IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P 47 of 2013

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

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

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

LAVAN LEGAL
Level 19
1 William Street
Perth WA 6000

Tel: 08 9288 6000
Fax: 08 9288 6001
Solicitor's Ref: IRF: 1144059
Iain Freeman

PART I: CERTIFICATION

1. The Sellers certify that the reply is in a form suitable for publication on the internet.

PART II: SELLERS' REPLY

2. *Re Verve's Submissions (VS) [2],[11].* The question of construction of cl.3.3 arises in the context of the circumstances prevailing from 3 June 2008 when the fire at Apache's plant caused a shortage of gas, demand exceeded supply, and the Sellers had to respond: Sellers' Submissions (**SS**) [12]-[30], J[10]-[16]. The Sellers' case is that cl.3.3, read as a AB3:1007
10 whole, did not require supply of SMDQ in the circumstances. The other issues only arise if the Sellers fail on cl.3.3. As Verve accepts, its duress claim does not arise if the Sellers' conduct was not a threatened or actual breach of the GSA: VS[55]. It is submitted that Verve's case is in reality that the Sellers breached cl.3.3 and should be liable for damages. The economic duress claim, as McLure P said at CA[33], is relied upon to avoid the effect of cll.22.7 and 22.9 of the GSA. AB3:1075

3. *General.* Verve's duress case is also internally inconsistent because on the one hand it seeks to treat a threatened or actual breach of the GSA as a "species of wrongdoing" that should be punished without regard to the cap on liability (VS[55],[57]-[61],[67]-[71],[73],[75],[93]-[95]). But in other places, again to avoid the cap, Verve's duress
20 case seeks to disconnect duress from the actual or threatened breach of contract (VS[131]-[134]). Any threat or demand relied on to ground the duress case was, in the circumstances, nothing more than commercial conduct in the circumstances then existing. Any "wrongful conduct" was no more than a threatened or actual breach of the GSA, the compensation for which is capped.

4. *Re VS[14],[16]-[19].* Verve's decision to buy gas under the Short Term Agreements (**STAs**) was because that gas was cheaper than diesel. It may have had no *economically* practical alternative, but it does not follow that pressure sufficient to amount to economic duress was *applied* to it. The evidence did not support any inference that "the Sellers threatened Verve or demanded" that it enter into the STAs: CA[29]. The Sellers AB3:1075
30 contend that the prevailing circumstances where demand exceeded supply, "relevant commercial, economic and operational matters" meant that the Sellers did not have to supply SMDQ. Those circumstances are relevant to whether cl.3.3 was breached. Further, accepting that Verve may have had no financial alternative does not mean that the Sellers were *continuing* to apply pressure. Verve, in fact, affirmed the STAs: SS[23],[26],[148],[151].

Clause 3.3 – proper construction

5. *Re VS[26],[53].* Murphy JA was correct to construe "likely commitment" in cl.3.3(b)(i) to include "a commitment to another party which had not been undertaken" but was likely to be made[1]. In its context, that is the natural meaning of "likely". In these
40 circumstances the obligation to make reasonable endeavours in cl.3.3(a) is relevantly weak.

[1] McLure P and Newnes JA did not address the issue; it cannot be said they disagreed: CA[20].

6. *Re VS[30].* The requirement to supply quantities of gas specified by cl.3.2 is an obligation subject to permitted tolerances. There is a clear contrast with the weaker obligation in cl.3.3. The Court of Appeal's construction results in the two obligations in cll.3.2 and 3.3 being very similar; the Sellers were incorrectly held to be disentitled to take account of "relevant commercial, economic and operational" matters when such matters became highly relevant to their determinations under cl.3.3(b).

