13 of 1977

IN THE PRIVY COUNCIL No. 23 of 1976

ON APPEAL

FROM THE SUPREME COURT OF THE STATE OF VICTORIA

BETWEEN:

BP REFINERY (WESTERNPORT)
PROPRIETARY LIMITED Appellant

- and -

THE PRESIDENT COUNCILLORS AND
RATEPAYERS OF THE SHIRE OF HASTINGS Respondent

CASE FOR THE APPELLANT

RECORD

1. This is an appeal from a judgment dated 5th May 1976 of the Full Court of the Supreme Court of Victoria (Gowans, Menhennitt and Newton JJ.) upon a Case Stated by the County Court at Melbourne under Section 304 of the Local Government Act 1958 (as amended) of Victoria. The circumstances in which the Case had been stated were that the Appellant, being aggrieved at the general rate made and levied by the Respondent for the rate year 1973/1974 in respect of the Appellant's oil refinery site at Westernport (which is within the Respondent's municipal district), had appealed to the County Court pursuant to Section 304 of the Local Government Act 1958; the County Court had on 12th September 1975 ordered that the Appeal be dismissed; the Appellant had required that Court to state the facts by way of special case for the determination of the Supreme Court thereon, pursuant to the provisions of section 304(3); and so the Case had been stated. By its judgment the Full Court confirmed the County Court's dismissal of the appeal. p. 32 p. 1 pp. 32-44

2. Under the Local Government Act 1958 general rates made and levied at least annually by the council of every

municipality are payable by the occupier (section 267) of rateable property within a municipal district, the normal basis of assessment being an amount per dollar of either the unimproved capital value or the net annual value of the property (section 266). But special provisions of the Act authorise agreements between councils of municipalities and their ratepayers in respect of land outside the Melbourne metropolitan area and used or to be used for industrial purposes as to the amount of rates payable in respect of such land, the object being the encouragement of decentralised industry by rate concessions. The provisions were inserted in the Act by the Local Government (Decentralised Industries) Act 1963 (Act. No. 7014) which came into force on 28th May 1963. It inserted a new provision, section 390A, into the Local Government Act 1958. Section 390A reads as follows:

> "390A. (1) The council of any municipality may enter into an agreement with any person liable to be rated in respect of any land within the municipality which is not within a radius of twenty-five miles of the General Post Office at Melbourne and which is used or to be used for industrial purposes as to the amount of rates that will be payable by him under this Act and the amount of rates so agreed to be paid shall notwithstanding anything in this Act be for all purposes the rates that may be made and levied under this Act in respect of that land.
>
> (2) No such agreement shall be made unless the council is of the opinion that the establishment or maintenance of that industry within the municipality makes a substantial contribution towards the industrial development of the municipality and encourages the decentralisation of industry in Victoria.
>
> (3) No such agreement shall have any force or effect until it has been approved by Order of the Governor in Council published in the Government Gazette.
>
> (4) The amount of rates to be paid under an agreement may be an amount specified in the agreement or may be an amount calculated in accordance with a method specified in the agreement".

(These provisions are now to be found in a slightly amended form in section 811BA of the Act).

3. On 15th May 1963, the Appellant had entered into an agreement with the State of Victoria (hereinafter referred to as "the State agreement") relating to the establishment of an oil refinery at Westernport within the Respondent's municipal district. That agreement was given statutory effect by Act of Parliament, the Westernport (Oil Refinery) Act 1963, (Act No. 7018), to which it is scheduled. By the agreement the "Company" was bound to erect an oil refinery on a site specified in the agreement (within the Respondent's municipal district) "and thereafter maintain operate and use the refinery and all additions and alterations thereto" (Clause 3(a)). The "Company" was defined to mean the Appellant and, if the rights of the company as assignee pursuant to this Agreement to any company, the assignee company (Clause 1(1)). The Company was given power to entrust to others the performance of any of its obligations under the agreement (Clause 6(b)) and power to dispose of its rights under the agreement or any interest therein to a company in which The British Petroleum Company of Australia Ltd. (a company then holding all the issued shares in the Appellant) held at least 30 per centum of the issued capital (Clause 6(c)). If the Company entered into liquidation (other than voluntarily for the purpose of reconstruction) or abandoned or repudiated the Agreement, the State was given the right to determine the Agreement by notice, but without affecting accrued rights obligations or liabilities (Clause 6(g)).

4. On 7th May 1964, the Appellant and the Respondent entered into an agreement (hereinafter referred to as "the rating agreement") pursuant to the provisions of Section 390A of the Local Government Act 1958. The agreement recites the Appellant's desire to establish an oil refinery on specified land; the State agreement; the fact that the Appellant occupied and was rateable in respect of the refinery land; the fact that the Respondent was of the opinion required by section 390A(2) (i.e. "that the establishment and maintenance of the said refinery within the municipal boundaries of the Shire makes a substantial contribution towards the industrial development of the municipality and encourages the decentralisation of industry in Victoria"); and the fact that the parties had agreed upon the amount of the rates payable by the Appellant in respect of the refinery site. By Clause 2 the amount of the rates that would be payable by the Appellant under the Local Government Act in respect of the refinery site for the period of the agreement (i.e. the period ending at the expiration of 40 years after the first day of the rate year next

p. 8

p. 8 L. 15

p. 8 LL. 35-41

p. 9 L. 20

following the date of the commissioning of the refinery) were agreed. They may be summarised as follows :-

p. 9 LL. 31-33 (a) for the year ending 30th September 1964 - One Thousand Pounds;

p. 9 LL. 34-36 (b) for the year ending 30th September 1965 - Two Thousand Pounds;

p. 9 LL. 37-40 (c) for the year ending 30th September 1966 and for any subsequent year prior to the commissioning date of the refinery - Three Thousand Pounds;

(d) provision was made for pro rating in the year of commissioning;

p. 10 L. 16 (e) for the period of 10 years commencing on the first day of the rate year next following the commissioning date, an annual amount of not less than Twenty-five Thousand Pounds and variable upwards by reference to the total amount of the capital expenditure of the Appellant upon the refinery site from time to time the amount of variation depending on the equation of capital expenditure of Twenty Million Pounds with rates of Thirty-three Thousand Pounds per annum.

p. 10 L. 45 (f) for the period of 30 years commencing at the expiration of the said period of 10 years, an amount calculated in accordance with the provisions set out in the preceding sub-paragraph save that if in such period there was a variation in the amount of the Respondent's general rate in the pound on rateable property in the Shire, the ratio of Thirty-three Thousand Pounds rates to Twenty Million Pounds capital expenditure would be varied proportionately.

pp. 11 & 12 LL. 44-2 Clause 4 provided that the agreement should cease to have effect at the end of the 30 year period. Clause 9 provided that the agreement was subject to the approval of the Governor-in-Council.

p. 13 L. 37 5. The rating agreement came into effect and obtained statutory force upon its being approved by the Governor-in-Council on 26th May 1964.

