

SUPREME COURT OF QUEENSLAND

CITATION: *Adani Abbot Point Terminal Pty Ltd v Lake Vermont Resources Pty Ltd & Ors* [2019] QSC 240

PARTIES: **ADANI ABBOT POINT TERMINAL PTY LTD**
ACN 149 298 206
(applicant)
v
LAKE VERMONT RESOURCES PTY LTD
ACN 114 286 841
(first respondent)
QCOAL PTY LTD
ACN 010 911 234
(second respondent)
BYERWEN COAL PTY LTD
ACN 133 357 632
(third respondent)
SONOMA MINE MANAGEMENT PTY LTD
ACN 124 677 443
(fourth respondent)

FILE NO: BS 9440 of 2017

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 25 September 2019

DELIVERED AT: Brisbane

HEARING DATE: 13 September 2019

JUDGE: Bradley J

ORDERS: **1. The second, third and fourth respondents have leave to read and file the application dated 13 September 2019.**

2. Pursuant to r 223(1), within 21 days, the applicant is to provide disclosure of the class of documents listed in category 12 in Annexure A to the application filed by leave by the second, third and fourth respondents dated 13 September 2019.

3. The costs of each of the parties are their costs in the proceeding.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND

TERRITORY COURTS – DISCOVERY AND INTERROGATORIES – DISCOVERY AND INSPECTION OF DOCUMENTS – DISCOVERY OF DOCUMENTS – DISCRETION OF COURT AND POWER TO ORDER – where the respondents seek orders under r 223 of the *Uniform Civil Procedure Rules* 1999 for the disclosure of certain classes of documents, on the basis that either the applicant has not complied with the duty of disclosure or the documents have passed out of the possession or control of the applicant – where the applicant contends that it has complied with its duty of disclosure and that the documents sought are either not directly relevant to an issue in the proceeding or do not exist – whether the court ought to make orders requiring disclosure by the applicant of any of the classes of documents identified by the respondents

Uniform Civil Procedure Rules 1999 (Qld), r 223

COUNSEL: L F Kelly QC, with S Cooper, for the applicant
S Couper QC, with D de Jersey, for the first respondent
J D McKenna QC, with D J Ananian-Cooper, for the second, third and fourth respondents

SOLICITORS: Clayton Utz for the applicant
DLA Piper for the first respondent
Holding Redlich, as town agents for Arnold Bloch Leibler, for the second, third and fourth respondents

- [1] This is a decision on interlocutory applications seeking orders relating to disclosure under r 223 of the *Uniform Civil Procedure Rules* 1999.
- [2] The substantive proceeding is between the applicant Adani Abbot Point Terminal Pty Ltd (**AAPT**), the first respondent Lake Vermont Resources Pty Ltd (**Lake Vermont**), and the second, third and fourth respondents (collectively the **QCoal Parties**). It is common ground that AAPT is the sub-lessee of the coal terminal at Abbot Point and the transferee of the rights and obligations of Ports Corporation of Queensland Limited (**PCQ**) pursuant to a Standard Abbot Point User Agreement (**user agreement**) with each of the respondents for the use of the coal terminal. The disputes which give rise to the proceeding are about the charges levied by AAPT on each of the respondents under its user agreement for the Handling Charge – Fixed (**HCF**), the Handling Charge – Variable (**HCV**), the Terminal Infrastructure Charge (**TIC**) and the Take or Pay Component (**TPC**) for the 2016-17, 2017-18 and 2018-19 financial years.
- [3] In the proceeding, AAPT seeks declarations as to the proper construction of the user agreements and a declaration that it has demonstrated each of two underlying charges (**OFC** and **OVC**), which were used to calculate HCF, HCV, TIC and TPC, is a reasonable charge having regard to the efficient operation of the terminal.
- [4] The respondents have defended and counterclaimed against AAPT, including by challenging the treatment of two payments made by a former user of the terminal, Queensland Coal Pty Limited (**QCPL**) pursuant to agreements executed in October

2016. The first is a payment of \$117 million by QCPL to AAPT in respect of the partial termination of QCPL's user agreement. The second is a payment of \$138 million by QCPL to Adani Mining Pty Ltd (AMPL), a company to which QCPL assigned certain of its rights under its user agreement.

