SUPREME COURT OF QUEENSLAND

CITATION:	*AGL Wholesale Gas Ltd & Anor v Origin Energy Ltd & Ors* [2008] QCA 366
PARTIES:	**AGL WHOLESALE GAS LIMITED** ACN 072 948 504 (first applicant/first appellant) **AGL ENERGY LIMITED** ACN 115 061 375 (second applicant/second appellant) **v** **ORIGIN ENERGY LIMITED** ACN 000 051 696 (first respondent/first respondent) **ORIGIN ENERGY RETAIL LIMITED** ACN 078 868 425 (second respondent/second respondent) **ORIGIN ENERGY CSG MARKETING PTY LIMITED** ACN 008 750 945 (third respondent/third respondent) **QUEENSLAND GAS COMPANY LIMITED** ACN 089 642 553 (fourth respondent/fourth respondent) **STARZAP PTY LTD** ACN 079 932 246 (fifth respondent/fifth respondent) **QUEENSLAND PETROLEUM COMPANY LIMITED** ACN 114 654 661 (sixth respondent/sixth respondent) **QGC (BERWYNDALE SOUTH) PTY LIMITED** ACN 116 145 110 (seventh respondent/seventh respondent) **QGC (INFRASTRUCTURE) PTY LTD** ACN 116 145 174 (eight respondent/eight respondent) **NUN PTY LIMITED** ACN 123 756 034 (ninth respondent/ninth respondent) **SGAI PTY LIMITED** ACN 116 132 873 (tenth respondent/tenth respondent) **SGA QUEENSLAND PTY LTD** ACN 114 116 068 (eleventh respondent/eleventh respondent) **BG INTERNATIONAL LIMITED** ABN 72 114 818 825 (twelfth respondent/twelfth respondent)
FILE NO/S:	Appeal No 9304 of 2008 SC No 5509 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 November 2008
DELIVERED AT:	Brisbane

HEARING DATE: 31 October 2008

JUDGES: Holmes and Muir JJA and White AJA
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDERS: **Appeal dismissed with costs**

CATCHWORDS: ARBITRATION – CONDUCT OF THE ARBITRATION PROCEEDINGS – PROCEDURE AND EVIDENCE – SUBPOENAS – where the appellants and first, second and third respondents are parties to a gas supply agreement at Moomba – where the agreement provides for arbitration to determine the price of gas if the parties fail to agree on a price between themselves – where the dispute was referred to arbitration – where the arbitrators are to consider all economic and other relevant factors in determining the market price for gas – where the appellants appeal against the decision of the primary judge to set side certain paragraphs of a subpoena for the production of documents served on the fourth to twelfth respondents who are non-parties to the agreement – where the documents relate to proposed gas pipelines and are of a confidential nature – whether the documents are of apparent relevance in determining the market price for gas at Moomba

Commercial Arbitration Act 1990 (Qld), s 17

Commissioner of Taxes v Executors of Rubin (1930) 44 CLR 132; [1930] HCA 21, considered
Lynall v Inland Revenue Commissioners [1972] AC 680, considered
National Employers' Mutual General Association Ltd v Waind and Hill [1978] 1 NSWLR 372, cited
Qld Power Trading Corp v Xstrata Qld Ltd & Ors [2005] QCA 477, cited
Santos Pty Ltd & Ors v Pipelines Authority of South Australia [1996] SASC 5628, cited
Santos v Pipelines Authority (1996) 66 SASR 38; [1996] SASC 5578, cited

COUNSEL: R N Traves SC, with D G Clothier, for the appellants
M J F Sweeney for the first to third respondents
J D McKenna SC, with M A Hoch, for the fourth to eleventh respondents
G J Gibson QC, T P Sullivan, for the twelfth respondent

SOLICITORS: Allens Arthur Robinson for the appellants
Clayton Utz for the first to third respondents
Corrs Chambers Westgarth for the fourth to eleventh respondents
Mallesons Stephen Jaques for the twelfth respondent

[1] **HOLMES JA:** I agree with the reasons of Muir JA and the order he proposes.

[2] **MUIR JA: Introduction**
The appellants, AGL Wholesale Gas Limited and AGL Energy Limited ("AGL") appeal against an order of a judge of the Supreme Court setting aside a number of paragraphs of a subpoena for production of documents served on Queensland Gas Company Limited, the fourth respondent. The fifth to eleventh respondents are related to the fourth respondent and had the same legal representation. For convenience, all or any of the fourth to eleventh respondents are referred to as "QGC". The twelfth respondent, BG International Limited ("BG"), which is a party to agreements which come within the ambit of the subpoena, joined with QGC in its application to set it aside.

