HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL AND GAGELER JJ

Matter No P47/2013

ELECTRICITY GENERATION CORPORATION
T/AS VERVE ENERGY APPELLANT

AND

WOODSIDE ENERGY LTD & ORS RESPONDENTS

Matter No P48/2013

WOODSIDE ENERGY LTD & ORS APPELLANTS

AND

ELECTRICITY GENERATION CORPORATION
T/AS VERVE ENERGY RESPONDENT

Electricity Generation Corporation v Woodside Energy Ltd
Woodside Energy Ltd v Electricity Generation Corporation
[2014] HCA 7
5 March 2014
P47/2013 & P48/2013

ORDER

Matter No P47/2013

Appeal dismissed with costs.

Matter No P48/2013

1. Appeal allowed with costs.

2. *Set aside paragraphs 1 to 4 of the orders of the Court of Appeal of the Supreme Court of Western Australia made on 20 February 2013 and, in their place, order that the appeal to that Court be dismissed with costs.*

On appeal from the Supreme Court of Western Australia

Representation

N C Hutley SC with J C Giles and D A Hughes for the appellant in P47/2013 and the respondent in P48/2013 (instructed by Jackson McDonald Lawyers)

D F Jackson QC with B Dharmananda SC, J K Taylor and E M Heenan for the appellants in P48/2013 and the respondents in P47/2013 (instructed by Lavan Legal)

CATCHWORDS

Electricity Generation Corporation v Woodside Energy Ltd
Woodside Energy Ltd v Electricity Generation Corporation

Contract − Construction – Long term gas supply agreement – Sellers obliged to use "reasonable endeavours" to supply supplemental gas – Agreement allowed sellers to take into account all "relevant commercial, economic and operational matters" in determining whether able to supply supplemental gas – Gas explosion at plant operated by third party temporarily reduced supply of gas to market – Sellers refused to supply supplemental gas at price stipulated in agreement during period of reduced supply – Sellers offered to supply equivalent quantities of gas at higher price under separate short term agreements – Whether sellers breached obligation to use "reasonable endeavours" to supply supplemental gas.

Words and phrases – "able", "reasonable endeavours", "relevant commercial, economic and operational matters".

1 FRENCH CJ, HAYNE, CRENNAN AND KIEFEL JJ. The first issue in these appeals is the construction and application of a long term gas supply agreement ("the GSA") between Electricity Generation Corporation trading as Verve Energy ("Verve") and various gas suppliers in Western Australia including Woodside Energy Ltd ("the Sellers"). The Sellers are the respondents to the first appeal and the appellants in the second.

2 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 purchases natural gas under the GSA for use in its power stations. Separate contracts between Verve and each of the Sellers are contained in the GSA[1], which obliges each Seller to make available for delivery to Verve a proportionate share of a maximum daily quantity of gas ("MDQ"), delivered in a common and commingled stream[2], and to use "reasonable endeavours"[3] to make available to Verve a supplemental maximum daily quantity of gas ("SMDQ"). In these reasons, the acronyms MDQ and SMDQ are used in the same way as they are used in the GSA, to refer to specified quantities of gas.

3 Both appeals concern the supply of gas to the Western Australian market, which was temporarily disrupted by an explosion at a gas plant operated by Apache Energy Limited ("Apache"). The first appeal, brought by Verve, challenges the conclusion that a contract induced by economic duress must be rescinded in order for restitution to be available. The Sellers' appeal concerns whether or not the Sellers breached the abovementioned "reasonable endeavours" obligation, which turns on the proper construction of cl 3.3 of the GSA.

4 If the Sellers' construction of cl 3.3 is accepted, with the consequence that the Sellers did not breach the GSA, the second issue (arising on the Sellers' notice of contention), namely whether Verve has a right to restitution of moneys paid under short term gas supply agreements (for alleged economic duress), does not arise. Nor do other issues in Verve's appeal concerning whether rescission of those agreements is necessary before obtaining restitution, and the quantum of any restitution.

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1 GSA, cl 31.3.

2 GSA, cl 1.3.

3 GSA, cl 3.3(a).

Background facts

5 The Sellers and Apache, the principal gas suppliers in Western Australia, operated gas plants located in the northwest of Western Australia. Gas was transported from both plants to the southwest of Western Australia by the Dampier to Bunbury Natural Gas Pipeline. On 3 June 2008, an explosion occurred at Apache's gas plant on Varanus Island. The 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 by 30 to 35 per cent, which led to demand exceeding supply.

6 On 6 June 2008, Apache entered into a written agreement with the Sellers and Japan Australia LNG (MIMI) Pty Ltd ("MIMI") under which the Sellers agreed to supply Apache with certain daily quantities of natural gas ("the Apache agreement"). Many other customers in Western Australia sought to purchase gas from the Sellers during this time, at prices far exceeding those contained in the GSA.

7 On 4 June 2008, before the Apache agreement was executed, the Sellers informed Verve that they would not supply SMDQ under the GSA to Verve for an indefinite period. On the same day, the Sellers offered to supply Verve with an equivalent quantity of gas for the month of June 2008, at a price which exceeded the price in the GSA applicable to SMDQ. Under protest, and without prejudice to its rights under cl 3.3(b), Verve entered into a "fully interruptible" short term gas supply agreement with the Sellers and MIMI for the supply of daily quantities of gas between 8am on 4 June and 8am on 30 June 2008. It was common ground that the effect of the agreement was that the Sellers were under no obligation to supply any particular quantities of gas to Verve, and that the price for gas delivered under the agreement was the prevailing market price.

8 On 20 June 2008, when it was clear that the shortage of supply referable to the Apache incident would continue until the end of September, the Sellers invited tenders for the purchase of gas from them under short term supply agreements for the period from 8am on 30 June to 8am on 30 September 2008.

