IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-000780
CIV-2013-404-004203
CIV-2013-404-004204
[2014] NZHC 31

UNDER	the Arbitration Act 1996
IN THE MATTER	of an arbitration before the Rt Hon Sir T M Gault, Hon R L Fisher QC and T C Weston QC
BETWEEN	SHELL (PETROLEUM MINING) COMPANY LIMITED First Plaintiff
	TODD PETROLEUM MINING COMPANY LIMITED Second Plaintiff
AND	VECTOR GAS CONTRACTS LIMITED First Defendant
	VECTOR GAS LIMITED Second Defendant

Hearing:	2, 3 and 4 December 2013
Appearances:	H N McIntosh and M F Mabbett for Plaintiffs B A Scott and A Kraack for Defendants
Judgment:	31 January 2014

JUDGMENT OF VENNING J

This judgment was delivered by me on 31 January 2014 at 4.00 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date...............

Solicitors: Russell McVeagh, Wellington
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Introduction

[1] The plaintiffs (together the Kapuni Mining Companies (KMCs)) appeal three awards of an Arbitral Tribunal (the Tribunal)[1] relating to disputes between the KMCs and the defendants (collectively Vector), arising from the implementation of the 1967 Kapuni Gas Contract (KGC).

[2] The three awards at issue are:

[1] The Rt Hon Sir TM Gault QC, Hon RL Fisher QC and TC Weston QC.

(a) Partial Award dated 12 November 2012 relating to allocation (the Partial Award);[2]

(b) Partial Award (No 2) dated 19 June 2013 relating to quantum and pricing issues (the Second Award);[3] and

(c) Final Award dated 6 September 2013 settling the form of the declarations arising from the Partial Award and Second Award.[4]

[3] The Tribunal also made costs awards which have been adjourned by agreement pending the outcome of this substantive appeal.

[4] As the Tribunal noted, the nature of the central dispute, the allocation issue, was summarised in the Arbitration Agreement as:

> " [concerning] ... the parties' entitlements to gas from the Kapuni Field. In particular, when Vector Gas Limited treats raw gas for Shell (Petroleum Mining) Company Limited and Todd Petroleum Mining Company Limited, and retains the liquids removed during the treatment process, what is the effect on the parties' gas allocations?"

[5] The Arbitration related to the period from 1 April 1997 (when the field was split under a 1997 judgment of the High Court), until July 2009 when the parties entered a new tolling agreement which superseded the previous arrangements.

Background

[6] In this introductory background section I introduce:

(a) the relevant parties;

(b) the concept of gas production and treatment; and

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4 CIV-2013-404-004203.

(c) the KGC, together with subsequent judgments, a settlement agreement and arbitral awards impacting on the implementation and interpretation of the KGC.

Parties

The KMCs (the Sellers)

[7] Originally, there were three KMCs: the existing two plaintiffs and another, the BP (Oil Exploration) Company of New Zealand Limited. BP sold its share in the joint venture to the existing two plaintiffs in 1991. For present purposes the KMCs are the only relevant sellers of gas from the Kapuni field.

Vector (the Buyer)

[8] Vector both treats gas at the Kapuni Gas Treatment Plant (KGTP) and also buys gas under the KGC. Specifically, Vector Gas Contracts Limited (VGCL) is the Buyer under the KGC. It is a subsidiary of Vector Gas Limited (VGL).

[9] VGL was originally incorporated as the Natural Gas Corporation of New Zealand (NGC) in March 1978. It changed its name to Vector Gas Limited in July 2006. It operates the KGTP and also sells some of the gas purchased by VGCL.

[10] For most purposes it is convenient to refer to the two Vector companies as *"Vector"*. However, as will be apparent, it is sometimes necessary to refer to NGC as opposed to Vector (when dealing with the historic aspects of the matter).

[11] The Minister of Mines was the original Buyer under the KGC. The Minister's rights as Buyer were assigned to NGC in February 1970. The rights were then vested in NGC pursuant to the Energy Act 1977 and an Order in Council dated 31 March 1978. NGC's interest as Buyer was assigned to Kapuni Gas Contracts Ltd (KGCL) in 1991. The rights were assigned from KGCL to Natural Gas Contracts Limited in August 2002. Natural Gas Contracts Limited then changed its name to VGCL in July 2006. It is common ground that VGCL is the current Buyer entitled to purchase gas from the KMCs under the KGC.

Gas production and treatment

[12] I largely adopt the summary relating to gas production and treatment from the Tribunal's Partial Award, which was itself based on the primer provided by the parties for the Tribunal.[5]

[13] The Kapuni Field is an onshore oil and gas field located in Southern Taranaki. The KMCs, through their operating company, Shell Todd Oil Services Limited (STOS), hold a mining licence which, following various extensions, is now due to expire in 2032. The mining leads to the extraction of reservoir fluid.

[14] Reservoir fluid is taken by way of some 10 (current) wells. The KMCs remove condensate from the reservoir fluid. Some of the condensate is extracted at the well sites and some is extracted at the Kapuni Production Station (owned by the KMCs). The resulting product after the removal of condensate is usually referred to as "raw gas". The raw gas from the Kapuni field has a high CO_2 content and must be treated to remove the CO_2 before it may be used for most normal domestic and industrial purposes.

[15] The KMCs take some of the raw gas as "own use" gas for the purposes of operating the field. Until 2009, the KMCs also sold some of the raw gas to users who were able to utilise the gas in its untreated state, namely Kiwi Cooperative Dairies Limited (Kiwi) and Taranaki By-Products Limited (TBP). The balance of the raw gas is then piped across the fence (as the parties refer to it) to the KGTP where it is treated. The treated gas is then referred to as "spec gas", "specified gas" or "treated gas".

[16] When the gas is treated at the KGTP, liquids (LPG and natural gasoline), are also removed. The remaining treated gas has less energy content as a result. For present purposes this is referred to as "energy shrinkage". The liquids removed are themselves valuable.

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5 The primer was also produced to assist the Court.

[17] Following treatment at the KGTP, the treated gas is then introduced into the transmission pipes which reticulate it around the North Island. At all material times, some of the treated gas ultimately went to customers of Nova (an entity associated with Todd).

The KGC and subsequent documents

[18] The KGC was entered into on 31 July 1967. As noted, the existing two plaintiffs and BP (Oil Exploration) Company of New Zealand Limited were the original sellers under that contract, and the Minister of Mines the original Buyer. Initially the Buyer took all the gas from the field under the KGC.

[19] In a judgment issued in February 1997 the High Court (Barker J sitting with R G Blunt as a lay member) upheld the KMCs' claim that the KGC contravened s 27 of the Commerce Act 1986 (the 1997 judgment). The Court ruled that, for the purpose of encouraging competition in the wholesale and retail natural gas markets in New Zealand, after 1 April 1997 the Kapuni gas reserves were to be divided equally between NGC as (the then) Buyer and the KMCs. The Buyer's half was to be purchased from the KMCs at the rate established by the KGC.

[20] The KMCs were entitled to sell their half into the wholesale or retail natural gas markets either as raw gas (CO_2 rich) or as treated gas following treatment. Subject to capacity, NGC was directed to provide its treatment facilities to the KMCs at a reasonable price.

[21] The 1997 judgment concluded by inviting the parties to submit a formal judgment for sealing. The parties made further submissions which culminated in a supplementary judgment dated 26 May 1997 (the supplementary judgment).

[22] Over the following months the parties negotiated the terms of the order to be sealed. On 10 October 1997, the judgment of the Court was sealed (the sealed orders).

[23] Following the issue of the sealed orders the parties negotiated a settlement to avoid an appeal. The settlement agreement was executed on 7 November 1997 (the settlement agreement).

[24] Order 27 of the sealed orders required the parties to agree a reasonable price for NGC to charge the KMCs to treat their gas. The parties were, however, unable to agree on the fee NGC was to charge for processing the KMCs' share of the gas. This led to an arbitration and the delivery of a Processing Fee Award (PFA) on 27 January 1999.

[25] I expand on the detail of the KGC, the judgments, the sealed orders, the settlement agreement and the PFA in the course of this decision.

Scope of the appeal

[26] There are three main appeal issues which arise from the Partial Award and the Second Award:

(a) the allocation issue;

(b) the quantum issue; and

(c) the pricing issue;

the latter two arise from the Second Award.

Allocation issue

[27] Within the allocation issue the principal issue is, as a matter of interpretation of the KGC, as amended or affected by subsequent events, when VGL treats raw gas for the KMCs and VGL retains the liquids, what is the effect on the parties' gas allocation, particularly in terms of the sealed orders and settlement agreement?

[28] In addition, the following subsidiary issues arise:

- The relevance of the PFA to the contractual interpretation;

- The relevance of subsequent conduct on the interpretation issue;
- Whether the parties reached a (different) binding agreement on or before December 2002; and
- Given the lapse of time, whether it was an abuse of process for Vector to take the matter to arbitration.

Quantum issue

[29] The quantum issue concerns whether the energy shrinkage following treatment is to be assessed on an actual or notional amount.

[30] In the event the Court determined the energy shrinkage should be calculated as an actual amount, Vector cross-appealed alleging it was an abuse of process to permit the KMCs to raise the issue in the arbitration. However, during submissions Mr Scott confirmed that Vector did not pursue that cross-appeal. I need say no more about it.

Pricing issue

[31] The pricing issue is whether the price paid by the Buyer for gas shrinkage is to be calculated at the marginal price paid by the Buyer for gas or the price set for the Buyer to buy its share of Current Tranche Gas.[6]

[32] The KMCs seek orders determining these issues in their favour or, alternatively, an order remitting the issues back to the Tribunal together with the series of directions that Mr McIntosh presented during the course of submissions. The quantum and pricing issues only arise in the event the Court finds for Vector on the allocation issue. If the Court accepts the KMCs' case on allocation, the quantum and pricing issues fall away.

[6] As defined in the settlement agreement.

