CA on appeal from Commercial Court (Mr Justice Langley) before Lord Woolf MR; Clarke LJ; Latham LJ. 23rd May 2000.

LORD WOOLF, MR: I will ask Lord Justice Clarke to give the judgment on the appeal.

LORD JUSTICE CLARKE:

1. Introduction

2. This is an appeal by the defendant, Texaco, from part of an order of Langley J made on 21 December 1999 in which he gave summary judgment for the claimant, Petrotrade, against Texaco for US$140,660.75 plus interest. There is also before the court an appeal by Petrotrade against another part of the same order in which the judge refused to award enhanced interest and costs on an indemnity basis. Both appeals are brought with the permission of the judge. Petrotrade's appeal only arises if Texaco's appeal fails.

3. I am only concerned at present with Texaco's appeal.

The Background

4. This action has taken a curious and not entirely satisfactory course. In September 1998 Petrotrade agreed to supply 6,000 metric tonnes of gasoil to Texaco. Texaco refused to pay the whole of the price on the ground that the gasoil did not comply with the contractual specification. Petrotrade commenced the proceedings in order to recover the unpaid part of the price. This appeal arises out of Petrotrade's second attempt to obtain summary judgment. The first attempt succeeded before Langley J. On 11 December 1998 he gave judgment for the same principal sum, US$140,66.75, plus interest. However, an appeal to this court by Texaco was successful. I was part of a constitution which comprised Kennedy, Otton LJJ and myself. I gave the main judgment. Thereafter Petrotrade amended its point of claim and again sought summary judgment. It was again successful and Texaco has again appealed to this court.

The Claim

5. I set out Petrotrade's case as then pleaded in my judgment of 6 May 1999. On 16 August 1999 Petrotrade served an amended points of claim. Its primary case can be seen from paragraphs 1 - 2(B) of the amended points of claim as follows:

"1. By an ~~written and/or~~ oral contract concluded by telephone on or about 15th September 1998 between Marc Schepers of the Plaintiffs and Mirelle Rietbergen of Starsupply Petroleum b.v. acting for an on behalf of the Defendants and evidenced by a telex dated 16th September 1998 sent by EP Services S.A. of Geneva, as agents for the Plaintiff, to the Defendant, the Plaintiff agreed to sell and the Defendant agreed to buy a quantity of 6,000 metric tonnes of gasoil, plus, or minus 10 per cent in the Defendant's option., ~~on the terms set out in the said telex.~~

1AIn the telephone conversation the essential variable terms of the agreement, including the price, the produce and the place and date of delivery were agreed.

1B The Plaintiffs' general terms and conditions were also incorporated into the contract by reason of:

a) the previous course of dealings between the parties and/or

b) the invariable and certain custom of the oil trade by which general terms and conditions of the seller are always incorporated into fob contracts of sale of oil.

PARTICULARS

The Plaintiffs in support of the course of dealing will rely on:

a) sale no PS 06 98 043 dated the 16th June 1998 by which the Plaintiffs sold premium unleaded gasoline to the Defendants by a contract which incorporated their terms;

b) purchase no PP 007 98 016 by which the Defendants sold 10,000 m.t. cycle oil to the Plaintiffs by a contract which incorporated the Defendants' terms.

c) 21 other contracts of sale concluded in the 12 months before September 1998 by which the Plaintiffs sold product to the Defendants and which incorporated the Plaintiffs' terms;

d) 162 other contracts of sale concluded between January 1993 and September 1997 by which the Plaintiffs sold product to the Texaco Group (of which 12 contracts were with the Defendants) and which incorporated the Plaintiff's terms;

2. The said contract provided as follows:-

5. PRICE: IN US DOLLARS PER MT, FOB ANTWERP, ON BILL OF LADING QUANTITY AS MEASURED IN VACUUM, (...)

8. PAYMENT: PAYMENT SHALL BE MADE IN UNITED STATES DOLLARS IN FULL WITHOUT ANY DEDUCTION, WITHHOLDING, SET-OFF OR COUNTERCLAIM OF ANY AMOUNT ON B/L QUANTITY, BY TELEGRAPHIC TRANSFER UPON RECEIPT OF TELEX INVOICE, LATEST FIVE (5) CALENDAR DAYS AFTER B/L DATE AGAINST COMMERCIAL INVOICE AND USUAL ORIGINAL SHIPPING DOCUMENTS OR IN CASE OF TEMPORARILY MISSING DOCUMENTS, AGAINST SELLER'S TELEX INVOICE AND TELEX LETTER OF INDEMNITY ISSUED IN A WORDING ACCEPTABLE TO BUYER AND COUNTERSIGNED BY BANQUE PARIBAS (SUISSE) SA, GENEVA. (...) IF DUE DATE FALLS ON A SUNDAY (...) PAYMENT SHALL BE MADE ON THE NEXT SUCCEEDING NEW YORK BANKING DAY.

10. QUANTITY/QUALITY: QUANTITY AND QUALITY TO BE DETERMINED OR CONFIRMED BY AN INDEPENDENT INSPECTOR AT THE LOADING INSTALLATION IN THE MANNER CUSTOMARY AT SUCH INSTALLATION. SUCH DETERMINATION SHALL BE FINAL AND BINDING FOR BOTH PARTIES SAVE FRAUD OR MANIFEST ERROR.

The Plaintiff will refer to the said contract as may be necessary for its full terms and effect.

2A Further or alternatively it was an invariable and certain custom of the oil trade that sales made fob on an open account basis always included a provision to the effect that payment would be made by the buyer in full without deduction, counter-claim or set off.

2B Further or alternatively, on 16th September 1998, EP Services acting for an don behalf of the Plaintiffs sent a message (no 164968) to the Defendants, reciting the terms of the contract and, in particular, reciting the terms set out in paragraph 2 above."

