**JUDGMENT : Mr. Justice Cresswell :** Commercial Court. 7th October 2005

## 1. INTRODUCTION

1. This case raises important issues about the duties owed by inspection companies in domestic and international trade.

2. By a contract made in March 1996 the claimant ("AIC") purchased from Mobil Sales and Supply Corporation ("Mobil") a mixed cargo of regular and premium unleaded gasoline on terms FOB Coryton Mobil Refinery Installation.

3. The contract provided that the cargo was to comply with Colonial Pipeline Specifications ("CPS"). The quantity and quality was to be determined at load port by mutually acceptable independent inspectors appointed by Mobil; costs to be shared 50/50. The results of the inspection were to be "*final and binding for both parties save for fraud or manifest error*". The defendant ("ITS") was appointed to carry out the load port inspection.

4. The cargo was loaded on the Kriti Palm between 30 March and 3 April 1996. Prior to loading ITS tested samples of the cargo from shore tanks. The regular unleaded gasoline was loaded in four parcels, and ITS issued certificates of quality for each of them. The certificate of quality for one of the parcels stated that the gasoline sampled did not meet specifications. However, ITS issued a further certificate of quality for a *"shore composite blend",* which stated that the regular unleaded gasoline met specifications.

5. By a contract dated 2 April 1996 AIC sold the cargo to Galaxy Energy (USA) Inc. (Galaxy) ex ship New York. The Quality clause in the AIC/Galaxy sub-sale provided: *"Quality: (A) M 2 meeting statutory baseline [i.e. CPS] with the following guarantees … RVP 9.0psi … determination of quality: As ascertained at load port and confirmed by Caleb Brett".*

6. The Kriti Palm arrived at New York on 14 April 1996 and began discharging the cargo on 15 April 1996. On 15 April 1996 Galaxy informed AIC that discharge had been suspended because the cargo had been found to be off-specification. In particular, Galaxy informed AIC that the Vapour Pressure of the regular unleaded gasoline was higher than the 9.0psi permitted under the CPS.

7. AIC called upon Galaxy to take delivery of the cargo on the basis that Galaxy was bound by ITS' certification that the cargo met specifications, including as to Vapour Pressure. Galaxy refused to take delivery of or to pay for the regular unleaded gasoline.

8. On 18 April 1996 payment on behalf of AIC was made by Banque Paribas to Mobil.

9. Galaxy only took delivery of the regular cargo after 5 July 1996.

10. The dispute between AIC and Galaxy led to proceedings before the Swiss courts, which lasted from April 1996 until December 2003. AIC was successful at first instance. Galaxy appealed to the Geneva Court of Appeal. On 19 April 2002 the Geneva Court of Appeal reversed the first instance judgment and order, rejected AIC's claims and substantially upheld Galaxy's counterclaims. AIC was ordered to pay Galaxy $1,165,037.62 + interest, $51,036.72 + interest and costs.

11. In this action AIC claim damages for breach of contract, deceit, breach of duty, and contribution from ITS pursuant to section 1 of the Civil Liability (Contribution) Act 1978 in respect of AIC's liability to Galaxy.

12. ITS deny liability. ITS also contend that all claims (other than the claim under the 1978 Act) are time-barred.

13. In response to ITS' limitation defence AIC relies upon section 32 of the Limitation Act 1980.

14. It is convenient to refer by way of introduction to the position of inspection companies. Inspection companies are instructed in connection with domestic and international documentary sales because they are understood and expected to have the necessary facilities and expertise to enable them to determine whether the seller has performed its contract in the relevant respects and are trusted to exercise independent judgment. Although an inspection company may receive its instructions from the seller (in the present case from both the seller (Mobil) and the buyer (AIC)) it will be aware that its certificate is likely to be required for presentation to the buyer and any sub-buyer (in the present case Galaxy) and/or to a bank or banks as part of the documentation against which payment is to be made. An inspection company is aware, therefore, that the buyer and/or sub-buyer and/or a bank which ultimately has recourse to a buyer/sub-buyer, will rely on the existence and accuracy of its certificate in paying the price for the goods. The buyer and/or sub-buyer is the person whom the inspection company should have in contemplation as the person most likely to be affected by any error in the certificate. Absent contract, this is a classic example of the situation envisaged by Lord Morris in the Hedley Byrne case, in which a person with particular expertise is instructed to produce a report which he knows will be passed on to another, who can be expected to rely on it. It is inherent in the nature of the task undertaken by the inspection company that it assumes responsibility to the buyer and/or sub-buyer for what is stated in the certificate. That is the whole purpose of its employment. (See ***Niru Battery Manufacturing Co v Milestone Trading Ltd*** [2003] EWCA Civ. 1146, paragraph 51, Moore-Bick J approved by Clarke LJ).

    It is also convenient to refer by way of introduction to gasoline cargoes and Vapour Pressure. The quality of a gasoline cargo to be loaded on to a vessel can be determined as follows: -

    i) Analyse each individual shore tank prior to loading to confirm they meet specification.

ii) Prepare a shore tank composite for analysis. However, the Vapour Pressure would be based on a calculation from the individual results (weighted average).

iii) Sample and test a ship's composite. For Vapour Pressure individual tanks would be tested and a weighted average calculated.

Vapour Pressure is measured on crude oils and volatile petroleum products. It is an important property for gasoline, because the Vapour Pressure affects the operation of fuel pumps and engines. It will be difficult to pump a gasoline with a high Vapour Pressure without vapour locks resulting at high altitudes or at high temperatures. Conversely there needs to be sufficient vapour generated at low temperatures to facilitate engine start-up and warm-up.

In addition, Vapour Pressure can be used as an indirect measure of the evaporation rate of the gasoline.

Vapour Pressure can also be used as a means of assessing the amount of VOCs a gasoline will release. A high Vapour Pressure can indicate high concentrations of VOCs in the gasoline. VOCs can impact adversely on the environment: they are a constituent of smog and have other health implications. In the case of gasoline they are also an indirect measure of flammability.

In some countries, e.g. the USA, there are seasonal limitations on the quantity of VOCs which can be released from materials such as gasoline.

## 2. A CHRONOLOGICAL ACCOUNT OF THE HISTORY OF THE DISPUTE AND PREVIOUS LITIGATION

15. I turn to set out a detailed account of the history of the dispute and previous litigation. This is largely drawn from an agreed statement of facts helpfully prepared by junior counsel. I have made some additions.

16. Between about 13 and 20 March 1996 a contract was concluded between Mobil and AIC. Mobil agreed to sell and AIC agreed to buy regular and premium gasoline FOB Coryton. The gasoline was to comply with Colonial Pipeline Specifications. The contract was governed by English law. The quantity and quality was to be determined at load port by mutually acceptable independent inspectors appointed by Mobil; costs to be shared 50/50. The results of the inspection were to be "*final and binding for both parties save for fraud or manifest error*".

17. On 14 March a charterparty of the Kriti Palm between ST Shipping (as owners) and AIC (as charterers) was agreed.

18. By a telex dated 20 March (to Mobil cc ITS) AIC nominated the Kriti Palm for the purposes of the Mobil/AIC contract.

19. Between about 22 and 25 March there were various exchanges between AIC and Mobil, consequent on which ITS was appointed by Mobil and AIC to sample and analyse the proposed cargoes.

20. On 22 March Mobil faxed instructions to ITS. These included a description of what was to be tested and a copy of the CPS. The CPS prescribed a maximum "RVP" of 9.0psi as arrived at by test method ASTM D5191.

21. The CPS was forwarded by ITS to Mr Paul Mailey (of ITS) at Coryton.

22. On 25 March:

    Banque Paribas (for account of AIC) opened a letter of credit in favour of Mobil.

    ITS acknowledged nomination of Kriti Palm and confirmed attendance.

23. On 26 March AIC informed Mobil and ITS that AIC required inspections "to be done during loading in addition to the normal inspection procedures", which included full static shore tank samples and analysis for both products colonial pipeline M2 Grade and R2 Grade (full specs on both), and first foot composite sample on cargo tanks to be analysed on main specs including RVP. A clearer copy of the CPS was forwarded by ITS to Mr Mailey at his request.

24. On 27 March:

    ITS enquired whether loading should be halted to enable tests of first foot ship's tank samples.

    The Kriti Palm arrived at Coryton and tendered NOR to load. No product was ready for loading and could be loaded until ITS certified that it complied with the CPS.

25. On 29 March:

    Mobil informed ITS that AIC should pay 100% for listed requests, otherwise 50/50.

    A message from Mr Damian Twyford (of ITS) to Mr Giovanni Sampino (of AIC) confirmed that AIC no longer required additional tests of first foot ship's tank samples.

26. On 30 March:

    ITS forwarded a Certificate of Quality ("CofQ") for shore tank 75x1 (1st parcel) regular gasoline to AIC. The CofQ stated that Reid Vapour Pressure tested by ASTM D323 = 8.91/8.98 psi; and that "FUEL MEETS SPECIFICATION".

    The Kriti Palm commenced loading.

27. On 2 April 1996:

    ITS forwarded CofQ for tank 75x1 (2nd parcel) regular gasoline and for tank 100x1 regular gasoline to AIC. The CofQ for tank 75x1 (2nd parcel) stated that Reid Vapour Pressure tested by ASTM D323 = 7.67/7.60 psi,

and that "*FUEL MEETS SPECIFICATION*". The CofQ for tank 100x1 stated that Reid Vapour Pressure tested by ASTM D323 = 7.83/7.81psi, and that "*FUEL MEETS SPECIFICATION*".

ITS reported provisional results for shore tank 61x4 to Mobil (but not AIC). The fuel did not meet specification due to results for MON and Olefins. Mobil requested ITS to prepare a weighted lab blend of samples i.e. a "shore composite blend". ITS performed certain physical analyses of the blend and calculated RVP by reference to the weighted average of the RVPs of the individual shore tanks.

ITS forwarded to AIC, cc. Mobil:

CofQ for the shore tank 61x4 regular gasoline, which bore words: "fuel does not meet specification". According to ITS' provisional report the fuel did not meet specification for MON and Olefins only. The CofQ stated that Reid Vapour Pressure tested by ASTM D323 = 8.85/9.01. It is agreed that the average of these two figures is ½(8.85+9.01) = 8.93 i.e. within specification.

CofQ for the shore tanks composite blend regular gasoline, which reported Reid Vapour Pressure of 8.22psi and states "FUEL MEETS SPECIFICATION". I will refer to the shore tanks composite blend certificate as "the certificate". I will refer to all 5 certificates in respect of the regular gasoline as "the certificates".

AIC faxed ITS' CofQ for the shore composite blend to First National Oil Brokers Inc., Connecticut ("FN"). FN communicated certain figures by telephone to Galaxy Energy (USA) ("Galaxy") before Galaxy agreed to the sub-sale.

In a fax timed 16:34 (local time Connecticut), FN confirmed the sub-sale of the cargo by AIC to Galaxy. The Quality clause in the AIC/Galaxy sub-sale provided: "Quality: (A) M 2 meeting statutory baseline [i.e. CPS] with the following guarantees … RVP 9.0psi … determination of quality: As ascertained at load port and confirmed by Caleb Brett". The sub-sale did not contain an express choice of law clause.

28. On 3 April:

ITS forwarded the CofQ for tank 100x1 premium gasoline to AIC.

The Kriti Palm completed loading and sailed for New York.

29. On 4 April:

ITS sent a telex to AIC attaching time log, cargo summary, and quality analysis (which did not include the phrase "Fuel meets [or does not meet] specification".) The quality results for the regular gasoline were stated on the basis of the shore composite blend CofQ.

In a message to Galaxy, AIC nominated the Kriti Palm and relayed loading information and details of the quality analysis as provided by ITS.