9 The Sellers' agent informed Verve that Verve would not receive the nominated SMDQ during that time, and would be required to enter the tender process to receive any additional gas from the Sellers. Again under protest, Verve submitted a successful tender and entered into another fully interruptible gas supply agreement with the Sellers and MIMI, until the end of September 2008. The price for gas delivered under the agreement was also the prevailing market price. From 30 September 2008, the Sellers supplied SMDQ to Verve

pursuant to the GSA. It was common ground that the Sellers had the capacity to supply SMDQ nominated by Verve during the relevant period.

10 These facts gave rise to a dispute over whether the Sellers breached their obligation under the GSA to use reasonable endeavours to supply SMDQ to Verve between 4 June and the end of September 2008.

The GSA and the issues

11 Clause 3 of the GSA provides for variously described quantities of gas which the Sellers are required to make available for delivery to Verve. At the heart of the dispute is the correct construction of cl 3.3 and, more particularly, the relationship between two parts of that clause, cl 3.3(a) and cl 3.3(b).

12 The GSA replaces a prior contract between the Sellers and Verve and "reflects and facilitates a long-term"[4] commercial relationship for the sale and purchase of natural gas[5]. This is part of the background and context in which cl 3.3 falls to be construed. Before going further, it is necessary to explain how the construction issue arises by reference to relevant provisions of the GSA.

13 The GSA consists of Recitals, a Contract Overview (which does not qualify any substantive provisions), Part A − Key Commercial Provisions[6], Part B − General Conditions[7], Part C − Definitions and Interpretation[8], and four Schedules. The GSA contains a number of provisions indicating that the Sellers supply gas to buyers other than Verve[9], and it was not in contest that the demand for gas could fluctuate in the context of a large domestic and commercial electricity market. A number of provisions also indicate that Verve may

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4 GSA, Recital C. The term of the GSA is indicated to be up to 20 years: GSA, Contract Overview and cll 2.1(a) and 30.

5 GSA, cl 1.1.

6 GSA, cll 1-8.

7 GSA, cll 9-29.

8 GSA, cll 30-31.

9 See particularly GSA, cl 12; see also cl 4.5(g).

purchase its gas requirements, above the minimum quantities set out in the GSA, from suppliers other than the Sellers[10].

14 Under the "Key Commercial Provisions" of the GSA, governing "quantities" and "price"[11], the Sellers agree to make available for delivery to "the Buyer" (ie Verve), and Verve agrees to receive and pay for − or pay for if not taken − gas, in quantities and at the price and in the manner specified in the GSA[12]. Clause 3 sets out the Sellers' delivery obligations by reference to maximum quantities and cl 4 provides for Verve's payment obligations by reference to minimum quantities.

15 Clause 3.1 provides for a Total Contract Quantity of gas ("TCQ"), which the Sellers are required to make available for delivery under the GSA. This provides the context for the following provisions dealing with daily quantities of gas (maximum and supplemental). Clause 3.2 provides for MDQ and cl 3.3 provides for SMDQ. By cl 3.2(a), the Sellers are required to make available for delivery on any day gas up to MDQ[13], subject to cl 9. It is convenient to turn briefly to cl 9 before considering cl 3.3.

16 Clause 9 of the "General Conditions" in the GSA[14] contains a complex scheme for "nominating" the quantities of gas required in the next seven day period[15]. By cl 9.1(a), Verve must nominate the quantity of gas which it requires for the next period. Within a few hours of that nomination, the Sellers are required to notify Verve of the quantity to be made available for that period[16].

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10 For example, Recital C of the GSA relevantly provides: "the Buyer intends to purchase most of its gas requirements from the Sellers (although up to 30% of those requirements above the Minimum Quantity may be purchased from other suppliers) within the terms of this Agreement to the extent feasible." See also cll 4.2(c) and 22.6.

11 See GSA, Part A.

12 GSA, cl 1.1.

13 Quantified in GSA, cl 3.2(b).

14 See GSA, Part B.

15 GSA, cl 9.1.

16 GSA, cl 9.1(b).

By cl 9.2, each Seller must make available for delivery to Verve, on each day, a quantity of gas which is as close as reasonably practicable to the lesser of MDQ or the last daily nomination[17]. Under cl 9.3, if Verve's daily nomination exceeds MDQ, each Seller must use reasonable endeavours to make the excess available "[i]n accordance with Clause 3.3", but no more than its proportionate share of SMDQ[18].

17 Turning to cl 3.3, the construction issue is best understood by setting out the whole of the clause − the language which is contested is italicised:

> "**3.3 Supplemental Maximum Daily Quantity**
>
> (a) If in accordance with Clause 9 ('Nominations') the Buyer's nomination for a Day exceeds the MDQ, the Sellers *must use reasonable endeavours* to make available for delivery up to an additional 30TJ/Day of Gas in excess of MDQ ('Supplemental Maximum Daily Quantity' or 'SMDQ').
>
> (b) 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* and, without limiting those matters, it is acknowledged and agreed by the Buyer that nothing in paragraph (a) requires the Sellers to make available for delivery any quantity by which a nomination for a Day exceeds MDQ where any of the following circumstances exist in relation to that quantity:
>
> (i) the Sellers form the reasonable view that there is insufficient capacity available throughout the Sellers' Facilities (having regard to all existing and likely commitments of each Seller and each Seller's obligations regarding maintenance, replacement, safety and integrity of the Sellers' Facilities) to make that quantity available for delivery;

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17 Clause 9.10 of the GSA provides for tolerances referable to operational matters. Clauses 9.11 and 9.14 deal respectively with "shortfall gas" and "excess gas" delivered as a result of operational circumstances.