[3] AGL and Origin Energy Limited, Origin Energy Retail Limited and Origin Energy CSG Marketing Pty Limited ("Origin"), the first, second and third respondents, are parties to a long-term gas supply agreement for the supply of gas by Origin to AGL for delivery at Moomba. The agreement provides for the periodic re-determination of the price of gas by agreement and, failing agreement, by arbitration. AGL and Origin failed to agree on the base price of gas for the period 2009 to 2014 and the dispute was referred to arbitration pursuant to the provisions of the agreement.

Clause 9 of the subject agreement

[4] The terms of the agreement of principal relevance are contained in clause 9. It provides[1]:

" “9.1 Price Review

(a) **The Sellers Representative or the Buyer may, by notice given to the other:**

(i) by 1 January 2007 and/or

(ii) by 1 January 2013

require a price review for the purposes of determining the market price for Gas at Moomba, which market price will be the Base Price (‘New Base Price’) effective from the beginning of the fifth Contract Year or the tenth Contract Year, as the case may be.

(b) The price review will proceed in accordance with the following fundamental principles:

(i) **the price review must determine the market price for Gas at Moomba for similar quantities of Gas to that which will be made available for delivery under this Agreement,**

(ii) **the price review must determine the market price for Gas at Moomba for Gas to be supplied under similar terms and conditions to this Agreement;**

…

(d) If notice is given under clause 9.l(a), **the Buyer and the Sellers' Representative must promptly negotiate,** without prejudice to any subsequent

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1 R 416 – 418.

arbitration, during the first three Months of the PR Period **in an attempt to reach agreement on the New Base Price. If agreement is not reached by the last day of that third Month, the Parties must immediately proceed to have the New Base Price determined by arbitration** in accordance with the following provisions of this clause 9. The Parties will bear their own costs in negotiating pursuant to this clause 9.1(d).

…

9.2 Appointment of price review arbitrators

(a) In the event an arbitration is required under clause 9.1(d), then within seven days of the end of the third Month of the PR Period, the Sellers' Representative and the Buyer will each appoint one arbitrator. If either fails to appoint an arbitrator within that time and continues in that failure for a further seven days then the other Party must request that an arbitrator be appointed for the Party failing to do so by the President of the Law Society of Queensland within, to the extent possible, seven days of the request by that other Party.

…

9.3 Parameters of price review arbitration

(a) **The function of the arbitrators and/or the umpire is to determine the New Base Price to apply from the relevant Price Review Date:**

(i) **strictly in accordance with the fundamental principles set out in clause 9.l (b); and**

(ii) **in accordance with the parameters set out in clause 9.3.**

(b) The arbitrators will determine the New Base Price as at the relevant Price Review Date such that, overall, the New Base Price represents the best assessment by the arbitrators of the market price for Gas at Moomba as at the Price Review Date for similar quantities under similar terms and conditions as this Agreement, and otherwise in accordance with clause 9.1(b).

(c) Subject to clauses 9.1(b) and 9.3(d), in determining the New Base Price, the arbitrators will have regard to all economic and other relevant factors.

(d) The arbitrators must not have regard to any transaction to supply or purchase Gas to the extent that the Gas is to be used for the purposes of electricity generation.

…

9.5 Confidentiality of proceedings

The Parties and the arbitrators and umpire will keep all proceedings, hearings in the proceedings, transcripts of any

hearing in the proceedings, pleadings, discovered documents, witness statements and any other evidence, private and confidential and will not disclose any of that information other than for the purposes of the arbitration. This will not apply to information which:

(a) a Party can demonstrate has already been published; or

(b) a Party is obliged to disclose by law (including the 'Listing Rules' of the Australian Stock Exchange Limited).

