SUPREME COURT OF QUEENSLAND

CITATION:	*Sugar Australia Pty Limited v Mackay Sugar Ltd* [2012] QSC 38
PARTIES:	**SUGAR AUSTRALIA PTY LIMITED (ACN 081 245 169)** (Applicant/Appellant)
	v
	MACKAY SUGAR LTD (ACN 057 463 671) (Respondent)
FILE NO/S:	BS 9265 of 2011
	BS 9266 of 2011
DIVISION:	Trial Division
PROCEEDING:	Originating Applications
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	8 March 2012
DELIVERED AT:	Brisbane
HEARING DATE:	17 February 2012
JUDGE:	McMurdo J
ORDER:	**In 9265 of 2011:**
	(1) The arbitrator's award be set aside pursuant to s42 of the Act
	(2) The dispute be remitted to the arbitrator for further consideration
	In 9266 of 2011:
	(1) leave to appeal under s 38 dismissed
	Order as to costs to be determined
CATCHWORDS:	ARBITRATION – THE AWARD – APPEAL OR JUDICIAL REVIEW – GROUNDS FOR REMITTING OR SETTING ASIDE – MISCONDUCT – DENIAL OF NATURAL JUSTICE – where the parties submitted points of contention to the arbitrator which defined the dispute between the parties - whether the failure by the arbitrator to provide the applicant with an opportunity to address a point which was critical to his reasoning amounted to misconduct by a denial of natural justice

Commercial Arbitration Act 1990 (Qld), s38, s42, s43

Sugar Industry Act 1991(Qld)

Alvaro v Temple [2009] WASC 205, cited

Interbulk Ltd v Aiden Shipping Co Ltd (The "Vimeira") [1984] 2 Lloyd's Rep 66, cited

Morgan Belle Pty Ltd v API Services (Vic) Pty Ltd [2005] SASC 488, applied

Re Association of Architects of Australia; ex parte Municipal Officers Association (1989) 63 ALJR 298, cited

Re Scibilia and Lejo Holdings Pty Ltd [1985] 1 Qd R 94, considered

Sabemo Pty Ltd v Malaysia Hotel (Aust) Pty Ltd, unreported, Supreme Court of New South Wales, Giles J, 4 June 1992, cited

COUNSEL: J McKenna SC and P Franco for the applicant
B O'Donnell QC and A C Stumer for the respondent

SOLICITORS: Minter Ellison for the applicant
McCullough Robertson for the respondent

[1] The applicant is the manager of a joint venture which operates the sugar refinery at Racecourse in Mackay. The respondent is a participant in that joint venture. It is also the owner and operator of the adjacent sugar mill at Racecourse. Naturally the operations of the mill and the refinery have always been closely related, the raw sugar required by the refinery being provided from the mill. Usually the quantity of sugar produced by the mill has been comfortably in excess of that required by the refinery. But that was not the case in April/May 2011, when the applicant had to buy from another and more expensive source.

[2] A dispute then arose, in which the applicant claimed that the failure to supply its requirements in those months was a breach of contract for which it should be compensated. The parties agreed that their dispute should be arbitrated.

[3] The outcome of the arbitration was that the applicant failed entirely in its claim. By these two proceedings, the applicant challenges that award. Its first and principal argument is that there was misconduct on the part of the arbitrator, for which the Court should set aside the award pursuant to s 42 of the *Commercial Arbitration Act 1990* (Qld) ("the Act"). The alleged misconduct is what is said to have been the failure by the arbitrator to provide the applicant with an opportunity to address a point which was a critical element in his reasoning. It is said that this was not a point which had been raised by the parties or which the applicant should have anticipated. In the other proceedings, the applicant claims that this point involved an error of law, which is manifest on the face of the award. Thus in the event that its challenge under s 42 fails, the applicant seeks leave to appeal on account of that error of law, pursuant to s 38 of the Act.

The background

[4] The joint venture which operates the refinery has been in place since 1998 but is presently governed by an agreement dated 20 April 2006 ("the JVA"). The original parties to the JVA were the applicant as the manager and three companies there described as the participants, which were the respondent, CSR Limited and CSR Refining Investments Pty Limited. The present make-up of the participants is different but the respondent remains, holding a 25 per cent interest.

