SUPREME COURT OF QUEENSLAND

CITATION:	*AGL Sales (Qld) Pty Ltd v Westside Corporation Ltd & Ors; Westside Corporation Ltd & Ors v AGL Sales (Qld) Pty Ltd* [2015] QSC 70
PARTIES:	**In SC No 6943 of 2014**: **AGL SALES (QUEENSLAND) PTY LIMITED** ACN 121 177 740 (applicant) **v** **WESTSIDE CORPORATION LIMITED** ACN 117 145 516 (first respondent) **WESTSIDE CSG A PTY LTD** ACN 138 989 358 (second respondent) **WESTSIDE CSG D PTY LTD** ACN 140 474 362 (third respondent) **MITSUI E&P AUSTRALIA PTY LIMITED** ACN 108 437 529 (fourth respondent) **In SC No 8636 of 2014:** **WESTSIDE CORPORATION LIMITED** ACN 117 145 516 (first applicant) **WESTSIDE CSG A PTY LTD** ACN 138 989 358 (second applicant) **WESTSIDE CSG D PTY LTD** ACN 140 474 362 (third applicant) **MITSUI E&P AUSTRALIA PTY LIMITED** ACN 108 437 529 (fourth applicant) **v** **AGL SALES (QUEENSLAND) PTY LIMITED** ACN 121 177 740 (respondent)
FILE NO/S:	SC No 6943 of 2014 SC No 8636 of 2014
DIVISION:	Trial Division
PROCEEDING:	Hearing

ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 April 2015
DELIVERED AT:	Brisbane
HEARING DATE:	13 February 2015
JUDGE:	Philip McMurdo J
ORDER:	**1. In proceeding No BS6943/14, it is declared that upon the proper construction of the Gas Sales Agreement dated 28 February 2003 to which the applicant and the respondents are parties, cl 7.2 of that agreement does not apply to a breach of an obligation to supply Deferred Gas pursuant to cl 9.3.3 of the agreement.** **2. In proceeding No BS8636/14, the Amended Originating Application is dismissed.**
CATCHWORDS:	CONTRACT – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – dispute regarding the proper interpretation of a contract (Gas Sales Agreement) between the parties – where the contract anticipated the quantity of gas requested by the buyer may exceed the total quantity delivered and provided the difference, "Deferred Gas", would be supplied by the seller during the contract Term or within the 12 month period from its expiry – whether the sellers were to supply Deferred Gas according to the terms of the agreement – whether a liquidated damages clause applied to breach of the obligation to supply Deferred Gas during the 12 month period after the expiry of the contract term CONTRACT – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – dispute regarding the proper interpretation of a Gas Sales Agreement – where the contract anticipated that any "Deferred Gas" would be supplied by the seller during the contract Term or within the 12 month period from expiry of the Term – whether the sellers were to supply Deferred Gas according to the terms of the agreement – whether a liquidated damages clause applied to breach of the obligation to supply Deferred Gas during the 12 month period after the expiry of the contract term INTERPRETATION – GENERAL RULES OF CONSTRUCTION OF INSTRUMENTS – COMMERCIAL AND BUSINESS TRANSACTIONS – PARTICULAR TRANSACTIONS – dispute regarding the proper interpretation of a Gas Sales Agreement – where the contract

anticipated that any "Deferred Gas", would be supplied by the seller during the Term of the contract or within the 12 month period from expiry of the Term – whether the sellers were to supply the Deferred Gas according to the terms of the agreement – whether a liquidated damages clause applied to breach of the obligation to supply Deferred Gas during the 12 month period after the expiry of the contract term

Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640, considered

COUNSEL: **In SC No 6943 of 2014**:
S L Doyle QC, with S J Webster, for the applicant
J D McKenna QC for the respondent

In SC No 8636 of 2014:
J D McKenna QC for the applicant
S L Doyle QC, with S J Webster, for the respondent

SOLICITORS: **In SC No 6943 of 2014**:
Minter Ellison for the applicant
Corrs Chambers Westgarth for the respondent

In SC No 8636 of 2014:
Corrs Chambers Westgarth for the applicant
Minter Ellison for the respondent

Outline

[1] These two proceedings involve the same issue, which is the proper interpretation of the contract between the parties called a Gas Sales Agreement and dated 28 February 2003 ("the agreement").

