Neutral Citation Number: [2021] EWCA Civ 718

Case No: A4/2020/1531

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
Mr Justice Teare
[2020] EWHC 1795 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/05/2021

Before:

LORD JUSTICE MOYLAN
LORD JUSTICE MALES
and
LORD JUSTICE PHILLIPS

- -

Between:

SEPTO TRADING INC.	**Respondent /Claimant**
- and -	
TINTRADE LIMITED	**Appellant/ Defendant**

- -
- -

Michael Ashcroft QC & Oliver Caplin (instructed by **Holman Fenwick Willan LLP**) for the **Appellant**
Robert Bright QC & Sarah Martin (instructed by **Allen & Overy LLP**) for the **Respondent**

Hearing date: 6th May 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on 18th May 2021

Lord Justice Males:

1. The issue in this appeal is whether a quality certificate issued by an independent inspector at the load port was intended to be conclusive evidence of the quality of a consignment of fuel oil supplied under an international sale contract. The email confirmation of the parties' transaction ("the Recap") said that the certificate would be binding on the parties in the absence of fraud or manifest error, but it also provided for the BP 2007 General Terms and Conditions for FOB Sales ("the BP Terms") to apply "where not in conflict with the above". Those terms say that the quality certificate will be conclusive and binding "for invoicing purposes", but without prejudice to the buyer's right to bring a quality claim.

2. The quality certificate issued by the independent inspector certified that the fuel oil was in accordance with the contractual specification at the load port, but the judge, Mr Justice Teare, found as a fact that it was not. He held that the BP Terms qualified the Recap term which, if it had stood alone, would have excluded the buyer's quality claim, but that there was no conflict between these terms which could be read together so as to give effect to both of them. Accordingly the buyer's claim succeeded and the judge assessed damages in the sum of US $3,058,801.

3. The seller, Tintrade Ltd, now appeals, contending that the BP Terms are in conflict with the Recap term providing for the determination of quality by the independent inspector to be binding on the parties. The buyer, Septo Trading Inc, supports the judge's reasoning and conclusion.

4. Accordingly this appeal raises once again the court's approach to the incorporation into a contract of general terms which are alleged to conflict or to be inconsistent with a term expressly agreed between the parties in a "main terms" document such as the Recap.

The contract terms

5. The parties' contract was concluded on 20th June 2018 and its terms were recorded in the Recap. The product was described as "high-sulphur fuel oil RMG 380 as per ISO 8217:2010". The quantity was 36,000 to 42,000 mt in buyer's option, with delivery "in one cargo lot, FOB one safe berth, one safe port Tallin or Ventspils, for loading on board M/T 'NOUNOU' during the period 1st – 3rd July 2018".

6. ISO 8217:2010, which deals with marine fuels, provides by clause 5.1 that the fuel shall conform to the characteristics and limits given in Table 1 or Table 2 as appropriate, when tested in accordance with the methods specified. Table 2, dealing with residual fuels, is the appropriate table and provides that "total sediment aged" shall not exceed 0.1%. "Total sediment aged", also known as "total sediment potential" or "TSP", is a measure of how much sediment any given fuel will produce in long-term storage. Thus TSP does not indicate the presence of contaminating materials but measures the fuel's tendency to precipitate sediment in, for example, the fuel filters of a marine engine.

7. The payment clause of the Recap was internally contradictory. In its first paragraph, it provided for payment by telegraphic transfer at the latest five working days after the bill of lading date, while its final paragraph provided for the buyer to open a letter of credit with a first-class bank. We were told that in the event a letter of credit was

opened. However, nothing turns on the contradiction, as in either case the contract provided for payment against usual shipping documents which would include a certificate of quality.

8. The clause in the Recap entitled "Determination of Quality and Quantity" provided as follows:

> "As ascertained at loadport by mutually acceptable first class independent inspector, or as ascertained by loadport authorities and witnessed by first class independent inspector (as per local practice at time of loading).
>
> Such result to be binding on parties save fraud or manifest error.
>
> Inspection costs to be shared 50/50 between buyer/seller."

9. A further clause, entitled "General", provided as follows:

> "Where not in conflict with the above, BP 2007 General Terms and Conditions for fob sales to apply."

