JUDGMENT : Mr Justice Langley: Commercial Court. 21st December 1999

1. The Claimant (Petrotrade) seeks a summary judgment on the basis that the Defendant (Texaco) has no real prospect of defending the claim in these proceedings. The claim is for $140,660.75 as the balance of the price of a cargo of diesel oil sold by Petrotrade to Texaco. Texaco deducted that sum from the full price of the oil alleging that the cargo was off-specification. Petrotrade say that Texaco was not entitled to make any deduction because the sale contract incorporated a no set-off clause and a clause by which the parties agreed that they would be bound by a determination by SGS of whether the cargo was to specification or not and SGS in fact determined that it met the specification.

2. Almost a year ago now I gave summary judgment to Petrotrade on the claim. But Texaco successfully appealed against that judgment to the Court of Appeal, whose Order is dated 14/5/99. The background and issues then before the court appear from the judgment of Clarke LJ in the Court of Appeal and I will not repeat them.

3. Petrotrade are now trying again. They have amended their claim and adduced further evidence which they say addresses the reasoning of the Court of Appeal and shows they are entitled to judgment because Texaco has no real defence to the claim as it is now advanced.

4. The two 'new' ways in which Petrotrade put the claim are to assert that the two clauses of the sale contract were incorporated either by an established course of trading between the parties or by Texaco's conduct in accepting them by nominating a vessel for shipment of the cargo, taking delivery of the cargo and agreeing to the appointment of SGS after they were aware of the clauses from a telex or E-mail sent to Texaco and Texaco's brokers by Petrotrade's agents on September 16, 1998. The telex undoubtedly contained the clauses. The basic terms of the contract had been agreed orally on September 15. The September 16 telex was followed by a Texaco telex on September 18 nominating the vessel and proposing SGS as inspectors of the cargo.

5. If the no set-off term was incorporated in the contract then Petrotrade would be entitled to judgment. If the SGS determination made at the loading port (Antwerp) complied with an agreed term that it should be binding then again Petrotrade would be entitled to judgment and the counterclaim by Texaco would also fail .

6. I will consider first Petrotrade's case that the terms were included by an established course of trading.

7. 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.

8. 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.

9. 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 been agreed orally on September 15. That was something which both parties recognised required to be done as evidenced by the brokers telex sent on September 15.

10. 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 shared 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.

11. Texaco also refers to the concluding words of the September 16 telex: *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.*

12. 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 on 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.

13. 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.

14. The final question is whether, granted the contract contained the terms about a binding determination by SGS, there was in fact such a determination.

15. The relevant clause reads in full: *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.*

16. 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.

17. SGS was informed in writing by Petrotrade's agents 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".

18. What led to this dispute was that on arrival in Dublin the cargo was tested and found not to have a flashpoint of 60 but of something (not substantially) below 60. SGS themselves, at Texaco's request, later tested certain samples retained at Antwerp and found them to be similarly below specification.

19. 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.

20. 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.

21. 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.

22. 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.

23. It follows that Petrotrade is entitled to summary judgment on both the claim and counterclaim.

Mr M. Nolan ...instructed by Messrs Davies Johnson for the Claimants)
Miss S. Cockerill ...instructed by Messrs Hill Taylor Dickinson for the Defendants)