse an order for costs made in the courts below, there remains a lis or issue between the parties. (page 1095)

See also ***Leibler and Others v. Air New Zeland Ltd. and Another***, [1998] 2 V.R. 525 (Supreme Court of Victoria Court of Appeal).

[99] A similar result was reached in ***National Coal Board v. Ridgway and another***, [1987] 3 All E. R. 582 (Court of Appeal). There, the Court noted that "no agreement had been reached concerning the costs of the appeal, and it would seem that that of itself provides sufficient lis to keep the appeal alive ..." (page 604).

[100] Further, in ***418486 B.C. Ltd. v. Newport City Club Ltd.***, [2005] B.C.J. No. 1935 (B.C. Court of Appeal), Rowles J.A. considered whether or not an appeal relating to costs only was an appeal as of right or whether it required leave of a justice of the Court of Appeal. The decision turned initially on the *British Columbia Court of Appeal Act* (section 6), but leave to appeal was given on the basis that "there can be no doubt that a determination of the points raised would be of importance to the parties because of the very substantial sums involved" (paragraph 45).

[101] Pertamina also cites ***Re Brisco***, [2006] O.J. No. 2827 (Ontario Superior Court of Justice) where a motion and cross-motion were directed to proceed on the merits, because the issue of costs remained.

[102] In ***157662 Canada Inc. c. Von Braun***, [1995] Q.J. No. 90, the Quebec Court of Appeal allowed an appeal to proceed despite the fact that the only live issue remaining was costs.

[103] A review of the cases cited by the parties indicates that the issue concerning costs is more complicated than suggested by counsel for KBC. Depending on the underlying legislation or rules of practice, appeals relating to costs may be either appeals as of right or appeals requiring leave of the Court.

[104] The logic of the ***Elders*** case is appealing: as long as the effect of a successful appeal between the parties would be a reverse in order for costs made in the courts below, there remains a live issue between them. That of itself may remove a matter from being moot or academic. However, there are many cases where the amount of costs are not substantial, and where costs would not necessarily follow the event. In those circumstances, cost issues would be unlikely to take the appeal out of the realm of mootness.

[105] KBC cites ***Coca-Cola Company of Canada v. Mathews,*** [1944] S.C.R. 385, but the circumstances there were very different. In that case, the appellant had agreed to pay the respondent the amount of the judgment appealed from and costs, regardless of the results on appeal. The Supreme Court noted that it had previously declined to hear appeals where the only dispute was over costs and that the case before it did not even have a live question of costs (at page 387). I do not take the case as standing for an absolute bar on appeals on costs.

[106] In ***Galcor Hotel Managers Ltd. v. Imperial Financial Services Ltd.***, [1993] B.C.J. No. 1491 (B.C. Court of Appeal), the judgment had been voluntarily paid. No issue as to costs was referenced.

[107] In ***Minielly v. Kristjanson***, [1990] S.J. No. 94 (Sask. Q.B.), the judgment had been satisfied and the respondent was not opposing the appeal. No issue of costs arose in that case.

[108] Since ***Atlas Lumber***, Rule 505(3) has been enacted in Alberta. It provides:

> 505(3) No judgment given or order made by the consent of the parties or as to costs only shall be subject to any appeal, except by leave of the court giving the judgment or making the order.

Coca-Cola, ***Dumont*** and ***Atlas Lumber*** do not say that a question of costs cannot found the basis of an appeal. To the extent that those cases are suggested to do so, they have been varied by ***Borowski*** which provides for a discretion as to moot matters, rather than absolute rules. While questions of costs themselves may not be "live issues" in the context of mootness, a question of costs is a valid consideration for the Court in determining whether to exercise its discretion to allow an otherwise moot appeal or matter to proceed.

[109] The Supreme Court recognized in ***Hongkong Bank of Canada v. Wheeler Holdings Ltd.***, [1993] 1 S.C.R. 167 that appeals as to costs might proceed, but only with leave of the Court (at paragraph 77).

[110] Here, it should be noted that this is not an appeal to the Court of Appeal or to the Supreme Court of Canada. This is an appeal as of right from summary judgment granted by the Master. The *Rules of Court* do not deal with appeals from the Master on costs alone. Veit J. considered the issue in ***Vegreville Electrical Services (1996) Ltd. v. 695093 Alberta Ltd.***, [1998] A.J. No. 665:

> ... the policy reasoning which underlies the rule should inform the approach of our court on the appeal of a costs decision by a Master. In other words, even if we don't require the Master's leave before we hear the costs appeal, we should show restraint in over-ruling a Master's costs decision, respecting the fact that the Master may have had reasons, arising out of the conduct of the proceedings at that level, to make a particular costs decision even though the reasons are not fully articulated. (paragraph 8)

[111] Here, this appeal is moot because the only "live issue" relates to costs. Nonetheless, costs are a relevant factor to consider under ***Borowski's*** second step relating to discretion.

