CACV 121/2003

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO. 121 OF 2003

(ON APPEAL FROM HCCT NO. 28 OF 2002)

IN THE MATTER OF THE ARBITRATION ORDINANCE (CAP.341)

and

IN THE MATTER OF AN ARBITRATION AWARD DATED 18 DECEMBER 2000 MADE IN AN ARBITRATION

BETWEEN

KARAHA BODAS COMPANY LLC — Plaintiff

and

PERSUSAHAAN PERTAMBANGAN MINYDAK DAN GAS BUMI NEGARA (otherwise known as PERTAMINA) — Defendant

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Before: Hon Tang VP, Stone J and Lam J in Court

Dates of Hearing: 11-13 September 2007

Date of Judgment: 9 October 2007

J U D G M E N T

Hon Tang VP:

Introduction

1. This is the defendant's ("Pertamina") appeal against the order of Burrell J, made as long ago as 27 March 2003, dismissing Pertamina's application to set aside his order dated 15 March 2002, granting leave to the plaintiff ("KBC") to enforce an arbitration award dated 18 December 2000 ("the Award") in the same manner as a judgment.

2. The award was made in Geneva on 18 December 2000 under the UNCITRAL Rules. Burrell J held, and it is not disputed on appeal, that the *lex arbitri* is Swiss law and that the supervisory court is the Swiss court.

3. There has been delay in the hearing of this appeal because of other proceedings between the parties in different jurisdictions. The result of those proceedings is that KBC has now been fully paid the full arbitral award. US$900,000 of which was recovered in the enforcement proceedings in Hong Kong. Hence, the result of this appeal will have consequence to the parties.

Background

4. In November 1994, a Joint Operation Contract ("JOC") was entered into between KBC and Pertamina. Pertamina is the well known state-owned company in Indonesia. The JOC was "governed by the laws and regulations of the Republic of Indonesia".

5. By the JOC, Pertamina appointed KBC as the sole contractor for the exploration and exploitation of geothermal energy in the "Karaha Area" as defined in the JOC (which included the Telaga area) in West Java. KBC was required to "arrange financing for the expenditures for Geothermal Operations" and "shall bear the risk and be responsible for the conduct of such Geothermal Operations" in the Karaha Area.

6. Any electricity ("up to a maximum aggregate generating capacity for the Contract Area of four hundred (400) MW.") produced would be sold to PT. PLN (Persero) ("PLN") under the Energy Sales Contract ("ESC") entered into on the same date. The parties to the ESC were KBC, Pertamina and PLN.

7. Both the JOC and ESC contained an arbitration clause for settlement of disputes by an Arbitral Tribunal under the UNCITRAL Arbitration Rules.

8. As a result of Asian Financial Crisis in 1997 the project was eventually suspended by presidential decrees.

9. There were 3 presidential decrees:

(i) On 20 September 1997, by Presidential Decree No. 39/1997, the project was postponed.

(ii) However, on 1 November 1997, by Presidential Decree No. 47/1997, it was decided that the project could resume.

(iii) On 10 January 1998, by Presidential Decree No. 5/1998, the project was once again postponed.

10. On 10 February 1998, KBC served on Pertamina and PLN a notice under Article 15.5(e) of the JOC, stating that:

> "… the issuance of Presidential Decrees 5/1998 and 39/1997 … constitute Government Related Events and Events of Force Majeure under Article 15.2(e) of (JOC)".

11. There is no dispute that the presidential decrees were Government Related Events as defined in the JOC and ESC, and that Article 15.2 of JOC provided that "… Events of Force Majeure shall include … (e) with respect to (KBC) only, any Government Related Event". Section 9.2(e) of the ESC was similar in effect.

12. The fact that such Government Related Events were "with respect to (KBC) only" Events of Force Majeure lay at the heart of KBC's claim. Pertamina contended however that although it could not rely on the presidential decrees as Events of Force Majeure, it was not liable to pay any damages since it was never in breach of contract. Another important area of dispute between the parties related to KBC's claim for damages, in particular, loss of profits.

13. On 30 April 1998, KBC served a notice of arbitration upon Pertamina, PLN and the Government of Indonesia. By a preliminary award of 30 September 1999, the Arbitral Tribunal ruled, inter alia, that it had no jurisdiction over the Government of Indonesia.

14. Eventually, the arbitration was heard over 5 days commencing on 9 June 2000. However, on 16 May 2000, Pertamina applied for an adjournment and discovery. This was rejected by the Arbitral Tribunal on 23 May 2000. This is one of the complaints in this appeal.

15. By the Final Award dated 18 December 2000, the Arbitral Tribunal decided that:

> "1. PERTAMINA and PLN have breached the ESC and PERTAMINA has breached the JOC.
>
> 2. PERTAMINA and PLN are jointly and severally condemned to pay US$111,100,000 million … for lost expenditures to KBC, …
>
> 3. PERTAMINA and PLN are jointly and severally condemned to pay US$150 million … to KBC for loss of profits …
>
> ……
>
> 6. All other claims of the parties are declared moot or dismissed."

Application to set aside leave

16. As noted, leave to enforce the award was given on 15 March 2002 by Burrell J. Pertamina's application to set aside leave came under Part IV of the Arbitration Ordinance, Cap. 341 ("the Ordinance") and was made under O. 73 r.10 of the Rules of the High Court.

17. Section 44 of the Ordinance provides that "Enforcement of a Convention award shall not be refused except in the cases mentioned in this section".

18. Pertamina relies on Sections 44(2)(c) and (d) as well as 44(3) of the Ordinance.

19. Under Section 44(2)(c) Pertamina's complaint is that as a result of the Arbitral Tribunal's refusal to grant an adjournment and discovery (see para. 14 above), Pertamina was "unable to present his case".

20. Under Section 44(2)(d), Pertamina's complaint is that the decision that it was in breach of contract was "… a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration".

21. Pertamina also relies on Section 44(3) under which the court may also refuse to enforce the award "if it would be contrary to public policy to enforce the award". On this, Pertamina relies essentially on two points. First, the Award of US$150,000,000 was arbitrary. It was "plucked from the air". Secondly, there was fraud or bad faith on the part of KBC as explained below. On fraud or bad faith Pertamina seeks leave to rely on certain internal documents of KBC (about 10 documents) which it is said could not with reasonable diligence have been produced before Burrell J. Pertamina's case on fraud or bad faith was the main focus of the appeal.

22. General guidance on Section 44(3) can be found in the decision of the Court of Final Appeal in *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 2 HKCFAR 111:

> "In my judgment, the position is as follows. Before a Convention jurisdiction can, in keeping with its being a party to the Convention, refuse enforcement of a Convention award on public policy grounds, the award must be so fundamentally offensive to that jurisdiction's notions of justice that, despite its being a party to the Convention, it cannot reasonably be expected to overlook the objection." Bokhary PJ.
>
> "However, the object of the Convention was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced (*Scherk v Alberto-Culver Co* (1974) 417 US 506; *Imperial Ethiopian Government v Baruch-Foster Corp* (1976) 535 F 2d 334 at p.335). In order to ensure the attainment of that object without excessive intervention on the part of courts of enforcement, the provisions of art. V, notably art. V2(b) relating to public policy, have been given a narrow construction. It has been generally accepted that the expression 'contrary to the public policy of that country' in art. V2(b) means 'contrary to the fundamental conceptions of morality and justice' of the forum. (*Parsons and Whittemore Overseas Co Inc v Societe General De L'Industrie Du Papier (RAKTA)* (1974) 508 F 2d 969 at p.974 (where the Convention expression was equated to 'the forum's most basic notions of morality and justice'); see AJ van den Berg, *The New York Convention of 1958* (Kluwer, 1981) at p.376; see also *Renusagar Power Co Ltd v General Electric Co* (Yearbook Commercial Arbitration XX (1995) 681 at pp.697-702))." Per Sir Anthony Mason NPJ.

