13 of 1977

IN THE PRIVY COUNCIL No.23 of 1976

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF VICTORIA

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

- and -

IN THE MATTER OF AN APPEAL THEREUNDER BY B.P. REFINERY (WESTERNPORT) PROPRIETARY LIMITED

BETWEEN:

B.P. REFINERY (WESTERNPORT) PROPRIETARY LIMITED — Appellant

- AND -

THE PRESIDENT COUNCILLORS AND RATE-PAYERS OF THE SHIRE OF HASTINGS — Respondent

CASE FOR RESPONDENT

Background Material

1. In 1963 the Victorian Parliament amended the Local Government Act 1958 by enacting the Local Government (Decentralized Industries) Act 1963; Act No. 7014 of 1963. The purpose of the amendment was to enable Municipal Councils to make "concessional rating agreements" for the purpose of encouraging industrial enterprises to occupy and utilise land outside a radius of 25 miles of the General Post Office in Melbourne. In its terms the amending Act, which inserted Section 390A into the Local Government Act, provided, in sub-section (1) as follows:-

> "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 25 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. On the 15th day of May 1963 B.P. Refinery (Westernport) Proprietary Limited (hereinafter referred to as "the Appellant") entered into an agreement with the Government of the State of Victoria relating to the establishment of an oil refinery and the establishment of port facilities at Crib Point in Victoria, which place is within the municipal boundaries of the Respondent, The President Councillors and Ratepayers of the Shire of Hastings (hereinafter called "the Shire of Hastings"). The agreement so entered into was subsequently ratified by the Westernport (Oil Refinery) Act 1963; Act No. 7018 of 1963.

3. At all material times on and before the 7th day of May 1964 the Appellant was the occupier of and the person liable to be rated in respect of the said land at Crib Point where the refinery was to be constructed.

Page 8 4. On the 7th day of May 1964 the Appellant entered into a rating agreement with the Respondent Shire of Hastings pursuant to the provisions of Section 390A of the Local Government Act 1958 aforesaid. On the 26th day of May 1964 the said rating agreement was approved
Page 14 by Order of the Governor-in-Council published in the Government Gazette of the State of Victoria.

5. Between the 26th day of May 1964 and the 31st day of December 1969 the Appellant remained the occupier of and the person liable to be rated in respect of the Refinery site and, during that period, the Refinery site was assessed at a rate calculated in accordance with the rating agreement.

<u>Events occurring between December 1969 and September 1973</u>.

6. On the 15th day of December 1969 the General Manager of the Appellant Company wrote a letter to the
Page 15 Secretary of the Respondent Shire of Hastings which

letter, omitting formal parts, was in the following terms:-

> "For several months now, BP in Australia has been considering its corporate structure with a view to seeing how it could be streamlined and improved. The conclusion which has yet to be approved by our Head Office in London amounts, very briefly, to the transfer of shareholdings in our two refinery companies at Kwinana and Westernport to BP Australia Limited, who will also acquire most of BP's other interests in Australia, and become the sole operating company responsible for the supply, shipping, refining and marketing. The Holding Company in Australia, The British Petroleum Company of Australia Limited, will, however, continue to exist.
>
> I am notifying you of this change, which is aimed to be effective from the beginning of 1970, before any public announcements are made because I know the interest the Councillors and yourself have in the activities of BP Westernport.
>
> You may rest assured that the change which is envisaged will make no difference to our concern with the development of our activities at Westernport, and I hope I may assume that there will be no difficulty over transferring to BP Australia Limited those rights and privileges which by suitable agreements have been vested in BP Refinery (Westernport) Proprietary Limited."

7. In response to the letter referred to in the preceding paragraph the Secretary of the Respondent Shire wrote a letter dated the 23rd December 1969 to the General Manager of the Appellant Company which letter, omitting formal parts, was in the following form:- Page 16

> "Dear Sir,
>
> re: Rating Agreement
>
> I desire to acknowledge receipt of your letter of the 15th December, ref. G.003 JPW/RM and in reply have to advise that the effect of the transfer of the shareholders in BP Refinery (Westernport) Proprietary Limited to BP Australia Limited on the agreement between this Council and your company will be considered to an early meeting and you will be advised in due course of the Council's determination in the matter."

8. At an Extraordinary General Meeting of the Appellant Company duly held on the 31st day of December 1969 it was resolved by special resolution that the Appellant be wound up voluntarily and further that one Victor George Henry Harrison be appointed the Liquidator. The said winding up was a member's voluntary winding up pursuant to the provisions of the Companies Act of Victoria 1961.