7. *Re VS[31]-[33],[42]-[44],[47].* The words "for a Day" (in cl.3.3(a)) and "on a Day" (in cl.3.3(b)) entail a construction that the obligation of reasonable endeavours remains up to the point of supply. Verve's argument that the obligation, once it arises, means that the Sellers are not permitted to take account of the matters in cl.3.3(b) is incorrect. The regime in cl.9 does not deprive cl.3.3(b) of content; cl.9.3 expressly connects the two. It is true that cl.3.3(b) gives content to the obligation in cl.3.3(a); it makes clear that the obligation is weak. The Sellers are permitted to determine their ability to supply by taking account of relevant matters. That determination can be made until the time for supply. No unintended consequences as asserted in VS[47] arise.

8. *Re VS[34],[35],[38],[41],[42],[46].* The obligation of the Sellers under cl.3.3(b) is to "use reasonable endeavours to make available for delivery" SMDQ. The expression "make available for delivery" is also used in the second part of cl.3.3(b). The words "able to supply SMDQ on a Day" should not be regarded as having a meaning different from "make available for delivery". The ability of the Sellers to take into account "all relevant commercial, economic and operational matters" indicates that the satisfaction of the test in cl.3.3(a) involves significant matters which of their nature are subjective, in that they involve the Sellers' assessment of their own position. The Sellers' argument is not that they need to supply only if they are willing to supply. Rather, cl.3.3(b) permits them to determine that they are unable to supply if in the prevailing circumstances that is not possible commercially, economically or operationally. That determination can be tested, and cannot be capricious.

9. As to VS[35] and [36], the Sellers' determination by reference to relevant matters in cl.3.3(b) *may* have similarities with a seller's ability to consider such matters in complying with a reasonable endeavours obligation described in the cases. It does not follow, however, that the ambit of cl.3.3(b) is to be read down; it expressly enables the Sellers to make the determination. The obligation in cl.3.3 is a weak obligation considering cl.3.3 as a whole. The consequences described in VS[46] do not arise on the Sellers' construction. In relation to cl.4.1(b)(v), the reference to "unable to supply" in that provision, so far as SMDQ is concerned, is a reference to circumstances where, consistently with cl.3.3, the Sellers are not able to make SMDQ available for delivery. In those circumstances, Verve will not be liable to take or pay under cl.4.2(c).

10. *Re VS[36].* Verve accepts that regard can be had to self-interest because cl.3.3(b) permits the making of a determination by taking into account commercial matters. The argument that the Sellers cannot take account of price unduly limits the meaning to the word "commercial". The Sellers' construction does not disconnect "ability" and the relevant matters; the relevant matters may be considered by the Sellers in determining their ability to supply, which is what the Sellers did. The word "able" may well refer to "capability and capacity" but that ability is measured by the Sellers' determination having regard to the relevant matters. The ultimate question is not whether in the abstract there is an ability to supply SMDQ on a Day. It is whether the Sellers are obliged to make available for delivery to Verve SMDQ in respect of any Day.

11. *Re VS[37],[52],[53].* Once it is accepted that the examples in cll.3.3(b)(i)-(iii) are "non-exhaustive", no reason exists for Verve's submission that a desire to maximise profit is not a relevant matter, unless "relevant commercial" etc is given a meaning narrower than its ordinary meaning. The first example permits the Sellers to not supply when they have a commitment or a *likely* commitment. In the circumstances prevailing, the Sellers could not make a firm commitment to supply gas (SS[60]) and had to agree to supply on a fully interruptible basis. However, the fact that they could not make a commitment does not mean that they could not take the prevailing circumstances of demand and supply, and the arrangements they made, into account. They were relevant matters.

12. *Re VS[38].* The Sellers' construction does not result in there being a "floor price" or giving them an "option". The Sellers' determination permitted by cl.3.3(b) will arise in differing prevailing circumstances. Verve's argument is internally inconsistent; Verve accepts the obligation can be affected by self-interest (like price factors) (VS[36]) but then insists the obligation cannot be affected by such commercial matters.

13. *Re VS[45].* The Sellers' construction is not that cl.3.3 has no content; cl.3.3 contains an obligation (albeit rather weak) to supply SMDQ on the Sellers' determination. The very specific cap in cl.22.7(c) has work to do.