30. On 10 April ITS forwarded its final report to AIC (c/o Banque Paribas), with an invoice for £1,601.24 for services rendered and the CofQs: (1) relating to the shore composite blend of the regular cargo, and (2) relating to the premium cargo. The loading report stated: -

*"The loading operations were protracted due to the vessel having to wait for available cargo. Analysis was performed on shore tanks soon as the tanks were available. The final tank for the regular parcel was found to be outside the required specifications, however after re-testing with a volumetric composite of all four tanks, the results were found to be acceptable."*

31. On 11 April Credit Agricole, Geneva ("Credit Agricole") (for account of Galaxy) opened a letter of credit in favour of AIC in respect of the price payable under the sub-sale. The documents required by the credit included "certificate of quality issued by load port independent inspector Caleb Brett" (document 3). The credit provided: "in lieu of missing documents 2 through 6, payment may be made against documents 1 and 4 (telex acceptable) and a LOI for missing documents (2,3, 5 and 6)". The letter of credit was not, in the event, confirmed.

32. On 14 April the Kriti Palm arrived at Linden, New Jersey.

33. On 15 April:

Analysis was performed by test ASTM D5191 on disport samples of cargo from the vessel's tanks, and on load port samples which had been transported on board. ITS USA (the discharge port inspectors appointed for the purposes of the AIC/Galaxy contract) obtained the following results for the regular cargo: (1) analysis of samples from the ship's tanks – RVP = 9.11 to 9.56 psi; (2) analysis of load port shore tank composite – RVP = 9.04 psi; and (3) analysis of load port ship's composite – RVP = 9.30 psi. Galaxy subsequently instructed SGS to take further samples from the ship's tanks and test them for Vapour Pressure using ASTM D5191. SGS obtained RVP results for the regular cargo of 9.30 to 9.69 psi.

The Kriti Palm commenced discharge of premium gasoline.

34. Galaxy complained to AIC about the cargoes following results of analysis undertaken at the discharge port.

AIC informed ITS about problems at the discharge port.

35. On 16 April:

Galaxy ceased discharge of cargoes.

Mr Rackham (of ITS) sent an internal ITS e-mail message to Mr Chalmers (of ITS), cc Dave Johnston and Nigel Lucas, discussing problems at the discharge port. The message said: -

*"Problem: ITS as Disport Inspectors declare high RVP and Octanes.*

…

Mobil declined to issue individual shore tank results as cargo sold FOB and final document was bench blend as representative of cargo loaded. This passed to AIC.

...RVP was tested by ITS Lab Tech at Coryton to ASTM D323 as an oversight and error not picked up at reporting stage by Inspection office.

Very early days yet but AIC state that vessel is held on demurrage and also if RVP method is found to be erroneously used they will hold us for total quality failure of cargo."

ITS informed AIC that Mobil had instructed ITS not to release information regarding Kriti Palm until after discussions on 17 April.

Mr Rackham arranged for residues of the (retained and broached) individual load port shore tank samples at Coryton to be located and sent to West Thurrock for testing in a Grabner machine of the type used under ASTM D5191 (the "Cooper re-tests"). Neither Mobil nor ITS were informed of the re-tests.

Mr Rackham's logbook contained an entry at 11.00 hours – *"LD re-test Regular unleaded. RVP Ceta 8.67. ASTM D5191 Grabner 8.57"*.

Mr Rackham's logbook contained an entry at 13.33 hours – *"JC re Kriti Palm. Harass UK need low RVP."*

Mr Rackham sent an email to Mr Johnston and Mr Balogh (cc Mr Stokes) in which he tabulated the load port results stated in ITS' certificates and said "*We are very sure at this end that overall vessel will show RVP under 9.0"*.

Mr Rackham responded to an email from Mr Ris of ITS Rotterdam, which had offered assistance. Mr Rackham said *"at present indications are that situation is resolved"*.

Pursuant to Mr Rackham's directions, 10 partially filled sample bottles were sent from Coryton to West Thurrock. Each bottle was marked with the shore tank number from which the Kriti Palm cargoes had been drawn. Mr Cooper conducted re-tests on these residues using the Grabner machine. He recorded the Cooper re-test results in a one-page manuscript note. The note recorded that he ran 2 preliminary tests through the Grabner machine with a sample of a compound known as "22DMB" in order to construct a "correction factor" for the machine. The results for the regular cargo were as follows:

*75x1 (2nd) – Corrected DVPE 8.47/8.69 psi (compared to 7.7 psi as the approximate figure stated in the CofQ).*

*100x1 – Corrected DVPE 9.43/9.46 psi (compared to 7.8 psi as the approximate figure stated in the CofQ).*

*61x4 – Corrected DVPE of 8.67/8.66 psi (compared to 8.85/9.01 psi as the figures stated in the CofQ).*

*75x1(1st) - Correct DVPE 9.30/9.39 psi (compared to 8.9 psi as the approximate figure stated in the CofQ).*

*The manuscript note also recorded "Sample bottles 500ml glass all 50-75% full".*

Mr Rackham tabulated the Cooper re-test results and calculated some kind of an average ASTM D5191 corrected figure of 9.16 psi. He also applied an EPA seasonal correction factor to produce an average of 9.33 psi.

Galaxy demanded from AIC a discount of US$230,000 to resume discharge of cargoes. Galaxy refused to discharge the regular cargo in the absence of a price discount.

AIC put Mobil (cc ITS) on notice of a possible claim and called for Mobil's prompt intervention.

AIC responded to Galaxy. Galaxy took issue with AIC's response.

A Saybolt report was sent to AIC, as to witnessing the tests performed by ITS USA on load port samples transported on board (not tests for RVP).

36. On 17 April:

Mr Rackham sent an email to Mr Chalmers and Mr Loughead. The hard copy document timed 0551 had "VNL" (Mr Lucas' initials) written in manuscript upon it next to "CC." The email said: -

"Current situation is that MV Kriti Palm loaded two grades Prem/Reg ums at Coryton a/c Mobil / A.I.C. AIC purchased FOB on Load C of Q

Quality by ITS at Coryton to C.P.C. spec grades R2/M2

On arrival New York AIC had sold to Galaxy and ITS appointed for Q and Q

Regular pcl at disport found off on RVP. spec max 9.0 load C of Q states 8.22.

Checking with our Mobil Lab tech it appears RVP done by ASTM D 393 and NOT 5191 as per CPC. C of Q checked and passed by local inspection office and C of Q states 393. This has been queried but I have not responded as yet.

AIC called in Saybolt to witness ITS in New York. Galaxy then appointed SGS.

Vessel has discharged premium pcl but Galaxy refuse to accept reg. pcl.

Vessel remains alongside on demurrage.

Late PM yesterday AIC served written telex notice of claim against Mobil London with cc copy to me at West Thurrock.

To date no admission of liability by ITS has been made. Have managed to obtain original RVP samples ex Coryton and whilst these have been broached for original tests have had Grabner RVPs conducted at West Thurrock and overall average for four tanks loaded ex shore onto 17 ship tanks find RVP to be 9.33.

Trying to stall AIC/Mobil questions but things becoming very heated"

Mobil in a message to AIC (cc. ITS) rejected AIC's contention that the cargo was off-specification. Mobil maintained that the products met contractual specification.

ITS USA forwarded to Mr Rackham RVP results obtained at discharge port from analysis of individual ship tank samples.

AIC called upon Galaxy to recommence discharge.

Mr Rackham's logbook contained an entry at 10.55hrs as to a telephone conversation between Mr Whitaker and Mr Rackham. *"AIC $1m – v/l sitting on berth"*. Mr Rackham recorded that Mr Whitaker insisted on speaking to somebody "NOW".

Mr Rackham arranged a telephone call between Mr Whitaker of AIC and Mr Lucas of ITS. He briefed Mr Lucas before the call.

Mr Rackham listened in to the telephone call between Mr Lucas and Mr Whitaker but did not talk. Mr Lucas recorded part of the call on his dictaphone. His secretary subsequently typed up a transcript. This telephone conversation is of central importance in this case.

37. In the course of the telephone conversation:

(1) Mr Lucas said "*It is impossible to go back into any of the samples because no samples are kept under ice."*

(2) (In answer to Mr Whitaker's statement "I have to find out some way of proving that it actually is off-specification – you are telling me that I cannot do that") Mr Lucas said "Not to the load port, but you can at the discharge port".

(3) (In answer to a statement from Mr Whitaker *"I have a Quality Certificate from you that says it is on-specification")* Mr Lucas replied "*we will be standing by that certificate*".

(4) (In answer to a question from Mr Whitaker "*well if the test 323 was done where test 5191 should have been done – do you not see that as inaccurate?") Mr Lucas said "I can't say whether it is inaccurate or not"*.

In a telephone conversation between AIC and Galaxy, AIC offered to pay money into escrow, and then offered a discount of US$100,000 to resolve the impasse at discharge port. Galaxy rejected AIC's proposals and demanded US$230,000.

Mr Lucas faxed Mr Whitaker referring to the latter's request during the telephone call either to change the CofQ or face legal action. Mr Lucas refused to change the CofQ because that "*would be a fraudulent act*".

ITS provided AIC with a "*statement of facts*" and duplicate copies of all six CofQs and loading report.

An ITS internal note from Mr Johnston (of ITS) to Mr Rackham instructed that load port samples were to be sealed. This was implemented.

38. On 18 April:

Mr Whitaker replied to the fax of 17 April from Mr Lucas. AIC provided further contact details of its London and New York lawyers.

In view of Galaxy's continuing refusal to accept the regular cargo, AIC ordered the Kriti Palm to discharge the balance of the cargoes at IMTT Bayonne for the account of Galaxy. The vessel shifted to berth and commenced discharge.

Payment on behalf of AIC was made by Banque Paribas to Mobil. Under the terms of the purchase contract between AIC and Mobil, AIC was bound to pay Mobil in full without offset or deduction.

A telephone conversation took place between Mobil (Mr Bradshaw/Mr Fraser) and AIC (Mr Hatcher/Mr Whitaker). Mobil said that they intended to re-test retained load port samples to investigate the validity of the RVP figures obtained at the discharge port. Mr Hatcher referred to the fact that AIC had spoken with ITS and that ITS had admitted that it may have erred in its "test report for RVP, the test method they ran on the cargo".

39. On 19 April:

Mr Lucas responded to Mr Whitaker's fax of 18 April saying that ITS was "*unable to produce a report stating a result which we did not obtain by a test method which we did not use."* ITS provided AIC with contact details for its London lawyers.

Mobil requested Inspectorate Witham to perform ASTM D5191 test on shore tank retained samples.

In a message from Mobil to AIC (cc. ITS) Mobil rejected the claim that the product was off-specification.

Saybolt informed AIC of the results of an analysis of samples taken from ship's tanks at IMTT Bayonne prior to discharge. The RVP tested by ASTM D5191 was 9.38-9.73 psi.

40. On 20 April the Kriti Palm completed discharge of cargoes at IMTT terminal.

41. On 22 April Mobil cancelled a request to Inspectorate Limited for testing of shore tank retained samples.

AIC instructed Banque Paribas to seek payment under the Galaxy letter of credit opened by Credit Agricole.

AIC telexed Galaxy denying breach of contract, and refusing to agree to a USD 230,000 discount. *"We attempted one last time thru FNOB to mitigate damages by offering a USD 100,000 discount…This offer was refused."*

Banque Paribas presented a commercial invoice, quantity certificates and LOI to Credit Agricole and asked for payment. The ITS quality certificates were not among the documents presented.

42. On 23 April:

Galaxy obtained a temporary injunction (following a without notice hearing) from the Tribunal of First Instance of Geneva, restraining Credit Agricole from making payment to AIC under the Galaxy letter of credit.

Galaxy complained to AIC that despite repeated requests AIC still refused to provide a copy of the certificate for tank 61x4.

43. On 26 April AIC reminded Galaxy that AIC had supplied Galaxy with a certificate for the shore composite. AIC maintained its refusal to provide a copy of the CofQ for tank 61x4.

44. On 29 April internally within ITS, Mr Rackham prepared a Non-conformance Report and Directive.

45. On 18 June 1996 AIC applied to set aside the order of the Tribunal of First Instance of Geneva.

46. On 3 July 1996, in a judgment, the Tribunal of First Instance of Geneva set aside the temporary injunction against Credit Agricole, on the ground that it was only appropriate for a court to interfere with a documentary credit payment mechanism where there was clear evidence of fraud.

47. On 5 July Credit Agricole gave notice of payment (with value 8.7.96) under the Galaxy letter of credit in favour of AIC.