9. On the 1st day of January 1970 the Appellant Company ceased to occupy the Refinery site and delivered up its occupation to BP Australia Limited, which Company then went into occupation of the said site and became the person liable to be rated in respect of the Refinery site pursuant to the provisions of the Local Government Act of the State of Victoria. Thereafter there followed a distribution of the assets of the Appellant Company in specie and in the course of that distribution a transfer was executed by the Liquidator of the Appellant Company on the 21st day of January 1970 to BP Australia Limited of lands including the said Refinery site and there was also transferred to BP Australia Limited the buildings and plant on the site together with all the other assets of the Appellant except a relatively small sum of money.

10. On the 3rd day of February 1970 the Council of the Respondent Shire resolved that the aforesaid rating agreement which had been entered into with the Appellant "be allowed to lapse", and on the 9th day of February 1970 the Secretary of the Respondent Shire wrote a letter to the General Manager of the Appellant Company which letter, omitting formal parts, was in the following form:-

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> "Dear Sir,
>
> With further reference to your letter of the 15th December, I have to advise that my Council has now considered the opinion handed down by its Solicitors in relation to the effect of the company change, on the agreement between BP Refinery (Westernport) Proprietary Limited, and this Council.
>
> The 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."

11. In response to the letter referred to in the preceding paragraph, a letter dated the 26th day of February 1970 and signed "B.P. Australia Ltd - L.F. Ogden, General Manager Westernport Refinery", was sent to the Secretary of the Shire of Hastings. The said letter, omitting formal parts, was in the following form:- Page 18

"Dear Sir,

I note the advice in your letter of 9th February and I would appreciate an opportunity to discuss with you and with your Council a fresh agreement to record the rates levied in respect of the Westernport Refinery site. These rates will become payable by BP Australia Limited which, as in the case of the refinery company, is a wholly-owned subsidiary of the holding company for our group in Australia, The British Petroleum Company of Australia Limited. As mentioned in my letter of 15th December, the circumstances of our presence and activities at Westernport are in no way affected by the alteration of our corporate structure. Considerable capital works are now in progress at the refinery site and extensions of the refinery plant will be constructed in the near future.

I trust that you can arrange an early opportunity for discussion of these matters."

12. In response to the letter referred to in the preceding paragraph the Secretary of the Respondent Shire, on the 14th day of April 1970 wrote a letter to the General Manager, BP Westernport Refinery, which letter, omitting formal parts, was as follows:- Page 19

"Dear Sir,

In reply to your letter of the 26th February, I desire to advise that the matters raised by you were placed before Council at a meeting on the 17th March and I have been instructed to advise that Council may give further consideration to your request at a later date. You will be advised in due course of any further action taken by Council."

13. BP Australia Limited remained in occupation of the refinery site until the 27th day of September 1973

when its occupation of the refinery site ceased in circumstances which will be hereunder described. During that period the Respondent Shire assessed the rates to be payable by BP Australia Limited (which was then the leviable occupier of the refinery site) otherwise than in accordance with the formula set out in paragraph 2 of the Concessional Rating Agreement but rather at the rate calculated in the manner otherwise applicable to the Respondent Shire's General Rate. The practical effect of this process was that BP Australia Limited was called upon to pay a rate well in excess of the amount which would otherwise have been payable if the terms of the Concessional Rating Agreement had applied. Thus, in the rating year ended the 30th September 1971 the Respondent Shire assessed BP Australia Limited to rates of $151,614.12 whereas, if the Rating Agreement had applied, the rates could not have been any more than $50,000.00. BP Australia Limited, as the then occupier of the refinery site and the person liable to be rated, appealed to the County Court of Victoria pursuant to the provisions of Section 304 of the Local Government Act 1958. The basis of the appeal was that the company, BP Australia Limited, was entitled to the benefit of the Concessional Rating Agreement which had been entered into between the Appellant and the Respondent Shire. Ultimately the matters raised on that appeal came before the Full Court of the Supreme Court of Victoria upon a Case Stated by the County Court Judge. The Full Court of the Supreme Court of Victoria ultimately decided that the benefits given by the Concessional Rating Agreement were personal to the Appellant and were not capable of being conferred upon BP Australia Limited either by virtue of the terms of the Concessional Rating Agreement itself or by the terms of Section 390A(1) of the Local Government Act 1958. (See BP Australia Limited v. The President Councillors and Ratepayers of the Shire of Hastings (1973) V.R. 194).

