

Neutral Citation Number: [2020] EWHC 263 (Comm)

Claim No: CL-2018-000702/CL-2018-000703

**IN THE HIGH COURT OF JUSTICE**  
**THE BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES**  
**COMMERCIAL COURT (QBD)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

[2020] EWHC 263 (Comm)

Date: 12/02/2020

IN THE MATTER OF THE ARBITRATION ACT 1996  
AND IN THE MATTER OF AN ARBITRATION CLAIM

Before :

**MR JUSTICE ROBIN KNOWLES CBE**

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Between :

**(1) RELIANCE INDUSTRIES LIMITED**

**(2) BG EXPLORATION AND PRODUCTION  
INDIA LIMITED**

**(“the  
Claimants”)**

**- and -**

**THE UNION OF INDIA**

**(“the  
Government”)**

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**Graham Dunning QC and Matthew Gearing QC** (instructed by **Allen & Overy**) for the  
Claimants

**Vernon Flynn QC, David Wolfson QC and Damien Walker** (instructed by **Dentons**) for the  
Government

Hearing dates: 10-12 September 2019

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### **Approved Judgment**

I direct that pursuant to CPR PD39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

MR JUSTICE ROBIN KNOWLES CBE

**Robin Knowles J:**

#### **Introduction**

1. The parties have engaged the supervisory jurisdiction of the English Court over an arbitration that is taking place before a distinguished international tribunal. Reliance Industries Limited and BG Exploration and Production India Limited are the claimants in the underlying arbitration (“the Claimants”). The Union of India (“the Government”), acting by its Joint Secretary (Exploration) Ministry of Petroleum and Natural Gas, is the respondent in the underlying arbitration.
2. So far as material, and put briefly, the arbitration concerns issues of cost recovery by the Claimants from the Government in relation to oil and gas exploration. The parties had entered into two Production Sharing Contracts (“PSCs”). The sums at issue are substantial. Following challenges to a Final Partial Award (“the FPA”) dated 12 October 2016, which were heard by Popplewell J (as he then was), the arbitral tribunal (“the Tribunal”) issued a further Final Partial Award dated 1 October 2018 (“the Further Award”). The parties now advance or seek to advance various challenges to that Further Award.
3. A valuable outline of the PSCs and of the arbitration is given by Popplewell J (as he then was) at [2018] EWHC 822 (Comm); [2018] 1 Lloyd’s Rep 562. I gratefully adopt and do not repeat that outline.

#### **The Government’s Challenge A**

4. The Government’s Challenge A is to the entire Further Award. The primary basis of that challenge is under section 67 of the Arbitration Act 1996 (“the Act”).
5. In the FPA the Tribunal had stated at paragraphs 28.5 and 33.12 in connection with what was described as “the Agreements Case”:

“In light of the Tribunal’s decision in respect of Issue 20 above, the Tribunal considers that this issue no longer falls for determination.”

6. Popplewell J (at [76] to [87]) held as follows:

“76. The Claimants contended that some particular categories of Development Costs fell outside the scope of the CRL on the basis that the Government had specifically agreed that they should do so and that the costs should be recoverable in any event. This was referred to as the "Agreements Case". It was advanced on the basis that agreement had been reached between the parties at the Management Committee meetings that the Development Costs of four particular work programmes in Tapti and six particular work programmes in Panna Mukta would be recoverable regardless of whether they were incurred in respect of works referred to in Appendix G or the IPOD.

...

78. The Claimants contend that having lost the estoppel argument, their Agreements Case necessarily fell for determination, and accordingly the failure by the Tribunal to address and determine it constitutes a serious irregularity. The foundation for this submission is sound: it does not follow from the fact that the parties had a common understanding as to the meaning of the CRL as to the recoverability of Development Costs (as the Tribunal found on the estoppel issue) that they could not have agreed ad hoc that the cost of some specific categories of development works should nevertheless be recoverable in full. The Government accepts that as a matter of logic, a determination of the estoppel case in its favour was not necessarily dispositive of the Agreements Case and that the latter had to be decided by the Tribunal. Its short answer to the challenge is that on the facts, the Claimants' Agreements Case relied on their interpretation of particular documentation which was inconsistent with findings that the Tribunal had already made on that documentation in relation to the estoppel case. In other words, in coming to its general conclusion on estoppel the Tribunal had considered and determined the specific questions which then arose in relation to the Agreements Case. In expressing its conclusion that the Agreements Case issue "no longer falls for determination" in the light of its conclusions on the estoppel case, the Tribunal was concluding that on the facts its findings on the estoppel case were dispositive of the Agreements Case, not that the Agreements Case did not need to be addressed. This is what the Tribunal meant by "no longer falls for determination".

79. The issue therefore resolves itself into one of interpretation of that expression. What did the Tribunal mean by "no longer falls for determination"?

80. I keep in mind that the principles governing the approach to the reading of awards are those summarised by Teare J in Pace Shipping Co Ltd v Churchgate Nigeria Ltd (The "PACE") [2010] 1 Lloyd's Rep 183 at [16], including the oft-cited dictum of Bingham J as he then was in Zermalt Holdings that the courts do not approach awards "with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards with the object of upsetting or frustrating the process of arbitration". As I observed in Bulk Ship Union SA v Clipper Bulk Shipping Limited [2012] 2 Lloyd's Reports 533 at [23], where the Tribunal has correctly identified the issues

which fall to be decided, the usual inference will be that those issues have been decided.

