In his analysis of the dispute, His Honour concluded that the claimed breach was internal to the contract and did not involve matters external to the text. Hence certain aspects of the matter were susceptible to resolution by arbitration. However, because some of the matters pleaded by Origin did not come within the ambit of an arbitration matter, it may be necessary to impose conditions to ensure that Origin would not be further prejudiced by any delay by Benaris in proceeding with the arbitration. The parties were invited to consider the matters that should be referred to arbitration and those that should be considered by the court.

ARBITRATION - SUBMISSION AS A DEFENCE AND AS A GROUND FOR STAY OF PROCEEDINGS - WHETHER DISPUTE IS A "MATTER AGREED TO BE REFERRED TO ARBITRATION" OR CAPABLE OF ARBITRATION

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

(Supreme Court of Tasmania; Slicer J*)*
This case involves the same matter as outlined in the above case note. It arose out of the invitation by Slicer J for the parties to consider conditions that might be imposed resulting from the order to stay the proceedings. Since the parties were unable to reach agreement, Slicer J was required to consider the matter further. His Honour concluded that such matters as the terms of the agreements between Origin and Benaris, performance, international practice, technical issues and the determination of contractual rights and obligations were susceptible to arbitration. However, other matters, particularly equitable issues involving both Origin and Woodside, are the province of the court (see paragraphs 53-56 of Slicer J's judgment).

An application for summary judgment by Woodside is still pending.

VICTORIA

INDUSTRY QUALITY STANDARD DEFINITION AND INTERPRETATION - COMMERCIAL ARBITRATION ACT 1984 (VICTORIA)[*]

***Qenos Pty Ltd v Mobil Oil Australia Pty Ltd (No1)* [2002] VSC 379**

Background facts

Qenos Pty Ltd ("**Qenos**") made an application to the Supreme Court of Victoria seeking leave (pursuant to section 38(4) of the *Commercial Arbitration Act* 1984 (Victoria)) to appeal against an interim arbitration award made on 12 June 2002.

The arbitration arose out of a dispute which had arisen between Qenos and Mobil Oil Australia Pty Ltd ("**Mobil**") with respect to the purchase by Mobil's Altona oil refinery of certain chemical coproducts produced by Qenos at its petrochemical manufacturing plant.

---

[*] Maria Palawelek, Solicitor, Corrs Chambers Westgarth, Melbourne.

On 15 February 1999, the parties entered into a petrochemical supply agreement ("**Supply Agreement**") which replaced a pre-existing arrangement in place since 1962. By virtue of the Supply Agreement, Mobil sold feedstocks to Qenos and purchased coproducts.

Article 4 of the Supply Agreement made provision for the quality and quantity of the coproducts to be sold by Qenos to Mobil. The relevant sections of Article 4 read as follows:

> "S4.01 [Qenos] agrees to sell to Mobil, and Mobil agrees to purchase from [Qenos], those Coproducts derived from the manufacture of Petrochemical Products in [Qenos]'s Petrochemical Plant from Feedstocks supplied by Mobil providing that such Coproducts conform to the applicable quality specifications as contained in Schedules 1(c), 1(d) and 1(e).
>
> ….
>
> S4.02 Mobil shall apply all reasonable endeavours to encourage the retention of Government legislation or industry quality standards which enable the Altona Refinery to accept Coproducts from [Qenos] for use in finished products blending without adverse impact to Mobil. Notwithstanding such endeavours, if changes to Government legislation or industry quality standards are introduced which adversely affect the Refinery's acceptance of such streams, then Mobil shall have the option to nominate revised Coproduct quality specifications to [Qenos]."

The dispute between the parties arose as a consequence of an increase in the incidence in late 1999 of a deleterious condition in the motors of certain motor cars referred to as sludging. After some investigation, Mobil was on 14 February 2000 informed that the source of this condition was petrol produced at the Mobil refinery at Altona. Furthermore, the component of this petrol responsible for the sludging was a di-olefin contained in significant quantities in untreated steam cracked naphtha ("**untreated SCN**"). Untreated SCN was one of the coproducts purchased by Mobil from Qenos under the supply agreement.

As soon as this link between untreated SCN and the sludging was established, Mobil withdrew from the market and recalled all premium unleaded petrol, which included significant quantities of this coproduct. On 14 February 2000, it ceased blending untreated SCN in its premium petrol products. Notwithstanding this, Qenos continued to supply untreated SCN as a coproduct under the Supply Agreement and to insist upon payment for it. Mobil was faced with the difficulty of storing and, in due course, disposing of the unwanted untreated SCN.