14. *Re VS[48],[49].* The Sellers' construction treats cl.3.3 as a whole. As a matter of structure and from the text of cl.3.3, cl.3.3(a) must be subject to, or conditioned by, cl.3.3(b). If the obligation in cl.3.3(a) is not so subject or conditioned, cl.3.3(b) would be otiose and would have no content. Clause 3.3(b) is giving content to the obligation to use reasonable endeavours to "make available for delivery" SMDQ to Verve.

15. The Sellers, of course, do not contend that they have a right to elect. They are permitted to make a determination under cl.3.3(b) for the purposes of cl.3.3(a), nothing more nor less. Clause 3.3(a) has content; cl.3.3 is given effect as a whole.

16. *Re VS[50],[51].* The Sellers' construction is not uncommercial. It cannot be assumed that Verve would only require SMDQ when market prices were high and demand exceeded supply. Further, because of Verve's take or pay obligations, it is not true that Verve would always choose to obtain alternative supply rather than SMDQ; cl.3.3 thus has real commercial content. Verve's argument that it is improbable that the parties intended a disconnection between Verve's obligation to buy gas and the Sellers' obligation to supply gas because of Verve's take or pay obligation is not a point about the objective construction of the GSA; it is an assertion about the nature of the bargain.

Economic duress

17. *Re VS[56],[100],[106],[107].* It is true that duress, like mistake, is a "vitiating factor" by which enrichment of the defendant is treated as "unjust", which may give rise to a right to restitution[2]. But, the issue remains as to exactly what right to restitution, and on what basis, is triggered if a "vitiating factor" exists.

[2] E.g. PBH Birks, *An Introduction to the Law of Restitution* (1989 revision), p 101. Consent is "vitiated" if a person transfers value e.g. by mistake or under duress. If a transfer is made with a "deliberately qualified intent" and the basis for the transfer does not arise, there is a failure of consideration. Unjust factors include mistake, duress, undue influence, exploitation of weakness and failure of consideration. These correspond to the "simple idea 'I did not mean it' and can be further broken down into 'impaired consent' (mistake, duress ...) 'qualified consent' (failure of consideration) ...": A Burrows, *The Law of Restitution* (2011, 3rd ed), p 86.

18. The primary remedy for duress is rescission. Rescission is the step which must precede the action to recover money paid under duress; if rescission is not available, the plaintiff should fail: e.g. JW Carter, *Contract Law in Australia* (2013, 6th ed) at p 502-504 [22-26]-[22-29][3]. Unless the duress also amounts to a tort, there appears to be no right to compensatory damages: *The Universe Sentinel* [1983] 1 AC 366 at 385 (Lord Diplock) but see at 400 (Lord Scarman).

19. The position is explained in *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (2002, 4th ed) (by RP Meagher, JD Heydon, MJ Leeming) at 860 [24-040]:

> "If a contract is voidable at law for fraudulent misrepresentation or for duress then there is no difficulty where the contract remains executory. Nothing having been done under the contract, rescission by act of the party concerned requires no consequential adjustment of the rights and obligations of the parties in order to put them in the same position as if the contract had never been made. However, where the contract has been wholly or partly executed the common law recognises that if the contract is to be treated as never made then each party must get back what he has given under the contract and in other respects be put in the same position as if there had been no contract. In other words, each party is entitled to *restitutio in integrum*. The reasons for this rule are given by Compton J in *Clarke v Dickson* (1858) El Bl & El 148 at 154-5; 120 ER 463 at 466: ..."

20. If the STAs had never been made, when the Sellers breached cl.3.3, they were liable to damages (but subject to the cap on liability). In quantum terms, rescission *or* restitution should not give Verve more than the sum so capped; Verve wants more than this on the assertion that the (independent) right to restitution for duress avoids the agreed position under the GSA. Such an approach goes beyond any authority.

