

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 III

(pages 345-766)

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

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Solicitors for the Respondent

**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 No.	Contents	Page Nos.
I	INDEX TO RECORD AND PART I—DOCUMENTS 1-100: Pleadings, Transcript, etc.— First Hearing	21
II	PART I—DOCUMENT 101: Reasons for Judgment— First Hearing	297
III	PART I—DOCUMENTS 102-111: Pleadings, Transcript, etc.— Second Hearing	345
IV	PART I—DOCUMENTS 112-116: incl. Reasons for Judgment— Second Hearing	767
V	PART II—EXHIBITS: Documents in Chronological Order	847
VI	PART II—EXHIBITS: Graphs, Calculations of Damages, Miscellaneous Agreements, etc.	1103

VOLUME III

TABLE OF CONTENTS

<i>No.</i>	<i>Description of Document</i>	<i>Date</i>	<i>Page</i>
102.	Points of Claim (Paragraph 2A of Amended Summons)	26th September, 1975	345
103.	Points of Defence (Paragraph 2A of Amended Summons)	8th October, 1975	347
104.	Affidavit: J. F. Sauerlander	27th October, 1975	348
105.	Stockholding Notice: Plaintiff to Defendant (Annexure "A")	2nd July, 1974	349
106.	Admissions by Plaintiff	25th November, 1975	350
107.	Affidavit: J. de Korver	11th December, 1975	352
108.	Contract of Affreightment: Concord Petroleum Corporation and International United Refining Co. Ltd. (Annexure "A")	4th June, 1974	352
109.	Plaintiff's Amendment to Points of Claim	16th December, 1975	365
110.	Defendant's Amendments to Points of Defence	29th March, 1976	366
111	Transcript of Second Hearing: Opening Address	17th November, 1975	366
	Plaintiff's Evidence: A. G. Coogan: Examination	17th-20th November, 1975	368
	Examination on the Voir Dire		372
	Cross Examination on the Voir Dire		375
	Re-Examination on the Voir Dire		386
	Examination		389
	Cross Examination		393
	Re-Examination		471
	J. F. Sauerlander: Examination	20th November, 1975	441
	Cross Examination		441
	E. A. Notter: Examination	20th and 24th-26th November, 1975	472
	Cross Examination		484
	Re-Examination		531

<i>No.</i>	<i>Description of Document</i>	<i>Date</i>	<i>Page</i>
111. (contd.)	D. F. Wilson: Examination	26th November, 1975	537
	Cross Examination		542
	Re-Examination		552
	H. J. Colish: Examination	26th-27th November, 1975	553
	Cross Examination		564
	Re-Examination		592
	L. H. Williams: Examination	27th November, 1975	593
	Defendant's evidence: G. D. G. Shaw: Examination	27th November, 1975	606
	Cross Examination		609
	C. Lockrey: Examination	27th November, 1975 and 1st December, 1975	610
	Cross Examination		628
	Re-Examination		673
	J. H. Rowland: Examination	2nd December, 1975	676
	Cross Examination		679
	B. C. Snape: Examination	2nd December, 1975	686
	Cross Examination		692
	P. B. Abt: Examination	2nd-3rd December, 1975	694
	Cross Examination		720
	Re-Examination		760
	N. F. Tregoning: Examination	2nd December, 1975	704
Cross Examination	713		

No. 102

Points of Claim (Paragraph 2A of Amended Summons)

No. 102

 Points of Claim
 (Paragraph 2A of
 Amended
 Summons)

 26th September
 1975

**POINTS OF CLAIM IN RELATION TO PARAGRAPH 2A OF AMENDED
 SUMMONS (FILED PURSUANT TO DIRECTIONS GIVEN ON 16TH
 SEPTEMBER 1975)**

1. By an agreement in writing bearing date 11th June 1970 made by and between the Plaintiff of the one part and the Defendant of the other part, being the Fuel Supply Agreement referred to in paragraph 1 of the amended Summons herein, the Defendant agreed to supply to the Plaintiff and the Plaintiff agreed to accept from the Defendant Furnace Oil upon the terms and conditions as to price and other matters therein set forth. The Plaintiff craves leave to refer to the said Agreement when produced as if the same had been fully set forth herein.
2. The storage tanks and other facilities referred to in Clause 1 of the said Agreement were completed in or about March 1971 and the first delivery of Furnace Oil by the Defendant to the Plaintiff under the said Agreement took place on 5th May 1971.
3. On or about 22nd March 1974 the Defendant in purported exercise of a power given under Clause 9C(iii) of the said Agreement delivered to the Plaintiff a notice being annexure "B" to the Affidavit of Sir David Griffin sworn and filed herein.
4. At the time of the giving of the said notice the base price for the supply of Furnace Oil under the said Agreement was A\$13.99 per metric ton.
5. The facts and circumstances existing at the time of delivery of the said notice and at any other material times were not such as to entitle the Defendant to deliver the said notice or to exercise the said power or otherwise to fix a revised base price for the supply of Furnace Oil under the said Agreement and the said notice was invalid and ineffective to fix a revised base price for the supply of Furnace Oil.
6. By letter dated 19th April 1974 the Defendant agreed to give the Plaintiff a short extension of time within which to make formal response to the said notice.
7. On 24th April 1974 the Plaintiff wrote to the Defendant, the letter of such date, being part of the Exhibits filed herein.
8. By letter dated 7th May 1974 the Defendant wrote to the Plaintiff asserting that its said notice was valid and further confirming that the Plaintiff had by its conduct elected to terminate the said Agreement so far as the purchase of Furnace Oil was concerned as from 24th July 1974.
9. At a meeting between representatives of the Plaintiff and the Defendant held on 17th May 1974 the Defendant by its representatives asserted not merely that the Plaintiff had terminated the said Agreement so far as concerned Furnace Oil, but that after 24th July 1974 the Defendant would, under no circumstances, supply Furnace Oil to the Plaintiff pursuant to the said Agreement.
10. At the said meeting on 17th May 1974, the Defendant by its said representatives further asserted that unless the Plaintiff declared that it accepted the Defendant's view that the said Agreement terminated on 24th July 1974 and unless the Plaintiff abandoned any claim thereunder in relation to Furnace Oil, the Defendant under no circumstances would, as from that date, deliver Furnace Oil to the Plaintiff other than on a spot basis.
11. Thereafter there were various meetings and discussions between representatives of the parties and in the said meetings and discussions the

No. 102
 Points of Claim
 (Paragraph 2A of
 Amended
 Summons)
 26th September
 1975
 (cont'd)

Defendant, by its representatives maintained the attitude stated in paragraphs 9 and 10 hereof.

12. By its conduct hereinbefore set forth the Defendant was in breach of and repudiated the said Agreement so far as it related to the supply of Furnace Oil.

Particulars.

The Plaintiff relies on the conduct of the Defendant set forth in paragraphs 3, 5, 8, 9, 10 and 11 both severally and collectively.

13. In June 1974 the Plaintiff accepted the said repudiation and terminated the said Agreement so far as it related to the supply of Furnace Oil.

Particulars.

10

The acceptance and termination was by the Plaintiff on 21st June 1974 contracting for alternative supplies of Furnace Oil and/or orally in a telephone conversation on 28th June 1974 between Messrs. Coogan and Lockrey and/or by letter from the Plaintiff to the Defendant dated 28th June 1974.

14. By reason of the foregoing the Plaintiff suffered damage.

Particulars.

The Plaintiff, using its best endeavours to arrange alternative sources of supply of Furnace Oil entered into an agreement with Kuwait National Petroleum Company under which it arranged for supplies of Furnace Oil and entered into an agreement with Concord Petroleum Corporation under which it arranged for delivery of supplies of Furnace Oil. The Plaintiff's claim for damages is calculated as follows:

20

Actual and estimated shipments of Furnace Oil under Contract with Kuwait National Petroleum Company ("Kuwait")

	Metric Tons
From 1.7.74 to 31.12.74	162,086
From 1.1.75 to 30.6.75	171,842
From 1.7.75 to 31.12.75	210,384
From 1.1.76 to 5.5.76 (earliest review date under Clause 9C(i) of the said Agreement)	120,000
From 5.5.76 to 5.9.76 (four months period for continued supply under 9C(i))	<u>120,000</u>
Total	<u>784,312</u>

30

Actual and estimated cost to the Plaintiff of Kuwait Furnace Oil delivered to Gove (including freight etc.)

Actual cost up to and including shipment loaded in July 1975 comprising a total of 393,662 metric tons	\$22,888,666.67
Estimated cost of Kuwait Furnace Oil delivered and deliverable from and after the July 1975 shipment:	
390,650 metric tons at overall estimated cost of \$62.30 per ton (the same overall cost as that for the July 1975 shipment)	<u>\$24,337,495.00</u>
Total estimated cost of Furnace Oil supplied from Kuwait ...	<u>\$47,226,162.00</u>
Plus additional demurrage	<u>100,000.00</u>
Total	<u>\$47,326,162.00</u>

40

Estimated cost to the Plaintiff of equivalent amount of Furnace Oil had the Defendant continued supplies (assuming same deliveries as from Kuwait)

No. 102
 —
 Points of Claim
 (Paragraph 2A of
 Amended
 Summons)
 —
 26th September
 1975
 (cont'd)

	In respect of period 1.7.74 to 31.12.74	
	162,086 metric tons × \$13.39 per metric ton	= \$2,170,331.50
	(Note \$13.39 per metric ton is the recalculated base price in respect of the above period under the said Agreement on account freight variations as per Clause 9B — and similar recalculations of base price are made below in respect of subsequent periods)	
10	1.1.75 to 30.6.75	
	171,842 metric tons × \$13.42	= \$2,306,119.60
	30.6.75 to 31.12.75	
	210,384 metric tons × \$13.73	= \$2,888,572.30
	1.1.76 to 5.5.76	
	120,000 metric tons × \$13.73 (estimated)	= \$1,647,600.00
	5.5.76 to 5.9.76	
	120,000 metric tons × \$13.73 (estimated)	= <u>\$1,647,600.00</u>
	Total	<u>\$10,660,222.00</u>
20	Difference in cost to Plaintiff of supplies from Kuwait and supplies from the Defendant together with interest	<u>\$36,665,940.00</u>

No. 103

No. 103
 —
 Points of Defence
 (Paragraph 2A of
 Amended
 Summons)
 —
 8th October 1975

Points of Defence (Paragraph 2A of Amended Summons)

1. The Defendant does not admit that paragraph 1 of the Points of Claim correctly states the effect of the Agreement.
2. The Defendant denies the allegations in paragraph 5 of the Points of Claim and says that the notice did validly and effectively fix a revised base price for the supply of furnace oil as therein specified.
3. In answer to paragraphs 9 and 10 of the Points of Claim the Defendant:
 - (a) says that the conversations at the meeting took place on a “without prejudice” basis;
 - (b) otherwise denies that the assertions of the representatives of the Defendant at the meeting were in or to the effect alleged.
4. In answer to paragraph 11 of the Points of Claim the Defendant:
 - (a) says that, at least in so far as the meetings and discussions dealt with or referred to the Notice or any termination of the Agreement pursuant to the Notice, the same took place on a “without prejudice” basis;
 - (b) repeats sub-paragraph (b) of paragraph 3 of the Defence and otherwise denies any maintaining by its representatives of the attitude alleged.
5. The Defendant denies paragraph 12 of the Points of Claim.
- 40 6. In answer to paragraph 13 of the Points of Claim the Defendant:
 - (a) denies any repudiation of the Agreement on its part;
 - (b) subject thereto denies that any repudiation of the Agreement on the Defendant’s part was accepted by the Plaintiff;
 - (c) alternatively to sub-paragraph (b) hereof says that any purported

No. 103
 —
 Points of Defence
 (Paragraph 2A of
 Amended
 Summons)
 —
 8th October 1975
 (cont'd)

acceptance by the Plaintiff of alleged repudiation of the Defendant was ineffective.

7. In answer to the Points of Claim generally, the Defendant says that, so far as is material, the letter referred to in paragraph 7 of the Points of Claim read as follows:

“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. 10
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.”

and the letter referred to in paragraph 8 of the Points of Claim read as follows: 20

“The fact is that our formal notice has been given and, in our view, is fully justifiable in terms of the Supply Agreement and the events which have happened. 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.”

and that, by reason of the foregoing, the Plaintiff should be treated as having elected to terminate the Agreement pursuant to the express provisions of Clause 9(C)(iii) of the Agreement in that regard.

8. Alternatively to 7, the Defendant says that: 30

- (a) the Plaintiff did not elect or effectively elect to terminate the Agreement pursuant to the said express provisions of Clause 9(C)(iii) by reason whereof the Plaintiff should be treated as having elected to affirm the Agreement on the basis of a revised base price for furnace oil of \$54.44 per metric ton; or
- (b) for the reasons set forth in (a) above, the Plaintiff should be treated as having elected to affirm the Agreement generally according to its terms.

9. Alternatively to 7 and 8, the Defendant says that the Plaintiff by its letter of 16th May, 1974 or otherwise by its conduct elected to affirm the Agreement.

10. The Defendant does not admit that the Plaintiff has suffered the damage particularised in paragraph 14 of the Points of Claim, either for the reasons assigned in the Points of Claim or otherwise. 40

No. 104
 —
 Affidavit: J. F.
 Sauerlander
 —
 27th October
 1975

No. 104

Affidavit: J. F. Sauerlander

ON the 27 day of October, 1975 I, JOHANN FRIEDRICH

SAUERLANDER, formerly of Nhulunbuy Gove, Northern Territory of Australia, but now care of 2460 Lemoine Avenue, Fort Lee, New Jersey, in the United States of America, say on oath:

1. From May, 1973 until September, 1975 I was the Site Administration Manager of the Plaintiff at Gove and as such I inter alia was responsible for the preparation of fortnightly notices of stockholding and estimated usage of Bunker Fuel, Diesoleum, Premium Motor Spirit, and ATK supplied by the Defendant to the Plaintiff for use at Gove.

10 2. On or about the second day of July, 1974 I caused to be prepared and thereafter dispatched to the Defendant the notice, a copy of which is annexed hereto marked "A", relating to each of the four petroleum products referred to therein.

3. This said notice was dispatched as a matter of routine and without my at that time addressing my mind to any contractual issues or disputes between the Plaintiff and the Defendant and without any prior communication between myself and any representative of the Plaintiff at its Sydney Head Office concerning the said notice or dispatch of it.

20 4. After I received a telex dated the 22nd day of July, 1974 from the Plaintiff's Head Office in Sydney asking me to insure that "there was no external correspondence or communication whatsoever from Gove relating to the supply of furnace oil either with BP or any other party." I caused the column relating to Bunker Fuel to be deleted from the pro-forma notices of stockholding and estimated usage from the Plaintiff to the Defendant and subsequent notices sent by the Plaintiff to the Defendant have omitted that column.

5. I ceased to be employed by the Plaintiff in September, 1975 and I am no longer a resident in Australia.

SWORN by the Deponent in the City, County and State of New York in the United States of America before me — J. F. SAUERLANDER

30 LESLIE SAMUEL WOODS, Vice Consul, Australian Consulate-General, New York.

No. 105

Stockholding Notice: Plaintiff to Defendant: (Annexure A to Affidavit of J.F. Sauerlander)

Nabalco Pty. Limited
Manager, Gove Joint Venture

BP Australia Limited,
ADELAIDE, S.A. 5001

July 2, 1974

Re: NABALCO/BP AUSTRALIA SUPPLY AGREEMENT

Dear Sirs,

40 Fortnightly notice of stock holding and estimated usage is as follows:

No. 104
—
Affidavit: J. F.
Sauerlander
—
27th October
1975
(cont'd)

No. 105
—
Stockholding
Notice: Plaintiff
to Defendant:
2nd July 1974
(Annexure A to
Affidavit of J. F.
Sauerlander)

<i>Stock holding</i>	<i>Bunker fuel</i>	<i>Diesoleum</i>	<i>Premium motor spir</i>	<i>A. T. K.</i>
Date: 2/7/74				
Stock on hand (l. gals)	10,616,229	525,561	443,540	304,185
Converted at (gal/tonne)	236	266	298	279
Stock on hand (tonne)	44,984	1,976	1,488*	1,090

*Includes 582 tonnes held on behalf of BP Nhulunbuy

ESTIMATED CONSUMPTION
(in tonnes)

2.7 - 8.7	6281			
9.7 -15.7	6281			
16.7 -22.7	6281			
23.7 -29.7	6281			
30.7 - 5.8	6256			
6.8 -12.8	6256			
13.8 -19.8	6256			
20.8 -26.8	6256	81 tonnes	34 tonnes	23 tonnes
27.8 - 2.9	5882	per week	per week	per week
3.9 - 9.9	5882			
10.9 -16.9	5882			
17.9 -23.9	5882			
24.9 -30.9	5882			
1.10- 7.10	5010			
8.10-14.10	5010			
15.10-21.10	5010			
22.10-28.10	5010			

10

20

Copies to:

BP Australia Ltd., Melbourne
General Manager
Administration Manager, Sydney
V. Trotta
J. Kennedy
Site Admin Manager

30

J. F. SAUERLANDER
Site Administration Manager

No. 106

Admissions
by Plaintiff

25th November
1975
(cont'd)

No. 106

Admissions by Plaintiff

1. At all material times relevant to the issues in this case the calculation of the Escalated Base Price Per Ton and Actual Cost Per Ton (calculated in accordance with the provisions of Sections 4, 5 and 6 of the Sales Agreement of January 22, 1969 between Gove Alumina Limited and Swiss Aluminium Limited) charged by

40

10 Gove Alumina Limited to Swiss Aluminium Limited and paid by Swiss Aluminium Limited to Gove Alumina Limited has been in accordance with the provisions of the said agreement and has included that portion of Operating Costs (Bauxite Treatment or Bauxite Mining Costs), borne and paid for by Gove Alumina Limited, and includes part of the price paid for furnace oil to KNPC and freight and associated charges thereon, incurred and/or paid for by Nabalco Pty. Limited, and calculated and recorded as being part of Operating Costs by Nabalco Pty. Limited pursuant to Clauses 10.1 of the Joint Venture Agreement and 5.1 of the Management Agreement, and charged to Gove Alumina Limited as part of total

20 2. At all material times relevant to the issues in this case the calculation of the sales Price Per Ton Escalated (calculated in accordance with the provisions of Section 5 of the Sales Agreement of October 14, 1969 between Swiss Aluminium Australia Limited and Swiss Aluminium Limited) charged by Swiss Aluminium Australia Limited to Swiss Aluminium Limited and paid by Swiss Aluminium Limited to Swiss Aluminium Australia Limited or to other parties on instructions of Swiss Aluminium Australia Limited has been in accordance with the provisions of the said agreement and has included that portion of Operating Costs (Bauxite Treatment or Bauxite Mining Costs) borne and paid for by Swiss Aluminium Australia Limited and includes part of the price paid for furnace oil to KNPC and freight and associated charges thereon, incurred and/or paid for by Nabalco Pty. Limited, and calculated and recorded as being part of Operating Costs by Nabalco Pty. Limited pursuant to Clauses 10.1 of the Joint Venture Agreement and 5.1 of the Management Agreement, and charged to Swiss Aluminium Australia Limited as part of Total Operating Costs pursuant to Clauses 9.1 and 9.2 of the Management Agreement.

30 3. At all material times relevant to the issues in this case the calculation of the actual price per Dry Ton of Bauxite (calculated in accordance with the provisions of Clause 10 of the Sales Agreement of January 22, 1969 between Gove Alumina Limited and Swiss Aluminium Limited) charged by Gove Alumina Limited to Swiss Aluminium Limited and paid by Swiss Aluminium Limited to Gove Alumina Limited has been in accordance with the provisions of the said agreement and has included that portion of Bauxite mining Costs borne and paid for by Gove Alumina Limited, and includes part of the price paid for furnace oil to KNPC and freight and associated charges thereon, incurred and/or paid for by Nabalco Pty. Limited, and calculated and recorded as being part of Bauxite Mining Costs by Nabalco Pty. Limited pursuant to Clauses 10.1 of the Joint Venture Agreement and 5.1 of the Management Agreement, and charged to Gove Alumina Limited as part of total Operating Costs pursuant to Clauses 9.1 and 9.2 of the Management Agreement.

40 4. Although it is not possible on the information presently collated by Nabalco Pty. Limited, to state with certainty that proportion of fuel oil (being the remaining part) used in the mining of bauxite for sale untreated to other than Swiss Aluminium Limited, the following are the most material facts known to Swiss Aluminium Australia Limited and Gove Alumina Limited, for determining such figures for the period July 1974 to August 1975.

- Approximately 64% of fuel oil was used to create steam and thereafter electricity, the balance has been used directly in the calcination process.
- Approximately 5% of the electricity generated was allocated to Bauxite Mining Costs.
- 50 — During the period approximately 21% of all bauxite mined was exported to purchasers other than Swiss Aluminium Limited.

No. 107

Affidavit: J. de
Korver11th December
1975

No. 107

Affidavit: J. de Korver

I, JOHN DE KORVER, of "The Hawthornes", Inglemere Road, London S.E. 23, Vice President, Marine Transportation, Occidental International Oil, Inc., Say on Oath:

1. I am a Vice President of Occidental International Oil, Inc. (O.I.O.I.), Portland House, Stag Place, London SW1E 5BY, England, a subsidiary of Occidental Petroleum Corporation. O.I.O.I. is in the business of providing a wide range of services to a large group of companies owned directly or indirectly by Occidental Petroleum Corporation, including Concord Petroleum Corporation (Concord), a company incorporated in Liberia and having its head office in Hamilton, Bermuda. O.I.O.I. provides Concord, the chartering and trading subsidiary of Occidental Petroleum Corporation, with administrative, management, accounting and chartering services and, when authorised by Concord, conducts negotiations for contracts of affreightments and sub-chartering of vessels for Concord's account. 10

2. As such, I am the only person since 1972 who is responsible for the negotiations and operations of Concord's and, therefore, Occidental's fleet of tankers whether such activity is chartering-in, chartering-out of vessels or entering into contracts of affreightments in which the Occidental Group is involved. 20

3. Annexed hereto and marked with the letter "A" is a true copy of a contract of affreightment dated the 4th of June, 1974, made between Concord Petroleum Corporation and International United Refining Company Limited, relating to the transportation of crude oil from the Persian Gulf to the U.S. Gulf, together with subsequent addenda.

Neither Concord nor any company within the Occidental Group contracted with the owners of Russian ships in the year 1974 for the carriage of oil from the Persian Gulf to North-West Europe at a rate of Worldscale 85 or at any other rate.

— JOHN DE KORVER.

Sworn by the Deponent in the City of Westminster, London, England, U.K. before me, this 11th day of December 1975. 30

— I. CROWTHER-SMITH.

NOTARY-PUBLIC
LONDON

No. 108

No. 108

Contract of
Affreightment:
Concord
Petroleum
Corporation and
International
United Refining
Co. Ltd.:
4th June 1974
(Annexure "A"
to Affidavit of J.
de Korver)

Contract of Affreightment: Concord Petroleum Corporation and International United Refining Co Ltd:

(Annexure "A" to Affidavit of J. de Korver)

IT IS THIS DAY AGREED between CONCORD PETROLEUM CORPORATION of HAMILTON BERMUDA (hereinafter referred to as "Owners") disponent owners of vessels to be nominated (hereinafter referred to as "the vessel") and International United Refining Co. Ltd. of London (hereinafter referred to as "Charterers"). 40

1. Owners guarantee that:—
- (b) the vessel's cargoes prior to loading under this charter will have been Crude and/or dirty Petroleum Products or harmless bulk cargoes
4.
5.
- (c) the vessel is fully fitted with heating coils in all cargo tanks;
- (e) the vessel is equipped with derricks capable of lifting to and supporting at the vessel's port and starboard manifolds heavy submarine hoses of up to 5 tons in weight.
- 10 (f) throughout the period of this charter the vessel will be entered in TOVALOP.
2. Owners shall exercise due diligence to ensure that from the time when their obligation to proceed under clause 4 attaches and before, at the commencement of and throughout the loaded voyage
- (a) the vessel's hull, machinery, boilers, tanks, equipment and facilities are in good order and condition, in every way fit for the service required, and fit to carry the cargo specified in clauses 4 and 26 hereof; and
- (b) the vessel has a full and efficient complement of master, officers and crew.
3. The master is bound to keep the tanks, pipes and pumps of the vessel always clean for the cargo specified in clause 4 hereof.
- 20 4. Subject to the provisions of clauses 5, 10, 22 and 23 hereof the vessel shall, with utmost despatch, proceed to a berth, dock, anchorage, submarine line, alongside a vessel or vessels or a lighter or lighters or any other place whatsoever as ordered by Charterers in one (1) or two (2) ports Persian Gulf excluding Fao and Abadan (intention Jebel Dhanna) or so near thereunto as she may safely get, and there load a full cargo of Crude Oil and/or dirty Petroleum Products maximum 2 grades within vessels natural segregation — maximum heating 125° F in bulk, but not in excess of the maximum quantity consistent with the International Load Line Convention, for the time being in force and being so loaded shall proceed (as ordered on signing bills of lading) to a berth, dock, anchorage, submarine line alongside a vessel or vessels or a lighter or lighters or any other place whatsoever as ordered by Charterers in one (1) or two (2) ports U.S. Gulf or U.S. Atlantic coast always excluding Florida (if New York not North of George Washington Bridge) or so near thereunto as she may safely get, and deliver the cargo.
- 30 5. Charterers shall exercise due diligence to order the vessel only to places which they consider safe for the vessel and where subject to the provisions of clause 21 hereof she may always lie afloat, but notwithstanding anything contained in this or any other clause of this charter, Charterers shall not be deemed to warrant the safety of any place and shall be under no liability in respect thereof except for loss or damage caused by their failure to exercise due diligence as aforesaid.
- 40 6. Freight shall be earned concurrently with delivery of the cargo at the discharge port or ports and shall be paid upon receipt of notice of completion of discharging Telegraphically to The Chase Manhattan Bank NA, (Attention International Paying & Receiving Dept.), 1 New York Plaza, New York, N.Y. 10015 For credit to Concord Petroleum Corporation Dollar account No. 15006638 with The Chase Manhattan Bank London in US\$ in New York at 150% of the rate for the voyage as provided for in the Worldwide Tanker Nominal Freight Scale (hereinafter referred to as "Worldscale") current at the date of completion of loading per ton of 2240 lbs. of cargo without deduction for normal or expected losses provided that no freight shall be payable on any quantity in excess of the maximum quantity consistent with the International Load Line Convention for the time being in force.
- 50

No. 108
—
Contract of
Affreightment:
Concord
Petroleum
Corporation and
International
United Refining
Co. Ltd.:
4th June 1974
(Annexure "A"
to Affidavit of J.
de Korver)
(cont'd)

1. Description
of vessel

2. Condition
of vessel

Cleanliness of
tanks

Loading Port(s)
Range

Cargo

Discharging
Port(s) Range

Safe Port

Payment of
Freight

If the vessel is ordered to proceed on a voyage for which a fixed differential is

<p>No. 108 — Contract of Affreightment: Concord Petroleum Corporation and International United Refining Co. Ltd.: 4th June 1974 (Annexure "A") to Affidavit of J. de Korver) (cont'd)</p>	<p>provided in <i>Worldscale</i> current at the date of commencement of loading, such fixed differential shall be payable without applying the percentage referred to in this clause.</p>	
<p>7. Dues and other charges</p>	<p>7. Dues and other charges upon the vessel, including those assessed by reference to the quantity of cargo loaded or discharged, shall be paid by Owners, and dues and other charges upon the cargo shall be paid by Charterers. However irrespective of the foregoing, where under a provision of <i>Worldscale</i> a due or charge is expressly for the account of Owners or Charterers then such due or charge shall be payable in accordance with such provision.</p>	
<p>8. Loading and Discharging of Cargo</p>	<p>8. The cargo shall be loaded into the vessel at the expense of Charterers, and at their risk only up to the vessel's permanent hose connections. The cargo shall be discharged from the vessel at the expense of Owners and at their risk only up to the vessel's permanent hose connections. Owners shall unless otherwise notified by Charterers or their agents supply all hands, equipment and facilities required on board for mooring and unmooring and connecting and disconnecting hoses for loading and discharging. If shore regulations do not permit fire on board and steam is necessary for discharging purposes Charterers shall provide such steam at their expense.</p>	10
<p>Cargo Maximum</p>	<p>9. In no event shall Charterers be required to furnish cargo in excess of the quantity stated in clause 1(a) hereof as the vessel's capacity for cargo.</p>	20
<p>Deadfreight</p>	<p>10. Charterers need not supply a full cargo but in that case freight shall nevertheless be paid as if the vessel had been loaded with a full cargo.</p>	
<p>Shifting</p>	<p>11. Charterers shall have the right of requiring the vessel to shift at ports of loading or discharging from a loading or discharging berth or place and back to the same or to another such berth or place once or more often on payment of all additional expenses incurred.</p>	
<p>Port and Terminal Combinations</p>	<p>For the purpose of freight payment the places grouped in <i>Port and Terminal Combinations</i> in <i>Worldscale</i> current at the date of commencement of loading are to be considered as berths within a single port, Charterers paying shifting expenses in accordance with the foregoing. Time spent shifting shall count against laytime or if the vessel is on demurrage for demurrage.</p>	30
<p>Laytime</p>	<p>13. 72 running hours shall be allowed Charterers for loading and discharging and all other Charterers' purposes whatsoever but 6 hours turn from notice of readiness at loading port Charterers shall have the right of loading and discharging during the night paying all extra expenses incurred ashore.</p>	
<p>Commencement of Laytime Notice of Readiness</p>	<p>14. Subject to the provisions of clause 15 hereof laytime shall at each loading and discharging port commence when the vessel is in all respects ready to load or discharge and written notice thereof has been received from the master or Owners agents by Charterers or their agents and the vessel is securely moored at the berth or other loading or discharging spot. Whether or not the specified berth or other loading or discharging spot is available and accessible, if the vessel is nevertheless ordered by Charterers to wait before proceeding thereto, laytime shall commence when written notice of readiness has been received and the vessel is securely moored at the customary anchorage.</p>	40
<p>Termination of Laytime</p>	<p>Laytime shall continue to run and demurrage, if incurred, shall continue to be payable until cargo hoses have been disconnected.</p>	
<p>Suspension of Laytime</p>	<p>15. Time shall not count against laytime or if the vessel is on demurrage for demurrage when spent or lost</p>	
	<p>(i) on an inward passage moving from anchorage, even if lightening has taken place at the anchorage, to the berth or other place of loading or discharging specified by Charterers</p>	50

- (ii) due to breakdown inefficiency or other cause attributable to the vessel and/or Owners
- (iii) as a result of strike lock out, stoppage or restraint of labour of master, officers or crew of the vessel or tug boats or pilot
- (iv) in handling ballast.

No. 108
 —
 Contract of
 Affreightment:
 Concord
 Petroleum
 Corporation and
 International
 United Refining
 Co. Ltd.:
 4th June 1974
 (Annexure "A"
 to Affidavit of J.
 de Korver)
 (cont'd)

10 16. Charterers shall pay demurrage at 150% of the demurrage rate applicable to vessels of a similar size to the vessel as provided for in *Worldscale* current at the date of completion of loading per running day and pro rata for part of a running day for all time by which the allowed laytime specified in clause 13 hereof is exceeded by the time taken to load and discharge and which under the provisions of this charter counts as laytime or for demurrage. If, however, all or part of such demurrage is incurred due to fire or explosion at ports of loading and/or discharging in or about the plant of, or by breakdown of machinery of, Charterers, shippers or consignees of the cargo or arises or results from act of God; act of war, strike; boycott; lock out; riot; civil commotion, and arrest or restraint of princes, rulers or peoples the rate of demurrage shall be reduced to half per running day or pro rata for part of a running day for such demurrage or part thereof.

16. Demurrage

20 17. If on passage to the nominated port of discharging the master finds that the port is inaccessible owing to ice, he shall immediately request Charterers by radio for revised orders and remain outside the area of ice-bound water. Upon receipt of such request, Charterers shall give orders for the vessel to proceed to an alternative ice-free and accessible port where there are facilities for receiving the cargo in bulk. In this event, freight shall be paid at the rate applicable under this charter to such alternative discharging port and any period by which the time taken to reach such alternative port exceeds the time which would have been taken had the vessel proceeded thither direct from the port of loading shall be paid for by Charterers at the demurrage rate as provided in clause 16 hereof per running day and pro rata for part of a running day.

Ice on Voyage

30 18. If on or after the vessel's arrival at a nominated port of discharging there is a danger of the vessel being frozen in, the master shall proceed to the nearest safe and ice-free position and at the same time request Charterers by radio for revised orders. Immediately upon receipt of such request Charterers shall give orders for the vessel either to proceed to an alternative ice-free and accessible port where there is no danger of the vessel being frozen in and where there are facilities for receiving the cargo in bulk or to return to and discharge at the nominated port.

Ice at Discharge
 Port

40 If the vessel is ordered to proceed to an alternative port, the sum in respect of freight and delay to be paid by Charterers shall be as laid down in clause 17 hereof, but if the vessel discharges at the nominated port, then the whole of the time occupied from the time the master's request for revised orders has been received by Charterers until shore hoses are disconnected after completion of discharge shall count against laytime or if the vessel is on demurrage, for demurrage. Any risk of physical damage to the vessel by reason of her returning to a port in which there is a danger of her being frozen in shall be for Charterers account and any delay caused thereby shall count against laytime or if the vessel is on demurrage for demurrage.

19. Time lost at any port due to quarantine shall not count against laytime or for demurrage unless such quarantine was in force at the time when such port was nominated by Charterers.

Quarantine

50 20. The vessel shall be addressed to agents nominated by Owners at ports of loading and discharging.

Agency

21. If in accordance with any clause of this charter Charterers order the vessel to a port of discharge which owing to insufficient depth of water cannot accommodate the vessel with the quantity of cargo on board Charterers undertake

Charterers'
 obligation at
 Shallow Draft
 Port

No. 108
 —
 Contract of
 Affreightment:
 Concord
 Petroleum
 Corporation and
 International
 United Refining
 Co. Ltd.:
 4th June 1974
 (Annexure "A"
 to Affidavit of J.
 de Korver)
 (cont'd)

to discharge sufficient cargo into vessels or lighters to enable the vessel to reach and lie always afloat at such discharge port. Charterers further undertake that, in the case of the vessel being ordered to discharge at more than one port, sufficient cargo will be discharged at each previous port to enable the vessel to reach and lie always afloat at the subsequent port or ports.

22. Charterers shall have the option of ordering the vessel to the following destinations for wireless orders:—

Quoin Island
 Land's End
 Gibraltar
 Suez
 St. Kitts

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22. Orders for
 Loading/
 Discharging
 Ports

If Charterers exercise such option they shall nominate actual loading or discharging port(s) in sufficient time to avoid delay to the vessel.

Deviation

23. If after loading or discharging ports have been nominated Charterers desire to vary any of such ports, Owners agree to issue such revised instructions as are necessary to give effect to Charterers' revised orders and Charterers agree to reimburse Owners for bunkers as applied by Shell International current at the date of completion loading in respect of any deviation, expenses and/or delay which may be incurred in consequence thereof and indemnify them against claims brought by holders of bills of lading by reason of such deviation. In addition, Charterers will pay at replacement price for any extra bunkers consumed, but shall not be liable for any other loss which results to Owners from Charterers varying such ports as aforesaid unless, immediately upon such variation, Owners notify Charterers of such loss. On receipt of such notification, Charterers shall have the right to revise the orders varying such ports, failing which any proved loss arising out of such variation shall be paid for by Charterers at cost.

20

Heating of Cargo

24. Owners undertake that the cargo shall be heated on passage to and, if required, whilst at the discharging port or ports in accordance with instructions given by Charterers or their agents at the loading port or ports, or by the consignees at the discharging port or ports, as the case may be but subject to a maximum temperature of 125° F.

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E.T.A.

25. Owners undertake that the master shall advise by radio, direct to Charterers, immediately on leaving the final port of call on the previous voyage or within 48 hours of the date of this charter, whichever is the later, the time and date of the vessel's expected arrival at the loading port, or, if the loading area is the Arabian Gulf then the time of arrival off Quoin Island. Owners also undertake that the master shall confirm or amend such advice not later than 96 hours before his vessel is due at the loading port or, in the case of the Arabian Gulf, off Quoin Island. The master shall also radio to Charterers direct immediately after departure from the final port of loading, the vessel's expected time of arrival at the discharging port or the point to which the vessel has been instructed to proceed for wireless orders, and shall again radio Charterers not later than 96 hours before the vessel is due at the discharging port. Any variation of more than 12 hours from expected times of arrival at loading or discharging ports shall be notified by the master to Charterers immediately. All radio messages sent by the master shall be addressed as per voyage instructions. Owners shall be responsible for any consequences or additional expenses arising as a result of non-compliance with this clause.

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Subletting/
 Assignment

27. Charterers shall have the option of subletting or assigning this charter to any individual or company, but Charterers shall always remain responsible for the due fulfilment of all the terms and conditions of this charter.

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Liberty

28. The vessel shall be at liberty to tow or be towed, to assist vessels in all

positions of distress, to call at any port or ports for oil fuel supplies, to sail without pilots and to deviate for the purpose of saving life or property.

29. Without prejudice to any express term hereof, the provisions of Articles III (other than Rule 8), IV, VIII and IX of the Carriage of Goods by Sea Act, 1924, of the United Kingdom shall apply to this charter and shall be deemed to be inserted in extenso herein. This charter shall be deemed to be a contract for the carriage of cargo by sea to which the said articles apply and Owners shall be entitled to the protection of the said articles in respect of any claim made hereunder. Charterers shall not, save to the extent otherwise in this charter expressly provided, be responsible for any loss or damage or delay or demurrage or failure in performance hereunder arising or resulting from act of God; act of war, seizure under legal process; quarantine restrictions; strikes; boycotts; lockouts; riots; civil commotions; and arrest or restraint of princes, rulers or peoples.

30. (i) Bills of Lading are to be signed as Charterers direct without prejudice to this charter. Charterers hereby indemnify Owners against all liabilities that may arise from the signing of Bills of Lading in accordance with the directions of Charterers to the extent that the terms of such Bills of Lading impose more onerous liabilities upon Owners than those assumed by Owners under the terms of this charter.

(ii) Owners agree that payment of Freight shall be covered solely by the terms of this charter and shall not seek to recover Freight under the terms of the Bill of Lading. Owners shall be liable to pay the contribution to General Average due from the Freight payable under this charter which is at their risk.

(iii) Charterers shall procure that all Bills of Lading presented to the master for signature pursuant to the terms of this charter shall contain Ice and War Risks Clauses in terms substantially similar to the terms of clauses 17, 18 and 31 of this charter so far as applicable to Bills of Lading.

31. (A) The master shall not be required or bound to sign Bills of Lading for any blockaded port or for any port which the master or Owners in his or their discretion consider dangerous or impossible to enter or reach.

(B) (i) If any port of loading or of discharging to which the vessel may properly be ordered under the provisions of this charter or Bills of Lading issued pursuant to this charter be blockaded, or

(ii) If owing to any war, hostilities, warlike operations, civil war, civil commotions, revolutions, or the operation of international law (a) entry to any such port of loading or of discharging or the loading or discharging of cargo at any such port be considered by the master or Owners in his or their discretion dangerous or prohibited or (b) it be considered by the master or Owners in his or their discretion dangerous or impossible or prohibited for the vessel to reach any such port of loading or of discharging

Charterers shall have the right to order the cargo or such part of it as may be affected to be loaded or discharged at any other port of loading or of discharging within the range of loading or discharging ports respectively established under the provisions of this charter (provided such other port is not blockaded or that entry thereto or loading or discharging of cargo thereat or reaching the same is not in the master's or Owners' discretion dangerous or prohibited). If in respect of a port of discharging no orders be received from Charterers within 48 hours after they or their agents have received from Owners a request for the nomination of a substitute port, Owners shall then be at liberty to discharge the cargo at any port which they or the master may in their or his discretion decide on (whether within the range of discharging ports established under the provisions of this charter or not) and such discharging shall be deemed to be due fulfilment of the contract or contracts of

No. 108
—
Contract of
Affreightment:
Concord
Petroleum
Corporation and
International
United Refining
Co. Ltd.:
4th June 1974
(Annexure "A"
to Affidavit of J.
de Korver)
(cont'd)

29. *Exceptions*

Bills of Lading

War Risks

No. 108
 —
 Contract of
 Affreightment:
 Concord
 Petroleum
 Corporation and
 International
 United Refining
 Co. Ltd.:
 4th June 1974
 (Annexure "A"
 to Affidavit of J.
 de Korver)
 (cont'd)

affreightment so far as cargo so discharged is concerned. In the event of the cargo being loaded or discharged at any such other port within the respective range of loading or discharging ports established under the provisions of this charter, this charter shall be read in respect of freight and all other conditions whatsoever as if the voyage performed were that originally nominated. However, if the vessel discharges the cargo at a port outside the range of discharging ports established under the provisions of this charter, freight shall be paid as for the voyage originally nominated and all extra expenses involved in reaching the actual port of discharging and/or discharging the cargo thereat shall be paid by Charterers. In this latter event Owners shall have a lien on the cargo for all such extra expenses.

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(C) The vessel shall have liberty to comply with any directions or recommendations as to departure, arrival, routes, ports of call, stoppages, destinations, zones, waters, delivery or in any other wise whatsoever given by the government of the nation under whose flag the vessel sails or any other government or local authority including any de facto government or local authority or by any person or body acting or purporting to act as or with the authority of any such government or authority or by any committee or person having under the terms of the war risks insurance on the vessel the right to give any such directions or recommendations. If by reason of or in compliance with any such directions or recommendations, anything is done or is not done such shall not be deemed a deviation.

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If by reason of or in compliance with any such directions or recommendations the vessel does not proceed to the port or ports of discharging originally nominated or to which she may have been properly ordered under the provisions of this charter or bills of lading issued pursuant to this charter, the vessel may proceed to any port of discharging which the master or Owners in his or their discretion may decide on and there discharge the cargo. Such discharging shall be deemed to be due fulfilment of the contract or contracts of affreightment and Owners shall be entitled to freight as if discharging had been effected at the port or ports originally nominated or to which the vessel may have been properly ordered under the provisions of this charter or Bills of Lading issued pursuant to this charter. All extra expenses involved in reaching and discharging the cargo at any such other port of discharging shall be paid by Charterers and Owners shall have a lien on the cargo for freight and all such extra expenses.

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Both to Blame
 Clause

32. If the liability for any collision in which the vessel is involved while performing this charter falls to be determined in accordance with the laws of the United States of America, the following clause, which shall be included or be deemed to be included in all Bills of Lading issued under this charter, shall apply:—

If the vessel comes into collision with another vessel as a result of the negligence of the other vessel and-or any act, neglect or default of the master, mariner, pilot or the servants of the Owners in the navigation or in the management of the vessel, the owners of the cargo carried hereunder will indemnify the Owners against all loss or liability to the other non-carrying vessel or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of the said cargo, paid or payable by the other or non-carrying vessel or her owners to the owners of the said cargo and set off, recouped or recovered by the other or non-carrying vessel or her owners as part of their claim against the carrying vessel or Owners.

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The foregoing provisions shall also apply where the owners, operators or those in charge of any vessel or vessels or objects other than, or in addition to, the colliding vessels or objects are at fault in respect to a collision or contract.

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33. General Average shall be payable according to the York/Antwerp Rules, 1974, and shall be adjusted in London, but should the adjustment be made in accordance with the law and practice of the United States of America, the following clause, which shall be included or be deemed to be included in all Bills of Lading issued pursuant to this charter, shall apply:—

10 In the event of accident, danger, damage or disaster before or after the commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the Owners are not responsible, by statute, contract or otherwise, the cargo, shippers, consignees or owners of the cargo shall contribute with the Owners in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the cargo.

If a salving vessel is owned or operated by the Owners, salvage shall be paid for as fully as if the said salving vessel or vessels belonged to strangers. Such deposit as the Owners or their agents may deem sufficient to cover the estimated contribution of the cargo and any salvage and special charges thereon shall, if required, be made by the cargo, shippers, consignees or owners of the cargo to the Owners before delivery.

20 34. All Bills of Lading issued pursuant to this charter shall contain the following Paramount clause:

This Bill of Lading shall

- 30 (1) in relation to the carriage of any cargo from any port in Great Britain or Northern Ireland to any other port whether in or outside Great Britain or Northern Ireland have effect subject to the provisions of the Carriage of Goods by Sea Act, 1924, and to the Rules contained in the Schedule thereto as applied by that Act and nothing herein contained shall be deemed a surrender by the Owners of any of their rights or immunities or an increase of any of their responsibilities or liabilities under the said Act;
- (2) in relation to the carriage of any cargo from any port of shipment in territory in which legislation similar in effect to the Carriage of Goods by Sea Act, 1924, of the United Kingdom is in force, have effect subject to such legislation and to the Rules contained in the Schedule thereto as applied by such legislation and nothing herein contained shall be deemed to be a surrender by the Owners of any of their rights or immunities under the said legislation or an increase of any of their responsibilities or liabilities under the said legislation; and
- 40 (3) in any other case have effect as if the contract of carriage herein contained were a contract of carriage to which the provisions of the Carriage of Goods by Sea Act, 1924, of the United Kingdom applied and the Owners shall be entitled to the benefit of the privileges, rights and immunities conferred by the said Act and the Rules contained in the Schedule thereto as if the same were herein specifically set out.

If any term of this Bill of Lading be repugnant to the provisions of the said Act or to the said legislation to any extent, such term shall be void to that extent but no further.

37. Owners shall ensure that the master shall

- 50 (a) at the start of the ballast passage before presenting for loading hereunder, retain on board all oil residues remaining in the vessel from the previous cargo;
- (b) during tank washing collect the washings into one cargo compartment

No. 108
—
Contract of
Affreightment:
Concord
Petroleum
Corporation and
International
United Refining
Co. Ltd.:
4th June 1974
(Annexure "A"
to Affidavit of J.
de Korver)
(cont'd)

33. General
Average New
Jason
Clause

Paramount
Clause

Oil Pollution
Prevention
Disposal of Tank
Washings

No. 108
 —
 Contract of
 Affreightment:
 Concord
 Petroleum
 Corporation and
 International
 United Refining
 Co. Ltd.:
 4th June 1974
 (Annexure "A"
 to Affidavit of J.
 de Korver)
 (cont'd)

- and, after maximum separation of free water, discharge such water overboard;
 (c) thereafter notify Charterers through Owners by radio of the amounts of oil and water in the segregated tank washings.

On being so notified, Charterers shall, before the vessel's arrival at the loading port, give instructions for the disposal of such segregated tank washings and Owners shall ensure that the master, on the vessel's arrival at the loading port, shall arrange, in conjunction with the cargo suppliers, for the measurement of the quantity of such segregated tank washings and shall make a note of such quantity in the vessel's ullage record.

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If Charterers require the cargo to be loaded on top of such segregated tank washings, freight in accordance with clause 6 hereof shall be payable on such quantity of segregated tank washings up to a tonnage equivalent to 1% of the vessel's deadweight tonnage on tropical marks and Owners shall ensure that the master shall keep the water in such segregated tank washings to a minimum which shall in any event not exceed 0.15% of the vessel's deadweight tonnage on tropical marks.

If Charterers require such segregated tank washings to be kept separate from the cargo to be loaded, they shall pay for any deadfreight so incurred.

Law and
 Litigation

38. (a) This charter shall be construed and the relations between the parties determined in accordance with the laws of England.
 (b) Any dispute arising under this charter shall be decided by the English Courts to whose jurisdiction the parties hereby agree.

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Arbitration

Provided that either party may elect to have the dispute referred to the arbitration of a single arbitrator in London or New York according to Disponent Owners and Charters, in accordance with the provisions of the Arbitration Act, 1950, or any statutory modification or re-enactment thereof for the time being in force. Such election shall be made by written notice by one party to the other not later than 21 days after receipt of a notice given by one party to the other of a dispute having arisen under this charter.

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Clauses 39 to 59 inclusive attached are deemed incorporated in this Charter Party.

INTERNATIONAL UNITED REFINING CO. LTD., — D. G. ROKISON,
 Director.

CONCORD PETROLEUM CORP., — R. G. MARTIN, Executive Vice
 President.

**Additional Clauses to Contract of Affreightment Concord Petroleum Corporation
 International United Refining Company dated 4th June, 1974**

39. This Charter Party shall hereinafter be referred to A "Contract".

40. This Contract shall be for 475,000 long tons ten (10) percent more or less in Owners option per annum or prorata to be lifted in 22 bottoms with one lifting per calendar month commencing July 1974.

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41. Cargo sizes shall be 35,000 to 50,000 long tons ten (10) percent more or less in Owners option, with Owners option to nominate, but not more than once per

calendar quarter, the "MIKTON" or substitute of 27,000 long tons ten (10) percent more or less in Owners option cargo capacity.

42. Laydays for the first lifting to be 25th July 1974 to 10th August 1974. To be narrowed.

43. Cancelling date on final lifting is 6th April 1976.

44. Vessel will be maximum eighteen (18) years of age at time of lifting but if Owners nominate vessel over 15 years of age then at their request Charterers will advise overage Insurance cost, if any, which Owner can accept for their own account or substitute with vessel maximum 15 years of age.

10 45. Maximum arrival draft at discharge port 39 feet saltwater and no deadfreight for Charterers account over this figure. Any Lighterage required over 39 feet to be for Owners' Account and any Lighterage below 39 feet to be for Charterers' Account.

46. Charterers have option to declare minimum five (5) days prior to loading a reduced quantity for which Charterers pay an additional Worldscale 15 points or prorata for every foot less declared on arrival draft at discharge port.

47. Maximum API of cargo to be 41 but if crude over 41 API any deadfreight thus incurred shall be for Charterers account.

20 48. Nomination Clause—Owners to nominate vessel or substitute giving size 40 days in advance with 15 days spread of laydays and actual nomination minimum 20 days prior to laydays when laydays/cancelling to be declared with maximum 6 days spread. Charterers to agree to amend the laydays spread if necessary and if same is acceptable to ADNOC.

49. In case of a general embargo by Arabian Gulf producing countries to the USA, Charterers have option to discharge UK Continent (Gibraltar-Hamburg range) or Scandinavia or Mediterranean (excluding Israel and Egypt) or Caribbean or East coast Canada or Atlantic Isles, always within institute warranty limits at no extra rate to Charterers.

30 50. In the event of the Suez Canal being opened for the transit of Tankers of the size nominated under this Contract then Charterers to have benefit, if any, of the revised rates.

51. Notwithstanding Owners bunker purchase obligation as per Clause 36 of Contract it is agreed that bunker ceiling prices to be based on an average price of US Dollars eighty (80) per long ton delivered for intermediate fuel oil maximum 1500 seconds Redwood. For each full one (1) US Dollar the posted/listed average price of BP at Das Island and Exxon at New Orleans quoted at the time of notice of readiness for each loading exceeds the delivered base price of US Dollars eighty (80) per long ton, the freight rate will be increased for that voyage by 0.8 Worldscale points.

40 52. United Refining Company of Warren Pennsylvania to provide guarantee of International United Refining Company Limited of London.

53. A commission of 2½% on freight, deadfreight and Demurrage is payable to Barks Williams London for division with International United Refining Co. Ltd. of London and 1¼% to Pacific Marine (Bermuda) Limited, for division.

54. Any increase in war risk insurance premiums on vessel and/or crew and/or crew war bonuses over and above those in effect as of the date of this contract to be for Charterers account excluding any additional for nominated vessel being over 15 years of age.

50 55. War cancellation — It is hereby mutually agreed that Charterers and/or Owners shall have the liberty to cancel this Contract should any major power become involved in a war with Liberia, a Scandinavian country, Greece, Panama, Italy, Yugoslavia, or each other. Major powers are defined as U.S.A., Great Britain, France, Japan and Peoples Republic of China, and U.S.S.R.

No. 108

Contract of
Affreightment:
Concord
Petroleum
Corporation and
International
United Refining
Co. Ltd.:
4th June 1974
(Annexure "A"
to Affidavit of J.
de Korver)
(cont'd)

No. 108
 —
 Contract of
 Affreightment:
 Concord
 Petroleum
 Corporation and
 International
 United Refining
 Co. Ltd.:
 4th June 1974
 (Annexure "A"
 to Affidavit of J.
 de Korver)
 (cont'd)

56. With reference to the nomination clause and under the provisions of Clause 29 (General exceptions Clause) failure to lift a cargo under the provisions of this nomination clause shall only effect that single voyage and not the rights and obligations of the Owner and Charterers under the total Contract.

57. Cargoes exclude vapour pressure — cargo shall not be shipped which has a vapour pressure at 100 degrees F. (one hundred degrees fahrenheit) in excess of 13½ lbs. (thirteen point five pounds) as determined by the current ASTM method (REID) D323.

58. Further to Clauses 31, 32, 33 and 34 of Shellvoy 3 Charter Party, Chamber of Shipping 1952 war risk Clauses (Tanker) 1, 2 and 3 as attached are hereby incorporated in this Contract and all Bills of Lading signed under this Contract shall include or shall be deemed to include Charter Party Clauses 31, 32, 33, 34 and Clauses 1, 2 and 3 of Chamber of Shipping War Risk. (Note: War risk clauses not reproduced.)

59. Vessel to be capable of minimum discharge of ten thousand barrels (10,000 Blas.) per hour provided shore facilities permit.

9th May, 1975

Addendum Number One to Contract of Affreightment dated 4th June, 1974 between Concord Petroleum Corporation and International United Refining Co. Ltd.

In consideration of Owners allowing vessel to discharge GUAYANILLA, Puerto Rico under Voyage 10 (NAI GINO loaded JEBEL DHANNA 30th April, 1975) of the above Contract of Affreightment it has been agreed as follows:—

- (1) Charterers confirm that Guayanilla can accept the NAI GINO and that there are no physical restrictions of the port affecting the vessel.
- (2) In addition to the freight rate of 150 per cent of Worldscale current at the date on completion of loading for the voyage JEBEL DHANNA to GUAYANILLA, the Charterers shall make a lump sum payment to the Owners of US Dollars 80,000 Net.

The above agreement is made without prejudice to Charterers and Owners respective claims.

All other terms and conditions of Contract of Affreightment dated 4th June, 1974 to remain the same.

INTERNATIONAL UNITED REFINING CO. LTD., — D. G. ROKISON,
 Director.

CONCORD PETROLEUM CORPORATION, — W. M. KOENEKE,
 Attorney-in-Fact.

28th May, 1975

Addendum Number Two to Contract of Affreightment dated 4th June, 1974 between Concord Petroleum Corporation and International United Refining Co. Ltd.

In consideration of Owners allowing Charterers the option to discharge GUAYANILLA, Puerto Rico under Voyage 11 (Kudamatsu Maru loaded JEBEL DHANNA 26th May, 1975) of the above Contract of Affreightment it has been

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agreed that if such option is declared then:—

- (1) Charterers confirm that Guayanilla can accept the Kudamatsu Maru and that there are no physical restrictions of the port affecting the vessel.
- (2) In addition to the freight rate of 150 per cent of Worldscale current at the date on completion of loading for the voyage JEBEL DHANNA to GUAYANILLA, the Charterers shall make a lump sum payment to the Owners of U.S. Dollars 80,000 Net.

The above agreement is made without prejudice to Charterers and Owners respective claims.

10 All other terms and conditions of Contract of Affreightment dated 4th June 1974 to remain the same.

INTERNATIONAL UNITED REFINING CO. LTD., — D. G. ROKISON,
Director.

CONCORD PETROLEUM CORPORATION, — W. M. KOENEKE,
Attorney-in-Fact.

Rider to Addendum No. Two. Dated 28th May, 1975 of C.O.A. dated 4th June, 1974 between Concord and United Refining.

20 Subject to terms and conditions of Addendum Number Two Owners hereby agree for vessel to discharge at Yabucoa Puerto Rico. All other terms and conditions of C.O.A. dated 4th June, 1974 and Addendums Numbers One and Two remain the same.

INTERNATIONAL UNITED REFINING CO. LTD., — D. G. ROKISON,
Director.

CONCORD PETROLEUM CORP., — R. G. MARTIN, Executive Vice
President.

25th June, 1975

Addendum Number 3 to Contract of Affreightment dated 4th June 1974 between Concord Petroleum Corporation and International United Refining Co. Ltd.

30 In consideration of both Owners and Charterers discharging their undertakings stipulated in the side letter dated 25th June, and attached hereto. The following is agreed:

- (1) Owners agree that for the lifting postponed from December, 1974 to 27th January 1975, the Worldscale increase (1974 to 1975) to be equally split between both Parties as far as rate and demurrage (Nai Gino loading).
- (2) The twelfth lifting of the first year by the Rina Lolli Ghetti (ETA PG 5/7/1975) represents approximately 10% option on the annual quantity which Owners are entitled to as per contract. Owners agree to split the Worldscale increase (1974-1975) on this one lifting as far as rate and demurrage.
- (3) For the scheduled 4 (four) liftings in 1976 Owners waive their right to claim any additional freight/demurrage increase for 1976, and to freeze at the 1975 rates, as applicable on 31st December, 1975, on the basis that Owners are protected for any Bunker expenditure above the Worldscale incorporated Bunker Component. For this purpose Owners will officially request Worldscale to advise the 1975 Bunker price incorporated in their

No. 108
—
Contract of
Affreightment:
Concord
Petroleum
Corporation and
International
United Refining
Co. Ltd.:
4th June 1974
(Annexure "A")
to Affidavit of J.
de Korver)
(cont'd)

No. 108
 —
 Contract of
 Affreightment:
 Concord
 Petroleum
 Corporation and
 International
 United Refining
 Co. Ltd.:
 4th June 1974
 (Annexure "A"
 to Affidavit of J.
 de Korver)
 (cont'd)

flat rate for the voyage Das Island to New Orleans which same amount will be frozen as well. Each additional full U.S. Dollar 1.00 (one) above this price will increase the freight rate by 0.8 Worldscale points. Owners to waive any increases in port charges in 1976 over 1975.

- (4) Owners agree for the remaining 10 (ten) months of the Contract (10 cargoes), starting with the Nai Mara ETA PG 15th July, 1975 to split the difference in Worldscale increase (1974-1975) as far as rate and demurrage for any quantity lifted on the last cargo over and above 396000 long tons total for the ten liftings.
- (5) Owners agree to extend the Contract of Affreightment discharge options to include the Caribbean Sea including Caribbean Islands (Puerto Rico, Trinidad, Freeport Bahamas, St. Croix but excluding Cuba). As well as the East Coast of Canada, but, always within American and British Institute Warranties limits. The freight rates applicable for these respective discharge areas will be the contractual freight rates (1975 Worldscale 150) plus a lumpsum of US Dollars 80000 (eighty thousand) nett per lifting. 10
- (6) For the purpose of nominating vessels for the balance of the contractual period, Charterers will accept the same notice clauses and spread of Laydays as they have with their suppliers ie. 15 days spread.
- (7) Charterers agree to accept from Owners nominated vessels not necessarily fitted with heating coils except in case clause 49 of the Contract of Affreightment applies. 20
- (8) It is understood that clause 50 and 54 of the Contract apply in the event of passages through the Suez Canal. It is further understood however in the event of Charterers paying freight on the basis of the vessel transmitting Suez in ballast, all extra Insurance premiums actual, or corresponding theoretical, for ballast transits on the actual or theoretical date of Suez passage will be paid by Charterers, whether Owner chooses to proceed via Suez in ballast or not.

All other terms and conditions of Contract of Affreightment dated the 4th June, 1974, and Addendums Numbers 1 and 2 to remain the same. 30

INTERNATIONAL UNITED REFINING CO. LTD., — D. G. ROKISON,
 Director.

CONCORD PETROLEUM CORP., — R. G. MARTIN, Executive Vice
 President.

**Side Letter Forming Part of Contract of Affreightment dated 4th June, 1974.
 Between Concord Petroleum Corporation and International United Refining
 Limited.**

In consideration of the agreement made on 25th June, 1975, namely Addendum No. 3 to the Contract of Affreightment dated 4th June, 1974 the following was also mutually agreed: 40

- (A) That charterers shall immediately cable remit all present short payments on past voyages including Freights and Demurrages.
- (B) Charterers withdraw the allegation that Bunker Clause 51 over-rides the Freight Clause 6 in the Contract of Affreightment.
- (C) Charterers shall reconfirm to Owners that the Contract of Affreightment dated 4th June, 1974 with amendments, will be honoured in full as per the Contractual terms.

- (D) Both Charterers and Owners will immediately abandon any legal proceedings on the present dispute arisen and each Party will bear their own legal costs sustained in this dispute.
- (E) United Refining Company of Warren, Pennsylvania hereby confirm that their Letter of Guarantee given to Concord Petroleum Corporation under the date of 10th July, 1974 retains its full validity.
- (F) Charterers shall accept Owners July/August 1975 Lifting Schedules immediately, subject to Adnoc approval, however, should demurrage occur on the loading of the "Nai Mara" E.T.A. Jebel Dhanna 15th July, 1975, and the "Nai Gino" E.T.A. Jebel Dhanna 1st August, 1975 then any time between the Notice of Readiness of the previous lifting, and the aforementioned vessels, be less than 15 days, then on any such time the demurrage rate to apply will be Worldscale 75 (1975). This time allowed can be accumulatively used to either vessel.
- (G) Charterers agree to give Owners first refusal, at competitive rates, on any Affreightment Contracts negotiated during the course of 1975 and 1976.

No. 108
—
Contract of
Affreightment:
Concord
Petroleum
Corporation and
International
United Refining
Co. Ltd.:
4th June 1974
(Annexure "A")
to Affidavit of J.
de Korver)
(cont'd)

INTERNATIONAL UNITED REFINING CO. LTD., — D. G. ROKISON,
Director.

CONCORD PETROLEUM CORP., — R. G. MARTIN, Executive Vice
President.

23rd September, 1975

**Addendum Number 4 to Contract of Affreightment dated 4th June, 1974 between
Concord Petroleum Corporation and International United Refining Co. Ltd.**

In consideration of Owners agreeing to cancel lifting No. 16 Rina Lolli Ghatti laydays/cancelling 1-15 October, 1975 under the above Contract of Affreightment Charterers, agree to pay Owners on the 10th November 1975 an amount of US. Dollars 673007.12.

It being understood that this special arrangement will apply to the voyage in question only and that the provisions of the said Contract of Affreightment shall remain in full force and effect with respect to the remaining voyages.

INTERNATIONAL UNITED REFINING CO. LTD., — D. G. ROKISON,
Director.

CONCORD PETROLEUM CORP., — R. G. MARTIN, Executive Vice
President.

No. 109

Plaintiff's Amendment to Points of Claim

13A. Alternatively to 12 and 13, by its conduct hereinbefore set forth the defendant was in breach of and repudiated the said agreement AND disputes arose

No. 109
—
Plaintiff's
Amendment to
Points of Claim
—
16th December
1975

No. 109
—
*Plaintiff's
Amendment to
Points of Claim*
—
16th December
1975
(cont'd)

between the parties as to their respective rights and liabilities thereunder AND it was agreed by and between the parties that they would confine their disputes to the defendant's obligation to supply furnace oil under the said agreement and to the legal consequences of the actions taken by the parties insofar as they related to furnace oil and that the said agreement would continue in relation to products other than furnace oil AND the plaintiff terminated the said agreement insofar as it related to the supply of furnace oil.

No. 110
—
*Defendant's
Amendments to
Points of Defence*
—
29th March 1976

No. 110

Defendant's Amendments to Points of Defence

11. In answer to paragraph 13A of the Plaintiff's Points of Claim the Defendant: 10
- (i) denies that it was in breach of and repudiated the said agreement,
 - (ii) denies that it was agreed by and between the parties that they would confine their disputes to the Defendant's obligation to supply furnace oil under the said agreement and to the legal consequences of the actions taken by the parties insofar as they related to furnace oil and that the said agreement would continue in relation to products other than furnace oil,
 - (iii) denies the Plaintiff's entitlement in law to terminate the said agreement only insofar as it related to the supply of furnace oil or at all,
 - (iv) says that if the parties agreed in the terms therein alleged, which again is denied, such an agreement is void for uncertainty, 20
 - (v) says that the agreement therein alleged is an agreement to which Section 9 of the Sale of Goods Act 1923 applies and is unenforceable for want of some memorandum in writing thereof.

No. 111
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*Transcript of
Second Hearing
Opening address*
—
17th November
1975

No. 111

Transcript of Second Hearing Opening Address

MR. OFFICER, Q.C. and MR. LOCKHART, Q.C. and MR. GLEESON, Q.C. appeared for the plaintiff.

MR. STAFF, Q.C. and MR. HORTON, Q.C. and MR. CONTI, and MR. COLLINS appeared for the defendant. 30

MR. OFFICER: I understand there are some subpoenas still to be answered. Mr. Horton said they are not quite ready to be called. Perhaps that might be done at two or tomorrow morning.

There is a witness, a Dr. Sauerlander. After the notification to B.P. of the

Kuwait contract the pro forma monthly requirements were sent to Adelaide from Gove. Dr. Sauerlander, who was the person responsible at Gove, has made an affidavit. My learned friend wishes him to attend for cross-examination. We have tracked him down to Switzerland. Dr. Sauerlander can be available to give evidence, but only on Thursday of this week. If your Honour has no objection, we would interpose him at that stage.

10 MR. STAFF: Before my friend proceeds, may I mention one matter. There were produced to us following serving a subpoena on Mr. Kuner's clients certain documents relating to the joint venture arrangement and other matters, upon an undertaking that they would be available only to solicitor and counsel. Further, that confidentiality would be preserved and they would not be used in the proceedings without notice to Mr. Kuner. We have given Mr. Kuner notice there are some of these documents we will undoubtedly want to use in the course of cross-examination and some we will want to tender. I understand Mr. Horton has just spoken to Mr. Kuner and arranged that they have some discussion about that matter during the adjournment.

20 We would propose in the course of cross-examination to seek to use some of those documents, and at appropriate points of time to tender them. I do not wish to inform Mr. Kuner of the particular documents in advance of their use. Perhaps it would be best left until 2 o'clock. I do not imagine we would want to use anything between now and 2 o'clock.

MR. OFFICER: I was going to open this round of the matter briefly to your Honour. Would your Honour look at the points of claim dated 26th September, 1975. Paragraph 1 just refers to the contract, the construction of which your Honour has already determined. Paragraph 2 refers to the construction of certain facilities which set the date for the commencement of the agreement. Paragraph 3 refers to B.P.'s notice escalating the price. Paragraph 4 refers to the price at which fuel oil was being sold under the contract at the date of that notice.

30 HIS HONOUR: I am down to par. 8, and I think that is where the new material starts.

MR. OFFICER: The letter of 7th May your Honour already has in evidence. Paragraph 9 and par. 10 are the subject of an objection by the defendant in its points of defence on the ground that the discussion on 17th May was without prejudice. At the appropriate time we will be making lengthy submissions to your Honour by reference to a number of authorities from the High Court downward, that in the circumstances of that case the conversation on that day was for a number of reasons admissible.

40 Paragraph 11 refers to various meetings and discussions between representatives of the parties. In those meetings and discussions B.P.'s attitude as declared on 17th May was maintained. The claim in par. 12 is that B.P. by its conduct, including 17th May, indicated a repudiation of the agreement. Paragraph 13 is the acceptance of the repudiation and termination of the agreement as to furnace oil. That was by the entry of Nabalco into the Kuwait contract and communication of the fact that we had contracted elsewhere to the defendant. Then there are particulars set out of damage.

Further recalculations have been done, and I understand they have all been

No. 111
 —
 Transcript of
 Second Hearing
 Opening address
 —
 17th November
 1975
 (cont'd)

communicated to the defendant, except that there is one further recalculation I understand to be made because the calculations made and communicated to the defendant do not reflect an escalation which took place at the commencement of October 1975 in the price of oil.

How we would go about the proof of the matters is as follows: As to the conversations with the representatives of B.P. we would call two executives from Nabalco who attended those conferences and took part in the discussion. We would then tender the Kuwait contract and also a contract with a company called Concord. The purchase from Kuwait was for fuel oil f.o.b. Persian Gulf. Nabalco had to arrange its own freight contract. We will be tendering those two contracts. We will be tendering evidence to your Honour as to what other sources were considered at the time the decision was made to select Kuwait and Concord. We will tender evidence of the efforts that were made in relation to the selection of the freight contract — the shopping around that took place. We will call evidence of an independent expert in the oil field, worldwide, who will speak from his knowledge as to the reasonableness of the price and the terms of the Kuwait contract as compared with the other possibilities that were open, and will likewise speak as to the price of the freight contract. The evidence of that independent expert will be in the form of handing the proof of the witness to my friend and to your Honour when he is in the box. Finally, we will call a person from the accounting staff of Nabalco who will deal with the computation of the loss which they have suffered, which involves looking to the shipments from Kuwait that have been received up to the present time as compared with the shipments that would have been received from B.P. under the old contract, and for the future estimating the quantities and the dates on which future shipments will be obtained under the Kuwait contract as compared with what the prices would have been under the old B.P. contract had it not terminated.

I should have said that the expert in the oil field whom we will call will also give your Honour what the beliefs were in the oil world standing as at mid-1974 with regard to what was likely to happen to freight rates; was it thought likely they would go up or down? and as to what was likely to happen with regard to fuel oil costs, particularly in its dependence on the price of crude. He will then tell your Honour what has occurred up to today's date and what he thinks is likely to happen in the future as from today's date.

I should say that all these calculations are made on the basis that the old B.P. contract would terminate in September 1976. Except for some minor adjustment there was a fixed price until 1976. We have assumed that thereafter there would not be a contract.

HIS HONOUR: In other words 9(C)(i) would run its course to September 1976.

MR. OFFICER: Yes.

ALLAN GORDON COOGAN,
sworn and examined:

MR. OFFICER: Q. Your full name is Allan Gordon Coogan? A. Yes.
 Q. You live at 82 Victoria Road, Bellevue Hill? A. Yes.

No. 111
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 Plaintiff's
 evidence: A. G.
 Coogan:
 Examination

Q. You are the general manager of Nabalco Pty Limited? A. Yes.

Q. At the end of 1945 you graduated from Sydney University with a degree in Mechanical and Chemical Engineering? A. Yes.

Q. You then spent nineteen years with John Lysaght Company in Port Kembla? A. Yes.

Q. For the last three of those years you were deputy general manager? A. Yes.

Q. You then spent four years with Mauri Bros. & Thompson as vice-president engineering? A. Yes.

10 Q. You were concerned in that situation with Mauri Bros. & Thompson in manufacture of stainless steel equipment? A. Yes.

Q. And the supply and construction of food processing and chemical plants? A. Yes.

Q. I think Mauri Bros. & Thompson do some food processing themselves? A. That is correct.

Q. Do they also engage in the business of manufacturing and erecting food processing and chemical plants for other companies? A. Yes.

Q. You joined Nabalco Pty. Limited early in 1969? A. Yes.

Q. After some months in the head office did you spend a year in Zurich? A. Yes.

20 Q. Returning to Australia in 1970? A. Yes.

Q. You went to Gove in December 1970? A. Yes.

Q. And left there in the middle of 1973? A. Yes.

Q. While you were in Zurich you spent time familiarising yourself with the Alu-Swiss group? A. Yes.

Q. And in particular studying alumina plants in Europe? A. Yes.

Q. Did you spend some time working in an alumina plant while you were there? A. Yes.

Q. When you arrived at Gove it was in the early stages of construction? A. Correct.

30 Q. When you departed was it in the latter stages of commissioning? A. Correct.

Q. While you were at Gove you were the site manager of Nabalco? A. Yes.

Q. As such you were the chief executive of Nabalco at Gove? A. Yes.

Q. I think you have indicated that you spent approximately two and a half years in that position? A. That is correct.

Q. And then you returned to Sydney to take up the position of general manager of Nabalco Pty. Limited in mid-1973? A. Yes.

Q. I want to ask you in relation to Gove is there a township in association with the bauxite treatment works? A. Yes, there is the township of Nhulunbuy.

Q. What is the size of that township? A. The town is approximately 4,000 people.

40 Q. That is men, women and children? A. Yes.

Q. Approximately how many are employed by Nabalco? A. The employment by Nabalco would be approximately 1,000 in the plant, in the project.

Q. That is engaged in the extraction of the bauxite? A. Yes.

Q. And in and in relation to the bauxite treatment works? A. Yes.

Q. Some of that 1,000 I think are wages staff? A. The proportion would be approximately 600 on the wages staff and 400 on the staff. You could say 600 wages employees and 400 staff.

Q. Are there persons in Nhulunbuy employed by people or companies other than Nabalco? A. Yes.

50 Q. Would you describe the situation? A. In addition to the Nabalco people there would be within that 4,000 approximately 700 men, women and children; the employees in that group would be involved in private enterprise and government activities in the main associated with the Nabalco activities.

Q. There are for example in the township shops such as Woolworths? A. There are quite a number of retail shops, a hotel; there is a car repair yard and other activities of that nature.

Q. Is there a hospital at Nhulunbuy? A. There is a large hospital in Nhulunbuy which was built not only to serve the community of Nhulunbuy but also the aboriginal community of Arnhem Land.

Q. I want you to say something as to what would happen if oil supplies to Nabalco at Gove ceased? A. The Gove project is entirely dependent on the supply of furnace oil. The furnace oil is used to generate electricity which supplies the whole area, and also the very large quantities of steam that are required to operate the alumina plant. If for some reason oil was not available it would mean a closure of the operation, both the alumina plant and the mining operation, and severe disruption of the Nhulunbuy community. It would be possible to close the plant down in an orderly way but in doing that it would mean that a majority of the employees would have to be retrenched. Recommissioning of the plant would be a very costly process and would extend over several months. 10

Q. You said it could be closed down in an orderly fashion. Does that mean closed down over a period? A. It would not be done quickly. I would say it could be done in four to six weeks. A supply of electricity would be available because we have a standby diesel station at Gove, which would mean that emergency power would be available to the plant and also the town of Nhulunbuy. 20

HIS HONOUR: Do you mean indefinitely or for a time? A. It could be indefinitely because diesel fuel is not difficult to obtain.

MR. OFFICER: Q. Why would the recommissioning of the plant take the period you have mentioned? A. Recommissioning of the plant would be lengthy because in the alumina process it is necessary to build up alumina hydrate in solution. This is present in the process in very large quantities, and it would take a considerable time to rebuild that hydrate content in the plant liquor circuit. That would be the principal problem.

Q. Would you look at that brochure. I think you have seen that before. Are you familiar with that? A. Yes, I am familiar with it. 30

Q. Does that correctly set out information of a very general nature about the joint venture and contain photographs of the plant? A. Yes it does.

(Brochure tendered, and if admitted it will be marked Ex.H)

Q. After the notice was received from B.P. escalating the price to \$54.44 did you have a number of discussions with Mr. Notter, your administration manager? A. Yes.

Q. You then were away from Australia between 16th April and 5th May? A. Yes.

Q. At that time you were in Zurich? A. Yes. 40

Q. Did you receive in Zurich numerous communications from Mr. Notter? A. Yes.

Q. After you returned did you receive the letter from B.P. dated 7th May? A. Yes.

Q. Do you remember when you first saw that letter? A. On 9th May.

Q. Did you then do something? A. Yes.

Q. What did you do? A. I telephoned Mr. Lockrey of B.P. in Melbourne, after reading the letter.

Q. What did you say to Mr. Lockrey on the 'phone and what did he say to you? A. I said to him — (Objected to by Mr. Staff as a possible without prejudice conversation). 50

MR. STAFF: I would need to lead evidence on the voir dire particularly of conversations which occurred on 17th April.

MR. OFFICER: This witness had no earlier conversations with anyone on the B.P. side. We can agree that the earlier conversations conducted by Mr. Notter were labelled "without prejudice".

No. 111
—
Plaintiff's
evidence: A. G.
Coogan:
Examination
(cont'd)

HIS HONOUR: Is the conference of 17th April amongst others?

MR. OFFICER: May I put it as I have. There were certain conferences preceding 9th May which were conducted by Mr. Notter and Mr. Lockrey, and perhaps some others. They were all labelled by the parties "without prejudice". This witness cannot speak as to them because he was not present. We do not seek from any witness to give evidence of them. When we come to 17th May the form of the conversation of 17th May was such (it was an hour and a half conference) that in our submission for a number of reasons it falls squarely within the cases which say it is not protected by the label "without prejudice", notwithstanding that at the commencement of the 17th May conference the parties said "We are meeting without prejudice."

HIS HONOUR: This conference is in between.

MR. OFFICER: This is a short conversation arranging to meet, which was later arranged to be 17th May.

MR. STAFF: If it is no more than that, I do not object to it.

HIS HONOUR: Is it any more than that?

MR. OFFICER: It is slightly more than that, in that Mr. Coogan gives Mr. Lockrey a reason for wishing, having read the letter of 7th May, to confer.

MR. STAFF: I would not object to that.

HIS HONOUR: I will allow the question.

MR. OFFICER: You telephoned Mr. Lockrey on the 9th? A. Yes.

Q. Did you know Mr. Lockrey prior to that telephone conversation? A. No.

Q. I suppose you introduced yourself to him? A. Yes.

Q. What did you say to him and what did he say to you? A. As I recall the conversation I said I am principally concerned and surprised at receiving your letter of 7th May. It seems to me to contradict what I thought was a good arrangement in that we could establish an interim supply of oil to Gove whilst the legal matters are being resolved in the Court. Mr. Lockrey said "I am sorry, but London has now taken over and things have changed." I then asked Mr. Lockrey if it would be possible to have a meeting with him to discuss the matter. I am not sure whether it was then or a little later on that the meeting was actually arranged. I think later because at that time Mr. Notter was away. I recall that he came back on 12th, and perhaps about then we arranged for the meeting to be held on 17th May in Melbourne.

Q. On 17th May did you travel to Melbourne with Mr. Notter? A. Yes.

Q. Did you attend Mr. Lockrey's office? A. Yes. We went into Mr. Lockrey's office. After normal greetings he said "I have recently had an injury in which I

No. 111
 Plaintiff's
 evidence: A. G.
 Coogan:
 Examination
 (cont'd)

suffered a whiplash disability and I have difficulty in remembering things. I have asked these other people to be present.”

Q. Were the other people introduced to you? A. He then introduced me and Mr. Notter to Mr. Brian Snape, who I understand is the furnace oil manager for B.P.; Mr. Rowland, the secretary of the company; and Mr. Skillen and Mr. Shaw who I recall are associated with the sales side.

Q. Were the words “without prejudice” used? A. Yes either myself or Mr. Lockrey, I am not sure which, said that the discussion we proposed to have would be without prejudice.

Q. After that did you say something? A. Yes, I said (Objected to). 10

MR. OFFICER: This gets into the realm of matters that were discussed. In our submission B.P. indicated an attitude which was repudiated.

HIS HONOUR: You propose now to lead evidence of the conversation which proceeded, but that is objected to by Mr. Staff on the ground that the conversation was without prejudice. I am at the moment determining the validity of that objection. I propose therefore to allow you to lead this evidence not as evidence in the case but as evidence on the voir dire.

MR. OFFICER: May I correct one thing which I said, that I did not intend to call any evidence of the earlier discussion. That is correct, except that as we have notified my learned friend by way of particulars, my learned friend's cross-claim for damages against Nabalco asserts the breach by us by entering into the Kuwait contract. One of our pleas in respect of that is in effect estoppel, that they are estopped from complaining at us having done so. In support of that plea of estoppel we would wish to give evidence from one of the earlier conferences between Mr. Notter and Mr. Lockrey. 20

HIS HONOUR: It is perfectly plain we are proceeding on the basis this is evidence on the voir dire and not evidence in the case?

MR. OFFICER: Certainly.

ON VOIR DIRE:

No. 111
 Plaintiff's
 evidence: A. G.
 Coogan:
 Examination on
 the Voir Dire
 (cont'd)

MR. OFFICER: Q. You had mentioned that you or Mr. Lockrey had said “We are talking without prejudice”, and that was agreed? A. Yes. 30

Q. Did you commence the conference? A. Yes. I said “We are here to discuss the oil contract and to discuss further the arrangement which I think was a fair one to both parties, to maintain the supply of oil to Gove whilst the matters before the Court were being determined.” Mr. Lockrey then gave us in broad terms the cost to B.P. — (Objection taken to paraphrasing).

Q. Can you recall precisely what Mr. Lockrey said about costs? A. I cannot recall precisely, except that Mr. Snape in a later conversation gave us more details of the losses to B.P. in which he said—

Q. Was Mr. Lockrey's reference to cost and Mr. Snape's detail as to cost separated by any conversation? A. Yes. 40

Q. Can we stay for the moment with Mr. Lockrey. A. After the discussion with Mr. Lockrey on costs he then said “London have said that we have to get out of

this contract. It is costing us too much. B.P. cannot continue." It was then that Mr. Snape gave details. The information I recall him saying was that the cost to B.P. at the time we were talking was running in the order of \$1 million a month.

Q. When Mr. Snape so informed those present, was anything then said by Mr. Lockrey? Who spoke next? A. Mr. Lockrey said "You can understand now why we cannot continue with the contract."

Q. What did you say? A. I said "I can understand your difficulties, but I was hopeful that we could still reach some agreement on an interim arrangement."

10 Q. Who spoke then? A. Mr. Rowland spoke very firmly and said that there can be no interim arrangement. "You have terminated the contract. The old contract is finished and the only way we are prepared to supply oil to you is under a new contract. If you take us to Court, we are not prepared to supply you under the old contract." Then he repeated again "You have terminated. We have your notice. There can be no interim arrangement."

Q. Who spoke next? A. Mr. Lockrey then said "Even if the old contract is terminated we recognise very well that Gove must have oil. In fact late last year when London were pressing us to cut back supplies to Gove, we insisted they should be maintained." He said "However, if there is to be no new contract we could only supply you on a spot basis."

20 Q. Who spoke then? A. I recall Mr. Notter saying "Spot, and all that goes with it." Mr. Lockrey said "Yes." Mr. Notter then said "Spot is spot, and we could never enforce that." Mr. Lockrey said "Well, yes, that is what spot is all about." I then said "What kind of a new contract do you have in mind?" Mr. Rowland, who had a document with him, said "We are not prepared to discuss a new contract unless you agree that the old contract is terminated." I said "I have not the authority to make such an agreement. It would be a matter for the board." Then Mr. Lockrey said "On the understanding that you cannot have a new contract until the old contract is terminated I think it is reasonable that you see some of the clauses of the contract we have in mind." Mr. Roland then handed us a document and said
 30 "There can be no negotiations on this. There is nothing to be negotiated in it." Mr. Notter and I then studied the document. I remember Mr. Notter saying "This is virtually a spot basis anyway." I said "I see here a clause that says you can increase the price even if you think something might happen. What if it does not happen? Do we get a rebate?" Mr. Lockrey said "No, it does not work that way."

Q. Would you look at those pages. (Handed to witness). That is a photostat. Do you see some handwriting on it, or pencil marking? A. Yes.

Q. Do you recognise in whose handwriting is the non-typed portion? A. Yes, I would say that is Mr. Notter's handwriting.

40 Q. Would you look at those pages and tell me is that a photostat of the pages which you were handed by Mr. Roland? A. Yes, I would say that is the document given to us at that meeting.

Q. The document in front of you is a photostat. Is that a photostat of a document you were given? A. Yes.

Q. Or is that the very document you were given? A. This is a photostat.

(Document m.f.i. 1, on the understanding his Honour will look at the document)

50 Q. You just recounted what Mr. Lockrey said in response to your inquiry. Did Mr. Lockrey continue or did you say something? A. Mr. Lockrey then said "If there is to be a new contract it can be for a one-year period only." I said that was too short a term for us and we would prefer a longer term contract. Mr. Lockrey said a three-year contract might be possible, although London were against it. If it could be arranged it would be at a penalty rate.

Q. In relation to length of contract did he refer to any other company? A. Yes.

No. 111
 —
 Plaintiff's
 evidence: A. G.
 Coogan:
 Examination on
 the Voir Dire
 (cont'd)

When he said "We could only offer you a one-year contract," he said they were crazy even offering a one-year contract because no long term contracts are being entered into these days.

Q. In relation to the one-year contract and a possible three-year contract was there any reference made to prices, and if so what was said? A. Mr. Snape referred to prices. He said that a one-year contract would be at a price of \$53.96, if I recall, and a three-year contract at a price of \$56.50.

Q. Did you say something? A. I protested at the difference. I said it did not seem fair to me that there should be a penalty of about \$2 on the three-year contract because if B.P. were gaining a profit on the one-year price it did not seem to be a base to me for an additional penalty on the three-year contract. Mr. Lockrey said "That is to cover the unknowns." I said "From a reading of this draft contract you have given us it seems to me the unknowns are very well covered in any event." I recall about that time saying to Mr. Rowland "If we take you to Court on the old contract what happens to this contract?" He said "There will be no new contract." 10

Q. Was anything said about London's reaction? A. No, I cannot recall anything specifically being said about London's reaction at that time except to say that when I complained about the extra costs, Mr. Snape said that he could see my point of view and he thought London had over-reacted, but was prepared to go back and discuss the matter further with them. 20

Q. That is discuss the three-year price? A. Yes.

(Luncheon adjournment)

HIS HONOUR: Mr. Coogan, you understand you are bound by the oath you took this morning.

WITNESS: Yes your Honour.

MR. OFFICER: Q. You made reference this morning to purchase of fuel oil but on spot only? A. Yes.

Q. From a practical point of view could the Gove project be run on a spot oil supply basis? (Question objected to as not on voir dire. Question withdrawn.) 30

Q. Would you put your mind back to the conversation on 17th May. You had referred at the adjournment to something Mr. Snape said about London. What happened after that reference? A. Around about that time Mr. Rowland left the room. I am not sure whether it was before or after he left that Mr. Snape said "To be frank with you, London would be very pleased to get out of the commitment to supply oil to Gove because prices and demand are so strong it could be sold better elsewhere." He went on to say this would be even more the case if the coming winter in Europe was a cold one.

Q. Do you recall anything else said by you or by anyone else? A. I said to Mr. Lockrey, would he mind if we continued to look elsewhere? He said "No. You can go your hardest, but we know you won't get it." 40

Q. Was there some general discussion on a couple of topics? A. Yes. There was quite a long discussion on the difficulties B.P. were having with the Prices Justification Tribunal. That was followed by a discussion on the general difficulties of the Middle East situation as related to B.P. and their oil supplies.

Q. Was anything else said that you can recall before the termination of the conference? A. I do not recall any further discussion except an endeavour by me to sum-up the points that had arisen from the discussion.

Q. What did you say in that regard? A. I said "It is my understanding that

there can be no interim arrangement as we had first hoped, and if we take you to Court you would not be prepared to supply under the old contract. As far as B.P. is concerned the old contract is finished. If we agree to that, you would be prepared to enter into a new contract in terms of the document you have given us and for either a one-year or a three-year period at the prices you have quoted to us." I then said "As I understand it if we take you to Court there can be no new contract. If we do take you to Court, supplies would be on a spot basis only with all the uncertainties that entails." I said "You have agreed that you will go back to London and endeavour to improve the price of the three-year contract, and we will take this document you have given us and study it, and as soon as possible let you know whether we intend to end the old contract and enter into a new contract of either a one- or a three-year term." As I recall it, at the end of the meeting Mr. Lockrey said "Yes, that is the position."

10 Q. After the usual pleasantries was that the end? A. The meeting ended and we were taken to lunch by B.P. and returned to the city.

MR. OFFICER: Your Honour, that is the conclusion of the 17th May. The only other conversations this witness had with Mr. Lockrey would not be covered by without prejudice.

HIS HONOUR: Mr. Staff, what do you propose to do now?

20 MR. STAFF: Cross-examine Mr. Coogan on the voir dire.

CROSS-EXAMINATION:

MR. STAFF: Q. Did you make some notes during the course of the meeting of 17th May? A. I did not make any notes during the course of the meeting.

Q. You made them on the afternoon of 17th May did you? A. Yes.

Q. In Melbourne or on your return to Sydney? A. I made them in the aeroplane going back to Sydney.

Q. When the events were fresh in your mind? A. Yes.

Q. And your impression of the sense of the meeting was clear in your mind? A. Yes.

30 Q. May I take it the meeting you had was an amicable friendly discussion? A. Yes.

Q. Perhaps one should add "between what we might regard as hardheaded businessmen on both sides"? A. Yes.

Q. The impression you came away from the meeting with was that the B.P. Australia representatives were saying that the current contract, so far as it related to furnace oil, was to be terminated and no legal action to be taken, termination to take effect from 24th July, as a condition for the parties entering into a new contract? A. Yes.

40 Q. You are quite clear that is the sense that you gained of the discussions that took place? A. Yes.

Q. Indeed you had gone along to that meeting for the purpose of discussing the possibilities of resolving the disputes that existed between you? A. Yes.

Q. You were aware of the background, what had happened whilst you were abroad in Zurich? A. Yes.

Q. You had been in Sydney earlier in April. You knew that following B.P.'s notice having been given your company had issued a notice to terminate the contract as from 24th July in respect of fuel oil supplies if the B.P. notice was effective? A. Yes.

Q. You were concerned with the situation that might arise ultimately when a court, if it had to, determined whether or not the B.P. notice was effective? A. Yes.

Q. You and your associates' overriding concern just prior to the meeting of 17th May was to maintain an assured supply of furnace oil for the Gove project? A. Yes.

Q. All else was subsidiary to that? A. That is correct. 10

Q. As well you were concerned, so far as was possible, to protect any legal rights you might have against B.P. under the contract? A. Yes.

Q. So long as you could do that without compromising what was your overriding priority, the maintenance of supply? A. Yes.

Q. Just prior to the meeting the position was, was it not, that your company had done everything that was necessary to refer the dispute to the Court without further delay; is that right? A. Yes.

Q. You were ready, as it were, to go, if you decided to institute legal proceedings? A. Yes.

Q. But your company did not then have any interim supply contract with anyone? A. That is correct. 20

Q. And certainly not with B.P.? A. No.

Q. Because you did not have such an arrangement for supply you had up till that time, 17th May, deferred legal action? A. Yes.

Q. A conscious decision had been taken not to do anything in the way of litigation until, if it were possible, you could reach some interim supply arrangement, or some other arrangement? A. Yes. The thought in my mind was that we should preserve our association with B.P. to the extent that we could.

Q. It was in your mind that legal action should be deferred until an interim supply contract was negotiated with B.P.? A. I would have preferred that the legal action be deferred until we had agreement with B.P. that oil would continue even though we were to enter into some legal activity. 30

Q. On 16th May you were concerned that until you made some agreement with B.P. legal action might affect their attitude in future negotiations? A. Yes.

Q. That was the view held amongst the executives responsible for the matter in your company? A. No, not all of them.

Q. At any rate it was your view? A. Yes.

Q. You were conscious at that point of time, 16th May, that there was no possibility of obtaining an alternative source of supply in Australia? A. Correct.

Q. Mr. Notter had confirmed, following an overseas visit, that supplies were not then available from the Middle East on any assured basis? A. Yes. 40

Q. Your approach was, and your attitude was, that unless something came almost out of the blue, whether you liked it or not, your immediate future supply for fuel oil had to lie with B.P.? A. Yes.

Q. It was in that frame of mind that you had arranged the meeting of 17th May, was not it? A. Yes.

Q. Before you went to that meeting it was your belief that B.P. were then offering a new contract on condition that you agreed to termination of the old contract without any further legal action by anyone? A. Yes.

Q. So you went along, knowing that was the basis upon which you went to discuss a new contract? A. That was the feeling I had until I received the letter of 7th May. 50

Q. Was not it your feeling on 16th May, the day before your meeting, that B.P.

were offering a new contract on the basis that you terminated the old contract without any further legal action? A. I cannot recall exactly that. Yes it could be.

Q. Do you remember on 16th May you sent a telex to Dr. Sorato? A. I do not remember the exact date, but I remember sending a telex to Dr. Sorato.

Q. Dr. Sorato was general manager of Alu-Swiss? A. Dr. Sorato is a general manager of Alu-Swiss.

Q. That is a Swiss company which in an indirect way, or in some way, is related to Swiss Aluminium Australia Pty. Limited? A. Yes.

Q. And through it has dealings with Nabalco? A. Yes.

10 Q. You were in touch at around this time with Dr. Sorato about the fuel oil supply for Gove? A. Yes. Dr. Sorato was the previous general manager of Nabalco. He had been concerned with the original fuel oil contract. He was the general manager of Alu-Swiss, who had a responsibility for operations in this section of the world, and so I was referring to him on the matter of the oil contract.

Q. I suppose you had been talking to him about it whilst you were in Switzerland? A. Yes.

20 Q. I want you to think about it. I put it to you again. I would like you if you can from your recollection to agree with me. On the day before you went to the meeting which you have told his Honour about this morning you sent a telex to Dr. Sorato saying it now appeared that B.P. are offering a new contract on the basis that we terminate the old contract without any further legal action? A. Yes.

Q. You recall that? A. I recall that statement.

Q. That reflected your state of mind on 16th May? A. Yes.

Q. It was in that state of mind that on the morning of the 17th I suppose you went to Melbourne and to Mr. Lockrey's office? A. Yes.

Q. And there, whether you said it or Mr. Lockrey did, you agreed on behalf of Nabalco that the discussion which followed was to be without prejudice? A. Yes.

30 Q. May we take it you were aware of what an agreement or discussion to be had without prejudice meant? A. I am not clear what "without prejudice" means in the legal sense. I was advised to make that statement by solicitors.

Q. Your company's solicitors advised you to, as it were, insist on the discussions being without prejudice? A. They asked me to make the statement that the meeting would be without prejudice.

Q. It was not something you did without advice? A. No.

Q. You went along with the intention to see whether on that day or as a result of those discussions you could enter into some arrangement with B.P. which would ensure continuity of fuel supply to Gove? A. Yes. That was the first objective.

Q. That was the primary objective? A. Yes, the primary objective.

40 Q. The secondary objective was to make such arrangement on the most favourable terms that you could? A. Yes.

Q. You were aware that B.P. up to that point of time were saying "We have given valid notice under clause 9C(iii) of the old contract"? A. Yes I was aware.

Q. Your company was saying "No, it is not valid; we do not admit it is valid." Your company was at the same time saying "While we do not admit it was valid, we have given a notice in case it was valid which will terminate the fuel oil supply on 24th July"? A. Yes.

Q. And B.P. were saying in answer to that "All right; if you want to terminate by your notice on 24th July, we will accept that, and that will bring the contract to an end." In substance they were maintaining that attitude? A. Yes.

50 Q. So it was clear to you there was a dispute about a legal question or a number of legal questions between the two parties as at 17th May? A. Yes.

Q. It was in an endeavour to resolve that dispute between you that you went to the discussion on 17th May? A. Yes.

Q. You went there to, as it were, preserve so many of your legal rights under the old contract as you could? A. Yes.

Q. And to give away what you might have to give away in return for an assurance of continuity of supply on satisfactory terms, if it could be achieved? A. Yes.

Q. Your understanding of the intention of both parties was that they were to bargain about the legal dispute and seek to resolve it by a commercial arrangement? A. Yes.

Q. It was in that context that you went along on the advice of your company's solicitors and said "This has all got to be without prejudice"? A. Yes. 10

Q. At the conclusion of the meeting your view was that your company had really two alternatives as a result of the discussions which had taken place; that is two alternatives in relation to the fuel oil supply? A. The alternative I had in mind—

Q. May I put them to you. What I am suggesting is your view was going back in the aircraft after the meeting, that your company had two alternatives as a result of what had happened that day, and they were firstly if you instituted court action on the old contract you would get no new contract from B.P., but you could get spot sales? A. Yes.

Q. The other alternative was that if the old contract is cancelled, with no action for damages being brought by Nabalco, you could get a one- or a three-year new contract at prices such as you have mentioned this morning or thereabouts? A. Yes. 20

Q. And of course with a rise and fall clause, which you regarded as being of some use possibly to you? A. Yes.

Q. Because I take it your view at the time was that it was not by any means impossible that fuel oil prices might fall? A. That is correct.

Q. May I go back for a moment to 16th May just before the without prejudice negotiations. Do you recall saying in your telex to Dr. Sorato, following the paragraph which I put to you earlier in relation to your understanding that B.P. were offering a new contract on the basis that you terminate the old: "This is a major aspect to be initially negotiated on Friday, and it may be that this is the best solution we can obtain, although obviously we would prefer to have an interim supply contract with B.P. or any other assured source whilst our position under the old contract is being determined by the Court." A. Yes. 30

Q. That was still your attitude the next morning? A. Yes.

Q. It was one of the reasons why you said that the discussions were to be without prejudice? A. All I can on the without prejudice basis is that was to me a legal mechanism and it did not necessarily relate to the substance of the discussions I wanted to have.

Q. Did you also say in your telex to Dr. Sorato "However, if we are unsuccessful in obtaining B.P.'s agreement to an interim contract plus court procedures, and Alu-Swiss are unable to offer an alternative supplier, I believe we would expect that any new contract which replaced the old contract would be negotiated with B.P. at prices substantially below \$54 per tonne and will contain a rise and fall clause which could act in our favour if the generally expressed view that oil prices will tend to drop proves to be correct; plus a termination clause if B.P. proves at a later time to be uneconomical compared to other suppliers"? A. Yes. 40

Q. The reference to \$54 a tonne is a reference to what? A. It was the notice that B.P.— 50

Q. The revised base price? A. Yes.

Q. You were hopeful in the course of your commercial negotiations on the 17th

you would be offered a new contract at a price lower than the revised base price? A. Yes.

Q. That was one of the quid pro quos for which you might drop your threatened or contemplated litigious proceedings? A. No. I did not think of it in those terms.

Q. Anyway that is what you said to Dr. Sorato, and that reflected your frame of mind as it then existed? A. Yes.

10 Q. In the discussions which you had on 17th May — they occurred in the context of the obligation under the contract to supply fuel oil, did not they? A. That is correct.

Q. Your references to termination of the contract and those similar references really were references in the context of being termination of the obligation to supply fuel oil under that contract? A. Yes, my preoccupation was very much fuel oil.

Q. When people talked about your notice having terminated the contract from 24th July, again that was in the context of being confined to the obligation to supply fuel oil? A. Yes.

Q. You understood that the contract in respect of other products was still regarded as being on foot? A. Yes.

20 Q. Beyond 24th July? A. Yes.

Q. I think you had received a telex from Mr. Notter when you were in Zurich on 26th April in which he had informed you of the then current state of negotiations with B.P.? A. Yes.

Q. You were aware at that time, 26th April, of earlier discussions with B.P. by Mr. Notter? A. Yes.

Q. I think with Mr. Lockrey on behalf of B.P.? A. Yes.

Q. Which they had prefaced by an agreement that these discussions should be without prejudice? A. Yes.

Q. You were aware that those discussions had been directed towards finding a solution to the opposing legal contentions about the respective notices? A. Yes.

30 Q. In the first instance about B.P.'s notice, and subsequently about the notice which Nabalco gave? A. Yes. The substance of the discussions was toward an interim arrangement which would allow the supply—

Q. I do not want you to go into the detail of them. What I want to get is that you were aware that there had been discussions; that they were, so far as your company was concerned, directed towards a solution of the problems which had arisen in relation to future supply as a result of notices having been given? A. Yes.

Q. And that they were agreed between Mr. Lockrey and Mr. Notter to be without prejudice? A. I was informed that that was the case.

40 Q. Mr. Notter on 26th April told you in a telex that B.P. had confirmed their willingness to discuss a mutually acceptable solution while you seek a solution (that is in supply), and that pending that they would not terminate furnace oil supply to Nabalco? A. Yes.

Q. You had written a report I suggest to the board of direction established under the joint venture agreement on 10th April, 1974, in relation to fuel oil supply? A. Yes.

Q. And problems that had arisen with B.P. Do you recall that in the concluding paragraph you said "It must also equally keep in mind that furnace oil supplies to Gove cannot be interrupted"? A. Yes.

50 Q. You went on to say "Key points in the contract are (1) that Nabalco can accept or reject the notice received from B.P. on 25th March or seek a compromise and negotiate a price with B.P. between \$13.99 and \$54.44 within thirty days of receiving notice? A. Yes.

Q. "If Nabalco do not accept the indicated price or a compromise price, then

under clause 9(C)(iii) B.P. can give Nabalco three months' notice to terminate their obligations under the contract." A. Yes.

Q. I suggest to you what you intended to convey was that Nabalco could give B.P. a three months' notice to terminate? A. Yes.

Q. It has been expressed the other way. Even back on 10th April you were looking to compromise of the disputed rights of the parties resulting in an agreement for continuity of oil supplies as possibly a way out of the whole problem? A. Yes.

Q. And that continued to be your attitude right up to and including throughout the 17th May meeting? A. Yes. 10

Q. When you came away from that meeting on 17th May you also came away with a clear impression that the B.P. representatives had freely accepted that they had a responsibility to maintain oil supplies to Gove? A. Yes.

Q. And that was the whole tenor of the basis on which the conversations were had? A. It was mentioned. I would not say it was the whole tenor of the conversations.

Q. You accepted it? A. Yes.

Q. As a fundamental basis of B.P.'s attitude? A. Mr. Lockrey did say that B.P. recognised that Gove must have oil and they would be prepared to supply on a spot basis if there was no new contract. 20

Q. That of course was not subject to the condition that you abandon litigation, was it? A. From my recollection from Mr. Rowland's statement if we entered into litigation oil would be only available on a spot basis.

Q. If you entered into litigation oil was still to be available on a spot basis? A. Yes.

Q. Your impression, when you came away from the meeting, was that B.P. freely accepted that they have a responsibility to maintain oil supplies at Gove? A. I do not think it could be said they freely accepted that.

Q. Did you send a telex to Dr. Sorato on 20th May? Do you remember that? A. I do not remember the exact date. 30

Q. A few days after the meeting? A. Yes.

Q. Did you say in that "B.P. freely accept that they have a responsibility to maintain oil supplies to Gove"? A. Yes.

Q. Was not that your attitude at that point of time? A. It may have been a subsequent re-thinking. At the meeting there was an impression given that B.P. would like to get out of supplying Gove at all.

Q. I put to you nevertheless you were left with the firm impression, whatever they might like, they accepted they had a responsibility to maintain oil supplies to Gove? A. That was the statement made by Mr. Lockrey.

Q. You believe it? A. Yes. 40

Q. You said in the telex to Dr. Sorato on 20th May "They have stated that if we initiate Court proceedings to test the validity of their notice and from which appeals could go on for up to two years, supply under the old contract will be terminated on 24th July and henceforth we would be on a spot basis, both as to delivery and price for oil." A. Yes.

Q. "B.P. freely accept that they have a responsibility to maintain oil supplies to Gove"? A. Yes.

Q. On the same day you said the same thing in a report which you wrote of your discussions with B.P. Australia in Melbourne on 17th May, 1974? A. Yes.

Q. Indeed on 20th May your recommendation to Dr. Sorato was that Nabalco continue with B.P. as our supplier and endeavour to obtain a three-year contract on fair terms, or alternatively a one-year contract? A. Yes. 50

Q. So that on 20th May it was still your view that the negotiations aimed at ensuring oil supply to Gove were still going on? A. Yes.

No. 111
 Plaintiff's
 evidence: A. G.
 Coogan: Cross-
 Examination on
 the Voir Dire
 (cont'd)

MR. STAFF: Q. Mr. Coogan, on 29th May you reported, did you not, in summary the events that occurred and discussions that had been had, "The initial reaction from BP indicated that they were prepared to enter an interim contract whilst the validity of the March 22 notice was determined"? A. Yes.

Q. "This attitude has changed and BP are not now prepared to enter into a new contract until all rights under the original contract have been terminated"? A. Yes.

Q. So that was your understanding after 17th May? A. Yes.

10 Q. And you then proceeded to write, "BP have indicated that the following alternatives are available to Nabalco: (1) Should Nabalco proceed with the determination of the validity of BPs notice, BP would be willing to supply fuel oil to Nabalco on a spot basis with regard to both price and availability"? A. Yes.

Q. And (2) provided that Nabalco agrees to waive all rights under the existing contract B.P. would be agreeable to enter into a new contract for a period of 1 to 3 years with rise and fall provisions with regard to both base price and freight. The terms of such a contract would not be negotiable"? A. Yes.

Q. And that is how you saw the position on the 29th? A. Yes.

20 Q. And finally you summarised your views as at that date, 29th May, as a result of the 17th May discussion, and subsequently reflected on them in these words: "Unless a reputable supplier with reliable resources of fuel oil similar to BP can be found who is willing to supply the Gove Project on a suitable contract basis, Nabalco has two alternatives: (1) to remain with BP on the best possible contractual basis. This includes foregoing all rights and remedies under the original contract. (2) Purchase fuel oil requirements on a spot basis until the validity of the BP notice has been established (which could be up to two years). If the BP notice is ruled to be valid then Nabalco would be deemed to have given notice to terminate that contract. In this case, a new contract would need to be negotiated with a reputable alternative supplier. Should the notice be ruled to be invalid then Nabalco would have a right for damages. Once Nabalco commences action in the Court to determine the validity of the notice, it is doubtful whether BP would be willing to supply fuel oil to Gove"? A. Yes.

30 Q. By 29th May that reflected your state of mind? A. Yes.

Q. Now you of course are aware that discussions — on 23rd May you had a telephone conversation with Mr Lockrey, did you not? A. I can't recall the 23rd May.

40 Q. I want to put to you that on the 23rd you rang Mr Lockrey and amongst other things you said you were endeavouring to get hold of two more directors to come to grips with the problem, with your proposals, that B.P.'s proposals were being studied in Zurich and — A. I don't recall that discussion.

Q. I put it to you that you said to Mr Lockrey that the terms and conditions were all B.P.'s way — no recollection whatever? A. I don't have a recollection of that discussion.

Q. Do you deny that a conversation along those lines took place a week or so after the Melbourne discussions? A. I can't deny it, I have no recollection of having the discussion.

50 Q. I put it to you that you told him that proposal for a three-year contract was being studied, and made other comments in relation to it; it does not help your recollection? A. No, I am sorry. The proposal certainly would have been studied but I can't recall talking to Mr. Lockrey about that.

HIS HONOUR: Mr. Staff, could I interrupt you for the moment. I am just

No. 111
 —
 Plaintiff's
 evidence: A. G.
 Coogan: Cross-
 Examination on
 the Voir Dire
 (cont'd)

trying to work out where you are going in my own mind. We commenced this procedure because of the badge which the parties have put on the conversation before it commenced.

MR. STAFF: Yes.

HIS HONOUR: And you are now cross-examining on the voir dire for that purpose.

MR. STAFF: Yes, your Honour, to indicate the scope and extent in point of time or duration over which the without prejudice conversations went on.

What I am seeking to do is to indicate that there was not simply a without prejudice conversation on 17th May, there was really a without prejudice bargaining going on in relation to the disputed rights of the parties and their solution from March until well after the 17th March. I am going to put to the witness that it went on for a considerable time longer. 10

HIS HONOUR: Assume that there had been no mention of without prejudice at either conference and these had simply been the negotiations that had proceeded; it would have been open to you to argue eventually, although the evidence was plainly admissible that there was no repudiation on 17th May, and no doubt if I admit the evidence ultimately that is what you will argue.

MR. STAFF: Yes.

HIS HONOUR: You will say although these things were said they are only part of the picture, but many other things happened and the parties were plainly in negotiation for many weeks thereafter. 20

MR. STAFF: That is really what I was seeking to do, to demonstrate that over a period there were negotiations and the 17th May is simply one bit of it.

HIS HONOUR: I am just wondering if we have not drifted out of the field of voir dire into the real question.

MR. STAFF: I hope not, your Honour. Perhaps I am getting a little removed from it. I was simply putting aspects of this 23rd May conversation to seek the recollection of Mr Coogan. That may perhaps have led me a little further than I ought to have gone on the voir dire. 30

HIS HONOUR: The other thing I am beginning to wonder is whether this exercise is really necessary in order to protect your position at all.

MR. STAFF: We would submit that it is because if these conversations are not to be admitted, notwithstanding the clear agreement, the clearly acknowledged agreement then, your Honour, it is going to open a wide field of evidence, cross-examination of quite a number of people, and this is going to require witnesses to be called who might otherwise, indeed almost certainly, would not be called, and we are anxious to confine the case as well as we may.

HIS HONOUR: It seems to me that what will probably be submitted eventually is although the parties agree that this conversation should be without 40

prejudice, when the plaintiffs got there they were told either, "You agree that the earlier contract has been cancelled or there are no negotiations except that we will entertain spot-dealing, those are our terms. We do not present you with any others." And that was an invitation to them to go elsewhere and an indication by you that you no longer regarded yourself as bound by the earlier contract.

Now that may be right or it may be wrong, but if parties choose to enter into what are called without prejudice negotiations and one party presents the other with a particular state of affairs is that any the less admissible than where such negotiations result in an agreement being made?

10 MR. STAFF: If the discussion is part of the negotiation for compromise of the disputed rights, we submit it is wholly inadmissible.

HIS HONOUR: You just pretend it did not happen?

MR. STAFF: Yes, your Honour, unless one can bring the case in the circumstances within one other recognised exception, and in our submission this case, certainly this evidence does not even prime facie fit into one of the recognised exceptions.

20 HIS HONOUR: Q. Supposing somebody — I am not suggesting this is the evidence, but supposing somebody in a conference of this kind said, "Look, you can forget about the old agreement as far as we are concerned it is in the wastepaper basket. We are prepared to enter into a new agreement with you but if you so much as put one foot inside a Court on the old agreement, that is the end of everything." You say such a statement could not be used in evidence?

30 MR. STAFF: I do not have to go that far, with respect; certainly Mr. Coogan's evidence does not reflect that state of affairs. He has been specific and he has acknowledged his own writings at the time reflected quite a different state of affairs. It was really to rebut or exclude any room for the suggestion that that was what the parties were doing, what he was doing on 17th May, that I sought to indicate that there were continuing negotiations over a considerable period of time and that Nabalco by continuing those negotiations clearly believed and recognised that there was room for negotiation, that there was a negotiation going on.

HIS HONOUR: There has been no objection to the evidence and it does not seem to me that we are duplicating anything as I said this morning because if I admit the evidence ultimately you will rely on all the matters you are eliciting now.

MR. STAFF: Perhaps not all the cross-examination may go in and to that extent one may have to sort it out a little, but I do not want to weary your Honour and I do not want to take it too far, but we regard the matter as important.

HIS HONOUR: I understand that. I will not stop you, Mr. Staff. I was just interested to know where we were going and on what basis questions were being put.

40 MR. STAFF: Q. Now on 16th May, Mr. Coogan, your company had written for signature by you a letter to Nabalco which was not sent until a week or so later?
A. Yes.

Q. You were aware of the terms of that letter? A. Yes.

No. 111
 —
 Plaintiff's
 evidence: A. G.
 Coogan: Cross-
 Examination on
 the Voir Dire
 (cont'd)

Q. And you were aware of its terms when you went to the meeting on the 17th?
 A. Yes.

Q. Because you were going to that meeting it was, I gather, consciously withheld? A. Yes.

MR. OFFICER: I object to that. How can the terms of a letter written on the 16th but not posted, not sent, according to my friend, until a week later, bear upon the admissibility of the conversation on the 17th? I submit it has no relevance whatever, your Honour.

HIS HONOUR: Except, I suppose, his state of mind has come into this. He has been asked questions about his state of mind and it have a bearing on what you— 10

MR OFFICER: His state of mind as a result of what took place on the 17th?

HIS HONOUR: The letter having been written and not sent.

MR. OFFICER: But, your Honour, we are not at the moment judging whether in the light of every evidence which may be tendered or in the light of whether further cross-examination of this may indicate that your Honour should take a different view, someone else's view of what happened on the 17th. We are not concerned now with the weight of the evidence. We are not concerned now with whether this witness as to the 17th May be accepted rather than another witness. Your Honour may at the end say, "Well I disbelieve Mr. Coogan, I accept the other witnesses", but we are only arguing at the moment whether the evidence which this witness, this one witness seeks to give in a form which is admissible— 20

HIS HONOUR: This is the point I raised with Mr Staff a moment ago.

MR. OFFICER: What Mr. Coogan's impression may have been the day after the 17th or a week after the 17th cannot, with respect, bear at all on whether his evidence as to what took place on the 17th is admissible.

HIS HONOUR: What do you say about this, Mr. Staff?

MR. STAFF: Your Honour, this evidence of the 17th is tendered to suggest repudiation. If it does not suggest repudiation, and if it is not capable of showing repudiation, then we would submit that it is inadmissible. 30

HIS HONOUR: But I will not deal with that on a voir dire condition, that is a substantive matter.

MR. STAFF: Your Honour in dealing with the without prejudice question has to determine, I submit, whether prima facie the evidence is capable of going to the issue that it is said to go to because a fortiori your Honour should not accept evidence which is prima facie inadmissible.

HIS HONOUR: I will not deal with that issue at this stage, Mr. Staff. I will only deal with this question of whether or not the fact that the negotiations were labelled "without prejudice" makes them inadmissible. I will deal with the other question as part of the final washup of the whole case after the whole of the evidence not before. 40

MR. STAFF: I do not want to canvass your Honour's ruling but I suspect that your Honour may have misunderstood, or I may not have made myself clear on the question of admissibility. I would submit that your Honour will not exclude the operation of the ordinary rule — after all there is a prima facie rule about without prejudice conversations and discussions and a strong prima facie rule. I would submit that your Honour would not exclude that unless the evidence in any event is capable of going to the issue as it is suggested.

10 HIS HONOUR: But that may be a very difficult and complex question upon which I will have to hear submissions at length and upon which there may be many authorities cited, and I am simply not prepared to deal with that question at this stage.

I have decided to deal with this question in the running because it seemed to me from what you said this morning that there would be difficulties if I endeavoured to make my usual course of admitting the evidence subject to objection and I am trying to help you in that way, but I am afraid that is the limit.

MR STAFF: If your Honour will not permit the question—

HIS HONOUR: I have not ruled on this question about the letter. You asked a specific question, and also I would like to hear why you say it is particularly relevant to this question.

20 MR STAFF: Your Honour will need to look at the letter. It is part of EX. 1. It is already in evidence. It is a letter which was originally typed with the date May 16th.

HIS HONOUR: What is the question you want to ask him?

MR STAFF: I wanted to get his agreement to the terms of par. 2 as he wrote it, representing what occurred at the meeting on 17th April.

HIS HONOUR: I will allow that question. That does not take away anything that I have said about my general approach.

MR STAFF: Might the witness perhaps see the letter? (Copy of letter shown to witness.)

30 Q. Would you just read it through, Mr Coogan? Did the context of that letter represent your attitude to the situation on 16th May? A. I thought the text of this letter on 16th May would not be helpful to the matters we proposed to discuss.

HIS HONOUR: I do not think that is really an answer to the question. What Mr Staff wants to know is whether notwithstanding what was discussed on 17th May the letter you are looking at represented your attitude, or your state of mind, on the 16th May, which was the date it bears? A. No, I did not think it did; it did not express my attitude.

MR STAFF: It did on 23rd May when it was sent. A. The time between the—

40 Q. Just answer that question. A. It was sent on 23rd May after pressure from our legal advisers.

Q. And you sent it on the 23rd? A. Yes.

Q. On that day it represented your attitude on behalf of the company? A. On behalf of the company rather than represented my attitude.

No. 111
 —
 Plaintiff's
 evidence: A. G.
 Coogan: Cross-
 Examination on
 the Voir Dire
 (cont'd)

Q. What was said in it in so far as there were statements of fact was true? A. Yes.

Q. In so far as they were statements of opinion they were true? A. Yes.

Q. One other matter, Mr Coogan; on 17th May you again reported on the discussions with BP in Melbourne — I am sorry, on 20th May you reported, I think you said earlier, on your discussions in Melbourne of 17th May? A. Yes.

Q. And you reported it at length in a report to the Board for the information of the officers of the company? A. Yes.

Q. And on that day you said, "BP consider that spot cargoes could be maintained"? A. Yes.

Q. And you indicated that BP that "BP would, if you took proceedings, not write a new contract and would supply only on a spot basis while you were in Court, but if you won probably not, if they won it would not offer a new contract"? A. Yes.

Q. And that reflected your state of mind following the discussions of 17th May? A. Yes.

Q. That is what you understood from the discussion on 17th May? A. Yes.

Q. That they would supply — that if you went to Court they would take the attitude that the old contract so far as fuel oil was concerned terminated by reason of your notice of 24th July, that they would not enter into a new contract with you? A. That is right.

Q. But that they would supply on a spot basis so long as the litigation was on foot, though your view was if BP won the litigation they probably would not then offer you a new contract? A. Yes.

Q. And that, whatever the words used between you, was what you understood were the words used by the BP representatives to be intended to convey to you? A. Yes.

RE-EXAMINATION:

No. 111
 —
 Plaintiff's
 evidence: A. G.
 Coogan:
 Re-examination
 on the Voir Dire

MR OFFICER: There are certain documents, since we are still on the voir dire, I would wish to tender arising out of the cross-examination by my learned friend.

They are a Telex, a copy of the Telex of 16th May from this witness to Dr Sorato; a copy of the summary made by this witness of the discussion with BP in Melbourne on the 17th, the document being dated the 20th May; the Telex to Dr Sorato of 20th May; and in relation to a report dated 29th May upon which the witness was cross-examined may I show a document to him and ask him a question.

Q. I think Mr Coogan you were asked some questions with regard to the document that is before you A. Yes.

Q. You see some initials up at the top? A. Yes.

Q. Was the document prepared by you or by somebody else? A. The document was prepared — was not prepared by me.

Q. It was prepared by a Mr Batterham on your staff? A. Yes.

Q. I see your initials are at the top? A. Yes.

Q. Did you read and approve the document? A. I can't recall the approval of the document. I should think the initials at the top would mean that a copy was forwarded to me and I would have read the document.

Q. I think it was put by my learned friend, and I am not suggesting with any deliberate mistake, but it was put as being a report made by you, I think, or a report prepared by you? A. I could not be certain as to the preparation of the report, but it was written by Mr Batterham, probably as a summary of other reports that he had received.

MR OFFICER: I would tender that document, your Honour, on which some questions were put, as well as the other three documents which I have just described.

10 MR STAFF: I object to them on the ground that nothing that I put to the witness in cross-examination makes the documents admissible as such. These are their own documents. I put certain passages of material to the witness and asked him if that reflected his view and he acceded to it, but that does not make anything else from the documents admissible.

HIS HONOUR: Might not it be necessary for me to see the whole of the document to see the context?

MR STAFF: No, with respect. To simply ask a witness whether he wrote something on a particular day and ask him whether that expresses his view of that in my submission does not make the document admissible in re-examination in whole.

20 HIS HONOUR: No, I will admit the document. They can be marked together for identification 2.

MR OFFICER: Mr Coogan, would you look — I think it is probably the last document in that bundle — the document dated 20th May, and described as discussions with BP Australia in Melbourne 17th May, 1974? (Witness shown mfi.2.) A. It is the first document, Mr Officer.

Q. You were asked as to whether — would you look at p. 2, the paragraph which is the fifth? A. Yes.

30 Q. Does that taken in its entirety represent the impression which you received from the 17th May conference? A. The paragraph I am reading is that "BP consider that spot cargos could be maintained but within the conditions of spot purchases"?

Q. Yes? A. That is a reflection of my recollection of the meeting.

Q. I think portion only of that had been put to you by Mr Staff. Would you turn in that bundle to a Telex dated 16th May? A. Yes.

Q. Would you turn to p. 2 of it? A. Yes.

Q. The paragraph numbered 5? A. Yes.

Q. I think this was put to you by Mr Staff and you see it is the portion which read, "It now appears that BP are offering a new contract on the basis that we terminate the old contract without any further legal action"? A. Yes.

40 Q. Had you had any communication by the 16th May with BP that led you to think that that was their attitude, other than the letter of 7th May? A. I had no communication from BP.

Q. Well, could I put it, other than the — (objected to as leading).

Q. You had the letter of 7th May? A. Yes.

Q. By the time this Telex had been prepared, had you had — you had had the initial discussion with Mr Lockrey on the 9th? A. Yes.

Q. Had you had any other communication from BP? A. No.

Q. Would you glance as rapidly as you can through those documents and tell me whether on the dates they bear they reflected your view? (objected to).

No. 111

Plaintiff's
evidence: A. G.
Coogan:
Re-examination
on the Voir Dire
(cont'd)

HIS HONOUR: What is the relevance of that, Mr Officer?

MR OFFICER: He has been asked, taking some particular isolated portions of these documents, did that portion represent his view on a particular date, and I submit I am entitled to have the fact, if it be the fact, that on the dates the documents bear — for example, the whole of a Telex which he sent to Dr Sorato, represented his view of the matter, be it right or wrong, his view of the matter as at that date.

HIS HONOUR: Is not the difficulty we are getting into that you no doubt what to have his evidence read in the light of the entirety of each of the documents? Mr Staff has asked him particularly about parts of them, and you want to say to me that they should be read, the parts, in their context, and you want the safeguard of an answer that the entirety represented his view. 10

If on a construction of the documents — which I have not yet looked at — it is open to the view that part of what he said to Mr Staff may be cut down by looking at the documents as a whole, what do I then do? In other words, if you want to get this from him haven't you got to do it rather more specifically than the way you are doing it now? If there is something there which causes some doubt or some qualification upon what Mr Staff put have not you got to put it to him really in his own interests rather than a bare question of admissibility?

MR OFFICER: Mr Coogan, would you look again at the document dated 20th and headed, "Discussions with BP (Aust.) in Melbourne, 17th May, 1974."? A. Yes. 20

Q. And would you look at p. 2, and would you look at the fourth last, third last and second last paragraphs, the one starting, "Nabalco would appear" — "would appear to have very little room to move".

Q. Yes. Do those three paragraphs reflect your assessment of Nabalco's situation as or following upon the 17th May conference at Melbourne? A. Yes, they do.

MR OFFICER: I tender those three, your Honour.

HIS HONOUR: It is already all in. 30

MR OFFICER: Perhaps I should identify them, on the second page it is the paragraph starting, "Nabalco would appear to have very little room", and the next two short paragraphs. I think that is sufficient, your Honour.

HIS HONOUR: Now should I ask Mr Coogan to stand down for the time being? I take it that is all the evidence you would wish to lead on the admissibility of this evidence?

MR OFFICER: Yes, that is the whole of the evidence from this witness as to 17th May.

HIS HONOUR: Then I should ask Mr Staff whether he proposes to call any evidence on the question. 40

MR STAFF: If that is all the evidence my friend is going to call in support of

the admissibility of Mr Coogan's evidence, then I would not propose to call any other evidence.

HIS HONOUR: Then is the convenient course to commence the argument on whether the evidence is admissible or not?

MR STAFF: So far as we are concerned, yes.

MR OFFICER: Yes, your Honour. (witness stood down)
(Mr Officer addressed his Honour.)

(FURTHER HEARING ADJOURNED TO 10 A.M. TUESDAY, 18TH NOVEMBER, 1975.)

10 **SECOND DAY: TUESDAY, 18TH NOVEMBER, 1975**

(Mr Officer concluded his submissions, Mr Staff addressed his Honour and Mr Officer addressed in reply.)

(His Honour admitted the evidence and for his Honour's judgment see separate transcript.)

(Brochure tendered and marked Ex. H)

ALLAN GORDON COOGAN
On former oath

MR OFFICER: Would your Honour look at the foot of page 4 of the evidence.

20 HIS HONOUR: Yes.

MR OFFICER: Mr Coogan, there is what you you have described as a stand-by diesel station at Gove? A. Yes.

Q. Assuming you had no supply of furnace oil and had therefore de-commissioned in the way you have described the alumina plant, would the alumina plant still require some electricity supply? A. There would be a requirement for services such as sewerage systems and water supply and general lighting.

Q. Is that the extent to which the alumina plant would require electricity? A. May be one or two other aspects, minor maintenance works but that would be the essential requirements for the alumina plant.

30 Q. Is that the sort of emergency power which could be supplied to the de-commissioned plant by the emergency diesel station? A. Yes.

Q. Could one run the alumina plant itself on diesel supplied electricity? A. No.

Q. You also said that the de-commissioning of the plant would mean that a majority of the employees would have to be retrenched. A. Yes.

Q. You told us you had about one thousand employees at Gove. A. Yes.

Q. What sort of majority are you talking about that would have to be

No. 111
Plaintiff's
evidence: A. G.
Coogan:
Re-examination
on the Voir Dire
(cont'd)

No. 111
Plaintiff's
evidence: A. G.
Coogan:
Examination
(cont'd)

No. 111
 —
 Plaintiff's
 evidence: A. G.
 Coogan:
 Examination
 (cont'd)

retrenched — putting that another way, how many would be retained once the plant had been de-commissioned? A. We have never made a close study of that but I would say we would need to retain possibly 200 people.

Q. Do you have any difficulty in recruiting to go to Gove — (objected to: allowed). A. At that time we had a degree of difficulty, less so now but the serious consequences of the loss of people would be the loss of experience we had generated in those people and it would be unlikely we would get a great number of the people we retrenched back again.

Q. On 17 May there was the reference, which you gave to his Honour, the conversation to the spot supply of oil, furnace oil? A. Yes. 10

Q. As the General Manager of a major user of fuel oil have you had over the years discussions on oil supply? A. No. I have not had a great deal of discussion on oil supply. The contract with BP was negotiated before my appointment but there have been discussions on other commodities which relate to spot purchases.

Q. What is your understanding of the word "spot" — (objected to).

Q. From the experience you had had in the acquisition of other materials under the description of spot, what do you conceive the word to mean (objected to: disallowed).

Q. Whatever the word means was it your opinion, from a practical point of view, the Gove project could be run on a spot basis — (objected to) 20

(Luncheon adjournment)

(Previous question read)

HIS HONOUR: I would allow the question "what did he understand by the words 'spot basis' at that time".

MR OFFICER: At 17 May 1974 what did you understand by the words in relation to the supply of fuel, supply on a spot basis? A. My understanding of spot supply was once any particular shipment that you had arranged was completed, you could then never be sure as to how much, or at what time, or at what quality or at what price the next shipment might involve.

HIS HONOUR: If you did not agree on the price or quality you simply did not get a shipment? A. You could negotiate but if you did not agree the supplier would say "Sorry, that is the condition and we are not prepared to ship to you unless you agree to the spot conditions at the time". 30

MR OFFICER: Did you have any understanding of who would get preference as between a contract customer and a spot purchaser (objected to: question withdrawn).

Q. I put to you now this question on the basis of spot supply means as you have described; could the Gove project be run with purchases of oil on a spot basis? A. No, it could not.

Q. Can you tell us why you answered that question "No"? A. It is my opinion that continuity of operations must be guaranteed. The characteristics of the alumina operation require that and any suggestion that there would be an interruption would mean very difficult problems. 40

Q. On 27 May did you have another phone call from Mr Notter? A. Yes.

Q. You had a call from him? A. Yes.

Q. Did you go to lunch on that day and meet someone you had never met before? A. Yes.

Q. Who was that? A. Mr Nyholm of the Kuwait National Petroleum Company.

Q. Were you introduced to him? A. Yes.

Q. Who by? A. Mr Notter.

Q. Did Mr Nyholm say anything to you as to how he had come to be in your office or in Nabalco's office that day? A. As I recall — (objected to: question withdrawn)

Q. Had you been in touch personally prior to 27 May with anyone from the Kuwait National Petroleum Company? A. No.

10 Q. Do not answer this if it is objected to. So far as you are aware had Mr Notter been in touch with anyone from that company — (objected to: question withdrawn).

Q. Would you look at this document? A. Yes.

Q. You have seen that document before? A. Yes.

Q. Was that the first written communication which Nabalco received from Kuwait — (objected to: rejected).

(Above document from Kuwait to Nabalco m.f.i. 3)

Q. You went to Zurich about 17 June? A. A few days before 17 June.

Q. Was a contract of affreightment executed with Concord? A. Yes.

20 Q. Do you recall the date upon which that was executed? A. I believe it was 19 June.

Q. Look at this document. Look through it including the signatures at the end of it. A. Yes.

Q. I think you are one of the signatories to that? A. Yes.

Q. Is that the affreightment contract that was entered into with Concord? A. Yes.

Q. I should have framed the question slightly different by asking "is that a photostat copy".

HIS HONOUR: Yes.

(Above photostat copy of contract with Concord tendered and marked Ex. J)

30 Q. Were you present when a document was executed with Kuwait? A. Yes.

Q. Where was that document executed? A. In Zurich.

Q. By both parties — or on behalf of both parties? A. Yes.

Q. Would you look at that document? A. Yes.

Q. Is that a photostat of the agreement between Nabalco and Kuwait? A. Yes.

Q. And executed on the day that is set out where the signatures are? A. Yes.

(Photostat agreement between Nabalco and Kuwait tendered. With His Honour's permission Mr Staff asked the following questions on the voir dire)

ON VOIR DIRE

40 MR STAFF: Q. (approaching) There are attached to the contract at the back two pages of what appear to be printed terms and conditions? A. Yes.

Q. I think your initials appear in various places? A. No, they are not mine.

Q. What about in the left-hand corner? A. No.

Q. You see there are a lot of provisions for parts of the printed terms which appear to be underlined? A. Yes.

Q. Were they in that form when the document was executed? A. I cannot remember.

Q. Can you tell us whether they are intended to be a deletion of the material that seems to be underlined or whether it is an emphasis — have a look at that. A. I would say they are intended to emphasise those points.

Q. You see there are some initials on the first of the two pages? A. Yes.

No. 111
—
Plaintiff's
evidence: A. G.
Coogan:
Examination
(cont'd)

No. 111
—
Plaintiff's
evidence: A. G.
Coogan:
Examination on
the Voir Dire

No. 111
—
Plaintiff's
evidence: A. G.
Coogan:
Examination on
the Voir Dire
(cont'd)

Q. And not on the second? Can you tell us whose initials they are? A. These are the initials of Dr Sorato, a member of the Board of direction of Nabalco.