6. The underlined passages show the amendments made in August 1999. The amended points of claim also contained these further allegations among others. The bill of lading was dated 22 September 1998 and thus payment of the FOB price was due on 28 September in accordance with clause 8. It was orally agreed on 18 September that SGS would be the independent inspector envisaged by clause 10. On 22 September SGS determined the quality of the cargo after taking a composite sample from the shore tanks before loading and reported the result of an analysis of that sample which showed that the cargo was within the contractual specification. Since that determination by SGS was neither fraudulent nor manifestly erroneous, it followed that it was final and binding on the parties in accordance with clause 10.

7. It was always Petrotrade's true case that the terms pleaded in paragraph 2 of the original points of claim, as set out in their telex of 16 September, were incorporated into the contract by a course of dealing between the parties. The course of dealing was not however pleaded at that stage and the judge did not consider the second affidavit of Mr Jeremy Davies of Petrotrade's solicitors, which relied, as I see it, both upon previous contracts and upon trade usage or custom. I am unable to accept Miss Cockerill's submission that the affidavit focused only on usage or custom.

8. I think that the reason that the judge did not consider the affidavit was that it was sworn very shortly before the hearing of the application for summary judgment and would, or might, have necessitated an adjournment.

9. On the last occasion, having referred to the position relating to the second affidavit of Mr Davies, I expressed my conclusions in this regard as follows:

"It follows that there was no evidence of the plaintiff's true case before the court.

In the absence of such evidence there was, in my judgment, no basis upon which on the evidence before him the judge could properly hold that Texaco had no arguable defence to Petrotrade's case as pleaded. It would not be just to hold that Texaco have no arguable case that there was no course of dealing upon which Petrotrade's case depends in circumstances when the nature of Petrotrade's case is not known. If Petrotrade wishes to rely upon a course of dealing it should, in my opinion, plead and prove it giving Texaco a proper opportunity to reply to it."

10. Kennedy and Otton LJJ agreed.

11. When the matter came before the judge for the second time, he did not consider Petrotrade's case based upon trade usage or custom, in respect of which he regarded Texaco's defence as arguable, but he held that Texaco had no real prospect of successfully defending the claim based upon the alleged course of dealing. The first issue in this appeal is whether he was right so to hold.

12. It is common ground, or at least not in dispute, that the contract was initially made by telephone as alleged in paragraph 1 of the amended points of claim. It was made between Mark Schepers of Petrotrade and Mirelle Rietbergen of Starsupply Petroleum ("Starsupply") who were brokers acting on behalf of Texaco. It is not suggested that the detailed terms of the contract were discussed on the telephone. On the contrary, all that was discussed and agreed was what have been called the variable terms, including the price, the product and the place and date of delivery. Thus it was agreed, amongst other things, that Texaco would buy from Petrotrade EN 590 gasoil of various specifications including a density at 15... centigrade of 0.820 minimum and 0.860 maximum and a flash point of a minimum of 60(celsius. The quantity was 6,000 metric tonnes plus or minus 10 per cent in buyer's option. The pricing was agreed and delivery was to be between 20 and 24 September with three days' notice to be given by Texaco. The product was to be supplied from Petrotrade's refinery in Antwerp. None of those matters is in dispute.

13. The issue between the parties is what other terms were incorporated into the contract. The judge accepted Petrotrade's case that the contract incorporated the terms set out in the telex of 16 September referred to in paragraph 1 of the amended points of claim. It was sent to Texaco by EP Services SA of Geneva ("EP Services") as agents for Petrotrade. A copy was sent to Starsupply. I have already set out the crucial terms because they are pleaded in paragraph 2 of the amended points of claim.

14. It is common ground that if those terms were incorporated Petrotrade was entitled to succeed on its claim because clause 8 expressly provided so far as relevant:

"PAYMENT SHALL BE MADE IN UNITED STATES DOLLARS IN FULL WITHOUT ANY DEDUCTION, WITHHOLDING, SET-OFF OR COUNTERCLAIM OF ANY AMOUNT ON B/L QUANTITY, BY TELEGRAPHIC TRANSFER UPON RECEIPT OF TELEX INVOICE, LATEST FIVE (5) CALENDAR DAYS AFTER B/L DATE AGAINST COMMERCIAL INVOICE AND USUAL ORIGINAL SHIPPING DOCUMENTS...."

15. It is not necessary to quote the other terms of the contract as set out in the telex, but I should note that it concluded as follows:

"FOR THE SAKE OF GOOD ORDER, PLEASE NOTE THAT THE TERMS OF THIS TRANSACTION SHALL BE AGREED SOLELY BETWEEN THE PARTIES AND THAT ANY BROKERS CONFIRMATION TELEX REFERENCING THE DETAILS OF THIS TRANSACTION IS FOR INFORMATIONAL PURPOSES ONLY...

WE THANK YOU VERY MUCH FOR THE CONCLUSION OF THIS BUSINESS.
BEST REGARDS,
EP SERVICES SA GENEVA AS AGENTS FOR PETROTRADE, INC."

16. It is right to observe that the telex did not refer to a telex of 15 September which had been sent by Starsupply to Petrotrade. That telex began: *"starsupply....as brokers only, herewith confirm following transaction on terms and conditions as below."*

17. The basic terms agreed on the telephone were then set out together with a number of further terms which included the following:
"determination quantity/quality
as ascertained by loading installation final and binding for both parties. costs will be 100 pct for buyer's account."

18. The telex concluded as follows:
"if we do not receive any observations after this telex, it is understood that above recap is acceptable to both parties and subsequently will be valid as binding contract.
we are please to have concluded this transaction with you, for which we thank you."

19. There was no direct response to the telex of 15 September which, as I have mentioned, was not referred to in the telex of 16 September. Thereafter, on 18 September, Texaco sent a telex or an e-mail to Petrotrade nominating the vessel "Chartsman" to carry the cargo. The telex included the following:
"INSPECTOR LOADWE PROPOSE SGS - PLEASE CONFIRM
COST50/50 PETROTRADE/TEXACO".