    Galaxy thereafter took delivery of the cargo which had been in storage at IMTT, Bayonne, New Jersey.

48. On 8 July Galaxy issued proceedings in New York against AIC.

49. On 9 July Galaxy sold the regular grade cargo to George E. Warren as GTAB Blendstock.

50. On 16 July Galaxy commenced saisie conservatoire proceedings in Paris against AIC.

51. On 16 September 1996 AIC filed in the Swiss Court a request for damages from Galaxy for wrongful interference in the LOC mechanism, on the basis of Galaxy's unlawful action in obtaining the temporary injunction.

52. On 6 December 1996 Galaxy filed before the Swiss Court submissions in response and Galaxy's counterclaims against AIC for damages for breach of the contract specification.

53. On 9 December Galaxy commenced proceedings against AIC and ITS in England (1996 Folio No. 3182). Galaxy claimed damages from AIC for breach of the AIC/Galaxy sale contract, and damages from ITS for failure to take reasonable care to ensure that statements in the certificate of quality were fair and accurate.

54. On 17 April 1997 the ITS' solicitors wrote to ITS in relation to disclosure in 1996 Folio No 3182. The letter included the following reference to the Cooper re-tests and the results thereof: -

    *"Handwritten notes dated 16 April apparently signed by M. Cooper. These are, I think a note of the test results obtained when the retained samples were subjected to an ASTM D5191 test once problems emerged in New York. These results are "invalid" because the samples had been broached for testing at an earlier stage, but still somewhat alarming because they showed a number of results over 9 (when one would have expected the pressure to have reduced consequent upon the samples being broached). …"*

55. On 4 September 1997 AIC's brief in response to Galaxy's counterclaim was filed before the Swiss Court.

56. On 13 March 1998 Moore-Bick J gave leave on ITS' ex parte application for ITS to issue and serve out of the jurisdiction on AIC a third party notice.

57. On 24 March 1998 ITS issued a third-party notice against AIC pursuant to the leave granted by Moore-Bick J in the English proceedings (1996 Folio No. 3182).

58. On 17 June 1998 AIC issued an application to stay the English proceedings (1996 Folio No. 3182).

59. On 31 July 1998 ITS served a counter-notice for a stay of the English proceedings (1996 Folio No. 3182).

60. In August 1998 Galaxy obtained a copy (for the first time) of the certificate for tank 61x4, by way of ITS' disclosure in 1996 Folio No 3182.

61. On 18 September 1998 Longmore J stayed the English proceedings (1996 Folio No. 3182) and the third-party proceedings brought by ITS against AIC, pursuant to Article 22 of the Lugano Convention, pending the outcome of the Swiss proceedings.

62. On 14 September 2000 the Tribunal of First Instance of Geneva gave judgment substantially upholding AIC's claims and rejecting Galaxy's counterclaims.

63. On 6 November 2000 Galaxy appealed against the judgment and order of the Tribunal of First Instance of Geneva.

64. On 19 April 2002 the Geneva Court of Appeal reversed the first instance judgment and order, rejected AIC's claims and substantially upheld Galaxy's counterclaims. AIC was ordered to pay Galaxy $1,165,037.62 + interest, $51,036.72 + interest and costs.

65. The reasoning of the Geneva Court of Appeal included the following, drawn from the translation of the judgment.

    The contract related to gasoline M 2 for the US market which had to be in conformity with the CPS.

    Galaxy received in New York gasoline which was not on-specification. The gasoline was not compatible with the figures resulting from the test made in Coryton by ITS communicated to Galaxy by fax of 4 April 1996.

    The test of the quality at load port was erroneous. The product did not meet the contractual specifications (the CPS). The product was either an aliud or a product which bore a defect or an absence of promised guarantee.

    The Regular M 2 constituted a debt in kind.

The failure to comply with the conditions as to RVP had the consequence that the gasoline M 2 did not conform to the CPS, but was another product which had to be sold as another product by Galaxy.

By delivering an aliud, AIC did not perform its obligations. The delivery of an aliud constitutes a violation of the contract.

It was for the debtor (AIC) to demonstrate that if it did not execute the contract properly, AIC did it without fault.

AIC failed to demonstrate absence of fault.

AIC knowingly loaded gasoline which did not conform to the CPS concerning the RVP. AIC knew that one of the tanks (61 x 4) contained gasoline which was not, with respect to RVP, in conformity with the contract (and with the CPS), the RVP being above 9psi (although the gasoline had been tested with an inadequate test).

AIC did not submit the certificate which related to tank 61 x 4 (which said it was off-specification). Galaxy, during the proceedings, was able to obtain the document in question directly from ITS.

It was never a contractual provision that only the shore composite blend would be determinative. Mr Whitaker admitted that AIC had received the certificate as to the tank which did not meet the specifications and the certificate as to the shore composite blend at the same time. He also admitted that he had been informed between 16 and 18 April that the test of the shore composite blend had been done in an erroneous way.

Although it appeared that a third test made by ITS Caleb Brett USA confirmed a high RVP above the limit of 9psi, AIC refused any discussion, any contradictory testing. AIC did not take the disputed product back as it should have done and, on the contrary, proceeded on its own initiative to discharge the regular cargo in the name of Galaxy, requesting in parallel the payment of the total amount of the letter of credit. Acting like that, AIC seriously violated its obligations.

The gasoline tested at load port included at least a tank which, according to the testing however inadequate, presented a RVP superior to 9psi.

AIC did not act properly following that discovery and proceeded to a shore composite blend which was found "acceptable". It gave the order to load the cargo on the Kriti Palm knowingly.

Contrary to its obligations, AIC refused to submit the certificate relating to tank 61 x 4 when it requested the payment of the letter of credit or later, demonstrating that AIC was conscious of acting in an incorrect way and that the product which had been loaded on the Kriti Palm was not on-specification.

As to the testing in New York at discharge, AIC could not be in any doubt that the M 2 did not conform to the contractual specifications and to the CPS. Its reaction vis-à-vis ITS was the best proof of this.

AIC however withdrew very quickly behind the contractual clause according to which the binding quality was the one acknowledged at load port, alleging thereby a thesis which was contrary to the most elementary rules of good faith.

AIC then forced Galaxy by delivering the disputed product in the name of the latter in New York.

It follows that not only did AIC violate its contractual obligations, but it did so with fault.

[It should be remembered that the Geneva Court of Appeal (and AIC and Galaxy) did not know of the Cooper re-tests and the results thereof].

66. On 26 April AIC commenced proceedings against Mobil (Folio 2002/430), claiming damages for breach of contract and/or for knowingly presenting false documents in order to obtain payment of the price.

67. On 17 May 2002 AIC commenced the present proceedings (2002 Folio 502) against ITS, claiming damages for negligence and/or negligent misrepresentation and/or contribution under the Civil Liability (Contribution) Act 1978. Documents relating to the Cooper re-tests and the results thereof were disclosed by ITS for the first time in these proceedings.

68. On 27 May AIC instituted civil law and public law appeals to the Swiss Supreme Court against the judgment and order of the Geneva Court of Appeal.

69. On 19 August 2002 AIC requested revision of the Geneva Court of Appeal judgment and order. AIC applied to the Swiss Court of Appeal to set aside its judgment on the ground that Galaxy had been struck off the companies register in Delaware on 1 March 2000 and that Galaxy had not disclosed this fact to the Swiss Court of Appeal. Galaxy responded by having itself restored to the companies register on 14 August 2002 with retroactive effect.

70. On 19 June 2003 the Geneva Court of Appeal rejected AIC's request for revision.

71. On 5 December 2003 the Swiss Supreme Court delivered judgments rejecting AIC's appeals.

72. On 5 May 2005 the action between AIC and Mobil (Folio 2002/430) was compromised. Mobil agreed to pay US$200,000 to AIC. There was no order as to costs.

## 3. AIC'S CASE AND ITS' CASE

**AIC'S CASE :** AIC's case is as follows.

73. ITS owed contractual duties:

(1) To use reasonable skill and care;

(These duties included a duty to comply with the professional standards expected of an international inspection agency, a duty to notify clients in writing of any circumstance casting doubt on the validity of reported results and a duty to investigate and report on anomalies/enquiries/complaints and a duty to provide all relevant information concerning an error, consequences and doubt surrounding reported results).

(2) To seek permission before use of samples and to inform clients of the fact of such use and the consequences thereof;

(3) Not to make misrepresentations or deceive AIC; and

(4) To follow instructions.

74. Further ITS owed duties in tort.

75. As to the duration of duties, ITS owed a continuing duty (up to and after 17 May 1996) to correct/qualify representations in certificates and/or to inform AIC of the Cooper re-tests and the results thereof and/or to inform AIC of the unauthorised testing of RVP samples.

76. ITS were in breach of duty.

(1) ITS were initially negligent.

(2) ITS made negligent misrepresentations on 17 April 1996.

(3) ITS negligently failed to correct/qualify/withdraw the certificate and negligently failed to disclose the Cooper re-tests and the results thereof on and after 17 April 1996.

(4) ITS were in breach of the contractual duty to disclose the Cooper re-tests and the results thereof.

(5) ITS were guilty of deceit.

77. As to (1) (initial negligence), ITS used the wrong test, D323, not D5191, the RVP result of 8.22 psi was calculated, there was no proper or adequate system for checking certificates, there was a more general failure to follow the D323 method, the D323 tests were carried out negligently, the cargo was off-specification at the load port (the Cooper re-tests and the results thereof were particularly significant in this context), Mr Mailey's RVP results were wrong and Mr Mailey was negligent in carrying out the D323 tests.

78. As to (2) (negligent misrepresentations on 17 April 1996), ITS continued to represent that the fuel met specification and that Mr Mailey's results were reliable. There was no proper basis for these representations.

79. As to (3) (negligent failure to correct/qualify/withdraw the certificate and negligent failure to disclose the Cooper re-tests and the results thereof on and after 17 April 1996), ITS knew that it had carried out the wrong test for RVP, ITS should have communicated the error, with full information pertaining to the potential consequences, ITS should have provided the Cooper re-tests and results to AIC, ITS appreciated that the certificate contained an incorrect result for RVP and should have stated that ITS could no longer stand by the certificate.

80. As to (4) (contractual duty to disclose the Cooper re-tests and the results thereof), the RVP samples were retained on behalf of the clients and/or were the joint property of the clients and/or were potentially relevant to the clients. ITS were obliged to seek permission for re-testing and to inform the clients of the fact and results of the unauthorised re-testing.

81. As to (5) (deceit), if Mr Lucas did know of the Cooper re-tests and the results thereof, then he made statements which were false to his knowledge. It is implausible that Mr Lucas did not know of the re-tests and the results thereof at the time of, or shortly after, the telephone conversation on 17 April 1996. Mr Lucas was at the very least reckless in maintaining that the fuel met specification and that the RVP result of 8.22 psi was reliable. Mr Lucas' failure to correct/qualify/withdraw statements made during the telephone conversation on 17 April 1996 and his failure to correct/qualify/withdraw the certificate were dishonest or reckless. Mr Lucas was involved after the telephone conversation of 17 April 1996. His attempt to contend otherwise is implausible. Inferences are to be drawn from Mr Lucas' highly unsatisfactory evidence in relation to the Swiss proceedings.

As to Mr Chalmers, it is implausible that he regarded the Cooper re-tests and the results thereof as of no relevance or importance. Mr Chalmers knew that there was something wrong with the RVP results stated in the certificates. Mr Chalmers knew it was wrong and misleading for ITS to continue to stand by the RVP results stated in the certificates and to reiterate that those results were reliable. In failing to correct/qualify/withdraw the certificate for the regular cargo and/or the false statements made by ITS on 17 April 1996, Mr Chalmers was acting dishonestly or recklessly.

82. As to ITS' duties in a claim situation, ITS' duties did not cease as soon as it had notice of a possible claim. Mr Lucas must have known this.

83. AIC did rely upon ITS' certificates and what was said (and not said) by ITS during the telephone conversation on 17 April 1996 and thereafter. ITS knew and intended that this would be so.