More background

23. Before dealing with Pertamina's complaints, more background needs to be stated.

24. Under the JOC, KBC was required to make minimum expenditure conducting Geothermal Operations. Paragraph 1 of the Award covered such expenditures.

25. The interface between JOC and ESC depended on the results of such Geothermal Operations. Under Article 4.5 of JOC, KBC:

> "… shall notify PERTAMINA upon the confirmation, to (KBC's) satisfaction, of Geothermal Energy (KBC) considers sufficient to supply a unit that (KBC) proposes to cause to be constructed (each notice delivered hereunder a 'Confirmation Notice'). Each Confirmation Notice shall include an engineering report with data sufficient, in (KBC's) reasonable judgment, to allow PERTAMINA to technically evaluate such Geothermal Energy. (KBC) shall upon PERTAMINA's request, consult with PERTAMINA with respect to each Confirmation Notice, and shall if necessary provide such existing additional technical data as PERTAMINA may reasonably require for its evaluation."

26. The Confirmation Notice has been referred to by the parties and in the Award as NORC (Notice of Resource Confirmation).

27. Article 4.6 of JOC went on to provide:

> "At any time during the first six (6) Contract years, (KBC) may give PERTAMINA notice of intention to develop the initial increment of Geothermal Energy and construct the initial Unit(s), … Thereafter at any time and from time to time (KBC) may give PERTAMINA notice of intention to develop additional increment(s) of Geothermal Energy and construct additional Unit(s) … Upon receipt of each Development Notice, PERTAMINA shall give written notice to (PLN) that (KBC) intends to proceed with such development and construction."

Such notices are called NOID (Notice of Intent to Develop).

28. Under the ESC, PLN was obliged to buy the energy thus produced, up to 400 MW, for 504 months after the "Effective Date" which was defined to mean "the date upon which the Minister of Mines approves (the ESC) by his signature of the Contract". What purported to be such a signature appeared at the end of the ESC.

29. There were 2 NORCs, one in September 1997 and one in December 1997 (also referred to as December NORC Update), and one NOID in December 1997. The September NORC was issued (on 18 September) shortly before the first presidential decree.

30. The September NORC related only to the Karaha field in the north. The September NORC was "for 60 MW at Karaha was submitted by KBC to PERTAMINA on September 18, 1997". The Award para. 5.

31. It is relevant to note that following the September NORC, there was a Joint Committee Meeting held on 14 October 1997. The meeting was attended by representations of Pertamina, PLN and KBC. The relevant parts of minutes recorded:

> "C Presidential Decree No. 39/1997 Explanation:
>
> ……
>
> PERTAMINA and PLN expressed confidence that a clarification to the PD 39/1997 would be issued in November or December after the questionary issued by the Government fulfill by Investor which would restore the original status of the geothermal projects. They stressed that KBC should continue to progress on their project.
>
> PLN stressed that this was a critical time for the projects and expressed that all parties would work together to seek re-activation of the projects. In particular, KBC should improve on the progress they are making on the project. KBC should try to issue Resource Confirmation (NORC) and Notices of Intent to Develop as soon as possible and re-start the EPC process as soon as possible.
>
> KBC expressed its appreciation for the support that PERTAMINA and PLN have offered to the project and agreed that significant progress still needs to be made.
>
> KBC informed the meeting that KBC and it's owners, ESI and Caithness, are exploring financing options with various interested groups, including Credit Suisse-First Boston. In

> particular, KBC will need to know what the requirements for project financing will be now that PD 39/1997 has been issued.
>
> KBC wished to state that it is important that the Indonesian Government understand that the cost of development and construction of this project is not debt burden for PLN. The project is financed by the equity partners and the Indonesian Government does not need to report this as debt.
>
> KBC also stated that KBC fully realized the importance of submitting the NORC and NOID and will do so within the next two months.
>
> ……
>
> D-2 Project Milestones:
>
> KBC submitted their first NORC (Notice of Resource Confirmation) for 60 MW at Karaha on September 18, 1997 to PERTAMINA.
>
> ……
>
> KBC has begun a preliminary survey of the Project Area for potential power plant site. This plan, in draft form, is in review by KBC. In mid-November, KBC will mobilize the power plant site civil/geotechnical evaluation team to begin the final selection process. Preliminarily, KBC has identified 3 sites in Karaha and 3 sites in Telaga Bodas as possible power plant sites."

32. This minutes supports the view that the parties believed the project to be commercially viable.

33. Moreover, para. 5 of the Award shows that the 14 October 1997 minutes did not stand alone. I quote:

> "5. As illustrated by the minutes of several Joint Committee Meetings, with the participation of KBC, PERTAMINA and PLN as well as in Work Plans and Budgets regularly presented by KBC to PERTAMINA in 1995, 1996 and 1997, KBC embarked into and partly completed during this period a program of exploration and drilling. At the Joint Committee Meeting of August 12, 1997, it was decided that KBC should submit a Notice of Resource Confirmation (NORC) of 55 MW at Karaha on or about September 15, 1997, and for 55 MW for Telaga

> Bodas on November 1st, 1997. A Notice of Intent to Develop (NOID) for 110 KWe at both sites was to be submitted by KBC on December 20, 1997. A first NORC for 60 MW at Karaha was submitted by KBC to PERTAMINA on September 18, 1997."

34. On 16 December 1997, KBC issued the December NORC and a NOID "which indicated a probable resource capacity for both areas of Karaha and Telega Bodas of 210 MW with a probable estimated reserve for Karaha of 240 MW". The Award para. 9.

35. The NOID was expressed to be issued in accordance with Article 4.6 of JOC. The NOID asserted that KBC would design, construct, commission and operate geothermal generating units utilizing the geothermal resource which has been confirmed within the area.

36. The substantial increase from 60 MW in the September NORC to 210 MW in the December NORC and NOID became the subject of serious challenge in the Arbitration. As Mr Jat submitted, Pertamina and PLN characterized the December NORC and NOID as "shams", "highly suspect", "fictional" and "not real". And I might add "specious".

37. But, there was no request by Pertamina to consult with KBC nor request for additional technical data. As the Arbitral Tribunal observed:

> "It is to be remarked that only during these proceedings (Pertamina and PLN) have raised this kind of objections to (KBC's) NORC and NOID of December 16, 1997. Moreover, the record indicates the parties' agreement in writing not to respect the contractually agreed 90-day time interval for notifying the December 1997 NORC and NOID … and the absence of any reaction by (Pertamina and PLN) in respect of such NORC and NOID." Award, para. 129

38. Be that as it may, it was Pertamina's case in the Arbitration that the project was not commercially viable, and there was no loss of profits. Indeed, in the Respondents' Post-Hearing Memorial dated 7 August 2000, at p. 56 under the rubic:

> "B. The 210 MW Plant Assumption Is Also Untenable",

it was submitted:

> "… KBC's 'lost profits' are reduced to approximately $70 million if the capacity of the plant is assumed to be 55 MW even at the grossly inflated 8.5% discount rate. At 55 MW, KBC's 'profits' disappear at a discount rate of about 11%, - which is still far too low."

