In The Privy Council

No. 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 IV

(pages 767-846)

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IN THE PRIVY COUNCIL Number of 1977

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

BP AUSTRALIA LIMITED
Appellant

NABALCO PTY LIMITED
Respondent

RECORD OF PROCEEDINGS:
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VOLUME IV

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Judgment of His Honour Mr Justice Sheppard on admissibility of evidence

JUDGMENT
(On admissibility of Evidence)

HIS HONOUR: In the course of his evidence yesterday Mr Coogan gave evidence of a conversation that he had had with Mr Lockrey, who is the manager of the Wholesale Sales Division for Australia of the defendant. He referred to the fact that he had received a letter from the defendant dated 7th May, which is part of Ex 1. That letter included the following statements:

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

Mr Coogan said that the conversation he had with Mr Lockrey on the telephone on 9th May, 1974, was principally concerned with his surprise at receiving the letter of 7th May. He continued, and, as I understand it, this is what he said to Mr Lockrey:

> "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 Coogan's evidence continued:

> "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 the 12th, and perhaps about then we arranged for the meeting to be held on 17th May in Melbourne."

The meeting was held and Mr Coogan said that before discussion began either he or Mr Lockrey said that the discussion would be without prejudice.

Mr Officer, on behalf of the plaintiff, then sought to elicit the terms of the conversation which ensued at the conference. This was objected to by Mr Staff on behalf of the defendant by reason of the fact that the parties had agreed to label their discussions without prejudice before they began. I then took evidence of what was said on the voir dire for the purpose of determining whether or not I should admit all or part of the conversation.

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In his evidence on the voir dire Mr Coogan said, amongst other things:

> "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. BP cannot continue.' "

It was then that a Mr Snape gave certain financial details and Mr Coogan continued:

> "The information I recall him saying was that the cost to BP at the time we were talking was running in the order of one million dollars a month."

He said that Mr Lockrey then said, "You can understand now why we cannot continue with the contract." Mr Coogan said, "I can understand your difficulties, but I was hopeful that we could still reach some agreement on an interim arrangement." His evidence continued:

> "**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.'
>
> **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.' "

There was then a discussion about what kind of new contract the representatives of the defendant had in mind. According to Mr Coogan the conference ended with his saying:

> "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 BP 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. As I understand it if we take you to Court there can be no new contract. If we do take you to Court, supply will be on a spot basis only with all the uncertainties that entails. 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."

He then said:

> "As I recall it, at the end of the meeting Mr Lockrey said, 'yes, that is the position.' "

There are a number of ways in which the plaintiff submits that the evidence to which I have referred, particularly what Mr Rowland said and what Mr Coogan said as a summary of the conference which was assented to by Mr Lockrey, is admissible.

The defendant has elected not to lead any evidence on the voir dire and I must take the evidence which has been given by Mr Coogan at its face value. It may be, of course, that I will have to view it differently after all the evidence is in and the matter falls for final consideration.

Despite the number of bases upon which the plaintiff contended that the evidence was admissible, I am of opinion that there is only one basis upon which its argument can be successfully put. If what Mr Rowland said, tacitly assented to as it was by Mr Lockrey, amounted to an indication that the defendant was simply not prepared to be bound by the old contract under any circumstances, then I think the words he used are admissible, and it follows also that the words which referred to those words in Mr Coogan's summary are also admissible. It must be remembered that the representative of the defendant spoke in the context of the facts that a notice under cl.9C(iii) of the contract had been given by the defendant and a notice had also been given by the plaintiff under that clause, although, as indicated in my earlier judgment, the plaintiff's notice was given on an alternative basis. The representatives of the defendant were therefore contending not only at the conference, but in the letter of 7th May, that the contract had terminated as to the supply of fuel oil by reason of the fact that the defendant had given a valid notice under the clause, and the plaintiff had exercised its consequential right to give a notice which had had the effect of terminating the agreement in respect of the supply of fuel oil as from 24th July, 1974.

I think the question to ask on the face of the evidence at this stage of the case is: did Mr Rowland say what he did without prejudice, or, was what he said, said as an absolute statement upon which the parties would then negotiate for the future? I have been referred to a number of authorities, and I do not mention them all, but I am satisfied that they establish that if the statement was of the latter kind it is plainly admissible. I refer to Kurtz v. Spence & Sons, 58 L.T., 438 at p.441, Nicholson v. Southern Star Fire Insurance Limited, 28 S.R. 124 at pp.131–132, and to the judgment of Wells, J. in the Supreme Court of South Australia in Davies v. Nyland, 10 S.A.S.R. 76 at pp.88–91. Although that case went on appeal there is nothing in the judgments delivered on appeal which would at all detract from what his Honour has said and I indicate my respectful agreement with it.

I have reached the conclusion that, as Mr Coogan has recounted the conversation, Mr Rowland was saying, with Mr Lockrey's assent, in the context of the defendant's view of the notices which had been given by the parties, that the old contract was at an end and that the defendant was not prepared to be bound further by it, nor to entertain it as something which might bind the defendant or affect it in the way that it would act in the negotiations which were to ensue. So far as the defendant was concerned the contract, as to fuel oil, was terminated, and the negoti-

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ations were to be had on that basis or not at all.

In the course of his argument Mr Staff raised the question of whether Mr Rowland, who is the secretary of the defendant, was authorised to make the statement which he did. The statement was made in the presence of Mr Lockrey who is, according to the correspondence, the manager of the Wholesale Sales Division of the defendant. Mr Lockrey did not dissent from what Mr Rowland had said. Mr Rowland's statement was specifically assented to by him when Mr Coogan summarised his understanding of the defendant's then attitude at the end of the conference. Both Mr Lockrey and Mr Rowland gave the impression that they were relating a stand which had come to them from London. The defendant is not a company incorporated in the United Kingdom but is a company incorporated here. Nevertheless, and understandably, one would expect them to act upon the instructions of senior executives of their London parent or associate. Notwithstanding that fact, I consider that there is prima facie evidence of authority on the part of the two executives of the defendant to make the statements which they did on its behalf. I do not therefore think that the admissibility of Mr Coogan's evidence is affected by any argument as to lack of authority.

Mr Officer seeks to rely, or may seek to rely in the future, upon other matters which were referred to in the conversation, particularly statements in relation to prices. I have reached no conclusion as to whether these statements are admissible to show that the defendant would not supply except at the prices indicated in the evidence. I think, however, that, although on the basis of what I have said, only the passages from the evidence to which I have referred are strictly admissible, the preferable course is to admit as evidence in the case the whole of the evidence given upon the examination on the voir dire to enable one to see the context in which the words attributed to Mr Rowland and Mr Lockrey were used. In the end it will be necessary for me to determine the question of whether or not the defendant repudiated the contract as to the supply of fuel oil. In coming to that conclusion I will, by reason of the ruling I have given, look at the evidence which Mr Coogan has given. But there may be other evidence given by Mr Coogan, or other evidence given by representatives of the plaintiff and the defendant. In the end it will become a question of what view I take of the submission made by the plaintiff that there has been repudiation in the light of the material which is before me. Although the defendant elected not to call evidence on examination on the voir dire, if a different view of the conversation were put to me in evidence by representatives of the defendant, it may be that I would not take the prima facie view of the conversation which I have taken in these reasons. All I decide at the moment is that the evidence given by Mr Coogan on the voir dire will be admitted as evidence in the case, but that does not indicate any ultimate view as to the question which is to be determined, namely, did the defendant repudiate the contract as to the supply of fuel oil.

There were some documents marked for identification in the course of the examination on the voir dire. These will not be admitted at this stage, but Mr Officer may tender them if he chooses to do so, or tender parts of them as the case may be.

MR STAFF: Your Honour, there is just one matter. There are I think five questions after a page and a half or thereabouts of a discussion between your Honour and me which we would respectfully wish not to tender as part of the cross-examination in the case. I refer to p.18, the last six questions on that page relating to what I put to Mr Lockrey about a discussion on 23rd May which he said he could not remember

in substance.

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MR OFFICER: I have no objection to that.

HIS HONOUR: The admission of the evidence to which I have referred will not include certain questions asked by Mr Staff of Mr Coogan which appear on p.18 of the transcript and commence with a question, "Now you of course are aware that discussions—on 23rd May you had a telephone conversation with Mr Lockrey, did you not" and end with the last question on that page.

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

JUDGMENT

HIS HONOUR: This is an action for damages brought by the plaintiff against the defendant for anticipatory breach of a fuel supply contract made between the parties on 11th June, 1970. The damages claimed are substantial being of the order of $20,000,000. The plaintiff is the operator of works situated on the Gove Peninsula near Nhulunbuy, a town in the Northern Territory of Australia.

Nhulunbuy is a town of some 4,000 people. The Gove Peninsula is on the north eastern corner of the Northern Territory. It lies between the Arafura Sea to the North and the Gulf of Carpentaria to the South. The land is rich in bauxite. Substantial works have been constructed upon the Peninsula by two companies, Swiss Aluminium Australia Pty Limited and Gove Alumina Limited, to enable bauxite to be extracted and treated by refinement to alumina. Port facilities enable large bulk carriers to load bauxite or alumina and carry it away to overseas ports. The town of Nhulunbuy exists only by reason of the need for a work force to staff the works. Until leases were granted by the Commonwealth Government to the plaintiff the Gove Peninsula was part of Arnhem Land, an aboriginal reserve. The population of the town is made up not only of the work force employed directly in the mining and refining activities which are carried on, but also of persons engaged in support and service occupations and activities. Many of those employed either directly at the works or in other occupations live in the town with their families.

The town is an isolated one. There is no road nor rail link to any other part of Australia. The nearest settlement of any size is the town of Darwin, itself not an over large centre, some 650 kilometres to the west. There are other smaller and equally isolated settlements along the Gulf of Carpentaria. Access to the town is only by air and sea, unless perhaps one embarked upon the risky course of taking a four wheel drive vehicle through the rugged country to the west and south. By sea the Peninsula is some 3,000 kilometres from Brisbane and 4,000 kilometres from both Perth and Sydney. It is slightly closer to the Indonesian cities of Jakarta and Surabaya on the north coast of Java.

In order to operate the various items of plant which make up the works large quantities of fuel oil are necessary. Much of this is used in the generation of electricity not only for the works but also for the town. Some generators can be operated by the use of diesoleum but the electricity so generated would not be sufficient to enable the works to be operated. Other operations depend upon the availability of fuel oil, but not as a result of its use in the generation of electricity. If the supply of fuel oil were cut off all operations would be brought to a halt and the activities of the townspeople severely restricted. The plaintiff, as the operator, and the unions, to which the members of the work force belong, would then be faced with difficult questions. If the work force were stood down it could not be elsewhere employed. It would have to leave. Once operations were to start again it would be dispersed. The plaintiff would face serious difficulties in rebuilding it.

I have referred to the fact that the leases were granted by the Crown to the plaintiff. They were granted pursuant to an agreement dated 22nd February, 1968, made between the Commonwealth and the plaintiff which agreement is known as the Gove Agreement.

The two companies already referred to, Swiss Aluminium Australia Pty Limited and Gove Alumina Limited, entered into a joint venture agreement in relation to the project. They also entered into a management agreement with the plaintiff by which they appointed it to manage and control the operations. Because of certain submissions made by the defendant it is necessary to refer to some of the provisions of both agreements. It is convenient to do that now. Before I do so I should mention that in addition to the joint venture agreement and the management agreement there were two other agreements known as a bauxite sales agreement and an alumina sales agreement made between the two companies. It is unnecessary for me to refer further to these two agreements.

Clause 2.1 of the joint venture agreement provided that the two companies thereby associated themselves in a joint venture, the purpose of which was the progressive exercise and development of the mining, production, treatment, transportation and shipment of bauxite and alumina. Clause 2.4 of the joint venture agreement provided that unless otherwise agreed by the two companies bauxite and alumina were to be delivered by the plaintiff to or to the order of the respective company entitled to take and ship the same under the agreement. Title was to pass on such delivery. Clause 2.5 provided that the property and assets to be made available by the companies for the purposes and duration of the joint venture should consist of certain rights referred to as the Gove Rights (which included the rights conferred by the Gove Agreement), the project itself, and all other property thereafter developed, constructed or acquired by the companies under or by virtue of the agreement. Clause 2.6 provided that the property and assets were to be owned as tenants in common in shares thereafter specified which were, subject to certain exceptions, seventy per cent as to Swiss Aluminium Australia Pty Limited, and thirty per cent as to Gove Alumina Limited. The agreement provided for the entry by the companies into the management agreement with the plaintiff. Clause 7.2 of the joint venture agreement provided that the project and all other operations and activities would be developed and operated by the plaintiff for the companies in accordance with the terms and conditions of the joint venture agreement and the management agreement. Clause 8 of the joint venture agreement provided for the establishment of a Board of Direction. It is unnecessary for me to refer to the detailed provisions which are made. I mention it only because it is necessary to make reference

to the Board of Direction when I come to deal with the provisions of the management agreement.

The management agreement is made between the two companies and the plaintiff. By clause 2.1 thereof it is provided that the plaintiff is thereby engaged by the companies to manage, supervise, control and conduct on their behalf all operations in order to ensure that the project is completed in accordance with the joint venture agreement and to enable the companies to exercise their respective rights under the joint venture agreement to take bauxite and/or alumina and to ensure that a company which is a party to any contract or contracts for the sale by it of bauxite and/or alumina is able to meet the delivery requirements of such contracts. The agreement provides that the plaintiff may itself or through such independent contractors as it shall engage undertake a number of enumerated activities which include the construction of a port, town, roads, communications and other facilities; the mining, production, crushing, screening, treating, transportation, handling, storage, stockpiling and loading for shipment and delivery of product; the custody, maintenance, operation, and protection of the property and assets of the companies; and the acquiring of materials, supplies, machinery, equipment and services.

By clause 2.3 it is provided that the plaintiff is to be subject to the general supervision of the Board of Direction and is to carry out the directions and decisions of the Board given or made in accordance with the joint venture agreement. Clause 2.5 provides that the plaintiff shall in regard to procuring material, equipment and services, act in accordance with the procurement and purchasing procedures, if any, as have been agreed by the Board. It is to obtain the prior approval of the Board before entering into any contract in excess of the sum of $1,000,000. By clause 2.6 the plaintiff is to refer to the Board, inter alia, any litigation or matters potentially leading thereto. By clause 4.2 the plaintiff, at least 45 days prior to each meeting of the Board, is to furnish each company with a proposed programme and proposed budgets for operations during the next ensuing year. The programme and budgets are to include, on a quarterly basis, inter alia, an itemised budget specifying separately bauxite mining costs and bauxite treatment costs and itemised estimated cash requirements and expenditures. By clause 4.3 such programme and budgets as approved are binding on the plaintiff who is to carry on operations during the period covered thereby in accordance therewith so far as funds made available permit. Clause 5.2 provides for the keeping of accounts by the plaintiff. Clause 9.1 of the agreement is as follows:

> "The Manager (the plaintiff) shall charge the Participants (the companies) with all costs, expenses and liabilities of the Manager hereafter incurred and actually paid or accrued in connection with Operations or pursuant to the programmes and budgets approved by the Board or otherwise authorised by the Board in accordance with the Joint Venture Agreement and this Agreement."

Clause 11.2 provides that the plaintiff is not to have authority to act for or to assume any obligation or liability on behalf of the companies or either of them except such authority as is conferred on the plaintiff by the management agreement or the joint venture agreement or by the board pursuant thereto. By clause 11.3 each company is to indemnify and hold the plaintiff harmless from and against any and all losses, claims, damages and liabilities arising out of any act or any assumption of any obligation by the plaintiff done or undertaken on behalf of such companies

pursuant to the agreement. By clause 13.1 the plaintiff is not to have any ownership, title, or interest in any property, real and personal, held, developed, constructed or acquired by or on behalf of the companies or either of them under or pursuant to the management agreement or the joint venture agreement or in any money collected by the plaintiff for the companies or either of them from sources other than the companies themselves, "except as the agent and representative hereunder" of the companies.

In order that there might be certainty of supply not only of fuel oil but also of other petroleum products as well, the plaintiff, with the approval of the Board of Direction, entered into the earlier mentioned fuel supply contract with the defendant. The contract is dated 11th June, 1970, and is expressed to be made between the defendant and the plaintiff. I have had occasion in the judgment delivered by me in these proceedings on 19th August, 1975, to refer in some detail to this contract. I incorporate my references to it on pp.3 to 9 inclusive of that judgment herein. It is necessary, however, to refer to certain further provisions of it. They are part of clause 2 and clause 16. The relevant part of clause 2 is:

> "Subject to the terms and conditions hereof the Buyer will purchase from the Seller and the Seller will supply and deliver to the Buyer the Buyer's requirements of Super Motor spirit Diesoleum and Furnace Oil together with such other petroleum products as the Buyer may from time to time request the Seller to supply."

Clause 16 of the contract is as follows:

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

The opening words of the contract specify the defendant as the seller and the plaintiff as the buyer. These descriptions are used throughout the contract to designate the defendant and the plaintiff respectively.

Pursuant to the fuel supply contract substantial quantities of petroleum products were delivered by the defendant to the plaintiff. The super motor spirit and diesoleum came from sources within Australia; the supplies of fuel oil came from sources outside it. I have referred to the sources of supply on pp.15 and 16 of my earlier judgment.

The contract was for a period of ten years from the date of the first delivery of fuel oil into the plaintiff's storage tanks (clause 1). Clause 9, which is set out in full on pp.4 to 8 inclusive of my earlier judgment, provided for what might happen depending upon the occurrence of certain eventualities there specified. In some cases the happening of a particular event would give one or both the parties the right to bring the contract to an end, in some cases as to all products, and in other cases in respect only of a particular product. It also provided that in certain circum-

stances the price payable for one or other of the products might be varied without there being any termination of the whole or any part of the contract.

Although there were some variations in the prices of products effected pursuant to clause 9, the contract proceeded uneventfully until the defendant, on 25th March, 1974, purported to give to the plaintiff a notice pursuant to the provisions of clause 9(C)(iii) of the contract. The notice is set out on p.10 of my earlier judgment. The notice was given because it was alleged that due to circumstances beyond the defendant's control it was, within the meaning of the clause relied upon, able only on onerous terms to obtain supplies of crude petroleum and/or petroleum products from the defendant's then sources and by its then usual routes for such supplies. The notice was based upon the actions of the OPEC countries in causing the price of crude oil to rise by approximately 1,000 per cent in the period October/December 1973. The evidence of what occurred is referred to in detail in my earlier judgment on pp.16 to 26 inclusive. For reasons which appear in that judgment I decided that the defendant was not entitled, upon the basis of the matters relied upon by it, to give a notice pursuant to clause 9(C)(iii) of the contract.

In order to protect its position the plaintiff also gave a notice and the terms of this notice are set out on pp.11 to 12 of my earlier judgment. In effect the plaintiff's notice said that it did not accept that the defendant's notice was valid. It also said that, if contrary to that view the defendant's notice were valid, the plaintiff's notice pursuant to the clause was to operate so as to terminate the plaintiff's obligation to purchase fuel oil at the expiration of the period provided for in the notice. The notice was given on 24th April, 1974. If contrary to my conclusion, the defendant's notice were valid, and the plaintiff's notice were a valid notice under the clause, the plaintiff's notice would have had the effect of terminating the contract as to fuel oil on 24th July, 1974.

These proceedings were commenced by summons filed on 19th June, 1974. Originally the summons sought only declaratory relief. In effect the relief sought was that upon the true construction of the contract the defendant's notice given on 25th March, 1974, was invalid. The arguments to be relied upon were not only based upon the construction of the agreement but were also based upon the application to the contract of the Prices Justification Act.

Originally it was hoped that the summons might be determined expeditiously. However, the defendant decided that it should put on extensive evidence of the events which had occurred in the Middle East and elsewhere in 1973 which led to the very substantial increase in cost. This evidence had to be collected from overseas and there was consequent delay. After it was put on the plaintiff, understandably, wished an opportunity to consider it with the result that the matter was not ready for hearing until February 1975. Although the parties were offered dates in that month, they preferred, for reasons which need not be mentioned, to take a date in May 1975.

Before the time arrived for that hearing the parties took the view that there was some reason to doubt whether the Court would or could give declaratory relief if it did not have the effect of finally determining the rights and obligations of the parties to the entirety of the dispute. The summons was accordingly amended. On pp.1 and 2 of my earlier judgment I set out what I then believed to be the relief claimed in the summons in its re-amended form. What I have set out, however, is an earlier form of the summons. The relief claimed in the summons is as follows:

"1. A declaration that on the true construction of the fuel supply agreement dated the 11th June, 1970 between the Defendant of the one part and the Plaintiff of the other part and in the events which have happened:
(a) The notice bearing date the 22nd March, 1974 delivered by the Defendant to the Plaintiff, a copy of which is referred to in the affidavit of David Griffin sworn herein the 19th June, 1974 is not a valid or effective exercise of the power given to the Defendant under Clause 9C(iii) of the said agreement or of any other power given to the Defendant under the said Agreement.
(b) The delivery of the said notice by the Defendant to the Plaintiff did not result in the price of $A54.44 per metric ton being fixed as the revised base price for supplies of Furnace Oil under the said agreement as from the 26th June, 1974 or at all.

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

2A. (a) A declaration that the defendant by its conduct in relation to the said notice and to the supply of Furnace Oil thereafter was in breach of and repudiated the said agreement so far as it related to the supply of Furnace Oil.
(b) A declaration that the Plaintiff is entitled to damages for the said breach of contract.
(c) An order fixing the amount of such damages or alternatively directing an enquiry as to the amount of such damages.

2B. Alternatively to 1, 2 and 2A a declaration that the Plaintiff by its notice to the Defendant dated the 24th April, 1974 terminated its obligation to purchase Furnace Oil under the said agreement as from a date three months from the giving of such notice.

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

During the earlier hearing in May 1975 the defendant filed a cross-summons. The relief claimed in that summons is set out on pp.2 and 3 of my earlier judgment.

In my earlier judgment I decided, as I have said, that the defendant's notice was not a valid notice under the clause relied upon by it. I also decided that the plaintiff's argument based upon the Prices Justification Act was unsound. There were also argued questions concerning the validity of the plaintiff's notice. Because of my views upon the invalidity of the defendant's notice these did not strictly arise for consideration but I expressed the view that if, contrary to my main conclusion, the defendant's notice were valid, the plaintiff's notice would also have been valid.

It is convenient to mention a matter left outstanding in that earlier judgment. It concerns a point relied upon by the plaintiff in answer to an argument advanced by the defendant that the plaintiff, by the defendant's notice (valid or invalid), had been put to its election and could not approbate and reprobate. It was contended by the plaintiff, amongst other things, that this argument could only be sound if the plaintiff, at the time when it was put to its election, had full knowledge of all

relevant factors necessary for it to make a decision. Because the evidence did not permit me, when I delivered my earlier judgment, to decide whether the plaintiff did have such knowledge, I reserved all matters arising by reason of that submission to the present hearing. No material during the present hearing was put before me to suggest that the plaintiff did not have knowledge of all material factors. Accordingly the submission made by the plaintiff based on absence of knowledge is rejected. It is right to say that counsel for the plaintiff ultimately withdrew the submission.