81. Mr Flynn's main arguments in support of the Government's interpretation were as follows:

(a) The Tribunal set out the rival arguments at some length in these sections of the Award, including the specific factual basis for the Claimants' Agreements Case. This would have been unnecessary had it intended to hold that the issues did not need to be considered. The recitation of each party's case by the Tribunal strongly suggests that it had considered each party's submissions on the issue on their merits and on the facts.

(b) Further support for the Government's construction was to be derived from other sections of the Award where the Tribunal had also disposed of issues by using the wording: "In light of the Tribunal's decision in respect of Issue [x] above, the Tribunal considers that this issue no longer falls for determination". That formulation was also used for Issue 21 (paragraph 25.11); Issue 22 (paragraph 26.3); Issue 23 (paragraph 27.8); and Issue 28 (paragraph 32.7).

(c) In relation to at least some aspects of the Agreements Case it can be seen from the detail of what the Tribunal said, when dealing with the estoppel case, that its findings do necessarily preclude there having been any agreement of the nature contended for by the Claimants in their Agreements Case. That is so, for example, in relation to the "NRPOD" work programme, which formed the largest constituent part of the Agreements Case claim in respect of Tapti (US\$670.85m out of a total expenditure of US\$698.10m). The interpretation of the words "no longer falls for determination" contended for by the Government is therefore justified by at least some of the detailed findings of fact set out in the Award. Whilst this exercise cannot be performed for every element of the Agreements Case, all the reasons on the face of the Award are consistent with the Tribunal determining that its factual conclusions on the estoppel case, based as they were on what happened at the Management Committee meetings, meant that the Claimants' Agreements Case, similarly so based, could not as a matter of fact be made out.

82. In response, Mr Gearing QC submitted that the similar wording used in the conclusions on Issues 21, 22, 23 and 28 supports the Claimants' construction. Each of those Issues concerned the Claimants' "Upside Case". That was relevant only if the Tribunal agreed with the Claimants that the criterion for applying the CRL was that relating to the production rate, in which case issues arose as to how that criterion was to be applied. As a result of the estoppel case, those Issues simply no longer arose. Therefore the words "no longer falls for determination", as it appeared in the conclusion on those Issues, simply meant "no longer needs to be determined".

83. In my judgment the Claimants' submissions are to be preferred on this issue of the interpretation of the Award. The natural meaning of the words is that the issue was not being addressed and decided, rather than that it was being decided by reference to other findings of fact. The issue did fall for

determination, and to say that it did not is an unlikely form of words to use if what the Tribunal intended to convey was that the issue was being addressed and determined.

...

85. When dealing with [certain other] issues ..., the Tribunal recited at some length the rival submissions, notwithstanding that it concluded, correctly, that those arguments did not need to be addressed. The recitation of the rival arguments in those sections of the Award means that the Government's interpretation gains no support from a similar recitation of the Agreements Case arguments in the section of the award under consideration.

86. I note that although it was accepted by the Government before me that the Agreements Case fell for decision in circumstances where the Government succeeded on its estoppel argument, the Award suggests that that was not apparently the stance taken, or consistently taken, before the Tribunal. Notwithstanding that in their evidence and argument before me the Claimants averred that the Government had never suggested that the estoppel case would be dispositive of the Agreements Case, the terms of paragraphs 25.7 and 25.8 of the Award suggest that the Government argued before the Tribunal that the estoppel case meant that the Claimants' "new primary case" could not be raised, where the "new primary case" included the Agreements Case as well as the Claimants' 15-year plateau case that was addressed as Issue 21 in that section of the Award. It is therefore possible that if the interpretation of "no longer falls for determination" is that for which the Claimants contend, it was a conclusion which the Tribunal understood was being contended for by the Government.

87. Accordingly I conclude that the Agreements Case fell for determination and the Tribunal failed to address it. That is a serious irregularity. It gives rise to a substantial injustice. Despite the force of Mr Flynn's submissions in relation to some of the particular elements of the Agreements Case, including in particular the NRPOD work programme, it is clear from the nature of the submissions recited in the Award that the Claimants meet the threshold of establishing that the Tribunal might have reached a decision in their favour, at least in respect of some items worth a substantial amount, had it addressed the Agreements Case. It cannot be said from the face of the Award that the Tribunal would have considered its findings in relation to the estoppel issue dispositive as a matter of fact of all the issues arising in respect of the Agreements Case."

7. Popplewell J ordered that "paragraphs 28.5 and 33.12 of the Award are remitted to the Tribunal for reconsideration pursuant to section 68(3)(a) ...". The Government emphasises that that was a conclusion reached on the (objective) question whether on a proper interpretation of the language which the Tribunal used in paragraphs 28.5 and 33.12 of the FPA against the relevant background, the Tribunal had reached a determination. But if the Tribunal had in fact at the time of issuing the FPA reached a decision on the issue - "made their minds up" as Mr Vernon Flynn QC put it for the Government - is the Tribunal held to that decision when they return to the matter

pursuant to the remittal for reconsideration? The Government says the Tribunal is so held.