6. Thereafter the oil refinery was constructed on the

agreed site, commissioned and commenced operation. It is still in operation: and it was in operation in the rate year 1973/1974.

7. The Appellant was the occupier of the refinery site in the rate year 1973/74, and as such was liable to have the rates made and levied by the Respondent for that year in respect of the refinery site, made and levied upon it. And in fact the Respondent did make and levy rates for that year in respect of the refinery site upon the Appellant. But it did not seek to calculate the amount of the rates it levied on the Respondent in accordance with the provisions of the rating agreement but without regard thereto; and instead sought to calculate the amount of the rates it levied on the Appellant in respect of the refinery site in accordance with the amount of the general rate made and levied by it on all rateable property within its municipal district. If the rates payable by the Appellant in respect of the refinery site for the rate year 1973/74 were to be calculated in accordance with the provisions of the rating agreement they would amount to $50,000; as calculated by the Respondent they amount to $154,960.00.

8. The circumstances on which the Respondent relies to justify its failure to give effect to the express terms of the rating agreement are as follows :

(a) between 1964 and the end of 1969 the Appellant constructed the refinery on the refinery site, and, after commissioning, operated it. During this period rates were levied on the Appellant by the Respondent in respect of the refinery site calculated in accordance with the rating agreement. But on 31st December 1969, as a step in the re-arrangement of the BP group of companies in Australia, the Appellant went into voluntary liquidation (in a member's voluntary winding up); and, on the following day it gave up occupation of the refinery site to its then parent, BP Australia Ltd. On 21st January 1970 the Appellant's liquidator, in the course of distribution of its assets to shareholders in specie, transferred the refinery site to BP Australia Ltd. This transfer was duly registered in the Office of Titles on 17th March 1970. BP Australia Ltd. remained in occupation of the refinery site from 1st January 1970 until 27th September 1973. It claimed that it was entitled to be rated by the Respondent in

respect of the refinery site in accordance with the terms of the rating agreement; but the Respondent did not accede to this claim and immediately rated BP Australia Ltd. at the general rate. BP Australia Ltd. appealed to the County Court against the first assessment of rates on this basis (the assessment in respect of the year 1970/1971); its appeal was dismissed; a Case was stated to the Supreme Court; and on the hearing of the Case Stated, BP Australia Ltd. again failed. The reasons for the judgment of the Full Court (delivered 20th November 1972) are reported as B.P. Australia Limited v. President Councillors and Ratepayers of the Shire of Hastings, (1973) V.R. 194. The Full Court held that section 390A(1) of the Local Government Act 1958 merely gave binding force to the rating agreement which it authorised and that the rating agreement was therefore not available to be relied on by a third party, such as BP Australia Ltd. was. In consequence an Order was obtained from the Supreme Court of Victoria on 27th September 1973 staying forever the winding up of the Appellant; and BP
p. 21 Australia Ltd., by a lease dated 28th September 1973, leased the refinery site to the Appellant. On 28th September 1973 the Appellant resumed and has since continued in occupation of the refinery site. Between 1st January 1970 and 28th September 1973 the Appellant did not supply to the Respondent the annual statements of the amount of its capital expen-
p. 12 L. 12 diture on the site which Clause 5 of the rating agreement provides shall be given to the Respondent by the Appellant each December.

(b) In late 1969 the Appellant informed the Respondent of the intention that BP Australia Ltd. become the
p. 15 operator of the refinery, and expressed the hope that there would be no difficulty in transferring to BP Australia Ltd. the rights vested in the Appellant by the rating agreement (Letter 15th December 1969).
p. 17 On 9th February 1970 the Respondent informed the Appellant that its solicitors had advised it that the rating agreement would "have no effect once the change has taken place, and as a result Council has resolved
p. 18 to allow the agreement to lapse". (Letter 9th February 1970). On 26th February, 1970, BP Australia Ltd. sought discussions with the Respondent

about a fresh rating agreement (Letter 26th February 1970). The Respondent replied that it might consider the matter later (Letter 14th April 1970). p. 19

9. The Respondent claimed that the events described in paragraph 8 enabled it to rate the Appellant in respect of the refinery site without regard to the terms of the rating agreement. Accordingly by its rate assessment notice for the 1973/1974 rating year (dated 29th January 1974) the Respondent sought to rate the Appellant in respect of the refinery site in the full amount and not at the amount fixed by the rating agreement. By Section 304 of the Local Government Act 1958, a ratepayer who is aggrieved by a rate assessment may appeal against the assessment to the County Court of Victoria. Pursuant to this section, the Appellant, by notice dated 28th March 1974, appealed to the County Court against the rate assessment in question. As appears from the Case Stated the facts found by the County Court had been agreed by the Appellant and the Respondent prior to the hearing of the Appeal and the relevant facts and documents are contained in the Case Stated. The Appeal came on for hearing before Judge Southwell on the 1st September 1975 and he gave judgment on 12th September 1975 dismissing the Appellant's Appeal.

p. 29

p. 6

pp. 2-5

p. 5 L. 35

10. Under section 304 of the Local Government Act 1958 no further appeal may be brought against the decision of the County Court following the hearing of an appeal thereunder but the section requires the Court to state the facts by way of special case for the determination of the Supreme Court of Victoria upon the application of either party to the appeal. The Appellant applied to Judge Southwell to state a case pursuant to the section and on 15th October 1975 a case was stated accordingly.

p. 5 L. 37

11. The Case Stated came on for hearing before the Full Court of the Supreme Court of Victoria constituted by Gowans, Menhennitt and Newton JJ. on 3rd, 4th and 5th May 1976.