Q. A member of the Board of direction of Nabalco? A. Yes, and these are Mr Meyer, a member of the Board of direction.

MR STAFF: I do not know whether your Honour can work out what it is but some of the material seems to be struck straight through and other parts underlined. It is difficult to know what is part of the contract and what is not on that copy.

(Above document handed to his Honour)

MR OFFICER: It may be, I do not think it is correct — that it is not a deletion. 10

HIS HONOUR: It is an underlining.

MR OFFICER: Yes the original is held in a bank in Sydney and we can arrange for the original to be produced for the purpose of comparing it.

HIS HONOUR: I think it is an underlining. I am quite happy to have all sorts of documents but it would not be possible to read all this document. It simply is not legible.

MR OFFICER: May it be marked for identification.

HIS HONOUR: It can be left here and you can substitute some satisfactory document in due course. 20

MR OFFICER: We will arrange for the original to be brought along.

MR STAFF: I do not require the original to be brought along. If my friend can produce a legible photostat to allow us to see which parts are in the contract and which parts are not—

HIS HONOUR: I think it is underlining rather than crossing out.
(Photostat agreement between Nabalco and Kuwait marked Ex. K)

MR OFFICER: You returned to Sydney about 25 or 26 June? A. Yes.

Q. Was a letter to BP drafted by your Solicitors? A. Yes.

Q. You went to Gove on what day? A. I think it was either 26 or 27 June.

Q. Was the draft discussed with you before you left? A. Yes. 30

Q. Was the letter signed by you? A. No.

Q. On 28 June were you in Gove? A. I was in Gove on 28 June, yes.

Q. Do you — did you receive a call from Mr Batterham of Nabalco's staff? A. Yes.

Q. After that call did you ring Mr Lockrey? A. Yes.

Q. You rang him while you were in Gove? A. Yes.

Q. Did he ask you a question? A. Yes.

Q. What did he say to you and what did you say to him? A. He said "Will you be requiring any further oil after July?" I said "No, we will not be requiring any further oil after July. We have made other arrangements". He said "What, not on a spot basis?" or "Not even on a spot basis". I said "No, it has already been made clear to you that we could not contemplate operating the Gove project on a spot basis. We have entered into a contract with another supplier". 40

No. 111
—
Plaintiff's
evidence: A. G.
Coogan:
Examination
(cont'd)

There was then a discussion and I said a letter was being forwarded to him in Melbourne advising him of the situation, that I would check whether the letter had been sent, and I would send him a telex advising him whether or not it had been sent.

Q. Would you look at that document? A. Yes.

Q. Did you send him the telex? A. Yes, I sent this telex to him.

(Above telex tendered and marked Ex. L.)

Q. Can you recall when you returned from Gove? A. I recall it was either 29 or 30th I am not sure.

10 Q. When you had returned to Sydney did you receive a call from Mr Lockrey? A. Yes, I received a call from Mr Lockrey and if I remember it was 1 July.

Q. What did he say to you? A. He said that he had not received a copy of the letter. I said that there must be a mix-up in the mail, I would telex the contents of the letter to him.

Q. Did you do so? A. Yes, I put the contents of the letter on a telex.

Q. Would you look at that document? A. Yes.

Q. Is that a photostat of the telex which you sent? A. Yes.

(Telex tendered and marked Ex. M.)

20 MR OFFICER: Q. Since the institution of these proceedings, which were I think the 19th June last year, have you discussed with Mr Notter the events of the 17th May? A. No, I have not.

Q. Have you seen a copy of any proof of evidence of his? A. No, I have not.

CROSS-EXAMINATION

MR STAFF: Q. There is existing, I think, between Nabalco and Swiss Alumina (Australia) Pty. Limited and Gove Alumina Ltd. an agreement which is called by those parties a management agreement, is there not? A. Yes.

Q. That agreement in general terms provides for, amongst other things, the operation of the plant at Gove by Nabalco?

MR OFFICER: May I register formally an objection.

30 MR STAFF: I will withdraw the question. I would call upon my learned friend to produce a copy of the management agreement made between Swiss Aluminium (Australia) and Gove Alumina Limited and Nabalco dated 22nd January, 1969. (Produced)

Q. Would you look at the document I show you, Mr Coogan? A. Yes.

Q. Is that the document which has called between the parties the management agreement? A. Yes.

Q. Does that relate to the operation of the plant by Nabalco? A. Yes.

Q. You are familiar with its terms in broad outlines, at any rate? A. I have not read it for a considerable time.

40 Q. But you know in general what it provides for? A. I have an understanding of the requirements that I have as the general manager to perform.

Q. You of course are the general manager of Nabalco which is the company described as manager under this agreement? A. Yes.

Q. So of course you have made yourself familiar with what Nabalco has to do as manager for the purposes of this agreement? A. I am not necessarily familiar

No. 111
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Plaintiff's
evidence: A. G.
Coogan:
Examination
(cont'd)

No. 111
—
Plaintiff's
evidence: A. G.
Coogan: Cross-
Examination

No. 111
 —
 Plaintiff's
 evidence: A. G.
 Coogan: Cross-
 Examination
 (cont'd)

with the details of this legal document, but I am familiar with the duties I have to perform as the manager.

(Management agreement tendered.)

MR OFFICER: We will be submitting as one alternative argument to your Honour at the conclusion that your Honour treats Nabalco under its fuel oil contract as principal and does not look to any other arrangement which Nabalco may have made with any other company, including what has been called loosely the joint venture list.

HIS HONOUR: Subject to that objection the document is admitted and will be Ex. 31.

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MR OFFICER: May my objection be taken as a standing one to any investigation as to relations between Nabalco and the joint venture list?

HIS HONOUR: Yes.

MR OFFICER: May I also submit that so far as my friend seeks to probe the relations between the joint venturers and onward buyers of alumina or materials, I object on the same ground.

HIS HONOUR: Yes.

MR STAFF: Q. Mr Coogan, there is I think, is there not, what is called a Board of Direction consisting of a number of people, representatives of each participant? A. Yes.

20

Q. And that board to your knowledge meets from time to time? A. Yes.

Q. And indeed you ordinarily report to that board before each meeting and on other occasions? A. Yes, I report to the board actually at the meeting.

Q. It is your habit, is it not, to prepare a written report of greater or lesser length, depending on the existing circumstances, in respect of each proposed board of direction meeting? A. Yes.

Q. You spoke earlier of the board of direction of Nabalco; that was intended to be a reference, may I take it, to the board of direction established under the joint venture. A. Yes.

Q. Nabalco has a board of directors of its own, quite different from the Board of Direction? A. Yes.

30

Q. Do you remember that on the 29th May Mr Batterham prepared a report in relation, amongst other things to the fuel oil contract? Do you remember that document you saw yesterday? A. Yes, I think I do recall the document that was prepared by Mr Batterham.

Q. You told us I think that that came to your notice — did it not? A. Yes, it came to my notice.

Q. Was that prepared as part of or the whole of a report to the board of direction? A. No, in my recollection it was not.

Q. Was it prepared as a report to you of the then current situation? A. No, I believe it was prepared as a report of advice to Sir David Griffin.

40

Q. He was Chairman of Nabalco, was he not? A. He is the Chairman of Nabalco Pty. Limited, not the board of direction.

Q. I think he is a member of the board of direction? A. Yes.

Q. And also a member of the board of Swiss Aluminium (Australia) Pty. Ltd.? A. Yes.

Q. Is he chairman of that latter board? A. No, I do not think he is.

Q. When you received a copy of Mr. Batterham's report, do you recall that he said in the opening sentence of that report, "On 11th June, 1970, Nabalco Pty. Limited (Nabalco) acting for and on behalf of the participants of the Gove Joint Venture and BP Australia Limited (BP) entered into a contract for the supply of fuel oil and other products to the Gove project". Do you recall reading that? A. I do not recall reading it.

Q. But that was the fact, was it not? A. I am not sure whether it was the fact or not.

10 Q. You do not recall reading it? A. If I could see the document I could read it.

MR STAFF: I would call under the provisions of the Evidence Act for Mr Batterham's report dated 29th May, 1974. (Produced)

Q. Would you look at the document my friend produces? A. Yes.

Q. I direct your attention to the first sentence under the heading Fuel Oil Contract? A. Yes.

Q. Presumably when you got the document you read that sentence? A. Yes.

Q. It accorded with your belief as to the facts, did it not? (Objected to, pressed, rejected)

Q. You told us you got a copy of this document of Mr Batterham's? A. Yes.

20 Q. You knew it was intended for the information of Sir David Griffin? A. Yes, I am not sure—

Q. Just answer my question. You knew it was for Sir David Griffin's information? A. Right.

Q. It was to your knowledge produced by one of your subordinate officers for that purpose? A. Yes.

Q. And I suppose produced on your direction, was it? A. No, I cannot recall whether Sir David asked for some notes before his meeting with Mr Rendall, Mr Batterham or myself. I do not recall directing the production of this document nor do I recall it being submitted to me for approval before being handed to Sir David.

30 Q. But you are clear it came to you at or about the time it was written? A. It came to me at or about the time it was written.

Q. You knew when it came to you it was being provided for Sir David's information? A. Yes.

Q. In relation to a matter which you regarded as being one of considerable gravity to the company? A. Yes.

40 Q. If you had seen anything in it that you regarded as erroneous in fact, you would immediately have drawn Sir David Griffin's attention to it? A. I would not have studied it particularly carefully because knowing it was going to Sir David Griffin, I knew he would be aware of the facts as expressed by Mr Batterham and who might not have known all the situation because he is relatively new to the job, but the main purpose of the document was to give Sir David some historical background of what occurred.

Q. The historical background of facts that you believed Sir David Griffin knew. A. The background to the events that had taken place.

Q. Just a moment ago did you not say that you did not bother reading it very carefully because Sir David would know all the facts? A. Sir David would know the facts such as the one you have raised. The important thing was that he know the events that had taken place.

50 Q. So when you read the first sentence you were indifferent as to whether it was accurate or inaccurate, were you? A. I did not read the document in close detail as to whether statements such as that first sentence were strictly correct or not. I was more concerned that Sir David be informed of the events that had happened.

Q. So when you started reading the document you said in effect to yourself "This is the fact and it does not matter whether it is true or not"? A. No, I did not.

Q. When you read the first sentence did it strike you as being in accord with the facts or not? (Objected to, pressed, allowed) A. I cannot recall that I examined it closely. In June 1974 I was not in Australia, and from recollection I do not ever recall making a judgment on the contents of the first sentence.

Q. So far as you were concerned it did not matter whether it was true or false at that point of time? A. I have no recollection of what I thought at that time.

Q. Just a complete failure of your recollection; that is all you can tell us?

HIS HONOUR: What he is saying that he really did not take a great deal of interest or notice of it, and therefore it may not be a question of failure of recollection but of disinterest. 10

Q. Mr Coogan, is it that you simply do not remember what your attitude was to this document at the time, or was it that you did not look at it with any particular care or interest and therefore are unable to say whether it truly represents a particular situation or not? A. I think it is the latter, your Honour. I did not really study it line by line to inform myself as to how completely accurate it was, and I think I cannot give you a better answer than that. The substance of the document seemed to me to be what was necessary to advise Sir David Griffin and I did not study the detailed points. 20

MR STAFF: Q. Of course you have always believed yourself Nabalco to be operating the project at Gove as an agent for the participants, haven't you? (Objected to, pressed on credit, allowed only on the ground of credit in the sense of reliability of recollection.)

MR STAFF: Q. Could you answer that question? A. I don't understand what is meant by the term "agent".

Q. For that reason only you feel you cannot answer the question I asked you, is that what you say? A. Well, I just have a difficulty when you ask me do I act as agent as to what the definition of agent is.

Q. What do you understand the word "agent" to mean? A. It can be "representative of". 30

Q. A representative of someone else? A. Yes.

Q. Well in that sense, using the word in that sense, can you now answer the question I previously asked you? A. I act as the — more the appointee, I think, of the Board of Direction to manage Nabalco.

Q. What I was asking you was, Mr Coogan, was it not your belief that Nabalco in carrying on the operations which it does under your direction at Gove acts purely as an agent for the participants under the joint venture agreement? A. I can't answer that because of the difficulty about this matter of "agent".

Q. Regarding Nabalco as a representative in the sense you understood the word "agent", would you not agree with me, my question? A. I thought your question referred to me being the agent. 40

Q. No, to Nabalco, Mr Coogan? A. Well, in that sense perhaps you could say that Nabalco acts as the representative of the Board of Direction but it does not seem a very clear definition to me.

Q. Of course whenever Nabalco desires to do anything of significance it is accustomed to seek authority from the Board of Direction established under the joint venture agreement, isn't it? A. Yes.

Q. You are the officer of Nabalco responsible in the ultimate for preparing the material or approving the material which is submitted to the Board of Direction for 50

the purpose of enabling them to make decisions about matters which are referred for their decision? A. Yes.

Q. You then, whether or not you write the document, ultimately approve documents, such as the agenda, for each meeting? A. Yes.

Q. And the material which goes to the Board to aid their considerations of the matters submitted by that agenda? A. Yes.

Q. You customarily describe the matter so submitted as "matters submitted by the manager for decision"? A. Yes, and also matters submitted for information.

10 Q. But where you want a decision it is described under the heading "Matters submitted by the manager for decision"? A. Yes.

Q. On 19th June, 1974, you recall, do you not, that such a matter was submitted, or, rather, two such matters, amongst other things, were submitted for decision by the Board of Direction? A. There could have been several matters, I can't recall exactly.

Q. Do you recall that on 19th June, 1974, one matter submitted for decision of the Board of Direction was the initiation of court proceedings challenging the validity of the notice served by BP Australia on Nabalco Pty. Limited on 25th March? A. Yes.

20 Q. And that another was concerned with the future supply of furnace oil for Gove? A. I think that is correct, yes, the approval for entering into a contract, I think, is the—

Q. Would you agree that on 19th June at your instigation the Board of Direction was asked to approve the issue of proceedings in the Supreme Court of New South Wales to challenge the validity of the notice which BP Australia had previously issued? A. Yes.

Q. Under cl. 9(c)(iii) of the Petroleum Products Agreement? A. Yes.

Q. And that the Board of Direction on that day resolved to authorise the manager to proceed? A. Yes.

30 Q. And that proceeding was the proceeding which initiated what is going on here today? A. Yes.

Q. Do you recall that on 19th June the Chairman of Nabalco, Sir David Griffin, wrote letters about the same matter to Swiss Aluminium Australia Limited and Gove Alumina? A. Yes, I recall that.

MR STAFF: I call for two letters of 19th June, 1974, or copies of them, addressed to the General Manager of Swiss Aluminium Australia Limited and the General Manager of Gove Alumina Limited from Nabalco under the signature of Sir David Griffin. (Produced).

Q. Would you look at each of those documents, Mr Coogan? A. Yes.

40 Q. Can you tell us shortly whether those were letters which Sir David sent on behalf of Nabalco to the companies who are the addressees? A. Yes.

(Above letters tendered, not objected to except for the previous general objection, admitted and marked Exhibit 32.)

MR STAFF: I then call on my friend to produce a copy of the agenda for the meeting of the Board of Direction of 19th June, 1974. (Produced).

Q. Would you look at the photocopy document which I show you? A. Yes.

50 Q. Just looking quickly at it, I propose drawing your attention to what is item 2.3, which seems to be omitted from that document, or any other reference to it seems to be omitted. Is that the whole of the agenda for that meeting or is it part of it? A. I would say that is the whole of the agenda for that meeting. I am not aware of any other.

Q. You notice under the item 2.3 there is a matter said to be submitted for decision relating to an employee, the secondment of an employee? A. Yes.

Q. Although there is further material under the headings 2.1 and 2.2 on the following pages, there is nothing else about 2.3? A. No.

Q. Is that the usual form of agenda? A. No, there would normally be some information relating to 2.3. This meeting was held when I was in Zurich so I cannot inform you—

Q. It is not fair to ask you — A. As to what went on at that meeting.

(Above agenda tendered, no special objection, admitted and marked Exhibit 33.)

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MR STAFF: I tender a record of decisions of the sixtieth meeting of the Board of Direction held on 19th June, 1974, or rather a photocopy of it.

(Above document tendered, no special objection, admitted and marked Exhibit 34.)

Q. Mr Coogan, you recall that at about a time when the petroleum products supply agreement was originally entered into with BP Australia two loan agreements were entered into between the participants of the joint venture and BP Australia Limited? A. I was not present at that time but I am aware that loan agreements exist, yes.

Q. You are aware — you have been aware since at least some — when the dispute with BP arose last year that those loan agreements can be terminated and the loans become repayable if the petroleum products supply agreement is terminated for any reason? A. I was not aware of that in the strict sense.

Q. You knew in general? A. I knew that presumably if the contract ceased then the loan agreements would come up for consideration.

Q. And that was a consideration in your thinking about what attitude the company should take in relation to the matter? A. No, it was not a consideration.

Q. It was a consideration of other officers of your company to your knowledge, wasn't it? A. It was discussed, yes.

Q. And there were some \$2½-million involved in those loan agreements? A. Yes.

Q. Which would have become liable to be repaid if the petroleum products supply agreement ended? A. Yes.

Q. On your understanding? A. Yes, that is my understanding.

MR OFFICER: Again may I say what is the relevance of his understanding of what are two very short documents.

HIS HONOUR: One thing I am not clear about, Mr Staff, is the termination was as to fuel oil only and you mentioned petroleum in what you put to him.

MR STAFF: Yes, I mentioned the petroleum products supply agreement meaning the agreement entered into in 1969.

40

HIS HONOUR: We are talking about the fuel supply agreement.

MR STAFF: We have talked about it as a fuel supply agreement at times, but of course it covers products other than fuel oil.

HIS HONOUR: That is what I am endeavouring to find out.

MR STAFF: That is the point I was seeking to make with the witness.

HIS HONOUR: The termination though, if there was one, was as to fuel oil only.

MR STAFF: That depends on what one calls "termination".

HIS HONOUR: Let us not have any mystery about it.

MR STAFF: As I understand it there is an issue, or there may be an issue about as to what was in fact terminated or what might have been terminated. Certainly the notice given under 9(c)(iii) related to fuel oil only.

HIS HONOUR: And as I understood it left the other products still the subject of the agreement.

10 MR STAFF: Yes, your Honour.

HIS HONOUR: Is that wrong?

MR STAFF: Well, certainly it will be our submission that that is right.

HIS HONOUR: Well then, it seemed to me there was an ambiguity in your question to him, and I thought it was important because you are asking him about his understanding of a legal document. If you talk about petroleum are you saying that this loan is repayable if the agreement goes in its entirety or if it goes as to fuel oil?

20 MR STAFF: What I was putting to him was the loans become repayable if the agreement goes in its entirety and only if it goes in its entirety, so that it does not go if the agreement goes only as to fuel oil.

HIS HONOUR: I am not sure whether that was clear to the witness, but it was not clear to me, and may I say that the first I have heard to my recollection that there was any termination of agreement so far as dieselene and super motor spirit was concerned is now.

MR OFFICER: Likewise.

MR STAFF: The first we had heard of it was a few days ago when we got a letter which seemed to us to suggest that it had gone in respect of all products. If I am wrong then I am wrong, but that is what we drew from the somewhat cryptic terms of the letter.

30 MR OFFICER: Could you identify the letter?

MR STAFF: I do not want to go to another point, but I have not got the information readily to hand. May I just clear it up with Mr Coogan? I suspect that Mr Coogan and I were not at cross purposes, but just in case.

Q. What I was suggesting to you was that if the supply agreement with BP Australia came to an end in its entirety the loan agreements became repayable? A. Yes, I am not sure of the details but my understanding would be if we terminated the contract totally then we would probably have to repay the loan.

40 Q. If it came to an end only in respect of the obligation to supply fuel oil then it did not affect the loans? A. Well, it could have. I don't know enough about it to know how that may occur.

MR STAFF: Then, your Honour, perhaps I had better tidy the matter up. I would call from my friend for copies of loan agreement made on 10th June, 1970, between Gove Alumina Limited and BP Australia Limited, and also a similar deed made 11th June, 1970, between Swiss Aluminium Australia Pty. Limited and BP Australia Limited.

HIS HONOUR: Can you tell me what this has to do with the case?

MR STAFF: Yes, we submit it will bear considerably upon the issue of repudiation because it will be our case or part of our case, one branch of our case, that the reason why the plaintiff never accepted what it alleged is — what it now alleges is our repudiatory conduct, was that it did not — amongst other things it did not want to bring the fuel oil contract, the supply contract as a whole to an end because its principals would have had to repay at a time of economic stringency a considerable sum of money. There were other reasons as well, but we will be submitting that that was one factor bearing upon the way they conducted themselves. 10

HIS HONOUR: Q. What I have not understood is how what was being done could bring it to an end in its entirety.

MR STAFF: If it was repudiated then the contract would have been terminated as to the whole, and it will be our submission that one simply cannot accept repudiatory conduct without bringing the contract as a whole to an end. You cannot, as it were, say, "I will terminate part of the provisions of the contract because you have repudiated the contract or some of the provisions of it," and there is we would submit clear authority for it in the High Court, the Privy Council and the House of Lords, you simply cannot divide up part of a contract and say "You have conducted yourself in a way which would amount to repudiation so we terminate part of it," and that will be one of our leading submissions. 20

And it was because of what had recently been written that we suspected that it was going to be alleged that there had been a total termination of the contract, but a new contract made in relation to other products that had led me into this series of questions, but that is not apparently what is being alleged. 30

But there is a clear issue of law, assuming such action, that is that we repudiated in a sense that we have entitled them to bring the contract to an end, an issue of law whether that gave them the right to bring it partially to an end whilst insisting on performance as to other provisions.

HIS HONOUR: Did they insist on its performance or did it just happen to be performance?

MR STAFF: No, it can be giving us requirement notices saying "Under the provisions of the Contract" and saying they wanted this product and they referred to the agreement in the requirement notices, and all along Sir David Griffin and Mr Coogan and Mr Notter your Honour will hear were talking about whether we were willing to go on with the contract so far as the other products were concerned and we were saying yes, whatever happens to fuel oil. 40

HIS HONOUR: You say that it is going to be submitted that they sought the continuing enforcement of the contract as to the other products to avoid having to repay \$2½-million?

MR STAFF: Yes, in part that, that was not the only—

HIS HONOUR: It is a pretty small sum of money in this case.

MR STAFF: It may be but it might also be a large sum of money in the middle of last year when interest rates were in excess of 20%, some inducement, and of course also there are many other considerations which no doubt played a part in the decision and we will come to those in due course, but I do not want to anticipate them at this stage, but it is one of the factors, that is as much as we put it.

I tender, your Honour, the two deeds for which we called, or rather copies of them.

10 (Above loan agreements tendered, no special objection, admitted and marked Exhibit 35.)

Q. Mr Coogan, at about the middle of last year the position was that some \$2½-million between the two joint ventures was still unpaid under the agreement? A. I think that is correct in — I am not very familiar with the agreement.

Q. That was because repayments had not been made precisely in accordance with the agreement? A. I am not aware of that.

Q. You don't know? A. No.

Q. Whatever the reason you think it was \$2½-million? A. I believe so.

20 Q. Would you just look at the accounts I show you, Mr Coogan? A. Yes.

Q. Perhaps just have a quick look at them and satisfy yourself, I want to ask you are they the published financial accounts for Nabalco for the financial year ending December, 1974? A. Yes.

Q. I suppose you were concerned in the ultimate approval of those accounts, were you not? A. Yes.

Q. As general manager? A. Yes.

Q. And I suppose in the preparation of the directors' report? A. Yes, I would have been concerned in it.

30 Q. You, is it true to say — is it fair to say that you were a party to the approval of what is said in the report of directors? A. I would have read this report and been aware of it, yes.

Q. And if you disagreed with anything in it as a statement of fact you would certainly have taken steps — A. I would have brought it to attention, yes.

Q. May we take it that the content of the third paragraph represents your understanding of the facts there stated? A. The third paragraph commences —?

Q. "The principle" — A. Yes.

Q. And I suggest to you the fourth paragraph also in your view is a true and accurate statement of the facts it records? A. Yes, that would be the situation.

40 Q. Would you then agree that during the financial year mentioned the company earned no income from the operation of the Gove project, that is the company Nabalco? A. Yes.

Q. And it incurred no loss in respect of that operation in that year? A. No, no loss is recorded here.

Q. So if anyone made any money out of it it was not Nabalco, and if anyone suffered any loss it was not Nabalco? A. Nabalco Pty. Limited.

Q. That is right, do you agree with that? A. Yes.

50 Q. And the only activity of the company other than the management of the Gove Joint Venture was the investment of some money which it held on behalf of the joint venture participants or borrowed from them? A. Yes, that would be surplus funds, I would say, made available by the participants for the operation of the project.

Q. In the report it says, "Income was derived from the short term investment of funds borrowed from the joint venture participants"? A. Yes.

Q. Are you saying that that is perhaps not strictly correct? —

MR OFFICER: I am not strictly objecting but I think I framed my objection earlier that I object to all the inquiry as to the relations between Nabalco and the joint venturers, and I take it your Honour understood my objection as covering this sort of evidence as well.

HIS HONOUR: Yes.

MR STAFF: Q. I am just trying to clarify what you said earlier. I think you said the income arose from investment of surplus funds which Nabalco Pty. Limited had held on behalf of the participants? A. Yes. 10

Q. Is that what you understood by the statement "Income was derived from short term investment of funds borrowed from the joint venture participants"? A. Yes, I would say that is a fair statement of my understanding, that it was funds that were surplus at any time and they were invested.

Q. But they were not in your understanding the joint venture participants funds which you invested for them? A. If we hold surplus funds at any time they are invested.

Q. But who ordinarily is credited with the interest on the investment? A. Nabalco Pty. Limited. 20

Q. And it keeps that for itself and does not pass it on to the joint venture participants? A. It is usually absorbed in the cost of running the operation.

Q. So it usually goes for the benefit of the participants, does it? A. It goes — the interest from the surplus funds becomes part of the cash available to operate the venture.

Q. But, Mr. Coogan, your company, Nabalco Pty. Limited, is, in these accounts, saying it earned a nett trading profit provided for income tax in respect of profit and it got that income which it earned from the short term investment of funds, which as I understand you to say were really the joint venture participants surplus funds? A. They were — the joint venture makes funds available— 30

Q. For the purpose of the operation? A. Yes, and it is not always those funds are required immediately and then they can be invested on a short term basis.

Q. And then you get some income into Nabalco from that investment? A. Into Nabalco Pty. Limited.

Q. Yes, and ordinarily you would treat that income as being money provided by the participants, wouldn't you, for the operation of the plant? A. Yes.

Q. Apparently in this particular year some part of that interest income was not so treated, it was treated as Nabalco Pty. Limited's own profit? A. That would seem to be the case here.

Q. That would not ordinarily be the situation, that seems to have been so in that particular year, is that what you are saying? A. I can't remember from other years, but it seems to be the case at this particular time. 40

Q. In any event it is clear, is it, Mr. Coogan, from what you said that Nabalco does not stand to make a profit for itself as a company or to sustain any loss for itself as a company as a result of the operations it carried on at Gove? A. I would say generally that is correct, yes.

Q. And that was the position last year, and it has been the position during the course of the current year? A. I am not sure about the current year, I am not—

Q. The situation has not altered to your knowledge, has it, to what it was last year? A. Not materially, no. 50

Q. Or to what it was the year before that? A. I would say the position has not altered.

Q. You would agree, would you not, that in so far as a price for the acquisition of fuel oil for the purposes of the Gove operation has been greater than that which it might have been or would have been if oil had been acquired from B.P. under the supply agreement, Nabalco Pty. Limited as a company stands neither to make a profit nor a loss out of the difference? A. Yes, I would say if we had to pay more for oil it would not be apparent in the accounts of Nabalco Pty. Limited.

10 Q. Nabalco would simply look to the participants to provide the money to meet the increased cost? A. Yes, we would virtually say that the cost of alumina has now increased substantially, or increased, and more funds will be required to operate the project because of that.

Q. And the participants have in fact provided whatever funds are necessary, have been necessary for that purpose? A. Yes.

Q. And the result has been that when they take their respective percentages of bauxite or alumina it simply costs them more to have that material produced? A. Yes.

Q. Of course Nabalco Pty. Limited does not sell the alumina or bauxite to the participants, does it? A. No.

20 Q. It simply carries on the operation, the result is that bauxite or alumina is produced and it is then shipped away in the names of, or it is treated as being the product of Swiss Aluminium Australia Pty. Limited and Gove Alumina Limited until they in turn sell it off to someone else? A. Yes, or use it or whatever the case may be.

Q. And it does not in any way affect the matter, does it, or the result, whether the fuel oil is used in and about the production of the product be it bauxite or alumina or whether it is used in the production of power or lighting for the town or township facilities or amenities or other things? A. When electricity is generated from the fuel oil that electricity is charged off to users.

30 Q. That is other than Swiss Aluminium Australia Pty. Limited and Gove Alumina? A. Yes.

Q. So if the hospital uses power it is charged for that power? A. Yes.

Q. And that comes back into the funds of the joint venture as a receipt? A. That would come back into the Nabalco operations as it were and is contra-ed against the cost of operating the power station.

Q. And the same thing happens with the residents, I suppose they pay for their domestic supplies of power? A. Some do.

Q. And whatever recoveries are made from consumers come back into the funds of the joint venture and are contra-ed against the cost of operations? A. Yes.

40 (Financial accounts of Nabalco Pty. Limited tendered, no special objection, admitted and marked *Exhibit 36.*)

(Further hearing adjourned to 10 a.m. Wednesday, 19th November, 1975.)

THIRD DAY: WEDNESDAY 19TH NOVEMBER, 1975

**ALLAN GORDON COOGAN,
 on former oath (Cross-examination cont'd.)**

MR. STAFF: Q. Mr. Coogan, yesterday at p. 42 you told me that some of the

electricity used by residents at Gove was charged for and some was not? A. Yes.

Q. May we take it that some of the employees of Nabalco, or others concerned in the operation, are provided with free power? A. Broadly the employees of Nabalco are not charged; the government residents are charged.

Q. Broadly the population is made up of employees in the project directly employed by Nabalco and public servants, government employees of one description or another? A. And those engaged in private enterprise activities.

Q. Retail trade? A. Yes.

Q. And I suppose those engaged in retail trade or private enterprise are also charged? A. Yes.

Q. There are three categories really, the government employees and the private enterprise people — they are charged for power used? A. Yes.

Q. And the Nabalco employees and associated persons, persons associated with the works, who are not? A. Yes.

Q. The proportion of fuel oil used in the generation of electricity for consumption in the town, that is the proportion of the whole amount of fuel oil used in the project, is that proportion used for the consumption of power — the production of power for consumption by residents and those engaged in business, and I suppose government activity, is quite a small proportion, isn't it? A. Yes, very small.

Q. Almost — less than one per cent? A. It would be difficult to determine that, Mr. Staff. The power station is essentially a combined operation producing electricity and steam, and steam is essentially the main product in the sense power, you could say in the concept you have asked me, would be almost a by-product.

Q. In other words the electricity is produced almost, as it were, as a by-product which would go to waste unless it was used in the town? A. Well, it would be hard to say going to waste, but putting it another way, if we could buy electricity outside the main purpose of the oil would be to produce the heat, the steam that we require.

HIS HONOUR: Q. If you were situated in Newcastle you would not be generating electricity? A. We would only be doing it, your Honour, in the sense that it is — as you have to produce steam it is good economic sense to use that steam to produce electricity on the way through, as it were.

MR. STAFF: Q. In other words the electricity is produced as really a bonus in the production of the steam, a bonus in the use of the steam? A. I would not say bonus but it is an economical advantage to do it that way.

Q. I think we understand it now, Mr. Coogan. Now would you agree that you would use at Gove almost if not completely the same amount of fuel oil for the production of steam necessary for the operation whether you produced electricity or not? A. It would be a difficult question to answer except to say — a difficult question to answer in the sense of the proportion of one to the other, but it would be broadly correct that electricity could be considered a by-product of the operation and steam production is the essential purpose.

Q. Whilst I recognise, and correct me if I am wrong, but I imagine that there is some additional capital cost involved in the construction facilities for the production of electricity? A. Yes, that would be correct.

Q. And I suppose it is right to regard some part of the cost of the production of the electricity as being attributable to the facility, the capital facility? A. That would be correct, there is a considerable capital involved.

Q. But apart from that cost factor in the cost of your electricity, you would agree, would you not, there is virtually no added cost by reason of the fuel oil? A.

To agree to that completely I would have to see a heat balance and energy balance, but in broad terms I think that would be correct.

Q. May we take it, Mr. Coogan, as a consequence of the increase of your fuel oil costs by reason of the purchases under the Kuwait contract, charges for electricity have not increased? A. No, they have not.

Q. They have not increased? A. No.

Q. Now fuel oil I suppose is used you say mainly in the production of steam? A. It is used in two areas, in the steam power station and in the calcination section of the plant.

10 Q. So you use it for the purpose of production of steam in the steam power plant? A. Yes.

Q. Then that steam is used for what purpose? A. The steam is generated in the boilers which are oil-fired. It is then passed through turbines where it generates electrical power. It then passes out of the turbines into the plant as a heating medium for the process of liquor.

Q. Is that part of the treatment of bauxite or some other process? A. The steam?

Q. Yes. A. The steam is an essential part in the treatment of the bauxite because of the heat that is necessary in the liquors.

20 Q. So steam so used is properly — or the cost of steam so used is properly regarded in the cost of production of bauxite? A. Yes.

Q. Or treatment of bauxite? A. It is certainly true in the case of the calcination oil and it would be true also for the steam that passes out of the power station to heat the liquors of the alumina circuit.

Q. Are they the only two uses of fuel oil or perhaps I should say three uses, electricity generation on the one hand, the calcination plant on the other and the generation of steam in the boilers for the bauxite treatment? A. Yes.

30 Q. Or generation of heat for the bauxite treatment? A. There is an important aspect of the electrical usage in that large quantities of compressed air are also used in the alumina plant to maintain hydrate liquors in suspension, and again I cannot recall the figures of a study, but a considerable amount of electricity would be required to operate those very large air compressors.

Q. The cost of that electricity in so far as it is attributable to fuel oil again would be a direct cost of production of alumina, would it? A. Yes, that and as there are again very large volumes of liquor being moved through the plant we have some quite massive pumping systems which are again big consumers of electricity.

Q. And again the cost of that electricity is properly regarded as a cost of bauxite treatment? A. It would be directly involved in the bauxite treatment.

40 Q. So it is true to say, is it, that leaving aside that small proportion of steam that is produced for the purposes of driving the generators to produce electricity for the town consumption, the cost of fuel oil is otherwise a direct cost of the production of the — the treatment of bauxite for production of alumina? A. Yes.

Q. And I suppose even that part of the steam which drives the generators to produce electricity for the town for town consumption is not entirely lost from the production of heat for the purposes of the production of heat for the boilers in the bauxite treatment? A. No, it would be such a small part that it would be just difficult to say lost or not lost, it goes through the circuit, that is all I can say.

Q. It is virtually a minimal figure? A. I would say so.

50 Q. So for practical purposes we can regard, can we, Mr. Coogan, the cost of fuel oil supply to the Gove project as being a direct cost in the treatment of bauxite for the production of alumina? A. Yes.

Q. Whatever its use? A. Yes.

Q. And in so far as any recoveries are made from the town residents and

business people for electricity, the benefit of those recoveries, is, as it were, brought to account in the reduction of the cost of production of alumina and treatment of bauxite? A. Yes, as I recall it the accounting function, if you like, of any payments by the government, for example, are brought back into the, if you like, electricity account.

Q. Now Mr. Coogan, I want to show you photocopy documents to see if you can identify some signatures for me. (Approached) Do you know Mr. Vernon? A. Yes.

Q. Is he director of Gove Alumina Limited to your knowledge? A. He is not, no. 10

Q. He was — A. At that time in 1968, 1969.

Q. Mr. Lovell, he was then secretary, was he? A. Yes.

Q. And Mr. Meyer, I think we have heard was a director of Swiss Alumina at that time? A. Yes.

Q. And he is still, I take it? A. Yes.

Q. And Mr. Muller? A. Yes.

Q. Are you familiar with the document, a copy of which I show you, Alumina Sales Agreement? A. I am not familiar with it, Mr. Staff. I have read it.

Q. You have read it, you know of its existence? A. I know of its existence, yes.

(Above agreement tendered; no special objection) 20

Q. I show you a copy document headed Agreement — Alumina Sales Agreement between Swiss Aluminium Australia Limited and Swiss Aluminium Limited dated 14th October, 1969. You see that? A. Yes.

Q. This one bears reproductions of handwritten signatures? A. Yes.

Q. Are you familiar with the signatures on it? Sir David Griffin? A. Yes, and this would be Dr. Sorato.

Q. They are the signatures to the seal, across the seal of Swiss Aluminium Australia Limited? A. Yes.

Q. And they were directors of that company, were they? A. Yes. This would be, I think, Mr. Emanuel Meyer. 30

Q. Of Swiss Aluminium Limited? A. Yes, and that would be the signature of Dr. Paul Muller.

(Above agreement tendered; no special objection)

Q. I show you an agreement called the Alumina Sales Agreement between Gove Australia Limited and Swiss Aluminium Limited. A. Yes.

Q. Again that reproduces or rather indicates signatures to the seal of Gove Alumina of Mr. Vernon and Mr. Brown? A. Yes.

Q. They were respectively directors of that company? A. Yes.

Q. And Mr. Meyer and Mr. Muller of Swiss Aluminium Limited? A. Yes.

(Above agreement tendered; no special objection) 40

Q. Then I show you a copy of a document called Bauxite Sales Agreement made between Gove Alumina Limited and Swiss Aluminium Limited. A. Yes.

Q. Again I show you the signatures of Mr. Vernon and Mr. Lovell, or a reproduction. A. Yes.

Q. And Mr. Meyer and Mr. Muller for Swiss Aluminium. A. Yes.

(Above agreement tendered; no special objection)

Q. Then I show you an agreement dated 27th May, 1971, between Gove Alumina Limited and Swiss Aluminium Limited — the one I show you does not bear any reproduction of signatures. Can you tell us whether that agreement was in fact executed between the parties? A. I have no knowledge of that. That seems to be an agreement relating to bauxite quality, that is my only comment. 50

(Mr. Officer told his Honour that he understood Mr. Kuner as he understood

it would wish that all the above documents as tendered were not made public. His Honour indicated that he would not make such an order at present but either Mr. Officer or Mr. Kuner could make a further application in due course.)

(Above agreements admitted and marked Ex. 37)

Q. (Approached) I show you a copy of an agreement called the Joint Venture Agreement between Swiss Aluminium Australia Limited and Gove Alumina Limited. A. Yes.

Q. That is an agreement, I think, is it not, referred to in the Management Agreement that you looked at yesterday? A. I believe so.

10 Q. You see in printed reproduction purporting to indicate the seal of Swiss Aluminium Australia Limited the signature of Sir David Griffin and Mr. Baillie secretary? A. Yes.

Q. And for Gove Alumina Mr. Vernon and Mr. Lovell signing as directors? A. Yes.

Q. I think they were persons holding those offices at the time? A. As I understand it.

(Above agreement tendered; no special objection)

20 Q. Then there is an agreement called the Technical Assistance Agreement between Swiss Aluminium Limited, Swiss Aluminium Australia Limited, Gove Alumina Limited and Nabalco Pty. Limited? A. Yes.

Q. Again I show you what purport to be indications of execution by the four companies and persons who occupied the offices, did they, that are described at the time? A. Yes.

(Above agreement tendered; no special objection)

Q. Then there is a Service Fee Agreement between Gove Alumina and Swiss Aluminium Limited and again I show you a record of the execution under the seal of the two companies and persons holding the offices that are described. A. Yes, they are the people who held those offices.

30 Q. Then I show you a printed copy of an agreement made 22nd February, 1968, between the Commonwealth of Australia and Nabalco Pty. Limited — I think this agreement has been called the Mining (Gove Peninsula Nabalco Agreement) it is a schedule to an Act of that name, is it not? A. I am not familiar with the legal details of it.

Q. Nabalco's own seal appears to have been affixed in the presence of Sir David Griffin and Mr. Vernon? A. Yes.

Q. And Mr. Joehr as secretary and it is signed by the Hon. Charles Edward Barnes as the Minister of State for the Territories at the time? A. Yes.

(Above agreement tendered; no special objection)

40 Q. And then there is a further agreement called the Supplemental Agreement and the agreement relating to the bauxite deposit at Gove made 30th May, 1969, between Swiss Aluminium Australia Pty. Limited, Gove Alumina Limited, the Commonwealth of Australia and Nabalco Pty. Limited? A. Yes.

Q. Can you tell me whether the signatures appearing over the reproduction of the seals are those of officers of the respective companies described? A. It is difficult to see them clearly, but I would say that is Sir David Griffin's, that seems to be Dr. Sorato, that seems to be Mr. Brown, that one, it may be Mr. Jackson, Mr. Gordon Jackson, it is not very clear.

Q. He was a director of Gove at the time, was he? A. I presume so.

50 Q. You have got Sir David Griffin again against Nabalco? A. Yes, and I think that seems to be Dr. Sorato.

Q. And I think again we have Mr. Nixon's signature as the Minister of State for the Interior? A. Yes.

(Above agreement tendered; no special objection)

(Above agreements admitted and marked Ex. 38)

No. 111
 —
 Plaintiff's
 evidence: A. G.
 Coogan: Cross-
 Examination
 (cont'd)

Q. (Approached) I want to draw your attention to cl. 2.4 of the Joint Venture Agreement, p. 45 of the volume—

HIS HONOUR: When you say 45, that is your red number but it may be p. 10 in Mr. Officer's copy.

MR. STAFF: Yes, I am sorry, p. 10 in the print, your Honour.

Q. You see that provision commences "Unless otherwise agreed by the participants Bauxite and Alumina shall be delivered by the manager to the order of respective participants" and so on? A. Yes.

Q. Has there been any other agreement between the participants? A. Other than this? 10

Q. Other than that provision. A. If there is I am not aware of it, Mr. Staff.

Q. And you would expect to be, wouldn't you? A. Yes, I would expect so, yes.

Q. Then turn to cl. 4.4 which is on p. 56. That provision provides for the Australian company, which is Gove, from time to time giving six months' notice to the Austra-Swiss and to the manager requesting the quantity of bauxite not exceeding 40 million dried tons be produced for it and loaded for shipment each ton treated. Has any notice been given under that provision? A. To change it?

Q. Yes. A. Again I am not aware of any notice to change it.

Q. Notice is required to be given to the manager and so far as you are aware no notice under that provision has been given to the manager? A. I am not aware of any notice that changes that provision. 20

Q. But the question I am asking you, Mr. Coogan, is not whether you are aware of a notice changing that provision but whether you are aware of any notice having been given to the manager in consequence of that provision? A. Yes, we regularly receive advice from — this is Gove Alumina — from Gove Alumina that they will be requiring bauxite.

Q. Does that mean you receive from time to time notices under that provision, cl. 4.4?—

HIS HONOUR: I am a bit worried about that, whether he knows. You can ask him his understanding perhaps and then there is no problem, but it is a bit unfair to ask him whether there have been notices under that clause because as I understand it he is not in that company. 30

MR. STAFF: But the notice to be given to him, to his company. We have had a response to a subpoena in respect of notices of that description and I do not know, my friend may be prepared to make the admission.

Q. Are you aware that a subpoena was served upon Nabalco Pty. Limited a week or more ago requiring the production of each notice and copy notice which had been given under cl. 4.4(a) of the Joint Venture Agreement? A. I was not aware of that one in particular but there have been a number of subpoenas served. I was not aware of that particular one. 40

Q. As general manager did you cause search and inquiry to be made in your company for the documents described in the subpoena? A. As a general statement I was aware that subpoenas had been served and we were endeavouring to meet the requirements of those subpoenas.

Q. Did you yourself make any inquiries for the documents? A. No.

Q. But you say there are documents as described in cl. 4.4 of the agreement? A. Yes, I have the same difficulty as you just referred to, Mr. Staff, in understanding these documents in total, but as I read this particular 4.4, I term it as — the effect

of it is we get a regular advice from Gove Alumina that bauxite should be shipped on their behalf.

Q. I show you a copy of a subpoena addressed to Nabalco Pty. Limited to the proper officer Nabalco Pty. Limited and requires production to this Court on 13th November at 9.30 the documents mentioned in it, and I refer you to Item 2 of that subpoena which is in these terms, "Each notice and copy notice given pursuant to cl. 4.4(a) of the Joint Venture Agreement by Gove to Swiss"? A. Yes.

10 Q. I put it to you that when that subpoena was answered it was said on behalf of your company that there were no such documents. What do you say about that?
 A. Well, it may be a question of interpretation, and I have just given you my interpretation of how—

Q. Your belief is that there are such documents? A. If my interpretation that these relate to shipping advices from Gove Alumina that we should follow the latter sentence, if you like, in that particular clause, then there are documents that relate to that.

MR. OFFICER: Perhaps I should clarify one thing which my friend said. My learned friend said the answer to the subpoena was that there were no such documents. I am instructed the answer to the subpoena was that no such documents could be found.

20 MR. STAFF: I have just read the transcript of the 13th November and I see that Mr. Herron neither said that they did not exist nor proffered any reason.

Q. Mr. Coogan, will you in the course of the next day or so have inquiries made to determine whether there are any documents of the description contained in that paragraph of the subpoena I showed you, and if so have them brought to Court? A. Yes, I will.

Q. Now I would refer you to cl. 5.4 on p. 25 of the agreement, which is p. 60 in the book. That provision relates to the giving of notice, in short, of the desire of a participant for the expansion of the plant? A. That is correct.

30 Q. Has any notice described as an initiating notice in that clause been given? A. I am not aware of any notice under 5.4.

HIS HONOUR: Mr. Staff, have you or your solicitors asked the advisers for the plaintiff these questions? It ought to be capable of being the subject of an admission.

(Discussion ensued)

MR. STAFF: Q. You have seen this morning, only briefly and partially, documents described as sales contracts of alumina and bauxite between the participants and Swiss Aluminium Limited? A. Yes.

40 Q. There is a further agreement, is there not, with some Japanese interests; between Gove Alumina and the Japanese interests in relation to the sale of bauxite?
 A. I have no knowledge of that agreement.

Q. Apart from such a possible agreement and those which you have seen this morning, are there any other contracts in respect of any production of bauxite or alumina from Gove in existence — for the sale of that product by either of the participants? A. I am not aware of any other contracts.

Q. Nabalco of course acts in arranging the shipment of the product be it bauxite or alumina from Gove on behalf of the participants? A. Yes.

Q. And the only shipments of products of which you are aware, as Manager of Nabalco, having been made, are in accordance with these contracts you saw this morning? A. The only shipments we make are for either one of the participants.

No. 111
 Plaintiff's
 evidence: A. G.
 Coogan: Cross-
 Examination
 (cont'd)

Q. And in pursuance of the contracts you saw this morning? A. I am not sure what happens after that in the sense of contractual arrangements.

Q. But at least you ship to the order of the participants? A. Yes.

Q. In your company's claim for damages in these proceedings, a claim has been made in respect of demurrage charges incurred and to be incurred in consequence of deliveries of oil by Concord from Kuwait National Petroleum Company? A. Yes, I understand so.

Q. You are aware of that claim? A. Yes, there is a demurrage claim.

Q. In fact demurrage charges have been incurred in respect of shipments delivered to Gove? A. There have been demurrage claims in relation to shipments of oil. 10

Q. Shipments from Kuwait to Gove in consequence of the contract which you entered into with Kuwait National Petroleum Co? A. The shipments would be concerned with the Concord contract.

Q. To get it clear, you buy your fuel oil from Kuwait National Petroleum? A. Yes.

Q. Under the terms of the Affreightment contracts with Concord it is shipped to Australia on your account? A. Yes.

Q. And under the affreightment contract demurrage was payable if discharge was delayed beyond seventy two hours? A. I do not remember specifically the hours but if there is a delay beyond the agreed time demurrage is charged. 20

Q. With some degree of consistency it is your company's claim, is it not, that demurrage charges have been incurred? A. Yes.

Q. Indeed, practically every time there has been a delivery? A. I am not sure how many times but there have been a number of times that demurrage was involved.

Q. Your claim involves a claim for further demurrage which you anticipate will be incurred in future? A. I am not clear as to the future demurrage claim arrangements.

Q. Are you aware of the circumstances in which demurrage has been incurred in the past? A. I would say from my knowledge because of the rate of discharge — the rate of discharge of the oil in the ship was too slow. 30

Q. Do you mean by that that the ship's discharge equipment was too slow to discharge it into your facility in 1972? A. That particular problem has been — we were endeavouring to resolve it to find whether the ship's equipment was too slow or there is some restriction in our entry arrangements that delays the ship.

Q. The position is it may be your fault or it may be the ship's fault that demurrage to this extent is being incurred with a considerable degree of consistency? A. I would say that is my interpretation.

HIS HONOUR: I am not sure whether the word "fault" is correctly used, unless you are using it in a neutral sense. It may be that it is a technical problem that is not involved but simply a state of affairs but you are complaining about being billed for the demurrage. 40

MR. STAFF: Yes.

HIS HONOUR: Q. Before the problem arose and whilst you were getting supplies from B.P., was there the same technical problem? A. I cannot recall. The discharge of the B.P. ships as I recall went according to the general time schedule. I do not recall the same difficulties as we have encountered now with the Kuwait shipment.

MR. STAFF: Q. The B.P. tankers were about 35,000 tonnes? A. Approximately.

Q. Under the Kuwait contract, if you use 35,000-tonners there is a penalty in the freight rate? A. Under the Concord contract, yes.

Q. So you use under the Concord contract 60,000-tonners? A. It is desirable you do.

10 Q. Your facilities at Gove were all designed for 35,000-tonners? A. No, not that way technically. It is a question of the ships' pumping capacity and our capacity to receive. The temperature of the oil has a bearing on this and we have not materially — I do not think in fact we have changed at all the receipt arrangements that we have for oil. We believe the studies we are making in relation to the discharge of oil get back to the capacity of the ship to pump at the rate they said they could pump.

Q. So there may be a failure in performance by the Concord ships giving rise to demurrage charges? A. It could be a difficulty in the pumping capacity of the ships.

Q. In other words, they have an inadequate pumping capacity for the time allowed under the contract for discharge? A. That is possible.

20 Q. Can you tell us before entering into the Concord affreightment contract what enquiry was made or what investigation was carried out as to the amount of time that would be required to discharge at Gove the anticipated cargoes which you were to receive? A. I was not directly involved in the technical discussions as to cargo discharge time. That was handled by Mr. Wilson who is a shipping expert. He negotiated with the Concord people to establish what would be a reasonable discharge time.

Q. Is Mr. Wilson an officer of Nabalco? A. He is not an officer of Nabalco.

Q. Is he an officer of Concord? A. He is employed by Swiss Aluminium Australia.

Q. He was given the task of evaluating the discharge times to be provided? A. He was seconded to Nabalco as being a marine expert to assist us in establishing the Concord contract.

30 Q. Would you tell us approximately when he was seconded to you for this purpose? A. I believe yesterday you showed me a Board Minute and at the bottom of that there was a—

Q. A reference to the secondment? A. Yes, the transfer of an officer. I think that was the occasion when he was transferred.

Q. 19th June? A. The Board meeting of 19th June, yes.

Q. I show you Ex. 34? A. That is the particular matter I had in mind. It refers to the secondment of Mr. Wilson.

Q. He was seconded on 19th June? A. Yes, on that date.

40 Q. The contract with Concord was signed on 18th June? A. I am not sure whether the contract was signed on the 18th or 19th. It was about that time.

Q. Mr. Wilson did not have much time to do his evaluations, did he? A. Mr. Wilson was discussing with shipper companies the possibility of a contract before this date as I recall.

Q. There was a very considerable hurry to enter into the Concord affreightment contract? A. We were anxious, having decided to enter the Kuwait contract, to have a back to back arrangement as to the carriage of oil.

50 Q. Having made a decision, at any rate at Nabalco level, before you submitted it to the Board of Directions, you made that decision to enter into the Kuwait contract and you set about rushing around to find someone to sign up to an affreightment contract? A. No, when the initial projects were discussed with Kuwait it was agreed it would be f.o.b. or Kuwait were offering f.o.b. arrangements and it was realised we would have to take steps to arrange shipping.

Q. You did not know that until 10th June or thereabouts? A. Before 10th June

there had been discussions and it was made clear to us that Kuwait could only enter into an f.o.b.-type contract.

Q. Your first contact with Kuwait was 27th May? A. Yes.

Q. You had no offer from Kuwait until 10th June? A. That was the formal offer from Kuwait, yes, but before there were considerable discussions.

Q. While you were talking with B.P., Kaiser and Kuwait? A. Yes.

Q. You were talking in general terms? A. Each of these companies were in the course of preparing a quote or contract proposal for us.

Q. Kaiser was on an f.o.b. basis? A. I do not recall clearly. I am not sure about that.

Q. B.P. was certainly f.o.b.? A. B.P. was c.i.f.

Q. I am sorry, Kaiser was f.o.b. — I will put it to you that Kaiser was c.i.f.? A. I think that would be so because Kaiser is a trading company and they have ships. That would be it.

Q. Your initial discussion with K.N.P.C. centred around both f.o.b. and c.i.f. contracts? A. The initial discussion more directly involved Mr. Notter. I cannot recall whether both.

(Short adjournment)

MR. STAFF: I call on my friend to produce a report dated 14th June, 1974 relating to the further supply of bunker C oil to Gove.

MR. OFFICER: That is produced.

MR. STAFF: I should say for the record what is produced is part of the document I called before. Obviously parts of the annexures are privileged documents and I would not seek to see Counsel's views but I think I should make it clear that the document is not what I called for, but I am quite content to use it in lieu of the document called for.

MR. STAFF: Q. Would you look at that photocopy document? A. Yes.

Q. Is that part a report you made on that day? A. Yes.

Q. 14th June? A. Yes, it was typed on 14th June.

Q. You prepared it some days before? A. It would have taken only a certain time — there would have been a certain amount of time involved in preparation, yes.

Q. It is a considerably voluminous document? A. Yes.

Q. Would you turn to p. 8, the second paragraph commencing, "Whilst initially K.N.P.C. discussed the possibility of f.o.b. and c.i.f. contracts, it later became clear they would prefer to enter into an f.o.b. commitment with Nabalco"? A. Yes.

Q. So between 27th May and 10th June there were some discussions with K.N.P.C. about both f.o.b. and what you have described as c.i.f. contracts? A. Yes.

Q. Did you participate in those discussions? A. I do not recall participating in the detailed discussions. That would have been Mr. Notter, but I may have been in more general discussions. I do not recall discussing the carrying arrangements for the oil for example.

Q. You got a firm offer from K.N.P.C. on 10th June? A. Yes.

Q. Between 10th and 14th June you had negotiated a draft contract with K.N.P.C.? A. Yes.

Q. So by 14th June you had a draft contract which you believed, subject to the approval of the Board of Direction of Kuwait was capable of being entered into? A. Yes.

Q. It was then I suppose that you set about trying to make an appropriate contract of affreightment? A. That would be correct.

Q. On 18th June you concluded the contract of affreightment? A. The 18th or 19th.

Q. You did not participate in the negotiations for the terms of the contract or the enquiries made for a shipper? A. I did not participate in the negotiations but I was aware of the progress.

Q. Who carried out the negotiations for the contract of affreightment? A. That was Mr. Wilson.

10 Q. Did he or someone else in the organisation make other enquiries in relation to available shipping companies who could make contracts of affreightment? A. I believe so.

Q. Who were the officers who did that? A. Mr. Notter and Mr. Wilson were working together on this.

Q. Mr. Notter will be able to tell us and Mr. Wilson? A. I assume so.

Q. You have already said you did not participate in that activity? A. I did not directly participate. I was kept informed of the progress.

Q. You knew, I suppose, that Concord, a party to the affreightment contract, was a subsidiary of Occidental Oil Co? A. I was told that.

20 Q. That its primary business was carrying the products of Occidental Oil Co.? A. I do not recall I was aware it was primarily involved in that.

Q. It was carrying for Occidental Oil? A. I understood that, yes.

MR. STAFF: I call for annexure H to Mr. Coogan's report of 14th June, 1974. I will go on with another matter while my friend looks for that.

Q. You know, don't you that on 14th September, 1975 the then Prime Minister made an announcement varying the price of Australian indigenous crude oil? A. I read it in the newspapers, yes.

30 Q. You know as a fact that variations took effect in consequence of the Prime Minister's statement? A. No, I do not know that as a fact. I am not an expert in the Australian oil supply situation.

Q. You use petroleum products on a large scale at Gove? A. We use some petroleum products, yes.

Q. You would be interested in the possible movement in prices of Australian products as a result of variations in the indigenous crude oil formula? A. I do not recall any particular interest at that time.

Q. You know the announcement was made in relation to that matter on the date I mentioned? A. I am not sure of the date. I know there was a change in the price basis for Australian crude oil.

40 Q. You were aware that the supply contract with B.P. contained a provision for a variation of price in the event of the refixing or variation of the price of Australian indigenous crude oil and a variation of allocations — were not you? A. I can recall some reference to the Australian indigenous pricing in the original B.P. supply agreement, but I would have to look at it again to be sure of what you are asking me.

Q. You are also aware there was a twelve percent devaluation of the Australian dollar last year? A. Yes.

Q. You are aware that the B.P. supply agreement also contained a provision for a price variation in the event of an alteration in the value of the Australian dollar? A. Yes, I recall a reference to that.

50 HIS HONOUR: Does the claim for damages as particularised, take this matter into account?

MR. STAFF: No.

MR. OFFICER: Further schedules have been handed over I understand to my friends after the filing of the particulars of claim that reflect these matters.

MR. STAFF: We will no doubt hear about that in due course.

HIS HONOUR: If they are to be taken into account in some schedule it may save you further trouble.

MR. OFFICER: I understand it has been agreed between Mr. Gleeson and Mr. Horton for the purpose of calculating the B.P. receipts we are accepting the figures used in the counter-claim. Is not that right?

MR. HORTON: For the purpose of calculating exchange rates.

10

HIS HONOUR: All I was asking you to do was to agree if you could or to narrow the field of disagreement.

(Mr. Staff stated that the matter would be mentioned later)

MR. STAFF: Q. It was known to your company very soon after 22nd March when B.P. served this notice, having revised the prices, that B.P. intended to press strongly its view that the notice was valid? A. Yes.

Q. At least that was the assumption made by the officers of your company dealing with the matter early in March or soon after the notice was received? A. I would say that is correct.

Q. It was well known to you and the other officers in your company dealing with the matter what had happened in the Middle East in relation to oil supplies generally? A. Yes.

20

Q. The historical events of the past eighteen months or so leading to the enormous increase in crude oil prices were well known to your company and its officers? A. Yes.

Q. And the chaotic conditions governing the supply of oil generally, both petroleum and fuel oil which had arisen in the world market prior to March 22-23, as a result of the Middle East oil embargoes and price rises, were well known to your company and its officers? A. Yes.

Q. It was in the light of that knowledge that late in March or early April your Company made an assessment of the course of action open to it as a consequence of the notice that B.P. had given? A. I am not sure of the date but we did make an assessment of what we might do.

30

Q. That was before you decided to give the conditional notice which you gave on the basis that it took effect only if B.P.'s notice was valid? A. It would be about that time.

Q. When you gave your notice and said it would take effect if B.P.'s notice was valid, you were aware in general terms of the events which had occurred in the Middle East in relation to oil supply and prices of crude oil and the like? A. Yes.

Q. You were aware of the chaotic trading conditions that prevailed in the world markets for fuel oil as a consequence? A. Yes.

40

Q. You supplemented your existing knowledge by enquiries you made in the Middle East and elsewhere throughout the world and to those who had a particular knowledge of the fuel situation? A. I cannot remember any enquiries other than Mr. Notter visited the Middle East.

Q. He was in the Middle East? A. Yes, in the course of determining what we

might be able to do, he went to the Middle East and tested the situation if you like to put it that way.

Q. He had a discussion with Ian Haig? A. I believe so. He told me so.

Q. He was in contact with you about the situation in the Middle East immediately before your conditional notice was given, was not he? A. The actual date I am not sure, but he was talking with Mr. Haig about that time.

Q. You would agree would you not there was nothing which you regarded as significant, which you did not know about the Middle East situation and the events which led to this vast increase in crude oil prices by the time you gave your notice?

10 A. I do not think I was as well informed as you say, but I was aware of the general situation in the Middle East.

Q. I suppose later on when this case got under way you read the affidavits which were filed on behalf of B.P.? A. Yes, I recall that.

Q. In general terms you found nothing new in them, did you? A. Perhaps I could better answer that if I re-read them. It is a long time ago.

Q. I was trying to avoid the necessity to impose that task on you but so far as your recollection goes — A. Yes, in general terms I would say so.

Q. I am not asking you for absolute precision and particularity, but in general terms? A. Yes.

20 HIS HONOUR: There may be some detail about particular supplies or sources about which he would not have been aware.

MR. STAFF: That was what I was seeking to ask.

Q. You understand that? A. I understood you to ask was I aware what was said in the documents that we received in relation to this matter. They generally expressed what I understood to be the situation in the Middle East and as I recall they did.

30 Q. There was nothing in general terms that you learned subsequently to the date you gave or your company gave its conditional notice that really was any different from the state of your knowledge earlier? A. No, I have no remembrance of that.

Q. One of your representatives had been provided by B.P. with a copy of an article written on behalf of the Chase-Manhattan Bank in relation to the oil situation. Do you remember that? A. I do not remember but that could be so. There was a lot of material both in technical journals and elsewhere on oil at that time.

Q. It was your understanding was it not around 10th April, 1974 that there was a fuel oil crisis in the Middle East which had arisen from the latter part of 1973 and subsequently? A. It would have been my understanding at that time, but whether it was 10th April I am not sure.

Q. Some little time before your company gave its notice? A. Yes.

40 Q. It was known to you that some large consumers of furnace oil had had their allocations reduced under a force majeure provision? A. I cannot recall the contract in relation to that, but I remember ships' bunkers being a problem at that time but whether under force majeure I cannot recall.

Q. You were aware some consumers of furnace oil had their allocations reduced below their requirements? A. My memory relates to ships' bunkers but I think what you say is correct.

HIS HONOUR: Mr. Staff, are you relying on cl. 13 of the contract?

MR. STAFF: No, your Honour.

Q. You understood at this time in April before your company gave the notice,

what I call the conditional notice, what the motives were of B.P.A. in giving this notice seeking to escalate the base price? A. I do not understand — the motives as I understand in that sense were expressed in the notice.

Q. Your understanding was in short perhaps and in general terms they were seeking to revise the base price because of the situation which had arisen in the Middle East and ultimately as a result of the escalating prices, which had escalated so enormously? A. Yes, I would say their motives would be affected by the situation.

Q. That is what you had in your mind in April, 1974? A. I would say so, yes.

Q. For that reason, if only in part, you set about investigating the possibility of alternative supplies of fuel oil in Australia and elsewhere? A. Yes, we were as I said before looking at the prospects of an alternative supplier to B.P. 10

Q. In the course of that enquiry you also gathered additional information about the general oil supply and price situation? A. Yes, we gathered information such as the major companies like Shell and Mobil could not supply us. We knew there was a possibility of oil from some of the trading companies, spot oil was possibly available. We had become acquainted with the problem.

MR. STAFF: Q. Indeed your inquiry suggested such a serious situation for the future as well as for the present, that you decided to investigate the possibility of using alternative fuel to furnace oil in Nabalco? A. Yes, Mr. Lockrey had suggested it might be a good idea because of the oil problems if we considered other forms of energy for Gove. 20

Q. You, in the end, formed the view that the question arising as to the validity of the B.P. notice was not one which was easy to determine conclusively one way or the other? A. I think in those days I was very influenced by what the lawyers were saying.

Q. But you thought that the decision might go one way or the other? A. No. We were of the feeling that — I am speaking now as a layman — that we obtain a number of opinions on the validity of the notice and my view was that the first two or perhaps three of those were so much in our favour that it was almost too good to be true and we should get one or two more. 30

Q. I am asking you before you gave your notice, didn't you feel that the worldwide fuel crisis of 1973/74 might have a significant impact on what the answer to the question, in erroneous terms or not, would be? (Objected to: pressed: last two questions read out: objection withdrawn: allowed: last question read out.) A. I certainly thought that the world oil situation at that time would have a bearing on our chances of success or otherwise.

Q. Was it not your state of mind at that time that whilst you were confident of success in the light of the advice you had had, you were equally conscious that you might not succeed? A. I was never confident of success, Mr. Staff. The lawyers said we should succeed but I am not sufficiently informed to become confident about that— 40

Q. Have—

HIS HONOUR: Let him finish the answer.

MR. STAFF: I thought he had.

WITNESS: I was saying, your Honour, in answer to that question, that although we had had advice that might lead me to be confident, I was not confident that we would necessarily succeed in court because other opinions had been expressed, not necessarily opinions that we had asked for from counsel, but, for

example, I think Mr. Chate (?) in C.S.R., who is a legal officer, had thought that the—

HIS HONOUR: It has now become not an answer to the question.

MR. STAFF: Q. Your approach to the situation factually in the light of the advice you had had was such that you could not count on being successful, though you hoped you would be? A. Yes.

Q. You recognised that in the end one party or the other no doubt would succeed unless a compromise ensued? A. Yes.

10 Q. But you also recognised that in the situation that existed, that unresolved question of who was to succeed might take some years to decide? A. Yes.

Q. I think you contemplated that if, for instance, B.P. lost they might appeal ultimately to the Privy Council? A. Yes.

Q. And equally that if your side lost, they might appeal to the Privy Council in the end? A. Or the High Court, yes, we would appeal.

Q. Your conduct, action, was significantly influenced by those considerations as well as the factual situation? A. Yes.

20 Q. Indeed, in your company there was a view, was there not, that it might well be said or thought to be inequitable to insist upon your strict right of the \$13 or \$14 a ton in price, even if you were successful? (Objected to: question read out: rejected.)

Q. What is your view, Mr. Coogan, that it would be inequitable to insist on supply at the old contract price without escalation if your company were ultimately successful (Objected to: pressed: rejected.)

Q. After your discussion of 17th May with Mr. Lockrey and others — A. Yes.

Q. — there were, were there not, substantial discussions between other persons, representatives of your company and representatives of BP about the question which I may generally describe as litigation or not, compromise agreement or not? A. The discussions as I recall—

30 Q. Could you just answer that question, Mr. Coogan? if you will. You were aware that discussions took place between representatives of your company and representatives of B.P. on the same subject matter which had been discussed during 17th May, were you not? A. I don't recall that, I just don't know.

Q. I put it to you there were discussions between Sir David Griffin and Mr. Rendle, the managing director of B.P. Australia, of which you are well aware? A. Yes, I am aware of that.

Q. You are aware the substance of them was concerned with the same matters as additional matters to those which were discussed at the 17th May between you and Mr. Lockrey, weren't you? A. Yes.

40 Q. Why did you say you were not aware of any such similar discussions a moment ago? A. My mind was concerned with Mr. Notter's discussion on the new contract. I had overlooked the fact that Sir David Griffin and Mr. Rendle had also had a discussion.

Q. You know that Sir David Griffin had a number of discussions with Mr. Rendle, don't you, about the matter? A. No—

Q. Over a period of time? A. — I think he had two discussions.

Q. And he arranged them for the express purpose of trying himself to resolve the problems that had arisen? A. Yes.

50 Q. He thought to do it or do attempt to resolve the problem that had, been, as it were, bogged down between the lower eschelon executives and the top level. — (Objected to: pressed: question withdrawn.)

Q. Sir David Griffin was the chairman of your company, wasn't he? A. Yes, Mr. Staff.

Q. And a senior officer to you? A. Yes.

Q. Did you not have discussions with Sir David Griffin before his conversation with Mr. Rendle took place? A. Yes.

Q. Did he not tell you the purpose for which he was going to discuss the matter with Mr. Rendle? A. Yes.

Q. Was it not one of the purposes he expressed to you that he wanted to see if he could resolve the impasse that had arisen between executive officers of Nabalco and the executive officers of B.P.A. who had been handling the matter, with the managing director of B.P.A.? A. Yes.

Q. It was in pursuance of that express purpose that he had meetings with Mr. Rendle? A. Yes. 10

Q. And no doubt he reported to you on those meetings? A. He did.

Q. He made notes which were made available to you? A. Yes.

Q. You just forgot about those meetings a few minutes ago, did you? A. I didn't forget — yes, I did forget because I was thinking of your question in terms of negotiations that were going on as to a new contract.

Q. I put to you that on the 23rd May you had a telephone conversation with Mr. Lockrey in continuation of the discussion which had gone on on 17th May? A. I don't recall that conversation.

Q. I put it to you that you were aware that on 27th, 28th and 29th May Mr. Notter and Mr. Lockrey had a number of conversations? A. I would be aware that they had discussions, yes. 20

Q. You knew they were in continuation of matters which had been generally discussed on 17th May? A. That is the point I was making before. They were a continuation of the possibilities of a new agreement.

Q. What was to be done about oil supply for Gove? A. Yes.

Q. And for Nabalco? A. Yes.

Q. You knew in those discussions, although they were described as being "without prejudice" by the people who had them, attitudes for the continuation of oil supply were expressed? A. I'm not so sure about attitudes. We were, as I recall it, moving towards the establishment of a new contract. 30

Q. Indeed, you were aware that discussions were had about programming future oil supplies for Nabalco? A. There was some question of that I think from B.P.

Q. You were aware I suppose that on 6th June Mr. Snape had a telephone conversation with Mr. Notter? A. I do not recall that conversation.

Q. Anyway, you are aware that Sir David Griffin rang Mr. Rendle in London? A. Yes.

Q. And had a discussion on the telephone with him? A. Yes.

Q. And arranged again to see him in Melbourne on 10th June? A. Yes. 40

Q. All that happened between 17th May and 10th June? A. Yes.

Q. In consequence of the telephone conversation with Mr. Rendle in London — from Australia to London — you were aware that ultimately Sir David Griffin and Mr. Rendle met in Melbourne and had a further conversation? A. Yes.

Q. You were not there, of course — I am not suggesting you were, but you were kept informed of everything that was going on throughout this period, weren't you? A. I received Sir David Griffin's notes of the discussion and I was aware that he was having the discussions.

Q. If Mr. Notter had a conversation he told you about it? A. I don't recall Mr. Notter telling me of a conversation with Mr. Snape, but he did make notes of his discussions at that time. 50

Q. He provided you with notes of his discussions? A. Yes.

Q. So that everything that was going on, at least as recorded by these, who was having the discussions on your side, was made known to you? A. Yes.

Q. So far as you were concerned anyway? A. Yes.

Q. Following the conversation between Sir David and Mr. Rendle on 10th June, and arising out of it, you were aware that Mr. Lockrey and Mr. Notter had further conversations? A. Yes, again this would have been covered by notes from Mr. Notter.

Q. Indeed, you yourself prepared a very long document recording your understanding of that had been going on and what had happened and the position that had been reached between the parties? A. Is this the report you showed me this morning?

10 Q. 14th June? A. With annexures?

Q. With annexures. A. That was a report I prepared for consideration by the directors.

HIS HONOUR: Q. By — A. By the Board of Directors.

MR. STAFF: Q. (Approached) Can you tell me whose initial appears on that? A. That is Mr. Notter's initials.

Q. You were aware that on 14th June Mr. Lockrey rang Mr. Notter, were you not? A. I don't recall that particularly.

20 Q. Don't you remember seeing a note of Mr. Notter's about such a telephone call? A. I don't — I can't remember it. If I could see the note perhaps it would help me to remember.

Q. I put it to you that on that day Mr. Lockrey and Mr. Notter talked about a proposed meeting in B.P. House, London, between Mr. Johnstone, Mr. Duncan Johnstone of B.P. and officers of your company? A. Yes, I am aware that we were — I think at Mr. Lockrey's suggestion we were endeavouring to arrange meetings with B.P., London, executives.

Q. You were aware that they spoke on that occasion about the price of future oil supplies? A. Again I don't recall it but I imagine that would be one of the things they would discuss.

30 Q. Don't you recall that on that occasion Mr. Lockrey told Mr. Notter that B.P. were concerned about Nabalco's supplies and that they wanted to plan ahead August/September delivery? A. That could be so, Mr. Staff, but I don't necessarily recall it. If again — there were a lot of documents passing my desk at that time and it is hard to remember what was said in them.

Q. What I am putting to you is that what you learned of what was going on between your officers and B.P. officers from 17th May onwards indicated that B.P. was concerned to see that supplies of oil to Gove were maintained, notwithstanding the dispute about the price which would ultimately have to be paid for it? A. I would say that B.P. were concerned either on some contractual basis or spot basis, they were concerned about the supply of oil.

40 Q. They were saying to you, look, don't worry, we will not let you down in terms of supplying all the oil you need to keep your plant operating properly, but if the litigation finishes up our way you are going to have to pay spot prices or the revised base price and we are going to invoice you at spot price meantime — (Objected to).

HIS HONOUR: When was this said?

MR. STAFF: Between 17th May and 14th June.

HIS HONOUR: By whom was it being said?

MR. STAFF: It was being said by officers of B.P. to officers of Nabalco.

No. 111

Plaintiff's
evidence: A. G.
Coogan: Cross-
Examination
(cont'd)

HIS HONOUR: Including Mr. Coogan?

MR. STAFF: No, your Honour, in particular between Mr. Lockrey and Mr. Notter, but not limited to those two. (Question withdrawn.)

Q. What I want to put to you, Mr. Coogan, is that on or about 14th June you became aware from Mr. Notter that he had a conversation with Mr. Lockrey in which Mr. Lockrey had said that B.P. were concerned about Nabalco's supplies and that they wanted to plan ahead August/September 1974 delivery? A. Well, you are reading from the document, I would say that that is correct, that Mr. Lockrey did approach—

Q. Have you got any recollection of hearing it at the time? A. The only recollection I have is when Mr. Lockrey rang on 28th June inquiring as to our July — or shipments required after July. I'm— 10

Q. (Approached) I show you a photocopy. Just look at that document, will you? A. Yes.

Q. Having looked at that document will you now agree that on or about 14th June you became aware that Mr. Lockrey and Mr. Notter had had a conversation to the effect of that which I put to you a question or two ago? A. Yes.

Q. At the same time did you become aware of a proposal that representatives of both parties might meet in London in the near future, Mr. Duncan Johnstone being suggested as the convenor, as it were, at B.P. House, London? A. Yes, that is in Mr. Notter's note too. 20

Q. At that point of time was it not your view that B.P. were seeking to tell you that they would guarantee you supplies of your requirements for the future at Gove though they were still arguing about the price at which they should be supplied? A. The only remembrance that I have of that time is that B.P. certainly undertook to supply us on a spot basis, or we could have a new contract, and during that time negotiations were actively under way to develop that new contract.

Q. But the basis of the spot suggestion was that it was to take care of the situation between the resolution of the litigation and when the parties' rights were determined? A. That was not my recollection of the events that took place. 30

Q. Wasn't it your understanding of the conversation you had and the material you learned from your other officers passing between B.P. representatives and your company's representatives? A. The only understanding that I remember from that time was that B.P. would not let us down but it would be on a spot basis.

Q. Indeed, B.P. and officers of B.P. from time to time indicated in conversation that they could not afford to let you down in terms of supply because of the enormous liability for damages which might arise if they happened to be wrong about their notice, if the plant came to cease operation? A. No, I do not recall that. I recall Mr. Lockrey saying at the meeting in Melbourne that he appreciated that Gove must have oil and he had taken that view against London pressure some months before, but I do not recall conversations that related to what would happen if the plant shut down. 40

Q. But was it not discussed about how impossible it was to contemplate the plant shutting down — that is impossible for both you and B.P.? A. Well, I certainly remember making the point that we — any interruption to our oil supplies would be catastrophic to us. I do not recall discussions from B.P.'s side on that.

Q. You observed it to B.P.? A. I did observe it to B.P., yes.

Q. In a context which suggested that it would, if the legal position turned out favourably, result in a massive liability for damages on the part of B.P.? A. I do not remember being so involved in those legal aspects, if you like, at that time. My main pre-occupation was oil supplies for Gove. 50

Q. Back in 1971 were you general manager of Nabalco? A. No.
 Q. Were you an officer of Nabalco in 1971? A. Yes.

HIS HONOUR: He was up in Gove.

MR. STAFF: Q. Were you aware that in 1971 B.P. had attempted to justify giving you notice under cl. 9C(iii) of the agreement as a result of some substantial price increases in the Middle East? (Objected to: allowed.) A. I became aware — if I was not aware at the time it happened, I became aware we had received a notice.

HIS HONOUR: Q. But in 1971? A. In 1971, yes.

MR. OFFICER: Q. Became aware in 1971? A. Yes.

10 MR. OFFICER: Or became aware of the notice in 1971?

HIS HONOUR: As I understand it he became aware in 1971.

WITNESS: I became aware in 1971 that B.P. had served a notice on Nabalco.

MR. STAFF: Q. Are you aware that at that time some discussions took place between the parties about its justification? A. No, I was not involved.

Q. Did you subsequently become aware that such discussions had taken place? A. No, I don't remember that. All I remember is that we obtained an opinion from counsel and expressed an attitude and that the matter was not continued.

20 Q. Anyway, you were aware in 1971 that B.P. had requested a price revision under 9C(iii) and you were aware that your company obtained some advice from senior counsel at that time? A. Yes.

Q. You were aware, were you not, that your company informed B.P. that it would not agree? A. I was told that, yes.

(Luncheon adjournment)

ON RESUMPTION: (In the absence of Mr. Coogan there was a discussion on repudiation)

ALLAN GORDON COOGAN

On former oath:

(Last two questions before lunch read out)

30 MR. STAFF: Q. You were aware, were you not, that at that time one of the Nabalco representatives informed B.P. that if supplies to Gove were affected and plant had to shut down there would be a massive claim for damages? A. No, I was not aware of that.

Q. Did you not become aware that that had been conveyed to B.P.A.? A. I don't recall that, Mr. Staff, no.

Q. (Approached) Would you look at the handwriting at the foot of the page I show you? A. Yes.

Q. Is the signature that of Mr. Notter? A. Yes.

Q. On the left-hand side? A. Yes.

Q. Then there is some block lettering? A. Yes.

40 Q. Capital letters? A. Yes.

Q. Do you know whose writing that is? A. I would say that is mine.

Q. Below it a handwritten note "Repayment of loan"? A. Yes.

No. 111
 —
 Plaintiff's
 evidence: A. G.
 Coogan: Cross-
 Examination
 (cont'd)

Q. Whose is that? A. That is also mine.

Q. Below that again handwritten "present amount of loan"? A. Yes.

Q. Is that again yours? A. Yes.

Q. Do you recall seeing a report by Mr. Notter made on or about 4th June in relation to a visit by him to B.P. in Melbourne on 31st May? A. I can't actually recall that but it may well have happened, Mr. Staff, yes.

Q. Do you recall that somewhere about the end of May Mr. Notter visited Mr. Snape, Cochrane and Lockrey in Melbourne? A. Yes, there was a meeting, I remember that.

Q. It would be your belief that Mr. Notter reported on that visit to you? A. Yes, I believe that is the document you have. 10

Q. You would have discussed his report, if he did report, with him? A. Yes.

Q. And with others within your organisation? A. I can't recall that but it would certainly have been discussed with Mr. Notter.

Q. (Approached) Might I show you a photocopy of a document "Report on Visit to B.P. Melbourne, May 31, 1974"? A. Yes.

Q. Above that it bears the notation "4/6/74"? A. Yes.

Q. Just have a quick look at that to identify it, if you have any recollection of it. You can turn the pages if you wish. I am not asking you to read the whole of it, just look at it? A. I identify this document as the one I am aware of. 20

Q. On the third page of that document are the notations I asked you about a moment? A. Yes.

Q. And Mr. Notter's signature as well? A. Yes.

Q. Would you agree that that is a copy of a report made by Mr. Notter in relation to his visit to B.P. Melbourne on 31st May? A. Yes.

Q. And that you discussed that report with him? A. Yes, as I recall it.

Q. Do you recall discussing on that occasion with Mr. Notter the consequences in relation to the loan agreements that I referred you to yesterday or this morning of the supply contract being terminated? A. It is possible that there was a discussion on that; I'm not sure whether those notes that I put on the bottom were after that or at the time of the discussion. 30

Q. At that time do you recall Mr. Notter telling you that he understood from Mr. Snape that the Nabalco supply had already been programmed into B.P.'s shipping for August 1974? A. Yes.

Q. He also told you that he understood from his discussion that the supply agreement dated June 11 1970 would remain in force until May 1976 in respect of both super-motor spirit and diesoleum? A. Yes.

Q. I suggest to you that you raised the question whether aircraft fuel and lubricants would continue to be supplied by B.P.? A. It wasn't then, it was at about that time. 40

Q. Either immediately or — A. Yes.

Q. — At a subsequent discussion — A. Yes.

Q. — shortly afterwards? A. Yes.

Q. Similarly you raised the question about the repayment of the loan? A. I'm not sure that is so. They may have been notes to remind me to raise the question some time. I can't recall that I discussed the loan with Mr. Notter; it would not necessarily be a matter that would concern him.

Q. At any rate, having read his report and perhaps subsequently cogitated about it, it occurred to you that some question about the repayment of the loan ought to be looked at? A. Yes. 50

Q. You then concerned yourself with what the situation might be in relation to the obligations of the participant to repay those loans? A. That could have been so. I don't have a distinct memory of discussing it but I think that would be likely.

Q. It is the only reason you would have put the note on the document in your handwriting, isn't it? A. It is a possible reason, yes.

Q. You then became aware, I suggest, that if the whole supply agreement, that is the supply agreement as a whole, covering all products, was terminated, B.P. could require repayment of the loan? A. I think I was always aware of that.

10 Q. You became aware that if the agreement was kept on foot but B.P. was not required to supply fuel oil there would be no occasion for it to be able to require repayment of the loan? A. No, it was not my understanding. The loan — too much was inconsequential — was not an amount in our terms and my pre-occupation was with an oil contract.

Q. But you nevertheless thought it necessary to put on this document something to remind you to have a look at the consequences which might flow in relation to the repayment of the loan if the supply contract was terminated? A. Yes.

Q. Having gone to the trouble to make that notation, you then pursued that question in the appropriate part of your organisation? A. I believe I would have asked the question. Aircraft fuel and lubricants were also inconsequential to me. It was just a reminder that they were not specifically mentioned.

20 Q. You reminded yourself to find out what the present amount of the loan was? that is at the date you put the note on? A. I'm not sure whether at that time I did, but I was aware that it was in the order of \$2.5-million.

Q. But you made a note in your own handwriting "Present amount of loan"? A. Yes, and I also made a note in relation to lubricants and aircraft fuel which I didn't follow up, as to how much of that we had.

Q. So having got that report you had in your mind that the supply agreement with B.P. was to go on until May 1976 in respect of super motor spirit and diesoleum. That's right, isn't it? A. This was an arrangement that the—

Q. Look, Mr. — A. Sorry Mr. Staff. The arrangement made was that the supply of—

30 Q. I didn't ask you the arrangement, Mr. Coogan. I asked you whether it was not your understanding that this date, that is round about 4th June, that as a consequence of the discussions which had been had by Mr. Notter and perhaps others, with B.P., your understanding was that the supply agreement was to remain in force until May 1976 in respect of both super motor spirit and diesoleum? A. Yes.

Q. And at that time you decided, or at a date shortly afterwards, that you had better find out what the legal position or practical position would be in respect of the aircraft fuel, of lubricants, and in relation to the repayment of the loan? A. Yes.

Q. And of the amount of the loan? A. I can't recall that the amount of the loan was a specific purpose but—

40 Q. That is the only reason you would have written the words "present amount of loan", isn't it? A. Yes.

Q. In fact, you went away and made those inquiries, I take it, did you? — some time within a short period afterwards? A. And some time I became aware of the amount of the loan, yes.

Q. And of the terms in relation to the repayment? A. Well, my understanding of the terms was that if the contract ceased, then we would be required to repay the loan.

50 Q. So that you also understood that if the contract went on until May 1976 in respect of super motor spirit and diesoleum, that then you did not have to repay the loan — the borrowers did not have to repay it? A. I do not recall an understanding of that nature. I'm not sure whether it related to furnace oil, what the — it wasn't there when the loan was negotiated, it was with Austasuisse (?) and I was not concerned with it.

No. 111
 —
 Plaintiff's
 evidence: A. G.
 Coogan: Cross-
 Examination
 (cont'd)

Q. Your company was concerned as a party — A. The loan agreement was something outside of my concern at the time.

Q. At any rate, you thought it important enough to write on the document the reminder to yourself to pursue any problem that might exist about repayment of the loan? A. Not so much to pursue as to—

Q. To clarify? A. To clarify, yes.

Q. I suppose you then went off and talked to people who represented Swiss Aluminium Australia Pty. Ltd. and Gove Alumina? A. Yes, that is possible.

Q. Didn't you? A. I don't recall it.

Q. That is what you would have expected to do? A. Yes, it is possible. 10

Q. So that up to this point of time, of course, you had no authority to bring about a situation in which the borrowers under those loan agreements might have to pay back their money? A. No, I don't recall that I had any authority in that respect.

Q. So that until you could have got some authority you would not have wanted to do anything which would bring the supply agreement to an end as a whole, would you? A. I can only say that at that time furnace oil was the major matter in my mind and these peripheral matters, if you like, were something that I was not giving a lot of attention to.

Q. But you were also keen to ensure that supplies of motor spirit and diesoleum from B.P. would continue to be provided under the agreement? A. No, I was not keen to ensure that. If it was agreeable to B.P. that it should continue, that was satisfactory; if it was not, the supplies of those products were available elsewhere, and that matter did not loom largely in my thoughts. 20

Q. Anyway, you were concerned enough about it to make a note so that you would remember to check up about the supply of aircraft fuel and lubricant? A. Yes, because as I recall that document, they were not specifically mentioned in the agreement.

Q. The document mentioned only that motor spirit and diesoleum would continue under the supply agreement? A. Yes. 30

Q. Until May 1976? A. Yes.

Q. So that there were the other products you were concerned to see would also continue if they could? A. Yes, I was not sure that, — I think, at that time, that those two products I have noted there were within the agreement.

Q. Anyway, you wanted to see whether they were? A. Yes, I wanted to find out.

Q. And find out whether you could still rely on the agreement to give you supplies of those products? A. Yes.

Q. So that you did not want to terminate the agreement as a whole at that point of time, did you? A. If B.P. wanted to go on with that side of the agreement, I was quite happy to do so. 40

Q. So that you did not want to do anything which would bring the agreement as a whole to an end, did you? A. In relation to—

Q. Everything. A. I did not, — as I said, have any great concern about the—

Q. Whether you had a great concern or not? A. — Diesel products themselves.

Q. Won't you agree that you were not at that point of time contemplating doing anything which would result in bringing the supply agreement with B.P. as a whole to an end? A. The memory I have of that is that unless we dropped litigation the furnace oil agreement was at an end and that left the other products which, to me, could be continued if B.P. wished to do that, or we could go elsewhere and find them. 50

Q. Mr. Coogan, you knew there was a single agreement called a supply agreement in your organisation? A. Yes.

Q. Between you and B.P., didn't you ? A. Yes.

Q. You knew that there were provisions in it which would enable one party or the other, in particular event, to bring to an end the particular obligation in respect of particular products? A. Yes.

Q. And you knew that to do that, at any rate in your understanding, in respect of a particular product, could result in the agreement remaining on foot as operative in respect of other products? A. Yes.

10 MR. STAFF: Q. And whether you were very much concerned one way or the other, in fact, at about 4th June you did not want to do anything which would necessarily bring to an end the obligations under the supply agreement in respect of products, did you? A. No, that could be correct.

Q. Well, it is correct, isn't it? Let's not quibble about it. A. I can only say, again, furnace oil was my main preoccupation. I was not concerned with the other products.

Q. Look, there were tremendous logistic product problems of getting supplies of most petroleum products to Gove, weren't there? A. As I recall, we had stocks at that time which would have taken us on for a considerable time and sufficient stocks to arrange for an alternative supply.

20 Q. Stocks of what — every product? A. Well, I can't be specific but the comment I believe I had from Mr. Notter was that there were stocks of the other products which had B.P. decided not to supply them would have given us time to make alternative arrangements.

Q. But if you could avoid it, you did not want to make alternative arrangements, did you? A. If I could avoid it and B.P. wished to continue that seemed to me a reasonable way to continue.

Q. So that you were not of a mind on 4th June or thereabouts to do anything which would necessarily bring the supply agreement with B.P. in respect of oil products to a complete end, were you? A. At that time, no.

30 Q. And, indeed, that situation has continued ever since, hasn't it? A. I don't understand that question, Mr. Staff.

Q. Well, you have since 4th June — I am sorry, your company has gone on giving notice to B.P. of what it required from fortnight to fortnight in the way of products other than fuel oil? A. Yes.

Q. And when deliveries have been proffered by B.P. in accordance with, say, notices of requirement, you have accepted them? A. Yes.

Q. You have paid for them at prices calculated in accordance with the provisions of the agreement? A. Yes.

40 Q. And ever since 4th June last year, won't you agree you have not contemplated doing anything which would bring to an end the supply agreement in respect of those other products? A. That is correct.

Q. So far as you are aware, no one else in your company has been desirous either before 4th June last year or since, to do anything to bring to an end the supply agreement in so far as it relates to other products than fuel oil? A. That's correct.

Q. And, indeed, you wrote to that effect in August of 1974 to B.P., didn't you? A. I can't recall that particular letter.

Q. Do you remember that in the middle of July 1974 you received two or perhaps three letters from B.P. in relation to future supplies of products under the supply agreement? A. Yes.

50 Q. And one of them arose out of the fact that your company had sent along a requisition or a notice requiring the supply in August 1974 I think it was. A. Yes.

Q. Of fuel oil as well as other products? A. Yes.

Q. And that notice was headed "Re: B.P. Supply Agreement" or "Supply Agreement"? A. Yes.

Q. And in answer to the three letters I think it was that your company received about that time, you recall that you wrote on 2nd August two or three letters — I am not sure if you signed all the letters that were written but there were two or three replies written to your knowledge? A. Yes.

Q. Certainly, I think you signed two of those letters each of them being addressed to Mr. Lockrey at B.P.? A. Yes.

Q. And do you recall saying in one of those letters in the second last sentence of the letter, "There is no dispute between us that the agreement continues in relation to petroleum products other than furnace oil."? A. Yes. 10

Q. And that was your intention at that point of time? A. Yes.

Q. Expressed by you on behalf of the company? A. Yes.

Q. I think in the other letter you said nothing which contradicted that assertion, did you? A. No, that would be the situation.

Q. Mr. Coogan, some time on 28th June, 1974, you became aware that Mr. Lockrey had been trying to contact you, did you not? A. Yes.

Q. I suppose you learned from Mr. Batterham, did you, that Mr. Lockrey had been trying to contact you in Sydney? A. Yes.

Q. And, in consequence, you rang Mr. Lockrey from Gove? A. Yes. 20

Q. And I put it to you that you said to him that you thanked him for the earlier offer to maintain your supplies and went on to say that Nabalco would not require the proposed August shipment? A. Yes.

Q. Nor would they require any further supplies of furnace oil in the foreseeable future? A. Yes.

Q. You were asked by Mr. Lockrey what was happening to other products? A. Yes, I recall something of that.

Q. And you said that Sir David had discussed this matter with Mr. Rendle? A. Sir David had discussed it, yes.

Q. And that Sir David had been informed that if Nabalco came to other arrangements for the supply of fuel oil B.P. would continue to maintain supplies of other products under the agreement? A. I can't remember the exact words but that would be the intent of them, yes. 30

Q. And you said to Mr. Lockrey that Nabalco were proceeding on that basis? A. Yes.

Q. And you expressed to Mr. Lockrey your thanks for past services? A. I would have said something to that effect, yes.

Q. I think undertook to him to confirm your company's decision not to purchase any more fuel oil from them under the contract or on a spot basis after the final July shipment? A. Yes, I said I would send him a telex in relation to that. 40

Q. You did not say anything about having negotiated a contract with Kuwait, did you? A. I can't recall mentioning it at that time. I might have said we were getting it from elsewhere but I don't think I mentioned Kuwait.

Q. But you did say you regretted not having told him earlier about the August shipment? A. That is possible.

Q. And you made no suggestion to him that your company was contemplating or was intending to launch some damages claim against B.P., did you? A. No, not that I remember.

Q. In short, all you told him was that your company would not require any further supplies of furnace oil in the foreseeable future? A. As I recall the discussion, yes. 50

Q. And, indeed, when you thanked him for his earlier offer to maintain your oil supplies, you had in your mind that there was on foot from B.P. a continuing

offer to maintain oil supplies to Gove? A. No, I had in mind that we were proceeding towards a new contract with B.P.—

Q. You also referred — I am sorry, you want to add some remark? A. When we were reaching a better agreement than had been suggested in Melbourne.

Q. But you in fact referred, did you not, to the offer to maintain supplies at spot prices? A. I would not have said "spot prices". It would have been "spot conditions". Supplies at spot prices were of no interest to us unless there was an assurance of supply as well.

10 Q. But he had offered to maintain your supplies. That is what you said, wasn't it? A. Yes, but the concept of spot supply and I said this to him, we couldn't conceive of running Gove on any concept of spot supply.

Q. But on 28th June you have already told me that you thanked him for his earlier offer to maintain your supplies, haven't you? A. Yes.

Q. And you did not say anything about under a new contract, did you? A. I don't remember referring to a contract.

Q. In fact, when this conversation took place, you had already signed the Kuwait contract a week or more earlier, hadn't you? A. The Kuwait contract was signed on 21st June.

20 Q. You had signed the shipping contract on 18th June, ten days before? A. Yes.

Q. And not a word to B.P. in the interim until 28th June when they ring you up to see what you want in respect of your August supplies? A. Yes, I, you will recall, was away in Zurich and I had come back just a few days before that.

Q. But there were others in the organisation, weren't there, Mr. Coogan? A. Yes.

Q. Not a word was said about the proposed August shipment not being required until 28th June, was it? A. That's correct.

Q. And, indeed, the fact that not a word had been said about it led you to express your regret for the delay in communicating? A. That is possible.

30 Q. Well, it is the fact, isn't it? A. I don't have an exact memory but I would say that is what I might well have said.

Q. And in your absence your assistant, Mr. Batterham, to your knowledge had not said a word about not requiring any further supplies even on the morning of 28th June when he talked to Mr. Coogan (sic.), had he? A. When he talked to Mr.?

Q. Mr. Lockrey? A. I don't think he did, no.

Q. He told you he didn't, didn't he? A. I can't recall what he told me but he told me Mr. Lockrey had rung about supplies and I rang him back.

Q. On 19th June the Board of Direction had authorised you to enter into the Kuwait contract, hadn't it? A. Yes.

40 Q. And by then you had also entered into your freightment contract? A. Yes.

Q. And not a word from your company until 28th June about it to B.P. Do you agree with that? A. Yes.

Q. And the only reason, may I take it, that you told B.P. on 28th June was that Mr. Lockrey was chasing you trying to find out what to do about your future requirements? A. When I returned from Zurich a letter was drafted to be sent to B.P. and I understood it to be sent on 28th June and Mr. Lockrey rang on the same day.

50 Q. On 21st June, of course, your company had instituted these proceedings in which they merely claimed a declaration as to the meaning of the contract or the validity of the B.P. notice, hadn't it? A. I am not sure of the date but proceedings were instituted, yes.

Q. Almost immediately after the Board of Direction's authorisation for you to enter into the Kuwait contract? A. Yes.

Q. And, indeed, they authorised the institution of those proceedings on 19th June? A. Yes.

Q. And before you went to Zurich, you knew that that was to happen in respect of it? A. When I went to Zurich I decided to make a recommendation that we accept the Kuwait contract and that we enter into litigation with B.P.

Q. Of course, until you were pretty sure that Kuwait were going to load your first shipment of oil, you did not want to tell B.P. that you would not require supply from them in August, did you? A. That was never in my mind.

Q. Can you tell us why did you delay or your company delay in communicating after 19th June to B.P. the fact that you were not going to require further supplies of oil? A. I can't tell you why.

Q. And, of course, not a word was said in the affidavit filed in support of the summons that was taken out about you having entered into other arrangements for supply, was it? A. I am not familiar with the affidavit, Mr. Staff. 10

Q. You are aware, are you not, that no claim for damages or no claim that the contract had been terminated was made in the summons which commenced these proceedings?

HIS HONOUR: Mr. Staff, I think we have got to remember the history of this.

MR. STAFF: Q. I think it was your report or recommendation to the Board of Direction that was adopted in relation to the institution of proceedings, wasn't it, Mr. Coogan? A. Yes. 20

Q. And I suppose you had discussed that matter with your company's solicitors before you wrote that report? A. Yes.

Q. What I put to you is that at that point of time it was your intention that the company should seek to have the Court determine who was right or wrong about the respective notices that had been given and what their obligations under the contract at that point of time were? A. Yes.

Q. And at that point of time so far as you were concerned acting for the company in the capacity you were, you were not seeking to say that because of anything that had happened on the part of B.P. your company had so acted as to terminate the contract? A. The legalistic side is difficult for me, Mr. Staff. 30

HIS HONOUR: Q. Was your state of mind one under which you thought, simply enough, that if their notice was bad you were entitled to damages and, if it was good, you were not? A. I think that would be a fair statement, your Honour. We had three objectives. I had three objectives in my mind. My first was to maintain an assurance of supply, whatever else. The second one was to preserve our legal rights as to the validity of the notice and, subsequently, damages if that was possible and, thirdly, to get the cheapest oil we could.

MR. STAFF: Q. Of course, on 19th June you expressly, I think, refrained from asking the Board of Direction for authority to make a claim for damages against B.P.? A. I was in Zurich and wasn't present. 40

Q. Well, your recommendation refrained from making such a — A. My recommendation would be within the booklet or paper we looked at this morning and I can't recall whether we referred to damages or just the validity of the notice.

Q. Mr. Coogan, was the position really that Sir David Griffin made the decision about what should be done in relation to getting authority to start the proceedings on those matters rather than you? A. The Board Meeting that was held while I was in Zurich would have been—

Q. The ultimate—? A. —brought about by him and he would have had a hand in wording the decisions of the Board. I became aware of them after I returned. My

concern was, as I said to you, that we had an agreement to a contract and we had agreement to now enter into or the opportunity to enter into litigation with B.P.

Q. But, nevertheless, it had been in your mind again at the point of time shortly before the Board of Direction meeting, and when you prepared your report for that Board Meeting that if the contract was terminated the outstanding loan of 2½-million had to be paid off? A. Yes.

Q. And you said so in that report? A. Yes.

10 Q. Of course, no effort was made to pay it off? Come on, it wasn't, was it? A. I can't remember whether it was an effort made or not or whether it was discussed with B.P. and by mutual agreement it was allowed to stand.

Q. That is speculation, isn't it? A. It is speculation but I don't have any—

Q. So far as you know, you can recall nothing that was done in relation to the repayment of it? A. No, I can't.

Q. Even when your company alleged in the course of these proceedings that the contract had been terminated? A. I contemplated that once the B.P. litigation commenced that B.P. would wish to withdraw that loan should I mention that in the report.

Q. But, in fact, you are aware, are you not, that the loans had continued in existence according to their terms? A. I am aware, yes.

20 Q. No suggestion has ever been made on the part of B.P. that the time had arrived because of termination of the contract when they should be repaid in total? A. I have no knowledge of any request from B.P. to repay the loan.

Q. And so far as you are aware, no offer of repayment because the contract had been terminated has been made? A. That is correct.

Q. Now, may I come back to this just for a moment and then I will leave it, Mr. Coogan, I hope. The reality, I suppose, was that when your recommendations to the Board of Direction were framed in June of 1974 Sir David Griffin had a considerable hand in framing those recommendations, at least, in so far as legal matters were concerned? A. No.

30 Q. Do you say you did not discuss it with him prior to the Board Meeting? A. I may have given him a copy of the document I prepared for discussion. I don't have any recollection of detailed discussion with him. That document would have been prepared by, as I recall, myself and Mr. Notter.

Q. So far as the legal matters were concerned, do you say you did not really have any discussion with Sir David about them? A. No, I would say the legal matters all along were more discussed with the solicitors to Nabalco and not Sir David.

Q. Well, you discussed legal matters with the solicitors? A. Yes.

40 Q. Sir David, of course, to your knowledge, had commenced his career as a lawyer? A. Yes.

Q. And, indeed, had been concerned in the practice of the law in one capacity or another for many years? A. Yes.

Q. And it is only in recent years that his commercial activities have absorbed his time? A. Yes.

Q. He was director of Swiss Aluminium (Australia) Pty. Limited? A. Yes.

Q. One of the participants and a borrower from B.P.? A. Yes.

Q. And he was Chairman of Nabalco? A. Yes.

50 Q. Do you say you did not discuss whether or not the contract should be called for or what your rights to damages were with Sir David? A. Yes, from time to time, if you like, in an elder statesman way we had discussions on the B.P. situation, sometimes with the solicitors, sometimes with Sir David.

Q. At any rate, your situation and the consequences of particular action which you might take were the subject of discussion at least with Sir David prior to 19th June? A. Yes.

Q. Perhaps we will hear some more from Sir David about that. Mr. Coogan, is Sir David still Chairman of Nabalco at the present time? A. Of Nabalco?

Q. Yes. A. Board of Direction.

Q. Nabalco Pty. Limited, Board of Directors? A. Yes.

Q. Chairman of Board of Directors? A. Of Nabalco Pty. Limited, yes.

Q. And he is alive and well? A. Yes.

Q. I suppose you have seen him recently? A. I have.

Q. And he is in Sydney at present? A. He was here yesterday and he was here this morning so he is here at present, yes.

Q. So far as you know, he has had no reason to fly away? A. No.

10

HIS HONOUR: I think you have established your point, Mr. Staff.

MR. STAFF: Q. Now, Mr. Coogan, following the discussion of 17th May, 1974, and subsequent events, including Sir David's conversations with Mr. Rendle, you prepared your report which came to be dated 14th June, 1974? A. Yes.

Q. And you remember that in that report after referring to discussions which had taken place on May 17, 1974, without prejudice, you stated what you regarded as the options which remained open to Nabalco? A. Yes, I did.

Q. And they were your words, were they not, "Thus, the following options remained open to Nabalco."? Would you like to look at it? A. Yes, if you don't mind.

20

Q. (Approached) 2.4 on p. 4, Mr. Coogan, and you agree you then said, "Thus, the following options remained open to Nabalco," and you stated three options? A. Yes.

Q. The first was to negotiate a fair and reasonable solution with B.P.? A. Yes.

Q. And "You know that B.P. have since offered . . . substantially changed contract"? A. Yes.

Q. That was a substantial change from the attitude expressed on 17th May? A. No, a substantially different contract to the contract we had previously had.

Q. A substantially changed contract is expressed in the sense from the previous supply contract? A. Yes.

30

Q. The second option was "Nabalco elects to test the validity of B.P.'s notice in court"? A. Yes.

Q. And the third "To negotiate an alternative furnace oil supply contract with a reputable supplier with proven resources"? A. Yes.

Q. In fact, what you recommended to the Board of Direction was to adopt Adoption 2, namely, to elect to test the validity of B.P.'s notice in court, wasn't it? A. Of those three options, yes.

Q. And that is what Nabalco elected to do? A. To test the validity, yes.

Q. And that is the authority that was given to them by the Board of Direction on 19th June? A. You mentioned the third option of entering into a—

40

Q. Alternative furnace oil supply contract with a reputable supplier? A. We also did that.

Q. So, you elected to test the validity of B.P.'s notice in court and, at the same time, you negotiated an alternative supply contract? A. Yes.

Q. And having done that after some delay you advised B.P. that you would not require any supplies of furnace oil in the foreseeable future? A. After the July shipment, yes.

Q. That is the course Nabalco chose to take? A. That was my recommendation and the course we chose to take, yes.

Q. And that was a deliberate course chosen after consideration of all that had happened and all the options open? A. Yes.

50

Q. I suppose, taken in what you believe was Nabalco's best interests? A. Yes.

Q. Of course, Mr. Coogan, taking that course did not really expose Nabalco to much risk of any financial or legal consequence, did it, in your view? A. In my view it did not.

Q. Because, even if you lost the fight with B.P.A. over the supply contract, you regarded your conditional notice as taking effect on 24th July, so that you would never come to have to pay the revised base price fixed by B.P. even if the notice was valid? Would you please say yes or no because it has got to go down, rather than nod? A. Yes, I am sorry.

10 Q. And even if your conditional notice should ultimately be held to be invalid for some reason or other, Nabalco was going to get its future supplies from the Kuwait Company at what you thought was going to be a lesser price than you would have taken supply from B.P. at the revised base price? A. Yes.

Q. So that all you stood to risk at the most in damages if your side turned out ultimately to be wrong by entering into the K.N.P.C. contract was the loss of profit, if any, that B.P. might make by not supplying you at the revised base price? A. I never considered that point, Mr. Staff.

20 Q. But that is the fact, isn't it? A. It may be the fact legally. My consideration was that if we lost, all we would lose would be the cost of the legal action, the solicitors and the barristers costs.

Q. So, that is all you stood to lose? A. In my opinion, which is considerable.

HIS HONOUR: That is not very much in this case.

MR. STAFF: It was very little, wasn't it?

MR. OFFICER: The witness does not nod.

MR. STAFF: Q. And, of course, in that state of affairs Nabalco's best interests would be best served by not bringing the supply contract to an end at all but by keeping it on foot, wouldn't it? A. This is a consideration that is new to me.

Q. You say you have never thought of it? A. No.

Q. And nobody has ever discussed it with you? A. No.

30 Q. You know no one at all has discussed it with your? A. No, the only—

Q. Sir David didn't discuss it? A. No, the only matter in relation to continuing on foot was the supply of the other products.

Q. Well, I suppose, was the position merely this, that because in your view all you stood to lose was the costs of the action, that it did not matter about bringing the contract to an end in relation to any product? A. Any product at all or any other product?

Q. Any product. Because you were going to get your supplies, if you were getting your supplies, from Kuwait? A. No, that is not my thinking as I recall it, Mr. Staff.

40 Q. On 17th May, 1974, in Melbourne there were present with you and Mr. Notter, Mr. Lockrey, Mr. Rowland, Mr. Snape, Mr. Skillen and Mr. Shaw? A. Yes.

Q. Mr. Skillen, I think, was only there part of the time? A. Mr. Rowland was there only part of the time. I am not sure whether Mr. Skillen was there full time or not.

Q. And Mr. Lockrey acted as unofficial, and de facto chairman, did he not? A. Yes, I would say that is correct.

MR. STAFF: Q. At an early point of the meeting, I am not sure whether

before or after the introductions and a reference to whiplash injury, you were aware, were you not, that Mr. Shaw was making notes? A. No, I was not.

Q. Didn't you see him there with paper and a pencil making notes of matters discussed as the meeting went on? A. I can't recall that I observed that, no.

Q. Do you remember where Mr. Shaw was sitting? A. He was sitting to my left.

Q. At a table? A. No, as I recall it he was sitting — we were in a circle of chairs and he was sitting in a chair.

Q. He was sitting to your left, what, immediately to your left? A. I can't — no, I would say he was in the furthest corner of the room from myself, Mr. Lockrey, Mr. Notter, and on my left he was seated. 10

Q. You were sitting in a sort of semi-circle, were you? A. Mr. Rowland and Mr. Snape were sitting opposite us; we were sitting here, Mr. Lockrey was acting as the chairman between the two of us, and Mr. Skillen and Mr. Shaw, if I recall, were further down the room.

Q. Was Mr. Lockrey to your recollection sitting at a table or just in a chair? A. Mr. Lockrey to my recollection was sitting at a desk.

Q. At a desk? A. Yes.

Q. You and Mr. Notter were sitting facing Mr. Lockrey, or to the left of him or to the right of him? A. As I recall it we were sitting on Mr. Lockrey's left. 20

Q. That is the left facing Mr. Lockrey or the left — assuming Mr. Lockrey is looking at you, on his left, or you looking at him, were you on his — A. I don't remember this kind of detail, I am sorry.

Q. If you cannot, no matter, Mr. Coogan, but I was just trying to get it if we could. But you feel difficulty in recollecting? A. My recollection is that Mr. Lockrey was at a desk, we were to one side of him and across from him were Mr. Snape and Mr. Rowland and then further along the room Mr. Skillen and Mr. Shaw.

Q. Mr. Skillen and Mr. Shaw were in clear view of you, were they? A. Yes.

Q. You could see anything they might be doing? A. Yes.

Q. But you do not recollect observing Mr. Shaw taking notes? A. No, I don't have a recollection of that. 30

Q. You do not deny it, do you? A. Well, I can't deny it because I don't recall either way.

Q. What I want to put to you is that you or Mr. Notter at the commencement of the serious business following the discussion about without prejudice indicated that you recognised B.P.'s problems? A. Yes. I am not sure at what stage of the discussion that occurred but I do recall saying that I recognised that B.P. had a problem.

Q. And then Mr. Lockrey outlined the basic problem as he saw it? A. Yes.

Q. And he told you that the old contract had been terminated by your notice, according to his legal advice? A. I am not sure when he said it but I know that Mr. Rowland certainly said it. 40

Q. What I am putting to you is that Mr. Lockrey said it quite early in the discussion following your statement that you recognised that B.P. had a problem? A. That is possible.

Q. And he went on to outline and define the losses that B.P. has incurred in supplying your company at the existing base price? A. Yes.

Q. And in fact he had in front of him a document to which he referred in the course of his outline of the matters for discussion and basic problems, didn't he? A. My recollection is that Mr. Snape had a document, I cannot remember whether Mr. Lockrey had a document. 50

Q. And he stated six points to you, I submit, at this early point of the meeting, that is Mr. Lockrey? A. Oh—

Q. Can't remember it? A. I can only remember Mr. Lockrey speaking in relatively broad terms about the B.P. problems of supply.

Q. What I want to put to you is that he said that to give you continuity of supply B.P. was prepared to negotiate a new contract for the supply of furnace oil; he said at least that, didn't he? A. Yes.

Q. And he said that what they had in mind was a one-year contract, preferably? A. Yes.

Q. And at some stage it was said, well, they would consider three years? A. I—

Q. Because you wanted three? A. I would rather have three years, yes.

10 Q. And it was said to you by Mr. Lockrey, I put it to you, the old contract would expire on 24th July, 1974, so far as furnace oil was concerned and that that was their legal advice? A. Yes.

Q. And for that reason they were not prepared to consider any extension of the old contract beyond the 24th July, that is any agreed extension beyond that date? A. Yes.

Q. And so far as they were concerned they believed that it had been terminated by you? A. I don't recall Mr. Lockrey saying that. Mr. Rowland said words to that effect.

20 Q. Do you recall Mr. Lockrey saying, "You disputed our notice of a revised base price, you have even disputed the validity of your own election to terminate consequent upon it"? A. I don't recall Mr. Lockrey saying that in those words.

Q. Do you deny he said words to that effect? A. I don't deny it, no.

Q. I put it to you that it was then said, "Under no circumstances will we enter into a new contract whilst you continue that dispute"? A. He possibly said that, yes.

30 Q. And what you understood him to be saying was that while you were contesting the validity of the notices and the validity of your own notice, they were not prepared to enter into a new contract for supply, that is a different contract from the existing one? A. What I understood him to say was that if we contested the validity of the notice in Court they would not be prepared to continue with the present contract.

Q. What I am putting to you, Mr. Coogan, is that what Mr. Lockrey said to you was, "You have disputed our notice of a revised base price, you have even disputed the validity of your own election to terminate consequent upon it"? A. That could have been said, yes. I don't recall it in those words.

Q. What he was saying to you — I am putting to you what Mr. Lockrey was saying, not anyone else? A. Yes.

40 Q. He did not say to you, "If you dispute it in Court we won't enter into any agreement with you," but rather what he was saying was while that dispute is extant between you and him B.P. would not enter into a new term supply contract, such as the one- or three-year contract you had discussed? A. My impression was that meant Court.

Q. But you cannot recall whether he said "Court" or not? A. No, I can't recall.

Q. Indeed, it is your impression — all your recollection has left you with is an impression rather than any recollection of what in fact was said in words, that is by Mr. Lockrey? A. Yes.

Q. Would you agree with that? A. Yes.

Q. He went on, I put it to you, that is Mr. Lockrey, to say to you, "In any new contract we would require you to acknowledge the termination of the old contract so far as it relates to furnace oil"? A. Yes.

50 Q. And that he said the commencement date of any contract would be from the 24th July, 1974? A. I don't recall a commencement date.

Q. I think it was common ground between you that B.P. was to continue to supply fuel oil up to 24th July? A. Yes.

Q. And there was no suggestion that they were not going to perform the fuel oil obligation up to that point of time? A. No.

Q. Whatever was said, the impression — the only understanding you came away with was in talking about what they would be doing after the 24th July — I am sorry, in talking about what they would do in the future and what they would not do in the future, they were talking prospectively from the 24th July? A. Yes.

Q. And everybody accepted between you that the contract was to go on according to its terms until at any rate the 24th July? A. Yes.

Q. And deliveries were to be made and paid for at the old base price? A. Yes.

Q. So that the contents of what was said by anybody was "What we are proposing for the period after the 24th July"? A. Yes. 10

Q. After that introductory outline — I am not asking you to accept my description of it, but after a conversation to the effect of what I have put to you so far that Mr. Lockrey said, I suggest to you that there was some discussion about the provisions of the new contract which was envisaged as a possibility? A. I am not sure at what time in the discussion that occurred, but there were discussions about—

Q. What I suggest to you is that that was in effect the third topic which was the third separate sort of division up of the meeting; there were these matters stated as general propositions by Mr. Lockrey, and I suggest to you that then came some discussion between the people present which might be described as preliminary provisions, an outline of preliminary provisions of the new contract? A. I am not sure at what time the discussion took place but it did take place. 20

Q. And in response to your inquiry it was indicated that a three-year period was possible? A. Yes.

Q. And two different prices were given to you in the event of a three-year contract, or alternatively, a one-year contract? A. Yes.

Q. And I suppose you made a note of the prices, did you? A. I made a mental note but I did not actually write them down.

Q. You didn't? Did Mr. Notter write them down, do you know? A. It is possible. I— 30

Q. They were not round dollar prices, were they? A. No.

Q. One was \$56.52 and the other was \$53.96? A. Yes.

Q. And you simply relied on your memory for that, did you? A. Yes, and discussion with Mr. Notter after the event.

Q. And there were some discussions about variation prices and provisions which B.P. were suggesting should apply in respect of variations? A. I am not sure whether that occurred then or at a later time. The terms of payment may have been.

There were also discussions relating to the \$53.96 price as to whether it was a bunker price or a retail price, and I believe we were told that this would be investigated. 40

Q. I suggest to you that after the price variation provisions were determined Mr. Notter said to those assembled something about a comparison with bunker prices in Europe and Australia? A. Yes.

Q. And there was some discussion then about that? A. Yes.

Q. You then raised the question as to the rationale behind a higher price for three years and then for one year? A. Yes.

Q. You wanted to know why the variation, why the difference? A. Yes.

Q. Did you then suggest the possibility of reverting to the old contract with the revised base price notice operating? A. I was seeking the possibility of the interim arrangement. 50

Q. What, applying, or taking supply on a basis which would involve you

paying the revised base price subject to adjustment when the Courts determined the matter? A. Yes.

Q. So that you say you offered to take supplies during the pendency of the litigation at the revised base price? A. There were several proposals for interim arrangement.

Q. Did you offer that at the meeting of 17th May? A. It is possible, yes.

Q. Did you or didn't you? A. I don't have a clear memory.

HIS HONOUR: Q. Was that offered at some time by you? A. I can't recall that it ever was offered, your Honour.

10 MR. STAFF: Q. What I want to put to you was that you raised the question whether the parties might not go back, rather than making a three-year contract or a one-year contract, go back to the existing supply contract and treat it as continuing operative for the future on the basis that the revised base price had taken effect and your conditional notice did not, was not to operate to bring it to an end on 24th July? A. I don't recall that.

Q. You cannot recall that? A. No.

20 Q. I suggest to you that there was then some discussion about the potential for the employment by B.P., if that happened, of 9C(iii) once again in the next six months or twelve months and you did not like that possibility? A. The chances of further OPEC price changes.

Q. And resort to the provisions of 9C(iii) as a result by B.P.? A. Yes, I don't exactly recall that but—

HIS HONOUR: Q. Could that have been discussed? A. It could have been discussed, yes.

MR. STAFF: Q. At this point of time the tone of the meeting as you discerned it was that everybody was looking for some solution to the whole problem which would govern the parties' relations finally for the future? A. Yes.

30 Q. And in the course of it there was some reference made to the possibility of some sort of interim arrangement being made rather than a final arrangement? A. Yes, that was — There had been previous discussions of that and there was further discussion of that at the meeting.

Q. But almost exclusively the intent was, and the discussions directed towards, finding a long-term final solution to the problems by means of a new contract, was it not? A. The intent — the intention of the discussion was that a long-term contract would be possible but it would not be possible if we took the matter of the old contract to Court.

40 Q. Well you say that, Mr. Coogan, but I think you told me earlier that you by no means recollected that Mr. Lockrey ever said that, said anything about going to Court? A. I don't recollect that clearly but I do recollect Mr. Rowland saying words to that effect.

Q. You have told us about that, just wait and we will come to it. Is really the only thing you can remember of this discussion what you say Mr. Rowland said to you? A. I remember some of the comments of Mr. Lockrey.

Q. You do not seem to have a very detailed recollection of anything in particular that Mr. Lockrey said? A. Some comments I remember in some detail, other things not.

Q. You remember his reference to his whiplash injury, do you? A. Yes, I remember that.

Q. But really the one thing that sticks in your mind is what Mr. Rowland said?

No. 111
 Plaintiff's
 evidence: A. G.
 Coogan: Cross-
 Examination
 (cont'd)

A. What Mr. Rowland said was very firmly said and my recollection of that is stronger than my recollection of what Mr. Lockrey said.

Q. You had of course arranged the conference with Mr. Lockrey? A. Yes.

Q. You knew he was the senior officer present of those present at this meeting, didn't you? A. Yes.

Q. You knew that he was chairman of the meeting? A. Yes.

Q. And you knew that he had told you when you came in that he brought these other people only really as listeners because he sometimes had difficulty in remembering? A. Yes.

Q. But you regarded Mr. Lockrey as the person with whom you were negotiating? A. Yes. 10

Q. And the one who was the person to state B.P.'s attitude? A. I don't think I thought of it exactly in those terms.

Q. But that was your general approach? A. That would be.

Q. You knew Mr. Rowland was just the secretary of the company, didn't you? A. I recall Mr. Lockrey implying that also Mr. Rowland had a part to play in the legal affairs of the company.

Q. You regarded him as something to do with the legal affairs, and the secretary? A. Yes, the secretary of the company.

Q. Who performed the secretarial functions of the company? A. Yes. 20

Q. But having nothing to do with selling or merchandising or that sort of thing? A. I don't recall whether I thought about him in those terms.

Q. You had never met him before that day, I suppose? A. No.

Q. And you knew nothing very much about the functions that other gentlemen who were present had in the company? A. No, only that Mr. Snape was introduced as the furnace oil manager and Mr. Skillen was in the sales division.

Q. You made it perfectly plain, did you not, to Mr. Lockrey and the others that you had no authority to make a deal then and there without reference back to your Board of Direction or somebody else? A. Yes, I made it clear, or endeavoured to, that I could not make a decision about ending the contract unless it was referred back. 30

Q. And it was perfectly clear to you that nobody on behalf of B.P. at this meeting had any authority to make any binding decision on the part of B.P.? A. It was not clear to me.

Q. Did you believe that although you had no authority to make a deal somebody on behalf of B.P. at this meeting could make a deal at that moment without reference to anyone else? A. I don't think I thought about that, Mr. Staff, I don't—

Q. It never crossed your mind? A. I don't think it did.

Q. Because you had no idea in your mind of anything coming out of this meeting which was to bind either party legally, did you? A. When I went to the meeting, no, I had no idea that it would be a legally binding situation. 40

Q. And that was one of the reasons, I suppose, that you specifically agreed that the meeting should be without prejudice? A. The meeting — my agreement or instructions to say the meeting was without prejudice was based on the legal situation.

Q. But you did not expect that anything anybody said or did at that meeting could legally affect the rights or obligations either of your company or of B.P. on that day, did you? A. I don't think I gave any thought to the legally binding situation. 50

Q. But you knew although you were general manager of Nabalco that your authority certainly did not enable you to commit Nabalco to anything at that meeting? A. My authority did not allow me to commit Nabalco to declaring a contract at an end.

Q. Or to make a new contract? A. I would say—

Q. Or to make a new contract? A. Yes, my authority would have allowed me to enter into an interim arrangement.

Q. Involving millions of dollars? A. Well, yes, you are right, it would have been necessary to refer that to the Board of Direction.

Q. And you were perfectly aware of that? A. Yes, any final agreement—

Q. So far as your company was concerned and your capacity was concerned, you knew when you went to this meeting that nothing you said or did had the authority of your company to bind it to any legal right or liability? A. That would be the situation, yes.

Q. And you made that plain to the B.P. meeting, didn't you? A. I said "This meeting is to be conducted without prejudice," I did not make any other—

Q. You also told them that you had to refer back to the Board for approval? A. For the cancellation or termination of the contract, yes.

Q. And you told the meeting, at the end of it, that Nabalco was to advise its intentions by 24th or 27th May but would need Board approval? A. Well, we would need to consider it. I am not sure whether I said "Board approval".

Q. No recollection that you used the words "but would need Board approval"? A. Other than in the matter of cancelling or terminating the contract, I don't have a recollection of that.

Q. What about making a new contract, interim supply arrangement or not? A. My recollection there would be that we would have to take away the proposals of B.P. and consider them and advise—

Q. And refer them to your Board? A. Well, that is possible, yes. I don't recall it, Mr. Staff.

Q. You do remember making a note of some of the matters that were discussed at the meeting on your way back in the aeroplane? A. Yes.

Q. What I want to put to you was that you in your note wrote "Nabalco to advise intention by 24th or 27th May" but you need Board approval? A. Well, if that is written there.

Q. And that is what you told the meeting? A. Well, that is what I don't recollect.

Q. Look, you would not have written in your record of the discussions that you needed Board approval if you had not told the B.P. representatives, would you? A. I could have because they were notes to remind me of events and what may be necessary following those events.

Q. Look, you told some of the officers in your company amongst other things that one of the impressions you got at this meeting from what you were told by B.P. was that the Nabalco furnace oil matter has very obviously been taken out of the hands of B.P. Australia by B.P. London? A. Yes.

Q. And that is because they told you at this meeting that nobody had any authority to bind B.P. Australia to anything in relation to the Nabalco affairs without reference to London? A. My recollection of that part of the discussion was London had taken over.

Q. And on that basis you were perfectly aware, were you not, that whatever was said to you at that meeting was said subject to London's authority? A. Yes.

Q. And that anything that was said or done at that meeting would need to be confirmed before it could bind B.P. by London? A. Yes.

Q. And you accepted what was said to you at that meeting on that basis? A. Yes.

Q. And indeed in relation to your protest about the difference in rate, current rate and the rate quoted for the three-year contract, you were told that the Australian representatives would refer that point back to London? A. Yes.

Q. And see what they could do for you in London? A. Yes.

Q. But you did not regard anything said to you at that meeting as intended to bind B.P. finally and completely in any respect, did you? A. No.

Q. Now you expressed, I suggest to you, after some discussion of the possibility that the old contract went on of B.P. in the future using 9C(iii) again, you expressed disappointment at the high level of the new price that was offered? A. Yes.

Q. And I put it to you that it was at that point of time that Mr. Rowland interjected to utter the first words that he had spoken at the meeting? A. I don't recall that.

Q. It was in response to your expression of disappointment about the price that was offered under the new contract following, I put it to you, discussion about the possibility, as it were, of reinstating the old contract for the future with intent that the base price applied but your termination notice did not? A. My recollection of Mr. Rowland's comment was either in relation to my remark about an interim possibility or the old contract that he said the old contract is terminated. 10

Q. Yes, but would you agree that what he said was said in the context of an inquiry on your part about — your part or Mr. Notter's, about the possibility instead of making a new contract of making an arrangement on the basis of the revised base price without treating your conditional notice as operative as another alternative? A. No, I don't. My recollection of Mr. Rowland's statement was that it was rather blunt and I recall him saying "You have terminated, we have your notice." 20

Q. What was the matter that was under discussion or in the course of discussion when Mr. Rowland made his comment, as you recall it? A. As I recall it it was when I raised the question of the possibility of continuing or reaching an interim arrangement.

Q. What interim arrangement? A. Well, we had been discussing interim arrangements in the previous week or weeks.

Q. But you had not been there to discuss it, had you, in previous weeks? A. Mr. Notter had been there discussing it with B.P. and reporting to me. 30

Q. What did you say immediately before Mr. Rowland's comment? A. My recollection is I said, "Is there a possibility of an interim arrangement or can we reach an interim arrangement?"

Q. Anything more? A. No.

Q. You did not say anything about the old contract then? A. I can't recall a reference to that. Mr. Rowland may have said "The old contract is finished" but I don't—

Q. Look, what Mr. Rowland said, was it not — I withdraw that. What I put to you is this, you said words to this effect, "Could we instead revert to the old contract with your notice? I acknowledge that this would mean your further potential employment of cl. 9C(iii), however, I am disappointed at the high level of the new price." Do you remember saying those words or words to that effect in virtually three sentences together? A. No, I don't. 40

Q. Do you deny that you said it? A. I don't deny I said it.

Q. I put it to you that when you said that Mr. Rowland said "This is without prejudice of course but our legal advice is that you by your actions have terminated the old contract it cannot therefore be reinstated"? A. Mr. Rowland said something to that effect, yes.

HIS HONOUR: Q. When you say "something to that effect", do you mean those words? A. I can't recall his words but my recollection of the words were that the old contract was finished. 50

Q. That is very different from what you just agreed to, Mr. Coogan. A. Yes. Can you read it again, please?

MR. STAFF: Q. I put it to you again, Mr. Coogan. What I put to you Mr. Rowland said was, "This is without prejudice of course but our legal advice is that you by your actions have terminated the old contract, it cannot therefore be reinstated"? A. I don't remember that sentence.

Q. Would you deny that that was what he said? A. I would not deny it.

Q. Do you recall that as he commenced to speak he said "This is without prejudice"? A. No.

Q. Would you deny that he said it? A. No.

10 Q. Would you deny that before he said anything about the old contract he said, "Our legal advice is that you by your actions have terminated the old contract"? A. I recall him saying "The old contract is finished, you have terminated it".

Q. Do you recall him using the words, "It cannot therefore be reinstated"? A. No.

Q. Do you recall him using the word "reinstated"? A. No.

Q. Would you deny that he used those words? A. No.

Q. Or the word "reinstated"? A. No.

Q. May I take it, Mr. Coogan, that you would not deny that what in fact Mr. Rowland said is what I have put to you or words very close to that? A. I would not deny that.

20 Q. And you would not deny, may I take it, that it was said immediately after and in response to an inquiry by you whether it would be possible to revert to the old contract with the revised base price notice operating? A. My memory of that was this term "interim arrangement".

Q. Whether "interim arrangement" was used or not, was there in relation to it discussion about possibility of going back to the old supply contract on the footing that the revised base price was applicable to supplies made? A. That could have been said.

Q. Do you think it was said? A. I don't recall that it was said.

Q. But it could have been? A. It could have been said.

30 Q. And it could have been said by you? A. Yes.

Q. And what I put to you is that it was said because you said you were disappointed about the high level of the price offering the new one- or three-year contract? A. I did make that comment about the level of the price — one- or three-year contract.

Q. You mean, correct me if I am wrong, but I think at that time the revised base price would have been cheaper than the three-year contract price that was offered to you, would it not? —

HIS HONOUR: By \$2.

WITNESS: The revised base price was \$54 a ton.

40 MR. STAFF: Q. So that it was cheaper than the \$56.52 which you were being quoted for a three-year contract? A. Yes.

Q. And does not that assist you to recollect that that was why you raised the question whether you could take up, notwithstanding that you had given your counter notice, that you could take up supplies on the basis that you ignored your termination notice rather than enter into a new three-year contract? A. My recollection of the comment on the three-year price was that a \$2 difference between that and the one-year price, that I asked why the difference between the two.

Q. But you also, did you not, made reference to the fact that \$56.52 was higher than the revised base price, \$2 higher? A. It is possible I said that, yes.

50 Q. And you were being offered \$56.52 for a three-year period new contract with price variation provisions? A. Yes.

Q. Cannot you recollect that at any rate for the moment you thought it might have been better to take the revised base price with the assurance of a long-term supply than to enter into a new contract \$2 higher over only three years with price variation? A. No, I can't recollect.

Q. Obviously it would have been, wouldn't it, Mr. Coogan, if you could only get supply from B.P.? A. Yes.

HIS HONOUR: There is of course 9C(i) Mr. Staff, which would mean less than three years perhaps.

MR. STAFF: Yes, it may be.

Q. Perhaps I should have in the question, Mr. Coogan, qualified it subject to the operation of 9C(i) bringing it to an end in 1976, but even so you would have been looking at the possibility of something better than two years at \$2 cheaper than the three-year contract that was offered to you; you would have necessarily thought of that, wouldn't you? A. I can't recollect thinking the way you put it, Mr. Staff. 10

Q. Do you recollect discussion about it at all? A. My recollection of price discussion related to the new contract offered to us.

Q. And you say that so far as your recollection goes you have no recollection whatever of discussion about going back to the old contract on the basis that your termination notice was not on? A. The only recollection I have is that we discussed interim contracts and that could have been one of the matters discussed. 20

Q. Of course this meeting went on for a considerable time, didn't it? A. Yes.

Q. What time did you get to B.P. in the morning, roughly? A. I think about 9.30.

Q. And you were there till time to go to lunch? A. Yes.

Q. So that the meeting lasted something over three hours, did it, or thereabouts? A. I think we broke a little time before lunch, but it was a long meeting.

