IN THE HIGH COURT OF AUSTRALIA
PERTH OFFICE OF THE REGISTRY

No. P47 of 2013

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

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. P48 of 2013

WOODSIDE ENERGY LTD (ABN 63 005 482 986) First Appellant

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

CHEVRON AUSTRALIA PTY LTD (ABN 29 086 197 757) Third Appellant

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

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

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

RESPONDENT'S (in P48/2013) and APPELLANT'S (in P47/2013) SUBMISSIONS

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PART I: Certification

1. The respondent in P48/2013 and appellant in P47/2013 (**Verve**) certifies that these submissions are suitable for publication on the internet.

PART II: Issues

2. The first issue with which these appeals are concerned is the proper construction of cl 3.3 and cl 9 of the long term gas supply agreement, dated 4 March 2003, between the respondents in P47/2013 and appellants in P48/2013 (**Sellers**) and Verve (**GSA**). More precisely the issue is the content of the Sellers' obligation to use reasonable endeavours to supply to Verve a volume of gas (known as **Supplemental Maximum Daily Quantity** or **SMDQ**) nominated by Verve. The question of construction is whether the obligation to use "*reasonable endeavours*" meant, in circumstances where (a) the Sellers had the volume of SMDQ gas nominated by Verve available to supply but (b) other buyers in the market were prepared to pay a price higher than the price payable by Verve for SMDQ under the GSA, that the Sellers were required to supply the volume of SMDQ nominated by Verve. If the Sellers were required to supply Verve with the volume of SMDQ nominated by Verve, the Sellers accept that they breached cl 3.3 of the GSA. Verve succeeded on this issue in the Court of Appeal, and this is the subject of the Sellers' appeal. The other issues only arise if the Sellers' appeal fails.

3. The second issue arises because the Court of Appeal held, subject to the rescission point (the third issue), that Verve has a right to restitution of moneys paid under wholly executed short term gas supply agreements entered into and performed by Verve due to the exertion of economic duress by the Sellers. The issue is whether, for the purpose of finding economic duress, (a) the Sellers' threatened or foreshadowed breach of the GSA was illegitimate (in the sense of constituting illegitimate pressure) when the Sellers believed their conduct did not involve a breach of the GSA and (b) whether the Sellers' conduct constituted relevant pressure. This issue arises on the Sellers' notice of contention.

4. The third issue is whether the Court of Appeal was correct to hold that rescission of the wholly executed short term gas supply agreements was necessary before Verve could obtain restitution of that part of the amount paid under those contracts which exceeded the amount payable for the same volume of SMDQ gas under the GSA. This issue is the subject of Verve's appeal. The Sellers raise a further submission as to the quantum of Verve's right to restitution.

5. The final issue is the proper construction of cl 22.7(c) and 22.9 of the GSA, which, if engaged, limit the Sellers' liability. The question of construction is whether those clauses are

engaged and limit the Sellers' liability in restitution arising from a threatened or foreshadowed breach of the GSA and the economic duress exerted by the Sellers. This issue arises on the Sellers' notice of contention if Verve succeeds on the rescission issue.

PART III: s.78B *Judiciary Act 1903*

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

PART IV: Relevant Facts

7. Verve and the Sellers are parties to the GSA, which is a long term contract for the supply of large volumes of gas (CA[1], [45]). The Sellers' Submissions (**SS**) [10] correctly describes the character of the GSA. The Sellers delegated the marketing of the gas and the administration of the GSA to a company they controlled, North West Shelf Gas Pty Limited (**NWSG**) (J[1]).

8. At the relevant time (June to September 2008) Verve, a statutory corporation, was the major generator and supplier of electricity to that part of Western Australia known as the "*South West Integrated System*" (**SWIS**), an area which includes Perth. Verve was subject to statutory obligations to generate electricity which meant that it was in effect the supplier of last resort in the SWIS (CA[2]). It purchased gas under the GSA for use in its power stations.

9. The respondents are participants in the North West Shelf Venture, which produces gas from the North West continental shelf (CA[45]).

10. In June 2008 there were two principal suppliers of gas into the West Australian market, including the SWIS, the Sellers and Apache Energy (**Apache**). The Sellers and Apache operated gas production plants located in the North West of Western Australia, which were the principal sources of supply of gas into the West Australian market. Gas from both the Sellers' plant and the Apache plant was transported to the SWIS by the Dampier to Bunbury Natural Gas Pipeline (**DBNGP**) (CA[3]).

11. Under the GSA, Verve has a right to nominate and the Sellers have an obligation to supply up to a specified maximum daily quantity of gas (**MDQ**), within a specified tolerance.[1] Verve also has a right to nominate, in addition to MDQ, SMDQ. The Sellers have an obligation to use "*reasonable endeavours*" to supply SMDQ, up to a specified additional volume[2] in excess of MDQ (CA[6]). Verve also has a take or pay obligation which varies by reference to Verve's demand for gas (CA[8]).

12. For each day during the week ending on 3 June 2008 Verve, pursuant to cl 9 of the GSA, nominated the maximum daily volume of MDQ and the maximum daily volume of SMDQ

[1] The Sellers maintain that both the volume of MDQ and the tolerance are confidential. The numbers are reproduced at CA[6] and CA[7] bullet point 4, respectively.

[2] The Sellers maintain that the volume is confidential. The number is reproduced at CA[6].

for the period 4 to 10 June 2008[3]. The nominations reflected Verve's demand for gas immediately prior to the events of 3 June 2008 (CA[10]).

13. On 3 June 2008 a fire at Apache's plant shut down the supply of gas from that plant. The shutdown of the Apache plant reduced the gas supply to the West Australian market by 30 to 35%. Demand for gas in Western Australia exceeded supply (CA[10], [53]-[54]). A further consequence of the shutdown of the Apache plant was that Verve required more fuel to meet its statutory and contractual electricity supply obligations, which increased as other electricity generators in the SWIS could not supply electricity due to the lack of available gas (CA[11]), and the Sellers knew Verve required the SMDQ volume of gas[4]. Due to the exceptional event, for a period from 3 June 2008 the market price for gas in Western Australia greatly increased as demand exceeded the reduced supply. At the same time, and because of the same event, Verve's demand for gas to meet its existing obligations increased. In June 2008 it was unknown for how long those market conditions would continue.

14. To meet its obligations, Verve's only economically practical alternative was to buy gas from the Sellers (CA[11]). Verve could not generate sufficient electricity from its coal fired power stations and, although Verve was able to burn diesel in some of the gas fired power stations, diesel was not an economic alternative to gas even at the prices demanded by the Sellers: Mr Waters' statement at [33].

15. On 4 June 2008 the Sellers told Verve that the Sellers would not supply SMDQ gas to Verve for an indefinite time. On the same day the Sellers offered to supply to Verve a volume of gas a day equal to the SMDQ volume for the period from 4 June to 29 June 2008, at a price per GJ that was many multiples higher than the price under the GSA for SMDQ gas (CA[153](b)). Under protest, Verve entered into a fully interruptible short term gas supply agreement with the Sellers and another company (**MIMI**) for the supply of a daily volume of gas which was slightly lower than the SMDQ volume[5] for the period 4 to 29 June 2008 (CA[12], [57], [153](a)-(b), (d)) at a price which was a number of multiples of the SMDQ price under the GSA. Due to a limit on the authority of its available officers, on 4 June 2008 Verve was only able to enter into a short term contract for the slightly lower daily volume (J[13]).

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[3] The parties adopted a convention that departed from the time for nominations provided for in cl 9. Verve made nominations for a period, usually for about the following 14 days (instead of 7 days). It did not give daily nominations, but always gave further nominations prior to expiry of the previous nomination. Each day NWSG accepted the then extant nomination as effective for the following 7 days, responding for that period under cl 9.2: J[72]-[73]. In the Court of Appeal it was common ground that the notices given were to be treated, as the Sellers did treat the notices, as an effective rolling 7 day nomination. No issue about the notices arises in this appeal as Le Miere J's unchallenged finding is that Verve in effect gave the 7 day notices required by cl 9.1 of the GSA.

[4] McKeagney T225.5-225.6, 230.10-231.1; de la Fuente (of NWSG) T252.2-252.4, 254.6-254.8 and 255.3-255.4

[5] The figures are CA[12], which it is understood the Sellers contend are confidential.

16. The statement made by the Sellers to Verve that the Sellers would not supply SMDQ, in the circumstances (the dramatic reduction in the supply of gas into the market which in turn increased Verve's electricity supply obligations and thus its gas requirements), left Verve with no practical alternative but to pay the Sellers what had become the new market price. The effect of the Sellers' statement that they would not supply SMDQ was that, in practical and financial terms, Verve had no option but to enter into the short term agreements (CA[154]).

17. The Sellers knew that their refusal to supply SMDQ placed enormous pressure on Verve and left Verve with no option but to accept the Sellers' terms: CA[29], [153(h)], [154]. The Sellers knew that Verve needed the SMDQ (or an equivalent volume of gas), and knew that the proposed short term agreements represented the best available option in the circumstances (CA[154]).

18. It is correct to say, as the Sellers do, that other buyers in the market were willing to pay more than the SMDQ price to obtain the supply of gas under the short term gas supply agreements. In a limited sense the Sellers are also correct to say that they could not meet all demand, but that statement is divorced from considerations of price. Those facts are a consequence of the circumstances in which the Sellers considered themselves able to engage in profit maximising behaviour by selling to, in effect, the highest bidder (de la Fuente T248.4-248.6, 252.6-252.7). The reliance on those facts by the Sellers is misplaced. To contend that a relevant justification is provided for the Sellers' conduct by the fact that others in the market were prepared to pay more than the SMDQ price, is to assume the answer to the question of construction raised by the Sellers' appeal.

19. The short term gas supply agreement which Verve entered into, and which other buyers entered into, did not impose on the Sellers an obligation to supply. The agreements were in effect a put option which the Sellers could exercise if they wished (CA[12], [157], agreements reproduced CA[155][6]). The agreements could also be terminated by short notice[7]. The pressure referred to in paragraph 17 of these submissions continued through the whole period from 4 June 2008 to 29 September 2008 as the Sellers continued to state that they would not supply SMDQ[8]. The effect of the pressure was that Verve entered into the two short term agreements, performed those agreements and did not (because SMDQ was not made available) terminate the agreements.

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[6] The agreements were all in relevantly the same terms, the only differences being price (in the second period from 30 June 2008), volume that may be supplied and that, unlike Verve, some buyers were required to pay in advance.

