JUDGMENT : MR. JUSTICE CLARKE: QBD Commercial Division. 27th September 2005.

1. In 1994 Heathrow Airport Limited (which I will refer to as "HAL") a subsidiary of BAA put out to tender the contract to run and operate a combined heat and power facility at Heathrow for 15 years. The facility supplies heat to cargo sheds and offices and it uses about 20% of the airport's electricity.

2. The successful bidders for this contract were two companies ATCO Power Generation Limited and EDF Energy (Energy Branch) Plc. They formed Thames Valley Power Limited ("TVPL"), the claimants, to own and run the facility under a set of contracts with HAL. In order to operate the facility so as to be able to supply heat and electricity to Heathrow Airport, TVPL needed gas. They sought bids from a number of prospective gas suppliers. In the result they selected a proposal from Total. They entered into a contract for the supply of gas with a company called Total Marketing of which Total Gas & Power Limited, the defendant, is the successor. Since nothing turns on the distinction between the two, I shall refer to the two companies simply as "Total".

3. The Total group is the fourth largest oil and gas supplier in the world. Total's annual sales to TVPL represent about 0.3% of the Total Group's 2004 UK production. The contract between TVPL and Total is dated 12th June 1995 and is known as "the Gas Supply Agreement" or GSA. TVPL is described as "the customer" and Total as "the supplier". It provides for the supply of gas over a 15 year period, less six days, from a date in the middle of 1995. The GSA is in two parts; there are standard conditions and special conditions; the latter prevail over the former.

4. Under the contract, Total are to be the sole suppliers of gas to the facility, (special condition 9), and TVPL are required to take and pay for the gas supplied. If they do not take a minimum amount of gas, they are required to pay for it nonetheless, (special condition 6.6).

5. Clause 6 of the special conditions contains an elaborate pricing mechanism. Until 1st October 1997 the prices were to be fixed, although there was to be an increase after 1st June 1996. Thereafter, the price was to be the lesser of two prices calculated quarterly according to two price formulae, P1 and P2, but never less than that prescribed by a third formula, P3. The pricing mechanism thus had both a ceiling, the lower of P1 and P2, and a floor, P3.

6. Clause 15 of the standard conditions is a force majeuree clause. It provides as follows:

"15.1 if either party is by reason of force majeuree rendered unable wholly or in part to carry out any of its obligations under this agreement then upon notice in writing of such force majeure from the party affected to the other party as soon as possible after the occurrence of the cause relied on, the party affected shall be released from its obligations and suspended from the exercise of its rights hereunder to the extent to which they are affected by the circumstances of force majeure and for the period during which those circumstances exist, provided that

(a) The party seeking relief under this standard condition shall advise the other party as soon as practicable of the force majeure together with its estimate of the likely effect of the force majeure on its ability to perform its obligations hereunder and of the likely period of such force majeure having regard to the matters referred to in paragraph (b) of this standard condition 15.1.

(b) The party affected shall use all reasonable endeavours to terminate the circumstances of force majeure if and to the extent reasonably practicable and with all reasonable speed and at reasonable cost having regard inter alia to the unexpired term of the contract period (but nothing in this proviso shall limit the absolute discretion of the party affected in regard to the settlement of any labour dispute constituting circumstances of force majeure); and

(c) nothing in this condition shall relieve either party of its obligations to indemnify or to make any payments due hereunder.

15.2, in this standard condition "force majeure" means any event or circumstances beyond the control of the party concerned resulting in the failure by that party in the fulfilment of any of its obligations under this agreement and which notwithstanding the exercise by it of reasonable diligence and foresight it was or would have been unable to prevent or overcome. Without limitation to the generality of this standard condition 15.2 it is acknowledged that any event or circumstance which qualifies as force majeure under the supplier's carriage agreement with British Gas shall be deemed to be a force majeure hereunder. In assessing the circumstances of force majeure affecting the customer, the price of gas under this agreement shall be excluded.

15.3, in the event of a circumstance of force majeure affecting the supplier's ability to supply gas hereunder, the supplier will, in so far as reasonably practicable, treat all its customers including the customer fairly and equally in determining the extent to which supplies are to be reduced, suspended or terminated".

7. On 5th July 2005 Total served what purported to be a notice under clause 15 in the following terms: *"We refer to the above-mentioned Gas Supply Agreement which was assigned to Total Gas & Power Limited (TGP) in October 2000. As you are aware, gas prices have risen considerably in recent times, in particular during the winter months. As a result of these increasing prices and the price formula for the sale of gas contained in the Gas Supply Agreement which is based on statistics produced by the DTI and the Producer Prices Index published by the Central Statistical Office, it will for large parts of the year become uneconomic to continue to supply gas to you under the Gas Supply Agreement. Accordingly, we regret to inform you that unless there is a significant fall in the anticipated UK market price of gas during the autumn and winter months, TGP will be unable to continue to supply further quantities of gas under the Gas Supply Agreement. TGP is therefore giving you formal notice under clause 15 of the standard conditions of sale forming part of the gas sales agreement that TGP will be unable to carry out its obligation to supply gas to you under the gas sales agreement after 30th September 2005 until further notice.*

Under the terms of the gas sales agreement you are entitled to obtain your requirements for gas from alternative suppliers until such time as TGP is in a position to resume supplies to you. We can further inform you that during this period TGP would be willing to supply gas to you at a bare "pass through" price. That is the price at which TGP could itself source such quantities of gas on the market without any further margin plus the actual transportation and metering charges incurred in effecting the supply. TGP regrets that it has been constrained to take this action, and we hope to be in a position to resume gas supplies under the gas sales agreement in the future. In this respect we will endeavour to keep you informed of the evolution of the situation in relation to the market price for gas".

8. On 20th July Herbert Smith, on behalf of TVPL replied saying that the increased cost of gas did not render Total unable to carry out its obligations, it merely rendered them less profitable. The letter requested an undertaking from Total that they would comply with their obligation to supply gas under the GSA and threatened proceedings if no such undertaking was given. By a letter of 25th July, Total expressed the view that proceedings would be precipitous in the absence of proper consideration of the point that they had to make on the last sentence of condition 15.2 to which I shall later refer. They did not offer any undertaking.

9. On 28th July a without prejudice meeting took place which failed to resolve matters. On 10th August Herbert Smith sent Total a copy of the claim form to be issued on Friday 12th.

