JUDGMENT : The Hon. Mr Justice Langley : Commercial Court. 9th June 2006

INTRODUCTION

1. The Claimant (ERG) operates two oil refineries in Priolo, near Syracuse, in Sicily, known as ISAB Sud and ISAB Nord. The Defendant is part of the Chevron Texaco Group ("Chevron").

2. By a contract agreed orally between two traders, Marco Montefiori of ERG and Julian Patterson of Chevron, in the course of telephone conversations between 6 and 12 May 2004, ERG agreed to sell to Chevron FOB ISAB refinery North side Priolo terminal 30,000 mt +/- 10% at Chevron's option of gasoline, with a specification suitable for the Kenyan market.

3. On 3 June 2004, four days after the expiry of the laycan period, Chevron terminated the contract on the basis that ERG was in breach of its obligation to deliver the cargo. The principal issue is whether or not Chevron was entitled to terminate the contract.

4. The market price of gasoline fell dramatically between 31 May and 3 June. ERG claims the differences between the contract price and the proceeds of selling the gasoline elsewhere after it was upgraded. It also claims for lost production. The claim is for almost US$3.4m. Some $2.5m represents the difference between the contract and the resale prices. Chevron seeks to justify its termination, but if it is liable to ERG, it seeks to counterclaim (in addition to demurrage) general damages for late delivery said to be or to include the difference between the value of the cargo had it been loaded in accordance with the contract and the value it would have had when it would have been delivered had the contract not been terminated.

The Trial

5. This trial is limited to liability issues and the issue of principle whether or not Chevron is entitled, if liable, to set off general damages for late delivery.

The Evidence

6. The relevant events are fully documented. Chevron's telephone conversations were recorded and agreed transcripts are available. ERG served witness statements from Mr Montefiori and five other witnesses. None of the witnesses were called to give evidence. Their evidence was admitted under the Civil Evidence Act.

7. Chevron served witness statements from Mr Patterson, his superior at the time, Mr Hillyer, and two members of the Operations Department, Ms Monti and Ms Cooper. They all gave evidence and were cross-examined by Mr Males QC, for ERG.

THE CONTRACT

8. The contract was the third contract agreed by Mr Montefiori with Chevron and the second he had agreed directly with Mr Patterson. The intervening, second contract, had been agreed with another Chevron trader in April. The first contract was agreed in March. Both the previous contracts had involved delays in shipment by ERG. Neither had been terminated.

9. The key issue is whether and if so what delivery date was agreed by Mr Montefiori. But the evidence of what they did agree is really incontestable. Terms were agreed in the final telephone conversation in the evening of 11 May, subject only to Mr Patterson and Chevron being satisfied that they could conclude a contract with the Claimant under its new name. On 12 May, that was agreed.

10. There is no issue that the discussions took place on the basis that ERG would draw up and provide to Chevron a written wording and that this would follow the terms of the previous contract agreed between the two traders save in any respects expressly agreed otherwise.

11. Mr Montefiori recorded the points agreed in his notebook and in an internal note to the operations department of ERG dated 12 May. Mr Patterson completed an internal deal sheet also dated 12 May. The written wording was sent by Mr Montefiori in a document dated 17 May. It is ERG's case that this document accurately set out what had been agreed on the relevant issues. It is also Chevron's case that the document was substantially an accurate reflection of what had been agreed, but if it is not to be read as providing for a contractual delivery date, then Chevron relies on the oral agreement which, it contends, did so.

Mr Montefiori's Notebook

12. Mr Montefiori's notes are just that; they include:
    "delivery FOB Priolo Treminal
    28-30
    27-30
    To 2 day laycan by 21/5
    vessel's nomination by 21/5
    laytime 36 + 6 shinc wp
    other clauses as per previous deal
    loading 27-30 then 2 laycan.
    pricing 25/5 to 1/6 OK"

13. The cryptic nature of these notes is not, however, hard to explain in the light of the transcripts of the recorded conversations and the written wording. The discussions had begun on 6 May when Mr Montefiori said he had a

"parcel" "loading" at the end of May "28-30 let's say" and Mr Patterson had expressed interest in it. On 11 May, Mr Patterson had suggested they work on the basis of the previous contract. Also on 11 May they agreed that the price of the cargo should be the average of certain Platt's FOB quotations for the period 25 May to 1 June plus 2.25 USD per MT. "Loading" was discussed for 28 or 27 to 30 May and agreed, in the final conversation on 11 May, as a "loading period 27-30" "to be narrowed to 2 days laycan". It was also then expressly agreed that "other clauses" would be "as per last deal" by which it is probable they were referring to the first contract agreed between them, and not the second, which had not involved Mr Patterson, albeit on the material issues there is no difference between the two contracts.

