Neutral Citation Number: [2020] EWHC 1795 (Comm)

Case No: CL-2018-000814

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/07/2020

Before :

MR. JUSTICE TEARE

- -

Between :

SEPTO TRADING INC.	**Claimant**
- and -	
TINTRADE LIMITED	**Defendant**

- -
- -

Robert Bright QC and Sarah Martin (instructed by **Allen & Overy LLP**) for the **Claimant**
Michael Ashcroft QC and Oliver Caplin (instructed by **HFW**) for the **Defendant**

Hearing dates: 8-11 June 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE TEARE

.....

"Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed to be 10:00 AM on 02 July 2020. A copy of the judgment in final form as handed down can be made available after that time, on request by email to the judge's Clerk"

Mr. Justice Teare :

1. This is a dispute between the Buyer and Seller of a cargo of fuel oil loaded on board the vessel NOUNOU at the port of Ventspils in Latvia in July 2018. The Buyer, Septo Trading Inc (of the BVI), claims that the cargo was off-spec and seeks an award of damages in the sum of US$7,785,478. The Seller, Tintrade Limited (of Jersey), denies that the cargo was off-spec and says that the damages claimed have been exaggerated.

2. There are essentially three issues. First, is the Buyer prevented from arguing that the cargo was off-spec by reason of an independent certificate of quality issued at the loadport ? If not, was the cargo off-spec ? If so, what damage was suffered by the Buyer ?

3. As a result of the Covid 19 crisis the trial was conducted entirely remotely with factual and expert witnesses giving their evidence by video-link. I am very grateful to the parties, their legal representatives, the witnesses and my clerk for making this remote trial possible.

The sale and purchase contract

4. The contract is evidenced by the "Recap" dated 20 June 2018 which recorded the terms agreed. The product was described as "high-sulphur fuel oil RMG 380 as per ISO 8217:2010". The quantity was 36,000 – 42,000 mt in Buyer's option and delivery was to be "in one cargo lot, fob one safe berth, one safe port Tallin or Ventspils, for loading on board M/T NOUNOU during the period 1-3 July 2018".

5. 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%. Clause 5.2 provides that the fuel shall be "a homogenous blend of hydrocarbons derived from petroleum refining".

6. 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."

7. The clause entitled "Title and Risk" provided as follows:

> "Property in the product delivered hereunder, and all risks in relation thereto, shall pass from the Seller to the Buyer at the loadport as the product passes the flange connection between the loading hoses and the vessel's permanent hoses."

8. The clause entitled "General" provided as follows:

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

9. The BP terms contain 41 sections and 8 schedules. Of relevance to the present case is, in particular, section 1, entitled "Measurement and sampling, independent inspection and certification." Section 1.1 provides as follows (so far as is material):

> "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:
>
> ……
>
> 1.1.2 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 ……. 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.
>
> ……
>
> 1.2.3 Any certificate of quantity and quality issued by an independent inspector pursuant to Section ….1.1.2(i) shall record that the independent inspector did witness, or himself

> undertook, the taking of samples and that the independent inspector did witness, or himself undertook, the analysis of such samples…….
>
> 1.2.4 In the event that the independent inspector did not undertake or did not witness the taking of samples or the analysis of such samples then the certificate of quantity and quality issued or countersigned by him must expressly reflect this and it will not, in these circumstances, be a certificate of quantity and quality for the purposes of Section 1.2.1 but merely evidence of those matters undertaken or witnessed by the inspector.
>
> 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.

HSFO (high sulphur fuel oil)

10. HSFO is a by-product of the process by which crude oil is refined to produce clean products such as gasoline, jet fuel and diesel. HSFO which has been derived from the primary atmospheric distillation of crude oil is generally of higher quality and is known as "straight run fuel oil". HSFO which has been derived from the secondary process of cracking is known as "cracked fuel" oil and considered of lower quality.

11. The main markets for HSFO are power generation and as a low priced bunker fuel in ships.

12. TSP or Total Sediment Potential (referred to in ISO 8217 as "total sediment aged") is a measure of how much sediment (asphaltenes) any given fuel oil will produce in long term storage. Thus TSP does not indicate the presence of contaminating materials but measures the fuel oil's tendency to precipitate sediment in, for example, the fuel filters of a marine engine.

The joint instructions to the independent surveyor

13. On 25 June 2018 the Seller nominated Ventspils as the loading port. On 26 June 2018 the Buyer provided SGS Latvija Limited (SGS) with instructions to perform quantity and quality determinations of the fuel oil to be shipped at Ventspils on board the vessel NOUNOU. There was no dispute that 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."

14. Section C stated the matters to be included in the survey report. Paragraph 8 stated:

> "Condition of pipeline before and after load (indicate the total capacity of the shore and ship's pipeline). Verification on pipeline contents to be made by inspector. Check all interconnecting valves to nominated loading system and seal shunt (sic)."

15. Section D set out the specification and in respect of TSP provided for a maximum of 0.1%.

The samples taken by SGS prior to loading and the certificate of quality

16. Samples were taken from a number of shore tanks on 20, 26 and 27 June 2018 and a composite sample prepared. It was analysed between 29 June and 2 July 2018. By a certificate dated 2 July 2018 the TSP was stated on behalf of SGS to be 0.04% and accordingly within the contractual specification.

The loading of the cargo

17. The cargo was loaded on board the vessel NOUNOU between 30 June and 2 July 2018. The quantity loaded was 41,335 mt.

Subsequent events

18. Between 2 July 2018 and 11 July 2018 the cargo was 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 17 July 2018, Saybolt España S.A.L. issued a certificate of analysis in respect of samples drawn from the M/V SKS TANARO on 12 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. Samples collected by SGS prior to and during the loading at Ventspils were subsequently tested by Inspectorate Rotterdam in the Netherlands on 31 July 2018. Their tests showed that whilst most samples from the shore tanks were on-spec, some were off-spec.

19. By the time the cargo had been found to be off-spec Septo had already paid the purchase price to Tintrade but had not been paid by Macoil. Septo subsequently learned that Macoil had sold approximately 10KT of the cargo to its customers before it was found to be off-spec.

20. After failing to persuade Tintrade to re-purchase the cargo and failing to agree a reduced price with Macoil, Septo decided to blend the off-spec cargo with a larger quantity of compatible product in order to produce an on-spec cargo and sell the re-blended product into the Singapore market, which is one of the world's largest fuel oil markets. Septo retrieved the 31KT of cargo remaining on board the M/V SKS TANARO in Gibraltar on 6 September 2018 and the cargo was transported to Malta. In Malta the 31KT was blended with around 104KT of straight run fuel oil on board the M/V MARSHAL Z.

The operation was successful. Septo was able to sell the blended cargo into the Singapore market.

