House of Lords before Lords Slynn of Hadley; Nolan; Steyn; Hope of Craighead; Hutton. 20th May 1998.

LORD SLYNN OF HADLEY ; My Lords,

The three defendant companies in these proceedings are licensees of the Trent Gas Field ("Trent") in the southern North Sea. The plaintiff company ("Total") buys gas and resells it in the United Kingdom for industrial and domestic purposes. Each of the defendants entered into an identical Letter Agreement with Total dated 15 February 1995. Since the issues between Total and the defendant companies were the same it has been convenient throughout to refer only to the agreement with the first defendant ("ARCO").

By the Letter Agreement ARCO and Total agreed to execute a "Fully-Termed Agreement" for the sale by ARCO and the purchase by Total of 50 per cent. of ARCO's interest in the natural gas in Trent. The Fully-Termed Agreement was to be substantially in the form of, and with no material changes to, points 1-14 in the Letter Agreement and the draft of an Agreement attached to it. The latter provided that the Fully-Termed Agreement "shall include the conditions precedent detailed in Clause 2.8 of the Draft Agreement" attached to the Letter.

Clause 2 was headed "Duration, Termination and Conditions Precedent" and it included Clause 2.8 which was headed "Approvals, Consents and the Allocation Agreement." That clause provided:

"2.8.1 This Agreement is conditional on:

(i) the Seller securing all relevant approvals from the Secretary of State for Trade and Industry of a development plan for the Reservoir compatible with its obligations under this Agreement.

(ii) the Seller receiving or procuring the receipt of all necessary consents for (a) the construction of the Delivery Facilities (including any modifications to the same required before the First Delivery Date) and; (b) the construction of additional facilities and/or modifications to or at the Delivery Terminal; and

(iii) the Seller becoming party to the Allocation Agreement.

"2.8.2 The Seller shall use its reasonable endeavours to obtain the approvals and consents and become party to the Allocation Agreement referred to in Clause 2.8.1 above by 1st March 1996. In using its reasonable endeavours to become a party to the Allocation Agreement, the Seller shall not be obliged to accept onerous contractual obligations and/or make an unusual or excessive payment (or payments) which (a) all other parties to the Allocation Agreement do not or would not have to accept and/or make; and/or (b) a Reasonable and Prudent Operator would not accept and/or make.

If the approvals and/or consents are not obtained by 1 March 1996, either the Seller or the Buyer may terminate this Agreement at any time thereafter provided that the Seller shall not be entitled to so terminate this Agreement if the Seller has not used reasonable endeavours to obtain any approval and/or consent which has not been obtained by such date."

Two important expressions used in this Clause are defined in Clause 1.1. The "Allocation Agreement" means "the Agreement(s) which will provide, inter alia, for the commingling, allocation and attribution of natural gas at the Delivery Terminal;" which was stated to be the Amoco Bacton gas terminal situated at Bacton, Norfolk. Secondly, "First Delivery Date" means "the Day, established in accordance with Clause 2.1, on and from which Natural Gas produced from the Reservoir is first to be delivered to the Buyer in accordance with the terms of this Agreement;"

Clause 2.1 gave the Seller, ARCO, the option to fix the First Delivery Date within the period 15 September--15 December 1996 inclusive. The Seller was, however, required to give the Buyer, Total, notice of the following periods, within which the Seller expected the First Delivery Date to fall:

"(a) by 1 March 1996 two months falling within the three month period;

b) by 1 May 1996 one month falling within the two month period."

Thereafter ARCO undertook to give 60 days' notice of its chosen First Delivery Date within the one month period. Provision was made as to what was to happen if each of these notices was not given but the relevant provision for the purposes of the argument in this case is that, if notice of both the two month and the one month periods was not given, the First Delivery Date was to be 15 December 1996.

Thus ARCO, with the obligation to use reasonable endeavours to obtain the necessary consents and approvals and to become party to the Allocation Agreement, had the unilateral right to fix the First Delivery Date. It could do that to suit its own arrangements.

Apart from these clauses of particular relevance to the present dispute the Letter Agreement and the Draft Agreement contained detailed provisions as to quantities and rate of supply, as to price and payment, as to quality and as to what was to happen on default. It is not necessary to set out these provisions but it is right as the appellant stresses to bear in mind the nature and the matrix of the agreement.

The gas reserves in Trent were estimated at the time of the Letter Agreement at 190 billion cubic feet and the life of the field at about 14 years. Developing an off-shore gas field involves massive capital investment on the part of the developer--from exploration, through design, to construction of the wells, the off-shore platforms and pipelines and the modifications needed at the on-shore terminal. The gas having left the field through a branch line to join the main pipeline to the terminal commingles with other gas and has to be processed to meet the necessary specifications before it is delivered by the Seller to the Buyer. For all this investment it is an advantage to the Seller to have a long-term contract, "a life of field depletion contract," for the full exploitation of the field until it is abandoned when it is no longer economically worthwhile to continue and to have agreed annual quantities which the Buyer will take. It is also an advantage to the Buyer who looks for long-term supply enabling the Buyer to plan its own onward contract. From the Buyer's point of view it can be no less important that the daily quantities of gas to be taken may be varied according to his needs and the Draft Agreement allows quantities to be nominated by the Buyer on a daily basis (including a zero

nomination) but subject to an obligation to take a minimal annual quantity for which it must pay if it does not take and to an adjustment of price if gas is not delivered on time but made up in later periods. This provides both flexibility and security for the Buyer.

But central to the project where, as here, gas is to be delivered to a terminal by a number of users of the facilities is the Allocation Agreement by which the quantities of gas leaving the terminal after necessary processing can be allocated and attributed to each user after allowance has been made for losses during transport and processing.

The relevant events following the signing of the Contract can be stated quite shortly. ARCO complied with all the provisions of Clause 2.1. Thus it gave notice on 28 February 1996 of the two month, period fixed at 1 October 1996--30 November 1996. On 29 April 1996 it gave notice of the one month period, fixed at 1 October--31 October 1996 and on 28 August 1996, it gave notice of the First Delivery Date which it fixed at 31 October 1996.

ARCO obtained the approvals and consents referred to in Clause 2.8 by 1 March 1996. ARCO did not, however, become a party to the Allocation Agreement by 1 March 1996 but it has not been suggested that it failed to use reasonable endeavours to do so.

It is agreed that in February 1995, the time of the contract, when much work had been done, but when much more remained to be done, it was anticipated that the code setting out the rights and responsibilities of users of the off-shore gas transportation system would be introduced in October 1995 but this did not happen until March 1996. By a letter dated 29 March 1996 ARCO, in reply to a question from Total asking for confirmation that ARCO had become a party to the Allocation Agreement, said that AMOCO was responsible for drafting the Allocation Agreement and that ARCO was using reasonable endeavours to expedite the signing. During the summer discussions took place about the Fully-Termed Agreement and on one draft of that agreement, prepared for a meeting in September, Total wrote: *"Given the proximity of the FDD, please advise on the status of the Allocation Agreement."* In September ARCO proposed a later start-up date but Total did not accept this.

Prior to the First Delivery Date, fixed by ARCO, Total nominated daily quantities of gas for delivery from that date but on 30 October 1996 ARCO advised Total that: *"It is possible that the agreements governing allocation of Trent . . . gas at the AMOCO Bacton Terminal will not be signed on 30 October in which eventuality the Seller would be unable to deliver gas from Trent to Total until such time as the Agreements are signed."*

It was, however, said on the same day and again on 31 October that it was anticipated that, following agreement of the Bacton Plant Owners and User Field Group, amendments to the existing RDAA Allocation Agreement would be executed and the revised system of software be approved and operational so that gas could flow even though ARCO had not become a party to the Allocation Agreement. It is not suggested that these arrangements constituted ARCO becoming a party to the Allocation Agreement.

On 5 November 1996 Total wrote: *"We note . . . that the Allocation Agreement is not in place. Without prejudice to the consequences of this fact, we require details of the approval which you have secured from the AMOCO Bacton Terminal Owners and an explanation as to why, if this is indeed the case, properly nominated quantities of Trent gas are not yet being delivered to TGM."*

On 6 November ARCO wrote to say that the Allocation Agreement had been executed by all relevant parties on that day. ARCO explained that the Allocation Agreement originally planned had been replaced by alternative agreements under the provision of the existing allocation agreements at the Bacton terminal. *"These agreements together with the off-shore sub-allocation and attribution agreement comprise the 'Allocation Agreement' for the purposes of the Fully-Termed Agreement."*

By Clause 8 of the Draft Agreement the price agreed was 17.75p per therm subject to adjustment. By the time of the First Delivery Date and subsequently the market price was substantially less so that obviously it was from that standpoint in ARCO's interest to maintain the agreement and in Total's to be free to buy in the market. Nevertheless gas began to flow on 7 November and has continued to be supplied. The parties are in dispute as to whether the agreements made by ARCO constituted the Allocation and Attribution Agreement required by the Letter Agreement and the Draft Agreement and as to the legal basis upon which Total has taken these deliveries but neither of these matters falls to be considered in the present proceedings.