8. The jurisdictional framework is put in this way by the Government. When a tribunal issues an award in relation to a particular matter, it is functus officio in relation to that matter and no longer has jurisdiction. Upon remission, the jurisdiction of the tribunal is revived, but a question arises as to the extent or scope of the revival: Stockman Interhold SA v Arricano Real Estate Plc [2018] 1 Lloyd's Rep 135 at [123] to [124]. Jurisdiction is revived only to the extent of the Court's remission: Glencore International AG v Beogradska Plovidba (The Avala) [1996] 2 Lloyd's Rep 311, 316. The extent of the remission has to be interpreted by reference to the Court's order in light of the background to that order: The Avala at page 316. The interpretation of the Court's order depends on what the language of the order would convey in the circumstances in which the court made it, so far as these circumstances were before the Court and patent to the parties. They include the reasons which are given by the Court in its judgment: Sans Souci Limited v VRL Services Limited [2012] UKPC 6 at [10] to [17]. The "powers and duties of the arbitrator cannot exceed what is necessary to give effect to the order for remittal": Carter v Harold Simpson Associates (Architects) Limited [2005] 1 WLR 919 at [19].
9. I do not regard this description by the Government of the jurisdictional framework as controversial, for present purposes.
10. The Government argues that it would be possible for the members of the Tribunal to give effect to the Order by restating paragraphs 28.5 and 33.12 of the FPA in language which made clear that (if they had) they had (at the time of the FPA) determined the Agreements Case in favour of the Government. To give effect to the Order, it would not be necessary for them to adjudicate upon the Agreements Case afresh.
11. Moreover, argues the Government, there is no reason why, as a matter of principle, it should be open to a tribunal to adjudicate upon an issue afresh simply because it so happened that it failed to express its conclusion with sufficient clarity first time around. To allow it to do so would be contrary to the principle of finality, to which strong priority has been given under the Act, and unfair to the party in whose favour the issue had originally been determined.
12. For those reasons, upon this particular remission, the Tribunal was, the Government argues, required to follow a two-stage process. First, to ask itself and answer the question whether it had reached a decision on the Agreements Case at the time of the FPA. If the answer to the question was "yes", then the Tribunal should issue a fresh award in which it stated this. It was only if the answer to the question was "no" that the Tribunal had jurisdiction to proceed to a second stage. That stage would involve the Tribunal in analysing the evidence and submissions concerning the Agreements Case to which it was permissible to have regard upon remission, and deciding that case.
13. In the Further Award, the Tribunal stated, at paragraph 3.9:

"When considering the Claimants' Agreements Case, [the Government] submits that the Tribunal should adopt a 'two-stage process': as a first step, the Tribunal would have to decide whether, in paragraphs 28.5 and 33.12 of

the FPA, it had intended to reject the Claimants' Agreements Case and only if the Tribunal decided that it had not so intended, could it then, as a second step, determine the Claimants' Agreements Case on the merits. However, without any clear legal authority in support and the [Government] has referred to none, the Tribunal is not persuaded that such a 'two-stage process' is either practical or permissible. In the Tribunal's view, as a consequence of the remittal, it is required to state its decision on the Claimants' Agreements Case."

14. There may be room for debate on the question whether a two-stage process is practical, as the Tribunal put it, although I can certainly follow the point that practicality may be an obstacle in a particular case.
15. However I accept that the Tribunal fundamentally dealt with this as a matter of jurisdiction. And that the Government's challenge goes to jurisdiction. On a challenge under section 67 it is for the Court to decide the matter afresh.
16. I respectfully agree with Mr Flynn QC's characterisation of the point at issue as a point of principle. Mr Flynn QC asks that the principle is tested by a simple example, on which he placed heavy emphasis, and which was in these terms:

"A tribunal has simply, by error, failed to provide a completed but missing page or pages of their award. Each page is signed by all three members of the tribunal. The award is sent back to the tribunal for reconsideration by order of the court on a challenge ...."

Mr Flynn QC says of this example:

"In my submission, it is obvious in those circumstances that the tribunal is not permitted to change its mind and find in favour of, say, the claimant, when it had found in favour of the respondent, or vice versa. All that is necessary and all that is permissible is for the tribunal to provide the missing pages and to confirm its original decision."

17. Of course I accept that the central thing that one would expect to happen in the example is that the missing pages were provided. But the example is put forward to test principle. If the Tribunal was simply ordered to reconsider then in principle it would have jurisdiction to do so. I accept the possibility that the particular order, read in the context of the particular decision to issue that order, may however bear some more particular meaning in a particular case.
18. It is to be observed that the Order for remission made by Popplewell J did not specify a two-stage process, or contain a formulation in terms of the first stage of that two-stage process. The Tribunal noted that authority supporting the idea of a two-stage process had not been found, and Mr Flynn QC properly informed me that authority directly on point for this Challenge A had not been found.
19. In my judgment in the present case principle stands firmly against the proposition that even if the Tribunal did first ask itself whether it had intended to reject the Claimants' Agreements Case at the time of the FPA, and took the view that it had, that prevented it as a matter of jurisdiction from looking further at the merits on the remission. A tribunal has not finally decided a case on the merits until it issues an award containing that decision. In principle, even if a tribunal forms an intention to reject a case it can revisit that intention before it issues the award containing its decision.

20. In Carter v Harold Simpson (above), Lord Hoffmann said, at [19], [23] and [24]:

“There is no rule that a remittal under section 11 necessarily means that the award ceases to have any effect and the parties start with a clean sheet. The general principle is that the powers and duties of the arbitrators cannot exceed what is necessary to give effect to the order for remittal. If the award is remitted for one specific purpose, such as to amend a name, the arbitrator has no power to amend the award in any other way.

...

The conclusion their Lordships draw from these exchanges is that on any view the remittal of the award does not deprive it of legal effect. It continues to operate so as to make the arbitrator *functus officio*, unable to alter his award on those matters which were not remitted.

...

