



**Neutral Citation Number: [2021] EWHC 1796 (Comm)**

**CL 2020 000015**

**IN THE HIGH COURT OF JUSTICE**

**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**

**COMMERCIAL COURT (QBD)**

Royal Courts of Justice, Rolls Building  
Fetter Lane, London, EC4A, 1NL

Date of Judgment: 5 July 2021

BEFORE:

**MR. ADRIAN BELTRAMI QC**

Sitting as a Judge of the High Court

**BETWEEN:**

**GALTRADE LIMITED**

**Claimant**

**and**

**BP OIL INTERNATIONAL LIMITED**

**Defendant**

Sean O’Sullivan QC, instructed by Jackson Parton, on behalf of the Claimant.  
Oliver Caplin, instructed by Hill Dickinson LLP, on behalf of the Defendant.

Hearing dates: 14-17 June, 21 June 2021.

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## JUDGMENT

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I direct that pursuant to CPR PD 39A paragraph 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 ADRIAN BELTRAMI QC:

#### A. INTRODUCTION

1. Both the Claimant and the Defendant carry on the business of fuel oil trading. By contract Ref: E180021288(F) dated 10 October 2018 (the **Contract**), the Defendant agreed to sell to the Claimant four parcels of 30-35,000 mt of low sulphur straight run fuel oil (**SRFO**) over the course of 4 months from November 2018 to February 2019, FOB Taman on the Black Sea coast. The price was index-linked to Platts 1% sulphur fuel oil FOB Mediterranean plus USD 22.50/mt. The third parcel (**Parcel 3**) was loaded on the mt *Pioneer* on 10 February 2019. It is common ground that Parcel 3 did not comply with the contractual specification in 3 respects and that the Defendant was thereby in breach of contract. The parties are in dispute over the consequences of that breach. The Claimant purported to reject Parcel 3 and claims damages calculated by reference to what it describes as its wasted expenditure. The Defendant, for its part, contends that the Claimant breached the Contract by wrongfully repudiating it and

by refusing to pay for Parcel 3. It counterclaims for what it contends are its losses caused by that breach.

2. The trial was conducted over 5 days between 14 June 2021 and 21 June 2021, remotely via Microsoft Teams. The two factual witnesses, Edoardo Filosa (**EF**) for the Claimant and Wilhelm von Schweinitz (**WVS**) for the Defendant, were the traders responsible for the Contract. Both gave their evidence openly and helpfully. They disagreed over the scale of the Defendant's breach and its impact on the Claimant, and each tended to blame the other for what had happened, but there was no substantive dispute over the primary facts, in respect of which there was in any event a sizeable documentary record through emails, texts and recorded telephone calls.
3. Pursuant to the Order of Moulder J dated 3 July 2020, as amended by the consent Order of Bryan J dated 30 March 2021, the parties were granted permission to rely on the evidence of two experts each. The idea was that one expert would address "*quality*" and the other "*trading/marketability*". It may be that these issues turned out to be less distinct than initially envisaged because there was certainly an overlap in the expert evidence, on both sides. But this was not in and of itself a problem and I do not consider that either party was disadvantaged.
4. The parties relied on evidence from the following experts:
  - a. Mr David Jones, for the Claimant. David Jones is a chartered chemist, a director of CWA Oil & Chemicals Department and an experienced cargo surveyor. He was asked to provide technical comments on the quality issues surrounding the shipment of Parcel 3.
  - b. Mr Tom James, for the Claimant. Tom James has extensive experience in the commodity sector. He is currently the CEO and CIO of TradeFlow Capital Management, a specialised commodity cargo investor. In addition to expertise in risk management, he confirmed that he has also direct involvement in the purchase and

sale of physical cargoes. He was asked to give evidence on the fuel oil trading market.

- c. Mr Peter Jones, for the Defendant. Peter Jones is a chemical engineer with many years of experience in the oil and gas sector, including working at major oil refineries. His evidence addressed technical aspects of refinery economics and product blending, as well as related questions of marketability.
  - d. Ms Catherine Jago, for the Defendant, has extensive experience in the oil industry, including as oil trader, oil broker, oil pricing journalist and consultant. Her evidence was given as an oil market expert.
5. The experts produced detailed reports and supplementary reports, together also with joint memoranda. Each gave evidence orally and was cross-examined. They were all well qualified and knowledgeable in their fields and they each gave clear evidence of their expert opinions, which I considered to be generally helpful. I discuss elements of the evidence by reference to specific issues below.

## **B. THE FACTS**

### ***B1. The Contract***

6. The Contract was evidenced by, amongst other documents, a confirmation of trade sent by email on 12 October 2018. Given the importance of the terms of the Contract to the resolution of the dispute between the parties, it is necessary to set out a number of the material terms:
7. The Parcels: Under the heading “Grade”, the Contract was for the sale of *“Non EU Qualified LOW-SULPHUR STRAIGHT-RUN FUEL OIL of Slaviansky origin meeting the agreed specification at the time and place of loading.”* There were four parcels, each of a *“QUANTITY AGREED MUTUALLY*

*BETWEEN BUYER AND SELLER*" of a minimum of 30,000 metric tonnes and a maximum of 35,000 metric tonnes.

8. There was then listed a series of detailed specifications under the sub-heading "Guarantees". These comprised either minimum or maximum values for each of Density, Viscosity, Water content, Ash content, Flash point, Sulphur content, Pour point, P-value, Xylene equivalent, Toluene equivalent, Bromine, Sodium, Vanadium and Nickel. Under the further sub-heading "Typicals", there was a similar (though not identical) list of specifications with attendant values. Whilst the "Typicals" values were no doubt of commercial interest, it was common ground that they did not define the contractual obligation of the Defendant.
9. Delivery: each Parcel had specified delivery terms. For Parcel 3, they were as follows: *"Delivery shall be given and taken FOB Taman with Laydays of 30 January 2019 to 31 January 2019. Seller to narrow to a one (1) day loading window latest COB 27<sup>th</sup> January 2019."*
10. Price: *"The fixed price per METRIC TONNE(S) FOB Taman shall be the arithmetic average of the high quotes for FUEL OIL 1% SULPHUR under the heading CARGOES FOB MED as published in Platts European Marketscan plus a premium of 22.50 US dollars per metric tonne... The applicable quotation(s) shall be those published in the 10 consecutive publication(s) dated immediately after the BILL OF LADING date of the shipment in question."*
11. Inspection: quality was to be determined *"at the load port in accordance with the governing General Terms and Conditions... A mutually agreed independent inspector shall be appointed to determine the quality and quantity."*
12. General Terms and Conditions: except as specifically detailed, the transaction was governed by the Defendant's General Terms and Conditions for Sales and Purchases of Crude Oil and Petroleum Products 2015 Edition (the **General Terms**).

13.The following provisions of the General Terms have a relevance to the dispute:

14.Part 1, Section 2, “Measurement and sampling, independent inspection and certification”:

*“2.1.1 Measurement of the quantities and the taking of samples and analysis thereof for the purpose 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...”*

*...(b) where the Loading Terminal is not operated by the Seller or the Seller’s Affiliate and if jointly agreed upon by the Buyer and Seller, by an independent inspector in accordance with the good standard practice at the Loading terminal at the time of shipment....”*

15.Part 1, Section 3, “Risk and property”:

*“3.1 ... the risk and property in the... Product delivered under the Agreement shall pass to the Buyer as the... Product passes the Vessel’s permanent hose connection at the Loading Terminal.”*

16.Part 1, Section 7, “Time allowed, delays and demurrage”:

*“7.1 Delays*

*In the event of any delay of any kind or from any cause whatsoever whether in connection with the scheduling of the Vessel’s turn to load (including any change in such scheduling), provision of a Berth for the Vessel, berthing or loading of the Vessel or otherwise howsoever without limitation, and provided always that the Vessel is eventually loaded pursuant to Section 6.2.2, any rights of the Buyer against the Seller, however the same may arise and whether or not arising under the Agreement, shall be limited in all circumstances whatsoever to a claim for the payment of demurrage as specified below, and the Buyer shall not be entitled to complain directly or indirectly of any delay except for the purpose of founding a claim to such demurrage.”*

17.Part 8, Section 57, “Definitions and Interpretation”:

*“57.1.51 “Product” means wholly or partially refined petroleum product or biofuel of the grade specified in the Special Provisions...*

*57.1.59 “Special Provisions” means the oral or written agreement in which, by reference, these General Terms and Conditions are incorporated to form the Agreement...*

*57.1.61 “typical” means a quality or characteristic often attributable to... Product from a particular source, given without guarantee and not amounting to a representation or warranty that such typical quality or attribute will be present in the... Product supplied;”*

18.Part 8, Section 59, “Quality and claims in respect of quality/quantity”:

*“59.1 Quality*

*59.1.1 Unless otherwise stated in the Special Provisions, the quality of... Product delivered hereunder shall not be inferior to the specification (if any) set out in the Special Provisions. Whether set out in these General Terms and Conditions or in the Special Provisions neither typicals nor any stipulation as to time of delivery shall form part of the... Product’s description, quality or fitness for purpose. This sub-section constitutes the whole of the Seller’s obligations with respect to the description, quality and fitness for purpose of the... Product and... all statutory or other conditions or warranties, express or implied, with respect to the description or satisfactory quality of the... Product or its fitness for any particular purpose or otherwise are hereby excluded...*

*59.2 Claims in respect of quality and/or quantity*

*59.2.1 Any complaint of deficiency of quantity or of variation of quality shall be admissible only if notified in writing to the Seller within 45 days of the completion of discharge date and accompanied by evidence fully supporting the complaint. Any term as to quantity in the Agreement, including in the Special Provisions, shall be an innominate term. Notwithstanding the foregoing, no claim shall be admitted in respect of any deficiency of quantity where the difference between the loaded and discharged quantity is 0.5% of the loaded quantity or less. If the difference between the loaded and discharged quantity is in excess of 0.5%, the whole amount of the loss may be claimed.”*

19. Part 8, Section 66, “Limitation of liabilities”:

*“66.1 Except as specifically provided in the Agreement, in no event, including the negligent act or omission its part, shall either party be liable to the other, whether under the Agreement or otherwise in connection with it, in contract, tort, breach of statutory duty or otherwise, in respect of any indirect or consequential losses or expenses including if and to the extent that they might otherwise not constitute indirect or consequential losses or expenses, loss of anticipated profits, plant shut-down or reduced production, loss of power generation, blackouts or electrical shut-down or reduction, goodwill, use, market reputation, business receipts or contracts or commercial opportunities, whether or not foreseeable.”*

## **B2. SRFO**

20. SRFO is the residual fuel oil which emerges from the primary refining of crude oil. In broad and simple terms (to describe what is an inevitably complex process) crude oil feedstock is typically heated and passed into a primary distillation column where the various hydrocarbon components are separated into boiling point range “fractions”. Light gases (methane-butane) are separated at the top of the column followed sequentially by higher boiling point fractions, such as gasoline, naphtha, kerosene, and diesel. SRFO, which is what remains, is a highly viscous, black product. By reason of the distillation process, trace components natural to crude oil



may be concentrated in the residual fractions, including for present purposes sulphur and vanadium, two naturally occurring components of crude oil.

21. SRFO is itself a valuable commodity because it may be converted into useful products through secondary refining processes. When placed in a vacuum distillation tower, it is separated into Vacuum Gas Oil (**VGO**) and Vacuum Residue (**VR**). The VGO is then upgraded through specialist units such as thermal and catalytic crackers. These “cracked” components include cycle oils from catalytic crackers, coker gas oils from cokers and visbroken/thermally-cracked gas oils and residues. Accordingly, SRFO may be utilised as a feedstock for secondary refining processes and there is a market for such product. Individual parcels of SRFO may also be blended with other parcels for shipment utilising economies of scale or to fit the requirements of particular refineries. Alternatively, SRFO can be used directly from production and sold into the fuels sector, for use largely in compression-ignition engines or as fuel for boilers. However, Peter Jones explained that this is generally an unattractive option because the price of conventional cracked residual fuel oil tends to be well below that of SRFO, and so the main market for SRFO is accordingly as a refinery feedstock.

22. Refineries with both primary and secondary refining units may generate their own SRFO as the product of the primary refining process. This may be sufficient to operate the secondary units at full efficiency. Alternatively, refineries may purchase SRFO in the market. Whether and to what extent there is such market demand will depend on a range of factors including the configuration of the refinery and market prices, in particular the price of SRFO relative to crude oil (as the feedstock for the primary units) and also relative to VGO and other products. Whatever the variations, however, David Jones confirmed that it is common industry practice for many refineries to import SRFO as feedstock for secondary processing.

