(30

IN THE HIGH COURT OF AUSTRALIA

BRITISH DOMINIONS OILS PROPRIETARY LIMITED.

V.

AMPOL PETROLEUM LIMITED.

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY.

on Thursday, 4th May, 1950.

H. E. Daw, Gov. Print., Melb.
C.12280/45

BRITISH DOMINIONS OILS PTY. LTD.

V.

AMPOL PETROLEUM LTD.

JUDGMENT WILLIAMS J.

BRITISH DOMINIONS OILS PTY. LTD.

V.

AMPOL PETROLEUM LTD.

JUDGMENT WILLIAMS J.

This action started in the Supreme Court of Victoria but at the hearing in that Court before MacFarlan J. it appeared to His Honour that there arose a question as to the limits inter se of the constitutional powers of the Commonwealth and the States, and that the action was by force of sec. 40A of the Judiciary Act 1903-48 removed to this Court and His Honour therefore proceeded no further in the action. When the action came on for hearing before me, I thought it wise, at the request of the parties, to make an order under sec. 40 of that Act removing the action into this Court.

The action is one brought to recover damages for certain alleged breaches of an agreement under seal made between the parties on 2nd September 1946, whereby the defendant agreed to supply the plaintiff for a period of seven years with its entire requirements of motor spirit and power and lighting kerosene for sale and distribution by the plaintiff in the State of Victoria. At the date of the agreement the defendant was a party to the Pool Agreement, which is the agreement referred to in the schedule to the National Security (Petroleum Products Distribution) Regulations, and the agreement provides that the period of seven years shall commence from the date of the termination of this agreement. During this period the plaintiff agreed to take from the defendant in each calendar year the whole of its requirements of motor spirit being not less than 1,200,000 imperial gallons of motor spirit in fairly equal monthly quantities during each year and the plaintiff also agreed to purchase and take from the defendant during this period

the whole of its requirements of power and lighting kerosene.

By clause 9 the plaintiff agreed that after the commencement of deliveries of motor spirit and power and lighting kerosene and during the continuance of the agreement it should not in the State of Victoria buy, sell, act as agent for, or deal in any motor spirit, power or lighting kerosene other than the motor spirit, power or lighting kerosene supplied by the defendant.

Clause 10 provided that if after the commencement of the delivery in terms of the agreement and thereafter during the continuance of the agreement by reason of the existence of a state of war, whether involving the Commonwealth of Australia or not, civil commotion, acts of God, restrictions by any government authority whether imperial, federal, state or otherwise, or anything beyond the reasonable and practicable control of the defendant or the plaintiff as the case might be, including fire, explosion, break down, a strike or combination of workers or any lock-out whether occurring in the business of the defendant or not, the defendant should be hindered or prevented from delivering motor spirit in accordance with the terms thereof or the plaintiff should be hindered or prevented from receiving the said motor spirit in accordance with such terms, the other party should not be thereby entitled to determine the agreement nor should either party have any claim for damages or penalty against the other in respect of such omission or failure to deliver or to receive but during the period when such motor spirit should not be delivered or received as aforesaid the plaintiff might purchase elsewhere sufficient motor spirit to meet its immediate needs.

Clause 7 provided that delivery of the motor spirit and power and lighting kerosene should be taken at Port Melbourne at such place as should from time to time be directed by the seller.

Before stating the issues that arise, it will be convenient briefly to refer to some of the facts. The plaintiff is a company which before the war had built up a considerable business in the sale of motor spirit. This business consisted of selling motor spirit retail from a double headed pump at its premises

in Flinders Street, Melbourne, and selling wholesale to garages and industrial users. The retail sales comprised about 15 per cent of its business and of the balance 15 per cent consisted of sales to garages and 60 per cent of sales to industrial users. The business derived its success largely from the allowance by the plaintiff of discounts to a large number of its customers ranging from ½d. to 1½d. per gallon below the usual retail and wholesale prices. The plaintiff procured its supplies of motor spirit from an importer named H. C. Sleigh under an agreement made on 23rd December 1937 whereby it agreed for a period of three years from 11th October 1937 to take not less than 600,000 or more than 900,000 gallons per annum. This agreement terminated on 11th October 1940, but it was agreed on 8th September 1940 that its terms should be extended for a period ending twelve months after the finish of the war while the cartel was in operation. The cartel was, I understand, an unofficial pool of motor spirit importers on the same lines as the official pool set out in the schedule to the National Security (Petroleum Products Distribution) Regulations.

The rationing of motor spirit commenced in Australia when the National Security (Liquid Fuel) Regulations came into force on 24th December 1940. Between this date and the date when the Petroleum Products Distribution Regulations came into operation on 15th August 1942, Sleigh continued to supply the plaintiff with motor spirit and the plaintiff carried on business as before. It applied for and was granted a bulk supplier's licence and a retail seller's licence under the Liquid Fuel Regulations but its sales were reduced by the impact of rationing so that, whereas sales in 1939 and 1940 had averaged about 850,000 gallons, in the year 1941 they fell to 566,000 gallons. When the official pool commenced to operate the plaintiff returned its bulk supplier's licence and thereafter during the life of the pool only purchased sufficient motor spirit from Sleigh to carry on its retail business while Sleigh supplied its previous wholesale customers direct and paid the plaintiff a share of the profits derived from this business. The

pool terminated on 12th March 1947, and the plaintiff then commenced to rebuild its wholesale business and to purchase motor spirit from Sleigh for this purpose. In August 1947 its sales, retail and wholesale, amounted to about 60,000 gallons.