Preliminary issues

The approach to this appeal

[33] This is an appeal on question(s) of law in accordance with the right expressly reserved in the Agreement,[7] and in accordance with cl 5 of the Second Schedule to the Arbitration Act 1996.[8]

[34] The appeal proceeds by way of a rehearing.[9] It is subject to the principles established in *Austin, Nichols & Co Inc v Stichting Lodestar*.[10]

[35] Mr McIntosh confirmed the KMCs accept they cannot challenge found facts and factual inferences drawn by the Tribunal on this appeal. However, he submitted the Court could consider the facts and make findings where the Tribunal had not. Mr Scott accepted the proper interpretation of the contract is a question of law and was therefore appealable, but submitted the Court does not have jurisdiction to make new findings on the evidence to fill any factual matters that may have been left unresolved by the Tribunal.

[36] The parties also differed on the Court's jurisdiction on questions of mixed law and fact. The issue arises particularly, but not exclusively, in relation to the Tribunal's decision to decline to take into account the post contractual conduct of the parties in interpreting the KGC as amended by the orders. The Tribunal found that in the period post 1999 the parties both internally and as between themselves had a variety of conflicting views. The Tribunal accordingly did not think that they could draw any clear or useful conclusion from the conduct which would assist in the interpretation of the contract. They therefore declined to take it into account when considering the interpretation of the contract. Mr McIntosh submitted the Court could revisit that issue. Mr Scott submitted the Court could only look at questions of mixed fact and law if the Tribunal was "obviously wrong".

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7 Agreement to Arbitrate, cl 1.3.
8 Schedule 2, cl 5(1)(a).
9 High Court Rules, r 26.13.
10 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

[37] In *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd*,[11] a full bench of the Court of Appeal discussed the approach the Court should take to an application for leave to appeal from an arbitration. The Court observed:[12]

> … our Parliament, like those in the United Kingdom and Australia, has chosen to favour finality, certainty and party autonomy over these considerations [arguments for a broad approach]. It intended to encourage arbitration as a dispute *resolution* mechanism. By enacting a statute with the express purpose of redefining and clarifying the limits of judicial review of arbitral awards, Parliament has made clear its intention that parties should be made to accept the arbitral decision where they have chosen to submit their dispute to resolution in such manner. It plainly intended a strict limitation on the involvement of the Courts where this choice has been made. This makes inappropriate a broad approach to the discretion, such as that proposed by counsel for the appellant in this case. (Of course, where *both* parties repent of their decision to choose arbitration over litigation and wish to submit their dispute over a question of law to the Courts, the 1996 Act makes provision for them to do so without leave: see clause 5(1)(b).)

[38] Parliament has also clarified the issue of what constitutes a question of law in this context by the 2007 amendment to the Arbitration Act, which by cl 5(10) to the Second Schedule now provides:[13]

> **9 Schedule 2 amended**
>
> Clause 5 of Schedule 2 is amended by adding the following subclause:
>
> "(10) For the purposes of this clause, **question of law**—
>
> "(a) includes an error of law that involves an incorrect interpretation of the applicable law (whether or not the error appears on the record of the decision); but
>
> "(b) does not include any question as to whether—
>
> "(i) the award or any part of the award was supported by any evidence or any sufficient or substantial evidence; and
>
> "(ii) the arbitral tribunal drew the correct factual inferences from the relevant primary facts."

[39] Counsel were unable to identify any authorities dealing with the issue of whether, on an appeal of question of law, this Court could make factual findings which had not been made by the Arbitral Tribunal. Mr McIntosh nevertheless

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[11] *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318.
[12] At [52].
[13] On 18 October 2007 by the Arbitration Amendment Act 2007, s 9.

submitted that this Court could find facts where the Tribunal had not made a determination. He also correctly noted that the *Doug Hood* decision was an application for leave to appeal, unlike the present situation where the parties had preserved the right to appeal on a question of law. It was for that reason the appeal was a rehearing on the record. However, against the clear direction of Parliament's intent in relation to the place of arbitration as a dispute resolution mechanism as noted by the Court of Appeal and confirmed by the 2007 amendment, I tend towards Mr Scott's submission that, on an appeal on a question of law, this Court does not have the ability to make further findings of fact where the Tribunal has not done so.

[40] The parties are bound by findings of fact, however flawed they may be.[14] In this context and against the background of the restriction of the right of appeal to appeals on a question of law, where the Tribunal has been silent on an issue or has not made a finding of fact, then I do not consider this Court on an appeal on a question of law can properly determine new facts not determined by the Tribunal. Put another way, the parties agreed the fact finding body was to be the Tribunal. It is not for this Court to take a different view to the Tribunal of the facts. Given a question of law does not extend to whether the Tribunal drew the correct inferences, I do not consider this Court can determine facts left undecided by the Tribunal. Such an exercise does not come within the intentionally confined ambit of a question of law.

[41] However, in the context of this appeal, and for the reasons that follow, I do not consider the issue to be of any particular moment in any event.

[42] On the issue of the approach to take to questions of mixed law and fact, it is fair to observe that the authorities are somewhat mixed.

[43] The Supreme Court of Canada succinctly identified the differences between questions of law and fact and what constitutes a mixed question of law and fact in *Canada (Director of Investigations and Research) v Southham Inc* as follows:[15]

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14 *Pupuke Service Station Ltd v Caltex Oil NZ Ltd* Appeal No 6394, reported as an appendix to *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd*, above n 11 at 338.

15 *Canada (Director of Investigations and Research) v Southham Inc* [1997] 1 SCR 748, (1997) 144 DLR (4th) 1 at [35].

> ... Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what "negligence" means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact. ...

[44] The decision of Mustill J in *Finelvet AG v Vinava Shipping Co Ltd; The Chrysalis*[16] is often cited on this issue. Mustill J divided the process of the arbitrator's reasoning into the following three stages:[17]

> (1) The arbitrator ascertains the facts. This process includes the making of findings on any facts which are in dispute. (2) The arbitrator ascertains the law. This process comprises not only the identification of all material rules of statute and common law, but also the identification and interpretation of the relevant parts of the contract, and the identification of those facts which must be taken into account when the decision is reached. (3) In the light of the facts and the law so ascertained, the arbitrator reaches his decision.

Mustill J then went on to state:

> In some cases, the third stage will be purely mechanical. Once the law is correctly ascertained, the decision follows inevitably from the application of it to the facts found. In other instances, however, the third stage involves an element of judgment on the part of the arbitrator. There is no uniquely 'right' answer to be derived from marrying the facts and the law, merely a choice of answers, none of which can be described as wrong.
>
> …
>
> Whether the third stage can ever be the proper subject of an appeal, in those cases where the making of the decision does not follow automatically from the ascertainment of the facts and the law, is not a matter on which it is necessary to express a view in the present case. *The Nema* [*Pioneer Shipping Ltd v BTP Tioxide Ltd, The Nema* [1981] 2 All ER 1030, [1982] AC 724], and *The Evia* [*Kodros Shipping Corp v Empresa Cubana de Fletes, The Evia* [1982] 3 All ER 350, [1982] 3 WLR 637 HL] show that, where the issue is one of commercial frustration, the court will not intervene, save only to the extent that it will have to form its own view, in order to see whether the arbitrator's decision is out of conformity with the only correct answer or (as the case may be) lies outside the range of correct answers. This is part of the process of investigating whether the arbitrator has gone wrong at the second stage. But once the court has concluded that a tribunal which correctly understood the law could have arrived at the same answer as the one reached

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[16] *Finelvet AG v Vinava Shipping Co Ltd; The Chrysalis* [1983] 2 All ER 658. In the New Zealand context, reference can also be made to the Law Commission report (*Improving the Arbitration Act* (NZLC R83, 2003)) ch 6 at [115].

[17] At 663.

> by the arbitrator, the fact that the individual judge himself would have come to a different conclusion is no ground for disturbing the award.

[45] On the issue of post-contractual conduct Mr McIntosh made a distinction between primary factual findings and the second step, whether the facts as found can or should be taken into account in determining the parties' objectively intended meaning of the contract. Mr McIntosh submitted that this Court could consider and overturn the Tribunal's decision to exclude the instances of subsequent conduct[18] when interpreting the contract.

[46] However, I do not consider that to be open to the Court in this case. The underlying factual findings about the post contractual conduct were that the parties held a variety of conflicting views. On the basis of those primary factual findings, which this Court cannot go behind, it was open to the Tribunal to find it could not draw any useful conclusions from such conduct, indeed such a finding was inevitable.

[47] Even if this were to be regarded as a question of mixed law and fact, it is one which lends itself to more than two possible outcomes. In other words, the Tribunal could have taken a number of views about the effect of the various instances of post contractual conduct. The authorities suggest in such a case that the Court should only interfere in circumstances where the outcome challenged is effectively outside the realm of reasonable outcomes.

[48] It follows that I consider the Tribunal's finding that the subsequent conduct was not sufficiently compelling to be of assistance in interpreting the contract to be a finding which is not appealable as a question of law. However, again for the reasons that follow I do not consider that it makes any material difference in this case.

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[18] The measuring by difference and invoicing practice the parties implemented and the position taken by them about the allocation of liquids in the 2004 "catch-up proceedings".

The interpretation of the consent orders

[49] There is a further preliminary matter. That is the interpretation of consent orders. The parties accept that consent orders may be interpreted according to contractual principles.[19]

[50] It is common ground that the KGC, the sealed orders and settlement agreement are to be read together. However, I accept there is force in Mr Scott's point that not all of the orders made by the Court are to be properly regarded as consent orders. A number of them directly followed the hard fought litigation before the Court rather than being produced as consent orders.

The allocation dispute

[51] I turn to the matters for determination. As noted the issue under the allocation dispute is whether the Buyer's right to extract, buy and keep the liquids (as shrinkage) is part of its right to buy 50 per cent of the gas produced from the field, the consequence being that the liquids are to be allocated to the Buyer's 50 per cent share of gas allocation or whether that right to the liquids is separate and additional to the Buyer's right to buy 50 per cent of the field so that the shrinkage is to be allocated to the KMCs' 50 per cent share of gas allocation.

KMCs' arguments

[52] The KMCs submit the correct interpretation is that the liquids purchased by the Buyer are to be counted as part of the Buyer's share of the gas taken. They say that is apparent from:

(a) the words of the KGC which confirm it by:

(i) the definition of gas; and

(ii) the terms of sealed order 27;

(b) the commercial common sense of the matter; and

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19 *Kirkpatrick v Kotis* [2004] NSWSC 1265, (2004) 62 NSWLR 567 at 45.