23. The value of SRFO is also affected by, amongst other things, its concentration of pollutants. Sulphur, for example, is a generally undesirable component because, when the fuel oil is eventually burnt, it

produces sulphur dioxide gas. Refineries do have de-hydrosulphurisation processes but at a cost. In broad terms, the greater the level of sulphur and other pollutants, the less desirable or valuable the SRFO as a feedstock to refineries in general or to any particular refinery. Equally, higher levels of pollutants may shift the economics of a blending programme, depending on the composition of other blendstocks and the specifications of the intended purchaser. Much of the expert evidence was directed to explaining the impact, on refineries, on blends and on prices, of the delivery of off-specification oil parcels.

24. For oil traders such as the Claimant and Defendant, blending may often be a way to extract value. The skill of the trader is to acquire and blend the right blendstocks to meet the requirement of the end purchaser but without “*quality giveaway*”. So, a parcel with a particular concentration of sulphur may be blended with other parcels with higher or lower sulphur concentrations, in order to meet, with as little margin as possible, the specifications in the on-sale contract. But, at the same time, all of the other specifications must be met. Of these, viscosity is also of particular importance in the blend. Ensuring that all specifications are met may mean that, for example, there has to be a greater margin on either sulphur or viscosity, or indeed both, hence quality giveaway. However, what is of most relevance for present purposes is that the blending of cargoes, which enables the composition of the overall parcel to be adjusted (and sulphur, in particular, blends in a linear fashion) is a further and common part of the business for oil traders such as these parties.

### **B3. Narrative of events**

25. The Claimant and the Defendant are competitors and, from time to time, trading partners. The Contract was negotiated in October 2018 through the broker, Tullet Prebon. From the Claimant’s perspective, which I accept, SRFO of Slavyansk origin FOB Taman was regarded as a high quality product which, at least at the time, offered profitable opportunities.

26. By a further contract evidenced by an email confirmation dated 26 November 2018 the Claimant agreed to sell three cargoes of 150,000 mt medium sulphur SRFO (with guaranteed specification of 2% sulphur) to Rongsheng Petrochemical (Singapore) PTE Ltd (**Rongsheng**), for delivery between January and April 2019 (the **Rongsheng forward contract**). EF explained that the parcels of SRFO purchased under the Contract were considered by the Claimant at the time as options as blendstocks on the Rongsheng forward contract.

27. In the event, each of Parcel 1 and Parcel 2 failed to meet the specifications in the Contract, and there were delays in loading:

- a. The agreed laycan for Parcel 1 was 29-30 November 2018. The Parcel was eventually loaded on the m/t *SCF Amur* with a bill of lading dated 14 December 2018. The cargo was tested upon loading. Results were available on 17 December 2018 and it was discovered that the cargo was off-specification for both viscosity (415.6 cst against the guarantee of 400 cst) and sulphur (1.39% against the guarantee of 1.30%). The Claimant and Defendant reached an agreement under which Parcel 1 was sold back to the Defendant for delivery at its refinery at Castellon.
- b. The agreed laycan for Parcel 2 was 30-31 December 2018. It was loaded on the m/t *Minerva Vaso* with a bill of lading dated 30 January 2019. This also turned out to be off-specification, for sulphur (1.48% against the guarantee of 1.30%) and vanadium (56 mg/kg against the guarantee of 50 mg/kg). The Claimant and Defendant on this occasion agreed a discount on the purchase price corresponding to the “HiLo” difference between the low-sulphur and high sulphur Platts FOB Med index prices (which Ms Jago calculated at around USD 22.7/mt) together with an additional discount of USD 7/mt. The result was a total discount against the original price of USD 29.7/mt, which WVS described as one of the biggest discounts he had ever given and which was made possible because, on this occasion, the Defendant’s own supplier was amenable to a corresponding, or at least significant, reduction on its contractual price. The Claimant used Parcel 2 to blend into lower

quality fuel oil for part performance of the Rongsheng forward contract on the m/t *Suez Rajan*.

28. It is common ground that the first two Parcels were both off-specification. There is no claim in the action for breach of contract in respect of these Parcels, as the Claimant and Defendant managed to resolve their differences. The only claim is for breach of contract in respect of Parcel 3 and I accept that the obligations in respect of each Parcel were divisible and need to be considered on their own. Nevertheless, I am entitled to take into account, as part of the narrative, the fact that the Defendant did not deliver Parcels 1 and 2 in accordance with the specifications set out in the Contract. The picture is more nuanced so far as concerns delay in loading the first two Parcels, as the Defendant says that the delays were the consequence of adverse weather and other matters out of its control. Further, the Defendant relies upon clause 7.1 of the General Terms to argue that the only relevant claim the Claimant could ever make about delay would be for demurrage and so a general complaint about delay could not justify, either directly or indirectly, any further causal consequences. In my judgment, as there has been no evidential exploration of the precise circumstances or reasons for the delays, I cannot assume, or find, that the Defendant was responsible for those delays.

29. The factual history of the first two Parcels nevertheless provides relevant context for the conduct of the parties in respect of Parcel 3. The Claimant has explained that the relationship between the parties had deteriorated and that the Claimant was legitimately concerned about issues of quality and delay for Parcels 3 and 4. By email dated 17 January 2019, the Claimant expressed its concerns about delay over Parcel 2 and Parcel 3. As for quality, the Claimant asked, *“Galtrade should also be grateful if BPOI could confirm that Parcel 2, and all parcels being loaded pursuant to the Contract, will be on-spec and correctly described as per the contract provisions.”* The Defendant replied on 18 January 2019, denying responsibility for any delays and responding to the request about quality as follows, *“As regards quality issues, we have passed on your comments regarding sulphur levels to our supplier and have been informed that cargoes will be on-spec. Of course since we are not the end supplier of this*

*oil, we are not in a position to guarantee this over and above the rights that you already have under our contract.”* As explained in evidence by WVS, it was apparent by this time that the supplier did have a problem with the sulphur content of the SRFO being supplied to Taman. This had been raised by the Defendant with the supplier, who had given assurances that the matter was being looked into and would be resolved. However, as the Defendant was not itself the supplier, the actual resolution of the problem was more a matter of hope or expectation than firm knowledge.

30. By 5 February 2019, the Defendant had learnt from its supplier that the matter had not been resolved, or at least that it probably had not been resolved. By text message on that date, WVS told EF that *“Hearing the Pioneer is likely to be a bit high on sulphur still.”* Meanwhile, the Claimant was also hearing rumours to similar effect from other sources. By email on 5 February 2019, it said, *“... we understand that the quality issues (off spec) have not been addressed and, through non-official sources, Galtrade understand that the cargo accumulated so far in relation to Parcel 3 is also seriously off-spec in relation to the Sulphur warranties.”*

31. Pursuant to the General Terms, arrangements for sampling and inspection were to be undertaken in accordance with the good standard practice at the loading terminal. For shipments at Taman, this meant that the determination would be by ship’s composite sample after loading. The parties agreed to appoint SGS Vostok Ltd (**SGS**) as joint inspector and to share the costs of the engagement. Because the contractually relevant testing was to be based on the composite sample after loading, in practice the results would not be available until after the vessel had loaded and sailed. As Taman was a congested port, there would be no possibility for the vessel to wait at berth for the result of the testing.

32. In view of its concern about the quality of Parcel 3, the Claimant requested that the Defendant agree to change the agreed testing procedure, so as to facilitate on-shore testing before loading. The Defendant did not agree to this on the ground that it would lead to a different arrangement to that which it had put in place with its own supplier. The Claimant even offered SGS to pay 100% of its costs of on-shore testing provided that in exchange it received the results from the shore tanks prior to loading. However, the

Defendant told SGS that it should not share the results of its on-shore testing with the Claimant.

33. The Defendant received shore tank results on 9 February 2019, which set the sulphur level at 1.47% (against a maximum guarantee of 1.30%). These results were provided by SGS but were indicative, in the sense that they were non-contractual as between the Claimant and the Defendant. WVS explained that the tests were conducted for the purpose of Russian customs at Taman *“and were non-binding”*, as between the Claimant and the Defendant. They were also not definitive, in that they might differ from the results of the ship’s sample, albeit that there was a strong likelihood that the formal results would also demonstrate an excess over the sulphur specification. At any rate, the results were passed on by WVS to EF in a text message on 9 February 2019, where he said, *“so hearing Sulphur 1.47 and visc 390”*. WVS went on immediately to seek to negotiate a discount off the price, in the same way as had been achieved for Parcel 2. On this occasion, the proposed discount was to be smaller. WVS said, *“while not knowing what I can get from the suppliers, who are really struggling with big discounts now, I think it’s fair to do 17\$/t discount... For 0.17% that is big.”*

34. Shortly after this text, EF and WVS spoke on the telephone. EF said that, *“part of the team they really don’t want this bloody cargo ...”*. But he went on to explore the possibility of a different solution, which was that, *“we find a commercial agreement to take this one”* but at the same time agree to cancel Parcel 4. WVS agreed that he would speak to the Defendant’s supplier in order to see what could be achieved but that this would not be possible on what was by then a Saturday evening. EF said that he would speak further internally. Some five minutes later, EF rang back and said that, *“I’m afraid that we are stuck here then so you will probably receive an official email a little bit later today and we think that we are going to reject the cargo.”*

35. By subsequent email on 9 February 2019, the Claimant said the following:

*“Our clear understanding on the basis of representations made to us, is that it will be impossible for BPOI to deliver a cargo which is within the*

*contractual specification, specifically with regard to sulphur content. This was confirmed by yourselves earlier this evening where you mentioned that the sulphur content is 1.47 against guaranteed contractual maximum spec of 1.30. We consider this representation to place BPOI in breach of contract entitling Galtrade to reject the cargo now; though for the avoidance of any doubt, this message is not itself a rejection notice.*

*In relation to BPOI's representation, we request:*

- That you immediately confirm that BPOI's representation is to be treated as an assessment of the quality of the cargo pursuant to the contract; OR*
- that you immediately provide us with the testing certificate (which BPOI clearly have) confirming that the cargo is off-spec as BPOI have represented...*

*We are prepared to wait until Monday, provided that: (i) the cargo will not be tendered for delivery; and (ii) that our willingness to wait until Monday has no impact on the assessment of the damages arising out of BPOI's breach (particularly as the vessel nominated for loading will have to wait until then, incurring costs)."*

36. In the event, at or around this time, the *Pioneer* had been called to berth at Taman for the purpose of loading at the port. This news was notified to WVS in a further call on 9 February 2019. EF said, *"so what I wanted to say was, so um unfortunately or whatever as you put it as you want the pilot is on board so ... The vessel was and he's scheduled to be berthed there in one hour so we sent you that message but there is no time for you to answer and we risk to go through a bigger mess so I want to avoid that so we will load the cargo... And then once loaded then we are going to reject that so there is no physical time to ask the vessel to wait because then we might end up to have invalid NOR then you risk that the vessel is gonna be blacklisted..."*

37. WVS explained in evidence that he was surprised to be told that the Claimant would proceed to load the cargo only then to reject it. He

described that as a very unusual way of changing your mind. On the other hand, the Claimant's case is that they had no viable alternative. They were unable to leave the vessel at the port without loading or without, as mentioned by EF, the risk of blacklisting. At the same time, because the Defendant had insisted on the contractual requirement of testing by ship's sample, they had been unable formally to reject the cargo based on an extra-contractual indicative measure taken from the shore tanks and communicated informally by Defendant to Claimant. EF described the Claimant's position as being "*between a rock and a hard place*". WVS sought to argue that, in reality, the Claimant decided, after weighing up its options, to load Parcel 3 "*for what were essentially their own commercial reasons.*" I regard that as an unrealistic assessment. Yes, at one level, every decision made by a party such as the Claimant in the operations of its business may be characterised as made for "*commercial reasons*". But this does not do justice to the genuine dilemma in which the Claimant found itself, as a result of its reasonable apprehension of the Defendant's breach of contract, yet in the absence of the contractually agreed test results on which the Defendant was itself insisting.

38. By the time EF and WVS spoke again on the Monday morning of 11 February 2019, the vessel had been loaded and was sitting at anchorage 12 nautical miles from port. There was a discussion as to what would or might happen upon the receipt of the official testing results from the ship's sample, including a rejection of Parcel 3 or the Claimant's earlier proposal to agree a discount on Parcel 3 and the termination of Parcel 4. WVS proposed that, in any event, the vessel should sail towards Malta rather than stay in the Black Sea and this is what was agreed. In terms of value, EF made the point (which he had made before) that he had been unable to market the cargo until he knew its quality. He expressed the view that, "*basically today this cargo is probably worth crack*" (a reference to the lower value conventional cracked fuel oil).