21. Although the actual loss suffered by Septo, the Buyer, in respect of the re-blended 31KT was said to be $3.82 million, the sum claimed as damages by the Buyer in respect of the total cargo of 41KT was, until the exchange of skeleton arguments, $10,704,563. At trial the sum claimed as damages was reduced to $7,785,478.

The explanation for the high TSP value found post-loading

22. This question has been carefully considered by two chemical experts. The Buyer called Mr. Cosulich and the Seller called Mr. Jones. Mr. Cosulich was relatively young and inexperienced but he appeared to be expert in his subject. His independence was challenged on the basis that he assisted the Buyer with the cargo in 2018 and since the events of 2018 has been contracted by the Buyer on a regular basis. He was not therefore an "independent" expert as he himself accepted. However, it was very apparent from his evidence that he took his duties as an expert witness seriously and conscientiously. Mr. Jones was a most experienced and authoritative expert in his field. He was also, as his opinions demonstrated, clearly objective. There were not many differences between the experts but to the extent that there were any, I prefer Mr. Jones' opinion because he was, by some margin, the more experienced in his field.

23. In this case the fuel oil from several shore tanks was blended on board the vessel in accordance with a loading plan which would have been agreed between the terminal Loadmaster and the vessel's Chief Officer and would have dealt with the rate of loading, the sequence of loading and the quantities to be loaded. It would have been expected that the agreed loading plan would produce a cargo of the required specification. The two experts were agreed that on board blending carries extra technical challenges. The best practice is to blend the components ashore before delivery to the vessel. The experts further agreed that the cargo in this case, after loading and blending on board, was off-spec for TSP. They were also agreed that the vessel was not implicated in the off-spec nature of the cargo after it had been loaded. The fuel oil contained in the seven shore tanks from which the Product was loaded was "fundamentally incompatible" so that the cause of the off-spec cargo after loading was of shore origin. It was the incompatibility of the product from the seven shore tanks which caused the cargo to be off-spec for TSP when it was blended on board the vessel. It was clear to Mr. Jones, and I accept, that the analysis of the composite sample prior to loading revealed an on-spec level of TSP because the samples used were unrepresentative of the product loaded on board.

Whether the Seller is bound by the Certificate of Quality

24. The first and most important issue to be resolved is whether the parties agreed that the Certificate of Quality issued at the loadport was to be binding on the parties for all purposes or only for invoicing purposes without prejudice to later claims for breach of contract. This depends upon whether clause 1.2.1 of the BP General Terms and Conditions is "in conflict" with the clause in the Recap entitled "Determination of Quality and Quantity". The latter provides that the determination of the independent inspector "to be binding on parties save fraud or manifest error." The former provides that the determination of the independent inspector "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."

25. Counsel for the Buyer submitted that the effect of clause 1.2.1 is to clarify the purposes for which the certificate of quantity and quality is binding, i.e. for the purposes of invoicing and payment. It is a "pay now, sue later" provision. This does not deprive such a certificate of all binding effect but it means that the certificate is not final. This was said to be not inconsistent with the Recap, which states only that the certificate is "binding". In other words, reading the two clauses together (as is the correct approach), the SGS Certificate of Quality was not final and binding between the parties because the Recap does not say that it is final and binding, only that it is "binding", and the effect of clause 1.2.1 is that it is binding only as to price.

26. Counsel for the Seller submitted that Section 1 of the BP terms which form part of a comprehensive regime concerning quality and quantity certificates which can only ever, at most, be binding for invoicing purposes conflict with, or are inconsistent with, what the parties agreed in the Recap, and so do not form part of the contract.

27. The manner in which the courts resolve such questions of alleged inconsistency has been addressed in several previous cases. It is not necessary to mention them all.

28. In *Pagnan v Tradax* [1987] 2 Lloyd's Reports 342 Bingham LJ addressed this question at pp.349-351 and, as ever, gave valuable guidance on the subject.

29. From his judgment it is apparent that the court should keep well in mind that the two clauses in question are all part of the same contract and that the parties chose to make the contract subject to the BP terms. Thus it would be wrong to approach the question of construction with any predisposition to find inconsistency between the Recap and the BP Terms. Equally, it would be wrong to approach the question of construction on the assumption that there is no inconsistency. The provision in the Recap that the BP terms apply where there is no conflict with the terms of the Recap show that the parties accept that there may be conflict or inconsistency. "One should therefore approach the documents in a cool and objective spirit to see whether there is inconsistency or not."

30. In doing so it is also necessary to keep in mind that "it is a commonplace of documentary construction that an apparently wide and absolute provision is subject to limitation, modification or qualification by other provisions. It does not make the later provisions inconsistent or repugnant." Thus, after reviewing several earlier cases, Bingham LJ said: "It is not enough if one term qualifies or modifies the effect of another; to be inconsistent a term must contradict another or be in conflict with it, such that effect cannot fairly be given to both clauses."

31. Finally, any construction so arrived at must be "tested against the touchstone of commercial common sense."

32. These principles were followed and applied by Beatson J. in the *Lowlands Orchid* [2010] 1 Lloyd's Reports 317. At paragraph 26 Beatson J. noted that "the distinction between a conflicting provision and a qualifying one is generally accepted."

33. Counsel for the Seller referred to other decisions of the court; see *Navigas v Enron* [1997] 2 Lloyd's Reports 759 and the *Helene Knutsen* [2003] 2 Lloyd's Reports 686. But neither case addressed the principles. Rather, they were examples of particular inconsistency between clauses.

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 Reports 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.

35. In addition to relying upon the fact that the BP terms limited the binding effect of the inspection certificate to matters of invoicing and payment of the price whereas the term in the Recap was unlimited in its effect, counsel for the Seller also relied upon what was said to be a difference between Section 1.1.2 of the BP terms, which referred to current Approved Industry Practice, and the Recap which referred to local practice at time of loading. It was said that this difference made clear that the inspection regime in the BP terms was quite different from the inspection regime in the Recap. I was not persuaded that this difference manifested two different inspection regimes. The Recap contemplates that the inspection will either be carried out by a first class independent inspector or by the loadport authorities and witnessed by a first class independent inspector. The natural meaning of the words in brackets, "as per local practice at time of loading", is that it is upon such practice that the question whether the inspection be by an independent inspector or by the loadport authorities will depend. The BP terms do not contain a provision to like effect. Section 1.1.2 (i) provides that an inspection by an independent inspector will be in accordance with the current Approved Industry Practice, a defined term, which clearly relates to the standard to which or by which inspections are to be carried out. It is to be contrasted with the requirement in Section 1.1.2(ii) which provides for inspections by the Loading Terminal's own inspectors (in circumstances where an independent inspector has not been agreed or access to such surveyor is denied) to be carried out in accordance with "good standard practice at the

Loading Terminal". (In this regard see Section 1.1.1 (i) and (ii) which are to the same effect.) I do not understand the Recap to provide that inspections carried out by an independent inspector may be carried out otherwise than in accordance with Approved Industry Practice. But even if it did the binding effect of a certificate depends upon reading the Recap and Section 1.2.1 together in the manner I have described.