(c) the parties' conduct which discloses a clear mutual understanding and practice.

[53] The KMCs' primary submissions are that the Tribunal fell into error by:

(a) ignoring evidence of the mutual pre-split understanding. The Tribunal declined to take into account clear and probative post-contractual evidence of how the parties had interpreted the contract; and

(b) while stating that Order 27 authoritatively determined the issue the Tribunal did not say how it did so. The Tribunal did not address key words, they misinterpreted the KMCs case and interpreted the order as applying to the wrong Vector party; and

(c) wrongly drawing subjective inferences from the supplementary judgment and the PFA. The PFA has no relevance.

[54] In the alternative, the KMCs contend that, in any event, in 2002 the parties reached a separate agreement to vary the contract allocating the liquids to the Buyer.

[55] Finally, the KMCs say the claim pursued by Vector was an abuse of process because of delay and incomplete evidence.

[56] Mr McIntosh confirmed that the KMCs do not pursue the estoppel argument, acknowledging it was based on factual findings. The KMCs accept it was determined against them on the facts and cannot be pursued on this appeal.

Vector's case

[57] Vector says that the KGC is a contract for the sale of quantities of raw gas – not for the sale of liquids, treated gas or energy. The splitting of the field by the 1997 judgment did not change the commodity being sold under the contract. The corollary of the KMCs being able to sell their 50 per cent share of the raw gas entitlements in any way they see fit, including without having the liquids removed, is that the allocation of the parties' respective raw gas entitlements must be completed

before each party decides what they want to do with it. Order 27 only becomes relevant if the KMCs decide they wish to have some or all of their raw gas processed by Vector. In that case the KMCs are electing to allow Vector to purchase the liquids removed from their gas and Order 27 confirms that is to be at the price payable for gas under the KGC.

The Tribunal's decision on the allocation issue

[58] In its Partial Award the Tribunal illustrated the difference between Vector's and KMC's argument (as pleaded at the arbitration) by way of example:

> 87 ... Assume that, on a given day, 200 units of raw gas are delivered to the KGTP for treatment (and there is no other sale of raw gas by the KMCs). There is a notional allocation of 100 units to each of the KMCs and Vector. As part of the subsequent treatment process, 15% of the raw gas is converted to liquids (15 x 2 = 30 units of liquids). That leaves 170 units of treated gas.
>
> 88 On the Vector argument, both Vector and the KMCs would share that gas equally. Each would take 85 units of treated gas. Vector would pay the KMCs (directly and by way of discount on the processing fee) for the 15 units arising from the KMC's share of the gas. The KMCs would pay for treatment of the 85 units of gas received by them.
>
> ...
>
> 91 On the KMC argument ... the KMCs would take 100 units of treated gas. That is, they say they are entitled to the energy equivalent of their share of the input gas. They say they are entitled to 100 units of raw gas and, following treatment, they should receive 100 units of treated gas. By contrast, on this approach, Vector would receive only 70 units of treated gas (plus the liquids). The KMCs say that is the intended consequence of their methodology. Vector would receive the same energy output as the KMCs. Vector would receive 70 units of treated gas and 30 units of liquids, a total of 100 units of energy.

[59] Before the Tribunal the KMCs described its argument as the "make-up" or "make-whole" approach. In effect, the KMCs argued that the KGC stipulated a "swap" of liquids for treated gas. That argument proved difficult to reconcile with the wording of the sealed orders that assumed energy shrinkage and a subsequent payment from Vector to KMCs to compensate for Vector's retention of the liquids.

[60] The Tribunal accepted Vector's argument. They concluded that, under the 1997 judgment, Vector was required to retain the liquids consequent upon treatment but the Court would not have intended that, in keeping the liquids NGC (now Vector)

would receive a lesser volume of treated gas. The Tribunal accepted Vector's argument that the allocation occurred prior to the treatment. The Tribunal considered the last (key) sentence in Order 27 addressed the point. The Tribunal interpreted the words "shall pay" used in Order 27 literally. In doing so the Tribunal rejected KMCs' argument that the Buyer must "make up" the gas in the sense that the Buyer must pay for the treated gas to ensure an equivalence of energy for the KMCs noting that, if the KMCs were right and that was what Order 27 contemplated, logically there would be no energy shrinkage.

[61] Fundamentally the Tribunal considered that the KMC argument was contrary to the KGC. The KGC was a gas supply contract not an energy contract. The Tribunal concluded that the sealed orders also supported the Vector argument. They did not see anything in the settlement agreement entered a month later which disturbed or altered that conclusion. To the extent it was relevant the Tribunal considered the settlement agreement was consistent with their preferred interpretation of Order 27. They then rejected the submission for the KMCs that the post-contract conduct was of assistance on the question of interpretation.

[62] On appeal the KMCs' argument does not rely on a "swap"; rather, KMC's entitlement to 100 units of treated gas (and Vector's corollary entitlement to 70 units of treated gas and 30 units of liquids) is established by the notional split of the "gas" from the field, the term "gas" including any or all of the hydocarbons left over after the condensate is removed. Although KMCs' entitlement to treated gas arises from the notional split of the field, the KMCs argue that it is not allocated to their reserves until after the gas is actually treated at the KGTP.

Discussion - allocation

[63] There are a number of key concepts in the relevant documents. The KGC defined "reservoir fluid", "condensate", and "gas" separately. Importantly "gas" was defined to mean:

> all of the Reservoir Fluid remaining after the Condensate has been removed,
> ...

Reservoir Fluid was defined as:

> that mixture of carbon dioxide, methane, ethane, liquefiable hydrocarbons, Condensate and other substances, gaseous or liquefiable as produced from the wells in the Kapuni Field.

[64] Article XII provided that gas to be delivered was:

> all Gas which flows from the field separators and such other Gas as becomes available in Sellers' handling of the production and separation of Condensate from the Reservoir Fluid. ...

[65] Article XIII provided for the measurement of the gas. The original measurement unit was British Thermal Units (BTUs). The parties now use joules. Article XVII provided separately for invoicing.

[66] In the 1997 judgment, having determined that s 27 of the Commerce Act 1986 applied to the KGC the Court then considered how to address the issue, bearing in mind the constraints of:

(a) interference with existing petrochemical contracts that NGC had at the time;

(b) the impracticality of a tender and

(c) the KMCs' ownership of the field.

[67] In the result the Court concluded inter alia that the:

> ... anti-competitive aspects can be eliminated by allowing the plaintiffs to retain up to one-half of the remaining gas in the field. ...
>
> ...
>
> Accordingly we propose that the remaining reserves be divided equally between plaintiffs and defendants. This is an equitable solution which is inducive of competition.
>
> ...
>
> We think that splitting the Kapuni Reserves will make the plaintiffs [KMCs] more eager to look for more gas. We note the plaintiffs' [KMCs'] ability to deliver gas as is demonstrated by the Kiwi Pipeline.
>
> The defendants' [KGCL and NGC's] half should be purchased from the plaintiffs at the contract rate (determined as per the contract part of the

> judgment); it will need to be used primarily to satisfy the demands of petrochemical contracts. If there is not enough Kapuni gas to do that, then the defendants, where contractually possible, will have to use the backup arrangements and supply Maui gas.
>
> ...
>
> This ruling means that the defendants will pay to the plaintiffs the agreed or arbitrated price for the first 7.5 PJ plus 85% of that price for the balance of their 50%.
>
> ...
>
> There has never been any suggestion but that the plaintiffs [KMCs] are entitled to retain the condensate and that the defendants are entitled to retain the liquids and CO_2 produced during the process of removing CO_2. As noted earlier, some of the liquids are sold back to the plaintiffs. We see no need to disturb those provisions in the contract.
>
> ...
>
> In respect of CO_2 removed gas, we note the undertaking of the defendants to make their CO_2 removal plant available to all comers at a reasonable commercial price. We therefore direct that CO_2 removal be undertaken if required at a reasonable price by arrangement between the parties. Failing agreement, the price is to be determined by arbitration or mediation with an attempt at mediation a condition precedent to arbitration.

[68] I observe that underlying the reasoning is the principle that the remaining reserves were to be divided equally. The defendants' right to retain the liquids was treated separately. It was recorded as not in issue and apparently not intended to be affected by the judgment.

[69] The parties raised a number of issues following the judgment. In response the Court issued the supplementary judgment. In relation to the issue of liquids the Court rejected a submission by KGCL and NGC that all gas, including the KMC's half, should go through the liquid removal process and that the Buyer should retain all substances removed except when sellers wished to sell CO_2 rich gas in which case the Buyer would remove the liquids but not CO_2. The Court held that out of the seller's half of the field only such gas as was required by the sellers to have CO_2 removed could be utilised by the Buyer for liquid removal. In other words, it was up to the KMCs to decide how much of the gas allocated to them they sent across the fence for treatment.

[70] The parties then settled the terms of the judgment in the sealed orders including:

> 20 The Court's finding that provisions of the [KGC] breach section 27 of the Act does not affect:
>
> 20.1 Sellers' right to retain Condensate produced from the Kapuni Field; and
>
> 20.2 Buyer's right to extract and retain [LPG], Natural Gasoline and CO_2 from all Gas delivered by Seller to Buyer for processing (as the terms "Condensate", "[LPG]", "Natural Gasoline" and "Gas" are defined in Article I of the [KGC]).
>
> 21 The [KGC] is hereby varied under section 89(2)(a) of the Act to provide:
>
> 21.1 that, subject to paragraph 22 below, the balance of the Kapuni field from 1 April 1997 be divided equally between the plaintiffs and the defendants until such time as the field becomes uneconomic and the provisions of the Contract take over;
>
> 21.2 that contract quantities are to be determined in accordance with paragraph 8 above, with each party being entitled to an equal share of the agreed or arbitrated contract quantities;
>
> 21.3 that the defendants' share of the contract quantities be purchased from the plaintiffs under the [KGC].
>
> [Order 22 required the parties to utilise their share of annual quantities but also provided for the KMCs to have a three year "holiday" period before they were obliged to do so.]
>
> ...
>
> 26 The plaintiffs [KMCs] are at liberty to sell their half of the gas without CO_2 removed and without any liquids removed.
>
> 27 The second defendant must remove CO_2 from gas to which the plaintiffs are entitled in terms of the order in paragraph 21 above at a reasonable price, if requested to do so by the plaintiffs, subject to the capacity of the [KGTP]. If the second defendant and the plaintiffs cannot agree on a reasonable price, that price is to be mediated and, failing agreement, determined by arbitration. Where Sellers deliver gas to the second defendant for the purpose of CO_2 removal, Buyer shall be entitled to extract from that gas and retain [LPG] and Natural Gasoline. Buyer shall pay for the difference between the energy content of the gas so delivered by Sellers to the second defendant, and the treated gas redelivered to Sellers, as gas taken under the [KGC]. For the avoidance of doubt:
>
> 27.1 nothing in this order affects any contracts between Seller and NGC in relation to [LPG] and Natural Gasolines.