Earlier in the same document, at page 31, under the rubic:

> "B. KBC Had Not Shown That It Could Have Built A 210 MW Plant",

it was submitted:

> "In fact, KBC's own documents demonstrate that it could not have built a 210 MW plant at Karaha Bodas. Indeed, it was not until its sudden – and highly suspect – December 1997 NORC Update and NOID that KBC ever claimed to contemplate producing more that 110 MW of electricity.
>
> ……
>
> … Since KBC has not yet satisfied its own criteria for demonstrating 110 MW of capacity, its current claim that it would have constructed 210 MW plant is plainly fictional."

At page 34, Pertamina complained that:

> "… KBC itself adopted a similar approach in its September 1997 NORC, … Only three months later, in the December 1997 NORC Update, KBC abandoned the distinction between proven and probable reserves in its power density calculations. Instead, KBC used an 'interpreted areal extent of resource' based on a

> much larger, undefined area … Only by such a gross inflation of the reserves area could KBC have arrived at its specious 240 MW reserves figure."

39. However, as noted, the Arbitral Tribunal awarded loss of profits of US$150,000,000 to KBC notwithstanding:

> "134. … a number of risks against which no protection was afforded by the JOC and the ESC have to be taken into account, including a cost of capital higher than estimated in the Claimant's cash flow projections, delays in plant(s) construction and operation and reserves exploitable in quantities lower than expected and/or entailing investments and operating costs for an amount higher than the amount assumed for purposes of such cash flow projections."

40. Both sides, with PLN and Pertamina on the same side, called experts. The experts called on behalf of Pertamina included Dr Malcolm Grant. Mr Yu accepts that it is not for this court to decide, what the parties have described as, the battle of the experts. Mr Yu submitted that in para. 131 of the Award:

> "… the Tribunal largely accepted (Pertamina's) argument,"

This is what the Tribunal said in para. 131:

> "This being said, the Arbitral Tribunal does not undervalue the possibility that the quantity of 210 MW of exploitable reserves in the Contract Area put forward by the Claimant might have resulted to be overestimated. It will accordingly give weight to this circumstance when making the allowance for lost profits."

An overestimation is different in kind from the Pertamina's case that the assertion of 210 MW was a sham.

41. Suffice it to say that the Arbitral Tribunal decided in KBC's favour, though reducing KBC's loss of profits claim of over US$500 million to US$150 million. Even so, that must have been on the basis (subject to the argument that it was arbitrary which I will turn to later) that the Arbitral Tribunal was not satisfied that the positions taken by Pertamina's experts including Dr Grant, were entirely correct.

The appeal

42. Of the many grounds relied on by Pertamina before Burrell J, all but 2 (now combined to 1) have been abandoned.

43. Several new grounds have been raised, and they are:

1) Fraud

2) That the Arbitral Tribunal had re-written the agreement between the parties, and

3) that the award of damages for lost of profit in the sum of US$150,000,000 was arbitrary.

44. The new case on fraud is based on about 10 documents (the discovered documents), which Pertamina sought leave (by summons dated 26 January 2006) to produce on appeal. The parties agreed (so did we) that we should look *de bene esse* at the discovered documents together with the parties' affidavit evidence dealing with them.

45. Mr Yu mounted a two pronged attack based on the discovered documents. First, he submitted they show fraud or lack of good faith on the part of KBC sufficient to satisfy a Hong Kong court that it would be contrary to public policy to enforce the award. Secondly, had Pertamina been aware of these documents, Pertamina would have been entitled to terminate the JOC and ESC because under Indonesian law good faith was required of the parties such that a lack of good faith would have entitled the other party to terminate the contract.

46. The parties also agreed that the three conditions in *Ladd v Marshall* (1954) 1 WLR 1489, are applicable by analogy. They required:

> "… first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible." Per Denning LJ (as he then was) at 1491.

47. The second condition is important:

> "the evidence must be such that, if given, it would probably have an important influence on the result of the case …",

the relevant result is the result of the application to set aside leave.

48. However, whether the discovered documents would probably have an important influence on the result of the application to set aside may also depend on whether such documents would probably have had an important influence on the result of the arbitration. That is so notwithstanding that we are concerned with whether it would be contrary

to public policy to enforce the Award. If the discovered documents do not support a case of fraud, bad faith or lack of good faith, they would not have had any important influence on the outcome of the arbitration. Nor should they persuade us to refuse enforcement.

49. I will turn to consider the discovered documents. Put briefly, they were said to have come from 12 boxes of documents inadvertently delivered by KBC to Pertamina's geothermal office in Indonesia in November 2002, and that they remained there until August 2005 when they were inspected for the first time by Pertamina's advisors.

50. It is clear that by the time of the hearing before Burrell J (January – March 2003) Pertamina already had the documents in their possession. Would the fact that they were not aware that they had such document make any difference?

51. Mr Yu submitted that the 1st *Ladd v Marshall* condition might be relaxed where a case of fraud is demonstrated from the new evidence, and that the person seeking leave has not acted in bad faith.

52. Has a case of fraud been made out? The answer to this question is important not just because of *Ladd v Marshall* but also whether the Award should be enforced.

53. *J.J. Agro Industries (P) Ltd v. Texuna International Ltd* [1994] 1 HKLR 89, was concerned with a claim that the enforcement of a GAFTA Tribunal award obtained in London would be contrary to public policy. The defendant contended that the award was procured by fraud:

> ".. in that one of their witnesses was kidnapped and forced to swear an affidavit contradicting what he had previously said in the letter".

54. Kaplan J adjourned the application:

> "… to enable time to be found to hear the viva voce evidence upon which this application is based."

55. Because he was satisfied that:

> "… if the kidnapping of Mr Savla is established that fact could give rise to the argument that this award should not be enforced on the public policy ground."

56. He said at page 93:

> "In arriving at the conclusion that the evidence is sufficient to meet the necessary threshold I have taken the test suggested by Mr Stevenson namely whether this evidence would persuade me to set aside a regular judgment. In other words, I applied the **Saudi Eagle** Test ([1986] 2 Lloyd's Rep 221)."

57. The *Saudi Eagle* is a decision of the English Court of Appeal which required the defendants who sought to set aside a regular judgment in default to show that they had a defence which had a reasonable prospect of success.

58. Mr Yu accepted that the test to be applied is the *Saudi Eagle* test.

59. I agree. Thus, I would not permit the discovered documents to be adduced on appeal unless I am satisfied that they show that the allegation of fraud or bad faith has a reasonable prospect of success. If I

were so satisfied, I agree with Mr Yu that the proper course to adopt would be to return the matter to the judge for further consideration.

60. What then is Pertamina's case on fraud or bad faith. I use bad faith for convenience but Mr Yu also relied on lack of good faith.

