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
ARBITRAITON 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

Date of Hearing: 6 June 2008

Date of Judgment: 16 June 2008

JUDGMENT ON COSTS

Hon Stone J (delivering the judgment of the court):

The application

1. This is the judgment upon the plaintiff's application to vary an order *nisi* as to costs.

2. On 9 October 2007 this court handed down its judgment dismissing an appeal by the defendant herein, 'Pertamina', against the judgment of Burrell J, dated 27 March 2003, whereby the learned judge had dismissed 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 in the like manner as a judgment.

3. The judgment of this court upon the substantive appeal speaks for itself.

4. At the conclusion of that judgment, this court made an order *nisi* that the costs of the dismissed appeal be to the plaintiff.

5. By letter dated 16 October 2007, the plaintiff's solicitors, Messrs Clyde & Co., made application to vary this order *nisi* as to costs, submitting that this court should order that the costs of the appeal be paid to the plaintiff either upon an indemnity basis, alternatively upon a common fund basis.

6. This is resisted by the defendant, Pertamina, which maintains that in the circumstances no more than the standard 'party and party' basis as to costs should be adopted – hence this hearing.

The argument

7. Mr Jat SC, who appears for KBC on this argument as he did on the appeal, rehearsed the basic principles as to the award of costs, and in particular drew the attention of the court to the decision of the Court of Final Appeal in *Town Planning Board v. Society for the Protection of the Harbour Ltd (No 2)*, [2004] 7 HKCFAR 114, at 123I-124F, wherein the Chief Justice observed that in order to obtain an order for costs upon an indemnity basis that the case had to have some "special or unusual feature" warranting a departure from the unusual 'party and party' norm, whilst at the same time the discretion so to do is not to be fettered "beyond the requirement that taxation on an indemnity basis must be 'appropriate'".

8. Mr Jat submitted that in light of the character of these proceedings – which were proceedings arising from the enforcement of a New York Convention arbitral award – clearly demonstrated that indeed it was so 'appropriate' to make an order for indemnity costs, and in the process of his argument he relied upon four main grounds to make this point good: *first*, that the serious and belated allegation of fraud against his client – in the permutations which variously had been relied upon during the course of this appeal – had been adjudged groundless and devoid of merit; *second*, that this appeal, and the evidence sought to be relied upon, was a clear attempt to re-argue the merits of the case; *third*, that the plaintiff's appeal, and the allegation of fraud, clearly could be seen as part of a wider picture whereby Pertamina had been "tenaciously attempting" to resist enforcement of the arbitral award worldwide – in fact, he noted, substantially the same allegation of fraud unsuccessfully had been put forward by Pertamina in litigation against KBC in the Cayman Islands – and *fourth*, that as a matter of policy a final arbitral award indeed should be final and recognized as such, subject only to the statutory exceptions expressly permitted.

9. In the course of his argument Mr Jat drew our attention to, and relied upon the Privy Council decision in *Maydwell v. WFM Motors (Pty) Ltd* [1997] 2 HKC 244, wherein the Judicial Committee was dealing with a New South Wales judgment against Mr Maydwell which had been registered in Hong Kong, and wherein he had sought to set it aside on various grounds, one of which being that the Australian judgment had been obtained by fraud, although Mr Maydwell had not at any time advanced a case of fraud before the Australian courts, which had found conclusive a certificate of indebtedness under a clause in a guarantee signed by Mr Maydwell.

10. The trial judge had set aside the registration of the judgment on an allegation of fraud different from that subsequently relied upon by Mr Maydwell, the Hong Kong Court of Appeal restored the registration of the judgment, and ultimately the question before the Board was whether the evidence disclosed a sufficient case of fraud on the part of WFM, the respondent. In the event their Lordships held that there was "no trace" of fraud by WFM, that there was "every indication" of an attempt by Mr Maydwell to avoid payment of his debts, and that "the allegation of fraud, being groundless, should never have been made."

11. Thus, counsel argued, this court on the substantive appeal clearly having taken a dim view of the allegations of fraud as variously advanced, ranging from the pre-hearing assertion that both the September and the December NORC and NOID were false, to the assertion at the outset of the hearing that only the December NORC and NOID had been fraudulently issued, to the final watered-down allegations of 'disingenuity', 'impropriety' and 'dubious business morality', it now was legitimately open to him to ask for costs to be taxed upon an indemnity basis; KBC had had no option but to incur very significant additional costs in dealing with the matter upon this appeal, he said, and in countering these new and unfounded allegations of fraud – which had *not* been advanced before Burrell J, notwithstanding that Pertamina then had had in its possession the very documents upon which reliance now had been placed.

12. On behalf of Pertamina, Mr Yu SC, who also had been counsel on the substantive appeal, mounted a spirited defence of his client's actions in this litigation. True it was, he said, that Pertamina had had these documents in its possession, but simply had not appreciated their content at the time of the first instance hearing before Mr Justice Burrell, and at no time in this litigation had Pertamina behaved other than in good faith.