[7] 24 hours notice under the June agreement and 72 hours notice on the July to September agreement (cl 15 of the short term gas supply agreements)

[8] As late as 27 August 2008 NWSG stated the Sellers could not supply SMDQ (email Annand to Leah), also the daily response to nominations showed that the Sellers would not supply SMDQ

20. Through June 2008 Verve continued to nominate SMDQ, which the Sellers did not supply. In mid-June 2008 the Sellers invited tenders for the purchase of gas under a further short term interruptible agreement for the period 30 June 2008 to 29 September 2008. Under protest, Verve lodged a tender which was accepted and Verve and the Sellers (and MIMI) entered into a further fully interruptible gas supply agreement for the SMDQ volume per day (CA[14], [58], [153](e)-(g)). The price per GJ of gas was many multiples of the price payable for SMDQ under the GSA, and higher again than the price payable under the 4 June 2008 agreements.

21. The Sellers had gas available to supply SMDQ to Verve from 4 June to 29 September 2008 (CA[16]). During that period no SMDQ was supplied to Verve. After 30 September 2008 the Sellers did supply SMDQ to Verve when nominated.

22. Verve continued to nominate SMDQ throughout that period, other than on 4 days towards the end of the period. SMDQ was not nominated on those days as (a) under the short term agreements Verve had a take or pay obligation and (b) on the last three days of the period Verve was not certain whether it would require SMDQ and was unable to terminate the short term agreements until it knew that, if required, SMDQ would be supplied[9].

PART V: Relevant Statutory Provisions

23. In addition to the legislation identified by the Sellers, the following legislation is relevant.

24. *Electricity Industry (Wholesale Electricity Market) Regulations 2004 (WA):*

> 12A The market rules may confer functions and impose requirements on the Electricity Generation Corporation and the Electricity Networks Corporation.

PART VI: Verve's Submissions

A. Proper construction and breach of clause 3.3 (Sellers' appeal grounds 1-3, Sellers' notice of contention ground 1)

The issue

25. The Sellers' appeal raises the proper construction of cl 3.3 of the GSA, which imposes on the Sellers an obligation to use "*reasonable endeavours*" to supply SMDQ to Verve, following a nomination by Verve in accordance with cl 9.

26. Clause 3.3 of the GSA is reproduced CA[15]. The Court of Appeal's construction of cl 3.3, read with the balance of cl 3 and cl 9, is correct (CA[16]-[21] per McLure P, Newnes JA agreeing, and [122]-[133] per Murphy JA). The Court of Appeal's reasons are also correct, with the exception of Murphy JA's construction of "*likely commitment*" in the fifth sentence of

[9] Mr Waters' statement paragraphs 101 and 102; no gas was supplied under the short term agreement on 15 September 2008 because, probably for operational reasons, supply was interrupted by the Sellers: Ms Clare's statement paragraph 49.

cl 3.3(b)(i) (CA[130]). That sentence was unnecessary to Murphy JA's construction of the obligation imposed by cl 3.3. McLure P, with whom Newnes JA agreed, did not rely on the proposition contained in that sentence.

Principles

27. The GSA should be construed in accordance with how a reasonable person, in the parties' position, should be taken to have objectively understood the contract, in the circumstances and context in which the contract was entered into[10]. The construction of the GSA is undertaken by an examination of the text, the apparent commercial objective of the parties and by assessing how a reasonable person would understand the language used in that context[11]. Preference is to be given to a construction which gives congruent operation to the component parts of the contract[12].

28. A commercial contract should be given a businesslike construction, consistent with the meaning dictated by the language adopted by the parties[13] or, in other words, as "*businessmen, in the course of their ordinary dealings, would give the document*"[14].

Construction

29. The proper construction of cl 3.3 is informed by the words used, the context of the clause and how the obligation created by cl 3.3 is engaged.

30. The Sellers' obligation, created by cl 3.3 of the GSA, to use "*reasonable endeavours*" to supply the volume of SMDQ nominated by Verve is of a different quality to the Sellers' obligation to supply MDQ, created by cl 3.2 of the GSA. Clause 3.2 creates a relevantly unconditioned obligation[15] to supply the nominated volume of MDQ, within a tolerance allowed for operational reasons (cl 9.2, 9.10). The different obligations demonstrate a careful working out by the parties of the content of the obligations assumed by the Sellers, a working out which is undoubtedly reflected in the agreement as to price (cl 6 of the GSA[16]). The construction accepted by the Court of Appeal gives the obligations created by cl 3.2 and 3.3 different content, consistent with the different quality of those obligations.

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[10] *Pacific Carriers Limited v BNP Paribas* (2004) 218 CLR 451 at [22] and *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40]

[11] *Pacific Carriers* at [22] and *Toll v Alphapharm* at [40]; *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 [2011] 1 WLR 2900 at [14]

[12] *Wilkie v Gordian Runoff Limited* [2005] HCA 17 (2005) 221 CLR 522 at [16] per Gleeson CJ, McHugh, Gummow and Kirby JJ

[13] *McCann v Switzerland Insurance Australia Limited* (2000) 203 CLR 579 at [22] per Gleeson CJ; *Rainy Sky* at [21]-[30]

[14] *Homburg Houtimport BV v Agrosin Limited (The Starsin)* [2003] UKHL 12 [2004] 1 AC 715 at [10] per Lord Bingham of Cornhill

[15] Clause 18 contains a *force majeure* condition, but the Sellers have not suggested that cl 18 had any operation.

[16] The "*Tranche 3*" price is the price payable for SMDQ and differs from the "*Tranche 2*" and *Tranche 3*" prices which are the prices for MDQ: cl 30, which is the Dictionary.

31. Clause 3.3(a) of the GSA, reinforced by cl 9.3, imposes an obligation on the Sellers to use "*reasonable endeavours*" to supply SMDQ to Verve. That obligation is engaged on receipt of a nomination for SMDQ, made by Verve in accordance with cl 9. Contrary to SS[38]-[39], the obligation to use "*reasonable endeavours*" is engaged on receipt by the Sellers of a nomination for SMDQ made 7 days prior to the "*Gas Day*"[17] of delivery, although that nomination may be the subject of change by a varied nomination (cl 3.3(a), 9.1 and 9.3)[18].

32. Clause 9 gives further content to the obligation by its prescriptive and detailed regime for nominations, variations to nominations, allowances for operational tolerances on the obligation to supply and provisions relating to the consequence of a shortfall in supply (summarised CA[77]-[98]). Clauses 3 and 9 reflect a careful agreement as to the parties' rights and correlative obligations, over the potential 20 year term of the GSA, which balances the uncertainties of supply (from a natural source and complex plant) and the different uncertainties of demand (for electricity in a large domestic and commercial market) (CA[20]).

33. Clause 3.3 imposes on the Sellers an obligation to use "*reasonable endeavours*" to supply SMDQ when Verve makes a nomination in accordance with cl 9. The commercial purpose is to impose an obligation with a content correlative to the risk Verve accepted. The content of that obligation to use "*reasonable endeavours*" is then exemplified or given content by cl 3.3(b). Clause 3.3(b) is in two parts.

34. The first part of cl 3.3(b), up to the word "*and*" at the end of the second line of cl 3.3(b), identifies of the content of the "*reasonable endeavours*" obligation created by cl 3.3(a) by identifying the matters, the "*relevant commercial, economic and operational matters*" referred to, which are to be considered in determining whether the Sellers are "*able*" to supply SMDQ for the purpose of the obligation in cl 3.3(a). That part of the clause directs attention to the Sellers' ability to supply, not willingness to supply (CA[19], [128]). The determination of whether the Sellers are "*able*" to supply is a substantially objective determination by reference to those matters, but does include a degree of evaluative or subjective judgment[19]. The effect of the Sellers' argument is that they need only supply if they are subjectively willing to supply. That is in substance a subjective construction which is inconsistent with both the language used and the apparent commercial purpose of cl 3.3.

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[17] A "*Gas Day*" runs from 8am on a day to 8am the following day.

[18] Accepting that Verve has the power to vary the nomination up to 48 hours prior to delivery, the "*Daily Nomination*" referred to in cl 9.3 can be, and absent exercise of that power will be, the nomination made 7 days before supply

[19] For example assessing the whether another buyer is likely to require the Sellers to perform an existing commitment to supply that buyer, or an assessment of the likely capacity of the plant over the following week. Both of those are evaluative judgments and the cl 3.3 obligation allows for the Sellers to make a assessment of those matters, provided the assessment is reasonable, in determining whether the Sellers are able to supply.

35. That first part of cl 3.3(b) performs two conventional functions. *First*, it identifies that compliance with the "*reasonable endeavours*" obligation is determined by whether the Sellers are "*able*" to supply SMDQ. *Second*, it defines the content of the obligation by identifying the relevant "*matters*" which inform the objective question of whether the Sellers are "*able*" to supply (CA[127]). The identified matters are the type of matters[20] which usually define the content of a "*best endeavours*" or "*reasonable endeavours*" obligation[21]. The "*reasonable endeavours*" obligation created by cl 3.3(a) is to be given an in effect conventional construction (CA[124], [132]). Contrary to the Sellers' submissions (SS[64]), the fact that the parties have chosen to expressly state the content of the "*reason endeavours*" obligation, in terms consistent with the usual content of the obligation, does not mean that the obligation is to be given some different and lesser content. These commercial parties chose familiar commercial language, which is the language of obligation, and objectively intended that obligation to be consistent with the usual meaning on the phrase used.

36. A "*reasonable endeavours*" obligation usually requires that the party under the obligation adopt a standard of endeavour to perform the obligation which is reasonable in all the circumstances[22]. Contained in the concept of "*reasonable endeavours*" is a consideration of the capability of the party under the obligation to undertake the task the subject of the "*reasonable endeavours*" obligation. The party under the obligation is not required to abandon all self-interest. The obligation is to perform if "*able*" (the language of cl 3.3(b)) to perform, assessed without total disregard for the party's self-interest. For example, the Sellers are not required to supply SMDQ gas if to do so would put them in breach of other contracts (a commercial interest), if a new tax on production means that costs of production exceed the price (an economic consideration) or if the plant did not have capacity (in the short term an operational matter, but in the long term questions of expanding the plant are commercial or economic). However, the obligation cannot be disregarded because someone else is prepared to pay more than the bargained price. The error in SS[50]-[51] is to disconnect the words containing the condition, "*relevant commercial, economic and operational matters*", from the subject of the condition, the Sellers' ability to supply.

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[20] *Transfield Pty Ltd v Arlo International Limited* (1980) 144 CLR 83 at 101 per Mason J, 107-87 per Wilson J; *Jet2.com Limited v Blackpool Airport Limited* [2012] EWCA Civ 417 [2012] 2 All ER (Comm) 1053 at [31]-[32] per Moore-Bick LJ, with whom Longmore LJ agreed, and the cases referred to at [21], [26]-[27]; *Cypjayne Pty Limited v Babcock & Brown International Pty Limited* [2011] NSWCA 173 (2011) 282 ALR 152 at [67] per Bathurst CJ, Macfarlan and Young JJA agreeing.

