OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 16 September 1999 *

I — Introduction

1. The Commission has seised the Court, pursuant to Article 42 of the ECSC Treaty (now Article 42 CS), of a dispute pursuant to an arbitration clause in a 1992 contract concerning coal consumption. Such disputes are still heard by the Court in respect of contracts concluded before the entry into force on 1 August 1993 of Council Decision 93/350/ECSC, EEC, Euratom of 8 June 1993 amending Council Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities. [1]

II — The Contract

2. The Commission concluded a contract (hereinafter 'the Contract') on 28 May 1992 with Coal Products Ltd (hereinafter 'Coal Products'), a subsidiary of British Coal Corporation (hereinafter 'British Coal'), which stipulated that the Commission would lend the company GBP 10 million to assist it in consuming ECSC coal in its briquette-making and methane-energy conversion plants in the United Kingdom. Article 6 of the Contract provided that the loan was to be repayable in full on 28 May 1997. Article 7 stated that Coal Products would not have the right to repay the loan before that date. By Article 10(3), Coal Products undertook not to sell, transfer or dispose of the project assets without the prior written consent of the Commission.

3. Interest was payable on the loan, but Article 5(4) of the Contract provided in the following terms for the payment of an interest rebate:

'Subject as herein provided the Borrower [Coal Products] 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

* Original language: English.

1 — OJ 1993 L 144, p. 21.

amounts due in respect of the Loan on any such date and subject always to the provisions of Article 11. ... .'

The five-year period for monitoring of consumption commenced a year later: 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)'. This, it appears, was a standard arrangement to give participating companies in such schemes time to complete the projects in question and to adjust supplies and production schedules to the specified targets. The Contract defined the annual consumption target ('Estimated ECSC Coal Burn') as 350 000 tonnes. '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 third anniversary of the disbursement of the loan, that is, 28 May 1995, was defined as the 'Assessment Date'. The fourth and fifth anniversaries of disbursement, viz. 28 May 1996 and 28 May 1997 respectively, were defined as 'Subsequent Report Date[s]'. Article 11(2) of the Contract provided as follows for variation of the level of rebate in the light of Actual ECSC Coal Burn:

'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 sub-paragraph (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 sub-paragraph (a) above or the previous application of the provisions of this sub-paragraph (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 sub-paragraph (a) above. The last sentence of sub-paragraph (a) above shall apply also in relation to redeterminations pursuant to the provisions of this sub-paragraph (b).

... .'

4. As a result of the one-year gap between disbursement of the loan, on the one hand, and the beginning of monitoring of consumption, on the other, the final Consumption Year (1997–98) was envisaged to come after both the payment of the last rebate and the repayment of the loan and a report comparing Actual and Estimated ECSC Coal Burn during that year was not provided for.

5. Article 19 of the Contract stipulated that it was to be subject to English law and that any claim or dispute regarding the validity, interpretation or performance of the Contract was to be submitted to the Court, pursuant to Article 42 of the ECSC Treaty. The loan was guaranteed by British Coal, under a contract also subject to English law and the jurisdiction of the Court.

6. In January 1995, British Coal sought the Commission's permission to dispose of Coal Products by way of a management and employee buy-out. It transpired that the new management wished to repay the loan immediately, contrary to the terms of the 1992 agreement. In a letter of 23 Jan-

uary 1995, the Commission agreed to the proposed disposal of Coal Products and to the immediate repayment of the loan, with accrued interest and costs. It added:

'After repayment, the coal consumption figures will be reviewed and there may be a revision of interest rebate due.

...

In addition, ECSC [the Commission] requests that CPL [Coal Products] confirms [*sic*] in writing that ... CPL accepts that, although the rights and obligations concerning rebate entitlement cease with the repayment of the loan, there may be an adjustment to be made to rebate already paid out, as explained below, following revision of the coal consumption figures.

...

With the repayment of the loan, ECSC will be in a position to review the coal consumption which was the basis of the ECSC financial contribution to the project. 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 MEBO [management and employee buy-out]. 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.'

The Commission also required that the British Coal guarantee remain in place until it had received all amounts due.

7. By letter of 30 January 1995, Coal Products accepted the terms for repayment set out in the Commission's letter of 23 January 1995:

'We refer to your letter dated 23rd January 1995 addressed to our parent company, BCC [British Coal] (reference 0893), together with BCC's reply. Thank you for

agreeing to accept early repayment. In consideration for this we agree as follows:

...

CPL accepts that, although rights and obligations concerning rebate entitlement due to be paid after the repayment of the loan cease on repayment, 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.'

