JUDGMENT : MR JUSTICE CHRISTOPHER CLARKE: Commercial Court. 15th November 2005.

1. On 17th February 2003 SHV Gas Supply and Trading SAS, the Claimant, ("SHV"), agreed to sell and Naftomar Shipping and Trading Co Ltd Inc, the Defendant, ("Naftomar") agreed to buy 2,700 mt +/- 5% at Sellers' option commercial butane meeting Melilli specifications CIF Tunisia Port – La Goulette or Gabes. Melilli is a port on the east of Sicily. The discharge port was to be declared at latest upon berthing at loading port. The price was US $ 390 per metric tonne and was to be paid by telegraphic transfer to the Sellers' bank account on the bill of lading quantity with a value date latest 20 days from the bill of lading date against telex invoice and normal shipping documents or sellers' letter of indemnity. The contract contained the following clauses:

   "Vessel AZUR GAZ Accepted by the Buyer

   Laycan Feb 17-19th 2003 consequently ETA Gabes Feb 20 am La Goulette Feb 19 pm

   Demurrage: 9,500 USD PDPR

   Force Majeure Neither Seller nor Buyer shall be liable in damages or otherwise for any failure or delay in the performance of any obligation hereunder other than the obligation to make payment, where such failure or delay is caused by force majeure, or any event occurrence or circumstance reasonably beyond the control of that party including without prejudice to the generality of the foegoing (sic), Acts of God, strikes, fires, floods, wars (whether declared or undeclared), riots, boycotts, restrictions imposed by government authorities including allocations, priorities, requisitions, quotas and price controls.

   The party whose performance is so affected shall immediately notify the other party here (sic), indicating the nature of such cause and, to the extent possible inform the other party of the expected duration of the force majeure event.

   Commercial Terms Where not in conflict with the above, Incoterms 2000 for CIF sales plus latest amendments to apply.

   Maritime Terms The Asbatankvoy charterparty amended for LPG attached to this contract where not in conflict with terms of the main body of this contract shall apply".

2. Incoterms 2000 provide as follows:

   "A4 Delivery

   The seller must deliver the goods on board the vessel at the port of shipment on the date or within the agreed period"

3. The contract was negotiated through the brokers FL Gaz, in the person of Madame Francois Lesenfans. She communicated with Mrs Pons, a senior trader employed by SHV and Mr Paolo Michi, a trader employed by Naftomar. Mrs Pons and Mr Michi did not deal with each other. The contract is contained in a recap fax sent by Madame Lesenfans to the parties on 17th February, as amended by a subsequent e-mail.

The charterparty

4. No Asbatankvoy charterparty was attached to that recap but the charter referred to was a voyage charter dated 31st January 2003 between Gas Marine, of Ezzahra, Tunisia and SHV which provided for the carriage on the "AZUR GAZ" of 2,700 mt of butane or LPG mix for carriage from Melilli to one safe/berth/port West or East Med, limited to a small number of discharging port options. These did not include Gabes or La Goulette, although these were later agreed. The laydays were to commence on 16th February and the cancelling date was 19th February.

Naftomar's sale contract with STIR

5. Naftomar needed the cargo as a matter of urgency in order to supply it to Societe Tunisiene des Industries de Raffinage ("STIR") with whom it had a contract to deliver 220,000 m.t. LPG and/or commercial butane for the Tunisian market during 2003, with deliveries to be made each month.

6. The negotiations for the contract between SHV and Naftomar were begun and concluded on 17th February and took only a matter of hours. In the course of them SHV became aware that the cargo was urgently required in Tunisia. The price that Naftomar paid ($ 390/mt) reflected the urgency of its need.

SHV's purchase contract with ERG

7. SHV had a term contract with ERG Raffinerie Mediterrane S.A.R.L. ("ERG") for the purchase of 10 monthly cargoes of 2,500 – 3,200 mt, final quantity at Buyer's option, of which 6 were to be butane, 4 LPG, (3 from one refinery and 1 from another) FOB Priolo. Priolo is in the same area as Melilli. There was a mutual option for an additional delivery of the same quantity. Clause 8 of that contract provided:

   "8. DELIVERY/NOMINATION

   FOB PRIOLO G…BY VESSELS ACCEPTABLE TO THE SELLER IN THE AGREED CONTRACTUAL PERIOD ACCORDING TO THE FOLLOWING NOMINATING PROCEDURE…

   SELLER WILL…DECLARE A 5 DAYS LIFTING PROGRAMME..

   ..BUYER WILL CONFIRM OR COUNTER PROPOSE ALTERNATIVE 5 DAYS LIFTING PERIOD(S)…

   ,,SELLER AND BUYER WILL REACH A FINAL AGREEMENT FOR THE LIFTING PERIOD..

   4 WORKING DYS BEFORE THE 1ST DAY OF THIS AGREED 5 DAYS LIFTING PERIOD BUYER WILL NARROW SUCH PERIOD TO A 3 DAYS LAYCAN..

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

8. By 17th February 2003 SHV had not yet found a buyer for the February 2003 parcel of butane. The cost of that parcel, under the applicable price formula in the ERG contract, was **$ 354/mt.** SHV had however entered into the charterparty referred to in paragraph 4 above. On 13th February SHV declared to the Owners of the AZUR GAZ ("Owners") "*intention Lavera to be confirmed tomorrow morning*". On 14th February SHV gave Owners voyage instructions specifying that the ship was to load the butane at Melilli, the suppliers being ERG, and that the cargo was to be discharged at the Geogaz Terminal at Lavera, near Marseille. I do not regard these notifications as representing a settled intention that the butane should be stored in order to be used for

subsequent supply to the French retail market. In the absence of any purchaser, instructions had to be given to the Owners and it was natural that they should be for the vessel to sail to a place where the cargo could be stored. I accept the evidence of Mr Nillus of SHV that SHV did not put commercial butane in store at Lavera for the French market, which normally seeks refinery grade butane; but did so either to await price rises or with a view to supplying a special purchaser like Lyondell.

Laycan

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. The expression does not fit so easily into the confines of a CIF contract where it is the seller's obligation to make a contract of carriage, ship the goods on board and tender the customary documents.

10. In the present case the reference to "*laycan*" in the sale contract came about because Mrs Pons, who was aware of the reference to "*laycan*" in the SHV contract with ERG (an FOB contract), wished to ensure that an identical provision was contained in SHV's contract with Naftomar. Mr Michi and Madame Lesenfans were unclear what the word "*laycan*" meant in the context of a CIF sale. Mr Michi thought that the word probably referred to loading but because of the uncertainty he required SHV to give ETAs for Gabes and La Goulette. Mrs Pons then came back with estimates for arrival at La Goulette on 19th February in the afternoon and at Gabes on 20th February in the morning and, having done so, agreed to add the words *"consequently ETA Gabes Feb 20 am, La Goulette Feb 19 pm"*.

Bad weather at Melilli

11. Melilli lies in Santa Panagia Bay on the east coast of Sicily, some 4 nautical miles north of Siracusa on the north side of Cape Santa Panagia. A number of refineries, including ERG, have terminals there and vessels moor alongside terminal jetties. Melilli is protected from weather from the south and west but exposed to winds from the north and north east.

12. In February 2003 Melilli experienced an unusually long spell of bad weather, which prevented vessels from loading. On 12th February 5 platforms, the ERG Terminal, the ENI Terminal and the ASI/IS Quay were inoperative for 6 hours; on 13th February one platform was inoperative for 7.5 hours; on 14th February 4 platforms were inoperative for periods ranging from 1.5 hours to 10 hours. On 15th and 16th February 5 platforms and the ERG Terminal were inoperative throughout the day due to heavy swells and a NE wind force 7. On 17th February the same applied with the addition of the ENI Terminal and the ASI/IS Quay.

13. The "AZUR GAZ" arrived at Melilli on 17th February at 2030, tendering Notice of Readiness at the same time, which was accepted at 2033. Because of the bad weather she had to lie in the outer roads of Santa Panagia Bay, some 12 nautical miles offshore. That is the customary anchorage in times of exceptionally bad weather. 13 other vessels were held in the same position. Between 17th February and 3rd March 2003 Melilli experienced winds of at least force 4 to 5 for most of the period. On 17th, 19th and 28th February the winds reached force 7 to 8. The usual wind speed during February is of the order of force 2 to 3.

