IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P 47 of 2013

BETWEEN:

ELECTRICITY GENERATION CORPORATION (ABN 58 673 830 106) t/as VERVE ENERGY

Appellant

and

WOODSIDE ENERGY LTD (ABN 63 005 482 986)

First Respondent

BP DEVELOPMENTS AUSTRALIA PTY LTD (ABN 54 081 102 856)

Second Respondent

CHEVRON AUSTRALIA PTY LTD (ABN 29 086 197 757)

Third Respondent

BHP BILLITON PETROLEUM (NORTH WEST SHELF) PTY LTD (ABN 41 004 514 489)

Fourth Respondent

SHELL DEVELOPMENT (AUSTRALIA) PTY LTD (ABN 14 009 663 576)

Fifth Respondent

AND

No. P 48 of 2013

WOODSIDE ENERGY LTD (ABN 63 005 482 986)

First Appellant

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Fourth Appellant

Dated: 17 October 2013
Filed on behalf of the Respondents/Appellants by:
LAVAN LEGAL
Level 19
1 William Street
Perth WA 6000

Tel: 08 9288 6000
Fax: 08 9288 6001
Solicitor's Ref: IRF:1137821
Iain Freeman

SHELL DEVELOPMENT (AUSTRALIA) PTY LTD (ABN 14 009 663 576)
Fifth Appellant

and

ELECTRICITY GENERATION CORPORATION (ABN 58 673 830 106) t/as VERVE ENERGY
Respondent

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APPELLANTS' (IN P 48/2013) AND RESPONDENTS' (IN P 47/2013) SUBMISSIONS

PART I: CERTIFICATION

1. The appellants (together **Sellers**) in P 48/2013 (**Sellers' appeal**) (who are also the respondents in the appeal brought by the appellant (**Verve**) in P 47/2013 (**Verve's appeal**)) certify that these submissions are suitable for publication on the internet.

PART II: ISSUES

2. On 27 September 2013, the Court notified the parties that joint submissions may be filed on the Sellers' appeal and Verve's appeal of no more than 40 pages in length.
20 These are the Sellers' joint submissions on their appeal and on Verve's appeal.

3. The issue which arises on the Sellers' appeal is whether, on the proper construction of cl.3.3 of the Sale and Purchase Agreement (**GSA**) between the Sellers and the Verve, the Sellers were obliged to make available for delivery supplemental gas or whether they were able not to supply because, taking into account all relevant commercial, economic and operational matters, they were not required to supply (J[66]-[70]; CA[16]-[22], [122]-[134]). If the Sellers' appeal succeeds then Verve's appeal would fail because absent breach of cl.3.3 of the GSA there could be no footing for a claim that the Sellers applied pressure amounting to economic duress.

4. The Court of Appeal (**CA**), however, found, at CA[23]-[31], [174]-[200], that the
30 Sellers breached cl.3.3 and also applied illegitimate pressure amounting to economic duress in causing Verve to enter into (together **Short Term Agreements**):

   (a) a short term gas supply agreement (**First Short Term Agreement**) with the Sellers and Japan Australia LNG (MIMI) Pty Ltd (**MIMI**) on 4 June 2008 for the supply of gas by the Sellers and MIMI to Verve for the period between 8:00am on 4 June 2008 and 8:00am on 30 June 2008; and

   (b) a short term gas supply agreement (**Second Short Term Agreement**) with the Sellers and MIMI on or about 25 June 2008 for the supply of gas by the Sellers and MIMI for the period between 8:00am on 30 June 2008 and 8:00am on 30 September 2008.

40 5. Verve, however, did not ultimately succeed on this issue because the Court of Appeal also held that it was necessary for Verve to seek rescission of the Short Term

Agreements to obtain restitution of money paid under them (CA[32]-[33], [201]-[206]). In Verve's appeal, it appeals against this finding.

6. By their notice of contention in Verve's appeal, grounds 1, 2 and 3, the Sellers contend that the Court of Appeal erred:

   (a) in finding (as a basis for the finding for economic duress) that the Sellers breached cl.3.3 of the GSA;

   (b) in finding that they applied illegitimate pressure amounting to economic duress in causing Verve to enter into the Short Term Agreements; and

   (c) in finding that either or both of cll.22.7(c) and 22.9 of the GSA, on their proper construction, did not provide an effective cap on the Sellers' liability whether, in contract, tort or restitution (CA[40], [163]-[172]).

7. If any one of the Sellers' contentions in Verve's appeal is upheld, Verve's appeal must fail.

PART III: s 78B *JUDICIARY ACT* 1903

8. No notice is required under s 78B of the *Judiciary Act* 1903 (Cth).

PART IV: CITATIONS

9. The reasons of the trial judge (J) in *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* [2011] WASC 268 have not otherwise been reported. The reasons of the Court of Appeal in *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* [2013] WASCA 36 have not otherwise been reported.

PART V: RELEVANT FACTS

10. The Sellers, as sellers, and Verve, as buyer, are parties to the GSA, which is a long term gas supply agreement. The agreement takes effect as a separate contract as between each Seller and Verve: J[2], cl.26.1(b).

11. Verve is the major generator and supplier of electricity to a large area in the South West of Western Australia: CA[2]. It purchases gas under the GSA for use in its electricity generation facilities.

12. On 3 June 2008, a fire at the production plant of another major producer of gas in Western Australia, Apache, caused a cessation of the production of natural gas at that plant and reduced the supply of natural gas to Western Australia by a significant proportion, some 30-35%: J[11], CA[10].

13. As appears from J[12], [75], as a result of the fire, Apache, several of Apache's customers, and other customers, sought to buy substantial quantities of gas from the Sellers, which far exceeded the amount of gas the Sellers could produce and supply, after taking into account their existing firm supply commitments. There was significant interest in gas and the Sellers received various calls requesting gas and offers were made at above market price: paras 96-105, witness statement of Alberto De la Fuente.

14. In those circumstances, the Sellers and MIMI[1] offered to buyers, including to Verve, short term gas supply agreements for the period between 4 June 2008 and 30 June 2008: J[13]. The Sellers offered to sell gas at what they considered to be market price, based on expressions of interest as to price they had received a short time before, namely in March 2008: paras 104-5, witness statement of Alberto De la Fuente. The Sellers entered into a number of short term contracts with these buyers: J[14]. The Sellers sought to allocate the available gas equitably: email of 4 June 2008 from N N Kruk (of Woodside Energy Ltd) to E E Howell. However, not all buyers could be accommodated by the Sellers and MIMI: email of 6 June 2008 from A A De la Fuente (of North West Shelf Gas Pty Ltd (**NWSG**)) to the Sellers' representatives.

15. As the trial judge observed at J[10], [80]-[84], there were limits on the reliable gas production capacity of the Karratha plant from which the Sellers and MIMI supplied gas, the Sellers had firm commitments to supply gas as to a significant proportion of that reliable capacity, and the Karratha plant could (unreliably) reach a higher maximum instantaneous rate of supply.

16. Under the GSA, the Sellers were required to make available for delivery the Maximum Daily Quantity or MDQ (cl.3.2). They also had to "use reasonable endeavours to make available" an additional amount of gas (**Supplemental Maximum Daily Quantity** or **SMDQ**) in excess of MDQ: see cll.3.3(a), 3.3(b), and 9 of the GSA. In the Sellers' appeal, they contend that, in the circumstances which then prevailed, cl.3.3(b) on its proper construction relieved them of any obligation to make SMDQ gas available to Verve. They accepted at trial, however, that, leaving aside other commitments, there was available gas which could have supplied Verve's SMDQ in the period 4 June 2008 to 30 September 2008.

17. Nominations as to the quantity of gas required by Verve were required under cl.9.1 of the GSA: J[16], [72], CA[10]. By 4 June 2008 and thereafter until 30 September 2008, Verve had nominated MDQ and SMDQ as the quantity of gas which it required. However, on 7, 26, 27, 28, 29 and 30 September 2008, Verve, pursuant to cll.9.4 and 9.7 of the GSA, reduced the quantity of gas it required under the GSA to below MDQ: NWSG tax invoice dated 1 October 2008 and attached delivery summary. Verve continued to receive further supply under the Second Short Term Agreement.

18. In the morning of 4 June 2008, Mr De la Fuente (marketing manager for NWSG, the Sellers' representative) telephoned Ms Carole Clare (Verve's gas contracts manager) and informed her that, following the disruption to Apache's gas supply the previous day, the Sellers could not supply Verve with SMDQ gas in June 2008: J[76]. It may be noted that, as McLure P said at CA[28], "There [was] no finding below that the Sellers acted for an improper purpose. The Sellers advised Verve that they would not supply SMDQ. The evidence does not support an inference that this was done for the purpose of compelling Verve to enter into the short term gas supply agreements. To the contrary, the evidence was that the Sellers were unable to satisfy all of the demand for gas in the relevant period. Moreover, Verve accepts that the Sellers acted in the genuine belief that they were not in breach of their reasonable endeavours obligation under the GSA.": see too CA[139] and J[77].

[1] MIMI is not a party to the GSA sued on by Verve, and was not a party to the proceedings in the courts below.

19. As already mentioned, as NWSG had done with other buyers, Mr De la Fuente also informed Ms Clare that the Sellers were willing to enter into a short term gas supply agreement to supply gas to Verve until 30 June 2008: J[10], [76].

20. Verve's managers discussed the Sellers' offer and decided to accept the offer for a quantity equivalent to the quantity of SMDQ gas: J[76].

21. By an email sent at 6:05pm on 4 June 2008, Ms Clare informed Mr De la Fuente that Verve "is prepared to accept gas on the basis offered but without prejudice to our rights" under cl.3.3 of the GSA and subject to a review of the short term agreement. Ms Clare also confirmed what Mr De la Fuente told her that morning, namely that the Sellers were looking to assist customers who were also Apache customers and any other party prepared to pay market price; and the Sellers were prepared to offer gas to Verve at the same price offered to third parties.

22. In the event, Verve entered into the First Short Term Agreement but for a lesser quantity than offered by the Sellers and MIMI, because Mr Jason Waters (a general manager at Verve) did not have authority to contract for the whole of the quantity offered: J[76]. The price Verve agreed to pay was the market price at the time: agreed fact [7]. The First Short Term Agreement was terminable by either party on 24 hours' notice: cl.15(a).

23. By letter of 10 June 2008, Verve gave notice to NWSG and the Sellers of a dispute under cl.21.1(b) of the GSA with respect to the Sellers' alleged breach of cl.3.3 of the GSA. Verve said that it had "claims for damages" arising from the alleged breach comprising the difference between the price for SMDQ gas and the price payable under the First Short Term Agreement; and the price paid by Verve to obtain alternative fuel. The letter noted that supply to Verve of gas in addition to MDQ was pursuant to the First Short Term Agreement, and not pursuant to the GSA.

24. By mid June 2008, it was known that the Apache outage was likely to continue until at least the end of September 2008: para 134 of witness statement of Alberto De la Fuente. On 20 June 2008, NWSG on behalf of the Sellers, informed buyers, including Verve, that the Sellers were tendering the sale of gas for the period between July and September 2008, and was willing to provide a tender package if the recipient agreed to confidentiality: J[78], CA[14].

25. On 20 June 2008, Mr De la Fuente also contacted Mr Frank Tanner at Verve and informed him of the tender process. Mr De la Fuente said that the Sellers could likely not supply SMDQ gas for the period July to September 2008: para 81 of witness statement of Jason Waters. The Court of Appeal's observations at CA[28], quoted in paragraph 18 above, applied also in relation to entry into the Second Short Term Agreement: see too J[79] and CA[139].