39. This call was followed up by an email exchange that morning. The Claimant sought confirmation from the Defendant that it could instruct the vessel to proceed to Malta. WVS replied:

*"Hi, it's your charter.*



*So yes, as we discussed, regardless of the outcome of this cargo (i.e. if we agreed a quality discount or if you decided to go down the route of rejecting the cargo, or if there was some other commercial solution to it) one thing is clear – it makes no sense to let your vessel wait in the Black Sea....*

*So in line with everyone's obligation to mitigate costs, this vessel should sail towards Malta for now, which gives us time to find a solution."*

40. The first set of official testing results came out on 12 February 2019. These revealed a sulphur content of 1.53%, against the guaranteed maximum of 1.30%. Other results, including for P value and vanadium were to follow. On the strength of these first results alone, the Claimant rejected the cargo. By email dated 12 February 2019, it said the following:

*"As you know, the recent testing of the cargo loaded on the performing vessel show[s] that the cargo is outside of the contractual specification in relation to the sulphur content which is of 1.53 Pct against a contractually guarantee[d] spec of maximum 1.30 Pct and typical spec of 1.16 Pct. We are waiting for the balance of testing and it may be that further spec will be outside of the contractual specs, for instance as to vanadium which was also off-spec the other times. For now, this is a huge difference from the contractual specification that makes this cargo drastically different from what Galtrade contracted for.*

*In the circumstances, Galtrade have no option but to reject the cargo and hereby place BPOI on formal notice of the same. We note that BPOI has instructed us to instruct the performing vessel to proceed to Malta, which instructions have been passed to the vessel. The cargo continue[s] to remain at BPOI's availability and Galtrade will continue to take all necessary steps to mitigate their position arising out of BPOI's breaches, as described above.*

*Galtrade hereby place BPOI on formal notice that they will be seeking to recover any and all losses associated with BPOI's failure to provide a cargo pursuant to the terms of the contract (including but not limited to freight, demurrage, and other expenses). Please be guided accordingly."*

41. The Defendant's case is that, whilst it accepts that the sulphur content in Parcel 3 was beyond the guaranteed specification, the excess was not "*drastically different*". WVS described the position instead as "*marginally off – spec*". According to his evidence, and based on his experience of trading these and other cargoes over many years, this affected the value of the cargo by about USD 10.50/mt, this including also any "*extremely small discount*" that would reflect the issues on vanadium and P-value which were subsequently to emerge.
42. On 13 February 2019, WVS told EF that the Defendant's supplier had refused to permit the cancellation of Parcel 4. In a subsequent conversation, EF made alternative proposals: with cancellation of Parcel 4, he proposed a price based on the high sulphur quote FOB Med plus USD 15 (this equating to something broadly similar to the discount agreed on Parcel 2); without cancellation of Parcel 4, the proposal was for high sulphur quote FOB Med plus USD 3 (a correspondingly greater discount than on Parcel 2).
43. On 14 February 2019, SGS produced its full analytical report which confirmed also that the cargo was off-specification for vanadium (59 mg/kg against a guarantee of 50 mg/kg) and P-value (2.0 against a guaranteed minimum 2.5). WVS conveyed these results on 15 February 2019 to the Defendant's brokers with a view to testing the market for a potential sale of the cargo. WVS said that he was trying to assess its marketability and value. At any rate, the proposed offer for the cargo given to the broker was high sulphur CIF Med + USD 18. By 18 February 2019, WVS was contemplating instead the possibility of blending the cargo with two other parcels, placing it on an Aframax tanker and transporting it to the US.
44. By email dated 18 February 2019, the Claimant notified the Defendant that the vessel had arrived at Malta. It continued, "*For the avoidance of any doubt, Galtrade's maintain its position that the cargo stands rejected and is at BPOI's availability. Galtrade will not pay for a cargo that it has rejected and look forward to receiving urgent instructions from BPOI as to how to deal with it.*"

45. On 20 February 2019, the Defendant agreed to take back the cargo, on the basis described in its email of that date:

*“To resolve the impasse, and mindful of the need to mitigate losses, BPOI will take back the cargo from m/t “Pioneer” via a ship to ship transfer.*

*BPOI will take this step on the basis that Galtrade has wrongfully rejected the cargo and that delivery of cargo 3 will be treated as cancelled upon BPOI taking possession.*

*BPOI will look to Galtrade to make good all losses and expenses that BPOI incurs as a result of the wrongful rejection and does not accept any liability for any costs incurred by Galtrade as a result of the wrongful rejection, nor as a result of Galtrade’s decision knowingly to load off-spec cargo.”*

46. The cargo was physically returned to the Defendant on 28 February 2019 by ship to ship transfer to mt *New Accord* off Malta. There was, according to WVS, “no realistic prospect” of finding a substitute buyer for Parcel 3 in the Mediterranean. As such, he decided that it would be better to blend Parcel 3 and to sell it further afield, probably into the US Gulf. There is a relatively minor point of detail as to precisely when that decision was taken, or at least as to when it became a certainty. WVS’s evidence, which I accept, was that it was from his perspective “highly likely” by 21 February 2019 that the cargo would be going to the US Gulf, and that this became more certain in the following days, albeit that the shifting nature of market dynamics meant that it was not 100% clear until later.

47. On about 28 February 2019, the Defendant accordingly blended Parcel 3 with a parcel of 13,042.642 mt 0.4-0.5% Libyan SRFO from mt *Voge Trust*. This was achieved aboard the *New Accord* off Malta. It then ordered the *New Accord* to Castellon in Spain, where a further parcel of 15,359.85 mt coker gasoil was blended in. The process therefore produced a blended parcel of 58,658 mt (the **Blended Parcel**). On 5 March 2019, the Defendant ordered the *New Accord* to the US Gulf, having also added a further cargo of 30,000 mt VGO, which was to be sold separately.

48. On 22 March 2019, the Blended Parcel was sold intra-group to BP Products North America Inc (**BPPNA**) for a price of the average of the settlement quotes for Brent crude as quoted on the Intercontinental Exchange between 25 and 27 March 2019 minus USD 2.53/bbl (the **BPPNA Sale**). Such an intra-group sale was standard practice for the BP Group when selling into the US. On 8 April 2019, the Blended Parcel was sold to Valero Marketing and Supply Co ex ship Port Arthur (Texas) for a price of the average of the settlement quotes for Brent crude between 10 and 12 April 2019 minus USD 2.50/bbl.

49. The decision to take back Parcel 3, to blend it and to sell it in the US resulted in changes being made to the Defendant's hedging arrangements in respect of the cargo. In various iterations of the Defendant's counterclaim, the extra hedging costs formed a significant part of its asserted damages. This was then explored with WVS and the Defendant's experts, with the result that the figures came to be recalculated after the conclusion of the evidence. As the matter finally rested, it became apparent that the extra hedging costs were relatively small. By its counterclaim, the Defendant claims the difference between the net sale price on the Contract (after factoring in a discount to reflect its off-specification nature, together with costs and hedging losses) and the net sale price on the BPPNA Sale (after costs and hedging losses). The Defendant proposes a discount figure of USD 10.5/mt, which results in a claim of just over USD 500,000. The quantum of that claim will therefore vary, depending on the level of the discount.

50. Given the nature of the arguments in place, as considered further below, one of the evidential questions addressed by the Claimant was as to what it would or could have done with Parcel 3, had this been delivered on-specification. EF explained that a trader such as the Claimant would normally seek to make arrangements for how to deal with a delivered parcel of SRFO in good time. In the present case, however, because of the uncertainty over the quality of Parcel 3, the Claimant felt that it could not make arrangements in advance. Had it been able to do so, EF suggested a number of uses to which the Claimant could have put a compliant Parcel 3: (a) as a blending component in performance of the Rongsheng forward

contract; (b) as a blending component in a sale to the US; or (c) as a cargo to be stored and then sold at a later date.

### C. STATEMENTS OF CASE

51. The Particulars of Claim were served on 10 January 2020 and remain in unamended form. After pleading the rejection of the cargo, the Claimant alleges a single breach of contract, in the following terms, at [14]:

*“... the Defendant breached the Contract in that Parcel 3 at the time and place of loading had:*

*14.1 an average sulphur content of 1.53%;*

*14.2 a P-value of 2; and*

*14.3 a Vanadium value of 59.”*

52. The damages claimed are also simply expressed, at [15]:

*“The Claimant claims damages in the amount of its wasted expenditure of dealing with Parcel 3, from which it derived no benefit as a result of the aforesaid breach and the subsequent rejection of Parcel 3...”*

There then follow particulars of wasted expenditure, including demurrage, freight and other expenses. The total sum claimed is USD 1,092,771.79

53. The Re-Re-Amended Defence and Counterclaim is dated 18 May 2021. Whilst the Defendant admits the pleaded breach of contract, it contends that the relevant term was an innominate or intermediate term, the breach of which did not entitle the Claimant to reject Parcel 3. Instead, the nature of the breach was such as to entitle the Claimant, at best, to *“a small downward price adjustment”*, which it subsequently values at USD 10.50/mt. The Defendant pleads in the alternative that the Claimant had lost its right to reject by accepting the delivery of the cargo on the

vessel (and acquiring title to it) in the knowledge from at least 9 February 2019 that the sulphur level was or was likely to be above the contractual specification, and/or by subsequently ordering the vessel to sail to Malta.

54. So far as concerns the Claimant's case for loss, the Defendant pleads that:

- a. The losses claimed were caused by the Claimant's wrongful rejection of Parcel 3 rather than the Defendant's breach.
- b. The claim for wasted expenditure must in any event fail because the Claimant would have suffered an even greater loss had Parcel 3 been delivered on-specification. This is because, on the Defendant's case, the market for SRFO had declined to such an extent that the cargo was commercially unviable and the Claimant would have suffered additional losses of USD 15-30/mt, over and above the expenses now claimed, had it been forced to deal with it.
- c. In the alternative, the claim for wasted expenditure is precluded by section 66.1 of the General Terms, which excludes claims for "*loss of anticipated profits*".

55. By way of Counterclaim, the Defendant claims that the Claimant's rejection of the cargo was a repudiatory breach of contract, and/or that there were further breaches by the failure to accept delivery or pay for the cargo. It claims as damages the difference between its counterfactual financial position absent breach and its actual position, in a sum finally calculated as USD 505,486.09.

56. The Claimant has pleaded a Re-Amended Reply and Defence to Counterclaim. It argues that it was entitled to reject Parcel 3 because there was breach of an express condition, and/or that the breach deprived the Claimant "*of substantially the whole benefit of the Contract.*" It denies that it has lost its right to reject as it could not be deemed to have accepted Parcel 3 until it had a reasonable opportunity to reject it, which did not arise until after the ship's composite samples had been tested in accordance with the Contract. Further, the decision to sail to

Malta was an agreed position between the parties with a view to finding a solution in the meantime. By way of Defence to Counterclaim, the Claimant contends that the Defendant's alleged losses were in fact incurred by way of mitigation of the Claimant's losses and so should be irrecoverable.

#### **D. THE ISSUES**

57. The pivotal issues may be broken down as follows:

- a. Issue 1: was the Claimant entitled to reject Parcel 3?
- b. Issue 2: is there a claim for wasted expenditure and if so for how much?
- c. Issue 3: Was the Claimant in breach of contract and if so what is the measure of loss?

#### **D1. Issue 1: was the Claimant entitled to reject Parcel 3?**

58. Within this issue are the following sub-issues:

- a. Did the contractual specification terms amount to conditions or intermediate terms of the Contract?
- b. If they were intermediate terms, did the admitted breaches nevertheless give rise to a right to reject?
- c. Did the Claimant lose any right to reject by accepting the delivery of the cargo on board the *Pioneer* or by directing the vessel to Malta?

***D1.1. Did the contractual specification terms amount to conditions or intermediate terms of the Contract?***

59. The determination whether the obligation to comply with the contractual specifications amounted to a condition of the Contract or an intermediate term, with consequences as regards the right of the innocent party to terminate for breach, turns on the interpretation of the Contract. Before embarking on that exercise, I must first clarify the subject matter which falls for interpretation, as to which there was a measure of dispute.

60. The Claimant directed me to clause 59.1.1 of the General Terms, in particular the provision that, *“Unless otherwise stated in the Special Provisions, the quality of:… (ii) Product delivered hereunder shall not be inferior to the specification (if any) set out in the Special Provisions.”* As the Claimant pointed out, by the remainder of the clause, the obligations otherwise existing under the Sale of Goods Act 1979 (**SOGA**) were replaced by this single obligation. On the Claimant’s case, this obligation is properly to be construed as a condition of the Contract.

61. The Defendant submitted that clause 59.1.1 is largely irrelevant, or at least superfluous, because the operative obligation is contained within the terms of the Contract, namely to deliver product of a quality that meets the specified guarantees. Because, on this argument, the obligation of the Defendant is expressly provided for in the Special Provisions, the relevant part of clause 59.1.1 is not engaged. However, as it seems to me, the specific terms in the Special Provisions complement and do not conflict with clause 59.1.1 and there is no difficulty in having regard to both, to the extent that this assists in determining the question of interpretation. In the event, nothing turns on this. The parties are agreed that there is a single relevant obligation, namely to deliver on-specification product in compliance with the guaranteed levels. That is plain from the Special Provisions. The fact that, pursuant to clause 59.1.1, the parties’ general obligations under SOGA are replaced by a single obligation to deliver product which is not inferior to the specification, does not in my judgment materially assist in determining whether the Defendant’s express obligations amount to conditions or intermediate terms.