[112] The second step analysis relating to costs should follow the same principles as cases dealing with leave to appeal where the issue on appeal is solely costs. One of the main considerations when considering leave is the quantum of costs.

[113] Here, the costs involved are in excess of $100,000. That is a substantial sum. Indeed, many matters proceed to trial and to appeal as a matter of right when much smaller sums than that are involved.

[114] In considering whether or not to give leave to appeal on a matter of costs only, it is appropriate for the Court to look at the amount of costs involved and consider whether or not the "scarce judicial resources" referred to in ***Borowski*** would be put to better use than hearing a potentially trifling matter. This, however, is not a trifling matter. The amount of costs is substantial. The parties have obviously invested significant energies and legal fees and disbursements to date. Pertamina appears intent to continue to spend its energies and resources pursuing this matter in the courts of Alberta. They do so knowing the risks they face with respect to costs if they are unsuccessful. They allege fraud in these proceedings. It is common, when allegations of fraud are made, pursued and not proven, for an unsuccessful party to pay solicitor and client costs to the party against whom they alleged fraud.

[115] Under ***Borowski***, a discretion must be exercised. Here, I exercise my discretion in favour of allowing this appeal to proceed. There must be a determination of the appeal on the merits before the question of costs can be properly addressed.

Adversarial Position

[116] This is not a case like ***Sun Life v. Jarvis***, referred to in the ***Elders*** decision. The parties to this appeal remain highly adversarial. While KBC has nothing further to gain in its protracted fight with Pertamina, it has not offered to refund the costs it has recovered from Pertamina in these proceedings, or to pay Pertamina's costs below and in this appeal to date. It has vigorously resisted the appeal and has vigorously argued this application. At this stage, there is no absence of adversarial position and there is no reason to exercise a discretion against allowing the appeal to proceed on concerns over their being no arguments raised against the relief sought.

Judicial Economy

[117] The scale of costs awarded by Master Breitkreuz is such that the Court should not be reluctant to hear this matter because it will likely extend over a number of days. Judicial economy is not a factor that suggests exercising a discretion against allowing the appeal to proceed on its merits. Costs cannot be separated from the merits, and the only way Pertamina has of addressing costs is to address the merits of the original application.

Legislative Function

[118] Exercising a discretion to allow the appeal to proceed because of the cost issues is consistent with the exercise of the Court's discretion to allow ordinary appeals on costs to be taken to the next level of adjudication. The amount of costs involved here supports exercising a discretion in favour of allowing the appeal to proceed.

Conclusion

[119] The dispute between the parties is moot. However, there remains a significant issue with respect to the costs of the proceedings before Master Breitkreuz and the costs of this appeal to date. Those costs are substantial and are well in excess of $100,000. Pertamina has already paid over $110,000 in costs to KBC. If Pertamina succeeds on this appeal and establishes that the Master should not have given summary judgment against it, Pertamina would likely be entitled to recover the costs paid by them, as well as to receive an award of costs for those proceedings and the appeal. There are, of course, some circumstances where costs might not follow the event, but in the usual course, a successful Appellant wins the reversal of cost awards against it and recovers costs against the former victor below and on the appeal.

[120] In Alberta, a live issue as to costs does not prevent a matter from being considered moot. There is still a discretion to be exercised in whether or not to permit such an appeal to proceed. In the circumstances of this case, I exercise that discretion in favour of allowing the appeal to proceed because of the quantum of costs involved. In my view, there is no other live issue between these parties that would save the matter from being moot, or that favours the exercise of my discretion in favour of Pertamina.

[121] Other than with respect to costs, Pertamina has not established that a decision on the merits of this appeal would have any practical effect on its or PLN's legal rights. This is not an appropriate case to permit proceedings to proceed for the purpose of clearing a reputation. The circumstances of Pertamina and PLN are very different from individuals that have a real and pressing need to clear their reputations.

[122] This appeal should proceed on its merits. Costs of this application will be costs in the cause.

Heard on the 27th day of June, 2007.
Dated at the City of Edmonton, Alberta this 24th day of October, 2007.

Robert A. Graesser
J.C.Q.B.A.

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