[2] The original parties to the agreement were Moura Sales Pty Limited, as the agent of the then owners and operators of the Moura Mine in Central Queensland and Energex Retail Pty Ltd, as agent for Allgas Energy Ltd. By several assignments, AGL (Sales Qld) Pty Ltd became the buyer and the other parties to these proceedings became the sellers.

[3] The agreement was for an initial term expiring at the beginning of 2008, but with provision for extensions of the expiry date. There were extensions with the result that the agreed "Term" of the agreement expired on 1 January 2015.

[4] As I will discuss, the quantity of gas which was to be supplied on any day during the Term was to be that nominated by the buyer to the seller, subject to some qualifications. One was that there was a maximum which the seller was obliged to supply on any day which was described as the "Maximum Daily Quantity" or "MDQ". The amount of that MDQ was set out in a schedule to the agreement, which showed different quantities at different times during the Term. For the last seven years of the Term, the agreed MDQ was 18,000 gigajoules.

[5] There was also an agreed minimum quantity, in that by cl 7.1, the buyer had to pay the seller for each month a dollar sum calculated by reference to a quantity of gas described as the "MMQ" and defined as the aggregate of 80 per cent of the applicable MDQ for each day in that month.

[6] The agreement anticipated that in any month, the quantity of gas actually supplied might be less than that for which the buyer had paid, or in other words the MMQ. The extent of that shortfall was described in the GSA as "Make-up Gas". Clause 9.2 required that shortfall to be "made up" during the Term and, if necessary, during the period of 12 months from the expiry of the Term.

[7] The agreement also anticipated that the quantity of gas requested by the buyer, measured by adding each daily nomination of the buyer's required quantity, might exceed the total quantity which was actually delivered. That difference was defined as "Deferred Gas" which, it was agreed, would be supplied during the Term and, if necessary, within that period of 12 months from the expiry of the Term. By cl 9.3.3, Deferred Gas to be supplied during that period of 12 months was to be delivered at a rate which was equal to 80 per cent of the MDQ applicable at the end of the Term unless otherwise agreed.

[8] The dispute here is about Deferred Gas. It is accepted by the sellers that there is Deferred Gas to be supplied within the period of 12 months from 1 January 2015.[1] But there is an anticipation that the sellers might not supply this Deferred Gas according to the agreement. The buyer says that the consequence of any such breach will be a liability for damages for breach of contract, to be assessed under the common law. The sellers say that their liability for any such breach would be capped by a liquidated damages provision of the agreement, which is cl 7.2. The question for present determination is whether cl 7.2 could apply in that event.

[9] AGL seeks a declaration that cl 7.2 does not apply to a breach of the obligation to supply Deferred Gas during the current period of 12 months. The sellers seek a declaration that cl 7.2 "will apply in respect of any delivery of Deferred Gas" during this period.

The relevant terms

[10] Clause 10.1 provided for the buyer to nominate a quantity of gas for delivery as follows:

> "10.1 Nominations and forecasts
>
> Energex may nominate any quantity of Gas for delivery to the Delivery Points on a Day but, notwithstanding anything in this clause 10. Moura is not obliged to deliver on any Day a quantity greater than the MDQ applicable to that Day. Energex shall submit forecasts and nominations to Moura Sales in accordance with the following schedule:
>
> 10.1.1 no later than 10 Business Days before the commencement of a Month, Energex must nominate the quantity of Gas to be delivered under this Agreement for each Day of that

[1] Affidavit of C Douglas (29 January 2015), Exhibit CLD-2.

Month at each Delivery Point (the quantity nominated for a Day under this provision shall be the 'Initial Nomination' for that Day);

10.1.2 no later than 2:00 pm on each Friday, Energex may nominate the quantity of Gas to be delivered under this Agreement for each Day of the following week (commencing at 8:00am on the next Monday) at each Delivery Point (the quantity nominated for a Day under this provision shall be the 'Second Nomination' for that Day), which may differ from and vary the Initial Nomination. If Energex does not submit a nomination under this clause 10.1.2, the Second Nomination shall equal the Initial Nomination; and

10.1.3 not later than 2:00 pm each Day, Energex may notify Moura Sales of its requirements for Gas to be delivered under this Agreement for the following Day at each Delivery Point (the quantity nominated for a Day under this provision shall be the 'Daily Nomination' for that Day, which may, subject to clause 10.1.4, differ from and vary the Second Nomination. The Parties shall maintain records of the aggregate of Delivered Quantities and Daily Nominations over a Month and reconcile these figures daily. If Energex does not submit a nomination under this clause 10.1.3, the Daily Nomination shall equal the Second Nomination.