18 GSA, cl 9.5(b).

(ii) the Sellers form the reasonable view that there has been insufficient notice of the requirement for that quantity to undertake all necessary procedures to ensure that capacity is available throughout the Sellers' Facilities to make that quantity available for delivery; or

(iii) where the Sellers have any obligation to make available for delivery quantities of Natural Gas to other customers, which obligations may conflict with the scheduling of delivery of that quantity to the Buyer.

(c) The Sellers have no obligation to supply and deliver Gas on a Day in excess of their obligations set out in Clauses 3.2 and 3.3 in respect of MDQ and SMDQ respectively."

18 The crucial issue of construction is the relationship between the Sellers' obligation in cl 3.3(a) to "use reasonable endeavours" to make SMDQ available for delivery to Verve, and the Sellers' entitlement under cl 3.3(b), in determining whether they "are able to supply SMDQ" on any particular day, to "take into account all relevant commercial, economic and operational matters".

19 Relevantly, cl 4.2 obliges Verve, in each contract year, to pay the Sellers for an Annual Minimum Quantity of gas ("AMQ"), whether or not Verve has taken that quantity[19]. Further, cl 4.3 contains calculations for a "minimum quantity" which is subject to offsets[20].

20 The prices for all gas delivered under the GSA are set out in cl 6. Subject to price reviews, cl 6 contains price tranches referable to quantities, tranche 3 being the price applicable to gas "delivered … in excess of MDQ"[21], thus the price for SMDQ.

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19 GSA, cl 4.2(c).

20 The "minimum quantity" can be reduced by an "offset" if the Sellers supply gas to a power producer (which Verve acknowledges is permitted under the GSA) with the effect of directly reducing Verve's market. Such a reduction will only be made where Verve has not disabled itself from taking the minimum quantity: see GSA, cl 4.5(a), (d)(iv) and (g).

21 GSA, cl 30.

21 Other features of the GSA which bear on the construction issue must also be mentioned. As to supply, Verve is not obliged to nominate any SMDQ for supply from the Sellers, and the Sellers are not obliged to reserve daily capacity in their plants to supply SMDQ to Verve, nor to refrain from agreeing to sell gas to third parties. As to payment, Verve's "take or pay" obligation applies to MDQ[22]. That obligation does not apply to SMDQ which Verve nominates, but which the Sellers are unable to supply, to the extent that Verve acquires that gas from another supplier[23]. It was not part of Verve's case that the practical effect of the "take or pay" obligation is that Verve would be obliged to pay for SMDQ not taken. Clause 12 provides for "restricted capacity" and sets out priorities to be followed when capacity is constrained.

22 In relation to defaults under the GSA, cl 22.6 limits the liability of Verve in respect of gas not taken to its liability in accordance with cl 4.2, which imposes the "take or pay" obligation in respect of AMQ. Clause 22.7 relevantly limits the Sellers' liability in respect of a failure to use reasonable endeavours to meet Verve's nominations of SMDQ. Pursuant to cl 22.7(c), each Seller's liability is limited to a proportionate share of the amount by which Verve's actual costs incurred in obtaining alternative gas exceed the amount equivalent to the price applicable to SMDQ in the GSA.

The litigation

23 In March 2009, Verve commenced proceedings in the Supreme Court of Western Australia, arguing, amongst other things, that the Sellers had breached their obligation under cl 3.3 of the GSA by failing to use "reasonable endeavours" to deliver nominated SMDQ to Verve between 4 June and 30 September 2008. Further, Verve contended that by refusing to supply nominated SMDQ, but offering an equivalent quantity of gas under the two short term supply contracts at a higher price than the price in the GSA applicable to SMDQ, the Sellers had exerted illegitimate pressure and placed Verve under economic duress.

24 Before the primary judge (Le Miere J), Verve submitted that once it had nominated SMDQ under the GSA, the Sellers were obliged to use reasonable endeavours to make the nominated quantity of gas available for delivery. Verve contended that cl 3.3(b) gave further content to that obligation, by providing that "relevant commercial, economic and operational matters" could be taken into

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22 GSA, cl 4.2(c). See also cll 4.1, 4.2(b) and 4.3(b)(ii).

23 GSA, cl 4.1(b)(v).

account by the Sellers in determining whether they were "able" to supply SMDQ under the GSA; that is, whether they had the *capacity* to supply SMDQ, not whether they *wished* to do so. The Sellers submitted that the obligation under cl 3.3(a) to supply SMDQ could not be considered in isolation from the "logically anterior question" arising under cl 3.3(b) − whether the Sellers were able to supply SMDQ after taking into account all relevant commercial, economic and operational matters. Clause 3.3(b), it was submitted, entitled the Sellers to determine their ability to supply SMDQ to Verve on any given day after taking into account all commercial, economic and operational matters relevant to them.

25 In preferring the Sellers' construction of cl 3.3 of the GSA[24], the primary judge found that cl 3.3(b) "conditioned" the Sellers' obligation under cl 3.3(a), by prescribing the circumstances in which the Sellers were not obliged "to use reasonable endeavours" to make SMDQ available for delivery[25]. His Honour said[26]:

> "In the context of cl 3.3(b) commercial matters include the sale of gas to other customers or potential customers and the profitability of such sales compared with the profitability of supplying SMDQ under the GSA. The Sellers may take such matters into consideration in determining whether they are 'able to supply SMDQ on a Day'."

26 That construction of cl 3.3 underpinned Le Miere J's conclusion that, in failing to supply nominated SMDQ to Verve pursuant to the GSA between 4 June and 30 September 2008, the Sellers did not breach cl 3.3 of the GSA[27].