36. Finally, counsel for the Seller submitted that Section 1.2.3 of the BP terms (which requires the certificate to record certain matters) was inconsistent with the Recap. I disagree. The requirements in Section 1.2.3 are not stated in the Recap but they can fairly be read with the Recap as explaining the necessary form of the required certificates.

37. For these reasons the Buyer's claim for damages for breach of contract is not stopped in its tracks by reason of the Certificate of Quality issued at Ventspils. In those circumstances it is not necessary to consider the other ways in which the Buyer sought to avoid the binding nature of the Certificate of Quality. Counsel for the Buyer relied upon four arguments in their closing submissions. I shall deal with each as briefly as I can.

The sample taken on 20 June 2018

38. Counsel for the Buyer submitted that the sample taken on 20 June 2018 was not taken pursuant to the joint instructions of the parties because the Seller did not nominate Ventspils as the loading port until 25 June and instructions to SGS were not given until 26 June. Indeed the evidence of Mr. Katsyka (the Seller's trader) was that the sample had been taken to enable Tintrade to nominate the loadport.

39. Counsel for the Seller submitted that the instructions to the inspector (which required the samples to be taken before loading) were issued after the contract was made and were therefore non-contractual. He further submitted, based upon Mr. Katsyka's evidence, that taking samples as early as 20 June was consistent with the local practice at Ventspils and therefore consistent with the Recap.

40. The joint instructions were that the composite sample be drawn "before the commencement of loading". The composite sample was drawn before the commencement of loading. There was therefore no breach of the instructions. It is therefore unnecessary to decide the interesting question whether a departure from post-contractual, but agreed, instructions can have the effect of preventing the Seller from relying upon the binding nature of the certificate.

41. There was evidence from Mr. Cosulich that it would not be usual to use a sample taken 10 days before loading (because of the risk of stratification) and evidence from Mr. Jones that it was contrary to good practice. Whilst the experts appeared to agree that it was good practice to draw samples shortly before loading (because of the risk of stratification), no case was advanced that the drawing of such sample was contrary to "Approved Industry Practice" as defined in the BP terms. Indeed, Mr. Jones had experience of many instances of product being retained and sampled many weeks prior to loading and in the case of residual fuel oil he would expect product stored for 10 days after original sampling to be valid for use in a blending trial. Therefore, although the Seller is unable to rely upon local practice as the appropriate standard (for the

reasons given above) I do not consider that the Buyer can make anything of the point that one of the samples was drawn too soon before the commencement of loading.

42. But there remains the argument that the sample drawn on 20 June was not drawn as part of the joint inspection but was drawn to enable the Seller to decide which loading port to nominate.

43. The question, it seems to me, is whether SGS were entitled to use the sample taken on 20 June to form, along with the later samples, the composite sample.

44. On that question there was little if any evidence. Reliance was placed on Mr. Jones' evidence that it was "on the face of it" not compliant to use a sample taken before the inspector was instructed. But in re-examination he said that he was sure that "they were acting within the scope of permitted operations at the terminal, and within their remit." The basis of that view was not stated but it may have been his belief, as stated in his supplementary report, that it would be normal practice for independent surveyors to make enquiries about shore tank inventory levels and to review relevant product movement and line management information. Mr. Katsyka said that it was normal to use a sample taken before the inspector was instructed and not surprising.

45. There is no doubt that SGS took the sample on 20 June before they had been instructed to act as agreed inspector and there is also no doubt that they used that sample to form part of the composite sample which they then tested. I am not persuaded that the fact that they did so is a reason for not treating their certificate as binding. Although the conduct of SGS in this regard is questionable it is difficult to identify why it is a departure from their instructions or why it was a "manifest" error (as to the meaning of which adjective, see below).

The person who took the samples

46. Section 1.2.3 of the BP terms required the certificate to "record that the independent surveyor did witness or himself undertook" the taking of samples and the analysis of such samples. It was submitted that the certificate of quality in this case failed to comply with that provision. Much was made of the acceptance by Mr. Jones that the person who purportedly signed the certificate on behalf of SGS, Larisa Bondarchuk, a laboratory coordinator, would not have taken the samples. However, the independent inspector appointed to sample the product and assess its quality was SGS. The certificate was required to state that the independent inspector, SGS, witnessed or undertook the sampling. The purpose of that provision is, as it seems to me, to require that the independent inspector actually witnesses or undertakes the sampling. It would not suffice that the independent inspector analysed samples which had been taken by others and not witnessed by the independent inspector. The certificate in this case stated in terms that the product was "sampled by SGS". That appears to me to be sufficient compliance with section 1.2.3 of the BP terms. Although there was real doubt as to who had signed the certificate on behalf of SGS it was not suggested that the certificate was not in truth one issued by SGS.

Failure to shut shore tank valves

47. The instructions to SGS stated: "Check all interconnecting valves to nominated loading system and seal shunt (sic)". The experts agreed that sealing shore tanks drastically

reduces the risk of cross contamination. But they also agreed that that it was rarely performed at most terminals. There was evidence, noted by Mr. Jones, that SGS was refused permission to apply seals to shore tanks and lines ahead of the NOUNOU delivery. Indeed, the SGS report contained a Statement of Facts which recorded their request for permission to seal the cargo lines to avoid the risk of "unpredictable transferring/leakages" and the terminal's refusal of that request. The request dated 30 June was also included in the report. There is no evidence that the failure to shut shore tank valves in fact caused the excessive TSP count.

48. The instruction in question was contained within section C of the instructions which concerned the documents and matters which were to be included in the survey report. Read in isolation the words relied upon may be regarded as containing an instruction to shut shore valves. But read in context the instruction requires the report to deal with the question of valves. In circumstances where the experts have agreed that sealing is rarely performed I do not consider it realistic to regard the instruction as a requirement that sealing must in fact take place.

49. SGS included in the report the documents relating to their request to shut the valves and the response of the terminal. It is therefore, it seems to me, difficult to say that SGS's report was defective or to criticise the conduct of SGS in this regard or the manner in which they performed their duties.

Non-representative samples

50. It was the evidence of Mr. Jones, gratefully accepted by counsel for the Buyer, that the samples drawn by SGS must have been non-representative. For if they had been representative they ought to have revealed the fact that the contents of the shore tanks, when blended on board, would have produced an excessive TSP count. It was therefore argued that SGS had failed to test a "representative composite sample" in accordance with their instructions and so the Buyer cannot be bound by the SGS determination of quality.