[71] For completeness I note the parties then concluded the settlement agreement by which they agreed to contract out of any appeal. In that settlement agreement they agreed:

> **Applicable terms for sale and purchase of Gas**
>
> 3.1 The parties agree that the terms set out in clauses 3.2 to 3.10 below shall constitute the applicable terms for sale and purchase of Current Tranche Gas.
>
> ...
>
> 3.6 Sellers and Buyer shall each be entitled to:
>
> 3.6.1 an equal share of the agreed AACQ [Adjusted Annual Contract Quantity] set out in clause 3.5 above in each Year commencing on or after 1 April 1997 during which Shared Gas is supplied, in accordance with paragraphs 21 and 22 of the Judgment.
>
> 3.6.2 an equal share of the Shared Gas, subject to adjustment in accordance with clause 3.8.3 below ...

[72] Clause 3.8.3 provided:

> If neither clause 3.8.1 nor clause 3.8.2 applies, [not relevant for present purposes] the quantity of Gas not taken shall be shared equally between Sellers and Buyer on the terms applicable to Shared Gas set out in this agreement, with all necessary modifications.

[73] "Shared Gas" was defined as:

> Current Tranche Gas excluding:
>
> (a) Gas sold and delivered to Buyer on or before 15 March 1996, and prior to 1 April 1997, and
>
> (b) Gas which was used by Sellers as fuel for the purposes of cycling Gas or transporting condensate, or supplied by Sellers to [Kiwi], on or after 15 March 1996 and prior to 1 April 1997.
>
> For the [avoidance] of doubt, *Shared Gas* excludes own use Gas to which Article IV(2) of the [KGC] applies.

[74] Fundamental to the determination of the issue of allocation is the concept of energy shrinkage.

[75] After the condensate is removed from the reservoir fluid the raw gas delivered to the KGTP for treatment is measured in gigajoules (GJ). When the raw gas is treated and the heavier hydrocarbons are removed (in the form of liquids) the energy content of the remaining gas stream is diminished. This lowering of the energy content of the raw gas is referred to as "energy shrinkage". The rate at which energy shrinkage occurs is not always constant, although the evidence and findings in the PFA concluded that, under normal operating conditions at the KGTP, for every 1.18 GJ of raw gas processed, approximately 0.18 GJ of LPG and natural gasoline is recovered. That means that the energy content of the (now treated) gas stream shrinks by about 15 per cent to 1 GJ.

[76] The starting point to determination of the allocation issue is that the 1997 judgment varied the KGC to provide that the balance of the gas reserves of the Kapuni field from 1 April 1997 was to be divided equally between the KMCs on the one hand and KGCL and NGC (now Vector) on the other. The balance of the Kapuni field referred to in Order 21 of the sealed orders is the raw gas from the field or, put another way, the reservoir fluid remaining after the condensate has been removed. Order 20 confirms the KMCs may retain the condensate. What is left is the reservoir fluid less the condensate or "gas" in terms of the KGC. This is confirmed by Order 20.2 which provides the relevant definitions in the KGC are to apply.

[77] Order 21 then provides for KGCL's and NGC's share (which is 50 per cent of the Gas) to be purchased from the KMCs. Importantly the KMCs were free to deal with their half of the gas in any way they saw fit, including without having the CO_2 removed and without any of the liquids removed.[20] For example, as noted the KMCs could supply untreated gas directly to Kiwi.

[78] However, in the event that the KMCs opted to have at least a part of their share of the gas treated at the NGC's KGTP then NGC was obligated to remove the CO_2 from the KMCs' gas. KGCL (as Buyer) was entitled to retain the liquids, the LPG and natural gasoline, extracted as part of the treatment process. As KGCL was effectively retaining part of the KMCs' share of the gas (because of the energy shrinkage during treatment) it was required to pay for the difference between the

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20 Order 26.

energy content of the gas delivered for treatment and the treated gas redelivered to the KMCs.[21] The last sentence of Order 27 recognises the energy shrinkage in the process and addresses it by requiring KGCL to pay for the difference for the shrinkage lost by the KMCs as a consequence of the treatment.

[79] Looked at another way, the treated Gas redelivered to the KMCs had less energy content than the Gas provided by them for treatment by NGC. NGC (or by this time its assignee, KGCL)[22] obtained a benefit from the treatment process, as it was entitled to retain the by-products of the treatment process, namely the LPG and natural gasoline. To address that issue, Order 27 required the Buyer (KGCL at the time) to pay the KMCs and fixed the price to be paid as the same as the gas supplied under the KGC.

[80] The clear intent of Order 27 was to require KGCL to provide compensation to the KMCs for the fact they were receiving less gas back than they had provided for treatment (measured in GJs) and that KGCL had obtained a benefit in that it was able to retain the LPG and natural gasoline. The compensation was provided, not by allocating the energy shrinkage to KGCL's share of the field (which would have effectively adjusted the 50/50 share of the field's reserves) but by requiring KGCL to pay for the shrinkage at the price of gas taken under the KGC. That Order 27 is concerned with payment rather than allocation is clear from the introductory words of the last sentence: "[b]uyer shall pay for the difference ...".

[81] In summary, the 1997 judgment and sealed orders provided for an equal division of the remaining gas reserves, but acknowledged that, if the KMCs chose to have part or all of their share of the reserves treated, KGCL was entitled to retain the liquids. As a consequence, the KMCs would receive less energy when the treated gas was redelivered to them. KGCL was required to compensate the KMCs to the extent that the liquids (the shrinkage) came from part of KMCs' gas allocation.

[82] Given the background and circumstances surrounding the KGC, the 1997 judgment, the supplementary judgment and orders I consider the correct

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[21] Order 27.
[22] NGC assigned its rights as Buyer to KGCL in 1991.

interpretation to be that the KGC is a contract for the sale of raw gas, not energy. Such interpretation is consistent with the wording of Order 27, and importantly, is consistent with and supported by the surrounding circumstances. Order 21.1 and 26 suggest that allocation of each party's respective raw gas entitlements is complete before each decides what they want to do with their own raw gas. In directing that the remaining reserves were to be shared equally before treatment, the Court regarded the defendants' right to retain the liquids obtained from treatment of KMCs' share of the gas reserves quite separately to the parties' rights to share equally in the Kapuni field.

[83] It is necessary however to address the submissions to the contrary raised by Mr McIntosh. He argued that the KGC properly interpreted defines gas as including liquids, and therefore liquids could count as part of the Buyer's share. In the alternative, he submitted that even if liquids were not gas, they were nevertheless expressly deemed to be so by Order 27 for the purposes of splitting of the field.

[84] Dealing with the contract interpretation argument first, fundamentally I do not consider there is any force in the argument for KMC that "gas" is in essence:

> all the hydrocarbons produced that are not condensate on the basis that production is within limits an ever changing mix of hydrocarbons and no mix will ever be the same.

[85] First, Mr McIntosh makes the point that the words "raw gas" and the concept of "raw gas" are not to be found anywhere in the KGC or later documents. He is correct, but raw gas is no more than a convenient term to describe gas as defined in the KGC, reservoir fluid less condensate. The primer, which was part of the agreed joint statement of facts presented to the Tribunal for the purposes of the arbitration, is replete with references to raw gas, which is defined in the primer as:

> reservoir fluid that has had the condensate removed by the KMCs but has not been treated at the KGTP and therefore does not meet New Zealand specifications for natural gas.

[86] The division of the Kapuni field in 1997 did not alter what was being sold under the contract. It simply altered the entitlement to take under the contract and, in its terms, split the entitlement equally between the KMCs and the Buyer in order to

provide for competition in accordance with the Commerce Act 1986. The KGC defined the subject matter of the sale as "gas" and provided that the sales units were to be measured in volumes of such gas, not by its component parts.

[87] Mr McIntosh sought to support his argument by submitting that a definition including both a residual description as a whole and the different constituents of the whole makes commercial sense in context. The hydrocarbons including the liquids can be sent to industrial users (such as Kiwi). He suggested it was implausible that the parties ever turned their minds to fixing the concept of gas as raw gas only.

[88] The submission is, with respect, speculative. Further, "gas" in terms of the contract is not limited to just hydrocarbons. Next, the gas to be delivered under the contract is further defined in the contract as all gas flowing from the KMCs' Kapuni production station.[23]

[89] Next, Mr McIntosh submitted that the parties' conduct and particularly the terms of the NGC gas contract showed the Vector parties' understanding of the meaning of gas was the same as the KMCs' in that it incorporated all hydrocarbons other than Condensate. The NGC gas contract between KGCL and NGC provided for NGC to buy gas from "the Buyer" under the KGC. NGC buys the gas remaining after the Buyer's contracts are fulfilled. Mr McIntosh noted that the definition of "Kapuni Gas" in the NGC gas contract excluded natural gasoline and LPG which, he submitted, indicated the parties accepted they would otherwise be gas in terms of the contract.

[90] However, the gas available to NGC under the agreement referred to was all the gas recoverable from the Kapuni field and which KGCL was entitled to purchase under the KGC less all Kapuni gas which KGCL was required at any time and from time to time to deliver to NZLFI under the NZLFI Gas Contract, Petrogas under the Petrogas Contract and Petrochem under the Petrochem Gas Contract. The contract between NGC and KGCL effectively defines Kapuni gas as treated gas. It does not advance KMCs' case on the interpretation issue.

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[23] Article XII(1) of the KGC.