62. The Claimant opened its case on the basis that it was “*obvious*” that the relevant obligation (by reference to clause 59.1.1) is a condition because:

- a. It is worded in absolute terms.
- b. If the intention had been to change the usual regime for a sale by description so fundamentally, the clause would need to say so. This argument carries the premise that the provision in the Contract to deliver “*Non EU Qualified LOW-SULPHUR STRAIGHT-RUN FUEL OIL of Slaviansky origin meeting the agreed specification at the time and place of loading*” would under SOGA have been considered, in its entirety, a term of description rather than quality, and therefore would have been a statutory condition absent clause 59.1.1.
- c. The parties would otherwise be expected to include a price adjustment mechanism for off-specification deliveries.
- d. Clause 59.2.1 of the General Terms provides that all terms as to quantity are innominate terms but makes no similar provision as regards terms as to quality.

63. Following the evidence, the Claimant further argued that:

- a. The relevant factual matrix, as described in particular by the experts, supported the submission that there was a market expectation that parties in the position of the Claimant and Defendant would treat specification obligations as conditions, breach of which would give rise to a right to reject.
- b. The classification of such obligations as conditions also satisfied more general considerations of commercial certainty, with the result that each party would know exactly where they stood upon delivery of off-specification goods.

64. The Defendant, for its part, argued that the relevant obligations were not conditions but “*classic examples*” of intermediate terms:

- a. The orthodox position when looking at quality parameter terms in sale of goods contracts is that they are intermediate terms.
- b. More broadly, English law has a general animosity towards finding a term to be a condition. In the absence of any clear agreement to the contrary, the Court should lean in favour of construing the term as intermediate.
- c. In the present case, there is nothing to support the conclusion that the parties did agree that the obligations were conditions. They did not say so, and the words which they did use, including the word “*Guarantees*”, carries no necessary implication.
- d. Support may be found in clause 59.2.1 of the General Terms, which sets out a regime for the making of claims for quality and quantity deficiencies within 45 days.
- e. The factual matrix supports the Defendant’s case, in particular because SRFO is an intermediate product which is almost always bought as refinery feedstock or as blend stock for a larger parcel of fuel oil. In such circumstances, so it was said, quality parameter limits are treated in the industry as “*soft limits*” because, in substance, refineries will be prepared to accept off specification product or, if not, it will normally be possible to blend the product into something which is acceptable.

### Discussion

65. After a review of a run of applicable cases, the following summary is given in *Chitty on Contracts Vol I* [13-040]:

*“The conclusion to be drawn from these cases is that a term of a contract will be held to be a condition:*

*(i) if it is expressly so provided by statute;*

*(ii) if it has been so categorised as the result of previous judicial decisions (although it has been said that some of the decisions on this matter are excessively technical and are “open to re-examination by the House of Lords”);*

*(iii) if it is so designated in the contract or if the consequences of its breach, that is, the right of the innocent party to treat himself as discharged, are provided for expressly in the contract; or*

*(iv) if the nature of the contract or the subject matter or the circumstances of the case lead to the conclusion that the parties must, by necessary implication, have intended that the innocent party would be discharged from further performance of his obligations in the event that the term was not fully and precisely complied with.*

*Otherwise a term of a contract will be considered to be an intermediate term.”*

66. None of (i), (ii) or (iii) applies in the present case, so the analysis turns on (iv). This engages an exercise of interpretation of the obligation in question, in accordance with the normal rules of contractual interpretation. Nevertheless, the cases do give a clear steer as to the correct approach. As *Chitty* says, at [13-035]:

*“In the absence of either express classification as a condition by the parties or of a statute or binding authority classifying the disputed term as a condition, modern courts seem more inclined to classify a term as intermediate rather than as a condition: “the modern approach is that a term is innominate unless a contrary intention is made clear.” A term is most likely to be classified as intermediate if it is capable of being broken either in a manner that is trivial and capable of remedy by an award of damages or in a way that is so fundamental as to undermine the whole contract.”*

67. By way of example, see the observations of Roskill LJ in *Cehave NV v Bremer Handelgesellschaft MbH* (“*The Hansa Nord*”) [1975] 2 Lloyd’s Rep 445, at p 457:

*“In my view, a court should not be over ready, unless required by statute or authority so to do, to construe a term in a contract as a "condition" any breach of which gives rise to a right to reject rather than as a term any breach of which sounds in damages - I deliberately avoid the use of the word "warranty" at this juncture. In principle contracts are made to be performed and not to be avoided according to the whims of market fluctuation and where there is a free choice between two possible constructions I think the court should tend to prefer that construction which will ensure performance and not encourage avoidance of contractual obligations.”*

68. This approach has been carried through into and applied in the context of obligations to deliver goods in accordance with quality specifications. In *Tradax International SA v Goldschmidt SA* [1977] 2 Lloyd’s Rep 604, at p 612, Slynn J drew from the decided cases that:

*“... in the absence of any clear agreement or prior decision that this was to be a condition, the court should lean in favour of construing this provision as to impurities as an intermediate term, only a serious and substantial breach of which entitled rejection.”*

69. The strength of pull towards intermediate terms rather than conditions is apparent from the summary in *MG Bridge, “The International Sale of Goods”*, at [2.43], in the following terms:

*“So well established has become the view that the proper remedy for physical defects in the goods in international sales is a price allowance that courts have reached similar conclusions when dealing with express quality terms failing to state the consequences of a breach. Terms considered to be intermediate stipulations, so that a breach not going to the root of the contract would give the buyer no more than a price allowance, including the shipment of citrus pellets “in good condition” and the requirements that white Syrian barley not contain excess of 4 per cent impurities and that crude oil be of the “usual Dakar refinery quality”. The conclusion that express quality terms are not conditions has avoided the difficulties that*

*arise where a contracting party has more than one route to termination, such as words and conduct that might amount to waiver one right to terminate but not to another.”*

70. It is right to acknowledge that these are indications rather than rules, and that the cases do not always lead to the same outcome. In *Tradax Export SA v European Grain & Shipping Ltd* [1983] 2 Lloyd’s Rep 100, Bingham J held that the words “*maximum 7.5% fibre*” in a contract for the sale of soya bean was both part of the description of the goods and a condition of the contract. The Defendant sought to argue that Bingham J was either in error or at least out of date but this was unconvincing. Of more significance, this was a very different case, which was concerned with a single parameter, the specification of which was itself unusual and which was ostensibly located within the express description of the goods rather than in the quality clause. Ultimately, it will always be a matter of interpretation of the particular contract by reference to its terms and the applicable factual matrix.

71. In my judgment, the obligations of the Defendant to comply with the guaranteed specifications in the Contract were not conditions but intermediate terms. This is for the following interlocking reasons in particular.

72. First, neither the Special Provisions nor the General Terms describes the obligations as conditions or specifies that there is an automatic right to reject if the specifications are not met. I agree that there is no such implication in the use of the word “*Guarantees*” or “*agreed specification*”. The Claimant makes the point that, equally, the obligations are not described as intermediate terms and nor is there a statement that there is no automatic right to reject. However, I consider that this absence tells against a construction of the obligations as conditions. Had commercial parties intended to strike such a balance, it may reasonably be expected that they would have said so.

73. Second, the Contract contains 14 guaranteed parameters. Further, on the evidence, they are not unusual or unusually expressed. David Jones described them as “*pretty normal requirements for straight-run fuel oil*”

and as “*a normal quality stipulation for that type of product.*” Accordingly, I see them more as regular or standard quality specifications than part of the description of the product.

74. Third, and given also the number of the parameters, I am concerned as to the commercial effect of their classification as conditions. The Claimant did not shirk from the conclusion that, on its case, any deviation from the guaranteed levels (whether maximum or minimum), other than perhaps something *de minimis*, would entitle the buyer to reject the cargo *in toto*. In the case of a naturally occurring product, albeit in a semi-refined state, this would place significant risk on the seller and accord corresponding commercial power to the buyer, which power would if anything increase in cases where testing was to be done by ship’s sample after the offending cargo had been loaded. This links directly to the first point mentioned above: the consequences are sufficiently striking for the absence of an express provision to that effect to be of significance. The Defendant submitted that the Claimant’s case was “*commercially absurd and would have a chilling effect on the commodities market if it were correct.*” Whether that is right or not, I do accept that the effect of the Claimant’s case, as regards the balance of commercial risk between the parties, is simply too severe and wide-ranging for it to be left unsaid in the Contract.

75. Fourth, and as discussed further below, it is not the case that the specifications mark some clear watershed between the acceptable and the unacceptable. On the contrary, David Jones confirmed that Parcel 3 remained “*usable as a blend stock for formulation of low sulfur bunker fuel for compression ignition engines, consumption in boiler or as feedstock into an oil refinery.*” He went on to say that, given the costs associated with its off-specification condition, it was “*less marketable*”, but both of the Claimant’s experts agreed in their respective joint memoranda that “*Parcel 3 remained marketable at an appropriate price*”. What that price might be is a question which I consider below. But for present purposes the relevance of this evidence is that it supports the view that the market in which the parties operate can accommodate product of different specifications, whether directly into refineries, for blending or for consumption. At the very least, this shows that it could never be said with certainty that every deviation from specification would

cause any, let alone substantial prejudice, to the buyer. That is to my mind not conducive to a conclusion that the parties would, at least without saying so expressly, expect the hard stop of a condition attaching to each specification.

76.Fifth, I do not believe that the rest of the expert evidence supported the Claimant's case in the way that it suggested. It is right that Peter Jones said that he had seen situations where "*people walk away*". Further, Ms Jago confirmed in cross-examination that "*there's a risk of rejection*". However, I saw these observations as no more than practical expressions of the reality that rejection, or at least the threat of rejection, may on occasion be a part of the discussion when there is a dispute. Neither expert came close to suggesting that there was a market expectation or understanding that any non-compliance with a list of specifications would give rise to a right to reject or even that this was a common outcome where there was such non-compliance.

77.Sixth, on the contrary, it is legitimate to have regard to the nature of the business which the parties were conducting and were known to be conducting. Both the Claimant and the Defendant are oil traders. That business involves seeking opportunities across different markets, and making use of different techniques including the creation of blendstocks. Indeed, in resisting the Defendant's argument that the Claimant was at a commercial disadvantage because of market movements in the relative value of SRFO, EF emphasised the skills of traders such as the Claimant to extract value from blending different parcels:

*"... it is important to understand that, from Galtrade's perspective, trades like this are never about gambling on the market price for [SRFO] rising or falling. We are always seeking to extract value by, for example, using higher specification [SRFO] to blend with and "improve" lower specification parcels, or filling a particular need for a refinery."*

Whilst I accept that there may well be commercial consequences if a parcel is delivered off-specification, I regard it as significant that the very business in which these parties engage might involve the upgrading or downgrading of parcels within larger blends. This makes it less likely that,

within such a market, the expectation would be that a single breach of a specification parameter would automatically make the cargo vulnerable to rejection. It might or might not, depending on its severity, but that is the language of intermediate terms not conditions. Moreover, the fact that the parties did agree a discount on Parcel 2 and sought to negotiate a discount on Parcel 3 points further to the view that, in the market in which the parties operate, deviations from specification are viewed as having remediable economic consequences.

78. Seventh, and as I have explained, the guidance of the cases leans in favour of intermediate terms rather than conditions, all other things being equal, and especially so in the area of quality deficiencies.

79. Eighth, I find little of assistance either way in the provisions of the General Terms. Clause 59.1.1 does not take the matter any further. As for clause 59.2.1:

- a. I attach no real significance to the reference in the first sentence to a timetable for the making of quality claims. The premise of such claims is that the cargo has not been rejected but that does not, in and of itself, either support or undermine the existence of a right to reject.
- b. I do not read into the fact that all terms as to quantity are expressed to be innominate terms the countervailing conclusion that all terms as to quality are not. That is a *non sequitur*. The only relevant point is that clause 59.2.1 says nothing at all about the classification of quality terms.

80. Ninth, whilst I understand the point that the Claimant has made about the advantage in terms of commercial certainty in having a bright line test and a clear entitlement to reject, this can only be taken so far. Commercial certainty is no doubt an important consideration but this must be balanced against all the other factors to which I have referred. The mere existence of intermediate terms as a concept means that certainty is not an absolute.



***D.1.2. If they were intermediate terms, did the admitted breaches nevertheless give rise to a right to reject?***

81. It follows from the above that I am satisfied that the relevant obligations under the Contract were intermediate terms and so the further question arises whether the breaches of these terms were sufficiently serious, on the facts of the case, to generate a right to reject.

