JUDGMENT : MR JUSTICE CHRISTOPHER CLARKE : Commercial Court. 9th November 2007

1. This is an application by Sabah Shipyard (Pakistan) Ltd ("Sabah") the claimant, against the defendant, the Islamic Republic of Pakistan, ("GOP") for summary judgment in the sum of US $ 17,374,893.03, together with further interest, under a written guarantee ("the guarantee") provided by GOP to Sabah on 5th May 1996 at Islamabad in Pakistan.

2. The guarantee was provided as part of a series of agreements relating to the design, construction, operation and maintenance of a barge-mounted electric power plant in Karachi ("the Karachi project"). The plant was to use fuel purchased from the Pakistan State Oil Company ("PSOC") and to supply electricity to the Karachi Electricity Supply Corporation ("KESC").

3. The governing contract for the Karachi project was an Implementation Agreement ("the IA") dated 6th March 1996. That agreement was made between Sabah and GOP and envisaged that the Karachi project would be carried out under two related agreements:

   (i) a Power Purchase Agreement ("PPA") between Sabah and KESC;

   (ii) a Fuel Supply Agreement ("FSA") between Sabah and, as it turned out, PSOC.

   The PPA was entered into on 7th March 1996 and the FSA was entered into on 25th March 1996.

The provisions of the IA

4. By Article IV of the IA Sabah was to implement the Karachi project in accordance with, inter alia, the PPA and the FSA. By Article VI Sabah was to purchase or lease a suitable site for the project.

5. In order to carry out the Karachi project Sabah needed finance in the form of equity and loans. GOP was concerned to know that such finance would be available. Accordingly Article XIX of the IA provided that, if Sabah failed to achieve "*Financial Closing*" by 28th March 1996, that would constitute an Event of Default giving rise to a right of termination on the part of GOP, provided however that no such event should be an Event of Default by Sabah if it resulted from a breach by GOP of the IA or by KESC of the PPA or by PSOC of the FSA. Article XX provided that, in the event of such a termination, GOP should be entitled to encash the Performance Guarantee (as to which see paragraph 35 below).

6. Failure to achieve Financial Closing by 28th March was also a "*Company Event of Default*" under the PPA

7. Article 1 of the IA set out a number of definitions including the following:

   (i) *"Company" means [Sabah] …*

   (ii) *"Complex" means the approximately 288MW …barge mounted power station to be owned and berthed by the Company…."*

   (iii) *"Financial Closing" means the execution and delivery of one or more agreements constituting all or a portion of the Financing Documents that together with the equity commitments of the Initial Shareholders evidence the financing necessary for the construction, testing and completion of the Complex …provided that the receipt of commitments for such equity shall not be less than as is required by the Company in order to satisfy the requirements of the Lenders and the Letter of Support.*" (Article 1.34)

   (iv) *"Financing Documents" means the loan agreements, notes, indentures, security agreements, guarantees and other documents relating to the construction and permanent financing (including refinancing) of the Complex or any part thereof, which shall include the Marubeni Commitment.*" (Article 1.35)

   (v) *"Fuel Supply Agreement" means the agreement between the Fuel Supplier and the Company for the supply of Fuel to be used by the Complex to generate electricity, as amended from time to time.*" (Article 1.41)

   (vi) *"Initial Shareholders" means the shareholders of [Sabah] that caused the incorporation of [Sabah}, including Sabah Shipyard SDN.BHD.*" (Article 1.49)

   (vii) "*"Lenders" means the lenders party to the Financing Documents together with their respective successors and assigns.*" (Article 1.57)

   (viii) "*"Power Purchase Agreement" means the agreement dated _____ 1996, entered into between KESC and the Company for the purchase and sale of electric power generated by the Complex, as amended from time to time, on financial terms acceptable to GOP.*" (Article 1.79)

8. Sabah had been incorporated in Pakistan for the purposes of the Karachi project. Its shareholders were, in equal proportions:

   (i) Sabah Shipyard, Sdn.Bhd, a Malaysian company ("Sabah Malaysia");

   (ii) Westmont Industries Berhad ("Westmont Industries"), Sabah's parent company;

   (iii) Marubeni Corporation ("Marubeni"); and

   (iv) Marubeni-Westmont ("M-W"), a Singaporean company.

   Until late 1996 or early 1997 Sabah was under the control of Dato Joseph Chong Ah ("Mr Chong"), a Malaysian businessman, whose business empire was run through the Westmont Group of companies, whose ultimate holding company was Westmont Holdings Sdn Bhd ("Westmont Holdings"), of which Mr Chong and his wife appeared to own 49%. Mr Chong was until 26th November 1996 Managing Director of Westmont Industries and a director until March 2000. He was Managing Director of Sabah Malaysia until 16th October 1996. He appears also to have been a director of Wing Tiek Holdings Bhd ("Wing Tiek") between, at least, August 1994 and December 1995 during which period Westmont Holdings controlled nearly 33% of Wing Tiek.

9. Article XX1 of the IA provided that the IA was to be governed by the laws of England.

10. Article XXII provided that: *"The GOP shall, at Financial Closing, execute and deliver to [Sabah] the Guarantee, as per Schedule 3".*

11. The PPA between Sabah and KESC provided for any dispute to be settled by arbitration in accordance with the Rules of Procedure for Arbitration Proceedings (the "ICSID Rules") of the International Centre for the Settlement of Investment Disputes established by the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States. But it also provided that unless and until the GOP implemented the Convention any dispute should be settled by ICC arbitration. By Article XXI of the IA GOP approved KESC's consent in the PPA to arbitration under the ICSID Rules.

12. The guarantee sued on is a guarantee of the obligations of KESC and FSA under the PPA and the FSC. I shall consider its specific provisions later in this judgment.

KESC draws on the Letter of Credit established by Sabah pursuant to the PPA

13. During the course of the Karachi project KESC drew on a standby letter of credit ("the BOA letter of credit") in the sum of $ 6.84 million which Sabah had established through the Bank of America ("the BOA") as required by clause 9.4 (f)(i) (A) and (B) of the PPA for amounts which were disputed by Sabah. Sabah claimed that this was a breach of Article 9.4 (f) (i) (C) of the PPA, which provided that, if Sabah was required to pay liquidated damages to KESC and failed to pay them when due, KESC would be entitled to draw or collect such amounts *"less any amounts disputed by [Sabah]"* from the letter of credit on presentation of a certificate from KESC stating (i) that amounts shown in an accompanying invoice were due and payable, and (ii) that an invoice for the amount in question had been delivered to Sabah and either no amounts had been disputed or only an identified portion.

14. Sabah claimed that KESC was in breach of that Article because it had claimed for amounts that were disputed (and not due) and had wrongfully provided a certificate to the BOA which did not disclose that the amounts claimed in KESC's invoices was disputed.

The Tompkins Award

15. On 8th December 2000, following arbitration between Sabah and KESC, to which GOP was not a party, the Honourable Sir David Tompkins QC, a former member of the New Zealand Court of Appeal, who was the sole arbitrator, issued an Interim Award, which he confirmed in a Final Award ("the Tompkins Award") on 4th June 2001. He determined that KESC was not entitled to draw against the letter of credit and ordered KESC to repay to Sabah $ 6.84 million being the total amount drawn down, together with interest at the rate of 11.75% compounded semi-annually, and costs. It is that sum for which Sabah seeks judgment.

16. On 27th June 2001 Sabah made a demand on KESC to honour the Award. KESC failed to do so and on 25th March 2004 Sabah was given permission by Creswell J to enforce the Tompkins Award in the same manner as a judgment. A later application by KESC to set aside the order was adjourned, conditional on the provision of $ 10 million by way of security which was never paid.

Attempts to enforce the guarantee – the first action

17. On 8th June 2001 Sabah wrote to KESC on the strength of the Interim Award demanding payment of the sum of $ 8,462,712.41 under the guarantee. On 3rd September 2001 Sabah made a second demand of GOP under the guarantee on the strength of the Final Award. Thereafter Sabah has been engaged in so far fruitless attempts to obtain payment under the guarantee. On 12th December 2001 it issued proceedings ("the first action") against KESC and GOP seeking payment of the Tompkins Award.

GOP's anti-suit injunction

18. On 11th December 2001 David Steel J had made an ex parte order restraining GOP from pursuing proceedings designed to stay Sabah's claim under the guarantee otherwise than in the English Courts. Sabah had sought this relief because on 31st October 2001 GOP had issued proceedings in the Court of the Senior Civil Judge in Islamabad seeking to avoid the Tompkins Award claiming that it was invalid on the ground of fraud in its procurement and seeking a permanent injunction restraining Sabah from making any demands under the guarantee.

19. On 6th February 2002 Steel J continued the anti suit injunction against GOP until trial and dismissed GOP's challenge to the jurisdiction and its claim to state immunity. He did so on the basis that the proceedings in Pakistan:

    "are oppressive and vexatious. The defendants have no legitimate interest in invoking Pakistan jurisdiction. It is, as I see it, a transparent device to seek to avoid liability under the guarantee by reference to defences which have little merit and that, in any event, are governed by English law. Furthermore they are being advanced in an inconvenient jurisdiction, and certainly not a neutral one, all in the context of an agreement in clause 1.9.3 not to object to English jurisdiction on the grounds of inconvenience."