[91] Next, Mr McIntosh referred to the wording of Order 27 and the history of the negotiations between the parties leading to the final form of Order 27. He noted that initially Vector as Buyer argued for the right to all of the liquids as part of its right to buy the gas under the KGC. That argument was, however, rejected in the supplementary judgment. Mr McIntosh submitted the Tribunal did not deal with this point. He also noted that Russell McVeagh had provided a memorandum of 7 May 1997 in which, on behalf of KMC, the firm argued it was unacceptable for KGCL and NGC to attempt to exclude the liquids extracted from the KMCs' gas from the Buyer's 50% allocation of reserves.

[92] However, the short point in response is that the last word on the subject, after the supplementary judgment and prior to the orders being completed and sealed was a letter from Chapman Tripp to Russell McVeagh on 8 July 1997. In that letter Chapman Tripp wrote inter alia:

> 5. KGCL/NGC are content to omit paragraphs 26.1 and 26.2 [26.2 providing "such liquids do not form part of the 50% of gas allocated to Buyer under paragraph ... above] on the grounds that they go without saying and were not (for that reason) actually said by the Judge. Since the Court has not made these points explicit KGCL/NGC accept that they cannot insist on filing a judgment in those terms. However if the enclosed judgment cannot be sealed by agreement, and it proves necessary to return to the Court, we will be asking the Court to make these matters explicit so that they may be recorded in the final judgment.

[93] Mr McIntosh's response was to submit the Tribunal was wrong to rely on those words. He submitted Russell McVeagh did not expressly respond to that assertion because it did no more than reflect the Buyer's position and could not assist the objective interpretation of the contract. However, in my judgment the letter is an effective response to the submission for the KMCs that post-judgment conduct to the extent of the parties' approach to the settlement of the form of the sealed orders supports the KMC's interpretation.

[94] Next, Mr McIntosh argued the KMCs' interpretation of "gas" is also reflected in the settlement agreement which draws no distinction between the different components of gas and prescribes half shares of production by energy. He noted it did not include any liquids reconciliation mechanism. But this is effectively a repetition of the argument that at some stage the KGC contract changed in nature

during the course of the proceedings to a contract for the sale of energy rather than "Gas" as defined. It is an argument I have already rejected.

[95] The terms of the settlement agreement added new definitions of current tranche gas and shared gas to deal with the issue of the life of the field and relevant pricing issues. Other than that, it confirmed that, except as they are otherwise inconsistent, the terms of the KGC continue to govern the sale and purchase of current tranche gas.[24] I am unable to accept there is anything in the terms of settlement agreement which supports the conclusion that the parties had intended such a significant change to the basis of their dealing.

[96] Mr McIntosh criticised the reasoning of the Tribunal in relation to Order 27. He submitted that while the Tribunal had concluded Order 27 was key to the interpretation issue, it had failed to say how Order 27 authoritatively determined the question of shrinkage. While accepting Order 27 prescribed a payment obligation and calculation mechanism, the KMCs say the elements do not exist in isolation and payment provided for must reflect the underlying quantity of gas purchased. The actual words used were unusual if the parties intended them to only mean payment at the gas price. Mr McIntosh submitted that in the Second Award the Tribunal had effectively rejected KMCs' argument that on the logic of the Partial Award the price could only be the prevailing gas price. In other words, in his submission the Tribunal had rejected an argument that the words meant at the contract price.

[97] I am unable to accept Mr McIntosh's criticism of the Tribunal's approach to Order 27. In particular, having discussed the general context to the orders the Tribunal stated:

> 104 We turn to the language used in the key sentence in Order 27. Our reasoning takes account of the wider context as explained above. We conclude that use of "*...shall pay...*" is to be interpreted literally. That is, there shall be a payment made by NGC (now Vector) for the energy shrinkage. The KMCs argue that "*pay*" is used more broadly. On their argument, the Buyer must make-up the gas – in that sense, the Buyer must pay for treated gas to ensure an equivalence of energy for the KMCs. We do not believe the Court endorsed the use of "*...shall pay*" in such a sense. In opening, Mr McIntosh accepted that the language used in Order 27 was

[24] Settlement agreement, cl 3.1.

> unusual if the Court was intending to refer to a payment in kind. He said, nevertheless, that that was the intention. We do not agree.
>
> ...
>
> 106 If the KMCs are right that Order 27 contemplated a make-up, and thus an equivalence of energy, then, logically, there would be no shrinkage. That is because NGC (Vector) would be required to make-up what would otherwise be shrinkage by way of treated gas. If there were 100 units of raw gas in, then the KMCs would receive a 100 units of treated gas out. It is difficult to read Order 27 as contemplating such an outcome.

[98] For the reasons given above I agree with the Tribunal's interpretation of Order 27. Order 27 deals with the treatment of gas to which the KMCs are otherwise entitled to. The Order does not create any entitlement to share in the gas reserves. The entitlement is provided for in Order 21. Order 27 clarifies that, while the Buyer is entitled to retain the LPG and natural gasoline extracted from the KMCs' gas sent for treatment, the Buyer is obliged to pay for those liquids as they represent the energy shrinkage. The Order recognises that the Buyer had to pay for the difference between the energy content of the gas delivered for treatment and the gas redelivered after treatment. The other side of the coin is that the Buyer may retain the liquids removed during the treatment process. The last sentence of Order 27 confirms that the payment was to be "as gas taken under the [KGC]". It prescribes the payment mechanism. There is no other mention of the price to be paid in respect of the shrinkage in that Order.

[99] Mr McIntosh also criticised the Tribunal for mischaracterising KMCs' case. The KMCs did not say that Order 27 expressly used the term "pay" in a broad sense to mean substitute with treated gas or that it expressly mandated a gas "make-up". The KMCs' case is that the shrinkage is deemed to be the gas taken by the Buyer under the contract so had to be part of the Buyer's half-share. To support that, Mr McIntosh referred to the invoicing practice, a matter to which I refer later. However, there is force in Mr Scott's criticism of that submission in that it was contrary to the evidence presented by the KMCs before the Tribunal. For example, Mr Jackson the commercial advisor to Shell talked about KGCL/NGC "effectively swapping some treated gas for liquids".

[100] Mr McIntosh also criticised the Tribunal for seemingly misunderstanding the separation between the Buyer and NGC.[25] He submitted the references to NGC were wrong because Order 27 referred to the Buyer as being required to pay for the shrinkage, which at the time was KGCL, rather than NGC. Mr McIntosh is correct. By this time NGC had assigned its rights as Buyer to KGCL. Order 27 does make a distinction between the party treating KMCs' gas and the party purchasing the liquids, the Buyer. However, nothing turns on that particular distinction in terms of the meaning to be given to "... shall pay for the difference ... as gas taken under the [KGC]".

[101] Another important feature relevant to the interpretation point is the parties' different approaches to the timing of allocation.

[102] The Tribunal accepted Vector's argument that the allocation of gas occurred prior to treatment irrespective of whether the KMCs had some or all of their gas treated. The Tribunal characterised the KMCs' argument that allocation necessarily takes place downstream of the KGTP regardless of how much gas the KMCs have treated on a given day as "highly refined" but considered it foundered on the simple point that the sealed orders did not mandate two different approaches to allocating the shared gas depending on whether the KMCs sought treatment of their share of the gas.

[103] The KMCs challenge the Tribunal's finding. Mr McIntosh submitted there was an intermingled stream of gas going across the fence which could not be separated into the parties' raw gas entitlements and the parties effectively adopted a later allocation in practice.

[104] The KMCs accept that while there may be a "notional split of the field" prior to treatment that "notional split" did not address the central issue of whether the Buyer's liquids entitlement was to be part of its gas entitlement (the matter in issue) nor when the parties should measure their respective off-takes and, in KMC's submission, allocate the gas.

[25] At [104] and [122] of the Partial Award.

[105] In an attempt to deal with the wording of Order 26:

> [The KMCs] are at liberty to sell their half of the gas without CO_2 removed and without any liquids removed.

Mr McIntosh submitted it did not advance either party's case because it was merely the Court's "in principle" reasoning for not permitting NGC to have all liquids from the field, irrespective of treatment, and was effectively subject to Order 27.

[106] Mr McIntosh submitted Vector's theory effectively relied on the parties expecting that, at some future time, the PFA arbitrator would to fix the notional rate of shrinkage for contractual allocation purposes.

[107] Effectively the KMCs are asking this Court to rule the Tribunal's finding that, as a matter of practice, gas was allocated to the parties prior to treatment was not tenable factually. Any such challenge must be on the basis that the finding was either not supported by the evidence or was contrary to it. That is, however, not an appeal on a question of law given the wording of cl 5(10) of Schedule 2.

[108] In any event, as Mr Scott submitted, had the parties chosen to strictly apply the contractual mechanism, each had a right to up to 50 per cent of the field deliverability on a daily basis. It would have been open to Vector to have requested delivery of an exact quantity of raw gas out of its entitlements, and the KMCs could equally have requested an exact quantity of their share be processed by Vector. The precise amount (of intermingled gas) could have been delivered to the treatment plant on a daily basis with the daily quantities confirmed by the relevant meter. As recorded in the primer "this meter is very accurate and the parties rely on it to quantify the amount of raw Kapuni Gas delivered to the KGTP". I accept that the fact the parties chose not to operate on this basis is not fatal. It simply confirms that they were content to have a more flexible arrangement based on the estimated forecast followed by subsequent quantification.

[109] Mr McIntosh's alternative argument was that, even if liquids were not gas, they were nevertheless expressly deemed to be so by Order 27. The KMCs submit that the words "as gas taken under the ... contract" mean more than simply at the gas

price. Mr McIntosh submitted that nowhere in the Partial Award were the words expressly addressed by the Tribunal. He took the Court in some detail through his cross-examination of Mr Seymour, the general manager gas trading for Vector. He submitted that Mr Seymour was equivocal on the matter and noted Mr Seymour's reference to being "mesmerised by that one sentence in cl 27 ...".

[110] But as has been discussed above Order 27 does not deal with the parties' entitlements to gas from the Kapuni field. The entitlement to gas is dealt with earlier, at Order 21. Order 27 addresses the issue of the processing of KMCs' share of the gas. It provides for VGL's obligation to process KMCs' gas at a reasonable price. It confirms that the Buyer, VGCL, may retain the liquids obtained from the process and provides the basis for fixing the price to be paid.