51. There was a dispute as to whether this allegation had been pleaded. The Buyer had pleaded (see paragraph 21 of the Points of Claim) that the SGS determination of quality was not binding "by reason of manifest error in the drawing of samples". Particulars of that allegation were given in paragraph 22 but this particular complaint was not pleaded. There is therefore force in the suggestion that the allegation has not been pleaded, albeit that paragraph 21 is wide enough to encompass the point and paragraph 22 is expressed to be "without prejudice to the generality of the foregoing".

52. In his first report dated 21 February 2020 Mr. Jones said that the reason that samples from the shore tanks indicated satisfactory TSP whereas samples from the ship's tanks revealed excessive TSP was "the underlying difficulty of capturing representative samples" (see paragraph 21). In the Joint Memorandum dated 20 March 2020 Mr. Jones repeated that the "the reason for these contrary observations is due to the unrepresentative nature of the shore tank samples" (see paragraph 4.2). Yet no further voluntary particulars of the broad allegation of a "manifest error in the drawing of samples" were given. Indeed, as emphasised by counsel for the Seller, the point was not mentioned in the opening skeleton argument of counsel for the Buyer. It was first advanced during cross-examination of Mr. Jones.

53. It is unfortunate that further voluntary particulars of the specific allegation concerning non-representative samples were not given prior to the trial. If they had been counsel for the Seller would have had the opportunity to discuss the matter with Mr. Jones. In the event he did not have that opportunity or any opportunity to cross-examine Mr. Cosulich on the subject. However, there is no doubt as to Mr. Jones' views. Moreover, they provide a clear, understandable and persuasive explanation of what must have happened. He is, as I have said, an authoritative and experienced expert in his field. His objectivity is manifest. Had further voluntary particulars of this allegation been given before the hearing I do not doubt that Mr. Jones' view would have remained what it was in both his original report and in the Joint Memorandum. Ultimately, I am persuaded that the late taking of this point has not caused actual prejudice to the Seller and that in circumstances where counsel for the Buyer wishes to rely upon the clear and persuasive evidence of the Seller's own expert it is not unfair or unjust to permit counsel to rely upon that evidence as identifying why there was an error in the drawing of samples, an allegation which had always been made but which had not been particularised in this respect.

54. I was referred to authorities on the meaning of "manifest" error. It is convenient and most helpful to refer to *The Interpretation of Contracts* (6th ed.) by Lewison LJ. at paragraph 14.07 for a comprehensive and unchallenged summary of the law. A determination in a certificate cannot be set aside merely because the certifier has made a mistake. The parties have agreed to be bound by the determination even if the expert has made a mistake. But where the contract provides that the contract does not bind in the case of a "manifest error" it can be set aside. "Manifest" refers to "oversights and blunders so obvious and obviously capable of affecting the determination as to admit of no difference of opinion" or "one that is obvious or easily demonstrable without extensive investigation". Where a certificate is said not to be conclusive in the case of a "manifest error" that cannot entitle a party to a "full blown trial in order to investigate the accuracy of the certificate."

55. Although Mr. Cosulich's first report dated 20 February 2020 mentioned the difficulty of taking representative samples (see for example paragraphs 41, 46 and 54) there was no suggestion that SGS had made an obvious blunder. On the contrary the report emphasised that the taking of representative samples may be "challenging because the operation is usually performed manually". Similarly, Mr. Jones in his report referred to the "underlying difficulty" of capturing representative samples. Both experts explained the high TSP count in the product by reference to the incompatibility of the product rather than by reference to some obvious error by SGS.

56. The matter was explored with Mr. Jones in cross-examination. He explained that if SGS had carried out checks for homogeneity in the shore tanks SGS would have discovered that they were not homogenous and that SGS could not therefore be sure that the samples were representative. Whether that was an obvious blunder by SGS was not put to him. However, the language used by Mr. Jones when asked about these matters does not suggest that he did regard it as an obvious blunder. At the end of this part of the cross-examination this exchange took place:

> Q. If SGS, in June at Ventspils, had checked for homogeneity of the individual shore tanks, they would have known that their composite sample was unlikely to be representative?

> A. Yes, I believe they just drew the samples and did the composite to the best of their ability, but they did not make any homogeneity checks, as far as I know.
>
> Q. You are right, we do not know. If they had checked, then that would have been apparent to them?
>
> A. Yes.
>
> Q. But it is certainly apparent to us now; yes?
>
> A. In retrospect.

57. These answers emphasise that SGS drew the samples "to the best of their ability". They also indicate that Mr. Jones did not know whether SGS had made any homogeneity checks. His use of the phrase "in retrospect" indicates that hindsight is being used. Those answers do not suggest that SGS committed an obvious blunder. If there was an error it was certainly not manifest. It had taken a trial, the exchange of experts' reports and the cross-examination of one of the experts to identify a possible error.

58. I do not therefore accept that the Buyer has established a "manifest error in the drawing of samples" which is what had been alleged.

59. The primary argument of Counsel for the Buyer did not appear to be that there was a manifest error in the drawing of samples. It was that SGS "did not take the steps necessary to ensure that their composite sample was representative: which means that they did not comply with the agreed instructions." Manifest error and a departure from instructions are different concepts; see *Veba Oil v Petrotrade* [2001] 2 Lloyd's Reports 295 at paragraph 34 per Simon Brown LJ. However, a departure from instructions with regard to the drawing of samples was not pleaded. In any event it cannot, in my judgment, succeed (even assuming that a failure to comply with instructions issued post-contract has the effect of depriving the determination of binding effect.) There is, as Simon Brown LJ said at paragraph 26(i) in *Veba Oil* a difference between, on the one hand, an expert going wrong in the course of his instructions and, on the other hand, not carrying out his instructions. This was not a case where the method of taking representative samples was prescribed by contract. It is to be contrasted with the facts of *Veba Oil* where the method of testing for the density of gasoil was prescribed by contract. SGS may have failed to take representative samples but they obviously took samples and must have believed that they were representative. This is, at most, a case of an expert going wrong in the course of carrying out his instructions. To succeed on an argument that the inspector had not carried out his instructions it would be necessary to show something like a sampling of the wrong cargo tanks, as counsel for the Seller submitted. If the determination of SGS could be challenged on the basis that, despite care being taken to obtain representative samples, the samples were in fact unrepresentative then terms in commodity contracts providing for independent inspectors to make binding findings on the basis of such samples would be deprived of effect in many cases.

60. I have therefore rejected each of the four fact-based arguments advanced by counsel for the Buyer in their closing submissions as reasons for avoiding the binding effect of the SGS determination. However, I have found in favour of the Buyer on the contractual

argument that the determination of SGS as to quality is only binding for invoicing purposes. The Buyer is thus free to claim damages for breach of the Seller's duty to supply a cargo of the required specification.

The actual condition of the cargo at the ship's manifold

61. This question of fact has been elaborately argued on both sides. There is in truth no material dispute of fact. The question is what conclusion can properly be drawn from the facts. I have however reached a clear conclusion.