61. It is said the discovered documents are:

> "… highly material and incontrovertible evidence that the P did not believe at the time that there was a proper basis for confirming geothermal energy sufficient to supply 201 MW of electricity."

62. In the course of his submissions, Mr Yu produced a draft plea of fraud. The crux of the complaint is in para. 3 where it is alleged that, when the December NORC and NOID were issued, "KBC as it at all material times knew full well that, by its own criteria as set out in Andrew Ryder's note of 18 October 1997 and reflected in the December NORC and NOID, it had neither any proper basis nor sufficient technical data for making the confirmation and declaration of intention as represented in the December NORC and NOID, viz., that there was commercially viable geothermal resource capacity to the extent of 210 MW". Andrew Ryder was KBC's exploration Manager.

63. As Mr Yu explained it, Pertamina's complaint is that the discovered documents, in particular, Andrew Ryder's note, showed that KBC adopted certain minimum criteria to assess the commercial viability of the project but that in the December NORC and NOID, KBC adopted different criteria notwithstanding that KBC:

> "… did not believe at that time that there was a proper basis for confirming geothermal energy sufficient to supply 210 MW of electricity".

64. Pertamina also complained that:

> "33. From these documents, it is plain that when P issued the December NORC Update and the NOID on 16 December 1997, it knew that it did not have the data to properly issue a NORC Update to confirm commercially viable geothermal resource capacity to the extent of 210 MW. These documents further show that P knew at the time that the conceptual model, in particular the volumetric analysis or recoverable heat method, which took no account of issues of fluid chemistry or permeability and merely produced crude estimation or educated guess of potential resources were put forward disingenuously to support the figures. In fact, D never accepted the method, but the Tribunal awarded a sum of US$150m for loss of profit to P based on P's false assertions and disingenuous justifications."

65. It is true that Pertamina never accepted the method. But that is not to the point. KBC prevailed in the arbitration. It is not for us to decide what was the correct or appropriate methodology. Whether the volumetric approach or any other approach adopted by KBC in the December NORC and NOID was appropriate was for the Arbitral Tribunal to decide.

66. Mr Yu also submitted that insofar as KBC has not adopted such "minimum" requirements in the December NORC and NOID, KBC was fraudulent, acting in bad faith or with a lack of good faith. That is so notwithstanding that in those documents KBC had set out clearly what methodologies it adopted and had clearly explained how it arrived at the conclusion which it did. The methodologies adopted in support of the

December NORC and NOID were clearly set out and explained, for example, in the executive summary of the December NORC.

67. Mr Yu made no attack on the September NORC. In Paragraph 3 of his written reply Mr Yu, explained that Pertamina did not pursue the allegation regarding the September NORC because "we err on the side of being charitable, … and (b) it was unnecessary." I ignore the forensic explanation. I note however that in Mr Simson Panjaitan's 6th affidavit it was said:

> "9(d) KBC had in its possession and at all material times, documents such as internal memoranda (referring to the discovered documents) which showed that KBC knew that the geothermal resources claimed in the September NORC and December NORC were *false* and that the 2 Notices and the NOID were likewise *false*;" (Emphasis supplied).

Pertamina's latest case is not so much that the December NORC and NOID were false but that KBC did not honestly believe in them.

68. Mr Yu referred us to and relied on the following passage from Spencer Bower, Turner and Handley on *Actionable Misrepresentation* (2000 Edition):

> "86 The law requires from a representor not only that he adds nothing which makes false what would otherwise have been true; he must not omit anything required to render true what would otherwise be false. Such an omission amounts to that form of *suppressio veri* which is *suggestio falsi*. A half truth may be a misrepresentation. To state a thing which is true only with qualifications or additions known to, but studiously withheld by, the representor, is to say something which is not. Such a statement is a 'lie', and a most dangerous and insidious form. 'If a man', says Chambre J, 'professing to answer a question, selects those facts only which are likely to give a credit to the person of whom he speaks, and keep back the rest, he is a more artful knave than he who tells a direct falsehood'."

69. The supposed half truth is the alleged lack of genuine belief. Or the alleged suppression that KBC had internal minimum criteria for commercial viability. The complaint is that the change in approach evident in the December NORC and NOID was dishonest because it was not believed in. But in my view that allegation has no reasonable prospect of success. Incidentally, I am not satisfied that there is even a prima facie case, which at one time was Mr Yu's suggested standard.

70. It is common ground that there has been no suppression of any primary data. Nor, as Mr Jat submitted, was it Dr Grant's view that he would have reached a different opinion had he had sight of the discovered documents. What Dr Grant said in his 2nd affidavit was that:

> "The final result would have been similar or identical to that I presented, but demonstrating that I was following KBC criteria [rather than present a completely independent assessment as he did] would, I think, have altered the tribunal's view of my conclusions."

71. I agree with Mr Jat that:

> "… the allegation that KBC's claims made in the Sep NORC and Dec NORC/NOID were fraudulent is a thinly veiled attempt to rehash the arguments during the arbitration over the commercial viability and size of the resource claimed by KBC."

72. It is clear that the Arbitral Tribunal had rejected similar arguments in the Award, see e.g. paras. 130-132.

73. I will not repeat Mr Yu's detailed submission on the discovered documents. I have considered them together with Mr Jat's retort. I will not add to the length of this judgment. I will deal briefly with

Andrew Ryder's note on which most weight was put. This was a handwritten note on plain paper showing:

> "… the drilling schedule and suggested sequence of drilling the wells that I worked on today. … As it stands now it is solely my views and opinions / preferences and that is not how these things should be developed. …
>
> ……
>
> The attached is simply one strategy that I developed this afternoon. I am sure that I have over-looked some important considerations and/or constraints that will need to be factored in …"

Pertamina fastens on the attachments, in particular, the attachment under "General Assumptions" and there the reference to "minimum requirements". It is said that this note recognized minimum criteria for commercial geothermal resources.

74. Mr Yu in his written submissions at para. 31(5) submitted that such minimum criteria were reflected in Ryder's note as well as in the process design parameters set by the plaintiff in the December NOID e.g. at page 28.

75. But as Mr Jat submitted,

> "if such criteria could be found in the NOID as now suggested, PERTAMINA would have known them all along".

I content myself by saying that even if at one time Ryder operated on the basis that these were the minimum criteria I am not satisfied that Pertamina has shown that the December NORC or NOID were dishonest in any way. I add by the way that the December NORC and NOID were supported by

independent experts against whom no imputation of dishonesty had or could be made.

76. The most that can be said about the discovered documents is that up until 1 December 1997, KBC did not appear to have been relying on the volumetric approach. However, in Susan Petty's memo of 12 November 1997 (one of the discovered documents), there is the following passage:

> "All of this data could be worked up into a passable NORC, particularly if we had more time and had some geologists working on some of the missing elements like the alteration mineralogy write ups and the description of the structural geology from the air photo interpretation. We can certainly draw some nice isotherm maps with what we have now and make some cross sections from them leading to a conceptual model. We can calculate the recoverable heat and maybe go so far as to use the power density approach to calculate the recoverable energy. However, and this is the whole point of this memo, the NORC would look a lot better and be more complete if we were to combine the Karaha NORC and all of its data together with what is available from Telaga and submit a NORC for the region as a whole confirming a minimum of 140 MW with the potential for more."

