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Case No: 2008-378

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

Royal Courts of Justice
Strand, London, WC2A 2LL
30/10/2012

B e f o r e :

MR JUSTICE HAMBLEN

Between:

Bominflot Bunkergesellschaft fur Mineralole mbH & Co	**Claimant**
- and -	
Petroplus Marketing AG	**Defendant**

Philip Edey QC (instructed by Holman Fenwick Willan Llp) for the Claimant
The Defendant was not represented
Hearing dates: 22 October 2012

HTML VERSION OF JUDGMENT

Mr Justice Hamblen :

Introduction

1. By a sale contract concluded on or about 9 January 2007, KG Bominflot ("the Buyer") agreed to buy and Petroplus ("the Seller") agreed to sell 38,500mt +/- 10% at the Buyer's option 1% EU qualified gasoil ("the gasoil") ex the BRC refinery in Antwerp at an FOB price equivalent to the International Petroleum Exchange ("IPE") February 2007 contract, minus $9.50/mt ("the contract").

2. Prior to loading, shoretank samples of the gasoil were tested by SGS and the gasoil was certified to be (and the Buyer accepts that it was in fact) on specification, including as to sediment content. Loading on board the *Mercini Lady* ("the vessel") was completed on 17 January 2007. By the time the vessel arrived at El Ferrol only 4 days later, the cargo was off-specification as to sediment.

3. It is the Buyer's case that:

   (1) The reason the gasoil's sediment content increased in such a short period of time was that the gasoil was, on delivery, "unstable" i.e. the gasoil contained unstable components which, when combined with air, oxidised, with such oxidation in turn producing (within the short voyage to El Ferrol) gums and sediments that were not there on delivery.

(2) Such an unstable gasoil (even prior to formation of sediment) could and would not be used for any of the purposes for which a gasoil of this description would normally be used (because of the risk of sediment formation) and was therefore, on delivery, not of satisfactory quality. The fact that the instability only manifested itself after delivery (in the form of increased sediment) is irrelevant.

4. The Buyer alleges that in those circumstances the Seller was in breach of the implied term under s.14(2) of the Sale of Goods 1979 ("SGA") that the gasoil should be of satisfactory quality on delivery and seeks to recover the losses allegedly caused thereby.

5. The matter comes to trial following an attempt by the Seller to defeat the Buyer's claim on the trial of certain preliminary issues (reported at [2009] 2 Lloyd's Rep 679 – Field J) and a subsequent appeal to the Court of Appeal (reported at [2011] 2 Lloyd's Rep. 442 – the main judgment being given by Rix LJ with whom Maurice Kay and Patten LJJ agreed), as to what terms as to quality were to be implied into the contract in circumstances where it contained detailed specifications and a certificate final clause. The result of those proceedings is that the s.14(2) term is to be implied.

6. In the meantime:

   (1) At the end of 2011/early 2012, the Seller went into a form of administration in Switzerland.

   (2) In April 2012, its former solicitors in these proceedings came off the record and it is no longer represented by solicitors nor has it obtained (or sought) permission from the Court to be otherwise represented (pursuant to CPR 39.6 and PD 39A, para.5).

   (3) Very recently, the Seller applied for and obtained recognition here of the administration as a foreign main proceeding in accordance with the UNCITRAL Model Law on cross-border insolvency as set out in Schedule 1 to the Cross-Border Insolvency Regulations 2006. However, the stay of these proceedings which automatically follows such recognition has been lifted.

   (4) The Seller has to date served no factual or expert evidence and is, as a result of the order of Field J dated 24 July 2012, precluded from serving such evidence or from running any positive case as regards the facts or matters of expertise that are otherwise in issue on the pleadings.

7. In the result the Seller was not represented at trial nor did it present any evidence or advance any submissions. Its case stands as set out in its Amended Defence ("ADef").

8. The Buyer nevertheless opened the case in detail both in writing and orally. It called its factual and expert witnesses in the usual way to confirm their witness statements and to answer any questions that the Court might have.

The evidence

9. In addition to the documentary evidence derived from the parties' disclosure and set out in the Trial Bundles, the Court was provided with witness statements and evidence from Mr Rolf Roeper, the Buyer's Risk Manager at the time, and Mr Juan Jose Alvarez Gonzales, the Buyer's Managing Director.

