

LEXSEE 1997 U.S. DIST. LEXIS 14954

**MALLON RESOURCES CORPORATION and MALLON OIL COMPANY,
Plaintiffs, -against- MIDLAND BANK plc, NEW YORK BRANCH, and MIDLAND
MONTAGU PRIVATE EQUITY, INC., Defendants.**

96 Civ. 7458 (RPP)

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
NEW YORK**

1997 U.S. Dist. LEXIS 14954

September 24, 1997, Decided

DISPOSITION: [*1] Complaint and counterclaim dismissed. Judgment Entered for defendant for the costs of this action.

COUNSEL: For Plaintiffs: Jeffrey A. Chase, Esq., Steven R. Beck, Esq., L. Doris Freedman, Jacobs Chase Frick Kleinkopf & Kelley, Denver, CO.

For Defendants: John K. Crossman, Esq., David A. Luttinger, Jr., Esq., Frank C. Welzer, Esq., Zevnik Horton Guibord & McGovern, L.L.P., New York, NY.

JUDGES: ROBERT P. PATTERSON, JR., U.S.D.J.

OPINION BY: ROBERT P. PATTERSON, JR.

OPINION:

**FINDINGS OF FACT AND CONCLUSIONS OF
LAW**

ROBERT P. PATTERSON, JR., U.S.D.J.

Plaintiffs Mallon Resources Corporation ("Mallon Resources"), a Colorado corporation, and its subsidiary Mallon Oil Company ("Mallon"), also a Colorado corporation, sue defendant Midland Bank, plc, New York Branch ("Midland"), a bank with its principal place of business in New York City, for breach of the covenant of good faith and fair dealing in connection with a Credit Agreement entered into by the parties on August 24, 1995. The case was tried on July 21 and 22, 1997. The following are the Court's Findings of Fact and

Conclusions of Law.

Findings of Fact

The Credit Agreement was negotiated after John A. Cleveland, Executive Director [*2] of HSBC Holdings, the holdings of which included Midland, received information while in Vancouver, Canada from a Mallon Resources director that Mallon was seeking financing and wanted to replace a production payment loan arrangement with short term financing. Mallon Resources had businesses other than Mallon for which a banking relationship with an international bank might be mutually beneficial. Cleveland, whose compensation is determined in part by new business generated, went to Denver and on June 15, 1995 met with Mallon Resources's president, George O. Mallon, Jr., Mallon's president, Kevin Fitzgerald, and Mallon's vice president of engineering, Ray Jones.

On June 21, 1995, Mallon Resources entered into a letter agreement with Midland, in which Midland agreed to evaluate the possibility of establishing a credit facility. (Ex. 2.) Thereafter, at Mallon's expense, Midland sent independent consultant engineer Forest Mintz ("Mintz") to review the December 31, 1994 reserve report (Intera I) prepared by Mallon's consulting petroleum engineering firm, Intera Information Technologies, Inc. ("Intera"), and to evaluate Mallon's expertise in oil and gas. (Tr. 426-27.) Mintz visited Mallon [*3] in Denver in late June 1995.

Mintz's evaluation of Mallon's oil and gas reserves was made more difficult because Mallon had been

