Judgment and Appeal

IN THE PRIVY COUNCIL No.11 of 1977

ON APPEAL

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

BETWEEN:

BP AUSTRALIA LIMITED Appellant

- and -

NABALCO PTY. LIMITED Respondent

APPELLANT'S CASE

1. This is an appeal by BP Australia Limited ("BP") from a decision of the Supreme Court of New South Wales, His Honour Mr Justice Sheppard, on 20th August, 1976, awarding Nabalco Pty Limited ("Nabalco") the sum of $26,338,338.57 as damages and interest for breach of a long-term Agreement for the supply of petroleum products. The appeal is brought pursuant to leave granted by that Court. p. 840 p. 845

2. The principal issues in this appeal are whether a notice given by BP increasing the price of one of the products, Nabalco's requirements of which were to be supplied under the Agreement, was valid and, if not, whether BP repudiated the Agreement by conduct and Nabalco accepted such repudiation and, if so, communicated that acceptance and suffered damage therefrom. By consent of the parties, the learned Judge heard the first issue separately, giving Judgment on 19th August, 1975, and subsequently hearing and determining the further issues. p. 297 p. 771

3. The Agreement was made on 11th June, 1970. It provided that BP should supply to Nabalco its requirements of super motor spirit, diesoleum and furnace oil for the business managed by Nabalco, consisting of the mining of bauxite and its treatment to alumina at Gove in the Northern Territory. The duration of the Agreement was to be for a period of ten years from 5th May, 1971. It was contemplated by the parties when the Agreement was made that supplies of each of the petroleum products would come from the Persian Gulf. In the event, however, motor spirit and diesoleum were supplied from sources within Australia. The furnace oil alone came from crude oil produced in the Persian Gulf and was supplied to BP by BP Trading Limited, an associated company, at market price. The prices for p. 22 l.30 p. 23 l.17 p. 23 ll.13 to 16 and p. 323 ll.19 to 22 p.311 ll.45 to 46 p.311 ll.47 to 48 p.322 l.47 to p.323 l.4

p. 25 l.4 to p. 29 l.7

products to Nabalco were fixed under Clause 8 of the Agreement but with provisions for adjustment under Clause 9 thereof.

4. In late 1973 and early 1974, as is common knowledge, the well known concerted action of the oil producing countries caused an unprecedented and drastic increase in the price of crude oil from the Persian Gulf. Prior to these increases, the "base price" at which furnace oil had been supplied by BP was, after adjustment to take account of alteration in freight rates, $13.99 per metric ton. Further supply at such a price would have involved BP in an "enormous loss". The learned Judge made detailed findings of fact in connection with the nature of supply and increase in cost which he summarised conveniently. BP accordingly gave notice on 22nd March 1974 pursuant to Clause 9(C)(iii) of the Agreement that it was only able upon onerous terms to obtain supply from its usual sources and by its usual routes and was incurring substantial extra costs thereby. In consequences, BP fixed a revised base price of $54.44 per metric ton for the supply of furnace oil to become operative, as provided for in the sub-clause, upon three months' notice on 26th June, 1974. So great had been the cost increase to BP, that this radically revised price was "little better than a break-even" price. Nabalco responded on 24th April, 1974 by contending that the notice given by BP was invalid but, in the event that the notice should be valid, determining the Agreement so far as it related to furnace oil upon three months' notice to expire on 24th July, 1974. It is accepted that Nabalco was entitled under the sub-clause to give such notice and that accordingly, if BP's notice was valid, the Agreement was determined insofar as it related to furnace oil with effect from 24th July 1974.

p.318 l.20 to p.319 l.30
p.328 l.26
p.328 l.30
p.323 l.15 to p.324 l.5
p.33
p.27 ll.3 to 28
p.33 l.30
p.33 ll.32 and 33
p.328 ll.30 to 33
Exhibit A p.898 and 899

5. The learned Judge was satisfied upon these facts that the altered terms of supply to BP were onerous. He rejected the submission of Nabalco that terms of supply could only be "onerous" within the meaning of clause 9(C)(iii) if they were peculiar to BP and not an increase incurred generally by suppliers. BP submits that the learned Judge was right in this conclusion. The increase in cost to BP was no less onerous because other suppliers of product suffered such increases: the loss to BP was exactly the same as it would have been if for some reason prices had been increased to BP alone. The learned judge considered that "onerous" meant "oppressive in a business sense", and that the new terms of supply to BP clearly satisfied this test, the events which had occurred having fallen within the plain meaning of the sub-clause. The learned Judge, however, held that the sub-clause was deprived of what otherwise would have been this meaning by the terms of clause

p.329 ll.9 to 13
p.326 ll.28 to 31
p.324 ll.36 and 37
p.329 ll.9 to 13
p.325 l.14 to p.329 l.13
p.334 ll.29 to 34

