JUDGMENT OF THE COURT (First Chamber)

16 May 2000 *

In Case C-274/97,

Commission of the European Communities, represented by P. Oliver, Legal Adviser, and B. Doherty, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of the same service, Wagner Centre, Kirchberg,

applicant,

v

Coal Products Ltd, established in Chesterfield, United Kingdom, represented by K.P.E. Lasok QC, and P. Harris, Barrister, instructed by A. Mott, Solicitor, with an address for service in Luxembourg at the Chambers of Zeyen, Beghin, Feider, Loeff, Claeys and Verbeke, 56-58 Rue Charles Martel,

defendant,

APPLICATION by the Commission of the European Communities under Article 42 of the ECSC Treaty for the recovery of a sum of ECU 252 558, corresponding to an interest rebate which it had granted to Coal Products Ltd

* Language of the case: English.

under a contract to assist Coal Products Ltd in consuming coal produced in the Community, plus interest at the rate of 8% as from 1 November 1995, and COUNTERCLAIM by the defendant for the payment of a sum of ECU 46 010, plus interest as from 3 February 1995,

THE COURT (First Chamber),

composed of: L. Sevón, President of the Chamber, D.A.O. Edward (Rapporteur) and P. Jann, Judges,

Advocate General: N. Fennelly,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 8 July 1999, at which Coal Products Ltd was represented by R. Thompson, Barrister, and A. Mott, and the Commission by P. Oliver and B. Doherty,

after hearing the Opinion of the Advocate General at the sitting on 16 September 1999,

gives the following

Judgment

1 By application lodged at the Registry of the Court on 29 July 1997, the Commission of the European Communities brought an action, pursuant to an arbitration clause drawn up on the basis of Article 42 of the ECSC Treaty, against Coal Products Ltd ('CPL') for the recovery of a sum of ECU 252 558, corresponding to an interest rebate which it had granted to CPL under a contract to assist CPL in consuming coal produced in the Community, plus interest at the rate of 8% as from 1 November 1995.

2 In its defence, CPL sought, by way of counterclaim, an order that the Commission pay the sum of ECU 46 010, plus interest as from 3 February 1995, or from 31 March 1995, corresponding to the balance of the interest rebate to which it claims to be entitled under the abovementioned contract.

The contract at issue

3 On 21 May 1992, the European Coal and Steel Community ('the ECSC'), represented by the Commission, concluded a loan agreement ('the contract') with CPL, a subsidiary of British Coal Corporation. Under that contract, the Commission agreed to lend the sum of GBP 10 000 000 to CPL with a view to promoting the consumption of coal produced within the European Coal and Steel Community in its briquette-making and methane-energy conversion plants in the United Kingdom.

4 Article 6 of the contract stipulated that the loan was to be repaid in one payment on 28 May 1997, and Article 7 stated that CPL was not to have the right to repay the loan before that date. Under Article 10 of the contract, CPL undertook not to sell, transfer or dispose of any of the project assets without the Commission's prior written consent.

5 Article 5(4) of the contract provided for the payment of an interest rebate in the following terms:

'Subject as herein provided the borrower [CPL] shall be entitled to receive a total interest rebate (the "rebate") from the lender [the Commission] in pounds of an amount equal to the sterling equivalent of 1 875 420 European Currency Units. The rebate shall be paid to the borrower twice-yearly during the first five years of the loan in two equal amounts of 187 542 European Currency Units on or about 28 May and 28 November in each year commencing on or about 28 November 1992 and ending on or about 28 May 1997, subject to the borrower having duly complied with its obligations under this agreement to pay interest and any other amounts due in respect of the loan on any such date and subject always to the provisions of Article 11. ...'

6 Article 11(2) of the contract stipulated:

'The loan is made on the basis that, and the interest rebate referred to in Article 5(4) is calculated on the assumption that, the actual ECSC coal burn in

each consumption year will at least equal the estimated ECSC coal burn. Accordingly, the following provisions shall apply:

(a) If the actual ECSC coal burn in respect of either of the two consumption years immediately preceding the assessment date is less than the estimated ECSC coal burn then (without prejudice to any other rights the lender may have under this agreement) the lender may, by notice in writing to the borrower, reduce the interest rebate to which the borrower is originally entitled under this agreement by the proportion which the shortfall between the estimated ECSC coal burn and the actual ECSC coal burn bears to the estimated ECSC coal burn. The amount by which interest rebate actually paid to the borrower exceeds the amount of interest rebate which the borrower would have received had the redetermined interest rebate applied from the outset, shall be reimbursed by the borrower to the lender by immediate repayment in full or, if the lender so specifies, by the lender withholding future instalments of interest rebate in settlement of the amount so due;

(b) In addition to the rights under subparagraph (a) above and without prejudice to any other rights the lender may have under this agreement, if:

