In The Privy Council

Judgment and Appeal

No. 11 of 1977

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES

Between

BP AUSTRALIA LIMITED ..... Appellant (Defendant)

and

NABALCO PTY LIMITED ..... Respondent (Plaintiff)

RECORD OF PROCEEDINGS

VOLUME II AND VOLUME IV

(pages 297-344) (pages 767-846)

Linklaters & Paines
59-67 Gresham Street
LONDON. EC2V 7JA
Solicitors for the Appellant

Hewitt Woollacott & Chown
113 Cannon Street
LONDON. EC4N 5AU
Solicitors for the Respondent

In The Privy Council

No. 11 of 1977

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES

Between

BP AUSTRALIA LIMITED ..... Appellant (Defendant)

and

NABALCO PTY LIMITED ..... Respondent (Plaintiff)

RECORD OF PROCEEDINGS

VOLUME II

(pages 297-344)

Linklaters & Paines
59-67 Gresham Street
LONDON. EC2V 7JA
Solicitors for the Appellant

Hewitt Woollacott & Chown
113 Cannon Street
LONDON. EC4N 5AU
Solicitors for the Respondent

IN THE PRIVY COUNCIL Number 11 of 1977

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

BP AUSTRALIA LIMITED
Appellant

NABALCO PTY LIMITED
Respondent

RECORD OF PROCEEDINGS:
INDEX TO VOLUMES

VOLUME II

TABLE OF CONTENTS

Note: *Each page of this Judgment has been separately numbered in order to be linked with the Judgment being Document 113 in Vol IV. This page number appears below marginal note.*

No. 101

Reasons for Judgment of His Honour Mr Justice Sheppard on First Hearing

JUDGMENT

ARRANGEMENT

HIS HONOUR: The principal question to be resolved is the validity of a notice dated 22nd March, 1974 given by the defendant to the plaintiff in purported exercise of a right so to do, conferred upon the defendant by clause 9(C)(iii) of a fuel supply contract dated 11th June, 1970 and made between the parties. The issue is whether at the time of the giving of the notice the defendant was able to obtain from its usual sources supplies of furnace oil for the purpose of fulfilling one of its obligations under the contract only upon onerous terms within the meaning of that expression as used in the clause. By its notice the defendants sought unilaterally to increase the price of furnace oil from its pre-existing price of $13.99 per metric ton to $54.44 per metric ton. The courses open to the plaintiff, if the notice were valid, were either to accept $54.44 as the new price or terminate the contract as to furnace oil upon three months notice to the defendant.

The relief sought by the plaintiff in its re-amended summons is as follows:—

"1. A declaration that on the true construction of the fuel supply agreement dated the 11th June, 1970, between the Defendant of the one part and the Plaintiff of the other part and in the events which have happened:

(a) the notice bearing date the 22nd March, 1974, delivered by the Defendant to the Plaintiff, a copy of which is referred to in the affidavit of David Griffin sworn herein the 19th June, 1974, is not a valid or effective exercise of the power given to the Defendant under Clause 9C(iii) of the said agreement or of any other power given to the Defendant under the said Agreement.

(b) The delivery of the said notice by the Defendant to the Plaintiff did not result in the price of $A54.44 per metric ton being fixed as the revised base price for supplies of Furnace Oil under the said agreement as from the 26th June, 1974, or at all.

2. A declaration that the conduct of the Defendant in delivering the said notice was illegal as being in breach of the Prices Justification Act, 1973 and that the said notice was therefore invalid.

2A. (a) A declaration that the defendant by its conduct in relation to the said notice and to the supply of Furnace Oil thereafter was in breach of and repudiated the said agreement so far as it related to the supply of Furnace Oil.

(b) A declaration that the Plaintiff is entitled to damages for the said breach of contract.

(c) An order fixing the amount of such damages or alternatively directing an inquiry as to the amount of such damages.

2B. In the event that the declaration claimed in par.2 is refused a declaration that the plaintiff by its notice to the defendant dated the 24th April, 1974, terminated its obligation to purchase furnace oil under the said agreement as from a date three months from the giving of such notice.

3. Such further or other relief as the nature of the case may require."

The plaintiff's claim for a declaration in terms of par.2 of the summons is not pressed, but questions concerning the effect of the Prices Justification Act, 1973, (Commonwealth) upon the validity of the notice were argued in connection with the plaintiff's claim for relief under par.1. I have been asked by the parties not to deal with the claim made in par.2A of the summons at this stage, and that claim is, accordingly, stood over to be later dealt with. One matter was argued in relation to the claim made in par.2B of the summons. That claim only arises for determination if I refuse the relief sought in par.1 of the summons. Although I am of opinion that the plaintiff is entitled to that relief, I propose to express an opinion on the matter argued. I shall also mention another submission which was foreshadowed, but which was not, for reasons later to be given, developed.

By its cross-summons filed after the hearing commenced, the defendant claims:—

"1. A declaration that upon the true construction of the Fuel Supply Agreement bearing dated 11th June, 1970 the subject of the proceedings and in the events which have happened:

(a) The Cross-Defendant was obliged to elect within one (1) month of receipt of the Notice bearing date 22nd March, 1974 the subject of the proceedings, irrespective of the validity thereof, as to whether or not it would give three months' notice in writing of termination provided for in Clause 9(C)(iii) of the said Agreement;

(b) The letter bearing date 24th April, 1974 from the Cross-Defendant to the Cross-Claimant (comprising part of Exhibit 1 herein) constituted an election on the Cross-Defendant's part to give three months' notice in writing of termination of the said Agreement so far as it related to the supply of furnace oil.

2. Alternatively to 1, a declaration that the Cross-Defendant by its conduct in relation to the said Notice and to the supply of furnace oil thereafter was in breach of and repudiated the said Agreement.

3. Such further or other relief as the nature of the proceedings may require."

That summons is, at the request of the parties, also not dealt with in these reasons for judgment and is stood over.

The Parties

Before referring to the provisions of the contract in question and the events which give rise to the questions to be determined I should say something about the parties. The plaintiff was incorporated on 2nd April 1964 in New South Wales. Its principal business is the management of the mining of bauxite and its treatment to alumina at Gove in the Northern Territory. The defendant was incorporated in Victoria and carries on business in Australia as a refiner and supplier of petroleum products. It is a wholly owned subsidiary of another Australian company, The British Petroleum Company of Australia Limited, which is in turn a wholly owned subsidiary of a company incorporated in the United Kingdom, the British Petroleum Company Limited (hereinafter called "the parent"). Also incorporated in the United Kingdom is another wholly owned subsidiary of the parent, B.P. Trading Limited (hereinafter called BPT). The parent and its subsidiary companies, which include companies additional to those already mentioned, comprise one of the largest oil groups in the world. It is engaged in all phases of the oil industry including exploring for, producing, transporting, refining and marketing crude oil, petroleum products, chemicals, gas and allied products. BPT is the principal operating company of the group.

The Contract

By cl.2 of the contract in question the plaintiff agreed to purchase and the defendant to supply and deliver to the plaintiff the plaintiff's requirements of super motor spirit, diesoleum and furnace oil together with such other petroleum products as the plaintiff might from time to time request the defendant to supply. By cl.3 of the contract the plaintiff was required at its own expense to construct at Gove and maintain in good order and repair bulk storage tanks, tankship discharging facilities and associated equipment as detailed in the first schedule to the contract. The plaintiff was also required to provide at Gove for the use of the

defendant a suitable berth for tankships up to forty thousand dead weight tons and also sufficient personnel to comply with all usual and reasonable on-shore procedures laid down from time to time by the defendant to be observed during the discharge of tankships. The tanks which the plaintiff was required to construct included such additional storage tanks for furnace oil as would for the time being be sufficient to store 35,000 long tons plus three weeks' normal usage of furnace oil by the plaintiff at that time. Clause 4 of the contract provided that delivery of super motor spirit, diesoleum and furnace oil should be made in bulk ex tankships into the plaintiff's ships' discharging hose at Gove. By cl.5 the plaintiff was to give to the defendant at its office in Adelaide:— (1) Notice in writing at fortnightly intervals of its stockholding of super motor spirit, diesoleum and furnace oil; and (2) notice in writing on or before the first day of each month of its estimated usage of those products for that month and each of the following three months. Subject to the plaintiff's current port facilities and port usage from time to time the defendant was obliged to arrange its tankship programme to enable it to replenish the plaintiff's stocks of super motor spirit, diesoleum and furnace oil so that the plaintiff's stocks of those products did not fall below fourteen days' usage as estimated by it and notified in accordance with the earlier provisions of the clause. By cl.6 of the contract the property in each delivery of product was deemed to have been transferred from the defendant to the plaintiff when the product passed the tankship's permanent hose connection provided it was connected to the plaintiff's flexible hose at Gove. The clause also provided for the manner in which measurement of quantities should take place. Clause 7 specified the quality of the product and cl.8 provided for the price at which the product was to be sold. The relevant product here is furnace oil and the price provided for in cl.8 was $A9.42 per metric ton provided the plaintiff's estimated usage enabled delivery by the defendant in quantities of more than 25,400 metric tons per delivery.

The side note to cl.9 is "price variations". It is a lengthy clause dealing with a number of matters and circumstances which may give rise to changes in the price to be paid for any of the products. Paragraph (C)(iii) of the clause is that part of the contract which arises directly for consideration. Despite the length of the clause I find it necessary to set out the whole of it. The reason for this is that the submissions to be dealt with involve the consideration of other parts of the clause on the basis that they shed light upon the meaning of the words in par.(C)(iii).

Clause 9 is in the following terms:

"9(A) Super Motor Spirit and Diesoleum

Freight Rates

Until the first day of January, 1977, the said base prices per metric ton for Super Motor Spirit and Diesoleum delivered hereunder shall be adjusted on the first day of July and January in each year by adding to or subtracting from them as the case may require the amount (converted to Australian currency per metric ton) by which the ocean freight rate effective on that day for the voyage Aden/Gove calculated from the assessment known as GP AFRA is above £(S)2/7/9d. per long ton or is below £(S)1/8/8d. per long ton.

(a) On the first day of January, 1977, the said base prices per metric ton shall be adjusted by adding to or subtracting from them as the case may require the amount (converted to Australian currency per metric ton) by which the average of the monthly assessments of the said GP AFRA ocean freight rate for the twelve months period commencing on the first day of January, 1976, shall be above or below £(S)1/18/2d.

(b) After the first day of January, 1977, the said base prices per metric ton (adjusted as provided in the preceding paragraph (a)) shall be further adjusted on the half-yearly days aforesaid by adding to or subtracting from them as the case may require the amount (converted to Australian currency per metric ton) by which the said GP AFRA ocean freight rate effective on that day is more than twenty-five per centum above or below the said average of the monthly freight rate assessments. Such basis for further adjusting the base prices per metric ton shall remain effective for a period of five years from the first day of January, 1977.

For the purposes of this subclause (A) and subclause (B) of this clause conversion of Sterling amounts to Australian currency shall be at the officially fixed rate of exchange applying on the date of adjustment.

(B) Furnace Oil

Freight Rates

Until the first day of January, 1977, the said base prices per metric ton for Furnace Oil delivered hereunder shall be adjusted on the first day of July and January in each year by adding to or subtracting from it as the case may require the amount (converted to Australian currency per metric ton) by which the ocean freight rate effective on that day for the voyage Aden/Gove calculated from the assessment known as MR AFRA is above £(S)1/15/10d. per long ton or is below £(S)1/1/6d. per long ton.

(a) On the first day of January, 1977, the said base price per metric ton shall be adjusted by adding to or subtracting from it as the case may require the amount (converted to Australian currency per metric ton) by which the average of the monthly assessments of the said MR AFRA freight rate for the twelve months period commencing on the first day of January, 1976, shall be above or below £(S)1/8/8d.

(b) After the first day of January, 1977, the said base price per metric ton (adjusted as provided in the preceding paragraph (a)) shall further be adjusted on the half-yearly days aforesaid by adding to or subtracting from it as the case may require the amount (converted to Australian currency per metric ton) by which the said MR AFRA freight rate effective on that day is more than twenty-five per centum above or below the said average of the monthly freight rate assessments. Such basis for further adjusting the base price per metric ton shall remain effective for a period of five years from the first day of January, 1977.

(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 lastmentioned 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 thereto 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 aforesaid. If 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 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 Sources 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 of termination as aforesaid at the base price per metric ton effective immediately prior to the date of the said firstmentioned notice subject to adjustment thereafter and in accordance with the terms and conditions of this agreement other than this clause.

(iv) Currency Revaluation

(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).

(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—

(a) the Commonwealth Government shall refix 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

(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 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 firstmentioned notice subject to adjustment thereafter and in accordance with the terms and conditions of this agreement other than this clause. If pursuant to this subclause a revised base price shall become operative for Super Motor Spirit and/or Diesoleum 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 Diesoleum 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.

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 rate per 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.

The appropriate 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.

If within 15 days after the expiry of the aforesaid period of thirty days the parties fail to so agree upon a London firm of shipbrokers John J. Jacobs & Company Ltd. of London or other company, if any, then carrying on or incorporating the business of that company shall determine the said appropriate rate of demurrage."

There are nine remaining clauses in the contract but I do not find it necessary to refer to any of these except cls.11 and 13. Clause 11 provides:—

"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 supplies to the Buyer hereunder it shall be charged to the Buyer's account.

For the purposes of this clause—

(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 $10.47 and $9.36 respectively per metric ton."

The side note to cl.13 is "Force Majeure". The second paragraph of the clause is in the following terms:—

"If, by reason of any cause reasonably beyond the control of the Seller, there is such a curtailment of or interference with (i) the 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 assessments referred to in cls. 9(A), (B) and (C)(ii) as GP AFRA and MR AFRA are indicators of freight levels from time to time. They are published half-yearly by the London Tanker Brokers' Panel and stand respectively for General Purpose Average Freight Rate Assessment and Main Route Average Freight Rate Assessment.