10. The BP Terms contain 41 sections and 8 schedules. Of particular relevance to the present case is section 1, entitled "Measurement and sampling, independent inspection and certification." This provides as follows (so far as material to this appeal):

> "1.1 Measurement and Sampling
>
> Measurement of the quantities and the taking of samples and analysis thereof for the purposes of determining the compliance of the Product with the quality and quantity provisions of the Special Provisions shall be carried out in the following manner:
>
> 1.1.1 Where the Loading Terminal is operated by the Seller: …
>
> 1.1.2 Where the Loading Terminal is not operated by the Seller:
>
> (i) by an independent inspector jointly agreed upon by the Buyer and Seller in accordance with current Approved Industry Practice. All charges of the independent inspector shall be shared equally between the parties and the inspector's report shall be made available to both parties. The Seller shall use all reasonable endeavours to enable the independent inspector so appointed to have full access to the facilities at the Loading Terminal necessary to perform his duties, or;
>
> (ii) should the parties fail to agree upon an independent inspector, or should the Loading Terminal refuse access to any independent inspector appointed by the parties then by the Loading Terminal's own qualified inspector(s) in accordance with good standard practice at the Loading Terminal at the time of shipment.

> 1.2 Certificates of Quantity and Quality
>
> 1.2.1 Provided always the certificates of quantity and quality (or such other equivalent documents as may be issued at the Loading Terminal) of the Product comprising the shipment are issued in accordance with sections 1.2.2 or 1.2.3 below then they shall, except in cases of manifest error or fraud, be conclusive and binding on both parties for invoicing purposes and the Buyer shall be obliged to make payment in full in accordance with Section 30.1 but without prejudice to the rights of either party to make any claim pursuant to Section 26.
>
> …
>
> 1.3 Place of Certification
>
> Should it not be customary practice at the Loading Terminal at the time of shipment for measurement and sampling pursuant to Section 1.1 to take place at the Vessel's manifold immediately prior to loading, or should the parties agree otherwise, then it is a condition of the Agreement that the Seller shall be obliged to provide the same quantity and quality of the Product at the Vessel's permanent hose connection as set out in the certificates of quantity and quality so issued."

11. Section 26 of the BP Terms is headed "Quality and claims in respect of quality/quantity". It provides that:

> "Unless otherwise stated in the Special Provisions, the quality of the Product delivered hereunder shall be not inferior to the specification set out in the Special Provisions. …"

It goes on to exclude conditions or warranties as to the description, quality or fitness for purpose of the product and provides that any quality claim must be brought within 45 days of completion of discharge.

The facts

12. On 25th June 2018 the seller nominated Ventspils as the loading port. The next day the buyer provided SGS Latvija Ltd ("SGS") with instructions to perform quantity and quality determinations of the fuel oil to be shipped at Ventspils on board the NOUNOU. These instructions were approved by the seller and so were joint instructions. They stated that:

> "Quality to be ascertained or witnessed (as per standard practice at load port at time of loading), basis representative composite sample drawn from shore tank(s) before commencement of loading."

13. The instructions set out the contractual specification, including that the maximum TSP was 0.1%.

14. SGS took samples from a number of shore tanks on 20th, 26th and 27th June 2018 and prepared a composite sample. This was analysed between 29th June and 2nd July 2018. SGS then issued a certificate dated 2nd July 2018 which set out the analysis results obtained for the various components of the specification. The TSP was stated to be 0.04% and was therefore within the contractual specification.

15. The cargo was loaded on board the vessel between 30th June and 2nd July 2018. The total loaded was 41,335 mt. The cargo was then transported to Gibraltar where it was transferred to the M/V FIONIA SWAN and the M/V SKS TANARO pursuant to a contract of sale between Septo and Macoil International SA. On 17th July 2018, Saybolt España SAL issued a certificate of analysis in respect of samples drawn from the M/V SKS TANARO on 12th July 2018 after Macoil had received the cargo. This stated that the TSP of the sample was 0.37%, being in excess of the maximum permitted TSP value under ISO 8217:2010. By this time, Septo had paid the purchase price.

16. Samples collected by SGS prior to and during the loading at Ventspils were subsequently analysed by Inspectorate Rotterdam in the Netherlands on 31st July 2018. This showed that although most samples from the shore tanks were on-spec, some were not. The expert witnesses called by the parties at the trial agreed that the cargo in this case, after loading and blending on board, was off-spec for TSP, and that the vessel was not implicated in this. The judge found that the fuel oil contained in the seven shore tanks from which the cargo was loaded was "fundamentally incompatible" and that this was the cause of the cargo being off-spec after loading; and that the samples taken by SGS from the shore tanks were unrepresentative of the product actually loaded on board.