Total, however, issued a writ on 10 January 1997 claiming a declaration that it was not bound by the terms agreed in the Letter Agreement. In the Statement of Claim this was put on the basis that the condition precedent (entering into the Allocation Agreement) not having been satisfied by the First Delivery Date the rights and obligations of the parties under the Letter Agreement "have terminated and/or have ceased to apply." The defence delivered was, first, that the agreement did not provide any specific date by which the Allocation Agreement had to be entered into nor did it give any right to terminate the Letter Agreement if the Allocation Agreement was not entered into by any fixed date. The alternative defence was that, if either 1 March or 31 October 1996 were fixed dates for entry by ARCO into the Allocation Agreement, Total had waived any right to rely on ARCO's failure to do so. Before Jonathan Parker J. the alleged waiver defence was abandoned. The sole issue was simply expressed--did the non-fulfilment of the condition that ARCO enter into the Allocation Agreement, which was admitted, mean that on 31 October 1996 the Agreement terminated or that further performance of the Agreement was merely suspended and if so for how long.

The learned judge refused Total's claim and dismissed the action. In his view to describe the obtaining of an allocation agreement as a condition precedent could only mean a condition precedent to further performance or subsistence of the sale agreement. It was not a condition precedent to the coming into being of a contract. The clause was still to be seen as

a condition precedent if the result was that "it relieves one or both parties from liability for breach of contract so long as the condition remains unfulfilled, but on the footing that once the condition is fulfilled the contract will continue in full effect." If it had been intended that the contract would automatically terminate the draftsman, thought the judge, would have said so expressly. In his view the First Delivery Date had to be read as the target date since delay in starting the period would not shorten the period for delivery.

Moreover if performance were suspended Total retained a right to terminate under Clause 2.7.2 of the Draft Agreement in the event that no Allocation Agreement was in place by the end of the ensuing 12 months, but, in the meantime, the suspensory condition would operate to relieve ARCO wholly or partly of liability for a breach of its delivery obligations. To read the condition as meaning that the Agreement automatically terminated if the Allocation Agreement was not in place on the First Delivery Date introduced uncertainty, was not expressly provided for, as it would have been if the parties so intended and made no commercial sense. A failure to enter into the Allocation Agreement as a result of which deliveries could not be made fell within Clause 2.7.2 so that Total could not terminate the contract until there had been a failure to deliver for 12 months. "*Clause 2.7.2 is highly material to the construction of Clause 2.8"* since in that clause the parties have "*allowed for substantial slippage in the progress of the project"*. That is *"inherently inconsistent*" with Total's claim as to automatic termination on the First Delivery Date.

The Court of Appeal, (Nourse L.J. dissenting, Peter Gibson L.J., Otton L.J.) discharged the judge's order and declared that Total was not bound by the terms in the Letter Agreement and Draft Agreement attached to it.

Peter Gibson L.J. held that the condition in Clause 2.8.1(iii) was not a promissory condition, the breach of which by one party allowed the other party to treat the contract as terminated. It was, however, still a matter of fundamental importance to the contract and to be treated as a "*contingent condition*" or *"a condition precedent*." These constitute *"states of affairs which, if they do not exist at a designated time, either automatically bring the contract to an end or suspend the obligations thereunder."* Peter Gibson L.J. rejected the contention that the First Delivery Date was a mere target date. It was of crucial importance in the scheme of the agreement. There was no provision in the agreement as to the fixing of a new delivery date or as to the suspension of obligations during the period after the First Delivery Date had passed if no Allocation Agreement had been entered into. The resulting uncertainty for an unknown period left the Buyer wholly without remedy. There was no reason to prefer 15 December 1996 over the date chosen by ARCO itself. He rejected the argument that non-compliance with the condition resulted in suspension of the agreement. In his view it produced a termination of the agreement and none of the authorities cited on behalf of ARCO compelled a different conclusion. Per contra the cases cited on behalf of Total *"show that the non-fulfilment of the condition precedent when no time is fixed for the performance of the condition but the latest time for that performance has expired can cause a contract for sale to terminate, if it ever came into existence."* Otton L.J. delivered a judgment substantially agreeing with Peter Gibson L.J.

Nourse L.J. did not consider that the condition in Clause 2.8.1(iii) of the Draft Agreement was properly described as a condition precedent. *"Whilst the description emphasises the effect of the provision, it tells us nothing of the time by which the specified event is to occur."* He concluded that judged objectively it could not have been the intention of the parties that if *"ARCO should not become a party to the Allocation Agreement on or before the First Delivery Date the sale agreement should thereupon determine."* Having analysed the facts adverted to by counsel on both sides he concluded: *"That means that this is a case where the contract fixes no time for the fulfilment of the condition, so that it must be fulfilled within a reasonable time, the reasonableness of the time being determined objectively as at the date of the contract; as to the last point, see in* ***Re Longlands Farm*** *[1968] 3 All E.R. 552, 556B-C per Cross J.".*

He continued: *"I would therefore hold a reasonable time to have been such a period after the first delivery date as was reasonably required for it to be ascertained whether the allocation agreement would be concluded or not. I do not attempt to put a precise term on that period."*

It had, however, not expired by the time ARCO did on 7 September 1996, subject to Total's outstanding contentions, become a party to the Allocation Agreement.

On this appeal the issue before Your Lordships was agreed by the parties to be as follows: *"Whether a condition to which a contract for the sale and purchase of North Sea Gas was expressed to be subject, but for whose fulfilment no time was fixed, had necessarily to be fulfilled before the date fixed for the first delivery of gas so that the agreement automatically terminated if not fulfilled."*

Both sides accept that a time will come when, if the Allocation Agreement is not entered into by ARCO, the Letter Agreement will terminate. No-one suggests 1 March 1996 since ARCO's obligation up to that stage was not to enter into an Allocation Agreement by that date but to use reasonable endeavours to do so. Four possibilities remain--(a) the First Delivery Date contended for by Total, 31 October 1996; (b) the last day of the period within which the First Delivery Date had to be fixed by ARCO, i.e. 15 December 1996 (ARCO's second choice); (c) such a period after the First Delivery Date as was reasonably required for it to be ascertained whether the Allocation Agreement would be concluded or not, which could be earlier or later than 15 December 1996 as accepted by Nourse L.J. (ARCO's third choice); or (d) a reasonable period being not less than 12 months from the First Delivery Date i.e. not before 31 October 1998 and perhaps considerably later dependent on whether the commercial purpose of the contract could be seen to be frustrated (ARCO's first choice).

Which if any of these is to be taken must depend on the construction of the express words of, or the recognition of an implied term in, the Letter Agreement, bearing in mind, as the appellants stress, this being a commercial contract, the desirability of upholding rather than defeating the purpose of the contract between the parties.

The starting point for resolving this question is the provision in the Letter Agreement that the Fully-Termed Agreement "shall include the condition precedent detailed in Clause 2.8 of the Draft Agreement" and the provision in Clause 2.8.1 that "*This Agreement is conditional on: . . . (ii) the Seller becoming party to the Allocation Agreement.*" Since by Clause 1.2(c) *"All headings in this Agreement are used for convenience only and shall not affect the construction or validity of this Agreement;"* I leave aside the heading to Clause 2 *"Duration Termination and Conditions Precedent."*

It is clear that the word condition may be used in a number of different senses. As Lord Reid said in ***Wickman Machine Tool Sales Ltd. v. L. Schuler A.G.*** [1974] A.C. 235, 250H: *"In the ordinary use of the English language 'condition' has many meanings, some of which have nothing to do with agreements. In connection with an agreement it may mean a pre-condition: something which must happen or be done before the agreement can take effect. Or it may mean some state of affairs which must continue to exist if the agreement is to remain in force. The legal meaning on which Schuler relies is, I think, one which would not occur to a layman; a condition in that sense is not something which has an automatic effect. It is a term the breach of which by one party gives to the other an option either to terminate the contract or to let the contract proceed and, if he so desires, sue for damages for the breach."*

In this context Your Lordships have been referred to the discussion in Chitty on Contracts, 27 ed., (1994) chapter 12, pp. 570-573 as to the difference between promissory conditions and contingent conditions. Mr. Pollock Q.C. relies in particular on the passage in paragraphs to 12-025 where breach of a promissory condition by one party, which gives the other party the opportunity to treat himself as discharged from further performance of the contract: *"must be carefully distinguished from that of a 'contingent' condition, i.e. a provision that on the happening of some uncertain event an obligation shall come into force, or that an obligation shall not come into force until such an event happens. In this latter case, the non-fulfilment of the condition gives no right of action for breach; it simply suspends the obligations of one or both parties."*

In paragraph 12-026 it is said, as an example of a condition precedent that: *"the parties may enter into an immediate binding contract, but subject to a condition, which suspends all or some of the obligations of one or both parties pending fulfilment of the condition."*

On the other hand at paragraph 12-028: *"The obligations of one or both parties may be made subject to a condition that it is to be immediately binding, but if certain facts are ascertained to exist or upon which the occurrence or non-occurrence of some further event, then either the contract is to cease to bind or one or both parties are to have the right to avoid the contract or bring it to an end."*

I agree with Mr. Pollock that is important to keep promissory and contingent conditions separate but in my opinion there is a common factor. If the provision in an agreement is of fundamental importance then the result either of a failure to perform it (if it is promissory) or of the event not happening or the act not being done (if it is a contingent condition or a condition precedent or a condition subsequent) may be that the contract either never comes into being or terminates. That may be so, whether the parties expressly say so or not. ***Wickman Machine Tool Sales Ltd. v. L. Schuler A.G.*** [1974] A.C. 235, 262G per Lord Wilberforce. To adapt the words of Maugham J. in In re Sandwell Park Colliery Company: Field v. The Company [1929] 1 Ch. 277, 282 "*the very existence of the mutual obligations is dependent on the performance of the condition.*" For completeness I would substitute "*performance or fulfilment of the condition*" for *"performance of the condition."*

I do not, therefore, accept Mr. Pollock's argument that the effect of the failure of an event upon which further performance depends can only lead to the suspension of the party's obligation under the contract. In my opinion it depends on the proper construction of the contract as to whether on the non-happening of the event the parties' obligations are suspended or whether the contract ceases to bind. For the reasons given by Peter Gibson L.J. I do not consider that the three cases relied on by the appellants (***Charles H. Windshuegl Ltd. v. Alexander Pickering & Co. Ltd.*** (1950) 84 Ll.L.Rep. 89, ***Smallman v. Smallman*** [1972] Fam. 25 and ***De Oleaga & Co. v. West Cumberland Iron and Steel Co.*** (1879) 4 Q.B.D. 472) lead to the conclusion that the only effect of the breach of such a condition can be the suspension of the parties' obligations.