[21] The content of a "*best endeavours*" and a "*reasonable endeavours*" clause are broadly the same: *Transfield* at 101 per Mason J; *Cypjayne* at [67] per Bathurst CJ; *Jet2.com* at [41] per Lewison LJ (dissenting in the result), although the exact content may differ.

[22] *Transfield v Arlo* at 100, 101, per Mason J, at 107 per Wilson J; *Hospital Products Limited v United States Surgical Corporation* (1984) 156 CLR at 91-2 per Mason J, 143-4 per Dawson J; *Jet2.com* at [31]-[32]

37. The second part of cl 3.3(b) identifies three circumstances in which the Sellers are deemed not to be "*able*" to supply. Those three examples give non-exhaustive content to the "*commercial, economic and operational matters*" referred to in the first part of cl 3.3(b) (CA[130]). None of those three examples is engaged. Those examples demonstrate the character of the "*relevant commercial, economic and operational matters*". "[C]*ommitments*" or "*obligations*" (cl 3.3(b)(i) and (iii)) are "*relevant*" matters. A wish to supply someone other than Verve, to maximise profit, is neither a "*commitment*" nor an "*obligation*" and is not a "*relevant commercial, economic and operational matter*".

38. The Court of Appeal was correct to hold that the Sellers cannot sell all available gas to another buyer, instead of supplying SMDQ to Verve, although another buyer is prepared, on the day of supply, to pay a higher price than the price payable by Verve for SMDQ under the GSA. Clause 3.3(b) defines the Sellers' obligation by reference to whether the Sellers are "*able*" to supply SMDQ gas (whether the Sellers have capacity or capability (CA[129])), not by whether they are willing to supply SMDQ gas. Whether the Sellers are "*able*" to supply is determined by the facts existing at and from the time of the nomination. That is a construction which gives content to the obligation, and effect to the commercial bargain. In contrast, the Sellers' construction should be rejected because it is inconsistent with the language used and because of its effect. On its proper construction cl 3.3 does not, in effect, grant an option to the Sellers to supply or create a floor price at which the Sellers will supply if they cannot obtain a better price in the market (CA[20] is correct). The construction advanced in SS[44], [48] and [62], to the effect that if a buyer is prepared to pay more than the SMDQ price, the Sellers are free to sell to that buyer instead of Verve, does not accord with these commercial parties' objective intention and is wrong. These parties would not have used the language of obligation if they intended, in effect, to grant the Sellers an option.

39. As the Sellers had gas available to supply Verve from 4 June 2008 to 29 September 2008, the Sellers breached cl 3.3 by failing to use "*reasonable endeavours*" to supply Verve the SMDQ gas nominated by Verve (CA[16], [21]-[22] and [134] (read with [114])).

40. Further matters consistent with that construction, and inconsistent with the Sellers' construction, are as follows.

41. *First*, the construction accepted by the Court of Appeal is consistent with the language used. As already described, that construction gives effect to the word "*able*" in cl 3.3(b) (CA[19], [128]). That construction further gives effect to the language used by the parties in describing cl 3.3 as an "*obligation*" (cl 3.3(c), CA[125]). In contrast, the Sellers' construction (for example, SS[62]) reads "*able*" as "*willing*", effectively converting cl 3.3 into an option to supply.

42. *Second*, the Sellers' construction also is inconsistent the scheme for nominations created by cl 9, cl 22.7(c) and the language of "*unable*" used in a related part of the GSA (CA[18]).

43. Clause 9.1(a) creates the procedure Verve is required to follow to nominate the volume of gas, including SMDQ, it requires for the following 7 days. Clause 9.1(b) requires that the Sellers inform Verve how much gas they will supply on each of those days. Clause 9.1(b) is a notice provision and does not affect the Sellers' obligation to supply or use "*reasonable endeavours*" to supply. The effect of cl 9.1(b) is to impose on the Sellers a duty to inform Verve how much gas the Sellers expect to supply. Clause 9.1(d) provides for Verve to vary its nomination up to 48 hours before the start of the "*Gas Day*" on which the supply is to be made. The last nomination received by the Sellers prior to 48 hours before the "*Gas Day*" is defined as the "*Daily Nomination*", and it is the "*Daily Nomination*" which defines the Sellers' delivery obligation (cl 9.1(e) and 9.2)[23]. Subject to cl 9.3 and a tolerance allowed for operational reason, the Sellers are required to deliver SMDQ if SMDQ is nominated. Clause 9.3 requires that the Sellers use "*reasonable endeavours*" to supply SMDQ in accordance with a Daily Nomination. Clause 9.3 contains no equivalent to cl 3.3(b), as would be necessary if the "*reasonable endeavours*" obligation was in effect a choice. Clause 9.3 differs from cl 3.3 as cl 3.3 is enlivened by a nomination while cl 9.3 is enlivened by the operative "*Daily Nomination*". In the event of a varied nomination made as little as 48 hours before delivery which increases the SMDQ required, the practical effect of an obligation to use "*reasonable endeavours*" is likely to be different and less onerous than the obligation imposed by cl 3.3. Similarly, cl 9.5 imposes on the Sellers an unqualified "*reasonable endeavours*" obligation to supply in the event of a change in Verve's nomination less than 48 hours before delivery. That is not qualified by the words the Sellers rely on to import a choice into cl 3.3. The Sellers' construction is both objectively improbable and gives the language of an elaborate regime created by cl 3.3 and 9 no practical content in relation to SMDQ.

44. Contrary to SS[41]-[44], once Verve makes a nomination for SMDQ pursuant to cl 9.1 the Sellers' obligation to exercise "*reasonable endeavours*" to supply the SMDQ, and Verve's correlative right to the benefit of the exercise of those "*reasonable endeavours*", is engaged (cl 3.3 and 9.3). The Sellers' determination, referred to in the opening words of cl 3.3(b), is a determination as to what is reasonably necessary for the Sellers to do, in the period between receipt of a nomination and supply, to comply with the obligation created by cl 3.3(a) (CA[133], contrary to SS[37], [57]).

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[23] Subject to the further obligation to use "*reasonable endeavours*" to supply a changed notification on shorter notice

45. The next inconsistency between the GSA and the Sellers' construction is that, unless cl 3.3 and 9.3 create obligations with content, the cap on liability in cl 22.7(c) has no or little operation (CA[131]). The presence of cl 22.7(c) demonstrates that the Sellers' construction is objectively improbable as that construction results in redundancy.

46. There is a further inconsistency with the language of the GSA in the Sellers' construction. Verve has a take or pay obligation created by the GSA (cl 4.1, 4.2(b), 4.3(b)(ii)). There is an exception to Verve's take or pay obligation which is engaged if the Sellers are "*unable*" to supply SMDQ and Verve takes from another supplier (cl 4.1(b)(v)). This exception does not apply if the Sellers are able but unwilling to supply. The take or pay obligation does not contemplate a circumstance where the Sellers are unwilling but able to supply at the price under the GSA. Consistent with the construction adopted by the Court of Appeal, "*unable*" in the context of Verve's take or pay obligation is the converse of "*able*" in the context of the Sellers' obligation to use "*reasonable endeavours*" to supply SMDQ (CA[19]).

47. *Third*, the Sellers' construction has a number of consequences not addressed by the language of the GSA, and which are objectively unintended. The occasion for the Sellers' decision whether they wish to supply is unstated, and could be before a nomination, at the time of a nomination, at some time between the nomination and supply or at the moment of supply. To which of the obligations created by cl 3.3(b) and 9.3 the choice attaches is unstated. That those matters are unstated tends to demonstrate that the Sellers' construction was not the construction objectively intended by the parties.

48. *Fourth*, the structure of cl 3.3 is inconsistent with the Sellers' construction. A plain English and commercially sensible construction of cl 3.3 is that cl 3.3(a) imposes the obligation and cl 3.3(b) is explanatory of or gives content to the obligation (CA[18]-[20], [122], [127]). The construction adopted by the Court of Appeal reads cl 3.3 as a whole, with both parts of cl 3.3(b) giving content to cl 3.3(a). The Sellers' construction gives cl 3.3(b) two functions. The Sellers construe their state of mind or determination, referred to in the first part of cl 3.3(b), as a condition to the obligation in cl 3.3(a) (SS[48]-[51]). The second part of the clause, on the Sellers' construction is then declaratory of three circumstances in which cl 3.3(a) does not require the Sellers to supply. There is no structural or textual support for that construction. The first part of cl 3.3(b) is not expressed to be a condition to cl 3.3(a), and is in language consistent with giving content to not conditioning the obligation (CA[127]).

49. *Fifth*, the Sellers' construction gives the obligation in cl 3.3(a) no real content. On the Sellers construction the Sellers' decision as to whether it is in their commercial interest to sell

SMDQ to Verve (based, for example, upon whether it is more profitable to sell to someone else) is a condition precedent to the Sellers' obligation. On their construction, the Sellers need only adopt the standard of reasonableness and the standard of endeavour imposed by cl 3.3(a) if they elect to do so.

50. The Sellers' construction is uncommercial and objectively unlikely (CA[20]). Putting to one side irrational behaviour (which objectively the parties to this agreement would not and are not to be taken to have contemplated), on the Sellers' construction cl 3.3 operates so as to confer on the Sellers an option to supply SMDQ at the SMDQ price. Assuming Verve wishes to obtain SMDQ gas on a particular day and the market price for gas is more than the SMDQ price, on the Sellers' construction (the Sellers being profit maximising organisations) the Sellers will not sell. If the market price is less than the SMDQ price Verve will presumably buy on market and not from the Sellers. While that illustration may be over simplified, if the market price is very close to the SMDQ price, it demonstrates that, under a contract expected to run for up to 20 years, on the Sellers' construction cl 3.3 has very little practical effect. The Sellers will not decide to supply SMDQ in the only circumstance Verve wishes to obtain SMDQ instead of buying on market. Objectively that is not what these commercial parties intended. If the Sellers' construction were correct there is no apparent reason to have included cl 3.3 at all. Another consequence of the Sellers' construction is that if the Sellers, on the day after entering into the GSA, decided that the SMDQ obligation was a bad deal the Sellers could refuse to supply SMDQ for the term of the GSA. That is a consequence without a commercial rationale and objectively unlikely to have been intended.

51. There is a related structural reason to reject the Sellers' construction. The take or pay obligation (cl 4.1) provides a structural incentive, or imperative, for Verve to take SMDQ instead of buying elsewhere. On the Sellers' construction the Sellers have no obligation, at least whenever the market price exceeds the SMDQ price, to sell SMDQ. It is improbable that the parties intended that disconnect between obligation of Verve to buy from the Sellers (irrespective of market price) and the Sellers' obligation to supply (dependent on market price).