[5] The JVA was made prior to the deregulation of the scheme for the compulsory acquisition of raw sugar which had existed under the *Sugar Industry Act 1991* (Qld). That deregulation was anticipated by the inclusion of this term within the JVA:

> "2.8 Sugar Acquisition – Following Deregulation
>
> In the event that the compulsory acquisition of raw sugar under the *Sugar Industry Act 1991 (Qld)* or other similar legislation in other states or territories of Australia or any Act in substitution or any similar Act in any other state or territory is abolished in whole or in part or is altered in such a way as to enable Mackay or CSR to sell either all or part of its raw sugar produced in Queensland directly to the Manager ('Abolition') then the provisions of Schedule 2 shall apply."

The relevant parts of Schedule 2 to the JVA were as follows:

> "SCHEDULE 2
>
> RAW SUGAR PURCHASE ARRANGEMENTS FOLLOWING ABOLITION
>
> This Schedule sets out the principles under which the Participants of the Joint Venture will purchase their raw sugar requirements, for the Racecourse Refinery ('Requirements') in the event of Abolition. 'Abolition' has the meaning given in clause 2.8.
>
> Because it is not possible to prescribe all the conditions which may exist at the time of Abolition, this schedule is to be used as an indication of the intent of the Participants should a dispute arise in the negotiation of raw sugar supply contracts between the Participants, Mackay and CSR.
>
> Obligation to supply raw sugar on Abolition
>
> The Participants will each severally appoint the Manager to purchase the raw sugar Requirements which will be expected to be of a standard of Brand 1 or better.
>
> *Subject to production limitations, Mackay will sell to the Manager sufficient raw sugar to meet the Requirements using its best*

endeavours to meet the quality parameters of the Manager. Mackay will at all time give preference of supply to the Participants.

Should there be a shortfall and subject to it being able to meet the quality and tonnage requirements of the Manager, CSR's Plane Creek Mill will sell the balance of the Requirements not supplied by Mackay and in such circumstances give preference of supply to the Participants. For the avoidance of doubt this obligation applies only where CSR retains a majority ownership of Plane Creek Mill.

In the unlikely event that Mackay and CSR's Plane Creek Mill do not have sufficient raw sugar to meet the Requirement and other supply sources are not viable, CSR will enter discussions in good faith to supply any further requirements from its next best source.

Though future increases in Requirements due to refinery expansions are not covered by these principles, it is expected that all parties will negotiate commercially in good faith to meet such Requirements. …"

I have emphasised the words which, upon the respondent's case, contained the relevant term governing the supply to the refinery in 2011.

[6] Following the deregulation of the industry, the parties entered into a further contract, entitled "Sale Contract" and dated 1 June 2007. It was expressed to contain the terms upon which the applicant agreed to buy and the respondent agreed to sell raw sugar. It was for a term of three years beginning on 1 July 2007. It included these terms:

"2. QUANTITY

Mackay Sugar will supply sufficient raw sugar to meet the raw sugar melt requirements for Sugar Australia's Racecourse Refinery provided that it is no more than Mackay Sugar's total annual raw sugar production.

3. DELIVERY, ORIGIN AND DESTINATION

3.1 All bulk raw sugar deliveries will be made by Mackay Sugar to Racecourse Refinery. All costs of discharge will be to Sugar Australia's account.

3.2 Raw sugar delivered from mills other than Racecourse Mill or from Mackay Bulk Sugar Terminal (MBST) shall be by road transport and shall be the responsibility of Mackay Sugar in the crushing season and invoiced pursuant to clause 5.2, below.

3.3 During the crushing season raw sugar will be delivered by Mackay Sugar from the Racecourse Mill sugar dryer to the Racecourse Refinery raw sugar melt weigher, except that to meet Sugar Australia's quality requirements Mackay Sugar

> may, with Sugar Australia's agreement, deliver from any other Mackay Sugar sugar mill and/or from its sugar stored at MBST to the weighbridge at Racecourse Mill.
>
> 3.4 During Mackay Sugar's non-crushing season sugar will be delivered MBST to the weighbridge at Racecourse Mill.
>
> …
>
> 7. QUALITY
>
> 7.1 Mackay Sugar must supply Brand 1 raw sugar in bulk from the current season's production at the time of shipment, except that during June to September, the previous season's sugar may be delivered."