[111] It follows I agree with Vector's case on allocation.

Post amendment conduct

[112] The parties accept that the Supreme Court decision in *Gibbons Holdings Ltd v Wholesale Distributors Ltd* confirms that evidence of post-contractual conduct can be used to assist the interpretation of a contract where it is capable of providing objective guidance as to the intended meaning of the parties at the time the contract was formed.[26] In *Gibbons Holdings* Tipping J put it this way:

> [62] I conclude this topic with the observation that properly focused and limited evidence of post-contract conduct will often be capable of shedding more light on contractual meaning than a lot of the pre-contractual material which is said to bear on that meaning. Post-contract evidence that logically indicates that at the time they contracted the parties attached a particular meaning to the words in dispute can be good evidence that a later attempt by one party to place a different meaning on those words is unpersuasive.
>
> [63] Even if the meaning suggested by the post-contract conduct is not the most immediately obvious objective meaning, the parties' shared conduct will be helpful in identifying what they themselves intended the words to mean. That, after all, must be the ultimate determinant. If the court can be confident from their subsequent conduct what both parties intended their words to mean, and the words are capable of bearing that meaning, it would be inappropriate to presume that they meant something else.

[113] The Tribunal dealt with this issue at para 123 of the Partial Award:

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[26] *Gibbons Holdings Ltd v Wholesale Distributors Ltd* [2007] NZSC 37, [2008] 1 NZLR 277.

> 123 Finally, we address the question of post-contract conduct as a means to interpret a contract. Without attempting to state the current law in that regard, we cannot see any basis in the subsequent conduct to embark upon that exercise. In the period post-1999 the parties both internally, and as between themselves, held a variety of conflicting views. We do not think we could draw any clear or useful conclusion from this conduct which would assist us to interpret the matters before us. Therefore, we decline to do so.

[114] Mr McIntosh criticised that conclusion and submitted that the invoicing fax of December 1997 (for example) was probative evidence of how the parties had understood the position. In that fax the KMCs set out a proposal for the invoicing of gas supplies. It was proposed the sales to KGCL (and NGC) would consist of:

> KGCL's sales to Methanix and Petrochem NGC wholesale sales to NGC customers shrinkage (conversion to liquids) on the above streams plus the shrinkage on processing Nova volumes.

Mr McIntosh submitted that the subsequent invoices stated the quantity of gas that the Buyer was buying whereas nothing else ever did.

[115] However, the Tribunal considered this December 1997 fax and subsequent invoices and concluded:

> 51 ... the KMCs argued that, not only was it an invoicing arrangement, but also an allocation mechanism (although not all its witnesses seemed to hold to that view). The Tribunal is quite satisfied that the KMCs are wrong as to this. The December 1997 fax set up an invoicing arrangement which was subsequently implemented. It was not an allocation mechanism. If it had been, there would have been no need subsequently to argue or discuss the topic of allocation. Yet the KMCs argue that in 2002 the parties did that and actually reached an agreement about allocation.

[116] And then later:

> 144 ... The argument focuses closely on the December 1997 fax. Despite the KMCs' best efforts, we can see no basis to conclude that the fax (or indeed anything else) *"was a clear allocation arrangement"* pre-2002 as argued by them in closing. Use of the word *"reconciliation"* in the December 1999 fax does not convert it into an agreed allocation mechanism.

[117] Those particular findings of the Tribunal are factual findings and cannot be subject to an appeal. Further, having reviewed the evidence on which they are based, I agree with the conclusions in any event. The December 1997 invoicing fax does not stand alone. After December 1997, the parties went to arbitration concerning the

processing fee. In the course of that arbitration NGCs' argument was premised on the assumption the energy shrinkage was to come from KMCs' 50 per cent share of the gas. The KMCs' argument proceeded on the assumption that the liquids removed by NGC during treatment formed part of KMCs' 50 per cent share of the Kapuni field:

> NGC's offers to the KMCs to date have been on the basis that it retains the liquids without giving full credit for their market value because NGC claims it only has to pay the KMCs the arbitrated Kapuni gas price. The KMCs submit that this results in an unreasonable treatment price. The KMCs own the liquids. They can choose to sell the gas untreated (and so sell the liquids too). If they treat the gas in their own bypass plant, they would be entitled to sell the liquids. Logically, after treatment, they must still own the liquids.

[118] Then in late 1999, Mr Seymour, on behalf of Vector, created a spreadsheet which allocated the energy shrinkage to the KMCs' 50 per cent share of the gas. In December 1998 or early 1999 Mr Seymour emailed the spreadsheet to the KMCs. From February 1999 onwards STOS circulated a revised version of Mr Seymour's spreadsheet within the KMCs. It was only in January 2001 that Mr Seymour emailed Shell with a revised reserves spreadsheet which suggested the energy shrinkage ought to be allocated to NGC's reserves.

[119] In addition there are a number of internal memoranda of the KMCs and STOS which updated the reserve spreadsheets and which allocated the shrinkage to the KMCs using the original Seymour reserves spreadsheet.

[120] There was then the meeting in August 2002 when Mr Seymour explained that NGC allocated the energy shrinkage to NGCs' share of the field. Thereafter the KMCs chose to adopt that position. However, Mr Seymour said in his evidence that when he reviewed matters again he discovered his "mistake" and reallocated the shrinkage to the KMCs' reserves.

[121] Against that very summarised background there was ample evidence for the Tribunal to have concluded, as it did, that the subsequent conduct was not sufficiently compelling or unequivocal as to assist on the issue of interpretation.

The overtake litigation

[122] Mr McIntosh next referred to the "overtake" litigation. In 2004 NGC initiated injunction proceedings on the basis the KMCs were taking more than their 50 per cent share of the gas reserves. That was based on NGCs assessment that the shrinkage was allocated against their reserves rather than KMCs' reserves. Mr McIntosh submitted it was entirely improbable that the Vector interests (at the time, NGC and NGCL) would not have been aware of the issue. Mr Seymour was the main witness for the Vector interests. The KMCs defended the proceeding on the basis that the liquids were part of Vector's 50 per cent share.

[123] The Tribunal concluded that nothing could be made of the interim injunction proceedings either way. Mr McIntosh submitted that the Tribunal's dismissal of the point was a major error. Again, however, if there was an error in that conclusion of the Tribunal it must be a factual finding because it underlay the Tribunal's conclusion that Vector's failure to revisit the shrinkage issue was not evidence of an agreement but rather reflected the mistake Vector was proceeding under. In other words the Tribunal accepted that during this period, including the "overtake" proceedings, Vector was proceeding on the basis of a mistaken misapprehension as to how the liquids were to be treated. That was a factual finding open to the Tribunal.

[124] The important fact remains that the parties both adopted inconsistent positions on this issue from time to time. Initially they had proceeded on the basis that the shrinkage was to be allocated to the KMCs' reserves. Then that position changed, but on Mr Seymour's evidence, from Vector's point of view Vector realised it was mistaken and changed again. The parties' actions were not sufficiently unambiguous to be determinative one way or the other on this issue.

The processing fee arbitration

[125] Mr McIntosh criticised the Tribunal's reliance on the PFA award as supporting its interpretation of the KGC. The Tribunal declined to hold the parties to positions taken by them in the controversy of the arbitration. Rather, the Tribunal concluded that it was more helpful to analyse the PFA as providing an insight into

the intentions of the High Court, noting it would be artificial to ignore the fact that the presiding Judge, Barker J, subsequently acted as the arbitrator following his retirement. The arbitration fleshed out the details left unresolved or incomplete in the earlier judgment.[27]

[126] Taken as a whole the PFA supports the interpretation that the liquids are to be attributed to KMCs' allocation of gas. For example, in the course of the Interim Award, the Hon Sir Ian Barker set out KMCs' calculation of the value of the liquids, noted the shrinkage and then stated:

> 6.69 I consider that this calculation must be discounted because of the real question marks over the LPG market at the present time and the other factors mentioned. Taking into account all the evidence, I consider that the value to NGC of the liquids extracted on a "spot" basis from the KMCs' share of the field, unbundled from the tolling price, is 38 cents per GJ.

When this comment is read in the context of earlier comments in the Award it is clear that the arbitrator treated the liquids as coming from and being attributable to KMCs' gas allocation.[28] To the extent it is relevant at all the PFA supports the Tribunal's interpretation.

The 2002 agreement

[127] Apart from relying on the August 2002 meeting as evidence of post-contract conduct supportive of the KMCs' interpretation, Mr McIntosh also submitted the parties made a subsequent agreement between August and December 2002 that energy shrinkage would be allocated to Vector's 50 per cent share of gas and that the parties were bound by that agreement. The Tribunal rejected that argument.

[128] KMCs' argument for the subsequent agreement is based on a number of features: the meeting on 23 August 2002, an email of 26 August 2002 sent after the meeting, and also a letter of 12 December 2002 in which the KMCs wrote to NGC advising of the increase in gas reserves with an attached reserves spreadsheet allocating the energy shrinkage to NGC.[29] The KMCs' argument proceeds on the

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[27] At [82] and [83] of the Partial Award.
[28] See cl 5.8, 5.9, 5.10 of the Award.
[29] Vol 7, p 1850.

basis that these events constituted a binding variation to the settlement agreement. They rely on *Antons Trawling Co Ltd v Smith*.[30]

[129] In *Antons Trawling* Mr Smith was the master of a fishing vessel operated by Antons which held a small quota for fishing orange roughy. Mr Smith claimed that at a meeting with the managing director of Antons in June 1994 he was promised a 10% share of any additional quota allocated to Antons as a result of him demonstrating to the Ministry of Agriculture and Fisheries the existence of orange roughy in sufficient commercial quantities to justify a larger quota. The Court accepted there was such a promise made and that in relation to one of the two areas in issue Mr Smith had demonstrated a commercial fishery which resulted in additional quota being granted to Antons. He was entitled to the enforcement of the promise in relation to that area of quota.