10. Clause 11 of the special conditions contains a disputes procedure. It provides as follows:

11. DISPUTES

11.1 ***Notice of Dispute or Difference*** *In the event of any dispute or disagreement between the parties regarding this Agreement or failure to agree matters contemplated herein as being subject to mutual agreement, either party may serve written notice thereof on the other.*

11.2.1 ***Good Faith Dispute Resolution*** *In all cases where a dispute or disagreement is notified pursuant to special condition 11.1, the provisions of Special Condition 11.2.2 shall apply in priority to the other provisions of this Special Condition 11.*

11.2.2 The Parties shall, as soon as practicable after service of a written notice pursuant to Special Condition 11.1 and in any event within seven days following the service of such notice meet and use all reasonable endeavours to resolve that dispute or difference in good faith and, if on the expiry of a period of 30 calendar days following the service of the notice the parties shall have failed to resolve that dispute or difference, this Special Condition 11.2.2. shall cease to apply and Special Condition 11.3 shall then apply.

11.3 ***Appointment of an expert***

11.3.1 Subject to Special Condition 11.2, where notice is served pursuant to Special Condition 11.1 and where it is provided in this agreement that a dispute or disagreement between the parties should be referred for decision to an independent expert, that expert will be chosen by agreement between the parties or failing agreement within the 21 calendar days following service of notice pursuant to Special Condition 11.1 or expiry of the period referred to in Special Condition 11.2.2 (where applicable) by the President of The Law Society of England & Wales ("the President") who shall be requested to select an appropriate expert. The expert will decide the matter referred to him as an expert and not as an arbitrator, and the Arbitration Acts shall not apply.

The parties will afford to the expert every assistance in deciding any matters referred to him and will provide him with all information he may reasonably request. The expert shall be entitled to call for such evidence and arguments from the parties and any other persons as he shall in his absolute discretion see fit in the course of making his determination. The expert shall in his absolute discretion determine the apportionment of his costs in so acting as between the parties. The parties will be bound by and comply with any decision of the expert. The determination of the expert will be final and finding upon the parties except in the event of fraud mistake or manifest error.

11.4 ***Arbitration I****n the event that notwithstanding the procedures set out in Special Condition 11.2, no expert can reasonably be appointed or for any other reason such procedures cannot be implemented, any dispute or difference arising under any of the provisions of this agreement may be referred by either party to arbitration pursuant to the Arbitration Acts".*

11. On 11th August Total wrote to Herbert Smith giving what they described as "formal notification of a dispute under special condition 11.1 in relation to the force majeure notice on 5th July and the subsequent claims raised by TVP", and called for a meeting although one had already taken place.

12. On 12th August TVPL launched these proceedings. On 18th August another without prejudice meeting took place. On 19th August Mr. Justice Aikens ordered that any application for a stay must be issued together with evidence in support by 4pm on Friday 26th with the hearing, estimated one hour, to take place as soon as possible thereafter. He also gave directions as to what was to happen if there was no application for a stay or the court did not grant one. Those directions were

    1 That the trial of the claim was to proceed on an expedited basis,

    2 That a Defence and further Statements of Case should be dispensed with and the parties are to agree the issue to be decided in writing within 3 days of the Court's decision upon any application that the Defendant may make for a stay or in the event that the Defendant does not make such an application within three days of the last date for the Defendant to do so as set out in paragraph 1 above.

    3 Any relevant disclosure and witness statements to be exchanged by 4pm on Thursday 15th September.

    4 That the hearing of the issue should take place as soon as practicable after 19th September with a time estimate of 1 day.

13. On 26th August Total applied for a stay of the proceedings until further order. On 6th September that application came before Mr. Justice Andrew Smith. He expressed the view, as I was told, that in June 1995 the phrase "any dispute or difference" had a specific meaning in the context of arbitration clauses such that it signified a dispute which was not one that could be resolved summarily under Order 14 on the ground that there was no issue to be tried. Accordingly, as it seemed to him, it would be necessary for the Court to consider the merits of Total's claim to invoke force majeure or the lack of them, in order to determine whether there should be a stay. Since the solicitor advocate representing Total, who had come to make the application for a stay, was not then in a position to deal with the question of the validity of the claim to invoke force majeure, Mr. Justice Smith ordered that the question of a stay be adjourned to 23rd September. He also ordered that the directions which Mr. Justice Aikens had previously ordered should come into effect if no stay was sought or ordered should have immediate effect. He also gave a further direction for service by the parties of a document setting out what they said was the relevant factual matrix. In the event the circumstances constituting the factual matrix have been agreed.

14. On 6th September Hammonds, the solicitors for Total, who had taken over from Denton Wilde Sapte, indicated that a five day trial was necessary and suggested a hearing after 21st September; but on 9th September Hammonds accepted that the issue of the service and effect of the notice of 5th July and Total's own stay application could be determined on 23rd September but said that all other issues would have to be determined later.

15. On 12th September the parties filed their suggested issues and these were eventually agreed to be the following:

    1 "Whether on the true construction of the Interruptible Gas Supply Agreement ("the Agreement") dated 12 June 1985 Total was entitled to serve on TVPL a notice pursuant to Clause 15 of the said Agreement contained in a letter dated 5th July 2005 ("the Letter") that the Defendant would cease to supply further quantities of gas to the Claimant under the Agreement after 30th September 2005 on the ground that as a result of increasing prices and

the price formula in the agreement "it will for large parts of the year become uneconomic to supply gas to you under the Gas Supply Agreement".

2 *If the answer to 1 above is "no" whether the Claimant was entitled to the relief sought by the Claimant in the particulars of claim and in particular whether on a true construction of Clause 9 of the Standard Conditions of the Agreement the Claimant was entitled either to damages or to specific performance in the event of a breach of the agreement by the Defendant arising out of the Defendant's failure to supply quantities of gas to the Claimant".*

Clause 9 of the standard conditions is an exclusion clause.

16. There is an issue as to what the first issue means. Mr. Woodford on behalf of Total said that they understood that, subject to the stay application, the court would consider the issue of principle as to whether or not a general condition 15 force majeure notice could ever be served on economic grounds, that is to say on the basis that an increase in the market price of gas had made the contract so loss making that Total could not as a matter of commercial practicality continue to perform it, leaving for later consideration the factual question as to whether the circumstances were sufficiently exceptional to amount to such impracticability. TVPL for their part submit that, subject to the stay point, the court has to decide every issue necessary to determine whether the force majeure notice was valid. As will become apparent in due course I do not think that it will be necessary for me to resolve this question.

17. On 13th September, Hammonds indicated, and later on in the day confirmed, that they did not presently intend to serve any witness evidence. They have in fact served a further witness statement from Mr. John Shead which addresses a number of matters raised in the skeleton arguments.

18. On 16th September a further without prejudice meeting took place. By the time of the hearing before me, Total had made plain that they would undertake to continue to supply TVPL with gas under the terms of the GSA until the conclusion of the expert determination, and that, if I ruled against them on the question of a stay, and also ruled that Total could not rely on the force majeure clause and that TVPL was entitled to specific performance in relation to Total's refusal to supply or damages, then they would withdraw their notice of 5th July and would continue to supply TVPL pursuant to the GSA.