17. The buyer claimed damages on the ground that the product was not in accordance with the contractual specification. The seller relied on the binding nature of the SGS quality certificate, as set out in the Recap. The buyer responded that, pursuant to the BP Terms, the certificate was binding only for invoicing purposes and did not preclude it from bringing a claim for damages based on the true quality of the product. The buyer contended also that the certificate was not binding because SGS had failed to comply with the agreed instructions (cf. *Veba Oil Supply & Trading GmbH v Petrotrade Inc* [2001] EWCA Civ 1832, [2001] 2 Lloyd's Rep 295), but that contention was rejected by the judge and has not been renewed on appeal.

Incorporation and inconsistency – the cases

18. The law which applies in a case like the present, where there is said to be an inconsistency between specially agreed terms and the printed standard terms of the contract, and where the contract contains an inconsistency clause, is well settled.

Pagnan v Tradax

19. The leading case is *Pagnan SpA v Tradax Ocean Transportation SA* [1987] 3 All ER 565. A special condition in a contract of sale FOB Thailand said that the sellers would provide an export certificate. The contract also provided that its general conditions should be according to GAFTA contract form 119, which included the standard GAFTA prohibition clause stating that, in the event of prohibition of export or in the case of any executive or legislative act by the government of the country of origin restricting export, any unfulfilled portion of the contract would be cancelled. The

contract also contained a clause dealing with the possibility of an inconsistency between the printed form of GAFTA 119 and the terms specially agreed by the parties:

> "Special terms and conditions contained herein and/or attached hereto shall be treated as if written on such contract form and shall prevail in so far as they may be inconsistent with the printed clauses of such Contract Form."

20. The first question to be decided was whether the special condition provided for an absolute obligation on the seller to obtain an export certificate or merely an obligation to use best endeavours to obtain one. Observing that the task of the court was "to construe the special condition fairly in the context of the contract as a whole and in its factual setting in order to ascertain the true intention of the parties", Lord Justice Bingham concluded that "the clause imposed an absolute obligation on the sellers to provide for the export certificate, save in so far as any other clause of the contract might modify the sellers' obligation or relieve him from the consequences of breach". He then turned to the question whether the prohibition clause protected the seller if it failed, for reasons falling within that clause, to provide the export certificate, commenting that if there was any inconsistency between the special condition and the prohibition clause, the former would prevail as that was what the parties had agreed in the inconsistency clause. He described the approach to be taken in the following terms:

> "It would in my judgment be quite wrong to approach this question of construction with any predisposition to find inconsistency between the special condition and clause 19 [i.e. the prohibition clause]. They are all part of the same contract, and the parties expressly chose to make their contract subject to the terms of GAFTA Form 119. …
>
> On the other hand it is wrong to approach the contract on the assumption that there is no inconsistency. By including the inconsistency clause, the parties have acknowledged that there may be. One should, therefore, approach the documents in a cool and objective spirit to see whether there is inconsistency or not.
>
> The judge found the arguments on this issue finely balanced, but concluded that there was no inconsistency as submitted by the buyers. I agree with his conclusion, but I have less hesitation in reaching it. It is a commonplace of documentary construction that an apparently wide and absolute provision is subject to limitation, modification or qualification by other provisions. That does not make the later provisions inconsistent or repugnant."

21. After considering some earlier authorities, which he considered a helpful illustration of how courts had approached the question of inconsistency in the past, Lord Justice Bingham said that:

> "It is not enough if one term qualifies or modifies the effect of another; to be inconsistent a term must contradict another term

> or be in conflict with it, such that effect cannot fairly be given to both clauses."

22. Applying this test, Lord Justice Bingham concluded that there was no inconsistency or conflict in the case before him. The natural meaning of the contract was that the sellers were to provide for the export certificate, but in case of prohibition of export or any executive or legislative act by the government of Thailand restricting export, the unfulfilled portion of the contract was to be cancelled. That did not deprive the special condition of effect, but provided the seller with a defence if they were unable to do so for a reason falling within "the carefully-defined ambit of the prohibition clause". He tested that conclusion "against the touchstone of commercial common sense", concluding that this was "an apportionment of risk which the parties could reasonably be supposed to have intended".

