SUPREME COURT OF QUEENSLAND

CITATION:	*Australia Pacific LNG P/L v Queensland Gas Company Ltd & Anor* [2009] QSC 133
PARTIES:	**AUSTRALIA PACIFIC LNG PTY LIMITED ABN 68 001 646 331** (plaintiff/applicant) v **QUEENSLAND GAS COMPANY LIMITED ABN 11 089 642 553** (first defendant/first respondent) **BG INTERNATIONAL LIMITED ARBN 114 818 825** (second defendant /second respondent)
FILE NO/S:	BS 5187 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	29 May 2009
DELIVERED AT:	Brisbane
HEARING DATE:	27 May 2009
JUDGE:	Martin J
ORDER:	**The application is dismissed**
CATCHWORDS:	EQUITY – Interim Injunctions - Organising principles of justice and convenience – Where a party to a Joint Operating Agreement gives notice of a meeting – Where the JOA requirements for giving notice of a meeting are not met – Where meeting would likely result in adoption of proposal – Where adoption of proposal would not necessarily result in development operation – Where fiduciary duties are owed – Whether there is a serious question to be tried - Whether balance of convenience test satisfied – Whether damages are an adequate remedy.
COUNSEL:	D J S Jackson QC and D de Jersey for the plaintiff/applicant G J Gibson QC and M Hoch for the first and second respondents/defendants
SOLICITORS:	Clayton Utz for the plaintiff/applicant Mallesons Stephen Jaques for the first and second respondents/defendants

[1] **MARTIN J:** The applicant seeks to restrain the first respondent from holding a meeting pursuant to a notice given by it on 19 March 2009.

[2] The parties to the application are parties to a joint operating agreement (JOA) by which they agreed to form a joint venture to explore for and produce petroleum from an area called ATP648P.

[3] Both of the respondents are wholly owned subsidiaries of BG Group plc. Queensland Gas Company Limited ('QGC') is the operator of the venture pursuant to the JOA.

[4] The respondents together control 68.75 per cent of the voting rights in the joint venture. Under the JOA an Operating Committee was formed which comprised the three parties. Decisions of that committee can only be made with a minimum of two parties having collectively not less than 65 per cent of the voting rights voting in favour of a particular resolution.

[5] On 19 March this year QGC gave notice of a meeting of the Operating Committee to occur on 28 April for consideration of a program and budget for a Feasibility Study. The date of that meeting has been postponed to 1 June 2009.

[6] The applicant argues that QGC should be restrained on an interim basis from holding that meeting. The applicant commenced an action on 18 May 2009 in which the only relief sought is a final injunction restraining the first defendant from proceeding with the meeting of the Operating Committee.

[7] In support of its submission in this application the applicant says:

(a) That it can establish a prima facie case, that is, it can demonstrate a sufficient likelihood of success to justify the preservation of the status quo pending trial by reference to what it says is the failure of the notice to comply with requirements of the JOA and the breach by QGC of its fiduciary duties to the applicant; and

(b) That, if the meeting goes ahead, it is impossible to quantify the damage to the applicant but, if it is restrained, it will only cause a relatively short delay to the respondents.

[8] The tests which I will apply on this application are those to be found in the reasons of Gummow and Hayne JJ (with whom Gleeson CJ and Crennan J agreed on this point) in *ABC v O'Neill* (2006) 227 CLR 57:

> **[65]** The relevant principles in Australia are those explained in *Beecham Group Ltd v Bristol Laboratories Pty Ltd* […] . This Court (Kitto, Taylor, Menzies and Owen JJ) said that on such applications the court addresses itself to two main inquiries and continued […] :
>
> > The first is whether the plaintiff has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief ... The second inquiry is ... whether the inconvenience or injury which the plaintiff would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the defendant would suffer if an injunction were granted.
>
> By using the phrase "prima facie case", their Honours did not mean that the plaintiff must show that it is more probable than not that at trial the plaintiff

> will succeed; it is sufficient that the plaintiff show a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial. That this was the sense in which the Court was referring to the notion of a prima facie case is apparent from an observation to that effect made by Kitto J in the course of argument […] . With reference to the first inquiry, the Court continued, in a statement of central importance for this appeal […] :
>
> > How strong the probability needs to be depends, no doubt, upon the nature of the rights [the plaintiff] asserts and the practical consequences likely to flow from the order he seeks.
>
> **…**
>
> **[70]** When Beecham and American Cyanamid are read with an understanding of the issues for determination and an appreciation of the similarity in outcome, much of the assumed disparity in principle between them loses its force. There is then no objection to the use of the phrase "serious question" if it is understood as conveying the notion that the seriousness of the question, like the strength of the probability referred to in Beecham, depends upon the considerations emphasised in Beecham.
>
> **[71]** However, a difference between this Court in Beecham and the House of Lords in American Cyanamid lies in the apparent statement by Lord Diplock that, provided the court is satisfied that the plaintiff's claim is not frivolous or vexatious, then there will be a serious question to be tried and this will be sufficient. The critical statement by his Lordship is "[t]he court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried" […] . That was followed by a proposition which appears to reverse matters of onus […] :
>
> > So *unless* the material available to the court at the hearing of the application for an interlocutory injunction *fails to disclose* that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.
> >
> > (Emphasis added.)
>
> Those statements do not accord with the doctrine in this Court as established by Beecham and should not be followed. They obscure the governing consideration that the requisite strength of the probability of ultimate success depends upon the nature of the rights asserted and the practical consequences likely to flow from the interlocutory order sought.
>
> **[72]** The second of these matters, the reference to practical consequences, is illustrated by the particular considerations which arise where the grant or refusal of an interlocutory injunction in effect would dispose of the action finally in favour of whichever party succeeded on that application […] . The first consideration mentioned in Beecham, the nature of the rights asserted by the plaintiff, redirects attention to the present appeal.

