Origin Energy Resources Limited v Benaris International NV & Anor; Woodside Energy Limited v Benaris International NV & Anor [2002] TASSC 50 (14 August 2002)

Last Updated: 15 August 2002

[2002] TASSC 50

CITATION: ***Origin Energy Resources*** *Limited v Benaris International NV & Anor*

Woodside Energy Limited v Benaris International NV & Anor [2002] TASSC 50

PARTIES: **ORIGIN ENERGY RESOURCES** LIMITED

v

BENARIS INTERNATIONAL NV

WOODSIDE ENERGY LIMITED

WOODSIDE ENERGY LIMITED

v

BENARIS INTERNATIONAL NV

ORIGIN ENERGY RESOURCES LIMITED

TITLE OF COURT: SUPREME COURT OF TASMANIA

JURISDICTION: ORIGINAL

FILE NO/S: 1144/2001

167/2002

DELIVERED ON: 14 August 2002

DELIVERED AT: Hobart

HEARING DATES: 13 - 15 May 2002

(Written submissions 22 May, 7 June 2002)

JUDGMENT OF: Slicer J

CATCHWORDS:

Arbitration - The submission and reference - Submission as a defence and as a ground for stay of proceedings - Stay of proceedings - Power of court to stay - Generally - Factors relevant to exercise of power to stay - Stay of proceedings for matter to be referred to arbitration.

Commercial Arbitration Act 1986 (Tas), s53.

International Arbitration Act 1974 (Cth), s7.

Aust Dig Arbitration [29]

Arbitration - The submission and reference - Submission as a defence and as a ground for stay of proceedings - Stay of proceedings - Order or refusal to stay - Particular cases in which stay ordered - Court proceedings instituted - Whether dispute is a "matter agreed to be referred to arbitration" - Whether dispute is a matter capable of arbitration.

Abigroup Contractors Pty Ltd v Transfield Pty Ltd and Anor [1998] VSC 103; (*Tanning Research Laboratories Inc v O'Brien* (1989 - 1990) 169 CLR 332 at 350; *Flakt Australia v Wilkens & Davies Construction Co Ltd* [1979] 2 NSWLR 243; *Timic v Hammock* [2001] FCA 74; *Winter v Somers* [2000] TASSC 33; *Stevens Constructions Pty Ltd v Teodor Zorko* [2002] SASC 42, followed.

Commercial Arbitration Act 1986 (Tas), s53.

International Arbitration Act 1974 (Cth), s7.

Aust Dig Arbitration [37]

REPRESENTATION:

Counsel:

Appellant: J D Merralls QC and G L Sealy

First Respondent: J H Karkar QC and W Harris

Second Respondent: D J Porter QC and P W Tree

Solicitors:

Appellant: Piggott Wood & Baker

First Respondent: Dobson Mitchell & Allport as agents for Johnson Winter & Slattery

Second Respondent: Page Seager

Judgment Number: [2002] TASSC 50

Number of Paragraphs: 55

Serial No 50/2002

File Nos 1144/2001

167/2002

ORIGIN ENERGY RESOURCES LIMITED v BENARIS INTERNATIONAL NV

and WOODSIDE ENERGY LIMITED

WOODSIDE ENERGY LIMITED v BENARIS INTERNATIONAL NV

and ORIGIN ENERGY RESOURCES LIMITED

REASONS FOR JUDGMENT SLICER J

14 August 2002

1 The parties are engaged in the exploration, testing and development of natural gas and petroleum resources in Bass Strait. Following dispute as to the terms of a contract, the plaintiff ("Origin") sought an order restraining the first defendant ("Benaris") from terminating the contract (and executing a power of attorney granted by it to Benaris). The third defendant ("Woodside") is a party to a connected, but subsidiary, contract with Origin and is affected by these proceedings. These proceedings concern an application by Benaris, seeking a stay of the proceedings initiated by Origin, pending the determination of the dispute by arbitration, which is said to be required by the terms of the contract.

2 Woodside has commenced separate proceedings, against both Origin and Benaris, seeking contractual and equitable remedies. A separate application has been made by Benaris seeking a stay of those proceedings until the determination of the original dispute.

Contractual relationship

3 In July 1997, Benaris acquired an exploration permit ("the permit") in respect of an area in Bass Strait for a six year period. On 6 July 1998, it transferred to Origin an 80 per cent undivided interest in that permit. On 10 December 1999, those parties entered into a Joint Operating Agreement ("Joint Operating Agreement"), providing for a joint operating venture to explore for petroleum, appraise the area and, if commercially viable, to develop any field in, and produce petroleum from, the area. The agreement appointed Origin as the

operator of the venture. On 26 June 2000, Origin transferred to Woodside a 50 per cent undivided interest in the permit. In return, Woodside was required to act as a sub-contractor to Origin for the purpose of carrying out the seismic and drilling operations in the permit area. Drilling operations were conducted in May 2001, at a cost of approximately $16m. Following analysis of the field data, Origin concluded that the "commitment well" ("Thylacine 1") ought be cased and suspended and advised Benaris and Woodside accordingly. Benaris and Woodside agreed and Thylacine 1 was duly cased. In June 2001, Origin commenced work on a second well, Thylacine 2, intended to provide further information about the lateral extent, volume and likely flow rates from the gas reservoirs within the area. Origin took the view that Benaris was contractually obliged to contribute to the exploration costs of Thylacine 2. Conversely, Benaris contended that the costs remained the responsibility of Origin, in accordance with the original agreement, which assigned an interest in the permit area to Origin. Origin persisted with its demand for contribution. In response, Benaris served a notice claiming that Origin had committed a material breach of the terms of the contract. The notice required Origin to remedy the alleged breach, default of which was said to entitle Benaris to terminate the agreement and require Origin to reassign the 80 per cent interest in the permit. That reassignment would divest Woodside of its interest granted by Origin.

4 In December 2001, Origin commenced proceedings against Benaris and Woodside claiming that:

(1) The notice was invalid since Origin had complied with the terms of the agreement or, alternatively, that the time for the performance of its obligations had not elapsed.

(2) It would be unconscionable for Benaris to require reassignment, given the expenditure of $16m, agreement by Benaris of the course taken by Origin, and the transfer of the 50 per cent interest to Woodside.

(3) The claim by Benaris was unenforceable since by reason of disproportionality and unconscionability, it constituted a penalty.

Woodside was joined as a defendant as an interested and affected party.

5 In March 2002, Woodside commenced separate proceedings against Benaris and Origin. In part it claimed the benefit of an agreement, dated 20 September 2000 ("the Assumption Agreement"), between the three parties, whereby Woodside assumed certain of Origin's obligations under the Joint Operating Agreement. In that agreement, Origin and Woodside agreed that Woodside became entitled to rights and benefits under the Joint Operating Agreement. Woodside claimed that Origin had complied with its contractual obligations vis a vis Benaris or, by reason of variation, that Origin was no longer required to comply, or that the time for compliance had not yet arisen. It further pleaded as against Benaris, estoppel, unconscionability and breach of the *Trade Practices Act* 1974 (Cth). The claim sought separate and additional remedies as against Origin.

6 These proceedings concern the claim by Benaris that the dispute is governed by an arbitration clause requiring the dispute to be determined by arbitration in Singapore in accordance with the *Arbitration Rules* of the Singapore Arbitration Centre. An issue raised on the application for stay is the effect of the *International Arbitration Act* 1974 (Cth) ("the Act") and the *Commercial Arbitration Act* 1986 (Tas) on the respective rights of the parties.

Terms of contracts

7 The principal contract governing the relationship between Origin (Origin is the corporate successor to Boral) and Benaris dated 6 July 1999 ("the Farmin Agreement") relevantly provides:

"**4.1** In consideration of Benaris transferring the Assigned Interest to Boral Energy in accordance with clause 3, Boral Energy shall:

4.1.1 undertake and complete the Seismic Program, and fully fund all costs relating to or in connection with the Seismic Program, which shall be completed within the third year of the Permit and in accordance with other terms and provisions of the Permit, the Act and any other legislation applicable to the implementation and completion of the Seismic Program; and

4.1.2 subject to clause 4.5, drill and test or abandon the Commitment Well, and fully fund the cost of drilling and testing or abandoning (as may be agreed in accordance with the Joint Operating Agreement) the Commitment Well, including the costs associated with the assessment of the well results,

including but not limited to, the costs of preparing a final well report and reserve calculations and any other reports required by the Authority and the costs of running production casing and testing operations as may be agreed, such drilling and testing of the Commitment Well to be completed within the time stipulated in the Permit, subject to any extension of time as may be approved by the Authority and in accordance with other terms and provisions of the Permit, the Act and any other legislation applicable to the drilling and testing of the Commitment Well.

Irrespective of clause 2.1, Boral Energy shall commence undertaking all planning for the Seismic Program upon the execution of this Agreement.

4.2 On and from the Effective Date, each of Boral and Benaris shall, except as otherwise provided in this Agreement, be liable for their respective Participating Interest costs and expenses in relation to the Permit.

4.3 The Parties agree that Boral Energy shall be appointed as Operator effective on and from the Effective Date."

Provision for termination is governed by cl 7A which, relevant to these proceedings, states:

"If:

(i) Boral Energy commits a material breach of this Agreement, and if capable of being remedied, such breach is not remedied within two (2) weeks of the notice from Benaris;

...

then upon the occurrence of any such events, Benaris shall be entitled to forthwith terminate this Agreement whereupon the provisions in clause 2.5 shall apply. Benaris may not terminate this Agreement pursuant to clause 7A(ii), (iii), (iv) or (v) after the date on which the Joint Operating Agreement which is to include insolvency provisions is executed. Benaris' entitlement to terminate this Agreement pursuant to clause 7A(i) will cease after Boral Energy has fully performed and discharged its obligations under clause 4.1

Boral Energy acknowledges that damages alone is not an adequate remedy for a breach of its obligations under clauses 2.5 or 4.5 of this Agreement and Benaris is entitled to specific performance, injunctive and other equitable relief

in addition to all other remedies available in law in enforcing the obligations under those clauses."

In the event of termination:

"2.5 If this Agreement is terminated pursuant to clauses 2.4 or 7A, Boral Energy shall forthwith and at its sole cost and expense, execute all documents and do all things necessary or as may be required by Benaris to re-assign or re-transfer the Assigned Interest, free and clear of all liens, encumbrances, rights and interest, to Benaris or any other person nominated by Benaris. In addition, Boral Energy shall forthwith deliver to Benaris all materials, data, reports, studies and other information, including geological data and well lot trades, acquired from any and all sources and/or prepared in connection with the Seismic Program and shall transfer to Benaris all its rights under all contracts relating to the Seismic Program to the extent that those contracts are transferable. Boral Energy must use its best endeavours to ensure that each contract relating to the Seismic Program contains a clause permitting the assignment of that contract to Benaris pursuant to this clause. The Parties agree that if this Agreement is terminated pursuant to clause 2.4 as a result of the non-satisfaction of the condition set out in clause 2.1.2 or the condition set out in clause 2.1.3, Boral Energy shall be entitled to a refund of the back costs paid in accordance with clause 2.1.1, free of interest. Save as expressly provided herein, Benaris shall not be required or obliged to pay to Boral Energy any other moneys in connection with the re-assignment or the re-transfer of the Assigned Interest pursuant to the provisions of this Agreement."

The agreement:

"... shall be governed by and interpreted in accordance with the laws of Tasmania and the Parties hereby expressly agree to submit to the non-exclusive jurisdiction of the Tasmanian courts." (Clause 11)

and the manner of resolution stated in cl 19 as:

"19 Arbitration

The Parties shall use all reasonable endeavours to resolve any dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination or invalidity thereof. If the Parties are unable to resolve such

dispute, controversy or claim within two (2) weeks, the dispute, controversy or claim shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ('SIAC Rules') for the time being in force, which rules are deemed to be incorporated by reference into this clause. The law of the arbitration shall be the Singapore International Arbitration Act Cap 143A. The tribunal shall consist of one arbitrator to be appointed by the Parties, or if the Parties cannot agree, by the Chairman of the SIAC.