14. Whilst it was in occupation of the site between the 1st day of January 1970 and the 27th day of September 1973, BP Australia Limited was assessed through and paid rates at the General Rate levied by the Respondent Shire and it did not give to the Respondent Shire a statement of capital expenditure upon the refinery site and the details thereof of the type envisaged by Clause 5 of the said Rating Agreement. Furthermore, between the dates referred to, the Appellant did not give to the Respondent Shire

any such statements.

15. On the 25th day of September 1973 the Liquidator of the Appellant, which at that time was still in the course of being wound up, applied to the Supreme Court of Victoria pursuant to the provisions of Section 243 and Section 274 of the Companies Act of the State of Victoria 1961 for an Order that the winding up of the Company be perpetually stayed. Upon the hearing of that application and upon that day Mr. Justice Crockett of the said Court ordered Page 20
10 that the said winding up of the Appellant Company be perpetually stayed and further ordered that an Extraordinary General Meeting of the contributors of the Company be held for the purposes of electing directors.

16. On the 28th day of September 1973, and following the Order referred to in the preceding paragraph, BP Australia Limited entered into an Indenture of Lease with the Appellant pursuant to which BP Australia Limited demised for a period of three years to the Appellant the refinery site and all the improvements
20 thereon. Accordingly, the Appellant resumed its occupation of the refinery site and gave notice of that fact to the Respondent Shire pursuant to obligations imposed upon it to that effect by the provisions of the Local Government Act aforesaid. Thereafter the Appellant Company has remained the occupier of the refinery site and the person liable to be rated in respect thereof.

Events Subsequent to September 1973.

17. By Assessment Notice dated the 29th January 1974 Page 29
30 and delivered to the Appellant the Respondent Shire assessed the Appellant on the basis of its General Rate in the sum of $154,960.00. If the Concessional Rating Agreement at that time was in force and effect the amount of rate which could have been levied against the Appellant pursuant to the formula set out in that Agreement would have been $50,000.00.

18. The Appellant appealed against this assessment pursuant to the said provisions of Section 304 of the Page 6
Local Government Act aforesaid to the County Court
40 Judge. The basis of the appeal was that the assessment had been wrongly made because it ought properly to have been calculated in accordance with the formula provided by Clause 2 of the Concessional Rating Agreement.

19. The County Court Judge before whom the Appeal was

returned dismissed the Appeal, concluding his reasons for doing so in the following terms:-

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> "In the end I have come to the conclusion that not only is this a personal contract, as the Supreme Court has already decided, but that there was a fundamental condition of continuing occupancy by the Appellant. A reading of the whole of the Agreement leads, in my opinion, to the finding that it contemplates that the Appellant will continuously occupy the site and therefore be liable for rates. I am further of the view that the actions of the parties and the correspondence amounted to an agreement that the Agreement was at an end or, if it did not, the Appellant was in fundamental breach and the Respondent rescinded the contract by its letter of the 9th February 1970, inelegantly expressed though it may have been."

Pages 1 to 5

20. At the request of the Appellant, the County Court Judge stated a case for the opinion of the Full Court of the Supreme Court of Victoria. The special case was returned before the Full Court of the Supreme Court of Victoria (comprising Justices Gowans, Menhennitt and Newton) on the 2nd and 3rd days of May 1976. At the conclusion of the hearing the Full Court made an Order on the Case Stated that the appeal be determined by the Order of the County Court dismissing the appeal being confirmed, and further ordered that the Respondent Shire's costs of the Case Stated be taxed and paid by the Appellant.

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21. The Reasons were delivered by the Full Court on the 5th day of May 1976 in support of the Order referred to in the preceding paragraph.

22. Upon Motion made to the Full Court of the Supreme Court of Victoria on the 17th day of June 1976 the said Full Court, pursuant to the provisions of Section 218 of the Supreme Court Act 1958 of the State of Victoria, granted leave to the Appellant (upon conditions stipulated) to appeal from its Decision upon the said Case Stated to Her Majesty in Her Privy Council.

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<u>Arguments advanced on behalf of the Respondent Shire in opposition to the said Appeal.</u>

23. The Respondent desires to advance the following arguments in support of the Decision given by the Full

Court of Victoria upon the return of the Case Stated:-

A. <u>The power interpretation of Section 390A of the Local Government Act.</u>

(a) Despite the apparent breadth of the Section (the full terms of which are set out in paragraph 1 of this written Case) it is the submission of the Respondent that the concluding words of the section have to be "read down" or given a restricted interpretation to render the sub-section meaningful.