20. I shall return to the question of what, if any, agreement was made as to the position of SGS. For present purposes it is sufficient to note that it was Petrotrade's alternative case before the judge that, if the contract did not incorporate the terms set out in the telex of 16 September, the telex amounted to an offer or counter offer to contract on those terms which was accepted by Texaco by sending the telex nominating the Chartsman, and/or accepting delivery of the cargo, and/or agreeing that the inspectors of the cargo should be SGS. The vessel subsequently arrived and loaded the cargo.

21. I return to Petrotrade's primary case that the terms set out in the telex of 16 September were incorporated by a course of dealing. In that regard the judge expressed his conclusions in this way:
"There is now evidence of numerous contracts for the sale of fuel products over some four and a half years preceding the disputed contract made between Petrotrade and Texaco and between Petrotrade and other companies in the Texaco group. Petrotrade (rightly in my judgment) does not seek to rely upon the latter. All these contracts, where Petrotrade was the seller, and the transactions were of the same nature as the present, were without exception 'confirmed' on Petrotrade's terms and conditions including the two clauses Petrotrade rely upon. Texaco submits that the evidence does not show that Petrotrade has any standard terms and conditions or if it did how they were incorporated into the contracts. Although it is true that no standard printed form has been produced or relied upon I cannot accept that submission. The whole thrust and detail of the evidence shows a method and course of trading including the use of the clauses in question. Moreover Texaco has not even suggested (let alone produced any evidence) that any other or different terms were ever used or that there ever was a relevant contract where they were not used. The point is taken that many of the previous transactions relied upon were with other divisions of Texaco or for other specific fuel products, but even excluding these (albeit I do not think it is right to do so) there is no dispute that over the 13 or so months prior to the contract there were 5 other contracts for the sale of similar if not the same product between Petrotrade as seller and Texaco as buyer on the same terms and effected in the same manner.
In my judgment that is sufficient of itself to establish a course of trading. It is the more so in the context of the total number of contracts between the same parties of which there were 22 in the previous 12 months."

22. Those conclusions were based upon the following evidence. Twenty two cargoes were sold by Petrotrade to Texaco in the twelve months before the contract with which we are concerned, all of which were on Petrotrade's terms. Those terms were substantially the terms set out in the telex of 16 September. Although Texaco says that some of those contracts should be left off the account because they involved different products, it is, as I understand it, accepted that there were 13 transactions, including this one between the parties, which involved the same cargo and, with slight exceptions, the same trading conditions of which, as the judge held, there were five in the previous 13 months.

23. Miss Cockerill's submissions, which she has deployed with skill and persistence on behalf of Texaco, may be summarised as follows as they appear in her skeleton argument:
*"1. The judge failed to give sufficient weight to the principle that clauses which exclude set-off require to be clearly established and proved (see **Modern Engineering Bristol v Gilbert Ash** [1974] AC 689 at 717H).*
2. If the judge had given sufficient weight to that principle he would have found that as there was no express agreement to the anti-set off clause when the contract was negotiated, it was necessary for Petrotrade to establish as a matter of clearest inference that such a term was agreed by the parties in some other way.
*3. The caution which the court should exercise in so doing is akin to that in finding fraud on the basis of inference alone (see **Sumitomo Bank Limited v Kartika Ratna Thair** [1993] 1 SLR 776).*
4. In the context of a summary judgment application, that equated to a requirement that Petrotrade prove either:
(i) a clear inference:

(a) that they had standard terms including that exclusion of set-off clause; and
(b) that those standard terms were incorporated by a consistent course of dealing
that the contrary argument had no reasonable prospect of success; or

(iii) that the requisite elements of a variation of the oral contract to incorporate that exclusion of set-off clause were so clearly established that the contrary argument had no reasonable prospect of success.

5. As to course of dealing, the judge should have held that:

(1) the court should be slow to give summary judgment on such a case unless the case being made is perfectly clear and the evidence of it is overwhelming because such cases are not otherwise suitable for summary judgment.

(2) Petrotrade's case could never clear that hurdle in that:

*(a) It was nowhere made clear how the course of dealing was said to have arisen. Petrotrade relied solely on the existence of previous contracts between the parties: (see **'The Havprins'** [1983] 2 Lloyd's Rep 356 at 360 and **Circle Freight v Medeast** [1988] 2 Lloyd's Rep 427 at 429).*

(b) It had changed substantially in the various affidavits relied upon by Petrotrade in support of their application. For example:

(i) The case was originally said to be based on a 'written and/or oral contract'.

(ii) Once the case on written contract was dropped the case for the incorporation of the terms was based on a case of custom and practice, not course of dealing.

(iii) The alternative case of variation was specifically not relied upon until after the judgment in the Court of Appeal.

(iv) The case on course of dealing was finally based on a list of previous contracts, not all of which were appended and large sections of which were conceded to be irrelevant in that it listed contracts with other companies, or in relation to other types of cargo, or related to purchases, not sales.

In those circumstances the case was not suitable for summary judgment.

*(3) In any event, Petrotrade's case on course of dealing effectively rested on 5 previous contracts between the parties for similar goods. The mere fact that there had been 5 previous sales for similar cargoes on similar terms was not enough to establish a course of dealing (see **McCutcheon v David MacBrayne Ltd** [1964] 2 WLR 125 and **Hollier v Rambler Motors** [1972] 2 QB 71).*

(4) It was necessary to establish that each party had led the other reasonably to believe that it intended that their rights and liabilities should be ascertained by reference to the terms of a document which had been consistently used by them in previous transactions (see Chitty Vol 1 paragraph 12-011).

(5) In the light of the facts that:

(a) there was no conduct on the part of Texaco which constituted a representation that they were content for all future dealings with Petrotrade to be on the terms of a particular previous contract; and

(b) the terms on which Petrotrade relied did not state upon their face that they were standard terms or terms which might be referable to the more than one transaction;

it was incumbent upon Petrotrade, in order to establish a course of dealing, to prove that Texaco was aware that these particular terms were the standard terms of the Claimants;

(6) There was no evidence as to that. On the contrary, Petrotrade failed to prove that they had any standard terms and conditions. The existence and terms of any standard terms were never dealt with in their affidavits. Nor were all the contracts the terms of which were adduced, identical in their terms. Still less had they established that the terms set out in the telex of 16th September were their standard terms; or that the Defendants were aware that this was the case;

(7) It would therefore be wrong to conclude that Texaco had no reasonable prospect of establishing that there was no course of dealing.