12. The judgment of the Full Court of Victoria was delivered by Gowans J. on 5th May 1976. The learned judges set out the terms of Section 390A of the Local Government Act 1958 and certain of the terms of the rating agreement, summarised the facts set out above and referred to the proceedings in the County Court. They then said that the Respondent contended that the rating agreement had come

p. 32

p. 33 LL. 1-15

p. 39 L. 15

to an end, so that nothing stood in the way of the Respondent rating the Appellant without regard to the provisions of the rating agreement.

Their Honours went on:

p. 39 LL. 19-31

> "The circumstances producing the termination of the agreement are said to be threefold in character -
>
> 1. the failure of a fundamental condition of the agreement that it should continue in operation only so long as the appellant should be the occupier of the refinery site and rateable as such;
>
> 2. a mutual consensus that the agreement should be treated as discharged;
>
> 3. the rescission of the agreement by the respondent Shire in consequence of the repudiation or fundamental breach of the agreement by the appellant".

Their Honours reached the conclusion in accordance with the Respondent's first contention, that there was to be implied in the agreement a term that the agreement should continue in force only so long as there continued to exist a state of affairs in which the Appellant was in occupation of the refinery site, that this state of affairs ceased to exist from 1st January 1970 and that the agreement then ceased to be in force. They also reached the conclusion in accordance with the Respondent's second contention that, if the agreement still subsisted after 1st January 1970, there was a mutual acquiescence between the Appellant and the Respondent, evidenced by the correspondence included in the Case Stated and the conduct of the Appellant, that the agreement should be treated as discharged and inoperative after the receipt of the Respondent's letter of 9th February 1970. The learned judges found it unnecessary to deal with the Respondent's third contention, namely that the agreement had been rescinded by it in consequence of repudiation or fundamental breach thereof by the Appellant. The Full Court therefore ordered that the appeal be determined by confirming the order the County Court dismissing the Appellant's Appeal.

p. 44 LL. 10-11

p. 17

p. 44 LL. 20-22

p. 44 LL. 36-40
p. 45

p. 46

13. On 17th June 1976 the Full Court of the Supreme Court of Victoria made an order granting the Appellant leave to

appeal to Her Majesty in Council.

THE IMPLIED TERM

14. The Appellant respectfully submits that the Full Court erred in holding that any term was to be implied in the agreement such as the Respondent contended for. The Courts do not lightly imply terms into agreements arrived at between parties, particularly where the parties have reduced their agreement to writing. The Courts will not imply a term unless, upon a consideration of the agreement, the implication necessarily arises that the parties must have intended that the suggested term should form part of their agreement, because that very term must be implied in order to give business efficacy to the agreement and so as to prevent the intention of the parties being defeated. Thus a term will only be implied where the Court is confident not only that something must be implied but also precisely what it is that should be implied. See

The Moorcock (1889), 15 P.D. 64
Hamlyn & Co. .v. Wood & Co., (1891) 2 Q.B. 489
Luxor (Eastbourne) Ltd. .v. Cooper, (1941) A.C. 108
Heimann .v. Commonwealth (1938), 38 S.R. (N.S.W.) 691
Scanlan's Neon Signs Ltd. .v. Toohey's Ltd. (1943), 67 C.L.R. 169.

The cases referred to by the Full Court, namely Taylor .v. Caldwell (1863), 3 B & S. 826, Turner .v. Goldsmith, (1891) 1 Q.B. 544, Measures Brothers Ltd. .v. Measures, (1910) 2 Ch. 248 and Reigate .v. Union Manufacturing Co., (1918) 1 K.B. 592 were further cases in the same line of authority and do not establish any different principle.

15. In the Appellant's submission, it is necessary, in applying to any particular contract the well-established principles of law concerning the implication of terms in contracts, to analyse the contract in question with a view to determining the nature and extent of the obligations it imposes and of the rights it confers on each of the parties in order to see whether there are matters unexpressed in the actual words of the contract, but which parties must have assumed, if the contract is to work sensibly from a business point of view. When this exercise is performed in respect of the rating agreement it becomes clear, it is submitted, that the agreement it embodies is of a somewhat singular character. On

the one hand, it does not oblige the Appellant to establish and maintain the refinery: because that obligation already lies on the Appellant, under the State agreement and its ratifying Act. On the other hand, it does not oblige the Appellant to pay rates: because that obligation already lies on the Appellant under the Local Government Act 1958 and will - and must - continue (if at all) to rest on that foundation. What the agreement does is to assume as its foundation the obligations so arising and grant the Appellant a concession in respect of the amount of the rates which may thereafter become payable by the Appellant to the Respondent in order - it may be assumed - to encourage the Appellant in the performance of its obligation under the State agreement to establish and maintain the refinery. The concession is provided by means of agreement upon the way in which the amount of rates payable by the Appellant during the term of the rating agreement is to be calculated. It is submitted that in these circumstances the only thing necessary to render the rating agreement sensibly effective from the point of view of both the Appellant and the Respondent is that it should be possible in respect of any rate year to calculate the amount of any rates payable by the Appellant in the manner which is provided in the rating agreement. In respect of the relevant year it is possible to make that calculation. Indeed it has always been possible to make that calculation, both at times when the Appellant has been rateable in respect of the refinery site, and - if it matters - at times when it has not. It is submitted that it is difficult, therefore, to say that it is necessary from any point of view, business or other, to imply anything into the agreement on the basis that, nevertheless, the parties must be taken to have agreed that, in the circumstances, the agreement should come to an end. Why should this be so? The Respondent has and will continue to have the benefit of the establishment and maintenance of the refinery in its municipal district pursuant to the obligations past and future imposed on the Appellant by the State agreement, and its ratifying Act; and it can have the full benefit of the rates it has agreed to receive, calculated precisely as agreed. Why should the Appellant be taken to have agreed to give upon the whole advantage of the rating agreement in these circumstances? There is nothing in the circumstances which suggests that to hold the Respondent to the rating agreement would be to hold it to something different in substance (or at all) from that to which it really agreed. It is true that, while the Appellant was out of

occupation of the refinery site and therefore not rateable in respect of it, the rates payable in respect of the site were not calculable in accordance with the rating agreement, but were calculable on the ordinary basis, because the new rateable occupier was not entitled to the benefit of the rating agreement. But it is respectfully submitted that since nevertheless the Appellant remained bound to establish and maintain the refinery to precisely the same extent as before, there is no reason to regard the substitution of a new rateable occupier of the refinery site as bringing the rating agreement to an (agreed) end, even if the rating agreement may for the time have had nothing on which to operate. The change was no disadvantage to the Respondent: it could levy rates upon the refinery site on the ordinary basis. Nor was the Respondent at any risk in respect to recovery of the rates from the new occupier. Rates are a charge on the land (Local Government Act 1958 sections 387 ff.).