In the meantime, during the life of the pool, the plaintiff had made the agreement of 2nd September 1946 with a view to purchasing its supplies of motor spirit from the defendant instead of from Sleigh when the pool terminated. The termination of the pool on 12th March 1947 would appear to have terminated the plaintiff's contract with Sleigh, even assuming that the reference to the cartel in the letter of 8th September 1940 included the official as well as the unofficial pool, but the plaintiff, the defendant and Sleigh all appear to have thought that the agreement between the plaintiff and Sleigh would continue in force until twelve months after the finish of the war. The plaintiff and the defendant appear to have thought that the war would finish when the National Security Regulations expired on 31st December 1946 and that the agreement with Sleigh would expire in a further twelve months, that is on 31st December 1947. This led the plaintiff, when executing the agreement of 2nd September 1946, to write to the defendant on 30th July 1946 pointing out that it was bound to Sleigh for the duration of the war and twelve months thereafter, and that it could not commence to take supplies from the defendant until it was released from Sleigh. The defendant replied on 10th September 1946 agreeing with this and stating that it understood that the plaintiff would commence operating with it just as soon as possible but in any case not later than 2nd January 1948. The letter also stated that "the government has indicated that the war will 'officially' end on 31st December 1946, and as your contract has a further twelve months to run to 31st December 1947, it will be 1948 before you are able to draw from A.M.P., unless you are able to make earlier arrangements to the contrary". By an agreement made between the plaintiff and Sleigh on 29th August 1947, it was agreed that the agreement of 23rd December 1937 should be considered as no

longer in force, but Sleigh agreed to supply the plaintiff with 25,000 gallons at its Flinders Street premises subject to one month's notice in writing on either side, but also subject to a promise by Sleigh that, provided the financial position as determined by costs warranted it, he would continue the arrangement for twelve months and possibly for an indefinite period thereafter.

It was contended for the plaintiff that the agreement of 2nd September 1946 was varied by substituting for the termination of the pool as the commencing date of the period of seven years the termination of the plaintiff's agreement with Sleigh, such date to be not later than 2nd January 1948, whilst it was contended for the defendant that there had been no such variation but a mere waiver of the defendant's right to require the plaintiff to take the whole of its supplies of petrol from it between the termination of the pool and the termination of the plaintiff's agreement with Sleigh. I am of opinion that the contention of the plaintiff is right and that the effect of the correspondence is to vary the agreement so that, in the events which have happened, the period of seven years commenced on 29th August 1947.

Clause 2 of the agreement provided that for the period of seven years from this date the plaintiff should take in each calendar year the whole of its requirements of motor spirit from the defendant in fairly equal monthly quantities during each year. A calendar year means a year commencing on 1st January and ending on 31st of December, see The Calendar (New Style) Act 1750 which applies by express words to the Dominions. But the agreement of 2nd September 1946 provided that the period of seven years was to commence from the date of the termination of the pool agreement and the pool agreement might have terminated on any day of any month during a calendar year. If the expression "calendar year" is construed strictly, the operation of the agreement becomes so uncertain that it would probably be avoided, but I think that the context is sufficient to show that the expression was intended to mean a period of one year according to the calendar from the date

on which the plaintiff's agreement with Sleigh terminated. A calendar month may mean the period between any day in one month and the day next before the corresponding day in the succeeding month according to the calendar, Hals. 2nd Edit. vol. 32, p. 120, and an analogous meaning may, I think, fairly be given to the expression under discussion.

The plaintiff was therefore entitled to commence ordering motor spirit from the defendant at the end of August 1947, but it did not give the defendant an immediate order. Instead it wrote to the defendant stating that it was ready to commence marketing under its supply agreement with the defendant and asked for the defendant's assurance that supplies were available as soon as possible. The Liquid Fuel Regulations had been continued in force from 31st December 1946 until 31st December 1947 by the Defence (Transitional Provisions) Act 1946. In September 1947 the defendant held a bulk supplier's licence under these regulations dated 5th June 1947. It was a condition of this licence that the total gallonage of motor spirit which might be disposed of by the licensee in any month and in any State to all licensed retailers and consumers on the surrender of the necessary ration tickets should not exceed the total gallonage authorised in writing by the controller for that month and State. For the month of September 1947 and thereafter to the date of the writ, the only gallonage which the defendant was authorised to dispose of was a monthly gallonage to be disposed of in New South Wales. This was because the total amount of motor spirit imported into Australia was controlled by the Customs (Import Licensing) Regulations 1939. The total amount allowed to be imported was apportioned between the different States and the importing companies were allotted quotas in each State based upon the trade they were doing in that State in a certain period before the war. As the defendant was only trading in New South Wales during this period it only received a quota for sale in New South Wales.

On receipt of the plaintiff's letter of 8th September 1947, the defendant applied to the Department of Supply & Shipping for a quota in Victoria to the extent of the gallonage previously marketed by the plaintiff but this was refused. The defendant notified this refusal to the plaintiff on 2nd October 1947. Nothing further happened until 18th December 1947 when the plaintiff wrote to the defendant enclosing what it called its first order for 10,000 gallons to be delivered in January 1948. The letter stated that the refusal of a licence for the defendant to supply the plaintiff in Victoria did not protect the defendant under clause 10 of the agreement because this clause only operated after commencement of deliveries, that it was beyond the constitutional powers of the Commonwealth to prevent the defendant selling its petrol inter-State, and that, in any event, the defendant could fulfil its contract by the delivery of motor spirit from its subsidiary company Alba Petroleum Co. of Aust. Pty. Ltd. Alba is a Victorian company, in which the defendant then held all shares, which had imported and sold motor spirit in Victoria before the war. It held a bulk supplier's licence also dated 5th June 1947 subject to the same condition as the defendant's licence and during the period between September 1947 and the date of the writ was authorised by the controller to dispose of a certain gallonage in Victoria.

The defendant did not supply the 10,000 gallons to the plaintiff but wrote to the plaintiff on 17th January 1948 stating that it had been advised by its solicitors that, in view of the terms of the agreement (presumably this was a reference to clause 10) and the provisions of the Liquid Fuel Regulations, the performance of the agreement could not be enforced. The letter concluded by stating that, apart from questions of law, the plaintiff should appreciate that when the agreement was entered into it was contemplated that at the termination of the pool there would be free importation of and free trading in motor spirit and not the regulations which then existed. Nothing further happened until 24th June 1948 when the plaintiff forwarded further orders for 90,000 gallons for January

and for 100,000 gallons for each of the months February to July inclusive, and expressed the hope that, despite the past breaches of the agreement by the defendant, the defendant would now carry out its contract. The defendant replied on 9th July 1947 adhering to its previous attitude and refusing to supply the orders. Further orders for 100,000 gallons for each of the months August, September and October were sent by the plaintiff to the defendant on 13th October 1948. These orders were not supplied and the writ in the action was issued on 2nd November 1948.