In this case the remittal was expressly concerned with the form of the award and it follows that the substance of the award remained valid and could properly form the subject matter of the action to enforce it. It also follows that the arbitrator had no jurisdiction to reconsider the merits, and was right to refuse to state a case on the questions of the law which it was said that he should have taken into account.”

21. Mr Flynn QC submits that it is clear from this that “the touchstone on remission is necessity; it’s not fairness, it’s not whether it was right or wrong first time, it is necessity.” He continues that in the present case “what the order says is that the paragraphs of the award are remitted for reconsideration, not that the Agreements Case is remitted, and certainly not a remission for a full rehearing on the merits.”
22. However what those paragraphs of the FPA had said was that the Agreements Case did not fall for consideration. To give effect to the order for remittal it was necessary for the Tribunal to have the powers and duties to achieve consideration (reconsideration) of the Agreements Case.
23. This does not unfairly involve “two bites of a cherry” for the Claimants or the Tribunal, as the Government suggested. Only at one stage did the Claimants receive, and the Tribunal make, a decision on the merits on the Agreements Case and that was through, and in, the Further Award.
24. Mr Flynn QC asks, for the Government, why should a tribunal have the power to change its mind by reason of the fortuity of a remission? To respond, the point is that the tribunal is not to be taken to have made up its mind until it issues an award that states what its mind is; until then it may change its mind. A tribunal that after discussion and drafting reached a decision one week but changed its mind the next week just as it was about to sign and issue the award, would obviously be acting within its jurisdiction and be using a power it had.
25. The Government mounted alternative challenges under section 68 of the Act. In my judgment these do not lead to a different conclusion. Mr Flynn QC made clear that the challenge under 68(2)(b) was made on the basis that (contrary to the Government’s primary submission) the Court considered that the question was not one concerning



the Tribunal's substantive jurisdiction, but one concerning its powers. The Government's argument was that by proceeding straight to the second stage, if a two-stage process was required, the Tribunal exceeded its powers. A challenge under section 68(2)(d) was made on the basis that, again if a two-stage process was required, the Tribunal failed to deal with the first stage. In my judgment the Tribunal was right to conclude that no two-stage process was required, so these challenges fall away accordingly.

### **The Government's Challenge B**

26. The Government seeks an order under section 68(3)(a) of the Act that the Claimants' Agreements Case in relation to US \$177.470 million costs in relation to the work programme for a new revised plan of development ("NRPOD") be remitted to the Tribunal for reconsideration.
27. The Claimants advanced their case before the Tribunal in respect of the NRPOD costs on two alternative bases: agreement and estoppel. The Tribunal decided the case in favour of the Claimants on the basis of agreement.
28. The Government argues that the evidence that was relevant and admissible in relation to the alternative cases differs for each case. When reviewing the pleadings and submissions, one must ask oneself: did this relate to agreement, or to estoppel?
29. The Claimants' case was that a management committee resolution ("MC Resolution") of 15 March 2005 recorded an agreement to the effect that costs of US\$177.47 million were recoverable in any event.
30. The Claimants emphasise that their case that there was an agreement was based on the wording not only of the MC Resolution but also on the wording of the minutes of the management committee meeting on that day. The Government says the minutes add nothing to the MC Resolution and point out that a witness for the Claimants, a Mr Shaw, stated that "the decision is in the resolution document" which he signed.
31. The Government's case was that because any agreement recorded in the MC Resolution was to the effect that the costs of US\$177.470 million fell within the scope of a Cost Recovery Limit ("CRL") certain provisions under Article 13 of one of the PSCs, the Tapti PSC, would as a result be engaged.
32. In finding that there was an agreement to the effect alleged by the Claimants the Tribunal considered witness evidence from Mr Shaw and a Mr Kulkarni. The Government argues that the Tribunal should not have relied upon the witness evidence to find an agreement to the effect alleged by the Claimants, and that to do so was a serious irregularity under section 68(2)(a) and/or section 68(2)(c) of the Act. Section 68(2)(d) is also invoked.
33. The Government points out that the Claimants informed the Tribunal that they were relying on their "oral evidence" in relation to their estoppel case. It further points out that in relation to an issue concerning the interpretation of a written agreement, witnesses' evidence concerning their subjective understanding of the meaning of the agreement is irrelevant. Moreover, the Government had submitted – and the Claimants had not denied – that, as a matter of Indian law, it is not permissible to

adduce oral evidence for the purpose of contradicting, varying, adding to or subtracting from the terms of a written agreement.

34. If the Tribunal was not prepared to disregard the witness evidence, then, argues the Government, the Tribunal had to address the Government's submissions concerning the use of witness evidence.
35. Mr Matthew Gearing QC for the Claimants responds that the arbitration had not proceeded with a clear demarcation between the estoppel case and the agreement case. Admittedly when it came to the agreement case the MC Resolution was at the heart of the finding of agreement. However that was not to the point that it supplied the totality of admissible evidence of what was agreed. The Government's challenge is, argue the Claimants, an illegitimate attempt to attack the decision of the Tribunal on the merits.
36. Mr David Wolfson QC for the Government of course recognised that he could not use section 68 to challenge the Tribunal's decision whether there was or was not an agreement. His point was that there was a serious risk that the reason the Government lost on that issue was that the Tribunal wrongly took into account the evidence of Mr Shaw and Mr Kulkani in relation to the case concerning agreement.
37. My assessment is that the parties both allowed matters to proceed relatively informally before the Tribunal, and without the rigour in compartmentalisation of evidence that is now sought to be argued by the Government. This is not a matter for criticism of the parties. It is also to be kept in mind that the MC Resolution recorded the outcome of discussion in meeting rather than comprised a conventional written contract.
38. There is reason to accept that the Tribunal considered the witness evidence for the purposes of the case concerning agreement and not just for the case concerning estoppel. Such consideration would at least be helpful in understanding the case advanced by the Claimants. It was further relevant to help address the question of the mechanism to implement the agreement alleged. Here the Tribunal referred to Mr Shaw's evidence about the purpose of a review that postdated the MC Resolution and which was designed to implement what had been agreed. I do not consider that reference illegitimate.
39. Most importantly it does not follow from the fact that the evidence was not compartmentalised and was considered that the experienced Tribunal actually used (or that there was a serious risk that it actually used) the subjective understanding of a witness to decide the meaning of the agreement recorded in the MC Resolution, or to contradict, vary, add to or subtract from the agreement there recorded.
40. The Tribunal explained why the Government's case that provisions under Article 13 of the Tapti PSC, would be engaged was not good, in these terms (at paragraph 3.16(b) on page 72 of the Further Award):