Mr Montefiori's Note

14. Mr Montefiori's Note to the Operations Department included "Period of loading 27-30/05".

Mr Patterson's Deal Sheet

15. Mr Patterson's Deal Sheet included:

"Delivery Period: 27-30 May 2004, to be narrowed to a 2-day Laycan at Buyer's Option 3 Clear working days prior to the first day of the Laycan.

Pricing Period 25th May to 1st June 2004.

Laytime 36 + 6 SHINC Weather Permitting"

In its language this Deal Sheet was in identical terms to Mr Patterson's Deal Sheet for the first, March, contract. It was also a reflection of what was clause 7 of the written wording of that contract and what became clause 7 of the written wording for this agreement.

The Written Wording

16. Mr Montefiori sent, as it was agreed he would, a written wording to Chevron for the attention of Mr Patterson by a telex dated 17 May, albeit it may in fact not have been sent until the following day. The written wording recorded the price as had been discussed with some added explanatory provisions taken from the previous March contract. Clause 7 consisted of three paragraphs and read:

"7. DELIVERY

FOB ISAB REFINERY NORTH SITE (PRIOLO TERMINAL – AUGUSTA BAY) IN A SINGLE LOT BY M/T "TBN"/SUBS TO BE NOMINATED BY BUYER AND TO BE ACCEPTABLE TO SELLER IN THE PERIOD 27-30/05/2004.

BUYER WILL NARROW SUCH PERIOD TO A TWO DAY LAYCAN LATEST BY 21/05/2004 C.O.B. ITALIAN TIME.

THE LAYCAN IS AN ESSENTIAL ELEMENT OF THE CONTRACT, IN FAVOUR OF SELLER."

17. The wording of Clause 7 was, save for the fact that the vessel had already been nominated for that contract, in identical terms to the wording which had been agreed for the first, March, contract and also for the second, April, contract. In particular the third paragraph had formed part of Clause 7 of each of those contracts without being questioned by Chevron.

18. Clauses 9 and 10 read:

"9. LAYTIME

36 RUNNING HOURS SHINC WEATHER PERMITTING PLUS 6 HOURS NOTICE ALWAYS DUE, (NOTICE OF READINESS MUST BE TENDERED ONLY AFTER THE VESSEL HAS ARRIVED WITHIN THE CUSTOMARY ANCHORAGE) PROVIDED VESSEL CAN RECEIVE THE TOTAL CARGO IN A PERIOD OF TIME EQUIVALENT TO THE TWO THIRDS OF THE AGREED LAYTIME HOURS.

IF THE VESSEL TENDERS N.O.R. AFTER THE FIRM AGREED LAYCAN, LAYTIME SHALL BEGIN UPON BERTHING.

LAYTIME SHALL COMMENCE EITHER 6 HOURS AFTER N.O.R. TENDERED AT LOADPORT OR UPON BERTHING, WHICHEVER IS EARLIER AND EXPIRE AT HOSES DISCONNECTION, OR RECEIPT OF DOCUMENTS, WHICEVER IS EARLIER. TIME USED FROM HOSES DISCONNECTIONS TILL RECEIPT OF DOCUMENTS ON BOARD SHALL BE EQUALLY SHARED BETWEEN BUYER AND SELLER AFTER THE THREE HRS USUALLY GRANTED BY SHIP.

10. DEMURRAGE

DEMURRAGE, IF ANY, WILL BE REQUESTED BY BUYER ONLY IF SHIP-OWNERS ACTUALLY CLAIM IT. DAILY RATE AS PER CHARTER PARTY…."

19. These Clauses also were in substantially the same terms as the previous contracts. The written wording, like its predecessors, also provided for the application of FOB Incoterms where not in conflict with the written wording.