By cl.1 of the agreement it was to commence upon the substantial completion of the storage tanks and other facilities referred to in cl.3 and to continue until the expiration of ten years from the date of the first delivery of furnace oil into the plaintiff's storage tanks. That delivery was effected on 5th May, 1971. By March of 1974, when the defendant purported to give to the plaintiff a notice pursuant to cl. 9(C)(iii) of the contract, the price payable for furnace oil had, by reason of the operation of cl. 9(B) of the contract, become $A13.99 per metric ton.

The Notices, their Purported Effect and other Correspondence

No. 101 Reasons for Judgment of His Honour Mr Justice Sheppard on First Hearing — 19th Aug., 1975 Page 10

The notice said to have been given by the defendant to the plaintiff pursuant to cl. 9(C)(iii) of the contract, is dated 22nd March 1974. It was received by the plaintiff on 25th March 1974. It is in the following terms:—

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

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

(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.

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.

(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 Twenty-sixth day of June, 1974."

As the notice says, its intended effect was to increase the base price of furnace oil to $54.44 per metric ton on and from 26th June, 1974. If the notice were a valid notice under the clause relied upon, the plaintiff was entitled pursuant to the clause to give a notice determining the contract. Such a notice had to be given within one month after the receipt of the defendant's notice and would take effect three months after it was given. Until then the defendant would be obliged to continue to supply furnace oil at the price existing at the date of the giving of the defendant's.notice, subject to adjustments thereto pursuant to clauses of the contract other than cl.9(C)(iii). It is to be noted that the notice did not purport to deal with any product other than furnace oil. This was a course permitted by the clause which envisaged that the price of one only, or two only, of the products, the subject of the agreement, might be affected by a notice given pursuant to the clause, and, further, that, if the plaintiff itself gave a notice, the contract would be determined as to one product, or two products, only, it remaining on foot in respect of the other one or two.

On 4th April, 1974, the plaintiff wrote to the defendant a letter referring to

the receipt of the defendant's notice on 25th March, 1974. The plaintiff's letter said that the notice had serious implications for it, and before the notice could properly be considered it needed more information. There followed nine questions seeking particulars of matters referred to in the notice. I need not set these out but they included questions asking what were the "onerous terms", what were the defendant's present or then usual sources of supplies and to what extent those sources differed from its past sources of supplies. Mention was made of the Prices Justification Act and the letter concluded with the following paragraph:—

"We need the information requested above so that we can be in a position to properly consider and evaluate your Notice. We must not be taken by you as stating that we will consider your Notice to be in any way valid or for that matter, invalid. However, we really cannot make any firm statement until we have the information for which we have asked in the above."

On 19th April, 1974, the defendant wrote to the plaintiff agreeing to extend the time within which the plaintiff might give a notice under the clause in question. On 24th April, 1974, the plaintiff wrote to the defendant. Its letter is relied upon by the plaintiff, in the event that I should find that the defendant's notice of 22nd March, 1974, was a valid notice under the clause, as a notice given by it under that clause having the effect of terminating the contract as therein provided for. The letter is in the following terms:—

"SUPPLY AGREEMENT OF JUNE 11, 1970

We refer to your Notice of March 22, 1974, which was received by us on March 25 and to our letter to you of April 4, 1974, in regard thereto to which no reply has yet been received by us.

As you know Clause 9(C)(iii) of the Agreement requires the Buyer to give Notice terminating the Agreement if any Notice given by the seller under the clause claims a revised base price which is unacceptable to the buyer. The buyer must—under the Clause—give its notice within one month of the delivery of the seller's Notice.

Whilst appreciating your offer of April 19, 1974, to extend the time for us to give Notice under Clause 9(C)(iii) of the Agreement by ten days, we consider it necessary to give you Notice as follows:—

1. The circumstances disclosed in your Notice of March 22, 1974, do not in our opinion, authorise you to give the Notice nor do any other circumstances of which we are aware.

2. We do not accept that your Notice of March 22, 1974, is valid or that you have fixed or were entitled to fix any revised base price pursuant thereto.

3. Should the Notice be valid or be subsequently held to be valid then this letter gives and is to be deemed always to have given your company three months' Notice pursuant to Clause 9(C)(iii) of the Agreement to terminate upon the expiration of such Notice our obligation to purchase under the Supply Agreement the Furnace Oil at the purported revised price which is unacceptable to us.

No. 101
Reasons for Judgment of His Honour Mr Justice Sheppard on First Hearing
—
19th Aug., 1975
Page 12

We believe it is implicit in the above that the parties to the agreement shall continue to abide by the terms thereof pending the resolution of the matter whether by mutual agreement or legal determination. We assume this will happen.

Without prejudice to our rights we are, of course, quite prepared to discuss with you in a spirit of goodwill and understanding your economic and other difficulties and ours and we trust that conversations between us will lead to an amicable solution of the matter satisfactory, as far as possible, to both of us.

We look forward to a reply to our letter of April 4, 1974."

If both notices had been valid, the contract would have determined on or about 24th July, 1974. It is not the primary submission of either party that this is what occurred. It is the secondary submission of the plaintiff that that is what occurred but only if I find, contrary to its primary submission, that the defendant's notice was good.

On 7th May, 1974, the defendant wrote to the plaintiff referring to a conference which had occurred on 17th April, 1974, as to which there is, as yet, no evidence. The defendant said in its letter that its present supply situation had been explained in some detail at the conference and went on to say that it respectfully suggested that the terms of the plaintiff's request for information contained in its letter of 4th April, 1974, were not appropriate in the present circumstances and it was therefore not proposed to deal with them in its letter. It said that its notice of 22nd March, 1974, was, in its view, fully justifiable in terms of the agreement and the events which had happened. The letter continued:—

"We therefore must also accept as a fact that you have elected, by virtue of your letter of 24th April, 1974, to terminate the Supply Agreement so far as the purchase of furnace oil is concerned, effective as from 24th July, 1974.

Between now and the expiration of the three months period expiring on 24th July, 1974, we remain available to discuss, if you so desire, a new contract for the supply of furnace oil with a view to ensuring continuity of supply."

In its letter of 16th May, 1974, the plaintiff referred to the need for the issues which had arisen between the parties to be determined by an appropriate court. It said that the conference of 17th April, 1974, had been agreed to be "without prejudice" and it also said that its letter of 24th April clearly conditioned the termination of the Supply Agreement, so far as the purchase of furnace oil was concerned, on the validity of the defendant's notice of 22nd March, 1974. It said, "for so long as any dispute continues between us on this point the contract in all of its terms continues to bind the parties". On 28th June, 1974, the plaintiff advised the defendant that it had been able to arrange an alternative source of supply which would ensure regular deliveries to it commencing in August 1974. The plaintiff said that the price it was obliged to pay for such supply was the best price which could reasonably have been obtained but that, whilst the price was lower than the price at which the defendant was prepared to continue supplying furnace oil to it under a new contract, it was still substantially more than the price at which, in the plaintiff's view, the defendant should be continuing to supply the plaintiff under the existing contract.

On 2nd July, 1974, the plaintiff gave notice of its stock holding, apparently pursuant to cl.5 of the contract. In one of three letters of 17th July, 1974, written by it to the plaintiff the defendant said:—

"We acknowledge receipt of your notice dated 2nd July, 1974, sent to our Adelaide office advising of your estimated usage of furnace oil as well as other products pursuant to Clause 5(A) of the supply agreement. Such notice has been sent by you notwithstanding the assertion contained in your letter dated 28th June, 1974, that you have arranged an alternative source of supply.

Consistent with our letters to you of even date we propose to arrange our tankship programme to ensure that your stocks of furnace oil will be replenished as envisaged by Clause 5(B) of the supply agreement. We will notify you separately of details of our shipping programme in order to avoid port congestion at Gove in the usual manner. Should you not require such replenishment we would be grateful for your telexed advice.

In due course we will invoice you for all furnace oil supplied after 24th July, 1974, at the revised base price of $54.44 set out in our notice dated 22nd March, 1974. We will expect payment to be made in accordance with our invoice. For our part we will, however, make the appropriate refund to you in the event that the final determination by the Court in the present proceedings is that our notice was invalid."

In a further letter of 17th July, 1974, to the plaintiff, the defendant said, amongst other things, that it did not agree that the plaintiff was entitled to condition the termination of the supply agreement in relation to the supply of furnace oil on the validity of the notice of 22nd March, 1974. It said that, notwithstanding that, by the plaintiff's act, it had brought the supply contract to an end, so far as concerned furnace oil, it was willing to continue the supply of furnace oil at the base price stated in its notice until the final determination by the Court of its validity, following which it was prepared to supply furnace oil at a base price conforming with that determination. In yet a further letter written to the plaintiff on 17th July, 1974, the defendant referred to the plaintiff's letter of 28th June, 1974, and, amongst other things, said:—

"We desire to affirm to you that while adhering to the validity of the notice, we are prepared to continue the supply of furnace oil at the base price stated in our said notice until the final determination by the Court of its validity, following which we are prepared to supply furnace oil at a base price conforming with that determination. In our letter to you of 7th May, 1974, we expressed the view, to which we still adhere, that you had given three months' notice pursuant to Clause 9(C)(iii) of the supply agreement, and that therefore by your own actions you had brought the agreement to an end as regards the supply of furnace oil. If by reason of the Court's determination, the true situation is that our notice was invalid in the first place, then for our part we are ready and willing to perform the supply contract in the manner set out above.

In this connection, we note that your letter of 28th June, 1974, also affirms the continued subsistence of the supply contract in relation to the supply of

No. 101
Reasons for Judgment of His Honour Mr Justice Sheppard on First Hearing
—
19th Aug., 1975
Page 14

furnace oil as well as the other petroleum products the subject of the agreement."

By a telex dated 22nd July, 1974, sent to the defendant, the plaintiff said, "The routine notice of 2 July was issued from Gove by oversight. In brief answer to your letter we do not require the replenishment of furnace oil you refer to."

In its letter of 2nd August, 1974, written to the defendant, the plaintiff confirmed what was contained in the telex of 22nd July, 1974. The plaintiff said that the telex was in no way an affirmation of the subject contract and continued:—

> "As we pointed out to you in our letter of the 28th June we have been able to arrange an alternative source of supply of furnace oil which should ensure regular deliveries to us commencing August 1974. For the reasons mentioned in our letter to you of even date the agreement so far as it relates to the supply of furnace oil is now at an end."

The parties drifted further into the language of dispute. In a second letter of 2nd August, 1974, written by the plaintiff it said:—

> "We acknowledge receipt of your letter of the 17th July 1974.
>
> It would appear from the terms of your letter, especially when read together with the other two letters of the same date sent by you to us, that you are seeking to gain some tactical advantage in relation to the dispute between us by endeavouring to obtain an admission that the supply agreement so far as it relates to the supply of furnace oil is still on foot. We have dealt with this matter in our reply to your letter of even date.
>
> As advised in our telex No.1108 of 22nd July 1974 the notice of the 2nd July 1974 referred to in the first paragraph of your letter is a routine letter sent by our administration at Gove to you in Adelaide. As you know it is one of a number of letters to the same effect sent fortnightly to you in Adelaide. It is in no way an affirmation of the subject contract.
>
> As we pointed out to you in our letter of the 28th June we have been able to arrange an alternative source of supply of furnace oil which should ensure regular deliveries to us commencing August 1974. For the reasons mentioned in our letter to you of even date the agreement so far as it relates to the supply of furnace oil is now at an end."

A further letter dated 14th August, 1974 was written by the defendant reiterating its previous stand in the matter. It is a lengthy letter and I do not set it out. It finally suggested that as the dispute was then before the Court, future correspondence should be conducted through the solicitors for the parties.

It will not be necessary in this judgment to deal with the effect of much that was said in the correspondence which occurred after the plaintiff's notice of 24th April, 1974, because to the extent that that correspondence is relevant to a determination of the respective rights and obligations fo the parties, it will only be necessary to consider it, along with such oral evidence as is led, when the Court

comes to deal with the plaintiff's claim for the declarations and other relief sought in par.2A of its summons. These matters are to be dealt with, as I have already said, after my decision on the matters argued has been considered by the parties.

The Competing Contentions of the Parties

If the defendant's notice is invalid and the defendant remained bound to supply the plaintiff at the price existing at the date it was served, the earliest date upon which the defendant could have procured an alteration to the price or the determination of the contract would, by reason of the terms of cl.9(C)(i) of the contract, be within the month following 5th May, 1976, five years after the date of the first shipment of furnace oil (three months later in the case of determination). It would have been bound to continue supply, therefore, from July, 1974, when it last supplied, until the middle of 1976 or a little later. It has not supplied during that period and the plaintiff has purchased furnace oil from alternative sources at a price below the $54.44 fixed in the defendant's notice, but higher than the price of $13.99 then prevailing. It claims damages in par.2A of the summons and these, I am informed by counsel, will exceed $28,000,000. If the plaintiff's primary submission fails and the notice is held to be good, it submits that its letter of 24th April, 1974, terminated the contract, so that it is under no liability to the defendant for damages. The defendant's primary submission is that its notice was good and, further, that the plaintiff's letter of 24th April, 1974, was not a notice by the plaintiff pursuant to the second part of cl.9(C)(iii) of the contract, with the result that the plaintiff was bound to take supplies at the new price of $54.44 per metric ton. It claims that the plaintiff wrongfully repudiated the contract, which repudiation the defendant accepted, and that the plaintiff is liable for damages accordingly. Alternatively, it submits, in the event that I hold its notice bad, that the correspondence already referred to and other matters yet to be given in evidence show that the plaintiff nevertheless kept the contract on foot, wrongfully repudiated it and is liable to it in damages. That matter is not dealt with in this judgment. Accordingly, there will only be determined in this judgment the validity of the defendant's notice and one question concerning the validity of the plaintiff's notice, assuming, contrary to my views, that the defendant's notice was good. There will not be determined the ultimate question of whether either the plaintiff or the defendant is entitled to damages. I make it clear that I have been assured by counsel, and I would not have allowed the matter to proceed otherwise, that there is no other material relevant to, nor submissions to be made in respect of, the matters which are dealt with herein.