10.1.4 Until such time as Moura Sales or the Coal Mine Owners enter into an arrangement with [Duke Queensland Pipeline Pty Ltd and DEI Queensland Pipeline Pty Ltd] to manage balancing of quantities of Gas delivered to the Queensland Gas Pipeline from the Moura Mine Pipeline (such as an operational balancing agreement), Moura Sales must use its reasonable endeavours to supply that amount nominated by Energex, pursuant to clause 10.1.3, in excess of 115% of the Second Nomination (the 'Affected Amount') but may refuse to deliver that Affected Amount by giving Notice to Energex not later than 4 hours after the receipt of Energex's nomination under clause 10.1.3. If Moura Sales issues a Notice under this clause 10.1.4, the Daily Nomination will be 115% of the Second Nomination provided that the Daily Nomination will not exceed the MDQ unless otherwise agreed.

10.1.5 If Moura Sales is unable to supply a quantity of Gas that Energex nominates for delivery on a Day in excess of the prevailing MDQ, then Moura Sales may refuse to deliver the amount that exceeds the prevailing MDQ by giving Notice to Energex not later than 4 hours after the receipt of Energex's nomination, or on the next Business Day for a nomination made pursuant to clause 10.1.1. If Moura Sales issues a Notice under this clause 10.1.5, the Initial

> Nomination, Second Nomination or Daily Nomination, as the case may be, will be reduced to be equal to the MDQ."

Clause 10 further provided:

> "10.2 Variation of nomination procedures
>
> Energex may vary, with the consent of Moura Sales (such consent not to be unreasonably withheld or delayed), the procedures and times specified in clause 10.1 to the extent necessary to ensure compatibility with equivalent requirements under downstream transportation arrangements and its own contracts for the onsale of Gas.
>
> 10.3 Termination of the Agreement
>
> This clause 10 survives termination."

[11] The quantity which the sellers had to supply was according to that "Daily Nomination". That was by cl 9.1.1 which was:

> "9.1.1 For so long as Moura Sales or the Coal Mine Owners do not have an effective arrangement with Duke to manage balancing of quantities of Gas delivered to the Queensland Gas Pipeline from the Moura Mine Pipeline (such as an operational balancing agreement), Moura Sales must, subject to clauses 13 and 14, deliver to Energex at the Delivery Points a quantity of Gas:
>
> (a) between 85% and 115% of the Daily Nomination;
>
> (b) between 90% and 110% of the aggregate of the Daily Nomination for any 3 consecutive Days;
>
> (c) between 95% and 105% of the aggregate of the Daily Nomination for any 7 consecutive Days; and
>
> (d) equal to the aggregate of the Daily Nomination for each Day in the relevant Month."

[12] The term "Daily Nomination" was defined[2] to mean "the quantity of Gas that [the buyer] requests for delivery, pursuant to clause 10.1, and [the sellers agree] to deliver … to the Delivery Points on a Day under this Agreement".

[13] The agreement contained this definition of MDQ:

> "'Maximum Daily Quantity' and 'MDQ' mean the maximum quantity of Gas, so specified in Schedule 2, that Moura Sales is obliged, pursuant to the terms of this Terms Sheet, to deliver to the Delivery Points on a Day during the Term."[3]

[14] The agreement provided a particular remedy for a breach of the obligation in cl 9.1.1(d). This was by cl 7.2:

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2 Agreement, sch 1.
3 Agreement, sch 1.