19. I turn then to consider whether there should be a stay. The first question is whether there is a "dispute or disagreement" between Total and TVPL within the meaning of the GSA. If so, the next question is whether it is a dispute which under special condition 11 is to be referred to expert determination.

20. Total claim that they were entitled to serve a force majeure notice. TVPL say that they were not. In ordinary language there is a dispute or disagreement between them on the point. But the meaning of those words has to be determined in the context in which they were written. In the late 1970s and 80s and early 90s, applications for summary judgment under Order 14 and for a stay of the action for the purposes of arbitration were regularly held at the same time both in the case of domestic and international arbitrations. If the matter could be determined summarily, the plaintiff would obtain judgment. If not, the action would, in the case of a non-domestic arbitration, have to be stayed unless the arbitration agreement was null and void, inoperative, or incapable of being performed because section 1 of the Arbitration Act 1975 obliged the court to order a stay unless "there is not in fact any dispute between the parties with regard to the matter agreed to be referred". In the case of a domestic arbitration agreement, the action was highly likely to be stayed unless there was some special factor which militated against that course.

21. In the second edition of **Russell & Boyd on Commercial Arbitration**, (pub.1989) page 123, the learned authors addressed the question of defences put forward with apparent good faith which were in fact insubstantial in the following terms: *"When dealing with defences of this kind, three questions may arise,*

1 Does the arbitrator have jurisdiction to entertain the claim and to make a valid award in respect of it?

2 Must the court grant a stay in respect of any action brought in respect of the claim if the matter falls within section 1 of the 1975 Act and may it grant a stay if it is within section 4.1 of the 1950 Act?

3 If an action is brought in respect of the claim, should the court grant summary judgment for the amount claimed? Whatever might be the position as regards a defence which is manifestly put forward in bad faith, there are strong logical arguments for the view that a bona fide if unsubstantial defence ought to be ruled upon by the arbitrator not the Court. This is so especially where there is a non-domestic arbitration agreement containing a valid agreement

to exclude the power of appeal on questions of law. Here, the parties are entitled by contract and statute to insist that their rights are decided by the arbitrator and nobody else. This entitlement plainly extends to cases where the defence is unsound in fact or law. A dispute which it can be seen in retrospect the plaintiff was always going to win is nonetheless a dispute. The practice whereby the Court pre—empts the sole jurisdiction of the arbitrator can therefore be justified only if it is legitimate to treat a dispute arising from a bad defence as ceasing to be a dispute at all when the defence is very bad indeed. The correctness of this approach is not self evident. Moreover, in all but the simplest of cases the Court will be required not merely to inspect the defence but to enquire into it – a process which may, in matters of any complexity, take hours or even days. When carrying out the enquiry the Court acts upon affidavits rather than oral evidence. The defendant might well object that this kind of trial in miniature by the Court is not something for which he bargained when making an express contract to leave his rights to the sole adjudication of the arbitrator.

Whatever the logical merits of this view, the law is quite clearly established to the contrary. Where the claimant contends that the defence has no real substance, the court habitually brings on for hearing at the same time the application by the claimant for summary judgment and the cross-application by the defendant for a stay, it being taken for granted that the success of one application determines the fate of the other".

22. Matters did not, however, stand still. In his seminal judgment in **Hayter v Nelson** [1990] 2 Lloyds Rep 265, Mr. Justice Saville, as he then was, had before him an application for summary judgment by the plaintiffs and an application for a stay under the 1975 Act by the defendant. The arbitration clause provided: *"Any disputes arising out of the agreement which cannot be settled amicably shall be referred to arbitration".*

Mr. Justice Saville assumed for the purposes of his judgment that the word "difference" and the word "dispute" had the same meaning. He addressed the suggestion made in some of the cases that if it can be shown that a claim under a contract is indisputable, i.e. one that cannot be resisted either on the facts or the law, then there is no dispute. He roundly rejected this suggestion by reference to a genuine dispute as to who won the boat race, pointing out that if the suggestion were correct, it would have the consequence that a claim which could not be resisted but which the defendant did in fact resist, could not be referred to arbitration. He cited the observation of Lord Justice Templeman in **Ellerine Brothers Pty Limited v Clinger [**1982] 1 WLR 1375 that: *"There is a dispute until the defendant admits that the sum and payable".*

23. Section 1 of the Arbitration Act 1975 only comes into play if proceedings are commenced by A against B in respect of a matter agreed by the parties to be referred to arbitration. In the light of his analysis Mr. Justice Saville held that the proceedings before him were in respect of a matter agreed by the parties to be referred in that a difference existed between them in respect of their rights and obligations arising out of the agreement containing the arbitration clause. But he interpreted the words *"if there is not in fact any dispute between the parties with regard to the matter agreed to be referred",* in section 1 of the 1975 Act, as applicable if there was not in fact anything disputable. In such circumstances, on the law as it then stood, the court was not bound to stay the action.

24. Mr. Justice Saville's analysis could not, in 1995, be regarded as established law. In the "**John C. Helmsling**" [1990] 2 Lloyd's Rep 290, Lord Justice Bingham, with whom Lord Justice Nourse and Sir George Waller agreed, professed himself to be much impressed by Mr. Justice Saville's arguments of logic and principle but said that there was a body of authority on the other side, that the question did not need to be resolved in that case, but that it might have to be in the future. Nevertheless it could not, in 1995, be taken as clear that the words "dispute" or "difference" or "disagreement" in an arbitration clause meant a dispute that could not be resolved on an application for summary judgment, and the judgment of Mr. Justice Saville was to the opposite effect.

25. In those circumstances it does not seem to me that the circumstances in which the GSA was made lead to the conclusion that the words "dispute or disagreement" should have anything other than their ordinary meaning. In their ordinary meaning there is here a dispute between the parties as to the applicability or otherwise of the force majeure clause.