Thus the situation, at the time that I commenced the present hearing, was that I had reached the conclusion that the defendant's notice was invalid, but not for any reasons associated with the application to the contract of the Prices Justification Act. I had reached the further conclusion that if, contrary to that view, the defendant's notice were valid, the plaintiff's notice, notwithstanding the language in which it was couched, was also valid.

Counsel for the defendant conceded that his client's only claim for damages for breach of contract against the plaintiff, apart from a claim for nominal damages, was in respect of the shipment of oil delivered on 19th July, 1974. The amount involved was of the order of $700,000. The defendant would only be entitled to recover this amount if both conclusions previously arrived at were erroneous. If both notices were valid the price charged and paid was the appropriate one. It would only be if the defendant's notice were valid and the plaintiff's notice invalid that there could be recovery. This would be because the defendant's notice would have effectively fixed a new base price for fuel oil after 26th June, 1974. The amount claimed was the difference between the new base price so fixed and the price previously existing. The defendant did not supply after 19th July, 1974. As I understand what I have been told by counsel for the defendant supply thereafter at the base price specified in the defendant's notice would not have resulted in any profit to the defendant. Such claim as it had would therefore result in nominal damages only. For the above reasons the cross-claim should be dismissed.

After my judgment of 19th August, 1975, was delivered I gave directions for the further conduct of the hearing. These included directions that the parties file points of claim and defence. I also gave directions in relation to the filing of points of cross-claim but, because of what I have just said, it is unnecessary to refer to those.

It is important that I refer to the points of claim and points of defence in some detail. Paragraph 1 of the points of claim refers to the contract. Paragraph 2 alleges the first delivery of oil on 5th May, 1971; the consequence of that allegation, which is not denied, would be that the agreement, subject to earlier termination in the event of the operation of one or other of the provisions of clause 9, would run until 5th May, 1981, as to all products. Paragraph 3 refers to the defendant's notice and paragraph 4 to the fact that at the time of the giving of the notice the base price for fuel oil was $13.99 per metric ton.

Paragraph 5 of the points of claim alleges that the facts and circumstances at the time of the delivery of the notice were not such as to entitle the defendant to exercise the power which it purported to exercise. That allegation was denied by the defendant, but of course the issue is concluded against the defendant by my earlier decision, subject to any contrary view taken by an appellate court. Paragraphs 6 and 7 of the points of claim refer to the plaintiff's notice of 24th April, 1974. Paragraphs 8 to 13A of the points of claim are in the following terms:

"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 the 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 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
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.

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 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."

Paragraph 13A was added by amendment after the hearing had concluded on 16th December, 1975. It necessitated the taking of further evidence and the hearing of further argument on 5th March, 1976.

Paragraphs 3, 4, 5 and 6 of the points of defence are in the following terms:

"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.

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

Paragraphs 7 and 8 of the Points of Defence refer to the plaintiff's notice of 24th April, 1974, and allege in the alternative either that the notice operated to terminate the agreement in accordance with the provisions of cl.9(C)(iii) of the contract or that the plaintiff did not elect or effectively elect so to terminate the agreement by reason whereof it should be treated as having elected to affirm the agreement "on the basis of a revised base price of furnace oil of $54.44 per metric ton". The matters raised by paras 7 and 8 of the Points of Defence have been dealt with in my earlier Judgment and need not be further referred to.

Paragraph 9 of the Points of Defence is in the following terms:

"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."

Paragraph 10 of the Points of Defence puts in issue the plaintiff's claim for damages which is made in para.14 of the Points of Claim. Paragraph 11 of the Points of Defence deals with para 13A of the Points of Claim. The allegations made in that

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paragraph are denied. Additionally it is said that the agreement relied upon in the paragraph is void for uncertainty and is also unenforceable for failure to comply with the provisions of s 9 of the Sale of Goods Act 1923.

Originally the amount claimed by the plaintiff for damages exceeded $36,000,000, but for reasons I now mention the claim is substantially reduced.

Clause 9(C)(v) of the contract provided for the giving by the plaintiff of a notice fixing a revised base price for any or all of the products covered by the agreement in the event, inter alia, of the Commonwealth Government re-fixing the price per barrel of indigenous crude oil under the Government's policy relating thereto. In September 1975 the Government did re-fix the price per barrel of indigenous crude oil under its policy relating thereto. On 20th November, 1975, the defendant gave the plaintiff a notice pursuant to cl.9(C)(v) as a result of the re-fixing of the price. The notice was given during the hearing. The plaintiff, as it was entitled to do under the clause, gave a notice terminating its obligation to purchase all products under the contract. It was agreed by counsel that the plaintiff's notice was to be deemed to have been given on 16th December, 1975. On that basis the contract, to the extent that it had not already been determined in whole or in part, was determined as to all products on 16th March, 1976 (three months after the date of the plaintiff's notice). If the plaintiff be entitled to damages, it is only entitled to damages based upon an entitlement to shipments at the March 1974 price (increased by adjustments other than any due to the invocation of cl.9(C)(iii)) up to 16th March, 1976, and not, as the plaintiff had originally claimed, up to September 1976. Furthermore, the defendant contends that the notice under cl.9(C)(v) would, if a purported notice under cl.9(C)(iii) had not been given, have been given earlier than it was with the result that any damages to which the plaintiff is entitled ought to be still further reduced upon the basis that the defendant's obligation to supply would have ceased, in any event, well before 16th March, 1976.

Subject to the matters raised by the addition of para 13A to the points of claim, the case brought by the plaintiff is one for damages for anticipatory breach of contract which breach the plaintiff alleges it accepted. This is the clear purport of paras 12 and 13 of the points of claim and the plaintiff did not in argument shrink from putting its case in this way, notwithstanding that the contract remained in force in respect of the supply of products other than fuel oil; in particular in respect of diesoleum and motor spirit but also in relation to other products as contemplated by cl.2.

A difficulty arose early in the hearing because the defendant submitted the plaintiff was not entitled to give in evidence any part of what was said at the meeting between representatives of the parties on 17th May, 1974, because the parties had agreed that their discussions should be "without prejudice". A similar submission was made in respect of the discussion which occurred on 31st May, 1974. It was agreed that statements were made before each meeting began in which it was said by representatives of both parties that their discussions would be "without prejudice". It was also submitted that, although no express reference was made to them being without prejudice, still later discussions were also inadmissible because they referred to matters dealt with in, or arose out of, the earlier discussions which were expressly had "without prejudice".

Because of objection taken by counsel for the defendant to the leading of the

evidence of what transpired at the first meeting referred to and the agreement of counsel for the plaintiff that there had been statements made before the meeting began that the discussion would be without prejudice, I took evidence initially on the voir dire. Counsel for the defendant cross-examined on the voir dire and I was then asked to rule whether the evidence was admissible. I did not decide the question finally. I decided however that the appropriate course was to allow the matter to proceed and to treat the evidence as evidence in the case. I delivered reasons for my decision on 18th November, 1975. I do not wish to refer to those reasons but I point out that when they were delivered only the evidence of Mr Coogan of what had transpired at the conference had been given and also that the matter was much more extensively argued in the course of the final addresses of counsel than it was at that early stage of the hearing.

I have found the resolution of the question of whether any part of the conversation which occurred on 17th May, 1974, may be relied upon by the plaintiff in evidence one of substantial difficulty. I propose to take the course first of coming to a conclusion as to the purport and effect of what was said at each of the discussions upon which the plaintiff relies and then determining the question of whether what was said and done on the defendant's behalf evinced an intention by the defendant not further to be bound by the contract. If those questions are answered favourably to the plaintiff, I shall then decide whether the whole or any part of the evidence upon which the plaintiff must rely is inadmissible because of the "without prejudice" label attached to two of the meetings between the parties. My reason for adopting this course is that I cannot decide whether the whole or any part of the discussions was in fact "without prejudice" until I have reached a conclusion, as best I can, as to what indeed was said. Once I have reached that conclusion it seems a convenient course to proceed at once to decide whether, if what was said was admissible, there is evidence of a repudiatory attitude on the part of the defendant. If there is not, it will be unnecessary to decide what part, if any, of the evidence should have been rejected.

There is not a substantial difference between the versions of the various witnesses as to what was said in the discussions relied upon, but there are differences of degree and emphasis. I should add that I am satisfied that each witness endeavoured, as best he could, to recall what had been said. To the extent that I prefer the evidence of one witness to that of another it is only that I have reached the conclusion that his recollection is more accurate. There is absolutely no question of any dishonesty in this case.

I begin the account of what transpired by referring to the fact that there was a without prejudice discussion between representatives of the parties on 17th April, 1974; no attempt was made to lead evidence of what was then discussed and I need not refer to it further. The next matter to be mentioned is a letter written by the defendant to the plaintiff on 7th May, 1974. I referred to that letter on p.12 of my previous judgment but it is necessary that I should set out part of it. Reference was made in it to the notices and to certain other conversations and letters. The letter concluded with the following paragraphs:

> "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 Agree-

ment so far as the purchase of furnace oil is concerned, effective as from 24th July, 1974.

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

The General Manager of the plaintiff is Mr A. G. Coogan. After he received the letter on 9th May, 1974, he rang Mr Lockrey, who is the Divisional Manager of the Sales Division of the defendant. He was the principal person in the employ of the defendant with whom Mr Coogan had been dealing up to that time. Mr Coogan, whose evidence on this point I accept, said to Mr Lockrey that he was principally concerned and surprised at receiving the letter of 7th May. His evidence continued:

> "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 been 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."

Mr Notter is the Administration Manager of the plaintiff.

Prior to the sending of the letter of 7th May and the telephone conversation of 9th May, certain telexes had passed between the defendant and the defendant's associated company in London, BP Trading Limited (hereinafter called BPT). On 2nd May, 1974, the defendant had telexed BPT saying, inter alia:

> "We believe that in any new agreement Nabalco will want to protect their position vis-a-vis the old contract, so that in the event of the court finding in their favour and our being found to have acted incorrectly in raising their current price they would be able to revert to that current price and to the current contract . . . 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 although we doubt Nabalco would wear this and therefore a negotiated price with sacrifice to both sides might be preferable".

On 9th May, 1974, BPT sent to the defendant a telex in which inter alia, it was said:

> "In negotiation for new contract we advise that three points are essential.
>
> (1) It has no relevance to previous contract.
>
> (2) Your suppliers are not signing contracts in excess of one year and it is with utmost reluctance they are prepared to consider exception in the Nabalco case to three years.

(3) All protective clauses as advised must be included without exception or modification.

Failing the above the termination of the existing contract will operate in fact and you are unable to offer continuity beyond this date except on spot basis. They must understand that they have to come to terms before 28th July."

In relation to what was said by the defendant to BPT in the extract from the telex earlier set out, BPT said:

"We quite agree which is why we wish to see termination accepted and confirmed as soon as possible. . . . We must be prepared to accept Nabalco legal challenge and implication is not too serious provided we have termination which will set limit on recovery of differential if court so rules. You will be able to cost meeting decision against going all the way to the Privy Council."

There then followed a discussion as to the prices which could be offered. The telex concluded:

"You may bear in mind latitude down to US$62 but please refer before implementing."

On 13th May, 1974, the defendant telexed to BPT, "We have formally accepted on 7th May Nabalco's termination of contract effective 24th July . . ." On 16th May, 1974, BPT telexed the defendant and thanked it for what was described as its confirmation of the formal acceptance on 7th May of the plaintiff's termination of the contract effective 24th July.

The meeting of 17th May was held in the defendant's office in Melbourne. Present at it were Messrs Lockrey (to whom I have referred and who acted as Chairman), J. H. Rowland, B. C. Snape, G. D. G. Shaw, R. J. Skillen, Coogan and Notter. To the two latter persons I have already referred. They were the only representatives present on the part of the plaintiff. Mr Rowland is the secretary of the defendant. At the relevant time he was its secretary and also manager of its legal department. Mr Snape was the manager of the defendant's government and national department, to which position he had just been appointed at the time of the contract. Mr Shaw is the defendant's retail sales superintendent. For a period up to the time of the meeting he had been acting in the position to which Mr Snape was appointed. Mr Skillen was another official of the defendant present at the conference but only for part of the time. He did not give evidence.

The accounts of the six witnesses who gave evidence vary to an extent. In order to resolve such conflicts as there are I have looked at documents which came into existence about the relevant time, including the telexes already referred to and others which I shall mention later on. I have also looked at notes made by various of the witnesses either before the conference commenced, during its progress, or after it concluded. One of the most valuable of these was a document containing notes made at the time by Mr Shaw. Mr Shaw had virtually no recollection of what was said apart from his notes. The initials used by him designate the undermentioned persons:

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EAN — Mr Notter
AC — Mr Coogan
JHR — Mr Rowland
CL — Mr Lockrey

His notes are as follows:

"1. Recognition of BP problems.

2. BP position outlined. Old contract terminated. We couldn't enter a new deal without clean break. Attitude defined against background of losses incurred already.

3. Preliminary provisions of new contract outlined.
(a) 3-year period possible. $56.52 per Tonne.
(b) 1-year period possible. $53.96 per Tonne
(c) Prices to vary. Provisions outlined.

4. EAN comparison with bunker prices in Europe and Australia.

5. AC ? rationale behind higher price for 3 years than for 1.
revert to old contract with notice. (Acknowledgment of further potential employment of 9(C)(iii).)
Disappointed at high level of new price.
JHR impossible to reinstate old contract.

6. CL Approach London to use first price ($53.96) for 3 years—or could we repay money we over-recover against unforeseen events.
JHR Don't bank on too much coming out of reimbursement.

7. EAN We are in effect offering a spot-price contract. (One-sided view of benefits available).
PJT element.
Freight—BMS/Gove v. Singapore/Gove
BMS/Singapore.

8. AC/JHR Sole supplier position. Maximum/minimum quantities with Nabalco having a second supplier.

9. AC/CL PJT—price freeze by Government. ? payment outside Australia by Aluswisse.
No—taxation. ? we supply fob S'pore or elsewhere. We would have to be very careful not to be seen to be circumventing national legislation.

10. EAN Queried rates of crude price-rise and product-rise.

11. AC Summarised 3 options. First indication from Nabalco possible in a week."

Of those witnesses who did attempt to give a detailed account of what occurred

I have decided that I should prefer the evidence of Mr Notter and Mr Snape. I think their recollection of the order in which matters were discussed is more probably correct than that, for instance, of Mr Coogan. However, in two respects I do accept evidence given by Mr Coogan. This is in respect of what was said as to two matters. Mr Coogan was able, because of the way the words used both by Mr Lockrey and Mr Rowland struck him, to recall on each occasion the precise words which were used. In my opinion these words have ultimate significance in the resolution of the questions to be decided.

Before I go to Mr Notter's evidence, I should refer to notes made for the conference (that is before it began) by Mr Lockrey. In my opinion they support the general purport of Mr Notter's evidence. They are as follows:

POINTS FOR DISCUSSION WITH NABALCO ON 17th MAY, 1974

"1. To give you continuity of supply we are prepared to negotiate a new contract for the supply of furnace oil.

2. The old contract will expire on 24th July, 1974 (at least so far as furnace oil is concerned).

3. We are not prepared to consider any extension of the old contract beyond 24th July, 1974. So far as we are concerned it has been terminated by you.

4. 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 whilst you continue that dispute.

5. In any new contract we would require you to acknowledge the termination of the old contract so far as it relates to furnace oil.

6. The commencement date of any new contract would be from 24th July, 1974."

I turn then to Mr Notter's evidence. After referring to the fact that it was agreed that the meeting would be held "without prejudice", his evidence continued:

"I can recall him (Mr Coogan) 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 BP, 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 we 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.'

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'.

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.'

"I then recall that either at this particular time, 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.' "

Reference was then made to the clauses and Mr Notter's evidence continued:

"**Q.** . . . what happened next? **A.** . . . 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 contract at all because we regard the old contract at an end.' "

This latter statement is to be compared with Mr Shaw's note 5 above set out in which he recorded Mr Rowland (JHR) as saying, "Impossible to reinstate old contract". Mr Notter went on:

"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 recognise 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 of $53.96 per ton and, with regard to a three-year contract, $56.52 per ton. Whilst these prices may appear high to you, I can only reassure you that these are the current market prices which BP must receive to adequately cover the cost of oil.' "

Mr Notter said that there then followed discussion about tonnages and prices and also the escalation clauses.

After that discussion Mr Notter said that Mr Coogan spoke and 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 enquiries with other oil companies. I trust you have no objection to this?' Mr Lockrey replied 'We certainly have no objection to you making further enquiries 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.' "

Mr Coogan's evidence of this part of the conversation was:

"**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'."

I accept this evidence. Mr Notter's evidence proceeded:

"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 3-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'.

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."

Mr Coogan's evidence concerning the reference to spot supply was:

"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.'

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'."

According to Mr Snape there was a discussion about a new contract. Two offers were made, one for a period of one year and the other for a period of three years. Prices were discussed for each and discussion took place about the reasonableness of those prices. Mr Lockrey mentioned difficulty in obtaining supply. Mr Snape then gave the following evidence:

"**Q.** Was there any reference in that discussion to the pre-existing contract . . .? **A.** I had the impression that everybody accepted that the old contract was terminated."

He continued:

"The only reference that I can recall to the old contract was well into the meeting when Mr Coogan inquired, 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. . . ."

"**Q.** Did anybody respond to that inquiry? **A.** Yes, Mr Rowland answered Mr Coogan.

Q. What did he say as you recollect? **A.** It is one of the things that I recollect very clearly because I was rather surprised that he jumped in and answered the question rather than Mr Lockrey. He said . . . '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 re-instated."

Again I refer to Mr Shaw's note 5 in so far as it recorded what was said by Mr Rowland.

Later Mr Snape said:

"My recollection of Mr Rowland's statement was that the old contract was finished and there were no conditions attached to writing a new contract. He was just stating a fact."

Mr Snape was shown part of the evidence given by Mr Notter and he said that that was in line with his recollection of what Mr Rowland had said. He added:

"Mr Rowland was—I am 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. (The passage from Mr Notter's evidence). As I understand it, he was concerned not to have the possibility of two contracts running at once."

Mr Snape made reference to the fact that Mr Coogan and Mr Notter stressed that Nabalco was entirely dependent on fuel oil for their operations. He said Mr Lockrey said on several occasions during the meeting that the defendant would not let the plaintiff run out of oil. According to Mr Snape Mr Lockrey said words to the effect, "There is no way that we will let you run out of oil".

After the conference Mr Coogan made notes. These refer to the matter last mentioned by Mr Snape. Amongst other things Mr Coogan said that the defendant freely accepted that it had an obligation to supply Gove and said that although it was under great pressure from London and elsewhere to divert cargoes in November-January it had insisted that Nabalco be serviced. Later in his notes Mr Coogan set out four options which were available to the plaintiff. I do not refer to these in detail, but his notes under what he described as option 2 said that the option was to take the defendant to court "to determine if notice valid". His note continued:

"2.1 BP would terminate contract on 24th July.
2.2 Would not write new contract.
2.3 Would supply only on a spot basis whilst we are in court and if they win would probably not offer new contract."

His second and third options related to the taking of the one year and three year contracts. It is noteworthy that there is no reference therein to maintaining any legal action at the same time. A similar understanding of what the upshot of the discussion was is disclosed in a telex sent by Mr Lockrey to a Mr Johnston on 17th

May, 1974, in which he said that the plaintiff was considering three possibilities. The first was to litigate "on old contract through all possible courts and after 24/7 to buy on spot basis with no formal contract". He then referred to the second and third possibilities as the one year and three year contract offered at the conference and added "both secondly and thirdly are conditional on complete termination of existing contract". He then made a number of comments in relation to the first possibility, that is litigation and purchase on spot basis after 24th July. He said, "This appears unlikely as Nabalco are fully aware our position and recognise supply dangers and temporary nature of current price advantage of spot market . . . They did canvass the possibility of their accepting our earlier notice for current contract. We strongly rejected their option on contract we maintain is formally terminated." Mr Lockrey expressed the view that the third possibility represented the "best avenue for mutual accommodation". He said that he had deliberately pitched the initial price high and should be prepared to negotiate down if necessary as discussions developed. He continued:

> "We now believe final decision will be between litigation and 3-year contract. They indicated they were expecting a favourable price for new contract in exchange for waiving rights to litigation. We will await their initial response before deciding whether a trade off is necessary but our impression is that they expect a compromise on our part to give a price of around A$48 to 50 per ton."

On 16th May, 1974, before the conference had taken place the plaintiff had prepared, but not sent, a letter to the defendant. The letter is referred to on p.12 of my earlier judgment. When I wrote what I did I did not know that the letter was not sent until 23rd May, 1974, after the conference had been held. The letter includes the following paragraph:

> "Our letter of 24th April clearly conditioned the termination of the Supply Agreement—so far as the purchase of furnace oil is concerned—on the validity of your Notice of the 25th March, 1974. For so long as any dispute continues between us on this point the Contract in all of its terms continues to bind the parties. It is for this reason that the immediate resolution of that dispute by an appropriate Court is vital."

It concluded by saying that the plaintiff was willing to discuss the possibility of any amicable solution to the matter. Because of its date the letter made no reference to the discussion which had taken place on 17th May, 1974. Reference was made to the discussion which had occurred on 17th April, 1974.

On 16th May, 1974, the day before the conference, the defendant had sent a letter to the Prices Justification Tribunal. The relevant parts of the letter are set out on pp.40–41 of my previous judgment, but they have an importance in relation to this aspect of the case and I set them out again. They are as follows:

> "We hereby give notice that we are about to commence negotiations with Nabalco Pty Ltd for a new contract to supply their furnace oil requirements at Gove, Northern Territory, currently 370,000 tons per annum. Our existing supply arrangements with Nabalco terminate on 24th July, 1974.

As this is a non-Category A product it does not attract an allocation of Australian crude oil. We are therefore obliged to import the total requirements at international prices. Although the base price on today's conditions would not exceed A$ 56.52 per metric ton, it will be above the Tribunal's current recommended maximum price . . . We will advise you of the agreed price when negotiations are completed."

Before proceeding I wish to summarise the effect of what was said by the defendant to the plaintiff at the conference of 17th May. It seems to me that five different statements were made by the defendant. In setting them out I have not overlooked the fact that the parties agreed that their discussion should be without prejudice. What I am about to say is subject to that matter with which I shall, in due course, deal. The statements to which I refer are as follows:

1. The defendant offered a one year or a three year contract at the base prices mentioned during the discussion and subject to the escalation clauses which were foreshadowed.

2. The defendant's willingness to offer such contracts was conditional upon the plaintiff agreeing to give up its rights (if any) under the old contract which was to be regarded as determined as to the supply of fuel oil as from 24th July, 1974.

3. The defendant would not, in any event, revert to the old contract which it regarded as having been determined by reason of the plaintiff's notice of 24th April, 1974.