9(C)(i). This sub-clause entitled either party to claim an alteration in price, not earlier than the end of the first five years of the first delivery of furnace oil, in the event that the FOB value of a product supplied under the Agreement had in its opinion substantially altered since the date upon which the Agreement was made. In the event that such alteration was reasonably established then, in default of agreement between the parties as to future prices, either party was to be entitled to determine the Agreement upon three months' notice. p.26 11.21 to 39

The learned Judge held that the cost increases fell within clause 9(C)(i) and that, but for the fact that five years of the Agreement had not expired, BP would have been entitled to invoke this sub-clause. The learned Judge then held that "what is within that sub-clause is not intended to be within clause 9(C)(iii)". He considered that to decide otherwise would have been to give Clause 9(C)(iii) an "overriding effect". He accordingly concluded that, notwithstanding the inability of the parties to rely upon clause 9(C)(i) until five years had expired, BP could not claim cost increases under clause 9(C)(iii). There was thus no mechanism by which BP could under the Agreement avoid supplying at an enormous loss until such time as clause 9(C)(i) could be invoked, namely 5th May, 1976. p.334 11.29 to 34 p.334 11.44 to 47

6. In BP's submission, there was no ground for departing from the ordinary meaning of clause 9(C)(iii). The sub-clause occurred within a clause designed to provide for adjustment of the fixed price having regard to increases in costs, changes in value, currency devaluation and for the recovery of demurrage. The sub-clause was the only provision entitling BP to recover additional costs other than certain costs specified in the other sub-clauses. It was intended to prevent BP from suffering the consequences of onerous terms of trading to the extent to which they led to substantial cost increases. Clearly, increased costs to BP could, if of sufficient magnitude, themselves constitute onerous terms since by definition they would give rise to substantial additional costs. There is nothing in clause 9 which suggests that the parties intended clause 9(C)(i) to derogate from the intent or effect of clause 9(C)(iii). Clause 9(C)(i) has a different object. It intends that there shall be a revision of prices at the option of <u>either</u> party in the event of a substantial <u>alteration</u> in <u>value</u>. Whilst value may be affected by <u>cost</u> variations, it my also increase or decrease without any such variation or even change to an extent which in part reflects changes in cost but in part also reflects other factors. The sub-clauses are thus

concerned with different concepts. It is wrong to conclude that Clause 9(C)(iii) does not operate if cost increases which are otherwise clearly within it affect value but does operate if value is not substantially altered. So to conclude would give to the clause an arbitrary operation. There is also a further fundamental difference between the sub-clauses. The protection afforded by clause 9(C)(iii) can be invoked if "at any time" during the agreement BP sustains substantial cost increases occasioned by onerous terms of supply. By contrast clause 9(C)(i) cannot operate for the first five year period of the Agreement. It was illogical for the learned Judge to conclude that the cost increases sustained by BP were within clause 9(C)(i) when, in fact, that sub-clause could not be invoked by either party at the time or for a substantial period thereafter. Nor does it assist Nabalco that in certain circumstances the sub-clauses could, after five years, become capable of operation upon the same facts as, for example, where there was a general rise in market costs affecting value. The possibility of such an overlap, which would have no practical significance, is no ground for depriving clause 9(C)(iii) of its full scope in circumstances where, irrespective of their effect upon value, increased costs are occasioned by onerous terms of supply within what the learned Judge held to be the ordinary meaning of clause 9(C)(iii). The possibility that such cost increases could be reflected in value at the end of the five year period should not deny their recovery after the three months' notice during which BP was in any event to bear the burden of those costs. If Nabalco is right, a very high rise in price which occurred, say, a month after the Agreement was concluded would be irrecoverable for almost five years, however great the loss it caused to the supplier. It was a commercially disastrous situation of this kind which clause 9(C)(iii) was designed to prevent. The mere fact that the operation of a clause contemplating a change either way in value is not to operate for five years is not sufficient to cause the plain meaning of clause 9(C)(iii) to be disregarded. By contrast, the plain words of the sub-clause construed in their ordinary meaning operate commercially but yet leave clause 9(C)(i) with a sensible, independent meaning as it is concerned only with value and the grant of mutual rights in the event of alteration in such value. Again, if, for example, onerous terms imposed after the first five years of the Agreement led to a steep rise in costs but only a small rise in value, it would be against the intent of the Agreement that the rise in price should be limited to the effect upon value. Nabalco could never be obliged

under Clause 9(C)(iii) to pay a price higher than that for which it could obtain the product elsewhere at the time of the increase by reason of its right to determine the obligation under the Agreement in respect of that particular product if an increase be notified.

7. If BP is wrong upon this issue, it falls to be determined whether BP repudiated the Agreement by conduct and whether Nabalco accepted such repudiation and communicated that acceptance and sustained the damages awarded. It is convenient to summarise the facts relating to such issue.