26. TVPL contend that even if that is so, the procedure for expert determination only applies "where it is provided in the agreement that a dispute or disagreement between the parties should be referred for decision to an independent expert": see special condition 11.3.1. There are only two such instances. The first

is special condition 8.12, which in certain circumstances grants a put option to the supplier, specifies the class of oil to be provided, and provides a complicated formula for the calculation of the price. The last paragraph of that condition provides as follows: *"The class of oil, price and price adjustment provision are subject to alteration, modification or amendment if so required, to meet environmental, statutory or similar regulatory requirements. If any such alteration is proposed by either party, then it is agreed that the parties will meet and discuss in good faith such changes. If no decision is agreed within 14 days, the parties shall submit to an expert in accordance with special condition 11".*

27. The second instance is standard condition 21 which provides under the heading "Severability": *"In the event that any term, condition or provision of this Agreement is held to be a violation of any applicable law, statute or regulation, the same shall be deemed to be deleted from this Agreement and shall be of no force and effect and this Agreement shall remain in full force and effect as if such term, condition or provision had not originally been contained in this Agreement. Notwithstanding the foregoing, in the event of any such deletion the parties shall meet to negotiate in good faith in order to agree in writing the terms of a mutually acceptable and satisfactory alternative provision in place of the provision so deleted and if, within a period of 30 days from the date of such deletion, the parties shall have failed to agree, either party may submit the matter for determination by an Expert appointed in accordance with special condition 11".*

28. Mr. Philip Shepherd, Q.C., for TVPL, submits that it is inherently unlikely that special condition 11 was intended to apply the expert determination procedure to all disputes. That would involve, at least in part, an ouster of the jurisdiction of the court whose jurisdiction is recognised in standard condition 17. In addition, the provision in special condition 11.2 that the parties should use all reasonable endeavours to resolve their disputes was, he submitted, unenforceable. It would be surprising if practically every dispute was to be subjected to a regime part of which lacked contractual force. Further, whilst the expert determination procedure was no doubt apt, for the two technical matters to which special condition 11.3 referred, it was markedly less suitable for other disputes.

29. I do not regard these considerations as of much assistance in interpreting the condition. To the extent that it applies, the expert determination procedure will, provided the court is prepared to grant a stay, take the place of an adjudication by the court. But that provides little guidance as to the reach of special condition 11. I do not propose to determine whether the obligation to use reasonable endeavours to resolve disputes is enforceable and, if so, to what extent, because, even if it is not, I do not regard that as indicating that the expert determination procedure should be given a limited remit. Clauses such as special condition 11.2 are in frequent use and often observed whether enforceable or not, as happened in this case. Nor do I accept that the expert determination procedure laid down is only apt for disputes such as those under special condition 8.12 and standard condition 21. These two conditions would themselves give rise to disputes of an entirely different character. Further, in circumstances where the expert is to be determined by agreement between the parties or, in default, by the President of The Law Society, it does not seem to me that I should approach the question of construction on the basis that the parties must have intended to give the procedure a restricted scope.

30. The essential question is whether the use of "and" in the second line of special condition 11.3.1 is conjunctive or disjunctive, or, as I would prefer to put it, whether special condition 11 envisages expert determination arising in two circumstances, (a) where a written notice is served under condition 11.1; and (b) in the circumstances specified in conditions 8.12 and 21. Mr. Shepherd points out that in the five places in which "or" appears in special condition 11 it is used disjunctively, and that in the four places in which "and" appears prior to its first use in special condition 11.3.1, and in the places where it appears thereafter, it is used in the conjunctive sense. He submits that it would be surprising if, in those circumstances, the draftsman intended "and" to have a disjunctive meaning in the second line of special condition 11.3.1. He also points out that the reference to "that expert" in line 4 of condition 11.3.1 makes grammatical sense in reference to its immediate antecedent, that is to say the expert provided for by the two particular conditions, but not in relation to the opening words: "Subject to special condition 11.2 where notice is served pursuant to special condition 11.1", as would be apparent if the later words from "and where it is provided" to "for decision to an independent expert" were excised.

31. In my judgment special condition 11 is intended to apply the expert determination procedure in both of the circumstances that I have identified. Special condition 11.1 entitles but, does not oblige, either party to serve written notice of a dispute. Condition 11.2.1 provides that if that happens, condition 11.2.2 shall apply. That requires the parties to meet and use all reasonable endeavours to resolve the dispute. If they do not do so within 30 days of the notice, special condition 11.3 "shall then apply". If, as Total contend, special condition 11.3.1 applies the expert determination procedure to any dispute the subject of the special condition 11.1 notice, special condition 11.3 does indeed "then apply". But if special condition 11.3.1 is only, as TVPL contend, applicable to a dispute under special condition 8.12 and general condition 21, it is not then applicable to most of the disputes which can be the subject of the notice.

32. It seems to me implausible that this was what the parties intended. The more likely meaning is that special condition 11 lays down a procedure for any dispute. That procedure consists of notice under 11.1, negotiation under 11.2 and, that failing, expert determination under 11.3. This is particularly so having regard to the reference to special condition 11.1 in the second line of 11.3. Indeed, if TVPL are right, the words *"subject to special condition 11.2 where notice is served pursuant to condition 11.1"* are superfluous and in the case of most disputes, special conditions 11.1 and 11.2 provide nothing more substantial than an unenforceable agreement to negotiate.

33. It is not possible to treat the procedure laid down in conditions 11.1 and 11.2.2 simply as an adjunct or supplement to special condition 8.12 and standard condition 21. Those conditions already provide for an obligatory meeting and good faith negotiation. Under special condition 8.12 there is then a mandatory submission to the expert if no agreement has been reached within 14 days of the meeting, and under special condition 21 a right but not an obligation to submit the matter for determination by the expert if agreement has not been reached within 30 days of a deemed deletion. These provisions are quite different from, and inconsistent with, the special condition 11 regime which provides for reference of a dispute to an expert once 30 days have elapsed since the service of the notice under special condition 11.1, which a party is entitled but not bound to serve.

34. What, as it seems to me, the draftsman has done is to set out a dispute resolution procedure applicable to "any dispute" involving a notice, a meeting for negotiation and expert determination. He has then introduced into special condition 11.3.1 reference to the two particular instances where the agreement already provides for meeting, negotiation and then submission to an expert. Condition 11.3 then deals with how the expert determination will work in all of these cases.

35. Lastly, special condition 11.4 provides that if, notwithstanding the procedures set out in special condition 11.2, no expert can reasonably be appointed "any dispute arising under any of the provisions" of the GSA may be referred by either party to arbitration. It would make no sense to construe the agreement as meaning that only disputes under the two specified clauses could be the subject of expert determination unless and until it appeared that an expert could not be appointed, in which case any dispute under any of the provisions could be referred to arbitration. Accordingly, I hold that section 11.3 is applicable to the dispute between the parties in relation to the force majeure notice. The "and" used in the second line of special condition 11.3.1 is in one sense conjunctive, not in the sense that the expert determination will apply in a case where there is both a notice under special condition 11.1 and also special condition 8.12 or standard condition 21 applies, but that in the sense that it will apply both where a special condition 11.1 notice is served and in the cases to which those latter conditions rely.

36. I do not regard the fact that the draftsman referred to "that expert" rather than "an expert" in the fourth line of condition 11.3.1, or that he did not use the expression "and also" as sufficient to outweigh all the considerations that I have mentioned that have led me to my conclusion.