I agree with Mr. Pollock that the condition referred to in the Letter Agreement and in the Draft Agreement is not a promissory condition in the sense referred to by Chitty. There is no question therefore of a breach by ARCO being treated by Total as discharging Total from its further obligation. It is also clear that entering into the Allocation Agreement was not a condition precedent to the coming into being of the Letter Agreement. That agreement came into being on 15 February 1995 and imposed obligations immediately on both parties to it.

Is the provision as to entering into the Allocation Agreement a contingent condition?

It seems to me without any doubt that, in the light of the terms of the contract as a whole, entry into the Allocation Agreement was regarded by the parties as fundamental since without it gas could not flow to the Bacton Delivery Terminal and be supplied to Total. That was the whole purpose of the agreement. The parties called entry into the Allocation Agreement a *"condition precedent"* and said that the agreement was *"conditional"* on the Seller becoming a party to the Allocation Agreement. As Lord Reid said in ***Wickman Machine Tool Sales Ltd. v. L. Schuler A.G.*** [1974] A.C. 235, 251 in seeking to discover intention as disclosed by the contract as a whole "*Use of the word 'condition' is an indication--even a strong indication--of such an intention but it is by no means conclusive.*" It is a strong indication here. Clause 2.8.1 in the present agreement is, moreover, the only clause which specifies matters on which the agreement is *"conditional"* and which are said to be *"conditions precedent."* In my opinion Clause 2.8.1 plainly makes entry into the Allocation Agreement a contingent condition or a condition precedent to the obligation to deliver and take quantities of gas under the agreement.

On this basis the issue between the parties is thus a narrow one, though, as the division of opinion in the courts below shows, not an easy one -viz since it was clear that the parties intended nomination of quantities of gas to be made and

nominated quantities of gas to be delivered with effect from the First Delivery Date, did the failure to enter into the Allocation Agreement mean that Total was no longer bound by the agreement; or did it mean that the obligations in relation to delivery and acceptance were suspended until ARCO did subsequently enter into the Allocation Agreement so long as it did so within the period found by Your Lordships to be an appropriate period.

There are pointers both ways. In favour of *"suspension"* Mr. Pollock has argued that a seller would not enter into a contract involving this massive investment unless he could be satisfied that he had a long-term contract assuring a predictable return on his investment in the development of the field, particularly since it was anticipated that the depletion of the Trent field would take some 14 years. It is only if the commercial purpose of the contract became frustrated that the parties would envisage termination other than pursuant to specific clauses of the agreement. Here there are provisions for termination--e.g. if the consents and approvals are not obtained by 1 March 1996 (Clause 2.8.2); by the buyer if deliveries are not made for twelve months (Clause 2.7.2) unless by reason of force majeure when either party may determine if the deliveries are not made for 18 months (Clause 14.6)--but there is not any provision for termination if the Allocation Agreement is not entered into in Clause 2.8.2 or elsewhere. There was evidence before Jonathan Parker J that it commonly occurred that allocation agreements were completed just before the first gas is delivered. This indicates, it is said, that the parties would be unlikely to consider that the whole contract was off if the Allocation Agreement was not completed by the chosen First Delivery Date. Moreover the provision for Default gas and substitution gas, for flexibility in nominating the Daily Contract Quantity, subject to the Annual Contract Quantities established, and the fact that under the Letter Agreement the First Contract Year may, depending on the choice of the seller begin at any time between 15 September and 15 December 1996 all indicate some flexibility and recognise that there may be some slippage in performance of the contract once the contractual obligation has come into being. All these points have been developed by Mr. Pollock Q.C. in seeking to lead to ARCO's primary case that a reasonable period of one year from the end of the period within which the First Delivery Date must fall should be allowed for ARCO to complete the Allocation Agreement without the contract coming to an end. From a commercial point of view there is obviously much force in many of these points.

The flaw in ARCO's argument, however, it seems to me at the end of the day is that it does not give sufficient emphasis to the importance of the First Delivery Date in the scheme agreed to by the parties. To ARCO before the judge this was a mere "target date;" before your Lordships it is said to be no more than the *"starting point . . . for the fourteen year period during which gas is to be supplied under the contract."* Contrary to this submission, but in agreement with the three members of the Court of Appeal I consider, to use the words of Otton L.J., that *". . . the First Delivery Date . . . once determined . . . is central to the intended operation of the agreement between the parties."*

That is the date fixed by ARCO (not less than 18 but up to 21 months after the signing of the contract) on and from which natural gas from Trent is first to be delivered to Total in accordance with the terms of the agreement. Whichever date is fixed between 15 September and 15 December 1996 establishes the beginning of the First Contract Year. It terminates the period in which modifications of the Delivery Facilities are taken into account for the purposes of Clause 2.8.1(ii); it fixes the period during which ARCO may deliver commissioning gas to test and commission the Delivery Facilities (Clause 2.9(i)); it fixes the period during which Total shall give notice to ARCO of the quantities of gas required (Clause 6.5 (b)). It fixes the months in which ARCO is to begin to render a statement to Total of Total's nominations for the preceding month (Clause 10.1). The contract provides for the parties' rights and remedies in relation to delivery and receipt of gas to begin from that date. There is no provision, once the First Delivery Date has been fixed, for it to be altered and neither side suggests that it can be altered. It is thus the date which once fixed is certain and from which the parties can begin to achieve the essential purpose of the agreement.

If the Allocation Agreement has not been entered into by that date then the gas cannot flow and it is to be noted that ARCO had not only twelve months from the signing of the Letter Agreement to 1 March 1996 to use its reasonable endeavours to complete the Allocation Agreement, but also a further period of between six-and-a-half and nine-and-a-half months (to be decided by ARCO in its entire discretion) before the gas was to flow. It is impossible to think that ARCO would not have had the First Delivery Date in mind when negotiating to enter into the Allocation Agreement, and conversely that on 28 August 1996 in fixing the First Delivery Date as the last day of the period of one month which it had chosen previously that ARCO did not have the need to complete the Allocation Agreement in mind. Even ARCO accepts that from the First Delivery Date, if there is no Allocation Agreement, the parties' rights are affected. ARCO says that they are merely suspended, though there is no mention in the agreement of the suspension of obligations or rights and nothing to indicate what terms are to apply during the period of the suspension. Since the First Delivery Date remains fixed, so that all the various notices have to be given in periods fixed by that date under the terms of the agreement, these notices may be wholly impracticable if the delivery of gas is not to begin until the Allocation Agreement is made at a later date.

As the delivery of gas is dependent on the making of the Allocation Agreement it seems to me not surprising that the parties should have provided in Clause 2.8 that "this Agreement is conditional on . . . (iii) the Seller becoming party to the Allocation Agreement." That seems to me to mean that if this condition is not fulfilled the agreement comes to an end.

But by when must the condition be fulfilled? It seems to me that the natural meaning of the clause is that it must be fulfilled in order to allow the First Delivery Date to be put into effect and that if looked at at the date of the contract (15 February 1995) that is what the parties would be likely to have said in the context of the scheme which they had set up.

I am not persuaded that any of the other times suggested is preferable or commercially more sensible. True a later date would have given ARCO more time and the Allocation Agreement would soon have been completed in fact. I reject, as did all the members of the Court of Appeal, ARCO's primary case that this agreement should be suspended for not less

than one year from 15 December 1996. To keep Total tied and in doubt for such a long period seems to me to be wholly unreasonable. Contrary to ARCO's submission I consider that Clause 2.8 is not there just to protect ARCO in case it is unable to deliver because other parties prevent the completion of the Allocation Agreement. It was there also to protect Total from being uncertain as to when deliveries would begin, thereby making difficult its own arrangements for fulfilling onward contracts of sale--a problem rightly acknowledged by ARCO in its letter to Total of 30 October 1996 even if in respect of a short period. There ARCO say *"We recognise the uncertainty this may cause the Buyer in predicting physical delivery of gas and the Sellers are still prepared to remove the uncertainty by agreeing late startup provisions, if you so desire."* How much greater would have been the uncertainty if Total thought it was bound to wait for more than twelve months from the First Delivery Date or from 15 December 1996.