26. Mr Jason Waters (a general manager at Verve) then telephoned Mr Gordon Rule (the general manager of NWSG) and said that the tender process was putting Verve in a "risky position". He then said, "[i]f we don't get the gas under the tender we would have to consider other avenues such as court proceedings": paras 81, 82 of witness statement of Jason Waters.

27. After Mr Waters received the Sellers' tender package, he had discussions with Verve's officers as to the price at which Verve should tender and he initially decided that Verve should tender at a particular price. Urgent approval of Verve's board was sought and obtained for this by a circular resolution: see email of 24 June 2008 from Tracey Burns at Verve and Verve's resolution 201 of 25 June 2008.

28. Mr Waters then reconsidered the price at which Verve should tender because he was concerned that there would be a greater need for gas arising from the recommissioning of a generation facility and the return to service of other power stations. Urgent approval of Verve's board was again sought and obtained for Verve to tender at a higher price: see Verve's resolution 202.

29. Mr Waters selected the price at which Verve would tender for the gas explicitly recognising Verve's statutory obligation under s.61 of the *Electricity Corporations Act* 2005 (WA) to act in accordance with prudent commercial principles: paras 20, 89, 90 of witness statement of Jason Waters; J[78].

30. In the event, Verve entered into the Second Short Term Agreement: J[78]. The price Verve agreed to pay was the market price at the time: agreed fact [8]. The Second Short Term Agreement was terminable by either party on 72 hours' notice: cl.15(a).

31. The "Proportionate Share" of each of the Sellers and MIMI under the Short Term Agreements was divided so that each of the Sellers and MIMI shared in equal proportions of 16.667%: Short Term Agreements, cl.1. This was necessarily different from the Sellers' "Proportionate Share" under the GSA, which was divided between Woodside Energy Ltd as to 50%, BP Developments Australia Pty Ltd and Chevron Australia Pty Ltd as to 16.66% (respectively), and BHP Billiton Petroleum (North West Shelf) Pty Ltd and Shell Development (Australia) Pty Ltd as to 8.33%, respectively: GSA, cl.26.3.

32. With respect to gas supplied by the Sellers and MIMI under the two Short Term Agreements, the evidence was that, had Verve not contracted to buy under these agreements, the Sellers and MIMI would have supplied to other buyers in that, in the circumstances that prevailed, the Sellers were unable to satisfy all of the demand for gas in the relevant period: CA[10], [28], [54], J[12].

PART VI: SELLERS' SUBMISSIONS

A. SELLERS DID NOT BREACH cl.3.3

(Notice of Appeal in Sellers' appeal P 48/2013, grounds 1, 2, and 3; Notice of Contention in Verve's appeal P 47/2013, ground 1)

33. By cl.3.2(a) of the GSA, the Sellers "are required" to make available for delivery on any Day gas up to MDQ. This is a firm obligation but is itself subject to cl.9 of the GSA, as discussed below. In respect of SMDQ, however, Verve is not *required* to take up SMDQ, and the Sellers are not obliged to reserve gas for Verve nor to refrain from agreeing to sell gas to third parties, even if such an agreement reduces or eliminates the Sellers' capacity to supply Verve: J[68].

34. The Sellers' appeal turns on the proper construction of cl.3.3, which relates to SMDQ. It provides:

"(a) If in accordance with Clause 9 (**Nominations**) [Verve's] nomination for a Day exceeds the MDQ, the Sellers must use reasonable endeavours to make available for delivery up to an additional 30 TJ/Day of Gas in excess of MDQ (**Supplemental Maximum Daily Quantity** or **SMDQ**).

(b) In determining whether they are able to supply SMDQ on a Day, the Sellers may take into account all relevant commercial, economic and operational matters and, without limiting those matters, it is acknowledged and agreed by [Verve] that nothing in paragraph (a) requires the Sellers to make available for delivery any quantity by which a nomination for a Day exceeds MDQ where any of the following circumstances exist in relation to that quantity:

(i) the Sellers form the reasonable view that there is insufficient capacity available throughout the Sellers' Facilities (having regard to all existing and likely commitments of each Seller and each Seller's obligations regarding maintenance, replacement, safety and integrity of the Sellers' Facilities) to make that quantity available for delivery;

(ii) the Sellers form the reasonable view that there has been insufficient notice of the requirement for that quantity to undertake all necessary procedures to ensure that capacity is available throughout the Sellers' Facilities to make that quantity available for delivery; or

(iii) where the Sellers have any obligation to make available for delivery quantities of Natural Gas to other customers, which obligations may conflict with the scheduling of delivery of that quantity to [Verve].

(c) The Sellers have no obligation to supply and deliver Gas on a Day in excess of their obligations set out in Clauses 3.2 and 3.3 in respect of MDQ and SMDQ respectively."

35. The central issue in relation to cl.3.3 concerns the relationship between:

(a) the Sellers' obligation in cl.3.3(a) to "use reasonable endeavours" to make available for delivery SMDQ gas; and

(b) the Sellers' entitlement under cl.3.3(b) to "take into account all relevant commercial, economic and operational matters".

36. It is clear, it is submitted, that the obligation under cl.3.3(a) is not absolute. Rather, it is an obligation to use "reasonable endeavours". Those "reasonable endeavours" are to be directed to "making available for delivery" up to SMDQ each Day.

37. It is accepted that, if cl.3.3(a) is taken in isolation, the term "reasonable endeavours" refers to endeavours which are objectively reasonable. The presence of cl.3.3(b), however, means that that concept must be read in the light of cl.3.3(b), which states specifically that "In determining whether they are able to supply SMDQ on a Day", the Sellers are entitled to "take into account all relevant commercial, economic and operational matters".

38. The expressive "In determining whether they are able to supply SMDQ on a Day" seems necessarily related to the question whether "reasonable endeavours" (in terms of cl.3.3(a)) have been made in relation to making available for delivery.

39. The ability of the Sellers to take into account "all relevant commercial, economic and operational matters" refers, necessarily, it is submitted, to such circumstances as are then existing. After all the supply is to be "on a Day" – see the opening words of cl.3.3(b).

40. The terms "commercial", "economic" and "operational" are likely to overlap to some degree. It seems *prima facie* clear, it is submitted, that the operational matters to be taken into account included the following:

    (a) the Sellers (and MIMI) and Apache were the only suppliers of gas to Western Australia;

    (b) the fire at Apache meant that the supply of gas to Western Australia was immediately reduced by 30-35%;

    (c) those customers supplied by Apache would seek to be supplied by the Sellers (and MIMI) until Apache was able to resume production;

    (d) the Sellers were contractually committed to Apache to assist with supply if Apache's supply failed: J[12].

41. In those circumstances the Sellers were faced with a situation where there were many suitors seeking gas and they were not able to supply them all. They took the course, in the case of Verve, of supplying the MDQ to which Verve was entitled by the GSA, and by then treating Verve on the same footing as it treated all others who wanted gas, or additional gas, namely by applying the market price (as in the case of the First Short Term Agreement), or by taking bids for the gas (as in the case of the Second Short Term Agreement).

42. In the circumstances with which the Sellers were confronted by the Apache fire, it is submitted that the matters taken into account were "commercial, economic and operational matters":

    (a) which were properly taken into account pursuant to cl.3.3(b); and

    (b) which should have resulted in the conclusion that they had not failed to comply with cl.3.3(a).

43. The trial judge, correctly it is submitted, held that cl.3.3(b) conditioned the Sellers' obligation to use reasonable endeavours under cl.3.3(a), and that "the meaning and content of 'able' is informed by the words 'the Sellers may take into account all relevant commercial, economic and operational matters'": J[70].

44. This included the right to take account of the sale of gas to other customers or potential customers, and also the profitability of such sales: J[70].

45. It may be noted that, under the GSA, Verve was not required to nominate for SMDQ gas, and the Sellers were not obliged to reserve gas for Verve nor to refrain from agreeing to sell gas to third parties, even if such an agreement reduced or eliminated the Sellers' capacity to supply Verve: J[68].

46. In arriving at his conclusion at J[70], the trial judge had accepted the Sellers' submission that the obligation to use reasonable endeavours in cl.3.3 relates to the practical steps that can reasonably be taken to make gas available for delivery, if SMDQ gas is to be supplied: J[60], [67].

47. In the Court of Appeal, McLure P held that under cl.3.3(a), the Sellers were required to use reasonable endeavours to supply SMDQ gas, if nominated; and the word "able" in cl.3.3(b) means "capability and capacity to supply the nominated SMDQ" by considering the matters and examples set out in cl.3.3(b): CA[18], [19]. Murphy JA also reasoned that the word "able" in cl.3.3(b) refers to "capability or capacity" and does not give to the Sellers a discretion to make available SMDQ gas if they consider it to be in their commercial interests to do so: CA[128], [129], [132].

48. The difficulty with the reasons of the Court of Appeal is that neither McLure P or Murphy JA explained how cl.3.3 operated where, on the one hand, it required the Sellers to use reasonable endeavours and, on the other, provided that the Sellers, in determining whether they were able to supply, were able to take into account their own commercial, economic, and operational interests. The words "*relevant commercial, economic and operational matters*" in cl.3.3(b), as a matter of ordinary meaning, refer to considerations of the nature referred to in paragraphs 40 and 41 above, and go so far as to include considerations of profitability.

49. Nothing in the express words of cl.3.3(a) nor cl.3.3(b) requires the conclusion, inherent in the Court of Appeal's reasons, that the obligation in cl.3.3(a) prevails over the Sellers' ability to give effect to the considerations referred to in cl.3.3(b).

50. In this regard, the range of matters that the Sellers may take into account by the use of the words "*relevant commercial, economic and operational matters*" is very broad. No doubt, as a matter of ordinary meaning, "operational" matters are those concerned with the practical process of producing and delivering gas in the circumstances then prevailing. Similarly, "economic" matters concern the financial viability and profitability of production and supply of additional nominated gas. The term "commercial" matters (which may overlap with economic matters) covers a still wider range – they are matters connected with the conduct of trade or business and include the pursuit of opportunities by the Sellers to sell gas at advantageous, or disadvantageous, prices, either immediately or in the future.

51. Thus, it cannot be said, as the Court of Appeal effectively concluded, that the Sellers are permitted to take into account "*relevant commercial, economic and operational matters*" only in assessing their "capability or capacity" to supply SMDQ gas, not in determining whether to supply such gas.

52. The proper construction of cl.3.3 is, to a degree, informed by the nomination provisions in cl.9 of the GSA. In this regard:

    (a) By cl.9.1(a), Verve is required to nominate the quantity of gas which it requires for the next period. Within a few hours of such a nomination, the Sellers are required to notify Verve as to the quantity which they "intend" to make available for that period: cl.9.1(b). The trial judge found at J[73], as McLure P noted at CA[10], that Verve's nominations of SMDQ gas were accepted. This did not mean anything other than that there had been a response by the Sellers in

conformity with cl.9 of the GSA, which is a non-binding statement of what is intended to be made available for delivery.

(b) By cl.9.2, each Seller is required to make available for delivery on each Day a quantity of gas which is as close as reasonably practicable to (within a specified percentage tolerance) the lesser of MDQ and the last Daily Nomination.

(c) By cl.9.3, if the Daily Nomination exceeds the MDQ, each Seller must further to its obligations under cl.3.2(a) up to MDQ, "use its reasonable endeavours" to make the excess available up to but no more than SMDQ, "[i]n accordance with Clause 3.3". That is, cl.9.3 does not provide for an obligation to use reasonable endeavours distinct from the effect of cl.3.3.

(d) By cl.9.4, Verve is able to request a variation to its Daily Nomination on short notice, to which the Sellers are required to notify Verve as to the quantity which they "intend (but are not obliged) to make available".

