MARATHON

100

THE HIGH COURT

1985 778 Sp. Ct. 6

BETWEEN:

MARATHON PETROLEUM IRELAND LTD.

Plaintiff

AND

BORD GAIS EIREANN

Defendant

Judgment of Mr. Justice Costello delivered the 18th February 1986.

Mary P. Costello
Regr.

INTRODUCTION

By a lease of 7th May 1970 the Minister for Industry and Commerce demised to Marathon Petroleum (Ireland) Ltd., ("Marathon") all the petroleum under the sea bed and sub-soil in the leasehold area described in the lease for a term of twenty one years and such other periods as were provided for in an earlier agreement. On the 10th July 1975 Marathon entered into an Agreement for the delivery and sale to a company called Bord Gais Teoranta Eireann of the reserves of natural gas contained in the area leased by the Minister. The Defendant's herein ("the Board") were established by the Gas Act, 1976 to carry out the functions prescribed by the Act and succeeded to the rights and liabilties of Bord Gais Teoranta Eireann under the 1975 Agreement. As it became possible to deliver natural gas at a date sooner than that originally contemplated an Interim Agreement was entered into on the 1st September, 1978 to permit this to be done, and as it was also established that the reserves of natural gas leased to Marathon in what the parties called "the Reservoir" were greater than originally estimated a further agreement, called a Supplemental Agreement, was entered into on the 1st April, 1984. Controversy has arisen between the parties as to the construction of two Articles in the principal Agreement of the 10th July, 1975 one relating to the quantities of gas which Marathon are obliged to deliver under the Agreement and the other relating to the price which the Board is obliged to pay for gas delivered to them, and Marathon has applied by Special Summons under Order 3 rule 7 for a determination by this Court of the controversial provisions. As will be readily appreciated the Agreement is a long and complex one but, apart from the disputed clauses,

it will be necessary only to refer to those features of it that will help to resolve the two controversies. I propose in Part 1 hereunder to concentrate on those provisions which bear on the parties' rights and obligations in relation to the supply of gas, and in Part 2 those dealing with the price payable to Marathon by the Board for supplies it has received.

Part 1

The Agreement, as I have said, was dated the 10th July 1975 but there was no question of Marathon being obliged to supply natural gas as from that date. The parties supplied for themselves a detailed dictionary of the terms they were to use and provided for what they termed the "First Delivery Date", being the date of commencement of continuous deliveries under the Agreement: unless otherwise agreed it was fixed as the 1st April 1979 (Clause 3.2). What they called the "Contract Period" was the period beginning the date of first delivery (i.e. the 1st April 1979) and ending on the date the Agreement was to terminate (Clause 1.5) which, unless previously terminated or extended in accordance with its terms, was to be twenty years fro the 31st December, 1979 (Clause 3.2). Marathon was required to sell to the Board all the gas it produced during the Contract Period (Clause 4.1) but if during that period there should no longer be economically recoverable reserves remaining in the Reservoir the Agreement was to terminate (Clause 22.1). And irrespective of the quantities delivered in any year of the Contract Period Marathon was to receive a minimum annual payment (Clause 10.3).

The Board's right to nominate quantities for delivery:

The parties devised a detailed system by which the Board

would nominate on a weekly basis its daily requirements of gas for the coming week. But it is important to bear in mind that quite clearly the parties appreciated that the Board's requirement would vary from time to time and not merely on an annual, monthly or weekly basis but from day to day, and there was no question of fixing a daily quantity which throughout the Contract Period the Board would be required to nominate and Marathon be obliged to deliver. They provided that for each "Contract Year" during the Contract Period there was to be established an average daily rate for the delivery of natural gas, expressed as a quantity of gas in cubic feet. This they called the "Daily Contract Quantity". (Clause 7.1 (1)). Originally the Daily Contract Quantity for the first three years of the Contract Period was specified at different rates but when a redetermination of the size of the reserves was effected the original figures were revised by the Supplemental Agreement of the 1st April, 1984 (Clause 2.1) and the Daily Contract Quantity was fixed at 165 million cubic feet per day (MMcfd). Marathon point out (without challenge by the Board) that the figure of the Daily Contract Quantity was arrived at by estimating the gas producable from the Reservoir over the twen year period of the Contract Period and calculating an average daily rate from this figure.

Having established for themselves a specified figure for the Daily Contract Quantity the parties then went on to define what they meant by the expression "Annual Contract Quantity" which they also employed in their Agreement (Clause 7.1 (3)). The quantity involved was firstly to be arrived at by a simple multiplication of the Daily Contract Quantity by the number of days in any contract year which sum, secondly, was to be reduced by certain deductions which are not

presently relevant and which accordingly I need not explain.

