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Electricity Generation Corporation -v- Woodside Energy Ltd & Ors [2014] HCA 7 (5 March 2014)

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 matter.”

The Buyer purchased gas from the other principal supplier (Apache) in the Western Australian market, however, 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 a 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

On appeal the majority of the High Court of Australia overturned the decision of the Western Australian Court of Appeal and accepted the position in the first instance and noted that the Sellers did not have to sacrifice their commercial interests when utilising the “reasonable endeavours” clause.

QUOTE

The majority stated at [38]:

Appreciation of the commercial purpose or objects is facilitated by an understanding "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating"^[39]. As Arden LJ observed in Re Golden Key Ltd^[40], unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption "that the parties ... intended to produce a commercial result". A commercial contract is to be construed so as to avoid it "making commercial nonsense or working commercial inconvenience"

The majority held at [47]:

...that the Sellers are not obliged to forgo or sacrifice their business interests when using reasonable endeavours to make SMDQ available for delivery.

IMPACT

The High Court’s decision highlights the need for careful consideration when drafting “reasonable endeavours” clauses in commercial contracts. Parties should turn their mind to possibly including specific and express obligations which are commercially acceptable in the performance of the contract.

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