(e) Clause 9.5 deals with the nature of the Sellers' obligation if there is a Short Notice Nomination Quantity under cl.9.4. In effect, with respect to such a nomination that is less than the Daily Delivery Obligation (ie. up to MDQ), the Sellers' obligation is reduced to an obligation to use reasonable endeavours. With respect to such a nomination that is more than the Daily Delivery Obligation (ie. including SMDQ), the Sellers' obligation is no more than to use reasonable endeavours consistently with cl.3.3.

(f) By cl.9.6, the Sellers' Representative (NWSG) is required to notify Verve as to the Sellers' intention to make gas available (under cll.9.1(b) and 9.4(b)) in good faith and is required to ensure the quantity notified is NWSG's best estimate acting as a Reasonable and Prudent Operator. In cl.30, "Reasonable and Prudent Operator" is defined to refer to the skills and experience of an operator under similar circumstances and conditions.

(g) By cl.9.7, Verve is permitted to notify the Sellers of its Desired Quantity within a very short period of the Sellers' ultimate allocation for a Day. By cl.9.8, despite cl.9.2(a), each Seller agrees to allocate gas, first, to meet Verve's Desired Quantity; or, secondly, within a certain percentage tolerance of the Short Notice Nomination Quantity; or, thirdly, as close as reasonably practicable or in any event within a certain percentage tolerance of the Daily Delivery Obligation referred to in cl.9.2.

(h) By cl.9.9, not later than 10.00am on each Day, NWSG must notify Verve of the total quantity of gas allocated to it by each Seller. That is, the allocation of gas occurs after delivery has in fact occurred: J[8].

53. In short, by reason of cll.3.2(a), 3.3 and the regime in cl.9, the Sellers are *obliged* (within a tolerance) to make available MDQ gas but are required only to use reasonable endeavours (as explained by cl.3.3) to make available SMDQ gas.[2] This is a lesser obligation than the strict or firm obligation (within a tolerance) to make MDQ gas available.

[2] A similar position applies in relation to the Short Notice Nomination Quantity of gas: see para 52(e) above.

54. The Sellers' contention as to the operation of cl.3.3(b) in relation to relevant commercial, economic, and operational matters, gives cl.3.3 a construction which gives effect to *each* of the words in cl 3.3. Preference should be given to a construction of cl.3.3 that supplies a congruent operation to the various components of cl.3.3: *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522 at 529 [16] (Gleeson CJ, McHugh, Gummow and Kirby JJ). The task of construction of an agreement is to be approached objectively by reference to the words used in the relevant agreement, for it is those words, and they alone, that speak to the parties: *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 461-2 [22] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

55. It is difficult, with respect, to identify the meaning attributed by the Court of Appeal to the terms "commercial" and "economic" matters in cl.3.3(b). McLure P's reasons at CA[16]-[17], do not, except in the negative respect referred to at CA[17], do so, and the first sentence of CA[19] does not elaborate on the meaning. Murphy JA, while accepting (at CA[132]) that the "commercial, economic and operational matters" referred to in cl.3.3(b) are those relating to the Sellers, provides no content as to their meaning (CA[132], [133]).

56. Clause 3.3 cannot be construed as a whole without an examination of the scope of cl.3.3(b). A feature of cl.3.3 is that the parties to the GSA did not impose a reasonable endeavours gas supply obligation on the Sellers, and leave unexpressed the existence and scope of the Sellers' entitlement to take into account all relevant commercial, economic and operational matters in determining their ability to supply SMDQ gas. Rather, by cl.3.3(b), the parties agreed upon a provision expressly conferring such an entitlement.

57. There are several significant features of the first part of cl.3.3(b). The provision confers on the Sellers themselves the entitlement to take into account the specified matters in determining whether they are able to supply SMDQ gas on any day. Those specified matters are solely concerned with the businesses and interests of the Sellers, not Verve, and are matters that only the Sellers may determine. The only limit imposed on the breadth of those stated factors arises by the use of the word "relevant" in cl.3.3(b), by which the factors must be related to a determination of the Sellers' ability to supply SMDQ gas on any Day.

58. The three examples particularised in cl.3.3(b) are examples of circumstances in which cl.3.3(a) does not require the Sellers to make SMDQ gas available for delivery. The first and third examples relate to commercial interests of the Sellers in meeting existing and likely gas supply commitments to other buyers, instead of supplying SMDQ gas to Verve.

59. The first example in cl.3.3(b)(i) is especially informative of the overall objective intention of the parties. It provides, in effect, that the Sellers have no supply obligation where they form a reasonable view about the sufficiency of plant capacity having regard to all existing and *likely* commitments of the Sellers, as well as other operational matters. The reference to likely commitment is particularly significant. As Murphy JA accepted, that includes prospective or expected commitments which have not yet been undertaken but would be likely to be engaged at a relevant time: CA[130]. Le Miere J, at J[69], was to similar effect.

60. In the circumstances that prevailed after the Apache fire and given the limits on the reliable gas production capacity of the Karratha plant from which the Sellers and MIMI supplied gas and their existing firm commitments, the Sellers and MIMI were not in a position to make binding commitments to supply gas under the several short term gas supply agreements that they made with buyers including Verve. Their obligations to supply gas under those agreements were "fully interruptible": see eg cl.5(a) of the First Short Term Agreement. These obligations may not have amounted to "commitments" in terms of cl.3.3(b)(i). That is why at trial the Sellers relied on the opening words of cl.3.3(b) rather than the terms of cl.3.3(b)(i): ts 202-204.

61. As the words of cl.3.3(b) – "without limiting those matters" – make clear, none of the examples set out in cl.3.3(b) represents the limits of the Sellers' entitlement to take into account all relevant commercial, economic and operational matters in determining their ability to supply SMDQ gas on a day.

62. The third example in cl.3.3(b)(iii), which entitles the Sellers to give priority to other customers, is not qualified by any concept of reasonableness. It simply allows the Sellers to choose to supply other customers instead of supply SMDQ gas to Verve.

63. Because the examples in cl.3.3(b) both qualify the operation of cl.3.3(a) and do not limit the scope of cl.3.3(b), the objective intention was that the Sellers are given the ability to take into account commercial self-interest beyond the itemised examples.

64. Murphy JA, at CA[132], appeared to take the view that the concept of "relevant commercial, economic and operational matters" was already contemplated by the concept of "reasonable endeavours" in cl.3.3(a). That view, it is submitted, should not be accepted. The passages cited by Murphy JA from *Transfield Pty Ltd v Arlo International Ltd* (1980) 144 CLR 83 do not go so far. Murphy JA's view also would render cl.3.3(b) otiose.

65. The true situation is that cl.3.3(b) is present to ensure that, whatever might otherwise be the ambit of the concept of "reasonable endeavours" in cl.3.3(a), the factors which may be taken into account in determining whether such reasonable endeavours have been used include all matters which are from the Sellers' point of view "relevant commercial, economic and operational matters".

B. SELLERS DID NOT APPLY PRESSURE AMOUNTING TO ECONOMIC DURESS

(Notice of Contention in Verve's appeal P 47/2013, ground 2)

66. As referred to in paragraphs 4 and 5 above, the Court of Appeal would have found in favour of Verve on economic duress were it not for the finding that it had not sought to rescind the Short Term Agreements. This part of the Sellers' Submissions contends that the Court of Appeal erred in finding that the Sellers applied such pressure.

Development of common law duress – from duress to the person to economic duress

67. The common law first recognised that actual or threatened violence to the person was actionable as duress: C Mitchell et al (eds), *Goff & Jones: The Law of Unjust Enrichment* (8th ed, 2011) at 300 [10-06]. Then, "duress of goods" was also recognised as actionable: eg *Astley v Reynolds* (1731) 2 Str 915; 93 ER 939; but see *Skeate v Beale*

(1841) 11 Ad & El 983; 113 ER 688, which was questioned in *Occidental Worldwide Investment Corp v Skibs A/S Avanti (The Siboen and the Sibotre)* [1976] 1 Lloyd's Rep 293 at 335; see also *Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd* (1991) 22 NSWLR 298 at 305-6 (Clarke JA).

68. The common law of duress did not develop clear rules as to when economic pressure (as opposed to duress to the person or duress of goods) can support an actionable claim. This was in part because of the well-known rule that a promise to pay more than the amount payable under an existing contract cannot be enforced because there is no consideration to support the promise: eg, *Stilk v Myrick* (1809) 2 Camp 317; 170 ER 1168. The rule in *Stilk v Myrick* was often deployed to support the conclusion that a contractual modification (even induced by pressure) could not be enforced for want of consideration.

For economic duress, pressure must be applied

69. In Australia from about the 1920s and in England from 1976, there has been a small number of cases where economic pressure has been considered. Analysis of those cases indicates that an economic duress claim is not available in every case where there is an actual or threatened breach of contract. This is consistent with the confined nature of the common law duress doctrine as it developed from duress to the person, and then to duress of goods.

70. The Court considered the issue in *Smith v William Charlick Ltd* (1924) 34 CLR 38. It was held that William Charlick failed in its claim against the Wheat Harvest Board to recover a further sum demanded by the Board, failing which the Board refused to supply William Charlick with wheat in the future. As Isaacs J said (at 56):

> "It is conceded that the only ground on which the promise to repay could be implied is 'compulsion'. The payment is said by [William Charlick] not to have been 'voluntary' but '*forced*' from it within the contemplation of the law. *Leaving aside, for the present, the question whether in law the payment was 'forced'* from [William Charlick] by some *undue advantage taken of its situation* having regard to the Wheat Harvest legislation, the point is whether the Board's insistence was what is regarded as 'compulsion' from the simple standpoint of common law. 'Compulsion' in relation to a payment of which refund is sought, and whether it is also variously called 'coercion,' 'extortion,' 'exaction,' or 'force,' includes every species of duress or conduct analogous to duress, actual or threatened, *exerted* by or on behalf of the payee and *applied* to the person or the property *or any right of the person* who pays or, in some cases, of a person related to or in affinity with him. Such compulsion is a legal wrong, and the law provides a remedy by raising a fictional promise to repay. Apart from any additional feature presented by the relevant legislation, it is plain that a mere abstention from selling goods to a man except on condition of his making a stated payment cannot, in the absence of some special relation, answer the description of 'compulsion,' however serious his situation arising from other circumstances may be..." [emphasis added].

71. Thus, Isaacs J considered that an action for money had and received claiming the plaintiff had been subjected to duress required the plaintiff to have been *forced* or pressure *applied* on it. This was so even when, as Isaacs J recognised, the pressure may be applied to "any right of" the alleged victim, including contractual rights. The other members of the majority analysed the issue in a similar way. It is not sufficient that a right of the alleged victim was at risk; it must also appear that the defendant applied

force or pressure to require the alleged victim to enter the impugned transaction. The mere statement by a defendant that it is not going to perform a contractual obligation does not meet the requirement that force or pressure be applied.

72. The requirement that the alleged victim was subjected to pressure which the law regards as unacceptable was referred to by Lord Wilberforce and Lord Simon (in dissent, but not on the applicable principles) in *Barton v Armstrong* [1976] AC 104 (PC) at 121:

> "The action is one to set aside an apparently complete and valid agreement on the ground of duress. The basis of the plaintiff's claim is, thus, that though there was apparent consent there was no true consent to the agreement: that the agreement was not voluntary.
>
> This involves consideration of what the law regards as voluntary, or its opposite; for in life, including the life of commerce and finance, many acts are done under pressure, sometimes overwhelming pressure, so that one can say that the actor had no choice but to act. Absence of choice in this sense does not negate consent in law: for this the pressure must be one of a kind which the law does not regard as legitimate. Thus, out of the various means by which consent may be obtained—advice, persuasion, influence, inducement, representation, commercial pressure—the law has come to select some which it will not accept as a reason for voluntary action: fraud, abuse of relation of confidence, undue influence, duress or coercion. In this the law, under the influence of equity, has developed from the old common law conception of duress—threat to life and limb—and it has arrived at the modern generalisation expressed by Holmes J—'subjected to an improper motive for action': *Fairbanks v Snow,* 13 NE Reporter 596, 598."