9.6 Commercial Arbitration Act to apply

Except as otherwise provided in this clause, the Commercial Arbitration Act 1990 (Queensland) will apply to any arbitration carried out for the purposes of a price review under clauses 9.1 to 9.8 (inclusive)." (emphasis added)

[5] Pursuant to directions given by the arbitrators, Origin and AGL exchanged notices identifying the economic and other relevant factors upon which they intended to rely. Included in Origin's notice are the following[2]:

"7. Demand for Gas in Eastern Australia

…

(e) will increase significantly throughout the period 2009 to 2014 by reasons of the development of significant liquefied natural gas (LNG) projects:

(i) six projects of significance have been announced for the development of liquefied natural gas for export from north Queensland (the first 5 from Gladstone) particularly for the Asian market, based on Queensland coal seam gas reserves:

…

B. Queensland Gas Company Limited and BG Group plc (a leading participant in the global LNG market);

…

If only one of the two largest of these LNG projects were to proceed, it would result in the liquefaction of more than 200 PJ of Gas per annum from Eastern Australia for export as LNG, commencing in 2012;

…"

[6] AGL's notice also made reference to the prospective coming online during the Price Review Period of further gas pipelines including the proposed Queensland – Hunter Gas Pipeline ("the Hunter Pipeline") intended to link Queensland gas supply

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2 R 418 – 419.

pipelines with pipelines in New South Wales. Other factors to which reference was made were an asserted excess of domestic supply over domestic 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.

[7] Counsel for QGC submitted that the exchanged notices should not be viewed as documents which played any role in defining the issues between the parties: they were not of the nature of pleadings and the parties had not joined issue on the assertions contained in them. It was submitted also that, by operation of clause 9.3(c) any use the arbitrators could make of "economic and other relevant factors" was subject to clauses 9.1(b) and 9.3(d). Clause 9.1(b) states "the fundamental principles" under which price reviews are to proceed.

The relevant provisions of the subpoena

[8] The paragraphs of the subpoena ordered to be deleted sought production of the following categories of documents:

(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 QGC "which consider the targeted timeframe 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."

(c) Reports prepared for QGC which consider how water production will be managed in relation to the extraction of gas from coal seam methane fields;

(d) Correspondence with government bodies or other regulatory bodies in relation to water management issues;

(e) Reports which consider how Ramp Gas may be managed.

The primary judge's reasons

[9] The reasons of the primary judge contain the following discussion in relation to the Hunter Pipeline, the completion of which would permit the supply of gas by QGC from Queensland to a proposed new gas-fired power station in the Hunter Valley. After recording that construction of the proposed Hunter Pipeline had not commenced, although a pipeline licence application had been made for it in Queensland and New South Wales and after a finding that "no final investment decision has been made in relation to the pipeline", the reasons state[3]:

> "[14] QGC's announcement to the Stock Exchange of 27 May 2008 relevantly contained the following:
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> > 'The gas for the power station would be transported by a new underground pipeline to be constructed as part of the Queensland Hunter Gas Pipeline project. QGC would be a significant foundation customer with the pipeline starting at QGC's Berwyndale

[3] R 420 – 421.

> South processing plant near Chinchilla and stretching 820 kilometres to Newcastle.
> The New South Wales Government's proposals to restructure parts of the State's electricity sector provided the impetus to QGC to prepare for a major investment in new gas fired power generation. '
>
> [15] The contracts manager for QGC, Mr Timmons has deposed in his affidavit that QGC has executed a conditional agreement with the proponents of the proposed Queensland Hunter Gas Pipeline. Unsurprisingly in light of the fact that the pipeline has not yet been constructed that agreement does not contain agreed or determined transportation tariffs. Rather it contains a price formula the inputs for which will not be determined until the pipeline is built. Completion of the pipeline is not expected until June 2011 or early 2012. The transportation tariffs will depend upon the cost of the construction and operation of the pipeline.
>
> [16] According to Mr Timmons QGC is presently the only customer which would be supplied with gas by the proposed pipeline. No arrangements have been entered into with any other customers or prospective customers. Mr Timmons is apparently aware that the proposed pipeline will only proceed in the foreseeable future if QGC is a foundation customer.
>
> [17] For its part, QGC's participation is reliant on the proposed Hunter Valley Power Station project proceeding. At this stage, QGC is not committed to the power station and will not be likely to make a decision until some time in 2009 or 2010."

[10] Within the scope of the subpoena are reports in respect of a conditional agreement entered into between QGC and BG concerning the proposed development of a liquefied natural gas project at Gladstone. In relation to this project, the reasons state[4]:

> "[18] QGC and BG have executed a conditional agreement in relation to the development of a liquefied natural gas (LNG) project at Gladstone. The project involves an estimated $8 billion development program which, if it proceeds, will involve construction of a plant near Gladstone, construction of a new pipeline from QGC's reserves to the LNG plant and additional gas production and processing facilities. An announcement in relation to the project was made in February 2008. A number of subsequent announcements have been made including an announcement on 15 July 2008 that Bechtel has been granted the contract for the front end engineering design of the plant. The most recent

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4 R 421.

announcement indicates that a final investment decision on the project is expected to be made in early 2010.