23. Lord Justice Woolf agreed, saying that the prohibition clause supplemented the special condition and was not inconsistent with it. Lord Justice Dillon said:

> "We have therefore merely to consider the printed words of the contract that the special condition is to prevail in so far as it may be inconsistent with the printed clauses of the GAFTA contract form. What is meant by inconsistency? Obviously there is inconsistency where two clauses cannot sensibly be read together, but can it really be said that there is inconsistency wherever one clause in a document qualifies another clause? A force majeure clause, or a strike and lock out clause, almost invariably does qualify the apparently absolute obligations undertaken by the parties under other clauses in the contract; so equally with an extension of time clause, for instance in a building agreement. So equally, with a lease, the re-entry clause qualifies the apparently unconditional demise for a term of years absolute, but no one would say that they were inconsistent.
>
> In my judgment the first task is to see if the clauses can sensibly be read together. If they cannot, there is inconsistency and the special condition is to prevail over the other clause in the printed form. But, if they can be read together, they should be and there is no inconsistency."

Alexander v West Bromwich

24. *Pagnan v Tradax* has been followed in many other cases. It is sufficient to refer to one of them. In *Alexander v West Bromwich Mortgage Co Ltd* [2016] EWCA Civ 496, [2017] 1 All ER 942, a mortgage offer stated that interest would be at a fixed rate until 30th June 2010 and thereafter would be at a variable rate of 1.99% above base rate. However, the lender's mortgage booklet which contained the mortgage conditions permitted the lender to vary the interest rate at any time for any one of eight listed reasons or by giving advance notice in writing. The booklet stated that if there were any inconsistencies, the terms of the offer would prevail. The borrower claimed that the mortgage conditions were inconsistent with the terms of the mortgage offer and accordingly were not incorporated into the contract. The judge held that there was no

inconsistency because the booklet conditions qualified but did not contradict the terms of the offer. This court disagreed.

25. After citing *Pagnan v Tradax* and referring to cases in which it had been followed, Lord Justice Hamblen (with whom Sir Brian Leveson P and Lady Justice Sharp agreed) said:

> "40. An example of a case where such inconsistency was established is *Gesellschaft Burgerlichen Rechts v Stockholms Rederiaktiebolag Svea, The Brabant* [1967] 1 QB 588 in which McNair J concluded that there was inconsistency in circumstances where one clause would deprive another 'almost entirely' of any effect, thereby effectively, but not completely, emasculating it.
>
> 41. An example given by Akenhead J in *RWE Npower Renewables v JN Bentley Ltd* [2013] EWHC 978 (TCC), and relied upon by the Lender, is where one part of the contract required a building to be painted black and another part stated it should be painted white. That is an example of a clear and literal contradiction between clauses. In my judgment, inconsistency is not limited to such cases. As *Pagnan v Tradax* makes clear, it extends to cases where clauses cannot 'fairly' or 'sensibly' be read together; not merely cases where they cannot literally be read together. One should approach that question having due regard to considerations of reasonableness and business common sense. As Rix J stated in *The Northern Progress* [1996] 2 Lloyd's Rep 319 at 330:
>
> > 'Indeed, it seems to me that the doctrine of the exclusion of terms which do not make sense (and the doctrine of manipulation which is designed to save an appropriate term for incorporation which would otherwise have to be excluded) as well as the doctrine of inconsistency are but aspects of the overall process of arriving at the true intention of the parties in which the concept of rationality and commercial commonsense must play their appropriate and fundamental roles'."

26. Lord Justice Hamblen referred also to the "main purpose" principle of construction:

> "46. The Borrower refers in particular to the statement of Lord Halsbury LC [in *Glynn v Margetson & Co*] ([1893] AC 351 at 357) that 'one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract'. The application of that principle obviously depends upon being able to identify 'the main purpose' (per Lord Halsbury) or the 'main object and intent' (per Lord Herschell) of the contract, which depends on the construction of the contract as a whole considered in its proper context.