21. *Re VS[57]-[61].* It is accepted that duress is not restricted to contract law; but when a contract is made by duress, the principles referred to above apply. Accepting that duress is underpinned by issues as to the quality of consent and as to the wrongfulness of the defendant's conduct, there is no justification for the assertion that, as a party should not benefit from its wrong, duress should be treated as giving some wider right to restitution. (Also, if Verve's complaint is that a wrong was done, its claim is a claim in tort (query, the tort of duress recognised by Lord Scarman in *The Universe Sentinel*)[4]. In that event, the cap on liability in cl.22.7(c) applies by force of cl.22.9.)

22. *Re VS[62].* The "coercion of will" theory has been rejected because it failed to appreciate that a plaintiff may be the subject of duress and yet willingly make a contract under duress. The rejection of the theory does not entail that the inquiry is only about whether there was wrongful conduct. As Verve recognises, the twin issues as to whether consent was vitiated, and whether that was by illegitimate means, continue to inform the doctrine. The inquiry as to whether the pressure applied in a particular case amounted to duress still has to be made. The passage in *Pao On* deals with this issue. The recent cases thus continue to refer to the need to identify "pressure amounting to compulsion of the will"[5].

23. *Re VS[63]-[66].* Verve accepts that there must be an "effective application of pressure"

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[3] Citing *The Atlantic Baron* [1979] QB 705; *The Evia Luck* [1992] 2 AC 152.

[4] See too *Spira v CBA* (2003) 57 NSWLR 544, 552 [49]-[50].

[5] *AG for England and Wales v R* [2004] 2 NZLR 577, 583 [15] (Lord Hoffmann); *DSND Subsea Limited v Petroleum Geo-Services ASA* [2000] BLR 530, 545 [131] (Dyson J).

and that the question of its legitimacy is distinct (VS[71]). Whether pressure was *applied* in a particular case is necessarily a factual question[6]. In this case, the Sellers did not apply pressure when they informed Verve of their genuine belief as to their obligations. This is far removed from the cases where a mortgagee, in duress of property, knowingly demands extra payments. As mentioned in SS[75] fn 3, *Hooper & Grass* was decided on its facts.

24. *Re VS[67]-[70].* If there is an actual or threatened breach of contract as a result of which a contractual modification is made, such breach may be wrongful and illegitimate; if there is no prior contract, a person can demand whatever they choose. That, alone, does not explain the difference between *Smith v William Charlick* and *White Rose Flour*. The further factual inquiry about whether pressure was applied, in the circumstances of the case, also remained to be answered in *White Rose Flour*: SS[75], fn 3. If Verve's contractual right under cl.3.3 was "quasi-proprietary", it is not clear why such a right could not have been protected by interlocutory injunction.

25. *Re VS[71].* Even though Verve accepts that there has to be an actual or threatened breach of contract and the "effective application of pressure" for duress, Verve then submits that such *application* occurred because Verve had no practical alternative (VS[81],[90]-[96]). If requisite pressure is found whenever a plaintiff has no practical alternative but to agree to a contractual modification, there will be duress whenever there is an actual or threatened breach of contract in such circumstances. The Sellers submit that such an approach would radically overextend the duress doctrine. All the prevailing factual circumstances should, instead, inform the outcome, including the defendant's good faith.

26. *Re VS[72].* The Sellers submit that their good faith is a relevant factual matter that informs the issue of whether they applied requisite pressure; their case is not that bad faith is necessary for liability, or that their good faith is sufficient to escape liability. *Spira* was a case about unconscionability where it was held that, despite the borrower not having any alternative, there was no unconscionability: 57 NSWLR 556-7 [86]-[90]. In discussing the tort of intimidation, Handley JA drew support from *Crescendo* and said (555 [73]) that ignorance of the law does not excuse but continued "[t]here must be a deliberate threat, and the act threatened must be unlawful, but there is no requirement that the defendant should be aware that it is unlawful". The Sellers submit that the relevance of such *deliberate* threats informs the duress doctrine as well. In determining such deliberate behaviour, the Sellers' genuine (and not obtuse) belief is relevant.

