Neutral Citation Number: [2023] EWHC 3264 (Comm)

Case No: LM-2023-000022

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
LONDON CIRCUIT COMMERCIAL COURT

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

Date: 19/12/2023

Before :

MS CLARE AMBROSE
sitting as a Deputy Judge of the High Court

- -

Between :

(1) AMS AMEROPA MARKETING SALES AG **(2) BALOISE BELGIUM S.A.**	**Claimants**
- and -	
OCEAN UNITY NAVIGATION INC	**Defendant**

- -
- -

Craig Williams (instructed by **Hughes and Dorman**) for the **Claimants**
David Semark (instructed by **Wikborg Rein LLP**) for the **Defendant**

Hearing dates: 28 & 29 November 2023
Draft judgment provided 8 December 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 19 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MS CLARE AMBROSE SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

Ms Clare Ambrose :

A Introduction

1. This is the trial of a claim relating to damage to a cargo of 50,000 metric tons of yellow soybeans ("the Cargo") carried from Louisiana to Egypt on board the vessel DORIC VALOUR ("the Vessel") in August 2020. The Cargo was loaded in apparent good order but on discharge some of it was found damaged. The Claimants are now claiming damages of USD 417,190 under bills of lading dated 4 August 2020 which were issued by the Defendant, who is the registered owner of the Vessel ("the Owners").

2. By the time of trial, the Owners had admitted breach of their contractual duty under the bills of lading to take reasonable care of the Cargo because crew on board had excessively heated fuel in the port topside fuel oil tank adjoining hold 4. The Owners accepted that this heating caused damage to a small part of the Cargo in that hold. However, the claim was disputed on grounds that the Claimants lacked title to sue. In addition, causation and quantum of recoverable losses were hotly disputed.

3. The key dividing line between the parties arose because the Claimants were seeking damages for loss of value of c. 3,600MT of the Cargo (described as "the Rejected Cargo") that contained both sound and damaged cargo. It had been separated from the rest of the Cargo, taken to a different warehouse and sold under a salvage sale ("the Salvage Sale"). The Owners maintained that only around 15 to 88MT of the Cargo had been damaged by reason of their breach. They said that the Claimants had failed to establish that the losses claimed were caused by that breach and had also unreasonably failed to mitigate in segregating sound and damaged cargo, and entering the Salvage Sale.

B The claims

4. It was common ground that the lawful holder of the bills of lading at discharge was an Egyptian company called International Oil Multiseed Extraction Co ("Oilex"). The First Claimant sues as the assignee of the rights of Oilex. The Second Claimant is the cargo insurer.

5. The Claimants' primary claim is for USD 417,190.17 on the basis that Oilex as receivers refused to accept the Rejected Cargo and in reasonable mitigation of their loss it was sold in a Salvage Sale. They claimed loss and damage in the following sums:

    a) USD 363,061.59 for loss of value of the Rejected Cargo based on the difference between its sound market value at the time of discharge (i.e. USD 454/MT) and its actual value as evidenced by the Salvage Sale at a price of USD 1,292,998.75.

    b) USD 54,128.58 for ancillary fees and expenses consisting of:

i) SGS fees in respect of monitoring, inspection, offshore transportation and other services in the sum of USD 11,648.38;

ii) survey fees in the sum of USD 14,883.37;

iii) warehouse rental, trucking and stevedoring fees in the total sum of USD 27,598.83.

6. Alternatively, the Claimants claim USD 347,883.68 as the difference between the sound CIF value of the Rejected Cargo (i.e. USD 435/MT) and its actual value as evidenced by the Salvage Sale (USD 293,755.10) plus the same ancillary fees and expenses (USD 54,128.58). The sound CIF value is taken from the invoice value of the Cargo paid by Oilex.

C The evidence

7. The Claimants called expert evidence from Mr David Duffield of AqualisBraemar (whose experience included many years as a surveyor and also as a chief officer) and Mr Samir Sarradj of Minton Treharne & Davies (whose expertise was as a biologist with specialisation in agricultural commodities).

8. The Owners called Dr Marcelo Rodrigues whose expertise was as a biologist with specialisation in grain cargoes. He had inspected and sampled the Rejected Cargo in a warehouse in Egypt on 24 and 25 September 2020. He gave both factual evidence by way of two witness statements and also expert evidence by way of expert report. The Owners also relied on the witness statement of Captain Samatios Ntouslatzis ("the Master") who was the Master of the Vessel at the relevant time.

9. The court had the benefit of around three hundred photos, contemporaneous documents and survey reports relating to the Cargo.

D The Factual Background

10. The underlying transactions relating to the Cargo involved an FOB sale, a CIF sale, a voyage charter and bills of lading that evidenced the contract of carriage undertaken by the Owners.

11. The First Claimant is a company based in Switzerland. It had purchased a cargo of soybeans from Zen-Noh Grain Corporation on FOB terms and entered into a voyage charter for carriage of the Cargo on an amended Synacomex form of the Vessel dated 7 July 2020 with Pacific Basin Spuramax Ltd.

12. The Second Claimant is an insurer based in Belgium and the First Claimant was named as assured on documents evidencing payment of survey fees.