84. AIC suffered the losses claimed as a result of acting on the basis that the certificate was correct and reliable and that what ITS had said was true. If ITS had disclosed the Cooper re-tests and the results thereof and/or cast doubt on the certificate, AIC would have acted very differently. There was no break in the chain of causation. AIC's actions in discharging the cargoes, and requiring Galaxy to pay and take delivery of the cargoes, did not break the chain of causation. AIC's losses were not caused by AIC acting in bad faith vis-à-vis Galaxy. The fact that AIC has not recovered all of its losses from Mobil does not break the chain of causation (nor does it mean that AIC has acted unreasonably in not mitigating its losses).

85. There was no failure on the part of AIC to mitigate. AIC made a reasonable offer to Galaxy. AIC did not act unreasonably in deciding to call on the letter of credit and enforce payment of the price by Galaxy. AIC did not

act unreasonably in not selling the cargoes to blenders in New York. AIC's claims are not barred by limitation. ITS was in breach of continuing duties on and after 17 May 1996. ITS was guilty of fraud. ITS was guilty of deliberate concealment. Facts relevant to AIC's right of action were concealed. The requirements of section 32 (1) (b) and 32 (2) of the Limitation Act 1980 are satisfied. Further AIC is entitled to contribution from ITS under the Civil Liability (Contribution) Act 1978. ITS was liable to Galaxy. ITS and AIC were liable to Galaxy for the same damage. ITS should make a 100% contribution.

86. For these reasons AIC submits that it is entitled to judgment for the sums claimed plus interest and costs.

**ITS' case :** ITS disputes AIC's case as set out above. I will refer below to ITS' submissions in relation to some of the important issues.

87. The Cooper re-tests and results is the only material which AIC argues was deliberately concealed.

88. The claim as pleaded up until Day 4 could only succeed in deceit or not at all. The pleaded reliance on deliberate concealment (s 32 (1) (b) the 1980 Act) was misconceived and unnecessary.

89. In order to circumvent this difficulty AIC added by way of very late amendment on Day 4 a claim for breach of alleged implied terms set out in paragraphs 23B1-3 of the Re-Re-Re Amended Particulars of Claim.

90. The new case on implied terms is unsustainable as a matter of contractual analysis and in any event does not satisfy the tests for deliberate concealment.

91. The claim in deceit was and remains bad in law and fact.

92. The claim ought to be dismissed on the grounds that there was no deceit. Apart from deceit the claim is time barred.

93. AIC's amendments have also introduced other contractual issues of potentially wide ranging significance for the inspection industry and international trade. It is unfortunate that this was done at such a late stage. ITS has done its best in the time available to collate and put before the court relevant industry materials.

94. In relation to the wider contractual issues, it is ITS' submission both on existing authority, and having regard to the practicalities, that a clear distinction must be drawn between matters of pure fact recorded in a certificate and which can be shown to be incontrovertibly wrong, and matters of opinion.

**4. WITNESSES**

**Witnesses called by the claimant**

95. Mr Giovanni Sampino

At the material time Mr Sampino's work for AIC primarily involved ship operations. When one of the traders at AIC agreed physical sale or purchase contracts, Mr Sampino would handle the nomination of vessels, the appointment of cargo inspectors and operations at load and discharge ports. (Mr Sampino is now the senior trader at AIC).

96. At the material time AIC's traders were Mr Rob Hatcher (the senior trader), Mr Stephen Payne and Mr Tom Whitaker. Mr Whitaker negotiated the contracts for the purchase and sale of the cargo. Mr Hatcher, Mr Payne and Mr Whitaker talked to each other about the contracts all the time. Mr Sampino was involved in these discussions. Mr Hatcher was at the material time the Managing Director of AIC.

**Hearsay Evidence**

97. Statements were admitted under the Civil Evidence Act 1995/CPR 33.2 from Mr Robert Hatcher and Mr Stephen Payne.

98. In addition paragraphs 14, 26 and 27 from a statement by Mr Stuart Bradshaw dated 30 September 2004 and pages 809F to 809H from the evidence given by Mr David Hopper before the Geneva Court of First Instance on 12 June 1998 were admitted under the 1995 Act/CPR 33.2.

**Statements not challenged**

99. Statements from Mr Clency Charles and Dr Robert Watt were admitted as unchallenged evidence.

100. Dr Watt is a Chartered Chemist and a Fellow of the Royal Society of Chemistry and a consultant to Dr J H Burgoyne & Partners.

In July 1998 AIC instructed Dr Watt as an expert witness in the litigation in Switzerland between AIC and Galaxy. Galaxy's case in Switzerland was that ITS should have used D5191, but that either test method used properly would have shown that the RVP of the cargo of regular unleaded gasoline was too high. This argument was supported by an expert report prepared by Professor Riccardo Cosulich of Laboratorio Chimico Merceologico, which AIC asked Dr Watt to comment on. Dr Watt's final report dated December 1998 concluded that ITS' inspectors had been entitled to use ASTM D323 to test the RVP of the cargo prior to loading at Coryton.

During his testimony on 1 June 1999 Galaxy's lawyers showed Dr Watt some documents he had not previously seen. Dr Watt said that strictly speaking (as he explained in his report in the Swiss proceedings) there is only one test for Reid Vapour Pressure, and that is ASTM D323. In practice, however, the letters RVP are used to refer to Vapour Pressure generally, probably because the Reid method was the first reliable test for Vapour Pressure. On this basis, a chemist/cargo inspector who is asked simply to test the RVP of gasoline can choose between a number of methods. However, if the chemist/cargo inspector is directed to a particular test method, he should use it. If Dr Watt had seen certain documents when he was preparing his expert report in the Swiss proceedings, he

would not have reached the same conclusions. His expert report was prepared on the basis that the inspectors at Coryton had not been directed to use the test methods specified in the CPS, and were therefore free to choose what method to use to test RVP. It is clear from the documents he had not seen that this was not the case, and that the inspectors were asked to test the RVP of the cargo using ASTM D5191. Their instructions could not have been interpreted differently.

Dr Watt said that he had recently been informed that on about 16 April 1996 ITS re-tested the original cargo samples using ASTM D5191, and found that the RVP of these samples exceeded the maximum of 9 psi that is permitted under the CPS. He said: -

*"If I had had this information when preparing my expert report for the Swiss proceedings, my conclusions might have been very different. … testing gasoline samples that have already been tested cannot produce reliable results for RVP because Vapour Pressure will have been lost when the samples were first tested. However, … the RVP at the time of such re-tests will inevitably be lower than it was at the time of the original tests. The results of ITS' re-tests on samples of the regular unleaded gasoline therefore call into question the reliability of all the RVP results from their original tests on this part of the cargo. I find it particularly striking that the RVP of one of the samples of regular unleaded gasoline when re-tested was 9.43/9.46, whereas its RVP when originally tested at Coryton was recorded as 7.8 psi. This appears to be inexplicable."*

**Witnesses called by the defendant**

101. Mr Nigel Lucas

102. Mr Nigel Lucas has a degree in chemistry. In 1996 he was the General Manager of ITS and was based at West Thurrock. In that role he had management responsibility for every Caleb Brett site in the United Kingdom (plus Norway and Nigeria). He held that position form 1990 to 1998. Mr Lucas reported to Mr Loughead, the Regional Director for Europe, Africa and the Middle East.

103. Mr Lucas said that at the time of his conversation with Mr Whitaker on 17 April he believed that the certificates that ITS had produced were reliable certificates. When giving evidence Mr Lucas said that he understood that Mr Mailey was working 100% for Mobil in the blending programme and then worked 50/50 for Mobil and AIC in the independent inspection and testing. Mr Lucas explained "if one was looking at RVP being measured and the blender making decisions about what extra components to put in as the hours go by, you would have a breadcrumb trail of RVP testing which would be a nice smooth curve up to the target point that he was looking for. That would have told me a volume of information about how reliable that sample would have been." Mr Lucas said that on 17 April 1996 he thought that Mr Mailey was involved in the blending at the time. In fact Mr Mailey was not involved in the blending exercise. If in fact Mr Lucas was mistaken as to Mr Mailey's role in April 1996 he cannot have made proper inquiries.

Mr Lucas said if he had known (a) that Mr Mailey was not involved in the blending exercise and (b) of the Cooper re-tests and the results thereof, he "*would have stood by the certificate, but we would have got into a much bigger argument then about what the Cooper results actually meant. We would have had to get into a three-cornered discussion with Mobil, AIC and ourselves to try and see what this actually would mean by way of a decision."*

104. In evidence for the Swiss proceedings before District Judge Elizabeth Silverwood-Cope on 11 November 1999, Mr Lucas was asked the following question – *"… please describe why it was (or was not) possible to check the actual RVP …?" Mr Lucas answered as follows " … it makes complete sense. I did not think you could analyse RVP 15 days later because the samples are unstable. The logic being they would not be representative of the same period after 15 days."* The Swiss courts did not know that the Cooper re-tests had been carried out by ITS. It was suggested to Mr Lucas that his answer for the purposes of the Swiss proceedings was misleading because no mention was made by him of the Cooper re-tests.

105. It is appropriate to make (and I do make) due allowance for the difficulties Mr Lucas faced when giving evidence because of the passage of time. Nonetheless I have marked reservations about important parts of his evidence.

106. I will return to consider Mr Lucas' evidence in some detail later in this judgment.

107. Mr John Chalmers

108. Mr Chalmers has a marine background. In March 1996 he was employed by ITS as Claims Manager. In addition he had responsibilities for claims for the Group at large. He also served as UK Quality Assurance Manager and Safety Adviser and had a wide role in Europe in terms of Quality Assurance. His title was Technical Manager Eastern Hemisphere/Safety Manager UK.

109. It is appropriate to make (and I do make) due allowance for the difficulties Mr Chalmers faced when giving evidence because of the passage of time. Nonetheless I have marked reservations about certain parts of his evidence.

110. The entry in Mr Rackham's logbook at 13.33 hours on 16 April ("*JC re Kriti Palm. Harass UK need low RVP*") I find probably refers to a telephone conversation between Mr Rackham and Mr Chalmers. In cross-examination Mr Rackham accepted that the note suggested that Mr Chalmers was anxious to get the results. The contemporary note in Mr Rackham's logbook is to be contrasted with Mr Chalmers' evidence that the Cooper re-tests were a *"botched up job on a spent sample*" and that he would probably have "*blown up all over the telephone*" when he became aware of the re-tests.

111. Mr Chalmers agreed that Mr Rackham was experienced and would know whether it was appropriate to re-test or not.

112. Mr Chalmers accepted that he was of the view that something was wrong with the result at Coryton because that result was out of line with other results.

113. When asked whether it was acceptable for ITS to say it was standing by the certificate in circumstances where ITS knew there was something wrong with one of the published results, Mr Chalmers said "*phrased like that, no*". At a later stage his evidence was as follows:

*"Q. … should ITS have stood by [the certificate] or should they have written a letter withdrawing it or what should they have done?*

*A. I think we should have been much clearer in what we were saying. We did tell them the wrong tests had been used. Sitting here today, I think I agree … that we could have written them a letter spelling out exactly that, that the wrong tests had been used and that there was therefore, in view of the other tests in America and the result we have here, an area of doubt.*

*Q. And "the result we have here" means what?*

*A. The RVP result …*

…

*Q. Are you saying that as of today you recognise that you should have written a letter saying, "We can no longer stand by this certificate"?*

*A. Sitting here today, I think I would have to recognise that."*

114. I will return to consider Mr Chalmers' evidence in some detail later in this judgment.

115. Mr Michael Cooper

At the material time Mr Cooper was a Senior Technician responsible for the day to day running of the ITS laboratory in West Thurrock.

116. On 16 April 1996 Mr Cooper was asked to run tests for Vapour Pressure on shore tank samples retained from the time when the cargo was shipped from Coryton. Mr Rackham arranged for residues of the (retained and broached) individual load port shore tank samples at Coryton to be located and sent to West Thurrock for testing in a Grabner machine of the type used under ASTM D5191. Mr Cooper prepared a note of the tests carried out and the results obtained. The second column listed the results produced by the Grabner machine. The third column listed the Dry Vapour Pressure Equivalent – the results that would be reported using ASTM D5191. The fifth column (Corrected DVPE) applied the correction of 0.10 psi. Mr Cooper said that if the broached samples remained intact and in good order, one would generally expect the Vapour Pressure to go down. It would be physically/chemically impossible for it to go up.