14. As a result of the bad weather the jetty was inoperative from 17th February to 2nd March, save for three periods:

    (i) 1530 on 19th February to 0930 on 21st;

    (ii) 1330 on 24th to 0700 on 26th; and

    (iii) 1000 on 26th to 1100 on 27th.

    By 1102 on 19th February AZUR GAZ was able to anchor and at 1300 did so. She was not able to berth until 1800 hours on 3rd March. Some bigger vessels managed to berth before she did. AZUR GAZ was scheduled to berth on 26th February but this was cancelled by the shore because berthing was not safe for a vessel of her size. Her place was taken by a larger vessel, which would be less affected by swell.

Naftomar cancels the contract

15. On 25th February Naftomar telexed to F L Gaz, as agents for SHV, cancelling the contract. They relied upon clause A4 of Incoterms and the failure of SHV to ship "*within the agreed period*" (which they treated as 17th - 19th February). On 26th February SHV replied disputing the claim that there was an agreed period for loading and contending that there was no breach on their part. On 27th February Naftomar referred to the laycan provision in the contract and repeated their cancellation. SHV noted Naftomar's decision and reserved their right to damages from what they claimed was Naftomar's repudiation.

16. AZUR GAZ commenced loading at 1848 on 3rd March and completed loading by 1248 on 4th March. On 7th March the cargo was put into storage at Lavera, near Marseille.

SHV's claim and Naftomar's defence

17. SHV's claim in these proceedings, as originally advanced, was for the difference between the contract price of $ 390/mt and what was said to be the sale price of the AZUR GAZ cargo under two sales of:

    (i) 1,784.654 mt to ENI on 31st May 2003 at FOB $ 243/mt; and

    (ii) 903.885 mt. to BP by way of an in tank transfer on 16th June 2003 at $ 253/mt

    They now, however recognize that their damages cannot be calculated by reference to sales made three months after the repudiation.

18. Naftomar contend that they were entitled to terminate the contract on one or more of three bases:
    (a) as a matter of construction the reference to *"Laycan Feb 17-19th 2003"* in the contract must, in context, be treated as a reference to a shipment period. SHV were in breach of their obligation to ship within that period; or
    (b) there was an implied term that the goods would be shipped within a reasonable time, which had expired by 27th February; and
    (c) SHV was in breach of its undertaking that the ETAs given were reached honestly and on reasonable grounds.

Was 17th – 19th February an agreed shipment period?

19. Mr Michael Ashcroft, for Naftomar, submits that 17th -19th February should be treated as a shipment period because that interpretation fits with the commercial background of the contract, whose object was to satisfy Naftomar's urgent need for cargo for Tunisia. The absence of a shipment period and the use of *"laycan"* in a CIF contract are both unusual. That oddity is removed if *"laycan"* is treated as a shipment period. That conclusion is strengthened by the use of the words *"consequently ETA Gabes Feb 20 am La Goulette Feb 19 pm"*. Those ETAs could only be given on the basis that the vessel would complete loading and not merely be ready to load between 17th and 19th February.[1] That construction is supported by clause 8 of the contract between SHV and ERG where, it is submitted, the use of the word "*laycan*" means "lifting period". Mrs Pons insisted on using the word "*laycan*" in the sale contract so as to ensure that the position was back to back.

20. I do not accept this submission. 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 and for it to do so is consistent with the incorporation of the charterparty. Whilst I recognise that the terms of the charter are only to be incorporated insofar as not in conflict with the main terms of the contract, the incorporation of the charter (which in clause 5 explains the meaning of laycan) is a pointer to the fact that expressions in the contract and charter were intended to have the same meaning. Further the addition of the words *"consequently ETA Gabes Feb 20 am, La Goulette Feb 19 pm"* appear to me to point away from the word *"laycan"* signifying an agreed shipment period. Rather the function of the ETAs seems to me to have been to give Naftomar some assurance of when the cargo was likely to arrive in circumstances where a shipment period had not been agreed. If the shipment period was guaranteed an ETA at the discharge port was hardly necessary.

21. If the word *"laycan"* does not provide for a shipment period, one will be implied. Further, whilst it is true that, if the vessel did not load between 17th and 19th February, she could not be estimated to arrive on 19th and 20th, there would be nothing odd, in ordinary circumstances, in SHV estimating that the vessel would load soon after she arrived so as to be able to arrive at the stated times. That is what Mrs Pons did. I do not regard the fact that in the negotiations Mrs Pons insisted on the use of the word "*laycan*" so as to ensure that the contract between SHV and Naftomar was back to back with the contract between SHV and ERG as admissible evidence on the construction of the former contract, particularly in circumstances where Naftomar had not seen the contract between SHV and ERG - even though ERG had a contract with Naftomar in similar terms. Even if I am wrong on that, I am far from convinced that the word *"laycan"* when used in the ERG contract must mean an agreed lifting period. 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 "*3 days 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.

22. Further, if it is permissible to look at the course of negotiations, I must take account of the fact that Mrs Pons required the word *"laycan"* to be used. Mr Michi then told Mrs Lesenfans that he had to have some guarantee that the ship would reach Tunisia at the correct time. Mrs Pons would not agree to change the word "*laycan*" and Mrs Lesenfans told her that, in those circumstances Naftomar required some kind of commitment as to when the vessel would arrive at the discharge port. As a result, the ETAs were given by Mrs Pons and, a little later, she agreed to add the words "*consequently ETA Gabes Feb 20 am, La Goulette Feb 19 pm"*. That sequence of events is not consistent with the laycan being an agreed shipment period.

Implied term

23. If, as I hold, there was no expressly agreed shipment period, it was an implied term of the contract that SHV would ship the goods within a reasonable time – section 29 (3) of the *Sale of Goods Act 1979* - unless that term has been validly excluded or modified. What is a reasonable time depends on the circumstances as they existed at the time in question. Thus in ***Hick v Raymond*** [1893] A.C. 22, Lord Herschell, L.C. said:

    "The respondents on the other hand contend that the question is not what time would have been necessary or what time would have been reasonable under existing circumstances, assuming that, insofar as the existing circumstances were extraordinary, they were not due to any act or default on the part of the respondents.

    My Lords, there appears to be no direct authority upon the point, although there are judgments bearing on the subject to which I will presently call attention. I would observe, in the first place, that there is of course no such thing as a reasonable time in the abstract. It must always depend on the circumstances. Upon "the ordinary circumstances" say the learned counsel for the appellant. But what may without impropriety be termed the ordinary circumstances differ in particular ports at different times of the year. As regards the practicability of discharging a vessel they may differ in summer and winter. Again, weather increasing the difficulty of, though not preventing, the discharge of a vessel may

[1] Loading took about 18 hours and the journey to La Goulette would take about 19 hours. So loading would in fact have to be completed on the 18th or early on the 19th if the vessel was to reach La Goulette "Feb 19 pm".

continue for so long a period that it may justly be termed extraordinary. Could it be contended that in so far as it lasted beyond the ordinary period the delay caused by it was to be excluded in determining whether the cargo had been discharged within a reasonable time? It appears to me that the appellant's contention would involve constant difficulty and dispute, and that the only sound principle is that the "reasonable time" should depend on the circumstances which actually exist. If the cargo has been taken with all reasonable despatch under those circumstances I think the obligation of the consignee has been fulfilled. When I say the circumstances which actually exist, I, of course, imply that those circumstances, in so far as they involve delay, have not been caused or contributed to by the consignee. I think the balance of authority, both as regards the cases which relate to contracts by a consignees to take discharge, and those in which the question what is a reasonable time has had to be answered when analogous obligations were under consideration, is distinctly in favour of the view taken by the Court below."

24. By that criterion SHV were not in breach. They could not be blamed for the weather or for the berthing difficulties and there is no evidence that they were in any way dilatory in shipping the cargo, given the circumstances that they faced.

25. Mr Ashcroft submits that, whilst the ordinary position is that stated by Lord Herschel, it is otherwise where there is a force majeure clause such as the one contained in this contract. In such a case the reasonableness of the time is to be measured by what is reasonable in ordinary circumstances i.e. without force majeure. If the circumstances are extraordinary, the sellers will either obtain relief under the force majeure clause or be in breach. I do not accept this submission. I do not regard a force majeure clause, an exceptions clause which is to be construed strictly, as sufficient *impliedly* to alter one of the usual characteristics of the term ordinarily implied. Its function is to relieve a party from liability for breach, not to convert into a breach conduct which is otherwise not a breach at all.