The performance of this Agreement by Boral Energy and Benaris shall continue during such dispute, controversy or claim and during the arbitral proceedings."

8 Benaris seeks to refer to arbitration whether or not Origin has committed a material breach of cl 4.1.2 entitling it to forfeiture of Origin's (and by necessary implication that of Woodside's) interests in the permit.

9 The agreement between Origin and Woodside of 26 June 2000 provides that the relevant governing law shall be that of Tasmania and the parties will submit "to the non-exclusive jurisdiction of the Tasmanian Courts" (cl 11) but contains no comparable arbitration clause (Joint Operating Agreement, cl 28). Woodside would have no right of standing in any proceedings held in Singapore, unless it succeeded in relying on its status as a party to the Assumption Agreement, thereby coming within the ambit of the Farmin Agreement, cl 19.

Reasonable endeavours

10 A preliminary issue arises through the commencing terms of the Farmin Agreement, cl 19, which relevantly provides:

"The Parties shall use all reasonable endeavours to resolve any dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination or invalidity thereof. If the Parties are unable to resolve such dispute ...".

11 Origin contends that following its notification that Benaris was required to contribute to the costs of Thylacine 2, the conduct and response of Benaris did not amount to "reasonable endeavour(s)" to resolve the dispute, controversy or claim. It says that no claim can be referred to arbitration until

the precondition of "reasonable endeavour" has been met. The parties have not placed before the Court all relevant documentation evidencing negotiations or otherwise, between June and December 2001, but are content to rely on a selection of material in the resolution of this preliminary issue.

12 On 23 May 2001, Origin advised Benaris and Woodside that it recommended that Thylacine 1 be suspended on the grounds that:

"> The discovery is expected to be commercial, based on volumetric estimates provided yesterday;

> The location of the well is optimal, either for a subsea or platform based development;

> The incremental cost to suspend is modest;

> Given the high likelihood of development, we do not believe that an unwarranted abandonment liability would be incurred."

and requested the parties to confirm their respective positions. Benaris and Woodside confirmed agreement on 23 and 24 May 2001, respectively.

13 On 15 June 2001, Origin wrote to Benaris in the following terms:

"Further to the T/30P Farmin Agreement between Benaris International NV and Origin Energy Resources Ltd dated 6 July 1999, Origin advises that, following the drilling of the Thylacine 1 well, we believe Origin has now fulfilled all farmin obligations pursuant to the above agreement, subject to completion of routine analysis of Thylacine 1 well data and preparation of a well completion report as provided for in the Thylacine 1 well AFE (AFE 300 0012).

For accounting purposes we propose that 31 May 2001 be regarded as the completion date, and that Joint Venture accounts reflect Benaris' participation at its 20% equity for forward spending. In practical terms this will mean that projects covered by AFE Nos 300 0006, 300 0008 and 300 0010 will be funded by Benaris at its 20% participating equity from 1 June 2001. Expenditure allocation for projects related to the earning program will be unchanged.

We request that Benaris indicates its agreement by signing a copy of this letter and returning it to the undersigned."

It was this contention which led to the disputation. On 31 July 2001, Benaris, by letter, rejected the proposal, stating:

"2 Pursuant to Clause 4.1.2 of the Farmin Agreement, Origin's obligations to Benaris in respect of the Commitment Well (as defined in the Farmin Agreement) are to drill and test or abandon the Commitment Well and to fully fund the cost of such drilling and testing or abandoning the Commitment Well.
3 In view of the above, we do not concur with Origin's proposal in the Facsimile that Origin has fulfilled its farmin obligations following the drilling of Thylacine 1 (save for the completion of routine analysis and a well completion report) since Origin must test, or abandon the same pursuant to Clause 4.1.2 of the Farmin Agreement. Consequentially, the Earn-in Period as defined in the Joint Operating Agreement dated 10 December 1999 ('JOA') is still continuing.
4 As such, pursuant to the terms of the Farmin Agreement and the Joint Operating Agreement dated 10 December 1999, Origin's farmin obligations to Benaris and to carry Benaris' 20% Participating Interest in the Permit are still continuing."
14 The issues were clearly articulated and fundamental to future operations. It is difficult to see how any steps short of capitulation of position could have resolved the difference. Origin restated its position, adding its opinion as to the benefits which would be achieved from further exploration, to which Benaris replied on 15 August, stating, in part:
"Apart from the strict legal terms, you have also argued that it would be reasonable for Benaris to acknowledge that Origin (and Woodside, although we do not know what the Woodside obligations are,) should be considered as having met its obligations because of the expenditure incurred to date. Although we acknowledge that Origin has undertaken 3D seismic, not 2D, and that wire-line testing has been carried out towards earning a significant equity, it is important to note that, consistent with the intent of the parties in respect of the earn-in by Origin, no maximum expenditure figure was nominated in the Farm-in Agreements. Again, the intent, confirmed in the quote from your letter, was that Origin would do whatever was necessary to determine if there had been a discovery, with the next step being commencement of commercial production.

One of the consequences of Origin/Woodside changing their minds now about testing is that there would be an additional expenditure of $2.8 million approx to re-enter and test Thylacine-1, as opposed to testing Thylacine-2. We can understand that Origin do not want to incur this additional expense. However, the question is - is it reasonable to ask Benaris to compromise its rights and agree to savings for Origin/Woodside of $2.8 million, at a cost to Benaris of $1.756 million (20% x $8.78 million)?

We have given this issue careful consideration and while we wish to make every endeavour to maintain good relations with Origin, both for this and future ventures, there does not seem to be any compelling reason for Benaris to voluntarily accept a penalty of $1.756 million"

and outlining its position to be:

"* Any further testing of Thylacine-1 is at the expense of Origin in accordance with Clause 4.1.2 of the Farm-in Agreement.

* If Thylacine-2 can be tested without re-entering Thylacine-1, then in consideration of Benaris accepting testing of Thylacine-2 in lieu of Thylacine-1, Benaris proposes that the share of Benaris in the testing costs should be borne by Origin towards satisfaction of Origin's earn-in obligations under the Farm-in Agreement (and in the process saving Origin/Woodside $2.8 million)."

15 The position last stated indicates that consideration had been given to the financial implications of further drilling and the effect of its position in relation to those implications. An attempt was made to resolve the difference by a meeting, involving formal resolution, as evidenced in an exchange of correspondence between Origin and solicitors for Benaris dated 13 and 16 November 2001, but such a course was not acceptable to Benaris. On 22 November 2001, the solicitors for Benaris wrote to Origin advising:

"We note you dispute the matters set out in paragraph 4 of our letter. Our client maintains that Origin Energy is in material breach of the Farmin Agreement but has not yet determined its position. We expect it will do so within the next few days.

In the interim, we wish to make clear that our client will continue to perform its obligations in accordance with the Farmin Agreement and related agreements but under cover of and subject to the following:

* our client expressly reserves its rights arising from the said material breach; and

* in continuing to perform consistent with the Farmin Agreement and related agreements our client does so without prejudice to its rights under those agreements and at law consequent upon the said material breach.

It follows that our client will participate in the meeting scheduled for today in Perth, this being the meeting titled 'Otway Workshop', and otherwise perform its obligations but all under cover of and subject to the above.

As to paragraph 2 of your letter, our client maintains the invalidity of the motion set out in the 'Record of Voting' document dated 2 November 2001.

Under cover of and subject to the matters referred to above, our client will give consideration to any further meetings that may be convened, as and when the need arises."

16 On 11 December 2001, solicitors for Benaris forwarded a formal notice of breach to Origin. It is obvious, from the material provided to the Court, that other events occurred and meetings held, which concerned the dispute. Correspondence between the parties remained cordial, but firm. Further exercises of "goodwill" and "best endeavour" would not have resolved the differences between the parties. Both parties clearly and politely articulated their respective positions, but the differences, both in textual interpretation and economic implications rendered endeavour, in itself, futile.

17 There is some basis for concluding that the commencing portion of cl 19 is similar in effect to a commercial "letter of comfort" (*Kleinwort Beanson Ltd v Malaysia Mining Corporation* [1989] 1 WLR 379; *Banque Brussels Lambert SA v Australian National Industries Ltd* (1989) 21 NSWLR 502; *ENT Pty Ltd v McVeigh* 61/1996) since in cases where a contractual relationship has irretrievably broken down, the general statement of reasonableness ought not prevent resolution by way of arbitration. In the circumstances as exist here, it is not necessary to determine the effect of the terms since the Court concludes that both parties were reasonable in attempting to resolve the impasse and acted in good faith in the defence of their respective positions.

Arbitration clause and statute

18 Benaris is incorporated in Curacao, the Netherlands, Antilles and is registered in Australia as a foreign company under the *Corporations Act* 2001. Australia is a party to an International Convention which provides for an arbitration process designed to meet the needs of modern commerce. The Netherlands ratified the Convention in its enactment of the Recognition and Enforcement of Foreign Arbitral Awards on 24 April 1964 and continues to be a Convention Country for the purposes of the Act. Singapore adopted the Convention on 21 August 1986 and likewise remains a Convention Country. Benaris has an office in Kuala Lumpur, Malaysia, but carries on business within Australia. Origin and Woodside are companies incorporated in Australia. Australia has given effect to the Convention through its enactment of the Act which designates the Supreme Court of each State and Territory as an enforcing institution (s56(1)), and provides that (s35(2)):

"An award may be enforced in the Supreme Court of a State or Territory as if the award had been made in that State or Territory in accordance with the law of the State or Territory."

19 The Act forms part of the law of Tasmania and is incorporated into the Farmin Agreement by virtue of cl 11. Any award made by the Singapore International Arbitration Centre would be enforceable in Tasmania, as if made by a Tasmanian arbitrator, and would be subject to review in the appropriate manner. The Act, s7, relevantly provides:

"(2) ... where:

(a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and

(b) the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration;

on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter.

(3) Where a court makes an order under subsection (2), it may, for the purpose of preserving the rights of the parties, make such interim or

supplementary orders as it thinks fit in relation to any property that is the subject of the matter to which the first-mentioned order relates."

20 With respect to the operation of the Act, s7, Gillard J, in *Abigroup Contractors Pty Ltd v Transfield Pty Ltd and Anor* [1998] VSC 103, par80 considered that:

"The words of the section are mandatory and once the prerequisites are satisfied then the court is bound to refer the matter to arbitration unless the court finds 'that the arbitration agreement is null and void, inoperative or incapable of being performed.' See s7(5)."

21 The inclusion by the parties of Tasmanian law in the agreement, cl 11, does not exclude the operation of the Act. It is not necessary to consider whether parties may exclude the operation of the Act by express statement, although I am less certain than was Gillard J (supra), (pars111 and 112) that it is possible to so do (see *Perry v National Provincial Bank of England* [1910] 1 Ch 464, *Lieberman v Morris* (1944) 69 CLR 69). Here the parties have expressly referred to the *Arbitration Rules* of the Singapore International Arbitration Centre. (*Flakt Australia v Wilkens & Davies Construction Co Ltd* [1979] 2 NSWLR 243.)

22 There is a tension within the Act, s7(2) created by the words:

"(b) the proceedings involve the determination of a matter that, in pursuant of the agreement, is capable of settlement by arbitration; and

... stay the proceedings, or so much of the proceedings as involves the determination of that matter ...".