In the statement of claim the plaintiff claims damages for loss of profit on the resale of 700,000 gallons of motor spirit at 4d. per gallon totalling £11,666.13. 4. The only evidence of loss of profits is with respect to the orders for the months of January to July 1948 inclusive and the claim is in respect of these months. For some reason, which was not explained, no claim was made for damages in respect of the subsequent orders. The pleadings go on to a rejoinder and the statement of defence has been twice amended, once before this hearing and again after the close of the evidence. The second amendment was allowed subject to the right of the plaintiff to apply for an adjournment at any stage and costs were reserved, but no adjournment was asked for. The defences pleaded in the statement of defence in its final form may be summarised under three heads:- (1) that the orders given for the motor spirit were not in accordance with the agreement; (2) that the Liquid Fuel Regulations and the Import Licensing Regulations 1939 severally or jointly amounted to restrictions of a government authority within the meaning of clause 10 of the agreement which hindered or prevented the defendant from delivering the motor spirit ordered by the plaintiff. The Banking (Foreign Exchange) Regulations S.R. 191 of 1946, made under the Banking Act 1945 on 19th December 1946, are also mentioned in the statement of defence, but these regulations do not appear to add any strength to the help, if any, that the defendant can derive from the Import Licensing Regulations; (3) that the existence of these regulations severally or jointly and executive action

threatened or reasonably to be contemplated under the Import Licensing Regulations and Banking (Foreign Exchange) Regulations when the defendant became liable to commence deliveries under the agreement, made it impossible or illegal for the defendant to perform the agreement and such impossibility was likely to continue for a prolonged and indefinite period and that the agreement was frustrated in law and came to an end as and from the date provided for commencement of deliveries. The amended reply alleged that the Liquid Fuel Regulations were not authorised by the defence power in September 1947, that in so far as any of the aforesaid regulations or executive action thereunder prevented the defendant selling motor spirit to the plaintiff in Victoria, such legislation or executive action infringed sec. 92 of the Constitution, and that the defendant could have supplied motor spirit through Alba. It will be seen that the defence of frustration is the most important for the defendant because if it succeeds the agreement of 2nd September 1946 was discharged whilst still executory and not only the present action must fail but no future action could be brought on the agreement, whereas the other defences only relate to alleged breaches of a still subsisting agreement prior to the date of the writ.

Before discussing the defences, it will be convenient to determine the meaning of the words "after the commencement of delivery in terms of this agreement" which appear in clause 10. Similar words appear in clauses 9 and 11 of the agreement. The alternative constructions of the words in clause 10 are (1) that they mean after there has been an actual order for motor spirit under the agreement and a delivery pursuant thereto (if this is right the defendant cannot rely on the clause as it has not delivered any motor spirit); (2) that they mean after the commencement of the period of delivery under the agreement, that is after 29th August 1947 (if this is right the defendant may be excused under the clause for failure to deliver any motor spirit to the plaintiff prior to the date of the writ). The first meaning gives literal force to the words. It is supported by the plaintiff, and, for

the purposes of the argument of frustration, adopted by the defendant. But it leads to strange and capricious results for it is impossible to conceive why the defendant should not be excused from supplying the first order if it was hindered or prevented from doing so by the events mentioned in the clause when it would be excused by these events from supplying all subsequent orders. The words would seem to have been inserted into the agreement because no deliveries of motor spirit were to be made until a future uncertain date. Until the termination of the pool the plaintiff had no right to order motor spirit and the defendant was under no obligation to supply it. Neither party therefore required any excuse for non performance in the meantime. But the risk that events beyond the control of either party might hinder or prevent it from performing its part of the agreement arose immediately the period of performance commenced so that either party might require an excuse if it was unable to perform the agreement by events beyond its control. Clause 10 specifies these events and excuses the defendant if it is unable to supply and the plaintiff if it is unable to receive motor spirit whilst such events operate. The defendant is not under an actual liability to deliver until it receives an order but from the commencement of the period of delivery until its termination it is under a contingent liability to deliver upon receipt of an order. It must supply whatever quantity of petrol is ordered by the plaintiff for the agreement does not limit the plaintiff's right to order any quantity it sees fit so long as it orders at least 1,200,000 gallons per annum and takes its requirements in fairly equal monthly instalments during each year. The promise of the plaintiff in clauses 1 and 2 of the agreement is to purchase its entire requirements of motor spirit from the defendant from the commencement until the conclusion of the period of seven years and this express promise in itself implies that the plaintiff will not purchase any of its requirements elsewhere. This promise is not contingent on any actual delivery of motor spirit pursuant to an

order. It is made in respect of the whole period of seven years. One would expect that the express covenant in clause 9 would relate to the same period, but if the words in this clause "after the commencement of deliveries of motor spirit" are read literally the covenant only operates after there has been an actual delivery of motor spirit and the obligations of the plaintiff under clauses 2 and 9 do not coincide. To ascertain the meaning of an instrument it is necessary not only to look at the particular words but to look at the context, the collocation, and the object of such words and to interpret the meaning according to what would appear to be the meaning intended to be conveyed by the use of the words under such circumstances, Beale 2nd Edit. p. 309. To reconcile clauses 2 and 9, it is necessary to construe the words under discussion to mean the commencement of the period of deliveries and this is, in my opinion, their true meaning to be gathered from the agreement as a whole. And it necessarily follows that a similar meaning should be attributed to the corresponding words in clause 10. Accordingly the agreement has an express clause providing for the suspension of performance in certain events, some of which, if they supervened, might cause the agreement to be frustrated. But this does not mean that the doctrine of frustration is necessarily inapplicable for the subsequent event may be of so sweeping a character as to make the future performance of the contract altogether different to that which the parties could reasonably have contemplated when it was entered into, and therefore not sufficiently limited to fall within the suspensory stipulation: Tamplin's Case 1916 2A.C. 397 at pp. 406,407; Bank Line Ltd. v. Capel 1919 A.C. 435; Woodfield Steamship Co.Ltd. v. Thompson 36 T.L.R. 43; Pacific Phosphate Co.Ltd. v. Empire Transport Co.Ltd. 36 T.L.R. 750.