Sources of Supply

The contract seems to have been contemplated that supplies of each of the products dealt with therein would come from the Persian Gulf. Both parties made this submission and it would seem to be correct by reason that they took as the freight rate that from Aden to Gove. In 1970 very little oil was being produced in Australia. The fields at Moonie and Barrow Island did not yield substantial quantities of crude oil and Bass Strait oil had only just begun to come on stream. It increased substantially in quantity as the period of the contract commenced to run, with the result that in fact all supplies of super motor spirit and dieseloum came from sources within Australia and not from overseas. The furnace oil, however, came from crude oil produced in the Persian Gulf. Bass Strait crude does not, because of its composition, yield upon refinement an oil appropriate to

No. 101
Reasons for Judgment of His Honour Mr Justice Sheppard on First Hearing
—
19th Aug., 1975
Page 16

be used for furnace oil of the type required by the plaintiff. The Bass Strait oil is too light for this purpose. Furnace oil of the requisite type is available from Australian refineries, including BP refineries, but it is refined from crude oil imported into this country, mostly, if not entirely, from Persian Gulf countries.

The first two shipments of furnace oil pursuant to the contract came from the BP refinery at Aden. Subject to two shipments which came from the Amoco refinery in Brisbane and one additional shipment from Aden, the balance came from Persian Gulf crude oil refined in Singapore at a refinery operated by another member of the BP group.

There were twenty-three shipments in all. In respect of each overseas delivery the defendant took delivery from Aden or Singapore on a C.I.F. basis, the arrangements being made for it by BPT who was the seller. Transportation to Australia was by tankship procured by BPT at the defendant's cost. The two deliveries from the Amoco refinery at Brisbane were pursuant to an exchange agreement in force between Amoco and the defendant. There was an internal reason why most overseas shipments came from Singapore and not from Aden. One of the BP companies had a contract to supply furnace oil to one or more power stations in Singapore. The contract was lost and it became convenient to send the furnace oil, which would otherwise have gone to the power station, to Gove, thus keeping the refinery in operation.

In due course it will be necessary for me to deal more fully with the terms upon which BPT supplied furnace oil to the defendant. It will be convenient for me to do this after I have referred to the events which are relied upon by the defendant to show that, within the meaning of cl.9(C)(iii) of the contract, it was able to obtain supplies of furnace oil from its usual sources of supply only upon onerous terms.

The Facts from which the Defendant Submits it should be Concluded that the Defendant could obtain Supplies only upon Onerous Terms

Broadly speaking, the facts so relied upon stem from action taken by the Persian Gulf States and other oil-producing countries situated in the Middle East and elsewhere to impose increasingly higher imposts upon companies such as BPT operating within their confines, thus causing an enormous increase in the price both of crude oil and of products derived therefrom.

The evidence was given in the main by affidavit. It was not the subject of any substantial challenge by the plaintiff and I should indicate that, for the purposes of this case, I have accepted the general purport of it. I propose to state the effect of it in the form of a narrative. It is important, however, that my findings be placed in their proper perspective. I am concerned in this judgment to determine a dispute which has arisen between two litigants as to the proper construction, in the events which have happened, of a contract made between them. In Australia we adopt the English system of resolving disputes by an adversary, and not an inquisitorial, method of procedure. It is for the parties to select what witnesses will or will not be called and what material will or will not be placed before the Court. The Court cannot, except in very special situations, call witnesses of its own. Upon the basis of the evidence which the parties put before a court it makes

findings which do not have effect for any purpose outside that of the dispute in which the parties are engaged. Such findings do not indicate that this Court, nor for that matter, any government of this country, has any general view of the events which transpired in the Middle East in the years 1970 to 1974.

The narrative is largely taken from the affidavit of Mr. J.W.R. Sutcliffe who is a director of BPT and chairman of its executive committee. Since Mr. Sutcliffe is a very senior executive within the BP group, the story is told, and this is no criticism of him, from BP's point of view. No doubt persons from the oil-producing countries might disagree with all or part of what he has said, or say that other factors, not mentioned by him, should be taken into account. Such considerations would be relevant if one were conducting some general inquiry as to what transpired in the Middle East in the relevant years, but for the purposes of resolving this dispute, which concerns the terms upon which furnace oil should be supplied within Australia by the defendant to the plaintiff pursuant to a contract made here, it is appropriate only to have regard to what the parties have chosen to put before me.

In addition to Mr. Sutcliffe's affidavit there were affidavits filed on behalf of the defendant from the following persons:—

Mr. J.H. Porter who is the Regional Co-ordinator for the Middle East of BPT. Mr. Porter swore five affidavits, one each in relation to the situation in Iran, Iraq, Kuwait, Qatar and Abu Dhabi.

Mr. R.N. Tottenham-Smith who is the Regional Co-ordinator for Africa for BPT. Mr. Tottenham-Smith's affidavit was sworn in relation to the position in Nigeria.

Mr. D.E. Miller who is the manager of the Pricing Division of BPT. Mr. Miller's affidavit was in relation to the costs at various times of obtaining product.

Mr. P.N. Price who is a member of a firm of chartered accountants practising in London, Messrs. Whinney, Murray & Co. Mr. Price verified some of the conclusions drawn by Mr. Miller in his affidavit.

Mr. J.C.E. Webster who is the Assistant General Manager of the Supply Department of BPT. Mr. Webster dealt with the supply of crude oil to the BP group.

Mr. R.A. Munt who is the Manager Commercial Services Department within the Central Planning and Co-ordination Division of the defendant. Mr. Munt dealt particularly with supply by BPT to the defendant.

Mr. J.H. Rowland who is the Secretary of the defendant. Mr. Rowland dealt with notices under the Prices Justification Act.

Additionally there was an affidavit and some oral evidence from Mr. Pritchard, the defendant's solicitor. It is unnecessary for me to refer to the purport of Mr. Pritchard's evidence.

No. 101
Reasons for Judgment of His Honour Mr Justice Sheppard on First Hearing
19th Aug., 1975
Page 18

The plaintiff called in reply Professor M.A. Adelman who is a professor of economics at the Massachusetts Institute of Technology.

Of the abovementioned witnesses the only ones to be crossexamined were Mr. Rowland, Mr. Munt, Mr. Webster and Professor Adelman.

I now proceed to an account of the matters relied upon by the defendant and of the events leading up to them. As previously said, this account comes in the main from the affidavit of Mr. Sutcliffe.

A principal source of supply for oil for the non-Communist industrialised nations has been the Persian Gulf countries. North America became a net importer of petroleum by the mid-1950s as its demand exceeded supply. Western European oil production has, up to date, always been insignificant and its expanding demand has been met by imports. The case is the same with Japan. The demand for oil by the countries I have mentioned increased enormously after the Second World War. This demand was met by expansion of production in the known oil-producing areas of North America, the Carribean Sea, the Middle East and the Far East. The Middle East area with only small consumption and rapidly expanding availability became the main supply source for the industrialised nations. By 1973 the area represented 55.4 per cent of the world's published proved reserves and accounted for 36.8 per cent of world oil production. More importantly, it represented 66 per cent of the world trading in oil. The BP group has been involved in the discovery and production of oil in the Middle East from its inception and the area represents over 80 per cent of the group's present supply sources. 41.1 per cent of BP's sources of supply are located in Iran, 27.61 per cent in Kuwait, 8.4 per cent in Abu Dhabi, 4.6 per cent in Iraq and 1.2 per cent in Qatar.

The above factors show that by 1973 the Middle East played an important part in the supply pattern of all major oil consuming areas outside the Communist countries. Costs of oil from this source formed an important element in the cost of energy in consuming countries. Oil was produced by companies (including BPT) which had at various times obtained concessions from the Persian Gulf States. The terms upon which the companies were permitted to acquire the oil differed in detail. But after the early 1950s those terms required that the producing company should deliver 12½ per cent of production to the State as royalty and pay an income tax upon the value of the balance of the oil taken determined as hereinafter mentioned. Most of the oil delivered to the host Government was sold back by it to the producers at the price or value upon which income tax was payable. This value was the producer's posted price for the grade of oil in question. The posted price was not necessarily the price at which the oil was sold to purchasers from the companies, but it was closely allied to it. Posted prices, which I understand, were fixed in earlier years by the companies unilaterally, did not change either frequently or radically but they did change so as to reflect market conditions as these conditions became established.

Throughout the late 1950s and the 1960s crude oil prices were under pressure as new suppliers sought access to the market, causing prices to fall. In the Middle East the producers were faced with a static level of tax payment (the tax was payable on posted prices higher than actual market prices) whilst their actual realisations from crude oil declined. To restore their position, postings were

reduced in the Persian Gulf by a total of approximately US25c per barrel on two occasions in the years 1959 and 1960. In response to this action and to restore their level of payment to what it had been, some host countries formed in September 1960 an organisation called the Organisation of Petroleum Exporting Countries (OPEC). The formation of OPEC took place at a meeting in Baghdad attended by representatives of Iran, Iraq, Kuwait, Saudi Arabia and Venezuela. Amongst other things the meeting resolved:—

"(1) That members can no longer remain indifferent to the attitude heretofore adopted by the oil companies in effecting price modification;

(2) that members shall demand that oil companies maintain their prices steady and free from all unnecessary fluctuations, that members shall endeavour, by all means available to them, to restore present prices to the levels prevailing before the reductions; that they shall ensure that if any new circumstances arise which in the estimation of the oil companies necessitate price modifications the said companies shall enter into consultation with the member or members affected in order fully to explain the circumstances."

After the initial OPEC conferences the world oil market prices for crude oil were for the most part below the level of posted prices but the revenues payable to the host countries were paid by reference to the posted prices and not the market prices. The posted prices remained pegged at the same level from 1960 until late 1970. In countries commencing production after 1960 prices were posted which were consistent with those posted in established production areas, and posted prices usually exceeded the corresponding market prices.

Despite the formation of OPEC, the oil companies were of opinion that its effect upon their operations would not be substantial because it seemed to them that OPEC members could not agree amongst themselves as to various matters, including reductions in production which would have meant increases in price. The OPEC countries thought that the only means available to them to bring about increases in their revenues was to encourage an increase rather than a reduction in levels of crude oil production. This led to competition between them with the result that there was no shortage of oil and prices remained low.

Between 1960 and 1970 the membership of OPEC increased to eleven by the addition of Algeria, Libya, Qatar, Abu Dhabi, Nigeria and Indonesia. By 1970 the membership of OPEC included all major oil exporting countries of the world with the exception of Mexico, Canada and the Communist countries; and by 1973 oil from OPEC member countries constituted about 90 per cent of world trade in crude oil. In June 1968 the OPEC countries, at a conference held in Vienna, made a declaratory statement of petroleum policy. This statement included the following:—

> "Member Governments shall endeavour as far as feasible, to explore for and develop their hydro-carbon resources directly. The capital, specialists and the promotion of marketing outlets required for such direct development may be complemented when necessary from alternative sources on a commercial basis."

No. 101
Reasons for Judgment of His Honour Mr Justice Sheppard on First Hearing
—
19th Aug., 1975
Page 20

After laying down circumstances under which a member government could enter into contracts with outside operators for reasonable remuneration, the declaration continued, inter alia:—

> "Where provision for Governmental participation in the ownership of the concession holding company under any of the present petroleum contracts has not been made, the Government may acquire a reasonable participation, on the grounds of the principle of changing circumstances ... In the event the operator declines to negotiate, or that the negotiations do not result in any agreement within a reasonable period of time, the Government shall make its own assessment of the amount by which the operators net earnings after tax is excessive, and such amount shall be paid by the operator to the Government."

There is a definition of the expression "excessively high net earnings" which is, to say the least, elastic.

Despite the terms of the statement above referred to, OPEC as a body took no collective overt action for the purpose of imposing on the oil companies the policies the subject of the statement until towards the end of 1970 after the contract under consideration here had been signed, although there was action initiated before that time by a number of individual members of OPEC.

In December 1970 the OPEC countries held a conference in Caracas in Venezuela. They resolved to adopt several new objectives including concerted and simultaneous action by all member countries with a view to enforcing and achieving their objectives. Amongst other things the conference resolved to establish a uniform general increase in the posted prices in all member countries to reflect the general improvement in the conditions of the international petroleum market and to establish fifty-five per cent as the minimum rate of taxation on the net income of the oil companies operating in those countries. After the conference, a representative of the Iranian Government said to the BP group in London that OPEC members were seeking that the industry in the Persian Gulf should negotiate collectively with the governments of the Gulf producing States.

In February 1971 there was a further conference of OPEC countries in Teheran at which it was, inter alia, resolved that each member country exporting oil from Persian Gulf terminals should introduce on 15th February, 1971, the necessary legal and/or legislative measures for the implementation of the objectives agreed upon at the Caracas conference. They further resolved that in the event that any oil company concerned failed to comply with these measures within seven days from the date of their adoption by the countries concerned, appropriate measures should be taken including a total embargo on shipments of crude oil and petroleum products by such company.

After the February 1971 OPEC conference, meetings took place in the same month in Teheran between the major oil producing companies and an OPEC committee consisting of Iran, Iraq, Abu Dhabi, Kuwait, Qatar and Saudi Arabia. An agreement was made designated as a "Security and Stability" agreement. It was expressed to be for a term of five years. Under it the host government return per barrel was increased to a level averaging about forty per cent above that

prevailing in October 1970. Individual increases by host governments were prohibited and so were further embargoes.

There were further conferences and further agreements made during the first six months of 1971 but these were not of major significance. In July 1971 a further OPEC conference was held in Vienna. It was proposed that host governments should have a share in the concessions held by oil producers in their respective countries. "Participation" was the expression used for the proposed acquisition by the host governments of direct interests in the concessions to be effected by negotiation rather than by nationalisation. The meeting resolved that all member countries should establish negotiations with the oil companies with a view to achieving effective participation on the basis proposed by a ministerial committee set up under an earlier resolution. At a conference held in Beirut in September 1971 reference was made in the resolution passed to the determination of a procedure for enforcing and achieving the objectives of an effective participation through concerted action.

