Supreme Court of Tasmania

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

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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] HCA 8; 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

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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] HCA 13; (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] HCA 8; 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] HCA 49; (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] HCA 40; (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.