UNREPORTED DECISION: NABALCO PTY LIMITED *v.* BP AUSTRALIA LIMITED

(No. 4310 of 1974 (Supreme Court of New South Wales). Judgment delivered 20 August 1976.

*by Robert L. Pritchard**

(1) *Construction of supply agreement* — petroleum products — provision for revised prices if seller unable to obtain supplies except "on onerous terms" — meaning of word "onerous" — *Rowett Leakey & Co.* v. *Scottish Provident Institution* (1927) 1 Ch 55 referred to — regard to be had to whole of contract — intention of parties to be ascertained from the language they have used — *Australian Broadcasting Commission* v. *Australian Performing Right Association Ltd* 129 CLR 99 at p 105 referred to.

(2) *Repudiation of contract* — statement of intention not to perform the contract constitutes anticipatory breach — *Spettabile etc Co.* v. *Northumberland Shipbuilding Co* 121 LT 628, *James Shaffer Ltd* v. *Findlay Durham and Brodie* (1953) 1 WLR 106 and *Sweet & Maxwell Ltd* v. *Universal News Services Ltd* (1964) 2 QB 699 referred to.

(3) *Admissibility of evidence* — without prejudice conversations — *Nicholson* v. *Southern Star Fire Insurance Co Ltd* 28 SR 124 applied; *Field* v. *Commissioner for Railways* 99 CLR 285 distinguished — use of without prejudice label does not prevent admission into evidence of an unconditional indication of a party's attitude.

(4) *Anticipatory breach* — does not by itself amount to breach but may be acted upon by the other party as a rescission of the contract to give an immediate right of action — other party must elect which course to pursue — rule in *Johnstone* v. *Milling* (1886) LR 16 QBD 460 discussed — rescission of whole contract unnecessary in rare cases where contract divisible — "reason and justice" decisive.

(5) *Principal and agent* — plaintiff agent for disclosed principals — status to sue — Bowstead on Agency 12th Ed. pp 266–7; *Parker* v. *Winlow* 7 E & B 1942 referred to.

(6) *Damages* — plaintiff manager of joint venture — plaintiff entitled to indemnity from joint venturers — fact of property in goods not passing to plaintiff irrelevant in contract between plaintiff and defendant as principals — plaintiff able to recover because of express provision in supply agreement.

(7) *Measure of damages* — plaintiff entitled to estimated loss directly and naturally resulting in ordinary course of events — *Garnac Grain Co Inc* v. *H.M.F. Faure & Fairclough Ltd* (1968) AC 1130 applied.

Judgment for plaintiff in the sum of $26,338,338.57. Conditional leave granted to appeal to Privy Council.

(Reporter's note: Because of the length of the unreported judgments in this case (some 120 pages), it is impracticable to set out the judgments in full. Considerable license therefore has been exercised in extracting the more salient parts of the judgments. The following extracts appear in the same order as the numbered headnotes to this case note. On any objective examination, the conclusions of Sheppard J. on questions number (3) and (4) are controversial. Mining and petroleum lawyers will find sections numbered (5) and (6) of particular interest in the context of the legal status of an operator under a mining joint venture agreement.)

(1) *Construction of supply agreement* — (Reporter's note: The decision of the Supreme Court of New South Wales was reversed on appeal by the Privy Council on this question: see *BP Australia Ltd.* v. *Nabalco Pty. Ltd.* (1977) 52 ALJR 412. In this note, a prior reading of the judgment of their Lordships delivered on appeal is assumed.)

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

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

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

Looking only at Cl. 9(C)(iii), without considering whether the meaning and operation of that clause is affected by other clauses in the contract, I have reached the conclusion that the defendant's submission, that the facts upon which it relies do show that it was able to obtain supplies only upon onerous terms, ought to be accepted. But it is when other clauses in the contract are considered that the defendant's difficulties arise.

The ultimate task is to ascertain the intention of the parties from the language they have used; cf *Australian Broadcasting Commission* v. *Australian Performing Right Association Ltd* 129 CLR 99 at p. 105. All the matters to which I have referred, both when considering only the words of Cl.9(C)(iii) and when considering its terms in the light of other clauses of the contract, must be taken into account in reaching a conclusion. In my opinion no consideration mentioned is decisive . . . Having considered the provisions of the other clauses of the contract, however, I have reached the conclusion that the better view is that the present case is not within the clause because it falls squarely within the provisions of Cl.9(C)(i) which, but for the time limit, could have been invoked; and further, that what is within that clause is not intended to be within Cl.9(C)(iii). To decide otherwise would give to Cl.9(C)(iii) an overriding effect.

For the above reasons I am of the opinion that the circumstances relied upon by the defendant are not within Cl.9(C)(iii) of the contract . . .

(2) *Repudiation of contract* — (Reporter's note: The undermentioned extract followed reference by Sheppard J. of the authorities of *Spettabile etc Co.* v. *Northumberland Shipbuilding Co* 121 LT 628, *James Shaffer Ltd* v. *Findlay Durham and Brodie* (1953) 1 WLR 106 and *Sweet & Maxwell Ltd* v. *Universal News Services Ltd* (1964) 2 QB 699).

SHEPPARD J. 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.

(3) *Admissibility of evidence* — (Reporter's note: After an extensive discussion of the authorities, Sheppard J. purported to apply the decision of the Supreme Court of New South Wales in *Nicholson* v. *Southern Star Fire Insurance Co Ltd* 28 S.R. 124 notwithstanding its apparent conflict with the High Court decision in *Field* v. *Commissioner for Railways* 99 CLR 285.)

SHEPPARD J. 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.

(4) *Anticipatory breach* — (Reporter's note: Sheppard J. comprehensively reviewed the authorities on anticipatory breach of contract quoting, inter alia, the following passage from the judgment of Lord Esher M.R. in *Johnstone* v. *Milling* (1886) 16 QBD 460:

> . . . 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 parts 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.

(Nonetheless Sheppard J. went on to distinguish the present case because the contract was capable of division.)

SHEPPARD J. Although, as I have said, many cases have been decided since *Johnstone* v. *Milling*, I have not found in any, whether in England or Australia, any different statement of the principle than those to be found in *Johnstone* v. *Milling* and the cases earlier referred to.

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 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 are 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 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*.

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.

(5) *Principal and agent* — (Reporter's note: In the only judicial observations on the status of an operator under a joint venture agreement to sue for damages in Australia, Sheppard J. considered the following two questions.)

SHEPPARD J. The two companies . . . 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 . . .

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 excercise 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. . . .

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 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 . . . to refer in some detail to this contract. . . . 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 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.

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 clause 16 of the contract coupled with the existince of the joint venture and management agreements earlier referred to . . . 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 submision. 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., pp266-7; *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.

(6) *Damages*

SHEPPARD J. 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 plaintiff 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 contract entered into between the plaintiff and the defendant as principals.

(7) *Measure of damages*

SHEPPARD J. 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 . . . "the measure of damages is the difference between that value and the contract price which they would have had to pay.*f* 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.

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