[7] The applicant's case, as put to the arbitrator, was that at a meeting of representatives of the parties on 4 June 2010, they agreed to continue to be bound by the terms of the Sale Contract for another three months, commencing 1 July 2010. The applicant's case relied upon minutes of that meeting which included the following:

> ". It was agreed that MSL will continue to supply raw sugar to SA from 1 July-30 Sept 10 whilst the new raw sugar supply contract negotiations / Independent Review / Arbitration are in progress.
>
> . The raw sugar supply terms and conditions *will remain unchanged from the existing agreement* for this period, until a new raw sugar supply agreement is concluded. Any differences between the old and the new agreements will be applied retrospectively to the deliveries from 1 July 10."
>
> (emphasis added)

The applicant further submitted to the arbitrator that, by necessary implication from their conduct, the parties continued to be bound by the terms of the Sale Contract until at least the alleged breach by the respondent in April/May 2011. The applicant's case was that the relevant term was not found within the JVA but was cl 2 of the Sale Contract.

[8] Accordingly, each side argued that there was an obligation upon the respondent to supply the amount of raw sugar which was required by the refinery, although an obligation which was subject to some express proviso or limitation concerning the extent of the mill's production.

[9] The milling or crushing of sugar cane occurs very soon after it is harvested. The harvest occurs usually from June through October and the mill's production in any calendar year occurs in the same period. The refinery's production, however, is fairly constant throughout the year. This is one of the reasons why, ordinarily, only some of the mill's production is immediately dispatched to the refinery and much of it is sent to a bulk storage facility.

[10] Because the mill's production in a calendar year is usually more than the refinery's requirements for the same period, the mill sells some of its production elsewhere. In deciding to do so, it has the benefit of forecasts of the refinery's requirements, which are made 12 months in advance and communicated to the participants in the joint venture, including the respondent.

[11] The respondent's production of raw sugar during the crushing season in the 2010 calendar year was much lower than in previous years. Its raw sugar production in that season was 605,175 tonnes, compared with 756,225 tonnes in the previous season and 926,037 tonnes in the season prior to that one. Still, the applicant's requirements could have been met had the respondent set aside the quantity which the applicant was predicted to require until the mill resumed production in mid 2011. But early in the 2010 season, the respondent dispatched much of its production to other buyers. Then later in 2010, unseasonably wet weather affected the harvesting of cane and thereby the production of raw sugar. This explains the reduction in the mill's production measured over the entire 2010 crushing season. The respondent's stocks of stored raw sugar began to run down until the point was reached in April/May 2011 when the respondent did not have sufficient reserves to supply what was then required by the applicant.

The arguments put to the arbitrator

[12] There was no hearing before the arbitrator. The evidence and the submissions were contained wholly in writing, in an extensive rally of documents described as Points of Contention and other submissions. According to the written agreement which the parties made specifically for this arbitration, the dispute was said to be "defined by the Points of Contention to be exchanged between the parties on or before 4.00pm on 29 July 2011". Although it was the applicant which was making the claim, it appears that the respondent's points of contention predated those of the applicant.

[13] In the respondent's document, it was contended that after the expiry of the Sale Contract on 30 June 2010, the parties had not been able to reach a further agreement and that "the ongoing raw sugar supply is being made in accordance with [the respondent's] obligations under Schedule 2. To the extent that they are relevant, the terms of the Sale Contract had been adopted as the basis for the continuing supply but that supply has been made under Schedule 2 and not the Sale Contract".[1] The respondent then contended that if the terms of the Sale Contract still applied, which was denied, the relevant term remained in Schedule 2 of the JVA because:

> "The present dispute turns directly on the question of production limitations and contingencies in the event of shortfall. The Sale Contract does not deal with either of these matters."[2]

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1 Respondent's contentions, paragraph 1.6.

2 Respondent's statement of contentions, paragraph 1.7(d).

It argued that its inability to supply the refinery in 2011 was due to "production limitations", namely the limitation upon its production in 2010 due to the bad weather and poor harvest.

[14] The respondent set out some further arguments, such as that the applicant had failed to mitigate its alleged losses, which the arbitrator found unnecessary to decide.