82. The Claimant contended that there was such a right to reject because *“the extent of the discrepancy here was such that it deprived Galtrade of substantially the whole benefit of the Contract. Put simply: it was buying low sulphur straight run fuel oil. This was not low sulphur straight run fuel oil.”*

83. As I understood it, there were two strands to the argument:

- a. The first, as expressed above, is that SRFO at a sulphur level of 1.53% is in reality a different product to SRFO at 1.30%. EF supported this case in his evidence: he said that, in the Mediterranean market, only SRFO with a maximum sulphur content of 1.30% is considered “low sulphur”; above that, a purchaser is *“either selling on a different basis, or looking to blend...”*
- b. The second part was more general, and indeed not tied specifically to the content of Parcel 3. It was that traders need to be confident that specifications will be met, so as to enable them to arrange to deal with the purchased cargo, whether by sale to a refinery on back to back terms or as part of the composition of a blend. In such circumstances, any deviation from the specification places the trader in an adverse position vis a vis his next counterparty. This argument seemed to apply to any deviations from specification. Indeed, the Claimant ran the example of the difference between a cargo with an on-specification vanadium content of 49 (problem free on a back to back sale) and an off specification vanadium content of 51 (problematic on a back to back sale). In the context

of Parcel 3 itself, the point was summarised by Tom James in his first expert report:

*“In the case of Parcel 3, the difference between the agreed value of 1.3% sulphur and the quality actually provided (1.53% sulphur) is in my opinion a big discrepancy which did not allow Galtrade to carry out their original trading plan, and thus in my opinion deprived them of the whole benefit of the Contract...”*

84. The Defendant contended that the admitted breaches (which, it emphasised, were limited to the delivery of an off-specification Parcel 3 rather than a complaint about the previous Parcels or about delay in delivery) were not apt to cause any serious harm which could not be remedied by a discount off the price. In more detail, it argued that:

- a. As mentioned above, both of the Claimant’s experts agreed that Parcel 3 remained marketable at an appropriate price.
- b. There is no particular significance to the label *“low sulphur”* in this context, as it is the actual composition rather than the label which is of relevance to refineries and for blending purposes. The difference between 1.30% and 1.53% sulphur is marginal. And indeed, even at the 1.30% level this is not actually regarded as *“low sulphur”* any more, rather *“medium sulphur”*. On the Defendant’s case, *“true”* low sulphur SRFO is below 1%, and under the relevant Platts index is 0.5%-0.7%.
- c. A sulphur level of 1.53% rather than 1.30% would have made no discernible difference on the use of the Parcel by a refiner or a blender. And indeed, a Parcel at that composition could have been used by the Claimant as part of the blend for the Rongsheng forward contract (or a spot contract which the Claimant also concluded with Rongsheng at the time).
- d. The vanadium difference was also marginal and would have had no impact on the use of the Parcel by a refiner or a blender. The same applies to the difference in P-value.

- e. Ultimately, as described by Ms Jago, *“any markets open to Galtrade to make a profit from selling or blending on spec Parcel 3 would also have been available for off spec Parcel 3.”*

85. The Defendant also relied on the fact that, although Parcel 2 was also off-specification (with sulphur content of 1.47%), this was not rejected by the Claimant. Instead, the Claimant and the Defendant agreed a discount off the price, and the Claimant was able to use Parcel 2 as part of the blend on one of the vessels (the *Suez Rajan*) for performance of the Rongsheng forward contract.

### Discussion

86. In *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] QB 26, at 69-70, Diplock LJ described the circumstances in which breach of an intermediate term might be repudiatory as follows:

*“The test whether an event has this effect or not has been stated in a number of metaphors all of which I think amount to the same thing: does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?”*

87. Whilst this is often treated as a seminal statement, Lewison LJ pointed out in *Ampurius Nu Homes Holdings Ltd v Telford Homes (Creekside) Ltd* [2013] EWCA Civ 577, [2013] 4 All ER 377, at [48]-[49], that there were nuances of expression in subsequent cases. For example, Buckley LJ used slightly different language in *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 WLR 361, at p 380:

*“To constitute repudiation, the threatened breach must be such as to deprive the injured party of a substantial part of the benefit to which he is entitled under the contract. The measure of the necessary degree of substantiality has been expressed in a variety of ways in the cases. It has been said that the breach must be of an essential term, or of a*

*fundamental term of the contract, or that it must go to the root of the contract.”*

88. As between these two expressions, there may be a difference, at least at the margins, between a deprivation of “*substantially the whole benefit*” and one of only “*a substantial part of the benefit*”. Whatever the precise formulation, Lewison LJ explained that the starting point must be to consider what benefit the injured party was intended to obtain from performance of the contract and then to consider the effect of the breach on that party, asking questions such as what financial loss it has caused, whether the breach is likely to be repeated and whether the injured party can be adequately compensated by an award of damages.

89. The approach is summarised in *Chitty Vol 1*, at [24-041]:

*“The question whether a breach of an intermediate term is sufficiently serious to entitle the innocent party to treat himself as discharged is to be determined “by evaluating all the relevant circumstances”. In conducting this inquiry, the court is not exercising a discretion, but is engaged in a fact-sensitive inquiry which involves “a multi-factorial assessment” and the use of various “open-textured expressions”. The bar which must be cleared before there is an entitlement in the innocent party to treat himself as discharged is a “high” one. A number of expressions have been used to describe the circumstances that warrant discharge, the most common being that the breach must “go to the root of the contract”. It has also been said that the breach must “affect the very substance of the contract”, or “frustrate the commercial purpose of the venture...”*

90. Applying the multi-factorial assessment described in *Chitty* and by Lewison LJ, I find that the admitted breaches of the Contract were not such as to entitle the Claimant to reject Parcel 3. This is, largely, for the reasons advanced by the Defendant. The points of most significance appear to me to be as follows.

91. First, in broad terms, the contractual benefit which the Claimant was intended to obtain was the delivery of a parcel of SRFO, meeting the agreed specifications, which it would be able to utilise as a trader (most

probably, as the parties reasonably expected, for sale to a refinery or for blending and then sale).

92. Second, I do not accept the submission that SRFO at 1.53% sulphur is a substantively different product to SRFO at 1.30% sulphur. Specifically, there was no objective evidence to support the contention advanced by EF that, on the Mediterranean market, SRFO is considered low sulphur only up to 1.30%. On the contrary, I accept the evidence of Peter Jones that, because the industry accepted specifications of low sulphur fuel oil is at 1% and of high sulphur fuel oil is at 3.5% (these being the values of the indices against which prices may be set), specifications of both 1.30% and 1.53% would (to the extent that a refinery was influenced by the label rather than, as seems much more likely, the actual composition) be viewed as intermediate rather than low sulphur. This is also supported by an example in the evidence of a contract entered into by the Claimant for the purchase of 45,000 mt of “*OMSK MEDIUM SULPHUR STRAIGHT RUN FUEL OIL IN LINE WITH THE FOLLOWING TYPICALS*”, with a “*typical*” sulphur level of 1.28%. This is difficult to reconcile with a case that an (admittedly guaranteed) cut-off of 1.30% divides a low sulphur product from something else entirely.

93. Third, the agreement of both of the Claimant’s experts that Parcel 3 remained marketable at an appropriate price, notwithstanding its off-specification form, strongly undermines the case that the Claimant was deprived of either substantially the whole benefit or a substantial part of the benefit of the Contract. There was also agreement, for example, that refiners are able to process SRFO of varying sulphur levels, including more than 1.53%, and are not restricted to between 0.5% and 1.30% sulphur.

94. Fourth, there was a lengthy debate, largely through the expert evidence over the scale and significance of Parcel 3’s deviation from specification. On this, I consider that the Defendant had the better of the argument:

- a. The Claimant’s expert evidence was in broad strokes but generally lacked detail or support. So, for example, David Jones expressed the conclusion that the consequence was a “*serious reduction of blending options or increase in secondary refining costs making*

*parcel 3 in the “as is” condition aboard PIONEER less marketable to refiners or fuel blending end-users” but he accepted that he was not in a position to undertake any analysis of the actual financial effect. Tom James, in turn, said in his report that SRFO could be used as oil refinery feedstock but “usually subject to sulphur level requirements of the refineries’ own feedstock plans, which usually range from 0.5% to 1.3% sulphur” but he admitted in cross-examination that he had provided no data to support this range and ended up conceding that “It just makes it more difficult... It just makes it harder to sell to refineries if you have higher sulphur levels because it costs them more money to remove the sulphur.”*

- b. In contrast, Peter Jones provided a more analytical exposition of why, from the perspective of a refinery, the deviations from specification would have little practical impact. In summary: (a) refineries are able to process SRFO at sulphur levels of 1.53% as much as at levels of 1.30%. Excess sulphur is not removed from the SRFO itself but from the distillate products derived from the secondary refining processes. Peter Jones’ evidence was that the sulphur is “easily removed” by hydrotreating within the refinery at limited extra cost; (b) the excess in vanadium would also have been of little concern. Once the SRFO has been distilled, vanadium concentrates in the VR portion of the distillate, where it is not a concern. Vanadium content in the VGO, where it might be of some concern to refiners using a catalytic cracker, was either non-existent or negligible (Peter Jones was firm that he had seen no more than 1 ppm in any VGO, albeit that David Jones said that he had seen a little more); and (c) the discrepancy in P-value was irrelevant to a refinery. This is a measure of fuel oil stability, specifically the potential for precipitation of asphaltenes in the form of flocculation (particles suspended in the oil) or sedimentation/stratification (complete separation of the asphaltene phase). However, stability is not a major concern for SRFO and in any event the P-value was just one measure. Other tests included the Toluene Equivalent and the Xylene Equivalent, both of which were included in the specification and both of which were satisfied. As a result, Peter Jones described any resultant risk

as “*non-existent*”. In fact, David Jones and Peter Jones agreed in their joint memorandum that these other measures indicated that the risk associated with fuel stability problems was “*very low*”.

95.Fifth, ultimately, however, the precise contours of this debate may not matter for present purposes because its premise was that the nature and extent of the deviations from specification could be assessed and a value placed on them. This was, perhaps, inevitable, given the agreement of the experts that Parcel 3 remained marketable, albeit at a reduced price. But once that premise has been established, it is difficult to avoid the conclusion that this is a case where the Claimant can properly be compensated for the financial effect of the breach rather than one where it has been deprived of the substantial benefit of its contract.

96.Sixth, for the same reason, I was unpersuaded by the Claimant’s focus on the fact, or at least likelihood, that a breach of specification in a supply contract would inevitably place it at a disadvantage with its own buyer or interfere with its own plans for a blending operation. True it is that a trader holding an on-specification parcel with a Vanadium level of 49 may be in a simpler position than if holding an off-specification one with a Vanadium level of 51, but the same may be said of any party who acts as an intermediate trader without, I anticipate, justifying general rights of rejection. If, ultimately, differences in specification (at this level, at least) affect the price rather than whether the product can be used at all for all or any of its intended purposes, then that is where the remedy ought in principle to lie. Ms Jago also explained the important attributes in the market of “*flexibility and agility*”, when it comes to making the most out of cargoes which are both off-specification and indeed higher than specification.

97.Seventh, I agree that the use to which the Claimant was able to put Parcel 2 provides evidence, if only further confirmatory evidence, of the above conclusions. Parcel 2 was delivered at the end of January 2019. The Claimant took delivery of three further blendstocks between 7 and 12 February 2019. It blended all of these parcels, together with other blends and shipped them on the *Suez Rajan* from Sicily around 17 February 2019. As I mention later, the Claimant sought to make much of the fact that it

made a profit of over USD 2 million on that delivery. I agree with the Defendant that this demonstrates the agility of an oil trader such as the Claimant to make use of parcels, even off-specification parcels, when the need arises. It provides support for the view that the commercial impact of a divergence from specification (at least on the scale in the present case) impacts on the value of the cargo; it does not mean that the buyer receives something substantively different from what it purchased. EF's evidence that "*when Galtrade accepted an off-specification cargo, it was because a compromise had been reached and satisfactory price adjustment made*" supports the same point.

98. Eighth, it is notable also that the Claimant did seek to negotiate a discount off Parcel 3. Admittedly this was against the backdrop of a threatened and then actual rejection of Parcel 3. Further, at least some of the time it was tied to a proposal to terminate Parcel 4 but there was at least one self-standing offer for a (large) discount off the price of Parcel 3. The parties did not, clearly, reach agreement, but the fact that the Claimant was prepared to countenance a reduction in the price for the specification breaches provides a further indication that this was ultimately a problem over value, and that the law ought to follow the same course.

***D.1.3. Did the Claimant lose any right to reject by accepting the delivery of the cargo on board the Pioneer or by directing the vessel to Malta?***

99. In view of the above findings, which mean that the Claimant had no right to reject Parcel 3, this further question does not arise for necessary determination. As the point was fully argued, I will nevertheless express my views.

100. The Defendant's case was that the Claimant knew that Parcel 3 was off-specification before the cargo was loaded onto the vessel but nevertheless accepted the delivery thereby acquiring title to the goods when it ought to have refused to do so. It also relied on what it characterised as the Claimant's own commercial decision to sail the vessel to Malta. Such conduct was inconsistent with any right to reject and so



the Claimant waived and/or lost such right. The relevant knowledge for these purposes was gained by the latest on 9 February 2019 when WVS told EF that the shore tank samples showed 1.47% sulphur content.