8. Following the notices already referred to, some further correspondence and telephone communications took place between the parties. By letter of 24th April 1974 Nabalco suggested the possibility of a meeting to discuss whether the dispute between the parties as to the validity of the notice and the problems which had arisen could be amicably resolved. By letter of 7th May 1974 BP expressed the view that the existing Agreement had been terminated with effect from 24th July 1974, and indicated availability to discuss a new agreement. A meeting was arranged to discuss the position on 17th May 1974. It is common ground that it was expressly agreed beforehand that this meeting should be held "without prejudice" to the legal rights of the parties. The learned Judge found that BP offered to supply furnace oil after the period of notice came to an end either on the terms of a new contract or, alternatively, upon a spot basis. BP made it plain that, in its view, the old Agreement so far as fuel oil was concerned was terminated and that a new agreement would only be available if Nabalco was prepared to acknowledge that the old Agreement in that respect was cancelled and that there would be no legal proceedings challenging the validity of the notice. The Nabalco representatives stated that they had no authority to acknolwedge the termination of the existing Agreement and a BP representative stated that, in the event of Nabalco wishing to continue to challenge the validity of the notice of increase, there could be no new contract, and that BP regarded the existing contract at an end. In the course of discussion, BP indicated that Nabalco was free to seek supplies elsewhere. The effect of the meeting was summarised by the Nabalco representatives to the effect that they understood BP to be requesting a declaration that the old Agreement was ended but that, if Nabalco decided to test the validity of the notice, there would be no new contract available to Nabalco and supplies under the old contract would cease in July. BP assented to this summary, but stated that spot supplies could still be available.

Exhibit A p.899 ll.15 to 18

Exhibit I (Part) p.917 ll.21 to 26

p.371 ll.37 to 39

p.371 ll.15 to 16

p.791 ll.8 to 28

p.786 ll.8 to 11

p.786 ll.30 to 34

p.787 ll.2 to 5

p.787 ll.34 to 36

p.787 l.38 to p.788 l.4

p.788 ll.5 to 8

p.790 11.22 to 25 Exhibit I (Part) p.934

9. Upon 23rd May, 1974 Nabalco sent to BP a letter dated 16th May, 1974 in which it stated that the exiting contract continued to bind the parties during the continuation of any dispute and, in consequence, the immediate resolution of such dispute was vital. A further meeting, also expressly agreed to be "without prejudice", took place on 31st May, 1974. At this meeting the parties discussed the terms and conditions of a new contract, and BP again made plain that it would require as a condition precedent to a new contract a decision by Nabalco to agree that the existing Agreement was terminated, On 13th June, 1974 Nabalco and BP again summarised the effect of the meetings which had been held on the 17th and 31st May. In a further telephone conservation of 14th June, BP emphasised that there might be problems in programming supplies unless Nabalco's decision upon the offer which had been made to it was made quickly. Upon 21st June, 1974 without having responded to the offer of settlement and without the knowledge of BP, Nabalco entered into an agreement with another supplier, a government oil company. By telephone on 28th June, 1974 Nabalco informed BP that it would not require any further furnace oil after July 1974 and had entered into an agreement with another supplier. Nabalco stated that a letter advising BP of the situation was being sent. The contents of such letter were telexed to BP on 1st July, 1974. This telex stated that, following BP's notice of 22nd March, 1974, Nabalco had sought to obtain another source of supply of fuel oil so as to minimise its loss and that an alternative source had now been obtained but that, as the price was significantly higher than the former fixed price, Nabalco would expect BP to recompense Nabalco in the event that the notice of increase was held to be invalid. The letter stated that deliveries from the alternative source would commence in August 1974. By a telex of 1st July, 1974 to BP Trading Limited, BP stated that the position with regard to the other products remained unaffected by the notice. This was consistent with the telex of the same date from Nabalco already referred to. By letter dated 17th July, 1974, BP affirmed to Nabalco that it adhered to its view that the notice of increase was valid but stated that, if the notice were held to be invalid, it remained ready and willing to perform under the terms of the existing Agreement.

p.782 11.14 and 15 p.792 11.22 and 23 p.792 11.24 to 27 Exhibit 43 (Part) p.991 p.793 1.19 to p.794 1.9 Exhibit 43 (Part) p.994 p.794 11.10 to 16 p.796 1.40 to p.797 1.1 Exhibit K p.1024 Exhibit 63 p.1039 p.797 11.14 to 21 p.797 11.22 to 25 Exhibit M p.1045 Exhibit 1 (Part) p.1044 Exhibit AJ (Part) p.1047 11.43 to 46 p.799 11.8 to 10 Exhibit 1 (Part) p.1056

p.799 11.19 and 20 p.460 11.32 to 47 p.815 1.39

10. On or about 18th June, 1974, Nabalco had notified under the Agreement its requirements of furnace oil for the month of July 1974. It accepted a supply of furnace oil on 19th July, 1974. It also required BP to supply under the Agreement motor spirit and diesoleum until, on account of a supervening event,

Nabalco finally determined the Agreement in its entirety with effect from March 1976. Exhibit AN Page 1096 p.833 11.34 to 43

11. Upon these facts the learned Judge concluded that:-

(i) The fact that the meetings of 17th/31st May 1974 were agreed to be without prejudice and the fact that the telephone conversations of 13th/14th June 1974 referred to these meetings did not prevent Nabalco from relying on such; p.812 11.25 to 28 p.813 11.1 to 6 p.813 11.15 to 17