77. When Mr Yu was referred to the above passage in Susan Petty's memorandum, his response was:

> "Because this was the memorandum where she was already thinking of the way of making a NORC look better."

78. Maybe so, but the discovered documents do not show that there was only one correct methodology or approach. Nor would the attempt by Pertamina e.g. by the Bixley's affidavit, to show that that was so help Pertamina. The battle of the experts was fought in the Arbitration.

The Arbitral Tribunal has made the Award based on their view of the expert evidence.

79. There is no evidence that KBC had accepted that the methodologies adopted by it was inappropriate. Nor does the fact that KBC was only partly successful (the loss of profits was about one-third of its claim) at the arbitration support the view those methodologies were dishonest or inappropriate.

80. Mr Yu also submitted that the discovered documents showed that the results of the exploration were not as satisfactory as might have been hoped. But it is accepted that data regarding each and every hole drilled had been supplied to Pertamina and correctly recorded or reflected in the December NORC or NOID. It is the interpretation put on them and the methodologies adopted which Pertamina asserted were inappropriate. But that was the case presented to the Arbitral Tribunal. What Pertamina is trying to do is to put a different gloss on the same case and use the discovered documents as a pretext for another attack on the Award.

81. Mr Yu also complained that insofar as Pertamina's witnesses continued to deny that they had adopted the criteria set up in Mr Ryder's memo, they were being disingenuous, and that supports Pertamina's case of fraud or bad faith. I do not agree they were disingenuous.

82. As Mr Jat explained:

> "Our evidence is that we had criteria. The criteria is that it must be economic, and 'economic' is a flexible concept. You look at the temperature, you look at the wellhead pressure, you look at acidity, and you do your economics. If you have very good

> wellhead pressure, very good permeability, it is very hot, there is a lot of steam, but it is acidic, what do you do about it? The allegation we have come to meet is that the well is not successful if one of the minimum criteria is not met. That is the case that we have come to meet. We never said that there is no criteria."

83. To conclude, I am not satisfied that Pertamina has established a prima facie case of fraud, bad faith or lack of good faith or a case which has a reasonable prospect of success. That being the case, that can be no question of our refusing to enforce the award because of the discovered documents. That is also a good reason to refuse leave under the second of the *Ladd v Marshall* conditions.

84. It is unnecessary to decide whether Pertamina has satisfied the first condition. I am, however, of the view that it has not. Mr Yu submitted that since the discovered documents only came into the possessing of Pertamina in 2002, the discovered documents could not be said to have been available for the proceedings before Burrell J had they used reasonable diligence. What is required by way of reasonable diligence depends on the facts of the particular case. The discovered documents were in their possession and when Pertamina's advisers turned their attention to them when they were found. I believe had they used reasonable diligence the discovered documents would have been available below. So for this reason too, I would refuse leave to adduce the discovered documents on appeal.

Arbitrary Award

85. I turn to consider the other points relied on by Mr Yu. The first of which is that it is contrary to public policy to enforce an arbitrary

award of damages. Mr Yu did not suggest that the figure of US$150 million was exorbitant or could not be justified. His complaint was that the award of US$150,000,000 was merely pluck a figure from the air. He submitted that it is contrary to public policy to enforce an award which is entirely arbitrary. He relied on *Adams v Cape Industries plc* [1990] 1 Ch 433, which was concerned with the enforcement in England of a judgment given by the United States Federal District Court at Tyler, Texas for damages of personal injuries allegedly suffered as a result of exposure to asbestos dust. There, the judge signed a default judgment for over US$15.5 million. The award made to individual plaintiffs fell into a number of bands: 67 were awarded US$37,000, 31 US$60,000, 47 US$85,000 and 61 US$1,200,000. The judge directed that the total award should represent an average award of US$75,000 per plaintiff, but it was the plaintiffs' counsel who selected the level of the bands and who identified the plaintiffs to be placed in each band in order to produce the directed average award.

86. Scott J (as he then was) refused enforcement on the basis that there had been no judicial assessment of the defendants' liability, and that the award damages had been arbitrary, not based on evidence and not related to the individual entitlements of the various plaintiffs.

87. On appeal by the plaintiff, the Court of Appeal dismissed the appeal. It held that the method by which the Tyler Court came to a decision as to the amount of the default judgment was contrary to the requirements of substantial justice contained in English law.

88. In the judgment of the court Slade LJ said at page 566:

> "The notion of substantial justice must be governed in a particular case by the nature of the proceedings under consideration. The purpose of an in personam monetary judgment is that the power of the state through the process of execution will take the defendant's assets in payment of the judgment. In cases of debt and in many cases of contract the amount due will have been fixed by the acts of the parties and in such cases a default judgment will not be defective for want of judicial assessment. When the claim is for unliquidated damages for a tortious wrong, such as personal injury, both our system and the federal system of the United States require, if there is no agreement between the parties, judicial assessment. That means that the extent of the defendant's obligation is to be assessed objectively by the independent judge upon proof by the plaintiff of the relevant facts. Our notions of substantial justice include, in our judgment, the requirement that in such a case the amount of compensation should not be fixed subjectively by or on behalf of the plaintiff."

89. So far as the Arbitral Tribunal's assessment of damages are concerned, I do not agree that the decision was arbitrary, or that the arbitrators had done no more than to have plucked a figure from the air. The Arbitral Tribunal acknowledged the difficulty in assessing damages for loss of profits. Thus in para. 136 of the Award it says:

> "136. The too many variables involved by such evaluation process suggests that different approach should be taken which, after duly considering these various factors, would entail a significant reduction of the Claimant's lost profits claim. The Arbitral Tribunal, after careful consideration of all elements involved in this analysis as enumerated above, and in the exercise of its inherent power to assess the quantum of damages on the basis of the evidence submitted by both parties, fixes at US $ 150 million (one hundred and fifty million US dollars), the amount of lost profits to which the Claimant is entitled."

90. That paragraph was preceded by several paragraphs where the Arbitral Tribunal discussed the rival contention of the parties.

91. In the end, Mr Yu was driven to rely on the expression "inherent power" in para. 136 of the Award. He submitted that was tantamount to saying that they have plucked a figure from the air.

92. Mr Jat submitted the Arbitral Tribunal was saying no more than:

> "…we have the power to assess the quantum irrespective of what both sides say. I am not bound to choose between A and B, I can look at the evidence and come to my conclusion."

93. I agree.

94. Mr Yu has not complained that the reasons were inadequate. Nor would I regard the reasons given as inadequate. I am of the view that the tribunal has sufficiently set out the parties' contentions and their reasons for coming to the sum awarded. See the Award paras. 112, 117, 121-136.

Section 44(2)(d)

95. As for the point that the tribunal has rewritten the contract, Mr Yu's complaint really is that the Government Related Event was a frustrating event and not a breach of either contract. That being the case, Pertamina could not be liable.