“the Tribunal does not accept [the Government's] assertion that the increase in the CRL to enable recovery of Development Costs of USD 177.470 million on NRPOD items of work inside the CRL, was dependent on the Contractor being able to show that the requirements of Article 13.1.4(c) of the PSCs were fulfilled: such condition is not borne out by the relevant MC resolutions.

These resolutions clearly show that the Parties had agreed full cost recovery of the Development Costs in the sum of USD 177.470 million without any condition attached to it. ...”

The emphasis on it being the resolutions that “clearly show” what had been agreed will be noted.

41. Where the Tribunal did not actually use the witness evidence in an inappropriate way, it follows that the Tribunal is not open to criticism for not addressing the Government’s submissions that it should not do so.

### **The Government’s Challenge C**

42. In relation to the costs of works known as the Panna Gas Lift Execution PD & PE works, when the Tribunal prepared the FPA it relied upon certain audited accounts (“the 2013 Audited Accounts”) to identify costs of works of \$483,862.
43. The costs of works known as the Panna Gas Lift Execution PD & PE works were also material to the Claimants’ Agreements Case. The Claimants informed the Tribunal that, after the FPA had been issued, it had been discovered that an error had occurred when the figures from the Contractors’ Cost Recovery Statement were being transcribed into the 2013 Audited Accounts, with the consequence that the figure of \$483,862 in the 2013 Audited Accounts was incorrect and there were further costs of works of \$23,293,547.
44. Both documents, the 2013 Audited Accounts and the Contractors’ Cost Recovery Statement, were part of the record in the arbitration. The Tribunal found at paragraph 3.23 of the Further Award that it had “not yet determined this sum” (i.e. the \$23,293,547). It went on, confining itself to the Claimants’ Agreements Case (“as only the Claimants’ Agreements Case has been remitted to the Tribunal for consideration”) to determine that the costs were costs to which the Claimants were entitled.
45. According to the Government, in accepting further costs of works of \$23,293,547, the Tribunal went wrong in respects which give rise to challenges under section 67, section 68(2)(b) and section 68(2)(a) of the Act. Under section 67 the Government challenges both the Tribunal’s award as to its substantive jurisdiction (section 67(1)(a)) and the award on the merits which it proceeded to make (section 67(1)(b)).
46. Before the Further Award the further costs of works of \$23,293,547 shown by the Contractors’ Costs Recovery Statement (and not shown by the 2013 Audited Accounts) had not been dealt with by the Tribunal. The Tribunal explained why the remission ordered by Popplewell J to determine the Claimants’ Agreements Case necessarily brought with it the question of dealing with the \$23,293,547:

“... once the Tribunal has determined any application for an increase in the CRL for Tapti and Panna Mukta as well as any outstanding issues, the accounts will need to be reworked and should at that stage any dispute arise between the Parties as regards this, the Tribunal would still need to determine such dispute”.

The Government argues that, on several grounds, the Tribunal was wrong to make this finding.

47. The Government argues that in fact the reason why the accounts will need to be reworked is that the Claimants have already recovered sums in respect of various sets of costs which exceed the sums which the Tribunal has held them to have been entitled to recover. There will therefore be a reworking in any event, and this further sum is not the thing that makes a reworking necessary. I do not consider this point affects the Tribunal's finding; which was simply that the accounts will need to be reworked, that this stage had not yet been undertaken, and to undertake the reworking the costs going into the reworking needed to be known.
48. The Government argues that if it were the case that it would be necessary for the Tribunal to "determine such dispute" at the later stage of the proceedings when the accounts are reworked, it would not follow that it was necessary to do so when it did (described as during the remission phase). I consider this to be a point of timing rather than substance. Where the Tribunal concluded that the accounts would need to be reworked it did not lack jurisdiction to deal earlier rather than later with a point relevant to the reworking where that point was apparent earlier rather than later.
49. Another argument by the Government was that it would in any event not be necessary for the Tribunal to "determine such dispute" at the later stage of the proceedings when the accounts were reworked, because the previous identification of \$483,862 of costs of works would operate (by virtue of the principles of res judicata and issue estoppel) to preclude the Claimants from contending that a larger amount of costs had been incurred. If it would not be necessary then, then it was not necessary in the Further Award and if it was not necessary in the Further Award the Tribunal lacked jurisdiction.
50. The Tribunal stated that it was of the view that it "has jurisdiction, is not functus officio and/or in any other way prevented from making a decision" in respect of the costs. The question is for me to determine on a section 67 challenge, but I share the same opinion as the Tribunal on the question. This is because I accept Mr Gearing QC's analysis that whilst the Tribunal had previously decided (in relation to the Appendix G case) that \$483,862 was recoverable it had not made a decision over sums beyond \$483,862, and such a decision would be needed on the Claimants' Agreements Case. This was not, as Mr Gearing QC corrected Mr Wolfson QC, a case about damages but a case about cost recovery. As the Tribunal recognised, cost recovery of the \$23,293,547 had not previously been dealt with and needed to be considered.
51. The challenge advanced by the Government under section 68(2)(b) of the Act is as an alternative to the section 67 challenge. It was to cover the scenario in which (contrary to the Government's submission) the Court found that the question is one of an excess of powers rather than a lack of substantive jurisdiction. I have dealt with the question as one of jurisdiction. In any event the Tribunal plainly had the power to do what it did with the 2013 Audited Accounts and the Contractors' Cost Recovery Statement, and with the written and oral argument it received.
52. The section 68(2)(a) challenge is advanced on the assumption that (contrary to the Government's submissions) the Court finds that the Tribunal did have jurisdiction or