[19] At this stage, environment approvals have not been obtained. Feasibility studies have not been completed. Applications have not been made for the necessary licences or permits. Despite this, there are large numbers of documents of a highly confidential and commercially-sensitive nature which relate to the proposal. These include documents relating to how the project might be developed, its timing, its costs, its structure, the production costs, agreed rates of return, projected revenue, potential markets and marketing strategies and technical and commercial issues concerning the project generally."

[11] The reasons also observe[5]:

"[20] At present there are at least four LNG projects proposed for Gladstone. Mr Timmons says that it is unlikely that all of these projects would be developed in the foreseeable future."

[12] The meaning of "ramp gas" is explained as follows:

"[23] … Ramp gas is the gas produced from coal seam methane fields before the volume of gas is at a level sufficient to sustain the operation of an LNG plant. An LNG plant requires the throughput of substantial volumes of coal seam methane gas. Because of the costs associated with an LNG plant, the company must have significant proven reserves of coal seam methane gas before it commits to such a project and must have significant volume of gas ready from the time the plant becomes operational. As a result the company must bring some of its wells into production prior to the LNG plant commencing operation. Some coal seam methane wells must flow continuously from the time they are brought into production whilst others do not. The gas which is produced in the lead up to an LNG plant commencing operations is called ramp gas."

[13] The primary judge found that "water management" was a significant issue in the production of coal seam gas because:

"[22] In lay terms, the water within and covering the underground coal seams needs to be removed to allow the methane gas to be extracted from coal. The water that is extracted has varying levels of contamination and salinity. The appropriate disposal of this water is a significant cost component of the production of the gas."

[14] The primary judge held that for documents to be properly the subject of a subpoena for present purposes, they had to have "apparent relevance" in that they were

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5 R 421.

required to "relate to the subject matter of the proceedings". His Honour concluded that the apparent relevance test was not satisfied. He explained[6]:

> "[44] In my view, the relevance of the documents in issue is 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.
>
> [45] Here the projects are at such a preliminary stage that even the likelihood of obtaining the necessary approvals for the project to proceed is still essentially a matter of speculation and no commitment has been made to proceed whether or not those approvals are obtained. In relation to the Gladstone project, on the material before me it appears that whether it proceeds will depend in part at least upon the development of other competing projects promoted by others.
>
> [46] Even in the theoretically efficient market to which McHugh J referred[7], the 'rational buyer' can only factor in the risk of and the projected size of future projects. That information is contained in the releases to the Stock Exchange. I accept the comment of Mr Craddock in his affidavit at paragraph 19 that a proposal 'that is still at an early stage of development will carry little weight as a pricing signal … Such proposals are generally complex and contingent on passing many milestones in the course of their development and, until the major milestones are achieved, it is pure speculation as to whether a proposal will proceed'. It could be added that in part, at least, a decision whether or not to proceed with a project may be subjective such that no analysis of preliminary data by an arbitrator can take the matter beyond a mere possibility."

The "apparent relevance" test

[15] The parties all accepted the "apparent relevance" test applied by the primary judge and described in the following passages in his reasons[8]:

> "[27] The significance of the apparent relevance test was discussed by McMurdo J in *Xstrata Queensland Limited v Santos Ltd & Ors* [2005] QSC 323 and in particular in paragraph 49. There his Honour said:
>
> 'This question involves the interpretation of the Xstrata Agreement, and in particular cl 10.12. The respective statements of contentions in the arbitration indicate some difference between Xstrata and the Producers as to the proper interpretation of their agreement. Such a difference is a question for the arbitrators, and its answer might require evidence admissible in aid of the task. This is not the

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6 R 425.

7 The reference is to the reasons of McHugh J in *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413 at 436.

8 Reasons, 422 – 423.

> occasion in which to decide such a question between Xstrata and the Producers. If there is an interpretation which is reasonably open, according to which the documents sought would be apparently relevant, then the relevance requirement is met.'