6. The Judge therefore erred in concluding as he did that 'the whole thrust and detail of the evidence shows a method and course of trading...', and that the fact that over the 13 or so months prior to the contract there were 5 other contracts for the sale of similar if not the same product between Petrotrade as seller and Texaco as buyer on the same terms '...is sufficient of itself to establish a course of dealing.'

7. Further the Judge erred in finding at page 3 of the Judgment that 'over the 13 or so months prior to the contract there were 5 other contracts for the sale of similar if not the same product .... on the same terms .... is sufficient of itself to establish a course of trading."

24. Miss Cockerill made a number of specific points relating to the particular contracts. Finally:

"8. The judge also erred in characterising as 'compelling evidence' in support of the course of dealing the lack of any reaction by Texaco to Petrotrade's agents' telex of 16th September. To the extent that the Judge gave weight to this factor he erred in so doing. Petrotrade's case that the lack of response by the Defendants to this telex represented an acknowledgement of the course of dealing was disputed by Texaco and the reasons for its of response were deposed to. It was therefore wrong as a matter of law for the Judge to disregard that dispute."

25. I am unable to accept those submissions which to my mind are over elaborate. None of the cases relied on by Miss Cockerill assists Texaco on the particular facts of this case. The question is simply whether the terms set out in the telex of 16 September were incorporated by a consistent course of dealing. To my mind there is no distinction in this regard between the no set-off clause (clause 10) and the other clauses. If the terms in that telex were incorporated, then so was clause 10. If they were not incorporated nor was clause 10.

26. As I observed in the course of my judgment on the last occasion, it was Petrotrade's true case then that the terms of the telex were part of the contract because of a course of dealing. That remains its case. In these circumstances I do not accept Miss Cockerill's submission that Petrotrade has changed its case. I agree with the approach and reasoning of the judge. Given the course of dealing to which he refers, both parties will have made the oral agreement on the basis that the contract would be subject to the same terms as before, subject only to any particular variations later agreed.

27. In ***McCutcheon v David MacBrayne Ltd*** Lord Reid put the matter in this way at page 128 (quoting from the Scottish text book, Gloag on Contract 2nd ed page 1927 at page 7): *"The judicial task is not to discover the actual intentions of each party; it is to decide what each was reasonably entitled to conclude from the attitude of the other."*

28. That principle has been applied on a number of occasions in this class of case: (see eg ***British Crane Hire Corporation Ltd v Ipswich Plant Hire Limited*** [1975] QB 303, see especially per Lord Denning MR at 311 and ***The TS Havprins*** [1983] 2 Lloyd's Rep 356 per Staughton J at 362.

29. In my judgment, given the evidence of previous contracts, each party was reasonably entitled to conclude that the contract on this occasion was agreed on the same terms as before. As I see it, neither party can have supposed that the only terms agreed were those expressly referred to on the telephone. Moreover, there was no warrant for the inference that it was at any time agreed that the terms were those set out in Texaco's broker's telex of 15 September. I am unable to accept Miss Cockerill's submissions in this regard.

30. The telex of 15 September can properly be regarded as an offer or counter offer but it was at no time accepted. The telex of 16 September came after the telex of 15 September and was plainly a reaction to it even though it did not expressly refer to it. The telex of 16 September was intended to have contractual effect.

31. I have already expressed my view that it simply set out the terms of the contract in accordance with the previous course of dealing. But if that is for any reason wrong, it was in any event a counter offer. It was suggested by Miss Cockerill that it was simply a broker's telex which itself stated in its concluding paragraph (quoted above) should be disregarded. I cannot accept that submission. The telex was sent by EP Services as agents not brokers. It follows that the concluding paragraph did not refer to the telex itself. That is a fanciful suggestion. The paragraph was, however, apt to refer to the telex of 15 September which was indeed a broker's telex. On this footing it is plain that any offer or counter offer contained in the telex of 15 September was never accepted. If the telex of 16 September is treated as a counter offer, it was subsequently accepted, as held by the judge.

32. Since it is common ground that there was a contract between the parties, and since I reject the suggestion that it was contained only in the oral agreement, the only real candidate for setting out the terms is the telex of 16 September. The events that followed support that conclusion. In this regard, after the passage to which I have already referred, the judge said:

"It is therefore not necessary to consider the alternative case of acceptance by conduct. Indeed I think the reality is that the lack of any reaction by Texaco or the brokers to the September 16 telex (other than to nominate the vessel and propose SGS) is itself compelling evidence to support the course of dealing exemplified by the previous contracts. If it had to be seen in a context where there was no prior course of dealing it would represent an attempt to continue to negotiate the further detailed terms of the contract the bare bones of which had only been agreed orally on September 15. That was something which both parties recognised required to be done as evidence by the brokers telex sent on September 15.

In that context, whilst I think there is some force in Texaco's submission that both the nomination of a vessel and the acceptance of delivery of the cargo are equivocal, because they could be referable to what was orally agreed on September 15, that cannot in my judgment be said for Texaco's proposal that SGS should carry out the inspection. The oral agreement said nothing about inspections. The brokers' telex of September 15 (which also talked of 'confirming' matters which it is wholly unrealistic to suppose had actually been discussed on that date) had referred to the costs of ascertainment 'by loading installation' being 100% for Texaco's account. The September 16 telex from Petrotrade's agents referred to an Inspector to be appointed by Petrotrade with costs shard equally. Texaco's proposal of SGS in the September 18 telex at a cost to be split 50:50 is consistent only with the September 16 telex.

Texaco also refers to the concluding words of the September 16 telex...."

