Force majeure

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

45″ Mr Wolfson accepts that, but for one provision of special condition 15, Total would not be arguing that they could invoke *force majeure*. The provision upon which he relies is the last sentence of standard condition 15.2 which reads: In assessing the circumstances of *force majeure* affecting the customer, the price of gas under this agreement shall be excluded. That provision, he submits, shows that it would not be open for TVPL as customer to contend that *force majeure* applied because of an increase in the price of the gas to be supplied to it under the GSA.

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

47″ But Total is exposed to the difference between the price that it has to pay in the market for the gas that it is to supply to TVPL and the contract price. The market price has no limit, nor therefore does Total's risk. There must, he submits, be a point at which the market price becomes so high that it is commercially impracticable for Total to continue. The last sentence of standard condition 15.2 supports the proposition that the parties contemplated that, when that point was reached, there would be a circumstance of *force majeure*. Inability should not be limited to physical inability, but extends to being, commercially speaking, unable.
The force majeure event or circumstance upon which Total relied was, he submitted, the fact that the prices which Total now had to pay had reached so high a point that Total could only perform the contract at a degree of loss that was quite beyond anything that anyone contemplated at the time of the agreement. Whether that was factually correct fell to be determined in the expert determination.

The factual matrix

The circumstances constituting the factual matrix have been agreed by the parties. They include the fact that both parties knew when entering into the agreement (i) that TVPL was a single purpose company which had entered into agreements with HAL with a 15-year term for the acquisition of a co-generation plant that was to generate and supply electricity and heat which HAL required for Heathrow, and (ii) that it was a condition of the HAL agreements that a Gas Supply Agreement be entered into. Total also knew that it was in competition with other tenderers to supply the required gas, (i.e. it was not forced to contract) the market price of which fluctuates. In addition, the parties knew that the indices in the pricing formula in clause 6 of the special conditions were designed to be consistent with those in the HAL agreements and that such indices had themselves risen and fallen prior to 12 June 1995. The parties also knew that the Total group had very large resources.

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

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

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

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

4. This conclusion is consistent with a line of cases, both on force majeure clauses and on frustration, several of which are cited in Mr Shepherd's skeleton argument, to the effect that the fact that a contract has become expensive to perform, even dramatically more expensive, is not a ground to relieve a party on the grounds of force majeure or frustration. I take as an example Tennants (Lancashire) Ltd v CS Wilson & Co Ltd [1917] AC 495, a force majeure case where Lord Loreburn observed at page 510: The argument that a man can be excused from performance of his contract when it becomes "commercially impossible" seems to me to be a dangerous contention which ought not to be admitted unless the parties plainly contracted to that effect. I accept, of course that each clause must be considered on its own wording and that force majeure clauses are not to be interpreted on the assumption that they are necessarily intended to express in words the common law doctrine of frustration. Nevertheless, this line of authority, the legal backdrop against which the GSA was written, strongly supports the proposition that this case is no exception. No case has been cited
to me in which a clause such as the present has been interpreted as relieving a party from its obligation to perform because the performance of the contract has become economically more burdensome. If a company as familiar with the effect of fluctuations as Total wished to secure that result, it would need to do so in much more explicit terms.

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

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

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

8. Mr Shead also gives an estimate on a "best guess basis" of Total's financial position in the future. His evidence is to the effect that Total will lose about £9½ million up to the date of termination of the contract. The calculation assumes that the cap will be breached, ie the market price of gas will exceed the maximum that TVPL can be required to pay. in the second quarter of 2006 and never return under the cap until the end of the contract. Even on the assumption - which I do not accept - that a sufficiently dramatic increase in the price of gas could amount to a frustrating event even though Total could still supply gas, an increase in market price which took the market price to a height no greater than the cap could scarcely have that consequence. In short. Total's claim to force majeure is in my judgment ill-founded. The notice does not state, nor is it the case, that Total has become unable to supply TVPL with gas. Even if the notice had stated that Total would not be able physically to supply gas in the future it would be premature; as it is, it claims only that at some unspecified date and absent a downward move in the market, it will become uneconomic to do so.

[...]

Referring Principles:

VI.3 - Force majeure