101. The Claimant denied that it had any knowledge of the Defendant's breach. It accepted that it was given information on the result of the shore tanks test but, as this had no contractual significance, it did not amount to knowledge of breach. Further, it pointed to section 35 of SOGA, which provides that:

*“(1) The buyer is deemed to have accepted the goods...*

*(a) When he intimates to the seller that he has accepted them; or*

*(b) When the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller.*

*(2) Where goods are delivered to the buyer and he has not previously examined them, he is not deemed to have accepted them under subsection (1) above until he has had a reasonable opportunity of examining them for the purpose:*

*(a) of ascertaining whether they are in conformity with the contract; and*

*(b) in the case of a contract for sale by sample of comparing the bulk with the sample.”*

102. The Claimant contended that, when a cargo of fuel oil is sold by reference to a detailed chemical specification, examining the goods is synonymous with carrying out sampling and chemical analysis, which was not done by or on behalf of the Claimant until the ship's samples were analysed. Further, where the parties have agreed a contractual procedure for that sampling and analysis, that procedure must represent the agreed method by which the buyer is given a reasonable opportunity to examine the goods.

103. The Defendant disputed the relevance of section 35, on the ground that it is concerned with the right of the buyer to examine the goods, as a

precursor to the exercise of any right to reject them. It submitted that such right of examination is irrelevant if the buyer already has the relevant knowledge which, when combined with inconsistent conduct, is otherwise sufficient to support a waiver/loss of the right to reject.

104. Both sides sought to place reliance on the Claimant's email of 9 February 2019. From the Defendant's perspective, the Claimant stated in terms that the indicative figure of 1.47% placed the Defendant in breach of contract entitling the Claimant to reject the cargo. The Claimant pointed out that, in the email, it went on to seek confirmation from the Defendant that either the 1.47% figure was to be treated as an assessment of the quality of the cargo pursuant to the Contract or that the Defendant should immediately provide the Claimant with the testing certificate confirming that the cargo was off-specification.

#### Discussion

105. Had I concluded that the Claimant was otherwise entitled to reject Parcel 3, whether for breach of a condition or for breach of an intermediate term, I would not have found that it had waived or lost that right to reject:

- a. As it seems to me, the answer is fully provided for by section 35 of SOGA. Under the contractual arrangements between the parties, there was no relevant examination except through the ship's composite samples. WVS himself said of the test results "*The only ones that mattered were the ship's composite ones.*" Applying section 35(2), the Claimant had not previously examined the cargo and did not have a reasonable opportunity of doing so except through that process. Hence, it is not deemed to have accepted the cargo until then.
- b. In any event, I do not accept that (even if this were thought to provide an exception to section 35(2)) the Claimant did have knowledge of the Defendant's breach on 9 February 2019. At most, the Claimant was told informally of indicative figures of sulphur content from the shore tanks. It may well be that the figure was

sufficiently high that it would be unlikely, indeed very unlikely, that the ship's sample would return a compliant sulphur rate but this could not be known for certain (and indeed, the ship's figure was different, albeit higher). And there was no indication of many of the other figures, including for vanadium and P-level and so the Claimant's knowledge, even of indicative figures, was incomplete.

- c. Furthermore, I am not satisfied that the acceptance of the delivery was in the circumstances an act inconsistent with the exercise by the Claimant of its right to reject. This has to be considered in the light of the contractual framework, and the dealings between the parties. Under the Contract, testing could not take place until the cargo was already loaded. The Claimant had sought to change the contractual arrangements in order that relevant testing could take place at an earlier stage but the Defendant had resisted such a change, because it did not want to diverge from the arrangements with its own supplier. The Defendant was entitled to take that position but it meant that, in practice, any steps taken by the Claimant before the ship's samples had been tested, would be met with the response that it was too early to reject, in advance of the only results in that mattered. At the very least, the Claimant was reasonably entitled to take that view, given the contractual arrangements and the Defendant's conduct. But if that is right, then I struggle to see how the mere acceptance of the cargo prior to the contractual testing upon which the Defendant had insisted would be an act inconsistent with the exercise of the Claimant's right to reject (if it had such a right). Nor is it of significance that the Claimant thereby acquired title to Parcel 3 because the transfer of title in advance of testing on the ship was simply a necessary consequence of the contractual regime.
- d. I see no separate relevance in the decision to sail to Malta. On the evidence, this was a joint decision, or at least a decision which the Defendant fully supported, on the basis that the parties could seek in the meantime to reach a commercial resolution or, if not, any loss (wherever it fell) would be mitigated by a positioning in Malta rather than the Black Sea. This was a sensible stop gap measure. It

was not inconsistent with the exercise by the Claimant of any right to reject.

**D2. Issue 2: is there a claim for wasted expenditure and if so for how much?**

106. The only pleaded claim for loss is for damages in the amount of the Claimant's *"wasted expenditure of dealing with Parcel 3, from which it derived no benefit as a result of the aforesaid breach and the subsequent rejection of Parcel 3."* The claimed losses are represented, in large part, by the costs of shipping Parcel 3 to Malta.

107. Pursuant to section 51 of SOGA, the measure of damages for non-delivery (including therefore properly rejected delivery) is as follows:

*"(2) The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract.*

*(3) Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered or (if no time was fixed) at the time of the refusal to deliver."*

108. The parties were agreed that there was no market for the immediate delivery of goods corresponding to a contractually compliant Parcel 3, hence the applicable rule would be the general measure under section 51(2), in the event that the Claimant was entitled to reject Parcel 3. However, I have held that it was not so entitled.

109. A buyer's damages for breach of warranty (hence where the goods have not been properly rejected) are the subject of section 53 of SOGA:

*"Where there is a breach of warranty by the seller... the buyer... may:*

(a) set up against the seller the breach of warranty in diminution or extinction of the price, or

(b) maintain an action against the seller for damages for breach of warranty.

(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(3) In the case of breach of warranty of quality such loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had fulfilled the warranty.”

110. As explained by Leggatt J in *Hirtenstein v Hill Dickinson LLP* [2014] EWHC 2711, at [115-117], the prima facie rule in sub-section (3) is not a freestanding measure of damages, rather a means to give effect to the basic measure in sub-section (2). Further, it rests on the assumption that there is a market in which substitute goods are immediately available to the injured party. So, the agreement between the parties that there was no such market means that, again, attention is to be focussed on the general measure.

111. It was also common ground that, at least in certain circumstances and absent contractual preclusion, a claimant can in principle measure its loss by reference to expenditure wasted by reason of the defendant’s breach. This was described by the Claimant as a claim for “*reliance losses*”. Whether a party chooses to frame the claim in this way is a matter of choice. In *Anglia Television Ltd v Reed* [1972] 1 QB 60, at p 63-64, Lord Denning MR said:

*“It seems to me that a plaintiff in such a case as this has an election: he can either claim for loss of profits, or for his wasted expenditure. But he must elect between them. He cannot claim both.”*

Further, in *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] 1 QB 16, at 32, Hutchison J expressed the view that “a plaintiff may always frame his claim in the alternative way if he chooses.”

112. The reason for this flexibility has been explained by Teare J in *Omak Maritime Ltd v Mamola Challenger Shipping Co* (“*The Mamola Challenger*”). [2010] EWHC 2026, [2011] 1 Lloyd’s Rep 47, at [42]. There is in truth no separate measure of loss for breach of contract derived from a claimant’s reliance on contractual performance. Instead, claims for wasted expenditure are a species of the normal measure of contractual loss, namely expectation loss, and so subject to all the rules attached to a conventional contractual damages claim, including in particular the fundamental principle, expressed in *Robinson v Harman* (1848) 1 Exch 850, that the purpose of the exercise is to place the claimant in the same situation, with respect to damages, as if the contract had been performed. A claim for wasted expenditure is merely an expression of the same claim, and carries the premise that, if the contract had been performed, the claimant would not have suffered the loss of the wasted expenditure.

113. The sub-issues which arise under this issue are:

- a. Can the Claimant pursue its claim for wasted expenditure in the event that it was not entitled to reject Parcel 3?
- b. Does the claim fail because the Defendant has established that the Claimant would have lost money even if the cargo had been on-specification?
- c. Is the claim precluded by clause 66.1 of the General Terms?

***D.2.1. Can the Claimant pursue its claim for wasted expenditure in the event that it was not entitled to reject Parcel 3?***

114. If the Claimant was entitled to reject Parcel 3, such that its claim for damages fell under section 51 of SOGA, then I would see no difficulty in principle (subject to the further objections discussed below) in advancing

a damages claim by reference to wasted expenditure. The case theory in that event would be that the cargo was properly rejected and/or should be treated as having never been delivered, and that any expenditure incurred by the Claimant in dealing with a rejected cargo has been wasted by reason of the breach.

115. But where, as I have found, the Claimant was not entitled to reject the cargo, the analysis is rather different. It is correct to say that, in the events which happened, the cargo was in fact returned to the Defendant and so, on one view, the Claimant has incurred costs in respect of a cargo which it never ended up buying, or at least retaining. But that is to ignore the very different legal relationships arising in the two scenarios. In the event that the Claimant had no entitlement to reject, then its purported rejection was itself a breach, indeed undoubtedly a repudiatory breach, of the Contract. That breach, together with the further breach of not actually paying for Parcel 3, was accepted by the Defendant when it agreed to receive the cargo back. We are therefore in a situation of consecutive breaches of contract, first by the Defendant and then by the Claimant. In assessing whether any and if so what losses have been incurred by the Claimant I must be astute to ensure that the distinct breaches are properly given effect. More specifically, when considering the consequences of the Defendant's breach, I will need to strip out the change in the parties' relations attributable to the Claimant's breach. That is an event not caused by the Defendant's breach and so irrelevant in constructing the necessary counterfactual for a damages calculation. As *Kramer* says in "*The Law of Contract Damages*", at [15-41]:

*"If the claimant takes steps that were out of the ordinary course, speculative or otherwise to be treated as collateral and not part of the continuous chain from the breach, ie unreasonable steps, the steps will be deemed by the principle of legal causation not to have occurred for the purpose of assessing damages (and any costs or benefits resulting from the steps ignored)."*

116. I have no doubt that, on the assumption that the Claimant wrongly rejected Parcel 3, this was an unreasonable step which must be deemed not to have occurred. What this means in practice is that, for the purpose

of analysing the Claimant's losses, the working hypothesis has to be that the Claimant is to be treated as having still retained the cargo. That is the modified "*actual*" scenario to be set against the applicable counterfactual that the Defendant delivered in compliance with the Contract. Critically, in both scenarios, the Claimant would still retain the goods. In each such scenario, the expenses would be incurred but they would not be wasted because the cargo would then still have had to be sold by the Claimant. The only reason that the expenses were in fact wasted is that the cargo was wrongly rejected by the Claimant, but that is to be stripped out of the analysis.

117. It is important also to understand that the mere incurrence of expenditure does not in and of itself give rise to a loss sounding in damages. Under the so-called reliance measure, the critical further component, which converts the expenditure into a potentially recoverable loss, is that this has been wasted or rendered futile by reason of the breach. So much is self-evident but is also confirmed in the text-books. Hence:

- a. *"The Law of Contract Damages"*, Kramer, at [18-59]: *"In some cases the damages measure will... be measured by the claimant's expenditure wasted by the defendant's breach... here we are talking only about expenditure that, even but for the breach, would still have been incurred although not (it is said by the claimant) wasted."* And, more generally, at [11-06]: *"A claimant cannot recover expenses that would have been incurred even but for the breach, whether on the same or an alternative transaction."*
- b. *Chitty Vol 1*, at [26-030]: *"Before the breach, or before it became apparent, the claimant may incur expenditure in reliance on the expected performance of the contract by the defendant where the expenditure was not incurred in or towards the performance of his own obligations; this is expenditure from which he expected to benefit, as part of the activity in which he was engaged, after he had received the benefit of the defendant's performance, but which the breach now renders futile ."*



c. *McGregor on Damages* at Ch 4 Part 1 section 3 refers to “An alternative measure: recovery for expenses rendered futile by the breach.”

118. When I first read the statements of case, I assumed that the claim for wasted expenditure was conditional upon on the anterior entitlement to have rejected the cargo, and that is what the wording of paragraph 15 of the Particulars of Claim perhaps suggests. However, the Claimant confirmed in Opening that it pursued exactly the same claim for loss even in the event that it was not entitled to reject the cargo. In other words, its recoverable loss for breach of contract had the same components, whether or not the Claimant’s contractual entitlement was to rejection plus damages or merely to damages alone. I consider that, in the present case at least, the claim is analytically flawed. The difference between the two scenarios is that, if the Claimant had an entitlement to reject, its expenditure on the cargo would indeed be wasted, or rendered futile, by reason of the Defendant’s breach; however, where the Claimant has no right to reject (and so where it ought to have retained the cargo and sold it), the expenditure is wasted by reason of its own breach. As an alternative way of expressing the same point, as per *Kramer* [11-06], once the wrongful rejection is stripped out of the analysis, the Claimant can be seen to be seeking to recover expenses that would have been incurred even but for the breach and on the same transaction.