117. Mr David Adams

Mr Adams was employed by ITS as a chemist inspector. His task was to oversee the loading operation and at the end of that operation to provide the correct documentation and samples.

118. In a statement made in 1999 he said that it was his task to make up the shore tank composite blend and described how he did so. He added that the result for the RVP for the shore tank composite blend would have been calculated, but he did not know who made the calculation.

119. Damian Twyford

Mr Twyford was employed by ITS as an Inspection Co-ordinator.

120. He signed certain of the ITS certificates of quality.

121. Mr Twyford accepted that he did not get out the specification and check whether all the required tests had been carried out, whether the correct tests had been carried out and whether the results reported were within the required specification. He accepted that he should have taken these steps, but failed to do so. When he signed certificates containing a statement "Fuel meets Specification", he did not make any independent check as to whether that was so or not. Further Mr Twyford accepted that he was not aware that some of the results in the shore composite certificate were calculated results.

**Hearsay Evidence**

122. Paragraphs 16, 21 and 27 of a statement by Mr Stuart Bradshaw dated 20 January 2005, paragraph 6 of a statement by Mr Michael Fraser dated 27 September 2004 and page 809 I from the said evidence of Mr David Hopper were admitted under the 1995 Act/CPR 33.2.

**Witnesses who provided statements to both sides** [I gave a direction by consent as to the procedure to be adopted and the order of cross-examination in relation to this evidence.]

123. Paul Mailey

Mr Mailey was employed by ITS as a chemist inspector in the laboratory at Mobil's Coryton refinery. Mr Mailey found that a parcel of cargo was off-specification. He reported this to Mobil's Production Control Office and Mr Twyford. The Production Control Office could then re-blend the parcel in question and ask him to test it again.

124. Mr Mailey used the wrong test (D323). Test D323 called for 1 litre containers to be used. In fact he used 500 millilitre containers. He did not check the manometer and gauge or transducer readings as required by D323. Mr Mailey accepted that if the sample containers were 75% full when re-tested by Mr Cooper, it was difficult to see how that could be if the D323 test procedures had been followed carefully.

125. Mr Mailey agreed that on re-testing broached samples, the expectation would be that the RVP figures would be lower than the figures he arrived at.

126. Mr Mailey also accepted that it was possible that something had gone wrong with his initial testing (in the light of the results obtained in the United States).

127. Mr Arthur Wyllie

Mr Wyllie was at the material time a Senior Inspector employed by ITS.

128. Mr Wyllie said that when he signed the certificate relating to the shore composite blend sample he was not aware that some of the results reported were not the result of analysis of the shore composite sample, but were calculated figures. Had he been aware of this he would have made this clear on the certificate.

129. Mr Christopher Rackham

130. At the material time Mr Rackham was employed by ITS as South East Area Manager.

131. Mr Rackham kept a careful logbook on a daily basis. His logbook has proved most helpful in piecing together the events of in particular April 1996.

132. Mr Rackham said that he regarded the Cooper re-tests as being an important matter and that he hoped and anticipated that the results would lead to the situation being resolved. He added that had the re-tests come out in the way he hoped, he would have informed AIC of the results.

133. At a later stage in his evidence Mr Rackham added that "we could not have put any confidence in those results" because the samples had been broached. This answer was out of line with some of his earlier evidence.

134. Mr Rackham said that once he had learnt of the Cooper re-test results, he would have told Mr Chalmers about them (and I am sure this is correct).

135. In a witness statement Mr Rackham said "I briefed [Mr Lucas] about the matter and that Mr Whitaker wanted to speak to somebody more senior than me. I informed him that we had used test method ASTM D323 rather than ASTM D5191. Otherwise, I am sure that I gave Nigel as full a briefing on events as possible, but I cannot now recall the detail."

136. When cross-examined Mr Rackham was asked "It is likely that you would have told [Mr Lucas] that both ITS (USA) and SGS [had] found the cargo to be off-spec for RVP on their analysis of the ship's tanks at New York?" Mr Rackham replied "It is likely I would have gone through all the pertinent points with him." I find that the overwhelming probability is that Mr Rackham informed Mr Lucas of the results of the ITS (USA) and SGS tests prior to the telephone conversation on 17 April.

137. Mr Rackham was then asked "The pertinent points would obviously include the facts of the re-tests and the re-tests results?" Mr Rackham answered "I would presume so, yes".

138. The importance and significance attached by ITS to the results of the Cooper re-tests was demonstrated by the note in Mr Rackham's logbook at 13.33 hours on 16 April – "JC re Kriti Palm. Harass UK need low RVP."

139. In my judgment the overwhelming probability is that Mr Rackham informed Mr Lucas of the Cooper re-tests and the results thereof in the course of briefing Mr Lucas prior to the telephone conversation on 17 April.

**Expert Evidence**

140. Mr Roland Revell and Dr Sheila Marshman

141. Mr Revell was called by AIC and Dr Marshman by ITS. I will refer to Mr Revell and Dr Marshman as "the experts".

142. Mr Revell is employed by Minton Treharne & Davies as a consultant chemist. He is a Chartered Chemist, a Member of the Royal Society of Chemistry and a Fellow of the Institute of Petroleum. His work involves the investigation of contamination claims, and special project work concerning oil, chemical and liquefied gas cargoes, for cargo underwriters, P & I Clubs, oil companies, oil traders and ship owners. Between 1990 and 1996 he worked as Technical Manager for Inspectorate Limited. For some part of this period he acted as a consultant to Mobil's Coryton Refinery, assisting and advising on the setting up of various in-plant testing laboratories.

143. Mr Revell was an impressive witness.

144. Dr Marshman has a PhD in chemistry (Royal Holloway, University of London). Her thesis involved investigation of sediment formation in modern fuel and lubricant systems. She is a Fellow of the Royal Society of Chemistry. She is an External Consultant with CWA International Consultancy Services, Oil & Chemical Department. She is a highly experienced petroleum chemist and has extensive experience of oil contamination incidents and quality disputes. She has over thirty years experience in fuels and lubricant analysis, testing and research.

Dr Marshman worked for Intertek between March 2002 and November 2003, but not on the inspection side. She has never been involved on the inspection side. She has never attended a commercial vessel loading. Mr Revell was accordingly better placed to provide assistance to the Court in these respects.

145. The experts assisted the Court in accordance with the duties of expert witnesses.

146. In their first joint report the experts agreed the following. Points of difference are shown in square brackets.

(1) Some of the test methods set out in the certificates of quality were not those called for in the Colonial Pipeline Specification. The test methods set out on the certificates included the testing of Vapour Pressure using ASTM D323, rather than the required method ASTM D5191. In addition the Benzene result was expressed as % volume when the CPS stated % weight.

(2) There were no Oxygenates results for any of the regular motor gasoline shore tanks. The CPS required the regular motor gasoline to have no Oxygenates.

[Mr Revell was of the opinion that due to the fact that there were no Oxygenates results and the use of alternative test methods to those stated in the CPS, ITS were not in a position to state "Fuel meets Specification".]

(3) If the tests ASTM D323 and ASTM D5191 had been performed correctly the results should be comparable.

(4) The EPA equation would give a Vapour Pressure result between 0.1 to 0.2 psi higher than the ASTM D5191 equation. The fact that the cargo was to be tested to CPS indicates it was destined for the USA. However, the application of the EPA equation is only required in certain circumstances.

(5) ASTM D323 will be prone to greater variations as indicated by the higher reproducibility.

(6) From the ship/shore quantity figures any contamination would have been very limited and would not have caused a significant increase in the Vapour Pressure. It was calculated that a 1% contamination, representing a volume of 390 cubic metres, from previous gasoline/naphtha cargoes, having a Vapour Pressure as high as 15 psi, would increase the Vapour Pressure of the overall cargo by less than 0.1 psi.

[Mr Revell was of the opinion that any increase in Vapour Pressure due to trace amounts of previous cargoes, such as gasoline or naphtha, would have been less than 0.05 psi.].

(7) As to why the test methods state 'do not perform tests on broached samples', it is accepted that generally the results on broached samples will be lower.

[Dr Marshman was of the opinion that in some cases the results have been found to be higher].

(8) The disport results confirmed that the cargo on board the "Kriti Palm" was off-specification in respect of Vapour Pressure at disport.

147. In their second joint report the experts agreed the following. Points of difference are shown in square brackets.

(9) The cargo was off-specification at disport.

(10) There was no evidence of contamination during the voyage.

(11) There was no evidence of contamination from the shoreline system.

(12) [As to whether the cargo was off-grade at load port, Mr Revell was of the opinion that it was off-grade at load port due to the fact that it was off-grade at disport, there being no evidence of contamination during the voyage or from the shoreline system. Dr Marshman could not confirm whether the cargo was off-grade at load port or not].

(13) The definition of Outliers is a result far enough in magnitude from other results to be considered not part of the set. The reasons for such a result are not always known.

(14) The two sets of results (Mr Mailey's results and Mr Cooper's re-test results) were so far apart that both should be considered suspect (IP 367).

[Mr Revell was of the opinion that the Cooper re-test results gained credibility by comparison with the results found at disport. Dr Marshman was of the opinion that the Cooper re-test results were invalid and that in comparing results from load port and disport the samples were not identical].

(15) The certificates stated the test methods used by ITS and the results found at the time, with the exception that the certificate for the shore tanks composite did not state that the RVP had been calculated, rather than determined directly by ASTM D323. [However, Dr Marshman stated that this was common industry practice].

(16) The certificate should not have stated that the "Fuel meets Specification".

(17) For non-oxygenated gasoline samples the RVP results obtained by ASTM D323 and ASTM D5191 should be comparable. 95% of the results would be expected to be within the reproducibility of ASTM D323, which is the greater.

(18) [As to the test procedures used by Mr Mailey, Mr Revell believed the tests were not performed in accordance with ASTM D323 procedures with respect to calibration and in some cases sample handling. Dr Marshman was of the opinion that sample handling was in accordance with ASTM D323 procedures and that appropriate calibration procedures were followed].

148. Cornelius van den Hout

149. Mr van den Hout has over 34 years of experience in the petroleum industry. He was instructed by ITS to consider issues relating to the quantum of loss sustained by AIC in relation to the cargo the subject of this case.

**International Standards**

150. Paragraphs (150) to (163) are drawn from an agreed statement prepared by the expert witnesses.

ISO 9001 and ISO 17025

The Quality Management Systems standards ISO 9001 and ISO 17025 were developed from the Ministry of Defence AQAP procedures for monitoring the quality of products and processes of their suppliers particularly for critical applications or products. AQAPs originated in about the 1950s. AQAPs were superseded by the ISO and NAMAS quality procedures in the 1990s.

151. Accreditation to either of the two standards above is not mandatory from a regulatory point of view. However, lack of accreditation or withdrawal of accreditation may well result in the company experiencing loss of credibility, subsequent loss of business and prevention from applying for certain business.

152. Accreditation is achieved by third party review of documentation and working practice within the organisation. Once achieved, accreditation is maintained by regular review by the accreditation authorities. Compliance by the organisation is demonstrated by internal audit, and the availability of internal documentation to show that compliance is continuous. This would include items such as training records, calibration records and procedures, review and changes to procedures, any areas of non-compliance and records of corrective actions.

153. During review by the accreditation authorities, discovery of major non-compliances with the standard can result in accreditation being suspended or withdrawn.

154. In 1996, the relevant accreditation for the various organisations was as follows:

ITS West Thurrock NAMAS accreditation. M10

ITS Inspection ISO 9002:1994

Mobil Laboratory ISO 9001:1994

**ISO 9001 Requirements**

155. ISO 9001:1994 was in operation in 1996. It is understood that the ITS Inspection Division had ISO 9002 and the Mobil Coryton Laboratory had ISO 9001 Accreditation.