A second application

- [5] The proceeding is being managed on the court's commercial list and orders including directions for the determination of complaints about AAPT's disclosure were made by Bond J on 29 March 2019.
- [6] On 21 June 2019, an application in the proceeding was filed seeking orders under r 223 in respect of 15 categories of documents. In the footer of the application, it was stated that the application was filed on behalf of all of the respondents in the proceeding, and identified the required details for the two firms acting for the respondents. However, the text of the application gave notice that Lake Vermont alone was applying for the relief and indicated that AAPT and the QCoal Parties were to be served with the application.
- [7] On 19 July 2019, further directions were made by Bond J. In these, his Honour proceeded on the basis that the 21 June 2019 application had been filed by all of the respondents.
- [8] In the written outline of submissions filed on 11 September 2019, AAPT identified potential difficulties raised by the form in which the 21 June 2019 application was filed.
- [9] At the hearing, Mr McKenna QC and Mr Ananian-Cooper, who appeared for the QCoal Parties, sought leave to read and file a separate application in the proceeding, seeking near identical relief to that sought by Lake Vermont in the application filed on 21 June 2019.
- [10] To avoid any confusion as to the parties seeking interlocutory relief and the specific relief sought by different respondents, I propose to grant leave to the QCoal Parties to read and file the application dated 13 September 2019.
- [11] In its written outline, Lake Vermont indicated that it would be seeking disclosure orders about the classes of documents in categories 1 to 9 of the application filed on 21 June 2019 and would not be seeking such orders about the classes of documents in categories 10 to 15.
- [12] At the hearing, Mr McKenna QC informed the court that the QCoal Parties adopted the submissions put on behalf of Lake Vermont in respect of the classes of documents in categories 1 to 9, and did not press the application for orders in respect of categories 10, 11 or 14.
- [13] After the hearing concluded, by consent of all the parties, an order was made dealing with the subject matter of categories 13 and 15.
- [14] It follows that the only matters remaining to be determined are whether any orders should be made in respect of the disclosure of the classes of documents in each of categories 1 to 9 and 12.

The requirement of r 223(4)

[15] The power of the court to make orders of the kind sought in the applications is confined by r 223(4):

- “(4) An order mentioned in subrule (1) or (2) may be made only if–
- (a) there are special circumstances and the interests of justice require it; or
 - (b) it appears there is an objective likelihood–
 - (i) the duty to disclose has not been complied with; or
 - (ii) a specified document or class of documents exists or existed and has passed out of the possession or control of a party.”

[16] The respondents seek the orders on the basis that either AAPT has not complied with the duty of disclosure or that the classes of documents identified in the annexure to each application have passed out of the possession or control of AAPT. It is not contended that there are special circumstances or that the interests of justice require the orders sought.

Direct relevance of classes of documents in categories 7 and 8

[17] In accordance with the directions of Bond J, the respondents identified the issues to which they contended the class of documents in each category was directly relevant.

[18] The category 7 documents were said to be directly relevant to whether by a letter dated 25 February 2016 PwC informed AAPT of a certain matter. The class of documents sought by the respondents in the category comprises the instructions (and any attachments) given to PwC regarding the advice in that letter.

[19] For the category 8 documents, the identified issue is whether by a letter dated 10 March 2016 AAPT gave QCPL notice under its user agreement that AAPT had formed a certain opinion. The documents sought by the respondents are the documents relevant to whether AAPT had formed the opinion expressed in its letter.

[20] The direct connection between each issue and the class of documents sought is not apparent. AAPT submitted that the issue in each of categories 7 and 8 was not a matter to which any document in the nominated class could be directly relevant, save for the specific document referred to in the category itself, i.e. the 25 February 2016 PwC letter and the 10 March 2016 AAPT letter. The two letters have, of course, been disclosed.

[21] On the basis of the issues and the pleading references identified by Lake Vermont and the QCoal parties in the applications, I am not persuaded that AAPT has erred in its understanding of its duty of disclosure. This is because I am not persuaded that the documents sought in each of these categories are directly relevant to the identified issue in the proceeding. The identified allegations appear to be limited to the instrumental effect of each letter, rather than the source or truth of its contents.