73. That is, it is not sufficient that a threatened breach of contract has induced a contractual modification or a new contract. A further inquiry is required, namely whether the threat amounted to pressure that the law is not prepared to accept. As McHugh JA said in *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40, at 46A-B, the "proper approach in my opinion is to ask whether any *applied* pressure induced the victim to enter into the contract and then ask whether that pressure went beyond what the law is prepared to countenance as legitimate?" [emphasis added].

74. In *Barton v Armstrong* Lord Wilberforce and Lord Simon also recognised that an absence of choice for the alleged victim (ie having no practical alternative) is not of itself sufficient.

75. In *Furphy v Nixon* (1925) 37 CLR 161, each member of the Court analysed the issue by determining whether the extra payment was "voluntary" or by inquiring about whether the vendors in that case "exerted pressure" under a threat or "unjustly forced" the payment by "improper pressure": at 170.1 (Knox CJ), 172.8 (Isaacs J), 178.8 (Higgins J). The Court's approach in *Furphy v Nixon* again supports the conclusion that, for a finding of economic duress, there must not only be a threatened breach of contract but there must also be the application or exertion of sufficient pressure.[3]

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[3] *White Rose Flour Milling Co Pty Ltd v Australian Wheat Board* (1944) 18 ALJR 324 is a single justice decision of Rich J. It was decided by reference to a factual question as to whether payments were made under *compulsion*. Rich J is reported to have said, "the question for determination was whether the facts showed that the payments made by W were made under compulsion – practical compulsion was sufficient" (at 326). In that case, unlike the present case, there does not appear to have been an issue as to whether pressure was applied by the Wheat Board.

In re Hooper & Grass' Contract [1949] VLR 269 was decided on the basis that there was "practical compulsion

76. *TA Sundell & Sons Pty Ltd v Emm Yannoulatos (Overseas) Pty Ltd* (1956) 56 SR (NSW) 323 was decided on the basis that there was no consideration for the promise to pay extra for the galvanised iron (at 327.5). As to the issue of compulsion or duress, even though the NSW Full Court (at 328.1-5) said that a threat to refrain from performing a contractual duty *may* amount to compulsion, it explained that it is also necessary for it to be shown that pressure was exerted and applied (quoting from Long Innes J's judgment at first instance in *Nixon v Furphy* (1925) 25 SR (NSW) 151 at 160). The Court regarded the question of whether pressure was exerted or applied as a question of fact (at 328.6).

77. In *DSND Subsea Ltd v Petroleum Geo-services ASA* [2000] BLR 530 at 545 [131], Dyson J emphasised that for actionable duress there must be pressure applied.

78. The notion that pressure must be *applied* has been referred to by Professor Birks (see P Birks, "The Travails of Duress" [1990] *LMCLQ* 342 at 343), where, in discussing *Crescendo*, he referred to the fact that "duress involves a pressure which is 'applied' by the person against whom relief is sought." Professor Stoljar has also recognised that the economic duress doctrine (which he described as "compulsion") required a finding that undue pressure was applied: SJ Stoljar, *The Law of Quasi-Contract* (2nd ed, 1989) at 80-81.

The Sellers did not apply pressure on Verve

79. It is submitted that the Sellers did not exert or apply pressure, in the sense referred to above, on Verve when the Short Term Agreements were made. The Sellers did not require Verve to enter into the Short Term Agreements. There was a very significant shortage of gas available for users in the circumstances prevailing after the fire at Apache's plant. It was in good faith that the Sellers informed Verve that they were not obliged to make SMDQ gas available. Verve chose to enter into the Short Term Agreements. It engaged in an open tender process with respect to the Second Short Term Agreement. It acted commercially as it was statutorily required to do under s.61 of the *Electricity Corporations Act*, and selected an appropriate price that reflected market conditions. The Sellers could have sold the available gas to other buyers.

80. Thus, accepting for immediate purposes that the Sellers were in breach of cl.3.3(a) of the GSA by stating that they would not perform under cl.3.3(a), they did not thereby exert or apply pressure for the purposes of the economic duress doctrine.

81. McLure P in the Court of Appeal at [29] identified the "live question" as being whether the Sellers "applied" pressure on Verve but then said that such pressure was applied because the "known consequences of their conduct was, in the circumstances, so dramatic that threats and demands were superfluous". With respect, this conclusion did not confront the identified live question but instead described the prevalent circumstances in June 2008. Assuming there was a breach, any absence of choice on the part of Verve did not convert the Sellers' breach of contract into conduct that involved the exertion of undue pressure by the Sellers on Verve. As is apparent from the passage

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to pay a demand not justified by law" on the facts of that case. The finding was that payments made under protest that were not due under the contract for the sale of land (when the vendor threatened to withhold settlement and charge penalties for late settlement) were recoverable. In that case, unlike the present case, the vendor applied pressure by calling for *extra payments under the sale contract.*

quoted above from *Barton v Armstrong*, many acts in life are done under pressure, sometimes overwhelming pressure, so that one can say that the actor had no choice but to act. But absence of choice in this sense does not negate consent in law. For the cause of action to arise, the pressure must be one of a kind which the law does not regard as legitimate.

82. Similar observations may be made in respect of the reasons of Murphy JA in the Court of Appeal at [183], where he effectively considered that the Sellers exerted pressure because of their breach of contract, which he regarded as unlawful. That is insufficient to support a conclusion that the requisite *pressure* was applied.

For economic duress, the pressure must be "illegitimate"

83. The Sellers further submit that any pressure was not "illegitimate" in any requisite sense.

84. It used to be thought that the alleged victim's will had to be "overborne" for a case in duress. This was criticised including by Professor Atiyah: PS Atiyah, "Economic Duress and the 'Overborne Will'" (1982) 98 *LQR* 197. Atiyah's criticism was, in summary, as follows. The "overborne will" theory was inconsistent with the House of Lords' decision in *DPP for Northern Ireland v Lynch* [1975] AC 653 at 695 (Lord Simon). In reality, a person who is subject to duress actually chooses to avoid the pressure rather than having his or her will overborne. The "overborne will" theory is also difficult to reconcile with the established rule that duress renders a contract voidable and not void. Further, the "overborne will" theory concentrates on the effect of the pressure on the victim. A test based on whether the pressure was "illegitimate" concentrates on the alleged wrongdoer and inquires whether, in the circumstances, as a matter of law and fact, the pressure was impermissible. In *Crescendo*, McHugh JA rejected the "overborne will" theory for similar reasons: at 45G-46B.

85. Once the "overborne will" theory is rejected, the issue is what amounts to "illegitimate" pressure. McHugh JA said in *Crescendo* that pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct, but that the categories are not closed: at 46A-B. However, McHugh JA did not explain what was involved in "unlawful threats", nor what amounts to "unconscionable conduct" for the purposes of the doctrine of economic duress.

86. It is submitted that *Goff & Jones: The Law of Unjust Enrichment* (8th ed 2011)) is correct in suggesting, at 316-7 [10-42], that not every breach of contract amounts to illegitimate conduct:

> "Most important is the nature of the pressure. It will often take the form of a threat, although a threat is not a necessary requirement. 'The law regards the threat of unlawful action as illegitimate, whatever the demand.' 'Action' is manifestly unlawful if it is criminal or tortious, or possibly, immoral or unconscionable. Moreover, an illegitimate threat is not legitimatised by the fact that it is accompanied by a threat to institute legal proceedings.
>
> In some circumstances, a threat to break a contract may be characterised as illegitimate but not all threats to do so are illegitimate. A threat may be illegitimate if the person making the threat knew that he would be in breach of contract if it were implemented. But what if the

person who made the threat believed that it was commercially reasonable for him to ask for a variation of an existing contract?" [footnotes omitted]

87. The true inquiry is whether "illegitimate" pressure was applied. It is not necessary to characterise the conduct as "unlawful", or even "unconscionable". In any event, the Sellers in this case did not act unconscionably.[4]

88. In *Attorney-General for England and Wales v R* [2004] 2 NZLR 577 (PC) at 583 [16] (Lord Hoffmann), it was made clear that the inquiry is about whether the pressure applied was legitimate; not whether there was unlawful conduct. In *Magsons Hardware Ltd v Concepts 124 Ltd* [2011] NZCA 559 at [22]-[23], the New Zealand Court of Appeal accepted Lord Hoffmann's analysis and also explained that a breach of contract might not be illegitimate, depending on the circumstances, relying on what was said in *McIntyre v Nemesis DBK Ltd* [2010] 1 NZLR 463 at 469 [30]. See also *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd (the "Atlantic Baron")* [1979] 1 QB 705 at 719E (Mocatta J). Not every breach of contract where there is a contractual modification amounts to duress: *B & S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419 at 425F-G (Griffiths LJ), 428D-E (Kerr LJ).

89. If every instance of threatened or actual breach of contract were, without more, illegitimate, settlements of disputed interpretations of contractual obligations which caused one of the parties to agree to a contractual modification or a new contract would be susceptible to avoidance for duress, whether or not the new contract (even a settlement of a disputed claim) was supported by consideration or made under seal. If subsequently disenchanted with the bargain it had struck, the allegedly pressured party would merely have to prove that the other party's interpretation of its obligations was wrong in order to undo the agreement.

90. From the cases, no clear test as to what amounts to "illegitimate" pressure has been authoritatively stated. In *Dimskal Shipping Co SA v ITWF* [1992] 2 AC 152 at 166, Lord Goff doubted, referring to McHugh JA's judgment in *Crescendo*, whether it is helpful to speak of the plaintiff's will having been coerced or overborne but said that it was not necessary, in that case, to consider "the broader question of what constitutes illegitimate economic pressure".

91. In *Equiticorp Finance Ltd (in liq) v BNZ* (1993) 32 NSWLR 50 at 106-7, Kirby P (in dissent, but not on the economic duress claim), said that the law was unclear as to what amounts to illegitimate pressure and concluded that the "doctrine of economic duress may be better seen as an aspect of the doctrines of undue influence and unconscionability".

92. In *ANZ v Karam* (2005) 64 NSWLR 149 at 168 [66], the NSW Court of Appeal described the terms "economic duress" and "illegitimate pressure" as vague and said that the concept of duress should be limited to threatened or actual unlawful conduct. But the court did not explain what was involved in such unlawful conduct, save to note that it was originally a reference to unlawful detention of goods (at 166 [61]). The court suggested that, if there is no unlawful conduct, the resulting agreement should be set aside not on the grounds of duress, but for undue influence or unconscionability (at 168 [66]).

[4] Verve abandoned its case based on unconscionability on the first day of the trial.

93. In *Westpac v Cockerill* (1998) 152 ALR 267, Kiefel J (Northrop and Lindgren JJ agreeing) analysed the issue as follows. (In that case, there was no finding of a breach of contract.) Lawful pressure *might* operate as duress if it was "illegitimate" (at 289.6). By referring to "unconscionable" conduct in *Crescendo*, McHugh JA may not have intended to refer to the equitable doctrine of unconscionability (at 289.7).

94. Kiefel J quoted from Isaacs J's judgment in *Smith v William Charlick*, and said that, even though the conclusion in that case was that money had been paid as a result of commercial pressure, not duress in the eye of the law, the passage from the judgment "usefully emphasises that duress focuses attention on the quality of assent" (at 290.4). There was a distinction between a claim for undue influence in equity and common law duress. The latter "necessitates a conclusion as to the quality and effect of both the threat made and the pressure applied" (at 290.9).