23 It is necessary "to first identify the subject matter of the controversy which falls for determination in these proceedings" (*Tanning Research Laboratories Inc v O'Brien* (1989 - 1990) 169 CLR 332 at 350), in order to determine whether the controversy itself falls within the scope of the arbitration agreement. The methodology also requires a court to ascertain whether "all" or "so much of the proceedings" is to be referred. The tension was recognised by McLelland J in *Flakt Australia v Wilkens & Davies Construction Co Ltd* (supra) when, in dealing with an argument that the word "matter" in s7(2)(b) denotes the ultimate subject matter at issue as one which could not be ascertained until the pleadings had closed, he said, at 250:

"It is further contended for the plaintiff that, in so far as the present application is founded upon s 7 of the 1974 Act, it is premature. It is argued that it is not until after the pleadings have closed that one can properly determine whether the proceedings fall within s 7 (2) (b).

In my opinion, the word 'matter' in s 7 (2) (b) denotes any claim for relief of a kind proper for determination in a court. It does not include every issue which would, or might, arise for decision in the course of the determination of such a claim. The use of the word 'settlement' provides support for the view. 'Settlement' is an apt term to be used in relation to a claim for relief - it is less apt in relation to a mere issue. Furthermore, it is significant that, if the prescribed conditions are fulfilled, a stay is mandatory, notwithstanding that the governing law of the arbitration agreement is that of a country not a party to the Convention; and that, under the law of that country, a stay of proceedings on the basis of an agreement to arbitrate may be discretionary, as it is under the law of New Zealand. In such circumstances, I would not, in the absence of compelling language, attribute to Parliament an intention to require that proceedings be stayed, unless the claim made in those proceedings was capable of resolution by arbitration. Although it is legitimate to look at the terms of the Convention to resolve any ambiguity of expression in the Act, and one finds the expressions 'subject matter' and 'matter' used in Art II, sub-arts 1 and 3 respectively of the Convention, each of these expressions seems to be there used in a fairly loose way, to which the way in which 'matter' is used in s 7 (2) (b) has no necessary relationship. Section 7 (2) by no means reflects the exact language of the Convention, but there is nothing in the Convention which suggests that s 7 (2) does not, on the view of its effect which I have expressed, operate to fulfil Australia's relevant obligation under Art II.

I see no reason to read into s 7 an unexpressed qualification as to the time when an application thereunder can be made. If, before the pleadings are closed, a party can show that the conditions of the section are satisfied, then the prescribed consequence should follow."

24 The pleadings in these proceedings thus far disclose a number of causes of action, but an issue which can be identified as capable of "settlement by

arbitration", must be referred and the remaining causes stayed pending the outcome of that arbitration. That approach accords with the conclusion reached by Sundberg J in *Timic v Hammock* [2001] FCA 74, a case concerning the application of the *Commercial Arbitration Act* 1990 (Qld) which contains a comparable provision. The identification is that of a substantive, although not necessarily, the ultimate, question for determination. The precondition is the existence of a subject-matter which is "in connection with" or "in relation to" a dispute giving rise to arbitration. (*Crusader Resources NL v Santos Ltd* Unreported, South Australian Supreme Court, Full Court, 21 March 1990, Butterworths BC 9000262).

Matter capable of arbitration

25 The issue in contention is whether Benaris is required to contribute to the cost of additional drilling and whether Origin's insistence on its agreeing to doing so before the work is undertaken constitutes a breach of the terms of the Farmin Agreement. Consequential questions include whether Origin's "non commencement" until cost sharing is agreed, is nevertheless permitted, since the time for performance had not elapsed. Central to those issues are the terms of the agreement and its interpretation.

26 The term "capable of arbitration" has wide import but remains governed by the terms of the agreement made by the parties. The parties have employed the terms "dispute controversy or claim" and "the breach termination or invalidity", "arising out of or relating to" the agreement. These terms provide an extremely wide ambit of the type, or category, of matter to be settled by arbitration (*Ashville Investments Ltd v Elmer Ltd* [1989] 1 QB 488; *Ethiopian Oil Seeds v Rio Del Mar Foods Inc* [1990] 1 Lloyd's Rep 136; *IBM Australia v National Distribution Services Ltd* (1991) 22 NSWLR 466).

27 These terms impact on the statutory requirement imposed by the Act, s7(2)(b) that:

"The proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration. It is first necessary to identify the matter or matters capable of settlement."

Before determining whether an issue in dispute can be identified as coming within the ambit of the Act, it is convenient to consider the application, if any, of comparable State legislation.

State legislation

28 Benaris contends that irrespective of the terms of the Commonwealth legislation, Origin is nevertheless bound by State legislation. Origin, in turn, seeks the exercise of discretion permitted by the Tasmanian enactment. The *Commercial Arbitration Act* 1986 (Tas), s53, relevantly provides:

"**53 -** (1) If a party to an arbitration agreement commences proceedings in a court against another party to the arbitration agreement in respect of a matter agreed to be referred to arbitration by the agreement, that other party may, subject to subsection (2), apply to that court to stay the proceedings and that court, if satisfied **-**

(a) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement; and

(b) that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary for the proper conduct of the arbitration **-**

may make an order staying the proceedings and may further give such directions with respect to the future conduct of the arbitration as it thinks fit.

(2) An application under subsection (1) shall not, except with the leave of the court in which the proceedings have been commenced, be made after the applicant has delivered pleadings or taken any other step in the proceedings other than the entry of an appearance."

29 Expressed in different terms (*Timic v Hammock* (supra); *Winter v Somers* [2000] TASSC 33; *Crusader Resources NL v Santos Ltd* (supra); *Turner Corporation Ltd (Receiver and Manager Appointed) v Austotel Pty Ltd* (Unreported, Supreme Court of New South Wales, 2 June 1994, Butterworths BC 9402557), the general purport is similar to the Commonwealth legislation. A court ought not decline to refer a matter for arbitration unless it is satisfied that there is good reason to permit the issue to be litigated in the court. Here, Benaris has taken no step (other than enter an appearance) to do anything apart from consenting to holding orders and making this application.

30 The additional matters pleaded by Origin and its relationship with Woodside might not be matters susceptible to arbitration, but the identification of the central issue, namely the terms of the Farmin Agreement, cl 4, which is susceptible to arbitration, permits the stay of the other causes of action. Insofar as the *Commercial Arbitration Act*, s53, affords discretion, I would exercise it in favour of Benaris (*Winter v Somers* (supra)).

31 A more compelling reason to decline to exercise power under the Tasmanian legislation is the existence of the Act. Benaris is entitled to the application of the Treaty and the exercise of rights under Commonwealth legislation. Its claim involves determination of terms such as "commitment well" (cl 1.1.6), "appraisal well" (Joint Operating Agreement (cl 1)), "cost associated with the amendment of the well results" (cl 4.1.2), and the like. In its notice of material breach, 2B, Benaris claims:

"B In breach of clause 4.1.2 of the Agreement Origin Energy has not tested the Commitment Well in accordance with standard or recognised industry practice for off shore exploration purposes."

Those very terms may well have particular meanings susceptible to interpretation by reference to industry practice and experience. The question of whether "Thylacine 2 can be tested without re-entering Thylacine 1" (letter 15 August 2001) might require technical expertise, experience or special knowledge on the part of any fact finder. (*O'Neill & Clayton Pty Ltd v Ellis & Clark Pty Ltd* (1978) 20 SASR 132; *The Lady Carrington Steamship Co Ltd v The Commonwealth* (1921) 29 CLR 596.)

32 The parties specifically referred to a specialist tribunal as being the appropriate institution to determine disputation. The oil and gas industry is trans-national and presumably requires some degree of consistency in its operations, terms and methods of ascertaining respective rights and obligations arising within that industry. The Commonwealth has given effect to a Treaty designed to facilitate the process and once a party with standing chooses to exercise its rights under that legislation, it ought prevail over concurrent, but not identical, State legislation. The effect of the Commonwealth enactment is not to render inconsistent the Tasmanian Act but, forming part of the law of Tasmania, operates concurrently with the

Commercial Arbitration Act (Tas). Any discretion afforded by the State Act is constrained by the terms of the Commonwealth Act if the parties are susceptible to and choose to involve that latter enactment.

33 The conclusion is that even if this Court accepted that there exists sufficient reason not to refer, it would nevertheless be required to give effect to the mandatory provision of the Commonwealth legislation.

Identification of issues

34 The completion and capping of Thylacine 1 might well have fulfilled Origin's responsibilities and required the parties to negotiate fresh terms for continued exploration. Benaris might be correct in its insistence that the terms of the Farmin Agreement require further drilling and assessment of the extent of the gas and petroleum field at the expense of Origin. In either case, the respective positions of the parties require consideration of the meaning of the terms agreed upon in the Farmin and Joint Operating Agreements. The position of Woodside is dependent, in part, on the outcome of that primary issue.

35 The statement of claim of Origin identifies six matters giving rise to the proceedings, namely whether:

(1) there had been a breach of the Farmin Agreement, cl 4.1.2, in that the commitment well had not been tested (and the results fully assessed) in accordance with the terms of the agreement;

(2) the failure of Origin to proceed with further testing or the drilling of Thylacine 2 at its own expense constituted a material breach in accordance with the agreement, cl 7A;

(3) whether the extension of time permitted for one of the phases of the exploration had deferred any obligation on the part of Origin which, in turn, affected the time permitted for any claim of breach (statement of claim, par18(b)) and, if so, whether that notice was invalid;

(4) in the event of a finding of material breach, Benaris was entitled to forfeiture in accordance with the agreement;

(5) Origin's entitlement to equitable relief precluded forfeiture and, in particular, whether cl 7A constituted a penalty rendering its operation unenforceable;

(6) there exists an equitable remedy for relief by way of declaration, injunction or a claim for damages.

36 The claim by Woodside raises additional issues, including contractual rights solely against Origin, but given that Woodside might not have standing in future arbitration proceedings, its position requires separate consideration.

37 The Farmin Agreement, cl 19, requires the parties to refer any "dispute, controversy or claim" to arbitration in the event of "failure to resolve such dispute". As of the day before the delivery of the notice of breach, both parties had a right to refer the matter. Origin contends that once Benaris elected to claim breach of a material term, seek remedy and claim termination, it chose not to invoke its right to arbitration and is thereby precluded from seeking the operation of cl 19 and the Act. The claim by Origin is that the action by Benaris goes not to the term of the contract but its continued existence and as such is not a matter capable of settlement by way of arbitration, and further, that such election made by Benaris precludes the operation of the arbitration clause.

38 The terms "dispute", "controversy", or "claim", permit wide interpretation (*Ashville Investments* (supra); *Ethiopian Oil Seeds v Rio Del Mar Foods Inc* (supra); *IBM Australia v National Distribution Services Ltd* (supra)). The parties did not specifically refer to an election to exercise a right or choice between litigation and arbitration, although presumably agreed that a referral would implicitly permit litigation if both parties chose to so do. But absent a specified procedure for the exercise of an elective right, the terms of the Farmin Agreement are mandatory and the requirements of the Act have been met (*Stevens Constructions Pty Ltd v Teodor Zorko* [2002] SASC 42). Had Benaris commenced proceedings, the issue of stay might have been more complex in that it had foregone an option provided by the contract. But it did no more than give notice that it regarded the conduct of its partner to amount to a material breach of a term of the agreement and that it required redress. It is at that stage that a dispute, claim or controversy formally arose. It was the existence of disputation which brought into operation the terms of the Farmin Agreement, cl 19. That required referral. The fact that Benaris did not take or suggest procedural mechanisms, or state formal reference, did not affect the

procedure for settlement of disputation agreed upon by the parties. The fact that Benaris did not claim disputation about a component of the contract such as the assessment of an amount or the performance of a subsidiary obligation, but sought to bring the contract to an end, did not deprive its claim of the characteristics of dispute or claim. Origin contested the right of Benaris to allege breach and claim forfeiture as it was entitled to do. It was entitled to seek the recourse of a Tasmanian court to preserve its rights and commercial integrity (*Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 (15 November 2001)). It was entitled, by virtue of the Farmin Agreement, to seek judicial protection to ensure that, pending resolution, the parties continue operations (Farmin Agreement, cl 19). But these rights did not extend to a capacity, through the commencement of proceedings, to extinguish the right of Benaris to refer the matter to arbitration. The provisions of the Farmin Agreement, cl 19, refer to a mandatory referral of disputation, not an optional exercise. The dispute was within the arbitration clause and related to one in respect of which the parties agreed ought be referred to arbitration and the term applies even if the relevant party has not taken steps for referral (*Stevens Constructions* (supra); *ARB Power Plants Ltd v Electricity Commission (NSW)* (1995) 35 NSWLR 596).