"7.2 Remedy

Despite any other provision of this Agreement, but subject to clause 13.4.5, if in any Month Moura Sales makes available to Energex at the Delivery Points an amount of Gas less than the aggregate of Daily Nominations for each Day in that Month, then Moura Sales must pay to Energex an amount ('Remedy Amount') equal to:

$$\left(\sum_{D=1}^{D=\text{Days in Month}} \text{Daily Nomination}_D - \sum_{D=1}^{D=\text{Days in Month}} \text{Delivered Quantity}_D\right) \text{x } 40\% \text{x Contract Price}_M$$

where:

Daily Nomination$_D$ is the Daily Nomination applicable to a Day in that Month;

Delivery Quantity$_D$ is the Delivered Quantity applicable to a Day in that Month; and

Contract Price$_M$ is the Contract Price applicable to that Month.

The Parties acknowledge that the amounts payable under this clause 7.2 have been the subject of negotiation between the Parties and are intended to be liquidated damages that constitute the anticipated or actual loss or damage which would be incurred by Energex due to failure of supply of Gas under this Agreement and not a penalty. Moura Sales liability for failure to supply Gas up to the aggregate of the Daily Nominations for each Day in a Month under this Agreement is limited to the Remedy Amount."

[15] By cl 5.1, the sellers were obliged to sell and the buyer obliged to buy and receive "at the Delivery Points" what was described as "the Delivered Quantity" for each day of a month during the Term. The term "Delivery Quantity" was defined[4] to mean (simply) "the quantity of Gas delivered to [the buyer] at a Delivery Point on a Day under this Agreement". The term "Delivery Point" is defined[5] to mean:

"(a) the point at which the Moura Mine Pipeline connects to the Queensland Gas Pipeline;

(b) the inlet flange to the Gas metering skid at the facility owned by Queensland Nitrates Pty Ltd …; or

(c) any other point nominated by [the buyer] in accordance with clause 5.3.2."

By cl 5.3.1, all gas was to be delivered "at a Delivery Point at the pressure for that Delivery Point specified in Schedule 2". By cl 5.3.2, the buyer was entitled to take delivery of gas at any Delivery Point specified in the agreement or nominated by a notice by the buyer to the sellers as a Delivery Point (subject to certain conditions set out in that clause and cl 5.3.3).

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4 Agreement, sch 1.

5 Agreement, sch 1.

[16] By cl 7.1, the buyer was required to pay to the sellers a monthly "Commodity Charge" calculated according to a formula there set out. As already noted, in effect the buyer was thereby obliged to pay for a quantity of gas which was 80 per cent of the aggregate of the applicable MDQ for each day in the relevant month, described as the MMQ.

[17] The subject of Make-Up Gas was governed by cl 9.2, which it is necessary to set out in full:

> "9.2 Deferred Uplift
>
> 9.2.1 In any Month during the Term, Moura Sales must supply and Energex must take delivery of quantities of Gas paid for under the MMQ payment obligation of clause 7.1 but not taken ('Make-up Gas') at a delivery rate equal to the applicable Daily Nomination, to the extent that the quantity of Gas (excluding Make-up Gas) taken during that Month exceeds the MMQ applicable to that Month.
>
> 9.2.2 For a period of 12 months after the termination of this Agreement by the effluxion of time, Moura Sales must continue to supply and Energex must continue to receive Make-up Gas at a rate not less than 80% of the MDQ applicable on the last Day prior to the termination of this Agreement. The Parties may agree through the nominations process of clause 10 to supply and receive Make-Up Gas at a rate exceeding 80% of the MDQ applicable on the last Day prior to the termination of this Agreement.
>
> 9.2.3 Energex must pay Moura Sales for each Month during the Term a charge for Make-up Gas ('Deferred Uplift Charge') which is calculated as the difference between the Contract Price applicable at the time of delivery of the Make-up Gas and the Contract Price(s) applicable at the time(s) of the relevant MMQ payment(s) multiplied by the quantity of Make-up Gas taken by Energex in that Month provided that the earliest Make-Up Gas accrued will be deemed to be the first Make-Up Gas made available for delivery under clauses 9.2.1 and 9.2.2.
>
> 9.2.4 This clause 9.2 survives termination."

[18] The subject of Deferred Gas was governed by cl 9.3 as follows:

> "9.3 Deferred Delivery
>
> 9.3.1 Subject to this clause 9.3, Moura Sales shall supply, and Energex must receive, a quantity of Gas ('Deferred Gas') equal to:
>
> $$\sum_{D=1}^{D=\text{Term Days}} (\text{Daily Nomination}_{DT} - \text{Delivered Quantity}_{DT})$$
>
> where:

Term Days is the number of Days since Commencement;

Daily Nomination_{DT} is the Daily Nomination applicable to a Day during the Term; and

Daily Quantity_{DT} is the Delivered Quantity applicable to that Day during the Term.