13. On 15 July 2020 the First Claimant sold 50,000MT of US no.2 or better yellow soybeans in bulk +/- 10% on CIF terms to Oilex. The sale contract provided that:

"*QUALITY SPECIFICATIONS:*

BROKEN/SPLITS: 20% MAXIMUM

MOISTURE: 13.5% MAXIMUM

TOTAL DAMAGED KERNELS: 5.0% MAXIMUM

INCLUDING HEAT DAMAGED KERNELS: 0.5% MAX

FOREIGN MATERIALS: 2.0% MAXIMUM

SBNS OF OTHER COLOURS: 2.0% MAXIMUM

PROTEIN: 34% MINIMUM

OIL: 18.5% MINIMUM (FOSFA METHOD)

AFLATOXIN (TOTAL, B1, B2, G1, G2): MAX. 20 PPB TOTAL, INCLUDING MAX 10 PPB B1

GOODS MUST BE SOUND, LOYAL MERCHANTABLE QUALITY AND FREE FROM FOREIGN SMELL AND LIVE INSECTS OR WEVEILS

WEIGHT/QUALITY AND CONDITION:

QUALITY AND CONDITION FINAL AT LOADING AS PER INDEPENDENT FIRST CLASS FOSFA APPROVED SURVEYOR'S CERTIFICATE AND/OR FGIS CERTIFICATE, IN SELLER'S OPTION AND EXPENSE. …

…

PRICE:

C/BU BASIS CBOT NOVEMBER 2020 FUTURES."

14. On 3-4 August 2020, the Cargo, a total of 49,574.949 MT of yellow soybeans in bulk, was loaded on board the Vessel from the Zen-Noh Grain Elevator at Convent Louisiana. The official USDA inspection certificate issued for the Cargo on loading showed that it fell within the specifications of the sale contract and also the limits of the US grading for US No.2 grade soybeans.

15. On 4 August 2020, fifty clean bills of lading on the Congenbill form ("the bills of lading") were issued on behalf of the Master. It was not disputed that these bills were issued on behalf of the Owners. The bills name Zen-Noh Grain Corporation as shipper and state "to order" in the consignee box. Oilex was identified as the notify party.

16. On 25 August 2020 the First Claimant issued an invoice to Oilex for USD 21,565,102.82, with the sale price stated as USD 435/MT. On 2 September 2020 Oilex paid the First Claimant this sum.

17. On around 30 August 2020, the Vessel arrived at Abu Qir Port (close to Alexandria). When the Vessel's holds were unsealed by SGS the soybeans in holds 1, 2, 3, and 5 were found to be sound but damage was found on the surface of the Cargo in hold 4.

18. On 31 August 2021 a joint survey took place involving surveyors instructed by the Owners' P & I club, Pacific Basin, the consignee, the cargo underwriter and the shipper (these last 3 were not identified but I refer to them broadly as cargo interests). A Joint Survey Report of the same date concluded from a visual inspection that the cargo surface inside hold 4 was lumpy, caked, rotten, discoloured and with bad smell, and also at a high temperature, which ranged between 32 ˚C and 47 ˚C.

19. The surveyors were not able to decide the exact quantity damaged and agreed that damaged cargo should be segregated with a view to determining the damaged cargo at the end of discharge. The crew immediately started work to remove the lumpy caked cargo on the surface (described by the experts as a crust). The work was done manually using buckets and shovels, with the caked cargo being put into large bags. On 2 September the Owners' P & I correspondent was told by the P & I surveyor that around 2-2.5MT had been segregated. At around that stage the P & I surveyor reported that soybeans discoloured due to heat had been discovered adjacent to the No.4 port topside fuel oil tank.

20. At that stage the crew continued working on manual segregation of damaged cargo from the sound cargo in hold 4, and the P & I Surveyor reported that 15.92MT of damaged cargo was separated into bags and weighed ashore.

21. On 10 September 2020 cargo interests objected to the crew continuing manual segregation on grounds that it would cause delay and more costs, and could cause increased risk of further deterioration. Discharge from hold 4 by way of grab using the ship's cranes commenced that day. Cargo was loaded into trailers on trucks on the berth, with hoppers on the shoreside used to fill the trailers.

22. A quantity of 3,631.790 MT of the Cargo (described as the Rejected Cargo) was recorded as discharged from hold 4, and sent by truck to a separate warehouse about 100km away at El Sherouq, together with the 15.92m that had been manually segregated.

23. There was no direct evidence from the First Claimant or Oilex to explain their actions but one of the survey reports indicated that Oilex had rejected the cargo taken to El Sherouq. The contemporaneous correspondence suggested that the First Claimant had arranged (and paid for) the trucks and warehousing, and the survey costs claimed had been paid by the Second Claimant as its insurer.

24. It was common ground that by 12 September 2020 all visually damaged cargo in Hold No.4 had been removed and discharge was completed by 14 September 2020. The Vessel sailed on 15 September 2020.

Following completion of discharge

25. On 17 September 2020 a joint inspection took place at El Sherouq warehouse (attended by surveyors acting on behalf of the Owners' P & I Club, shippers, consignees, underwriters and charterers). They issued a joint inspection report indicating that segregation was not feasible and a salvage solution would be sought (although the Owners' and charterers' surveyor did not sign the report).

26. There were many photos of the Rejected Cargo at the warehouse showing large piles in a very large open space with a concrete floor. Dr Rodrigues explained that when he attended on 24-25 September 2020 there were around 5 large pits of soybeans of different sizes and heights. The maximum height was about 4m. There was a small separate pit of visibly damaged soybeans that Dr Rodrigues was told was the 15.92MT that had been manually segregated. He found that the cargo at the accessible surface was of sound appearance, although noted a few isolated spots where the soybeans were germinating.

27. Mr Duffield's evidence was that the trailers carrying cargo by truck from the Vessel to the warehouse would have taken around 25MT of soybeans each. Just to give an idea of the basic scale of the Rejected Cargo quantity, this estimate suggested that it amounted to 144 truckloads.