Q. Two and a half hours? A. Possibly, yes.

Q. And lunch of course took some little time at B.P. in Melbourne, I suppose? A. Yes. 30

Q. And I think another gentleman joined you for lunch, did he not? A. Yes.

Q. And the pre-lunch activities and lunch absorbed some considerable time? A. Some time, yes.

Q. And of course between the individual members of the meeting over lunch people went on discussing matters that were not confined to social matters, didn't they? A. I recall the luncheon discussion being the general problems of the oil industry and other matters of that kind.

Q. Anyway, you spent two, two and a half hours in this discussion of which you gave evidence yesterday or the day before, I am not sure which? A. Yes. 40

Q. And of course your evidence, you would agree, Mr. Coogan, that you gave the other day in answer to my learned friend Mr. Officer when he asked you about it, would rather reflect at first glance a meeting which lasted only a very short time, wouldn't it? A. In the meeting as well as the points we discussed there was quite a long discussion on the difficulties B.P. were having with the Prices Justification Tribunal, as I remember.

Q. There were discussions about all sorts of other things too, weren't there? A. There was discussion about the Middle East problems, supply problems, et cetera.

Q. It went on in various aspects of the problems besetting you and B.P. and the possibilities of living together in one or another way for two, two and a half hours, and people made comments about various aspects of the discussion from time to time? A. Yes. 50

Q. Some of them, it seemed to you, to be off-the-cuff, unconsidered opinions expressed? A. I can't recall that kind of reaction.

Q. Random observations thrown in? A. Again I don't recall discussion in that term.

Q. You discussed the possibility of buying your oil from B.P. f.o.b. Singapore or somewhere else, didn't you? A. I don't recall.

Q. You don't recall that? A. No.

10 Q. Don't you recall that you suggested when problems about the Prices Justification Tribunal were raised that you said that B.P. could avoid any taxation in Australia by you buying your supplies f.o.b. Singapore or elsewhere? A. I remember the discussion on the P.J.T. matters; I don't recall that discussion.

Q. And do you remember Mr. Lockrey saying B.P. would have to be very careful about entertaining any such proposition lest they be seen to be circumventing the national legislation? A. That is possible.

Q. Indeed, did you not suggest that the price could be lowered if they sold you f.o.b. somewhere ex-Australia and took payment outside Australia because they would be saving tax? A. No, I don't recall that.

Q. No recollection? A. No.

(Further hearing adjourned to 10 a.m. Thursday, 20th November, 1975.)

20 **FOURTH DAY: THURSDAY, 20th NOVEMBER, 1975**

(Mr. Meagher, Q.C. sought leave to appear with Mr. Hely for the two companies for which Mr. Kuner previously appeared. Mr. Meagher asked that the matter of subpoenas be deferred while he had some further discussion with Mr. Horton.)

JOHANN FRIEDRICH SAUERLANDER

(Interposed)

Sworn and examined:

MR. OFFICER: Q. Your full name is Johann Friedrich Sauerlander? A. Yes.

Q. You were formerly of Nhulunbuy, Gove? A. Yes.

30 Q. You are now at 246 North Lamoyne Avenue, Fort Leigh, New Jersey, United States? A. Yes.

Q. You have sworn an affidavit in this matter, have you not? A. I have.

Q. Is that a copy of the affidavit which you have sworn? (shown) A. Yes, it is.

Q. Are the facts set out there true and correct? (Objection to pars. 3 and 4 of affidavit: allowed subject to objection.)

Q. At the time you despatched the notice which is dated 2nd July, did you know one way or the other whether a contract with Kuwait was entered into by Nabalco? A. I could not say whether I knew it on that date.

CROSS-EXAMINATION

40 MR. STAFF: Q. You were responsible in your position as site administration manager, I take it, at the time, for supervision at any rate of administrative matters at Gove? A. Yes.

No. 111
—
Plaintiff's
evidence: A. G.
Coogan: Cross-
Examination
(cont'd)

No. 111
—
Plaintiff's
evidence: J. F.
Sauerlander:
Examination

No. 111
—
Plaintiff's
evidence: J. F.
Sauerlander:
Cross-
Examination

- Q. In relation to the plant? A. Yes.
- Q. You I suppose were responsible for seeing that supplies of materials and available labour were maintained to keep the plant operating? A. At Gove, yes.
- Q. In the course of your duties you would ordinarily be informed of any decisions made, for instance, for retrenchment of staff at the plant? A. Yes.
- Q. You would be advised, for instance, if the plant were intended to be shut down shortly, of that fact? A. Yes.
- Q. That sort of advice would be necessary for the performance of the duties you were carrying on? A. Yes.
- Q. Of course, prior to July of 1974 you were aware that a contract for the supply of petroleum, products, including fuel oil, existed between B.P. Australia and Nabalco Pty. Limited? A. Yes. 10
- Q. For a considerable time you had, each fortnight, despatched to B.P. Australia Ltd. and other people, notices given fortnightly of stock holdings and estimated usage of petroleum products? A. Yes.
- Q. It was part of your duty I take it to see that those notices went every fortnight to B.P. Australia Ltd.? A. Yes.
- Q. You, throughout your time, diligently saw that that occurred, did you? A. Yes.
- Q. I suppose you had, at the commencement of your duties, an instruction to attend to that matter each fortnight? A. Yes. 20
- Q. It was your custom, was it not, not only to send the notice to B.P. Australia Ltd., but also to send copies of it to Sydney? A. Yes.
- Q. And to other offices of Nabalco Pty. Ltd.? A. Yes.
- Q. So that when you despatched the notice to B.P. Australia Ltd. you, at the same time, despatched a copy of it to the head office of Nabalco Pty. Ltd. in Sydney? A. Yes.
- Q. You sent the original to B.P. Australia in Adelaide? A. Yes.
- Q. You sent the original to B.P. Australia Ltd. and a copy to the head office of Nabalco in Sydney in accordance with your standing instructions? A. Correct. 30
- Q. It was also part of your standing instructions to send copies to certain other officers in Nabalco Pty. Ltd.? A. Yes.
- Q. Were they always the same people or did they vary over the years? A. They did vary over the years.
- Q. At around July 1974, who were those people, do you remember? A. There was a copy to the site manager I believe, there was one to the general manager, there was one to the administration manager, Mr. Notter.
- Q. So that — A. Yes, I think that was it.
- Q. Who was the site manager? A. Dr. Koeppe.
- Q. You sent one to the general manager, Mr. Coogan? A. Correct. 40
- Q. And one to Mr. Notter? A. Yes.
- Q. Did you send copies of the notice of 2nd July 1974 which was referred to in your affidavit, to Mr. Coogan and Mr. Notter? A. Yes, I did.
- Q. You sent them at the same time as you sent the notice to B.P. Australia? A. Yes.
- Q. You sent a notice on 2nd July and when you sent it had you been given any instruction varying the instructions which you had had for some time in relation to the despatch of notices of this character? A. Not on that day, no.
- Q. So that when you despatched it, you despatched it strictly in accordance with your then current instructions? A. Yes. 50
- Q. In your experience, how long in the ordinary course of things did it take for mail to travel from your office in Gove to Sydney Head Office of Nabalco, or from Sydney Head Office to your office? A. Three to five days, sometimes longer.
- Q. But the average was three to five days? A. Yes.

Q. What about communications from your office to B.P. in Adelaide — much the same time? A. Much the same, yes.

Q. Do you recall when you first received any communication from anybody in your company, Nabalco Pty. Ltd., after 2nd July relating to the notice which had been despatched on the 2nd? A. Would you please repeat when or—

Q. Yes, when. A. I can't recall now.

Q. Was it a matter of three to five days, or more like a fortnight? A. I don't know.

10 Q. Did you receive any communication subsequent to the 2nd July in relation to notices of stock holdings and estimated usage which you had sent, in the future? A. No, not relating directly to that until the instruction came which is mentioned in the affidavit.

Q. So that it was not until 22nd July that you heard anything which indicated there was to be a change in your instructions in relation to seeking notice of stock-holding and estimated usage? A. This was a written instruction on that date.

Q. That was the first variation of your standing instructions that you received? A. In writing, yes.

20 Q. What about orally? A. I can recall that we talked about those matters and I believe that we talked about this very point but I could not say when this was.

Q. Before you received the telex or after or at about the same time? A. It could have been before or about the same time; I would not be sure.

Q. So that it may well have been 22nd July or a day or two either side of that that the discussion took place? A. Yes.

Q. Your recollection is you think that is more probable than not? A. That it was before?

Q. That it was around about 22nd July or a day or so either side of it? A. The way I recall it, yes.

30 Q. You are quite positive that you despatched both to Mr. Notter and to Mr. Coogan about 2nd July, copies of the notices? A. I did not do it personally; it would have been done by my secretary, but it was always done.

Q. And nobody ever complained to you that they had not got copies in Sydney of the notices? A. Not that I can recall.

Q. You had, I think, been using the same form of document for many months at least before 2nd July? A. Yes.

Q. To notify the stock-holding and estimated usage? A. Yes.

Q. We have a sample of them annexed to your affidavit. Following your telex instruction on 22nd July I think you redrafted or altered the form of notice, did you not? A. Yes, I had it altered.

40 Q. You eliminated the reference to bunker fuel? A. Yes.

Q. And the column relating to that? A. Yes.

Q. Otherwise it continued in exactly the same form, except for the figures of course? A. Yes.

Q. And it continued to bear the heading under the letterhead and the name of the addressee, "Re Nabalco/B.P. Australia Supply Agreement"? A. Yes.

Q. Whilst you were at Gove from March, say, of 1974, throughout 1974 you heard nothing I suppose from officers of your company about any proposal to shut down the plant? A. No, I can't recall.

50 Q. You would recall if you had heard, wouldn't you, that would have been such a — A. Yes, I guess so.

Q. — critical decision? A. Yes.

Q. May I take it you were not made aware of any likelihood of any curtailment of fuel oil supplies during that period? A. No.

No. 111
—
Plaintiff's
evidence: J. F.
Sauerlander:
Cross-
Examination
(cont'd)

Q. Mr. Coogan and Mr. Notter were backwards and forwards to Gove over that period? A. Yes, they were.

Q. Nothing you heard in the course of your duties or otherwise suggested that anybody — that the company expected any curtailment of fuel oil supplies? A. It could have been discussed that there could be a problem but I could not recall or say anything—

Q. You just cannot recollect any such discussion? A. No.

(No re-examination.)

(Witness retired and excused.)

No. 111
—
Plaintiff's
evidence: A. G.
Coogan: Cross-
Examination
(cont'd)

ALLAN GORDON COOGAN

10

On former oath.

Cross-examination continued

MR. STAFF: Q. I had been asking you yesterday afternoon, amongst other things, about the sequence of the conversation on 17th May with Mr. Lockrey and others. I had been trying to get from you your recollection as to the point of time and the context in which Mr. Rowland made his remark of which you gave evidence. Following that remark I suggest to you that Mr. Lockrey's next comment certainly did not indicate any agreement with Mr. Rowland's point of view as expressed by you? A. My recollection of that, Mr. Staff, is that Mr. Lockrey pointed out that even if there was not — the old contract was not existing, Gove — he knew that Gove depended on oil and that if there was no new contract oil would be available, but it would have to be on a spot basis.

20

Q. In talking about Gove being dependent on oil, you understood him as speaking not just of the residents of Gove, but of the operation of the plant at Gove? A. Yes.

Q. The whole operation? A. The Gove project, yes.

Q. You understood him, in saying to you, well, so far as Nabalco Pty. Ltd. is concerned and its operations at Gove, there is no need to worry about the availability of supplies of oil to keep the plant going? A. No, I didn't understand it that way. My understanding was that we would endeavour to maintain oil supplies but it would have to be on a spot basis.

30

Q. But you had at Gove a very considerable storage capacity, didn't you? A. Yes, we had quite a large storage capacity.

Q. You did not depend upon supplies coming in daily or weekly, did you? A. No.

Q. It had been the practice, indeed, your obligation under the agreement, to keep B.P. informed fortnightly as to how your stocks were going? A. Yes.

Q. And what your estimated usage for the next fortnight would be? A. I'm not sure if it is a fortnight, but there was a regular advice.

Q. This was all designed to enable B.P. to programme supplies so that you would not run out? A. Yes.

40

Q. And to programme them at perhaps two-monthly, three-monthly or four-monthly intervals? A. I don't know the details of their programme.

Q. But you know at any rate shipments had been programmed on fairly lengthy intervals? A. Yes.

Q. It was always your anticipation that supplies would come in in the same sort

of way? A. My understanding was we had a contract and B.P. would supply oil under that contract.

Q. B.P. had been accustomed to supplying in about 35,000 ton tankers? A. Yes.

Q. And a full shipload as a rule? A. Yes.

10 Q. You saw no reason to believe that the future would produce other than deliveries of the same general nature? A. Well, I was concerned because a remark was made that London did not wish to supply oil to Australia or to us at all if they could avoid it. There were better markets elsewhere; the Middle East situation was very disturbed and whilst the contract would give us some priority if supplies were difficult, in my concept of a spot supply, I could not see how we could have a

guarantee of supply.
Q. At any rate, B.P. gentlemen were saying, we will maintain your supplies though they will be on spot price basis? A. No, I don't recall it being a matter of supply on a spot price basis. My recollection is that the supply would be on a spot basis.

Q. Back in April you were aware, indeed, you reported to the Board, did you not, that B.P. had advised Nabalco that they were prepared to guarantee continuation of supplies after July of 1974? A. In April 1974?

Q. April, yes. A. I don't specifically recall that report, Mr. Staff.

20 Q. Don't you recall having gained the understanding that B.P. had said they would guarantee continuation of supplies after the three months' notice which ran out in July? A. No. If I could see that Board minute or Board report, it would be of assistance but—

Q. You do not recollect? A. I do not recollect it precisely.

Q. Do you recollect it at all? A. In the period up to 17th May there were negotiations proceeding as to some interim arrangement; it may be related to that comment.

30 Q. A little after Mr. Rowland's observation, whatever it was, about the termination of the old contract, do you recall Mr. Lockrey saying that he would approach London to see whether he could get authority to use one year contract price of \$53.96 for a three-year contract? A. I don't recall Mr. Lockrey saying that; I recall Mr. Snape saying that he thought there could be an improvement on the three-year price.

Q. You had no recollection of Mr. Lockrey saying that he would approach London to see if he could get their agreement to applying the one-year price to the three-year contract? A. I don't recall Mr. Lockrey saying that.

40 Q. Do you recall about that stage of the meeting, that is after Mr. Rowland's remark, Mr. Lockrey saying something about the repayment of money which represented that part of the price they were quoting you that had been designed to cover unforeseen events in the event that the unforeseen events did not occur? A. I remember a conversation relating to if unforeseen events do not occur what happens, do we get some kind of a rebate or not, and I'm not sure if it was that time in the conversation or whether it related to a clause or one of the clauses in the draft contract that had been given to us.

50 Q. Do you recall one of the explanations given to you when you queried the difference between the three-year contract price that was quoted to you and the one-year contract price was that the higher price over the three-year period was designed to cover contingencies which might arise from unforeseen events in the three-year span? A. Yes, I recall — my recollection of that particular conversation was Mr. Lockrey saying, "That is to cover the unknowns".

Q. And of course, the unknowns over three years were likely to be very much greater than the unknowns over one year, is that correct? A. Yes.

Q. That is why you wanted, on behalf of Nabalco, to get a three-year contract

if you could, wasn't it? A. The whole thrust of my objective was to get the longest term contract we could.

Q. At the nearest to fixed prices that you could? A. Well, at the best price we could.

Q. And on terms which would maintain that price for as long as possible? A. Yes, with a contract document that would give us a chance to maintain the price at the best we could.

Q. Anyway, you do recall that there was some discussion about the recovery if the unforeseen events did not occur, of the extra built-in part of the price? A. Yes.

Q. I think in the end everybody thought that was really not a practicable proposition? A. I remember Mr. Snape saying that he thought London had overreacted, he thought we had a point of view in that and he would be — he or Mr. Lockrey would go back to London and see if it was possible to improve on the three-year price. 10

Q. Of course, in relation to that subject matter Mr. Rowland had an observation to make, didn't he? A. I don't recall Mr. Rowland making a remark on the three-year price.

Q. What about on the subject of recovery of the unforeseen events part of the price? A. I don't recall Mr. Rowland making a comment on that.

Q. Is your recollection that Mr. Rowland only made one observation in the course of this meeting, namely, the one you told us about? A. Mr. Rowland, when it was suggested that we might look at the prospective new contract, said, as I remember it, "There is no point in discussing this new contract unless we agree that the old one is at an end". 20

Q. That was the only observation, was it, to your recollection, that he made in the course of the two or three hours you were together? A. No. When it was agreed we could see the new contract I recall him saying that, as he handed over the document, "There can be nothing to negotiate in this" or "There is nothing we will negotiate on this document or contract."

Q. Do you recall him saying anything else in the two or three hours you were together? A. Nothing of significance. I remember him saying he had another meeting to go to and he asked to be excused, that is the only— 30

Q. At what point of the meeting do you recollect him leaving? A. I don't have a clear recollection of when that occurred.

Q. Was it before lunch? A. It was before lunch.

Q. You do not recollect him saying that you should not bank on too much coming out of reimbursement? A. No, I don't recall that.

Q. Would you deny that he said it? A. I don't deny it but I don't remember him saying it.

(Mr. Coogan stood down and left the court while his Honour discussed the line of questioning with counsel, at the conclusion of which Mr. Coogan returned to court.) 40

MR. STAFF: Q. (Last two questions and answers read out) In relation to those answers, Mr. Coogan, is your position this, that you are reasonably convinced that nothing like that was said by Mr. Rowland, although your state of recollection is such that you concede the possibility it was said. Is that what you are seeking to convey, or something different? A. No, I am saying that I do not remember Mr. Rowland saying it: he could have said it.

Q. Does that mean that your state of recollection is such that you are quite ready to agree that it is the sort of thing you might not remember, though it was said? A. Yes. 50

Q. Do you think it likely, in the state of your present recollection, that it was

said? A. My memory is that it was Mr. Snape who agreed that there may be some possibility of improving the three-year price, but I don't remember Mr. Rowland making a statement in that respect.

HIS HONOUR: Q. Could I just say this to you, Mr. Coogan, witnesses are often asked about their recollections of conversations, some of which took place many months or sometimes years beforehand? A. Yes.

Q. And naturally human recollection is frail? A. Yes.

Q. None of us remembers conversations precisely. What is asked of you is that you give the court your best recollection of it? A. Yes.

10 Q. Or of the substance of it. Questions are put by counsel as to what the best of your recollection of conversation is? A. Yes.

Q. But when a counsel comes to cross-examine you he seeks to put to you his own client's recollection? A. Yes.

Q. Of what they say was said. A cross-examiner will often ask the witness if something was said; the witness says, "I have no recollection", and he is then asked, "Will you deny that it was said?" Now, you have on occasions, said that you would not deny various things that Mr. Staff had said to you? A. Yes.

20 Q. What I am uncertain about is whether you are saying — and you may not be saying the same thing on each occasion — I simply cannot remember enough about the conversation to recollect whether that was said or not, I certainly would not deny it. Or whether you are saying — I am reasonably convinced of what I say but naturally human recollection is frail, to the best of my recollection that is what was said, but I cannot exclude the possibility that what is put to me was what was said. Do you understand the difference between those two sets of affairs? A. Not very well, your Honour.

Q. There are some things one can be reasonably positive about, I suppose, in a conversation. If you were involved in a motor accident and it was said by the other driver that you had left your car and said "I am fearfully sorry, it's all my fault." A. Yes.

30 Q. And you came to give evidence and you said, "I certainly didn't say anything like that at all, he is wrong." If somebody put to you, "Do you recollect saying that?" and you said, "No" and they said, "Would you be prepared to deny it?" and you said, "No, I wouldn't", there would be little a judge could do except take the view that although you had put a contrary account of the conversation, your own recollection was not very firm and that you were prepared to leave the field open, so to speak, for the other witnesses. But if, in the course of a long conversation, many things are said about a subject matter, some of them stick in your mind; others do not. It may be you simply have not got a recollection of some things, and after a period this affects your recollection very strongly? A. I think that would be the situation.

40 Q. But you may end up with a state of mind in which you say, "To the best of my recollection this was said. I don't think other things were said, I can't deny that they may not have been, I simply do not think that they were." A. Yes, I —

Q. Do you understand? A. Well, I understand, your Honour, that if I cannot specifically remember something being said and Mr. Staff asks me, "Do you deny it was said?", unless I can clearly remember it being said or not said, then I cannot deny it was said.

50 Q. Quite, but what I am left in doubt about is, in what sense you are using that. Are you saying, "to the best of my recollection I don't think that was said, it may have been, or I simply have no recollection one way or the other", and the field so far as that conversation or statement is concerned is just open? A. I think it would be the former, to the best of my recollection I can't remember it being said but it may have been said.

MR. STAFF: Q. Do we understand, Mr. Coogan, that you do recollect some discussion taking place about the possibility of B.P. refunding the difference between \$56.52 and \$53.96 if the unknowns did not occur during the term of the contract, the three-year term? A. Yes.

Q. You are quite clear there was a discussion about that subject matter? A. Yes.

Q. Is this the position, you cannot recollect whether or not Mr. Rowland said something about that subject matter? A. No, I can't.

Q. You do recollect Mr. Snape saying something about it? A. Yes.

Q. Have you got any recollection which enables you to say you do not think Mr. Rowland said anything about it or do you think he may have said something about it? A. He may have said something about it. 10

Q. You think it possible that he may have said "Don't bank on too much coming out of reimbursement"? A. It is possible that he said that, yes.

Q. That sort of a comment rings a slight bell, does it? A. No, it doesn't; the only bell that I have in that situation is Mr. Snape's comments.

Q. Then I think well on in the course of the discussion Mr. Notter observed that what B.P. was really offering was a spot price contract, did he? A. Mr. Notter, having read the document that Mr. Rowland had handed to us, read it fairly quickly, he said, "This seems to amount to virtually a spot price basis or a spot price contract", I'm not sure what the words were. 20

Q. He said something to the effect that the benefits that were available from it were pretty one-sided? A. Yes, he would have said something to the effect if I remember.

Q. Following that there was some discussion about the Prices Justification Tribunal? A. There was quite a large discussion on that. Mr. Lockrey explained some of the difficulties that B.P. were having with the P.J.T.

Q. There was a discussion between Mr. Notter and others about freight from Bandar Mah-Shahr/Gove, Singapore/Gore and Bandar Mah-Shahr Singapore? A. I don't recall the— 30

Q. Don't you recall some discussion about that? A. On freight, no, I can't recall any discussion.

Q. That would be an important element in ultimate price? A. Yes.

Q. Do you say that your state of recollection is such that you cannot recall at all any discussion whatever about the freight? A. No, I can't recall.

Q. I suggest to you there was a discussion about the comparison between Bandar Mah-Shahr/Gove freight and the Singapore/Gove freight plus Bandar Mah-Shahr/Singapore freight — that does not stir your recollection at all? A. No.

Q. You would agree, would you, Mr. Coogan, that the state of your recollection is such that you certainly would not be able to say that the probabilities are that that subject matter was not discussed? A. No. 40

Q. I think you told me yesterday you also had no recollection about discussion of purchases outside Australia and saving on Australian tax by Alusuisse paying outside Australia and you having f.o.b. Singapore? A. I don't have any recollection of that discussion.

Q. Is the position again that the state of your recollection is such that you are not able to say one way or the other whether that was discussed or not discussed? A. I am not able to say one way or the other whether that was discussed or not.

Q. It could equally well have been discussed, could it, as not? A. It is possible it was discussed, Mr. Staff; I don't recollect it. 50

Q. Do you think it probably was not, according to your recollection? A. No, I can't say that.

Q. Do you remember Mr. Notter raising a question about the rates of crude

price rises and product price rises and their relationship? A. No, my recollection of price discussion that Mr. Notter had related to bunker prices and retail prices. I don't recollect that particularly.

Q. You do not recollect the subject of relationship between crude price rise and product price rise? A. No.

Q. Again, is the state of your recollection such that you cannot proffer a view as to whether it is more probable that it was discussed than it was not? A. The only — I can only say it was possible it was discussed but I do not recall it.

10 Q. Then at the conclusion of the meeting you summarised Nabalco's three options? A. I endeavoured to summarise the discussion.

Q. You stated three options which Nabalco had, didn't you, three possible courses? A. Yes, there was the — first of all the—

Q. I am not asking you what they were at the moment. You told us that — A. I mentioned some of the options, yes.

Q. You said that you would give B.P. a first indication about what you wanted to do possibly in a week? A. I can't recall whether it was a week but I may have said as soon as possible.

Q. I suggest to you you said either within a week or by the 24th or 27th May? A. Well, that is possible, I don't recall.

20 Q. Which is the following Friday or Monday? A. I don't recall specifically saying a time.

Q. You told me yesterday that you had no recollection of a discussion about whether you could go back to the base price rather than the three-year contract proposition, that is to the base price under the old agreement with the revised price operative and your notice regarded as not operative? A. I don't recall that discussion.

Q. Are you able to tell his Honour whether, so far as your recollection goes, it probably was not discussed? A. No, I could not say it was probably not discussed, no.

30 Q. (approached) I just want you to read that — do you recognise the handwriting? A. Yes.

Q. Would you read the paragraph at the top of the page, just the six lines at the top of the page, to yourself? A. Yes.

Q. Having read that, can you recall whether there was some discussion at the meeting of the 17th May about an offer of the base price under the old contract and a question of whether it should be left open? A. No, I can't recall that being mentioned.

40 Q. You wrote after the meeting, these words, didn't you, "Offer of base price ex notice 22/3 is no longer open (N. cancelled contract if notice is invalid) if we cannot go to court, then notice *is* invalid!!" A. They are Mr. Notter's notes; I didn't write that.

Q. Mr. Coogan, didn't you tell me you wrote some notes coming back in the aeroplane? A. Yes.

Q. The other day I thought you identified those notes for me? A. I identified — yes, I—

MR. OFFICER: He didn't identify those; he identified typed notes, not hand-written notes.

50 MR. STAFF: Q. Do you say you did not make any hand-written notes in the aircraft coming back from Melbourne? A. I did make hand-written notes in the aircraft.

Q. Have you got those? A. No, I gave the hand-written notes to my secretary and she typed out a note.

Q. I suppose you then destroyed your hand-written note, did you? A. I presume so. We certainly haven't got them.

Q. You have yourself still no recollection of any discussion about taking out supplies in the future under the existing supply contract rather than entering into a three-year contract at the higher price quoted to you on that day? A. No, I don't have any recollection of that, Mr. Staff.

Q. You, I suppose, then used the hand-written notes you made for the purposes of your report on those discussions which you wrote on the 20th May, or which was dated 20th May, did you? A. I'm not sure of the day the typed notes were prepared; it would have been probably the following Monday, following the meeting.

10

Q. The 20th would have been I think a Monday? A. That is—

Q. (approached) I show you a front page at the moment? A. Yes.

Q. That is the front page of a document which you had typed up on the 20th May? A. Yes.

Q. You set out in that document on p. 3 and going over to p. 4— A. Yes.

Q. — some options, and they were the options, were they, which struck you as being available to Nabalco following the discussions in which you had participated? A. Yes.

Q. One of those options you regarded as being to continue with the present contract by accepting the notice as valid at \$54.44? A. Yes.

20

Q. You observed that no doubt that would be followed by further notice or notices increasing the price? A. Yes.

Q. And that it was not possible, that is I suppose to admit the notices as valid, because in admitting it as valid, it automatically exercised your notice to B.P. termination? A. Yes.

Q. What did you mean by that, Mr. Coogan? A. Well, that was my interpretation of what would happen legally if we continued in terms of the letter that we had written to B.P.

Q. But you were contemplating what the consequences of admitting the B.P. notice as being valid would be, were you not? A. Yes.

30

Q. That was because you had had a discussion with the B.P. representatives about the possibility of doing just that rather than dealing on a three-year contract at a higher price, wasn't it? A. It is possible, Mr. Staff; as I told you I don't have a recollection of that discussion but it is certainly a possibility.

Q. But looking at that note which you made, presumably on the Friday or within a day or two of the discussion — A. Yes.

Q. — Must that not have been the fact? A. Well, as a fact I can't say. It is certainly my note and I must have been thinking like that at that time.

Q. You still cannot recollect any discussion about it at the meeting? A. No.

Q. Then you posed the question to yourself, "Do B.P. have the right to terminate supply whether notice valid or not?", didn't you? A. Yes.

40

Q. And you said "No"? A. Yes.

Q. So that that was your view following the meeting that whilst there was an argument about price going on there was no doubt that B.P. did not have a right to terminate supply whether the notice was valid or not? A. That is what I have written there.

Q. And that is what your state of mind was after hearing the discussion and participating in them, wasn't it? A. Yes, I would say that would be correct, yes.

Q. You have underlined the word "supply" when you have written it, haven't you? A. Yes.

50

Q. So that you were drawing a distinction plainly between supply and something else? A. It appears so from that, yes.

Q. That was the distinction that was drawn throughout the meeting, wasn't it?

A. Well, I think in answer to that you would have to read the other options that I have expressed there.

Q. What was the distinction you were seeking to emphasise when you underlined the word "supply" in the passage I have read to you? A. I would have difficulty recalling that, Mr. Staff. These notes were written in the aeroplane; it may have been a reminder to me to follow that up with our solicitors—

Q. Of course, in the third paragraph on the—

MR. OFFICER: Q. I don't think he had finished his answer.

10 MR. STAFF: Q. I'm sorry, did you not finish? A. What I said was that these notes were written in the aeroplane on the way back. They were, in a sense, reminders of things that would have to be checked, questions to be answered and that may have been a reminder to me to check as to the rights of the situation with our solicitors. I—

Q. But Mr. Coogan, you have answered the question with the word "No", without qualification? A. Right.

Q. Haven't you? A. I have written "No" there, yes.

Q. It does not sound like an aide memoire to ask your solicitors what the position was, does it? A. It could. I wouldn't say that it is not a reminder.

20 Q. In the third paragraph on the preceding page you had written, "B.P. Australia freely accept that they have an obligation to supply Gove and state that although they were under great pressure from London and elsewhere to divert cargoes in November/January, they, B.P.A., insist that Nabalco get service." A. Yes, I have written that, and I have also written further down, if I can answer further—

Q. Do you want to refer to the fifth paragraph? A. "B.P.A. considered that spot cargoes could be maintained but within the conditions of spot purchases."

Q. With that in your mind you then write on the next page under Item 1.3, "Do B.P. have right to terminate *supply* whether notice valid or not?" and you have added the word "No"? A. That is correct.

30 Q. Your frame of mind then was that B.P. had no right to terminate supply if their notice was invalid, or whether it was valid or not, apparently? A. It is very difficult for me to determine what my frame of mind was, Mr. Staff.

Q. Then you turned your mind to what you called "Option 2"? A. Yes.

Q. You started off "Take B.P. to court to determine if notice valid"? A. Yes.

Q. Your frame of mind reflected by that was one of the things we can do is to go to court to see whether the notice is valid and thus to see whether the contract is on foot or is not, or will terminate on 24th July or will go on beyond this, wasn't it? A. No, I think that was just a straight-out option we had, we could either take B.P. to court or we could not take — or not determine to take B.P. to court.

40 Q. Then you make some observations on what might happen in that event, you say, 2.1, "B.P. would terminate contract on 24th July"? A. Yes.

Q. That is because of your notice, the notice that your company has given, wasn't it? A. This was, if I recall, a follow-on from Mr. Rowland's statement that we had terminated the contract.

Q. By your notice? A. Yes.

Q. Then 2.2, "Would not write new contract"? A. Yes.

Q. 2.3, "Would supply only on a spot basis while we are in court and if they win would probably not offer new contract"? A. Yes.

50 Q. No reservation there about the supply while you were in court, was there? A. No, that was one of the things that was referred to in the discussion, that if we went to court that supply would be on a spot basis.

Q. And supplies maintained? A. Well, I have written there, "Would supply only on a spot basis".

Q. I put it to you when you wrote that what you intended to convey was that they would supply only on a spot price basis? A. No, that was never in my mind.

Q. You did not underline supply there? A. No.

Q. Perhaps we can omit the next paragraph. You indicate you had been told B.P. had taken advice from various people? A. Yes.

Q. Then you say, this was the impression you came away from the meeting with, 2.5, "Are determined not to get caught again legally as they were on previous occasions. Appear as confident as we are in their legal position"? A. That is what I wrote, yes. 10

Q. That reflected your view of what had been said and done in Melbourne on the 17th? A. That is what I recall Mr. Lockrey saying when he introduced this subject of 2.4.

Q. Your view that they appeared as confident as you were in the legal position was the result of what you heard in Melbourne? A. Yes.

Q. Then you go on to state an option in relation to the writing of a one-year contract and you comment upon that and then go to what you call option 4 and you comment upon a three-year contract as a possibility there? A. Yes.

Q. In relation to Option 2 in 2.3, you said what would happen in your view whilst the case was in court? A. Yes. 20

Q. You said what would probably happen if B.P. should win? A. Yes.

Q. You made no observation as to what would happen if B.P. should lose and you should win? A. No, I haven't.

Q. That was not a matter of any real consequence to you then, was it? A. Could I—

Q. Was it or was it not? A. Could you please ask that question again?

MR. STAFF: Q. You had addressed your attention to what would happen if, while you were in Court, in relation to the operation of that? A. Yes.

Q. And what would happen if BP won after you were in Court? A. Yes. 30

Q. But you made no comment or observation on what would happen if BP should lose? A. No.

Q. And you should have won? A. No, I have not, sir.

Q. Was that simply because in that event you understood that the contract would go on as a continuing contract? A. I just have no recollection of why I would, or thoughts I may have had if we won in the Court. I think I should say the state of mind I was in during this meeting and afterwards was this priority of obtaining furnace oil for Gove on an assured basis.

Q. And of course, you had known that for some time Mr Notter had had discussions with BP people designed to ensure the flow of oil to Nabalco? A. Yes, I was aware that discussions had taken place, as I referred to in the past, and I used the term "interim arrangement". 40

Q. I just want to take you back for a moment and put to you one matter I asked you about yesterday, again. What I want to ask you is this: you told me yesterday that you would not you think deny that a conversation in those terms had taken place between the people present at the meeting on 17th May and in particular you and Mr. Rowland. May I remind you of the conversation I put to you. You said to the meeting, "Could we instead revert to the old contract that was noticed. I acknowledge that this would mean your further potential of cl. 9C(iii). However, I am disappointed at the high level of the new price." You said yesterday afternoon you could not recollect that being said by you to that effect but you also added that you did not deny that you said it, at p. 87, the second question and answer. When you said yesterday that you did not deny that you said it did you 50

have in mind the fact that in your report of 20th May there is some matter which might suggest to you that some such discussion took place? A. There were discussions of possible interim arrangements. During those discussions I may have made the statement you have just mentioned.

Q. So that there was discussion about the potential of further employment of cl. 9C(iii)? A. It is possible, yes.

Q. Well your report of 20th May suggests that also, doesn't it? (objected to: not pressed.)

10 Q. It certainly suggests that you had it in mind about that time, doesn't it? A. Yes.

Q. And you had it in your mind at about 17th May, or at least a day or two afterwards, the possibility of perhaps being better off by accepting the revised base price noticed and going on at a price of \$54.44? A. Yes, that is possible.

Q. So with that aid to your memory you are now, I take it, are you, quite prepared to concede that you could easily have said something such as I put to you at this meeting on 17th May? A. Something in those terms could have occurred, yes.

20 Q. Will you also agree that just as easily Mr Rowland may have replied to your statement, "This is without prejudice, of course, but our legal advice is that you by your actions have terminated the old contract, it cannot therefore be reinstated"? A. I don't recall Mr Rowland using those words when he said "the old contract is finished, we have your notice and it is terminated." My recollection is he did not use the words "without prejudice".

Q. But did he say, "But our legal advice is you by your actions have terminated your old contract"? A. He could have used those words but he certainly said as far as BP was concerned the old contract is finished, we have your notice.

Q. You agree, so far as your recollection goes in saying what he did he referred to the legal advice that they had? A. I don't remember him using that term.

30 Q. I take it that you don't remember whether he did or he did not? A. That is correct.

Q. It is not a matter of you being convinced or reasonably convinced that he did not use the words? A. No.

Q. You are stating he may well have used the words? A. He may well have used the words "on legal advice".

Q. Would you agree that he may just as well have said what he did in answer to what you could have said about reverting to the old contract? A. As I recall the conversation when I was discussing the possible interim arrangements Mr Rowland made a reference such as you have put there.

40 Q. And that was the reference about which you gave evidence to Mr Officer the other day when you were first in the witness box; it was the same reference you had in mind? A. We were discussing interim arrangements and what Mr Rowland followed up then.

Q. Mr Rowland did not discuss the same sort of case more than once? A. I don't recall him; other than that one introductory occasion.

Q. Would you agree with me that in reality the provisions which you accepted for the KNPC contract in relation to supplies and price variations from a practical point of view amount to a liberty to KNPC to fix whatever price they think fit for the oil they supplied? A. No, I don't see the contract in those terms.

(Short adjournment.)

50 (Photostat copy of the original Kuwait contract substituted for the existing copy Ex.J.)

Q. You have told us that it was your view all the time that it was impossible to look forward to running a Gove operation unless you were assured of regular supplies of fuel oil? A. Yes.

Q. On a contractual basis? A. Yes.

Q. It was in your view quite impossible to contemplate running a plant on what you have described as a spot basis? A. Yes.

Q. That is in circumstances, so far as deliveries are concerned, in which you would be left without any assurance contractually on supply when you needed it? A. Yes.

Q. I just want to be clear; what you are saying about spot deliveries is understood by all of us and that I am not doing you any disservice in stating my understanding. But it is, is it not, that you saw that it was necessary to have a contractual assurance of supply at required intervals from which the seller could not, as it were, renege at his will? A. "Resile" is a word I don't quite understand.

Q. Go back on. A. Yes.

Q. But not, without penalty, fail to deliver? A. Yes.

Q. And you regarded it, so far as price is concerned, as necessary to have some certain price in the term of the contract subject perhaps to some rise and fall provision? A. Yes.

Q. Did you participate in the consideration of the terms which should be accepted from KNPC? A. There were discussions, yes.

Q. It was part of your function to look at the terms that were offered for the contract? A. Yes.

Q. To see whether they were such as to satisfy what you believed to be the requirement of contractual certainty for deliveries and prices of fuel oil at Gove? A. Yes, but not personally myself be satisfied; to have people who understood contracts better than I did, satisfied.

Q. Did you set out for these persons the guidelines that you wished to achieve? A. The guidelines were more or less as you stated them a few minutes ago.

Q. Contractual certainty? A. A contract.

Q. A contract which was not such as to allow the seller to make deliveries or not as he wished and at whatever prices he liked? A. Yes.

Q. You gave consideration, I suppose, to the terms of the contract that was in fact executed with KNPC? A. Yes.

Q. In fact I think you signed the contract on behalf of Nabalco, did you? A. No, I did not.

Q. You recommended the form of contract, did you not? A. Yes.

Q. Can you tell us who signed the contract for the buyer? A. Dr Sorato and Dr Muller.

Q. Anyway, you made a recommendation to the board of direction that the Kuwait contract as it was finally made, was in a form that satisfied the requirements that you have outlined? A. Yes.

Q. To enable you to do that, of course, I take it you read the contract? A. Yes.

Q. And you came to the conclusion it gave you the requisite certainty? A. I am not an expert on contracts.

Q. It appeared to you — A. I submitted it to our solicitors. They assured me it was satisfactory as far as they were concerned. The price basis, as I understood it, seemed to be something we could comprehend and on that basis the contract was satisfactory.

Q. (Approaches) You read Article 7 in relation to price adjustment in relation to the printed terms incorporated in the document, I suppose? A. Yes.

Q. Would you not agree that provision left you in the situation where if the seller wanted to raise the price he was free to do so?

HIS HONOUR: Or perhaps terminate the contract.

MR STAFF: Q. I will add to the question: or to bring the contract to an end if

he did not like it? A. Yes, it says that if changes occur the parties must promptly negotiate under the new conditions.

Q. So that if there is any variation in the market price, in effect, the seller can pass it on to you or bring about a situation in which you either agree or bring the contract to an end? A. Yes.

Q. In other words that was a spot provision for price, wasn't it, or the equivalent of it? A. It certainly allows for changes in price.

Q. It is a long way more favourable to the seller than cl.9C(iii) to BP, isn't it, however you may interpret cl.9C(iii)? A. It is a legal point, Mr Staff, that I—

10 Q. Do you say you were conscious of what that article meant when you recommended that this contract be concepted or made? A. Yes, I was conscious that that article was there.

Q. You were conscious that the contract you were making gave you a price which, if it was to be applied to deliveries to you, could be put up or could be varied directly in line with market prices? A. Market prices in terms of the Arabian Gulf.

HIS HONOUR: The parallel is 9C(i) without time limit, is it not?

MR STAFF: Yes, Your Honour.

20 Q. Do you recall the provision in cl.9C(i) of the supply agreement with BP? A. Not clearly.

Q. It provided that variation at the end of five years if f.o.b. prices increased? A. Yes, I have some recollection of it but I do not recall it in detail.

Q. This price adjustment provision you were aware of? A. Yes.

Q. You were conscious it gave the seller the right to vary the price as the market prices at any particular time varied? A. Yes.

Q. In that respect you were no better off than buying spot, were you? A. In a price sense that could be the situation.

Q. You were equally, I suppose, conscious of the existence in the contract of article 6?—

30 HIS HONOUR: I can see a difference, Mr Staff. I can see a difference between a spot and this, despite article 7.

MR STAFF: Perhaps I could ask a question about that.

Q. From a practical point of view, so far as the operation of the Gove plant was concerned it was your view, was it not, that Article 7 the price adjustment provision gave you in reality not much if any advantage over buy spot, so far as price was concerned? A. I don't know what my view was at that time as related to spot purchases or not. I have not considered it in the terms you have put to me this morning.

40 Q. Looking at it today, would you not agree from a practical point of view, having regard to the substantial realities, a contract with that provision in it for price adjustment gives you — in relation to your operation at Gove — little or no advantage over spot purchases from time to time, so far as price is concerned? A. Yes, I would say that allows for price flexibility. In relation to a spot situation in prices, it could depend on a general demand in the sense that oil was very hard to get and if you were buying it spot the man who happened to have the cargo of oil available could name his price whatever happened. That required, as I understand it, some conditions to change that would allow you to come back under that particular clause.

50 Q. You see that the change condition is "if during the term of this agreement changes should occur in the factors governing freely negotiated prices"? A. Yes.

Q. So if any change occurred in the factors governing freely negotiated prices in that area, this clause would enable the seller to say "Pay the high price or call it off."? A. That is one interpretation.

Q. In effect? A. Yes.

Q. And of course availability of oil is one of the factors which does govern freely negotiated prices; is that correct? A. Yes.

Q. Would you look at article 6, the force majeure in the printed condition? A. Yes.

Q. You were conscious that was contained in the contract when it was made, I suppose? A. Yes.

Q. And of course with your concern for the certainty of supplies of furnace oil to Gove you paid, I suppose, particular attention to that provision? A. Yes, of course—

Q. But did you pay attention to it? A. I was aware of the force majeure clause in the contract, as most contracts I understand have them. As I said before this document was submitted to our solicitors, they reported that it was a satisfactory contractual document. My knowledge of the technical sense of force majeure is not great.

Q. You knew, did you not, when you recommended the making of this contract to the board of direction that a force majeure provision was a provision of a character which could entitle — depending on what it said — the seller to avoid performance? A. Yes, all contracts, as I know them, including the one offered by BP had a force majeure clause in it.

Q. Did you know force majeure clauses vary from contract to contract? A. I did not know that, that is the kind of thing I expect solicitors or lawyers to advise me on.

Q. Do you say you were not concerned to see all the events under this force majeure provision might give the seller the right to say "Well I am not going to make any deliveries"? A. I read the clause, Mr Staff, but I relied on legal advice I had that that was not an unreasonable force majeure clause.

Q. You realised, did you, amongst other things, that the provision was that if by reason of any cause beyond the control of the seller there is a curtailment or suspension of availability of product the seller shall be at liberty to withhold, reduce, or suspend deliveries to the extent that the seller considers reasonable and equitable. You realised that was there? A. Yes.

Q. That introduced an element of very considerable uncertainty to the continuing availability of oil to Gove, did it not? A. As with all force majeure clauses there is an area of uncertainty.

Q. But the element of uncertainty that you were concerned about that might arise from having to make spot purchases, so far as deliveries were concerned, was simply that if you were buying spot from time to time you might find that because of curtailment of availability of oil you just could not? A. Yes.

Q. And that is virtually what this clause was saying what might happen under this contract, wasn't it? A. Within the concept of force majeure, yes.

Q. That if for any reason beyond the control of the seller there is a curtailment or suspension of availability the seller need not deliver? A. Yes.

Q. That did not give you much greater protection, did it, than you had in buying spot any assurance from your potential supplier that he would do all he could to maintain supply? A. Again on the spot situation, you are seeking a cargo of oil. The seller can simply say "There it is, take it or leave it." As I can see this type of situation the seller has to give some reason why he is not prepared to supply.

Q. Would you look at article 8 which is headed "performance". Read it through to yourself? A. Yes, I have read that fairly quickly.

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Q. I particularly direct your attention to the last six lines commencing "without prejudice". It says, "It is further agreed that the seller shall not be liable for any such claims or payments of any nature whatsoever or deemed to be in breach of this agreement because of any delay or failure in observing or performing any of the conditions or provisions of the agreement if such delay or failure was caused by or arose out of any action or order direct or indirect of the Government of the State of Kuwait or any agency thereof"? A. Yes.

10 Q. So if the Government of the State of Kuwait said, "Don't deliver to Nabalco", you had no remedy. Did you understand that? A. I did not understand that we necessarily did not have any remedy. This is again a legal interpretation that I do not think I am competent to make.

Q. You did not appreciate when you recommended that this contract be entered into that if the Government of the State of Kuwait intervened in that way, saying to the KNPC company that they should not sell oil to you, that you would have no remedy available to you, you were not conscious of that, is that so? A. It is a long time since I read this contract. I possibly was conscious of that. You have drawn it to my attention again and I understand what you mean.

20 Q. But of course you were aware that the owner of KNPC, the company with which you were contracting, was the government of the State of Kuwait, weren't you? A. Yes.

Q. So if the owner of the company you were contracting with said today "Don't supply", would you not agree that so far as your understanding you were without remedy? A. Well, I again — being a layman I could not say that, I would prefer a lawyer.

30 Q. I am not putting this to you in a manner of binding you as a matter of law. I am trying to get your understanding of what the situation was, if you had one. If you did not have a consciousness or understanding of what was the result of these things, please say so? A. Again, Mr. Staff, I regard this as the fine print of the contract. It was submitted to our lawyers. They said it was not an unreasonable contract. I read it as a layman and accepted their opinion.

Q. I think in your report you said it was a fair and reasonable contract — you said that contract conditions were fair and reasonable? A. That is what the lawyers informed me.

Q. Did you make any independent estimation yourself of whether the conditions were fair and reasonable? A. I would have read these clauses you have read out to me.

40 Q. What I want to put to you is this, had you been aware that the contract you were entering into contained a provision such as that at the end of article 8 which I have just referred to, would you have recommended it as a fair and reasonable contract? A. I did recommend it so—

Q. It is a pretty one-sided provision, isn't it? A. Yes, it is.

Q. It is as if Nabalco entered into a contract with someone else who said they would sell the product, but if Swiss Aluminium or Gove said, "Don't sell it", you were not liable to delivery. Doesn't it appear to you to be pretty much like that? A. It is a difficult thing for me to define.

50 * Q. Would you agree with me so far as your understanding of that provision goes now — and I am not putting it as a matter of law but as what you took from that, it enables the Government of Kuwait, the owner of the company that you were contracting for, to relieve that company from its obligation to supply you whenever it likes? (objected to.)

Q. On the assumption that the Government of Kuwait is the owner of KNPC, can you answer the question I asked? (Above question marked * read by Court Reporter.) A. I would agree as expressed here the Government of Kuwait can affect the supply situation of the contract.

Q. And by intervention of the KNPC Company you could be prevented from getting supplies at any point of time? A. That is an interpretation, yes.

Q. In that event your company would have no contractual remedy as a result of those words, as you understand it? A. I have heard a lot about contracts in this Court, Mr Staff, and I don't think I could answer that.

Q. It was, when this contract was entered into, your belief that KNPC was owned by the Government of Kuwait? A. If not owned, there was a substantial holding. I don't remember considering the ownership particularly but I would have certainly considered that the Government of Kuwait had a major say in what went on in that company.

Q. You remember on 14th June writing in your report to the board of direction "KNPC is the marketing company of the Government of Kuwait responsible for the direct marketing of Kuwait's share of oil and petroleum products to customers."? A. You are reading from my report, that is what I have written?

Q. That is what I am putting to you was your belief on 14th June? A. Yes.

Q. And continued to be your belief up until at least the time when the contract was entered into? A. Yes.

Q. It was your belief at that point of time that the KNPC company was owned and controlled by the Government of Kuwait, wasn't it? A. I would say it was my belief it was controlled, I am not sure of the ownership.

Q. Would you not agree with me that having looked at those provisions that I have drawn your attention to this morning, Articles 6, 7 and 8 of the printed terms, really all this contract gave you was the goodwill of the Kuwait Government as an assurance of supply for the future? A. I considered — again, I was advised it was a reasonable contract, something we could enter into as a contract.

Q. But I am asking you now, as practical businessman charged with the responsibility of ultimately running the Gove operation as general manager, won't you agree that looking at those provisions, according to your present understanding of them, this contract gave you little but an assurance of supply which could not be contractually enforced? A. It gave us an assurance of supply and we had a contract. Whether it could be contractually enforced I am not competent to say.

Q. But it gave you no more certainty of supply, did it, looking at it with those provisions, than an assurance by BP that it would maintain supplies to you on a spot price basis would have given you? A. I considered this gave us more assurance than a spot supply assurance by BP.

Q. What I am putting to you is as a practical businessman on your knowledge of the operation of the Gove supply and your knowledge of the history of the relationship between your company and BP, this contract in the light of the provisions I have referred to gave you no more assurance of supply for the future than an undertaking by BP to maintain continuity of supply at spot prices would have given you? A. I would prefer to have this contract.

Q. Why, Mr Coogan? A. Because BP were not prepared in writing, as I understand it, to give us an assurance that they would continue to give us supply at spot prices. However imperfect this document may be, it was at least a legal document that had been examined by our lawyers who had approved it.

Q. Did you ask BP to put their assurance of supply of spot prices in writing? A. I have no recollection of asking.

Q. Are you aware of anybody else in your organisation asking BP to put their assurance of continuity of supply of spot prices in writing for you? A. No.

Q. So, so far as you know nobody ever asked for it to be put in writing? A. My recollections of the 17th May meeting, there was no indication at that time that BP were prepared to supply other than on the basis of spot is spot.

Q. Had BP Australia given you an assurance of continuity of supply at spot prices, would you in that event still regard the KNPC document or contract as

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giving you anything other than BP Australia's assurance? A. Had BP been prepared to enter into a contract with the price clause, as it were, on a spot basis I would have been very interested to have that kind of contract considered.

Q. Your view had been able to get from BP a contract assuring you of continuity of supply at spot prices, you would have regarded that certainly as as good as what you got from KNPC? A. It would depend on what clause, such as the ones you have drawn my attention to, would be in the BP contract.

10 Q. Neither you or anybody else in your organisation ever asked BP Australia to give you a contract or supply — assuring you of continuity of supply at spot prices, did you? A. I don't recall anybody asking that, nor do I recall it being offered.

Q. Do you remember getting — shortly after 2nd July — a copy of Dr Sauerlander's notice to BP Australia of stockholding and estimated usage? A. I am aware that Dr Sauerlander sent a document to BP. I cannot recall receiving a copy of it.

Q. You are aware, are you, that Dr Sauerlander on standing instructions sent every fortnight a notice to BP Australia of stockholding and estimated usage? A. Yes.

20 Q. And as general manager you were aware that notices of that character and description had been sent regularly each fortnight throughout the term of the contract? A. Yes.

Q. And you were aware that the contract supply agreement with BP Australia required Nabalco to despatch these fortnightly notices? A. Yes.

Q. Dr Sauerlander was the officer in Nabalco who had the responsibility for performing that function? A. Yes.

Q. Copies of the notices which he sent regularly came to your office for your attention? A. They were -- if there was a copy sent to head office, yes.

Q. And sent to the general manager? A. I would have seen it, yes.

30 Q. You habitually got a copy within your office within a few days of the date that the notices bore? A. Yes.

Q. Do you recollect a notice dated July 2, coming to your attention within a few days of that date? A. No, I don't recall.

Q. Were you in Sydney about July 5 and a few days thereafter? A. I would have to check that, I may have been in Gove, I may have been in Sydney. I was either one place or the other.

Q. In any event, you were aware as part of your duties as general manager that these notices were required by the contract to go out every fortnight? A. Yes.

Q. And copies of them customarily came to your notice? A. Yes.

40 Q. I suppose that was to enable you to make sure that the contractual obligation of your company under the supply agreement with BP was being performed? A. That would normally be a matter for the administration department who would give that notice more attention than I would.

Q. In any event the system assured that a copy came to your office? A. Came to head office, yes.

Q. And came to you as general manager? A. It would come in the mail, yes.

Q. And went into the general manager's office for attention? A. I think there is a copy sent to my office, yes.

50 Q. At any time before July 2 did you issue any instruction to Dr Sauerlander or anyone else that any change in practice that prevailed in relation to notification of stockholding and usage be made? A. No.

Q. So when Dr Sauerlander sent out his notice on July 2 he was acting strictly in accordance with the standing instructions issued by the appropriate officer of the company? A. Yes.

Q. There was no mistake about that, was there? A. Well—

No. 111
 Plaintiff's
 evidence: A. G.
 Coogan: Cross-
 Examination
 (cont'd)

Q. Can you answer that question? A. There was a mistake.

Q. Dr Sauerlander made no mistake, did he? A. I think he did make a mistake.

Q. His instructions on 2nd July were to send out the notices, the fortnightly notice of stockholding and usage? A. Yes.

Q. That is what he did? A. Yes, but I think he made a mistake.

HIS HONOUR: Q. I think what is being put to you is was it his mistake or somebody else's mistake? A. I think it was Dr Sauerlander's mistake, your Honour.

MR STAFF: Q. Do you say that Dr Sauerlander had been told not to send out the notice of stockholding and estimated usage which he in fact sent out? A. What I am endeavouring to say is it was well known to Dr Sauerlander at that time that furnace oil was a very important matter under almost daily attention and in my opinion he made a mistake sending that routine notice without bringing it to somebody else's attention, as to what the situation was on furnace oil. 10

MR. STAFF: Q. You knew he had been sending out fortnightly notices in the usual form in relation to furnace oil and other products for the past three months, didn't you? A. Yes.

Q. And you never told him to refer to you before he sent any such notice out, did you? A. No.

Q. And nobody else in the organisation told him to refer to you or to anyone else before sending out any particular notices, did they? A. I am not aware if they did that, Mr. Staff. 20

Q. Dr. Sauerlander was at Gove? A. Yes.

Q. Carrying out his duties there? A. Yes.

Q. He had nothing to do with discussions that you and others were having with B.P.? A. He was—

Q. Did he? A. He was very much aware of it.

Q. He had nothing to do with those discussions, did he, that you or Mr. Notter had with B.P.? A. In a direct sense, no. He may have been giving figures or consumption or matters of that sort to Mr. Notter, I don't really know that.

Q. He was providing you say whatever information he was being asked for? A. That would be correct. 30

Q. And to your knowledge fortnight by fortnight through March, April, May and June sending out the ordinary form of notice of stock holding, usage, containing particulars in respect of fuel oil? A. Yes.

Q. Yet you say, do you, that suddenly come the 2nd July and he should have referred to you before he sent out the notice? A. I say that I would have hoped in his position that he would have thought a little more deeply before he sent on the routine notice and referred it to either myself or Mr. Notter.

Q. What about the one of the 18th June, should he have thought about that and referred it to you or Mr. Notter? A. I think in any matters of furnace oil about that time he should have been conscious of the changing circumstances and at least acquired (sic), probably Mr. Notter, as to what the situation was. 40

Q. You say that notwithstanding his current instruction to send them out he should have in your opinion referred to yourself or Mr. Notter before he sent out the 18th June notice? A. Yes, I would expect — he was quite a senior manager in the organisation — that he would react to the furnace oil situation and ask himself a question about it and not just automatically send out a notice.

HIS HONOUR: Could I just ask you, Mr. Staff, what notice led to the supply on the 19th July; was that the 18th June notice? 50

MR. STAFF: I am not sure, your Honour, I think that was probably earlier. 50

HIS HONOUR: No action was taken in fact on the 2nd July as to fuel oil?

MR. STAFF: No supply was ultimately made, your Honour, no, but action was taken, as your Honour will hear. The shipment was programmed but subsequently cancelled as a result of a subsequent—

*No. 111
Plaintiff's
evidence: A. G.
Coogan: Cross-
Examination
(cont'd)*

HIS HONOUR: But there was a supply on 19th July?

MR. STAFF: Yes, that was as a result of an earlier situation. The fortnightly notices went out but they did not produce necessarily a shipment — each notice did not necessarily produce a shipment.

10 HIS HONOUR: Is it a question of what the state of the bunkers or the tanks was?

MR. STAFF: What was the state of the storage and what was the estimated usage having regard to the last series of perhaps two months notices, and it was B.P.'s obligation to assess the point of time at which it would be necessary and the quantity it would be necessary to deliver in the light of the information which these notices gave them.

HIS HONOUR: You did supply on 19th July?

MR. STAFF: Yes, your Honour.

HIS HONOUR: And you did supply at either the old prices or something a little less?

20 MR. STAFF: Yes, we supplied at the old base price as adjusted for contractual adjustments for freight and the like.

Q. Mr. Coogan, you of course were aware that the notice of 18th June had gone out, weren't you? A. Yes.

Q. Without reference to you or to Mr. Notter? A. This was a routine matter.

Q. Yes, but once you became aware that the notice of the 18th June had gone out without reference to you, having regard to the situation didn't you

HIS HONOUR: Do you mean with no reference?

MR. STAFF: Without reference, yes.

30 Q. Once you were aware that the 18th June notice had gone out from Dr Sauerlander without reference to you or Mr. Notter you did not then say to Dr. Sauerlander, "Don't send any more without reference", did you? A. No, the first knowledge I had was when I think Mr. Lockrey rang or somebody in B.P. rang and said "We have a notice from you," and I checked up and telexed, I think, Mr. Lockrey, to say it had been sent in error.

Q. But you thought Dr. Sauerlander should have been referring to you; why didn't you raise a complaint, at any rate, after you became aware of the 18th June notice having gone without reference? A. I can't recollect that.

40 Q. Why do you say Dr. Sauerlander should have referred rather than you should have altered the instruction, Mr. Coogan? A. I think I simply overlooked the fact of these notices going to Adelaide.

Q. You say you overlooked it? A. Overlooked in the sense of advising him not to send any more, or Mr. Notter may have overlooked it too. You can ask him.

Q. It was not Dr. Sauerlander's error but rather yours or Mr. Notter's, wasn't

it? A. In the sense of advising him to refer any furnace oil matters, yes, it was my error.

Q. You did not take any action to stop any more notices going out until 22nd July, did you? A. After the call from B.P. I sent a telex to Gove saying that any matters relating to furnace oil should be referred to head office.

Q. And that was on 22nd July? A. I am not sure of the date but it was –

Q. You are aware that Dr. Sauerlander swore an affidavit in these proceedings which was read this morning? A. I have not read that affidavit.

MR. STAFF: Your Honour, might the witness see Dr. Sauerlander's affidavit? (shown to witness)

Q. Would you look at the 4th paragraph of that affidavit on the 2nd page? You see there in the first line a reference to a telex dated 22nd July from the plaintiff's head office? A. Yes.

Q. Is that the telex you were talking about a moment ago? A. Yes.

Q. So would you agree that it was not until the 22nd July that any reference or any instruction was conveyed to Dr. Sauerlander about following the standing instruction? A. Yes.

HIS HONOUR: This is a matter which is referred to in at least one of those three letters of 17th July, and there was a telex wasn't there earlier than that, or am I wrong?

MR. STAFF: Dr. Sauerlander this morning said not, your Honour.

HIS HONOUR: The telex is part of Ex. 1.

MR. STAFF: It is a telex from Nabalco to Mr. Lockrey, 22nd July?

HIS HONOUR: Yes. It really was not until the letters of 17th July that the plaintiff appears to have become aware of the significance of what had been done.

MR. STAFF: Well, your Honour, that is perhaps a question between us.

Q. Mr. Coogan, the first shipment of oil from Kuwait, the first loading of oil from Kuwait was scheduled for about the end of July, was it not, towards the end of July? A. I don't recall that detail.

Q. Don't you recall it? It would have been about the 22nd, would it? A. I just don't have any recollection of that.

Q. What I want to ask you is whether in fact the requisition of the 2nd, or the notice of the 2nd July was not withdrawn until after the Kuwait company had commenced loading its first delivery for shipment to you? A. I can be very certain of that. There was no discussion, concept or talks that I ever engaged in that has that in mind.

I say again that the sending of that notice was I believe a genuine error by Dr. Sauerlander, it was an error on my part in not telling him not to send it, and when it was brought to attention we did something about it.

Q. You were not trying to keep your options open in case the K.N.P.C. company fell down? A. In no way.

Q. You had been concerned of course in ensuring that you got a reputable and reliable supply? A. Yes.

Q. You had not had any experience with K.N.P.C. prior, had you? A. No. We made inquiries about them.

Q. But you had no prior experience with them? A. No direct experience, no.

Q. And indeed the Arab national companies or Gulf national companies were

relatively new in the oil scene, weren't they, as shippers of oil? A. In the checks we made from the Kuwait company they had quite an impressive list of customers, but I do not know how long they had been supplying them, and I do not know how long they had been in the oil business themselves.

Q. You did not make any inquiries as to how long the Kuwait national company had been in the business of supplying oil? A. We had a number of inquiries made, yes.

Q. You did know then how long they had been in business? A. I am not sure the information we received said how long.

10 Q. You do not know whether you knew how long they had been in the business, whether they were just new-comers or whether they had been engaged for some years? A. I recall from the discussions with the Kuwait company in London that there was — one of the matters discussed was their experience in supply of oil and capacity of their refinery, but I don't specifically recall being able to answer you as to how long they had been in the oil business.

Q. And you don't know what inquiries were made about their reputation or stability or reliability? A. Yes, we had some inquiries made.

Q. What were they? A. They were more concerned as to their business reputation.

20 Q. From whom did you make inquiries? A. There was a bank if I remember in Zurich. I can't recall the other inquiries; there would have been some reference to that.

Q. Did you ask for a bank reference, did you? A. In a sense, yes.

Q. Well you did not have much time from the time you came to first hear of them as potential suppliers to make very extensive inquiries, did you? A. No, we didn't have much time but they did provide a list of customers that they had.

Q. Did you make inquiries of those customers about their reliability? A. I don't recall a direct approach to a customer.

30 Q. So that so far as any really solid information that you might have had was concerned you were pretty short of material supporting or confirming the reliability of them as suppliers, weren't you, through July? A. Yes. I can't be certain about this but I think one of my thoughts at that time was that B.P. also obtained oil from Kuwait.

Q. Not in the way you were obtaining it, Mr. Coogan, though, was it? A. Not in the direct sense, no.

Q. Not as it were as a wholesale customer? A. I was not clear what the B.P. relationships were.

40 Q. You knew in June, July, that you would need oil supplied come August, at Gove, didn't you? A. Again it would depend on the storage in the tanks but normally we would be requiring oil depending on the size of the shipment. It was a 35,000-ton shipment we required one of those about once a month.

Q. Can't you recall that to your knowledge it was necessary to get oil to Gove to keep the plant going some time in August? A. I don't know what the stock position was; it is possible that that is the case.

Q. Can't you recollect whether you knew or not at that time, that is back in June, July? A. Well, it is a long time ago. I would say that I don't recollect what our stock was. It was likely that we would need a cargo about that time, yes.

50 Q. Don't you recollect discussions in June in which B.P. were saying to you, "Look, let us know what you want to do, we have got to programme a shipment for Gove"? A. Yes.

Q. And that was because if you did not get a delivery in August you were going to be out of oil, wasn't it? A. That would be likely, yes.

Q. And so it was imperative that you got your first shipment from K.N.P.C. pretty early in August, wasn't it? A. Without seeing the figures, yes, that is possible.

Q. And if they fell down in their first shipment would you not agree you had in mind that you could go back to B.P. so long as this shipment that you knew was programmed was still in the pipeline? A. Emphatically not.

Q. Why then did you wait till the 22nd July before countermanding or altering Dr. Sauerlander's previous standing instruction? A. I was not aware that the final oil advice, routine advice, had been sent by Dr. Sauerlander referring to furnace oil. It was not until B.P. drew it to our attention and when we received their advice we advised them that the notice had been sent as an oversight.

Q. You agree that both you and Mr. Notter were getting copies of these documents coming to your office? A. The document would be passing through my office, yes. 10

Q. And somebody in your office would know within a few days of 2nd July that it had gone out, wouldn't they? A. I would expect somewhere in the administration division, Mr. Notter's division, that this may have been seen. I don't recall observing it.

Q. Mr. Notter also had responsibility for intervening in these sort of affairs, didn't he? A. Yes. If he observed this I would expect that he would bring it to attention.

Q. And that is the only explanation you can proffer, Mr. Coogan, for no change being made in Dr. Sauerlander's instructions until the 22nd July? A. It is the explanation. As soon as the matter was brought to my attention I sent the telex to Gove and we advised B.P. the notice had been sent in error and— 20

Q. Had you finished? A. I was just going to add that that was not -- tricks like that is not the way I would like to do business and I certainly would not have been involved in anything like that.

Q. Were you in Sydney from the period early July until 22nd July? A. I would have to check that. It is likely I was. I said I would be either here or in Gove. I don't think I was overseas at the time.

Q. You received a letter written by Mr. Lockrey on 17th July and addressed to you as General Manager of Nabalco, did you? A. I don't recall the date. If I could see the letter? 30

Q. I show you a copy. (Approached) It is part of Ex. 1. Just look at the photocopy of the letter of 17th July. It commences, "We acknowledge receipt of your notice of 17th July" as there are a number of letters of the same date, I think? A. Yes, I recall it.

Q. You recall it? A. Yes.

Q. You got that I suppose within a day or two days at the most of the 17th July, didn't you? A. I expect so. I think there is a date stamp on it.

Q. Not on my copy, but would you expect to get it within a day, by about the 18th or 19th anyway? A. Under normal conditions, yes. 40

Q. And it still took you three days to telex Dr. Sauerlander? A. It may have been a weekend involved, I don't know.

Q. Would not you have telexed off to Dr. Sauerlander the moment you got it if it had simply been an error that the notice had been issued? A. That letter would have certainly generated the type of telex that I sent but as to whether I would send it at the moment I got it, I don't recall.

Q. But you regarded it as important, didn't you? A. Yes, I do regard it as important, yes.

Q. And of course you appreciate under the contract B.P. Australia's obligations were to maintain your supplies according to your requirements and that notices such as these were given for the purpose of providing the necessary information for B.P. to act on? A. Yes. 50

Q. And without these notices B.P. could never have estimated your usages or requirements? A. Yes.

Q. And without getting your notices they could never perform their obligation to supply? A. Yes.

Q. And so far as your contractual relations with B.P. were concerned you understood these notices to be of the most critical importance? A. They were important in advising B.P. of our requirements, yes.

Q. You would not have waited three days after the 19th July to telex Dr. Sauerlander, would you? A. I can't answer—

10 Q. Assuming you got the letter? A. I can't assume that I got the letter unless I know what our date stamp, or is there a date stamp on it, and was there a weekend in between or what was the situation. I can assure you, as soon as possible. There is no deliberate delay on my part in advising Dr. Sauerlander.

HIS HONOUR: The 17th was a Wednesday and the 22nd was a Monday. It is possible the letter was received on the 19th, which would have been a Friday.

MR. STAFF: It may be that the letter was not received until the 22nd, your Honour. Mr. Officer shows me his copy which bears a date stamp the 19th.

HIS HONOUR: That was the Friday. The telex went on the Monday. It appears to have gone at 4.25 p.m. according to my copy.

20 MR. STAFF: Q. In the light of that information perhaps if you will accept that the letter of the 17th was received in the head office of your company on the 19th and the telex went to Dr. Sauerlander—

HIS HONOUR: That is the telex to B.P.

MR. STAFF: Q. Would you expect that the letter from B.P. to you was received on the 19th July, Friday? A. If as Mr. Officer indicated it bears a date stamp—

MR. OFFICER: That is correct.

WITNESS: Of the 19th, then I do accept it.

MR. STAFF: Q. And your telex to Mr. Lockrey in answer to that letter did not go off till about 4.45 on the Monday following? A. That is as his Honour just said, yes.

30 Q. You appreciate it may well be unlikely to get any attention in B.P. until the Tuesday going off that late on the Monday afternoon?

HIS HONOUR: According to this it was sent off at 4.25 and it was received in B.P.'s office at 4.30.

MR. STAFF: Q. It went off at 4.25 apparently and was received at 4.30 at B.P.'s office? A. Yes, I have just heard that.

Q. You appreciate it took apparently, a matter that you regarded as critical to the contractual relationship between the two companies, it took until late in the afternoon on the Monday even to tell B.P. that you would not want supply? A. Mr. Staff—

40 Q. You appreciate that, Mr. Coogan? A. I do appreciate that.

Q. Can you tell us why that delay? A. I have no recollection at all. I may have

been in a meeting, I may have been engaged in other things, but I just want to say again there was no deliberate delay on my part in advising B.P.

Q. Could there have been on somebody else's part in your organisation? A. I have no knowledge of anybody taking that attitude and I want to say again that we had no intention of playing the kind of tricks you have implied on B.P.

Q. But you would agree, would you not, that the time sequence is very strange? A. I don't agree that it is strange. There may have been many other things that affected the timing of those telexes.

(Luncheon adjournment)

Q. Mr. Coogan, do you recall that you had a telephone conversation with Mr. Lockrey on the 1st July? A. Yes. 10

Q. That followed your telex to him after the conversation you had with him on the 28th June? A. Yes.

Q. I think he telephoned you to tell you that he had not yet seen the relevant letter that your telex referred to? A. Yes.

Q. You said it had been posted on the 28th but in any event promised to telex the contents of it to him that morning, that is the 1st July? A. Yes.

Q. Mr. Lockrey I think expressed his regrets that you had taken on a new supplier? A. Yes.

Q. You indicated to him that your feelings personally were very similar? A. Yes, I regretted that we were parting company with B.P. in this area. 20

Q. You said that Nabalco's action was entirely commercial, that they had been and still were happy with their personal associations? A. Yes.

Q. And Mr. Lockrey said to you that he hoped that Nabalco's needs were being adequately satisfied? A. Yes.

Q. You said that you had contracted for up to five years at a price substantially better than B.P.'s new price in the letter of notification? A. Yes, I think that is right.

Q. And you went on and said that Nabalco's move was related only to furnace oil and you hoped that the present associations would be maintained in the supply of other products and services at Gove? A. Yes, I think that is correct. 30

Q. Then you had a further conversation on the next day with Mr. Lockrey, did you not? A. I think it was the same day. It may have been the next day.

Q. I put it to you that it was on the 2nd and Mr. Lockrey again telephoned you and thanked you for the telex message, that is the telexing the contents of the letter? A. Yes.

Q. And he asked you could you elucidate the circumstances surrounding the signing of the new contract that you had signed, that Nabalco had signed? A. I don't recall that letter.

Q. Do you remember telling him that the contract had been signed last Friday week in Zurich? A. Yes, I don't directly remember it but I could have said that, yes, Mr. Staff. 40

Q. Did you tell him that it was an attractive offer as indeed were several others, including Kaiser who offered a one-year option and supplies coming from quite good sources? A. Again I don't remember the actual conversation but that was the situation. I may well have said that to Mr. Lockrey, yes.

Q. You don't remember any conversation along those lines on or about the 2nd July? A. I remember having a discussion with Mr. Lockrey. It is possible that I did talk about the Kaiser contract.

Q. Do you remember Mr. Lockrey — I put it to you — in the telephone conversation on the 2nd July asking you whether Nabalco felt that they had cavalier treatment from B.P.? A. Yes, I remember that very well. 50

Q. Was that in the conversation, in the conversation about the 2nd July? A. Yes. Mr. Lockrey said, "London say or London allege that we lost the Nabalco contract, or lost the Gove contract because of our cavalier attitude to Nabalco".

Q. Did you make some comment in reply to it? A. Yes, I said that that was not my view, that I had never — I think Mr. Lockrey may have said, "Is that your view or have you ever said that," but in any event I said, "That is not my view. I have never used that expression and as far as I know it was not used by Mr. Notter or Sir David Griffin."

Q. Did Mr. Lockrey say to you that he was sorry the way things had gone but if Nabalco should need him they were still around? A. Yes.

10 Q. And you I think said to him that you were pleased to hear that B.P. would be willing to consider assisting if there were any breakdowns in supply? A. Yes. I said that, and I also thanked him, if I remember, for the past co-operation that we had from B.P. and that there were no hard feelings on our part in relation to this furnace oil matter.

Q. Was there some further conversation, reference to the loan, which was outstanding and the interest rate payable under it? A. I don't — there may have been a discussion but I don't recall the loan matter. I think Mr. Lockrey did ask "What happens from here, or where do we go from here?" He may have mentioned the loan in that context. I think I replied, "Well, it is now as far as I know a matter for the lawyers. I don't clearly understand what happened. I think we go to court," and so on.

20 Q. Was there some reference also, do you remember, to future supplies and services at Gove of other products? A. Yes, I think we did — Mr. Lockrey said as you said that B.P. would be prepared to help us, and there was a reference to the continuance of the other products.

Q. I think you are a director of Australian Territory Liner Services Pty. Limited are you not? A. Yes.

Q. At some time that company was called Nabalco Shipping Pty. Limited? A. It is a little more complex than that, Mr. Staff. I think, I am not sure what document you have got there, but there is an explanation in it that it is a rather complex relationship between several companies.

30 Q. Anyway, you are a director of Australian Territory Liner Services Pty. Limited? A. Yes.

Q. And I think that company is 50% owned by Nabalco Shipping Pty. Limited? A. Yes.

Q. And presumably the other 50% is owned somewhere else, and Nabalco Shipping Pty. Limited is 70% owned by Swiss Aluminium Australia Pty. Limited? A. Yes, that is right.

Q. And the other 30% by Gove, is it? A. Gove Alumina, yes.

40 Q. The agent for the Concord company with which you made the affreightment contract is Australian Territory Liner Services Pty. Limited, is it not? A. No, Mr. Wilson is the General Manager, was the General Manager of A.T.L.S. as we call it, then, and as the marine expert, he was the one who was engaged in negotiations with Concord.

Q. Did Australian Territory Liner Services Pty. Limited earn some commission or brokerage out of the Concord, the entering into the Concord affreightment contract? A. No.

Q. You say that company was not an agent — to your knowledge was not the agent of Concord at the time you entered into the contract? A. No, if I remember correctly Stolt Nielson in Australia were the agents for Concord or the brokers of it.

50 Q. You are also I think a director of Swiss Aluminium Australia Pty. Limited, are you not, Mr. Coogan? A. I am an alternate director.

Q. As such you are reasonably familiar no doubt with the marketing arrangements of that company? A. Well, reasonably familiar, yes.

MR STAFF: Q. And to your knowledge that company has sold or has contracted to sell the whole of its production from the Gove Project for twenty years to Swiss Aluminium Limited, has it not? A. Yes.

Q. It has contracted to do that upon terms which leave it exactly the same amount of profit no matter what the cost of production is? A. I am not, I don't think, expert enough to answer the contractual arrangements as to how the alumina transfers from Nabalco through Swiss Aluminium Australia to Swiss Aluminium Limited. To get a better answer than that it may be more preferable to ask the general manager of that company who lives with it on a day to day basis.

Q. Who is that? Who is the general manager? A. Mr Powell. 10

Q. At any event, your understanding is that Swiss Aluminium Australia Pty. Limited has a contract for the sale of its total production from Gove for many years to come and that that contract entitles it to recover the whole cost to it of production of the product plus an amount of profit. (Question withdrawn)

Q. Would you agree with me that on 6th June, 1974, it was your belief that B.P. would supply Nabalco on a spot basis during Court proceedings which you then estimated would require about a year assuming an appeal to the Privy Council by either side? A. I think you are reading from a telex I sent, Mr Staff.

Q. Was that your belief? A. Yes.

Q. At that time it was also your belief that B.P. would continue to supply other petroleum products to Gove? A. Yes. 20

Q. Would you look at the copy telex which I show you dated 6th June. Is that a copy of the telex you sent on 6th June? A. Yes.

Q. And the contents of it represented your belief as to the facts and opinions which are expressed in it at that time? A. Yes.

Q. And that was so in the light of the discussions you had had and the information you had learned about the matters the subject of which is discussed? A. Yes.

(Copy telex of 6th June, 1974, tendered and admitted as Exhibit 39)

Q. I think, subject to my colleague's energy, there is only one other matter I want to ask you about. Following your entry into the contract with Kuwait National Petroleum Company, your early experience was such that you found yourselves with rapidly increasing prices, didn't you? A. The price rises were disappointing to us in that they did increase, yes. 30

Q. They increased with every shipment, virtually, didn't they? A. I can't be certain of that. They were changing with the posted prices at Bandar Mah-Shahr and also there were currency changes.

Q. If you look at them, you might just as equally well conclude that they moved like spot prices? A. I don't have any comparison of spot prices.

Q. At any event, you discovered that in the six months following the entry into the contract price increases represented additional costs to Nabalco of about \$2,000,000 per annum? A. On an annual basis I haven't worked it out but I think my memory of it is it rose \$10 per ton. 40

Q. By December 1974 you yourself were much concerned about the escalation of price? A. Yes.

Q. And, I take it, the frequency of the escalations? A. Well, certainly the increases.

Q. And you wrote a letter to the Vice President of the company complaining about them? A. Yes.

Q. Which indicated that you had concern at the rapid escalation? A. Yes. 50

Q. And you said you had endeavoured to explain to Mr Notter that unlike a major oil company or distributor Nabalco was not able to pass on to secondary customers at short notice such increased costs of raw materials? A. Yes.

Q. It was hardly accurate, was it, Mr Coogan? A. Well, I hadn't considered it in those terms before, Mr Staff.

Q. You went on to say, did you not, "We recognise that oil producing countries in determining their rights of . . . major oil companies." Do you remember writing that? A. Yes.

Q. And then, "Having foreseen such developments in the early part of 1974 . . . direct relationship with K.N.P.C.?" A. Yes.

Q. Was that a truthful statement of the reason why you chose to deal with K.N.P.C.? A. I think that is a fair comment.

10 Q. So that the real reason you entered into the contract with K.N.P.C. was that having foreseen the developments in the early part of 1974 you wanted to secure Nabalco's long-term supplies of furnace oil with a producing country rather than an oil company? A. Not the only reason. It was a reason that I gave weight to.

Q. That was the substantial reason, was it? A. No, the substantial reason to me was the price, initial price comparisons in the contracts when we considered the three, B.P., Kaiser and Kuwait alterations.

Q. Mr Coogan, you went on to say, "For our part we did not anticipate . . . not involved in oil company affairs.?" A. Yes.

20 Q. So, again, you are saying, aren't you, that you thought that there was to be a considerable advantage to you in dealing with an oil producing country rather than with a vendor, the seller of oil being an oil company? A. What I had in mind there was that the posted prices Bandar Mah-Shahr, Ras-Tanura and Bahrain are posted by the international oil companies. It seemed to us that perhaps what was a direct problem between the international oil companies and Kuwait was pushing up the posted prices posted by the international oil companies and I think we were endeavouring to see if there was a possibility of avoiding what we thought might be a conflict between us, Caltex and Kuwait or the other companies in the Gulf and avoid these changes that were occurring in the posted prices not posted by Kuwait, for example, but posted by the oil companies themselves.

30 Q. But you had agreed with Kuwait National Petroleum Company that your price under their contract should be tied to posted prices? A. Yes.

Q. At any event, do you recall writing on December 12, 1974, in reference to the increases which had occurred since the contract was written, "The latest increase, that is, fifty cents a barrel, was telexed to us on December 6, 1974 . . . since the signing of the contract.?" A. That is the letter I wrote and that is what I said, yes.

Q. And that was your view of what had happened? A. Yes.

40 Q. In retrospect, Mr Coogan, do you really think you would have done any worse at spot prices? A. I think there is a — perhaps in Platt's Oilgram I don't read it — some kind of index of the spot market and I haven't made a comparison of how we would go spot versus those prices.

Q. You had prior to 29th May, 1974, had some negotiations with other suppliers of products in Australia, amongst them Shell and Mobil? A. Yes.

Q. I think you also had some communication with Caltex? A. Yes.

(Mr Batterham's report of 29th May, 1974, called for: already produced as part of m.f.i. 2)

Q. (Approached) Mr Coogan, do you recognise this? A. Yes.

50 Q. And you recall there was at some stage at any rate an original document of which this is purported to be a copy? A. Yes, when we discussed this, you asked me what it had been produced for. It was somewhat of a mystery to me. I knew that about that time, Sir David Griffin was to have a discussion with Mr Rendell and I, I think, wrongly assumed it related to an advice to him and remembering also that these initials were unusual.

No. 111
 Plaintiff's
 evidence: A. G.
 Coogan: Cross-
 Examination
 (cont'd)

Q. That is "A.G.P."? A. A.G.P. which is the initials of Mr Powell and I believe that these were some notes, perhaps initially by Mr Powell, to be completed by Mr Batterham and these apparent gaps were left to be filled in at a later time. They did not seem to me to relate to any board report I was preparing and I was a little troubled as to where they had come from and why they had been prepared and I think if you were to ask either of those people they could explain that these are not deletions but it was the way the report was prepared.

Q. Well, have you in recent days discussed this matter with some of these officers or someone else? A. I asked Mr Batterham.

Q. And that is the substance of what he told you, what you have just recounted? A. Yes. 10

Q. But you have no personal knowledge? A. No.

Q. All you have been telling us is what Mr Batterham told you the other day? A. Yes, that he had not prepared these for Sir David Griffin.

Q. And what you have said about what appear to be deletions not being deletions but being original blanks is, again, speculation from what you were told by Mr Batterham? A. That is correct.

Q. Of course, if you look at p. 4 at Item 2.1 the sentence commences "However, Caltex have indicated" and then there is about an inch and a half of gap? A. Yes.

Q. It certainly looks to the uneducated, doesn't it, Mr Coogan, that part of the sentence has been blanked out, masked? A. Yes. 20

Q. And then in par. 2.2 it commences, "Following discussions with the Australian Government Department of . . . Mr Notter, Managing Director Administrative Division of Nabalco undertook a preliminary investigation."? A. Yes.

Q. It certainly appears on first sight that the name of the department has been masked out? A. Yes.

Q. In the reproduction. A. Again, it is speculation that I was told this was a draft which was not completed and that is the reason for these apparent gaps.

Q. Then, on p. 5 after the paragraph numbered 2.3 you come to paragraph numbered 2.4 which appears with no material reproduced for an area of about three inches? A. Right. 30

Q. Of course, from Item 2.4 the document jumps to paragraph numbered 5? A. Yes.

Q. This seems a bit odd also, doesn't it, Mr Coogan? A. As I said to you, I was rather puzzled about this document. It didn't remind me of anything I had asked for and I was not clear as to the purpose for which it had been prepared because it didn't seem to relate to the report I was preparing for later presentation.

Q. Well, it discusses amongst other things what the company was doing to investigate alternative supply? A. Yes. 40

Q. And it is in that area that it seems it would appear to the uninformed that the document has been doctored? A. Yes.

Q. On p. 6 there are four lines at the top of the page and the rest of the page is blank? A. Yes.

Q. You might also notice that the pagination on some of the pages is in type? A. Yes.

Q. And in some of them has been altered in ink? A. Yes.

Q. So that the document now has a consecutive pagination either original type, ink altered type or original ink? A. Yes.

Q. A curious way to put together a document isn't it, Mr Coogan? A. I agree with you again and, as you said, it is speculation but I was told it was a rough draft and maybe you want to ask Mr Batterham about it. 50

RE-EXAMINATION

No. 111
 —
 Plaintiff's
 evidence: A. G.
 Coogan:
 Re-examination

MR OFFICER: Q. Mr Coogan, I think you told my learned friend that some approach was made on behalf of the plaintiff to Caltex? A. Yes.

Q. Are you aware whether Caltex ever did respond? A. I don't recall a written response from Caltex. Mr Notter may have had a telephone response from them.

10 Q. You were asked some questions by my learned friend, if I may just indicate the general topic which was under discussion, and I am referring to the evidence at p. 73, your Honour — you were asked some questions relating to the fact that when the summons was initially issued, the Court summons was issued, no claim in it was made for damages. Do you recall that line of questioning yesterday? A. Yes.

Q. (Approached) I think you were shown that document at some time in the last few days by my learned friend, Mr Staff, were you not? A. Yes.

Q. They were the agenda for the Board of Direction meeting to be held on 19th June? A. Yes.

Q. And you observe that under 2.1 certain letters are referred to as being letters directed to the joint ventures? A. Yes.

Q. And those letters were tabled? A. Yes.

Q. Are those the letters that were referred to in that minute?

MR STAFF: They are already in I think, Mr Officer, Exhibits 31 and 32.

20 WITNESS: The answer is yes.

MR OFFICER: Sorry, your Honour, I was under a misapprehension.

(Escalation clauses previously m.f.i. 1 tendered, objected to; admitted subject to Mr Staff's objection to evidence of what transpired at the 17th May conversation as Exhibit N)

(Part of document previously m.f.i. 2 consisting of Mr Coogan's typed-up notes on the top bearing date 20th May being his account of the discussions with B.P. on the 17th tendered, objected to; admitted subject to Mr Staff's objection to evidence of what transpired at the 17th May conversation as Exhibit O)

30 (Two telexes to which reference has been made by Mr. Coogan, sent to Dr. Sorato in Zurich, dated 16th May 1974 and telex following conference on 17th May, 1974 dated 20th May, 1974, tendered: Objection to telex of 16th May: admitted subject to objection and marked Ex. P.)

(Same objection taken to telex of 20th May as a whole: tendered on the same ground as to the witness' state of mind: admitted subject to Mr. Staff's objection based upon the fact that the meeting was without prejudice: marked Ex. Q.)

(Witness retired)

40 (Telex No. 370 from defendant to B.P., London dated 2nd May, 1974, telex C985 from B.P., London to the defendant, dated 9th May, 1974, telex C650 from defendant to B.P. dated 17th May, 1974, together with typed copy and telex No. 115 dated 14th June, 1974 from defendant to B.P. London, together with typed copy tendered: objected to as pieces of paper do not prove themselves; secondly, what B.P. London says to B.P. Australia does not prove itself nor is it admissible as proof of what is contained in the document: His Honour asked how the documents were listed for discovery.

In telex dated 2/5/74, par. EFF tendered: after discussion, His Honour said he would prefer Mr. Officer to defer these tenders until Mr. Notter is either in the

No. 111
—
Plaintiff's
evidence: A. G.
Coogan:
Re-examination
(cont'd)

witness box or after his evidence is concluded: Tender of telex dated 9th May deferred.

Telex dated 17th May still tendered: objected to: admitted subject to objection and marked Ex. R.)

(Tender of telex of 14th June deferred)

(Document produced yesterday on discovery headed "Points for discussion with Nabalco on 17th May, 1974 tendered: objected to as a piece of paper does not prove itself: admitted and marked, subject to general objection, Ex. S.)

No. 111
—
Plaintiff's
evidence: E. A.
Notter:
Examination

EDWARD ALBERT NOTTER

sworn and examined:

10

MR OFFICER: Q. Your name is Edward Albert Notter? A. Yes.

Q. You live at 77 Ballyshannon Road, Killarney Heights? A. Yes.

Q. You are, and since November 1972 have been the administration manager for the plaintiff company? A. Yes.

Q. Prior to November 1972 you were commercial manager? A. Yes.

Q. As such did you have the responsibility for the latter part of the negotiations that led to the signing of the BP supply contract of June 1970? A. That is correct.

Q. Has that contract since been administered under your control? A. Yes.

Q. Apparently while you continued as commercial manager under the then administration manager? A. Yes.

20

Q. And since November 1972 with you being the administration manager? A. That is right.

Q. I think you were also secretary of the plaintiff company? A. Of Nabalco Pty Ltd, yes.

Q. I want to ask you some questions relating to the relative consumption of various types of petroleum product by the plaintiff company in its operations at Gove? A. Yes.

Q. Apart from the fuel oil, the defendant supplies under the agreement of June 1970 diesoleum, lubricants and motor spirit to the plaintiff at Gove? A. Yes.

30

Q. Would the amounts paid for the totality of such respective products by early 1974 have been in the order of fuel oil \$4.3 million per year? A. I am not absolutely certain. I have not added it up myself.

Q. If I put certain figures to you — though you may not be able to vouch precisely for the figures you may be able to say the importance from a money point of view would be of the order shown by one figure to another? A. Yes. (Objected to.)

Q. Apart from the supply agreement of June 1970 was there an agreement between BP and Nabalco for the storage by Nabalco of certain goods for BP. Is there any such agreement? A. Not for the storage of goods by Nabalco, for the storage of goods owned by BP in Nabalco's facilities, yes.

40

Q. On BP's behalf Nabalco stores certain goods? A. Yes.

Q. What goods are these? A. Super petrol and diesel fuel.

Q. Does Nabalco do anything with those goods? A. Yes.

Q. What do they do? A. They supply them to nominated customers of BP

either on the Gove Peninsual or prawning vessels or other facilities to which we are authorised to supply fuel on their behalf.

Q. Is the agreement in writing? A. Yes, there is an exchange of letters going back to approximately November 1973.

Q. As to aviation fuel at Gove, does Nabalco buy aviation fuel from BP? A. No.

Q. Does it do anything with aviation fuel at Gove? A. Yes.

10 Q. What does it do? A. We accept aviation fuel at Gove as agent on behalf of BP; we store such aviation fuel either in drums or in a bulk installation owned by BP; transport such fuel to the airport and issues such fuel to aircraft requiring fuel at the airport under an agency agreement which is referred to as the BP air agency agreement.

Q. Is there any other supplier of aviation fuel to aeroplanes landing at Gove? A. No, not to my knowledge.

Q. We have had some descriptions from Mr Coogan of the township at Nhulunbuy? A. Yes.

Q. Is there a BP service station in that town? A. Yes. (Objected to on the grounds of relevance; admitted subject to objection.)

Q. You are familiar with the township of Gove? A. Yes.

20 Q. Is there a service station other than a BP one? A. No.

Q. You had a number of conversations with Mr Lockrey after the delivery of the BP notice in March? A. Yes.

Q. And prior to 17th May conference? A. Yes.

Q. During that period did you write a letter to Shell? A. Yes.

Q. That, I think, was following a discussion which you had with Mr Denholme of Shell? A. Yes.

Q. Did you enquire from any other of the major oil companies? A. Yes, I had one enquiry to the Mobil Oil Company.

Q. Following that did you write to Mobil? A. Yes.

30 Q. Following your discussion did you get some correspondence from Mobil? A. Yes, I got a reply.

Q. Those enquiries of Shell and Mobil were made in April, were they not? A. Yes, on or about 16th April, and with Mobil on 18th April.

Q. At some time you enquired from Esso, did you? A. Yes, Esso and Caltex, but that was after,

Q. After the meeting of 17th? A. That is right.

Q. As to Caltex, you wrote them a letter? A. Yes.

Q. Did you ever receive a letter back from them? A. No.

40 Q. Did you ever receive any telephone call from them? A. No, not to my recollection.

Q. As to Esso? A. No reply.

Q. Would you look at these copy letters (shown). Are those copies of the correspondence to and fro between the plaintiff and Shell? A. Yes, Shell and others. There is also a letter I wrote to Sumitomo and a letter which I sent to Caltex Oil. Those are the letters I sent and those are the replies.

Q. Sumitomo, was there any reply? A. Not in writing.

(Abovementioned correspondence tendered: mfi.4 pending inspection by counsel for the defendant.)

(Witness stood down)

50 **(FURTHER HEARING ADJOURNED TO 10 A.M. MONDAY, 24TH NOVEMBER, 1975.)**

FIFTH DAY: MONDAY, 24TH NOVEMBER, 1975.

EDWARD ALBERT NOTTER
On former oath:

No. 111
—
Plaintiff's
evidence: E. A.
Notter:
Examination
(cont'd)

HIS HONOUR: Q. You understand you are bound by the oath you took on Thursday? A. Yes I do.

Q. And you remain bound by that oath whilst you are in the witness box giving evidence? A. Yes.

Q. I need not say that to you after coming back again after each adjournment? A. Yes.

MR. STAFF: There is one matter that is giving us some concern, and that is about the answers to subpoenas that have previously been referred to. We were informed over the weekend — although we had believed otherwise on Friday — that no admissions whatever will be made on behalf of Mr. Kuner's clients. That has led us to consider our position and it seemed to us three courses are open: the first is to seek leave to at this stage administer certain interrogatories to the present plaintiff; second, to pursue our motion for discovery which was stood over for hearing, which may cause more delay; and the third, simply to rely on calling Mr. Kuner on his subpoenas and wading through the mass of material. 10

It seemed to us a preferable course, at least initially, perhaps, one which would save time, in for us to seek leave to administer a small number of interrogatories on the subject matter to this plaintiff and at a convenient point of time we would seek to do that, your Honour. 20

It is perhaps necessary to see what the fate of that can be before we can conclude cross-examination of Mr. Notter. We rather decided to leave calling Mr. Kuner or his clients on subpoena to produce a great mass of documents until we saw what fate the application for leave to administer interrogatories had, and then what answers we got.

Mr. Horton has just concluded the preparation of interrogatories. We will show them to my friend. Perhaps our friend will wish to look at them while Mr. Notter's evidence in chief proceeds. I only mention it in relation to whatever time is convenient to your Honour and my friend to deal with it. I would not wish to conclude cross-examination of Mr. Notter without giving some indication of where we were going on this matter. I did refrain from cross-examining Mr. Coogan on this point. 30

HIS HONOUR: Where are we on this point? You say Nabalco itself simply acts as an agent for two principals named in the joint venture agreement.

MR. STAFF: Yes.

HIS HONOUR: As I understand you, or understood your cross-examination the other day, you would also say they are simply a contractual situation where what they get is passed on at no further loss to them. 40

MR. STAFF: Yes.

HIS HONOUR: And you get that, I understand, from certain documents which have already been produced.

MR. STAFF: Certain documents, plus the factual situation.

HIS HONOUR: What you want is that factual situation established so that your argument gains ground subsequently.

MR. STAFF: Yes.

HIS HONOUR: It seems unfortunate we cannot reach some agreed course.

10 MR. STAFF: Agreement had been reached on Friday afternoon but apparently there has been a change of mind overnight. We have simply been informed they are not prepared to discuss the matter further; so we are left in this situation.

HIS HONOUR: I will hear what Mr. Officer has to say.

MR. OFFICER: I know nothing about it. I could not express a view about interrogatories until I have seen them.

HIS HONOUR: All I say is that it is most unfortunate if there cannot be some agreement, with some matters being in issue, and documents being produced.

20 MR. OFFICER: Your Honour saw once or twice in the last week there was some tentative form of admission. We are aware that attempts have been made between the joint venture and the defendant to reach a suitable conclusion.

HIS HONOUR: I must confess I am not at this stage very impressed by this attempt to keep documents secret. I realise this is not your problem so much as Mr. Kuner's. There might be some commercial reason such as competitors learning of certain things. But in the way that the matter is being dealt with, I do not have a great deal of sympathy for Mr. Kuner's clients at the moment. One thing, if agreement cannot be reached it may be better if I order the production of these documents and no embargo on the production and adjourn the case until next year while Mr. Staff has a look at them. I think Mr. Kuner ought to realise that.

30 I am simply not prepared, bearing in mind the workload of this court, to allow this sort of thing to continue unless there is good reason for it. If there is, please tell me about it.

MR. OFFICER: If there is good reason I will tell you, your Honour.

HIS HONOUR: One has the feeling that the two companies are simply making almost a convenience of the court in its procedures and I am not prepared to allow that to happen.

MR. OFFICER: Doubtless what your Honour has said will be passed on

HIS HONOUR: If this is not resolved today I think I will seriously consider using the process of discovery and the documents will be produced; there will be no

No. 111
 Plaintiff's
 evidence: E. A.
 Notter:
 Examination
 (cont'd)

embargo on their production unless I am satisfied on material properly put before me that I should put such an embargo on them.

Mr. Staff has made his argument very clear. I would have thought the factual situation necessary to support his case cannot be in dispute, really. It is only a question of making the facts known. I will not say any more, Mr. Officer.

MR. STAFF: There was a tender outstanding at the adjournment. I might indicate we have no objection to the tender, except to the document which bears the pagination No.21, which does not appear to be a letter at all but appears to be notes of a discussion.

MR. OFFICER: Your Honour recalls I mentioned the other day we would not seek to tender evidence of discussions earlier than 17th May, except in reply to my friend's case there is one short witness. 10

HIS HONOUR: You are agreeing then to leave out the document of which Mr. Staff complains?

MR. OFFICER: Yes your Honour.
 (Document objected to remained m.f.i.4.)

(Letters, formerly part of m.f.i.4 as follows: tendered: 16th April, from plaintiff to Shell Company. Reply by Shell of 17th April. Further letter from Shell dated 1st May. Letter dated 17th May from plaintiff to Sumitomo. Letter of 20th May from plaintiff to Caltex. Admitted and marked Ex.T.) 20

MR. OFFICER: Q. Mr. Notter, prior to 17th May you had a number of discussions with representatives of B.P., is that correct? A. Yes.

Q. You were overseas in the Middle East at some time in April, were you not? A. No, in May, 2nd to 12th May.

Q. On your return from the Middle East did you read the letter from B.P. dated 7th May? A. Yes.

Q. Between the time you read that letter and the conference on 17th May I don't think you spoke to anyone from B.P.? A. Not to my recollection.

Q. On 17th May you attended with Mr. Coogan a conference in Melbourne? A. Yes. 30

Q. Do you recall who was present at the conference on behalf of B.P.? A. Yes I do.

Q. Who were they? A. Mr. Lockrey, Mr. Snape, Mr. Shaw, Mr. Skillen and Mr. Rowland.

Q. How long, approximately, did the conference last? A. Approximately two hours.

Q. I suppose it commenced with an exchange of greetings and introductions? A. Yes.

Q. What was the first thing you recall being said, and who said it? A. Both Mr. Lockrey and Mr. Coogan exchanged the intention that the meeting shall proceed like other meetings, without prejudice. I cannot recall quite who said it first but they both agreed. 40

Q. Who commenced talking about the substance of the meeting? A. I recall Mr. Coogan commencing with the meeting by saying — (objected to)

HIS HONOUR: It can be noted that you object generally, Mr. Staff, to any part of this conversation being given in evidence.

10 MR. OFFICER: Q. What did Mr. Coogan say? A. I can recall him saying "Mr. Lockrey, we have come to Melbourne to discuss where we are with regard to the continuation of oil supplies to Gove. As you know, we are very concerned with the oil supply and I do not have to stress how important the supplies are to Gove. We have read your letter of 7th May and whilst I was under the impression from my discussions with Mr. Notter that some sort of an arrangement had been reached between Nabalco and B.P., I now have the impression that this is no longer the case. Could you please explain to us where precisely we are standing with regard to the old contract and also the new contract which you have mentioned in your letter of 7th May".

Mr. Lockrey replied "Mr. Coogan, you must appreciate that the oil situation in the Middle East is still chaotic. In fact, we are not always up to date either as to what precisely is happening and in fact must rely as to what we are being told from London. I regret but the arrangements which I did discuss with Mr. Notter during the preceding last months are no longer available. However, we also value the relationship we have been able to develop with Nabalco and we recognise the importance oil is taking in Gove and are therefore still prepared to discuss with you the basis of a new contract."

20 Mr. Coogan replied "I understand your point but could you outline to us more about this contract." Mr. Lockrey replied "Before we can discuss or negotiate with you the new contract it has to be quite clear that such a contract can only be available if you are prepared to declare the old contract cancelled and I mean no legal action on the validity of the notice."

30 Q. Do you recall who spoke then? A. Yes. I asked Mr. Lockrey and said "Colin, when you speak about cancelling the old contract or regard the old contract as cancelled, where does that leave us with other things such as petrol, diesel, lubricants etc.?" Mr. Lockrey replied "As far as we are concerned we would only see the end of the old contract with regard to furnace oil and would expect that the contract would continue with regard to other products." Mr. Lockrey continued by saying "We have had a number of discussions with London concerning this new contract. We have obtained some relevant escalation clauses which need to be incorporated. I have some of these clauses here and I will make them available to you in a moment".

40 I then recall that either at this particular point, or maybe it could have been slightly at a later point, Mr. Rowland spoke saying "I don't quite agree that we should make any clauses available or to discuss a contract with Nabalco unless they are prepared to declare the old contract at an end with regard to furnace oil." Mr. Coogan replied and he said "Mr. Rowland, we have come to Melbourne to determine where we are and also to discuss the basis of a new contract. We are interested to talk to you about such a new contract. However, if you ask us to declare right here the old contract at an end without the possibility to test the legality of your notice in court, then I must advise you that neither myself nor Mr. Notter have the authority to do this and in fact the decision is such a big one, which you must appreciate can only be taken by our Board."

Mr. Lockrey continued saying "I can appreciate your situation, Mr. Coogan, and whilst I may have instructions to the contrary I have nevertheless decided to make some of these clauses available to you."

We were then given approximately five pages of photocopies containing a number of escalation clauses.

No. 111
 Plaintiff's
 evidence: E. A.
 Notter:
 Examination
 (cont'd)

Q. (witness shown Ex.N.) Would you look at that. Is that either the clauses or a photostat of the clauses that were handed to you? A. This is a copy of the photostat which was handed to us at that meeting.

Q. When they were handed to you, what happened next? Was anything said when they were handed to you? A. Yes. Either — I am not quite clear — Mr. Lockrey or Mr. Snape said “these clauses have to be taken the way they are and they are subject to no amendments. You are welcome to discuss them, of course, with your legal advisers but we might as well point out to you now that we cannot accept any amendments or suggestions.” Mr. Coogan replied “Thank you Mr. Lockrey, these clauses look fairly complicated and we will study them on return to Sydney. However, Mr. Lockrey, what would be the situation if our Board decides that they cannot discard the old contract and want to press on with legal action on the validity of your notice?” Mr. Rowland replied, and he said “Then, Mr. Coogan, there can be no new contract, in fact no new contract at all because we regard the old contract at an end.” 10

Mr. Lockrey, to my recollection, confirmed Mr. Rowland's statement. Mr. Coogan continued by stating “We now understand what is required from us but nevertheless we would appreciate if you could give us some more information with regard to the terms and prices of such a new contract?” Mr. Lockrey continued “As I indicated to you earlier, we had a number of discussions with London, and in fact they were very adamant that we should not offer you a contract exceeding one year. However, we recognised the need for a long-term supply contract to a project such as Gove and have been able to convince our London people that we should offer you the opportunity of either a one-year or a three- year contract. With regard to a one-year contract, the price will amount to \$53.96 per ton and, with regard to a three-year contract, \$56.52 per ton. Whilst those prices may appear high to you, I can only reassure you that these are the current market prices which B.P. must receive to adequately cover the cost of oil.” 20

At this particular point I asked Mr. Lockrey, I said “Colin I agree that these prices are high and in fact from the current deliveries to Gove during the past two or three years I noticed that you have delivered us oil of a similar quality and specification on what is commonly known as ship bunkers. Even in today's situation the price of ship bunkers is lower than the prices you have just quoted to us and I fail to understand why ships can obtain the same type of oil in lots of 500,000 or 1,500 tons shipped alongside in lighters at a price lower than bulk deliveries in tank ships varying in size from 30 to 40-thousand tons?” Mr. Lockrey replied and said “I can't give you a ready answer to your question, I shall refer the matter later on to our people in London.” 30

I continued and said “I have just had a quick glance at the escalation clauses which you have handed to us and whilst I have not been able to study them they do, however, indicate to me that they are very wide. In fact, you can escalate price retrospective and prospective and also adjust the price in anticipation of an event happening. Basically I regard it as similar to a spot price. In view of the wide escalation clauses which are designed to accommodate every conceivable event, I cannot understand why the one-year contract should be cheaper than a 3-year contract since in normal commercial terms long-term agreements have a more favourable price than short-term agreements.” 40

Mr. Lockrey replied and said “Really contracts as they used to be written are a thing of the past. To date with what is happening in the Middle East there are just that many unknown factors that possibly the additional price has been added to the 50

one-year price to cover the unknown. In fact, I can tell you now that our people in London do not even know the price of crude oil they are currently obtaining from Kuwait. However, I will endeavour to obtain more information to this question from London and shall also try to bring the two prices closer together."

10 I think Mr. Coogan then spoke. He said "Mr. Lockrey, I think we understand where we stand today and certainly shall report to our Board as soon as possible. You will appreciate that we have to give our Board some justification or comparison and it will therefore be necessary for us to make some further inquiries with other oil companies. I trust you have no objection to this?" Mr. Lockrey replied "We certainly have no objection to you making further inquiries with other oil companies but we doubt as to whether you will be successful, and in fact we think they cannot even offer you a 1-year contract."

20 Mr. Coogan spoke again. He thanked Mr. Lockrey and said "Might I summarise the situation the way we see it as of today. You are offering us an option of either a 1-year or a three-year contract at either \$53.96 or \$56.52. If we choose to accept such a contract — and I might mention that we are interested in the long-term contract, the 3-year contract — you are asking us to declare the old contract at an end and agree not to take legal action on the validity of the notice. If, however, our Board decides that the notice must be tested in court then there will be no contract available to Nabalco and supplies under the old contract would cease during July this year".

30 Mr. Lockrey replied, "In summary I agree that this is where we stand today but of course oil supplies could still be available to you but this would have to be on the basis of spot." I spoke, saying, "Colin, but surely we know spot is spot and it cannot be considered for a project such as Gove?" Mr. Lockrey replied "I agree there is a certain element of risk associated with spot and it would also be fair to say that in a very tight situation a contract customer would have preference over a spot customer." Mr. Coogan also spoke on the subject and said "Mr. Lockrey, with an investment of \$310-million in Gove I cannot accede to the principle of spot shipments. We will now report the matter to our Board and hopefully come back to you on the question which you have asked us concerning the old contract."

Mr. Lockrey thanked Mr. Coogan and indicated that preferably he would like to have important matters answered based on his reference to the Board not later than 27th May. The meeting, to my recollection, closed soon after and we adjourned for lunch.

There is one point I forgot: Mr. Lockrey also pointed out to Mr. Coogan and myself the amount of losses B.P. have sustained under the contract up to April 1974, some \$4.2-million and that they estimate that losses after April would be in the vicinity of \$1-million per month.

40 Q. Can you give an indication of at what point in the conversation that reference was made? A. Yes, that was made just when Mr. Lockrey said they appreciate the importance Nabalco places on oil, "That B.P. are happy to discuss with you a new contract" and at this point I recall this reference to losses being made.

Q. Do you recall anything else that was said by anyone during the conference?
 A. There may have been certain other things but I can't recall any other points.

Q. Do you recall whether any other topics were discussed? A. Other than oil?

Q. No, in relation to oil generally? A. No.

No. 111
 Plaintiff's
 evidence: E. A.
 Notter:
 Examination
 (cont'd)

Q. Then I think after the meeting you went down and had lunch? A. Yes, we were joined by, I think, Mr. Johnstone, who was the General Manager of B.P.

Q. Then, Mr. Notter, you came back by plane with Mr. Coogan that night? A. Yes.

Q. The 17th was a Friday, I think? A. Yes.

Q. On the Saturday and Sunday did you have any phone calls with anyone? A. Yes, I had a telephone call from Kaiser Trading in Oakland, California.

Q. On the Saturday or Sunday did you have one discussion with Kaiser or more than one? A. I had one telephone conversation with Oakland, they rang me on Saturday morning at home. I also had a telephone conversation with the local General Manager here of Kaiser Trading, a Mr. Longstaff. 10

Q. Did you have a discussion with someone from Kaiser on Monday 20th? A. Yes.

Q. Was that with Mr. Longstaff? A. Yes.

Q. On 23rd May did you receive a telex from Kaiser? A. Yes.

Q. Would you look at this document please (shown). Is that a copy of the telex you received? A. Yes.

(Copy of telex dated 23rd May from Kaiser Trading, tendered. Admitted without objection and marked Ex.U.) 20

Q. Did you have a telephone conversation with Mr. Lockrey on 27th May? A. Yes.

Q. In part, did that refer to arranging a meeting between two other people? A. Yes.

Q. But in the course of that conversation was anything said which was a follow-up, as it were, of 17th May? A. No. With — no — on 27th?

Q. I am sorry, did you receive a call from Mr. Lockrey on 28th? A. Yes.

Q. One on 27th about arranging a meeting? A. Yes.

Q. And then you had another call from him on 28th? A. Two telephone calls. 30

Q. What did Mr. Lockrey say to you on the 28th? (Objected to. Objection noted. Allowed.)

Q. You say you had two calls from Mr. Lockrey on the 28th? A. Yes.

Q. Would you come to the first of those and tell us what was said? What did Mr. Lockrey say? A. The telephone discussion concerned an arrangement under which Sir David Griffin — (objected to)

Q. In the first of the two conversations of 28th, was anything said which related to the subject matter that had been discussed on the 17th? A. Yes.

Q. Would you tell me what, in this first conversation, was said on that? A. I said "Colin, there are two outstanding points from our meeting in Melbourne on the 17th. You were going to check with London on the question of the relationship of ship bunkers versus the new contract prices you have quoted to us. And also on the question why a 1-year contract is cheaper than a 3-year contract price?" Mr. Lockrey replied "On the question of ship bunkers, London have reacted very swiftly and stated that any relationship between the contract prices and ship bunker prices is purely coincidental and has no bearing whatsoever. On the question between the 1-year and the 3-year contract price, we are still discussing this matter with London and are hopeful to bring the prices closer together but nothing as yet has been decided." 40

Q. At the first conversation on the 28th was there anything further said on the topics that had been discussed on 17th May? A. Yes, to the point that in reply to their request on the decision with regard to the old contract, that I inform Mr. Lockrey, saying, "Colin, we have as yet no decision and the Board has not met and therefore we cannot give you an answer." 50

Q. Then you had a second discussion with Mr. Lockrey on 28th May? A. Yes, he rang me in Sydney.

Q. What did he say when he rang you? A. He said "Eddie, further to our talk this morning I might as well tell you that Brian Snape is quietly working on drafting the escalation clauses which were given to you on the 17th May into a new contract. However, this is as far as we can go before you come back and tell us what your Board has decided." I thanked Mr. Lockrey and I said "Colin thank you, but you know it is not my decision and I just have to wait for what our Board will decide." Mr. Lockrey continued "We have been able to work out some worthwhile savings in trying to bring the two contract prices closer together." May I outline—

Q. He then discussed various points? A. Yes.

10 Q. As to which he thought some saving or paring of the price perhaps could be effected? A. Could be available subject to us making a declaration.

Q. Would you look at this document please (shown) Is that a copy of a further telex which you received from Kaiser? A. Yes.

(Telex from Kaiser dated 28th May, 1974 tendered. Admitted without objection and marked Ex.V.)

Q. About 30th May did you have a further conversation with Mr. Lockrey? A. Yes.

Q. By telephone? A. Yes. I rang Mr. Lockrey.

20 Q. In that conversation was anything said relating to the subject matter discussed on 17th May, any of the subject matter that had been discussed on 17th May? A. Yes, I suggested to Mr. Lockrey that we should meet in an endeavour to discuss and draft a new contract.

Q. Did such a meeting subsequently take place? A. Yes it did.

Q. On what date? A. On 31st May in Melbourne.

Q. At that meeting on 31st May were you there alone on behalf of the plaintiff? A. Yes.

Q. Who was present on behalf of B.P.? A. Mr. Lockrey, Mr. Snape and Mr. Cochrane.

30 Q. What was said at the meeting? A. I said — (objected to. Objection noted. Allowed) That we meet here again without prejudice and Mr. Lockrey agreed to this qualification.

Q. After that what was said? A. Mr. Lockrey—

HIS HONOUR: I do not know what I should do. It is covered by Mr. Staff's general objection but here is another conversation which was expressly prefaced by the "without prejudice" label. What is the convenient course, should I hear the evidence subject to objection or should I have another voir dire hearing. What do you say, Mr. Staff?

40 MR. STAFF: It appears to be covered by your Honour's previous ruling. This, as Mr. Notter has said, is a follow-on from the previous discussion with a view to drafting a contract. With respect, I could not make a different objection, your Honour.

HIS HONOUR: It is probably better to let it in and deal with it later.

MR. STAFF: So long as I am covered by the general objection, I am content.

MR. OFFICER: Q. What was said? A. Mr. Lockrey commenced the meeting by saying "I have agreed to this meeting to take place following the discussion between Mr. Rendle and Sir David Griffin. I agreed that we should meet here and define, as far as we can go, the terms and conditions of a new contract. However, I must make it very clear to you that we still require from you a decision with regard

No. 111
 —
 Plaintiff's
 evidence: E. A.
 Notter:
 Examination
 (cont'd)

to the old contract as we discussed with you on 17th May. If you cannot give us such a decision then obviously we cannot finally negotiate a contract. I understand from London that no immediate decision has been reached between Sir David and Mr. Rendle and that Mr. Rendle is having some further discussions with our people in London. At the same time both parties felt that some negotiations should continue. We have decided this at a number of discussions with London and I am pleased to advise you that in principle we are now able to offer you a 3-year agreement and above all we have been able to reduce the contract price from \$56.62 to \$52.52 subject to some technical details which Mr. Snape will discuss with you later on."

10

WITNESS: Mr. Lockrey continued, he said, "As a matter of interest we are in some bother ourselves at this particular stage as I have been talking to our shipping boys downstairs. I understand that they have to confirm shipping arrangements already now for August this year and therefore you can see how imperative it is that a decision is reached by your Board so that we know what to do". I replied, "I can appreciate your problems but as I indicated to you previously I can do nothing than just wait as to what our Board will decide."

Mr. Lockrey then continued saying, "You will find the necessary co-operation from Brian Snape and Ivan Cochrane; unfortunately I cannot stay for the rest of your meeting because I have to go to the hospital and see some doctors." I asked, "May I ask what is wrong with you?" He replied, "Some time ago I had an unfortunate whiplash injury and it has been quite a nuisance to me; sometimes I just forget things." I said, "I am very sorry to hear this, Colin, and I hope that they can fix it up very quickly, or put it right very quickly."

20

He then left and we continued to define the new contract and incorporating the escalation clauses by mutual agreement between the three of us, we did not discuss the notice under the contract or negotiations which have taken place to date and so we concentrated on defining a new agreement.

MR. OFFICER: Q. I want to go back to that period while Mr. Lockrey was present. Can you recall anything else that was said? A. Yes, when mentioning that they are in a spot with problems — when mentioning that they were in a spot of bother themselves with regard to the timing of shipping he said that, "Unless we have a decision soon you may just have to accept spot shipments." I replied stating that, "As previously stated spot shipments are not acceptable for Gove."

30

Q. When you returned from Melbourne did you have a document which was partly typed and partly handwritten? A. Yes, and it was stuck together with tape, you know, various pieces put together into the form of a contract.

Q. Did it reflect what you thought was the outcome of the meeting with Mr. Snape and with Mr. Cochrane? A. It did indeed.

Q. Do you still have that very document that you brought back from Melbourne? A. No.

40

Q. When you returned to Sydney did you have it typed up? A. Yes.

Q. Did you send a copy to B.P.? A. Yes.

Q. Would you look at this document (shown). A. That is the document, that is a copy of the typed document which was also sent to B.P.

(Above document tendered without objection and marked Ex.W.)

Q. Mr. Notter, we have had some evidence from Mr. Coogan about a Mr. Nyholm of Kuwait and the National Petroleum Corporation? A. Yes.

Q. When did you first meet him? A. I am not absolutely certain on the date, it

was either the 26th or 27th May; most likely the 26th, if that was a Monday then I think it was the 26th.

Q. Had you had any previous communication with K.N.P.C.? A. No.

Q. On the day when you first met him did you have a lengthy discussion with him? A. No, approximately one hour.

Q. Then, I think you went to lunch with Mr. Nyholm and Mr. Coogan? A. Yes, either on that day or the following day, I'm not 100% certain.

Q. Then after that initial meeting did you have any further discussions with K.N.P.C.? A. Yes, daily discussions.

10 Q. Were you also at the same time having discussions with Kaiser? A. Yes.

Q. Then did you have a telephone conversation in June with Mr. Lockrey? A. Yes.

Q. Can you fix the date of that? A. Yes, there were actually two, one on the 13th and one on the 14th.

Q. Let's take the one on the 13th. Did you ring him or did he ring you? A. The 13th — he rang me.

Q. Was there any discussion between you on the subject matters that had been discussed on the 17th May? A. Yes.

20 Q. What was said in that regard? (noted covered by same objection). A. First Mr. Lockrey said, "I understand at the meeting which took place between Sir David and Mr. Rendle that no immediate decision would be made by your Board. In actual fact I understand that no decision of any importance could be reached at that meeting." Secondly Mr. Lockrey said "I have had a solicitor's — or a letter drafted by our solicitors on my desk which I was keeping pending the meeting between Sir David and Mr. Rendle. I now think I should send it to you." I asked Mr. Lockrey, "Colin, as I believe Sir David indicated to you, we are leaving on the week-end to go to Zurich to discuss the matter further. In view of the limited time can you read me this letter over the telephone. He replied, "I don't think that is necessary. The letter basically only refutes the points which you have made in your letter of the 30 17th May or 16th May" — I'm not quite certain about — 16th or 17th May — "and that in our opinion we have given you sufficient information regarding the availability and prices of crude oil." I replied, "I will convey this point to our legal advisers. However, since we are leaving for overseas and to make a decision and I also understand you know that we have some alternatives open to us — I think it would be a good idea if I reiterate the situation as I understand it today."

40 I said, "You are still offering us a three year contract at \$52.52 as per our negotiations in Melbourne on the 31st May. However, this contract is only available to us if we declare or if our Board declares the old contract at an end and agree not to take legal action on the validity of the notice. Should our Board decide otherwise then there will be no new contract or indeed a contract available to Nabalco and supplies would cease on the 24th July." Mr. Lockrey replied, "In summary I agree with you, but of course we would not be as harsh as just turn off the oil; supplies could still be available to you on a spot basis as mentioned earlier. In fact, even should you decide now in favour of a new contract we may have to make some makeshift arrangements for one or two months between the old contract terminating in July and the time it takes for the new contract to become operative, from a logistics point of view." I replied that I appreciate his situation but as indicated earlier spot supplies are not acceptable. I think that's about the contents of our discussion on the 13th.

50 Q. Then I think you mentioned a moment ago you had another discussion with Mr. Lockrey on the 14th? A. Yes.

Q. Did he call you or did you call him? A. No, he called me from Melbourne.

Q. What did he say to you and what did you say to him relative to the matters

No. 111
 —
 Plaintiff's
 evidence: E. A.
 Notter:
 Examination
 (cont'd)

that had been discussed at the conference on the 17th May? A. He said, "Eddy, we are very concerned about the continuation of oil supplies to Gove. I have just had a further discussion with our shipping people and they told me they are already now confirming shipping arrangements for August and September. Really, unless we know soon what you are going to do we can see some problems." I replied, "I appreciate your concern but pending our discussion in Zurich there is not much more I can add at this particular point". Mr. Lockrey replied, he said, "In view of the fact that both you and Allan Coogan are going to Zurich and London not being very far away, I suggest that you, if you have some time, call on a Mr. Duncan Johnstone who is the man who was handling the Nabalco matter in general. I feel certain that he can give you a lot more information as to what has happened and what is happening with regard to oil supplies and, for instance only today we learned that Saudi-Arabia have assumed ownership of the Aramco interests up to 60%, thus increasing the price of — the posted price, I'm sorry, of crude oil to \$US.10.75 per barrel. I can only see prices continuing to increase." I replied, "It is a very kind suggestion of you, Colin, and certainly if we have the time we will try and see Mr. Johnstone. He, Mr. Lockrey replied and he said, "By the way, when you see Mr. Johnstone, or should you see Mr. Johnstone in London, please don't mention the price of \$52.52 to him since this price is lower than what was indicated to us from London". I replied, "I will keep that in mind and thank you for your call", and that was the end of the conversation. 10

Q. Have you had any further conversations with Mr. Lockrey prior to the execution of the Kuwait contract? A. No. 20

(Short adjournment)

EDWARD ALBERT NOTTER
On former oath:

HIS HONOUR: You had finished, Mr. Officer?

MR. OFFICER: Yes your Honour. There is one matter I should have raised.

Q. Mr. Notter, you gave some evidence this morning about your discussions with Mr. Lockrey on 13th June? A. Yes. 30

Q. You gave us the evidence which you said you wanted to recapitulate, summarise? A. Yes.

Q. Do you recall anything else that was said in that conversation, other than what you have given this morning? A. Yes. At the end of that conversation I said to Mr. Lockrey "I believe Sir David had asked Mr. Rendell as to whether he will be prepared to continue supplying other products to Nabalco in the event that we should choose an alternative for the supply of furnace oil. I understand from Sir David that Mr. Rendle had no objection to this". Mr. Lockrey replied that as far as he understands there will be no objection to these other products being supplied to Nabalco beyond July 1974. 40

No. 111
 —
 Plaintiff's
 evidence: E. A.
 Notter: Cross-
 Examination

CROSS-EXAMINATION

MR. STAFF: Q. Mr. Notter, did this particular conversation just strike you between you left the box at half past 11 and 2 o'clock unaided by anyone? A. No.

Q. It just came into your mind, did it, that you had forgotten to give this particular conversation? A. It came to my mind after Mr. Officer asked a question.

Q. When? A. Just now.

Q. It had not occurred to you that you had not given evidence to that effect in your evidence this morning? A. I remembered that I did not mention this this morning, although I remembered that conversation very well.

Q. Did you first realise that you had not given that evidence this morning when you were asked that question by Mr. Officer in the box just now, did you? A. Yes.

Q. It was after you realised it between half past 11 and 2 o'clock? A. No.

Q. Or somebody spoke to you about that particular subject matter? A. No one has talked to me about that matter.

10 Q. You had no inkling that Mr. Officer was going to ask the question which he did just now? A. No.

Q. It came as a complete shock to you? A. Not as a shock.

Q. The question which he did just now? A. No.

Q. It came as a complete shock? A. Not as a shock.

Q. As a surprise? A. The fact, he asked me that question.

Q. You particularly remembered that that particular conversation was the one you forgot this morning? A. No, I gave it some thought and I remember that was one.

20 Q. It was discussed? A. It was not discussed, I just remembered I did not mention it this morning.

Q. It came to you almost straight away? A. No, I remembered it.

Q. How long did you take to give it some thought? A. Some seconds.

Q. You have a good recollection of all the conversation you had with Mr. Lockrey and others, have you? A. A very good recollection, yes.

Q. You were able this morning to tell us about them in considerable detail? A. Yes.

Q. That was as a result of your recollection of what happened on the various occasions on which you had a conversation, was it? A. Yes.

30 Q. Unaided by anything else? A. I certainly remember the context of pertinent points of my conversations with Mr. Lockrey. It would be fair to say that I have been able to refresh my recollection at the hands of notes.

Q. So you, before giving your evidence, had made a study of various notes? A. I had read my notes which I made at the time, some 18 months ago.

Q. You say you made some notes at the time, some 18 months ago? A. Yes.

Q. You wrote all those notes, did you? A. Yes.

Q. And you read those notes before you gave evidence? A. Not today but in the past few months, few weeks.

Q. You have read them on numerous occasions, have you? A. Yes.

40 Q. And you have endeavoured to memorise a good deal of the language that appears on these notes have you? A. No; but the contents of the discussion.

Q. Have you studied other people's notes, Mr. Notter? A. I read one note which was prepared jointly between Mr. Coogan and myself, which was the note following the meeting of 17th May.

Q. A note prepared jointly by you and Mr. Coogan? A. He prepared it. We sat in the plane together and I read his notes, I added on to it. We complemented each other in the notes which we wrote on the way back from Melbourne.

Q. Did you write those notes in handwriting? A. Mr. Coogan wrote them in handwriting. I also wrote some myself.

50 Q. So you studied, quite recently, the notes which Mr. Coogan wrote in handwriting on the aircraft coming back, and your own handwritten notes, is that right? A. And my own, yes.

Q. You are quite clear about that? A. In that case would you like to repeat the question?

Q. Let me just get it clear; you wrote some notes in your handwriting, coming back on the aircraft after the meeting on 17th May? A. Yes.

Q. Those notes you have studied recently? A. Yes.

*Q. Mr. Coogan in your presence wrote some notes in handwriting coming back on the aircraft? A. Yes.

*Q. And those notes you have studied recently? A. Yes.

MR. STAFF: I call on my friend, your Honour, to produce some handwritten notes of Mr. Notter and Mr. Coogan, written on 17th May in the aircraft on the way from Melbourne to Sydney.

MR. OFFICER: For reasons that were given in evidence by Mr. Coogan, his handwritten notes are no longer available but there is a typed copy which was used in court. I produce a photostat of the second document, Mr. Notter's notes. 10

MR. STAFF: Q. Mr. Notter, you told me that you recently saw Mr. Coogan's handwritten notes and studied them? A. His notes?

Q. I asked you had you recently studied Mr. Coogan's handwritten notes and you said Yes. Is that true? A. No.

HIS HONOUR: I do not know if the witness is agreeing that he did say that that was true.

Q. What do you mean when you say No? A. That I have seen, or recently studied Mr. Coogan's handwritten notes, but the typed notes. 20

HIS HONOUR: If you want the question read, Mr. Staff, you may have it read.

MR. STAFF: No your Honour.

Q. You recall telling me in answer to my question a few minutes ago that you recently studied Mr. Coogan's handwritten notes? A. I don't recall "handwritten".

Q. You don't know what you call handwritten: is that your answer? A. I don't recall the word "handwritten".

MR. STAFF: Your Honour, I wonder if the question I asked could be read back.

(Questions marked * read by court reporter) 30

Q. Do you want to withdraw that answer, Mr. Notter? A. I have studied those notes but not the handwritten notes, they have since been typed and I did not see the significance between the handwritten and with regard to the notes.

HIS HONOUR: Q. What you are saying is although you had studied the notes, and although they had originally been handwritten, what you studied recently was a typed copy? A. Yes.

Q. Is that what you say you meant when you were answering Mr. Staff's questions? A. Yes, that is what I meant.

HIS HONOUR: For better or for worse, that is what he said, Mr. Staff.

MR STAFF: Q. Do you say that Mr. Coogan's typed notes, which you recently studied, were simply a typed version of what he wrote in handwriting in your presence in the aircraft? A. To the best of my knowledge, yes. 40

Q. That is the best of your recollection? A. Yes.

Q. There were no alterations to that or additions to that when they were typed up? A. I am not aware of any.

Q. Pardon? A. I am not aware of any, I don't know.

Q. A moment ago you told his Honour what you had meant earlier was that you had studied the typed-up version of Mr. Coogan's notes made in the aeroplane. Do you want to withdraw that answer? A. No.

Q. (witness shown Ex.O.) Just have a careful look at that document, please? A. I have read the notes.

10 Q. They, would you say, are the typed-up version of Mr. Coogan's handwritten notes made on 17th May in the aeroplane? A. To the best of my knowledge, yes.

HIS HONOUR: Q. And are they the notes, copies of which you have used to refresh your recollection in the last few weeks or months? A. Yes.

MR. STAFF: Q. So that you have used those notes and you have used your own handwritten notes made on 17th May? A. Yes.

Q. Just look at those notes? (witness shown further documents) A. Yes, I have read those notes.

Q. Are those the notes you made on the aircraft? A. Yes.

(Handwritten notes of Mr. Notter made on 17th May, on the aircraft from Melbourne to Sydney, tendered. Admitted without objection and marked Ex.40.)

20 Q. When you made those notes you were endeavouring to record on paper the essential points made in the discussion you have had with the B.P. people, were you not? A. Yes.

Q. And were you attempting to record events in the order in which they occurred? A. No.

Q. So that those notes do not represent any reproduction of the order in which topics and subject matters were discussed? A. Not necessarily, no.

Q. Well not at all? A. I cannot say.

Q. I suppose the first note you made "without prejudice" indicates perhaps one of the first topics discussed? A. It was.

30 Q. And it was the first significant matter which, in your view, was discussed? A. It was significant — how do you say in English — the meeting was labelled without prejudice, if that puts it into a certain context.

Q. To your mind that had a real significance, did it? Or didn't it? A. Yes.

Q. What significance did it have in your mind? A. I don't fully understand the full legal implications of "without prejudice" but what I understand "without prejudice" to be is that it protects parties having a discussion or an exchange of correspondence without prejudice in order that anything may be said you know later on won't become an admission in court. That was my understanding.

40 Q. It was against that background that you recorded the things that were said by the B.P. representative to you on 17th May? A. Yes it was.

Q. Prior to the 17th May conversation you had had, I think, a number of discussions with various people in B.P. about fuel oil subsequent to March of 1974? A. Yes.

