



# FEDERAL COURT OF AUSTRALIA

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### Neptune Wellness Solutions, Inc v Azpa Pharmaceuticals Pty Ltd [2021] FCA 676

File number: VID 208 of 2021

Judgment of: COLVIN J

Date of judgment: 21 June 2021

Catchwords: **ARBITRATION** - application to enforce foreign arbitral award made in Canada as judgment of Court - where distributorship agreement contained arbitration agreement for arbitration in Quebec - where arbitrator made award in favour of applicant - where no payment made by respondents in respect of award - where respondents did not appear - whether requirements of s 9 of *International Arbitration Act 1974* (Cth) met - application allowed

Legislation: *International Arbitration Act 1974* (Cth) ss 8, 9

Cases cited: *Tianjin Jishengtai Investment Consulting Partnership Enterprise v Huang* [2020] FCA 767

Division: General Division

Registry: Victoria

National Practice Area: Commercial and Corporations

Sub-area: International Commercial Arbitration

Number of paragraphs: 10

Date of hearing: 21 June 2021

Counsel for the Applicant: Mr P Kulevski

Solicitor for the Applicant: Corrs Chambers Westgarth

Counsel for the Respondents: The Respondents did not appear

**ORDERS**

**VID 208 of 2021**

**BETWEEN:** **NEPTUNE WELLNESS SOLUTIONS, INC**  
Applicant

**AND:** **AZPA PHARMACEUTICALS PTY LTD**  
First Respondent

**ACN 137 395 003 PTY LTD (FORMERLY KNOWN AS AZPA PTY LTD)**  
Second Respondent

**ORDER MADE BY: COLVIN J**

**DATE OF ORDER: 21 JUNE 2021**

**THE COURT DECLARES THAT:**

1. Pursuant to s 8(3) of the *International Arbitration Act 1974* (Cth), the applicant is entitled to enforce against the respondents a foreign arbitral award made in Montreal, Canada on 15 February 2021 as if the award were a judgment of the Court.

**THE COURT ORDERS THAT:**

2. There be judgment in favour of the applicant against the respondents in the following amounts:

- (a) AU\$4,185,917.15, being the principal amount of the award;
- (b) AU\$1,491,448.02, being pre-award interest on the amount in order 2(a) calculated at the Québec, Canada legal rate of interest, being 5% calculated daily, from 31 December 2013 to 15 February 2021; and
- (c) \$AU3,626,473.27, being the applicant's costs associated with the arbitration.

3. The respondents pay the applicant's costs of and incidental to the application.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

**REASONS FOR JUDGMENT**

**COLVIN J:**

1 Australia has assumed obligations under the Convention of the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration (**Convention**). It has taken steps to give effect to those obligations by enacting the *International Arbitration Act 1974* (Cth). By s 8 of the *International Arbitration Act*, an arbitral award made in pursuance of an arbitral agreement in a country other than Australia which is an arbitral award to which the Convention applies is binding for all purposes and may be enforced in this Court as if the award were a judgment or order of the

Court.

2 Neptune Wellness Solutions, Inc (**Neptune**) has obtained an arbitral award in Canada against Azpa Pharmaceuticals Pty Ltd and Azpa Pty Ltd (together, **Azpa Parties**). Neptune seeks to enforce the award as if it were a judgment of this Court. It seeks a declaration that it is entitled to do so and a judgment in Australian dollars in this Court that includes interest and costs as determined in the arbitration. It also seeks the costs of the present application.

3 The Azpa Parties are Australian companies with their registered offices at the same address in Melbourne. They have been served with the originating process but have not responded. Neptune seeks orders on the application despite the failure of the Azpa Parties to appear.

4 The hearing of the application took place in open Court in Perth with counsel for Neptune appearing remotely. There was no appearance for the Azpa Parties.

