

IN THE PRIVY COUNCIL

No. 11 of 1977

O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH WALES
COMMON LAW DIVISION
COMMERCIAL LIST IN ACTION No.4310 of 1974

B E T W E E N :

BP AUSTRALIA LIMITED Appellant

- and -

NABALCO PTY. LIMITED Respondent

CASE FOR THE RESPONDENT

Record

pp.297-340
pp.771-839

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1. This is an appeal by BP Australia Limited (hereinafter called "BPA") from declarations and orders made by Mr. Justice Sheppard of the Supreme Court of New South Wales in favour of Nabalco Pty. Limited (hereinafter called "Nabalco") in an action brought by Nabalco against BPA for breach of contract. His Honour awarded Nabalco damages, including interest up to the date of judgment, amounting to \$26,338,338.57.

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2. BPA was the seller and Nabalco was the buyer under a written agreement, dated 11th June 1970, for the supply of petroleum products, including furnace oil (sometimes referred to in the evidence as fuel oil.)

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3. Nabalco is the manager of certain large operations, including the mining of bauxite and the production of alumina, which are being carried out on the Gove Peninsula in the Northern Territory of Australia, by a consortium of Swiss and Australian interests known as the "Gove Joint Venture." The agreement was for the supply of petroleum products to the Gove Project.

4. By reason of clause 3 of the agreement, and in the events that occurred, the agreement commenced in March 1971, and was to continue (subject to various contingencies)

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for 10 years from 5th May 1971.

- p.242 L 16 5. The dispute which arose between the parties related to furnace oil, a product of which it was essential that Nabalco should have an assured and continuous supply and of which Nabalco consumed at Gove during the relevant period some 360,000 metric tons annually.
- p.868 L 20 6. At the time the agreement was entered into, the market price of furnace oil was falling. The downward trend in that market price had begun in 1957. The agreement contained a clause (9(C)(i)) which provided in substance that if the contract price of any one of the three main products covered by it (diesoleum, super motor spirit and furnace oil) were to become substantially out of line with the ruling market price (or "F.O.B. value") of that product then either party could, by notice, require a re-negotiation of the contract price of all three products. It was expressly stipulated, however, that such right could not be exercised for 5 years from a date which turned out to be 5th May 1971. To that extent, until 5th May 1976, contract prices were fixed, notwithstanding movements in world market prices. 10
- p.274 L 32
p.275 L 14-15
- p.299 LL 27-35
p.321 LL 11-21 7. At all material times BPA obtained its supply of furnace oil for delivery under the Gove contract from a related company, BP Trading Limited ("BPT"). The price which BPA paid BPT for the product was based on current market prices. The furnace oil for the most part was refined in Singapore from crude oil which came from the Middle East. 30
- p.322 L 22 to
p.323 L 14
- p.312 L30 to
p.322 L 21 8. Between 1971 and 1974 the oil producing nations, members of OPEC, from whom the BP group obtained crude oil, took a series of concerted steps to increase their revenues from oil production. These steps, the impact of which was felt by all oil companies, forced up world prices of crude oil and petroleum products. From a very early stage of the Gove contract, even before the first delivery of furnace oil, they produced the result that BPA was paying BPT for furnace oil a price which was out of line with the price it was recovering from Nabalco, the contract price for furnace oil having become substantially less than its general market price (or "F.O.B. value"). This resulted in an early but unsuccessful attempt by BPA to have included in the contract 40
- Exhibit F
pp.868-869 50

10 "an F.O.B. escalation clause", free of the 5 year restriction. In late 1973, however, the OPEC countries achieved a very large and sudden increase in their revenue by forcing on oil producers what was approximately a tenfold increase in their contributions to the host government. This meant that the contract price of furnace oil was many times less than its general market price and therefore (by reason of the terms on which BPA acquired the product from BPT) the contract became even more unprofitable to BPA.

9. BPA was aware that on 5th May, 1976 it would be able to invoke the price adjustment clause referred to in 6 above. In the meantime, however, it was losing heavily by continuing to supply at the contract price. It, therefore, in early 1974, invoked another provision of the contract under which it was entitled in certain circumstances to fix a new price for a product subject to Nabalco's right to terminate the agreement as to that product if it so elected. It also made it plain that it would not continue to supply furnace oil at the old contract price.

p.243 LL 19-22

p.33

10. The substance of the dispute which then arose was whether in the circumstances, and notwithstanding the 5 year restriction upon reviewing the contract price in relation to general market levels, BPA was entitled under the contract to take the action which it took. Nabalco also claimed that, in the events which transpired in relation to that dispute, BPA repudiated its contractual obligations.

p.21 LL 1-20

p.21 LL 20-32

(A) THE CONTRACT

pp.22-32

11. By clause 2 of the agreement, subject to the terms and conditions of the agreement, Nabalco was obliged to purchase from BPA and BPA was obliged to supply and deliver to Nabalco Nabalco's requirements of Super Motor Spirit, Diesoleum and Furnace Oil, together with other requirements of petroleum products.

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12. The contract provided for delivery of petroleum products at Gove contained various provisions regulating the necessary arrangements to be made for delivery, acceptance and storage.

13. The provisions relating to price, which

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are critical to the present case, are to be found in clauses 8 and 9.

In short, the contract fixed a base price for each product and contained a series of detailed procedures for "price variations" in certain circumstances.

Clause 8 was in the following terms:-

"8. Subject to the other provisions hereof the base prices to be paid by the Buyer to the Seller shall be:

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| | |
|-----------------------|-------------------------|
| BP Super Motor Spirit | ₹A.31.32 per metric ton |
| BP Diesoleum | ₹A.18.31 per metric ton |
| BP Furnace Oil | ₹A. 9.42 per metric ton |

if the Buyer's estimated usage could enable delivery by the Seller in quantities of more than 25,400 metric tons per delivery.

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| | |
|----------------|-------------------------|
| BP Furnace Oil | ₹A.12.45 per metric ton |
|----------------|-------------------------|

if the Buyer's estimate usage could not enable delivery by the Seller in quantities of more than 25,400 metric tons per delivery."

In the events which occurred the former of the prices (i.e. A₹9.42) fixed for furnace oil took effect.

Clause 9, described in the marginal note as relating to "Price Variations" commenced, in paragraphs (A) and (B) with a series of provisions for adjustment of prices by reason of variations in world freight rates. Those provisions are not directly relevant, save that by March 1974 they had operated to increase the base price of furnace oil to ₹A.13.99 per metric tonne.

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The key provisions of the contract were contained in clause 9(C). They were as follows:

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"C. Super Motor Spirit, Diesoleum and Furnace Oil
(i) F.O.B. Values-
The Seller or the Buyer may (but not

earlier than the expiration of five
(5) years from the date of the first
delivery of Furnace Oil hereunder or
the first day of April 1977 whichever
shall be the earlier) by notice in
writing to the other notify the
other that in the opinion of the
party giving such notice the
F.O.B. value of Super Motor
Spirit, Diesoleum and/or Furnace
Oil has substantially altered since
the date hereof and upon the
receipt of such notice and subject
to production by the party giving
such notice of reasonable evidence
of such substantial alteration
both parties will as soon as may be
practicable confer together for the
purpose of fixing a fresh base price
for Super Motor Spirit, Diesoleum
and Furnace Oil to be delivered
hereunder. If such substantial
alteration be reasonably established
and within one (1) month after the
giving of such notice the parties
do not agree in writing upon the
then existing base prices continuing
to apply or upon fresh base prices
then either party may by three (3)
months' notice to the other but
without prejudice to any then
existing action or right of action
by one against the other terminate
this agreement as from the
expiration of such last mentioned
notice.