39 Prior to the delivery of the notice of material breach of 11 December 2001, there can be no doubt but that Origin and Benaris were engaged in a dispute, controversy or claim. The notice did no more than crystallise the existence and terms of that dispute. It identified the relevant parts of the agreement and claimed a breach of a particular clause particularised as a failure to test: "... the Commitment Well in accordance with standard or recognised industry breach for off shore exploration purposes".

40 The claimed breach was internal to the contract and did not involve an event or occurrence or failure external to the term of the text or which had arisen by reason of a matter either unforeseen by the parties or occurring outside their respective control. The notice required action or continued performance of a condition within a particular time and claimed a future right, the exercise of which would produce a consequence provided for in the agreement. Origin was entitled to refer the controversy articulated in the

notice for arbitration. The controversy might be that of a mixture of fact and law (*Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co* [1971] 2 QB 23), but was susceptible to resolution by arbitration. Neither the service of the notice nor its terms altered the characterisation of the dispute. Notice of a claimed right of termination was itself referred to in cl 19. Origin contends that the matter proposed by Benaris for referral to arbitration differs from that which was originally the subject of disputation. It is true that its anticipatory claim of a right to forfeiture can be said to be a matter arising following termination, but the existence of a right to terminate remains a matter governed by the terms of the agreement. The terms of the agreement, their interpretation, factual matters giving rise to or surrounding the claimed breach, and any consequences are inextricably linked. The matter as a whole is susceptible to resolution by arbitration.

Election or waiver

41 Origin contends that the service of the notice constitutes either an election to bring the matter outside the terms of an operating contract or the waiver of a procedural right (*Sargent v ASL Developments Ltd* (1974) 131 CLR 634; *Stevens Constructions* (supra)). It was Origin which commenced proceedings in a court. Had Benaris done so, its conduct might have prevented it from recourse to cl 19. The commencement of proceedings by Origin does not, of itself, constitute a basis for concluding that Benaris had treated the contract as having come to an end (*Commonwealth v Verwayen* (1990) 170 CLR 394). The Act itself is predicated upon the existence of proceedings independent of arbitration which might require an order for stay. Benaris gave notice that it regarded its contractual partner as being in breach of the agreement and provided time for remedial action. It gave notice of its claimed consequence of failure to remedy such breach. In doing so, it remained within the terms of the Farmin Agreement and was entitled to seek a remedial right afforded by the contract. Even if that conclusion be wrong, the result would remain the same. The notice was dated 11 December 2001 and provided a period of 14 days within which the claimed breach was to be rectified. The time for determining whether an election has been made ought be determined (*Sargent v ASL Developments* (supra)) as of the date of the commencement of proceedings

which, in this case, was 19 December 2001. The time fixed in the notice had not then elapsed. The notice of breach remained within the terms of the contract and did not, of itself, alter the characteristic of the claim to that beyond the ambit of the Farmin Agreement, cl 19. The claim that the statute ought not be applied is rejected.

Inherent jurisdiction

42 Benaris seeks the exercise of inherent power of the Court to control its procedures. That power relates not to the substance of the matter sought to be litigated, but to the right of access, ought not preclude an exercise of statutory right. The right of an affected person, citizen or otherwise, who comes within the jurisdiction of this Court, to seek a substantive remedy ought not be inhibited by statutory prohibition, but remedy is constrained by statute. The inherent power to stay proceedings is constrained by statute and is more closely related to the principles of procedural fairness or absence of process, rather than wider matters such as commercial convenience and the like. Its exercise ought not preclude the operation of statute. In the circumstances of this case, the statutory and contractual rights of Benaris preclude the exercise of any inherent power. Assuming the existence of such inherent power (*Rousell-Uclaf v G D Searle & Co Ltd* [1978] 1 Lloyd's Rep 225) this Court ought, in the exercise of its discretion, refuse to invoke inherent power to defeat statute. No such power will be exercised.

43 Any inherent jurisdiction possessed by this Court to manage its own proceedings ought not prevail as against the enactment of the Act.

Woodside

44 Woodside's relationship with Benaris is determined by its contractual obligations and rights through Origin. Those rights and objections were acknowledged by Benaris in the Deed of Assumption dated 20 September 2000. There are some differences between the wording of that document and similar provisions in the Joint Operating Agreement but, for the purpose of this determination, they are of little significance. While the three companies are parties to the Assumption Agreement, the obligation of Woodside to contribute to the joint venture operations arises from the Joint Operating Agreement, cl 10.1 and the Deed of Assumption, cls 3.1 and 7.1. Questions of consideration,

accrued rights and obligations as between Origin and Woodside, are independent of the terms of the Farmin Agreement, but, of course, the various agreements are interdependent. Woodside has no direct obligation to Benaris in the performance of the obligations required by the Farmin Agreement, cl 4.

45 There is an argument that the sum of all the agreements, irrespective of the differing parties to and/or rights and obligations created by the components, creates an interdependent agreement which would be susceptible to determination by a court or the process of arbitration in its totality.

46 It may be that a court hearing both actions concurrently might, given the pleadings of equitable and statutory remedies, be able to resolve the totality of rights, obligations and consequences in one series of interdependent orders. But such is not necessarily the case in the event of arbitration, a more narrowly defined procedure. The distinction arises because Woodside and Origin contend that it would be wrong to grant Benaris a stay on the Origin proceedings and refer that claim for arbitration whilst leaving Woodside bereft of standing in arbitration and susceptible to loss by the outcome of a process to which it was not a party.

47 The argument can only be resolved by reference to the terms of the Act, s7. It refers to:

"proceedings instituted by a party to an arbitration agreement"

and:

"determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration."

Woodside is not subject to the terms of the Farmin Agreement, cl 19. That clause does not govern substantive rights but affords procedural methodology for their determination. Woodside has not, in any of its agreements, accepted such a procedure, nor absent acceptance of interdependency and totality, be required to submit to such a procedure. The Act, s7(4) provides:

"For the purpose of subsection (2) and (3) a reference to a party includes a reference to a person claiming through or under a party"

a term referred to and considered by the High Court in *Tanning Research Laboratories Inc v O'Brien* (supra).

48 Benaris does not contend that Woodside is susceptible to the arbitration process by virtue of the Act, s7(4), nor that there exists any power afforded by the Act, s7(2) to stay the proceedings of Woodside. In any event, the power to stay is inextricably connected with the obligation to "refer the parties to arbitration". Even if this Court decided that Woodside is a "person claiming through or under a party", it is uncertain that the Singapore Arbitration Centre would be required to entertain Woodside as a party to its proceedings if referral was made.

49 The consequence might be undesirable in that referral of the dispute between Origin and Benaris to arbitration leaves Woodside susceptible to consequence without a right of intervention, and/or an outcome different from that which it achieves through its own proceedings in Action No 167/2001. Nevertheless, irrespective of the outcome of arbitration proceedings, all aspects of the disputation remain susceptible to the law of Tasmania and resolution of conflicting outcomes would remain the province of the Court within this jurisdiction. They might arise either at the conclusion of arbitration proceedings or at the time when a party seeks enforcement of the award.

50 Benaris contends that the competing procedural rights can best be resolved by the use of the inherent power of this Court to stay the Woodside proceedings until the outcome of the arbitration proceedings. The use of that power, accepting that it exists in circumstances such as exist here, ought be used sparingly. A stay of proceedings in which a party seeks an equitable remedy because of the existence of a different, but connected, dispute between other parties, ought not be considered on the basis of convenience or consistency of outcome. Accepting the argument of Benaris that Woodside has no standing as a party in the arbitration proceedings and that Woodside's entitlements are dependent on the outcome of those proceedings, it ought not be permitted by a claim of inherent power to preclude Woodside from seeking to enforce its rights within this jurisdiction.

51 Woodside and Origin seek to use the prejudice to Woodside by its loss of procedural rights and inconsistency of outcome (*Taunton-Collins v Cromie* [1964] 1 WLR 663; *Al Amria* [1981] 2 Lloyds Rep 119; *The Pine Hill* [1958] 2 Lloyds Rep 146) as a basis for the refusal of a stay in the Origin proceedings.

Given the conclusion that the terms of the Act, s7, require stay and referral, those considerations are irrelevant. Alternatively, Origin seeks the application of the Act, s7(2) and (3), which permits an order to be made "upon such conditions ... as it thinks fit", or as supplementary "for the purpose of preserving the rights of the parties". Conditions were imposed in *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5)* (1998) 90 FCR 1 which were designed to ensure that the successful applicant did not take advantage of the stay to unduly prolong the proceedings. But the conditions sought in this case are fundamental. They would require Benaris to permit the appearance of Woodside before the Singapore Tribunal, or in some way structure the terms of submission to arbitration to permit a right of audience. The terms of submission might not be acceptable to the tribunal or be outside the terms of the UNCITRAL Model Law on International Commercial Arbitration or the procedural rules of the tribunal. A ruling of this Court would not bind the tribunal. In any event, a right of audience would not require the tribunal to take into account any substantive rights of Woodside in the determination of the terms of agreement and respective rights of Origin and Benaris.

52 Benaris seeks to use the power to make an order subject to conditions to advance its argument in favour of the grant of the primary order, namely to afford procedural fairness. Although these applications were heard together, and the issues raised by separate proceedings are interlinked, they remain distinct proceedings. Woodside has pleaded issues and remedy against both Origin and Benaris, some of which differ from those pleaded by Origin against Benaris. A stay of proceedings in the latter action on condition that Benaris and/or Origin submit to a right of audience on the part of Woodside would doubly prejudice Woodside. Either it would afford a basis of a stay in the Woodside proceedings, leaving it with procedural but not substantive rights, or if no stay were granted, would require it to pursue concurrent proceedings. Benaris' ultimate contention that Woodside's interest in the lease is automatically determined by the outcome of the arbitration proceedings between it and Origin, might eventually be found to be correct, although at this stage of proceedings such a consequence is not inevitable. Irrespective of

that outcome, certain rights claimed by Woodside are not dependent upon the outcome of disputation concerning the Farmin Agreement.

53 The power to impose conditions ought not impact on the application for a stay and referral in the Origin proceedings, nor operate as a reason for stay in the Woodside proceedings.

Conclusion

54 The Origin proceedings ought be stayed, at least in part. The matter, or matters, capable of resolution by way of arbitration ought be referred for arbitration. Some of the matters pleaded by Origin do not come within the ambit of an arbitration matter and it might be necessary to specifically identify those matters to be referred (see the Act, s7(2)(b) "so much of the proceedings as involves the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter"). It might also be necessary to impose conditions which ensure that the prejudicial effects of stay are not compounded by delay on the part of Benaris in the reference to arbitration. The parties are invited to consider the practical effects of this determination and seek any necessary consequential or supplementary orders.