(ii) BP had repudiated the Agreement by renunciation of its obligation to supply furnace oil at the meetings of 17th/31st May, 1974 and in the conversations of 13th/14th June, 1974; p.795 11.31 to 41 p.805 11.41 to 47 p.813 11.42 to 46

(iii) Nabalco was entitled to accept such repudiation in respect of the supply of furnace oil only, but to affirm the Agreement as regards the supply of motor sprit and diesoleum; and p.818 11.14 to 37 p.829 1.28 p.830 11.13 to 18

(iv) Nabalco was entitled to accept the repudiation on 28th June, 1974 with effect from 24th July, 1974 but to require continued performance until that date; and p.818 11.14 to 37 p.829 11.24 to 26

(v) Nabalco had, in fact, accepted such repudiation in respect of the supply of furnace oil on 28th June, 1974 with effect from 24th July, 1974; p.817 11.30 to 39

(vi) Nabalco had communicated such acceptance or BP should have understood it to be accepting such repudiation; and p.818 11.1 to 13

(vii) Nabalco had not affirmed the Agreement either by requiring furnace oil to be delivered until 24th July, 1974 and accepting such delivery, nor by continuing to accept the continuance of the Agreement in respect of the supply of motor spirit and diesoleum. p.816 11.27 to 30

In the submission of BP the learned Judge was wrong in each of these conclusions.

12. In any event, BP submits that the learned Judge should not have admitted evidence of the meetings which took place on 17th/31st May, 1974 or the telephone conversations of 13th/14th June, 1974. The learned Judge concluded that the authorities were not entirely consistent as to the extent to which statements made purportedly "without prejudice" could not be referred to or relied upon in proceedings. He further concluded that the divergence could be reconciled by holding that conditional statements made in such negotiations were inadmissible but that statements made unconditionally were admissible. The learned Judge also concluded that, in p.811 11.2 to 5 p.811 1.41 to p. 812 1.1 p.812 11.2 to 24

inviting Nabalco to do its best to obtain an alternative source of supply and in stating that it was not prepared to go back to the old Agreement, BP had made unconditional statements of its attitude to future supplies. These could not be excluded even though the discussions were had expressly without prejudice. He further concluded that, in any event, the conversations of 13th/14th June 1974 were not a continuation of the series of negotiations designed to effect a settlement of the dispute.

p.813 ll.6 to 9

p.813 ll.15 to 47

13. BP submits, firstly, that the entirety of the conversations of 17th/31st May 1974 were inadmissible in evidence. They had been expressly agreed to be "without prejudice" so that the parties could speak freely and frankly with a view to settlement of their dispute. The conversations should therefore be held inadmissible, in the same way that documents brought into existence under an express or tacit agreement that they would not used to the prejudice of either party are exempt from production: Rabin v. Mendoza (1954) 1 W.L.R. 271. Nabalco should not be permitted to resile from its agreement, and to permit it to do so would be contrary to that aspect of public policy which has encouraged the opportunity for parties to seek freely to resolve their dispute by negotiating without prejudice to their legal rights. Nor is it right to examine statements in isolation and, if one such statement is found to be unconditional, exclude it from the ambit of the without prejudice negotiations to settle a dispute in which context the statement itself is made. It would inhibit such discussions if there was a prospect that they could be analysed in detail in order to separate unconditional, and consequently admissible, statements from inadmissible, conditional statements. The learned Judge took the statements which he regarded as unconditional out of their context, whereas they were part and parcel of the negotiations for a compromise. The position is different from that in which a party makes an unconditional statement in a letter to which he purports to attach the without prejudice label whereas in fact the letter is not directed towards settling a dispute and no agreement has been reached that it should be treated without prejudice. BP further submits that the telephone conversations of 13th/14th June, 1974, were essentially consequential upon, referable to, and involved a summary of, the negotiations which had been expressly without prejudice. These conversations commenced with an enquiry by BP as to whether Nabalco was prepared to accept the proposed compromise and led to Nabalco summarising the effect of the offer which had been made. The conversations were consequently within the ambit of the without prejudice negotiations or, alternatively, it

p.785 ll.28 and 29
p.792 ll.14 and 15

should be inferred that the parties tacitly agreed that they were to be treated upon the same basis. Nabalco itself, in its telex of 1st July, 1974, did not purport to rely upon anything which had been said in these negotiations as ground for termination. It relied upon the notice of increase in price which, as already submitted, was not repudiatory. BP submits that Nabalco was correct in not referring to any of the subsequent meetings or conversations since, as well as not being repudiatory, such conversations were entirely without prejudice to the legal rights of the parties and should not have been admitted in evidence.