9.3.2 If in any Month during the Term:

(a) there is Deferred Gas available for delivery by Moura Sales;

(b) Moura Sales has supplied all quantities of Make-up Gas pursuant to clause 9.2; and

(c) the aggregate of the Delivered Quantities in that Month is greater than the product of the applicable MDQ and the number of Days in that Month (this difference being defined as 'Excess Gas'),

then the Excess Gas, excluding any make-up Gas, so delivered by Moura Sales is deemed to be the supply of Deferred Gas, to the extent that the Excess Gas is not greater than the quantity of Deferred Gas available for delivery.

9.3.3 For a period of 12 months after the termination of this Agreement by the effluxion of time, and subsequent to supply by Moura Sales of all quantities of Make-up Gas pursuant to clause 9.2, Moura Sales shall continue to supply, and Energex must continue to receive, the quantity of Deferred Gas not taken during the Term.

Deferred Gas supplied by Moura Sales under this clause 9.3.3 shall be delivered at a rate equal to 80% of the MDQ applicable at termination of this Agreement, unless otherwise agreed by the Parties pursuant to clause 10.

9.3.4 Energex shall pay Moura Sales for Deferred Gas delivered under this clause the Contract Price as defined in Schedule 2 and amended in accordance with clause 8.

9.3.5 This clause 9.3 survives termination."

[19] The presently relevant obligation is contained in cl 9.3.3, under which the sellers are obliged to supply, and the buyer is obliged to receive, the quantity of Deferred Gas not taken during the Term. As already noted, it is common ground that there is a quantity of Deferred Gas to be supplied during 2015. The precise quantity may not be presently agreed, but that does not matter for the purposes of this judgment.

[20] Clause 9.3.3 also provides for the rate at which that quantity of Deferred Gas, as quantified at the end of the Term, is to be supplied. Again subject to the supply of all quantities of Make-Up Gas pursuant to cl 9.2, that quantity of Deferred Gas is to be delivered at a rate equal to 80 per cent of the MDQ "applicable at termination of this

Agreement" unless the rate is "otherwise agreed by the Parties pursuant to clause 10". As is apparently common ground, the applicable MDQ is that applying immediately prior to the expiry of the Term: 18,000 gigajoules per day.

[21] As to the qualification that the rate might be otherwise agreed by the parties under cl 10, that clause does not so clearly provide for an agreement of that kind. Clause 10 refers to an agreement between the parties only in two places. One is in cl 10.1.4, which allows an agreement by which a Daily Nomination might exceed the MDQ. But that is not the circumstance in which cl 9.3.3 provides for the parties to "otherwise agree". The other provision is cl 10.2. But that is for an agreement to vary the operation of cl 10.1 and for a particular purpose which is not immediately relevant.

[22] Some meaning should be given, if possible, to the words "pursuant to clause 10" where they appear at the end of cl 9.3.3. The only rational meaning is that the parties intended to provide that, by the use of the process of nominations for which cl 10 provided, and by the sellers agreeing to supply at a rate according to a nomination, the parties might thereby agree upon a different rate than 80 per cent of the MDQ.

[23] Importantly, the parties were not obliged to arrive at a rate for the supply of Deferred Gas after the expiry of the Term which was different from the rate of 80 per cent of the ultimate MDQ.

The scope of cl 7.2

[24] The sellers say that cl 7.2 has an application which extends beyond the Term of the agreement, or in other words that it has an ongoing operation during 2015. They argue that the agreed process of Daily Nominations, as set out in cl 10.1, also continues to apply during 2015. And they say that cl 9.1.1(d) will continue to require the sellers to deliver a quantity of gas equal to the aggregate of the Daily Nomination for each day in a month. They seem to say that if the sellers perform that obligation under cl 9.1.1(d), they will effectively perform their obligations in cl 9.3.3. If they fail to perform their obligations under cl 9.3.3, the buyer's only remedy is for liquidated damages under cl 7.2.