On 23 June 2000, Mobil wrote to Qenos nominating revised coproduct quality specifications pursuant to s4.02 of the Supply Agreement. These new specifications stipulated that coproducts should contain virtually none of the offending untreated SCN. Qenos disputed the validity of this nomination on the basis that no changes to government legislation or industry quality standard had occurred. This was a central issue in the arbitration, an issue which was determined by the arbitrator in favour of Mobil.

Arbitrator's decision

At the outset the arbitrator held that Article 4 dealt with two quality standards (the industry standards and those set out in the schedules) and that only a change in the industry standards could

trigger the right for Mobil to revise the coproduct quality specifications. The standards set out in the schedules were therefore not considered further by the arbitrator. The arbitrator held the relevant industry quality standard to be considered was that which existed immediately prior to the date of change in the standards and not at the date of the Supply Agreement as argued by Qenos.

The arbitrator rejected the submission put on behalf of Qenos that an industry quality standard must be a standard imposed by some independent and authoritative body. He concluded that absent such an imposed standard, a standard might be established by agreement between the major suppliers in the industry or by industry practice or both. The arbitrator also held the obligation to make reasonable endeavours to encourage retention of existing standards was imposed on Mobil only where the maintenance of existing industry quality standards in the face of change would have no adverse impact upon its acceptance of the coproducts.

The arbitrator then turned to determining what the relevant industry standard was. He found the Australian Standard for petrol, namely AS 1876-1990, standing alone would not provide a satisfactory standard to meet modern motoring requirements. Consequently, he also considered the specifications established in respect of petrol supply in the industry, specifically the "Product Exchange Specifications" ("**PESs**") established by the four major suppliers of petrol to govern the supply of petrol between them.

As there was no uniformity in the PESs, the arbitrator held it was not possible to conclude that these alone or together with AS 1876-1990 represented an industry quality standard. Instead, the arbitrator said they represented minimum acceptable requirements.

On the basis that neither the Australian Standard or the PESs contained any mention of untreated SCN, he decided that unless the inclusion of untreated SCN affected some performance requirement of the Australian Standard or the PESs, the inclusion was not a breach of these minimum acceptable requirements. Accordingly, he held the minimum acceptable requirements were silent on the issue of untreated SCN. The arbitrator also accepted that no refinery other than Mobil's Altona refinery blended untreated SCN in its petrol and said he was therefore unable to conclude that this limited usage itself amounted to a quality standard affecting the industry.

In conclusion, the arbitrator held that the silence of the industry quality standards with respect to untreated SCN was replaced by an express prohibition upon its use and that this amounted to a change giving Mobil the right to nominate revised coproduct specifications under s4.02 of the Supply Agreement.

Grounds of appeal

The grounds of appeal set out by Qenos in relation to the industry standards which were considered by the judge were as follows:

1. THE ARBITRATOR ERRED IN THE PROPER CONSTRUCTION OF S4.02 OF THE SUPPLY AGREEMENT IN THE FOLLOWING RESPECTS

(a) in finding the phrase 'industry quality standards' encompassed the practice of Mobil supplying to, and BP, Shell and Caltex accepting, petrol blended with untreated SCN;

(b) in finding that Mobil had made an effective nomination under s4.02 when the arbitrator did not determine what the standard for blending untreated SCN into petrol was at the date of the Supply Agreement; and

(c) having found that in the period February 1999 until 2000 there was no relevant industry quality standard imposed by some outside authority, the arbitrator erred in failing to find that there was no relevant industry quality standard in relation to the use of untreated SCN in finished product blending and that therefore Mobil was not entitled to nominate revised coproduct specifications under s4.02;

2. THE ARBITRATOR ERRED IN DISREGARDING THE PRIMARY MEANING OF THE WORD "STANDARD" AS DETERMINED BY THE HIGH COURT IN *R V GALVIN EX PARTE METAL TRADERS EMPLOYERS ASSOCIATION* (1949) 77 CLR 432 AT 447

Decision of Byrne J

Byrne J upheld the arbitrator's findings and noted that even if the arbitrator's findings on the content of the industry quality standards were incorrect, they did not amount to an error of law. The question of law under consideration was the proper construction of s4.02 of the Supply Agreement and, in particular, the meaning of the expression "industry quality standards" which is used in that section.