4. The plaintiff was at liberty to seek such alternative supplies of fuel oil as it could obtain. The defendant's attitude was summed up in the statement, "You can go your hardest but we know you won't get it."

5. The defendant, in the event of agreement not being reached upon a new contract, was willing to supply on a spot basis and made statements reassuring the plaintiff that it would not let it down.

This latter statement left in the plaintiff's mind a real fear that there was a risk about this course and that it might be left without supplies if it did not have a firm contract. It was clearly stated that preference would have to be given to those customers who had term contracts. These remarks were made in an atmosphere when the events of late 1973 in the Middle East were fresh in the minds of both sides and in the context of supply to Gove, which I have indicated is a very isolated area; and also in the context of there being at Gove a town of some 4,000 people many of whom would be unemployed indefinitely if the works were closed down. I am satisfied that not only Mr Notter and Mr Coogan, but also Mr Lockrey, believed that there was a danger of inability to supply if a term contract were not concluded. In his telex to London of 17th May, 1974, earlier referred to, Mr Lockrey mentioned the fact that Nabalco "recognise supply dangers and temporary nature of current price advantage of spot market".

Despite submissions to the contrary by counsel for the plaintiff, it is plain to me that it did not, either during or immediately after the conference of 17th May, 1974, treat what was said by the representatives of the defendant as indicating an

intention on the part of the defendant to repudiate its obligations under the contract. This is clear upon the face of Mr Coogan's evidence. He agreed that at the time of the conference he was aware that whatever was said to him at the meeting was said subject "to London's authority", and further that anything that was said or done at that meeting would need to be confirmed by London before it could bind the defendant. He said that he accepted what was said to him at the meeting on that basis and agreed that he did not regard anything said to him at the meeting as intended to bind the defendant finally and completely in any respect. It is to be observed that the plaintiff does not in its points of claim rely upon the meeting of 17th May alone as conduct amounting to repudiation of the contract so far as fuel oil is concerned. Paragraph 11 alleges further meetings and discussions and a maintenance by the defendant during those meetings and discussions of the attitude alleged to have been stated by the defendant, inter alia, at the meeting.

The next event of importance was a further meeting at the defendant's Melbourne office on 31st May, 1974, which it was also agreed should be without prejudice. Mr Coogan did not attend that meeting. Mr Notter attended alone on behalf of the plaintiff. Present on behalf of the defendant were Mr Lockrey, Mr Snape and a Mr Cochrane. Mr Lockrey was not present throughout the meeting. Again I accept Mr Notter's evidence of what occurred. According to him Mr Lockrey commenced by saying:

> "I have agreed to this meeting to take place following the discussion between Mr Rendell 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 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 Rendell and that Mr Rendell 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 three-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. . . . 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."

Mr Notter said that he 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."

Sir David Griffin is the Chairman of Directors of the plaintiff, and Mr Rendell is the General Manager in Australia of the defendant.

Mr Lockrey then left the meeting. There followed detailed discussion concern-

ing the form of the escalation clauses to be included in any new contract which was negotiated.

I should pause to say that, although what had been said to Mr Coogan and Mr Notter on 17th May, 1974, was not taken by them as being intended to bind the defendant finally and completely in any respect, it was plain, after what was said by Mr Lockrey to Mr Notter on 31st May, 1974, that the statements made at the meeting did, by 31st May, 1974, reflect the defendant's attitude. That it was also BPT's attitude is confirmed inferentially by further telexes passing between the defendant and BPT. On the same date as the second conference was held (31st May, 1974) BPT telexed to the defendant saying:

> "Grateful you confirm our understanding of position post 24th July in event new contract not concluded by this date as follows. Firstly, you have undertaken to continue to cover their requirements for an unspecified period. Secondly, such cover will be met on spot basis . . . in which case you would refer to us for spot quotation and spot freight to which you would add your on costs."

This telex was acknowledged by a telex sent to BPT by the defendant on 4th June, 1974.

On 13th June, 1974, Mr Notter spoke to Mr Lockrey on the telephone. Mr Notter said that Mr Lockrey had rung him. The conversation was objected to because it referred to matters discussed on 17th May. It was submitted that, for that reason, it was to be regarded as having taken place without prejudice. Mr Notter's evidence of this conversation, which I accept, was as follows:

> "First Mr Lockrey said, 'I understand at the meeting which took place between Sir David and Mr Rendell 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 Rendell. 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 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 price 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'.
>
> 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 appreciated his situation but as indicated earlier spot supplies are not acceptable."

Mr Lockrey rang Mr Notter again on 14th June. Mr Notter's evidence of this conversation was as follows:

> "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.' "

Mr Notter mentioned that he and Mr Coogan were to go to Zurich to discuss the matter and said that there was not anything that could be done until such discussion had been held.

Both in his evidence in chief and his cross-examination Mr Notter was asked about a further matter discussed by him with Mr Lockrey during his conversation of 13th June. The evidence given by him of that further matter in his cross-examination was:

> "I would have used words to the effect 'Colin, I understand Sir David mentioned to Mr Rendell that he had other alternatives under consideration. He has asked Mr Rendell as to whether you or BP 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 Rendell 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 Rendell 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.' "

He confirmed to counsel for the defendant that he and Mr Lockrey were both talking about the supply of petroleum and diesel fuel under the agreement which the defendant was saying was terminated from 24th July, 1974, in respect of fuel oil.

The reference to a conversation between Sir David Griffin and Mr Rendell was a reference to a conversation which had taken place between them on 10th June, 1974. The purport of their conversation is to be found in the answer to an interrogatory (part of Exhibit 80). The conversation was as follows:

> Sir David Griffin: "If there is to be a parting of ways on the supply of furnace oil to Gove, which seems likely, would BP still be interested in the other parts of the contract."

Mr Rendell: "I really have not thought about it at all but at this stage I feel that the answer would be 'Yes, we would'."

The answer to the interrogatory was tendered by the defendant without objection.

Mr Notter made notes of his conversation with Mr Lockrey on 13th and 14th June. Portion of his note of the conversation of 13th June, 1974, is as follows:

"I then ventured to recapitulate the situation as far as I, on behalf of Nabalco, understand it to be:

1. BP consider their notice as valid and, therefore, insist that the old Contract comes to an end on 24th July, 1974.

2. Therefore, supplies under the old Contract would cease on 24th July, 1974.

3. Unless a new Contract is executed with BP as per the negotiations on 31st May, 1974, supplies will no longer be forthcoming under Contract conditions.

4. BP reiterated that they would not be as harsh as just to turn off the oil, but it would have to be clear in our mind that such continuous supplies would only be forthcoming on a 'spot' basis with all its hazards and uncertainties.

5. If, indeed, a new Contract is not executed soon, there may even have to be some makeshift shipments between the termination of deliveries under the old Contract and the commencement of deliveries under such new Contract.

I also informed him that both the General Manager and myself will be proceeding to Zurich to discuss the final decision/actions of Nabalco. He was again drawn to the fact that Nabalco has, besides BP, two other alternative suppliers. This he knew from Sir David's discussions.

He also recalled Sir David's question to Mr Rendell on the point as to whether BP 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."

The conclusion to be drawn from what was said in the telephone conversations of 13th and 14th June, 1974, is that the defendant was maintaining the stand taken up by it at the meeting of 17th May, 1974, and reiterated at the meeting of 31st May, 1974. By 14th June, 1974, there was plainly no question about it being its actual attitude. Mr Notter was given to understand that, on the basis that that was its attitude, an answer was required forthwith. Accordingly, subject to the significance of the use of the words "without prejudice" prior to the commencements of the conferences held on 17th and 31st May, 1974, each of the statements numbered 1 to 5 inclusive set out on p.21 is to be regarded as reflecting, as at 14th June, 1974, the defendant's actual attitude to the contract and to the problems which confronted the parties. I say this notwithstanding a submission made by counsel

for the defendant that Mr Rowland did not have the defendant's authority to say, as he did on 17th May, 1974, words to the effect that it was impossible to reinstate the old contract. What he said was said without demur by Mr Lockrey who was in charge of the negotiations on the defendant's behalf. Furthermore, that approach was maintained, at least by implication, by Mr Lockrey in his subsequent conversations with Mr Notter.

I should next refer to a letter written by the plaintiff's solicitors to the plaintiff on 14th June, 1974. The letter was tendered without objection during the re-examination of Mr Notter but was eventually relied upon, in a way which I shall later describe, by the defendant. Amongst other things the letter said:

> "In this case the Summons which we have already forwarded to you seeks a declaration from the Court as to the validity or otherwise of BP's notice.
>
> If the Court declares that the notice is invalid the effect so far as the contract is concerned will be to establish conclusively that by issuing the notice and by subsequently refusing to supply oil except at the revised price BP has repudiated the contract.
>
> The question of the assessment of Nabalco's damages arising out of the repudiation of the contract will be a matter either for a negotiated settlement or further legal action to have those damages determined.
>
> The hearing of the Summons may be expected to take place in October of this year if the Summons is issued immediately. If any appeal is taken from that hearing further delays of up to twelve months can be expected.
>
> Following yesterday's conference with . . . Queen's Counsel we confirm the decision not to attempt to elicit from BP any further statements regarding supply of oil by BP to Nabalco pending determination of the dispute."

Mr Notter's notes of the conversation he had had with Mr Lockrey on 13th June, 1974, had been headed "Q.C. meeting".

In the meantime the plaintiff had been negotiating with possible alternate suppliers of fuel oil and with a shipping company who would be able to provide tanker space in which the oil might be carried to Gove. On 18th June, 1974, the plaintiff entered into an agreement with Concord Petroleum Corporation of Bermuda ("Concord") pursuant to which Concord agreed upon the terms therein contained to carry fuel oil from the Arabian Gulf to Australia during the period 1st August, 1974, to 31st July, 1977. It will be necessary at a later point of time to refer in more detail to the terms of this agreement.

On the following day, as I have already mentioned, these proceedings were instituted but, at that stage, sought only declaratory relief in relation to the validity or otherwise of the defendant's notice.

On 21st June, 1974, the plaintiff entered into an agreement with Kuwait National Petroleum Company (hereinafter called KNPC) whereby it was agreed that KNPC would deliver quantities of heavy fuel oil as therein provided for to the plaintiff during

the period 1st August, 1974, to 31st July, 1977. Delivery was to be made by KNPC into the plaintiff's vessels FOB Shuaiba, Kuwait, or, at KNPC's option, FOB any other port in the Arabian Gulf excluding Fao and Abadan. It will be necessary for me to refer in more detail also to the terms of that agreement.

On 19th June, 1974, there had been a meeting of the Board of Direction constituted pursuant to the joint venture agreement. The meeting had authorised the plaintiff to initiate these proceedings, to enter into the contract with KNPC and to enter into a contract of affreightment with Concord. It is appropriate to mention, in the light of submissions made by counsel for the defendant, that there was no mention in the minutes of the Board of Direction meeting tendered referring to the repudiation by the defendant of its obligations to supply fuel oil pursuant to the old contract nor to the acceptance by the plaintiff of any repudiation of that obligation by the defendant.

On 28th June, 1974, Mr Coogan was in Gove. He rang Mr Lockrey who was in Melbourne. According to his evidence the conversation proceeded as follows:

> "He (Mr Lockrey) 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'.
>
> 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."

The telex informed Mr Lockrey that the plaintiff had already forwarded a letter explaining the situation. It said that if the letter were not received by 1st July to advise and the contents would be telexed. Mr Lockrey made a note of the conversation. Amongst other things the note said:

> "He (Mr Coogan) thanked me for the earlier offer to maintain their supplies, i.e. spot basis and went on to indicate that Nabalco would not require the proposed August shipment, nor would they require any further supplies of furnace oil in the foreseeable future. When asked what was happening to the other products, he went on to say that during Sir David's conversation with Mr Rendell, Sir David was informed that in the event of Nabalco coming to some arrangements for the supply of fuel oil, that BP would continue to maintain supplies of other products and that Nabalco were working on this basis.
>
> At no stage was the conversation said to be without 'prejudice' by Coogan. In fact he expressed his regret in having not informed us earlier about the August shipment."

The plaintiff's letter of 28th June, 1974, was not received by the defendant until 2nd July, 1974. However, on 1st July, 1974, its contents were telexed to the defendant. The letter was in the following terms:

"Following the service by you of the Notice dated 22nd March, 1974, (which we contend and have always contended was invalid), we have done all in our power to obtain another source of supply of furnace oil for Gove and thus to minimise the loss we will suffer.

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 our contract with you of 11th June, 1970.

As you are aware we have already taken out a summons seeking declarations that the notice which you served on us is invalid, and we now inform you that if the Court finds in our favour we will look to you to recompense us for the loss suffered as a result of the events which have taken place."

Some indications of the defendant's thinking prior to 28th June, 1974, is to be found in two telexes dated 21st and 28th June respectively. Both were sent by the defendant to BPT in London. In the first the following statements appear:

"Agree that shipments discharged after 24th July will be at spot prices. However, we must ensure supplies are maintained to prevent possible massive liability for subsequent damages should court find in Nabalco's favour.

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 CIF Gove this cargo."

The second telex was in the following terms:

"Your 799: Nabalco have today verbally confirmed they will not require any fuel oil from us after July, 1974. We have checked with Ampol who have in the past imported fuel oil from KNPC and they strongly deny any involvement. They claim they were advised for information this morning by KNPC that they had finalised a contract with Nabalco. Other likely suppliers have also denied any involvement so deal may be direct:

Comments on your specific points are:

Legal implications are still being studied as this is a most unexpected turn. Neither we nor our legal advisers can see the motive behind Nabalco's action at this stage. We expected them to force us to not supply under the old contract before actually buying elsewhere. Detailed discussions with our legal advisers are continuing and we expect to have an outline of our approach for your comment after our next meeting with senior counsel on 3 Jul. At this stage we expect to recommend your sending out an independent expert to give evidence on the international oil industry especially the happenings during October-December 1973. We shall revert on this

soonest but meanwhile you might like to give thought to a suitable person.

We have no objection to you replacing the tonnage to QAL Kaiser. We appreciate the short term supply problem Nabalco's move has caused. However we should not put ourselves in a position where we cannot meet Nabalco's needs until we receive written confirmation of their decision. This is expected early next week."

In a further telex of 1st July, 1974, the defendant said to BPT in London:

"In the meantime it should be understood that the Nabalco action relates to fuel oil and that our exclusive position at Gove with other products remains untouched."

In my earlier judgment on p.13 I referred to the fact that on 2nd July, 1974, the plaintiff gave notice of its stockholding, apparently pursuant to cl.5 of the contract. This was inconsistent with the attitude taken up in the plaintiff's letter of 28th June. The notice was sent by an employee of the plaintiff, Dr Sauerlander, who was at the time stationed at Gove. I am satisfied by his evidence and that of Mr Coogan that the sending of the notice was an oversight on the part of the plaintiff. Whether the fact that it was sent was due to an error on Mr Coogan's or Dr Sauerlander's part I do not think need be resolved.

The plaintiff sent requirement notices fortnightly. The notice sent prior to that of 2nd July, 1974, was sent on or about 18th June, 1974, and the notice prior to that notice on 4th June, 1974. By telex dated 22nd July, 1974, sent to the defendant the plaintiff said that the routine notice of 2nd July was issued from Gove by an oversight. It was also said that the plaintiff did not require the replenishment of the furnace oil referred to. The plaintiff does not suggest that there was any mistake about the sending of the requirement notices on 4th and 18th June, 1974.

On pp.13–14 of my earlier judgment I referred to three letters dated 17th July written by the defendant to the plaintiff. It is necessary that I should set out the terms of what I shall refer to as the third letter written by the defendant to the plaintiff on 17th July, 1974, in which it was said:

"We acknowledge receipt of your letter of 28th June, 1974.

We note your advice that you have arranged an alternative source of supply for furnace oil at a price lower than the price specified in our notice dated 22nd March, 1974, but that it is 'substantially more' than the price at which, in your view, we should be continuing to supply you under our supply agreement.

We desire to affirm to you that while adhering to the validity of the notice, we are prepared to continue the supply of furnace oil at the base price stated in our said notice until the final determination by the Court of its validity, following which we are prepared to supply furnace oil at a base price conforming with that determination. In our letter to you of 7th May, 1974, we expressed the view, to which we still adhere, that you had given three months' notice pursuant to Clause 9C(iii) of the supply agreement, and that therefore by your own actions you had brought the agreement to an end as

regards the supply of furnace oil. If by reason of the Court's determination, the true situation is that our notice was invalid in the first place, then for our part we are ready and willing to perform the supply contract in the manner set out above.

In this connection, we note that your letter of 28th June, 1974, also affirms the continued subsistence of the supply contract in relation to the supply of furnace oil as well as the other petroleum products the subject of the agreement."

Subject to the amendment made by the addition of para 13A of its points of claim, the plaintiff's case is that the defendant evinced on 13th and 14th June, 1974 (if not earlier) an intention not to be bound, after 24th July, 1974, by an obligation to supply fuel oil under the contract, that that conduct was wrongful because of the invalidity of the defendant's notice of 25th March, 1974, that the plaintiff did nothing after 13th June, 1974, to affirm that part of the contract which provided for the supply of fuel oil, that it accepted the anticipatory breach of contract by the defendant when it entered into the contracts with KNPC and Concord and that it notified its acceptance of the breach in the telephone conversation which occurred between Mr Lockrey and Mr Coogan on 28th June, 1974, or, at the latest, on 1st or 2nd July, 1974, when its letter of 28th June was received by the defendant firstly by telex and then by post.

As already indicated counsel for the defendant sought to have excluded all evidence, not only of what was said at the meetings of 17th and 31st May, but also of the discussions over the telephone between Mr Lockrey and Mr Coogan on 13th and 14th June. But as earlier foreshadowed it is with his submission that, whether the evidence of the discussions be admitted or not, there was no evidence of an anticipatory breach on the part of the defendant, that I first propose to deal. I emphasise that it is only with that submission that I am, at the moment, concerned. In particular I am, for the time being, leaving out of account complications which arise by reason of the contract being for the supply of a number of products, the supply of only one of which is in question. The discussion upon which I am about to embark proceeds upon the hypothesis that the contract was for the supply of fuel oil only. That hypothesis is false. To the problems raised by the fact that the contract was for the supply of at least three products, two at least of which the defendant continued to supply thereunder until March this year I shall later come.

Counsel for the defendant relied upon a well-settled principle that, where there is a genuine dispute between two parties to a contract concerning its construction, and one party manifests an intention to perform it only according to his view of it pending the determination of the dispute by the court, such manifestation will not of itself constitute repudiation. Counsel for the defendant submitted that the defendant's attitude all along had been as expressed in the third letter written by it on 17th July, 1974, which I have earlier set out. That attitude, so he submitted, was not a repudiatory one. Counsel for the plaintiff agreed that the attitude manifested in that letter was not repudiatory in character but submitted that it was a very different attitude from that which had been expressed in the conversations relied upon by him. In his submission it presented a complete change of mind which came too late, his case being that the defendant's repudiation of its obligation to supply fuel oil had been accepted by the plaintiff by 2nd July, 1974. Before I proceed it is convenient to refer to some of the authorities upon which counsel for the defendant relies,

notwithstanding that the principle is a well known one.

In Spettabile etc, Co. v. Northumberland Shipbuilding Co. 121 L.T. 628 Atkin L. J. (as he then was) said at p.634:

> "A repudiation has been defined in different terms—by Lord Selborne as an absolute refusal to perform a contract; by Lord Esher as a total refusal to perform it; by Bowen L. J. in Johnstone v. Milling 16 QBD 460 as a declaration of an intention not to carry out a contract when the time arrives, and by Lord Haldane in Bradley v. H. Newsom, Sons & Co. Ltd (1919) AC 16 as an intention to treat the obligation as altogether at an end. They all come to the same thing, and they all amount at any rate to this, that it must be shown that the party to the contract made quite plain his own intention not to perform the contract."

After referring to that and a number of other cases, Singleton, L. J. in James Shaffer Ltd v. Findlay Durham & Brodie (1953) 1 WLR 106 at p.121 said:

> "Mr Paull submitted that when the defendants Brodie and Durham said 'We are only under an obligation to pass forward such orders as we get,' they were saying 'There is no obligation on us to perform the contract, although we are ready to perform another contract.' I am not sure that that is right. The view of the defendants was: 'We take the view that under this contract we are only responsible to pass forward the orders which we get, but we are going to do the best we can,' and they might have added: 'we will do everything possible, because on every order we get, we make something.' In those circumstances, is it possible to say that the defendants, either by not sending forward orders, or by anything said at the interview, showed an intention to abandon and altogether to refuse the performance of the contract, or is it possible to say that, because they raised a question as to the construction of the contract, they evinced an intention no longer to be bound by the contract? I think not."

In Sweet & Maxwell Ltd v. Universal News Services Ltd (1964) 2 QB 699, Harman L. J. referred both to the Spettabile and Shaffer cases. After setting out portion of the passage cited above from the judgment of Atkin, L. J. in the Spettabile case he proceeded at p.730 as follows:

> "That again is the test, and judged by that test I do not think the defendants in this case made it plain that they did not intend to perform the contract. It was attractively suggested that what they did was to say 'we will only perform the contract upon our terms and not on yours,' and that the contract they offered was a different contract from that which they were bound to perform and that, therefore, they repudiated. But I do not think that a person who maintains his view of the construction of what is, after all, a not very perspicuous document is repudiating because he says 'my view of it is this, and this I will do' and the other man says 'well, my view is different.' Let them go to the court and have the matter determined as they can. But to seize upon an attitude of that sort and call it repudiation in order to serve an object which was then of course dear to the hearts of the plaintiffs, who wanted to get rid of this deed, is not in my opinion justified, and I would therefore differ from the judge's view on that.'

At p.734 Pearson, L. J. (as he then was) said:

> "Moreover, even if they had taken an erroneous view as to the effect of the agreement, it would not follow that the expression of an erroneous view or the taking of an erroneous objection to some clause proposed to be inserted in the lease would amount to a repudiation of the agreement for a lease."

At p.737 Buckley, J. (as he then was) said:

> "If A and B, parties to a contract, form different views as to the construction and effect of their contract, and A demands performance by B of some act which B denies he is obliged to perform upon the true interpretation of the contract, then, if B says, 'I am ready and willing to perform the contract according to its true tenor, but I contend that what you, A, require of me is not obligatory upon me according to the true construction of the contract,' and if in so saying he is acting in good faith, he does not manifest the intention to refuse to perform the contract. On the contrary, he affirms his readiness to perform the contract, but merely puts in issue the true effect of the contract."

The attitude manifested by the defendant in its third letter of 17th July, 1974, was, as I have said, plainly in accordance with the principle to which I have been referring. The letter fits almost exactly the words of Buckley, J., just cited. The question is whether, what the defendant had said on 17th and 31st May and 13th and 14th June, 1974, reflected any different attitude from that disclosed in the letter.

