Electricity Generation Corporation t/as Verve Energy -v- Woodside Energy Ltd
[2013] WASCA 36 (20 February 2013)

FACTS

Verve Energy ["the Buyer"] and Woodside ["the Sellers"] were parties to a long-term gas supply agreement ["GSA"] which required the Sellers to "use reasonable endeavours" to make the additional gas available but qualified by a term stating "In determining whether they are able to supply SMDQ on a day, the Sellers may take into account all relevant commercial, economic and operational matters…".

The Buyer, also purchased gas from the other principal supplier (Apache) in the Western Australian market. Due to an explosion at an Apache gas production facility, the demand for gas and therefore the market price in Western Australia both increased exponentially.

The Sellers sought to take advantage of the situation by informing the Buyer that they could not supply the SMDQ under the terms of the GSA. but only under new agreement ["new agreement"], and this new agreement stipulated prices which were quite substantially higher than the GSA. The Buyer entered into the new agreement under protest.

ISSUE

Whether the Sellers obligation to "use reasonable endeavours" to supply the requested SMDQ gas under the GSA was breached by the imposition of the new agreement.

FINDING

The Supreme Court found in favour of the Sellers at first instance but the Court of Appeal upheld the appeal and held that the Sellers did not have the discretion or 'option' to not sell additional gas to the Buyer under the GSA because prospective purchasers were offering higher prices.

The Court of Appeal considered the argument that the new agreement(s) were voidable under the doctrine of economic duress due to illegitimate pressure being placed on the Buyer. The Court of Appeal held that whilst the Sellers had not made any threats and/or placed demands on the Buyer to enter the new agreement, the Sellers knew that if the supply of gas was not forthcoming the Buyer had no choice but agree to the terms. However the Buyer's claim for unjust enrichment was lost because the Buyer did not terminate the new agreement.

QUOTE

> *McClure held [18] "…The natural and ordinary meaning of that clause is that the Sellers must use reasonable endeavours to supply to Verve..."*
>
> *[24…"There are two material facts of the cause of action in economic duress being (1) that illegitimate pressure was applied which (2) induced the victim to enter into the contract (or make a non-contractual payment); the illegitimate pressure does not have to be the sole reason for the victim entering into the contract, it is sufficient if is it one of the reasons:…"*
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> *Murphy JA held: [132] … here may be instances where the particular factual dispute puts sharply into focus the precise scope, content and complexion of the phrase 'commercial, economic and operational matters', but that is not this case. In this case there is no dispute that if the buyer's construction of cl 3.3(a) is correct, the reasonable endeavours obligation was breached and the complexion of that phrase does not require further analysis.*
>
> *[133] …There is nothing in the text or structure of cl 3.3 which gives the sellers a separate right to decide whether or not to supply SMDQ gas, which stands apart from the reasonable endeavours obligation which is engaged under cl 3.3(a) once a nomination in accordance with cl 9 has been made.*

IMPACT

The case provides clear guidance that "reasonable endeavours" clauses will be interpreted within the context of the contract as a whole as a important obligation. Parties, should take care when drafting such clauses to clearly outline the obligations to be performed and to ensure that they are performed in full.

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