[130] On appeal one issue was whether consideration had been provided given the existing agreement between Antons and Mr Smith. The Court of Appeal held that consideration was not an end in itself; rather it was important as a signal that the parties intended to be bound by their contract. If parties who had already made clear their intention to be bound acted upon an agreement to a variation, they would be bound by their agreement.[31]

[131] In the present case, however, the difficulty for the KMCs is the express finding of the Tribunal that there was no clear agreement by the parties to vary the existing contract by allocating the liquids to the NGC. The Tribunal made factual findings that at the meeting in August Mr Seymour's statement was greeted by silence. There was no positive response or acceptance by the KMCs. The Tribunal found, as a matter of fact, there was no engagement with Mr Seymour's proposition by the KMCs. That was deliberate. As for the subsequent correspondence there was no clear and unequivocal offer to vary existing contractual rights which had been accepted by the Vector interests. The Tribunal did not consider that the December 2002 letter could be construed as a relevant response to any offer made by Mr Seymour in August. Importantly, the Tribunal also referred to Mr Jackson's answer

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30 *Antons Trawling Co Ltd v Smith* [2003] 2 NZLR 23 (CA).
31 At [93].

in cross-examination that he did not really see the events in August as constituting an agreement. He regarded it as a confirmation of what was already happening.

[132] On my review of the correspondence I conclude that there was no variation to the existing arrangements made in 2002. It was simply a continuation of the existing conduct of the parties.

Abuse of process

[133] The last substantive matter raised by the KMCs on the allocation issue is the abuse of process argument. They argue that it was an abuse for Vector to pursue the arbitration at this late stage, relying on *Henderson v Henderson*, *Johnson v Gore Wood & Co (A firm) (No. 1)*, and *Neylon v Dickens*.[32] In short, the KMCs say that given the passage of time they could not properly defend what they characterised as Vector's belated claim for a new interpretation. Discovery was limited. The Tribunal dealt with this argument peremptorily as follows:

> 142 The KMCs also plead affirmative defences based upon res judicata (arising from the 1997 Judgment) and an alleged abuse of process. ... The arguments appear to be subsumed in those already addressed under the heading Shrinkage, particularly by reference to the definition of *"Gas"*. We do not need to add anything more about them.

[134] The well established principle in *Johnson v Gore Wood & Co* is that the bringing of a claim in later proceedings may, without more, amount to an abuse if the Court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in earlier proceedings if it was to be raised at all. There is nothing in *Neylon v Dickens* that adds to this general proposition.

[135] I consider the abuse of process argument to be misconceived. The parties had differing views as to the interpretation of the KGC (and subsequent documents) in relation to the allocation of the energy shrinkage against gas reserves. They each considered their view to be correct. As the Tribunal held, there was no comprehensive or clear evidence of agreement either way arising from their conduct. The earlier proceedings did not directly address this issue. They were either directed

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[32] *Henderson v Henderson* 67 ER 312; *Johnson v Gore Wood & Co (A firm) (No. 1)* [2002] AC 1; and *Neylon v Dickens* [1987] 1 NZLR 402 at 409.

at the consequences of the 1997 judgment or the fee NGL was to charge for processing the KMCs' gas. The current allocation issue was not directly before the Court or the arbitrator in the earlier proceedings. In the circumstances it was reasonable, given the context of a lengthy contract with years to run and significant money at stake, to seek clarification by way of the further submission to arbitration directed expressly at this issue. There was no abuse of process.

Quantum

[136] The Tribunal dealt with the issues of quantum and price in the Second Award. The quantum issue arises because, having accepted the energy shrinkage is to be attributed to the KMCs' allocation of gas, it is necessary to determine the amount of the shrinkage to be allocated against the KMCs' reserves.

[137] Vector accepts that the wording of Order 27 supports the conclusion that the quantum to be allocated is the actual energy shrinkage, the difference between the energy content of the gas delivered for treatment and that redelivered after treatment and removal of the liquids. The parties are agreed that the actual energy shrinkage difference was 6.9 petajoules (PJ).

[138] However, in the PFA the arbitrator determined the processing fee the KMCs were to pay on the assumption that the rate of shrinkage was approximately 15%. In other words 0.18 GJ for every 1.18 GJ of raw gas processed. Vector argued before the Tribunal that the notional rate of 15% should apply and that the KMCs were estopped from arguing that the quantum of the energy shrinkage should be the actual energy shrinkage despite the wording of Order 27.

[139] The Tribunal accepted Vector's argument, concluding in the Second Award as follows:

> [85] The KMCs accepted that the figure of 34c would remain fixed and that it was based on the assumption that shrinkage would be 15% of the raw gas supplied for treatment. Nevertheless, when it came to allocating to reserves, they said the actual figure should be used. Vector argued that this was an inconsistency of approach and we agree. Contrary to the KMCs' argument, we believe there is a necessary link between use of that ratio in setting the discount and in the consequential fixing of reserves. True, the Arbitrator did not address this explicitly but we do not think that matters.

> [86] If the economic rationale of the Arbitrator's assessment is analysed we have little doubt that there is an unspoken assumption that any reserves allocation must be on an assumed basis. After all, quantification of the amount of the liquids was central to determining the quantum of the discount. The Arbitrator was effectively deeming Vector to be purchasing the assumed volume of liquids which was paid for by way of the discount. If Vector is effectively deemed to have purchased those liquids on that assumed basis then that, likewise, should be how the reserves allocation is calculated. The quantification of the amount of the KMCs' reserves was a necessary step in the logic of how the Arbitrator set the discounted processing fee. The KMCs have had the benefit of that discount and must, in our opinion, now accept the consequence which flows from that.

KMCs' position on the quantum issue

[140] Outlining his submissions in support of KMCs' position on the quantum issue Mr McIntosh took the opportunity to once again criticise the reasoning of the Tribunal in the Partial Award. He submitted, inter alia:

(a) that the fact quantum and price were issues at all highlighted the parties' conduct to the contrary;

(b) they showed the "strained" nature of the Tribunal's interpretation on allocation;

(c) they showed the flaws in the Tribunal's comprehension of the allocation evidence; and

(d) they showed why the arbitration was an abuse of process.

[141] Those arguments must fail for the reasons set out above.

[142] More specifically on the quantum issue he submitted that:

(a) the shrinkage to be allocated to the KMCs must contractually and logically be the actual amount;

(b) the only basis asserted by Vector, or the Tribunal for fixing and shrinkage at the notional amount, is the dicta of the PFA arbitrator; and

(c) even if the arbitrator assumed allocation of shrinkage to the KMCs for the purposes of setting a reasonable processing fee, he did not intend and in any event did not fix all components of his fee setting methodology for all time.

[143] Expanding on point (c) Mr McIntosh repeated the allocation submissions that nothing that was said in the PFA impacted on the issue of allocation and secondly, in finding that there was an implicit determination of the quantum in the PFA the Tribunal applied the wrong test, determined the matter in a way that was inconsistent with the raw gas aspect of the contract, and misunderstood the fee setting process the PFA arbitrator followed (including who the parties to the arbitration were and what they did and were entitled to do).

The PFA – from a quantum point of view

[144] Mr McIntosh is correct that in the PFA the arbitrator did not expressly address the issue of allocation. However, in fixing the processing fee that the KMCs were to pay the arbitrator proceeded on the basis of KMCs' calculation of the value of the liquids (per Mr Trachsel's evidence) which proceeded on the basis that processing 1:18 GJ raw gas yielded 1 GJ of treated gas.

[145] As a preliminary point Vector submits the ground of appeal does not raise a question of law as the Tribunal made factual findings both as to allocation and quantum. However, the Tribunal's decision on this issue is essentially an interpretation of the PFA. I deal with the matter on the basis of the substantive merits of KMCs' challenge.

[146] The parties are agreed that the relevant law on issue estoppel and whether, in the circumstances of this case, an issue estoppel arises is to be determined on the test set out in *Talyancich v Index Developments Ltd*:[33]

> Issue estoppel arises where an earlier decision is relied upon, not as determining the existence or non-existence of the cause of action, but, as determining, as an essential and fundamental step in the logic of the judgment, without which it could not stand, some lesser issue which is

[33] *Talyancich v Index Developments Ltd* [1992] 3 NZLR 28 (CA) at 37.

> necessary to establish (or demolish) the cause of action set up in the later proceedings: (Spencer Bower & Turner, The Doctrine of Res Judicata (2nd ed, 1969), pp 149-150, para 191).

[147] The question is whether, as an essential and fundamental step in the logic of fixing the processing fee to be fixed, and without which the PFA decision could not stand, the arbitrator determined the quantum of the shrinkage. Put another way, to make out the estoppel, Vector has to establish that the quantum of the shrinkage was fundamental to the arbitrator's decision in the PFA without which the substantive determination concerning the price to be charged for treating the KMCs' gas could not stand.

[148] In fixing the fee it is implicit the arbitrator proceeded in the PFA on the basis of a 15% shrinkage in yield:

> 6.68 The KMCs' calculation of value of liquids (calculated as per Mr Trachsel's brief of evidence) are as follows:
>
> **Processing 1:18 GJ raw gas yields**
>
> - 1 GJ of treated gas
> - 4.9 litres of LPG
> - bbls of natural gasoline
>
> **Calculation**

	CTS/GJ Treated Gas
4.9 litres @ 14 cents per litre	69
0.1 bbls gasoline @ $16 per bbl	16
	85
Less 0.18 GJ "lost" gas (shrinkage) @ 1.90 (the maximum possible fee to be fixed under the price arbitration)	34
Value Added	51

> N.B. If shrinkage costed at discount gas price of $1.68 (the lowest price under the arbitration), then added value of liquids is 55 cents, rather than 51 cents.

[149] It is relevant that immediately after para 6.68, which detailed the assumed shrinkage, the arbitrator went on to discuss the appropriate discount because of the real question mark over the LPG market at the time before determining the value to

NGC of the liquids extracted on the spot basis at 38 cents per GJ. That in turn was fundamental to the arbitrator's final calculation of the processing fee as discussed at 8.2:

> 8.2 The range for an unbundled tolling fee is between 74 cents (cost to KMCs of the bypass offset by advantages) and 50 cents as the assessed marginal cost. Taking into account all evidence, submissions and considerations, I fix the simple unbundled tolling fee at 58 cents per GJ. Based on my assessment of the value of the liquids to NGC, I fix the tolling fee at 20 cents per GJ if NGC retains the liquids. The 58 cents per GJ applies if the liquids are returned to KMCs after CO^2 removal. These assessments are made after full consideration of the evidence which I have used as the basis for an informed judgment on what is reasonable in all the relevant circumstances.