Chevron's Response

20. On 19 May, Chevron responded to the written wording confirming agreement "with the following modifications". One of the "modifications" was:

"DELIVERY. PLEASE DELETE THIRD PARAGRAPH."

21. On 28 May, Mr Montefiori prepared a response rejecting Chevron's "amendment request as it is not in line with the agreement reached during negotiations". It seems this response was sent on 31 May and received by Chevron on 1 June.

Conclusion

22. The first issue for the Court is to decide whether the parties' contract was (in the relevant aspects) correctly recorded in the written wording and, if not, in what respects it was inaccurate.

23. Both parties contend that at least the first two paragraphs of Clause 7 of the written wording accurately record the agreement, albeit they construe the words used differently. I agree. The first, March, contract, was the template for the negotiations. The written wording faithfully followed the wording of that contract. The dates to be used in Clause 7 were the dates discussed and agreed in the telephone conversations. Mr Patterson said those paragraphs were an accurate reflection of what had been agreed orally.

24. There are two points in particular which Mr Bright, for Chevron, seeks to emphasise. First, that the negotiations were conducted on the basis that loading would commence on or at least shortly after the nominated vessel arrived and would be completed within the laytime. Second, that they were also conducted on the basis that the pricing period would relate to the anticipated loading period.

25. As to the first point, it is clear from the references to "loading" in the documents and telephone conversations to which I have referred in paragraphs 12 to 15 that, unsurprisingly, the parties anticipated that loading would follow upon the arrival of the nominated vessel. But the discussions were in the context of Clause 7, entitled, as it was, "Delivery".

26. As to the second of Mr Bright's points, I think it is clear, again unsurprisingly, that the pricing period and the anticipated loading period, were related. That would reduce, but by no means eliminate, as Mr Patterson acknowledged, the risk to Chevron of a market price reduction from the price calculated as an average over the period 25 May to 1 June to a price based around the Bill of Lading date. But there is no evidence that ERG were aware of any re-sale arrangements made or likely to be made by Chevron. In fact none were made. Chevron's evidence is that it would be usual for such cargoes to be sold at an average of the prices around the Bill of Lading date with the consequence that the later the Bill the greater the risk of a market fall against the contract price. Equally, the cargo could have been pre-sold or hedged or bought (as Mr Hillyer said) for the purposes of Chevron-related companies with outlets in Kenya.

27. The Court's task, having determined the wording of the contract, is to construe it objectively in its commercial context. The understandings and beliefs of the parties are not material unless expressed. I cannot find in the matters to which I have referred or in Mr Bright's submissions any basis for concluding that the material terms of the contract were other than those set out in the written wording and it is therefore those words which have to be construed.

28. Further, in my judgment, the third paragraph of Clause 7 was a term of the contract. It became so in consequence of the oral agreement that, save as discussed, the terms of the previous contract would apply.

THE FACTS

29. On 17 May 2004, Chevron nominated the vessel "Luxmar" to load the cargo and sought acceptance from ERG, adding that "date range will be narrowed to a two day range in due course and in accordance with contractual agreement". ERG accepted the nomination on the same day. On 20 May the vessel gave an ETA Priolo of 28 May.

30. On 21 May, Ms Cooper notified Mr Montefiori by email that:

    "We hereby narrow laycan to two day date range 29/30th May 2004".

31. On 24 May, ERG confirmed "Laycan 29/30.5.2004".

32. On 26 May, Chevron narrowed the contract quantity to 31,450 MT plus or minus 5% operational tolerance. On the same day ERG started to blend the cargo, but, on 28 May encountered technical problems with its plant. The evidence is that the necessary repairs were not completed until 3 June.

33. The vessel arrived at Priolo at 10.00 hours on 28 May and gave notice of readiness. The laycan period had not then started. The cargo was not ready because of the problems at the plant. There is some dispute about the extent to which Chevron were informed about the progress of repairs and likely availability of the cargo. Chevron put ERG on notice of a damages claim including demurrage on 28 May itself and probably it was known to Chevron then that it was unlikely that the vessel would even commence loading within the narrowed laycan period ending at midnight on 30 May.

34. By 3 June loading had still not commenced but cargo in two out of three shore tanks had been tested and found to be on specification. Chevron had information on 3 June that the vessel would probably berth on 4 June. Mr Patterson had sought to re-negotiate the price. The market had started to fall on 31 May. ERG would not agree.