10. It was also provided with expert reports and evidence from Mr Roland Revell, a petroleum chemist consultant with Minton Treharne & Davies, and Ms Catherine Jago, an oil and energy industry expert with CJH Energy Limited.

11. All the written evidence relied on by the Buyer had been served on the Seller.

The issues

12. Leaving aside various factual matters not admitted by the Seller (but in respect of which it has not pleaded a positive case), the main issues raised on the pleadings are as follows:

(1) Were the high sediment levels found at El Ferrol the result of the gasoil being the subject of rust and/or inorganic contamination on board the vessel?

(2) If not:

(a) Was the gasoil unstable on shipment/delivery?

(b) If so, was the gasoil therefore not of satisfactory quality on shipment/delivery? In particular, is an unstable gasoil of this description suitable for all the purposes for which gasoil of this description is commonly supplied?

(3) If the gasoil was not of satisfactory quality, is that a breach of contract by the Seller in circumstances where the way in which the problem would (and did) manifest itself was increased sediment which is a matter covered by the contractual specification?

(4) If so, did that breach cause the Buyer the losses alleged?

(5) If so, were the legal costs paid by the Buyers to owners in connection with a claim brought by owners arising out of the fact that the vessel arrived at El Ferrol with off-specification gasoil too remote to be recoverable? (6) Did the Buyer fail to mitigate its losses by not removing the sediment by filtration and treating any instability?

13. However, as a result of the Order of Field J dated 24 July 2012, in circumstances where the Seller has served no evidence within the time stipulated by that Order, the Seller is precluded from running any positive case as to any fact or matter of expertise which is in issue.

The contract

14. The contract was entered into on or about 9 January 2007. It materially provided as follows:

(1) Clause 4.1 set out various quality specifications for the gasoil, including that the total sediments should not exceed 10mg/litre. However, there is no specification as to stability.

(2) Quality was to be determined by a surveyor (to be agreed upon) at the loadport on the basis of shoretank samples and the determination was to be final and binding save in the case of fraud or manifest error (Cl.12).

(3) Under Cl.15, risk and title was to pass when the gasoil passed the vessel's permanent hose connection at the loadport at which time the Buyer assumed all risks pertaining to the gasoil.

(4) Within Cl.18 is an exclusion clause on which the Seller relied, unsuccessfully, on the trial (and appeal in respect) of the preliminary issues.

The on-sale contracts

15. The gasoil was on-sold by the Buyer to its sister company, Bominflot SA on a CIF El Ferrol and Cartagena basis. Bominflot SA had in turn on-sold the gasoil to the Spanish Ministry of Defence on a CIF EL Ferrol and Cartagena basis. In each case the contract required the gasoil to have maximum sediments of 10mg/litre (i.e. just as in the head contract between the Buyer and Seller).

The background facts

16. I find the background facts to be as follows:

(1) The agreed loadport surveyor was SGS. Prior to loading at Antwerp, SGS tested a composite sample made up of samples of the gasoil taken from the 5 shoretanks (2233, 2241, 2245, 2332 and 2434) from which the gasoil was loaded on to the vessel. The results of that test were recorded in SGS' Certificate of Analysis and indicated that total sediments in that sample were 6.4mg/litre.

(2) The Buyer accepted that the gasoil complied with the contractual specifications, including as to sediment, on delivery (even though a test method other than that specified in the contract was used to test for sediment).

(3) A total of 39,988.029mt gasoil was loaded on board the vessel under two bills of lading, for carriage to and delivery at El Ferrol and then Cartagena, Spain. Loading was completed at 0245hrs on 17 January 2007, with the vessel departing at 0630hrs that day.

(4) The vessel arrived at El Ferrol on the morning of 21 January 2007 i.e. only 4 days after completion of loading at Antwerp. That was within a reasonable time of delivery of the gasoil, i.e. on board the vessel, as accepted by the Seller before the Court of Appeal: Rix LJ at paras.32 and 64(1).

(5) Composite samples of gasoil were taken from each of the vessel's tanks on 21 January, tested (on behalf of the Spanish Ministry of Defence) by Laboratorio de Fluidos and in every case found to be off-specification as to sediment, with the results ranging from 11 to 104mg/litre.

(6) Further samples from the vessel's tanks were taken on 22 January and tested as follows:

(a) Upper, middle and lower samples were taken from each tank on behalf of the Spanish Ministry of Defence and again tested by Laboratorio de Fluidos who found that the average sediment quantities across the three samples from each tank was lower than in the previous composite samples but still in most cases above 10mg/litre, with the average being 14mg/litre.