Nor do I think that Clause 2.7.2, which entitles Total to determine the agreement only after ARCO has defaulted on deliveries for 12 months, is of assistance. That clause in my opinion is dealing with a situation where the gas could flow because there is an Allocation Agreement and the First Delivery Date has passed but gas has not been delivered. It does not mean that the Seller should have 12 months to make the Allocation Agreement.

For similar reasons I do not accept ARCO's third choice, that which appealed to Nourse L.J., i.e. "such period after the First Delivery Date as was reasonably required for it to be ascertained whether the Allocation Agreement would be concluded or not." That seems to me to leave matters in too much doubt and it might be difficult to operate and might well mean in practice that the date by which the condition was to be fulfilled became the date when it was in fact fulfilled. If that were intended the parties could just as well have said that the First Delivery Date shall be a specified date after the date when the Allocation Agreement has been entered into.

Moreover it, like the other two suggested alternatives, leaves the condition to be satisfied after the First Delivery Date, which seems to me to be contrary to the intention of the parties deduced from a consideration of the contract as a whole. It is difficult to see why, if the reasonable period is to be assessed at the date of the contract (as I think it should see ***Re Longlands Farm, Alford v. Superior Developments Ltd.*** [1968] 3 All E.R. 552, it should be necessary to fix any time after the First Delivery Date.

That leaves ARCO's second choice, 15 December 1996. That has the merit of some certainty since it was the last date on which the First Delivery Date could fall and it was the date to be taken if ARCO failed to give the necessary notices. But it seems to me artificial to take that date. In the first place it ceases to be a relevant date either as the potential end of the period or as the "default date" once the First Delivery Date has been nominated. In the second place the First Delivery Date was chosen in its discretion by the Seller and it seems to me that it would be strange to give ARCO more time within the overall period once it had fixed the date.

Thus independent of authority I arrive at the conclusion that the appropriate date is the first Delivery Date. The choice of the First Delivery Date is however, in my view consistent with the approach of the court in three cases relied on by Mr. Kentridge Q.C. Those cases are concerned it is true with the sale of land but it seems to me that the principle established is applicable mutatis mutandis to other contracts. Like Peter Gibson L.J. and with respect to some expressions of opinion to the contrary in ***Perri v. Coolangatta Investments PTY Ltd***. (1982) 149 C.L.R. 537 I do not accept that they have no relevance to a contract of the present kind for the supply of goods even though it is a long-term instalment contract. Thus is Smith v. Butler [1900] 1 Q.B. 694 where a contract for the sale of land was conditional on the mortgagee consenting to the transfer of a loan to the plaintiff Romer L.J. said at page 699 *"to my mind it is reasonably clear that the vendor has until the time fixed for completion, or, if no time for completion is fixed, then a reasonable time, in which to procure the assent of the mortgagee to the acceptance of the purchaser as mortgagor"*.

In ***Aberfoyle Plantations Ltd. v. Khaw Bian Cheng*** [1960] A.C. 115 (P.C) Lord Jenkins having referred to Smith v. Butler and to In re Sandwell Park, Colliery Company (supra) said: *"Before parting with these two authorities their Lordships would observe that the reason for taking the date fixed for completion by a conditional contract of sale as the date by which the condition is to be fulfilled appears to their Lordships to be that until the condition is fulfilled there is no contract of sale to be completed, and accordingly, that by fixing a date for completion the parties must by implication be regarded as having agreed that the contract must have become absolute through performance of the condition by that date at latest."*

Mr. Kentridge Q.C. has submitted in addition that a number of clauses would be quite unworkable unless the First Delivery Date is taken. Mr. Pollock totally rejects that contention. It seems to me that some of the clauses would be more difficult to operate but in view of the conclusion I have reached I do not think that it is necessary to decide whether they would be unworkable.

It is said to be unreasonable that the contract terminated on the First Delivery Date when ARCO was, it asserts but Total does not accept, able to enter into the Allocation Agreement a few days later, the answer is that exactly the same thing could happen if 15 December 1996 were taken as the dates determining the reasonable period for ARCO for comply with the condition. It might still need a few extra days. Mr. Pollock says that courts should be slow to produce an absurd result. I do not consider that to read this condition as meaning that if it is not complied with contractual obligations come to an end produces an absurd result. In the present case it seems to me that Total just as well as ARCO can argue that the result for which they contend is one which will be commercially justified.

Accordingly as a matter of the construction of this contract I hold that the time for the fulfilment of the condition precedent, i.e. entering into the Allocation Agreement by ARCO, was the First Delivery Date fixed by ARCO itself. In the circumstances since that condition was not fulfilled Total was no longer bound by the agreement.

I would therefore dismiss the appeal.

LORD NOLAN ; My Lords,
I have had the advantage of reading in draft the speech prepared my noble and learned friend Lord Slynn of Hadley. For the reasons which he gives I too would dismiss the appeal.

LORD STEYN ; My Lords,
The central question is whether on a correct construction of a long- term contract for the sale of gas it was discharged by reason of the non-occurrence of a condition. It is a contract of a type which is sometimes called a relational contract. But there are no special rules of interpretation applicable to such contracts: see McKendrick, The Regulation of Long Term Contracts in English law, essay in Good Faith and Fault in Contract Law, ed. Beatson and Friedman, 1995, 305. That is not to say that in an appropriate case a court may not take into account that, by reason of the changing conditions affecting such a contract, a flexible approach may best match the reasonable expectations of the parties. But, as in the case of all contracts, loyalty to the contractual text viewed against its relevant contextual background is the first principle of construction.

The Trent Reservoir
In 1995 Arco British Limited and two other companies were licensees of the gas field known as the Trent Reservoir which is situated in the southern basin of the North Sea. At that stage it was estimated that the economically recoverable gas reserves of the Trent Reservoir would last some 14 years. A platform has been installed at the Trent Reservoir. Gas is transported from the Trent Platform to the Amoco Gas Terminal at Bacton in Norfolk where the "*raw*" gas is processed. The Bacton Terminal is a multi-user terminal. It is therefore necessary for an owner of gas delivered to the Bacton Terminal, to become a party to the allocation agreement applicable to it. The allocation agreement determines by mathematical formulae how much gas leaving the terminal is to be treated as derived from each of the fields. When the processed gas leaves the terminal it enters the onshore transportation system and is delivered to purchasers of gas.

The context and basic contractual terms of the contracts
For the three licensees of the Trent Reservoir the conclusion of a long term contract for the sale of gas offered the advantage that the gas would be sold at pre-agreed terms over the life of the field, guaranteeing a minimum level of receipts. For potential purchasers of gas such a contract offered the attraction of security of supply and, among other things, some flexibility through nomination procedures. These are the principal commercial considerations which in February 1995 led to negotiations for a long term contract between the licensee companies and Total Gas Marketing Limited. Those negotiations resulted in the conclusion of three identical contracts between the licensee companies and Total for the sale and purchase of 50 per cent. of the economically recoverable reserves of the gas field. It will be convenient to refer to one contract only. It was structured as a "buyer's nominated" depletion contract. The Buyer is entitled to receive on a daily basis a supply of gas in response to properly made daily nominations during the operation of the contract. The Buyer is obliged to take or pay for an annual minimum quantity of gas. If the Seller fails to deliver the nominated daily quantity, the Buyer is entitled to substantial discounts.

The contractual terms impinging of the dispute
It is now necessary to describe in greater detail the terms of the contract so far as they are relevant to the dispute. The parties executed a Letter Agreement dated 15 February 1995 which provided for an agreement to execute a "Fully Termed Agreement" containing the terms of the Letter Agreement and otherwise substantially in the form of an annexed Draft 1 of an Agreement for the Sale or Purchase of Natural Gas. No further contractual document was executed but it is common ground that a binding contract was made on 15 February 1995. The Letter of Agreement provided that the agreement to be executed "shall include the conditions precedent detailed in Clause 2.8 of the Draft Agreement." Under the Draft Agreement the First Delivery Date is the date "on and from which National Gas produced from the Reservoir is first to be delivered to the Buyer." Because of the difficulty of specifying, far in advance, the exact date on which all arrangements will be in place to allow gas sales to begin, the contract contains a "funnel mechanism" whereby the Seller can select a first delivery date within an agreed "window." It works as follows:

"2.1 (a) . . .

(b) The First Delivery Date shall be within the period from 15 September 1996 to 15 December 1996 inclusive.

(c) The Seller shall give the Buyer the following notices of the period within which the Seller expects the First Delivery Date will fall:

(i) by 1 March 1996 a period of two (2) months falling within the period specified in Clause 2.1 (b) above; and

(ii) by 1 May 1996 a period of one (1) month falling within the period notified under Clause 2.1 (c)(i) above.

(d) The Seller will give the Buyer sixty (60) days prior notice of the First Deliver Date which date shall fall within the month notified under Clause 2.1(c)(ii) above.