Exhibit M p.1045

14. Secondly, the learned Judge found that at the meeting of 17th May 1974 BP stated unequivocally that it would not, in any event, revert to the existing Agreement. He found that this statement was not regarded at the time as repudiatory, since Nabalco knew that all statements at the meeting were subject to confirmation by BP's parent company in London. He found, however, that BP maintained the same attitude on 31st May 1974 and in the telephone conversations of 13th/14th June 1974. It is submitted that the facts previously summarised, based on the evidence of Nabalco which the learned Judge accepted, does not justify this conclusion. The proper inference from these facts was that, in negotiations, BP was stating that a new contract was conditional upon recognition that the old Agreement was terminated and abandonment of the challenge to the validity of the notice of increase. If, however, negotiations broke down, both parties accepted that the dispute would have to be resolved. It was BP's strongly expressed opinion (based, as the learned Judge held, on reasonable grounds) that the effect of the notices was that the Agreement terminated on 24th July 1974. BP had, however, never stated that, in the event of the dispute being resolved in favour of Nabalco, it would decline to supply on the terms of the existing Agreement. Yet the learned Judge must, wrongly in the submision of BP, have so concluded because otherwise he could not have held that BP had repudiated. Supplies until resolution would have been on the basis of spot delivery. BP was prepared to supply Nabalco's requirements of oil. The letters of 17th July 1974 confirmed this. The learned Judge failed to give weight to the fact that all statements at the meetings and in telephone conversations were made against the background that, in the absence of an amicable settlement, it was the contemplation of both parties that the dispute as to the validity of the notice would be determined by legal proceedings. In negotiations, attempts were made to propose a settlement which would dispose of the necessity for such proceedings, but these attempts do not evince an attitude on

p.791 11.20 to 23
p.791 1.42 to p.792 1.8
p.793 11.3 to 7
p.795 11.31 to 35
p.828 11.3 to 8
p.791 11.26 to 28
p.794 11.2 to 9
Exhibit 1 (Part) pp.1055 and 1056
p.789 1.38
p.790 11.29 to 32

the part of BP not to be bound by any finding made in those proceedings. Nor was the statement that Nabalco was entitled to look for supplies elsewhere in any way repudiatory. The maintenance by BP of its contention that the notice was valid and that accordingly the Agreement would come to an end in July 1974 was not repudiatory; James Shaffer Limited v. Findlay Durham & Brodie (1935) 1 W.L.R. 106; Sweet & Maxwell Limited v. Universal News Services Limited (1964) 2 Q.B. 699.

15. Thirdly, Nabalco purported only to accept the repudiation insofar as it related to the supply of fuel oil. It is accepted by BP that the renunciation of an obligation to supply furnace oil would have been a breach of contract which Nabalco could have treated as repudiatory of the entire Agreement. It is submitted, however, that Nabalco had the option of accepting any repudiation of the Agreement or of affirming its continuation notwithstanding the breach. It was not entitled to accept the repudiation of part of the Agreement but affirm the Agreement in respect of the supply of other fuels. The conclusion of the learned Judge was contrary to authority, which gives the innocent party the choice of either affirming the contract notwithstanding the breach or, alternatively, of accepting the repudiation and rescinding the entire Agreement. The learned Judge considered that such a conclusion would be an affront to common sense, since Nabalco required the supplies of the other fuels. In fact, however, if Nabalco had accepted the repudiation, it would have been open to BP and Nabalco to negotiate a fresh contract for the supply of the other fuels. This would not have disadvantaged Nabalco since, if BP had insisted on terms more advantageous to itself in respect of the supply of other fuels, Nabalco's damages by reason of repudiation would have been increased. Alternatively, it would have been open to Nabalco to seek to obtain supplies of these other products elsewhere and they were readily obtainable. The learned Judge rightly rejected the submissions of Nabalco that there were three agreements and not one agreement; having done so he was wrong to conclude that the Agreement was divisible in the sense that repudiation of the entire Agreement by renunciation of one fundamental obligation entitled Nabalco to accept not the repudiation of the Agreement itself but the repudiation of the single obligation. Nabalco could not approbate and reprobate by affirming part and disaffirming the rest - thereby unilaterally making a new contract: see Suisse Atlantique Societe d' Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale (1967) A.C. 361.

p.818 11.28 to 33

p.825 11.22 to 33

p.830 11.13 to 18

16. Fourthly, BP submits that the learned Judge should not have concluded that any repudiation of its obligations by BP to

p.818 11.14 to 37

supply fuel oil in the future, namely, from 24th July, 1974 could be accepted not with immediate effect but as from 24th July, 1974. Nabalco had the choice either of accepting the renunciation of the future obligation with immediate effect or of keeping the contract alive for the benefit of both parties until the renunciation by BP of its obligation became an actual breach of contract on or after 24th July, 1974; The Mersey Steel & Iron Co. (Limited) v. Naylor, Benzon & Co. (1884) 9 App. Cas. 434; White & Carter (Councils) Limited v. McGregor (1962) A.C. 413, at p.427 per Lord Reid; Huppert v. Stock Options of Australia Pty Limited (1965-66) 39 A.L.J.R. 103; F.J. Bloeman Limited v. Council of City of Gold Coast (1972) A.C. 115. It was not open to Nabalco to affirm the contract at the old base rate involving a loss to BP until 24th July, 1974 whilst having already accepted the repudiation with effect from a future date. The importance of this submission is that by its letters dated 17th July, 1974, BP made it plain during the currency of the obligation to deliver fuel oil that, if its notice of increase were held invalid, it was willing to continue to supply at the terms provided in the existing Agreement. If BP had repudiated the Agreement, it nevertheless by those letters withdrew that repudiation during the continued existence of the obligation and at a time when Nabalco was requiring performance under the Agreement.