20. On 14th November 2002 the Court of Appeal, which had granted permission to appeal on 24th April 2002, dismissed GOP's appeal on all grounds.

Sabah's applications for summary judgment

21. On 22nd February 2002 Sabah had applied for summary judgment. This application did not proceed pending the outcome in the Court of Appeal. In his fifth witness statement in the first action of 5th April 2002 Mr Steven Morris of Howard Kennedy, GOP's solicitors, set out the defences on which GOP relied.

22. On 19th June 2003 Sabah issued a further application for summary judgment on the basis of Amended Particulars of Claim that had been served in draft.

23. Neither application was ever the subject of a hearing. The second application was overtaken by the events to which I am about to refer.

GOP asserts that the first action was unauthorised

24. On 2nd December 2003, after receipt of Sabah's evidence, GOP applied to strike out the first action on the basis that it was begun without the "*due and lawful authority*" of Sabah. As a result Sabah's then solicitors came off the record.

25. GOP's solicitors regarded it as essential to see Sabah's statutory books of account in order to determine the authority issue. Sabah took the view that that was not necessary under the law of Pakistan but was content to disclose the books if they could be obtained. Unhappily the books were being held Sabah's former accountants and auditors who asserted a lien over them for their fees.

26. On 25th June 2004 a consent order was made by which it was agreed that Sabah would use "*reasonable and proper endeavours*" to secure the disclosure of the statutory books currently in or believed to be in the possession of the accountants. Morison J, gave a short judgment which recorded that both parties recognised the importance of obtaining access to the statutory books because inspection of them was likely to put an end to the dispute about authority to bring the proceedings.

27. On 11th August 2004 Sabah began proceedings in Karachi against the auditors seeking disclosure of the books. The auditors resisted that application on the grounds, inter alia, that the suit was filed without the lawful authority of Sabah, having been commenced on the basis of a power of attorney executed by the Chief Executive of Sabah in favour of certain advocates, and without a resolution of the board. On 24th November 2004 the Sindh High Court dismissed Sabah's claim on this ground. On 7th February 2006 that decision was reversed by the Sindh Court of Appeal upon the basis that Article 80 of Sabah's Articles empowered the Chief Executive to authorise legal proceedings without a board resolution. Sabah's claim to obtain the statutory books has, however, still not been determined and does not appear to have been progressed in any way since the judgment of 7th February 2006.

28. In the light of the allegations about want of authority, on 14th December 2005 Sabah passed further board resolutions ratifying the actions already taken and demands made and authorising the commencement of the present proceedings ("the second action").

The second action

29. The second action was commenced on 17th May 2006 and Points of Defence were served on 29th September 2006. This was the first time that GOP had, under the rules, been required to plead a defence. On 27th November 2006 GOP issued an application to strike out the second action on the ground that it was an abuse of process, given that the first action was still on foot.

30. On 27th January 2007 Simon J stayed the first action with liberty to apply. The application for summary judgment with which I am concerned was made on 15th May 2007.

GOP's defence

31. GOP's defence to the claim under the guarantee is essentially twofold. GOP claims:

    (i) to have been induced to execute the guarantee on 5th May 1996 by fraudulent misrepresentations in relation to the performance of Sabah's obligations as to Financial Closing;

    (ii) not to be bound by the Tompkins Award but, instead, to be entitled to have the claim under the guarantee proved against it afresh. If that exercise is undertaken it will, GOP says, be apparent that KESC was not liable for damages for breach of the PPA as alleged.

The central issue

32. The question for decision is whether GOP has any real prospect of succeeding in either of those defences.

The history of the Karachi Project

33. Before addressing the central issue it is necessary to recount some more of the history so far as it appears from the material before the Court. The Karachi project came about as a result of a policy on power ("the power policy") announced by GOP in March 1994 which was designed to attract investors from the private sector to build and operate power plants in Pakistan in order to make up for an acute shortage of electrical power from public sector sources. The power policy came to be implemented by the Private Power and Infrastructure Board ("the Board") on behalf of GOP. Sabah Malaysia became interested in investing in the project and identified a site in Karachi. The site was owned by the Port Qasim Authority.

34. On 19th July 1994 Sabah Malaysia completed an application form in respect of the Karachi project which it sent to the Board. In it Sabah Malaysia indicated that it was the 100% sponsor of the project with a $ 60 million equity share and that the loan finance would be $ 200 million. It indicated, in two different places on the form, that "*Lenders approached, discussions held*" and "*Funding bank identified and discussions held*". The form also specified, under the heading "*Schedule*", October 1994 as the date of Financial Closure.

35. On 18th September 1994 the Board issued a Letter of Interest to "*M/s Sabah Shipyard/Coastal Power (Pvt) Ltd,*[1] *c/o Sabah Shipyard SDN BHD)*", confirming GOP's interest in Phase 1 of Sabah Malaysia's proposal for a barge mounted power plant of 144 MW capacity subject to, inter alia:

"iii) 100% project financing will be arranged from off-shore sources."

The Letter advised the recipient to provide a Performance Guarantee as per the format provided in the documents package in the amount of Rs 100,000 per MW. That Performance Guarantee was issued by the BOA on 29th September 1994 in the sum of 14.4 million rupees. By the Performance Guarantee the BOA promised to pay the full amount of the guarantee on first demand if Sabah Malaysia defaulted under the Letter of Support ("LOS") referred to in the next paragraph), the PPA or the IA. Such default would include a failure to achieve Financial Closing no later than 6 months after the date of the LOS.

36. On 1st January 1995 the Board issued to Sabah Malaysia an LOS for a 144 MW plant. That letter gave Sabah Malaysia permission to design, finance, insure, build, own, operate and maintain the plant. The letter set out a number of detailed conditions on the basis of which it was granted. Amongst these were the following:

(i) within six weeks Sabah Malaysia was to negotiate and sign the Implementation, Power Purchase and Fuel Supply Agreements as per standardised drafts;

(ii) Sabah Malaysia was to achieve Financial Closing (as defined in the standardized Implementation Agreement) for the project within six months of the LOS, failing which the GOP could enforce the Performance Guarantee in full;

(iii) Sabah Malaysia was to incorporate a public limited company in Pakistan for the purpose of carrying out the whole of the project, and, after its incorporation, Sabah Malaysia's rights under the LOS would be assigned to it;

(iv) 100% project financing would be arranged from off-shore sources;

(v) the equity contribution to the project would be not less than 20% of the total capital cost, and commitments for such equity closing were to be provided at Financial Closing in form and substance satisfactory to GOP and the Lenders.

37. In January 1995 the project was increased in size so as to provide for 288 MW capacity. On 13th February 1995 a further Performance Guarantee for Rs 14.4 million was issued by BOA on behalf of Sabah Malaysia (on terms which were later revised). On 22nd June 1995 GOP sent Sabah Malaysia an Addendum to the LOS covering a 288 MW plant.

38. An extension of time for Financial Closing was granted and it became 28th March 1996, the date specified in the IA

39. On 8th July 1995, for reasons which are not clear, a Memorandum of Understanding was signed between Sabah Malaysia and GOP confirming GOP's full support for the project in accordance with the LOI/LOS. On 7th December 1995 Sabah was incorporated.

Submission of documents for Financial Closing

40. In a letter of 19th December 1995 Sabah submitted to the Board "*for the purpose of financial closing*" a number of documents which were said to "*evidence the financing for the completion of the Complex and commitment of equity*" and which included the following:

(a) A letter from Westinghouse Electric S.A. ("Westinghouse") dated 15th December 1995 which confirmed that it had delivered equipment [4 combustion turbines] and services to Sabah Malaysia in relation to the 288 MW Karachi project and had received payment in excess of $ 60 million in consideration thereof.

(b) A letter from Sabah Malaysia to Sabah in connection with the $ 60 million equity share; see paragraph 41.

(c) A letter of commitment from M-W indicating a preparedness to provide a 13 year amortising term loan of $ 200 million under the terms and conditions set out in an attached term sheet or to guarantee the same. The term sheet provided for Westmont Industries to be the Guarantor.

(d) A letter from Sabah Malaysia to Sabah, accepted by Sabah in which Sabah Malaysia indicated that it was prepared to provide Sabah with a 30 year $ 40 million facility, subordinated to the M-W Loan or guarantee such financing by others.

41. Letter (b) included the following:

"In consideration of the deposit of the following sums by your following shareholder companies with us in conjunction with the down payment of US$ 60 million to Westinghouse Electric S.A. for the purchase of equipment and related services for the abovementioned 288 MW Barge Mounted Power Plant:

Marubeni Corporation	*US $ 20 million*
Marubeni Westmont Pte Ltd	*US $ 10 million*
Westmont Industries Berhad	*US $ 10 million*

We hereby confirm that the said sum of US $ 60 million will be credited with Sabah Shipyard (Pakistan) Ltd in the following proportions in due course:

Marubeni Corporation	*US $ 20 million*

[1] Whether a company of this name, or the name Coastal Power (Pvt) Ltd, ever existed is unclear

Sabah Shipyard Sd Bhd	*US $ 20 million*
Marubeni Westmont Pte Ltd	*US $ 10 million*
Westmont Industries Berhad	*US $ 10 million"*

42. On 8th February 1996 the Qasim Port Authority issued a letter of intent to Sabah Malaysia indicating its intention to lease the site to it for 50 years. Possession of the site was given to Sabah on 6th March 1996. In March 1996 the IA, FSA and PPA were all signed.