96. We are not concerned with the merit of the arbitral award. Mr Yu recognises that he cannot question the merits of the decision. So he accepts that it would not avail him to submit that the arbitrators have misconstrued the agreement. He was driven to argue that the Arbitral

Tribunal had rewritten the contract to bring himself within Section 44(2)(d) of the Ordinance, which provides that:

> "(d) … the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration;"

97. Mr Yu relied on the American decision *Brown & Williamson Tobacco Corporation v Chesley* 749 NYS 2d 842, a decision of the Supreme Court, New York County, to the effect that an arbitrator could be said to have exceeded his power if his construction of the contract is completely irrational, and tentamount to making a new contract.

98. It is only necessary to refer to paras. 54-57 of the award:

> "54. However, the legal consequences of this factual situation were not the same for KBC on the one hand and for PERTAMINA and PLN on the other hand.
>
> It is common ground among the parties that the decision by the Presidential Decree to postpone the Karaha Project is a 'Government Related Event', as defined both in the JOC and the ESC. The JOC (Article 15.2 (e)) reads: '… Events of Force Majeure shall include, but not limited to : …… (e) with respect to Contractor only, any Government Related Event'.
>
> The same text appears in Section 9.2 (e) of the ESC, the word 'Contractor' being replaced by 'Company', both words referring to KBC.
>
> Thus, it results from the two contracts that the Presidential Decrees were Force Majeure Events for KBC, but not for PERTAMINA and PLN. The legal consequence is that, while KBC was entitled to invoke the Presidential Decrees as a legitimate excuse not to perform its obligations, PERTAMINA and PLN were not entitled to do so as far as the performance of their own obligations was concerned. To assert the contrary, as the Respondents do, is just an attempt to deprive of any significant meaning the provisions of Article 15.2(e) of the JOC and Section 9.2(e) of the ESC which

clearly indicate that a Government Related Event is not a Force Majeure Event with respect to PERTAMINA and PLN.

55. Since PERTAMINA and PLN were not in a position to rely on the Presidential Decrees as a valid excuse not to perform their obligation, under the ESC and the JOC, the non-performance of such obligations is a breach of contract for which they are liable, unless they can show another exonerating circumstance. They have not, and, in this respect, the Respondent's allegations that KBC failed to prove its readiness, willingness and ability to perform the Project are immaterial.

56. The above stated conclusion is not in contradiction with the finding of the Arbitral Tribunal, in its Preliminary Award of September 30, 1999, according to which 'a governmental decision which prevents KBC to perform its obligations is not deemed to be a breach of contract by PERTAMINA and PLN but a Force Majeure Event excusing KBC's non performance'. This finding aimed at stressing that the Government was not a party to the Contracts and it was not meant to express any view as to the consequences for PERTAMINA and PLN of a Governmental decision which prevents the performance of the Contracts. Contrary to the Respondents' point of view, the fact that they are not responsible for the Governmental decision to prevent the performance of the Contracts does not exempt them from liability if they do not perform their own obligations in abiding by the decision. The Governmental decisions, in this case the Presidential Decrees n.39/1997 and n.5/1988, do not amount to a breach of PERTAMINA's and PLN's obligations. However, since a Governmental event is not a Force Majeure event for them, their non-performance has no legitimate excuse and must be considered as a breach of contract.

57. Such distinction is far from being artificial, as the Respondents contend. It applies each time a party is actually prevented from performing its contractual obligations by an event which it cannot invoke as Force Majeure due to the existence of provisions to that effect in the contract or by application of the law. Many examples may be provided. For instance, depending on the provisions of a contract, a strike may or may not be a Force Majeure event. If it is not, and although a party is actually prevented by the strike to perform its obligations, non-performance will amount to a breach of contract. Likewise, the failure of a subcontractor may or may not be characterized as a Force Majeure Event: in the negative, it is not a legitimate excuse for non-performance although the defaulting party played no role in its subcontractor's default.

> Even more significant, is the case of the seller which, according to some trade terms (e.g. CIF) has no legitimate excuse if it does not deliver the goods because an export license has been cancelled: although the cancellation is the result of a governmental decision for which the seller is not responsible, it is in breach of contract for non performance of its obligations of delivery. As rightly pointed out by the Claimant, the provisions of Article 15.2 (e) of the JOC and Section 9.2 (e) of the ESC express an allocation of risk, by putting the consequences of a Governmental decision which prevents the performance of the contract at PERTAMINA's and PLN's sole risk."

99. With respect, in my opinion, this is a just, practical, sensible and commercial decision, and the conclusion is unassailable. The effect of Pertamina's submission on the effect of Article 15(e) and Section 9.2(e) is that KBC would only be entitled to compensation if the presidential decrees had been issued after the generating plants had been commissioned but no compensation would be payable if the decrees had been issued the day before. I have no hesitation in rejecting the submission.

Section 44(2)(c)

100. The last point related to the refusal of the tribunal to grant an adjournment or to order discovery. It is said to be a serious procedural irregularity.

101. The hearing of the arbitration was scheduled to be heard for 5 days commencing on 9 June 2000. By letter dated 16 May 2000, Pertamina applied for an adjournment. That letter included a schedule of documents that Pertamina wished to obtain by way of discovery.

102. KBC opposed an adjournment as well as discovery on the basis that:

> "The purpose of Respondents' request is only one of delay."

It also opposed discovery on the basis that Pertamina had elected to proceed without broad discovery and it should not be allowed discovery at such a late stage.

103. Pertamina's response dated 18 May 2000 concluded with the following:

> "Respondents, therefore, respectfully request an adjournment in their time to submit their rejoinder and in their hearing date for a reasonable period, and that KBC be ordered to produce the documents requested by Respondents which are required for it to respond to KBC's new contentions."

104. By letter dated 23 May 2000, the Arbitral Tribunal decided that an adjournment of the hearing would not be justified in the circumstances.

105. Burrell J in his judgment said:

> "40. Pertamina submit that the application should have been granted because KBC, in its rebuttal had raised 'a fundamentally new case' concerning their funding of the project and Pertamina needed both time and further discovery to properly investigate the matter.
>
> 41. The primary reason that Pertamina must fail in this attempt to invoke section 44(2)(c) and persuade this court not to enforce the award is that their description of a 'fundamentally new case' is an overstatement of the position. It was not so new as to cause this court to depart from the basic principle that procedural matters are essentially matters for the Tribunal. These were procedural matters, upon which decisions were made, from

> which it cannot be shown that Pertamina did not get a fair hearing."

106. With respect, I agree.

107. Mr Yu complained that there was no decision on the request for discovery. But as the transcript of the hearing on 23 June 2000 shows, Pertamina proceeded on the basis that the request for discovery "as effectively being denied, and we went forward".

108. Mr Yu complained that the Arbitral Tribunal should have allowed discovery without an adjournment. It is quite clear that what Pertamina applied for at the time was an adjournment and discovery. Pertamina never asked for discovery without an adjournment. Mr Yu said that the burden should not have been put on Pertamina to ask for it. I do not agree.

109. There is nothing in this complaint.

Conclusion

110. For the above reasons, I would dismiss the appeal.

Hon Stone J:

111. I respectfully agree with the detailed and cogent judgment of the Vice-President, which I have had the opportunity of reading in draft.

112. I, too, would dismiss this appeal with costs.

113. In light of the circumstances of this case, and of the manner in which the argument developed, I should like to proffer a few words of my own.