> 47. *Glynn v Margetson* highlights that the importance or centrality of the specially agreed term being considered may be a relevant consideration. If it sets out what may reasonably be understood to be the main purpose or object of the contract then a printed standard term which is inconsistent with that purpose or object is likely to be found to be a term which cannot 'fairly' or 'sensibly' be read together with it. …"

27. Applying these principles, Lord Justice Hamblen held that there was an inconsistency between the offer document and the printed conditions in the booklet: the booklet provided for "an entirely different method of varying the [interest] rate" from that stated in the offer document; to incorporate the printed conditions was "not a matter of qualification or modification" but of "transformation and indeed negation"; and the product description set out in the offer document was the main purpose of the contract, so that a printed term which entitled the lender to substitute a different product was inconsistent with that main purpose.

28. Thus there is a distinction between a printed term which qualifies or supplements a specially agreed term and one which transforms or negates it. In order to decide on which side of this line any particular term falls, the question is whether the two clauses can be read together fairly and sensibly so as to give effect to both. This question must be approached practically, having regard to business common sense, and is not a literal or mechanical exercise. It will be relevant to consider whether the printed term effectively deprives the special term of any effect (some of the cases describe this as the special term being "emasculated", but in my view it more helpful to say that it is deprived of effect). If so, the two clauses are likely to be inconsistent. It will also be relevant to consider whether the specially agreed term is part of the main purpose of the contract or, which is much the same thing, whether it forms a central feature of the contractual scheme. If so, a printed term which detracts from that scheme is likely to be inconsistent with it. Ultimately, the object is to ascertain the intention of the parties as it appears from the language in its commercial setting.

The judgment

29. In the present case the judge summarised and applied these principles, setting out his reasoning and conclusion as follows:

> "34. Assisted by the guidance given by Bingham LJ and approaching the matter in, I hope, a sufficiently cool and objective manner I have concluded that clause 1.2.1 of the BP terms is not in conflict with the Recap. Rather, it qualifies the Recap. The clause in the Recap entitled 'Determination of Quality and Quantity', had it stood alone, would have had the effect contended for by the Seller, that is, that in any claim for breach of contract the determination of the independent inspector would be binding as to quality. But it does not stand alone. It stands together with clause 1.2.1 of the BP terms. That clause can be read together with the Recap by regarding it as qualifying the otherwise general effect of the Recap by saying that the binding nature of the determination of the independent inspector is limited to questions of invoicing, without prejudice to any later

> claim for breach of contract. In that way both clauses can be read together and effect can be given to both of them. Thus clause 1.2.1 is not in conflict with the Recap. It qualifies or explains the Recap. To conclude that it was in conflict with the Recap would require the court to ignore the construction which fairly gives effect to both clauses. Such a construction, which gives effect to the BP terms, can hardly be inconsistent with commercial common sense. Of course the business purpose of an (unqualified) independent inspection clause is to avoid disputes about quality; see *Toepfer v Continental Grain* [1974] 1 Lloyd's Rep 11 at p.14 per Sir David Cairns. But the modification of such an unqualified clause brought about by the BP terms seeks to improve the position of the party wishing to challenge the independent inspector's determination by limiting the binding effect of the independent inspection to questions of invoicing and payment of the price. It cannot be suggested that such a modification was not consistent with commercial common sense. It is simply a variant of the determination of quality provision which limits the binding nature of the determination."

30. I would note three features of this reasoning. First, the judge expressly accepted that if the Recap term had stood alone, it would have had the effect for which the seller contended, that is to say it would have barred any quality claim by the buyer. Second, either construction would accord with commercial common sense: the purpose of an unqualified certificate final clause is to avoid disputes about quality, but on the other hand the BP Terms are widely used. Third, to read the BP Terms as qualifying the Recap term by limiting the binding nature of the determination to questions of invoicing, without prejudice to any later claim for breach of contract, was a construction "which fairly gives effect to both clauses".

The parties' submissions

31. For the appellant seller Mr Michael Ashcroft QC submitted that the judge was wrong. The clauses cannot fairly and sensibly be read together. Rather there is a fundamental conflict between them. While the Recap term provides that the determination of quality set out in the independent inspector's certificate will be binding for all purposes, the BP Terms provide that the certificate will be binding only for the purpose of invoicing. As shown by the decision of Mr Justice Colman in *Navigas Ltd v Enron Liquid Fuels Inc* [1997] 2 Lloyd's Rep 759, these are entirely different regimes. The judge's conclusion gave no effect to the Recap term, but effectively deleted it from the contract.