95. Kiefel J then said (at 292.1), "In most instances where duress is established the party coerced has had little choice. It is not, however, that inequality of bargaining position, or the reason for its creation, which is the essence of the action – it is the *pressure* brought to bear and its *wrongfulness*: 'There must be pressure the practical effect of which is compulsion or the absence of choice': *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366 at 400 (Lord Scarman)..." [emphasis added].

96. In *Pao On v Lau Yiu Long* [1980] AC 614, although there was a threat to breach the main contract to sell shares unless the defendants agreed to provide an indemnity inconsistent with the already agreed subsidiary agreement that the shares would be bought back at $2.50 each, the Privy Council held that there was no economic duress because the commercial pressure did not amount to improper coercion. The case is an instance where a threatened breach of contract, was not, of itself, sufficient to ground a claim in economic duress. Pressure was required. In that context, Lord Scarman explained (at 635C-E):

> "In determining whether there was a coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it."

The Sellers submit that, in determining whether they applied pressure which was illegitimate, the proper inquiry is the inquiry described by Lord Scarman above.[5]

97. The Court of Appeal (Murphy JA at [183]) worked on the assumption that there was no course open to Verve other than to enter into the Short Term Agreements. Murphy JA held that there was not "any realistic prospect of obtaining an urgent interlocutory mandatory injunction requiring the sellers to use reasonable endeavours to supply SMDQ gas under the GSA". That view, with respect, seems extreme. It would be surprising if, in view of the claimed importance to Verve of supply of SMDQ gas, interlocutory relief could not be obtained to keep matters *in statu quo* for the short

[5] The Sellers submit that Lord Scarman's use of language that may be characterised as relying on the "overborne will" theory does not affect the nature of the proper inquiry identified by Lord Scarman. Indeed, McHugh JA referred to *Pao On* in *Crescendo*.

period (four months) of reduced availability of gas. There is no doubt that Verve received independent advice. Indeed, by Verve's letter of 10 June 2008, it gave notice of its claim for damages under the GSA, accepting the parties' rights and obligations under the First Short Term Agreement.

98. It is submitted that the Sellers did not apply illegitimate pressure on Verve to make it enter into the Short Term Agreements.

The relevance of good faith in determining whether conduct was illegitimate

99. Further, it has sometimes been suggested that the defendant should not be liable in economic duress if the defendant acted in good faith or honestly believed that it was not in breach of contract when informing the plaintiff that it need not perform. The Sellers do not suggest that economic duress can never be made out if a defendant reasonably and honestly believed that it was not in breach of contract. Instead, the Sellers submit that their good faith is a relevant consideration and informs whether they *applied* pressure and whether that pressure should be characterised as illegitimate for the purposes of the economic duress doctrine.

100. Professor Birks identified the issue as to whether every breach of contract is necessarily illegitimate and suggested that, depending on the circumstances, it may not necessarily be so. Birks suggested that the bad faith of the defendant may be a relevant consideration, which was better than seeking to limit the scope of duress by deploying a more stringent test of causation:[6] P Birks, *An Introduction to the Law of Restitution* (1989 revision) at 182-4; P Birks, "The Travails of Duress" [1990] *LMCLQ* 342 at 345-7.

101. Some English cases have suggested that the good faith of the defendant may be a relevant consideration: *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714 at 719; *D&C Builders Ltd v Rees* [1966] 2 QB 617 at 626F; *DSND Subsea Ltd v Petroleum Geo-services ASA* [2000] BLR 530 at 545-6 (Dyson J). The Sellers submit that Fullagar J's statement in *Hoopers & Grass' Contract* [1949] VLR 269 at 272 that it makes no difference that the defendant honestly believed he was legally entitled to seek a higher price, needs to be read in the context of that case, where it was held that pressure was applied. As mentioned above, in *Barton v Armstrong*, Lord Wilberforce and Lord Simon accepted that the inquiry includes whether the defendant had "an *improper motive* for action" [emphasis added].

102. The Court of Appeal regarded *CTN Cash and Carry* as irrelevant because the good faith conduct in that case was lawful: CA[30], [198]-[200]. The Court of Appeal did not otherwise consider the relevance of the Sellers' good faith.

103. In *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723 at 744C-D, Santow J suggested that the notion of good faith as a line of demarcation between legitimate and illegitimate pressure "is better replaced by a more precise and apposite one of 'unfair pressure'."

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[6] As to the test of causation, in *Barton v Armstrong* [1976] AC 104 at 119A and 121G-H, it was held that, with duress to the person, the duress need only be "a" cause of the impugned transaction. However, in *Dimskal* [1992] 2 AC 152 at 165H, Lord Goff said that in the case of economic pressure, the pressure must have been a "significant cause" inducing entry into the impugned contract. In *Huyton SA v Peter Cremer GmbH* [1999] 1 Lloyds Rep 620 at 636, Mance J said that the "relaxed view of causation in the special context of duress to the person cannot prevail in the less serious context of economic duress".

This conception of "unfair pressure", however, refers back to the need to show the application of pressure and a need to make a judgment about whether it was unfair. The Sellers submit the good faith conduct of the defendant may be relevant to the issue of what amounts to "unfair".

104. In *DPP (Vic) v Le* (2007) 232 CLR 562, at 576 [43], Gummow and Hayne JJ appear to have accepted that a "practical benefit" can amount to a sufficient consideration for a contractual variation. If "practical benefit" can amount to sufficient consideration, it should be accepted that at least some contractual modifications induced by the pressure of circumstances, even involving a breach of contract, will not amount to economic duress. The Sellers submit that the true enquiry is whether "illegitimate" pressure was applied; their good faith is a relevant consideration.

105. In circumstances where cl.3.3 of the GSA is open to more than one construction (as is evident from the differences between the trial judge and the Court of Appeal), the Sellers should not be held to have applied illegitimate pressure when informing Verve that they considered that they did not have to supply SMDQ gas, in the circumstances that prevailed in June 2008. The trial judge found that the Sellers genuinely determined that they were not able to supply SMDQ gas, and Verve accepted that the Sellers had acted in good faith and had not knowingly breached cl.3.3(a): J[77], [79]; CA[139].

106. Even if it be accepted that Verve had no practical alternative other than to enter into the Short Term Agreements, the Sellers submit that the unavailability of an alternative (in circumstances that prevailed because of the fire at Apache's plant) did not render the Sellers' conduct illegitimate. The inquiry requires a consideration of a number of factors as Lord Scarman explained in *Pao On*, including the Sellers' genuine belief as to the effect of cl.3.3.

Conclusion: Sellers did not apply illegitimate pressure and acted in good faith

107. In summary, for the above reasons, the Court of Appeal's finding that the Sellers applied pressure should not be accepted. As McLure P found (CA[28], [29]):

    (a) there was no finding by the trial judge that the Sellers acted for an improper purpose;

    (b) the Sellers advised Verve that they would not supply SMDQ gas, but the evidence did not support an inference that this was done for the purpose of compelling Verve to enter into the Short Term Agreements;

    (c) to the contrary, the evidence was that the Sellers were unable to satisfy all of the demand for gas in the relevant period;

    (d) Verve accepted that the Sellers acted in the genuine belief that they were not in breach of their reasonable endeavours obligations under the GSA; and

    (e) the evidence does not support an inference that the Sellers threatened Verve or demanded that Verve enter into the Short Term Agreements.

108. In addition, it was common ground that the Sellers were not contractually prevented from selling gas to third parties even if such sales reduced or eliminated the Sellers' capacity to supply Verve with SMDQ gas (CA[20]).

109. Regard should also be had to the trial judge's findings (J[76], [77], [78], [87]), to the effect that the Sellers said that they could not supply SMDQ gas because of the disruption to Apache's gas supply, but offered short term contracts on 4 June 2008 (which, after internal consideration by management, Verve decided to take: J[76]) and allowed Verve to tender for gas (which it did on or about 20 June 2008: J[78]). The Sellers were merely informing Verve of their reasonable and genuine understanding of the effect of cl.3.3 of the GSA (CA[30], [139], [184]).

110. The Sellers made no demand. Instead, they offered to supply gas at the same market price that was being offered to third parties, and later called for a tender to reflect market conditions. They did not cause the unforeseen disruption of a third party gas supplier. In respect of the Second Short Term Agreement, the price was determined by Verve's tender. At the time of its tender, Verve knew that an alternative option available to it was to approach the Court for relief, as is apparent from Mr Waters' statement (para 82). The Sellers attempted to allocate gas equitably. Any commercial pressure which arose was not applied by the Sellers. The Sellers did not coerce, induce, or otherwise pressure Verve to enter into the Short Term Agreements.

111. As to McLure P's view at CA[29] that the Sellers did not have to threaten or demand anything because that was "superfluous", it is true that a defendant may exert pressure to achieve an outcome with a veiled threat (see CA[180]; *Vantage Navigation Corporation v Suhail & Saud Bahwan Building Materials LLC (The Alev)* [1989] 1 Lloyds Rep 138 at 142, 145). However, in this case, the Sellers did not explicitly or implicitly threaten or demand anything from Verve. There was neither an express threat, nor a veiled threat nor demand. Nor was there any application of pressure by the Sellers.

112. The evidence, and the trial judge's findings, did not justify a finding of application of pressure, or inducement (and certainly did not justify a finding of application of *illegitimate* pressure). McLure P's finding in CA[40] demonstrates this difficulty, insofar as her Honour refers in the passive tense to "pressure generated by that breach".

113. Murphy JA's decision (at CA[183]) did not involve any finding that the Sellers applied pressure to force Verve to make the Short Term Agreements. As submitted earlier, his Honour's finding that there was not any realistic prospect of obtaining an urgent interlocutory injunction should not be accepted. It is difficult to see why this course was not open to Verve (if not by 4 June 2008, then at least by 20 June 2008 when the Second Short Term Agreement was made, and indeed thereafter whilst the agreement was being performed).

114. It is not to the point that the Sellers did not contend that affirmation or delay precluded the claim for duress: Murphy JA at CA[183]. Contentions of that nature would only have been relevant if Verve had sought rescission of the Short Term Agreements.

115. The fact that Verve was invited to tender for gas, and chose to do so at a price which it considered commercial – Murphy JA at CA[183] – should not result in a finding that the Sellers applied pressure to Verve.

116. If the Sellers were incorrect in their genuine belief as to the effect of cl.3.3, they were liable for damages under the GSA. They did not become immediately liable for economic duress by reason of their breach of contract.

C. RESCISSION IS REQUIRED BEFORE VERVE IS ENTITLED TO RESTITUTION OF MONEY PAID

(Sellers' response to Verve's appeal)

Cases and principles holding that rescission is required

117. If the Sellers are correct that they did not apply illegitimate pressure amounting to economic duress, Verve's appeal cannot succeed. Assuming, however, that there was economic duress, the Court of Appeal was correct to hold that rescission of the Short Term Agreements was required before Verve could get restitution of money paid under them (CA[33], [201]-[206]).

10 118. This is because a claim for restitution arising from duress, being historically a claim for money had and received, could only be made if any underlying contract under which the payments were made was first set aside. It is necessary to set out, as shortly as possible, the historical development of the claim for money had and received.