Exhibit 1 (Part) pp.1055 and 1056

17. The combined effect of the conclusions of the learned Judge considered in the preceding two paragraphs has the effect that an action based on repudiation may be brought in respect of a renunciation of part of the mutual rights and obligations of the Agreement, whilst the Agreement remains on foot and continues to be performed by both parties indefinitely in respect of other obligations; additionally it means that such action may be brought notwithstanding that during continuance of performance of all the mutual rights and obligations a repudiation has been withdrawn. Both these conclusions are wholly contrary to the well established principles governing repudiation.

18. Nabalco further alleged, by way of avoidance of the consequences of the third submission, that the parties reached an agreement whereby the obligations to supply motor spirit and diesoleum were to remain in full force and effect notwithstanding the determination of the other obligations. The learned Judge concluded, rightly in the submission of BP, that the evidence upon which Nabalco relied was not of any contractual significance. Moreover, there was no evidence that the parties intended these words to take effect if Nabalco contended

p.826 ll.19 to 22

that BP had repudiated its obligation to supply furnace oil, as opposed to having given a valid notice which led to determination of the Agreement by Nabalco.

19. Fifthly, it is submitted that neither the conversation of 28th June, 1974, nor the telex of 1st July 1974 amount to an acceptance by Nabalco of any repudiation by BP. In the conversation of 28th June, 1974 Nabalco merely informed BP that it had reached an agreement with another supplier and would, accordingly, not require further supplies from BP. It was not suggested in that conversation either that BP had repudiated by its conduct, or that Nabalco was accepting such repudiation. Neither in the conversation nor in the telex did Nabalco purport to accept a repudiation. The telex of 1st July 1974 did not refer at all to the conduct which the learned Judge held to be repudiatory, but relied solely upon the notice given by BP as its ground for determining the Agreement and holding BP liable for recompense. As already submitted, this notice was not a repudiation of the Agreement. Thus, if BP repudiated, Nabalco did not accept such repudiation prior to the withdrawal thereof by BP in its letters dated 17th July 1974. Even if the telex can be construed as the purported acceptance of an alleged repudiation by the service of the notice, it does not avail Nabalco: it is not open to a party to sue upon a repudiation which it has not accepted, and justify its action by relying upon a purported acceptance of conduct which was, in fact, not repudiatory.

Exhibit M p.1045

p.797 ll.14 to 21

Exhibit M p.1045

Exhibit 1 (Part) pp.1055 and 1056

20. Sixthly, BP submits that there was no evidence that Nabalco communicated unambiguously to BP any decision by it to accept BP's repudiation (if any). It did not say so; there is no evidence of any decision by its Board or the Board of Management or of any executive officer that it should accept a repudiation. At the same time, Nabalco continued to seek performance of the contract and deliveries of furnace oil up to 24th July 1974 and instituted declaratory proceedings in which it did not claim damages. It had by letter dated 16th May 1974 (but sent on 23rd May, 1974) stated unambiguously to BP that "so long as any dispute continues" the contract would remain on foot. Moreover the learned trial judge found that "there is little doubt that (Nabalco) had (BP) guessing by the last week in June 1974" as to what Nabalco intended to do.

Exhibit 34 p.1022 p.797 ll.4 to 19 p.81511.23 to 25 p.814 ll.33 to 37 Exhibit 1 (Part) p.934 p.790 ll.22 to 25 p.816 ll.9 to 10

21. Seventhly, BP submits that by its conduct Nabalco affirmed the Agreement between 14th June, 1974 and the determination of the Agreement to supply fuel oil on 24th July 1974. BP relies upon the requirement of Nabalco that BP should continue to supply fuel oil until that date;

the service of a notice of fuel requirements on 18th June, 1974 and the affirmation of the obligations to supply motor spirit and diesoleum under the Agreement until its determination in March, 1976. Thus Nabalco elected to affirm the Agreement.

p.815 ll.23 to 25

p.825 ll.39 to 41

22. The learned Judge awarded damages to Nabalco on the basis that it was entitled to recover the difference between the cost of supplies at the old base rate until determination of the Agreement and the increased costs incurred under the replacement contracts of supply and affreightment.