52. *Sixth*, contrary to J[68] and SS[33] the mutually known background is consistent with Verve's construction. Verve accepts that SMDQ is not "*reserved*"[24] under the GSA and that the Sellers

[24] J[68] is correct to the extent that there is no obligation to "*reserve*" gas on a daily basis to supply SMDQ, but to the extent that J[68] is to the effect that there is no obligation to "*reserve*" gas at all it is wrong. By cl 3.1 the Sellers are required to make a specified volume of "*Gas*" available to Verve over the term of the GSA. That is, the Sellers are required to "*reserve*" the specified volume of gas from the relevant blocks for supply to Verve. The correct proposition is that there is no obligation to reserve daily capacity in the plant to supply SMDQ gas.

(prior to an effective nomination) can enter into contracts which would have the effect that they were unable (as opposed to unwilling) to supply SMDQ gas: cl 3.3(b)(i) would be engaged. That is a risk which Verve assumed. However, it is a risk taken in the circumstance that the Sellers in practical terms had only a set volume of gas per day day[25] of firm gas available for sale and the balance of supply was interruptible (CA[50]-[51]). Objectively the risk taken by Verve is of known content, and is obversely commensurate with the possibility that the Sellers would sell interruptible gas on a committed basis. Verve took the risk of an interruptible supply of SMDQ, which was commensurate with the "*reasonable endeavours*" obligation and the agreed price (CA[132]). That is no reason to give cl 3.3(a) no practical content where in point of fact the Sellers have not committed the whole of their supply (CA[132]).

53. *Finally*, contrary to the Sellers' submissions, the words in parenthesis in cl 3.3(b)(i) are directed to commitments entered into by the Sellers, not possible commitments. A likely commitment is a commitment likely to be engaged (for example under an call option likely to be exercised, or an obligation such as that created by cl 3.2), not a commitment likely to be entered into after receipt of the 7 day rolling nomination but before supply (CA[20] per McLure P is correct and CA[130] per Murphy JA, to that extent, understates the obligation)[26]. That follows from the "*reasonable endeavours*" obligation being engaged on a 7 rolling day nomination, which includes SMDQ, being made (CA[123]). Before that nomination is made, the Sellers are free to commit or contingently commit gas with the consequence that they cannot supply SMDQ when subsequently nominated, but once the nomination is made the Sellers are constrained by their obligation to use "*reasonable endeavours*". Further, the point does not directly arise. The short term agreements entered into by the Sellers on and after 4 June 2008 do not contain a commitment undertaken by the Sellers. As already identified, those agreements were in effect a put option with no obligation imposed on the Sellers.

54. The Court of Appeal was correct to find breach of cl 3.3 by the Sellers in failing to perform the obligation imposed by cl 3.3 and, consequently, failing to supply SMDQ from 4 June 2008 to 29 September 2008.

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[25] Again, the Sellers say the volume is confidential, and the figure can be found at CA[50].

[26] Murphy JA's suggestion that the Sellers could enter into a new commitment after receipt of a nomination is wrong. The effect of the nomination is to engage the "*reasonable endeavours*" obligation. The Sellers do not have to supply Verve in preference to a pre-existing (pre-dating the nomination) contingent commitment where the contingency occurs or is likely to occur between nomination and supply of SMDQ thus enlivening the commitment, but the Sellers cannot (at least in the usual course), in the 7 days between receipt of a nomination and supply of SMDQ, enter into a new commitment which has the consequence that the Sellers are not "*able*" to supply SMDQ.

B. Whether the Sellers exercised illegitimate pressure amounting to economic duress (Sellers' notice of contention ground 2)

The Issue

55. The Sellers' notice of contention raises the issue as to whether the Sellers applied illegitimate pressure amounting to economic duress upon Verve when, initially on 4 June 2008 and then in effect through to 29 September 2008, they said that they would not supply SMDQ to Verve and offered, in its place, the same gas at a number of multiples of the SMDQ price under the short term gas supply agreements. The Court of Appeal was correct to hold that the Sellers' conduct amounted to economic duress (CA[31], [183]). Verve accepts that economic duress does not arise on the present facts if the Sellers' conduct did not constitute a foreshadowed or threatened breach of the GSA or an actual breach.

Principles

56. It is well established that duress, including economic duress, is a vitiating factor which renders unjust the retention of a benefit received by the person imposing the duress, giving rise to a right to restitution (*David Securities Pty Limited v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 379[27]).

57. Duress is not a concept restricted to the law of contract. It is a concept of wide application in the civil and criminal law. In private law, relevantly, duress has application to both the law of contract and to the law of unjust enrichment. The law relating to duress is underpinned by two distinct but overlapping justifications.[28]

58. The first justification focuses on the effect of pressure upon the consent of one of the parties. This justification is significant because, in many areas of the law, the ascription of legal responsibility depends upon the consent or intention of a party. The application of pressure amounting to duress is recognised as affecting the quality of a party's consent, and so can affect whether legal responsibility is ascribed. Cases concerning duress in contract and unjust enrichment which are expressed in language that emphasises the voluntariness of a transaction draw upon this justification (eg *Pao On v Lau Yiu Long* [1980] AC 614).

59. The second justification focuses upon the wrongfulness or illegitimacy of the pressure placed by one party upon the other. Thus duress, including economic duress, is sometimes referred

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[27] Per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ, also *Equuscorp Pty Limited v Haxton* [2012] HCA 7 (2012) 246 CLR 498 at [30] per French CJ, Crennan and Kiefel JJ

[28] See Stephen Smith, *Contract Theory* (2004, Oxford University Press) at 316.

to as a species of wrongdoing.[29] In private law the Court will often be required to decide upon the allocation of rights between the party who applied the pressure and the party upon whom the pressure has been applied. In this context, the second justification assumes greater significance, and is connected to the principle that a party should not benefit from its own wrong.

60. The modern law of economic duress recognises both justifications. In *Crescendo Management Pty Ltd v Westpac Banking Corp* (1988) 19 NSWLR 40 McHugh JA said at 46:

> *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. Pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct. But the categories are not closed. Even overwhelming pressure, not amounting to unconscionable or unlawful conduct, however, will not necessarily constitute economic duress.*

61. This approach emphasises both the wrongfulness of the pressure and whether it induced the victim to act. It has been followed many times in this country and in the United Kingdom.[30] The Court of Appeal correctly applied this approach (CA[24], [176]).

62. The Sellers' submissions commend to the Court as the applicable test a passage from the advice of the Privy Council delivered by Lord Scarman in *Pao On v Lau Yiu Long* [1980] AC 614 at 635C-E, extracted at SS[96]. That test does not reflect the modern law. It looks only to the consent of the victim and does not consider the wider context. It reflects the old "*coercion of will*" theory of duress that has been rejected (*Crescendo Management Pty Ltd v Westpac Banking Corp* (1988) 19 NSWLR 40 at 45G per McHugh JA; *The Evia Luck* at 165-166 per Lord Goff of Chievely).

63. The questions whether pressure has been applied, whether it is illegitimate and whether it induced the victim to act are not at large. They are informed by authority, which supports the Court of Appeal's reasons and conclusion. For the following reasons the Court of Appeal correctly held that the Sellers applied economic duress to Verve, and that Verve is entitled to restitution of the additional amounts paid under the short term gas supply agreements.

Illegitimacy

64. The wrongdoing, or threatened wrongdoing, by the party applying the pressure is the determinative fact in assessing whether pressure is illegitimate. That is consistent with the

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[29] *Smith v William Charlick Ltd* (1924) 34 CLR 38 at 56 (Isaacs J); *The Universe Sentinel* [1983] 1 AC 366 at 400; *R v Her Majesty's Attorney-General for England and Wales* [2003] UKPC 22 [2004] 2 NZLR 577 at [15] (Lord Hoffmann).

[30] See, eg, *The Evia Luck* [1992] 2 AC 152 at 165 (Lord Goff), and the same approach was applied earlier in *The Universe Sentinel* [1983] 1 AC 366 at 384 (Lord Diplock), 400 (Lord Scarman).

jurisprudential foundation for recognition of duress as a vitiating factor. As Isaacs J said in *Smith v William Charlick Ltd* (1924) 34 CLR 38 at 56:

> *"Compulsion" in relation to payment of which refund is sought, and whether it is variously called "coercion", "extortion", "exaction", or "force", includes every species of duress or conduct analogous to duress 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..."*

65. Likewise, in *R v Her Majesty's Attorney-General* [2004] 2 NZLR 577 Lord Hoffman said at [16]:

> *The legitimacy of the pressure must be examined from two aspects: first, the nature of the pressure and secondly, the nature of the demand which the pressure is applied to support.... Generally speaking, the threat of any form of unlawful action will be regarded as illegitimate.*

66. For example, it has long been recognised that where a mortgagee is contractually bound to discharge a mortgage but demands a further payment to which it is not entitled, the payment is taken to have been made under compulsion.[31] That is because the demand, whether explicitly or implicitly, constitutes a foreshadowed or threatened breach of the promise to discharge the mortgage on repayment. Likewise, an actual or threatened breach of contract is a species of unlawful conduct that is relevantly illegitimate. In *Re Hooper & Grass' Contract* [1949] VLR 269, Fullagar J said at 272:

> *What the vendor was doing was ... threatening to withhold that to which the other party was legally entitled unless he would pay a price which he had no right to receive. In such a case I think the true rule of law is that a payment under protest is not a voluntary payment, whatever the position may be where the payment is not made under protest. ... In cases of this type the withholding of another's legal right is, I think, itself treated as a 'practical compulsion'.*

67. The existence of a threatened breach of contract is the critical feature that distinguishes the decisions of this Court in *Smith v William Charlick Ltd* (1924) 34 CLR 38 and *White Rose Flour Milling Co Pty Ltd v Australian Wheat Board* (1945) 18 ALJ 324. In both cases the Wheat Board, which held a monopoly on the sale of grain, demanded and received payments from a miller upon a threat, in essence, not to supply further grain. In *Smith v William Charlick*, the Court held that there was no compulsion because the Wheat Board had no obligation to supply grain in the future and so was within its rights to threaten not to do so (at 51, 56, 61, 68). In particular, Isaacs J held that refusal to supply the wheat without payment was not compulsion "*in the absence of some special relation*" (at 56). Likewise, the absence of a contractual obligation was determinative for Rich J (at 68). By contrast, in *White Rose Flour Milling*, the

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[31] *J & S Holdings Pty Ltd v NRMA Insurance Ltd* (1982) 41 ALR 539 at 555 (Blackburn, Deane and Ellicott JJ); *Fraser v Pendlebury* (1861) 31 LJCP 1; *Close v Phipps* (1844) 7 M & G 586 at 590; 135 ER 236 at 238.

Wheat Board was contractually bound to supply further grain to the miller. It was on that basis that Rich J, sitting alone, distinguished *Smith v William Charlick*, and held that the payments made were not relevantly voluntary (at 326-7).