(b) Upper, middle, lower and running samples were taken from each tank by SGS on behalf of the Seller and tested by SGS who set out their findings in preliminary report BC07-00355 which shows that some of the samples had extremely high sediment content (the highest being 106mg/kg or 92mg/litre); a number of the running samples showed

sediment in excess of 10mg/litre; and the average of each tank's average sediment content across its upper, middle and lower samples was 17mg/litre.

(7) As a result of its testing of the gasoil showing the gasoil to be off-specification as to sediment, the Spanish Ministry of Defence rejected the gasoil.

(8) On 30 January, the vessel moved to an anchorage at Bilbao arriving there the following day.

(9) Further lower, middle, upper and running samples were taken from the vessel's tanks on 2 February and tested by SGS with the results showing significantly higher sediment levels than previously found, with every sample showing sediment levels higher than 10mg/litre and the average of all the running samples being 39mg/litre and the average result for the average of the upper/middle/lower samples for each tank being 53mg/litre.

(10)Samples taken on 2 February, along with retained loadport samples, were subsequently the subject of a joint analysis in Reading in June 2007 (attended by, amongst others, CWA on behalf of the Seller) the results of which were as follows:

(a) Testing the nature of the sediments: Samples of the sediment consisted mainly of amorphous agglomerates of carbon/sulphur rich material. This type of deposit is indicative of instability and/or incompatibility, as explained in the evidence of Mr Revell.

(b) Testing the level of sediments:

(i) Tests on retained loadport shoretank samples (for the 5 shoretanks) showed sediment levels of 18, 10, 44, 170 and 6 mg/litre (as compared to, respectively, 7, 3, 25, less than 1 and 2 mg/litre found by SGS at the loadport).

(ii) Tests on a volumetric composite of a second set of retained loadport shoretank samples showed sediment levels of 55mg/litre.

(iii) Tests on a volumetric composite of individual cargo tank samples taken on completion of loading at Antwerp showed sediment levels of 95mg/litre (as against 9mg/litre found at Antwerp after loading).

(iv) Tests on a volumetric composite of the middle samples from each cargo tank taken at Bilbao showed sediment levels of 59mg/litre.

(c) Testing for storage instability:

(i) Quite separately from testing for actual sediment levels, it is possible to test for storage stability (using test method ASTM D5304). Such a test was done (for the first time) at the joint testing.

(ii) A volumetric composite of the retained loadport shoretank samples was prepared for storage stability testing, which involved filtering the sample. Due to a delay of a few hours after filtering and before the test, the already filtered sample was refiltered, removing the equivalent of 4mg/litre of sediment after only a few hours.

(iii) The storage stability test was then done in duplicate on the refiltered sample, with results of 3.5 and 4.1mg/100mls. The relevant upper test limit is 1.5 mg/100mls so that the results were indicative of possible stability problems, as explained by Mr Revell.

The preliminary issues

17. The preliminary issues were suggested by the Seller on the basis that if it could shut out the implied terms on which the Buyer's case was then based, it would defeat the Buyer's claim without the need for a trial.

18. The Seller contended that the implied terms on which the Buyer relied (a) should not here be implied or (b) alternatively were here excluded.

19. The Buyer agreed to the proposed preliminary issues which were duly heard by Field J and resolved (largely) in favour of the Buyer. In particular, Field J held that:

    (1) there was an implied term:

        (a) under s.14(2) of the Sale of Goods Act 1979, that the gasoil would be of satisfactory quality on delivery, one aspect of which was the gasoil's ability to remain of satisfactory quality for a reasonable period after delivery; and

        (b) at common law that the gasoil would remain on specification for a reasonable time after delivery;

    (2) neither term was here excluded by Cl.18.

20. The Seller appealed to the Court of Appeal only in relation to conclusions (1)(b) and (2). It therefore accepted that, subject to (2), implied term (1)(a) was indeed to be implied (notwithstanding the detailed specifications in the contract and the certificate final provisions). On appeal, the Seller succeeded in relation to (1)(b) but not in relation to (2). The Seller sought permission to appeal to the Supreme Court but permission was refused.

21. For present purposes the important point is that it has been held that the contract contained the s.14(2) implied term of satisfactory quality. It was the Buyer's case that there was a breach of this term on delivery by reason of the instability of the gasoil. It did not press its alternative argument that the implied term involved an obligation that the gasoil would remain of satisfactory quality for a reasonable period after delivery.