27. *Re VS[74],[75].* The Sellers do not contend there is a need to show bad faith for duress; only that the defendant's good faith is relevant. There is no lack of coherence in the law if a defendant's genuine belief as to contractual entitlement informs the inquiry as to duress.

28. Whether the Sellers breached cl.3.3, however, does not depend on their genuine belief; contract breach is objectively determined, as is the prior allocation of risks and caps on liability. Giving "primacy to Verve's contractual rights" includes giving primacy to the caps on liability to which Verve agreed; the asserted logic of its duress claim should not change this.

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[6] eg. *TA Sundell & Sons P/L v EMM Yannoulatos (Overseas) P/L* (1956) 56 SR (NSW) 323, 326, pt 3, 328.5

29. *Re VS[76]-[79].* Findings that the Sellers acted in good faith were made in this case. The Sellers contend that their genuine belief is relevant to the inquiry. It is not to the point that there may be difficulties in making such a finding. Once Verve accepts that good faith may be relevant to a lawful-act duress case, the logic of disregarding good faith altogether in an unlawful-act case overemphasises the unlawfulness and fails to address the other elements of duress.

30. *Re VS[80],[81].* The Sellers did not seek to apply pressure on Verve and leave it with no other practical choice. That was a consequence of the prevailing emergency circumstances; not a consequence of the Sellers' conduct. In the prevailing circumstances, Verve did nothing more than agree to pay market price.

31. *Re VS[83]-[89].* Verve could have applied for interlocutory relief particularly after making the First STA and before making the Second STA. It, instead, affirmed those agreements and reserved the right to claim damages for breach of the GSA. Also, Verve was first invoiced under the First STA on 1 July 2008. It had time to seek interlocutory relief to force compliance with the GSA but did not. Those matters are relevant to whether there was duress. Also, seeking interlocutory (not final) relief would not have taken 4 days.

32. *Re VS[90]-[92],[94].* Even accepting that Verve had no alternative, all of the points summarised at VS[90] suggest that the Sellers did not *apply* pressure. A lack of alternative caused by the circumstances is not an application of pressure by the defendant. No latent threat was made by the Sellers. The Sellers informed Verve of their view as to the contractual position, did not seek to extract more money *from Verve*, but sold gas at market prices to as many customers as they could supply, ramping up production to do so. The Sellers would have sold the available gas to other customers. If anything, they breached their contract with Verve, but did not engage in duress. The present case does not resemble the so-called "canonical" cases.

33. *Re VS[93],[95].* The submission at VS[93],[95] is in substance that a defendant who breaches its contract when the plaintiff has no alternative but to agree to a contractual modification *applies* illegitimate pressure. The Sellers submit that such a duress doctrine is far too wide, and is not, and should not be, the law.

34. *Re VS[96].* The Sellers were not "sophisticated contract breakers"; they informed Verve of the position they genuinely believed was so. The Sellers' reliance on the contention that pressure must have been applied by them is not formalism. It is an element of duress, an element which the Sellers submit was not satisfied.

Rescission

35. *Re VS[97],[100],[103].* The Sellers do not dispute that the claim for money had and received is not based on an implied contract[7]; but "the substance of the law still had to be found" in the concrete emanations from the authorities: *Equuscorp v Haxton* 246 CLR 498 [29][8]. Even if unjust enrichment is the "unifying" concept, it does not mean that the established rules can be ignored (SS[138]-[139]). In *Pavey*, the Court

[7] The implied contract theory was rejected in *Pavey & Matthews P/L v Paul* (1987) 162 CLR 221, 227, 246-57.

[8] Quoting Ibbetson, "Unjust Enrichment in English Law" in Schrage (ed) *Unjust Enrichment and the Law of Contract* (2001) 33, p 46.

considered the historical development of the law to make good the conclusion that a *quantum meruit* claim was not a contractual claim; the Court did not ignore the historical position and reach a conclusion by reference to the abstract concept.