156. The ISO 9000 series of standards (ISO 9001,9002,9003) state the requirements for a quality management system which cover processes. It is applicable to a wide range of organisations, including but not exclusive to production, testing, research and inspection activities. The application of ISO 9001 can be used for contractual or certification purposes.

157. The main areas of difference between the ISO 9001, 9002 & 9003 standards relate to the areas of competence which are covered under the various standards. Thus ISO 9001 covers design, development, production, installation and servicing and ISO 9003 covers final inspection and test areas. (ISO 9001:1994 Introduction). ISO 9002 would 'nest inside' ISO 9001 because its scope is limited with regard to areas of competence.

158. Under ISO 9001, a process can be an action such as carrying out a test, or an inspection, or producing a report. The intention of the quality control system is to provide control over various activities which may interact. For example, a request for analysis and the subsequent required activities may include:

i) Receipt of request: check requirements (methods, timescales, availability of personnel) can be met, acknowledge receipt of request, log request on system

ii) Receipt of samples: log samples on system, pass to relevant personnel or laboratory

iii) Check equipment is in calibration

iv) Analyse sample in duplicate, check results against calibration data

v) Report results.

159. The rationale behind the process approach is given in the Introduction section of ISO 9001: 2000 paragraphs 0.1 to 0.4.

**ISO 17025 Requirements**

160. The ISO 17025 standard was initiated in 1999.

161. The equivalent document that was valid in 1996 would have been the NAMAS Accreditation standard: General Criteria of Competence for Calibration and Testing Laboratories M 10.

162. NAMAS or ISO 17025 accreditation is more specific than the ISO 9001 accreditation in that it deals specifically with laboratory activities. Laboratories are accredited for particular tests, and not necessarily all the tests which are carried out at the laboratory. However, the same controls and quality procedures are expected to apply to all tests carried out. Tests not specifically accredited should be identified on test certificates as non-accredited methods.

163. If testing laboratories comply with the requirements of this International Standard, they will operate a quality management system for their testing and calibration activities that also meets the principles of ISO 9001.

**5. LIST OF MAIN ISSUES IN DISPUTE**

164. I set out below the list of main issues in dispute, as agreed between the parties.

1. To what extent was AIC experienced with the purchase and sale of gasoline at the time of the transactions to which the claim relates?

2. Was ITS retained by Mobil and AIC in any kind of advisory capacity? What was the proper scope of the contractual duties owed by ITS to AIC?
3. What were ITS' instructions with regard to testing for RVP? Did ITS reasonably interpret its instructions with regard to testing for RVP? Did ITS carry out its instructions with regard to testing for RVP?
4. Were the RVP results by test method ASTM D323 ('D323') stated in the ITS certificates of quality for the regular cargo:
   (i) accurate and/or accurately stated?
   (ii) wrong?
5. Can it be shown whether the regular cargo would have been on- or off-specification in the shore tanks, if DVPE had been tested in accordance with ASTM D5191? If so: Was the regular cargo off-specification in the shore tanks and, if so, did ITS know that the cargo would have been shown to be off-specification, if DVPE had been tested in accordance with D5191?
6. Was ITS negligent in its initial analysis of the regular cargo:
   (i) in omitting to clarify whether it should use D323 or D5191 before the analysis?
   (ii) in using the test method D323?; and/or
   (iii) in failing properly and/or adequately to perform test D323?
7. Did ITS fail to have in place any proper system to check the certificates of quality before they were issued? Was ITS negligent in failing to have in place any proper system to check the certificates of quality before they were issued?
8. What statements were contained in the Certificates of Quality? Did the Certificates of Quality contain false statement(s)? In the Certificates, did ITS misrepresent or misreport the results of what it had done?
9. Was ITS negligent in issuing certificates of quality that stated "FUEL MEETS SPECIFICATION" when ITS had used test D323 to test the fuel for RVP?
10. As of 18 April 1996, or thereafter, did AIC in fact rely on the Certificates?
11. As of 18 April 1996, or thereafter, could AIC reasonably rely on the statements in the Certificates that "fuel meets specification" (where applicable)? Further or alternatively, could AIC reasonably rely on the statements in the Certificates that "fuel meets specification" (where applicable), if what AIC had intended to instruct ITS to carry out was a test for DVPE such as that for which D5191 is required?
12. What is/was the uniform practice of arriving at the RVP result of a shore composite blend? What is/was the due method of arriving at the RVP result of a shore composite blend? Did the shore composite blend certificate represent that the RVP result stated therein had been obtained by analysis of a shore composite sample using test D323 and, if so, was ITS negligent in issuing a certificate in that form?
13. Did Galaxy rely upon ITS' certification of the regular cargo when entering into the AIC/Galaxy contract?
14. What RVP samples were taken by ITS?
15. What was ITS' standard practice as regards sample retention? What material was subject to ITS' sample retention standards?
16. What RVP samples were kept by ITS, if any; and in what condition? What residues of samples were kept by ITS; and in what condition?
17. What material was the subject-matter of the re-tests by Mr Cooper on 16 April 1996?
18. Was the material re-tested by Mr Cooper being held by ITS on behalf of AIC and Mobil?
19. Was the material re-tested by Mr Cooper properly to be regarded as the joint property of AIC and Mobil?
20. Should ITS have sought AIC's and Mobil's permission before conducting such re-tests and was ITS in breach of duty in failing so to do?
21. Are/were the results of the re-tests to be relied on for any purpose? Should ITS have informed AIC and Mobil about the fact of the re-tests and the results thereof and was ITS in breach of duty in failing so to do?
22. Should ITS have informed AIC about the fact of the re-tests and the results thereof in the telcon on 17 April 1996, and/or subsequent to the telcon, and was ITS in breach of duty in failing so to do?
23. Did Mr Lucas know of the re-tests and the results thereof (i) by the time of the telcon on 17 April 1996 and (ii) thereafter?
24. What was Mr Chalmers' knowledge of the re-tests and the results thereof by 17 April 1996 and thereafter?
25. Was what was said (and not said) by Mr Lucas in the telcon on 17 April 1996 false and misleading?
26. Was Mr Lucas negligent in what he said (and did not say) during the telcon on 17 April 1996?
27. Was Mr Lucas dishonest in what he said (and did not say) during the telcon on 17 April 1996?
28. Did Mr Lucas intend AIC to rely upon what he said during the telcon on 17 April 1996?
29. On or after 17 April 1996 was ITS negligent in failing to correct or qualify or withdraw what had been stated in the certificates of quality?
30. On or after 17 April 1996 were Mr Lucas and/or Mr Chalmers dishonest in failing to correct or qualify or withdraw what had been stated in the certificates of quality?
31. Did Mr Lucas and/or Mr Chalmers make a deliberate decision not to disclose the fact of the Cooper re-tests and/or the results thereof to AIC and Mobil in circumstances where the re-tests and/or the results thereof

should have been disclosed to AIC and Mobil and/or Mr Lucas and/or Mr Chalmers knew that the re-tests and/or the results thereof should have been disclosed to AIC and Mobil?

32. If and to the extent that ITS was under a duty to disclose the fact of the Cooper re-tests and/or the results thereof (see issue 22 above), on or after 17 April 1996 were Mr Lucas and/or Mr Chalmers aware that ITS was under such a duty and did Mr Lucas and/or Mr Chalmers make a deliberate decision not to disclose the same?
33. Did ITS deliberately conceal a fact relevant to AIC's right of action against ITS?
34. If ITS did deliberately conceal a fact relevant to AIC's right of action against ITS, should AIC nevertheless have found out that fact by the exercise of reasonable diligence prior to 17 May 1996?
35. Are AIC's claims time-barred under section 2 and/or 5 of the Limitation Act 1980, save for the contribution claim?
36. Did AIC rely upon what was said (and not said) during the telcon on 17 April 1996 and, if so, in what way did AIC so rely?
37. What (if any) difference would it have made to AIC's conduct if ITS had disclosed the Cooper re-tests and the results thereof on 17 April 1996 or thereafter?
38. What (if any) difference would it have made to AIC's conduct if, on or after 17 April 1996, ITS had qualified or withdrawn its certificate(s) of quality for the regular cargo?
39. What loss (if any) has been caused by any breaches of contract and/or duty by ITS?
40. Did AIC fail to mitigate and/or did AIC aggravate its loss, and if so to what extent, by:
    i) not disclosing certificate of quality for shore tank 61x4 to Galaxy and/or by drawing on Galaxy's letter of credit in the knowledge that the Certificates certified that the cargo had been tested to method D323?
    ii) failing to reblend the cargo, or to cause the cargo to be reblended, prior to requesting payment from Galaxy and/or drawing on Galaxy's letter of credit?
    iii) failing to agree a cargo discount with Galaxy?
    iv) failing to resell the cargo in its existing condition at the prevailing market rates?
    v) pursuing unsuccessful legal proceedings in Switzerland against Galaxy, whereby AIC was held liable on Galaxy's cross-claims and incurred legal costs?
41. What were the foreseeable consequences of the alleged breaches of duty? Are the losses (or any of them) claimed by AIC too remote in law to be recoverable?
42. Did AIC cause its loss in whole or in part by acting in bad faith in not disclosing certificate of quality for shore tank 61x4 to Galaxy and/or by drawing on Galaxy's letter of credit in the knowledge that the Certificates certified that the cargo had been tested to method D323?
43. Was ITS liable to Galaxy in tort (in negligence or deceit)?
44. Was ITS liable to Galaxy for the "same damage" in relation to which AIC was held liable to Galaxy in the Swiss proceedings?
45. Is ITS liable to provide an indemnity to AIC in respect of AIC's liability to Galaxy (as established in the Swiss proceedings)?
46. Is ITS liable to provide a contribution to AIC in respect of AIC's liability to Galaxy (as established in the Swiss proceedings) and, if so, what level of contribution is fair and just in all the circumstances?

165. Before turning to consider the agreed issues it is convenient to set out the legal principles that apply where it is alleged that the wrong method of testing was applied by an inspection company.

**6. MISTAKE AND DEPARTURE FROM INSTRUCTIONS CONTRASTED**

166. In Veba Oil Supply and Trading Gmbh v Petrotrade Inc [2001] EWCA Civ. 1832 [2002] 1 Lloyd's Rep. 295 the defendants sold to the claimants 25,000 tonnes of gasoil f.o.b. Antwerp. Clause 10 of the contract provided that the quantity and quality of the cargo was –

*"… to be determined by a mutually agreed independent inspector at the loading installation [Antwerp] in the manner customary at such installation such determination shall be final and binding for both parties save fraud or manifest error …"*

Under clause 4 of the contract against the marginal heading "PRODUCT/QUALITY" the following words appeared:

*"Gasoil meeting the following guaranteed specifications:*

*Test Limit Method ASTM*

*Density at 15 deg. C +0.876 kg/1 max D1298."*

167. Caleb Brett were the appointed independent inspectors and were instructed to carry out the determination under clause 10. Caleb Brett produced a report in which they determined the density was 0.8750 kg/1.

168. The claimants contended that they had on sold the oil to the Lebanese Ministry of Oil on similar terms as to quality, but on arrival and testing it was found that the density of the cargo exceeded the contractual maximum. The claimants claimed damages.

169. The claimants submitted that the determination was not final and binding on them. They argued that the method used for testing the product was ASTM D 4052 rather than D 1298 as specified in the contract.

170. The defendants applied for summary dismissal of the claim against them and contended that the fact that the inspector departed from instructions in this respect did not amount to a material departure rendering the determination invalid on grounds of manifest error. The test used was a more accurate and widely used method of calculating the density of gasoil; it had a lower margin of error, and the test used was the one which was customary at the Antwerp loading installation.

Morison J held that Caleb Brett had been asked to determine the quality of the gasoil using method D 1298; they had not done so and the parties had not agreed to be bound by a determination as to quality by any other method; there was a manifest error due to the wrong test being used; and clause 10 could not operate unless the determination had been made in accordance with the method stipulated in clause 4. The defendants' application for summary dismissal of the claim brought against them was dismissed.

171. The defendants appealed, the issue for decision being as follows. If an independent expert departs from his instructions in a material respect his determination is not binding. What for these purposes is a material respect?