In December 1971 the Libyan government nationalised all BP's rights and assets in relation to its oil concessions in that country.

On 20th January, 1972, the OPEC members, including Libya, and the major oil producing companies, including the parent company of the BP group, signed an agreement known as the Geneva 1 Agreement. Its principal effect was to relate the US dollar price per barrel to the US dollar exchange rate with a range of nine other currencies. Adjustments were to be made quarterly and the object of the agreement was to offset losses being sustained by the host countries as a result of the fall in value of the US dollar.

A supplemental Geneva Agreement (Geneva II) was signed on 1st June, 1973, by the same parties. Its making followed public protestations by OPEC to the companies that the application of the indices the subject of the Geneva I Agreement was not sufficiently favourable to them. The agreement was amended to give effect to some of the OPEC demands.

Throughout the whole of 1972 negotiations took place between the companies and the OPEC countries on the question of participation and its implementation. The negotiating countries were Saudi Arabia, Kuwait, Iraq, Abu Dhabi and Qatar. These negotiations resulted in the making of what were called general agreements on participation. These were signed in December 1972 and January 1973. The National Assembly of Kuwait refused to ratify the making of the participation agreement by that country's representatives.

According to Mr. Sutcliffe's evidence, the OPEC countries continued, during the negotiations leading up to the general agreements on participation, to make public threats against the oil companies of concerted action for failure to comply with the decisions of OPEC conferences. During the course of the 1972 negotiations Iran withdrew from the discussions and entered into separate negotiations with the oil producers operating in its country. Iraq also withdrew after it took action in June 1972 to nationalise the Iraq Petroleum Company Limited, the largest concession holder in Iraq.

The general agreements on participation provided for a twenty-five per cent

ownership interest in the respective concessional areas to be transferred to the host governments on 1st January, 1973, such interest increasing in stages thereafter to fifty-one per cent by 1st January 1982. Provision was also made for the purchase by the oil producing companies over a period of years of quantities of government crude oil described as "participation crude". The share remaining to the companies was described as "cost crude" or "equity crude". The companies were entitled to purchase part of the participation crude to satisfy their own customer requirements and were obliged to purchase so much of the balance as was not required by the host country for disposal to its own consumer connections. The general agreements applying to the Gulf countries were followed in the case of Nigeria with a participation agreement taking effect as from 1st April, 1973, in relation to the BP group's concession areas to the extent of a thirty-five per cent undivided interest in favour of the Nigerian government with the right to take up a further sixteen per cent by 1982.

There is some detail in the evidence as to the nationalisation of the BP interests in Iraq. As a result of what occurred, the group's only surviving source of crude oil in Iraq is through its 23.75 per cent interest in a company, Basrah Petroleum Company Limited and that source is the subject of a participation agreement.

Towards the middle of 1973 OPEC had demanded further collective negotiation with the oil producing countries on the level of posted prices. A policy statement had been made as to this matter at an OPEC conference held in Vienna in June 1973. A meeting was held in Vienna on 8th October, 1973, between the Gulf members of OPEC and oil industry representatives. Two days earlier war had broken out between Israel and some of the Arab countries. This war is known as "the October war". At the conference the Gulf members of OPEC proposed to the industry representatives posted prices increases of the order of one hundred per cent. The representatives informed the OPEC countries that, having regard to the consequential adverse effect of any such increase on the balance of payments situations of consumer countries, they could not give any indications of acceptance of the proposal without prior consultation with their governments. The meeting was adjourned but before any negotiations were resumed the six Gulf members of OPEC, namely Iran, Iraq, Saudi Arabia, Abu Dhabi, Kuwait and Qatar, unilaterally announced on 16th October, 1973, large increases in posted price levels to take immediate effect. No prior warning of the announcement was made. The effect on the then existing posted prices of Persian Gulf crude oil was increases of seventy per cent to almost one hundred per cent.

Paragraph K5 of Mr. Sutcliffe's affidavit is as follows:—

> "Although the OPEC countries had in the past repeatedly made threats of action against oil producer countries who might fail to agree to the terms of supply sought by the OPEC countries, the 16th October, 1973, announcement was the first occasion of OPEC members taking and implementing decisions unilaterally, that is to say, without first securing their object by prior negotiation with the oil producers. The announcement was made notwithstanding the subsistence of the Teheran agreement."

On 17th October, 1973, the Persian Gulf members of OPEC other than Iran announced certain production cut-backs and embargoes. These were imposed,

according to a copy of a communique of Arab States issued on 17th October, 1973, for the purpose of bringing pressure to bear upon a number of western countries to force Israel to withdraw from Arab occupied territories. It was said that it had been decided to start immediately reducing oil production not less than five per cent per month "from September production".

Mr. Sutcliffe said that as a result of what had occurred on 16th and 17th October, 1973, world crude oil market prices rose very sharply. On 11th December, 1973, the Iranian Government conducted an auction of crude oil when sales took place at the price of $US17 per barrel. This caused a scramble amongst oil consumers to secure supplies of crude oil, many would be purchasers by passing the oil producing companies and seeking to negotiate directly with host governments.

On 23rd December, 1973, the Persian Gulf members of OPEC again took unilateral action to raise the posted price levels effective from 1st January, 1974. The communique said that it had been decided "to set government take of $7 per barrel for the marker crude, Arabian light 34-degree API. The relevant price for this crude will therefore be $11.651 per barrel. The effective date for this posted price shall be Jan. 1, 1974". The effect on the then existing posted prices, that is the posted prices as at 31st December, 1973, was an increase of about one hundred and thirty per cent.

Increases in posted prices were not the only means whereby OPEC countries increased their "take". In December 1973 a bill to nationalise oil producing companies was introduced in the Kuwait National Assembly. The legislation was not enacted, because on 29th January, 1974, the consortium in Kuwait in which the BP group holds a one-half interest ceded a sixty per cent participation in its Kuwait concession and operations as from 1st January, 1974. On 20th February, 1974, the consortium in Qatar in which the BP group holds a 23.75 per cent interest also ceded a sixty per cent participation in its Qatar concession and operations as from 1st January, 1974, in lieu of the twenty-five per cent participation theretofor applicable. A similar result was achieved in Abu Dhabi.

In October 1972 the government of Iran announced that it required the Iranian Oil Consortium, in which the BP group holds the largest interest, namely forty per cent, to discuss amendments to the then existing agreement made in 1954 between the government and the consortium on the ground of changing circumstances. On 23rd January, 1973, the Shah of Iran announced that the 1954 consortium agreement would come to an end in 1979 (notwithstanding the provisions for extension contained therein) and said that under a new agreement, "The company shall become customers and oil shall be made available to them at reasonable terms on a long-term basis".

After negotiations the consortium chose to submit to a new sale and purchase agreement under which it was promised a supply of crude oil on a long-term basis which it could purchase "at a fair price with the discounts that anyone grants to its good customers". The sale and purchase agreement was dated 31st July, 1973 and it included the following provisions:—

"(a) The 1954 agreement was terminated and the new agreement was expressed to be for a term of twenty years from 21st March, 1973.

(b) The National Iranian Oil Company was to take full charge of all operations.

(c) Iran was to receive the same financial benefits as it would have obtained under a general agreement on participation.

(d) The consortium members were to receive all the available production after allowing for Iranian consumption and certain defined quantities of export oil for the Iranian company. These quantities were to rise from two hundred thousand barrels per day in 1973 by annual increases to one million five hundred thousand barrels per day by 1981

(e) The amount to be paid by consortium members for crude oil was to comprise operating costs (which included depreciation) plus a royalty of 12.5 per cent calculated by reference to posted prices plus tax calculated at a rate of 55 per cent on such prices plus a 'balancing margin' calculated retrospectively to 21st March, 1973 'the level of which, when taken together with all other financial and fiscal benefits accruing to Iran and NIOC, will be such as to assure Iran that the total financial benefits and advantages to Iran and NIOC under this agreement shall be no less favourable than those applicable (at present or in the future) to other countries in the Persian Gulf under the General Agreement and related arrangements.'"

On 16th October, 1973, the Iranian Government along with those of the Gulf States unilaterally fixed the posted price for crude oil produced in Iran. By letter dated 17th October, 1973, the Minister of Finance informed the consortium members' representative that in accordance with the decision taken by the members of OPEC bordering the Persian Gulf, the posted prices applicable to Iranian light and Iranian heavy crudes were as from 16th October, 1973, thenceforth to be, depending upon grade and gravity, between $US4.969 and $US5.091 per barrel. Iran unilaterally fixed the posted price for crude produced in Iran as from 1st January 1974. The prices so fixed were $US11.635 for Iranian heavy and $US11.875 for Iranian light.

In 1974 discussions continued between the consortium and the Iranian Government on the determination of the current balancing margins as a result of which an agreement was reached on 6th June, 1974 between the consortium and the Iranian Government "provisionally ... as an interim measure", for the 1974 payment in respect of the balancing margin being increased to $3.50 per barrel "as part fulfilment of members' obligation". Payment has been made retrospectively from 1st January, 1974 at that rate. The previous provisional balancing margin had been set at 6.5 cents per barrel for the period 1973 to 1975. Negotiations are still in train in relation to the balancing margin actually to be paid for the initial period of the sale and purchase agreement, namely from 21st March, 1973, to 31st December, 1973. The Iranian company is seeking 28.3 cents per barrel but there has not yet been final agreement.

The final two paragraphs of Mr. Sutcliffe's affidavit are as follows:—

"M1 I say that in relation to:

(a) Each of the unilateral posted price fixings taking effect from 16th October, 1973 and 1st January, 1974;

(b) Each of the unilateral actions to impose production cutbacks or export embargoes taking effect on or after 17th October, 1973;

(c) Each of the Teheran, Tripoli, Lagos and East Mediterranean Agreements;

(d) Each of the Agreements made as to 'participation' (including those initially conceding 25% 'participation');

(e) The Iranian Sale and Purchase Agreement.

Neither the BP Group nor the Consortia in which the BP Group holds interest and membership were willing to accept or enter into the same (as the case may be) but in each case the BP Group and the said Consortia did accede to the said price fixings and other actions and enter into the said agreements in order to avoid the loss of availability of crude oil from each of the relevant sources of supply.

M2 Crude oil being the raw material for the manufacture of refined products such as furnace oil, the foregoing increases in posted prices (and therefore in the tax paid costs and the cost burden of participation) of crude oil effected as from 16th October, 1973 and 1st January 1974 increased the cost to the BP Group of manufacturing its full range of refined products by the same extent as the increases in the cost of crude oil."

Mr. J.C.E. Webster, who, it will be recalled, is the assistant general manager of the Supply Department of BPT said that the BP group's requirements of crude oil for the purpose of satisfying both the needs of its refining and market operations and its obligations to purchasers of crude oil and products were throughout 1973 and the following year of such volume as to have been and still be incapable of satisfaction out of the group's available sources of supply exclusive of its entitlement to "participation" or "buy-back" crude from the governments of Kuwait, Abu Dhabi, Qatar and Nigeria. Mr. Webster further said, "... in order to satisfy the needs of its said operations and obligations it (the BP group) has lifted the totality of its availability or entitlement to such 'participation' or 'buy-back' crude." Between October 1973 and the end of March 1974 BPT's sources of crude oil supply were such that it was obliged to cut back or reduce sales to customers, including sales of furnace oil. Despite its difficulties, however, it did not ultimately have to impose any reduction in supplies to the defendant.

Mr. D.E. Miller, the manager of the Pricing Division of BPT, said that the group's acquisition cost of equity crude (that is oil which remains its property, as distinct from participation crude) is made up of three basic elements, namely the operating costs (including depreciation), the royalty and the tax payable to the host government. In addition to incurring increased costs in recovering equity crude, the group has had to purchase, as already mentioned, participation crude under the various buy-back arrangements previously referred to.

Annexures to Mr. Miller's affidavits show the increase in the cost of obtaining equity crude between the early months of 1970 and the early months of 1974. In the case of Abu Dhabi the increase was from $US1.085 per barrel to

No. 101
Reasons for Judgment of His Honour Mr Justice Sheppard on First Hearing
—
19th Aug., 1975
Page 26

$US7.73 per barrel. In the early months of 1970 the proportion of buy-back crude oil was negligible. This increased substantially after the participation agreements which took effect in 1973, the price being paid in the early months of 1974 reaching, as I have indicated, a figure of the order of $US11. By then the proportion of equity to buy-back crude was the fraction 40/56 and the cost of lifting each barrel of oil was slightly over $10, averaging equity and buy-back. Similar results apply in the case of Qatar. In the case of Kuwait the average cost is $9.1 as opposed to $10 and in the case of Iran it is $8.9. Appended as a schedule to this judgment is a graph depicting, for the years 1969 to 1974, the effect of the results of the increase in the amount of buy-back crude which the BP group has had to purchase. Also appended as schedules to this judgment are graphs prepared in relation to certain grades of Kuwait and Iranian oils showing the increases in cost brought about as a result of the actions referred to. The graphs are headed, "Illustration of tax paid, participation and total costs 1969—mid-1974". The expression "tax paid" refers to tax paid on equity crude and the expression "participation" to buy-back oil. The graphs show that by the beginning of 1974 the tax paid cost had risen to approximately $7 per barrel and the total cost to just over $9 in the case of Kuwait and not quite $10 in the case of Iran. That latter figure is not quite in accord with that which appears in the relevant annexure to Mr. Miller's affidavit, but the difference is not material for present purposes.