(e) In the event of the failure by the Seller to provide notice under any of Clauses 2.1(c)(i), 2.1(c)(ii) and 2.1(d) above, the First Delivery Date shall be the last Day of any period previously notified under Clause 2.1(c)(i) and Clause 2.1(c)(ii) above. For the avoidance of doubt, if no periods are notified by the Seller in accordance with Clause 2.1(c), the First Delivery Date shall be 15 December 1996."

For convenience I will refer to a First Delivery Date which comes into existence as a result of a notice or notices by the Seller as *"the selected First Delivery Date*" and to the date, which becomes operative by default if no notices are given, as "*the residual First Delivery Date."* Substantively, I have to add that once a First Delivery Date is determined, it is fixed and cannot be altered except by agreement. Moreover, it is not a mere target date or starting point; it has a dispositive effect on the rights and obligations of the parties. Clause 2.7.2 is relied on by the Sellers. It reads as follows:

"2.7.2 The Buyer may terminate this Agreement if deliveries of Natural Gas have not been made by the Seller for a continuous period of twelve (12) months other than as a result of an event (or events) of Force Majeure."

The critical provisions of the Draft Agreement appear under the heading "Approvals, Consents and the Allocation Agreement." Those provisions read as follows:

"2.8.1 This Agreement is conditional on:

(i) the Seller securing all relevant approvals from the Secretary of State for Trade and Industry of a development plan for the Reservoir compatible with its obligations under this Agreement;

(ii) the Seller receiving or procuring the receipt of all necessary consents for (a) the construction of the Delivery Facilities (including any modifications to the same required before the First Delivery Date) and; (b) the construction of additional facilities and/or modifications to or at the Delivery Terminal; and

(iii) the Seller becoming party to the Allocation Agreement. 2.8.2. The Seller shall use its reasonable endeavours to obtain the approvals and consents and become party to the Allocation Agreement referred to in Clause 2.8.1 above by 1 March 1996. . . .

If the approvals and/or consents are not obtained by 1 March 1996, either the Seller or the Buyer may terminate this Agreement at any time thereafter provided that the Seller shall not be entitled to so terminate this Agreement if the Seller has not used reasonable endeavours to obtain any approval and/or consent which has not been obtained by such date."

The contract contained an elaborate Force Majeure clause, which provided that if force majeure subsisted for a period in excess of 18 months during which period no deliveries of gas were made to the Buyer, each party would be entitled to terminate the contract by giving 60 days notice to the other party. The contract contained no arbitration clause but it did provide for a resolution of points of difference by a duly appointed expert.

The fate of the conditions precedent

It is now necessary to relate what happened about the three conditions precedent. By 1 March 1996 the Seller had obtained the relevant approvals and consents specified in Clause 2.8, thereby complying with those two *"conditions precedent."* But the Seller had not yet become party to an allocation agreement. Under the *"funnel mechanism"* the Seller gave the following notices:

(a) On 28 February 1996 the Seller advised the Buyer that the First Delivery Date would be between 1 October 1996 to 30 November 1996.

(b) On 29 April 1996 the Seller advised the Buyer that the First Delivery Date would be between 1 October to 31 October 1996.

(c) On 28 August 1996 the Seller advised the Buyer that the First Delivery Date would be 31 October 1996.

Under the contract 31 October 1996 therefore became the First Delivery Date. Unfortunately, when that date arrived the Seller had not yet become a party to the allocation agreement. It is not alleged that the Seller was in breach of the obligation to use reasonable endeavours to become a party to the allocation agreement. But, by late 1996 there had been a downturn in gas prices and the Buyer decided to take advantage of the failure of the Seller to become a party to the allocation agreement to try to rid itself of a contract that had become unfavourable to it.

The proceedings

By a writ issued on 10 January 1997 the Buyer sought a declaration that they were not bound by the terms of the contract. Jonathan Parker J. dismissed the Buyer's claim and found in favour of the Seller. By a majority (Peter Gibson L.J and Otton L.J) the Court of Appeal allowed the Buyer's appeal and held that the contract was discharged by reason of the fact that the Seller had not become a party to allocation agreement by 31 October 1996. Nourse L.J. dissented.

The issues

On appeal to the House of Lord's the argument of the Buyer (the respondent) was that the Seller's failure to become a party to the allocation agreement by 31 October 1996 (the selected First Delivery Date) amounted to the non-occurrence of a condition which caused the contract to be automatically discharged. The Seller (the appellant) put forward three separate counter arguments. The first was that, despite the failure to conclude an allocation agreement, the contract was not brought to an end on the selected First Delivery Date (31 October 1996) or even on the residual First Delivery Date (15 December 1996). The Seller argued that the contract was merely suspended. This was the Seller's primary case and it was one which was in substance upheld at first instance by Jonathan Parker J. This argument was rejected by all three members of the Court of Appeal. Secondly, the Seller argued in the alternative to its primary contention that the contract could only be discharged if no allocation agreement was concluded by 15 December 1996. This argument was also rejected by all three members of the Court of Appeal. Thirdly, the Seller supported the reasoning of Nourse L.J. in the Court of Appeal. Nourse L.J. held that the condition requiring the conclusion of an allocation agreement had to be fulfilled within a reasonable time. He added: *"I would therefore hold a reasonable time to have been such a period after the First Delivery Date as was reasonably required for it to be ascertained whether the allocation agreement would be concluded or not."*

In the result the House has been asked to consider and choose between four suggested interpretations of the contract.

Clearing the decks: The terminology and structure of Clause 2.8

Before examining the rival arguments it is necessary to consider briefly the terminology and general structure of Clause 2.8. The contract provided for three separate "*conditions precedent*," viz in respect of consents, approvals and an allocation agreement. The word *"conditions*" and the phrase *"conditions precedent*" are used in a number of different senses in English law. Lewison identifies six current meanings of the word *"condition"*: see The Interpretation of Contracts,

2nd ed., (1997), p. 389. This is a source of recurring confusion. But the prospects of persuading lawyers to adopt a more rational terminology are bleak. After all, as a distinguished commentator has observed, *"there is probably no change in the law harder to achieve than one of terminology":* G.H. Treitel "*Conditions"* and "*Conditions Precedent*," 106 L.Q.R. 185, 192. Fortunately it is possible in the present case to deduce from the contractual context with tolerable certainty what the parties had in mind by the use of the word "*conditions"* and the phrase "*condition precedent*."

In civilian legal systems a condition is sharply distinguished from the actual terms of a contract. It is reserved for an external fact upon which the existence of the contract depends: see Cheshire, Fifoot, and Furmston, Law of Contract, 13th ed., (1996) 151. In English law a condition frequently means an actual term of the agreement. It is therefore necessary to distinguish between promissory and contingent conditions. Clause 2.8 is in promissory form insofar as it imposes a reasonable endeavours obligation on the Seller to secure the fulfilment of the conditions precedent. Nevertheless the three conditions operate contingently upon the non-occurrence of the contemplated events. The fact that in respect of approvals and consents Clause 2.8 provides for a bilateral option to terminate does not alter the basic contingent nature of the conditions. That brings me to what is meant by "*conditions precedent*" in the present contract. Traditionally, a distinction is made between conditions precedent and conditions subsequent. Given that one is dealing with contingent as opposed to promissory conditions, one can for present purposes say that a fact is a condition precedent to a contract for the creation of which it is necessary; and that a fact is a condition subsequent to a contract that it extinguishes: see Corbin on Contracts, 1960, vol. 34, s. 739; and the judgment of Stephenson L.J. in the Court of Appeal in ***Wickman Machine Tool Sales Ltd. v. L. Schuler A.G.*** [1972] 1 W.L.R. 840, 859E-G. On the other hand, *"condition precedent*" is sometimes used in the sense of a condition subsequent. That is not so surprising. The question is: condition precedent to what? And in this case the question can then only receive the answer: the operation of the contract.

Clause 2.8 is, however, structurally incomplete. It explicitly provides for a right to terminate if approvals and consents are not obtained by 1 March 1996. But, although there was a reasonable endeavours undertaking to become a party to an allocation agreement by 1 March 1996, the consequence of that date passing without the Seller becoming a party to the allocation agreement are not spelt out. But, during oral argument counsel were in agreement that, if no allocation agreement was concluded by 1 March 1996, the Seller remained under an obligation to continue to use reasonable endeavours to become a party to the allocation agreement. Such an implication is plainly necessary to render the contract workable. It may be of significance when that implied obligation of reasonable endeavours terminates: on the selected First Delivery Date (3 October 1996), on the residual First Delivery Date (15 December 1996), or even thereafter. On this point there was no agreement between counsel. This is an aspect to which I will have to return.

Choosing between the four interpretations

The question is which of the four interpretations put forward best matches the expressed contractual intent of the parties. This question must be considered in the light of the contractual language, the contractual scheme, the commercial context, and the reasonable expectations of the parties. And it must be judged as at the time of the conclusion of the contract, viz 15 February 1995. Approaching the matter in this way, I am satisfied that there are compelling reasons why two of the interpretations cannot be right, viz the Seller's primary construction and the construction upheld in the Court of Appeal by Nourse L.J. I will first explain my reasons for this view.

