



HIGH COURT OF AUSTRALIA

5 March 2014

ELECTRICITY GENERATION CORPORATION T/AS VERVE ENERGY v WOODSIDE
ENERGY LTD & ORS;
WOODSIDE ENERGY LTD & ORS v ELECTRICITY GENERATION CORPORATION T/AS
VERVE ENERGY

[2014] HCA 7

Today the High Court, by majority, held that Woodside Energy Ltd and other gas suppliers in Western Australia ("the Sellers") did not breach their obligation to use "reasonable endeavours" to make a certain quantity of gas available to Electricity Generation Corporation t/as Verve Energy ("Verve") under a long term gas supply agreement. The High Court dismissed Verve's appeal against a decision of the Court of Appeal of the Supreme Court of Western Australia and allowed an appeal from that decision brought by the Sellers.

Verve, a statutory corporation, is the major generator and supplier of electricity to a large area in the southwest of Western Australia, including Perth. Verve purchased natural gas from the Sellers for use in its power stations. Under cl 3.3(a) of the agreement, the Sellers were obliged to use "reasonable endeavours" to make available to Verve a supplemental maximum daily quantity of gas ("SMDQ"), in addition to the gas they were ordinarily required to supply to Verve each day. In determining whether they were able to supply SMDQ, cl 3.3(b) provided that the Sellers could take into account "all relevant commercial, economic and operational matters".

On 3 June 2008, an explosion occurred at a gas plant on Varanus Island in Western Australia. That explosion caused the cessation of gas production at the plant and effected a temporary reduction in the supply of natural gas to the Western Australian market, which led to demand exceeding supply. After the explosion, the Sellers informed Verve that they would not supply SMDQ to Verve under the agreement between June and September 2008. However, the Sellers offered to supply Verve with an equivalent quantity of gas for the period at a price higher than that applicable to SMDQ, which they were offering to other customers in the Western Australian market. Under protest, Verve agreed to purchase gas from the Sellers at the higher price, which was the prevailing market price. Verve commenced proceedings against the Sellers in the Supreme Court of Western Australia, arguing that the Sellers had breached their obligation to use "reasonable endeavours" to supply SMDQ to Verve.

The primary judge found that the Sellers had not breached their obligation to use "reasonable endeavours" to supply SMDQ to Verve between June and September 2008. His Honour found that cl 3.3(b) of the agreement allowed the Sellers to take into account commercial matters, including the sale of gas to other customers and the profitability of such sales, in determining whether they were able to supply SMDQ to Verve. Verve successfully appealed to the Court of Appeal, which held, amongst other things, that the Sellers had breached their obligation under cl 3.3. By special leave, both Verve and the Sellers appealed to the High Court.

The High Court, by majority, held that contractual obligations to use "reasonable endeavours" are not absolute, but are conditioned by what is reasonable in the circumstances. What was a "reasonable" standard of endeavours obliged by cl 3.3(a) of the agreement was conditioned by the

Sellers' responsibilities to Verve in respect of SMDQ, as well as their express entitlement to take into account "relevant commercial, economic and operational matters". The Court held that the Sellers were not obliged to forego or sacrifice their business interests when using reasonable endeavours to make SMDQ available for delivery to Verve. Accordingly, cl 3.3 did not oblige the Sellers to supply SMDQ to Verve when the explosion at Varanus Island occasioned business conditions which led to a conflict between the Sellers' business interests and Verve's interest in obtaining SMDQ at the price stipulated in the agreement. As the Sellers' construction of the agreement was accepted by the Court, it was unnecessary to consider other issues raised by the appeals.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*