33. which I have quoted. The judge added:

"Texaco's submission is that the telex itself is such a brokers confirmation and so is to be ignored. But the evidence is and the documents demonstrate that the authors of the telex were Petrotrade's agents not brokers and indeed that Texaco knew as much. That is how Texaco addressed them. The September 18 telex was addressed to Petrotrade at the agent's number. Indeed if the words are read literally and Texaco is right there was no contract at all because the oral agreement of September 15 was made not 'between the parties' but between the agents and Texaco's brokers. The meaning of the words is in my judgment clear. They apply to Texaco's brokers. They do not apply to the telex itself or to Petrotrade's agents.

If it was necessary to decide whether there was a real prospect of Texaco successfully defending the claim put on this basis, I would also decide that there was not."

34. I agree with that reasoning.

35. The evidence points to the fact that the parties contracted on the basis of their previous course of dealing. In this regard I agree with the judge that Texaco's proposal in its 18 September telex that the inspection costs be split

50/50 is consistent with the acceptance of the 16 September telex because clause 10, as set out in that telex, provided in full as follows:

"QUANTITY AND QUALITY TO BE DETERMINED OR CONFIRMED BY AN INDEPENDENT INSPECTOR AT THE LOADING INSTALLATION, IN THE MANNER CUSTOMARY AT SUCH INSTALLATION. SUCH DETERMINATION SHALL BE FINAL AND BINDING FOR BOTH PARTIES SAVE FRAUD OR MANIFEST ERROR. INSPECTOR TO BE APPOINTED BY SELLER, COSTS TO BE SHARED EQUALLY BETWEEN BUYER AND SELLER."

36. For some reason that clause is reproduced in the amended points of claim without the last sentence. I agree with the judge that Texaco's telex of 18 September is consistent only with an acceptance that those terms were agreed. I note that it is not consistent with the terms of the telex of 15 September which provided for such costs to be 100 per cent for buyer's account.

37. In all these circumstances I would hold that the contract between the parties incorporated the terms set out in the 16 September telex. Moreover, I agree with the judge that there is no real prospect of Texaco establishing the contrary at a trial and that the judge was right to hold that Petrotrade was entitled to recover on the claim because of the no set-off clause in clause 8.

The Set-off or Counterclaim

38. The remaining question on Texaco's appeal is whether the judge was also right to hold that Texaco had no real prospect of succeeding on its counterclaim. It follows from the conclusion set out above that clause 10 in the September telex formed part of the contract. It was therefore agreed that quantity and quality were to be determined by an independent inspector at the loading installation in the manner customary at such installation and that "*such determination shall be final and binding for both parties save fraud or manifest error*."

39. The facts relevant to this question are as follows. In its telex of 18 September, Texaco both nominated the vessel and proposed SGS as cargo inspectors with costs to be shared on a 50/50 basis. It is not in dispute that that proposal was subsequently agreed by Petrotrade. As a result, EP Services instructed SGS to test the cargo at the load port "*based on a composite shore tank sample*" for the relevant specifications, including a minimum flash point of 60... celsius. SGS began sampling the proposed cargo at once. On 22 September SGS issued a report of its analysis of the composite sample which stated that "*the result mentioned below met the specification*". It is of significance that the report expressly refers to the correct contract reference number. One of those results showed a flash point of 60 celsius which, to my mind, plainly satisfied the specification that it must be a minimum of 60(centigrade.

40. The bill of lading was issued on the same day, 22 September, and the vessel proceeded to Dublin. However, she was not discharged there because it was said that the cargo was off specification. Texaco relied on further analyses carried out by SGS. The vessel proceeded to Pembroke where she discharged at a Texaco refinery. Because of the allegation that the cargo was off specification, Texaco deducted the amount of its alleged loss, namely $140,660.75 from the price.

41. The question under his head was whether Texaco had a real prospect of showing that it was not bound by the SGS report or determination of 22 September that the flash point was 60... centigrade. In considering this question the judge set out clause 10 which I have concluded formed part of the contract. He then expressed his conclusions in this way:

"I would add that I see no material distinction between this clause and the version put forward by Texaco's brokers in their September 15 telex, save as to sharing of costs, and thus the same answer would apply even if that clause had been the one agreed.

SGS was informed in writing by Petrotrade's agent on September 18 that the (relevant) specification was 'Flashpoint 60 min(imum)'. The SGS 'Report' dated at Antwerp on september 22 stated 'The Results mentioned below meet the Specifications'. Mentioned below was 'B Flashpoint ...60.0."

42. The judge then described the nature of the dispute and said:

"Texaco's first submission was that a report giving the flash point as 60 was itself non-compliant because it did not say 60 <u>minimum</u>. The submission was supported by reference to Petrotrade's evidence (advanced to explain how the test results could differ within stated parameters) of the possibility of variations in test results which it was said made the 'minimum' important. I cannot accept this. Not only is it remarkable to find the point made for the first time in the course of the hearing but the more so when the litigation has been conducted on the basis that the report was compliant. Texaco are not inexperienced in such matters and one must assume read the report and saw nothing 'wrong' with it. Indeed the evidence of Texaco comes very close to and can fairly be read as admitting as much. In any event, SGS were aware of the specification and said it was met. '60' is compliant with a minimum of 60 and even if it might not be the reference to the specification removes any doubt."

43. I entirely agree with the judge. I have already expressed my view that the report stating that the flash point of the composite sample 60... celsius complies with the specification that it be a minimum of 60 celsius. Moreover SGS expressly stated that the sample met that specification and no-one suggested the contrary until comparatively recently.

44. I accept Miss Cockerill's submission that it was for Petrotrade to show that the determination complied with the agreed terms. In my judgment it plainly did and there is no real prospect of a judge reaching a different conclusion at a trial.

45. The judge dealt with Texaco's second submission in this way:

"Texaco's second submission was that the evidence did not establish that SGS had made a determination in the manner customary at the loading installation as required by the clause. By a combination of the evidence of Mr Davies in his Third Witness statement (paras 16-24) and Fourth Witness Statement (para 8) supported by SGS itself in my judgment Petrotrade has established just that. It is notable also that Texaco has produced no evidence of its own on the question. Reference was made to the risk that SGS was not impartial as it could face a claim, but that is hardly borne out by the subsequent tests carried out nor is it a reason for not producing evidence on the question, if anything the opposite.