Earlier (p.21) I have set out in summary form my conclusions as to the various statements which were made on behalf of the defendant at the conference of 17th May, 1974. I have also concluded that, whilst those statements were then made tentatively, they had, by 13th June, 1974, come to represent the defendant's firm attitude to its obligation to supply fuel oil under the old contract and to the problem which confronted the parties.

In my opinion there is a marked contrast between the statement numbered 3 and that contained in the defendant's third letter of 17th July, 1974, earlier set out. The third statement made it clear that the defendant would not, in any event, revert to the old contract which it regarded as having been determined by reason of the plaintiff's notice of 24th April, 1974. This attitude is to be contrasted with that which appears in the defendant's third letter of 17th July, 1974, earlier referred to and set out in my earlier judgment. In order to throw up the point of difference between the two alternatives I repeat the essential part of what was there said, namely, "If by reason of the court's determination, the true situation is that our notice was invalid in the first place, then for our part we are ready and willing to perform the supply contract in the manner set out above;" that is at a price in accordance with the court's determination.

But the fact that there is this point of difference between what was said on 17th May, carried through, as it was, to 13th June, 1974, and what was said in the defendant's third letter of 17th July, 1974, does not end the matter. Notwithstanding that that would be my conclusion, counsel for the defendant submitted that it was vital to keep to the forefront of one's mind, when considering this aspect of the

case, that the defendant, upon highly reliable legal advice, bona fide took the view that its notice under cl.9(C)(iii) of the contract was valid. It was its view that the plaintiff's letter of 24th April, 1974, operated as a notice under the same clause and had the effect of terminating the obligation of the defendant to supply fuel oil after 24th July, 1974. Notwithstanding the cessation, in its view, of that obligation after that date, the contract otherwise continued in full force and effect obliging the defendant to supply and the plaintiff to take the plaintiff's requirements of the remaining products dealt with in the contract. Therefore, according to the submission the defendant's attitude was not repudiatory. It had merely taken a stance, based upon advice and in good faith, that the meaning and effect of the contract, in the events which had happened, were such that the obligation to supply fuel oil, one only of a number of products to be supplied under the contract, would come to an end on 24th July, 1974.

I do not agree with this submission. The fact is that the attitude manifested by the defendant firstly through Mr Rowland with Mr Lockrey's concurrence at the meeting of 17th May, 1974 and then reiterated by Mr Lockrey on the telephone to Mr Notter on 13th June, 1974, was that, whatever else happened, there was, so far as fuel oil was concerned, no going back to the old contract. The defendant's obligation to supply fuel oil was, in the defendant's expressed view, concluded by reason of the combined effect of its notice of 25th March, 1974 and the plaintiff's notice of 24th April, 1974. There was to be no return from that situation so far as the defendant was concerned.

That did not mean that the defendant was not willing to supply any fuel oil at all after 24th July, 1974. It was prepared to supply it pursuant to a term contract, if the plaintiff gave up any rights it might have had under the old contract; if the plaintiff did not, the defendant remained willing to supply upon a spot basis, provided, of course, it had supplies available for that purpose. But the significant fact is that although it was, in the ways which I have mentioned, prepared to maintain supply, it was, until it wrote its letter of 17th July, 1974, not prepared again to supply under the old contract. A fair assessment of its intention manifested by what its representatives said on 17th May, 1974 and 13th June, 1974 was that there would be no supply pursuant to the contract, no matter what was decided by the court in relation to the validity of its notice of 25th March, 1974.

It is true that what it said has to be looked at in the light of its own belief that the plaintiff had only two options open to it—to take a term contract and give up any rights under the existing contract which it might have, or to risk taking supplies on a spot basis. The defendant had never turned its mind to what its attitude would be if it saw as a real possibility the plaintiff obtaining supply from an alternate source. From what was said by the representatives of the defendant on 17th May, 1974, and from the terms of telexes passing between the defendant and BPT in London (to some, but not to all of which I have referred) the defendant firmly believed that there was no alternative source of supply open upon a term, as distinct from a spot basis. Its shock when it learned of the KNPC contract was patent.

The defendant's belief that the plaintiff would have to rely upon it as its source of supply of fuel oil, either term or spot, serves to make understandable the denial to be discerned from the evidence of the defendant's principal witnesses, that it had ever manifested an intention not to be bound by its obligation to supply fuel oil, whatever the extent of that obligation was found by the court to be. It also explains

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apparent resentment on the part of the defendant's witnesses that such a suggestion should be made. And it is something which needs to be understood when one comes to consider the very strong submission made by counsel for the defendant that nothing said on behalf of the defendant amounted to the manifestation of an intention not to be bound to deliver fuel oil after 24th July, 1974.

The defendant had decided, for very understandable commercial reasons, to engage in some hard bargaining. It knew that there was a real question about the validity of its notice. Senior counsel in London, Sydney and Melbourne were obviously divided on the question. It could quite reasonably, for the purposes of the course of action it would follow, accept as correct some of the opinions it had received (they had not all been favourable). But from a commercial point of view its problems would all be over if it could achieve a release of any claim under the existing contract in exchange for a new term contract, particularly if that contract had satisfactory escalators in it. As counsel for the defendant said, that was the quid pro quo. The defendant knew that it could not take the risk of ceasing supplies of fuel oil to the peninsula. Apart from that course involving it in an enormous claim for damages if, contrary to the advice upon which it was acting, its notice were invalid, there were questions of the effect upon its public image, if it ceased supply, and genuine concern by it for the welfare of the 4,000 inhabitants of Nhulunbuy. All this is clear from Mr Lockrey's evidence. I am satisfied, upon the basis of his evidence, that the defendant had no actual intention of letting the plaintiff down. It would, unless events well beyond its control prevented it from doing so, supply on a spot basis, if there was no agreement upon a new contract. But, as a matter of negotiation, it was not averse to letting the plaintiff think that there were uncertainties about supply upon a spot basis. There might be difficulties about it. Preference would have to be given to term customers. Mr Lockrey himself believed, as witness his telex to BPT of 17th May, 1974, earlier referred to (p.20), that spot supply could involve risks.

Thus the seeds of doubt were sown. Nothing was said of the kind subsequently said in evidence and in argument before me to reassure the plaintiff or to disabuse its mind of a feeling that there was uncertainty in the continuity of supply if it had no term contract. In this way those representing the defendant sought to persuade the plaintiff to take a term contract in exchange for the giving up of its rights (if any) under the existing contract. The defendant knew that the plaintiff could be no more sanguine about its legal situation than it was itself. The plaintiff might have no claim for damages at all. It was worried about the continuation of its entire operation. It might be deprived of fuel oil for a substantial period. This would affect not only the viability of its operation in this very isolated part of Australia, but also the livelihoods of many hundreds of people about whom it, too, was concerned.

Mr Coogan's thinking after he left the meeting of 17th May, 1974, was pessimistic. This can be seen from his notes, particularly that part of them where he referred to the various options open to the plaintiff. His thinking was that, if there were no alternative supply available (and he was not hopeful about this), the plaintiff would have to give up its rights under the existing contract and take term supply. His thinking, it must be remembered, was being done against a background in which the events which had taken place in the Middle East at the end of 1973 were very much closer and loomed much larger than is now the case.

I should pause to say that I would not wish it to be thought that I consider that there was anything unfair or improper in the bargaining attitude taken up by the defendant. It was bargaining with a subsidiary of another multi-national corporation. It itself had suffered a substantial imposition by reason of the vast increase in oil prices which had occurred in the middle East during the latter part of 1973. Even if its legal advice were totally correct, it was still forced to supply shipments at the old prices until 24th July, 1974. It was only to be expected that it would engage in fairly tough bargaining in an attempt to rid itself of further substantial losses after 24th July, 1974.

Although I have spent a little time in analysing the attitudes of the parties, the reasons for them and the problems which each faced, I do not regard very much of what I have said as directly relevant to the ultimate question now to be decided. I began this discussion by saying that the defendant's denials of any manifestation of an intention no longer to be bound by an obligation to supply fuel oil could only be understood if one also understood its firm belief that, there being no likelihood of an alternate source of supply, the plaintiff would have to take supplies from it, either on a spot or a term basis. Supply from an alternate source did not enter its head. It invited the plaintiff to "go its hardest" to find a new source. I accept that the defendant did not intend to let the plaintiff down, unless circumstances outside its control, and that of BPT, prevented it from supplying. But to return to where this discussion began, the defendant in fact said that it would never again supply under the old contract; so far as furnace oil was concerned that contract was at an end.

In my opinion this statement, confirmed as it was on 13th June, 1974 in the conversation between Mr Lockrey and Mr Notter on that day, was an anticipatory breach of the contract. It was capable, subject to what I have yet to say about the effect, if any, of the discussions being without prejudice, of acceptance immediately as such by the plaintiff.

In reaching this conclusion I have taken into account the submission made by counsel for the defendant that the defendant's statements were no more than the taking in good faith of a stand that the defendant, pending the resolution of the question of the validity of its notice by the court in the proceeding which it knew was shortly to be commenced, would continue to perform the contract in accordance with the advice it had received. The defendant, so it was submitted, in refusing to supply the plaintiff's requirements of fuel oil under the contract after the time provided for in the plaintiff's notice of 24th April, 1974, but in continuing to supply the other products the subject of the contract, was continuing to perform the contract in accordance with its bona fide view of its obligations thereunder. No repudiation was therefore involved. The fallacy in the submission in my opinion, is that the defendant, not overlooking its view as to its legal obligations, was firmly saying that it would not in fact again supply fuel oil under the contract. It would do so only on a spot basis or pursuant to a new term contract to be negotiated. The point of distinction between the defendant's statements relied upon by the plaintiff and what would have been a statement not amounting to an indication of an intention to repudiate is well brought out by the contrast between the statements made in those conversations, tentatively at the meeting of 17th May, 1974, and finally in the telephone conversation of 13th June, 1974, and the statement in the defendant's third letter of 17th July, 1974. That statement, in contradistinction to what was said in the conversations, contemplates further supply if it should transpire that the defendant's belief in its legal rights and obligations proved to be erroneous.

The next matter to which I go is the effect, if any, of the discussions being labelled without prejudice.

There are great numbers of cases in which the question of whether or not statements made without prejudice can be admitted in evidence or whether a party to litigation is obliged to produce to his opponent upon discovery documents which are either expressly endorsed without prejudice or are to be deemed to be without prejudice because they form part of a chain of, for example, correspondence which was begun with a without prejudice letter. It is obvious from the cases that the law is concerned to protect such statements as a matter of public policy in order to encourage settlement of litigation. If such statements were not protected parties would not be able to discuss their problems freely for fear that they may be deemed to have made an admission, not only by reason of particular statements made during discussions or in correspondence, but by reason of having entered into any discussion about settling a claim whatever. Apart from the public policy ground upon which evidence of what is said in without prejudice discussions is excluded, there is a separate ground based upon contract. This seems to have been applied not so much in relation to the admissibility of evidence, but in relation to the production of documents expressed or deemed to be without prejudice upon discovery. Thus in Rabin v. Mendoza (1954) 1 WLR 271 it was held by the Court of Appeal in England that if documents came into being under an express or a tacit agreement that they should not be used to the prejudice of either party an order for production should not be made. At p.273 Denning, L. J. (as he then was) referred to a statement in Bray on Discovery at p.308 to the effect that the right to discovery might be lost by contract "as where correspondence passed between the parties' solicitors with a view to an amicable arrangement of the question at issue". He referred also to what Lord Langdale, M. R. had said in Whiffen v. Hartwright (1848) 11 Beav 111 at p.112. Denning, L. J. went on to say:

> "If documents come into being under an express, or, I would add, a tacit agreement that they should not be used to the prejudice of either party, an order for production will not be made."

Romer, L. J. agreed in what Denning, L. J. had said and concluded his judgment with the following sentence:

> "It seems to me that it would be monstrous to allow the plaintiff to make use—as he certainly would make use for his own purposes as against the defendants of a document which is entitled to the protection of 'without prejudice' status."

So far as I can ascertain documents and discussions labelled without prejudice have been rejected in evidence, not on what might be described as contractual grounds, but rather on grounds of public policy. In La Roche v. Armstrong (1922) 1 KB 485, the defendant was a solicitor. He was sued by a plaintiff administrator in circumstances where it was alleged that the deceased had entrusted money to the defendant's client. The defendant had written to the plaintiff's solicitor making certain statements about moneys held by him for his client. Two letters were written and each was headed "Without Prejudice". Lush, J. rejected the tender of the two letters saying that in his opinion they could not be admitted in evidence either against the defendant or against a client on whose behalf they were written. At p.489 he continued:

"There is no authority upon the point, but my reason is that to rule otherwise would in many cases make negotiations for the settlement of litigation almost impossible. Unless parties to such negotiations can feel safe in making an offer and stating the facts upon which it is based the door to negotiations may be closed. It is for the benefit of litigants and others, that statements should be freely made in order to settle litigation. That being so, it is necessary for me to hold that the solicitor who makes statements in the course of negotiations 'without prejudice' is similarly protected. If the solicitor cannot place before the other side all the material reasons which made the offer of settlement reasonable without fear of an action if the offer is refused, it would be difficult to negotiate at all."

When his Lordship said that there was no authority upon the point I assume that he was referring to the fact that there was no authority on the question of whether or not, the solicitor and not his client being the defendant in the proceedings, the correspondence was inadmissible against the solicitor as well as against the client. I say this because there was in existence at the time of the decision of Lush, J. a substantial body of authority on the more general question. I propose to refer to some of the earlier cases and then to some decisions after that of Lush, J., whose judgment was specifically approved by the Court of Appeal in England in McTaggart v. McTaggart (1949) P.94. Despite the approval of the passage by Cohen and Denning, L. JJ. in that case it seems to me to be doubtful whether they regarded the matter as to which Lush, J. said there was no authority to have been the narrow question to which I have referred. There is no report of the argument in McTaggart v. McTaggart so that it is not possible to determine what authorities, if any, were referred to the court. No authority other than La Roche v. Armstrong is referred to in the judgments.

The earliest case to which I refer is Thomson v. Austen (1823) 1 L.J. (O.S.) K.B. 99. It is not of direct relevance except that it shows that statements made in the course of a negotiation to settle a matter may sometimes be admitted in evidence and, more importantly, that where a question arises as to whether such a statement is admissible, evidence of the whole conversation should be received. At p.99 the court said:

"We are of opinion that this matter requires further investigation, as to the real nature of the conversation. It appears that part of the conversation between the witness and the plaintiff was received in evidence and presented to the jury for their consideration, and that part was rejected. We think that there is so much inconvenience in hearing part of a conversation, and not the whole of it, that it must be a strong case which would induce us to omit any part of it in a charge to a jury. We also think that the evidence which was refused was not indicative of any intention to make a compromise, for if it had been so, he would have offered some concession, some sacrifice for the sake of peace; but he simply wishes the matter ended, and then makes an unqualified admission. We, therefore, think that there should be a new trial."

In Kurtz v. Spence, 58 L.T. 438 a question arose as to what would constitute a threat for the purposes of s 32 of the Patents Designs and Trademarks Act, 1883. It was held by Kekewich, J., that a letter written without prejudice alleging infringement and threatening proceedings if infringement were continued was a threat within

the Act. At p.441 his Lordship said:

> "The plaintiff or defendant, a party litigant, may say to his opponent, 'Now, you and I are likely to be engaged in severe warfare. If that warfare proceeds, you understand I shall take every advantage of you that the game of war permits. You must expect no mercy and I shall ask for none; but, before bloodshed, let us discuss the matter, and let us agree that, for the purpose of this discussion we will be more or less frank. We will try to come to terms, and that nothing that either of us says shall ever be used against him so as to interfere with our rights at war if unfortunately war results.' That is what I understand to be the meaning, not the definition of 'without prejudice'. But, if when those parties meet one of them says to the other, 'Now, we are going to meet and discuss this with a view to an amicable settlement, but I tell you fairly, and with a view to induce an amicable settlement, that I mean to take legal proceedings if we cannot settle—I mean to insist upon my rights if unfortunately we cannot agree to terms,' it would be far from consonant with justice if I would shut out that threat and say that it is not a threat within s 32 so as to entitle the person against whom the threat is made to bring an action to restrain the continuance of it. I think that would be stretching 'without prejudice' much too far and, in fact, giving it a meaning which it was never intended to have."

In re River Steamer Company (1871) L.R. 6 Ch. App. 822 Mellish, L. J., with whom James, L. J. agreed, said at pp.831–2:

> "As to the letter of the 19th of February, there is this further objection, that it is stated to be without prejudice. I am strongly of opinion, although it is not necessary to decide it in this case, that a letter which is stated to be without prejudice cannot be relied upon to take a case out of the Statute of Limitations, for it cannot do so unless it can be relied upon as a new contract. Now, if a man says his letter is without prejudice, that is tantamount to saying, 'I make you an offer which you may accept or not, as you like; but if you do not accept it, the having made it is to have no effect at all'. It appears to me, not on the ground of bad faith, but on the construction of the document, that when a man says in his letter it is to be without prejudice, he cannot be held to have entered into any contract by it if the offer contained in it is not accepted."

In Walker v. Wilsher L.R. (1889) 23 QBD 335, Lord Esher, M. R. said:

> "It is, I think, a good rule to say that nothing which is written or said without prejudice should be looked at without the consent of both parties, otherwise the whole object of the limitation would be destroyed."

Lindley, L. J., at the same page said in reference to the meaning of the words "without prejudice":

> "I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted a complete contract is established, and the letter, although written without prejudice operates to alter the old state of things and to establish a new one."

The cases to which I have referred, other than La Roche v. Armstrong and McTaggart v. McTaggart, appear amongst those collected in the joint judgment of the High Court in Field v. Commissioner for Railways 99 CLR 285 at p.292. At pp.291–2 their Honours said:

> "The law relating to communications without prejudice is of course familiar. As a matter of policy the law has long excluded from evidence admissions by words or conduct made by parties in the course of negotiations to settle litigation. The purpose is to enable parties engaged in an attempt to compromise litigation to communicate with one another freely and without the embarrassment which the liability of their communications to be put in evidence subsequently might impose upon them. The law relieves them of this embarrassment so that their negotiations to avoid litigation or to settle it may go on unhampered. This form of privilege, however, is directed against the admission in evidence of express or implied admissions. It covers admissions by words or conduct. For example, neither party can use the readiness of the other to negotiate as an implied admission. It is not concerned with objective facts which may be ascertained during the course of negotiations. These may be proved by direct evidence. But it is concerned with the use of the negotiations or what is said in the course of them as evidence by way of admission. For some centuries almost it has been recognised that parties may properly give definition to the occasions when they are communicating in this manner by the use of the words 'without prejudice' and to some extent the area of protection may be enlarged by the tacit acceptance by one side of the use by the other side of these words."

In Nicholson v. Southern Star Fire Insurance Co. Ltd 28 S.R. 124 Gordon, J., in whose judgment James and Davidson, JJ. concurred, said at pp.131–2:

> "It was, however, contended broadly that a letter headed 'without prejudice' could not amount to a rejection of the plaintiff's claim and reliance was placed upon the decision of Swinfen Eady, J. in Re Weston and Thomas' Contract ((1907) 1 Ch 244). I do not agree with that contention. I agree (and that is what I think Swinfen Eady J. intended to decide) that a letter which is written merely as a tentative offer and as part and parcel of negotiations for a settlement and headed 'without prejudice' cannot be construed as a 'rejection'. That is a matter of construction. If the Court comes to the conclusion that a letter headed 'without prejudice' is rightly to be admitted in evidence because it is not connected with any negotiations for settlement, in such case I see no reason why that letter should not amount to a 'rejection'. On the other hand if a letter so headed 'without prejudice' is merely a tentative statement and made in the course of negotiations for settlement then I think that letter would not rightly be admitted in evidence and could not amount to a rejection which must of course be clear, definite and final."

This whole question was discussed at some length more recently by Wells, J. in Davies v. Nyland (1974) 10 SASR 76. His Honour referred to passages from Wigmore on Evidence, 3rd Ed. (1940) Vol 4 p.26 (s 1061). At pp.88–89 before his reference to Wigmore his Honour said:

"I pause here to consider an incidental question of law of some importance concerning the effects of an announcement or superscription to the effect that a conversation or certain correspondence is 'without prejudice'. The practice of stipulating that discussions or correspondence directed towards achieving the settlement of a disputed claim are, or are to be, without prejudice is of respectable antiquity. Its justification and the broad principles regulating the consequences of such a stipulation admit of little doubt. But in some quarters of the community there is a belief, amounting almost to a superstitious obsession, that the expression 'without prejudice' is possessed of virtually magical qualities, and that anything done or said under its supposed aegis is everlastingly hidden from the prying eyes of a court."

In the passages from Wigmore appear the following statements:

"Whether an offer to settle a claim by a partial or complete payment, amounts to an admission of the truth of the facts on which the claim is based, and is therefore receivable in evidence, is a question which has given rise to prolonged discussion and to varied but often unsatisfactory attempts at explanation.

The solution is a simple one in its principle though elusive and indefinite in its application; it is merely this, that a concession which is hypothetical or conditional only can never be interpreted as an assertion representing the parties' actual belief, and therefore cannot be an admission; and, conversely, an unconditional assertion is receivable, without any regard to the circumstances which accompany it." (p.26)

"The true reason for excluding an offer of compromise is that it does not ordinarily proceed from and imply a specific belief that the adversary's claim is well founded, but rather a belief that the further prosecution of that claim, whether well founded or not, would in any event cause such annoyance as is preferably avoided by the payment of the sum offered. In short, the offer implies merely a desire for peace, not a concession of wrong done. (p.28)

"So it is apparent that the occasion of the utterance is not decisive; that is, it may or may not have been accompanied by a reservation or an injunction of secrecy; and it may or may not have occurred during negotiations for a settlement or a compromise. What is important is the form of the statement whether it is explicit and absolute. If, making all implications from the context and the circumstances, the statement assumes the adversary's claim to be well-grounded for the mere purpose of discussing a settlement which will avoid litigation, and expresses nothing as to the terms of the specific claim, it is not an admission; nor is the party making it in any the worse condition for having omitted the phrase 'without prejudice', or for having offered the full amount of the claim without any pretence of compromise. If on the other hand, the statement is explicit and absolute so far as appears, it is not saved by any cabalistic phrase, nor by its occurrence in the course of compromise negotiations." (p.29)

Wells, J. expressed the view at p.90 that the statements made by Wigmore

were good law in the State of South Australia.

There appears to me to be some conflict between these statements and also some of the statements made in the earlier cases to which I have referred, on the one hand, and what is said by Lush, J. in La Roche v. Armstrong and by Cohen and Denning, L. JJ. in McTaggart v. McTaggart on the other. Undoubtedly the decision in McTaggart v. McTaggart has led to it being established in England that statements made by a husband or wife to a person acting in the capacity of marriage guidance counsellor cannot be used in evidence; see for example Pais v. Pais (1971), P.119. But I do not read the judgments in McTaggart v. McTaggart as being restricted to that particular problem, although it was that particular problem which there concerned the court. The fact that reliance was placed on La Roche v. Armstrong indicates that the problem is approached upon a general basis. Cohen, L. J., in McTaggart v. McTaggart concluded his judgment by saying at p.97:

> ". . . but it seems to me that the principle applies to negotiations to avoid threatened litigation and a fortiori to negotiations between parties themselves. No one will be prejudiced by such a rule as I have suggested, for if reconciliation takes place there is an end of the matter, and, if the attempts at reconciliation fail the aggrieved party can always ask the alleged deserting party to return."