Force majeure

26. If I am wrong on that and, subject to the force majeure clause, SHV were in breach in failing to ship within what, in ordinary circumstances, would be a reasonable time, (which, in my judgment would be no later than 24 or at most 48 hours after 19th February), three questions arise:
    (a) assuming that the force majeure clause has no application, were Naftomar entitled to terminate the contract?
    (b) if the answer to (a) is "yes", does the force majeure clause, if its notification provisions were satisfied, prevent Naftomar terminating the contract?
    (c) if the answer to (b) is "yes" has SHV complied with the notice provisions of the clause and, if not, what is the consequence?

27. As to (a) the obligation to ship within a reasonable time is to be regarded, like most shipment obligations, as a condition: ***Thomas Borthwick (Glasgow) Ltd v Bunge & Co Ltd*** [1969] 1 Lloyd's Rep 17, 28. If it is to be regarded as an intermediate term, then by 27th February the consequences of the breach were such as to entitle Naftomar to terminate. By then they had lost substantially the whole benefit that the contract was intended to give them namely the prompt supply of cargo for their Tunisian buyers.

28. As to (b) the clause does not, in my view, preclude Naftomar from terminating the contract. A force majeure clause is an exceptions clause and must be construed strictly. This clause, if operative, does not mean that the seller is not in breach in failing to ship within the agreed time. It affords relief from the consequences of breach by providing that the seller shall not be "*liable in damages or otherwise*" for delay in the performance of that obligation. Such a provision clearly excludes any liability in damages. But the entitlement of Naftomar to treat itself as discharged from any further obligation to perform does not impose any liability on SHV whether in damages or otherwise. It relieves Naftomar of a liability that it would otherwise have. Mr Buckingham submits that this analysis does not give effect to the words "*or otherwise*". But those words are apt to cover any attempt to compel the seller to perform (e.g. by way of specific performance or injunction) or to obtain recompense for breach e.g. by set off against the price.

29. Mr Ashcroft also submitted that the force majeure clause could not apply because the problems of bad weather and consequent berthing delay existed when the contract was made and their existence and likely continuance could have been discovered upon diligent inquiry. The parties cannot, he submitted, have intended the clause to apply in those circumstances. I do not regard the clause as inapplicable upon this ground. The fact that bad weather/berthing problems could have been foreseen and inquired about may give Naftomar other remedies. But it does not, in my view affect the operation of the clause. I note in this respect the observations of Staughton J., in ***The Radauti*** [1987] 2 Lloyd's Rep 276, 282:
    "Insofar as the expression "force majeure" has even a general meaning in English law, I would for my part doubt whether it necessarily conveys the second element imprevisibilite, or at any rate I doubt if the notion was held by the draftsman of this contract. Some wars may be foreseen, some strikes and some abnormal tempests or storms. I would suggest it is more a question of causation, whether the incidence of a particular peril which could have been foreseen can really be said to have caused one party's failure of performance".

30. Mr Ashcroft also submitted that the clause was inapplicable because SHV could not show that shipment from an alternative port of Melilli specification cargo was impossible. In ***Kinonklijke Bunge v Compagnie Continental*** [1973] 2 Lloyd's Rep 44, 51 Kerr J had to consider a clause which allowed a seller an extension of time for shipment in the event that shipment was prevented during the last 28 days of the guaranteed time of shipment by strikes at a considerable number of ports. Kerr J concluded that the sellers could rely on the clause:

"..if they show that one or more of the events mentioned in clause 20 prevented shipment during the contractual shipment period from the intended loading port"

He reached that view because (although he doubted whether this was sufficient of itself) he thought it unlikely that the intention of the parties was that the clause should only operate if the events covered by it occurred at every port throughout a considerable loading range; and because the second paragraph of the clause required the seller to give notice of an intention to claim an extension of time stating the port or ports from which shipment was *intended* to be made.

31. In the present case although the contract did not, on its face, provide for a port of shipment, it called for butane of Melilli specification to be shipped on the AZUR GAZ, a vessel accepted by Naftomar, and incorporated a charterparty which provided for only one loading port, namely Melilli. In those circumstances the parties must, I think, be taken to have intended that if the AZUR GAS could not load because of berthing difficulties at Mellili, the force majeure clause would apply. In any event it would not have been possible for SHV to obtain an alternative cargo of Mellili specification, purchase it on terms that matched the laycan spread, and arrange for the AZUR GAZ to load the cargo at an alternative load port within the laycan spread.

32. As to (c), this question does not arise. But, if it did, the answer to it is, in my view, as follows. AZUR GAZ arrived at Melilli at 2030 on 17th February. At 1151 French time on 18th February Owners' brokers e-mailed SHV saying:

"please note following from Agents

172030 Arrived N.o.r.t.

Due to bad weather not possible the (sic) dropped anchor to s.panagia raod.vessel till now stay 12 miles from s.panagia bay in drifting

PLS NOTE VESSEL AWAITING AT 12 MILES FROM S.PANAGIA BAY ROAD

[The e-mail then set out details of 13 other waiting vessels]

NO BERTHING PROSPECTS AVAILABLE

Shall keep you posted"

At 1202 SHV forwarded that e-mail to Madame Lesenfans for Naftomar. At 1325 she forwarded that e-mail to Naftomar.

33. On 19th February SHV e-mailed Madame Lesenfans what was described as "*the latest news received form G/T AZUR GAZ"*. That news was this:

"Just now, the port only open for anchorage

No berthing prospect will revert today p.m.

Pls note the vessel awaiting for load/disch. At Erg Med.

[There then followed a list of 13 vessels]

Will revert with time on anchorage"

34. On 21st February 2003 SHV sent an e-mail to Naftomar which included the following:

"…..Vessel arrived Melilli within the agreed contractual laycan but could not be berthed upon arrival due to the port closure (bad weather). This delay due to a force majeure situation for which we cannot be held liable".

35. Mr Ashcroft submits that SHV did not *immediately* notify Naftomar of the force majeure and never provided an estimate of the likely duration of the event and that on that account there has been a breach of a condition precedent to the operation of the clause. I do not agree. What the clause calls for is notification of the cause of the delay in the performance of the relevant obligation. Notice of the cause was given by about noon the next morning of a delay that had begun at about 2030 the night before. That seems to me sufficiently immediate for the purposes of the clause. It was not possible to inform Naftomar of the expected duration of the force majeure event since that was dependent on when the bad weather would abate, how soon the congestion would clear,and when the AZUR GAZ would berth.

36. If I am wrong on that it is necessary to consider whether compliance with the notice provision was a condition precedent. In *Mamidoil-Jetoil v Okta* [2003] I Lloyd's Rep 1 at 24-5 Aikens J was inclined to hold that a prompt notice provision in the force majeure clause before him was a condition precedent to its application. The clause provided:

"Neither party shall be responsible for damage caused by delay or failure to perform in whole or in part the stipulations of the present Agreement, when such delay of (sic) failure is attributable to earthquakes, acts of God, strikes, riots, rebellion, hostilities, fire, flood, acts or compliance with request of any governmental or EC authority war conditions or other causes beyond the control of the party affected, whether or not similar to those enumerated.

The party invoking force majeur (sic), shall give prompt notice to the other party by fax, telex followed by registered letter stating the kind of Force Majeure.

The certificate issued by the respective Chamber of Commerce and Industry shall be considered as sufficient proof of such circumstances and the duration"

37. Aikens, J said:

"134. I would have been inclined to hold that notice provision in the 1993 contract is a condition precedent. The form of the notice provision is imperative: a party "invoking force majeure shall give prompt notice to the other party". The implication behind that imperative is that, if the party does not, then it cannot rely on force

majeure. The reason for requiring notice to be given must be that the "other party" can then investigate the alleged force majeure at the time. It can challenge whether it does prevent performance or delay in performance by the party invoking force majeure. Alternatively it can see if there are other means of enabling performance to be continued. Lastly, if the notice provision is only an innominate term, then I find it difficult to see when the innocent party could allege it had suffered additional damage as a result of not being told promptly of the force majeure event other than the very damages that it would wish to receive for the first party's failure to perform the contract at all. These factors would all lead me to conclude that the parties intended the notice provision to be a condition precedent.