27 Verve's further claim for damages for the tort of duress was rejected by the primary judge. Le Miere J found that Verve had not established that it entered into the short term gas supply agreements as a result of illegitimate

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24 *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* [2011] WASC 268 at [67].

25 *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* [2011] WASC 268 at [68]-[70].

26 *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* [2011] WASC 268 at [70].

27 *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* [2011] WASC 268 at [77], [79].

pressure exerted by the Sellers. The Sellers were at liberty to demand the price they did for the supply of gas to Verve, beyond the gas they were obliged to provide under the GSA. It made no difference, his Honour explained, that the Sellers knew that Verve required additional gas to meet its statutory or contractual obligations; nor did it make any difference that they knew that there was no alternative source from which Verve could obtain the gas[28].

28 In the event that the primary judge was wrong on the construction of cl 3.3, his Honour went on to consider cl 22.7 of the GSA. Le Miere J found that cl 22.7(c) effected a limitation on the Sellers' liability in respect of any breach of cl 3.3 of the GSA[29].

29 Verve appealed to the Court of Appeal of the Supreme Court of Western Australia, arguing that the primary judge had erred in dismissing Verve's claim for damages for the Sellers' alleged breach of cl 3.3 of the GSA. Verve again submitted that, on the proper construction of cl 3.3, the Sellers had breached their obligation to use reasonable endeavours to supply SMDQ during the period from 4 June to 30 September 2008.

30 The Court of Appeal (McLure P, Newnes and Murphy JJA) resolved the issue of construction against the Sellers[30]. Murphy JA found that the obligation to use reasonable endeavours under cl 3.3(a) was conditioned by Verve making a nomination for SMDQ under cl 9. Clause 3.3(b) was not expressed to be such a conditioning event, but rather set out the factors which the Sellers could take into account to inform their obligation under cl 3.3(a). Murphy JA considered that there was nothing in the text or structure of cl 3.3 which gave the Sellers a right to decide whether or not to supply SMDQ, separate from their obligation to use reasonable endeavours once a nomination under cl 9 had been made[31]. His Honour went on to dismiss Verve's challenge to the primary judge's construction of cl 22.7(c).

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28 *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* [2011] WASC 268 at [87].

29 *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* [2011] WASC 268 at [98].

30 *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* [2013] WASCA 36 at [21], [44], [122].

31 *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* [2013] WASCA 36 at [133].

31 McLure P (Newnes JA concurring) agreed with Murphy JA in part, providing separate reasons in respect of the construction of cll 3.3 and 22.7(c) of the GSA. In her Honour's view, the Sellers' construction of cl 3.3 was inconsistent with the natural and ordinary meaning of that clause. McLure P found that the natural and ordinary meaning of cl 3.3 was that the Sellers must use reasonable endeavours to supply SMDQ to Verve which was the subject of a nomination under cl 9. The scope and content of that obligation was informed and delineated by the more specific matters and examples set out in cl 3.3(b)[32]. In that context, McLure P considered that the word "able" at the beginning of cl 3.3(b) meant the Sellers' "capacity to supply the nominated SMDQ"[33], having regard to the matters and examples specified therein. This construction, in her Honour's view, was also consistent with the commercial objectives and operational challenges reflected in the terms of the GSA as a whole.

32 All members of the Court of Appeal agreed that the Sellers applied illegitimate pressure to Verve, which caused Verve to enter into the short term gas supply agreements[34]. The Court of Appeal went on to find that Verve could have no cause of action in unjust enrichment for economic duress unless and until the short term gas supply agreements were rescinded[35].

33 Special leave was granted in each of the appeals. In this Court, the Sellers contended that the construction of cl 3.3 of the GSA accepted by Le Miere J was to be preferred. The parties were agreed that if that construction were correct, further issues in both appeals would fall away.

34 For the reasons which follow, the construction advanced by the Sellers should be accepted, with the result that the first appeal must be dismissed and the second appeal should be allowed.

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32 *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* [2013] WASCA 36 at [18].

33 *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* [2013] WASCA 36 at [19].

34 *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* [2013] WASCA 36 at [31], [44], [183].

35 *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* [2013] WASCA 36 at [33], [44], [201]-[206].

The construction issue

35 Both Verve and the Sellers recognised that this Court has reaffirmed the objective approach to be adopted in determining the rights and liabilities of parties to a contract. The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean[36]. That approach is not unfamiliar[37]. As reaffirmed, it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract[38]. Appreciation of the commercial purpose or objects is facilitated by an understanding "of the genesis of the transaction, the background, the context

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36 *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 at 589 [22] per Gleeson CJ; [2000] HCA 65; *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 462 [22] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ; [2004] HCA 35; *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at 160 [8] per Gleeson CJ; [2008] HCA 3; see further *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181 at 188 [11] per Gleeson CJ, Gummow and Hayne JJ; [2001] HCA 70, citing *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912; [1998] 1 All ER 98 at 114. See also *Homburg Houtimport BV v Agrosin Private Ltd* [2004] 1 AC 715 at 737 [10] per Lord Bingham of Cornhill.

37 See, for example, *Hydarnes Steamship Co v Indemnity Mutual Marine Assurance Co* [1895] 1 QB 500 at 504 per Lord Esher MR; *Bergl (Australia) Ltd v Moxon Lighterage Co Ltd* (1920) 28 CLR 194 at 199 per Knox CJ, Isaacs and Gavan Duffy JJ; [1920] HCA 41; see generally Lord Bingham of Cornhill, "A New Thing Under the Sun? The Interpretation of Contract and the *ICS* Decision", (2008) 12 *Edinburgh Law Review* 374.