62. Before the cargo was loaded there were two out of seven shore tanks which recorded excessive TSP. The other tanks had compliant levels of TSP. But, as Mr. Jones said and I accept, "it is implicit in any blend on-board operation that component parts of the total blend contained in their respective shore tanks need not individually meet the required end specification for the target blend." That two shore tanks were out of specification was "unsurprising". (In describing the operation as a blend on-board operation Mr. Jones was referring to what in fact happened at Ventspils. There was, see below, an unresolved dispute as to whether the contract, construed in its factual matrix, provided for such an operation.)

63. However, the fuel oil in the seven tanks taken together was, as the experts agreed, "fundamentally incompatible". What this means was explained by Mr. Cosulich in his first report. TSP addresses fuel oil stability. An unstable fuel oil is one which results in the precipitation of solids (asphaltenes) contained in the fuel. (It is, as the adjective "potential" in TSP suggests, a measure of future precipitation of solids.) Fuel oil instability may come about as a result of the co-mingling of incompatible fuel oils. TSP testing is a reliable measure of the compatibility between different fuel oils because, where incompatible fuel oils are co-mingled, the resultant co-mingled fuel will be unstable, causing the precipitation of sediments and delivering a high result when tested for TSP.

64. So, when the seven parcels of fuel oil passed the ship's manifold (and before) they were incompatible with each other and would lead to a high TSP count after the seven parcels had been co-mingled on board. For all practical purposes the effect of the incompatibility was, as Mr. Cosulich said, that the whole cargo would have a high TSP content once it was co-mingled on board. Mr. Jones accepted when cross-examined that this was "probably" so. In my judgment this is sufficient to establish that the Product when it passed the ship's manifold (and before) was not compliant with the specification.

65. The submission made by counsel for the Seller was that the incompatibility only arose in the NOUNOU's tanks, as the various parcels from the shore tanks that had been sequentially loaded were blended in situ in the ship's tanks. But this submission cannot survive the experts' agreement that the fuel contained in the seven shore tanks was fundamentally incompatible.

66. I have well in mind that risk in the cargo passed from the Seller to the Buyer as the product passed the flange connection between the loading hoses and the vessel's permanent hoses. But in circumstances where the cargo from all seven tanks was fundamentally incompatible as it passed the flange connection the production of an off-

spec cargo after blending on board was, in practical terms, inevitable. This was not a matter of risk but of practical inevitability.

67. The matter can be tested in this way. If the incompatibility had been discovered by SGS before loading would the product have been loaded at the same rate, in the same order and in the same quantities as agreed between the terminal Loadmaster and the vessel's Chief Officer ? Plainly not. The projected blend of the product and the required rate, sequence and quantity of loading would have had to have been altered before loading so as to ensure that the cargo after loading did not have an excessive TSP. An incompatible cargo would not knowingly have been loaded on board the vessel. By reason of incompatibility the TSP count was excessive.

68. I have reached this conclusion without reliance upon clause 5.2 of ISO 8217 which requires the fuel to be homogenous. I refused the Buyer permission on the opening day of the trial (for reasons given on that day) to amend to plead a breach of this clause as a cause of the Buyer's loss. It was said that the contract in fact provided for a blend on-shore operation but counsel for the Seller did not accept that proposition and required time to investigate the factual matrix. I accepted that clause 5.2 might still be relied upon in order to construe the contract so long as any such argument of construction did not amount to another way of raising the argument of breach, for which permission had been refused. It seemed to me that the manner in which counsel for the Buyer sought to rely upon it in his closing submissions, where he sought to say that the parties had not agreed to a blending on-board operation, was in truth another way of putting the argument for which permission to amend had been refused (though I accept of course that counsel sought to avoid doing that). I have also reached this conclusion without reliance upon the "one cargo lot" provision in the delivery clause which seemed to me to mean no more than that the cargo was to be delivered in one cargo loading operation.

69. For these reasons I have concluded that the Buyer has established the breach of contract alleged. By reason of incompatibility the cargo had an excessive TSP.

<u>The measure of damage</u>

70. There was, by the time of trial, agreement that the market value of the fuel oil in on-spec condition was $424 per mt.

71. There was a dispute as to the actual value of the fuel in its off-spec condition.

72. The Buyer's case (at trial) was that the actual value was $235.73 per mt. It was said that there was no market for the fuel oil in its off-spec condition but that the cost of a blending operation to make it on-spec and then selling it enabled the actual value of the off-spec cargo to be assessed. That gave a loss of $7,782,168.

73. The Seller's case was that there was a market for the fuel oil in its off-spec condition and that value was $404 per mt. On that basis the Buyer's loss was considerably less than that claimed, namely, $826,703. In the alternative the actual value was $380 per mt giving a loss of $1,818,446.

74. The loss suffered by the Buyer was considered by two market experts. The Buyer called Mr. Waddington. However, whilst he had much experience in the oil business, he had no experience of the fuel oil market. The Seller called Mr. Heilpern who had experience

of the fuel oil market. He also had experience of blending fuel oils though he could not recall having done so in order to achieve a desired level of TSP. On the face of it Mr. Heilpern was to be preferred in terms of experience. But both experts found it necessary to consult with traders in the market. This was stated expressly by Mr. Heilpern in his reports and revealed by Mr. Waddington when cross-examined. This created difficulty when assessing their evidence, particularly when the opinion of traders had been relied upon. There was an attack on Mr. Heilpern's objectivity but I was not persuaded by it. A particular figure he used was subject to criticism. It is possible, though not obvious, that a different figure should have been adopted by Mr. Heilpern. This perhaps suggested that some allowance for approximation or possible error should be made when considering his calculations but I nevertheless considered that he was seeking to give the court his objective opinion.

The market for high TSP fuel oil

75. It has been said that "normally, there is no market in the ordinary sense for damaged or defective goods"; see *Benjamin's Sale of Goods* 10th.ed. paragraph 17-052. In the present case the fuel oil was not damaged or defective but had a specification which did not comply with the contract of sale and purchase. The specification was an industry standard, ISO 8127, and further blending was required to make it acceptable to bunker fuel buyers.

76. Mr. Heilpern gave evidence that there are entities in the market who purchase and blend high TSP fuel oil for on-sale. He instances Vitol, Mercuria, Gunvor, BP and Totsa. Mr. Waddington gave evidence that there was no "direct market for high TSP fuel oil to an end consumer". A bunker fuel buyer would not want it because of the risk of engine problems, and power generation suppliers, whilst they could possibly accommodate small quantities of high TSP fuel oil, are limited in number, geographically dispersed and unlikely to be interested in large quantities of high TSP fuel oil. But when cross-examined Mr. Waddington accepted that there were purchasers of high TSP fuel who blended it for on-sale. Indeed, he said he was aware that in many circumstances large traders will take in a cargo in distressed condition and he accepted that it was a reasonable view for Mr. Heilpern to take that there were markets in which "this contaminated product" could have been sold. His explanation for not mentioning this market in his first report appears to have been that that none of these "large traders" had expressed an interest in the product. In view of Mr. Heilpern's experience of the fuel oil market and in the light of Mr. Waddington's evidence in cross-examination I accept Mr. Heilpern's evidence that there are traders who purchase and blend high TSP fuel for on-sale.