(ii) Freight Rate Assessments -
If the GP and/or the MR AFRA freight
rate assessments hereinbefore
referred to shall cease to be fixed
during the continuance of this
contract then the parties hereto
shall endeavour to mutually agree
upon a fresh index or indices to
be substituted for that or those
which has or have ceased to be fixed
as aforesiad. It upon the expiration
of one (1) month from the date upon
which any such index shall cease to
be fixed there shall be any
difference between the parties
concerning the fixing of a new index
therefor then either party may
forthwith give to the other notice
in writing of the existence of such

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difference and such difference shall be referred to arbitration. Any such reference shall be deemed to be a reference to arbitration within the meaning of the Arbitration Act 1902 of the State of New South Wales or any statutory modification or re-enactment thereof for the time being in force.

- (iii) Interruption to Seller's Source of Supply - If at any time due to circumstances beyond the Seller's control, the Seller is unable or able only on onerous terms to obtain supplies of crude petroleum and/or petroleum products from its present or then usual sources and by the present or then usual routes for such supplies, and if in consequence thereof the Seller incurs substantial additional costs in respect of the supply of Super Motor Spirit, Diesoleum and/or Furnace Oil deliverable hereunder then the Seller may give notice thereof to the Buyer and fix a revised base price per metric ton for supplies of such Super Motor Spirit, Diesoleum and/or Furnace Oil hereunder as is so affected and save as herein provided such revised base price or prices per metric ton shall become operative on the day stated in the notice being a date not less than three (3) months after the date of the notice. If any such revised base price per metric ton shall be unacceptable to the Buyer then within one month after the receipt of the said notice the buyer shall give three months' notice in writing to the Seller to terminate upon the expiration of such notice its obligation to purchase under this agreement the product or products the revised base price or prices of which is or are unacceptable in which event the Seller will until the date upon which such obligation terminates supply to the Buyer the BP product or products in respect of which the Seller shall have given notice or termination as aforesaid at the base price per metric ton effective immediately prior to the date of the said first mentioned notice subject to adjustment thereafter and in accordance with the terms and
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conditions of this agreement other than this clause.

(iv) Currency Revaluation

10 (a) If during the continuance hereof the parity of the Australian dollar as notified as at the date hereof to the International Monetary Fund is changed by five (5) percent or more, the parties shall promptly consult together (but without reference to arbitration) to determine appropriate and equitable revision of the base prices payable hereunder (by not more than the extent of the change in the valuation in question).

20 (b) If agreement is not reached between the parties within thirty (30) days of the date of such change in valuation, the party wishing the greater increase in the case of devaluation - or decrease in the case of revaluation upwards - in the base prices may terminate this agreement upon the expiration of thirty (30) days' notice in writing to the other.

(v) Indigenous Crude Oil

If subsequent to the date hereof -

40 (a) The Commonwealth Government shall re-fix the Absorption formula, the Allocation formula and/or the price per barrel of indigenous crude oil under the Government's policy relating to indigenous crude oil, and/or

50 (b) The Seller shall be prohibited from supplying imported Super Motor Spirit, Diesoleum and/or Furnace Oil to the Buyer then the Seller may within three (3) months after the said event give notice thereof to the Buyer and fix a revised base price or prices per metric ton for supplies of Super Motor Spirit, Diesoleum and/or Furnace Oil hereunder and provisions for the variation of each such revised base price, and save as

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herein provided such revised base price or prices per metric ton and variation provisions shall become operative on the day stated in the notice being a date not less than three months after the date of service of the notice. If such revised base price or prices per metric ton and variation provisions shall be unacceptable to the Buyer then within one month after the receipt of the said notice the Buyer may give three (3) months' notice in writing to the Seller to terminate upon the expiration of such notice its obligation to purchase under this agreement the product or products the revised base price of which is unacceptable in which event the Seller will until the date upon which such obligation terminates supply that or those products (as the case may be) to the Buyer at the base price per metric ton effective immediately prior to the date of the first mentioned notice subject to adjustment thereafter and in accordance with the terms and conditions of this agreement other than this clause. If pursuant to this sub-clause a revised base price shall become operative for Super Motor Spirit and/or Dieselum then in respect of that product or products having a revised price clause 11 hereof shall as from the date of the operation of such revised price be construed as if "indigenous crude penalty" had been deleted therefrom.

(vi) Demurrage

The said base prices are based on the discharge of each shipment of Super Motor Spirit and/or Dieselum at an average rate of one hundred and Sixty-five (165) metric tons per running hour and for each shipment of Furnace Oil by a GP Tankship at an average rate of 739 metric tons per running hour and by an MR Tankship at an average rate of 1,102 metric tons per running hour Sundays and holidays excepted unless used. Running hours shall commence, berth or no berth, six (6) hours after notice of readiness to discharge is given to the Buyer's nominated representative at Gove by the Master of the tankship on

arrival at the port of discharge.

10 If the shipment is not discharged within the time allowed, in accordance with the preceding paragraph, the Buyer shall be liable for the payment of demurrage in respect of the excess time at the appropriate day (or pro rata for part of a day) as hereinafter specified Provided Always that if by reason of her own deficiencies the tankship cannot commence or having commenced cannot maintain the appropriate average rate for the discharge of the shipment in question from the time of commencing pumping, any additional time used solely by reason of such deficiencies shall be deducted in calculating the time (if any) in respect of which the Buyer is liable for demurrage as herein provided. The Buyer's liability as to laytime and demurrage shall be absolute and not subject to qualification by the provisions of the Force Majeure Clause hereof.

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30 The approximate rate of demurrage shall be the London Market Voyage Charter rate current on the date notice of readiness to discharge is given as aforesaid for a tankship of the size and type used. If the parties fail to agree within thirty (30) days upon the amount of such rate then at the instance of either party the question shall be referred to and determined by a London firm of shipbrokers agreed upon by both parties whose decision thereon shall be final and binding."

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14. At this stage, the following features of clause 9(C) and its various paragraphs may be noted.

(a) The subject matter of each paragraph is identified by a heading. Prima facie, each paragraph deals with a different subject.

50 (b) Clause 9(C) (i) may be invoked by either party by giving notice to the other. Clauses 9(C)(ii) and (iv) and (vi) operate

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of their own force. Clauses 9(C)(iii) and (v) may be invoked only by the seller giving notice to the buyer.

(c) The mechanism for working out the consequences of disagreement between the parties varies between the paragraphs. Clause 9(C)(i) provides for consultation as to a revised base price for all products (even though the notice may apply to only one product) and, in the event of failure to agree, termination of the whole agreement by either party. Clause 9(C)(ii) provides for arbitration. Clause 9(C)(iii) provides for the seller to fix a revised base price as to one product subject to the buyer's right to terminate the agreement as to that product. Clause 9(C)(vi) provides for consultation and gives a right of termination to one party only. Clause 9(C)(v) provides a machinery similar to 9(C)(iii). Clause 9(C)(vi) contains a provision akin to arbitration. 10

p.330 L 6

P.867 LL 1-10

(d) It was agreed by both parties that the expression "F.O.B. values" meant world F.O.B. values. The expression appears to be related to the way BPT fixed the prices it charged BPA, and it corresponds with the main element in those prices, that is, F.O.B. Bandar Mah-Shar, the term "value" being used rather than "price" presumably to emphasise that a mere change in inter-company transfer prices would not bring clause 9(C)(i) into operation but 9(C)(i) is not restricted to something occurring in relation to some described location - compare 9A, 9B, 9(C)(iii), (iv) and (v), 11 and 12. 30

(e) Both 9(C)(i) and 9(C)(iii) use the expressions "substantially" or "substantial". Clause 9(C)(i) talks of values having "substantially altered." Clause 9(C)(iii) talks of "substantial additional costs". The apparent purpose in both cases is simply to exclude minor or insubstantial changes. Provided a change is not insubstantial then it may be taken into account. If it is substantial then it does not matter how great it is. The term "substantial" imposes a lower, but not an upper limit, on the relevant degree of change. 40

(f) There is no apparent limitation on the number of times any of the paragraphs may be invoked, or may operate during the currency of the contract.