The Seller's Primary Submission: Only Frustration Ends The Impasse

Counsel for the Seller contended that even if no allocation agreement is concluded by the selected First Delivery Date or by the residual Delivery Date (15 December 1996) the contract is not discharged. Counsel submitted that in the absence of the Seller becoming a party to the allocation agreement the contract will only be terminated by operation of law, viz by commercial frustration. Invoking the analogy of Clause 2.7.2 he suggested that a delay of 12 months after 15 December 1996 in the Seller becoming a party to the allocation agreement would frustrate the contract. He emphasized the fact that there is no explicit provision stating that non conclusion of an allocation agreement by a given date would discharge the contract. He pointed out the enormous sums expended by the Seller in anticipation of a commercial relationship intended to last some 14 years. And he stressed that the approach to the construction of such contracts must take into account the commercial need for flexibility. But in my view there are a number of reasons which cumulatively show that this argument is unsustainable. First, despite the deliberate use of the word condition precedent in regard to the allocation agreement, the argument contemplates that the contract will never be discharged under and by virtue of the contractual provisions. It contemplates that, subject to discharge by frustration, the contract is simply suspended and continues. Given contractual language redolent of conditionality, as well as the fact of the indispensability of an allocation agreement to any performance, this construction is prima facie implausible. The contractual language shows that the parties contemplated that under the contract a time would come when it was too late for the condition regarding an allocation agreement to be fulfilled, and that the contract would then be discharged. On the other hand, the construction put forward on behalf of the Seller treats the words "condition precedent", so far as it relates to the Seller becoming party to an allocation agreement, as devoid of meaning. It is true, of course, that there is no provision setting out the consequences of the non-occurrence of this particular contingent condition. But, in regard to contingent conditions, it is not necessary for parties when stipulating for a condition precedent or a condition subsequent to spell out the consequences of non-occurrence of the condition: these are prima facie inherent in the use of such terms: compare the observation of Lord Wilberforce in **Wickman Machine Tool Sales Ltd. v. L. Schuler A.G.** [1974] A.C. 23J, 262G which is unaffected by the difference of opinion in **Wickman**. In this legal context an interpretation which gives no effect to the words "*condition precedent*", so far as it applies to the allocation agreement, ought to be received with an initial sense of incredulity. Secondly, it is common ground that a reasonable endeavours obligation rested on the Seller to become a party to an allocation agreement even after 1 March 1996 if no such agreement was concluded by that date. This must be an implied obligation. It would be strange if such an implied obligation lasted beyond the residual First Delivery Date

(15 December 1996). And it would make no commercial sense to say that, although the reasonable endeavours obligation to become a party to the allocation agreement would lapse at least on 15 December 1996, the contract would still continue beyond that date and could only be terminated by frustration. Thirdly, a suspension of the contract for 12 months after 15 December 1996 is commercially an inordinately long delay. But one cannot even be confident that, if no allocation agreement was in place, the contract would on analogy with Clause 2.7.2. become frustrated after 12 months. The analogy of the 18 months period under the force majeure Clause might be more appropriate. In any event, the doctrine of commercial frustration operates prospectively: the question of discharge is to be determined by reference to the time of the occurrence of the allegedly frustrating event, i.e. the non conclusion of the allocation agreement: see G.H. Treitel, Frustration and Force Majeure, 1994, 365-366. It is a matter of speculation how long a prospective delay would be regarded as sufficient to bring the contract to an end by operation of law. The judge would have to make a value judgment. The result would be uncertainty and unpredictability. Yet the Buyer, as a purchaser for resale in the domestic market, would have wished to know with certainty by a fixed date whether its agreement with the Seller is effective, or whether its supplies would have to be sought elsewhere. The Seller would have been aware of this fact. The primary argument of the Seller is therefore contrary to the reasonable expectations, which the parties must have shared. And the parties chose language which is apt to shut out the spectre of prolonged uncertainty. It shows that the parties wanted to know where they stood, and would not have wanted to await the uncertain outcome of a dispute as to frustration. For these reasons I reject the Seller's primary argument.

For the avoidance of doubt I must make clear that my conclusion is entirely uninfluenced by the argument of the Buyer based on the decision in **Aberfoyle Plantations Ltd. v. Khaw Bian Cheng** [1960] A.C. 115, and in particular Lord Jenkins' canon of construction at p. 124 that "*Where a conditional contract of sale fixes a date for the completion of the sale, then the condition must be fulfilled by this date*". Having come to a conclusion adverse to the Seller on the language of the contract, Peter Gibson L.J stated that ***Aberfoyle*** and like cases gave by analogy some support for his conclusion. Like Jonathan Parker J. at first instance, and Nourse L.J. and Otton L.J. in the Court of Appeal I consider that there is such a vast difference between the simple situation under a typical sale of land and the complex position under a long-term contract for the sale of gas that the canon of construction extracted from Aberfoyle can provide no assistance.

But, as I have explained, the primary argument of the Seller must fail on a proper contextual interpretation of the contract.

The construction of Nourse L.J.

While counsel for the Seller formally placed before the House the construction adopted by Nourse L.J., he accepted in oral argument that it involves a test which in practice would be difficult to apply. It also finds no support in the language of the contract. I am afraid the contract cannot be upheld on this basis.

The real choice: Termination on the selected First Delivery Date or at the Residual Delivery Date

My Lords, it follows that the contract would become discharged either by a failure to conclude an allocation agreement by the selected First Delivery Date (1 October 1996), or by the residual First Delivery Date (15 December 1996). Which date best matches the intention of the parties? This is a narrow but not entirely easy point on which my views have fluctuated. Counsel for the Seller argued that if the market had moved against the Buyer, the latter should not be prejudiced by an automatic termination prior to 15 December, simply because the Seller happens to have nominated an earlier First Delivery Date. Equally, he argued, if as happened the market moved against the Seller, it should not be prejudice as a result of notices given months earlier. Counsel emphasized the random nature of such results. These are considerations of some weight. But perhaps such results can to some extent be said to be inevitable in a provision for automatic termination in the event of non-occurrence of a contingent condition dependent on the will of a third party or parties. But, in any event, there are contrary considerations. Given the need to imply a continuation after 1 March 1996 of a reasonable endeavours obligation to procure an allocation agreement, the question arises whether that obligation terminates on the selected First Delivery Date (1 October 1996) or on the residual First Delivery Date (15 December 1996). It seems right to imply such an obligation only to the extent that it is necessary to render the contract workable. On this supposition the reasonable endeavours obligation terminated on the selected First Delivery Date. In these circumstances it would be curious to say that the contract continues after the obligation to use best endeavours to become a party to an allocation agreement ends. More broadly I agree with the submission of counsel for the Buyers that, for the purpose of the narrow issue under consideration, the straightforward commercial construction is that in the event of a First Delivery Date being selected the residual First Delivery Date simply falls away for all purposes. The natural interpretation is that the condition precedent regarding an allocation agreement is linked with the operative First Delivery Date viz the selected First Delivery Date or in default of one the residual First Delivery Date. While this issue was finely balanced, I have been persuaded that the Buyer's construction is correct. The contract was therefore discharged on 31 October 1996.

Conclusion

My Lords, much as I would have wished to uphold this contract if that were possible, for the reasons I have given I am bound to conclude that the appeal of the Seller ought to be dismissed. Subject to disagreeing on the relevance of decisions such as Aberfoyle, I am also in substantial agreement with the reasons given by my noble and learned friend Lord Slynn of Hadley.

LORD HOPE OF CRAIGHEAD My Lords,

I have had the advantage of reading in draft the speech which has been prepared by my noble and learned friend Lord Slynn of Hadley. For the reasons which he gives I too would dismiss this appeal. I confess however that I have reached this conclusion with regret. It seems to me most unlikely that the parties to this agreement intended that it should

be capable of being terminated by reason only of the non-fulfilment of the condition about the Allocation Agreement once the so-called funnelling mechanism in clause 2.1 had been put into effect by the Seller to identify the First Delivery Date.

This was a commercial contract which, to the knowledge of both parties, was bound to involve the Seller in a good deal of preliminary expenditure in order to provide the facilities which were needed to deliver the gas which was to be supplied to the Buyer. Their bargain was struck against the background of a market for gas which had proved in the past to be extremely volatile. Substantial changes in the open market price of this commodity would be bound to affect the value of the investment by either party in the transaction. One of the purposes of an agreement of this kind is to eliminate the risk of having to carry the burden of such price changes. It is no secret that the reason why the Buyer wishes to terminate the agreement is that the market has now turned in its favour. It can obtain gas elsewhere more cheaply than it would have been required to take gas from the Trent Reservoir under the agreement. No doubt it will seek to renegotiate a fresh bargain with the Seller for the supply of the Trent gas at a more favourable price. The Buyer is not to be criticised if the wording of the agreement permits this course. But the court should be slow to lend its assistance. Commercial contracts should so far as possible be upheld. That is especially so where the party who seeks to preserve the contract has incurred expenditure after it was entered into with a view to performing it in the future over a period of many years. Almost every commercial enterprise depends upon the investment of capital with the expectation of profit in return. Long term commercial contracts are made in order to protect the value of the investment. It is disappointing to find that in this case it has not been possible to construe the agreement in such a way as to provide the Seller with the protection which it was designed to achieve.