135. There could have been a further issue of what precisely is meant by "prompt". Its interpretation would depend on the circumstances of the case. But here Okta did not suggest that the letter of June 5, 2001 constituted "prompt" notice of the force majeure letters of Nov. 16 and 26, 1999. Nor did Jetoil argue that the letter of June 5, 2001 did not constitute "prompt" notice of the May 30, 2001 letter."

38. In ***Bremer Handelsgesellschaft m.b.H. v Vanden Avenne–Izegem PVBA*** (1978) 2 Lloyd's Rep 109 Lord Wilberforce said that there were three factors that determined whether a notice provision was a condition precedent: (i) the form of the clause itself; (ii) the relation of the clause to the contract as a whole; and (iii) general considerations of law. In relation to the clause before him, which provided for cancellation of a contract for the sale of soya beans on the happening of various events, he said this:

"As to (i) the clause is not framed as a condition precedent. The "cancellation" effected by the first sentence is not expressed to be conditional upon the second sentence being complied with: it operates automatically upon the relevant event. Learned Counsel for the buyers invited your Lordships to read cl.21 as if the first sentence were linked with the second by such words as "provided that" – an argument which must surely support the view that without such words, the second sentence does not attain condition status. Moreover, the generality of the words "without delay" tells against the buyer's contention. If a condition were intended a definite time limit would be more likely to be set. Then, as to (ii), provisions elsewhere in the contract .... suggest that the second sentence is not intended as a condition. (iii) Automatic and invariable treatment of a clause such as this runs counter to the approach, which modern authorities recognise, of treating such a provision as having the force of a condition (giving rise to rescission or invalidity), or of a contractual term (giving rise to damages only) according to the nature and gravity of the breach. The clause is then categorised as an innominate term…In my opinion the clause may vary appropriately and should be regarded as such an intermediate term: to do so would recognise that while in many, possibly most, instances, breach of it can adequately be sanctioned by damages, cases may exist in which, in fairness to the buyer, it would be proper to treat the cancellation as not having effect. On the other hand, always so to treat it may often be unfair to the seller, and unnecessarily rigid."

39. I incline to the view that compliance with the notice provisions is not, under this form of clause, a condition precedent. First, the clause does not, but easily could have, said that notice was a condition precedent or that reliance on force majeure was only available provided such notice was given. Second, the clause does not contain any clear implication that that must have been intended. Third, the demurrage time bar clause provides a specific cut off point beyond which a demurrage claim is not possible. The force majeure clause does not contain such a provision. Fourth, I find it difficult to accept that, in a contract such as this, the parties contemplated that the failure by one party to inform the other immediately of the cause of its failure to perform, or a failure to give all possible details as to the expected duration of the cause, should disentitle the affected party from any reliance on the force majeure event. I see the force of the observations made by Aikens J, particularly in relation to the long term contract that he had to consider, whilst recognising that the considerations that caused him to reach the view that he did (the imperative nature of the clause, the need for the "other party" to be able to challenge the existence of force majeure or mitigate its effect, and the difficulty of proving loss as a result of non-notification) could be said to apply in very many cases and leave little scope for the considerations set out in *Bremer Vulcan.*

The ETA

40. At 1220 French time on 17th February the vessel's Paris agents (Asmarine Associes S.A.) had sent an e-mail to SHV in the following terms:

"further latest telcons hereby confirm Owners can grant option to discharge Melilli cargo OSB/P Tunisia (Gabes or La Goulette), freight rate to be as per Lavera discharge basis.

Vessel present ETA Melilli: 17.2.03 – 1900 hours

Vessel has been granted free pratique in Melilli as from this morning 10.30 hours

Thanks to advise final decision regarding disport soonest".

41. As is apparent nothing in that e-mail suggested bad weather or berthing difficulties at Melilli and Mrs Pons was not aware of either. She expected that the agents would tell her of any difficulties. Mrs Pons calculated her ETAs in the following manner. She made a conservative estimate of the time for loading of 24 hours. She then calculated the time the vessel would take to sail to Gabes/La Goulette by taking the 325/375 nautical miles recorded in the Veson Distance Table Calculations divided by the vessel's service speed of 14.5. knots making about 19 hours sailing time to La Goulette and about 22.5 to Gabes. Her evidence was that she always gave ETAs at disports by reference to data such as the vessel's speed, the distance to be covered and reasonably anticipated loading times; and would only include circumstances such as port closure due to bad weather in the calculation if she was specifically aware of such events.

The nature of an ETA

42. SHV's contractual obligation, which was a condition, was that the ETAs should have been given honestly and on reasonable grounds: ***Sanday v Keighley Maxted*** [1922] 10 Ll. L. Rep 738, ***The Mihalis Angelos*** [1971] 1 QB 164. Mr Buckingham submits that the ETAs were given on reasonable grounds because, so far as Mrs Pons was aware, there was nothing to indicate to her that her calculations might be misplaced, or to put her on inquiry about the weather at Melilli or any berthing problems there. She was not bound, as a matter of course, to make positive inquiries as to the situation at the port. Mr Ashcroft submits that the ETAs were not given on reasonable grounds because no attempt was made, as it should have been, to obtain information from anyone about the situation at Melilli. There are therefore two related questions:

    (a) was Mrs Pons justified in giving the ETAs that she did in the absence of anything to put her on inquiry, or

    (b) were the ETAs defective because Mrs Pons ought to have known of the weather/berthing problems at Melilli?

43. In ***Sanday v Keighley Maxted*** the arbitrators had found that the term "*Expected ready to load late September"* had not been broken in respect of a contract made on September 2nd and 9th but had been broken in the case of a contract made on September 20th. On August 10th the vessel had sailed from the United States for Rio where she was to discharge coal and then load oats and maize in the Plate. The Master of the Rolls said:

    "But the expectation must not only be honest. It must be founded on reasonable grounds; and it seems to me the arbitrators were justified in that finding. At any rate it is a finding with which we cannot interfere.

    *In the same way in the other case they have found that on Sept. 2 and 9 the sellers had reasonable ground for making that statement. I am not at all sure I should have found in the same way: but I have not got all the facts before me. I do not know what port in the States she left. I do not know a great number of factors that I have no doubt were known to the arbitrators in coming to their conclusion. I should have thought that by Sept. 2 or 9, if they had no information of her arriving, as they could not have, there was quite enough **to put them on enquiry**; and I should have had the greatest hesitation in coming to the conclusion at which the arbitrators came. But they have come to that conclusion and, it being a question of degree and fact, it was competent for them to do so and we cannot interfere with that finding" (emphasis added).*

    Mr Buckingham relies on that case as indicating that an estimate will only be defective if there is something to put the estimator on inquiry. Whilst the case clearly shows that an estimate may be defective for that reason it cannot be taken as authority that that is the only circumstance in which that will be so.

44. In ***Pagnan v Schouten*** [1973] 1 Lloyd's Rep 349, 358 Kerr J (as he then was) said:

    *"I take it to be the law that in determining whether or not a statement of expectation, such as this, was made on reasonable grounds one must not only consider the information which was in fact known to the maker of the statement but also any facts **which he ought to have known or as to which he was put on enquiry**. Thus, in* Louis ***Dreyfus & Co. v Lauro*** *(1938) 60 Ll.L.Rep 94, at p.96, Mr Justice Branson, in reviewing the earlier authorities clearly considered that one was not only concerned with the information which the maker of the statement had but also with "all the information as to which he had been put upon enquiry". Similarly, in **Efploia Shipping Corporation Ltd. V Canadian Transport Co Ltd. (The Pantanassa),** [1985] 2 Lloyd's Rep 449, at p 457, Mr Justice Diplock (as he then was) said, in a similar context:*

    *"…when I look to see whether they have reasonable grounds for their estimate, I see no reason why I should not take as the knowledge of the shipowners – and it is they who are proffering the estimate – such knowledge as their responsible officials have **or ought to have**." " (emphasis added)*

45. Mr Buckingham submits that Kerr J's reference to "*facts which he ought to have known or as to which he was put on enquiry*" does not contemplate a general duty of investigation. Kerr J was, he submitted, setting out the existing law which limited the relevant knowledge to that actually possessed by the giver of the ETA and matters as to which he or she was put on inquiry. The reference to *"facts which he ought to have known"* must either be treated as synonymous with the matters as to which the giver of the estimate is put on inquiry or as referring to the type of knowledge identified in "***The Pantanassa***" where the estimate of bunkers "*expected about 6/700 tons*", which had been made by the shipowners' London agent, was wrong because the master or engineer had failed to take proper measurements and had given the agent an inaccurate figure for the bunkers on board.

