MARATHON

121

Finlay C.J.
Walsh J.
Griffin J.
Hederman J.
McCarthy J.

THE SUPREME COURT

126/86

BETWEEN

MARATHON PETROLEUM (IRELAND) LIMITED

Plaintiff

and

BORD GAIS EIREANN

Defendant

JUDGMENT delivered on the 31st day of July 1986 by FINLAY C.J. (Walsh, Griffin, Hederman JJ concur)

This is an appeal by the Plaintiff against the Order of the High Court dated the 18th February 1986, which determined the interpretation of certain clauses of an Agreement made between the Plaintiff and the Defendant. By an Agreement in writing made on the 10th day of July 1975 the Plaintiff as the producer of gas from the Kinsale Gas Field entered into a contract with the predecessors of the Defendants who are Bord Gais Eireann Teoranta, providing in great detail for the supply by the Plaintiff to the Defendant of

natural gas landed on shore at a pipeline. Differences with regard to the interpretation of this Agreement occurred between the parties and by Special Summons the Plaintiff sought from the High Court declarations with regard to the interpretation of two separate clauses of the Agreement. In effect the High Court decision was to interpret the two clauses in question in accordance with the submissions made on behalf of the Defendant and against that decision this appeal is brought.

Before considering the individual clauses in dispute, it is necessary to set out shortly, in my view, the general nature of this Contract. It was a Contract executed between the parties in July of 1975 which was based on an anticipated commencement date for supply, not earlier than April of 1979.

The gas to be supplied was extracted by rigs from the reservoir situated off shore at Kinsale and pumped through a pipeline to the shore where it was connected up to the Defendant's installations. It is not capable of being stored under the arrangements of the Defendant or of the Plaintiff and, therefore, the supply must, as far as possible, be continuously maintained. The

Contract provides an obligation on the Defendant as the consumer to take a minimum quantity of gas each year, and if they fail to take that minimum quantity they must, in any event pay for it, though they would be entitled to the supply of the deficiency, free of charge, in a succeeding year. The price of the commodity which is expressed in multiples of cubic feet, is arranged by means of a formula having regard to various world oil and other energy prices and is also the subject matter of an exchange rate currency fluctuation which is one of the clauses in dispute.

A machinery is provided for the notification by the Defendant as consumer to the Plaintiff as producer of the quantity required each week. Broadly speaking, the Contract is intended to last for twenty years with various provisions for its earlier termination.

The first clause in the Agreement which is the subject matter of a dispute is clause 11.2, entitled "Currency Exchange Adjustment", which at sub-clause 1 states 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 years of this Agreement, if applicable, to reflect changes in the Irish pound/United States dollar exchange rate in accordance with the following formulae:"

The clause then provides a complicated adjustment formula which is not relevant to the issue which arises.

The Plaintiff contends that this clause is to be construed as providing for the operation of the currency exchange adjustment for a period of ten years from the first delivery date. The Defendant contends that the currency exchange adjustment applied only for a period of ten years from the date of the Contract, namely, the 10th July 1975 and, therefore, ceased to be applicable on the 10th July 1985.

Clause 3.1 of the Agreement provides that the Agreement shall come into force upon the date first hereinbefore written, which is the 10th July 1975. Clause 3.2 of the Agreement provides that the date of the commencement of continuous deliveries under the terms of the Agreement, which is to be called the first

delivery date, shall, unless otherwise agreed in writing between the parties, be the 1st April 1979 provided that it is not sooner than the first day of the month of April following the expiration of a thirty-six month period after the issue of full approval by the Minister for Industry and Commerce to the Plaintiff's plans.

The Plaintiff's submissions on this issue may th s be summarised. They submit that since the currency exchange adjustment could not become operative until continuous delivery has commenced, that it would be meaningless to provide for a period of ten years fron the date of the Contract when in effect by virtue of the terms of the Contract itself and the first delivery date provided for in it, the exchange adjustment could only be applicable for slightly more than six years. The first ten years of this Agreement, they urge, should be construed as meaning the first ten years of the Agreement in operation with regard to the delivery o gas, that being the only matter in respect of which this price adjustment becomes material.

The Defendant, on the other hand, submits that the wording of clause 11.2(1) is unambiguous and can only have one meaning and that the principle applica le

to the construction of contracts means that the Court should not go beyond that unambiguous meaning so as to seek to interpret the intention of the parties.

It was with this latter view that the learned High Court Judge agreed and it was on that basis that he reached his judgment on this particular issue.

I would also accept the Defendant's submissions on this issue. By Article 1.5 of this Agreement the words "Contract period" are defined as meaning "the period from the first delivery date to the date on which this Agreement shall be terminated by any of the means herein provided."