A right to nominate quantities for delivery was conferred on the Board by Clause 7.2. Firstly an obligation was imposed on Marathon to maintain throughout the Contract Period a capacity (called the "Delivery Capacity") to deliver natural gas from the Reservoir for each day of the Contract Period at a rate of not less than 110% of the Daily Contract Quantity. Then a right each and every day to nominate for delivery quantities of gas up to 110% of the Daily Contract Quantity was granted to the Board. (Clause 7.2 (1) first paragraph).

The Board's right to nominate a quantity for daily delivery in excess of the Daily Contract Quantity is not limited to requests of up to 110% of that figure. Under sub-paragraph (a) of this sub-clause an express right to nominate daily deliveries between 110% and 120% of the Daily Contract Quantity was conferred, and a right to nominate in excess of 120% of the Daily Contract Quantity was conferred by sub-paragraph (b). Whilst the notification procedures contained in a later clause (Clause 7.4) require that notice of the Board's requirements be given "within the limitations contained in Clause 7.2" it will be observed that this Clause contains no restriction on the Board's right to nominate whatever quantities they wanted whether they were below or above the Daily Contract Quantity. The Agreement makes clear that the figure agreed as a Daily Contract Quantity figure fulfills three main purposes. Firstly, by enabling a calculation of the Annual Contract Quantity to be made it enabled the fixed annual minimum sum payable to Marathon to be ascertained (Clause 10.3). Secondly, it establishes the basis for calculating the daily capacity to deliver natural gas which Marathon was required to

maintain (Clause 7.2). And thirdly it fixes a basis for defining the scope and extent of the different obligations imposed on Marathon by the Board's nominations — a subject to which I will now turn.

Marathon's obligation to deliver nominated quantities

I propose here to examine Marathon's obligations arising on the exercise by the Board of the three distinct nomination rights conferred by Clause 7.2 (1).

The first paragrpah of Clause 7.2 (1) which conferred a righ to nominate up to 110% of the Daily Contract Quantity contained no reference to any obligation on Marathon to comply with the nomination. This is to be found in Clause 7.2(2) which provided a broad and comprehensive obligation on Marathon to deliver in each day the quantity of natural gas properly nominated by the Board. This obligation is in no way qualified and in my view Marathon is contractually obliged to deliver any quantities nominated by the Board up to 110% of the Daily Contract Quantity.

This situation is, however, different in respect of sub-paragraph (a) nominations, that is those for quantities between 110% and 120% of the Daily Contract Quantity. This paragraph spells out Marathon's qualified obligation to comply. It is only obliged to do so if it can reasonably do so

> "taking account of the capabilities of the then existing Producer's Facilities, good gas field practices, reasonable maintenance and repairs required and Force Majeure conditions".

If a dispute arises regarding any objection to deliver the matter is referred to a panel of experts (in respect of whom provision is made in Article XX) for determination.

And the situation is different again in respect of sub-paragraph (b) nominations, that is those in excess of 120%

of the Daily Contract Quantity. Before any obligation could arise the Board was required to comply with two conditions, firstly it was required to agree in writing that such additional quantities were to be withdrawn from the Reservoir and secondly to agree in writing to give certain specified indemnities. And if it did arise it was qualified in two ways, firstly non-compliance was permitted if it was reasonable taking into account the matters I have referred to in sub-paragraph (a) and secondly an express right of refusal was conferred by a proviso at the end of sub-clause (b) which stated-

> "Provided always that the Producer excercising the standard of a reasonalbe and prudent operator shall have the express right to refuse deliveries of such excess quantities taking into consideration the matters set out above".

Furthermore, in respect of such nominations Marathon is under no obligation to submit a dispute arising from non-compliance to the determination of a panel of experts.

This proviso which confers the right of refusal based on the standards of a reasonalbe and prudent operator appears at the end of sub-paragraph (b) and a question arises as to whether it also refers to sub-paragraph (a) nominations (those between 110% and 120% of the Daily Contract Quantity). I think it does. The proviso refers to the right to refuse deliveries of "such excess quantities" and it seems to me that this refers to the "excess quantities" of which there is specific reference made in sub-paragraph (a) as well as to the "excess quantities" to which reference is made in sub-paragraph (b). But there is no reference made to "excess quantities" in the first paragraph of Clause 7.2(1) and I do not think that the right conferred by the proviso applies to nominations under this paragraph (nor was such right claimed in the submissions made on Marathon's behalf).