43. There was an issue between Sabah and the Board as to whether Financial Closing had been achieved by 19th December 1995.

44. By a letter from Sabah to the Board dated 26th March 2006 Sabah submitted the "*Financial Close Documents as per attached list, which together with the said documents submitted on 19th December 1995 evidence the financing for the completion of the Complex and commitment of equity*". The documents included a letter to the Board signed on behalf of Sabah and M-W confirming that the equity commitment to the project of $ 60 million had been fully funded, and new commitment letters from M-W and Sabah Malaysia to Sabah confirming their commitments of 19th December 1995 in respect of the $ 200 million and $ 40 million loans.

45. Also provided by 26th March 1996 were two documents entitled "*Financing Agreement*" each dated 15th March 1996. The first was an agreement between M-W and Sabah under which M-W promised to lend Sabah $ 200 million for the purpose of the Karachi project. The second was an agreement between Sabah Malaysia and Sabah whereby Sabah Malaysia promised to lend Sabah $ 40 million for the same purpose.

46. On 18th March 1996, for reasons which are not apparent, Westmont Industries, Marubeni and M-W appear to have transferred all of their shares in Sabah to Sabah Malaysia, as appears from Sabah's Register of Members.

Financial Closing

47. Financial Closing purportedly took place on 26th March 2006. The BOA standby letter of credit referred to in paragraph 13 in the sum of $ 6.84 million was issued in favour of KESC on 4th April 1996. On 17th April 1996 GOP wrote to Sabah Malaysia acknowledging that Financial Closing had been achieved.

48. On 22nd April Sabah entered into an Engineering, Procurement and Construction Contract with Sabah Malaysia under which Sabah Malaysia agreed to carry out the project for $ 275 million.

49. On 7th May 1996 GOP sent a letter to Sabah Malaysia enclosing the guarantee.

50. On 24th and 28th May 1996 Sabah and M-W purported to confirm that all the pre-conditions to the drawdown of the Loan as contained in the Financing Agreements of 15th March 1996 had been satisfied.

Problems with the site

51. A group called the Fels Jaya Group ("Fels Jaya"), which was an international power provider, claimed that it had a lease of about 40% of the site from the Government of Sindh, which appears not to have owned the land. In August 1996 Fels Jaya obtained an injunction against the Board, the Government of Sindh and the Qasim Port Authority requiring them not to take any steps detrimental to its rights and interests. On 14th May 1997, after Sabah had applied (on 22nd April 1997) to be joined as a party to the proceedings, the injunction was set aside; and on 22nd May 1997 Sabah obtained a lease of the site from the Port Authority. Fels Jaya lodged an appeal against the decision setting aside the injunction but it appears neither to have been heard nor dismissed.

52. No work appears to have been undertaken on the site from 6th March 1996 onwards.

53. The PPA defined the "*Required Commercial Operations Date*" ("RCOD") as being 20 months after Financial Closing. That date was 26th November 1997. The Commercial Operations Date ("COD") was the day after the date on which the complex was commissioned. If the COD was more than 15 months after 26th November 1997 (i.e. after 26th February 1999) KESC was entitled to terminate the PPA.

54. On 17th October 1997 Sabah asked the Board for an extension of the RCOD for 14 months on the basis of an alleged Force Majeure Event pursuant to Article XIII of the PPA. The event relied upon was the obtaining of an injunction by Fels Jaya and the subsequent appeal against its discharge. The Board refused any extension on the basis that the litigation relating to the site was not a Force Majeure Event (which exists only if events or circumstances beyond the control of Sabah have materially and adversely affected Sabah's performance under the PPA and those events or circumstances could not have been prevented or remedied through the exercise of diligence and reasonable care) and that Sabah had failed to give the notice required under Article 13.2 of the PPA.

55. KESC also relied on Article 13.4 of the PPA which provides that no relief including the extension of performance deadlines would be granted to Sabah to the extent that such failure or delay would, nevertheless, have been experienced by Sabah if the Force Majeure Event relied upon had not occurred.

56. On 15th January 1998 KESC demanded $ 114,000 from BOA under the BOA letter of credit, being liquidated damages from 26th November 1997 to 30th November 1997 consequent upon the RCOD not having been achieved by 26th November 1997. Similar demands of $ 684,000 per month were made for each month thereafter until the amount claimed reached the $ 6.84 million value of the credit. BOA paid KESC the amount demanded, following the commencement of Court proceedings, in early July 1999,

57. On 9th July 1998 the Board gave Sabah notice of intention to terminate the IA on the ground that Sabah had failed to prosecute the Project in a diligent manner, which was one of the Company Events of Default under the IA.

58. On 19th November 1998 GOP gave Sabah notice terminating the IA. This effectively terminated the PPA.

59. On 9th August 1999 Westmont Industries was the subject of a Scheme of Arrangement.

The GOP and KESC Arbitrations

60. On 7th December 1998 Sabah lodged with the ICC a request for arbitration under the IA. One of the claims that Sabah made in that arbitration ("the first GOP arbitration") was for payment of the $ 6.84 million drawn by KESC under the BOA letter of credit. That was, however, only a small part of the total claim which, as amended, was for approximately $ 510 million as damages for GOP's wrongful termination of the IA. The arbitrator in the first GOP arbitration was Mr Derek Firth ("Mr Firth"). Sabah lodged its request for arbitration under the PPA ("the KESC arbitration") on the same day.

61. The Tompkins Award was issued on 8th December 2000. Sir David held (a) that the Fels Jaya injunction and appeal constituted Force Majeure Events under Article 13.1 of the PPA; (b) that non-compliance with the time and form requirements for the giving of notice under Article 13.2 did not prevent KESC from relying on those events as justifying an extension of the RCOD; (c) that Sabah was entitled to have the RCOD extended from 26th November 1997 to 18th December 1998 and (d) that KESC was in breach of the PPA in (i) refusing to extend the RCOD, (ii) claiming liquidated damages and obtaining payment under the BOA letter of credit, (iii) in drawing on the BOA letter of credit in respect of amounts that were in dispute and (iv) providing a certificate to the BOA that failed to disclose that the whole of the amount claimed was disputed.

62. As part of his reasoning leading to the Award Sir David held that the Fels Jaya injunction and appeal prevented drawdown of the M-W loan because it was a condition precedent to that drawdown that Sabah had a lease of the site. (paragraph 76 of the Award). However, if that was so (as it was), the confirmation by Sabah Malaysia and M-W to Sabah in May 1996 (see paragraph 50 above) that the pre-conditions to drawdown of the loans contained in the Finance Agreements had been satisfied was incorrect.

63. On 28th January 2002 GOP filed its defence in the GOP arbitration with accompanying documents. GOP's defence, included averments (i) that, whilst $ 20 million of the equity had been subscribed by treating a payment made by Sabah Malaysia to Westinghouse as the consideration for the issue of the shares, in fact no such consideration had been received by Westinghouse from Sabah Malaysia nor had shares worth $ 60 million been issued (ii) that the loan agreements for $ 200 million were "*mere eyewash obtained by [Sabah] to misled [GOP]*". By the time of the defence in the first GOP arbitration GOP had obtained a considerable amount of material that was not before Sir David Tompkins, much of it from public records in Malaysia and Singapore.

64. Thereafter Sabah failed to provide or guarantee an advance of costs of $ 80,000 as required by the ICC Court following an amendment by Sabah to increase its claim. On or by 2nd April 2002 Sabah's claims in the GOP arbitration were, under the ICC rules, "*considered as withdrawn*". Sabah was so informed on 4th April. Sabah wrote to the ICC Secretariat seeking immediate reinstatement of its claim but that request was out of time. That notwithstanding, it has always been open to Sabah to make a new request for arbitration. Sabah has not done so.

65. One effect of the deemed withdrawal of Sabah's claims was that GOP's application for specific discovery of 16th February 2002 and its application to the arbitrator on 20th March 2002 for a peremptory order lapsed.

66. Under the ICC's rules all the arbitrators' powers in respect of the first arbitration apparently lapsed when Sabah's claims were considered as withdrawn.[2] In order to seek to recover its costs of the first GOP arbitration it was, therefore, necessary for GOP to commence a second arbitration ("the second GOP arbitration"), which it did on 12th August 2002.

67. On 16th December 2004 Mr Firth, who was also the arbitrator in the second GOP arbitration held that GOP was entitled to $ 442,030 being the GOP's costs in the first GOP arbitration as damages for Sabah's breach of the IA, together with GOP's costs of the second GOP arbitration.

68. In the course of his award ("the Firth Award") Mr Firth made a number of observations which are potentially relevant to the present case.

69. Sabah has sought to appeal to the High Court of the Republic of Singapore against the Firth Award upon the basis that he decided matters which he was not asked to decide and exceeded the ambit of his appointment. It has, I was told, still not proved possible effectively to serve the application to appeal on GOP. Sabah claims that this is on account of various technical points on service taken by GOP.