32. For the respondent buyer Mr Robert Bright QC supported the reasoning of the judge, submitting that the BP Terms qualified but did not contradict the Recap term, and that the two clauses can be read together with effect being given to both of them. The BP Terms do not deprive the Recap term of all meaning as the quality certificate remains binding for invoicing purposes, that is to say it is a "pay now, sue later" clause, providing that the buyer must pay the purchase price against a certificate stating the product to be on specification while leaving it free to pursue a quality claim for damages thereafter, but only within 45 days of completion of discharge as provided in Section 26.3 of the BP Terms. If no claim is brought within that time, the certificate would be binding for all purposes.

33. In addition, by a Respondent's Notice, Mr Bright relied on Section 1.3 of the BP Terms. He submitted that by agreeing the instructions to SGS to sample the fuel oil in the shore tanks at the load port rather than at the vessel's manifold immediately prior to loading, the parties had "agreed otherwise" for the purpose of Section 1.3, so that it had become a condition of the contract that the product provided at the vessel's permanent hose connection would be as set out in the quality certificate issued by SGS. This supported the judge's conclusion that the quality certificate was binding only for invoicing purposes, but not otherwise; and also gave rise to an independent claim for damages for breach of Section 1.3.

Discussion

34. I begin by considering the meaning of the "Determination of Quality and Quantity" clause in the Recap. This is, it seems to me, the necessary starting point, just as it was necessary in *Pagnan v Tradax* to begin by ascertaining the meaning of the export licence clause and in *Alexander* to interpret the terms of the offer document. The parties disagreed on the approach to this question. Mr Bright submitted that, as with any contractual term, the Recap term must be construed in the context of the contract as a whole, which includes Section 1 of the BP Terms. Conversely, Mr Ashcroft submitted that Section 1 of the BP Terms did not form part of the contract as a whole because the BP Terms only apply where they are "not in conflict" with the main terms set out in the Recap and, where there is a conflict, they do not apply at all.

35. Nevertheless, it is necessary to start somewhere and in my judgment the starting point is the meaning of the Recap term. We should form a provisional view of what that term means, which can then be tested against other clauses of the contract in the usual way. At this stage, account should not be taken of the printed term which is alleged to be inconsistent. However, if the provisional view thus formed requires significant modification when account is taken of Section 1 of the BP Terms, that is likely to be relevant to the issue of inconsistency. Plainly, if a contract term means one thing when it is considered on its own and means something very different when it is considered in the light of a printed term in a set of standard conditions, that is likely to shed considerable light on that issue.

36. In my judgment the judge was right to conclude that the effect of the Recap term, considered on its own, is that the quality certificate is intended to be binding on both parties for all purposes. That is the clear meaning of the term, which refers to a "determination" which is to be "binding on parties". Initially, I understood Mr Bright to accept this. When asked whether he agreed with the judge's conclusion that, had it stood alone, the Recap term would have the effect for which the seller contended, he said that he did: as he put it, "it is just as simple as that". Later, however, he retreated from this position, drawing a distinction between a term providing for a certificate which was merely "binding" and one which was "final and binding". I would reject any such distinction. In this context the words "final", "binding" and "conclusive" all mean the same thing.

37. I see no reason to revise this provisional view when the construction of the Recap term is tested against other provisions of the contract, including (assuming it to apply) Section 1 of the BP Terms. Whether or not Section 1 of the BP Terms qualifies the effect of the Recap term, it does not change the meaning of the word "binding". Nobody

would think, reading the Recap term, that the word "binding" meant "binding for invoicing purposes".

38. Accordingly the starting point for consideration of the issue of inconsistency is that the Recap term provides that the quality certificate issued by the mutually acceptable independent inspector is binding on the parties, so that (assuming always that the certificate shows the product to be on-spec) the buyer cannot thereafter bring a claim on the ground that the quality of the product is not in accordance with the contract. As Professor Bridge explains, provision for such certificates to be binding forms a central feature of many international sales contracts (*Bridge, The International Sale of Goods*, 4th Ed (2017)):