37. If the dispute had arisen prior to the coming into force of the 1996 Arbitration Act and had been the subject of a non-domestic arbitration agreement, the court would have been bound under the Arbitration Act 1975 to stay the proceedings unless there was in fact nothing disputable. In the case of a domestic arbitration agreement, the court would have had a discretion under section 4 of the Arbitration Act 1950 whether or not to stay the action for arbitration. If it came to the conclusion that TVPL's claim was indisputable, the likelihood is that it would have given summary judgment.

38. Part 1 of the Arbitration Act 1950 and the whole of the Arbitration Act 1975 were repealed by the Arbitration Act 1996, section 9 of which entitles a party to an arbitration agreement against whom legal proceedings are brought, in respect of a matter which under the agreement is to be referred to arbitration, to apply for a stay. Provided the applicant has acknowledged the legal proceedings and has not taken any step in them to answer the substantive claim, the court is bound to grant him a stay unless the Arbitration Agreement is null and void, inoperative or incapable of being performed.

39. In **Channel Tunnel Group Limited v Balfour Beatty Construction Limited** [1993] AC 334, Lord Mustill in the House of Lords addressed the question as to whether in a case where one side really had, as was submitted, no case at all, it could still be said that there was a dispute between the parties with regard to the matter agreed to be referred within the meaning of section 1 of the 1975 Act. He said this at p.356: *"In recent times this exception to the mandatory stay [i.e. where there is not in fact any dispute] has been regarded as the opposite side of the coin to the jurisdiction of the court under Rules of the Supreme Court Order 14 to give summary judgment in favour of the plaintiff where the defendant has no arguable defence. If the plaintiff to an action which the defendant has applied to stay can show that there is no defence to the claim, the court is enabled at one and the same time to refuse the defendant a stay and to give final judgment for the plaintiff. This jurisdiction -- unique, so far as I am aware, to the law of England – has proved to be very useful in practice, especially in times when interest rates are high, for protecting creditors with valid claims from being forced into an unfavourable settlement by the prospect that they will have to wait until the end of an arbitration in order to collect their money. I believe, however, that care should be taken not to confuse a situation in which the defendant disputes the claim on grounds which the plaintiff is very likely indeed to overcome with a situation in which the defendant is not really raising a dispute at all.*

It is unnecessary for present purposes to explore the question in depth since in my opinion the position on the facts of the present case is quite clear, but I would endorse the powerful warnings against encroachment on the parties' agreement to have their commercial differences decided by their chosen tribunals and on the international policy exemplified in the English legislation that this consent should be honoured by the courts given by Lord Justice Parker in ***Home and Overseas Insurance Company Limited v Mentor Insurance Company UK Limited*** *[1990] 1 WLR 153, 158-159 and Mr. Justice Saville in* ***Hayter v Nelson*** *[1990] 2 Lloyd's Rep 265".*

On the facts of that case Lord Mustill held that there was much that was in dispute and disputable.

40. In **The "Halki"** [1998] 1 Lloyds Rep 45-49 Mr. Justice Anthony Clarke, as he then was, had to consider whether if the plaintiff's demurrage claim was indisputable there could still be a dispute between the parties which, pursuant to the 1996 Act, the defendants were entitled to have referred to arbitration, or whether on the contrary the plaintiffs were entitled to judgment under order 14. After a careful consideration of the authorities, including **Hayter v Nelson** and a decision of his own in which he had followed that case, he expressed himself firmly of the opinion that *"However indisputable the plaintiff's claim, there remains a dispute between the parties which they agreed to refer to arbitration"* so that the defendant was entitled to a stay and the plaintiffs were not entitled to order 14 judgment.

41. That decision was upheld by a majority of the Court of Appeal: see the report at 1998 1 Lloyd's Rep 465. The majority held firstly that, once money was claimed, there was a dispute unless and until the defendants admitted that the sum was due and payable. If a party refused to pay a sum which was claimed, or denied that it was owing, then in the ordinary use of language there was a dispute between the parties. As it seems to me, the same must apply here if the defendants do not admit that they have no claim to invoke force majeure. The majority accepted that there was a real and significant difference between the word "dispute" and the words "in fact no dispute" in the 1975 Act, words which had their origin in an amendment added in 1930 by section 8 of the Arbitration (Foreign Proceedings) Act 1930 at the end of section 1 of the Arbitration Clauses Protocol Act 1924; and that it was those words which were the source of the court's jurisdiction to grant summary judgment in cases where there was a dispute but on examination nothing disputable.

42. They also held that the fact that the latter words were not included in the 1996 Act showed that, save as otherwise provided in section 9, a party to an arbitration agreement was entitled to a stay unless the court concluded that the action was not brought in respect of the matter which under the agreement was referred to arbitration. If, therefore, special condition 11 constituted an arbitration agreement, I would, as I see it, in the light of those authorities, be bound to grant Total the stay that they seek unless satisfied that Total was

not really raising a dispute at all, ie did not genuinely claim an entitlement to invoke force majeure. It was not submitted to me that the dispute was the subject of an arbitration agreement although the procedure is one which may develop into an arbitration since, under special condition 11.4, if no expert can reasonably be appointed, or for any other reason the special condition 11.3 procedure cannot be implemented, any dispute or difference arising under the GSA may be referred to arbitration.

43. The question therefore arises as to what approach the court should take when faced by an application by one of the parties to a dispute to stay proceedings in order to give effect to an agreed method of dispute resolution, namely expert determination, which does not amount to an arbitration agreement, and the extent to which the merits or lack of them are relevant to the exercise of that discretion. That the court has such a power to stay is apparent from the decision in Channel Tunnel Group. I shall return to the question of discretion after a consideration of what those merits may be.

Force majeure

44. In order for Total to be able to be released from its obligations under the GSA on the grounds of force majeure, it must establish
(i) The existence of force majeure, that is to say an event or circumstance beyond its control.
(ii) That that event or those circumstances have resulted in a failure by Total to fulfil one or more of its obligations under the GSA because it or they have caused Total to be unable wholly or partly to carry out such obligation or obligations
(iii) That notwithstanding the exercise by Total of reasonable diligence and foresight, it was or would have been unable to prevent or overcome the relevant event or circumstances,
(iv) That Total gave notice in writing of such force majeure as soon as possible after the occurrence of the cause relied on.

45. Mr. Wolfson accepts that, but for one provision of special condition 15, Total would not be arguing that they could invoke force majeure. The provision upon which he relies is the last sentence of standard condition 15.2 which reads: *"In assessing the circumstances of force majeure affecting the customer, the price of gas under this agreement shall be excluded"*.

