

BETWEEN

ELECTRA PTY LTD (APPELLANT)

and

DUCT SUPPLIERS LTD (RESPONDENT)

RESPONDENT'S OUTLINE OF SUBMISSIONS

SENIOR COUNSEL

JUNIOR COUNSEL

INSTRUCTING SOLICITOR

Summary of Submissions

- 1 The original contract was lawfully varied and then later repudiated by the appellant.**
- 2 Economic duress is not established due to the availability of a reasonable and practical alternative to agreeing to the higher price.**
- 3 Alternatively, if economic duress is established, the appellant is estopped from claiming that the contract is void for economic duress.**

1. The original contract was lawfully varied and then later repudiated by the appellant.

1.1 The original contract was varied and the appellant was under contract to buy the remaining heating units for \$40,000.

1.1.1 The parties agreed to the variation.

- *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988) 14 NSWLR 527, 534.

1.1.2 The variation was supported by consideration.

1.1.2.1 The respondent provided fresh consideration for the variation by importing different and higher quality units than those stipulated in the original contract.

- *Wigan v Edwards* (1973) 1 ALR 497, 512.

1.1.2.2 In the alternative, the appellant received a practical benefit from the variation.

- *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723, 746-747.
- *Ajax Cooke Pty Ltd v Nugent* (Unreported, Supreme Court of Victoria, Phillips J, 29 November 1993) [12-13].
- *Silver v Dome Resources* (2007) 62 ACSR 539, [131-134].

1.2 The appellant's rejection of the final shipment at the agreed price, viewed objectively in context, represented a repudiation of the varied contract which conferred a right to terminate upon the respondent.

1.2.1 This repudiation constituted a representation that there was no point in the respondent tendering performance on the 24th of April.

- *Foran v Wight* (1989) 168 CLR 385, 462.
- *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623, [22].
- *Carr v Berriman* (1953) 89 CLR 327, 351.

1.2.2 The respondent was not 'substantially incapable' of performance at the time of repudiation and thus was sufficiently willing and able to perform as to retain the right to terminate.

- *Foran v Wight* (1989) 168 CLR 385, 462.

2. Economic duress is not established due to the availability of a reasonable and practical alternative to agreeing to the higher price.

2.1 The absence of a reasonable and practical alternative to agreeing to the demand is a factor when alleging economic duress.

- *Equiticorp Finance Ltd v Bank of New Zealand* (1993) 32 NSWLR 50, 88.
- *Equiticorp Financial Services Ltd v Equiticorp Financial Services (NZ) Ltd* (1992) 29 NSWLR 260, 297.
- *Pao On v Lau Yiu Long* [1979] UKPC 2, 12.
- *McIntyre v Nemesis DBK Ltd* [2009] NZCA 329, [19-22, 67 & 77].
- *DNSD Subsea Ltd v Petroleum Geo-Services ASA* [2000] BLR 530, [131-132 & 136].

2.2 If the reasonable and practical alternative rule applies, then the availability of an alternative supplier discovered between the 14th and 20th of April indicates that a reasonable alternative was available at the time of the variation.

2.3 Whether reasonable alternatives were available is determined objectively, and may require the party alleging duress to have made reasonable inquiries.

- *DNSD Subsea Ltd v Petroleum Geo-Services ASA* [2000] BLR 530, [131-132 & 136].
- *McIntyre v Nemesis DBK Ltd* [2009] NZCA 329, [19-22, 67 & 77].

3. Alternatively, if economic duress is established, the appellant is estopped from claiming that the contract is void for economic duress.

3.1 Equitable estoppel can prevent a party from exercising a right to void for duress.

- *Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd* (1991) 22 NSWLR 298, 304-308.
- *Australian Horizons (Vic) Pty Ltd v Ryan Land Co Pty Ltd* [1994] 2 VR 463, 500.

3.2 The respondent experienced a material or significant detriment in reliance upon the appellant's induced representation by conduct, sufficient to ground an estoppel, due to the \$10,000 spent on airfreight for the second to last delivery.

- *Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd* (1991) 22 NSWLR 298, 304-308.
- *Commonwealth v Verwayen* (1990) 170 CLR 394, 441.
- *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 404, 428-429.

3.3 The appellant was aware of this detrimental reliance, as it was communicated to them by the respondent.

- *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 428-429.

AUTHORITIES CITED

A – Cases

Australia:

- Ajax Cooke Pty Ltd v Nugent* (Unreported, Supreme Court of Victoria, Phillips J, 29 November 1993)
- Australian Horizons (Vic) Pty Ltd v Ryan Land Co Pty Ltd* [1994] 2 VR 463
- Carr v Berriman* (1953) 89 CLR 327
- Commonwealth v Verwayen* (1990) 170 CLR 394
- Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40
- DNSD Subsea Ltd v Petroleum Geo-Services ASA* [2000] BLR 530
- Dome Resources NL v Silver* [2008] NSWCA 322
- Electricity Generation Corporation (trading as Verve Energy) v Woodside Energy Ltd* [2013] WASCA 36
- Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988) 14 NSWLR 527
- Equiticorp Finance Ltd v Bank of New Zealand* (1993) 32 NSWLR 50
- Equiticorp Financial Services Ltd v Equiticorp Financial Services (NZ) Ltd* (1992) 29 NSWLR 260
- Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89
- Foran v Wight* (1989) 168 CLR 385
- Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd* (1991) 22 NSWLR 298
- Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623
- Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR723
- Silver v Dome Resources* (2007) 62 ACSR 539
- TA Sundell v Yannoulatos* [1956] SR (NSW) 323
- Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387
- Wigan v Edwards* (1973) 1 ALR 497

New Zealand:

- McIntyre v Nemesis DBK Ltd* [2009] NZCA 329

United Kingdom:

- Pao On v Lau Yiu Long* [1979] UKPC 2