developing new producing reserves by drilling six new wells in the Northeast Lea field in Southeastern New Mexico, the first of which was completed in December 1994 and the others in the first half of 1995. Mallon wanted Mintz to include the reserves of these wells as producing reserves in his report to Midland as support for a larger loan. Since Intera was unable to provide a report until September on Mallon's oil and gas reserves as of June 30, 1995, Mintz agreed to base his report to Midland on an adjusted to June 30, 1995 basis. Accordingly, Mintz had Mallon provide him with a computer run by Intera which used the Intera I information n1 modified so that those wells completed as of January 1995 were included in the Proved Developed Producing (PDP) reserves category, using Intera I's forecasted reserves for Proved Undeveloped Reserves (PUR) as completed well results for those wells, and valuing, as per Mintz's instructions, all Mallon oil reserves at \$ 17 a barrel and all Mallon producing gas reserves at \$ 1.60 per MCF (million cubic feet). This computer [*4] run, referred to in testimony as the Mintz run, was furnished by Mallon to Mintz on or about July 10, 1995. (Ex. 7.) On July 12, 1995, Mintz made a written report to John Cleveland of Midland of his conclusions and analysis concerning Mallon's oil and gas operations and reserves. (Ex. RRR; Tr. 437.) Those conclusions used projections of Mallon reserves in the PDP, PDNP and PUR categories drawn from the Mintz Run (Ex. RRR at B0474-B0477.) Upon receipt of the Mintz conclusions, Cleveland prepared Midland's calculation of Mallon's "borrowing base" at \$ 10.2 million. (Ex. H; Tr. 400-01) Accordingly, the Credit Agreement entered into by Mallon and Midland allowed Mallon to borrow up to \$ 10 million during the initial period.

n1 Intera placed Mallon reserves into three categories, with Proved Developed Producing (PDP) being the most valuable, Proved Developed Non Producing (PDNP) the next most valuable, and Proved Undeveloped Reserves (PUR) the least valuable.

According to Fitzgerald and Jones, Mintz had been advised [*5] orally in June that there had been negative results involving the newly drilled No. 10 well in the Northeast Lea field making the value of the PDP reserves for No. 10 considerably less than as had been projected

in Intera I. (Tr. 42-42; 302-06.) Fitzgerald maintains that he also provided Mintz with written data demonstrating the No. 10 well's poor reserves as well as other new well information in July 1995. (Exs. 7A and 7B; Tr. 43-47, 304-05.) There is no cover letter or memoranda supporting his testimony that such data was sent to Mintz, although Fitzgerald testified that a handwritten note to Mintz dated July 10, 1995 (Ex. SSSS) accompanied exhibits 7A and 7B. (Tr. 165-170, 271-277). That note does not reflect that it was actually sent to Mintz but is almost a word-for-word copy of a note George O. Mallon, Jr. sent to Cleveland at his hotel on July 13, 1995. (Ex. JJJJ). Both exhibits state that the accompanying projections "are for the base Intera reserves (PDP only) plus the following schedule of work." n2 Mintz denies being aware in July 1995 of receiving documents 7A and 7B which Fitzgerald testified accompanied his note, although Mintz admits the documents were discovered among [*6] Mintz's papers. Fitzgerald testified that Mintz was to use the information contained in documents 7A and 7B to modify the Mintz run to make it more accurately reflect Mallon's PDP. Mintz testified that he did not modify the Mintz run to reflect the No. 10 well's poor performance in his report to Midland and that he does not recall ever being advised of its poor performance until late September. (Tr. 453-57.) Mintz's report to Cleveland and his own notes corroborate him. In his July 12, 1997, report to Cleveland, he stated, "A successful drilling program in the Lea Northeast field during early 1995 has resulted in six successful oil wells which have added substantial value (\$ 4.2 million) to the Company's PDP reserves" (Ex. RRR at B0467). Mintz handwritten notes of July 21, 1995 include the note, "Lea NE wells holding up." (Ex. 14.)

n2 The schedules accompanying Exhibit JJJJ are different than Exhibit 7A.

While Midland and Mallon were discussing the possibility of a credit agreement, George O. Mallon, Jr. was [*7] also discussing a potential credit agreement with another bank, Banc One. In this lawsuit it is Mallon's contention that it had a commitment from Banc One to extend it a credit facility letter with a borrowing base of \$ 10 million, and that Midland in bad faith raised its borrowing base to \$ 10 million to take the business from Banc One, in order to obtain the fees and other

benefits generated by the credit agreement, while knowing that it would have to redetermine and reduce the borrowing base when it received the June 30, 1995 Intera report (Intera II) on Mallon oil and gas reserves which would reflect the poor results of the No. 10 well.