The evidence is in short that SGS made a compliant determination. Subsequent (non-contractual) tests have shown different results. Those results are probably explained by testing variations. They are not a basis in my judgment for any real argument that there was an error in the determination let alone a manifest one. Such clauses are intended to achieve certainty and to be confined to obvious errors.

I think therefore that the determination was binding on Texaco and there is no real prospect of Texaco defending the claim against them on that basis either."

46. I entirely agree with the judge. There is no evidence to suggest that the determination was not made in the manner customary at the loading port within the meaning of clause 10. In the absence of evidence to the contrary from Texaco, which it would have been well placed to obtain and adduce if it were available, the clear inference is that SGS carried out the determination and the analysis in the customary manner.

47. Finally, in so far as it is submitted that the subsequent tests show that there was a manifest error in the first test, again I entirely agree with the judge that they do not.

48. It follows that I agree with the judge that Texaco has no real prospect of persuading the court that it is entitled to set off the amount it deducted from the price because Petrotrade has plainly brought the case within clause 10 on its facts.

Conclusion

49. In all the circumstances I have reached the conclusion that the judge was right to hold that Texaco has no real prospect of either defeating the claim or advancing a successful set-off or counterclaim.

50. It follows that I would dismiss the appeal.

51. **LORD JUSTICE LATHAM:** I agree.

52. **LORD WOOLF, MR:** I also agree. The judgment which I now give relates to the claimant's cross-appeal.

53. The cross-appeal is as to Langley J's decision on 21 December 1999. Langley J refused to award the claimant enhanced interest and costs on an indemnity basis, despite the fact that the claimant had made a Part 36 offer which was lower than the amount of the judgment in favour of the claimant.

54. The particular significance of the cross-appeal is that it is the first opportunity which this court has had to consider the general approach to be adopted by a court where a defendant is ordered to pay a sum in excess of a claimant's offer under Part 36.

55. Part 36 is one of the cornerstones of the reforms of procedure made by the CPR. Part 36 makes significant changes to the previous practice and procedure relating to payments into and out of court under what was RSC Order 22. The first of these changes is that offers to settle can be made before as well as after the commencement of proceedings. In the case of both, the court is required to take into account an offer when making any order as to costs (see rule 36.10). Secondly, offers to settle can be made by any party to the proceedings. In particular, as in this case, they may now be made by a claimant.

56. A Part 36 offer may relate to the whole claim, to part of it or to any issue that arises in the proceedings (see rule 36.5/2). In addition a Part 36 offer is not confined to money claims. However, if a defendant's offer includes an offer to settle a money claim, a payment into court is required once proceedings have started (see rule 36.3). There are procedural requirements which have to be complied with, otherwise the offer will not strictly speaking constitute a Part 36 offer. This does not prevent a party making an offer in whatever manner that party chooses, but if that offer is not in accordance with Part 36, *"it will only have the consequences specified"* in Part 36 "*if the court so orders*" (rule 36.1).

57. This appeal is primarily concerned with Part 36.21. The terms of that rule are:

"36.21 (1) This rule applies where at trial-

(a) a defendant is held liable for more; or

(b) the judgment against a defendant is more advantageous to the claimant,

than the proposals contained in a claimant's Part 36 offer.

(2) The court may order interest on the whole or part of any sum of money (excluding interest) awarded to the claimant at a rate not exceeding 10% above base rate for some or all of the period starting with the latest date on which the defendant could have accepted the offer without needing the permission of the court.

(3) The court may also order that the claimant is entitled to-

(a) his costs on the indemnity basis from the latest date when the defendant could have accepted the offer without needing the permission of the court; and

(b) interest on those costs at a rate not exceeding 10% above base rate.

> *(4) Where this rule applies, the court will make the orders referred to in paragraphs (2) and (3) unless it considers it unjust to do so.*
>
> *(Rule 36.12 sets out the latest date when the defendant could have accepted the offer.)*
>
> *(5) In considering whether it would be unjust to make the orders referred to in (2) and (3) above, the court will take into account all the circumstances of the case including-*
>
> *(a) the terms of any Part 36 offer;*
>
> *(b) the stage in the proceedings when any Part 36 offer or Part 36 payment was made;*
>
> *(c) the information available to the parties at the time when the Part 36 offer or Part 36 payment was made; and*
>
> *(d) the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the offer or payment into court to be made or evaluated.*
>
> *(6) The power of the court under this rule is n addition to any other power it may have to award interest."*

58. It will be noted that the opening words of rule 36.21 are "*This rule applies where at trial"* (my emphasis). Those words are not to be ignored. They mean that the rule does not apply where, as in this case, summary judgment is given under Part 24. Part 24.1 sets out a procedure by which the court may decide a claim or a particular issue *"without a trial"*. This may seem surprising, but it is to be borne in mind that a court always has the power to order costs on an indemnity basis. The court also has the general power to award interest at such a rate as it considers just. Furthermore, if proceedings are disposed of summarily this will normally be at an early stage in the proceedings so that questions of costs and interest will not be as significant as they would otherwise be.

59. The provisions of Part 36.21(2) and (3) are important because without them Part 36 offers would be of no value to a claimant. Part 36.21(2) and (3) create the incentive for a claimant to make a Part 36 offer. It is for this reason that paragraph (4) of the rule is worded in terms which requires the court to make the orders referred to in paragraphs (2) and (3) "unless it considers it unjust to do so".

60. It should be appreciated, even in cases to which paragraph (4) applies, that the court retains a considerable discretion as to the period during which the rate at which interest should be payable.

61. The reason for Part 36.21 not applying where there is no trial is probably a decision of the Rules Committee that paragraphs (2) and (3) should not apply to proceedings which are a form of debt collecting. By making a Part 36 offer, a claimant could put himself in a position where indemnity costs and enhanced interest orders could be made when it would not be appropriate.