35. At 15.08 hours on 3 June Chevron informed ERG that:

    "We hereby accept your failure to commence loading … as repudiatory of the Sale Contract, which is hereby terminated."

36. Subsequent exchanges failed to produce an agreement, and on 11 June ERG accepted Chevron's conduct as bringing the contract to an end.

CLAUSE 7

37. The liability issues depend on the construction of clause 7 which I have found correctly recorded the agreement of the parties.

ERG's Case

38. ERG's case can be stated simply. It is Mr Males' submission that clause 7 obliges Chevron to present a vessel at Priolo which would arrive and give notice of readiness during the narrowed laycan range of 29 to 30 May. Upon that event (as happened) ERG was obliged to load the vessel within the laytime allowed by clause 9 (36+6 hours) or to pay demurrage, if any, in accordance with clause 10 of the contract. There was no other "delivery" obligation upon ERG, and so Chevron had no right to terminate the contract as it purported to do on 3 June.

Chevron's Case

39. Chevron's case is not so straightforward. In his written opening submissions, Mr Bright contended (in accordance with the pleadings) that clause 7 (and/or the oral exchanges) imposed a period within which ERG was bound to deliver the cargo. He continued:

"The precise effect of this is susceptible to debate. A number of possibilities arise:

(1) The cargo had to be loaded, in the sense that loading had to be completed, within the delivery period (in effect by midnight on 30 May).

(2) Delivery had to be commenced within such a time as would ordinarily permit delivery to be completed within 30 May.

(3) Delivery had to be commenced within 30 May.

(4) Delivery had to be completed within the laytime provisions."

40. In an FOB contract such as this "delivery" "loading" and "shipment" are the same. Mr Bright acknowledged that "delivery" would normally mean completed delivery (as it does in the INCO terms) and his primary submission therefore favoured (1) or (2) of his possibilities. But he also acknowledged that reading clause 7 with the laytime clause, (clause 9), might be "more consistent" with possibilities (3) and (4) "and may make more sense given the general commercial background". The evidence is that the cargo could be expected to take about 40 hours to load.

41. Mr Bright also developed a further submission during the course of the hearing, but that is better explained after consideration of the wording of clause 7 and the authorities so far as I think to be necessary. I should also note that Mr Patterson (and Ms Monti) thought the agreement was that delivery would commence within the narrowed laycan period and so by midnight on 30 May (i.e. possibility 3). Mr Patterson obviously felt some difficulty with possibilities 1 and 2.

Construction

42. The meaning of "laycan" is not in issue. Nor is it suggested that it was used in any different sense. In ***The "Azur Gaz"*** [2006] 1 Lloyd's Rep 163, Christopher Clarke J said, at page 165, para 9:

"The term laycan is habitually used in the negotiation of charterparties, to refer to the earliest date at which the laydays can commence and the date after which the charter can be cancelled if the vessel has not by then arrived. By extension the term is to be found in fob sales, so as to provide that the seller can cancel the contract if the vessel, which it is the buyer's duty to procure, does not arrive at the port by the cancellation date."

43. And, at page 167, the Judge said:

"The word "laycan", which was intentionally chosen, does not mean "shipment". It is perfectly capable of applying in its ordinary sense to the present contract….."

44. With that in mind, the wording of clause 7, must, I think, be read as providing for a laycan and no more. Mr Bright submitted that the first two paragraphs of the clause were to be read separately, and the first paragraph, especially read with the title to the clause, provided for a delivery date. But I do not think that is a possible construction for a number of reasons, as submitted by Mr Males:

i) The words "narrow such period" in the second paragraph plainly refer to the period in the first paragraph and describe that as a "laycan". A delivery period cannot be narrowed to a laycan any more than a pea can be narrowed to a bean.

ii) The title to the clause, "delivery", undoubtedly was used as a heading for provisions addressing a laycan period (the second and third paragraphs) and is not wholly inappropriate in that context.

iii) The word "delivery" itself raises uncertainty as Mr Bright (and Mr Patterson) acknowledge. It would normally mean completed loading. But if it did, and the first paragraph is a stipulation for delivery in that sense, the clause creates an absurdity. The vessel could arrive at any time prior to midnight on 30 May (paragraph 2) but must also be fully loaded by 30 May (paragraph 1). Indeed loading could not even be commenced on time in such circumstances.