28. It was common ground that salvage bids were obtained for the Rejected Cargo by 22 September 2020. These were obtained mainly by an Egyptian based broker called Adam Grain who were described on the joint inspection report as instructed by the consignee. The court was not provided with a translated copy of the tender but correspondence suggested that bids at prices of USD 200/MT, USD 300/MT and USD 355/MT were received. In particular, on 24 September 2020 an offer was made to purchase the Rejected Cargo of 3,631.79MT at the offered price of USD 355/MT.

29. On 24 September 2020 the First Claimant notified Oilex that the damaged cargo had been sold at USD 355/MT and that the buyer (named as Itihad in these emails) would transmit the price to Oilex. Later that day Oilex confirmed that it had received the sum of USD 1,289,286.45 (i.e. 3,631.79 x 355). The sale contract was not produced but it was common ground that a salvage sale to an Egyptian buyer had taken place at around this time at a price of USD 355/MT.

30. On 24-25 September 2020 joint sampling took place at El Sherouq warehouse and Dr Rodriguez attended on both days on behalf of the Owners. On 24 September surveyors for the Owners, charterers, consignees, shippers, and cargo underwriters attended. The sampling could not go ahead because the sampling probe was faulty.

31. Dr Rodrigues, cargo underwriters' and charterers' surveyors attended again on 25 September 2020 when sampling did take place. When Dr Rodrigues arrived trucks sent by the salvage buyer were already waiting to collect the Rejected Cargo, and the payloader started to load trucks with that cargo after it had been sampled.

32. The four surveyors present took 164 increment samples of around 400g from the five pits. Samples were collected with a 2m multi-window sampling probe. The

separate pile with 15.9MT of visibly damaged cargo was spot sampled separately. The five large piles were sampled at the lower, middle and upper areas of the heaps. The samples were then mixed, quartered and split into duplicate samples that were sent to be analysed at the Salomon & Seaber laboratory in London ("S & S).

33. On 27 October 2020 the cargo samples taken on 25 September 2020 were opened by S & S, and on 3 December 2020 certificates of analysis were issued for those samples. It was common ground that these certificates found that the Rejected Cargo was on-specification (save for the 15.92MT piled and sampled separately) but there was a dispute as to whether the sampling was representative.

34. On 8 March 2021 Oilex presented a claim to the First Claimant for USD 375,315 based on the difference between the Salvage Sale price of USD 355/MT and the sold price being USD 438.75 plus local fees of USD 19.59/MT.

35. On 15 March 2021 the First Claimant gave Oilex a credit note for the sum of USD 284,015 based on the difference between the Salvage Sale price of USD 355/MT and the sold price at USD 433.20/MT.

36. On 12 July 2021 the Vessel was arrested in South Africa by the First Claimant and on 16 July 2021 a UK Club P & I LOU was issued to release her.

37. A document described as an assignment of rights ("the Assignment") was issued by Oilex to the First Claimant. This document was signed and stamped on or about 13 July 2021 (though it was dated 7 September 2020). Notice of the Assignment was given to the Owners on 13 July 2021. The Assignment states:

> "*We, the undersigned INTERNATIONAL OIL MULTISEED EXTRACTION CO. herewith assign to AMS AMEROPA MARKETING AND SALES AG, all rights pertaining to us in connection with the above-referenced shipment.*
>
> *In particular we assign all rights to AMS AMEROPA MARKETING AND SALES AG to recover the loss suffered from the liable parties and in particular against the owner of the vessel m/v "DORIC VALOUR"*."

E FINDINGS ON THE ISSUES

38. The central disputes were:

    a) Does the First Claimant have title to sue for the damages claimed?

    b) Were the losses claimed caused by the Owners' breach?

    c) What was the extent of physical damage to the Cargo caused by the Owners' breach?

    d) Was the Rejected Cargo sound?

e) Were the damages claimed incurred in reasonable mitigation of loss caused by the Owners' breach? Do Owners have a defence of failure to mitigate loss?

f) Were the damages claimed adequately proven?

Title to sue

39. The Owners maintained that the Second Claimant had no title to sue since it was merely the insurer of the Cargo and had no right of suit. This appeared to be uncontroversial and I accept that the Second Claimant had no title to sue. The dispute turned on whether the First Claimant had title to sue as assignee of Oilex. The First Claimant had pleaded that it had direct rights to sue as a holder of the bills of lading but this was not pursued at trial.

40. The Owners claimed that when Oilex assigned its rights to the Claimants by way of the Assignment it had already been made whole and had no cause of action against the Owners. They argued that Oilex had retained title to the Rejected Cargo and had sold it directly to the third-party salvage buyer (by way of the Salvage Sale) and had received compensation from the First Claimant for its claim relating to the alleged condition of the Cargo.

41. The Claimants maintained that such recovery would not preclude recovery against the Owners under the bills of lading as found in *The Baltic Strait* [2018] 2 Lloyd's Rep. 33. The Owners maintained that in *The Baltic Strait* the bill of lading holder was suing in a representative capacity subject to an obligation to hold any recovery on trust for the seller. They argued that the case was distinguishable because the bill of lading holder (Oilex) is not party to this action, the Claimants are not suing in a representative capacity, and Oilex's assignment was limited to Oilex's own claim, i.e., their "*rights pertaining to us in connection with the above-referenced shipment".*

42. The Owners also argued that the Claimants are in fact seeking to claim their own losses arising from their commercial decision to compensate Oilex and sell the Rejected Cargo on Oilex's behalf instead of asserting their rights under the sale contract (under which Oilex took the risk of damage during the voyage). The Owners maintained that Oilex was not entitled to reject the cargo and the First Claimants could have kept the purchase price paid.