70. On 12th August 2005 GOP issued a petition in the High Court of Sindh at Karachi seeking to wind Sabah up. On 13th August 2007 the High Court of Sindh allowed the petition. On 13th September 2007 the Pakistani Court of Appeal set aside the winding up order. .

The misrepresentation defence as pleaded

71. In its defence, signed by Leading Counsel, GOP contends that the letter of 19th December 1995 (see paragraph 40 above) contained expressly or by necessary implication a representation that the letters enclosed with that letter and the commitments described in them were bona fide commitments by companies able to perform and

[2] If so, it seems profoundly unsatisfactory that an arbitrator in an arbitration where the claim is deemed to be withdrawn cannot deal, in that arbitration, with the costs involved.

satisfy the commitments, and that Sabah so believed and had reasonable grounds to believe. Those representations were continuing representations on the basis of which GOP executed the guarantee.

72. GOP claims that those misrepresentations were false because:
(a) Sabah Malaysia, M-W and Westmont Industries were at no material time capable of providing the capital indicated in the letters;
(b) Mr Chong, who signed the letter of 15th December from Sabah Malaysia and was, as director and/or shareholder of the three companies, deeply involved with the operations of these companies, and knew that the companies lacked the financial resources or the authority necessary to make the funds committed available; and
(c) there were no or no reasonable grounds to think that the companies were able to provide the capital indicated in the letters.

73. The basis upon which the representations relied on are said to be false is set out in the Points of Defence. What follows is derived from that document and some of the material referred to in it.

74. Firstly, reliance is place on the alleged fact that, when issues of financing arose after December 1995, Sabah never referred to the three companies nor did it seek any material funding from them.

75. Secondly, as to the $ 200 million M-W commitment, M-W was a joint venture company set up by three other companies being (i) Marubeni, (ii) Marubeni Singapore Pte Ltd "("Marubeni Singapore") and (iii) Westmont Holdings Sdn Bhd ("Westmont Holdings"). The two Marubeni corporations between them owned and controlled a 51% shareholding and Westmont Holdings owned and controlled a 49% shareholding in M-W. The purpose of M-W, the joint venture company, was to act as exclusive supplier to the Westmont Group of companies of steel material, plant and equipment and raw materials for steel making.

76. The rights and obligations of the shareholders of M-W were governed by a Shareholders' Agreement dated 28th April 1995 which established the terms of M-W's Articles. Those Articles required that functions such as the lending of money not in connection with the ordinary course of business of the company's business required the unanimous consent of the directors present or by proxy at a quorate meeting. In fact the purported M-W loan was unknown to Marubeni Corporation; and no consent was ever given for the making of a loan to Sabah in any amount, let alone $ 200 million which M-W did not have the ability to lend. Marubeni could have provided the capital, but it did not even know of the Karachi project - as Mr Chong knew or ought to have known.

77. Thirdly, as to the letter from Westinghouse, it is alleged, that, whilst that letter represented that a normal commercial arrangement had been concluded between Westinghouse and Sabah Malaysia for the purchase of equipment, what actually happened was different. By a purported agreement dated 3rd August 1994 between Westinghouse and Wing Tiek, Westinghouse agreed to sell to Wing Tiek two combustion turbines for $ 27,773,000. According to an affidavit of Mr Chinn on behalf of Westinghouse in the Malaysian proceedings – see paragraph 79 below – these turbines were delivered to Sabah Malaysia. At that time the turbines were not dedicated to the Karachi project but were probably intended for the performance of an agreement made between Sabah Malaysia and Lynwood Development Ltd ("Lynwood") of 22nd September 1994 to construct and deliver to Lynwood a 288 MW barge mounted power plant

78. By what purported to be an agreement dated 14th December 1994 between Wing Tiek and Westinghouse ("the Westinghouse Agreement") generating equipment, including combustion turbines, transformers, a heat recovery steam generator and steam turbines, was to be supplied by Westinghouse to Sabah Malaysia in relation to the Karachi project at a contract price of $ 130 million, with part of Westinghouse's obligations treated as performed by the earlier delivery of the two combustion turbines. Much but not all of this equipment was supplied to Sabah Malaysia. But, according to an affidavit of 14th March 2000 of Mr Gaffoor, the then managing director of Sabah Malaysia, the Westinghouse agreement is void and unenforceable - see paragraph 40 – due to various breaches of the Singapore Companies Act.

79. Mr Gaffoor's affidavit was sworn in proceedings before the High Court of Malaysia. Wing Tiek had on 14th February 1998 obtained an ex parte injunction restraining Sabah Malaysia from dealing with two barges containing four gas turbine generators. The trigger for the application for this injunction appears to have been the issue of an application by Westmont Industries and Sabah Malaysia to the Court to convene creditors' meetings in connection with two proposed schemes of arrangement pursuant to which the barge mounted power plants, which were in Sabah Malaysia's shipyard, would be sold to raise money to pay off creditors, and the granting of an order to that effect on 4th February 1998. There was a dispute in those proceedings as to whether the equipment delivered by Westinghouse belonged to Westinghouse, Wing Tiek or Sabah Malaysia.

80. It appears from paragraph 41 of Mr Gaffoor's affidavit that Wing Tiek has, itself, alleged in an arbitration brought against it by Westinghouse that the Westinghouse Agreement was void and unenforceable for a number of reasons (not sanctioned by the shareholders or the board, executed by the managing director in excess of those powers, a disguised loan by Wing Tiek to Sabah Malaysia, etc): see Mr Morris' 3rd WS, paragraph 115.ii.

81. There is said to have been an oral agreement between the general manager of Sabah Malaysia and Wing Tiek that Wing Tiek would sell the equipment purchased from Westinghouse to Sabah Malaysia but Mr Gaffoor disputes the existence of that agreement and asserts that any such agreement was void and unenforceable: paragraphs 43 and 44 of his affidavit.

82. GOP also relies on the presentation to the Board of the two Financing Agreements of 15th March 1996 as constituting an express or implied representation that the loans the subject of those documents were bona fide loans by companies able and willing to advance the sums in question.

83. But, so GOP contends, neither Sabah Malaysia nor M-W were capable, or reasonably believed to be capable, of providing the capital indicated in the letters or the Financing Agreements. M-W, in particular had neither the power nor the ability to lend money (see paragraph 76). The Financing Agreements were shams. The Sabah Malaysia and M-W commitments were or ought to have been known by Sabah, Sabah Malaysia and Mr Chong not to provide any sufficiently sound financial basis for Financial Closing. They were held out as providing such a basis as part of a deceitful misrepresentation to avoid the Board calling on the Performance Guarantee. If the Board had been told the truth about Sabah's financial circumstances GOP would not have executed the guarantee and would have called on the Performance Guarantee.

84. The defence is developed in a very long third witness statement of Mr Morris of June 2007.

Sabah's criticism of GOP's defence

85. Mr Stanley Brodie QC for Sabah submits that GOP has no real prospect of showing that it can avoid its liabilities under the guarantee on the grounds that it was induced to enter into it by a fraudulent, or any other, misrepresentation. Firstly, as he submits, the documents relied upon by GOP do not, in truth, contain anything that, on proper analysis, amounts to a representation. Secondly, there is no realistic prospect of Sabah establishing by admissible evidence at a trial that any misrepresentation made was false. Thirdly, there is no basis for saying that GOP was induced to enter into the guarantee as a result of any alleged misrepresentation.

Representations

86. The letter of December 19th 1995 submits a number of documents, which consist, in the case of the letter from M-W and the second letter from Sabah Malaysia, of statements of preparedness to provide finance, and, in the case of the letter from Westinghouse and the first letter from Sabah Malaysia, of confirmation of the delivery of $ 60 million of equipment together with an explanation as to how the amounts paid by the shareholders of Sabah for the purpose of acquiring that equipment would be treated as credited by Sabah to its shareholders.

87. An entrepreneur who produces to his potential employer documents detailing the financial commitments he has received, does not, in doing so, usually warrant the ability of his financiers to provide him with the promised funds. Were it so, he could find himself liable if, without his knowledge, they turned out not to have the funds that he thought they had. But, in providing such details, he is likely impliedly to represent that, as far as he is aware, the commitments made to him are genuine commitments which the financiers are able to fulfil; or, to put it another way, that as far as he knows and believes the commitments are genuine ones which the lenders can and will carry out. In addition, if he is in a far stronger position than the employer to know the true position, the implied representation may be that he has reasonable grounds for his belief.

88. It seems to me well arguable that the submission by the letter of 19th December 1995 "*for the purpose of financial closing*" of "*documents which evidence the financing for the completion of the Complex*" together with the submission of the two Financing Agreements of 15th March 1996 contain just such implied representations in respect of the commitments that were the subject of those documents.

89. Mr Brodie submitted that any representation of the kind alleged would have been unnecessary because:

(a) it would have been pointless for Sabah to sign the IA and other agreements, provide a letter of credit for $ 6.84 million under the PPA, and embark upon the works if the necessary finance was in doubt;

(b) GOP recognised, as is apparent from the requirements contained in the original Application Form, that it needed to do its own due diligence as to the financial competence of Sabah and its backers; and it is to be inferred that it must have made its own assessment of the proposed lenders, as a result of which on 17th April 1996 it acknowledged that Financial Closing had occurred.