iv) If the laycan period was a loading period, then the laytime provisions in clause 9 are inconsistent with it. A party is entitled to use the laytime as it sees fit: ***Inverkip Steamship Co Ltd v Bunge & Co*** [1917] 2 KB 193 at 202 per Scrutton LJ; ***The Ulyanovsk*** (Steyn J) [1990] 1 Lloyd's Rep 425.

v) Both the authorities cited in the previous sub-paragraph also support the proposition that the demurrage provided for by the contract is the sole remedy for the seller's breach of contract in failing to load by the end of laytime. So, too, does the decision of Devlin J in ***Universal Cargo Carriers v Citati*** [1957] 2 QB 401.

vi) It would make little commercial sense for a refinery to agree to a term permitting the buyer to terminate the contract if a vessel were part loaded on expiry of the laycan. That would risk blocking tanks and disruption to operations.

45. It was in an attempt to address these points (or some of them) that Mr Bright developed a further submission. It was this. If Chevron wanted to rely upon the obligation of ERG to deliver by midnight on 30 May (for which he contended) then Chevron had to be able to provide a vessel and give notice of readiness in time for that to be done and so, in this case, by at latest some 42 hours before midnight on 30 May, that is by 0600 hours on 29 May. If they did that, then ERG was bound to complete loading in that period of 42 hours on pains of the contract being terminated if they did not. If Chevron failed to give such a notice on time then that failure would relieve ERG of its delivery obligation, because ERG's obligation was dependent on Chevron acting so as to enable it to be fulfilled.

46. That submission is, in my judgment, ingenious but also demonstrably flawed. There is nothing in the agreement made by the parties which provides for it. It can hardly be said, nor was it submitted, that it could satisfy the test for implication of a term. The effect, that a notice of readiness given at 05.59 hours on 29 May would commit ERG to loading the full cargo by midnight on 30 May but a notice given at 06.01 hours would not, is a commercial nonsense.

47. In the ***Azur Gaz***, Christopher Clarke J, at page 167, para 21, considered a contract between ERG and another counter-party which (see para 7) was in its clause 8 substantially the same as the present contract as regards the second and third paragraphs of our clause 7. The first paragraph (unlike this case) used in its wording the language of "lifting programme" and "lifting period". Even with such wording, Christopher Clarke J said he was "far from convinced" that the word "laycan" must mean "an agreed lifting period". He continued:

"It is true that the first part of the clause refers to the agreement of a lifting period, but without specifying whether that is a period during which the parties contemplate that the cargo will be lifted or one in which it must be lifted. The lifting period is then to be narrowed to a three day Laycan. If the parties choose to use the word Laycan in an fob contract they are, in my judgment, to be taken as meaning what they say. At the lowest the matter is not clear."

48. Mr Bright does not even have the comfort of reference in clause 7 to a lifting period. He also submitted that it would be most unusual for an fob contract not to contain a delivery stipulation. That may be so. But it cannot serve to create one where as a matter of construction none exists and the stipulations suggested make no commercial sense.

49. In my judgment, clause 7 says nothing about delivery obligations in the first three of the possible senses for which Chevron contend. The delivery obligation was, as Mr Males submitted, to load the vessel within the laytime provided for.

OTHER LIABILITY ISSUES

50. Mr Bright submitted that if I reached the conclusion I have reached on clause 7 there remained two bases on which, nonetheless, Chevron could justify the termination of the contract. The first was that a failure to complete delivery within the laytime provisions was itself a breach of condition entitling Chevron to terminate. The second was that ERG was in breach of an obligation to deliver within a reasonable time which also entitled Chevron to terminate.

Obligation to load within Laytime

51. There is no dispute that ERG was obliged to load the Vessel within the stipulated laytime, nor that it failed in fact to do so. Mr Males submits, relying on ***Inverkip, Citati,*** and ***The Al Hofuf*** [1981] Lloyd's Rep 81, that a right to terminate would only arise upon the expiry of "a frustrating time" and until then Chevron's remedy is limited to the demurrage provided for in clause 10. Mr Males is right.