[28] Later at paragraph 55, his Honour went on to say:

> 'The question of what is meant by apparently relevant was extensively discussed by Moffitt P (with whom Hutley and Glass JJA agreed) in *National Employers' Mutual General Association Ltd v Waind and Hill* at 378-386. Moffitt P said that the requirement of apparent relevance could be stated in terms that the documents must 'relate to the subject matter of the proceedings', a relatively undemanding requirement. However, he also said that the relevance of documents must be more clearly demonstrated where there are competing considerations such as privacy:
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> > 'The crucial question in relation to the exercise of the discretion to permit inspection [of documents produced to the court] is whether the documents have apparent relevance to the issues. It is at the [stage when the documents are tendered] that questions between the parties of relevance in fact and admissibility are ruled upon. The judge is in some difficulty in determining whether documents are relevant prior to the presentation of the evidence or at the commencement of the case. If there is particular objection from the witness, or questions of privacy are involved, no doubt procedure can be adopted to ensure that only relevant documents are inspected. In other cases, it would appear appropriate to proceed to exercise the discretion [to permit inspection], provided the documents are apparently relevant or are on the subject matter of the litigation.' "

[16] The test propounded in *National Employers' Mutual*[9] was also applied by this Court in *Qld Power Trading Corp v Xstrata Qld Ltd & Ors.*[10]

[17] It was also common ground, as I understand counsels arguments, that the fact that documents sought to be subpoenaed contained non parties' sensitive commercial information, although relevant to the exercise of the Court's discretion, did not bear on whether the documents satisfied the apparent relevance test. This consensus, in my view, is soundly based. If the primary judge's reasons are to be taken as concluding to the contrary, his Honour erred in that respect.

The parties' contentions

[18] Counsel for AGL seized on the primary judge's acceptance in paragraph [46] of his reasons of the opinion of Mr Craddock in relation to the Gladstone LNG Project that

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9 [1978] 1 NSWLR 372.

10 [2005] QCA 477 at [17].

a proposal "that is still at an early stage of development will carry little weight as a pricing signal …". It was submitted that this opinion carried with it the implication that the subject information was of at least some weight and was thus of relevance. It was submitted also, in effect, that the primary judge's finding amounted to a conclusion that a gas supply project could not be treated as relevant no matter its scale and irrespective of the likelihood of its proceeding, unless the proposal had reached some undetermined point at which it had some undetermined degree of certainty of proceeding.

[19] Counsel for QGC argued that the material sought to be subpoenaed did not meet the test of apparent relevance on the basis that a "market price" can be determined only by reference to information reasonably available in the appropriate market at relevant times.[11] The subject information, it was submitted, was confidential to QGC and thus irrelevant to the determination of market price. The confidentiality of the information was not in dispute.

[20] QGC's argument placed substantial reliance on the reasoning in *Lynall v Inland Revenue Commissioners.*[12] The case concerned the fixing of "price … in the open market" of a parcel of shares held in a private company. It was common ground that the value of the shares would be substantially higher if, in determining price, 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 that the hypothetical purchaser should not be treated as having knowledge of such information. For present purposes the reasoning of the Court is sufficiently explained in the following passages from the reasons of Lord Reid[13]:

> "We must decide what the highest bidder would have offered in the hypothetical sale in the open market, which the Act requires us to imagine took place at the time of Mrs. Lynall's death. The sum which any bidder will offer must depend on what he knows (or thinks he knows) about the property for which he bids. The decision of this case turns on the question what knowledge the hypothetical bidders must be supposed to have had about the affairs of Linread. One solution would be that they must be supposed to have been omniscient. But we have to consider what would in fact have happened if this imaginary sale had taken place, or at least - if we are looking for a general rule - what would happen in the event of a sale of this kind taking place. One thing which would not happen would be that the bidders would be omniscient. They would derive their knowledge from facts made available to them by the shareholder exposing the shares for sale. We must suppose that, being a willing seller and an honest man he would give as much information as he was entitled to give. If he was not a director he would give the information which he could get as a shareholder. If he was a director and had confidential information, he could not disclose that information without the consent of the board of directors.
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> . . .

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11 An admitted exception to this proposition was evidence of actual sales of gas in the market place.

12 [1972] AC 680.

13 *Lynall v Inland Revenue Commissioners* [1972] AC 680 at 694 - 696.