(i) the actual ECSC coal burn in any of the consumption years ended on the respective subsequent report dates is less than the amount of the ECSC coal burn on which the interest rebate applicable to the loan is then based (whether that be the estimated ECSC coal burn or a lower amount as a result of the application of the provisions of subparagraph (a) above or the previous application of the provisions of this subparagraph (b)); and

(ii) the lender considers such shortfall to be of a material amount,

the lender may, by notice in writing to the borrower, reduce the amount of interest rebate applicable in respect of the loan for the relevant consumption year and any subsequent consumption years on the same proportionate basis (using the actual ECSC coal burn for the relevant consumption year) as is referred to in subparagraph (a) above. The last sentence of subparagraph (a) above shall apply also in relation to redeterminations pursuant to the provisions of this subparagraph (b).

...'

7 Article 1 of the contract defined the annual consumption target ('estimated ECSC coal burn') as 350 000 tonnes. Under the same article, 'actual ECSC coal burn' was defined as 'the amount of ECSC coal actually consumed in the industrial equipment in each consumption year but, in the case of each of the two consumption years immediately preceding the assessment date, the annual average of such consumption for those two consumption years'. The 'consumption year' was defined as 'the period of one calendar year up to but excluding 28 May in each of the years 1994 to 1998 (both inclusive)'. Article 1 also defined the 'assessment date' as being the third anniversary of the disbursement of the loan, namely 28 May 1995. The fourth and fifth anniversaries of the payment of the loan, that is to say 28 May 1996 and 28 May 1997 respectively, were defined as 'subsequent report date[s]'.

8 Article 19 provided that the contract was subject to English law and that any claim or dispute regarding the validity, interpretation or performance of the contract was to be submitted exclusively to the Court of Justice, pursuant to Article 42 of the Treaty.

9 Following the purchase of CPL by a management and employee buy-out team, CPL wished to repay the loan immediately. In a letter of 23 January 1995, the Commission agreed to that request on condition that CPL accept the following proposal:

'As the assessment date will not have been reached by the date of early repayment, we propose that the rebate entitlement be calculated proportionally up to the date of the early repayment. This may lead to a part of the rebate being repaid to ECSC or to a balance being paid in favour of CPL.

Consequently, we would be grateful if CPL would provide us with full details of the coal consumption in the three years immediately preceding the date of transfer to the [management and employee buy-out team]. We propose that the details should be provided within 60 days and should follow the format required by the contract as if the report were being produced at assessment'.

10 By letter of 30 January 1995, CPL accepted that 'there may be an adjustment to be paid to the rebate already paid out and that calculation of this rebate will be based on a monitoring period ending on the date of repayment of the loan'.

Arguments of the parties

11 In order to justify the repayment by CPL of the sum of ECU 252 558, the Commission submits that that amount represents the difference between the ECU 750 168 which it has already paid to CPL by way of interest rebate and the ECU 497 610 which, according to its calculations, CPL would have been entitled

to claim. According to the Commission, the ECSC coal consumption target for the 20-month period from 28 May 1993 to 29 January 1995 must be reduced in proportion to that period to 583 333 tonnes, that is 5/6 (or 20/24) of the estimated ECSC coal burn (700 000 tonnes) for the two consumption years preceding the assessment date of 28 May 1995. Since CPL consumed only 464 332 tonnes of ECSC coal during that 20-month period, that is 79.6% of the revised target, it can therefore claim only 79.6% of the interest rebate for that period, that is 79.6% of a third (20/60) of the sum of ECU 1 875 420 which represents the total amount of the rebate agreed under the contract for the entire period of its performance. Taking account of the payment of ECU 750 168 already made by the Commission in respect of the 32-month period from the entry into force of the contract up to 29 January 1995, the Commission is justified in claiming the repayment of a sum of ECU 252 558, plus interest.

12 CPL relies on two main pleas. First, it submits that a new, separate contract arose from the exchange of letters on 23 and 30 January 1995, which led to the implied rescission of the contract. Since that new contract contains no arbitration clause attributing jurisdiction to the Court of Justice, the present application is inadmissible.

13 Second, on the substance, CPL contends that it is entitled to a rebate of ECU 796 178 for the period under consideration. Since it has received only a sum of ECU 750 168, it submits that it is entitled to the payment of the difference between those two amounts, namely ECU 46 010.

14 CPL contends that the Commission modified the assessment period by putting back the beginning of that period to 28 May 1992. In this respect, it refers to the Commission's letter of 23 January 1995 and relies, first, on the Commission's statement that the monitoring period for coal consumption, on which rebate entitlement is based, was to end at the date of repayment of the loan and, second, on the reference made by the Commission to the proportional calculation of the rebate actually due and its request to CPL for consumption figures for the three years preceding the purchase of that undertaking. However, CPL contends that

only consumption after 28 May 1993 is to be taken into account for the calculation of the rebate. Thus, CPL acknowledges that, over the 20-month consumption period, its actual ECSC coal burn reached only 79.6% of the adjusted estimated burn. It none the less contends that it is that figure which should be used to assess the proportion of rebate to which it is entitled in respect of the 32-month period since the payment of the loan and the payment of the first rebate instalment. This results in an amount of ECU 796 178.