power. In this event the Government goes on to argue that the Tribunal failed to comply with its general duty under section 33 of the Act.

53. The Government makes a number of individual criticisms. These include the following. First, that the Tribunal wrongly recorded that it was “not in dispute that Development Costs in the sum of USD 23,293,547.00 had been incurred on ‘Panna gas lift execution – PD & PE’ in addition to Development Costs in the sum of USD 483,862.00”. Second, that the Tribunal also referred to audited financial statements for the Financial Year ending 31 March 2016 when the Claimants had not sought to rely on these in relation to this issue and when other audited accounts (those of the PMT Joint Venture dated 28 June 2016 for the year ended on 31 March 2016) actually record that the amount of costs incurred in relation to Panna Gas Lift Execution PD & PE under item code PC-120B was \$483,301. Third, the Government adds that the Claimants have never sought to have the 2013 Audited Accounts corrected and suggests it is inherently improbable that they were incorrect. The Government points out that it submitted that, in the event that the Tribunal admitted the “evidence” of error in the 2013 Audited Accounts, the Government would need to be given “an opportunity to respond to that evidence”.
54. These individual criticisms provide context for a core point in the argument of the Government under section 68, which is that the Tribunal failed to establish and pursue appropriate procedures for the determination of the issue as to whether there was an error in the 2013 Audited Accounts.
55. In the present case, in my judgment, and with respect, there is nothing in that core point. With the assistance of the written and oral argument on this hearing I have reviewed the relevant materials. The error was put forward as obvious, which it is on the face of things. There was no positive case from the Government that \$483,862 was correct, and was correct for reasons explained by the Government to the Tribunal. The Tribunal was rightly doing its best to assess documents as pieces of evidence, and this it did without unfairness.
56. Against the considerations I have just mentioned, I do not consider the individual criticisms amount in the present case to a failure on the part of the Tribunal to comply with its general duty under section 33 of the Act.

### **The Government’s Challenge E**

57. The Government’s Challenge E is made under section 68 of the Act and arises out of on the Tribunal’s treatment of the costs of specified infill wells and an expanded plan of development known as “EPOD”.
58. Accepting the Claimants’ Agreements Case, the Tribunal found that these costs were fully recoverable because that had been agreed by the parties. The Tribunal went on to find that the mechanism for full recovery was that the costs fell within the CRL and that the CRL was to be increased to the extent necessary to ensure full recovery of the costs.
59. The Government argues that this mechanism was not advanced as the Claimants’ case; indeed, that the Claimants had argued that the costs fell outside the CRL. This was a serious irregularity, argues the Government, referring to see RJ v HB [2018]

EWHC 2833 at [22] to [27]. It was also inconsistent with another conclusion reached by the Tribunal over a different set of costs. The Tribunal's finding in this respect was important, argues the Government, because (as noted above) its case was that increases in the CRL required the use of a machinery under Article 13 of the PSCs, and the approval of the Management Committee.

60. The short answer is that what matters is that the Tribunal found that it had been agreed that the costs were fully recoverable. The Claimants' case was that it had been agreed that the costs were fully recoverable, and the Tribunal's finding was within that case. Even if criticism could be levelled at the Tribunal's view on the mechanism, and I do not accept that it can, and even acknowledging that the Claimants argued that the costs fell outside the CRL, the fundamental point remains that the Tribunal was entitled to find in favour of the Claimants that it had been agreed that the costs were fully recoverable. The mechanism delivers that.
61. This is why, as I understand it, the Claimants say that their Agreements Case transcended the question as to whether the costs were inside or outside the CRL. The agreement that the costs were fully recoverable also deals with any suggestion that Article 13 or Management Committee approval might affect the ultimate result.
62. The point on inconsistency with another conclusion reached by the Tribunal would, even if correct (and I do not accept it is), go to the reasoning of the Tribunal and cannot sustain a section 68 challenge.