Conclusions on title to sue

43. The Owners referred to backdating of the Assignment but they did not pursue a positive case that the Assignment was invalid. As an assignee the First Claimants were entitled to pursue claims that were available to Oilex pertaining to the Cargo. It was common ground that Oilex retained title to the Cargo at all material times. In principle this gave Oilex title to sue under the bills of lading. The real issue was as to whether it (or its assignees) could recover nominal or full damages, in particular where Oilex had recovered compensation from the First Claimant seller. As Hobhouse J commented in *The Sanix Ace* [1987] 1 Lloyd's Rep. 465, the issue

is one of remoteness and mitigation, going to whether a separate payment is collateral or *res inter alios acta.*

44. *The Baltic Strait* is authority that a bill of lading holder who has purchased goods may recover full damages for breach from the carrier under the contract of carriage despite making recovery from the seller by way of a settlement under its sale contract. Recovery under the sale contract is not something for which the bill of lading holder must give credit when claiming against the carrier.

45. The matters relied upon by the Owners were not decisive aspects underlying the decision in *The Baltic Strait* and would not displace its application. The terms of the Assignment were wide enough to give the First Claimant the right to make its claim. Oilex's recovery from the First Claimant or by way of the Salvage Sale did not mean that it had no title to sue the Owners under the bills of lading, or that its recoveries would prevent it from establishing recoverable loss. The Owners' criticism of the merits of the commercial settlement reached between the First Claimant and Oilex would not affect title to sue or give rise to a credit in the Owners' favour.

46. The Owners also argued that the arrangements concluded by Oilex and the First Claimant in September 2020 arose as a result of the Owners' breach and were a benefit derived from mitigation that had to be taken into account. This was more clearly a mitigation argument but it fails for similar reasons. The arrangement concluded between the First Claimant and Oilex on around 24 September was directly linked to rights under the existing sale contract rather than arising out of the breach. *The Baltic Strait* shows that settlements under such arrangements are not to be treated as a benefit obtained in the course of mitigation for which credit must be given to the Owners.

47. Accordingly, I reject the Owners' argument that the First Claimant had no title to sue for the damages claimed.

Causation issues: were the losses claimed caused by the Owners' breach?

48. There was limited debate on the law relating to the causation issues. It was common ground that the burden lay on the Claimants to prove the loss claimed by reason of the Owners' breach, including claims made on the basis that the Rejected Cargo was sold in reasonable mitigation of loss arising from the Owners' breach.

49. The Claimant relied on the decision of the Court of Appeal in *Borealis v Geogas Trading* [2011] 1 Lloyd's Rep. 483 [43-45] showing what is required to break the chain of causation between a breach and a loss:

> "*43. First, although an evidential burden rests on the defendant insofar as it contends that there was a break in the chain of causation, the legal burden of proof rests throughout on the claimant to prove that the defendant's breach of contract caused its loss.*
>
> *44. Secondly, in order to comprise a novus actus interveniens, so breaking the chain of causation, the conduct of the claimant "must constitute an event*

> *of such impact that it 'obliterates' the wrongdoing . . " of the defendant: Clerk and Lindsell on Torts, 19th Edition, at para 2-78. The same test applies in contract. For there to be a break in the chain of causation, the true cause of the loss must be the conduct of the claimant rather than the breach of contract on the part of the defendant; if the breach of contract by the defendant and the claimant's subsequent conduct are concurrent causes, it must be unlikely that the chain of causation will be broken. In circumstances where the defendant's breach of contract remains an effective cause of the loss, at least ordinarily, the chain of causation will not be broken….*
>
> *45. Thirdly, it is difficult to conceive that anything less than unreasonable conduct on the part of the Claimant would be capable of breaking the chain of causation*."

50. The parties acknowledged that different aspects of the principles of mitigation were being invoked, sometimes described by Chitty on Contracts (para 29-096) as the three rules of mitigation, "First, the claimant cannot recover damages for any part of his loss consequent upon the defendant's breach of contract that the claimant could have avoided by taking reasonable steps. Secondly, if the claimant in fact avoids or mitigates his loss consequent upon the defendant's breach, he cannot recover for such avoided loss, even though the steps he took were more than could be reasonably required of him under the first rule. Thirdly, where the claimant incurs loss or expense in the course of taking reasonable steps to mitigate the loss resulting from the defendant's breach, the claimant may recover this further loss or expense from the defendant."

51. Where the Owners were alleging that the cargo interests had failed to mitigate loss then the burden lay on them to prove an unreasonable failure. The standard to be applied is a high one since the defendant is the wrongdoer and its breach may have placed the innocent party in a difficult situation.

What was the extent of physical damage caused by the Owners' breach?

52. The Claimants maintained that the total amount of damaged/contaminated cargo attributable to Owners' breach was 3,642.25MT. They argued that it was not possible to separate the admixture of sound and directly physically damaged cargo within the Rejected Cargo and it should all be considered physically damaged.

53. The Owners maintained that the sums claimed were exaggerated since the Claimants had failed to show that c. 3,600MT of cargo had been physically damaged, or that loss of value of that quantity (and all the ancillary costs claimed such as transport and storage fees) was attributable to their breach. They argued that the court should only find that around 70 to 100MT of cargo was damaged by reason of their breach (this was based on Mr Duffield's estimate of 73MT damaged cargo, and Dr Rodrigues' estimate of the maximum quantity of damage at 88MT, plus allowing for the 15.9MT of damaged cargo that was manually segregated by the crew).