Mallon has produced no evidence of a commitment from Banc One to extend it a credit facility of \$ 10 million. Exhibit 13, a letter from Banc One, dated July 19, 1995 and transmitted on July 20, 1995, stated, "This letter and term sheet is not a commitment on behalf of the Bank to enter into any loan transaction." The accompanying revised term sheet is labeled "for discussion purposes only" and states the revised term sheet is subject to completion of an engineering review, as admitted by Fitzgerald. (Tr. 258-60.) On July 21, around the time of [*8] Mallon's receipt of Exhibit 13, George O. Mallon, Jr. notified Banc One that Mallon was not going to refinance with Banc One because it was going to refinance with Midland and because Banc One had not made its revised offer earlier. (Ex. FFFF.) On July 21, 1995, Mallon entered into a second engagement letter with Midland. (Ex. 15.) On August 7, 1995, Midland issued a conditional commitment to loan Mallon \$ 10 million. (Ex. 17.)

The Credit Agreement, entered into on August 24, 1995, obligated Midland to make advances to Mallon Oil for an amount not exceeding the borrowing base. (Ex 19, § 2.1.) The initial borrowing base was set at \$ 10 million. (Ex 19, § 2.9.) On August 24, 1997, by virtue of a promissory note executed as part of the Credit Agreement (the "Note"), the credit facility (had it continued that long) could have continued for two years and then converted to a three-year term loan requiring quarterly principal and interest payments. (Ex. 21.) Mallon's first payments of principal under the Note were to become due on December 31, 1997, with the final principal installment due on August 24, 2000, at which time Mallon was required to fully pay off the loan. (Ex. 21 at 2.) Under [*9] the terms of the Credit Agreement, until August 24, 1997, Mallon was not required (but had the option) to make principal payments so long as the principal outstanding did not exceed the borrowing base. (Ex. 19, § 2.6, § 2.7; Ex. 21.)

By the terms of the Credit Agreement, the borrowing base was to be redetermined by Midland for the first time within 30 days of September 1, 1995 (the "evaluation date"). (Ex. 19, § 2.10 and at 4.) Midland wanted this

redetermination date -- a date only eight days after the loan closing -- because it wanted to reevaluate the borrowing base in light of forthcoming new engineering data to be prepared by Mallon's consultant, Intera, as of July 1, 1995 (Intera II). (Ex. 19, § 2.10.) (Tr. 430: 16 - 431: 19; 494: 3 - 15.) Mallon wanted this date because it wanted a higher borrowing base to fund more drilling activity. Such new data would therefore be six months more current than the previous Intera report which had been prepared using data as of December 31, 1994.

Although the parties presented conflicting evidence on whether Mallon employees ever orally told Mintz anything about the Northeast Lea field disappointments, the preponderance of the credible [*10] evidence demonstrates that Mintz did not know until September 1995 that the Mintz Report was based upon projections of oil production which were never going to be met. Mintz testified credibly that he was not told by anyone at Mallon to revise the oil production data in the Mintz Report to get a more accurate picture of Mallon's reserves. (Tr. 453: 2 - 454: 5.) Indeed, in response to a question from the Court, Mintz explained that he lacked the data necessary to prepare an engineering report with new projections; rather, any engineering reports incorporating new production projections for Mallon Oil would have had to have been completed by Intera, plaintiffs' engineering consultant. (Tr. 473: 1 - 13.)

On September 1, 1995, Cleveland recommended to Midland that its assumption for oil prices for loans to all its customers be reduced 50 cents a barrel from 17.50 to \$ 17.00. (Tr. 393-95; Ex. 38 at B0811.)

On October 10, 1995, Intera II was sent to Midland and Mintz. After receipt of Intera II, Mintz reevaluated Mallon's reserves and reported to Cleveland that based on the results in the first half of 1995 Mallon's reserves should be reduced from the Mintz run evaluation. (Ex. O.) He [*11] also reported that Intera II was calculated on a different basis from Intera I. (Ex. O.) Intera II increased Mallon's net operating profits by the elimination of overhead expenses for Mallon's share, as operator, of overhead well expenses (Tr. 332-34), and oil and gas prices were calculated using escalations from January 1, 1995 instead of on an unescalated basis as in Intera I. The value of Mallon's reserves was increased \$ 850,000 by those accounting methods in Intera II. (Tr. 332-34.)