[15] In the applicant's points of contention, it was said that the relevant contract was the Sale Contract, which had continued in force after June 2010. It relied upon cl 2 of the Sale Contract which it set out in full in this document. It appeared to anticipate some argument in reliance upon the proviso within cl 2, and made this contention:

> "16. Under Clause 2 of the Sale Contract, MSL is obliged to supply sufficient raw sugar to meet the raw sugar melt requirements of SAPL's Racecourse Refinery **provided that the amount so required is no more than MSL's total annual raw sugar production**.
>
> 17. SAPL's requirements was no more than MSL's total raw sugar production for the 2010 season."
>
> (Original emphasis)

[16] There was no alternative contention by the applicant that it had enjoyed a contractual entitlement to be supplied with its requirements by the JVA, and in particular Schedule 2.

[17] There followed a sequence of documents, respectively described as the Respondent's Response, the Applicant's Response, the Respondent's Second Response and the Applicant's Rejoinder. There was also an agreed bundle of documentary evidence.

[18] In one of its submissions, the applicant addressed the terms of Schedule 2 of the JVA, arguing that the facts would not engage the proviso within that term, because:

> "… 'Production limitation' only occurs when MSL's total annual raw sugar production is less than the raw sugar melt requirements for Racecourse Refinery. … Once MSL concedes as it does … that it produced enough raw sugar in the period in question to supply Sugar Australia's raw sugar melt requirements, the inevitable factual, as well as legal, conclusion arises that MSL's problem was not a production limitation but a failure to manage its risks."[3]

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[3] Paragraph 5 of the applicant's Rejoinder.

A related submission was that if the relevant term was that in Schedule 2 of the JVA, the respondent was in breach of that term by failing to "at all times give preference of supply to the Participants".[4]

[19] Yet although the applicant made those submissions about Schedule 2 of the JVA, its claim was made solely upon the premise that the parties had agreed to extend the operation of the Sale Contract and that cl 2 applied in its entirety. It did not contend, in the alternative, that if the parties had not extended the Sale Contract, or that if it had been extended but with the exclusion of cl 2, then there was an agreement for the supply of the refinery's requirements according to Schedule 2 of the JVA. Rather, it made strong submissions to the effect that Schedule 2 was not in the terms of a binding contract of sale, but was instead an indication of the parties' intentions to negotiate such a contract. Therefore, absent proof that the Sale Contract had been extended and with the inclusion of cl 2, the applicant's claim would fail.

[20] The applicant's case for the continued operation of the Sale Contract beyond its three year term had two parts. The first was the agreement said to have been made at the meeting of 4 June 2010, which was for an extension for a period of three months. The second was that by conduct, a further extension beyond September 2010 was agreed, although not for any definite term. The applicant's case was that each of these extensions involved the inclusion of cl 2 of the Sale Contract in its entirety. There was no argument, in the alternative, that the parties had agreed that the refinery's requirements would be met by the respondent, but had necessarily excluded the operation of the proviso within cl 2.

The arbitrator's reasons

[21] The arbitrator's award was expressed as follows:

> "Sugar Australia has not established a breach of contract which gives rise to an entitlement to damages."

His reasons began by identifying the dispute and recording the factual context. The relevant terms of the JVA and of the Sale Contract were set out. The arbitrator recorded the contentions made by the parties. Of the applicant's case, he wrote that it was put "on the basis that the Sales Contract alone contains the applicable contractual provisions" and that the applicant had submitted "that the JVA, and more particularly Schedule 2 of the JVA, does not regulate or affect a raw sugar supply contract in respect of the Project once that supply contract is brought into existence".

[22] The arbitrator then turned to the proper construction of the documents relied upon in the respective submissions. He concluded that "the purpose of Schedule 2 [of the JVA] was to record the principles which the parties agreed to adopt in negotiating the Sale Contract if the events referred to in clause 2.8 occurred".[5] In this, he accepted the applicant's argument. He added that Schedule 2 also had effect after

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4 Paragraph 6.4 of the applicant's Rejoinder.

5 Reasons, paragraph 40.

the expiry of the three year term of the Sale Contract, but only by "prescribing the principles to be adopted in negotiating a subsequent Sale Contract".