119. In 1760, in *Moses v Macferlen* (1760) 2 Burr 1005; 97 ER 676, a leading decision in an action on the case for money had and received, Lord Mansfield explained that if the defendant is under an obligation "from the ties of natural justice, to refund; the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract ("quasi ex contractu," as the Roman law expresses it)" (at 1008, ER 678). Lord Mansfield said that this "kind of equitable action, to recover back
20 money, which ought not in justice to be kept, is beneficial..." (at 1012, ER 680). He then said that the action "lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition, (express, or implied;) or *extortion; or oppression; or an undue advantage* taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances" (at 1012, ER 681) [emphasis added]. With respect to duress, the entitlement to recover back money paid was, as Lord Mansfield identified in *Moses v Macferlen*, an entitlement that arose pursuant to an action upon the case for money had and received.

120. The action on the case for money had and received was developed because of the inadequacy of the previously existing forms of action:

30 (a) The action in covenant had been confined to apply only to promises under seal and, further, proof of informal agreements could be effected by "wager of law" or "compurgation" (whereby an unscrupulous defendant could defeat a just claim by procuring a number of supporters, usually 11 or 12, to say on oath there was no claim): IM Jackman, "Why the History of Restitution Matters", in JA Watson (ed), *Historical Foundations of Australian Law*, volume II (2013) 203 at 235-6; JH Baker, *An Introduction to Legal History* (4th ed, 2002) at 318-321.

(b) The action in debt was confined to an action for a sum certain, was not available with respect to an executory contract (where there was a promise to perform), and "wager of law" was available. There was another type of action in debt founded
40 on a conditioned bond (whereby a promise under seal to pay was conditioned on the performance of work), where few defences were available but included defences of *non est factum*, duress or other incapacity: Jackman, ibid at 236-7; Baker, ibid at 321-3.

(c) The action of account only provided a process for fixing a disputed or unqualified amount of indebtedness, and the defence of "wager of law" was available: Jackman, ibid at 238-9.

121. In the light of the shortcomings of the actions in covenant, debt and of account, the action on the case in assumpsit (where "wager of law" was unavailable) emerged by taking the following steps:

(a) An action for trespass in an action on the case was permitted where the action for covenant was unavailable (because there was no deed), on the basis that the action for trespass was available where there was a positive act of wrongdoing, even where there was a contractual arrangement involved: Jackman, ibid at 239-40; Baker, ibid at 329-31.

(b) Before about 1500, that action for trespass in an action on the case, even where there was a contractual arrangement involved, was regarded as unavailable in the case of a "mere nonfeasance" and a misfeasance (a positive act of wrongdoing) was required. This was even though the distinction between the two was "slippery": Jackman, ibid at 240; Baker, ibid at 333-5.

(c) By 1505, an action on the case of assumpsit for nonfeasance in not performing a promise, without the preoccupation with tort, became available. It was said that even though assumpsit did not lie to enforce a promise (which required a deed), the action was based on an additional factor such as misfeasance, fraud or detrimental reliance. By the middle of the 16th century, these factors were replaced by the term "consideration": Jackman, ibid at 240-1; Baker, ibid at 337-341.

(d) By the 1540s, the action on the case of assumpsit was beginning to replace the action of debt but the action in assumpsit was still restrained by the need to show some "cause" or "consideration" for the promise to pay. Fictional devices were used to show such cause or consideration. This was tolerated by the King's Bench, but not the Common Pleas: Jackman, ibid at 241-2; Baker, ibid at 341-4.

(e) The conflict between the Common Pleas' insistence on proof of the cause or consideration and the Queen's Bench toleration of a fiction was brought to an end in *Slade's Case* (1602) 4 Co Rep 92b, 76 ER 1074; also 80 ER 15, 72 ER 677. *Slade's Case* decided that "every contract executory imports in itself an *assumpsit*, for when one agrees to pay money, or to deliver any thing, thereby he assumes or promises to pay, or deliver it" (4 Co Rep 94a, 76 ER 1077): Jackman, ibid at 242-3; Baker at 344-5.

(f) Assumpsit thus became the vehicle by which the law of contract became unified: Jackman, ibid at 243.

122. The action on the case for indebitatus assumpsit then separated into several distinct standard forms, which became known as the "common counts". The actions known as the *quantum meruit* (for services rendered) and *quantum valebat* (for goods provided) thus developed. In these actions, there was a genuine understanding or expectation that the services or goods were to be paid for, from which the undertaking to pay was actually to be inferred: Jackman, ibid at 244.

123. Then, the next "radical" innovation was to extend indebitatus assumpsit to cases where the defendant's undertaking or promise to pay could not be inferred from the circumstances, but was truly fictitious. There were two main groups of such cases, first, duties to pay fixed sums imposed by statute, by-law or custom; and, secondly, the cases which came to be cases for "money had and received for the use of the plaintiff": Jackman, ibid at 245-6.

124. There were four main kinds of claims for money had and received. First, the plaintiff could claim for money which the defendant had obtained by misconduct, eg, by wrongly usurping an office. Secondly, the plaintiff could recover money paid by mistake. Thirdly, the plaintiff could recover money which he or she had been forced to pay by the exercise of some improper authority or influence. Fourthly, the action was available when money had been paid on a consideration that had wholly failed: Jackman, ibid at 245-7.

125. By 1710, it was firmly established that the action of indebitatus assumpsit was available in three distinct situations. First, cases of debt arising from actual contracts. This was called special assumpsit. Secondly, cases arising from a genuine (but implicit) promise to pay, illustrated by the actions of *quantum meruit*, *quantum valebat* and account stated. Thirdly, there were cases where there was no promise at all but the circumstances demonstrated that an obligation to pay should be imposed. This last category included the action for money had and received by the defendant to the plaintiff's use, where the money is paid by mistake, or on a consideration which happens to fail, or through imposition, extortion, or oppression, or where advantage is taken of the plaintiff's situation: Jackman, ibid at 247, referring to Book III of Sir William Blackstone's *Commentaries*.

126. Therefore, a claim at common law for duress was a claim in an action on the case for indebitatus assumpsit, relying on the common count of money had and received. It was a claim based on a fictitious promise to repay if there was actionable duress.

127. Given the development of the money had and received claim, there was a question whether the action for money had and received (based on a fictitious promise) was available if there was an actual contract in place on which the plaintiff could sue in special assumpsit (ie. using the first distinct situation of indebitatus assumpsit described above, namely, for debt arising from actual contracts).

128. That question came to be decided in *Weston v Downes* (1778) 1 Dougl 24; 99 ER 19, and *Towers v Barrett* (1786) 1 TR 133, 99 ER 1014. In both cases, it was held that money had and received was only available where there was a special (express) contract if it was proved that the special contract had been rescinded: see also D O'Sullivan, S Elliott, R Zakrzewski, *The Law of Rescission* (2008) at 57 [3.24].

129. Writing in 1849, CG Addison, in *A Treatise on the Law of Contracts and Rights and Liabilities Ex Contractu* (2nd ed, 1849), explained (at 78):

> "If one man has obtained money from another through the medium of oppression, imposition, extortion, or deceit, such money is, in contemplation of law, money received for the use of the injured party, it is not the money of the wrongdoer, he has no right to retain it; and the law therefore implies a promise from him to return it to the rightful owner, whose title to it cannot be destroyed and annulled by the fraudulent and unjust

dispossession. *But to entitle the party to recover the money he must repudiate the whole transaction as soon as he discovers the fraud*" [emphasis added].

130. Addison cited *Campbell v Fleming* (1834) 1 Ad & E 40; 110 ER 1122 for the last point. In that case, there was an action in assumpsit for money had and received where a person had been fraudulently induced to buy some shares. Those shares were on-sold by the buyer but the buyer maintained a claim to recover the money paid by him for the shares. It was held that the claim was unavailable, with respect to that executed contract, because rescission was not possible. This was so despite the fact that there was "gross fraud" (at 41, ER 1123 (Littledale J)). Parke J said, "After the plaintiff, knowing of the fraud, had elected to treat the transaction as a contract, he had lost his right of rescinding it; and the fraud could do no more than entitle him to rescind" (at 42, ER 1123). Patteson J stated, "To entitle him to [recover the money paid] he should, at the time of discovering the fraud, have elected to repudiate the whole transaction" (at 42, ER 1123).

131. O'Sullivan et al explain that the "cases that followed *Weston v Downes* generalise the rescission requirement beyond money had and received to all forms of general assumpsit, including for the value of services rendered and goods sold and delivered": *The Law of Rescission* at 58 [3.26]. In concluding their analysis, they explain that "The modern rule that a contract must first be terminated before the common law will impose a personal obligation to restore the value of benefits conferred emerged at the end of the eighteenth century following the decision of Buller J in *Weston v Downes* and *Towers v Barrett*. The rule derived from a working out of the relationship between general and special assumpsit": at 60 [3.29].

132. Further, it has long been established, since *Whelpdale's case* (1604) 5 Co Rep 119a, 77 ER 239 at 119a (at para 2), ER 240, that duress makes a contract voidable, not void, at common law, and provides a defence to claims to enforce the contract: see *The Law of Rescission* at 321 [14.07]. See also *DPP for Northern Ireland v Lynch* [1975] AC 653 at 695 (Lord Simon).

133. The modern cases, many of which are collected at CA[201], confirm that agreements vitiated by duress are merely voidable, not void, and a claim in restitution for money paid pursuant to an agreement made under duress requires rescission of the agreement:

    (a) Lord Diplock explained in *Universe Tankships Inc of Monrovia v ITWF* [1983] AC 366 at 385, the use of economic duress is not a tort *per se* and the remedy is not an action for damages but an action for restitution and the avoidance of any contract that was induced by the duress. He expressly acknowledged that such a contract may not be revocable if it had been approbated (at 384).

    (b) In *Pao On* [1980] AC 614, Lord Scarman stated that "unless the facts are such as to support a plea of 'non est factum', which is not suggested in this case, duress does no more than confer upon the victim the opportunity, if taken in time, to avoid the contract" (at 634F-G). See also at 636C-D.

    (c) In *Barton v Armstrong* [1973] 2 NSWLR 598 at 614, Jacobs JA explained that it is "an essential element of duress at common law that the act done thereunder is voidable and not void, and the law is that the party menaced must avoid the transaction when the duress ends".

(d) In *Dimskal Shipping Co SA v ITWF* [1992] 2 AC 152 at 165, Lord Goff said that "before the owners could establish any right to recover the money, they had first to avoid the relevant contract. Until this was done, the money in question was paid under a binding contract and so was irrecoverable in restitution".

134. To the same effect, K Mason, JW Carter, GJ Tolhurst, in *Mason and Carter's Restitution Law in Australia* (2nd ed, 2008) at 546 [1302] explain that "While the contract is in place there is no right to restitution." Also, they explain that the existence of conduct constituting a vitiating factor such as duress, although conferring a right of rescission, does not give the plaintiff any general right of election between restitution and damages (at [1304]).

135. For the first of these propositions, Mason et al refer to 318-9 [909], where, referring to authority including in this Court (*Summers v Commonwealth* (1918) 25 CLR 144 at 152-3; *Phillips v Ellinson Bros Pty Ltd* (1941) 65 CLR 221 at 236; *Steele v Tardiani* (1946) 72 CLR 386 at 402; *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435 at 450-1, 462), they state:

> "One aspect of the implied contract theory, applied from the end of the eighteenth century, and adopted in Australia as generally applicable to quasi-contractual claims in relation to ineffective contracts, is the proposition that no action can be brought for restitution while an inconsistent contractual promise exists between the parties in relation to the subject matter of the claim. This survives today: it is real and not fictional. The proposition is properly based, not on an inability to imply a contract, but on the fact that the benefit was rendered in performance of a valid legal duty" [footnotes omitted].

136. Professor Stoljar also recognised that the remedy for compulsion or economic duress is a "rescissory remedy": *The Law of Quasi-Contract* at 81.