54. The Owners accepted that some admixture of heat damaged and sound cargo was unavoidable since there cannot be a perfect segregation of such beans in a bulk

soybean cargo. However, they pointed to the evidence of both experts suggesting that ordinarily heat damaged soybeans can be segregated in an admixture with sound cargo in a ratio of roughly 3:1. Accordingly, they argued that their breach would have caused, at most, around 300MT of cargo to be contaminated.

Mechanism and extent of damage on board

55. Assessing the extent of damage caused by the Owners' breach depended on the mechanism by which damage occurred and also the assessment of the condition of the Cargo on discharge. Evidence of the condition of the Rejected Cargo sampled at the warehouse in September 2020 is also relevant to the dispute as to what Cargo was damaged on discharge, and also goes to whether losses on the Salvage Sale were caused by the Owners' breach.

56. The expert evidence was key on these matters. The experts helpfully reached a large degree of common ground in their joint experts' memorandum. The experts agreed that the damage on the surface of hold 4 was indicative of "ship's sweat", namely the result of condensation forming on the underside of the cold metal hatch covers and dripping onto the cargo, resulting in a pattern of caked and mouldy cargo by way of a crust. This was described as wet damage. This crust would have been about 10cm or so thick. Mr Sarradj's evidence was that this type of damage would usually be limited to a few metric tonnes and the Owners' manual segregation of the caked wet damaged cargo on the surface of hold 4 into bags was largely undisputed.

57. The experts agreed that the effect of heating from the topside port fuel oil tank meant that cargo adjacent to the tank would be heat damaged. Heat damaged soybeans are dried and discoloured (also sometimes described as burnt). The heat damaged beans (unlike the wet damaged beans) would largely remain free flowing, and are more likely to be mixed with sound beans. The experts had agreed at the joint experts' meeting that Mr Duffield's estimate of the quantity of heat damaged beans for the port side FOT was 73.71MT based on a reasoned assessment of the tank area (while Dr Rodrigues's equivalent estimate was 88MT).

58. The disputes were mainly about the extent of damaged cargo within the stow. It was agreed that the moisture driven off the heated beans would condense on the hatch covers increasing cargo spoilage but there was a difference between the experts as to whether moisture from heat damaged beans would move upwards (Dr Rodrigues' view) or whether it would also move further into the body of the stow, and continue to cause moisture damage there (Mr Duffield's view in his supplementary report). Mr Sarradj presented a more tentative view, suggesting that a heat gradient between areas of high and low temperature would mean that moisture from the warmer edge would move, leading to damage of less severity in the centre of the stow depending on how long the Cargo was heated.

59. Mr Sarradj gave fair and helpful evidence but he had less experience both at a scientific and operational level than Dr Rodrigues. Mr Sarradj's evidence also failed to reflect the practical reality of the situation faced by the Owners and cargo interests in Egypt. For example, he suggested that if he had attended at the warehouse in Egypt, he would have insisted that the cargo be sampled in motion

from each truck even though he acknowledged that this would probably have taken three days.

60. Mr Duffield had helpfully agreed matters in the joint memorandum. His evidence on disputed issues was less reliable because he attempted to provide scientific theories as to the cause and extent of damage that was largely outside his expertise (especially where the Claimants had instructed a scientist to address those issues). In particular, in his supplementary report he departed from the evidence he gave in the joint memorandum as to the extent of heat damaged cargo. He also introduced a new estimate of damaged cargo based on admixture and "the unknown". On this basis he estimated that 15-20% of the Rejected Cargo was damaged (i.e. up to 720MT).

61. Mr Duffield's new estimate was expressly put forward as a matter of experience rather than science, but he relied on the conductivity of heat through steel leading to heat damaged cargo adjacent to a larger area of steel than the heated tank. He said there would be moisture damage within the depths of the cargo because warm moisture would continue to spread in all directions (i.e. including horizontally as well as upwards) causing continually worsening degradation in the body of the Cargo. Mr Duffield's new estimate was not convincing. The original estimate and Dr Rodrigues's views better reflected the basic science and his practical experience of damaged soybeans.

62. Dr Rodrigues's evidence was to be preferred on matters (including this estimate) where there was disagreement. I accept his evidence that when a soybean cargo is damaged by tank heating the bulk of damage is localised in close proximity to the overheated tank concerned. Damage within the centre of the stow caused by a heat gradient during this voyage would be limited. Warm moist air generated when the beans are heated goes up and does not move horizontally into the centre of the stow. There is a finite amount of moisture within the soybeans so moisture migration does not necessarily create continually worsening degradation. Here the source of heat was a fuel tank on the top side of the hatch so damage would be in a more restricted area than if the heat source was underneath the hold. Dr Rodrigues estimated that heat damaged cargo would be within 50cm of the heated tank and the photos from hold 4 were consistent with this. I accept his evidence that the maximum amount of cargo affected by heat damage would be 88MT, based on the area of the fuel oil tank and the likely spread of heat damage adjoining that heat source.

Was the Rejected Cargo at the warehouse sound?

63. The Owners maintained that on discharge the Rejected Cargo was sound as shown by the results of the S & S analysis of the samples drawn at the warehouse. This was relied on to answer the Claimants' case on the amount of Cargo physically damaged, and show that the amount of physical damage caused by its breach was at the lower end of the scale between 15.5 and 100MT. Dr Rodrigues relied on these results to suggest that his estimate of 88MT was an overestimate. The results were also relevant to the Owners' case on failure to mitigate in making the Salvage Sale.