Q. I think you had a meeting on 17th April with Mr. Lockrey in Melbourne, did you not? A. Yes.

Q. Were you on that occasion given a document by Mr. Lockrey? (no answer)

Q. I suggest to you an article? A. Yes.

50 Q. Appearing in a publication? A. May I just think. I can recall a copy of an article, it may have been from Petroleum Weekly, I am not quite clear, dealing with certain matters of the Middle East situation.

Q. Would you look at the photocopy document which I show you. (witness shown document) A. Yes, I have read that.

Q. Is that a photocopy of the article you were given on 17th April? A. It may be, I could not be 100% sure.

Q. It probably is? A. It probably is.

(Photocopy of article from Petroleum Weekly, tendered. Objected to on the grounds of relevance. Mr. Staff informed his Honour that it was tendered as part of the state of knowledge of Nabalco on the election point. The objection was then withdrawn by Mr. Officer and the article was admitted and marked Ex.41.)

Q. As at about 18th April, perhaps a little earlier, but certainly at that time it was your view, was it not, that the events which had occurred in the Middle East in relation to oil gave rise to a situation in which it could accurately be described in your belief as one where oil had been used as a bargaining tool against the western world? A. Yes. 10

Q. Just before I pass on: I think you agreed, did you not, Mr. Notter, that the discussions which you had with the representatives on 17th April were agreed to be without prejudice? A. Yes.

Q. Then I think you had a further discussion with Mr. Lockrey by telephone on 23rd April in relation to the "without prejudice" discussions on the 17th, did you not? A. 23rd April?

Q. Yes, on 23rd April. A. I can recall a conversation on 23rd April but I could not that much— 20

Q. You can't really remember it? A. I can't remember the full contents of that conversation.

Q. Do you recall whether it was without prejudice, or not? A. It most likely would have been without prejudice.

Q. Then do you recall you had a further conversation by telephone with Mr. Lockrey on 26th April which followed your letter, that is Nabalco's letter, of 24th April in which you said "if the B.P. notice is valid we terminate the fuel oil supply application"? A. Would you please repeat this?

Q. Do you remember on 24th April Nabalco wrote a letter to B.P. saying that they did not agree with the notice which B.P. had given was valid? A. Yes. 30

Q. But that if it was they were exercising the right to determine the contract on three months' notice? A. That is correct.

Q. So far as it related to fuel oil? A. Yes.

Q. What I put to you is that two days after that Mr. Lockrey rang you up? A. Yes.

Q. There was mention in that discussion of it being without prejudice? A. Not to my recollection.

Q. And Mr. Lockrey said to you that he had had your letter of 24th April, or words to that effect? A. Yes.

Q. That B.P. believed that their notice was valid and therefore they accepted your letter as being a valid notice of determination of the fuel oil contract? A. Yes. 40

Q. And that he said further that the legal advice B.P. had was that the letter of 4th April, in which he had earlier written asking some questions relating to the contract, it was now being terminated and therefore that he should not answer those questions? A. That is correct.

Q. He said further that those questions might further be considered in relation to and provided a new contract is signed, or words to that effect? A. He said that once they regard the old contract as terminated in July they are still prepared to discuss with us—

Q. Making a new contract? A. A new contract. 50

Q. He told you that they believed their notice was valid and thus that the agreement was terminated as a result of what their legal advisers had told them? A. Yes, with supplies.

Q. He went on to say that it was understood that if a notice was subsequently held to be invalid the contract for fuel oil continues? A. Yes.

Q. He then suggested to you that you may have discussions about a new contract without prejudice? A. Yes.

Q. And you made a note about that conversation, didn't you? A. Yes.

MR. STAFF: I call for Mr. Notter's note of that 26th April conversation.

MR. OFFICER: It is produced, your Honour.

MR. STAFF: Q. Would you look at the note I show you. (witness shown document) Is that the note you made of that particular conversation? A. I wrote that down whilst having the telephone conversation.

10 (Mr. Notter's note of the conversation with Mr. Lockrey on 26th April, tendered. Admitted without objection and marked Ex.42.)

Q. You then conveyed your impressions or recollections of that conversation to Mr. Coogan, didn't you? A. Yes.

Q. On that very same day? A. Yes.

Q. I suppose you conveyed it to Mr. Coogan in a telex which you sent him in Zurich on that day, 26th April? A. Yes.

20 Q. You stated in that telex what you understood to be the position explained by Mr. Lockrey on the telephone on 26th? A. And also passed on the discussions with Mr. Lockrey prior to that time.

Q. Do you mean passed on the "without prejudice" discussions? A. Discussions to date, developments to date.

Q. You sent a telex to Mr. Coogan in which you said "Our letter 24th April was hand delivered to B.P. They replied by phone confirming receipt of our letter"?

A. That is correct.

Q. "They had discussed it with their legal advisers"? A. Right.

30 Q. "Because they think that their notice dated 27th March 1974 as valid they accept our notice contained in letter 24th April, Clause 9 (c) (iii) and consider supply contract with Nabalco will expire 28th September 1974? A. That is correct.

Q. I think 28th was an error, it should have been 24th? A. There was some clarity at that time as to whether it was 24th or 28th.

Q. You went on "Whilst on one side referring to when contract is finalised they understand that it is subsequent legal actions confirmed their notice as invalid, then the old contract will still apply." A. Yes.

Q. That is what Mr. Lockrey had said to you on 26th April, wasn't it? A. Yes.

Q. You then went on to say "In the meantime they are prepared to write a new contract with Nabalco at a negotiable price about \$40 per tonne, pending decision on legal contract."? A. Yes.

40 Q. "They will not reply to our letters of April 4 and 20." A. Yes.

Q. You also went on to say, in essence, they feel they could break the old contract but are keen to write a new contract with Nabalco at less than the suggested new base price. They are also prepared to follow legal determination of old contract. Is that right? A. Yes.

Q. Then you went on to express your own opinion about this, and Queen's Counsel's opinion? A. Yes.

Q. And then to express some views about courses which were open to your company: and then you concluded, "B.P. confirmed again their willingness to discuss a mutually acceptable solution whilst we seek such a solution they will not terminate the furnace oil supply to Nabalco." A. Yes.

50 Q. And that was the position as you understood it between you and B.P. as a result of the conversation you had with Mr. Lockrey on 26th April. An open

conversation not expressed to be "without prejudice" which you had on 26th April, wasn't it? A. Yes, but it was also based on previous conversations which developed into final conversation.

Q. Mr. Notter, what I put to you in that telex that you wrote was simply a summary of the conversation you had had with Mr. Lockrey on 26th April, wasn't it? (No answer).

Q. I am not asking you about the comments you made about Nabalco's position, or any of that sort of material, I am asking you about what you said in that telex had been told to you by B.P. A. No.

Q. What do you say in the matter I have read to you that you wrote in the telex was not based on your summary of the conversation you had Mr. Lockrey on 26th April? A. Yes, on 26th April Mr. Lockrey did not say, or said words that legal action can continue on the validity of the notice. He said that should the notice be subsequently be declared invalid, then supplies would continue under the old contract. I previously had discussions with Mr. Lockrey during which we discussed— 10

Q. I don't want to ask you about what you discussed previously with him, I asked you to identify that part of what you said in the telex which had been told to you by B.P. which had come from a conversation you had with Mr. Lockrey on 26th April. Can you do that? A. Yes. As I said, the question of dealing with legal action in the notice, that was not discussed. 20

Q. In your note of the conversation on 26th April you wrote "They regard old contract as finished but understand that if notice is subsequently as not invalid contract continues," did you not? A. Yes.

Q. Well, that is what Mr. Lockrey said that day, was it not? A. Yes he did.

Q. And that is what you said in the telex, was it not? A. Yes, but I also said in the telex that we should, whilst legal action can continue, it implies, Mr. Lockrey's statement implies that legal action can continue but he did not spell it out.

Q. Are you serious in that answer? (Witness gesticulates)

HIS HONOUR: Is the last question answered or is it rhetorical? 30

MR. STAFF: He just put his hands up, he didn't answer it.

Q. Mr. Notter, then you had three or four days later, a further telephone conversation with Mr. Lockrey, I suggest on 30th April, did you not? A. Yes.

Q. You rang Mr. Lockrey? A. Yes.

Q. You suggested that both you and B.P. agree, without prejudice, that your solicitors should now get together and agree on a joint approach to the courts to establish the legal position of B.P. and Nabalco? A. Correct.

Q. Mr. Lockrey said he agreed and suggested that Dudley Westgarth make contact with Mr. Robert Pritchard, B.P.'s Sydney solicitor, and gave you a telephone number? A. Yes. 40

Q. You also said to Mr. Lockrey, did you not, that whilst legal action takes place Nabalco wants to start talking about a new contract? A. Yes.

Q. Which would take over the oil supply obligation as from the 28th July if the legal situation under the old contract remained outstanding? A. Yes.

Q. So this was your suggestion that you get together to talk about a new contract to take over altogether? A. That we get together, yes.

Q. And start talking of a new contract which would take over the oil supply obligation of B.P. as from the 28th July? A. Yes.

Q. If the legal situation then was still outstanding? A. Yes.

Q. That was what you asked Mr. Lockrey to agree to do, to talk about? A. Yes. 50

Q. He agreed he would ask London office to advise the guidelines for such a contract and he would then submit a draft to you? A. Yes.

Q. So what you were proposing on the 30th April to Mr. Lockrey was that you get together to talk, without prejudice, about making a new contract to take over oil supply as from the 28th July if you had a dispute still on foot? A. Yes.

Q. He said he would make some inquiries from London and it would take about 10 to 14 days? A. Yes.

Q. You had some discussions about a period for which a new contract might run? A. Yes, based on our previous discussions.

10 Q. I am not asking you what was based on your previous discussions Mr. Notter. I am asking you what you discussed on the 30th April when you asked Mr. Lockrey's agreement to enter into without prejudice negotiations for a new contract? A. Yes.

Q. You had some discussion that day about the period for which a new contract might run, did you not? What do you remember of that discussion? A. Either 3 or 5 years.

Q. Who said that? A. I said that.

Q. You said you wanted 3 to 5 years? A. No, I said it can be 3 or 5 years.

20 Q. What else did you say about it? A. That it can either be a new contract or it could be an extension of the existing contract and it would continue at the market price.

Q. What else did you say about that subject matter on the 30th April? A. And should the — I said that if subsequently the notice, B.P.'s notice, is invalid, then for the unexpired contract period the old contract price would have to apply.

Q. Anything else? A. Not from what we have already discussed or—

Q. You have not studied your notes of the pre-May 17th conversation nearly as carefully as the 17th May and onwards notes have you? A. I have made no distinction.

30 Q. Do you remember saying that if B.P.'s notice be subsequently held to be invalid at law a new contract would cease and the supply obligation of B.P. would revert back to the terms and conditions of the 1970 contract? A. That is right.

Q. And the price would have to be back adjusted? A. Yes.

Q. It is rather different from what you told us a few moments ago isn't it? A. I have meant the same.

Q. It meant the same to you?

HIS HONOUR: Q. You say it meant the same to you or you meant to say the same thing. Do you understand the difference? A. I understand the difference but I tried to, in short, say what, you know, that was the situation.

40 Q. You mean when you gave evidence without Mr. Staff recalling the note to you, you meant to say something along the lines of the note. A. Yes.

MR. STAFF: Q. Do you remember being asked by Mr. Lockrey whether you wanted him to think in terms of a fixed price or a fluctuating price? A. At what time?

Q. 30th April, talking about a new contract? A. At a — at that time we were discussing a contract, either a new contract or an extension subject to an escalation clause under which B.P. would be able to recover future O.P.E.C. price adjustment.

Q. You actually discussed that, did you, with Mr. Lockrey on 30th April? A. In broad terms.

50 Q. So Mr. Lockrey said he would want a couple of weeks and you accepted that? A. Yes.

Q. That, of course, was after you had been told by Mr. Lockrey that following

No. 111
 —
 Plaintiff's
 evidence: E. A.
 Notter: Cross-
 Examination
 (cont'd)

legal advice after the receipt of your notice of April 24th, B.P. believed that the contract would come to an end at 24th July or thereabouts? A. Yes.

Q. You reported that conversation to Mr. Coogan in due course? A. Yes, in due course; he was still overseas.

Q. When he came back or while he was overseas you reported to him what had happened? A. Yes.

Q. In due course when about a fortnight went by, the meeting for the 17th May was arranged? A. It was arranged, yes, in my absence.

Q. It was arranged as a result of your suggestion to Mr. Lockrey on 30th April that Nabalco wanted to talk, without prejudice, about a new contract? A. I can't say that. (Objected to) I did not arrange the meeting; it was arranged in my absence, I said. 10

Q. You reported it, what you had said to Mr. Lockrey on the 30th, to Mr. Coogan? A. Yes.

Q. You are aware that subsequently Mr. Coogan arranged the meeting of the 17th May? A. Yes, he did.

Q. And invited you to go along, I take it? A. Yes.

Q. When did you come back to Australia in May? A. On the 12th of May.

Q. I suppose you then said to Mr. Coogan, look, the fortnight is just about up that Mr. Lockrey wanted, why don't you ring up and arrange a meeting or something like that? A. No. 20

Q. You say you made no suggestion that the time was about right to pursue the earlier discussions? A. No, I came back from overseas and was given the letter of the 7th May from B.P.

Q. All that said was virtually what Mr. Lockrey had told you on the 26th, wasn't it? A. Not all.

Q. Pretty well? A. Not all.

Q. It told you, as Mr. Lockrey had told you on the 26th, that because of your notice they regarded on legal advice the contract as coming to an end on 24th July? A. That is right. 30

Q. And that because of that if some arrangement was not made the obligation to supply oil to Gove would come to an end in July? A. Yes.

Q. What else was there in it that had not been the subject of discussion, your discussion on the 26th April or the 30th April with Mr. Lockrey? A. It was not what was in it; it was what was not in it.

Q. There was nothing that was in the letter that differed from what you had been told by Mr. Lockrey about their attitude to your notice in the earlier conversations? A. That is right.

Q. In any event, when you went along to the 17th May meeting, you went along wanting to talk, without prejudice, about negotiation of a new contract, perhaps amongst other things, but at least that one of the things you wanted to talk about, without prejudice? A. That was one of the things, yes. 40

Q. That was what you had suggested should be the subject of a without prejudice discussion as far back as 30th April? A. Yes.

Q. During the course of that meeting you learned that B.P. Australia still freely accepted that they had an obligation to supply Gove with fuel oil, and that is the Gove operation run by Nabalco, didn't you? A. That was not my impression.

Q. Do you recall that in the notes which Mr. Coogan wrote on the aircraft and that were typed up subsequently, he said B.P. Australia freely accepted that they have an obligation to supply Gove? A. Yes. 50

Q. Do you deny that that was apparent and said in the course of the conversations on the 17th May? A. No, I don't deny that.

Q. It was said, wasn't it? A. Yes — yes, maybe not in the same words but—

Q. In substance, the effect of that was said? A. Yes.

Q. They went on to say that they considered that spot cargoes could be maintained? A. No.

Q. Mm? A. No.

Q. Do you deny that was said? A. That supplies could be available as spot shipments.

Q. Those were the words in which that sort of sentiment was expressed? A. Yes.

10 Q. You took it to mean that B.P. Australia were saying they had an obligation to supply Gove, to maintain the supplies to Gove to keep the plant going, but that if it was to be spot then spot prices would apply? A. No.

Q. Who said anything different, Mr. Notter? A. Mr. Lockrey said that "supplies could still be available to you but this would have to be on spot basis". I replied to Mr. Lockrey saying that, "Colin, we all know spot is spot and surely you can't consider spot shipments for a project such as Gove". Mr. Lockrey clearly agreed at that meeting that there was an element of risk—

Q. What did he say? A. — associated with spot and that contract customers have a preference over spot customers.

Q. Does that accord with freely accepting that they have an obligation to supply Gove?

20 HIS HONOUR: In what sense are you using "obligation"? You are not there recounting to him I think any part of the conversation.

MR. STAFF: He had conceded that or the substance of that was said at the meeting.

HIS HONOUR: It may become important to me ultimately to consider in what sense the word "obligation" was used. Are you talking about a legal obligation or a moral obligation?

MR. STAFF: I am talking in the language of the man of commerce who was discussing the matter, whether they were talking in terms of legal obligation or commercial obligation, I don't know; that is perhaps a task for valuation ultimately.

30 HIS HONOUR: It seems there is not a great deal of difference in relation to what the words were but it may be a question of some significance as to the sense in which the words were used.

MR. STAFF: What did Mr. Lockrey say in answer to your statements that you say you made "spot is spot"? Don't give us a paraphrase of it, tell us what he said as best you can recollect it? A. He said, "We would endeavour to keep you supplied", or — no, I'm sorry — he said that, "spot shipments have an element of risk associated with them and that a contract customer in the event of an oil shortage as we just experienced would have preferential treatment over a spot customer".

40 Q. Anything else? A. But that they would endeavour to keep us supplied.

Q. Didn't he say to you words to the effect that they recognised they had a responsibility to maintain supplies to the Gove operation? A. I think he said that earlier.

Q. Yes? A. Not at that time.

Q. You say he said it earlier? A. Mmm.

Q. Didn't he at some point of time at any rate, say to you, either about the 26th or 30th or on the 17th May, that they could not contemplate the prospect of Gove ceasing to operate because of the liability for damages that might arise if they

turned out to be wrong about their view of the legal position? A. Not in those words.

Q. In effect that is what he said to you, isn't it? A. He said that on more than one occasion that they don't seek a break with Nabalco and that they would like to maintain supplies to Gove.

Q. That is very different from what I put to you, Mr. Notter, isn't it? A. In my opinion it is, yes.

Q. What I put to you was that what Mr. Lockrey conveyed to you, either on the 26th April, 30th April or the 17th May, or in that period, was that if the Gove operation came to a halt through lack of fuel oil supplies from B.P., B.P. recognised that if their legal advice turned out ultimately to be wrong, there would be an enormous liability for damages, or there could be an enormous liability for damages? A. To my recollection the consequential loss and the liability was not discussed following cessation of oil supplies to Gove. 10

Q. You have got no recollection of that subject matter being referred to, directly or indirectly? A. Not — I can't recall that, no.

Q. Could it, according to the state of your recollection? A. It could have been, but I can't recall it.

Q. You had drawn attention to that possibility back in 1971, hadn't you, in conversations with B.P. representatives? A. Yes, and I have always stressed the need or importance of oil. 20

Q. And the enormous losses that would follow from a shut down of the operation? A. Not a loss, a cost.

Q. In 1971 you said that if the Gove operation came to a stop because of B.P.'s insistence upon a price rise then, you would sue them through all the courts in the land as far as the Privy Council? A. Yes, I think I said that at the time, yes.

Q. It was perfectly apparent to you that everybody participating in this May 17 discussion was proceeding on the basis that B.P. could simply not afford to see the plant close down for lack of oil supply while there was still any question that their legal advice might turn out to be wrong? A. I can't judge that, I can't say that there was. 30

Q. That was your view, wasn't it? (objected to)

Q. That was your view, wasn't it? (objected to)

Q. During the course of discussions on the 17th May it was your view wasn't it, that there was little or no risk that B.P. would stop oil supplies to Gove in a situation which would result in the Gove operation closing down because of the massive liability for damages that could arise if that happened? A. It was no longer my view.

Q. That was no longer your view. You say you had had the view on the 17th May during the discussions you were having with B.P. that they were quite prepared to let supplies of oil run out as it were and see Gove cease to be operative, no matter the risks of liability and damages? A. I came to form that opinion on the 17th May, yes. 40

Q. Nevertheless, you co-operated with Mr. Coogan in the preparation of his handwritten notes which became the typed notes you identified earlier, didn't you? A. Yes.

Q. You were quite happy to join with Mr. Coogan in expressing the sentiment that B.P. Australia freely accepted that they have an obligation to supply Gove? A. Yes.

Q. And that B.P. consider that spot cargoes could be maintained but within the conditions of spot purchases? A. Yes. 50

Q. You agreed with that as a summation of your impression of the meeting, didn't you? A. They had — yes.

Q. What I want to put to you is it was being put to you by B.P. that whilst they were quite sure they could maintain supplies on a spot basis, nevertheless there was always an element of risk and if you negotiated the contract they wanted you to negotiate, you would obtain preferential treatment over other spot customers? A. No, that is not the way I understand or understood it at that time.

Q. Do you remember Mr. Coogan wrote a contract, "however, limiting would give us priority over other customers not so covered" and the emphasis was that all future contracts would be limited in number and term? A. Yes.

10 Q. You agreed with that as being what the B.P. representatives told you about the advantage of having a contract at that meeting on the 17th May? A. And that also if there is no contract and we accept spot that other contract customers other than Nabalco would have preference over spot supplies.

Q. But what they were saying to you was that a contract such as they were proposing would give you the advantage of preference over other spot customers? A. Mmm.

Q. Wasn't it? A. Any contract customer that chooses to do business with them would have preference over spot customers.

Q. And if you entered into the contract that you were there discussing it would give you a priority over other spot customers? A. One would assume so.

20 Q. Well, they said so to you? A. Yes.

Q. It is not a matter of assumption, is it? A. They said contract customers have.

HIS HONOUR: Q. Did you think on what you had seen on the suggested contract up to that time that you would be better off under the contract, price-wise than if you dealt with them on a spot basis, bearing in mind the escalation clauses which you had been shown? A. I certainly would have liked to see a contract even at that time and I had no knowledge at that time as to what spot prices may be spot prices cannot be predicted until they really become available but I would have liked to see a contract, yes.

30 Q. To see it from the point of view of the price which would be fixed for it notwithstanding the escalation clauses, or see it because it would give you certainty of supply as against people who only dealt on a spot basis? A. Particularly on the security of supply and not being subject to the unknown factors of spot.

Q. The unknown factors of spot supplies? A. Of spot supplies.

40 Q. Did you feel, looking at the escalation clauses, that you would pay under the contract offered much the same as you would if you dealt in spot consignments? A. Most likely, yes, and it is very hard to say what a spot price will be from time to time. I mean, spot is like an ad hoc purchase. It is something which is available tomorrow in a quantity, a quality, at a price; if there are three bidders for the spot, the spot is higher. If there are a number of spot parcels available in the world and there are only limited interested parties, then the price should be lower, but it is completely ad hoc with regard to availability, price and quality. This is the frightening part of the whole spot concept.

MR. STAFF: Q. You told his Honour this morning during the course of 17th May meeting you said "I have just had a glance at the escalation provisions, they are very wide. You could escalate retrospectively and prospectively? A. Yes.

Q. And in the end you express the view they were very similar to spot prices? A. Yes.

Q. A very similar result to spot prices? A. Yes.

50 Q. So it was your view at that meeting that the contract being discussed as an expedient really was likely to leave you in the position of paying virtually spot prices? A. Yes, one could say that, yes. I also said prices could escalate in anticipation.

Q. And of course under the contract you would have been able to have the prices reduced in circumstances also? A. One would hope so.

Q. The provision was drafted? A. Yes.

Q. So the reality of the position on 17th May was that what you did not like about the contract was the provision for escalation which would leave you paying spot prices, in your view? A. That is not right.

Q. You were quite happy about that? A. As I said to his Honour I was not so much worried about the differential between the contract price or the so-called spot price but the main point of worry was the continuation of the real liability of the contract supply for oil.

Q. If your legal advice was correct you did not have to worry about that? A. I very much had to worry about that.

Q. If you did not get oil and your legal advice was right you could get all your costs back from B.P., if they did not supply you? A. Depends when.

Q. You knew you could sue them for the costs or the loss that might flow from not getting oil if the old contract was on foot as your legal advice suggested? A. At the time you run out of oil in an alumina plant it is too late to worry about the consequences.

HIS HONOUR: What I cannot understand is why should they be the ones to sue.

MR. STAFF: Under the arrangement the supply at \$13 a ton had been stated. We would have supplied and they paid the \$13 and we settled for the price.

HIS HONOUR: What I do not follow is the questions seem to be put on the hypothesis that he was to pay \$54 a ton, or under the new contract where the price would be much the same but in the event of the notice being held to be good, the old situation would prevail. Does not the question arise as to whether you would supply at the price of around about \$50 a ton rather than \$13.

MR. STAFF: That is perhaps one view. What we hope to put is our attitude was that we will supply, we want you to pay the spot price, we will supply you with the oil and if it turns out when the litigation is over, you have paid enough or we have charged you too much, we will adjust the amounts.

HIS HONOUR: Are you going to say you would have supplied at \$13 a ton?

MR. STAFF: We are going to say we would have supplied and left the court to determine what was the proper price.

MR. STAFF: Q. At the conversation of 17th May do you remember Mr. Coogan after the discussion about the difference, the reason for the difference in price between the 3-year and 1-year contract, do you remember him asking whether Nabalco might not go back to taking supply under the old contract at the reduced base price on the footing that Nabalco had not given notice to terminate in July? A. I cannot recall him asking that.

Q. Do you remember a discussion about that as a possibility? A. Not to my recollection although I know he mentioned this in his notes — I cannot recall it.

Q. You mentioned it in your note, did not you? A. Possibly in different words.

Q. Would you look at the notes of the meeting of 17th May that you made, p.2 at the top, "e.g. this means". Would you read the next few lines? A. That is correct.

Q. Is that not a reference to the subject matter which I mentioned to you having been discussed during the course of that meeting? A. Not necessarily.

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Q. Not necessarily. Having looked at that, will you not agree that during the course of the meeting there was some discussion about the possibility of going on with the old contract on the footing that B.P. had given their notice and that Nabalco had not, or was to be treated as if it had not? A. I cannot recall this.

Q. Let me put this to you, you remember that the price under the revised base price was about \$54? A. And 44 cents, yes.

Q. Some \$2 less than the price B.P. were now asking in the 3-year contract? A. Yes.

10 Q. Does not that help you to remember that there was some discussion that it might be better — that you might be better off going back to the \$54 figure under the old contract? A. No, because B.P. also offered us a 1-year contract at \$53.96 which was 88 cents cheaper per ton than the base price under the notice.

Q. For one year? A. Yes.

Q. With escalations? A. With escalations.

Q. Whereas under the old contract you had \$54 for possibly another seven years? A. It may be so. I do not know.

Q. It still had about seven years to run in 1974? A. The contract has a provision whereby after the first five years both parties meet together for the purpose of fixing a base price which was due in May 1976.

20 Q. That was two years away? A. Yes.

Q. That provision came into force in May 1976 so that you would have got two more years at least with a possibility of longer at \$54-odd rather than three years at \$56.52? A. Possibly.

Q. You say there was no discussion whatever about that question at that meeting? A. Not a discussion I recall. Certainly it does not stem from this note. These notes stem from the fact as requested by Mr. Rowland that the contract is at an end, therefore it could no longer be available. That is the discussion as I recall.

30 Q. That is what you are recalling as having been said, at the top of the second page of your notes that the base price ex notice 22/3 is no longer open, and cancels contract — (Objected to; question withdrawn).

Q. Did you not tell me these notes were your notes of the conversation topics or conversations that had been discussed at the meeting? A. They were my notes for the purpose of noting down some facts which were said and also what occurred in the development and thoughts and I have written on top of the note "e.g., this means" — obviously it does not say that was said.

Q. You say what is recorded on the second page of your notes was not said at the meeting — at the top? A. No, but something was said which would account for my writing on the top of that page.

40 Q. At the foot of the previous page you have written — two-thirds of the way down "C.L. outlines new contract"? A. Yes.

Q. I cannot read the next part? A. "U.K. says only one year".

Q. "B.P.A. pushed for three years"? A. Yes.

Q. And you recorded the prices for a year and three years? A. Yes.

Q. And it goes on "plus rise and fall as per B.P.'s clause"? A. Yes.

Q. You say "e.g. this means"? A. That last paragraph outlines the contract and certain things were said during the outlining of the contract.

Q. What was said during the outlining of the contract, is that recorded at the top of the second page? A. Not necessarily.

Q. Is it or isn't it? A. It is not. It is just a thought which means that.

50 Q. What is recorded in the words "e.g. this means" and the following four or six lines is just a thought you had in the aircraft? A. Yes, that is how I understood certain matters which were said to me or to us at the meeting.

Q. It is a thought you had in the aircraft and not an attempt to record the substance of what was said at the meeting? A. Would you repeat that question?

No. 111
 Plaintiff's
 evidence: E. A.
 Notter: Cross-
 Examination
 (cont'd)

Q. Do you say that what appears in the seven lines at the top of the second page of your notes is not an attempt to record what was said at the meeting? A. No.

Q. You mean it is not an attempt? A. It is not an attempt.

Q. And it is just some mental process that you had in the aircraft? A. It is a conclusion I drew.

Q. And wrote down in the aircraft as a mental thought of yours? A. Yes, it was a private note of mine.

Q. Go to the next ten lines, about half the page — are they simply notes you made in the aircraft going back or do they represent an attempt to record things that were said at the meeting? A. The first seven lines are notes on a point I raised during the meeting. The remaining three lines are again a conclusion I reached from what was said at the meeting.

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Q. Not something you said at the meeting? A. No, to my knowledge I did not say that at the meeting.

Q. The next two lines record something that happened at the meeting “B.P. submitted new rise and fall price clause”? A. Yes, they did.

Q. And the next three lines records something that was said at the meeting? A. That is right.

Q. The next three lines record something that was said? A. Yes, by both parties.

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Q. What about the matter appearing “A.G.C. summary of situation” and what appears thereafter. Does that represent something that was said at the meeting? A. To my recollection it does.

Q. So that except for the first six or seven lines of that page and the three lines in the middle of the page, everything else on that page represents what was said or done at the meeting? A. That is correct.

Q. I suppose you would agree that everything on the front page represents what was said or done at the meeting — it represents a note of what was said or done at the meeting? A. Yes.

Q. You are quite clear in your recollection that there was never at the meeting any discussion at all that you heard about the possibility of going back to the old contract on notice of reduced base prices instead of the three-year contract at the higher price? A. I did not say never. I said I cannot recall that was discussed at the meeting. It may have been discussed but I cannot recall it.

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Q. Does that mean your state of recollection is such that it could as well have been said as not? A. It was not said to my recollection.

Q. Is the state of your recollection that anything is possible but you do not think it was said? A. I do not recall it in my mind. I cannot recall it at this particular point or a month ago or two months ago.

Q. What I want to put to you is that during the course of the discussion about the difference between the one-year price and the three-year price proposed for the new contract Mr. Coogan said “Could we instead revert to the old contract without your notice. I acknowledge this would mean a further potential employment of cl.9 C(iii) however I am disappointed at the high level of the prices”. Do you recall him saying that or words to that effect? A. I am sorry, I cannot.

40

Q. Can you recall him saying he was disappointed at the high level of the new prices? A. He could have.

Q. Did he say it? A. He could have said it. I cannot specifically recall.

Q. Did he say anything about the further potential employment of cl.9 C(iii)? A. No.

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Q. Could he have said it? A. He could have said it.

Q. I put it to you in reply to words of that character that Mr. Rowland said “This is without prejudice but our legal advice is you by your actions have

terminated the old contract. It cannot therefore be reinstated"? A. I cannot specifically recall that.

Q. That of course is what B.P. had said in their letter of 7th May? A. You asked me whether I recalled it on the 17th. I said "No." I do know it was said in the letter.

10 Q. What I am putting to you is that Mr. Rowland said when he was speaking about the old contract being finished that he expressed that in words to the effect I have just read to you. Would you agree with that or not? A. Yes, except he also told us there shall be no legal action on the validity of their notice, we would have to tear up a terribly good contract.

Q. One at a time. What I was asking you was did Mr. Rowland during the course of the meeting say "This is without prejudice but our legal advice is that you by your actions have terminated the old contract. It cannot therefore be reinstated". I put to you that is what he said. I think you told me he did say that? A. No. I did not say he said it at the meeting. He could have said it at the meeting.

Q. So far as your recollection goes those could have been the words he used when he spoke about the old contract being finished and not being able to be reinstated? A. Yes, they could have been the words but I have no recollection of those words.

20 Q. You realise in your evidence you have attributed to Mr. Rowland two or three different statements about the contract being terminated in different words? A. Those are the words I recall.

Q. Do you recall that he made more than one statement about the contract being over or not being able to be reinstated, or did he make a number of statements or only one such statement? A. One specific statement.

Q. Would you deny that one statement was made to the effect of the words which I read to you a few moments ago? A. In or in fact?

30 Q. Let us take it in two parts. It was made in the words which I read out to you? A. It could have included those words, yes.

(Witness stood down)

(Further hearing adjourned to 10 a.m. Tuesday, 25th November 1975)

SIXTH DAY: TUESDAY, 25th NOVEMBER, 1975

EDWARD ALBERT NOTTER, on former oath:

40 MR. STAFF: Q. Mr. Notter, I want to put to you a number of questions about the meeting of 17th May in relation to the order of events, the order that the discussions took and the subject matters with which it was concerned. Now firstly I suggest to you at the beginning after the agreement about the meeting being without prejudice, there was some discussion about the nature of B.P.'s problems and an indication on the part of Mr. Coogan that you recognise, that Nabalco recognised those problems. Would you agree with that? A. We understood the problems.

Q. That was really the beginning of the discussion? A. Not the beginning.

Q. What I put to you is your indication that Nabalco recognised B.P.'s problems followed immediately after the agreement that the meeting should be without prejudice. You would agree that was so? A. After Mr. Coogan had stated the purpose why he asked for the meeting — why he had come to Melbourne.

Q. You say Mr. Coogan firstly stated why he came to the meeting? A. Yes.

No. 111
—
Plaintiff's
evidence: E. A.
Notter: Cross-
Examination
(cont'd)

No. 111
—
Plaintiff's
evidence: E. A.
Notter: Cross-
Examination
(cont'd)

Q. And then he said that Nabalco recognised the problem that faced B.P.? A. I did not say that he said he recognised the problem. He said we recognised it was a problem.

Q. Then Mr. Lockrey said that B.P.'s position was that you had given a notice to terminate the contract, that B.P. believed its notice was valid, so that the contract would terminate in July. Would you agree with that? A. He may have said that. I did not say it in my evidence.

Q. I am not asking you what you said in your evidence. I am asking you whether in fact that happened at the meeting? A. I cannot recall. He could have said it. Most likely he would have said it.

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Q. You think it probable that he said it? A. Yes.

Q. Do you recall that he also said they would not enter into a new contract without a clean break? A. Or words to that effect.

Q. As a result if you wanted to enter into a new contract it would be a condition that Nabalco agree to no litigation and would recognise the termination in July of the old contract? A. Yes.

Q. He then went on to indicate the losses which had been incurred by B.P. already? A. Yes.

Q. And proceeded to give a preliminary outline of generally the provisions of the new contract that he was proposing? A. Yes.

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Q. That was the way in which the meeting proceeded from the introductory remarks? A. The way I remember it.

Q. Then he spoke about the one-year period and the price and the three-year period and the price under that contract? A. There were some other discussions prior to that but he did say that.

Q. When he spoke about the prices and the variations of the prices you raised the question of the comparison with bunker prices in Europe and Australia? A. Yes.

Q. Ships bunkers? A. Yes.

Q. And Mr. Coogan, after you spoke about that matter, raised the question about the reasons behind the higher prices for three years and for one year? A. I think I raised that point but that was again according to my memory.

30

Q. Do you have any recollection of Mr. Coogan asking the question "What was the rationale behind the higher prices for three years than for one year?"? A. As I said I either asked the question or he did. I am not absolutely clear. We both discussed it.

Q. You both had something to say about that subject? A. Yes.

Q. At that time in the general discussion I put it to you Mr. Coogan said "Could we revert to the old contract with B.P.'s notice?"? A. He could have said it but I cannot recall that.

Q. I put it to you it was at that time Mr. Rowland made his remark which I put to you yesterday? A. If it was said then it could have been said at that time but again I qualify that I cannot remember that incident in my mind.

40

Q. You think Mr. Rowland's remark probably would have been made at the point of time that Mr. Coogan spoke on that matter, if he did in fact speak of it? A. On that subject, yes. He made some other remarks.

Q. Then there was the discussion about or a statement by Mr. Lockrey that he would approach London to see if they could use the one-year price for the three-year contract? A. Yes, I recall that he said — he used the words to try to bring the two prices closer together and try to find the reason or obtain reasons why the price differential was there.

50

Q. Do you remember at that time in that context there was a discussion about whether if B.P. recovered more — (Question withdrawn).

Q. Do you remember there was a discussion about the reason for the difference

between the one-year and the three-year price, it being said that the difference was to cover unforeseen events? A. It was said it may recover unforeseen events.

Q. Was there some discussion then about the possibility of Nabalco being repaid anything that was over-recovered because of the non-appearance of unforeseen events? A. Again that could have been but I cannot clearly recall it.

Q. Do you think it probably was? A. Probably, yes.

Q. I put to you that Mr. Rowland at that stage said something to this effect "Don't bank on too much coming out of reimbursements"? A. I cannot recall that.

10 Q. Do you recall saying yourself in effect they were offering a spot price contract, that was B.P.? A. By virtue of the escalation clause, that makes it virtually a spot price.

Q. Contract? A. Price. It becomes a spot price.

Q. You were being offered a contract for a period that the prices would vary virtually with spot prices, or virtually spot prices might be expected? A. Yes, the escalation clause made it virtually a spot price.

Q. I think you expressed the view that the benefits available from the variation provisions were pretty much one-sided? A. Would you repeat that?

Q. It was your view the benefits available from the contract were pretty much one-sided? A. From the escalation clause, yes.

20 Q. You did not think much of the variation provisions for fall, that is for a reduction in the price? A. It would be unlikely there would be a reduction, yes.

Q. Then do you recall there occurred some discussion about the Prices Justification Tribunal? A. Not specifically but it could have been raised because the escalation clause made reference to the Prices Justification Tribunal which was unique.

Q. Do you recall there was also a discussion about freight from Bandar Mah Shahr to Gove, Singapore, compared with the freight from Singapore to Gove, plus Bandar Mah Shahr to Singapore? A. It could have been. I cannot recall specifically.

30 Q. You think probably there was? A. Probably but I cannot recall.

Q. Do you recall Mr. Coogan spoke about the provisions of the old contract which required B.P. to be the sole supplier of the product? A. No, I cannot recall that.

Q. Do you recall some discussion about whether the contract might provide for a maximum and minimum quantity of oil to be supplied by B.P. leaving Nabalco to obtain a second supplier? A. It could have been mentioned. I cannot recall.

Q. Again you cannot recall but you think it may well have been mentioned? A. Not may well — it could have been mentioned.

40 Q. Do you recall there was then some discussion about making arrangements for payment for oil outside Australia by Alusuise? A. I cannot recall.

Q. You cannot recall that? A. Payments outside Australia?

Q. You have no recollection of a discussion about taxation, the way in which B.P. might be able to save tax, by being paid for oil supplied f.o.b., Singapore or somewhere else and paid outside Australia? A. I cannot recall that.

Q. Do you deny that subject matter was discussed? A. I do not deny it. I am saying I cannot recall it.

Q. You say you cannot recall Mr. Coogan raising that subject matter? A. I cannot recall it.

50 Q. I put it to you Mr. Lockrey said when the matter was raised that B.P. would have to be very careful not to be seen to be circumventing national legislation. You cannot recall anything about such a subject? A. I am sorry, I cannot.

Q. Of course you and Mr. Coogan were trying to find a way in which to get the prices offered under the new contract reduced? A. We were interested in lower prices, indeed.

Q. One way in which you may have been able to persuade B.P. to take a lower

price was if you could suggest a means for B.P. to save tax in relation to profits it might make on sales of oil to you? A. That could be.

Q. You say you have no recollection whatever of that sort of thing being discussed? A. I cannot recall it.

Q. You remember towards the end of the meeting you questioned the relationship between the rates by which crude oil had risen and product prices had risen? A. I cannot recall at that meeting but at one stage in my discussions I can recall having asked B.P. more on the relationship of the complicated system of posted prices and product posted prices.

Q. Yesterday in giving evidence in answer to questions Mr. Officer asked you you recounted in pretty much direct form what you say your recollection of the conversation was. Did you not? A. The pertinent points I memorised in my memory, the ones I thought important at the time. 10

Q. Were you endeavouring when giving your evidence yesterday to recall and state the words which were used by the people who said things at that meeting? A. No. It would be wrong to say that you recall after eighteen months the precise words spoken at the meeting.

Q. You were really trying to express in your own words your recollections and reconstructions of conversations after studying your notes and Mr. Coogan's notes — (Objected to; question withdrawn). 20

Q. I suppose you recollected parts of what you believed to be the actual conversations that occurred? A. I believe there are some sentences and some words and I really recall the words.

Q. Other words you used in giving your evidence yesterday of what was said in the conversations are simply a reconstruction with the aid of your notes of what you think must have been said? A. Not a reconstruction, no.

Q. What is it then? A. It is a memorisation of the pertinent points that were important or hit me as important at the time of the meeting and I used the notes to refresh my recollection of those pertinent points which I memorised at the meeting.

Q. So we may understand what you say, correct me if I am wrong, you say you memorised the pertinent points at the meeting? A. Yes. 30

Q. Do you mean you memorised particular sentences or memorised subject matters which were discussed? A. Some sentences and some subject matters which were discussed which were in my opinion of a certain importance.

Q. You then wrote down in your notes these particular matters, did you? A. At the time or after the meetings or conversations, yes.

Q. So your notes contain at any rate the matters which you regarded as most pertinent of the matters which were discussed at the meeting? A. That would be right, yes.

Q. Your notes contain in some instances exact words or sentences which you memorised at the meeting? A. Which I recall or at the time felt these were the words spoken at the meeting. 40

Q. Are you saying you wrote down in your notes those words you recall having been spoken or did you carry them in your memory? A. I may have done that, yes.

Q. So when you gave evidence yesterday it consisted of some words which were the words you recalled having been used at the meeting and other words which you have now put together to portray what you believe to have been the discussion about the pertinent subject matter. Is that an accurate summary? A. I have used words which to the best of my understanding portray the subject which was discussed. 50

Q. So I suppose when you said at the foot of p. 133 and over on 134, that you can recall this. You say "I can recall him saying" — that is Mr. Coogan — "Mr. Lockrey, we have come to Melbourne to discuss where we are with regard to the

continuation of oil supplies to Gove". You do not suggest those are the words which Mr. Coogan used? A. No, those are not the words but he asked the same question in—

Q. The same words? A. Some words to the same effect.

Q. When you went on and said "As you know, we are very concerned with the oil supply and I do not have to stress how important the supplies are to Gove" — again those words you do not suggest are the exact words he used? A. No.

Q. But he said something along those lines? A. Yes.

10 Q. For the most part where you attribute in evidence particular words to a particular speaker they are simply words which you have chosen to portray the general character of what you recall was spoken? A. Not all, but most.

Q. In general that would be so? A. Yes, but not all.

Q. I put to you when you said at p. 134 that Mr. Lockrey said "I regret but the arrangements which I did discuss with Mr. Notter during the preceding last months are no longer available" — I suggest those words were not spoken by Mr. Lockrey? A. He would have used words to that effect.

Q. But you would agree that he did not use, or you cannot recall whether he did or did not use words similar to those which I have just read out? A. I am sorry, can you repeat that?

20 Q. You would agree you do not suggest Mr. Lockrey used those words which I read out, namely "I regret but the arrangements which I did discuss with Mr. Notter during the preceding last months are no longer available"? A. He may not have used those words but words to that effect.

Q. What you say is it was your recollection with the aid of your notes he said something which you think was to that effect? A. Not with the aid of my notes, according to my memory. There were no particular notes on that subject.

Q. There is nothing about that in your notes? A. Yes.

Q. So your recollection of that matter comes very simply from your general recollection? A. My memory, yes.

30 Q. I suppose you have more recently discussed this with Mr. Coogan? A. More recently?

Q. You have recently discussed with Mr. Coogan what was said at the meetings? A. I have not discussed the contents of that meeting with Mr. Coogan.

Q. Not at all? A. Not at all.

Q. That is I suppose you are saying not since the meeting of 17th May? A. No, after the 17th May of course we discussed the matter, in June and July and possibly December but you are asking me recently and under recently I would understand in the last two or three months and my answer would be No.

Q. You did discuss it in December of last year? A. Possibly.

40 Q. That was when the hearing was fixed for February last year? A. As I said possibly we discussed B.P.'s matter many times.

Q. I do not want to take you through all the passages on p. 134 but you gave evidence that Mr. Lockrey said "Before we can discuss or negotiate with you the new contract, it is to be quite clear that such a contract can only be available if you are prepared to declare the old contract cancelled and I mean no legal action on the validity of the notice". Would you agree Mr. Lockrey did not use those words? A. I would not like to state here that he used the precise words, but words very close, to this effect.

50 Q. I put to you that he did not use the expression "declare the old contract cancelled" or anything like that? A. In my opinion words to that effect or very close, if not those words.

Q. You say he used the word "declare"? A. Very close to that.

Q. You say in your understanding of the words that he used, it was something

close to what you have produced? A. For that sentence, yes, because it came to me as a shock.

Q. You cannot say whether he used the word "declare" or not? A. "Declare" or a word very close to that effect.

Q. What would you regard as a word very close to "declare"? A. State.

Q. Or agree? A. No, agree would not be the right word. It was a declaration which was required from us or from the board.

Q. He did not ask as a basic condition of the agreement to make a new contract that you agree that the old contract was over and that each party would take no legal action after what had happened? A. It was more in the form of a declaration, or an agreement to declare. 10

Q. That was what you had understood was B.P.'s attitude before you ever went along to the meeting of 17th May? A. No.

Q. You knew before you went to the meeting that B.P. was saying "We will negotiate a fixed term new contract but only if you agree not to litigate about the old and agree that it be regarded as ended from July"? A. That statement came on the 17th, not before.

Q. I suppose you co-operated with Mr. Coogan in drafting the telex which went to Dr. Sorato when you were in Sydney about this matter. A. On what date?

Q. About 17th May you were co-operating closely with Mr. Coogan? A. I was working with him, yes. 20

Q. He showed you what he proposed to send to Dr. Sorato around that time? A. Possibly.

Q. He showed you what he sent to him after he sent it? A. I would have seen what has been sent but not what had been drafted, necessarily.

Q. (Approaching) You recall Mr. Coogan sent a telex to Dr. Sorato on 16th May, Ex. P, do you recall that or do you not recall having seen it — can you recall having seen it? A. May I read it?

Q. Having looked at the opening part, does it ring a bell? A. It says "Confidential, General Manager" — it does not necessarily mean I would have seen it. I would like to read the telex and I will tell you whether I have seen it. 30

Q. Would you look at the matter which is under Item A down to just before it starts par. (b). Do not go beyond that point for the moment. A. Yes. (Witness complies).

Q. Having read that much can you recall having seen that telex about the time it went off? A. I cannot.

Q. Now would you read pars. (b)(1) and (b)(2) on the first page? A. Yes. (Witness complies).

Q. Having read the whole of the material on that page can you recall having seen that telex either before or after it went off on 16th May? A. I have no clear recollection. I have no copy of this telex but I could have seen it. 40

Q. You probably did? A. I would have possibly seen it. What is in here is something I would have ———

Q. You would have discussed what should go in it with Mr. Coogan? A. Not necessarily.

Q. But probably? A. I have no copy of the telex.

Q. Let us see how good your memory is. There are plenty of things that do not appear in your notes that you have told us about? A. Yes.

Q. Do you say you cannot recall discussing this telex with Mr. Coogan on 16th May or about that time? A. Not specifically this telex. I have had many discussions with him. 50

Q. You were working very closely with Mr. Coogan about the fuel oil situation on 16th May? A. No, I had just been overseas. I just came back. He had other

discussions with other people. I also had discussions with the general manager in Zurich.

Q. You had discussions abroad with different people? A. Yes.

Q. When you came back, you brought Mr. Coogan up to date about the issues discussed abroad and he brought you up to date with his discussions? A. I brought him up to date with my discussions but he may not have brought me up to date with all his discussions.

Q. Have a look at par. 5 on the second page of the telex. A. Yes.

10 Q. Did you discuss that matter with Mr. Coogan on or about 16th May? A. Prior to the meeting of the 17th, yes.

Q. So when you went to the meeting of 17th you knew that B.P. were offering a new contract on the basis that you agree to terminate, that your old contract is terminated and no further legal action would be taken? A. I did not know but that telex clearly states signed Mr. Coogan and Mr. Powell. It has no relation to my name whatever.

Q. Did not you tell me a moment ago you discussed the matter appearing in par. 5 with Mr. Coogan before the meeting on 17th May? A. The subject of that statement but not that telex.

20 Q. It was the view you and he had before you went to the meeting that what B.P. were about to offer, and you were about to negotiate on, was a new contract with B.P., being a condition that B.P. was putting on, that the old contract had terminated without further legal action? A. We assumed from the letter of 7th May from B.P. because it no longer offered the possibility of any legal action on the validity of the notice. It was an assumption.

MR. STAFF: Q. There was nothing whatever in the letter of the 7th May saying that B.P. would only discuss a new contract on the condition that legal action under the old contract was terminated, or rather abandoned, and you agreed to terminate the determination of the old, was there? A. That is correct, but I said yesterday it is not what was in the letter but what was not in the letter worried us.

30 Q. So that you say that without any information coming from B.P. you and Mr. Coogan formed the view before the 17th May that B.P. would only offer you a new contract if you agreed that the old contract was finished and that there should be no legal action, do you? A. It appeared from the letter to be that way, yes.

Q. There was nothing in the letter that suggested that, was there? A. No, but the letter didn't—

Q. So how did it appear from the letter, Mr. Notter? A. The letter said what we knew before; the letter no longer offered the possibility of legal action on the validity of this notice.

Q. Why, why do you say that? A. It no longer made reference.

40 Q. The letter said that B.P. regarded their notice as valid in effect and your notice as having terminated the contract as from July? A. Correct.

Q. It did not say a word about whether the legal action was open to you or not open to you, did it? A. It is the same what Mr. Lockrey told me on the 26th April; at that time, however, he said, "We understand that if the notice is subsequently valid the contract will continue."

Q. On the 30th you asked him if he would talk to you, without prejudice, about a new contract to take over the obligation under the old as from the 28th July? A. The 30th of what month?

Q. April? A. April, yes, after we discussed the joint legal approach.

50 Q. Again, he did not say anything to you on that occasion about that contract being conditioned on no litigation, did he? A. No, he did not.

Q. Did you say that between the 30th April and 16th May you guessed that

what B.P. were going to say to you on the 17th was that "We will only make a new contract with you if you agree that the old be terminated and you agree you won't go to the court."? A. They said on their letter of the 7th May.

Q. So that you say you and Mr. Coogan simply guessed that that was going to be the approach on the 17th because of what was in the letter of the 7th May? We are quite clear about that, are we Mr. Notter? A. We were afraid that that may be the situation.

Q. Mr. Coogan told Dr. Sorato it now appears that that is the situation? A. That is Mr. Coogan.

Q. You did not disagree with that, did you? A. No, not when reading that letter of the 7th May. 10

Q. Then when you got to the meeting on the 17th and Mr. Lockrey said what he said about it being a condition of the making of the new contract that you agreed on no litigation and the termination of the old contract, it was no surprise to you? A. Would you please repeat this?

Q. When you got to the meeting of the 17th May and Mr. Lockrey said that B.P. would not make a new contract with you unless you agreed or declared the old contract terminated and agreed there should be no litigation, that came as no surprise to you? A. As a shock.

Q. It came as a shock? A. Yes. 20

Q. But on the 16th, that is what you were expecting him to say, wasn't it? A. I was afraid that that may be the case but it was not spelled out.

Q. You and Mr. Coogan had come to the conclusion that that was precisely what was going to happen the next day, hadn't you? A. Yes.

Q. Mmm. A. Mr. Coogan asked that in his Telex.

Q. It was also your view on the 16th, wasn't it? A. From his letter of the 7th May I was worried that this may be the view.

Q. Nevertheless you say it came as a shock to you when Mr. Lockrey spoke of it on the 17th? A. It did indeed.

Q. I suppose you saw Dr. Sorato's Telex of the 16th May that was addressed to Messrs. Coogan and Powell, didn't you? A. Not necessarily. 30

Q. Can't you recall whether you saw it before you went to the 17th May meeting? A. I can't recall it offhand.

Q. (Approached) I suppose you took a file down with you on the aircraft, didn't you, relating to the B.P. matter? A. My file, yes.

Q. What about Mr. Coogan, did he have his? A. I can't recall.

Q. Just have a look at the Telex dated 16th May from Dr. Sorato for the attention of Messrs. Coogan and Powell (Shown)? A. No, I can't recall having read the Telex.

Q. Probably you had, hadn't you? A. Possibly, I can't recall; it is not on my file. 40

Q. At any rate Mr. Coogan had told you before you got to Melbourne, had he not, that Dr. Sorato had Telexed in these words, "We support your approach to have an interim contract awaiting the result of the legal action but if you are capable to obtain a favourable long-term contract for Nabalco it is my opinion that you also enter into a new agreement avoiding to go to court." A. That is a reasonable statement of the situation and the alternatives available to us at the time. I would—

Q. You knew that that information had been conveyed by Dr. Sorato to Mr. Coogan before you went to Melbourne on the 17th May, didn't you? A. The essence of it, yes; as to whether this, in those words I knew or not, I don't know. 50

Q. Do you still tell his Honour when Mr. Lockrey said they would only deal with you on the basis — that is they would only make a new contract if you agreed on no litigation and to the termination it came as a shock? A. Yes, it did.

Q. It is suggested to me, Mr. Notter, that the Telex may have been received on the 17th, that is the Telex dated the 16th may have been received on the 17th? A. It could have been.

Q. Would that fact lead you to want to alter any of the answers you have given about your knowledge of the information in it? A. No.

Q. Before the meeting took place on the 17th? A. No, my opinion was based on the letter of the 7th and my discussions on the 30th April — 7th May, that should be.

10 Q. At p. 134 at the foot of the page you gave this evidence yesterday, "Mr Lockrey continued saying 'I can appreciate your situation, Mr. Coogan, and whilst I may have instructions to the contrary I have nevertheless decided to make some of these clauses available to you.'" A. Yes.

Q. I want to put to you that Mr. Coogan did not say that "Whilst I may have instructions to the contrary", or anything like that? A. Mr. Coogan certainly did not say that.

Q. I'm sorry, Mr. Lockrey did not say the words, "Whilst I may have instructions to the contrary", or any words like that? A. These are — according to my recollections are the words, or words to the effect which were conveyed to us.

20 Q. Will you deny that Mr. Lockrey said nothing like the words "Whilst I may have instructions to the contrary"? A. Could you please repeat that question?

Q. Are you prepared to deny that Mr. Lockrey did not say anything like the words, "Whilst I may have instructions to the contrary"? A. He may not use those words, but according to my recollection, words of a similar effect.

Q. What sort of words according to your recollection? A. I have given those according to my recollection.

Q. Did you say he may have used some others? A. Possibly could have used some others.

30 Q. You say he spoke about not having authority to bind B.P. to anything? (Objected to: question read out) A. He did not say that.

Q. Did he say anything about having authority to do anything? A. Yes.

Q. What did he say about that matter? A. He had authority to offer us a one or a three year contract.

Q. He said that, did he? A. After negotiations with his London office he is now — he has not used the word "authority", but he is now able to offer us a one or a three year contract.

Q. He did not use the word "authority"? A. No, he did not.

Q. Did he use the word "instructions"? A. He may have used the word "instructions".

40 Q. Incidentally, you knew that Mr. Rowland was the company secretary of B.P., didn't you? A. Yes, he signed the notice.

Q. What notice? A. Of the 22nd March was signed by Mr. Rowland, the secretary.

Q. Indeed, you wrote down on your note on the 17th May against Mr. Rowland's name "(Company secretary)"? A. Yes.

50 Q. Mr. Notter, yesterday in giving your evidence at p. 135, near the top of the page, you said that Mr. Coogan asked Mr. Lockrey "what would be the situation if our board decides they cannot discard the old contract and want to press on with legal action on the validity of your notice." You said, "Mr. Rowland replied, and he said, 'Then, Mr. Coogan, there can be no new contract, in fact no new contract at all because we regard the old contract at an end.'" A. He said—

Q. And then you went on — A. I'm sorry, that is not what I said. He said, "There will be no new contract, in fact no contract at all as we regard the old contract at an end." You used the word "new contract" twice.

No. 111
 Plaintiff's
 evidence: E. A.
 Notter: Cross-
 Examination
 (cont'd)

Q. The transcript records your answer given yesterday, Mr. Notter, and you have used the words "new contract" twice, so that you say when you were giving your evidence yesterday you intended not to use the words "new contract" twice? A. If I said the words "new contract" twice then that would not be—

Q. Had you memorised what you were going to say Mr. Rowland said on that occasion? A. No, but it is—

Q. Mmm. A. No.

Q. You repeated it verbatim a moment ago? A. It was a very clear statement.

Q. You then added, "Mr. Lockrey, to my recollection, confirmed Mr. Rowland's statement." What did Mr. Lockrey say? A. He possibly used the words— 10

Q. Well — A. No, he may have used the words—

Q. I asked you what did he say, not possibly — A. I can't recall the precise words he said.

Q. You can't recall what he said. You recall Mr. Rowland's words with precision but you can't recall what Mr. Lockrey said, is that right? A. I think I can recall Mr. Rowland's—

Q. You think — A. Position—

Q. You think you can recall Mr. Rowland's? A. That's right.

Q. You have got no recollection at all of what Mr. Lockrey said? A. I have recollection of words to the effect of what he said, but not his precise words. 20

Q. Yesterday of course you have been careful to give conversations in the direct form, yet when you came to this you simply said, "Mr. Lockrey, to my recollection, confirmed Mr. Rowland's statement." Why did you do that? A. That is by — possibly an oversight. I am not used to give — or to give evidence in these sort of matters in the first person; I have never had to do this before and I may have slipped upon one occasion.

Q. What I suggest to you is you did it because you had no recollection whatever of Mr. Lockrey having said anything? A. That is not correct.

Q. I suggest to you you had no recollection of what Mr. Lockrey said at that point of time? A. I have a recollection that he did not reject what was said. 30

Q. He did not — A. He did not say that was not the case.

Q. You mean you think he said nothing? A. No he did not say nothing; he said something.

Q. You think he did not say anything to deny or affirm what Mr. Rowland said? A. He did not say anything to deny what Mr. Rowland said.

Q. What do you recollect him having said, if you recollect anything? A. Yes, just, "Mr. Coogan, I am afraid that is the situation."

Q. You don't recollect anything? A. No. I gave you an answer and said he said, to the best of my recollection, "Mr. Coogan, I am afraid that is the situation." 40

Q. I'm sorry, I didn't hear that? A. Yes.

Q. You now have a recollection of him using those words, do you? A. Not a recollection of those words; I did say, to the best of my recollection before "words to this effect"; he didn't—

Q. The point is, have you got a recollection? A. I think so.

Q. Of the words he used? A. I have a recollection that he did not deny what Mr. Rowland said.

Q. That is the whole of your recollection on that subject matter? A. That he was affirmative to what — after what Mr. Rowland said.

Q. Do you remember that at the commencement of the meeting, Mr. Lockrey read from a piece of paper in front of him? A. No, I can't. 50

Q. Do you not remember him saying, with a piece of paper in front of him, words to this effect, "To give continuity of supply we are prepared to negotiate a new contract for the supply of furnace oil."? A. He may have said that.

Q. Then, "The old contract will expire on the 24th July, 1974, at least so far as furnace oil is concerned."? A. He may have said that too.

Q. "We are not prepared to consider any extension of the old contract beyond the 24th July; so far as we are concerned it has been terminated by you."? A. He could have said this, consistent with what I said before.

Q. "You have disputed our notice of a revised base price; you have even disputed the validity of your own election to terminate consequent on it; under no circumstances will we enter into a new contract while you continue that dispute." Do you agree he spoke those words? A. I can't recall, but he could have said it.

10 Q. Could have said it? A. Mmm.

Q. He went on to say, "In any new contract we would require you to acknowledge the termination of the old contract so far as it relates to furnace oil."? A. Not the precise words but he certainly said words to this effect.

Q. "And the commencement date of any new contract would be from the 24th July, 1974."? A. Yes, but again I can't recall, or I would not agree that these were the words spoken. What was spoken was the facts of what you just said is what we also — what I also have said on a recollection in a different way.

Q. You do not regard what you have said as being really any different from what I have just read to you in the last half dozen questions or so? A. Basically not.

20 Q. Would you regard it simply as a statement of the same matter that you recollect in different words from those which you stated basically? A. Yes, in broad terms, yes.

Q. You would agree, I gather from what you have said, that the words which were used might just as well have been those which I put to you in the last six or eight questions, as those which you stated in giving your evidence? A. No, I cannot agree; obviously the words I remember I have to — these are the words I do remember to the best of my ability. I do not dispute with what you have said, I would not swear to either word or wording which you have read.

30 Q. Do you recall a Telex Mr., Coogan sent to Dr. Sorato on the 16th May that I showed you a little while ago? A. Yes, I have.

Q. Exhibit P. (Approached) Would you look at the sixth paragraph of that Telex on the second page. Perhaps you had better read again the fifth so it is in context? A. I have read six, yes.

Q. Would you not now agree that when you went to Melbourne on the 17th May, you and Mr. Coogan regarded the matter of the new contract as a major aspect to be initially negotiated in respect of what you anticipated to be B.P.'s requirement that you agree to terminate the old contract without further legal action as a condition of making the new? A. I agree that in my mind the availability and terms of a new contract was of major importance on the way going to
 40 Melbourne.

Q. Would you not agree that you and Mr. Coogan when you went to Melbourne were agreed that a major aspect that you were going to try and negotiate was the elimination of the B.P. condition that you give up the prospect of litigation under the old contract? A. It was not the elimination, the major aspect we were going to negotiate; it was the, what you call — we were worried about having to negotiate a contract without having the right to legal determination of the notice.

Q. You went to Melbourne with one of the primary purposes of trying to get a new contract without being required to agree to the termination of the old without legal action? A. Indeed we did and that—

50 Q. And you still say — do you want to add something more? A. I mean that is a normal, an absolutely normal fact. You have certain rights to go to court and if someone takes these rights away, you worry.

Q. You went down there with that as one of your major negotiating objectives and when you were confronted with B.P.'s attitude, you got a shock? A. Yes, I did.

(Short adjournment)

MR. STAFF: Q. I think you told his Honour yesterday that you received a telephone call from Mr. Lockrey on the 27th May, which related to the arranging of a meeting. Do you recall that? A. Yes, but I recall that I said I was not quite certain as to whether Mr. Lockrey rang me on the 27th or as to whether I rang him. There was a telephone discussion on the 27th.

Q. In evidence you gave at p.137, this was the question, ". . . did you receive a call from Mr. Lockrey on the 28th? A. Yes. Q. One on the 27th about arranging a meeting? A. Yes. Q. And then you had another call from him on the 28th? A. Two telephone calls." You say you do not remember whether you rang Mr. Lockrey or he rang you on the 27th? A. I'm not clear in my mind but I am fairly certain I rang him on the 27th. 10

Q. I put it to you you rang him on the 27th and you told him that management had submitted B.P.'s proposals and the implications of them for Nabalco to their board — that is to your board. Do you remember that? A. No, I said that—

Q. Well do you deny that you told him that? A. Management had submitted—

Q. — B.P.'s proposals and the implications of them for Nabalco to the board? A. That is correct, yes.

Q. You went on to say that although in the past Nabalco management here and in Zurich have entered discussions on any subject relating to Australian fuel supply with B.P. London, Nabalco chairman, Sir David Griffin felt that he should make personal representation to Mr. Rendle with whom he has common external board affiliation? A. Correct. 20

Q. And then you suggested, or said words to the effect that you felt that the board was checking up on the general management presentation? A. I did not say that yesterday.

Q. Mmm. A. I did not say that yesterday.

Q. No, I did not suggest you did, but that is what you said on the 27th May to Mr. Lockrey, isn't it? A. I could have said it; I can't recall it specifically.

Q. You went on to say that Sir David wishes to speak with Mr. Rendle around 11 a.m. Tuesday, London time? A. Yes. 30

Q. Mr. Lockrey told you that he had no objection to a call being made and would inform London to expect it? A. That's right.

Q. At that point of time you understood that Sir David was intervening in the negotiations which had commenced on the 17th May and continued thereafter to see what he could do about resolving the dispute between the parties? A. Yes, in his position as the chairman, yes.

Q. No doubt you subsequently learned that a telephone conversation between Mr. Rendle and Sir David Griffin took place? A. Yes.

Q. Then on the 28th you rang Mr. Lockrey on the occasion on the first call to ask him if the telephone time for the conversation could be put forward to 1430 hours London time? A. That's right. 40

Q. So that it was you who rang Mr. Lockrey first on the 28th? A. That is right.

Q. You then had some discussion with Mr. Lockrey about two matters you mentioned yesterday? A. Yes.

Q. Then that call concluded and Mr. Lockrey almost immediately rang you back? A. Within some hours.

Q. Within a short period of time? A. Within a short time, maybe one hour or three hours.

Q. And told you that Mr. Snape was working away on escalation of various provisions? A. Yes, he told me that Mr. Snape was working on incorporating the escalation clauses into a draft contract. 50

Q. He told you also that there were a number of areas in which possible savings could be made? A. Yes.

Q. He went on to list a number of possible areas? A. Four areas.

Q. Without going into the detail of that, they related to variation of credit terms? A. Yes.

Q. Acceptance of ownership of cargoes at the point of loading? A. Yes.

Q. Specification variations? A. Yes.

Q. Particularly in relation to a vanadium restriction? A. Of others too, more important ones.

Q. Yes, but particularly in relation to that? A. Yes.

10 Q. He left you saying that they were still doing their sums and suggesting to you that there were advantages in a fluctuating contract in today's conditions because some people were brave enough to forecast a fall in price? A. I can't recall that but he may have said it.

Q. I think that concluded on the footing that you would ring him after the 'phone call to London had taken place? A. Yes.

Q. After that conversation with Mr. Lockrey you formed the view that B.P. was very keen? A. Yes, or co-operative may be the better word.

Q. Your view could be summarised in the words "B.P. appear to have become terribly keen"? A. Yes.

Q. That was keen to supply fuel oil to you? A. Keen to retain the contract.

20 Q. To retain the contract? A. To retain a contractual relationship.

Q. In relation to the supply of fuel oil? A. Yes.

Q. But of course, it had always been your view, had it not, that B.P. had very large supplies of oil, crude oil? A. Yes, it had.

Q. And that their resources rated as possibly the largest of all the major oil companies? A. According to — that was what Mr. Lockrey told me.

Q. But that was your view too, wasn't it? A. Yes, but that was — that statement was made by Mr. Lockrey to me and I would not disagree with the statement in principle.

Q. Indeed, you did some checking up while you were in the Middle East during April, didn't you? A. Not on the resources of B.P.

30 Q. You knew enough, didn't you, about their resources to readily accept Mr. Lockrey's statement? A. Yes.

Q. Indeed, your view was that their resources were possibly the largest, and with good housekeeping would allow B.P. to continue to fill what you regarded as their well-assessed obligation? A. Yes, that is what Mr. Lockrey told me.

Q. You believed that all through these conversations in May and June, didn't you? A. That statement which I have quoted I made in April, and I believed it in April and in May, yes.

Q. You believed it in June too, didn't you? A. In June certain other developments took place.

40 Q. Did you believe it in June? A. Yes.

Q. You did not tell us about it yesterday but you did, in fact, have a telephone call with Mr. Lockrey on the 29th May, didn't you? A. I cannot recall it specifically.

Q. Following on the conversations between Mr. Rendle and Sir David Griffin? A. There may have been a short telephone call, yes.

Q. You did not make a note about such a call, did you? A. Possibly not, no, I have—

Q. You have looked at all your notes in recent times, haven't you? Can't you remember whether you made a note or did not? A. I have no note concerning that 'phone call on my file.

50 Q. You have no note concerning such a call? A. But I may still have made one and put it away as a non-important matter.

Q. Not having a note you cannot recollect anything about it? A. I said there may have been a telephone call; most likely there was a telephone call on a matter which was not very important.

No. 111
 —
 Plaintiff's
 evidence: E. A.
 Notter: Cross-
 Examination
 (cont'd)

Q. But you cannot recollect anything about anything that was said in such a telephone call on the 29th. Is that the case? A. Not specifically, no.

Q. Is that because you have not got a note, Mr. Notter? A. No, I cannot specifically recall the conversation.

Q. You remember Mr. Lockrey said that you and Mr. Coogan expected to hear from Sir David Griffin during the morning? A. Would you please repeat this?

Q. Do you remember that you said to Mr. Lockrey that you and Mr. Coogan expected to hear from Sir David during the morning — this is on the 29th? A. I may well have said that, yes.

Q. Do you recall that Mr. Lockrey said to you that he was concerned that Sir David may have gained the impression that there was plenty of time to talk over your mutual problems and that he may have got the impression that we — we being B.P. — were prepared to change our stand? A. I can recall a statement to this effect, not those words; I cannot say precisely when that statement was made. 10

Q. Anyway, Mr. Lockrey at some point of time, made a statement to that effect? A. Yes, he did, and he made it again later.

Q. I put it to you that on the 29th May in a telephone call in the morning he also went on to say that he wanted to emphasise that he could not in any way alter B.P.'s position, and if Nabalco contemplated entering into a new contract this should be done without delay. Any recollection of that? A. Yes, I— 20

Q. On the 29th May? A. 29th or the 30th.

Q. You cannot place the date? A. Not the specific date but there was certainly a telephone conversation between myself and Mr. Lockrey on either the 29th or the 30th.

Q. You gave some evidence about one on the 30th yesterday, didn't you? A. Yes, but it could have been — I do not deny the 29th but in my recollection it was the 30th.

Q. I put it to you he went on to say to you, "On the other hand, if you wish to operate on a spot purchase basis, this intention ought also to be conveyed without delay since B.P. was currently involved in the precision planning of the August shipping planning and delays at this stage could react very much against Nabalco." A. That is correct, yes. 30

Q. Again you do not know whether that was the 29th or the 30th? A. I can recollect this statement but I cannot say as to whether it was on the 29th or the 30th.

Q. Did you say to him, I put it to you, on the 29th, that you agreed with Mr. Lockrey and you said that they, without specifying who "they" were, were not easy about Sir David Griffin's role and that the Nabalco general management would push for a speedy resolution of the whole matter? A. I cannot identify the word "they" or what it means. We were certainly very concerned and wanted to achieve a solution one way or the other. 40

Q. Do you deny you said to him words to the effect of those I put to you a moment ago? A. I can't recall having said "they", or I can't even tell you what "they" means.

Q. I put it to you that what it means is the management executives who had been participating in the discussions with B.P.? A. I can only answer to this saying that we were very concerned and wanted to see a speedy decision and a solution one way or the other.

Q. What I put to you as saying to Mr. Lockrey was that they were not easy about Sir David Griffin's role. In other words, that those in management of Nabalco who had been participating in the discussions were not very pleased about Sir David's intervention. Did you say something like that to him? A. I could have said something like this, but not these words. 50

Q. Then you had a telephone conversation again on the 30th May with Mr. Lockrey, did you not? A. Yes.

Q. You gave some evidence about that yesterday? A. I did.

Q. By the time you had that conversation you had heard, had you not, that Mr. Rendle and Sir David Griffin had agreed that they would meet in Melbourne in Mr. Rendle's office later in June? A. On 10th June, yes.

10 Q. Two things, in the meantime discussions about the new contract should be pursued and no decision was made until after they met again on the 10th June? A. That's right, and at the same time, if I may complement this, Mr. — I understood that Mr. Rendle was going to talk to his London people on the subject matter again and in the meantime they both felt that negotiations should continue.

Q. About a new contract? A. About the new contract, yes.

Q. So the meeting of May 31st was arranged? A. Yes.

Q. Indeed it was arranged so far as you knew specifically as a result of the decision taken between Sir David and Mr. Rendle? A. Yes, in the spirit of that decision.

20 Q. When you came to write a report about it you described the object of that meeting as to discuss and summarise, without prejudice, alternative terms and conditions under a new furnace oil contract to take effect as from July 24th, 1974, if required by Nabalco? A. Yes.

Q. That was as you saw the object of the meeting? A. To define the contract so it may be ready when it is required.

Q. Mr. Lockrey was present only in an introductory sense, wasn't he? A. Yes.

Q. Also at lunch? A. Yes.

Q. So he, as it were, welcomed you to B.P., said a few words in an introductory way and handed you over to discussions with Mr. Snape and Mr. Cochrane? A. That is right.

Q. He came back to join you all for lunch? A. That is what I recall, yes.

30 Q. Then you went back to your discussions with Mr. Cochrane and Mr. Snape for the rest of the day? A. I am not clear in my mind as to whether — that I think is correct, yes.—

Q. It was pretty much a full day working session, wasn't it? A. It takes — yes, I mean, it took three months to negotiate the first contract and one would assume it may take three hours or four hours to negotiate another contract.

Q. I am not criticising you Mr. Notter? A. Yes.

Q. I was only putting to you it was virtually a full day of negotiation, writing clauses and cutting there and sticking there — bits of paper? A. Yes.

Q. Whatever Mr. Lockrey said at the opening it was very much only in the way of an introductory statement, was it not? A. Yes.

40 Q. He opened by referring to the conversation between Sir David Griffin and Mr. Rendle? A. Yes.

Q. He said B.P. fully appreciated Sir David's interest in the situation and good intention for continuation of the relationship between B.P. and Nabalco? A. Yes.

Q. He went on to say that based on a brief cable he had had from Mr. Rendle you should not draw any conclusions that the situation between B.P. and Nabalco as outlined in May has or is likely to change? A. That is right.

Q. He also said B.P. would appreciate an early indication as to whether Nabalco wanted a new contract or not, and preferably before Sir David's visit to Melbourne? A. Yes.

50 Q. He spoke of his negotiations with London in seeking a price reduction, said he had been successful and that they were prepared to offer a three year contract? A. That is right.

Q. He told you he had been able to reduce the price about \$4? A. Yes, subject to some specification changes.

No. 111
 Plaintiff's
 evidence: E. A.
 Notter: Cross-
 Examination
 (cont'd)

Q. He then, as he left, said he hoped that the forthcoming discussion with Mr. Snape and Mr. Cochrane would be successful? A. Yes.

Q. That is really all that was said by Mr. Cochrane in that conversation, isn't it? A. By Mr. Lockrey.

Q. I am sorry, Mr. Lockrey. A. He also referred to shipping problems.

Q. Shipping problems? A. And the need for an early decision.

Q. What I want to put to you is that he said nothing on that occasion about whiplash injuries? A. Yes, he did.

Q. You are quite clear in your mind that it was on this occasion that you heard about Mr. Lockrey's whiplash injury, are you? A. To my recollection, yes. 10

Q. Could it have been at the 17th May meeting, Mr. Notter, that you first heard about that injury? A. I can't recall.

Q. The evidence you gave yesterday, I put it to you, suggested that this was the first occasion on which you heard of Mr. Lockrey's whiplash injury. Would you agree with that? A. Yes, to my recollection it is the first time that I can recall that he mentioned this to me.

Q. Do you remember when he came to the 17th May meeting whether, as he introduced the people there, he said, "I have asked these people to come along because some little time ago I suffered a whiplash injury and I do not always remember things."? A. No, I can't recall. 20

MR. STAFF: Q. Do you say that was not said at the beginning of the 17th May meeting by Mr. Lockrey? A. It may have been said, I can't recall.

Q. If it was said on 17th May it is unlikely that it would have been on the 31st, isn't it? A. No, because on the 31st he explained this as an ability for him not being able to participate at the meeting and that he had to go away and see a doctor.

Q. The meeting was a drafting session, and I think that you did not expect Mr. Lockrey to participate in it. Isn't that so? A. It would not be impossible that he would have attended.

Q. Look, after reference to the whiplash injury had occurred on 17th May you would have heard it then, wouldn't you? A. Would you repeat that please? 30

Q. If reference to the whiplash injury had occurred on 17th May you would have heard it then, wouldn't you? A. I could have heard it there, I can't recall.

Q. If you had heard it on 17th May you would not have said on 31st to him "May I ask what is wrong with you", would you? A. No, if I recall the 17th May I would not have asked that question.

Q. And you would not have said "I am sorry, I am very sorry to hear this Colin, I hope they can fix it quickly, or put it right"? A. No.

Q. So I take it then the state of your recollection is such that you do not know whether it was said, whether Mr. Lockrey said something about his whiplash injury on the 17th or on the 31st? A. My recollection is clear that he said it on the 31st and excused himself from this meeting. I said I can't recall him having made any reference on the 17th May. He may have said it, I can't recall it. 40

Q. You certainly would not regard it as probable that he said it on 17th, "I have invited these other gentlemen here because I suffered a whiplash injury and I sometimes forget things"? A. No, he didn't say that.

HIS HONOUR: Mr. Staff, I notice that sometimes you used the word "probable" in the questions you ask?

MR. STAFF: Yes your Honour.

HIS HONOUR: I do not know whether that is intended to have any significance? 50

MR. STAFF: In the state of the witness's recollection it is hopeful that he indicated to some extent what the state of the recollection was.

HIS HONOUR: But of course the word "probable" in the light of the standard of proof which I have to apply, has a special significance if it is used in a particular way.

MR. STAFF: I am not using it in that particular sense. I am not seeking to extract that sense from the witness but I had thought it may assist your Honour in gauging the state of recollection of the witness. It is not easy to really discover it.

10 HIS HONOUR: I had always thought "probably" meant more likely than not. But I have read the judgment of the House of Lords in Kufos' case and Lord Reid does not take that view. He takes it as something which is on some occasions less than a 50% chance.

MR. STAFF: It is perhaps not very helpful, your Honour.

HIS HONOUR: I thought if you were using it in that way, the witness ought to be aware of that intended meaning.

MR. STAFF: I am using it in the sense of the common meaning of the word. It is perhaps again not altogether easy for your Honour to assess the meaning this witness places on it.

20 Q. Mr. Notter, the next occasion that you had any discussion with a representative of B.P. I suggest to you was 6th June when you spoke to Mr. Snape on the telephone. Do you recall that? A. Yes.

Q. You did not give any evidence about that yesterday, did you? A. No, that conversation solely concerned the draft of the contract.

Q. You say it solely concerned the draft of the contract, do you? A. To my recollection it was a conversation and, if I might add, the draft which was prepared in Melbourne I took back to Sydney to type it up into its final form. To assist B.P. I had that draft typed over the weekend and I sent it back to Melbourne and my recollection is that Mr. Snape confirmed that the draft was the statement as was negotiated on 31st May.

30 Q. Was there anything else in your recollection said between you on that occasion? A. There may have been. I cannot recall any pertinent points from that discussion.

Q. So far as your recollection goes, it was really only a conversation concerned with the drafting of the contract? A. Not with the drafting, the draft of the contract which I had typed in Sydney and returned to him for approval.

Q. You have no recollection of it concerning anything else? A. No.

Q. Again, you did not make a note of this conversation, did you? A. No, I didn't think it was a particularly important conversation.

40 Q. So you have not been able to refresh your recollection about it? A. But I recall the conversation.

Q. But you have not been able to refresh your recollection about the contents of the conversation? A. I don't need to, I recalled the contents dealing with the acceptance of the draft as typed by Nabalco.

Q. In fact Mr. Snape asked you what had happened at the Board meeting on 4th June in relation to the new contract, didn't he? A. I can't recall that.

Q. It had been intended to hold a Board of Direction meeting on 4th June, hadn't it? A. I couldn't say offhand.

Q. Don't you remember that that meeting was deferred after you had the Kuwait approach? A. No.

Q. Do you say it was not in fact deferred? A. I can't recall a deferral of a Board of Direction meeting.

Q. Can you recall Mr. Snape asking what decision had been reached at the planned meeting of the Nabalco Board on 4th June about the fuel oil contract? A. How would he have known about the meeting on 4th June?

Q. I suggest you told him, or Mr. Coogan had? A. When, on 17th May?

Q. Would you answer my question, Mr. Notter? A. I can't recall that and I can't recall a deferred Board of Direction meeting.

Q. Do you deny he asked that question or a question to that effect on 6th June? A. I do not deny it, I can't recall it.

Q. Do you recall you said to him the meeting had been deferred by the direction of Sir David Griffin until after he had spoken to Mr. Rendle? A. I can't recall that.

Q. Do you remember saying that Sir David is expecting a phone call from Mr. Rendle on Saturday 8th June to arrange a meeting for early next week? (No answer)

Q. You have no recollection of that? A. No, that could have been said.

Q. Do you now recollect that the proposed meeting between Mr. Rendle and Mr. Griffin was discussed in this telephone call on 6th June with Mr. Snape? A. It may have been.

Q. But do you now have a recollection that it was in fact discussed? A. I recollect that either from that discussion or a discussion with Sir David that there was going to be a phone call on the weekend to arrange a meeting on the day or the Monday or Tuesday following the weekend. Sir David went down to Melbourne to play golf on that weekend and after that golf he was going to see Mr. Rendle.

Q. Does all that now help you to recollect that you discussed those arrangements with Mr. Snape on 6th June? A. No.

Q. Well whether they were held or not, do you now have a recollection that you did discuss those arrangements? A. I may have discussed the telephone call at the weekend for a meeting on the Monday or Tuesday but I can't say that with any degree of accuracy.

Q. Did you say that you felt the negotiations had been taken completely out of your hands and Mr. Coogan's hands? A. No.

Q. Do you deny saying something to that effect? A. I would not have said that.

Q. Do you recollect saying that you expect your next involvement will be early next week to tie up the loose ends after the principals have agreed on some compromise? A. No, I can't recall that.

Q. Something to that effect? A. No.

Q. No recollection whatever? A. No.

Q. Do you remember saying to him that you were quite happy to expect fuel oil at F.129 quality provided the maximum vanadium content of 100 p.p.m. is specified? A. No, we could not accept 100 p.p.m. vanadium content.

Q. Do you remember saying that to Mr. Snape on 6th June? A. I can't recall it, it is very unlikely that I said it.

Q. Do you remember that you said on that day you had received better prices than B.P.'s but none for a period beyond six weeks? A. I can't recall that.

Q. Do you say you were very conscious of B.P. Australia's efforts to maintain oil supplies during the recent crisis and Nabalco and Zurich wish to continue to deal with B.P.? A. I could have said in previous discussions and possibly at that, that we were still interested to deal with B.P., that is true. We had a good relationship.

Q. I think you agreed with the recommendations that were made to the Board

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of Direction in respect of the contracts which ultimately became or were regarded as available with B.P., with Kaiser Trading and with the Kuwait National Petroleum Company? A. Yes, I have a hand draft of that.

Q. Each of them specified 100 parts per million maximum vanadium, didn't they? A. That is correct.

Q. You told his Honour a few minutes ago you could not accept 100 p.p.m. vanadium? A. That is right.

Q. And yet you recommended three contracts specifying that vanadium content? A. That is right.

10 Q. Do you still say you could not accept 100 parts per million vanadium at Gove? A. We could, but technically it would be very disadvantageous to the alumina which is produced, and in fact there is a qualification to that point.

Q. (Approaches with documents) Mr. Notter, do you recall Mr. Coogan's lengthy document which contained the recommendation to the Board of Direction in respect of the Kuwait, Kaiser and B.P. contracts? A. Yes.

Q. I suppose you assisted in the preparation of that, did you? A. Yes.

Q. Under "quality" in relation to each contract the specification is stated as providing vanadium 100 parts per million maximum? A. That is correct.

20 Q. Indeed, the asterisk refers you to the statement at the bottom of that page "All offers are based on a vanadium content 100 p.p.m. maximum, however for quoted average content between 50 and 80"? A. That is right.

Q. Indeed, in your discussions with Mr. Nyholm of the Kuwait National Petroleum Company he indicated that the specification would have to be increased from 60 p.p.m. to 100 in relation to vanadium although the average was expected to be 80 to 85 p.p.m.? A. That is right, and he also was going to give a letter of awareness to this effect.

Q. I am sorry? A. He was also going to give a letter of awareness regarding the vanadium content, to this effect.

30 Q. In fact you agreed in the Kuwait contract to accept oil of a vanadium content of a maximum of 100 p.p.m.? A. That is correct.

HIS HONOUR: Mr. Staff, I am not aware of what this goes to.

MR. STAFF: It is really only the witness's answer some five minutes ago in which he denied having a conversation about vanadium content with Mr. Snape on 6th June and proffered as the reason for it that they would not, just could not accept 100 parts per million as the maximum specification for the oil. That was proffered as his reason for denying the specification. That, unfortunately, led me some further distance.

Q. You recall, Mr. Notter, that Sir David Griffin and Mr. Rendle had some conversation on 10th June? A. Yes.

40 Q. Then you had some conversation with Mr. Lockrey on 13th and 14th about which you gave some evidence yesterday? A. Yes.

Q. And during the conversation on the 13th you said to Mr. Lockrey, did you not, the situation as you saw it or understood it was that firstly B.P. considered their notice was valid and therefore were insisting that the old contract comes to an end on July 24? A. Yes.

Q. And at the time that was the language which you, that is on 13th June, thought appropriately recorded what was said about that matter to Mr. Lockrey? A. Yes.

50 Q. And you went on to say "Therefore supplies under the old contract would cease on July 24"? A. That is right.

Q. This is what you understood to be the situation as you were recounting it to

No. 111
 Plaintiff's
 evidence: E. A.
 Notter: Cross-
 Examination
 (cont'd)

Mr. Lockrey? A. It was indeed the same words as Mr. Lockrey told me on 24th April.

Q. And thirdly you said "Unless a new contract is executed with B.P. as per the negotiations of May 31 supplies will no longer be forthcoming under contract conditions"? A. That is right.

Q. That is after 24th July? A. Yes.

Q. But you expected, and indeed had no reason to suppose that supplies would not be maintained up to 24th July? A. I had no doubt up to 24th July.

Q. And you were expecting supplies of fuel oil to be delivered between 13th June and 24th July, weren't you? A. Yes.

Q. And in fact they were delivered, and accepted and paid for? A. That is right. I think there was one shipment I could not quote without referring back to my files.

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HIS HONOUR: There is no doubt the last shipment was on 19th July.

MR. STAFF: That is right.

Q. At all times you were expecting a shipment to be made in July, weren't you? A. Not specifically July within the conditions of the contract which said that stocks should not fall below 14,000 tonnes and if they did fall, and if the time came, it was necessary for them to replenish our stock.

Q. So you at this time in June, say around 13th, you were anticipating that B.P. would deliver oil at any time before 24th June if the stocks fell low enough to require it to be delivered under the contract provisions? A. Yes.

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HIS HONOUR: Q. And delivered at the old price? A. Not at the old contract conditions, not the price of 13.99 which changed on 1st July.

MR. STAFF: Q. The price? A. The price within the terms of the old contract, i.e. I expected B.P. to honour their contractual obligation up to 24th July 1974.

Q. And nothing that was said between any of the B.P. representatives or you or Mr. Coogan indicated to you that B.P. did not intend to continue to honour that obligation up to 24th July? A. I had no reason to believe otherwise.

Q. Everything they said indicated that they did so intend, didn't it? A. That is correct.

30

Q. And I put it to you specifically, Mr. Notter, in your job you were aware that a delivery in July would be necessary to maintain your minimum supply and storage? A. If it was required within the contract, yes, and most likely it was. I have not got the stock figures now.

Q. You do not recall now? A. I recall it could have been necessary but I don't have the stock figures available here.

HIS HONOUR: Q. As you understood the attitude of B.P., namely, that they would deliver under the old contract up to 24th July? A. Yes.

Q. To what extent, as you understood it, was that attitude based on a view that they had that the old contract would terminate on that date as the result of the notice which your company had given? A. Yes, as per their letter of 7th May in which they have said that because they regard their notice as valid they accept our notice, and therefore supplies under the old contract would cease on 24th July.

40

Q. So on the basis of that, as you understand it, you could safely assume that they would continue delivery under the old contract up to that date? A. Yes.

MR. STAFF: Q. And indeed on behalf of Nabalco you wanted them to continue to deliver up to that date whatever amount of fuel oil was necessary to fulfil their contractual delivery? A. Yes.

Q. And at no time did you as an officer of Nabalco want to bring the contract to an end any earlier than 24th July, at least? A. I thought in B.P.'s opinion we had already brought it to an end.

*No. 111
—
Plaintiff's
evidence: E. A
Notter: Cross-
Examination
(cont'd)*

HIS HONOUR: Q. That is not really an answer to the question? A. I am sorry, but that is the way I understood it, at that time the contract was already at an end. It was no longer a question to be determined as to whether we wanted it at an end or not. We were told "The contract is at an end."

Q. This was 24th July? A. Yes, as from 24th July.

10 MR. STAFF: Q. But it was not your wish as an officer of Nabalco to do anything that would bring it to an end at an earlier date than 24th July? A. It was not my wish, no.

Q. Nor that of any other officer, so far as you were aware, in Nabalco? A. Not to my knowledge, no.

Q. Indeed you would have regarded it as calamitous for anybody in Nabalco to terminate an obligation to supply fuel oil earlier than 24th July? A. I can't agree with calamity but something not necessary.

20 Q. If you needed supplies of fuel to get the plant going earlier, at least by about the middle of July, in the state of affairs that existed prior to the middle of July you may well have run out of oil before you got an alternative supply landed at Gove after B.P. was released from the commitment to deliver in the middle of July, might you not? A. Possibly, but I cannot say, I have not got the stock figures here.

Q. Would you assume that a shipment was delivered and accepted on 19th July? A. I believe a shipment was delivered. I would have to check.

Q. Would you assume that that shipment was required to maintain the minimum storage at Gove at about that time, that is of fuel oil? A. I would assume so, yes.

Q. You would not have wanted, on behalf of Nabalco, before that shipment was received, put into your storage, to have terminated B.P.'s obligation to deliver that shipment of oil, would you? A. No.

30 Q. And indeed you never took any action which in your belief would have had that effect, did you? A. I couldn't.

Q. And so far as you know nobody else in Nabalco took any such action? A. I was overseas and I believe no-one else did.

Q. You, on 13th June, made a note of your conversation with Mr. Lockrey on that date, didn't you? A. Yes.

Q. You recorded what had been spoken between you and Mr. Lockrey in relation to the continued supply of petroleum, diesel, aviation fuels and lubricants? A. Yes.

40 Q. You recorded it in these words, did you not, "He also recalled Sir David's question to Mr. Rendle on the point as to whether B.P. would continue to supply petroleum, diesel and aviation fuels and lubricants to Gove should Nabalco elect to change its supplier of furnace oil. He agreed this would be the case"? A. Yes.

Q. Is that an accurate reflection of the conversation you had with Mr. Lockrey on that day about that matter? A. It would be a statement of words to that effect based on my recollection on the day of what was spoken; not the precise words but words to this effect, yes.

Q. But your recollection on that day would have been much better than your recollection yesterday, wouldn't it? A. One would assume, yes.

50 Q. Because you dictated those notes immediately or very soon after your telephone call took place, didn't you? A. Yes.

Q. While it was fresh in your mind? A. Yes.

Q. And I take it that the "he" mentioned in your note was Mr. Lockrey? A. Yes.

Q. And Mr. Lockrey then said something to you about a question which Sir David had asked Mr. Rendle, did he? A. Yes.

Q. Can you remember what that was or any of the words Mr. Lockrey said, as you wrote them down, recalling Sir David's question to Mr. Rendle? A. I would have used words to the effect "Colin, I understand Sir David mentioned to Mr. Rendle that he had other alternatives under consideration. He has asked Mr. Rendle as to whether you or B.P. will be prepared to maintain supplies of petrol, diesel, aviation fuels and lubricants to Gove should Nabalco choose in favour of one of those alternatives. I understand, Colin, that Mr. Rendle had no objection to these supplies being maintained to Gove and I recall Mr. Lockrey saying words to the effect 'I am aware of these discussions between Sir David and Mr. Rendle and I guess it will be all right. I agree or I guess these contracts can continue, or will continue to be supplied to you in Gove.'"

Q. What you were both talking about was the supply of petroleum and diesel fuel under the agreement which B.P. was saying was terminated from 24th July in respect of fuel? A. Yes.

Q. So far as aviation fuel and lubricants were concerned, they were being supplied under other agreements? A. Yes.

Q. Which were existing between them? A. Lubricants, I am sorry, is also mentioned in the agreement dated 11th June 1970.

Q. Thank you Mr. Notter, I accept that. Aircraft fuel is the subject of a separate agreement? A. The agreement referred to is the air-B.P. agency agreement.

Q. You also made a note of your 14th June conversation, didn't you? A. Yes, a handwritten note.

Q. The evidence you gave yesterday is really almost a precise reflection of what is contained in that note, isn't it? A. It was a very short telephone conversation.

Q. One you made at the time? A. Writing it down, yes.

MR. STAFF: I call for that note, your Honour, of 14th June. 30

MR. OFFICER: It is produced, your Honour.

(Abovementioned note of Mr. Notter dated 14th June 1974, tendered. At Mr. Officer's request a further note of Mr. Notter in relation to a conversation on 13th June 1974 was tendered. Both notes admitted and marked Ex.43)

MR. STAFF: There is one matter Mr. Horton asked me to stop for so a note could be made of it, your Honour.

MR. HORTON: Your Honour, Mr. Kuner is here and Mr. Meagher has departed.

HIS HONOUR: The main thing is to get the admission from Mr. Officer.

MR. HORTON: I understand he is agreeable to the form, your Honour. Might I hand that document to your Honour. 40

(Admissions which have been handed up in relation to the matter which was discussed yesterday, tendered. Admitted without objection and marked Ex. 44)

HIS HONOUR: Does that dispose of the need to further call on these subpoenas?

MR. HORTON: Yes your Honour.

HIS HONOUR: Or to record the documents which were produced yesterday under those subpoenas?

No. 111
Plaintiff's
evidence: E. A
Notter: Cross-
Examination
(cont'd)

MR. HORTON: Yes your Honour, in relation to them they refer to costs and prices and so-forth that were passed on. Most of these referred to contracts.

HIS HONOUR: Should I release these documents now?

MR. HORTON: We would ask your Honour to do that. Mr. Kuner is going to take them away and sort out those documents.

HIS HONOUR: The documents produced yesterday on subpoena may be released to the parties which produced them.

10 MR. OFFICER: Would your Honour note that those admissions are admitted subject to our argument on the question of relevance.

HIS HONOUR: Yes, I admit them subject to relevance.
(Luncheon adjournment)

ON RESUMPTION

HIS HONOUR: I though before making a final decision on this question of whether or not I should accede to Mr. Staff's application to cross-examine Sir David Griffin, I would like to discuss the matter a little further with counsel.

Firstly, Mr. Officer, assume I were to refuse it, it is not impossible that evidence would be led by Mr. Staff which would make it necessary—

20 MR. OFFICER: It might require an answer, as it were.

HIS HONOUR: Yes, in reply. I do not know what the situation is in relation to his movements, how long he is going overseas for?

MR. OFFICER: I understand his commitments require him to leave over this coming weekend and return back into the jurisdiction about 10th December, your Honour.

HIS HONOUR: That is during the week after next?

MR. OFFICER: Yes.

30 HIS HONOUR: By which time, hopefully, the evidence will be finished. Mr. Staff seemed to think this morning it would finish towards the end of next week. I would be loath to delay the case, this opportunity having been given, and I think that is a matter you should consider, whatever I might decide ultimately to do.

The other thing I wanted to say really, and to both of you, was I have tried to think of this in terms of what the position would have been if there had been one hearing and oral evidence. That is probably not, however, a correct way to think about it because that is not what happened. If one did think about it in that way I suppose one might find some likeness to a situation where a witness had given evidence on one aspect of the matter, there have been no cross-examination, no

No. 111
 —
 Plaintiff's
 evidence: E. A.
 Notter: Cross-
 Examination
 (cont'd)

relevant cross-examination, and then other evidence is given and leave is asked to have him brought back for further questions. In normal circumstances one would accede to such an application.

On the other hand, the hearing here was broken up into two separate and distinct compartments. I cannot help thinking that perhaps if you had thought that this eventuality was likely you would have seen to it that the evidence Sir David gave was given by somebody else. I do not say that offensively but obviously we are in a tactical situation where advantage is sought to be taken of the fact that it was he who gave evidence of the contract. So I have not found the analogy particularly helpful. I thought I would indicate these thoughts I had in my mind, and if either of you wish to say anything? 10

MR. STAFF: All we wish to say in relation possibly to my friend wanting to call Sir David in reply is that as at presently advised it would be our view and our likely submission that such an application, before or after the end of the evidence, in my friend's case in reply, would be that he would be splitting his case.

HIS HONOUR: I, in this court, do not worry too much about people splitting their cases.

MR. STAFF: Where a deliberate truce is made not to call a witness in chief — your Honour still has a judicial discretion. I simply draw attention to it. We would object with the utmost degree to calling Sir David in reply. 20

HIS HONOUR: But you see, for instance supposing you led from Mr. Rendle the conversation he had with Sir David and Sir David has another version, why then should not the evidence be given.

MR. STAFF: Because the evidence would go to the issue which my friend opened up when he invited your Honour to admit the evidence of 17th May in the without prejudice discussion as going to repudiation which he said was then discussed and the attitude maintained thereafter right up through June. I think in this case he says it was accepted either on 27th or 28th June. If it is his case. He said without prejudice discussions demonstrated it. They take place in the period when he is putting to your Honour that our attitude is maintained consistently when you say it is a clear issue he has taken upon himself in chief. He had to. The mere fact that Mr. Rendle gives a different version in our submission provides no justification for letting him split, when he has chosen to exclude, no doubt for a very good reason. 30

HIS HONOUR: I really think the only reason I am hesitating about this is if those advising the plaintiff had adverted to the question they simply would not have had Sir David Griffin swearing the affidavit in support of the summons because the things he swore to could have been sworn to by any other officer in the company. You are either fairly or unfairly taking advantage of the situation.

MR. STAFF: It is, one of the fruits, either bitter or sweet, of the adversary system as we know it. 40

HIS HONOUR: I suppose if I adhere to what I say about the adversary system I should not take any notice of the fact that it came about in that way.

MR. STAFF: I do not want to make any more of it, your Honour.

HIS HONOUR: Do you want to say anything more, Mr. Officer?

MR. OFFICER: Only on the question of splitting.

HIS HONOUR: I am not terribly interested in splitting. Splitting has gone out, even in the most strict situations.

MR. OFFICER: We have called evidence of conversations which we submit are an adherence to it. We did not open the conversations Sir David had with Mr. Rendle as in our view they were neither a repetition of the attitude on the 17th, nor were they to the contrary of the attitude on the 17th.

10 HIS HONOUR: I have not found this an easy matter to decide but I think on the whole I should allow Sir David Griffin to be cross-examined and that is the decision I make. It can be done at a time to suit his convenience within reason, Mr. Officer.

MR. OFFICER: I think probably some time on Thursday.

HIS HONOUR: You can probably liaise with Mr. Staff about that.

MR. OFFICER: I will, your Honour.

EDWARD ALBERT NOTTER
On former oath:

HIS HONOUR: I should add, Mr. Officer, that if you should wish to lead evidence in chief from him there is nothing to stop you doing that. It is not just a matter of the evidence in the affidavit, he becomes a witness in the case.

20 MR. STAFF: Q. Prior to 28th June, I put to you before that date Mr. Lockery had told you, had he not, that B.P. were ready to continue to supply Nabalco to ensure that they had no interruption in supply. The only thing was that after 24th July that would involve Nabalco buying on a spot basis? A. Yes.

Q. He also said to you just before you went off to Switzerland in June that B.P. were engaged in their normal forward programming and it was pretty important for them to know what shipments were required by Nabalco for 24th July? A. Yes.

Q. You said you would have a look at it and let him know? A. I said, "It is a matter for the Board and the management to decide, I can't decide this."

30 Q. He told you also on this same occasion that B.P. had tentatively scheduled a shipment of 32,000 tonnes of furnace oil for August for delivery to Gove? A. I think Sir that is correct, I can recall that.

Q. So that Nabalco, through you, knew before you left for Switzerland that B.P. had an August shipment schedule on a tentative basis? A. Yes, but not on the contract.

Q. And of course you recognised, did you not, that scheduling a shipment of 32,000 tonnes of oil for August delivery even tentatively would necessarily involve B.P. in expense? A. It may, yes.

40 Q. You would expect it to, wouldn't you, expense that would be thrown away if you did not want it? A. I would assume so, I don't know what their particular arrangements are, or were.

No. 111
 Plaintiff's
 evidence: E. A.
 Notter: Cross-
 Examination
 (cont'd)

Q. But you would assume, even if it was only a small expense? A. Yes, it could be.

Q. You knew that it would be necessary to make shipping arrangements, for instance? A. Yes.

Q. To allocate a particular tanker for the particular voyage? A. Yes, but I was not aware as to whether they had shipping arrangements on a contract of freight or whether these were voyage charters or otherwise, I could not assess the degree of expense involved.

Q. You knew they mostly used their own tankers, didn't you? A. I knew they had a tanker fleet but they did not use their own tankers to supply Gove. 10

Q. So it would have been your belief that they would have had to arrange to charter a tanker for the voyage from Singapore to Gove in August? A. Yes.

Q. And to make those arrangements necessarily involves expense, doesn't it? A. It depends on the charter agreements.

Q. And it meant the time of the appropriate people in B.P. being spent arranging these things? A. Yes, they had the shipping department, or have a shipping department.

Q. And telexes being sent at a money cost? A. Yes.

Q. To the appropriate places? A. Yes.

Q. (Approaches with document) I show you a letter or copy letter. Is the signature over the typed written name D.F. Wilson that of Mr. Wilson, an officer of Nabalco? A. It is an initial of Mr. Wilson who was at that time an officer of Nabalco, in 1971. 20

(Letter from Nabalco to B.P. Australia dated 14th September 1971, tendered. Admitted without objection and marked Ex. 45)

MR. STAFF: That identifies the origin of the requirement notice and the purpose for which it was used, your Honour.

HIS HONOUR: What is the relevance of this?

MR. STAFF: It shows the notice was intended to satisfy the contractual obligation referred to. 30

HIS HONOUR: What is this to be used in connection with, your submission about 2nd July?

MR. STAFF: And 18th June and any others, your Honour. Those which followed throughout August up until the present date.

HIS HONOUR: I am sorry.

MR. STAFF: Those that followed from then on, right up until the present time.

Q. In June of 1974 Nabalco was in the course of constructing additional storage of 40,000 tonnes for fuel oil at Gove, was it not? A. Yes.

Q. And that was a storage over and above that which, under the supply agreement of 1970, Nabalco had undertaken to erect? A. Yes. 40

Q. I take it that some time since June of 1974 that storage has been completed? A. Yes.

Q. The additions? A. Yes.

Q. Amongst the deliveries of oil taken from K.N.P.C. has been oil sufficient to fill up that additional storage? A. No.

Q. Well your reserve stock has increased substantially since August 1974, hasn't it? A. By 20,000 tonnes.

Q. You say 20,000? A. Yes, one of the tankers.

Q. Of course, in the claim made by Nabalco for damages the cost, additional cost of that reserve storage has been included, hasn't it? A. I don't understand your question.

Q. Well in your claim—

HIS HONOUR: Q. Mr. Staff is suggesting that you are charging B.P. for the cost of building an additional storage tank, is that so?

10 MR. STAFF: Not building the tank, filling the additional storage tank. In other words, building up the reserve stock beyond that which, under the B.P. contract, there would have been. In other words they are simply giving themselves a greater amount of reserve store, no doubt against contingencies. But under the B.P. Contract B.P. would have been required to deliver.

HIS HONOUR: Yes; I don't quite understand how that reflects in money at the moment.

20 MR. STAFF: One has to do the figures, I suppose. What I am suggesting to Mr. Notter is that beyond the ordinary usage of oil plus the contract, the 1970 contract reserve stock which was provided for, there is now an extra at least 20,000 tonnes of reserve stock.

Q. Do you agree with that, Mr. Notter? A. Not of reserve stock, no. There is at times an additional quantity of up to 20,000 tonnes at any one time at Gove. The reserve stock is not increased by 20,000.

Q. Your reserve stock ordinarily remains something in the order of 20,000 tonnes more than you would have anticipated it to be if you had been receiving supplies under the B.P. supply contract? A. No, the reserve stock, we try to keep at Gove at any one time, and I qualify this as I understand you refer to the reserve stock being the minimum stock, between 15 and 20,000 tonnes.

HIS HONOUR: When you say tonnes you mean metric tonnes?

30 MR. STAFF: Yes your Honour, I was trying to make it plain that it was in metric terms.

Q. (Approaches with document) Would you look at the graph I show you. Did you complete the additional storage for at least 20,000 additional tonnes of storage round about November 1974? A. Yes.

Q. Up to that point of time your maximum storage of fuel oil remained a little under the 60 thousand tonne mark? A. Yes.

Q. Following the completion of the additional storage it shot up to nearly 90,000 tonnes? A. Yes.

40 Q. With some fluctuations, 10,000 tonnes or more, the peak storage has been maintained in that order? A. The peak storage, yes.

Q. I think you were anticipating that in August of 1975 your storage would have then reached just a little under 90,000 tonnes? A. Yes.

Q. Would you not agree that since the additional storage was completed both the maximum and the minimum storages have remained fairly constant at something like 20,000 tonnes above those which occurred before you completed the storage, give or take a few thousand tonnes? A. Yes, I think I said 15,000 to 20,000 tonnes. I understand that to be the reserve. So that at any one time we have a quantity of oil in Gove but reserve I understand to be the minimum quantity.

No. 111
 —
 Plaintiff's
 evidence: E. A.
 Notter: Cross-
 Examination
 (cont'd)

Q. You treat that as the minimum that your figures reach? A. Yes.

Q. But in November 1974 your minimum got down to around about 11,000 tonnes, did it not? A. Yes.

Q. And in August 1975 you were anticipating it would not fall below about 28,000 tonnes? A. That is correct.

Q. I take it that is approximately what happened in August of 1975? A. I can't answer that from here, it depends also on shipping arrangements.

(Graph of oil storage at Gove taken from discovery file of plaintiff headed "Fuel oil usage analysis", tendered. Admitted without objection and marked Ex. 46)

HIS HONOUR: Q. Is what you are saying, Mr. Staff, if the position had remained as before and B.P. had been compelled to supply it would not have had to supply so much? 10

MR. STAFF: Yes your Honour, its obligation we would say under the contract was to supply so as to maintain the minimum reserve and then to supply what was required for usage. What we would submit, your Honour, this graph purports to illustrate is that because Nabalco put in additional storage they sought from Kuwait a greater quantity of fuel oil than would have been required under the B.P. contract. I think the figure is worked out at something like \$1 million, we would submit. It started with the use by Nabalco of 60,000 tonne tankers, whereas previously the figures had been 25,000 to 30,000 tonnes. 20

(Mr. Officer made application and was granted leave to uplift the graph Ex. 46 in order to have photostat copies prepared of same)

MR. STAFF: Q. Mr. Notter, in June of 1974 you made an inquiry as to the amount of diesel and petroleum fuel which you had in store at Gove; do you recall? A. Yes.

Q. And you then discovered that you had sufficient diesel and petroleum fuel to last you until approximately March of 1975? A. That is correct.

Q. So that you had plenty of stock of diesel and motor spirit? A. Yes.

Q. The only thing you were likely to be short of was fuel oil, unless you got the B.P. delivery in June of 1974? A. Yes. 30

Q. Mr. Notter, at or about the time that the Kuwait contract was recommended by you and Mr. Coogan in June of 1974 it was your view, was it not, that there was a very consistent reason for negotiating directly with the Kuwait National Petroleum Company? A. In comparison to others, yes.

Q. And that reason was that any future relationship between the source of oil and Nabalco would not be dependent upon the relationship of an intermediary, that is a major oil company? A. Or a trading company, yes. It was mainly directed towards a trading company.

Q. It was really your view, expressed in your recommendation, that the real advantage of the K.N.P.C. contract lay in the fact that you were dealing with a producer rather than one of the major oil companies? A. Yes. 40

Q. And that was really the value to you because you thought you were less likely to have trouble with supplies if you were dealing with the oil producing country rather than one of the oil companies? A. That is correct, and as I said this morning certain things changed in June which have made that view much more important than it may have been in April or May.

Q. But in June, if you had held that view as far back as April, and through May, did you not? A. No.

Q. You thought back in April that Kaiser, for instance, might not be able to guarantee future supplies if the Middle East situation deteriorated again, didn't you? A. Yes, it would be difficult for a trading company to succeed in another fuel oil crisis as we experienced. 50

Q. By June, at any rate, you had come to the firm conclusion that the real value of contracting with Kuwait National Petroleum Company was that you eliminated the intermediary oil company and went straight to the source of the oil, the point of production? A. No, it was one of the advantages. I also said in general in that note that both B.P. and K.N.P.C. as regarded as safe.

Q. (Approaches with document) I just want to show you a note dated 2nd May 1974. Is that a copy of a note that you wrote? A. Yes, I dictated it.

Q. And it was typed out? A. And signed by my secretary.

10 Q. It reflected the views which you had formed, certain matters or things you had been told and the recommendation in effect that you were making as to what should be done for the time being? A. Yes, trying to find more information.

Q. In effect you were saying, amongst other things, that you should proceed in accordance with Mr. Lockhart's advice that B.P. on the subject of a new contract strictly and without prejudice and that you or till action under this contract should not have any effect on the legal situation of the current contract? A. Yes, maintain dual action by finding more information, which we could not get.

*Q. You were in effect seeking to pursue or preserve the old contract situation and whatever rights you had under it? A. Yes.

20 Q. And at the same time to explore the possibility of making a new contract with B.P.? A. Yes.

Q. And you tended also to pursue the possibility of getting oil somewhere else? A. To determine the availability of oil and prices which at that time we could not get because we have not received the reply to our letter of 4th April.

Q. Was it your understanding and intention that you should pursue all these courses without affecting your legal situation?

HIS HONOUR: That you should or could?

MR. STAFF: That you could.

30 WITNESS: I considered it my duty to find out as much information as I could on the availability of oil, and also the position in the Middle East.

Q. You considered it was your duty to find out such information as you could on the availability of oil and you attempted to preserve your rights under the old contract and you made general inquiries about the availability of oil and prices concurrently with the without prejudice situation under the current contract? A. Yes, at that time.

Q. And that is what you set out to do on Nabalco's behalf through May and June, wasn't it? On 2nd May, which was before the letter of 7th May at which time I had a man's agreement with Mr. Lockrey that certain things may happen.

40 Q. But what you set out to do after 2nd May was to pursue those three courses in the expectation that you should do it without affecting your rights under the old supply contract, wasn't it? A. Yes, to get the information.

HIS HONOUR: Mr. Staff, you used the expression in one of the earlier of that series of questions "Pursue the old contract situation". I think I am correct in that.

MR. STAFF: I thought I said preserve the old contract situation, your Honour.

HIS HONOUR: I do not quite understand what you meant by "The old contract situation". I do not know whether it related to the old contract situation because the notice was invalid or more to keeping the contract on foot.

MR. STAFF: Perhaps if I might ask the witness some questions I might be able to clear it up.

HIS HONOUR: I am not sure, perhaps it would be best to clear it up.

MR. STAFF: Q. The note to which I referred you to, Mr. Notter, was dated 2nd May? A. Yes.

Q. In the questions I asked you what I intended to convey to you was that at that date, 2nd May, you were of the view as a result of Mr. Lockhart's advice that Nabalco could proceed with the matter of negotiation of a new contract whilst preserving their rights under the old contract, whatever they might be: and that you would also pursue your inquiries about availability of oil and prices elsewhere. Is that what you understood me to be putting? A. Yes. 10

Q. Then I intended to put to you what you were intending to do for Nabalco in the immediate future after 2nd May was to pursue that very course, namely, to endeavour to preserve your rights under the old contract but pursue side by side the negotiations for a new contract and as well to make inquiries about availability of oil and prices elsewhere? A. Yes.

Q. And that was what you understood me to be putting to you earlier, was it? A. Yes, and that was also the situation as to what was said by Mr. Lockrey on 26th April, namely, they were prepared to discuss a new agreement; they understand if the notice is subsequently declared invalid supplies will continue. And thirdly, they would not reply to our letters on price, hence I had to go and find out more information on the availability of oil and prices somewhere else in the world. 20

HIS HONOUR: Q. When you talk about the rights under the old contract or preserving rights under the old contract, you mean not only breach of — I am talking to Mr. Staff in this discussion — you are talking about not only a right supposed to exist because of receiving an invalid notice but a consequential right for delivery of fuel oil at the old price.

MR. STAFF: What I was putting, your Honour, was seeking to preserve the rights under the contract, whatever they were, without specifying what they were and without, indeed anything else. 30

HIS HONOUR: This is where it gets very difficult for me in dealing with a lay witness. One thinks of the counter-note or notice given by the plaintiff. One thinks of keeping the contract on foot. One thinks of acts of repudiation.

MR. STAFF: That is why I put it in the neutral way.

HIS HONOUR: I am not sure the witness appreciates the significance of all those things.

MR. STAFF: Perhaps I might ask this question.

HIS HONOUR: It may not be important that he should. But eventually I suppose it may be a matter for legal argument.

MR. STAFF: Perhaps I can ask one more question; I do not want to take too much time with it. 40

Q. Mr. Notter, at 2nd May 1974 you did not know with any degree of certainty what Nabalco's rights were in the situation that was then existing, did you, as a matter of law? A. No, but we had legal advice.

Q. You had some legal advice that you had a number of — there were a number of things you could do and a number of things you could say, I suppose? A. Yes.

Q. What you wanted to do at that point of time for Nabalco was to preserve whatever rights it might have of any nature arising out of the old supply contract? A. I understand in that case legal rights, yes.

Q. Supply of oil? A. No, the legal right to have the notice decided.

Q. The legal right to have the notice decided in court? A. The validity of the notice decided in court.

10 Q. You were not thinking about anything on the validity of the notice being tested in court at that stage; is that what you were saying? A. I was thinking about preserving the right to have the validity of the notice tested in court.

Q. Were you thinking about preserving any other legal right? A. I think that sums up the legal right, when you go to court and ask a court to determine as to whether the action of either party was right or wrong.

MR. STAFF: I call for the note of 2nd May.

MR. OFFICER: It is produced, your Honour.

(Note of Mr. Notter of 2nd May 1974 tendered. Admitted without objection and marked Ex. 47)

20 (Letter from Nabalco to Kuwait National Petroleum Company dated 12th December, 1974, tendered. Admitted without objection and marked Ex. 48)

MR. STAFF: Q. Mr. Notter, I think since the Concord Shipping Company has been carrying oil, or its ships have been carrying oil to Gove, you or others connected with the shipping away from Gove of alumina and bauxite have provided return cargoes to that company, with alumina at any rate, have you not? A. No we have not, but may I—

Q. Mr. Notter, some of the vessels which have delivered oil supplies to Nabalco have on their return journey taken alumina from Gove, have they not? A. Yes, but not under arrangement with Nabalco.

30 Q. What, with Swiss Alumina? A. Either Swiss Alumina or Gove Alumina.

Q. One or other of the participants? A. The vessels discharge their cargo, became free, were open on the market and were subsequently or even prior to that chartered by one of the participants for the carriage of cargo.

Q. That arrangement was one which was envisaged at the time you sought to enter into the Concord agreement of affreightment by you? A. It is fair to say I thought of that possibility, yes.

Q. May I take it that that was a matter which was discussed in the negotiation of the Concord agreement with the Concord company? A. I did not attend discussions with the Concord company.

40 Q. But did you give any instructions about those negotiations? A. I would have given an instruction by way of a suggestion to explore the possibility.

Q. I think you have heard Mr. Wilson carried out those negotiations? A. Yes.

Q. Did you give him an instruction about such a matter? A. An instruction or suggestion, yes, to explore the possibility.

Q. But you don't know whether there was any exploration of that possibility when the contract was negotiated by Mr. Wilson? A. Not specifically but I would assume it was raised.

Q. Of course, if a carrier knew that he would have return cargoes, those cargoes available for carriage from Gove on his way back after delivery of the oil? A. Yes.

50

Q. He would be much more likely to give you a reduced rate for the forward journey, wouldn't he? A. Yes, or you could say you could find him more interested to come from the Persian Gulf to Northern Australia, which is not a very well-frequented route.

Q. Indeed, unless he was going to get some alumina to carry, or bauxite, he has got no prospect of getting much else at Gove? A. No, there would not be much else, but it also depends on the ship he uses.

Q. Yes, but if it is right, if he quoted you a rate for delivery of oil with a firm promise of at least some return cargoes, you would be much more likely to get a cheaper rate for the forward journey, wouldn't you? A. One would assume so, yes. 10

Q. Of course, if he is getting a high rate for his forward journey carrying oil he is much more likely to offer a lower rate for the return cargo loading, isn't he? A. Possibly, I could not say, I have no knowledge of this.

Q. Come now Mr. Notter, you are the Administration Manager of this whole project aren't you? A. Yes, but I don't administer or conclude shipping arrangements for bauxite and alumina from Gove.

Q. But the management agreement provides that the manager shall co-ordinate shipping schedules and arrange deliveries of bauxite and/or alumina in accordance with s.6 of the Joint Venture Agreement, doesn't it? A. That is correct. He does not arrange shipping outside products. 20

Q. And to arrange deliveries? A. Delivery to the ship.

HIS HONOUR: Q. Is there any difficulty about a ship carrying oil subsequently carrying alumina? A. It has to be a special ship which in the shipping term is referred to as an obo. It is a shipping term in which the ship referred to is an oil bulk carrier. It has separate compartments. It can carry in some compartments oil, referred to in our case as dirty products, meaning crude or residue furnace oil which is very dirty and these compartments are cleaned out — there is machinery on board to clean these compartments, no hatches on top so that bulk cargoes can be loaded in it, wheat, bauxite or alumina. There are not that many obo vessels currently in Australia — in the world and in our case the majority of oil shipments being made are made by what is on the market referred to as dirty tankers, that is tankers who carry nothing else than dirty products and not equipped to take dual cargoes. 30

Q. Has this been the case with deliveries from Kuwait? A. With the exception of four ships, that is right. They were oboes of small tonnage and the other ships were what is commonly referred to as dirty product tankers which could not be used within today's economic means of shipping, to load bulk cargoes, to have no hatches, to have pipelines to receive and pipelines to pump out.

MR. STAFF: The Mikton was a vessel which on a number of occasions carried full cargoes of alumina? A. On two occasions to my knowledge. 40

Q. Do you say that is the only vessel which carried alumina from Gove? A. I said there were four.

Q. What were the other ones? A. Four vessels were obo vessels and the first two shipments came in the ship Nia Gino, Italian, that was an obo ship which made two voyages. I am not aware whether alumina was loaded because I was overseas. I know the Mikton made two deliveries. She is a very small tanker and has taken back alumina from Gove on a separate arrangement.

HIS HONOUR: I suppose not to the Persian Gulf? A. No, to the best of my recollection she went to America.

MR. STAFF: Q. So that the first three shipments to Gove were in vessels capable of taking back alumina? A. Yes.

Q. And the ninth delivery was in such a vessel? A. Yes, the first three vessels because the storage capacity was not big enough to receive ships of the larger size envisaged under the Concord contract.

Q. You knew when you entered into the Concord contract, that would be the case? A. We knew there would have to be two or three deliveries of smaller parcels before the storage capacity, which was commissioned in January 1974 would be completed in November 1974.

10 Q. Of course you agreed to pay a penalty over the basic charter rate, the freight rate, for these smaller vessels? A. Yes.

Q. I put it to you you held out the inducement that you would provide back cargo for a cheaper rate through the participant? A. Held out?

HIS HONOUR: It would not be back cargo.

MR. STAFF: Return cargo.

HIS HONOUR: It would go somewhere else, I would have thought. I should not think there was a great demand for alumina in the Persian Gulf.

20 MR. STAFF: No. The ship no doubt came around the Cape, picked up the oil at the Persian Gulf and went back around the Cape no doubt to Europe in that sense.

WITNESS: I think both the Mikton shipments to the best of my recollection went to America.

MR. STAFF: . Through the Panama Canal? A. Yes.

Q. You do not know the arrangements under which these shipments of alumina were provided for the vessels which brought oil to Gove? A. I did not know these arrangements and I knew of no arrangements for ships taking alumina or bauxite from Gove.

30 Q. You did not know in the negotiations of the contract whether any arrangements were made or any promise held out, about shipments of alumina which could be taken from Gove by vessels unloading oil? A. I am not aware of promises but I would expect in today's age that one would try to explore those possibilities.

Q. The first supply of oil for Gove from Kuwait was loaded or commenced loading on 26th July, did it not? A. I cannot recall the exact date.

Q. About that? A. Yes, I was not here. I might explain I left Australia on 16th June and I returned on 7th September. I went to a management school overseas. Maybe that assists.

40 Q. I suppose you would agree that a voyage of a 30,000-ton tanker or thereabouts ordinarily from the Persian Gulf to Gove, would expect to take about a fortnight? A. About sixteen days, yes.

RE-EXAMINATION:

MR. OFFICER: Q. You were asked questions about the relative importance to you in recommending the Kuwait contract of the fact that Kuwait was a producer. Do you recall? A. Yes.

No. 111
 Plaintiff's
 evidence: E. A.
 Notter:
 Re-examination
 (cont'd)

Q. Can you tell the Court what were the factors that led you to recommend the Kuwait contract and in what order of importance you viewed them? A. First during May and during the early part of June it became apparent from the press that the producer countries were taking over ownership of the major oil companies' concessions in the Middle East and in fact the point which I think Mr. Lockrey pointed out to me on 14th June in the telephone conversation . . .

Q. When he mentioned Aranco? A. Yes, and also the fact he mentioned near 17th May that B.P. not then knew because of this participation agreement the Kuwait price of crude oil they had received and currently receiving and hence that was a development which occurred in May and also one of the factors I discovered when I was in South Arabia with Ian Haig. 10

Q. That viewed as a whole is one factor in recommending Kuwait? A. Yes.

Q. It was a producer rather than a person, either a dealer or subject to variations in their participating rights? A. Yes.

Q. What were the other factors which led you to recommend the adoption of the Kuwait contract? A. The other factor which led us to the Kuwait contract — (Mr. Staff objected to the use of the word "us").

Q. Keep it to what were the factors which led you to recommend to the authorities who had to decide on the Kuwait contract? A. It was a fact that Kuwait appeared as a reliable alternative which enabled Nabalco to pursue its right to take legal action under the notice of the contract. 20

Q. Were there any other factors that influenced you in recommending Kuwait? A. Price. It was the base price cheaper than \$52.50 from B.P.

Q. So you now mention three factors, were there any others that influenced you? A. Yes, they were prepared to issue a letter in which . . .

Q. Would you keep your voice up? A. I am sorry, I had negotiated with K.N.P.C. that they would issue to Nabalco a letter of awareness under which they would limit the Vanadium content of oil to be delivered below the 100 ppm specified in the contract. On my recollection they reduced the vanadium content under the letter of awareness from fifty-two to eighty ppm. 30

Q. What was that? A. From 50 to 80 ppm.

Q. As far as you are aware has that been observed? A. Yes.

Q. Now were there any other factors, you now mention four? A. No.

Q. Of those four which we might loosely describe as producer country, secondly as an alternative supplier to enable you to pursue your legal action? A. Yes.

Q. Thirdly the price, the base price and fourth, the assurance on vanadium? A. Yes.

Q. Of those four can you rank them in order of importance to you in the recommendation you made? A. No.1 the right to take legal action under the notice, No.2 to deal with a producer or national oil company of a producer government, No.3 the vanadium and No.4 the price. 40

Q. In relation to the tanks that were put in you said while my friend was questioning you, they were commissioned in January and brought into use in November? A. Yes, 1974.

Q. When you say they were commissioned, do you mean physically commissioned or commissioned in the sense of a contract being placed for their construction? A. The erection of the tanks was approved by the Gove Joint Venture participants on or about January 1974 following the situation we experienced in the Middle East, the fuel oil crisis. 50

Q. Was the construction of these extra tanks a matter which someone in Nabalco thought of or a course recommended to Nabalco or the Board of Direction — (Objected to).

(At Mr. Officer's request the witness left the Court while counsel argued the admissibility of the above question. His Honour allowed the question subject to objection. The question was read.)

(Mr. Notter returned to the witness-box.)

MR. OFFICER: May the question be read?

HIS HONOUR: Yes.

(Previous question read)

MR. OFFICER: Q. By someone other than Nabalco? A. To the best of my recollection it was recommended by the participants, the Gove Joint Venture participants.

10 Q. Was it discussed with B.P. — (Objected to).

Q. Did you discuss with B.P. the proposal that the extra storage tanks should be put in, that is you yourself? A. Yes.

Q. With whom on the part of B.P. did you discuss it? A. I recall discussing it with Mr. Peter Shaw and possibly also with at the same time in the meeting, Mr. Snape.

Q. When was that discussion, do you know? A. During October and January there were a number of discussions, close discussions with B.P.

20 Q. October 1973 and January 1974? A. Yes, during that period regarding or as a result of the oil prices in the Middle East. We explored a number of possibilities like chartering a tanker and mooring it at Gove and trying to have more storage at Gove.

Q. Do not answer this question if objection is taken to it. What was the attitude of B.P. to the suggestion that further storage facilities should be put in — (Objected to in form).

Q. You raised the suggestion with B.P. in these discussions with Mr. Snape? A. And Mr. Shaw.

Q. What did you say to them and what did they say to you? A. I recall saying that assuming we build two additional tanks as fast as we can, could you fill those tanks over and above or in addition to your normal deliveries of oil to Gove.

30 Q. What did they say? A. I then offered at that time that we would want to keep those tanks as security stock and recognising the difficult situation we would be prepared to negotiate with them prices outside the contract. One of the gentlemen from B.P., either Mr. Shaw or Mr. Snape replied that at the present time — that was the end of 1973 or early 1974, January 1974, they would use their best endeavours to fill such tanks but they could not see at the present time the additional capacity required to fill those tanks, as and when they were constructed.

40 Q. Did you have any further discussions with anyone from B.P. on the question of filling the tanks before you commenced the construction of them? A. There could have been other general discussions but none of importance that I can recall. We just set out to build the tanks.

Q. After you had commenced to build the tanks did you have any discussions with B.P. with regard to the filling of them? A. Yes.

Q. Can you fix the approximate time? A. Yes, I can tell you the date. It was during my negotiations with Mr. Snape and Mr. Cochrane on 31st May in which time I asked as part of the contract that we would be allowed to purchase over and above the contract quantity, a parcel of approximately 40,000 tons on the open market or on the spot market as and when available so that the tanks could be filled in case B.P. would not have the capacity to fill them.

HIS HONOUR: Q. When you say "as part of the contract" do you mean as

No. 111
 —
 Plaintiff's
 evidence: E. A.
 Notter:
 Re-examination
 (cont'd)

part of the new contract? A. As part of the new contract. The new contract provided for the possibility of us buying 40,000 tons from anyone so we might fill those two tanks.

MR. OFFICER: Q. Does the existence of the extra capacity affect the frequency with which ships deliver fuel oil to Gove? A. Yes. There are less ships, bigger ships but fewer shipments.

Q. What is the practice in Nabalco's office in Sydney on the receipt of a telex? A. It gets taken off the telex machines at approximately 7 a.m. by our officer who is the man who looks after the office.

Telexes are split into three — into four groups. One lot of telex are addressed to Swiss Aluminium Australia, the others are addressed to the Chairman, Sir David Griffin, and others addressed confidentially to the general manager. 10

Q. I am asking you with regard to telexes addressed to Nabalco? A. It would go into the circulation file and a copy to the person to whom it is marked for attention.

Q. At what time does it receive the date stamp? A. At about 7.30 in the morning or thereabouts.

Q. Do any of your telexes come in during the day? A. Yes, the overseas ones come in during the night.

MR. OFFICER: (approached) Q. You were shown this morning by Mr. Staff this telex of the 16th May from Dr. Sorato to Nabalco, attention Messrs. Coogan, Powell? A. Yes. 20

Q. You see the telex is dated 16th May? A. Yes.

Q. And has on it a rubber stamp "Received 17th May, 1974"? A. Yes.

Q. I take it from what you have just said a few moments ago that that is an indication that the telex came in overnight and at somewhere about 7.30 a.m. on the 17th it would receive the date stamp? A. Yes.

Q. You were asked some questions today by my learned friend to the effect that the question of damages was only thought of after the proceedings were instituted? 30

HIS HONOUR: I don't recall it being put in that way.

MR. OFFICER: It was not put quite that way. I withdraw the suggestion I made in the earlier question.

Q. It was put that until after the proceedings were instituted there was no intention of claiming that there had been any repudiation on the part of B.P.? (objected to as not being what Mr. Staff put)

Q. Mr. Notter, would you look at this copy letter please (shown). Do you recall receiving such a letter from Messrs. Dudley Westgarth & Co.? A. Yes.

(Copy letter from Dudley Westgarth & Co. tendered without objection and marked Ex. X) 40

Q. (approached) This morning, do you recall — if you would look through that document (shown) — (Objected to: objection withdrawn)

Q. Would you look at that Mr. Notter (shown Ex. S), do you recall — A. May I just finish reading it please; I am not a fast reader. I have read it.

Q. You will recall this morning that my learned friend put to you that the matters set out there were matters which had been raised and spoken, I think, by Mr. Lockrey at the meeting? A. Yes, he did.

Q. On the 17th May? A. He did, yes.

Q. Were the matters said at the meeting additional to the matters covered by the topics referred to on that bit of paper? (Objected to: rejected) 50

(Mr. Notter left the court at 3.45 p.m. while the objection was discussed in relation to what evidence had been given in cross-examination in relation to what appears on Ex. S: last question read out: his Honour referred to p.135 of the transcript at the end of the top paragraph: question withdrawn at this stage and the matter can be raised in the morning if necessary after the transcript is available.)

(Mr. Notter returned to court at 3.55 p.m.)

10 Q. Mr. Notter, in chief, when you were giving your evidence, you recall saying that Mr. Coogan said, "However, Mr. Lockrey what would be the situation if our board decides that they cannot discard the old contract and want to press on with legal action on the validity of your notice." "Mr. Rowland replied and he said, 'Then Mr. Coogan, there can be no new contract; in fact, no — "you remember the word "new" appears for the second time? A. Yes.