55 The application to stay the Woodside proceedings is rejected.

Origin Energy Resources Limited v Benaris International NV & Anor (No 2) [2002] TASSC 104 (22 November 2002)

Last Updated: 25 November 2002

[2002] TASSC 104

CITATION: *Origin Energy Resources Limited v Benaris International NV & Anor (No 2)* [2002] TASSC 104

PARTIES: ORIGIN ENERGY RESOURCES LIMITED

v

BENARIS INTERNATIONAL NV

WOODSIDE ENERGY LIMITED

TITLE OF COURT: SUPREME COURT OF TASMANIA

JURISDICTION: ORIGINAL

FILE NO/S: 1144/2001

DELIVERED ON: 22 November 2002

DELIVERED AT: Hobart

HEARING DATES: 28, 29 October 2002

JUDGMENT OF: Slicer J

CATCHWORDS:

Arbitration - The submission and reference - Submission as a defence and as a ground for stay of proceedings - Whether dispute is a "matter agreed to be referred to arbitration" - Whether dispute is a matter capable of arbitration - Second defendant not a party to arbitration.

International Arbitration Act 1974 (Cth), s7(2).

International Commercial Arbitration Convention.

UNCITRAL Model Law

Resort Condominiums International Inc v Bolwell & Anor (1993) 118 ALR 655; *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5) & Anor* (1998) 90 FCR 1; *Recyclers of Australia Pty Ltd v Hettinga Equipment Inc* (2000) 100 FCA 420; *White Industries v Trammel* (1983) 51 ALR 779; *Flakt Australia Ltd v Wilkins & Davies Construction Co Ltd* (1979) 25 ALR 605, followed.

Tanning Research Laboratories Inc v O'Brien (1990) 169 CLR 332, applied.

Bakri Navigation Company Limited v Ship "Golden Glory" Glorious Shipping SA (Owners of), Federal Court of Australia, unreported 306/1991; *Elders CED Ltd v Dravo Corporation* (1984) 59 ALR 206; *Mitchell Cotts Freight (Australia) Pty Ltd v Through Transit Mutual Insurance Association Ltd* (1989) 98 FLR 99, considered.

IBM Australia Ltd v National Distribution Services (1991) 22 NSWLR 466; *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] 2 WLR 262; *Northern Regional Health Authority v Derek Couch Construction Co Ltd* [1984] QC 614, referred to.

Aust Dig Arbitration [37]

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Second Defendant/Respondent: P W Tree

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Judgment Number: [2002] TASSC 104

Number of Paragraphs: 58

Serial No 104/2002

File No 1144/2001

ORIGIN ENERGY RESOURCES LIMITED v BENARIS INTERNATIONAL NV

and WOODSIDE ENERGY LIMITED(NO 2)

REASONS FOR JUDGMENT SLICER J

22 November 2002

1 The issues giving rise to these reasons for judgment have been stated in ***Origin Energy Resources*** *Limited v Benaris International NV & Anor; Woodside Energy Limited v Benaris International NV & Anor* [2002] TASSC 50 in which proceedings comprised in action 1144/2001 were stayed and matters capable of resolution referred to arbitration as required by the *International Arbitration Act* 1974 (Cth) ("the Act"), s7. The pleadings contained varying claims for remedy and the judgment did not identify the precise matters to be referred. The reasons for judgment concluded, at par54:

"The Origin proceedings ought be stayed, at least in part. The matter, or matters, capable of resolution by way of arbitration ought be referred for arbitration. Some of the matters pleaded by Origin do not come within the ambit of an arbitration matter and it might be necessary to specifically identify those matters to be referred (see the Act, s7(2)(b) 'so much of the proceedings as involves the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter'). It might also be necessary to impose conditions which ensure that the prejudicial effects of stay are not compounded by delay on the part of Benaris in the reference to arbitration. The parties are invited to consider the practical effects of this determination and seek any necessary consequential or supplementary orders."

Origin and Benaris have been unable to agree either on the terms of arbitration or the necessity or form of any consequential orders.

2 The determination of consequential orders has been made more complex by other issues, both procedural and substantive. There is a separate, but concurrent, action (167/2002) concerning the same parties and similar issues, which was also the subject of the earlier hearing. Following the publication of the reasons for decision on 14 August 2002, Woodside, on 13 September, applied for summary judgment against both Origin and Benaris in those separate proceedings and sought liberty "to pursue the balance of its claim for relief".

3 Both the matters concerning consequential orders in this action and summary judgment were listed, at the convenience of counsel, on 28 October 2002, the former for hearing and the latter for mention only. On that day, Origin, without appropriate notice to the Court or the other parties, sought to argue that the application for summary judgment be first determined and that the referral to arbitration made in general terms in judgment [2002] TASSC 50, be stayed until the resolution of all matters comprised in the action brought by Woodside, as a condition permitted by the Act, s7(2)(b). In doing so it doubtless sought to use any findings and orders in the Woodside action as a bar to any contrary determinations in the arbitration proceedings. Its failure to give adequate notice and its mistaken and careless assumption

concerning the timing of the summary judgment application caused prejudice to the other parties, especially Woodside, which sought to place further evidence before the Court, and created a dilemma for this Court.

4 The Court has resolved to partially resolve the dilemma on its own initiative. Failure to do so might involve a further delay in the determination of the matter or matters to be referred to arbitration until well into the year 2003. The Court will resolve the initial issue of contention in the absence of a determination of the application for summary judgment, but refrain from making formal orders. The parties will at least be aware of the basis of the issue of matters to be referred and in the absence of summary judgment be better able to advance their respective cases. If summary judgment is granted, then its impact can be determined as a discrete issue.

5 A further complication is caused by the nature of the proceedings. Benaris purported to terminate the principal agreement (the Farmin Agreement) which caused Origin to commence its proceedings by way of writ and delivery of a statement of claim. By necessity, its pleadings included matters often raised by a defendant. Benaris sought recourse to the provisions of the Act before the delivery of its defence and the issue of referral was determined before the closure of the pleadings. Thus, not all of the issues have necessarily been identified. That in turn is compounded by the existence of the concurrent action, 167/2002, with similar, but not necessarily, identical issues, and the prospect of claims of *res judicata* or issue estoppel. Origin and Woodside have a commonality of interest, at least in relation to the issue of termination of the Farmin Agreement and have adopted similar positions in relation to this hearing.

6 The areas of dispute were stated in an exchange of letters between Origin and Benaris on 6 and 15 August 2001 respectively. In its letter dated 6 August, Origin advised:

"However, we do not agree that Origin should meet Benaris' share of the cost of a potential production test in Thylacine 1, should the Joint Venture elect to re-enter this well for such purpose, for the following reasons:

1 Clause 4.1.2 of the Farmin Agreement provides for the drilling and testing or abandoning of the Commitment Well and a decision was made to test, not

abandon. We believe that Origin (and Woodside) met its testing obligations in full through the conduct and funding of an exhaustive MDT pressure and sampling program at significant cost, that underpinned the decision by the Joint Venture, (including Benaris), to case and suspend this well for later completion as a producer.

The decision to test by wireline was a deliberate one based on both technical and cost considerations.

2 The intent of the Farmin Agreement was that the obligation under Clause 4.1.2 would be fulfilled on conclusion of all operations relating to the drilling and evaluation necessary to determine that the well was a discovery and potentially capable of commercial production. It was not envisaged or intended that future appraisal activities conducted as part of a completely separate operation would be included. We consider that all such separate operations are outside the scope of the Agreement.

3 Benaris' position can be interpreted to imply that Origin will not have fulfilled its farmin obligations to Benaris unless and until a production test is carried out on Thylacine 1 or the well is abandoned, neither of which may occur under the Joint Venture's current forward plans. If this is in fact Benaris' position, we would have expected comments to that effect from Benaris at the time that decisions were being made in relation to suspension of the well? We consider it unreasonable for Benaris to subsequently advise that it does not regard the operations conducted on Thylacine 1 as fulfilling the earning obligation.

Note also that in the event that Thylacine 1 is abandoned, Benaris' costs of any such operation are protected by Clause 5.3 of the Farmin Agreement.

4 Selective testing in Thylacine 1, if it occurs, would be undertaken with the benefit of knowledge acquired in the appraisal well Thylacine 2, and for that matter, knowledge acquired in Georgraphe 1 and potentially Geographe North 1 in adjacent permit VIC/P43.

Given that in all probability both fields will be developed in combination, production testing is proposed to optimise such a combined development through selective testing of zones in those wells where there may still remain some doubt as to the magnitude of their contribution to future production.

A corollary of this is that, for example, had we production tested intervals in Thylacine 1 at the time of drilling, we may well have acquired superfluous data at great cost, if such information could have been acquired more cost effectively in subsequent wells, be it Thylacine 2, Geographe 1 or Geographe North 1.

5 We would also argue on the basis of reasonableness, that Origin (and Woodside) has fully met its farmin obligations to Benaris through the funding of 3D seismic, not 2D seismic across the Thylacine structure, and the drilling, MDT testing, and casing of Thylacine 1 at a combined cost significantly greater than anticipated at the time our farmin negotiations were concluded."

7 Benaris in its reply defined its approach in the following terms:

"We agree in essence with your statement in paragraph 2 of your letter that 'the intent of the Farm-in Agreement was that the obligation under Clause 4.1.2 would be fulfilled on conclusion of all operations relating to the drilling and evaluation necessary to determine that the well was a discovery and potentially capable of commercial production'. We also reiterate our position as set out in our letter dated 31 July 2001, namely that this intent as clearly expressed in Clause 4.1.2 means that the farm-in obligations of Origin continue in respect of the Commitment Well (as defined in the Farm-in Agreement) until all testing and evaluation necessary prior to commencement of production is completed.

This intent has always been maintained throughout discussions by the parties in respect of Thylacine-1 and should be examined in the light thereof:

(a) During initial pre-drill discussions, Origin and Benaris both supported testing of Thylacine-1 in a success case. Woodside presented a case for not needing to test Thylacine wells at pre-drill TCM's but Benaris have continued to express their view that the Thylacine-1 well should be tested to improve technical understanding, demonstrate deliverability and book reserves.

(b) After the drilling of Thylacine-1, Origin (and Woodside) recommended that Thylacine-1 be suspended, on the basis that no further testing of wells was necessary ie that Thylacine-1, which Origin expected to be a commercial discovery, and any subsequent wells showing similar results, (and indeed the field), could be brought into production without any further testing. It was on

the premise of such recommendation that Benaris agreed to the proposed suspension of Thylacine-1.

However, for reasons which are not entirely clear to us, Origin and Woodside have changed their minds in respect of any further testing of Thylacine-1. It is now proposed that testing is needed on Thylacine-2 and that Thylacine-1 may have to be re-entered for testing if the Thylacine-2 well is not suitable.

This clearly shows that Origin is of the view that not all-necessary evaluation in respect of Thylacine-1 has been carried out. This is further demonstrated by Origin's confirmation at the Operating Committee Meeting on 2 August 2001 that a discovery has not been notified to the Joint Authority under the applicable legislation and that there is no immediate intention to do so.

As such, Benaris did not make any comment on the testing issue at the time the suspension decision was taken because at that time it was not contemplated by the parties that there would be further testing. Now you are adopting the rather incongruous position of saying that you believe further testing is required, but at the same time asking Benaris to acknowledge that Origin has performed all necessary testing in respect of Thylacine-1 and hence completed its earn-in obligations as set out under Clause 4.1.2 of the Farm-in Agreement!

The inescapable conclusion drawn from the above is that the earn-in requirements of Clause 4.1.2 of the Farm-in Agreement have not been met.

Apart from the strict legal terms, you have also argued that it would be reasonable for Benaris to acknowledge that Origin (and Woodside, although we do not know what the Woodside obligations are,) should be considered as having met its obligations because of the expenditure incurred to date.

Although we acknowledge that Origin has undertaken 3D seismic, not 2D, and that wire-line testing has been carried out towards earning a significant equity, it is important to note that, consistent with the intent of the parties in respect of the earn-in by Origin, no maximum expenditure figure was nominated in the Farm-in Agreements. Again, the intent, confirmed in the quote from your letter, was that Origin would do whatever was necessary to determine if there had been a discovery, with the next step being commencement of commercial production.