46. I do not accept Mr Buckingham's submission. Prior to ***Pagnan v Schouten*** it was well established that the undertaking is that the estimate is made on reasonable grounds. An estimate will not have been so made if an inquiry which ought to have been made has not been made and the answer would have invalidated the estimate. I do not believe that Kerr J's reference to *"facts which he ought to have known"* or that of Diplock J to *"such knowledge as their responsible officials have or ought to have"* was confined to circumstances where the estimator was put on inquiry or where, as in *"**The Pantanassa**"*, the inquiry made was confounded by negligence in measurement. That that is so is apparent from the passage in Kerr J's judgment immediately following the passage cited by Mr Buckingham which I have set out in paragraph 44 above:

    "It therefore seems to me that one question which requires to be answered is whether or not the maker of the statement should reasonably have made further inquiries before making the statement. If it would have been reasonable to have made such inquiries and unreasonable to have omitted to do so, and if such enquiries, if made, would have lead any reasonable person to hold a different expectation, then it seems to me that the statement cannot be said to have been made on reasonable grounds".

    Kerr J., remitted the case to the arbitrators for further findings of fact.

47. In my judgment Mrs Pons' estimate of the time of the vessel's arrival at the discharge port was not based on reasonable grounds in the absence of any information whatever as to the berthing prospects at the loading port, which was a port of which she had no experience. Bad weather, port closure and berthing difficulties can and do occur at Melilli and other ports in winter. It was not, in my judgment, reasonably to be assumed that in February there would be no problem. I agree, in this respect, with the comment at paragraph 4.8. of Cooke on Voyage Charters (2nd Ed) in respect of estimates of expected arrival given by shipowners:

    "There will often be circumstances where the owner will be obliged to make enquiries of third parties, such as port agents, in order to ascertain the time likely to be required for obtaining a berth and for cargo handling operations at previous ports".

    Mr Buckingham submitted that this passage was simply wrong. I disagree.

48. Mrs Pons' experience as a trader was in relation to North West Europe. She was familiar with Lavera, which she described as a very safe port with very little delays. She had no experience of Melilli. She accepted in evidence that if she had been asked to give an ETB (estimated time of berthing) she would have had to ask about berthing prospects. She did not do so because, in her view, it was not usual to do so; she had no reason to suppose that there might be a problem with bad weather affecting berthing; and she would have expected to be told (either by the brokers, the owners' agents or ERG) if there was such a problem. She told me that with the benefit of hindsight she wished that she had checked, and that her present practice is to make inquiries about berthing prospects before giving an ETA at disport. I do not regard her present practice as something borne of an unfortunate experience that goes beyond what was reasonably required at the time. It represents what should have been done then. I do not think it reasonable to have failed to make such checks.

49. I have reached this conclusion without reference to the evidence of Mr Michi although my conclusion is consistent with his evidence. Mr Michi was primarily concerned with contracts and operations. But he did do trades; and he would often either give ETAs for the discharge port, or do checks for Mr Nachati, who was Naftomar's principal trader, before he made a contract with an ETA disport. His evidence was that he would always investigate with the suppliers or the vessel's agent about the situation at the loadport before giving an ETA for the discharge port. Mr Buckingham submitted that there was a flaw in that evidence. In a telex dated 17th February SHV nominated AZUR GAZ to STIR in terms which included the following:

    "ARRIVAL: 18TH – 20TH FEBRUARY 2003 (BASIS LOADING PRIOLO 17-19/2)."

    Mr Buckingham pointed out that, although the telex contains an estimated time of loading at Priolo (i.e. Melilli) Mr Michi had not investigated the loading position himself, even though he was, as he told me, aware of bad weather in the Western Mediterranean and that it had affected supplies to Tunisia, but not that Melilli was affected. Mr Michi explained that the reason why he had not investigated was (i) that he was a CIF buyer and (ii) that he was relying on SHV to check. This was, Mr Buckingham submitted, illogical. As to (i) he was a CIF buyer vis a vis SHV but a CIF seller vis-à-vis STIR. As to (ii) he had no reason to suppose that SHV would investigate the position and simply made an assumption to that effect.

50. Whilst Naftomar was both a CIF buyer and a CIF seller, it was not, as was SHV, the charterer of the vessel and not, therefore, in contact with the vessel or her agents in ordinary course. More importantly I do not accept that Mr Michi had no reason to suppose that SHV would have investigated the position. On the contrary Naftomar was the recipient of a contractual undertaking to the effect that the ETAs at the discharging port were based on reasonable grounds. Mr Michi was entitled to expect that the estimate had been given after due inquiry.

51. An inquiry of someone with knowledge of what was happening at Melilli would have revealed that the port was, on account of bad weather, substantially inoperative on 15th, 16th and 17th February and that there was no prospect of AZUR GAZ berthing immediately upon arrival on 17th. That inquiry could have been made of the Owners' agent at Melilli – Vinci Maritima - if necessary through the owners' brokers in Paris, or of ERG, SHV's suppliers, or of SHV's preferred agent at Melilli – Ferrari - even though they were not nominated for the purpose of this charter. Mrs Pons gave evidence that obtaining information from ERG, and certainly obtaining it promptly, was problematic. Mr Michi told me that he talked with ERG every day, since Naftomar had a term contract with ERG, and found the operations people a reliable and, if necessary, prompt source of information about matters such as bad weather and congestion.

52. It is impossible to tell whether there would have been any difficulty in obtaining information in circumstances where the inquiry was never made. I regard it, however, as unlikely that SHV could obtain no information from any of these sources or from a Lloyd's agent at Melilli. If, contrary to what I regard as likely, Mrs Pons could not obtain any information she would not have been justified in giving an unqualified ETA. If she gave an estimate at all, she would have to explain that the estimate was subject to any berthing delays at Melilli as to which she had no information.

53. If, as I hold, the ETAs were not based on reasonable grounds, SHV were in breach of condition and Naftomar was entitled to terminate as they did: ***The Mihalis Angelos*** (1971) 1 QB 164, 194, 199-200 and 204-7. Even if the term is to be regarded as an innominate term, the consequences of the invalidity of the estimate were such as to entitle termination by 27th February. Further, the ETAs constituted a misrepresentation which was relied on by Mr Michi of Naftomar, who had required them to be given when the "laycan" term was proposed. It was a matter of particular concern to Mr Michi to establish when the cargo could be expected to arrive at the discharge port. He did not know of the bad weather at Melilli. Had he known that bad weather was giving rise to berthing problems he would not have purchased the cargo.

54. It is immaterial that, in treating the contract as at an end, Naftomar relied on a failure to ship during *"the agreed period"*. Naftomar had good reason to terminate the contract and did so: *The Mihalis Angelos,* 193 A-B.

Damages

55. In the light of my conclusion that Naftomar were entitled to terminate the question of damages does not arise. But since the question has been fully argued I set out my conclusions below.

56. Where there is an available market, the seller's damages for non acceptance are prima facie the difference between the contract price and the market price at the time when the goods ought to have been accepted or, if no time was fixed for acceptance, at the time of the refusal to accept: section 50 (3) of the Sale of Goods Act 1979. Here there was no time fixed for the acceptance of the documents representing the goods. Had Naftomar not repudiated the contract, but simply refused to accept the documents, the damages would be calculated at the date of that refusal. SHV would have been obliged to present the documents promptly and, had they done so, Naftomar would have rejected them immediately – probably on or about 5th – 7th March. Ordinarily the market price on the relevant date is to be taken as the price which would have been obtained on the assumption that the price had been negotiated over a short period before that date if it is appropriate to make that assumption in order to make the price on the notional sale a fair one: ***Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd*** (1990) 3 All ER 723.