[25] According to the sellers' argument, it is significant that cl 7.2, unlike certain other clauses such as cl 5.1.1, is not expressed to operate only "during the Term". Similarly, cl 9.1.1 is not expressed to operate only during the Term. And cl 10 is expressed to have an operation which "survives termination".[6]

[26] The sellers point to the fact that there are provisions which are not expressed to operate only "during the Term" or to "survive termination", which the parties must have intended to apply during the current 12 month period. For example, there is cl 11 which provides for the metering of gas and there is cl 13.3 which requires the gas to be of a certain quality. The sellers' argument in this respect refers also to cl 5.3.1, cl 5.5, cl 6.1 and cl 15. Each of these provisions (apart from cl 7.2) appears to be operative during the current period. They fortify the sellers' submission, which I accept, that the absence of a specific provision in cl 7.2 that it will operate after the Term or "termination" does not compel the conclusion that it has no such operation.

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[6] Agreement, cl 10.3.

[27] The sellers' argument seeks support from the introductory words of cl 7.2, namely "[d]espite any other provision of this Agreement …". Those words would be significant in the event of an inconsistency between cl 7.2 and another provision of the agreement. But that would be where cl 7.2 applies. The present question is whether it does apply to a breach of cl 9.3.3.

[28] The sellers' argument suggests that there is some significance in cl 7.2 being expressed to be "subject to clause 13.4.5". That clause provides for a particular liability of the sellers in the event of costs being incurred in consequence of the supply of "Off-Specification Gas".[7] The sellers suggest that such an event might arguably constitute a failure to deliver "Gas" in a way which would attract the operation of cl 7.2. So the inclusion of this express qualification in cl 7.2, it is said, indicates an intention that breaches of other provisions of the agreement, which also constitute a failure to deliver gas, could result only in a liability for liquidated damages under that clause. That submission is relevant but hardly determinative.

[29] The sellers' case has an essential difficulty which is not persuasively addressed by their submissions. The difficulty is that the obligations imposed upon the sellers by cl 9.3.3 do not correspond with the obligation which is relevant under cl 7.2. Under cl 9.3.3, the sellers must supply a certain quantity of Deferred Gas and they must do so at a certain rate. Subject to the parties agreeing otherwise, that rate is equal to 80 per cent of the MDQ applicable at the expiry of the Term. Clause 7.2 does not provide for a breach of either of those obligations. It provides a remedy for the sellers' failure to supply a quantity, *in any month*, which is at least the aggregate of Daily Nominations for each day in that month.

[30] Clause 7.2 provides a remedy but it is not the source of the relevant obligation. The source is cl 9.1.1(d). As the concluding words of cl 7.2 emphasise, the so-called Remedy Amount is the agreed compensation for the sellers' "failure to supply Gas up to the aggregate of the Daily Nominations for each Day in a Month under this Agreement". The sellers rely upon the more general language of the preceding sentence ("failure of supply of Gas under this Agreement …"), but that cannot be read in isolation.

[31] Clause 9.3.3 makes it possible for the parties to agree on a different rate of supply and refers in that respect to cl 10. But cl 9.3.3 does not require the parties to act under cl 10 in any respect. As cl 7.2 could not apply in the absence of Daily Nominations, the absence of any requirement for such nominations, in the operation of cl 9.3.3, makes it difficult to conclude that cl 7.2 must apply to any breach of cl 9.3.3. Further, there is a tension between the application of that nominations process, according to cl 9.1 and cl 10.1, and the agreed rate of supply in cl 9.3.3. Under cl 10.1, the sellers' obligation to deliver on any day was limited to amount of the MDQ. Under cl 9.3.3, the agreed rate is equal to *80 per cent* of the MDQ. The sellers' argument seeks to answer this inconsistency in this way. They say that within this period of 12 months after the expiry of the Term, the "MDQ applicable to that Day", as that expression is used in cl 10.1, takes on a new meaning. Prior to the expiry of the Term, it was the applicable MDQ as set out in a schedule to the agreement. As already noted, the term MDQ is defined to mean the maximum quantity of gas, as specified in Schedule 2, that the sellers are obliged to deliver on a day. But the sellers argue that during this post Term period, the

[7] As defined in sch 1 of the Agreement.

expression "the MDQ applicable to that Day" means instead "80% of the MDQ applicable at termination of this Agreement".[8] This argument cannot be accepted. The term MDQ has a defined meaning, which is that it is a maximum daily quantity which the sellers are obliged to deliver on a day *during the Term*. The agreement does not identify anything as a maximum daily quantity or MDQ which is to apply *after* the Term. It provides for a rate of supply of Deferred Gas (and a rate for the supply Make-Up Gas) after the Term not by reference to a current MDQ, but instead to the MDQ applicable at termination of the agreement. The expression "the MDQ applicable to that Day" in cl 10.1 is inapt in the current situation.