(g) If any two of the paragraphs of clause 9(C) were to cover the same subject matter, there is 50

no apparent restriction on the rights of the parties to invoke them other than the restriction inherent in the terms of each paragraph. If, for example, paragraphs (i) and (iii) both applied to the same situation, and the seller gave a notice under (iii), there would be nothing to prevent the buyer giving a notice under (i).

10 15. Other particularly relevant clauses were clauses 11, 13 and 16. They were as follows:

20 "11. The base prices hereinbefore set out exclude all allowances for inward wharfage at Gove, Customs Duty, Excise Duty, indigenous crude penalty, primage or any other duties or taxes and if without default by the Seller such charges shall be incurred directly and necessarily in connection with supply to the Buyer hereunder it shall be charged to the Buyer's account.

For the purposes of this clause -

- 30 (i) no "indigenous crude penalty" shall be payable in respect of Furnace Oil delivered hereunder.
(ii) in respect of Super Motor Spirit and Diesoleum delivered hereunder the "indigenous crude penalty" shall be deemed to be \$A.10.47 and \$A.9.36 respectively per metric ton."

.....

40 "13. No failure or omission to carry out or observe any of the stipulations or conditions of this contract shall except as herein expressly provided to the contrary give rise to any claim against either party or be deemed a breach of the contract if such failure or omission arises from any cause reasonably beyond the control of the defaulting party.

50 If, by reason of any cause reasonably beyond the control of the Seller, there is such a curtailment of or interference with (i) the

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availability to the Seller of crude petroleum and or petroleum products from any source of supply in any country or (ii) the transportation of such crude petroleum and/or of such petroleum products as either to delay or hinder the Seller in, or to prevent the Seller from, supplying the full quantity of the petroleum product or products (or any of them) deliverable hereunder and also at the same time maintaining in full its other business in petroleum products (wherever produced and whether for delivery at the same place or places as is or are specified herein or elsewhere), then the Seller shall be at liberty to withhold, reduce or suspend deliveries hereunder to such extent as is reasonable and equitable in all the circumstances and the Seller shall not be bound to acquire by purchase or otherwise additional quantities from other suppliers.

The Buyer shall be free to purchase from other suppliers any deficiency of deliveries caused by the operation of this Clause."

.....

"16. The Buyer declares and the Seller acknowledges that the Buyer enters into this Agreement as Manager Gove Joint Venture for and on behalf of Swiss Aluminium Australia Pty. Limited and Gove Alumina Limited as Joint Venture and accordingly in any action or claim hereunder for loss or damage the Buyer shall be entitled to recover loss or damage suffered by the said Joint Venture or either of them to the same extent as would be the case if the Joint Venture were parties hereto and Plaintiffs in lieu of the Buyer."

(B) BPA'S NOTICE UNDER CLAUSE 9(C)(iii) 40

16. The events in the Middle East and elsewhere which led up to the giving of BPA's notice were not in significant dispute. They are described by His Honour at pp. 312 to 322 of the reasons for judgment of 19th August, 1975.

17. BPA delivered to Nabalco a notice, dated 22nd March, 1974 in the following terms:

"Supply Agreement dated 11th June, 1970 for Super Motor Spirit, Diesoleum and Furnace Oil

p.312 L28 to p.322

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Pursuant to Clause 9(C)(iii) of the above Agreement BP Australia Limited (hereinafter called "BP") hereby gives notice to Nabalco Pty. Ltd. that:-

10 (i) Due to circumstances beyond BP's control BP is able only on onerous terms to obtain supplies of crude petroleum and/or petroleum products from BP's present or now usual sources and by the present or now usual routes for such supplies.

20 Owing to the actions of the OPEC countries which are entirely beyond BP's control BP is only able to obtain supplies on the following terms: the cost to BP of Furnace Oil (excluding freight) rose between October, 1973 and December, 1973 by A\$3.64 per metric ton and remained at about that increased level of cost until the shipment for which loading commenced at Singapore on 31st January, 1974. Supplies of this product loaded or to be loaded in March, 1974 are available from BP's now usual sources only at a price increased by approximately A\$24.92 per metric ton (excluding freight) beyond the price paid for the said 31st January shipment. It is expected that the price will not fall below the price as so increased.

40 (ii) In consequence of the foregoing BP is incurring substantial additional costs as detailed above in respect of the supply of Furnace Oil deliverable under the above Agreement.

(iii) BP hereby fixes a revised base price of A\$54.44 per metric ton for the supply of Furnace Oil under the above Agreement.

(iv) The said revised base price per metric ton shall become operative on the 26th day of June, 1974.

DATED this 22nd day of March, 1974. "

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p.243 LL 19-38 18. It is of some importance to note how the figure of \$A.54.44 mentioned in BPA's notice was reached. A key factor was the consideration that the events that had occurred undoubtedly fell within clause 9(C)(i), and that had it not been for the 5 year limitation on the operation of that clause it would have been available. That limitation would cease to operate on 5th May 1976. So the BPA witness who made the necessary calculations made an estimate of F.O.B. Bandar Mah-Shar prices through to May 1976 when BPA would become free of the time constraint imposed by 9(C)(i), using an inflation factor, and fixed a revised base price which would cover BPA's costs over that period. It could scarcely have been doubted, and apparently was not doubted, that 9(C)(i) would be invoked as soon as it became available. Thus, in a case that plainly fell with 9(C)(i) BPA invoked 9(C)(iii) in a manner which, if successful, enabled one party (BPA) in the events which had occurred to disregard the 5 year time limit inherent in 9(C)(i). 10 20

(C) EVENTS FOLLOWING BPA'S NOTICE

p.306 L45 to 19. After an exchange of correspondence in which Nabalco sought some further particulars from BPA, on 24th April 1974, Nabalco wrote to BPA a letter which denied the validity of BPA's notice but which said that in the event that BPA's notice was found to be valid, Nabalco exercised its rights under 9(C)(iii) to terminate its obligations to purchase furnace oil under the agreement. 30

pp.308-310 20. Thereafter there occurred correspondence and discussion between the parties relating to the effect of BPA's notice, and Nabalco's letter, and the future of the agreement. On 19th June, 1974 this action, which originally took the form of an application by Nabalco for declarations as to the then contractual position of the parties, was commenced. The events which led up to the commencement of the proceedings may be summarized shortly as follows: 40

p.782 L110-21 (a) Prior to 7th May, 1974 there were "without prejudice" discussions concerning a proposed interim arrangement pending the resolution of the dispute as to the validity of BPA's notice.

p.781 L37 (b) On 7th May, 1974 BPA wrote to Nabalco 50

asserting the termination of this agreement, as far as furnace oil was concerned, and offering to discuss a new contract for the supply of furnace oil.

10 (c) BPA insisted in its communications with Nabalco that the contract as to furnace oil had been brought to an end by Nabalco as from 24th July 1974, and that from that date BPA would not under any circumstances supply furnace oil under the contract.