Cleveland used Intera II and Mintz's report of

October 12, 1995 (Ex. O) to calculate Mallon's adjusted "borrowing base at \$ 9,222." (Ex. 5 at B0873.) A calculation of a new borrowing base upon receipt of Intera II was anticipated pursuant to Section 2.10 of the Credit Agreement. (Ex. 19 at B0157, B0167-8.) In Exhibit O, Mintz had calculated the Mallon reserves present value at \$ 19,100 as of July 1, 1995. Cleveland valued the reserves at \$ 19,277. Cleveland's calculation of the new borrowing base became \$ 9,222. (Ex. S at B0873.)

Mallon protested that this proposed reduction in the borrowing base to \$ 9.2 million was impossible because its PDP reserves had increased during the first half of 1995 [*12] by \$ 4 million (a 40% improvement). (Ex. 32.) Mallon claimed that it should not suffer because Midland had made an error in its initial valuation and pointed out that it had counted on the \$ 10 million borrowing base, and that if it could not continue drilling, it would have cash flow problems. (Id. at B0050.) There is no mention in this letter dated October 2, 1997 that Mintz had received the information about the poor results of the No. 10 well in the Northeast Lea field prior to Midland's issuance of the commitment letter or its execution of the Credit Agreement, as Fitzgerald and Jones testified. Cleveland testified that he did not use Mintz's pricing in calculating the initial or the new borrowing base, that only Mintz oil and gas volumes were used, and that the bank made its own calculations of

the correct present and future prices of oil and gas and applied those to Intera II volumes as confirmed by Mintz. (Tr. at 388, 400-01.)

Cleveland's supporting documents (Exs. 1 and 23, RRR and O) and his schedules (Exs. H and S) bear him out. Mintz credited Mallon with an increase of \$ 4.2 million in reserves in his July 12, 1997 report to Cleveland. (Ex. RRR.) Cleveland then made [*13] his calculation of the borrowing base by calculating not only the discounted present value of the reserves, but also by calculating the sufficiency of the cash flow available from Mallon's oil and gas wells to cover the interest costs in the first two years of the Revolving Credit and the payments of principal and interest in the last three years. (Ex. H.) In the fall of 1995, Cleveland did the same calculation but used a 50 [cents] lower oil price (Ex. 38 at B0812) and volumes from the Mintz Report of October 12, 1995. (Intera II columns) (Ex. O, Table I.) Cleveland's cash flow charts in the fall of 1995 showed Mallon would only be able to pay back less than half of the \$ 10 million loan. (Ex. S at 17.) The shortfall was due to several factors: (1) the reduced oil price; (2) the nature of the Delaware formation in the Northeast Lea field n3 and (3) the poor result in the No. 10 well and some of the other new wells.

MALLON OIL AND GAS RESERVES

	Intera I		Intera II	
	Oil Barrels	Gas MCF	OIL Barrels	GAS MCF
Reserves				
PDP	818,202	11,144,750	1,097,890	11,775,720
PDNP	154,398	3,526,376	125,296	2,841,652
PUR	733,745	4,560,476	517,097	4,817,427
Total	1,706,343	19,231,601	1,740,283	19,434,799

[*14]

VALUATION OF RESERVES

	Intera I		Intera II	
	Undiscounted	Estimated Present Value Discounted 10%	Future Undiscounted	Net Value Estimated Present Value at 10%
PDP	\$ 16,874,150	10,778,130	24,620,860	\$ 14,253,410
PDNP	4,912,304	2,648,857	3,611,339	1,921,090
PUR	8,183,619	4,875,234	6,319,959	2,927,555
Total	\$ 29,970,073	\$ 18,302,321	\$ 34,552,158	\$ 19,102,055

his management that:

n3 In Intera I, scheduled production from the producing gas reserves in the Lea Northeast field was calculated on a declining exponential straight line basis. Intera II showed that the declining curve should have been hyperbolic, resulting in greatly reduced production in early years while lengthening the projected life of the wells.