57. In the present case there are two additional considerations. First, if SHV are entitled to damages, it is on the basis that, contrary to my findings, it was Naftomar which wrongly repudiated the contract. If so that repudiation was accepted by SHV on 27th February, and they thereupon came under a duty to mitigate their loss. In practice there was, in my judgment, little they could do until the cargo began to be loaded on board, on 3rd March 2003, except to keep their ears to the ground and canvass interest in the market. It would certainly have been difficult to interest traders in the cargo without at least a firm berthing prospect, which was only obtained (for the 3rd) on 1st or 2nd March, or, more likely, loading having begun. During that period SHV took no active steps to sell the cargo, partly because it had not been put on board, partly because they thought that Naftomar might change their mind, and partly because of a reluctance to go to the market with what the market would think of as Naftomar's product. But I accept Mr Nillus' evidence that, as an active participant in the market, he would have become aware if someone was interested during that period and that if an opportunity to sell had come up he would have contacted Naftomar about it.

58. Second, although there was an available market in the sense that in March there were traders interested in and willing to buy chemical grade butane, it was not a market in which a trader could sell the AZUR GAZ quantity of butane on any given day at a fair market price. Over a matter of weeks it would be possible to do so. In ***Petrotrade v Stinnes*** [1995] I Lloyd's Rep 142 Colman J held that the fact that there was a limited demand for the relevant product, such that it would take two weeks to sell all of it, perhaps at differing prices, did not mean that there was no available market. I respectfully agree. Colman J assessed the damages by reference to the average of the prices that would have been obtained during the minimum period that it would have taken a reasonable oil dealer acting with reasonable expedition to sell the entire parcel at the relevant market or current price.

59. The present case is not one where, because of its quantity, any sale would have to take place over a period of weeks (or days). The AZUR GAZ quantity of cargo would, in all probability, be sold on a particular day. But it is not possible to predict when exactly that day would be. In those circumstances, as it seems to me, the task of the Court must be to make the best estimate it can of when, acting reasonably, the sellers would have been able to sell the cargo and at what price. This may involve some roughness of estimation.

60. It is not easy to determine when and at what price SHV, acting reasonably, could have sold the AZUR GAS cargo. This is for a number of reasons. First, the number of Mediterranean spot trades that were taking place over the first three weeks of March would have been small. Mr Culnane, who gave evidence for the buyers, estimated that it would have been of the order of a couple of trades a week. Mrs Jago guessed (and it was avowedly a guess) that it would be 3-4 a day.

61. Second, data on prices appears daily in reports published by Platts and Argus The former reports FOB prices for refinery grade butane. The latter reports CIF prices of chemical grade butane, usually for large size cargoes. But these reports are not entirely reliable. They depend on information that participants in the market are prepared to reveal about their trades, which may be less than the full story. A number of deals will be done on a "P & C" (private and confidential) basis and details of them may never be revealed, or may be revealed, not necessarily with complete accuracy, at second or third hand. The potential inaccuracy of the data is greater if the market is falling and the number of trades is limited. The information in the reports may well lag behind what is happening on the ground.

62. At the time the market price of butane was falling. The Platts Butane FOB Med and Argus Butane CIF Med Daily quotes for the period from 27th February to 24th March 2003 were as follows

DATE	PLATTS BUTANE FOB MED	ARGUS BUTANE CIF MED
27 Feb	362.5.	360
28 Feb	362.5	360

3 March	362.5.	355
4 March	357.5.	350
5 March	352.5.	347.5
6 March	352.5.	347.5
7 March	337.5	347.5
10 March	337.5	347.5
11 March	337.5.	347.5
12 March	332.5.	342.5
13 March	329.5.	342.5
14 March	319.5	325
17 March	302.5	325
18 March	285	315
19 March	275	315
20 March	250	305
21 March	250	295
24 March	250	295

63. Third, the AZUR GAZ cargo was more difficult to sell than some other cargoes. *Tunisia* was covered very largely by Naftomar itself. The vessel could not have berthed at *Morocco's* main port Mohammedia, where Naftomar was the main importer, because of a 120 metre length restriction (AZUR GAZ was 121.7 metres). Morocco, which does not require field grade butane, has two other possible ports – Nador and Jorf Lasfar; but possible buying interest in Morocco was likely to be very limited particularly since the usual monthly demand into Morocco had been satisfied by a large sale made by Sonatrach. But SHV could hope to supply those who were themselves supplying Morocco. In *Spain,* the main importer was Repsol, who had had problems with a previous Melilli cargo. Further, the Melilli specification does not match Spanish requirements for a maximum of 5% propane and 2% ethane, although generally Melilli product will meet those requirements. In addition Spain prefers larger cargoes and Repsol would not accept a vessel, such as AZUR GAZ, that was more than 20 years old. In respect of Spain, and *Egypt* SHV would have to compete with suppliers with large semi-refrigerated ships. A sale into *Turkey* would not have been possible because the only, or, at any rate the principal, importer that can accept unmixed butane was an Israeli company and the Tunisian owner of the AZUR GAS would not have agreed to go there. SHV's contract with its supplier prevented it from selling into *Italy*. A sale into *West Africa* was impractical given (a) the limited demand there; (b) the large extra freight costs that would have been incurred; and (c) the fact that the owners of the vessel would probably have refused to sail her there. I do not, however, accept that the cargo was "distressed" in the sense that it had to be sold quickly because it had nowhere to go and would thus command a lower price. That would have been so if the cargo was on ship and there was no store to which it could go. But once the butane had been discharged into the cavern it had found a "home", which was available when the cargo was loaded. The butane ex AZUR GAZ was chemical or field grade butane, which can command a premium from some buyers. But it does not always do so, particularly in a falling market when there are high stock levels, as was the case at the relevant time.

64. Fourth, if and to the extent that SHV sought to sell the cargo before it was put into storage, no written record of the attempt remains. Much of the communication in the market is either by telephone or by the "Yahoo" messenger system, the record of which does not survive.

4th March

65. On 4th March Naftomar offered (by telephone to FL Gaz) to take the cargo at $ 350/mt provided that SHV waived any claim. SHV reasonably declined that offer both because of the requirement of waiver and because the Platt's price had not then fallen by $ 40, the reduction sought by Naftomar. On the same day Mr Nillus of SHV offered Lyondell 4,000 mt butane ITT Lavera at $ 355/mt because, in the light of Naftomar's offer, he thought that that sort of price might be achievable. According to the recollection of Mr Taco Bavelaar, contained in an e-mail of 3rd March 2005, the likelihood is that the reason why the offer was not accepted was either because Lyondell already had sufficient butane in their inventory or because he believed that it was better to wait until prices were lower. Prices in the butane market usually (but not inevitably) go sharply down in about March/April before rising again in the autumn. I accept Mr Nillus' evidence that in those circumstances there was

no point in going back to Lyondell, with whom he dealt a lot, with a lower price. If Lyondell were interested they would revert on price. On the same day Platts reported a sale of 3,600 mt traded on a P & C basis CIF Tarragona, price unknown.

66. On 6th March SHV e-mailed to Naftomar as follows:

"Bearing mind that SHV Gas Supply & Trading loss due to cancellation of the CIF sale will represent around US $ 108,000 (2,700 MT x $40), please let us know whether or not Naftomar is ready to support the same. If the reply is yes, an immediate meeting needs to take place during which a) we will submit full proof of our loss..."

The basis upon which a loss of $ 40/mt, which implies a sale price of $ 350/mt, was chosen and the nature of the *"full proof"* proposed are both unclear. I think that the likelihood is that SHV were taking what, in the light of their offer to Lyondell and that of Naftomar to them, they thought represented a market price that they could appropriately claim.

7th March

67. On 7th March 2003 the AZUR GAZ cargo was sold to AGZ Holdings for € 300 per mt. and discharged into a chemical butane cavern at Lavera. The US$ equivalent is $ 331.60. The sale took place because property in the butane had to be transferred to AGZ Holdings in order for it to enter the cavern. It would be repurchased by SHV when they wished to take it out of the cavern. I consider the significance of this sale below. For the moment I assume that it is to be disregarded. The Trade Ticket Report for this transaction has a "mark to market" reference of March 2003, which assumed a sale of the cargo by SHV in March (although these markings change from time to time). A Daily Trade Audit Report of 10th March is to the same effect. In the event the market fell severely during the second and third weeks of March. Mr Nillus expected that after such a fall it would bounce back. But it did not. The market did pick up towards the end of the year although not as much as usual.

68. A Daily Trade Audit Report disclosed only after the evidence was complete revealed that on 7th March SHV bought 10,000 mt of butane from ETMSA at $ 345/mt. and sold the same quantity on the same day to STASCO. The documentation relating to these transactions has not been produced. There is a reference to the sale in Platts for 7th March.