Issue (1): was the vessel responsible?

22. It is convenient to start with this issue, not least because the only other possibility raised by either side is that the gasoil was unstable on delivery (it being common ground that the gasoil was on specification as to sediment on delivery).

23. The suggestion that the increased sediment levels were attributable to inorganic or rust contamination on board the vessel was first pleaded in the ADef, served on 12 December 2011. No evidence was served to support the suggestion and the Order of Field J precludes it even being advanced.

24. In any event, I accept the expert evidence of Mr Revell rejecting the suggestion that the sediment increases were due to inorganic or rust contamination on board the vessel. As he stated in his report: "the various analyses have conclusively demonstrated the sediment was predominantly inorganic in nature and was not rust from the vessel's tanks and/or lines". Mr Revell's view would appear to have been shared by CWA (representing the Seller at the joint analysis) as set out in para.3.5.2 of Dr Marshman's report, which was provided by the Seller on disclosure.

Issue (2): was the gasoil of satisfactory quality?

Was the gasoil unstable?

25. If the gasoil was on specification when loaded and the vessel was not the cause of the increased sediment levels found a few days later at El Ferrol, the only other possibility that has even been raised is that the cargo was unstable on delivery. Not only is that, inferentially, the only alternative conclusion but the evidence positively points to the same conclusion.

26. Mr Revell of MTD explained what instability means in this context and how it leads to the formation of sediment which is not present at the outset in his report at para.4.6.1 and 4.6.2:

"4.6.1 During transportation, storage and/or use the distillate fuel (i.e. Gas Oil) will come into contact with air, which contains oxygen. If the distillate fuel contains unstable components, such as cracked refinery distillate fractions, they can oxidise when in contact with the air (oxygen) and this oxidation in turn produces gums and sediments. If the Gas Oil blend/cargo is unstable the oxidation will continue until all the unstable components present in the Gas Oil have been oxidised, which means the levels of sediment continue to increase over a period of time.

4.6.2 It is known that phenalenes and phenalenones are not present in stable straight run distillate fuels but are present in cracked fuels. Trials have also shown that over a period of time the phenalenes content diminishes whilst the phenalenones content increases. The chemistry of the sediment formation in cracked distillate fuels is complex and is thought to proceed by the following steps:-

(i) Phenalenes are oxidised to phenalenones

(ii) Phenalenones react with Indoles to form Indolyphenalenes and Indolyphenalenones, which are sediment precursors.

(iii) These precursors then react with acids to form sediment."

27. It was the evidence of Mr. Revell, which I accept, that the gasoil was unstable on delivery at Antwerp and that such instability led to the formation of and resulting increase in sediments over the short voyage to El Ferrol.

28. The main bases for that conclusion are as follows:

(1) The fact of the increase in sediment levels over the short period between Antwerp and El Ferrol.

(2) The fact that the sediment levels in the original shoretank samples had increased significantly by the time of the joint testing in June 2007. Even over a period as long as 5

months (between sampling and the joint analysis), the sediment levels in a stable gasoil would not so increase.

(3) The fact that the composite sample from the vessel's tanks on loading showed sediment levels of 96mg/litre by the time of the joint analysis and analysis of the sediment showed it to consist of predominantly amorphous agglomerates of carbon/sulphur rich material which is typical of sediment formed due to instability of gasoil.

(4) The colour deterioration of certain of the samples.

(5) The storage stability test carried out on the shoretank composite sample at the joint analysis, which indicated high results at 3.5/4.1mg/100mls.

29. Further, it is to be noted that that conclusion is also supported by the opinions expressed in the report prepared by CWA for the Seller following the joint analysis: at paras.3.4.6, 3.5.3, 3.5.4, 4.4.5, 4.4.6, 4.4.11, 4.4.12, 4.4.13, 4.6 and 4.8 (where the author's overall conclusions are set out).

Is an unstable gasoil of satisfactory quality?

30. As Mr. Revell explained in his report at para. (4.1.2):

"Gas Oils can be used for various uses such as power generation on land of trains, buses, trucks, automobiles, construction and agricultural equipment. In addition Gas Oils are often used at sea to provide power to vessel's main propulsion and to run its auxiliary equipment".