Likewise in litigation or potential litigation which is not matrimonial in character a party could, it might be thought, after the conclusion of without prejudice correspondence or discussions, bring the matter out into the open by asking openly whether a particular attitude was in fact adopted unequivocally or not. It is true that the other party may not be bound to answer, but his silence will be sufficient in most cases to reveal his true intention.

I regard myself, however, as bound immediately by what Gordon, J. said in the Full Court of this State in 1938, agreed in as it was by two other judges of this court. I do not find in the passage cited from the judgment of the High Court in Field v. Commissioner for Railways, anything which runs counter to this view because of the use by their Honours of the words "It is not concerned with objective facts which may be ascertained during the course of negotiations. These may be proved by direct evidence". I think that there may be some difference of view between the judgments in that case and the view of Lush, J. in La Roche v. Armstrong, in which Cohen and Denning, L.JJ, agreed in McTaggart v. McTaggart. Lush, J. referred to the stating of facts upon which an offer was based. That does not seem to me to be in accord with the view of the High Court nor of Gordon, J. Furthermore, the earlier decisions in Thomas v. Austen and Kurtz v. Spence, demonstrate that there may be parts of without prejudice discussions or correspondence which may be used for certain purposes, e.g. the demand in the Kurtz case which case was, as I have said, approved by the High Court in Field v. Commissioner for Railways.

In my view the apparent divergence of judicial opinion may be reconciled by saying that statements which are made conditionally will not be admissible. These will include statements which, if not made under the shelter of a without prejudice label, would be admissions, and statements which are negotiatory in the sense of their amounting to offers to enter into contractual relations. But the fact that a document or conversation may have been headed or agreed to be without prejudice will not prevent the admission into evidence of statements which were clearly intended to be

an unconditional indication of a party's attitude to a matter in question.

The key to what it is appropriate to have regard to in the present case is, in my opinion, the statement made by Mr Lockrey, to the effect that the plaintiff was at liberty to seek an alternate supply of fuel oil. There could not have been anything conditional about that statement. The plaintiff was invited by Mr Lockrey to "go your hardest". Plainly connected with that statement was the other statement made during the conference of 17th May that the defendant was not prepared to go back to the old contract. Either the plaintiff had to take the risk of spot supply by the defendant or enter into a term contract in exchange for the giving up of its rights, if any, under the existing contract. The plaintiff was unwilling to give up those rights but wanted the security of a term supply. The only way it could get this was by procuring an alternate supply which would mean no supply by the defendant, a situation which the defendant itself invited. On the other hand the fact that the defendant made the alternative offers which it did cannot be used to its disadvantage. As I have said, although they involved hard bargaining on its part, there was nothing improper about what it proposed; it merely sought to extricate itself from the difficult situation in which it was placed. It would have succeeded if the plaintiff had not been fortunate enough to obtain the alternate source of supply it was invited to seek. Subject, however, to what I have earlier said about all statements made on 17th May, 1974, being then made tentatively, statements encouraging the plaintiff to seek an alternate source of supply and taking the stand that there was to be no going back to the old contract so far as fuel oil was concerned, were plainly made unconditionally, with the intention, even on 17th May, 1974, that the former should be relied upon.

I conclude, therefore, that the fact that the discussions of 17th and 31st May, 1974, were had without prejudice does not alter the fact that by 13th June, 1974, the defendant had manifested a refusal any longer to be bound by an obligation to supply fuel oil pursuant to the contract.

Counsel for the defendant submitted in the alternative that I should have rejected all that was said on 17th and 31st May, 1974, because the parties should be regarded as having entered into an agreement that nothing that was then said should ever be the subject of evidence by either of them. In this regard he relied upon the decision of the English Court of Appeal in Rabin v. Mendoza (supra) already referred to. As I remarked when making reference to that decision, what may be described as the contractual ground, as distinct from the public policy ground, has been relied upon in relation to discovery and inspection rather than in connection with the admissibility in evidence of without prejudice documents or conversations. I must confess to an inability myself to perceive any distinction of substance between the two situations, but the numerous authorities to which I have referred show that in some circumstances statements made in without prejudice documents or conversations will be admitted in evidence. When they are not the ground of their rejection is public policy and not contract. Counsel for the defendant supported his submission that I should reject the evidence upon contractual grounds by saying that what had really happened in the present case was that the two sides had decided, both on 17th and 31st May, 1974, to meet and to freely discuss the very great problem that confronted them both. Discussions needed to be open and frank and neither wished to be troubled by any thought that what was said might need to be given in evidence if the dispute were not settled amicably. In the same connection counsel said that this was a reason why a number of the witnesses did not take steps to keep in their minds,

as might well have otherwise been the case, the precise terms of the conversations. I have given this submission close thought. I believe it to have substantial force. But on the basis of the authorities to which I have earlier referred, I remain satisfied that the two statements upon which it is necessary for the plaintiff to rely were, subject to what I have said as to one of them being tentative on 17th May, 1974, made unconditionally. I repeat that the invitation to the plaintiff to go its hardest to obtain an alternate source of supply could not have been made conditionally or without prejudice unless, of course, it were made with tongue in cheek as to which there is absolutely no suggestion.

Finally on this question of the conversations being without prejudice I believe that what said on 17th and 31st May, 1974, is admissible on a quite different basis. I agree with counsel for the defendant that a series of letters or discussions, the first of which is expressed to be without prejudice, will all be similarly regarded although no express statement is made at each discussion or in each letter which comprises the series. But I do not regard what was said on 13th and 14th June, as fitting into that category, that is as a continuation of the series of negotiations designed to effect a settlement of the dispute. Mr Lockrey, when he said what he did on these occasions, particularly on 13th June, 1974, opened the whole negotiation. He wanted to know what the plaintiff proposed to do. He wished to know this as a matter of urgency, and in order to obtain an answer he had to make this defendant's attitude clear and unambiguous. He could only do this by confirming unconditionally, and, by inference, in no without prejudice fashion, that the manifestation of the defendant's attitude in the previous conversations in fact represented its firm attitude to its obligations under the contract and to the totality of the problem. Accordingly, whatever be the problems associated with the labelling of the two May discussions "without prejudice", I think that these disappeared once one comes to consider what was said on 13th and 14th June, 1974. In order to understand the implications of what was then said it is necessary to have regard to the earlier discussions which, as I say, Mr Lockrey opened, if the fact be that they needed opening. Indeed it is right to say that there can be discerned in the evidence of what was done and said by the defendant in the period 7th May, 1974, to 14th June, 1974, a consistent attitude pursuant to which it was not prepared to supply fuel oil pursuant to the old contract. I select 7th May, 1974, because that is the date of the defendant's letter which led to the telephone conversation of 9th May, 1974, between Mr Coogan and Mr Lockrey. Neither the letter nor the conversation were expressed to be without prejudice. Each is consistent only with the stance which I have found the defendant to have taken on 13th and 14th June, 1974. Nothing in the telexes which subsequently passed between the defendant and BPT in London would lead one to any different conclusion and reinforcement for that conclusion is to be found in the terms of the defendant's letter to the Prices Justification Tribunal dated 16th May, 1974, and set out on pp.20–21 hereof.

My conclusions so far establish that on 13th June, 1974, the defendant manifested an intention no longer to be bound by any obligation further to supply fuel oil pursuant to the contract. There was no disagreement between counsel that this was a fundamental obligation going to the root of the contract. There was thus a repudiation which the plaintiff might have accepted as an anticipatory breach of the contract. The effect of such an acceptance would have been forthwith to bring the whole contract to an end (not just that part of it which provided for the supply of fuel oil). The contract would be terminated except insofar as the plaintiff would retain a right to sue the defendant for damages for its anticipatory breach. The next major

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difficulties with which I must deal arise by reason of the Plaintiff's purported acceptance, not of an anticipatory breach of the whole contract, but of the refusal of the defendant to perform its obligation to supply fuel oil thereunder, and from the fact that that acceptance was to operate, not immediately, but from a point of time in the future, that is, after 24th July, 1974.

Before I come to those difficulties, it is convenient to deal with further submissions made by counsel for the defendant advanced upon the basis that the difficulties just mentioned did not exist. In other words, for the purpose of dealing with the submissions, I should assume, contrary to the true situation, that the contract was for the supply of fuel oil alone. The submissions relate to questions of whether the plaintiff had affirmed the contract, notwithstanding what was written in its letter of 28th June, 1974, and, whether, again not overlooking that letter, it had really accepted the defendant's repudiation.

The first matter relied upon by the defendant to persuade me that the plaintiff had affirmed the contract was the plaintiff's letter dated 16th May, 1974, but sent after the conference of 17th May, 1974, on 23rd May, 1974. That letter (see p. 20 hereof) said in part, "For so long as any dispute continues between us on this point the Contract in all of its terms continues to bind the parties". I agree that that statement plainly amounted to an affirmation by the plaintiff of the contract on 23rd May, 1974. But its position has to be looked at, not on 23rd May, 1974, but on 13th June, 1974. By that time the plaintiff was in negotiation with KNPC. Its attitude was changing. However, if nothing had occurred in the way of further manifestations of attitude by the defendant after 17th May, 1974, the plaintiff would have been unable to resile from the attitude taken up by it on 23rd May. The contract would have remained on foot. But the defendant expressed its unwillingness to supply fuel oil pursuant to the contract both on 31st May, 1974, and on 13th June, 1974. Each time it did so it presented the plaintiff with a further opportunity to consider whether it should accept the statements made as evincing an intention to repudiate and as thus amounting to an anticipatory breach of the contract or not. The plaintiff's letter of 16th May, 1974, accordingly lost significance once the 31st May, 1974, discussion took place.

Then it was said that the terms in which the Summons was couched indicated that the plaintiff had decided to affirm the contract. The summons issued on 19th June, 1974, six days after the conversation which took place on 13th June, 1974. In it the plaintiff sought, at that time, only declaratory relief as to the invalidity of the defendant's notice which the defendant had purported to give pursuant to cl 9(C)(iii) of the contract. It was claimed that the issue of the summons in the form in which it was on 19th June, 1974, was an indication to the defendant that nothing that it had so far done or said was regarded by the plaintiff as something which the plaintiff would accept as an anticipatory breach of the contract. I do not agree with this. Firstly, the summons was issued two days before the contract with KNPC was entered into and more than a week before the plaintiff communicated to the defendant its intentions. Furthermore, I think that the declaration originally sought in the summons was sought as a first step in resolving the dispute. After all, the validity of the defendant's notice was the great issue in question between the parties at that stage. The reason why the summons was subsequently amended was not so much that, by that time, the plaintiff had decided to sue the defendant for anticipatory breach of contract, but because of counsel's joint view that, in the light of the provisions of s 63 of the Supreme Court Act, 1970, and what had been said about that provision by the

Chief Justice in Neeta (Epping) Pty Ltd v. Phillips, 48 ALJR 204, it was questionable whether it was appropriate to proceed only with the determination of the question of the validity of the notice. The terms of the plaintiff's solicitors' letter of 14th June, 1974, (p.26 hereof) written to the plaintiff shows that repudiation and acceptance thereof were well in the minds of the plaintiff and its advisers.

Next it was said that the plaintiff had indicated an intention to affirm the contract when it sent requirement notices to the defendant on 18th June and 2nd July, 1974. Both these notices were sent after 14th June, 1974, when, upon my findings, the defendant manifested an intention no longer to be bound by an obligation to supply fuel oil under the contract. I have already referred to the fact that the sending of the notice on 2nd July, 1974, was an error either of Dr Saurlander or Mr Coogan or both (p.29 hereof). In the light of the plain terms of the conversation between Mr Coogan and Mr Lockrey which took place on 28th June, 1974, and the equally plain terms of the plaintiff's letter of the same date received by the defendant by telex on 1st July, 1974, and by mail on 2nd July, 1974, it seems to me that the defendant ought to have appreciated that the sending of the requirements notice of 2nd July, 1974, was or may well have been a mistake. Certainly it was put on enquiry. It is true that the plaintiff was tardy in finally advising the defendant that it was a mistake, but the defendant could not really have thought that the sending of what was, after all a formal, although important for the purposes of the contract, document, could have been intended to override what was said in considered terms in the plaintiff's letter of 28th June, 1974.

The requirements notice of 18th June, 1974, is in a different category. There was no mistake made in the sending of it. It was sent a day before the Concord contract was entered into and three days before the entry into the KNPC contract. The Board of Direction meeting authorising the plaintiff to enter into the two contracts was held also a day after the sending of the notice. The defendant places strong reliance upon the fact that the notice, having been sent before the entry into the KNPC contract which was the event which enabled the plaintiff to purport to accept the defendant's repudiation, must be regarded as a prior affirmation of the contract with the result that the plaintiff's purported acceptance must be nugatory.

However, it must be remembered that the plaintiff had taken the view that it was in order to accept the defendant's offer to supply the plaintiff's requirements of fuel oil up to 24th July, 1974. It knew that the defendant was refusing to supply thereafter pursuant to the contract; it would only supply pursuant to a new term contract or upon a spot basis. In my opinion the sending of the notice of 18th June, 1974, was not an unequivocal indication by the plaintiff that, despite what had been said to it on 13th June, 1974, it had decided to affirm the contract. The defendant, in order to maintain supplies up to 24th July, 1974 (the last shipment was on 19th July, 1974) would or, at the least, might well need to know the plaintiff's requirements for that purpose. I do not therefore regard the sending of the requirements notice of 18th June, 1974, as an affirmation of the contract by the plaintiff.

In broader terms than I have so far indicated, the defendant's real complaint about the plaintiff's conduct in the critical period 13th to 28th June, 1974, was that it was, to use an expression, "playing its cards too close to its chest". It was in this connection that the defendant made reference to the terms of the plaintiff's letter of 14th June, 1974 (p.26). The last paragraph of that letter reveals that the plaintiff, upon advice, made a deliberate decision not to seek to bring the matter further out

into the open. Thus, so it was submitted, the defendant was lulled into a false sense of security, first by the terms of the summons which sought only declaratory relief and then by the receipt of the requirements notice despatched on 18th June, 1974. The plaintiff's attitude was thus said to have been, at the least, equivocal. It is not to be forgotten that Mr Lockrey had sought on 13th and 14th June, 1974, a plain indication of what the plaintiff's requirements were to be. It does not seem to me, and he does not say so in his evidence, that he thought that he had received his answer in the terms of the summons and the requirements notice, both of which would have been received by 20th June, 1974. Notwithstanding that conclusion, there is little doubt that the plaintiff had the defendant guessing by the last week in June, 1974. The defendant was certain that the plaintiff could not in fact obtain an alternate source of supply. Until late May or early June 1974 the plaintiff also thought that this would turn out to be the position. Once the negotiations with KNPC began it is plain that it feared that their disclosure might lead to KNPC being put off in some way. That was obviously the reason why the plaintiff was advised on 14th June, 1974, not further to bring the matter out into the open. The defendant's complaints about the plaintiff's lack of clear communication to it until 28th June, 1974, stem in part from its own shock when it discovered that the plaintiff, after all, had obtained an alternate source of supply. In a telex sent by the defendant to BPT on 1st July, 1974, the defendant, amongst other things, said, "Legal implications are still being studied as this is a most unexpected turn. Neither we nor our legal advisers can see the motive behind Nabalco's action at this stage. We expected them to force us to not supply under the old contract before actually buying elsewhere."

The most unexpected turn referred to was Mr Coogan's communication to Mr Lockrey of 28th June, 1974 to the effect that Nabalco no longer wanted supplies of fuel oil, it having entered into a contract with another company.

It has been necessary for me to give all these matters careful consideration. I have reached the conclusion that the matters relied upon by the defendant, whether taken together or separately, when considered against the background of the negotiations to which I have referred do not amount to an affirmation of the contract by the plaintiff. As I have said, the plaintiff was in a difficult position. It believed it had legal rights based upon the invalidity of the defendant's notice under cl.9(C)(iii) of the contract. If it could not obtain alternative supplies, it would have to give up those rights in return for the security of a term contract. Its own view that spot supply involved risks was not a view from which, as I have earlier said, the defendant attempted to dissuade it. Both parties were playing in a hard school. The cold question I have to consider is whether anything done by the plaintiff between 14th June, 1974, and 28th June, 1974, amounted to the manifestation of an attitude to affirm the contract. For reasons already given I am satisfied that there was not any such manifestation.

Evidence was given on behalf of the defendant by a Mr Tregoning. He is employed as a supply programmer with the defendant. The purpose of his evidence was to show that planning to be done by the defendant and BPT, both in Australia and London, for shipments of oil to Gove involved substantial complications and the need to integrate the necessary shipping movements with those needed for supply pursuant to other contracts in other parts of the world. I accept his evidence, the effect of some of which is confirmed by the terms of a number of telexes passing between the defendant and BPT. The further submission was made by counsel for the defendant that the sending of the requirements notice of 18th June, 1974, had led to

a situation under which the defendant had accepted it at its face value and acted to its detriment in that it had incurred substantial expenditure in arranging for projected shipments to take place after 24th July, 1974. I am satisfied that the defendant was put to expense in this way. But the terms of the telexes establish that supply after 19th or 24th July, 1974, was not being considered by the defendant as supply pursuant to the contract. It was contemplating either spot supply or supply pursuant to a new contract. As time went on it was becoming increasingly unlikely that supply after 24th July, 1974, would be supply pursuant to a new contract, but there is nothing in the telexes, any more than there is in any other evidence, to suggest that supply which Mr Tregoning and others were planning for the period to follow 24th July, 1974, was to be pursuant to the contract. I refer, inter alia, to the telex from BPT to the defendant set out on p.23 hereof. Arrangements to maintain supply were therefore being made, not because of any recognition by the defendant of an obligation to supply, but because of its fear, already referred to, of an immense liability for damages if the operations at Gove were brought to a stop for want of fuel oil. Insofar, therefore, as the defendant relied upon the requirements notice of 18th June, 1974, and went to trouble and expense, as a result thereof, in arranging for supply after 24th July, 1974, it did not do so in a relevant sense. It had no intention of supplying under the old contract after 24th July, 1974. To the extent that it went to unnecessary trouble and expense in order to be in a position to supply, it was not because of any belief on its part that it was required to do so by any insistence on the part of the plaintiff that its supply after 24th July, 1974, be pursuant to the contract.

That concludes all I wish to say about affirmation, or rather about the fact that the plaintiff did not between 14th and 28th June, 1974, affirm the contract. I come next to acceptance still upon the hypothesis that there was an obligation to supply only fuel oil pursuant to the contract. The first submission made by the defendant as to this matter was that although there was a Board of Direction meeting on 19th June, 1974, at which the plaintiff was authorised by the joint venturers to enter into the KNPC and Concord contracts there was no minute of any decision to accept the defendant's repudiation of the contract. I agree that that is so, but I think that the way in which the plaintiff acted, with the concurrence of the joint venturers, demonstrates that it was purporting to accept the defendant's repudiation. It had been invited to obtain an alternate source of supply of fuel oil, it had obtained it, it had entered into contracts for that alternate supply and the shipment of it to Australia and it informed the defendant on 28th June, 1974, that it wished no further supplies after 24th July, 1974. In those circumstances I do not think that the absence of any minute at the Board of Direction meeting affects the fact that the plaintiff did purport to accept the defendant's repudiation as an anticipatory breach of the contract.

The other submission made in this regard by the defendant was that there was nothing in what the plaintiff did which plainly indicated to the defendant that the plaintiff was purporting to accept as an anticipatory breach of the contract some repudiatory conduct of the defendant. This is really a corollary to its more general argument an affirmation. It was submitted that in the way that the evidence had been left all that was revealed was that the plaintiff being in difficulties had, without reason, gone off and obtained an alternate supply and then informed the defendant of this fact, what it was really doing was accepting the fact that its own notice had brought the contract, insofar as it required the supply of fuel oil, to an end as from 24th July, 1974. I think that this submission ignores what the defendant itself had to say about the problem at the discussions to which I have referred in detail. More importantly it ignores the cause of the whole problem, namely the plaintiff's view that the defendant

was not entitled to invoke the provisions of cl 9(C)(iii). It is true that there is not anything in the words used by Mr Coogan to Mr Lockrey on 28th June or in the plaintiff's letter to the defendant of the same date which refers to the acceptance of repudiatory conduct. But I think that in the whole context of what had occurred since the giving of the defendant's notice on 25th March, 1974, it must have been apparent to the defendant that what was happening was that the plaintiff was purporting to accept the refusal of the defendant, regarded by the plaintiff as wrongful, further to supply fuel oil pursuant to the contract. The defendant knew full well that the plaintiff was not intending to give up any rights which it had. Its letter of 28th June, 1974, said: ". . . in our view you should be continuing to supply us (with fuel oil) under our contract with you of 11th June, 1970. . . . we now inform you that if the court finds in our favour we will look to you to recompense us the loss suffered as a result of the events which have taken place".

I now turn to what I regard as the questions of major difficulty in this case. I propose now to leave the false hypothesis upon which I have proceeded and look at the question of whether the plaintiff's claim is defeated because it purported to accept in terms the defendant's refusal to be bound by an obligation to supply fuel oil after 24th July, 1974, and did not purport forthwith to rescind the entirety of the contract for anticipatory breach by the defendant. In other words was the plaintiff able to leave the remainder of the contract on foot and bring only that part of it which required the supply of fuel oil to an end. Additionally, was it able to accept the defendant's refusal in terms (supply up to 24th July, 1974, but no supply thereafter pursuant to the contract), or was it bound, if it wished to terminate all or any part of the contract, to accept the anticipatory breach forthwith so that the contract ceased to have effect in respect of the supply of fuel oil from 28th June, 1974, rather than 24th July, 1974. The defendant's submission was that if the plaintiff wished to do what it purported to do it needed to bring the contract to an end forthwith, that is on 28th June, 1974, as to the entirety of the obligations of the parties. Insofar as this might seem to be an affront to commercial common sense the defendant said that that objection was overcome in law by the fact that the plaintiff's proper course was to terminate finally and in toto and then offer to accept supply of the other products, and of fuel oil up to 24th July, 1974, not pursuant to the contract but in mitigation of the damages which it would otherwise suffer. Counsel for the defendant submitted that that was the state of English law and that it did not permit of any middle course such as was contended for by the plaintiff. The plaintiff met that submission head-on but, in addition, raised certain other matters which, if accepted, would overcome the difficulty.

It is now necessary for me to embark upon a consideration of the law in relation to anticipatory breach to see whether the defendant's submissions are sound or not.