Mr. Barwick contended that the agreement of 2nd September 1946 had been frustrated because at the end of August 1947 performance of the agreement had become impossible and that such impossibility was likely to continue for an indefinite period on three alternative grounds: (1) it was then illegal for the

defendant to deliver motor spirit to the defendant in Victoria because it was prevented by the Liquid Fuel Regulations from disposing of motor spirit outside New South Wales; (2) the Import Licensing Regulations and Banking (Foreign Exchange) Regulations and executive action taken or reasonably to be anticipated thereunder prevented the defendant importing sufficient motor spirit to supply the plaintiff or disposing of what it imported outside New South Wales; (3) even if the Liquid Fuel Regulations were invalid and any legislation or executive act intended to prevent the defendant selling motor spirit outside New South Wales infringed sec. 92 of the Constitution, the defendant was unable to deliver motor spirit to the plaintiff in Victoria because the restrictions preventing the defendant doing so were regarded by the community as valid and in a practical business sense made performance as impossible as if they were valid in the absence of a declaration by the Court that they were invalid. In this connection it is to be noted that the judgment of this Court in Wagner v. Gall A.L.R. 493 was not delivered until 6th June 1949. [In discussing these contentions, a question arises on the threshold with respect to the validity of the Liquid Fuel Regulations in August 1947. They had been continued in force after the expiration of the National Security Act on 31st December 1946 for a period of twelve months by the Defence (Transitional Provisions) Act 1946, and for a further period of twelve months by the Defence (Transitional Provisions) Act 1947. In Wagner v. Gall, Gall was prosecuted for a breach of these regulations on 16th November 1948 and this Court held that the complaint must be dismissed because the regulations were invalid on this date. It was held that the Transition Act 1947 was invalid so far as it purported to extend the Liquid Fuel Regulations beyond 31st December 1947. And I think that it also follows from this decision that the Transition Act 1946, so far as it purported to continue the Liquid Fuel Regulations in 1947, was also invalid. Wagner v. Gall was decided on broad grounds, all of which appear to me to be as applicable to 1947 as they were to 1948. Further, even if these grounds are not

applicable to 1947, the regulations as legislation in the period of transition from hostilities to peace were then open to a similar attack to that which succeeded in the case of Crouch v. The Commonwealth 77 C.L.R. 339, namely that to be a valid exercise of the defence power in this period, it must appear from the regulations that they are capable of aiding the remission of the community from hostilities to peace. This might have appeared if the regulations had prescribed some order of priority in the distribution of motor spirit to those classes of purchasers who had more urgent need of motor spirit than other members of the public for the purpose of restoring the community to a condition of peace. But the Liquid Fuel Regulations, like the Control of New Motor Cars Order held to be invalid in Crouch's Case, contain no such prescription. They may have been administered to this end, but it is the legislation and not the executive acts done under it which must be authorised by the defence power. The Liquid Fuel Regulations are couched in such wide terms that they could only be authorised by the defence power at a time when the existence of hostilities gave the Commonwealth Parliament complete control over the commodity. Accordingly, in my opinion, the Liquid Fuel Regulations were invalid in August 1947. [Mr. Barwick contended that Wagner v. Gall was only concerned with the Regulations so far as they controlled the retail sale of motor spirit and that this decision did not necessarily invalidate the regulations relating to the bulk suppliers' licences and in particular regulation 15A, which was introduced by an amendment on 21st May 1947. Sec. 6 of the Defence (Transitional Provisions) Act continues the regulations to which it refers in force for the prescribed period not as regulations but as part of the Act and I agree that this has the effect of giving statutory force to the regulations in the schedule so that they may look for support to any legislative power of the Commonwealth Parliament and not merely to the defence power. It was contended that the regulations relating to bulk suppliers' licences and in particular Regulation 15A could be supported by the power to make laws with respect to trade

and commerce with other countries. The Import Licensing Regulations are made under the Customs Act and give the Minister a wide discretion with respect to the importation of goods but it would not be a valid exercise of this discretion to attempt to control the use of the goods once they had been lawfully landed and released from Customs control. After this stage imported goods are subject to federal law only to the same extent as goods produced in Australia and a condition that the goods should not be sold among the States would infringe sec. 92 of the Constitution. It follows that, in my opinion, the first ground urged by Mr. Barwick in support of the defence of frustration fails.

I shall now proceed to discuss the other two grounds. The evidence establishes that the agreement of 2nd September 1946 was entered into in the mutual belief that when the pool ended there would be no restriction on the import into or the sale of motor spirit in Australia, and it was contended that the restrictions which existed in August 1947 and were then likely to continue to exist for an indefinite period made so vital a difference to the circumstances in which it was intended that performance should take place that to require the parties to perform the contract would be to require them to perform a contract altogether different from that which they had agreed to perform. In the words of Viscount Haldane in Tamplins Case 1916 A.C. 397 at p. 407, "The foundation of what the parties are deemed to have had in contemplation has disappeared and the contract itself has vanished with the foundation". The doctrine of frustration was recently considered by this Court in Scanlan's New Neon Ltd. v. Tooheys 67 C.L.R. 169. This case, from which the Privy Council refused special leave to appeal, has been followed in New Zealand in Devonport Borough v. Candy Filters N.Z.Ltd. 1945 N.Z. L.R. 403. Denny Mott & Dickson Ltd. v

James B. Frazer & Co.Ltd. 1944 A.C. 265, is a subsequent decision of the House of Lords, and Mr. Barwick placed much reliance on the view of the doctrine expressed by Lord Wright at pp. 273 to 276. His Lordship there said the explanation that the rule is to be found in the theory that it depends on an implied condition of the contract is really no explanation but admitted that his own view was somewhat heretical. There is, I think, a distinct preponderance of opinion in the speeches of the noble and learned Lords who have dealt with the doctrine in the many appeals which have reached the House of Lords in favour of the view that the doctrine rests on an implied term. This view was taken by this Court in Scanlan's Case and I see no reason to depart from it. In Tamplin's Case 1916 A.C. 397, Earl Loreburn said at pp. 403, 404, that "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". Where the foundation of the contract has gone the Court implies a term that "no reasonable men who contemplated such an alteration would be content to remain bound by the contract if it came about", Court Line Ltd. v. Dant & Russell Inc. 1939 3 A.E.R. 314 at pp. 316, 317. In Hirji Mulji v Cheong Yue/Steamship Co.Ltd. 1926 A.C. 497 at p. 510, Lord Sumner said "frustration.... is explained in theory as a condition or term of the contract, implied by the law ab initio, in order to supply what the parties would have inserted had the matter occurred to them, on the basis of what is fair and reasonable, having regard to the mutual interests concerned and of the main objects of the contract: see per Lord Watson in Dahl v. Nelson, Donkin & Co. It is irrespective of the individuals concerned, their temperaments and failings, their interests and circumstances. It is really a device, by which the rules as to absolute contracts are reconciled with a special exception which justice demands."