119. The Claimant submitted that the textbooks referred to no precondition for a wasted expenditure claim that the contract has been (validly) repudiated. That may be so but the real focus must be on the analytical components of the claim, and the books confirm that it is concerned with expenditure wasted or rendered futile by the breach. The Claimant also referred to *Cullinane v British “Rema” Manufacturing Co Ltd* [1954] 1 QB 292 but there is nothing in that case which assists on this point. I also note Chadwick LJ’s assessment of the limited significance of *Cullinane* in *Filobake Ltd v Rondo Ltd* [2005] EWCA Civ 563, at [60]:

*“We start with the “Cullinane” principle. The actual issue in Cullinane itself was the disentanglement of a claim that was based at*

*one and the same time on loss of profits expected from the operation of equipment and loss of the capital value and installation expenses relating to that equipment. This court held that at least on the facts of that case the overlap between the two claims meant that to allow them both would grant double compensation. That, however, was as far as Cullinane went.”*

120. Finally, the Claimant referred to *Savva v Hussein* (1997) 73 P&CR 150, where the Court of Appeal did not interfere with a judgment in favour of a tenant for breach of a repairing covenant in a commercial lease. As appears from the judgment of Staughton LJ, the tenant sought to establish a claim for loss of profits during the period in which the premises were shut due to damp. The trial judge was not satisfied with the figures but awarded instead an amount equal to two months' rent. I do not see that this case, on very different facts, is inconsistent with my analysis. On the contrary, this would appear to be a case where the rent was demonstrably wasted by reason of the breach.

121. In conclusion, I find that the Claimant's claim for wasted expenditure is legally unavailable in the event, which I have also found, that it was not entitled to reject the cargo and hence was restricted to a claim for damages for breach of warranty under section 53 of SOGA. Such losses are not directly or naturally resulting, in the ordinary course of events, from the breach of warranty, because the expenditure in question was not wasted by reason of the breach. Instead, the expenditure was wasted by reason of the Claimant's own unreasonable conduct in wrongly rejecting the cargo, in breach of contract.

122. No alternative measure of loss has been pleaded or has ever been claimed and so I am bound to reach the conclusion that the Claimant can recover only nominal damages for the admitted breaches of contract on the part of the Defendant. This is, however, not as dramatic a consequence as it might at first sight appear. Whilst I have found that the Claimant has not made out its claim for damages, the financial impact on the Claimant of the Defendant's breach may still be represented by the notional discount to be applied to the Contract price in diminution of the Defendant's counterclaim.

***D.2.2 Does the claim fail because the Defendant has established that the Claimant would have lost money even if the cargo had been on-specification?***

123. In the light of my findings so far, this question does not arise for necessary determination. Again, however, the matter was fully argued and indeed was the subject of a large part of the expert evidence. Accordingly, I shall address it, at least to the extent of setting out my broad conclusions on the material before me. The premise of the following paragraphs is that, contrary to my findings above, the Claimant was entitled to reject Parcel 3.

124. As I have mentioned, the juridical nature of the claim for wasted expenditure was explained by Teare J in *The Mamola Challenger* as an expression of a contractual claim for expectation losses. Particularly where a claimant may be unable to articulate a conventional claim for lost profits (as in, for example *Savva v Hussein*), it may instead be able to say that it would not have suffered the losses evidenced by its wasted expenditure if the defendant had performed the contract. The premise is that it would in that event have generated profit, or at least revenue, which would at a minimum have recouped the level of expenses so that they were not wasted.

125. This means that, in turn, such a claim has validity only if and to the extent that the Court is satisfied that the claimant would indeed have generated the necessary revenue to recoup the expenses. The Court will not knowingly make an award of damages which puts the claimant in a better position than if the contract had been performed and so will not allow a claim for wasted expenditure if the result of the breach is that the claimant has thereby managed to extricate itself from a loss-making transaction.

126. Because it is the defendant who has (in the simple case) caused the predicament in which the claimant finds itself, the law applies a rebuttable presumption that the claimant would have generated enough

revenue at least to break even: *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111, [2013] 1 Lloyd's Rep 526, at [188] and [190], per Leggatt J. Further, as per *Kramer* [18-77], "*the burden on the defendant is a real one, and the court will not lightly conclude that the claimant would not have recouped its expenditure.*" The principle also operates as a cap, in that there is a sliding scale under which a claimant may be able to recover more or less of its wasted expenditure depending on how far it would have missed that break even point.

127. The Court must therefore consider, on the defendant's burden of proof, the hypothetical question of the claimant's profitability in the eventuality of contractual performance. In so doing, the Court will apply what has been referred to as the "*fair wind*" principle, or the "*principle of reasonable assumptions*". In *Yam Seng*, at [188], Leggatt J described this as being that "*it is fair to resolve uncertainties about what would have happened but for the defendant's wrongdoing by making reasonable assumptions which err, if anything, on the side of generosity to the claimant where it is the defendant's wrongdoing which has created those uncertainties.*"

128. In the present case, the Defendant has always maintained that the reason the Claimant in fact rejected the cargo is that the market had turned against the Claimant and that the Contract was loss-making, whether on- or off-specification. Specifically, whereas SRFO had traded at a substantial discount to crude oil in October 2018, the price of crude then dropped sharply, with the result that SRFO traded close to the price of crude in early 2019 and sometimes even at a premium. The consequence, so the Defendant maintained, was that the market for SRFO contracted because refinery economics then favoured the purchase of the superior quality crude over SRFO and the generation by refineries of their own SRFO. The price of VGO also declined against SRFO, making buying VGO more attractive to a refinery than buying SRFO. As a result of these market changes, the price of SRFO fell sharply relative to that of conventional fuel oil, such that the premium agreed under the Contract against the Platts index for 1% sulphur fuel oil FOB Mediterranean became uneconomic. Ms Jago's view, built upon Peter Jones' analysis, was that the Claimant would have needed to discount a compliant Parcel 3 by at least USD 45/mt in

February and March 2019 to make it an attractive purchase to a Mediterranean refinery. Further, through the construction of various models, it was suggested that a blended parcel to the Far East or the US would also have resulted in losses.

129. The Claimant resisted these conclusions. It characterised itself as a skilled oil trader and pointed to various profitable transactions in SRFO which it entered into at around this time. These included the shipment on the *Suez Rajan* as part of the performance of the Rongsheng forward contract. This had a particular relevance, given both that Parcel 2 was included within the blend on that shipment and that the Claimant's initial intention had been to use the SRFO from the Contract generally to supply the Rongsheng forward contract. The Claimant made an overall profit on the *Suez Rajan* shipment of USD 2,139,630. Further, and amongst other things, the Claimant was able to point to two "spot" sales for SRFO in the Mediterranean undertaken by the Claimant at or near break even: (a) on 30 January 2019, the Claimant sold 35,000 mt SRFO to ORL TA in Israel, at a small loss of USD 864; and (b) on 22 February 2019, it sold 30-35,000 mt of SRFO to H & R GmbH in Germany at a profit of USD160,118. This demonstrated, so the Claimant maintained, that the market for SRFO had not crashed in the way suggested by the Defendant and that there remained opportunities which the Claimant could and would have exploited.

130. There was also a difference of principle over the construction of the relevant counterfactual for the purpose of determining whether the Claimant would or would not have broken even. On the Defendant's case, the question is what would have happened "*but for*" the breach and so the counterfactual must start at the date of breach. In this case, the breach was the failure to deliver on-specification cargo and so the counterfactual question is simply what would have happened had the Defendant complied with that obligation on 10 February 2019. It relies, amongst other things on the general principle that there is no obligation to mitigate loss before the breach. The Claimant argues that this is too narrow an approach and that it is necessary to take into account the whole factual scenario. Specifically, it is relevant that the Claimant did not in fact arrange an on-sale of Parcel 3 in the weeks leading up to its delivery

because of its legitimate (and in the event well founded) concerns that the delivery would be off-specification. Hence, on the Claimant's case, the counterfactual question is what would have happened had the Claimant been able to deal effectively with Parcel 3 in advance.

131. This otherwise rather esoteric question has a practical significance in that the Claimant accepted that it would not, from a standing start in February 2019, have been able to turn Parcel 3 to profitable use. The Claimant would have been in the disadvantageous position of a distressed seller, even with an on-specification cargo. However, on the Claimant's case, if it had had the opportunity properly to plan in advance, it could and would have at least broken even.

132. This is not a point, so far as appears on the materials before me, that has previously been considered. The Claimant relies on *Kramer* [1-47], where the diagrammatic representation of the counterfactual certainly starts with the date of breach. But I do not read too much into this. That is no doubt the normal case. The real question, as it seems to me, is whether, even though the innocent party has no duty to mitigate in advance of the breach (this was common ground: see eg *McGregor on Damages* at [9-021]), any steps which are in fact taken, or at least reasonably taken, in mitigation in advance of an expected breach, can be legally relevant or should be treated as *res inter alios acta* because they occurred before the breach. Subject to the filter of reasonableness, I see no reason why such conduct should not be relevant, in an appropriate case. The fact that the steps are taken in advance of breach and without legal obligation does not provide a principled reason to exclude them. This is supported by the observation of Mance J in *Coastal (Bermuda) Petroleum Ltd v VTT Vulcan Petroleum SA (The "Marine Star")* [1994] 2 Lloyd's Rep 629, at p 639, that "A party who acts to secure his position in advance of a breach which he predicts will occur takes the risk that it will not occur. However, there is no incongruity in allowing him to attribute his conduct to the breach if and when his prediction proves sound." This was in a slightly different context and the Claimant properly pointed out that the decision itself was overturned on appeal at [1996] 2 Lloyd's Rep 383, but on a different point.

133. The Claimant's case is that, in effective mitigation of its loss, it did not tie itself to an on-sale contract or make other firm plans in advance, because it was reasonably concerned that Parcel 3 would be off-specification and that this would only cause greater problems and consequent loss. This was supported by Tom James, who said that it was *"obvious that, once you cannot trust the specification figures that you have been given, you cannot make arrangements to sell the cargo on, or blend it into a larger parcel, until you know what you are actually dealing with."*
134. Given the difficulties already encountered with Parcels 1 and 2, I find that the Claimant acted reasonably. In the event, the Claimant's apprehension was fully justified. In such circumstances, I consider that it would be wrong to construct a counterfactual from the date of delivery which ignores the steps taken or not taken by the Claimant in reasonable mitigation of its expected loss. Accordingly, the relevant counterfactual question is whether the Claimant could have broken even had the Defendant delivered an on-specification Parcel 3 and had the Claimant been able to take normal steps to plan for such delivery in advance.
135. As was perhaps inevitable, each side also directly attacked the approach of the other to the economic analyses. The Claimant complained that the Defendant had not produced, either to the Defendant or to its own experts, details of its own (assumed profitable) trading in SRFO during this period. The Defendant, in turn, complained that the Claimant's evidential production had been sparse. The Claimant attacked elements of the analysis and models of the Defendant's experts as speculative or inapposite. The Defendant retorted that it was not good enough for the Claimant to take *"pot shots"* at the Defendant's calculations without producing its own versions.
136. Ultimately, I was left with a very complex, though only partial and largely hypothetical picture. I do have sympathy, in broad terms, with the Claimant's complaint that much of the Defendant's analysis was indirect and hypothetical and that it often raised as many uncertainties as answers. So, for example, (a) the refinery economics analysis was retrospective rather than dynamic and could only ever present a

generalised picture rather than one directed to the strategic decisions made at the time by any particular refineries, including those buying SRFO *“at the margin”*; (b) modelling on the economics of transporting a hypothetical blend on a hypothetical ship to the Far East or elsewhere, especially where the information is incomplete, is likely to be an uncertain exercise; and (c) insofar as the analysis was derived from movements in the Platts low sulphur SRFO index, this also suffered from queries over the make-up and reliability of an index which Ms Jago herself described as *“not considered to be reliably accurate”*. None of this is intended to be a criticism of either Peter Jones or Ms Jago. It may simply be that the question which has been raised by the Defendant is not readily susceptible to a comprehensive retrospective investigation or that it is just too vast an endeavour to try to plot accurately the likely profitability of a notional parcel of SRFO in the hands of an oil trader, at least without clear parameters. That is especially so when the very business of a trader such as the Claimant is to seek opportunities across different markets and by adopting a range of tools, whether by direct sale or blending. EF explained that *“Galtrade’s success as a trader comes from seeing where there is a need to fulfil”*. Whilst that is, perhaps, a statement of the obvious, the evidence of actual transactions at the time shows that the Claimant was continuing to deal with SRFO at or close to profit during this period.