68. The decision in *White Rose Flour Milling* is consistent with earlier authority of this Court in *Furphy v Nixon* (1925) 37 CLR 161, where a vendor of land refused to complete under the contract for sale unless further payments were made in addition to those required under the contract. Knox CJ agreed (at 169) with reasons of the trial judge, Long-Innes J, who distinguished *Smith v William Charwick* on the basis that in that case the Wheat Board had no obligation to supply wheat in future, whereas in *Nixon v Furphy* (1925) 25 SR (NSW) 151 at 159-60:

> *...there was not only a threat of an unauthorised interference with the property and legal rights of the plaintiff, but the money was paid in order to have that done which the defendants were already legally bound to do.*

69. The language of '*interference with property or legal rights*' is reflective of the development of economic duress out of duress of goods, where the law treats as illegitimate any unlawful threat to detain goods unless a payment is made or a further contract entered into.[32] The development of economic duress out of duress of goods is also consistent with this Court's recognition that the law places high store on compliance with contractual obligations, such that contractual rights are quasi-proprietary in character (*Zhu v Treasurer of New South Wales* (2004) 218 CLR 530 at [128]-[130], [159] per curiam).

70. In this way, an interference with the contractual rights of another, by an actual or threatened breach, is seen at law to be illegitimate in the same way as an unlawful interference with property rights. The same reasoning was endorsed by the Full Court of New South Wales in *TA Sundell & Sons Pty Ltd v Emm Yannoulatos (Overseas) Pty Ltd* (1956) 56 SR (NSW) 323 at 328 and by Isaacs J in *Smith v William Charlick* (1924) 34 CLR 38 at 56. More recently, that same principle was described by Priestley JA (Clarke and Handley JJA agreeing on this point) as reflecting the course of authority in New South Wales (*Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd* (1991) 22 NSWLR 298 at 302B–E), and was applied by Mocatta J in *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1978] 1 QB 705 at 718B-D, 719D-E.

71. These authorities establish the principle that an actual or threatened breach of contract *simpliciter* is relevantly illegitimate for the purposes of the law of duress. That is consistent with (a) the high store placed upon compliance with contractual promises and (b) the

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[32] Mitchell, Mitchell and Watterson, *Goff & Jones: The Law of Unjust Enrichment* (8th ed, 2011, Thomson Reuters) at 305-309.

underlying rationale of duress identified earlier in these submissions. Of course it does not follow, as the Sellers' submissions suggest (at SS[88]), that every actual or threatened breach of contract has the consequence that a subsequent payment made or contract entered into between the parties is therefore susceptible to avoidance for duress. The other elements of duress must also be present including, critically, the effective application of pressure. The question of the legitimacy of the pressure is distinct from the existence and effect of the pressure (*The Universe Sentinel* [1983] 1 AC 366 at 400A-B).

Illegitimacy and Good Faith

72. The Court should not accept the Sellers' submission that, in the present case, good faith is relevant to determining whether the pressure is illegitimate (SS[99] to [106]) for the following reasons.

73. *First*, as the analysis above demonstrates, for the purposes of duress an actual or threatened breach of contract is relevantly illegitimate. As a matter of logic, the good faith of the party in breach has no relevance because sufficient illegitimacy arises from the interference with the pre-existing legal right. That logical position was articulated expressly in *Re Hooper & Grass' Contract* [1949] VLR 269, where Fullagar J at 271 held that "*It makes no difference that the vendor honestly believed that he was legally entitled in any case to the price which he asked*". To a similar effect, Handley JA (Beazley and Tobias JJA agreeing) in *Spira v Commonwealth Bank of Australia* [2003] NSWCA 180 (2003) 57 NSWLR 544 at [73] rejected the proposition that a person exerting pressure must know it to be unlawful. As in other areas of the law, "*ignorance of the law should be no excuse*" (*Spira* at [73]). Similarly, both as a matter of policy and of logic a defendant with an obtuse or idiosyncratic understanding of that defendant's obligations ought not be rewarded.

74. *Second*, coherence is important. A *bona fide* state of mind alters neither the fact of breach of contract nor that the breach of contract is wrongful or illegitimate conduct. Similarly the defence of justification, to the tort of unlawful interference with contractual rights, depends on the existence of a superior right, not a *bona fide* belief (*Zhu v Treasurer* at [144]). Further, in the analogous right to restitution of moneys paid under a demand made *colore officii* it is not necessary to show that the defendant acted in bad faith or knowingly unlawfully (*Mason v State of New South Wales* (1959) 102 CLR 108 at 141 per Windeyer J[33]). Recognising *bona fide* conduct as an exception to duress constituted by a threatened or actual breach of contract is

[33] That is demonstrated by the "*Woolwich principle*" where tax charged without parliamentary authority is recoverable by the taxpayer (as recently slightly restated in *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2012] UKSC 19 [2012] 2 AC 337). The point is that the right to recovery is not dependent on the State knowing that the tax was beyond power.

to detract from a coherent application of the legal norms recognised by the law of contract, unlawful interference with contractual rights and restitution.

75. *Third*, the allocation of rights is appropriately governed by the fact of wrongful conduct, not the belief of the person acting or threatening to act wrongfully. That can be demonstrated by the facts of this case. The Sellers owed Verve an obligation to use "*reasonable endeavours*" to supply SMDQ. That contractual promise was accepted as part of complex bundle of rights and obligations conferred by a long term contract. The Sellers made the choice not to perform that obligation, for the purpose of making a profit in the short term. They knew that Verve believed that the "*reasonable endeavours*" obligation meant that the Sellers were required to supply SMDQ. The Sellers took or accepted the risk that their belief that they were entitled to act as they did was wrong. The appropriate allocation of rights in that circumstance is to give primacy to Verve's contractual rights, which the Sellers took the risk of wrongfully not performing.

76. *Fourth*, there is no bright line between a defendant that knows its obligations and one that does not. If the defendant's knowledge that the defendant's foreshadowed conduct is wrongful were a necessary component of duress, what is the position of a defendant which is told by the innocent party that the conduct is wrongful (as in effect happened), or of a defendant who refuses (or unreasonably fails) to seek legal advice on a complex question of construction of a contract? The existence of gradations of notice or knowledge is a further powerful reason to reject the Sellers' argument.

77. That is not to say that good faith plays no role assessing illegitimacy in any circumstance. Lawful conduct can, in appropriate circumstances, amount to illegitimate pressure (eg, *Westpac Banking Corporation v Cockerill* (1998) 152 ALR 267 at 289 per Kiefel J).[34] Good faith may often be relevant where it is asserted that lawful conduct amounts to illegitimate pressure (*CTN Cash & Carry v Gallaher* [1994] 4 All ER 714). This is because, when conduct is lawful, whether the conduct is in good faith or not informs the character, that is the legitimacy, of the conduct.

78. The authorities relied upon by the Sellers do not support the relevance of the Sellers' good faith in the present circumstances. *CTN Cash & Carry v Gallaher* [1994] 4 All ER 714 was a case where lawful conduct was asserted to amount to illegitimate pressure, and so good faith was an appropriate consideration. Murphy JA was correct to distinguish the case on this basis (CA[198]). *D&C Builders Ltd v Rees* [1966] 2 QB 617 concerned whether a true accord and

[34] See further Greig and Davis, *The Law of Contract* (1989, LBC) at 956-8.

satisfaction had been reached in settlement of a dispute. The reference by Dankwerts LJ at 626E to the fact that the defendants "*really behaved very badly*" was made as part of his Lordship's consideration of the genuineness of the accord, and not the illegitimacy of any pressure. The Sellers' submissions at SS[104] regarding the judgment of Gummow and Hayne JJ in *DPP (Vic) v Le* (2007) 232 CLR 562 at 576 that a '*practical benefit*' can amount to adequate consideration go nowhere. The adequacy of consideration to support the existence of a contract is a different juridical concept to the legitimacy of the pressure in the context of which the contract was formed.

79. The Sellers also rely on *DSND Subsea Ltd v Petroleum Geo-Services ASA* [2000] BLR 530 at 545-6, where Dyson J said *obiter* that good faith was relevant in circumstances where the party in breach was itself in a very difficult situation and was in breach because of that difficulty. Three points arise. *First*, if otherwise correct, that situation is clearly distinguishable from the present facts, where the Sellers were in no position of disadvantage. In the present case the Sellers saw an advantage and they pressed it, believing that they were entitled to do so (CA[200]; de la Fuente T252.6-252.7). The good faith upon which the Sellers rely is based only on the fact that they did not believe their actions breached the GSA. *Second*, for the reasons identified, the suggestion that the fact that a party was in breach, in effect through no fault of its own, informs the legitimacy of its unlawful conduct is wrong[35]. The *obiter* suggestion in *DSND Subsea* should not be adopted. *Third*, at least usually, a party in a difficult position will be unable to exert sufficient pressure to be a significant cause in the other party agreeing to a new contract or making a payment (an analysis consistent with *Huyton SA v Peter Cremer GmbH & Co* at 636). In the unusual circumstance where a party in breach because of being in a difficult position can exert sufficient pressure, there is no adequate reason why that party's conduct should not amount to economic duress.

Pressure

80. The force of the pressure necessary to establish economic duress must be sufficient to affect the conduct of a reasonable businessperson. The test has been stated in a number of relevantly equivalent ways: "*sufficient to influence the conduct of a prudent business man*" (Kitto J approving that phrase in *Robertson v Frank Bros Co*, (1889) 132 US 17 at 23)[36], "*sufficient to alarm a reasonable man in the position of the purchasers and thereby to coerce his will*" (Isaacs J)[37] and "*the*

[35] Albeit *obiter* and expressed cautiously, *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd's Rep 620 at 637 per Mance J is inconsistent with the Sellers' contention and with *DSND Subsea*.
[36] *Mason v New South Wales* (1959) 102 CLR 108 at 126
[37] *Furphy v Nixon* (1925) 37 CLR 161 at 172.

victim's intentional submission arising from the realisation that there is no other practical choice open to him".[38]

81. The facts in the present case point very clearly in one direction. Verve was bound by its existing contractual obligations and statutory obligations as supplier of last resort to ensure that electricity supply to the SWIS was maintained. In the circumstances recited earlier in these submissions, Verve could not meet its obligations without obtaining a volume of gas equivalent to SMDQ. The Sellers had a temporary monopoly. McLure P was correct to conclude, in those circumstances, that "*to meet its obligations, Verve's only economically practical alternative was to obtain gas from the Sellers*" (CA[11], also CA[29], [183]).

10 82. In answer to that proposition the Sellers advance two arguments. The first is that Verve could have applied for an injunction. The second is to the effect that the Sellers' conduct did not amount to pressure. Both arguments are (a) inconsistent with the findings of fact made by the Court of Appeal and (b) are wrong in principle.