16. Many of the cases concerning implied terms have dealt with contracts imposing obligations extending continuously over a period but something has occurred and it has been suggested that the party prima facie under the obligation is to be excused from performance of the obligation by reason of an implied term said to excuse performance of it in the new circumstances. It was in this context that the statements quoted by the Full Court from the judgments in Turner .v. Goldsmith and Measures Brothers Ltd. .v. Measures, Reigate .v. Union Manufacturing Co. (supra) were made. But the present case is wholly dissimilar from such a case. Here what occurred was that the Appellant gave up occupation of the refinery site. That of itself brought to an end the Appellant's obligation to pay rates, not because of any implied term in the agreement but because the basis under the Local Government Act 1958 upon which the Appellant's liability to pay rates rested, namely occupation, had gone. The Respondent's right to levy rates upon the Appellant in respect of the refinery site likewise had gone and for the same reason. In other words, since the agreement did not impose an obligation to pay the rates nor confer a corresponding right to receive them, but only determined the amount thereof when an obligation to pay otherwise existed, no term is needed in order to excuse either party from performance of any obligation otherwise continuously operative in the new circumstances. The term sought to be implied accordingly cannot be likened to a term excusing performance of an otherwise continuous obligation but rather must be likened to a term

bringing an obligation operative only in certain circumstances to an end if those circumstances should cease - even if those circumstances should thereupon recur. For the term sought to be implied is to the effect that if the Appellant's occupation of the refinery site ceases, whether temporarily, permanently, or indefinitely, resort shall not thereafter be had to the rating agreement to fix the amount of the rates payable by the Appellant in respect of the site should the Appellant resume occupation and become liable to pay rates. It is respectfully submitted that the authorities referred to by the Full Court afford no basis for implying such a term.

17. Moreover, terms are only implied in contracts, where, in the Court's view, the parties must have intended to agree to them. The time that is relevant for this purpose is, of course, the time the agreement is made. But, if neither of the parties regards the suggested term as part of the agreement, at the time of the occurrence of the events with which the suggested implied term deals, that fact, it is submitted throws some light on the answer to the question whether the parties ought to be taken as having intended to agree to the term, as a matter of business necessity. Here it is plain that both parties regarded the rating agreement as continuing in effect after the Appellant had ceased to occupy the refinery
pp. 15 & 17 site (Letters of 15th December 1969 and 9th February 1970) and the Full Court so found, this finding forming the basis of its conclusions on the Respondent's second contention (see below paragraph 22). So by supporting the implied term contended for by the Respondent, the Full Court concluded that the rating agreement contained a term relating to events which subsequently did occur although neither the Appellant nor the Respondent regarded such term as being a term of the agreement at the time when those events in fact occurred - and which presumably therefore represents no more than the subsequent invention of the Respondent's legal advisers. This is, it is submitted, to impose on the parties a term which they plainly did not in fact intend to agree to, in the guise of saying, contrary to the acknowledged facts, that they must have so intended.

18. The Full Court expressed its conclusions on this branch of the Appeal as follows:

p. 8 " Turning then to the rating agreement in this case
p. 9 L. 20 it is found that it is prima facie to last for over forty

years. There is to be found in Clause 2 a provision dealing with the amount of the rates to be payable by the appellant company under the Local Government Act in respect of the refinery site. This imposes an obligation on the company to pay and presumably a correlative obligation on the Shire to charge, accordingly. It contemplates occupation of the site by the appellant so as to be a ratepayer. That in itself might permit of intermittent occupation. But the provision is hedged about and linked with the other contents of the agreement. There is a recital of the agreement between the appellant and the State of Victoria. The contents of that agreement are thus made relevant to the nature of the rating agreement; in effect it was recited that the appellant had agreed to establish and maintain the reinery on the site subject to a limited right of assignment and delegation. There is also a recital that the Shire is of opinion that the establishment and maintenance of the refinery is beneficial to it and to the State in the respects set out in section 390A of Act 7014. There is also a recital of the fact of the appellant's existing occupation and rateability in respect of the site. But there is to be noted an absence of any provision in the rating agreement giving the appellant a right of disposal of occupation directly or indirectly in contrast to what is provided for in the agreement with the State. This background is not in itself of conclusive effect, but against that background there is to be found a provision in Clause 2(ii) for the amount of the rates payable after the commencement of refining operations on the commissioning date to be calculated according to the capital expenditure of the appellant upon the refinery site from time to time, and there is a provision for a minimum, unless it is otherwise agreed in writing between the Shire and the appellant. There is to be found a provision in Clause 5 for the giving to the Shire by the appellant each year a certified statement of the amount of the appellant's capital expenditure upon the site with details as required, the subsequent annual statements after the 1st to include the amount of such capital expenditure for the previous twelve months; and this is a necessary incident of the rating of the appellant.

p. 8 L. 25

p. 8 L. 36

p. 9 L. 31

p. 12 LL. 12-17

There is to be found also a provision in Clause 3 p. 11 LL. 40-43

for the appellant to confer with the Shire at the end of the second period of ten years on all matters pertaining to the agreement and its operation and effectiveness.

A general view of these provisions appears to have led Adam, J. in the earlier case, to say (1973 V.R. at p. 196) that "the agreement itself from its terms did not contemplate any assignment by the company of any rights or obligations thereunder, or indeed any change of the company's ownership or occupancy of the rated land".