137. Accordingly, a plaintiff must seek rescission in order to recover money paid pursuant to a voidable contract.

138. This Court has emphasised that in Australian law "unjust enrichment" is not "a definitive legal principle according to its own terms" (*Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [151] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ)); nor is it "a principle which can be taken as a sufficient premise for direct application in a particular case" (*Friend v Brooker* (2009) 239 CLR 129 at [7] (French CJ, Gummow, Hayne and Bell JJ); *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269 at [85] (Gummow, Hayne, Heydon, Kiefel and Bell JJ)). It is thus not correct to contend at an abstract or high level (as Verve did in its Summary of Argument on the application for special leave (at [20])) that rescission is not required because the Sellers' "unjust enrichment" should be reversed.

139. It is, instead, necessary to proceed by the ordinary processes of legal reasoning and by reference to existing categories of cases in which an obligation of payment has been recognised (*Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635 at 665 [85] (Gummow, Hayne, Crennan and Kiefel JJ), citing *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 257 (Deane J). Thus, the common law doctrines referred to above and the established authorities are the applicable principles, not the abstract concept of unjust enrichment.

140. Also, even if the abstract concept were used, the short answer to it is that, whilst the Short Term Agreements are not rescinded, the Sellers were not unjustly enriched. They and MIMI were entitled to be paid under them. Further:

(a) The *prima facie* liability to make restitution is displaced in circumstances where the payment was made for good consideration, such as to discharge an existing debt: *Australia & New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662 at 673 (Mason CJ, Wilson, Deane, Toohey and Gaudron JJ); *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 379-380 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ), 405 (Dawson J). Until the contract is set aside, the money in question is paid under a binding contract.

(b) While a contract remains on foot, the parties' allocation of risk under it is to be respected and not ignored: *Lumbers* at 651 [37], 653-5 [43]-[47], 662-4 [77]-[80], 667-8 [93]-[94], 674 [124]-[127]. It would therefore be inconsistent for the parties' rights and obligations under the contract to remain on foot, while permitting a plaintiff to recover payments made under it.

141. *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 does not assist Verve's case (CA[206]). In *Roxborough*, Gleeson CJ, Gaudron and Hayne JJ permitted the claim for failure of consideration because the consideration that had failed was distinct and severable (at 524-9 [14]-[24]). Equally, Gummow J recognised that a restitutionary remedy was available only if it was consistent with the contractual position (at 545 [75]) and that the failure of consideration claim was permitted because the payments made by the appellants could be "broken up" (at 558 [109]). Also, Callinan J permitted the claim because there was a total failure of consideration in respect of a "discrete, identified component of the consideration" (at 589 [199]). *Roxborough* does not stand for the proposition that it is unnecessary to deal with any inconsistency between the rights and obligations under a valid contract and a claim for unjust enrichment.

142. In *Roxborough* there was no conflict between the valid contract and the failure of consideration claim that was permitted. In contrast, in this case, the Short Term Agreements cannot be treated as containing separable and not interdependent obligations to supply gas and to pay for that supply. An order for restitution of money paid by Verve under the Short Term Agreements would be inconsistent with the rights and obligations under the Short Term Agreements, unless they are rescinded.

143. Verve has also relied on *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353. But, in that case, rescission of the agreement under which the payment had been made was unnecessary because the relevant clause (namely, cl.8(b) of the loan agreements) pursuant to which the mistaken payments were made was rendered "absolutely void" by s.261 of the *Income Tax Assessment Act* 1936 (Cth). There was thus no tension between the claim for restitution of the mistaken payments and the loan agreements.

144. Verve did not seek rescission because it maintains that it is not necessary to do so. Verve confined its case below to an argument that it was not necessary to avoid or rescind the Short Term Agreements (CA[32], [161]). It conducted the trial claiming damages for the "tort of duress" (J[85]).

145. Verve submitted in its Summary of Argument on the special leave application (at [29]-[30]) that rescission was not necessary for restitution because if the transaction under the Short Term Agreements were reversed by utilising an accounting adjustment, there could be unfairness for Verve.

146. The authorities require rescission and a reversal of the transactions made under the impugned contract. To point to an abstract notion of "unfairness" places emphasis on the alleged duress, without addressing the question of what relief is available for such duress. Even in the case of fraud, in an action for money had and received, as *Campbell v Fleming* (1834) 1 Ad & E 40; 110 ER 1122 demonstrated and *Alati v Kruger* (1955) 94 CLR 216 at 223-224 confirms, rescission and a reversal of the transactions effected under the impugned contract is a requirement.

147. There is no unfairness in this approach. Verve has its right to damages for breach of contract under the GSA. *Prima facie* that right to damages would be quantified as the difference between the amounts payable for gas under the Short Term Agreements and the amounts which would have been payable for SMDQ gas. The only reason why those amounts are not recoverable in full is because of the agreed limitation on damages provided for by cl.22.7(c) of the GSA. There is nothing unfair about confining Verve to its contractual rights; the claim in duress is an endeavour to bypass the damages cap provided for under the GSA.

148. If rescission had been sought, the Sellers would have claimed that Verve was not entitled to rescission because of its affirmation of the Short Term Agreements. It is now too late for Verve to seek rescission as it was required to do. As to affirmation:

(a) In *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] 1 QB 705 at 721 (Mocatta J), the court refused to permit recovery of money paid pursuant to an agreement made under duress because the plaintiff's had, by their conduct (including their delay in taking action), affirmed the agreement.

(b) Other cases in which affirmation has been held to preclude rescission of a contract entered into under duress (and recovery of money paid pursuant to it) include *Ormes v Beadel* (1860) 2 De G F & J 33; 45 ER 649 (at 336, ER 651); *Enimont Overseas AG v Ro Jugotanker Zadar (the "Olib")* [1991] 2 Lloyd's Law Reports 108 at 118, col 1.2; and *DSND Subsea Ltd v Petroleum Geo-services ASA* [2000] BLR 630 at 547-548 (Dyson J).

(c) "Affirmation" may involve either an election not to avoid the contract, or conduct which estops the plaintiff from asserting any power to rescind it: *Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd* (1991) 22 NSWLR 298 at 304C-E.

149. The facts relevant to affirmation were not considered by the trial judge or the Court of Appeal, because Verve did not seek rescission of the Short Term Agreements. It is convenient to turn to the relevant facts, to demonstrate why it is not a straightforward matter to order restitution without dealing with the agreed allocation of risks, and the acceptance of contractual rights and obligations under the Short Term Agreements.

If Verve had sought rescission, it would not have been available

150. If Verve had sought rescission of the Short Term Agreements, there would have been at least three bases on which the Sellers could have defended the claim.

151. *First,* there would have been a live issue as to whether Verve had affirmed the Short Term Agreements, or whether Verve's delay should preclude rescission. Evidence supportive of a finding of affirmation includes the following:

(a) On 4 June 2008, Verve determined, after independent consideration by its managers on 4 June 2008, that it would accept the offer by the Sellers and MIMI to enter into the First Short Term Agreement: J[76].

(b) On 10 June 2008, Verve gave notice of a dispute under cl.21.1(b) of the GSA, stating that it had "claims for damages" arising from the alleged breach of the GSA, comprising the difference between the price for SMDQ gas and the price payable under the First Short Term Agreement, as well as damages for the price paid by Verve to obtain alternative fuel. This constituted an election to pursue a claim for damages under the GSA rather than to seek to set aside the Short Term Agreements. Further, this was a clear and unequivocal statement that the First Short Term Agreement was binding on Verve.

(c) At least by 20 June 2008, Verve could have sought relief in the court. On that date, Verve's representatives informed the Sellers that, if they were unsuccessful in the tender for gas, they would have to consider other avenues such as court proceedings. The fact of this threat by Verve, together with the legal notice of dispute provided on 10 June 2008, indicates that at least by 20 June 2008, Verve had obtained legal advice and had chosen to continue receiving supply under the First Short Term Agreement.

(d) Verve chose to submit a tender on around 20 June 2008, and this led to the Second Short Term Agreement. If Verve had been unsuccessful, the Sellers could have sold the gas that was supplied to Verve to third parties at market prices.

(e) In addition, and in light of the above circumstances, Verve's unexplained delay in seeking "restitution" of amounts paid under the Short Term Agreements, in failing to terminate those agreements (termination being possible on 24 (or 72) hours' notice), and in continuing to receive supply under them for almost four months evidences affirmation of those agreements.

152. *Secondly,* the court would have had to consider the effect of rescission on third parties, including MIMI. The Short Term Agreements operated as separate agreements with each of the Sellers and MIMI. There is no basis for rescinding the agreements as between Verve and MIMI. Further, it may have been necessary to join MIMI to any action brought: *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at 46 [131].

153. *Thirdly,* as already mentioned, the effect of rescission on each of the Sellers would have been the subject of a significant factual contest, in respect of the allocation of gas under the GSA and the appropriate amount to be repaid by each Seller (if any). If rescission had been sought and obtained, it would not follow (as Verve suggests by its Notice of

Appeal) that Verve would be entitled to "restitution of additional payments made by [Verve] to the respondents" in the amounts sought, for reasons including the following.

(a) MIMI was a supplier under the Short Term Agreements, but not the GSA. MIMI was not a party to the proceedings (notwithstanding that Verve seeks restitution of moneys paid under the Short Term Agreements from the Sellers).

(b) As mentioned, the "Proportionate Share" of gas to be supplied by each of the Sellers, and by MIMI, was different from the proportionate share provided under the GSA (see cl.1 (definitions); cf cl.26.3 of the GSA). This affected the charges paid to each of the Sellers and MIMI (see cl.6, which provided: "Buyers must pay to each Seller the Price for that Seller's Proportionate Share of all gas delivered...") and the amount of gas the Sellers and MIMI were obliged to deliver (see cl.8). They were not same under each agreement.

(c) Having regard to cl.3.3(b)(i), the Sellers were permitted to enter into contracts with third parties by which they committed to supply gas even if that commitment had the effect that the Sellers would have insufficient additional gas to be able to meet nominations of SMDQ gas by Verve: J[69], CA[20]. Further, demand exceeded supply, and many customers who had requested or tendered for gas were turned away: CA[28].

(d) In late September 2008, Verve reduced the quantity of gas it required pursuant to cl.9.4 and cl.9.7 of the GSA.

Amount of restitution claimed against the Sellers is incorrect

154. In Verve's notice of appeal, it asserts that the Sellers caused Verve to enter into the Short Term Agreements "to buy the same volume of gas at a much higher price". That is incorrect because the proportion of gas sold by three of the five Sellers (namely, Woodside Energy Ltd, BHP Billiton Petroleum (North West Shelf) Pty Ltd and Shell Development (Australia) Pty Ltd) under the Short Term Agreements was different from the proportion of gas that would have been sold by them had they been obliged to do so under cl.3.3 of the GSA.[7]

155. Order 2 in Verve's notice of appeal seeks an order that in effect treats each Seller as liable to give restitution for a sixth of the total amount that was paid under the Short Term Agreements, on the assumption that each Seller would have supplied that same proportion of gas under the GSA.[8] The proportion of a sixth is selected, apparently, to because MIMI sold one sixth of the gas under the Short Term Agreements. No attempt is made, however, to take account of the fact that the alleged breach of the GSA, upon which the whole claim in duress is founded, occurred with respect to different proportions, the Sellers being obliged to perform in different proportions under the

[7] Woodside Energy Ltd's proportionate share under the GSA was 50% but under the Short Term Agreements was 16.66%. BP Developments Australia Pty Ltd and Chevron Australia Pty Ltd's proportionate share under the GSA and under the Short Term Agreements was 16.66%. BHP Billiton Petroleum (North West Shelf) Pty Ltd and Shell Development (Australia) Pty Ltd's proportionate share under the GSA was 8.33% and under the Short Term Agreements was 16.66%. MIMI's proportionate share under the Short Term Agreements 16.66%.