90. As to (i) it is obviously possible that Sabah signed the IA in the hope that it would be able to raise the necessary finance when it did not have it at the time. As to (ii) it is no answer to a claim in misrepresentation that the innocent party could and should have discovered the truth with due diligence: ***Redgrave v Hurd*** [1881] 20 Ch D 1; nor that GOP was induced to accept that Financial Closing had taken place by matters in addition to the representations relied on: ***Standard Chartered Bank v Pakistan National Shipping Corp*** [2003] 1 AC 959 at paras 14-17.

Falsity

91. Mr Timothy Young QC, for GOP, who drafted the defence, submits that it is far from fanciful to think that GOP can establish, to the necessarily high standard, that the representations impliedly made were untrue, and known by Sabah to be so. In this respect he refers to the decision of Mr Firth in the second GOP arbitration. In the Firth Award Mr Firth found that there was a substantial case of misrepresentation and improper conduct for Sabah to answer.

92. In the second GOP arbitration Mr Firth first determined that he had jurisdiction to entertain a claim for costs incurred in respect of the first arbitration. His award in that respect was upheld by Judith Parakash J in the High Court in Singapore. On the merits of the question as to who should bear the costs, he decided that one of the questions was: why did Sabah not simply reintroduce its earlier claim? GOP submitted to him that Sabah did not do so because Sabah's claim in the first GOP arbitration that it was prevented from performing its obligations under the IA was a smokescreen to hide the fact that in truth it was not able to perform those obligations. GOP alleged, amongst other things, he records, firstly that Sabah and Sabah Malaysia had no conceivable capability

of performing their obligations and that Westinghouse the principal supplier was owed over $ 80 million and had suspended supply from March 1997. Secondly, it was alleged that virtually all of the apparent funding in the form of a loan facility from M-W of $ 200 million and a loan facility from Sabah Malaysia of $ 40 million was apparently convincing but in fact illusory.

93. Mr Firth decided that there was prima facie evidence on the balance of probabilities to support both those contentions. In particular he decided the following:

(a) the shareholder equity promised appeared to have been based on prior expenditure for plant; but full payment did not appear to have been made for the plant by Sabah Malaysia which did not transfer funds or goods in specie to Sabah;

(b) the Sabah Malaysia advance appeared to be outside the capability of Sabah Malaysia;

(c) the M-W promised facility did not appear to have been permitted either by the company's constitutional documents or the Shareholders' Agreement. In March 1997 the Board of M-W had become deadlocked and the company dysfunctional.

(d) throughout the period from 1996 to 22nd June 1998 when Westinghouse lodged a request for Arbitration in respect of debts owed to it by Sabah Malaysia, no mention was ever made to Westinghouse that Sabah would have access to a line of credit of $ 200 million given by that company on 15th March 1996.

(e) It appeared that Mr Chong pleaded guilty on 25th April 2000 to charges brought by the Malaysian Securities Commission for furnishing misleading information to the Kuala Lumpur Stock Exchange for the purpose of deceiving the public in relation to the affairs of Westmont Industries.

94. In relation to point (c) Mr Firth referred to an affidavit sworn on 17 September 1998 by Mr Eisho Kunitomo, General Manager, International Legal Section, Legal Department of Marubeni Corporation in support of a petition made by Marubeni in Singapore to wind up M-W, which was wound up on 23rd March 1999. Mr Firth described that affidavit thus:

"*… the deponent sets out over 39 pages a detailed account of what, if true, can only be described as appalling corporate conduct by the proprietors of the Sabah Group. There are detailed allegations of fraud, but even if the notion of fraud is discounted, there is a factual history of tens of millions of dollars being obtained from legitimate international banks and funnelled, effectively, to companies controlled by the Sabah proprietors. The promise of the US200m facility in favour of Sabah appears to have been given without any semblance of legitimate authority; and the company appears to have had no prospect whatever of being in a position to honour the promise*".

95. Mr Firth also said this:

"*All of this material is detailed and authentic (coming mainly from public records) and, on the face of it, quite damning of Sabah's position. Also, it might be said that if there is a straightforward explanation for the prejudicial inferences to be drawn from all of this material, it would have been very easy for Sabah to have given it, with or without the assistance of lawyers. Also, if there were not any difficulties for Sabah of the kind alleged, it is impossible to understand why Sabah did not simply reintroduce its claim as it was quite entitled to do; and for relatively modest cost*".

96. Mr Young submits that the misrepresentation defence can scarcely be regarded as unrealistic in the light of the observations made by the arbitrator selected to determine the disputes between Sabah and GOP; particularly when, now as then, there is no affidavit or witness statement from anyone behind Sabah to dispel the inferences which are prompted by the material to which Mr Firth refers.

97. Mr Firth decided that Sabah was liable to pay the costs of the first arbitration on the grounds that the costs were:

(a) an expense incurred by GOP as the result of conduct of Sabah not contemplated or justified by the IA and that Sabah had an obligation to indemnify GOP for the cost it had unnecessarily incurred at the instigation of Sabah; and

(b) payable as damages for breach of the obligation on each party under clause 2.6. of the IA to carry out their obligations and duties under it in good faith. Sabah's conduct in presenting the claim "*in the circumstances now exposed by*" GOP was a breach of that obligation.

He awarded GOP the costs of the first arbitration in the sum of $ 442,030.

Mr Kunitomo's affidavit

98. Mr Firth's description of Kunitomo's affidavit is an accurate one, and his comment on its significance is apt. What follows is a summary of some of its contents.

99. In his affidavit Mr Kunitomo recounts how in April 1995 an existing company was used as the vehicle for a joint venture between Marubeni and Westmont Holdings. The company was renamed Marubeni-Westmont Pte Ltd ("M-W"). The existing directors resigned and two new ones were appointed. Westmont Holdings, Marubeni and Marubeni Singapore, Marubeni's wholly owned subsidiary, entered into the Shareholders' Agreement. The capital was increased and issued so that Marubeni owned 41%, Marubeni Singapore 10% and Westmont 49%.

100. Marubeni and Marubeni Singapore never agreed that their role in the joint venture was to provide financial banking and support for M-W or that Marubeni's role was to enable M-W to secure banking facilities.

101. The Shareholders' Agreement provided that M-W would act as exclusive suppliers to the Westmont Group of companies, including Sabah Malaysia and the National Steel Corporation ("NSC"), a Philippines company, and

Wing Tiek, and its group of companies, which was part of the Westmont Group, of steel and steel related material and equipment.

102. M-W began to carry on the businesses specified in the Shareholders' Agreement. Until December 1996 70% of sales turnover was to NSC. In December 1996 Westmont Holdings sold its interest in NSC, which resulted in a dramatic reduction in M-W's turnover. Sales to other companies in the Westmont Group also fell very dramatically because of deteriorating economic conditions and the deteriorating financial state of the Westmont group. As a result M-W ceased to do any business after December 1997. In 1998 Marubeni filed a petition in the High Court of Singapore to wind M-W up.

103. Mr Kunitomo goes on to record that, after the Shareholders' Agreement was entered into, Mr Abe, the then managing director of M-W, approached the Mitsubishi Bank Ltd ("MB"), which subsequently merged with Bank of Tokyo to become Bank of Tokyo Mitsubishi Ltd ("BOTM"), and MB by a letter of 25th July 1995 offered M-W banking facilities totalling $ 50,000,000, to be reviewed in July 1996. Marubeni provided, in October 1995, a Letter of Awareness effective until 31st March 1996 and another one in April 1996 effective until 31st March 1997.

104. M-W used letter of credit facilities granted by BOTM up to a maximum of about $ 40 million by March 1996. M-W was also granted facilities by Standard Chartered Bank ("SCB") between October 1995 and April 1997, which were used by M-W on three occasions, of which facilities Marubeni was unaware until February 1998. Marubeni was also unaware until then that a facility had been granted to M-W by Tokyo Bank ("TB") and that there was one draw down under that facility in the form of a letter of credit for $ 9.4 million.

105. Until April 1998 the only audited accounts of M-W available to Marubeni since the establishment of the joint venture were those for the year ending 31st March 1996. These showed a *credit balance* with banks in excess of $ 1 million and did not show amounts owed to any banks, although on that date, as it now transpired, SCB was owed more than RM 19 million (about $ 8.5. million) and BOTM more than $ 40 million.

106. On 2nd February 1998 a meeting took place between (i) one of Marubeni's directors, (ii) Mr Chong, the managing director of Westmont Holdings and (iii) Mr Abe, who was then one of the two directors of W-M. At this meeting Marubeni learnt for the first time (a) of the SCB and TB facilities; (b) that the total owing to BOTM, SCB, and TB by M-W was more than $ 42 million; (c) that M-W had paid $ 21.4 million to Wing Tiek under a letter of credit ostensibly for the purchase of the steel slabs in November 1995, which purchase did not in fact take place; (d) that M-W had made a loan to Wing Tiek Holdings Asia Inc ("WTHA"); and (e) that the total owed to M-W by companies in the Westmont Group in respect of amounts transferred to them amounted to $ 46 million. Mr Chong said that he would arrange for Westmont to repay the sums owed by the Group.