Rescission for anticipatory breach of contract has its origin in the decision in Hochster v. De la Tour 2 E & B 673; 118 ER 922. Lord Campbell, C.J., applied to the problem with which he was confronted cases dealing with what he regarded as an analogous situation. It had already been decided in a number of authorities that when a defendant had made it impossible for himself to perform an act promised to be done at some future time, he might then and there be sued for breach of contract. Instances of this referred to in the judgment were a promise to execute a lease on a future day and before that day the promisor executing a lease to another for the same term, a man contracting to sell and deliver specific goods on a future day and before that day selling and delivering them to another, and a breach of promise to marry

constituted by the promisor marrying another. After referring to these examples Lord Campbell continues (pp.688–690, p.926):

> "One reason alleged in support of such an action is, that the defendant has, before the day, rendered it impossible for him to perform the contract at the day: but this does not necessarily follow; for, prior to the day fixed for doing the act, the first wife may have died, a surrender of the lease executed might be obtained, and the defendant might have repurchased the goods so as to be in a situation to sell and deliver them to the plaintiff. Another reason may be, that, where there is a contract to do an act on a future day, there is a relation constituted between the parties in the meantime by the contract, and that they impliedly promise that in the meantime neither will do any thing to the prejudice of the other inconsistent with that relation. As an example, a man and woman engaged to marry are affianced to one another during the period between the time of the engagement and the celebration of the marriage. In this very case, of traveller and courier, from the day of the hiring till the day when the employment was to begin, they were engaged to each other; and it seems to be a breach of an implied contract if either of them renounces the engagement. This reasoning seems in accordance with the unanimous decision of the Exchequer Chamber in Elderton v. Emmens (a), which we have followed in subsequent cases in this Court. The declaration in the present case, in alleging a breach, states a great deal more than a passing intention on the part of the defendant which he may repent of, and could only be proved by evidence that he had utterly renounced the contract, or done some act which rendered it impossible for him to perform it. If the plaintiff has no remedy for breach of the contract unless he treats the contract as in force, and acts upon it down to the 1st June, 1852, it follows that, till then, he must enter into no employment which will interfere with his promise "to start with the defendant on such travels on the day and year," and that he must then be properly equipped in all respects as a courier for a three months' tour on the continent of Europe. But it is surely much more rational, and more for the benefit of both parties, that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. Thus, instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract. It seems strange that the defendant, after renouncing the contract, and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind. If the plaintiff is barred of any remedy by entering into an engagement inconsistent with starting as a courier with the defendant on the 1st June, he is prejudiced by putting faith in the defendant's assertion: and it would be more consonant with principle, if the defendant were precluded from saying that he had not broken the contract when he declared that he entirely renounced it."

Hochster v. De la Tour was referred to with approval in a number of cases decided somewhat later in the Nineteenth century. These included Frost v. Knight (1872) LR7 Ex.111, Mersey Steel and Iron Co. v. Naylor (1884) 9 App Cas 434 and Johnstone v. Milling (1886) L.R. 16 QBD 460. Since those cases were decided large

numbers of cases involving this question have come before the courts. The principle stated in Hochster v. De la Tour has never been questioned. The cases have usually been concerned with the problem of whether the defendant really did manifest an intention not to be bound by a future essential obligation. That was the matter which concerned the courts which decided the cases earlier referred to in this judgment (pp.31–32). Other cases have been concerned with the question of whether a plaintiff has accepted the repudiation offered, or whether he has affirmed the contract thus keeping it on foot until the time for performance had arrived. Still others have been concerned with the question of whether, despite valid rescission, any part of the contract remains on foot; Heyman v. Darwins Limited (1942) AC 356 at p.372; cf F. J. Bloemen Pty Ltd v. Council of the City of Gold Coast (1973) AC 115.

In relation to the matters I have mentioned the law may be regarded, generally speaking, as well settled. Different factual situations arise and give rise to difficulty; but it is the well established principles laid down in the earlier cases which are applied to them. In a normal situation one would not need, therefore, to refer in any detail to judicial statements of the principle which is in question. But the defendant has submitted that the plaintiff here is well outside the principle; whilst the plaintiff has conceded that, although it claims to be within it, no case has yet been decided which precisely covers this one. It is therefore necessary to consider carefully the language which has been used by a number of eminent Judges during the past hundred years or so. It is also necessary to make some analysis of one of the early authorities above referred to, Johnstone v. Milling, because counsel for the defendant submitted that it directly covered this case.

The case concerned a lease of premises for a term of 21 years determinable by the lessee at the end of the first four years by six months' notice. In the lease the lessor covenanted to rebuild the premises after the expiration of the first four years of the term upon six months' notice from the lessee requiring him so to do. Before the expiration of the first four years of the term the lessor on many occasions told the lessee that he would be unable to procure the money for rebuilding the premises. The lessee in consequence of this statement gave the requisite notice under the provisions of the lease entitling him to determine the term at the end of the first four years. After the determination of the lease he continued to occupy the premises for some months, paying rent to the lessor's mortgagees on the chance of the lessor's procuring the money to rebuild. The lessor being unable to rebuild the premises, the lessee claimed damages against him for breach of the contract to do so. The matter which concerned the court was the lessee's claim for damages for breach of contract. This was brought as a counterclaim in proceedings instituted by the lessor. All that is said in the report concerning that claim is that the facts with regard to it are immaterial to the report (p.461).

It was held that the covenant to rebuild never having actually been broken, because the lessee had before the time before its performance determined the lease, the lessee could not recover unless there had been a breach of contract by anticipation within the doctrine of Hochster v. De la Tour and Frost v. Knight (both earlier referred to) by reason of a wrongful repudiation of the lessee's covenant by him before the time for performance. The principal ground of decision was that the claim should fail because what had been said by the lessor did not in the circumstances of the case amount to a repudiation. A secondary ground upon which the lessor failed was that if, contrary to the primary decision, it did, such repudiation before the time of performance arrived would not amount to a breach of the contract unless the lessee

elected to treat it as putting an end to the contract except for the purposes of an action for such breach. It was said that the lessee had not under the circumstances so elected and that he could not therefore maintain his claim.

Additionally to the matters already referred to, there was discussion in the judgment of Lord Esher M.R. as to whether the doctrine of Hochster v. De la Tour could be applicable to the case of a lease or other contract containing various stipulations where the whole contract could not be treated as put an end to upon the wrongful repudiation of one of the stipulations in the contract by the promiser. It was the discussion on that latter matter which was said to provide a basis for saying that the question under consideration had been decided against the plaintiff.

At p.468 Lord Esher M.R. said:

> "The contract made between the plaintiff and the defendant was the whole lease. The covenant in question is a particular covenant in the lease not going to the whole consideration. If there were an actual breach of such a covenant at the time fixed for performance, such breach would not, according to the authorities, entitle the tenant to throw up his lease. That being so, I do not hesitate to say, though it is not necessary in this case to decide the point, that an anticipatory breach could not entitle him to do so, that (sic) and it does not appear to me that he could elect to rescind part of the contract. Therefore it seems to me that the defendant could not elect to put an end to the contract in consequence of what the plaintiff stated."

I think that the matter to which his Lordship was referring was the question of whether or not the breach was a breach of an essential term in the contract. Although he expressed no final opinion, he thought it doubtful whether it was, so that even assuming an anticipatory breach by the lessor of a term and an election by the lessor to accept it as such, there was no anticipatory breach either of the entire contract nor of a term going to the root of it entitling the lessee then and there to rescind. That is not a matter that is here in question. It is agreed that the defendant's refusal to be bound by its obligation to supply fuel oil was, assuming all else against the defendant, a refusal to be bound by an essential obligation. The difficulty arises because the plaintiff did not purport to rescind the contract in its entirety. My thought that what his Lordship was referring to was whether or not the breach was a breach of an essential term may not be correct. He may have meant exactly what he said; if he did the law is not now as he believed it to be. More recent authorities establish that it is enough if the defendant manifests a refusal to be bound, not by the entirety of his obligations under the contract which he is bound to perform in the future, but by one which is regarded as essential or goes to the root of the contract.

Although I do not think that what his Lordship said in the passage above cited assists in the resolution of the present problem, there are other statements in the judgments which have a general relevance for present purposes. On p.467 Lord Esher, after referring generally to a number of cases, of which he said the best known was Hochester v. De la Tour, continued:

> "In those cases the doctrine relied on has been expressed in various terms more or less accurately; but I think that in all of them the effect of the language used with regard to the doctrine of anticipatory breach of contract is that a renunciation of a contract, or, in other words, a total refusal

to perform it by one party before the time for performance arrives, does not, by itself, amount to a breach of contract but may be so acted upon and adopted by the other party as a rescission of the contract as to give an immediate right of action. When one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not of course amount to a rescission of the contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation. He cannot, however, himself proceed with the contract on the footing that it still exists for other purposes, and also treat such renunciation as an immediate breach. If he adopts the renunciation, the contract is at an end except for the purposes of the action for such wrongful renunciation; if he does not wish to do so, he must wait for the arrival of the time when in the ordinary course a cause of action on the contract would arise. He must elect which course he will pursue. Such appears to me to be the only doctrine recognised by the law with regard to anticipatory breach of contract."

Cotton L.J. referred to a number of cases and then set out what was said by Cockburn C.J. in Frost v. Knight (7 Ex. 111). Amongst other things Cockburn, C.J. said:

> "The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance: but in that case he keeps the contract alive for the benefit of the other party as well as his own: he remains subject to all the obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it: on the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

Cotton, L.J. continued at p.471:

> "It must be taken therefore that the law is that, when one party has done an act which amounts to a wrongful renunciation of the contract and the other has acted upon it as such, there is a cause of action in respect thereof, but, when the other has not done so, then both the parties, as well he who has attempted to renounce the contract as he who asserts its existence, are

entitled to the benefit of its provisions."

At pp.472–473 Bowen, L.J. said:

> "We have, therefore, to consider upon what principles and under what circumstances it must be held that a promisee, who finds himself confronted with a declaration of intention by the promisor not to carry out the contract when the time for performance arrived, may treat the contract as broken and sue for the breach thereof. It would seem on principle that the declaration of such intention by the promisor is not in itself and unless acted on by the promisee a breach of the contract; and that it only becomes a breach when it is converted by force of what follows it into a wrongful renunciation of the contract. Its real operation appears to be to give the promisee the right of electing either to treat the declaration as brutum fulmen, and holding fast to the contract to wait till the time for its performance has arrived, or to act upon it, and treat it as a final assertion by the promisor that he is no longer bound by the contract, and a wrongful renunciation of the contractual relation into which he has entered. But such declaration only becomes a wrongful act if the promisee elects to treat it as such. If he does so elect, it becomes a breach of contract, and he can recover upon it as such. Upon looking to the reason of the thing it seems obvious that in the latter case the rights of the parties under the contract must be regarded as culminating at the time of the wrongful renunciation of the contract, which must then be regarded as ceasing to exist except for the purpose of the promisee's maintaining his action upon it; it would be unjust and inconsistent with all fairness that the promisee should be entitled to bring his action as upon a wrongful renunciation of the contract, and yet to treat the contract as still open and existing with regard to the future. Such being the reason of the thing, the authorities seem all to be the same way."

Although, as I have said, many cases have been decided since Johnstone v. Milling, I have not found in any, whether in England or in Australia, any different statement of the principle than those to be found in Johnstone v. Milling and the cases earlier referred to. I add, however, two more references. In Martin v. Stout (1925) AC 359, Lord Atkinson, after making reference, inter alia, to Hochster v. De la Tour and Mersey Steel v. Naylor, said at p.364:

> "Many other authorities might be cited in support of this well-established principle of English law, that where a contract is to be performed on a future day or is dependent on a contingency, and one of the parties to the contract repudiates it and shows by word or act that he does not intend to perform it, the other party is entitled to sue him for breach of the contract without waiting for the arrival of the time fixed for performance, or the happening of the contingency on which the contract is dependent, and is himself absolved from the further performance of his part of the contract. If he elects to do this the contract is completely at an end, and the party in default is not entitled to an opportunity to change his mind. But the repudiation of a contract by one of the parties to it does not of itself discharge the contract. It only gives to the other party the option of either treating the contract as at an end, or of waiting until the stipulated time has arrived or the contingency upon which the performance of the contract was dependent has happened."

In Suisse Atlantique v. N. V. Rotterdamsche (1967) 1 AC 361 Lord Reid said at p.398:

> "If fundamental breach is established the next question is what effect, if any, that has on the applicability of other terms of the contract. This question has often arisen with regard to clauses excluding liability, in whole or in part, of the party in breach. I do not think that there is generally much difficulty where the innocent party has elected to treat the breach as a repudiation, bring the contract to an end and sue for damages. Then the whole contract has ceased to exist including the exclusion clause, and I do not see how that clause can then be used to exclude an action for loss which will be suffered by the innocent party after it has ceased to exist, such as loss of the profit which would have accrued if the contract had run its full term "

This whole matter is discussed at length in Corbin on Contracts (1951) volume 4, paragraphs 959 et seq. In para 972 under the heading "Repudiation of Part of a Contract Only", there is a lengthy analysis of the decision in Johnstone v. Milling and reference to certain American decisions. The analysis is preceded by the following statement:

> "The repudiation of a contract is almost always total in character. It is either a refusal to render any further performance whatever under the contract, or it is a refusal to render such a material part of the promised performance that it goes to the essence of the contract and can properly be regarded as total by the injured party. It is quite possible, however, for a contractor to repudiate a minor part of his contract while remaining ready and willing to perform the balance when the time comes. This partial repudiation may be anticipatory in character. At present, however, there seems to be no authority for saying that, for such a partial anticipatory repudiation, an action for damages can be at once maintained. There is one English case in which the question was given some slight consideration, although the decision rested mainly on other points. This case is deserving of analysis and discussion here."

The case referred to is Johnstone v. Milling.

Counsel for the plaintiff relied on this passage as indicating that the matter now to be decided is completely free from authority. Although that may be so I do not think that what Corbin has said justifies that submission. He is dealing, because of what Lord Esher, M.R. said in Johnstone v. Milling, with an anticipatory breach of a non-essential obligation. That is the matter for which, according to Corbin, there is no authority. Here there is a repudiation of an essential obligation which entitled the plaintiff to rescind the contract in its entirety. The plaintiff did not take that course. It purported to accept the defendant's renunciation of its obligation to supply fuel oil under the contract and otherwise kept the contract on foot.

Counsel for the plaintiff referred me to a number of American authorities, but I do not feel able to obtain any assistance from these. Insofar as there is to be found in any American decision a view different from that expressed in the English and Australian cases, I could not properly adopt it. Insofar as any view so expressed is similar to that expressed in the authorities which bind me, it is unnecessary to refer to it in the light of the wealth of judicial statements to be found in the English decisions.

It is not difficult to see, on the basis of what is said in the authorities to which I have referred, why counsel for the defendant was able to make a strong submission that the plaintiff's purported acceptance of the defendant's anticipatory breach of contract did not enable it to succeed in this action. The defendant's submission was that the plaintiff had to elect, either to terminate forthwith the contract in respect of the entirety of the obligations of the parties or to keep it on foot. It was submitted that the only effect which the plaintiff's conduct had (that is its entry into the KNPC and Concord contracts and its informing the defendant that it required no supplies of fuel oil after 24th July, 1974) was to accept that the contract as to fuel oil was terminated by mutual agreement as from 24th July, 1974. This gave it no right to sue the defendant for damages.

Recognising the strength of the defendant's position, the plaintiff made two outflanking movements. One was to say that there was not one contract; rather there were three, one each for the supply of fuel oil, diesoleum and motor spirit. If this were right the plaintiff had accepted an anticipatory breach of one of the contracts, that whereby the defendant was to supply fuel oil, and was within the principles enunciated in the cases; that is, overlooking for the moment, the defendant's submission that an acceptance had to operate immediately. The plaintiff's other way of getting round the problem was to say that the parties had agreed, after the dispute arose, to separate the question of the supply of fuel oil and to treat it in fact as an independant obligation (para 13A of points of claim).

In my opinion the plaintiff's submission that there were three contracts and not one is unreal. The contract was one pursuant to which the parties intended that the defendant would supply the entirety of the plaintiff's requirements of petroleum products for the period of the contract. The fact that, in some of the circumstances postulated in cl 9, the defendant's obligation to supply one product might cease before its obligation to supply others does not mean that there were three contracts. If it were not for the present problem it would not have occurred to anyone that there were. The contract has been carefully drawn. It is described as "an agreement" throughout. On the face of it there is no warrant for regarding it as three agreements. To do so would do violence to the language which the parties have chosen to use and to its substance. The plaintiff's submission that there were three contracts and not one is therefore rejected.

The evidence upon which the plaintiff relies to establish that the parties agreed, after the dispute as to fuel oil had arisen, to treat the supply of fuel oil as an independent matter I have already set out (pp.24–25). On pp.24–25 is set out an interrogatory and the answer thereto in which it appears that Mr Rendell tentatively agreed with Sir David Griffin to continue to supply the other products if there were "a parting of the ways" on the supply of fuel oil. In his discussion with Mr Lockrey on 14th June, 1974, Mr Notter elicited from him that supplies of motor spirit and diesoleum would be continued. It was submitted by the plaintiff that there was thus constituted between the parties a contract whereby "it was agreed . . . that they would confine their disputes to the defendant's obligations 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", (para 13A points of claim).

I have the gravest doubt whether the words used by the parties in the conver-

sations to which I have referred were intended by either of them to be contractual. But leaving that difficulty aside, I think that there is a more fundamental reason why the plaintiff's submission must fail. The parties, as I have indicated, had been engaged in some hard bargaining. For both of them much was at stake. For the contract upon which the plaintiff seeks to rely to be of any use to it it must contain a term, express or implied, pursuant to which the defendant, for consideration, agreed to the plaintiff being able to accept the repudiation by the defendant of its obligation to supply fuel oil under the contract as an anticipatory breach merely of that obligation and further agreed to it, the breach having been accepted by the plaintiff, being able to sue the defendant then and there for such damages as it could recover. There was no word of any such term in any of the conversations relied upon. Moreover the defendant was not unmindful of the plaintiff's dilemma. This is revealed by what is said in its telex to BPT of 1st July, 1974. There it said that it had thought that the plaintiff would force it to supply under the contract after 24th July, 1974. I do not think that the discussions relied upon by the plaintiff gave rise to any more than a sensible business arrangement under which the parties agreed that the supply of the remaining products would continue. As to fuel oil no quarter was being given or taken. Certainly there is not evinced in the discussions any intention on the part of the defendant to give up any tactical advantage which it had. For me to do what the plaintiff asks I would, in the circumstances of this case, need the clearest of indications of such an intention in the language used by the parties. It is not there; nor is it a case where it can be said that the term relied upon should be implied by law. If there were a contract, it is not shown that it is necessary to imply such a term to give the contract business efficacy.

The plaintiff's outflanking movements having failed I return to its frontal assualt. The plaintiff submitted that the law in relation to anticipatory breach was based on consensus—repudiation by defendant and acceptance of that repudiation by a plaintiff, the consequence being termination and a right in the plaintiff to sue for damages without waiting for the time when the defendant was to perform its obligation. Support for the concept of consensus in this field of the law is to be found in the speech of Lord Wrenbury in Bradley v. H. Newsom Sons & Co. (1919) AC 1, firstly at pp.51–2 and then at pp.53–4. The two passages are as follow:

> "A contract between two persons results from the consensus of the two minds agreeing animo contrahendi to terms which each accepts and which create obligations between them. The contract, having been entered into, may be determined in any one of three ways. First, consensus created the contract, and consensus may determine it. If the two parties agree to determine the contract it is determined. Secondly, some contracts, though expressed in absolute terms, are, by the nature of the matter, so obviously dependant upon the possibility of performing the promise that a term is implied excepting the events which render performance according to the promise impossible. In the case of such events happening the contract ceases to be operative. Thus, in a contract for personal service for a term of years, will be implied a condition if the party shall so long live. Thirdly, if the one party to the contract, by words or by conduct, expresses to the other party an intention not to perform his obligation under the contract when the time arrives for its performance, the latter may say, "I take you at your word; I accept your repudiation of your promise, and will sue you for breach." This is really no addition to, but a particular application of, the principle first above stated. The first party has, in fact, made an offer. This

offer is: "I am not going to perform the contract. I offer to end it here and now, and to accept the consequences of ending it, those consequences, as I know, being that you can sue me for damages for my refusal." The other may accept or may decline that offer. If he accepts, then by consensus the contract is determined, but with a right to damages against the party who has refused to perform. In each of these cases it is the consensus of the parties which brings the contract to an end. In the first and third cases it is consensus dehors the contract. In the second, it is the consensus to the implied term contained in the contract."

. . . . . .

"In order to make clear what my view is of the law applicable to such a case I must say something of what is commonly called "anticipatory breach" of contract. My Lords, the expression is, I think, unfortunate. In Hochster v. De la Tour, the leading case upon this subject, Lord Campbell made no use of the expression in his judgment. It is used several time by Lord Esher in Johnstone v. Milling, but not by either of his colleagues. The words used are, of course, immaterial unless they lead, in course of time, to an erroneous impression. There can be no breach of an obligation in anticipation. It is no breach not to do an act at a time when its performance is not yet contractually due. If there be a contract to do an act at a future time, and the promisor, before that time arrives, says that when the time does arrive he will not do it, he is repudiating his promise which binds him in the present, but is in no default in not doing an act which is only to be done in the future. He is recalling or repudiating his promise, and that is wrongful. His breach is a breach of a presently binding promise, not an anticipatory breach of an act to be done in the future. To take Bowen L.J.'s words in Johnstone v. Milling, it is "a wrongful renunciation of the contractual relation into which he has entered." It is the third case which I put above. The result is that the other party to the contract has an option either to ignore the repudiation or to avail himself of it. If he does the latter it is still by consensus of the parties, and not by some superior force, that the contract is determined. I cannot see that the doctrine of what is generally called "anticipatory breach" lends any support to the contention of the respondents in this case. It is no authority for the proposition that anything other than the intention of the contracting parties can either tie or untie the bonds of a contract."

Notwithstanding the authority which his Lordship's words have for me, I think one must be careful about consensus in this field. So often, as in this case, a defendant will make statements or perform acts which he does not consider constitute a repudiation of his contractual obligations or any of them. In some cases he will be conscious that they might; in others that possibility will not occur to him. If there be in fact a repudiation and an acceptance of it the plaintiff will have the right to sue for damages. Where the defendant has done something not believed by him to constitute a breach and finds himself, against his will, in a position where the plaintiff has terminated the contract and is suing for damages for breach of the defendant's obligation, it is difficult to perceive consensus in any real sense between the parties. Legal theory will, of course, enable all this to be explained if one imports into the original contract an implied term that the parties will not by their words or conduct renounce their future obligations, and, further, that, if either does, he will, if the other party elects to rescind, be liable in damages. But, although on one view of his judgment that is how Lord Campbell, C.J. in Hochester v. De la Tour explained the existence of the action, it is not how it is now explained; cf. Corbin vol 4, para 960,

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pp. 856 et seq. Lord Wrenbury himself speaks of the consensus being "dehors the contract".