Compliance with the duty of disclosure – categories 1 to 6 and 9

- [22] AAPT accepted that any documents described in categories 1 to 6 and 9 of the applications would be directly relevant to matters in issue in the proceeding. If AAPT had any such documents in its possession or control, AAPT accepted it was obliged to disclose them to the respondents. The only dispute to be resolved was whether AAPT had discharged its duty to disclose such relevant documents in its possession or control.
- [23] Mr Perrett, the solicitor for AAPT, has deposed to the process by which AAPT has undertaken disclosure. His affidavit is thorough and detailed. He charts the steps by which the potential sources of directly relevant documents were identified. He reveals that some 1,492,470 such documents were delivered to the solicitors for review, together with the whole of AAPT's legal file. Mr Perrett explains the processes by which these documents were searched, the search results were reviewed and the documents identified by the searches were perused and individually reviewed to compile AAPT's list of documents to be disclosed.
- [24] Save for one respect, the respondents did not contend that Mr Perrett or those working under his supervision had erred in any identifiable respect in the processes they undertook. The exception was criticism of the search terms used.
- [25] Lake Vermont criticised the absence of a search for the composite phrases "deed of novation" and "termination agreement". Initial searches were undertaken for "novation" and "termination" and second searches were undertaken for each of those words in combination with "Queensland Coal" and "QCPL". I give this criticism little weight.
- [26] Lake Vermont's further contention that a search ought to have been performed for the date of the agreements (31 October 2016) and for the amounts of the relevant payments (\$138 million and \$117 million) is also unpersuasive. I am satisfied that the terms used by AAPT were appropriate and likely to have been effective to identify documents worthy of further examination in a proportionate disclosure process.
- [27] The other complaints were of a different nature. They proceeded on the basis that something must have gone awry in the AAPT disclosure process because only a small number of documents in certain categories had been disclosed. There were a number of contentions put in support of this part of the challenge to AAPT's disclosure.
- [28] Lake Vermont's first contention was that the number of documents disclosed by AAPT falling within categories 1 to 5 did not include the "very large volume of memoranda, file notes, minutes of meetings and other records which record why the payment was made by the applicant" expected by Lake Vermont's solicitor, Mr Uthmeyer. It was said that AAPT would have to possess or control such documents to "deal with its financial records; its financial disclosures, taxation records, what-have-you."
- [29] The evidence of Mr Perrett, on information and belief, addressed the size of AAPT and its undertaking. At the relevant times, AAPT had only a small number of employees. Its payroll records show the scale of its staff, ranging from two (at 30 June 2016) down to one (at 30 June 2017) and up to a peak of four (at 30 June 2018). Mr Perrett's enquiries identified five other personnel, outside AAPT but within the Adani Group, with whom AAPT staff may have engaged in connection with the matters in issue. The

electronic communication files for the AAPT employees and the other Adani Group personnel were provided to Mr Perrett for review as part of AAPT's disclosure.

- [30] The transactions the subject of the October 2016 agreements were significant, owing to the sums paid, but they were not overly complicated. The respective negotiations were with one existing user (QCPL) and with one new user (AMPL). The new user was a fellow member of the Adani Group.
- [31] Mr Uthmeyer's speculation about the size and scale of AAPT, the volume of documents generated by the negotiations and the further elaboration of these points in the Lake Vermont written submissions appear quite remote from the facts in Mr Perrett's affidavit.
- [32] The second contention arises from Mr Uthmeyer's review of the AAPT disclosed documents. He identified a small number of documents, fewer than 10, which referred to discussions or to a telephone call or which were or referred to a term sheet, a spreadsheet or calculations. Lake Vermont's complaint was that AAPT had not disclosed documents that recorded the discussions or "what happened" between discussions or how or why the term sheet, the spreadsheet or the calculations were produced. Mr Uthmeyer also opined, for example, that "a company of the applicant's size and commercial sophistication" making an assessment of QCPL's financial standing "would have produced a large volume of memoranda, file notes, minutes of meetings and other records" which he said would record "why" the assessment of QCPL's financial standing was made. Mr Uthmeyer said he had been able to identify only five disclosed documents as falling in categories 6 to 9 of the application.
- [33] Mr Couper QC took me to a number of the disclosed documents. These indicated that authorisation to negotiate with QCPL was sought and given from within the holding company structure for AAPT. The inter-party exchanges with QCPL (and its parent RioTinto) appeared to have been short and irregular. They indicate that the negotiation was undertaken principally in meetings or discussions. The proposed entry into the agreements was the subject of a report by PwC, apparently commissioned with information from elsewhere in the Adani Group. It appears that the flow of funds under the various transactions was agreed to occur consistently with the PwC advice.
- [34] AAPT was not required to discharge its duty of disclosure by addressing each of the categories of documents set out in the respondents' applications. It was a general duty and remains so. The description of categories can be a means of scrutinising a party's disclosure, but there are limits to its usefulness. It comes with the inbuilt assumption that many documents falling within each category exist. That assumption may itself be disproved if a sufficiently robust and appropriate document search and review process produces few or no documents in one or more categories.
- [35] In addition to the small number of employees, noted above, Mr Perrett conveyed information from AAPT's general manager, Mr Wicks, who had been with the company since 1 October 2015. According to this information, AAPT's records are held electronically. It is not the practice to retain hard copy files. Mr Wicks himself does not have a practice of keeping hard copy files or diary records.
- [36] What Lake Vermont characterises as a sparse number of disclosed documents may simply be indicative of the small and lean staff conducting a straight-forward

negotiation, between attending to their more regular operational duties. It is possible that some documents exist and were not captured in the disclosure processes undertaken by AAPT. Within the small operation of AAPT, it is also possible that few or no such “what”, “how” or “why” records were made.