62. However, it would be wrong to regard the rule as producing penal consequences. An order for indemnity costs does not enable a claimant to receive more costs than he has incurred. Its practical effect is to avoid his costs being assessed at a lesser figure. When assessing costs on the standard basis the court the court will only allow costs "*which are proportionate to the matters in issue*" and "*resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable proportionate in amount in favour of the paying party"*. On the other hand, where the costs are assessed on an indemnity basis, the issue of proportionality does not have to be considered. The court only considers whether the costs were unreasonably incurred or for an unreasonable amount. The court will then resolve any doubt in favour of the receiving party. Even on an indemnity basis, however, the receiving party is restricted to recovering only the amount of costs which have been incurred (see Part 44.4 and Part 44.5).

63. The ability of the court to award costs on an indemnity basis and interest at an enhanced rate should not be regarded as penal because orders for costs, even when made on an indemnity basis, never actually compensate a claimant for having to come to court to bring proceedings. The very process of being involved in court proceedings inevitably has an impact on a claimant, whether he is a private individual or a multi-national corporation. A claimant would be better off had he not become involved in court proceedings. Part of the culture of the CPR is to encourage parties to avoid proceedings unless it is unreasonable for them to do otherwise. In the case of an individual proceedings necessarily involve inconvenience and frequently involve anxiety and distress. These are not taken into account when assessing costs on the normal basis. In the case of a corporation, corporation senior officials and other staff inevitably will be diverted from their normal duties as a consequence of the proceedings. The disruption this causes to a corporation is not recoverable under an order for costs.

64. The power to order indemnity costs or higher rate interest is a means of achieving a fairer result for a claimant. If a defendant involves a claimant in proceedings after an offer has been made, and in the event, the result is no more favourable to the defendant than that which would have been achieved if the claimant's offer had been accepted without the need for those proceedings, the message of Part 36.21 is that, prima facie, it is just to makes an indemnity order for costs and for interest at an enhanced rate to be awarded. However, the indemnity order need not be for the entire proceedings nor, as I have already indicated, need the award of interest be for a particular period or at a particular rate. It must not however exceed the figure of 10 per cent referred to in Part 36.

65. There are circumstances where a just result is no order for costs or no interest even where the award exceeds an offer made by a claimant. Part 36.21 does no more than indicate the order which is to be made by the court unless it considers it is unjust to make that order. The general message of Part 36.21, when it applies, is that the court will usually order a higher rate of interest than the going rate. As to what the additional rate of interest should be, it is not possible to give specific guidance. Reference for general guidance has to be made to the terms of Part 36.21 and, in particular, to the provisions of paragraph (5).

66. Having made those remarks, I turn shortly to the facts of the appeal in so far as they are relevant to the question of costs and interest. The important starting point is the fact that Petrotrade, the claimants, made a Part 36 offer on 25 March 1999. That offer was in the sum of $7,000 less than the sum actually recovered by the claimant. Although that offer was made by Petrotrade before the CPR came into force on 26 April 1999, it was still a matter which a court would be entitled to take into account in exercising its discretion as to costs. I accept the submission of Mr Nolan that it is a relevant circumstance, though the offer is not technically a Part 36 offer.

67. Because Petrotrade was concerned as to whether an offer made prior to the commencement of the CPR would be effective, on 26 April 1999 a further offer was made by them in the same terms. It is significant to note that the judgment of the Court of Appeal on the first appeal by Texaco (to which my Lord referred in his judgment on this appeal) was given on 6 May 1999, almost precisely 12 months ago. This was followed by amended points of claim which were served by the claimants on 16 August 1999. The next relevant date is 21 December 1999 when the second judgment in favour of the claimants was given by Langley J.

68. The offers to which I have referred are contained in two letters from the claimant's solicitors to the defendant's solicitors of 25 March 1999 and 26 April 1999 in the following terms:

69. 25 March 1999:

"*Dear Sirs*

We note that this action will fall within the transitional arrangements for the new Civil Procedure Rules and therefore come under Practice Direction 51.

Having taken instructions from our client, and in an effort to resolve this matter, our clients are prepared to make a formal 'offer of settlement' in accordance with part 36 of the Practice Directions.

Our client is prepared to accept the sum of US$142,942.15, inclusive of interest up to the date of this offer, and costs. This offer takes into account any counterclaim.

In the event that this offer is not accepted, we reserve the right to bring a copy of this letter to the Court's attention on the issues of interest and costs.

This offer is open for 21 days from the date of this letter. After 21 days, the offer may only be accepted if liability for costs is agreed or with the permission of the Court."

70. and,

71. 26 April 1999:

"Dear Sirs,

Without prejudice to the offer contained in our letter of 25th March, in the event Part 36 offers in settlement are not effective prior to 26th April, we hereby repeat the offer contained in our letter of 25th March.

Our client is prepared to accept the sum of US$142,942.15, inclusive of interest up to the date of this offer, and costs. This offer takes into account any counterclaim.

In the event that this offer is not accepted, we reserve the right to bring a copy of this letter as well as that of 25th March to the Court's attention on the issues of interest and costs."

72. Both the offers were followed by a summary judgment granted by Langley J. In accordance with what I have said earlier in this judgment, because they were summary judgments means that the terms of Part 36.21 did not apply. It is still necessary, however, to consider whether, if Part 36.21 did or did not apply to the judgment, this is a case where the judge in the exercise of his discretion should have made an indemnity order for costs or an order in relation to interest which would be above the normal rate.

73. So far as interest is concerned in commercial cases, the going rate is now 1 per cent above base rate. That was the rate of interest which the judge awarded, adjusted for the sum involved being in dollars. In the ordinary way, in the Commercial Court, the practice of awarding interest at the going rate should continue, notwithstanding the CPR's introduction, until the present practice is shown to be no longer appropriate.

74. Although Part 36.21 has no application, where an offer is made by a claimant in the present circumstances, it is possible for the court, when exercising its general jurisdiction as to interest, to give a higher rate of interest than the going rate. It is important that courts bear this in mind otherwise claimants might be tempted not to obtain summary judgment in cases where it could be obtained with the objective of obtaining higher rates of interest at the conclusion of a trial. That would be entirely contrary to the whole ethos and policy of the CPR. I am confident that if it was shown this had occurred, the court would use its powers to ensure that a claimant did not benefit by any such tactic.