64. There was a dispute as to whether the results were reliable. The Claimants argued that the sampling at the warehouse was not representative because the surveyors

had only sampled by using a 2m probe. They relied on Mr Sarradj's evidence to suggest that there was no way of knowing the quality of the samples that were not accessible by this sampling probe because some piles were 4m high. Both Mr Sarradj and Mr Duffield suggested that the heat damaged cargo was more likely to be in the deeper parts of the stockpiles. Mr Duffield suggested that the truck drivers and warehouse staff would just have dumped cargo rather than kept more damaged cargo together. They suggested that there were clearly heat damaged beans found on board and accordingly the heat damaged beans must not have been accessible to the sampling probe, emphasising that if the Rejected Cargo had truly been on specification, then it would have only had 18MT (i.e. 0.5%) of heat damaged kernels.

65. Both the Claimants' experts also suggested that the Rejected Cargo was not within contractual specifications because S & S did not include results of odour within their certificate and had not been asked to test for odour.

66. Dr Rodrigues relied on the S & S results to suggest that his estimate of 88MT of heat damaged cargo was probably an overestimate.

67. There was little weight to the Claimants' criticisms of the sampling of the Rejected Cargo at the warehouse and by S & S. The First Claimant had controlled the trucking and warehousing of the Rejected Cargo, and Oilex had title to the Cargo throughout. They had instructed several surveyors and could have carried out appropriate testing at any stage to identify the condition of the Rejected Cargo. Oilex and the First Claimant had chosen not to send their surveyors to attend the sampling on 25 September 2020 without giving any obvious reason. The Second Claimant's surveyor had not objected. Dr Rodrigues correctly pointed out that the piles had been sampled toward the edge so any heat damaged material at the bottom would have been tested. He accepted that the preferred method of sampling cargo is when it is flowing in motion but this was not feasible. It would have taken days since the Cargo was already in the warehouse and had been sold for immediate delivery to a third-party buyer.

68. There was little sound basis for the Claimants' experts to suggest that the samples collected would have not been within specification on grounds of odour. They failed adequately to take into account that the surveyors present in the warehouse had assessed that there was no malodour. The best available evidence as to the odour of the samples collected was from Dr Rodrigues who had been present over two days and had taken samples from 2m within the piles. Neither he, nor the other surveyors instructed by cargo interests had noted malodour in circumstances where they were being instructed to assess the Rejected Cargo's condition. Previously the surveyors had noted malodour, and they would all reasonably have known that odour is a very relevant consideration in assessing a cargo's condition. The same point would apply to the specialist scientists analysing the grain at the laboratory. Dr Rodrigues correctly noted that odour is a parameter that should be included where abnormal but certification does not require an analysis.

69. The sampling of the Rejected Cargo on 25 September 2020 was as representative as possible in the circumstances. However, it was not 100% representative because it had not been carried out in the preferred sampling conditions (i.e. off a conveyor

belt) and there was no evidence of how discoloured trailer loads had actually been dumped at the warehouse. As Dr Rodrigues noted, it was more likely that a significant part of the heat damaged cargo had been in certain trailers, and had been pushed together into certain pits rather than ending up in the centre bottom of each pit. The results were more consistent with the Owners' case on the quantity of heat damaged beans than the Claimants. Making allowance for some shortcomings in the representativeness of the sampling (the statistical reliability of which was not explored by the experts) the results would also be consistent with my conclusion as to the amount of physical damage (which includes the 15.9mt that was not sampled).

Conclusions on amount of damaged cargo

70. A precise estimate of the amount of physically damaged cargo is difficult, especially in light of the fact that heat damaged cargo will mix with sound cargo. Taking account of all the matters set out above, including the experts' common estimate, Dr Rodrigues' explanations and the analysis of the Rejected Cargo at the warehouse, I find that 70-80MT of the Cargo was physically damaged (including both wet damage and heat damage) by reason of Owners' breach in heating fuel oil in the No. 4 topside tank.

71. Some admixture between sound and heat damaged soybeans would have been inevitable in any segregation exercise. Dr Rodrigues suggested that an admixture in a ratio of 3:1 would be a rule of thumb in extracting damaged cargo. Mr Duffield did not accept the rule of thumb but acknowledged that in practice there would often be a similar ratio. This ratio may be a starting point for assessing the quantity of sound cargo admixed with damaged. However, the Owners' evidence was not sufficient to justify the court making a finding that the quantity of contaminated admixed cargo caused by the Owners' breach was limited to 300MT.

72. Neither manual segregation nor a more fine-tuned method of segregation was pursued by way of grabs in hold 4. For reasons set out below, the cargo interests' approach was a reasonable response to the damage. In these circumstances it would be difficult reliably to assess the minimum amount of admixed cargo that could have been segregated, and a finding was not necessary since the claim is made on the basis of losses incurred in mitigation of damage.

Were the damages claimed incurred in reasonable mitigation of loss caused by the Owners' breach? Do Owners have a defence of failure to mitigate loss?

73. The Owners disputed the Claimants' case that the losses claimed flowed from the Owners' breach. The Owners also made a positive case that the Claimants had failed to mitigate their loss by:

    a) refusing to allow manual segregation to take place on board the vessel;

    b) failing to carry out further segregation by grab;

    c) failing to carry out a proper segregation exercise post-discharge notwithstanding SGS's indication that this would be carried out;

(Owners maintained that all these measures would have limited the contaminated cargo to around 300MT)

d) failing to obtain proper bids when seeking alternative buyers and concluding the Salvage Sale.