Counsel on behalf of the Plaintiff conceded that the interpretation which he sought to place upon clause 11.2 in effect involved the substitution in that article for the words "of this Agreement" the word "of the Contract period". A consideration of the Contract, however, indicates that in a very considerabl number of instances the parties have provided for rights to continue or obligations to be enforced during the Contract period and have done so by express reference to that period. Examples of these provisions are to be found in clause 8.1 which obliges the Plaintiff as producer throughout the Contract

period to provide certain facilities and maintain them. Clause 8.2 which provides an obligation on the Defendant as consumer to maintain certain facilities throughout the Contract period. Clause 9.1 which provides for an exchange of information material to the Contract between the parties "at all times throughout the Contract period". Clause 19.1 which gave a right to the consumer to assign his rights and obligations "at any time during the Contract period". In the recitals prior to the operative Agreement itself at clause C, it is recited that the producer has agreed to deliver to the consumer all the natural gas to be produced from the reservoir during the Contract period.

A consideration of these clauses make it, in my view, impossible so to construe the provisions of clause 11.2(1) as to interpret the words "the first ten years of this Agreement" so as to be equivalent to the special meaning assigned by the Contract to the words "Contract period".

It was urged, as I have indicated, on behalf of the Plaintiff that there was no meaning or sense in the parties reaching an agreement with regard to a currency exchange rate and confining it to a period

of ten years with the knowledge and in the expectation that for up to four years of that period it would be inoperable and irrelevant. I do not see this as being a consideration which renders unreasonable or illogical the construction which I would put upon the clause on the basis of the actual words used in it. The parties in reaching this Agreement in July of 1975 were fixing,as the formula contained in clause 11.2 indicates, a variation arrangement based on a certain range of exchange rate between the US dollar and the pound. They were presumably doing so on the basis of each of their view as to the likely fluctuations in currency between the United States and Ireland, and there would be no illogicality in their deciding that they were not prepared to permit of an exchange rate fluctuation into a period beyond ten years from the time at which they were making the Contract and viewing the likely movements of currency in so far as they could be prophesied. For these reasons I would uphold the decision of Costello J. in the High Court and would dismiss the Plaintiff's appeal with regard to the interpretation of this clause.

Clause 7.2

The other matter in dispute between the parties is the interpretation of the provisions of clause 7.2, which deals with the obligation of the Plaintiff as producer to deliver to the Defendant as consumer specified quantities of gas per day.

The material provisions of that clause as amended are as follows:

> "7.2(2) 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.
>
> (3) 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 60,000 million cubic feet (60,000 mm. c.f.) 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 cumulative total of daily shortfalls provided always that
>
> 1. if no annual deficiency or daily shortfalls exist, then whenever it appears that 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 the delivery and takes of such natural gas for the remainder of that contract year."

The Plaintiff contends that the true interpretatio of these provisions is that if at any time when no annual deficiency or daily shortfall exists, the nominated quantities already delivered to the Defendant make it probable that the limitation of 60,000 mm. c.f. for the year will be exceeded, that upon notification by them to the Defendant their obligation, irrespective of any higher demand by the Defendant is limited to supplying on each day a quantity of gas not exceeding the daily contract quantity as defined in clause 7.1.

The Defendant contends that even after notification within the terms of clause 7.2(3)(b)(i) that the Plaintiff is obliged to deliver to the Defendant the daily quantity nominated by the Defendant, subject only to the right of the Plaintiff to refuse to supply such additional amount above the daily contract quantity in the circumstances and for the reasons provided for in clause 7.2(1) or by reason

of a force majeure provision contained in clause 17 of the Contract.

In the High Court, Costello J. held with the Defendant's submission on this clause.

I am satisfied that clause 11.2 contained provisions which were so clearly expressed that there was nothing to enable the Court to put upon them a construction different from that which the words had and that therefore the words must prevail. In relation to clause 7, however, I am satisfied that there is a clear contradiction between the terms of the various subsections which I have quoted, and that therefore my obligation is to seek in the terms of the entire Agreement evidence of the real intention of the parties and that, if I can find it, that should prevail over the ordinary meaning of the words.

The contradiction which, in my view, arises in these clauses can be identified in the following way. If the Plaintiff's contention is correct, then, it is difficult to see how the limitation contained in 7.2(3) to 60,000 mm. c.f. which as an annual contract quantity is in effect only the sum of 365 daily contract quantities, less a provision for shut-down periods,

can be read consistently with the rights, qualified though they may be, expressly provided in clause 7.2(1) to the Defendant to nominate 110 per cent of the daily contract quantity and to nominate between 110 per cent and 120 per cent and, in a further category, above 120 per cent of the daily contract quantity.

If the Defendant's interpretation of the clause, on the other hand, is correct, it makes effectively, subject to certain conditions, the plain limitation to 60,000 mm. c.f. per year, contained in clause 7.2(3) inoperable.

I have come to the conclusion that the Plaintiff's contention with regard to the construction of this clause is the correct one and reflects the real intention of the parties.

By clause 3.3 it is provided that subject to any specific rights of termination or extension in the Agreement, that the Agreement was to continue in force for a term of twenty years from the 31st day of December next following the first delivery date.