77. There was, however, no evidence that in 2018 trader/blenders had bought cargoes similar in size to those on NOUNOU with as high a TSP as 0.37%. Mr. Heilpern was aware that in 2018 traders/blenders bought high TSP cargoes from PKN Orlen (a Polish refinery) in cargo lots of 15,000 mt with up to 0.15% TSP, applying a discount of $0.5 per mt for every 0.01% over 0.1% up to 0.15%. Mr. Waddington accepted in the Joint Memorandum that there was a market for such fuel oil. Mr. Heilpern had also been informed by a trader at Gunvor that he had "recently" blended a cargo of 0.42% TSP. In his supplementary report Mr. Heilpern said that some buyers do not have TSP limits and he described the market for fuel oil as "large and diverse". Mr. Waddington was given the opportunity to dissent from that description of the market and did not do so.

Instead he said that from his observations and discussions "these large buyers would not take such a large cargo in its entirety".

78. Mr. Waddington explained that he did not consider that such trader/blenders would have been attracted by a large quantity of very high TSP cargo. He thought that if there had been such buyers Mr. Grigoriev would have accepted an offer from them. It is therefore necessary to turn to Mr. Grigoriev's evidence.

79. Mr. Grigoriev gave evidence in his second statement that he had approached Nathan Witts at Tullett (who had brokered the contract between Septo and Tintrade) and asked him to find a solution for the off-spec product. He said that over a two or three week period he had a series of intensive telephone calls with Tullett to find a solution including investigating buyers for all or part of the off-spec product. He said that he was told that no expressions of interest had been received. This evidence was challenged on the basis that it had not been mentioned in Mr. Grigoriev's first statement. In that statement Mr. Grigoriev had said that in the expectation that the product would be returned to Septo, Septo instructed SGS to conduct tests on samples from the off-spec cargo and from a cargo of straight run fuel oil to see whether the off-spec cargo could be blended with a compatible product to produce an on-spec cargo. "In the light of these results, Septo approached Tullett and asked for an indication of the price such a cargo might achieve if delivered into Singapore." Once Tullett had advised that a "net back value" of $350 per mt could be achieved for the blended cargo Septo then approached Macoil and Tintrade to invite them to match that net back value. Mr. Grigoriev regarded them as the "obvious buyers" for the off-spec cargo. Mr. Grigoriev made no mention in his first statement of asking Tullett to find buyers for the off-spec product. Indeed, he said this: "If Septo had offered it to other buyers in an off-spec condition, it is possible that they would have sought an even lower price from Septo, knowing that it was a distressed sale." That comment sits unhappily with the suggestion made in his second statement that attempts had been made to find a buyer for the cargo in its off-spec condition and that no interest had been expressed.

80. If Mr. Grigoriev had had an intensive series of calls with Tullett over a two to three week period regarding attempts to find a buyer for the off-spec cargo and, following the lack of interest, decided to carry out the blending operation and sell the blended cargo into Singapore his first statement would, I think, have been expressed in different terms than it was. Indeed, the tenor of his first statement is contrary to the account given in his second statement.

81. It appears that before signing his second statement on 9 April 2020 Mr. Grigoriev approached Mr. Witts to ask him for his recollection of what had happened in 2018. On 9 March 2020 Mr. Witts replied as follows:

> "July/August was a lifetime ago but I know if I tried to sell 0.4 tsp now or 2 years ago unless it was basically free I wouldn't be able to place it in malta or rots for sure. Even of it was free because it isn't linear I'm not sure anyone in malta would take it as there is less tankage than rots. I was offering some oil from element last week that was 0.2 and some bbbls from millazo that was 0.3 and I didn't have anyone that would touch either."

82. Thus, perhaps unsurprisingly, Mr. Witts did not appear to have a recollection of what happened in July and August 2018. Instead he offered his opinion of what was likely to have happened. On 6 April 2020 Mr. Grigoriev asked Mr. Witts for his recollection and for any written materials relating to his attempts to place the cargo in the market. On the same day Mr. Witts replied. He said that all phone calls were recorded but that he was working at home and that he did not have access to his phone calls. "Without being specific and given we are talking a 2 month period nearly 2 years ago I wouldn't know where to start as I make hundreds of phone calls a week on multiple positions. Sorry I cant be more specific at this time." Again he offered his opinion that "rarely does anybody take the risk on such high sediments on such a large quantity".

83. To resolve this dispute of fact I therefore have only Mr. Grigoriev's evidence. I consider that it is more probable than not that the account given in his first witness statement reflects what took place in July and August 2018. If Mr. Grigoriev, over a two to three week period, had had intensive discussions with Mr. Witts about selling the off-spec cargo and that Tullett had canvassed the market for buyers of the off-spec cargo but with no result it seems to me likely that he would have mentioned that as the reason why Septo decided to blend the off-spec cargo itself. Instead he gave an account of approaching Tullett for buyers of the blended cargo after the SGS tests suggested that blending the off-spec cargo was likely to bring it back on-spec. Rather than saying that selling the blended cargo into Singapore was the best option because Tullett had failed to find any buyer for the off-spec cargo, Mr. Grigoriev said that he discussed this matter with other traders who all confirmed that Singapore was the best option for Septo.

84. When cross-examined about this Mr. Grigoriev insisted that his account in his second statement was true. However, Mr. Grigoriev was a witness who was plainly aware of the issues in the case. Some of his answers were long, and in the nature of argument, as he sought to put in as much material as he could to explain Septo's position. It is Septo's case that there was no market for the off-spec cargo and Mr. Grigoriev was very careful not to give any answers that suggested that at the time he and Septo had formed a view as to what the value of the off-spec cargo was. Thus he denied that in August and September 2018 Septo stated to Tintrade and Macoil what it thought the value of the cargo in its off-spec condition was, when, on a fair reading of the correspondence, that is what Septo (and Mr. Grigoriev) clearly did.

85. On 23 August 2018, in a letter entitled "Request for offer of Salvage Sale and/or loading of Off-spec Product", Septo informed Macoil that representatives of their underwriters had managed "to find potential buyer for the price above $350 USD/mt based on present market and based on actual circumstances." Macoil was invited to match that price. Mr. Grigoriev said that that was not the value of the cargo in its "contaminated state". However, it is difficult to understand a salvage sale based on market value and the actual circumstances in any other light.