Stopping manual segregation

74. The Owners failed to show that Oilex (or cargo interests more generally) had acted unreasonably in stopping manual segregation on 10 September 2023 or that this amounted to break in the chain of causation between the Owners' breach and the losses claimed. Segregation of the damaged cargo from the sound cargo in hold 4 was necessary in order to avoid the entire Cargo in that hold being treated as damaged. It was common ground that some segregation exercise was necessary by reason of the Owners' breach. The dispute was as to how it was managed.

75. Dr Rodrigues fairly accepted that the location of the heat damaged cargo below the wings underneath the fuel oil tank meant that segregation would have been a complex exercise whether done manually or by grab. Sequential discharge of sound cargo and damaged cargo would have been required and the heat damaged soybeans would have been prone to flow into the discharge pit.

76. Dr Rodrigues criticised the segregation adopted but he did not attempt to identify the minimum amount of admixed sound and damaged cargo that could have been segregated (whether by manual or grab segregation). He also accepted that manual segregation would have been laborious, and could have taken days or weeks depending on the amount of damaged cargo. The crew had taken several days to segregate 16MT. Owners asked the court to find that 70-100MT of the Cargo was heat damaged and this would have taken much longer. It is also significant that when cargo interests decided to stop the manual segregation the parties did not yet know the extent of the damage and this was a further reason why it was reasonable.

77. Dr Rodrigues also fairly recognised that the photos showed that crew could have been placed in a dangerous situation in manually segregating cargo on a steep stow. The Master did not have experience of segregating a damaged soyabean cargo and accordingly his views on the viability of the exercise had limited weight.

Other means of segregation on board or at the warehouse

78. The Owners failed to show that the cargo interests (whether Oilex as receiver or the First Claimant making arrangements as seller of the Cargo) had unreasonably insisted on discharge by grabs without any further segregation being performed. The approach that cargo interests had required was simply that discharge by grabs continue from hold 4 until there were no visible signs of discoloured beans. This was a fairly basic method of segregation but it was safe and avoided the risk of substantial delay and significant admixture throughout the whole stow.

79. Dr Rodrigues suggested that more effective segregation could have been achieved by taking out the sound cargo from the starboard side, and then removing the damaged cargo from the portside. This would have been more effective because

less sound cargo from the starboard side would be segregated. However, there would still have been very substantial admixture and he did not suggest how much cargo would have had to be segregated. In any event, this proposal only emerged with the benefit of hindsight and his expertise. It was not put forward by any of the surveyors at the time and the Owners failed to show that the method required by cargo interests was unreasonable.

80. Dr Rodrigues accepted that once the sound and damaged soybeans were admixed it was not practical to attempt to segregate them. Accordingly, the cargo interests could not be criticised for having not carried out further segregation at the warehouse.

Failure to obtain proper bids when seeking alternative buyers

81. The Claimants maintained that the Salvage Sale was the natural consequence of the damage to the Cargo caused by the Owners' breach. The Owners alleged that the Oilex had failed to mitigate in concluding a salvage sale, in particular by way of a failure to obtain proper bids or wait until the sampling results were in hand. They argued that the sampling results shows that the Rejected Cargo was within its contractual specification (and also within the specification for US grade 2). They also relied on Dr Rodrigues' evidence that these results showed that the Rejected Cargo was in a stable condition by 24-25 September 2020 and would not have deteriorated in the warehouse. Dr Rodrigues said there was no technical justification for a distressed/salvage sale. He suggested it was standard practice to analyse samples before selling cargo, and that it would be unreasonable to sell cargo in a salvage sale without a laboratory analysis.

82. I accept that the Rejected Cargo was in a stable condition at the end of September 2020 as shown by the S & S results, and this was consistent with Dr Rodrigues' direct evidence of its apparently sound condition at that stage. However, the evidence did not show that it would have remained in that condition if it had been left in the warehouse until early December 2020. This was because moisture damage was already apparent with some germinating soybeans and Dr Rodrigues accepted that a soybean cargo's condition will deteriorate over time. There may also have been strong commercial reasons for not waiting until December for a sale (including storage and financing costs).

83. Segregation of the damaged cargo and a separate sale (or disposal) of such cargo was a direct consequence of the Owners' breach. The issue was whether losses on the Salvage Sale were reasonably incurred by reason of that breach.

84. It would have been possible for cargo interests to have pressed for an earlier laboratory result from S & S or to obtain quicker results from a local laboratory, and used such results to re-advertise the Rejected Cargo as being within specification and thereby obtained a higher price for it. However, neither side provided market evidence as to the likely price. I do not accept that obtaining a laboratory analysis is standard practice prior to making a salvage sale of a soybean cargo. It may well be common in situations where Brookes Bell is instructed (and analysis is probably already in issue). However, a trader's approach to the sale of

a Cargo that is damaged in part is essentially a commercial decision rather than a matter of technical expertise.