38 *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 461-462 [22] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179 [40] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ; [2004] HCA 52; *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at 160 [8] per Gleeson CJ, 174 [53] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ; *Byrnes v Kendle* (2011) 243 CLR 253 at 284 [98] per Heydon and Crennan JJ; [2011] HCA 26. See also *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 at 326, 350; *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 at 2906-2907 [14]; [2012] 1 All ER 1137 at 1144.

[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"[41].

Submissions in this Court

36 In seeking to uphold the primary judge's construction of cl 3.3, the Sellers submitted that the GSA imposed different obligations on the Sellers in respect of MDQ and SMDQ, the latter being a lesser obligation than the strict or firm obligation (within a tolerance) to make MDQ available for delivery under cl 3.2(a). The Sellers submitted that there was no textual foundation for the Court of Appeal's construction of cl 3.3, by which cl 3.3(a) prevailed over the Sellers' ability to give effect to the considerations in cl 3.3(b). It was contended that the matters specified in cl 3.3(b), as exemplified in pars (i), (ii) and (iii), were solely concerned with the business interests of the Sellers.

37 The Sellers urged that, read as a whole, cl 3.3 imposed an obligation to use reasonable endeavours to supply SMDQ, which was qualified or conditioned by the Sellers' entitlement to take into account their own commercial, economic and operational interests in relation to that supply of gas. Applying this construction, the Sellers contended that the Apache incident, and the consequential business conditions in the market, were matters which the Sellers were entitled to take into account under cl 3.3(b) in determining whether they were "able" − having regard to their capacity and business interests − to supply SMDQ nominated by Verve. Accordingly, the Sellers' actions in declining to

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39 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 350 per Mason J; [1982] HCA 24, citing *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 at 995-996; [1976] 3 All ER 570 at 574. See also *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530 at 559 [82] per Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ; [2004] HCA 56; *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at 160 [8] per Gleeson CJ.

40 [2009] EWCA Civ 636 at [28].

41 *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530 at 559 [82] per Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ. See also *Gollin & Co Ltd v Karenlee Nominees Pty Ltd* (1983) 153 CLR 455 at 464; [1983] HCA 38.

supply Verve with nominated SMDQ in the relevant period, and in supplying gas that was available (ie above firm commitments, which included MDQ) on a fully interruptible basis and at prevailing market prices, did not constitute a breach of cl 3.3.

38 Verve agreed that cl 3.2 contained an unconditional obligation[42] which could be contrasted with cl 3.3, the latter of which imposed a standard of endeavours that was reasonable in the circumstances. Verve's substantive answer to the Sellers' construction thereafter was largely defensive. Verve submitted that if the Sellers' construction of cl 3.3 were correct, the obligation to use reasonable endeavours to supply SMDQ was left without practical content, leading to the submission that the Sellers' construction was "uncommercial and objectively unlikely" and inconsistent with the whole of the GSA. The nomination procedure was relied on by Verve as a complex regime supporting the proposition that the obligation to use reasonable endeavours was engaged in some unqualified way on receipt of a nomination for SMDQ. The "take or pay" obligation was described as an incentive (although not an obligation) for Verve to obtain SMDQ from the Sellers. Verve urged, as it had in the courts below, that the word "able", as it occurs in cl 3.3(b), should be construed as a reference to the Sellers' *capacity* to deliver SMDQ and not as a reference to their *willingness* to do so.

39 In essence, Verve contended that cl 3.3, correctly interpreted, obliged the Sellers to supply nominated SMDQ to Verve, notwithstanding the circumstance that the prevailing market price of gas was significantly higher than the tranche 3 price in the GSA. In applying that interpretation, Verve characterised the Sellers' actions in the relevant period as a breach of their obligation to use reasonable endeavours to supply SMDQ.

Reasonable endeavours

40 Contractual obligations framed in terms of "reasonable endeavours" or "best endeavours (or efforts)" are familiar. Argument proceeded on the basis that substantially similar obligations are imposed by either expression[43]. Such

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42 Subject to *force majeure* (cl 18 of the GSA), which was of no relevance to the facts.

43 See, for example, *Cypjayne Pty Ltd v Babcock & Brown International Pty Ltd* (2011) 282 ALR 152 at 163 [67]; *Jet2.com Ltd v Blackpool Airport Ltd* [2012] 2 All ER (Comm) 1053 at 1061 [16], 1067 [41]. Cf *CPC Group Ltd v Qatari Diar Real Estate Investment Company* [2010] EWHC 1535 (Ch) at [252]-[253].

obligations are not uncommon in distribution agreements[44], intellectual property licences[45], mining and resources agreements[46] and planning and construction contracts[47]. Such clauses are ordinarily inserted into commercial contracts between parties at arm's length who have their own independent business interests[48].

41 Three general observations can be made about obligations to use reasonable endeavours to achieve a contractual object. First, an obligation expressed thus is not an absolute or unconditional obligation[49]. Second, the nature and extent of an obligation imposed in such terms is necessarily conditioned by what is reasonable in the circumstances, which can include circumstances that may affect an obligee's business[50]. This was explained by Mason J in *Hospital Products Ltd v United States Surgical Corporation*[51], which

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44 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41; [1984] HCA 64.

45 See, for example, *Terrell v Mabie Todd & Co Ltd* (1952) 69 RPC 234; see also Melville, *Forms and Agreements on Intellectual Property and International Licensing*, revised 3rd ed (2008), vol 2, §9.10.

46 *Centennial Coal Company Ltd v Xstrata Coal Pty Ltd* (2009) 76 NSWLR 129.

47 *Yewbelle Ltd v London Green Developments Ltd* [2008] 1 P & CR 279; *CPC Group Ltd v Qatari Diar Real Estate Investment Company* [2010] EWHC 1535 (Ch).

48 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 91-92 per Mason J, 118 per Wilson J, 143-144 per Dawson J.