In our opinion when the actual provisions which have been referred to, relating to actions to be done by the appellant, are set against the background of the main provisions of the agreement and what is recited in the agreement, the nature of the contract and its terms, "considered in a reasonable and businesslike manner" (as Kennedy L.J. said) lead fairly to an inference that the parties intended, and there was an implication to the effect, that the contract was to remain in force only so long as there continued to exist a state of affairs where the refinery site was in the occupation of the appellant, it maintaining the refinery and being in a position to render accounts of its capital expenditure on the site from time to time so as to enable the rates payable by the appellant to be computed. That state of affairs which was so contemplated, and in our opinion intended, ceased to exist as from January 1st, 1970. In our opinion the agreement then ceased to be in force. The respondent's first contention should therefore be upheld".

19. In the appellant's respectful submission this reasoning is erroneous:

(i) The rating agreement does not impose any obligation to pay or give any right to levy rates in respect of the refinery site. That obligation and right derive not from that agreement but from the Local Government Act 1958 itself. What the agreement does is no more than fix by agreement (as permitted by section 390A) "the amount of rates that will be payable .... under this Act". So Clause 2 of the rating agreement provides that "the amount of rates that will be payable by the Company under the Local Government Act ....

p. 9 L. 4
p. 9 LL. 20 & 26

in respect of the refinery site shall be as follows". Thus if the Appellant should cease to be liable to be rated in respect of the refinery site under the Act, the rating agreement would not oblige it to pay any rates at all in respect of the site. Accordingly it is not necessary to imply any term in the rating agreement to prevent the Respondent receiving rates twice in respect of the site or levying rates on the Appellant in respect of the site at a time when it was no longer in a rateable relation to the site.

(ii) Moreover, as the Full Court says, the rating agreement recites the State agreement, that is to say, it recites in effect that the Appellant had agreed to establish and maintain the refinery on the site subject to a limited right of assignment and delegation and that this was beneficial to the Respondent (or at least that the Respondent thought that it was). It is true that the rating agreement contains no right of assignment or delegation to parallel that in the State agreement; and that it was held in BP Australia Ltd. v. President Councillors and Ratepayers of the Shire of Hastings (supra) that the benefit of the rating agreement does not enure for the benefit of successors to the Appellant in rateable occupation of the refinery site. But it is respectfully submitted that the parties must be taken to have had in contemplation when the rating agreement was made :- p. 41 L. 41 to p. 42 LL. 1-9

(a) That the Appellant might assign its rights or delegate performance of its obligations or of the operations authorised by the State agreement; and hence, it is submitted, that someone else might (in conformity with the terms of the State agreement) come into rateable occupation of the refinery site or part of it;

(b) That whatever might thereafter happen by way of assignment or delegation, the Appellant would remain bound to ensure the construction and the continued maintenance operation and use of the refinery.

It is submitted that in these circumstances (i.e. that the Appellant at all times remained bound to secure the continued operation of the refinery) there is no reason to regard it as other than sensible and just for the rating agreement to provide benefits to the Appellant whenever in

rateable occupation of the refinery site over the period of the rating agreement, even if that occupation should prove - as it plainly might - intermittent or non-continuous: because it was to be expected that the benefits to secure which the Respondent entered into the agreement (i.e. the construction and continued operation of the refinery on the refinery site) would be secured to the Respondent by means of the obligations imposed on the Appellant (and, in no circumstances, on anyone else) by the State agreement and the Westernport (Oil Refinery) Act 1963.

(iii) Accordingly, if during the term of the rating agreement, it was intended that in any circumstances the agreement should cease to operate in favour of the Appellant, it is to be expected that the agreement would specify those circumstances: but the only event on which the agreement expressly provides (Clause 4(i)) that it is to cease to have effect is the expiry of the period of 30 years referred to in Clause 2(iii). It is submitted that this provision carries with it the implication that the agreement is not to cease to have effect in any other circumstances. This conclusion is reinforced, it is submitted, by two other provisions in the rating agreement. The first such provision is the provision in Clause 4(ii) that a new rating agreement may be entered into after the expiration of the 30 year period. This implies, it is submitted, that a new rating agreement is not expected before that time, i.e. that the rating agreement will continue for its full term whatever happens by way of assignment, delegation etc. The second such provision is the provision in Clause 7(iii) that a dispute between the parties relating to the rates payable on the refinery site arising from circumstances not envisaged at the date of the agreement is to be referred to the arbitration of the Minister for Local Government. This implies that the parties intended that even events not envisaged by them at the date of the agreement should not operate to bring it to an end before the time provided in the agreement.

p. 11 LL. 1-2
p. 10 LL. 45-47
p. 11 LL. 1-3
p. 12 LL. 3-11
p. 12 LL. 41-44
p. 13 LL. 1-5

(iv) The provision of the rating agreement which appears to have weighed principally with the Full Court is the provision in Clause 5. That clause provides as follows:

p. 12 LL. 12-27

"From and after the said commissioning date

the Company shall after the preparation of each annual Balance Sheet and Statement of Accounts and on or before the first Tuesday in December in each year give to the Shire a statement certified by the Company's auditors of the amount of the Company's capital expenditure upon the refinery site and such details thereof as the Shire may reasonably require the first of such statements to include the amount of such capital expenditure as at the commissioning date and subsequent statements to include the amount of such capital expenditure during the twelve (12) months preceding the date to which the accounts of the Company are made up". p. 12 LL. 12-27

Their Honours said that the giving of the statements provided for in Clause 5 is a necessary incident of the rating of the Appellant because the amount of rates payable under the agreement is calculated by reference to the total amount of the capital expenditure of the Appellant upon the refinery site from time to time; and the Clause 5 statements are intended to inform the Respondent what this amount is. Their Honours apparently took the view that once the Appellant went out of occupation of the refinery site, it would no longer be "maintaining the refinery and .... in a position to render accounts of its capital expenditure on the site from time to time so as to enable the rates payable by the Appellant to be computed". But, it is submitted, it does not follow that once out of occupation the Appellant could no longer supply Clause 5 statements. It is to be expected that figures of total capital expenditure on the site would be available to it from time to time from any delegate or related company. (Only related companies are contemplated by Clause 6(c) of the State agreement as possible assignees). Moreover, if the relevant figure is the total amount of the Appellant's own capital expenditure on the refinery site, that figure must in all circumstances have been expected to be available to it. There is accordingly, it is submitted, no warrant for Their Honour's conclusions, especially as the Appellant can never escape the non-assignable obligation to secure the maintenance of the refinery. And, in any case, Clause 5 statements are not conclusive.