Q. "— no new contract at all because we regard the old contract as at an end."?
 A. Yes.

Q. While you were being questioned by my learned friend this morning I think you said that those words spoken by Mr. Rowland were words which as distinct words you recall having been said? (Objected to: allowed)

20 Q. Is there anything that you recall especially that assists you in saying that those were the very words? A. Only the fact that those words came so unexpected that somehow they appear to have imprinted themselves in my memory.

Q. Were they said in any manner other than that in which the general conversation had continued? A. They were said in a very straight direct manner which left no doubt as to what was said was also meant.

Q. (bottom of p.166, top of p.167) You were asked some questions as to the impression you received on 17th May relative to B.P. not maintaining a supply of fuel oil to Gove, letting Gove run out of oil. Do you remember that? A. Yes.

30 Q. Perhaps I should read you the two questions which raised the matter. You were asked, "Q. During the course of discussions on the 17th, it was your view, wasn't it, that there was little or no risk that B.P. would stop oil supplies to Gove in a situation which would result in the Gove operation closing down because of the massive liability for damages that could arise if that happened? A. It was no longer my view. Q. That was no longer your view. You say you had had the view on the 17th May during the discussion you were having with B.P. that they were quite prepared to let supplies of oil run out as it were and see Gove cease to be operative, no matter the risks of liability and damages? A. I came to form that opinion on the 17th May, yes." What was it on the 17th May that led you to hold the opinion which I have just read to you from your evidence? (Objected to: allowed) A. As I
 40 said I was shocked at that meeting about the ultimatum that we can have a contract if we agree not to take legal action and if you don't take — and if we do not agree to this condition then there shall only be supplies on a spot basis and my understanding of on the spot basis, and I have purchased many cargoes at spot, other than oil, lead me to believe that we could run out of oil.

Q. (Approached) You were asked some questions with regard to a Telex which you sent to Mr. Coogan dated 26th April? A. Yes.

Q. You recall you were asked some questions as to whether what was set out in that Telex was the attitude which you derived from the discussion you had had on the 26th April, the same day as the Telex? A. Yes.

Q. Do you recall those questions? A. Yes.

50 Q. You said that what was set out was not derived solely from the 26th April discussion? A. Yes.

Q. What are the portions of that Telex which were not derived by you solely from the 26th but from earlier discussions? A. The point which says that B.P. will not terminate the furnace oil supply to Nabalco.

Q. That is — A. This section here.

No. 111
 —
 Plaintiff's
 evidence: E. A.
 Notter:
 Re-examination
 (cont'd)

Q. I'm sorry. A. Here, "B.P. confirmed—
 Q. That is the second last paragraph? A. Yes.
 Q. Commencing on the first line, "B.P. confirmed" and down to line 4 finishing
 with the word "Nabalco"? A. Yes.
 Q. Is there any other portion? A. And also the second paragraph here.
 Q. The second paragraph of this (Objected to as not being in answer to
 question)

(Witness stood down)

(Further hearing adjourned to 10 a.m. on Wednesday, 26th November, 1975.)

SEVENTH DAY: WEDNESDAY, 26TH NOVEMBER, 1975

10

No. 111
 —
 Plaintiff's
 evidence: E. A.
 Notter:
 Re-examination
 (cont'd)

EDWARD ALBERT NOTTER
On former oath:

RE-EXAMINATION CONT'D:

MR. OFFICER: Q. There were two matters as to which I had to look at the transcript: one was the contents of Ex.S that were put to the witness. I have looked at the transcript and I do not need to ask any questions about that, having studied the transcript. The other one was the question put to the witness about the telex of 26th April and that appears in the transcript at p.161.

Q. (Approached) I show you a telex dated 26th April. You were asked some questions about that at p.161 by my learned friend Mr. Staff. You were referred to portions of the first paragraph on that page of the telex and the second paragraph on that page, and it was put to you that what you said in those first two paragraphs of that page of the telex had been told to you by B.P. and you answered "No". You were then asked, "What do you say in the matter I have read to you that you wrote in the telex was not based on your summary of the conversation you had with Mr. Lockrey on 26th April?" and your answer was, "Yes, on 26th April Mr. Lockrey did not say, or said words that legal action can continue on the validity of the notice. He said that should the notice be subsequently be declared invalid, then supplies would continue under the old contract. I previously had discussions with Mr. Lockrey during which we discussed —" and then my learned friend cut in on your answer and said, "I don't want to ask you about what you discussed previously with him, I asked you to identify that part of what you said in the telex which had been told to you by B.P. which had come from a conversation you had with Mr. Lockrey on 26th April. Can you do that? A. Yes. As I said, the question of dealing with legal action in the notice, that was not discussed."

20

30

Now, looking at the first two paragraphs on the page that is before you, is the portion referring to legal determination of the old contract in the second paragraph the only portion of the first two paragraphs on that page that had not been conveyed to you on the 26th but at some earlier time? (Witness reads document) Perhaps I should withdraw that question and ask you in a slightly different fashion what portions, if any, of the first and second paragraphs were observations not made to you by Mr. Lockrey on the 26th? (Objected to as having already been asked and answered in cross-examination).

40

Q. You referred yesterday to some conversations you had had with regard to the extra tanks? A. Yes.

Q. With some people from B.P.? A. Yes.

Q. I think you want to correct something as to one of the names you gave as the people with whom you had the discussions? A. Yes, I have made an error. I got two names mixed up. I said that this early conversation in late 1973 early — meaning January, about January 1974, were with Mr. Peter Shaw and Mr. Snape. I am sorry, but I meant Mr. Lockrey. Mr. Lockrey was the likely other person I remember who attended some of those discussions. Mr. Snape was not there at that time.

10 Q. So it should be, is this correct, Shaw and Lockrey? A. And on some instances Mr. Lockrey, but not Mr. Snape; I am sorry.

(Portion of telex dated 26th April which is numbered 2 under the note “reply by B.P.” tendered without objection and marked Ex. Y.)

MR STAFF: Q. (By leave) (Approached) Would you look at the three copy telexes which I show you and tell me whether they are copies of telexes which passed between you and Mr. Peter Shaw in relation to the storage tank matter? A. These are telexes exchanged between myself and Mr. Shaw.

Q. At a time just subsequently to the decision by the board of direction to install the extra tanks? A. Yes.

(Above telexes tendered without objection and marked Ex. 49)

20 (Letter of awareness referred to in Mr. Notter’s evidence yesterday called for: will be made available.)

(Witness retired & excused subject to recall.)

DOUGLAS FAIRHURST WILSON

Sworn and examined:

MR OFFICER: Q. Your full name is Douglas Fairhurst Wilson, you live at 11 Pembroke Place, Belrose? A. That is correct.

Q. You are presently employed by a company called Patrick Operations Pty Limited? A. That is correct.

30 Q. Which is a subsidiary of James Patrick & Company? A. Correct.

Q. A stevedoring and shipping concern? A. That is correct.

Q. You are manager, ship management? A. Correct.

Q. For ten years you were a sea-going officer? A. Yes.

Q. You are qualified as a master mariner? A. I am.

Q. Then for 13 years you were in various administrative positions in the operation and management of ships? A. That is correct.

Q. Including a wide range of chartering activities? A. Correct.

Q. You were then, for a time, general manager of Australia Territory Liner Services? A. That is so.

40 Q. Is that the operating shipping company owned concern known as Nabalco Shipping Pty Limited? A. It was at that time, yes.

Q. In that capacity were you responsible, for example, for the shipment of certain supplies to Gove? A. I was.

Q. Such as? A. Oh, the general materials and goods that are necessary to keep the plant operating and to sustain the population in the township.

Q. Would it be right to say excluding the fuel oil and petroleum? A. That is correct.

Q. That all the other products used are brought in by ship? A. Yes.

No. 111
—
Plaintiff's
evidence: E. A.
Notter:
Re-examination
(cont'd)

No. 111
—
Plaintiff's
evidence: D. F.
Wilson:
Examination
(cont'd)

No. 111
 —
 Plaintiff's
 evidence: D. F.
 Wilson:
 Examination
 (cont'd)

Q. And by shipping organised by Australian Territory Liner Services? A. Only for goods from Australian sources.

Q. Yes. A. Yes.

Q. Around April-May 1974, had you heard something with regard to the fuel oil supply contract between Nabalco and B.P.? A. Yes, at that time I was aware that Nabalco was—

Q. I am sorry, you had heard something with regard to the fuel oil supply contract between B.P. and Nabalco? A. Yes.

Q. As a result of that did you make some inquiries? A. I did.

Q. To whom did you direct those inquiries? A. To Stolt Neilsen Australia. 10

Q. What is Stolt Neilsen, what line of business? A. Stolt Neilsen is a Norwegian company involved in operating tank ships and also involved in brokerage. My particular interest was in directing my inquiries to their brokerage activities where they have an office in Australia for conducting that sort of business.

Q. At this time did you also arrange to be provided with certain market reports? A. I did.

Q. What was the nature of those reports? A. Well, these were tanker market reports which were reports circulated throughout the shipping brokerage world advising brokers of tanker fixture business that has been concluded, also cargoes available for shipment or ships available for cargoes. It gives a fair indication of the situation in the tanker market. 20

Q. Do those reports include any freight levels? A. They do, they generally report the level of freight that each particular item of business is concluded.

Q. Are long term contracts for the affreightment of fuel oil common? (Objected to.)

Q. In the tanker reports which you arranged to be supplied with, they are periodical are they? A. Yes, they are.

Q. How frequently do they come out? A. Daily.

Q. Do you recall when you arranged to be supplied with these reports? A. Yes, I believe it was during the first week in June that I started receiving them, either the last week in May or the first week in June. I initiated the inquiry obviously towards the end of May. 30

Q. You continued to receive them up to what point in time? A. Up to the time that we concluded the pro forma agreement with Concord.

Q. Can you fix that precisely, or with any approximation? A. That would have been about the 12th June.

Q. Had you, prior to looking at those reports, had any experience in the chartering or arranging for the conveyance of fuel oil? A. I had not.

Q. Did those reports contain particulars of various types of arrangements — (Objected to). 40

(During discussion on the objection his Honour asked whether the reports were available and the witness replied as follows —)

WITNESS: I believe that some of them are, yes, your Honour, I believe that some of them are.

MR OFFICER: Q. Are available? A. Are available, yes, I believe so.

HIS HONOUR: Q. Only some, not all? A. That is correct. An approach could be made—

(Question originally objected to withdrawn for the time being.)

MR OFFICER: Q. Mr. Wilson, when you commenced the inquiry of Stolt

Neilsen and when you arranged to be supplied with the tanker reports, had you been instructed to do anything by way of making such inquiries? A. I had not.

Q. Were you at some time so instructed? A. Subsequently, yes.

Q. Can you fix the approximate time when you were so instructed? A. The instruction would have been towards the end of the first week in June.

Q. Did you then do something with regard to further inquiries? A. The instruction that I referred to earlier embraced the possibility or otherwise of shipping arrangements from the Persian Gulf to Gove. It embraced considering contract arrangements to effect the movement of certain quantities of oil. On the basis of that instruction I initiated inquiries through the broker—

Q. The same broker, Stolt Neilsen? A. Yes, the same broker. — to invite suitable owner companies to indicate the interest in a possible contract of affreightment.

Q. After you had made your, I will style it formal inquiry from Stolt Neilsen, did some companies respond to the inquiry? A. They did.

Q. Can you name them? A. There was Halcoussis, Niarchos, Maersk Line and one other company whose names escapes me at the moment.

Q. Coch Oil? A. Coch Oil, that is correct.

Q. Do you recall the freight rates which they indicated as those on which they would do business? A. Three of them, excluding Maersk, the other three indicated a level between world scale 195 and world scale 200, in the area of 200.

Q. And Maersk? A. Maersk indicated interest on a time charter basis which could not be considered by Nabalco because Nabalco was seeking a specific type of contract. (Objected to.)

Q. Then after those responses had come in, did you receive a response from Concord? A. I did.

Q. I want to ask you this, Mr. Wilson, you knew the broad nature of Nabalco's business? A. Yes.

Q. Correct me if I am wrong, but by this time you were aware of a possibility of Nabalco entering into a long term contract for fuel? A. Correct.

Q. On terms that would require Nabalco to arrange for the transport of the fuel from the Persian Gulf? A. That is correct.

Q. With your experience of chartering generally, would it have been prudent for Nabalco not to have entered into a long term affreightment contract, but to have sought charters from time to time? (Objected to: allowed: question read out)

A. This would have been a very hazardous course for Nabalco to consider charters from time to time because in analysing the problem that existed the key factor was the logistics of the problem, not so much the transportation of oil which is fairly well established in the manner in which oil is transported, but in Gove there was a situation where there was a fixed tank capacity, a known consumption, a fairly long distance from the source of supply. The critical nature of the oil made it essential that certain levels be maintained. The arrival date of ships at Gove with certain quantities of cargo, correct quantities of cargo was critical because of the nature of the fixed storage and because the arrival date was critical, the loading date was critical. The transit time from the Persian Gulf to Gove is between 16 to 19 days which represents 16 to 19,000 tonnes of oil storage allocation. Under a normal charter party a ship owner seeks lay cancelling days of approximately three weeks which would have represented a span of consumption of 21,000 tonnes. We were successful in reducing that under the Concord transport to 14 days, but you can see that of the storage capacity on a logistics basis a quantity of approximately 33,000 tonnes is allocated against known factors, the transit time on and the lay cancelling period under the contract. The tolerance for ships not arriving when required with the right quantity of oil is very very limited in this arrangement. This was not so much a contract for shipment of oil by accepted commercial practices, but a special

No. 111
 —
 Plaintiff's
 evidence: D. F.
 Wilson:
 Examination
 (cont'd)

contract providing a machinery for ensuring that ships were in a position to load and in a position to discharge the right quantity of oil at the right time.

Q. You are familiar with what are called consecutive voyage charters? A. Yes, I am.

Q. What is the essential nature of such an arrangement? A. Well, the essential nature is that generally the same vessel is utilised in a round trip cycle from supply source to consumption point. It is dependent on the quantity per annum that is to be shipped or over whatever period of time the shipment takes place. The ship size is geared to delivering in even quantities over that particular period. The distance between source and consumption point has to align with the size of the ship and the consumption level. It is a continuous supply geared to consumption level, a ship geared to the consumption level in conjunction with the distance and round trip time taken. 10

Q. Would you now compare, for the purposes of the Gove requirements, a long term affreightment contract with a consecutive voyage charter? (Objected to: question withdrawn for the moment.)

Q. Assume that Gove requires the delivery from the Persian Gulf of a critical substance — I do not say oil or anything else at the moment — a critical substance, its requirements in quantity vary somewhat from month to month, or may vary, and I ask you on those assumptions to compare, if there is such a word, the prudence — to what extent is it prudent for Nabalco to seek an affreightment contract rather than a consecutive voyage charter for the movement of those critical goods? A. The — (Objected to on the ground that this witness is not qualified to deal with that: allowed). 20

Q. Do you recall the question? A. I recall it, it was the prudence of considering consecutive voyage charters—

Q. Yes. A. Consecutive voyage charters technically workable, logistically workable, if the level of consumption remains static and at the same level. The risk that would arise from considering consecutive voyage charters if Nabalco were to commit for a number of successive consecutive voyage charters was that there could have been, under certain circumstances, a reduction in the consumption of oil at Gove and Nabalco would then be committed to its succession of consecutive charters if that were the arrangement entered into. That was obviously undesirable. The contract which was negotiated provides logistic machinery to call upon ships when required to facilitate the total movement and as these come up therefore flexibility to absorb fluctuations in consumption levels at Gove. 30

HIS HONOUR: Q. Was that the only reason why you preferred the present contract rather than the consecutive voyage charter? A. Well, not entirely. My instructions were, of course, to secure a pro forma contract which aligned with the supply contract. I do not believe that Nabalco would have entered into a supply contract without the knowledge that there was a known method of shipment over the supply of that contract. 40

MR OFFICER: Q. You have given the rates at which the first three or four responders to the inquiry were prepared to commence negotiation. What was the rate which Concord first indicated? A. Concord came in with an interest at — (Objected to in this form)

Q. Would you look at that copy telex, Mr. Wilson? (Shown)

Q. After the approach by Concord did you have certain negotiations with Concord, ultimately oral negotiations? A. I did.

Q. Did you have those oral negotiations, you being in Australia, or did you go overseas? A. My communications with Concord in Australia were through the 50

brokers Stolt, Nielsen and my direct communications with Concord were following my arrival in London.

Q. I show you Ex. J, will you have a glance through that document? A. Yes.

Q. I want to ask you whether that document is in the form which was negotiated by you? A. This appears to be in the form of the contract I negotiated with Concord.

Q. At any time before the date of execution that that contract bears, were you informed by any one in Nabalco that there was a possibility of backloading from Gove? A. Not according to my recollection.

10 Q. Did you ever in the negotiations suggest to Concord there might be such a possibility? A. I did not, nor could I because it was outside the scope of my authority to do so.

Q. So far as you recall did Concord ask you whether there was such a possibility? A. Not according to my recollection.

Q. After the contract was executed you, may I call it, went back to your normal duties as the general manager of Australian Territory Liner Services? A. I did.

20 Q. In that capacity did you have anything to do with the administration of the Concord contract? A. Only to the extent that I facilitated the nomination of the first shipment under that contract to set it on the right path so to speak.

Q. Did you receive a communication from Concord saying it would be the Nai Gina? A. I received a communication in reply to the request for nomination which said they were considering either the Nai Gina or the Mikton and would reply within a short period as to which one. Subsequently that came shortly afterwards advising us it would be the Nai Gina and that complied with the nomination requirement of the contract.

Q. Subsequently did you receive a telex from Stolt Nielsen — I am sorry — did you receive a communication? A. I did.

Q. Did you then do something? A. Yes.

30 Q. What did you do? A. The communication from Stolt Nielsen — I was approached by Stolt Nielsen — (Objected to).

Q. Did you then do something? A. Yes, I sent a telex to Aluswisse.

Q. Have you got that telex with you? A. I have.

Q. May I see it please? A. Yes. (Produced)

(Above telex tendered and marked Ex. Z)

Q. I want to ask you one other question, under the Concord contract I think seventy-two hours are allowed for loading and unloading? A. That is correct.

Q. Before demurrage commences? A. That is correct.

40 Q. In your negotiations with Concord did you have anything to do about that figure? A. That was a figure which was established prior to my departure from Australia as was the level of the freight.

Q. When you say established, what do you mean? A. It was agreed upon between Concord and Nablco in the pro forma contract. Naturally in the subsequent negotiations of the machinery and the protected clauses of the contract I sought to increase that from a prudent economical point of view only but the owners would not vary their decision on not only the seventy-two hours but also the world scale rate of 170.

50 Q. Apart from the four responses from companies other than Concord which you have earlier described and the response from Concord, was there a response from any other shipping company? A. No.

MR. STAFF: Before I cross-examine, I call on subpoena the appropriate officer of the Australian Territory Liner Services Pty. Limited.

No. 111
 —
 Plaintiff's
 evidence: D. F.
 Wilson:
 Examination
 (cont'd)

HIS HONOUR: Do you know anything about this, Mr. Officer?

MR. OFFICER: I have not heard of it before.

(At this stage the Australian Territory Liner Services Pty. Limited was called outside the Court. Nobody appeared to answer the subpoena.)

MR. STAFF: I thought that Nabalco would answer this, being a subsidiary of theirs.

MR. OFFICER: I do not think that Australian Territory Liner Services is a subsidiary of the plaintiff company.

No. 111
 —
 Plaintiff's
 evidence: D. F.
 Wilson: Cross-
 Examination

CROSS-EXAMINATION:

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MR. STAFF: Q. I take it from what you have told us that the only brokers you contacted were Stolt & Neilsen? A. That is correct.

Q. You did not make any attempt whatever to make any inquiries about the possibility of arranging transport for oil in one way or another through anyone else? A. I did not — through anyone else.

Q. Or from anyone else? A. That is correct.

Q. Before you gave instructions to Stolt & Neilsen I think you took steps to familiarise yourself with the previous week or the previous ten days of the Daily Tanker Bulletins? A. Yes.

Q. I take it you had no communications with any representative of Concord until you got to London? A. That is correct. 20

Q. When was that? A. That, according to my recollection, was on 14th or 15th June.

Q. You had the pro forma contract from Concord by the 6th? A. We had a pro forma agreement on certain items that would be included in any contract that would be negotiated.

Q. I think you said earlier you had received tanker market reports up to the time you had the pro forma agreement with Concord, about 12th June? A. That is right. That was on the telex form.

Q. Any communications from you to Concord went in fact from you to Stolt, Neilsen and you believe were relayed by Stolt, Nielsen to Concord? A. That is correct. 30

Q. And any information that came to you from Stolt, Nielsen, they attributed it to communications from Concord? A. That is correct, generally by the copy of the telex in and out of the Stolt machine.

Q. You saw copies of telexes which came as you believe from Concord to Stolt, Nielsen? A. Yes.

Q. I suppose you have still got copies of those? A. I believe there are some copies available.

Q. May I take it by 12th June you had indicated your acceptance of the freight rate, the world scale 170? A. Yes. 40

Q. You had indicated your acceptance of the 72-hour demurrage limit? A. Yes.

Q. I suppose you were aware at that time it was highly unlikely that a 60,000-ton vessel would be able to unload a full cargo of oil at Gove in seventy-two hours? A. Seventy-two hours and . . .

Q. Would you just answer the question? A. A 60,000-ton tanker in my opinion could unload at Gove in seventy-two hours.

Q. At 12th June you had had no experience whatever in the tanker trade? A. No.

Q. You had made no inquiry or investigation about the discharge period for a full cargo from a 60,000-ton tanker? A. I had.

Q. When did you make that inquiry? A. When I was supply manager on the inside administration at Gove in the Northern Territory and receiving tankers regularly.

10 Q. When did you make inquiries as to the discharge period for unloading a full cargo from a 60,000-ton vessel? A. I do not recall making a specific inquiry to that effect.

Q. You just told his Honour you did? A. What I meant to say was that I was familiar with the discharge rates of ships due to my capacity as supply manager located in Gove in the period when we were receiving tankers regularly.

Q. You were receiving loading from B.P. Australia in twenty-five to 35,000-ton tankers? A. We were, yes.

Q. You had no experience or facilities for discharge of oil from 60,000-ton vessels while in Gove? A. I had not.

20 Q. You were aware that a 25-35,000-ton tanker would normally unload without difficulty at Gove in less than seventy-two hours? A. I was.

Q. Your experience had been that B.P. tankers had regularly so unloaded? A. That is correct.

Q. May we take it you made no inquiry about whether a 60,000-ton vessel would be capable of unloading at Gove in the conditions there prevailing and likely to be prevailing in the 72-hour period? A. I made a personal inquiry to the extent of checking with the original B.P. contract where a medium range tanker could maintain a discharge rate of approximately 1,100 tons per hour and taking a pro rata extension it was quite clear that larger vessels could also maintain the same discharge rate.

30 Q. That is how you came to make the assumption that a 60,000-ton vessel would unload without incurring demurrage in ordinary circumstances at Gove? A. No, I was also aware through general information in the area that a 60,000-ton vessel could hold a pumping rate of at least 1,100 or 1,200 tons an hour.

Q. At Gove berthing cannot be effected between 2200 local time and sunrise ordinarily? A. I do not know what the situation is there at the moment.

Q. That was the position when you were there? A. It was.

40 Q. So if a vessel arrived between the times I mentioned the discharge period is reduced again? A. Not necessarily. I would argue that a vessel cannot be ready to discharge unless it has been cleared by the authorities and therefore it has no effect on the discharge time.

Q. You were aware that the 72-hour provision included loading time? A. I was.

Q. I take it you had no experience whatever of the loading time taken by a 60,000-ton tanker? A. We knew the general rate for approximately a day.

Q. How did you know that? A. It is not difficult to secure information in a particular industry by conversation.

Q. You did not ask anyone about that? A. I did.

Q. Who? A. Stolt, Nielsen.

50 Q. Who in Stolt, Nielsen? A. Mr. E. O. Nansen.

Q. When did you ask that? A. Approximately the time or at the time when it became necessary for me to consider or to inform myself of the shipping requirements for oil from the Persian Gulf to Gove.

Q. When did you do that? A. In the period, second half of May to 12th June at some stage of our continuous discussion.

Q. At what stage of your so-called continuous discussion did you make this inquiry? A. I cannot recall the exact time.

Q. I put to you that you cannot recall making such an inquiry? A. I can.

Q. Why cannot you tell us whether it was when you first commenced your inquiries or at or about 12th June or at what point of the inquiry it came? A. Because it was not a matter of such significance to me that it would have registered unforgettably.

Q. When you started your inquiries you asked what size tankers you would be dealing with — that you would be likely to be dealing with? A. Yes.

Q. Did you? A. Yes.

Q. Right at the beginning when you went to Stolt, Nielsen you specified the size of the tankers? A. The range.

Q. The range? A. Yes.

Q. What was the range? A. Forty to 60,000 tons.

Q. Nabalco had been of course receiving supplies from tankers in the range of 25-35,000 tons? A. I believe so.

Q. You understood that the facilities at Gove had been constructed in contemplation of the use of vessels of that size? A. That is not my information. My understanding was that the jetty was designed for 60,000-ton vessels . . .

Q. Just answer the question — (Objected to).

(Previous question read; question allowed)

HIS HONOUR: Q. Did you understand that or not? A. No.
 (Short adjournment)

MR. STAFF: Q. I suppose you will agree with me, will you not, shipments in respect of which no demurrage was incurred were shipments in the Nai Gina and Mikton? A. I am not aware of that.

Q. You are not aware that the only shipments under which demurrage charges have been incurred are the nine shipments in respect of 60,000-tonners? A. I am not aware of that.

Q. Or that no claims for demurrage have been made for tankers in the range of 25-35,000 tons? A. No.

Q. When did you leave Gove? A. As far as I can recall, March 1972.

Q. March 1972? A. Yes.

Q. When did you leave Australain Liner Services? A. In April 1975.

Q. In your capacity with Australian Liners you were not concerned for the most part with shipments going to or from Gove? A. Not with Australian Liners, other than coastal shipments. Could I correct the date I left Gove. I believe it was March 1973, not 1972.

Q. May I take it your daily tanker market reports started to come to you some time after 27th May? A. That is correct.

Q. Some time I suggest to you in the first week of June? A. That is correct.

Q. 1st June I think was a Saturday? A. Quite possibly.

Q. If that was so it would have been on the 3rd or subsequently you got your first daily market report? A. Quite possibly.

Q. They did not come out on Saturdays or Sundays? A. Not that I am aware of.

Q. They are weekday publications? A. Yes.

Q. You would have had perhaps seven or eight as a maximum before you agreed on the tanker rate under the contract of affreightment with Concord? A. That would be correct.

Q. I suppose you were told when asked to make inquiries that you would have

to know almost certainly what contract was available within a week or so? A. Yes, I had a deadline.

Q. It was a very short time? A. Yes.

Q. What was the deadline? A. It was according to my recollection about 18th June.

Q. When was that deadline given to you? A. That was given to me with the authority to proceed with the seeking of a contract. It would have been round about 4th or 5th June.

Q. So some time after the 27th you began to make inquiries? A. Yes.

10 Q. They being primarily in relation to getting daily tanker market reports? A. Yes.

Q. Then in the first week of June probably you pursued these inquiries through Stolt, Nielsen in the direction of finding out who might be interested in a contract of affreightment? A. That is correct, on 5th June we put a firm proposal on the market.

Q. It was a proposal which indicated your interest was in a contract of affreightment? A. That is correct.

Q. You were instructed I gather to look for a contract of affreightment and nothing else? A. That is correct.

20 Q. So that in fact you did nothing to inquire about the availability of freight rates which might be on offer in respect of consecutive voyage charters? A. Yes, it was not then considered.

Q. Or any other form of contractual arrangement for the transport of oil to Gove? A. Yes, no other form would have been practical.

Q. You formed the view no other form would have been practical? A. In relation to the provisions required, yes.

HIS HONOUR: Q. You seem to suggest it was not so much these other forms of contract were not considered but they were simply rejected out of hand? A. That is correct.

30 Q. Do you mean it came to mind but was immediately put aside and then you concentrated on the contract of affreightment? A. Yes.

MR. STAFF: Q. Is that the way you approached it, really? A. According to my recollection.

Q. You told his Honour your instructions were to seek a contract of affreightment and nothing else? A. But a contract of affreightment can cover a wide range of methods of arranging transport. A contract of affreightment is not explicitly one type of contract.

Q. It certainly excluded in your mind, according to your instructions, consecutive voyage charters? A. It did.

40 Q. So in fact you did not consider whether a consecutive voyage charter was appropriate? A. I did. It was inappropriate because it could not be married back to back certainly with the provisions in the supply contract.

Q. When was it you considered it inappropriate having regard to the provisions of the supply contract? A. It would have to be in the period from 1st June, 1974. It could not be in any other period but the specific or exact date I could not tell you.

HIS HONOUR: Q. By the supply contract, you mean the contract entered into with Kuwait? A. Yes.

MR. STAFF: Q. You are aware that contract was not entered into until 22nd June? A. Yes, that is correct, and neither was the shipping contract.

Q. The terms were not finalised by any means by 14th June? A. That may be so.

Q. What did you know about the supply contract or its proposed terms before 14th June? A. I had a copy of the proposed contract which contained certain provisions relating to the job which I had to take cognisance of and which I was also aware was a contract that was open until 21st June.

Q. You told his Honour you formed the view that the consecutive voyage charter would be quite inappropriate having regard to what you knew about the Kuwait National Petroleum contract proposal? A. And what I knew about the requirements at Gove.

Q. You knew at Gove there were storage facilities in June 1974 which at the very minimum would have accommodated 35,000 tons plus three weeks' usage at that time? A. That is correct.

Q. What did you regard the weekly usage as about that time? A. About between 800 and 1,000 tons a day.

Q. It would be around about 6,000 tons a week? A. Approximately.

Q. So you knew there was something over 50,000 tons' storage at Gove? A. Yes.

Q. In the light of that storage capacity you regarded the consecutive voyage charter as quite inappropriate? A. Not in regard strictly to that capacity. The storage is only one element which brought me to the conclusion that the consecutive voyage charter was not appropriate for Nabalco's requirements.

Q. You said earlier you thought the consecutive voyage charter was technically satisfactory if the level of usage remained static? A. As a general philosophy, yes.

Q. Gove's level of usage by June 1974 was fairly stable? A. That is correct but the contract was for a three-year period and one has to provide for possible fluctuations.

Q. Further substantial storage was under construction in June 1974? A. It was committed but whether construction had started — I know it was planned.

Q. And expected to be finished within a few months? A. That is correct.

Q. Indeed if you had not accepted the completion of that storage or taken that into account, you could not have contemplated 60,000-ton vessels? A. That is correct.

Q. Your substantial reason why you formed the view that the consecutive voyage charter was inappropriate was there could have been a reduction in the usage at Gove? A. From the technical aspect only.

Q. There was to your knowledge no practical possibility in the ordinary course of events of a reduction in usage at Gove? A. Not that I was aware of.

Q. Nothing that you were told or knew suggested the slightest possibility of a reduction in usage at Gove in the foreseeable future? A. That is correct.

Q. Indeed the expectations made known to you were in the succeeding years usage would be increased? A. Or remain static.

Q. But certainly not fall? A. No.

Q. In that state of affairs for the reasons you have told us you discarded the possibility of inquiry about the availability of consecutive voyage charters? A. That is only one set of circumstances relating to that decision.

Q. I suppose you knew there were in the world in 1974 and today many utilities in Europe, America and elsewhere who were direct buyers of heavy oil from producers? A. That may be the case.

Q. Did you know or not? A. No, I did not know.

Q. Did you know that many purchasers of heavy oil direct from producers arrange their own shipping? A. That may well be so.

Q. You do not know that? A. I do not know.

Q. Do you know that consecutive voyage charters are quite a common method

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employed by utilities and other direct purchasers of fuel oil for the conveyance of their oil to them? A. That may be so.

Q. You do not know? A. Not specifically.

Q. Do you know at all? A. It would depend on which facility.

Q. A utility company producing electricity or other power for consumers of a region or locality has ordinarily to your knowledge and experience a critical requirement for maintaining supply? A. That could be possible.

10 Q. Do you know or not? A. No, I do not because it depends upon each individual situation. There could be an alternative source of supply in case of emergency. There could also be alternative storage capacity available to consider and it could be more flexible. I do not know without looking at each individual facility and the circumstances that apply to its case.

Q. Did you know that there were consecutive voyage charters being written around June or July 1974 at world scale rates far below 170? A. Yes, and far above.

Q. And consecutive voyage charters at four, two and three years? A. The only information I have is what appears in the tanker oil reports.

Q. For the seven or eight days? A. In this period that the activity took place.

Q. Do you know that contracts of affreightment were being written around the time you were looking at rates, world scale rates well below 170? A. No.

20 Q. Did you know that a contract of affreightment was written to lift 800,000 tons over eighteen months at a monthly rate starting in September 1974 using 45,000-ton tankers at a world scale rate of 85? A. I do not know. That may not have been relevant.

Q. Did you know it was written with Concord? A. No.

Q. Did you know that Concord was a subsidiary of Occidental Oil? A. Yes.

Q. Do you know it was primarily a carrier for Occidental? A. Yes.

30 Q. Do you know anything of Concord's reputation as to maintaining supply generally? A. I knew that it had experienced certain financial difficulties a few years earlier and recovered that situation and on the information I had at the time were reliable in terms of the contract.

Q. Do you know they were well known in the tanker world as a company which failed to perform from time to time? A. I do not know that and it is not evidence in the Nabalco performance.

Q. Were the quotations you got from the other companies in writing? A. They were.

Q. You do not know where that writing is? A. I believe it is available.

Q. Have you got it? A. No.

Q. But so far as you are aware it is available today? A. Yes.

Q. Was the inquiry you put out to the market in writing? A. Yes.

40 Q. So far as you are aware is it available now? A. It was placed in front of me earlier today.

Q. How did you come to choose Stolt, Nielsen as your broker for this purpose? A. Previous history with them on the one hand and they are themselves engaged in operating tankers and would therefore have supported any lack of knowledge I had or lack of experience with their own experience and the close geographical proximity. It was a combination of these factors which suggested they were the best people to deal with in the time available.

50 Q. The very short period of time was a significant factor in choosing a Sydney-based broker — a broker who had a Sydney office? A. Obviously because they had their Norwegian offices anyway.

Q. Were Stolt, Nielsen otherwise connected in business with Australian Territory Liner Services? A. No.

Q. Or Nabalco? A. They had acted as brokers previously for a shipping contract which we organised for Nabalco.

Q. You negotiated or you accepted in the contract with Concord a commission rate of 3.75 per cent payable to Pacific Marine? A. Yes, for distribution amongst brokers.

Q. I suppose the normal industry commission is one and a quarter per cent? A. Not necessarily. It varies depending on the situation.

Q. I put it to you normally it is one and a quarter per cent. Do you agree or disagree with that? A. In my experience I would deny that.

Q. In the oil tanker industry? A. I could not comment on that.

Q. I put it to you that is the normal rate in the tanker industry, one and a quarter per cent rising sometimes to two and a half per cent but that three and three-quarter per cent is extraordinarily unusual? A. I would disagree bearing in mind the circumstances of this particular contract as distinct from the normal straightforward contracts. 10

Q. What are the circumstances which are unusual? A. It is a contract of affreightment where the shipowner has taken on certain obligations which go clearly beyond those expressed in the normal tanker voyage charter party.

Q. I suppose you would agree that the commission rate would be reflected in the freight prices charged? A. That is normal.

Q. The lower the commission rate the lower you would expect the freight rate to be? A. Yes. 20

Q. What I want to put to you is in June 1974 the appropriate and market world scale rate, which was appropriate for contracts of affreightment of the character entered into with Concord would have been or was in the range — that is in 1974 — a world scale rate of 120-130? A. I disagree entirely.

Q. From your inquiries you disagree? A. In the circumstances applying to this particular situation.

Q. You had agreed on a firm rate for this contract before 14th June? A. That is correct.

Q. It was after that you went to London to finalise the details? A. That is correct. 30

Q. You had that very rapidly executed contract on the 18th? A. Not executing the contract but producing the contract which the owner was agreeable to enter for a consideration by the Board of Direction of Nabalco.

Q. You did not yourself execute it? A. No.

Q. It was executed on the 18th? A. That may be the case. I conveyed the contract which had been agreed to Mr. Notter who took it.

Q. You left for London and Oslo about 16th June? A. I left for London, yes.

Q. And Oslo? A. No. I think it was on the 14th or 15th.

Q. Why did you go to Oslo? A. I did not go there.

Q. You intended to go there? A. I intended to if time permitted. 40

Q. I suppose you were told part of the great urgency in getting the contract of affreightment fixed up was that Nabalco wanted to get oil in August? A. No that was not so. The way it was personally presented to me, I understood the supply contract had a deadline of acceptance which was 21st June and unless a back-to-back shipping contract was available that could not be given proper consideration.

Q. The intention was you would have a final contract ready for approval in Zurich by 21st or 22nd June? A. It would have to be that date according to my recollection.

Q. But in fact you had it ready much earlier? A. Possibly about two days. There may have been a weekend involved. 50

Q. You had what you regarded as a firm commitment in the middle of June? A. No.

Q. Before you ever left? A. No.

Q. You agreed on the essential elements? A. No, we agreed on price and lay time.

Q. You agreed for the period? A. A contract subject to negotiation on the details of the contract.

Q. You agreed with the term of three years? A. Yes. That was a relatively straightforward item. The complexity was in the logistics, the machinery for securing ships at the right time and the acceptance of force majeure by the shipowner as part of the contract. They were the difficult points.

10 Q. When you got your four replies one of which was regarded by you as inappropriate you simply sought to close on the one which had the cheapest rate? A. That is right. The variation in price was so substantial and the time available for the complexity of the contract was so limited that clearly Concord was the best course of action to pursue in this criteria.

Q. You saw a great variation in the world scale rates quoted between the four who answered? A. Yes.

Q. Did not it occur to you that further inquiries might produce a similarly great variation? A. No, I believed that Concord, as you will recall, their offer came in subsequent to the other four and I thought they had undertaken more research and given more consideration than the other four.

20 Q. You knew that the tanker market in the world was deteriorating very rapidly? A. In certain areas.

Q. You knew there was a vast over-supply of tanker vessels in the world? A. Predominantly in the larger tankers.

Q. You knew there was an additional quantity of tanker construction under way which could only be expected to further depress the market in the future? A. You have to bear in mind I was looking at a three-year contract, not a three-months contract.

30 Q. You knew in those three years the vast amount of tanker capacity which was then building up, would be flooded on to the market? A. Yes, but as to the effect that would have been conjecture.

Q. You knew that world business was contracting? A. There were signs.

Q. More than signs? A. It depends on what sphere you are referring to.

Q. You knew in Australia business was rapidly contracting in June 1974? A. That may have been the case.

Q. It was, was not it? A. No, I do not think so. The evidence was not there in Australia.

Q. Interest rates were over twenty per cent—

HIS HONOUR: When?

MR. STAFF: In June of last year.

40 Q. The Bank of New South Wales was paying interest in excess of twenty per cent on deposited money? A. It may well have been.

Q. Do not you recall? A. No.

Q. Do not you recall those factors of economic recession in the middle of last year? A. Not to the extent you have indicated.

50 Q. You do not recall having that impression when you were negotiating this contract? A. I was aware of certain things. There was a depression certainly in the forthcoming six months in the tanker freight rates. The indicators were there but overriding that consideration was the fact that a contract had to be concluded at the best price available in June 1974 and at that time that was the best price available from our inquiries.

HIS HONOUR: Q. For a three-year contract? A. Yes.

MR. STAFF: Q. Were you in fact conscious at the time you were making inquiries that prior to and including 1973 oil demand was booming and freight levels had been very high? A. Yes.

Q. You were aware, were not you, that in and around 1972 and 1973 a vast number of tanker building contracts were placed? A. Yes.

Q. There was an enormous amount of tanker capacity on the slips under construction for 1974? A. Yes.

Q. You were aware it was anticipated in the tanker market that the additional capacity would commence being unloaded on the market in 1974 and the next two years? A. Yes.

Q. So that the extra capacity was going to hit the market in the three-year period you were looking forward to? A. Generally, yes.

Q. By June 1974 it was well known in the tanker market that the tanker tonnage would greatly exceed demand? A. I would say it was, yes.

Q. And tankers were being tied up in the fjords in Norway? A. Yes.

Q. By the middle of June last? A. That is possible.

Q. And being tied up wherever it was possible to find space? A. Yes.

Q. Charter rates had commenced to decline rapidly by June of last year? A. Not by June, subsequent to June.

Q. The expectation in the market was they were declining and would continue to decline sharply? A. I would say yes, generally. I might add at that time the shipowner was inflexible. It was the best offer and it was a case of having a contract or not having one.

Q. You are aware that since June 1974 charter rates have continued to decline? A. I am.

Q. I want to suggest that contracts of affreightment in relation to the transport of oil are relatively rare? A. I believe that to be the case, yes.

Q. I take it you did not consult the charter list published by Howard Houlder? A. No.

Q. Or Drewry? A. No.

MR STAFF: I call on subpoena Australian Territory Liner Services Pty Limited. I understand Mr Kuner is here in response to this subpoena.

MR KUNER: I am here in relation to that subpoena, your Honour. I also am here in relation to a subpoena which had been addressed to Nabalco Shipping Pty Limited calling for the same documents. There is a bundle of documents which I produce to the Court and which answer both subpoenas. At this stage they have not been divided into those which come under each company's terms but they are in answer to those subpoenas.

HIS HONOUR: Q. Is there any objection to counsel seeing those documents?

MR KUNER: No, your Honour.

HIS HONOUR: Counsel may have access to the documents produced.

MR KUNER: They are photostat copies of the originals, your Honour.

MR STAFF: Q. There is just one further matter I wished to ask Mr Wilson: I suppose you agree that west of Suez a vessel owner in arriving at an appropriate for a contract of affreightment would set a rate in ordinary circumstances having regard to the limited possibility of onward freight or return from Gove?

HIS HONOUR: West of Suez?

MR STAFF: Q. A vessel operating west of Suez? A. East of Suez or west of Suez.

Q. I am sorry, east of Suez? A. Yes. Not necessarily, it depends on what nature of vessels that particular line has.

Q. Let us talk about tankers? A. Yes.

Q. Would you agree in respect of tankers? A. Is this a general question?

10 Q. Let me put it to you this way and I will withdraw that question. A tanker-owner operating to the west of Suez, you would ordinarily expect to quote a rate for the transport of oil taking into account the considerable opportunities for picking up a cargo for an onward or a return voyage somewhere in Europe? A. That would obviously have some influence upon his thinking, particularly on a spot sort of basis.

Q. It would clearly have a considerable significance to the rate that would be charged under a contract of affreightment, Mr Wilson? A. No, I disagree.

Q. It would certainly influence the rate which the product owner would be prepared to pay? A. I don't quite understand that question.

20 HIS HONOUR: What I don't quite understand about this, Mr Staff, is we have started off with a contract that requires a ship to travel from the Persian Gulf to Gove?

MR STAFF: Yes.

HIS HONOUR: Then we assume it is going to be loaded with something else.

MR STAFF: That is so, somewhere. There are a number of situations. The vessel is travelling from a port where there is a freely available freight market and a practical certainty of picking up a cargo, either to go back to the Persian Gulf or some other place, and it will operate at a cheaper rate.

HIS HONOUR: I am thinking about the geography of it. If he could go back to the Persian Gulf with his vessel loaded, that is highly desirable, but I would have thought it was highly unlikely in this case because of the type of cargo.

30 MR STAFF: But it could go back to Europe.

HIS HONOUR: That depends on whether he goes around the Cape of Good Hope or through the Suez Canal.

MR STAFF: I understand he can go through the Suez Canal now.

HIS HONOUR: I don't know about that. If he could go to the west coast of America, perhaps, as distinct from the East coast, that may be one thing; or if he could go to some of the other Asian ports, I don't know. Is it not a matter of speculation knowing what was available and what was possible. Some back-loading might be highly desirable, some might be marginal and others may be impossible. I don't know whether the witness knows or not.

40 MR STAFF: It may be the evidence of a witness with expert qualifications and may be that he does not know. That is what I was seeking to find out from this

No. 111
 Plaintiff's
 evidence: D. F.
 Wilson: Cross-
 Examination
 (cont'd)

witness, whether he knows or not. On the other hand, experts in the tanker industry might be able to tell you.

HIS HONOUR: Would it not be better to let your experts tell us about that rather than attempting to obtain that information from this witness?

MR STAFF: I was thinking about the fact that some comment might be made.

HIS HONOUR: If a comment is made I will not take any notice of it, Mr Staff.

RE-EXAMINATION:

No. 111
 Plaintiff's
 evidence: D. F.
 Wilson:
 Re-examination
 (cont'd)

MR OFFICER: Q. You were for a time at Gove as supply manager, were you not? A. That is correct. 10

Q. In relation to the arrival of oil shipments, what duties did you have? A. That came within the responsibility of the section which was within my department. So I carried the overall responsibility to the site manager for the performance of that sector's activities.

Q. You were asked some questions by my learned friend in relation to the possible fluctuation in the rate and consumption of oil, fuel oil, at Gove? A. Yes.

Q. You stated to him that in effect fluctuation or what you thought was the possibility of fluctuation or reduction in consumption was one only of the reasons for your discarding a consecutive voyage charter. What were the other reasons? A. The other reasons were the logistic problems of aligning these consecutive voyages to Nabalco's timetable requirements for consumption. The further reason was the fact that consecutive voyage charters are fairly standardised in their format and would not cover the additional protection and clauses which were required of Nabalco to lie back to back with the supply contract from Kuwait. 20

Q. For example, was one of the clauses of the — (objection to leading).

Q. You mentioned, I think, in answer to my learned friend the force majeure clause in the contract? A. I did.

Q. Was that subject designed in those words for some purpose? A. Yes. That force majeure clause is one which is in the KNPC supply contract. It was essential that Nabalco should not be left in a position where a termination of the supply contract with KNPC would leave it bound to a shipping contract that would continue for some years afterwards. So that force majeure clause had to have the same application in the shipping contract as it did in the supply contract. 30

Q. Mr Wilson, you said in relation to the commission rate that there were, I think you said, unusual circumstances and obligations? A. Yes.

Q. Which, as you saw it, justified the three and three-quarters? A. Yes.

Q. Can you mention briefly a few of the special circumstances and applications?

HIS HONOUR: .Can I just ask this, first of all; are they the same circumstances as you mentioned when you first commenced your evidence? A. Yes, very similar, yes. 40

MR OFFICER: Q. You disagreed with my learned friend when he put to you that an appropriate rate would have been world scale 120 to 130? A. I did.

Q. You disagreed with that in the circumstances of the task you had? A. That

and the total situation relating to the contract. The offers available, the particular route that ships would be traversing and the comparison of other offers that had been received for the same business.

Q. You were asked a number of questions about the expectation of excess tanker capacity in the world and the fact that tankers were being laid up in the fjords of Norway and so on? A. Yes.

10 Q. Would the tankers under construction when they came into operation, came into service, have effect on existing tanker rates or would they have affected tanker rates for some types of tankers more than others? A. This was my view, that the surplus of tankers would not have had the same impact on world-scale rates for world range sizes of ships. Very clearly in my mind the first ships which would be laid up and discarded would be the very large tankers, and that has in fact transpired, generally. Ships in the range that we were contemplating, 40- to 60,000 tonnes, it was foreseeable that good utilised ships could utilise the Suez Canal in the ensuing eighteen months when it was contemplated it would be open. It is possible it might have been in demand for that as one reason, and the demand might have doubled to offset the decline in rates also from the fact that these large ships are ones that are not generally built these days. So there were a number of conjectural factors which could have been remembered in conjunction with the reduction in the world scale rate on this particular size of tanker and it might not have been as great for other sizes.

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(Mr Officer informed his Honour that he had completed re-examination and asked that the witness be excused from further attendance.)

MR STAFF: May he not be excused at this stage, your Honour. We would like to tender some of the documents which this witness was led and gave evidence of in paraphrased fashion, having regard to the way he gave his evidence. Those are the documents produced on subpoena.

HIS HONOUR: Can they be looked at during the adjournment?

30 MR STAFF: Yes, your Honour.

HIS HONOUR: Would you wait until after 2 o'clock. I will release you as soon as I can.

WITNESS: Thank you, your Honour.

(Witness retired)

HARRY JOHN COLISH

sworn and examined:

MR OFFICER: Q. Your full name is Harry John Colish? A. That is so.

Q. You reside at 155, East 76th Street, New York? A. That is correct.

40 Q. You are by occupation a consultant? A. I am.

MR OFFICER: My learned friend Mr Staff and I have agreed on the course that we wish to follow in relation to this witness's evidence and other witnesses. That is that several days before the witness is to give the type of evidence that Mr Colish is about to give, that we will give to the other side a copy of a proof of the evidence that the witness is to give.

No. 111
—
Plaintiff's
evidence: D. F.
Wilson:
Re-examination
(cont'd)

No. 111
—
Plaintiff's
evidence: H. J.
Colish:
Examination

No. 111
 —
 Plaintiff's
 evidence: H. J.
 Colish:
 Examination
 (cont'd)

MR STAFF: Your Honour, I do not mind Mr Officer identifying the document and tendering it. Of course, that would be subject to objection to some parts of it.

MR OFFICER: Q. Mr Colish, you referred in the commencement of this document to your having been employed by the Mobil organisation? A. Yes.

Q. I understand the period of such employment was over 30 years? A. That is correct.

Q. You set out the varying capacities in which you were so employed, and amongst them you were employed in international economic consulting from 1969 to 1974? A. Yes.

Q. Before that you were in charge of a department called the tax economic department? A. Yes.

Q. And before that you were for some years in charge of an international competition appraisal, as it was called? A. Yes.

Q. Was that the first such appraisal done for Mobil? A. Yes, it was indeed, and I believe to the best of my knowledge the first such proposal ever undertaken within the oil industry.

Q. Further down on the first page you have referred to a wartime and early post-war joint industry supply programme? A. Yes, that is correct.

Q. What was that concerned with? A. During the last war the British and Washington authorities agreed to co-ordinate an oil and tanker supply programme for the various then Colonies and countries of West Africa. This was only for the industry of five countries, as well as for the governments, and was done by Mobil and within Mobil it was done by me. It made it necessary to schedule supplies and ships from various sources to co-ordinate them under wartime conditions, a rather difficult logistic problem of oil and ships.

(Copy of proof of Mr Colish's evidence tendered: admitted and marked EX.AA subject to objections about to be made by Mr Staff hereunder.)

MR STAFF: I have no objection to the document, your Honour, subject to a few passages that perhaps it might be convenient if I indicated the specific objections to your Honour at this stage.

First of all on p. 3 about two-thirds of the way down in products there is a reference to p.7 of the details. I object to the next sentence, "All reported Persian Gulf . . ."

HIS HONOUR: Do you press that, Mr Officer?

MR OFFICER: I would like to ask the witness a question and then press it, your Honour.

HIS HONOUR: You can deal with that later.

MR STAFF: Then I would object, your Honour, to the press citations set out on p.5 and the sentence introducing them.

HIS HONOUR: We have had a lot of this type of evidence before, from Professor Adelman.

MR STAFF: Yes, your Honour, the general character and the trend. But I would submit the press statements of particular people, particularly since it is no

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doubt a minute selection of a mass of available material, even from an expert it is not admissible.

No. 111
—
Plaintiff's
evidence: H. J.
Colich:
Examination
(cont'd)

HIS HONOUR: Is the type of thing said here not generally agreed to?

MR STAFF: It is rather inconsistent with what Professor Adelman said, to start with, your Honour, but in many instances Mr Colich's evidence is not the subject of issue at all. We would agree with it. But in some areas the protection and trend we would be at issue with.

10 HIS HONOUR: It is something that can be taken into account. I just do not know until I have seen the full significance of his evidence. Can we leave it, and I will look at it in the context of what already has gone through.

MR STAFF: At the foot of p.5 Mr Colich expresses a conclusion. I am not objecting to him expressing his expertise in the industry, I would not think of doing so. But it is just the selection of various writers of newspapers that we would object to.

HIS HONOUR: What do you say, Mr Officer?

MR OFFICER: Well, your Honour, in respect of his knowledge, an expert is expected, of course, to read all or as much as he can affecting his own world.

20 HIS HONOUR: It could be that he then expresses an opinion and the material is not admissible anyway. But if one said, "What did you base the opinion on?" and he said "Documents A, B and C." What is the situation?

MR OFFICER: I do not imagine — and I am still unaware that there is any dispute; if my friend says, "I don't object to the opinion but I object to the statement of the material upon which he founded the opinion", then we can delete it.

HIS HONOUR: At the moment I reject that part of p.5 of the proof of evidence which commences with the sentence, "The following press citations elicit the following . . ." and ending, "Six, 17-74."

MR STAFF: Does your Honour reject the introductory words of the sentence as well?

30 HIS HONOUR: Yes.

MR STAFF: Then, your Honour, there is some more of similar material on p.6.

HIS HONOUR: I reject the two press statements on p.6.

MR STAFF: Then, your Honour, we have another series of press statements on pp.7, 8 and 9.

HIS HONOUR: They also will be rejected, as will be the opening words on p.7, "the following press excerpts . . .".

No. 111
 —
 Plaintiff's
 evidence: H. J.
 Colish:
 Examination
 (cont'd)

MR STAFF: Perhaps the first sentence after the cutting of the press insert on p.9 is in the same category.

HIS HONOUR: I do not see why? What do you say about that, Mr Officer?

MR OFFICER: No, your Honour, because on p.7 we have had certain figures included.

MR STAFF: I think if you read it with the sentence that is read on p.7 it is all right. I withdraw the objection, your Honour.

About the middle or a little below the middle of p.9 there is a sentence commencing, "From my informants in the trade . . .". I object to that sentence, your Honour. 10

HIS HONOUR: It is not a matter of expert opinion, it is a matter of proving it. But do not forget, Mr Staff, you may be wanting to call some evidence of this sort. If you are put to strict proof you may not find it so easy to prove.

MR STAFF: That is so, your Honour.

HIS HONOUR: What do you say about that, Mr Officer?

MR OFFICER: The objection has been taken, I cannot press it in this form, your Honour.

HIS HONOUR: I agree. The objection has been taken and the sentence referred to will be rejected.

MR STAFF: Then, your Honour, so far as the matter relating to the market in relation to tanker transportation is concerned, I perhaps am at a disadvantage because I do not as yet have Mr Colish's qualifications which are said to appear on the first page of the document. 20

MR OFFICER: I am having copies prepared and I will give those to my friend and your Honour after the luncheon adjournment.

MR STAFF: I am not sure whether his experience in tanker transportation goes beyond that of which he spoke of as during the war. If that is so I would have an objection.

HIS HONOUR: Perhaps Mr Officer will give you the qualifications during the adjournment. 30

MR STAFF: Yes, your Honour.
 (Luncheon adjournment.)

ON RESUMPTION:
 (His Honour read the document Ex.AA.)

MR STAFF: I have agreement at this stage to tender the telexes exchanged between 13th and 14th June, 1974, and a telex of 21st October, 1974. Those telexes passed between Nabalco and the Concord representative. Your Honour will see that those have a bluish-green paint on them and they are the portions that Mr Horton 40

regards as significant; and on the October one, your Honour will find that there is a portion marked in green and I understand that is my friend's marking.

MR HORTON: I wonder if I could interrupt, your Honour; the telexes which Mr Staff referred to could now go in. The further telex of 21st October goes in with the agreement of the parties with the fact that the Concord freight agreement was extended for the two-year period as contemplated by the telex; and at the same time there is a drop in the rate as mentioned in that telex.

MR OFFICER: There was a drop in the freight rate, but apart from the commencement from the Concord contract which is before your Honour.

10 (Telexes referred to above dated 13th and 14th June, 1974, and 21st October, 1974, admitted without objection and marked Ex.50.)

(At this stage Mr D.F. Wilson was excused from further attendance.)

MR STAFF: Might I at this stage go back to indicating my objections to the proof of evidence, Ex.AA, your Honour.

HIS HONOUR: Yes.

MR STAFF: I have looked now at Mr Colish's additional qualifications, a copy of which has been handed to me. We would not, in the light of what appears in that document, object to him as an expert witness sufficiently qualified in tanker transportation.

20 (Copy of Mr Colish's statement of qualifications tendered. Admitted without objection and marked part of Ex.AA.)

There is one matter on p.4 which I omitted earlier, and it is just a little below the middle of the page with the section commencing, "During the second quarter of 1974 Nabalco canvassed the heavy fuel oil and tanker freight markets . . ."

HIS HONOUR: You say the extent to which they did that is in issue and as far as the tanker freight market is concerned, we know what they did by reason of what Mr Wilson has told us.

MR STAFF: I do not want it to go in by default, your Honour. It is only part of the history, really.

30 HIS HONOUR: The price in the Kuwait contract is based on barrel price in United States dollars, is that right?

MR STAFF: Yes.

HIS HONOUR: What is the comparison with the BP price?

MR OFFICER: There will be evidence about that, your Honour. Does your Honour mean the old BP supply contract?

HIS HONOUR: Both, really; in other words how much in Australian dollars per tonne?

MR STAFF: I think about \$54 was the commencing price under the Kuwait contract, that is Kuwait contract plus Concord.

40 HIS HONOUR: That is \$54?

No. 111
—
Plaintiff's
evidence: H. J.
Colish:
Examination
(cont'd)

MR OFFICER: \$54.14.

HIS HONOUR: What I want to know is what we are worrying about. You had a notice of a revised base price of \$54.

MR OFFICER: \$54.44.

HIS HONOUR: There was talk at the discussion of \$56 for a three-year contract and \$53 for a one-year contract, and there may have been some other variations of that price downward, somewhat.

MR OFFICER: There was in discussion variation of the one-year contract, so far as the evidence goes. But the evidence is for a three-year contract and that was after some negotiation and discussion at London rates of \$52.52.

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HIS HONOUR: I appreciate that these differences may multiply themselves into substantial figures but the substantial difference we are concerned about is between a figure of \$50-plus and \$13.

MR OFFICER: Yes; except, your Honour, that under the Kuwait contract there were certain escalations. The last delivery that has been made under the Kuwait contract is by reason of the escalators in it and it has gone to \$62.46. If we were right, as your Honour has held, with regard to the construction of the old contract, then except for freight escalations and some other escalations it was to a substantial extent, at least, for a substantial part of the period up to the present date virtually fixed. It might have moved a bit, \$13 with freight movements and so on. The last delivery that has been made, it would have been \$13.68 under the old BP contract.

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HIS HONOUR: And if BP are right, you may have been paying them \$54.44 plus a few cents, perhaps?

MR STAFF: Perhaps the situation can be graphically illustrated. We have plotted this and the graph might be useful to your Honour in understanding the situation. I did propose at some stage to tender this graph and this might be a good time. It shows the movement graphically of Nabalco's Kuwait plus cost freight price and \$54 revised base price.

HIS HONOUR: It is illustrative only.

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MR STAFF: Yes, it is illustrative, your Honour.

HIS HONOUR: It does not have any probative value.

MR OFFICER: No, your Honour. I have not had the opportunity of studying the accuracy of it.

HIS HONOUR: I understand that, but it might help me to work out the sort of difference that is between you.

MR OFFICER: Yes, your Honour.

(Graph setting out movements and prices of oil tendered: admitted as set out above and marked Ex.51.)

MR OFFICER: Your Honour will observe the blue line is the revised base price under the old contract. There is no inclusion in this of a comparison of the Kuwait Concord contract with the new contract which was to a great extent negotiated, the one that would have commenced \$52.52 for three years, but which had extremely fluid escalators.

10 HIS HONOUR: But you see, we enter another field of difficulty there, don't we? Because although that evidence is in I am by no means satisfied at the moment that it may be used for that purpose. In other words, I have to remember the without prejudice label in that conversation. The only evidence I think really let in at the moment, although the whole of it is in, the only effective evidence I have let in was what was said by Mr Rowland and what was picked up by Mr Coogan and Mr Notter from that.

MR OFFICER: Yes.

HIS HONOUR: I know how you originally wanted to rely on the conversation to establish that they would not rely on those prices plus the escalation clause, but I have still to make up my mind whether that evidence is admissible in this case.

20 MR OFFICER: We would ultimately be putting to your Honour, without going over all of it again, that there were a number of ways in which they intended an attitude of repudiation and the one your Honour has just mentioned would be one in such a way.

HIS HONOUR: Mr Staff, do you propose to say — perhaps as an argument of last resort — that whatever else the position may be about anything, the plaintiff should have mitigated by staying with you.

MR STAFF: Yes, your Honour. One or other of the bases, even on a spot basis, as a last resort.

HIS HONOUR: What kind of difference, in round figures, in the ultimate make this difference between the blue line and the red line; just so that I will know in what realm I am.

30 MR STAFF: Your Honour, I do not have the books here. I am told roughly — and it is roughly — in the order of \$3,000,000.

MR OFFICER: Q. That is up to the present time, is it?

MR STAFF: That is to 31st December this year.

40 HIS HONOUR: Because really, I suppose, what happened was — and this is not any final view — one cannot help thinking particularly on the basis of Mr Notter's evidence that the reason they left you was their feeling they were not going to get a contract out of you if they challenged the old contract, if they took proceedings to determine what was right or wrong. They simply were not going to get anything but spot dealing from you and they left you for that reason. Where that leaves everybody I am not quite sure.

MR STAFF: I am not quite sure either, your Honour. But we would in the ultimate be putting a submission that they should have accepted spot-dealing with

No. 111
 —
 Plaintiff's
 evidence: H. J.
 Colish:
 Examination
 (cont'd)

us if they wanted to preserve their rights under the contract and they could have preserved their rights under the contract by spot-dealing with us.

If it had so happened that they could not get a delivery and Gove was short for a time, that is a matter in which they had their rights. But of course that was a very strong sanction against us failing to supply on spot-prices. In other words, they had virtually the same sanction as if they had a contract without guaranteed supply from us, if they were right under the old contract. They had exactly the same sanction to delivery against spot-orders and spot-supplies.

HIS HONOUR: I cannot help remarking that on the evidence to date the unfortunate commercial fact is that probably they left you because rightly or wrongly they felt that they could not safely have stayed with you and challenged a contract at the same time. 10

MR STAFF: That may be, your Honour.

HIS HONOUR: It does seem an unfortunate state of affairs but I suppose it is water under the bridge now.

MR STAFF: Yes, your Honour.

HIS HONOUR: Mr Staff, there are no other objections to the document Ex.AA, I take it?

MR STAFF: The only other matter is the final annexure to the document, your Honour: the printed annexure at the end which is a page out of Platt's, the relevance or purpose of which I am not quite sure about. I cannot really perceive what it is for. I do not know whether my friend can clear that up. 20

MR OFFICER: Perhaps, your Honour, the tender of that might be deferred: it may be when we have been through the document with Mr Colich we may be able to fill in the position in relation to the press citations and that document.

HIS HONOUR: I will omit the last page at this stage but you may seek to add it if you wish.

I have read to the end of p.10 of the statement, Mr Officer. Does the witness deal with the base price, the reasonableness of what might be called the escalation clauses?

MR OFFICER: Under the Kuwait contract? 30

HIS HONOUR: Yes.

MR OFFICER: I don't think he does so specifically.

HIS HONOUR: I just wondered — as that would be a fairly relevant matter to consider. It might be that Mr Staff is really objecting to that in this contract. I would think he could hardly take exception to the base price because the base price is very close to his own. But it is what happens after that where the disagreement will arise. If Mr Staff is otherwise wrong in the case, and if you had stayed with BP, I suppose the difference would have been simply between \$54 and \$13, in round figures. 40

MR OFFICER: Yes.

HIS HONOUR: But it is the excess above the \$54 that causes the dispute.

MR OFFICER: Yes. It might have been the difference between \$54 and \$13, but of course, if the s.9(c)(iii) notice raising the price to \$54.44 were a valid price, notwithstanding s.9(c)(i) it might well have been operative on other occasions before September 1976.

No. 111
—
Plaintiff's
evidence: H. J.
Colish:
Examination
(cont'd)

10 HIS HONOUR: I have been thinking about that ever since one or other of you said it. It occurred to me when one looked back into that type of document we had as to whether the clause would operate once or a number of times in relation to s.9(c)(i), and I also wondered if it did operate, the starting point would have to be \$54 and not \$9. And you would then have to have increased costs as a result — you would have to look at those words in the context of \$54 and come to a conclusion as to whether it was such a burden as put them on the basis of a take-off point of \$54.

MR OFFICER: I am reminded, your Honour, that in BP's cross-claim against us they assert, they allege that under the old BP contract they would now be supplying us at a shade over \$60 per tonne. I am not certain. I do not think that the elevation as it were from \$54.44 to a shade over \$60 would be wholly freight. It looks as though there may well be in that some additional element on oil price.

20 HIS HONOUR: It might arise because of the announcement about the crude oil policy; I'm not sure.

MR OFFICER: No, that is not brought about in that figure, your Honour, the \$60.

HIS HONOUR: I do not think I should say any more. I wanted to narrow the area of dispute and it seems to me to be in relation to clauses and not so much in relation to the base price.

MR OFFICER: Base price is one element, your Honour.

30 HIS HONOUR: I do not know to what extent Mr Staff disputes that. If that is what you have got and no escalation he may have thought it a pretty reasonable deal.

MR OFFICER: His attitude may well have been different.

HIS HONOUR: I have not read what he says about tankers yet.

HARRY JOHN COLISH

On former oath.

HIS HONOUR: You understand you are bound by your earlier oath? A. Yes, your Honour.

40 Q. If you are unfortunate enough to be there in the witness box after succeeding adjournments you understand when you are in the witness box you are still bound by that oath? A. Indeed, your Honour.

No. 111
 —
 Plaintiff's
 evidence: H. J.
 Colish:
 Examination
 (cont'd)

MR. OFFICER: Q. Mr. Colish, I want to ask you what, in your experience and understanding of the oil world is the meaning of the word "spot"? A. It basically refers to one delivery. It is perfectly clear in the marine field where it always is the same as a single voyage charter. A spot charter is the same as a single voyage charter. In the oil trade it would also normally relate to one delivery. Where a market such as Rotterdam is concerned, where a lot of the trading is done in barge lots rather than cargo lots, it may mean one quantity to be delivered of several barge lots in a short period of time. But in the context of Gove or some similar arrangement it could only refer to one cargo.

Q. Are you acquainted with the editor-in-chief of Platts Oil Gram? A. I have known him for fifteen years, I think I can call him an old friend. 10

Q. That is Mr Peckworth? A. Halsey Peckworth, yes.

Q. Does he visit you and do you visit him? A. We meet periodically, usually over lunch. I have been to his office and he has been to mine.

Q. Do not answer this question if it is objected to. You say on p.3, this is the passage to which my learned friend objected, "All reported Persian Gulf Market price are said to have reflected spot sales." From whence did you derive that understanding? A. That evidence — once I knew that I would be coming to Australia I gathered all the material which I thought may seem pertinent for my testimony. I asked Halsey Peckworth to meet at lunch and one of the questions I specifically asked him was the nature of the Persian Gulf price which is periodically reported and I got a very clear answer from him that they were all spot transactions. 20

MR. OFFICER: I now press for the admission of that portion of the statement, your Honour.

MR. STAFF: I think it is in evidence now, your Honour.

HIS HONOUR: I think it has now been admitted, Mr. Officer.

WITNESS: Might I please ask your Honour, I apologise, on the preceding page at the bottom of p.2 there is a typographical error, the word in the third last line should not read "Press" but "Price". 30

HIS HONOUR: Very well, I will alter that. Thank you.

MR. OFFICER: Q. Will you look at the top of p.3: Is it right that in line 2 after the word "products" you go on and say "including fuel oil"? A. Yes.

Q. Those words should be added? A. Yes.

MR OFFICER: Perhaps that might be added, your Honour.

HIS HONOUR: Yes, I will add those words.

WITNESS: On p.5 the press citations are not evidence but none the less I would like to correct in the second press citation, in the last line, it says, "We made no production", it should be "prediction".

MR. STAFF: Q. Would you turn over to pp.19 and 20. You have been supplied with a copy of the Kuwait contract? A. Yes. I do not have it with me right now but I have seen it and studied it. 40

Q. At the foot of pp.19 and 20 you make a comment on one of the escalators in that? A. Yes.

Q. I want to ask you, firstly the escalation of price by reference to posted prices; there is such an escalator in the Kuwait contract? A. There is indeed, it is an escalator with reference to the average posted price of defined grades of fuel oil in the Persian Gulf.

10 Q. I want to ask you, is that an unusual type of clause to be inserted? A. No, it is not, crude posted price escalators have become now unusual and no longer widely used but product posted prices are used since these prices are prepared by the companies concerned. I have seen that some of the other contracts that have been discussed by Nabalco, copies of which I have reviewed, also referred to one or another price escalator, such as the proposed BP contract, such as the Kaiser contract referred to posting at Singapore and so on. So product price posting is one escalator which is quite customary.

20 Q. There is another escalator in the Kuwait contract to which you referred at the bottom of p.19 and the top of p.20? A. I would assume that is a reserve escalator. If the posting companies would not raise the posting of residual prices sufficiently to recover the increases in Host Government take, it means increases in royalties and taxes and possibly in buy back prices to the various producing countries, governments would impose upon the oil companies, if the posted price increase falls short of this burden increase, then Kuwait National would have the right to raise this as an additional request for re-negotiation of a price but the contract could be terminated for this because it is unacceptable to Nabalco. That sort of thing I do not regard as unusual in terms of post 1973 — 1973 developments. In fact it had not been unusual prior to that, I am familiar with a number of contracts where the escalation was purely and simply the increase in host-government take rather than anything else. I know such clauses existed as early as 1960.

30 Q. If you studied the escalators that were in the proposed new BP contract — did you study those? A. Yes, I have. I can't recall them all verbatim but I have studied them.

Q. If you were advising the company negotiating on the basis of the Kuwait form of contract or the proposed B.P. form of contract, what advice would you give to your clients? A. As far as the escalation provisions are concerned I would have to say there was not much to choose between them. They were both trying to protect the seller to the greatest extent possible.

40 MR. OFFICER: Q. Mr. Colish, I want to ask you some questions now about K.N.P.C. For how long, so far as you are aware, has that company been operating? A. As I recall, and I have not researched this precisely so I am speaking from memory only, since the late 1950s. As I recall, K.N.P.C. goes back to that time. It is an unusual company inasmuch as it was the first company owned by governments and-or nationals of a producing country which went into commercial competition with the established international oil companies. All other national oil companies are of very much later vintage than K.N.P.C.

K.N.P.C., as I recall it, at an early stage had built and owned a refinery in Denmark which was some time in the early 1960s. It sold it to one of the large international oil companies. Kalundborg I believe was the location. From that time it has retained some strong commercial contacts in Scandinavia and, while I have not followed in any detail its customers — this is just impossible — I believe that they still have a number of Scandinavian customers amongst their clients.

50 It is a company which, to the best of my knowledge, has had a perfectly good commercial reputation, which has honoured its obligations and which has in, say, the dozen years or so prior to the switch of power from the international oil

No. 111
 Plaintiff's
 evidence: H. J.
 Colish:
 Examination
 (cont'd)

companies to consuming country governments very successfully competed commercially with those oil companies. I have no doubt that it has continued to do so.

Q. I think you were in Court this morning when some questions were put to Mr. Wilson with regard to the commission on the Concord contract of three and three-quarter per cent? A. It is undoubtedly on the high side so far as commissions go but there is one thing — there is no sacrosanct and generally established commission — and I would say one thing. If it is a one-shot customer, brokers are more likely to ask for a higher rate than if it is a steady permanent customer.

I am quite sure that B.P. won't have to pay more than one and a quarter per cent, just as my former employers, Mobil, wouldn't have paid more than that either but, if Nabalco comes along and has one-shot business, the commission rates will go up. I think that is just part of the commercial game.

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No. 111
 Plaintiff's
 evidence: H. J.
 Colish: Cross-
 Examination
 (cont'd)

CROSS-EXAMINATION:

MR. STAFF: Q. Mr. Colish, of course, if you know the propensities of brokers in relation to their commission charges you recognise that the commission rate is a very negotiable factor, don't you? A. Not very negotiable. I can draw a very easy parallel. In the New York Stock Exchange brokers worked on the fixed commission rules until a few months ago when the U.S. Security Exchange Commission has lifted those rules and has made them a matter of negotiation with the almost inevitable result that the commission rates for the large institution buyers became a fraction of those which I have to pay.

20

Q. Of course, if you are looking at a situation in which you know there is a well established industry producing on a large scale, likely to continue for years and years to come, those circumstances would play a part in the commission rate that the broker ultimately would be likely to accept? A. Continuing business likely to continue for decades will undoubtedly sway a broker in trying to hold his particular client.

Q. And if you are negotiating for an operation like Gove, a supply for three years with the probability of another two years after that — A. I would say a possibility.

30

Q. Those factors would be likely to influence a broker, wouldn't they? A. In asking for a commission rate?

Q. In his commission rate. A. Quite reasonably so.

Q. Of course, if the broker knew that you were approaching — that is the purchaser — the situation on the basis that within a matter of a few days he felt he had to conclude the contract, the broker is likely to ask for a higher rate, isn't he? A. That is something which does not allow an answer. I am not sufficiently familiar with the conditions that prevailed at the time that I can answer, Mr. Staff.

40

Q. Oh, come now, come now. The anxious purchaser always gets charged more than the one who preserves an attitude of — A. Possibly.

Q. Looking elsewhere? A. Possibly. By no means—

HIS HONOUR: Mr. Staff, I am aware of the way bargaining goes on generally in many fields, even at the Bar when cases are being heard. The point is made I think. It is a question of the weight of it.

MR. STAFF: Q. And, Mr. Colish, would you not agree that three and three-quarters is very unusual? A. I wouldn't say it is very unusual but I would say it is on the high side of the range of rates.

50

HIS HONOUR: Is there any evidence that Mr. Wilson endeavoured to negotiate that?

MR. STAFF: No. I put some questions to him about it though.

Q. Now, Mr. Colish, what I want to put to you is that it is not normal in a long-term fuel oil contract to find price tied to changes in posted prices? A. Oh, yes, that is quite usual.

Q. I see. You say it is quite usual? A. Oh, yes.

Q. Today? A. Today. What choice does a seller have? He can either—

Q. You say — A. May I finish? He may either—

10 Q. I think you have answered the question I asked.

HIS HONOUR: I think yes. You see, it is a question of whether the question has been answered, Mr. Colish. Mr. Staff is entitled to restrict you to an answer to his question. Mr. Officer is entitled to re-examine you after to bring out anything he may wish. If Mr. Staff doesn't want the balance of what you say, he is not to have it thrust on him. A. I apologise.

MR. STAFF: Q. Mr. Colish, I put it to you that it is not normal today to find in long-term contracts, fuel oil contracts, a tie of the price to posted prices? A. Quite usual.

Q. You say it is quite usual? A. It depends where in the world—

20 Q. I beg your pardon — A. If you let me finish, I will say that it depends where in the world this happens, what the other conditions of a contract are. Your question is so broadly based that I would say it is certainly quite usual where it concerns the supply to a customer east of Suez.

Q. It is not usual where it concerns the supply to a customer west of Suez? A. It depends where the customer is and the other supplies. You have the other possibility of escalators. The posted price might be very usual but other escalators might be chosen.

30 Q. But you would agree, would you not, that where you tie in the long-term fuel oil contract the price to changes in posted prices and the contract is initially made at a price above posted prices the buyer will forever be paying above posting and above the historical normal price for fuel oil? A. I do not know what the historical normal price of fuel oil is. I can't, therefore, answer your question. I would appreciate you defining it for me.

Q. What I put to you is that historically one can find that the normal price of a fuel oil over the long term has been in terms of discount from the posted price? A. In the long term. Shall we substitute the word "arms length market price" for "normal price". I would answer you that in the past, say, throughout most of the 1960s the arms length market price of fuel oil used to be below the posted price but—

40 Q. But the whole of the historical experience of arms length fuel oil prices indicates that except in the very short run fuel oil prices are at a discount on posted prices. Would you agree with that? A. No, but I would like to—

Q. Well, if you don't, just say so, Mr. Colish. I am not asking you at the moment why you don't agree; I am just asking whether you agree or you don't? A. Would you repeat your question again?

Q. I think you have answered it, thank you, Mr. Colish. Would you agree that heavy fuel oil is simply a combustible? A. It is something that is burned, yes.

50 Q. And ordinarily it is worth no more than any other source of heat subject to allowance for handling costs which may be higher with one source of heat and lower with another. Would you agree with that? A. If I understand you correctly and I would prefer to re-state it in my own words, subject to you correcting me

No. 111
 —
 Plaintiff's
 evidence: H. J.
 Colish: Cross-
 Examination
 (cont'd)

please, what you are saying is that the b.t.u. content, the heat content of different sources of energy is the salient point to the buyer subject to differences in ease of handling.

Q. And cost of handling? A. Ease and cost of handling, yes. This, I think, is, generally speaking, true provided buyers' facilities once installed permit him the choice among different fuels which, for the normal user, is very rarely the case.

Q. I am putting to you the general arms length market value not to a particular customer but in the market place to customers generally, Mr. Colish. That was the basis on which I put the question. A. I am sorry, I did not understand your question. Yes, not in the short run but in the longer run different energy sources, different fuels which compete with one another will have to arrive at a price level which is roughly in balance. 10

HIS HONOUR: Q. Do you mean there is thus relationship between the price of coal and the price of fuel oil? Is that what is being said? A. And I thought that this is what you were driving at.

MR. STAFF: I think that is what Mr. Colish was saying.

WITNESS: It does not always work in the short term, your Honour. In the long term it is a question of how long which remains to be resolved. It may be years in the very long term.

HIS HONOUR: What I find difficult to understand about that is that one would either set a plant up to use coal or set it up to use oil and, if one set it up to use coal, as I understand it, one would set it up to use a particular kind of coal probably, because one has different kinds of coal to be used for different purposes. 20

WITNESS: It very rarely has much meaning in practice. Where it does become meaningful is where public utilities — this is the only example that comes to my mind. There are such public utilities particularly along the east coast of the United States which are equipped to switch from one fuel to another at relatively short notice so that depending upon the market it would either be coal or residual fuel oil. This has happened in the past but aside from those utilities and perhaps, although I am not even aware of them, but perhaps some large industrial installations, the overwhelming number of fuel oil consumers or any coal consumers is in no such position. They are tied to the fuel for which their particular installation has been erected. 30

MR. STAFF: Has your Honour's question been answered?

HIS HONOUR: Yes.

MR. STAFF: Q. Well then, Mr. Colish, may I come back to the matter I was putting to you. The value in market of heavy fuel oil is merely, and I am talking about the arms length market, restricted merely by its value as a source of heat, is it not? A. Like that of any other fuel.

Q. And, of course, crude oil itself has a value as a source of heat? A. Yes, indeed. 40

Q. Any technical problems for land-based installations which once existed in relation to burning of crude as an alternative source of heat have now long since been overcome, haven't they? A. Basically, the answer is Yes but these technical provisions have to exist in any particular facility because basically, of course, or, not basically, always, crude oil has a different flashpoint from that of fuel oil. Therefore, it makes its use a great deal more hazardous to be used under a boiler than that of fuel oil.

10 It is also not in the ordinary course of events all that attractive. The country where crude oil has been burned to a considerable extent is Japan and the reason why it has been done so is very largely one of environmental concern. The type of crude oil which Japan has burned has very often been Indonesian crude oil which is low sulphur.

Q. One method of dealing with some of the difficulties or problems or hazards in burning crude is to remove the light ends before you burn it, isn't it? A. They don't in Japan. That is just the point—

Q. But that is one method? A. But then you are no longer burning crude oil. You are first of all going through some previous distillation process which is the very one that any refinery engages in in order to have the residue at the end.

20 Q. Now, look, would you agree that the result is that in the long term the heavy fuel oil price does not go appreciably above the price of crude oil? A. To give you a very generalised answer to that is somewhat difficult because a lot depends on the type of market and refinery. The answer would be a most definite Yes in a country such as the United States where refineries operate to a very low yield of residual fuel oil and a very high yield, the maximum yield, of light ends and, in particular, gasolene.

In the Persian Gulf where historically the residual fuel oil has represented a large percentage of the total output of products, the total realisations received by the refiner for all the products produced has to cover crude plus the cost of refining itself.

30 If residual fuel oil represents a large percentage of the total output from that refinery it, accordingly, has to bear a larger portion of the total cost, hence its relation to the crude cost would differ somewhat maintaining a slightly higher price level than would be the case under a different refinery pattern such as that prevailing in the United States.

But, in principle, yes, the residual price should be lower or not much above the price of crude oil. It might be above.

40 Q. And over any appreciable term if price in a particular place of fuel oil was much above the price of crude, you would find people going elsewhere or switching to the burning of crude, wouldn't you? A. Elsewhere, if there is some elsewhere to go to. Burning crude, as I said before, burning crude is very rare because very few installations are so equipped.

Q. It is rare, I put to you, because historically over any substantial period the price of heavy fuel oil has been at a discount on crude price? A. I agreed with that and said that in most markets this is so. In the Persian Gulf the discount compared with crude has not been substantial. I can very clearly recall in the late 1960s where,

No. 111
 —
 Plaintiff's
 evidence: H. J.
 Colish: Cross-
 Examination
 (cont'd)

say, crude would have sold for around \$1.15 or \$1.20, \$1.15, and the price of residual fuel oil of the type we are here discussing would have been at least that high, possibly higher. I would have to refresh my memory and really go over my records which, unfortunately, are all in New York but, speaking from memory, I would say that this was so for the reason I mentioned before that in the Persian Gulf all residual fuel oil which sometimes in certain refineries represented sixty per cent of all the products produced by that refinery, it obviously has to bear some of the refining costs.

*Q. And, Mr. Colish, you will agree, won't you, that in the Persian Gulf the bunkering trade has been an important element in fuel oil prices being kept up, particularly posted prices? A. No, I would not agree with that at all. What I would agree—

10

Q. I am not asking you what you would agree with. A. Okay.

Q. I am asking whether you agree with the proposition I put to you, Mr. Colish. A. If I understood you correctly, what you are saying is that bunker prices have been artificially kept up.

HIS HONOUR: Mr. Colish, I am sorry, we have certain procedures in this Court. You may not agree with them — A. No, I am sorry.

Q. Well, you listen to me for a minute. But, regrettably, this afternoon you are affected by them and you must play the game according to our rules and not any others that you would prefer. Mr. Staff is entitled to have you answer his questions and only answer them. Please don't feel unfairly treated. This is the way we do things here. Mr. Officer has, as I say, the right to re-examine you when Mr. Staff is finished if he thinks he should do that and, if you would be kind enough to simply answer the question then I think you will find that your time in the witness-box will be relatively short. A. I apologise to your Honour for unwittingly having done that and apologise to you, Mr. Staff.

20

(Question marked * on p.252 read)

WITNESS: Ships bunkers have played an important part in the total sales of residual fuel oil in the Persian Gulf.

30

MR. STAFF: Q. Indeed, it would have represented approximately forty per cent of offshore sales, would it not, historically? A. I am not at the moment able to recall the precise figure but the percentage which you have quoted sounds right.

HIS HONOUR: I am not sure that I understand the terms, Mr. Staff, when you say offshore sales.

MR. STAFF: Some sales, of course, from the Persian Gulf are transported by pipeline.

WITNESS: No.

MR. STAFF: They are sales or in that area they are sales, as I understand it, not export sales that is, not sales either to ships or export abroad.

40

WITNESS: May I, Mr. Staff, perhaps in the interest of—

HIS HONOUR: Just a minute. But what I haven't understood is, bearing in mind the percentage figure of forty per cent what are we talking about?

MR. STAFF: What I was talking about was bunkers plus exports.

HIS HONOUR: And do you say bunkers are forty per cent?

MR. STAFF: Bunkers, forty per cent. The question I put was that the bunkers represent forty per cent of offshore sales which consist of bunkers plus export. That was the sense in which I put the question. Perhaps Mr. Colish didn't understand it in that sense and I will ask him.

WITNESS: I wouldn't—

10 MR. STAFF: Undoubtedly there are some internal sales.

HIS HONOUR: These are ships; not tankers necessarily?

MR. STAFF: No, ships burning their own fuel as fuel. That is the bunkers.

HIS HONOUR: But where does all this shipping come from and go to which causes it to go to the Persian Gulf?

MR. STAFF: Some of them are tankers; undoubtedly, some of them are freighters; some are cargo.

HIS HONOUR: It is obviously not the busiest sea lane in the world.

MR. STAFF: I don't know, your Honour.

HIS HONOUR: I would have thought the transatlantic would have been.

20 MR. STAFF: And perhaps having regard to its location and the cost of fuel oil and the cost of transporting fuel oil and other available sources in the Indian Ocean ships go there to bunker. That may explain part of it.

HIS HONOUR: Do you mean to say that forty per cent of all the oil produced in the Persian Gulf goes into ships bunkers?

MR. STAFF: No, forty per cent of the sales of heavy fuel oil go in ships bunkers — not crude.

HIS HONOUR: Of heavy fuel oil?

MR. STAFF: Of heavy fuel oil. I think Mr. Colish said he could not agree with the exact figure but it sounded about right.

30 WITNESS: If I may please?

MR. STAFF: Q. Yes please, Mr. Colish, take my invitation to tell us. A. Thank you. The production of residual fuel oil, the output of residual fuel oil from Persian Gulf refineries would have three uses. One, and this is the least important one, local use in public industry or public utilities existing in those producing countries and the remaining and far more important portion to be provided for

bunkers on the spot and for cargo, and the larger remaining portion for cargo exports, for residual fuel oil exported in cargoes such as the one we are here concerned with, to answer his Honour, by far the greatest portion of the ships bunkers are supplied to tankers some of which may take bunkers for half of the round voyage taking the remaining bunkers at destination. Others may bunker in the Persian Gulf for the complete round voyage.

HIS HONOUR: Well, it is residual fuel oil that we are talking about.

MR. STAFF: Q. It seems to be variously called furnace oil, heavy fuel oil —
 A. Bunker C.

Q. Bunker C and other names? A. And other names. 10

Q. They are all much of a muchness. A. It always means the residual as the portion of the crude oil which remains after distillation as a residuum at the bottom and the heaviest portion is the one we are interested in.

Q. The residual fuel oil is really that part of the oil you leave depending how much product you refine out of the crude? A. No, that is not quite correct. After the first basic distillation which really distils off everything that you can distil off that distillation you are then left with the residual. It requires some secondary processing to reduce this residual further.

Q. But how much residual fuel you are left with in a particular refinery depends in the end upon how much residual fuel oil, rather, how much other product the refinery finds it economic to take out of the crude by the primary or secondary processes? A. Let's say upon the refinery equipment available and upon the market conditions. 20

Q. The economics? A. Yes.

Q. So that the greater the demand for the lighter products such as gasolene, naphtha and domestic heating products and the like the greater the demand for those products and the higher the price of those products the more likely the refiner is to take the maximum he can out of the crude leaving a relatively smaller supply of residual, assuming he has got the equipment to do it? A. Yes, Mr. Staff, if the demand for the light products is very great, the price for the light products in relation to the residual fuel oil will be much higher. The relationship between them, the ratio of price, will be greater than otherwise would be the case, thus making it economical to install the additional necessary refinery equipment to do that. 30

Q. And the result of that is that the greater the demand for the refined light products in the world the more likely it is that the supply of fuel oil available will diminish? A. That is not the only point.

Q. Oh, no, but would you not agree that it is a general proposition? A. If the demand for other products grows more than that for residual fuel oil, yes, but there is, of course, a question of what is the relative growth in demand for the different fractions derived from crude. That is the determining factor. 40

Q. If the profit available to the refiner and marketer of the lighter products increases, then he is more likely to be producing less or have less residual oil than in the converse circumstances? A. Yes, and this rate of profit would depend upon

greater growth of demand because otherwise such would not be the case and, of course, refiners have to deal with very costly investments and short-term variations of the demand and prices would provide no inducements. It would have to be a sustained change in growth patterns.

10 MR. STAFF: Q. As the demand in the lighter products contracts, so you almost inevitably find a greater abundance of fuel oil? A. We ignore in all this discussion one factor that almost all the refineries have some flexibility in their facilities. The more sophisticated the refinery the greater the flexibility, and the first thing a refiner would do if he sees his demand pattern change is to adjust his refining operations to fall in line with the demand pattern. Only where such flexibility no longer exists would occur what you have just suggested.

Q. But surely the less sophisticated the refineries — A. I beg your pardon, I didn't mean to use the term "sophisticated" in the subjective sense, but in the objective sense, meaning — I apologise that I am simply using — a refinery equipped with a lot of secondary and tertiary equipment is one which we would term a sophisticated refinery in contrast to one which has a simple distillation unit.

Q. Let us use your terms? A. I just don't want to leave any misunderstanding.

20 Q. The less sophisticated the refinery would respond to a contraction of demand for the lighter products by simply refining out or distilling out less of the lighter products from the crude? A. One should expect this to be the case. Strangely enough a first resort of most refiners would be just to try and cut the price on the surplus product. Only faced with the inevitable necessity of cutting back will they cut back.

Q. Then the refiner finds himself with a surplus of fuel oil and he cuts the price of that? A. That is what I have just said, I think he would do that because before he cuts the refinery's runs.

Q. A situation existing by June 1974, the refiners found themselves faced with a great contraction of demand for the lighter product? A. No.

Q. Mmm. A. No, strangely—

30 Q. You say no? A. No.

Q. What I put to you is between the beginning of 1973 and the middle of 1974 there had been an enormous contraction of the demand for light products throughout the world? A. Yes.

Q. And demand was still contracting in June of 1974 for light products? A. No, this is not generally so, for in many parts of the world the light product demand had begun to go up again, partly to rebuild depleted stocks, partly because people were already going back to their former habits.

40 Q. Mr. Colish, in the United States taxes on gasoline were raised particularly to depress demand during the middle of last year, were they not? A. They were, and strangely enough the one product which has resisted the demand contraction in the United States and in most of continental Europe is petrol, gasoline. The—

No. 111
—
Plaintiff's
evidence: H. J.
Colish: Cross-
Examination
(cont'd)

Q. Let's leave petrol aside. The demand for the other light products contracted, did it not? A. In the United States petrol makes up 50 per cent of the total crude barrels.

Q. Does that mean you agree with the question I asked you in respect of other light products? A. Distillates generally contracted.

Q. And the demand for domestic heating oil contracted? A. Domestic heating oil are also distillates, I am sorry, I meant to include that in.

Q. And naphtha, had you included that? A. That varied, naphtha is—

Q. In Europe one saw the same contraction of demand for the lighter products including petrol? A. No. 10

Q. Do you exclude petrol in Europe also? A. Yes sir, because in Germany and in several other countries gasoline demands started to grow again in spite of increased taxes, in spite of everything else and much to the surprise of the industry.

Q. Won't you agree that by June of 1974 the market was awash with fuel oil? A. At what time?

Q. In June 1974? A. No, I wouldn't say that because all I have to do is to look at the Rotterdam prices and see the price of fuel oil was better maintained than that of light products.

Q. You have not told us about arms length negotiated prices by utilities buying in bulk over a term in large parcels, have you? A. No, because extremely little is known about that. 20

Q. But it is well known that arm's length arrangements involving large quantities of fuel oil by utilities have always been written at a very substantial discount on posted prices, isn't it? A. Well, we would first have to—

Q. Can't you answer my question? A. No, because you have not told me what posted price in what country and where.

Q. What I put to you in general terms, in the world market — do you say you cannot answer that question? A. In general terms from oil supply prior to 1970, yes, discounts were available under those conditions.

Q. In the large direct purchaser very substantial discounts on posted prices, would you not agree? A. I am trying to think now whether I am going to give you a misleading answer or not. Within the United States, not necessarily so, but probably so. Without the United States, yes. 30

Q. Would you not agree that direct purchasers from the Persian Gulf of fuel oil has directly been able to purchase fuel oil at substantial discounts on Persian Gulf posted prices? A. Yes. Historically prior to all the upheavals in the middle East, yes.

Q. Of course, in 1973, one reached a situation of chaos and panic in the Persian Gulf and elsewhere in relation to fuel oil supplies? A. In 1973 prior to the events of October, prices rose everywhere because supplies became tight, all short

term and long term prices rose. And very frequently rose above the level of posted prices, and spot prices in particular went through the roof.

Q. We have heard from Prof. Adelman about some of those matters. I think we are aware of those in this case, Mr. Colish. By early 1974 the real panic was over, wasn't it? A. Not in early 1974 but after the Arab countries or most of the Arab countries lifted production cutbacks and also the embargoes which always were of lesser concern than the production cut-backs, after they began to lift the production cut-backs the real panic — the real panic in terms of panic prices was over, but it left the industry — in doubt in terms of what to expect for the future.

10 Q. By early 1974 you agree the real panic was over? A. Not by early 1974. As I said just a second ago after cut-backs were lifted, which was some time after the middle of March 1974 was the real panic in terms of prices panic, but not in terms of supply panic, was over, in the second quarter of 1974, but the industry was still faced with the same uncertainty about future supplies.

Q. The problem was by no means resolved? A. On the contrary.

Q. I think we are agreed on that? A. On the contrary.

Q. By June of 1974 whilst everyone was troubled about the future the real disparity from almost day-to-day in spot prices was over, wasn't it? A. The real disparity between the spot prices and what?

20 Q. Spot prices from day-to-day? A. You mean fluctuations of spot prices?

Q. Yes. A. Yes, there was a slow trend rather than the hectic trend which we had seen theretofore. Spot prices of some products decreased more steeply than residual.

Q. By May of 1974, of course, within some of the Persian Gulf producing countries they were reducing prices, weren't they? A. Prices of what, Mr. Staff?

Q. Prices of crude and product? A. We have to distinguish.

Q. You do not agree with me? A. I am sorry, I am afraid the way you put your question I can neither say yes nor no.

30 Q. I will ask you another way, would you not agree that prior to May of this year — I put May 1974, I meant 1975, Abu Dhabi had lowered its take by well over 50 cents a barrel in crude? A. Its take on equity crude.

Q. That was without negotiation but simply at the State's own insistence? A. Abu Dhabi had so much over-priced its crudes that they no longer sold and therefore Abu Dhabi reduced the price of crude, whereas the other countries did not.

Q. Abu Dhabi reduced its price to get sales? A. Yes, indeed.

Q. That trend is not exclusive to Abu Dhabi, is it? A. It is entirely exclusive — I should not say entirely exclusive — it is not a general trend because crude prices and Government take have since been raised.

No. 111
 —
 Plaintiff's
 evidence: H. J.
 Colish: Cross-
 Examination
 (cont'd)

Q. You are talking about October 1975? A. Yes, Mr. Staff.

Q. I have been asking you about Persian Gulf bunkers and I think you did agree with me that the larger customers for fuel oil in the Persian Gulf historically have been able to obtain their fuel oil in the general run of things at substantial discounts on postings? A. Historically prior to those 1973-74 events, yes.

Q. You have not any information or knowledge what such customers have been able to do in the last couple of years? A. No.

Q. That information has not been available to you? A. No, the best example I can cite is that not one of the supply contracts with the huge mining enterprises in Australia has ever been reported in the trade press at any time since the sixties to date. 10

HIS HONOUR: Q. At any time since — ? A. Since the 1960's to date. They have all been privately negotiated and have never become public knowledge.

MR. STAFF: Q. So that so far as you know the historical traditional discount on posted prices for fuel oil to the large customers may still be being obtained? A. You mean under new contracts, under then existing—

Q. Under new contracts? A. That depends on the time when the new contract would have been concluded. Today, yes.

Q. Where the purchaser has been trying to bargain? A. I would assume that any purchaser would bargain. I know of none that would not. 20

Q. You might learn of one here. A. I am many years within the industry, I have yet to meet one.

Q. I think you did say a moment ago that at the present time you would expect large direct purchasers from the Persian Gulf of fuel oil to be able to negotiate a price at a discount on posted prices? A. Contrary to what was generally expected in the world in 1974, the recession has proved to be very protracted and a most severe one. In 1974 optimism reigned and people thought that the recession would quickly be over; it is still with us. As a result industrial activity has declined around the world and residual fuel oil demand has fallen over very much and has not yet regained its former level, with the inevitable result that prices for residual fuel oil are under pressure and what you describe is currently the case. 30

Q. You would expect now supplies to be available to a purchaser like Nabalco at a substantial discount on posted prices? A. It would depend I think upon the duration of the contract to be completed because people do expect that the recession will subside and no prudent seller would tie himself to a low price for an undue duration, for 12 months there is, that beyond that it is the gambling instinct of the seller; some would, some would not.

Q. Certainly you would think it surprising to see sellers negotiating contracts for fuel oil ex Persian Gulf at a substantial discount on postings on, say, a two year term basis? A. I am not sure; some few might: those who would take a very pessimistic view of the world economy. Others I think would not because— 40

Q. They are optimists? A. Not necessarily optimists, but they realise that they no longer have any crude profits to fall back on and it is better not to incur losses.

Q. Of course, any seller who is getting what he regards as a high price is prepared to give you normally quite a long term, isn't he. A. But what is high price? A high price is high only in relation to the underlying costs rather than in absolute terms and if the margin is thin he would not.

Q. A five-year term for a fuel oil supply contract is unusually lengthy, isn't it, so far as you are aware. A. At what time, Mr. Staff? Today?

10 Q. Let's say in June of 1974? A. In June of 1974 most international oil companies would not have entertained such a contract and would have declined it for new customers because they were not anxious to acquire any additional business which was risky, fraught with uncertainties, and the number of sellers prepared to sell for such a length of time was very small indeed, and to the best of my knowledge could be found only among the national oil companies of producing countries who for very obvious reasons were not confronted with the same risks.

Q. Of course you would have anticipated that any producer country would in June of 1974, have been prepared to contract for a substantial term of years for the supply of fuel oil, wouldn't you? A. Any producer—

20 Q. FOB I mean, F.O.B. the home country? A. Mr. Staff, I was not going to contradict you. I was merely going to qualify it slightly. Any producer country having refining facilities, which is not the case for all of them, but those producing countries which also have products for sale — this is the only qualification I want to make so that I don't give a stupid answer — would have been prepared to do so, yes, because they wanted to exploit the situation which the preceding events have created for them which have pushed back the international oil companies and have made way for the aspirations of the national companies; this is the situation which they want to capitalise on.

Q. In June and earlier in 1974 those producer countries with refining facilities — A. Which were not numerous.

30 Q. — were the aggressive marketers? A. They did not have to be very aggressive, because any of those countries prepared to sell long term had a seller's market.

40 Q. But within the limits of competition between themselves? A. Yes, within limits of competition between themselves, and there was not in my opinion any doubt that such sophisticated and experienced national oil companies as Kuwait National Petroleum Company was probably far ahead in the running. The national Iranian Oil Company which has a very large refinery was not particularly interested in selling products because they were pretty much absorbed with the internal sales which absorbed most of the available refining capacity and Saudi-Arabia did not enter into those activities at all.

Q. But there were producing countries with refining facilities other than Kuwait in June 1974, weren't there? A. Yes, such as—

Q. Such as? A. I mentioned Iran in a minor way. There was Lybia in a minor

No. 111
 —
 Plaintiff's
 evidence: H. J.
 Colish: Cross-
 Examination
 (cont'd)

way and I believe that Petromin, the national oil company of Saudi-Arabia concentrated its efforts on crude oil rather than products.

Q. But it did have a refining capacity? A. The refining capacity it had acquired as part of its participation, but I am not sure that it ever really made use of it.

Q. You have no knowledge, I take it, of what contracts for fuel oil were written up in producing countries other than the Kuwait National Petroleum Company contract which it wrote with Nabalco? A. I remember reading some references in the trade press but without any details. Attention was then focused upon crude rather than products.

Q. You did tell his Honour earlier that really the escalation provision in the Kuwait contract was not much different from B.P.'s proposed escalation provision? 10
 A. They were different provisions the way they were written, but the likely effect of those escalation provisions was in my opinion significantly different.

Q. You regarded, over the term of the contract, the proposed contract as likely to equate the price which would be paid under either contract fairly closely with probable future spot prices over the same term, did you not? A. It is impossible to predict future spot prices; we don't know whether the O.P.E.C. countries may do in the future.

Q. But the provision, the consequence of both sets of provisions, was really to tie the contract price virtually to the market price from time to time, was it not? A. 20
 No, I don't think so, no.

Q. Or above it? A. No no, neither.

Q. Did you examine article 6 of the Kuwait contract? A. Yes.

Q. The printed — A. Yes, the printed article 6, yes.

Q. I am sorry, printed article 7? A. Yes — 6 — 7 is the one.

Q. Seven is prices? A. Yes, I have examined it.

Q. You have it in your mind? A. Pretty well, yes, but you might be kind enough to read it.

Q. It is in Ex. K. (Approached) It commences, "If during the term of the agreement changes should occur . . . (reads) . . ." A. Yes, I would consider that 30
 as a second reserve clause just as the one that is written in the text of the contract against the right which gives K.N.P.C. to ask for renegotiation of the contract price should posted prices fail to recover fully increases in Government take. This is a similar provision as I read it which similarly gives K.N.P.C. the right to ask for renegotiation. If some of the factors which affect market prices change, such as United States Government controls, currency exchange rates and so on and so forth.

Q. But of course, supply and demand is one of the factors that governs the freely negotiated price of the petrol, petroleum products, isn't it? A. I would not 40
 read it into this clause.

Q. You would not read supply and demand as one of the factors? A. No.

Q. Governing freely negotiated prices? A. Not if I read the whole clause.

Q. Your view then is expressed upon the footing that changes in supply and demand would not give rise to the possibility of operation of article 7? A. No, because this is such an over-riding important factor that it has not been spelled out here, makes it in my opinion very obvious that this was not intended by article 7, but factors such as this which are identified.

10 Q. Would changes in the availability, world-wide, of crude, for instance be changes which in your view are within article 7? A. If such changes in the availability of crude were the result of actions by the producing countries concerned, my answer would be yes.

Q. Whether they were results of actions by the producing country or anyone else — A. Anyone else I think become academic within the time frame of the contract we are contemplating here.

Q. I think you agreed, did you not, that the availability, world-wide, of crude is a factor which would reflect itself in spot prices from time to time? A. Within the time frame of three to five years the world is likely to be awash in crude rather than to be short of it if producing countries do not artificially restrain the availability of crude.

20 Q. So that spot prices are likely to continue downwards, are they? A. Spot prices of what?

Q. Crude? A. Spot prices of crude are going to go up.

Q. Notwithstanding that the world is awash with crude? A. Indeed, because the producing countries are going to raise the official price again and again. They have demonstrated their ability to do so and I have no doubt that they will repeat to demonstrate to the world that they can do so till the end of the decade.

Q. You are aware, of course, of contrary views of the industry, aren't you? A. I am aware of those views. I am also aware that—

Q. You prefer your own, of course? A. Pardon?

30 Q. You prefer your own view, of course? A. No, I do not prefer my view but so far I have been lucky enough to be right and I have a predilection for being right.

Q. And hope, like the rest of us, to be right in the future? A. Mr. Staff, I would be happy to discuss it in the future.

Q. But you are, you agree, aware of contrary views in the industry? A. Of course.

Q. And you are aware of views held fairly widely that it is impossible to make any satisfactory prediction as to which way prices will go, of crude or product? A. I don't share this view.

Q. No, but you are aware of the existence of those views? A. I am quite aware

and if I were to seek to predict the prices of either crude or products in the year 1985, provided I were alive, I would say this is an absolute impossibility, but to make predictions for 12, 18 months ahead, I think is reasonably possible.

Q. Of course, you are aware that last year the learned editor of Platt's expressed the views that it was impossible to predict what movement was going to occur? A. I don't think it was the editor; the editor never expresses his own views, but I think he reported industry views.

Q. One of the views was that in, say, March, the end of March 1974, future price levels were — A. Yes.

Q. There were just too many unknowns to make any prediction beyond the first part of the year? A. That was the prevailing mood of the industry, yes. They did not know which way to turn, they did not know what the price would go up, go down, would the producing countries make available all the oil they needed, on what terms, how much would they have to purchase at one price, they could not — no, I think matters have settled down a little bit. 10

Q. But if the world-wide economic recession continues to deepen in the next 12 months, there is very strong reason to think that your anticipated October 1976 rise might not occur, isn't there? A. I don't think I predicted one for October 1976, but for July 1976.

Q. I am sorry, July 1976? A. I think there is every reason to think it will occur because we are talking about a Government dictated increase and not a market increase. What the situation is today is that the margin available to the international oil industry has become extremely slim and that the underlying cost of now \$11-something for crude oil is the all important factor in determining price, whether the remaining margin of crude is now something in order of 15 to 20 cents a barrel, whether a couple of cents are eroded or not, is, in the last analysis, totally irrelevant. 20

(Witness stood down.)

(Further hearing adjourned to 10 a.m. on Thursday, 27th November, 1975.)

EIGHTH DAY: THURSDAY, 27TH NOVEMBER, 1975 30

MR. OFFICER: There are some corrections in the transcript, the first one is p.161, the fifth line on that page, it should be July instead of September. The parties were uncertain at some time whether it was the 24th or 28th but they have always considered it was July.

HIS HONOUR: I think that is right.

MR. OFFICER: The next is on p.167, a paragraph almost halfway down commencing, "Do you remember Mr. Coogan". The quotation mark should start after the word "wrote" and before the word "contract".

On p.222 up from the bottom the name of the organisation should be Koch. At p.242 the third paragraph from the bottom, there was a reference to some bluish-green paint on the Telex. My friend attributes some of that to Mr. Horton and seems to attribute the mark on the October one to me. 40

MR. STAFF: I think I said it was Mr. Lockhart. It could be fixed by taking out "I understand that is my friend's marking."

HIS HONOUR: Yes. At p.243, the fourth paragraph from the bottom, it should be \$54.44.

MR. OFFICER: Turning to p.261 there is the question "You did tell his Honour earlier . . ." It should be "not significant."

10 I might also add that my friend has informed me that he no longer requires David Griffin to attend for cross-examination. Sir David will accordingly be leaving the jurisdiction. I did say that he would be back on the 9th previously but he will not now be back until the 19th December unless something extraordinary happens.

HIS HONOUR: There is no difficulty about that unless you find you need him in reply. That is the only risk.

MR. OFFICER: Yes, we will have to do the best we can if that arises.

HARRY JOHN COLISH
On former oath:

MR. STAFF: Q. You told his Honour yesterday that whilst you regarded it as unusual for escalator provisions to be tied to posted price crude, it was not unusual to tie escalator provisions to posted price product. Do you recall? A. Yes.

20 Q. You gave illustrations of other contracts, other than this K.N.P.C. contract of which you knew which contained such escalators? A. Yes.

Q. Were those which you mentioned yesterday the only other contracts of which you had knowledge which contained such escalator provisions? A. Not too many product term contracts have been written in recent months so I cannot offhand think of another one.

Q. I think you also said yesterday that the provisions of term contracts do not very often become publicly known? A. Very rarely.

30 Q. So your conclusion that it was not unusual to have escalator provisions in term contracts tied to product prices or postings was based really upon what you had seen recently in relation to the proposed provisions suggested for a contract between Nabalco and B.P. Australia? A. No. It is also based upon discussions with people in the industry.

Q. But without any knowledge of the particular provisions written into the actual contracts? A. Discussions about the standard escalator provisions which are now quite customary in the industry.

Q. The only contract you referred to yesterday was — a proposal for B.P.'s contract and Kaiser? A. Yes.

No. 111
—
Plaintiff's
evidence: H. J.
Colish: Cross-
Examination
(cont'd)

No. 111
—
Plaintiff's
evidence: H. J.
Colish: Cross-
Examination
(cont'd)

No. 111
 Plaintiff's
 evidence: H. J.
 Colish: Cross-
 Examination
 (cont'd)

Q. That was not in fact a contract, only a proposal? A. Yes.

Q. In relation to heavy fuel oil would not you agree it would be most unusual to find variation provisions based upon both crude prices, crude postings and product postings? A. I am sorry I do not follow you. Crude postings and product.

Q. Bringing both into the calculation? A. I do not recall that any of the contract proposals contemplate crude postings and product postings.

Q. Such a provision, I put to you, would be in your view most unusual? A. We are talking about crude postings rather than crude market prices or crude take.

Q. Let us talk firstly about crude postings and product postings as being factors in the variation calculations. A. I think crude postings have nowadays become in a new contract rather unusual. 10

Q. A combination of crude postings and product postings would be similarly unusual? A. As far as escalators — I think they would be.

Q. Crude postings and fuel oil postings often will move quite differently? A. I would say they move sometimes differently, not in the long term but in the short term.

Q. Often enough over a period one will find fuel oil prices below crude? A. When you say fuel oil prices—

Q. Market prices. A. That will depend upon the part of the world we are reviewing. In the Persian Gulf fuel oil market prices have not usually been lower than crude oil prices. 20

Q. When you say crude oil market prices you are talking of spot prices? A. Today the difference between crude spot terms and crude term prices is of no great significance. In the past, in the '60s it mattered.

Q. Did not you say yesterday that you did not know what prices had been negotiated for fuel oil in the Persian Gulf by direct purchasers in recent times — you did not know? A. That is correct.

Q. So it is really impossible to say market prices — term contracts, are the same as spot prices in the Persian Gulf? A. Are not we talking about—

Q. Residue fuel oil? A. Fuel oil prices at this moment will be lower for spot purchases than for term purchases — yes, but this has been the case now for at least a year. 30

Q. That is a view you offer without knowing what prices over the last year in term contracts have been negotiated by direct purchasers of residual fuel oil from the Persian Gulf? A. It is based upon discussions with people in the industry, with people who are trading, who are selling and buying.

Q. But people do not disclose the prices they are paying under term contracts? A. People who are buying and selling will not disclose to me the name of any particular buyer or seller but they will on the basis of a long-established relationship disclose to me the general conditions on the market. 40

Q. You will agree with me in about June 1974 and prior thereto very large increases in both crude and posted product prices and product market prices had been very substantially achieved because of the existence, what might be called the cartel of producing nations.

10 Q. Without wanting to be precise virtually the whole market price of crude and a large percentage of the price product ex refinery was attributable to the cartel nations participating in an indirect or direct share of the price? A. Yes, the costs in a wider sense were an overwhelming component of price. Of course to leave no misunderstanding when we talk of individual product prices, the allocation of raw material costs to individual products represents insoluble problems. I do not want to leave the wrong impression. That is perfectly correct for crude but true for products only if we take the total barrel of the products derived from one barrel—

Q. You mean it may be misleading if applied to a particular product only? A. Yes.

20 Q. You would agree that the various producer cartels have obviously quite different national interests, one from the other or at least some from some others? A. I think they all have several interests in common and certain other interests which differ. They have in common the highest possible price, an increase of the OPEC organisation power and at least the potential ability of controlling production.

Q. Some of the nations are sparsely populated and some heavily populated? A. Yes.

Q. Some have considerable economic aspirations for their own countries at the present time and others not so? A. I believe they all have aspirations for the economic betterment of their own countries but where the difference may arise is in relation to the available resources to these objectives. I think the sparsely populated country will find it potentially easier to satisfy that aspiration but the more heavily populated will have to use a larger portion of the available resources.

30 HIS HONOUR: Q. I suppose there may be economic aspirations and industrial aspirations? A. I would say both.

Q. I suppose all have economic aspirations? A. Yes, and they all have great financial aspirations.

Q. But some wish to see their country developed and others would not be so concerned? A. Yes, I think virtually all countries want to see their countries developed but there are some with very small resources aside of oil in the Persian Gulf which virtually have nothing to develop.

40 MR. STAFF: Q. Of course some of the nations have large available resources of crude which can be readily developed or from which crude can be readily obtained in increasing quantities if they want to? A. I would say they virtually all have by the standards of our industrially wealthy countries large resources but the possibility of quickly increasing production differs from country to country.

Q. And differs very widely? A. It differs widely. Saudi Arabia has by all accounts the potential to double and possibly triple its current rate of production.

Similar increases in the current production rate could not occur in line with geological knowledge — I do not pretend to have any — in Iran or Kuwait.

Q. So that of course the common desire for increasing revenue has a potential of being satisfied on the one hand in a country like Saudi Arabia merely by increasing production whereas that would not be potentially possible in a country like Iran — in general. A. Iran would prefer to do both.

Q. Iran of course I suppose has perhaps, so far as one can observe, the greatest aspirations for both increasing the price and increasing the revenue? A. I think that is a fair statement.

Q. And Iran has possibly the least capacity for increased production economically to increase total production? A. Again I have to say I am no geologist and I am hesitant to comment on things which I only understand second and third hand. I can say more recently exploration ventures in Iran have all been fairly disappointing but whether new ventures will be more successful remains to be seen. 10

Q. In fact the Iranian production has been diminishing in the last year or so? A. Not the potential production. It has dropped as it has also dropped in Saudi Arabia in response to declining demand.

Q. Do you agree there is a strong body of opinion in the industry that considers Saudi Arabia might well decide to aim at increased production and increased revenue even at present prices or at lower prices? A. I do not think so. 20

Q. You do not share the view but you would agree there is a body of opinion in the industry to that effect? A. No.

Q. You do not regard that opinion as existing? A. I do not regard that opinion as existing in the industry. It has actually been voiced in political circles.

Q. It has been voiced by Professor Adelman? A. Yes, I highly respect him. I have a great liking for him but he has the outsider's point of view rather than the insider's point of view as far as the industry is concerned and on this particular point I must respectfully part company with him as I have done on other occasions.

Q. We are accustomed to experts disagreeing? A. This in no way detracts from my general admiration and liking for him. He is undoubtedly an academic with a great interest in this particular field. 30

HIS HONOUR: Assuming this was as you say would it really happen soon enough to affect things before September 1976?

MR. STAFF: One does not know but it is one factor.

Q. You draw a distinction between outsiders and insiders. I take it you are wishing to convey that you were an insider and Professor Adelman was an outsider? A. Yes, an outsider in the sense of never being in a position to see the workings of the oil industry from within an oil organisation.

Q. His experience having been rather in the academic fields as against yours in multi-national oil companies, or one of them? A. Yes. 40

MR. STAFF: Q. You wanted to give some reasons in support of your view that they may be of some help in those words, "It is unlikely that the different interests of the various cartel countries will create any split in the cartel"? A. That is absolutely right. Saudia Arabia has very successfully given the impression on each occasion it would like to take a most conservative view. In practice when the chips were down it has always agreed that the take would increase. It may have a restraining interest, when Saudia Arabia had made this application but the increase took place — there has been a great deal of hope or had been, which I did not share, that on 1st October, 1975 there will be no increase. But there was an increase
 10 and it was quite substantial. I think we see a repetition again. I would say that after July of 1976 — there are again different opinions as you elicited from me yesterday, I think the majority expects an increase of 1% but one minority of opinion expects a higher increase because they think the more belligerent members of O.P.E.C. will exact a higher increase. Others expect that, it will wait until the year ends. I think I state the correct viewpoint for, as I said, 5%.

Q. You would agree, I suppose, would you Mr. Colish, that there is absolutely no market justification for increasing the price? A. There was no market justification for the previous increases ever since 1970.

Q. So whether or not there will be an increase in price, or a reduction in price,
 20 depends solely upon political circumstances as well as other factors? A. Yes.

HIS HONOUR: Q. Does the fact that — and I am only going on what I believe is general knowledge — that the Arab interests have invested large sums of money in various enterprises in the western world affect this one way or the other. Do they feel if they put prices up on oil it will affect the viability of their enterprises which they have invested money in? Or on the other hand do they feel they are not getting the return out of their investment because of the inflation of the countries they have invested their money in? These are only matters I have read in newspapers and I am seeking your views? A. Your Honour has touched upon a very important and very sensitive consideration. I am convinced that the Arab countries
 30 — not only the Arab countries but the oil countries, are very much aware of this and I think they have been very careful of this, to test the water as it were, and if the reaction on the part of the industrialised world had been very strong it is quite conceivable that subsequent increases might not have taken place, might not have been as great. There was no reaction beyond words, fairly meaningless words.

Q. Do you mean in respect of the October increase? A. In respect of the October increase, and January increase and subsequent increases. I think the oil countries, particularly the Arab countries, have now seen that if the increases are fed into the system in small doses, into the industrialised world and further be told that those countries — those increases are justified on the inflational figures in the industrialised countries, in the goods that those countries import, that there will be
 40 no serious resistance. The extent of the investment of the various O.P.E.C. countries varies slightly. Mr. Staff has rightly referred to the different position in different countries. As to Saudia Arabia, it would be in a position to invest huge sums of moneys but being apparently an extraordinarily cautious government that country has tried to invest domestically and into other Arab countries the maximum amount possible.

The current five year programme contemplates the whole amount should be invested in Saudia Arabia. I think I, in common with most observers, think it is a practical impossibility and that surplus, very large surplus sums will remain. But

whether those sums will be invested in short, medium or long term is a matter of speculation. In all probability most of it will not be invested long term. One country which has for years invested large sums as a true investor has been Kuwait. Kuwait, in many respects has been — in many respects — by far the most sophisticated amongst all the countries, both in relation to its financial investment policies. One only has to walk around London and see the position. Much of the real estate in London is Kuwait owned. In fact they recently bought an island off the south coast of South Carolina for development. That is a country which has also shown by its creation of Kuwait National, ahead of the rest of the world, that it plans to pursue the double course of an O.P.E.C. member trying to reap the maximum benefits from increased political power, and at the same time to reap the maximum benefits of an ordinary extremely shrewd commercial and financial community.

10

Q. Anyway, your view is that prices will rise again before September of next year? A. This is my view your Honour, yes.

MR. STAFF: Q. Mr. Colish, you annexed to or attached to your report O which is an Exhibit — a table of what you call 74 European bulk prices and selected dates. That is the first attachment, I think? A. Yes Mr. Staff.

Q. For the first half of the year you indicated prices for the first five months of the year, prices as at the 1st of the month. Do you recall? A. Yes Mr. Staff.

Q. Then you indicated a price in the middle of May — 15th May — or rather prices? A. Yes.

20

Q. You then went on to indicate 1st June and 1st July prices? A. Yes.

Q. You omitted August and September altogether, you included October 1st and omitted November. Why the omission, Mr. Colish? A. Because it seemed to me that after the crucial period of concern to this case, namely, after July 1, less frequent intervals would serve to illustrate the course of price movements. But I have here in front of me Platts Oil Price Handbook for 1974 which has a complete list of the daily prices of oil, as well as the monthly averages, the low and high, and I offer it to counsel for inspection.

Q. You could give us from it, I take it, the prices say on 1st August, 1st September, 1st November and 1st December? A. Yes.

30

Q. Of course, when you got to December you went to 30th December rather than the 1st of the month? A. Yes.

Q. Why was that? A. I wanted to show the end of the year, that is all. But all the remaining prices are available. They will not, I believe, show any significant difference.

Q. Perhaps you or Mr. Officer or those with him might take out those prices and add them to the Exhibit, Mr. Colish. I do not want to take time now doing it. But it may be useful for his Honour to have the figures month by month as a record? A. Yes, it will be easy. It is available right here.

40

Q. I suppose for fuel oil one would normally see in Europe a hardening of prices as you get into winter? A. Indeed.

Q. Particularly with the approach of the Christmas season? A. No, it is not so much at the Christmas season but the heating season.

Q. But the demand always increases throughout the winter? A. For both distillate and heating oil — to the extent that they use it for heating fuel, to the extent of which fuel is used for heating purposes.

Q. I suppose also the extent to which they are used for generation of electricity? A. Indeed, because more electricity is required for lighting in the winter months. It is to some extent offset in some hot countries by the greater use of air conditioning in the summer months. So it is less pronounced.

10 Q. So the rise that we see between 1st October and 30th December in your figures you will say, will you not, is apparently accounted for by the approach of the winter season? A. Yes, and in June the prices have probably hit the seasonal low point.

Q. First July seems to be the low point? A. Yes, I'd say very close to it.

Q. Then you normally experience a gradual increase as the end of the year approaches? A. This is generally the case when you have no extraordinary circumstances, no disturbing factors such as O.P.E.C. embargoes, yes.

20 Q. So really if you are comparing the trend of prices one needs to look at more than the three or four month period somewhere during the year? A. Yes, that is why I have tried to set it out, yes.

Q. So I suppose really the comparison is better made one year against the other? A. With—

Q. Other circumstances being equal? A. That would have been fine in the 1960's but in the 1970's such a thing would be misleading, almost totally impossible.

Q. In 1973, compared to 1974 you would have got a disturbed picture? A. It would have been a very completely disturbed figure but it could be done — but it would be completely meaningless.

Q. 1974 as compared with 1975 would give you a more realistic view of the trend, would it not? A. Somewhat more realistic.

30 Q. But the first part of 1974 was distorted and 1975 is again an abnormal year because it is the year of the deepest recession in the entire post-war period which has distorted the pattern of product prices one against another. A. It is very much more depressed the residual price around the world than it is in other areas. Or in other years. So again that would not be meaningful. What I think the comparison did show was that there was the second quarter of 1974 residual prices which had stabilised to a much greater extent than the prices of gasoline which continued to drop very steeply.

40 Q. At p.9 of your report you said in table A near the top of the page "Table A shows that during the second half of 1974 . . . heavy fuel oil prices raised." A. Yes.

Q. I suppose you would add to that, would you not, in the light of the evidence

No. 111
 —
 Plaintiff's
 evidence: H. J.
 Colish: Cross-
 Examination
 (cont'd)

you have given this morning "Rose at the end of the year and then declined quite sharply"? A. Yes, you would have to review the price of oil products in 1975, which I have not done yet. In 1974 we saw the relative stability and even slight seasonal increases in prices compared to a drastic drop in other prices, and I think that was relevant for an observer in June of 1974.

Q. But would you not agree, for the reasons you have already mentioned, that is the worst economic recession for many years, prices have declined considerably through 1975, of fuel oil? A. That is correct, and unfortunately this is something which was generally unforeseen in June of 1974.

Q. Come now Mr. Colish, the recession was well upon us by the middle of 1974, wasn't it? A. But people expected by the beginning of 1975 the world would pull out of it. 10

Q. The United States had been suffering a severe downturn since the early 1970's, hadn't it? A. This is quite true but in retrospective we can just only call it a hope — but at that time this was the expectation, that by 1975 the recession would be over and the United States Government has repeatedly made a forecast that this would be so, I visited London in November 1974 and again in May 1975 because I regarded opinion in London as particularly well informed — and in November 1974 people in London generally accepted that the continent — and notably Germany, which the strongest economic country in Europe, would by early 1975 pull out of the recession. When I came back in 1975 there was great disappointment that that had not been the case. 20

Q. Are you talking about people who you know or people in the industry when you say "people"? A. I mean economist, informed people. I remember men like Paul Frankil Walter Levy's organisation, Jack Hartshorn, Jack Reeves and a good many others. I talked to people in the financial community and this was the impression I gained.

Q. There was a considerable body of opinion which, by the middle of 1974, was to the contrary effect, was there not Mr. Colish? A. No.

Q. I think the majority opinion was to that effect? A. I think the majority opinion accepted that Government measures would result in an upswing of the economy in virtually all countries by 1975. 30

Q. You are expressing that view as being virtually a unanimous view current in practically all countries, did you? A. I didn't say unanimous.

HIS HONOUR: Mr. Staff, I do worry about how far we should take this. I think you have underlined the questions quite well. But if it is only directed to whether the price will go up next year, the witness has made his position in that regard quite clear, he has put all of his opinion, and no doubt you will call a witness who has a contrary view.

MR. STAFF: It seems to us to be also relevant, your Honour, to what it was reasonable to dispute in June 1974. And it was for that reason that I put the matter. I think I have sufficiently put the point. 40

HIS HONOUR: Do you mean from the point of view as to whether it was advisable or inadvisable to enter into the Kuwait contract?

MR. STAFF: Yes, that and the Concord contract. Yes, if your Honour thinks I have sufficiently dealt with the area of difference between us I will leave it.

Q. Mr. Colish, I want to put to you that in about May-June of 1974 for 60,000 tonne tankers for a trip from the Persian Gulf to Gove a reasonable freight rate would have been about 120 world scale? A. No, not according to the available records. But spot rates were not much higher than that.

10 Q. You found one record, did you not, at a world scale of 150? A. I found one contract of affreightment concluded in June 1974 in a spot rate. But the contract of affreightment concluded in June 1974 by Occidental Concord with United Refining Company in the United States at a rate of world scale 150.

Q. Yes. A. And it is the only contract of affreightment which I have been able to discover in any of the various brokerage reports during the entire first half of 1974. This particular contract of affreightment was reported by Howard Holder Charting Limited and H.P. Drury Limited in its "Shipping Statistics and Economics".

20 Q. Would you deny that a rate of about 120 to 130 world scale in June of 1974 in the light of the factors then known to the market would have been a reasonable rate for a contract of affreightment of the character of that entered into between Concord and Nabalco? A. No, I think that such a rate was not obtainable in the market at the time.

30 Q. Your view is 120 to 130 world scale would be quite ridiculous? A. I did not say ridiculous, because having lived in this oil industry for many years I am no longer going to regard anything as ridiculous. But I say it was unobtainable at that time because it was a period when people were reluctant to enter into any kind of long-term arrangement, even term chartering which dropped off steeply because normally the predominant method of securing tonnage in the industry, at that time it had dried up — not completely dried up but had gone down. But consecutive charters which normally covered something in the order of 15% of the total tonnage operating under a consecutive oil chartering contract was dropping off so steeply that very soon it represented one or two per cent. The answer in the industry which then prevailed resulted in most activity being in the spot market.

40 Q. What you are telling us is, is it, that most people whether buyer or seller preferred in the middle of 1974, having regard to the state of the market, to operate on a spot basis? A. One would have to look at it a slightly different way. Most charterers are oil companies. Oil companies have a large percentage of their tonnage covered by various other arrangements. They are typically available for charter at something like 30 to 40% of the requirements. These requirements were there. They, furthermore, had a large percentage covered by term charters. So it is the term of the balance of the uncovered needs to be covered and it is in that segment that the industry — and that means oil companies because they are a far greater number of oil charterers, preferred not to commit themselves to oil charters and switched to spot.

Q. Your reasons for that view was that market conditions were so uncertain that the industry at any rate regarded it as far preferable to operate on a spot basis until they saw what was going to happen? A. Having a different portion of the tonnage covered already they decided that the balance could be left to spot to a greater extent than usual.

Q. There was a sign in the market that there would be a shortage of tanker capacity in the world for the next year or so, was there? A. What the industry was primarily interested in were the very large ships and for those large ships there was definitely no sign of a shortage, there was every expectation of a huge surplus.

Q. And there was no sign in the market of any shortage from June 1974 onwards of 60,000 tonnes, was there? A. For the immediate future there was of 60,000 tonnes was not very likely—

Q. I am sorry, did you say there was or there was not? A. Your Honour, very likely, was not. For the somewhat longer terms, say three years or so, the outlook for the very large tankers was still absolutely clear, there would be an abundant surplus but for the smaller ones, it became more difficult to forecast because the small ships were becoming increasingly obsolescent if not obsolete and were ready for the scrap heap. 10

HIS HONOUR: Mr. Staff, I suppose in relation to this matter you will say to me "Look, there was plenty of shipping. The wise thing to do was to stand back and have a look at it."

MR. STAFF: And see what the industry was doing.

HIS HONOUR: And I suppose Mr. Staff will say "I had an installation at Gove, I had a town to look after, all these other things, enterprise, could I fairly take the risk that something might go wrong. It may be that everything might turn out well. But the wise thing for me to do was to see that I had a firm contract for a number of years." That is really the issue between you, is it not? 20

MR. STAFF: It is not quite as clear cut as that, your Honour, because there was another option open. There was an option to organise the first couple of shipments on a spot basis for two or three months while they had a good look at the market conditions.

HIS HONOUR: But if they had fallen between two stools, to use an expression, in their minds Gove was at risk. I am not suggesting this is a view that will prevail, but that is an argument.

MR. STAFF: No doubt that is the argument. That is the one that will have to be put. And the lines are drawn, your Honour, certainly. I think I have got from Mr. Colish what I want in that particular context. 30

WITNESS: I have said before, the industry supplemented with a spot market rather than covered its total requirements in the spot market. There is a vast difference in this. I am quite sure the industry would not under any circumstances have relied on the spot market for its total needs.

MR. STAFF: Q. But in any event, in retrospect you would agree, would you not, that Nabalco would have had no difficulty whatsoever in getting tanker capacity to transport shipments of oil to Gove during 1974? A. I think it would have been an entirely unsuitable approach. 40

HIS HONOUR: Q. That is not really an answer to the question. Mr. Staff wants to know if they would have had any real difficulty in doing that in 1974, and

he is restricting himself to 1974. A. Yes, they would have had considerable difficulty.

No. 111
—
Plaintiff's
evidence: H. J.
Colish: Cross-
Examination
(cont'd)

MR. STAFF: Q. What difficulty would they have had? A. Nabalco's position is that of having a fixed need for supplies in a certain cycle in certain phases. They would need to fit shipping precisely to that same cycle. That is almost impossible to accomplish on the term on the basis of spot charters or on term charters.

10 Q. Why, Mr. Colish? A. I will be happy to explain. Because we take a certain amount of oil which has to be imported. You would have to find a ship that totally filled the quarterly, whatever period we wished to talk about, carrying capacity which would exactly meet those needs. To equate these two is theoretically possible but practically impossible. But even if you found the ship had say in theory exactly equated those figures, and ships have a bad habit of slipping in their arrival dates, it would have thrown the whole thing out of gear. It is not coincidence that Nabalco went for the Concord contract which provided those.

Q. Do you know what storage Nabalco has for oil? A. I read something but I don't recall what the number was.

Q. You did not take into account in assessing the importance as you say of having operating for six months in 1974 of spot charter, but you did not take into account any storage that they have got? A. Oh yes, of course.