That provision, he submits, shows that it would not be open for TVPL as customer to contend that force majeure applied because of an increase in the price of the gas to be supplied to it under the GSA.

46. But no mention is made of the price of gas to the supplier. That omission must have some significance and makes it arguable that under this agreement a "sufficiently dramatic" increase in the market price of gas could amount to a force majeure circumstance if it had the result that the losses that Total would suffer under the GSA made its continued fulfilment of the GSA commercially impracticable. There is in this respect, he observes, a noticeable difference between the exposure of TVPL and that of Total. TVPL can never suffer a loss greater than the difference between the contract price and the market value of gas; even if gas had no value their loss would not exceed that price. Hence, he suggests, the last sentence of standard condition 15.2.

47. But Total is exposed to the difference between the price that it has to pay in the market for the gas that it is to supply to TVPL and the contract price. The market price has no limit, nor therefore does Total's risk. There must, he submits, be a point at which the market price becomes so high that it is commercially impracticable for Total to continue. The last sentence of standard condition 15.2 supports the proposition that the parties contemplated that, when that point was reached, there would be a circumstance of force majeure. Inability should not be limited to physical inability, but extends to being, commercially speaking, unable.

48. The force majeure event or circumstance upon which Total relied was, he submitted, the fact that the prices which Total now had to pay had reached so high a point that Total could only perform the contract at a degree of loss that was quite beyond anything that anyone contemplated at the time of the agreement. Whether that was factually correct fell to be determined in the expert determination.

The factual matrix

49. The circumstances constituting the factual matrix have been agreed by the parties. They include the fact that both parties knew when entering into the agreement (i) that TVPL was a single purpose company

which had entered into agreements with HAL with a 15 year term for the acquisition of a co-generation plant that was to generate and supply electricity and heat which HAL required for Heathrow, and (ii) that it was a condition of the HAL agreements that a Gas Supply Agreement be entered into. Total also knew that it was in competition with other tenderers to supply the required gas, (i.e. it was not forced to contract) the market price of which fluctuates. In addition, the parties knew that the indices in the pricing formula in clause 6 of the special conditions were designed to be consistent with those in the HAL agreements and that such indices had themselves risen and fallen prior to 12th June 1995. The parties also knew that the Total Group had very large resources.

50. Despite the cogency with which they were advanced, I do not accept Mr. Woodford's submissions for the following reasons:

1 The force majeure event has to have caused Total to be unable to carry out its obligations under the GSA. Total's obligation under the GSA is to supply, ie to make physical delivery of, gas in accordance with the conditions. These include provisions in respect of a nominated amount of consumption by the customer for each of the contract years, and a maximum consumption in any one day. Total is unable to carry out that obligation if some event has occurred as a result of which it cannot do that. The fact that it is much more expensive, even very greatly more expensive for it to do so, does not mean that it cannot do so.

2 To interpret clause 15 as applicable in circumstances where performance is "commercially impractical" or Total is "commercially unable" to supply is to enforce a qualification highly uncertain in ambit and open ended in reach which is neither necessary nor obvious and which is inconsistent with the express terms of the GSA. Total's obligation under the GSA to supply gas in return for the price is not dependent on nor is it related to the market price of gas. Nor is Total's obligation an obligation to supply gas provided that the cost to it of doing so is not commercially unacceptable or impracticable. In those circumstances if Total can supply gas it cannot be said that they are unable to perform their obligations under the agreement.

3 The reference in the last sentence of standard condition 15.2 to what is not to be taken into account in assessing the circumstances of force majeure affecting the customer cannot in my view carry the implication, or cause standard conditions 15.1 and 15.2 to mean, that Total do not have to establish that some event has caused them not to be able to deliver gas. It serves perfectly well as a warning that so far as TVPL, which has to pay the contract price, is concerned, the size of that price is not to be considered for force majeure purposes. The customer cannot say that it is unable to pay the price because it is too high. It does not at all follow that the supplier is entitled to rely upon an increase in the market price in comparison to the contract price as a force majeure circumstance. This single sentence is in my view wholly inadequate to alter the clear meaning of the bulk of conditions 15.1 and 15.2. If the draftsman had meant these conditions to have the consequence now contended for, it is inconceivable that he would have expressed himself so obliquely.

4 This conclusion is consistent with a line of cases, both on force majeure clauses and on frustration, several of which are cited in Mr. Shepherd's skeleton argument, to the effect that the fact that a contract has become expensive to perform, even dramatically more expensive, is not a ground to relieve a party on the grounds of force majeure or frustration. I take as an example **Tennants Lancashire Limited v Wilson CS & Co Ltd** (1917) AC 495, a force majeure case where Lord Loriburn observed at p.510: *"The argument that a man can be excused from performance of his contract when it becomes 'commercially impossible' seems to me to be a dangerous contention which ought not to be admitted unless the parties plainly contracted to that effect".*

I accept, of course that each clause must be considered on its own wording and that force majeure clauses are not to be interpreted on the assumption that they are necessarily intended to express in words the common law doctrine of frustration. Nevertheless, this line of authority, the legal backdrop against which the GSA was written, strongly supports the proposition that this case is no exception. No case has been cited to me in which a clause such as the present has been interpreted as relieving a party from its obligation to perform because the performance of the contract has become economically more

burdensome. If a company as familiar with the effect of fluctuations as Total wished to secure that result, it would need to do so in much more explicit terms.

5 This conclusion is also support by a consideration of the factual matrix. In the circumstances in which the contract was entered into TVPL were, in the absence of clear word to the contrary, entitled to expect that Total would supply them with gas against payment of the contract price throughout the 15 year term and would not be entitled to refuse to do so because the cost of so doing had increased even exponentially. That was Total's risk, particularly in the light of the price escalation clause which provided, within limits, for increases in the contract price in accordance with formulae based on indices. See **Publicker Industries Inc v Union Carbide Corporation** [1973] 17 UCC Reporter, Serv 989 where the existence of a contractual provision for limited increases in the price of ethanol resulting from a rise in the cost of ethylene *"impelled the conclusion that the parties intended that the risk of a substantial and unforeseen rise in its cost would be borne by the seller"*.

6 The letter of 5th July does not claim that Total has become unable to supply gas. It indicates that as a result of increasing prices and the price formula in the GSA, it will become "uneconomic" for large parts of the year to supply gas, and gives notice that unless there is a significant fall in the anticipated UK market price of gas during the autumn and winter months, it will be unable to supply further quantities of gas after 30th September. At the same time it offers to supply gas at the market price. It thus indicates that Total can in fact continue to supply gas but at a loss or a lesser profit if it only receives the contract price.