114. The desirability of finality within arbitral disputes conducted pursuant to the 1958 New York Convention – the object of which was to facilitate the recognition and enforcement of commercial arbitration agreements in international contracts – is reflected in the provisions of domestic Ordinances providing for the enforcement of Convention awards.

115. Hence section 42(2) of the Hong Kong Arbitration Ordinance ('the Ordinance') provides that:

> "Any Convention award which would be enforceable under this Part shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Hong Kong…"

116. Section 44(1) of the Ordinance states that the enforcement of a Convention award "shall not be refused" *except* in the cases detailed in that section: thus section 44(2) specifies six specific circumstances whereby, if proved, enforcement of such an award may be refused, whilst section 44(3) is couched in general terms, providing that:

> "Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, *or if it would be contrary to public policy to enforce the award."* (Emphasis added)

117. There is thus a broad 'public policy' exception, and it is an exception, as my lord the Vice-President has pointed out, which has been the subject of judicial consideration in the territory's highest court: see *Hebei Import & Export Corp v. Polytek Engineering Co. Ltd* (1999) 2 HKCFAR 111.

118. Thus, in *Hebei, op cit.*, at 139, Sir Anthony Mason NPJ noted that the provenance of the public policy exception lay in Article V2(b) of the Convention, and that "It has been generally accepted that the expression 'contrary to the public policy of that country' in art. V2(b) means "contrary to the fundamental conceptions of morality and justice of the forum".

119. It is worth stressing that concept of 'public policy' as a preclusionary tool is not infinitely elastic – it strikes me that on occasion it is over-enthusiastically prayed in aid – although it is clear that the most fertile area for the invocation of the provisions of section 44(3) is that of fraud, which traditionally is said to 'unravel all': if and in so far as it can be demonstrated that the award which now is sought to be enforced in Hong Kong has been obtained by fraud, this will fall squarely within the statutory exception, which in effect is no more than the statutory reflection of the common law maxim *'ex turpi causa non oritur actio'*.

120. So far, so good. However, considerable problems arise, as this case aptly demonstrates, when it is sought to establish the existence of fraud in order to preclude enforcement of a Convention award.

121. It should be emphasised that the issue of fraud never was raised or placed before the learned judge below, Mr Justice Burrell, from whose decision granting the plaintiff leave to enforce the arbitral award made in its favour the present appeal nominally lies; in fact the fraud aspect of the case was argued *de novo* before this court.

122. This was because the issue of fraud raised its head only as the consequence of the belated discovery by Pertamina of certain documents, the content of which, it is said, demonstrate that officers of the successful claimant, KBC, had acted fraudulently in written submissions which had been made to Pertamina regarding the viability of certain geothermal well-heads.

123. Hence, the present case was complicated by the application to adduce these documents on appeal, as new evidence, under accepted *Ladd v. Marshall* principles, albeit in the event the court entertained argument and looked at the documents *de bene esse*, with the practical result that issues of admissibility were placed to one side during development of the fraud submission by Mr Yu SC, leading for the appellant, Pertamina.

124. The assertion of fraud on the part of KBC in effect became the 'admission ticket' into what began to resemble a detailed reargument of the case and a rehearing of the very matters with which the learned arbitrators had been seized, albeit without, of course, sight of the 'new' documentation.

125. Moreover, the assertion of fraud as now mounted begged two specific questions: first, what was the benchmark which the appellant was

required to meet in terms of the fraud allegation?; and second, and in light of the answer to that, whether it was able to satisfy the court that its allegation of fraud in fact was well-founded?

126. In response to the benchmark point, at the outset Mr Yu SC was content to assert that all that he needed to do was to establish a '*prima facie* case' and that, if he was successful in this endeavour, directions should be made to remit the issue to a judge at first instance for the fraud allegation to be pleaded out and tried.

127. Thus, if Mr Yu's argument were to hold sway, the Hong Kong court would become embroiled in satellite litigation within the context of an ostensibly final arbitral award which had been made consequent upon five days of hearing in Switzerland by respected international arbitrators.

128. It seems to me that this was far-removed from the intention of the legislation enshrining the principle of the enforcement of Convention awards, and that equally it must be a matter of public policy that, absent clear indication of the existence of fraud, the Hong Kong court, *qua* enforcement court, ought not lightly to be persuaded into such unwanted and unnecessary collateral litigation.

129. For my part I do *not* accept that the standard that is required to be demonstrated by a respondent to an action for the enforcement of an arbitral award is no more than one of a '*prima facie* case', a term which in my view connotes an undesirable degree of malleability.

130. If and in so far as fraud is to be asserted in this context, in my judgment the allegation should not only be specifically identified/particularized, in accordance with accepted principle, but that the allegation should emerge from the papers with a degree of clarity such that, if not actually 'leaping off the page', nevertheless the court should be left in little doubt, on the evidence placed before it, that there is a cogent and realistic case of fraud which requires to be ventilated and met.

131. In this context Mr Yu SC did, I think, accept in the course of debate between Bench and Bar that he would be equally happy with the *Saudi Eagle* rubric of "a real prospect of success", and in this I respectfully agree with the view of Tang VP that this is the criterion which should be applied in this context.

132. In my judgment this is the minimum standard so required, and unless it can responsibly be asserted by counsel that an allegation of fraud can be demonstrated to this level, it should not be canvassed or otherwise raised before the Hong Kong court in an effort to prevent enforcement of a Convention award.

133. Which brings me to the second question: on the present evidence before this court, was the appellant able to satisfy the court to the requisite level?

134. In this I entirely agree with the conclusion of the Vice-President; so far as I was concerned the material variously prayed in aid in support of this plea did not achieve the level of a '*prima facie* case', much less the standard of a 'reasonable prospect of success'.

135. In order to advance his argument, Mr Yu SC was constrained to delve into the minutiae of the case, via the recently discovered documentation, and to attempt to demonstrate, by means of inference and circumstantial extrapolation, that officers of KBC had been guilty of *suppressio veri*, and that they had knowingly and dishonestly had failed to reveal their true belief in the existence of the projected geothermal resources.

136. To say that he manifestly failed in this endeavour is not to be critical of his efforts so to persuade; it is perhaps fair to say that it was only Mr Yu's considerable forensic skill that was able to invest this argument with any degree of respectability.

137. For my part he did not come close to establishing the element of dishonesty inherent in the allegation of fraud, nor did I think that the main document upon which ultimately reliance was placed, namely, the December NORC – which, as Mr Jat SC for the respondent pointed out, itself was an extensive (106 page) document which on its face indicated the methodology which was being adopted, and indicating the uncertainties of the volumetric method, with a whole section (Chapter 6) outlining the uncertainties of this method – was of assistance in terms of the case which was sought to be made out on behalf of Pertamina.

138. In the circumstances I consider that there was ample justification in Mr Jat's further observation that, in addition to the December NORC, the same material was set out in the December NOID, and that in the circumstances the fraud advanced was "the most peculiar fraud" he could imagine, given that it was unclear what his client had

suppressed: “We gave them all the data. We told them different methods. On his case, we even told them the criteria…”

139. Looking at the case in the round, therefore, as far as I was concerned the fraud allegation as mooted did not get off the ground, and, in company with the Vice-President, I did not consider that the alleged alteration in approach on the part of KBC, as evidenced in the December NORC and NOID, was fraudulent or could be categorized as an intention to mislead. Nor did it avail Mr Yu alternatively to couch his criticism in terms of alleged disingenuity or impropriety or dubious business morality on the part of KBC: either the conduct complained of was fraudulent – which was the case the plaintiff came to meet – or it was not, and in this case he simply was unable to hit his desired target.