I have already referred to the general obligation to deliver contained in Clause 7.2(2). I should quote it in full as there are two further points to be made about it. It reads:-

> "The Producer shall deliver in each day the quantity of natural gas properly nominated by the Consumer for delivery on such day and the Consumer shall take such deliveries according to the nomination or nominations in force".

Firstly, although this Clause appears to impose an absolute obligation on Marathon to deliver all quantities which are properly nominated I think it must be read subject to the specific qualifications and right of refusal conferred on Marathon by sub-paragraphs (a) and (b) and the proviso in Clause 7.2 (1). Secondly, the obligation in this clause is to deliver such quantities which have been "properly nominated". Clause 7.4 imposes an obligation on the Board to give notice to Marathon of the rates of delivery required (the Daily Rate) in accordance with the provisions of the Second Schedule (which contains detailed provisions for weekly notification of the daily rates required in the coming week to be given not later than nine o'clock on a Friday morning) and it seems to me that the reference to "properly nominated" quantities in Clause 7.2 (2) is a reference to those quantities which have been nominated in accordance with the procedural requirements of the Second Schedule.

The rights and obligations of the parties therefore (apart from the express limitations contained in Clause 7.2 (3) which I will come to in a moment) can be summarised as follows:

(a) The Board's <u>right to nominate</u> quantities of gas for delivery by Marathon is not restricted in any way, in particular it is not restricted by the Daily Contract Quantity figure or by the Annual Contract Quantity figure;

(b) When nominating quantities in excess of 120% of the

Daily Contract Quantity the Board must comply with conditions laid down in sub-paragraph (b) of Clause 7.2 (1);

(c) Nominations must be made "properly", that is in accordance with the provisions of the Second Schedule;

(d) Marathon is under an absolute obligation to deliver quantities nominated up to 110% of the Daily Contract Quantity. Its obligation to deliver quantities in excess of that is only a qualified one as set out in sub-paragraphs (a) and (b) of Clause 7.2 (1). In addition this qualified obligation is supported by an express right of refusal, as set out in proviso to which I have already referred.

It is of some relevance to point out here that the effect of this qualified obligation and the right of refusal is, inter alia, that Marathon could refuse to deliver quantities in excess of 110% of the Daily Contract Quantity if it could show that a reasonable and prudent producer would do so having regard to good field practices. In the dispute that has arisen as to the quantities nominated for delivery by the Board Marathon has not claimed exemption from its obligations for this reason; it has claimed that the Board's nominations are wrongfully exceeding a limit set by Clause 7.2 (3) to which I will now refer.

Clause 7.2 (3)

This Clause is at the core of the issue I am presently considering. As amended by the Supplemental Agreement the first part of the first sentence of Clause 7.2 (3) reads as follows:-

> "Unless the parties otherwise agree the total deliveries of natural gas from the Reservoir to the Consumer for each Contract Year shall be limited to approximately sixty thousand million cubic feet (60,000 MMcf)....."

It will be recalled that the Daily Contract Quantity was fixed by the Supplemental Agreement at 165 million cubic feet and that in a year of 365 days the Annual Contract Quantity would be 60,225 million cubic feet if there were no deductions. The limitation figure fixed by the parties was based on these calculations and is in fact the agreed Annual Contract Quantity for a year of 365 days, adjusted downwards.

If the Clause ended at the point where my quotation breaks of it is hard to see how there could be room for conflict between the parties. But the Clause continues and contains two exceptions and a proviso. The exceptions to the limitation figure are formulated in the following way:-

> "..... except for those Contract Years in which the Consumer has requested quantities in excess of the Annual Contract Quantity for that year for the purpose of
>
> (A) the recoupment of an Annual Deficiency or
>
> (B) the delivery and taking of those volumes of natural gas equal to the total of Daily Shortfalls....."

I need not delay in considering these exceptions at any length, because they are not relevant to the issue I have to decide. Briefly their effect is this. The annual limitation of sixty thousand million cubic feet is not to apply in any Contract Year in which Marathon is recouping the Board in respect of quantities paid for but not taken up in previous years under the minimum payment terms (Clauses 10.3 and 10.4). And it is not to apply in any Contract Year in which Marathon is supplying quantities of gas which can properly be regarded as making up the shortfall which had occurred in a previous year when

Marathon had failed to supply in accordance with the Board's properly notified requests (Clause 10.2).