107. This discovery caused Marubeni to examine M-W's books and to carry out some investigations. (It also led to the resignation of Mr Abe and Mr Doray, the other director). The investigators found that in November 1995 M-W issued a letter of credit for about $ 21.14 million for 70,000 tons of steel slabs purportedly sold by Wing Tiek. On 20th November 1995 M-W purported to enter into a contract with Wing Tiek for the purchase of the steel slabs for a total price of $ 21.4 million and on 22nd November 1995 purported to enter into a contract with NSC for the sale of the same steel for $ 21.19 million. Wing Tiek submitted under the letter of credit an invoice of 23rd November 1995 and its delivery order addressed to M-W for the steel with what appeared to be the signature of one of the then directors of M-W acknowledging receipt. But, according to the other director of M-W, no goods were ever sold or delivered to M-W or NSC. On 12th February 1998 Wing Tiek acknowledged that it owed M-W the $ 21.4 million it had received.

108. Marubeni also discovered that M-W had used the credit facilities granted by MB and SCB to transfer funds to WTHA and to other companies including a company called Puncack International Consultancy Pte Ltd ("Puncack"), and to Westmont Holdings, when there was no apparent justification for making the remittance, no goods or services having been supplied therefore, as was confirmed by subsequent acknowledgements of obligations to repay the amounts in question (in the case of Puncack the amount was later reflected in M-W's accounts as a debt due from a company incorporated in the BVI).

109. In short M-W had, from not long after the inception of the joint venture, been used as an improper means of financing the Westmont Group. The investigators also found that M-W had been trading through three stock broking firms in significant numbers of shares in Wing Tiek, even though M-W was not established as an investment holding company.

110. Mr Kunitomo expressed the belief that some of the officers of M-W had, in complicity with other persons, concealed from Marubeni the true state of affairs at M-W, and that the revelations made in February 1998 were only made because it was impossible to continue the concealment for much longer.

Sabah's submissions on the material relied on by GOP to show falsity

111. Mr Brodie submits that the material to which I have referred does not mean that there is a realistic prospect of proving in this Court that Sabah was guilty of fraudulent representation. Mr Firth's award went beyond determining what he had to decide. Mr Kunitomo was partisan since he was seeking, on behalf of his employer, to wind M-W up. His affidavit referred to affidavits sworn by others with which he disagreed and which the Court has not seen. It is doubtful whether he will ever come to give evidence in England. Mr Brodie also points out that Mr Kunitomo refers to the fact that M-W appeared to have entered into a commitment in March 1996 to lend $ 200 million to Sabah, without making any further comment upon that.

My conclusions on falsity

112. I take a different view. Whether or not Mr Firth exceeded his jurisdiction in making his Award (a matter which I do not decide but which does not seem to me to be the case) the material before him appears to me to have justified, or, at the least, arguably to have justified, his conclusions. Mr Kunitomo's evidence cannot be discarded simply because he was giving evidence in support of the petition of his employers, especially because much of it appears to be based upon objective facts which are either a matter of record or matters (such as the state of Marubeni's knowledge) of which he could be expected to be aware. Nor do I accept that it can be assumed that he would not give evidence before a court in this country or that his evidence would be valueless for the purpose of establishing fraud if it was given in writing.

113. In my judgment the material to which I have referred affords GOP a realistic prospect of establishing (a) that by tendering the letter of 19th December 1995 and its attachments and the Financing Agreements of 15th March 1996 Sabah impliedly made representations that, as far as it knew and believed the commitments contained in those letters were genuine ones and that it had reason to hold that belief; and (b) that M-W was not and could never have been believed by those behind Sabah, including in particular Mr Chong, to be able to provide $ 200 million of finance; and (c) that the same applies in respect of Sabah Malaysia and its $ 40 million facility.

114. A number of other matters add credence to the charge of fraudulent representation. Firstly, Sabah does not seem, after Financial Closing, ever to have sought to draw down any funding from the $ 200 million and $ 40 million facilities. Instead it sought finance from other sources including Exim bank, which arranged a $ 100 million facility: see paragraph 125 below. A letter of 3rd October 1997 from Mr Sio Kai Sing, a director of a company in the Westmont group, referred to that facility and to other financing being arranged, and to the difficulty of borrowing the balance of funding "*without which Exim are unwilling to release their portion of the loans*".

115. Secondly, although M-W sent a letter to Sabah on 28th May 1996 confirming that Sabah had satisfied all the preconditions to the drawdown of the $ 200 million loan, one of the conditions precedent to that loan namely the provision of a corporate guarantee from Westmont Industries appears never to have been fulfilled: see the letter of 6th May 1998 from Mr Walker, Sabah's then Chief Executive.

116. Thirdly, a document of February 1998 headed "*Questions on the Execution of Trust Deed*" ("the questions document"), which appears to be a Sabah Malaysia document written with a view to justifying a trust deed by which all the shares in Sabah were to be held on trust for Westmont Offshore, states that "*[Sabah] has never obtained any borrowings for the financing of the construction of the barges*". The questions document indicates that Sabah Malaysia did not have the ability to finance the project and indicates that the real financing for the project was coming from Westmont Offshore.

117. Fourthly, an internal Sabah Malaysia document of 24th March 1998 records that "*The largest loan of $ 200 million was from [M-W] which cannot be funded and therefore cannot be drawn down*".

118. Mr Brodie also relied on the fact that in the KESC arbitration, although issues were raised about Sabah's ability to finance and complete the project, the present misrepresentation claim was not raised. He also submits that it would be incongruous for Sabah to make the representations alleged in order, as is said to have been its motive, to avoid liability under the Performance Guarantee for 14.4 million rupees[3] (approximately equivalent to £ 200,000), given that once it entered into the IA and associated agreements Sabah would have to provide a letter of credit for the much larger figure of US $ 6.84 million.

119. As to the former, GOP was not a party to the KESC arbitration and, although it is a state owned company, in which at the time GOP owned majority shareholding, there is no evidence that it is, for all intents and purposes, the same as the GOP. Sir David Tompkins held that various matters strongly suggested "*that when it comes to significant matters relating to the PPA, [KESC] was subject to the direction and control of the Board*". But the extent to which GOP was involved in the KESC arbitration, if at all, is unclear. According to the evidence of Mr Akhtar of Amhurst Brown, GOP's solicitors in Pakistan, relayed through Mr Morris (paragraph 77) KESC did not consult or discuss the KESC arbitration with GOP, it being a routine matter with which GOP would not normally deal. Further it appears to be the case that the evidential material justifying the misrepresentation claim only came forward in the course of GOP's preparation for the first GOP arbitration.

120. As to the latter, it would, indeed, be incongruous for anyone to exchange a lesser for a greater liability in the absence of some countervailing benefit. But it is clearly possible that Sabah made false representations as to the availability of finance in March 1996 in the hope that, with the IA and associated agreements becoming no longer subject to termination in the absence of Financial Closing, real finance could successfully be found.

121. In addition, so far as the equity investment of $ 60 million is concerned, a letter from Westinghouse of 15th May 1996 confirmed to Sabah that Westinghouse had received in excess of $ 60 million for the delivery of four combustion turbine generators and auxiliary equipment. On 17th May 1996 Sabah sent that letter to the Board explaining that the equipment had been purchased through Wing Tiek and that payment had been received from Wing Tiek and "*Wing Tiek's associated company Marubeni*".

122. In the light of Mr Kunitomo's affidavit it is, however, open to doubt whether Marubeni and M-W ever made the $ 20 and $ 10 million equity investment attributed to them in the letter of 19th December 1995. In addition the

[3] Or perhaps 28.8 million rupees: see paragraph 37 above.

questions document (see paragraph 116) indicates that by its date (February 1998) $ 60 million worth of shares in Sabah had still not. been issued.

123. It is, also, unclear whether Sabah ever received the benefit of the $ 60 million of equipment. A Sabah Malaysia internal report of 24th March 1998 refers to the "*$60 million of equity [being] threatened because [Wing Tiek] has filed a suit claiming that [Sabah Malaysia] has not paid them for the gas turbine equipment.*" This is presumably a reference to the Malaysian proceedings.

124. It appears from the affidavit of Mr Chinn of Westinghouse filed in the Malaysian proceedings that Westinghouse shipped four combustion turbines to Sabah Malaysia and was paid $ 50,000,000, probably by or on behalf of Wing Tiek, and by December 1995 $ 60.723 million had been paid to Westinghouse. But by the time of Financial Closing Westinghouse was owed $ 50,250,000 and by March 1997, when Westinghouse suspended all further work on the contract, a further $ 37.227 million. Westinghouse claimed to be entitled to the equipment (or some of it) that was at Sabah Malaysia.

125. Lastly, Sabah Malaysia's ability to loan $ 40 million is open to serious question in view of (a) the problems that Wing Tiek appears to have had in being paid and paying Westinghouse; and (b) the fact that in February 1996 Sabah was seeking loan financing for the Project from other financial institutions: see the letter from Exim Bank of 20th February 1996 stating that it had raised $ 100 million for the project and Morris WS paragraphs 149 – 152. That lending was subject to certain conditions precedent, one of which was that Sabah was required to provide documentary evidence that it had entered into other agreements with other lenders to meet the difference between the $ 100 million and the construction costs of the Project (about $ 140 million) – a condition which Sabah would have had difficulty in fulfilling by producing documents purporting to show the $ 40 million and $ 200 million loan, which would lead Exim Bank to question why any further financing was being sought by Sabah.