49 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 144 per Dawson J; *Cypjayne Pty Ltd v Babcock & Brown International Pty Ltd* (2011) 282 ALR 152 at 163 [67].

50 *Transfield Pty Ltd v Arlo International Ltd* (1980) 144 CLR 83 at 101 per Mason J; [1980] HCA 15, citing Lord Roche in *B Davis Ltd v Tooth & Co Ltd* [1937] 4 All ER 118 at 128.

51 (1984) 156 CLR 41 at 91-92; see also at 118 per Wilson J, 144 per Dawson J.

concerned a sole distributor's obligation to use "best efforts" to promote the sale of a manufacturer's products. His Honour said[52]:

> "The qualification [of reasonableness] itself is aimed at situations in which there would be a conflict between the obligation to use best efforts and the independent business interests of the distributor and has the object of resolving those conflicts by the standard of reasonableness … It therefore involves a recognition that the interests of [the manufacturer] could not be paramount in every case and that in some cases the interests of the distributor would prevail."

42 As Sellers J observed of a corporate obligee in *Terrell v Mabie Todd & Co Ltd*[53], an obligation to use reasonable endeavours would not oblige the achievement of a contractual object "to the certain ruin of the Company or to the utter disregard of the interests of the shareholders". An obligee's freedom to act in its own business interests, in matters to which the agreement relates, is not necessarily foreclosed, or to be sacrificed, by an obligation to use reasonable endeavours to achieve a contractual object[54].

43 Third, some contracts containing an obligation to use or make reasonable endeavours to achieve a contractual object contain their own internal standard of what is reasonable, by some express reference relevant to the business interests of an obligee[55].

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52 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 92.

53 (1952) 69 RPC 234 at 236.

54 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 118 per Wilson J, 144 per Dawson J, both citing *Van Valkenburgh, Nooger & Neville Inc v Hayden Publishing Co* 30 NY 2d 34 (1972). See also *Yewbelle Ltd v London Green Developments Ltd* [2008] 1 P & CR 279 at 288 [29].

55 See, for example, *CPC Group Ltd v Qatari Diar Real Estate Investment Company* [2010] EWHC 1535 (Ch) at [252]; *Cypjayne Pty Ltd v Babcock & Brown International Pty Ltd* (2011) 282 ALR 152 at 163 [68].

Clause 3.3

44 The GSA, pre-eminently a commercial contract between parties at arm's length with their own independent business interests[56], should be given a businesslike interpretation in accordance with the authorities and the approach described above.

45 Broadly described, the chief commercial purpose and objects of the GSA are twofold. First, Verve obtains a secure supply of gas which the Sellers are obliged to make available for delivery up to the specified MDQ, and secondly, the Sellers have an assured price in respect of the specified AMQ, which Verve is obliged to take and pay for, or pay for if not taken. The business interests of the parties coincide in each contract year, but also over the long term, in respect of the quantities of gas which *must be delivered* by the Sellers and which *must be paid for* by Verve, whether taken or not. Those provisions have the effect of insulating the parties from respective risks of fluctuations in demand and price in the context of a large domestic and commercial electricity market, at least to the extent of those quantities and the unconditional obligations imposed in respect of them.

46 A supplementary commercial purpose or object of the GSA is the supply of SMDQ at the tranche 3 price, bearing in mind that, subject to the "take or pay" obligations for AMQ, Verve is not contractually bound to buy SMDQ from the Sellers and the Sellers are not contractually bound to reserve capacity in their plants for SMDQ. The obligation to use reasonable endeavours to supply SMDQ, provided for in cl 3.3, can be readily contrasted with the unconditional obligation to supply MDQ specified in cl 3.2. By way of contrast, the language of cl 3.3(a) is recognisably the language of qualified obligation, and cl 3.3(b) provides an internal standard of reasonableness by which the obligation to use reasonable endeavours to supply SMDQ can be measured.

47 Taken as a whole, cl 3.3 provides for a balancing of interests if the business interests of the parties in respect of the supply of SMDQ do not entirely coincide, or if they conflict. What is a "reasonable" standard of endeavours obliged by cl 3.3(a) is conditioned both by the Sellers' responsibilities to Verve in respect of SMDQ and by the Sellers' express entitlement to take into account

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56 Clause 31.4(l) of the GSA provides: "[T]his Agreement is not intended to, and does not, create any partnership, joint venture, agency relationship or other business entity between the Sellers and the Buyer nor does it impose any fiduciary obligations on any Party".

"relevant commercial, economic and operational matters" when determining whether they are "able" to supply SMDQ. Compendiously, the expression "commercial, economic and operational matters" refers to matters affecting the Sellers' business interests. The relevant ability to supply is thus qualified, in part, by reference to the constraints imposed by commercial and economic considerations. The non-exhaustive examples of circumstances in which the Sellers will not breach the obligation to use reasonable endeavours to supply SMDQ, found in cl 3.3(b)(i), (ii) and (iii), are not confined to "capacity" (or capacity constraints). The effect of cl 3.3(b) is that the Sellers are not obliged to forgo or sacrifice their business interests when using reasonable endeavours to make SMDQ available for delivery. Verve's submission that "able" should be construed narrowly, so as to refer only to the Sellers' capacity to supply, fails to give full effect to the entire text of cl 3.3(b) and must be rejected. The word "able" in cl 3.3(b) relates to the Sellers' ability, having regard to their capacity and their business interests, to supply SMDQ. This is the interpretation which should be given to cl 3.3.

48 The construction which has been accepted is consistent with surrounding circumstances known to both parties at the time of entering the GSA, which include the circumstances that the Sellers sell and supply gas to customers and buyers in the market other than Verve, some essential services depend on gas supply, and the prevailing market price of gas at any particular time may be greater (or less) than the tranche 3 price in the GSA.