p. 12
p. 42 LL. 26-28
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(v) In argument the Respondent pointed to the anomalous situation which might arise if the Appellant went out of occupation for a period, the new occupier carried out improvements to the site and the Appellant thereafter resumed occupation. For it was argued that the value of those improvements could not be taken into account
p. 8 in applying the formula in the rating agreement in order to determine the amount of the rates payable by the Appellant after it resumed occupation. Whether this was the correct conclusion in any particular case would depend, it is submitted, on whether or not the Appellant on re-occupying the site paid for the improvements. If the Appellant did so, the value of the improvements would, in the Appellant's submission, be taken into
p. 8 account in applying the formula under the rating agreement in order to determine the amount of the rates payable by the Appellant on re-occupying the refinery site. In other words, the value of the improvements would be taken into account, if the transactions giving rise to the changes in occupation of the refinery site were ordinary arms-length commercial transactions. If the transactions were not such, but were, for example, intra-group transactions which for that reason took place without appropriate payments being made, it may be conceded that the value of the improve-
p. 8 ments would not be taken into account under the rating agreement formula: but the same anomaly would arise if the Appellant remained in occupation of the refinery site and permitted another group company to carry out improvements on the site at that other company's own expense e.g. the construction of a petro-chemical complex on the site by a related company in the BP Group. This latter anomaly would plainly form no
p. 8 basis for implying any term in the rating agreement, and, it is submitted that the former anomaly is in the same case.

(vi) The fact of the matter is that the Respondent entered
p. 8 into the rating agreement in order to secure to itself something which it regarded as a benefit, namely the establishment and maintenance of the refinery within its municipal boundaries; it enjoyed that benefit both before and after the Appellant went out of occupation of the refinery site in 1970 until after it went back into occupation of it in 1973; it has continued to enjoy that benefit up to the present time; and it is

to be expected that it will continue to enjoy that benefit, at least for the period of the rating agreement, and most probably for much longer. Nevertheless, despite the fact that it has had and will continue to have all the benefit it sought in entering into the rating agreement, the Respondent seeks to deny the Appellant the rights given to it by the rating agreement - although without the Respondent's concession of those rights to the Appellant, the Appellant might not have conferred all or some of that benefit on the Respondent. This it seeks to do by relying, not on the express terms of the rating agreement, but on an implication said to arise from its express terms, it being argued that it is plain that at the time the rating agreement was made both parties must have intended that it should cease for-ever to operate in case the Appellant should cease during the term of the agreement to occupy the refinery site, however temporarily, and even though the Appel-lant subsequently went back into operation during that term. This, it is said, was the common intention of both parties, despite the fact that this means that it is asserted that both parties intended that in certain cir-cumstances, one party, the Respondent, should get all the benefit it hoped to get from the rating agreement, but the other party, the Appellant, should not. It is respectfully submitted that such an intention cannot sensibly be held to have been the common intention of the parties.

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(vii) Accordingly it is submitted that it is not only not necessary to imply the suggested term in order to give business efficacy to the rating agreement, but, further, that it will operate more conveniently and more sensibly without the implication; and that the intention of the parties, so far as can be discovered from the express terms of the rating agreement, would not be achieved but would rather be defeated by the implication. The only inconvenience suggested by the Full Court in the operation of the rating agreement without the implication is the supposed inability of the Appellant to supply Clause 5 statements while out of occupation. It has been submitted that this suggested inability ought not to be supposed to exist in fact; and that there is every reason to suppose that the necessary statements could in fact be supplied while the Appellant was out of occu-pation. But even if this were not so, both parties

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RECORD

p. 8 agree that the rating agreement fixes the amount of rates payable in respect of the refinery site only while the Appellant is in rateable occupation of it; and there is no reason to suppose - and the Full Court does not suggest any reason to suppose - that at such a time (i.e. p. 12 while in occupation) the Appellant could not supply Clause 5 statements. Thus, if it were true that while out of occupation of the refinery site the Appellant could not in p. 12 fact supply Clause 5 statements to the Respondent, and that the parties must be taken to have realised that this would be so, it is submitted that it would be much more reasonable to infer the consequence that the parties must accordingly have intended that while out of occupation of the refinery site the Appellant should not be bound to deliver what were, after all, useless statements to the p. 12 Respondent under Clause 5, rather than the consequence that, because this useless formality could not be carried out, the parties must have intended the whole agreement to come to an end - to the disadvantage of only one of them.

20. There is an additional reason to be cautious. The p. 13 LL. 18-19 rating agreement itself provides that it is subject to the approval of the Governor-in-Council; and section 390A of the Local Government Act 1958 which permits rating agreements to be made (they otherwise being ineffective at law) also requires approval of the Governor-in-Council to such agreements before they become effective (section 390A(3)). The rating p. 13 L. 37 agreement was in fact approved by the Governor-in-Council on 26th May 1964. It is submitted that in these circumstances no term should be implied in the rating agreement unless it is clear that not only must both of the parties have intended that the term should form part of the agreement, but also that the Governor-in-Council must have intended to approve of that very term as part of the agreement: because only what is approved by the Governor-in-Council can have any legal effect, whatever the parties may have agreed between themselves. Or the question may be put another way: has the Governor-in-Council approved of this (implied) term of the agreement? The answer that such approval has been given as a matter of fact, can it is submitted, only be made if the term is so obvious that it can be said that it must have occurred to the Governor-in- p. 8 Council when approving of the rating agreement, that approval was given to that term. That cannot be said of this (implied) term.

21. In the Appellant's respectful submission it is accordingly erroneous to imply a term in the rating agreement that

> "the contract was to remain in force only so long as there continued to exist a state of affairs where the refinery site was in the occupation of the appellant, it maintaining the refinery, and being in a position to render accounts of its capital expenditure on the site from time to time so as to enable the rates payable by the appellant to be computed".

On the contrary, the express terms of the rating agreement should be held to operate in accordance with what they say.