- [37] In oral argument, counsel for Lake Vermont raised another complaint that Mr Perrett’s team had not been provided with repositories of the electronic documents of certain persons who were not employees or officers of AAPT. It was submitted that AAPT ought to have disclosed documents of other companies in the Adani Group passing to or from two of those persons: Mr Gautam Adani and Mr Arup Roy. Mr Couper QC explained this submission was made on the basis that those other companies and persons may have been shadow or *de facto* directors of AAPT within the meaning of s 9 of the *Corporations Act*.
- [38] This allegation seems to have been raised without any prior notice, at an interlocutory hearing, which had been the subject of detailed directions, including for the prior exchange of written submissions. It is a serious allegation, necessarily calling for a degree of care and caution. In the circumstances, it is not appropriate to reach any concluded view on it. If it were necessary, then the only open conclusion would be that the allegation is not proved.
- [39] However, for the purposes of these applications, it is sufficient to note two things. Firstly, if AAPT had directors other than its *de jure* directors, there is no reason to assume that any documents or communications of those persons are in the possession or control of AAPT. As Mr Kelly QC noted, one does not demonstrate a failure to comply with the duty of disclosure by proposing that a party has failed to examine the documents of another person, who is not a party. Secondly, the disclosure processes, as described by Mr Perrett, were proportionate, appropriate and sufficient to lead to the disclosure of relevant communications passing between anyone, including Mr Adani or Mr Roy, on the one hand, and any of the AAPT staff or officers or the identified Adani Group personnel, on the other.
- [40] In short, I am not persuaded that there is an objective likelihood that AAPT has failed to comply with its duty of disclosure in the manner contended by Lake Vermont in respect of the classes of documents described in categories 1 to 6 and 9.

Documents relating to the PwC reports – category 12

- [41] In addition to the further specific disclosure sought by Lake Vermont, the QCoal parties sought orders for the disclosure of category 12 documents, said to be those:
- “that contain a statement of, or a report by, PwC in relation to the OFC and OVC for FY17/18 and FY18/19, including any drafts of the PwC reports and statement by PwC, or communications between [AAPT] (by itself or by its agents, including Clayton Utz) and PwC in relation to the substance of the reports.”
- [42] These documents are said to be directly relevant to the dispute as to whether the OFC and OVC for those two financial years are “reasonable having regard to the efficient operation of the Terminal” as alleged by AAPT and denied by the respondents.

- [43] AAPT's pleaded case includes the contention that AAPT demonstrated that these charges were objectively reasonable (in the relevant sense) by retaining PwC, obtaining the PwC report and providing it to the respondents. It is also said to be directly relevant to AAPT's alternative case that – on the basis of the PwC report – AAPT acted reasonably in forming the subjective view that the charges were reasonable.
- [44] The respondents defend and counterclaim on the basis that the analysis undertaken by PwC was insufficient to demonstrate the reasonableness of the charges.
- [45] AAPT denied that such PwC report-related documents are directly relevant. Mr Kelly QC submitted that AAPT's case was limited to its reliance on the final PwC report. He said no reliance was placed on any draft report or earlier statement. He also noted that no allegation was made by the respondents that anything had occurred with the retainer of PwC or the production of the PwC report that might be a basis for impeaching AAPT's reliance on it.
- [46] There is some force in these submissions. However, the instructions given to PwC and any communications between PwC and AAPT about the report, including any drafts of the report, would be directly relevant to the issue of whether, by the steps it has taken, AAPT has demonstrated that the charge is reasonable and the issue of whether AAPT acted reasonably in reaching that conclusion. This is because any such documents would tend to prove or disprove those allegations. It follows that, to the extent that AAPT has any such documents in its possession or under its control, AAPT is obliged to disclose them for the purposes of the proceeding.
- [47] It is clear that to date AAPT has taken a different view about the direct relevance of any such documents. As a consequence, I am satisfied there is an objective likelihood that AAPT has not complied with its duty of disclosure in respect of the class of documents in category 12.
- [48] Accordingly, an order may be made pursuant to r 223(1) in respect of that class of documents. The alternative relief, in the form of an order pursuant to r 223(2), is not necessary, as there is no present evidentiary basis for concluding that any such documents as may exist or have existed have passed out of the possession or control of AAPT.

Costs

- [49] Lake Vermont has obtained none of the relief it pressed at the hearing. The QCoal Parties have succeeded in one of the ten categories pressed by them. They also obtained, by consent, orders in respect of two other categories. AAPT has yielded on two categories and lost to the QCoal Parties on one. It has otherwise succeeded.
- [50] Given the mixed result and the difficulties that might arise in attempting to identify the costs relating to different categories of documents, I propose to order that the costs be costs in the proceeding for each of the parties.

Disposition

- [51] Leave will be granted to the QCoal Parties to read and file their application dated 13 September 2019. An order will be made for AAPT to provide disclosure of the class of documents in category 12 pursuant to r 223(1). Costs will be in the proceeding.