172. Simon Brown LJ in dismissing the appeal said at paragraph 26: -

"(i) A mistake is one thing; a departure from instructions quite another. A mistake is made when an expert goes wrong in the course of carrying out his instructions. The difference between that and an expert not carrying out his instructions is obvious.

(ii) Under the old law a mistake would vitiate the expert's determination if it could be shown that it affected the result. That was the concept of material mistake established in Dean v Prince and Frank H. Wright (Constructions) Limited v Frodoor. Not so, however, with regard to a departure from instructions – see Ungoed-Thomas J's judgment in Jones v Jones …

(iii) Under the modern law the position is the same as it was with regard to a departure from instructions, different with regard to mistakes. As Lord Denning explained in Campbell v Edwards, if an expert makes a mistake whilst carrying out his instructions, the parties are nevertheless bound by it for the very good reason that they have agreed to be bound by it. Where, however, the expert departs from his instructions, the position is very different: in those circumstances the parties have not agreed to be bound.

(iv) The test of materiality devised for identifying vitiating mistakes does not carry across to the quite separate field of departures from instructions. This seems to me so both as a matter of principle and of authority. The position is as stated in Jones v Jones and in Dillon LJ's judgment in Jones v Sherwood at p.287 … where he illustrates the principle by reference to Jones v Jones.

(v) ***Dean v Prince and Frank H. Wright (Constructions) Limited v Frodoor*** – although on any view rightly decided – should no longer be regarded as authoritative with regard to experts' mistakes. That for the most part was made clear in Jones v Sherwood. The contrary is not to be inferred from the dictum in Dillon LJ's judgment at p.288 (the other line of reasoning on which he did not found his judgment) referring back to Frank H. Wright (Constructions) Limited v Frodoor. It is time that ***Dean v Prince and Frank H. Wright (Constructions) Limited v Frodoor*** received their quietus.

(vi) Once a material departure from instructions is established, the court is not concerned with its effect on the result. The position is accurately stated in paragraph 98 of Lloyd J's judgment in Shell UK v Enterprise Oil: the determination in those circumstances is simply not binding on the parties. Given that a material departure vitiates the determination whether or not it affects the result, it could hardly be the effect on the result which determines the materiality of the departure in the first place. Rather I would hold any departure to be material unless it can truly be characterised as trivial or de minimis in the sense of it being obvious that it could make no possible difference to either party."

173. Tuckey LJ agreed with the formulation at paragraph 26 (vi) above. Dyson LJ differed as to how to define a material departure from instructions stating (at paragraph 47) that test should be *"a departure which the parties would reasonably have regarded – as sufficient to invalidate the determination."*

174. The following points should be noted. It would not have been easy for a client such as AIC inexperienced in the purchase and sale of gasoline (see issue 1) to determine whether a departure from instructions was trivial or de minimis. I refer under issue 6 below to test methods that are technically equivalent and would be expected to give results that are not significantly different. If the tests ASTM D323 and ASTM D5191 had been performed correctly the results should be comparable. Once it was clear that ITS had departed from instructions as to the test method (and used D323 instead of D5191) it was perfectly understandable commercially that AIC (with its very limited experience) would look to ITS (as an independent inspection company) for an answer one way or the other as to whether ITS was standing by the certificate which said "Fuel meets Specification", and act accordingly vis-à-vis Mobil or Galaxy.

I turn to consider the agreed issues in turn.

## 7. ANALYSIS AND DISCUSSION OF AND CONCLUSIONS AS TO THE AGREED ISSUES

### 1. To what extent was AIC experienced with the purchase and sale of gasoline at the time of the transactions to which the claim relates?

175. AIC's business has always been the buying, selling and blending of gasoil and gasoil products. The Kriti Palm cargo was the only gasoline cargo Mr Sampino has dealt with either operationally or as a trader.

176. According to Mr Hatcher gasoline trading was not AIC's business. He had no experience in trading gasoline, nor did anyone else in AIC in 1996, except Mr Whitaker who had quite limited experience. Prior to 1996 AIC occasionally purchased a gasoline cargo if it considered an arbitrage opportunity had arisen. After the Kriti Palm incident AIC did not do so again.

177. According to Mr Payne no one at AIC had any real experience in trading gasoline. It is a much more complicated product than gasoil to sell or blend. On the very few occasions when AIC did trade gasoline it was because an arbitrage window arose, for shipment to or from the USA.

**2. Was ITS retained by Mobil and AIC in any kind of advisory capacity? What was the proper scope of the contractual duties owed by ITS to AIC?**

178. Mr Mildon QC for ITS submitted as follows. Once the inspector has published his certificate his task is finished. He is functus officio in the same way as an arbitrator after publication of an award. ITS would not dispute that if it had made a statement of fact, which went to the question whether or not it had complied with its mandate, had believed that statement to be true at the time of making it, and had subsequently learnt that the statement of fact was false then ITS would, as a matter of law, have come under a duty to correct the original statement in order to enable Mobil and AIC to decide whether there had been compliance with ITS' mandate. ITS' duty would have been to communicate the correction to both Mobil and AIC, preferably at the same time, and by way of formal Supplement to the original certificate. It would not have been appropriate to deal with such a matter by way of side letter or with any degree of informality. Thus, if through an internal mix-up ITS' certificates had stated that Mr Mailey had used method D5191, and that error had later been detected within ITS, then it would have been ITS' duty to correct the error by issuing a formal Supplement deleting method D5191 and substituting D323. Similarly if ITS had established uncontrovertibly that Mr Mailey had mixed up the samples from two tanks so that the identification of the tank number at the top of a certificate was wrong, then ITS would have been bound to issue a formal Supplement. The position is different where and to the extent that the original statement or certificate involves an element of opinion and/or the information alleged to be disclosable is irrelevant to the question whether the inspector has complied with its mandate. A statement of opinion involves a statement that the opinion is honestly held at the time when the statement is made. It does not follow as a matter of law, that just because the representor subsequently changes his mind, ergo he is bound to communicate his change of opinion. Further, if, which ITS would dispute, its mandate from Mobil and AIC required it to form and state an opinion, the mandate was to state its opinion at the time of producing the certificate. Provided ITS' opinion was honestly held at the time of issuing the certificates, any subsequent change of mind (which is in any event disputed) would be irrelevant.

179. I do not accept that the analogy drawn by Mr Mildon with the position of an arbitrator is apposite. Nor do I accept that once an inspection company has published its certificate it is necessarily functus officio. As to Mr Mildon's further submissions, in my judgment, the obligations owed by ITS were as set out below.

180. Mr Lucas accepted that an inspection company should inform "both parties as quickly as possible when [an] error is discovered. The certificate stands [as] a record of that moment in time. If it could be proven to be in error, the corrections are made at a later date."

181. I analyse the position as follows.

182. On 22 March 1996 Mobil faxed instructions to ITS. These included a description of what was to be tested and a copy of the CPS. The CPS prescribed a maximum "RVP" of 9.0psi as arrived at by test method ASTM D5191. On 26 March AIC informed Mobil and ITS that AIC required inspections "to be done during loading in addition to the normal inspection procedures", which included full static shore tank samples and analysis for both products colonial pipeline M2 Grade and R2 Grade (full specs on both), and first foot composite sample on cargo tanks to be analysed on main specs including RVP. On 27 March ITS enquired whether loading should be halted to enable tests of first foot ship's tank samples. On 29 March Mobil informed ITS that AIC should pay 100% for listed requests, otherwise 50/50. A message from Mr Damian Twyford (of ITS) to Mr Giovanni Sampino (of AIC) confirmed that AIC no longer required additional tests of first foot ship's tank samples.

183. Inspection companies are instructed in connection with domestic and international documentary sales because they are understood and expected to have the necessary facilities and expertise to enable them to determine whether the seller has performed its contract in the relevant respects and are trusted to exercise independent judgment. Although an inspection company may receive its instructions from the seller (in the present case from both the seller (Mobil) and the buyer (AIC)), it will be aware that its certificate is likely to be required for presentation to the buyer and any sub-buyer (in the present case Galaxy) and/or to a bank or banks as part of the documentation against which payment is to be made. An inspection company is aware, therefore, that the buyer and/or sub-buyer and/or a bank which ultimately has recourse to a buyer/sub-buyer, will rely on the existence and accuracy of its certificate in paying the price for the goods. The buyer and/or sub-buyer is the person whom the inspection company should have in contemplation as the person most likely to be affected by any error in the certificate. Absent contract, this is a classic example of the situation envisaged by Lord Morris in the Hedley Byrne case, in which a person with particular expertise is instructed to produce a report which he knows will be passed on to another, who can be expected to rely on it. It is inherent in the nature of the task undertaken by the inspection company that it assumes responsibility to the buyer and/or sub-buyer for what is stated in the

certificate. That is the whole purpose of its employment. (See Niru Battery Manufacturing Co v Milestone Trading Ltd [2003] EWCA Civ. 1146, paragraph 51, Moore-Bick J approved by Clarke LJ).

184. Inspection agencies do not necessarily know the particular terms of the contract or contracts of sale. Such contracts frequently provide that an inspection certificate is to be binding, save in the case of fraud or manifest error. Parties include provisions for inspection certificates in sale contracts with a view to achieving certainty and finality. In the present case the contract between Mobil and AIC provided that the results of the inspection were to be "final and binding for both parties save for fraud or manifest error", and the contract between AIC and Galaxy provided - "Determination of quality: As ascertained at load port and confirmed by Caleb Brett".

185. ITS was jointly instructed by Mobil and AIC. The contract between Mobil/AIC and ITS required ITS to take reasonable care to ensure that any certificate it issued was accurate as to those matters on which it was instructed to report. Further, ITS assumed responsibility to persons who ITS should have had in contemplation as most likely to be affected by any error in any certificate. In the present case such persons included Galaxy.

186. The best guide to what is comprised in the duty owed by an inspection agency (whether in contract or tort) to take reasonable care to ensure that any certificate issued is accurate as to the matters on which it is instructed to report, is found in the International Standards at the material time.

187. In 1996, the relevant accreditation was as follows:
ITS West Thurrock - NAMAS accreditation. M10
ITS Inspection - ISO 9002:1994

188. The experts, in a table attached to their joint report dated 24 June, helpfully identified the relevant provisions of NAMAS Accreditation Standard M 10 that applied to ITS West Thurrock in 1996.