(d) On 17th May 1974, senior executives of the two companies met in Melbourne. The meeting was stated to be "without prejudice", but for reasons which will be discussed below His Honour admitted evidence of the discussion. Throughout the meeting BPA took the attitude described in (c) above.

p.783 L24 to
p.792 L13

20 (e) On 23rd May, 1974 Nabalco sent BPA a letter which had been prepared prior to the above meeting, re-asserting the invalidity of BPA's notice and that Nabalco's primary contention was that the agreement still bound BPA to supply furnace oil at the base price that was operative at the delivery of the notice. Nabalco said that it sought an immediate resolution of the dispute by a Court.

p.790 LL22-36
Exhibit 1 (pt)
p.934

30 (f) There were discussions between representatives of the parties as to the terms of a possible new furnace oil contract. BPA told Nabalco that it was at liberty to seek alternative supplies of furnace oil. However BPA felt, and expressed, confidence that no alternative source of supply would be available to Nabalco.

p.792 L14 to
p.793 L2
p.791 LL23-25

40 (g) Directors of the respective companies had a discussion in the course of which the BPA Director intimated that if there were a parting of the ways as to furnace oil, BPA would be content to continue to supply other products under the existing agreement.

p.794 L37 to
p.795 L2

(h) On 31st May 1974 there was a further meeting between some senior executives of the parties.

p.792 LL14-46 to
p.793 L2

(i) On 13th June there was a further discussion between executives of the parties as to their respective contentions about the

p.793 LL 19-46
p.794
p.795 LL1-30

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old contract and as to the terms of a possible new one. The points mentioned in (e) and (g) were re-affirmed. This discussion was not said to be "without prejudice".

p.791 LL10-30
p.805 LL20-27
p.812 LL25-28

21. His Honour found as a fact that over this period BPA gave Nabalco clearly to understand that under no circumstances would BPA supply furnace oil under the existing contract after 24th July 1974 and that after that date, unless a new contract were negotiated, Nabalco would be in what was for it the commercially impossible situation of having to depend on "spot" supplies. Both parties appreciated that the consequences of interruption of supply of furnace oil to Gove would have been disastrous. (In internal communications BPA executives referred to a possible liability for damage of proportions far exceeding the present claim).

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Exhibit 64 (pt)
p.1034 LL20-24
p.835 LL17-19

22. In the meantime Nabalco was looking for some alternative source of supply of furnace oil which would enable it to minimize its loss and to pursue what it saw as its legal rights against BPA. (BPA was insisting that any litigation be abandoned as a condition of any new supply agreement). To BPA's astonishment, Nabalco found one. On 21st June, 1974 Nabalco entered into a 3-year contract to purchase furnace oil from Kuwait National Petroleum Company ("KNPC") having on 18th June, 1974 entered into a contract of affreightment with Concord Petroleum Corporation ("Concord").

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p.803 L39-43

Exhibit K
pp.1024-1033

Exhibit J
pp.1000-1018

p.797 LL4 to
p.798 LL6

23. On 28th June 1974 Nabalco informed BPA orally and in writing that it would not require furnace oil from BPA after July and that it would sue BPA for the loss it would suffer by reason of BPA's repudiation of its obligations under the old contract. To its proceedings for declaratory relief, commenced before 28th June, it subsequently added a claim for damages.

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p.780 LL4-27

24. Thereafter both parties operated under the old contract in relation to petroleum products other than furnace oil. That contract ultimately came to an end, in a way which also operated to limit the damages recoverable by Nabalco in this action, on 16th March, 1976 by reason of the giving by BPA of a notice under clause 9(C)(v) and a notice in response by Nabalco. (His Honour held that the action of the Commonwealth Government which led to the above notices would also have been relied upon by BPA in relation to furnace oil had the contract

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p.839 LL7049

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subsisted in regard to that product at the relevant time).

(D) THE ISSUE AS TO THE VALIDITY OF
BPA'S NOTICE

25. His Honour's findings of fact relevant to this issue are set out, in the form of conclusions, at pp. 323 and 324 of the reasons for judgment of 19th August, 1975.

p.323 ll5 to
p.324

10 The respondent does not challenge these findings but submits that the undisputed evidence also established the following propositions, which to some extent are implicit in His Honour's findings.

(a) The events referred to in BPA's notice gave rise to a substantial alteration in the F.O.B. value of furnace oil within the meaning of clause 9(C)(i) of the contract.

20 (b) At all material times both before and after the events referred to in the notice BPA acquired furnace oil for delivery to Nabalco under the contract from BPT at a price the principal component of which was a figure corresponding to what the contract calls "F.O.B. value", and the "substantial additional costs" referred to in BPA's notice under clause 9(C)(iii) took the form of an increase in that component of BPT's price to BPA, the
30 "onerous terms" being the fair and reasonable price charged by BPT to BPA.

40 26. (a) The respondent submits that on the true construction of clause 9 of the contract, a substantial alteration in F.O.B. values of furnace oil, although that would (by reason of the basis on which BPA dealt with BPT) necessarily result in the incurring by BPA of substantial additional costs in respect of the supply of furnace oil, was a matter governed by clause 9(C)(i) and could not form the basis of a valid notice under 9(C)(iii).

(b) The facts of the present case fell squarely within 9(C)(i), and had it not been for the express prohibition against invoking that clause for a specified time, that clause would have provided the

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machinery for dealing with the matter.

(c) Clause 9(C)(i) in its terms prevents price variations on the basis of changes in F.O.B. values. That restriction operates against both seller and buyer. To permit the seller to invoke clause 9(C)(iii) in a case which falls within 9(C)(i) is to qualify the restriction in favour of one party only.

(d) The meaning of 9(C)(i) remains constant throughout the contract. The impossibility of treating the same occurrence as being within 9(C)(i) and 9(C)(iii) may be demonstrated by examining the situation which would arise out of such an occurrence after the five year period referred to in 9(C)(i) had elapsed. The two paragraphs involve different machinery and different consequences. Suppose the seller gave a notice under 9(C)(iii). It would then be open to the buyer to give a notice under 9(C)(i) based on the very same facts. The parties would then be in a tangle of inconsistent rights, powers and obligations. Or suppose the seller (and why should he elect) gave simultaneously a notice under each of 9(C)(i) and 9(C)(iii).

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27. (a) Nabalco further submits that, as a matter of construction of clause 9(C)(iii), an increase in the world market price of furnace oil which BPT charges BPA does not constitute "onerous terms".

(b) The paragraph treats "onerous terms" and "substantial additional costs" as separate matters, the latter to be the consequence of the former. BPA's notice depends upon the treating of the additional costs as the onerous terms.

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(c) The concept of "onerous terms" in clause 9(C)(iii) involves a comparison of the terms upon which BPA is able to obtain supplies at any given time with the terms upon which other people in the market are able to obtain supplies.

(d) Clause 9(C)(iii), as its heading indicates, is dealing with some kind of dislocation to BPA's normal supply pattern.

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(e) There was not at any relevant time any material change in the terms on which BPA obtained its supplies of furnace oil from BPT. Those terms were never "onerous". What occurred was that, by reason of the nature of those terms, the

performance by BPA of its contractual obligations to Nabalco became more unprofitable.

10 (f) If BPA was obtaining supplies on "onerous terms" within the meaning of Clause 9(C)(iii) because it was paying more to BPT than Nabalco was paying it then the clause gave BPA a built-in guarantee of profitability. Once again, the terms of 9(C) make it seem very unlikely that such was the intention of the parties.

20 28. (a) Nabalco further submits that the only form of valid notice which a seller could give under the contract was one which could lawfully operate to fix a revised base price as from the notified date, such that if the buyer so chose, he could enforce supply from that date at the new price.

(b) In the events which occurred, the Price Justification Act 1973 of the Commonwealth of Australia applied to prevent BPA's notice from so operating.

30 (c) His Honour dealt with this submission adversely to the respondent. A summary of the relevant legislation and material facts appears from pp.335 to 339 of the reasons for judgment of 19th August 1975. The respondent submits that His Honour should have held (had it been necessary to decide the point) that in the circumstances the legislation rendered BPA's notice conditional and therefore invalid.

p.335 L18 to
p.339

40 29. The respondent submits that for the foregoing reasons BPA's notice was not a valid or effective exercise of the power to fix a revised base price under Clause 9(C)(iii) of the contract.