III — Arguments of the parties

8. The Commission calculated that the ECSC coal consumption target for the 20 months from 28 May 1993 to 29 January 1995 should be reduced proportionally to 583 333 tonnes, that is, 5/6 (20/24) of the Estimated ECSC Coal Burn (700 000 tonnes) for the two Consumption Years leading to the Assessment Date on 28 May 1995. It transpired that Coal Products had consumed 464 332 tonnes of ECSC coal during that 20-month period, 79.6% of the revised target. The Commission concluded that Coal Products was entitled to 79.6% of the rebate for that period, which, in turn, was one third (20/60) of the rebate agreed for the entire five-year period of the contract, leading to a figure of ECU 497 610. [2] Over the 32-month period of rebate payments under the contract, the Commission had paid out ECU 750 168 [3] and, therefore, sought the return of ECU 252 558.

9. Coal Products argued for a different approach. Although it acknowledged in one letter (of 20 March 1995) that any clawback would be calculated from 28 May 1993, it has otherwise argued that this aspect of the 1992 agreement was changed by the Commission's letter of 23 January 1995, either by variation or by the conclusion of a distinct new agreement governing early repayment. [4] Invoking the Commission's agreement to early repayment, contrary to the terms of the 1992 agreement, its statement that obligations under that contract would cease with repayment, its reference to proportional calculation of the rebate actually due and, in particular, its request for 3-year consumption figures, Coal Products contended that the Commission had varied the assessment period, pushing back its starting date to 28 May 1992. However, it still main-

2 — ECU 1 875 420/3 = ECU 625 140 x. 796 = ECU 497 610.

3 — This sum represents two years' rebate payments (four payments). The rebate payment due on 28 November 1994 was not made, apparently because the Commission was already aware of the plans for a management and employee buy-out, which would have constituted a breach of Article 10(3) of the Contract if undertaken without the Commission's permission.

4 — Letter of 30 July 1996.

tained that it was only consumption after 28 May 1993 which needed to be taken into account. Thus, it acknowledged that in the 20-month consumption period, its ECSC coal consumption reached only 79.6% of the adjusted contractual level. However, it considered that it should use this figure to assess the proportion of rebate it was entitled to over the 32-month period since the payment of the loan and the commencement of rebate payments. This resulted in an entitlement to ECU 796 178.[5] As only ECU 750 168 had been advanced, Coal Products submitted a claim for a further rebate payment of ECU 46 010.

10. After extensive correspondence in which both sides adhered to their respective calculations, the Commission commenced proceedings on 31 July 1997 for recovery of the sum of ECU 252 558, plus interest at 8% from 3 February 1995 and costs. Its essential argument is that, with the exception of the concession by which it permitted early repayment and calculated the contractual consumption targets and the rebate due on the basis of the proportion of the total contractual consumption period which had actually transpired at the date of repayment, all aspects of the question are governed by the Contract — including the starting date for assessment of consumption and the choice of law and jurisdiction. Coal Products submits, principally, that the Contract was implicitly rescinded by a new agreement, arising from the exchange of letters on 23 and 30 January 1995, which, in fundamental respects, contradicts (through the reference to three-year consumption figures) or deprives of substance (through repayment of the loan) and, therefore, ousts the earlier agreement. It relies, in particular, on the statement that obligations under the 1992 agreement would cease with repayment. It first raises the rescission point in order to contest the admissibility of the Commission's action — if the Commission letter of 23 January 1995 constituted an offer of a new contract, subsequently accepted by Coal Products, that contract contains no arbitration clause attributing jurisdiction to the Court, so that the Court, which has no inherent jurisdiction in such matters, cannot be seised of the case. It argues further, in a series of alternatives, that the parties agreed in that correspondence a 32-month rebate period; that the Commission, in so far as it has a contractual right to the sums it claims under the 1992 agreement, has waived, or is estopped from raising, that right; that no agreement exists between the parties as to the method of calculating the rebate, so that there is nothing for the Court to enforce; and (a point accepted by the Commission) that interest should run on any sum owing to the Commission only from 1 November 1995, a reasonable period after the Commission actually specified (in its letter of 24 October 1995) the sum it actually considered to be due. On the basis of the calculations outlined above, Coal

5 — ECU 1 875 420 x 32/60 = ECU 1 000 224 x .796 = ECU 796 178.

Products also makes a counterclaim for ECU 46 010, plus interest, and seeks, in any event, its costs.