In essence, the result was that in Intera II Mallon's oil and gas reserves remained relatively the same but now production from those wells was calculated to drop significantly in the early years, as much as 50% in the first year (Tr. 341) [*15] and as much as 30% in the first month (Tr. 346), and pay out over a longer period. Also, although the value of PDP reserves had increased by \$ 3.5 million, the value of PDNP and PUR reserves had decreased by \$ 2.5 million. As a result of all this new information, Mallon's projected income was calculated to be insufficient to meet all the principal payments in the loan in the last five years required under the Credit Agreement. Intera, now Schlumberger Geo Quest, submitted a new study of Mallon's reserves as of July 1, 1995. On November 30, 1995, this study (Intera III) increased the estimated value of proved undeveloped reserves by approximately \$ 100,000 for a total present value of all proved reserves of \$ 19,230,450.

In evaluating Intera II and III, Cleveland reported to

The new engineering report reflects a deterioration in Mallon's reserves, due primarily to the poor performance of a well drilled in the Lea Northeast field in April and May 1995, the Federal No. 10 . . . This well had originally been projected to produce approximately 275 barrels of oil per day. The highest production it achieved has been 80 bpd . . . In response to this situation, [*16] Intera has reduced (from \$ 980,000 to \$ 129,000) the estimated present value of the No. 10 well and has decreased estimated ultimate recoverable volumes for several adjacent wells and PUD locations in the Lea Northeast field in the mid-year engineering report. Intera has also projected steeper initial declines for several of the newer Lea Northeast wells while lengthening their projected life. This change has had a significant impact on the cash flow generating profile of the Company's reserves, reducing cash flow in the near term years and slightly increasing cash flow in some later years.

(Ex. 38 at BO810.)

Cleveland calculated that the borrowing base of \$ 10 million was reduced by \$ 217,000 by the price parameter

change of 50 [cents], \$ 485,070 by the No. 10 well impact, and \$ 89,930 by the other reserve adjustments. n4 (Ex. 38 at B0812.) In addition, Cleveland reported that Mallon had experienced some temporary mechanical problems that interfered with oil production affecting cash flow and capital, that Mallon had acquired additional interests in oil leases which would require capital expenditures, and that the bank's projected oil price adjustment for all customers [*17] had adversely affected the viability of the loan. (Ex. 38 at B0811.)

n4 Cleveland pointed out that in August 1995 his base cash flow projections for Mallon's performance in 1996 had shown that cash from operations in 1996 would total \$ 5.395 million. In comparison, due to lower estimated 1996 volumes, later projections showed that cash from operations would amount to only \$ 2.144 million, that later years would be marginally lower, and that, at the maturing date on the loan, \$ 5.9 million would remain unpaid. (Ex. 38 at B30813.)

In sum, Intera II did increase the value of Mallon's projected reserves by using an escalation of oil and gas prices as of January 1, 1995 and a reduction of expenses, and by an accounting change in the treatment of overhead for Mallon-operated wells that increased the present value of Mallon by \$ 850,000. (Tr. 334; Ex. 25.) However, because the first half of the 1995 drilling results shown in Intera II and III had not added 40% to the value of Mallon reserves as Fitzgerald contended, [*18] and because Midland had already calculated the borrowing base on that projected increase in reserves, the Intera II and III changes were not sufficient to offset the 50 [cents] per barrel oil price reduction and the cash flow problems which Cleveland had projected based on Intera II and Intera III's variations to the schedule of oil production from the Northeast Lea field as a result of the declining hyperbolic curve and the poor results from well No. 10.