By clause 7.3(1) it is provided that the contract quantity and delivery capacity specified in clauses 7.1 and 7.2 of the Contract are premised on the fact that the producer has secured raw geological data on

the reservoir and has estimated a field reserve (which has been by agreement increased from the original contract of 1975) and that the consumer having been supplied with the data has agreed the extent of the field reserve and apparently has also agreed that the producer should be able to continue to deliver natural gas at the rates provided for in the Contract as amended throughout the contract period. As already indicated in this judgment, the contract period is defined as the period commencing with the first delivery date and concluding with the termination of the Contract and therefore by virtue of clause 3.3 the premise upon which clause 7.1 and clause 7.2 are calculated and based is a premise that the reserves in the reservoir of gas will be sufficient to provide, at the annual and daily rates contracted for, a twenty-year continuous supply of gas.

I have no doubt that considering these specific provisions of the Contract and other terms of it as well, that the entire intention of the parties was based on an assumption that the Contract, if their calculations were correct, would continue for twenty

years. If the construction sought to be put by the Defendant on this clause 7.2 were accepted, then an inevitable consequence of it would be that assuming that the Defendant as apparently it does, wished for a greater annual amount on a regular basis than 60,000 mm. c.f., that the reservoir would be emptied and the Contract would be concluded well short of the twenty-year period. I am satisfied such a construction does not accord with the real intention of the parties, and I am therefore satisfied that the Plaintiff is entitled to succeed in this appeal on this issue. I would, therefore, vary the Order of the High Court by substituting for clause 2 thereof the following declaration:

> "In any contract year (as defined in Article 1.6 of the Agreement), the Plaintiff is not obliged to deliver to the Defendant a quantity of natural gas in excess of approximately 60,000 million cubic feet, together with an amount equal to any annual deficiency and daily shortfalls (as defined in Articles 10.3 and 10.2(1) of the Agreement, respectively)."

Approved
J. A. Finlay 31/7/98

MARATHON

135

Finlay C.J.
Walsh J.
Griffin J.
Hederman J.
McCarthy J.
(126/86)

MARATHON PETROLEUM (IRELAND) LIMITED

.v.

BORD GAIS EIREANN

Judgment of McCarthy J. delivered the 31st day of July 1986

1. Currency Variation

I have read the judgment of the Chief Justice on the issue of the currency variation clause and I agree with the conclusion and the reasons therefor.

2. Daily Contract Quantity; Annual Contract Quantity - Clause 7

The parties effectively agreed on the probable reservoir and calculated daily and annual quantities on an assumed twenty year period of abstraction from the reservoir. I recognise the force of the argument that there is an overall limitation provided by Article 7.2 (3) that is 60,000 mm.c.f.; this is reinforced by the exception where extra quantities are requested to make up an annual deficiency or the cumulative total of daily shortfalls. So be it but one then turns to the proviso to Article 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 the delivery 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 annual contract quantity pursuant to the provisions of Clause 4.4. of Article IV."

In terms, the proviso contemplates that the limitation will be exceeded within the contract year; yet, apart from notifying the consumer (the defendant) the producer is bound to continue delivery unless the parties mutually agree to restrict the delivery. The producer could, of course,call in aid the earlier provision in respect of daily quantities for the reason that might properly be ascribed. Failing that, however, it seems to me that Article 7.2 does no more than prescribe daily delivery in accordance with a proper nomination, an annual delivery calculated by multiplying the daily contract quantity by the number of days in the year with a right to recoup shortfalls in any one year but subject to the proviso. The proviso then, surely, contemplates an annual delivery in excess of the limitation and not ascribable to earlier shortfalls. If that can happen in one year, why not another? The producer is given no right to recoup the excess procured in Year A by the operation of the proviso by a shortfall in delivery in Year B. The further provision, by Article 22 that the agreement would terminate when there was no longer a balance of economically recoverable reserves remaining in the reservoir would seem to contemplate the contingency of which the plaintiff complains - that nominations totalling an excess of the annual limitation figure would reduce the abstraction period to one of less than twenty years. Such may well be the case. We were informed by Counsel for the plaintiff, in the course of the argument, that the equipment installed was capable of abstracting 176% of the Daily Contract

Quantity, a fact which adds some force to Mr. Gleeson's complaint that the plaintiff accepted the defendant's interpretation of this clause until the currency dispute broke out, borne out as it is by the statement in paragraph nine of the affidavit of the Vice-President of the plaintiff:-

> "There is also a dispute between the parties (which arose prior to the dispute just described) concerning the proper interpretation of Article 11.2....."

For these reasons, I share the view held by Costello J. in the High Court that the construction of Clause 7.2 (3) urged by the plaintiff was not correct. In his judgment, the learned trial Judge adverted to three main arguments put forward in support of this contention, but I did not understand the third of these to be part of the contention in the course of the appeal.

In the result, I would dismiss the appeal.

Approved

31.7.86.