IV — Analysis

Jurisdiction

11. I shall first address the issue of the Court's jurisdiction, which turns on the question whether the exchange of correspondence in January 1995 varied or rescinded the Contract. Both parties rely, correctly in my view, upon *dicta* in *Morris* v *Baron & Co.* [6] and in *British and Benningtons Ltd* v *North Western Cachar Tea Co. Ltd* [7] as stating of the law in this regard. In *Morris* v *Baron*, Lord Dunedin distinguished as follows between variation and rescission:

'In the first case [variation] there are no such executory clauses in the second arrangement as would enable you to sue upon that alone if the first did not exist; in the second [rescission] you could sue on the second arrangement alone, and the first contract is got rid of either by express words to that effect, or because, the second dealing with the same subject-matter as the first but in a different way, it is impossible that the two should be both performed.' [8]

In the same case, Lord Atkinson observed that, with the exception of the price of the goods concerned, the terms of the earlier and later agreements were in conflict 'in all those material and fundamental provisions which go to the root of each of them', [9] with the result that it was impossible to arrive at any rational conclusion other than that it was the clear intention of both parties to treat the original agreement as abandoned or non-existent. In *British and Benningtons*, he stated, in a similar vein, that rescission would be presumed when the parties entered into an agreement which was entirely inconsistent with the old or, if not entirely inconsistent with it, was inconsistent with it to an extent that went to the very root of it. [10]

12. It is clear that the correspondence between the parties and British Coal in January 1995 altered the terms of the Contract, principally because Article 7 of

6 — [1918] AC 1.
7 — [1923] AC 48.
8 — Loc. cit., at p. 26.
9 — Ibid., at p. 33.
10 — Loc. cit., at p. 62.

the Contract precluded early repayment of the loan. However, I do not accept that this change, accompanied by stipulations regarding the interest rebate, was fundamentally inconsistent with the continued application of those terms of the Contract which were still potentially relevant after such repayment. In particular, the position adopted in the correspondence regarding the proportional calculation of the interest rebate is incomprehensible without reference to the original terms of the Contract governing the amount of that rebate, the period during which it was payable, the definition of Estimated and Actual ECSC Coal Burn and the monitoring mechanism through the submission of reports for Consumption Years. It would, as a result, be impossible to execute a contract based exclusively on that correspondence. In the circumstances, the repayment of the loan cannot be said to have been entirely inconsistent with the Contract, or to have gone to its root, as the Commission's collateral obligation to pay interest rebate was expressly stated to survive, subject to conditions which, although amended in the light of that repayment, were impossible to apply other than in conjunction with the Contract.

13. As a result, I conclude that the Contract continued to apply in a varied form and that the provisions of Article 19 of the Contract regarding the jurisdiction of the Court continue to apply.

Substance

14. I turn now to the Commission's claim for the repayment of ECU 252 558. In my view, the Commission's claim should be rejected. Its argument, as summarised at paragraph 8 above, is based upon a premiss which is not borne out either by the terms of the Contract or by those of the correspondence which varied it, viz. that there was a direct and organic link between payment of interest rebate over the five-year period of the loan, from 1992 to 1997, and the achievement of the Estimated ECSC Coal Burn targets over the five Consumption Years from 1993 to 1998. In consequence, it has submitted that the proportional calculation of the interest rebate referred to in its letter of 23 January 1995 entailed not only a proportional reduction in the Estimated ECSC Coal Burn target applicable to the 20-month period from May 1993 to January 1995, from 700 000 tonnes to 583 333 tonnes, but also a reduction in the amount of interest rebate to which Coal Products could be entitled upon fulfilment of that target based on the proportion of those 20 months of consumption to the five years (60 months) over which interest rebate was payable. The Commission described the interest rebate on numerous occasions at the oral hearing as an advance, subject to recovery in the event of failure to satisfy the consumption targets indicated in the Contract. In construing the Contract, the Court is required to apply the principle of English law that the intention of the parties is to be gathered from the entire instrument, but in the light of the meaning of the words they have used. At no point does the Contract require the interest rebate payments to be treated as a simple advance in respect of the following year's consumption. The rebate is

an entitlement which is subject to later revision in the light of the Actual ECSC Coal Burn, in accordance with a complex formula and subject to notice being given by the Commission.

15. My view that the interest rebate cannot be characterised as a simple advance is bolstered by the manner in which such subsequent revisions of the rebate are calculated. While it is true that the rebate, or part thereof, could be recovered by the Commission in the case of deficient consumption of ECSC coal by Coal Products, the Contract did not provide for an automatic linkage between one year's rebate payments and the following year's consumption. Nor did it link the total amount of rebate payable to the total consumption of ECSC coal. Article 5(4) of the Contract subjected the bi-annual payment of the interest rebate from November 1992 to the provisions of Article 11. Article 11(2)(a) of the Contract permitted the Commission to vary the first *three* years' rebate in line with lower than estimated Actual ECSC Coal Burn in the first *two* Consumption Years up to the Assessment Date. Furthermore, it is clear that such a variation in the amount of rebate payable every six months would also have applied to subsequent Consumption Years, even if Coal Products had later succeeded in reaching or even exceeding the initial Estimated ECSC Coal Burn target of 350 000 tonnes per annum. Article 11(2)(b) only provides for a further proportional reduction in the interest rebate in the light of even more serious shortfalls in consumption. Finally, no provision was made for recovery of prior rebate payments in the case of a shortfall of consumption in the final Consumption Year, in respect of which the Contract did not require a report to be submitted.