31. In those circumstances, the amount of total sediment in the Gas Oil is important since high levels "can cause filter plugging, combustion chamber deposit formation and gumming or lacquering of injection system components with resultant sticking and wear, which makes it unsuitable for use" (para. 4.2.1.).

32. On that basis, it was Mr. Revell's evidence that an unstable gasoil cargo is not of satisfactory quality and therefore this gasoil cargo was not of satisfactory quality on delivery (paras.4.6.3 and 12.5) because:

"A Gas Oil that was unstable would, in my opinion, be unmarketable for use as a finished product and could not be used for any of the normal end-uses of a Gas Oil for the following reasons:-

(i) The unstable Gas Oil would produce sediment over a period of time. The rate of sediment production could not be predicted as it would depend upon how unstable the cargo was, storage conditions, temperature, mixing and the amount of oxygen coming into contact with the fuel.

(ii) As the stability testing is only predictive any potential end user of an unstable Gas Oil would not know what the sediment levels would be likely to be after a few days, one week, one month or six months. Therefore the user would not know when the sediment levels would become high enough to cause operational problems in the equipment being powered by the Gas Oil, such as those discussed in 4.2.1."

33. Mr Revell's approach accords with that of Ms. Jago (from a trader's perspective). As she stated at para.4.19 of her report:

"An on specification, finished grade cargo of gasoil, such as that sold by Petroplus to Bominflot, can be used for a variety of purposes such as power generation of vehicles of various sorts including shipping. However, if the gasoil is unstable then my understanding as a trader is that it cannot be put to those uses and therefore has to be sold into a very different market involving different players who are able to deal with instability before selling the material as a finished grade".

34. The evidence therefore established that instability is a different quality issue to the mere presence of sediment. In particular: it is subject to a different test; it is a serious problem regardless of whether or not sediment has yet been formed; it has particular causes and dealing with it is likely to involve different procedures.

35. Under s.14(2B) of the SGA, one aspect of the quality of goods relevant to determining whether they are of satisfactory quality is their "fitness for all the purposes for which goods of the kind in question are commonly supplied".

36. On the basis of Mr. Revell's evidence the gasoil was not fit for any of the purposes for which it is commonly supplied and in the light of all the evidence before the court I conclude that the gasoil was not of satisfactory quality for the purposes of the implied term under s.14(2) of the SGA on which the Buyer relies.

37. It was the Seller's pleaded case that the purpose for which gasoil of this nature and with these contractual specs is commonly supplied is for use as automotive diesel or heating fuel and not for a military specification for marine gas turbines and high performance diesel engines (ADef, paras.3(iii) and 11(i)(d)). As to that:

(1) It is not open to the Seller in light of the Order of Field J.

(2) In any event, it is factually too narrow as explained in Mr. Revell's evidence as set out above.

(3) Moreover, it ignores the facts that:

(a) the relevant question under s.14(2B) is the gasoil's fitness for purposes for <u>all</u> the uses for which gasoil of this description is commonly used;

(b) although the gasoil was ultimately intended for military use:

(i) the gasoil was not sold on the basis of any intended military use; and

(ii) in any event it was not some special feature of such intended use that made the gasoil not of satisfactory quality: instability is a serious problem for <u>any</u> commonly intended end-use.

<u>Inability to remain of satisfactory quality</u>

38. The Buyer did not press this alternative way of putting its case and I express no views upon it.

Issue (3): the scope of the implied term

39. It is the Seller's pleaded case that even if the Court upheld the Buyer's case on Issues (1) and (2), the Buyer's case must nonetheless fail because the implied term on which the Buyer relies is "limited to characteristics of the cargo which were not covered directly or indirectly by the contractual specifications" (ADef at para.3(i)).

40. The origins of this point appear to lie in the observations of Rix LJ at the end of paragraph 42 of his judgment where, after acknowledging that it was "impossible without knowing at least something more about the circumstances in which it is alleged that the gasoil changed, to say whether the statutory section 14(2) implication… would assist the buyer" and going on to set out how the claim might work depending on the expert evidence, he added this:

    "And if the only consequence of the oil's surmised instability was its effect on sediment, it may still be the case that the true effect of the contract was to make the determination of the sediment at the time of loading… conclusive, to the exclusion of an implied condition as to quality"

41. The basis for that reservation appears to lie in the fact that the contract contains a spec as to sediment (Cl.4) and that compliance with that specification was to be (conclusively, subject to fraud or manifest error) determined at the loadport (Cl.12): see paras.41 and 63.