36. *General and re VS[114]-[117].* There are essentially three reasons why the Sellers submit that rescission is required before restitution may be obtained for duress. *First*, even before the action for money had and received for duress, a contract made under duress has always been voidable, not void, so that the duressed party could seek to set aside the contract, ie to rescind it *ab initio*[9]. *Secondly*, when the action for money had and received developed, it was held that rescission (whether *ab initio* or *in futuro*) was necessary for the action grounded on the vitiating or qualifying factors[10]. *Thirdly*, in modern times, restitutionary claims are treated as subsidiary or "gap-filling" and are not available if they clash with existing contractual claims or contractual rights or obligations[11].

37. Assuming there was duress, the Sellers were not unjustly *enriched* because, unless the STAs were set aside *ab initio*, with benefits transferred under them reversed, Verve was obliged to pay under them and the Sellers were obliged to, and did, perform under them. Even though these agreements have been wholly executed, it cannot be said that there is no clash between the contractual rights and obligations under them and the restitutionary claim for duress (unless the rights and obligations under them are treated as subsidiary in the sense referred to above (which is not the law)). Unlike in tort, the action for money had and received does not give *compensation* for loss or damage suffered by the plaintiff but is available to reverse a transaction made where a qualifying or vitiating factor is present: *Roxborough* at 542 [68] (Gummow J)[12].

38. When Verve submits that it is entitled to restitution, without rescission, it is seeking compensation for the wrong done by the Sellers, namely, their actual or threatened breach of contract. Such a wrong (whether contract-breach or a separate tort) was agreed by the parties to have a limit on liability by cll.22.7(c) and 22.9.

39. *Re VS[101].* On the authorities, restitution is not an alternative remedy to rescission: above [18]-[19][13]. In *Portman Building Society v Hamlyn Taylor Neck* [1998] 4 All ER 202, in a failed claim for money had and received for mistake, Millett LJ recognised that a claim for restitution is designed to reverse an unjust enrichment (at 206), but said "[t]he obligation to make restitution must flow from the ineffectiveness of the transaction under which the money was paid … It is fundamental that, where money is paid under a legally effective transaction, neither misrepresentation nor mistake vitiates consent or gives rise by itself to an obligation to make restitution" (at 208).

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[9] SS[132]-[133]; *Speke v Flemying* (1522) YB Pas 14 Hen VIII, 7, 28a; *Dive v Manningham* (1551) Plowden 60, 66; *Whelpdale's Case* (1604) 5 Co Rep 119a, 77 ER 239, 2 Inst 482-483; Holdsworth, *A History of English Law*, vol 8 (2nd ed, 1937), p 51; Ibbetson, *A Historical Introduction to the Law of Obligations* (1999), p 71-73.

[10] SS[118]-[131]; *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, 385 (Gaudron J). In *Baltic,* Mason CJ recognised (at 355-6) that rescission *ab initio* is not required if the qualifying factor of failure of consideration is the unjust factor but the contract still had to be discharged *in futuro*.

[11] *Roxborough v Rothmans of Pall Mall* 208 CLR 545 [75] (Gummow J); *Lumbers v W Cook Builders* (2008) 232 CLR 635 (see SS[140(b)]).

[12] See also PBH Birks, "The Concept of a Civil Wrong" in DG Owen (ed) *Philosophical Foundations of Tort Law* (1995) 31, p 33-34, 46-52, esp. 48-9.

[13] See too C Mitchell et al, *Goff & Jones The Law of Unjust Enrichment* (2011, 8th ed), p 864-65 [40-06]-[40-08]; G Virgo, *The Principles of the Law of Restitution* (2006, 2nd ed), p 28-29, 188-9.

40. *Re VS[102]-[104]. Roxborough* did not hold that an unjust enrichment claim can be made if it clashes with rights under contract: SS[141]-[142]. It was held that as the tax component had been paid as a "several part" of the consideration, recovery of it would not result in confusion between rights of compensation and restitution: [21]. The tax component could be "broken up" so that the requirement for a *total* failure of consideration was satisfied: [109]. The Court's conclusion that restitution was available recognised the primacy of the contract, which is why the Court considered the issue of whether the contract denied restitution: [21], [58]. Murphy JA did not distinguish *Roxborough* because it was not a duress case but because the consideration that failed was several. The issue in *Roxborough* was not whether rescission *ab initio* was required because the claim was for failure of consideration; the historical development of the law was not ignored. With vitiating factors (eg mistake, duress), as opposed to a qualifying factor (failure of consideration), rescission *ab initio* is required.