DISCHARGE BY AGREEMENT

22. The Full Court expressed its conclusions in this branch of the Appeal as follows:

> "As to the second contention the issue centres around the construction and effect of the appellant's letter to the Shire of December 15, 1969 and the Shire's letter to the appellant of February the 9th 1970, and around the inference to be drawn from the conduct of the parties. — p.43 LL.19-48 / p.15 / p.17
>
> The appellant's letter, on a proper understanding of it, constituted an intimation to the respondent Shire that as from the beginning of 1970 it was contemplated that the appellant would cease to operate the refinery, and it was suggested that the appellant might cease to exist, and there was an intimation that it was being assumed that the rights and privileges hitherto vested in the appellant by agreement with the Shire would be made available to BP Australia Limited by the Shire "transferring" them to that company.
>
> The Shire's letter recorded its view of what would be the effect of that change on the rating agreement - that is, that it would then have no effect - and it recorded the Council's attitude that it would allow the agreement to lapse. The appellant had already implemented the change by going into liquidation, yielding up occupation of the — p.43 LL.36-48

refinery, and executing a transfer of the title and the buildings and plant thereon. After the receipt of the Shire's letter the liquidator did nothing with respect to this intimation from the Shire, but, presumably caused the transfer of title to be registered. There-
p. 44 LL. 1-2 after, the appellant ceased to supply its statement of capital expenditure for the calculation of the rates.

In our opinion the inference should be drawn from that sequence of events, and without regard to what the Shire did with respect to BP Australia Limited, or what BP Australia Limited did with respect to the Shire, that, if the rating agreement were still subsisting after January 1st, there was mutual acquiescence between the appellant and the Shire that it was to be treated as discharged and inoperative after the receipt of the Shire's letter.

p. 44 LL. 12-13 In our opinion therefore this alternative contention of the respondent should be sustained."

23. The Appellant respectfully submits that, even though in the last sentence of this passage the Court describes the contention being dealt with as "alternative", the Court, in upholding both the Respondent's first contention and its second contention in the way in which it did, simultaneously gave effect to submissions which were mutually inconsistent. For if there was a failure of a fundamental condition whereby
p. 8 the rating agreement came to an end, there was no room for the parties to agree to the termination of the agreement. And, on the other hand, if it was competent for the parties to agree to the termination of the rating agreement, that presupposes that there was no implied condition the failure of which had itself brought the agreement to an end. Certainly, at the very least (as submitted above) the Full Court's conclusions on this branch of the Appeal throw doubt on its conclusions on the first branch of the Appeal, because they proceed on the basis that the parties agreed to discharge the
p. 8 rating agreement in circumstances in which the terms of the agreement itself (if the agreement did indeed contain the suggested implied term) had already had that very effect, without the need for any action at all by either of the parties.

24. It is submitted that it was not competent for the parties to agree to discharge the rating agreement without entering into a fresh agreement pursuant to section 390A of the

Local Government Act 1958 and obtaining the approval of the Governor-in-Council to that agreement. For the rating agreement did not and could not have any effect at law without approval of the Governor-in-Council (clause 9 of the rating agreement, section 390A(3) of the Local Government Act 1958) and once approval of the agreement was given "the amount of the rates so agreed to be paid shall notwithstanding anything in this Act be for all purposes the rates that may be made and levied under this Act in respect of that land" (Section 390A(1)). The rating agreement once approved, is thus given effect and operation by the terms of the section in the manner therein laid down; and that effect and operation may, it is submitted, not thereafter be altered except in conformity with the section itself. Compare - p. 8

Caledonian Railway Co. .v. Greenock & Wemyss Bay Railway Co. (1874), L.R. 2 Sc. & Div. 347.
Reg. .v. Midland Railway Co. (1887), 19 Q.B.D. 540.

25. But in any case neither the letters relied on nor the actions of the Appellant show "mutual acquiescence between the Appellant and the Shire" (meaning, presumably agreement between them) that the rating agreement was to be treated as discharged and inoperative. The Appellant's letter of 15th December, 1969 informs the Respondent that it is proposed that the refinery be operated by BP Australia Ltd. but that "the change envisaged will make no difference to our concern with the development of our activities at Westernport", and expresses the hope that there would be no difficulty in transferring the Appellant's rights under the rating agreement to BP Australia Ltd. Thereafter the Appellant went into voluntary liquidation, and the Appellant gave BP Australia Ltd. occupation and then a transfer of the refinery site. By letter dated 9th February 1970, after these things had been done, the Respondent wrote to the Appellant in reference to the letter of 15th December 1969 and informed the Appellant that its p. 8 p. 15 p. 17 p. 15

> "Solicitors have advised that the agreement will have no effect once the change has taken place, and as a result Council has resolved to allow the agreement to lapse". p. 17 LL. 24-27

BP Australia Ltd. sought discussion of a fresh agreement in relation to rates on the refinery site (Letter 26th February 1970) but the Council declined any such discussion, at any p. 18

p. 19

rate for the time being (Letter 14th April 1970). The Respondent then asserted its right to assess BP Australia Ltd. (now the rateable occupier of the refinery site) without regard to the rating agreement, and assessed the rates on the refinery site for 1970/71, on the ordinary basis. BP Australia Ltd. asserted that the Respondent was bound by the rating agreement (as given effect to by section 390A of the Local Government Act 1958) to assess its rates in respect of the refinery site at the amount fixed by the rating agreement. But BP Australia Ltd. failed to establish this contention, and judgment in favour of the Respondent was delivered in the Full Court in November 1972. Before the commencement of the next rate year (1st October 1973) the winding up of the Appellant had been stayed (25th September 1973) and the refinery site had been leased by BP Australia Ltd. to the Appellant (28th September 1973). The Appellant, having gone back to occupation of the refinery site pursuant to that lease, became rateable in respect of it and at the first opportunity (1973/1974) the Respondent assessed the Appellant in

p. 29

respect of it without regard to the provisions of the rating agreement. The Appellant asserted its right to be rated in accordance with the rating agreement and appealed. (It is that appeal that is now being determined). While out of occupation of the refinery site the Appellant did not deliver Clause 5 statements to the Respondent.

