Arbitration proceeding – determination of "market price" – subpoena under *Commercial Arbitration Act 1990* s 17 – confidential documents not available to market place – UCPR r 416 - setting aside subpoena – whether documents of "apparent relevance" – whether oppressive to require production

AGL Wholesale Gas Ltd v Origin Energy Ltd [2008] QCA 366 involved an appeal against the setting aside of paragraphs of a subpoena issued under s 17 of the *Commercial Arbitration Act 1990* (Qld). The Court was satisfied that even if the documents were of "apparent relevance" to the subject matter of the proceedings, it would nevertheless be oppressive to require their production.

Facts

The applicants and appellants were AGL Wholesale Gas Limited and AGL Energy Limited ("AGL"). AGL were parties to a long-term gas supply agreement with Origin Energy Limited and related companies ("Origin"), for the supply of gas by Origin to AGL for delivery at Moomba. The agreement provided for periodic re-determination of the price of gas by agreement and, failing agreement, by arbitration. The parties failed to agree on the base price of gas for the period 2009-2014 and the dispute was referred to arbitration. The arbitrators were required to determine the market price for gas at Moomba as at 1 May 2009 for similar quantities under similar conditions as the Gas Sales agreement. The agreement included a clause in relation to the confidentiality of the proceedings.

Under directions given by the arbitrators the parties exchanged notices identifying the economic and other relevant factors on which they intended to rely. The notice by Origin included details of claimed increase in demand for gas in Eastern Australia by reason of the development of significant liquefied natural gas ("LNG") projects. AGL's notice also made reference to: the prospective coming online during the price review period of further gas pipelines; an asserted excess of domestic supply over demand "due to the ramp up of gas production from the south east Queensland coal seam methane fields over the Price Review Period"; and existing and planned increases in gas reserves and production.

AGL obtained leave to issue subpoenas under s 17 of the *Commercial Arbitration Act 1990* against certain third parties, including Queensland Gas Company Limited ("QGC"). BG International Limited ("BG"), which was counterparty to agreements which came within the ambit of the subpoena, joined with QGC in an application to set aside parts of the subpoena to QGC.

Decision at first instance

At first instance (*AGL Wholesale Gas Ltd v Origin Energy Ltd* [2008] QSC 201) Dutney J set aside the paragraphs of the subpoena seeking production of:

(a) Agreements to which QGC is a party for the transportation of gas to a location in eastern Australia by way of the Hunter Pipeline;
(b) Reports prepared for the Board or CEO of QGC which consider:
    - "the targeted time frame for front end engineering and design, for final investment decision and for first production in relation to liquefied natural

gas projects, including any reports which consider factors that may lead to delay in relation to LNG projects";

- how water production will be managed in relation to the extraction of gas from coal seam methane fields; or
- how Ramp Gas may be managed.

(c) Correspondence with government bodies or other regulatory bodies in relation to water management issues.

The judge held that for documents to be properly the subject of a subpoena for production they had to have "apparent relevance" in that they were required to "relate to the subject matter of the proceedings. In that regard he adopted the test expressed by Moffitt P (with whom Hutley and Glass JJA agreed) in *National Employers' Mutual General Association Ltd v Waind and Hill* [1978] 1 NSWLR 372 at 378-386.

Dutney J also drew from the judgment of Moffitt P the view that the relevance of documents must be more clearly demonstrated where there are competing considerations such as privacy. The test in *National Employers' Mutual* was also applied in the Queensland Supreme Court in *Qld Power Trading Corp v Xstrata Qld Ltd* [2005] QCA 477 at [17].

Dutney J noted the projects to which the documents related were at preliminary stages of development, and accepted evidence that they could "carry little weight as a pricing signal". He concluded the relevance of the documents in the disputed paragraphs of the subpoena was not sufficiently arguable to satisfy the test of apparent relevance, "particularly in circumstances where the information sought to be disclosed is of such a sensitive and confidential nature." AGL appealed against that decision.

Submissions on appeal

The parties all accepted on the appeal the "apparent relevance" test applied at first instance. It was also common ground that the fact that documents sought to be subpoenaed contained non parties' sensitive commercial information, did not bear on whether the documents satisfied the apparent relevance test, although was relevant to the exercise of the court's discretion.

In the Court of Appeal, Muir JA (with whose reasons Holmes JA and White AJA agreed) found this consensus to be soundly based. He said: "If the primary judge's reasons are to be taken as concluding to the contrary, he erred in that respect."

One of the submissions for AGL was that the statement in the reasons of the primary judge that a proposal "that is still at an early stage of development will carry little weight as a pricing signal…" carried with it an implication that the subject information was of at least some weight and was thus of relevance.

AGL also argued that the "market price" was the price the market would pay if all relevant information was known, regardless of whether some facts were confidential to third parties.

Counsel for QGC argued that the material sought to be subpoenaed did not meet the test of apparent relevance because a "market price" could only be determined by

reference to information reasonably available in the appropriate market at relevant times. (Evidence of actual sales of gas in the market place was an admitted exception to this proposition). It was submitted that the information confidential to QGC was thus irrelevant to the determination of market price.