41. *Re VS[105]-[107].* The Sellers' submission is not inconsistent with *Baltic*. Deane and Dawson JJ recognised the relevance of the historical position but said that it should not impede principle. The Sellers rely on coherent established principle, not technicality. Verve's complaint is that it was duressed into making the STAs; absent them, Verve would have had a breach of contract claim, nothing more. Any right to restitution should not give it back more than its contractual entitlement under the GSA. The requirement for rescission of a contract made under duress is to ensure there is no clash between restitution and contract; and as duress vitiates consent, a contract so made can be set aside for duress – that is the remedy. The need for rescission is not fortuitous but the law's response to the cause.

42. *Re VS[108]-[113].* If a contract made under duress (or even fraud) is fully executed, the victim is required to rescind and is not entitled to seek restitution: above [19]. If the victim does not seek to set aside the contract but rather seeks compensation for the duress or fraud, the victim makes a claim in tort – in the latter case in deceit (*Alati v Kruger* (1955) 94 CLR 216, 222); and in the former case, there is doubt about whether a tort claim for duress exists. Rescission is not required if the claim is in tort but, in that event, the claim is for compensation. The statement in *Grimaldi* (200 FCR 296, 364 [277]) that rescission, although required if proprietary relief is being granted, is not required if a personal remedy is sought, is not on point. The personal remedy referred to was a claim for equitable compensation as is apparent from the reference to *Greater Pacific Investments Pty Ltd (in liq) v Australian National Industries Ltd* (1996) 39 NSWLR 143, 153E-154.

43. Once it is seen that Verve retains its claim for compensation for breach of the GSA and once it is seen that the claim for duress (a vitiating factor) only permits a victim to set aside a contract made under duress, there is no need for a new "remedial solution". (Verve may also have had a separate claim in tort.) The requirement for rescission also reflects the law that, if it is not sought and there is affirmation, no relief in unjust enrichment is available but relief in contract and tort remains; see SS[145]-[147].

44. *Re VS[118].* If, as Verve contends, "unjust enrichment" informs the ambit of claims relying on vitiating or qualifying factors, so too should the principle that a *quantum meruit* remedy is unavailable if a contract governs the situation. Indeed, with the vitiating factors, the aim is to set aside the contract made where consent was vitiated. The same principle applies in both cases.

45. *Re VS[119]-[123].* Verve's duress claim hinges on its claim that the Sellers threatened a breach of, or actually breached, the GSA: VS[55]. Restitution for unjust enrichment entitles a reversal of the enrichment received, all else being shown. Given the proportions sold by each Seller under separate contracts (GSA, cl.26.1(b); STAs, cl.2(a)), as shown in the table[14], in the case of BHPB and Shell, the claim for restitution exceeds the proportion of their breach. As *Smith v William Charlick* demonstrates, they could not have gained *by duress* the whole of the amount claimed against them by Verve.

Clauses 22.7(c) and 22.9

46. *Re VS[127]-[134].* Clause 22.7(c) specifically limits each Seller's liability for a failure in the supply of gas above MDQ up to SMDQ. It is each Seller's "liability" (whether in contract or otherwise) that is limited. The limit applies when there is a failure to use "reasonable endeavours", the obligation which is specified relevantly in cl.3.3(a). In that context, any suggestion that cl.22.7(c) or the words "in respect of" in it do not refer to any claim for a breach of cl.3.3 should not be accepted. There are a number of matters that support this argument: SS[158]-[171].