[23] He accepted the applicant's argument that at least prior to 30 June 2010, the Sale Contract "contained all the essential terms required to regulate the obligations of the Parties …". He said that the question then was whether the Sale Contract "continued to govern the obligations of [the parties] after 30 June 2010 …".[6] He referred to the minutes of the meeting of 4 June 2010, which had recorded that the respondent would continue to supply the refinery, over the three months to the end of September, "until a new raw sugar supply agreement is concluded". The arbitrator said that "it appears that a new raw sugar supply agreement was not concluded by 30 September 2010 and sugar continued to be supplied by MSL to Sugar Australia after that date. The parties have apparently still not been able to agree on the terms of a new Sale Contract".[7]

[24] The arbitrator accepted the applicant's argument that the minutes of the meeting of 4 June 2010 recorded an agreement made between the parties for the three months commencing 1 July 2010. But he then questioned whether "the parties objectively intended to import clause 2 of the expired Sale Contract by what was said at the meeting on 4 June 2010".[8] The arbitrator focussed upon the proviso in cl 2, referring as it did to "Mackay Sugar's total annual raw sugar production". He said that this raised a question as to whether "'total annual … production' refers to the calendar year in which the breach occurred: 1 January 2011 to 31 December 2011, or some other period".[9] An alternative interpretation suggested by the arbitrator was that the relevant year of production was one commencing 1 July, having regard to the fact that the Sale Contract was for a term commencing on 1 July 2007.[10]

[25] The arbitrator said that there was "an immediate difficulty in applying this [proviso to clause 2] in the context of an agreement expressed to operate for the period from 1 July 2010 to 30 September 2010". The difficulty was that for a contract to be performed over that three month period, "what period was to constitute Mackay Sugar's total annual raw sugar production"?[11] He continued:

> "Such a provision may make sense in the context of an agreement where the term is '*three (3) years beginning on 1 July 2007 and* [continuing] *until 30 June 2010*', but not in [an] agreement expressed to extend for only 3 months.
>
> More significantly, a determination of whether there has been a breach of clause 2 requires a comparison to be undertaken between the quantity of raw sugar to meet the requirements for the Racecourse Refinery and MSL's Mackay total annual raw sugar production. Such a comparison can only be undertaken by looking at both on some annualised basis. …

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6 Reasons, paragraph 46.
7 Reasons, paragraph 50.
8 Reasons, paragraph 65.
9 Reasons, paragraph 69.
10 Ibid.
11 Reasons, paragraph 70.

> The mechanism in clause 2 for determining whether a failure to supply sufficient raw sugar for the Racecourse Refinery constitutes a breach is not one which can be sensibly applied to an agreement expressed to operate for only a 3 month period."[12]

[26] For those reasons, the arbitrator said that:

> "… I am not persuaded that, objectively, the parties intended that the reference in the 4 June 2010 meeting to the raw sugar supply terms and conditions remaining unchanged was a reference to anything more than the terms and conditions dealing with matters of delivery, price and quality over the interim period while negotiations for a new Sale Contract were occurring."[13]

In other words, the agreement made for the three months to September 2010 had not included cl 2.

[27] As to the position after 30 September 2010, the arbitrator accepted that the parties had made a further agreement "upon the same terms as the supply from 1 July 2010, rather than upon the terms and conditions of supply during the preceding three year period which expired on 30 June 2010".[14] Because cl 2 of the three year contract was not a term of the July-September 2010 agreement, it was not a term of the further interim agreement which operated after September. Accordingly, the arbitrator held, the applicant had not established that cl 2 applied to the agreement which operated at the relevant time, with the consequence that no breach of contract was established.[15]

The applicant's complaint of procedural unfairness

[28] The applicant complains that no submissions had been made to the arbitrator which went to this reasoning as to the exclusion of cl 2. In particular, there was no submission by either party as to the meaning of those words within the proviso of cl 2 and as to what, if any, was the impact of those words upon the effect of the agreements made in and after June 2010.

[29] The respondent, however, says that it did address these matters within its submissions to the arbitrator. In particular, it relies upon paragraph 4.8 of its submission dated 19 August 2011, under the heading "Expiry of Sale Contract", which, in context, was as follows:

> "4.7 Our position is that, where the term of a contract has expired, the parties would expressly renew the contract if

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12 Reasons, paragraphs 70-71, 73.
13 Reasons, paragraph 75.
14 Reasons, paragraph 85.
15 Reasons, paragraph 87.

that were their intention. In the absence of an express statement to this effect, the safer conclusion is that the parties' behaviour after that date is at most an agreement by conduct. The key inquiry is, what is the content of that agreement by conduct?