(E) NABALCO'S LETTER OF 24TH APRIL 1974

p.307 L20

30. It is convenient to deal with the issues concerning the effect of this letter at this stage, because the attitude which BPA took to the letter was bound up with its subsequent attitude towards performance of its contractual obligations.

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31. At the time when Nabalco wrote the letter its primary contention was, as it still is, that BPA's notice was not a valid notice under 9(C)(iii). If that contention were correct then the letter operated to maintain Nabalco's rights under the contract.

32. The validity of BPA's notice was, however, plainly a matter of contention between the parties, and the contract required Nabalco to respond to a valid notice (if it wished to respond at all) within one month. The dispute as to the validity of the notice was unlikely to be settled within one month so Nabalco took the only course that was reasonably open to it. It stated that if, contrary to its primary contention, the notice were valid, then it made a certain response to it. There is, it is submitted, no reason why that could not be done.

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33. Insofar as Nabalco's letter stated that its termination of the contract as to furnace oil pursuant to 9(C)(iii) was conditional upon the validity of BPA's notice it was merely asserting what was in any event the legal position under the contract.

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34. What Nabalco was unequivocally telling BPA was that Nabalco did not propose to pay the "revised base price for furnace oil", and this for two reasons:

- (a) BPA had no power to fix that revised price;
- (b) if, contrary to (a), it did, then Nabalco was exercising its right to cancel the contract as to furnace oil.

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35. If BPA's notice be held to be valid then, it is submitted, Nabalco's letter operated as an effective counter-notice under clause 9(C)(iii) and Nabalco is entitled to the declaration sought in paragraph 2B of the summons.

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If, on the other hand, BPA's notice be held to be invalid then, it is submitted, Nabalco's letter left the contractual obligations of the parties unaffected.

(F) THE ISSUE AS TO WHETHER BPA
REPUDIATED

10 36. Involved in this issue is a dispute as to the admissibility of certain evidence of conversations stated to be "without prejudice." The respondent submits that such evidence was correctly admitted. However, it does not concede that the evidence in question is necessary for its success on this point. It appears convenient on this aspect of the case first to deal with the argument of the respondent on the point, leaving to one side questions of admissibility of evidence, then to deal with those questions, and finally to deal with the result that would flow even if the questions of admissibility of evidence were resolved adversely to the respondent.

20 37. The respondent submits that BPA by its conduct unequivocally evinced an intention not to perform its contractual obligations in relation to the supply of furnace oil and that this constituted repudiation entitling Nabalco to take the action it did and to sue for damages. Particulars of the relevant conduct are set forth following paragraph 12 of the Points of Claim.

p.812 LL 25-28

p.345-346

30 38. The main issue on this aspect of the case was whether BPA's conduct did amount to repudiation of the kind described above (sometimes called "anticipatory breach") or whether BPA was merely affirming a bona fide view of the meaning of a contract whilst offering to perform the contract according to whatever view was held to be correct. In due course on 17th July, 1974, after Nabalco accepted BPA's repudiation and (to BPA's knowledge) had contracted to obtain supplies of furnace oil elsewhere, BPA did in a letter to Nabalco adopt a stance more in keeping with the latter alternative. That letter was, however, in marked contrast to what it had written and said previously.

p.799 L 30 to
p.800 L 8

p.802 LL 29-40

50 39. There are many decided cases which indicate the distinction between repudiation of a contract and a bona fide but mistaken assertion as to its meaning. Some of these are discussed in His Honour's reasons for judgment (e.g. Sweet & Maxwell Limited v. Universal News Service Limited 1964 2 Q.B.D. 699, Luna Park N.S.W. Limited v. Tramways

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Advertising Pty. Ltd. 61 C.L.R. at 304-5;
Ross T. Smyth & Co. Limited v. T.D. Bailey Son
& Co. 1940 3 All E.R. 60; Smyth v. Smykowsky
1957 S.R. (N.S.W.) 306; James Shaffer Ltd. v.
Finlay Durham & Brodie 1953 1 W.L.R. 106;
Pacific Coast Engineering Co. v. Merritt Chapman
and Scott Corporation 411 F. 2 d. 889).

A decision of your Lordships' Board which is in point is that given in the Canadian case of Clausen v. Canada Timber & Lands Limited (1923) 4 D.L.R. 751. In that case one party to a contract mistakenly believed that the other parties had brought the contract to an end by certain conduct on their part and took the position that the contract was therefore no longer on foot. This was held to constitute repudiation. Lord Summer, delivering the reasons of the Board, said at p. 775.

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"It is well settled that, insofar as repudiation of a contract is relied on, that is the intimation by one party to the other of an intention no longer to be bound by the terms of the contract, the intimation must be unequivocal Here the intimation, such as it is, consists in a formal written notice, and the matter is therefore one of construction.

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.....

The writer virtually says two things (1) "I intend to bring this contract to an end because you have assigned it without leave"; and (2) "I have taken, and I continue to maintain, the position that you have brought the contract to an end by dissolving your partnership". As a declaration of intention the document is unequivocal. Twice over the writer says that his principals will no longer be bound by the terms of the contract. It is true that he twice over gives a reason for this intention, and in each case the reason is one, which he may have thought right but which is certainly wrong. Still, the only result is that the intention, thus declared, is one which can be accepted by the opposite party and treated as a final repudiation and as the foundation of a claim for damages for what is called an anticipatory breach".

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40. It is submitted that His Honour correctly

applied those principles to the facts as he found them.

In considering the facts as to what passed between Nabalco and BPA from the date of delivery of BPA's notice up to the announcement by Nabalco to BPA that Nabalco had made other arrangements for the supply of furnace oil the following matters are of particular significance.

- 10 (a) BPA's notice itself is an unequivocal (and, on the hypothesis on which this issue arises for consideration, erroneous) statement of the price at which furnace oil would be supplied as from 26th June 1974;
- (b) Prior to early May the parties were willing to pursue some interim arrangement pending the outcome of judicial determination of the validity of BPA's notice;
- 20 (c) BPA's letter of 7th May, 1974 (which was an open letter) made it clear that no interim arrangement was available and that BPA insisted on recognition of what it accepted to be the contractual position, involving inter alia, no contractual obligation on BPA to supply furnace oil (at any price) after the date fixed by Nabalco's letter, that is 24th July, 1974.
- 30 (d) At the meeting of 17th May, 1974 BPA again made it plain that there could be no interim arrangement, and that BPA's contention that its contractual obligations to supply furnace oil to Nabalco, at any price, would cease on 23th July, 1974 was unconditional, unequivocal and not the subject of any negotiation. The only choice BPA gave Nabalco was to accept that situation and negotiate for a new contract, or to refuse to accept it in which case there would be no supplies other than on a "spot" basis.
- 40 (e) So far as price is concerned, BPA never at any time after the interim arrangement proposals were abandoned offered or expressed willingness to supply either at

Exh Aj (pt) p.897
Exh 58 (pt) 90D LL1-18
Exh 58 (pt) p.901
Exh 42 (pt) p.901
Exh 72 p.904 L11

Exhibit I (pt) p.917

p.791 LL13-28

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the existing price or at the "revised base price".

(f) There was never (prior to 17th July 1974) any question of BPA offering to perform the contract in accordance with what it was ultimately found to be. There was, for example, no suggestion of delivery at a price later to be adjusted in accordance with the Court's ruling.

p.803 LL39-43
p.910 LL26-33

(g) BPA confidently believed that Nabalco had no real possibility of obtaining supplies from any source other than BPA. BPA obviously considered that in this regard it had Nabalco "in a corner" and it acted accordingly. By the time it wrote its letter of 17th July BPA had found out that in this regard it had made a major miscalculation. By then it was too late to retrieve the position.