83. *Availability of an Injunction*: The Sellers' submission that Verve could have obtained injunctive relief (SS[97]) should be rejected.

84. Murphy JA was correct to find that there was no "*realistic prospect*" of obtaining an interlocutory mandatory injunction (CA[183]). That is a finding of fact made by an experienced judge familiar with the practice in Western Australia. There is no adequate basis to interfere in that finding.

20 85. The authorities make clear that, in circumstances of pressure involving a need to act promptly, the possibility of court proceedings will not normally be a practical alternative. In *Mason v New South Wales* (1959) 102 CLR 108 Windeyer J said at 145:

> *And so generally in an action at law for the recovery of money illegally exacted by duress of property, a payment will be considered as made under compulsion notwithstanding that the plaintiff might have avoided having to make it by resorting to equity for an injunction.*

86. To similar effect, Kitto J at 129 held that recourse to the Courts would not have been a practical alternative because "*the loss to be anticipated ... was so serious that any prudent person in their position must have felt strongly impelled to choose the lesser evil*". It was necessary to have regard to "*practical affairs*" (at 125).

30 87. Likewise, in *Carillion Construction Ltd v Felix (UK) Ltd* [2001] BLR 1 at 9 Dyson J held that it was "*impossible to say with any confidence*" that the Court would grant a mandatory injunction requiring the defendants to complete cladding works. His Lordship considered it significant

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[38] *The Universe Sentinel* [1983] 1 AC 366 at 400 (Lord Scarman).

that the matter was one of urgency and even expedited proceedings would have taken weeks, perhaps months, to come before the Court (this shows why duress can rarely be demonstrated in compromise cases, because the compromise is rarely under time pressure).

88. Those principles apply with particular force to the present facts. Verve's only possible legal remedy would have been to apply to a Court for a mandatory injunction to enforce the Sellers' obligations to use their "*reasonable endeavours*" and to supply SMDQ. As Murphy JA held, the success of an application for an injunction of that character was not a realistic prospect. An injunction application could not be prepared and heard on 4 June 2008, and Verve needed the gas immediately. It could not risk any delay. It is doubtful that there would have been time, in the days following 4 June 2008, to gather the evidence about the availability of gas or the supply process needed to show, to the level of a serious question to be tried, breach of the "*reasonable endeavours*" obligation (particularly as an injunction would in effect resolve the proceedings). That evidence was, in large measure, in the hands of the Sellers. It could also be expected that the Court would have been unwilling to make mandatory orders requiring the use of "*best endeavours*". The course of proceedings below demonstrates further the improbability of an interlocutory injunction or an expedited hearing. The trial was heard over 4 days, with a large volume of technical evidence tendered (as is clear from the trial judgment much of the dispute about the facts resolved immediately before and during the course of the trial). That material could neither be prepared nor presented on an application for an urgent injunction. Questions of the balance of convenience would also have been debated. The Court of Appeal, with its knowledge of West Australian practice, was correct to hold that there was no realistic prospect of an injunction being obtained.

89. In those circumstances, the possibility of applying for an injunction does not diminish the pressure applied, or the effect of that pressure on Verve.

90. *Application of illegitimate pressure by Sellers*: The Sellers submit (SS[79]) that they did not "*apply*" pressure to Verve because they did not "*require*" Verve to enter the short term agreements; they believed in good faith that they were not obliged to make SMDQ available; Verve chose to enter the agreements freely; Verve engaged in an open tender process, acted commercially and agreed to pay an appropriate price that reflected market conditions. The Sellers submit (SS[81]) that McLure P was wrong to decide the matter based upon the known consequences of the Seller's conduct being so dramatic that threats and demands were superfluous (CA[29]). McLure P is said to have erred because the absence of choice by Verve did not

convert the Sellers' breach into conduct that involved undue pressure by the Sellers upon Verve (SS[81]).

91. The question of the Sellers' good faith has been addressed, and logically does not inform the question of whether pressure was applied. The Sellers' submissions to the effect that Verve chose to participate in the tender process and enter into the short term agreements overlooks (a) the findings of fact referred to earlier in these submissions that Verve had no realistic alternative but to buy gas from the Sellers and (b) that the overborne will theory of duress has been rejected. The real issue raised by the Sellers is whether the Sellers applied pressure, in the circumstances, by informing Verve that they would not supply SMDQ but simultaneously offering the same volume and quality of gas at a number of multiples of the SMDQ price (Ms Clare's statement [36]-[40], de la Fuente T250.3-250.7).

92. The Court of Appeal was correct to hold that there was no need for the Sellers to make what was in terms a threat. Where the consequences are clear, there is no need for a threat to be made (*Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd* (1991) 22 NSWLR 298 at 303B). Thus, in *Saginaw v Consumers Power Co*, 8 NW 2d 149 (1943) Butzel J held that consumers of gas who were asked to make excessive payments to public utilities did not have to show that any threat was made. That was because the "*latent threat that the gas company would shut off the gas was constantly before the consumer*" (at 153).

93. It is not the case that the pressure applied to Verve was simply one of external circumstances caused by the fire at Apache's plant. If the Sellers had performed their promise under the GSA to use "*reasonable endeavours*" to supply SMDQ, Verve would have been under no pressure. It was the statement that the Sellers would not supply SMDQ which, in the circumstances, constituted the pressure.

94. The Court should reject the Sellers' submission to the effect that an absence of choice on the part of Verve did not convert the Sellers' breach into the exertion of undue pressure by the Sellers on Verve (SS[81]). That is precisely the effect that it had, and it is that absence of real choice which is a reason why economic duress is a vitiating factor creating a right to restitution. The authorities show that a threat to breach a contract unless further demands are met, made at a time of pressure, is a canonical case of economic duress.[39] To re-state the criteria by contending that the Sellers did not "*require*" Verve to enter into the short term gas

[39] See, eg: *Furphy v Nixon* (1925) 37 CLR 161; *Re Hooper & Grass' Contract* [1949] VLR 269; *TA Sundell & Sons Pty Ltd v Emm Yannoulatos (Overseas) Pty Ltd* [1956] SR (NSW) 323; *White Rose Flour Milling Co Pty Ltd v Australian Wheat Board* (1945) 18 ALJ 324; *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1978] 1 QB 705; *B & S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419; *Kolmar Group AG v Traxpo Enterprises Pvt Limited* [2010] 2 Lloyd's Rep 655.

supply agreements, as the Sellers do, is to mis-state those criteria. It is the illegitimacy and the pressure that is relevant.

95. The Sellers conduct is to be considered as a whole, and in the context in which it occurred. That involves an analysis of both the statement (whether or not in terms of a threat) and the demand (*The Universe Sentinel* [1983] 1 AC 366 at 401C). In circumstances where Verve had a pressing need for gas above MDQ which only the Sellers could supply, the Sellers foreshadowed breach of their contractual obligations to supply SMDQ. Simultaneously, the Sellers then offered the same volume of gas at many times the price. They then later invited Verve to participate in a tender process in which, in the circumstances, Verve had no choice but to (a) participate and (b) offer to buy gas at a price certain of being successful. In that way, illegitimate pressure was applied by the Sellers which forced Verve into each of the short term gas supply agreements. That pressure was a "*significant cause*"[40] (it was the sole cause) of Verve's decision to enter the short term gas supply agreements.

96. The Sellers' submissions involve a proposition amounting to formalism. In the commercial world an express threat is not required to exert pressure. A sophisticated contract breaker can and is likely to use language which is not a blunt threat, but which has the same effect as an express threat. Whether there has been economic duress is not determined by looking to whether the words used were a threat (or expressed as being to "*require*"), but to the effect of the words used. The Court of Appeal was correct to reject the Sellers' submission.

C. Whether rescission is a condition on the availability of restitution (Verve's appeal)

97. The Court of Appeal was wrong to hold that Verve was required to rescind the short term agreements in order to be entitled to the remedy of restitution (CA[33], [202]). Rescission is not required before restitution of money paid under a wholly executed contract is available.

98. The Sellers support the Court of Appeal's reasoning by contending that the Court of Appeal's decision ought to be upheld by reference to the historical development of the causes of action of money had and received, on the one hand, and breach of contract on the other hand. It is contended that, by reason of this historical development, restitution is not available for monies paid under a contract that remains on foot.

99. The Court of Appeal erred, and the Sellers' submissions should be rejected, for the reasons that follow.

100. *First*, rescission of a contract is not now required before a payment under that contract is recoverable as moneys had and received. The obligation to repay the money had and

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[40] *The Evia Luck* [1992] 2 AC 152 at 165.

received arises at law because the Sellers have been unjustly enriched (*Roxborough v Rothmans of Pall Mall Australia Limited* [2001] HCA 68 (2001) 208 CLR 516 at [62]-[63] per Gummow J, *Equuscorp v Haxton* at [30]). The Sellers have been enriched by receipt of the money which exceeded those amounts payable under the GSA. The enrichment of the Sellers is unjust because the Sellers procured Verve's entry into the short term contracts, and consequently the payments by Verve, by economic duress (*David Securities v Commonwealth Bank* at 379 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ; *Equuscorp v Haxton* at [30]). It is the imposition and effect of that economic duress that renders retention of the payments unjust. The presence of a wholly executed contract has no effect on retention by the Sellers of the payments being unjust.

101. That the short term contracts are voidable is not to the point. Rescission is a remedy, as is restitution, available where one party has entered into a contract and made payments because of the other party's economic duress. The existence of an alternative remedy (rescission) does not have the consequence that the alternative remedy is a condition to relief.

102. *Second*, the Court of Appeal's conclusion that, to obtain a remedy of restitution, the contract under which the money was paid must first be rescinded is inconsistent with the judgment of this Court in *Roxborough*. In *Roxborough* this Court held that restitution was available for a partial failure of consideration (a) where the contracts under which the payments had been made had not been rescinded and (b) because that part of the consideration which had wholly failed was, on the proper construction of those contracts, severable (at [13], [16]-[19], [21] per Gleeson CJ, Gaudron and Hayne JJ, at [43]-[45], [55]-[61], [65] and [105]-[109] per Gummow J). In *Roxborough* the Court expressly found that the remedy in restitution was a general law remedy, recourse to which was not denied by the contracts between the parties (at [21] per Gleeson CJ, Gaudron and Hayne JJ, [58] per Gummow J). The Court held the remedy to be available although the contracts in *Roxborough* had not been rescinded.

103. The Court of Appeal (CA[206]) distinguished *Roxborough* on the basis that the right to restitution in *Roxborough* arose because of a partial failure of consideration and not because of economic duress. That is not a reason to distinguish *Roxborough*. The Court of Appeal did not explain why rescission was required where the contract was induced by economic duress, nor why economic duress, being the factor which made retention of the moneys unjust, had the consequence that *Roxborough* was distinguishable. Contrary to the Court of Appeal's reasoning, it is wrong in principle to draw distinctions based upon how the enrichment was

gained (*David Securities* at 375 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ). The Court of Appeal erred in distinguishing *Roxborough*.