> The respondents' figure of £4 10s. per share can only be justified if it must be supposed that these reports would have been made known to all genuine potential buyers, or at least to accountants nominated by them. That could only have been done with the consent of Linread's board of directors. They were under no legal obligation to make any confidential information available. Circumstances vary so much that I have some difficulty in seeing how we could lay down any general rule that directors must be supposed to have done something which they were not obliged to do. The farthest we could possibly go would be to hold that directors must be deemed to have done what all reasonable directors would do. Then it might be reasonable to say that they would disclose information provided that its disclosure could not possibly prejudice the interests of the company. But that would not be sufficient to enable the respondents to succeed."

[21] *Lynall* has been applied in England[14] and cited with approval in Australia.[15]

[22] It was submitted that the concept of "market price" was shown by the authorities in England and Australia to contemplate a hypothetical open dealing in the way of ordinary business under normal circumstances. In this regard particular reliance was placed on *Commissioner of Taxes v Executors of Rubin.*[16]

[23] Counsel for BG advanced a similar line of argument. In reply, counsel for AGL put forward these propositions:

(a) Provided that a construction of the agreement was reasonably open which permitted the consideration of the subject documents, it was inappropriate to determine any issue of construction: that was a matter for the arbitrators;

(b) The construction of "market price" put forward by QGC and BG was not the only construction of the agreement reasonably open. The authorities on which QGC and BG relied related to commodities "such as land, for which there is a ready and open market". The characteristics of the relevant market and thus the meaning of "market value" were issues in the arbitration for determination by the arbitrators.

(c) The subject market is characterised by a few large suppliers, by a few large customers, by long term bi-lateral gas contracts which can vary significantly in their content (including price) and by the confidentiality of those contracts. There is very little information relevant to pricing readily available in the market;

(d) It is common for parties to gas supply agreements to arbitrate price reviews and to obtain access to other participants' price information in the context

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14 *Cornwall Coast Country Club v Cardgrange Ltd* [1987] 1 EGLR 146 (per Scott J); *Electricity Supply Nominees Ltd v London Clubs Ltd* [1988] 2 EGLR 152 (per Hoffman J); *Thomson v Christie Manson & Woods Ltd* [2005] EWCA Civ 555 (per May LJ with whom the other members of the Court agreed).

15 *CEG McFadden v Commissioner of Stamp Duties (NSW)* (1980) ATC 4343 at 4349; *Barisa Pty Ltd v Varga Bros Investments Pty Ltd* (1991) 4 ACSR 620 at 622 – 623 (NSWCA); and *Holt & Anor v Cox* (1997) 23 ACSR 590 at 600 (NSWCA).

16 (1930) 44 CLR 132 at 144 (per Isaacs CJ), 148-149 (per Rich J) and 153 per Starke J.

> of those reviews. It is arguable that "market price" is to be determined in the context of the common use of such procedures to set the "market price". The parties to the agreement in providing for the utilisation of those procedures would have had the expectation that the arbitrators would have access to confidential information as to price through the parties' recourse to subpoenas.

Consideration of opposing contentions

[24] With respect, it seems to me that the submissions on behalf of AGL as to "market price" do little to illuminate the meaning of that term in clause 9.1 of the agreement or to give content to the role of "market" in "market price". Nor do I find compelling the argument that because the powers in s 17 of the *Commercial Arbitration Act* 1990 (Qld) are available in relation to information not freely available in the subject market, that information is necessarily relevant to the determination of market price. Clause 9.1 proceeds on the premise that the parties will conduct a price review with a view to agreeing on the market price for gas at Moomba. Arbitration is required only if the parties' negotiations fail. The arbitration is to determine that which the parties failed to resolve by agreement. The parties, of course, have no ability to subpoena materials to assist their negotiations. Each party must do the best it can on the information available to it. And, to my mind, it would be a little surprising if the existence of 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. The provisions in Acts and Rules of Court relating to discovery and subpoenas are procedural. They facilitate the informed determination by tribunals of rights and/or obligations, the foundation of which, normally, is extraneous to and independent of the litigation process.

[25] It is not necessary, however, to reach a concluded view as to the correctness of the propositions advanced on behalf of AGL. Counsel for Origin submitted that this Court should not make determinations as to the construction of the agreement which might affect the determination of the same or like issues in the arbitration. The concern was expressed that although this Court's findings on questions of construction may not be binding on the parties as a matter of law, the statement of concluded opinions by this Court on questions of construction may influence the arbitrators. Submissions to like effect were made on behalf of AGL.