That brings me to the proviso in this Clause on whose construction the issue between the parties depends. Immediately after sub-clauses (A) and (B) which I have just quoted the following words appear in Clause 7.2 (3)

"Provided Always that

(i) if no Annual Deficiency or Daily Shortfalls exist then whenever it appears that said limitation may be exceeded within the Contract Year the Producer shall promptly notify the Consumer of that fact but the Producer shall continue to deliver and the Consumer shall continue to take such natural gas in accordance with the provisions of this Agreement unless the Consumer and the Producer mutually agree to restrict deliveries and takes of such natural gas for the remainder of that Contract Year, and

(ii) the said limitation shall be revised in accordance with each and every revision of the Annaul Contract Quantity pursuant to the provision of Clause 4.4 of Article IV".

It will be noted that this proviso placed two separate obligations on the parties. Clearly they considered that the Board would be in a position to estimate future demands of its customers and so they placed on the Board an obligation to inform Marathon when they considered in the light of existing deliveries the annual figure of 60,000 million cubic feet might be exceded. But they also placed the obligation on Marathon which I have underlined in the quotation, namely for the rest of the post-notification Contract Year to continue to deliver natural gas "in accordance with the provisions of the Agreement". The Board say that this means that in the post-notification period they are entitled to serve the weekly notices in accordance with the Second Schedule; that they are entitled to excerise their notification rights contained in Clause 7.2 (1); that Marathon in the post notification period must comply with any nomination

up to 110% of the Daily Contract Quantity and in respect of nominations above this their obligations and rights are those as set out in Clause 7.2 (1). So in the post-notification period Marathon could, for example, rely on prudent and reasonable producer tests to which I have referred but cannot refuse delivery because to do so would bring annual deliveries over the figure named in the first part of Clause 7.2 (3).

Marathon counters with three main agruments. Firstly, they say that the parties have agreed on an annual limitation figure and that the Board is not free to ignore it when making its weekly nominations. It suggests that the parties were concerned to ensure that there would be no interruption of supplies and accept that Marathon is required to continue to deliver gas under the Agreement even though the limitation figure may be exceeded. They agree therefore that the limitation figure is not an absolute one but submit that the Clause must be construed in a reasonable manner and so as to permit only marginal excesses over the limitation figure to take place. But this gloss on the terms used in the first part of Clause 7.2 (3) fails to take adequately into account what the parties agreed to in their proviso. And it seems to me that they applied all the provisions of the Agreement to the post-notification period of the Contract Year in which a notification notice was served and by doing so they did not impose any other restrictions on Marathon's obligation to deliver over and above those contained in Clause 7.2 (1).

Secondly, Marathon point to the fact that the parties clearly contemplated that the Contract Period during which Marathon would supply natural gas to the Board would last for twenty years and it is said that the Board's construction of Clause 7.2 (2) is contrary to the parties intentions as to

ignore the agreed annual limitation figure could result in the exhaustion of the Reservoir in a much shorter period. It is, of course, true that the parties provided that, unless otherwise agreed, the Agreement was to continue in force for a term of twenty years from the 31st December 1979 (Article III), but they also provided that notwithstanding anything contained in Article III the Agreement would terminate when there was no longer a balance of economically recoverable reserves remaining in the Reservoir (Article XXII). It seems to me, therefore, that this submission does not take adequate notice of all that the parties had agreed. The contingency contemplated in Article XXII could come about if, for example, an error had been made in the estimate of the total reserves in the Reservoir. But it could also come about by nominations in excess of the annual limitation figure which a reasonable and prudent operator bearing in mind good gas field practices would comply with. And so if economicall recoverable reserves were reduced by the operation of the rights and obligations which the parties had agreed upon then it could not be said that the contract was terminated contrary to their intention

Thirdly, it is said that in the post-notification period of a Contract Year the proviso to Clause 7.2 (3) requires Marathon to deliver only such quantities which have, in the words of Clause 7.2 (2), been "properly nominated"; and it is urged that nominations in that period which would result in the limitation figure contained in Clause 7.2 (3) being exceeded should be regarded as ones improperly made. If this is so it is said that n contractual obligation to comply with them can exist. But the obligation to deliver properly nominated quantites contained in Clause 7.2 (2) is, as I have already pointed out, an obligatio to deliver nominated quantities which comply with the procedural

provisions of the Second Schedule. Once the Board has made a proper nomination in accordance with the Second Schedule it must be complied with, unless Marathon is excused from non-compliance by some other contractual provision.