Supply by BPT to the Defendant

Mr. Miller said that since May 1957 BPT has posted product prices (these are to be distinguished from crude oil posted prices) for sales delivered in bulk cargo lots, until 1967, f.o.b. Abadan, and thereafter, f.o.b. Bandar Mah-Shahr (both ports having oil loading facilities on the Persian Gulf coast of Iran) in respect of products manufactured in the Abadan refinery. BPT announced its product postings by publishing at its London headquarters a series of schedules bearing its name and address and entitled "Bandar Mah-Shahr posted prices—petroleum products".

The refinery at Abadan is one of the largest in the world, the BP group having the right to process through it 120,000 barrels per day of crude oil. Bandar Mah-Shahr is BPT's largest supply point for refined products in the Middle East. The defendant customarily obtains all its imported products, including furnace oil, from BPT at prices which are based on BPT's Bandar Mah-Shahr posted prices.

Mr. Munt, the manager of the Commercial Services Department of the defendant gave detailed evidence showing the basis upon which the defendant acquired supplies of furnace oil, as well as other products, from BPT. He was at pains to emphasise that, although there was a relationship between BPT and the defendant, the arrangement between them for the supply and purchase of products was truly a commercial one and they dealt with one another at arms length. Mr. Webster said that the Bandar Mah-Shahr posted prices for product were a fair market asking price for what he described as term business. By term business he meant business which was not a spot sale. The posted prices were not the prices actually paid. They underwent adjustment for reasons mentioned by Mr. Munt in his evidence.

The evidence satisfies me that the prices paid from time to time by the

defendant to BPT were prices unaffected by any considerations except market considerations. They were not inflated as a result of any group policy whereby the defendant was to be forced to pay more than a true market price for that which was supplied to it.

Evidence given by Mr. Munt that the defendant must justify the prices it pays to external authorities such as the Commissioner of Taxation, the Prices Justification Tribunal and the Collector of Customs reinforces me in the above conclusion.

The only other matter to be mentioned in relation to the terms upon which the defendant receives supplies from BPT is that there was not, in respect of any period relevant to the determination of the issues in this case, any contract between the two companies whereby BPT was obliged to supply the defendant for a fixed term on particular conditions or at particular prices. The principal basis of their business was the Bandar Mah-Shahr posted prices from time to time.

Conclusions to be Drawn from the Evidence

My conclusions upon the evidence are as follow:—

(1) The defendant's source of supply of furnace oil for the purposes of fulfilling its obligations under the contract was oil sold to it by BPT;

(2) The contract contemplated, and the parties intended, that the oil would be produced by BPT from crude oil acquired by it as a result of concessions held by it in various Persian Gulf countries. It was contemplated that the oil would be refined at a BP refinery in the Persian Gulf;

(3) In fact the oil was refined from Persian Gulf crude oil, but the refining of it was, for the most part, carried out at Singapore;

(4) At the time the contract was signed the price of crude oil was little more than $US1.00 per barrel. Despite the existence of OPEC for ten years and indications in its resolutions that concerted action by its members could or should be taken to increase the entitlements of its members, little concerted action had been taken by the date of the contract;

(5) After the contract was signed the OPEC countries began to act in concert much more effectively than had previously been the case;

(6) By January 1974 they had succeeded in lifting the overall cost of crude oil to the BP group to an amount of the order of $US9 to $US10 per barrel;

(7) This cost was common to all producers having to obtain supplies from the Persian Gulf members of OPEC;

(8) The world price of crude oil, and thus of products such as furnace oil, was increased accordingly;

(9) The defendant could not, in any practical sense, obtain supplies of furnace oil to fulfill its obligations under the contract from any other source than that referred to above;

No. 101
Reasons for Judgment of His Honour Mr Justice Sheppard on First Hearing
—
19th Aug., 1975
Page 28

(10) The prices charged it by BPT were fair and reasonable, having regard to the prevailing conditions. It would not be reasonable to have expected the defendant to look for other sources of supply nor does the evidence disclose that, if it had, any such sources would have been available to it at prices lower than in fact it paid to BPT.

The Validity of the Defendant's Notice

The primary submission of the plaintiff was that the circumstances relied upon by the defendant were not such as to entitle it to give a valid notice under clause 9(C)(iii) of the contract. The defendant submitted that the evidence showed clearly that it was, within the meaning of the clause, due to circumstances beyond its control, able only on onerous terms to obtain supplies of furnace oil from its usual sources of supply as they existed on 1st January 1974 and thereafter, and further, that the defendant had incurred substantial additional costs in respect of the supply of furnace oil deliverable under the contract.

A starting point for the consideration of the competing submissions is to determine two questions in relation to the use of the expression "on onerous terms". The two questions are, firstly, with respect to what must the terms referred to relate and, secondly, what is the meaning of the word "onerous". Plainly the expression "able only on onerous terms to obtain supplies" of, in this case, furnace oil, relates to the defendant's obligations as seller or supplier under this contract. The expression is used in relation to its obligation to supply in the required quantities at the base prices provided for in cl.8, adjusted from time to time as provided for in clauses of the contract other than the one under consideration.

Reference was made by counsel for the defendant to what was said by Warrington L.J. in Rowett Leakey & Co. v. Scottish Provident Institution (1927) 1 Ch. 55 as to the meaning of the word onerous. At p.71 His Lordship said:—

> "The primary meaning of 'onerous' is burdensome or troublesome, or inconvenient, or difficult. You might talk about an onerous property, meaning a white elephant, you might talk about an onerous task, meaning one which requires great effort to perform. You might talk about an onerous obligation—namely, an obligation which imposes a serious burden upon the person on whom it falls."

The word onerous is defined in the Shorter Oxford Dictionary, 3rd Edition, to mean "of the nature of a burden; burdensome, oppressive; of the nature of a legal obligation". In my opinion it is used in this clause as meaning oppressive in a business sense. Notwithstanding what Warrington L.J. said in the passage above cited it involves a greater burden, in my opinion, than one which is merely troublesome or inconvenient or difficult.

To determine whether the circumstances relied upon by the defendant fall within the clause, one must of course, have regard to the whole of the contract and not just the words of the clause itself. Not overlooking that this was what ultimately had to be done, counsel approached the resolution of the ultimate question in a piecemeal fashion. This was done in order properly to analyze the problem and was, in my opinion, an appropriate course to adopt. Counsel for the

plaintiff looked at cl. 9(C)(iii) of the contract without reference to other clauses in it and submitted that the events relied upon by the defendant were plainly outside its purview. He further contended that, if, contrary to his submission in that regard, the circumstances relied upon were within the clause if it alone were looked at, a consideration of a number of other clauses would show that the events relied upon were not intended by the parties to be within it. Finally he submitted that the events relied upon could not be relied upon by the defendant, because insofar as they brought about a situation under which supply could only be obtained upon onerous terms, they related not to the defendant's source of supply at the relevant time, which was the BP refinery at Singapore, but to BPT's sources of supply of crude oil from the Persian Gulf. To put it another way what was submitted was that the events relied upon by the defendant affected not the defendant but its supplier, BPT.

I propose to proceed by considering, first of all, whether the events relied upon would be within the clause if one were to disregard all other clauses of the contract and leave out of account any question of the identity of the company affected by the events relied upon. That will involve me in considering two submissions made by the plaintiff to show that the events were not within the clause and then considering the positive case of the defendant made upon the basis of the evidence that the case was within the clause.

The first of the plaintiff's submissions to which I have referred was that, having regard to what might be described as the headnote to the clause, "Interruption to Seller's Sources of Supply", it was really an interruption to supply clause. It had no application where, as here, the defendant or its associate continued to be able to obtain supplies from its existing source of supply, albeit at a vastly increased cost. I reject this submission because I think it ignores the plain words of the clause. The clause envisages two alternative situations—inability to obtain supplies from the seller's usual sources of supply, and ability only upon onerous terms to obtain such supplies. The second alternative contemplates that supply will continue to come from the same source.

Before proceeding I should in passing mention that it was assumed by the parties that there were two further and, for the purposes of this case, irrelevant alternatives, namely inability or ability only upon onerous terms to obtain supplies by the usual routes for such supplies. It has occurred to me that there may be something to be said for the view that the use of the word "and" between the words "usual sources" and the words "by the present or then usual routes for such supplies" may not mean that the later words are to be read disjunctively from the word "sources". If this were so the events relied upon here would not be within the clause because there is no effect upon the usual routes of supply of BPT or the defendant; nor has either company incurred any increased costs as a result of any effect upon routes of supply. No argument to this effect was addressed to me. I have no concluded view about it and I think that I should proceed upon the assumption that the clause may apply either when there is an effect upon sources of supply or upon routes of supply.

As previously mentioned I am of the view that the plain language of the clause permits it to operate, assuming that the defendant can obtain supplies only upon onerous terms, where the defendant continues to obtain supplies from its usual sources. Whilst it is appropriate in cases of ambiguity or other uncertainty

No. 101
Reasons for Judgment of His Honour Mr Justice Sheppard on First Hearing
—
19th Aug., 1975
Page 30

to have regard to a headnote in order to construe a provision such as the one in question, that is not a permissible course where the language is plain. Looking at other sidenotes and headnotes in the contract it is clear that they are intended only to be shortly descriptive of the general nature of what is to be found in the various clauses. It would be very wrong to allow words such as are in the headnote here to circumscribe the operation of a provision which on its face provides for a number of alternative situations including interference with routes of supply to which the headnote makes no reference.

The second submission relied upon by the plaintiff to show that the events in question were outside the clause was that the increased cost was, broadly speaking, uniform throughout the world so that the price which the defendant had become obliged to pay for supplies was a world market price. The defendant did not contest this view of the facts. It was submitted that a supply which could be obtained upon world market prices, no matter how high those prices became, could never consitute, within the meaning of the clause, a supply upon onerous terms. Meeting the market was an everyday commercial activity. If a supplier under a fixed contract did not himself have his supplier similarly bound that was a commercial risk he took. No doubt he took it not unmindful of the advantage which would arise if the market fell and the consumer remained bound to buy at a price fixed in relation to the pre-existing market.

I have given this submission much thought. It is necessary first of all to take into account the fact that reference in the clause is made to the defendant's "present or then usual sources". This suggests that one ought to concentrate ones attention upon those sources of supply and upon matters which affect them in some special way rather than upon sources of supply throughout the world generally. It is open to the interpretation that there must be something in the circumstances relied upon which specially affect the defendant's sources of supply as distinct from world sources of supply. The alternative view is that the clause operates so long as the defendant's sources of supply are affected, whether along with some or all other sources of supply or not. I have reached the conclusion that I should prefer the second way of looking at the clause. It does not operate unless there is increased cost incurred. It applies to interruptions to supply and contemplates, therefore, that, although the defendant may need to go elsewhere, it may still incur increased costs. It also contemplates that supply will continue. If the defendant could not obtain supplies at all the clause would not be applicable; Clause 13 would be invoked. Accordingly, the clause contemplates the possibility of supply from another source but at an increased cost. The presence of the words "usual sources" is explicable upon the basis that it was necessary for the draftsman of the clause to refer specifically to the defendant's usual sources of supply. He had to do this in order to provide a foundation for the operation of the clause. The fact that he has done so ought not therefore to be regarded as a conclusive indication that he intended the clause to operate only when events especially affecting the defendant's sources of supply and no others should occur. Reference to the defendant's sources of supply, therefore, does not necessarily point to a situation under which the events relied upon must be special rather than general in their effect.

Once this view is taken it becomes extremely difficult to resist the defendant's submission that an increase of sufficiently vast proportions in the world market price of one of the products the subject of the clause can entitle it to invoke it.

It will be remembered that at the outset I said that the words in question must be construed with reference to the defendant's obligation to supply under this contract in the quantities and for the prices determined in accordance with the provisions of all relevant clauses other than that under consideration. The question must be one of fact and degree. It is a matter of evaluating the effect of the circumstances which are relied upon and their impact upon the ability of the defendant to supply. Counsel for the plaintiff submitted that an increase in market prices could never under any circumstances be within the clause no matter how great it was. Thus his submission would deny the application of the clause to a situation where world prices rose one hundred or one thousand times their present level. Such an eventuality might mean financial ruin for even so large an organisation as the BP group. Yet despite the presence in the contract of what again are plain words it is said that in such a situation the defendant is not entitled to invoke the clause simply because all it has to do is to meet the market. If the clause stood alone unaffected in its meaning by the provisions of other clauses, it would be my opinion, not omitting from consideration the reference at the beginning of the clause to the defendant's own sources of supply, that a rise in world market prices of very large proportions could be within the clause.

I next deal with the positive submission made by the defendant that it has brought itself within the clause. In order to do so it must show three things, namely:

(a) that the circumstances relied upon were beyond its control;

(b) that it is able only upon onerous terms (using that expression in the sense of an oppressive burden) to obtain supplies from its usual sources;

(c) that in consequence of such ability only to obtain supplies upon onerous terms it has and will incur substantial additional costs in respect of the supply of fuel oil.

Before proceeding I emphasise that I am still considering the matter on the basis that no other clause of the contract sheds any light on the meaning which Cl. 9(C)(iii) is to bear and, further, upon the assumption that the matters relied upon affect the defendant's sources of supply as well as those of BPT.

Clearly the circumstances relied upon were outside the control either of the defendant or BPT. The increases in cost and price came about because of the fact that the participation agreements earlier referred to were entered into by the companies. The companies considered that they had no alternative but to sign the agreements; if they had not they stood to lose their concessions entirely. Coupled with the participation agreements and their effect is the fact that in October 1973 the Persian Gulf countries unilaterally fixed the posted prices of crude oil. The October postings were followed by the very greatly increased January 1974 postings. The result was the present cost of $US9 to US$10 per barrel.