137. Having reviewed the evidence again, I am left with the view that it is perfectly possible that the Claimant would have lost money on a compliant Parcel 3 but it is equally possible that it would not, and that it is difficult to assess with any degree of assurance which is the more likely outcome. In that state of uncertainty, I do find comfort in the evidence presented by the Claimant of actual transactions at the time which were profitable or close to profitable, albeit that I note that this was not necessarily a comprehensive list. Taking all this together, applying also the fair wind principle, and had the matter arisen for determination, I would have concluded that the Defendant had not discharged the burden of showing that it was more likely than not that the Claimant would not at least have broken even had it been supplied with a compliant Parcel 3 and had it been able to plan in advance.



### ***D.2.3. Is the claim precluded by clause 66.1 of the General Terms?***

138. The Defendant's further argument, which again I shall deal with though it does not arise for necessary determination, is that the Claimant's claim for wasted expenditure is on proper analysis a claim for "*loss of anticipated profits*" and so precluded by clause 66.1 of the General Terms. This argument derives principally from the explanation of the nature of the claim for wasted expenditure, as set out in *The Mamola Challenger*. The submission was that, if it is in reality merely an expression of expectation loss, which is recoverable only to the extent that the Claimant would have generated sufficient revenue at least to break even, then it is in substance a claim for the "*anticipated profits*" that would have been so generated. The Defendant also relied on the decision of O'Farrell J in *CIS General Insurance Ltd v IBM United Kingdom Ltd* [2021] EWHC 347, at [666]-[688].

139. I will deal with this argument shortly because I believe it is misconceived:

- a. Starting with the clause 66.1, the term "*loss of anticipated profits*" is on its proper interpretation intended to exclude the recovery of conventional claims for loss of profit (whether falling under either limb of *Hadley v Baxendale* (1854) 9 Exch 341). Hence, a buyer cannot claim the profit he would otherwise have earned on its on-sale. And the seller cannot make a claim for its inability to put the sale price to profitable use. In each case, though, such a claim could only ever be for (and so the exclusion must apply to) net profits over and above the party's costs. If the contention were that the party would merely have broken even, then there would have been no profits to recover. I do not read clause 66.1 in an expansive way so as to apply to a claim which could not be made.
- b. This interpretation is consistent with the analysis of Cooke J in *Glencore Energy UK Ltd v Cirrus Oil Services Ltd* [2014] EWHC 87, [2014] 2 Lloyd's Rep 1, [at 98]. When dealing with the same clause in an earlier version of the General Terms, he said:

*“Lost profit is the difference between the total net cost to the seller of acquiring the goods and bringing them to market on the one hand and the net sale price that would have been achieved on the other.”*

- c. Conversely, and although the claim for wasted expenditure is an expression of the claim for expectation losses, it is no necessary part of that claim that the claimant has foregone any actual net profits. The only assumption is that the claimant would have broken even had the contract been complied with. Put another way, the substance of the claim is that the claimant has lost money which it would not otherwise have lost. It is not that the claimant has foregone a profit which it would otherwise have earned.
- d. The point may also be articulated via *Benjamin*, at [17-062]: *“But the buyer can recover his wasted expenditure only to the extent that it would have been covered by the gross return which he would have made from the use of the goods if the seller had fully performed his contract.”* In my judgment, a limitation on this measure of loss by reference to the buyer’s gross return does not mean that the claim is in fact for loss of anticipated profits within the meaning of clause 66.1.
- e. So far as *CIS General Insurance* is concerned, I accept the Claimant’s submission that the relevant clause in that case was materially different, in that it excluded a much wider category of losses, namely *“which are indirect or consequential Losses, or for loss of profit, revenue, savings (including anticipated savings)...”*. No doubt, this was because it was a very different sort of contract, for the supply and management of a new IT system. I do not find that the analysis in that case is of assistance in considering the scope of clause 66.1 of the General Terms and its application to the present case.

**D.3. Issue 3: Was the Claimant in breach of contract and if so what is the measure of loss?**

140. For the reasons that I have already given, I find that the Claimant acted in breach of contract in wrongly rejecting Parcel 3 and in refusing to pay the Contract price. The Defendant accepted that breach when it received the cargo back by ship to ship transfer in Malta.

141. A seller's claim for damages for non-acceptance (or, as here, wrongful rejection) falls under section 50 of SOGA:

*“(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.*

*(2) The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the buyer's breach of contract.*

*(3) Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price at the time when the goods ought to have been accepted or (if no time was fixed for acceptance) at the time of the refusal to accept.”*

142. The sum claimed by the Defendant is calculated as the Contract price, less an allowance for the off-specification delivery, minus the net sum recovered by the Defendant on the sale of Parcel 3, as part of the Blended Parcel, to BPPNA.

143. The following sub-issues then arise:

- a. Are the losses claimed on analysis sums spent in mitigation of the Claimant's loss?
- b. What is the quantum of the counterclaim?

***D.3.1. Are the losses claimed on analysis sums spent in mitigation of the Claimant's loss?***

144. The Claimant resists the entirety of the Defendant's counterclaim on the ground that the actions taken by the Defendant in receiving back the cargo, in blending it into the Blended Parcel and in selling it into the US Gulf should properly be characterised as steps taken in mitigation or diminution of the Claimant's own loss caused by the Defendant's breach, and therefore cannot found a damages claim by the Defendant. However, this must fail on the analysis of the separate breaches which I have set out. Upon the breach of contract by the Claimant, accepted by the Defendant, the Defendant is entitled to damages pursuant to section 50 of SOGA. The steps taken by the Defendant to sell Parcel 3 were in mitigation of its own loss, consequential upon the Claimant's breach. The impact of the Defendant's breach is taken into account in the calculation by an appropriate discount off the Contract price.

145. However, I do not believe that this point ultimately matters, once it is accepted that the Defendant must give credit, against its counterclaim, for the loss of value in the cargo due to its off-specification nature. If properly assessed, that figure ought to reflect the notional damages which would otherwise have been due to the Claimant by reason of the Defendant's breach. Any losses suffered by the Defendant after taking into account that credit, if and to the extent that such losses were indeed suffered, can only have been caused by the Claimant's breach. It is to that final question that I now turn.

***D.3.2. What is the quantum of the counterclaim?***

146. By the end of the hearing, the basic figures making up the Defendant's calculation of loss were agreed. The Claimant has a legitimate complaint that it took the Defendant a long time, and several iterations, to arrive at these figures, especially for its hedging losses, and that the right approach had to be extracted through cross-examination, but the proper figures did eventually arrive. I reject any residual criticism, to the

extent that it was maintained, of the Defendant's hedging strategies themselves. I do not consider that the Defendant acted unreasonably in mitigation of its own loss.

147. The outstanding, and difficult, issue is as to the appropriate discount to be given off the Contract price to reflect the Defendant's own breach of contract. This may be seen as either the notional application of section 53(1)(a) of SOGA, where the Claimant in effect sets up the breach of warranty in diminution of the price, or a component of the calculation of the seller's damages under section 50(2). Either approach ought to arrive at the same result. Section 53(1)(a) follows the law as laid down in *Mondel v Steel* (1841) 8 M & W 858, at p 871-2, where it was held that, in response to a claim by the seller, it was "*competent for [the buyer]... simply to defend himself by shewing how much less the subject-matter of the action was worth, by reason of the breach of contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract...*"

148. In the absence of an available market, any calculation of loss, or diminution in value, for breach of warranty carries inherent complications. How does the Court arrive at a figure for loss without a market value on which it can rely? The answer, as with most questions around damages, is that it must do the best that it can, using the available material and extrapolating from any applicable data points. By way of analogy, *Benjamin's Sale of Goods* describes at [17-021] the range of potential sources for the estimation of loss under section 51(2) in the absence of an available market: "*The assessment must be made on the basis of the value of the contract goods at the time and place of the breach which may be ascertained by any relevant evidence, such as the cost of the nearest equivalent, or a resale price, or the profits which the buyer would have made had he acquired the goods and manufactured them into other articles, as the seller knew that he intended to do.*"

149. Further although the question is, necessarily, an objective one, this does not mean that there is necessarily a single answer to the value or price of a particular defect. The impact of that defect may be very

different at the outset of a contract and at the date of its performance. This latter point was demonstrated very clearly in the present case. In some contracts for the delivery of fuel oil, parties may include an “*escalator clause*” which places a defined value on variations in specification, for example increasing or decreasing the price in increments depending on the ultimate level of sulphur, at least within a stated band. Those prices might be dictated, for example, by the perceived cost to the refinery of having to remove the sulphur from its distillates. But it is a different scenario when a buyer is presented with an off-specification cargo without any pre-agreed escalator. As the Claimant submitted, that puts the buyer in a difficult position if it has already on-sold the cargo on the same terms or if this interferes with its blending plans. The evidence was that refineries tend to place orders 3-4 weeks in advance and that, whilst there can be spot sales, these are more unusual. I have not accepted the submission that this supported the Claimant’s right to reject Parcel 3. But I do see that it may have an effect on value. The value to a buyer of SRFO which is known at the outset to have sulphur at 1.53% may be markedly different to the value to the buyer of SRFO which is delivered with the same sulphur level out of specification. This suggests that there may be a range of appropriate values rather than a single effect of any individual defect.

150. The Defendant’s approach in the evidence was to seek to calculate a single discount value drawn from the individual elements which were off-specification. Peter Jones assessed the value from the perspective of a refinery, at something in the region of USD 1/mt for the sulphur, with the vanadium and P-value figures justifying only a modest, if any, further discount. Ms Jago was of the view the market price differentials would lead to a discount of around USD 4.7m/mt for the sulphur and vanadium, with a further small reduction of P-value. However, this does not take me very far in assessing the diminution in value of this cargo in the circumstances of this case.

151. The Claimant did not really engage in any calculations of value, presumably because it had put its case on the wasted expenditure basis. It, instead, emphasised just how difficult it was for a buyer to dispose of an off-specification cargo especially where (as here) the buyer had not

arranged an on-sale because of concerns that the cargo would not meet the specifications. I specifically asked Tom James how he would go about a calculation but he only repeated how difficult this was, given the number of permutations and the absence now of live data. However, I accept the Claimant's submission that the correct discount "*must encompass all of the consequences of it becoming a distressed seller.*"

152. Given the limitations of the exercise, and the absence of any reliably applicable forensic calculation, I apprehend that I ought to pay particular regard to such contemporaneous material as exists as a proxy for evidence of actual value (or at least perceived actual value, which may in the end be the same thing). In this regard, I consider that the best evidence is the price discount agreed between the Claimant and the Defendant on Parcel 2, the composition of which was similar to (although, so far as sulphur and vanadium was concerned, not quite as bad as) Parcel 3. The discount (as agreed by the experts) was USD 29.7/mt. WVS was at pains to emphasise that this was especially generous. That may well be his view, with the benefit of hindsight, but it is difficult to avoid the conclusion that it approximated to what the parties at the time considered was a suitable discount to reflect the delivery by the Defendant of a similarly off-specification parcel of SRFO.

153. WVS also gave evidence that, in a negotiation with the Claimant in respect of Parcel 3, he would have been prepared to give a discount of only USD 10.50/mt. This is not easy to reconcile with the USD 17/mt figure which he described as "*fair*" on 9 February 2019 but, in any event, it does not provide any sure basis of the actual value, at least when set against the discount which was in fact agreed on Parcel 2.

154. The second piece of contemporaneous evidence is that the Defendant succeeded in negotiating a discount on Parcel 3 with its own supplier, at a level, calculated by Tom James, of USD 24.795/mt. Whilst, again, there may have been factors influencing that negotiation, this is sufficiently close to the discount between the Claimant and Defendant on Parcel 2 to give confidence that these are the sort of figures that are likely to be appropriate. Finally, there is the email sent by WVS to the Defendant's brokers on 15 February 2019 with a view to testing the

market for the sale of Parcel 3. This was priced off the Platts High Sulphur quote CIF MED + 18. This did not reflect an agreement and so it has perhaps less direct evidential value but again, it appears to fall in a similar region to the discounts I have referred to.

155. Taking all these matters together, I have reached the conclusion that the fairest assessment is the discount in fact agreed on Parcel 2. That is in my judgment the best contemporaneous evidence of the value to these parties of the Defendant's breach of contract in respect of Parcel 2, and I do not believe that the variations between Parcel 2 and Parcel 3 justify a materially different assessment. That figure is also supported by the further contemporaneous data points that I have referred to. This is undoubtedly a broad brush assessment but I believe that it is the most appropriate assessment on the evidence before me.

156. I have been provided with a helpful Excel spreadsheet for the resultant calculation of the Defendant's damages claim. On my application of the tool, and applying a discount of USD 29.7/mt, the value of the counterclaim is entirely extinguished (and indeed the Defendant can be seen to have made a small profit).

## **E. DISPOSITION**

157. The Claimant and the Defendant are each entitled to judgment for nominal damages.