ELECTRICITY GENERATION CORPORATION T/AS VERVE ENERGY v WOODSIDE ENERGY LTD & ORS (P47/2013);
WOODSIDE ENERGY LTD & ORS v ELECTRICITY GENERATION CORPORATION T/AS VERVE ENERGY (P48/2013)

Court appealed from: Court of Appeal of the Supreme Court of Western Australia [2013] WASCA 36

Date of judgment: 20 February 2013

Date of grant of special leave: 12 September 2013

Woodside Energy Ltd ("Woodside") and Electricity Generation Corporation ("Verve") were parties to a long term gas supply agreement ("GSA"). Verve was the major generator and supplier of electricity to a large area in the south west of Western Australia. It purchased gas under the GSA for use in its electricity generation facilities.

Under the GSA, Woodside had firm obligations to supply up to the maximum daily quantity of gas ("MDQ") nominated by Verve, within a specified tolerance. Verve was also entitled to nominate up to an additional quantity of gas per day in excess of MDQ, defined as SMDQ (supplemental maximum daily quantity).

Clause 3.3 of the GSA governed supply of SMDQ Gas. In essence, if Verve nominated to receive SMDQ Gas for a day, Woodside was obligated to use reasonable endeavours to make it available for delivery. In determining whether they were able to supply SMDQ on a day, Woodside could take into account all relevant commercial, economic and operational matters. Without limiting those matters, cl.3.3(b) specified instances where it was acknowledged by Verve that Woodside was not obliged to make SMDQ Gas available.

On 3 June 2008, a fire at a gas production facility owned by Apache (the other principal supplier of gas into the Western Australian market) shut down the supply of gas from that plant. This event reduced gas supply to the market by some 30%-35%. Demand for gas then exceeded supply and prices for short term supply increased considerably. These circumstances prevailed until late September 2008. Under cl.3.3, Woodside was obliged to use reasonable endeavours to make an additional amount of gas available, taking into account all relevant commercial, economic and operational matters. On 4 June 2008, Woodside informed Verve that they would not be able to supply additional gas but they could however supply the equivalent quantity of gas at a greater price than the prescribed price. Under protest, Verve entered into a series of short term agreements with Woodside for additional gas at this higher price.

Verve sued Woodside for damages for breach of cl.3.3. Verve contended that cl.3.3(a) required the applicants to use reasonable endeavours to supply nominated SMDQ Gas, that the content of this obligation was informed by cl.3.3(b) and that the overall effect of the whole provision was that if Woodside had the requisite volume of gas available (in a practical, operational sense) and none of the circumstances identified in sub-paragraphs (i) to (iii) of cl.3.3(b) applied, they were obliged to supply it. Verve did not contend that Woodside had acted unreasonably in the way in which they had taken into account commercial and economic matters in determining their capacity to supply SMDQ Gas.

The trial judge upheld the construction of cl.3.3 contended for by Woodside and dismissed Verve's claim for damages for breach of cl.3.3.

The Court of Appeal (McLure P, Newnes and Murphy JJA) found that Woodside was in breach of contract notwithstanding its commercial decision that they could not supply and also that Woodside had applied illegitimate pressure amounting to economic duress in causing Verve to

enter into the short term contracts. Verve however did not ultimately succeed on this issue because the Court of Appeal also held that it was necessary for Verve to seek rescission of the short term agreements to obtain restitution of money paid under them.

The grounds of appeal are:

VERVE (P47/2013)

- The Court of Appeal having held that Woodside was required to sell certain volumes of gas to Verve by an existing contract but, by economic duress, caused Verve to enter into short term supply agreements to buy that same volume of gas at a much higher price and those contracts having been wholly performed, erred in:
  - Holding that Verve was required to rescind those short term contracts before it could obtain restitution of the additional moneys paid under those contracts; and
  - Dismissing Verve's claim for restitution of the additional payments made by Verve to Woodside pursuant to the short term contracts because Verve had not rescinded those contracts.

Woodside has filed a notice of contention in Verve's appeal contending that the decision of the Full Court should be affirmed on the ground that the Court erroneously decided or failed to decide some matter of fact or law. The grounds include: that the Court of Appeal should have held that Woodside was not required to make available for delivery SMDQ Gas because taking into account all relevant commercial, economic and operational matters, Woodside was not able and not obliged to supply SMDQ Gas.

WOODSIDE (P48/2013)

- The Court of Appeal erred in law in its construction of cl.3.3 of the GSA between Woodside and Verve in finding that the clause obliged Woodside by cl.3.3(a) of the GSA to use reasonable endeavours to make available for delivery of an additional 30 TJ/Day of gas (SMDQ) in excess of the MDQ without giving any meaning (or any adequate meaning) and effect to the express words of cl.3.3(b) of the GSA that permitted Woodside to take into account all relevant "commercial, economic and operational matters" in determining whether Woodside were able to supply SMDQ Gas.

- The Court of Appeal thereby erred in law in holding that the appellants were liable in damages for breaching cl.3.3 of the GSA.

- The Court of Appeal should have held that Woodside were not required to make available for delivery SMDQ Gas because, taking into account all relevant "commercial, economic and operational matters", Woodside was not able and not obliged to supply SMDQ Gas.