

Inconsistent Contractual Terms the Court of Appeal Gave a Unanimous Yes

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PRACTICES Shipping, Litigation, Energy, Power and Natural Resources, Europe, Middle East and Africa, Offshore Oil and Gas, Offshore Oil and Gas Dispute Resolution, Oil and Gas, Oil and Gas Litigation

The Court of Appeal has recently overturned the decision of Teare J in the Commercial Court¹, finding that the alleged inconsistent terms are in conflict and cannot fairly and sensibly be read together.

In *Septo Trading Inc v Tintrade Limited*² all three Court of Appeal judges (Moylan, Males and Phillips LJ) held that on its true construction, the contract provided that the quality certificate issued by the independent inspector at the load port would be binding on matters of quality, so that the respondent buyer was precluded from bringing its claim for off-spec fuel supplied by the appellant seller.

The sale was evidenced by a “Recap” which said that the quality certificate would be binding in the absence of fraud or manifest error (the “Recap Term”) and provided for the BP 2007 General Terms and Conditions for fob sales (the “BP Terms”) to apply “where not in conflict with the above”. The BP Terms said that the quality certificate will be conclusive and binding “for invoicing purposes”, but without prejudice to the buyer’s right to bring a quality claim.

As previously reported³, the Commercial Court held that the BP Terms qualified the Recap Term which, if it had stood alone, would have excluded the buyer’s quality claim, but there was no conflict between these terms which could be read together, so as to give effect to both, allowing the buyer’s claim for off-spec fuel. The seller’s appeal maintains that the two terms are in conflict.

In allowing the appeal, Males LJ started with the meaning of the Recap Term and noted that the Commercial Court was right to conclude that the effect and clear meaning of it, considered on its own, is that the quality certificate is intended to be binding on both parties for all purposes. Next, he considered the effect of the BP Terms was that the binding nature of the quality certificate is for a very limited purpose – invoicing – but without prejudice to the buyer’s right to bring a quality claim.

Turning then to the question of inconsistency, he reached the firm conclusion that the BP Terms are in conflict with the Recap Term, with the BP Terms not merely qualifying or supplementing the Recap Term but depriving it of all practical effect. This conclusion was reached for the following reasons.

First, the two terms provide for the quality certificate to be binding for two clearly different purposes and with the effect that the BP Terms would deprive the Recap Term of all effect. Second, a regime where a quality certificate is binding is fundamentally different from one in which it is not. Third, the provision in the Recap Term for the quality certificate to be binding is a central feature of the contractual scheme. It defines the seller’s obligation with regard to the quality of the product, that obligation being to provide a product which is certified by the independent inspector at the loadport

as being in conformity with the contractual specification. Males LJ noted that, in circumstances where no two sets of samples of fuel are likely to be exactly the same, this provides an important measure of certainty, and it is unlikely that the parties would wish to substantially detract from this by means of the BP Terms.

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

The successful appeal is interesting because as recognised here, the law which applies where there is said to be an inconsistency between specially agreed terms and the printed standard terms of the contract, and where the contract contains an inconsistency clause, is well settled. In this case though, its application gave different results in the two different courts.

So what to learn? The advice in our previous article still stands - care should always be taken when general terms and conditions are incorporated into a contract, especially when the same issues are covered in both the specially agreed terms and the standard terms. Drafters should particularly ensure that the specially agreed terms of their contract fully reflect the intention of the parties.

1 *Septo Trading Inc v Tintrade Limited* [2020] EWHC 1795 (Comm)

2 [2021] EWCA Civ 718

3 <https://www.haynesboone.com/alerts/inconsistent-contractual-terms>