In the present case the defendant took a stand, based as I have earlier said, on certain legal advice. It was that both its notice and that of the plaintiff were valid with the result that that part of the contract which obliged it to supply fuel oil came to an end on 24th July, 1974, not as a result of any breach by it but by reason of the operation of certain of the provisions of the contract in the events which had happened. Upon the basis of that stand it manifested, in the view that I have taken, a wrongful refusal to supply fuel oil pursuant to the contract thereafter. That I have found to amount to a repudiation of an essential obligation and, notwithstanding Lord Wrenbury's criticism of the expression, an anticipatory breach of contract. But the defendant has never so regarded it and will only be bound so to do by judicial decision. There is no agreement on its part to the termination of the whole or any part of the contract, not pursuant to the provisions of cl.9(C)(iii), but by the rescission of the plaintiff for breach on its (the defendant's) part. Nor is there any agreement on the defendant's part to the plaintiff maintaining this action for damages.

To be contrasted with this case are cases where parties to a contract mutually agree that the contract shall be rescinded either in whole or in part. No breach is involved and no action for damages lies. There is consensus in that the rescission has been brought about with the agreement and consent of both parties; see Salmond and Williams on Contracts, 2nd ed. pp.488–9. It is to be observed that the learned authors deal with that matter quite separately from repudiation and its consequences which are dealt with in a chapter entitled, "The Dissolution of Contracts by Breach" at pp.541–3. I refer also to Chitty on Contracts, 23rd ed., vol 1, paras 1229, 1339 to 1345 and 1468.

It may be that Lord Wrenbury did not intend to say more than that there cannot be a termination of a contract or anticipatory breach without consensus in the sense that a repudiation by one party of a contractual obligation will itself be of no consequence unless the other party accepts it and terminates the contract. That is what is invariably said by all other judges whose judgments I have read. So long as consensus is understood in that sense there is no problem. But that is of no assistance to the plaintiff here.

However, I have reached the conclusion that the plaintiff is nevertheless entitled to succeed. I agree with the plaintiff's submission that there is no authority which precisely covers the present case. I must have regard to the judicial dicta to which I have referred. But I must bear in mind that they were all said in relation to the contracts and the particular facts of the cases being considered in each of the cases where the pronouncements are made. The common law of England is renowned for its common sense and fairness. Down the years litigants, particularly those in the commercial field, have resorted to it and to the English courts for the settlement of their disputes. They have done so because of the standard of justice which is applied. It is plain from a reading of Lord Campbell's judgment in Hochster v. De la Tour that he was of opinion that reason and justice required the conclusion to which he came. An absurd situation, notwithstanding Corbin's criticisms, would otherwise have arisen. The contract would have remained on foot and the plaintiff would have had to keep himself ready to perform it, for his part, the following year knowing that the defendant would almost certainly not require his services.

In the present case the plaintiff carries on a vast enterprise in a most isolated part of the world. For its operations it depends utterly on regular supplies of fuel oil in substantial quantities. These must come, not from any source in Australia, but from the Persian Gulf. Unless the plaintiff is assured of regular supplies its operations are in jeopardy. To secure supply it entered into the contract with which this case is concerned. For reasons associated with the giving by the defendant of a notice purporting to be pusuant to cl.9(C)(iii) of the contract the parties found themselves in dispute. Eventually the defendant said to the plaintiff, in effect, "From 24th July, 1974, I will no longer supply you with fuel oil pursuant to the contract. I will supply it on a spot basis but we both know the risks of that. If you want a term supply from me you must give up any rights which you may have to sue for any damages under the existing contract. Of course you are at liberty to look elsewhere for supplies, and, as far as I am concerned, you may go your hardest in that respect, but I do not think you will be successful". The plaintiff took the defendant at its word and concluded that in the interests of its operation and the welfare of all on the peninsula it would be forced to give up its rights (if any) to sue for damages in order to obtain the security of a term supply, unless it could obtain such a supply from another source. This it succeeded in doing. It had thus attained security of supply and preserved its right to treat the defendant as having repudiated its obligations under the contract.

According to the defendant's argument the plaintiff was then placed in a dilemma. Either it had to rescind the contract then and there as to its entirety offering to take such supplies as the defendant would give it in mitigation of damages, or it had to keep the contract on foot. If it kept it on foot it would have two sources of supply. So it could not do that. If it rescinded forthwith, notwithstanding what the defendant had said about not letting it down, it was at risk as to its July 1974 shipment of fuel oil. More importantly it would need to begin a search for other sources of supply of the other products which the defendant had said it was quite willing to continue supplying.

The contract, although one, was capable of division. In certain circumstances it made provision for that being done itself. The defendant had suggested the very course the plaintiff had taken. It was, as I have said, agreeable to maintain supplies of the other products. Yet, according to its submission, the law permits of no course midway between the two elections which it is said were the only ones open to the plaintiff. I have already said that I have felt the strength of that submission based as it is upon the way this branch of the law has been dealt with by many eminent judges. But, and I do not say this offensively to counsel, such a conclusion has the ring of absurdity about it. It is not one based upon reason and justice. I do not believe the law has placed itself in such a straitjacket.

It is not often helpful to re-state a problem in the form of an example. But I do it in this case simply to throw up what is involved in the defendant's submission. Suppose a supplier of goods agrees to supply the needs of a factory as to three different products for thirty-six months and that supplies of each product are required each month. Suppose the monthly supply of each product is essential to the business. Suppose further that there are few alternative sources of supply and that none of these is available at short notice. It must be the defendant's submission in this case that, if the supplier for any reason renounces his obligation to supply product A as from a point of time two months hence, at the same time indicating that he is prepared to continue, pursuant to the contract, the supply of the remaining products, the factory must then and there elect either to terminate the entirety of the contract and immediately sue for damages or keep the contract on foot, give such requirement notices

as the contract may oblige it to give, and bring a series of actions against the supplier—one arising each time he fails to make a delivery of product A. The factory could not take the risk of arranging an alternate source of supply for fear that, the contract being on foot as to all products, the supplier might after all meet his obligation. If one changes the example to one where the contract is for the supply of 10,000 items of one particular commodity each month and the supplier says, "Two months hence I will only supply 7,000 items per month. You must obtain supplies of the remaining 3,000 from some other source", the defendant must make the same submission. It is that the factory can never take the supplier at his word and retain a right to sue. If it does it will have agreed to a partial rescission of the contract with no right in either party to sue the other; cf. Salmond and Williams pp.488–9 and Chitty on Contracts, para 1229, both earlier referred to.

It is my opinion that these examples demonstrate that the upholding of the defendant's submission would lead one, for no purpose, to an absurd and unjust decision. Not to give effect to it in no way prejudices the defendant. To do so is to do no more than to follow the defendant's own suggestion. The contract is divisible. No question of there being a large number of mutual rights and obligations incapable of separation arises. The position may well have been regarded otherwise in Johnstone v. Milling. The defendant was under no illusion that the plaintiff was holding it responsible in damages for the increased price it would be forced to pay for supplies. That was the plaintiff's attitude all along; the defendant would not offer a term supply unless the plaintiff gave up its rights. The fact that the plaintiff intended to sue the defendant for damages was mentioned in its letter of 28th June, 1974, earlier set out.

By giving effect to the plaintiff's submission I do not consider that I am applying any principle not yet known to the law nor bringing about any fundamental change therein. Perhaps it is true to say, as Dixon, J. (as he then was) said in Peter Turnbull & Co. v. Mundus Trading Co., 90 CLR 235 at pp.245–6, in relation to the facts of that case, "this is not a case confined to a simple anticipatory refusal to perform or declaration of inability to perform on the part of one party followed by an election by the other not to treat the contract as discharged by breach. The course taken by the defendant involved something more than that and the additional element brings into application other principles of law". I say that, notwithstanding the form of the points of claim, particularly paragraphs 12 and 13 thereof. They refer to a repudiation of the defendant's obligation to supply fuel oil and an acceptance of that repudiation and the termination of the contract so far as it required the defendant to supply fuel oil. The defendant is driven to submit that these paragraphs, or at least paragraph 13, are bad in law because they disclose no cause of action. It is my opinion that that submission is wrong.

It should be emphasised that cases in which a party in the position of the plaintiff here is not faced with the need to make one of the two elections referred to by counsel for the defendant will be rare. Usually the case will be one pursuant to which the plaintiff will be forced to elect between the two courses of action. Even where a contract is to a degree capable of division or separation there will usually be present difficulties in that course because the mutual rights and obligations of the parties will be so entwined as to make such a course impossible. Moreover, in many cases there will be a readily available market for a commodity which is the subject of a contract with the result that the plaintiff can easily arrange an alternative source of supply to a place which has not the remoteness of the Gove Peninsula.

Before I conclude this part of the judgment I should mention submissions made by counsel for the defendant based upon a loan agreement made between the parties when the fuel supply contract was entered into. It provided for a loan by the defendant to the plaintiff of some $2,000,000. The loan was to be repaid if the contract for any reason were terminated. Submissions were made to suggest that the plaintiff adopted the course it did in order to avoid the consequences of the repayment of this loan. I am satisfied by the evidence of the plaintiff's witnesses that this had nothing to do with the course of action which the plaintiff took. The submissions are accordingly rejected.

Two further submissions made on behalf of the defendant were that the plaintiff had no status to sue the defendant and that, if that submission were rejected, it was entitled to recover nominal damages only. The first of these submissions is based upon what is said to be the proper construction of cl 16 of the contract coupled with the existence of the joint venture and management agreements earlier referred to (pp.2–4 hereof). It will be remembered that the opening words of clause 16 are, "The Buyer declares and the Seller acknowledges that the Buyer enters into this Agreement as Manager Gove Joint Venture for and on behalf of Swiss Aluminium Australia Pty Limited and Gove Alumina Limited as Joint Venturers . . .". The contract opens with the words—

> "AGREEMENT made the Eleventh day of June 1970 BETWEEN BP AUSTRALIA LIMITED whose registered office is at 1 Albert Road Melbourne (hereinafter called 'the Seller') of the one part AND NABALCO PTY LIMITED whose registered office is at 1 Alfred Street Sydney (hereinafter called 'the Buyer') of the other part WHEREBY IT IS AGREED . . ."

Thereafter the plaintiff and the defendant are referred to as "the Buyer" and "the Seller" respectively. It is the defendant's submission that each time the word "buyer" is used it is, by reason of the provisions of clause 16, to be read as "Nabalco Pty Limited as agent for Swiss Aluminium Australia Pty Limited and Gove Alumina Limited". The proper plaintiffs were therefore said to be those two companies and not Nabalco Pty Limited. The defendant faced up to the consequences of this submission quite frankly. It readily conceded that if it were to sue for the price of any goods supplied pursuant to the contract or for breach of the plaintiff's obligation to carry out the works and provide the equipment mentioned in clause 3 of the agreement, the appropriate defendants would be the Joint Venture and not the plaintiff who was acting as an agent for disclosed principals.

I reject the defendant's submission. In my opinion it ignores the true purpose of clause 16. The words of the clause which follow those relied upon by the defendant disclose that purpose. They are "and accordingly in any action or claim hereunder for loss or damage the Buyer shall be entitled to recover loss or damage suffered by the said Joint Venturers or either of them to the same extent as would be the case if the Joint Venturers were parties hereto and Plaintiffs in lieu of the Buyer". The purpose of the clause is thus to enable the plaintiff to include in its claim for damages loss or damage suffered not only by it but by the joint venturers or either of them. The draftsman obviously had in mind the fact that as between the joint venturers and the plaintiff, the plaintiff was a manager and a question might arise whether loss resulting from a breach of the contract by the defendant was suffered by it or the joint venture. Clause 16 was designed to overcome that problem. The opening words of the clause are intended to be descriptive only of the plaintiff's relationship with the

joint venturers and to explain the reason for the clause; cf Bowstead on Agency, 12th ed., pp.266–7; Parker v. Winlow 7 E. & B. 942. The words relied upon by the defendant were not intended to indicate the capacity in which the plaintiff contracted. What I have said is enough to indicate why the defendant's submission is unsound. But I would add to what I have said that the clause in express words contemplates an action against the defendant by the plaintiff, and further, that if what the defendant submits were intended, the contract could simply have been expressed to be made between the joint venturers as buyers and the defendant as seller.

The submission that the plaintiff is entitled to nominal damages only is based upon a consideration of the provisions of the joint venture and management agreements set out on pp.2–4 hereof. The principal provision relied upon is clause 9.1 of the management agreement which is set out on p.3. The effect of it is that the plaintiff is entitled to charge the joint venturers with all its costs, expenses and liabilities incurred and paid or accrued in connection with the carrying out of its duties under the agreement. There is also the right to an indemnity in clause 11.3. The defendant's submission is that the plantiff can never suffer any damage for any breach by the defendant of the contract. All moneys it is obliged to pay out it is entitled to recover from the joint venturers. I reject the submission. I think that clause 9.1 of the contract is to be read as if the word "properly" were inserted prior to the words "incurred and actually paid or accrued". The contrary view leads to an absurd situation. The plaintiff could enter into all sorts of contracts for the erection of buildings and installations or for the supply of goods or services. No breach of any such contract would ever sound in other than nominal damages. The loss sustained would be passed on to the joint venturers who would be called upon to pay it. Defaulting contractors would escape scot free.

Support for the argument was said to be found in the provisions of clause 13.1 of the management agreement the relevant effect of which was that the plaintiff did not ever acquire any property in the oil. But as between the plaintiff and the defendant it was the defendant's obligation to supply oil to the plaintiff. Clause 9.1 of the management agreement envisaged that the plaintiff would, in its personal capacity, recover expenses and costs. It could only do this if it entered into a contract as principal. The fact that the oil did not become its property is a matter between the plaintiff and the joint venturers; it is an irrelevant factor when what is being considered is a breach of a contract entered into between the plaintiff and the defendant as principals.

My conclusion makes it unnecessary to consider additional arguments put by the plaintiff based upon clause 16 of the contract in question.

I turn now to the question of damages. I agree with counsel for the defendant that the principles to be applied in assessing the plaintiff's damages are those stated by Lord Pearson in Garnac Grain Co. Inc. v. H. M. F. Faure & Fairclough Ltd (1968) AC 1130 at p.1140. His Lordship said:

> "If Bunge did on January 24, by the mere issue of the writ, elect to treat Garnac's refusal to perform the contract as a repudiation of it, so that the contract was rescinded by Bunge on January 24, does that alter the date for ascertaining the difference between the contract price and the market price? If the contract continued, the proper date for that purpose would be February 4. If the contract was rescinded by Bunge on January 24,

would that become the proper date? Both on principle and on authority the answer is 'No'. If the contract had been duly carried out by Garnac, Bunge would have had the goods (to be exact, shipping documents covering the goods) on February 4. By Garnac's breach of contract Bunge have been deprived of the market value which the goods would have had on 4th February, and the measure of damages is the difference between that value and the contract price which they would have had to pay. That is the principle. It is subject to a qualification that if the buyer has a reasonable opportunity of mitigating the damage by buying the goods at a lower price at an earlier date (after the acceptance of repudiation but before the contract date for performance), a reduction of the damages may be appropriate. Both the principle and the qualification are stated in a series of cases: Hochster v. De la Tour; Frost v. Knight; Roper v. Johnson; and Melachrino v. Nickoll and Knight."

As in all cases involving the assessment of damages the approach is one of reasonableness and fairness to both parties. Although, this being a case of anticipatory breach, the provisions of s 53 of the Sale of Goods Act 1923 (the New South Wales Act because cl 15 of the contract makes the law of New South Wales the applicable law) do not apply, it seems to me that I should approach the question upon the analogy of sub-sec (2) of that section which provides that the measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract.

When the evidence concluded the contract was still on foot as to motor spirit and diesoleum. The plaintiff up to that time had been proceeding upon the basis that it would not have come to an end until September 1976. That was the earliest date when it could have been terminated pursuant to the provisions of cl 9(C)(i). That is a matter which I dealt with more extensively in my earlier judgment. The plaintiff approached the problem of damages by projecting from 24th July, 1974, the actual cost to it of acquiring its supplies of fuel oil up to 3rd November, 1975, and then the anticipated cost up to September 1976. The cost was what it was or would be bound to pay under the KNPC and Concord contracts. Schedules were prepared for what were described as Voyages 1 to 15, the first ten of which had already taken place. Voyages 11 to 15 inclusive were, at the time of the preparation of the schedules, in the future.

The plaintiff's approach had to be changed after the defendant gave it a notice pursuant to cl 9(C)(v) of the contract fixing new base prices for all products (including fuel oil) on the ground that the Commonwealth Government had, on 14th September, 1975, as from 18th September, 1975, refixed the price per barrel of indigenous crude oil under the Government's policy relating to that commodity. The notice was given on 20th November, 1975. The plaintiff, as I have previously mentioned, is to be deemed to have given a notice pursuant to the clause on 16th December, 1975. It is agreed that the effect of that notice was to terminate the entirety of the contract as from 16th March, 1976. Accordingly, the plaintiff's claim must cease in any event at Voyage 12 the commencing date of which was on or about 26th February, 1976. The defendant has submitted, for reasons later to be mentioned, that the plaintiff should be limited to a claim in respect of Voyages 1 to 10 only. Voyage 10, as I have indicated, concluded on 3rd November, 1975.

The defendant made certain admissions concerning the plaintiff's schedules. The admissions were similar in all cases. So that the extent of the admissions made can be

seen I set out those concerning Voyages 1 to 10. They are as follow:

> "It is agreed by the parties, without admission by the Defendant as to the validity of any basis of entitlement of the Plaintiff to claim from the Defendant any of the components or elements below referred to, that the Comparative Voyage Analyses dated 17/11/75 now tendered show
> (1) the actual prices for fuel oil freight and associated charges paid in respect of the various shipments of fuel oil Numbered 1 to 10 referred to therein
> (2) the dates such expenditures were incurred and
> (3) the consequential excess of such prices over the price that would have been payable to the Defendant for such shipments had the Defendant continued to supply at the original base price adjusted from time to time pursuant to Clause 9(B) of the Supply Agreement of 11/6/70.
> PROVIDED HOWEVER that the Plaintiff waives its claim in respect of item (R) (Insurance—Charterers Liability) in respect of voyages 1 to 8 inclusive. Also tendered are a second set of analyses identical with the first set, save that demurrage is excluded."

The plaintiff's claim is, bearing in mind the fact that the contract has now been determined, for the difference between what it cost it to acquire its requirements of fuel oil under the KNPC and Concord contracts and the price it would have paid to the defendant if it had continued to supply it at the price prevailing on 25th March, 1974, or any increase in that price to which the plaintiff was entitled as a result of the operation of any provision of the contract other than cl 9(C)(iii). The defendant attacked that approach as being erroneous.

Its basis for doing so was that the plaintiff had acted unreasonably in entering into the KNPC and Concord contracts. It submitted that the plaintiff should rather have taken term or spot supply from the defendant. Both courses would in fact have involved the plaintiff in somewhat less expense than it has incurred under its existing arrangements. I reject the defendant's submissions. It is idle for it to say that the plaintiff should have taken term supply from it. That was not available to the plaintiff unless it gave up its right to sue the defendant for damages for breach of contract. That was what was made clear in the conversation of 17th May, 1974, earlier dealt with. Notwithstanding that that conversation was labelled "Without Prejudice", that part of it is, in my opinion, admissible at least for the purpose of showing that the defendant's offer of a term supply is irrelevant for present purposes because it was only offered upon condition that the plaintiff gave up such rights as it had to sue for damages.

I have already had something to say about supply upon a spot basis. Each party called an expert who had had worldwide experience in the petroleum industry, the plaintiff a Mr Colish and the defendant, a Mr Abt. Both were impressive witnesses. It was Mr Abt's view that the plaintiff had acted too hastily. He thought, and this was the submission made by counsel for the defendant, that the plaintiff would have been well advised to have accepted the defendant's offer of spot supply for two or three months while it (the plaintiff) considered its position. This would have given it more opportunity to negotiate with other suppliers and carriers and also to assess how the market would move as the consequences of the October 1973–January 1974 crisis in the petroleum industry became more apparent. Certainly hindsight indicates that there is much wisdom in what Mr Abt said. But it would be wrong for me to use

hindsight. The plaintiff was responsible for seeing to it that the operation at Gove was able to continue. It could not do so if supplies of fuel oil were exhausted or insufficient. Not only the joint venturers, but many people on the peninsula would be affected if this occurred. The plaintiff regarded spot supply as risky—so risky that it would prefer to give up its rights to sue the defendant in return for a term supply if no other source of supply were available. That plainly was Mr Coogan's attitude. It is to be discerned from his notes made after the conference of 17th May, 1974. The plaintiff made its thoughts in this regard known to the defendant. As I have mentioned earlier the defendant certainly did nothing to discourage the plaintiff from thinking along those lines. I refer again to Mr Coogan's evidence of his recollection of what was said between Mr Notter and Mr Lockrey, namely:

> "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'."

Counsel for the defendant impressed upon me the fact that the defendant could not in fact have let the plaintiff down. Mr Lockrey had said that it would not during the discussion. In his evidence he referred to the potential massive liability for damages, harm to the defendant's public image and its genuine concern for the welfare of the people of Nhulunbuy as reasons why not. But he, I think, was also using hindsight when he gave that evidence. I refer once again to his telex to BPT of 17th May, 1974, sent after the meeting on that day. He said in relation to the possibility of the plaintiff taking spot supply, "This appears unlikely as Nabalco are fully aware our position and recognise supply dangers and temporary nature of current price advantage of spot market". That statement indicates, in my opinion, that he thought that there were risks and disadvantages in spot supply.

Accordingly, I am of opinion that it was not unreasonable for the plaintiff to refuse spot supply from the defendant even for the first two or three months following 24th July, 1974.

The defendant's next approach was to say that there was a market in the Persian Gulf for fuel oil and that the measuring rod for the assessment of the plaintiff's damages was that market, a market which it was submitted was at all times lower than the price paid pursuant to the KNPC contract. But what market is being spoken of? It was the spot market; it could be nothing else. Once one concludes, as I have, that the plaintiff was acting reasonably in making term supply a first priority, the market for spot supply ceases to provide a guide as to the reasonableness, qua the defendant, of the price which was agreed to be paid. That indeed was Mr Lockrey's view as witness the telex just quoted. It would, of course, be relevant to know whether the plaintiff could have obtained supplies pursuant to a term contract more favourable than that entered into with KNPC. The evidence satisfies me that there was no other source of supply available. The internal telexes passing between the defendant and BPT in London show that BPT, notwithstanding its worldwide ramifications in the petroleum industry, was satisfied that there was no other source of supply. Indeed the BP companies did not expect KNPC to be a supplier and were confident that the plaintiff would have to accept term supply from the defendant with the consequence that it would have to forfeit its right to sue for damages.