7 There is no evidence before me that establishes that Total cannot supply gas for the remainder of the term. On the contrary, Mr. Shead's witness statement of 21st September states that Total is confident that it can procure TVPL's requirements beyond 1st October 2005 on a day ahead basis and offers to do so at a pass through price: and, if their argument on force majeure and remedies fails, Total have undertaken to continue to supply.

8 Mr. Shead also gives an estimate on a "best guess basis" of total's financial position in the future. His evidence is to the effect that Total will lose about £9½ million up to the date of termination of the contract. The calculation assumes that the cap will be breached, i.e. the market price of gas will exceed the maximum that TVPL can be required to pay, in the second quarter of 2006 and never return under the cap until the end of the contract. Even on the assumption – which I do not accept – that a sufficiently dramatic increase in the price of gas could amount to a frustrating event even though Total could still supply gas, an increase in market price which took the market price to a height no greater than the cap could scarcely have that consequence.

In short, Total's claim to force majeure is in my judgment ill-founded. The notice does not state, nor is it the case, that Total has become unable to supply TVPL with gas. Even if the notice had stated that Total would not be able physically to supply gas in the future it would be premature; as it is, it claims only that at some unspecified date and absent a downward move in the market, it will become uneconomic to do so.

Discretion

51. I now turn to consider the way in which I should exercise my discretion. Mr. Woodford submitted that, once I had determined that the dispute fell within special condition 11, I should grant a stay unless his clients really had nothing to argue about. The court should give effect to the method of dispute resolution that the parties had agreed upon. There was no basis, he submitted, for regarding it as in any way unsuitable since the expert would be chosen either by agreement or by the President of The Law Society and in any event that was the procedure that the parties had chosen. In this respect Mr. Woodford is able to pray in aid the observations of Lord Mustill in **The Channel Tunnel Group** case where he said, at p.353B: *"It is plain that clause 67 was carefully drafted, but equally plain that all concerned must have recognised the potential weakness of the two stage procedure and concluded that despite them there was a balance of practical advantage over the alternative of proceedings before the national courts of England and France. Having made this choice, I believe that it is in accordance, not only with the presumption exemplified in the English cases cited above that those who make agreements for the resolution of the disputes must show good reasons for departing from them, but also with the interests of the orderly regulation of international commerce, that having promised to take their complaints to the experts and if necessary to the arbitrators, that is where the appellants should go. The fact that the appellants now find their chosen method too slow to suit their purpose is to my way of thinking quite beside the point"*.

52. Mr. Shepherd submitted that one of the factors militating against a stay was the fact that it would involve wasteful and unnecessary duplication since the issue which was one of law had now been fully addressed. Mr. Woodford submitted that this was no grounds to refuse a stay; the court had heard extended argument on the merits because TVPL had declined to accept the applicability of special condition 11 and because of the view taken by Mr. Justice Smith as to their relevance. In the light of that expression of view, Total could scarcely be expected to confine themselves to arguing about the construction of the arbitration clause. But that did not alter the fact that the parties had agreed, as I have now found, on a different method of dispute resolution, and Total were entitled to have their case determined in the manner that the parties had chosen. If they had chosen arbitration the court would have been bound to do so. The fact that they had chosen a not greatly different method of dispute resolution meant that the court had a discretion, but for the purposes of deciding whether to grant a stay the court should regard the difference between arbitration and expert determination as immaterial.

53. Mr. Shepherd submitted that the difference was very significant. The parties had expressly agreed that the expert should not act as an arbitrator and that the Arbitration Acts would not apply, a circumstance which Mr. Woodford himself had prayed in aid in submitting that Mr. Justice Smith need not have been concerned about the application of authorities and practices in respect of cases to which those Acts do apply. The consequence was that I had a discretion, which he invited me to exercise by refusing a stay on the ground that Total's case was and could be seen to be hopeless; there was nothing to be gained in sending the matter off for expert determination; the matter was of immense seriousness for his clients, whose whole financial future was at stake. Further, there was a significant public interest in the speedy resolution of these proceedings which involved the supply of power to London's principal airport.

54. I have come to the conclusion that I should refuse a stay. My grounds are these. First, while I see the force of the submission that the difference between arbitration and expert determination is insufficient to justify refusal of a stay which, had there been an arbitration agreement, would have been mandatory, the fact of the matter is that in the case of an arbitration agreement a stay would only have been mandatory because the provisions of section 9 of the Arbitration Act 1996 make it so. Parliament has not legislated in the same way in respect of dispute resolution procedures other than agreements to arbitrate. There are, of course, significant differences between an expert determination and arbitration. It remains, of course, the case that there must be some good reason for refusing a stay, but in my judgment there is such a reason in circumstances where it has become apparent that Total's claim to invoke force majeure is unsustainable as a matter of the proper construction of the agreement in the light of facts that are not in dispute. Had this case been decided immediately prior to the coming into force of the 1996 Act, TVPL would on my findings have been entitled to judgment under Order 14 even if there had been a domestic arbitration agreement. The fact that the 1996 Act has altered the position in the case of all arbitration agreements does not persuade me that summary judgment should be refused in the case of what is not an arbitration agreement.

55. Second, I bear in mind not only that the question at issue is one of construction, but that the parties have prepared for the hearing and conducted it on the footing that unless there is a stay the court will finally determine the agreed issues. There is, or should be, nothing that has been held back whether by way of evidence or submission which would or might be available at a later trial. It follows that if there is a stay, the proceedings before the chosen expert will represent a complete duplication of effort and expense. I accept that prima facie disputes are to be determined in the manner that the parties have agreed, but that does not mean that the court is bound to refer an issue for expert determination when it has become apparent after what amounts to a trial that the construction argued for is erroneous and unsustainable.

56. Third, I take into account and give some weight to the importance to both sides, and to some extent to the wider public, of a speedy resolution of the issues. Although TVPL is the creature of large and powerful corporations, the financial consequences for it are potentially disastrous. The force majeure issue has been unresolved since early July. The notice was intended to lead to a cessation of supply at the price provided for by the GSA from the commencement of the gas year on 1st October. The court itself ordered expedition so that the hearing has come on in vacation. It may be that the expert determination procedure could be speedily completed, but it is also possible that there may be significant delays in the agreement or

appointment of an expert, his determination, and any proceedings that may follow thereafter. I note that Total's original suggestion was that the case would take five days to try and that they proposed a date in November.

57. I have been referred to the decision of Mr. Justice Colman in **Cable and Wireless Plc v IBM United Kingdom Limited** [2002] EWHC 2059. In that case Mr. Justice Colman stayed a claim for declaratory relief in order that the parties should embark upon a mediation provided for in their agreement. He held that the obligations of the parties in this respect were sufficiently defined as to be enforceable and that mediation was the appropriate course, both because it had been agreed and because the declaratory relief sought in the action might be rendered futile if a particular report turned out to be invalid -- an issue that was bound to be included in any mediation. I do not believe that the decision in that case, which did not include a contention that the claim for declaratory relief was capable of summary adjudication and in which the court had not fixed an urgent hearing of the disputed issue and heard it, militates against the conclusion that I have reached.