It was contended that the condition which is not expressed in the present case resembles the condition in Krell v. Henry 1903 2 K.B. 740, where the foundation of the contract was that an

event, namely the coronation processions, would occur which did not occur. The restrictions on the import into and sale of motor spirit in Australia did not vanish with the end of the pool or by the end of August 1947. Instead the Prime Minister made a public announcement on 28th February 1947, just before the termination of the pool, that due to the shortage of dollars petrol rationing would be continued for an indefinite period, that his government was determined that the Liquid Fuel Regulations should be strictly complied with, and that the government expected that all the oil companies, distributors, garage and service station proprietors and the motoring public would co-operate fully with the liquid fuel control administration in keeping consumption within the ration scale. Mr. Walkley gave evidence of a conference at Canberra at which all the companies which were parties to the pool were represented by their managing directors and at which the Prime Minister and Treasurer, the Minister for Supply & Shipping, the Minister for Customs, and officials of the Treasury and the Ministry of Supply & Shipping were present on behalf of the government. This conference was held about three days before the termination of the pool, and those present were told that upon its termination only a limited amount of motor spirit could be imported and the parties must each agree to accept a percentage of the market or regulations would be framed to compel them to do so. Mr. Walkley objected to the percentage of 8.08 per cent of the New South Wales market allotted to the defendant and asked what would happen if he sold in excess of his quota. Mr. McFarlane, the senior treasury official, who was also secretary to the Treasurer, told Mr. Walkley that the government had other means of regulating the defendant's imports. Mr. Walkley said that the quota system was introduced immediately after pool and his company was confined to a quota of 8.08 per cent of the total imports into Australia apportioned to New South Wales. The defendant from time to time applied for and was granted an interim licence under the Import Licensing Regulations to import sufficient motor spirit to satisfy this quota. Authority was also obtained

by the defendant's bank under the Banking (Exchange Control) Regulations to establish a credit to pay for such imports. After the motor spirit had arrived in an Australian port the defendant was granted a final licence to import it. These licences did not and, in my opinion, could not validly contain any restriction on the sale of the motor spirit after importation. But the Liquid Fuel Regulations provided by regulation 30 that the Liquid Fuel Board might, at its absolute discretion, grant a bulk supplier's licence on such terms as it thought fit and the bulk supplier's licence granted to the defendant on 5th June 1947 contained the provision already mentioned. It was policed by the introduction into the regulations of regulation 15A which provided that a bulk supplier should not during any month move out of any Customs warehouse or excise factories in the State any liquid fuel in excess of the quantity authorised in writing by the controller in respect of that bulk supplier for that month and State. A bulk supplier's licence was granted to Alba on the same date as that of the defendant and contained a similar provision. This company, which had only traded in Victoria before the war, was allotted a quota of 7.65 per cent of the total imports of motor spirit apportioned to Victoria. The motor spirit released to the defendant under its bulk supplier's licence each month was made subject to a condition that it should be sold in New South Wales and the motor spirit released to Alba each month was made subject to the condition that it should be sold in Victoria.

I have already said that, in my opinion, the Liquid Fuel Regulations under which these licences were granted and conditions imposed were at all material times invalid. But the regulations were being observed as valid regulations by the community and their invalidity was not established prior to the delivery of judgment in Wagner v. Gall on 6th June 1949. It was contended that

commercial men can only carry on business on the assumption that laws made by the parliaments of the Commonwealth and States are valid exercises of their constitutional powers, and if such laws on their face make the performance of a contract impossible, and such impossibility is likely to continue for an indefinite period, the contract is equally frustrated whether the laws are valid or not. No authority was cited in support of the contention. Mr. Hudson referred to the Russian Bank for Foreign Trade v. Excess Insurance Co. 1918 2 K.B. 123, where Bailhache J. held that an invalid requisition of a ship without its seizure is not a restraint of princes within the usual exception in marine insurance policies, but this case has more to do with the question whether an invalid law would be a restriction of a government authority within the meaning of clause 10 of the agreement of 2nd September 1946 than with the present point. It is not a very helpful case because the decision was affirmed on appeal on a different ground, 1919 1 K.B. 39, and Scrutton L.J., without expressing a final opinion, thought that a requisition by the Admiralty, assuming it to be ultra vires, might well be a restraint of princes. In Inland Revenue Commissioners v. Joicey 1913 1 K.B. 445 at p. 455, Hamilton L.J., as Lord Sumner then was, said of a rule making authority, "its rules are ultra vires if they go beyond the scope of the delegation. Suppose all the rules, when made, to be ultra vires. If so, they are as if they were not, they do not exist." See also Minister of Agriculture and Fisheries v. Matthews 1950 1 K.B. 148. It may be different where "a government department in its dealing with a subject takes it upon itself to assume authority upon a matter with which he is concerned, he is

entitled to rely upon it having the authority which it assumes. He does not know, and cannot be expected to know, the limits of its authority." Robertson v. Minister of Pensions 1949 1 K.B. 227 at p. 232: Falmouth Boat Construction Co.Ltd. v. Howell 1950 W.N. (Eng.) 109. But I am not here concerned with dealing between a government official and a subject, but with dealings between subjects and the effect upon these dealings not of matters of which one or the other is ignorant but of Acts and regulations the contents of which are available to the public. It is clear that an invalid Act or regulation will not justify conduct which is tortious if the Act or regulation is invalid: McClintock v. The Commonwealth 75 C.L.R.1 at p.19; Bank of N.S.W. v. The Commonwealth 76 C.L.R. 1 at p. 290, and I do not see how an invalid Act or regulation can have any effect upon the rights and liabilities of the parties to a contract. It seems to me that the maxim ignorantia juris haud excusat applies and that an invalid law is a law which has no existence and cannot have the effect in law of making the performance of a contract impossible, or assist a party relying on frustration.