[9] I turn now to consider the submission made with respect to the question of a prima facie case.

[10] As I have said, the applicant organises its arguments under two heads.

[11] The first relates to the requirements of the JOA. The applicant asserts that there are detailed requirements which QGC must fulfil if it wishes to give a valid notice of meeting. The respondents do not contend that a prima facie case has not been established but say that there is no serious question to be tried because:

(a) The claim as pleaded is fundamentally flawed; and
(b) Damages are an adequate remedy.

[12] Mr Jackson QC (for the applicant) took me to the requirements of the JOA and compared them with the contents of the notice of meeting. The requirements of the JOA are extensive and precise. Clauses 8.2.1, 8.2.2, 8.2.3 and 8.2.4 contain the requirements for a valid notice. The notice given by QGC does not comply with most of those requirements.

[13] As I said, Mr Gibson QC (for the respondents) does not, for the purposes of this application, contend otherwise but points to the pleading and the adequacy of damages.

[14] As to the pleading point, paragraph 29 of the Statement of Claim reads:

> "In consequence of the first defendant's conduct and breaches referred to above, the plaintiff will suffer loss and damage, in that the plaintiff will lose the opportunity of conducting an investment utilising ATP684P at a minimum target return on investment which maximises return to the joint venture, including itself to the extent of its interest in the joint venture."

[15] The respondent's argument on this point is threefold:

(a) No loss of opportunity can arise at this stage because all that can occur at the meeting is the consideration of the proposal for a feasibility study and its adoption;
(b) Implicit in the allegation is an assumption that the proposed minimum target return is six per cent and that assumption is erroneous;
(c) Causation is not established – the failure to disclose cannot cause the alleged loss.

[16] As to the first point: if the meeting is held, QGC contends that there can be no action taken which would cause a loss of opportunity to invest in the manner alleged. To make good the pleaded proposition the applicant must show that if the meeting proceeds as notified it is a necessary consequence that it will lose the opportunity referred to in paragraph 29 of the Statement of Claim. Mr Jackson QC argued that, even though clauses 8.2.4 and 8.2.5 do not, in terms, mandate that the adoption of the proposal will lead to a development operation, the proposal that the the study proceed on the basis that the Minimum Target Return on Investment (MTRI) be six per cent has contractual significance.

[17] It was argued that a feasibility study which proceeded on the basis of a MTRI of six per cent may ultimately result in the applicant becoming obliged to become a party to gas sales terms with a company owned or controlled by the second respondent. That obligation, it was argued, could arise under cl 8.3.4 of the JOA. If that happened, the applicant says, the MTRI of six per cent would mean that it would

make a loss on sales but that the respondents, by selling to associated companies, would have the benefit of a form of transfer pricing which would result in the group to which they belong enjoying a lower price for the gas.

[18] A substantial part of the debate on the hearing of this application concerned the figure of six per cent and whether or not it was a real rate of return or a nominal rate. That is not something I neither can nor need to decide. There certainly is a triable issue with respect to its true nature. But QGC has made submissions and tendered evidence which would make it very difficult to resile from the proposition that the six per cent figure is a real, ungeared, post tax rate of return and that the nominal rate is of the order of nine per cent.

[19] Whatever the figure may be, I do not accept that the applicant would be contractually bound to adopt it and to sell gas on the basis of it *solely* because a meeting to consider undertaking a feasibility proposal is to be held. I accept that it is probably inevitable, given the voting rights, that the proposal will be adopted. Even so, that does not necessarily engage the next process under the JOA which is a development operation under cl 8.2.5.

[20] The other basis for the applicant's claim that it has a prima facie case is the allegation that the first respondent has breached its fiduciary duty to the applicant. The applicant has, to my satisfaction, established a prima facie case that fiduciary duties are owed by QGC to the applicant. But, the next step, that of showing a case of breach, has not been so satisfied. The applicant's case rests mainly on the proposition that it will be placed in a position of disadvantage by the use of the MTRI of six per cent. As I have said earlier, there is room for debate over its meaning, but the room for manoeuvre in the future for the first respondent has been limited by its evidence and the submissions on its behalf.

[21] The respondents argue that, notwithstanding the questions of a prima facie case and so on, damages are an adequate remedy for the applicant. The applicant responds to that by submitting that it loses all its rights under the JOA to be informed according to the JOA at the meeting once the meeting is held. It may be that, if the meeting is held in the form proposed by the first respondent, that any failure to comply with the JOA will render the meeting and any resolutions from the meeting void. That can be put to one side, though, for these purposes. The plaintiff has not established that it will suffer any compensable injury as a result of the meeting being held in the terms of the current notice. As I consider it likely that the meeting will approve the proposal, the applicant will not suffer any compensable injury because the proposal is that the feasibility study be conducted at no cost to the applicant. I accept the submission of the respondents that it is only when a program and budget for development is submitted for approval by the Operating Committee that the applicant could be placed in a position where it could suffer a loss.

[22] I have concluded, so far, that the applicant has not demonstrated a prima facie case sufficient to warrant an interim injunction nor has it demonstrated that damages are not an adequate remedy. I turn, briefly, to the question of balance of convenience. Some fairly expansive submissions were made by the first respondent about the possible consequences of a delay in the meeting and the undertaking of a feasibility study. At best, the first respondent has satisfied me that the decision on whether or not to proceed is time sensitive, as a final investment decision is due in the first

quarter of 2010. For the reasons set out above and for those I have just referred to the balance of convenience is tipped, slightly, in favour of the respondents.

[23] In light of the above, the application is dismissed.