That the parties agreed by the proviso to Clause 7.2 (3) to permit the Board to ignore the limitation figure they had earlier agreed upon in its first sentence is not as eccentric as at first sight it might appear. The limitation figure was a rounded down calculation based on the Daily Contract Quantity which, in turn, was a mathematical average arrived at by dividing the estimated size of the Reservoir by the number of days in twenty years. Just as the parties regarded this Daily Contract Quantity as only a rough and ready guide of the daily quantities in any given year which in practice would be required over the life of the agreement so too they regarded the annual limitation figure in Clause 7.2 (3) as only an approximate estimate of what in practice would be required in any given year of the contract period. Furthermore, they did not give the Board a licence to demand delivery of whatever quantities they might see fit to order in the post-notification period and they protected Marathon against unreasonable demands by the qualifications and rights to which I have already referred. And the notification requirements in the proviso were not otiose; for they helped to ensure (a) that Marathon would have a reasonable opportunity to consider whether it should invoke its right to refusal and (b) that the resolution of any dispute that might arise might be achieved with minimum risk to the continuity of supplies.

I must hold, then, that the construction of Clause 7.2 (3) urged by Marathon is not correct.

Part 2

The second issue for determination is entirely distinct from the first and concerns the construction of a price variation clause in Article XI. What was termed the "Transaction Price" that is the price at which natural gas supplied under the Agreement should be paid for, was fixed at 39.25 Irish pence per million Btu of Gross Calorific Value (Clause 10.1). But Article XI contained two clauses providing for an adjustment of this price - the second clause being the one whose construction is now in dispute. This was headed "Currency Adjustment" and read as follows:-

> "The Transaction Price will vary for the year in which the First Delivery Date occurs and each year thereafter for a total period of the first ten (10) years of this Agreement if applicable to reflect changes in the Irish Pound - United States Dollar exchange rate in accordance with the following formula: (Clause 11.2 (1))

There follows two formulae which I need not quote here; suffice it to say that if the exchange rate of the Irish Pound is greater than U.S. $2.40 then the Transaction Price would be reduced in accordance with one formula. If the exchange rate of the Irish Pound is less than U.S. $2.20 then the Transaction Price would be increased in accordance with another formula.

The issue between the parties is a simple one to state (but not so simple to resolve), namely whether the ten year period referred to in the words of the Clause which I have underlined is to run from the 10th July, 1975 (which is the date of the Agreemen and the date which according to Clause 3.1 it is to come into force) or from the 1st April, 1979 which is the "First Delivery Date" agreed between the parties. The importance of the issue is obvious. For a considerable time the rate of exchange of the Irish pound has been much less than U.S. $2.20 and during the year 1985 up to the middle of the month of November

its value varied from U.S. $0.91 to U.S. $1.17. If the Board is right and the ten year period ran from 10th July 1975 then no price increase can be claimed from the 10th July of last year. If Marathon is right then the price adjustment clause continues to operate and assuming that the Irish pound does not recover to U.S. $2.20 it will continue to operate in Marathon's favour until the 1st April, 1989.

To understand Marathon's submissions on the true construction of this Clause some of the earlier Clauses in the Agreement to which I have already referred must be borne in mind Marathon was under no obligation to supply natural gas to the Board until the 1st April 1979, nearly four years after the date on which the Agreement came into force. Its delivery obligation and the Board's corresponding payment obligation only existed during the Contract Period, that is for the twenty years from that date referred to in Clause 3.3. So, even though the Agreement came into force on the 10th July 1979 nearly four years would elapse in which no payment would be made and the currency exchange adjustment clause would be totally inoperative during this period. So it is urged that it is unreasonable to suggest (indeed "nonsensical" was the adjective used) that the parties intended that the ten year period would be running during a period when the variation clause would not be operative. The parties, it is said, must have intended it to run from the 1st April 1979.

It is claimed that this construction finds support from other provisions of the contract. The Agreement contained a Clause (Clause 15.2 (2)) giving the right to the Board to verify the accuracy of Marathon's equipment "once in every month during the continuance of this Agreement", and another Clause (Clause 15.3) requireing Marathon to correct defects in its

measuring equipment found "during the continuance of this Agreement". It is urged that although they used the phrase "during the continuance of this Agreement" in both Clauses the parties must have intended that they would operate only after deliveries had commenced, and it is suggested that a similar construction must be put on Clause 11.2 (1) for this too could only operate after deliveries had commenced, that is after the 1st April 1979.