But I need not pursue the point because, in my opinion, taking the view most favourable to the defendant, and even assuming that the Liquid Fuel Regulations were valid in 1947 and that clause 10 of the agreement did not operate prior to an actual delivery of motor spirit, I would not be prepared to hold that the agreement was frustrated. I am not satisfied that the foundation of the agreement was that the defendant should be free to import and sell and the plaintiff free to buy and sell motor spirit when the agreement fell to be performed at the end of August 1947. The fact that the plaintiff had agreed to take at least 1,200,000 gallons a month is not sufficient to prove that it was essential to the performance of the agreement by the plaintiff that the consumption of motor spirit should not be rationed. It was essential to the performance of the agreement that it should be possible for

the defendant to import sufficient motor spirit to supply the plaintiff's orders and to deliver the motor spirit to the plaintiff at Port Melbourne. But there never was any legislation absolutely prohibiting the defendant from so doing. The Import Licensing Regulations only made it necessary for the defendant in August 1947 to procure a licence to import motor spirit and the defendant was at all times authorised to import more motor spirit than was required to supply the defendant. The only difficulty in the way of the defendant performing the contract lay in the condition imposed on the defendant under the Liquid Fuel Regulations not to sell motor spirit outside New South Wales. I have already said that this condition was invalid and must be treated as non-existent. Even if it was valid, it was not an absolute prohibition but a prohibition subject to a licence, and the agreement would at most have been subject to an implied condition that the defendant would use its best endeavours to obtain a licence and performance would only have become impossible if a licence had been refused: Re Anglo Russian Merchant Traders & Batt (John & Co. London) 1917 2 K.B. 679; J. W. Taylor & Co. v. Landauer & Co. 1940 4 A.E.R. 335; K. C. Sethia (1944) Ltd. v. Partabmull Rameshwar 1950 1 A.E.R. 51; cf. Mitchell Cotts & Co. (Middle East) Ltd. v. Hairco Ltd. 169 L.T. 349. The defendant applied for a licence which was in effect an application to be allotted, in addition to its quota in New South Wales, a share of the quota allotted to Sleigh in Victoria, and it is not surprising that this application was refused. If the defendant had used its best endeavours to obtain a licence, it would have applied to be allowed to supply the plaintiff out of its own quota or for a share of the quota allotted to Alba, with the consent of Alba, and there is no reason to believe that this application would not have been granted. The doctrine of frustration does not apply in favour of a party who is in default: Maritime National Fish Ltd. v. Ocean Trawlers Ltd. 1935 A.C.=524. It was also possible for the defendant to perform the agreement without a breach of the condition by causing Alba to supply the plaintiff. The purchase by one company of all the shares of another company is now recognised to be one of the ways in which the businesses of two companies may be amalgamated. See

the cases cited in Associated Newspapers Ltd. v. Federal Commissioner of Taxation 69 C.L.R. 257 at pp. 262, 263. Alba's quota in Victoria was from 700,000 to 800,000 gallons a month. All the shares in Alba were acquired by the defendant in June 1945. On 27th August 1945 the articles of association of the defendant were altered by special resolution, and certain articles were added which created a management board comprising three directors elected to represent holders of deferred shares resident in Victoria and three directors appointed from time to time by the directors other than these three directors. Each member of the management board has one vote and all questions are decided by a majority of votes. If the number of votes for and against a resolution is equal the resolution is deemed to be negatived. The management board is authorised to determine the general policy of the company and all matters relating to finance, supply and marketing. Mr. Walkley said that the defendant could not have compelled Alba to supply the plaintiff because the three directors appointed to represent Victoria would not have agreed and there would have been a deadlock. But the real question is whether it was impossible for the defendant in August 1947 to have delivered motor spirit to the plaintiff at Port Melbourne, and if it was possible to do so through Alba, the question whether the board of directors of the defendant was willing that the defendant should perform the agreement in this way is immaterial. A company is still able to perform a contract although the directors as a whole or by a majority may prefer to break the contract and pay damages. Between August 1947 and November 1948 Alba was authorised to sell motor spirit in Victoria and had sufficient motor spirit to supply the plaintiff. Alba was under the control of the defendant and the defendant could therefore have performed its contract through Alba. The defendant was discharging motor spirit which it was licensed to import at Port Melbourne on loan to Alba under the loan-borrow agreement existing amongst the group of companies importing motor spirit from Bahrein of which the defendant and Alba were members, so that the defendant's own or

spirit was available at Port Melbourne. The condition in the defendant's bulk supplier's licence against selling motor spirit outside New South Wales only applied to motor spirit sold under that licence, and had no application to motor spirit sold under another licence granted to another company which the defendant controlled.

It was also contended that the Import Licensing Regulations and executive action threatened or reasonably to be expected thereunder made it impossible for the defendant to perform the agreement because, if it had attempted to sell motor spirit out of New South Wales, it would have been punished by having its imports curtailed or refused and its business destroyed. The validity of the Import Licensing Regulations was upheld in Poole v. Wah Min Chan 75 C.L.R. 218. The executive action referred to is what was described as the threat of Mr. McFarlane to regulate the defendant's imports by other means than the Liquid Fuel Regulations if it exceeded its quota. I do not read this as a threat to prevent the defendant selling motor spirit which it had imported out of New South Wales if it was unlawful to prevent it doing so. The Minister had a discretion under the Import Licensing Regulations to determine the amount of motor spirit, if any, which the defendant would be allowed to import. But there is no evidence of any threat that, if it was unlawful to impose such a condition, future licences would not be granted if the defendant sold its motor spirit outside New South Wales. The only threat was that the defendant would not be authorised to import sufficient motor spirit to enable it to exceed its quota. Such a threat had no reference to the manner in which the defendant sold its quota.