Underlying the matters referred to in paragraph (b) above is the assumption that the defendant had usual sources of supply. "Source" could refer to the supplier to the defendant or to the place from which the oil came. It may refer to the immediate source (Singapore or BPT) or to the ultimate source (Persian Gulf crude oil or, again, BPT). I do not need to resolve these questions, although I

No. 101
Reasons for Judgment of His Honour Mr Justice Sheppard on First Hearing
—
19th Aug., 1975
Page 32

think that the better view is the immediate source. I think this follows, despite the reference in the clause to supplies of crude as well as of product, because what is referred to is the seller's source of supply. The seller, that is the defendant, at no time carried out its own refining. But in one way or another the defendant had usual sources of supply. Its evidence is plain that without resort to substantial quantities of Persian Gulf crude oil the BP group could not fulfil its world wide commitments. If one looks at ultimate sources its usual source was Persian Gulf crude oil subsequently refined, for the most part, in Singapore. Its immediate source was Singapore. But without oil from the Persian Gulf the Singapore refinery would not have had oil to refine to furnace oil. It will be remembered that Australian crude oil would not yield the appropriate grade of furnace oil required. There was never any question, therefore, of Australian crude oil being refined to yield the furnace oil in question at one of the BP refineries in Australia. Wherever refinement took place the crude oil had to come from overseas and there was no other source of it available directly or indirectly to the defendant except the Persian Gulf.

Accordingly, the question directly arises, was the defendant able only upon onerous terms to obtain supplies of fuel oil from its usual sources of supply? I have already referred to the fact that this requires an evaluation of the circumstances relied upon as they affect the defendant's ability to supply furnace oil in the quantities and at the prices otherwise required by the contract. At the date of the contract the cost of crude oil to BPT was $US1 per barrel or thereabouts. By 1st January 1974 it had become, as I have just mentioned, $US9 to $US10 per barrel, an increase of the order of 900 percent to 1,000 percent. The price payable per metric ton under the contract had increased from $A9.42 to $A13.99 per metric ton due to the operation of Cl.9(B) of the contract, the increase being designed to compensate the defendant for variations in freight rates. Without going to the detail of it, the defendant's evidence further established that continuing to supply at the adjusted base price would have involved the defendant in an enormous loss. It also established that a figure of the order of $A54.44 fixed by it in its notice would bring about a situation under which the price, if accepted by the plaintiff, would have been little better than a break-even one. It was the submission of the defendant that the burden thus imposed upon it was, unless the clause could be invoked, enormous and vast, far beyond anything that it would expect to recover out of the continued operation of its business as one might recover a loss upon a particular contract which had resulted in a deficiency, but which had been performed against the same business background as that in which it had been negotiated. It was said that a substantial grey area might surround the line to be drawn between supply on onerous terms and supply upon terms which were not onerous; but that wherever that line should be, the facts of this case indicated that it had plainly been crossed.

Reliance was placed by the defendant not only upon the increase in costs that came about in the period October 1973 to January 1974, but on more general considerations associated with what was claimed to be the future uncertainty of the terms upon which oil could be obtained. It was said that the way ahead was paved with the probabilities of further unilateral increases in price, insistence on still greater participation and the imposition of restrictions and embargoes of various kinds. I do not think it appropriate to take these matters into account. They themselves, if they are to come about, have not resulted, as yet, in the defendant incurring increased costs and may never do so. They do not yet affect

the terms (including the price to be paid) upon which the defendant is able to obtain supplies. The evidence discloses that there has been the uncertainty relied upon for very many years prior to October 1973, but it did not result in the increase in costs necessary for the invokation of the clause until the actual increases in cost in October 1973 and January 1974 which were the prime reasons for the giving of the notice by the defendant.

The consideration of the defendant's submission, leaving out of account the matters mentioned in the last paragraph, involves an exercise in judgment. Looking only at Cl. 9(C)(iii), without considering whether the meaning and operation of that clause is affected by other clauses in the contract, I have reached the conclusion that the defendant's submission that the facts upon which it relies do show that it was able to obtain supplies only upon onerous terms ought to be accepted. But it is when other clauses in the contract are considered that the defendant's difficulties arise. I turn next to that exercise.

The clauses to be considered are Cl. 9(C)(i) dealing with F.O.B. values, Cl. 9(C)(iv) dealing with currency revaluation, Cl. 9(C)(v) dealing with indigenous crude oil and Cls. 9(A) and (B) dealing with freight rates. Some reference needs also to be made to Cl. 11 which I have earlier set out.

Cl. 9(C)(i) is a clause which, unlike Cl. 9(C)(iii), is mutual. It may be invoked by either party. It is not available so to be invoked, however, until 6th May 1976 five years after the first delivery of furnace oil. It may be invoked where there has been a substantial alteration in the "F.O.B. value of Super Motor Spirit, Diesoleum and/or Furnace Oil". If it is justifiably invoked it requires the parties as soon as may be practicable to confer together for the purpose of fixing a fresh base price for each product. If within one month after the clause is invoked 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 months' notice to the other terminate the contract. Thus the clause differs from Cl. 9(C)(iii) of the contract not only in its reference to substantial alteration of F.O.B. values as distinct from ability to supply only upon onerous terms, but also in the following respects:—

(a) the clause does not apply "at any time" as does Cl. 9(C)(iii); it is not available to be invoked until 6th May 1976;

(b) the clause is mutual; it may be invoked by the buyer as well as the seller;

(c) it applies only to product and not, as well, to crude oil;

(d) if it is invoked as to one or two products, all base prices arise for re-negotiation, not just that of the product or products in respect of which the clause is invoked;

(e) it requires the holding of a conference and negotiation; it does not permit either party to give a notice increasing or decreasing a price unilaterally;

(f) if there is no agreement, either party may terminate but there is no obligation to do so; without a notice of termination within a reasonable time after negotiations have broken down one would think that, despite the absence of the

No. 101
Reasons for Judgment of His Honour Mr Justice Sheppard on First Hearing
—
19th Aug., 1975
Page 34

written agreement referred to, the pre-existing prices would continue to apply and the contract would remain on foot;

(g) such termination as is brought about is in respect of the whole contract; not only that part of it providing for the supply of the product or products in respect of which the clause was invoked.

It was agreed by both parties that "F.O.B. values" in the clause referred to world F.O.B. values. There was no issue that the world F.O.B. cost, and therefore value, of furnace oil had substantially increased as a result of the events referred to in the defendant's evidence. But for the provision as to time, the defendant could therefore have invoked Cl. 9(C)(i) in the present case. Although it was not available for that reason, its meaning and field of operation must be the same before, as well as after, the date upon which either party might invoke it. It follows that, if the events relied upon had transpired after 5th May 1976 and if the meaning and effect of Cl. 9(C)(iii) is as the defendant submits it is, both clauses would have been available to be invoked by the defendant. Either could have been relied upon. Moreover, unless there is to be read into the contract some implied restriction, the defendant could have invoked both, if not simultaneously, then consecutively, provided Cl. 9(C)(i) were invoked first. I shall say more about what might have transpired in such a situation a little later.

The plaintiff seeks to use these considerations, which are based upon the assumption that the events occurred after 5th May 1976, to demonstrate that, whatever would otherwise have fallen within the concept of a supply that could only be obtained on onerous terms, no difficulties confronting the defendant as a result of a substantial increase (alteration) of F.O.B. values of a particular product, however large, was intended to fall within it. Such a situation was specifically provided for in Cl. 9(C)(i) and not otherwise. The clause assured the plaintiff of a five year period of price stability, subject to comparatively minor adjustments which might be made to prices pursuant to other specific provisions of the contract. The defendant took the risk that world prices might fluctuate adversely to it during this period, standing, of course, to gain if any fluctuation were downwards.

Before coming to conclusions about the respective spheres of operation of Cls. 9(C)(i) and 9(C)(iii) of the contract, I must deal with one further question in relation to the circumstances under which Cl. 9(C)(i) may be invoked. I must also refer to the other clauses in the contract which are relied upon by the plaintiff as pointing to the circumstances here relied upon by the defendant being outside the purview of Cl. 9(C)(iii). The submissions of both parties revealed a joint view that Cl. 9(C)(i) would have less impact upon the answer to the ultimate question to be determined, if, upon its true construction, it could be invoked only once. The possibilities are really three, namely:—

(a) the clause may be invoked only once;

(b) it may be invoked once by each party;

(c) it may be invoked by either party as often as the F.O.B. value of one or more of the products undergoes a substantial alteration which has not been taken account of in the fixing or re-fixing of the base price of the product or products the value of which has altered.

I am not convinced that the determination of which of the above possibilities is the correct one assists much in the resolution of the problem. But the matter was argued at length and I propose to express some views about it. If the clause is invoked, one of five things will occur. These are:—

(a) the parties will fail to agree and one or both will give a notice of termination;

(b) the parties will fail to agree, but no notice of termination will be given and the contract will, because of continued performance by the parties, continue as before at the previously existing base prices;

(c) the parties will agree in writing upon the old base prices continuing to apply and the contract will remain in force as before;

(d) the parties will agree upon new base prices, and these will become the base prices for the purposes of the contract which will otherwise continue as before;

(e) there will be agreement, but it will involve more than base prices with the result that there will be, in effect, a new contract.

Only in the circumstances postulated in paragraphs (b), (c) and (d) will the question of whether the clause may be subsequently invoked because of a fresh alteration in value arise. If the base prices have not altered the clause will remain in full force and effect. Equally, if new base prices are substituted for those previously in existence, it will also remain in full force and effect. Why, if there be a further substantial alteration in an F.O.B. value, should not the party affected thereby give a further notice under the clause? The defendant points to the words, "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". The emphasis is mine. On the other hand, the plaintiff points to the words "then existing base prices". These are, of course, explicable upon the basis that the price is subject to adjustment by reason of the operation of one or more of the remaining clauses, e.g. Cl.9(B). I do not think the matter is capable of easy resolution but I incline to the view that the plaintiff's submission is the correct one. There would appear to be no sensible commercial reason why the clause should be restricted to one implementation or to one implementation by each party. Once the parties have agreed upon the existing base prices continuing, whether expressly or by conduct, or agreed upon new base prices, it is difficult to perceive any reason why they should have intended the contract to continue in force without either party having the right further to invoke Cl. 9(C)(i). I think that the words relied upon by the defendant do not altogether fit in with such a construction of the clause but I do not think that their effect is such as to indicate positively that it is not the meaning which the clause bears and I think that the other matters I have mentioned outweigh their effect. Despite my views about the number of times upon which the clause may be invoked, however, those views have not weighed very much with me in the determination of the ultimate outcome of the case. The important consideration is that the parties specifically provided for what was to happen in the event of there being a substantial alteration of F.O.B. values.

I next turn to deal with the remaining clauses of the contract relied upon by

the plaintiff. Cl. 9(C)(iv) deals with currency revaluation and provides that if the parity of the Australian dollar is changed by five per cent or more the parties are promptly to consult together to determine an appropriate and equitable revision of the base prices payable but by not more than the extent of the change in the valuation in question. If agreement is not reached 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 the agreement on the expiration of thirty days' notice in writing. Cl. 9(C)(v) provides, inter alia, for what is to happen if the Commonwealth Government shall refix the price per barrel of indigenous crude oil under the Government's policy relating to indigenous crude oil and/or the defendant is prohibited from supplying imported super motor spirit, diesoleum and/or furnace oil to the plaintiff. The procedure which is to be followed is similar to that provided for when the circumstances postulated in Cl. 9(C)(iii) arise. It involves unilateral action by the defendant which is entitled to refix the base price of the products in question. The clause differs from Cl. 9(C)(iii) in that the refixing may be in respect of all products, no matter that only one is affected, and, further, because there is not the provision in the clause making it depend for its operation upon the seller incurring substantial additional costs. Clauses 9(A) and (B) deal with freight rates in respect of motor spirit and diesoleum, and furnace oil respectively. Certain adjustments are permitted in the early years of the contract; more substantial adjustments are permitted after 1st January 1977

The plaintiff submits that the contract has made specific provision for what adjustment to base prices may be made in the event of:—

(a) A substantial alteration of F.O.B. values (Cl.9(C)(i));

(b) Currency revaluation (Cl.9(C)(iv));

(c) Changes by the Government in its indigenous crude oil policy (Cl. 9(C)(v));

(d) Freight rates (Cl.9(A) and (B)).

Some reliance was also placed upon the provisions of Cl.11 dealing with "indigenous crude penalty". In relation to furnace oil it is provided that there shall be no such penalty payable by the plaintiff. In relation to the other products the penalty is quantified.

The plaintiff submits that, if the defendant incurs increased costs, no matter how great, by reason of any one of the specific circumstances dealt with in the clauses above mentioned, the circumstances are outside the operation of Cl. 9(C)(iii). The defendant submits that it can operate and in such circumstances will apply along with one or other of the clauses relied upon by the plaintiff to restrict its meaning. It was careful to submit, however, that this would not always be the case. For instance, in relation to Cl. 9(C)(i), it submitted that not all substantial alterations of F.O.B. values would involve supply only upon onerous terms. There might be a substantial alteration of an F.O.B. value which, although involving the defendant in an increased cost, would not amount to such an oppressive burden as to constitute onerous terms within the meaning of the clause.

The plaintiff relied not only upon a cutting down of the prima facie meaning of the relevant words in Cl. 9(C)(iii) by reason of the fact that the other clauses

relied upon each dealt specifically with a subject matter which might in certain circumstances have otherwise rendered it able only to supply upon onerous terms, but also upon inconsistent machinery provisions in the various clauses. The only two which are similar are Cl. 9(C)(iii) and Cl. 9(C)(v). Even they are not the same because, as I have previously pointed out, the latter does not restrict the defendant to revising only the base price of the product which is affected by one of the events referred to in the clause; the position is otherwise in relation to Cl. 9(C)(iii). It will be recalled that when I commenced my consideration of Cl. 9(C)(i), I listed the differences between the two clauses including the differences in the procedure to be followed pursuant to each once it was invoked. The point made by the plaintiff is that it would be unlikely that the parties would have intended to agree to two entirely different provisions by which base prices could be increased or the contract terminated applying in the same circumstances if the procedure to be followed pursuant to the clauses and the effect upon the contract brought about by their invokation were substantially different.