86. On 23 August 2018 Septo invited Tintrade to bid for the off-spec cargo on a "salvage sale". Septo said that they had found a potential buyer for the cargo, following various test blends, for a price above $350 per mt "based on present market situation and based on present circumstances." Tintrade were invited to offer to buy the cargo "at an equivalent price." The natural meaning of that letter is that Septo valued the off-spec cargo at above $350 per mt. However, Mr. Grigoriev refused to accept that.

87. On 24 August 2018 Septo informed Tintrade of their claim. They informed Tintrade that "the contaminated cargo will be sold as a salvage for the amount of 350 USD/MTS basis Gibraltar based on present market situation and current circumstances." Again, the natural meaning of the letter was that Septo valued the off-spec cargo at US$350 per mt. Mr. Grigoriev refused to accept that suggestion.

88. On 27 August 2018 Macoil requested a reduction in the price to $175 per mt. and claimed payment of the damages to date. On 29 August 2018 Septo informed Macoil that it "had never questioned the cargo being off-spec as per contract" but that the price and conditions proposed by Macoil were unacceptable. "We as Septo have to sell this product in line with existing market conditions in our own interest and in the interest of our insurers. We have thus re-iterated and substantiated our offer below which we kindly ask you to check and provide your substantiated counterview if you see the situation differently." In response, on 29 August 2018 Macoil requested either payment of $2 million and a guarantee in respect of a further $4 million in respect of Macoil's damages or a purchase of the cargo at $250 per mt. On the same day Septo rejected the offer to buy at $250 per mt. "Considering a substantial difference with present market conditions you can understand that the Bank wants to get the highest value for the salvage fuel".

89. On 30 August 2018 Macoil replied: "In a last effort to amicably settle this dispute we can offer you USD 350/mt for the cargo, subject to the terms of our agreement". On the same day Septo rejected that offer and said they would accept $380 per mt. for "the contaminated cargo". They justified their increased demand by reference to a recent rise in price levels ($20 per mt.) and costs incurred in connection with shipping and blending costs ($10 per mt.).

90. But agreement was not reached.

91. On 3 September 2018, after learning that Macoil had sold 4.6 mt of the cargo to AOT at $175 per mt, Mr. Grigoriev complained that the product had been sold at $200 per mt less than "its real value". That can only be a reference to Septo's valuation of the cargo in its off-spec condition at $375 per mt.

92. Mr. Grigoriev's evidence in response to all questions on this contemporaneous correspondence was that $350 per mt was what he called a "net back value", that is the value which could be achieved having blended the cargo with another so as to achieve a satisfactory quality of cargo. This was the evidence that he had given in his witness statement dated 6 December 2019. It was "the net price of the cargo once all costs and expenses had been taken into account". Whilst calculations of this nature may well have figured in Septo's assessment of the value of the off-spec cargo I am unable to accept Mr. Grigoriev's evidence that $350 plus per mt. was not his assessment of the value of the cargo in its off-spec condition. It is not possible to fit that denial with the terms of the contemporaneous emails to Tintrade and Macoil. Those emails refer to a salvage sale based upon the market situation and the current circumstances. No mention is made of the price which could be achieved in the then hypothetical circumstances of the cargo having been blended with another cargo so as to produce an on-spec cargo. Indeed, the price payable by a purchaser of the re-blended on-spec cargo would be in excess of the net back value. I formed the opinion that Mr. Grigoriev was not being candid with the court and was instead arguing Septo's case as best as he could.

93. Counsel for Septo submitted that the price of $350 per mt. "included the costs of re-blending; in effect it reflected the price that Septo hoped to achieve after a successful re-blending operation." I am unable to accept that submission. That would be a "gross" value, not a "net back value".

94. For these reasons, the unreliability of Mr. Grigoriev as a witness and the differences between his first and second statement, I am unable to accept Mr. Grigoriev's evidence that he instructed Tullett to find buyers for the off-spec cargo. The reliance placed by Mr. Waddington on the absence of offers from trader/blenders in 2018 is therefore misplaced.

95. Moreover, the terms of Mr. Grigoriev's emails to Tintrade and Macoil suggest that in his opinion the fuel oil in its off-spec condition did have a market value in August and September 2018. Although Tintrade had no interest in purchasing the off-spec cargo back from Septo, Macoil was interested in buying it in its actual condition at a reduced price. It ultimately offered to buy the cargo at $350 per mt. That suggests that Macoil also believed that the off-spec cargo had a market value. But when it made that offer Septo wanted $380 per mt. and no deal was done.

96. Thus, although no evidence has been adduced of actual sales of fuel oil cargo with TSP of 0.37% and in the quantity on board NOUNOU, I am persuaded that there was a market in 2018 for such off-spec fuel oil. I accept Mr. Heilpern's evidence that the market for fuel oil is large and diverse. That market includes traders and blenders who purchase high TSP fuel oil for blending and on-sale. That market is particularly apparent from the PKN Orlen sales. Although PKN Orlen sales do not appear to include fuel oil of the high TSP or of the quantity on board NOUNOU information provided to Mr. Heilpern from a trader at Gunvor showed that sales of such high TSP can take place. Mr. Waddington's doubts about the existence of a market stemmed from an understanding that this market had been tested by Septo and Tullet in 2018 and that no purchasers had been found. But Septo and Tullett had not tested the market. Septo preferred to attempt to sell the off-spec cargo to Tintrade or Macoil and if that failed to conduct the blending operation themselves and sell the blended on-spec cargo into Singapore. The negotiations between Septo and Macoil show that each believed the off-spec cargo had a value. It is also not without significance on this question of an available market that until trial the case of Septo was that the actual value of the fuel oil in its off-spec condition was $175 per mt, being the price at which Macoil had sold 4,600 mt to AOT. At that stage Septo must have considered that it was appropriate to measure their losses by the price available in the market. Indeed the pleading claimed that the sale at $175 per mt by Macoil to AOT was "an arm's length sale in the same or the nearest available market."

The actual value of the off-spec fuel oil

97. On that basis the actual value of the off-spec fuel in the market must be assessed. This is difficult because there is no published data for sales of fuel oil with a high TSP.

Mr. Heilpern's view

98. In his opinion the value of the off-spec product was $404.04 per mt.

99. There is a large market for fuel oil in barges at Rotterdam. Pricing is generally based on pricing published by Platts for Barges FOB Rotterdam. That was used in the Recap recording the contract between the Seller and the Buyer in this case. Mr. Heilpern exhibited messages from traders who confirmed the discount used for valuing off-spec product sold by PKN Orlen. The trader at Gunvor to whom Mr. Heilpern spoke said that he assessed a discount of $12.50 on Barges as appropriate. Another trader from Mercuria thought that a discount of $15-$20 was appropriate. Both were apparently using the PKN Orlen discount and the anticipated cost of the blending operation. It is apparent from the spread of suggested discount that different views as to the appropriate discount can be held. There was no way of examining the opinions of traders offered to Mr. Heilpern. Mr. Heilpern himself considered that an appropriate discount was $18.77. It was not explained how that figure was achieved. It appears that he may have taken into account the spread of discounts suggested to him and the costs of storage and blending. But the details were not given. He then concluded that this would equate to a price of $404.04 per mt. Again, the precise arithmetic is not apparent. I do not consider that I can accept this figure in circumstances where it is unclear how it is arrived at. During the trial it was referred to from time to time as a value based upon the PKN Orlen discount. It is likely that that was one matter borne in mind but, reading Mr. Heilpern's report, the costs of a blending operation were also considered. It is unsatisfactory that the court is asked to accept a figure which is unexplained.