The plaintiff was not an importer of motor spirit. It had to procure its supplies locally. The purpose of the agreement was to enable the plaintiff to procure its supplies from the defendant instead of from Sleigh. As soon as the agreement with Sleigh terminated the plaintiff would be left without supplies unless it could obtain supplies from the defendant. The plaintiff's business

was mainly the sale of motor spirit wholesale and retail. If it could not obtain supplies from the defendant its whole business was likely to be ruined. The defendant, on the other hand, at the date of the agreement was importing over 800,000 gallons of motor spirit per month of which it was under contract to supply about 300,000 gallons a month to customers mostly at wholesale prices, while the balance was used to supply garage proprietors who had installed the defendant's pumps, these proprietors having no legal right to any supply but it being to the business advantage of the defendant to supply them with as much motor spirit as possible. Between September 1947 and November 1948 the defendant was still authorised to import and sell over 800,000 gallons a month and the amount which it was authorised to import was increasing. At first it could not have supplied the plaintiff as a new account without diminishing the supply to its pumps. But in several months the authorised amount was sufficient to allow the defendant to supply the plaintiff and at the same time supply the same amount as previously to the pumps. But the pump business was more profitable than its contract with the plaintiff and the defendant preferred to supply and increase the supply to its pumps rather than supply the plaintiff. Alba always had enough motor spirit to supply all its contractual obligations and perform the agreement with the plaintiff on behalf of the defendant. But, like the defendant, it had not enough motor spirit to carry on business which was more profitable than the agreement with the plaintiff and supply the plaintiff as well.

Mr. Barwick urged me to look at the matter through the eyes of the plaintiff. Before the war it was selling about 850,000 gallons of motor spirit a year. Its wholesale business was temporarily destroyed by the pool. It had agreed with the defendant to order at least 1,200,000 gallons a year. In these circumstances would it be just to the plaintiff to hold it to such a bargain when it could only sell to customers who had licences to purchase motor spirit. The answer, it seems to me, is that if the

consumption of motor spirit is rationed, it is because the commodity is in short supply. The consumption is rationed so as not to exceed the supply and any trader who can supply the commodity has a market in which to sell it. In Denny Nott & Dickson Ltd. 1944 A.C. at pp. 274, 275, Lord Wright said that "the data for decision are, on the one hand, the terms and construction of the contract, read in the light of the then existing circumstances, and, on the other hand, the events which have occurred". I can find nothing in these data to warrant an implication that the whole foundation of the agreement failed because legal restrictions upon the import and sale of motor spirit continued after August 1947. It would, no doubt, be an advantage to the defendant to be relieved from an agreement which has turned out to be unprofitable. But it is the performance of a common object which has to be frustrated and not merely the individual advantage which one party or the other may have gained from the contract. It would, in my opinion, be most unfair to the plaintiff to imply such an intention. For these reasons I am of opinion that, even assuming clause 10 of the agreement did not commence to operate before an actual delivery, the plea of frustration fails.

But I have already said that in my opinion clause 10 came into operation at the end of August 1947, and Mr. Barwick admitted that this weakened the defendant's case on frustration because the clause expressly provides for the performance of the agreement being only suspended on the occurrence of many events which otherwise might have worked a frustration. For instance, the clause contemplates the existence of a state of war hindering or preventing performance. It applies to an existing or future state of war. It is a very wide clause and is to operate during the continuance of the agreement, so that the change in circumstances would have to be very sweeping indeed to justify a Court holding that, although the mere lettering of the clause would include what had occurred, the foundation of the agreement had, nevertheless, gone because the occurrence was beyond anything which the parties could reasonably have contemplated when they entered into the agreement. In Denny

Mott & Dickson Ltd. at pp. 269, 270, Viscount Simon L.C. points out that the majority of the cases where the doctrine of frustration has been applied have been cases "arising out of the last war and now out of the present war where a particular contract entered into before the war has been brought to a premature conclusion by war regulations which render it illegal and, therefore, prevent, the due performance of some of its obligations or the due enjoyment of some of the rights under the contract". The agreement of 2nd September 1946 was not entered into before the war. It was entered into a year after hostilities had ceased but whilst a state of war still existed. It was entered into whilst the Import Licensing Regulations were in force and whilst the Liquid Fuel Regulations were also in force although there was reason to believe that the latter would expire with the National Security Act on 31st December 1946.

The regulations are restrictions of a government authority within the meaning of the clause, so that the parties expressly contemplated that such restrictions might exist and provided for them. They were hindrances that were foreseen and, therefore, unlike the hindrances to the performance of the contracts discussed in Veithardt & Hall Ltd. v. Rylands Bros. Ltd. 116 L.T. 706, and many other cases where the express condition did not apply to the subsequent event rendering the further performance of the contract impossible.

The substantial question therefore appears to be whether within the meaning of clause 10 of the agreement there existed government restrictions which hindered or prevented the defendant from delivering motor spirit in accordance with the terms of the agreement. It is clear that at all relevant times the defendant was authorised to import more motor spirit than it required to supply the plaintiff so that the Import Licensing Regulations did not prevent the defendant performing the agreement. The question is whether the defendant was hindered from performing the agreement. The defendant relief upon Tennants (Lancashire Ltd.) v. C.S.Wilson & Co.Ltd. 1917 A.C.495. In that case the appellants by a contract dated 12th December 1913 had contracted with the respondents to sell to the respondents its requirements of magnesium chloride over the year 1944, estimated at from 400 to 600 tons, the quantity to be at buyers option, to be delivered in equal monthly instalments. The conditions annexed to the contract provided that deliveries might be suspended pending any contingencies beyond the control of the sellers or buyers (such as fire, accidents, war, strikes, lockouts, or the like)