58. I turn then to consider whether or not on the footing that Total are not entitled to invoke force majeure, TVPL are entitled to specific performance or damages. In the light of the position taken by Total, it is sufficient for TVPL's purposes if they are entitled to damages since Total have indicated that, in that event, they will continue to supply under the terms and conditions of the GSA. Total relies on standard condition 9 which provides as follows, under the heading "***Liability":***

"9.1 The Supplier will indemnify the Customer against damage or injury to property or persons arising out of or in connection with this Agreement to the extent that such physical damage or personal injury is directly caused by the default or by the negligent or wilful acts or omissions of the Supplier, its servants agents or contractors.

9.2 The Customer will indemnify the Supplier against damage or injury to property or persons arising out of or in connection with this Agreement to the extent that such physical damage or personal injury is directly caused by the default or by the negligent or wilful acts or omissions of the Customer, its servants agents or contractors.

9.3 Notwithstanding anything expressed or implied in this agreement save for the provisions of Standard Condition 5.2(b) neither the Supplier nor the Customer shall be liable for the other party's loss of use, loss of assets, loss of profits, contracts, production or revenue, or for increased cost of working or business interruption however caused arising out of or in connection with this agreement, irrespective of whether such loss, increased cost of working or business interruption is caused by the sole or concurrent negligence of the Supplier or the Customer and whether or not foreseeable at the date of signature of this agreement or by any other act or omission of the Supplier or the Customer.

9.4 The provisions of this Condition shall exclude all other remedies of the party effected at law".

59. Mr. Woodford submits that this condition imposes an obligation on the supplier to indemnify the customer against physical damage to property or person to the extent that such damage is directly caused by the suppliers, servants or agents or subcontractors in the manner specified in general condition 9.1 and a similar obligation on the customer to indemnify the supplier in respect of damage of that kind caused by the servants etc of the customer, but that save to that extent the parties are, with one exception, to have no remedy at all. Further, any claim by TVPL for damages representing the difference between the contract and market price would, he submits, amount to a claim either for "loss of assets" or "increased cost of working" within standard condition 9.3. But those provisions did not mean that the agreement was wholly devoid of content because Total would be able to sue for the price of gas supplied.

60. If these contentions be well-founded, the GSA is a remarkably one-sided and unfair agreement. Leaving aside the question of physical damage, the only person who can sue is Total. TVPL has no redress whatever should Total for whatever reason decline to supply. An agreement which was plainly intended to secure for TVPL a continued supply of gas at a price which was index-linked as closely as possible to the same indices as were used in setting the price HAL would pay to TVPL, would fail to achieve its object.

61. Further, the elaborate termination rights provided for in standard condition 12 which include rights of termination for breach would be redundant. Total could at any time cease to supply without penalty. Standard condition 12.5 provides that

"Termination shall not affect

(a) the accrued rights and obligations of the parties at the date of the determination or the rights and obligations arising as a consequence of termination;

(b) any right at law to claim damages or other relief as a result of or in connection with the act, omission, event or circumstances entitling the supplier or the customer to terminate this agreement in accordance with this standard condition".

It is difficult to suppose that all that the draftsman had in mind under (a) was a right of indemnity for damage to property. Moreover, if Total's construction is right, there would appear to be no right to claim damages that either supplier or customer would enjoy as a result of circumstances entitling either to terminate. Those circumstances do not relate to physical damage.

62. If Total wanted to achieve the result that its core obligation, ie to supply gas, was unenforceable by TVPL, it needed in my judgment to use markedly clearer language than this. The provisions are in fact perfectly capable of sensible application without the extraordinary consequences contended for. Condition 9.3 relieves each party from liability for consequential loss arising (typically) if physical damage to property or a failure to take or deliver gas has a knock-on effect on the operations of the customer or the supplier. It is not apt to relieve Total from liability if it fails in breach of contract to deliver any gas at all. Condition 9 cannot be regarded as meaning that neither party has, save under conditions 9.1 and 9.2 any remedy against the other at all. If that were so, Total would have no claim for the price and the agreement would cease to be even a unilateral contract. It means that in respect of physical damage, the subject with which conditions 9.1 and 9.2 deal, there will be cross-indemnities in respect of the damage but no claim for consequential loss or any other remedy. Lastly, if TVPL has no right to claim damages under the agreement save by way of indemnification in respect of physical damage, the provisions in special condition 15 that any dispute can be referred to expert determination would seem practically devoid of content.

63. In those circumstances it is not strictly necessary for me to consider whether this is a case for specific performance or injunctive relief to the same effect, but, if it is, I answer the question in the affirmative. It would in my view be entirely unjust that TVPL should be confined to a remedy in damages. The basis of the GSA was that TVPL would be assured of a source of supply from a first-rank supplier at an agreed price for a 15 year term in order that they might in turn contract with HAL for a similar term. To confine them to a claim in damages would deprive them of substantially the whole benefit that the contract was intended to give them.

64. There is a further difficulty: if the contract is to be treated as remaining on foot but with Total in continuing breach, TVPL will not be in a position to seek or secure another long term source of supply, since Total may if the market turns, claim to resume supplies under the agreement. If, as they may therefore be driven to do, TVPL treat Total's refusal to supply as repudiatory, they would then be faced with the almost impossible task in calculating any damages of predicting over a five year period

(a) the state of the gas market, in order to calculate the price that TVPL will have to pay its new supplier or suppliers; and

(b) the changes in the several indices that make up formulae P1, P2 and P3, in order to calculate what they would have had to pay if Total had carried on supplying.

Last but by no means least – if TVPL is compelled to pay gas at market prices it may, unless the shortfall is quickly made up by the payment of damages, become insolvent as early as the beginning of 2006.

65. Accordingly, subject to any further argument on the form of the order, I propose

(a) to refuse a stay and to dismiss Total's application dated 26th August;

(b) to declare that on the true construction of the Gas Supply Agreement, Total was not entitled to serve on TVPL the notice pursuant to special condition 15 contained in the letter of 5th July 2005;

(c) to declare that in the event that in reliance on that notice Total were to fail to supply TVPL with any gas pursuant to the GSA, TVPL would be entitled to damages and an order by way of specific performance.

MR. P. SHEPHERD Q.C. and MR. D. HERBERT (instructed by Herbert Smith) appeared on behalf of the Claimant.
MR. D. WOLFSON (instructed by Hammonds) appeared on behalf of the Defendant.