Mr. Waddington's view

100. In his opinion the value of the off-spec product was $235.73 per mt.

101. Mr. Waddington's opinion was not of the actual value of the off-spec cargo on the basis of an available market. His assessment was based on the costs of blending the off-spec fuel so as to make it on-spec for sale in Europe. These costs were assessed in the sum of $7,785,478 or $188.35 per mt.

102. Even if there was no available market and it was necessary to analyse what was termed "the costs of cure" I would not have found Mr. Waddington's analysis persuasive. First, I am not at all sure that Mr. Waddington is an expert in this subject. He has not dealt in fuel oil and has not been involved in blending fuel oil. Second, his cost of re-blending appears to be considerably in excess of what Septo and Macoil must have thought the cost was in 2018 when Septo invited offers of $350 per mt for the off-spec product and Macoil offered to buy the off-spec product at $350 per mt. Whereas Septo and Macoil considered that the cargo was worth $350 per mt. Mr. Waddington assessed its value at $235 per mt. Third, when Septo carried out the blending operation in respect of 31KT of the off-spec cargo and transported it to Singapore for on sale they incurred losses of $3.82 million according to the evidence of Mr. Grigoriev. Yet Mr. Waddington appears to have calculated that the reasonable cost of blending the total cargo of 41KT and selling it in Europe was some $7.78 million. When account is taken of freight costs to Singapore the total costs calculated costs based on Mr. Waddington's figures were of the order of $10.78 million. This, at the very least, suggests that some caution should be exercised before accepting Mr. Waddington's figures but in reality suggests that something has gone wrong with Mr. Waddington's figures. Although Mr. Waddington commented on the reasonableness of the steps taken by Septo he did not have any explanation for this very substantial difference beyond saying that "market and price conditions can change daily so that there is no exact standard formula by which theses costs can be derived" and that "a relatively complex bending operation" was required.

His figures were subjected to criticism by Mr. Heilpern on several fronts (the use of straight run fuel oil, assuming blending is linear, blending to 0.08% rather than 0.1% TSP and blending on a VLCC rather than using storage ashore) but it is unnecessary to consider each of those criticisms. Mr. Waddington's lack of experience of the fuel oil market, the difference between the contemporaneous assessment of value ($350 per mt) and his assessment ($235 per mt) and the huge difference between the actual and the hypothetical costs calculated by Mr. Waddington persuaded me that I could not safely rely upon Mr. Waddington's figures.

The best evidence of the actual value of the off-spec cargo

103. So, for different reasons, neither the opinion of Mr. Heilpern nor the opinion of Waddington is persuasive as to the actual value of the off-spec cargo. The court is left with the contemporaneous correspondence between Septo and Macoil. Septo sought an offer in excess of $350 per mt. and eventually received an offer of $350 per mt. from Macoil. At that point Septo demanded $380 per mt. Agreement was not reached. Counsel for Tintrade, the Seller, submitted that, if his primary case of $404 per mt. was not accepted by the court, the court should find the value in the figure of $380 per mt. It is true that that fits well with Mr. Grigoriev's complaint on 3 September 2018 that Macoil had sold part of the cargo at $175 per mt., $200 per mt. less than "the real value". However, the impression I gained from the correspondence was that Mr. Grigoriev, having got Macoil up from an initial offer of $175 per mt. to an offer of $350 per mt., wished to get them up a little further. Although he said at the time that the increased demand was because of a movement in the market and because of incurred costs there was no other support for these statements. Just as he said in the correspondence that he had a "buyer" (when he did not) these statements were probably made to encourage (or, to use the language of counsel for the Buyer, to "hustle") Macoil to increase their offer yet further with no actual foundation in fact. In my judgment the best evidence of the actual value of the off-spec fuel loaded on NOUNOU was $350 per mt. That was the price sought at the time by Septo and more importantly was the price offered by Macoil at the time.

104. There was evidence from Mr. Grigoriev as to why he did not accept the offer. It was suggested that he did not wish to give credit terms to Macoil. There is little if any support for that in the contemporaneous correspondence. However, I do not consider that the reason matters. What is significant is the view he and Macoil formed as to the value of the off- spec fuel oil.

105. Tintrade did not re-purchase the cargo at $350 per mt. Mr. Katsyka was asked about this and said that by the time of 23 August 2018 Tintrade had loaded another 3-4 vessels and were preparing for another. For operational reasons it would have been difficult to receive another 41 KT. He did not think that would be very good business. That evidence appears credible. I therefore do not consider that Tintrade's failure to buy the cargo at $350 per mt. is evidence that Tintrade did not consider that the cargo was worth that. In any event, Macoil clearly did.

106. On the basis of $350 per mt. the loss suffered by Septo was $3,058,801. This is somewhat lower than the figure said to represent Septo's actual loss of $3.82 million in respect of the 31KT re-blended by the Septo. But damages based upon their actual loss have not been claimed by Septo. Indeed I was told that they refused to provide disclosure in respect of their actual loss. Their claim, until the exchange of skeleton

arguments, was for over $10 million. That was grossly exaggerated because they preferred to say that the market value was $175 per mt. rather than the $350 per mt. which they had sought at the time and had been offered by Macoil. When that claim was abandoned they based a claim on a notional cost of cure rather than on the figure said by Mr. Grigoriev to be the actual cost of cure in respect of the 31 KT re-blended by Septo.

107. I consider that Septo's losses should therefore be found in the sum of $3,058,801.

108. There is also a claim for a declaration that Septo is entitled to be indemnified in respect of Macoil's claims against Septo. No such claim has been advanced and it is known that Macoil went into liquidation in about October 2018. It is possible, I suppose, that the liquidator may bring a claim and so I consider that in principle Septo is entitled to a declaration of an entitlement to be indemnified. However, I am reluctant to grant the declaration sought without knowing what claims, if any, will in fact be advanced by Macoil. Unless the parties can agree a form of declaration which preserves the right of Tintrade to argue that the particular claims advanced by Macoil should not be covered by the declaration I would prefer not to grant a declaration but to preserve Septo's right to seek such a declaration in the event that claims are in fact brought.

109. I am very grateful to counsel for the clarity of their submissions and their ability to deal with the several legal, factual and expert issues in the four days allotted to the trial.