140. The issue of fraud undoubtedly constituted the main bridgehead of this appeal. In terms of the other subsidiary issues raised by Mr Yu SC – the issue of the alleged arbitrariness of the damages award, the allegation that the tribunal had ‘rewritten’ the contract, and the procedural complaint in terms of the failure of the tribunal to grant an adjournment or discovery – I also agree with the analysis of the Vice-President, and am of the view that there is nothing in any of these points which would justify the court in declining to enforce this arbitral award.

141. I note that of these subsidiary points, only the alleged procedural impropriety on the part of the Tribunal was a point ventilated before Burrell J, whose judgment upon the issue was, if I may say so, impeccable.

142. In my view the course that this case has taken represents a paradigm example of what should *not* occur in the context of enforcement of Convention awards, wherein an alleged case of fraud is used as the 'hook' to reopen argument upon the entire case hitherto the subject of full arbitral consideration. In opening this appeal Mr Yu had noted that Pertamina anxiously had been awaiting its 'day in court', but for my part I regret to say that I consider this appeal to have been singularly lacking in merit.

Hon Lam J:

143. I have the advantage of reading the judgments of the Vice-President and Stone J in draft. I respectfully agree with them and for the reasons given therein, the appeal must fail. I only wish to highlight that this is an appeal from a decision to enforce an international arbitral award. The Vice-President and Stone J have discussed at length the benchmark required for resisting enforcement on the ground of fraud. I agree with them that the *Saudi Eagle* threshold must be satisfied before the enforcing court should pay any heed to such contention. Once the threshold is satisfied, the enforcing court will probably have to hear the evidence on the allegation of fraud and make findings on the same. Whether the award should be enforced will then depend upon such findings.

144. That is the position regarding an allegation of fraud being raised at the first instance court when a respondent seeks to resist the enforcement of an international arbitral award.

145. In the present case, the allegation of fraud is not raised at the court below. However, on analysis, similar allegation had been raised during the arbitration in the form of an assertion that the December NOID and NORC were sham documents. In Pertamina's Reply and First Memorial of 7 April 2000 filed in the arbitration proceedings, the following assertions were advanced at p.42-43 of the document,

> "Moreover, it is apparent that KBC in fact had no bona fide intention to 'design, construct, commission and operate geothermal generating units' producing 210 MW of electricity as it represented in the NOID because the proven and probable resources for such units were entirely inadequate for a 210W pant and because it did not have, and would not be able to obtain, financing for such a plant. KBC hurriedly put together and delivered its sham NOIN --- and the equally sham NORC on which it was based --- in order to position itself to argue that the Project should be continued by the Government or, failing that, to assert enormous damage claims for 'lost profits'…"

146. In my view, putting aside the variation in the forensic formulation of the respondent's case, the substance of the allegation remains the same. The only new input that Pertamina has instilled into this part of its case in this appeal were the belatedly discovered documents.

147. Since this is an appeal, the admission of fresh evidence should be governed by the rule laid down in *Ladd v Marshall*. The first criterion in that rule is that it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.

148. Mr Yu relied on a passage in *Phipson on Evidence* 16th Edn. Para.13-07 and several unreported English authorities to contend that the first criterion of *Ladd v Marshall* is relaxed in cases where fraud is alleged. For my part, whilst I agree that the authorities show that the first criterion

may be relaxed in exceptional cases, I do not think they go so far as to graft a general exception whenever fraud is alleged.

149. As observed in *Hamilton v Al Fayed (No.4)* [2001] EMLR 15, it is necessary to strike a fair balance between the need for concluded litigation to be determinative of the disputes and the desirability that the judicial process should achieve the right result.

150. Turning to the cases cited by Mr Yu, *Zincroft Civil Engineering Ltd v Sphere Drake Insurance Ltd* (English Court of Appeal) unreported, 26 November 1996 was an appeal against a judgment obtained under an Order 14 application. Potter LJ held that a defendant who is suspicious of fraud but is reasonably prevented or sensibly inhibited from raising it at the state of summary judgment should not be precluded from using solid and substantial evidence acquired by him after the judgment to set aside the same. On the facts, the court was satisfied that the new evidence could not with reasonable diligence have been obtained.

151. In *Hamilton v Brodie Brittain Racing Ltd* (English Court of Appeal) unreported, 13 December 1995, Butler-Sloss LJ observed as follows,

> "Fraud or deceit, which is proved, goes to the root of the litigation and may vitiate the decision of the court. If the allegations are relevant and comply with conditions 2 and 3 of *Ladd v Marshall*, and a prima facie case is disclosed, unless the applicant has not acted in good faith, such as by deliberately not raising the issue at court with knowledge of the fraud, a court would look very carefully at the possibility of a miscarriage of justice if he were shut out from a rehearing of his case."

Later on, Her Ladyship said,

> "… in cases of deception or impropriety or fraud, condition 1 is to be considered with a greater degree of flexibility than cases in which such serious allegations are not raised, and too strict an adherence to those important guidelines in *Ladd v Marshall* should not inhibit a consideration by the court of the justice of the case."

152. In these cases, the fraud in question was fraud in terms of false evidence adduced at the court below. In contrast, in this appeal, the alleged fraud was fraud practiced on Pertamina when the December NOID and NORC were issued.

153. What can be derived from these cases is that when there is clear evidence of a judgment being obtained by fraud (in that conditions 2 and 3 of *Ladd v Marshall* are met), the court will apply condition 1 with flexibility to avoid any miscarriage of justice. An allegation of fraud *per se* is neither here nor there, much depends on the strength of the case as to fraud and its relevance.

154. In the present case, for the reasons given by the Vice-President, I do not think Pertamina comes anywhere near to establishing that the new evidence would have an important influence on the outcome of the arbitration. Further, I do not think they show any fraud practised by KBC at the court below or for that matter, at the arbitration proceedings.

155. Hence, I see no reason why *Ladd v Marshall* should not be applied in its full vigour. The so-called new documents were available to Pertamina when the matter was heard at the court below. I do not accept their explanation on why the documents remained unnoticed for a long period of time. Though the arbitration proceedings had been completed,

Pertamina had all along been taking active steps to resist the enforcement of the award in many jurisdictions. I concur in the Vice-President's conclusion that Pertamina failed to satisfy the first condition.

156. Therefore, the new evidence is inadmissible for the purpose of the appeal.

Hon Tang VP:

157. The appeal is dismissed with an order nisi that costs be to the plaintiff.

(Robert Tang)	(William Stone)	(M H Lam)
Vice-President	Judge of the Court of First Instance	Judge of the Court of First Instance

Mr. Benjamin Yu, SC, Mr. Rimsky Yuen, SC, and Mr. M. C. Law, instructed by Messrs Richards Butler for the Defendant.

Mr. Jat Sew Tong, SC and Ms. Grace Chow, instructed by Messrs Clyde & Co. for the Plaintiff.