47. Further, cl.22.7(c) is a broadly expressed provision dealing with a specific topic, namely the consequence of a failure to supply more than MDQ up to SMDQ. The intention was to catch all forms of liability with respect to such a failure. Also, cl.22.9 provides that the "remedies" expressly set out in the GSA for breach are the "sole and exclusive remedies" "in respect of" any breach (or for tort). The intention was to provide an exclusive regime for remedies *arising from* any breach, including remedies seeking restitution.

48. *Re VS[128].* Verve's approach is to treat the vitiating factor of duress as a wrong to support its assertion that "in respect of" is not wide enough to cover its claim for unjust enrichment. Such an approach does not attempt to give meaning to "in respect of" in its context but asserts a conclusion that clear words were not used. Any exercise of illegitimate pressure by the Sellers arose *because* of their threatened or actual breach of contract – that is Verve's case. It is thus not correct to suggest that the Sellers' liability in duress does not arise in respect of their breach, namely, a failure to use reasonable endeavours.

49. *Re VS[129].* Accepting that the GSA has to be construed as a whole, nothing in recital C supports Verve's preferred construction. In any event, the Sellers genuinely believed that they were not acting in breach of cl.3.3. There was no exercise of duress "for the opportunistic purpose of short term profit maximisation". The connecting words "in respect of" when dealing with the "liability" of each Seller in cl.22.7(c) are wide enough in their context and in the context of cl.22.9 to refer to and cover any liability arising from any cause of action, whether in contract, tort or unjust enrichment. The same connecting words are used in cl.22.9.

50. *Re VS[130].* Given the different proportions of supply under the STAs when compared

[14]

	Woodside	BP	Chevron	BHPB	Shell	MIMI
GSA	50%	$16^{2/3}$%	$16^{2/3}$%	$8^{1/3}$%	$8^{1/3}$%	-
Short Term Agreements	$16^{2/3}$%	$16^{2/3}$%	$16^{2/3}$%	$16^{2/3}$%	$16^{2/3}$%	$16^{2/3}$%

Seller, under its separate contract, has "in effect supplied an equivalent volume of gas to Verve". No notice was given by Verve under cl.9.11(c). In any event, on its plain terms, cl.22.7(c) is *not* confined, and is *not* engaged only when cll.9.12(a)(vi)(B)(3) or 9.12(b)(iv) are engaged. Further, the reference to Verve's "sole remedy" in them manifests an intention that the aim was to narrow the Sellers' liability, not to narrow the circumstances in which cl.22.7(c) applies.

51. *Re VS[131]-[134].* Verve's attempt to dissect the Sellers' conduct as between threatened breach and actual breach to sustain its argument that only conduct relating to an actual breach is "in respect of" the failure to supply covered by cl.22.7(c) misconstrues the clause. The words "liability" and "in respect of" in cl.22.7(c) are not in their context objectively intended to be so confined. Also, any threatened breach may have amounted to an anticipatory breach, well within the conception of breach. Moreover, Verve's claim in unjust enrichment would arise when the enrichment was received by the Sellers; such receipt occurred after breach. Verve's cause of action in unjust enrichment arose when the Sellers are alleged to have been in breach. The claim is "in respect of" such breach.

52. *Re VS[133].* With respect, Murphy JA's reasoning was correct. His reasoning that the Sellers' failure to use reasonable endeavours was "directly connected with" the entry into the STAs makes it plain that the failure was "in respect of" a breach. Murphy JA's view that the claim is "in respect of" a breach because the impugned STAs would not have been made but for the breach is also correct; that reasoning does not depend on his view about the need for rescission.

53. *Re VS[134].* For the reasons set out above at [46]-[51] and at SS[158]-[171], the words "in respect of" are sufficiently wide in this context to limit liability for any claim in unjust enrichment, when such a claim arises because of a threatened or actual breach of contract. With respect, McLure P's reasoning should not be accepted because the "taking advantage of the pressure generated by" the Sellers' breach is, in context, "in respect of" such a breach. Absent a breach, no *illegitimate* advantage of pressure could have been taken to justify a claim in duress.

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

B Dharmananda SC

J K Taylor

E M Heenan