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Exh AJ (pt)
p.1037
Exh AJ (pt)
p.1040 LL20-33

p.803 L 43

41. His Honour made the following finding of fact concerning BPA's intention as manifested by what it said and did:

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p.803 LL30-33

"A fair assessment of its intention manifested by what its representatives said on 17th May 1974 and 13th June 1974 was that there would be no supply pursuant to the contract, no matter what was decided by the Court in relation to the validity of its notice of 25th March 1974."

His Honour summarized the evidence as to what BPA said to Nabalco thus:

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p.805 LL21-22

"..... the defendant in fact said that it would never again supply under the old contract; so far as furnace oil was concerned that contract was at an end."

There was ample evidence to support those findings of fact, and it is submitted that they are correct.

42. The contest as to admissibility of evidence arose because two of the occasions relied upon by Nabalco as a manifestation of BPA's intention, a meeting of 17th May and a meeting of 31st May, were expressly stated to be "without prejudice". Another occasion, a discussion of 13th June 1974, was argued by the defendant to be covered by the same

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description as being in substance a continuation of the earlier discussions. Those discussions were of importance in that on each occasion BPA stated and confirmed its earlier position clearly and emphatically. However the respondent argued below, and now submits, that even without the evidence as to what occurred on those occasions BPA sufficiently manifested its intention not to be bound by the contract.

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43. His Honour dealt with the matter of the admissibility of evidence on pages 806 to 813 of his reasons for judgment of 8th July 1976. The respondent submits that His Honour's decision on the point was correct for the reasons given.

pp.806-813

44. The respondent further submits:

(a) Whether one treats the theoretical basis of the principle under which evidence of what is said or written "without prejudice" is to be excluded as being a rule of public policy, or an express or implied contract, the cases recognize that there are qualifications to the principle and that not everything that is said or written on such an occasion is absolutely and for all purposes excluded (e.g. Kurtz v. Spence 58 L.T. 438; Davies v. Nyland (1974) 10 S.A.S.R. 76; Wigmore on Evidence 3rd Ed. Vol. 4 p.26.) As Wigmore points out, that which attracts the privilege is not the use of the expression "without prejudice", but the subject matter of the communication, namely a statement made in the course of a bona fide attempt to compromise impending litigation. That which the law prevents is the use of such a statement as an admission against the party making it in the event that the attempt to compromise fails. (Field v. Commissioner for Railways 99 C.L.R. 285 at 292). It is not inconsistent either with the public policy underlying the rule, or the contract said to be made between the parties, that if one of them, unconditionally and unequivocally, not merely as part of a negotiating stance, but as a basis on which the other party is intended to act whether

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the matter is compromised or not, makes manifest an intention not to perform a contract, then the other can give evidence of what is said.

- (b) BPA's statements on 17th May and 31st May 1974 as to their intention and attitude with regard to the contract insofar as it related to supplies of furnace oil after 24th July 1974, gave, and were intended to give, Nabalco vital information which it had to have regardless of the outcome of the negotiation. The information was information on which Nabalco, as BPA well knew, had to act. It cannot have been intended by BPA that Nabalco should disregard it if the settlement discussions broke down. It would be quite unreal to treat BPA's statements that it would under no circumstances entertain any suggestion that it was contractually bound to supply furnace oil after 24th July 1974 as part of a negotiation and nothing more. That being BPA's attitude in fact, it would be surprising if it did not intend Nabalco to know it, and act on the basis of such knowledge. Indeed, as His Honour pointed out, in one specific respect (seeking another supplier) BPA expressly invited Nabalco so to act.

p.812 LL2-6

- (c) In considering the point last made it is to be remembered that both parties were actually conscious of the enormity of the consequences that could result if Gove found itself without furnace oil. Internal communications within BPA indicate that it was well aware that so long as Nabalco had a supply of furnace oil the situation was in hand in the sense that, even if BPA were wrong in its assertions about the contract, its liability for damages, although large by ordinary standards, was really only roughly of the order of the losses it would be making if it performed the contract; once, however, Nabalco was without supplies of furnace oil the situation would be out of hand and BPA would be facing a potential liability for damages far beyond the extent of the losses it would make under the contract.

Exhibit 64 (pt)
p.1034 LL20-24

45. The respondent further submits that His Honour was in any event correct in holding that, even if the conversations of 17th May and 31st May were

covered by the "without prejudice" principles, they were "opened" by Mr. Lockrey in the telephone conversation of 13th June. The inference which His Honour drew, that Mr. Lockrey was on that occasion openly confirming the attitude of BPA to the contract after 24th July, was amply supported by the evidence as to the facts and surrounding circumstances.

p.813 L110-41

10 In the conversation of 13th June there was express reference to the possibility that Nabalco might obtain another supplier of furnace oil. Even in the earlier discussions, said to be "without prejudice", that was recognized as at least a theoretical possibility and by 13th June Nabalco squarely raised it as a real alternative to be considered. It was for the purpose of considering all the alternatives open to Nabalco, and not merely for considering the proposed new contract with BPA, that Nabalco sought confirmation of BPA's attitude and it is reasonable to infer that it was for that purpose that Mr. Lockrey reaffirmed BPA's position.

p.795 LL25-26

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30 46. Finally, on this issue, Nabalco submits that even if evidence of the discussions of 17th May, 31st May and 13th June were all rejected, the conduct of BPA (including what would then have to be regarded as its silence on the critical matter) would amount to repudiation.

40 Bearing in mind the contents of BPA's original notice, and the subsequent open correspondence, including BPA's letter of 7th May, then if BPA is taken to have said nothing since 7th May it would have evinced and continued to evince an intention not to be bound by the contract insofar as it related to furnace oil after 24th July 1974.

(G) THE ISSUE AS TO WHETHER NABALCO
ACCEPTED BPA'S REPUDIATION

47. BPA submitted at the hearing that even if its conduct did amount to repudiation of its contractual obligations nevertheless Nabalco should fail in the action because it failed to take advantage of that repudiation in such a way as would now entitle it to recover damages. This

submission was based on various grounds, the legal consequences of which were described in the Points of Defence by way of a denial that any repudiation was accepted by Nabalco, an assertion that "any purported acceptance" of such repudiation was "ineffective" and an assertion that Nabalco "elected to affirm the Agreement". In considering those various arguments, especially that which is discussed below as "the partial termination argument," it is important to bear in mind the ultimate legal consequences ascribed to them by BPA.

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I. The Partial Termination Argument

p.818 L14 to
p.831 L9

48. The various aspects of this argument were dealt with by His Honour in his reasons for judgment of 8th July 1967 on pages 818 to 831. Whilst Nabalco supports the ultimate conclusion of His Honour, and the ground on which he finally rejected BPA's submission in this issue, His Honour in the process rejected various alternative grounds on which Nabalco sought to meet BPA's contention and to that extent Nabalco takes issue with His Honour's reasoning.

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49. BPA's argument was based on the fact that the contract in question was a contract for the supply, not only of furnace oil, but also of diesoleum, super motor spirit and, for that matter, other petroleum products. Although when the parties fell into dispute they usually referred, in their discussions and correspondence, to "the contract" as though it were a contract for the supply of furnace oil only, yet the alleged repudiation was of part only of BPA's total contractual obligations, that is to say its obligations to supply furnace oil, and even then only from a future time (24th July 1974). So, the argument ran, Nabalco was not entitled to terminate the contract insofar as it related to furnace oil to be delivered after 24th July 1974 only and yet continue (as it did) to treat the contract as being on foot in relation to the other products. Its only right (apart from treating the contract as remaining on foot) was to terminate the whole contract immediately.

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50. There are certain preliminary observations to be made about this argument.