### **The Claimants' Challenges 1, 2 and 3**

63. The Claimants challenge the Further Award pursuant to section 67 of the Act. They contend that at paragraph 3.22(d) of the Further Award the Tribunal wrongly determined that it had no jurisdiction on the remission to take into account documents which, although already on the record prior to the issue of the FPA, had not previously been referred to by the Claimants in the context of their Agreements Case.
64. The consequence was, say the Claimants, that the Tribunal wrongly declined jurisdiction to entertain a claim by the Claimants for \$259,488,003, as part of a total sum claimed of \$402,666,003.
65. In their claim form the Claimants also framed the challenge to this determination by the Tribunal as a challenge or proposed challenge under sections 68 and 69 of the Act. However, in light of it being common ground between the parties that the question was one of jurisdiction, Mr Graham Dunning QC for the Claimants indicated that it was no longer necessary to advance the case under sections 68 and 69; section 67 alone would suffice.
66. The determination was by a majority. Although again, as a question of jurisdiction, the question is now one for the Court, it is appropriate to record the way in which the majority saw the matter. I have considered its entire reasoning, even though only an extract is set out below:

“... [W]hat the Claimants clearly do seek to do is to make further, i.e. new, submissions thus effectively expanding on the Agreements Case by reference

to and relying on documents which – albeit on the record prior to the release of the FPA – had not been referred to and relied on by the Claimants in support of their Agreements Case. Neither The Avala nor Stockman appear to expressly address this specific question, namely whether a party could, on remittal, make submissions it had not made prior to the release of the award and in respect of documents which were already on the record at the time the award was rendered but which were relied on in support of a different case/issue. ...

... [T]he Claimants' submission taken to its ultimate conclusion, would mean that on remission, a party is entitled to expand and improve on its original case by making further, i.e. new submissions referring to documents which – albeit on the record – it has not previously relied on in support of the remitted issue/case thereby effectively having a second opportunity to make good its case. It is the view of the majority of the Tribunal that this is not the purpose of remission – at least in the present circumstances. This is because the conclusion reached in the High Court Judgement was that the Tribunal had simply not decided the Claimants' Agreements Case even though this case fell for determination. There is no other 'defect' in the FPA: the Claimants' Agreements Case had been fully argued by the Parties before the Tribunal prior to the release of the FPA and all that the Tribunal is required to do as a result of the High Court Judgment and that the Order is to now determine the Claimants' Agreements Case as if it had done so in the FPA when this had been released on 12 October 2016. ... The Claimants requested a refresher hearing for the purposes of refreshing the Tribunal's memory on the Claimants' Agreements Case: however, the fact that the Tribunal has acceded to the Claimants' request does not mean that the Tribunal has given leave to the Claimants to expand on their Agreements Case. The same applies to the schedule(s) which the Tribunal requested the Parties to produce in respect of the Claimants' Agreements Case: it goes without saying that the purpose of such schedule(s) is not to give leave to the Claimants to expand on their Agreements Case. ...

In the majority of the Tribunal's view, there is a further more fundamental reason for not permitting a party to effectively expand on its original case by making further, i.e. new submissions with reference to documents which – albeit on the record – it had not previously relied on in support of the remitted issue. In particular in this case, the Parties had, prior to the release of the FPA, full opportunity to make such submissions as they wished to make in respect of the Claimants' Agreements Case including at an oral hearing. If a party was permitted, on remittal, to make submissions it had not made previously in respect of documents which – albeit on the record – it had not previously relied on in support of the remitted issue, such party would not only effectively be given a second opportunity to make good its case but it would also deprive the opposing party of an opportunity to make good its case and address these – in particular in circumstances such as those prevailing in this case.

... Taking all of the above into account and in particular the parts of the decisions in Stockman and The Avala referred to above, it is clear, in the

majority of the Tribunal's view, that in principle, a tribunal is on remittal to decide the remitted issue (as described in the remission order) on the basis of the submissions and the evidence before it at the time of the award's release. This is clear from Rix J's decision that "[...] prima facie, a limited remission to an arbitrator will be a remission for the arbitrator to reconsider matters on the issues pleaded or otherwise [even informally] before him at the original hearing" ... Only in exceptional circumstances is a tribunal entitled to derogate from this rule, namely if events or matters occurred after the award had been released and even then only if it is necessary for the tribunal to take into account such subsequent matters and events: Stockman, at paragraph 132. Moreover, as is clear from Rix J's analysis in The Avala as reflected in paragraph 125 of Stockman, a tribunal, on remittal, can no longer permit a party to amend its case in respect of a particular aspect unless the court's remission order expressly confers on the tribunal jurisdiction to permit this specific amendment...."

67. Mr Dunning QC's argument for the Claimants may be summarised as follows. The jurisdiction of the Tribunal was revived by the remission ordered by the Court. The Agreements Case was remitted in full. The Tribunal had power to decide how the remitted reference would proceed, and exercised that power. The decision reached by the Tribunal (by a majority) was a decision as to its jurisdiction. Under section 67 it is for the Court to reach its own decision on jurisdiction. The Court should conclude that the claim calculated at \$402,666,003 was within the remitted Agreements Case. The Agreements Case concerned payment of amounts actually incurred. It transpired that the amounts actually incurred were \$402,666,003. No amendment of the Agreements Case was involved or required. The relevant material was on the record. The Tribunal should have concluded it had jurisdiction to adjudicate.
68. Mr Flynn QC argued for the Government that a party should not be allowed to take advantage of the fortuity of a remission. On the remission the Tribunal did not have jurisdiction to consider a case from the Claimants which is different in some material respect from the case which the Claimants advanced prior to the issue of the FPA. An amendment was required for the case the Claimants wished to advance. The majority of the Tribunal was correct in its decision on jurisdiction, but it would, he argued, have reached the same decision as a matter of discretion. Further, even if the Tribunal was wrong in its decision on jurisdiction the Court should make no order on the challenge in this particular case.
69. In the passage from the decision of Rix J (as he then was) in The Avala (above) cited by the Tribunal majority, the limitation referred to is expressed in terms of "the issues pleaded or otherwise [even informally] before him at the original hearing". It is not expressed in terms of arguments or submissions on those issues, or documents on the record bearing on those issues.
70. Rix J later described the limitation to which he was referring as "matters which had not been pleaded nor were otherwise informally before [the arbitrator] previously, but which could only be raised before him by way of amendment".
71. The limitations, also referred to by the Tribunal majority, on taking account of subsequent events or matters, are limitations of a different nature but they too are not about limiting reference to documents that are on the record.