20 Q. If you did not know what it was you could not tell? A. I heard in yesterday's testimony that the reserve stocks were apparently very modest.

Q. What do you regard as very modest? A. For an isolated consumer like Nabalco something like three or four weeks' consumption I would regard as very modest.

Q. You are expressing the view that they would only have about three or four weeks storage? A. If they could maintain for about three months storage at a minimum, at any time—

30 Q. It would be very difficult? A. That would be a different story. That is why most consuming countries insist on maintaining such stocks. But this, I understand, was not the case. When I said before three months storage, I did not mean three months total storage capacity but the stocks available at any time equal to three months consumption.

Q. I suppose you would agree, would you Mr. Colish, that a ship owner's assessment of the extent of the opportunity for obtaining cargoes either onward or backward or intermediate cargoes after discharging his oil, whether he has got a contract of affreightment for cartage of oil or not, would influence the price that he would want for the cartage of the oil? A. Yes.

40 Q. And the extent of the opportunity would influence the price upwards or downwards, that is the opportunity for what I call intermediate cargoes? A. Possibly, yes.

Q. In the tanker market generally the rate for a contract of affreightment is normally lower than equivalent time charter or consecutive voyage charter? A. The

No. 111
 —
 Plaintiff's
 evidence: H. J.
 Colish: Cross-
 Examination
 (cont'd)

other way around. A contract of affreightment is always higher than that for a comparable term charter.

Q. Why is that? A. Because the owner assumes responsibilities and burdens which he does not have to assume under a time charter. But to make sure that his ships are available at the right time at the right place involves additional work, it may mean idle time for some ships and this has to be compensated for at a higher rate.

Q. At p.13 of your report you gave an explanation of A.F.R.A.? A. Yes.

Q. You did not there indicate the monthly A.F.R.A. award for different size categories, did you? A. I go from a prevailing—

10

Q. I appreciate that? A. I once wrote a 25 page explanation of A.F.R.A. I can make it longer.

Q. I don't want to take that time? A. Surely.

Q. But in effect the larger the vessel size the lower in the world scale rate? A. The lower the A.F.R.A. rate, yes.

Q. An average difference, for instance, in the monthly A.F.R.A. award between medium range vessels, that is between 25,000 and 50,000 tonnes, roughly, and large range vessels from 50,000 to 75,000 tonnes, between January 1st 1974 and September 1st 1975 has been more than 50 points, has it not? A. If you allow me one second, Mr. Staff, I would rather not guess, I would rather refresh my memory.

20

Q. Yes. A. You mentioned this period, Mr. Staff.

Q. January 1st, 1974 to September 1st, 1975? A. And the two vessel categories were medium range and large range vessels?

Q. Medium range to large range. A. It is 80,000, 79,999 for the large range. The difference between these two rates was—

Q. The difference has been more than 50 points at that period? A. It was about 50 points during the first half, perhaps at times a bit more. It dropped in the second half to about 50 — yes, still about 50. They had dropped considerably in 1975 to something like 40 and in September, the rates, these are the months I happen to have with me, it is still somewhere about 40.

30

Q. So that indicates a very considerable distance in an applicable rate of freight between medium range vessels and large range vessels in this category that we have mentioned? A. Between medium range vessels which would cover the size categories from about 25,000 to 45,000 and large range vessels which covered the category from 45,000 to 80,000 tonnes.

Q. Yes. A. And of course these are averages for all the vessels within those ranges.

Q. But it does indicate that there is generally a very large difference? A. Yes.

Q. Would you agree that the world scale rate is revised for bunkers only once a

year? A. It is generally revised, that means overall all rates are reviewed and revised and have been reviewed and revised in recent years once a year. In the early years, in the 1960's when the world was a somewhat more stable place and inflation was not rampant, revisions were not made.

Q. In recent years the custom has been— A. Yes, general revisions once a year and minor revisions within the year.

Q. So that the world scale changes on January 1st of this year would reflect changes which occurred during the one year period after September 1st of the previous year? A. Yes.

10 Q. Of course, in June 1974 it was very apparent in the tanker industry that there was going to be a large increase in the world scale which would come about on 1st January, 1975? A. I think that generally speaking the tanker industry people expected such an increase.

Q. And it was expected to be a high increase? A. Yes it would have been.

Q. And that was foreseen, certainly by June 1974? A. Let us say people who were really intimately conversant with all the factors and conditions could have foreseen it. You really had to know what the world scale computations and calculations involved. Unless you knew you did not foresee what was happening.

20 Q. A good competent broker would let you into the secret, wouldn't he? A. I quite frankly never asked one since I do not have to. I decline to answer that question because I have never tried to ask a broker to find out.

Q. Of course, the increase was something in the order of 35% wasn't it? A. It varied for different voyages. They varied because the effect of raising — there are three factors which effect the changes — tanker costs, port charges and currency exchange rates. And they vary for individual voyages.

Q. At any rate, in the sphere of the vessels covered by the Concord contract the increase turned out to be about 35%? A. On that particular voyage, I have not got the exact number but I understand 35%.

30 Q. So by agreeing in June the world scale was 170, it was in effect known to the market, the normal market, that in all probability that rate would give you from 1st January what was in effect world scale 205 or thereabouts? A. Strangely enough it does not seem to be known to the market in general. I asked questions of people in the marine and the tanker industry in the couple of weeks preceding my departure for Australia and I learned that it was quite customary to conclude transportation contracts, or even consecutive voyage contracts which may go from one year to the next on this very basis of a fixed quotation to world scale, which world scale might subsequently vary.

Q. Mr. Colish, in fact during 1974 world scale issued monthly guidance indices, did it not? A. Yes it did.

40 Q. And they showed the effect that the rapidly rising tanker costs would have in world scale rates when they arrived on the world? A. Yes, there were preliminary indications.

No. 111
 —
 Plaintiffs
 evidence: H. J.
 Colish: Cross-
 Examination
 (cont'd)

Q. Do you say that the market did not know, notwithstanding these indices being issued monthly? A. I did not say the market did not know, I said not all of the market but not that because a good many — I don't want to say a good many, but the type of contracts which had such a co-efficient to world scale, consecutive voyage charters and contracts of affreightment, frequently, use the same approach.

(Short adjournment)

MR. STAFF: I have nothing more, your Honour.

RE-EXAMINATION

No. 111
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 Plaintiffs
 evidence: H. J.
 Colish:
 Re-examination
 (cont'd)

MR. OFFICER: Q. I wish to ask Mr. Colish some questions relating to the evidence he gave at p.261. You remember that yesterday Mr. Staff asked you about the escalation provision in the Kuwait contract as compared with the escalators in the new B.P. contract, or proposed B.P. contract? A. Yes. 10

Q. You answered that they were different provisions the way they were written but the likely effect of those escalation provisions was in your opinion not significantly different? A. Yes.

Q. To what extent was the likely affect different? A. I have the provisions of the Kuwait contract pretty well in my mind but I would be grateful if I could once again look at the B.P. proposed contract provisions. There is one point of which I am not quite certain. 20

HIS HONOUR: This is the contract. There was a separate exhibit that is just the escalation clauses which was given at the conference.

MR. OFFICER: The contract as finally negotiated, your Honour.

Q. (Witness shown Ex. W) I refer you to clause 8? A. Yes. The Kuwait contract has its primary escalation provision an average of the postings of all companies in the Persian Gulf in prices. The proposed B.P. contract links the primary escalation provision to the lowest price posting. That may work one way or the other. It was probably not a very significant point. The two remaining escalation provisions of the Kuwait contract give K.N.P.C. the right to ask for renegotiation of the price. It is also fairly clearly defined, the factors. The cost increase escalator and the B.P. contract is not as clearly defined because it entitles the seller to increase the price by the full amount, the cost of increases to the seller of making available the furnace fuel oil available herein. It does not specify how the underlying cost increases are to be translated into the price of the fuel oil. This introduces an element of unilateral decision into this factor which is unique to the B.P. contract. 30

Q. You expressed on p.249 an opinion with regard to the rate of three and three-quarter commission under the Concord contract? A. Yes.

Q. It was put to you "Would you not agree that three and three-quarters is very unusual?": and your answer was "I would not say it is very unusual but I would say it is on the high side of the range of rates."? A. Yes. 40

Q. Now in the formal negotiation of a contract, such as the Concord contract,

and the parties to it what would you expect as a more usual rate than three and three-quarters? A. As I said three and three-quarters would not shock, a more usual one I would have expected to be somewhere in the vicinity of two and a half to three per cent for that sort of thing.

*No. 111
—
Plaintiff's
evidence: H. J.
Colish: Cross-
Examination
(cont'd)*

(Witness retired and excused)

MR. OFFICER: We will not proffer the evidence of Nabalco's senior purchasing officer who will explain the calculations which have been made in regard to damages and, to a considerable extent inform your Honour as to what the position is. Mr. Williams will be taken by Mr. Gleeson.

10

LLYN HAROLD WILLIAMS
Sworn and examined.

*No. 111
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Plaintiff's
evidence: L. H.
Williams:
Examination*

MR. GLEESON: Q. Is your full name Llyn Harold Williams? A. That is correct.

Q. Do you live at Unit 2, 100 Washington St., Bexley? A. That is correct.

Q. I think you are the senior purchasing officer of Nabalco Pty. Limited? A. Yes sir.

Q. And you have held that position since you joined Nabalco in August of 1973? A. That is right.

20 Q. I think prior to that you were a supply officer with the Commonwealth Portland Cement Co.? A. Supply manager.

Q. And prior to that you had been a senior purchasing officer with Queensland Alumina Limited? A. That is correct.

Q. Your duties with Nabalco are, I think, that you are the second in charge of purchasing and your main responsibility since September 1974 has been with respect to the administration of raw material supplies? A. That is correct.

Q. I think that prior to September 1974 you did not have anything yourself to do with fuel oil supplies? A. No.

Q. But since September 1974 administering amongst other things arrangements for the supply of fuel oil has been your responsibility? A. That is correct.

30 Q. Your duties in that regard, I think, include monitoring the forecast usage of fuel oil as advised to you from Gove? A. Yes.

Q. And within the parameters of the K.N.P.C. and Concord contracts making arrangements for shipments to Gove of fuel oil? A. Yes.

Q. And supervising the making of payments for those shipments under those contracts? A. That is correct.

No. 111
 Plaintiff's
 evidence: L. H.
 Williams:
 Examination
 (cont'd)

Q. Before coming to the question of payments, Mr. Williams, there is I think an established procedure within Nabalco relating to the making of estimates for future oil usage? A. That is correct.

Q. I think once a month a meeting takes place at Gove when the matter of fuel oil usage is reviewed? A. Yes.

Q. And I think that working forecasts of fuel oil usage are made five months ahead including the current month? A. That is correct.

Q. I show you two documents that have been earlier this month supplied to the defendant — one is headed "Schedule of usage of fuel oil" and the other is headed "Schedule of estimated usage of fuel oil"? A. Yes.

10

Q. The latter document covering the period from 4th November, 1975 to 5th September, 1976? A. Yes.

Q. Are those documents which you yourself prepared? A. Yes.

Q. And do they respectfully record the actual figures with respect to past fuel oil usage and Nabalco's estimates of future fuel oil usage up to the end of the period ending 5th September, 1976? A. Yes.

(Abovementioned documents entitled "Schedule of usage of fuel oil" and "Schedule of estimated usage of fuel oil" covering the period 4th November 1975 to 5th September 1976, tendered. Admitted without objection and marked Ex. AB)

Q. Mr. Williams, coming to the question of payments that are made for fuel oil supplies obtained for Gove, I think there are established procedures that have been settled in that regard? A. Yes.

20

Q. They are, of course, to an extent covered by the terms of the contracts that are already in evidence? A. Yes.

Q. But could you just briefly tell his Honour, with respect to payment to K.N.P.C. for fuel oil purchased F.O.B. Persian Gulf, by what method is such payment made? A. By an irrevocable letter of credit.

Q. Is that letter of credit established by the Manufacturers Hanover Trust Company in London? A. That is correct.

Q. On behalf of Nabalco? A. Yes.

30

Q. Does the procedure that is followed involve the submission to Nabalco by K.N.P.C. of shipping documents and including commercial invoices in respect of particular shipments? A. Yes.

Q. And the establishment by Manufacturers Hanover Trust Company at the request of and on behalf of Nabalco in London of a letter of credit in respect of that shipment? A. Yes.

Q. And payment at the amount the subject of that invoice by means of that letter of credit? A. Yes.

Q. I show you a small group of documents. (Shows witness) I think the position is you have prepared — and there was some time ago copies of these documents made available to representatives of B.P. — a separate file of documents in respect of each shipment of fuel oil that has been obtained under the K.N.P.C. Concord contracts? A. Yes.

Q. And they are available if anyone would wish to look at them at the moment? A. Yes.

Q. But you have extracted from those files, as an example of what happens, certain documents? A. Yes I have.

10 Q. I now show you a small bundle of documents. Do those typify the procedures that are followed with respect to payment of K.N.P.C. under this contract for that fuel oil? (Witness shown documents) A. Yes.

(Schedule of documents typifying the procedures followed with respect to payment of K.N.P.C. for fuel oil, tendered. Admitted without objection and marked Ex. AC)

Q. For the other major component of cost, Mr. Williams have you also extracted from those voyage files — (Question withdrawn)

20 Q. What is the procedure that is followed with respect to payment of Concord of freight costs under the Concord contract? A. On receipt of cargo at Gove Nabalco pays the amount by telegraphic transfer at Sydney which is paid into Concord's bank account in London.

Q. I show you again a similar bundle of documents extracted from those voyage files. Do those typify the documents that come into existence in respect of payment of freight costs to Concord? A. Yes.

(Bundle of documents showing expenses in respect of payment of freight costs, tendered. Admitted without objection and marked Ex. AD)

30 HIS HONOUR: Mr. Gleeson, there is one thing I did not quite follow. If we look at the letter of credit — or the request for the letter of credit which is part of Exhibit A, it refers to 57,000 tonnes heavy fuel oil arriving on the vessel Russell H. Green. I think somewhere it says — yes, in the letter, it is to arrive on or about 8th November 1974. If I look at the schedule which is Exhibit AB I do not find any shipment of that size.

MR. GLEESON: No, your Honour, those schedules are schedules of actual usage. No doubt quantity of fuel oil coming out of tanks.

Q. Mr. Williams, I think over the last couple of days you have spent some time with representatives of the defendant company. You had earlier yourself taken out figures in relation to the individual shipments of fuel oil that have to date been received by Nabalco under the K.N.P.C. Concord contracts? A. Yes.

40 Q. And in respect of those shipments you have prepared details of the actual costs that were incurred in respect of those shipments and compared those costs with the costs which would have been incurred under the old B.P. contract? A. That is correct.

Q. You prepared two separate sets of figures in that regard, the second set of figures in that regard being identical with the first set except that they excluded demurrage? A. Yes.

Q. So that the appropriate figures would be readily ascertainable in the event that the claim, so far as it related to demurrage were disallowed? A. Yes.

Q. I think you have made an agreement in relation to those figures with B.P., which has been reduced to writing? A. Yes.

(Two bundles of schedules of figures with a sheet recording an agreement between the parties in relation to those figures, tendered. Admitted without objection and marked Ex. AE)

10

Q. These are the figures you have agreed with B.P.? A. Yes.

MR. GLEESON: Perhaps if I could explain those, your Honour. First of all, in relation to the agreement, it is a genuine negotiated bargain in the sense that as your Honour will see we have, as it were, to avoid argument in the various matters that might have been the subject of argument, agreed to drop part of the claim that is contained in those figures. That can be dealt with no doubt in address, as to what is actually the amount of money involved. It is just a calculation from those figures. It was thought unmanageable to try to do the figures again. It is about \$25,000, I think. The precise figure will be given to your Honour later.

HIS HONOUR: I think I should note that part of Exhibit AE is an agreement which has been mentioned by you. I note that it is an unsigned document which has been unidentified but I will identify it by initialling it, dating it with today's date and placing it with the papers.

20

MR. GLEESON: Q. Mr. Williams, just to explain the method involved in this document, would you take your own copy please and could we go the figures in respect of voyage no.1? A. Yes.

Q. In relation to voyage no.1, if I may take you through that, in the first document with the demurrage included, first of all, you have set out the name of the vessel and its gross registered tonnage which is relevant to one of the figures that appears below. Is that correct? A. That is correct.

30

Q. Then there is reference to the bill of lading quantity, first of all in barrels and then in metric tonnes? A. Yes.

Q. I think there is a procedure established whereby a firm of surveyors called B. & R. Redwood employed by Nabalco in the Persian Gulf certify the correctness of the figures put forward by K.N.P.C. as the bill of lading quantity? A. Yes.

Q. I think one of the differences between the K.N.P.C. contract and the old B.P. contract was that under the K.N.P.C. contract Nabalco worked on the basis of the bill of lading quantity? A. Yes.

Q. Whereas under the old B.P. contract it paid on the basis of the quantity actually delivered to Gove? A. Yes.

40

Q. I think in practice more often than not there is a slight discrepancy between the bill of lading quantity and the quantity actually delivered to Gove? A. Yes.

Q. The quantity actually delivered to Gove is measured by what is called the out turn statement? A. Yes.

Q. And that explains the reference in some of the goods on this document to out turn statement of quantities? A. Yes.

Q. I do not think the discrepancy between those two amounts indicates that anybody is doing anything wrong, it is just a normal discrepancy? A. Yes.

10 HIS HONOUR: Q. That can be due to temperature, can't it, in some circumstances? A. Temperature, tank calibration, your Honour, under the — when we were receiving fuel oil from B.P. as I recall — before my time with Nabalco — one of the technical officers went to Gove to try and ascertain why there is a discrepancy and even he could not determine that.

HIS HONOUR: What do you pay for, the actual weight or the—

MR. GLEESON: You pay for the Bill of Lading quantity to K.N.P.C. F.O.V. Then there is other information set out on this document which is self explanatory.

HIS HONOUR: I am already down to M, Mr. Gleeson, but I don't know what the next letters stand for M.H.T.C.

20 MR. GLEESON: Manufacturers Hanover Trust Company, letter of credit fee.

Q. That is a fee that Nabalco pays to Manufacturers Hanover Trust Company for the establishment of these letters of credit? A. Yes.

Q. Then there are other computations set out under item R, insurance, that is the item that we have agreed to drop? A. Yes.

Q. Then there is another item of insurance under T, that is a particular kind of insurance. Is that amount paid by Nabalco to Stenhouse, who are Nabalco's brokers? A. That is correct.

Q. Then about the middle of the page you have totalled for the items involved in what might be called payment to in respect of the K.N.P.C. contract? A. Yes.

30 Q. And then further down the page you deal with payments to or in respect of the Concord contract? A. Yes.

Q. There was no demurrage in relation to this first voyage? A. That is correct.

Q. The survey fee, is that the fee paid to B. & R. Redwood for the work they do in the Persian Gulf? A. Yes.

HIS HONOUR: Q. I think the exchange rate is different for the freight than it was for the sale of the oil. You have got a note I think on the next page about that. Was there a change about this time? A. Yes, your Honour. Unfortunately the devaluation of the Australian dollar occurred the day we had to make payment for the fuel oil.

No. 111
 Plaintiff's
 evidence: L. H.
 Williams:
 Examination
 (cont'd)

MR. GLEESON: Q. You have just taken actual exchange rates that apply on the day that payment was made? A. The actual exchange rates applied.

Q. In relation to this first shipment, by the way, it will be noticed that there had been a small escalation in the price between the date of writing the K.N.P.C. contract and the date of the first shipment? A. Yes.

Q. I show you a document. Is that a telex that Nabalco received from K.N.P.C. in relation to that matter? A. That is correct.

(Telex from K.N.P.C. to Nabalco tendered without objection and marked Exhibit AF.)

Q. I think you have in fact this morning computed the difference in Australian dollars per tonne involved in that escalation? A. Yes. 10

Q. How much was it? A. Approximately 12 cents per tonne based on the exchange rate ruling at that time.

(His Honour was referred to voyage 4 to see the difference between file 1 and file 2.)

Q. Mr. Williams, you have prepared a comparable set of documents I think in relation to expected future deliveries between now and the 5th September, 1976? A. Yes.

Q. I show you these two bundles, are they the computations in respect of those future deliveries? 20

HIS HONOUR: Mr. Staff, is it agreed 5th September 1976 is the right date?

MR. STAFF: No, your Honour.

HIS HONOUR: You would be contending for an earlier date?

MR. STAFF: Yes, contending for a date before Christmas this year.

MR. GLEESON: Q. Under the old B.P. contract there were at least two possible escalators, one was 9B relating to freight rates and Nabalco and B.P. have agreed between themselves on what those escalation figures would have been, and that agreement is reflected in those figures that have been tendered in respect of past voyages? A. That is correct.

Q. It is agreed I understand also between us that the potential escalator contained in cl.9C(iv) of the contract in the events that happened, did not operate? 30

HIS HONOUR: Is that currency?

MR. GLEESON: Currency. It is probably inaccurate to call it escalator, but there is another important provision of the contract that is relevant to the matter that your Honour just raised and that is the cut off point, that is cl.9C(v). It has already been foreshadowed by Mr. Staff that what happened in relation to indigenous crude recently is of relevance in this case.

HIS HONOUR: In other words he said he could have given you notice under that clause.

MR. GLEESON: He has given a notice and we have not responded to it yet. We have for the purposes of our calculations ignored that, but no doubt it will be said to be relevant by the other side.

HIS HONOUR: Mr. Staff, that is based on saying that you have a cut off point before Christmas.

MR. STAFF: Yes, your Honour, that notice will take effect a few days before Christmas and from then on we would be prepared and ready and willing to supply at a proper rate for the balance of the 7 years of the contract.

HIS HONOUR: Assuming that, do you agree otherwise with the 5th September, 1976 or do you still contend for an earlier date.

MR. STAFF: I think probably 5th September, I think that is the only logical date.

HIS HONOUR: That is the 9C(i) date?

MR. STAFF: Yes.

MR. GLEESON: Q. In relation to these sets of figures that you have prepared and that I have just shown you, as well as preparing one bundle with demurrage included and one bundle with demurrage excluded, I think within each bundle you have prepared two separate sets of figures: one of them prepared on the basis of a set of assumptions as to what might happen in the future, most unfavourable to Nabalco and most favourable to B.P., and the other prepared on a set of assumptions as to what might happen in the future, most favourable to Nabalco and most unfavourable to B.P.? A. Yes.

Q. And in every case the explanatory notes should make it possible to deduce an intermediate figure in the event that the conclusion should be reached that neither of those individual sets of assumptions is the right assumption to make, but that some intermediate combination of the assumptions is appropriate? A. That is correct.

(Above documents tendered; right of objection reserved; documents to be marked for identification.)

Q. Voyage 11 in the first file, do you have a copy of that in front of you? A. Yes.

Q. This has been done I think on the same method as was used in relation to the figures tendered concerning the actual voyages to date? A. Yes.

HIS HONOUR: Is this an actual voyage or a notional voyage?

MR. GLEESON: Q. This is an expected voyage? A. Yes.

Q. You have assumed that all these voyages will be in the Russell H. Green? A. Yes.

No. 111
 —
 Plaintiff's
 evidence: L. H.
 Williams:
 Examination
 (cont'd)

Q. Why have you selected the Russell H. Green? A. We have selected the Russell H. Green as being a typical 60,000 tonne vessel which we would expect to receive shipments under our agreement with Concord.

Q. That is what you in fact do expect? A. Yes. Well, in fact, Russell H. Green has been nominated for voyage 11.

Q. You have got a figure in there for bill of lading quantity and a note B which sets out the assumption according to which you have arrived at that quantity, estimated 6.5 barrels a tonne based on previous voyages. Can you just explain to his Honour why it was that you assumed you would have a bill of lading quantity of 403,000? A. We have assumed for this voyage that he will not get more than 62,000 tonne based on previous shipments. To compute that back to barrels under which our contract with K.N.P.C. is based on, we have to determine how many barrels in 62,000 tonnes of cargo and based on previous ten voyages the average works out to about to six or seven decimal places, but for the purpose of this study we have taken 6.5 to express it in round figures. 10

Q. In relation to note D which is relevant to item E, you have had to make an assumption as to the out turn loss, that is the difference between the bill of lading quantity and the quantity shown by the out turn statement? A. Yes.

Q. Have you computed the estimated out turn loss simply by taking the average of the actual out turn loss experienced on voyages 1 to 10? A. That is correct. 20

Q. Then you have taken a bill of lading dated, as appears from item G of 18th December, 1975. What led you to take that date? A. Item E?

Q. Yes? A. We assumed that a 19 day voyage is a typical voyage under our agreement and it is based on an average of voyages 1 to 8 and in forecasting shipments we assume an E.T.A. Gove and we compute backwards 19 days and day 1 is the bill of lading day of that 19 days.

Q. In relation to item I, f.o.b., the price per barrel, you have assumed as appears I think from note A that this shipment will be invoiced at the new contract price effective as of the 17th — or is it the 11th October? A. 17th. 30

Q. 17th October, 1975 that you have in fact been notified by K.N.P.C.? A. Yes.

Q. In relation to the exchange rate you have assumed as the appropriate exchange rate that which did in fact apply on the day on which you prepared these figures, namely 17th November? A. That is correct.

Q. For the reason I think that in terms of exchange and currency movements you did not feel that there was any other assumption that you could make? A. That is correct.

Q. In relation to the figures under the document headed voyage No.11A, could you tell his Honour with respect to escalators and other factors that might affect price or cost movements, what assumptions you have made in relation to voyage 11A and then point out how they differ from the assumptions that have been made in respect of voyage 11B? A. 11A— 40

HIS HONOUR: 11A — what are they, favourable to B.P.?

MR. GLEESON: Yes, they are what I might call the conservative assumptions.

HIS HONOUR: And 11B are those favourable to Nabalco assumptions?

MR. GLEESON: The plaintiff in 11A.

10 WITNESS: In 11A if we go to line X, rate per actual tonne, we have assumed that the Concord freight contract rate will remain the same as it stands today on the basis that despite world scale increasing at Persian Gulf ports from \$8.15 to \$8.21 per tonne, we have requested Concord not to apply the increase, and this is what we have assumed as at that date. If you go to 11B we withdraw that assumption and apply it, and the differential is reflected in the respective freight rates per tonne.

MR. GLEESON: Q. What is the next one? A. The next one is demurrage. We have assumed that demurrage is not incurred on 11A, whereas on 11B our experience with a vessel typical to the size of the Russell H. Green, we will in fact incur demurrage and this is based on the past performance of previous, say, 60,000 tonne vessels, namely voyages 4, 5, 6 and 7.

HIS HONOUR: I suppose the differential between these two extremes of assumptions is substantial, is it, or not?

MR. GLEESON: Yes, it is, your Honour.

HIS HONOUR: Does it run into millions or less than that?

20 MR. GLEESON: Less than that your Honour.

MR. OFFICER: 70,000-odd on 11A as compared with 11B.

HIS HONOUR: How many shipments altogether?

MR. GLEESON: 11 through 16 inclusive, 5.

HIS HONOUR: 70,000 a time, is that in round figures?

MR. GLEESON: I notice in relation to voyage 15 it gets up to 290,000.

HIS HONOUR: The difference between the two approaches.

MR. GLEESON: Yes, your Honour.

(His Honour pointed out that by the time he delivered his judgment voyage 11 would be over.)

30 MR. GLEESON: What is the next difference between 11A and 11B. A. 11A and 11B, return to the column marked B.P.A., lines 14, 15, 16, and 17. In specifically line 16 we have assumed 11A that Afra will increase as from the 1st January, keeping in mind that the discharge date at Gove will be the 7th January, from which time we would pay the rate ruling. We have taken, because we cannot predict ahead, that November 1st, Afra rate is in fact 129.7 for the type of vessel we are contemplating and we apply as per the arrangements in the past under the B.P.

agreement for a freight adjustment factor which is based on Afra exchange rates between pounds Sterling, U.S. dollar and the Australian dollar and we reach a figure of \$5.16 cents per metric ton.

If we take 11B we assume Afra will not increase and it will be that figure already advised by B.P. that will be applicable.

Q. So what you have done in this exercise in 11A is when you are working out how much you will have to pay K.N.P.C. you have assumed there will be no freight rate increase and what you would have had to pay B.P., you have assumed that there would have been no freight rate increase? A. That's right.

Q. In 11B you have reversed those assumptions? A. That is correct.

10

Q. To give the two extremes in that regard of what I might call the most conservative approach and the most favourable approach? A. Yes.

Q. Is there any difference between 11A—

HIS HONOUR: Let me follow it, has the freight remain down for both situations in 11B and up for both in 11A, or is it one up and one down.

MR. GLEESON: It is K.N.P.C. down, B.P. up in 11A, and K.N.P.C. up, B.P. down in 11B.

Q. Is that right? A. Yes.

Q. Suppose that somebody were to reach the conclusion in relation to voyage 9 that the proper combination of assumptions would be that the Concord freight rate will in fact increase and also that the Afra freight rate will increase. How do you apply that combination of assumptions to 11A and 11B. What do you then do? A. On that basis you would take 11A and recalculate from line X and you will take into account the fact that the Concord World Scale rate will increase. We have already allowed for world scale to increase but as the facts become known both figures would ultimately be adjusted.

20

Q. Do you mean by that that you would, in 11A, between items X and 11 inclusive put in instead of the figures which now appear in 11A in relation to freight rate, the figures which appear in 11B in relation to freight? A. The line 11 will not increase because that is a fixed rate.

30

HIS HONOUR: Q. What Mr. Gleeson says is if you make the assumption that both freight rates are going to move upwards or downwards it is simply a question of transposing the calculations from one document to the other? A. That is correct.

MR. GLEESON: Q. How extensive the transposition would be might depend on the view that you took about demurrage, for example? A. Yes.

Q. Could you take us to the voyage where you did on one occasion apply and on the other occasion not apply, Mr. Colish's assumptions about what is going to happen to posted prices next year? A. Yes, voyage 14A and 14B. 14A assumes there will be no increases.

Q. Whereabouts? A. Line I on 14A.

Q. Line I, f.o.b. price per barrel? A. That is correct.

Q. That assumes what? A. That assumes that the posted prices effective 17th October this year will not change. If we go to 14B, line I, we have assumed a straight 5% escalation on the price of 10.75 cents a barrel.

Q. You are not venturing any prediction in that regard yourself? A. No.

Q. You base your assumption on what you understand to be the effect of Mr. Colish's evidence? A. That is correct.

10 Q. But if the assumption is accepted, the consequences appear in 14B? A. That is right.

Q. If the assumption is rejected the consequences appear in 14A? A. That is correct.

HIS HONOUR: Q. You agree B.P.'s price to some extent for 14A is effected by a greater freight rise? A. Yes.

MR. GLEESON: Q. Because there is no other escalator provision in the old B.P. contract that would be capable of operating? A. Apart from currency fluctuation.

20 Q. This is all done on the assumption that 9C(v) is irrelevant to the exercise and that the only escalators of significance when it comes to working out what B.P. would be, would be Afra and 9C(iv)? A. Yes.

Q. If of course 9C(v) were regarded as relevant, it may very well be that one could never get to considering what is going to happen in July, 1976? (No answer.)

(Luncheon adjournment.)

ON RESUMPTION:

HIS HONOUR: Mr Williams, you are still bound by your former oath.

MR. GLEESON: Q. At the adjournment I was asking you some questions about these figures that you have prepared in relation to voyages 11 to 15 inclusive? A. Yes.

30 Q. I want to just ask you a couple of details about the assumptions that have been made in those figures, briefly, but before I do, is this the position, that with respect to these figures as to future voyages the matter therein contained as to times and amounts and future deliveries represent your expectations as Nabalco's purchasing officer. Is that the position? A. Yes.

Q. But that in relation to matters of cost what you have endeavoured to do is simply to cover the various possibilities, to expose the various assumptions that might be made and to canvass the range of assumptions without expressing any personal preference for one assumption or the other? A. That is correct.

Q. And that is why you have preferred in relation to the A series a set of figures on the most unfavourable assumption and in the B series a set of figures on the most favourable assumption for consistency, and you would not wish yourself to be taken to be putting forward any view as to what is the right assumption? A. That is correct.

Q. In relation to voyage 12 could you tell his Honour how the figures in relation to voyage No.12A compare in terms of assumptions, with the figures in relation to voyage No.12B. Would you draw his Honour's attention to the comparative assumption? A. Certainly. Line I in 12A and 12B, no assumption is drawn apart from the fact that the price per barrel remains constant.

10

Q. You are now talking about 12A? A. 12A and 12B.

Q. In 12A what assumption is made? A. We assumed that the price per barrel remains the price as quoted on the 12th October by K.N.P.C. On 12B we make an identical assumption, line X, we assumed that the price per tonne is based on the world scale rate effective 1st October for voyage Shuaiba-Gove.

Q. That is 12A? A. 12A.

Q. What did you assume in 12B? A. 12B we have applied a 7.5% increase which we take to be effective from 1st January, 1976.

Q. Where did you get that figure from? A. This is a figure Mr. Colish has put forward.

20

Q. As you understand it, in his evidence? A. Yes.

Q. You have dealt with down to line X on 12A and compared it with that line on 12B? A. That is correct.

Q. What is the next assumption? A. The next assumption in 12A is that Nabalco will not incur any demurrage where as in 12B we make the assumption that we will incur 22 hours demurrage based on an average of voyages, 4, 5, 6 and 7.

Q. What is the next assumption? A. The next assumption we got to B.P.A. column line 16, we assume that Afra will increase from the 1st January to a figure we have calculated to \$5.16 a tonne based on the Afra rate quoted 1st November this year applying certain exchange rates. 12B we have assumed that Afra will not increase as from 1st January.

30

Q. That covers the range of comparative assumptions in voyage 12? A. There are other assumptions relevant to the payment dates.

Q. They appear from the column? A. Yes.

Q. Voyage 13, would you draw his Honour's attention to comparative assumptions that have been made in relation to 13A, and 13B. A. The assumptions for 13A and 13B are identical to 12A and 12B.

Q. And 14? A. 14A we assume that line I, the f.o.b. price per barrel will not increase as at 1st July.

40

Q. What have you done in 14B? A. 14B we have assumed that the posted prices will increase 5%.

Q. I think you told us this morning that is based on what you understood to be Mr. Colish's evidence? A. That is correct. 14A we go to freight, line X, we assume that the world scale rate will not change as it stands as at 1st October. 14B we apply an assumption of 7.5% effective from the 1st January.

10 Q. Again based on what you understand to Mr. Colish's evidence? A. That is correct. For demurrage on 14A we assume Nabalco will not incur demurrage. For 14B we do assume for the same reasons as given for 12A and 12B. The next point in 14A, the B.P.A. column, we assume that line 16, freight Afra adjustment per ton will increase to \$5.16 assuming that the Afra rate as at 1st November remains constant for this period, as against 14B, we assume that Afra does not increase as at 1st January.

Q. And voyage 15? A. Voyage 15 is identical to that of voyage 14.

(Subject documents tendered: no objection subject to reserving right to cross-examine in relation to mathematical calculations, if necessary: admitted on that basis as Exhibit AG.)

(No cross-examination subject to above reservation.)

20 (Witness retired and excused subject to recall.)

(Case for the plaintiff closed.)

CASE FOR THE DEFENDANT.

(9C(v) notice B.P. to Nabalco dated 20th November, 1975 tendered without objection, subject to relevance; marked exhibit 52.)

(Letter from Department and Minerals and Energy dated 24th October, 1975 addressed to Arthur R. Pritchard and Company together with attached press statement by the then Prime Minister tendered without objection, subject to relevance; marked Ex. 53.)

30 (Copy licence agreement dated 1st November, 1974 between Nabalco Pty. Limited and B.P. Australia Limited, tendered; no special objection subject to general objection made some days ago about looking beyond the plaintiff: marked Exhibit 54.)

(Deed made 20th October, 1972 between Swiss Aluminium Australia Pty. Limited, Gove Alumina Limited and B.P. Australia Limited tendered; objected to as the plaintiff is not a party; admitted and marked Exhibit 55.)

(Air agency agreement made 1st November 1974 between B.P. Australia Limited and Nabalco Limited, tendered, no objection subject to relevance; marked Exhibit 56.)

GEORGE DAVIDSON GEOFFREY SHAW.**Sworn and examined:**

No. 111
 —
 Defendant's
 evidence:
 G. D. G. Shaw:
 Examination

MR. STAFF: Q. Mr. Shaw, your name is George Davidson Geoffrey Shaw?
 A. That is right.

Q. You live at 90 Queens Road, Carnegia, Victoria? A. I do.

Q. You are retail sales superintendent of B.P. Australia? A. That is right.

Q. You are employed within the sales division of that company and have been for some three years now? A. That is right.

Q. I think prior to Mr. Snape's return from secondment to the London office of B.P. Limited, you had been acting in the position of manager, Government and National department, within the sales division of B.P. Australia? A. That is right. 10

Q. You relinquished that task when Mr. Snape returned to Australia, or within a few days of his return? A. Yes. I did.

Q. I think he returned quite shortly before the 17th May, did he not? A. Yes, about the 7th if I remember correctly.

Q. By the 17th I think you had handed over to Mr. Snape? A. Yes.

Q. Since Mr. Snape's return and your handover of your previous tasks to him, you have had nothing whatever to do with matters concerning Nabalco or the Nabalco supply contract? A. That is correct, nothing at all.

Q. You have neither been engaged in any duties in the course of your ordinary duties which had the reference to that? A. No. 20

Q. Nor have you had any other contact with the dispute or problems arising out of it? A. No.

Q. I think after Mr. Snape's return from London and after handing over to him, you were invited to attend a meeting on 17th May? A. Yes.

Q. With some representatives of B.P. and representatives of Nabalco? A. Yes, I was.

Q. You attended that meeting at B.P. House in Melbourne? A. I did.

Q. Can you tell us who was present so far as you can recollect? A. Present for Nabalco were Mr. Coogan and Mr. Notter, and present for B.P., Mr. Lockrey who was in the chair for the meeting, Mr. Rowland, Mr. Snape and myself, and Mr. Skillen for part of the time. 30

Q. How long do you recall that meeting continuing? A. It is hard to say, an hour — between 1 and 2 hours would be an estimate.

Q. Have you any recollection of doing anything at that meeting? A. I took some notes during the meeting.

Q. Was that at the request of anyone or on your own initiative? A. It was on my own initiative.

Q. I want you to look at the handwritten document which I show you, along with the title? A. Yes.

Q. Is that handwritten sheet in your handwriting? A. It is.

Q. Is that the sheet of notes which you took at this meeting? A. Yes.

10 Q. That is the actual sheet, is it? A. Yes, with the exception of the additional words at the bottom which are not in my writing.

Q. Those were not your words and not put on it at the meeting? A. They were put on subsequent to the meeting.

Q. By somebody else? A. Yes.

Q. Do you know whose handwriting that is? A. That is Mr. Snape's handwriting.

Q. The typewritten document I think is a typed copy of the note, is it? A. Yes, it is.

Q. The note contains a number of numbered paragraphs? A. Yes.

20 Q. Do those numbers indicate a chronological order of the subject matter? A. They do, yes.

Q. So that would you just explain to his Honour how you came, in consequence of matters occurring at the meeting, to make the notes? A. I made the notes successively together with the numbers on the paper as the points were raised in the course of the meeting in chronological sequence.

Q. Your notes do not, of course, purport to be a transcript of the discussion? A. In no way, no.

Q. What were you aiming to record? A. I was aiming to record the points on which action would subsequently be necessary by B.P. and also to prepare a record of the major points that emerged from the discussion at the meeting.

30 Q. You used in the notes some initials? A. Yes.

Q. Against some of the numbered items? A. Yes.

Q. What does E.A.N. mean? A. Mr. Notter.

Q. A.C.? A. Mr. Coogan.

Q. J.H.R.? A. Mr. Rowland.

Q. C.L.? A. Mr. Lockrey.

Q. Without resort to your notes, have you any recollection of any of the discussion that occurred on that day? A. Yes.

Q. You have some? A. Yes, I have some.

Q. Can you tell us what recollection you retain? A. The meeting was opened by Mr. Lockrey as chairman of the meeting and he summarised the problems that currently confronted B.P. which had led to the meeting taking place. He produced a resume of our then current position and he stated in the course of those remarks that the contract, the agreement between B.P. and Nabalco had been terminated. He also included in those remarks an expression of willingness on B.P.'s part to continue supply Nabalco at some point after the end of July. 10

MR. LOCKHART: Can we have what he said?

(His Honour requested that the precise conversation be given as best the witness could do so.)

MR. STAFF: Q. Are you able to recollect the words which were spoken by Mr. Lockrey? A. No.

Q. Or words which, according to your recollection, conveyed the effect of what he stated? A. Not the words, no.

Q. You are left, are you, with simply a general impression? A. Yes.

Q. Of the effect to you of what he said? A. Yes. 20

Q. Beyond that you do not carry any recollection? A. I cannot go beyond that, no.

Q. With the aid of your notes are you able to do any more? A. Not in terms of recalling Mr. Lockrey's words, no.

Q. Or those of anyone else? A. I beg your pardon?

Q. Or those of anyone else? A. No.

(Mr. Shaw's handwritten and typed notes tendered; objected to; tendered on the basis of s.14B of the Evidence Act and as being a contemporary record made by the witness of the events as they occurred:)

(His Honour discussed with counsel the admissibility of the handwritten notes taken at the meeting of 14th May by this witness. Document handed to his Honour. His Honour admitted the document which was marked Ex. 57.) 30

MR. STAFF: Q. You have recently looked through the document, Ex. 57, your notes? A. Yes.

Q. Having refreshed your memory by reference to it are you able to say that it records the series of matters which were discussed? A. Yes.

Q. And other descriptions of discussions which are recorded? A. Yes.

Q. Would you look at Ex. 57? A. Yes.

Q. You see against the number 5, you have recorded a number of — four sentences? A. Yes.

Q. You have commenced that paragraph with the letters A. C.? A. Yes.

Q. Having looked at the document and refreshed your recollection can you tell us whether the four matters that are mentioned were spoken to you by Mr. Coogan — (question rejected).

10 Q. In the same paragraph you have the initials J.H.R. opposite the sentence?
A. Yes.

Q. Would you tell his Honour — no, I withdraw that question.

CROSS-EXAMINATION:

MR. LOCKHART: Q. Would you look at the document the officer hands to you? A. Yes.

Q. Having looked at it I want to ask you whether you have seen it before. It is a telex from B.P.A. to B.P. dated 17th May 1974. A. Yes.

Q. Have you seen that document before? A. Not that I can recall.

Q. Would you hand it back please? A. Yes. (Witness complies.)

20 Q. Did you notice that the document had a stamp in the top right-hand corner of the various groupings within B.P.A. to whom a copy of that telex would have been directed? A. I did not notice it.

Q. Look at it again and tell me if there is anything on that document which indicates it would have come to your attention in the normal course of events? A. It may have done. I cannot say more than that, I am afraid.

Q. May I have it back? A. Yes.

Q. Would you look at this document the officer now shows to you and tell me if you have seen this before? A. I do not recall it, I am afraid.

(Witness retired and excused.)

30 HIS HONOUR: Have those documents you showed the witness been identified?

No. 111
 —
 Defendant's
 evidence:
 G. D. G. Shaw:
 Cross-
 Examination
 (cont'd)

MR. LOCKHART: Yes, the first document is Ex. R. The second document has not yet been identified. Perhaps it might be marked.

(Above document mfi. 5.)

No. 111
 —
 Defendant's
 evidence:
 C. Lockrey:
 Examination
 (cont'd)

COLIN LOCKREY
Sworn and examined:

MR. STAFF: Q. Your name is Colin Lockrey? A. Yes.

Q. You live at 5 Adele Court, Doncaster, Victoria? A. Yes.

Q. You are the divisional manager of the sales Division of B.P. Australia? A. Yes. 10

Q. You were appointed to that position when the sales division was created by the Amalgamation of the former retail and wholesale sales divisions about 1974? A. Yes.

Q. Prior to that you had held the position, for a number of years, as manager of the wholesale sales division, which you held when the supply agreement was made with Nabalco Pty. Ltd. in June 1970? A. Yes.

Q. Prior to that you had been the general sales manager of the company? A. Yes.

Q. I think you first had some discussions with Mr. Notter and Dr. Sorato back in 1971? A. Yes. 20

Q. At that time you had some general discussions with them about events that were then occurring in the Middle East? A. Yes.

Q. In 1971? A. Yes.

Q. You were aware of the service by B.P.A. of its revised base price notice in March 1974 upon Nabalco? A. Yes.

Q. You were the officer in B.P.A. primarily responsible for matters relating to that notice and arising out of it? A. Yes.

Q. And in relation to negotiations that subsequently occurred with representatives of Nabalco? A. Yes.

Q. You were not the only person who had some part in the negotiations? A. No, I was a team leader. 30

Q. I want to take you first to this matter. You had some discussions with Mr. Notter from Nabalco on 17th April? A. Yes.

Q. I do not want to ask you about those discussions. They were, I think, agreed between you and Mr. Notter to be without prejudice? A. Yes.

Q. May I now pass forward. I think you had some further discussions with Mr. Notter on the telephone and I suggest that was on 26th April. Do you recall that?
 A. About that time, yes.

Q. Do you recall before you had a discussion with him on the telephone doing anything in preparation for that discussion? A. I made notes.

Q. Did you do anything having made the notes? Were they typed out? A. Yes.

Q. Did you do anything with them before you had the telephone conversation?
 A. I would have taken the precaution to ensure I had satisfied my legal advisers.

Q. What did that mean you did? A. I would have—

10 Q. Do not tell us the discussion, but what you did, any particular item? A. I would have submitted those notes to our legal department to ensure that I have observed all the legal requirements — (objected to by Mr. Lockhart; question allowed).

Q. Having prepared the notes did you make a telephone conversation? A. On the 26th?

Q. If you cannot recall the date, say so. A. Yes.

Q. Can you recall about that time making a telephone call? A. Yes.

Q. To Mr. Notter? A. Yes.

Q. When you made the call did you have your notes with you? A. Certainly.

20 Q. Can you recall what you said to Mr. Notter over the telephone and what he said to you? A. This is on 26th April?

Q. Yes. A. That conversation would have related to

Q. Before you tell us that, are you able to recollect the words you used to Mr. Notter and the words he used to you? A. I do not think I can. I would like to feel I can refer to the actual record of the phone conversation at the time.

Q. Have you with you some notes which you made either before or after or at the time of the telephone conversation? A. I have.

Q. Would you look at the two documents which the officer will show to you?
 A. Yes.

30 Q. Are they the documents which you had with you at the time you made the telephone conversation to Mr. Notter? A. Yes.

Q. There are two of them, did you have both at the time? A. I had the original of the document. I would have had copies. The second one is a copy.

Q. There were further copies? A. Yes, probably a file copy.

Q. Just look at them both — (Objected to by Mr. Lockhart).

HIS HONOUR: Q. Were they notes you had made when the telephone call was conducted or were they notes which came into existence as a result of the telephone call? A. These are headed . . .

Q. What were they? A. I prepared these for the telephone conversation.

Q. So they are not notes made by you after the telephone conversation or in the course of the telephone conversation but were notes you prepared prior to the telephone conversation being held? A. Preparatory to the conversation being had and added to after the conversation.

HIS HONOUR: I simply have no view as to notes made in anticipation of a telephone conversation as an aid to recollection, I will have to get some assistance. 10

MR. STAFF: It may assist your Honour to look at the notes because it is a composite document. It is partly typewritten and partly handwritten. I seek to establish that the handwritten part follow the conversation. The handwritten part was made after the conversation, the typescript having been done previously. That, together with the handwritten part, is of the same character as if it had been written as a whole following the conversation. In other words, it is as if the witness had started all over.

HIS HONOUR: You mean he incorporated what was there before?

MR. STAFF: Yes. 20

HIS HONOUR: I am going to need some authorities for this. The answer to that proposition is simply not readily available to my mind.

MR. STAFF: If the writing had been made during the course of the conversation or after the conversation the note would be plainly available to refresh his recollection. If instead of rewriting it he puts his endorsement on it as being his recollection after the note was made, of what was said, the principle should be no different.

HIS HONOUR: I understand what you are saying but I do not know the answer. I may need some assistance. Can Mr. Lockhart see the document?

MR. STAFF: No, my friend can call for it. 30

(A discussion ensued as to the use of the document by the witness between counsel and his Honour.)

HIS HONOUR: Is it a document of discovery?

MR. STAFF: No, it was one in which privilege was claimed.

HIS HONOUR: On what basis?

MR. STAFF: I think part of it was without prejudice, that was one paragraph and the others were the subject of a claim of professional privilege based upon the

foundation of what the witness had already said. It was an issue prepared for the purpose of getting advice.

MR. LOCKHART: I have not seen the document. If it is a document referred to as item 50 in the affidavit of discovery or item 53, it appears to be discovered but not made available for inspection. The one in respect of privilege was made on the sole ground of the without prejudice discussion.

HIS HONOUR: Q. Are you able to tell me by looking at the totality of the document what you recall about the conversation on 26th April with Mr. Coogan?
A. Yes your Honour.

10 Q. With Mr. Notter? A. Yes, I have written on the bottom of the document some minutes after the telephone conversation that the contents of the document were discussed with Mr. Notter who will revert next week. He was informed that we shall not be answering his letter of 24th April and I have dated and timed it 12.15 p.m. which would have been minutes after the conversation.

(At this stage the document in question was handed to his Honour.)

HIS HONOUR: Mr. Staff, I propose to allow him to use the document to refresh his recollection.

MR. LOCKHART: May the witness exhaust his recollection first.

HIS HONOUR: Yes.

20 (Discussion ensued.)

MR. LOCKHART: I hate to interrupt my friend but it did appear while that discussion was going on, that the witness was reading the notes.

HIS HONOUR: That may be so, Mr. Lockhart, but you can cross-examine in due course.

MR. STAFF: Mr. Lockrey, before I ask you to tell us your recollection, what recollection you have, without going back into those notes, have you in fact in recent weeks looked at your notes for the purposes of refreshing your recollection?
A. Yes.

30 Q. Before you look at them, would you tell his Honour what you can recall of the discussion which you had on 26th April on the telephone with Mr. Notter, and would you tell his Honour so far as you are able what was said to Mr. Notter, and what he said to you, in the direct form if you can do it? A. I recall that I made the telephone call to Mr. Notter. I referred to some correspondence that we had received.

Q. Can you recall whether you described that correspondence? What did you say about it? A. This was a letter received from — this was the letter dated 24th April, I think.

Q. From whom? A. From Nabalco.

Q. Who was it to? A. From Nabalco to B.P.

No. 111
 Defendant's
 evidence:
 C. Lockrey:
 Examination
 (cont'd)

Q. What did you say about that, Mr. Lockrey? A. I acknowledge receipt of the letter and informed Mr. Notter that we regarded this as the notice of termination of our contract.

Q. Did he say anything to you? A. I believe that he expressed some concern—

Q. You cannot quite tell us that, Mr. Lockrey. Would you see if you can use the words that he used? A. I can't recall the words that he used.

Q. Do you recall the general effect of the words that he used?

HIS HONOUR: Q. Mr. Lockrey, what is required of you is not to recall, unless you can clearly do so, the precise words which were used. But what we would like to have is the substance of your recollection of what you said to him and what he said to you on that occasion, as best you can, without the aid of the notes that you had in front of you a little while ago. Now do you understand that? A. Yes your Honour. 10

Your Honour, may I say that I have some considerable difficulty in recalling a number of things. I am under medical treatment, I have had an injury which makes this rather difficult for me under the stress of the moment. I can't recall the words—

Q. No, I understand that, and few people could I should think. But can you help me by, notwithstanding your difficulties, recalling substantially as best you can what was said by each of you. If you can't please tell me? A. Yes.

MR. STAFF: Might I interpose to make it quite clear to the witness that we do not want him to guess what the substance was. If he has no recollection he should say so. 20

HIS HONOUR: We certainly would not want you, Mr. Lockrey to guess at what was said. We just want you to endeavour to remember by giving us the best of the substance of your recollection. Have you any recollection?

WITNESS: I recall that Mr. Notter referred to the question that his company had asked us in an earlier letter concerning our supply difficulties. I indicated that we would not be answering those questions but without prejudice I would be prepared to engage in a conversation about our mutual difficulties. From our point of view that day, Nabalco that is, had terminated the contract and we would have to think in terms of writing another contract. 30

MR. STAFF: Q. Is there anything else you remember about the discussion, that is the substance of what you spoke or Mr. Notter spoke? A. Not without prompting.

MR. STAFF: Might Mr. Lockrey be shown his notes now, your Honour? (Notes handed to witness)

Q. Would you just look through your notes. If there is anything, first of all you perhaps ought to tell us first — there are two copies of the same typed script, one with some handwriting, your handwriting, which I think you earlier referred to as the dated letter and which is timed at 12 p.m.? A. Yes. 40

Q. Is that in fact your handwriting? A. Yes.

Q. And there is another one with some further handwriting? A. That also is my handwriting.

Q. That is your handwriting also? A. Yes.

Q. Would you tell us when that handwriting came to be put upon that copy? A. Are you referring to the original?

Q. No, to the handwriting with the time on it — were they both had the time on them, I think? A. Yes.

Q. There is one with Mr. Robert Pritchard's name in handwriting on it? A. Yes, that would have been done on the day.

10 Q. Which day do you mean by that? A. The day of the conversation, the 26th.

Q. Can you tell us approximately when, in relation to the conversation you had that day — in other words before the conversation, after the conversation or what? A. I think that it would have been after the conversation, or during the conversation, because we were talking in the terms of legal matters and since Mr. Pritchard was our Sydney solicitor, his name could well have come up in the conversation.

Q. Just before you leave that — to the left and above the word "Robert Pritchard" there is some further handwriting. Would you tell us when that went on? A. That would have occurred after the conversation. I would think some time after the conversation.

20 Q. By that do you mean on another day, or the same day or what? A. I think this would have been on another day.

Q. Then on the right hand side opposite the writing of the words "Robert Pritchard" is some further handwriting — is that yours also? A. Yes.

Q. Can you tell us when that was done? A. I would say that was part of the conversation that we had on the 26th.

Q. Made during the conversation? A. During the conversation.

Q. I think we have already said on the other document the sentence written there with your initials and the time was written immediately after the time of the conversation? A. That is correct.

30 Q. Having looked through that — and I want you to ignore the writing to the left and above "Robert Pritchard's" name which you say was put on on a subsequent day — ignoring that, looking at the rest of the notes and refreshing your recollection by that reference only tell us what else was said between Mr. Notter and yourself on the occasion of this telephone call, additional to that which you have already told us about? A. Looking at the typewritten notes I mentioned that I believe we had submitted a valid notice and we accepted the Nabalco notice as being a valid notice of termination of our contract.

Q. Yes, did you say anything more? A. I mentioned a new contract.

No. 111
 —
 Defendant's
 evidence:
 C. Lockrey:
 Examination
 (cont'd)

Q. What did you say about that? A. I mentioned that a new contract should be entered into for supplies.

Q. Yes. A. Supplies commencing 28th July, which was the termination date of the old contract.

Q. Anything more? A. I don't think there is anything more that I have not said concerning — there is a note at the bottom here of what Mr. Notter said to me.

Q. Having looked at that can you recall what Mr. Notter said? A. Yes.

Q. We have to get down on the notes what you said and what Mr. Notter said. Having refreshed your recollection from the document what can you say? A. Mr. Notter was quite concerned at developments and he said if the viability of the Gove project had been assessed on a fixed price, or fixed prices bases for the first five years and any increases could place the whole of the project in jeopardy. 10

Q. Yes, any more that you can recall either you or Mr. Notter said? A. Mr. Notter having heard of the points that we discussed said that he expected to revert next week or within a week of our conversation.

Q. Did you say anything about your legal advice? A. Yes, I had mentioned that our legal people had said that the points of the earlier letter, that is 4th April, related to the contract which is being terminated by Nabalco and therefore we should not answer any questions relating to it at that stage.

Q. Do you recall whether anything was said about “without prejudice” by you or Mr. Notter? A. Yes, I think I mentioned earlier that I had said that I would be prepared to discuss any of our problems, our actual problems, and difficulties in so far as they affect the new contract in an open and without prejudice basis. 20

Q. Is there anything else you can recollect?

HIS HONOUR: Q. I am sorry, but what did you understand by those words “on an open and without prejudice basis”? A. I believe, your Honour, that in expressing those words that I could be very frank and open without any fear of those words being used against me later on in any legal way.

MR. STAFF: Q. Was there anything else you could recollect of the conversation that day between you and Mr. Notter? A. I don't think so. 30

(Mr. Lockrey's notes referred to above, tendered under s.14B of the Evidence Act. Objected to. Admitted and marked Ex. 58)

HIS HONOUR: He has not purported to say, as I understand his evidence, that all these things were said. I appreciate the note on the document and this is the basis upon which I propose to allow it in. One bears in mind what he said himself in relation to what was said with the document in front of him.

MR. STAFF: Yes your Honour. I do not think your Honour will find very much difference.

Q. I think a few days later you had a telephone call from Mr. Notter did you not? A. Ah. 40

Q. Did you remember? A. Yes.

Q. Then some time subsequent to that I think your company wrote a letter to Nabalco dated 7th May? A. Yes.

Q. Do you recall that event? A. Yes.

MR. STAFF: That is part of Exhibit 1, your Honour.

Q. Shortly after 7th May, and before 17th May, did you have some communication with Mr. Coogan or Mr. Notter? A. Yes.

10 Q. Can you recall when you had the next — that is in sequence after 7th May — communication with Mr. Notter or Mr. Coogan? A. I can't remember the date but I believe it would have been a conversation with Mr. Coogan.

Q. Can you tell us approximately when? A. It would have been between the 7th and the date of our letter, I think, and 17th May which was the date of the meeting after the discussion of a new contract.

Q. Can you tell us what was said in this conversation to Mr. Coogan and what Mr. Coogan said to you, to the best of your recollection? A. I think that there would have been very little other than to indicate that he and Mr. Notter would like to come down and talk about a new contract.

Q. Do you recall what you said to him? A. That we would be very happy to do this.

20 Q. Do you remember that Mr. Coogan and Mr. Notter did come to your office on 17th May 1974? A. Yes.

Q. Some little time before that I think you had had, with other representatives of B.P. Australia, a conference with Mr. Jeffrey of Queen's Counsel, Mr. Conti and Mr. Pritchard? A. Ummm.

Q. I don't want to ask you about the detail of it, but did you have such a conversation? A. Yes.

Q. You met on 17th May Mr. Coogan and Mr. Notter. What time of the day was that, do you recall? A. It would have been in the morning, possibly around 10.30 because I think they came down from Sydney that morning.

30 Q. Who was present, do you recollect? A. For Nabalco Mr. Coogan and Mr. Notter, for B.P. Australia Mr. Shaw, Mr. Snape, Mr. Rowland Mr. Skillen part time and myself in the chair.

Q. Mr. Rowland, I have heard, was the company secretary was he not? A. Yes.

Q. Did he have some other vocation in the organisation? A. Yes, he was manager of our legal department.

Q. Mr. Snape was in sales, was he? A. Yes, Mr. Snape had recently returned from a tour of duty in the United Kingdom and was in the process of taking over from Mr. Shaw who had held the job temporarily.

No. 111
 —
 Defendant's
 evidence:
 C. Lockrey:
 Examination
 (cont'd)

Q. What about Mr. Skillen, what was his capacity in the organisation? A. Mr. Skillen is a member of my staff and his particular interest on that occasion was associated with the Prices Justification Tribunal's procedure.

Q. Did you take with you to the meeting a document? A. Yes, I had two documents.

Q. Have you those with you now? A. I have copies of them.

Q. Would you look at the two documents that the officer shows you now (Shows witness) Are they the documents we have just mentioned? A. Yes.

MR. STAFF: One, for identification purposes, your Honour, is the original of Exhibit S and the other one I think is the original of what Mr. Lockhart had marked for identification in Mr. Shaw's evidence. 10

Q. I think you say you had those documents with you during the meeting? A. Yes indeed I read from one of them.

Q. Did you also make a notation in your own handwriting on one of them? A. Yes.

Q. Would you look at the short one page document I show you, the original of Exhibit S. Is that the one on which you made a note in your own handwriting during the course of the meeting? A. Yes.

Q. You spoke of reading from one during the meeting: is that the document you read from? A. This would be the document I read from. 20

Q. The handwritten notes you spoke of as writing during the course of the meeting is following para.1, is it? A. That is correct.

Q. There is some handwriting added on to the top of clause 5, or para.5, that is not your handwriting is it? A. No.

Q. Was that on the document when you took it into the meeting? A. Yes.

Q. Do you know whose handwriting that is? A. Yes, that is the handwriting of a member of our legal department.

Q. Who is that? A. Mr. Cochrane.

Q. And that had been written on before you went into the meeting? A. Yes.

HIS HONOUR: Q. Did you read the document out as a whole or did you read it step by step and then discuss the various points? A. I read it out as a whole, your Honour. I follow this practice because of my problem, to ensure that I observe all the legal requirements and that I do not miss any point, any vital points. In actual fact this document was prepared by our legal people. 30

MR. STAFF: Q. At what point of the discussion of May 17th did you read from this document, Mr. Lockrey? A. This would have been almost at the commencement of the discussion. It may not have been apparent that I read it but I read it.

Q. You were sitting behind your table, were you? A. This is right.

Q. And it was on the table in front of you? A. Beside me, yes.

Q. We have heard that you and Mr. Coogan agreed between you that the meeting was to be without prejudice? A. Yes.

Q. Did you read this before that agreement was expressed or afterwards? A. No, afterwards.

10 Q. Can you tell us just to place it in point of sequence, when was it in relation to the commencement of the meeting that the agreement between you and Mr. Coogan was expressed? A. When exchange would have been right at the commencement of the meeting and this would have been very soon after that.

Q. Can you recall who said what, who was the first to speak about the meeting being without prejudice, you or Mr. Coogan or anyone else? A. I think it might have been Mr. Coogan.

Q. But you are somewhat doubtful? A. I am somewhat doubtful. I certainly would have concurred immediately.

Q. May I take it that you did not read from the other document which you identified? A. No.

20 Q. Can you tell his Honour so far as you recollect what was next said at the meeting and by whom following your reading from the document Exhibit S, or the original of Exhibit S? A. I think that we would have restated, I would have restated our position in respect of the—

Q. Can you tell us, rather than summarising your recollections of the subject matter — can you give us a little more particularity about what you said so far as you are able to recollect it? (no answer)

Q. If you can't recall say so, I don't want you to guess at what might have been said? A. No, I would not like to guess at it. I can only express it in general terms.

30 Q. What is the best of your recollection about, for instance, once you finish reading from the document Ex. S, what is the best recollection you have as to what the next subject matter of discussion was? A. Very quickly we got onto the question of a new contract because that was the main object of the meeting.

Q. What was that, to the best of your recollection? What was said about that subject matter and by whom? A. I explained that since we had given notice of a new price and Nabalco had given notice of termination of the contract we were obliged to write a new contract. We then discussed the possible basis of the new contract.

Q. Again, can you tell us just as well as you can recollect what was said about the basis of the new contract and who said it? A. I said "We can offer a one year contract or a three year contract on the understanding that the old contract had been terminated." The new contract would be subject to the usual terms and conditions, in respect of price fluctuation elements and the like.

Q. Did you mention a starting price of respective contracts? A. I mentioned that for a one year contract we would offer a price of \$53.96. For a three year contract we would offer a price of \$56.52. This was a preliminary sort of discussion on how the new contract would be formed.

Q. What did you say? Did you say something to that effect? A. Yes, that this was a preliminary introduction to all the aspects of the new contract to be discussed.

Q. Did Mr. Coogan and Mr. Notter have anything to say at this stage of the conversation? A. Before I mention what they said, we also discussed the alternative to the one and three year contract.

10

Q. What did you say about this matter? A. I said that in the absence of agreeing to a one year or a three year contract we could maintain Nabalco's supplies on a spot price basis.

Q. Yes, anything more about that? A. Mr. Notter expressed some concern.

Q. What did he say? A. He — I can't remember exactly what he said but the concept of a spot price filled him with some concern.

Q. You can't remember what he said about it? Did Mr. Coogan say anything at that suggestion? A. No, because at that stage I was at some pains — (Objected to)

Q. What did you say? A. At that stage I said that B.P. would make supplies to Nabalco on a spot price basis. I remember words that I said to Mr. Notter because I had been at some pains to use similar words throughout all of our negotiations. (Objected to. Mr. Lockhart asked that the answer be struck out. His Honour stated that he would ignore the answer)

20

Q. What were the words you used? A. "Eddie, Gove would never be without oil".

Q. Then did you pass on to some other subject matter of discussion, or did Mr. Notter reply to you, or did anyone else say anything at that point on that subject matter? A. No.

Q. So far as you recollect you passed on to something more? A. We passed on to the—

30

(Witness stood down)

(Further hearing adjourned until 10 a.m. on Monday, 1st December, 1975.)

NINTH DAY: MONDAY, 1ST DECEMBER, 1975.

MR. OFFICER: Your Honour, while Mr. Colish was in the box there was some question as to one of the schedules to his report, Table A, and Mr. Staff asked that it should be completed giving the first day of each month up to December. I give my friend a copy of it and may I hand a copy to your Honour.

HIS HONOUR: I will add that to Exhibit AA.

COLIN LOCKREY
On former oath:

No. 111
—
Defendant's
evidence:
C. Lockrey:
Examination
(cont'd)

HIS HONOUR: Q. Mr. Lockrey, you understand you are bound by the oath you took last Thursday? A. Yes, your Honour.

Q. To save me saying it again, you understand when you are in the witness box giving evidence you remained bound by that oath? A. Yes, your Honour.

10 MR. STAFF: Q. Mr. Lockrey, on Thursday afternoon I was asking you about the meeting of 17th May and we have got to the point — just to remind you — where you said, you had told us that you had outlined the two types of contract which you could offer to Nabalco, one year or three years, and you had mentioned prices, and then you went on to say that you had told Mr. Coogan at the meeting, and Mr. Notter, Gove would never be without oil. Now that is the point to which we had progressed.

Can you tell us what you can recollect of the conversation that followed in that meeting between yourself and others and anyone else who was there, any of the Nabalco representatives? A. Yes, when we discussed the two term contracts, the one year and the three year, Mr. Coogan expressed some disappointment at the prices.

20 He suggested, or inquired as to whether we might look at the old contract again, whereupon Mr. Rowland, who had been invited to come to the meeting by myself to—

Q. Don't worry about that, Mr. Lockrey, just tell us what was said between you. Mr. Rowland said something, did he? A. Yes, Mr. Rowland said something.

Q. Now what was that? A. Mr. Rowland said that there was no way in which the old contract could be reinstated because it had been terminated by Nabalco.

Q. Anything else from Mr. Rowland or anyone else about that matter? A. No, not that I can recall.

Q. Now before you go on—

HIS HONOUR: Q. Did you say anything when he said that? A. No, your Honour, not that I can recall.

30 MR. STAFF: Q. We have heard Mr. Rowland was the company secretary; did he have any other capacity or duties in the company? A. Yes, he was the manager of our legal department.

Q. What conversation followed that particular exchange, do you recall? A. Mr. Notter showed some concern and—

Q. Well, can you tell us what he said? A. That we were in effect offering them a spot price proposition, and we discussed the role of the P.J.T. in the pricing. We also discussed—

Q. Can you recall what was said between you about that matter? A. I can't recall precisely.

Q. Now can you recall any other subjects that were discussed? A. Yes, we discussed the subject of sole supply because—

Q. Don't tell us the reason, just tell us what you can recollect of the discussion. If you cannot recollect any more than the subject matter, well, just say so, Mr. Lockrey. A. I can't remember who said it but the role of the Trade Practices Act or Commissioner came into the discussion in respect of being a sole supplier. Mr. Rowland expressed the legal opinion on this matter—

Q. Can you recall what he said? A. He would have said that we should not— 10

Q. First, this is what you recollect, is it? A. This is what I recollect, yes.

Q. Yes. A. We should not think in terms of exclusive supply which was contrary to the Trade Practices Act.

Q. Did anyone say anything more about that matter? A. There was some discussion and I would say several people participated. There was discussion about paying for the supplies outside of Australia through Alusuisse. I replied that we would have to be very careful to ensure that we were not circumventing the Australian laws in regard to taxation or any other matters relating thereto.

Q. Is there anything else you can recollect about that discussion at that meeting, Mr. Lockrey? A. I can recollect the final summation by Mr. Coogan. 20

Q. Can you tell us what you recall of that? A. Mr. Coogan said that in effect we were offering three propositions: a three year contract at 56.52 and a one year contract at 53.91 and those two offers were contingent upon the old contract being terminated in all respects, including any future litigation; the third alternative was that B.P. would supply on a spot price basis.

On reflection there were several other points, I remember earlier in the conversation Mr. Notter suggested that the prices being offered were akin to bunker prices. I had no reply to this and undertook to find out something on the matter for him.

HIS HONOUR: Q. When Mr. Coogan — you mentioned the three alternatives a moment ago — when he had finished those, did you say anything or did anybody? A. Yes, Mr. Coogan said that he would be in touch with us the next week. 30

MR. STAFF: Q. Now there is nothing else you recall then about that meeting, Mr. Lockrey, is that the situation, at the moment anyway? A. I think they were the main parts.

Q. And we have heard that you went off to lunch and everybody broke up shortly after lunch? A. Yes.

Q. And in fact went their own ways. Now a few days later, I think in the next week, do you recall having had a telephone call with Mr. Coogan, I suggest to you

on 23rd May? A. I had a telephone call from Mr. Coogan by way of a progress report.

Q. Can you recollect what he said to you or so much of what he said to you that you can recall would you tell us? A. Yes, he said that he had been endeavouring to get hold of some of the directors to progress the proposition that we had put to them at our meeting on 17th May. The matter had been put to their shareholders, who I think were nominated as Alusuisse and C.S.R.

He said that he believed that the three year proposition would be the most acceptable one to the shareholders and this was favoured by Nabalco.

10 He also made the comment that the proposition was rather onesided in B.P.'s favour. I confirmed that this would be so. I cannot recall anything else in that conversation.

MR. STAFF: Q. Would you look at the document which the officer will show you. Is that a note which you dictated and had typed up immediately following the telephone conversation? A. Correct, yes.

Q. I think you have initialled it at the foot, have you? A. That is correct.

(Above document tendered without objection and marked Ex. 59.)

Q. Then a few days later, I suggest to you on 27th May, Mr. Lockrey, did Mr. Notter ring you? A. Mr. Notter did ring several days later.

20 Q. Do you recall what he said to you? A. Once again, this was in the form of a progress report. He said that Nabalco general management had submitted our proposals with their recommendations to their Board. He indicated that because of the enormity of the problem that the Board had undertaken to make their own enquiries, and, as it were, check up on the submission. This was understandable because of the very large sums involved. Consequent on this, Sir David Griffin, who knew Mr. Rendle, wished to talk with him, and since Mr. Rendle was in London, Nabalco was seeking our reaction to Sir David telephoning Mr. Rendle in London. My reply was that B.P. would have no objection.

30 I think that the only — or the only other matter that I can recall was that Mr. Notter indicated that he would be reverting on the subject again in due course.

Q. Would you look at the document which the officer will show you, is that the typescript of a note which you dictated following the conversation with Mr. Notter of which you have just told us? A. Yes.

Q. Your initials, I think, appear, in the bottom left-hand corner? A. Yes.

(Abovementioned note tendered without objection and marked Ex. 60.)

40 Q. Then I think we have heard, Mr. Lockrey, that on the next day, 28th May, you had two conversations on the telephone with Mr. Notter on price and details of the proposed new contract. Following those conversations, did you then have a further conversation with Mr. Notter on 29th May, do you recall? A. I could well have had the conversation; there were a number at that time, but I cannot recollect the substance of that conversation.

Q. Would you look at the document which the officer will show you. Is that a typescript of a note which you dictated following the conversation on 29th May with Mr. Notter? A. That's right.

Q. I think again your initials appear in the lower left-hand side of the page? A. Correct.

(Above note tendered without objection and marked Ex. 61.)

Q. Do you recall that a meeting took place between representatives between B.P.A. and representatives of Nabalco in Melbourne on 31st May? A. Yes.

Q. Do you recall being present at that meeting or at any part of it? A. Only at a part of the meeting. 10

Q. Can you place the part of the meeting or the period of the meeting at which you were present? A. My recollection is that my room was used for an assembly point. Those present then adjourned to the office next door to mine which was a vacant office and proceeded to study the terms of a new contract.

Q. You did not go into the other room, I take it? — did you take them there or did you not? A. Whilst the proceedings were on, I left my office and opened the door of the other office, put my head in and made several comments.

Q. During what you have inferentially called the assembly period when the people were in your room, do you recall any of the conversation that took place? A. No, I don't. It would have been just general conversation, I would think. 20

Q. Who do you recall being in your office that day, that is being representatives of Nabalco and B.P. concerned? A. Mr. Notter from Nabalco, Mr. Snape, from B.P. and I believe Mr. Cochrane joined us later.

Q. You have said you do not recall any conversation which took place in your office, except of a very general character. Is there anything at all you can tell us about the time when you were assembled there? A. No, only that it was in the morning.

Q. You said you put your head in once or twice to the other office during the time that Mr. Notter and B.P. representatives were there? A. Once only.

Q. Once only? What did you say on that occasion? A. I indicated to Mr. Notter that I had successfully arranged for London to agree to a three-year contract and also that by implementing the various suggestions that we had made earlier in respect of local matters, that we had been able to reduce the price to \$52.52 per tonne. I believe that I might have also made some reference to the discussions between Mr. Rendle and Mr. Griffin, Sir David Griffin. 30

Q. Can you recall anything you said about those discussions or have you just got a? A. I have a recollection suggesting that what I was saying would stand and that their conversation, I did not think, would depart from that stand.

Q. If I may take you back to the 17th May, do you recall saying anything at that meeting about a whiplash injury? A. Yes, in the form of an apology. 40

Q. What is it you can recollect at that time? A. I am not sure to whom I addressed it, probably generally to Mr. Coogan and the various other people assembled, that I had had this injury, that I was under medical treatment and that I was relying on those assembled to assist me in considering the matters to be discussed.

Q. Have you any recollection of speaking of a similar injury on 31st May? A. I have no recollection.

Q. One way or the other? A. I just have no recollection.

10 Q. Did you make any note or record of the conversations you had during the course of this 31st May meeting? A. No, any written confirmation?

Q. Any written? A. No.

Q. You were aware, I think, or became aware, shortly afterwards, that on 10th June, a meeting took place between Mr. Rendle and Sir David in Melbourne? A. Yes.

Q. Do you recall having telephone conversations with Mr. Notter about the middle of June? A. The middle of June? Yes, I would have had several conversations with him.

20 Q. Can you recall when the first of them was, either exactly or approximately, and what was said between you? A. I would need to have my memory refreshed on that.

Q. You have got no recollection beyond the fact that you had some telephone conversations about that time? A. No, I recall the telephone conversations. I think it was towards the latter end of June, because I think Mr. Notter was away at a school, out of the country.

Q. What I was going to take you to next was around about the end of June, I think you have already said you recall having some telephone conversations. Do you recall one with Mr. Butterham? A. Yes.

Q. Can you recall when that was, approximately? A. That would have been towards the end of June, perhaps about 28th or 27th, or something like that.

30 Q. Have you any recollection of what was said to Mr. Butterham in that telephone call? A. I rang Nabalco with the idea of talking with Mr. Coogan or Mr. Notter.

Q. You asked for Mr. Coogan, did you? A. Yes. Mr. Butterham informed me that Mr. Coogan was not there, that in fact he was in Darwin. I said to Mr. Butterham that I was rather anxious to ascertain Nabalco's requirements in respect of the cargoes that we had ordered to ensure that their supplies were maintained. Mr. Butterham said he knew something of the subject and he would get in touch with Mr. Coogan to ask him to let me know, or to give me some information as soon as possible.

40 Q. Was that the whole of what you recollect being spoken between you and Mr. Butterham? A. That is in very general terms, but I did make a record note of it.

No. 111
 —
 Defendant's
 evidence:
 C. Lockrey:
 Examination
 (cont'd)

Q. At the moment, that is the extent of your recollection, is it? A. Yes.

Q. Would you look at the photocopy of the document which the officer will show you? Is that a photocopy of a note which you dictated and had typed up following the conversation with Mr. Butterham? A. It is.

Q. Apart from the first paragraph, does it record the substance of the conversation which you had with Mr. Butterham? A. That is correct, yes.

Q. You signed that at the foot of the page? A. Yes.

(Above document (except first paragraph if objected to) tendered without objection and marked Ex. 62.)

Q. A short time later, on the same day, did you receive a telephone call from Mr. Coogan? A. Yes. 10

Q. Can you recall what he said to you? A. Yes, Mr. Coogan informed me that he was telephoning from Darwin. He had received the message about my inquiry from Mr. Butterham. He apologized for having not informed us earlier that Nabalco would require no further supplies of furnace oil from B.P. He thanked me for our past services and referred to our happy association over the period of the old contract.

Q. Following that conversation, did you dictate a note, have it typed up and signed it? A. Yes.

Q. Look at the photocopy document which the officer will show you, is that a photocopy of the note that you had typed and signed? A. That is. 20

(Above note tendered without objection and marked Ex. 63: noted third last sentence not part of the note of the conversation.)

Q. You recall that there were, about the middle of July, some letters written by B.P. to Nabalco, with replies to those in early August. Have you got a recollection of those events? A. Yes.

Q. I think early in July you had two more telephone conversations with Mr. Coogan, do you remember? A. Yes.

Q. I won't trouble you about those, but was that so far as discussion with Nabalco was concerned, did that bring to an end your oral discussions with Nabalco? A. Yes. 30

Q. Would you look at the three Telexes which the officer will show you. Are they telexes which passed between B.P. Australia and B.P. London between 21st and 28th June? A. Correct.

Q. I think the yellow ones are Telexes from B.P. Australia to B.P. London? A. Correct.

Q. Were the two sent by B.P. sent on your instructions? A. Yes.

Q. And the green one from B.P. London was received in answer to the first of the other two? A. That is so.

Q. That came to your attention at about the time they passed and were received? A. Yes.

Q. You did not actually despatch those from B.P. Australia, I gather? A. Physically, no.

Q. But they were despatched on your instructions? A. Correct.

(Three copy Telexes between B.P. Australia and B.P. London, tendered without objection and marked Ex. 64.)

10 Q. Throughout the months of May, June, July 1974, was B.P. Australia in a position to supply fuel oil to Nabalco in substantial quantities? A. Yes.

Q. Since that time, has B.P. Australia been in a position to supply fuel oil to Nabalco if it required it? A. Yes.

Q. In quantities such as the supply agreement of 1970 contemplated? A. Yes.

Q. Throughout that period from, say, March last year, right through to the present time, has B.P. Australia been willing to supply such quantities of fuel to Nabalco had they required it? A. Yes.

20 Q. So long as the legal question of the validity of B.P.'s original notice and of Nabalco's conditional notice was outstanding, what was B.P. Australia's attitude to the determination of the appropriate price for supplies of oil to Nabalco? (Objection to preface of question: put as relevant to the question of repudiation: allowed: question read out.) A. B.P.'s attitude was governed by the legal advice that the old contract had been terminated by Nabalco; therefore, a new contract had to be written, the terms of which had been conveyed to Nabalco. These had been negotiated at various stages. It was also accepted that—

Q. This is the statement of the attitude, is it? A. The attitude also was that in the event of B.P. failing in the litigation that B.P. would recompense Nabalco.

30 Q. Would you just explain that? What I am asking you about is B.P.'s attitude so long as there was litigation about the validity of the notice on foot, and, of course, on the basis that there was no new contract in existence. A. Well, B.P.'s attitude firstly would be that supply must continue, that there must be no interruption in supply, and we were at pains to point this out to Nabalco at various times.

Q. You have told us about that. I am just asking you about the attitude of B.P. at this stage. What about price, in the meantime? A. Well, the price in the new contract had been set at 52.52.

HIS HONOUR: Q. Assume they persisted in litigation so that, as I understand it, you were not prepared to enter into a new contract? A. Well, the price would be the spot price of the day.

No. 111
 —
 Defendant's
 evidence:
 C. Lockrey:
 Examination
 (cont'd)

Q. Which would be of the order of \$50 a tonne? A. That is correct, your Honour.

Q. Is it correct, as part of the attitude B.P. had, that assuming litigation, you would not supply on any other basis? A. Whilst litigation was occurring, we would not supply on any other basis if Nabalco had not entered into a new contract.

Q. If the supply, being spot supply, at the price that you mention and Nabalco had been successful in the litigation, you would have taken the view that there would have had to have been a monetary adjustment? A. That is correct, your Honour. May I make one addition, our attitude was that the price was to be spot, not the supply.

Q. I understand that, but was there to be a binding obligation upon B.P. to supply? A. We already had, we believed, an obligation. We had a moral responsibility, I believed myself personally, and the company did. We also had in mind the effect of allowing Gove to go without oil, a national company closing up. We could not be involved in such an event. 10

Q. You mean it would not do your public image any good? A. It would not do our public image any good, and also we could be faced with an enormous consequential damages suit, not only from the non-supply of oil, but from the closure of the plant.

Q. If they were right about the notice and you were wrong? A. If the court found that they were wrong, we would have to revert to our obligations under the old price. 20

Q. But what I was really asking you was, as you understood the position, if they entered upon litigation, there would be no new contract written for either one or three years, as we have heard about, and although there were those instructions to do with moral obligations and your company's public image and the fear perhaps of a very much greater claim for damages than we even see here, was there any legal obligation on you, as you understood it to supply? A. No, I believe that there was no legal obligation, your Honour, the contract having been determined, according to our legal advice.

30

No. 111
 —
 Defendant's
 evidence:
 C. Lockrey:
 Cross-
 Examination

CROSS-EXAMINATION:

MR. LOCKHART: Q. It was your view, was it not, on 17th May, 1974, that Nabalco regarded continuity and security of supply to Gove, of furnace oil, as a matter of great importance? A. Yes.

Q. That was the view that you held before and after the 17th May, too, was it not? A. Yes.

Q. Your knowledge that Nabalco did place great importance on the continuity and security of supply of furnace oil to Gove was a matter that, in your view in May 1974, gave B.P. a distinct tactical advantage in negotiating with Nabalco, is that not so? A. It did not occur to me, but your findings would be correct. 40

Q. Did it occur to you that your belief that Nabalco placed great importance on the security and continuity of supply of furnace oil to Gove strengthened your negotiating position with Nabalco in May 1974? A. It is my belief that that is correct.

Q. Indeed, Mr. Lockrey, you sought, did you not from B.P. London on 13th May, 1974 information from B.P. London as to whether there were any price hikes or pro rata cut-backs applied at associated plants of B.P. outside Australia, didn't you? A. I may have.

10 Q. Do you recall if you did or did not? A. Well, I would like to be reminded if you have got something to show me.

Q. Let me show you a Telex of 13th May, 1974. Look at the document the officer now shows you. I draw your attention in particular to the paragraph marked "Thirdly" in the middle of the page, and also to that short paragraph marked "Secondly" above it? A. Yes.

Q. That is a Telex that was sent by you or under your instructions to B.P. London, was it not? A. Yes, I would — yes.

20 Q. You say under the item "Secondly", "Notter's returns being delayed and we expect first discussions on new contract 17/5 earliest. We hope to present for discussion then terms of offer based on \$U.S. 64 per metric ton, f.o.b., with full escalations" — that is what you said to London, is it not? A. Yes.

Q. Did you go on to say: "Thirdly: as background and to assist in negotiation, grateful any information you can provide on supply and price position of other Alusuisse operations" — that is so, isn't it? A. Yes.

Q. Then you went on: "Obviously Notter will be fully briefed on these in Zurich. Nabalco have continually emphasised the necessity of supply security and if price hikes and —" — should that be "pro rata", Mr. Lockrey, the word "pro rata"? A. I think so, yes.

30 Q. "— pro rata cut-backs have been applied at associated plants outside Australia our negotiating position is strengthened." That is what you said to B.P. London, is it not? A. That is correct.

Q. You sought that information, did you not, because if, in fact, you were informed by B.P. London, that associated plants throughout the world were having to affect supply to their customers by price hikes and pro rata cut-backs, that would be useful to you in bargaining with Nabalco on 17th May. That is, so, isn't it? A. I think on the contrary, that the main object there, would be to emphasise to Nabalco how, despite the conditions of the day which were very parlous, that we, B.P. Australia, had been able to maintain supplies, despite other companies having been cut back throughout the world.

40 Q. You knew by the time you sent that Telex, did you not, that Nabalco had, through Mr. Notter, made it clear to you that it wished to test the validity of your March notice in the courts. That is so, isn't it? A. Yes.

Q. You had made it clear to him by that time, had you not, that so far as you were concerned, that was a satisfactory course to be adopted? A. Mr. Notter had

conveyed his intention to me. I can't recall having agreed but I don't think I would have objected to his reasoning.

Q. That is because, is it not, that you took the view, at least prior to 13th May — we will come to the subsequent period later — that both B.P.A. and Nabalco should have an opportunity to test the validity of the B.P.A. notice in the courts if Nabalco wished to take that course of action. That is right, isn't it? A. This was a point of view held by Mr. Notter—

Q. And expressed to you? A. And expressed to me.

Q. And a view — A. I don't recall expressing my view on this because at that time, I was unaware of our legal view which was the guiding influence in my negotiations. 10

Q. Just have a look in that same file that you have, Mr. Lockrey, if you would, please. Perhaps if it is handed back to me, I will find it for you.

HIS HONOUR: Q. Mr. Lockrey, did you approach the negotiation on the basis that your legal advice was correct and that what you did or said at the negotiation was based upon unquestionably correct legal advice? A. That is correct, your Honour.

MR. LOCKHART: Q. Would you just look at that document? A. Excuse me, your Honour, may I add to that that this was fortified by legal views from various quarters outside the company. 20

HIS HONOUR: Q. I understand that, I follow that completely. You had a number of Opinions, I understand?

MR. LOCKHART: Q. You had been told, before 17th May by B.P., had you not, that you should seek to avoid legal action as, notwithstanding B.P.'s judgment as to the validity of the B.P. notice, strange things happen in Court. Is not that what you were told? A. Yes.

Q. You knew on 17th May that notwithstanding the legal advice you had received, if the notice were tested, you might win but you might lose. That is a fair way of putting it, isn't it? A. Yes.

Q. Just look at the document in front of you, if you would. If you wish to turn over to the page towards your left, which is the start of that Telex — it is a Telex, is it not, from B.P.A. to B.P. of 2nd May, 1974? A. Yes. 30

Q. Sent under your instructions? A. Yes.

Q. Turn over to the page where it starts at the top: I think it is (EEE) at the very top — 2nd May. A. Yes, it is a bit hard to read, actually.

Q. Do you agree with me that what it says is this: "Further discussions were held 30/4 and we have agreed solicitors for both sides should meet to discuss legal questions concerning hearing of suit to rule on interpretation of contract." A. Yes.

Q. Is that an accurate reflection of the substance of the conversation that was 40

held on 30th April, between you and Mr. Notter? A. I think you will have to show me my notes before I can answer that on that particular date.

Q. We do not have the benefit of your notes of that, but I am putting that Telex to you as indicating that that was the conclusion that you drew from your discussions with Mr. Notter on 30th April, is that not so? A. I think it is reasonable to assume that.

MR. LOCKHART: Q. If it were not accurate you would not have signed it, would you? A. No.

10 Q. At the time you sent the Telex the matters you have set out in the Telex were further in your mind? A. Yes.

Q. So may we take it it is a fair summary at least of part of the conversation between Mr. Notter and yourself on 30th April, that you agreed the solicitors from both sides should meet and discuss the legal questions concerning the hearing of the suit? A. Correct. My hesitation was related as to whether or not it occurred on the 30th.

MR. LOCKHART: My friend says I should put the rest of the sentence. It is blanked out as "without prejudice" in my copy, your Honour.

20 MR. STAFF: Apparently in the blanking out of the remaining four lines four words have been blanked out which were part of the previous sentence my friend was putting to the witness in his last question, your Honour. Whoever blanked out the rest of it blanked out too much. It then goes on to another matter and apparently the person has missed the fact that it was part of the preceding sentence. My friend might put that part of the sentence to the witness.

MR. LOCKHART: I will be coming back to the matter later on.

Q. Apparently the Telex showed the additional words which I did not read to you previously are "and our price — rise claimed. stop" So that extract I read to you with the addition I have just inserted at Mr. Staff's request is a fair summary of what was discussed between you and Mr. Notter on 30th April? A. Agreed between Mr. Notter and myself on some date, yes.

30 Q. On or about 30th April? A. Yes.

Q. If you look at your Telex you see it says "Further discussions were held 30th April", do you see that? A. Yes.

Q. So is it not more likely that on 30th April that you recall that particular conversation would have occurred? A. Yes.

Q. You were anxious, were you not, to get the best deal with Nabalco on 17th May in the interests of B.P.? A. I was interested in getting the best deal for both of us.

Q. For both of you? A. Yes.

40 Q. Do you mean by that that you were concerned to get the lowest or the highest? A. Nabalco had been good customers of ours for a long time. I was aware

No. 111
 —
 Defendant's
 evidence:
 C. Lockrey:
 Cross-
 Examination
 (cont'd)

of the enormity of the increased charges. We had a very good relationship and I was out to see we gave them a fair price, whatever that might be.

Q. So you would dispute, would you, that you were at some pains before 17th May to ensure that B.P. Australia was in the strongest bargaining position with Nabalco that it could be? A. No, I don't deny that.

Q. Now you knew before 17th May, didn't you, that in all probability the only company as you understood it that would be a supplier of Nabalco but after July would be your own company? A. I didn't know it but I thought it.

Q. You had been told, hadn't you, by B.P. London that all other competitors had been eliminated? A. That does not mean that I believed it. 10

Q. But you had been told that by B.P. London, hadn't you? A. I am not sure of that, I may have.

Q. You had been told that Shell, Mobil and Esso were not in the running for getting the Nabalco supply contract; you had been told that, hadn't you? A. I recollect some such advice, but that is all I can remember.

Q. You had been told, had you not, that Kaiser were unlikely to be interested in supplying fuel oil to Nabalco at Gove, weren't you? A. Yes.

Q. And you had been told too, hadn't you, that K.N.P.C. was definitely not interested in supplying fuel oil to Nabalco at Gove? A. Yes. That is still not all.

Q. You had been told that all likely competitors had been eliminated by B.P., hadn't you? A. I could have been. 20

Q. Do you have any doubt about that? A. I would just like my memory refreshed if you have got it there.

Q. Turn to the page which I show you which is the Telex of 2nd May, 1974, no. C8452 from B.P. London to B.P. Melbourne, and it is the third line in particular I draw your attention to? A. Yes.

Q. Do you have that now? A. Yes.

Q. So you had been told, had you not, on 2nd May by B.P. London that in addition to their earlier advice about competitors they now advised that as Shell, Mobil and Esso are now in the market for heavy oil supplies "We do not think they will present you with any problem"? A. That is right. 30

Q. "As you have quite readily accepted notice of termination we believe Nabalco have no alternative but give you contract." Is that so? A. Yes.

Q. It then goes on "From 28th July and you have done much to secure this with your undertaking of continuity"? A. That is so.

Q. So it was, was it not, your view at the date you received that Telex that the probability was that B.P. Australia was the only likely supplier after July for fuel oil to Nabalco at Gove? A. I would use the word possibly instead of probably.

Q. At any rate you formed the view from the Telexes you received from B.P. London that it was B.P. London's view that it was probable that your company would be the only likely supplier of fuel oil to Nabalco at Gove after July; isn't that so? A. This is fair enough, yes.

Q. You kept B.P. London informed throughout the whole of the period of discussion between two companies, Nabalco and B.P. Australia, of what was happening, did you not? A. Pretty well.

Q. And B.P. London kept you informed of things that bore upon those discussions, did it not? A. Yes, with some exceptions.

10 Q. You were told, were you not, by B.P. London prior to 17th May 1974 and during the month of May that in negotiations for a new contract they advised that three points were essential. Do you recall that? A. Yes. I think you must distinguish between telling and advising.

Q. Yes. A. London won't tell us to do it, they suggest it. They might use different words but we are the ones who decide.

Q. Sometimes they are doing more than advising, they are doing more than merely advising, aren't they? A. But it was still in fact myself advising our approach.

20 Q. You were advised, were you not, by B.P. London at the time I have mentioned of three points that were essential in negotiating with Nabalco for a new contract? A. Yes.

Q. Do you remember the first of those says that it must have no relevance to the previous contract? A. Yes.

Q. The second that your — that is B.P. Australia's supplier? A. On the consignment contracts in excess of one year and it is with the utmost reluctance—

Q. It says "contracts in excess of one year and it is with the utmost reluctance that they are prepared to consider an exception in Nabalco's case of three years"? A. That is right, yes.

Q. Thirdly, all protective clauses as advised must be included without exception or on direction? A. Yes.

30 Q. Do you recall that B.P. advised you that following the above three points the termination of the contract, the existing contract, would operate in fact? A. Yes.

Q. And you are unable to offer continuity beyond that date except on a spot basis? A. Yes.

Q. And that Nabalco must understand that they have to come to terms before 28th July? A. Yes.

Q. Those instructions or rather those advices you sought to execute, did you not? A. Generally, yes.

Q. Can you recall if that advice that came from B.P. was on 9th May, having

No. 111
 —
 Defendant's
 evidence:
 C. Lockrey:
 Cross-
 Examination
 (cont'd)

referred you to the appropriate Telex? A. I would like you to refer me to the appropriate Telex.

Q. I show you a copy of the particular Telex, it appears in about the middle of the page? A. Yes.

Q. So what I read out, would you agree, was taken from the Telex of 9th May? A. I agree, yes.

Q. You draw a distinction, do you, between a spot supply of furnace oil and a spot price of supply in relation to furnace oil? A. Yes.

Q. Do you remember reporting to London on the discussions that were held on 17th May, about which you have given evidence? A. Yes.

10

Q. Would you turn to the file in front of you and locate a Telex of 17th May No.C650? A. Yes.

(Short adjournment)

Q. I was going to take you to 17th May, 1974. You have that Telex in front of you, Exhibit R? A. Yes.

Q. That Telex, did it not, emanated from you in Melbourne to B.P. London? A. Yes.

Q. It is a fair summary, is it, of the points that emerged in that meeting? A. I think so.

Q. Indeed a Telex that was drafted by you, was it? A. I would certainly have the major role in it, anyway.

20

Q. Anyhow, its contents were approved before it was sent to London? A. Yes.

Q. You say this, do you not, "At today's meeting the following plans emerged, aye", that is the Telex form of "A"? A. Yes.

Q. "Nabalco are now considering three possibilities. Firstly to litigate an old contract through all possible course." Is the next word "affect"? A. Yes.

Q. "With effect from 24th July to buy on spot basis on no formal contract"? A. Yes.

Q. That is a fair summary of that point as it emerged from the meeting, is it not? A. Yes.

30

Q. Then you go on to say "Secondly, accept a one year contract at \$.Aust. 59.96 per metric tonne c.i.f. with escalations"? A. Yes.

Q. That is a fair way of putting it, is it? A. Yes.

Q. The next part "\$56.52 per metric tonne c.i.f. also with full escalations". That is a fair summary too, is it not? A. Yes.

Q. Then you go on to say "Both secondly and thirdly are conditional upon termination of existing contract."? A. Yes.

Q. What you meant to convey by the passage I last read to you, Mr. Lockrey, was it not, was that if Nabalco were to have a one or three year contract there had to be a complete termination of the existing contract? A. That is correct.

Q. A complete termination coupled with no litigation whatever in relation to it? A. That is correct.

10 HIS HONOUR: I think we need to be careful, in view of one argument Mr. Staff has foreshadowed, although I do not suppose I will make any other sense in what the witness says; but determined as to fuel oil. The question is understood in that sense.

MR. LOCKHART: Thank you your Honour.

Q. It was your view, was it not, in 1974 that the action of Nabalco in delivering the cross-notice constituted a termination of the contract in relation to the supply of fuel oil? A. Yes.

Q. And not otherwise? A. Correct.

Q. Indeed, you made it clear, did you not — it was your view, was it not, that it was desirable that the contract remain on foot except as to fuel oil and had been terminated? A. Yes, I agreed with Nabalco that this should occur, it was the mutual feeling.

20 Q. You agreed with Nabalco that the contract should go qua furnace oil only? A. Would you repeat that please?

Q. You agreed with Nabalco that the contract should be terminated with respect to furnace oil only, did you not? A. I didn't agree, they had terminated it in our view. I agree that it had been terminated in respect of fuel oil.

Q. When you use the words "we agreed", it was a mutual feeling or words to that effect, did you agree the dispute would be confined to a dispute re furnace oil? A. Yes.

30 Q. But it was clear to you, was it not, on 17th May that if Nabalco was to have a one year or a three year contract then, as a condition of there being to have one or other of those two contracts they could not litigate the issue of the validity of the B.P. notice in court? A. Yes. Our view was rather one of no alternative, the contract had been terminated, therefore there was no contract.

Q. No contract in respect of furnace oil? A. Furnace oil.

Q. You go on to say in your Telex that you make comments on each of the three alternatives, down — it is about two thirds of the way down the first page? A. Yes.

Q. You say "Firstly" — and of course you are commenting on the first possibility of litigating the old contract through all possible courts and buying on a spot basis with no formal contract, aren't you? A. Yes.

No. 111
 —
 Defendant's
 evidence:
 C. Lockrey:
 Cross-
 Examination
 (cont'd)

Q. You say, do you not, "This appears unlikely as Nabalco are fully aware our position and recognise supply dangers and temporary nature of current market spot price . . ." and so on? A. Yes.

Q. It was your view, was it not, that because supplying on a spot basis entailed dangers as to supply it was unlikely that Nabalco would be interested in anything except a long term contract; isn't that so? A. Against the conditions of the day, yes.

Q. Well that was your view on 17th May, was it not? A. Yes.

Q. You knew that Nabalco were only interested in having a long term contract for the supply of furnace oil to Gove, didn't you? A. I believed this was their wish, yes.

10

Q. And therefore it was your view that they would simply not be interested in supply on a spot basis at all? A. I believed that they would have negotiated a new long term contract.

Q. And because you knew that they would do that — you thought they recognised the dangers of spot supply and you thought it highly unlikely that they would take alternative one as set out in the Telex. That is a fair summary of the position, isn't it? A. I believed it was unlikely that they would take this course, although I had assured Nabalco at various times that they would never go without oil.

Q. We will come to that a little later, Mr. Lockrey. But you were not prepared to offer them a formal contract on any spot basis of supply, were you? A. No.

20

Q. You knew, didn't you, that if Nabalco were to buy from B.P., whether it be on a spot supply basis or a spot price basis, that they would have to go after the obligations of B.P. towards customers with long term contracts which had been signed. That is right, isn't it? A. We saw no difficulty in this.

Q. But that is so, isn't it? A. That is so.

Q. You were interested to find out before 17th May where price rates and pro rata cut backs of companies throughout the world had an effect on supply because you knew, didn't you, that would militate against Nabalco buying on any spot basis? A. I also knew—

30

Q. Just answer that question first, please? A. Would you mind putting that question again?

Q. Yes. You knew when you were interested to find out before 17th May whether the price rates and pro rata cut backs had throughout the world affected the supply because if the answer to that were in the affirmative it would improve your negotiating position with Nabalco to get them a one year or three year contract? A. No.

Q. You knew, didn't you, that if that information was in the affirmative it would render more unlikely the possibility of Nabalco being interested in any purchase on a spot basis? A. That could be a line of thought.

40

Q. It is more than a line of thought, isn't it, because you say that they recognise

supply dangers, and you supplied additional spot supply, isn't that right? A. The supply dangers of the day were related to the international conditions of the day and those conditions virtually were linked in being able to maintain supplies of all types without rationing. Australia was very lucky in this regard as rationing was not applied.

Q. But you see your comment in your Telex about supply dangers being recognised by Nabalco as solely in the context of the first possibility which Nabalco was considering, namely, supply on a spot basis without a formal contract. That is right, isn't it? A. They were the dangers in Nabalco's mind.

10 Q. And you knew they were the dangers in Nabalco's mind, didn't you? A. Nabalco's mind, not our mind.

Q. Did you do anything to inform Nabalco of the fact that they were not the dangers that were present in your mind, did you? A. I certainly did.

Q. Did you? And yet you had in your Telex "This appears unlikely as Nabalco are fully aware our position and recognise supply dangers and temporary nature of current price advantage of spot market." Yet you said that to B.P. London on 17th May? A. This would make little difference, it does not necessarily cover B.P.'s position.

20 Q. Would you agree with me that what you were conveying to B.P. in that Telex in there about 17th May was that as you saw it Nabalco appeared unlikely to adopt the first alternative because they are fully aware of your position and they recognise supply dangers and the temporary nature of the current price advantage of the spot market? A. That is what is written there, yes.

Q. That was your view, wasn't it? A. Yes.

Q. So nothing was said to the Nabalco representatives caused you to think that they did other than recognise supply dangers if they adopted alternatives one? That is accurate, isn't it, as a reflexion of your view? A. I believe that Nabalco had this view of supply dangers.

Q. And you said nothing to change that view of theirs, did you? A. Yes I did.

30 Q. On 17th May? A. Yes.

Q. And yet you summarised the meeting after it is concluded by conveying the impression to London that Nabalco are considering this first alternative and recognise supply dangers inherent in it. Is that what you say? A. That is what is there.

Q. That is inaccurate, is it? A. No.

Q. It was your view, wasn't it, at the end of the 17th May meeting that Nabalco would not be interested in spot basis without a formal contract alternative in part because they recognised supply dangers in relation to spot basis of supply. That is right, isn't it? A. My belief then was—

40 Q. Tell us what your belief was? A. That Nabalco, even if the supply market

No. 111
 —
 Defendant's
 evidence:
 C. Lockrey:
 Cross-
 Examination
 (cont'd)

was stable and reassured, that Nabalco was interested in a long term supply agreement.

Q. Yes, but you see—

HIS HONOUR: Mr. Lockhart, I do not want to interrupt you but I just wonder if we could shorten this a little. Mr. Lockrey, would you be kind enough to go outside for a few minutes? A. Certainly.

(Witness left court)

HIS HONOUR: This will serve two purposes, even if it does not shorten it a little, it will at least clarify my mind. Are you seeking to establish, Mr. Lockhart, only by this cross-examination that so far as B.P. was concerned at this time, particularly on 17th May, the contract so far as affected the fuel oil was over? 10

MR. LOCKHART: That is one matter, your Honour.

HIS HONOUR: And without prejudice or not, that was your attitude and the position communicated to your client from which they would not move.

MR. LOCKHART: I am seeking to establish that and more, your Honour.

HIS HONOUR: Is it convenient to tell me what it is?

MR. LOCKHART: Yes. I am seeking to establish that before 17th May there had been a willingness on the part of B.P. Australia to discuss with Nabalco an intermediate supply situation pending the outcome of litigation and that that would not jeopardise a new long term contract of supply. 20

But so far as Nabalco's representatives were concerned, the first inkling they had of the contract was 7th May in the letter coupled in particular with the discussion of 17th May and that was a complete volte face on the part of B.P. Australia and they conducted the discussion on 17th May knowing a number of things. First, there were no rival customers likely to be interested in Nabalco's position on purely other than a spot basis of supply. Secondly, that B.P. Australia won the contract they would have lost substantial damages. Thirdly, they knew Nabalco regarded continuity and security of supplies as critical. Fourthly, they were determined to ensure that Nabalco gave up any right it had to litigate any question under the old contract. Because they had all the cards they sought to exert bargaining pressure upon Nabalco designed to ensure that they would have a long term contract at a price which would be below the notice price, a negotiated price because of all the matters I mentioned. 30

What went wrong was Mr. Nyholm walked through Nabalco's door, after K.N.P.C. said they were not interested and then said they were.

HIS HONOUR: This is where I am confused. I can well understand B.P. had bargaining strength superior to Nabalco, or at least had that strength in Nabalco's mind. I can well understand that B.P. though it was almost in an impregnable position and was in a situation to force Nabalco to give up the idea to litigate the case. But all these things to me seem to be in the realm of bargaining and seem to be affected by the "without prejudice" label. 40

10 What I regard as important, and no doubt I will have to consider this in detail later on, is the question of whether or not the attitude expressed at the conference, when we find it in Mr. Coogan's evidence, Mr. Notter's evidence and really I think in Mr. Shaw's evidence, and this witness' evidence too, that the old contract had gone by reason of the two notices and their legal advice and on no basis were they prepared to supply under it, on no basis were they prepared to do anything in relation to it contractually. Whether that was an indication of an attitude that had been formed, a willy nilly attitude, not from something they would retreat. But an indication of whatever else was said at this conference this was not said without prejudice, this was their fair attitude.

Is there any other question?

MR. LOCKHART: That is the fundamental question to which it goes. It also, of course, will go to the other question of what use your Honour seeks to make in due course of the attitude of B.P. in relation to it.

HIS HONOUR: I do not myself perceive a great deal of distinction between the two attitudes.

20 MR. LOCKHART: The impression conveyed to Mr. Lockrey is that B.P. were prepared throughout to supply and give a refund if it was negotiated against them. We say they maintained that until May, and on 17th May there was a total change of attitude.

HIS HONOUR: But as far as this case is concerned — and I may be quite wrong again — but surely if they would not supply to you at the old contract price, provided my decision is right that must be the end of it.

MR. LOCKHART: And coupled with the 7th May letter.

HIS HONOUR: If my decision is wrong we do not have a case anyway.

MR. LOCKHART: I say that fully. The simplicity and clarity of the approach of the objective facts based on the 7th May letter.

HIS HONOUR: I do not want to stop you but—

30 MR. LOCKHART: If the case should ever go further, whoever takes it further may find that these matters could become significant in the eyes of another tribunal and I would hesitate to stop this line of questioning now.

HIS HONOUR: I appreciate the responsibility you have. I just want to have it clear in my own mind where we were going.

(Witness returned to the court)

MR. LOCKHART: Q. You believe in short that Nabalco just was not interested in a spot basis of supply? A. I believed that their first requirement was a long term contract. I was not aware whether they would or would not go into a spot price basis.

Q. You held the view they would enter into a spot supply basis as a matter of

No. 111
 Defendant's
 evidence:
 C. Lockrey:
 Cross-
 Examination
 (cont'd)

last resort? A. It was suggested at one time that a spot basis would serve whilst the matter was being litigated quickly.

Q. The spot basis was — (reads). But that suggestion was made well before 17th May, wasn't it? A. Yes.

Q. And certainly that suggestion was not an available alternative as at 17th May except to the extent that it is part of the next possibility referred to in the application before you? A. On 17th May Mr. Coogan outlined three possibilities. One of them was spot, the other two were contracts. So my view was they could have taken one of three.

Q. But you thought it most unlikely they would take spot? A. Certainly, because I believed they wanted a term contract and indeed they indicated this. 10

Q. Incidentally, you make no mention in your Telex of supply to be given on a spot price basis only, do you? A. No, but I mention "No formal contract".

Q. Yes, exactly, no formal contract; whereas they would receive a formal contract if it was a one or three year contract? A. Yes.

Q. And you knew they wanted a formal contract? A. That is right.

Q. And because supply, whether it be spot supply or supply on a spot price basis, could never guarantee to Nabalco any deliveries except a particular delivery or deliveries under the spot contractual arrangement; that is so, isn't it? A. We endeavoured to convey that our arrangement of spot supply was better than that. We had programmed Nabalco's supplies from far ahead. It was in the pipeline, as it were, so there was no danger from a supply angle, of physical supply. Indeed, Mr. Notter referred to one of our offers on a contract as virtually a supply price basis. 20

Q. That was your view on 17th May, was it? A. What was my view?

Q. What you had just given an answer to? A. Yes.

Q. And yet you wrote as you did in your Telex of 17th May, 1974, saying "This appears unlikely as Nabalco are fully aware our position and recognise supply dangers and temporary nature of current price advantage of spot market"? A. Yes.

*Q. That is intended to convey to B.P. is it not, that you thought it unlikely that the first alternative would be accepted by Nabalco because of the supply dangers inherent in it, is that right? A. My feeling— 30

Q. Can you answer that question, first of all? A. Would you mind putting it again.

Q. (Question marked * read by court reporter) A. That would be one of the reasons.

Q. The other reason would be the temporary nature of the current price advantage of the spot market? A. That would be another reason, and more another one.

Q. Tell us what it is? A. That they wanted a long term contract, which they had indicated to us.

Q. When you said in your Telex — and by all means look at it — “And they recognise the supply dangers” you meant to convey, did you not, not merely that it was Nabalco’s view that there supply dangers inherent in the first alternative but that was the fact as you saw it. Isn’t that so? A. At the meeting we discussed—

Q. Can you answer that question, Mr. Lockrey? A. No it is not.

10 Q. Well you didn’t put it to London as being the view of B.P. as you say “It appears unlikely as Nabalco are fully aware of our position and recognise supply dangers”? A. Yes.

Q. Didn’t you intend to convey by that that there were in fact supply dangers and that Nabalco recognised them? A. Yes.

Q. Is that what you intended to convey? A. Nabalco were aware of the world supply dangers.

Q. But they were aware of that in a context of the first alternative. That is so, isn’t it? A. In respect of spot supplies.

Q. And there were only three alternatives set out in your Telex? A. That is correct.

20 Q. And they were the only three that emerges from the meeting, weren’t they? A. Correct.

Q. You were aware, were you not, throughout the whole of May of last year, and indeed subsequently, that if there were litigation over the validity of your notice and that if Nabalco were to succeed in it it could involve B.P. Australia in a massive liability for damages? A. Yes.

Q. And indeed you expressed that view to B.P. London by Telex of 21st June, 1974, did you not? A. Can I see that here?

Q. I show you that Telex, which is part of Ex. 64. It is dated 21st June, 1974, is numbered C214 and is from B.P. Australia to B.P.? A. Yes.

30 Q. In particular I refer you to the last paragraph in that Telex that I show you? A. Yes; the one referring to spot prices, is that the one?

Q. Yes. However, you go on to say, don’t you “We must ensure supplies are maintained to prevent possible massive liability or subsequent damages should court find in Nabalco’s favour”? A. Yes.

Q. And that was a view — when did you first form that view, can you recall that? A. I think it was the logical view, a logical conclusion early in the piece, that if court said we were wrong we were wrong.

Q. On the other hand, if you continued with the old contract on the basis of supplying furnace oil until 1976 at \$13-odd per tonne you would be involved in massive loss, would you not? A. The law also said we had no contract.

No. 111
 —
 Defendant's
 evidence:
 C. Lockrey:
 Cross-
 Examination
 (cont'd)

Q. I appreciate that was the view. But if they were wrong and if you continued to abide by the old contract your company would have been involved in a massive loss, would it not? A. Yes.

Q. You were at pains to ensure as part of your bargaining that Nabalco — were you not — that the validity of your company's notice was not to be brought before the case by Nabalco but if they wanted a formal contract with the company — A. Would you mind repeating that?

Q. You were determined to ensure, were you not, in the conduct of bargaining with Nabalco that if Nabalco wanted a formal contract from your company it would have to give up its rights to litigate the validity of the B.P. Australia notice? A. Yes. 10

Q. And that was the basis on which you conducted discussions on 17th May? A. My advice was I had no alternative.

Q. It was the basis on which you discussed the matters on 17th May? A. Yes.

HIS HONOUR: Q. In other words, the only basis upon which you were prepared to enter into a term contract was in exchange for the giving up by Nabalco of whatever legal rights it had in relation to the old contract? A. Yes your Honour.

MR. LOCKHART: Q. It was your belief, was it not, on 2nd May last year that in any new agreement between Nabalco and B.P. Australia as to furnace oil Nabalco would want to protect their position vis-a-vis the old contract? A. I am not sure of the date but I would say that I would accept that view from Nabalco, yes. 20

Q. Would you prefer to look at the Telex? A. Yes.

Q. Would you turn towards the beginning of the folder of 2nd May no.31o. It is the one you were looking at a little earlier? A. I have that.

Q. Turn to the second page under the item "E.F.F."? A. Yes.

Q. That is the Telex that you drafted, I suppose, is that so? A. Yes.

Q. And sent to London? A. Yes.

Q. Did you say in it "We believe that in any new agreement Nabalco will want to protect their position vis-a-vis the old contract"? A. This is right.

Q. That was your view, was it not? A. Yes. 30

Q. So in the events that occurred — (reads) "Particular current price they would be able to refer to that current price and to the current contract. stop"? A. Yes.

Q. That reflects your view, does it? A. Yes, it reflects the legal view. I am expressing the advice that I have had.

Q. So far as you know expressing the B.P. Australia view? A. Yes.

Q. "However, our response will be that completion of a fresh contract will be

conditional upon Nabalco acknowledging that current contract is at an end for all purposes"? A. Yes.

Q. "Although we doubt Nabalco would wear this and therefore a negotiated price with sacrifice to both sides may be preferable"? A. Yes.

Q. That is a fair summation of your own view at the time, is it? A. At the time, yes.

10 Q. So it would be quite wrong to suggest, would it not, at the time you wrote that Telex it was your view that B.P. Australia would be prepared to allow Nabalco supplies for 24th July other than on a spot basis and at the same time pursue its rights to litigate the validity of your company's notice? A. It was the view at the time, it was crystallised later as we got further legal advice.

Q. It was a view which had been subsequently changed, had it? A. No.

Q. And it was the view which was held in July 1974, I take it? A. I would think so.

Q. Mr. Lockrey, can you find over the pages a Telex of 27th May, 1974, no.C785? A. Yes.

Q. Turn to the second page of it if you could. You, I take it, drafted that Telex, did you? A. Yes.

20 Q. It is a Telex of 27th May, 1974, from B.P. Australia to B.P. London? A. It is more personal than that. It is for Mr. Rendell from me.

Q. You obtained that information from the face of the Telex, did you not? A. That is correct.

Q. In which you say under point four on page two, do you not, "Any deal is dependent upon complete cancellation of fuel oil contract in old contract and any litigation relative thereto"? A. That is right.

Q. And you reflected your view at that time also, I think? A. Reflected the company and legal view, yes.

Q. And yours? A. Yes.

30 Q. Turn over the page a little further to 14th June Telex if you would please, No.115? A. Yes.

Q. That too is a Telex drafted by you, right? A. Yes.

Q. And was sent by B.P. Australia to B.P. London, was it not? A. Yes.

Q. On 14th June, 1974? A. Yes.

Q. You say in it in the last sentence "That is price to the form . . . remains at either irresistible \$.Aust. 52.52 which price Nabalco knows somewhat lower than was expected reasonable level and made possible by us through local economies including quality relaxation and increased credit terms. This price would form part

No. 111
 —
 Defendant's
 evidence:
 C. Lockrey:
 Cross-
 Examination
 (cont'd)

of a new contract in that if they acknowledge complete termination of old fuel oil contract including any mention for consideration arising therefrom"? A. Yes.

Q. That is an accurate summary of your view at the time of the despatch of that Telex, is it? A. Yes.

Q. And I take it an accurate view of the opinion of the legal department in your office? A. Yes, and also the external legal advisors.

MR. LOCKHART: Q. Mr. Lockrey, you gave some evidence as to your recollection of a conversation you had with Mr. Notter on 26th April, 1974, do you recall that, on Friday? A. I can't recall the content but if you prompt me I will—

Q. You mean you cannot at the moment recall what was said in that conversation, is that what you are saying? A. No, would you mind giving me a lead? 10

Q. Well, did you say to Mr. Notter words to this effect — you appreciate I am not seeking to bind you to precise words? A. Yes.

Q. Words to this effect, "However we are happy to discuss matters although we regard the old contract as finished"? A. I think that is fair enough, yes.

Q. And, "We understand however that if the notice is subsequently ruled invalid, the old contract continues," or words to that effect? A. Yes.

Q. Now you gave evidence on Friday also about a conversation you had with Mr. Coogan on about 9th May, 1974, I think you fixed it as being a couple of days after the letter of 7th May. Now you recall giving that evidence, do you, as to what was said in that telephone conversation between the two of you? A. Was this concerning the appointment for the new contract? 20

Q. Yes, that is so? A. Yes.

Q. It was after the 7th and before the 17th of May that you had that conversation? A. Yes.

Q. Have you at the moment any recollection of what was said in that conversation? A. No, only that it was a short one and it was to do with the meeting.

Q. You mean beyond that you cannot recall what if anything was said, is that right? A. Not at the moment, no.

Q. The 17th May discussions which you have given evidence of was the first occasion, was it not, on which you said to anyone representing Nabalco that B.P.A. would be prepared to consider a term contract only on the basis of there being no litigation by Nabalco of questions relating to the validity of the B.P.A. notice of March; that is right, isn't it? A. No, I don't — I don't think that is right, I think I would have indicated this point of view earlier. 30

Q. Well, you did not indicate it as late as the 30th April, did you? A. Maybe not.

Q. Do you mean you may have indicated something to that effect to Mr.

Coogan in that telephone conversation arranging the meeting on 17th May? A. I think that is possible, yes.

Q. That would be the occasion that you had in mind, if any? A. There was an earlier occasion, I am not too sure when it was, but—

Q. Well, during the telephone conversation with Mr. Coogan and yourself where the meeting of 17th May was established, did Mr. Coogan say to you something to this effect that letter of 17th May seems to contradict what he thought was a good arrangement in that Nabalco could establish an interim supply of oil to Gove — I am sorry, I will read that again.

10 Did he say words to this effect, “It seems to me to contradict what I thought was a good arrangement, that is the letter of 7th May, in that we could establish an interim supply of oil to Gove whilst the legal matters are being resolved in the court,” or words to that effect? A. I don’t recall but it could well have happened.

Q. And did you say to him something to this effect, “I am sorry but London has now taken over and things have changed”? A. I can’t imagine I said that.

Q. But it was the fact, wasn’t it? A. It was not the fact.

20 Q. You had been given, call it a directive or an advice, what you will, Mr. Lockrey, you had been given to understand by B.P. London, shortly before the, say, 9th May 1974, that there could be no arrangement with Nabalco for a term contract supply of oil to Gove whilst Nabalco sought to litigate the validity of the B.P.A. March notice; that is so, isn’t it? A. This would have been an expression of a legal view from legal people in London, it would have been an expression of view, not a direction. You must understand that we are dealing with a commercial, with an international product, and London being responsible for certain aspects of the supply of that product must join in a discussion with us.

30 Q. Very well, but London had made it clear to you, had it not, by the early part of May, that as it saw it there could be no contract with Nabalco for a supply of oil on a term or periodic basis if Nabalco persisted in litigating the question of the validity of the March notice, isn’t that so? A. This could well be. I guess this is in a telex somewhere.

Q. Was it a view that was communicated to you by London, before or after your discussion with Mr. Notter of 30th April that we have referred to earlier? A. I am not sure. I would have to check up on the dates, but it was a view which was being considered by legal people on both sides of the world and there was a lot of to-ing and fro-ing and, you know, when I had the final view I am not sure.

Q. At any rate, if you turn to the telex of 2nd May 1974, from B.P. London to B.P. Melbourne C.852, near the beginning of the file, Mr. Lockrey, if you would please, you will find two of that date? A. What number?

Q. C852? A. Yes.

40 Q. Just cast your eye over it, if you would, and look down towards the latter part of it where it says under the item Cee “Negotiate new contract which must have all escalation/review/FM we have discussed and advised. It must have no connection with old contract which expires totally on termination date”? A. Yes.

Q. "We would prefer duration one year but agree to three years if and only if all above conditions apply. Suggest your new base price is USDlrs.64 F.O.B. P.G. This may be difficult to negotiate as Notter will no doubt have picked up European buyer resistance which exists at present. However there is distinct lack of competition bidders and we anticipate substantial market hardening" and what appears to be "4Q74-1075. Let us know if we can help"? A. Yes.

Q. So does that assist you to recall when it was that you learned B.P.'s attitude was that the new contract must have no connection with the old? A. Well, it could well have been that time, yes.

Q. Could it be the reason why you wrote in the terms you did in your telex of 2nd May No.370, which immediately precedes it I think in your file — A. Yes. 10

Q. —perhaps follows it, under the item E.F.F., which I have already read to you, starting "We believe that"? A. Yes, this would have been the legal view that expressed.

HIS HONOUR: Q. Mr. Lockrey, you are inclined to tell me that you are expressing a legal view from time to time; you have said that I think or used expressions like it quite a number of times. People get legal advice about their situations from time to time and they then go to a negotiating table without lawyers and they may accept without question the legal advice which they have been given so that the attitude which they reveal is along the lines that their lawyers advised them or they may say to themselves, "Well, I have been advised of this but," to use an expression that was used this morning, "Strange things have happened in court, I will negotiate on the basis that I am in a strong position legally but that that may not necessarily turn out to be the case and I will therefore give or be prepared to give some ground in relation to my position no matter that my lawyers have advised me strongly about it". 20

Now you were negotiating on behalf of B.P.A. and you have told me that the attitude you were expressing was really the attitude of the company's lawyers both internal and external. Were you not really putting what you said as the attitude of B.P.A. the reason for putting it in the strong terms in which you did being the strong legal advice which you had been given? A. Your Honour, I understood that I could negotiate on price but I could not negotiate on the understanding of the state of the old contract. 30

Each time we wrote a telex we sent the words to our legal people to read to see that we had expressed ourselves correctly, and when we had our meeting on the 17th of May I invited the legal man to be present so that we would have an understanding of our position.

Q. That was Mr. Rowland? A. Mr. Rowland, he is a legal man and he represented the legal view externally and internally.

Q. Please correct me if I am wrong but as I understood it the legal view became your view as the negotiator? A. Well, we accepted the legal view. The legal view came from two sources, it came from overseas and it came from local sources. That being the legal view I had no other view, I had to accept that. 40

Q. And you did? A. And I did. I had no alternative.

MR. LOCKHART: Q. It was the information that was conveyed to you in that telex I have referred to from London of 2nd May 1974 No. C.852, I read out to you, Mr. Lockrey, that made it clear to you, did it not, that all questions thereafter of an interim supply arrangement whilst the validity of your company's notice was being tested simply was no longer viable? A. As the telex suggests or says here it is a suggestion from London, "We suggest" "We suggest", it is their view. Now we do not necessarily have to accept that view.

No. 111
—
Defendant's
evidence:
C. Lockrey:
Cross-
Examination
(cont'd)

Q. Indeed but you did in fact accept it, didn't you? A. After the legal people had informed us, yes.

10 Q. It was after those events which occurred that you expressed the views you did in your telex of 2nd May in par.E.F.F.? A. That is right.

Q. You say "We believe that" etc.? A. Yes.

Q. And you are expressly there what you understood to be the view of your legal people here and your own views and B.P.A.'s views? A. That is correct.

Q. And it was at that point of time, was it not, that it was clear to you that there could no longer be any question of an interim supply arrangement with Nabalco pending the resolution of the dispute on the question of the interpretation and other matters on the old contract? A. Yes, I think that would be fair enough.

20 Q. I show you a note from the same file headed "Telephone call from E. Notter 27-4-74". Would you just look at that please and read it to yourself? A. Yes.

Q. Does that assist you in recalling whether you had a telephone call from Mr. Notter on that date? A. Certainly.

Q. Did he say words to this effect to you that "They", that is Nabalco, "Want us to consider through our legal people whether we would regard it as being fair for them to approach the New South Wales Supreme Court since the contract is subject to the laws of New South Wales for a judgment by a judge of the Supreme Court," is that right? A. Yes.

Q. "It is known as a construction summons"? A. Yes.

30 Q. "He tells you whether the thing is viable or not. He arbitrates". Is that so? A. Yes.

Q. Did you say "This is sort of an interim step to clear the way and it does not stop us from proceeding but just enables you to determine which course you have got to take," is that right? A. Yes.

Q. And I think there was an exchange of the names of the respective solicitors for Nabalco and B.P.A., is that right? A. Yes.

Q. Mr. Herron of Westgarth's was given by Mr. Notter, Mr. Pritchard was given by yourself? A. That is right.

Q. And you discussed that matter with Mr. Rowland, did you, Mr. Lockrey? A. Yes, and Mr. Cochrane.

No. 111
 —
 Defendant's
 evidence:
 C. Lockrey:
 Cross-
 Examination
 (cont'd)

Q. On or about 23rd April? A. Yes.

Q. Did Mr. Rowland convey to you that he saw no objection to Nabalco proceeding as they wished to? A. Yes, that would be right.

Q. And did Mr. Cochrane convey to you much the same impression? A. Yes.

Q. And you told Mr. Notter of their views, did you, by telephone on 23rd April? A. Correct.

Q. You see the document I show you from the same file, in the top right hand corner 26/4 and "C. Lockrey" in the left hand corner? A. Yes.

Q. Do you recognise the handwriting? A. No.

Q. Do you know how — well, you may assume it was produced by your company at some stage during a discovery of documents. A. I don't think this is from our company, I think it must be from your side. 10

Q. Well, it is Mr. Notter's note I gather but as I understand it this came from your files too. Do you know that or not? A. I don't think we would have Mr. Notter's notes on our file.

Q. Just to put the matter to rest, just turn over a page or two, to a note — it may be the next page I think — is that a note 30-4-74 called B.P. file note? A. Yes.

Q. Is that a document which you have seen before? A. No, this is Mr. Notter's.

Q. Mr. Lockrey, I want to take you for a moment to the 17th May discussion. You were in court, were you not, throughout the whole of this case thus far except during the examination of Mr. Coogan on the voir dire and the cross-examination, brief though it was, of Mr. Shaw on Friday? A. I think, yes, but I think there were times when I was asked to leave. I am not too sure when they were. 20

Q. I suggest to you that you left when you were asked to leave during Mr. Coogan's examination on the voir dire, as it is called.

HIS HONOUR: Q. When he gave evidence about the conversation of the 17th May, that is what is suggested? A. Yes, whatever you say.

HIS HONOUR: I think it might be made clear, Mr. Lockhart, that I did not ask him to leave. If he was asked to leave it was obviously one of B.P.'s counsel or your solicitor. 30

MR. LOCKHART: Q. Subject to those two periods of time you have been in court throughout this period of the hearing, haven't you?—

HIS HONOUR: I am not sure that he knows what you mean by the examination on the voir dire.

MR. LOCKHART: Q. You have been in court during Mr. Notter's examination? A. Yes.

Q. And during Mr. Coogan's cross-examination by Mr. Staff? A. Yes.

Q. And you were here when Mr. Shaw gave evidence on Friday to Mr. Staff in chief? A. I was here just for a short time; I was asked to leave.

Q. Were you here when Mr. Shaw's notes relating to the 17th May meeting were tendered in court? A. Yes.

Q. Did you hear his evidence, and I will read it to you, on p.290A — Mr. Staff asked him in relation to those notes, "Your notes do not, of course, purport to be a transcript of the discussion?" he said, "In no way, no".

10 Next question from Mr. Staff, "What were you aiming to record?" He said, "I was aiming to record the points on which action would subsequently be necessary by B.P. and also to prepare a record of the major points that emerged from the discussion at the meeting". A. Yes, I recall that.

Q. Were those notes prepared by him at your request? A. No.

Q. But you have seen them, have you, since they were prepared? A. Yes.

Q. Do they in your view answer the description of the record of the points on which action would subsequently be necessary by B.P.? A. My impression is that they went a little further than "I consider"; these were the main salient points which I had put in a telex to London.

20 Q. Just to make this clear, do you mean that the main salient points as you thought them to be were those in the telex of 17th May from B.P.A. to B.P. London which I showed you before the short adjournment this morning? A. I would say that they contain the main salient points but my concern then was the contracts, the three modes of possible supply.

Q. Do you mean by the answer you gave a short while ago that you thought Mr. Shaw's notes went beyond that to deal with other matters that were important but not as important as you thought the matters the subject of that telex of 17th May were? A. They did, they dealt with quite a lot of side discussions and so on.

Q. At any rate may we take it that in your view nothing of importance was omitted from those notes of Mr. Shaw? A. I don't think so.

HIS HONOUR: Q. Do you want to look at them? A. I would like to see them your Honour (Witness shown Ex. 57)

30 MR. LOCKHART: Q. Having looked at those notes of Mr. Shaw, Ex.57, are there matters that you recollect as being important that are not dealt with by him in those notes? A. No, I don't think so.

(Luncheon adjournment)

Q. Before the luncheon adjournment you had agreed with me, you remember that in your view there were no matters of importance missing from Mr. Shaw's notes of the meeting of the 17th May, Ex.57, do you recall? A. I could not recollect any.

Q. You could not recollect any now, is that right? A. I don't think so.

No. 111
 —
 Defendant's
 evidence:
 C. Lockrey:
 Cross-
 Examination
 (cont'd)

Q. Now you pointed out to me this morning when I was putting a telex to you of 21st June 1974, under C.214 — you might like to look at it in the file — you recall I directed your attention to the last paragraph against the item Cee and you pointed out to me that you had used the words in that telex “agree with shipments discharged after 24th July will be at spot prices.” And that was a deliberate choice of language by you I suppose in the telex “spot prices”, was it not? A. Yes.

Q. May I take it that it was just as deliberate a choice of language that caused you to say in your telex of 17th May, 1974 — turn to it by all means if you wish, No.C650 — when you said the first of the three possibilities was to litigate on the old contract through all possible courts and W.E.F. 24-7 to buy on spot basis with no formal contract, may I take it the words “to buy on spot basis” were also chosen by you with care? A. “With no formal contract” added, yes.

10

Q. But you did not say to buy on spot prices, did you? A. No, I said spot basis.

Q. And you gave evidence on Friday (sic) at p.300 and 301 that in the absence — last question p.300 “In the absence of agreeing to a one year or a three year contract we could maintain Nabalco’s supplies on a spot price basis”, that is what you said you said at the meeting, do you recall that? A. Yes.

Q. You went on to say, p.301, that you do not remember exactly what Mr. Notter said but the concept of a spot price filled him with some concern, right? A. Yes.