Conclusions of Law

I

Midland did not breach the covenant of good faith and fair dealing. Plaintiff's speculations about a

conspiracy between Cleveland and Mintz are unsubstantiated. The most that can be shown assuming Mintz received information about the poor results in the Northeast Lea field is that Mintz was negligent in not reporting the new information he received to Cleveland. Plaintiff has not shown by a preponderance of the evidence, however, that Mintz actually received such information in June or July as Fitzgerald and Jones contend. Jones's notes of September 18, 1995 state that Mintz wanted to see what Mallon had done and Mallon's well activity survey, which indicates Mintz had not received Exhibits 7A and 7B [*19] earlier. (Ex. 22.) Jones's notes do not comment that Mintz already had those results and did not have to re-review them. Furthermore, the evidence is insufficient to show that Mallon suffered any damage by being required to refund money to Midland as it had only borrowed \$ 9.2 million. Upon receiving Midland's notice that its borrowing base would be reduced, it determined to obtain financing from Banc One. In the meantime, Mallon drew down the remaining \$ 800,000 of the \$ 10 million revolving loan with Midland's consent in order to continue its new drilling program. Thus, if Mintz was negligent, his negligence did not injure Mallon significantly. Furthermore, no evidence was offered from which the Court could calculate damages for any delays caused by Midland.

II

Midland's counterclaim seeks to recover attorney's fees pursuant to its right to indemnification based on Section 8.3 of the Credit Agreement which states in bold face type:

Section 8.3. Indemnity. Each Borrower agrees to indemnify Lender, upon demand, from and against any and all liabilities, obligations, claims, losses, damages, penalties, fines, actions, judgments, suits, settlements, costs, expenses or [*20] disbursements (including reasonable fees of attorneys, accountants, experts and advisors) of any kind or nature whatsoever (in this section collectively called "liabilities and costs") which to any extent (in whole or in part) may be imposed on, incurred by, or asserted against Lender growing out of, resulting from or in any

other way associated with any of the Collateral, the Loan Documents, or the transactions and events (including the enforcement or defense thereof) at any time associated therewith or contemplated therein (including any violation or noncompliance with any Environmental Laws by either Borrower or any liabilities or duties of either Borrower or Borrowers or of Lender with respect to Hazardous Materials found in or released into the environment). THE FOREGOING INDEMNIFICATION SHALL APPLY WHETHER OR NOT SUCH LIABILITIES AND COSTS ARE IN ANY WAY OR TO ANY EXTENT CAUSED, IN WHOLE OR IN PART, BY ANY NEGLIGENT ACT OR OMISSION OF ANY KIND BY LENDER, provided only that Lender shall be not entitled under this section to receive indemnification for that portion, if any, of any liabilities and costs which is proximately caused by its own individual gross negligence or willful [*21] misconduct, as determined in a final judgment. If any Person (including either Borrower or any of its Affiliates) ever alleges such gross negligence or willful misconduct by Lender, the indemnification provided for in this section shall nonetheless be paid upon demand, subject to later adjustment or reimbursement, until such time as a court of competent jurisdiction enters a final judgment as to the extent and effect of the alleged gross negligence or willful misconduct. As used in this section the term "Lender" shall refer not only to the Person designated as such in Section 1.1 but also to each director, officer, agent, attorney, employee, representative and Affiliate of such Person.

(Defendant's Findings of Fact ("DFOF") P 69; Ex. 19, § 8.3) (emphasis in original).

Midland argues that Section 8.3 is as broad as can be since it covers "any and all liabilities . . . of any kind or nature whatsoever . . . resulting from or in any other way associated with any of the Collateral, the Loan Documents or the transactions and events (including the enforcement or defense thereof) at any time associated therewith or contemplated therein," (DFOF P 70; Ex. 19 § 8.3); that the only [*22] exclusion is for Midland's gross negligence or willful misconduct; that the Credit Agreement includes indemnification for disputes between the borrower and lender because it includes claims for the "enforcement or defense" of the loan documents; that naturally any claim for enforcement or defense of the Loan Documents must perforce be between Mallon as borrower and Midland as lender (DFOF PP 71, 72); and that the entire history of the transaction and other terms of the Credit Agreement all demonstrate the parties' mutual understanding that the transaction costs would be borne by Mallon (DFOF P 73).