From time to time in the course of the argument both in the courts below and in your Lordships House it has been suggested on the Seller's behalf that clause 2.8.2(c) was inserted into the agreement solely for its benefit. If that were so, it would have led inevitably to the dismissal of this action by the Buyer. It would have been open to the Seller to waive the condition at any time and to insist upon performance of the contract: ***Hawksley v. Outram*** [1892] 3 Ch 359. But, as Brightman J. pointed out in ***Heron Garage Properties Ltd v. Moss*** [1974] 1 W.L.R. 148, 153G-H, the answer to the question whether a stipulation is for the exclusive benefit of the party who seeks to waive it must be found upon the face of the contract. It is a question of construction.

In the present case it seemed to me, at one stage, that there were indications within the wording of the agreement that clause 2.8.2(c) was of this character. The differences between the treatment in clause 2.8.2 of the other two conditions precedent and its treatment of the condition about the Allocation Agreement must be taken to have been deliberate. The Seller was required to use its best endeavours to ensure that all three conditions were satisfied by 1 March 1996. The explanation for the choice of that date for all three conditions lies in clause 2.1, because the first step to identify the First Delivery Date had to be taken on or before that date. A relatively narrow window within which that date had to lie was laid down by that clause, no doubt for good commercial reasons as the parties could not afford to keep the matter in suspense indefinitely. But as to what was to happen after 1 March 1996 the three conditions were treated differently. Both parties were to be entitled to terminate the agreement at any time if one or other or both of the first two conditions were not satisfied. The clause is silent as to what the position was to be in regard to condition (c).

As to reason for this silence, the answer seemed to me to lie in the difference which clause 2.8.2 itself recognises between the consents and approvals to which the other two conditions refer and the Allocation Agreement which is the subject of clause 2.8.2(c). The consents and approvals had to be obtained from the Secretary of State and other agencies such as the Health and Safety Executive. It was uncertain at the date of entering into the agreement whether, and if so when, they would be available. The Allocation Agreement was a matter for negotiation on commercial terms with the other users of the Seller's facilities. Unlike the consents and approvals, it was something which was to bargained for. The Seller was protected by an express provision in the best endeavours clause against having to enter into such an agreement by 1 March 1996 upon terms which were unreasonable. But in the end of the day it would have had to become party to an allocation agreement at whatever price and on whatever conditions, however onerous, if it was to be able to supply gas to the Buyer from the Trent Reservoir. It might be thought that the Buyer had no need of protection against difficulty in obtaining an allocation agreement on terms which were not unduly onerous, as the whole expense of it was to rest the Seller and not on the Buyer. All the Buyer had to do was to insist upon the performance of the contract, which provided all that was needed for its protection once the First Delivery Date had been identified. It was the Seller who was in need of a provision in the agreement which would protect it in the event of such a difficulty.

These arguments were in need of careful scrutiny before they could be accepted as providing an answer in the Seller's favour in this case. No doubt for very good reasons, they were not developed by Mr. Pollock in the course of his address. So I do not wish to say any more about them. The fact that I have mentioned them at all is due solely to my unease that the way in which we have had to dispose of this appeal may be at odds with the commercial purpose of the agreement.

LORD HUTTON My Lords,

In the Agreement between the appellant ("Arco") and the respondent ("Total") Clause 2.8.1 provides:

"This Agreement is conditional on:

(iii) the Seller becoming party to the Allocation Agreement."

The issue arising in this appeal is whether the non-fulfilment of the condition set out in Clause 2.8.1(iii) by 31 October 1996, which was the First Delivery Date under the Agreement, operated to terminate the Agreement on that date or whether the non- fulfilment by that date operated only to suspend the obligations under the Agreement.

The relevant terms of the Agreement and the background to it have been set out in the speeches of my noble and learned friends, Lord Slynn of Hadley and Lord Steyn, and I refer only to two aspects of the Agreement which I consider to be of particular relevance and which are noted by Peter Gibson L.J. in his judgment. The first is that the Agreement envisages two periods within the course of its operation. The first period is from the date on which the Agreement is made until the First Delivery Date, during which period the contractual obligations of Arco are largely geared to ensuring that there would be a supply of gas from the First Delivery Date. The second period is from the First Delivery Date when the supply of gas will commence until the termination of the Agreement. The second aspect of particular significance is that the First Delivery Date is a date of great contractual importance, because from that date the supply of gas, which is the whole purpose of the contract, is to commence.

As has been observed in the authorities, the word *"condition*" or "*conditional"* and the words *"condition precedent*" are used in contracts with different meanings. It was common case that the condition contained in Clause 2.8.1(iii) and described in the Letter Agreement as "*a condition precedent*" was not a condition precedent in the sense that no contract came into existence between Arco and Total until the condition was fulfilled. It was accepted that a contract did come into existence between the parties on 15 February 1995 under which both parties assumed certain obligations to be carried out before the First Delivery Date when the principal obligations arose.

It was not in dispute between the parties that the non-fulfilment of the condition specified in Clause 2.8.1(iii) by the First Delivery Date, 31 October 1996, had an effect on the obligations imposed on the parties by the Agreement. The submission of Total was that the non-fulfilment of the condition by that date operated to terminate the Agreement. In its written case Total submitted that it was immaterial whether the condition was classified as a condition precedent to the continuation of the Agreement or as a condition subsequent to the Agreement. I consider that this latter submission is correct. In ***Perri v. Coolangatta Investments Pty. Ltd.*** [1982] 149 C.L.R. 537, 541 and 543 Gibbs C.J. stated: *"However, provided that the effect of the condition is clearly understood, its classification may be merely a matter of words . . . it probably does not matter in the present case whether the condition is described as 'precedent' or 'subsequent', provided that it is understood that its non-fulfilment did not prevent a binding contract from coming into existence but did have the effect that the respondent was under no obligation to complete the sale unless the condition was fulfilled or waived."*

Devlin J. expressed a similar opinion in ***Charles H Windschuegl Ltd. v. Alexander Pickering & Co. Ltd.*** (1950) 84 Ll.L.Rep. 89, 92: *"Whether it is regarded as a condition precedent, or condition subsequent, does not matter very much, I think, as a matter of law or as a matter of business."*

Before your Lordships both parties debated the issue which arose by regarding the condition set out in Clause 2.8.1(iii) as a condition precedent rather than as a condition subsequent.☐

A further point which arose in the course of the submissions related to the case made by Total before the High Court and the Court of Appeal that the non-fulfilment of the condition by the First Delivery Date operated automatically to terminate the Agreement. Before your Lordships Mr. Kentridge Q.C., for Total, accepted that there was no material distinction between automatic termination of the Agreement on non-fulfilment of the condition and the election by Total to treat the Agreement as terminated on non-fulfilment, because if non- fulfilment did operate automatically to terminate the Agreement, but Total with the agreement of Arco wished the Agreement to continue, the parties would simply agree to treat the Agreement as still continuing. I consider that the acceptance of this point does not affect Total's case.

The submission of Arco was that the non-fulfilment of the condition by the First Delivery Date only suspended the obligations of Arco under the Agreement, and Arco submitted that the Agreement would eventually be terminated if there was such delay after the First Delivery Date in Arco entering into the Allocation Agreement that the commercial purpose of the Agreement would be frustrated. Arco further submitted that such frustration would not occur until a substantial period had elapsed after 31 October 1996.

Therefore two issues arise for determination from these conflicting submissions. The issues are closely interwoven and, although capable of being stated separately, cannot be considered in isolation. One issue is whether non-fulfilment of the condition operated to terminate the Agreement or only to suspend it. The other issue is, if non-fulfilment of the condition operated to terminate the Agreement and not merely to suspend it, by what date was the condition to be fulfilled.

It was submitted on behalf of Arco that the parties had entered into the Agreement as a long-term contract, that before the gas could be supplied there was much planning and preparatory work to be carried out involving very large capital expenditure, and that gas was to be supplied under the Agreement for a period estimated to last for about 14 years. It was further submitted that there was no express provision in Clause 2.8. that the Agreement would or could be terminated if Arco had not entered into the Allocation Agreement by the First Delivery Date, which omission was to be contrasted with the provisions in Clause 2.8.2 for termination of the Agreement if the necessary approvals and consents specified in sub-paragraphs (i) and (ii) of Clause 2.8.1 were not obtained by 1 March 1996. The omission of an express provision for termination in respect of Clause 2.8.1(iii) was to be further contrasted with the express provision for termination to be found in Clause 2.7.2 which provided: *"The Buyer may terminate this Agreement if deliveries of Natural Gas have not been made by the Seller for a continuous period of twelve (12) months other than as a result of an event (or events) of Force Majeure."*

Therefore it was clear that if, after the supply of gas had commenced, Arco then failed to deliver gas, Total would not be entitled to terminate the Agreement unless failure to deliver lasted for a continuous period of 12 months. Clause 14.6 also provided that either party might terminate the Agreement if Force Majeure prevented the delivery of gas for a period in excess of eighteen months.

Arco further relied on the evidence that it was a frequent occurrence that Allocation Agreements (which are dependent upon the agreement of third parties with the seller) are often not concluded until shortly before the gas supply from the delivery terminal commences. Arco also advanced the point that the effect on the parties of termination of the Agreement because of the failure to enter into the Allocation Agreement by the First Delivery Date could not be foreseen when the Agreement was made, as whether it would be for the advantage of the seller or the buyer for the Agreement to terminate would depend on the state of the market at the First Delivery Date.