> "2.34 **Inspection agencies** Going beyond the prescribed quality itself, the central feature of the contractual scheme in the standard forms used for international sales is that matters of quality and chemical composition of the goods are to be decided in a way that binds both seller and buyer by a disinterested inspection agency which looks at samples drawn, usually on shipment. …
>
> 2.35 **Merits of independent binding inspection** The virtue of an inspection agreed by the parties to be binding carried out by an independent inspectorate is that it tends to minimize disagreement between the parties in respect of the quality and make-up of the goods supplied. Buyers receive an independent survey report and avoid costly disputes, getting the benefit of the same term in their sub-contracts; sellers avoid complaints that have to be resolved by evidence taken in a foreign country long after the goods have been delivered, and they have the chance to replace goods that do not pass muster with the surveyor at the port of shipment. …"

39. The next step is to consider the effect of the printed term. Section 1.2 of the BP Terms provides that the quality certificate is to be "conclusive and binding on both parties for invoicing purposes" and that the buyer is obliged to make payment in full, but that this is "without prejudice to the rights of either party to make any claim pursuant to Section 26", that is to say a claim that the product is not in accordance with the specification (it may be noted that although Section 1.2 refers to the rights of "either party", a quality claim will only ever be made by the buyer). Plainly this is different from the Recap term, but it is relevant to consider what is meant by saying that a quality certificate (as distinct from a quantity certificate, where the seller will invoice for the quantity certified as having been loaded) is binding "for invoicing purposes". This is not a case, as *Navigas v Enron* was, where the contract stipulates an allowance by way of deduction from the price in the event of failure to conform to the specification.

40. Mr Bright submitted that Section 1.2 is a "pay now, sue later" provision, but such a provision is redundant in a documentary sale such as this. The seller must present its documents to the buyer's bank under the letter of credit, which documents must include a quality certificate as one of the stipulated shipping documents; if the documents are in order, the buyer's bank must pay; and no question arises as to the actual quality of the product. It is difficult to see, therefore, that the provision for the quality certificate

to be binding "for invoicing purposes" has any substantive content in this case. Indeed, Section 1.2 of the BP Terms would have exactly the same effect, so far as the quality certificate is concerned, if instead of saying that the certificate was binding "for invoicing purposes", it said that the certificate was not binding at all.

41. Finally, I turn to the question of inconsistency. I have reached the firm conclusion that Section 1.2 of the BP Terms is in conflict with the Recap term. The two provisions cannot fairly and sensibly be read together. The printed term does not merely qualify or supplement the Recap term, but rather deprives it of all practical effect. I reach this conclusion for the following reasons.

42. First, as I have explained, the Recap term provides for the quality certificate to be binding for all purposes, so as to preclude a claim for damages for breach of quality, while the printed term provides that the binding nature of the certificate is for a very limited purpose, "for invoicing purposes" only, and even that turns out on analysis to be illusory. This does for practical purposes deprive the Recap term of all effect. Mr Bright submitted that the Recap term would nevertheless have some effect because the certificate would be binding as to quality if no claim was made within the 45 days from completion of discharge for which Section 26 of the BP Terms provides. But that is merely to say that Section 26 provides a time limit for the making of quality claims. It has nothing to do with whether the quality certificate is binding.

43. Second, a regime in which a certificate of quality is binding is fundamentally different from one in which it is not. This was the view of Mr Justice Colman in *Navigas v Enron*, and I agree with him. In that case the telex which was the equivalent of the Recap in our case provided that the cargo would be inspected at the load port for quality and quantity by an independent inspector appointed by the seller, with the costs to be shared equally between the buyer and the seller. The clause did not say in terms that the certificate to be provided by the independent inspector would be binding, but Mr Justice Colman held that this was the effect of the clause. The contract also incorporated standard printed terms which provided for the buyer to engage an independent inspector whose certificate was expressly stated not to be binding; and for the quantity and quality of product delivered to the vessel to be determined for bill of lading and invoicing purposes by the supplier who controlled the loading terminal. Mr Justice Colman held that the inspection regime in the printed terms was fundamentally different from that set out in the telex, and that the latter must prevail. In so holding, he did not refer to *Pagnan v Tradax*, perhaps because the contract in *Navigas* did not contain an inconsistency clause, but his analysis is consistent with it and it is hard to think that he did not have it in mind:

> "In my judgment, the inspection provision in the telex is intended to be the only means of determining the quality and quantity of the cargo. The inspector is to be independent, albeit appointed by the seller and the costs are to be shared equally. Read alone, the clear effect is that the parties wish the quality and quantity to be conclusively determined by an independent inspector. They are content to share the cost because they jointly entrust to that inspector the determination of the quality and quantity actually shipped for the purpose of their contract.