4.8 If the conduct is found to incorporate specific obligations that existed under the earlier agreement, then the presumption must be that the agreement by conduct goes no further than those specific obligations. This by itself is no proof that the parties intended to adopt all of the terms of the expired agreement wholesale. It is no answer to say that the parties referred to clause numbers from the original agreement; it is very plausible that they did so by way of shorthand, to acknowledge the operation of provision similar in nature to those contained in the clause in question. It would be reading a lot into a little to conclude that the parties intended to recommence the operation of the expired contract in all its terms.

4.9 In the present scenario, the parties' conduct also suggests that they do not believe the old Sale Contract continues to operate. They have been negotiating a new agreement, and have done so in accordance with the principles in Schedule 2 to the JV Agreement. Had the Sale Contract been intended to operate even up to the conclusion of such an agreement, we might have expected to see an acknowledgement to that effect or at least a discussion as to the transition away from the Sale Contract. There has been nothing of the sort; the behaviour of the parties is much more consistent with a belief that the Sale Contract has already expired.

4.10 Sugar Australia contends that the Sale Contract was extended until 30 September 2010 based on the minutes of the meeting held on 4 June 2010. Our position is that the Sale Contract terminated on 30 June 2010 at the end of its term. The minutes do no more than reflect the acknowledgement by MSL that it has an ongoing obligation under Schedule 2 to continue to supply sugar whilst a new contract is being negotiated. The reference to the 'raw sugar supply terms and conditions will remain unchanged' reflect the intention of the parties to establish the basis for supply under Schedule 2 until the new contract was negotiated. This is consistent with the submissions of both parties: that of itself Schedule 2 does not include all of the provisions necessary to form a new agreement – so it is necessary to import some terms from the Sale Contract until the new agreement is negotiated.

4.11 If Sugar Australia is correct and the Sale Contract was extended until 30 September 2010, there is no evidence that

> it was further extended beyond that date. The ongoing supply is consistent with MSL meeting its obligations under Schedule 2."

[30] However, I do not accept that the respondent did make the submission which it says can be found within those paragraphs, which is for the exclusion of cl 2. There is no specific reference there to cl 2, let alone to the proviso within cl 2 and to a proposition that the proviso could have no sensible operation in an agreement for a term of less than one year.

[31] Section 42 of the Act provides as follows:

> **"42 Power to set aside award**
>
> (1) Where -
>
> (a) there has been misconduct on the part of an arbitrator or umpire or an arbitrator or umpire has misconducted the proceedings; or
>
> (b) the arbitration or award has been improperly procured;
>
> the court may, on the application of a party to the arbitration agreement, set the award aside either wholly or in part.
>
> (2) Where the arbitrator or umpire has misconducted the proceedings by making an award partly in respect of a matter not referred to arbitration pursuant to the arbitration agreement, the court may set aside that part of the award if it can do so without materially affecting the remaining part of the award.
>
> (3) Where an application is made under this section to set aside an award, the court may order that any money made payable by the award shall be paid into court or otherwise secured pending the determination of the application."

Section 4 of the Act defines "misconduct" to include "a breach of the rules of natural justice".

[32] I was referred to many cases arising from arbitrations, in which a complaint of the kind made here was or was not successful. It is common ground that for this question there is no difference in principle according to whether the context is an arbitration or a court proceeding. A party is entitled to know of the case put against it and to be given an opportunity of replying to that case.[16] Similarly, a party is

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16 See eg *Morgan Belle Pty Ltd v API Services (Vic) Pty Ltd* [2005] SASC 488 at [39].

entitled to know of a point which although not raised by its opponent, is considered by the arbitrator to be adverse to its case. In *Interbulk Ltd v Aiden Shipping Co Ltd (The "Vimeira")*, Goff LJ said:

> "There is plain authority that for arbitrators so to decide a case, without giving a party any warning that the point is one which they have in mind and so giving the party no opportunity of dealing with it, amounts to technical misconduct and renders the award liable to be set aside or remitted … In truth, we are simply talking about fairness. It is not fair to decide a case against a party on an issue which has never been raised in the case without drawing the point to his attention so that he may have an opportunity of dealing with it, either by calling further evidence or by addressing argument on the facts or the law to the tribunal. In my judgment, the arbitrators in the present failed to give that opportunity to the charterers …"[17]