104. *Roxborough* is also fatal to the Sellers' reliance on authorities based on the historical forms of action. The result in that case is inconsistent with the right being governed by historical forms of action. That is because the part payments were made under contracts that had not been rescinded. The fact that certain obligations under the contracts could be regarded "*severable*" (at [21], per Gleeson CJ, Gaudron and Hayne JJ) or in a form where payments made could be "*broken up*" (at [109] per Gummow J), did not alter the continued existence of the underlying contracts. But that did not matter. That is because "*to permit recovery of the tax component would not result in confusion between rights of compensation and restitution*" (at [22] per Gleeson CJ, Gaudron and Hayne JJ). Likewise, Gummow J saw the availability of the remedy as a logical development of the "*gap filling and auxiliary role of restitutionary remedies*" (at [75]).

105. If the forms of action once stood in the way of recovery in restitution in a case such as the present, they no longer do so. As Deane and Dawson JJ said in *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 376:

> *"the artificial constraints imposed by the old forms of action can, unless they reflect coherent principle, be disregarded where they impede the principled enunciation and development of the law. In particular, the notions of good conscience, which both the common law and equity recognized as the underlying rationale of the law of unjust enrichment, now dictate that, in applying the relevant doctrines of law and equity, regard be had to matters of substance rather than technical form."*

106. The principled and coherent development of the law requires that Verve be entitled to restitution of the wholly executed short term gas supply agreements without any need to rescind. It is required to ensure coherence in the application of the principles of duress across the law of contract and unjust enrichment, and because the supposed requirement serves no purpose. The need for coherence in the operation of the principles relating to duress has been long recognised. Thus, it was once the case that duress was not available as a defence to an executory contract but could be relied upon for the recovery of money paid.[41] Professor Atiyah has examined the historical reasons for that "*absurd result*".[42] The distinction has now been swept away.[43] Similarly there is no adequate reason why the right to restitution should depend, perhaps fortuitously, on the existence of a right to rescind. Likewise, in *Barton v Armstrong* [1976] AC 104, the members of the Privy Council were guided by the need

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[41] See *Skeate v Beale* (1841) 11 AD & E 983; 113 ER 690.
[42] PS Atiyah, *The Rise and Fall of Freedom of Contract* (1979, Clarendon Press) at 437-8.
[43] *The Siboen and the Sibotre* [1976] 1 Lloyd's Rep 293 at 335; *Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd* (1991) 22 NSWLR 298 at 306B-D.

for coherence between the law of duress and the law of undue influence (at 118D-F per Lord Cross, Lord Kilbrandon and Sir Garfield Barwick; at 121D-F per Lord Wilberforce and Lord Simon). In each of these cases, the law of contract evolved to ensure the coherent and just application of principles of duress and to give content to substance rather than technical form.

107. *Third*, there is no juridical reason to require rescission of a wholly executed contract (assuming that rescission of the wholly executed contracts is possible) as a condition to the availability of relief. The remedy of restitution is available because of the factor which makes retention of the money unjust, in this case economic duress. As *Roxborough* demonstrates, that obligation arises independently of the contract under which the payment is made. That is consistent with the position in the United States.[44]

108. The absence of any apparent reason for imposing rescission as a condition to relief is reinforced because the contracts are wholly executed. In the present circumstances the short term gas supply agreements were completely performed by the Sellers delivering the contracted volume of gas and by Verve paying for that gas. Rescission could have no apparent material effect on the rights of the parties in relation to the relief sought. This is a case where recovery "*would not result in confusion between rights of compensation and restitution*".[45]

109. The common law of Australia may require rescission of an underlying contract before proprietary relief is available. The distinction drawn is between proprietary remedies and *in personam* remedies. For proprietary relief, rescission is (or can be) required to establish the time of the re-vesting of the proprietary interest, but in the case of *in personam* remedies there is no requirement for rescission (*Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6 (2012) 200 FCR 296 at [277]). The *in personam* remedy sought by Verve does not require rescission of the short term contracts.

110. *Fourth*, there is a real question whether rescission was available to Verve, as the Sellers accept (SS[152]). That is because *restitutio in integrum* cannot be given, as will often be so where economic duress is successfully exerted (the economic duress cases demonstrate that often the reason why economic duress is successfully exerted is that the market for a commodity has moved rapidly or unexpectedly and the party subject to the duress required the commodity to consume or on sell or otherwise use). In this case Verve cannot return the

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[44] See American Law Institute, "*Restatement (Third) of Restitution and Unjust Enrichment*" (2011) §14(2): "*A transfer induced by duress is subject to rescission* **and** *restitution. The transferee is liable in restitution as necessary to avoid unjust enrichment*" (emphasis added), and which is developed further in Comment (a): "*When a claimant has been induced by duress to enter a contract, the avoidance of any executory obligation is purely a matter of contract law; while the recovery of a performance involves a claim in restitution*".

[45] *Roxborough v Rothmans of Pall Mall Australia Limited* (2001) 208 CLR 516 at [21].

gas to the Sellers as it has consumed the gas in generating electricity. The impossibility of *restitutio in integrum* because the subject matter cannot be restored is not uncommon. The remedial solution to that fact is that restitution is a remedy available instead of rescission where, as here, rescission is (or may be) unavailable because the subject matter (for example) has been destroyed (Edelman & Bant "*Unjust Enrichment in Australia*" at 23).

111. To impose on relief a condition of rescission with *restitutio in integrum* either has the consequence that whether relief is available is determined arbitrarily, or demonstrates that to require rescission has no practical or relevant effect at law. In this case, if *restitutio in integrum* requires the return of the gas or an equivalent volume of gas, that will be impossible as the gas has been consumed or, if different gas could be returned, involve the inutile exercise of Verve buying gas from the Sellers and giving it back (which is theoretical only as the gas cannot physically be taken and returned). If *restitutio in integrum* can be made by an accounting adjustment (as McLure P held CA[33]), there is an issue as to the time when the gas is valued. If it is valued at the time the gas was acquired, then Verve's remedy is illusory, as the market value was the price paid (as will often be the case where one party to a contract engages in economic duress). If the accounting is at the price under the GSA, then the requirement of rescission and *restitutio in integrum* is without utility as it results in the same adjustment to the amount to be paid to Verve as does restitution of the excess payment. If at some other value, the remedy for duress is rendered arbitrary as depending on movements in the market and the time of rescission. The policy of the law is not to impose potentially arbitrary restrictions on relief, as least without good reason. There is no good reason to restrict restitution to cases in which the contract under which the relevant payment was made can be and has been rescinded.

112. The result for which the Sellers contend has demonstrable flaws. The Sellers point to reasons why rescission may be unavailable, including that the rights of a third party may be effected by rescission. There is no adequate reason why a plaintiff's right to restitution should depend on the accident or expedient that rescission be unavailable because of the rights of an innocent third party. Restitution for economic duress is an *in personam* remedy, requiring the enriched party to repay the money value of the benefit received. That remedy only potentially affects third parties if rescission is required. The concern identified by the Sellers demonstrates why conditioning relief on obtaining rescission is wrong, as it adds unnecessary restrictions on the availability of the remedy. Similarly, imposition of a condition that the contract be rescinded does not engage with all circumstances in which duress may operate. Assume a circumstance where the innocent party has a right to terminate an existing

contract. The defendant exercises duress which causes the innocent party not to exercise that right. The contract is not voidable, and the consequence of the Sellers' submission is that the innocent party who has made payments under the contract cannot recover.

113. *Fifth*, if rescission requires merely an accounting exercise, then there is no utility to rescission. Calculation of the quantum of restitution is straightforward, and does not require rescission. Whether Verve's submission or the Sellers' submission as to the principle to be applied in determining quantum is correct, the quantum is readily calculated. To make rescission a formal requirement of relief in such a case is thus to elevate form over substance. It makes the incantation of the words "*I rescind*" a requirement of relief. Of course, in cases where a contract is wholly executory or part performed at the time that the pressure comes to an end, an election to rescind may be important as questions of election or affirmation will arise.[46] But a case such as the present, in which the contract was wholly executed before the pressure was relieved, should be treated no differently to a case of a payment made in circumstances which vitiate the basis for the payment.

114. *Sixth*, the Court of Appeal referred to a series of cases on which it relied, and on which the Sellers rely, as supporting the conclusion that rescission was a condition to relief (CA[201]). Those authorities do not provide a sufficient foundation for the Court of Appeal's conclusion.

115. Some of the English authorities to which the Court of Appeal referred are to the effect that rescission is required before a remedy is available for duress. The only appellate authority which may support the Court of Appeal's conclusion is *Dimskal Shipping Co SA v International Transport Workers Federation* [1992] 2 AC 152 at 165, however (a) the significance of that judgment may be doubted as the relevant passage is in a paragraph in the judgment commencing "*It was common ground between the parties...*" and (b) the contracts were not wholly executed see [1992] 2 AC at 162-3, also the trial judgment [1989] 1 Lloyds Rep 166 at 169-170. None of the English cases referred to by the Court of Appeal explains the reason why rescission is required, but instead all either assume or assert the proposition. On analysis the cases generally involve either an election or an executory contract. The exception is *Einmont Overseas AG v Jugotanker Zadar (The Olib)* [1991] 2 Lloyd's Rep 108 at 118, a first instance judgment in which the proposition is *obiter*, unexplained and wrong.

116. *Pan Ocean Shipping Limited v Creditcorp* [1994] 1 WLR 161 at 164 does not support the Court of Appeal's conclusion. The claim in restitution failed in *Pan Ocean* because there was an express term of the charter party which dealt with the charterer's right to repayment

[46] Such was the case in *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1978] 1 QB 705.

(either because the charter party necessarily displaced the remedy or the promise to repay had the consequence that there was not a total failure of consideration as alleged). That was in the context in which the right to the payments had been assigned to a creditor of the shipowner, and the payments made to the creditor. As between the charterer and the creditor, the creditor had not been unjustly enriched. The case also involved a contract which was not wholly executed (the charter party had been terminated on acceptance of the owner's repudiation before it was wholly performed).

117. To the extent that the English cases support the Court of Appeal's reasoning those cases are inconsistent with *Roxborough*, *Equuscorp v Haxton* and *David Securities* and do not state the law of Australia.

118. The Australian cases referred to by the Court of Appeal are all cases in which the claim was upon a *quantum meruit* for work done or services performed in the circumstance where there was a contract (or contracts) which governed the parties' rights and obligations in relation to those or related works or services. In that circumstance it is correct that generally there is no room for a *quantum meruit* remedy because the contract governs the right to payment (*Lumbers v W Cook Builders Pty Limited (in liq)* [2008] HCA 27 (2008) 232 CLR 635 at [79]-[80] per Gummow, Hayne, Crennan and Keifel JJ). Those cases have no application to the present circumstances where the factor making retention of the payment unjust relates to entry into the contract.