[26] It is appropriate in my view to accede to the course favoured by the parties to the arbitration. As counsel for AGL and Origin submitted, the construction of the agreement is capable of being affected by extrinsic evidence not before this court. Moreover, only part of the agreement was put in evidence at first instance and on appeal and it is the arbitrators who must make the ultimate decisions on relevance and admissibility.

[27] The primary judge found that documents sought in respect of the Gladstone LNG proposal were of "a highly confidential and commercially-sensitive nature".[17] Similar but more general findings were made about the confidentiality of other subpoenaed material. No issue was taken with these findings. Nor was there a challenge to the primary judge's finding, in effect, that documents relating to ramp

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17 Reasons, para [44].

gas and water management were relevant only as documents relating to the proposed Gladstone LNG proposal.

[28] It may be accepted that the power to subpoena documents conferred by s 17 of the *Commercial Arbitration Act* advances the public interest by facilitating determinations based on the true facts.[18] But rule 416 of the *Uniform Civil Procedure Rules* 1999 confers a discretionary power to set aside subpoenas. The fact that the purpose of the subpoena is to obtain commercially sensitive confidential documents the property of a third party is plainly relevant to the exercise of the discretion even though confidentiality, of itself, may not be sufficient for a successful challenge. The strength of the party's contentions as to the relevance of the subpoenaed documents is also relevant to the exercise of the discretion.[19] So, too, is the view I take that AGL's submissions in respect of "market price", on the material before this Court, are less than compelling.

[29] Of significance also is the peripheral nature of the evidence in relation to the Hunter Pipeline and the Gladstone LNG Proposal. That evidence can be relevant only in so far as it sheds some light on the "market price for gas at Moomba". The primary judge explained at some length in his reasons how both of these projects were at an early stage of development and by no means certain to proceed in their presently contemplated form or at all. Some of the relevant findings of the primary judge in this regard are quoted above. There was no challenge to these findings or to the following finding in paragraph [45] of the reasons:

> "[45] Here the projects are at such a preliminary stage that even the likelihood of obtaining the necessary approvals for the project to proceed is still essentially a matter of speculation and no commitment has been made to proceed whether or not those approvals are obtained. In relation to the Gladstone project, on the material before me it appears that whether it proceeds will depend in part at least upon the development of other competing projects promoted by others."

[30] For the subpoenaed material to be of use to the arbitrators, they would need to assess matters such as: the degree of likelihood that the projects will proceed as planned or otherwise having regard to regulatory, economic and other factors; the likely completion dates; the prices likely to be obtained for gas supplied to Gladstone and the possible impact of the projects as evaluated on the "market price for gas at Moomba". Any assessment of the subject proposal by the arbitrators must involve a substantial degree of speculation, and it is apparent that the evidence and argument in relation to these matters has the potential to be very extensive.

[31] It is increasingly recognised that courts should strive to achieve efficient cost effective litigation. That goal cannot be reached if parties to litigation are left free to utilise powers such as those in respect of discovery and subpoenas regardless of the utility or lack thereof of the process sought to be employed. The relentless pursuit of the marginal is to be discouraged. 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 monies on issues of peripheral or scant relevance, assuming the

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18 See eg., *Re Commissioner of Water Resources* [1991] 1 Qd R 549.

19 *Santos v Pipelines Authority* (1996) 66 SASR 38.

existence of "apparent relevance" for present purposes. Keeping the parties focussed on the true issues in the arbitration will assist the arbitrators in fulfilling their role expeditiously and free from unnecessary distractions. 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.

[32] For these reasons, if the exercise of the primary judge's discretion miscarried for any reason, this Court should exercise its discretion the same way.

[33] I would order that the appeal be dismissed with costs.

[34] **WHITE AJA:** I have read the reasons for judgment of Muir JA and agree with his Honour's reasons that the appeal should be dismissed with costs.

[35] As his Honour has observed, AGL's submission that s 17 of the *Commercial Arbitration Act* 1990 can inform the scope of the expression "market" in cl 9.1 of the Agreement is not compelling. The function of that provision is to provide the machinery for the issue of the subpoena. It can say nothing about its content or ambit.[20]

[36] As his Honour has concluded, where the apparent relevance of the documents sought appears to be at the very margin of the subject matter of the arbitration, the court will be inclined to protect confidential information the property of a non-party to the arbitration by exercising its discretion to uphold the objection to production.

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[20] *Santos Pty Ltd & Ors v Pipelines Authority of South Australia* [1996] SASC 5628 (27 May 1996) per Perry J at para 88.