Although the prior engagement letters between the parties did require Mallon to pay Midland's costs, those agreements were for specific costs of Midland envisaged by the parties in order to put the credit facility in place and about which both parties were apprised, e.g. fees for title search, for engineering consultants, and for attorneys. The indemnification provision of the Credit Agreement involves indemnification for costs which might arise in the future and which were not contemplated at the time by either party. Under these circumstances, the provision must be examined under New [*23] York law n5 in light of the purpose of the Credit Agreement and the facts and circumstances surrounding its execution.

Words in a contract are to be construed to achieve the apparent purpose of the parties. Although the words might "seem to admit of a larger sense, yet they should be restrained to the particular occasion and to the particular object which the parties had in view." This is particularly true with indemnity contracts. When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. The promise should not be found unless it can be clearly implied from the language and purpose of the entire

agreement and the surrounding facts and circumstances. Inasmuch as a promise by one party to a contract to indemnify the other for attorney's fees incurred in litigation between them is contrary to the well-understood rule that parties are responsible for their own attorney's fees, the court should not infer a party's intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise.

[*24]

Hooper Assocs. v. AGS Computers, Inc., 74 N.Y.2d 487, 549 N.Y.S.2d 365, 367, 548 N.E.2d 903 (1989) (citations omitted; emphasis added). The Court went on to explain that the indemnity provision at issue covered damages arising from claims brought by third parties and that none of its terms were "exclusively or unequivocally referable to claims between the parties themselves." Id.

n5 The Credit Agreement provides that it was to be governed by the law of New York. (Ex. 19, Sec. 9.5.)

Here, although Midland argues that the enforcement and defense of the collateral and loan documents necessarily contemplates claims asserted by Midland against Mallon (enforcement) or by Mallon against Midland (defense), the express language of the indemnity provision is broader. It provides that claims "against Lender growing out of, resulting from or in any other way associated with any of the Collateral, the Loan Documents or the transactions and events (including the enforcement or defense thereof) at any time associated [*25] therewith or contemplated therein" are to be covered under the Agreement. This language is not limited to claims between the two parties. Furthermore, the Credit Agreement contemplates that environmental claims can be made against the parties which necessarily would be brought by third parties. (Ex. 19, Sec. 4.1(k).)

Similarly, the Credit Agreement provides Midland with a security schedule. (Ex. 19 at B0209.) The secured liens which Midland would acquire if it had to foreclose under the Credit Agreement are matters which are clearly envisaged as potentially requiring enforcement against or defense from third parties. (Ex. 19, Sec. 6.3.)

Thus, although the language of the indemnification provision is not exactly the same as in *Hooper Assocs.*, it does contemplate reimbursement for expenses arising from third party claims, despite Midland's arguments to the contrary, and is not "exclusively or unequivocally referable to claims between the parties themselves." *Hooper Assocs.*, 549 N.Y.S.2d at 367. At no point do the terms of the provision refer "exclusively" or "unequivocally" to indemnification for liabilities and costs arising from claims brought by the Borrower against the Lender. [*26] Midland's attorney's fees cannot be imposed on a party unless the intention to do so is unmistakably clear from the language of the promise. See id.; *Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc.*, 98 F.3d 13, 20-21 (2d Cir. 1996); cf. *Asian Vegetable Research and Dev. Ctr. v. Institute for Int'l Educ.*, 944 F. Supp. 1169, 1175-77 (S.D.N.Y. 1996). *Breed, Abbott & Morgan v. Hulko*, 139 A.D.2d 71, 531 N.Y.S.2d 240 (App. Div. 1988), aff'd 74 N.Y.2d 686, 543 N.Y.S.2d 373, 541 N.E.2d 402 (1989), relied on by Midland, is distinguishable because there the intent to indemnify the escrowee from the claims of the parties was manifest. See *Hooper Assocs.*, 549 N.Y.S.2d at 368.

The complaint and counterclaim are dismissed.

Enter judgment for defendant for the costs of this action.

IT IS SO ORDERED.

Dated: New York, New York

September 24, 1997

Robert P. Patterson, Jr.

U.S.D.J.