The plaintiff posed a number of examples to illustrate the submission which it made. I do not refer to each of these; it is enough if I refer to one. Suppose the meaning of the expression in question is as the defendant submits it is, and further suppose a vast increase in the F.O.B. value of furnace oil (leading to increased costs being incurred by the defendant) which on that hypothesis comes within both clauses. The defendant could invoke, firstly, Cl. 9(C)(i) and there would follow the conference therein provided for at which the base price of each product would be open to be re-negotiated. Assume a satisfactory outcome of those negotiations in relation to the base prices of motor spirit and diesoleum but no agreement as to a revised base price for furnace oil. Either party could terminate the contract but neither might chose to do so; the plaintiff for the reason that it was satisfied as regards the prices of motor spirit and diesoleum, believed that the defendant was also satisfied as to the prices for those products, and hoped that the defendant would not terminate it as to its entirety simply because of dissatisfaction over the price of one product. The defendant on the other hand might decide not to give a notice of termination but to invoke Cl. 9(C)(iii). There would be no further conference. It would seek to impose unilaterally upon the plaintiff a fresh base price for furnace oil, knowing that if this were rejected by the plaintiff the contract would nevertheless remain on foot as to the two products in respect of which agreement had been reached. If the plaintiff were not to give a notice pursuant to Cl. 9(C)(iii), terminating the contract as to furnace oil, the defendant would have achieved a very satisfactory position from its point of view; if, on the contrary, the plaintiff were to terminate the contract, it would only be terminated as to the supply of furance oil and would remain in force in respect of the two products, the prices of which were satisfactory to the defendant. The plaintiff would have lost bargaining power as regards an alternate supplier because it would be seeking supplies of one product, rather than three. The plaintiff contends that there is nothing upon the face of the contract which would prevent the defendant, if the meaning contended for by it were accepted, from acting in the way I have described. No doubt if a clause were available to be invoked, it would need to be invoked within a reasonable time after the occurrence of the events relied upon for its invokation. Subject to that there is no time limit. In this regard Cls. 9(C)(i) and 9(C)(iii) are to be compared with Cl. 9(C)(iv) dealing with currency revaluation which requires the parties to consult together "promptly", and Cl.9(C)(v) which requires the notice therein provided for to be given within three months.

No. 101
Reasons for Judgment of His Honour Mr Justice Sheppard on First Hearing
19th Aug., 1975
Page 38

I have earlier referred to the fact that the field intended to be covered by each of the clauses, although some be not available for particular periods, ought not to be found to be different depending upon whether the time for its invokation had arrived or not. The plaintiff submits that the consideration I have mentioned indicates that the parties did not intend Cl. 9(C)(i) and Cl. 9(C)(iii) ever to operate in respect to the same circumstances. In partial answer to this submission the defendant submitted that upon the face of the clauses relied upon there was plainly disclosed one circumstance in which there could be overlapping, that is to say reliance, in respect of the same circumstances, on one of two applicable clauses. The two clauses were said to be Cl. 9(C)(i) and Cl. 9(C)(v). It was supposed that the Commonwealth Government re-fixed the price of indigenous crude oil to equate it with world F.O.B. values which, it was assumed, had undergone substantial alteration. The difficulty with this example is that Cl. 9(C)(v) is dealing with crude oil whilst Cl. 9(C)(i) is dealing with the F.O.B. values of product as distinct from crude. I do not, therefore, consider that there can be overlapping of clauses 9(C)(i) and 9(C)(v).

The ultimate task is to ascertain the intention of the parties from the language they have used; cf Australian Broadcasting Commission v. Australian Performing Right Association Ltd. 129 C.L.R.99 at p.105. All the matters to which I have referred, both when considering only the words of Cl. 9(C)(iii) and when considering its terms in the light of other clauses of the contract, must be taken into account in reaching a conclusion. In my opinion no consideration mentioned is decisive. Despite the difficulties to which I have referred a possible construction of the contract, derived from the language used, is that the parties intended that any event or series of events outside the defendant's control which imposed upon it a sufficiently oppressive burden, if it were forced to continue supply at the then existing base prices, would come within the clause. Whether the events were of general application in the industry or affected only the defendant's sources of supply would not be material. Having considered the provisions of the other clauses of the contract, however, I have reached the conclusion that the better view is that the present case is not within the clause because it falls squarely within the provisions of Cl. 9(C)(i) which, but for the time limit, could have been invoked; and, further, that what is within that clause is not intended to be within Cl. 9(C)(iii). To decide otherwise would give to Cl. 9(C)(iii) an overriding effect. If this had been their intention I think that clearer words would have been used by the parties to indicate that this was so and, also, that the provision would not have been placed third in a clause containing, in effect, five provisions pursuant to which base prices might alter, some of them also involving the possible termination of the contract by one party or the other. It is important, I know, to consider substance and not form, but in a carefully worded document such as the contract here under consideration one would have expected to find a provision intended to have such an overriding effect in a separate clause such as is the case with Cl.13.

For the above reasons I am of opinion that the circumstances relied upon by the defendant are not within Cl. 9(C)(iii) of the contract, and that its notice of 22nd March 1974 was invalid or ineffective as a notice pursuant to that clause.

I have reached this conclusion without having taken into account the plaintiff's third submission to the effect that the events relied upon affect, not the

defendant's sources of supply, but those of its supplier, BPT. Although that is in a sense literally correct, I am of opinion that the events in question also affected the defendant directly. It could not obtain supplies except on terms similar to those offered it by BPT. Those were, as I have earlier found, terms unaffected by the relationship of the two companies. Examples were posed by counsel for the plaintiff suggesting that if the clause could apply in these circumstances, a vastly increased price imposed upon the defendant by reason of some BP group policy, perhaps for taxation or similar reasons, would enable it to invoke the clause. I do not agree that this is so. It could go to the market to obtain supplies at market prices. If it did not do so, it may be true to say that it was able to obtain supplies only upon onerous terms from its usual sources. But that would not be the reason why it incurred increased costs. The cause of its increased costs would be its obligation owed to a related company not to buy at market prices, but to buy at an inflated price because of group policy and instructions.

The plaintiff's third submission has not therefore weighed with me in reaching the ultimate conclusion to which I have come that the defendant's notice was invalid.

The Effect, if any, upon the Defendant's Notice of the Prices Justification Act 1973

An alternative submission advanced by the plaintiff was that the defendant's notice was invalid because of the effect upon it of the abovementioned Act. Since I have found the notice to be ineffective, it is strictly unnecessary for me to deal with the submission, but I propose to say something about it. The purport of it is that a notice, to be an effective notice must be unconditional, and that the notice in question was made conditional by virtue of the operation of the Act.

The defendant is a company to which the Act applies (ss.3 and 5). Section 18(1) of the Act provides that a company to which the Act applies shall not supply goods of a particular description at a price that is higher than the highest price at which the company supplied goods of that description on the same or substantially similar terms and conditions during the immediately preceding months unless a notice in writing stating that the company proposes to supply goods of that description at that higher price has been given to the Prices Justification Tribunal and the prescribed period has expired or the Tribunal has served notice in writing on the company before the expiration of that period stating that the Tribunal does not intend to hold an inquiry as to whether the proposed price is justified. The prescribed period mentioned in s.18(1) is defined in s.18(4) as the period of twenty-one days that commenced on the day on which the notice referred to in s.18(1) was given to the Tribunal. Section 18(4) is made subject to the provisions of s.18(5) which provides that if the Tribunal serves notice in writing on the company before the expiration of the period of twenty-one days referred to in sub-s.(4) stating that the Tribunal intends to hold an inquiry as to whether the proposed higher price is justified, the prescribed period for the purposes of sub-s.(1) is the period that commenced on the day on which the notice referred to in sub-s.(1) was given to the Tribunal and ends on one of a number of specified days. These are as follows:—

(a) the day on which the Minister makes available to the public the report of the Tribunal in relation to the proposed higher price;

(b) the fourteenth day after the day on which the report of the tribunal in relation to the proposed higher price is furnished to the Minister; or

(c) the fourteenth day after the expiration of:—

(i) the period of three months that commenced on the day on which the Tribunal served notice on the company that it intended to hold an inquiry; or
(ii) such further period as is, or such further periods as are, specified in a notice or notices served on the company under section 19(2).

That latter provision provides that if the Tribunal is of the opinion that the company has failed to provide the Tribunal with sufficient information to enable it to complete its inquiry within the period referred to in s.19(1)(c) (the period is in effect three months) or within any further period or periods specified in any other notice or notices served on the company in pursuance of the subsection, the Tribunal shall serve notice in writing on the company stating that the Tribunal is of that opinion and that it requires a further period specified in the notice within which to complete its inquiry and report.

Despite the length of time which may be taken up in carrying through its procedures, the important point to be noted is that the Act does not, provided its procedures are followed, purport to prevent a price ultimately being increased. Its provisions are not designed to fix prices; rather they provide a moratorium.

Before proceeding I should indicate that the parties were in agreement that the case did not come within the provisions of s.18(2) of the Act. I should also say that the Act has since been amended (Act No.47 of 1974). It is not relevant to consider the amended legislation which, if it had been in force at the relevant time, would have denied to the defendant one of the submissions relied upon by it. It will subsequently be seen that I do not think that that submission, of itself, would have answered that of the plaintiff.

In the first half of 1974 the defendant gave to the tribunal a number of notices pursuant to the Act, some dealing with proposals to increase the price charged for the supply of furnace oil. I need only refer to two of these. On 14th February, 1974 it notified the Tribunal that subject to the operation of pars.(2) and (3) of the notice it proposed to increase the prices of products supplied by it. There followed a list of products which included fuel oil (there is not a substantial distinction between fuel oil and furnace oil) the price of which was to be increased to $23.65 per ton to all buyers. Paragraph (2) of the notice said that the defendant proposed to increase the prices at which it supplied goods pursuant to existing contracts obtained by competitive tender or by competitive negotiation and containing rise-and-fall clauses in accordance with the terms of such contracts. The notice, therefore, did not apply in relation to the supply of furnace oil under the contract here in question. On 16th May, 1974 the defendant wrote to the chairman of the Tribunal. The letter included the following paragraphs:—

> "We hereby give notice that we are about to commence negotiations with Nabalco Pty Ltd for a new contract to supply their furnace oil requirements at Gove, Northern Territory, currently 370,000 tons per

annum. Our existing supply arrangements with Nabalco terminate on 24th July, 1974.

As this is a non-Category A product it does not attract an allocation of Australian crude oil. We are therefore obliged to import the total requirement at international prices. Although the base price on today's conditions would not exceed $A56.52 per metric ton, it will be above the Tribunal's current recommended maximum price.

. . . . . .

We will advise you of the agreed price when negotiations are completed."

On 4th June, 1974 the defendant was notified that the Tribunal did not intend to hold an inquiry "as to whether the proposed price referred to in your notice dated 16 May 1974 is justified." The defendant's letter of 16th May, 1974 and the Tribunal's response do not bear upon the resolution of the present problem. There were in fact to be no negotiations. On the contrary, the defendant had purported to refix the price at $54.44 per metric ton. The letter was obviously written upon the assumption that the notice given by the defendant was valid as also was the notice given by the plaintiff with the result that the contract as to the supply of furnace oil would terminate on 24th July, 1974. That is what the letter says in the first paragraph. The belief of the defendant that the contract would terminate on 24th July, 1974 as to furnace oil explains why the last delivery was effected on 19th July, 1974, after 26th June, 1974 at the pre-existing base price (in fact the price was slightly less).

The plaintiff's submission involves the proposition that at the time the defendant's notice was given the defendant must have been authorised by the Act to charge the increased price from the date specified in the notice, namely 26th June, 1974. The plaintiff was not to know whether it could have charged that price or not. The procedures provided for in the Act might have been exhausted, so that the defendant would have been free to charge the price fixed by it, or they might not. The fact that the Tribunal did not propose to hold an inquiry as a result of what it was told in the letter of 16th May, 1974 did not mean that its attitude would have been the same if it had realised that the price was to be fixed unilaterally and was not to come about as a result of negotiation as suggested in the letter. In any event the relevant time was the date of service of the defendant's notice, 25th March, 1974, at which time no relevant notice at all had been given by the defendant. The procedures contemplated by the Act could take many months to complete, with the result that it could well have been unlawful for the defendant to charge the new price in respect of the first and some subsequent deliveries after 26th June, 1974, if the plaintiff had accepted the new price and had not given notice terminating the contract pursuant to its right under cl. 9(C)(iii) so to do.

It is perhaps surprising not to find a provision in the Act dealing expressly with the effect, if any, of the Act upon price escalation clauses in long term contracts. There being none, one must come to a conclusion about the answer to that question upon a consideration of the whole of the provisions of the Act and from its purpose and intended field of operation as ascertained therefrom. I have already referred to the fact that the Act does not operate to fix prices. It

No. 101
Reasons for Judgment of His Honour Mr Justice Sheppard on First Hearing
—
19th Aug., 1975
Page 42

postpones, in certain circumstances, the date when a supplier of goods to whom it applies may effect increases. It may discourage suppliers from charging prices higher than those which the Tribunal, after an inquiry, when one is directed, considers justified; but to the extent that it does, that is not a legal consequence of its operation. Accordingly, not only is there no express provision in the Act purporting to affect contracts as distinct from the actual supply of goods; there is also the fact that there will come a time, even though some months may intervene, when the Act will not operate to prevent an increase in price of whatever magnitude lawfully being charged. These considerations lead to the conclusion that the Act was not intended to affect long term contracts for the supply of goods containing price escalation clauses except that the operation which such clauses might otherwise have had may be delayed for a period.