In the same case, Ackner LJ said:

> "If an arbitrator considers that the parties or their experts have missed the real point … then it is not only a matter of obvious prudence, but the arbitrator is obliged, in common fairness or, as it is sometimes described, as a matter of natural justice, to put the point to them so that they have an opportunity of dealing with it."[18]

[33] The question here is whether the applicant was deprived unfairly of an opportunity to put its case, by argument and if relevant by further evidence, against the reasoning by which the arbitrator had rejected the applicant's case. The answer largely turns upon whether the applicant should reasonably have anticipated that, without the arbitrator providing such an opportunity to the applicant, the arbitrator might determine the dispute by that reasoning. In *Re Association of Architects of Australia; ex parte Municipal Officers Association*, Gaudron J said:

> "As was pointed out by Deane J in *Sullivan v Department of Transport* (1978) 20 ALR 323 at 343, procedural fairness requires only that a party be given 'a reasonable *opportunity* to present his case' and not that the tribunal ensure 'that a party takes the best advantage of the opportunity to which he is entitled'. And it is always relevant to enquire whether the party or his legal representative should reasonably have apprehended that the issue was or might become a live issue: see *Re Building Workers' Industrial Union of Australia; ex parte Gallagher* (1988) 62 ALJR 81 at 84; 76 ALR 353 at 358."[19]

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17 [1984] 2 Lloyd's Rep 66 at 74-5.
18 [1984] 2 Lloyd's Rep 66 at 76.
19 (1989) 63 ALJR 298 at 305.

[34] In the present case, as in many of those which were cited, the respective arguments were premised upon certain descriptions of the relevant issues in the arbitration, demonstrating that it is possible to construct arguments either way depending upon the level of abstraction at which an issue is described. For example, it can be said that the issue of whether there was a contract which obliged the respondent to supply the refinery's requirements, as at April/May 2011, was clearly before the arbitrator and the critical reasoning of the arbitrator was in deciding that issue. On the other hand, it can be said that the issue of whether a term, in the words of cl 2, could sensibly operate within a contract for less than a period of a year, was not raised by the contentions to the arbitrator.

[35] A remarkable consequence of the arbitrator's reasoning was that after the expiry of the three year contract in June 2010, there was no contract between the parties which contained any term which obliged the respondent, conditionally or otherwise, to supply any raw sugar to the applicant. That was not a position which was suggested by any of the respondent's contentions or submissions. Its case accepted that it was subject to such an obligation, but with a proviso in the terms of that in Schedule 2 of the JVA. Therefore, the relationship between the parties, as determined by the arbitrator, was markedly different from that for which either party had contended.

[36] The proviso within cl 2, even in the context of the Sale Contract with its duration of three years, was not expressed as clearly as it might have been. However, it fairly appears that the reference to the respondent's "total annual raw sugar production" was to its production over a crushing season. At least arguably, the effect of cl 2 within the (original) Sale Contract was that the respondent would not have to supply sugar to the refinery once the quantity supplied within that year had reached the amount of the mill's production from the crushing season within that year.

[37] In that part of the applicant's points of contention, which I have extracted above at [15], there was an indication of how the proviso within cl 2 might have operated within a contract existing in April/May 2011. It was that at the point at which the respondent did not supply the refinery's requirements, the amount which the refinery had required from July 2010 had become more than the amount which the mill had produced in the 2010 crushing season. This indicated the way in which the proviso could have been applied to the agreement for the three months ending September 2010.

[38] In its response to the applicant's points of contention, the respondent did not challenge the operation of the proviso which was indicated by the applicant's contention. The respondent did refer to that part of the document, but only to say that because it was inconsistent with Schedule 2 to the JVA, it was to be disregarded. Therefore, it was unnecessary for the applicant to develop this contention by its submissions to the arbitrator.

[39] It is not said now that it was beyond the power of the arbitrator to reach his view as to the meaning of cl 2 and as to its applicability after June 2010. But in my conclusion the applicant should not reasonably have apprehended that the arbitrator

would dismiss its claim by this view of cl 2, without providing the applicant with an opportunity to make submissions on the point. The applicant has established that there was misconduct within s 42 by a failure to provide natural justice. The remaining questions concern what relief, if any, should be given.