p.832 to 839

23. BP submits that, in fact, no such damages should have been awarded and that damages should have been held to be nominal. Nabalco managed the plant in accordance with the terms of an agreement ("the Management Agreement") on behalf of Swiss Aluminium Australia Pty Limited and Gove Alumina Limited. By clause 9.1 of the Management Agreement, Nabalco was entitled to charge the joint venturers with all expenses incurred in the performance of the Management Agreement and thus, in consequence, was entitled to pass on the extra costs of obtaining fuel oil under the replacement agreements. The learned Judge concluded that this reflected the fact that Nabalco entered into the Supply Agreement with BP as principal. By Clause 16 of the Supply Agreement, it was provided that Nabalco should be entitled to recover loss or damage suffered by the joint venturers or either of them to the same extent as would be the case if the joint venturers were parties to the Agreement. However, by an Agreement called the Mining (Gove Peninsula Nabalco) Agreement, Nabalco undertook to negotiate a contract with Swiss Aluminium Limited, the parent company of Swiss Aluminium Australia Pty Limited, for it to purchase the whole bauxite output at a price not below the cost of production and freight; pursuant to that Agreement, further agreements were made respectively between Swiss Aluminium Australia Limited and Swiss Aluminium Limited and between Gove Alumina Limited and Swiss Aluminium Limited whereby the two Australian companies agreed to sell the whole of the output of alumina to Swiss Aluminium Limited at prices which were to escalate so as at all times to exceed bauxite mining costs and bauxite treatment costs incurred and payable by the participants under the Joint Venture Agreement. Similarly, by another Agreement, Gove Alumina Limited was permitted to export specified quantities of untreated baxuite under a long term agreement to Swiss Aluminium Limited at prices subject to escalation so as at all times to exceed bauxite mining costs incurred by and payable by the participants. The effect of these Agreements was that Nabalco was entitled to be reimbursed by the participants for the amount of the cost of furnace oil

Exhibit 31 p.1435

Exhibit 31 p.1443 l.2

p.30 l.16

Exhibit 38 (Part) p.1360 p.1367 l.33

Exhibit 37 (Part) pp.1457 and 1465 p.1458 ll.28 to 43 p.1465 l.46 to p.1467 l.4 p.1459 ll.24 to 49 p.1467 l.33 to p.1471 l.20

Exhibit 37 (Part) p.1446 p.1447 l.28 p.1447 l.17 p.1450 l.32 to p.1452 l.6

p.350 l.36 to p.351 l.50

p.404 l.15 to p.405 l.52

p.30 l.17

p.831 l.43

p.404 l.15 to p.405 l.52

purchases and, in turn, the participants were entitled to add that cost to the prices payable to them for alumina and bauxite sold to Swiss Aluminium Limited. Almost all the fuel oil used at Gove was consumed in the production and treatment of material which was sold under these agreements at prices which were increased to cover the cost of fuel oil purchases. Thus either Nabalco itself sustained no loss in that it was entirely reimbursed by the joint venturers or, alternatively, if Nabalco was entitled to recover any loss sustained by the joint venturers by virtue of clause 16 of the Supply Agreement, then in fact the joint venturers sustained almost no loss in that they were able to pass on the increased costs effectively in their entirety to their purchasers. No doubt, in turn, those purchasers passed on the cost as part of an increase in the price of the commodity sold by them. The learned Judge held that Nabalco was entitled to recover losses sustained by the joint venturers, but did not deal with BP's submission that the joint venturers had themselves sustained no loss. The amount consumed in other ways was inferentially a fraction of 1 per cent of the furnace oil supplied by BP, and in argument the learned Judge stated that, if he were wrong in his view that damages were recoverable even though the increase was passed on, it would be necessary for the issue to be remitted to him for a small assessment. In the submission of BP, with the exception of the small amount which falls to be assessed in respect of furnace oil used in other ways, Nabalco had sustained no such loss and, in consequence, the basis of calculation of damages by the learned Judge was wrong.

p.832 l.38

p.832 l.20

p.834 l.18 to p.837 l.7

24. Alternatively BP submits that the learned Judge, although purporting to adopt and apply the principles stated by Lord Pearson in Garnac Grain Co. Incorporated v. H.M.F. Faure and Fairclough Limited (1968) A.C. 1130 at 1140, failed to apply them by approaching the question of damages, as he described it, upon the analogy of sub-section 2 of section 53 of the Sale of Goods Act (N.S.W.) - (also S.53(2) of the English Act). Thus the learned Judge regarded the question of measuring the damages sustained by reference only to the difference between prices payable under the new contracts, which Nabalco entered into for supply and delivery respectively of furnace oil, and the BP contract prices as resting solely upon the answer to the question, "Did Nabalco act reasonably in entering into those contracts?" As BP submits, he thus failed to measure the damages by reference to market prices, of which there was in fact no evidence to permit an assessment of damages to be made. The only evidence was in general terms that,

throughout the whole of the relevant period, market values were below the prices paid by Nabalco under the contracts which it had entered into. Thus BP submits that the amount of damages awarded is erroneous.