26. It is respectfully submitted that it is unreal to have regard to some of these facts and not to others, as the Full Court did, for the Full Court to have reached its conclusions "without regard to what the Shire did with respect to BP Australia Ltd., or what BP Australia Ltd. did with respect to the Shire." Looking at all that happened, it is submitted that only one conclusion can properly be drawn: namely that there was a continuing assertion on the part of all those on

p. 8

the BP side (including the Appellant) that the rating agreement was not at an end after January/February 1970, and that it remained effective thereafter. But it was said (at first) that, in the circumstances, it enured (by virtue of the provisions of Section 390A) for the benefit of BP Australia Ltd. It may be true that in the circumstances prevailing after January/February 1970 (i.e. while the Appellant was out of occupation of the refinery site) the Appellant regarded the rating agreement as inoperative so far as the Appellant was concerned - because it was no longer rateable in respect of the refinery site; but this is not to say that the Appellant was therefore regarding the agreement as altogether discharged and

inoperative. On the contrary it was being asserted that the rating agreement continued to bind the Respondent, with the effect that the Respondent was bound to assess refinery site rates to BP Australia Ltd. in accordance with the provisions of the rating agreement. When it was held that this was wrong, the Appellant went back into occupation of the refinery site - and again sought for itself the benefit of the rating agreement. p. 8 p. 8

27. Accordingly it is submitted that the sequence of events shows no agreement between the parties (even assuming that such an agreement could have any legal effect) that the rating agreement was to be treated as discharged and inoperative. Rather it shows that the Appellant has always asserted that the rating agreement should be treated as effective: first in favour of itself, then in favour of BP Australia Ltd. and then (again) in favour of itself. p. 8 p. 8

28. It is respectfully submitted that the Full Court's conclusions on this branch of the appeal, are for these reasons, erroneous.

REPUDIATION BY APPELLANT, FOLLOWED BY RESCISSION BY THE RESPONDENT

29. The Respondent contended at the hearing before the Full Court that by the terms of the rating agreement the Appellant was obliged to remain in occupation of the refinery site and to maintain operate and use the refinery; that these obligations were of fundamental importance; that the Appellant was in breach of them; and that the Respondent was accordingly entitled to and did rescind that agreement. p. 8

30. The Full Court expressed no conclusion on these contentions, except the conclusion that they raised difficult questions.

31. The Appellant respectfully submits that the rating agreement imposes no such obligations upon the Appellant as those contended for. There are no such express terms; and it is impossible to imply any such terms. First, if any such terms were to be implied, the rating agreement would become one in which the most important matters which the parties had agreed upon were unexpressed, and only the minor matters of agreement had been actually written down. It is submitted that this is prima facie p. 8 p. 8

unlikely. Second, the suggested term about occupation is contrary to the provisions of the State agreement enabling vicarious performance and that agreement is referred to in
p. 8 the recitals of the rating agreement. The suggested term about maintenance, operation and use of the refinery is also contrary to the provisions of the State agreement, if it means more than the provisions in that regard which are contained in that agreement. (No-one contends that those provisions of that agreement have been broken). It is submitted that
p. 8 the rating agreement does not provide for any of these matters but is content to rest upon the provisions of the State agreement and its ratifying Act, and upon the provisions of the Local Government Act 1958. In the light of the obligations so imposed and the rights so given, there was no need for
p. 8 the rating agreement to make any provision about them. There is accordingly, no necessity, business or other, to imply such terms. In any case the Respondent has never
p. 8 purported to rescind the rating agreement. The letter of
p. 17 9th February 1970 merely records a belief on the Respondent's part, induced by its solicitors, that in the circumstances the
p. 8 rating agreement is of no effect, together with a determination
p. 8 not to review it. Last, even if the rating agreement contained any of the terms alleged, even if the Appellant was in breach of them and its breach amounted to a repudiation of it, and
p. 8 even if the Respondent purported to rescind the rating agreement in consequence, it is submitted that any such purported rescission was nevertheless ineffective. For once the
p. 8 rating agreement was made and approved by the Governor-
p. 13 L. 37 in-Council under section 390A, it took effect, it is submitted, according to its terms, despite what either of the parties might do (section 390A (1)), unless replaced by another agreement also approved by the Governor-in-Council (Compare paragraph 24 above).

30. Accordingly, it is submitted that there is nothing in the Respondent's third contention.

SUMMARY

32. The Appellant respectfully submits that the judgment of
p. 32 the Full Court of Victoria was wrong and ought to be reversed and this appeal ought to be allowed with costs for the following (amongst other)

REASONS

(a) Because the amount of the rates which under the

Local Government Act 1958 may be made and levied by the Respondent on the Appellant in respect of the refinery site for the rate year 1973/1974 is the amount produced by the calculation provided for in the rating agreement. p.8

(b) Because the rating agreement should take effect according to its express terms, without any of the implications contended for the Respondent. p.8

(c) Because it is unnecessary to imply any of the terms contended for by the Respondent into the rating agreement in order to give it business efficacy.

(d) Because no term should be implied into the rating agreement that it was to remain in force only so long as there continued to exist a state of affairs where the refinery site was in the occupation of the Appellant. p.8

(e) Because the parties could not legally agree to discharge the rating agreement without the approval of the Governor-in-Council.

(f) Because the parties did not in fact agree that that rating agreement should be treated as discharged and inoperative.

(g) Because there was no repudiation or fundamental breach of the agreement by the Appellant nor any rescission thereof by the Respondent following repudiation or breach; and even if there were any such purported rescission, it would be ineffective in the absence of another agreement made and approved by the Governor-in-Council under section 390A of the Local Government Act 1958.

B. J. SHAW

DOUGLAS GRAHAM

Of Counsel for the Appellant.

No. 23 of 1976

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF THE STATE OF VICTORIA

IN THE MATTER OF SECTION 304 OF THE LOCAL GOVERNMENT ACT 1908

- and -

IN THE MATTER OF AN APPEAL THEREUNDER BY BP REFINERY (WESTERNPORT) PROPRIETARY LIMITED

BETWEEN:

BP REFINERY (WESTERNPORT) PROPRIETARY LIMITED Appellant

- and -

THE PRESIDENT COUNCILLORS AND RATEPAYERS OF THE SHIRE OF HASTINGS Respondent

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CASE FOR THE APPELLANT

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