42. At the original trial of the preliminary issues before Field J, the Seller ran the argument that Cl.4 and Cl.12 meant that there should be no implied term under s.14(2) of the SGA at all: see the judgment of Field J at para.44. Field J rejected that argument. The Seller did not appeal on that point or suggest, on the appeal (or at the trial), that the unappealed implied term should be limited in the way now contended for.

43. Rix LJ's reservations were first aired in his judgment, in relation to an implied term found by Field J and in respect of which there was no appeal. They were therefore expressed without the benefit of hearing argument from either party. It may be that these reservations were influenced by an apparent scepticism about the factual premise of the Buyer's case and uncertainty about how the Buyer would put its case.

44. Notwithstanding his reservations Rix LJ recognised that instability might mean that the cargo was of unsatisfactory quality if it was "a truly latent and separate vice which the specification tests would leave untouched and undiscovered". I find that the instability of the gasoil was such a vice on the facts as I find them to be, as borne out by the expert evidence.

45. I further find that instability was not a characteristic of the cargo which was covered directly by the specifications. The specs are silent as to stability. Stability is a matter which can be tested for but no provision to do so was made.

46. As to whether it was "indirectly" covered by the specifications, it is unclear what this means. If instability was in truth no more than a way of saying that on delivery the gasoil already contained sediment which exceeded the specifications, but which was not detected on delivery then it may be that it would be "indirectly" covered by the specifications. Equally, if the way of testing for stability was the same as that for sediment so that a gasoil which was on specification for sediment would be regarded as being stable then again it may be that it would be "indirectly" covered. In both cases it would be a quality characteristic which, although not specified, would or should be demonstrated by contractual specification test procedures.

47. I would not, however, accept that the mere fact that instability results in an increase in sediment means that it is "indirectly" covered. There is nothing on the face of the contract which limits the ambit of the statutorily implied term and in particular removes from its ambit instability, if that would otherwise render the gasoil not of satisfactory quality, simply because the instability will lead to an increase in sediment which is the subject of a contractual specification.

48. Further, if the mere fact that the unsatisfactory quality later manifests itself in something covered by the specifications means that it is "indirectly" covered thereby then the statutorily implied term would be largely deprived of meaningful content: it is not easy to think of things which could be inherently but latently wrong with the cargo such that it was not of satisfactory quality, which are not the subject of the specifications, but which would later manifest themselves in a manner which would not affect something covered by the specifications.

49. Standing back, once it is accepted that the s.14(2) implied term is otherwise to be implied, it is hard to see why, even under a contract containing Cl.4 and Cl.12, the Buyer should be held to take the risk of an inherent vice such as instability which is not tested at the loadport and would therefore not be revealed at the loadport, but which means in and of itself that the cargo which he has bought cannot be used for any of the purposes for which it would usually be used and is therefore not of satisfactory quality.

50. Even if it be assumed that the implied term is subject to the limitations contended for by the Seller, I accordingly find that instability was not a characteristic of the cargo which was covered directly or indirectly by the contractual specifications.

51. For all these reasons I conclude that if, as I have found, the cargo delivered was unstable and therefore not, at that point, of satisfactory quality for the purposes of the statutorily implied term, the Seller was in breach of that term, and the fact that the result of the instability would be (and in fact was) the later formation of sediment does not alter that.

Issue (4): losses and causation

52. The Buyer's case is that as a result of the Seller's breach of the implied term, the Buyer suffered various losses as set out in their Amended Particulars of Claim ("APOC") at para.13.

53. The Seller has never advanced a positive case on the pleadings in relation to quantum (save in relation to the legal costs and mitigation issues). Rather it has simply denied that the Buyer suffered any loss and damage by reason of any breach of contract (ADef, para.13) and put the Buyer to "strict proof" of its alleged loss and damage (ADef, para.14).

<u>The difference between the sound and unsound value of the gasoil</u>

54. As a result of the instability of the gasoil (and therefore the Seller's breach of contract), the sediment levels in the gasoil increased to a point where the gasoil was not on-specification as to sediment under the Buyer's on-sale contract with Bominflot SA or Bominflot SA's contract with the Spanish Ministry of Defence. Bominflot SA and the Spanish Ministry of Defence were therefore entitled to reject the gasoil and did so.