On this basis in relation to ground 1(a) of the appeal, Byrne J held it was unsustainable for Qenos to argue that the arbitrator erred in his conclusion that an industry quality standard might be established in whole or in part by industry practice. He also said that it was a question of fact, but in any event, not manifestly wrong, for the arbitrator to conclude that it was irrelevant to the content of any industry quality standard that Mobil was the only refinery who blended untreated SCN in their product. Further, His Honour upheld the arbitrator's decision in respect of grounds 1(b) and 1(c).

In relation to the second ground of the appeal, Byrne J held the arbitrator did not fall into manifest error in concluding that the High Court's observations in relation to the meaning of "standard" were of no assistance in the environment in which the present parties were operating as they were concerned with its use in the expression "standard hours of work" in the context where the hours were stipulated by an industrial award.

His Honour concluded that the circumstances in which untreated SCN became outlawed were unusual and that the change in the practice of Mobil in blending untreated SCN in its petrol was forced upon it by the unexpected adverse effect of its petrol on certain motor cars. It was commercially impossible for it to seek to maintain a standard which would cause it to sell to the public a product which would be likely to cause damage to motor cars and damage to its own reputation.

Comments

In his consideration of the arbitrator's decision, Byrne J made a number of comments which could affect the way in which parties interpret contracts which require them to comply with or which refer to industry standards. The main points were that:

3. THE TERM "INDUSTRY STANDARD" IS NOT RESTRICTED TO STANDARDS AND MINIMUM REQUIREMENTS SET OUT BY THE GOVERNMENT OR AUTHORITIES AND THAT GENERAL INDUSTRY PRACTICE MAY BE RELIED ON WHEN DETERMINING WHAT THE INDUSTRY STANDARD IS; AND

4. THE DEFINITION OF THE WORD "STANDARD" WILL BE CONSIDERED BY THE COURT IN THE CONTEXT IT IS BEING USED.

SUMMARY OF GAS INDUSTRY (RESIDUAL PROVISIONS) (AMENDMENT) ACT 51/2002 (VIC)*

The purpose of the Act, which came into effect on 4 November 2002, is to amend the *Gas Industry (Residual Provisions) Act* 1994 (Vic.) ("**GIRP Act**") to provide for the transfer of certain property, rights and liabilities from Gascor Pty Ltd ("**Gascor**") to another state-owned entity.

Gascor acts as a gas wholesaler. It purchases gas from Esso/BHP-Billiton and on-sells it to private sector gas retailers Origin Energy (Vic.) Pty Ltd, AGL Victoria Pty Ltd and TXU Australia Pty Ltd. Until the onset of full retail contestability ("**FRC**") on 1 October 2002, each of the retailers had an exclusive right in a geographical area to supply gas as an agent of Gascor to non-contestable customers. The retailers paid agency fees to Gascor in return. On commencement of FRC, the retailers' obligation to pay agency fees to Gascor lapsed.

When the Bracks Government came to power in October 1999 the gas industry (apart from Gascor) had passed to private ownership. Pre-existing contractual arrangements established as part of the reform process provided the State of Victoria (the "**State**") with options exercisable until 31 December 2002 to transfer one third of the shares in Gascor to each of the retailers.

Certain steps were required before the State would be in a position to exercise the options if it determined to do so. In particular, as a condition to the State exercising the options, the State had to warrant that if and when Gascor was transferred to the retailers it would have no contingent, accrued or prospective liabilities (apart from certain defined liabilities related to its respective contracts with Esso/BHP-Billiton and the retailers).

Gascor (together with 15 other State entities) is a party in the Longford class action. These proceedings arose over fire and explosions at the Esso/BHP-Billiton gas processing plant at Longford on 25 September 1998. The class action is a claim by gas users and stood-down workers for damages relating to the 10-day cessation of gas supplies, which followed the events at Longford.

The purpose of the Act is to transfer Gascor's Longford class action interests, including any liability, to another State entity to ensure that the State could elect to exercise the options to transfer its shares in Gascor to the retailers without being in breach of warranties contained in the contract granting the options. Similarly it ensured preservation of the interests of the state with respect to the class action.

---

* Maria Pawelek, Corrs Chambers Westgarth, Melbourne.