In addition to making the general submissions so far dealt with the defendant made a number of submissions dealing with particular aspects both of the KNPC

contract and the Concord contract. It was said that the KNPC contract conferred upon the plaintiff substantial advantage in that it was dealing direct with the instrumentality of one of the oil producing nations, namely Kuwait. It was said that this should operate as a discounting factor. But I repeat that there was no other source of supply. It is not a case of the plaintiff preferring, although the price were greater, supply from Kuwait to supply from an oil company such as the defendant. In the circumstances that prevailed the plaintiff was forced to deal with KNPC.

In relation to the Concord contract it was said, first of all, that the freight to be paid thereunder was to be paid at an excessive rate. Clause 11.1 of that contract provided that freight should be paid at the rate of World Scale 170 as applicable on the bill of lading date of each cargo "which at the commencement hereof is US$10.08 per long ton."

I interpose to say that the objective of World Scale 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.

Mr Abt's criticism of the freight rate charged in the Concord contract arose because of the escalation provisions contained therein (cl 22). He said:

> "The escalation provisions of the Concord contract were predicated upon a changing Worldscale index (that is Worldscale 100) for the full duration of the Contract. I will illustrate what I mean by 'changing'. As at 1st January, 1974, the Worldscale 100 index, in terms of a basic unit cost or value (i.e. long ton) was US$5.88, for the voyage Shuaiba to Gove. As at 1st January, 1975, the same unit voyage cost for Worldscale 100 increased to US$8.16. Consequently, had the Concord/Nabalco Worldscale rate remained contractually fixed at 170 for the full term of 3 years, the increased cost per long ton payable by Nabalco would have escalated from $10.08 to $13.87. In fact, by reason of the negotiated decrease in Worldscale rate to 165, which was effected in Nabalco's favour in October 1974, the actual increase to Nabalco was to $13.46 instead of $13.87."

Without going into the balance of his evidence in detail it was to the effect that Nabalco should have been able to obtain a rate based on 1974 World Scale and not a rate which would change with the yearly changes in the World Scale index.

Mr Colish disagreed with Mr Abt and thought that the rate although high was within the range of what was reasonable.

There was much discussion in the evidence about the isolated area which had to be supplied. It was plain that freight rates for voyages which took a ship to ports west of the Persian Gulf were lower, generally speaking, than those for voyages which took a vessel east thereof. There was also discussion about the feasibility of obtaining back loading. It was unlikely that there could be back loading of a petroleum product. Certainly no such loading would have been available from Gove. It was possible that there might have been such back loading from Melbourne or from Indonesian ports. But, as mentioned in the early part of this judgment, the peninsula is remote even

from these places. There was also discussion as to whether it would not be possible for there to be back loading of bauxite or alumina from Gove itself. For this to have been done there would need to have been used a special class of vessel (an obo) which could be converted to carry either petroleum or other bulk cargoes.

I have taken all these matters and some others into account. But I have reached the conclusion that, notwithstanding the criticisms which Mr Abt has made, the plaintiff acted reasonably in entering into the Concord contract. A term supply from KNPC was useless to it unless the supply could be delivered at Gove. Unlike the contract which the plaintiff had with the defendant the contract with KNPC provided for delivery at Persian Gulf ports. The plaintiff therefore had to obtain a contract with a reliable carrier. The carrier had to be prepared to make vessels available on what was described as a back to back basis. In other words there had to be a vessel available as supplies were needed. In respect of the Concord contract the plaintiff had to act with the same haste in which it acted in entering into the KNPC contract. Otherwise that contract was of no use to it. It may be that if further inquiries had been made or if further time had been allowed to elapse it would have done somewhat better. But having taken into account Mr Colish's evidence, which I accept, I have reached the conclusion that the rates charged in the Concord contract are reasonable and the amounts incurred for freight properly form the basis for the assessment of the plaintiff's damage in this respect.

An essential difference between the Concord contract and that here in question was in the size of the cargoes to be delivered. Under the Concord contract cargoes were to be not less than 36,000 metric tons nor more than 66,000 metric tons (cl 5.2). In the contract with the defendant deliveries were contemplated in the order of 25,000 to 30,000 metric tons. After the first shipment under the Concord contract had been delivered on 17th August, 1974, (the quantity was 35,245 tons) deliveries increased substantially in size. By Voyage No. 4 which was completed in December 1974 the quantities had reached 60,000 tons and were seldom less than this thereafter. The fact that larger deliveries were to be accepted meant that the plaintiff's storage tanks were insufficient and it had to construct more in order to be able to accept the deliveries which were being made. It would appear that its storage capacity had been so increased by the end of 1974. Thereafter it always had on hand upwards of 20,000 tons of oil more than would have been the case if the old contract had continued. In other words it had, by reason of the provisions of the Concord contract and the additional storage space which was built, an additional amount of oil which was somewhat less than the equivalent of a tanker load under the old contract. This must lead to the conclusion that one of the twelve shipments which form the starting point for the plaintiff's claim ought to be in part disregarded. But a question arises as to whether it should be a shipment early, in the middle or at the end of the period. I shall return to that matter shortly. I point out, however, that because of increases in costs it will advantage the plaintiff to have the shipment taken into account as one of the early shipments, whilst the defendant will be advantaged if it is taken into account towards the end of the period.

There are provisions in the Concord contract which oblige the plaintiff to pay demurrage after 72 hours (cl 10.3 and .4). To the extent that the plaintiff has had to pay demurrage pursuant to these provisions, I think the probabilities are that the delays which brought that situation about were due, at least to a substantial extent, to the fact that the plaintiff's equipment was not capable of accepting fuel at a sufficiently fast rate bearing in mind the increased size of the tankers which Concord

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were using. Demurrage should therefore be excluded from any calculation.

Brokerage was charged for the contract at the rate of 3.75 per cent on the actual amount of freight, deadfreight and demurrage. It was payable to Pacific Marine (Bermuda) Limited (cl 24). Having considered the evidence of Mr Abt and Mr Colish on this matter I think that this percentage ought in the interests of fairness to the defendant to be reduced to 2.5 per cent.

One further matter to be decided before I come to my conclusions on the way in which the plaintiff's damages are to be calculated arises by reason of the recent termination of the contract pursuant to the provisions of clause 9(C)(v) thereof. The defendant's notice pursuant to the clause was given on 20th November, 1975, and the plaintiff's notice pursuant thereto is to be treated as having been given on 16th December, 1975. The contract came to an end, therefore, on 16th March, 1976. It was submitted, as I have previously mentioned, that if the defendant had still been supplying fuel oil under the old contract in September 1975 when the Commonwealth Government refixed as from 18th September, 1975, the price per barrel of indigenous crude oil under the Government's policy relating thereto, it would have been likely that the defendant would have given a notice pursuant to the clause no more than a week or a fortnight after 18th September, 1975, when the change in policy was made. This would have meant notice by the plaintiff no later than the end of October with the result that the contract would have been terminated at the end of January, 1976. The plaintiff submitted that these were matters of pure speculation. No evidence was given by any employee of the defendant in relation to them and I should look, according to the plaintiff's submission, not to what might have happened, but at what did happen namely, notice on 20th November, 1975, and termination on 16th March, 1976. The reason for the delay between September and November 1975 was apparently to do with the carrying out by the defendant of procedures which it might have been necessary for it to follow because of the provisions of the Prices Justification Act 1973, as amended. I am not persuaded that it was necessary for the defendant to comply with any such procedures before it could give a valid notice; neither party addressed me on the present requirements of the Act. They are not the same as those which were considered by me in my earlier judgment because of subsequent amendments to the legislation.

One matter I think I have to take into account in determining this question is that Voyage 12 was projected in the plaintiff's schedules to commence on or about 26th February, 1976, and to conclude on 17th March, 1976. On the basis that this is what actually happened discharge was completed one day after the contract in fact had terminated. I think another matter I have to take into account in relation to Voyage 12 is that if the defendant had been supplying fuel oil under the contract at the old price when the Government's announcement was made on 14th September, 1975, it would have programmed its shipments so as to provide as little oil as possible before its notice pursuant to cl 9(C)(v) either led to the acceptance by the plaintiff of a new base price for products supplied under the contract or termination. That consideration coupled with the matters put to me by counsel for the defendant concerning the incentive which the defendant would have had to give a notice substantially earlier than 20th November, 1975, lead me firmly to the conclusion that I should leave out of account Voyage 12 and I do so. Voyage No. 4, as I have said, delivery pursuant to which was completed on 2nd December, 1974, was the first voyage upon which more than 60,000 metric tons of oil were carried. I think it is the voyage to select for the purpose of arriving at the sum by which the plaintiff's claim should be reduced because

of the increased storage space which the plaintiff had to provide because of the larger size of the tankers being used by Concord. The claim made in respect of that voyage should be reduced by one-half.

Accordingly the plaintiff's claim for damages will be quantified by totalling the amounts claimed in the schedules for Voyages 1 to 11 inclusive subject to:—

(a) the amount for Voyage 4 being reduced by one-half;
(b) no demurrage being included;
(c) brokerage being reduced to 2.5 per cent;
(d) omitting the item Insurance-Charterer's Liability from Voyages 1 to 8 in terms of the proviso to the admission made by the defendant above set out.

Finally I deal with a claim made by the plaintiff for interest on the amount to be awarded, such claim being made pursuant to the provisions of s 94 of the Supreme Court Act of 1970. In my opinion the plaintiff is entitled to interest. Very often a court in awarding interest selects the date for the commencement of the interest period arbitrarly having regard to the fact that it is not possible to come to a reasoned or precise conclusion as to when the starting point should be. In the present case that difficulty does not arise, although the calculation involves some complexity. In my opinion the plaintiff is entitled to interest from each of the dates when it actually paid the amounts it did pay in respect of the eleven voyages which form the basis of its claim. I am not sure whether there is evidence to show the date of payment but if there is not I give leave to the plaintiff to re-open its case for this purpose. Interest will be paid upon the amount of the differential between what it cost the plaintiff by reason of the provisions of the KNPC and Concord contracts and what it would have cost the plaintiff if the defendant had continued to supply it. The rate of interest is ten per cent per annum and interest will run down to the date when I formally pronounce judgment.

Accordingly there will be judgment for the plaintiff in the action. It is entitled to recover damages calculated in the manner I have indicated. I would expect the parties to be able to agree upon the amount of the judgment to be entered but if, for any reason, they cannot the matter can be put back into my list for the purpose of my hearing further submissions.

The matter is stood over to a date to be fixed to enable the parties to consider what I have said. When it is restored to the list I shall pronounce judgment as I have indicated and make any declaration necessary to give effect to my conclusions. I shall also deal with the question of costs. I make it clear that I have not today pronounced any formal judgment so that no time for appeal has yet begun to run. That will not occur until I formally enter judgment in accordance with the procedure I have outlined above.

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No. 114

Judgment of His Honour Mr Justice Sheppard

JUDGMENT

HIS HONOUR: In this matter I delivered reasons for judgment on 8th July last. In those reasons I decided that the plaintiff was entitled to succeed and I indicated the basis upon which its damages should be assessed. I suggested that the parties should be able to reach agreement, in accordance with the principles which I had set out, upon the amount. When I say agreement, I mean agreement upon what was really the arithmetic involved. This morning the plaintiff has tendered a schedule, which will become Ex AO in the case, which indicates that the amount to which the plaintiff is entitled, including interest up to 19th August, 1976, is $26,338,338.57. Accordingly I direct the entry of judgment for the plaintiff in that sum. I order the defendant to pay the plaintiff's costs of the proceedings including the reserved costs.

I make an order in terms of the document entitled "Order Granting Conditional Leave to Appeal".

No. 115
Notice of Motion for leave to appeal to Her Majesty in Council

20th Aug., 1976

No. 115

Notice of Motion for leave to appeal to Her Majesty in Council

NOTICE OF MOTION

TAKE NOTICE that the abovenamed BP AUSTRALIA LIMITED will this day move for an order granting leave to appeal to Her Majesty in Council from the judgment of the Honourable Ian Fitzhardinge Sheppard made this day upon the following grounds:

1. That His Honour was in error in holding that on the true construction of the Fuel Supply Agreement dated 11 June, 1970 made between the Defendant of the one part and the Plaintiff of the other part and in the events which had happened the Defendant's Notice of 22 March, 1974 was not a valid notice pursuant to the provisions of Clause 9(C)(iii) of the said Agreement.

2. That His Honour was in error in holding that it was not appropriate to take into account, for the purposes of determining whether the Defendant was able only on onerous terms to obtain supplies of fuel oil from its usual sources of supply, what His Honour described as "the more general considerations associated with what was claimed to be the future uncertainty of the terms upon which oil could be obtained" such as "the probabilities of further unilateral increases in price, insistence on still greater participation and the imposition of restrictions and embargoes of various kinds".

3. That His Honour was in error in holding:
   (a) that the present case fell squarely within the provisions of Clause 9(C)(i) of the said Agreement, but for the time limit therein provided for; and further
   (b) that what was within the said Clause 9(C)(i) was not, on the true construction of the said Agreement, intended to be within the said Clause 9(C)(iii)

4. Alternatively to Grounds 1 to 3 above, His Honour should have held that upon the true construction of the said Fuel Supply Agreement and in the events which had happened:
   (a) the Plaintiff was obliged to elect within one month of receipt of the Defendant's said Notice of 22 March, 1974, irrespective of the validity thereof, as to whether or not it would give the three months' notice in writing of termination provided for in Clause 9(C)(iii) of the said Agreement; and
   (b) the letter of 24 April, 1974 from the Plaintiff to the Defendant constituted an election on the Plaintiff's part to give three month's notice in writing of termination of the said Agreement so far as it related to the supply of furnace oil.

5. That His Honour was in error in holding that the Defendant by its conduct was in breach of and repudiated the said Fuel Supply Agreement so far as it related to the supply of furnace oil and that in particular His Honour was in error in holding or determining that:
   (a) the evidence of Mr Notter at the meeting of 17 May, 1974 was to be preferred, where it was in conflict with the evidence of the Defendant's witnesses;
   (b) the effect of what was said by the Defendant to the Plaintiff at the meeting of 17 May, 1974 was as follows:
      "1. The Defendant offered a one year or a three year contract at the base prices mentioned during the discussion and subject to the escalation clauses which were foreshadowed.
      2. The Defendant's willingness to offer such contracts was conditional upon the Plaintiff agreeing to give up its rights (if any) under the old contract which was to be regarded as determined, as to the supply of fuel oil, as from 24 July, 1974.
      3. The Defendant would not, in any event, revert to the old contract which it regarded as having been determined by reason of the Plaintiff's Notice of 24 April, 1974.
      4. The Plaintiff was at liberty to seek such alternative supplies of fuel oil as it could obtain. The Defendant's attitude was summed up in the statement, "You can go your hardest but we know you won't get it."
      5. The Defendant, in the event of agreement not being reached upon a new contract, was willing to supply on a spot basis and made statements reassuring the Plaintiff that it would not let it down."
   (c) the evidence of Mr Notter at the meeting of 31 May, 1974 was to be preferred, where it was in conflict with the evidence of the Defendant's witnesses;

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Notice of Motion for leave to appeal to Her Majesty in Council

20th Aug., 1976 (Cont'd)

(d) the conclusion which should be drawn from the telephone conversations of 13 June, 1974 and/or 14 June, 1974 was that the Defendant was maintaining the asserted "stand taken up by it at the meeting of 17 May, 1974 and re-iterated at the meeting of 31 May, 1974";

(e) evidence as to what was said at the meetings of 17 May, 1974 and 31 May, 1974 and of the discussions on the telephone between Mr Lockrey and Mr Coogan on 13 June, 1974 and 14 June, 1974 was admissible;

(f) there was a marked contrast between the asserted statement of the Defendant set out in paragraph 3 of sub-ground (b) above and the contents of the Defendant's letter of 17 July, 1974 to the Plaintiff;

(g) a fair assessment of the Defendant's intention manifested by what its representatives said on 17 May, 1974 and 13 June, 1974 was that there would be no supply pursuant to the said Agreement, no matter what was decided by the Court in relation to the validity of its Notice of 25 March, 1974;

(h) the Defendant in fact said to the Plaintiff that it would never again supply furnace oil under the said Agreement and further that so far as furnace oil was concerned the said Agreement was at an end;

(i) the Defendant had committed anticipatory breach of contract by its alleged statement set out in sub-ground (h) above;

(j) there was an apparent divergence of judicial opinion in the relevant authorities relating to "without prejudice" communications and that such divergence could be reconciled by saying that statements which are made conditionally will not be admissible and that statements "clearly intended to be an unconditional indication of a party's attitude to a matter in question" may be admitted into evidence;

(k) the relevant statements of Mr Lockrey and/or Mr Rowland to the Plaintiff's representatives were unconditional and therefore admissible as evidence as to anticipatory breach on the Defendant's part;

(l) the statements made by the Defendant's representatives at the meetings of 17 May, 1974 and 31 May, 1974 were admissible notwithstanding that the parties may have entered into an agreement beforehand that nothing that was then said should ever be the subject of evidence by either of them;

(m) what was said on 13 June, 1974 and 14 June, 1974 was not a continuation of a series of negotiations designed to effect a settlement of the dispute and was not said to be "without prejudice" so as to be protected from admission into evidence;

(n) that on 13 June, 1974 the Defendant manifested an intention no longer to be bound by any obligation further to supply fuel oil pursuant to the said Agreement.

6. That His Honour was in error in holding that he did "not regard very much of what" he had said about "the attitudes of the parties, the reasons for them and the problems which each faced" as being "directly relevant to the ultimate question now to be decided".

7. That His Honour was in error in holding that:
   (a) the acts and conduct of the Defendant constituted a repudiation by it of the contract;
   (b) what the Defendant said on 17 and 31 May, 1974 and 14 June, 1974 reflected a different attitude from that disclosed in its letter of 17 July, 1974.

8. That His Honour was in error in holding that the Plaintiff did not affirm the said Fuel Supply Agreement after the Defendant's alleged act or acts of repudiation and that in particular His Honour should have held that such affirmation occurred by reason of:
   (a) the continued supply and acceptance of goods pursuant to the contract up to 24 July, 1974 and thereafter; and/or
   (b) the Plaintiff's letter to the Defendant of 16 May, 1974 (sent after the meeting of 17 May, 1974);
   (c) the Summons filed herein by the Plaintiff on 19 June, 1974; and/or
   (d) the sending by the Plaintiff of requirements notices to the Defendant on 4 June, 1974, on 18 June, 1974 and 2 July, 1974.

9. That His Honour was in error in holding that the sending of the notice of stockholding on 2 July, 1974 by the Plaintiff was an oversight on its part.

10. That His Honour was in error in holding that the Plaintiff accepted the Defendant's alleged repudiation of the said Fuel Supply Agreement and that in particular His Honour was in error in holding or determining that:
   (a) It was not necessary for the Plaintiff to have brought the said Agreement to an end forthwith as to the entirety of the obligations of the parties under the said Agreement for its "acceptance of the Defendant's alleged repudiation to have been effective;
   (b) The acceptance of the Defendant's repudiation being expressed to take effect only as from a specified date in the future (24 July, 1974) could validly constitute an election to accept and determine the contract as from that date rather than as from the date of such purported acceptance;
   (c) The absence of any minute at the Plaintiff's Board of Direction meeting did not affect the fact that the Plaintiff did otherwise accept the Defendant's alleged repudiation as an anticipatory breach of the said Agreement;
   (d) The submission made on behalf of the Defendant, that there was nothing in what the Plaintiff did which plainly indicated to the Defendant that the Plaintiff was purporting to accept as an anticipatory breach of the said Agreement some alleged repudiatory conduct of the Defendant, should be rejected;
   (e) The Plaintiff's acceptance of the Defendant's repudiation (if any) and determination thereby of part only of the contract, that is, that part of the contract relating to the supply of fuel oil, was in law capable of creating a liability in the Defendant for damages for anticipatory breach of that part of the contract.

11. That His Honour was in error in his examination and application of the

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legal authorities as to acceptance of repudiation and anticipatory breach and in particular:

(a) concerning the matter to which the Master of the Rolls was referring on page 468 of Johnstone v. Milling (1886 LR 16 QBD 460);

(b) in holding that there was no authority which precisely covered the present case;

(c) in holding that there was a ring of absurdity about the Defendant's submission that in the present case the law permitted of "no course midway between the two elections", that is to say, the election to rescind the said Agreement as to its entirety or the election to keep the contract on foot and that by giving effect to the Plaintiff's submission to the contrary, His Honour was not thereby "applying any principle not yet known to the law nor bringing about any fundamental change therein".

12. That His Honour should have held that there was no evidence or no sufficient evidence of the acceptance by the Plaintiff of any act or acts of repudiation by the Defendant.

13. That His Honour was in error in holding that the Plaintiff did not adopt the course of purported rescission as to supplies of fuel oil only in order to avoid the consequences of repayment of the loan the subject of the contemporaneous Loan Agreement made between the parties.

14. That His Honour should have held that the Plaintiff had no status to sue by reason of the provisions of Clause 16 of the said Fuel Supply Agreement.

15. That His Honour should have held that, by reason of the provisions of the Joint Venture Agreement between Swiss Aluminium Australia Pty Limited and Gove Alumina Limited and the Management Agreement between the Plaintiff and the said Swiss Aluminium Australia Pty Limited and Gove Alumina Limited, whether taken alone or in conjunction with evidence tendered at the hearing concerning transactions and matters implemented pursuant to such Agreements, the Plaintiff was only entitled to nominal damages, if the Plaintiff was entitled to succeed at all.

16. That His Honour was in error in holding that the Plaintiff had acted reasonably in entering into the Contract with Kuwait National Petroleum Company and in rejecting the submission of the Defendant that the Plaintiff ought reasonably to have taken term or "spot" supply.

17. That His Honour was in error in holding that the Plaintiff had acted reasonably in entering into the Concord Contract.

DATED this 20th day of August 1976.

D. A. STAFF

Senior Counsel for the Defendant

No. 116

Order of His Honour Mr Justice Sheppard granting final leave to appeal to Her Majesty in Council

ORDER GRANTING FINAL LEAVE TO APPEAL

The 4th day of November 1976.

UPON MOTION made this day pursuant to the Notice of Motion filed herein on the 20th day of August 1976, WHEREUPON AND UPON READING the said Notice of Motion the Affidavit of Robert Lloyd Pritchard sworn on the 20th day of August 1976 and the Prothonotary's Certificate of Compliance, AND UPON HEARING what is alleged by Mr Robert Lloyd Pritchard, Solicitor for the Appellant and Mr John Henry Herron, Solicitor for the Respondent IT IS ORDERED that final leave to appeal to Her Majesty in Council from the Judgment of the Honourable Ian Fitzhardinge Sheppard given and made herein on the 20th day of August 1976, be and the same is hereby granted to the Appellant AND IT IS FURTHER ORDERED that upon payment by the Appellant of the costs of preparation of the Transcript Record and despatch thereof to England the sum of Fifty dollars ($50.00) deposited in Court by the Appellant as security for and towards the cost thereof be paid out of Court to the Appellant.

I. F. SHEPPARD
Judge.