p.1271 l.36 to p.1272 l.6
p.1267 l.30 to p.1270 l.6

25. In any event BP submits that on the evidence it was erroneous to find, or the evidence did not permit the learned Judge to find, that Nabalco acted reasonably in entering into the contracts for the supply and transport respectively of furnace oil. It is submitted that the evidence of Mr Abt demonstrated that the price payable by Nabalco for oil under the terms of the contract with Kuwait National Petroleum Company (KNPC) was significantly higher than the prevailing market prices and that there was nothing in any of the other evidence to permit the conclusion that, nevertheless, it was reasonable for Nabalco in the circumstances to enter into that contract, having regard to its terms, and to the time when it entered into it. Mr Abt's evidence was that the initial contract price of US$9.25 per barrel paid to KNPC was above the then posted price for fuel oil and that by virtue of the escalation provisions of the KNPC contract (Article E), the price payable to KNPC throughout the duration of the KNPC contract would be always above the posted price for the time being. More importantly, his evidence was that, except on rare occasions, fuel oil prices both for "spot" supply and for long term supply were below posted prices. Mr Colish conceded that large customers had been probably getting fuel oil supply at prices less than posting and less than the KNPC price. Moreover it is BP's submission that the evidence of Mr Wilson relating to the investigation of available affreightment contracts and the temrs thereof established undue haste and insufficient enquiry by Nabalco, leading to acceptance of terms as to price and future escalations of price which were unreasonably favourable to the other party - a conclusion expressed by Mr Abt and, it is submitted, not really dissented from by Mr Colish (the other expert witness). Mr Abt's opinion was that freight costs were unreasonably excessive by at least $1,871,786. BP submits that this evidence should have been accepted in reduction of damages. For completeness, the following references are given to evidence on that subject:

Exhibit 65 p.1271 11.36 to 44

Exhibit 65 p.1272 11.2 to 6

p.574 11.14 to 31

pp.542 to 551

Exhibit 65 p.1269 1.33
Exhibit 65 p.1273

> Mr Colish: Ex. AA (P. 1258, LL.26 to 49 and P.1260 LL.14 to 18); also under cross-examination at Pp. 587 to 588;
>
> Mr. Abt: para. 2.9 Ex. 65 (P.1269); also in examination in chief from Pp. 694 to 704 and again from Pp. 714 to 719 under cross-examination from Pp. 720 to 750 and in re-examination at Pp. 760 to 762.

The meaning of "Worldscale" is dealt with by Mr Colish at P.1257 of Ex.AA and by Mr Abt at para. 2.2 of Ex.65 (P.1267) and on a single page annexure to Ex.65 (P.1275) and again, in examination in chief, at P. 714.

The meaning of "AFRA" is dealt with by Mr Abt on the single page annexure to Ex.65 (P.1275) and again, in examination in chief, at Pp.701 and 715 and by Mr Colish on P.1257 of Ex.AA.

Further, it is clear that a very significant motivation leading to Nabalco's decision to enter into the fuel oil supply contract with KNPC was that it would in consequence be dealing in the future with an oil producing State and not with an oil company such as BP. Nabalco was thus bargaining for benefits additional to those which it had under the Agreement with BP and for that reason, no doubt, was prepared to accept other than market terms.

p.1078 ll.1 to 6
p.469 ll.3 to 29
p.526 l.31 to p.527 l.40
p.532 ll.1 to 42

Wherefore BP submits that this appeal should be allowed for the following amongst other reasons:

R E A S O N S

(1) BECAUSE, upon the proper construction of the Agreement, the notice dated 22nd March, 1974 was valid and, accordingly, the Agreement was determined by Nabalco's notice dated 24th April, 1974.

(2) BECAUSE BP did not repudiate the said Agreement.

(3) BECAUSE any repudiatory conduct of BP took place in the course of without prejudice negotiations which should not have been admitted in evidence.

(4) BECAUSE Nabalco were not entitled to purport to accept a repudiation of an obligation under the Agreement whilst affirming the other obligations thereunder.

(5) BECAUSE Nabalco were not entitled to accept a repudiation with effect from a future date, and any repudiation was withdrawn by BP during the continuance of the obligation in respect of the supply of furnace oil.

(6) BECAUSE Nabalco did not accept validly any repudiation by BP, but purported to accept, as repudiatory, conduct which was, in fact, not repudiatory.

(7) BECAUSE Nabalco did not communicate any acceptance of repudiation to BP.

(8) BECAUSE Nabalco affirmed the said Agreement.

(9) BECAUSE neither Nabalco nor, alternatively, the joint venturers suffered the damages awarded by the learned Judge.

(10) BECAUSE the Judgment of the learned Judge was wrong and ought to be reversed.

D. STAFF ESQ. Q.C.,

R.S. ALEXANDER ESQ. Q.C.,

D. HORTON ESQ. Q.C.,

R. CONTI ESQ.

No. 11 of 1977

IN THE PRIVY COUNCIL

ON APPEAL

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

BETWEEN:

BP AUSTRALIA LIMITED — Appellant

- and -

NABALCO PTY. LIMITED — Respondent

APPELLANT'S CASE

LINKLATERS & PAINES
Barrington House,
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