The plaintiff submits that that may be so, but it was entitled to certainty. If it chose to submit to the new price operative from 26th June, 1974, it was entitled to have the defendant bound by a legally enforceable obligation to continue its deliveries after that time. If the defendant could not charge its increased price, it would not have been bound so to supply. It might have been prepared to do so, but it would not have been legally bound, with the result that the plaintiff's undertaking might have been placed in jeopardy because of lack of furnace oil. I think that the proposition that the defendant would not, in such circumstances, be legally bound to supply is incorrect. The contract was made three years before the passing of the Act. It was made, as are all contracts, upon the basis that the general law applying in the community at the time it was made and during the period of its intended performance would, if relevant, apply to it. It operated subject to that law. The defendant's right to charge the increased price after 26th June, 1974 might or might not have been affected by the operation of the Act, and it is therefore true to say that its notice had to be read, when it was received on 25th March, 1974, as notifying the increase specified in it as operating after 26th June, 1974 subject to its right to charge it being unaffected by the legislation. But that did not make the notice conditional in the sense contended for by the plaintiff. It operated in the context of a long term supply contract. If for a period the new price could not be charged, the defendant's obligation to maintain supplies nevertheless continued.

In some circumstances legislation of the kind in question might have a much more far reaching effect. It might prevent indefinitely the charging of an increased price. Continued supply may become financially ruinous for the supplier. In such a case a serious question might arise as to whether the contract had not been frustrated by the operation of the legislation; but see Scanlan's New Neon Limited v. Tooheys Limited 67 C.L.R. 169. If that were the situation here the plaintiff's case would not be assisted. I do not however think that it was. The contract, if the plaintiff had been prepared to accept the increase, would have continued, the defendant possibly being bound to supply deliveries effected in the early months after 26th June, 1974 at the pre-existing price.

The conclusion is that the plaintiff was bound to treat the defendant's notice, when it received it on 25th March, 1974, as unaffected in its operation by the Act. As events turned out there would have been no restriction on the defendant's right to charge the new price. It will be recalled that the defendant, believing that the plaintiff's notice of 24th April, 1974 was effective to terminate the contract as to furnace oil, last supplied on 19th July, 1974. It previously supplied on 14th June,

1974. Section 18(1) of the Act prohibits the supply of goods at a price that is higher than the highest price at which the company supplied goods of the same description on the same or substantially similar terms and conditions during the immediately preceding month. It is irrelevant to look at supply by the defendant of furnace oil to any customer other than the plaintiff because to no other customer did it supply on the same or substantially similar terms. "Month" in s.18 of the Act means calendar month. Since the defendant's previous supply to that of 19th July, 1974 was more than one month before the first supply for which the new price could have been charged, the Act had no application. If the following supply had been within one month of 19th July, 1974 that, and not any earlier supply, would have been the reference point and there would have been no breach of the Act because the new price would already have been charged.

These considerations were relied upon by the defendant as an answer to the plaintiff's submission about the effect of the Act upon the notice. They do not, however, in my opinion provide an answer because the matter has to be looked at at the date the plaintiff received the notice, namely 25th March, 1974. I think, however, that the matters so relied upon do serve to illustrate that the Act can only have a temporary or transient effect, and, in some situations, no effect at all.

For the above reasons I do not consider that the Prices Justification Act 1973 operated to affect the validity of the defendant notice.

The Validity of the Plaintiff's Notice given under clause 9(C)(iii)

As already indicated this argument was put on the basis that the defendant's notice was valid. Since I have decided that it was invalid this matter does not really arise for consideration. It was however argued at some length and I should express some views about it. The defendant's submission is that the notice which is set out on pages 13 and 14 hereof is ineffective because it approbates and reprobates. It purports to operate in two different ways. On the one hand, it claims that the defendant's notice is invalid with the result that the pre-existing price continues to apply. On the other hand, in case the notice should be found to be valid, it purports itself to be a notice terminating the contract pursuant to the clause. The defendant submits that its notice, valid or invalid, put the plaintiff in a position where it had to elect what its course would be. The submission seeks to liken the plaintiff's situation to that of one party to a contract where the other has committed an act which may amount to conduct entitling the first party to rescind for anticipatory breach. In such circumstances the party having such right must by unequivocal words or conduct indicate that he accepts the conduct of the other party as a repudiation of the contract and treats it as being at an end. I do not think that the analogy is apt. In the present case the plaintiff was placed in a dilemma. Either the defendant's notice was effective or it was not. If it were ineffective the plaintiff wished the contract to continue as before. If it were effective, the plaintiff, pursuant to a right conferred by the contract upon it so to do, wished to terminate it. If the notice were invalid nothing that the plaintiff did could make it valid. It was ineffective for any purpose and the contract continued as before. It did not need words from the plaintiff to make it valid or invalid. But if it were valid a notice was required if the plaintiff were desirous of terminating the contract. It made its position clear by saying that, whilst not accepting the validity of the notice, if it were, contrary to its views valid, it terminated the contract pursuant to a right in that behalf so to do. It was not a case in which

No. 101
Reasons for Judgment of His Honour Mr Justice Sheppard on First Hearing
—
19th Aug., 1975
Page 44

there was any question of the plaintiff rescinding the contract pursuant to a supposed right so to do arising because of some conduct on the part of the defendant manifesting an intention not further to be bound thereby. The plaintiff made it plain that the contract was to remain on foot either to continue for its full term or so that it might be terminated pursuant to a specific provision contained therein.

Accordingly, if I had found that the defendant's notice were good, I would have concluded also that the plaintiff's notice was good.

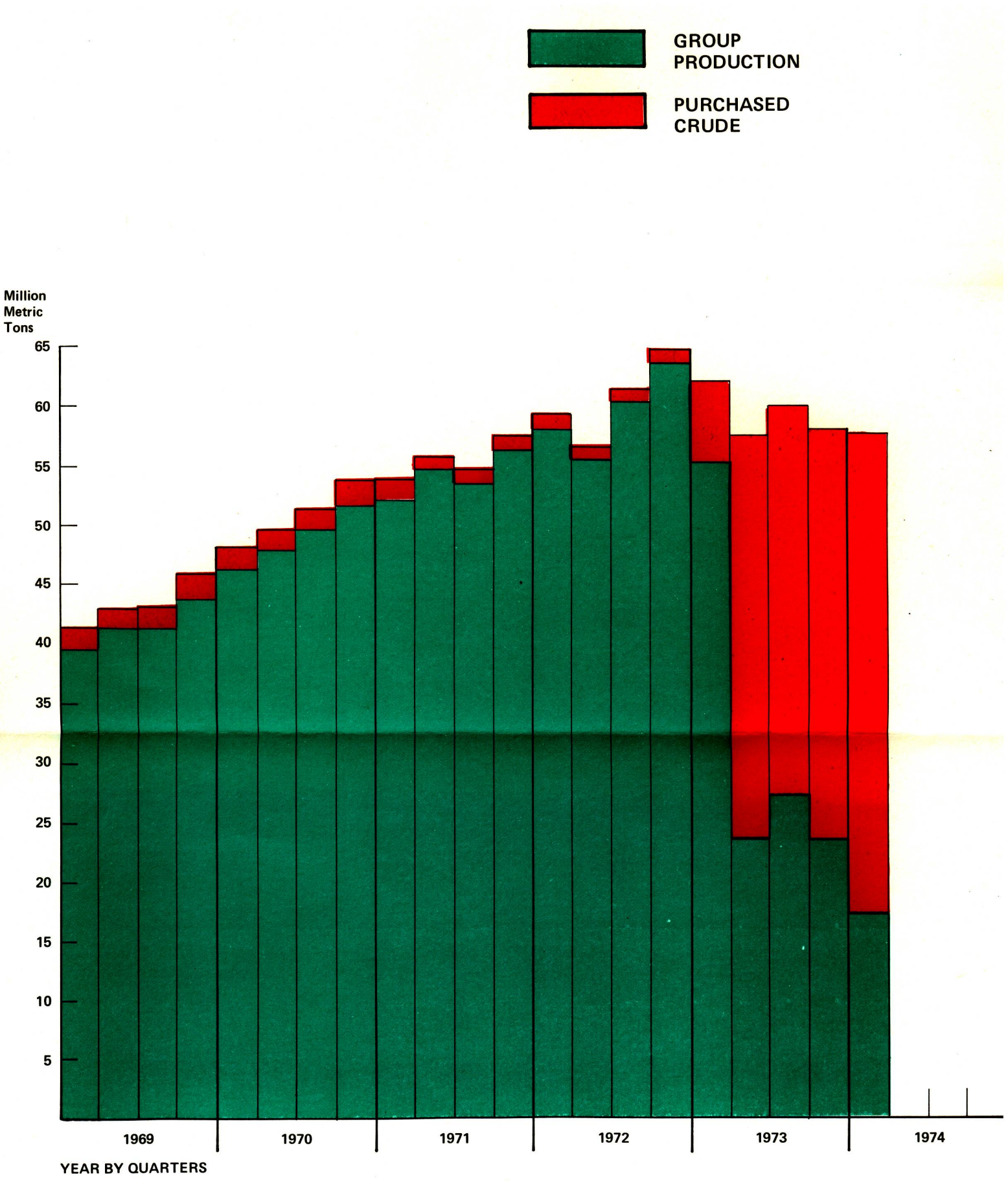
I should finally mention an alternative submission made by the plaintiff in order to overcome the defendant's submission. It submitted that if, contrary to its submission, it was put in a position where it had to elect, it was not able to do so because of absence of information on its part. It referred to the fact that its letter of 7th April, 1974 remained unanswered. The defendant contended that it was in full possession of the facts by reason of information which had been conveyed to it orally at the conference which was held on 17th April, 1974. When this submission was raised it was agreed that it would not be dealt with at this hearing but would be postponed to be considered when other matters which can only be resolved after further evidence is given are decided.

Conclusion

In the result I have reached the conclusion that the defendant's notice of 22nd March, 1974 was not a valid notice pursuant to the provisions of cl. 9(C)(iii) of the contract. The two summonses are stood over to a date to be fixed for the purpose of determining what declarations, if any, should now be made, dealing with the question of costs to date and deciding upon the course which the further hearing of the matter should take.

BP GROUP CRUDE OIL SOURCES

Exh. 20



Exh. 22

ILLUSTRATION OF TAX PAID, PARTICIPATION AND TOTAL COSTS 1969-MID 1974

31° KUWAIT

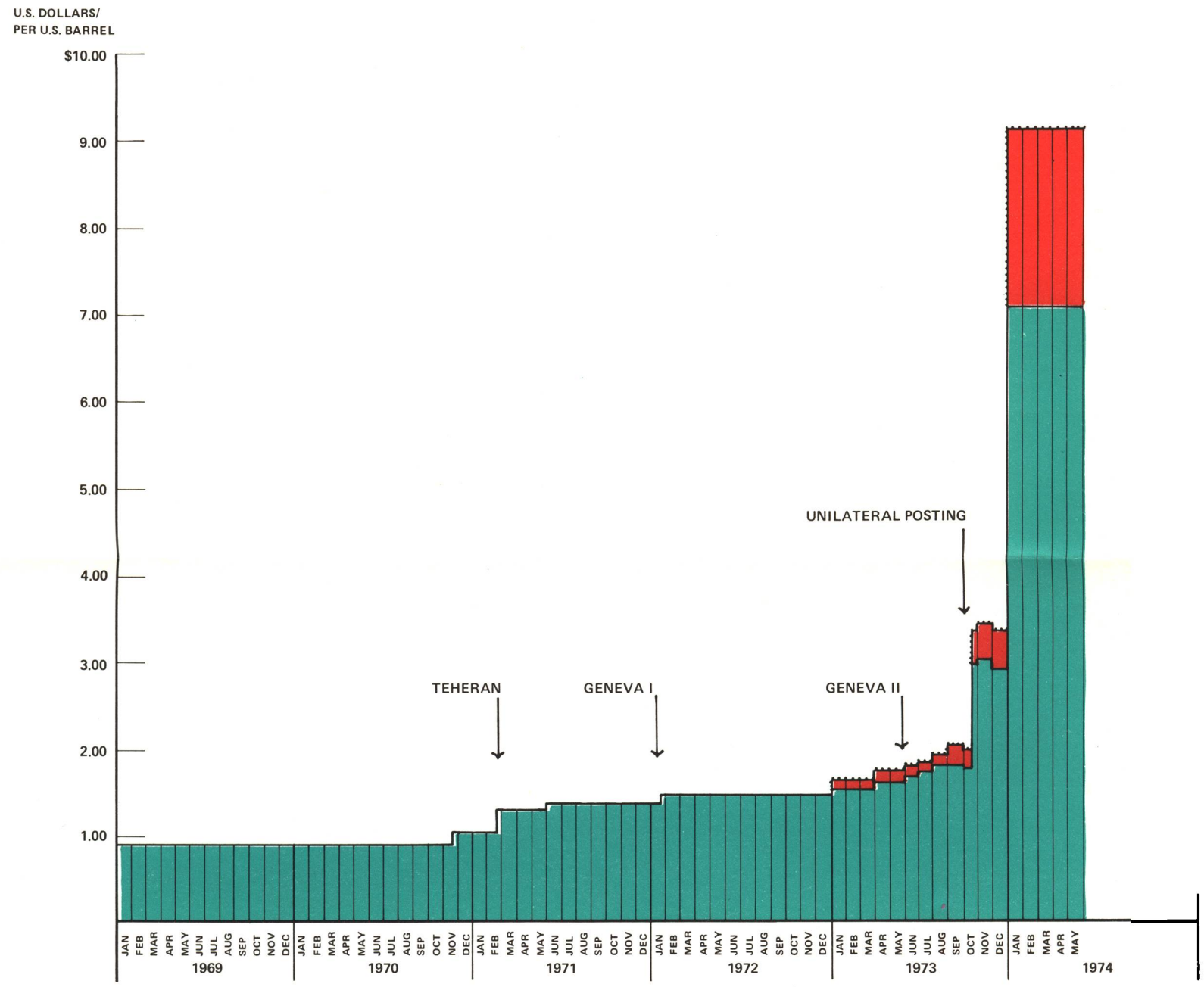


ILLUSTRATION OF TAX PAID, PARTICIPATION AND TOTAL COSTS 1969–MID 1974

Exh. 22

IRAN LIGHT

TAX PAID COST

TOTAL COST

PARTICIPATION BURDEN