5 The following affidavits were filed and read on the application:

- (1) Felicia Renée Williams affirmed on 23 April 2021;
- (2) Frédéric Paré sworn 15 April 2021;
- (3) Bronwyn Lisa Lincoln sworn 26 April 2021;
- (4) Christopher Mark Warwick affirmed 19 May 2021;
- (5) Bronwyn Lisa Lincoln sworn 31 May 2021; and
- (6) Bronwyn Lisa Lincoln sworn 21 June 2021.

6 The affidavits establish that:

- (1) Neptune and the Azpa Parties were parties to an arbitration agreement contained in a distributorship agreement entered into on 8 December 2011.
- (2) Under the terms of the distributorship agreement, Azpa Pty Ltd was appointed as the exclusive distributor of Neptune Krill Oil in Australia and New Zealand.
- (3) A duly certified copy of the distributorship agreement containing the arbitration agreement has been produced to the Court.
- (4) The arbitration agreement provides for an arbitration in Quebec according to Canadian laws if the distributor is the defendant.
- (5) Arbitration proceedings under the arbitration agreement were commenced on 20 August 2014.
- (6) The Azpa Parties were defendants in the arbitral proceedings.
- (7) The arbitrator was duly appointed and the parties actively participated in the arbitral process.
- (8) The arbitral proceedings had a convoluted procedural history.
- (9) Following a hearing at which the parties were represented by counsel and presented oral and written evidence, the arbitrator made an award in the following terms:

For the reasons set out above, the Arbitrator:

(a) GRANTS Neptune's claim for breach of contract, based on Azpa's alleged failure to pay Neptune's invoices for krill oil that Neptune delivered to Azpa during 2013, and

ORDERS Azpa jointly and solidarily to pay the principal amount of CA\$3,904,623.52 (corresponding to US\$3,670,793.95 as of 31 December 2013), together with pre-Award interest at the Quebec legal rate to the date of this Award;

(b) DENIES all of Azpa's counterclaims;

(c) ORDERS Azpa jointly and solidarily to pay an additional CA\$3,382,774.27, on account of Neptune's costs associated with this Arbitration;

(d) DECLARES that no further sums are owed by either Party on account of any claims asserted in these proceedings.

(10) The pre-award interest calculated in accordance with the Quebec legal rate is CA\$1,391,222.71.

(11) A duly certified copy of the original award made in Montreal Canada on 15 February 2021 has been produced to the Court.

(12) No payment has been made by the Azpa Parties in respect of the award.

(13) On 14 May 2021, the Azpa Parties were served with the originating application and affidavits as then filed together with a copy of the orders listing the application for hearing on 15 June 2021.

(14) There was no appearance for the Azpa Parties at the hearing on 15 June 2021 and the application was heard and adjourned until 21 June 2021 for consideration of the making of final orders by reference to current evidence as to the applicable exchange rate.

(15) The exchange rate on 18 June 2021 as published by the Reserve Bank of Australia on 21 June 2021 was AU\$1.00 = CA\$0.9328.

(16) Applying the published exchange rate to the award, the amounts ordered by the arbitrator to be paid by the Azpa Parties equate to AU\$4,185,917.15 for the principal amount and AU\$3,626,473.27 for Neptune's costs associated with the arbitration and AU\$1,491,448.02 for pre-award interest.

7 Canada is a party to the Convention.

8 On the evidence, the requirements of s 9 of the *International Arbitration Act* are met and I am satisfied that the award is a foreign award for the purposes of the *International Arbitration Act* and that Neptune is entitled to have the award recognised and enforced in Australia. Further, it may be enforced in this Court as if it were a judgment of this Court. The appropriate course is for a declaration to be made and in order to enable the award to be enforced as a judgment of this Court in accordance with the rights conferred by the *International Arbitration Act*, for judgment in the amount of the award to be ordered in favour of Neptune.

9 As the award is to be enforced in Australia, it is appropriate that the judgment be expressed in Australian currency: *Tianjin Jishengtai Investment Consulting Partnership Enterprise v Huang* [2020] FCA 767 at [22]-[23].

10 There should be an order for Neptune's costs of and incidental to the application to be paid by the Azpa Parties.

I certify that the preceding ten (10) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Colvin.

Associate:

Dated: 21 June 2021