49 Understood as explained above, cl 3.3 did not oblige the Sellers to supply SMDQ to Verve notwithstanding conflict with their own business interests. Applied to the facts, cl 3.3 did not oblige the Sellers to supply SMDQ to Verve when the Apache incident occasioned business conditions leading to conflict between the Sellers' business interests and Verve's interest in obtaining nominated SMDQ at the tranche 3 price.

50 These conclusions render it unnecessary to consider other issues raised by the appeals, including the construction issue in respect of cl 22.7, which imposes a cap on the Sellers' liability for default in respect of the supply of SMDQ.

Orders

51 For these reasons the first appeal should be dismissed and the second appeal should be allowed. Paragraphs 1 to 4 (inclusive) of the orders of the Court of Appeal made on 20 February 2013 should be set aside and, in their place, there should be an order that the appeal to that Court is dismissed. There should be an order that Verve pay the Sellers' costs in the Court of Appeal and in this Court.

52 GAGELER J. The facts and procedural history are set out in the reasons for judgment of the majority. Save in their most salient aspects, the facts need not be repeated. It is convenient to refer to the parties to both appeals as "the Sellers" and "the Buyer", and to refer to their long term sale and purchase agreement as "the GSA".

53 Commercial parties contracting at arm's length are free to agree on terms each considers to be to its own commercial advantage. The terms of their agreement, however, are construed by a court to mean what reasonable commercial parties in their position can be taken together to have meant.

54 Clause 3.2 of the GSA imposes an obligation on the Sellers to make a maximum daily quantity of gas ("MDQ") available for delivery under the GSA.

55 Clause 3.3 imposes an additional obligation on the Sellers which operates against the background of the Buyer having a continuing obligation under cl 9.1 to nominate to the Sellers, in advance of each day, the quantity of gas the Buyer requires under the GSA for the following seven days. While the precise mechanics of the Buyer's nomination for a particular day need not be examined, it is relevant to note that the Buyer is obliged by cl 9.6 to nominate the Buyer's requirements in good faith as the Buyer's best estimate as a reasonable and prudent operator at the time of the nomination.

56 Clause 3.3(a) provides that, if the Buyer's nomination for a day exceeds MDQ, the Sellers "must use reasonable endeavours" to make gas available for delivery in excess of MDQ up to an additional daily quantity specified as the supplemental maximum daily quantity ("SMDQ"). There is now no dispute between the parties that the reference in cl 3.3(a) to "reasonable endeavours" is to endeavours which are objectively reasonable. There is also now no dispute between the parties that cl 3.3(b), in entitling the Sellers to "take into account all relevant commercial, economic and operational matters" in "determining whether they are able to supply SMDQ on a [d]ay", is concerned with the Sellers' use of endeavours which are objectively reasonable in accordance with cl 3.3(a).

57 Clause 3.3(c) makes clear that the Sellers have no obligation to supply and deliver gas on a day in excess of their obligations in respect of MDQ and SMDQ.

58 Clause 6.1(d) sets a price for gas delivered in excess of MDQ which is fixed for the twenty year period of the GSA subject to elaborate and prescriptive provisions governing price adjustment and price review set out in cll 6.2 and 7. Clause 6.1(d) thereby sets a fixed price for such gas as the Sellers are obliged to deliver on a day up to SMDQ in performance of their obligation under cl 3.3(a) of the GSA. It also applies that price for such gas as the Sellers choose to deliver under the GSA on a day in excess of SMDQ.

59 The fundamental difficulty that I have with the construction of cl 3.3(b) of the GSA now advanced by the Sellers is that I am unable to see how reasonable commercial parties in the position of the Sellers and the Buyer, having agreed in cl 6.1(d) on a fixed price for such gas as may be delivered daily by the Sellers in excess of MDQ and having agreed in cl 3.3(a) that the Sellers must use reasonable endeavours to make gas nominated by the Buyer available for delivery up to SMDQ, can be taken to have meant by cl 3.3(b) to give the Sellers a discretion not to make gas available for delivery up to SMDQ merely because market circumstances present an opportunity for the Sellers to demand a substantially higher price for that gas than the price fixed by cl 6.1(d).

60 The Sellers' construction is one which renders the obligation to use reasonable endeavours imposed on the Sellers by cl 3.3(a) of the GSA elusive, if not illusory, and which renders the price fixed by cl 6.1(d) of the GSA a price which is meaningful only if and when the Sellers consider it to their commercial advantage to accept it. The construction would, in commercial terms, eliminate the distinction carefully drawn in cl 3.3 between delivery of nominated gas in excess of MDQ up to SMDQ, in respect of which the Sellers are subjected to an obligation by cl 3.3(a), and the delivery of gas in excess of MDQ and SMDQ, in respect of which cl 3.3(c) makes clear that the Sellers are subjected to no obligation.

61 Had reasonable commercial parties in the position of the Sellers and the Buyer meant the price fixed by cl 6.1(d) of the GSA to operate as a floor price at which the Sellers might choose to supply gas to the Buyer up to SMDQ only if and when the Sellers considered selling at that price to be to their commercial advantage, then it is difficult to see why, as reasonable commercial parties, they would have structured cl 3.3 as they did. The Buyer does not overstate the position in submitting that, if the Sellers' construction were correct, there is no apparent reason to have included cl 3.3 at all.