69. On 11th April 2003 SHV's solicitors wrote to Naftomar contending that "*despite various attempts to do so*" it had not been possible to sell the cargo and that due to the fall in the market the claim was now for over $ 432,000 plus storage costs. What those attempts were has, with the exception of the offer to Lyondell, not appeared.

70. In the light of the above, the experts retained by the parties are unable to say that there was a specific buyer for the butane at a specific price on a specific day. They are agreed that by March 24th at the latest the cargo should have been sold.

71. Mrs Jago who gave evidence for SHV thought that the likelihood was that the cargo would have been sold towards the end of the period ending 24th March, because there would by then have been more time for marketing it, and that the most probable price for a sale at that time was $ 250/mt.

72. Naftomar contend that a sale could probably have been concluded relatively promptly at a fair price in early March. They contend that SHV should have sought to market the cargo as from 27th February; that because it was chemical and not refinery grade butane it would be particularly attractive to some buyers, and that there would probably have been buyers for it in view of supply difficulties caused by bad weather in the Mediterranean. According to the market press the price was still reasonably firm and there was demand in the market. The offers and sale referred to in paragraph 65 above indicate that $ 350 mt. was perceived to be the correct price. Although several countries are supplied with butane by traders who make bids against tenders on a monthly basis and, if successful, supply butane in much larger quantities than 2,700 mt., those traders may themselves need spot cargoes in order to effect the contracted supply. Taking all those considerations into account they submit that the cargo could probably have been sold by 10th March 2003 at or around $ 340/mt. An alternative approach would be to take the average of the prices between 3rd March and 24th March of $ 315.09.

Conclusion

73. I think that the likelihood is that this would not have been an easy cargo to sell. The factors to which I refer in paragraph 63 above limited the range of persons who would have been interested. Whilst the offers to which I have referred in paragraph 65 suggest a price around the $ 350 level in early March, they did not mature into contracts. With the exception of the sale of 10,000 mt on 7th March there is no evidence of actual buyers at that level and I am not convinced that that sale of what appears to have been purchased at the same price is a reliable guide to what could have been achieved for the AZUR GAZ cargo. Potential buyers would be likely to be biding their time to see if the market dropped. I was impressed by the evidence of Mrs Jago, who was well qualified to give it, to the effect that the likelihood is that this cargo would be sold towards the end of the period ending 24th March at about $ 250/mt. At any rate I am not persuaded that SHV, acting reasonably, would have sold at a greater price. $ 250/mt. is the Platts price for 24th March but I accept Mrs Jago's view that it is an appropriate price for the end of the period ending on that day rather than as the price for that day. In view of the lag between sales being made and intelligence of them reaching the press, the actual figure at which a sale might have taken place on 24th March could well have been lower than $ 250/mt. I take account of the fact that Mr Culnane, who was called by Naftomar, could not say that SHV ought to have sold before 24th March.

SHV's failure to give proper disclosure

74. Two specific disclosure orders were made in this case. The first, in November 2004 required disclosure of, amongst other things:

"3 All documents evidencing attempts to sell the February consignment ..during the period January 2003 to July 2003

…

5. All documents relating to the storage requirements of SHV/Primagas for the butane at Lavera to service the French gas market for the period February 2003 to end of June 2003.

6. All documents evidencing trades carried out by SHV in the Mediterranean of butane from February 2003 to July 2003…"

75. As a result of the second of those orders, made in March 2005 a document was disclosed [2] which appeared on its face to indicate a sale of the AZUR GAZ cargo for € 811,872.30 against an invoice numbered S 10303107 together with a redacted copy of an agreement between SHV and AGZ Holding ("AGZ"). That invoice was produced to the Defendant on 20th October 2005 under cover of a letter from SHV's solicitors, which set out SHV's comment on the invoice:

"Contrary to the contractual transfer price of € 200/mt (as per the capacity agreement) we agreed with AGZ to apply a transfer price of € 300/mt for reasons which we are now, more than 2.5 years later, not sure what they were. At the end of the day it does not really matter, because this is simply a transfer price. We again bought the same quantity back from AGZ at € 300/mt in November and December of 2003. It therefore seems to have been for accounting purposes".

In the light of the evidence that was given by Mr Nillus, a trader employed by SHV, only days later I regard this account as significantly less than complete.

76. The invoice appears to show a sale of the cargo to AGZ Holding on or about 7th March 2003 at a price of € 300/mt. The production of this invoice led to a call for more documents and the production of an unredacted copy of the agreement between SHV and AGZ Holding ("AGZ") which had previously been disclosed in redacted form.

77. In the light of the documents revealed just before or during the trial, and some evidence given on them, the true picture began to emerge. The butane was discharged into a storage cavern at Laverna on 7th March 2003. That cavern is owned by Geogaz, whose shareholders include Total, Shell, Esso and AGZ. The terms upon which the cavern is operated are that no product can be stored in it unless it is owned by one of those shareholders.

78. For that reason SHV and AGZ entered into what is described as a "*Chemical Grade Butane Cavern Agreement*". The agreement is in three parts but it provides for the parts to be considered together as one transaction. Part A is a capacity agreement whereby AGZ agrees to offer its entire capacity in the cavern, as well as capacity pooled with Lyondell, and other capacity which it could get from its rights under its agreement with Geogaz, in return for a lump sum and a monthly fee. Part B is described as a "Sale & Purchase Agreement". Part C is a profit sharing agreement.

79. Part B provides as follows:

*"1. **Object of the Agreement***

Under this agreement, AGZ Holding agrees to buy the chemical grade butane SHV wishes to import in the chemical grade butane cavern in Laverna as per the rental agreement detailed in Part A and SHV agrees to buy back the chemical grade butane stored in the chemical grade butane cavern in Lavera

…

*4.1. **SHV to AGZ Holding deliveries***

SHV will deliver the product at its convenience either by in-tank transfer into the capacity or by CIF deliveries.

In case of CIF deliveries

SHV will deliver AGZ Holding under Terms and Conditions as set forth in Appendix 1, but always in line with Geogaz terminal regulations which shall at any time supersede this agreement

In case of in-tank deliveries: (when SHV wishes to buy from a third party into storage)

For each in-tank delivery both parties will agree on one or the other following procedures to apply:

Either

All rights and obligations of Third party vis-à-vis AGZ Holding are assigned to SHV.

AGZ Holding will issue an invoice to SHV to collect the funds due to Third party by SHV. Title and property of the product in-tank will remain with AGZ Holding

Nevertheless, SHV will issue an invoice for the corresponding quantity at the transfer price as defined below

Or:

SHV will directly deliver in-tank AGZ Holding into AGZ Holding capacity or pooled capacity under terms and conditions set in Appendix 2

*4.2. **AGZ Holding to SHV deliveries***

In the case of FOB deliveries

AGZ Holding will deliver SHV under Terms and conditions as set forth in Appendix 3, but always in line with Geogaz terminal regulations which shall at any time supersede this agreement.

[2] 4B/27/169

In the case of in-tank deliveries (when SHV wishes to sell to a third party into the storage)

For each in-tank delivery both parties will agree on one or other following procedures to apply:

Either:

All rights and obligations of AGZ Holding vis-à-vis Third party are assigned to SHV.

AGZ Holding will receive an invoice from SHV to collect the funds due by Third party to SHV. Title and property of the product in-tank will remain with AGZ Holding.

Nevertheless, AGZ Holding will issue an invoice for the corresponding quantity at the transfer price as defined below.

Or:

AGZ Holding will deliver SHV under Terms and conditions as set forth in Appendix 2, but always in line with Geogaz terminal regulation which shall at any time supersede this agreement.

*5 **Transfer price***

For quantities sold by SHV to AGZ Holding ("In") and quantities sold by AGZ Holding to SHV ("out") the following fixed transfer price will be applied:

200 €/mt (two hundred Euros per metric ton)

....

*7. **Payment of the product***

It is understood that the parties will work toward an offset of the invoices (quantities "out" versus quantities "in") so that transfer of funds are minimised."

80. Appendix 1 of the Agreement contained the standard CIF Sale contract terms for sales to AGZ. Appendix 2 contained the standard ITT sale/purchase contract terms for sales to or by SHV. Appendix 3 contained the standard FOB Sale contract terms for the sale back to SHV.