15 At the hearing, CPL proposed a different interpretation of the contract, its new calculations resulting in a debt by CPL to the Commission of ECU 3 751. However, in response, the Commission invoked the first subparagraph of Article 42(2) of the Rules of Procedure, claiming that this interpretation constituted a new plea in law.

Jurisdiction of the Court

16 According to CPL, the exchange of letters between itself and the Commission had the effect of bringing the contract to an end and replacing it with a new contract which does not contain a clause attributing jurisdiction to the Court of Justice.

17 It must be pointed out, first, that reference to the contract is necessary in order to make both the content and the scope of the exchange of letters comprehensible and, second, that those letters do not contain any stipulation which is fundamentally inconsistent with the clauses of that contract, which are capable

of being applied notwithstanding the fact that the Commission accepted early repayment of the loan by CPL.

18 Consequently, it must be concluded, applying the criteria of the relevant law, namely English law, that the exchange of letters did not bring about the rescission of the contract and, accordingly, Article 19 thereof continues to apply to the present dispute.

Substance

19 The argument put forward by the Commission, as reproduced in paragraph 11 of the present judgment, assumes a correlation between the payment of the interest rebate over the period of the loan, that is from 1992 to 1997, and the achievement of the estimated ECSC coal burn targets over the five consumption years, namely from May 1993 to May 1998, so that any interest rebate granted before the end of the contract must be regarded as an advance until the final settlement of accounts. However, such a premiss does not follow at all from the terms of the contract.

20 The contract establishes no automatic correlation between the payments corresponding to one year's rebate and the actual ECSC coal burn for the following year. Nor does the contract link the total amount of rebate payable to the total consumption for the five years under consideration.

21 On the contrary, it is clear from Article 11(2)(a) of the contract that the part of the rebate which is paid up to the assessment date, that is to say during the first three years of the contract, is acquired once and for all after having been, where appropriate, reduced in line with lower than estimated actual ECSC coal burn in

the first two consumption years preceding the assessment date. The entitlement to that part of the rebate is not affected subsequently by consumption after that date.

22 Furthermore, the contract includes no stipulation relating to recovery of the rebate paid during the year preceding the final consumption year in the event of insufficient actual ECSC coal burn over that final year, in respect of which the contract does not require a report to be submitted, although a report is the essential condition for a final settlement of accounts in the sense suggested by the Commission. The method of calculation proposed by the Commission, if it were adopted, would confer on the Commission power to monitor consumption in the final year of the contract although such a possibility is in no way provided for by the contract.

23 It follows that the reference in the exchange of letters to a proportional calculation of the rebate up to the date of early repayment of the loan cannot be understood as meaning that it establishes a direct correspondence between the five-year period during which the rebate is payable and the five-year period, commencing a year later, in respect of which the contract specifies ECSC coal consumption targets. The interpretation of the contract put forward by the Commission in support of its application for repayment of the sum of ECU 252 558, plus interest as from 1 November 1995, must therefore be rejected.

24 In order to justify its counterclaim that the Commission should be ordered to pay it a sum of ECU 46 010, plus interest, CPL relies on calculations which are based on the same premisses as those of the Commission and which also postulate the existence of a direct correspondence between the period taken into account in respect of the payment of the rebate and that relating to the actual ECSC coal

burn. For the same reasons as those set out in paragraphs 19 to 23 of the present judgment such an argument cannot be accepted and, accordingly, CPL's counterclaim must be dismissed.

25 As regards the argument put forward by CPL at the hearing, it must be accepted that it constitutes a new plea in law. Since the Commission invoked, in this respect, the first subparagraph of Article 42(2) of the Rules of Procedure, that plea must be declared inadmissible.

26 It follows that both the Commission's application and CPL's counterclaim must be dismissed.

Costs

27 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if costs have been applied for in the successful party's pleadings. However, the first subparagraph of Article 69(3) provides that the Court may order that the costs be shared or that the parties bear their own costs if each party succeeds on some and fails on other heads. Since the Commission and CPL have been unsuccessful, each party must be ordered to bear its own costs.

On those grounds,

THE COURT (First Chamber)

hereby:

1. **Dismisses the application by the Commission of the European Communities and the counterclaim by Coal Products Ltd;**

2. **Orders the Commission of the European Communities and Coal Products Ltd to bear their own costs.**

Sevón Edward Jann

Delivered in open court in Luxembourg on 16 May 2000.

R. Grass

Registrar

L. Sevón

President of the First Chamber