One of the consequences of Origin/Woodside changing their minds now about testing is that there would be an additional expenditure of $2.8 million approx to re-enter and test Thylacine-1, as opposed to testing Thylacine-2. We can understand that Origin do not want to incur this additional expense. However, the question is - is it reasonable to ask Benaris to compromise its rights and agree to savings for Origin/Woodside of $2.8 million, at a cost to Benaris of $1.756 million (20% x $8.78 million)?

We have given this issue careful consideration and while we wish to make every endeavour to maintain good relations with Origin, both for this and future ventures, there does not seem to be any compelling reason for Benaris to voluntarily accept a penalty of $1.756 million.

In conclusion, Benaris maintains that Origin has not fulfilled its earn-in obligations under the Farm-in Agreement. As such, our specific positions concerning testing are as follows:

* Any further testing of Thylacine-1 is at the expense of Origin in accordance with Clause 4.1.2 of the Farm-in Agreement.

* If Thylacine-2 can be tested without re-entering Thylacine-1, then in consideration of Benaris accepting testing of Thylacine-2 in lieu of Thylacine-1, Benaris proposes that the share of Benaris in the testing costs should be borne by Origin towards satisfaction of Origin's earn-in obligations under the Farm-in Agreement (and in the process saving Origin/Woodside $2.8 million)."

8 Some, but not all, of these matters can be identified in the pleadings of Origin and, taken together, the matters in dispute can be formulated as:

(1) whether Origin had performed its contractual obligations in accordance with the Farmin Agreement (in particular cl 4.1.2) and if not, whether non-performance constituted a breach of contract;

(2) whether the time for the performance of certain obligations by Origin had elapsed, or if not, its conduct amounted to an anticipatory breach giving rise to remedy;

(3) whether notice of termination dated 11 December was a valid notice of breach for the purposes of the Farmin Agreement, cl 7A;

(4) whether the unconscionable conduct of Benaris entitled Origin to relief from any remedy sought by Benaris under its contractual rights afforded by

the Farmin Agreement (in particular, cls 2.5 and 7A) or constitute a penalty such as to render them unenforceable.

9 Two matters can be identified as disputation which are not clearly raised in the pleadings, namely whether Origin has remedied any breach within a particular time and whether any obligations have not been fully performed by Origin. Those issues can be identified by reference to the exchange of correspondence, implied in the existing pleadings or might become apparent in any defence or reply delivered by the parties. Benaris contends that issues referable to arbitration are not necessarily confined by the pleadings but may be expanded by reference to the interests of others not party to the arbitration clause.

10 Three of the issues identified and the questions of remedy of breach and part performance are clearly contractual in nature and capable of resolution by arbitration. Two of the issues, namely unconscionable conduct and relief from the consequence of forfeiture, are equitable in nature. The question of the nature of a penalty comes within both categories.

11 Benaris contends that all matters identified are referable to arbitration. Origin, subject to its arguments concerning stay and summary judgment, concedes that the matters raised in its statement of claim, pars1 - 18 (propositions 1 - 3 (supra)) are capable of reference, but that the equitable pleas ought not remain matters for arbitration.

12 The contention of Benaris is initially attractive. The one tribunal ought determine all of the matters in contention but for specific and confined matters, (*Government Insurance Office of NSW v Atkinson Leighton Joint Venture* (1981) 146 CLR 206, Stephen J at 235). Any error of law by the arbitration tribunal, especially in the application of equitable principles, might be susceptible to limited review by this Court, but findings of fact might not be subject to the appellate process. The central disputation, concerning the ambit of clauses of exploration, results, date and the extent of necessary testing, could best be determined by a specialist tribunal. Ordinarily reference of the whole dispute could readily be made within the terms of the agreement. To that extent, issues such as "variation by agreement or conduct", "international practice", "appropriate data", "penalty or compensation", and the like, ought

remain the province of the arbitration process. A specialist tribunal might be able to determine competing equities provided that all the parties are before it. It might not be able to do so in the case of an absent party.

13 However, as Mustill and Boyd, *Commercial Arbitration*, Butterworths 1982, observed, at 111:

"One of the weakest features of English arbitral procedure is its inability to deal with third party situations."

14 In this case both Origin and Benaris effectively have separate claims involving Woodside. Benaris claims the return of the portion of the licence held by Woodside through Origin. Origin and Woodside have a commonality of interest in that issue, yet Woodside is the second defendant. The Assumption Agreement involved the three parties, yet only two are parties to the arbitration clause which is the subject of these proceedings. There are two sets of proceedings; an arbitration and an action in this Court. Questions of inconsistency of outcome, applicability of findings of fact, merger of judgment and *res judicata* are possible issues. (See generally Mustill and Boyd (supra) at 105, 109 - 112.)

15 Referral of "all of the issues" as between Origin and Benaris will not resolve those problems. The making of an award is often equivalent to a judgment (*Brali v Hyundai Corporation* (1988) 84 ALR 176) and is said to be one which finally determines the rights of the parties (*Resort Condominiums International Inc v Bolwell & Anor* (1993) 118 ALR 655). An award might bind Origin but, arguably, not Woodside. Dealings between Woodside and Benaris might afford Origin a basis for claiming estoppel or variation of contract. Acquiescence by Benaris through the Assumption Agreement might preclude a finding that Benaris had validly terminated the contract or was entitled to the return of all of the claimed interest in the licence. Given that the reference to arbitration has been made before the closing of the pleadings, it is impossible for the Court to identify all of the issues, or their permutations, which might be raised by the parties. Benaris is seeking the reference of all of the matters identified in the statement of claim but resolution of these matters will, in all probability, require consideration of other issues not yet raised. The manner of the pleadings is an important consideration, but is not determinative

(*Recyclers of Australia Pty Ltd v Hettinga Equipment Inc* (2000) 100 FCA 420 at 426).

16 The arbitration clause, which survives purported termination (*Resort Condominiums v Bolwell* (supra)), does not, by its own existence, enlarge the nature of the matters to be referred. The terms "dispute", "controversy" and the like, remain confined to the contract and create no grant of additional jurisdiction to the arbitrator. An award might merge jurisdiction with judgment, but does not necessarily govern it unless "all matters capable of resolution" are determined by the arbitral award.

17 In Australia, unlike the United Kingdom (*Harbour Assurance Co (UK) v Kansa General International Insurance* (1993) 1 Lloyds Rep 455), there is no presumption that "one stop" adjudication is a necessary outcome (*Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5) & Anor* (1998) 90 FCR 1; cf *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466). See generally *Contemporary Developments in the Law of International Arbitration in Australia and New Zealand,* Peter E King, (1999) 18 Australian Bar Review 254.

18 In *White Industries Ltd v Trammel and Ors* (1983) 51 ALR 779, Lockhart J did not refer to arbitration a matter described in the statement of claim of the action as:

"The third respondent in its capacity as Superintendent failed and neglected to act in a reasonable and equitable manner in determining and valuing CI and granting an extension of time thereon and was accordingly in breach of cl 23 of the said agreement."

since:

"There would still be a dispute or difference arising out of the contract, namely, a dispute or difference between the applicant as builder and the third respondent as Superintendent in relation to the third respondent's alleged failure and neglect to act in a reasonable and equitable manner in determining and valuing the relevant claims and granting extensions of time."

19 In *Bakri Navigation Company Limited v Ship "Golden Glory" Glorious Shipping SA (Owners of),* Federal Court of Australia, unreported 242/1991, Gummow J, exercising Admiralty jurisdiction, was required to deal with a

claim of beneficial or equitable interest in a ship subject to arrest. His resolution of the initial problem has been described by Dr Wiswall, Procter and Associate in Admiralty, in his *1994 Ebsworth & Ebsworth Maritime Law Lecture in International Law*, in the following terms at 7 - 8:

"The second Australian development is the case of The 'Golden Glory', which is noted because it 'sets the stage' for a yet more significant case. The issue before the Admiralty Court was whether an action in rem lies to compel specific performance of a contract for the sale of a ship, the ship in question having been arrested within the geographical jurisdiction of the Court and the owners having moved for release. An action for specific performance is in its nature a suit in equity in personam and is not the same as the possessory or petitory suit in admiralty to which I have earlier refereed, though if successful the practical effect of the outcome would be impossible to distinguish. Without discussing the equitable powers of the Admiralty Court or the source thereof, the Court held for the probability of jurisdiction and instead of issuing a decree for specific performance made the Solomonic decision to release the vessel from arrest conditional upon an undertaking by the defendant to execute and deliver a deed of sale in approved from. To coin a phrase, this was a 'neat' way to confirm that the equitable jurisdiction of the Admiralty Court may be exercised in actions in rem."

20 Solomon was recalled in response to an application for stay and referral to arbitration in accordance with the Act, s7. One of the matters raised in the continued hearing was whether the arbitration award was "inoperative or incapable of being performed" as prescribed by the Act, s7(5). The plaintiff had:

"... disavowed any further argument which would assert that the claim to specific performance was not a matter the determination of which was 'capable of settlement by arbitration' within the meaning of sub-s 7 (2) of the Act because such a claim was susceptible of determination exclusively by the exercise of judicial power; *cf Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 351 - 352, per Deane, Gaudron JJ." (*Bakri Navigation Company Limited v Ship "Golden Glory" Glorious Shipping SA (Owners of),* Federal Court of Australia, unreported 306/1991, Gummow J.)

His Honour was required to determine four preliminary questions, namely:
"(1) Is there a concluded agreement between Bakri Navigation Co Limited and glorious Shipping SA for the sale of the ship 'Golden Glory' upon the terms alleged by Bakri Navigation Co Limited?
(2) If 'yes' to (1), does this proceeding involve the determination of a matter which, in pursuance of that agreement, is capable of settlement by arbitration, within the meaning of s 7 of the *International Arbitration Act* 1974 ('the Act')?
(3) Should the proceeding, as to whole or part, and, if so, as to which part, be stayed by order under sub-s 7 (2) of the Act, and the parties referred to arbitration?
(4) Is the Court required by sub-s 7 (2) not to make an order it otherwise would make under sub-s 7(2) of the Act?"
21 In his reasons for judgment (*Bakri Navigation Company Limited v Ship "Golden Glory" Glorious Shipping SA (Owners of)* Federal Court of Australia, unreported 306/1991, Gummow J concluded that the answer to questions 1, 2 and 4 was "yes" and to question 3, "no". He did so because although the matter was capable of resolution by arbitration despite the terms of a Deed of Undertaking said to have varied the terms of the agreement. He accepted a submission that the existence of an arbitration agreement:
"... for the purposes of the Arbitration Act, [was] ... to be answered by looking at the state of affairs as it exists when the application for a stay is made."
He concluded that the effect of the Deed of Undertaking did not deprive the arbitration agreement of "all effect in the circumstances" but rendered it:
"... inoperative or ineffective in respect of the claims involved in the present proceeding ...".
22 The reasoning, applicable here, is not that some of the matters raised are not referable, but that events subsequent to the Farmin Agreement or the conduct and exchanges before and after the Notice of Termination, are relevant to the resolution of the competing claims of the respective parties and that, if such be the case, whether they are all "capable of resolution by arbitration?"
23 The requirement, in a case such as this, to determine the ultimate issue, makes it necessary to define the powers afforded to the arbitral tribunal or the

extent of adjudication afforded by the reference (*Beaufort Developments (NL) Ltd v Gilbert-Ash (NL) Ltd* [1999] 1 AC 266).

24 Mustill and Boyd ((supra) at 117), express the opinion that:

"English law has never arrived at a general theory for distinguishing those disputes which may be settled by arbitration from those which may not."