- (a) The ultimate legal consequence which is said to flow from it is not easy to define. Having regard to the pleadings, it must be that Nabalco, by continuing to accept supplies

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of diesoleum and super motor spirit under the contract, either elected to affirm the whole contract, or ineffectively accepted the repudiation of the contract, in circumstances where it in fact went elsewhere for its supplies of furnace oil. On this view the contract remained in force as to furnace oil, at the old price, after 24th July 1974, but BPA was never in breach of it because Nabalco failed to call upon BPA to deliver under it. Another possible view is that the only legal consequence of what Nabalco did was that it was not contractually entitled to further supplies of diesoleum and motor spirit.

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- (b) The matter in question was one which the parties apparently thought they had solved at the time. Before Nabalco terminated the contract as to furnace oil it expressly raised with BPA the matter of what would happen to the rest of the contract if it did so. At that stage BPA might well have said:

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p.794 LL20-43
p.795 LLL-3

"If you don't take furnace oil from us you can't continue to buy other products from us."

On the contrary, it indicated (indeed, so Nabalco submits, expressly agreed) that it would suit BPA to confine the parties' dispute to furnace oil and to go on with the rest of the contract as though nothing had happened. There were good commercial reasons why it suited the parties at the time to isolate the furnace oil dispute. Treating the contract as divisible apparently did not strike them as strange or unfair; rather they seem to have regarded that as a sensible and reasonable thing to do.

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Exh AJ (pt)
p.1047 L43 to
p.1048 L2

- (c) The practical consequences of such an argument, if it be correct, are striking. Let it be supposed that by 7th May 1974 BPA had repudiated by indicating clearly that as from 24th July it would no longer supply Nabalco with furnace oil under the contract. At the same time it made it clear, first, that it would observe all its contractual obligations up to 24th July and, second, that there-

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after it would observe its obligations in relation to all products other than furnace oil. If the argument be correct Nabalco then had to elect between only two courses: either to terminate the whole contract forthwith, or to insist on the observance of the whole contract. In truth, the second possibility was not open to Nabalco at all. It had to have furnace oil and, indeed, it had to have an assurance of future supplies. It couldn't force BPA (by way, for example, of seeking a decree for specific performance) to supply furnace oil. It couldn't take the risk of waiting to see what happened. It was only in the most artificial sense that Nabalco could "elect" at all, if the only alternatives were those posed above. With BPA taking the attitude it did towards future supplies of furnace oil, Nabalco's only real choice (apart from coming to terms with BPA) was between terminating the whole contract at once or terminating as to that part which BPA was saying it would not perform (that is, supplying furnace oil after a future date). Yet BPA's argument is that the law did not give Nabalco such a choice.

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51. (a) The respondent submits, as His Honour concluded, that it is quite consistent with the principles relating to anticipatory breach of contract by the repudiation by one party of his obligation, that if the contract is divisible in its nature, and the party in breach has confined his repudiation to a divisible part of the contract, then the other party may accept that repudiation and terminate the contract as to that part. Indeed, such a result is common in relation to contracts for the sale of goods. (Rosenthal & Sons Ltd. v. Esmail 1965 1 W.L.R. 1117).

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(b) The present contract was divisible. It contains various provisions (of which clause 9(C) (iii) is an example) which could produce the result that it would cease to operate as to one product (such as furnace oil) and continue to operate in relation to others.

(c) This argument falls to be considered on the hypothesis that BPA divided the contract itself, in that it repudiated a separate part of it.

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(d) BPA supported its argument on this point by reference to certain obiter dicta in the Court of Appeal In Johnstone v. Milling (1886) L.R. 16 Q.B.D. 460. The respondent submits that the facts of that case were quite different from the present and that the consideration of justice and fairness which led Bowen L.J. to say at pages 472-4 that the promisee there should not be entitled to bring his action on a renunciation of the contract and yet to treat the contract as still on foot points in the opposite direction in the circumstances of the present case. Further, the contract in Johnstone v. Milling was not divisible and the consequence of permitting the kind of division contended for would in that case have been just as unreasonable as the consequence of not permitting division in the present case.

52. It appears to be accepted in the United States of America that if a contract is inherently divisible, repudiation of a several part of it by one party entitled the other party to cancel the contract as to that part only. (Internatio-Rotterdam Inc. v. River Brand R.M. Inc. 259 F.2 d 137.) The uniform Commercial Code of the United States in the sections which deal with "anticipatory breach" and "cover" give effect to the same consideration (.e.g Section 2-610, 2-711 and 2-712).

53. In the case of a "requirements" contract such as that in question in the present case, the concept of a party in Nabalco's position taking "cover" is of particular significance. Nabalco, during the currency of the contract needed, and was entitled to, an assurance that its future requirements would be satisfied. When it lost that assurance it was forced to cover its position. Apart from making a new agreement with BPA, the only way it could do this was to arrange to obtain its requirements from another supplier. The latter course necessarily involved terminating its arrangements with BPA as to furnace oil, for once Nabalco went elsewhere it had no requirements for BPA to satisfy.

54. Another way of looking at the problem,

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which leads to the same result, is to consider Nabalco's duty to mitigate its damages. As has been noted above, if Nabalco had simply waited for BPA to refuse to deliver furnace oil after the 24th July, 1974 and its operations had to close because of lack of fuel, the damages would have been enormous. From this point of view also, Nabalco had no real choice but to obtain an alternative supply of furnace oil, especially since BPA only offered an assurance of continued supply on condition that Nabalco did not take its dispute with BPA to Court.

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55. Alternatively to the above, the respondent submits that the supposed problem does not arise at all because there were in fact a number of separate contracts between the parties, one being that related to furnace oil.

56. (a) Finally on this issue, the respondent submits, contrary to His Honour's conclusions, that after the dispute as to furnace oil had arisen the parties made an agreement, to the effect of that alleged in paragraph 13A of the Points of Claim, the consequence of which was to confine their dispute to furnace oil and to entitle Nabalco to take the course it did even if (contrary to the foregoing arguments) such a course would not have been open to Nabalco in the absence of agreement.

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p.365 L35 to
p.366 L7

p.825 LL34-41

(b) There were discussions, first between Sir David Griffin, Chairman of Nabalco, and Mr. Rendle, Managing Director of BPA, and later between Messrs. Notter and Lockrey which His Honour described as amounting to no more than a "sensible business arrangement under which the parties agreed that the supply of the remaining products would continue."

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p.826 LL14-17

p.826 LL19-24

(c) His Honour, however, remained unconvinced that the BPA officers who made the "sensible business arrangement" appreciated the full significance of the kind of agreement now relied on by the respondent.

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(d) It is submitted that His Honour on this point, erred in not finding that there was an agreement of the kind alleged by the respondent and, in particular in failing to give full effect to what was indeed "a sensible business arrangement" on the ground

of supposed lack of appreciation of its legal consequences which would in any event be irrelevant.

(e) At the hearing BPA argued that the alleged agreement was void for uncertainty and unenforceable by reason of the Sale of Goods Act. The respondent takes issue with these contentions, and as to the latter submits that it is not endeavouring to enforce the agreement in any relevant sense.

p.814 I14 to
p.816 I26

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II Other Alleged Acts of Affirmance

57. At the hearing BPA relied upon various acts on the part of Nabalco as amounting to affirmance of the contract at or after a time when Nabalco was bound to elect whether or not to accept BPA's repudiation.

58. In this connection, the respondent submits that there is a large element of unreality involved in any allegation that Nabalco "elected" to "affirm" the contract. For reasons mentioned earlier, Nabalco had a very limited area of choice open to it. Coming to terms with BPA involved, as a condition, not going to Court. It could not force BPA to supply. Going elsewhere for furnace oil involved putting an end to BPA's obligation to satisfy its requirements of that product. In those circumstances it is not easy to understand precisely what Nabalco was supposed to be affirming. For Nabalco to have affirmed this contract in the way in which a party to a specifically enforceable contract for the sale of land affirms his contract in the face of breach by the other party was not a course that was realistically open to it. These considerations are material in evaluating the conduct in question.