(b) It is accordingly the submission of the Respondent that the concluding words of the section:-

"...." and 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" mean, upon a proper interpretation of the section, that the rates agreed to be paid shall be the rates that may be made and levied under this Act in respect of that land "so long as the agreement shall last."

(c) In support of this contention the Respondent adopts and relies upon those Reasons given by the Full Court of the State of Victoria which appear in the Record. Pages 32-34

B. <u>In the events that happened in December 1969 and January 1970 the agreement came to an end.</u>

The Respondent submits that, in the events that happened in December 1969 and January 1970, the agreement between the Appellant and itself came to an end because:-

(a) The agreement, properly interpreted, disclosed an underlying intention on the part of each party to it that the agreement would come to an end and all rights and obligations thereunder would cease upon the Appellant ceasing to occupy the refinery site and ceasing to maintain a refinery thereon and ceasing to pay rates computed in accordance with the agreement.

(b) The conduct of the parties amounted to a consensus between them to bring their rights

and obligations under the agreement to an end.

(c) The conduct of the Appellant in December 1969 and January 1970 amounted to a repudiation of its obligations under the agreement which entitled the Respondent to treat the agreement as having come to an end and the conduct of the Respondent thereafter was only consistent with the Respondent having so treated the agreement as being at an end.

C. Arguments of the Respondent in support of its contention under paragraph B(a) hereof.

(a) A perusal of the agreement as a whole and its terms reveals that the parties to it contemplated that its subsistence should only continue so long as the Appellant continued to occupy the refinery site and to maintain thereupon the refinery referred to in the agreement. In particular, the Respondent refers to the following parts of the said agreement:-

(i) The recital numbered (i) which provides that "The company is desirous of establishing an oil refinery on certain land situated at Crib Point being the lands described etc."

(ii) The recital numbered (ii) "The company has entered into an agreement with the State of Victoria relating to the establishment of the said refinery and the construction of port facilities at Crib Point which agreement as ratified by the Westernport (Oil Refinery) Act 1963 is hereinafter called "the refinery agreement."

(iii) The recital numbered (iii) which provides "The company occupies and intends to become the registered proprietor of the refinery site and is liable to be rated in respect thereof."

(iv) The recital numbered (iv) which provides "The Shire is of the opinion 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 decentralization of industry in Victoria."

(v) The recital numbered (v) that "The Shire is empowered by the Local Government (Decentralized Industries) Act 1963 to enter into an agreement with the company as to the amount of rates that will be payable by the company."

(vi) The whole of the terms of Clause 1 of the agreement and in particular the references in such clause to the fact that:-

(aa) The rates fixed by the agreement will be "payable by the company";

(bb) The fact that the clause itself contemplates that the rates will be payable by the company (Appellant) from the date of the agreement and successively thereafter year by year until the agreement has expired;

(cc) The fact that sub-clause (ii) of the said clause contemplates that the amount of the rates is to be fixed with reference to the capital expenditure made by the Appellant upon the refinery site;

(dd) The fact that under clause 3 of the agreement the parties contemplated that at the expiration of the period therein referred to the Appellant should confer with the Respondent on all matters pertaining to the agreement and its operation and effectiveness.

(ee) The fact that clause 5 of the said agreement imposed upon the Appellant the positive obligation after the "commissioning date" to give to the Respondent Shire in each year of the agreement a statement, certified by its auditors, of the amount of the capital expenditure so expended by the Appellant upon the refinery site in the relevant year and such details thereof as the

Respondent Shire might reasonably require for the purposes of enabling the Respondent Shire to fix the amount of rates to be levied by it upon the Appellant pursuant to the terms of the agreement.

(ff) The fact that clause 6 of the agreement imposed a positive obligation upon the Appellant to pay the rates fixed by the agreement in each year thereof.

(b) It is submitted that the proper interpretation of the whole of the Agreement including the terms above referred to discloses an intention on the part of the parties to the agreement that the Appellant company would continue to occupy the site for the duration of the agreement and to establish, improve and maintain a refinery upon the refinery site and to pay a rate in each successive year throughout the duration of the agreement to be fixed in accordance with a formula which itself contemplated a continuing occupation of the site by the Appellant company. The terms of the agreement also contemplated that the Respondent Shire, so long as the Appellant company complied with its obligations, would levy the rates fixed in accordance with the formula set out in the agreement. The obligations so imposed upon the Appellant company were of a "personal" nature. (See the Decision of the Full Court in the case of B.P. Australia Limited v. The Shire of Hastings (1973) V.R. 194 at 196).