[150] In reaching that conclusion as to the processing fee the arbitrator employed a number of steps in his reasoning. They included quantifying the amount of the liquids removed (in GJs) from KMCs' gas during treatment, the valuation of the remaining gas and the quantity of the liquids. The discount was then applied to the "unbundled" processing fee to arrive at the final discounted (bundled) processing fee. The assumed shrinkage figure of 15 per cent was an essential step in reaching the final processing fee.

[151] Mr McIntosh repeated the KMCs' submissions that the arbitrator could have reached the same conclusion by another means. That may be true. Anything is possible with the variables involved. However, it was necessary for the Arbitrator to adopt a figure for shrinkage as part of the process of fixing the appropriate processing fee. The undisputable fact is that, in reliance on the evidence of Mr Trachsel and as a step in the process of fixing the fee adopted by him the arbitrator applied a 15 per cent figure for shrinkage.

[152] In terms of the finality or the conclusiveness of the finding in the PFA it is relevant that, following the delivery of the interim PFA, the KMCs successfully opposed NGC's attempt to have the price indexation at PPI reviewed annually and to apply a review period for both the unbundled fee and the liquids' value. The arbitrator rejected NGC's argument in the final award, concluding he was bound to apply the earlier rulings.

[153] Mr McIntosh submitted that the Tribunal's subjective interpretations of the Arbitrator's decision in the PFA were flawed. In particular the Tribunal fell into error by applying a consistency threshold as opposed to the necessity threshold required for an issue estoppel. Mr McIntosh referred to para 85 of the Second Award where the Tribunal had agreed with Vector's argument that KMCs' argument that the figure of 34 cents would remain fixed and based on the assumed shrinkage of 15 per cent but the actual figure could still be applied to reserves was "an inconsistency of approach".

[154] However, with respect, that submission overlooks the next sentence in that particular paragraph of the Tribunal decision where they go on to note:

> 85 ... Contrary to the KMCs' argument, we believe there is a necessary link between use of that ratio and setting the discount and in the consequential fixing of reserves.

[155] Next, picking up on the point in *Talyancich v Index Developments Ltd* that a useful test is whether it is possible to appeal the finding being put forward as founding an estoppel the KMCs submitted that they could not realistically have appealed the implicit finding in the PFA about quantum since if it existed it was well hidden. Mr McIntosh submitted that there would have to be an assumption that the arbitrator by using the fixed percentage of liquids when setting the fee intended to fix it contractually for all time and then appeal on that basis. But that calculation could have been challenged as part of any challenge to the ultimate processing fee. Further, the context in which the arbitrator in the PFA used the 15 per cent is relevant. First, he accepted and applied the evidence of Mr Trachsel for the KMCs on this issue. Next, the arbitrator did fix the fee for all time leaving the only issue amenable to review as the two yearly PPI. The KMCs had argued strongly and successfully against any further review.

[156] Mr McIntosh also submitted that the Tribunal fell into error by assuming that the additional liquids value was a figure actually paid by Vector when actually the PFA was all about the payment the KMCs were required to pay for the treatment of the gas. The liquids calculation was intended to yield a notional working figure by which the processing fee would be discounted. I agree with the submission by Mr Scott for Vector that even if that is a fair statement of the Tribunal's position it is not

relevant and does not establish any error of law. Further, it is not incorrect to view Vector as effectively paying for the liquids in the form of the discount applied on the processing fee. One is the other side of the coin to the other.

Pricing

[157] The last issue raised on appeal concerns the price at which shrinkage is to be charged given that Vector has exhausted its share of the Shared Gas (as defined in the settlement agreement) but the KMCs have reserves of that shared gas remaining.

[158] Before the Tribunal Vector argued the price to be paid for the shrinkage was the price set for Shared Gas, whereas KMC argued the price should be the new gas price (yet to be negotiated when the matter was before the Tribunal).

[159] The Tribunal concluded:

> [111] The key point, to us, is that there remains the existing price for Shared Gas. Until that is exhausted, we think that Vector should pay for shrinkage at the existing price.

Vector's argument

[160] In summary Vector's argument is that the contract provides for different gas prices for different tranches of gas. Until both parties have exhausted their entitlement under a particular tranche the price to be paid for shrinkage on the gas is the Shared Gas price.

KMCs' argument

[161] The KMCs argue that the words of Order 27 apply so that the Buyer must pay for shrinkage "as if it were" gas. The reference to "as gas taken" and the price for gas in Order 27 means that the price for gas taken is whatever the gas price is for that gas at the time it is taken.

[162] In short, KMCs' argument is that the issue is determined by the words of Order 27 and that Order 27 must mean the shrinkage price is to be the gas price payable at the time because only the Buyer takes gas under the contract. The KMCs

do not pay for their share of gas, rather they take it pursuant to their mining licence rights.

[163] Mr McIntosh accepted that the sealed orders and settlement agreement must be read together but submitted that it could not be ignored the sealed orders were drafted and sealed first in time and contained no cross-reference at all to some of the new concepts in the settlement agreement such as, for instance, Current Tranche Gas. While acknowledging cls 3.7 to 3.10 of the settlement agreement (for example) refer to the KMCs taking gas he submitted that does not mean that KMCs are taking gas under the contract. The clauses simply acknowledge the reality that as a result of the 1997 judgment the KMCs can take and keep part of the gas that they produce under the mining licence. However, there is no need for the KMCs to take under the contract as such.

[164] Mr McIntosh submitted that once, as has happened, Vector had taken its share of the current tranche gas then cls 3.2 to 3.10 of the settlement agreement had no continuing effect. He submitted this was supported by cl 3.11 of the settlement agreement.

[165] In responding to the Tribunal's criticism of his submissions as intricate, Mr McIntosh suggested the KMCs' argument was actually straightforward:

(a) First, the clear words of Order 27 prescribe Vector must pay the same price for shrinkage as it does for gas; and

(b) secondly, Order 27 cannot have the meaning argued for by Vector because the KMCs do not take their gas under the contract – they pay nothing for their gas.

Discussion – price

[166] The KMCs' argument is essentially that since they do not pay for their gas the references to payment in particular in Order 27 cannot be a reference to KMCs taking gas because the price paid by them would be nothing. By contrast Vector as

Buyer pays the price irrespective of how much gas the KMCs have or have not taken.

[167] However, I accept the submission for Vector that the KMCs' argument ignores the context and other relevant material. The issue cannot be looked at in isolation by reference to Order 27 alone. After the sealed orders were concluded both parties had appeal rights. They then completed the settlement agreement and recorded the terms upon which they agreed not to pursue an appeal from the 1997 judgment. Importantly, the settlement agreement provided for the applicable terms for the sale and purchase of Current Tranche Gas. Current Tranche Gas was defined in the settlement agreement as:

> ... Gas sold and delivered to Buyer or utilised by Sellers (other than own use Gas to which Article IV(2) of the [KGC] applies) on or after 15 March 1996, over and above the threshold quantity of Gas of 514.96 PJ referred to in paragraph 5 of the Judgment and up to a total quantity of Gas of 850 PJ.[34]

[168] So as defined, Current Tranche Gas was not limited just to the gas sold and delivered to the Buyers. It included the KMCs' share of gas reserves. Clause 3.2 provided for the parties to endeavour to agree a price for the sale and purchase of the Current Tranche Gas.

[169] In my judgment it is therefore apparent that the price for Current Tranche Gas was not exclusively determined by Order 27. Further, the KMCs' interpretation of Order 27 is flawed. Mr McIntosh submitted Order 27 refers to a payment by the Buyer as gas taken under the contract so that the natural meaning is that it is a payment for shrinkage taken by the Buyer as gas under the contract. That, however, harks back to the KMCs' case that the shrinkage is to be treated as gas taken by Vector under the contract. For the reasons given above the shrinkage is not to be treated as gas taken by Vector. It is part of the KMCs' allocation of gas reserves, albeit that Vector is to pay the gas price for that shrinkage. The KMCs' interpretation requires reading into Order 27 the highlighted words:

> Buyer shall pay for the difference ... as gas taken [*by the Buyer*] under the KGC.

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34 Subsequently reserves were extended under cl 2.5 to 1010 PJ.

But that is again a rerun of the KMCs' argument in relation to allocation which I have rejected.

[170] The KMCs' argument is essentially they do not take under the contract but rather in accordance with it. That is, with respect, a distinction without difference in this case. Prior to the 1997 judgment the KMCs had no right themselves to have any allocation of the gas for their own purposes and for resale. As a result of the 1997 judgment they obtained such rights.

[171] Nor am I able to accept the KMC argument that cls 3.2 to 3.10 of the settlement agreement have no application to it once Vector takes its share under the contract. The settlement agreement deals with concepts of adjusted annual contract quantities and maximum daily quantities. Where, for example, either party was taking gas at a lesser rate than the maximum daily quantity the other was entitled to use such surplus deliverability: cl 3.10. That clause must still apply notwithstanding that Vector has completed taking its share of shared gas. If, for example, the KMCs do not take their half of the shared gas, per cl 3.8.3, the quantity of gas not taken is to be shared equally between KMCs and Vector. If either party does not use their share of the annual contract quantity they lose half the amount they have not taken and it is available to the other party. That applies notwithstanding that Vector may have already completed taking its share of the shared gas.

[172] Other parts of the sealed orders also address the issue, particularly again Order 21.1 which divides the balance of the Kapuni Field and Order 21.2:

> ... contract quantities are to be determined in accordance with paragraph 8 above, with each party being entitled to an equal share of the agreed or arbitrated contract quantities.

[173] The short point is that the current tranche of gas has not been exhausted, at least in relation to the KMCs' entitlement, and until it is the price paid for shrinkage is the shared gas price.

[174] For the above reasons I agree with the Tribunal's reasoning.

Result

[175] The appeals against the decision of the Tribunal are dismissed.

Costs

[176] Costs should follow the event. They are reserved to be dealt with by way of memorandum in the event counsel are unable to agree. In that event Vector are to file memoranda by 28 February 2014 and the KMCs are to respond by 14 March 2014. Any reply by Vector by 21 March 2014.

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Venning J