16. This contractual scheme does not provide either expressly or by implication for a direct correspondence between the five-year period over which the rebate was payable and the five-year period, commencing a year later, in respect of which the Contract specified consumption targets. Thus, it cannot be supposed that the subsequent agreement on premature repayment of the loan entailed, by necessary implication, that such a correspondence should be established between the 20-month period of consumption actually accomplished and Coal Products' rebate entitlement. The reference to a proportional calculation of the rebate in these changed circumstances cannot be understood, without more, as establishing such a correspondence. It would be much more in keeping with the contractual scheme and, in particular, with the provisions governing the first three years of its application, for this statement to be interpreted as merely advancing the Assessment Date to the end of January 1995, so that rebate payments over the 32-month period [11] from the conclusion of the Contract could be reassessed in the light of 20 months of coal consumption. The reason given in the

11 — See paragraph 18 below for a slightly different approach, based on provision in Article 5(4) of the Contract for the payment of the rebate at six-month intervals.

Commission's letter of 23 January 1995 for its proposal that the rebate 'be calculated proportionally up to the date of early repayment' is that the 'Assessment Date will not have been reached', which justifies using the 20 months then expired of the 'Consumption Years immediately preceding the Assessment Date' for the calculation. It does not justify taking the additional step proposed by the Commission of using the proportion that the total period of 20 months of consumption bears to the 60 months over which the rebate was payable. So radical an alteration of the contractual scheme would have had to be laid down by clear express words, which was not done in the present case.

17. It would be possible to argue, in the light of the alternative interpretation of the variation agreement of January 1995 suggested immediately above, that Coal Products' counter-claim should succeed. However, this is not the case made by Coal Products in support of its counter-claim for ECU 46 010. It submitted in its written pleadings that the Commission's request for three years' consumption data implied that the assessment period for proportionally calculating its rebate entitlement, as provided for in the exchange of letters, was 32 months. I cannot agree that a mere request for information amounts to a proposal for a new term of the Contract. Coal Products' proposition for an assessment period of three years is, in any event, impossible to realise, since only 32 months had run. Furthermore, I am unable to comprehend how, even if this were the case, this could support Coal Products' counter-claim. Coal Products clearly accepted the Commission's view that the Estimated ECSC Coal Burn should be revised to give a proportionally adjusted 20-month target and that Actual ECSC Coal Burn during the 20-month period up to the end of January 1995 should be the basis for calculating Coal Products' definitive rebate entitlement. Coal Products' counter-claim is based on applying the resulting adjustment formula — rebate × 79.6% — to 32 months' rebate, that is, 32/60 of the total rebate to be paid over five years. However, as we have seen above, the length of the period over which rebate is payable has no automatic connection under the Contract with the period in respect of which consumption data is assessed. Thus, there is no apparent connection between the case made by Coal Products and the Commission's request for consumption information. I recommend, therefore, that the counter-claim also be rejected.

18. At the oral hearing, counsel for Coal Products adopted a different approach to the interpretation of the Contract, as varied, which was broadly consistent with the alternative approach which I briefly outlined in paragraph 16 above. However, he took the view that the division of the total rebate entitlement under Article 5(4) of the Contract into tranches payable at six-month intervals meant that the proportional calculation of the rebate provided for in the variation agreement could be applied only to tranches paid or payable in respect of complete six-month periods, that is, up to 28 November 1994. This would have

resulted in Coal Products owing the Commission ECU 3 751. However, the Commission raised Article 42(2) of the Rules of Procedure of the Court of Justice, submitting that this represented a new plea in law. I am conscious of the irony that, if my analysis of the Commission's claim is adopted by the Court, the Commission will be seen to have invoked Article 42(2) against its own interests. None the less, I agree that Coal Products' submissions at the oral hearing were substantially new and recommend, therefore, that the Court deem them to be inadmissible.

Costs

19. As I do not recommend that either the claim or the counter-claim be accepted by the Court, each party should, in my view, bear its own costs.

V — Conclusion

20. In the light of the foregoing, I recommend that the Court:

— Reject the Commission's claim;

— Reject Coal Products Limited's counter-claim;

— Order each of the parties to bear its own costs.