causing a short supply of labour, fuel, raw material, or manufactured produce, or otherwise preventing or hindering the manufacture or delivery of the article. On the outbreak of war on 4th August 1914 the appellants had 17 running contracts, including the contract with the respondents, for the supply of magnesium chloride. Prior to the outbreak of war the appellants were able to purchase an unlimited quantity of the chemical in Germany and in small quantities from other manufacturers. On the outbreak of war it became impossible for the appellants to purchase sufficient quantities of the chemical to perform the 17 contracts and they could only have supplied the respondents if they had done so in preference to all other customers. Between August 1914 and the end of that year the appellants obtained 589 tons of the chemical of which they sold 287 tons to persons with whom they had no contracts and the balance to customers whose contracts had been suspended at largely increased prices. The House of Lords held that, apart from the question of price, the evidence showed a shortage in the supply of the chemical which hindered delivery by preventing the sellers from fulfilling their obligations to their customers in the ordinary course of business and that the suspension was justified. At p. 510 Earl Loreburn said that the appellants "could have obtained enough to supply their contract with the present respondents if they had disregarded other contracts, and other business necessities in order to satisfy the respondents. To place a merchant in the position of being unable to deliver unless he dislocates his business and breaks his other contracts in order to fulfil one surely hinders delivery". At p. 515 Lord Dunedin said "It is also, I think, quite evident that a supply sufficient only for the merchant's needs for his usual customers hinders him in delivery of the full amount to one customer, and that the words used clearly contemplate this position". At p.520 Lord Atkinson said "The whole argument of the respondents has been directed to show that the appellants could have obtained the 240 tons necessary to fulfil their particular contract, and that the appellants were bound to supply them in preference to all

others. The respondents were to get what they contracted for, and, if their contention be sound, the other customers were to be left with a cause of action. But the delivery, which might be prevented or hindered, was not the mere delivery to one purchaser amongst many of the quantity purchased by him, but delivery under the normal engagements of the appellants' trade to the whole body of the customers to whom they were bound to deliver in the year 1914. At p. 522 Lord Shaw said "The condition appears to me to be one applicable to a hindrance in the delivery of an article of trade in the ordinary and usual course of trade in such an article". At p. 526 Lord Wrenbury said "The delivery of the article in condition 1 does not mean that the supply was insufficient to implement the respondent's contract ignoring all others but in sufficient to a substantial and not an illusory amount to admit of delivery of the article, i.e. magnesium chloride, to whomsoever was entitled to require delivery". As I understand the speeches of Their Lordships the hindrance arose from the fact that the appellants were unable to purchase sufficient quantities of the chemical to supply their customers under the 17 running contracts and this authorised the appellants to suspend deliveries under them all. Since the deliveries were rightly suspended it was immaterial that the appellants sold 287 tons to persons with whom they had no contracts of sale. Tennants Case has been followed and applied in Peter Dixon & Sons Ltd. v. Henderson Craig & Co.Ltd. 1919 2 K.B. 778 and Pool Shipping Co.Ltd. v. London Coal Co. of Gibraltar Ltd. 1939 2 A.E.R. 432. In the last mentioned case Branson J. at p. 436 said that in Tennants Case "it was held that the Court was entitled to look beyond the two people, the seller and buyer, and consider what were the seller's commitments to other persons under contracts which existed between them". Tennants Case is, in my opinion, distinguishable from the present case on its facts and does not assist the defendant. The defendant had at all times ample motor spirit to fulfil all its contracts. Alba was in a similar position. All that the defendant had to do in order to supply

the plaintiff was to reduce the supply of motor spirit to its pumps. Alternatively it could have supplied the plaintiff through Alba by causing Alba to reduce the supply of motor spirit to its pumps. This would not have involved any breach of contract on the part of the defendant or Alba. The case is quite different from E. Hulton & Co.Ltd. v. Chadwick Taylor & Co. 122 L.T. 66, where the regulations only permitted the respondent to import sufficient paper to supply two-thirds of its contractual obligations to each of its customers. The fact that the defendant's imports of motor spirit were restricted did not hinder or prevent it delivering motor spirit to the plaintiff in accordance with the agreement. Only a dislike of the loss of profit involved stood in the way. The restrictions referred to in clause 10 of the agreement are, in my opinion, valid restrictions and do not include invalid regulations. Even if they do, the Liquid Fuel Regulations were not a hindrance or prevention because they did not hinder or prevent the defendant performing its contract through Alba. Clause 10 also provides that the defendant is excused from deliveries whenever it is hindered or prevented from doing so by anything beyond its reasonable and practicable control, but this provision, though relied on, does not appear to me to assist the defendant. I am therefore of opinion that clause 10 is not a defence to the action.

Accordingly the plaintiff is entitled to recover damages for any failure by the defendant to supply it with motor spirit on receipt of orders which were proper orders under the agreement. The order of 18th December 1947 for 10,000 gallons to be delivered in January 1948 was a proper order. The orders of 24th June 1948 for 90,000 gallons to be delivered in January and 100,000 gallons to be delivered in each of the months of February, March, April and May were not proper orders. The orders of the same date for 100,000 gallons to be delivered in June and 100,000 gallons to be delivered in July were proper orders. It is common ground that the proper way to measure the damages is to apply the second rule in Hadley v. Baxendale and to ascertain as best one may the profits which the defendant would have made if the motor spirit had been supplied pursuant to these orders. In the months in which these orders

were given the plaintiff was receiving supplies from Sleigh for its retail business. Sleigh supplied 16,702 gallons in January, 15,162 gallons in June and 16,500 gallons in July. While I am prepared to hold that the plaintiff could have profitably sold the 10,000 gallons ordered for January in addition to the motor spirit supplied by Sleigh, I am not prepared to hold that the plaintiff could have profitably sold more than 30,000 gallons of the June order in addition to the motor spirit supplied by Sleigh or that of the 100,000 gallons ordered for July the plaintiff could have profitably sold more than 80,000 gallons excluding the motor spirit supplied by Sleigh. Further I am not prepared to hold that the plaintiff could have sold these 120,000 gallons at more than 3d. a gallon profit or, in other words, that it would have made more profit from these sales than £1,500. From this amount there must be deducted the £356 profit made by the plaintiff on the sale of the motor spirit supplied by Sleigh in July, which leaves a nett amount of £1,144. Accordingly I give judgment for the plaintiff for £1,144 with costs, including costs of pleadings, interrogatories, discovery, shorthand notes of evidence and proceedings at the trial in this Court and in the Supreme Court.