Inducement

126. The IA required GOP to execute and deliver the guarantee at Financial Closing. It does not follow that the representations relied on cannot have induced the giving of the guarantee, even if they were made before the IA. Insofar as they were made before the IA was executed they could not only have induced the execution of that agreement but could also realistically be said to have had an effect which continued until Financial Closing and the execution of the guarantee. If the financing proffered was, to the knowledge of Sabah, not genuine and GOP had known that, it would be unlikely (to put it no higher) to have executed the guarantee, even if that exposed GOP to a claim for damages or specific performance of the obligation to guarantee. Such a claim would no doubt have been met with the contention that Sabah could not rely on its own wrong in securing the execution of the IA on the faith of false representations in order to assert that GOP was under an obligation to execute the guarantee.

127. Further the parties cannot have intended that Financial Closing would be achieved by the provision of documents which Sabah knew did not contain genuine financing commitments. An implied representation as to the genuineness of those commitments may, therefore, be said to amount to a representation as to the achievement of Financial Closing - the event upon which the requirement to give the guarantee is conditional - and, therefore to have induced the giving of the guarantee. The proffering of the two agreements of 15th March 1996 cannot have induced the making of the IA but can have induced the guarantee.

128. Mr Brodie observed, rightly, that there is before the Court no witness statement from someone on behalf of GOP, e.g. the Managing Director of the Board, dealing with GOP's reliance upon the alleged misrepresentations. That does not, in my judgment, mean that the misrepresentation defence is without real prospect of success. First, the defence, in which reliance is pleaded, is the subject of a statement of truth signed on behalf of GOP. Second, once a fraudulent representation is established the Court will probably infer that it was relied upon in the absence of evidence from Sabah to show that it was not.

Issue Estoppel

129. Sabah submitted that the GOP was estopped by reason of the fact that the misrepresentation point was not raised before Steel J or the Court of Appeal. In granting, and confirming the grant of, an anti-suit injunction, each Court relied on the jurisdiction clause in the guarantee. But the decision of neither Court involved a final judgment – a necessary ingredient of a plea of issue estoppel: ***"The Sennar (No 2)"*** [1985] AC 490, 499.

Entire Agreement

130. The guarantee has an entire agreement clause. But such a clause cannot, as Sabah accepts, exclude liability in the case of deceit unless the guarantee is very clearly worded and the deceit is not that of a party to the contract itself: ***HIH Casualty v Chase Manhattan Bank*** [2003] 2 Lloyd's Rep 61.

Affirmation and Laches

131. Sabah contends that, even if a defence of misrepresentation was otherwise available to GOP, GOP have affirmed the guarantee or are precluded by laches from treating it as void. It is sufficient to say that, in my judgment, GOP has a real prospect of showing that neither contention is well founded; in the first case upon the basis that the GOP has not affirmed the guarantee with knowledge of the facts giving it the right to avoid and its right to do so; in the second upon the basis that the circumstances are not such as would make it unjust for the GOP to rely upon the misrepresentation alleged, on account of the lapse of time.

132. Mr Brodie also relied upon the fact that the misrepresentation defence had not been raised before as an indication that it cannot have been believed to have a realistic chance of success. In this respect his best point was that the misrepresentation defence was not been raised before Steel J or the Court of Appeal, although the defence in the GOP first arbitration was filed at the end of January 2002. But, given the contents of that defence, the material that supports it, and Mr Firth's Award it is impossible to infer that GOP had no faith in it. Why such a defence was not referred to in the anti-suit injunction proceedings taking place at the same time is not clear. It may be that those advising GOP in London were not then aware, or fully aware, of the averments being raised in the second GOP arbitration and the material to support them, and/or that they took the view that the misrepresentation contention went to the defence as opposed to the issue as to where proceeding could or should be brought. Whatever the reason, the material that I have now seen, and upon which I have heard extensive submissions, satisfies me of the existence of a realistic defence.

Restitutio in integrum

133. Sabah's skeleton argument submitted that the putative defence was bound to fail because, even if the guarantee had been induced by representation, rescission was impossible because *restitutio in integrum* could not be achieved. The IA was entered into and the guarantee issued thereafter. On the footing that the guarantee was induced by a continuing misrepresentation, it seems to me debatable whether substantial restitution requires anything to be done in return for the avoidance of the guarantee; and, even if *restitutio in integrum* cannot be achieved, that may not be a fatal obstacle; and GOP may have a claim for damages in deceit in the amount of its liability under the guarantee: cp ***Halpern v Halpern*** [2007] 2 Lloyd's Rep 56..

***In re Kitchin* and "*The Vasso*"**

134. In addition to its case on misrepresentation GOP contends that it is, in any event, not bound by the findings in the Tompkins Award and that it is incumbent on Sabah to establish its case against GOP independently of that Award. Per contra, Mr Brodie submits that the guarantee is intended, and by its terms expressed, to be an absolute and unconditional security, that it is widely drafted so as to include an obligation to cover an award, and that it would lose much of its worth if it were otherwise.

135. The guarantee provides as follows:

"1.1. *Guarantee*

In consideration of [Sabah] having entered into the Power Purchase Agreement with KESC and the Fuel Supply Agreement with the Fuel Supplier, the Guarantor hereby irrevocably and unconditionally guarantees and promises to pay the Company any and every sum of money KESC and the Fuel Supplier are obligated to pay to [Sabah] under or pursuant to the Power Purchase Agreement and the Fuel Supply Agreement that KESC or the Fuel Supplier has failed to pay when due in accordance with the terms of those agreements, which obligation of the GOP shall include monetary damages arising out of any failure by KESC or the Fuel Supplier to perform its obligations under the Power Purchase Agreement or the Fuel Supply Agreement, respectively, to the extent that any failure to perform such obligations gives rise to monetary damages."

1.2 *Waiver of Defenses*

The obligations of the Guarantor under this Guarantee shall be absolute and unconditional and shall remain in full force and effect until all the covenants, terms, and agreements set forth in the Power Purchase Agreement, and the Fuel Supply Agreement have been completely discharged and performed, unless waived by [Sabah]in writing. The obligations of the Guarantor shall not be modified or impaired upon (and the Guarantor waives any defense to the performance of such obligations based upon) the happening from time to time of any event including the following:

…

1.2.4 *The bankruptcy, insolvency, or other failure or financial disability of KESC, the Fuel Supplier or [Sabah];*

…

1.2.9 *Any invalidity or unenforceability of the Implementation Agreement, the Power Purchase Agreement, or the Fuel Supply Agreement, or any of their respective provisions, terms or conditions; …*"

1.3. *Continuing Guarantee*

This Guarantee shall be a continuing security and, accordingly, shall extend to cover the balance due to [Sabah] at any time from KESC, or the Fuel Supplier, as the case may be, under each of the respective Agreements. No demand made by [Sabah] hereunder shall prejudice or restrict the right of [Sabah] to make further or other demands."

1.8. *No Set-off*

No set-off, counterclaim, reduction, or diminution of any obligation that the Guarantor has or may have against [Sabah] nor any right of subrogation that the Guarantor has or may have against [Sabah] shall be available to the Guarantor against [Sabah] in connection with any obligation of the Guarantor to [Sabah] under this Guarantee."

1.9 Submission to Jurisdiction: Service of Process

1.91 *Submission to Jurisdiction*

Each Party hereby consents to the jurisdiction of the Courts of England for any action filed by the other Party under this Agreement to resolve any dispute between the Parties and may be enforced in England except with respect to the

Protected Assets, as defined in the Implementation Agreement of the Guarantor. …

1.9.3 Waiver of Defence of Inconvenient Forum

Each Party waives any objection that it may now or hereafter have to the venue of any action or proceeding brought as consented to in this Section 1.9, and specifically waives any objection that any such action or proceeding was brought in any inconvenient forum and agrees not to plead or claim the same."

136. Mr Brodie submits that the provision that the guarantee is to "*include monetary damages arising out of any failure by KESC or the Fuel Supplier to perform its obligations under the Power Purchase Agreement or the Fuel Supply Agreement, respectively, to the extent that any failure to perform such obligations gives rise to monetary damages*" shows that the guarantee covers an award of damages made by an arbitrator.

137. In ***Re Kitchin*** [1881] 17 Ch. Div 668 Cantor, a firm of wine suppliers in Germany, appointed the Pelican Bottling Company ("Pelican"), an English firm, as its sole agent. Mr Kitchin was one of the two partners of Pelican. He retired and his son took his place. Pelican was thereafter a new firm consisting of the son and Mr Kitchin's original partner. Cantor obtained a guarantee of Pelican's obligations from Mr Kitchin. The agreement between the two firms contained an arbitration clause. By his guarantee Mr Kitchin undertook and guaranteed that all wines supplied by Cantor "*shall be duly paid for, and that [the agreement with Pelican] shall be otherwise duly performed in all respects on their part*". Cantor said that there had been breaches of the agreement by Pelican. An umpire awarded Cantor damages in respect of Pelican's failure to take the quantity of wine that it had contracted to take. Judgment was later entered against Pelican on the award.