(c) The Respondent submits that when the Appellant decided, in December 1969, to put itself into voluntary liquidation and, pursuant to that decision, appointed a Receiver, transferred the site to another person, and went out of occupation, the agreement came to an end of its own force.

(d) If, as the Respondent submits, the contract upon a proper interpretation of its terms involved a contemplation by the parties that it would only subsist so long as the state of affairs referred to in sub-paragraph (a)

hereof continued to exist, then it is consistent with principle that the agreement came to an end when that state of affairs ceased to exist by reason of the Appellant's own conduct. This would be so either because the continued performance by the parties of their respective rights and obligations was rendered impossible by the conduct of the Appellant or because the agreement itself was subject to an implied term that the contract would come to an end in the events which have happened - that implication arising from the nature of the agreement itself.

(See Taylor v. Caldwell (1863) 3 B. & S. 826;

Turner v. Goldsmith (1891) 1 Q.B. 544;

Measures Bros. Ltd. v. Measures (1910) 2 Ch.D 248;

Davis Contractors Ltd. v. Fareham UDC (1956) A.C. 696.)

(e) In further support of its contention that the agreement came to an end of its own force in the events that happened, the Respondent submits that the expressions of opinion of Lord Simon in British Movietone News Ltd. v. London and District Cinemas Ltd. (1952) A.C. 166 at page 185 are apposite. His Lordship said "If .... a consideration of the terms of a contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point - not because the Court in its discretion thinks it is just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation." The Respondent submits that it gets further support for its contention from the proposition stated in the speech of Lord Loreburn in F.A. Tamplin S.S. Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd. (1916) 2 A.C. 397 at pages 403-4 where His Lordship said:-

" ... a Court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not

from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things will continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract..... In most of the cases it is said that there was an implied condition in the contract which operated to release the parties from performing it, and in all of them I think that was at the bottom of the principle upon which the Court proceeded. It is my opinion the true principle, for no Court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted .... Were the altered conditions such that, had they thought of them, the parties would have taken their chance of them or such that as sensible men they would have said "If that happens, of course, it is all over between us"?

(f) In further support of its contention that this agreement came to an end in the events which happened in December 1969 and January 1970 of its own force, the Respondent refers to and relies upon those passages in the Decision of the Full Court of the Supreme Court of Victoria which are to be found in the Record.

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D. <u>Arguments advanced in support of the contention that the conduct of the parties amounted to a consensus to bring their rights and obligations under the agreement to an end.</u>

(a) The Respondent submits that the proper construction of the correspondence which passed between it and the Appellant in December 1969 and January 1970 and the conduct of each party thereafter amounted to a mutual agreement to discharge each other from the performance of their respective obligations under the agreement which at that stage was still executory in its nature.

(b) In particular the Respondent refers to the terms of the letter written by the Appellant to it on the 15th day of December 1969 and the Respondent's letter dated the 9th day of

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February 1970 The Respondent submits that the Appellant's letter constituted a notification to the Shire that as from the beginning of 1970 it would no longer be operating a refinery and would no longer be in occupation of the refinery site. The Respondent submits that, further, the letter amounted to a notification that the Appellant was going out of existence and would, accordingly, no longer regard itself as bound by the obligations which had been imposed upon it by the terms of the agreement.

(c) Following the notification given to the Shire in the terms referred to in the preceding sub-paragraph, the Appellant chose not to wait for the Shire's response but chose to commence to wind up its affairs, to appoint a Liquidator, to transfer the refinery site to another company and to go out of occupation of that site.

(d) On the 9th day of February 1970, following the events which have been referred to in the preceding sub-paragraph, the Shire responded to the Appellant's said letter of the 15th December 1969 in terms which, when properly construed, recorded the Shire's view that, in the events that have happened, the agreement would no longer have any effect and that accordingly the Council had "resolved to allow the agreement to lapse." In its context it is submitted that these words could only mean that the Council had resolved to permit the Appellant to be discharged from its obligations under the agreement.

