determination, rather than taking a legislative approach to authorise or validate any executive action by government to terminate ML7032.

Perhaps at last the nature and significance of sovereign risk is becoming increasingly evident and important to the executive branch of government. That said, the Queensland Government has indicated it will instigate an expressions of interest process in relation to thee Aurukun resource. The timing of that process relative to the timing of the outcome of the government's legal proceedings, will say much as to the government's attitude to sovereign risk.

SOUTH AUSTRALIA

WHEN ARE FINAL ACCOUNTS NOT FINAL? *

Santos & Ors v Delhi Petroleum Pty Ltd ([2002] SASC 272)

Construction – Common law estoppel – Detriment – Remedies

Introduction

The Full Court of the Supreme Court of South Australia recently delivered its decision in *Santos Limited & Ors v Delhi Petroleum Pty Ltd.*[1] The court found in favour of Delhi Petroleum Pty Ltd ("Delhi") and ordered the balance of the Cooper Basin Downstream Joint Venture Producers to repay monies earlier paid by Delhi as a member of that Joint Venture (collectively referred to as "the Producers".

The court was required to determine the proper construction of a joint venture agreement between the Producers or, alternatively, decide whether historical but incorrect accounting practice under that agreement created a common law estoppel.

Background

At the end of 1981 a liquids processing plant was constructed at what is now known as Port Bonython ("the Facility"). The Facility included wharfage and roads and water infrastructure. The Producers entered into an agreement with the State of South Australia to fund and construct the wharfage and roads and water infrastructure. The agreement, called the *Stony Point Indenture,* was passed into legislation as part of the *Stony Point (Liquids) Ratification Act* 1981 (the Act).

Under the Act, it was agreed that the Producers would fund the construction of the wharf then transfer ownership to the State. The State would repay the Producers for the construction of the wharf in equal annual instalments. The Producers, at the same time, agreed to pay the State for the use of the wharf a sum equal to the repayment. A similar arrangement was put in place for roads and water facilities.

To give effect, amongst other things, to these arrangements, the Producers, as between themselves, entered into a joint venture known as the Downstream Agreement ("the Agreement"). Under the Agreement, each producer was assigned a participation factor, which varied in accordance with the contribution made by that producer to the Facility. The participation factors reflected ownership in the facility, contribution to operating and capital expenses and entitlement to product. The

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1 [2002] SASC 272.

Agreement appointed Santos Limited as Operator responsible for crediting and debiting each producer for income and expenditure in accordance with their respective participation factors.

The Operator was required to conduct reviews and adjustments of the participation factors on a biannual basis. Each producer had a right under the Agreement to dispute the way in which any aspect of the review and adjustment had been carried out. Both the 1987 and the 1989 reviews were disputed and the subject of considerable litigation.

By 1996, after a series of arbitrations and litigation, in order to properly reconcile the accounts under the Agreement, a fixed participation for each producer was agreed for all participations from 1987 to 1996. To facilitate this, the Producers entered into the Fixed Factor Settlement Agreement ("Settlement Agreement") requiring the Operator to carry out a series of accounting adjustments. During the preparation of these adjustments the Operator concluded that, based on its construction of the relevant agreements, historical treatment of the wharfage and roads and water receipts and expenses was incorrect. The other defendants agreed with the Operator's construction and the historical practice was "corrected" in the adjusted accounts for the period 1987 to 1996.

Delhi was required to repay an amount of approximately $4.5 million. Delhi paid this amount under protest and initiated the proceedings against the Operator and the other defendants.

The Proceedings

Delhi alleged that:

1. Properly construed, the Agreement and the Settlement Agreement and the Act validate the historical approach.
2. In the alternative, read in light of the Act and correspondence contemporaneous to the Act and the Agreement, there had been a variation to the Agreement in regard to the treatment of the wharfage and roads and water operating expenses.
3. The historical accounting practice had amounted to a representation as to the proper apportionment of the wharfage and roads and water payments.[2] It asserted the Operator was therefore estopped from correcting the historical accounting procedure.
4. Delhi also alleged the Operator, was not entitled to deduct its legal costs from the downstream accounts to defend the proceedings.

The Court's Decision

The matter was heard at first instance before his Honour Justice Prior, who delivered his decision on 17 August 2001.[3] His Honour found that a representation had been made by the Operator, albeit inadvertently, through its historical practice and that it was estopped from departing from the historical practice.

His Honour found that Delhi had relied upon the historical accounting in entering into the Settlement Agreement and in calculating the monies payable to it as a consequence of the required adjustment of accounts. The court found that Delhi would suffer detriment if the Operator was not held to the adjustments and that Delhi would not have entered into the Settlement Agreement had they known the historical treatment was to be changed.

His Honour dismissed Delhi's other arguments.

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2 If Delhi had been aware that this historical practice would be altered, it alleged it would have negotiated for a higher fixed factor under the Settlement Agreement.

3 [2001] SASC 255.

The defendants appealed this decision. Delhi cross-appealed.

The Full Court dismissed the appeal. His Honour Justice Besanko, dismissed Delhi's cross appeal as to estoppel and Operator's costs. The majority upheld the cross-appeal.

The Full Court found that:

(a) *Construction of the Downstream Agreement*
The indenture to the Act regulated the proportions in which the fixed components of the wharfage and the roads and water were to be paid. The Full Court rejected the defendant's submission that the Agreement only governed the proportion of the payment of those operating costs. The proper construction was that asserted by Delhi.

(b) *Estoppel*
If Delhi's construction was wrong and the Operator was right then, alternatively, two memoranda compiled by the Operator's employees in 1984 and 1986 which detailed the historical accounting procedure and adopted a mistaken construction, had been distributed to all parties and represented the common understanding of the parties at that time. As a consequence of that common understanding, the Operator was estopped from going back and adjusting the accounts in the way that it did. Delhi would not have proceeded in executing the Settlement Agreement if it was aware of the adjustments made by the Operator.

(d) *Operator's Costs*
The Operator was not entitled to debit its costs from the Unit Account as the defence of the proceedings was not a cost for which the Operator was entitled to be reimbursed under the relevant joint venture agreements.

TASMANIA

GAS LEGISLATION*

The Tasmanian gas pipeline legislation saga goes on, with further amendments to the *Gas Act* 2002 (Tas) and the *Gas Pipelines Act* 2000 (Tas) since last reporting. These amendments were achieved through the *Gas Legislation Amendment (Land Acquisition) Act* 2003 (Tas) which entered into force on Royal Assent on 18 June 2003 and the *Gas Infrastructure (Miscellaneous Amendments) Act* 2003 (Tas) (Royal Assent on 4 July 2003).

The *Gas Legislation Amendment (Land Acquisition) Act* provides for the compulsory acquisition of land by a gas entity for its own purposes and also for the purpose of installation and maintenance of telecommunications infrastructure (through the insertion of a new s 84A in the *Gas Act* and s 27A in the *Gas Pipelines Act*). The stated purpose of this amendment is "to provide a straightforward mechanism for the acquisition of private land, where necessary, to provide for the continued development of natural gad infrastructure in Tasmania".[1] The second reading speech notes that this amendment gives gas entities the same powers as electricity entities under s 51 of the *Electricity Supply Industry Act* 1995 (Tas). The reason for the provision relating to telecommunications infrastructure is to enable the necessary facilities for fibre optic cables, which are intended to be installed alongside the gas pipeline at some future date.

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* Dianne Nicol.

1 Second reading speech, House of Assembly *Hansard*, Wednesday 21 May 2003 - Part 2.