138. The Court of Appeal held that, in the absence of a special agreement, a judgment or an award against a principal debtor is not binding on the surety and is not evidence against him. James, L.J. said this:

"There are a great number of things which by the agreement [Pelican] are bound to do; [Mr Kitchin] guarantees that they will do these things, and if they fail to do them, then he is liable in an action against him by Messrs Cantor for any damages which can be shown by legal evidence to have been caused them by that default. That is what he has agreed. It is contended that he is liable to pay any sum which an arbitrator shall say is the amount of the damages. The guarantee must be expressed in very clear words indeed before I could assent to a construction which might lead to the grossest injustice. ….If a surety chooses to make himself liable to pay what any person may say is the loss which the creditor has sustained, of course he can do so, and if he has entered into such a contract he must abide by it. But it would be a strong thing to say that he had done so, unless you find that he has said so in so many words. The arbitration is a proceeding to which he is no party; it is a proceeding between the creditor and the person who is alleged to have broken his contract, and if the surety is bound by it, any letter which the principal debtor had written, any expression he had used, or any step he had taken in the arbitration would be binding upon the surety. The principal debtor might entirely neglect to defend the surety properly in the arbitration; he might make admissions of various things which would be binding as against him, but which would not, in the absence of agreement, be binding as against the surety. It would be monstrous that a man, who is not bound by any admission of the principal debtor, should be bound by an agreement between the creditor and the principal debtor as to the mode in which the liability should be ascertained."

139. Lush, LJ, said that: *"You must find explicit words to make a person liable to pay any amount which may be awarded against a third person whether it be a jury, or a judge, or an arbitrator".*

140. Two things are to be noted. Firstly, Cantor's claim against Pelican was for damages for breach of contract. Secondly, the Court treated the close connection between the guarantor and the new partner, his son, as irrelevant. For the purposes of determining the meaning of the guarantee the guarantee had to be treated as if Mr Kitchin "had been an entire stranger".

141. In ***The "Vasso"*** [1979] 2 Lloyd's Rep 412 the "Vasso" was sold by the first plaintiff to a one-ship company of which the defendant, Mr Emmanuel Colocotronis, was the principal shareholder, and leased back on an eight year time charter to the second plaintiff. Mr Colocotronis guaranteed the due performance and payment by the Owners of all liabilities and obligations of the Owners under a number of agreements one of which was an addendum to the sale contract, which addendum contained a London Arbitration clause. The vessel stranded and was abandoned to underwriters. Mr Colocotronis recovered substantial insurance monies, in which, pursuant to the addendum, the plaintiffs claimed a share. The arbitrator – Mr Christopher Staughton, QC - made an award in favour of the plaintiffs and they attempted to recover the amount of the award under the guarantee. .

142. The plaintiffs claimed (i) that it was an implied term of the contract contained in the addendum that each party would pay any sum awarded by an arbitration tribunal established thereunder and (ii) that since Mr Colocotronis undertook and guaranteed the due performance and payment by the owners of their liabilities and obligations thereunder, he guaranteed that owners would honour the award. The implied term was not disputed. But, by reference to *Re Kitchin*, Goff.J, as he then was, held that the second part of the proposition was contrary to authority and could not be supported. He said:

"In truth, an arbitration clause which provides the machinery for resolving disputes arising between the parties to the contract has special characteristics which distinguishes it from the main obligations of the contract, as can be seen from the leading case of ***Heyman v Darwins*** *[1942] A.C. 356. The short answer is that, as a matter of construction a guarantee containing general words, as in the case of the guarantee of the defendant, although applicable generally to obligations of the principal debtor arising under the relevant agreement, does not apply to an obligation to honour an arbitration award".*

143. In my judgment, the principle established in ***Re Kitchin*** and confirmed in *The* ***"Vasso"*** is applicable here. I do not regard the fact that the clause extends to monetary damages arising out of a failure to perform obligations

under the agreement as amounting to the "*very clear words indeed*" required to make a surety liable to honour an award made against the principal. They are perfectly apt to make clear that the surety's obligation is not limited to paying any debts of the principal debtor but extends to paying any amount which the principal is bound to pay in respect of damages for breach of contract (as was the case in ***Re Kitchin*****).** Mr Brodie submits that the wording is directed to a judgment or award of damages. But the wording says nothing about the form of the damages that the guarantee is to cover other than that, so far as presently relevant, they must arise out of a failure by KESC "*to perform its obligations under the Power Purchase Agreement … to the extent that any failure to perform such obligations gives rise to monetary damages*"; and the Award itself is an order for the payment of a specific sum, giving rise to a debt.

144. Moreover, the guarantee and associated agreements were drafted by lawyers and governed by English law as the law of choice. The terms of the guarantee, such as those relating to waiver of defences (clause 1.2) and sovereign immunity (clause 2.6), show, as one would expect, a familiarity with applicable English law concepts. The decisions in ***Re Kitchin*** and ***The "Vasso"*** were, thus, part of the context in which the guarantee was drafted and executed. It would have been very easy to insert a provision that the guarantor's obligations extended to guaranteeing the performance of any Award against the principal or that any such award should be evidence (conclusive or otherwise) against the surety. The fact that, against that legal background, the clause fails to do so militates against a construction of the guarantee which would extend to coverage of an Award.

145. That conclusion is strengthened by the fact that other terms were agreed which did tie GOP in with determinations reached. Thus it was agreed by clause 9.7 (a)(i) that GOP would be bound (subject to some exceptions) by any settlement or waiver in writing by KESC of any dispute or breach under the PPA with respect to any issue or claim by Sabah based on the same facts or acts or omissions; and, by clause 9.7 (a) (ii) that a final non-appealable order issued in proceedings initiated by KESC and based on a claim for a breach of the PPA should be with prejudice to any proceedings against Sabah that GOP could otherwise bring for breach by Sabah of substantially the same obligations under the IA.

Under clause 1.3, upon which Mr Brodie placed some reliance, the guarantee extended to cover "*the balance due to [Sabah] at any time from KESC, or the Fuel Supplier, as the case may be, under each of the respective Agreements*". It was an implied obligation of KESC under the agreement to pay any sum awarded by the arbitrator. The balance due from KESC under the PPA may, therefore, be said to include the amount due under the Award. But in ***The Vasso*** the argument, advanced by Mr John Hobhouse, QC, that the guarantee covered the award because an obligation to honour it was implied in the principal debtor's agreement with the creditor, failed as being inconsistent with the ratio decidendi of ***Re Kitchin***, which requires very clear language. A guarantee that merely guarantees the principal debtor's obligations, or his performance, or the amount or balance due from the principal debtor is not sufficient to require the surety to honour an arbitration award.

146. Accordingly, as it seems to me, GOP is entitled to have the case proved against it and Sabah cannot rest its case on KESC's failure to honour the Tompkins Award to establish liability on GOP. At any rate it is arguable that that is so. That is not to say that evidence adduced in the Tompkins arbitration will not be admissible in the claim against the GOP. Whether it is or not will depend on the application of the English law of evidence.

147. I have not overlooked the fact that, in giving judgment in the anti-suit injunction hearing Steel J said the following:
"*In the course of his submissions, Mr Gruder developed a new justification for the institution of proceedings in Pakistan. This, as I understand it, was to the effect that the claimants could not rely on the arbitration award in seeking to enforce the guarantee, and needed to prove their case in the same way as KESC had in their arbitration. In support of that submission, he referred to the decision of the Court of Appeal in* ***ex parte Kitchin****, (1881) 17 Ch Div 668. This argument seemed to me to be misconceived. It is not in issue that the claimant must, if they wish to make good their claim contained in the claim form, rely upon the terms of the special agreement in the present case. The decision in* ***Kitchin,*** *where there was no special agreement, is not material.*" [4]

148. I take the judge to have been saying that Sabah would have to establish that, as a matter of construction, the guarantee covered the Award in order to succeed in advancing the claim made in the Claim Form, so that an argument in favour of Pakistani jurisdiction based on ***Re Kitchin*** in which there was nothing that could amount to a special agreement, was misconceived. In essence he was saying that GOP was raising points of construction, which did not justify proceeding in Pakistan. At an earlier stage in his judgment, however, he had described GOP's contention that the guarantee did not cover the Award as "*at first blush only just arguable*". If, which I doubt, he was expressing the view that GOP had no realistic defence, or, which I doubt even more, that ***In Re Kitchin*** had no relevance to any such defence, I respectfully disagree with him.

Conclusion

149. In short, I am not persuaded that GOP has no realistic defence to Sabah's claim. Nor am I persuaded that the defence is so thin that I should require the GOP to bring a sizeable sum into court as a condition of it being allowed to defend the action. Whether, of course, that defence will succeed is for the trial judge to decide.

Mr Stanley Brodie QC & Mr Yash Kulkarni (instructed by Hamilton Downing Quinn) for the Claimant
Mr Timothy Young QC (instructed by Howard Kennedy) for the Defendant

[4] 4 Page 28 of the judgment [11 / 3 / 109-110].