20

Q. Was it after that that you used the words “Eddy, Gove would never be without oil,” is that right? A. I’m not sure that it was straight after that but in that reasonable time slot, yes.

Q. Was it before or after the first words that I said to you that you said, “Eddy, Gove would never be without oil”? A. I believe it may have been afterwards because it was to reassure him in his concern.

Q. But it did not reassure him as you thought at the time, did it? A. I believe that it did.

Q. Well, you see, this morning Mr. Staff went on with that conversation with you and asked you to relate what occurred after that particular statement was made by you and you went on to relate that and you said to Mr. Staff, “Notter showed some concern and said we were in effect offering a spot price proposition,” that is what you said this morning, didn’t you? A. Yes.

30

Q. So that notwithstanding your assurance that “Eddy Gove would never be without oil,” he still had some concern about a spot price basis of supply, didn’t he? A. If the same sequence is followed, yes, but I don’t know that it was.

Q. But you see, Mr. Staff put the questions to you this morning on the basis that that followed what you said at p.301 of the transcript on Friday last (sic), and you agreed with that, didn’t you? A. They followed in the sense that it was afterwards. Now whether something came in between I can’t recall.

40

Q. At any rate, notwithstanding the fact that you said to Mr. Notter, “Eddy, Gove would never be without oil”, he still made it clear to you that the concept of spot price filled him with concern, is that right? A. I believe that he could have had

that concern, bearing in mind of course that spot — a spot basis for commodities other than oil could be quite different spot basis for alumina or any other product could be quite different.

Q. Of course here we are talking about furnace oil, aren't we? A. That is right.

Q. And that is how you understand the questions I am putting to you and the answers you are giving to be that context, aren't you? A. Correct, but we are talking about Mr. Notter's understanding also.

10 Q. Yes, his understanding in relation to furnace oil, that is what we are discussing? A. But that understanding could be related to his experience of spot purchases with other commodities.

Q. But whatever it was related to it was in the context of a discussion on furnace oil wasn't it? A. That is right.

Q. And he expressed concern about this concept of spot prices? A. That is right.

Q. You draw a distinction, do you, Mr. Lockrey, between a spot supply basis and a spot price basis in relation to the supply of furnace oil, do you? A. In this particular instance, yes.

20 HIS HONOUR: Q. Could you just tell me so that I will not be under any misunderstanding, what do you mean by spot supply of furnace oil in these circumstances? A. Your Honour, if spot supply is offered by a small organisation without large resources, without a background of dependability and the like, this would be — this could be a fairly risky thing, in times of emergency. In other words, they would undertake to supply the oil as and when it became available. If there were problems with not being able to supply their contract customers and the like the person buying on the spot basis could suffer.

30 In our instance we had substantial sources of supply. We have been supplying Nabalco for a long time. We had been supplying Nabalco and we had programmed their supplies some time ahead. There was no doubt whatsoever in our minds that we had oil to give to Nabalco and this caused me to reiterate on several occasions that Nabalco would never go without oil.

Now as far as the supply was concerned with B.P. there was no question of supply not occurring, but the price would be the price operating on the day that we purchased it or at the time we purchased it, and that was the difference.

Q. Well, on that basis you could have entered into an agreement to supply at the prevailing market price at each time of supply, could you not? A. Well, we virtually do that at the time, your Honour. We say "This is the price, you undertake to accept this and we will supply it".

40 Q. But you did tell me this morning I thought, and you please correct me if I am wrong, that you were prepared to assure them of supply because of a feeling of moral obligation towards them? A. Yes.

Q. Because of the effect upon your public image if you did not? A. Yes.

Q. And because of the fear that you had that if you proved wrong in any legal argument the damages would be very very great? A. Yes.

Q. But at the same time, as I understood you, you did say to me that as you understood the situation B.P. was not under any legal obligation to supply if a spot basis were accepted? A. That is correct, your Honour.

Q. So that they had to accept your assurance in your mind without having any legal right to enforce the supply which you promised? A. This is right, your Honour. Had they insisted on or endeavoured to get some assuring of supply I think in terms of right but covering supply rather than price, I am sure that this could have been forthcoming. 10

Q. But would you have been prepared to enter into a contract to supply them for 12 months or 3 months at market prices or spot market prices whatever they happened to be at the time of supply? A. We would have, your Honour, and in fact the one year contract that we offered could almost be interpreted as a spot price basis, as Mr. Notter indicated on the 17th May, yet this was a contract offer.

Q. Did you apart from that offer, offer to supply them at spot prices contractually? In other words, did you offer to be contractually bound to supply them for a period at spot prices? A. I did not use the words "Contractually", your Honour, but I assured them of supply and assured them that Nabalco would not go without. 20

MR. LOCKHART: Q. Mr. Lockrey, in your telex of 17th May, you stated the three alternatives, didn't you? A. Yes.

Q. And one of those alternatives was stated as a one year contract with full escalation, was it not? A. Yes.

Q. And you were careful to state as a separate alternative to the first, namely, buy on a spot basis with no formal contract, weren't you? A. Yes.

Q. That is right, isn't it? A. Yes.

Q. And that was on the basis that Nabalco might choose to litigate on the old contract "through all possible courts", wasn't it? A. Yes, I think I set out the possibilities as Mr. Coogan summarised them on the 17th May. 30

Q. And you summarised them accurately I take it? A. I believe so.

Q. So that as far as you knew if option 1 was exercised by Nabalco there could be — they could be buying furnace oil on a spot basis without a formal contract for months or years? A. Yes, but Nabalco had also—

Q. Just a moment, for months or years; you say yes to that, do you? A. Yes.

Q. Is that right? A. Yes.

Q. That was one of the reasons, was it not, why you were not prepared in those circumstances to offer any formal contract to them except on the one or three year basis that you set out in your telex? A. I do not understand that question.

Q. The litigation could go on for months or years; you agree with that don't you? A. Except that Nabalco said it would be short term and they were taking steps to ensure it was handled quickly.

Q. But you in your own telex said that the litigation could go on through all courts? A. Yes.

Q. And you interpreted that, I take it, through a number of appellate processes, if necessary, as high as the Privy Council? A. Yes.

Q. And you knew that could take months or even years, didn't you? A. Well, some considerable time.

10 Q. And realising that you were not prepared to bind your company contractually to Nabalco to supply on spot prices but were only prepared to, as it were, assume in your own mind some moral obligation in relation to them, weren't you? A. The question of contractual spot basis, if you can have such a thing, did not come into the conversation.

Q. In fact, Mr. Lockrey, it is your understanding, isn't it, that you cannot have a contract on a spot basis or a spot price basis that is for a periodic term? A. A written contract are you talking about?

Q. Well, a written contract, yes? A. It becomes a contract deal then.

20 Q. Of course the contract, whether it be one year term, three or five year term, and the context discussed on the 17th May was a contract guaranteeing supply during the period of the contract, wasn't it? A. Yes, at a fluctuating price.

Q. At a fluctuating price, but one of the essential distinctions between the second and the third alternative on the one hand, and the first alternative on the other, was it not, was that there could be no legal guarantee of supply under the first alternative? A. No legal guarantee, correct.

HIS HONOUR: Q. And if they took the second or the third they had to give up their prospect of success in the courts? A. That is right, your Honour, that was our advice.

Q. That was the attitude you expressed though, wasn't it? A. Yes.

30 MR. LOCKHART: Q. And you have expressed it after taking legal advice both within and outside the company, is that right? A. Yes.

Q. And after you had received advice from B.P. London — I took you to it this morning and I will remind you of it again, in the telex of 9th May, 1974, by all means get it, 9th May, 1974, do you have it there? A. Yes.

Q. Look a little way below halfway down, if you would, below the three alternatives, "the termination of the existing contract will operate in fact and you are unable to offer continuity beyond this date except on spot basis"? A. Yes.

40 Q. So that you interpreted London as advising that there ought not be supply except on a spot basis unless the above condition referred to in the telex were observed, isn't that so? A. We could offer continuity London say other than—

No. 111
 —
 Defendant's
 evidence:
 C. Lockrey:
 Cross-
 Examination
 (cont'd)

Q. No, unable to offer continuity beyond this date except on a spot basis? A. Yes.

Q. And that means, doesn't it, as you understood it, that there could be no legal obligation of supplying on a spot basis except qua the particular spot contract or contracts in question? A. Yes.

Q. And you knew that that was a matter in which Mr. Notter expressed grave concern at the meeting of the 17th May? A. Yes, Mr. Notter wanted a contract.

Q. And indeed he said to you, did he not — A. Which we offered him.

Q. He said to you — well, you offered it to him but you offered it to him on terms, amongst other things, that they could not exercise their right to test the validity of your notice, didn't you? A. Yes, on advice. 10

Q. Did Mr. Notter say to you during the 17th May meeting — I withdraw that. Did you say to Mr. Notter and the others at the meeting something to the effect, "However, if there is to be no new contract we could only supply you on a spot basis"? A. Yes, I may have said a spot price basis, I may have said a spot price but I would have referred to spot.

Q. At any rate, whatever word or words you used, it is fair to say, isn't it, that your telex of 17th May would have most accurately summarised it as being a spot basis? A. With no formal contract, yes.

Q. So that did he say to you, that is, Mr. Notter say to you, "spot and all that goes with it" or words to that effect? A. Well, he would have expressed some concern, I can't recall what it was. 20

Q. He could have said it, you are not sure, is that what you say, but they were words of concern? A. Words of concern, yes.

Q. And did you say to him something to the effect of the following — I am sorry, did he say something to you to the effect of the following, "Spot is spot and we could never enforce that"? A. Did who say it, I am sorry?

Q. Mr. Notter. I am sorry, I may have misled you. Did Mr. Notter say to you words to that effect, "Spot is spot and we could never enforce that"? A. I don't recall that. 30

Q. I do not wish to get into an exercise of semantics, but when you say "think" do you mean he could have said it and you don't have any recollection? A. I don't have any recollection.

Q. One way or the other? A. Yes.

Q. Did you say, "Well, yes, that is what spot is all about", or something like that? A. I don't recall saying that. I don't think I would have said that.

Q. If you had said it it would be a quite accurate statement of the fact, wouldn't it? A. Except that overshadowing this is my reassurance that Nabalco would not go without oil, therefore we were going to maintain supply.

HIS HONOUR: Q. But he had to take you at your word, didn't he? A. In what respect, your Honour?

Q. Well, he had to accept your word there was no way he could enforce that promise in the court? A. Yes, he had to take our word, your Honour, and we had that sort of relationship I thought in all our dealings.

MR. LOCKHART: Q. So if he had said to you, "spot is spot and we could never enforce that", that would be an accurate statement of the position as you understood it to be on 17th May, would it not? A. Yes, if he was looking at spot as he had it in his mind that would be an accurate assessment, but his concept of spot apparently was not my concept of spot.

10 Q. Your concept of spot certainly means — you have made this quite clear, haven't you, Mr. Lockrey, that spot does not involve a legal obligation to supply? A. That is right.

Q. So if Mr. Notter had said to you, "We could never enforce that," meaning spot, that would be, according to your understanding on 17th May, an accurate statement of fact? A. If he could not enforce it in law, yes.

Q. And it would have been the most natural thing in the world for you to have said to him, if he said that, "Well, yes, that is what spot is all about", isn't that so? A. No, I would not agree with that.

20 Q. But it would have reflected your view, wouldn't it? A. If I was referring to his concept of spot.

Q. If you will assume that the word "enforced" meant "enforced in the courts", if you said, "Well, yes, that is what spot is all about," that would have been an accurate expression of your view? A. If I had said this; if I had said this, yes.

Q. Now you told us on Friday (sic) that you have made this statement, "Eddy, Gove would never be without oil," on more than one occasion during the negotiations, didn't you? A. Yes.

Q. I withdraw that and put it to you differently. You said, didn't you, Mr. Lockrey, that — you remember saying to Mr. Notter "Eddy, Gove will would never be without oil", at the 17th May discussion? A. Yes.

30 Q. And you said on Friday (p.301), that you had been at pains at some pains, to use similar words throughout "All of our negotiation"? A. Both with Mr. Notter and Mr. Coogan as I thought.

Q. So you had used those words, had you? A. No, I did not use those words but I had assured them of continuity of supply and that we believed we should maintain continuity of supply.

40 Q. Do you mean this, Mr. Lockrey, that during the discussions, including those of the 26th and 30th April of which you have given evidence, the subject of continuity of supply on an interim basis while the litigation was going through the courts as you saw it, in those discussions you did use similar words as those I have read to you, "Gove will never be without oil" in conversations with Mr. Notter and Mr. Coogan? A. Yes.

No. 111
 —
 Defendant's
 evidence:
 C. Lockrey:
 Cross-
 Examination
 (cont'd)

Q. But that was in a context where you thought there could be an interim supply situation, wasn't there, pending the outcome of the legal proceedings? A. No, I was not aware what the supply arrangement was going to be, I was always hopeful of a contract.

Q. But until 2nd May when you received the telex we discussed this morning from B.P. London, you were hopeful that the legal rights of the parties could be sorted out and co-extensively with an interim supply arrangement, weren't you? A. Well, I thought that the interests of the parties could be discussed and ironed out but I wasn't too sure what sort of a supply arrangement we would have.

Q. At that stage you did not see an inconsistency, did you, between litigation by Nabalco against B.P. and interim supply arrangements pending the outcome of litigation, did you? A. Would you mind saying that again? 10

Q. You did not see, did you — and I am referring to the period of May April — any inconsistency between Nabalco suing B.P. in relation to B.P.'s notice of March through the courts and until the litigation was resolved, there being an interim supply, did you? A. I believed there could be an interim supply arrangement without a contract at this stage.

MR. LOCKHART: Q. During the period occupied by proceeding through the courts? A. Yes, Nabalco had terminated the contract and my understanding, my advice was that because the old contract had gone, a new one would have to be signed. Failing that, supply would have to be on some interim basis. 20

Q. But you saw that it was possible, did you not, in late April to supply on some interim basis while the courts were looking at the problems of the contract and the notice? A. What time in April? I would have—

Q. Let me remind you, Mr. Lockrey. You have agreed with me this morning that as at 23rd April — turn by all means towards the note in the file in front of you of the 23rd April relating to a telephone call from Mr. Notter. Do you see that? It has handwriting on the bottom of it? A. No, I haven't got it here.

Q. (Approached) You agreed with me this morning that on or about 23rd April, 1974 it was your view that Mr. Rowland and Mr. Cochrane saw no objection to Nabalco proceeding through the courts to test the validity of your notice and that that fact was communicated to Mr. Notter by you. You agreed with that this morning, didn't you? A. Yes. 30

Q. Turn a few pages over in the book, if you would, to 2nd May, 1974 telex — that is the one from Australia to London, p.2 of that? A. That is 370?

Q. I'm sorry? A. 370, is it?

Q. 370, the second page at the top. You agreed with me that on 30th April you had had a discussion with Mr. Notter where you agreed the solicitors for both sides should meet to discuss legal questions concerning the hearing of the suit to rule on the interpretation of the contract? A. Yes. 40

Q. On 23rd and 30th April it was your view, was it not, that pending the outcome of litigation by Nabalco to test the validity of the B.P. notice there could

be supply on an interim basis, interim pending the outcome of the court's decision. That is so, isn't it? A. Some form of supply, yes.

Q. A form of supply that would allow Nabalco to litigate. That is so, isn't it? A. Yes.

Q. And give it security of supply? A. Yes. I'm sorry, when did we get the Nabalco notice?

Q. You mean the Nabalco counter notice, the cross-notice? A. Terminating the contract?

Q. 24th April? A. 24th April?

10 Q. Yes. A. Well, I would say that from that point on my advice was that the old contract had terminated, and any future supply would be on a new contract basis or on a spot price basis.

Q. As at 30th April you held the view, didn't you, that Nabalco was free to litigate the question of its rights if it wished to, did you not? A. Yes.

Q. You held the view then, did you not, that if it proceeded to litigate the issues then in that event they would still be able to obtain supply on some secure basis pending the outcome of the litigation? A. Yes.

20 Q. Your view was changed, was it not, after you received the telex of the 2nd May — just turn over one page if you would — 2nd May, 1974, No.C852 from B.P. London? A. You are suggesting my view was changed from the 30th, did you say?

Q. To the 2nd May? A. To the 2nd May, I don't think so; I think my view was crystallised by the legal advice that was coming forth.

Q. At what point of time? A. I would say that — I'm sorry, I'm looking at the wrong one. Were you referring to the telex from us to London on the 2nd?

Q. No, from London to you on the 2nd May. There were two on the 2nd May, it is No.C852? A. Yes. Well, we sent one on the 2nd May also, didn't we?

Q. Yes, you did. A. And in that we expressed our view.

Q. Yes, you do. Of course, in your telex of 2nd May, that is your telex No.370, Mr. Lockrey — do you have it there? A. Yes.

30 Q. You expressed the view that it is your belief that in any new agreement Nabalco will want to protect their position viz-a-viz the old contract, don't you? A. Yes.

Q. That belief was held by you following what you had been told by Mr. Notter too. That is so, isn't it? A. Yes, and Mr. Coogan.

Q. You had spoken to Mr. Coogan, had you, before the 30th April? A. I think I had several conversations with Mr. Coogan; I can't remember the times but I certainly know that was in his mind.

Q. I put it to you that the first occasion you had a conversation with Mr. Coogan was on the 9th May over the telephone. Do you agree with that? A. Could be; I wouldn't dispute it. I thought that I had spoken to Mr. Coogan previously.

Q. Or are you just guessing at that? A. I'm not guessing at all. I believe that I spoke to Mr. Coogan.

Q. Before the 9th May? A. Yes.

Q. Before the sending of the 7th May letter, is that so? A. Well, I knew Mr. Coogan and I believe that I had some communication with him.

Q. When did you first meet Mr. Coogan face to face? A. I don't know.

Q. It was on 17th May, was it not, 1974? A. I don't know. 10

Q. You are not prepared to deny that was the first occasion you met him, are you Mr. Lockrey? A. No, if Mr. Coogan is strong on the point that that was the first time he had met me, I would accept his word.

Q. You mean you just do not remember? A. That's right.

Q. At any rate it was your belief on the 2nd May that Nabalco would want to protect their position viz-a-viz the old contract, wasn't it? A. Yes.

Q. You had said nothing to Nabalco at that stage, had you, to indicate that you would only be prepared to contract with them for a fixed term contract on the basis of no litigation? A. No, I don't recall that.

Q. When you say that you used the words on the 17th May, "Eddie, Gove would never be without oil", are you seeking to convey the general impression by words that you used, whatever they be? A. The general impression? (question withdrawn) 20

Q. Do you say those were the exact words you used on the 17th May? A. Pretty well.

Q. But they could have been different words but to much the same effect, is that what you say? A. They would be very close to the words I used, yes.

Q. Would you turn in that file in front of you please to a copy of Ex.S which is "Points of discussion with Nabalco on 17th May"? A. I don't think I have that.

Q. Just look at Ex.S if you would please (shown). You see in the 5th paragraph — if you want to read the whole of it, please do so — "in any new contract we would require you to acknowledge the termination of the old contract" and in handwriting after that are the words, "so far as it relates to furnace oil"? A. Yes. 30

Q. Those words or words close to them were words that you used at the meeting, were they not? A. Yes.

Q. That was on Mr. Rowland's advice, was it? A. Partly on Mr. Rowland's advice, yes.

Q. What you intended to convey by the words you used, was it not, was that there could not be a new contract unless Nabalco acknowledged as a condition of entering into the contract that it would not litigate whatever rights it had in relation to the old contract? A. Yes.

Q. In respect of furnace oil? A. Furnace oil, yes.

Q. (Approached) In the document Ex. S in front of you, I draw your attention in cl.5 to certain words in handwriting? A. Yes.

Q. Whose handwriting are they in? A. Mr. Cochrane's, I believe.

10 Q. Below the first clause there are some words in handwriting towards the top right-hand section, whose handwriting is that? A. Mine.

Q. Would you read it out for us as to what it says? A. One year — one year normally but three years if all terms met.

Q. Is the word "but" or is it the word "limit"? A. No, "but".

Q. "One year normally but three years if all terms met". Let me show you another document produced by your solicitors to the solicitors for the plaintiff. Just ignore if you would some crossing out in the top right-hand corner which is my own. Do you see some handwriting following the first paragraph saying "Period one or three years if all present conditions accepted"? A. Yes.

Q. Is that also Mr. Cochrane's handwriting? A. I don't know.

20 Q. Just look at it if you would please and tell me if you can identify it? A. It is similar but I wouldn't say it is his; it looks very similar though.

Q. Is it your own handwriting? A. No.

Q. Can you tell us whether you have seen that document before, the one I have just last shown to you? A. I have seen that copy of the document; I don't think I have seen that one (indicated). I should imagine that that is their copy and this is my copy.

Q. One moment, it is not clear for the notes as to what you are referring to. You have seen that copy, meaning Ex.S, is that right? A. That's right.

30 Q. Have you seen the other copy which I last showed to you? A. I don't believe so.

Q. Which document did you have with you at the meeting? A. That one (indicated).

Q. Ex.S? A. Yes.

(Second document shown to witness tendered without objection and marked Ex.AH)

Q. At 17th May meeting there was no statement made by you or any B.P.A. representative at all, was there, to the effect that if Nabalco were to sue B.P. on the

No. 111
 —
 Defendant's
 evidence:
 C. Lockrey:
 Cross-
 Examination
 (cont'd)

March notice of B.P. and to win it that B.P. would recompense Nabalco? A. I don't recall that.

Q. It would have been completely contrary to the stand you took at the meeting, wouldn't it? A. The meeting in my understanding was to discuss primarily aspects of a new contract.

Q. Yes, but can't you help us a little more than that. What I put to you is that the statement that I read in the question was not made by you or any other B.P. representative at the 17th May meeting. Can you agree with that or not? A. I don't recall it having been made.

Q. But it would be quite inconsistent if that had been said with the alternatives offered by B.P. at the meeting? A. Yes, I would have thought we were past that point. 10

Q. You never made any subsequent statement, did you, to any Nabalco representative — Mr. Notter, Mr. Coogan or anybody else — to the effect that if Nabalco sued B.P.A. and B.P.A. filed in the litigation that B.P.A. would recompense Nabalco, or words to that effect? A. On the 17th?

Q. After the 17th? A. I thought that after the 17th that may have been contained in a letter that went to Nabalco.

Q. Leaving aside the letter of the 17th July which you now have in mind, I am asking you about statements made, orally, to any Nabalco representative? A. I can't recall it. 20

Q. You had gone past that? A. Yes.

Q. Not only at the 17th May but also subsequently? A. I believe that we were going to sign a new contract, yes.

Q. You believed that there was going to be a new contract signed, but on the basis that there would be no litigation over the old, didn't you? A. Yes.

Q. So when you said this morning in answer to a question of Mr. Staff that B.P.'s attitude was that in the event of B.P. failing in the litigation it would recompense Nabalco, that is quite inaccurate, isn't it? A. No, it is not inaccurate; you asked me what was in my mind. 30

Q. It was a matter which you regarded, that is the prospect of litigation after the 17th May, as being academic, wasn't it? (Objected to unless a time period is put on it)

Q. Notwithstanding the commencement of the litigation by Nabalco, you still believed there would be a contract between the two companies, didn't you, for the supply of furnace oil on some periodic basis? A. Yes.

Q. One or three years? A. Yes.

Q. As at 17th May you knew that if there was to be such a contract there could be no litigation, didn't you? A. Yes.

Q. But you still remained hopeful there would be a contract? A. Yes.

Q. When you learned that a contract had been signed with K.N.P.C. and Nabalco, B.P. London was critical of B.P.A., was it not? A. In one sense, yes.

Q. It said, didn't it, it was suggested that there had been a cavalier attitude adopted by B.P.A.'s representatives in discussing negotiations with Nabalco's representatives? A. That's right.

Q. You were at pains to point out to B.P. London that was not the fact, weren't you? A. Correct.

Q. And you believed it not to be the fact? A. I knew it not to be the fact.

10 Q. What had happened was that despite the statements B.P. London had made to you in earlier telexes that I have directed your attention to, suddenly out of the blue K.N.P.C. signed the contract with Nabalco. That was how you saw it, wasn't it? A. Yes.

Q. That was a quite unexpected development to you? A. Unexpected, yes.

Q. Indeed, B.P. (sic) had assured you that that would not happen, hadn't it? A. Earlier they had indicated they didn't think it would happen — that is K.N.P.C. you are talking about?

Q. Yes, K.N.P.C.? A. Mmm.

20 Q. It is that which, as you saw it, went wrong with the discussions, wasn't it, that unexpected development occurring? A. The appearance of K.N.P.C. on the Australian scene you are talking about?

Q. Yes. A. That's right.

Q. When was it that you first learned that Nabalco and K.N.P.C. had signed a contract for the supply of oil in relation to Gove? A. The day that Mr. Coogan told me, which I think was — the record note was there that you referred to this morning, was it the 28th?

Q. Of — A. Of June or something.

Q. Are you referring to the day of the conversation with Mr. Batterham, is it, and then Mr. Coogan from Darwin? A. That's right.

30 Q. You may take it that has been said to be the 28th June. Did you have any knowledge of the fact of the contract having been signed between K.N.P.C. and Nabalco before the 28th June? A. No.

Q. Had you information in your possession before the 28th June which made you suspect that something was on foot between Nabalco and K.N.P.C. in relation to furnace oil supply at Gove? A. I would say that there were innuendoes and bits and pieces of information but I don't believe that anything of that sort had happened.

No. 111
 —
 Defendant's
 evidence:
 C. Lockrey:
 Cross-
 Examination
 (cont'd)

Q. Would you turn in the file in front of you to a telex from B.P.A. to B.P. London of 1st July, 1974, No.C341? A. Yes.

Q. Do you have that? A. Yes.

Q. Turn to the third page of it, the last page, towards the top. First of all, that is a telex, is it, that you — A. Johnstone—

Q. I am sorry. A. From Johnstone in London.

Q. For Johnstone, isn't it, from Wholesale Sales? A. Yes, for Johnstone.

Q. It emanated from you, did it not? A. Yes.

Q. It says on p.3, does it not, "In the meantime it should be understood that the Nabalco action relates to fuel oil and that our exclusive position at Gove with the products remains in touch." It goes on to say, "This in turn could have effect on our loan which is currently attracting a very high rate of interest"? A. Yes.

10

Q. That was your view, was it not, that the loan from your company to the joint ventures was an investment which was currently attracting a very high rate of interest? A. Yes.

Q. It was an attractive investment? A. I wouldn't say that.

Q. A good investment? A. I am not in a position to say that; we could have used it to much better advantage; I don't know.

Q. I can't hear what you say. A. I say we could have used it to better advantage within our group, within our organisation, but I don't know.

20

Q. In any event, it was attracting then a very high rate of interest? A. Yes.

Q. And it was a matter that you thought relevant for B.P. London to know? A. That's right.

Q. Turn over towards the end of the file if you would please — I think it may be the last document in that file, a note from Mr. Snape of 18th September, 1974. Do you have that? A. No, I don't think I have that. This goes up — 18th September?

Q. I think it may be the document you have in front of you now? A. Oh, to the Manager of our Finance Accounts Division.

Q. Of the 18th September? A. Yes.

30

Q. Just read it through to yourself. A. Yes.

Q. Have you seen that document before? A. No, I have not.

Q. If you would just close the volume in front of you for the moment. Incidentally, Mr. Lockrey, on Friday you had a pile of things on the witness box in front of you on your left? A. Yes.

Q. Do you recall that, and a typed document on the top of them? A. Yes.

Q. Were you reading from that document when you were in the box? A. From the typed document?

Q. Yes. A. No.

No. 111
—
Defendant's
evidence:
C. Lockrey:
Cross-
Examination
(cont'd)

HIS HONOUR: Q. I think one of the documents you had was really handwritten. A. Handwritten. I had some dates which I was referring to.

MR. LOCKHART: Q. In your own handwriting? A. Yes.

Q. Was that on your left in the witness box? A. The pile was on my left, yes.

10 Q. What were you looking at it for? A. I explained that I had some difficulty in recalling dates and so on and I was — this was a record of the date sequence as far as I could recall.

Q. What particular dates was it that you recall looking at in those notes? A. I would say the dates generally, the dates that I was asked about.

Q. The dates of all relevant conversations that you were asked about on Friday? A. The dates — it would have had dates of conversations, yes.

Q. Was that because without looking at those notes you would not have been able to give evidence of the dates? A. I think that is pretty likely, yes. There were a couple that were pretty significant in my mind such as the 17th May.

20 Q. Just turn in the black file again, if you would, to a telex of 21st June, 1974, No.C214. It is from Wholesale Sales, B.P.A., to B.P. London? A. Yes.

Q. Do you have that? A. Yes.

Q. I am not sure if you have the right one? A. C699.

Q. No. C214. A. Oh yes, to London, yes.

Q. I'm sorry. A. To London from Wholesale Sales.

Q. That is correct, yes. Just read under the last paragraph please, to yourself, starting, "Agree that shipments discharged . . ."? A. Yes.

30 Q. "Agree that shipments discharged on 24th July will be at spot price . . . (reads) . . . to prevent possible massive liability or subsequent damages should court find in Nabalco's favour". It is the next part I want to direct your attention to, "the first spot shipment will be cargo C964 being 32,000 T. on the Loida loading Singapore approximately 31-7, arrival Gove 8-8. Grateful your advice on price C.I.F. Gove in this cargo". Do you see that? A. Yes.

Q. Turn over some more pages to telex from Melbourne to London for Wholesale Sales of 3rd July, 1974, very much towards the end of the file, No.C890? A. Yes.

Q. Just look at the last paragraph if you would. It says, "In due course we would like to know details if you can get them . . . (reads) . . . We understand you have dropped Loida shipment. Grateful you keep us advised your legal advice."? A. Yes.

Q. Would you agree that the Loida shipment it has referred to in the first of those two telexes, No.C214, was dropped at some stage prior to 3rd July 1974? A. Yes, but I'm not sure what the term "drop" means. I did not write the telex. Our supply people would have come into this. I'm sure though that it refers to the same ship.

Q. When you say "not sure" what it means, it means, does it not, the shipment was simply cancelled? A. Well, it could mean that; I think it does but I'm not sure. 10

Q. What else in the circumstances could it mean? A. Well, it might have been dropped from their programme but not cancelled; there may be some re-arrangement within the supply pattern of which I am unaware.

Q. So it could be either cancelled or simply dropped out of the supply pattern for some purpose? A. Yes, or diverted or something of this nature, but there are people who can explain that to you.

Q. (Shown part of Ex.1, 3 letters of 17th July.) Just before going to that, Mr. Lockrey, just one matter: in relation to your knowledge of when you first heard that there may have been a contract between K.N.P.C. and Nabalco, would you turn in your black file there to a telex from London to Melbourne of 27th June, 1974, No.C799? A. Which number? 20

Q. No. C799? A. Yes.

Q. Just read it through to yourself? A. Yes.

Q. You read that on its receipt, I suppose, did you? A. Yes.

Q. Did it indicate to you that you were being informed by B.P. London that "contrary to assurances K.N.P. have concluded a deal through a third party and believe it nets back to then \$U.S.61 P.N.T. N.P.G." Is that right? A. Yes.

Q. Would you turn over two pages to a telex of 28th June No.C326 from Melbourne to London, the first paragraph. Do you see that? A. Yes. 30

Q. Was that a telex that you sent, you dispatched from Melbourne? A. No.

Q. It was from some other division of the company, was it? A. Yes, that's correct.

Q. Did you see that telex on or about 28th June? A. Most unlikely.

Q. At any rate, you knew, did you, on 27th June, that you were being told by London that a deal had been concluded with K.N.P.C. and Nabalco through a third party. Is that what that first telex I took you to, C799, conveyed to you? A. Well, it is not telling me. London had told us a lot of things that were wrong. They even mention a third party, but it certainly was a suggestion.

Q. It may not be telling you but it is informing you, isn't it, that that is what London says? A. They had this information, yes, but I would not believe that until I had word from the customer.

Q. Was it that that caused you to ring Mr. Batterham the next day? I am told it is date stamped 28th June, Mr. Lockrey, the telex C799? A. Yes.

10 Q. Having received the telex, whenever it was you received it, did you telephone Mr. Batterham? A. I think there were probably two things that caused me to telephone Mr. Batterham; one was the question of supplies which had been under discussion. Did they want the shipment or didn't they because we were getting very tight on our programming, we had to know, and this sort of information would have added to the need to get some information from the customer.

Q. Having been told what you were by B.P. London, you were anxious to find out from Mr. Batterham, I take it, if your information was correct or not? A. Yes, I wanted to find out from Nabalco and I rang them.

(At his Honour's request it was stated by Mr. Officer, through Mr. Lockhart, that the names of Butterham and Batterham were in fact referring to only one person, Mr. Batterham)

20 Q. Turn if you would to the 17th July letter which his Honour has handed down to you? A. Yes.

Q. Is the one that you have in front of you the one that covers two pages which a short paragraph on the second page? A. No — yes, I have that one now.

Q. (Approached) The letter in front of you of 17th July is the one of two pages with a third paragraph at the top of p.2, is that right? A. Yes.

Q. That is a letter that is signed by Mr. Lever? A. That is correct.

Q. He is a director of B.P.A., isn't he? A. That is correct.

Q. That is a letter, is it, that was sent out with your knowledge? A. With my knowledge. It would be a letter written by our legal people in draft form given to Mr. Snape who had it typed and signed by the director.

30 Q. Is it a letter that you approved being sent? A. I don't think that my approval entered into it. It was a matter of what the legal people wanted us to send.

Q. By the legal people do you mean the house lawyers at B.P.A. or external advisers? A. Both.

HIS HONOUR: Q. But it became your letter or Mr. Snape's letter, didn't it? A. Yes, your Honour, Mr. Lever's letter, he signed it and Mr. Snape wrote it; Mr. Snape's initials are on it.

Q. You are not seeking to say it is not B.P.'s letter, are you? A. No, not at all, your Honour, B.P.'s letter.

MR. LOCKHART: Q. At the time it was written, you knew that, if the then

No. 111
—
Defendant's
evidence:
C. Lockrey:
Cross-
Examination
(cont'd)

current litigation by Nabalco resulted in Nabalco's favour, that you could be facing a huge liability for damages, didn't you? A. Yes.

Q. You knew by the time the 17th July letter was sent that the K.N.P.C.-Nabalco contract had been concluded, didn't you? A. Yes.

Q. So that supply of furnace oil after the 24th July would be by K.N.P.C., not B.P., didn't you? A. Yes.

Q. You knew, did you not, that B.P. would not be supplying furnace oil to Nabalco after 24th July? (objected to)

Q. Not that you knew — but you assumed, did you not, that B.P.A. would not be supplying furnace oil to Nabalco after the 24th July? (Objected to)

10

Q. Would you like it read back? A. Yes please.

Q. (Question read by court reporter) A. Could I refer to the letter?

Q. No, I just want your recollection for a moment without the aid of the letter?
A. I think I was not clear on what was going to happen then.

Q. You knew there was a K.N.P.C. contract provided to take over, didn't you?
A. I had no idea of the terms of the contract, what they were, whether it was one month, three months or three years. I knew Nabalco were going to try to litigate this thing quickly.

Q. But you had been told, however, on 28th June by Mr. Coogan, had you not—

20

HIS HONOUR: There is a letter of 28th June a little earlier in the file, Mr. Lockhart.

Q. (Witness shown letter) Just look at that letter? A. Yes.

Q. It may be the one you are referring to; it is Exhibit 1. You will find a letter from Nabalco of 28th June? A. Yes your Honour.

MR. LOCKHART: Q. (Approaching) In front of you is a copy from Nabalco to B.P. Australia of 28th June, 1974, Mr. Lockrey? A. Yes.

Q. You see in it it states "Following the service by you of the notice dated 22nd March 1974 which we contend and always have contended was valid, we have done all in our power to obtain another source of furnace power at Gove . . ."? A. Yes.

30

Q. It then goes on to say "We are writing to inform you that we have now been able to arrange an alternative source of supply which should ensure regular deliveries to us commencing in August 1974. The price we are obliged to pay for such supply is, we believe, the best price which we could reasonably have obtained. While the price is lower than the price at which you were prepared to continue supplying furnace oil to us under a new contract, it is still substantially more than the price at which, in our view, you should be continuing to supply us under the contract with you of 11th June, 1970." Then it goes on to deal with other matters relating to price. Do you see that? A. Yes.

Q. You have seen that letter before the despatch of the 17th July letter, had you not? A. Yes.

Q. And was it not your view when the 17th July letter was despatched that so far as you knew Nabalco had an alternative source of supply with K.N.P.C. which could ensure they had regular deliveries commencing in August 1974? A. But I still don't know the terms of the contract and I don't know for how long. The letter does not say anything about how long.

10 HIS HONOUR: Q. But didn't you take it from that letter of 28th June that Nabalco was saying that so far as furnace oil is concerned you need not worry any more, "We have an alternative source of supply"? A. Yes your Honour.

Q. And therefore you can forget about it? A. Yes your Honour.

MR. LOCKHART: Q. And that was the substance of what was conveyed to you by Mr. Coogan over the telephone, wasn't it? A. Yes.

Q. So that when the 17th July letter was written, Mr. Lockrey, you knew, did you not, that it was — (Question withdrawn)

Q. Look at the letter of 17th July, the one I showed you? A. The same one, yes.

Q. Do you have it in front of you? A. Yes.

Q. I refer you to the part commencing in the third paragraph "We desire to affirm"? A. I may have the wrong one — yes, I have it.

20 Q. That letter says "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 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"? A. Yes.

Q. Was that statement made in the letter discussed with you by anyone in B.P. Australia before it was despatched? A. That is their legal terminology.

Q. It is the legal terminology? A. Yes. I have no hand in the compilation of it.

30 Q. It certainly did not reflect your own view, did it? A. I think it could have reflected my view. I mean having determined that we were wrong and we had the correct situation, then we had to.

Q. Mr. Lockrey, the letter goes on to say "In our letter 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 therefore by your own actions you had brought the agreement to an end as regard the subject of furnace oil. For comparison of the court's determination . . . for our part we are ready and willing to perform a supply contract in the manner set out above."? A. Yes.

Q. Mr. Lockrey, at the time that letter was written, you knew, did you not, that there was no statement by you as the man in charge of negotiations with the Nabalco after the end of April 1974 to anyone on behalf of Nabalco that you would be prepared to continue the supply of furnace oil to Nabalco at the base price stated

No. 111
 Defendant's
 evidence:
 C. Lockrey:
 Cross-
 Examination
 (cont'd)

in your notice until the final determination by the court of its validity? (Objected to; question read by court reporter; question withdrawn)

Q. Were you the officer of B.P. Australia primarily responsible for matters relating to the March notice of B.P. and matters arising out of it? A. I was one of several.

Q. You were not then the officer primarily responsible for these letters, is that right? A. The notice?

Q. For matters relating to that notice and arising out of it? A. You could say I was primarily responsible.

Q. Well that is the fact, isn't it, you were? A. You are talking about a legal matter, aren't you? 10

Q. I am just reminding you, Mr. Lockrey, what Mr. Staff put to you on Friday. At p.292 of the transcript he asked you this question "You were the officer in B.P. Australia primarily responsible for matters relating to that notice and arising out of it." He was referring to the March 1974 notice? A. Yes.

Q. And you said "Yes, that was true"? A. Yes.

Q. Were you in relation to negotiations and subsequently in discussions with representatives of Nabalco the officer in B.P. Australia primarily responsible for matters relating to that? A. Yes.

Q. You were a team leader, in effect? A. That is correct. 20

Q. Well now, after the end of April, 1974 you never said to anyone, did you, in Nabalco that you were prepared to continue the supply of furnace oil at the base price stated in your March notice? A. I don't believe so.

Q. And you never said to anyone on behalf of Nabalco after the end of April, did you, that if there was a court proceeding and final determination of the validity of the notice that you would be prepared to supply furnace oil at a base price conforming with that determination? A. No, I didn't further say.

Q. If that had been so it would not have been a true reflection of your own view, would it? A. No.

Q. The statement made in the letter which has been read out more than once, but for your own use is that first sentence in the third paragraph commencing "We desire," that statement to your knowledge was false, was it not, as representing the true desire of B.P. Australia at the time the letter was written? A. Would you say that again please? 30

Q. (Question read by court reporter) A. No, I would not use the term "false" at all.

Q. You see, the paragraph commences "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 . . ." and then it goes on, you see? A. Yes.

Q. Wouldn't you agree, reading the letter, that it conveyed the impression to you that the writer is desiring to affirm that it has been an attitude of the writer before 17th July? A. I don't know about the writer. It is affirming something. I don't know — this might relate to some previous letter, I don't know.

Q. The word used is "affirm", isn't it, not "state"? A. Yes.

Q. Would you not agree that reading that letter, as you do in the witness box, that the impression it conveys to you is that the writer is saying that B.P. Australia desires to affirm what follows in the sense of affirm that it has been stated before?

10 HIS HONOUR: Q. In the sense of confirm? A. Yes. I rather feel that that might be related to another letter.

MR. LOCKHART: Q. Are you guessing when you say that, Mr. Lockrey? A. Yes.

HIS HONOUR: Q. You have not any particular letter in mind, have you? A. No your Honour.

Q. Who signed that letter? A. Mr. Lever, the director, written by Mr. Snape, or processed by Mr. Snape.

Q. Do you mean after the legal department? A. It was written by the legal people.

20 MR. LOCKHART: Q. That is not a letter that you played any direct role in yourself; is that right? A. That would be right.

Q. Would you turn to your Telex file again please? Do you see towards the end of the Telex on 21st June, 1974, No.C699? A. Yes.

Q. That is the Telex, isn't it, from B.P. London to B.P. Australia? A. Yes.

Q. It is part of Ex. 64. It states, amongst other things, does it not "Confirm we aware of liability dangers and have not removed obligation from estimates nor should you. Will advise spot rate for year either to Nabalco 20th July. Current rate for your information U.S. \$60,000. F.O.D. P.G. plus freight, W.S.200. We expect market to harden but whether this will do so by time of your offer not sure. Meantime bunker rate is U.S. \$64." A. Yes.

30 Q. What did that Telex convey to you when you read it? A. Well I thought the first thing is that London have said to us that they have not removed the obligation to supply Nabalco from their estimating network and neither should we; in other words they are maintaining their responsibility to supply.

Q. Yes. A. There is a typographical error there.

Q. What is that \$60, it is certainly not \$60,000.

Q. Let us assume that is a typographical error, and it should be \$60? A. Yes. Well just as it says, the market is hardening. I think the reference to the bunker rate is possibly in connection with Mr. Notter's enquiry about the price being — the price under offer being very close to bunker rate, I am not sure about this.

Q. The reference to "plus freight W.S. 200" is "World scale 200", isn't it? A. Yes.

Q. What does that convey to you? A. Look, I don't know, you would have to ask Mr. Snape about that.

Q. In the 17th May, 1974, Telex — go back if you would like to it — you see it is numbered C650? A. Yes. This is our Telex?

Q. Yes. You see under the item B comments about in serratium "They did canvass the possibility of our accepting their notice of 22nd March for current contract but we strongly rejected their objection on current price we firmly maintain is terminated"? A. Yes.

10

Q. May we take it then that during 17th May discussions Mr. Coogan or Mr. Notter asked whether it was possible that they could accept your notice of 22nd March notifying the higher price but you rejected that on the basis that you maintained the contract had been formally terminated? A. Yes.

Q. You know, don't you, that a request notice dated 2nd July, 1974 was forwarded from Gove to Adelaide? A. Yes.

Q. You know the notice I am referring to you, do you? A. Yes.

Q. You know, don't you, that on 17th July one of the three letters that B.P. Australia wrote to Nabalco was in relation to that notice? (No answer)

Q. By all means look at it if you wish. A. I remember the letter. I am just checking on the date, that is all. Yes.

20

Q. It is a letter of you yourself, is it not? A. Yes.

Q. Did you write that after consulting with lawyers? A. No, the lawyers wrote it.

Q. They wrote it and you signed it; is that the position? A. That is right.

Q. You were informed, were you not, by letter of 2nd August from Nabalco, a letter addressed to you also in that exhibit — by all means look at it if you wish? A. Yes:

Q. That that notice of 2nd July was a letter sent by the Gove administration to B.P. Australia in Adelaide? A. This is what the letter says, yes.

30

Q. You knew they said it was one of a number of letters to the same effect sent fortnightly to you in Adelaide and was by no way an affirmation of the contract? A. Yes.

Q. You replied, did you not, by letter on 14th August, 1974 addressed to Nabalco under a letter signed by you? A. Signed by me, yes.

Q. In paragraph numbered 5 — A. Yes.

Q. You recall, do you not, "the explanation set out in the third paragraph of

your letter under reply is accepted and we certainly do not propose to regard your notice of supply as containing a notice . . . nor to regard it as constituting an affirmation of the subject contract"? A. That is right.

Q. That was the view you held at the time you wrote that letter, I take it? A. It was the lawyer's view.

HIS HONOUR: Q. Did the lawyers write that one too? A. With the exception of the last paragraph, your Honour, where I was feeling I was the meat in the sandwich and I said the lawyers should communicate between themselves.

MR. LOCKHART: Q. So that letter too was drafted by the lawyers? A. Yes.

10 Q. In all three letters of 17th July in that respect were written by the lawyers? A. I think that would be most likely, yes.

HIS HONOUR: Mr. Lockhart, I am not sure whether you want to ask questions about it, or anybody, and I am not sure that this is the right witness to deal with the matter: but I have been looking at Ex. 27 which was tendered in the previous hearing, the letter from the Prices Justification Tribunal; it is a letter of 16th May. It does have a reference to Mr. Lockrey's position at the top of it. If any reliance is to be placed on it afterwards for any purpose — I don't know whether it will be either of you. I just draw it to your attention, you might show it to Mr. Staff.

20 MR. LOCKHART: I would like to ask some questions in relation to it.

Q. (Approaches) Mr. Lockrey, I show you Ex. 27 the letter of 16th May, 1974, from B.P. Australia to the Chairman of the Prices Justification Tribunal in Melbourne. Who signed the letter? A. Mr. Rowland.

Q. A copy is marked to you as manager, wholesale division? A. Yes, because it was written by one of my staff.

Q. By Mr. Snape? A. Yes.

Q. HIS HONOUR: Is that Mr. Snape's letter or Mr. Skillen's letter? A. It is Mr. Snape's letter. Mr. Snape was handling the Nabalco interests and there was a sort of crossing of interests with Mr. Snape, I think.

30 Q. MR. LOCKHART: Whose initials are they over the word "secretary"? A. Mr. Rowlands.

Q. So does that mean Mr. Rowland signed it? A. Mr. Snape wrote it. This is the procedure generally followed with the Prices Justification Tribunal communications, the secretary sends it.

Q. It says "Our existing supply arrangement with Nabalco terminated on 24th July, 1974." This is the letter of 16th July 1974? A. Yes.

Q. Does that convey to you that you were representing to the Prices Justification Tribunal on 16th May that the old contract with Nabalco would terminate on 24th July, 1974? A. It reads like that, doesn't it?

No. 111
 —
 Defendant's
 evidence:
 C. Lockrey:
 Cross-
 Examination
 (cont'd)

Q. Was it written after consultation with you? A. No.

Q. You are sure of that? A. But I would have been somewhere in the discussion.

Q. A copy appears to have been marked to you, does it not? A. Yes.

Q. In the normal course of events would that copy letter have been brought to your attention? A. Not necessarily, it could have gone straight to Mr. Snape.

Q. In wholesale sales? A. Yes. I have about 20 managers and I am not involved in every piece of paper.

Q. Are you accurately described as manager, wholesale sales division? A. Yes, and my division has a number of product managers. 10

Q. They are called product managers? A. Yes.

Q. But only one manager in that division? A. Yes, only one manager of the division, that is myself. Correction there, wholesale sales division did not have as many managers then, I have more now than I did then, but a number of managers might be wholesale sales division.

Q. I just want to get this clear. Is the way the letter is marked in the top right hand corner an indication within the company that this letter would come to you? A. No, not to me personally, to my division. Everything to the division is addressed to the manager, wholesale sales division. I may not necessarily see any of them.

Q. You don't recall whether you saw that letter on or about the time it was sent or not? A. I could well have seen it. 20

Q. Have you a recollection of it? A. A vague recollection of general communications with the Prices Justification Tribunal.

Q. Have you any specific recollection of that letter? A. Let me look at it again. I think I do have a recollection of this letter.

Q. Of having seen it at about the time it was sent, is that so? A. Yes, I think so or afterwards. But I recollect the contents of the letter. But I am not just too sure of the date.

Q. Do you recall taking any steps in relation to the letter after you saw it, or not? A. No, none, that was my staff's responsibility. 30

HIS HONOUR: Q. What is written in that first paragraph seemed to you as you understood the position, accurately to reflect your own view of the contract at this time or on the following day, 17th May, when the conference was held? A. Umm.

Q. Have a look at it? A. I think that this was written before the conference.

Q. It is the day before? A. Yes, the day before. Is that what you wanted to know, your Honour?

Q. No, I wondered if you thought what was written in the first paragraph reflected your own understanding of the position in relation to the fuel supply contract at that time, whether on 16th or 17th May? A. Yes. I think all I can say is we wanted to be sure that we had followed the correct procedures of the Prices Justification Tribunal.

No. 111
—
Defendant's
evidence:
C. Lockrey:
Cross-
Examination
(cont'd)

Q. I understand that. But you see it refers there to the fact that the contract will terminate — in effect that is what the words mean — on 24th July? A. Yes.

10 Q. Is that any different from your own understanding of the situation as it was either on 16th May or on 17th May? A. No, I think that that would have been our belief, that Nabalco had terminated the contract.

Q. You had given a notice which you had been advised was valid and they had given a counter notice? A. They had terminated the contract. We had given notice of the price change and they had given notice of termination.

Q. It would take effect on or about 24th July? A. This is right.

Q. And that was your understanding of the situation at the time? A. That is right, your Honour.

MR. LOCKHART: Q. And the understanding that you had from the various lawyers that B.P. had both in and outside the company? A. Yes.

20 Q. And as you understood it, the attitude and understanding of the company itself? A. Yes.

Q. Just one matter, Mr. Lockrey. Of the three letters of 17th July 1974, two of them being your signature. You are aware of that, are you? A. Yes.

Q. Did you read them before they were sent out under your signature? A. Yes.

Q. In your view are they accurate and truthful letters? A. I believe so, I think had they not been truthful I would have done something about them. But I may have been also overawed by the fact that they had been prepared by eminent counsel.

Q. But you have no doubt about the accuracy of their contents, before you signed them? A. No.

RE-EXAMINATION:

30 MR. STAFF: Q. You referred to those three letters as having been written by lawyers? A. Yes.

No. 111
—
Defendant's
evidence:
C. Lockrey:
Re-examination

Q. When you signed the two you signed did you intend them to have any less effect than that which they stated because they were prepared by the lawyers? A. No.

No. 111
 Defendant's
 evidence:
 C. Lockrey:
 Re-examination
 (cont'd)

Q. Did you intend to adopt what they said? A. That is correct.

Q. As the company's position at that date? A. That is correct.

Q. In your understanding of the letter Mr. Lever wrote, did it have any lesser effect because Mr. Lever signed it? A. No more effect.

Q. You understood it to be a statement of the company's position for the future? A. That is correct.

MR. STAFF: I wish to tender a Telex of 27th June, 1974 from B.P. London to wholesale sales B.P. Australia. My learned friend cross-examined on the first three lines, your Honour. We would submit that the rest of it indicates qualification and explanation, which were not put to the witness. 10

HIS HONOUR: Mr. Lockhart did say he was going to tender such of those documents as were not already in evidence.

MR. LOCKHART: I had intended to tender every Telex or letter put to this witness.

MR. STAFF: I would object to parts in some of them, your Honour.

HIS HONOUR: The difficulty is when I come to read them; if I could have the documents in a series it is much more simple for me. Would it be possible for there to be some discussion overnight about what is to be tendered and so on and if there is agreement they can go in. If there is not agreement I can deal with the question of admissibility later. 20

MR. STAFF: Q. One other matter, Mr. Lockrey; You said in answer to a question from his Honour that you accepted the legal view of the effect of Nabalco's notice of determination? A. Yes.

Q. You said, I think in answer to his Honour that you had no alternative but to accept that view. You expressed that view which you extended in that way to the Nabalco representative on 17th May? A. Yes.

Q. Did you merely express it as a view of the company or did you express it as a consequence of the legal advice that had been given to the company? A. I expressed it as a view of the company consequent upon the legal advice that we had from several quarters. 30

Q. Did you mention that, that it was a consequence of that? A. Did I mention—?

Q. Did you say anything? A. I am sorry, I mentioned the name (Objection to leading)

HIS HONOUR: Q. I think what Mr. Staff wants to know, Mr. Lockrey, is when you indicated that as the company's attitude, namely that your notice was good and that Nabalco had terminated the contract by their counter-notice, did you say that you were doing that on legal advice or did you simply say it as the company's attitude; or don't you remember? A. I don't recall what I said, your Honour, but I know what I should have said. 40

MR. STAFF: Q. You don't recall it? A. No.

Q. Do you recall any other occasion on which you expressed a similar view of the company's position to any other representatives from Nabalco? A. It is rather confusing to me. It seems to me that whenever I wish to express anything to anyone or was expressing anything to anyone I was expressing the company's view which came from the good legal advice we were paying for.

No. 111
—
Defendant's
evidence:
C. Lockrey;
Re-examination
(cont'd)

10 HIS HONOUR: Q. It comes down to this, doesn't it, that you were taking legal advice in relation to every step, letters were being drafted for you by the lawyers and you simply followed the advice you were given and sent the letters that you were given to sign? A. That is correct your Honour.

Q. But nevertheless what you said and what was in the letters was the view expressed by you at B.P.? A. That is correct your Honour.

MR. STAFF: Q. One other matter I might ask you. You told his Honour in answer to a question his Honour asked you, that after you had a conversation at the end of June with Mr. Coogan and got Sir David Griffin's letter dated 28th June you understood there was no need to worry about fuel oil supply any more for Nabalco. Do you recall making an answer to that effect to his Honour? A. Yes.

Q. I think you got the letter from Sir David Griffin, although it is dated 28th June, in early July did you not? A. I spoke to Mr. Coogan I think on 28th June.

20 Q. Yes. A. And the confirmation came by letter so that could well be right.

HIS HONOUR: Is there a date stamp on it?

MR. LOCKHART: There is a Telex of 1st July, your Honour.

MR. STAFF: Your Honour might remember Mr. Notter gave this evidence in cross-examination, that he got a Telex from Mr. Lockrey asking for the contents of it; the contents of Sir David's letter because it had not turned up.

HIS HONOUR: I notice 28th June was a Friday, 1st July was a Monday.

30 MR. STAFF: Q. You recall your answer to his Honour about that matter. Did you a few days after getting Sir David Griffin's letter receive your letter about the notice which had been sent from Gove to Adelaide in relation to estimated usage? A. Yes.

Q. When you got that notice what was your reaction, your state of mind, in relation to your future obligations to supply Gove? A. I was somewhat confused.

Q. And you then wrote your letter dated 17th July asking about that notice? A. Yes.

Q. So you got the notice from him about the notice coming in, that is the notice dated 12th July, before you wrote the letter on 17th July did you take some legal advice about that matter? A. Yes.

HIS HONOUR: I think he said the legal department wrote the letter.

No. 111
 Defendant's
 evidence:
 C. Lockrey:
 Re-examination
 (cont'd)

MR. STAFF: Yes, that is true your Honour.

(Witness retired)

(Further hearing adjourned until 10 a.m. on Tuesday, 2nd December, 1975.)

TENTH DAY: TUESDAY, 2ND DECEMBER, 1975

No. 111
 Defendant's
 evidence: J. H.
 Rowland:
 Examination

JOHN HOWARD ROWLAND
Sworn and examined

MR. HORTON: Q. Is your full name John Howard Rowland? A. Yes.

Q. You live at 5 Remon Avenue, Camberwell, Victoria and you are the secretary of B.P. Australia? A. That is so.

Q. And you were the secretary and also the manager of the Legal Department in May of 1974? A. Yes. 10

Q. Just before I come to the evidence relating to the matters in issue, might I just take you to what happened to you on 28th June, 1974, I think, when you were up in Sydney? A. The 27th, I have checked the date since.

Q. 1974, was it? A. Yes, 27th June, 1974.

Q. You were in Sydney on company business, I think? A. Yes.

Q. And what happened? A. I had had dinner in the Wentworth Hotel where I was staying and went for a brief walk afterwards, not more than a couple of blocks. I am not sure in which street, but looking at it since I think it was probably Elizabeth Street, and I was attacked. I sustained concussion, I would think, as I am not able to say more than I saw the first blow coming, but I suffered abrasions and mostly about the head, and subsequently learned that my hearing had been affected in my left ear. That mended in the course of some five months. And I sustained a broken nose. 20

Q. And you were robbed, were you not? A. Yes, money was taken from my wallet and my watch was gone after the event.

MR. HORTON: I mention this only, your Honour, so that it perhaps throws some light on Mr. Rowland's recollection which is not by any means perfect.

HIS HONOUR: Yes, I think I had been informed informally of what had befallen Mr. Rowland. 30

MR. HORTON: Q. On 17th May, 1974 we have heard there was a meeting at B.P. Australia's offices in Melbourne between representatives of Nabalco, Mr. Coogan and Mr. Notter, and various people acting for B.P., and you attended, I think, did you not that meeting? A. Yes.

Q. Had the party assembled by the time you arrived? A. Yes. I was called down

by Mr. Lockrey. I am two floors away from his office; and Mr. Notter and Mr. Coogan and Mr. Lockrey, Mr. Snape and Mr. Shaw were present when I arrived.

Q. What was your particular interest in attending that conversation? A. I was called down to state the legal advice which we had had on the notice which we had given to Nabalco under the terms of the contract and what was the effect of the response we had had from Nabalco.

Q. In the course of the meeting did you tell the Nabalco gentlemen what the advice was that had been received? A. Yes.

10 Q. What was that advice? What did you say and so far as your recollection allows you to do so would you use the direct speech? A. I cannot give you the words because I cannot remember them specifically but I was there only to advise or to say what was the advice, and it was that the notice was valid and that the response from Nabalco, I think in April, 24th April as I recall, had the effect of terminating that agreement pursuant to the terms of the agreement.

Q. So far as furnace oil was concerned? A. So far as furnace oil was concerned.

Q. Now there were discussions, we have heard of many matters, some matters of detail relating to the proposed new contracts? A. Yes.

20 Q. Did you have occasion to make any further remark during the course of the meeting? A. Oh, yes, I said pretty much the same thing two or three times, I would think, in the course of the meeting when I felt I was required to do so because the discussion was proceeding contrary to the advice we had been given.

HIS HONOUR: Mr. Horton, I appreciate Mr. Rowland's problem, he has my sympathy, but for his evidence to be of value surely an attempt ought to be made to get his recollection of the conversation?

MR. HORTON: I am coming to that, your Honour.

HIS HONOUR: Why do it this way if you are coming to that?

MR. HORTON: I was about to ask him what was the context of the conversation, what part of the conversation led him to intervene and make a further remark. I do not propose taking him through all the detail.

30 HIS HONOUR: I know that to do so may be tedious and it may be taxing his memory, but after all evidence has been given now by two witness from Nabalco and two from B.P., and if you seek to direct his mind only to certain things, in the light of what else has gone on, I just simply may have to take the view for reasons which are readily understandable he does not remember enough of the conversation to be of value to me as a witness. Let there not be any misunderstanding about it. You may take that course if you wish but I do not want you to be under any misunderstanding if you do.

MR. HORTON: Well, your Honour, it is not time of course to address your Honour on the approach we ask your Honour to take to the witness' evidence, but your Honour will remember he was there for a specific purpose, he was not taking a direct part in the discussions.

No. 111
 Defendant's
 evidence: J. H.
 Rowland:
 Examination
 (cont'd)

HIS HONOUR: That is what he says but the words attributed to him by Mr. Coogan and Mr. Notter would not suggest that, or that is what will be put to me by counsel against you.

MR. HORTON: Your Honour, I was going to take him to that part of the conversation directly.

HIS HONOUR: You take your own course, Mr. Horton; I told you what was in my mind.

MR. HORTON: Q. Mr. Rowland, what was the context of the conversation which led you to make a further remark in the course of this meeting? A. I can only remember one in particular and that was that the old contract be considered to be still in operation, I think its terms were to be changed in some way, and that prompted me to say again— 10

Q. Stop there for a moment; who made a reference to the old contract? A. Either Mr. Coogan or Mr. Notter, I am not certain which but one of the representatives.

Q. Do you remember what was said by one or other of them about the old contract? A. Only words to the effect that it should be considered still in force and possibly its terms amended. That prompted me to make the remarks again that I had made earlier.

Q. What did you say when you were so prompted? A. Again simply that we had had legal advice that our notice was valid and that the response from Nabalco had the effect of terminating the contract in respect of furnace oil. 20

Q. You mentioned to his Honour that you recollect making this remark more than twice, I think a few times? A. I feel that I made it two or three times, I would think not more than three, I can't be absolutely certain about the number of times, but that the only purpose I was to serve at that meeting, and I said it when called upon to do so.

Q. Do you recollect with any more precision what was suggested in relation to the old contract? You mentioned that somebody said that the old contract, perhaps with some modification, should go on; can you tell his Honour with more precision what was said about that? A. No, I can't be any more specific than that. As I say, this was my purpose at the meeting, and the mention of the old contract being still in force prompted my remarks again. 30

Q. Now do you have any recollection of the other topics of conversation at the meeting? A. Well, the only other one to which I was giving close attention was the new terms for a new contract. I think some clauses were handed to the representatives of Nabalco and here again there was discussion about whether the old contract was still operative in respect of furnace oil, and I think that was probably the thing that prompted me on another occasion. I do not have the clearest recollection of that, except that I do remember of course that some clauses for a new contract were handed to one of the representatives of Nabalco. 40

Q. Do you remember what was said about those clauses by Nabalco people when they received them? A. No. I can see I think Mr. Coogan skipping through them, there were several pages, so that he could not absorb the content, but he did

not receive them very favourably. I think he said something to the effect that these were more favourable to B.P. than Nabalco, or something to that effect.

Q. (Approaches) I show you p.7 of the transcript, Mr. Rowland, and I direct your attention to the third last question on that page. Would you read the third last question to yourself, please? A. Yes, I have read it.

Q. Did you say that at the meeting of 17th May? A. I don't believe I said all that is in that answer. The first two sentences would be correct, I should think.

MR. LOCKHART: Could they be identified?

10 MR. HORTON: Q. "Mr. Rowland spoke very firmly and said that there can be no interim arrangement." Sentence 1. "You have terminated the contract," full stop? A. Three sentences, yes.

HIS HONOUR: Q. Do you include the next sentence, "The old contract is finished and the only way we are prepared to supply oil to you is under a new contract"?—

MR. HORTON: Q. Did you say that? A. No, I don't believe I said that; supply is not my function and I would not have the authority to say that.

Q. Well, which part of it did you say, Mr. Rowland? A. I still think only the first two sentences, only that part which relates to termination of the old contract.

20 HIS HONOUR: Q. Did you say "The old contract is finished"? A. Finished or terminated. I think I would have been more likely to have said the old contract is terminated.

MR. HORTON: Q. I show you p.135 of the transcript. This is Mr. Notter's evidence, Mr. Rowland, and perhaps I ought to just refer you shortly to p.134. At the foot of p.134 Mr. Notter told us that he was handed some five pages containing a number of escalation clauses, and those you may take it are copies of the proposed terms for the new contract that he was offered on that day? A. Yes.

30 Q. And at p.135 would you please read the first question and answer on p.135, or perhaps I should say the first paragraph of the first question and answer on p.135? A. Again I can't recall the words I am said to have stated, but I might very well have said that the old contract is at an end. Again I think I could have used the expression "is terminated".

CROSS-EXAMINATION

MR. LOCKHART: Q. Would you look at Ex.AH, please Mr. Rowland? (Shown) Is that your handwriting following the typed words under point 1? A. No.

Q. Do you know whose handwriting it is? A. Well, it looks like Mr. Cochrane's handwriting to me.

No. 111
—
Defendant's
evidence: J. H.
Rowland:
Examination
(cont'd)

No. 111
—
Defendant's
evidence: J. H.
Rowland: Cross
Examination

Q. Is it Mr. Cochrane's handwriting that follows the typing under point 5? A. Yes, I recognise that one very plainly.

Q. And look at Ex.S if you would; you may assume that the only differences between Ex.AH in front of you and Ex.S are in relation to the handwriting that follows the typing under point 1. (Shown) A. Yes.

Q. Was Ex.S, the document to your left last shown to you by the officer — you have that? A. Yes.

Q. Are you looking at Ex.S, Mr. Rowland? A. Yes.

Q. Is that a document that was prepared by B.P.A.'s legal department? A. In conjunction with either myself — I did see it before the meeting. 10

Q. You gave instructions for its preparation, didn't you? A. No, I would not think so.

Q. See, you are head of the legal department, are you not? A. Yes.

Q. As well as secretary of the company? A. Yes.

Q. And you were concerned to ensure, were you not, at the 17th May meeting that the meeting was kept along lines consistent with the legal advice you had received, were you not? A. To the extent the meeting was concerned with the old contract and what was the effect of the Nabalco response to our notice; I was concerned with that portion of the meeting, yes.

Q. And you were concerned to ensure, were you not, that the B.P.A. attitude was made clear, namely, that not only was the old contract terminated but there could not be a new contract between Nabalco and B.P.A. unless Nabalco acknowledged that the old contract was at an end for all purposes, is that right? A. In respect of furnace oil, yes. 20

Q. In respect of furnace oil, is that right? A. Yes.

Q. And you were concerned to ensure, were you not, that there could be no new contract unless Nabalco agreed that it would not sue B.P. in relation to any matters arising out of the old contract? A. I was not concerned about whether there was to be a new contract, that was Lockrey's field. I would not come into the question until the form of that new contract was determined; whether or not there was to be a new contract was for him to negotiate. I was concerned only that the old contract should be recognised as terminated. 30

Q. And indeed if you look at point 5 of Ex.S in front of you, which says, "In any new contract we would require you to acknowledge the termination of the old contract," and the handwritten words are added, "So far as it relates to furnace oil."

You were concerned to ensure, weren't you, that the B.P.A. attitude was made clear that there could not be a new contract unless there was an acknowledgment by Nabalco that it would not challenge the authority of the March notice of B.P.A. in the courts, isn't that so? A. I was concerned to be sure that there were not two contracts operating in respect of the same obligations. Obviously it appeared 40

desirable that we should have acknowledgment, if there were a new contract, that the old one had been terminated.

HIS HONOUR: Q. Were not you concerned as a matter of bargaining to remove any threat of a claim by exchanging a new contract for an acknowledgment that the old one had gone for all purposes? A. I was not directing my mind to that, your Honour. As I say, any—

No. 111
—
Defendant's
evidence: J. H.
Rowland: Cross
Examination
(cont'd)

10 Q. Did that not occur to you? A. Oh, it would have occurred to me but it is not my field to negotiate for supply, for sales, I am concerned to see that the company's documentation is as correct as I can arrange it or with advice make it, but as to whether or not there will be a contract, that is for the operative executives to determine.

MR. LOCKHART: Q. You were not there as a negotiator, were you? A. No.

Q. But you were there, weren't you, to make the B.P.A. attitude to negotiation clear? A. I don't know what you mean by the B.P.A. attitude. As I say, I could not join in the negotiation, I was there if I was called upon specifically to tell the advice we had received.

Q. You knew, did you not, that if the notice given in March by B.P.A. to Nabalco were invalid your company could be involved in a very substantial liability for damages to Nabalco? A. Yes.

20 Q. And that was present to your mind on 17th May, wasn't it? A. Oh, yes.

Q. You knew, did you not, on 17th May that if the old contract were to continue at the old price of some \$13 per ton, B.P. Australia would be facing substantial losses? A. Yes.

Q. And you were concerned to ensure, weren't you, that if there were to be a new contract, on whatever terms it happened to be to B.P.A., that they first had to acknowledge not only that the old contract had gone for all purposes qua furnace oil but that they could not challenge the validity of the B.P.A. notice in the courts? A. I was stating the fact that the old contract had terminated according to the advice given to us.

30 HIS HONOUR: Q. Mr. Rowland, you have told me that you are manager of the legal department; you have some legal qualification? A. Yes.

Q. What is that? A. I was admitted in South Australia to practise in the Supreme Court of South Australia.

Q. Were you in private practice for long? A. I was admitted in April 1937 and I commenced war service at the beginning of 1941, returned to the firm in June, 1945, and remained there until, oh, about two years, and then I also had a secretarial qualification and I had to get practical experience in that, and then I went overseas in October, 1948, when I joined B.P. in its legal operations in London.

40 Q. Were you in the legal offices of B.P. or its associates thereafter until your appointment as secretary? A. Yes, I was in Contracts Branch in London, and that was for four years, and I was transferred out here and I in fact established the legal department out here, having also the office of secretary.

No. 111
 —
 Defendant's
 evidence: J. H.
 Rowland: Cross-
 Examination
 (cont'd)

Q. Is it commonplace for you to be present at negotiations of the larger contracts into which B.P. enters? A. No, it is not commonplace by any means. In fact it is rare. As I say, it is our operative executives who negotiate and I myself am concerned with the documentation or any advice of course which those negotiations might require.

Q. You have lawyers internally employed in the office I take it? A. No, no, we use the outside solicitors in all States.

Q. You use always external advisers? A. Yes.

Q. Do you not have any permanent legal employees other than yourself? A. Not qualified. Or we had not until very recently. There is another one will be my successor shortly, who has been only on concessions for exploration department.

10

MR. LOCKHART: Q. When you attended the 17th May meeting you regarded your role, did you, as one whereby you would make it plain to those present as a matter of fact that B.P.A. regarded the old contract as terminated for all purposes in respect of furnace oil? A. That was the advice we had been given, yes.

Q. And that was the role that you regarded yourself as performing, was it? A. That was what I was asked to do and that was properly my role, yes.

Q. Was it a role that you properly carried out? A. I believe so, yes.

Q. Now look at Ex.R which is shown to you, would you, please? It is a telex of 17th May, 1974 from B.P.A. to B.P. London? A. Yes.

20

Q. That was a document that was prepared, was it not, with your participation following the meeting of 17th May? A. No, I don't believe that I made any contribution to the preparation of that telex.

Q. But you have seen it before, haven't you? A. Oh, yes, I do see all the telexes which are sent from B.P.A.

Q. And you saw that telex in front of you on 17th May, did you not? A. Well, very shortly afterwards; that was a Friday, I would not expect to see it until the circulation on the Monday.

Q. And you read it, I take it? A. Oh, yes.

30

Q. Read it carefully? A. Yes, to the extent that I was concerned, of course, with the mention of termination.

Q. Mr. Rowland, you read it carefully, did you not, because it purported to summarise the points that emerged at the meeting of 17th May at which you were present, is that not so? A. It was a report of the meeting, yes.

Q. And do you now agree that the document in front of you as being an accurate report of the principal points that emerged from the meeting? A. Those points which concerned me, and there is only one of them.

Q. Which is that, Mr. Rowland? A. The reference to complete termination of the existing contract.

MR. HORTON: I object to that, your Honour. I just want to preserve the situation by taking my learned friend Mr. Staff's usual objection to the contents of this telex.

HIS HONOUR: Yes, all this is naturally subject to that general objection.

WITNESS: The lines that say "Both secondly and thirdly".

MR. LOCKHART: Q. The lines that say "Both secondly and thirdly are conditional upon termination of existing contract", that is right, is it? A. Yes.

10 Q. So your particular concern, was it, was that all the three possibilities that Nabalco were then considering, your concern was that as to the first possibility, namely, litigating the old contract through all possible courts and w.e.f. 24/7 to buy on spot basis with no formal contract — I am sorry, I withdraw that.

Your concern, was it, was that this clause "both secondly and thirdly" above those two lines that you have just directed my attention to — your concern was to ensure that they were accurately recorded, is that right? A. That the telex did not contain something which I would have considered was incorrect.

20 Q. And if the telex had contained something which did not accord with your recollection of the meeting you would have drawn Mr. Lockrey's attention to it, would you not? A. Yes, yes.

Q. And you did not do that, did you? A. I don't believe so, no.

Q. So that what you read in the telex that is in front of you at the time you read it on or about 20th May accorded with your recollection of what was said at the meeting, did it not? A. I don't know that I would have applied my mind to anything else than reference to termination of the contract that I have mentioned.

Q. Mr. Rowland, you were concerned at the meeting to ensure that the B.P.A. view as to the termination of the contract was made clear to the meeting, weren't you? A. I don't know what you mean by the B.P.A. view now. I was reporting the advice which the company had received.

30 Q. And you made it clear at the meeting, did you not, that if Nabalco proceeded to litigate on the old contract through the courts they could not have a new long term contract for furnace oil? A. That was not my field at that meeting. As I say, I was called down to report the advice we had received.

I was not asked about whether or no I would discuss another contract. I did not put in any more than, or make any other contribution than that the advice we had received was as I have stated.

40 Q. When you read in the telex on or about 20th May, and read it now if you wish, firstly to litigate that old contract through all possible courts and w.e.f. 24/7 to buy on spot basis with no formal contract, that struck you, did it not, as an accurate summary of that option which was open to Nabalco, did it not? A. Yes, I did not object to that statement.

Q. Because it is a fair summary of what, the first of the three options that was open to Nabalco taken at the meeting was; that is so, isn't it? A. I believe that option was open to them, yes.

Q. And it is an option that emerged from the discussion at the meeting, isn't it? A. I don't see how it could have emerged from the discussion at the meeting. The option was there or not regardless of the meeting.

Q. It was made plain at the meeting, was it not, that if Nabalco wished to litigate that old contract then it would have to buy on a spot basis with no formal contract; isn't that so? A. I believe Mr. Lockrey did point out to them that that would be the basis upon which he was prepared to talk to them about supply, but that is not my field. 10

HIS HONOUR: Q. But did you not hear words like that said? A. Yes, I heard words like that said but not by myself.

MR. LOCKHART: Q. You have a clear recollection, do you, Mr. Rowland, that words like that were said but not by you, is that right? A. Words about supply on a spot basis do you mean?

Q. Yes? A. Oh, yes, there was talk about supply and what terms there would be.

Q. But you have a clear recollection, do you, that it was not you who said that if Nabalco wanted to litigate on the old contract they could only buy on a spot basis with no formal contract, is that right? A. I don't believe I said that. What was pointed out in another section of evidence, of course, that it was imputed to me — no, I was simply reporting the legal advice we had received. 20

Q. When you say you do not believe you said it, do you say that because conscious as you are of the role you were to perform at the meeting you therefore think you did not say that but have no real recollection one way or the other of whether you said it? A. Oh, no, I have a firm belief that I did not say what was the effect of litigation, in fact I think the expression used by somebody else, I should have thought by Mr. Lockrey, was "take us to court". Well, that is not an expression that I would use normally and I was not discussing that, I was simply reporting the advice we had received. 30

Q. You do not have a very good memory of the details of the discussion at the meeting, do you? A. No, I believe I listened intelligently. I had seen Ex.S before the meeting so that I knew what was the matter to be considered, but I was not called upon to make any other contribution than that I have mentioned.

Q. Of course was it you who was responsible for the inclusion of item 5 in Ex.S, the typed part first? A. I agreed that it should be there, yes.

Q. You agreed with whom? A. Well, Lockrey presumably. The addition was certainly with my approval.

Q. The addition you mean so far as it relates to furnace oil? A. Furnace oil, yes. 40

Q. Would you agree with me that as you saw it the purpose to be served by

item 5 in Ex.S was to ensure that Nabalco knew at the meeting of 17th May that there could be no new contract for the supply of furnace oil unless the old contract was terminated in every respect? A. I was simply saying that the old contract was terminated according to our advice.

Q. But terminated in every respect so far as furnace oil is concerned? A. Yes.

Q. Now Mr. Rowland, you said you saw telexes that went from B.P.A. to B.P. London? A. I do see all the telexes, yes.

Q. And you saw the telexes that come in, I take it, too, do you? A. Yes.

10 Q. (Approaches) I show you, Mr. Rowland, a copy of a telex from B.P.A. to B.P. London of 2nd May, 1974, do you see that? A. Yes.

Q. And it is a two-page telex, as you see. Just read any part of it that you wish to, but I want to draw your attention particularly to the item EFF on p.2 of the telex and ask you some questions about that. You have read that, have you? A. Yes.

Q. Now that is a telex at or about the time of its despatch from B.P.A. to B.P. London which you saw, did you? A. I can't say before. I would have seen it circulating in the copies of telexes, yes.

Q. At or about the time it went? A. Yes.

20 Q. Do the contents of that paragraph marked EFF state substantially accurately the attitude expressed by the B.P.A. representative, whoever it may have happened to have been, at the meeting of 17th May? (Objected to; copy of telex shown to his Honour; question withdrawn)

Q. Did you discuss with Mr. Lockrey the matters that are referred to in EFF at or about the time of the despatch of the telex? A. I don't recall discussing them with him but the content of that paragraph would suggest that I must have been in touch with him about it, yes.

Q. It was your belief, was it not, about 2nd May last year that in any new agreement Nabalco would want to protect its position vis a vis the old contract? A. I did not object to that statement being in the telex.

30 Q. And you did not object to any statement in that paragraph EFF being in the telex, did you? A. I don't know that I had an opportunity of objecting before the telex. I believe I saw the copy afterwards and I don't think there was any occasion to correct any of the content of the telex.

Q. There was nothing that you read that struck you as being inaccurate? A. Nothing that called for correction.

Q. Just to make this point quite clear with you, the statements that you made at the meeting of 17th May were, I gather, not made by you as a part of any bargaining or negotiating position? A. No.

Q. They were made by you as a statement of fact of what B.P.A.'s attitude was? A. A statement of the legal advice which had been given to us.

No. 111
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 Defendant's
 evidence: J. H.
 Rowland: Cross-
 Examination
 (cont'd)

Q. Legal advice given to you and accepted by B.P.A.? A. Yes.

Q. And communicated as such to those present at the meeting? A. Yes.

Q. Mr. Rowland, you were aware that three letters of 17th July, 1974 were despatched by B.P.A. to Nabalco, were you not? A. Well, I am not sure of—

Q. Would you like to see them? A. There were letters about that time. I don't know the dates of them. (File of correspondence shown to witness.)

Q. I do not want to take you to the detail of them, I just want you to identify them? A. Yes, I see that there are three letters of that date.

Q. What role if any did you play in their preparation? A. I would have seen all three I believe before they went out. As I recall it they were prepared with the advice of our solicitors — at least two of them if not all three. 10

Q. Were they letters that were sent out upon your own legal advice, that is your, Mr. Rowland's, legal advice? A. We were closely in touch with our solicitors and we were adopting their advice.

Q. Turn over the pages a little in that bundle to a letter of 14th August, 1974, if you would. That is the one signed by Mr. Lockrey. Do you have that? A. Yes.

Q. What role if any did you play in the preparation of that letter? A. My impression is that the draft of that letter was supplied by our solicitors. I really made no direct contribution to it.

(Witness retired and excused)

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No. 111
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 Defendant's
 evidence: B. C.
 Snape:
 Examination

BRIAN CLYDE SNAPE
Sworn and examined

MR. HORTON: Q. Your full name is Brian Clyde Snape, you live at 3 Bluff Street, East Hawthorne in the State of Victoria? A. Yes.

Q. You are the manager of Government and National Department of B.P. Australia Limited? A. That is correct.

Q. I think you held that position since May of 1974? A. Correct.

Q. Prior to being so appointed you had been for some time with B.P. Limited in London and you had returned to Australia shortly before taking up the position that you now occupy? A. Yes. 30

Q. I think Mr. Shaw, who has given evidence, had been your predecessor, had he not? A. That is true.

Q. Now you returned to take up your present position on 7th May, 1974 and I think that you in the week or more succeeding that became aware of the Nabalco supply contract difficulties? A. Yes.

Q. You were asked by Mr. Lockrey to attend a meeting that was to be held on 17th May in Melbourne at the B.P. offices? A. That is correct.

Q. And you attended that meeting I think and there met Mr. Coogan and Mr. Notter from Nabalco? A. Yes.

Q. And present were a number of other B.P. executives, B.P.A. executives? A. Yes.

MR. HORTON: Q. Mr. Snape, I think Mr. Lockrey introduced you to the Nabalco people and Mr. Lockrey, in effect, was Chairman, as it were, of the meeting? A. That's right, it was in his office.

10 Q. Can you tell us your recollection of what was discussed at the meeting? A. It was a long meeting, so obviously there were many things discussed. Would you like me to try and work through it in its systematic order?

Q. Yes, in the order if you can of the topics as they came up according to your memory? A. Well, Mr. Lockrey was sitting at his desk and the balance of us were spread around in a rough semi-circle around his office, and after Mr. Shaw and I arrived, Mr. Rowland arrived as well and the meeting as such then commenced.

HIS HONOUR: I'm sorry, I cannot hear you.

20 WITNESS: The meeting as such commenced after Mr. Rowland arrived. I can recall it being agreed by Mr. Coogan and Mr. Lockhart that the meeting would be "without prejudice". I think that they both indicated that their legal advisers had suggested or recommended that this be the case. Mr. Lockrey went on to — I beg your pardon, prior to that, Mr. Coogan said that they had come down to talk about a new supply contract and Mr. Lockrey went on to outline what would be, I should think, an offer of the basis of a new contract.

MR. HORTON: Q. Do you recollect his exact words at this distance in time, Mr. Snape? A. No, I can't recall all the words that were said, certainly not.

30 Q. Can you tell us to the best of your recollection what Mr. Lockrey said about the basis of a new contract? A. He offered a new contract for a period of one or three years' duration and he indicated prices for the two periods. From memory, the three year period was \$56.50, or in that order, and the one year period was \$53-something, less than \$54. This resulted in some discussion as to why the three year price should be higher than the one year price.

Q. Who raised that question? A. I think it was Mr. Notter. Mr. Notter went on to compare the three year price with the then current bunker price and pointed out that the going rate at that time for bunkers was less than we were offering for a three year contract for obviously a very much larger tonnage.

40 Q. Did anybody explain to Mr. Notter or Mr. Coogan why there was the difference between the three year price per tonne and the one year price per tonne? A. Yes, Mr. Lockrey pointed out that we were having difficulty in getting supply cover from our suppliers for a term of more than one year and that the only terms on which we at that stage were able to get back to back supply cover, involved a penalty for insurance against the unknown.

No. 111
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 Defendant's
 evidence: B. C.
 Snape:
 Examination
 (cont'd)

Q. He, having explained that, was there any discussion about that aspect? A. Not that I can recall; I am sure that I have very much abbreviated it but I think that I have covered the main points of it.

Q. Was there any reference in the discussion to the pre-existing contract or perhaps the existing contract, whichever way one likes to look at it, but the 1970 contract?

HIS HONOUR: Let's call it the old contract.

WITNESS: I had the impression that everybody accepted that the old contract was terminated.

MR. HORTON: Q. Can you tell us who referred to your contract, if anyone did? A. The only reference that I can recall to the old contract was well into the meeting when Mr. Coogan enquired, I should think, it struck me as somewhat tentatively, "Wouldn't it be better for Nabalco or couldn't Nabalco consider going back to the old contract at the revised price that was offered to them earlier." Apart from that, I can recall— 10

HIS HONOUR: Q. Did anybody respond to that inquiry? A. Yes, Mr. Rowland answered Mr. Coogan—

MR. HORTON: Q. What did he say as you recollect? A. It is one of the things that I can recollect very clearly because I was rather surprised that he jumped in and answered the question rather than Mr. Lockrey. He said that: "This is what our solicitors, or our lawyers, have been studying for the last month or so and on their advice —" he must reaffirm that Nabalco had terminated the old contract themselves and there was no way that it could be reinstated. 20

Q. Was there any further discussion about the old contract after that was said? A. I can recall no other discussion of the old contract.

Q. Was there some further discussion about these prices that had been put forward by Mr. Lockrey or for a one-year or three-year new contract? A. Other than what I have described, I can recall no other salient points arising except—

Q. You did mention that Mr. Notter raised a comparison with bunker fuel in small quantities. Did anybody say anything in answer to this point that he made as to the lack of some discount for volume? A. Mr. Lockrey undertook to investigate it and report back with an explanation for it. It seemed a valid point. 30

Q. Incidentally, was a Mr. Skillen there at the meeting? A. Mr. Skillen was not there for all of the meeting. He came in well into the meeting when the Prices Justification Tribunal was mentioned and as he had been the company officer who was co-ordinating P.J.T. matters, Mr. Lockrey asked him to come in.

Q. Did he discuss with the meeting P.J.T. problems generally? A. Yes, I recall that that was about the time that the first major P.J.T. announcement had been made, it was about the time of my arrival back in Melbourne, following an inquiry, I think, into the Shell Company's costings, and so it was a fairly topical issue and Mr. Skillen gave a resume of the P.J.T.'s findings in the Shell inquiry. 40

Q. We have been told here by other witnesses that some draft terms for some of the clauses at all events of the new contract had been prepared and were offered to the Nabalco people at this meeting. Do you remember any discussion about those draft terms? A. Yes, Mr. Notter flicked through them while the meeting was proceeding and made some observations on them as he was doing so. I can recall him saying that they were very one-sided and that, in effect, they would reduce a term contract to a spot contract, or words to that effect.

10 Q. Was there some discussion as to whether the proposals which had been put to the meeting would be considered or whether they were to be rejected, or what happened? A. Well, Mr. Lockrey undertook to investigate this bunker, this apparent bunker anomaly, and also to see if there were some ways in which the price perhaps could be reduced because it had been indicated that Nabalco would accept a lower grade of oil or at least that they would consider a lower grade of oil and so Mr. Lockrey undertook to study that and Mr. Coogan undertook to come back with their views on the discussion and the alternatives. I am sure some sort of a time was indicated, perhaps a week or ten days because we were all keen to try and get the things tidied up.

20 Q. Do you remember anything more of the conversation at the meeting? A. It seems that if one has commenced a meeting which probably went for two hours into a few words, there must have been a lot more.

Q. You are not the only one to do that.

HIS HONOUR: It is a common experience, Mr. Snape, if it is any comfort to you.

WITNESS: I can't recall any other salient points.

MR. HORTON: Q. Then I think you broke off for lunch? A. Yes, which was, in many ways, an extension of the meeting.

30 Q. You had a discussion, I think, with Mr. Skillen, was it, and then made a recommendation to Mr. Lockrey, but you can't tell us unless my learned friends want it, what you said, but after the lunch did Mr. Lockrey say something further about price in the new contract or proposed price to Mr. Coogan or Mr. Notter? A. Yes, at the conclusion of the luncheon, I understand there was a rounding-up of what had happened and what had been discussed and I can recall Mr. Lockrey suggesting to Mr. Coogan that if they would come back with a figure which they thought was a reasonable and justifiable figure from their point of view, well, we would be happy to consider it and perhaps explain why, if there was a large difference between the two, what the reasons for the difference were.

Q. (Approached). I show you p.7 of the transcript. Would you be kind enough to read the third last question and the answer please? A. Yes.

40 Q. Did Mr. Rowland say that at the meeting on 17th May? A. Certainly the early part of the—

Q. Can you be a little more precise?

HIS HONOUR: Q. When Mr. Horton says did he say that, we understand you cannot remember exact words, but did he say something substantially to the same

effect as that? A. Only partly, your Honour. I don't recall him saying anything about: "If you take us to Court we are not prepared to supply you under the old contract."

Q. Did he say: "The only way we are prepared to supply oil to you is under a new contract."? A. I doubt if it would have been put in those words. I think he would have said: "The only way we can supply oil to you is under a new contract.", but the extract that I have been shown makes it appear conditional. My recollection of Mr. Rowland's statement was that the old contract was finished and there was no — there were no conditions attached to writing a new contract. He was just stating a fact.

10

MR. HORTON: Q. At the foot of p.134, Mr. Notter tells us that the proposed terms, or photocopies of them, were handed over as you have mentioned, and at the top of p.135, he gives a long answer. Would you look at the first paragraph, and, in particular that sentence beginning: "However, Mr. Lockrey, what would be the situation . . ." down to the end? A. Yes, I have read it.

Q. Did Mr. Rowland say that? A. That is — that would be more in line with my recollection of what Mr. Rowland said than the earlier passage you showed me. I think he was, Mr. Rowland was, — I'm sure he made reference to the fact that he was speaking on the result of our legal advisers' investigations into it, which is not referred to there. As I understand it, he was concerned not to have the possibility of two contracts running at once.

20

Q. Was anything said during the discussion about the maintenance of furnace oil to Gove on 17th May? A. Yes, there was quite a bit.

Q. Who said that, and what did they say? A. I think we all knew that—

Q. My learned friend would prefer you, I think, to give, as closely as you can, the words that were spoken and who spoke them, rather than what was in your mind at the time? A. We were reminded by Nabalco that they were entirely dependent on fuel oil for their operations and Mr. Lockrey pointed out on several occasions during the meeting that we would not let Nabalco run out of oil, and he referred back to the efforts that B.P. Australia had made during the October-December 1973 crisis to maintain supplies to Nabalco and gave, I thought, a very strong assurance that we would maintain supplies.

30

Q. Do you recollect the words that led you to describe it as a strong assurance? A. I think he used words something like: "There is no way that we will let you run out of oil."

Q. I think that it has appeared from other evidence that there were telephone conversations back and forth between B.P. and Nabalco in the ensuing fortnight or so. Did you overhear some of those conversations Mr. Lockrey had with some at Nabalco? A. I should think I overheard all of them.

Q. Do you remember any part of them? A. I can recall one subsequent to the 17th May meeting with Mr. Notter, when Mr. Lockrey passed through some possible areas of cost reduction or price reduction which were the result of some — of calculations that I had done. I can recall he had a conversation with Mr. Coogan subsequent to 17th May meeting about, or enquiring as to whether Nabalco had made any progress on their considerations—

40

Q. Might I just ask you, in making your calculations did you have to gather information from various departments, including I think the shipping department or whatever its proper description is, at B.P.? A. None of the options involved shipping as such. Certainly, I did talk with other departments about some of the possible ways that we could reduce the price.

Q. I was wondering whether in this fortnight up until the end of May you had conveyed to Mr. Lockrey something about shipping programmes. A. He was aware that—

MR. LOCKHART: Can we have what was said?

10 WITNESS: Sorry. I had told Mr. Lockrey that my investigations had revealed that Nabalco's August shipment was then programmed and that—

MR. HORTON: Q. Do you remember Mr. Lockrey mentioning anything about that in one of the 'phone conversations that you were present at? A. Yes, he told Mr. Notter that, during one of the 'phone conversations.

Q. Do you recollect what he said to Mr. Notter about shipping? A. He told Mr. Notter that we had already programmed the August shipment; this would have been in response to an inquiry—

20 Q. You only heard one end of it, you see. There was another meeting on 31st May between yourself, I think, Mr. Lockrey, for a time, Mr. Cochrane and Mr. Notter, on the part of Nabalco? A. That is correct.

Q. Do you recollect what the main purpose of that meeting was on 31st May? A. Yes, it was to draw up a new contract commencing on 25th—

Q. Was it your task and Mr. Cochrane's task on the part of B.P. to conduct a detailed examination with Mr. Notter of the terms of such a contract? A. That is true, it was.

Q. Before you set upon that task, was Mr. Lockrey present with you and Mr. Cochrane? A. Yes, Mr. Lockrey was present at the early part of the meeting, as I recall it, before Mr. Cochrane joined us.

30 Q. Do you recollect anything of the discussion between Mr. Lockrey and Mr. Notter on that occasion, apart from pleasantries, of course? A. Yes, that was the occasion when Mr. Lockrey told Mr. Notter that we had been able to bring the price for a three-year contract down to \$52.52 per metric ton; I think that was the main information that Mr. Lockrey passed on. He was not present for very long.

Q. I think you spent most of the day working with Mr. Notter, did you not, on the specific terms that were the subject of your meeting? A. With Mr. Cochrane, yes.

Q. Did you have any discussion with Mr. Lockrey about future supplies in a general way, other than the specific terms of the document you were discussing? A. Mr. Lockrey?

40 HIS HONOUR: You mean Mr. Notter?

No. 111
—
Defendant's
evidence: B. C.
Snape:
Examination
(cont'd)

MR. HORTON: Q. I'm sorry, Mr. Notter. A. I'm sure we covered it. If one spends a whole day in conversation and discussion, yes, yes, we did, and I would have on the 31st May—

Q. Can you remember whether you said anything specifically to Mr. Notter about actual supplies, actual deliveries. A. On the 31st May, I told him that we had then programmed the August shipment and we would like a quick — (objected to: allowed).

Q. You said you would like —? A. We were all keen to have the new contract finalised.

HIS HONOUR: Q. Is this what was said? A. Yes, your Honour.

10

(After a question from his Honour, Mr. Horton indicated that they would be calling someone from the shipping department to explain about the August shipment being programmed.)

(Short adjournment.)

HIS HONOUR: Mr. Snape, you understand you are still on your former oath?

WITNESS: Yes, your Honour.

No. 111
—
Defendant's
evidence: B. C.
Snape: Cross-
Examination
(cont'd)

CROSS-EXAMINATION:

MR. LOCKHART: Q. Mr. Snape, have you discussed the events of 17th May last year with Mr. Lockrey? A. Recently sir, or —?

Q. At all? A. Oh, yes.

20

Q. Have you discussed them within the last, say, two months? A. I should think not specifically. There would have been a lot of discussion about it in the latter part of last year, but not recently, no.

Q. You have not discussed the events at all as to the 17th May, is that right, within the last two months, with Mr. Lockrey? A. No; I can't say I haven't discussed it at all; I certainly have not discussed it with him since the hearing started.

Q. Since —? A. Since the hearing started, since—

Q. Have you discussed the events of 17th May with Mr. Rowland at all? A. Not in any depth, no.

30

Q. Have you discussed events of that day with him, within the last, say, two months? A. No.

Q. You gave evidence that you overheard a number of telephone conversations between Mr. Lockrey and Mr. Notter. Do you recall that? A. Yes.

Q. These were conversations after 17th May, is that right? A. Yes.

Q. Where were you physically in relation to Mr. Lockrey's telephone when you overheard those conversations? A. I was in his office.

Q. Do you normally sit in his office? A. No, I sit two offices removed from him but—

Q. He summoned you and asked you to come and listen in to his end of the telephone call, is that right? A. That is correct.

Q. You did not have another telephone that you could pick up and listen into? A. No.

10 Q. Do you know if the occasion on which you overheard the telephone conversations at Mr. Lockrey's end were conversations that he had introduced by telephoning Mr. Notter, or could they have been conversations where Mr. Notter had rung Mr. Lockrey, or don't you know? A. I should think they would be both ways.

Q. If Mr. Notter rang Mr. Lockrey, then how is it that you would suddenly appear in the office and overhear the conversation? A. Mr. Lockrey had a secretary.

Q. She would go and fetch you and bring you in, is that right? A. Yes.

20 HIS HONOUR: Q. You were brought in for the express purpose of hearing what Mr. Lockrey said? A. I understand so, your Honour, and then we would discuss what was said after the 'phone call was finished.

MR. LOCKHART: Q. Going to 17th May, you told Mr. Horton that it was Mr. Coogan who enquired if it would be better for Nabalco to go back to the old contract at the revised base price. Do you remember saying that this morning? A. Yes.

Q. It was immediately after that, wasn't it, that Mr. Rowland came into the conversation and made it clear that it was impossible to reinstate the old contract under any circumstances? (Objected to.)

30 Q. It was Mr. Rowland who said, immediately after Mr. Coogan had said that, was it not, that it was impossible to reinstate the old contract, or words to that effect? A. I'm not quite sure about the words to that effect, but Mr. Rowland said that on the advice of our lawyers, the old contract was terminated.

Q. He used words to the effect that you have mentioned to Mr. Horton earlier to-day, but those words that he used were immediately after Mr. Coogan's inquiry as to whether it would not be better for Nabalco to go back to the old contract at the revised base price? A. Yes.

(No re-examination)

(Witness retired and excused)

PAUL BRENNAN ABT
Sworn and examined:

No. 111
 —
 Defendant's
 evidence: P. B.
 Abt:
 Examination

MR. STAFF: Q. Your name is Paul Brennan Abt, you live at 9516 Chimney Corner, Dallas, Texas, United States of America? A. That is right.

Q. You are a petroleum consultant, practising as such in the United States? A. That is correct.

Q. I think you have set out your qualifications and your observations in relation to Concord Contract of Affreightment and the K.N.P.C. Fuel Oil Supply Contract in a document which the officer will show you, have you not? A. Yes, that is correct.

10

(Report of Mr. Abt tendered without objection and marked Ex. 65.)

(Mr. Officer indicated that he may have to seek an adjournment before cross-examination of Mr. Abt as in his report Mr. Abt says that he would give certain reasons in his evidence from the witness box. This was noted by his Honour.)

Q. At 2.7 on p.5 — have you got a copy of the report? A. I do, but it is in my brief case. (Witness handed brief case.)

Q. P.5, 2.7 is the first place. You gave one example of a method of approach which would have avoided what you really describe as the posting provisions to which you refer? You indicated you would like to give other illustrations in your evidence. Can you give his Honour now those illustrations? A. Yes. I would say of the alternatives available to a long-term charter at this point in time, a good index that was used and could be used in a contract of this type to provide for escalation, particularly in bunker clauses, would be any change from the actual cost of bunkers at that time. Another method would be to have the change occur only if it exceeds a certain range, up or down. Another possible type could be to changes in product fuel oil postings in the Persian Gulf. Those are the ones that occur to me now. As a matter of fact, I believe there is a mechanism provided in the Concord Agreement which specifies that if bunker prices go above a certain level, which I think is \$75 per tonne, then there is either an increase provided in the freight rate or Nabalco has the right to supply the bunker.

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Q. Of these illustrations you have mentioned, are they or any of them, in your opinion, common escalation provisions? A. Yes, I would say the most common would be in a contract of this type — I would have to say the most common would be for the owner to have the burden of estimating the bunker cost for the duration of the agreement, so that you would fix a flat price per tonne. However, in these times, if it were thought to be desirable to have a bunker escalation clause, two things: one, it should go up and down depending on — my preference would be to the — and the normal thing would be a tie to the actual cost because it was never intended that an owner make money on his bunker purchases in a contract.

Q. Having regard to market conditions about the middle of last year, is it your opinion that a contract of affreightment containing one or other of your suggested provisions in view of that to which you referred in 2.7 in the Concord Contract, would have been obtainable? A. Yes.

40

Q. In your opinion, would such a contract of affreightment have been obtainable readily or with difficulty? A. Well, I would say that at that time there was no doubt that the market, both spot and term, was trending downward and the only question left unanswered was how far down would the market go. I'm sorry, Mr. Staff, what was the—

*No. 111
—
Defendant's
evidence: P. B.
Abt:
Examination
(cont'd)*

10 Q. I asked you really, to tell his Honour how difficult it would be or how easy it would be? A. There certainly was, at that time, with the exception of very small tankers, and I would class by that as up to about 25,000 tonnes, there was a surplus of tonnage in the world, there was certainly right up to the L.R1 category which is
20 tankers in the, I believe, 45 to 80,000 tonne range, there was a surplus, and the surplus increased as the tankers got larger than 80,000 tonne. There was an over-supply and there had been an overbuilding of tankers that were coming onto the market. All of this was further complicated or agitated by the slowing down in demand due to the high prices that had come into being for both crude oil and product since October 1973.

HIS HONOUR: Q. Does a surplus of tanker capacity in the world necessarily lead to a reduction in freight costs below a certain level? A. Certainly over a period of time it would, your Honour, and I believe that was exactly the situation that was
20 occurring. Just for the sake of an example, in October 1973, when I believe freight rates reached their peak, the comparable rate would have been world-scale, say 300 or 350, that by the spring of the following year in 1974, the freight rate would have been more below, certainly below world scale 100 for spot voyages of the same tanker, using 100 as an index, which means that in times of surplus you will get a market trend downwards, and in times of shortage, you will get a market trend upwards, but it does not occur overnight; it is a gradual trend.

30 Q. All I had in mind was that you may reach a point where to a tanker operator, it simply is not economical to run the tanker at all for the prices prevailing; it is better for him to tie it up? A. That is correct, your Honour, and in the last twelve months I would say the tanker business has been in exactly that situation where there are a lot of tankers being tied up for that very reason. The market rate for them is not enough to cover their costs, so the tanker owners will lay up the ships.

MR. STAFF: You mentioned in the answer to his Honour's question the spring of 1974. You were, I take it, referring to the northern spring? A. Yes, I'm sorry, right.

Q. I just thought I had better clear it up? A. March-April.

Q. March-April, you had in mind, did you? A. Right.

MR. STAFF: Q. I then take you to par.6, which is No.229 — just to refresh your memory about the subject matter of that paragraph.

40 HIS HONOUR: I suppose somewhere we have to have a short definition of world scale, Mr. Staff?

MR. STAFF: Your Honour, I had intended — at Mr. Conti's suggestion, to get Mr. Abt to identify a published description of the oil scale which I then propose to tender. Perhaps I could do it at this point.

No. 111
 —
 Defendant's
 evidence: P. B.
 Abt:
 Examination
 (cont'd)

Q. Mr. Abt, would you look at the publication shown to you now. Are you familiar with that material? A. Yes, I am.

Q. In your opinion does it adequately describe world scale? A. I am afraid it does not, Mr. Staff. What this is is normally — I think it is the introductory pages to the world scale book. But I have here, if I may, a publication which I feel is very good — which contains a rather brief description of world scale, what it is and what it was intended to do.

MR. STAFF: Then, if I may, I will tender that.

Q. Is it a description in your language or is it something we can understand? A. No, it is not in my language but I would come very close to using those words if I were to describe it. 10

HIS HONOUR: Q. Is it very long? A. No.

Q. Then you can read it onto the transcript? A. Yes. This is a description of the objective rather than what World Scale is. "The objective of Worldscale, as of the other freight scales that it has replaced, is to furnish a list of basic freight rates for all voyages upon which tankers ply, calculated according to a common set of assumptions so that it provides a yardstick which accurately reflects the relationship between one voyage and another. It is not intended to be an expression of actual freight rates or operating costs but it does give a means whereby rates for all voyages and market levels can be readily assessed and compared. 20

The Worldscale voyage rates are in United States currency. The basic Worldscale rate for any voyage is referred to as 100 points or 100% of Worldscale. The freight level to be applied to the rate for a particular voyage is expressed as a percentage or points of Worldscale."

Mr. STAFF: Q. In the circumstances I will have my other document back. Passing to p.6, 2.9, you express there your opinion, Mr. Abt, that by June, 1974, the term Market Worldscale rate for the subject tanker contract did not exceed 120 to 130 1974 Worldscale? A. Yes.

Q. And on the basis that the rate was not tied to Worldscale index 100? A. Yes.

HIS HONOUR: Q. You mean by that it would remain in 1974? A. Yes, your Honour, 1974 Worldscale index 100. 30

Q. Would that mean that the price set to the clause you mentioned, cl.19 I think it is, would remain after all? A. Yes, your Honour.

MR. STAFF: Q. What you are saying is it would not automatically increase because Worldscale 1975, for instance, increased? A. No.

HIS HONOUR: Q. This is what I don't quite understand fully because as I understand it you start off the new year with a new index and it will rise in that year, or perhaps in that year; is that right? A. No, your Honour, when you say a new index, a new index is in terms of the base of flat index which is known as the Worldscale 100 upon which rates are based. 40

MR. STAFF: Q. So that when you refer to Worldscale 170, for instance Mr.

Abt, that is an indication that the rate which you are agreeing to is 170 percent of Wordscale 100? A. That is correct.

HIS HONOUR: Q. And if you use Wordscale 100 as the base for 1974 and fix a rate of 170, then it stays the same? A. Yes.

Q. And if you draw your contract so as to enable the shipping company to charge the Wordscale rate as each new year opens, so the rate goes up? A. Automatically, yes, your Honour.

MR. STAFF: Q. If costs are increasing it must go up, is that so? A. Yes.

10 Q. That is the way it is ascertained? A. If port class or more specifically during this period bunker class are rising, then the world rate will increase.

Q. As you point out in your material, by June of 1974 it was obvious that Wordscale 75 was going to be up between 30 and 40% on 1974 Wordscale 100? A. That is correct, Mr. Staff.

Q. So that one could see that by January of 1975 it had that increase, if your rate was tied to Wordscale, whatever it was each year, that is Wordscale 100 each year? A. That is correct.

20 Q. What you point out in your material is that since by June of 1974 the market knew of the increase in costs, a ship owner would be seeking to fix for a contract entered into in June, 1974, a Wordscale figure such as 170 which would reflect his estimate of the already increased costs? A. That is correct.

Q. So that to agree to a further increase based upon the same increase of cost within the short time as you point out was not prudent conduct? A. Yes, I think one could have by any increase that may have been provided but to a more meaningful index.

Q. A more meaningful? A. Index. Such as an increase or decrease from actual bunker class at the time the contract was done.

HIS HONOUR: Q. Is there any problem in getting a company, in your view, to undertake a voyage of this kind, Gove being a fairly remote part of the world? A. I am sorry, your Honour, would you mind repeating that?

30 Q. Is there any consideration associated with the remoteness of Gove which would make it difficult or more difficult to persuade a shipping company to enter into a contract of this kind than if the voyage were to some other part of the world? A. I would say yes, on a one voyage basis where it is normally on a one voyage basis or spot basis. If the owner did ask a premium for voyages P.G. East or P.G. West, simply P.G. West offers more opportunities for what is known as a back haul. This may or may not be true. If — there are certainly better back haul opportunities available on P.G. East. For example discharging a cargo at Gove, loading a cargo of Indonesian crude oil for Japan, back hauling Japanese crude oil to Singapore or North West Europe; or to the United States West Coast. I simply
40 point out those opportunities to make the point that the west does — P.G. East does have opportunities but normally on a one-voyage basis one would have to say that there are more opportunities P.G. West than P.G. East. On a term contract I do not believe there is any discretion at a given time because normally someone

No. 111
 —
 Defendant's
 evidence: P. B.
 Abt:
 Examination
 (cont'd)

would not enter into a contract of affreightment without foreseeing opportunities wherever the direction of the vessels for utilising the vessels between trips for at least some of the time.

Q. Just so it is on record; you referred to P.G. West and P.G. East; that is a reference to the east and west of the Persian Gulf? A. That is correct.

Q. The expression you used "back haul" may I take it in the industry is not to be interpreted literally but rather as meaning an on loading whether it be at the port of commencement or even in the opposite direction? A. That is correct, Mr. Staff. At any time the ship owner can keep his vessel loaded versus empty in ballast it makes his load. So what we refer to as a partial back haul is more a normal thing than a ship completely loaded all the time. It is almost impossible. 10

Q. But the description "back haul" would express — in the case of a tanker coming from the Persian Gulf to Gove — a loading, for instance, from the East Coast of Australia to the West Coast of America? A. Yes.

Q. Or the other example you gave in your answer a few minutes ago? A. Yes.

HIS HONOUR: Q. Of course, that would involve you in either having a ship which was capable of carrying a different kind of bulk cargo or there being cargoes of this type available for carriage from the East Coast of Australia to the West Coast of America? A. That would certainly sometimes be true, your Honour. But you have in the case of Australia alumina which is exported so you would certainly have to have a particular kind of vessel that loaded both liquid and dry cargo. However, the backhaul opportunities available even though you do not have what is known as the oboe or ore-oil carrier would be to go empty to say Indonesia and pick up another cargo of Indonesian crude oil for Japan or the United States West Coast. And then further, you could pick up a cargo of say fuel oil which from time to time becomes available in Japan and cargo which can be carried as far as North West Europe, past the Persian Gulf again. 20

Q. Pick up fuel oil in Japan? A. Yes.

Q. Is there much movement of fuel oil from Japan? A. On a spot basis. As a matter of fact, I think during this particular period Japan had a surplus of fuel oil and there were unique movements from Japan to as far as North West Europe. 30

Q. One had the impression from the press — and that is the only way I could have the impression — that Japan felt the fuel crisis more than anyone else? A. I think that is true, but in this particular period where supply was beginning to catch up with demand, and prices were trending downwards, I think there was an overreaction in many countries, including Japan, where they suddenly found themselves with a surplus of fuel.

Q. Was this pressure in refining operations? A. Yes, sir.

(Document setting out the objectives of Worldscale added to Exhibit 65.)

MR. STAFF: Q. As you know also in your experience in the industry the fuel oil from the East Coast of Australia is the subject of transportation across the Pacific from time to time? A. Yes. 40

Q. This is fuel oil derived from the Bass Strait group? A. Yes.

Q. It is transported to a considerable extent to the West Coast of America? A. I understand there are imports of it.

Q. I had taken you to p.6 and par.2.9 of your proof? A. Yes.

Q. You indicated there at the end of that paragraph that you would like to have the opportunity of referring to material you had ascertained in relation to America shipping and it has in fact negotiated during the end of 1974? A. Yes.

10 Q. Can you tell his Honour what material you referred to, what did you find in relation to actual contracts in fact negotiated during 1974 in relation to shipping rates of comparable character? A. Well I might mention at this point in time there were not many fixtures of this kind recorded in this particular period. The one fixture which Mr. Colish mentioned had to do with a contract of affreightment running between — as a matter of fact, Concord and United Refining whereas by Concord chartered out on a contract of affreightment for 24 months 45,000 dead weight ton vessels at a rate of Worldscale 150. That was one market example.

HIS HONOUR: Q. Whereabouts was the voyage? A. That was to the East Coast of the United States.

20 Q. From the Persian Gulf? A. That is right. It was to the United States Gulf but it is the same, from the Persian Gulf. So that was an example, that was a P.G. West voyage.

30 Q. A P.G. East voyage? A. No, it would go west. It would go around Africa. My comment on that particular fixture is that while the rate Worldscale 150 — if that was the market rate for 35,000 to 45,000 ton vessels the rate for a 60,000 ton vessel which falls into a — usually we call a cheaper category — could have been as low as world rate 100 for a larger sized vessel. That is the type of vessel that Nabalco chartered from Concord, the basic agreement was for 60,000 ton tankers. The market differential in what is known as a M.R., medium range Afra category and the L.R.1 category as run based on the period January of 1974 through August or September of this year, there should be about 50 points difference in the fixture rate. I am not saying that this means that the rate if the Nabalco Concord contract should have been Worldscale 100 but I am pointing out that for the difference in the size of vessels based on that one known C.O.A., that you can make a case and had United Refining fixed 60,000 ton vessels, that they could have logically obtained a rate as low as Worldscale 100.

40 The second fixture that has come to my attention was one made by Occidental, the parent company of Concord whereby Occidental chartered in August, 1974, — the contract itself I believe was concluded in June of 1974 — some Russian flag vessels of approximately 45,000 deadweight tons on a contract of affreightment to North West Europe at a rate of Worldscale 85. That was for a total of over 800,000 tons over an 18 month period. It is roughly one 45,000 ton loading per month.

HIS HONOUR: Q. And this is again from the Persian Gulf? A. From the Persian Gulf but that was Europe but the contract — but again I say at rate Worldscale 85 is substantially lower and could not make the same case with this particular sized vessel, the 45,000 tonners you would normally pay more money than you would for a 60,000 tonner.

No. 111
 —
 Defendant's
 evidence: P. B.
 Abt:
 Examination
 (cont'd)

Now those are the two specific examples that I could find of similar type movements at the time Nabalco negotiated their agreement with Concord. My own conclusion about the correct freight rate is based on my looking back at records of fixtures issued by tanker economic companies at that time, the companies that keep records of this type; of not exactly similar fixtures but what was happening in the market on term and on spot, plus soliciting the opinion of tanker brokers in the United States and in the United Kingdom as to their opinion. Taking all of this together I have estimated that the market rate at the time the Nabalco Concord fixture was made should have been more in the range of Worldscale 120 to 130 without any further tie to escalation than was already existing in the Concord agreement, that is the provision for bunker costs go above \$75 per ton within the freight rate to the other increase so Nabalco could supply its own bunkers. 10

HIS HONOUR: Q. Was there anybody else in the market with whom, as you see it, negotiations might have been held — other than Concord? A. Well certainly the Greek shipping owners, Daniel K. Ludwig. Any of the major oil companies. I know Nabalco contacted some but certainly other major oil companies which are not marketing in Australia would have had vessels in their fleet that could have performed this voyage. I recall — I don't recall the names of the particular companies that were contacted by Nabalco at the time that they were negotiating with Concord, but certainly in addition to those there would have been at least 10 or 15 more who would have had the potential of supplying the tonnage required. 20

MR. STAFF: Q. You mentioned oil companies who did not operate in Australia. Are there such companies which regularly charter ships or make contracts of affreightment? A. Yes.

Q. In the transportation of oil for other parties? A. Well no, I would have to say that large oil companies would generally make a contract of affreightment mainly geared towards the hauling of their own product or crude. So you would mainly turn in a case like this, I believe once you had supported the F.O.B. and freight elements your option would be the large Greek or American ship owners who had a sufficient number of vessels so that a contract of affreightment would have appealed to them. 30

Q. Apparently there were also red flag ships available in the market? A. Apparently Russian flag vessels, yes.

Q. If I may then take you to the next paragraph, 2.10, in which you refer to the tables which are attached and a graph? A. Yes.

Q. And then at the end of it on p.6 (a) you said you would like the opportunity of explaining the graph in more detail? A. Yes.

Q. If you would turn to the graph, would you now give his Honour that additional explanation? A. Yes, your Honour. This graph simply shows the number of vessels performing to date on the Nabalco Concord agreement. It shows both bill of lading and — no, well it just shows the bill of lading quantity. In the centre section under 5, 6 and 7, it shows the count per metric tonne in United States dollars, the unit cost in United States dollars and the total in both United States dollars and Australian dollars. These are figures, I believe, that Nabalco supplied to B.P. as representing their actual freight cost. Under claims 8 and 9 there is both a calculation in United States dollars and in Australian dollars which shows — I believe this represents Worldscale 125 which is the mid-point between Worldscale 40

120 at the bottom and 130 at the top which I feel is the market or should have been the market at that time. Claims 10 and 11 are amounts in United States and Australian dollars which show that through ten voyages in total the Concord cost of freight at Worldscale 170 plus their escalations exceeded what I feel is the market cost through — what would have been the market cost through ten voyages something of the order of \$1,900,000 Australian.

*No. 111
—
Defendant's
evidence: P. B.
Abt:
Examination
(cont'd)*

HIS HONOUR: Q. I am sorry, to go back to Worldscale, but I have also been told about another indicator of a freight level — and it is mentioned I think on your graph also, namely Afra rate? A. Yes.

10 Q. I was told that the Afra rates were published half yearly by the London Bunker Broker's Panel and they set general purpose average freight assessment and main rate average freight assessment. I think we have here Afra L.R. which I believe stands for long range? A. Larger range.

Q. Is there a relationship between the two indicators or are they just different indicators? A. They are different indicators, your Honour. I do have here — I do have it here so the young lady could copy it, a definition of what Afra means in the context of the Worldscale.

(Copies of what Afra means were prepared and handed to the parties. The document is set out below.)

AFRA.

20 The most widely used assessment is AFRA — average freight rate assessment — which is made by the London Bunker Brokers Panel. The panel now consists of six brokers and was formed over the years 1948-1949 at the request of Shell and B.P. The Panel is an independent body acting within terms of reference provided by Shell and B.P.

AFRA provides an independently assessed average of the level of freight actually paid for commercially registered vessels engaged in the carriage of oil during the period over which the assessment is made. It is widely used by the oil industry as the basis for inter-affiliate pricing as a price variation indicator in short period contracts. It is also accepted in a number of countries as the basis for freight
30 in official price structures. Acceptance is, however, not universal.

AFRA rates are expressed as percentages or points of Worldscale. They are the following vessel size categories:

G.P. (General Purpose) 16,500 to 24,999 tons. S.D.W.
M.R. (Medium Range) 25,000 to 44,999 tons. S.D.W.
L.R.1 (Large Range 1) 45,000 to 79,999 tons. S.D.W.
L.R.2 (Large Range 2) 80,000 to 259,000 tons. S.D.W.
V.L.C.C. (Very Large Crude Carrier) 160,000 tons and over.

MR. STAFF: Q. Mr. Abt, would you turn to the graph; I think it follows your charge and is the coloured one? A. Yes.

40 Q. Then could you tell His Honour what the chart shows? A. Yes. Your Honour, things we can — may I mention briefly what afra is. I think there is a more detailed information which will be typed out. (see above) But it is a monthly

No. 111
 —
 Defendant's
 evidence: P. B.
 A.B.:
 Examination
 (cont'd)

assessment of the actual cost of every tanker which is operating in the world. There are different AFRA awards every month ranging from general purpose size vessel to the mammoth vessels which I think are called ultra large crude oil carriers which run above 200 and 250,000 tons. But the AFRA is not market but it is meant to reflect historically plus updated every month the actual cost of every vessel afloat. Now Afra is on a monthly basis stated on Worldscale, whatever the Worldscale is at the time. The dollar per tonne is generally derived for each category of AFRA and applied to the Worldscale rate. There you generally find that general purpose vessels will carry a much higher per tonne because then V.L.C.C.'s which are generally in excess of 200,000 tons. But this bottom line, the flat line, is United States dollar per tonne cost of AFRA for each month of the period that the ten voyages were carried out which were referred to on the graph, when those occurred. The yellow line is my estimate of what the market would have been at that time if the contract which Concord entered — I am sorry, Nabalco entered into with Concord; and the red line is a plotting of the dollars per tonne it actually cost Nabalco by virtue of their freight agreement with Concord.

10

HIS HONOUR: Q. Is the yellow intended to indicate a range? A. Yes, the yellow in terms of Worldscale indicates a range between 120 on the bottom and 130 on the top; in terms of dollars per tonne.

MR. STAFF: Q. You, in describing the yellow which was your estimate, I think, of actual rates for a contract such as the Concord contract. We take it that that is excluding a provision for escalation such as you have talked about earlier today, that is such as was contained in the Concord contract in fact? A. Yes, that would say that there would be no further escalation to the rate per tonne.

20

Q. Does it take into account the cl.19 part about bunkers in the contract or not? A. Is cl.19 the clause which talks about \$75 per tonne?

Q. Yes. A. When I estimate that Worldscale 120 to 130 is the market rate I mean in terms of dollars per tonne which range from the low \$7 to the high \$7. That rate would be basically fixed. Now if because of particular conditions there was a necessity for tying the base rate to an escalation clause, I would say that the clause in the Concord contract is certainly satisfactory, that if one did it differently, as I mentioned it previously, I would certainly tie it to actual movements in the bunker class.

30

Q. The one you talk about is the one about bunkers increasing above \$75 United States? A. Right.

Q. The red line shows the actual cost to Nabalco? A. That is so.

Q. We see that there was an increase between voyage two and voyage three to the cost and then a sharp decrease for voyage four. The contract rate was tied to 170 with escalation but there was no, as I understand it, provision in the contract for reduction rate, was there? A. No, only for an increase being a vessel smaller than 60,000 tonnes, if it was utilised, which I believe was in fact done as the red line starts at \$11 rather than about \$10 which was the Worldscale 170 rate.

40

Q. The Worldscale rate would have been about \$10 at the commencement of the voyage; is that what you are saying? A. I believe the explanation for the \$11 being the cost of freight on the first voyage is the fact that a smaller tanker was used

by Nabalco and there is provision in the Nabalco Concord contract for a penalty for any tanker used below 60,000 tonne.

Q. In terms of your plotted line it then is something above — above \$1 or so above Worldscale 170 for a 60,000 tonner? A. That is correct.

Q. Then we see, when you come to voyage 3, that apparently the price or cost has gone up about 50 cents? A. That appears to be right.

Q. Then it drops about \$1.50 for voyage 4? A. Right.

Q. Can you tell us how that comes about? A. I believe voyage 4 was the first voyage where a 60,000 tonner was in fact used.

10 Q. Which one came back to Worldscale 170? A. That would of course be Worldscale 170, right.

Q. Then there is, between that time and the fifth voyage, a very steep increase from ten up to about \$13.50 or perhaps a shade less? Does that indicate basically the operation of the provision, the Worldscale 170 provision having regard to the refixing of Worldscale 1975? A. Yes it does, it reflects what I put about the 35 to 40% increase in the basic cost, the basic value of Worldscale 100 at this particular voyage of 1st January, 1975, against 1st January, 1974.

HIS HONOUR: Q. It then became 205 under the old scale? A. That is correct.

Q. And that is why the increase is there? A. That is correct.

20 MR. STAFF: Q. And then you find a pretty well stable rate throughout the rest of the voyages? A. Yes.

Q. Rather in line as to stability with your market range estimate? A. That is correct.

Q. More or less the same for AFRA, although one sees a slight decline in AFRA and then a slight rise? A. That is correct.

Q. We will just come back to p.7, par.2.11. You say the contract of affreightment was generally available at lower rates than either time charter scale consecutive voyage charters due to the combination benefits available to the fleet owner? A. Yes.

30 Q. At the end of the paragraph you say you would like to elaborate on the reasons for this having regard to the difference between you and Mr. Colish? A. Yes.

Q. I think you have already indicated some of those reasons, have you not? A. Yes.

Q. Is there anything additional you would like to add? A. Well there are basically three points that make the contract of affreightment clearly less expensive than a time charter or a consecutive voyage charter. The first is the flexibility which it gives to a fleet owner to use many vessels in his fleet to service that one contract. The second advantage versus a time charter or a voyage charter, this is to the

No. 111
 —
 Defendant's
 evidence: P. B.
 Abt:
 Examination
 (cont'd)

owner, is that he can — as is evidenced in the Concord agreement — put in a number of different vessels of different size. For example, I believe in the Concord contract he has the right to put in between approximately 35,000 and 60 to 66,000 metric tonnes, which is quite a broad range. The third advantage is that an owner with business in the area of discharge — and I would have to say that Concord certainly had and has business in this area, other business — it puts the owner's vessels in position to take advantage of the available, what we previously referred to as back haul business at an advantage over competitors who may be sailing their vessel to North West Europe.

Q. You have mentioned Occidental which had other business in the general area of Gove. Whereabouts were their business interests? A. I am just aware of at least four back hauls — well I should say there were four vessels which delivered fuel oil to my knowledge to Gove which then loaded alumina and took the alumina to the United States. I am assuming here something may or may not be true, that Concord having combination oil-ore carriers had before this contract was made and after it's over have the same kind of business for these vessels in this area. 10

(Luncheon adjournment.)

MR. STAFF: My friends have agreed, subject to your Honour, to my interposing a witness. I do not anticipate the witness taking too long, but because of the air strike tomorrow if he does not return to Melbourne on a flight booked this evening he will not be able to return till Thursday. 20

HIS HONOUR: Yes, very well.

(Mr. P. Abt, stood down.)

No. 111
 —
 Defendant's
 evidence: N. F.
 Tregoning:
 Examination

NEIL FREDERICK TREGONING
Sworn and examined:

MR. HORTON: Q. Is your name Neil Frederick Tregoning? A. It is.

Q. You reside at 13 Hughes Street, East Brighton, Victoria? A. Yes.

Q. You are a supply programmer with B.P. Australia? A. That is correct.

Q. I think you are employed by B.P. as Superintendent of the Programmes section in the Production Planning and Studies Department of the company? A. That is so. 30

Q. You have worked for the company since 1966 and have held your present position since August of 1972? A. That is so.

Q. Before that you worked in the Supply Department of B.P. Trading Limited for over a year? A. Yes.

Q. You are the head of the section which is responsible for the scheduling of refinery production which also involves the scheduling of crude supplies within Australia? A. Yes.

Q. And also imports to Australia and exports from Australia of what are called mainline products, that is to say products shipped in tank ships? A. Correct.

No. 111
—
Defendant's
evidence: N. F.
Tregoning:
Examination
(cont'd)

MR. OFFICER: This witness is going to talk about our supplies as programmed and so on. I would object on the grounds of relevance but otherwise, for the time being, I have no objection to my learned friend leading the witness.

HIS HONOUR: I take it this relates to the 2nd July notice.

MR. HORTON: And to the August and September shipments, your Honour. Your Honour will remember the evidence of Mr. Snape to the effect that he told Mr. Notter that the ore shipment had been programmed.

10 HIS HONOUR: This is in relation to your claim?

MR. HORTON: This is in relation to our claim, also in relation to questions of detriment which we supplied as a result of what we say was an election by Nabalco given as a repudiation.

HIS HONOUR: I will allow the evidence subject to the objection.

MR. HORTON: Q. The company's supply programming function up to the end of 1974 was based on the programming function of B.P. Trading Limited in London where they had a linear programming model called Gram which stood for Group Resources Allocation Model? A. That is so, normally called GRAM.

20 HIS HONOUR: Q. Is it a computer? A. It is a computer model, a software programme which is processed on a computer.

MR. HORTON: Q. GRAM provided a representation of the B.P. groups 30 refineries, crude supplies, markets and the like? A. Correct.

Q. And the purpose of GRAM was to efficiently plan the complex logistics exercise of processing the crude oil available to the group through the refineries available to the group to meet the entire groups customer commitments and sales aspirations? A. Yes, that is correct.

Q. Since the closure of the Suez Canal the group for planning purposes has divided the world into East and West, I think? A. Yes.

Q. The dividing line being Capetown? A. Yes.

30 Q. Was that because the Persian Gulf Refineries had become 30 to 40 days away from Europe rather than 10 days as previously? A. Yes.

Q. GRAM gave a separate supply picture for the eastern area of which Australia is a part? A. Yes.

Q. In the company's office in Melbourne it was re-optimised on B.P. Australia's local model for the immediate year ahead, that is GRAM worked ahead on a three-year programme? A. Yes.

Q. That means that GRAM itself worked under a three-year projection? A. Correct.

Q. Might I pause there to ask you this, what does re-optimised mean? A. One re-optimises by bringing into our problem the most up-to-date information and give basic balancing prices and so on having changed one achieves a new optimum which is the base solution, the least cost solution to the problem we have set the computer.

Q. You do that because you are looking at only one year ahead whereas GRAM looks three years ahead? A. In essence the real point is that we are taking a look at the problem that much later in time, two to three weeks later; and so circumstances have changed.

Q. In 1974 all major supply programming and scheduling decisions were taken in London? A. Correct. 10

Q. Only minor short-term decisions were taken in Melbourne where, in addition to scheduling applicable to Australian operations, B.P. Australia advised on scheduling for Singapore refining operations (including through it Malaysia) and also the scheduling of New Zealand product imports? A. We had that advising role.

Q. Any re-optimising by the company in Melbourne had to be reported to London where the impact of local short-term decisions was evaluated and decisions taken as to the impact on the groups supply planning? A. True.

Q. I think since early this year B.P. Australia alone has carried out the optimising of B.P. Australia's supply function? A. True. 20

Q. During May of 1974 B.P. Australia as a matter of normal routine, computed a solution, that is to say a plan, for the period of August and September, 1974, which included a requirement for 64,000 tonnes of fuel oil (F201) to be shipped to Nabalco at Gove? A. True.

Q. The final solution was reported to B.P. London on 28th May, 1974, by telex No.800? A. True.

Q. You have that telex before you? A. Yes, correct.

Q. That was accepted by London on 29th May, 1974, by telex No.307, which is also before you? A. Yes.

Q. As a basis for the B.P. Australia stock exercise then in preparation? A. Correct. 30

Q. The B.P. Australia stock exercise of 3rd May, 1974, is set forth on telex No.412 of that date, in particular para.4, which had already firmly requested a 32,000 tonne cargo of F201 to arrive at Gove at cargo No.C956 between the dates 20th July, 1974 and 8th August, 1974? A. Correct. That appears at item 13.

Q. Could I just ask you what F201 is? A. F201 was a special grade promulgated throughout the B.P. group as the oil for supply to Gove for Nabalco.

Q. The solution referred to earlier had the purpose and effect of determining for the two months of August and September, 1974, the supply and refining pattern for the entirety of the Australian and Singapore operations of the B.P. group? A. True. 40

Q. It took effect from the time of its acceptance by London the following day as referred to earlier. Upon taking effect — (objected to).

Q. Mr. Tregoning, you have told us that solution which took effect by its acceptance on 29th May, 1974 — what was done in relation to the supply of crude oil in proportions in which it was to be shipped as a result of this solution which had been worked out between you and London by the use of GRAM and the local computer operations? (Objected to.)

10 Q. Mr. Tregoning, the solution having been agreed upon in May, 1974, what, from your knowledge of the system which you acquired in your time in London, as well as here, would have happened as a result of the acceptance of that solution? (Objected to; disallowed.)

Q. Mr. Tregoning, back in the days in 1972 or thereabouts when you were in London what would have happened at the London end following upon the agreement upon this solution which you have mentioned? A. London would have expected B.P. Australia to take the next step and prepare a time phased plan for those two months of August and September as well as an up-date of the months of June and July which had already been covered previously.

20 Q. Would London have taken, three years ago, a solution into consideration in making any determination about this programme, in relation to crude oil I mean? A. Yes, London takes account of the solution which is after all a rather theoretical exercise, it is only of value to experts. But there are certain important features and London would have taken account of these.

Q. And done what with them when they took account of them? A. Made decisions perhaps on crude sales or perhaps of acquiring product, sure that they could look after B.P. Australia's interests.

Q. Has the system changed to your knowledge since 1972 in relation to the action taken upon a solution being agreed? A. No, not on the solution being agreed, the system was the same.

30 Q. You said that London expected Australia to take some step following the acceptance of the solution: what was that step? A. It is the preparation of the stock exercise which was subsequently despatched on 31st May.

Q. Is that telex No.88 of 31st May, 1974? A. That is correct.

HIS HONOUR: Mr. Horton, so I can better understand where you are going, on what we have here from the witness there seems to be a good deal of comment made about this, at least as at 17th May and thereabouts B.P. was of the view the contract had been terminated by Nabalco by reason of the notice or whatever date in April it was.