[8] The precise numbers in proposed orders 2(a)-2(e) in Verve's notice of appeal vary because account has been taken of the trial judge's orders with respect to the separate breaches of contract that occurred in January 2008, which matters are not the subject of this appeal.

GSA. For this reason alone, the relief claimed by Verve should not be given. The proper course would have been for rescission to have been sought and for issues of this sort to have been properly ventilated and adjudicated, on the evidence.

Summary

156. Finally, in summary, Verve would not be left without a remedy if it were denied rescission. If Verve is correct in its construction of cl.3.3(b) of the GSA (on which the duress claim turns, in any event), then Verve is entitled to substantial damages for breach of contract from the Sellers. The fact that Verve's liability is contractually limited, because of its agreement under cl.22.7(c) of the GSA, does not give rise to any unfairness or injustice (particularly in light of Verve's 10 June 2008 letter, electing to sue for damages).

157. It is appropriate that Verve's remedy be limited in accordance with the commercial bargain struck by the parties in respect of their liability for breach of the GSA, particularly as there is no question that the GSA itself remains in force (and Verve continued to receive supply of gas under it). Further, an award of damages has the advantage of avoiding any interference with MIMI's rights. There is no injustice in upholding the GSA by an award of damages, in the event that the Sellers breached cl.3.3(a).

D. THE CAP ON LIABILITY UNDER THE GSA

(Notice of Contention in Verve's appeal P 47/2013, ground 3)

158. If the Sellers are incorrect in their submissions above, Verve's claim for restitution would yet be subject to the cap in cl.22.7(c). The majority in the Court of Appeal erred in construing, and reading down, the plain words of cl.22.7(c). On this point, Murphy JA was, with respect, correct. This is ground 3 of the Sellers' contentions.

159. Clause 22.7(c) of the GSA provided:

> "The liability of each Seller in respect of a failure to use reasonable endeavours to meet a Buyer nomination above MDQ up to SMDQ is limited to its Proportionate Share of the amount by which the actual costs incurred by the Buyer in obtaining alternative fuel exceed the amount equivalent to the Gas Price, up to a maximum liability of that Seller's share of the Tranche 3 Price per GJ."

160. The ambit of cl.22.7(c) turns principally on the words "in respect of". Those words are ample in their scope, and in other contexts they have been held to "denote a relationship which is wide in its ambit": *Genders v Government Insurance Office of New South Wales* (1959) 102 CLR 363 at 387.2 (Menzies J); see also *Technical Products Pty Ltd v State Government Insurance Officer (Qld)* (1989) 167 CLR 45 at 47 (describing the words as having "a very wide meaning").

161. The words are broad enough to engage successive causes of action or other events which might occur from a single cause (here, being the failure to use reasonable endeavours) or a liability which might come about as a result of multiple causes.

162. Clause 22.7(c) expressly provides that the liability of each Seller "in respect of a failure to use reasonable endeavours" to supply SMDQ gas is capped. In circumstances where

Verve's claim in economic duress was always founded on the Sellers' breach of cl.3.3, any liability of the Sellers for economic duress was "in respect of" the Sellers' failure or breach of their obligation under cl.3.3.

163. The reasons of McLure P at CA[40] (with which Newnes JA agreed) for rejecting the above construction of cl.22.7(c) were, in short:

(a) there must be a sufficient or material connection between the Sellers' liability for economic duress and the breach of cl.3.3;

(b) the words "in respect of" are not wide enough to capture such liability even though the economic duress claim was founded on a breach of cl.3.3 because the liability "stems not from the failure to use reasonable endeavours but in taking advantage of the pressure generated by that breach".

164. With respect, McLure P's reasoning should not be accepted. There was a sufficient or material connection (if that be required), including because:

(a) The liability for economic duress arose only because of the breach of cl.3.3 and arose "in respect of", or was intimately connected with, the breach, being the failure to use reasonable endeavours to supply gas.

(b) The fact that the Sellers apparently took advantage of the pressure caused by their breach does not mean that any liability for restitution did not arise in connection with, or in respect of, their breach.

(c) To use the language of *Technical Products Pty Ltd v State Government Insurance Officer (Qld)* (1989) 167 CLR 45 at 47, there was a "discernible and rational link between" the failure to use reasonable endeavours and the liability for economic duress. It was "in respect" of it.

(d) Alternatively, to adopt the language used by her Honour (at CA[40]), there was a "sufficient" or "material" connection between the Sellers' liability for economic duress and the breach of cl.3.3. The two were so closely connected that they arose from the same factual matters, and the breach of cl.3.3 was relied upon by Verve as the "unlawful" conduct giving rise to the illegitimate pressure allegedly applied by the Sellers. As her Honour recognised, the contractual breach arising from the failure to use reasonable endeavours was "a material fact" of the alleged liability in unjust enrichment in economic duress.

165. Further, it is not clear that the parties objectively intended that a "sufficient" or "material" connection would be required. They did not express the requirement in that way in cl.22.7(c). Such a requirement arose in *J & G Knowles & Associates v Commissioner of Taxation* (2000) 96 FCR 402 because there had to be a relevant connection between benefits and employment for the *Fringe Benefits Tax Assessment Act 1986* (Cth) to be engaged.

166. Indeed, as McLure P recognised, in order to interpret the phrase "in respect of", it is necessary to have regard to the context in which the phrase is used. Clause 22.7(c) should be construed "according to its natural and ordinary meaning" read in the light of the GSA as a whole, thereby giving due weight to the context: *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500 at 510.

167. In *Workers' Compensation Board (Qld) v Technical Products Pty Ltd* (1988) 165 CLR 642, the Court recognised that the words "in respect of" are capable of having a wide meaning, but "the phrase gathers meaning from the context in which it appears and it is that context which will determine the matters to which it extends": at 653-654 (Deane, Dawson and Toohey JJ); see also *Commissioner of Taxation v Scully* (2000) 201 CLR 148 at 171 (Gaudron ACJ, McHugh, Gummow and Callinan JJ).

168. To similar effect, it has been said that relational terms such as "in respect of" (or "in relation to", "in connection with" and "in") are ambulatory words, and the nature and breadth of the relationships they cover will depend on the context and purpose: *R v Khazaal* (2012) 246 CLR 601 at [31] (French CJ); see also *Kostas v HIA Insurance Services Pty Ltd trading as Home Owners Warranty* (2010) 241 CLR 390 at [24] (French CJ).

169. In the present case, the relevant context includes the following:

(a) The parties had agreed to limit the Sellers' liability "in respect of" a failure to use reasonable endeavours in the manner provided. That is, they chose the wider language "in respect of" a failure to use reasonable endeavours rather than narrower language such as "for" a failure to use reasonable endeavours.

(b) The parties agreed to delineate the events giving rise to the contractual limitation on liability by reference to the factual events to which cl.22.7(c) would apply (that is, "a failure to use reasonable endeavours ...") rather than specifying the causes of action to which the clause would apply. In this way, cl.22.7(c) accommodated a situation where the failure to use reasonable endeavours might give rise to multiple causes of action (for example, breach of contract, for money had and received claims, duress, negligence, or other torts). Thus, the parties chose the broader of at least two available methods of identifying the range of circumstances which might engage the limitation on liability.

(c) Similarly, by referring to liability "in respect of a failure to use reasonable endeavours ..." rather than liability "for breach of the obligation to use reasonable endeavours", the parties expressed the operation of cl.22.7(c) so that it was not restricted to liability for breach of contract.

(d) There is no limitation on the type of "failure" which might engage cl.22.7(c), rather the reference to "a failure" has a wide operation.

(e) There is nothing in the text of cl.22.7 or the context provided by cl.22 or the GSA as a whole which would lead the Court to narrow the category of causes of action which would be caught by cl.22.7(c) in a manner which the parties did not themselves objectively choose to employ. Indeed, the contrary is true. The parties chose to go even further, in cl.22.9, by which the parties expressed their agreement to confine the remedies available "in respect of" any breach of the GSA or for negligence or any other tort to the remedies "expressly set out in this Agreement for breach" and to give releases for various kinds of loss or damage. By cl.22.9, the parties evinced a general intention to exclude, rather than expand, the remedies that might be available in respect of any breach of the GSA.

(f) Both parties had the benefit of limitation of various liability clauses in cl.22 (the parties had also agreed to limit the Buyers' liability under cl.22.6). There is nothing in cl.22 which suggests that the parties' preference was to confine those limitations of liability in any narrow fashion.

170. Murphy JA's reasoning as to this issue at CA[165]-[171] was correct. The Court should give a wide meaning to the words "in respect of", in the context of cl.22.7(c) (which is not confined to referring only to contractual causes of action), and the cause of action in economic duress arises only if the Sellers failed to use reasonable endeavours in breach of cl.3.3.

171. For these reasons, even if Verve's appeal is otherwise successful, that appeal should be dismissed because the Court of Appeal's orders already provides for the Sellers' liability to be capped in the amounts prescribed under cl.22.7(c).

172. The appeal brought by Verve in the Court of Appeal alleged, relevantly, that the trial judge erred in dismissing Verve's "claim for damages for the tort of economic duress" (see grounds 4 and 5(a) of Verve's Notice of Appeal).

173. As submitted above, economic duress renders a contract voidable, and it is not a tort which would sound in damages. In any event, reliance on the "tort of duress" does not assist Verve, because cl.22.9 of the GSA excludes a claim for damages in respect of "any other tort arising from any act or omission in the course of or in connection with the performance" of the GSA. Further, the words "in respect of" in cl.22.7(c) are wide enough to refer to a tort claim, as explained above.

PART VII: CONSTITUTIONAL AND STATUTORY PROVISIONS

174. Section 61 of the *Electricity Corporations Act* 2005 (WA) provides:

> "(1) A corporation in performing its functions must —
>
> (a) act in accordance with prudent commercial principles; and
>
> (b) endeavour to make a profit, consistently with maximising its long term value.
>
> (2) In respect of the function of the Electricity Networks Corporation referred to in section 41(c) —
>
> (a) subsection (1) does not apply; and
>
> (b) the corporation is required to ensure, so far as is practicable, that the reasonable cost of performing the function does not exceed its revenue from doing so.
>
> (3) If there is any conflict or inconsistency between the duty imposed by subsection (1) and —
>
> (a) a direction given under this Act; or
>
> (b) any provision in the *Electricity Transmission and Distribution Systems (Access) Act 1994* Schedule 5 or 6,

the direction, or provision of that Schedule, prevails."

PART VIII: ORDERS SOUGHT

175. In the Sellers' appeal (proceedings P 48 of 2013):

(a) Appeal allowed with costs.

(b) Set aside orders 1, 2, 3 and 4 of the orders of the Court of Appeal of the Supreme Court of Western Australia and instead order that the whole of the appeal to the Court of Appeal of the Supreme Court of Western Australia be dismissed with costs.

176. In Verve's appeal (proceedings P 47 of 2013):

(a) Appeal dismissed with costs.

PART IX: TIME ESTIMATE

177. The Sellers' estimate that they will require 4.5 hours for the presentation of their case.

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D F Jackson QC
Tel: (02) 8224 3009
Fax: (02) 9233 1850
Email: jacksonqc@sevenwentworth.com.au

B Dharmananda SC
Tel: (08) 9220 0471
Email: brahma@francisburt.com.au

J K Taylor
Tel: (02) 9233 2451
Email: jtaylor@selbornechambers.com.au

E M Heenan
Tel: (08) 9220 0582
Email: eheenan@francisburt.com.au