75. If it is accepted that a court has power to depart from the going rate because of a claimant's offer, the question then arises as to what additional interest it would be appropriate to offer? Quite clearly it should not exceed the 10 per cent referred to in Part 36.21. The court would have to take into account all the circumstances in considering whether it would be just to make an order of enhanced interest. Those include the matters which are set out in Part 36.21(5).

76. Looking at the facts of this case, it is relevant that no-one suggests that the defendants were otherwise than bona fide in disputing the claim. They may have been wrong as to their assessment of the legal position but it is not a situation where the conduct of the proceedings justifies any specific criticism. If there is cause to criticise a party, then, in accord with the policy of the CPR, I would not say that this would justify increasing the rate of enhanced

interest to punish that party. It would, however, mean because the party had behaved in that way, the party had forfeited the opportunity of achieving a reduction in the rate of additional interest payable. This is not the position.

77. The amount of the claim is also a relevant factor. If a claim is small, enhanced interest has to be at a higher rate than if the claim is large, otherwise the additional advantage for the claimant will not be achieved. In this case the sum involved was neither particularly large nor particularly modest. The conclusion that I would come to is that, if the matter was one for my discretion at first instance, I would award in the region of 4 per cent above base rate for the appropriate period.

78. In considering the appropriate period in this case, I would have taken into account the fact that the claimant had not advanced their case in a satisfactory manner. I would take that course not because of any pleading error but because of the requirement that a claimant should provide the other parties with the information which they need in order to evaluate the offer which has been made.

79. So far as pleading points are concerned, we were helpfully referred to the decision of Mr David Foskett QC, sitting as a Deputy High Court Judge in the case of ***Richard Little & Ors v George Little Sebire & Co*** (The Times, 17 November 1999). In that case Mr Foskett indicated that the court should take as the starting point 10 per cent above base. This is not an approach I would endorse. However, he also said at paragraph 2.6 said:

"If one accepts for this purpose the premise that, as originally pleaded, the claim arising from Scheme 2 would have failed, there are, it seems tome, two relevant questions when it comes to the issue of costs:

(1) If it had been pleaded correctly, would it have succeeded?

(2) If it had been pleaded correctly, would the Defendant's attitude to the litigation have changed?"

80. Mr Foskett then answered those questions respectively, "Yes" and "No". This is the approach the court should have adopted here where they can be answered similarly. I would have taken that into account in deciding the period of interest which would be appropriate. Having regard to the history described by my Lord in his judgment on the appeal, the appropriate period for enhanced interest which I would regard as right in this case would have been 12 months.

81. Turning to the question of indemnity orders for costs, I would also have made an order for indemnity costs commencing after the judgment was given by my Lord in the Court of Appeal on the first occasion. I would have regarded it as appropriate to have said in this case that from about the time of the first Part 36 offer by Petrotrade, indemnity costs should be ordered.

82. In my remarks so far, I have indicated the order I would have made, but that does not dispose of the cross-appeal. The question arises as to whether it can appropriately be said that, on the arguments which were advanced before him in the court below, the judge erred in the exercise of his discretion. The argument before the judge was wholly different from the argument which has been advanced in this court. In particular, the applicability of Part 36.21 was not raised. It seems to me that it would be wrong to interfere with a judge's decision on questions of discretion as to costs where the judge has not had placed before him the arguments which would, perhaps, have compelled him to take a different view.

83. The fact that the court has power to make the orders to which I have referred in this judgment should not be used as justification for appeals on questions of costs where the judge has done his best, as I believe the judge did in this case, to come to the right answer as a matter of discretion on the material which was before him.

84. Accordingly, while I have given what I hope is some indication as to the approach to be taken to questions such as those canvassed before us in the future, in this case I have come to the conclusion that the cross-appeal should be dismissed.

85. **LORD JUSTICE CLARKE**: I agree with the judgment and order of my Lord, the Master of the Rolls, and wish to add only a few words of my own. In a case to which CPR 36.21 does not apply because the defendant is not held liable "at trial" within the meaning of CPR 36.21(1)(a), I do not think it is appropriate to apply the subsequent paragraphs of that rule as if the rule did apply. However, the court has a wide discretion as to both interest and costs. I entirely agree that the making and refusal of a Part 36 offer is a highly material factor in deciding how those discretions should be exercised.

86. Although, as so often, everything will depend on the circumstances of the case, justice will ordinarily require that factor to be reflected in both the order for costs and in the award of interest. In the instant case I entirely agree with the approach outlined by my Lord. In particular I agree with the period of 12 months to which he referred on the footing that the 12 months began at about the time of the previous judgment of the Court of Appeal. I further agree with the order proposed.

87. **LORD JUSTICE LATHAM:** I also agree. I would associate myself with what my Lord, Lord Justice Clarke, has indicated about the length of the period in question and I would take the beginning of the appropriate period for enhanced interest to be about May of last year.

88. As far as the issue of principle is concerned in relation to the application of the matters set out in Part 36.21 to situations where a case is disposed of other than at trial, I would merely add that it is clear from Part 44.3(4) that the CPR itself acknowledges that the court should have regard to a Part 36 offer in the situation such as this. Part 44.3(4) reads:

"In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including -

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and

(c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36)."

89. It seems to me that, by analogy, it is right for the court to take into account the fact of an offer under Part 36 in a situation where Part 36.21 does not strictly apply.

90. For those reasons, I agree with my Lords and agree with the orders proposed.

Order: Appeal dismissed. Cross-appeal dismissed. Interest awarded at the rate of 4% above base rate for a period of 12 months. Respondents to receive half of the costs of both the appeal and cross-appeal.

MISS S COCKERILL (Instructed by Messrs Hill Taylor Dickinson, London, EC3A 7LP) appeared on behalf of the Appellant
MR M NOLAN (Instructed by Messrs Davies Johnson & Co, Plymouth, PL4 0ES) appeared on behalf of the Respondent