(e) It is submitted that the correspondence so referred to amounted to a request by the Appellant of the Respondent to be discharged from its future obligations under the agreement and an accession by the Respondent to that request. It is further submitted that this construction of the correspondence is confirmed by the conduct of the parties thereafter because the Appellant continued with its winding up, ceased to supply statements of capital expenditure for the calculation of the rates in accordance with Clause 5 of the agreement and ceased in fact to pay rates to the Respondent. On its part the Respondent levied rates, otherwise than in accordance with the agreement, upon the person

who had become the new occupier of the refinery site.

(f) The Respondent submits that in the circumstances the proper inference to be drawn from the matters to which reference has been made is that the agreement was discharged by mutual consent.

(See Rose & Frank Co. v. J.R. Crompton & Bros. Ltd. (1925) A.C.445).

E. Arguments in support of the contention that the Appellant repudiated the agreement and the Respondent accepted such repudiation and rescinded the agreement.

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(a) The Respondent submits that the letter written to it by the Appellant on the 15th December 1969 together with the conduct of the Appellant thereafter amounted to an intimation by the Appellant to the Shire that it (the Appellant) no longer intended to be bound by the terms of the said agreement or to perform its obligations thereunder. The existence of this intention, in the Respondent's submission,

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is highlighted by the subsequent letter written by the "General Manager Westernport Refinery" to the Respondent Shire on the 26th day of February 1970 in which the General Manager stated that he "would appreciate an opportunity to discuss with you and with your Council a fresh agreement to record the rates levied in respect of the Westernport Refinery site".

(b) The expressions of intention on the part of the Appellant company above referred to and its acts and conduct after the 15th December 1969 clearly showed, in the Respondent's submission, that the Appellant did not mean to accept and discharge the obligations which were imposed upon it under the agreement.

(c) These obligations included the fundamental obligations to remain in occupation and pay the rates calculated in accordance with the agreement. There was implied in the agreement a condition that the Appellant remain in occupation, such condition being implied as a matter of the proper construction of the

agreement and in order to give, in the business sense, efficacy to the agreement. (The Moorcock (1889) 14 P.D. 64 at pp. 68 and 70; Shirlaw v. Southern Foundries (1926) Ltd. (1939) 2 K.B., 206 at p. 227).

(d) The submission on behalf of the Respondent that the Appellant repudiated the agreement does not depend on the implication of the conditions set out in sub-paragraph (c) above. It is further submitted that the Appellant made evident its intention to treat the agreement as no longer in existence and accordingly it made plain that it did not recognize any continuing obligations under it. These obligations included the obligation to give to the Shire each year "a statement certified by the Company's auditors of the amount of the Company's capital expenditure upon the refinery site."

(e) The attitude adopted by the Appellant company and referred to in the preceding sub-paragraphs gave the right to the Respondent Shire to rescind the agreement by "accepting the repudiation". (See Heyman v. Darwins Ltd. (1942) A.C. 356 at page 361; Berger v. Boyles (1971) V.R. 321 at 324.)

(f) In the submission of the Respondent it became clear that the actions taken by the Respondent following the aforesaid intimation on the part of the Appellant that it no longer intended to be bound by the terms of the contract, amounted to a rescission of the contract by the Respondent in the sense that its words and conduct were only consistent with an intention on its part to treat the contract as being at an end. Such an intention on the part of the Respondent is to be inferred from the following facts and circumstances:-

(i) The letter written by the Respondent to the Appellant dated the 9th February 1970 in which the Respondent advised the Appellant that "the 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". Page 17

(ii) The fact that following the Respondent Shire's aforesaid letter dated the 9th February 1970 negotiations commenced between the Shire and the General Manager of the Westernport Refinery to establish a fresh agreement.

(iii) The fact that in the rating year subsequent to August 1970 the Shire levied rates upon B.P. Australia Limited otherwise than in accordance with the terms of the said Agreement.

(g) It is submitted by the Respondent that the aforesaid correspondence and conduct of the parties is consistent only with an election on the part of the Appellant Company no longer to be bound by the terms of its agreement and a subsequent acceptance of that situation by the Respondent Shire. In the circumstances, the agreement came to an end. (See Heyman v. Darwins Ltd. above)

24. For the reasons advanced herein the Respondent submits that the Judgment of the Full Court of the Supreme Court of Victoria should be upheld and the Appeal herein be dismissed.

J.A. GOBBO

J.S. WINNEKE

No. 23 of 1976

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- AND -

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CASE FOR RESPONDENT

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