13. In this connection he accepted, of course, that ultimately his submissions as to fraud had not found favour with the court, but he submitted that in the circumstances it had been open to Pertamina genuinely to advance these allegations: Pertamina "genuinely believed" that in this regard it had a good case.

14. In addition, he argued, plainly this was not an instance in which Pertamina was trying to delay payment, as had been the case in *Maydwell, op cit.*, since the approximate sum of US$900,000 odd already had been paid to KBC.

15. Nor, said Mr Yu, should this court pay attention to any matter outwith the specific circumstances of this case; thus, he suggested, the fact that Pertamina had engaged in various pieces of litigation all over the world arising out of this hotly-contested arbitration, and the unfair and unjustified award consequent thereon, was nothing to the immediate point, and should not sound in the costs of this litigation.

16. At all times, Mr Yu maintained, his client had been *bona fide* seeking to protect its legal rights, there had been no abuse of the right to litigate, the litigation as had taken place had not been shown to be for a 'collateral purpose', his client was entitled to raise fraud under the statute, and there was no evidence of bad faith.

17. In short, therefore, there was no "special or unusual feature" present in this case which would merit an order as to costs over and above the usual 'party and party' basis, and in the circumstances he asked the court not to vary its order *nisi*.

Decision

18. We are unable to agree with Mr Yu's submissions, persuasively though they were advanced.

19. After some reflection, we take the view that indeed it is 'appropriate' in all the circumstances for this appeal to attract an order of indemnity costs.

20. We say so for three reasons.

21. We are of the opinion that no good reason has been advanced for the failure on the part of Pertamina to rely upon these 'new' documents, and thus to advance the fraud allegation, before Mr Justice Burrell in the court below; in fact, although we do not need to go this far, we consider that it is a not unreasonable inference that these documents had been available at the time of the arbitration hearing itself.

22. Second, as the substantive appellate judgment makes clear, and for the reasons outlined therein, which we will not here repeat, we have taken a critical view of the merits of this appeal.

23. We would add, in this context, that we are far from convinced that the litigant's alleged "genuine belief" in the rectitude of its cause provides a sound or reliable or conclusive benchmark for an appraisal of the merit, or otherwise, of any particular piece of litigation. It seems to us, with respect, that to infuse the argument with what is said to be the subjective belief of one party serves to distract from the objective appraisal necessary for a court to adopt in the evaluation of the merits of any argument seriously advanced before it.

24. Third, we are unable to accept the contention that, for practical purposes, the litigation which has been instituted in other jurisdictions simply can be put to one side as 'irrelevant', which is how Mr Yu would have us regard it.

25. As we understand the position, consequent upon this arbitral award, Pertamina variously has instituted litigation in no fewer than *six* other jurisdictions, in addition to Hong Kong, in a bid either to avoid liability, or payment of the arbitral award, or enforcement thereof: in Switzerland, Texas, New York, Indonesia, Cayman Islands, Canada and Singapore. In addition, we understand that the litigation in the United States is not yet concluded, and that an appeal is pending to the Supreme Court.

26. It strikes us that that which appears to be Pertamina's persistent refusal to accept and to abide by the Award, and the concerted steps taken on its part to delay and obstruct KBC's enforcement of the Award in these differing jurisdictions is not something that simply can be ignored, and in this context, we consider well-founded Mr Jat's submission that this Hong Kong litigation is another manifestation of a consistent pattern, and represents precisely what should not be permitted to occur in the context of arbitration proceedings under the New York Convention.

27. This is not to say, of course, that a party to an arbitral award is precluded from legitimately raising the issue of fraud *if* such can be shown legitimately to exist – as Mr Yu has pointed out, the Arbitration Ordinance provides within section 44 specific matters permitting non-enforcement of Convention awards (see in this connection section 44(3)) – but in this instance, as our judgment on the substantive appeal makes clear, we have been unable to discern to the requisite standard the fraudulent conduct which Pertamina belatedly now asserts, which allegations in our view were utilized as an 'admission ticket' in the attempt to reargue the merits of the arbitral award of which Pertamina so vociferously complains.

28. It seems to us, therefore, that the substantive argument in the present case, coupled with the surrounding factual matrix, invites the conclusion that this litigation indeed does contain within it the 'special and unusual features' which, in the exercise of this court's unfettered discretion, justify dismissal of this appeal with costs to be borne by the defendant upon an indemnity basis, such costs to be taxed if not agreed.

29. Accordingly the earlier order *nisi* as to costs is to be varied in terms.

(Robert Tang) Vice-President	(WILLIAM STONE) JUDGE OF THE COURT OF FIRST INSTANCE	(M.H. Lam) Judge of the Court of First Instance

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

Mr Benjamin Yu SC and Mr M C Law, instructed by Messrs Richards Butler, for the defendant