81. The effect of this agreement was twofold. First it provided for a genuine sale to AGZ. That was necessary in order to transfer property to AGZ so as to meet the conditions of use of the cavern. Second, it provided that every sale of any given quantity would be transferred back at the same fixed price of € 200/m.t. But it did not specify when this sale had to be and, as will become apparent, the price was subject to variation.

82. At the time when the butane ex AZUR GAZ was discharged into the cavern in March 2003 it contained only about 144 mt of butane attributable to AGZ (and thus SHV), being the umpumpable residue. Effectively SHV had no stock there. 2,706.241 mt were discharged into the cavern from the AZUR GAZ. Invoice S 10303107 was issued by SHV to AGZ for 2,706.241 mt at € 300/mt. The choice of € 300, which was agreed with AGZ, had a purpose, which was, as Mr Nillus explained to me, to ensure that SHV's books did not show a big and unexpected loss (i.e. the loss which would have been represented by the difference between the FOB purchase price of $ 354 (together with freight of about $ 30.50) and € 200. The Trade Ticket Report for the sale records under the heading "Trading Notes":

"This deal replace (sic) the one cancelled by Naftomar ... Please create a provision for the money we are claiming to Naftomar (see legal case dealt by JB Julia)/ Provision to be made = 100 K$,"

83. SHV operate, at least for some purposes, including stock control, a FIFO (first in, first out) policy in respect of their stock. SHV cannot, however, physically match any given quantity coming in with any given quantity going out. Once butane is delivered into the tank and mixed with other butane already there, and then with butane entered thereafter, it forms part of an undifferentiated mass. This mass belongs not only to AGZ but also to the other shareholders of Geogaz. By then it is impossible to distinguish any particular part of the butane as belonging to any particular participant.

84. The first SHV sales of butane from the cavern after March 2003 were, firstly a sale to ENI made on 27th May 2003 of 1,784.654 m.t. at $ 243/mt. This cargo was shipped on the "Henriette Kosan" on 31st May 2003. The second was a sale to BP France on 6th June of 3,000 m.t. at $253/mt. This cargo was the subject of an in-tank transfer on 16th June. At the time of these sales there was in the cavern 8,963.858 and 12,306.68 m.t. of butane belonging to AGZ together with the product of several other companies in a tank holding, in all, 52,762.247 mt and over 71,000 mt of product on those two days. On the basis of the FIFO policy the AZUR GAZ cargo would be taken to have been used up (together with other product) in satisfying these two sales. In order to give effect to these sales AGZ issued invoices to SHV claiming payment in respect of these two parcels (at € 200 per m.t.). SHV in their pleadings treat the whole of the sale to ENI and part of the sale to BP France as a sale of the AZUR GAZ cargo.

85. As at May and June 2003 there had not been a transfer back to SHV of the AZUR GAZ quantity at € 300/mt. That happened in November and December 2003. On or about 3rd and 27th November 2003 SHV sold 2,000 metric tons of butane from the cavern to TTZ at $ 305/mt and 3,000 m.t. to Lyondell at a price to be determined by a formula and which exceeded $ 300/mt. In order to enable it to do so AGZ invoiced SHV for (a) the whole quantity of the TTZ cargo i.e. 2,000 m.t. and (b) 706.241 m.t., part of the quantity of the Lyondell cargo, at € 300/mt. The balance of the Lyondell cargo was invoiced at € 200/mt. The Trade Ticket Report for the purchase by SHV from AGZ Holding of the 2,000 mt has the Trading Note:

"We vuy (sic) back at 300 (part of the product we sold at this price to AGZ in March (product from Azur gaz). Balance is on TT 13207 in start dec."

TT 13027 relates to the 706.241 mt.

86. As is apparent from the above SHV have at different times and for different purposes treated the AZUR GAZ cargo as resold in either May/June (see the pleadings) or November/December (see the Trading Note referred to above). Mr Nillus' statement of 24th October 2005 contains the following passages:

"13 *The "AZUR GAS" cargo was not transferred back from AGZ to SHV (at the exceptionally agreed transfer price of € 300/MT) until after the cargo was sold to ENI and BP (in May and June 2003 respectively). This is because the prices at which we were able to sell the "AZUR GAS" cargo back to ENI and BP …were not close enough to the € 300/MT at which we booked in our accounts the transfer back from AGZ of the "AZUR GAS" quantity*

14 *In other words, had the "AZUR GAS" quantity been transferred back to SHV from AGZ at € 300/MT in May and June 2003, our books would have shown a loss that would have been purely theoretical given that the "AZUR GAS" cargo was sold to ENI and BP. Again this would have distorted the results...*

16 *Ultimately, the "AZUR GAS" quantity was transferred back from AGZ to SHV in two parts in November and December, when we were able to sell butane at Lavera at prices in excess of US $ 300/MT..."*

87. Since SHV's damages are not to be calculated by reference to sales in either May or November, it is not directly material to determine whether for their internal purposes SHV treated the AZUR GAZ cargo as being sold in May or November or whether, for the purposes of any claim to damages, they were right to do so. On the basis of the now disclosed contemporary material and Mr Nillus' statement it seems to me clear that, for profit and loss purposes, SHV treated the AZUR GAZ cargo as purchased back by them in November and December and on sold to TTZ and Lyondell.

88. What it is material to decide is whether the sale to AGZ in March is to be treated as a sale of the AZUR GAZ cargo the price of which (equivalent to US $ 331.60) should represent the lowest price by reference to which SHV's damages are to be calculated. Mr Buckingham submits that it should not because, although the sale to AGZ was a real sale which was intended to take effect in accordance with its terms and to transfer property in the butane to AGZ, it was not a sale which can be regarded as crystallising SHV's claim to damages. This is because it was always going to be matched by a subsequent purchase of exactly the same quantity at the same price. The two transactions cancel each other out and are cost neutral. So in the long term the sale effects no mitigation of loss. The only sales which should count for the purposes of calculating damages are sales to the market and not sales that are made because of the particular terms of the storage agreement. AGZ, it is submitted, are not real traders; they simply take a share (25% under Part C) of SHV's profits.

89. I do not accept this. The March sale was a genuine sale to AGZ. The price was selected for a particular purpose namely to mitigate the loss that would otherwise appear in SHV's books by comparison with the cost of purchase of the cargo from ERG. If it was intended by SHV for that purpose I do not see why it should not also be treated as mitigating SHV's loss for the purpose of determining what SHV can recover as a result of Naftomar's termination. Further, whilst it is true that there would have to be a repurchase by SHV of the same quantity at € 300/mt, the timing of that repurchase was at SHV's option. SHV could choose to exercise it, as in the event it did, at a time when a purchase price of € 300/mt would enable it to make a profit on the resale. The situation is, as it seems to me, no different than it would have been had SHV sold the cargo at € 300/mt to a third party with an option to buy back a similar amount at the same price at a time of its choosing. I do not see why such a sale should not count for the purposes of determining what mitigation SHV had made of their loss.

90. Accordingly, had I awarded SHV damages I would have taken their loss as the difference between the contract price of $ 390/mt and $ 331.60/mt (i.e. €300/mt).

91. SHV's failure to disclose the relevant documents until a very late stage was reprehensible. As a result of it a considerable amount of time was taken up with the question of what further documents should be disclosed, and what they signified. I was told that "*the view was taken*" that the documents of which discovery was given later were irrelevant. I do not know who exactly took that view although it included Mr Nillus and, I expect, SHV's in house lawyer and, in respect of whatever documents they were shown, such as the redacted agreement, SHV's English solicitors. Whilst I follow the submission that the sales to AGZ are irrelevant as qualifying sales for the purpose of calculating damages, I fail to see how it could be thought that it was not necessary to disclose, amongst other documents, documents which showed:

(i) a sale of the very cargo in issue in March 2003 at € 300/mt;

(ii) the full terms of the sale and purchase agreement pursuant to which that sale was made and

(iii) the Trade Ticket Report which showed that SHV had themselves treated the March sale as mitigating their own loss.

On any view they were documents that might affect, as they do, the Claimant's case. There was no justification for redacting the sale and purchase agreement on the grounds of confidentiality. The effect of doing so was to hide from view references in the agreement that showed that a genuine sale of the cargo at € 300/mt had taken place.

Mr Stewart Buckingham (instructed by Clyde & Co) for the Claimant
Mr Michael Ashcroft (instructed by Thomas Cooper & Stibbard) for the Defendant