Amount

119. The Sellers' submission to the effect that there is difficulty in calculating the quantum of an order for restitution should be rejected. The issue arises because the Sellers supplied gas in different proportions under the short term agreements compared to their obligation under the GSA. The principled method of calculation must be identified, but once that decision is made there is no difficulty. Rescission is irrelevant to that issue, which is a question of the assessment of a money sum payable.

120. The first method of assessment is to calculate the amount each Seller is required to disgorge as the excess received by each Seller under the short term gas supply agreements over the amount payable had that Seller sold that volume of gas at the contracted SMDQ price (ie excess price per GJ of gas multiplied by volume supplied by that Seller). The second method is to calculate the excess received by each Seller under the short term gas supply agreements compared to what that Seller would have received under the GSA (ie amount paid to the Seller under the short term gas supply agreements less the amount which would have been paid to that Seller had the gas supplied been supplied under the GSA)

121. Contrary to the Sellers' submissions (at SS[154]), the first method identified is appropriate. Restitution is a remedy that requires a defendant to disgorge the unjust enrichment received. Each Seller's gain is the amount received for the gas that it supplied in excess of the amount that was due to it for that gas supplied under the GSA. All of the necessary integers for identifying the gain are known: the GSA price is known, the higher price under the short term gas supply agreements is known, and the amount paid to each Seller at that higher price is known. The Sellers' private arrangements, which may well include contractual or equitable rights of contribution, indemnity or adjustment, ought not affect Verve's rights. The private arrangements between the Sellers do not change the fact that each Seller sold the relevant volume of gas to Verve at a price which was a number of multiples of the price at which that Seller was required to sell to Verve, and have retained the benefit of doing so.

122. The fact that some of the Sellers supplied different proportions of gas under the GSA and short term gas supply agreements has no sufficient connection with the assessment of the gain that they actually made. The Sellers wrongly suggest a need 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*" (at SS[155]). There is no such need. That is because it is wrong to characterise the right to restitution as flowing, in a remedial sense, from a "*breach of the GSA*" as the Sellers contend. To do so is to confuse restitution for duress with damages for breach. The relevant remedy flows from the Sellers' enrichment, which is readily quantified. The Sellers' proposition is wrong for a further reason. The threatened or foreshadowed refusal to supply which constituted the duress was not itself a breach of contract. The conduct constituting the duress and the conduct constituting the breach were different (breach was performing the threat), and have different remedial consequences.

123. The numerical or monetary consequence of the second method of calculation are clear. If the amount cannot be agreed, the question of calculation should be remitted to the Court of Appeal.

D. Proper Construction of cl 22.7(c) and 22.9 (Sellers' notice of contention ground 3)

The Issue

124. Clauses 22.7(c) and 22.9 are clauses which limit the Sellers' liability to Verve in the circumstances identified in those clauses. The issue of construction raised by the Sellers' notice of contention is whether the clauses limit the Sellers' liability to make restitution to the extent the Sellers have been unjustly enriched by reason of the economic duress exercised by

the Sellers. Each clause is engaged if, but only if, that liability is "*in respect of a failure to use reasonable endeavours*" (cl 22.7(c)) or "*in respect of a breach*" of the GSA (cl 22.9).

Principles

125. Each of cl 22.7(c) and 22.9 is to be construed "*according to its natural meaning, read in light of the contract as a whole, thereby giving due weight to the context in which the clause appears including the nature and object of the contract, and, where appropriate, construing the clause contra proferentem in the case of ambiguity*" (*Darlington Futures Limited v Delco Australia Pty Limited* (1986) 161 CLR 500 at 510 per Mason, Wilson, Brennan, Deane and Dawson JJ; *Nissho Iwai Australia Limited v Malaysian International Shipping Corporation, Berhad* (1989) 167 CLR 219 at 227 per Mason CJ, Brennan, Deane, Gaudron and McHugh JJ).

126. The relational phrase "*in respect of*" takes its content from the context and the purpose of the GSA as a whole and clause in which it appears (*R v Khazaal* [2012] HCA 26 (2012) 246 CLR 601 at [31] per French CJ). That phrase presents the question of construction, it does require a particular answer to that question. The phrase can mean, and in context does mean, in effect, a liability for a breach of the relevant obligation.

Construction

127. Read consistently with the object of the GSA, cl 22.7(c) and cl 29 do not limit the Sellers' liability in restitution to the extent of the Sellers' enrichment through the application of economic duress for the following reasons.

128. *First*, neither the Sellers nor Verve objectively intended to limit the other party's liability for economic duress. Clear language is necessary before an intention is imputed to a commercial party to the effect that it intended to limit the liability of another party to a contract arising from economic duress. Conduct constituting economic duress is likely to be directed to inflicting economic harm, by illegitimate conduct, on the innocent party. It is improbable that a commercial party, absent clear words, intended to expose itself to loss arising from that circumstance, or to provide an implicit invitation to the other party to take advantage of an opportunity to profit by harming the economic interests of the first party. That is not to say that parties cannot agree to exclude liability arising from economic duress, but is to say that absent clear words a commercial contract ought not be construed to have that effect. In context, the Sellers' liability is not in respect of a failure to use "*reasonable endeavours*" to supply but arises from the exercise of illegitimate pressure which actuated a payment resulting in the Sellers' unjust enrichment. That the illegitimate pressure involved in effect a statement or threat that the Sellers would not use "*reasonable endeavours*" does not

convert the liability into a liability "*in respect of a failure to use reasonable endeavours*" or "*in respect of a breach*" of the GSA.

129. *Second*, the GSA is a long term contract between large and reputable commercial organisations. By recital C of the GSA the Sellers and Verve described the GSA as reflecting and facilitating a "*long-term partnership between*" Verve and the Sellers. That "*partnership model*" is described in the recital as the reason for the Sellers accepting that any loss in market share by Verve would (implicitly adversely) affect the Sellers by creating the potential for lower than expected gas sales, and as being the reason for Verve committing to buy most of its gas requirements from the Sellers. The exercise of economic duress for the opportunistic purpose of short term profit maximisation is inimical to that "*partnership model*". Clauses 22.7(c) and 22.9 should be construed consistently with that recital[47]. The connection required by the phrase "*in respect of*" is a liability for a breach of the relevant obligation (whether sounding in damages for breach of contract or, when considering cl 22.9, negligence). It is not extended to conduct inimical to the "*partnership model*".

130. *Third*, cl 22.9 informs the identification of the purpose of the limitations on liability. The Sellers' obligation to supply and to make up shortfalls in supply is subject to detailed regulation particularly in cl 9 of the GSA. Clauses 9.10 to 9.13 are engaged by a failure to supply gas. The purpose of cl 22.9 (and similarly cl 22.7(c)) is to limit the Sellers' liability where those provisions are engaged. In the present circumstances those clauses have no application. The Sellers have in effect supplied an equivalent volume of gas to Verve and cl 9.10-9.13 were not engaged (those clauses are not directed to the circumstance of ongoing demand for gas which the Sellers can but will not meet under the GSA). Clauses 22.7(c) and 22.9 are not directed to the relevant circumstances or the present claim.

131. *Fourth* and irrespective of the construction advanced in the preceding paragraphs, in point of fact the Sellers' liability in restitution is not "*in respect of a failure to use reasonable endeavours*" or "*in respect of a breach*" of the GSA. The liability arises from the exertion of illegitimate pressure, the illegitimate pressure being the threatened or foreshadowed prospective failure to use "*reasonable endeavours*". That pressure occurred every day the Sellers notified Verve that they would not supply SMDQ (on 4 June 2008 and then every day in giving notice under cl 9.1(b) of the GSA). Clauses 22.7(c) and 22.9 are not engaged by conduct amounting to a foreshadowed or threatened breach. As the events occurred, Verve had two causes of action. The first, in restitution, arose from the illegitimate pressure (the

[47] As to use of recitals as an aid to construction, *Franklins Pty Limited v Metcash Trading Limited* [2009] HCA 407 (2009) 76 NSWLR 603 at [380] per Campbell JA, Allsop P and Giles JA agreeing on this point (at [29] and [42] respectively); Lewison "*The Interpretation of Contracts*" (5th edn) at [10.11]

foreshadowed or prospective breach) and resultant payment. The second, for breach of contract, accrued when the Sellers did not in point of fact use "*reasonable endeavours*" to supply SMDQ. The remedies for each differed and likely are in different amounts. For example, the claim in contract may include consequential loss, but in restitution does not. Subject to not being entitled to double recovery, Verve was entitled to judgment on both causes of action. Clauses 22.7(c) and 22.9 were only engaged by or "*in respect of*" breach of contract but not economic duress. On the language of cl 22.7(c) and 22.9, neither is engaged by the relevant claim.

132. On the proper construction of cl 22.7(c) and 22.9, those clauses are engaged by a claim for a breach of cl 3.3 and 9.3, not for a cause of action in restitution for economic duress even if breach of cl 3.3 and 9.3 is an integer of that cause of action. The Sellers' liability stems from the illegitimate pressure, not from the breach of contract (CA[40]). In any event, the failure to use "*reasonable endeavours*", as distinct from the threatened failure to use "*reasonable endeavours*", is not an integer of the cause of action for restitution.

133. Murphy JA's reasons do not identify a sufficient reason to reach a different conclusion as to the proper construction of cl 22.7(c) and 22.9. Murphy JA's first reason (CA[168(a)]) is wrong (a) in point of fact as it was the threatened or foreshadowed breach, not the breach, which constituted the relevant pressure and (b) because whether a liability is "*in respect of*" a breach is conceptually different to the paraphrase "*directly connected with*" a breach. Murphy JA's first reason replaces one relational phrase with another but does not provide an answer to the question of construction posed. Murphy JA's second reason (CA[168(b)]) (a) is wrong as being founded on the perceived requirement for rescission, (b) is wrong in point of fact as it confuses the threatened or foreshadowed breach with actual breach and (c) is circular.

134. The Sellers' submissions also do not provide a sufficient reason for a different result. *First*, those submissions assume that the liability in restitution flows from breach which, for the reasons identified, is wrong. *Second*, if the first point is incorrect, the Sellers' submissions identify that the phrase "*in respect of*" can have a meaning sufficiently broad to include a claim in restitution for economic duress. But that is only to identify the question, not the proper construction. For the reasons identified in these submissions the proper construction is that identified by McLure P.

PART VII: Sellers' Notice of Contention

135. Verve's arguments in relation to the Sellers' Notice of Contention are contained in Part VI(A) and VI(D) above.

PART VIII: Time Estimate

136. Verve estimates that it will require 3 hours to present its case.

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