52. In ***Inverkip,*** Owners claimed damages against Charterers for the detention of their Vessel for what was found to be beyond a reasonable time after expiry of the lay days. The Owners failed. The Court of Appeal held the claim was limited to the demurrage provided for. At pages 200-201, Scrutton LJ said:

"The sum agreed for freight in a charter covers the use of the ship for an agreed time for loading or discharging, known as the lay days, and for the voyage. But there is almost invariably a term in the agreement providing for an additional payment, known as demurrage, for detention beyond the agreed lay days. This is sometimes treated as agreed damages for detaining the ship, sometimes as an agreed payment for extra lay days. In my view the mere fact that the charterer has not loaded the ship in the lay days does not entitle the shipowner to withdraw the ship from the service; and whether the payment for these days after the lay days on which the ship is detained is treated as agreed liquidated damages or as an agreed payment for time which the charterer has a right to use at his option, the amount to be paid for these days is fixed by the charter. On the other hand it is obvious that the charterer is not entitled to keep the ship on demurrage for ever. What is the time when he may treat his obligation to stay as removed and sail away?

Counsel for the shipowners said that this time came when a reasonable time had elapsed. Asked a reasonable time for what? they had some difficulty in answering…. The reasonable time for loading is exhausted by the lay days. What is the second reasonable time at the end of which the ship may leave? Her days on demurrage are part of an unreasonable time for loading. Is the Court to determine what is a reasonable degree of unreasonableness? In my view the test of reasonable time is not one that is applicable. To enable the ship to abandon the charter without the consent of the charterer I think the shipowner must show either such a failure to load as amounts to a repudiation of or final refusal to perform the charter, which the shipowner may accept as a final breach and depart claiming damages… or such a commercial frustration of the adventure by delay…"

53. The decision in ***Citati*** is to the same effect. Mr Bright submitted that both authorities were charterparty cases not cases concerned with FOB contracts. That is true. But I see no reason at all why the principle should be different. More importantly, the decision of Mocatta J in ***The "Al Hofuf",*** applied the same principle to an FOB contract.

Obligation to deliver within a reasonable time

54. These decisions also dispose of the final submission by Mr Bright. There is no obligation to deliver in a reasonable time breach of which could justify the termination of the contract. Indeed, I think Mr Males is also right in his submission that no such term is to be implied at all.

55. Section 29(3) of the Sale of Goods Act, 1979 provides that:

"Where under a contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time."

56. The wording is apt if it means within a reasonable time of making the contract. But that has no relevance in this case. The wording can only apply if "sending" the goods to Chevron includes putting them on board a vessel provided by Chevron, which I doubt. But, conclusively in my judgment, this contract did provide a time for "sending" the cargo even if it has such a meaning, namely the laytime provisions. A term requiring loading within a reasonable time would also be inconsistent with the requirement for expiry of a "frustrating period".

57. If it had been necessary to address the question whether a reasonable time had expired by the afternoon of 3 June, I would have held that it had not. I think, as is agreed, that the question has to be viewed on the basis of the situation as it was at that time. ERG had by then, to Chevron's knowledge, two tanks ready to load and the probability was that the vessel would berth the next day.

THE DAMAGES ISSUE

58. In the context of my decisions on the terms of the contract, there is no basis on which Chevron can claim general damages for delay. The counterclaim must be limited to demurrage (which is conceded). In ***The Bonde*** [1991] 1 Lloyd's Rep 136, at page 143, Potter J, held that, in order to advance such a claim for general damages for delay in an FOB contract, there had to be a breach additional to or separate from that of failing to load within the lay days and/or at an agreed rate of loading, so as to establish a separate right not circumscribed by the right to demurrage. Mr Bright submitted that the demurrage clause in this agreement was unusual or to be construed as addressing only the case where Owners did claim demurrage from Chevron and nothing more. I do not agree. The clause is, as it says it is, a "demurrage" clause, and uses the word in its ordinary sense. Chevron, no doubt, regrets its limitations but that is no reason to give it a meaning it does not have.

CONCLUSION

59. Chevron is liable to ERG for wrongfully terminating the contract. The amount of that liability is for another day, if it cannot be agreed. Chevron is entitled to demurrage as provided for in clause 10 but not to general damages for delay.

Mr S. Males QC (instructed by MFB) for the Claimant
Mr R. Bright (instructed by Fishers) for the Defendant