72. Mr Christopher Hancock QC in Stockman (above) at [132] valuably summarises the position:

“... prima facie, a limited remission would be to deal with the matters before the arbitrator on the pleadings before him at the date of the original award. However, this can only be a prima facie rule, and, in an appropriate case and, depending on the breadth of the order of remission, it may be that the arbitrator has to deal with matters that have occurred since the date of the First Award.”

73. The Tribunal majority formulated their view of the principle as follows:

“... in principle, a tribunal is on remittal to decide the remitted issue (as described in the remittal order) on the basis of the submissions and the evidence before it at the time of the award’s release.”

The Tribunal majority said that this “was clear from” the passage from Rix J that they cited (see above). However, in that passage Rix J in fact refers to issues and not to submissions and evidence. The distinction is important, and with great respect the Tribunal majority is not here correct in its formulation of the principle.

74. The Tribunal majority itself described what the Claimants were seeking to do as “to make further, i.e. new, submissions thus effectively expanding on the Agreements Case by reference to and relying on documents which – albeit on the record prior to the release of the FPA – had not been referred to and relied on by the Claimants in support of their Agreements Case”.

75. However the case itself was not new. I take the view no amendment was required to make the case: there was no new material fact that the Claimants wished to rely on but had not pleaded. The amounts differed but had the same foundations in terms of material facts. There was not even a question that an amendment was needed for transparency or to avoid unfair surprise.

76. In these circumstances, and given that the remission ordered in this case required consideration by the Tribunal of the Agreements Case, there was jurisdiction to consider documents on the record and hear further argument in support of that case. The Government suggested that the principle of finality required a more restrictive approach under the Act than under predecessor legislation, but whatever may be the position had the documents not been on the record, the difference that matters for jurisdiction is one that involves a new issue or requires an amendment.

77. I do not see the present case as a case of advantage from the fortuity of a remission, but in any event that characterisation does not go to jurisdiction.

78. The Tribunal majority described a consequence of depriving another party of an opportunity to address new argument as “a further more fundamental reason” for not permitting a party to make further new submissions with reference to documents which although on the record had not previously been relied on in support of the remitted issue. It was of course for the Tribunal to control the further argument and the proceedings to achieve fairness and avoid unfairness. However on the face of things, the consequence to which the Tribunal majority referred would require

consideration of whether to allow further time or opportunity to the Government to respond before a decision was made on the merits. This too is not about jurisdiction.

79. The Tribunal having reached its decision as a matter of jurisdiction, and moreover by a majority rather than unanimously, I do not accept it can be concluded with safety that the Tribunal would have reached the same decision as a matter of discretion. A very careful exercise would be appropriate on any exercise of discretion.
80. The Government invited me, if (as I do) I upheld the section 67 challenge, to make no order. In my view the aspect of the case is far too significant to accede to that application.
81. Although I shall deal with relief at a further hearing, I understood all parties to recognise that if the challenge succeeded and it was appropriate that I make an order, the matter should be remitted to the Tribunal.

### **The Government's Challenge D**

82. The Government's Challenge D contends that, when it was addressing the Claimants' Agreements Case concerning the costs of infill wells at Panna Mukta, the Tribunal was wrong to hold that it had jurisdiction to take into account an MC resolution of 16 March 2006. The Tribunal based that holding on the fact that the Claimants had relied upon the MC resolution in relation to their Agreements Case in respect of the infill wells prior to the FPA. It is not disputed that the document was on the record, but (says the Government) the Claimants had not in fact relied on the document.
83. The Tribunal explained at paragraph 3.19 of the Further Award why it considered that it had jurisdiction to take into account the MC resolution of 16 March 2006:

“[T]he Tribunal notes that the Claimants, in the second column of table 2.4 of the Claimants' 2014 Post-Hearing Submissions, refer to '2003-2010' as being the 'Date of Management Committee approval'. Accordingly, the Tribunal concludes that the Claimants have, even before the FPA had been issued, referred to all the MC resolutions on the record of these proceedings which concerned infill well drilling.”
84. The Government argues this was a point which was conceived by the Tribunal of its own initiative. At no stage did the Claimants themselves argue that the reference to “2003-2010” in Table 2.4 of their Post-Hearing Submissions should be interpreted as being a reference to all MC resolutions which were on the record. Moreover, the second column of the Table also referred to paragraph 2.178 of the Claimants' Post-Hearing Submissions and that paragraph referred to a number of MC resolutions, but not the resolution of 16 March 2006.
85. I have no doubt the Tribunal had jurisdiction (and was within its powers) to take into account the MC resolution of 16 March 2006, and agree with the reason it gave. I do

not consider the cross reference to paragraph 2.178 cuts down the reference to '2013-2010'.

## **Conclusions**

86. The Government's challenges fail and the Claimants' section 67 challenge succeeds. I invite the parties to discuss the terms of an Order to reflect these conclusions. Further or consequential argument will be heard on a date to be fixed.