Arco submitted that the meaning and effect to be given to Clause 2.8.1(iii) depended on the intention of the parties, and that having regard to the above factors, a court should not come to the conclusion that the parties had intended that the Agreement would be terminated if Arco had not entered into the Allocation Agreement by the First Delivery Date, but rather should conclude that the parties must have intended that a delay in concluding the Allocation Agreement would not terminate the Agreement but only suspend performance of the obligations under it. Arco further pointed out that what had actually happened was that an Agreement, which it claimed to constitute the Allocation Agreement, had been concluded on 6 November 1996, a mere six days after the First Delivery Date, and argued that the parties could not have intended that a mere six days' delay would terminate the Agreement which was intended to provide for the supply of gas for a period of 14 years.

My Lords, notwithstanding that there is considerable weight in these points, I am of opinion that non- fulfilment of the condition did operate to terminate the Agreement and not merely to suspend it. In Wickman Machine Tool Sales Ltd. v. L. Schuler A.G. [1974] A.C. 235 this House considered the meaning of the word "condition" in a term of a contract which provided in Clause 7(b):

"It shall be [a] condition of this agreement that:--

(i) Sales shall send its representatives to visit the six firms whose names are listed in the Schedule hereto at least once in every week for the purpose of soliciting orders for panel presses."

Lord Reid stated at p. 251C:

"What is contended is that the terms of clause 7 'sufficiently express an intention' to make any breach, however small, of the obligation to make visits a condition so that any breach shall entitle Schuler to rescind the whole contract if they so desire.

Schuler maintains that the use of the word 'condition' is in itself enough to establish this intention. No doubt some words used by lawyers do have a rigid inflexible meaning. But we must remember that we are seeking to discover intention as disclosed by the contract as a whole. Use of the word 'condition' is an indication--even a strong indication--of such an intention but it is by no means conclusive.

The fact that a particular construction leads to a very unreasonable result must be a relevant consideration."

Mr. Pollock Q.C., for Arco, submitted that the judgments in ***Wickman Machine Tool Sales Ltd. v. L. Schuler A.G.*** afford no guidance in the present case because in the ***Wickman Tools*** case the condition under consideration was a promissory condition, the non-fulfilment of which constituted a breach of contract, whereas in the present case it was not in dispute that the condition set out in Clause 2.8.1(iii) was not a promissory condition but a contingent condition, the non-fulfilment of which gave rise to no right of action. Mr. Pollock further submitted that the non-fulfilment of a contingent condition did not operate to terminate a contract, but only to suspend the performance of the obligations arising under it, and in support of this submission he relied on the decisions in the cases of ***De Oleaga & Co. v. West Cumberland Iron and Steel Company*** (1879) 4 Q.B.D. 472, ***Windschuegl v. Pickering*** 84 Ll.L.Rep. 89 and ***Smallman v. Smallman*** [1972] Fam. 25.

I do not accept the submission that because a condition is a contingent condition and not a promissory condition, non-fulfilment merely suspends the performance of obligations under the contract and cannot terminate the contract. In the decision of the High Court of Australia in ***Perri v. Coolangatta Investments Pty. Ltd.*** [1982] 149 C.L.R. 537, 546 Gibbs C.J. stated: *". . . I consider that when the time has elapsed for performance of a condition which is not a promissory condition, but a condition precedent to the obligation to complete a contract of sale, either party, if not in default, can elect to treat the contract as at an end if the condition has not been fulfilled or waived . . . "*

There are cases where non-fulfilment of a contingent condition will operate only to suspend a contract rather than to terminate it, as in the three cases cited by Mr. Pollock which related to words in a contract and to circumstances which differed greatly from the present case. Whether non-fulfilment will operate to suspend or terminate will depend on the context and setting of the word "*condition*" or "*conditional*" in the particular contract. The present contract states that: *"This Agreement is conditional on (iii) the Seller becoming party to the Allocation Agreement."* The Letter of Agreement expressly refers to the *"conditions precedent"* detailed in Clause 2.8. These words in the Agreement and the Letter Agreement are, in themselves, more consistent with non- fulfilment operating to terminate the Agreement rather than merely operating to suspend it. The judgments of this House in the Wickman Tool case show that the deliberate use of the word *"condition"* in a contract, particularly when it is used in only one part of a lengthy agreement containing many provisions, is an indication that non-fulfilment of the condition will terminate the agreement, unless this construction would lead to a very unreasonable result which, in my opinion, would not be the case here. Moreover, as Gibson L.J. observed in his judgment, there is not a word about suspension in this Agreement between Arco and Total.

In the ***Wickman Tool*** case this House was considering a promissory condition, but I consider that the opinions expressed in the judgments also provide guidance when consideration is being given to the effect of the non-fulfilment of a contingent condition, because the word "*condition*" denotes, as Lord Morris of Borth-y-Gest observed at 258H, *"something fundamental to the continued operation of an agreement,"* and this can be either a promissory condition or a contingent condition.

Therefore, having concluded that non-fulfilment of the condition in Clause 2.8.1(iii) operated to terminate the Agreement, I turn to consider the issue of the date by which the condition had to be fulfilled. The First Delivery Date was the date on which the performance of the essential obligations of the Agreement was to begin. As Gibson L.J. stated in his judgment, *"The First Delivery Date is of crucial importance in the scheme of the agreement"*, and Otton L.J. stated that *"The First Delivery Date, once determined, is central to the intended operation of the agreement between the parties."* This leads, in my opinion, to the conclusion that the condition was to be fulfilled by the First Delivery Date, and consequently that its non-fulfilment by that date operated to terminate the Agreement. Whilst the present contract for the supply of gas over a lengthy period differs in many respects from a contract for the sale of land, I consider that Total is entitled to draw an analogy between the First Delivery Date in this Agreement, when performance was to begin, and the date fixed for completion of a sale of land, and to derive support from the judgment of the Privy Council delivered by Lord Jenkins in ***Aberfoyle Plantations Limited v. Khaw Bian Cheng*** [1960] A.C. 115, 124: *"Where a conditional contract of sale fixes a date for the completion of the sale, then the condition must be fulfilled by that date."*

See also per Maugham J. in ***In re Sandwell Park Colliery Company*** [1929] 1 Ch. 277-283.

Arco accepted that at some stage after the First Delivery Date the Agreement would eventually be terminated if Arco was unable to enter into the Allocation Agreement, and Arco's argument was that the termination would be brought about by frustration. In my opinion in this case where the First Delivery Date was of crucial importance and where the parties had expressly made the entry into the Allocation Agreement by Arco a condition of the Agreement, a court should not hold that the Agreement would eventually be terminated by frustration at some date unspecified by the contract subsequent to the First Delivery Date. As Evans J. stated in **Nile Co. for the Export of Agricultural Crops v. H & J M Bennett (Commodities) Limited** [1986] 1 Lloyd's Rep. 555, 582, referring to an event claimed to frustrate the contract: *"The . . . question . . . is whether the new situation thus created is within or outside the scope of the contract on its true construction."*

In my opinion the failure to enter into the Allocation Agreement and the situation created by it was within the scope of the contract on its true construction and was governed by Clause 2.8.1(iii).

If the argument advanced on behalf of Arco were correct, it would mean that the Agreement would be left suspended from the First Delivery Date for a period, the duration of which could not be accurately forecast, with all the uncertainty which this would involve, and I do not consider that the parties who entered into this carefully drafted Agreement intended such a result.

As regards the period of suspension of the Agreement after 31 October 1996 until the Agreement would be terminated by frustration by reason of Arco not having entered into the Allocation Agreement, Arco submitted that there were three possible periods, and in its written case it stated:

"Arco's primary case is that there can be no question of termination before 12 months have elapsed from the First Delivery Date. This was accepted by Jonathan Parker J.

In the alternative, Arco submits that termination cannot arise until 15 December 1996, ie. the last day of the contractual delivery window.

Nourse L.J. held that a reasonable time for the conclusion of the allocation agreement was such period after the First Delivery Date as was required for it to be ascertained whether the allocation agreement would be concluded or not. If necessary, Arco adopts this as a second alternative."

In my opinion none of these periods is consistent with the intention of the parties to be derived from the terms of the Agreement. I consider that Arco cannot derive assistance from the provision in Clause 2.7.2 that Total can only terminate the Agreement if deliveries of gas have not been made for a continuous period of 12 months, because that Clause is dealing with the different situation where Arco's obligation to deliver gas had arisen and where Total would be compensated for a failure to deliver under the provisions of Clause 17 of the Agreement relating to Default Gas. Nor can 15 December 1996 be a date on which Arco can rely once it chose to notify Total that The First Delivery Date would be 31 October 1996; on that notification being given 15 December 1996 ceased to be the last day of *"the contractual delivery window"* and 31 October 1996 became the First Delivery Date under the contract. I further consider that the period suggested by Nourse L.J. in his dissenting judgment, viz. *"such a period after the first delivery date as was reasonably required for it to be ascertained whether the allocation agreement would be concluded or not"* would give rise to very considerable uncertainty in its operation and that at the time of making the Agreement the parties would not have intended that such uncertainty could arise.

Accordingly, for the reasons which I have given, I would dismiss this appeal.