Relief

[40] The respondent submits that no relief should be granted because, as it happened, there was no error in the arbitrator's reasoning. But that is far from clear. The potential operation of cl 2, with its proviso, in the way which was indicated by the applicant's contentions appears to involve an interpretation which was at least open. The arbitrator thought that the comparison between the refinery's requirements and the mill's production could be made only by reference to annual figures for each of them. However, in the Sale Contract this proviso was to operate throughout a year of operations. On any day in each of the three years of this agreement, there had to be a comparison which could be made as at that date, between what had been supplied to the refinery and what had been produced by the mill, so that it could be seen whether a quantity which was then being requested for immediate delivery to the refinery was more than the mill was then obliged to supply. The terms of cl 2 are not without some difficulties in their interpretation. But it is far from clear that the arbitrator was correct in his interpretation.

[41] The applicant submits that the appropriate relief is simply to set aside the award. A consequence of that order, it submits, would be that the matter would not be reconsidered by the arbitrator. He would be *functus officio*. The arbitration agreement provided for a determination only by this particular arbitrator. But the respondent says that such an order would have a different consequence, which is that there would remain outstanding the arbitration to which the parties agreed. The arbitration would be concluded only by an award, and there would be no award once this award is set aside.

[42] Under s 43 of the Act, the Court may remit any matter referred to arbitration by an arbitration agreement, together with any directions it thinks proper, to the arbitrator for reconsideration. The circumstances in which that power is exercisable include where the award is set aside for misconduct pursuant to s 42 of the Act: see in particular, the analysis by Murphy J in *Alvaro v Temple*.[20] It may not be necessary for an order to be made under s 43 if the award is set aside under s 42 because, as McPherson J said in *Re Scibilia and Lejo Holdings Pty Ltd*:

> "[A]s is said by Mustill & Boyd in the passage from their book earlier referred to, the effect of the order setting aside the award is that the arbitration reverts to the position in which it stood immediately before the arbitrator published his award. At that stage the arbitrator is not *functus officio* and is therefore entitled to

[20] [2009] WASC 205 at [54]-[66]; see also *Sabemo Pty Ltd v Malaysia Hotel (Aust) Pty Ltd*, unreported, Supreme Court of New South Wales, Giles J, 4 June 1992.

> reconsider the award, which *ex hypothesi* is to be regarded as not then made."[21]

In *Alvaro v Temple*, Murphy J noted that a different view had been taken in England, which is that "an order setting aside the award not only avoids the award, but also desseizes the arbitrator of the reference" so that to avoid doubt, it may be prudent to order a remitter expressly.[22]

[43] The applicant seems reluctant to have the arbitrator reconsider the matter, apprehending that although the arbitrator would endeavour to fairly consider the further submissions, his reasoning might still be affected by the fact that he has expressed a concluded view on the question. As against that, this arbitrator would have a head start in the determination of the dispute. The setting aside of the award would not require the arbitrator to reconsider issues already determined by him which could not be affected by the issue or issues for which he should have sought submissions.[23] I am not persuaded that there is an undue risk that the arbitrator would not properly consider any further submissions or evidence. It is not as if the arbitrator has already received and rejected the submissions which the applicants would now make. Nor is it a case where the arbitrator must revisit factual findings, particularly on any issue affected by the reliability or credibility of a witness. In my view, this arbitrator should be asked to reconsider the dispute.

[44] It is the entirety of the dispute which should be remitted to the arbitrator. As I have said, that need not require him to revisit findings or conclusions which are unaffected by the questions upon which submissions should have been sought. The alternative would be to attempt to define certain issues to be remitted. But that could unnecessarily complicate the further conduct of the arbitration.

Conclusion

[45] Pursuant to s 42 of the Act, the award will be set aside. Pursuant to s 43 of the Act, the dispute which had been referred to the arbitrator will be remitted to him for further consideration. They will be the orders in proceedings 9265/11. The alternative application, which was for leave to appeal under s 38 of the Act and which was made in proceeding 9266/11, was pressed only if I was not persuaded to grant relief under s 42. It will be dismissed. I will hear the parties as to costs.

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21 [1985] 1 Qd R 94 at 102.

22 [2009] WASC 205 at [69]-[70].

23 *Re Scibilia and Lejo Holdings Pty Ltd*