This argument for QGC placed substantial reliance on the reasoning in *Lynall v Inland Revenue Commissioners* [1972] AC 680. That case concerned the determination of the price in the open market of a parcel of shares held in a private company. It was common ground that the price that the highest bidder would have offered for the shares in a hypothetical sale in the open market value would have been substantially higher if the market was assumed to know of confidential plans of the directors of the company to embark on a public share issue. The court concluded in that case that the hypothetical purchaser should not be treated as having knowledge of such information.

Muir JA referred to the explanation given by Lord Reid in *Lynall* (at 694-696) of what the court had to consider what would happen in the event of a sale of the kind contemplated. Lord Reid had emphasised in his judgment that the bidders would not be omniscient. Rather they would derive their knowledge from the facts made available to them by the shareholders offering the shares for sale. This should be supposed to be the information the shareholder was entitled to give.

If the shareholder was not a director, it would be the information available to shareholders. If the shareholder was also a director in possession of confidential information, it would be only information which the board consented to be made available. As to what the board might be supposed to have made available, Lord Reid had concluded he could go no further than to say that the directors must be deemed to have done what all reasonable directors would do, and that reasonable directors would disclose information provided that its disclosure could not possibly prejudice the interests of the company. As Muir JA noted, *Lynall* has been applied in England, and cited with approval in Australia.

It was submitted both by QCG and BG that the concept of "market price" was shown by the authorities both in England and Australia as contemplating a hypothetical open dealing in the way of ordinary business under normal circumstances. Particular reliance was placed on *Commissioner of Taxes v Executors of Rubin* (193) 44 CLR 132 at 144 (per Isaacs CJ), 148-9 (per Rich J) and 153 (per Starke J).

The propositions advanced by counsel for AGL in response included the following:

- The construction of "market price" put forward by QCG and BG was not the only construction of the agreement reasonably open. The authorities on which QGC and BG relied should be distinguished, on the basis that they related to commodities "such as land, for which there is a ready and open market". The characteristics of the relevant market and the meaning of "market value" were issues in the arbitration for determination by the arbitrators.
- The market in question here was characterised by a few large suppliers, a few large customers, by long term bi-lateral gas contracts which could vary significantly in content (including price), and by the confidentiality of those contracts. There was very little information relevant to pricing readily available in the market.

- It was common for parties to gas supply agreements to arbitrate price reviews and to obtain access to other participants' price information in the context of those reviews. It was arguable that "market price" was to be determined in the context of the common use of such procedures to set the "market price." The parties to the agreement would have expected that the arbitrators would have access to confidential information as to price through parties' recourse to subpoenas.

Analysis in the Court of Appeal

Muir JA (with whose reasons Holmes JA and White AJA agreed) found it unnecessary to reach a concluded view on AGL's submissions as to "market price." He noted, however, that arbitration was only relevant if the parties' negotiations failed, and that the parties had no ability to subpoena materials to assist their negotiation.

He thought it would be "surprising" if the power conferred on the court by s 17 of the *Commercial Arbitration Act* bore in any way on the determination of the matters relevant to the arbitrators' determination.

Reference was then made to r 416 of the *Uniform Civil Procedure Rules 1999* (Qld), which confers a discretionary power to set aside subpoenas. The fact that that no issue had been taken by the parties with the findings of the primary judge about the confidentiality of the subpoenaed material, including some documents of "a highly confidential and commercially-sensitive nature" was regarded as relevant to the exercise of that discretion. The Court's view that AGL's submissions about "market price" were less than compelling was also significant.

Muir JA also noted that there was no challenge to the finding that some of the subpoenaed documents related to projects that were at such an early stage of development that they could be regarded as of no more than peripheral relevance. For that material to be of any use to the arbitrators, there would need to be extensive evidence and argument about a whole range of matters, and any assessment the arbitrators would make in that regard would involve a substantial degree of speculation.

Muir JA observed that it is increasingly recognised that courts should strive to achieve efficient cost effective litigation. He proceeded (at [31]):

> "In my view, provision of the subpoenaed material would tend to distract the parties from pursuing the central issue in the arbitration and be likely to result in the expenditure of considerable time, energy and moneys on issues of peripheral or scant relevance, assuming the existence of "apparent relevance" for present purposes…If the documents in question are of "apparent relevance" their limited probative value, their extent, their confidentiality and commercial sensitivity combine to make it oppressive to require their production."

For these reasons, the Court concluded that, even if the exercise of the primary judge's miscarried for any reason, the Court of Appeal should exercise its discretion the same way. The appeal was dismissed with costs.

Comment

As at first instance, the decision in the Court of Appeal did not find it necessary to deal conclusively with the interesting policy issue raised in the submissions as to whether information could be required which, though apparently relevant to the question of the "market price" to be determined in the arbitration, were not available to the market place. In this respect the Court may well have been conscious to ensure that its decision did not have the effect of binding the arbitrators in any way with findings on issues of construction.

Although regarding AGL's arguments on the issue of "market price" as "less than compelling", the Court's reasons for finding the subject paragraphs of the subpoena to be oppressive in the circumstances of this case leave open the possibility that such documentary material may be validly obtained on subpoena. This may be the case even if it the information is of a highly sensitive and confidential nature if the circumstances are such that, rather than the apparent relevance of the documents sought being at the very margin of the subject matter of the arbitration, they appear to be of direct relevance to that subject matter.