> By contrast, the inspection regime applicable at Yanbu under art 13.2 provides as follows: (i) The buyer can engage and pay an independent inspector to witness the measurement (presumably by others) of the vessel and its loading and to inspect the grade and quality of the product 'delivered'. (ii) The report of that inspector is not to be binding and is not to be used for invoice or bill of lading figures. (iii) The invoice and bill of lading figures will be determined by SAMAREC or its supplier and those figures will be based on shore samples and shore quantities. In this connection, I reject as contrary to the ordinary meaning and natural sense of the words the argument advanced by Mr Sussex [for the buyer] that 'determined for such purposes' includes binding the parties as well as providing invoice and bill of lading data.
>
> That is a fundamentally different inspection regime from that of the telex inspection term. It involves no means of conclusive determination of either quality or quantity. …"

44. Third, the provision in the Recap term for the quality certificate to be binding is a central feature of the contractual scheme, as explained by Professor Bridge. It defines the seller's obligation with regard to the quality of the product, that obligation being to provide a product which is certified by the independent inspector as being in conformity with the contractual specification. In the case of a liquid cargo whose composition can only be determined by sampling and analysis, and where no two sets of samples are likely to be exactly the same, this provides an important measure of certainty. It is unlikely that the parties would wish substantially to detract from this by means of printed terms.

45. Finally, it is necessary to stand back and consider the intention of the parties as practical business people operating in the real world. While it is perfectly reasonable for parties to choose a contractual scheme in which the quality certificate is not binding but is merely evidence, it is appropriate to ask whether that is a commercially reasonable interpretation of what they have done in this case. In my view it is not. As Lord Justice Phillips said in the course of argument, if the parties' intention was to provide that the quality certificate would not be binding in any real sense, they went about it in a very strange way, first by saying in the Recap that it would be binding and then by providing something different in standard conditions which could be argued to qualify and not to nullify what was said in the Recap.

46. For much the same reasons, I would hold that Section 1.3 of the BP Terms has no application in this case either. Like Section 1.2, it provides for a fundamentally different regime from that set out in the Recap term and deprives the Recap of practical effect. While the Recap provides for the independent inspector's certificate of quality to be binding and leaves the parties free to agree (as they did) what instructions should be given to the inspector which will lead to the issue of that binding certificate, Section 1.3 undermines this regime by insisting that if the parties agree that the certificate of quality should be based on shore tank samples, it is nevertheless a condition of the contract that the seller must provide the same quality of product at the vessel's permanent hose connection as set out in the certificate of quality.

47. As Mr Ashcroft pointed out, this would lead to some odd results. For example, he submitted (and Mr Bright agreed) that it would mean that the buyer could reject the cargo if analysis based on sampling at the vessel's permanent hose connection showed results which were different from those set out in the certificate of quality, even if those results were in conformity with the contractual specification.

48. Even more fundamentally, Section 1.3 says nothing about who is to carry out the sampling at the vessel's hose connection which the clause contemplates. Plainly it will not be the independent inspector, as the premise for the clause is that this is not customary at the load port or the parties have agreed otherwise. Thus the parties' agreement in the Recap term that the quality of the product will be determined conclusively by an independent inspector appointed and paid for jointly is transformed so that what matters is a sampling operation carried out by someone else at the vessel's hose connection for which no provision is made in the contract or alternatively a sampling operation carried out at some later stage, for example at the discharge port, which then attempts to work backwards to ascertain what the position would have been if the cargo had been sampled at the vessel's hose connection at the load port.

49. Thus if Section 1.3 applies as Mr Bright contends, it operates as something of a trap for the seller. A seller who would reasonably think that he was agreeing the procedure to be followed by the independent inspector which would result in the issue of a binding certificate of quality would in fact be contracting out of the regime agreed in the Recap term and replacing it with a new and different term as to quality which has the status of a condition of the contract.

Disposal

50. In my judgment this contract, on its true construction, provided that the quality certificate issued at the load port would be binding, with the consequence that the buyer is precluded from bringing its claim in this case. I would therefore allow the appeal.

Lord Justice Phillips:

51. I agree.

Lord Justice Moylan:

52. I also agree.