55. In those circumstances, the Buyer had to find an alternative sub-buyer of the gasoil. Independent brokers (PVM Oil Associates – "PVM") were instructed to see if they could find a

buyer willing to take the gasoil and re-refine it or use it as a cutter stock (i.e. for blending with a fuel oil), but had real difficulties doing so, not least because of the size of the parcel.

56. Eventually, on 5 February 2007, BV Mabanaft ("Mabanaft") agreed:

    (1) to buy the gasoil (based on the SGS analysis of the samples taken in Spain as set out in report BC07-00355) at a price equivalent to the gasoil IPE futures contract for February 2007 minus $50/mt with delivery ex *Mercini Lady* in Antwerp;

    (2) to sell to the Buyer replacement gasoil for delivery to the Spanish Ministry of Defence in two parcels in each case at a price of February 2007 IPE flat basis for delivery at El Ferrol and at Cartagena.

57. The Buyer claims damages for the loss in value of the gasoil calculated as follows:

    (1) the difference between what it paid the Seller for the gasoil and the price (converted into an FOB price to ensure like is being compared with like) at which it was able to sell the unsound gasoil to Mabanaft, namely 854,696.15; plus

    (2) the difference between what it paid for the replacement cargoes, again converted for the purposes of the comparison into an FOB price, and what it paid the Seller for the gasoil, namely $856,519.19 (for the El Ferrol cargo) plus $397,011.36 (for the Cartagena cargo) amounting to $1,253,530.55, resulting in a total claim of $2,108,226.70.

58. The sum so calculated and claimed has never been the subject of any positive contrary plea by the Seller and the Buyer submits that it represents the actual loss directly and naturally suffered by it as a result of the Seller's breach and that it should therefore be recoverable – see s.53(2) of the SGA.

59. The Buyer recognises that under s.53(3) of the SGA, *prima facie* the measure of loss for the purposes of s.53(2) is the difference between the sound and unsound market value of the goods at the time of delivery. However, the Buyer contends that in a case such as this where the defect is latent and only later discovered, the starting point should be the date on which the Buyer discovered the problem. Moreover, where, as here, the Buyer was unable (despite its efforts) to sell the unsound cargo immediately on discovering the problem, the relevant date should be the date of the eventual sale (in order to give full effect to s.53(2)). In this connection it relies on *Benjamin on Sale of Goods* (8th ed.) at para. 17-054 and the cases there referred to.

60. I accept and find that this is a case where the defect did not become patent until later and that, on discovery of the defect, the Buyer at all times acted reasonably in seeking to minimise its losses in terms of the loss in value of the cargo

61. In those circumstances I accept and find that the loss directly and naturally resulting is that which results from their actual resale of the gasoil and that the relevant date for calculation of the diminution in value of the goods is the date of that resale. The best evidence of the value of the gasoil at that time is the price reasonably achieved on the resale of the unsound gasoil to Mabanaft.

62. I also accept that it follows that that is also the date at which the value of sound gasoil should be assessed. If it were otherwise one would not be comparing like with like and market distortions would be introduced (which could increase or decrease the loss). In principle the same date should be taken for the assessment of both sound and unsound values.

63. *Benjamin* at 17-54 proceeds on the basis that there will be just one date for assessment of both sound and unsound values: see the heading "relevant time for ascertaining values" (emphasis added). Para.20-124 also proceeds on the same basis drawing no distinction between the date for the purposes of assessing the sound and the unsound value of the cargo. Further, in cases where the time at which to assess the unsound value of the goods has been postponed to a date after the date of delivery, the sound value has also been assessed as at that same later date – see, for example, *Van den Hurk v R Martens* [1920] 1 KB 850; *Obaseki v Reif* [1952] 2 Lloyd's Rep.346; *Choil Trading SA v Sahara Energy* [2010] EWHC 374 (Comm).

64. The best evidence of the value of sound gasoil at the time of the resale is the price reasonably achieved on the purchase of the substitute cargo from Mabanaft on that date.

65. I accordingly accept that damages for diminution in value have been properly calculated and claimed.

66. By way of cross-check, the Buyer adduced expert evidence from Ms Jago as to the difference between the sound and unsound market value of the gasoil. She concluded that at the date of arrival at El Ferrol, the difference between the sound and unsound market values of the gasoil was $2,169,707.23 (i.e. a little more than is actually claimed under this head by the Buyer).