25 In order to determine the terms of reference, it is necessary to return to the terms of the Act, s7.

Legislative scheme

26 The legislation provides for:

(1) referral and procedural matters associated with existing proceedings and the preservation of rights (s7);

(2) recognition and enforcement of foreign awards (ss8, 9);

(3) administrative and evidentiary matters (ss10, 10A, 12, 14, 28);

(4) adoption of a model law (ss15 - 17) designation of judicial process (s18), and the extent of jurisdiction (ss20 - 22);

(5) powers and procedures of arbitral tribunals (ss23 - 27, 29);

(6) settlement of Investment Disputes, PtIV.

27 The Model Law "has the force of law in Australia" (s16) and powers of recognition and enforcement of an award are granted to this Court (s18) although there are some restrictions concerning public policy (s19), inconsistency (s20), and variation by agreement (ss21, 22).

Applicable provisions

28 The Act, s7(2) applies to:

"(a) *proceedings* instituted by a party to an arbitration agreement ... against *another party* to the agreement." [Emphasis added.]

and

"(b) the proceedings involve the determination of *a matter* that, in pursuance of the agreement is *capable of settlement* by arbitration ...". [Emphasis added.]

29 Under the terms of the Farmin Agreement, Benaris transferred to Origin an 80 per cent undivided interest in a resource permit and subsequently the parties entered into a Joint Operating Agreement providing for the exploration of gas and petroleum, with Origin as the operator. In 2000, Origin transferred

to Woodside a 50 per cent undivided interest in the permit, reducing its own interest to 30 per cent. Following disputation as to the extent of rights and obligations created by the Farmin Agreement, Benaris purported, by notice, to terminate the agreement and required Origin:

"A ... to remedy the breach."

and

"B ... If Origin does not remedy the said breach within two (2) weeks of this notice from Benaris then Benaris shall be entitled to forthwith terminate this Agreement whereupon the provisions of Clause 2.5 shall apply."

Clause 2.5 provides:

"**2.5** If this Agreement is terminated pursuant to clauses 2.4 or 7A, *Origin* shall forthwith and at its sole cost and expense, execute all documents and do all things necessary or as may be required by Benaris to re-assign or re-transfer the Assigned Interest, free and clear of all liens, encumbrances, rights and interest, to Benaris or any other person nominated by Benaris. In addition, *Origin* shall forthwith deliver to Benaris all materials, data, reports, studies and other information, including geological data and well lot trades, acquired from any and all sources and/or prepared in connection with the Seismic Program and shall transfer to Benaris all its rights under all contracts relating to the Seismic Program to the extent that those contracts are transferable. *Origin* must use its best endeavours to ensure that each contract relating to the Seismic Program contains a clause permitting the assignment of that contract to Benaris pursuant to this clause.

The Parties agree that if this Agreement is terminated pursuant to clause 2.4 as a result of the non-satisfaction of the condition set out in clause 2.1.2 or the condition set out in clause 2.1.3, *Origin* shall be entitled to a refund of the back costs paid in accordance with clause 2.1.1, free of interest. Save as expressly provided herein, Benaris shall not be required or obliged to pay to *Origin* any other moneys in connection with the re-assignment or the re-transfer of the Assigned Interest pursuant to the provisions of this Agreement."

30 A matter referred for arbitration would be the operation of cl 2.5. Central to these proceedings is the contention that Benaris is entitled to the re-

assignment of the 80 per cent interest presently held by Origin and Woodside. Benaris has not sought in these proceedings, as yet, any order for re-assignment by Woodside, nor commenced separate proceedings.

Model Law

31 The terms of the International Commercial Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards is set out in the Act, Sch1, and the UNCITRAL Model Law in Sch2. It forms part of the law of Tasmania (the Act, s16). The Model Law, Article 8, requires:

"(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."

and provides:

"(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court."

The terms of Article 8 differ from the Act, s7. Parliament has defined the reference of "a matter ... capable of resolution", rather than a referral of parties "in a matter which is the subject of an arbitration agreement". The distinction restricts the import of Article 8 (*Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] 2 WLR 262, Lord Mustill at 278 - 279, see *Critique in Commentary* by Reymond, (1993) 109 LQR 337).

32 Article 16, par1, allows an arbitral tribunal to rule on its own jurisdiction and the validity of the agreement, and for those purposes:

"... an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract."

33 The terms of the arbitration clause (Farmin Agreement, cl 19) of dispute, controversy or claim, permit the Singapore International Arbitration Centre wide jurisdictional power, although it might be required to give consideration to the terms of the Farmin Agreement, cl 14, which provides:

"14.1 All remedies, rights, undertakings, obligations or agreements of the Parties under this Agreement arising by law in respect of this Agreement shall

be cumulative and none thereof shall be in limitation of any other rights, remedies, undertakings, obligations or agreements of the Parties provided that neither Party shall be liable to the other for any indirect or consequential damages arising from any breach of this Agreement.

14.2 Each of the Parties may follow any such remedy to which it is entitled by law or otherwise, either concurrently or successively at its option."

It would be within the power (subject to cl 14) of the arbitral tribunal to order Origin to re-assign the original 80 per cent interest in the licence in accordance with the Farmin Agreement, cl 2.5, or determine that Benaris is entitled to itself execute the re-assignment by virtue of a power of attorney provided for in the Farmin Agreement, cl 2A.

34 The Model Law, ChVII, limits the basis on which an award can be set aside, providing.

"(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may only be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or
(b) the court finds that:
(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
(ii) the award is in conflict with the public policy of this State.
(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.
(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside."
35 The award might be susceptible to challenge on the basis that Woodside's claimed interest in the licence was not, for reasons outside the issues arbitrated, susceptible to re-assignment and was beyond the power of either Origin or Benaris to give effect to the Farmin Agreement by virtue of cls 2.5 and 2A. But a more likely outcome would be that the award might not be susceptible to review. Certainly Woodside would not have standing to challenge the determination independently of these proceedings. The term "not capable of settlement by arbitration" as used in Model Law, Article 34(b)(i), might require this Court to visit the whole matter afresh so that declarations or orders can be made requiring the re-assignment by Woodside. An award made in relation to the material rights and obligations of Origin and Benaris must, by virtue of Article 35(1):
"... be recognized as binding and, upon application in writing to *this* Court, shall be enforced".
Recognition or enforcement of the award may only be refused for reasons stated in Article 36, namely:

"(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State."

36 Two consequences might follow from the terms of Articles 35 and 36.

37 The first is that an award determining forfeiture or re-assignment of the 80 per cent interest would be binding in these proceedings and give rise to the claim of issue estoppel or *res judicata* within the action commenced by Origin. Such an order binding as against Woodside might be "a breach of natural

justice in connection with the *making* of the award" as predicated by the Act, s19(6).

38 The second is that the wording of Article 36(iii) recognises the separation of matters from "that part of the award which contain decisions *which* may be recognised and enforced". Any equitable remedy possessed by Woodside by virtue of either the Assumption Agreement, conduct or estoppel (on which Origin could also rely) might operate to prevent re-assignment or forfeiture.

39 The above analysis has been conducted in an attempt to interpret the meaning of "matter ... capable of settlement by arbitration" appearing in the Act, s7(2). Benaris contends that all matters in dispute must be referred and, presumably, that the award would constitute a final order. Origin contends that the ultimate issue, namely forfeiture and re-assignment, is not, by reason of Woodside's equitable interest, capable of resolution by arbitration. Consideration of the provisions of the Model Laws supports Origin's contention.

40 The orders sought by Origin include an injunction restraining Benaris from:

"A(2) exercising its powers under the Power of Attorney in order to effect a transfer from Origin of any of the 80% undivided interest on the Permit originally transferred to Origin pursuant to the Farm-In Agreement"

and a declaration that:

"B(2) ... Origin is entitled to be relieved against forfeiture of its interest in the Permit."

41 They are not matters capable of resolution by arbitration. There is some commonality of interest between Origin and Woodside and Origin might obtain the above orders by reason of Woodside's equitable claim raised in *these* proceedings. Woodside has an interest in the issue of whether Benaris' entitlement under the Farmin Agreement, cls 2.5 and 7A, constitutes a penalty, since that determination would impact on its own interest. It would either be bound, through *res judicata* or issue estoppel, by the award of the arbitral tribunal (*Dobbs v National Bank* (1935) 53 CLR 643) in which it had no right to argue its case and be denied natural justice (the Act, s19(1)(b)) or be permitted to re-argue the issue upon the continuation of these proceedings. In the latter instance, there would be no "settlement" of the matter by arbitration.

A further matter, not capable of resolution by arbitration, is whether the effect of the Assumption Agreement was to reduce the share of the 80 per cent interest said by Benaris to be held by Origin.

42 The fact that all matters in dispute are not the subject of the Act, s7(2) (or its equivalent) was recognised in *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5) & Anor* (supra), a case involving contractual and non-contractual claims against two other parties. In his judgment (with whom the other members of the court agreed), Emmett J said:

"Referring the parties to arbitration in respect of Contractual Claims against WBC, while the balance of the proceedings against WBC and the whole of the proceedings against KMC continue in this Court, would have the unfortunate result that Hi-Fert and WBC would be litigating similar issues in different tribunals. The result is unfortunate in so far as the parties may be required to litigate similar issues in two places. However, that is the result of the operation of section 11 of the *Carriage of Goods by Sea Act* and the insistence by WBC on invoking the provisions of section 7 of the *International Arbitration Act. Prime facie*, Hi-Fert, having properly commenced proceedings in this Court, is entitled to prosecute the proceedings against WBC and KMC in this Court - *Oceanic Sun Line Special Shipping Co. Inc. v Fay* (1988) 165 CLR 197 at 239. If the appellants succeed in the proceedings, there may be no need to pursue the Contractual Claims against WBC by arbitration in London. If the appellants fail, however, those claims can then be pursued in London. Accordingly, *I consider that the appropriate course would be to impose a condition on the stay of the Contractual Claims that the reference to arbitration in respect of the Contractual Claims not proceed until after the final determination of the proceedings in the Federal Court*." (Emphasis added.)

43 That distinction was further acknowledge by Deane and Gaudron JJ in their joint judgment in *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332, when they said, at 351 - 352:

"By requiring that the proceedings or so much of the proceedings as involves the determination of a matter capable of settlement by arbitration be stayed, s7(2) clearly contemplates that the proceedings may encompass issues additional to those constituting 'a matter ... capable of settlement by

arbitration'. See *Flakt Aust v Wilkins & Davies Const* (1979) 2 NSWLR 243; *Allergan Pharmaceuticals Inc v Bausch & Lomb Inc* (1985) 7 ATPR 40-636.

14.

The word 'matter' is not defined in the Act. In the quite different context of Ch III of the Constitution, it has been held that the word 'matter' means 'the whole matter' and encompasses 'all claims made within the scope of the controversy': *Fencott v Muller* (1983) 152 CLR 570, at p 603. See also *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457, at p 475. However, in any context, 'matter' is a word of wide import. In the context of 27(2), the expression 'matter ... capable of settlement by arbitration' may, but does not necessarily, mean the whole matter in controversy in the court proceedings. So too, it may, but does not necessarily encompass all the claims within the scope of the controversy in the court proceedings. Even so, the expression 'matter ... capable of settlement by arbitration' indicates something more than a mere issue which might fall for decision in the court proceedings or might fall for decision in arbitral proceedings if they were instituted. See *Flakt*, at p 250. It requires that there be some subject matter, some right or liability in controversy which, if not co-extensive with the subject matter in controversy in the court proceedings, is at least susceptible of settlement as a discrete controversy. The words 'capable of settlement by arbitration' indicate that the controversy must be one falling within the scope of the arbitration agreement and, perhaps, one relating to rights which are not required to be determined exclusively by the exercise of judicial power. See Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd ed (1989), pp 149-150, where it is noted that 'English law has never arrived at a general theory for distinguishing those disputes which may be settled by arbitration from those which may not' but that the powers of an arbitrator 'are limited by considerations of public policy and by the fact that he is appointed by the parties and not by the state'."