85. Overall, the cargo interests had acted reasonably in concluding the Salvage Sale of the Rejected Cargo on around 24 September 2024 at USD355/MT and there were several factors suggesting that the sale was reasonably concluded as a result of the Owners' breach of the bills of lading.

a) The Rejected Cargo included Cargo that was known to have been heat damaged, as was apparent from the photos and survey reports. It had been segregated from the rest of the Cargo. The parties also knew that the surface temperature in hold 4 was up to 47 ˚C on discharge in late August, again consistent with a damaged cargo.

b) Three weeks had passed since damage to the Cargo had been discovered. Oilex appeared to have rejected the Rejected Cargo.

c) On 24 September 2020 the parties did not know whether the Rejected Cargo was stable or susceptible to further deterioration due to the heating and damage already found and it was in the interests of both sides to minimise such damage. Indeed, the very purpose of sampling on 24/25 September 2020 was to investigate its actual condition.

d) Dr Rodrigues's evidence was that there were some isolated spots of cargo in the warehouse where the soybeans were moist and germinating. He also noticed water leaking from the warehouse ceiling.

e) Several surveyors had inspected the damage on board. Surveyors also inspected the Rejected Cargo at the warehouse on 17 September. At that stage, the cargo interests' surveyors were describing the Rejected Cargo as "apparently sound" in correspondence. Several of the surveyors present at the inspection had agreed that a salvage sale was the best solution. The views of these surveyors were not tested and are not decisive, but they show how local surveyors were viewing the Rejected Cargo and that any sale was likely to be on the basis of the cargo being "apparently sound".

f) Cargo interests had instructed an established local broker who had surveyed the Rejected Cargo and put out a tender. There had been more than one bid and the highest bid accepted was 82% of the price invoiced to Oilex on 30 August 2020 for sound cargo.

g) In light of the known damage and delay since discharge some discount on the market price for a US No.2 grade cargo being delivered to Egypt straight from the US would have been inevitable.

h) Dr Rodrigues' estimate of the heat damaged cargo suggested that there were up to 4 times more heat damaged beans than allowed under the US No.2 grade specification. My finding as to the quantity of physically damaged cargo on discharge also suggests that the proportion of heat damaged beans present in the Rejected Cargo would have exceeded the US No.2 grade specification.

86. In these circumstances, the cargo interests' conduct in concluding a salvage sale was a reasonable response to the damage discovered on discharge. The court did not have the benefit of market evidence on salvage sales or sound market values. Both sides could have obtained such evidence to support their positive case on mitigation. However, such evidence was not essential to understand the nature of a salvage sale or decide whether it was reasonable for Oilex to sell promptly without obtaining a certificate of analysis. There was no evidence to suggest that a reliable analysis could have been obtained within days as opposed to weeks. More significantly, even if a laboratory (whether a local one or S & S) had certified the Rejected Cargo as on specification then the other circumstances set out above suggested that it would have been treated as a distressed cargo, and more so as time passed.

87. Pricing of salvage sales of distressed cargoes is not fine-tuned. A prompt sale of the Rejected Cargo was likely to preferable for both seller and any interested buyer, especially since the cargo's actual condition and stability (including moisture levels) was not known at that stage. While risks of deterioration due to the warehouse conditions were not the Owners' responsibility, a prompt sale at a discount of 18% on the invoice price protected against further deterioration attributable to the Owners' breach, including ongoing costs such as storage.

88. In conclusion, the Claimants were able to show that the discharge and Salvage Sale of the Rejected Cargo arose by reason of the Owners' breach. The Owners failed to establish a failure to mitigate on cargo interests' part in refusing to allow manual segregation to continue, in not segregating more effectively and in concluding the Salvage Sale.

Were the damages claimed adequately proven?

89. The Owners maintained that the Claimants had not proven the losses claimed because there was no evidence to support the figures put forward for the sound market value in Abu Qir, the sound CIF value of the Rejected Cargo, or its actual value on discharge. They suggested that the CIF value was not the correct measure. Further, in circumstances where the sampling results showed that the Rejected Cargo was within specification then nominal damages only should be awarded. They also suggested that the ancillary costs (USD 54,128.58) were disproportionate against the actual physical damage caused, unproven and not incurred by Oilex.

90. The Claimants accepted that they had not produced evidence to back up the figure of USD 454/MT for the sound market value and they failed to justify the primary claim based on that figure. However, the claim based on the sound CIF value of USD 435/MT was the actual invoice value of the Cargo in a sound state based on its actual CIF sale concluded on 15 July 2020 (and based on futures prices). This provided adequate evidence as to the sound value of the Rejected Cargo on 30 August 2020. The actual salvage price achieved was adequate evidence of the value of the Rejected Cargo.

91. If the Owners had not been in breach Oilex would have received a full sound cargo. By reason of the Owners' breach they had to sell the Rejected Cargo at a lower price. The sound CIF invoice value and the salvage price achieved following a bid

process adequately evidenced the difference in value. The sum of USD 293,755.10 claimed as that difference between the sound CIF price and the salvage price reflected Oilex's loss by reason of the Owners' breach, and is recoverable in damages.

92. The Claimants failed to show that the ancillary costs claimed were losses that had been suffered by Oilex. They suggested that Oilex would have been liable for such costs. I accept that transport, storage and survey fees were costs likely to result where a damaged or admixed cargo is segregated and the owner of such cargo may incur such costs. However, the burden lay upon the Claimants to prove that Oilex had suffered such losses by reason of Owners' breach. The invoices produced showed that the costs were incurred by the Claimants. The Claimants provided no evidence as to the arrangements reached with Oilex other than the Assignment and correspondence on the Salvage Sale. There was no concrete basis for concluding that Oilex had incurred the ancillary costs or was liable for them. The claim in respect of them is rejected.

93. The Owners had put forward a limitation defence under Article IV rule 5(a) of the Hague Visby Rules. They rightly did not pursue that defence as the quantities involved (especially taking account of admixtures) meant that limitation would not have made a difference although it might have raised interesting argument as to the nature of economically damaged goods and the treatment of costs incurred in mitigation of loss.

94. In conclusion, the sum of USD 293,755.10 is recoverable by the First Claimant in damages based on the difference between the sound value of the Rejected Cargo and its actual value on discharge. The claims for ancillary costs are dismissed.