But the construction urged by Marathon fails, it seems to me, to take into account the plain meaning of the words the parties used. They agreed a year in which the variation of the Transaction Price would be permitted (the year in which the First Delivery Date occurred that is, the year 1979)and they agreed that the variation clause would only operate for a limited period, that is "for a total period of the first ten (10) years of this Agreement". They did not provide that the ten year period was to commence from the First Delivery Date, or from the 1st April 1979 or from the commencment of the Contract Period as they could easily have done if that was their intention. Instead they provided that it should apply "for the first ten years of this Agreement" which, it seems to me, quite clearly means ten years from the 10th July 1975. In this connection the language of this Clause is to be contrasted with that employed in Clause 1A of the Second Schedule. There the parties were making provision for notification by the Board of the daily quantities of gas that Marathon should deliver in the week following the notification. They decided that for a limited period the Board would be allowed to vary the weekly notification and they did so by reference to the "initial five years following the first deliveries of natural gas hereunder" - a formula which had the parties' intention been that as suggested

by Marathon could have easily been adopted in Clause 11.2 (1). It is also to be borne in mind that the parties had gone to considerable trouble to define what they meant by the expression the "Contract Period", that they had used this term throughout the agreement (for example, the right of assignment only existed throughout the "Contract Period" and not from the date of the Agreement (Clause 19.1)) and it is only reasonable to infer that the failure expressly to specify that the ten year period was to operate during the Contract Period was a deliberate one.

It is true that for the first four years of the Agreement the price variation clause would be inoperative, but this is not a decisive factor in ascertaining the true construction of the Clause. The parties were agreeing the dates on which the variation clause would commence and conclude and there is no reason to suppose that the intention of the parties was that it should last for the longer period now claimed by Marathon merely because for some time after the agreement came into force no payments would be made under the contract. And I do not think that the provisions of the Agreement relating to the accuracy of Marthon's equipment and the correction of defects in it contained in the Clauses of Article 15 to which I was referred supports Marathon's construction of Clauses 11.2 (1). It is, I agree, probable that those provisions of Clause 15 would not commence to operate until after 1st April 1979 but I do not think that that fact assists in anyway in elucidating the intention of the parties on an entirely different aspect of their transaction.

There was one other submission to which I should finally refer. The first price adjustment clause in Article XI was a Clause (Clause 11.1 (1)) which permitted adjustments to be made

in the Transaction Price according to a stated formula to reflect changes (from a base year of 1977) in the "energy and feedstock alternatives" therein referred to. This adjustment was not to come into operation until the year 1979. It was pointed out that there was a reference in the Formula contained in Clause 11.2 (1) (the currency exchange adjustment clause) to the Formula in Clause 11.1 (1) and that this supported the suggestion that it was intended that the time limit of the former Clause was to operate from the year 1979. But I do not think that this is so. The parties made clear (Clause 11.2 (2)) that the two adjustments were distinct; and whilst both were to commence to operate in the year 1979 the first Clause contained no time limitation on its operation (it was declared to operate "for each year of the Contract Term") whilst the second did. It does not assist, therefore, in the construction of the sub-clause which I am required to consider.

I must hold therefore that the ten year period referred to in Clause 11.2 (1) began to run from the 10th July 1975.

Part 3

The application to adduce additional evidence

The Board accepted as a correct summary of the law the statement in Phibson on "Evidence" (12th Edition, paragraph 1961) that "where the language of a document is clear and applies without difficulty to the facts of the case extrinsic evidence is not admissible to affect its interpretation" and they submitted that the words used by the parties in Clause 11.2 (1) were clear and could be applied without difficulty to the facts of this case and that accordingly extrinsic evidence to construe them was not required. But they advanced an alternative argument and submitted that if I concluded that the words were ambiguous that I should admit extrinsic evidence to assist in their

interpretation comprising two affidavits which (a) exhibited earlier drafts of the Agreement of the 10th July 1975 and (b) in which the deponent gave evidence of a meeting in which negotiations relating to Clause 11.2 (1) took place. They accepted that this type of extrinsic evidence would be inadmissible if I were to follow the views of the House of Lords expressed in Prenn .v. Simonds (1971) 1 W.L.R. p 1381, but urged that the American authorities (academic and judicial) which were quoted in argument on this point were different and were to be preferred. As I have concluded that the language employed by the parties in Clause 11.2 (1) was clear and could be applied to the facts of this case without difficulty it is unnecessary for me to express any view on the interesting legal points which the Board's alternative submission raised or to reach any decision on the admissibility of the evidence contained in the two affidavits.

Approved
DL
15.1.86