44 In *Flakt Australia Ltd v Wilkins & Davies Construction Co Ltd* (1979) 25 ALR 605, McLelland J, at 613 was of the opinion that:

"... the word 'matter' in s 7(2)(b) denotes any claim for relief of a kind proper for determination in a court. It does not include every issue which would or

might arise for decision in the course of the determination of such a claim. The use of the word 'settlement' provides support for the view. 'Settlement' is an apt term to be used in relation to a claim for relief - it is less apt in relation to a mere issue."

Flakt was followed in *Elders CED Ltd v Dravo Corporation* (1984) 59 ALR 206 by Foster J, who, notwithstanding his belief, stated at 210:

"... that the very matters sought to be determined by this summons will be raised during the course of the arbitration and may very well find themselves back in this court by way of stated case"

referred some of the matters raised to arbitration. (See also *Mitchell Cotts Freight (Australia) Pty Ltd v Through Transit Mutual Insurance Association Ltd* (1989) 98 FLR 99 at 117.)

45 The ultimate issue is the return of the licence or permit to Benaris. The term "subject matter", as used by Deane and Gaudron JJ in *Tanning Research Laboratories Inc v O'Brien* (supra), was considered by Merkel J in *Recyclers of Australia Pty Ltd v Hettinga Equipment Inc* (supra) in the following terms at pars18 - 19:

"While Deane and Gaudron JJ may have differed in some respects from the majority on the question of the scope of a 'matter', *Tanning Research* is authority for the view that, for the purposes of s 7(2), the 'matter' to be determined in a proceeding is to be ascertained by reference to the subject matter of the dispute in the proceeding and the substantive, although not necessarily the ultimate, questions for determination in the proceeding. The scope of the matter is to be ascertained from the pleadings *and* from the underlying subject matter upon which the pleadings, including the defence, are based: *Tanning Research* at 343-344 and 351-354 cf *Fencott v Muller* (1983) 152 CLR 570 at 608, *Hooper v Kirella* (1999) 167 ALR 358 at 368-371. The manner in which a claim or a defence is pleaded is of importance to, but is not determinative of, the characterisation of the 'matter' for the purpose of s 7(2). Once the 'matter' is properly characterised the question to be determined is whether that matter is capable of settlement under the arbitration clause."

46 His Honour further considered that events and dealings occurring after the formation of the contract might not be matters referable to an arbitral tribunal. His remarks, at par64:

"The post contractual representations stand on a different footing. To the extent that those representations do not rely upon or flow from the contractual relationship they are capable of standing as independent and severable claims that do not arise "under" the sale agreement. However, at this stage, the post contractual claims have not been sufficiently articulated to enable me to determine that they are truly independent of and severable from the contractual claims relating to the performance or suitability of the unit. As they presently stand, the claims appear to be ancillary to, and flow from, the claims the subject of the stay under s 7(2)."

are apposite to these proceedings. Merkel J characterised the separate issues as primary and ancillary, stating, at par69:

"... 'contractual claims' (which are to be stayed under s 7(2)) appear to be the primary and substantial claims, and the other claims the ancillary and less significant claims. It is also likely that the outcome of the contractual claims will be determinative of many of the issues arising between the parties. Furthermore, if Unimould succeeds on the contractual claims it is unlikely that the other claims would proceed and if they did, their outcome is likely to be significantly affected by the determination of the contractual claims."

He concluded, at par70:

"In all the circumstances the significant legal and factual overlap between the contractual and the non-contractual claims makes it desirable that the primary and substantial contractual claims be determined first. That will avoid the undesirable outcome of having overlapping claims adjudicated upon by different tribunals at the same time with the risk of inconsistent decisions: see *Hi-Fert* at 167-168."

That approach is the one attempted here.

47 The following matters can be identified by reference to the pleadings and a list of matters or questions identified by Benaris as being "capable of settlement by arbitration".

ISSUES STATEMENT OF

	CLAIM
1.1 Identification of parties, factual material and general background.	Paragraphs 1, 2, 3, 7, 14
1.2 Did Origin Energy Resources Limited ("Origin") by (a) 15 June 2001 (b) 11 December 2001 fully perform and discharge its obligations under cl 4.1.2 of the Farmin Agreement dated 6 July 1999 between Boral Energy Resources Limited ("Origin") and Benaris International NV ("Benaris")?	Paragraphs 4, 5, 6, 8, 16
1.3 If either part of question 1 is answered no, did Origin in the circumstances commit a material breach of cl 4.1.2 of that Farmin Agreement within cl 7A(1) thereof?	Paragraphs 10, 11, 12
1.4 If question 2 is answered yes, was Benaris entitled on 11 December 2001 to give notice of material breach to Origin in respect of that material breach?	Paragraph 17
1.5 If question 3 is answered yes, was the notice dated 11 December 2001 sent to Origin under cover of a letter of that date from Deacons as solicitors for Benaris a valid notice of material breach for the purposes of cl 7A of that Farmin Agreement?	Paragraphs 17, 18
1.6 If question 4 is answered yes, was that breach remedied by Origin (a) within two weeks of that notice; (b) at any other time?	Paragraphs 19(1)(b) and (d) (by implication), 18(3).
1.7 If question 5(a) is answered no, was Benaris (in the absence of an injunction restraining it from doing so) then entitled to terminate that Farmin Agreement?	Paragraph 19

1.8 If question 6 is answered yes, was Origin in the circumstances entitled to be relieved in equity against having to re-assign or re-transfer, under cl 2.5 of that Farmin Agreement, the Assigned Interest in Commonwealth exploration permit T/30P issued under the *Petroleum (Submerged Lands) Act* 1967 and, if so, upon what, if any, terms and conditions.	Paragraph 20
ISSUES	**STATEMENT OF CLAIM**
1.9 If question 5(b) is answered yes, what rights, if any, does Benaris have against Origin by virtue of Origin's having remedied the material breach referred to in the notice dated 11 December 2001 beyond but not within two weeks of that notice?	Paragraph 20
1.10 If either question 3 or question 4 is answered no, what obligations of Origin under cl 4.1 of that Farmin Agreement have not yet been fully performed and discharged by Origin?	General

48 The following matters can be identified as not being encompassed by Benaris' formulation of issues but which are raised by the pleadings:

ISSUES	**STATEMENT OF CLAIM**
2.1 Effect, if any, of the Woodside Farmin Agreement and Assumption Agreement on the rights and obligations of Origin and Woodside.	Paragraph 8
2.2 Effect of Power of Attorney on Benaris' capacity to require the re-assumption of the whole of the interest in the licence.	Paragraphs 8(a) and (b), 9
2.3 Effect, if any, of acquiescence and/or variation by reason of dealings with Origin and Woodside.	Paragraphs 13, 14
2.4 If the notice is valid in form, was Benaris for reasons other than those in accordance with its contractual rights,	Paragraph 19

entitled to terminate the Farmin Agreement.

2.5 Whether Benaris' entitlement under the Farmin Agreement, cls 2.5 and 7A, constitute a penalty:	Paragraph 19

2.5.1 at law as provided by in the contract;

2.5.2 by reason of equitable principles arising

from unconscionability and/or proportionality.

49 The following remedies sought can be identified from the pleadings which require consideration of issues arising both from the contractual rights and obligations and equities claimed by Origin, either directly or through Woodside.

ISSUES	STATEMENT OF CLAIM
3 Injunction preventing:	
3.1 Termination of Farmin Agreement	A(1)
3.2 Exercise of power to require re-assignment of the 80% undivided interest in the Permit	A(2)
4 Declarations	
4.1 Validity of notice	B1
4.2 Entitlement to relief from forfeiture	B2
4.3 Unenforceability of forfeiture because of penalty:	B3

4.3.1 under the contract;

4.3.2 by reason of equity.

50 The following matters can be identified as being "capable of settlement by arbitration", 1.1 to 1.6, 1.10, 2.5.1, 4.3.1.

51 The following matters can be identified as being, in part, "capable of settlement by arbitration", 1.7 and 1.9, 2.1 to 2.2, insofar as they can be resolved by reference to the contractual rights and obligations of Origin and Benaris.

52 The following matters can be identified as not being capable of settlement by arbitration, either:

* in part - 1.7 and 1.9, 2.1 to 2.2.
* in entirety - 1.8, 2.3, 2.4, 2.5.2, 3 and 4.

53 The terms of the principal and subsidiary agreements made between Origin and Benaris, performance, international practice, technical issues such as data, testing requirements, adequacy, and the determination of contractual rights and obligations, are matters which are the province of the arbtiral tribunal.

54 The effect of these determinations by reason of merger, *res judicata* and/or issue estoppel, the pure equities of Origin (direct or indirect) and Woodside remain the province of this Court.

55 The reasoning process adopted in relation to the issue of penalty (2.5.1, 3.5.2), illustrates the complexity of this reference. There is no reason why the arbitral tribunal ought not determine both the legal and equitable status of the claims. Privity, at one level, precludes Woodside from the right to contest the issue, yet since the equitable question is one of law and affects Woodside's interest in the licence, it is entitled as a party to these proceedings to be heard on the matter before a final determination is made. A finding by the arbitral tribunal might be binding as against Origin by merger, estoppel or *res judicata* but, as a matter of procedural fairness, Woodside is entitled to be heard on the issue. Benaris claims that Woodside has chosen, by its own contractual dealings to "stand or fall" by Origin's interests, and could suggest that the reasoning outlined above is either sophist in nature or an "artificial construct". But Benaris likewise had choices. It knew of Woodside's involvement and had some contractual relationship with it. It chose not to provide an extended arbitration provision which would have permitted an arbitral tribunal to determine the totality of disputation. The Assumption Agreement might well bind Woodside to the fate of Origin but, at this stage of these proceedings, such is impossible to determine. Since the outcome of the penalty issue (a component of the forfeiture issue) impacts on Woodside, it is entitled to be heard on both the final issue (forfeiture) and a component (status of the

clauses) which is a pre-condition to that final issue. The "artificial construct" if such be the case, is not of the Court's making.

56 The order involves by necessity a two phase process. That process has been recognised in the United Kingdom where it is internal to the arbitration itself. (*Beaufort Developments* (supra) overruling *Northern Regional Health Authority v Derek Couch Construction Co Ltd* [1984] QC 614; *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* (supra).) There is no reason why it cannot be applied as between a tribunal and a court, referring identified matters for arbitration. Whether the award made by the arbitral tribunal is regarded as a final or intermediary determination and be capable of merger, will depend on its terms. Final judgment in this Court will depend on whether further evidence is called and, if so, the import of that evidence. Final injunctive or declaratory relief will, in all probability, be a synthesis of the arbitral award and the continued proceedings.

Pending application

57 In the pending application for summary judgment in action 167/2002, counsel for Woodside foreshadowed an argument that this Court has power afforded by the Act, s7(2), to grant referral to arbitration, subject to the condition that the referral ought be deferred until the resolution of the separate action. Absent success in that application, the use of the power to impose conditions to stay these proceeding would render the whole of action 1144/2001 ineffective. An order has been made staying these proceedings and referring matters to arbitration. A stay on the reference would bring the whole of the action to an end. That course would deprive Benaris of its statutory right to have a complex and technical case referred to a specialist tribunal. The application for summary judgment will be listed for hearing as soon as possible after the time for the lodging of the additional affidavit material has elapsed.

Orders

58 The orders to be made, subject to the determination of the application for summary judgment, are:

(1) Matters to be referred to arbitration:

(a) in full (as identified in the reasons for judgment), 1.1 to 1.6, 1.10, 2.5.1, 4.3.1;

(b) in part, 1.7 and 1.9, 2.1 to 2.2.

(2) Matters not referred to arbitration:

(a) in full, 1.8, 2.3 to 2.4, 2.5.2, 3 and 4;

(b) in part, 1.7 and 1.9, 2.1 to 2.2