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59. As to what amounts to an election to affirm a contract in the face of breach by the other party the respondent refers to Wendt v. Bruce 95 C.L.R. 245; Sargent v. A.S.L. Developments Limited 48 A.L.J.R. 410; Larratt v. Bankers and Traders Insurance Co. Ltd. 41 S.R. 215 and Perry v. Davis 3 C.B.N.S. 760.

60. The matters of affirmance relied upon were:

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- p.814 LL26-31
- (a) Nabalco's letter, dated 16th May 1974 and sent on 23rd May 1974. As His Honour pointed out, by BPA's adherence to its attitude to supply of furnace oil after 24th July 1974 it presented Nabalco with a further or continuing opportunity to accept its repudiation. Thus no significance attaches to the fact that Nabalco did not, in this letter, cancel the contract.
- p.814 L40 to p.815 L5
- (b) The summons for declaratory relief issued by Nabalco. As His Honour held, this was merely neutral. 10
- p.815 L10
- (c) The requirements notices sent by Nabalco in accordance with the usual system. The only one of these that could have been of real significance was, as His Honour found, sent by error after Nabalco had plainly communicated its intention to obtain future supplies of furnace oil elsewhere.
61. The respondent submits that His Honour's reasoning and conclusion in relation to the alleged acts of affirmance was correct. 20

III Alleged Failure to Elect

62. In answer to BPA's claim of lack of positive conduct on the part of Nabalco prior to 28th June 1974, amounting to an election to accept BPA's breach of contract, His Honour held that there was nothing in Nabalco's conduct over this period which operated to deprive it of the right to obtain an alternative source of supply, or to deprive its conduct in that regard, communicated to BPA, of the quality of an election to terminate the contract in relation to furnace oil. The respondent submits that His Honour was correct. 30

(H) OTHER ISSUES

I Nabalco's Right to Sue

- p.831 L10
63. BPA submitted that Nabalco had no status to sue the defendant because it was merely an agent, being the Manager of the Gove Joint Venture for Swiss Aluminium Australia Pty. Limited and Gove Alumina Limited. 40
64. BPA was at all times well aware of Nabalco's role in relation to the Gove Joint Venture. The provisions of clause 16 of the supply contract are quoted in paragraph 15 above. The contract identified Nabalco as "the buyer" and the apparent

purpose of clause 16 was to deal with the kind of problem now under consideration.

65. Nabalco submits that it is entitled to maintain this action in its own name on the following grounds:

- (a) It contracted as principal within the meaning of the relevant rules;
- (b) Alternatively, if it contracted as agent, the case falls within the principles according to which a party who contracts an agent is entitled to maintain an action in his own name, the ultimate test being the intention of the parties. That intention is clearly manifested in the present contract, in particular in clause 16. (cf. H.O. Brandt & Co. v. H.N. Morris & Co. Limited 1917 2 K.B. 784; Fisher v. Marsh 6 B.S. 416, 112 E.R. 1427, Halsbury's Laws of England, 4th Ed. Vol. 1 p. 521, H.J. Lyons & Sandon Ltd. v. Houlson 1963 S.A.S.R. 29).
- (c) Alternatively, clause 16 itself expressly entitles Nabalco to sue in its own name for breach of this contract. (cf. Jackson v. Horizon Holidays Limited 1975 3 All E.R. 92).

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66. On this point it should be noted that by its cross claim in these proceedings BPA has sued Nabalco on the contract.

pp.298-299

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II Nabalco's Right to Sue for Substantial as Distinct from Nominal Damages

67. BPA argued that Nabalco was entitled to nominal damages only because under the contracts governing the basis on which it manages the Gove Joint Venture it was entitled to pass on the increased furnace oil costs to Swiss Aluminium Australia Pty. Limited and Gove Alumina Limited.

p.832 L9

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68. Again, the respondent submits that clause 16 of the contract was designed to, and does, cover this point.

69. Further, the respondent submits that as between itself and the Gove Joint Venture Partners it is only entitled to pass on costs to the extent to which they are properly incurred, and is bound to pursue an action

p.1436 L51 to
p.1437 L2

Record

such as the present.

70. The respondent submits that in a case such as the present if one party has a right to sue another party for breach of contract it is legally irrelevant that the plaintiff has contractual arrangements with some third party, relating to indemnity or otherwise, which protect the plaintiff against loss to the extent to which it is unable to recover from the defendant. Such third party arrangements are remote and irrelevant. 10

(Rodoconachi, Sons & Co. v. Milburn Bros. 1886 18 Q.B.D. 67; Joyner v. Weeks 1891 2 Q.B. 31, Williams Bros. v. Ed. T. Agius Ltd. 1914 A.C. 510; Slater & Anor v. Hoyle & Smith Ltd. 1920 2 K.B. 11; Haviland & Ors. v. Long & Anor. 1952 2 Q.B. 80; Director of War Service Homes v. Harris 1968 Queensland State Reports 275; Brading v. F. McNeill & Co. Ltd. 1946 1 Ch. 145 and Mouat v. Betts Motors Ltd. 1959 A.C. 71.)

71. If the appellants argument were taken to its logical conclusion, public utilities, non-profit making organizations and managerial enterprises would to a large extent be deprived of a right to sue a supplier of goods for damages for breach of contract (cf. Diamond Cutting Works Federation Ltd. v. Triefus & Co. Ltd. 1956 1 Ll. L.R. 216). 20

III Reasonableness of the Contracts for
Alternative Supplies made by Nabalco

72. Subject to the matters dealt with above there was no particular dispute of principle before His Honour as to the principles relevant to quantification of damages assuming the case ought otherwise to be resolved in Nabalco's favour. The substantial issues were issues of fact, that is to say, the reasonableness of the contracts made by Nabalco with KNPC and Concord as a substituted arrangement for obtaining satisfaction of Nabalco's requirements of furnace oil for the future, and the relationship between the prices paid by Nabalco under those contracts to market prices for the purposes of deciding whether and to what extent those contracts provided a proper measure of the damages suffered by Nabalco. 30 40

73. A considerable amount of time at the hearing was devoted to the resolution of this issue of fact. Each party called as a witness an American expert in the oil industry, Nabalco's expert being Mr. Colish and BPA's expert being Mr. Abt.

74. The respondent submits that His Honour's

findings of fact upon these issues were amply supported by the evidence, and were correct, and that there was no error of principle or of fact in his Honour's quantification of damages.

(I) CONCLUSION

75. The respondent submits that the appeal ought to be dismissed for the following amongst other

R E A S O N S

- 10 (1) BPA's notice of 22nd March 1974 was not a valid or effective exercise of the power contained in Clause 9(C)(iii) to fix a revised base price for furnace oil and was, in particular, an impermissible attempt by BPA to avoid the time limitation in clause 9(C)(i) relating to re-negotiation of the contract prices to take account of changes in general market values;
- 20 (2) BPA's conduct in relation to the notice and Nabalco's response to the notice, and in particular BPA's manifestation of its intention not to supply furnace oil under the contract, at the contract price or any other price, after the 24th July 1974 was a breach of contract;
- 30 (3) In the circumstances, including the nature of the contract, and the agreements and arrangements between the parties, Nabalco was entitled to, and did, terminate the contract as to supplies of furnace oil.
- (4) Nabalco thereupon became entitled to sue BPA for damages being, in broad terms, the difference between what it had to pay for furnace oil under its new contractual arrangements and the price at which BPA had been obliged to supply it under the Nabalco - BPA contract.
- 40 (5) His Honour in calculating the damages, correctly found the facts and applied the proper legal principles.

FORBES OFFICER QC
JOHN LOCKHART QC
MURRAY GLEESON QC

No. 11 of 1977

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH
WALES

COMMON LAW DIVISION

B E T W E E N :-

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- and -

NABALCO PTY. LIMITED Respondent

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