62 The better construction of cl 3.3(b) is that advanced by the Buyer and unanimously accepted in the Court of Appeal of the Supreme Court of Western Australia. In allowing the Sellers to "take into account all relevant commercial, economic and operational matters" in "determining whether they are able to supply SMDQ on a [d]ay", cl 3.3(b) is directed to the ability or capacity of the Sellers to make gas nominated by the Buyer available for delivery in the performance of their obligation under cl 3.3(a) to use reasonable endeavours to make gas nominated by the Buyer available for delivery up to SMDQ. The reference in cl 3.3(b) to the Sellers being "able" to supply SMDQ on a day is to objective ability or capacity in the same way as the reference in cl 3.3(a) to "reasonable endeavours" is to objectively reasonable endeavours.

63 Clause 3.3(b) operates on that construction to ensure that if the Sellers are objectively unable (as distinct from being subjectively unwilling) to supply SMDQ on a day by reason of "relevant commercial, economic and operational

matters", they will not be required to make gas available to the Buyer under cl 3.3(a). The "relevant commercial, economic and operational matters" to which cl 3.3(b) refers encompass the totality of circumstances which might from time to time bear upon the ability or capacity of the Sellers to make gas nominated by the Buyer available for delivery up to SMDQ. Indeed, cl 3.3(b)(i) and (iii) makes clear that those circumstances include, without limitation, "all existing and likely commitments of each Seller" to the extent those commitments cause the Sellers to "form the reasonable view that there is insufficient capacity" to make a nominated quantity available for delivery, as well as conflicting obligations of the Sellers to make gas available for delivery to other customers.

64 The Buyer conceded in argument that relevant "commercial" and "economic" matters to which cl 3.3(b) refers necessarily extend to circumstances which bear on the ability or capacity of each Seller to make gas nominated by the Buyer available for delivery up to SMDQ at the price fixed by cl 6.1(d) of the GSA. The Buyer therefore conceded that the Sellers, using reasonable endeavours, would not be obliged to make gas available for delivery at that price if the circumstances were such that the Sellers were thereby being forced to make that gas available for delivery at a loss. The Buyer gave the hypothetical example of a new tax on production leading to an increase in the Sellers' costs of production.

65 Acceptance of that concession does not entail acceptance that the "commercial" and "economic" matters to which cl 3.3(b) refers also necessarily extend to the opportunity cost to the Sellers of making gas available for delivery to the Buyer under the GSA resulting from the Sellers, as a consequence of making that gas available for delivery under the GSA, no longer having that gas available to be put to a more profitable use.

66 The wholly understandable desire of the Sellers to maximise their profits throughout the period of the GSA might well be described as a "commercial" or "economic" matter. But their desire to maximise their profits by withholding gas from delivery to the Buyer under the GSA so as to be able to sell that gas at a higher price would not be "relevant" to "whether they are able to supply SMDQ on a [d]ay" within the meaning of cl 3.3(b). Their desire would not be "relevant" because it would not bear objectively on their ability or capacity to make gas nominated by the Buyer available for delivery up to SMDQ. That the Sellers might be unable to put gas to a more profitable use as a consequence of making that gas available for delivery to the Buyer under the GSA would not mean that the Sellers would thereby be less able or have less capacity to make that gas available for delivery to the Buyer under the GSA. They would remain "able", just reluctant or unwilling.

67 There is no dispute between the parties that, on the Buyer's construction of cl 3.3(b) of the GSA, the Sellers breached cl 3.3(a) by refusing to make gas available for delivery under the GSA and holding out for a higher price which the

Buyer had no practical option but to pay in order to continue its operations. There is also no dispute as to the quantification of damages for that breach as assessed by the Court of Appeal.

68 Accepting the Buyer's construction of cl 3.3(b) of the GSA, I would therefore dismiss the Sellers' appeal, leaving the award of damages by the Court of Appeal intact.

69 The Buyer's appeal can be dealt with quite shortly. The claim by the Buyer to recover the higher price it paid to the Sellers in restitution is a valiant, but ultimately vain, attempt by the Buyer to overcome the cap in cl 22.7(c) of the GSA on "[t]he liability of each Seller in respect of a failure to use reasonable endeavours to meet a Buyer nomination above MDQ up to SMDQ".

70 The Buyer does not argue that the "liability" to which cl 22.7(c) refers is confined to liability in contract. Nor does the Buyer argue that the Sellers' breach of cl 3.3(a) was not a "failure" by each Seller "to use reasonable endeavours to meet a Buyer nomination above MDQ up to SMDQ" within the meaning of cl 22.7(c).

71 What the Buyer argues is that cl 22.7(c) does not extend to a threatened failure to use reasonable endeavours to meet a Buyer nomination above MDQ up to SMDQ and that the threat rather than the refusal of the Sellers to make gas available for delivery under the GSA forms the basis of each Seller's liability in restitution. The difficulty with that argument is that, even if it were assumed in the Buyer's favour that the distinction between threatened and actual failure is available on the construction of cl 22.7(c), the Buyer's claim in restitution necessarily relies on the Sellers' failure to use reasonable endeavours to meet the Buyer's daily nominations above MDQ up to SMDQ both to establish causation and to quantify the amount the Buyer claims that the Sellers have an obligation to disgorge. But for the Sellers' failure to use reasonable endeavours to meet the Buyer's daily nominations above MDQ up to SMDQ, the Buyer would have no claim for the higher price it paid. The liability of each Seller in restitution which the Buyer asserts is therefore necessarily a liability "in respect of a failure to use reasonable endeavours to meet a Buyer nomination above MDQ up to SMDQ".

72 The award of damages for breach of cl 3.3(a) made by the Court of Appeal against each Seller is already in an amount which is capped by cl 22.7(c) of the GSA. The application of cl 22.7(c) to the Buyer's further claim in restitution means that the Buyer could not do better even if its asserted cause of action were established.

73 The result of the application of cl 22.7(c) to the Buyer's claim in restitution is therefore that the Buyer's appeal must also be dismissed. Other issues potentially arising in that appeal need not be determined.