40 MR. HORTON: Yes, so far as furnace oil was concerned.

HIS HONOUR: The last date was 24th July, and that gave rise as I understand it to the shipment on 19th July, which was in fact the last shipment of furnace oil.

MR. HORTON: Indeed.

No. 111
—
Defendant's
evidence: N. F.
Tregoning:
Examination
(cont'd)

HIS HONOUR: Although that may give rise to legal argument, that situation, there is no factual doubt about that.

MR. HORTON: No, your Honour.

HIS HONOUR: We know that a shipping notice was given in June; we know that one was given, allegedly by mistake, on 2nd July. There is a dispute about whether it was simply an oversight or whether it was some attempt to play it both ways.

MR. HORTON: Yes.

HIS HONOUR: About what requirement notices are you asking him? Is it relevant to know what was done about the other contracts, the motor spirit and so on? 10

MR. HORTON: No, because I understand they are local products.

HIS HONOUR: Do you want to ask him about the consequences of the requirement notice generally?

MR. HORTON: Not directly, because I don't know whether he ever saw the document that went to the Adelaide office from Gove. But just as to what steps B.P. took to put itself in the position of delivering 60,000-odd tons of oil in August and September. It also picks up the supply in July of about 19,000.

HIS HONOUR: I asked you whether this was to do with your claim and you told me in part it was, also the election. 20

MR. HORTON: The part that is to do with our claim is the shipment that arrived in Gove on 19th July, the last shipment, that is the step in our cross-claim. The rest of it relates to the programming and reservation of tank supplies and the like, fuel oil, for August and September. The latter two we put on the basis of detriment suffered by us.

HIS HONOUR: What I have not followed was the attitude in May when your contract was determined on 24th July by Nabalco.

MR. HORTON: Yes.

HIS HONOUR: On the last hearing you argued that irrespective of the validity of the plaintiff's notice there was a need for an election on the basis of that notice and that because the notice was expressed in an additional or alternative form there was no exercise of the right to determine the contract. 30

MR. HORTON: The election we were speaking of in that agreement — if I do not misrepresent my learned leader — was an election by reason of the contractual term, that is they served this counter notice or not, and no doubt served in terms which are ambiguous. The election I speak of is the election which springs up to either accept the repudiation or amend by decision.

HIS HONOUR: Are you talking about the entry into the Kuwait contract or the letter of 28th June.

10 MR. HORTON: We are talking about whatever repudiation it is my friend's ultimately allege. The particulars allege a repudiation based on 17th May, and there has been some evidence about that. They also allege conduct subsequent to that which it is said amounts to repudiation and there has been little or no evidence about that. The question of what is the acceptance of the repudiation, assuming there was an acceptance, is another question. Maybe it is the entry into the contract. We have not heard from my friend of the events or the election to accept the repudiation. Whatever event it was it would seem it would not have taken place prior to 10th June when Kuwait was first introduced to Nabalco — and one would have thought very much later. So arranging these shipments in the intervening period between the so called repudiatory act in part and the election, whatever on their part, would serve to close out that election.

HIS HONOUR: Where I am left somewhat stranded is how does that fit in with termination on 24th July.

MR. HORTON: It does not, Your Honour. It assumed the contract continued. It is the claim that is brought against us here; notwithstanding the counter notice. And until it was brought to an end by acceptance of a repudiation.

20 HIS HONOUR: But if my decision about the notice be right, and my decision about the other election on the plaintiff's notice also be right, why can it be said that your insistence on termination on 24th July and refusal to supply on the basis of which we have heard it itself a repudiatory act or subject to repudiation.

30 MR. HORTON: It is so said — and probably will be said by my friends — but it still has to be accepted to be effective. We will be submitting there was no acceptance. We will also say it was not repudiatory in the sense that one needs to find such conduct according to the authorities. We further put, if I may just add, that on the evidence we were offering to do all that we had to do under the contract, and that was to supply furnace oil. And that this activity of which evidence is now developing was activity under the contract. We are taking the view that although our notice was right, we could not be certain of it and the court finding which then was thought not to be going to be delayed to any extent at all, might find us having to take the risk of failing to supply fuel oil.

Your Honour's position is coloured a little by the old "without prejudice" conversations which loom large in the evidence. If you leave all that out, all that one has—

HIS HONOUR: I am not sure, and I do not think I should ask you now. Indeed that is something I have been asking myself, just what is left if one leaves out this conversation. I just wanted to understand where this witness's evidence is to fit in. You want to lead evidence on what was done in relation to ensuring supply on and after 19th July.

40 MR. HORTON: Yes, on and after, your Honour.

Q. On 31st May, 1974, B.P. Australia in its stock exercise of that date formally advised Products Branch, London, by telex No.88 par.5, of requirements for fuel oil cargoes of 32,000 tonnes (F201) to be discharged to Nabalco at Gove during the third quarter of 1974 as follows: Cargo No.C956 arriving between 10th and 24th July, 1974; Cargo No.C964 arriving between 14th and 30th August, 1974; and

No. 111
 —
 Defendant's
 evidence: N. F.
 Tregoning:
 Examination
 (cont'd)

cargo, which was unnumbered, arriving between 22nd September and 8th October, 1974? A. Yes.

Q. Would you look at telex No.88 then go to the fifth paragraph thereof; did that inform Products Branch London of the cargo No.956, did it? A. Correct, item 6.

Q. By what vessel was that cargo to be shipped? Does that appear from that or the subsequent telexes? I think if you look at the next telex you see a reference on telex 284 on the second paragraph to estimated time of arrival 2nd July? A. No, that vessel would be going to Kwinana. I do not believe there is a reference in these documents.

10

Q. Is there any material which indicates what cargo 956 was shipped in, what vessel it was shipped in? A. There would be any number of documents which would refer to that vessel which actually carried out the shipment but they are not in this court.

Q. Do you know which vessel it was, from your examination of the documents? (Objected to.)

Q. You may take it from earlier evidence given in this case cargo No.C956 came from Singapore to Gove, arriving at Gove on 19th July, 1974, in a vessel called Tamara and it was a cargo of 19,500-odd tons? A. Right.

Q. However, as late as on 26th June, 1974, B.P. Australia restated its requirements of fuel oil imports during August-September, 1974, to Products Branch in London and I think that is telex No.284? A. Yes.

20

Q. Does that appear in par. Bee in that telex? A. That is the restatement at the time.

Q. Included in this requirement was cargo No.C964 to be carried by the vessel Loida which was to load a cargo of 32,000 long tonnes of fuel oil for Nabalco estimated to arrive on 8th August, 1974, at Gove with a further cargo of 2,000 tonnes No.C968 to arrive between the dates 9th and 25th September, 1974, at Gove? A. That is correct.

Q. On the same day Products Branch London telexed noting the programme and in respect of cargo No.C964 suggesting that it be loaded at Singapore while cargo C968 was to be loaded at Aden and that appears from telex 773 par.Cee? A. Yes.

30

Q. At that point was there any further communication which B.P. Australia needed to make to B.P. London in respect of the cargoes referred to in telex No.284 to ensure their delivery? A. No, that telex No.773 from London was acceptance of our programme.

Q. On 28th June, 1974, B.P. Australia telexed Products Branch, London, with copy to Singapore advising that Nabalco has an alternative supplier for at least cargo C964 and perhaps indefinitely. Is that telex No.C326? A. That is the one.

40

Q. Then going to par.13; on 28th June, 1974 — (Objected to).

Q. I will leave par.13 and go on. It appears on 28th June, 1974, you received a telex on that date numbered 805 which related to the cargo C956 which had been programmed for Gove from London? A. That is correct, C805.

Q. Would you look at that telex please, in particular to para.Dee. You see the reference there to "handy vessels available load Singapore end July-August as follows" and the names of various tankers set out? A. Yes.

Q. What are "handy vessels"? A. It is a synonymous term for a general vessel, which has already been referred to. A vessel normally up to 25,000 tonnes, the smaller class.

10 Q. Referring to par.14: on 1st July, 1974, B.P. Australia telexed Products Branch — and that is in telex No.342 — and does that telex relate to the availability of other ports for the vessel Loida in Australia, other than Gove? A. Yes, it does, it tells London that we could not accept Loida anywhere else but Gove at the time.

Q. Do you know whether you made any inquiry about any other port, apart from Melbourne which is referred to in that telex, as alternative for the Loida cargo? A. The other physical one was Kwinana but the stocks of fuel oil were that Loida would have had to wait many days before being able to completely discharge.

Q. Did you make some inquiries about the stocks at Kwinana? A. It is part of my job to know the stocks at Kwinana from day to day.

20 Q. On 1st July, 1974, Products Branch telex B.P. Australia — that is telex No.839 — and there is a reference in that telex again to handy vessels? A. Yes.

Q. In par.16 you referred to — (Objected to).

Q. As a result of the cancellation of the proposed shipment to Gove in the Loida, what had to be done? (Objected to.)

Q. What was done as a result of the cancellation of the Loida shipment? (Objected to.)

Q. Under your direction? A. We had a responsibility to accept the oil from the Loida cargo in Australia and after much to-ing and fro-ing a programme had been established to accept that oil into Australia. The oil had to be moved in suitable handy vessels and London decided to put — (Objected to).

30 HIS HONOUR: Q. I think what we would like to know is just what happened. Did it go somewhere, was it taken in somewhere in Australia or taken to New Zealand? A. All of the other oil produced at Singapore to my understanding was produced for export and came to Australia.

Q. But we are talking about a particular consignment, aren't we? A. Your Honour, refineries do not really set aside particular oil until they know the hour that ship arrives.

HIS HONOUR: Q. I understand that, but you were asked about a particular shipment.

MR. HORTON: Q. The shipment that was to come on the Loida? A. Yes.

No. 111
 —
 Defendant's
 evidence: N. F.
 Tregoning:
 Examination
 (cont'd)

Q. Obviously it did not come on the Loida, I think you said it came on handy vessels? A. It did.

Q. Do you know how many? A. Basically the oil was reblended and transferred to Australia in handy vessels.

HIS HONOUR: Q. When you say reblended, what was involved in that? A. The oil for Gove was a heavier grade than the oil we could expect for most of the installations of Australia so therefore it requires diluant gas oil to be added to the F201, the Gove grade, in order to make it useable as bunker fuel generally in Australia.

Q. So it was reblended and brought to Australia in handy vessels? A. Correct. 10

Q. In two, I think you said, is that right? A. That is correct.

MR. HORTON: Q. That, I suppose, required some adjustment of your shipments to Australia? (Objected to.)

Q. In your capacity as head of the Supply Department did you have the overseeing of imports from places other than Singapore of fuel oil for places in Australia? A. In essence, yes.

Q. What are the other places that fuel oil used to come for B.P.'s other customers and for its own use, bunkers and so on in 1974; and I specifically refer to August-September? A. The normal sources other than Singapore refinery were Aden, Bandemashar and Kuwait, that is Mena Alahmadi. 20

Q. Did your programming function involve you in programming shipments in the future of fuel oil from these places in the Middle East that you have just mentioned, in 1974? A. We listed the requirements for those vessels to be programmed.

Q. When you got the 64,000 tonnes approximately of the reblended oil from Singapore did you make any alteration to your programme for importation of Middle East fuel as a result of getting this extra tankage? A. Certainly our tanks were already programmed to be almost full, even with this extra 60,000. So when we had to accept the extra 60,000 tons we did ask London to cut back our Persian Gulf imports. 30

HIS HONOUR: Q. When you say London, do you mean B.P. Trading? A. Products Branch in B.P. Trading, yes your Honour.

MR. HORTON: Q. Can you estimate the number of hours or days that that would be of extra work done by the Branch that you control as a result of the planning of those two shipments and their cancellation and what flowed from their cancellation? A. It was a very significant fact; I would feel that of the ten or twelve days that elapsed between the Nabalco cancellation and finally coming up with a reasonable programme, one of my programmers plus myself had devoted say three to four man-hours to that subject alone, and also its repercussions on other imports. 40

HIS HONOUR: I don't quite understand the last part of the answer.

MR. HORTON: Q. What were the repercussions on your other imports, in the Middle East? A. In accepting oil out of Singapore rejected from Gove, one of the answers was quite tight date ranges of availabilities out of Singapore and one works to accept this in Australia without delay.

No. 111
—
Defendant's
evidence: N. F.
Tregoning:
Examination
(cont'd)

Q. What did that then involve, the necessity to work under tight ranges? A. We were involved in changing ports of discharge and general reprogramming our imports which were accepted around the coastal installations.

Q. From Singapore as well as from other ports of origin? A. Yes.

10 Q. Why is it you have to work to a tight schedule of acceptance? A. Singapore does not have the flexibility of the operation of the Persian Gulf B.P. Refineries. The cargo becomes available on a particular day and a given number of days after that the tanks are full. One either lifts the cargo before that given day or Singapore refinery would be forced to reduce output.

Q. I think you mentioned you and your assistant worked three or four man-hours over that period? A. Yes.

Q. Is that the total number of hours or do you mean to say it was three or four man-hours a day? A. I believe I said man-days.

HIS HONOUR: You did say man-hours, but you mean man-days? A. I do, your Honour, yes.

20 MR. HORTON: Q. Does that mean that you yourself worked three or four days and your assistant worked three or four days also or between the two of you it added up to one man three or four days work? A. One man three or four days work, but this was not the only problem at the time.

(Telex tendered without objection, other than the one previously mentioned: and marked Ex.66)

CROSS-EXAMINATION

MR. OFFICER: Q. It is important for the optimising process that you mentioned for your department to be kept up-to-date with anything relevant to supply programming? A. Correct.

No. 111
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Defendant's
evidence: N. F.
Tregoning:
Cross-
Examination

30 Q. In May-June of 1974, was your department advised by B.P. that they regarded the Nabalco contract as terminating in July 1974? A. I had heard that there was talk of the contract terminating on 24th July, I believe, but this was not seen in any way to affect supply.

Q. Were you made aware that on 16th May B.P. told the Prices Justification Tribunal the contract was terminated in July? A. I was not.

Q. Were you told that there were negotiations going on about a new contract to take effect after July? A. Yes.

Q. Or as from July? A. I knew discussions were taking place concerning supply after the 24th July.

No. 111
 —
 Defendant's
 evidence: N. F.
 Tregoning:
 Cross-
 Examination
 (cont'd)

Q. You were told also I suppose, were you not, that B.P. had told Nabalco they had no objection at all to Nabalco looking for a furnace oil supply from some other source? A. I was not told that.

Q. Did this communication to your department of whether the contract was terminating in July — were they communications to your department in written form from some other department or from management? A. I think we would have sighted various cables which I would have read on the subject and the rest of it would normally have been telephone conversations which are our normal means of communication.

Q. You did read a number of telexes — you said cables, you meant telexes I suppose? A. Synonymous to me, yes. 10

Q. You did read a number of them on the B.P.-Nabalco situation? A. Yes, I would not know whether it was two, or four or what, but yes, I was aware that something was happening.

Q. It would be right to summarise your information, would it, by saying that the contract with B.P. was, you believed, terminating but that there was going to be some other arrangement reached which would require supply. Is that a fair statement to make? A. That is a fair statement.

(No re-examination.)

(Witness retired and excused)

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No. 111
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 Defendant's
 evidence: P. B.
 Abt:
 Examination
 (cont'd)

PAUL BRENNAN ABT
On former oath: Examination continued:

MR. STAFF: Q. Mr. Abt, could you tell his Honour in your your words what the relationship between Worldscale and the Afra rate is? A. Yes, I will try. It is well to remember that Afra is generally stated in terms of Worldscale although they are two different things. Worldscale has as its base the assumption that a vessel of approximately 19,000 tonnes between any given known tanker voyage in the world uses so much fuel has a certain daily operating cost, proceeds at a certain speed and for each given voyage, regardless of length, that is stated in terms of dollars per tonne. The purpose of that statement is to have a common base for each known voyage in the world so that at any given moment Wordscale 100 for each known voyage can be stated in terms of a percentage of Worldscale. There is a Worldscale 100 rate for each possible tanker voyage route in the world; the longer the voyage the higher the basic rate. 30

HIS HONOUR: Q. Are they all Worldscale 100? A. Each of the basic index, yes.

Q. So that there is a Worldscale 100 for, say, Aden-Gove and a Wordscale 100 for say Singapore-Gove? A. That is correct, and one of the reasons you do that, it is very common in the oil business to have what they call a time charter where a voyage — the charterer makes a contract with the owner to use a vessel for a certain length of time and he can go any place in the world where tankers normally go. By 40

having such a thing as Worldscale you can build a rate in Worldscale which will be different for each given voyage. If he goes, for example, from the Persian Gulf to Gove, on the first voyage and back to the Persian Gulf, then to the North West Europe, a different rate applies but as to Worldscale it theoretically will return to the owner the same amount of money.

Q. Per day, per week or per month? A. Per voyage.

10 Q. Per voyage? A. Yes, per round trip voyage. Now Afra — I don't know the historical development of it — but the make up of Afra is an estimate of the average cost of operating every tanker that is under hire or owned since, I believe, 1950. It may be a little earlier than 1950. That includes time charters, it includes spot charters, it includes company owned fleets, it includes consecutive voyage charter parties, and all of those numbers are averaged into what is known as the Afra rate which is up-dated every month for the month ending the middle of the previous month.

20 Q. So you lump together all kinds of charters? A. In every trade and the rate differences that are quoted in terms of dollars per tonne for several different categories, the smallness of which would be the general purpose vessels which are — I forget the exact size — but up to, say, 20,000 tonnes. The next category would be medium range vessels which run 20 to 35,000 tonnes, would have a higher per tonne rate applicable because there are fewer vessels. I mean, the G.P. would be higher than the medium range; the L.R.1 category would be, say, from 45 to 79,000 dead weight tonnes and for each of those there is a — it is translated into Worldscale every month and that would represent the average cost of all tonnage used in the different categories uptodate to the 15th, I believe it is the 15th of the prior month. The Afra probably was created mainly for inter-company transactions and to be representative of a long term communication of the cost of operating tonnage of different sizes.

30 Q. Where does Worldscale get its figures from? A. Worldscale I believe for certain voyages they are done by some brokers in London; for other voyages they are done by brokers in New York and the calculations themselves are done by members of the Worldscale panel. The information comes from — the members of the panel are brokers and have available to them in the course of their business the cost of port charges and bunkers and those changeable items to Worldscale that are incorporated, well, in the case of port charges they are changed if they are significant through the year, and in the case of bunkers once a year, on January 1st. But the source of that information is the actual cost of bunkers at a particular port. These brokers themselves are running ships are — in some instances they are thoroughly acquainted with the ins and outs with the cost of operating a tanker because that is their business really, to know that. They get it from the owners, they
 40 get it—

Q. Both Afra and Worldscale are freight indicators, are they? A. That is correct.

Q. They are being used mainly by the larger oil companies internally for their long term contracts? A. That is correct, although it is also at any given moment a fairly accurate indication of the average cost of operating the different sized vessels.

Q. What do you mean when you say Afra expressed itself in Worldscale? A. When a dollar per tonne figure is arrived at as being the cost of operating a tanker,

No. 111
 —
 Defendant's
 evidence: P. B.
 Abt:
 Examination
 (cont'd)

then it is applied — say you come out with \$5.88, you would apply that number to the particular Worldscale index for the voyage in question, and then you have an Afra rate.

Q. To make it easier, you mean is \$5 and goes up a dollar, it becomes 120 Worldscale, or what — I have just made it 6-5ths — obviously I'm wrong? A. I'm sorry, your Honour I don't follow that.

Q. What I don't understand, you told me Afra is average freight rate? A. Average cost.

Q. Average cost, and it is given in terms of Worldscale? A. That is correct.

Q. Supposing the average cost goes up in a given year, supposing it is plus 20% by June compared with, say, January. How does that reflect in the Worldscale, how is it expressed? A. The average cost goes up 20%? 10

Q. Yes, 20%? A. Well, then it would come out as — if Worldscale in January was — if the Afra rate translated into Worldscale was 110 for the average voyage any place in the world and it went up and it would come out as Worldscale 120 or whatever that increase would be on the average Worldscale index for every voyage in the world.

HIS HONOUR: I'm not sure that I am much further forward. To the extent that I am not it is my fault.

MR. OFFICER: I think it is in Mr Colish's report. 20

WITNESS: I think Mr. Colish had in his report a fairly good explanation of both of those.

HIS HONOUR: Q. He does not explain Worldscale, does he — or does he? A. Yes, I think at p.14.

HIS HONOUR: I have read pp.13 and 14. Is there something else I should read? I don't think I should take any more time over it at the moment.

MR. STAFF: Q. May I take you to p.9 of your report par.2.14(d) where you speak of the spot market for both transportation and fuel oil being lower than the terminal market and you say you do not accept as realistic . . . (reads) . . . 1974 or otherwise — for reasons which you would like to elaborate. What are those reasons? A. Well, the term "spot" in either the tanker trade or the oil business is simply meant to denote a way of doing business that means you do it once and then you have another transaction. It is a method that most companies use to take advantage of down turns in the market for any given product that will not be deflected in the term market for that product or service until much later. The point is the spot market is more indicative of a truer market at any given moment than a term market, or it should be. 30

HIS HONOUR: Q. What has been put to me, or will be put to me finally is that to supply a place like Gove which, as you may know, is quite isolated, if an essential requirement such as fuel oil, it was simply too much of a risk to expect there to be at the necessary times tankers available to carry the oil? A. Well your Honour, I would say that the risk of supply at Gove is not increased in terms of 40

reliability of supply versus any other arrangement you may make. One does run a risk that at a given moment you would have to pay a substantially higher price for the combination of product and freight or you might pay a price that is substantially lower, but you would never have a risk in terms of not being able to get a tanker, and in normal times, not being able to get a product, your risk is no greater. The real risk, as I would view it in security for an installation such as Gove would be in a tanker sinking. If you choose the charter in a tanker versus each time, you of course will have a different rate; it will be higher or lower than you last paid.

10 The same is true for the product but you do not only — normally in a spot transaction you have the option of dealing with more than one supplier of crude in freight; in fact, that would be the normal way one would buy in the spot market. You would contact a number of potential sellers of freight and a number of potential sellers of product and you would choose the one at the given moment—

Q. You say you would have no shortage of bidders for the job at any given time in say 1974? A. Certainly not, not in a — no, there were plenty of tankers around and even of the smaller size, and certainly plenty in the range of 25 to 60,000 tonnes, and at that particular time there was a surplus of fuel oil and this was reflected in spot market prices being lower than term prices and the same is true with freight. There was a surplus of vessels, or a surplus was becoming apparent at that time and freight rates were falling rapidly which was more reflected in the spot market than in the term market, at that time.

20 But I don't believe, your Honour, there is any implication in the word "spot" being something bad; it is something that people would normally do, even in having a — I wouldn't hesitate, for example, if I were running Gove to keep a small percentage of my requirements open to my purchase on the spot market where I would not necessarily have to, but I could if market conditions were such that I could take advantage of lower prices.

Q. Since you have said that, would you in, say June of 1974, have advised Gove, as a consultant, to deal in spot and not otherwise? A. Well, your Honour, it is difficult to place myself in that exact position but from what I have been able to determine I think my advice to Nabalco may have been "buy one or two spot cargoes". The risk was minimal and I would feel, I think I would have felt that one would have a better feel for more of a market term rate than one could get by dealing very quickly simply to meet the deadline, as I believe Nabalco was probably and understandably doing. That both spot crude prices and spot freight prices were lower at the time and trending lower. So I would not have seen any risk, even on the side of paying more money than either B.P. or K.N.P.C. or anyone else was offering at that time. And the question of would a tanker be available when I needed it, I don't think would be a worry at all. Even in a high freight market climbing higher, there is always tonnage around because people play this market all the time. The question is would you have to pay more and the answer is yes in a rising market; in a falling market you pay less. So it is a question of price risk rather than security when you talk about spot, and at this particular time I don't think there was any risk on price, at least for, as far as you could see, the next two cargo requirements.

40 MR. STAFF: Q. Looking at the situation in retrospect, Mr. Abt, that is at today's date, having regard to what you know has happened since June of last year, both in relation to fuel oil and vessel supply, and prices of each, what would you say about spot as against term arrangements? A. Well, certainly Nabalco, with the value of hindsight, could have bought all their requirements spot and come out very

No. 111
 —
 Defendant's
 evidence: P. B.
 Abt:
 Examination
 (cont'd)

much better financially. Now, I am not saying there that that was the — in response to your Honour's question, I was saying for a cargo or two, a period of one, two, three or four months, but I think it is fair to say that the market in both term and spot has trended downward, even in the case of fuel oil where there have been — I don't know how many cost increases on crude got reflected in fuel oil posting increases; there has not been a market increase — there have been increases by the P.G. countries taking more money, but not in terms of market supply and demand. So it has been a constantly falling market in the buyers' favour, whether one bought spot or term.

MR. STAFF: Q. I gather you are saying that was whether one bought spot for a couple of cargoes or so and looked around at the term market and then entered into a term contract? A. Right. 10

Q. Or whether one continued to buy spot? A. Right. As things have turned out either way would have been more financially advantageous to Nabalco.

Q. And of course I think you said looking at the situation in June 1974 it was your opinion that the market was, in both fuel oil and ships, was going to go the way it did? A. Yes.

Q. That is as you saw it as a forecast in June 1974? A. Yes.

HIS HONOUR: Q. I think what I will need to know eventually is how strongly you view this. You see, what will be said on the one hand is that here was a company outside the oil industry, the recent oil crisis well in its mind, needing fuel oil so to speak as its life blood and in its view — that view may be wrong, but in its view at the time, having lost its permanent source of supply, faced with that kind of situation was it acting unreasonably in doing what it did, or was the only reasonable and prudent course to do what you say and at least watch the market for two or three months taking spot deliveries as necessary in that time? 20

In other words, we might all be confronted in our daily lives with a question of what course of action we take in a particular set of circumstances and hindsight might show us that one was the preferable course, but looking at it with foresight was it reasonable in the circumstances to take either one, or was it right to take one and wrong to take the other, and then I would like to know how high you view this. 30

I appreciate what you are saying about preferable course, but in your view was it one that was simply dictated in that situation as the only one reasonable to take? A. Well, your Honour, I feel what mitigates — if there was something wrong in Nabalco's decision, it was making such a quick decision.

I believe it is unreasonable to even have a chance at making a good decision on a three year contract of the type we are talking about, having one week or two weeks from Australia, and I simply have the impression taking the lower of the initial four that were tendered to them — that is on the freight side — certainly tanker operators will operate in this fashion, they always quote higher than they expect to get, it is normal business practice, sometimes considerably higher, especially in a changing market as we had at that time. 40

It was trending downward and it was going downward very fast in terms of spot, but owners were trying to hold the line on the term market and I think common sense would have dictated waiting and not exhibiting that urgency.

Had Nabalco had — had Nabalco the luxury of waiting — and I am not sure it was luxury, but had they waited certainly they would have gotten a better rate and the longer they waited the better rate they would have got on a term contract.

I do not feel there was any risk whatsoever in waiting at that time on the basis of what was known generally in the industry about what was happening to fuel oil prices and to transportation rates and the availability of spot transportation and spot fuel oil. I just — my course would have been to wait in a falling market.

10 Q. But as a consultant and with your experience are you prepared to say that their course in the circumstances, and looking at it from say June of 1974 ahead, not backwards with hindsight, are you prepared to say in your view their course was unreasonable and wrong? A. I would say it was bad judgment.

You know — again this is hindsight, I certainly don't — I could not build a case myself from what I know now of doing what Nabalco did.

The impression I have is that everyone had very fearful consequences of dealing in the spot market at that time and it is nothing to be fearful of. Your risk is price, you may have to pay a higher price at any given moment but I don't believe you had that worry at that time; it was not availability of tankers or fuel oil.

20 MR. STAFF: Q. Mr. Abt, having regard to your views as to the situation, looking forward from June 1974 of the probable course of the market, would you with your experience think that Nabalco had acted reasonably in entering into the freight contract which they did enter into in 1974? A. There was nothing wrong with the freight contract.

In my view there was something substantially wrong both with the rate and to the escalating factors that were in the contract. In other words, the concept of getting a c.o.a., contract of affreightment, certainly makes sense. The problem was the rate which was paid for that particular kind of contract and the escalation factors that were incorporated in the contract. Those factors I feel were — left something to be desired.

30 HIS HONOUR: Q. By the rate you mean the original 1.70 and the escalation being the fact that it transferred to the following year? A. That is correct, your Honour; from the two factors one is the rate being high and the other the non-market factors having an automatic increase in the base rate.

MR. STAFF: Q. But what I was seeking to put to you — I think I did not quite make myself understood — what I was seeking to put to you, Mr. Abt, having regard to the market conditions in June 1974 was Nabalco in entering into the Concorde freight contract, which it did in fact do in June 1974, in your opinion acting reasonably, that is, with all the provisions of the price structure and the rest that are in it? A. Did you see reasonably, Mr. Staff?

40 Q. Was it acting reasonably in your opinion? A. No. I mean, perhaps I would choose a different word. I would say they entered into a non-competitive from their point of view type of contract; they could have done much better.

HIS HONOUR: Q. Is it correct to say that in your view they entered into a contract that was well above that offering and obtainable on the market at that time? A. Yes.

No. 111
 —
 Defendant's
 evidence: P. B.
 Abt:
 Examination
 (cont'd)

MR. STAFF: Q. And in your view, at that time if you sought response from some tanker operators or owners and received only four responses, would you at that time think that a potential customer, such as Nabalco, would have been acting reasonably in simply selecting one of the initial four responses, that is at June 1974? A. I have the impression, and I could be wrong on this, that Nabalco did in fact choose Concorde because they were some 30 points below what the other three bidders put to them. Whether or not there was a negotiation over the rate eventually entered into I don't know, but I have the impression that there was not.

In any event, I certainly would have gone to other — asked the broker to go to other owners and get other indications. 10

Q. And that would be in your opinion the ordinary course that would be followed? A. Yes.

HIS HONOUR: Q. Is it customary for brokers to advise in those circumstances or do they simply take the instructions of their clients? A. I think normally, your Honour, brokers would take instructions and they would advise, if their advice was asked for.

Normally they are told that "We are interested in a contract and here is the rate we would like to pay," and there is a dialogue that goes on, "Oh, that is way below the market", and you might say what is the market and you usually start out at very wide differences between owners and likely charterers. 20

Q. Do brokers act for both parties or only for the person seeking the contract? A. They generally act for the person seeking the contract. That person might be an owner who is seeking to let out his ship and it might be the charterer who is seeking to charter in a ship, but he only acts — with rare exceptions he acts for one or other party.

Q. Not for both? A. Not for both.

No. 111
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 Defendant's
 evidence: P. B.
 Abt: Cross-
 Examination
 (cont'd)

CROSS-EXAMINATION

MR. OFFICER: Q. Mr. Abt, you have said several times that "Afra" is a reflection of average cost? A. Yes.

Q. Worldscale is a calculation of cost, is it not? A. Yes, for a specified tanker, yes. 30

Q. And the essential difference is this, is it not, Worldscale is a calculation of, may I call it, today's cost; it may be a few months behind but up to date costs, correct? A. Not quite.

Q. Of costs calculated as at September or something and coming into operation in January? A. I don't believe it reflects realistic operating costs. However—

Q. That is its aim? A. Its aim is to reflect approximate cost.

Q. Now I put to you that Afra is an average of the rates being paid under arms

length contracts within which I include charters, isn't that correct? A. No, it also includes a company owned tonnage.

Q. May I take it, divide the two points, first it is an average of the rates being paid under still current contracts? A. Right.

Q. So that if a charter happened to be entered into five years ago for five years and it is still current when the Afra calculations are being made, that charter is reflected? A. Correct.

10 Q. So the effect to which it reflects operating costs is quite accidental, isn't it?
A. Yes, I would say that operating costs are more a factor of Worldscale than they are of Afra.

Q. And of course not only does Afra measure the average of affreightment rates rather than operating costs, but it also includes in the Afra contracts that may be four, five years old? A. That is correct.

Q. And it may or may not have in them adequate escalators? A. That is correct.

Q. Now in relation to your comments this afternoon on spot, would I be right in saying that you know of no large public utility, or other large consumer of fuel oil, which operates wholly on spot purchases and spot affreightments? A. That would be correct.

20 Q. So you will agree that the view generally taken by the controllers of these organisations is that it is preferable or more prudent for them to have a term supply and term affreightment rather than spot? A. And I would hasten to add—

Q. Would you agree with that question, though you want to add a qualification? A. Yes.

Q. May we have the qualification? A. That if a — say a utility or a large fuel oil buyer would normally buy from more than one supplier both for security and diversification of course.

HIS HONOUR: Q. You mean he will have term contracts with two suppliers?
A. Yes. I am not saying this was a practical thing for Nabalco but a larger utility.

30 MR. OFFICER: Q. That is spreading the risk but none of them spread as far as having wholly spot? A. That is correct.

Q. It was not long before mid-1974 that there had been embargoes in the Middle East? A. That is correct.

Q. And there were still fears of the Arab countries or the OPEC countries increasing their participation? A. Increasing participation, yes, but I think the embargo fear had left by mid-1974.

HIS HONOUR: Q. I suppose anyway, if we are going to talk about embargoes, you were inclined to say this earlier that where you have got a term contract or spot supply embargoes are still going to affect it? A. Yes.

No. 111
 —
 Defendant's
 evidence: P. B.
 Abt: Cross-
 Examination
 (cont'd)

Q. Depending upon the force majeure clause in the contract that may mean the end of the contract if there are embargoes? A. That is correct.

MR. OFFICER: Q. So far as there was any risk of embargo, and the oil world had not wholly excluded any possibility of embargoes for the future, had it? A. No, of course not.

Q. So far as any such risk did exist a buyer of fuel oil under a term contract would be somewhat safer than a buyer merely on spot? A. Yes, you have a certain degree of security in a term supply contract.

Q. The holder of a term supply contract is going to be in a better position to have supply than a person who merely buys spot on the market? A. Generally speaking, Mr. Officer, I think that the main reason that that is true is that someone who is buying under a term contract in the event of a force majeure type of affair a reliable company would usually spread its available supplies over its own subsidiaries and to its long-term customers equally. In terms of the spot market you are only buying one cargo so you get a lot of potential people wanting to buy spot at a time of shortage and you simply don't have it. 10

Q. You don't have the long-standing association to protect you? A. That is right.

Q. Would it be right, Mr. Abt, that with the knowledge you now have you can say Nabalco would have done better had they bought all their requirements on spot than they have under the Kuwait contract? A. Yes, I am saying that certainly. 20

Q. You also suggested as a course they might have followed that they might have bought their first two or three shipments on spot? A. That is correct.

Q. To some extent that judgment also is expressed knowing what has happened, knowing that the trends mid-1974 which you believed would happen have happened? A. I would say so, yes.

Q. And of course I suppose one of the reasons why spot is not wholly used as a method of business by public utilities would be the fact that it takes a fair amount of organising to arrange spot supplies which will wholly maintain a business to which the supply is critical, is that right? A. I think that is true, Mr. Officer, but I think another perhaps more important reason why it is not on spot is that generally utilities can pass on — they have to have some knowledge of what their costs are in dealing with public type commissions and so on and so forth, and if they were only in a spot market they do not know what their costs are for any given period. It is somewhat easy for them to pass on to their own users and hold out a contract and say, "Look, our fuel oil cost went up," than it is to demonstrate what happens to them in the spot market. 30

Q. But nevertheless it is a fact, is it not, that it would take a fair amount of organising if, for example, Nabalco were to buy all their fuel oil by spot purchases? A. Certainly. You would have to have a full time tanker man. 40

Q. And I think you said in your evidence that in fact some people have — I am not sure that these are your precise words — played the tanker charter market, is that right? A. Well, certainly there are people that do it all the time.

Q. And I suppose another reason why large consumers of fuel oil, for example, big mining companies, do not as a rule buy their fuel oil on spot is because their main business is the mining or the production or whatever their business is rather than the playing of a tanker market? A. I would think that is right.

Q. May I go back for a moment because I think we unwittingly passed it over; the Afra rates, I suggested to you that they do not include charters between related companies, parent and subsidiary or a brother subsidiary? A. No, but they do include the cost at an estimated figure of the tonnage which is utilised by a large company in shipments to a subsidiary.

10 Q. The Afra includes charters by say one subsidiary of B.P. to another subsidiary of B.P.? A. Well, most charters as between related companies are done on the basis of Afra. What I am saying though, the Afra rate that is announced every month includes a certain cost that in fact is estimated as being the cost of all the ships owned by say B.P.

Q. I thought we agreed a little while ago that Afra is an average not of operating costs but of charter or contract rates as between owner and charterer or owner and — A. It includes a profit element obviously because it is the cost to the charterer not to the owner.

Q. But it is an average of the prices that is paid for a vessel? A. That is right.

20 Q. It is not an average of the cost of the owner operating the vessel? A. That is correct.

Q. Now if one subsidiary of B.P. charters ships from another subsidiary of B.P. the price paid by the chartering subsidiary is not included in Afra, is it? A. It usually is Afra.

Q. I am not saying upon which rates the inter company charter is made, I am asking you is it an inter company charter of that sort, whatever the — A. I don't believe so, Mr. Officer. I am not positive of that.

30 Q. I think we are then more or less in agreement that your belief is that there is included in Afra only what I will loosely call arm's length charters and arm's length contracts? A. Right, but the cost — B.P.'s fleet or Mobil's fleet or Exxon's fleet would be included in there at a cost or whatever that is the average of all the other costs that are in the Afra rate, the cost of all the other factors that are in the other rate.

Q. You say the people who produce the Afra calculations say "Well now, we will take all the arm's length charters and affreightment contracts and apply the average within the classes of size of ship to the ships that are subject to the arm's length charters and thereby get an average"? A. For company owned fleets.

40 Q. But is not the first process to take the arm's length contract, apply the charter rates thus shown or the rates thus shown to the ships of the tonnage that are in fact subject to those arm's length charters and thereby get an average rate for a ship of a given size? A. I believe you are saying the right thing, Mr. Officer, but I am struggling to—

Q. Do the calculators of Afra then bring in the company fleets? A. Yes.

No. 111
—
Defendant's
evidence: P. B.
Abt: Cross-
Examination
(cont'd)

Q. By saying, "Well, we also have a million tons of company ship in that range"? A. Right.

Q. "We will apply the preliminary Afra rate for that range which we have got from the arm's length charters and assume that it applies to that million tons of company shipping"? A. That is my understanding.

Q. Irrespective of what rates are in fact paid between the two subsidiaries? A. That is correct.

(Further hearing adjourned to 10 a.m. Wednesday, 3rd December, 1975)

ELEVENTH DAY: WEDNESDAY, 3RD DECEMBER, 1975

10

No. 111
—
Defendant's
evidence: P. B.
Abt: Cross-
Examination
(cont'd)

PAUL BRENNAN ABT
On former oath:

HIS HONOUR: Q. You understand you are bound by the oath which you took yesterday? A. Yes sir.

CROSS-EXAMINATION
cont'd.

MR. OFFICER: Q. You told me yesterday that if Nabalco were to organise its supplies on a spot basis that would involve Nabalco in some obligation to its organisation to cope with the organising of spot shipments? A. What I meant by that, you certainly would need an experienced tankerman. An alternative would be a very very trustworthy broker.

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Q. So either way one would be involved in some expense as compared with a term contract? A. If you chose to supply Nabalco spot it would require more time and more effort to keep up with current market trends, yes.

Q. Not only to keep up with market trends but also some additional expense in shopping around to ensure that your spot shipment was obtained on terms that it would arrive in Gove at the right time? A. I don't believe you would have a problem in that respect. The additional cost would be mainly in having a man who would be current with the market and make sure he was. There normally would be several different tankers available from different owners at a given time that would meet a given arrival time.

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Q. Perhaps I should put it slightly differently. Part of the function either of the employed tanker experienced tankerman or of the broker would be to look over the market and make a spot purchase and arrangements for delivery so that the product would reach Gove at the right time in accordance with Gove's needs. A. Certainly.

Q. In a contract of affreightment the shipowner has to himself arrange that the shipments will arrive at the right time. A. I don't believe so, Mr. Officer, that would be largely a function of the terms that are written into the contract. But unless the

shipowner's obligation is to maintain storage for a certain time it would be up to the charterer, in this case Nabalco, to notify the shipowner when they needed it.

No. 111
Defendant's
evidence: P. B.
Abt. Cross:
Examination
(cont'd)

Q. True, but the charterer being under an obligation, with some notice, to state his requirements and when he required it: it is then up to the shipowner to organise his fleet so as to discharge the required amount at Gove at or very close to the time notified by the charterer. A. I think it is basically correct but it would be more not the discharge that would be the owner's responsibility but the loading, in the case of Nabalco the Concord contract. In other words his obligation generates around a loading date rather than a discharge date.

10 Q. Can I say to load in time so he can discharge at the required time? A. That is correct.

Q. That is one of the tasks in a contract of affreightment which the shipowner undertakes? A. No more so than anything in any other type of contract of affreightment.

Q. Perhaps I should clarify what I mean by contract of affreightment. I am not styling the term charter as a contract of affreightment; would that be your terminology also? A. I am sorry.

Q. I am speaking on the one hand of single voyage charters, term charters and consecutive voyage charters? A. Yes.

20 Q. And on the other hand of a contract of affreightment; do you regard the contract of affreightment as being different from the first three types of transportation arrangements? A. Normally the obligation under any of the four alternatives you mentioned of the shipowner would be to load within a given range. Whether it be spot or a contract of affreightment.

Q. Perhaps I should leave out the spot. Take the term charter. The owner charters the vessel to the charterer for some period, six months, a year, whatever was the agreed period; and the charterer then takes all the voyages that ship is to make within a year? A. That would be correct, that would be a time charter.

30 Q. In a time charter the shipowner has no opportunity within that year or within that time of using the vessel other than under that time charter? A. That is correct.

Q. So within the stipulated time the owner does not have to arrange for the vessel to be in particular places at particular times other than the commencement of the charter? A. That is correct, he receives X amount of money per month or per day.

Q. Nor, under a time charter, does he have any opportunity of doing back loading? A. That is correct.

Q. Under a consecutive voyage charter the ship just shuttles from point A to point B; is that correct? A. Yes.

40 Q. The consecutive voyage charter would normally be for consecutive voyages for a stated period? A. Or for a number of voyages.

Q. So that again within the time or the time that will be itself in completing the stipulated number of voyages the shipowner has no opportunity of using the ship in any other way? A. Only if he substitutes another vessel for that, that is all, with the permission of the charterer.

Q. So that in the case of a time charter and in the case of a consecutive voyage charter, an owner having entered into it, looks for his income solely to that one charter; correct? A. That is correct.

Q. He has no opportunity of using the ship in any other way? A. That is correct.

Q. And he has no business obligation in his own interest to organise intermediate uses of the ship? A. That is correct. 10

Q. May we see if we understand each other in the use of the phrase "contract of affreightment". Am I right in suggesting that general understanding and your understanding is that as distinct from the time and consecutive voyage charter a contract of affreightment means that if in the time spell there is an opportunity to use the ship and for purposes other than those of the contracting party, Nabalco, the shipowner can use the ship for other purposes? A. That is correct.

Q. But to use the ship for other purposes he has to arrange interlocking other uses? A. Would you clarify that?

Q. In his own interest he has to arrange uses of the vessel that will slot into the time scale of observing his contractual obligations without disrupting them? A. Certainly, his basic obligation is to supply X number of tonnes in vessels of his option given the size categories that have been given. 20

Q. But he does have, in his own interest, this organisational task which is not made by the owner of a time charter or a consecutive voyage charter? A. He certainly has a scheduling task, not associated with time charterers or voyage charterers: but I would say the cost of that scheduling task is minimal. What I am saying is a man who has a fleet has to keep track of where his fleet is, whether it is being used by the owner or being used by somebody else.

Q. Being used by the charterer? A. That is correct. 30

Q. In the sense in which we have been using the phrase, "contract of affreightment", they are rare as compared with time charters and consecutive voyage charters? A. I would not say they are rare.

Q. I didn't quite ask you that, I said they are rare as compared with time charters and consecutive voyage charters? A. In business of the Nabalco type?

Q. In conveyance of fuel oil? A. Anywhere, is that the question?

Q. Yes. A. I would say so, yes.

Q. I suggest to you — because you said yesterday rates under contracts of affreightment were normally cheaper than rates for a time charter or consecutive voyage charter — that if your statement yesterday as to rates were correct one 40

would expect to see more contracts of affreightment? A. No, I don't think for that reason one would either expect to see more or less. The contract of affreightment, the normal contract of affreightment, is performed by a company which supplies both the product and the transportation.

10 Q. What I want to put — and would I be right in saying — and I am sorry I cannot put it to you because this bit of your evidence is not fully transcribed yet — that when you expressed the view yesterday that rates under a contract of affreightment were normally lower than under a time charter or consecutive voyage charter, you were speaking only of contracts of affreightment where the shipper was also the person selling the goods carried? A. No, I was speaking of contracts of affreightment generally. They are rare where the supplier of the transportation is not the supplier of fuel oil; but I would make that statement with regard to contracts of affreightment generally.

HIS HONOUR: Where the supplier and the carrier is the same, would it really be a contract of affreightment or simply a contract to deliver a commodity at a particular time? A. It would be a contract of affreightment, your Honour, it is just the way it is defined. He happens to be hauling his own material but the contract of affreightment is simply a contract to haul his own or someone else's material to a destination.

20 Q. Do you envisage there to be two contracts, one to supply FOB the port of shipment and another by the same party to carry? A. No, not — where the supplier of the transportation was the supplier of the material there would only be one contract.

Q. As there was in the original contract here by B.P.? A. Yes.

Q. But that is not a contract of affreightment in ordinary parlance, is it? A. I believe that is simply what is called a delivered contract. The contract of affreightment part refers only to the freight ask backs. That differs from the B.P.-Nabalco agreement in that a total price for both freight and FOB was rendered on discharge.

30 Q. I was puzzled in the calling of part of a supply agreement a contract of affreightment. I would have thought a contract of affreightment would have been one in which the carrier agreed to carry freight from a particular place to a particular place for a consignee? A. That is correct your Honour, if I said something different I didn't mean to.

Q. It was only this idea that the contract of affreightment was usually made by the person whose product was being shipped meant in effect by the division? A. I see what you mean. I guess what I should have said — I am sorry — that the CIF contract would normally be made by a company with both the product and the freight. I was in error.

40 MR. OFFICER: Q. Then if we refer to a contract of affreightment as being a contract entered into to carry the goods purchased from some person other than the shipowner — would that be a reasonable terminology of it to proceed? A. Yes.

Q. Was it in that sense that you suggested yesterday that rates under a contract of affreightment are normally lower than rates under a time or consecutive voyage charter? A. Yes.

No. 111
 —
 Defendant's
 evidence: P. B.
 Abt: Cross-
 Examination
 (cont'd)

Q. If that were correct, would you not expect that contracts of affreightment in the sense in which we have just spoken of would be much more common than they are? A. If they were the only factor involved, yes. I believe — if I may Mr. Officer — the reason contracts of affreightment are not as popular as — if I may write the lower freight rate indicated, if that would indicate — is that one must be a fleet owner to enter into — one must have more than one or two or three vessels to enter into a contract of affreightment. He must have the flexibility of supplying—

Q. Size of fleet? A. Size of fleet is a big factor.

Q. Are there any other conditions which reflect on the rarity of contracts of affreightment as compared with time and consecutive voyage charters? A. Yes, I would say that the market for fuel oil in the world is largely a term market controlled by the majors where they perform their own transportation. The other large market for fuel oil is in ships bunkers which is very much a spot type transaction. So the incidence of companies like Nabalco, the size of Nabalco, purchasing fuel oil in the market are relatively small compared to the movements of fuel oil in the world. 10

Q. Fuel oil is carried under time charters, is it not? A. Yes.

Q. And extensively carried under time charters? A. Not normally when one only has one destination for the fuel oil. If one has several different drop-off points, if you like, I think that would be the more normal route for the time charter. 20

Q. Apart from it being carried in time charters and subject to what you have just said, it is also carried in consecutive voyage charters? A. Yes.

Q. And it is of course carried in spot charters? A. Yes.

Q. And it is, though rarely as compared to the other three transportation arrangements I have mentioned, carried under contracts of affreightment? A. Yes.

Q. You told us yesterday that certainly in May 1974 there were a number of fleet owners who would have been interested in contracts of affreightment? A. I believe so.

Q. There are at all times in the world a number of fleet owners interested in carrying goods not restricted to goods owned by them? A. Yes, that is correct. 30

Q. So that we have the situation that there is plenty of owners who have the fleets necessary to enter into contracts of affreightment? A. That is correct.

Q. And yet we find that the contracts of affreightment entered into are rare in number as compared with the other types of arrangement I have mentioned: that is correct, is it not? A. I would say that is correct in the total carriage of fuel oil.

Q. And yet a contract of affreightment you claim is clearly at lower rates than under the term of the consecutive voyage charters? A. That is correct.

HIS HONOUR: Q. Is that because they get a certainty of business for their fleet of ships, or what? A. Your Honour I would say the main reason is that the fleet owner entering into a contract of affreightment can simply treat an additional commitment to carry as part of his own fleet requirement. So it may be scheduled 40

as if it was part of his own requirements where he has substitution possibility, the possibility of chartering or using the same vessel on other voyages, would take advantage of opportunities which might arise. And also it would put his vessels in position in a given trade to take advantage of additional business which he would otherwise be far away from.

MR. OFFICER: Q. Take a consecutive voyage charter. The ship for the given period or the given number of voyages is shuttling backwards and forwards earning all the time — apart from lay days? A. That is correct.

10 Q. So that in that respect a consecutive voyage charter produces more earning hours than a contract of affreightment? A. I am not sure that is true, Mr. Officer. Would you state that again?

Q. In a consecutive voyage charter the ship is just for the given period or given number of voyages shuttling backwards and forwards; there is no opportunity of looking for other freights? A. That is correct.

Q. And there is no necessity on the part of the shipowner to do anything by way of looking for other business? A. That is correct.

20 Q. And I suggest to you that under a consecutive voyage charter between points A and B the ship would normally have more earning hours than if the ship were under a contract of affreightment? A. Not between voyages but certainly to the extent that a ship owner did not utilise his fleet including the ones which are involved in the COA arrangement, to this false extent your statement would be correct. Going over one voyage, if he makes two voyages and gets paid for two voyages certainly his income would be more than a man who went one voyage and had no employment for the second voyage, which could be the case in a COA; but it clearly is not.

Q. I was taking the situation where let us say one had a consecutive voyage charter for 10 shipments Persian Gulf to Gove. A. Yes.

Q. And on the other hand the alternative was a contract of affreightment covering 10 shipments to Gove? A. Yes.

30 Q. The shipowner would have more earning hours in the consecutive voyage charter because the ship is just shuttling backwards and forwards then under the contract of affreightment? A. That is correct, providing the end user can receive the fuel.

Q. In mid-1974 though the panic may have died down a bit there was still very great uncertainty felt in the oil world, was there not? A. Certainly.

Q. Have you a copy of Mr. Colish's report? A. I have.

Q. Would you look at p.5 and read the press citations that appear on that page to yourself? A. Yes.

40 Q. You would agree, would you not, that at and around the dates which those citations bear those views were quite widely held? A. There seems to be a number of divergent views on different subjects here.

No. 111
 —
 Defendant's
 evidence: P. B.
 Abt: Cross-
 Examination
 (cont'd)

Q. Perhaps I should take the last two. Would you look at the second-last one which bears a date in May. I am not asking you at the moment whether you agree with it, but the view expressed there was a quite commonly held view, was it not? A. No, I could not agree that it was. May I say something here, Mr. Officer?

Q. Yes. A. In the overall context of this statement there is no doubt in my mind that it was the industry opinion that it was foreseeable future crude oil costs would be increasing as a result of increases to the producing governments. Beyond that I see nothing in those quotations that you could not find in arguments one way or the other.

Q. I am not asking you, as yet, whether you agree with them all. A. Yes. 10

Q. But take the second last one, there were a number of people, responsible people — whether you think they were right or wrong in the oil industry — who held that view? A. Yes.

Q. Would you look at the last one, whether you agree with it or not, there were many responsible people who held the thought that that was a fair assessment of the situation? A. Well—

Q. There were many who thought that was an appropriate description? A. No, not—

HIS HONOUR: It is really not an opinion, it is a statement of fact.

MR. OFFICER: Q. I am not asking you what you thought, but there were many who thought that was an appropriate description? A. No, I don't feel that is true. 20

Q. Would you look at p.6 of the report please. Read the first one from Petroleum Intelligence Weekly. Would you agree that whether you thought what appears in that quotation was correct or not, there were a number of responsible people in the industry who took that view? A. Yes.

Q. Would you read the last one on p.6 commencing "Sun Oil" from Platts. Whether you agree with what was there expressed, would you concede that there were many responsible people in the industry who did take that view? A. I am not quite clear here, Mr. Officer, in the second quotation whether "Sun" is a buyer or a seller. I mean in the context of the quotation that is attributed to them. 30

HIS HONOUR: It sounds as though they are a buyer, does it not?

MR. OFFICER: Q. Do you think it more likely that Sun was a buyer? A. Normally Sun is a large seller.

HIS HONOUR: Q. Your puzzle is you know Sun is a seller but the context of the article which show it as a buyer. A. That is so, your Honour.

MR. OFFICER: Q. Sun itself, is it a well owner? A. They have substantial production, yes.

Q. I suggest — and would you agree with this — that Sun always has been a

net importer? A. Net meaning they need imports to supply their domestic United States requirements or that the majority of their requirements are met by imports?

Q. Net in the sense of for their total purposes buying more, needing to buy in addition to what they draw from their own wells. A. For both — they both buy domestic and foreign, yes.

10 Q. To the extent therefore to which they were buyers from this report they were having the difficulties that are described there? A. The problem I would speculate that Sun was addressing itself to the general uncertainty of the short term market. At this time I believe people were thinking in terms of three months being very difficult to predict. I can't quarrel that Sun said this, it is a quotation and I presume that someone—

Q. You would be prepared to accept it as the sort of thing they might well have said? A. Certainly.

Q. Platts is a pretty responsible organisation, is it not? A. Not in my opinion.

Q. However, you would be prepared to accept, would you not, that Sun may well have expressed the view that is set out there? (objected to).

20 HIS HONOUR: Q. One of the difficulties is you would wish to see the whole article? A. Yes. I think this may have been taken out of context. I find it difficult to understand what they are talking about.

(Second last citation on p.5 and the first on p.6 tendered, without objection, marked as part of Ex. AA)

MR. OFFICER: Q. Mr. Abt, we know, apart from these Press citations that there was great worry and uncertainty in the oil world about the future? A. That is certainly true.

HIS HONOUR: Q. I suppose there still is, to a certain degree? A. I would say in the same extent, yes, to-day, it is also true.

MR. OFFICER: Q. Somewhat more in mid-1974? A. No, I don't believe so.

30 Q. However, with the uncertainties that existed in mid-1974, that made decision-making very much more difficult, did it not? A. Certainly.

Q. It made the wisdom of many decisions much more debatable? A. Well, I would certainly agree with your first statement, Mr. Officer. I find it difficult to know how one can find the wisdom of a decision debatable at the time it is made.

HIS HONOUR: Q. You mean you have trouble understanding the question? A. I guess that is what—

Q. I think what Mr. Officer is dealing with is perhaps something along the same lines as I asked you about yesterday.

MR. OFFICER: I am coming towards that.

HIS HONOUR: He is saying that you may have — (question withdrawn).

No. 111
 Defendant's
 evidence: P. B.
 Abt: Cross-
 Examination
 (cont'd)

HIS HONOUR: I think it is fair to say the witness does not understand that question.

MR. OFFICER: Q. Mr. Abt, in times of stability, it is very much easier to say of a decision, and I am not now suggesting one uses hindsight, in times of stability, it is easier to say of a decision made, that appears to be quite a right decision or a doubtful decision or appears clearly to be a wrong decision. A. I certainly think in stable times, with a little past history, in stable times, it is easier to justify any decision that is made in terms of past.

Q. And justify it at the time it is made before you know what the future holds?
 A. One

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Q. Because the future is expected to be fairly stable? A. And to the extent that people feel it is representative of the past, decisions are easier.

Q. I observe in part of your evidence yesterday, and I am referring now to p.394 at the foot of it, you standing as at yesterday, thought that in mid-1974 you would have felt that it was better for Nabalco to buy one or two spot purchases, spot cargoes? A. Yes.

Q. So you thought what Nabalco was doing in seeking straight away contract terms supply was understandable? A. Certainly.

Q. Would I be right in summarising what your attitude would have been in mid-1974, and I am asking you to put yourself back to that date and treat yourself as not having the benefit of knowing what has actually occurred after that date, and I ask you to assume that you were told that Nabalco had decided to seek straight away a term supply and term affreightment. You think you would have thought it wise for them to seek several spot shipments? A. I think it would have been possible to determine that both spot and long-term charter arrangements were trending rather rapidly downward.

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Q. Yes, but I am not asking you that at the moment. I am just asking you, you would have thought it advisable, even though you did not have the benefit of hindsight, for them to buy one or two spot shipments? A. Certainly, or to buy time, however.

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Q. But you, nevertheless, thought their decision to seek the term contracts was understandable? A. Certainly.

Q. You gave yesterday three points which you said make a contract of affreightment cheaper than time or consecutive voyage. Do you remember giving those three? A. I believe so, yes.

Q. The first two were flexibility to the owner and (2) he can put in different vessels of different sizes, or words to that effect? A. Yes.

Q. They are really one point, rather than two, aren't they? Flexibility and —?
 A. No, the first point, Mr. Officer, has to do with his ability to utilise the interim voyages in whatever way he thinks is best to obtain back-hauls, to take advantage of the spot market in a completely different area of the world, to perform some task for the owner company not related to that particular contract. The second point has to do with the flexibility of the owner in having the right to put in a range of

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tonnage size, like in the Nabalco contract, I believe his rights run from 35 to 66,000 metric tons which covers a broad range of tonnage.

No. 111
—
*Defendant's
evidence: P. B.
Abt: Cross;
Examination
(cont'd)*

Q. Of course, to some extent, his flexibility is curtailed by the volume for which Nabalco, for example, calls? A. Certainly, but he would include that in his plans, yes.

10 Q. If Nabalco called for 60,000 tons to be delivered at a particular time, and he put in two small vessels, rather than one 60,000 tonner, he would be suffering increased costs, would he not, in running two small ships, rather than one 60,000? A. He certainly would not have to incur increased costs. He may find himself in a position at a given time where he has more smaller vessels than larger vessels but that would be his, the owner's choice, as it is contained in the Concord Agreement.

Q. The third one you gave was an owner with business in the area of discharge, can arrange back-loading. Of course, in relation to contracts of affreightment, the rates quoted being cheaper, it is necessary to substantiate your third point for the owner before he enters into the contract to know that he can, or probably can, get back-loading? A. I think that would have to be on the owner's mind, yes.

20 Q. I think you, from the inquiries you have made in relation to this case, do not suggest that Concord knew before it entered the contract of affreightment of any back-loading of alumina as a probability? A. I would suggest that they probably did.

Q. Did know? A. Certainly.

Q. That alumina could be back-loaded? A. Certainly.

Q. And that they could get the business? A. There was a reasonable prospect of them getting some business.

Q. While or if oboes were used? A. Yes.

Q. You referred yesterday to the possibility of moving Indonesian crude to Japan? A. Correct.

Q. Japan itself has a very large tanker fleet, hasn't it? A. Yes, it does.

30 Q. A tanker fleet, which in mid-1974, was not wholly occupied? A. I would say that is correct.

Q. You would expect the Japanese purchasers primarily to wish to use the Japanese tankers, if possible? A. That would be the normal course, yes.

Q. You referred, also, to the possibility of back-loading fuel oil from Japan to Europe? A. That is correct — or to in-between points.

Q. Japan is the biggest importer from the Persian Gulf, east, is it not? A. Yes.

Q. And the biggest importer of fuel oil and product from Singapore, east? A. It would depend — I'm not all that acquainted with the statistics, Mr. Officer. Certainly Japan imports fuel oil sometimes; they export fuel oil at other times. As a

No. 111
 —
 Defendant's
 evidence: P. B.
 Abt: Cross-
 Examination
 (cont'd)

normal case, Japan, I believe, would be in balance except for low sulphur fuel oil which you can't get from the Middle East.

Q. It is a big importer of crude from Indonesia? A. Yes.

HIS HONOUR: Q. Do Indonesians export much these days? A. Yes, they are quite substantial, I think on the order of a million, six or seven hundred thousand barrels of crude oil a day and product.

Q. My recollection of the evidence we had in the other part of the case was Indonesian reserves were nothing like the Persian Gulf? A. That is correct.

Q. Their reserves were, to me, at any rate, surprisingly low.

MR. OFFICER: Compared with the Persian Gulf, certainly.

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HIS HONOUR: But even as compared with other oil-producing countries, they did not seem to have the quantities.

MR. OFFICER: I think they were less, my recollection is they were less than Venezuela.—

WITNESS: Yes, I don't know what the reserves are, but they are nothing like the reserves of the Middle East.

MR. OFFICER: Q. The Middle East, or Venezuela or Nigeria? A. Or Libya or Algeria; the Indonesian reserves are not great comparatively speaking. They do have the advantage of being a low-sulphur type crude oil which—

Q. And therefore much sought after by Japan with its ecology problems? A. That is correct. 20

Q. You would agree that the export of fuel oil from Japan westward, is quite rare, isn't it? A. It occurs periodically. I can't say how many times per year, but it is done; for example, I do know, because I was involved in the situation, that many cargoes of high sulphur fuel oil were removed from Japan to the Rotterdam area in mid-1974.

Q. You used yesterday the word "unique" in relation to the shipment of fuel oil from Japan westward? A. That would not be a normal movement beyond Singapore or Australia or, it would not be normal to by-pass the Persian Gulf and continue on to Europe. 30

Q. Normally, the needs of Singapore would be supplied by the Singapore refineries, would they not? A. That is correct.

Q. Australia does not import much fuel oil from Japan, does it? A. Not to my knowledge.

Q. It would be correct to say also, because this was adverted to yesterday as a possibility, that very little crude or Australian crude or product moves from the Bass Strait to the West Coast of the United States? A. Well, certainly, no crude does, to my knowledge, and I don't know the volume of product. I do know that

some fuel oil, low-sulphur fuel oil made from Australian crude does move to the west coast.

Q. Your belief is a small quantity? A. Relative to the total.

HIS HONOUR: Q. Total what? A. Relative to the total volumes.

Q. Relative to the total Bass Strait production? A. Or to the total imports of the U.S. west coast.

MR. OFFICER: Q. You referred to the "Occidental Charter" which you think was entered into in June 1974, the Persian Gulf to north-west Europe, Worldscale 85, do you remember that? A. Yes.

10 Q. You did not, in expressing the opinion as to what you thought would be a correct rate for the Concord Nabalco Contract of Affreightment, rely on the Occidental Charter, did you? A. No, it was just one of two charters of a similar nature that were made at that time.

Q. Charter or contract of affreightment — was it a charter? A. It was a contract of affreightment.

Q. From whence did you get information about that contract? A. From two separate sources, (1) a New York brokerage firm — two New York brokerage firms and one London brokerage firm.

20 Q. You, by reason of the fact that you did not rely on — had some suspicion that there may be some special feature about it? A. No, it was just that the one thing that is not clear in that charter is whether it was done on the basis of what the escalation factors were. If one assumed it was in terms of Worldscale 1974 it is a very low rate compared to what Nabalco did. If it escalated it is still low rate, but I did not rely on it because that was not the main basis for my opinion. It seemed to me if someone looked at either of those two fixtures this would indicate that being the only ones done at the time, the comparable fixture at Nabalco should have been substantially below 170, but I did not rely on those two.

Q. Occidental have quite close associations with Russia, do they not? A. I believe the chairman of the board is Russian by extraction and—

30 Q. And that is Armand Hammer? A. That is correct.

Q. He has had what one might call special relations with the U.S.S.R. since the 1920's? A. Yes.

Q. I think to the surprise of everyone, he made some contracts back in 1920 with regard to Russian timber and that sort of thing? A. That is my understanding.

(His Honour asked the relevance of the last two questions.)

WITNESS: They were Russian flag vessels, your Honour.

HIS HONOUR: Q. Russian —? A. Russian flag vessels.

No. 111
 —
 Defendant's
 evidence: P. B.
 Abt: Cross-
 Examination
 (cont'd)

Q. Are Russian wages cheaper or are the vessels subsidised by the Russian Government? A. Not to my knowledge.

MR. OFFICER: Q. You do not know one way or the other? A. I don't know one way or the other.

Q. Your view which you expressed yesterday was that the Concord/Nabalco contract should really have been at 1974 Worldscale 120-130 and if there were to be any escalation at all, it should be no more than as appears in cl.19 of the bunker cost escalation? A. I think that would have been sufficient, yes.

Q. So that you thought that Concord or any other shipowner would, for three years, enter into a contract which, except for the cost of bunker fuel, was a fixed price? A. Well, Mr. Officer— 10

Q. That is a simple question, isn't it? A. Yes.

Q. Your answer is yes, that is what you thought the shipowner would do? A. Yes.

Q. You have told us that already in 1974 there had been great increases in costs of operating ships, correct? A. Yes.

Q. Which you expected would be reflected in Worldscale January 1975? A. Yes.

Q. It was not your view that for the duration of the three-year contract, operating costs of ships would remain stable, apart from bunker costs, was it? A. No. 20

Q. So we have the situation that there have already, as compared with Worldscale 1974, been large increases in operating costs by mid-1974? A. Certainly there were large increases for bunker costs. I am not sure—

Q. No, I am talking about operating costs other than bunker. There have, since Worldscale 1974 was fixed, been calculated and fixed, large increases. A. In costs other than bunkers?

Q. Bunker. A. I am not aware that that is correct.

Q. There had been no increases in crew wages, no increase in providing the crew? A. Not anywhere near the significance of— 30

Q. I didn't ask you the size, I said substantially there had already been some increases? A. One would have reasonably expected that to be true, yes.

Q. When you were giving evidence yesterday and spoke of the large increases in operating costs that had already occurred by mid-1974 as compared with the time that Worldscale 1974 was assessed, were you speaking only of increases in bunker costs? A. I was — I don't recall talking about operating costs, but if I did my — I was referring to bunker, known increases in bunker costs.

Q. Would you agree with me that as from the time Worldscale 1974 was

assessed, there had been increases in operating costs other than bunker? A. Probably.

Q. Have you any doubt? A. I don't know.

Q. You don't? A. I am assuming that, yes, there were, but I don't know what the magnitude of them was, except to know that it was nothing compared to the increases in bunker costs. I am assuming that, yes, that inflation being what it is, it costs more for stores, it costs more for crews' wages as a directional thing.

Q. And port charges? A. Yes.

Q. And insurance? A. Yes.

10 Q. You did not expect that that upward movement in those non-bunker costs would level out and cease over a three-year contract, did you? A. No.

(Short adjournment.)

MR. OFFICER: Q. Mr. Abt, your view, therefore, was that apart from bunker increases outside the scale that is provided by cl.19 —? A. That is correct.

Q. — that a shipowner would have been willing to accept a fixed price by which he would bear all costs that, within the three years, might occur in port charges, crews' wages, insurance, providoring and the like? A. Yes, he would anticipate that in his rate quotation.

20 Q. You say, do you, in suggesting 1974 Worldscale 120-130 that you have anticipated that? A. That is correct.

Q. So that if you were to select a Worldscale not tied to 1974, you would take a considerably lower rate? A. I am sorry, I did not understand that question.

Q. You have just told me that in suggesting that the rate should have been 1974 Worldscale 120-130, you have built into your selection of 120-130 an allowance for increases over the three-year period in operating costs, other than bunker? A. That is correct.

30 Q. So if you were not tying the freight to Worldscale 1974 but merely to Worldscale, your rate would be considerably lower? A. Yes, if I am following your question, if Worldscale went up 35% to the base index to January 1st, 1975, then I would estimate a rate 35 points below the 120-130 in terms of 1974.

Q. I want to come back to your Worldscale suggestion in a moment, but at p.379, you said to my learned friend when he asked you this question: "You have mentioned Occidental which had other business in the general area of Gove. Whereabouts were their business interests?", and you answered: "I am just aware of at least four back-hauls. Well, I should say there were four vessels which delivered fuel oil, to my knowledge, to Gove, which then loaded alumina and took the alumina to the United States." I want to ask you, you there say that there were four vessels which back-loaded aluminium from your reading of Mr. Notter's evidence, is that correct? A. Yes.

Q. So your statement that there were four back-loads depends wholly on the interpretation of the evidence Mr. Notter gave? A. Yes.

Q. Until the early 1970's, there was very little movement, year by year, in Worldscale, would you agree with that — I'm sorry, I am excluding any war years.

HIS HONOUR: When you say Worldscale, it did not come in until 1970, as I understand it.

MR. OFFICER: Q. Is that correct? A. I believe so, Worldscale—

HIS HONOUR: I am looking at p.14 of Mr. Colish's report.

MR. OFFICER: Q. I think there was a predecessor. A. There was, yes.

HIS HONOUR: Q. There was a predecessor. A. The predecessor was Innerscale. 10

HIS HONOUR: In September 1969, Worldscale superseded Innerscale and they were revised in 1971-72, etc.

MR. OFFICER: Q. It is only a matter of terminology. Am I right in saying the somewhat similar indices before 1970 had not varied greatly from year to year? A. Except in the change of the basis structure of the indices.

Q. Then in the 1970's, and I am speaking of before the O.P.E.C. violent movement of 1973 there had been quite considerable changes in Worldscale, had there not? A. I don't believe so, unless it was due to a change in the structure of oil scale.— 20

Q. I am speaking of a period after the structural change. A. No, I think it was a relative period of stability.

Q. But you would also agree, would you not, that in 1974 Worldscale was a very common escalation factor in contracts? A. I would certainly say it was reasonable to use Worldscale, yes — not the most common.

Q. Even in 1974? A. I wouldn't think so, in 1974.

Q. Did you say "would" —? A. I would not think so.

Q. However, there were very many people who still contracted in 1974 on the basis of a Worldscale rate? A. I don't know, but I wouldn't think so; I would not think that someone would contract in 1974 based on Worldscale, whereas I would not doubt that it was fairly common in May 1973. 40

Q. However, the two contracts and the only two of which you are aware, made in 1974, at around the middle of the year were written in Worldscale, weren't they, contracts of affreightment? A. I have not seen the contracts. The terms were stated in terms of Worldscale.

Q. You do not doubt that they were? A. The more normal thing—

Q. I didn't ask you that. The two contracts of affreightment that have been

mentioned so far as to the best of your knowledge from what you read in the publications were written in Worldscale? A. I don't know one way or the other because the freight rate was stated in terms of Worldscale.

*No. 111
—
Defendant's
evidence: P. B.
Abt: Cross-
Examination
(cont'd)*

Q. I'm sorry, the freight rate is stated in terms of Worldscale. A. Was stated in terms of Worldscale.

10 Q. So, so far as you are aware, and you know nothing to the contrary, those two contracts were written with the freight varying, with Worldscale? A. May I look at something? (Witness looks at paper in front of him.) My information indicates that the basis was 1974 Worldscale for the Occidental fixture that was mentioned by Mr. Colish, that is the Worldscale 150.

Q. You derive that from reading some publication? A. No, I derive that from two separate brokerage sources.

Q. Brokerage sources who had negotiated the contract? A. I'm not sure; they had a record of the fixtures.

Q. Of this United Refining Contract of Affreightment? A. Yes—

Q. Let me take that one first, let me take the United Refining one. A. Right.

Q. You saw that contract referred to in publications, did you? A. I did not; I didn't look for it in publications.

20 Q. Are you aware, even to-day, that reference has appeared to it in publications? A. I am certain it has.

HIS HONOUR: Q. That is not really, I suppose, an answer to the question. You mean you are certain because you would expect it to be? A. I would expect it to be, yes.

MR. OFFICER: Q. You would not doubt, would you, from what Mr. Colish says, that the note he has read of it expresses the freight in simply Worldscale 150? A. All freights are expressed normally in terms of Worldscale.

Q. You have suggested that the freight under that contract is Worldscale 1974, 150, haven't you? A. That is the information I have.

30 Q. I was putting to you you would accept, would you not, from Mr. Colish's report, that the report he read in one of the broker market reports of that contract, suggested the freight was simply Worldscale 150? A. I would accept that statement.

Q. Who were the brokers you spoke to? A. Longquin and Boylan (?) in New York, and also a broker, Tankship in New York and John R. Jacobs in London.

Q. Your attention was drawn by one of them to the United Refining charter? A. Yes.

Q. I'm sorry, United Refining contract. A. Yes.

Q. Then you pursued your inquiries with the other two brokers, or the other brokers you have mentioned? A. The United Refining, both the United Refining —

well, we are just talking about United Refining now. Independently, I heard of that particular fixture from the three sources. May I say something here, Mr. Officer?

Q. Yes. A. The point is I don't know what particular contract tie, if any, was contained in these contracts that were reported because I don't believe that appears in the report of the fixtures as a normal thing. However, the statement in the context of what happened in 1975 that a fixture was made on the basis of 1974 Worldscale, would imply that if there were a tie it would be to some other factor than Worldscale changes.

Q. Are you suggesting that in 1975 something was published that said that the United Refining Contract was not simply Worldscale 150, but Worldscale 1974, 150? A. No, I am implying that in 1974 three separate brokers have told me that the United Refining fixture was made at a rate of Worldscale 150 in terms of 1974 Worldscale. 10

Q. I was suggesting to you before we got on to the special terms of the United Refining contracts that contracts of affreightment were still, in 1974, being written in simply Worldscale and a number? A. I am not aware that any were or were not.

Q. I beg your pardon? A. I am not aware one way or the other.

Q. You recall the evidence you gave yesterday about the Occidental chartering of the Russian flagships? A. Yes.

Q. You said the freight, from what you had said, was Worldscale 85? A. That is correct. 20

Q. That would suggest, would it not, that it is what I have called simply Worldscale 85 and not Worldscale 1974, 85? A. The information I have on that—

Q. Can't you answer that? A. It does not suggest one way or the other, but I do have some information that perhaps supports what you are saying.

Q. What is the source of your information? A. John R. Jacobs, in this particular case.

Q. Were they the brokers who negotiated —? A. I don't believe so.

Q. Let's have it, what is it? A. It is uncertain, according to the reports about this particular C.O.A. transaction whether the basis was 1974 Worldscale or 1974 Worldscale, as amended. 30

HIS HONOUR: Q. As you understand the way these things are construed, if somebody simply says Worldscale 170 in a contract written in 1974, in the industry, do they simply lift it to Worldscale 1975 when 1975 comes round? A. No, your Honour, it would be stated in terms of — if it were stated in Worldscale it would also be stated in terms of dollars per tonne and if there was an escalation factor, it would be specifically mentioned, whether the escalation would be—

Q. If they were going to transfer to 1975 when 1975 came around, that would be specifically mentioned? A. It would be specifically mentioned if there is a change in Worldscale. 40

Q. I have not looked at this contract. What does it say, does it make it clear?
 Cl.11(1) — (reads). A. I believe subsequently there is a specific—

Q. Some other clause? A. — clause.

MR. STAFF: In 22, your Honour.

HIS HONOUR: You say the intent of that is to transfer it to the new
 Worldscale as it comes in?

MR. OFFICER: I would think the opening words of 11.1 would provide that.

HIS HONOUR: You mean because of the words “as
 applicable . . . reads . . .” of each cargo?

10 MR. OFFICER: Yes.

(Mr. Officer said he would make some further inquiries about these two
 contracts.)

Q. (Approach) I was referring you earlier to the second Press citation on p.6 of
 Mr. Colish’s report about the Sun? A. Yes.

Q. You asked if you could see the source of that quotation. (Shown.) Will you
 agree, it is apparent from that document before you that Sun made the observation
 as a buyer? A. That is true. But this was a testimony to the Federal Energy Office at
 that time and I am not sure what Sun’s motives were. They were obviously trying to
 make a point.

20 Q. Are you suggesting that the sort of difficulty which they said they were
 experiencing was unique to them? A. It could have been; I don’t know.

Q. Can I direct your attention to the words commencing “Sun has found . . .”
 A. Ummm.

Q. Are you saying you are unaware one way or the other as to whether buyers
 were finding it virtually impossible in the current market to negotiate term contracts
 at prices below spot and short-term levels. Is that what you are saying? A. No, I am
 trying to read this in the context of the problem.

HIS HONOUR: Q. Just take your time and read it to yourself.

30 WITNESS: This testimony had to do with inter-company pricing and what was
 the proper price to be shown on prices to affiliates so—

MR. OFFICER: Q. You will agree, will you not, that the statement “Sun has
 found it is virtually impossible in the current market to negotiate term contracts at
 prices below spot and short-term levels.” has nothing to do with purchases from
 affiliates. A. No, the testimony has to do—

Q. I did not ask that. That statement as to Sun’s experience has nothing to do
 with the situation between Sun and an affiliate. A. Yes, it does, because—

Q. By affiliate—

No. 111

Defendant's
evidence: P. B.
Abt: Cross-
Examination
(cont'd)

MR. STAFF: Let him finish.

WITNESS: The beginning of this sentence is, "These are tasks that were given by various world companies as to the proper method of pricing sales to affiliates in the United States." and I believe what Sun is saying, they start out buying from Sonatrach at a price and in turn re-sold that material to an affiliate and the price rose and that price, after having risen, would be below the price the F.A.A. was suggesting was fair as a charge to Sun's affiliate in the United States.

Q. By affiliate, you mean a company which is controlled by another one? A. Yes.

Q. What we would call a subsidiary, is that a word used by you? A. Yes. 10

Q. Sun would never find it impossible to negotiate at particular rates with an affiliate would it? A. I'm sorry, Mr. Officer, would you repeat that?

Q. If what we call the parent and subsidiary, Sun and an affiliate were negotiating, you would not expect difficulty in reaching agreement as between such two parties, would you? A. To-day, yes.

Q. Let us take during 1974, would you expect the subsidiary to haggle with its parent? A. The thing I am struggling with, Mr. Officer, there has been a change in — what you say is that if I control someone, basically I should not have a big problem in telling them what the price is or agreeing on the price. There has been a change that has been occurring in the industry in the structure of large companies, whereby because of the shortages and so on and so forth, affiliates are, in fact, encouraged to buy on the open market if they can get a better price than is being offered by the parent company and it is only in that context that I am having a problem in answering your question. 20

Q. Perhaps without spending too much time on it, may I just ask you this: you understand, do you, the passage reading: "Sun has found it is virtually impossible in the current market to negotiate term contracts at prices below spot and short-term levels", to refer to a virtual impossibility of the parent negotiating a term contract with its subsidiary at prices below spot and short-term levels. Is that what you are saying? A. I believe that is what this says, yes. 30

(Document about which the witness has been asked about, tendered)

MR. STAFF: I have no objection to that part of the document which deals with the matter Mr. Abt was cross-examined on, and in that context it is the whole of the column on the left hand side of the page. It then goes on to other matters which are related to completely different facts, statements of opinion and the like. We would object to that. It is really the claim going down on this page finishing just above the heading "Sweden Gas Oil Sale".

MR. OFFICER: I accept the proposal and restrict my tender to the left hand column finishing above the line "Sweden Gas Oil Sale".

(Above mentioned document admitted and marked Ex.K. Mr. Officer was given permission to retain the document and have that section which had been admitted as an exhibit photostated and the remainder blanked off) 40

MR. OFFICER: Q. Assuming, Mr. Abt, we are talking about a spot cargo from Persian Gulf to Gove around July-August 1974 we would expect the rate expressed in Worldscale and a number to be, I gather from your evidence, a little higher than 120, 130? A. No, I would expect it to be lower than 130, spot.

Q. You would regard them, I suppose, a quotation for a spot shipment of Worldscale 200 to be extremely high? A. Yes.

Q. If such a quotation were made by a person you would expect that was an outrageous figure at which to start? A. May I ask you, Mr. Officer, for what size vessel is this quotation, because it does make a substantial difference.

10 Q. Well may I say for 30,000 to 60,000 tons? A. Yes, that would be high.

HIS HONOUR: Q. The word used was outrageous. Do you agree with that? A. If it were 25,000 tons, there is such a substantial difference in even a spot market rate as compared to a 60,000 tonner, the term outrageous — no, I am afraid I cannot accept that because I would not use the word outrageous, but it is certainly high.

MR. OFFICER: Q. Could I ask you this, if it were in the 25,000-35,000 ton range it would be high? A. It would be, in my opinion.

Q. In tonnage range? A. In the tonnage range it would be high.

20 Q. If it were for 60,000 tons it would be extremely high? A. That is, in my opinion, correct.

Q. That opinion would not alter, of course, I take it as to whether the person making the quotation were a supplying of fuel oil or mere transporter? A. It would make no difference.

30 HIS HONOUR: I cannot help saying, Mr. Officer, eventually it is going to come down to a question of whether or not it was unreasonably high. One might pay a price which is too high for a commodity and yet there may be many reasons why one would or would not. One could get it more cheaply and yet it would not be unreasonable to pay the high price in the circumstances, but when we talk of high, too high or extremely high, I don't know how helpful these expressions will be in the end.

MR. OFFICER: Eventually it will all tie up with the answers given, your Honour.

Q. If the rate quoted were Worldscale 200 for a 32,000 tonner, that would be in your category too high? A. Yes.

Q. You will agree, of course Mr. Abt, that if one takes the tied freight 1974 Worldscale and even if one assumes that the United Refining Contract was 1974 Worldscale 150, one does have a range of contracts entered into, even if tied to 1974, which in some cases are above and some cases below your recommended 1974 Worldscale 120, 130? A. That is correct.

40 Q. Both the contracts are a fragment you referred to were Persian Gulf West? A. That is correct.

No. 111
 —
 Defendant's
 evidence: P. B.
 Abt: Cross-
 Examination
 (cont'd)

Q. You agree that freight rates on an average are higher Persian Gulf West than Persian Gulf East? A. I agree with that, only in a spot context, not in a term contract context.

Q. But I thought you said or agreed that the difference was because in moving fuel oil west of the Persian Gulf there was then at the normal ports of discharge or in the general vicinity more opportunity of picking up a back loading or an onward loading? A. That is correct; but I hasten to add there are no opportunities Persian Gulf East.

Q. But that is the reason why the average freight rates east of Persian Gulf are higher than west of Persian Gulf? A. That is certainly true on a spot basis. 10

Q. And it would also apply, would it not, to some extent at least in a contract of affreightment where the shipowner might be able to use his vessel before he had to return to the Persian Gulf again? A. Not necessarily.

Q. I did not say necessarily: there would be a greater opportunity in a contract of a freightment of fuel oil of using the vessel in between the affreightment commitments if you are moving the oil west of the Persian Gulf rather than east? A. Yes.

HIS HONOUR: Mr. Officer, your question seems to assume there is only one vessel, is that right?

MR. OFFICER: The question is not applied to that. 20

HIS HONOUR: I had the understanding that these people supplied a vessel as the occasion arose?

MR. OFFICER: Whatever the occasion, if they took vessel A from the Persian Gulf west then there is more opportunity of using that vessel for some fuel movement if you are west of the Persian Gulf rather than if you take that vessel east, even though on the next occasion you may take vessel B rather than vessel A.

Q. That is the general situation, isn't it? A. Yes, with regard to oil, it is certainly true.

Q. And that is the reason why one sees calculations of the difference between freights east and west of the Persian Gulf? A. One does not normally see differences in term fixtures reflecting the difference. 30

Q. But that is because the affreightment contracts are so few in number? A. Well that is certainly a factor. I think another factor would be that while the opportunities west of any given voyage are greater in the oil business, there would be substantial opportunities east in both oil and say bauxite that are not available Persian Gulf west.

Q. You restrict the last part of your answer to the alumina, do you? A. I was thinking about alumina but certainly in that trade you would have iron ore that is being exported from Australia and I am certain other minerals.

Q. But likewise if we are thinking of a ship that can actually carry minerals on one trip and fuel oil on another, there are opportunities west of the Persian Gulf, aren't there? A. Certainly.

No. 111
—
Defendant's
evidence: P. B.
Abt: Cross-
Examination
(cont'd)

HIS HONOUR: Q. There would be different provisions between cargoes of iron ore and carrying aluminium, would there not. All I have in mind is that one is much heavier than the other? A. I would not think so, your Honour, not basically. I think they would both be hauled as dry cargo.

10 Q. There are stories that ships when they carry iron ore on this coast, that they behave rather strangely because they carry what is called "stiff" cargo and they react in particular ways in particular weather conditions? A. That could be.

Q. I thought the same problem might arise in relation to fuel oil or alumina because they are both much lighter? A. I think that is right.

Q. Would you agree with that? A. I don't know, your Honour. When it comes down to it, I don't know much about what I would call dry cargo or metal cargo or ore carrying: whether there are or are not different considerations.

MR. STAFF: There are, of course, calculations made which illustrate the single voyage dirty fixtures for Persian Gulf west and Persian Gulf east? A. Yes.

Q. (approaches) That is the sort of document I had in mind which runs up and down 1974? A. Yes.

20 Q. They are published in what publication? A. This appears to be from a publication put out Drury's of London or a similar publication.

Q. Looking at the two ranges, the two ship sizes which are relevant in this case, you would agree would you not that bar an occasional month from January 1972 onwards and including June, 1974 the Worldscale Rates for Single voyage dirty fixtures have been considerably higher Persian Gulf east than Persian Gulf west? A. Yes sir.

(List of calculations illustrating single voyage charges for Persian Gulf west and Persian Gulf east, tendered. Admitted without objection and marked Ex.AL)

30 Q. Mr. Abt, you said that though in your view the opportunities west as compared with east could be better taken advantage of in a single voyage charter, that nevertheless to some extent the opportunities existed with an affreightment contract west as compared with east? A. On both affreightment contract and on spot?

Q. Yes. A. Yes.

HIS HONOUR: I would like to have this document (Ex.AL) explained to me. I am looking at the borderline between December 1973 and January 1974 and if the west voyage rises from 100 to 117, from east it is 125 to 130.

MR. OFFICER: Which size ships?

40 HIS HONOUR: 40,000 plus. Am I dealing with the same index or has it been revised to 1974.

No. 111
 Defendant's
 evidence: P. B.
 Abt: Cross-
 Examination
 (cont'd)

Q. Do you have a copy of it in front of you? A. I have a copy of a document —

Q. Is it the same index all the way through or is it a different index which starts each January?

MR. OFFICER: They are the Worldscale rate so there would be a change in that as one goes to January each year.

HIS HONOUR: That is what I had in mind.

WITNESS: I am looking at a much later issue of a similar publication, which is not the same. It runs into 1975, for example and in this particular instance it notes that all historical rates have been changed into a 1975 Worldscale basis.

HIS HONOUR: Q. You mean they have all been related to 1975? A. For this particular addition they have. This is for 1975. I think that may be for 1974. 10

Q. It is up to July 1974? A. Yes.

Q. If you go back into 1973 — and no doubt this reflects the oil crisis — you get figures in the 300s around August, September and October? A. That is right.

Q. I just wondered if it was the same index all the way through? A. I would have thought your Honour, unless it is noted there, because there was not a great significant difference between the base rates 1973 versus 1974, that the rates are stated in 1973 Worldscale in the case of 1973 and 1974 in the case of 1974.

Q. So they are all comparable for that reason? A. For all practical purposes. But because the change was so great in the prices I am looking at they had to convert the 1975 Worldscale without looking back over trial years. 20

MR. OFFICER: Q. Would you agree with this, that looking at Ex. AL — which only goes to 1974 — the intention is for 1973 to express the monthly averages in 1973 Worldscale and in 1974 to express them in 1974 Worldscale? A. That would be my guess.

Q. And that continues on and is the explanation for the big jump that one sees in January 1975 on your sheet? A. No, you would not see a big jump because everything has been converted to 1975 levels and related back in the table I have.

Q. In yours 1975 is in 1975 Worldscale but they have gone back and recalculated the earlier years to bring them all to 1975 Worldscale? A. That is correct. 30

HIS HONOUR: Q. The understanding I was under was I thought that had been done but the sheet I have does not indicate that — but that is not what you say? A. I am speculating, your Honour, but I would guess if there was any significant difference between 1973 or 1974 Worldscale it probably has not been changed, I mean if there was no significant difference it probably was not changed so 1973 has been stated in terms of 1973 Worldscale and 1974 in terms of 1974 Worldscale.

MR. OFFICER: This is not by way of address to the witness, your Honour, but this may have a significance running from right to left, and one does see figures and tallies which reflect a period of great uncertainty. The critical thing from our point of view is the comparison.

No. 111
 Defendant's
 evidence: P. B.
 Abt: Cross-
 Examination
 (cont'd)

HIS HONOUR: The western rate is lower than the eastern.

MR. OFFICER: Yes your Honour.

Q. You would agree this being average monthly calculation, that the bulk of the Persian Gulf east charters would be to Japan from the Middle East, from the Persian Gulf? A. I would have to assume so, yes.

10 Q. Certainly the bulk of that would be Persian Gulf, Singapore, Japan, Manilla as compared with Persian Gulf to Australia? A. Yes.

(Luncheon adjournment)

ON RESUMPTION:

MR. OFFICER: Q. Mr. Abt, this morning I was speaking to you about the possible cost increases which would not be covered by the adoption of the proposal you have in mind of a 1974 Worldscale plus clause 19. Do you remember those questions? A. Yes.

20 Q. I should also have put to you that that proposal of course would also make the ship owner bear for three years any increase in bunker costs which were not of such a size as to bring clause 19 into operation? A. That is not necessarily true, Mr. Officer, if in fact the owner estimate correctly but it is the norm for a long term contract. He could not suffer the loss of bunkers. In other words, part of the freight rate consideration would be the assumption that costs will go up.

Q. If one had therefore built into the price which one attaches to 1974 Worldscale a pre-estimate of bunker price movements, then would you agree that if that had been done and one had clause 19, if the bunker prices exceeded the range so as to bring clause 19 into operation the charterer would get the benefit of those increases twice? A. No, I don't see that Mr. Officer.

30 Q. Clause 19 operates if the bunker prices increase to more than a given number of dollars? A. Correct.

Q. And it operates automatically in that event by making an addition to the freight, does it? A. Correct.

Q. If one had made some calculation that bunker prices would probably over the three years go up by \$10 a tonne and one had allowed for that in fixing one's 120 or 130 Worldscale 1974, and if bunker prices went up by such an amount that clause 19 operated, then the owner of the bunkers got some part of the increase twice, would he not? A. It would depend on what bunker factor he estimated as part of his freight rate.

40 Q. Yes, I know. But I am asking you to assume that he had accepted an increase and had built the amount of that accepted increase into a coefficient that he applies to 1974 Worldscale, right? A. Yes.

No. 111
 —
 Defendant's
 evidence: P. B.
 Aft: Cross-
 Examination
 (cont'd)

Q. If he does that then of course he gets some benefit of that accepted increase from the commencement of the three year contract? A. Yes.

Q. And if an increase does occur which is large enough to trigger off the operation of clause 19 he will get, upon that happening, a freight increase under clause 19, won't he? A. That is correct, yes.

Q. So that if a \$20 increase — just let us take a figure — occurred that would trigger off clause 19 and he built into his Worldscale 1974 coefficient provision for a \$10 price increase, then upon the bunker prices going up \$20 he will get double benefit, won't he? A. Yes, I can see that happening, in a set of circumstances.

Q. If the circumstances I have described occur, he will get double benefit automatically, won't he? (no answer) 10

Q. Some double benefit? A. Yes.

Q. In the evidence you have given in your report that you think Nabalco could have negotiated a better deal — certainly with regard to the affreightment contract — you have in mind, have you not, that by an expedient of a couple of spot purchases Nabalco has obtained more time for negotiation? A. No, my assumption was that in any event Nabalco should have been able to negotiate a better rate and the longer they waited the better the rate would be.

Q. Of course, how much better it could have negotiated with Concord would have depended also upon the extent to which it might have obtained other bidders, I will call them, who were prepared to enter a back to back contract of affreightment, back to back with the Kuwait contract? A. Not necessarily. It could also result from more intense negotiations with the people who bid. 20

Q. But of course your position, unless you knew that there were other bidders who would be interested at the sort of Worldscale that you have suggested, an interest in entering a back to back contract, your position negotiating with Concord would not be from a position of great strength would it? A. Not if you insisted on entering into a contract in a short amount of time, no.

Q. Have you a copy of your tendered report with you? A. Yes.

Q. Would you turn to paragraph 2.11 in that document? A. Yes. 30

Q. I was asking you some questions this morning, and I think you agreed, that the very considerable bulk of the transactions upon which Ex.AL would be based and Persian Gulf east would be to Singapore, Japan, particularly Japan and Manilla rather than Australia? A. I would certainly say Japan, yes. I don't know how Australia would compare to Singapore or to Manilla. But this would also include — I thought of it afterwards — this would include the United States west coast.

Q. The Persian Gulf and right through to the United States west coast? A. Yes.

Q. The sort of freight rate which an owner will seek, to be under a charter or under a contract of affreightment, to some extent also depends upon the actual port of destination, doesn't it? A. Certainly. 40

Q. The physical locality and nature of the surrounding area of the port of discharge? A. Certainly.

Q. I think you would agree that for deliveries of fuel oil, Gove would be a very isolated part in terms of movements Persian Gulf east? A. Certainly a unique port, yes.

Q. Unique in the sense of isolated with a considerable distance to go before one could pick up any back cargo other than alumina? A. No, I think Indonesia would be fairly close.

10 Q. I am including Indonesia being a fair distance. Nothing in close proximity to Gove? A. Other Australian ports is the only thing.

Q. Yes, but to carry fuel oil to Gove and then look for a back load is to put yourself in a much more isolated situation than if, for example, you were carrying to any port in Japan? A. I would say both — there are more ports in Japan but the back haul opportunities from Japan are fairly limited, except at certain times.

20 HIS HONOUR: Q. The distances involved in the Australian case though are very much greater than in Japan, aren't they? A. Certainly in the shipment of things like alumina. Now I would have to say that in terms of oil I guess that there would be as many opportunities in picking up a cargo in Australia at a port other than Gove, of oil for shipment say to the United States west coast, as there are in Japan for shipments — which would be unusual — to Singapore or to Okinawa.

Q. They would have to come from a place with a refinery, I take it, upon the Australian coast? A. Yes.

Q. That would be at the closest Brisbane and at the furthest it would be Perth? A. Yes.

Q. Brisbane would be a week and Perth would be 10 days or more, wouldn't it? A. Right.

Q. Is that a significant time in this connection? A. I would say a week's time is a significant amount of time.

30 MR. OFFICER: Q. And more than a week becomes more significant still? A. Certainly.

Q. And of course, if you can only pick up a back load of product not near Brisbane or near Perth but at a refinery near Melbourne, the time would be even more significant? A. Certainly.

HIS HONOUR: I would have thought Perth was the furthest, but I could be quite wrong.

MR. OFFICER: The furthest from Gove — you either go down past Perth to Melbourne or you go the other way.

Q. On page 8 in par.2.14 (a) you take the United refining contract and you do an exercise based on that contract? A. Yes.

Q. Am I correct in saying what you have done there is to say that the spread of vessels between those to be used in the United Refining contract and those used except for the first few trips in the Nabalco-Concord contract show on, for example, Afra rates a spread of 50 points? A. Over a long period of time, yes.

Q. That is the approach out of which you reached the 100? A. Yes.

Q. The United Refining ships were 35 to 45,000 tonnes? A. That is correct.

Q. That is to say they were in the upper half of the medium range scale under Afra? A. That is correct.

Q. The Concord vessels to be used in the Nabalco contract would be — except for the first few — partly in the medium range and partly in the L.R.1 range? A. That is correct, but with the right on the part of Concord being in the L.R.1 range. 10

Q. So far as they are in the L.R.1 range, they are in the low half of the L.R.1 range, are they not? A. The middle half.

Q. The middle half? A. 60, it is the size of vessel contemplated long term under the Concord agreement, because there is a penalty other than for 60, which is about in the middle of the L.R. range.

Q. So the spread that we are looking for — if we are going to use the Afra spread — is between the upper half of the medium range Afra and the middle of the large range 1? A. Yes.

Q. Now the Afra range for medium range would include clean vessels, wouldn't it? A. No, I believe there is a different rate for clean and dirty. 20

Q. Have you an Afra scale there? A. I will have to check that. Afra does contemplate both — and dirty tankers.

Q. Separately or within the one? A. Within the one range.

Q. Within the one statement of prices for that range? A. Right.

Q. Clean vessels are vessels that carry product other than fuel oil, is that right? A. Yes, or crude oil.

Q. Traditionally they command a higher freight rate than carriers of crude or fuel oil? A. Yes.

Q. But the large range 1 would not include vessels? A. Not normally. 30

Q. So that if we bear those factors in mind, I suggest to you that it is not proper in trying to apply Afra rates to the United Refining contract to say, "Well, the spread is of 50 points"? A. That is probably right.

Q. I suggest that it would be more appropriate to say that the relevant spread, bearing in mind the clean vessels in the lower range, would be in the vicinity of 15 or 20 points? A. Or 25, in that range.

Q. Of course, the Afra rates pay no regard to whether the voyages are east or west of the Persian Gulf? A. That is correct.

HIS HONOUR: Q. Well they are a world average, are they not? A. Yes.

MR. OFFICER: Q. Would you turn to the foot of page 9, par.3.2. I ask you to just read it to yourself, to refresh your recollection, the last sentence or last four lines on that page? A. Yes.

Q. Now there are certainly some in the oil industry, some responsible people who think there will be an increase; is that correct? A. Yes.

10 Q. And some responsible people who think the increase will be greater than that mid point which Mr. Colish suggests? A. I don't recall the mid point, Mr. Officer.

Q. I am sorry, he took five percent as an accepted increase in July 1976? A. In crude oil or fuel oil, was this?

Q. In crude oil price increase and posted prices? A. Crude cost increase?

Q. Crude price increase generated by further Opec action? A. Right. But again I must ask you the question, is that a five percent increase in cost or a five percent increase in postings?

Q. One of his statements is set out. May I read one line of his statement to you? A. Sure.

20 Q. "I expect another crude price increase both as to official Opec market prices and posted price from July 1, 1976? A. O.K.

Q. I think in his evidence he suggested there would be some people who thought the increase would be greater, as well as some who thought it would be less or nil?

HIS HONOUR: What page is that, Mr. Officer?

MR. OFFICER: The page I read from is the bottom of page 21 of his report, your Honour.

30 Q. You have told me, I think, that there are responsible people who think there will be an increase and my question was — or my question now is to you, and there are responsible people in the oil industry who expect an increase greater than 5 percent? A. I have not heard any, of any responsible people, with any scientific method attempting to predict the amount of increase or indicate if there will be an increase. The feeling on the part of people who think there will be an increase, because without market justification there has been an increase in the past: the feeling on the part of the people who feel there won't be an increase is that things have gone too far, there is no market for long, it is simply a matter of the Opec countries demanding and getting more money. And perhaps for the first time the Opec countries will temper their prior rapid increases or request for rapid increases due to the fact that they find their sales are going down and it is time to be friends
40 again with the consuming world.

HIS HONOUR: Q. What is their attitude in your view dependent to a degree on the way the consuming countries come out of the recession? A. Assuming there was a big increase, I would say that the Opec nations would tend more to an increase. And conversely if the present world situation continues I do not think that good business would dictate any further increases, having good judgment. But what I am saying is strictly a matter of speculation. If there is an increase it will be not justified by any market considerations.

MR. OFFICER: Q. But it would be correct to say, would it not, that even though there may have been some falling off in sales, that by reason of their previous price increase, the Opec countries by and large have received greater revenue than before the increases? A. In every instance, that is correct. 10

Q. So that the fact that sales may somewhat diminish upon the increase in price does not argue against the financial benefit to the Opec countries of a price increase? A. That is correct.

Q. Now you have said that whether there will or won't cannot be demonstrated by economic circumstances or economic considerations, supply and demand and so on? A. Yes.

Q. But notwithstanding, there is a body of responsible opinion in the oil industry that expects some increase in July 1976? A. Certainly.

Q. And some, in that fashion, expect an increase greater than 5 percent? A. As I say, I have seen no responsible people estimating what the amount of the increase will be. It has no bearing on reality. 20

Q. Yes, I am not suggesting — well it has this importance to reality, does it not, that people have to make a judgment, however they make it, of political considerations or strictly economic consideration for the purpose of contracting, as to whether there will or will not or whether there probably will or probably will not be an increase in July 1976? A. That is correct.

Q. And I am merely putting to you that there are for those reasons a number who have formed a judgment, a number of responsible people who have formed a judgment and who expect an increase of more than 5 percent? A. I simply say I have heard no one predicting the amount of an increase. 30

Q. But would it be right to say, however, that the majority — whether you agree with it or not — the majority of the informed opinion or responsible opinion in the oil industry expect an increase? A. I know of two major oil companies—

Q. I am sorry, that is a simple question? A. The answer is no.

HIS HONOUR: This is something that will happen next year. It is only in respect of one or two voyages.

MR. OFFICER: In respect of two voyages, your Honour. Those voyages are in the rough order of \$1 million.

HIS HONOUR: There seems to be something unreal here in making a judgment, probably in February, about whether or not the Opec countries are going to put the oil price up in July when I know that my judgment will not be the final 40

one in the case and the appeal — assuming it is decided — will settle the liability after the event. I know courts have to do these things and they do do it but I am just wondering if we could somehow preserve the situation. In a sense the damages you are entitled to in respect of that damage, in the way that you put your case, are going to be pre-paid, they are going to be paid before they arise.

MR. OFFICER: Yes, your Honour.

HIS HONOUR: I cannot think of a way myself but I thought—

MR. OFFICER: May I just say three things. I do not want to ask Mr. Abt any further questions on that subject but while he is out here from a long distance I want to probe the views he has expressed.

Point two, it may be that there will be a response by Nabalco to the 9 (c) (V) notice which was served on 20th November and which my learned friend had tendered which will mean that the contract terminates before that date. But if that does not occur, if there were any way that could be thought of to allow your Honour not be forced to speculate we would be perfectly happy — because it is a very difficult area.

Q. Would you turn to page 10, the top of that page. You would agree, I think, would you not that speaking by and large if something happens in Saudi Arabia that will have an effect and is likely to be followed in Kuwait. Would you agree with that, with regard to things like Governments taking posted prices? A. Yes, Opec has tended to act together.

Q. If there were an increase of Government take of crude, that would likely be reflected, would it not, in Saudi Arabia in an increase in product postings? A. If it is subsequent to the increase in crude oil price, yes.

Q. And that is particularly, is it not, because in Saudi Arabia the income tax that the oil companies pay is paid on product postings? A. I am not aware that that is true.

Q. You are not aware of that. You do not know one way or the other? A. I would have thought the income tax paid in Saudi Arabia is based on crude oil rather than product.

Q. Of course, if a tax were paid on product postings, then if the Government take of crude went up there would be some pressure from the Government on the companies to increase their product postings as otherwise it might be said that they were trying to deprive the Government of tax? A. No, I am not following that reasoning. I could be wrong, but I do not see how a Government can tax both crude and product when the product is made out of the crude. If you are talking about an uplift tax or something like that, a value added tax. But the reason people changed their product postings is twofold, one to reflect increases in their crude oil because they may or may not get in all products and changes in market conditions up and down.

Q. We know, of course, there was a time when companies tried to hold the product postings, do you remember that, and there was some pressure from the Governments? A. I can't recall if I knew that. I don't recall any pressure by the companies — pressure by the companies you said?

Q. No, by the Governments on the companies to increase the product postings?
 A. I don't doubt that it occurred but product postings, at least up to this time, have been the prerogative of the companies rather than the Government.

Q. It would be correct, would it not, to say that the companies have good reasons of their own and have tried to hold back the prices of fuel oil to a great extent than they have tried to hold back the prices of other and more competitive products or more saleable products? A. What do you mean by hold back, Mr. Officer.

Q. To increase — if they are increasing — to a lesser extent in fuel oil, but in say gasoline? A. So far as I know when pro-rating — attempt to pro-rate crude oil costs in the form of product increases and it would be no attempt on the part of the companies to put on larger or smaller percentage of the increase of fuel oil, except the pressure dictated by market considerations. If one can get more in the market for fuel oil one would equate a higher percentage posting on it compared to the other products and vice versa. 10

Q. The result of what the economic recession — if that is the right word — or slowdown has been that fuel oil has become more difficult to sell than for example, gasoline? A. There is a surplus of both at the moment but I would say yes, there is a surplus of fuel.

Q. I am sorry, my question was gasoline has remained more readily saleable than fuel oil? A. I would not say that is true. 20

HIS HONOUR: Q. Is there any marked tendency on the part of the Western consuming nations to reduce their consumption of petroleum products? A. I think there have been attempts, your Honour, but I think they have largely failed. I think the reason consumption is down is simply because industrial activity is down.

MR. OFFICER: Q. But the industrial activity downturn effects to a greater extent the consumption of fuel oil, does it not, than the consumption of — for example — gasoline? A. Yes.

Q. Hence, gasoline sales have not been affected to the same proportion as fuel oil sales? A. I think one must determine what market one is talking about. 30

Q. Let me say western Europe for a start? A. That is probably true in Western Europe, I would say not true in the United States.

Q. Would you look at par.4.1. You say the subsequent effects of the Kuwait National Petroleum Corporation contract relative . . . are not to any material extent more favourable than the relative considerations of the B.P. contract". You expressed that opinion looking strictly at the clauses of one contract as compared with the other. Is that correct? A. Yes.

Q. You pay no regard in that statement to whether, for example, the price of getting a B.P. contract was for going retention or anything of that sort? A. No.

Q. Further down in that paragraph you refer to the virtual identity of K.N.P.C. with the Government of Kuwait? A. Yes. 40

Q. At the date of this contract there was not much virtual identity, was there?

A. Yes there was.

Q. Has the identity changed between the date of the contract and the present time? A. Not to my knowledge.

Q. There has been no change in the composition or no change in the degree of control of K.N.P.C. by the Kuwait Government? A. Not to my knowledge.

Q. You don't know one way or the other? A. If there has been any change?

Q. Yes. A. Yes, I don't know.

HIS HONOUR: Q. Yes, you don't know of any but there could have been? A. There could have been.

10 HIS HONOUR: I suppose another consideration is the fact that the company is in Kuwait.

MR. OFFICER: B.P. is in Australia.

HIS HONOUR: Do you draw a comparison between the two?

MR. OFFICER: With respect, I would think the conclusions to be drawn from the facts your Honour mentioned are just as true to B.P. as they are to K.N.P.C. However, that is certainly a matter of inference rather than evidence.

20 HIS HONOUR: No, but I think what has been said against you — it may have no relevance to the consideration of that — is you are dealing with the Kuwait company, it is an Opec country. If you are dealing with B.P. it is here, it can be sued. You can't sue the Kuwait company despite the fact that it is said to be governed by British law: unless Kuwait wanted to go along with it you probably would not have much chance, there would not be much point in starting.

MR. OFFICER: That may be, your Honour. I did not take it so much that way. I take it from this, of course, this is what I was talking about, that the witness was saying there was the virtual identity of K.N.P.C. with the Government; therefore the benefits of B.P. are more available.

30 HIS HONOUR: But there are many countries which are near with whom people deal and know they have to deal with them on the basis that either they pay up or there is simply nothing you can do about it. There is no legal remedy available. I think that is the type of thing that is going to be said to me about this.

MR. OFFICER: Maybe, your Honour.

Q. Mr. Abt, you would agree that the Arab countries, but especially Kuwait, have been diligent for many years in trying to build up their own direct sales of crude and product? A. Yes.

Q. And building up direct sales to buyers in consuming countries? A. Yes.

No. 111
 —
 Defendant's
 evidence: P. B.
 Abt: Cross-
 Examination
 (cont'd)

Q. You would agree that whatever might be the claim at one particular month or another, there is always hanging over companies such as B.P. in its relations with post countries in the Middle East some fear of nationalisation? A. You mean more nationalisation.

Q. I am sorry, more nationalisation? A. Yes.

Q. And even perhaps of complete nationalisation? A. Yes.

Q. Turn to par.5.1, if you would? A. Yes.

Q. About the middle of that page you say, after referring to Nabalco paying more than posted prices per barrel, you have a sentence in this regard that the contract is less favourable to Nabalco than the proposed new B.P. provisions. Do you observe that? A. Yes. 10

Q. You are aware, are you not, that the proposed price for C.I.F. Gove to be inserted in the new contract was \$52.52. Are you aware of that? A. That was one of the prices I recall, yes. There were several.

Q. For a three year contract that was the last notified price after consultation with London? A. I will accept that.

Q. You are aware that the first shipment from Kuwait plus freight was less than \$52.52, are you not? A. I was not aware that there were any shipments at that price.

Q. I beg your pardon. The first landed shipment from Kuwait was landed at \$54.14. A. Are you talking about the original contract? 20

Q. I am sorry, the first shipment under the Kuwait and Concord contracts landed at \$54.14?

HIS HONOUR: That was the actual price.

WITNESS: I accept that, if it was.

MR. OFFICER: Your criticism of the Concord contract is that a fair freight would have been very considerably below that paid by Nabalco to Concord? A. Yes.

Q. Approximately how much per metric tonne would your freight reduce the Concord freight? A. Well it is approximately 60 cents for every 10 points Worldscale which means — which comes out at 1.20, 50 \$3 per tonne, roughly. 30

HIS HONOUR: Q. You say 120 to 130? A. Yes.

Q. So it would be 40 to 50? A. I was using 120 just as a number. But if it was 40 points which was 130 versus 170, 40 points — that comes out between \$2.40 and \$3.

Q. That is American dollars, I take it? A. Yes.

MR. OFFICER: Q. So you say in Australian dollars the landed price per metric tonne should have been what, down around 51 or thereabouts? A. Initially, yes.

Q. As compared with \$52.52 which was the price B.P. were proposing to charge if a new contract were executed? (objected to)

MR. STAFF: I think, your Honour, that question I should object to. I think it is asked in the context of having referred to freight.

HIS HONOUR: He has taken \$3 off \$54.

10 MR. STAFF: It is put, as it were, the true price of the company's of freight plus oil. I am not sure that Mr. Abt has it in mind.

HIS HONOUR: It seems to me the range for the start is \$2.40 to \$3, and that is American, so that it would be less than that in our dollars.

MR. STAFF: \$2. But Mr. Abt has given evidence about his objection, what is criticism of the fuel oil price factor under the equation is. The question seems to ignore that as having an influence on the landed cost. I do not think my friend was asking the question with the intention—

20 HIS HONOUR: What does he say as to that. I know he is critical of entering into a formal contract and says it should have been either spot dealing or spot dealing for two or three shipments. He is critical of the escalation provisions. But is he critical of the actual price?

MR. STAFF: He says he is content to accept the original freight price, that is the contract price which we have here immediately escalated. I am not quite sure, I think at the time even of the first shipment there was an escalation factor in it. There is one other factor in fairness to the witness, your Honour will recall Mr. Abt's graph when the first shipment started off at \$1 higher than the Concord contract because of the penalty for the small ship. So that is another factor in the equation. If it had been 60,000 the freight rate would have been about \$10, and that is the best rate, about \$10.

30 HIS HONOUR: It seems to me the very differential is more of the order of \$2 than \$3 and there are other matters Mr. Staff has mentioned. What he is worried about is you have worried about freight and you have only put the freight part to the witness. If you want to do more you should make that clear.

MR. OFFICER: I am eliminating the penalty for using a small ship. I then want to compare that with the \$52.52. Perhaps I can approach it a different way.

Q. Mr. Abt, can you tell us in Australian dollars preferably, if you can, what per metric tonne you think the cost of freight should be from the Persian Gulf to Gove in mid-1975 — let us say August 1974. You can take the vessel as being of the 25 to 35,000 tonne range? A. Rather than 60,000 tonnes?

Q. Yes.

40 HIS HONOUR: Q. Do you want any calculating aid, or do you need to refer to any documents. If you do, please do. A. For the smaller vessels?

No. 111
 —
 Defendant's
 evidence: P. B.
 Abt: Cross-
 Examination
 (cont'd)

MR. OFFICER: Q. 25 to 35,000 tonnes. A. I will add on say 25 points, saying that the Worldscale 125 is my estimate—

Q. I am just asking you, you take any basis you like. Can you tell me in Australian dollars — or United States dollars if you prefer — how many dollars per metric tonne would be a fair thing for the transportation of fuel oil Persian Gulf to Gove? A. I don't have the right factors to convert from United States per long tonne but it would be of the order of \$11.80 per long tonne.

HIS HONOUR: Q. For freight? A. Yes. That is in American dollars per long tonne. I guess we convert that to Australian dollars per metric tonne.

MR. OFFICER: Q. Perhaps let me — rather than spend too much time on it — we have the basis from which we can progress from your estimate. But what I am putting to you — and let me put it to you directly — is that bearing in mind that B.P. was shipping its own product and bearing in mind your criticism of the Concord contract, do those factors not suggest to your mind that the fuel oil component in B.P.'s \$52.52 was the same as or higher than the price of \$9.25 U.S. per barrel? A. I don't know what the B.P. component was either on F.O.B. or freight. The only thing I can guide on is what the C.I.F. price was. I don't believe the components are broken up. 10

Q. I am not asking you whether they are. Perhaps my last question could be read to the witness. (question read by court reporter) 20

HIS HONOUR: Q. What he is suggesting to you is that B.P. were in fact charging in their \$52 price, the price which was not less than and greater than the K.N.P.C. price of \$9.25 a barrel? A. I can say that is possible.

MR. OFFICER: Q. Would you agree that the two factors mentioned in my question suggested as a probability? A. I don't know. I am thinking in terms of U.S. dollars and I am afraid I cannot make the calculations where I can say one way or another.

HIS HONOUR: Q. It ought perhaps be clear in your question and mind that the \$52.52 was Australian dollars and the \$9.25 was American dollars?

MR. OFFICER: I appended U.S. before my statement. 30

HIS HONOUR: Yes, I just wanted it to be clear.

MR. OFFICER: Q. In paragraph 5.1 you are criticising Nabalco for agreeing to pay \$9.25 initially above posted prices plus escalations that will keep it above posted prices, aren't you? A. Yes.

Q. And you are saying that in that respect the contract is less favourable to Nabalco than the proposed B.P. provisions? A. I am sorry, I believe I am referring here to the escalation.

HIS HONOUR: Q. You are referring, as I understand it, to the escalation clauses which are, as you make your statement there, yet to operate. In other words, you are looking ahead and saying the escalation clauses in the K.N.P.C. contract are, if anything less favourable than those proffered by B.P. Is that right? A. Less favourable to Nabalco? 40

Q. Yes. A. Yes.

MR. OFFICER: Q. I see, you are not criticising Nabalco for entering into a contract the initial price of which was above postings? A. No, it is to the ties.

No. 111
—
Defendant's
evidence: P. B.
Abt: Cross-
Examination
(cont'd)

Q. Would you turn to page 12 please. In paragraph 6.1 you are comparing the old B.P. contract as to credit terms with the Kuwait contract, Kuwait and Concord contracts? A. That is correct.

10 Q. Of course, the comparison would be very different if one were looking to the Kuwait contract and the Concord contract on the one hand, and the new proposed B.P. contract on the other? A. I have not seen the terms of the proposed B.P. contract.

Q. If I suggest to you — and I think this is correct — the new contract would provide for payment 30 days after invoice, invoice after delivery at Gove? A. Yes.

Q. The comparison would not be nearly as odious from the point of view of Nabalco's position? A. That is certainly true.

Q. You said a moment ago, I think, words to the effect that you had not seen the new B.P. contract? A. No.

Q. As I understand it he saw the escalation clauses and that is all? A. That is all your Honour.

MR. OFFICER: Q. What I will call the final draft? A. Yes.

20 MR. OFFICER: I have nothing further, your Honour, except as to whether these two contracts of affreightment were 74 Worldscale. Had there been any hint — I am not wishing to raise any criticism at the moment of Mr. Abt, there having been no hint in the statement we got on Monday: but we are only able of course to commence enquiries today, and because of time lags it may be tonight, before we are able to communicate in the first instance. I have no doubt Mr. Colish would like to get back, and would Mr. Abt, to the United States from where they came. I do indicate that it may be tomorrow — or we hope tomorrow, perhaps even
30 Friday before we receive information, or we hope to receive it. I would perhaps indicate to your Honour in the circumstances we hope to receive it at least in the first instance in the form of a telex from Occidental or Concord who were the parties to both.

HIS HONOUR: There is no great problem, because either it will be as you hope it would be or it won't. If it is as you hope, then I am sure Mr. Abt would concede certain things. If it is not, it stays where it is.

MR. OFFICER: I only raise it, your Honour, because it will be one way or the other. The conclusions to be drawn probably won't require Mr. Abt to remain until we know one way or the other. I take it likewise whatever be the answer my learned friend would not want Mr. Colish to stay.

40 HIS HONOUR: The only thing is there may be some objection to the form of evidence.

No. 111
—
Defendant's
evidence: P. B.
Abt: Cross-
Examination
(cont'd)

MR. OFFICER: I had intended, if that arose, to ask your Honour in the circumstances to permit perhaps to be tendered — even though it could not be done until probably next week — if they were prepared to disclose it, a copy of a contract annexed to a short affidavit. What we are seeking at the moment initially in this form is the freight clauses and escalators because it seems to me that provided we have those we do not need the whole contract.

HIS HONOUR: I am sure we can overcome the problem and I do not think there is any need for either witness to remain.

No. 111
—
Defendant's
evidence: P. B.
Abt:
Re-examination

RE-EXAMINATION

MR. STAFF: Q. You were asked some questions by my learned friend about B.P. having a fear of nationalisation in the Persian Gulf hanging over its head. Has B.P. to your knowledge access to crude in other parts of the world than the Persian Gulf? A. Yes. 10

Q. Whereabouts? A. Libya — are you talking about production that they own. They certainly have access to crude worldwide. They certainly had production of their own in North Africa. Whether that has all been nationalised already I don't know. They certainly have production in Nigeria. They will have substantial production in Alaska and the North Sea.

Q. Production in those two places is close to coming on? A. Yes.

Q. And there will be production next year? A. In the North Sea certainly. 20

Q. Alaska is fairly close? A. Yes.

Q. Is there any great fear of nationalisation of the Alaskan and North Sea interests hanging over B.P.s head? A. No, I am not sure about the North Sea.

Q. Is there any great fear of denial of access to the North Sea or Alaska fields? A. No.

Q. You were also asked by my learned friend this afternoon about the possibility of a double benefit accruing to a shipowner if he had a provision such as clause 19 of the Concord contract, the one about escalation of bunker costs? A. Yes.

Q. If he had also correctly or reasonably correctly protected himself in negotiating the original rate against anticipated rises in bunker costs? A. Right. 30

Q. You agreed that in given circumstances there could be a double benefit? A. Some double benefit, yes.

Q. What if as well he had tied his rate to Worldscale as it escalated each year, would that give him a triple benefit? A. You mean as—

Q. As in the Concord contract? A. I would think so.

HIS HONOUR: Q. That is his view of the construction of the contract is it not?

MR. STAFF: Yes.

Q. You also told my learned friend this morning it was your view that Nabalco should have, as you expressed it, bought time in relation to obtaining a couple of spot charters and just having a look around for a contract of affreightment? A. That is correct.

Q. You told his Honour, I think, or my learned friend, that you thought that the Nabalco decision to seek a term contract was understandable? A. Yes.

10 Q. What are your reasons for thinking it understandable? A. Well, being preoccupied with security my first choice would have been to deal with someone like B.P. I am not advocating that B.P. was the only one but someone who had fuel oil and transportation. Secondly, you needed — unless you wanted to get into the transportation business yourself, you need some index, some delivery schedule you could count upon so that you could run your business and get on.

Q. It was these reasons which led you to the reason that you thought the decision was understandable? A. Yes, there was a great deal of long term concept in a long term contract.

20 Q. However, in terms of seeking a true market rate for transportation was it your view that Nabalco should have, as you expressed it, bought time? A. Yes.

Q. You were asked some questions this morning about contracts of affreightment and about product sellers transportation arrangements. Is it the fact that some of the product sellers, that is of crude or product in the oil industry are themselves tanker owners and operators? A. Yes.

Q. So they simply carry their own product to the purchasers? A. Yes.

Q. Others, I take it, are product sellers who have subsidiaries or affiliated companies which are the shipping operators? A. Yes.

Q. And Occidental and Concord are an illustration of that? A. Yes.

30 Q. Then you have independent carriers who are the transportation people? A. Yes.

Q. I think you told my learned friend that where you have a product seller such as B.P. who has its own shipping operation you do not of course get contracts of affreightment or contracts of any kind for the carriage of product. A. That is correct.

Q. But do you in fact find contracts of one kind or another entered into between the product sellers and their affiliated shipping companies? A. Yes.

Q. And do you find contracts of affreightment sometimes entered into in those circumstances, or must they be spot or term arrangements? A. I think between the parent and its affiliated company, is that what you mean?

No. 111
 —
 Defendant's
 evidence: P. B.
 Abt:
 Re-examination
 (cont'd)

Q. Yes. A. I think there would normally be a formula worked out. Normally, it would be current Afra for the size of vessel plus the then current posting for the product.

(Witness retired)

MR. STAFF: I would tender several documents. Firstly, I tender a projection which has been done using Mr. Abt's assumptions or views of the excess cost involved in the projected shipments 11 to 15. Your Honour remembers the hypothetical shipments of my learned friend. It runs across the page and commencing 11, 12, 13, 14 and 15, we have related it to the projection that my learned friend has made in respect of those shipments.

10

(Above document admitted without objection and marked Ex.67)

Then I would tender a telex dated 5th June, 1974, from Mr. Wilson to Stolt Neilsen.

(Above document admitted without objection and marked Ex.68)

Then I would tender, your Honour, a reconciliation of usage of fuel oil by Nabalco on the shipments delivered to Gove by K.N.P.C. Concord. This is made up in the way which is indicated from usage figures, which are Ex.AB, and adjusts stock. What it shows, we submit, is that up to voyage 10 we are being taxed with the cost of 21,908 tonnes in excess of usage.

HIS HONOUR: Is this because of the additional storage that was put in?

20

MR. STAFF: Yes, your Honour.

HIS HONOUR: The point of it is, you say that you would have been obliged to supply in round figures 22,000 tonnes less?

MR. STAFF: That is so.

MR. OFFICER: We have no objection to this calculation — what it really is is an argumentative calculation, or drawing conclusions, but we would certainly object — if your Honour looks down the first page your Honour sees the 21,900 and it is called "over supply on voyage 10". This is an over-supply by and including voyage 10.

Now it may be a matter of some debate as to whether this 20,000-odd tonnes filling the spare tanks is to be taken as supply from the first shipment or the second or the third or the tenth because the price varies greatly.

30

HIS HONOUR: Your objection has been noted on the transcript Mr. Officer and you are protected. I will admit the document.

(Above document marked Ex.69)

MR. STAFF: Next I would tender a publication called "Tanker Rate Schedules", which contains a description of the various predecessors of Worldscale and of Worldscale and Components which go to make it up.

MR. OFFICER: Not having had the opportunity of reading this before, I feel that I have to object on the ground of relevance because I do not know what is in it.

No. 111
—
Defendant's
evidence: P. B.
Avt:
Re-examination
(cont'd)

HIS HONOUR: Can I mark it tentatively as Ex.70 and if you wish to press some objection to it you can do that tomorrow or at some other time, and if you want to uplift it to read it or to have a copy made that may be done?

MR. OFFICER: I would certainly like to have an opportunity to read it before pressing the objection or withdrawing it.

(Above publication tentatively marked Ex.70)

10 MR. STAFF: Next I would tender a record of the minutes of decisions of meetings of the Board of Direction Gove Joint Venture held on 24th July, 1969 and 25th June, 1970; the relevant minutes are to be found in item 2.4 on p.2 of the 1969 minute and item 3.2 on p.2 of the 1970 minute.

MR. OFFICER: May I repeat the phrase so often used, we have no special objection.

(Above document admitted and marked Ex.71)

MR. STAFF: May I tender next a record of the minutes of decisions of a meeting of the Board of Direction on 26th April, 1974 and the relevant minute is to be found at 3.3 on p.4.

(Above document admitted without special objection and marked Ex.72)

20 Then, your Honour, I tender a record of decisions of the Board of Direction Gove Joint Venture, 17th November, 1975, and the relevant item is 2.1 on p.2.

(Above document admitted without special objection and marked Ex.73)

Then I would tender, your Honour, a photo copy of a deed of assignment made 30th May, 1969 between Nabalco and Swiss Aluminium Australia Pty. Ltd. and Gove Alumina Limited.

(Above document admitted without special objection and marked Ex.74)

I would next tender, your Honour, a statement of quantities of diesoleum and super motor spirit delivered under the supply agreement by B.P. to Nabalco since 28th October, 1974.

30 (Above document admitted without objection and marked Ex.75)

Then I would tender a telex dated 22nd July, 1974, from Nabalco to B.P. Australia.

HIS HONOUR: This telex is already part of Ex.1. Do you still want it to go in?

MR. STAFF: No, your Honour, I will withdraw that tender.

No. 111
 —
 Defendant's
 evidence: P. B.
 Abt:
 Re-examination
 (cont'd)

I would tender next pars.2, 3 and 4 only of a report by Mr. Notter dated July 1975 to the General Manager of Nabalco.

(Above paragraphs admitted without objection and marked Ex.76)

Then, your Honour, I tender a memorandum of Mr. Notter to Mr. Coogan dated 20th June, 1974. The last two paragraphs are the only two of any real relevance.

MR. OFFICER: My friend tenders the last two paragraphs as being relevant. We would submit that they are not relevant; so far as we can recall they were not put to the author of the document and in our submission they are not relevant. Perhaps your Honour might care to look at it for the purpose of deciding that.

10

MR. STAFF: I do not want it to be thought that we do not suggest the whole document is relevant but I was simply intending to indicate the particular paragraphs we considered most relevant.

MR. OFFICER: I ask your Honour particularly perhaps to look at the last two which my friend says are the more important or more relevant portions, particularly if that is the tide in any way to be made relevant to alter some of the suggestions that were made that we were delaying a termination with B.P. until the first shipment from Kuwait was on board. It is a matter that should have been put to the author of that document.

HIS HONOUR: As I understand it, Mr. Officer, you can call him in reply to deal with that if you thought use was going to be made of it.

20

MR. OFFICER: But, your Honour, he was in the witness box and if it is going to be suggested by use of that document that he should not be believed in whatever evidence he gave, then it should have been put to him. I know I can call him in reply but, with respect, that is a secondary point.

HIS HONOUR: Yes, but the fact that he was not cross-examined on it does not make it inadmissible.

MR. OFFICER: If the suggestion is going to be made that he is not going to be believed because of that document then the document, with respect, should have been put to him.

30

HIS HONOUR: Maybe that would be a reason why I would not accept the submission, but it does not make the document inadmissible.

MR. OFFICER: We rest particularly on the submission, your Honour, that nothing that appears in that document is relevant.

HIS HONOUR: No, I will admit the document.

(Above document marked Ex.77)

MR. STAFF: Then, your Honour, I would tender a letter from B.P. Australia to Nabalco dated 9th August, 1974 with a debit note dated 7th August, 1974 and annexures, a remittance advice dated 17th October, 1974. This simply shows the

charge for and payment of the last shipment, the 19th July shipment of fuel oil to Gove at the escalated old base price.

(Above document admitted without objection and marked Ex.78)

Might I recall Mr. Abt? He has done a recalculation of an estimate that he gave of \$US11.80 for the small tanker and he finds he made a mistake.

No. 111
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Defendant's
evidence: P. B.
Abt:
Re-examination
(cont'd)

PAUL BRENNAN ABT

Recalled:

No. 111
—
Defendant's
evidence: P. B.
Abt: Recalled

HIS HONOUR: Q. You remain bound by your former oath, you understand, Mr. Abt? A. Yes, your Honour.

10 MR. STAFF: Q. Mr. Abt, you remember in answer to my learned friend you gave an estimate, which you did in the witness box, for a 25-35,000 tonne tanker trip middle of last year Persian Gulf to Gove and you indicated that you thought \$US11.80 per long tonne was about the figure that you regarded as appropriate? A. Yes.

Q. Have you since leaving the witness box worked through your figures again? A. Yes.

Q. What did you find? A. The basis for the — my basis for Worldscale, 100, in the 11.80 calculation was wrong. I get a figure closer to \$8 than \$6, so the new calculation is—

20 HIS HONOUR: Q. 80 cents instead of 60? A. No, that part of it is correct, but in doing the calculation as to what the market would have been for a 25 to 35,000 tonner I assumed a Worldscale rate of 25 points higher than a 125, meaning a 150, but my error came in in using a base Worldscale that was wrong. The base Worldscale is 5.93 and I believe I was using 7.93 in my calculations.

MR. STAFF: Q. Your estimate of \$US11.80 per long tonne should have been I think \$US8.90? A. Per long tonne.

Q. I think you worked that out at \$Aust.5.90 per metric tonne? A. That is correct.

Q. At what rate of exchange? A. I believe it was about \$US1.30 to \$Aust.1.00.

30 Q. I suggest to you — the rate you took from one of the exhibits, did you? Did you do the conversion from \$US8.90 per long tonne? A. No, I did not, that conversion was done by Mr. Snape, he had a calculator.

MR. STAFF: Q. I am told, your Honour, it was done at 1.485, which was the agreed figure between the parties at that time and that gives a figure of \$Aust.5.90 per metric tonne.

No. 111
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*Defendant's
evidence: P. B.
Abt: Recalled
(cont'd)*

MR. OFFICER: I have no questions.

(Witness retired)

(Case for the defendant closed)

(Mr. Officer indicated that his only case in reply would be to tender certain documents which he expected would be ready for tender tomorrow)

(Further hearing adjourned to 10 a.m. Thursday, 4th December, 1975)