67. I accordingly find the Buyer's recoverable damages under this head to be $2,108,226.70.

Additional freight

68. As a result of the Seller's breach, the Buyer had to incur the further cost of the freight back to Antwerp (in order to deliver it to Mabanaft). The Buyer therefore claimed $649,350.65 in respect of such freight. *Benjamin* at 17-062 recognises the recoverability of foreseeable expenses reasonably incurred as a result of a seller's breach, of which freight on a return voyage is given as an example. I find that this freight was foreseeably and reasonably incurred and is recoverable in damages.

Demurrage

69. The total demurrage for which the Buyer was liable and paid under the charterparty was $442,245.70. The vast majority of the time for which the Buyer was liable in demurrage was spent (at El Ferrol, Bilbao and back at Antwerp) as a result of the discovery that the gasoil's sediment had deteriorated (requiring samples to be taken and tests to be carried out; leading to the rejection of the gasoil and the need to find a new buyer; and then the return to Antwerp) and was therefore the result of the Seller's breach. *Benjamin* at 20-125 recognises the recoverability in damages of consequential loss such as demurrage.

70. In his third witness statement Mr Roeper explained how much time/demurrage would have been incurred had there been no breach. I accept that evidence and find that the Buyer is entitled to damages for demurrage foreseeably incurred in the net amount of $374,386.

Commission

71. The Buyer had to pay a commission of $9,998.19 to PVM (the broker who found the buyer, Mabanaft) on the sale of the unsound gasoil which it would not have incurred but for the Seller's breach. I find that it is entitled to recover damages for that foreseeable consequential loss.

Inspection, expert and testing costs

72. As a result of the Seller's breach, the Buyer incurred:

(1) €52,363.27 in respect of the fees of Saybolt, SGS (including the Buyer's share of SGS the joint analysis), Inspectorate and Intertek in connection with the unsound gasoil;

(2) £20,222.94 in respect of the fees of Brookes Bell, Mr Andrew Ryan and the Buyer's share of the RSSL joint testing fees.

73. I find that the Buyer is entitled to recover damages in respect of these foreseeable consequential costs.

Legal costs

74. Initially, the Buyer believed that the cause of the deterioration in the gasoil's sediment levels must have been caused by the vessel and defended proceedings brought by her owners for demurrage and freight on that basis and counterclaimed for the Buyer's losses.

75. However, following the joint testing in June 2007 which showed that the vessel was not the cause of the increase in the gasoil's sediment levels (but rather that such was caused by the instability of the gasoil), those proceedings were settled on terms that the Buyer paid the demurrage and the owners' costs of £67,624.45 and €10,073.74.

76. The Buyer contended that the cause of the Buyer initially resisting owners' claim and thereby ultimately being liable to owners for their costs was Seller's breach which resulted in the increase of sediment during the voyage which it is said naturally suggested that the vessel was to blame.

77. The Buyer further submitted that the resulting losses are not too remote but were the reasonably foreseeable result of a breach of this sort: the natural first instinct on facts such as those here is that the vessel must be at fault (and indeed the Seller says as much in the ADef).

78. The premise of the Buyer's damages claim is the Seller's breach of contract and one is concerned with the foreseeable consequences of that breach. Under this head the Buyer is claiming damages for costs incurred on the premise that the Seller was not in breach and that the loss was caused by a breach of contract by a third party. I do not accept that damages premised on the Seller not being in breach are a foreseeable consequence of the Seller's breach. Further or alternatively, the costs were the consequence of the Buyer's choice to fight the owners' claim, which is a sufficiently independent matter to mean that I am not satisfied that it was caused by the Seller's breach. I accordingly reject this head of damages.

Issue (5): remoteness of the legal costs

79. This has been dealt with above.

Issue (6): mitigation

80. The Seller is precluded from running its recent plea of failure to mitigate (ADef, para.13A) by the Order of Field J. However, in any event I find that:

(1) The burden is on the Seller to prove any failure to mitigate. In circumstances where it has not adduced any evidence on the point, it cannot discharge that burden.

(2) The allegation of a failure to mitigate is in any event rebutted by the factual evidence of Mr Roeper at para.11 of his witness statement and the expert evidence of Mr Revell at para.10 of his report.

Conclusion

81. I accordingly find that the Seller was in breach of contract and that it is liable to pay damages in respect of the losses suffered as a result by the Buyer in the amounts set out above, together with interest thereon.