[32] There is another important difference between the present situation and that which existed during the Term of the agreement. During the Term, it was for the buyer to determine the quantity or quantities which would be bought and sold (subject to the MDQ and the buyer's obligation to pay for the minimum quantity). The buyer determined the quantity or quantities by nominations under cl 10. But in the present period under cl 9.3.3, the buyer is not given that choice. The quantity which must be sold and purchased is the quantity of Deferred Gas not taken during the Term. And nor can the buyer unilaterally determine the rate of supply of that quantity of gas, because that rate must be either as fixed by cl 9.3.3 or as the parties further agree. Again, the process set out in cl 10.1 is inapt in the situation.

[33] For the sellers it is argued that the process of nomination under cl 10 is required for the practical purpose of fixing the location or locations at which a certain quantity of gas is to be supplied. Clause 10.1 permits the buyer to nominate "any quantity of Gas for delivery to the Delivery Points on a Day …" and the following sub-clauses provide for a nomination of a quantity of gas to be delivered "at each Delivery Point". It is said that without the operation of cl 10.1 in the present situation, there would be an uncertainty as to the point or points of delivery.

[34] As already noted, the agreement defined "Delivery Point" to mean two particular locations as well as any other point nominated by the buyer in accordance with cl 5.3.2. During the Term, the buyer was able to determine not only the quantity and rate of supply, but to do so by reference to particular delivery points. Again, the current situation is different. The buyer must accept a certain quantity and rate of supply. And it must do so at one or more of the agreed delivery points. It is unnecessary for the process under cl 10 to be employed for the operation of cl 9.3.3.

[35] In *Electricity Generation Corporation v Woodside Energy Ltd*,[9] the plurality said that the interpretation of a commercial contract requires a 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. I have had regard to the extensive list of "background facts" as detailed in the written submissions for the sellers. But those facts together with the evident commercial purposes of this long term gas supply agreement, do not significantly affect the determination of the present question of interpretation. The contractual obligations of the parties under cl 9.3.3 are not in dispute. The issue of interpretation is whether the parties agreed upon a certain remedy, according to cl 7.2, for any breach of those obligations on the part of the sellers. The particular purpose of cl 9.3.3 was to ensure the gas which was required by the buyer but

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[8] Applicants' Outline in BS8636/14, [217].
[9] (2014) 251 CLR 640, 657 [35].

not supplied by the sellers should be bought and sold within the following 12 months. The purpose would not be served by confining the buyer to a remedy which would be incapable of operation, absent the parties adopting the nominations process. It could hardly be said that the acceptance of the sellers' argument is necessary to avoid the agreement "making commercial nonsense or working commercial inconvenience".[10]

[36] In my conclusion, the argument of AGL Sales (Queensland) Pty Ltd should be accepted. I have reached this conclusion uninfluenced by evidence for AGL, in an affidavit of Mr Cornish, to which there was an objection on the basis that it was irrelevant to the interpretation of the agreement.

Relief

[37] In its Amended Originating Application, AGL Sales (Queensland) Pty Ltd seeks firstly a declaration that the respondents are required to supply to the applicant 5.256 petajoules during the year commencing in 1 January 2015. By paragraph 1A of that Application, it seeks a declaration that upon the proper construction of the agreement, cl 7.2 does not apply to a breach of the obligation to supply Deferred Gas pursuant to cl 9.3.3. Last December I ordered that the Application under paragraph 1A be heard and determined separately from the balance of AGL's application and with the Originating Application filed by the sellers.

[38] It follows that there should be a declaration in terms of paragraph 1A of the Amended Originating Application in proceeding BS6943/14 and that the Amended Originating Application in BS8636/14 be dismissed.

[10] Ibid.