189. The NAMAS Accreditation Standard M 10 in 1996 included the following requirements: -
*"8 METHODS AND PROCEDURES FOR CALIBRATIONS AND TESTS …*

*8.3 The Laboratory shall take all steps to ensure that the Client's requirements are clearly prescribed and understood. … …*

*12 CALIBRATION CERTIFICATES, TEST REPORTS AND TEST CERTIFICATES*

*12.1 The results of each calibration, test or series of calibrations or tests shall be reported accurately, clearly, unambiguously and objectively to the Client. The results shall be reported in a calibration certificate, test report or test certificate. Subject to the agreement of NAMAS the certificate or report may be issued as hard copy or by electronic data transfer. Unless otherwise stated, the requirements of 12 of this Standard apply to all forms of presentation of calibration and/or test results. The certificate or report shall include all information relevant to the validity and application of the calibration or test results and all information required by the calibration or test method and procedure used. This information shall be set out with due regard to ease of assimilation by the reader.*

*12.2 The certificate or report shall be factually correct and shall be checked before issue. …*

*12.4 The certificate or report shall make it clear whether the results reported refer to calibrations or tests carried out on a single item, or on a batch of items. Where relevant, details of any sampling carried out shall be included. … …*

*12.11 Each calibration certificate and test report or test certificate shall also convey at least the following information: …*

*(i) any abnormalities or departures from standard condition;*

*(j) reference to calibration or test method and procedure used;*

*(k) any standard or other specification relevant to the calibration or test method or procedure, and deviations, additions to or exclusions from the specification concerned; …*

*(n) any design or performance specifications met or failed;*

*…*

*(p) any other available information requested by a client, relevant to the validity or applicability of the calibration or test result.*

*12.12 Material amendments to a calibration certificate, test report, or test certificate after issue shall be made only in the form of a further document, or data transfer including the statement, "Supplement to Calibration Certificate, Test Report or Test Certificate, serial number --- (or as otherwise identified)", or equivalent form of wording. Such amendment shall meet all the relevant requirements of 12 of this Standard.*

*12.13 The Laboratory shall notify clients promptly, in writing, of any event such as the identification of defective measuring or test equipment that casts doubt on the validity of results given in any calibration certificate, test report or test certificate or amendment to a report or certificate. …*

*13 HANDLING OF COMPLAINTS AND ANOMALIES*

*13.1 The Laboratory shall have documented policy and procedures for the resolution of complaints received from clients or other parties about the Laboratory's accredited activities. A record shall be maintained of all complaints and of the actions taken by the Laboratory.*

*13.2 Where a complaint, or any other circumstance, raises doubt concerning the Laboratory's compliance with the Laboratory's policies or procedures, or with the requirements of this Standard, or otherwise concerning the*

*quality of the Laboratory's calibrations or tests, the Laboratory shall ensure that those areas of activity and responsibility involved are promptly audited in accordance with 4 of this Standard.*

*13.3 Where the audit findings cast doubt on the correctness or validity of the Laboratory's calibration or test results, the Laboratory shall immediately notify, in writing, any client whose work may have been affected."*

190. These requirements were reflected in ITS' Quality Control Manual, which was not disclosed until the start of the trial. In particular ITS' Quality Control Manual provided: -

*"11.1 Policy*

*The results of each test or series of tests shall be reported accurately, clearly, unambiguously and objectively to the Client in the form of a test report or test certificate. … UKAS requirements shall apply to all forms of presentation of test results. The certificate or report shall include all information relevant to the validity and application of the test results and all information required by the test method and procedure used. This information shall be set out in a manner such as to allow ease of assimilation by the reader…*

*11.2 Authorisation*

*The certificate or report shall be factually correct and shall be checked and approved before issue…*

*11.4 Supplementary Certificates/Reports*

*Where amendments to test reports or test certificates are required after issue these shall be in the form of a separate document … and should be clearly identified. Supplementary reports and amendments shall meet all other requirements with respect to reporting as described above, including the need for authorisation and signature.*

*11.5 Validity of Certificates/Reports*

*The Laboratory shall notify clients in writing of any circumstance, which casts doubt on the validity of results given in any test report or certificate, and, where possible, following corrective action, repeat the tests affected and re-issue an amended report or certificate.*

*HANDLING OF COMPLAINTS AND ANOMALIES*

*12.2 Procedure*

*The following procedure shall be followed to record all client enquiries and complaints if they relate to the quality of service received or when the validity or accuracy of results is in question. This procedure is also applicable to anomalies that have been identified/raised within the laboratory: …*

*c) Subsequent investigation of the complaint shall be undertaken as soon as possible. All findings and resulting actions shall be recorded and the client notified appropriately, preferably in writing. If necessary, corrected versions of reports shall be submitted. All other clients whose work may have been similarly affected shall be notified in writing and again corrected versions of reports submitted."*

191. In this case the certificates related to analyses done at both Coryton and West Thurrock. The certificates were issued by the Gray's office which is based at West Thurrock. The relevant provisions of NAMAS Accreditation Standard M 10 that applied to ITS West Thurrock in 1996 represented internationally accepted practice at the material time, and provide appropriate guidance as to the nature and extent of ITS' duty to take reasonable care in circumstances such as those that arose in the present case.

192. Thus in my opinion ITS' duty to take reasonable care to ensure that any certificate it issued was accurate as to those matters on which it was instructed to report, included the following implied obligations to both Mobil and AIC: -

i) to determine whether Mobil had performed its contract with AIC in the relevant respects, applying the test methods ITS was instructed to apply.

ii) to exercise independent and impartial judgment and to act as an independent and impartial inspection company at all material times.

iii) to report the results of tests independently, accurately, clearly, unambiguously and objectively.

iv) to include in any certificate all information relevant to the validity and application of the test results and all information required by the test method and procedure used.

v) to make it clear whether the results reported referred to tests carried out on a single item, or on a batch of items, including where relevant details of any sampling carried out.

vi) to include in any certificate: - any departures from standard condition; reference to the test method and procedure used; any standard or other specification relevant to the test method or procedure and deviations, additions to or exclusions from the specification concerned.

vii) to issue material amendments to any certificate in the form of a further document by way of a Supplement to the certificate, with a statement to the effect that the same should be passed onto any person to whom the original certificate had been provided.

viii) where a complaint or any other circumstance raised doubt concerning the quality of the tests, to ensure that the relevant work/tests were promptly audited/reviewed. Where the audit/review findings cast doubt on the correctness or validity of the test results such as to necessitate a Supplement to the certificate, to write to Mobil and AIC immediately enclosing the Supplement, with a statement to the effect that the Supplement to the certificate should be passed onto any person to whom the original certificate had been provided.

**3. What were ITS' instructions with regard to testing for RVP? Did ITS reasonably interpret its instructions with regard to testing for RVP? Did ITS carry out its instructions with regard to testing for RVP?**

193. ITS' instructions included a description of what was to be tested and a copy of the CPS. The CPS prescribed a maximum "RVP" of 9.0 psi as arrived at by test method ASTM D5191.

194. I prefer and accept Mr Revell's evidence – "If … in 1996 I was being asked to do a Vapour Pressure meeting CPS, I would be aware that it [was] almost certain to be D5191, and if I needed any confirmation on that, then I would go back to the client, even to the extent that I [might] … ask … what calculation to use. … The best [approach] is … to put the Vapour Pressure and the test method down [in the certificate] … Everybody in the industry now accepts that RVP is just a form of expressing a Vapour Pressure rather than just akin to D323." (See further in this connection Dr Watt's evidence at paragraph (100) above).

195. ITS' case is that its instructions were ambiguous, and accordingly ITS ought to have sought clarification of its instructions. If contrary to Mr Revell's view (which I accept) the instructions were ambiguous, I find that if ITS had reverted to Mobil/AIC, ITS would have received confirmation that it was to test Vapour Pressure by test method ASTM D5191.

196. In the light of Mr Revell's evidence (which I accept) I answer the second and third sub-issues in the negative.

197. The analysis set out above is confirmed by ITS' Non-Conformance Report dated 29 April 1996 which read "Export gasoline testing at Coryton. Vapour Pressure test method by incorrect interpretation of specification."

**4 Were the RVP results by test method ASTM D323 stated in the ITS certificates of quality for the regular cargo:**
**i) accurate and/or accurately stated?**
**ii) wrong?**

198. The experts agreed that in the light of the ship/shore quantity figures, any contamination would have been very limited and would not have caused a significant increase in the Vapour Pressure.

199. I accept Mr Revell's evidence, in relation to the broached/opened samples re-tested by Mr Cooper, as follows. The Vapour Pressure of the samples when tested would probably have been lower than when they were first tested at Coryton. The results of the Cooper re-tests established on a balance of probabilities that the tests ITS carried out before loading significantly understated the Vapour Pressure of the regular grade gasoline. (In cross-examination Mr Lucas agreed that because of the loss of light ends in the case of a broached sample, one would expect the RVP figure on re-test to be lower).

200. I accept Mr Revell's opinion that the information now available (particularly the Cooper re-test results) indicates that the original ASTM D323 tests carried out by Mr Mailey of ITS were not in accordance with the stated test procedures and that at least some of the ASTM D323 results, as reported by ITS, were probably incorrect and significantly understated the Vapour Pressure of the gasoline in at least two of the shore tanks at Mobil Coryton.

201. The ASTM D5191 results reported by both ITS (US) and SGS at disport were broadly comparable. These two sets of results were also broadly similar but marginally higher than the Cooper re-test results, which were performed on broached samples. I accept Mr Revell's opinion that the ITS (US) and SGS Vapour Pressure results broadly corroborated each other and when viewed together with the Cooper re-test results confirmed that the regular motor gasoline on board the Kriti Palm was on a balance of probabilities off-specification.

202. I find that the Vapour Pressure results by test D323 stated in the ITS certificates of quality for the regular cargo were probably wrong. The results of the Cooper re-tests were a key piece of evidence, highly relevant to this conclusion.

203. I find that Mr Lucas and Mr Chambers knew, understood and appreciated the matters set out in the last four paragraphs.

**5. Can it be shown whether the regular cargo would have been on- or off-specification in the shore tanks, if DVPE had been tested in accordance with ASTM D5191? If so: Was the regular cargo off-specification in the shore tanks and, if so, did ITS know that the cargo would have been shown to be off-specification, if DVPE had been tested in accordance with D5191?**

204. I repeat the answer to issue 4.

205. I find that on a balance of probabilities it can be shown that the regular cargo would have been off-specification in the shore tanks, if DVPE had been tested in accordance with ASTM D5191. I also find on a balance of probabilities (a) that the regular cargo was off-specification in the shore tanks and (b) that ITS (in particular Mr Lucas and Mr Chalmers) knew from the results of the Cooper re-tests that the cargo would have been shown to be off-specification, if DVPE had been tested in accordance with D5191.

206. The Cooper analysis of the broached samples provided what Mr Revell described as a "check indication" as to the Vapour Pressure of the four shore tanks used in loading the Kriti Palm. The fact that the results, for two of the shore tanks, were found to be significantly higher in the Cooper re-tests, confirmed that at least some of the original results were probably incorrect. (See further the evidence of Dr Watt at paragraph (100) above).

207. These conclusions are consistent with the evidence of Mr Rackham who agreed that the Cooper re-tests provided clear evidence (a) that the cargo was off-specification at load port and (b) that if the cargo had been tested with the correct method (5191), then the results would probably have been over 9psi.

208. Further Mr Chalmers accepted that it was very unfortunate that Mr Lucas said in the course of the conversation on 17 April "we will be standing by that certificate". The certificate stated "Fuel meets Specification."

**6. Was ITS negligent in its initial analysis of the regular cargo:**
**i) in omitting to clarify whether it should use D323 or D5191 before the analysis?**
**ii) in using the test method D323?; and/or**
**iii) in failing properly and/or adequately to perform test D323?**

209. I repeat the answers to issues 3, 4 and 5 above. I answer the three sub-issues in the affirmative.

210. For completeness I add the following. In his first report Mr Revell stated: -
*"It appears from ITS' load port certificates of quality that several of the test methods reportedly used for the Kriti Palm cargo at Coryton were not the methods required by the CPS:*
*Test Parameter CPS test method Test method ITS*
*used*
*Vapour Pressure ASTM D5191 ASTM D323*
*Benzene Content ASTM D3606/4053 ASTM D2267/*
*4815*
*(Benzene Results % Weight % volume)*
*Copper Corrosion ASTM D130* IP 154**
*Existent Gum ASTM D381* IP 131**
*API Gravity ASTM D287/1298 IP 365*
*Oxidation Stab ASTM D525* IP 40**
*Distillation ASTM D86* IP 123**
*Oxygenates ASTM D4815 Not tested*
*Lead Content ASTM D3237 Not stated*
*(*Indicate test methods used by ITS that are technically equivalent to the CPS test methods for the relevant parameters and would be expected to give results that are not significantly different)."*

211. Dr Marshman agreed with the above, save that she said that IP 365 (API Gravity) was a more accurate, although technically different test.

**7. Did ITS fail to have in place any proper system to check the certificates of quality before they were issued? Was ITS negligent in failing to have in place any proper system to check the certificates of quality before they were issued?**

212. I answer both questions in the affirmative.

213. In his Directive dated 29 April 1996 Mr Rackham wrote "it is apparent that whilst test results are being cross-checked for accuracy by two personnel at Grays prior to publication of results, there remains a weak link whereby the actual method requested is not always cross-referenced." I refer to the terms of Mr Rackham's Directive and the accompanying Non-Conformance Report.

214. Mr Chalmers (in my view rightly) accepted that the checking by Mr Twyford and Mr Wyllie before they signed the certificates of quality was inadequate.

**8. What statements were contained in the Certificates of Quality? Did the Certificates of Quality contain false statement(s)? In the Certificates, did ITS misrepresent or misreport the results of what it had done?**

215. Mr Mildon QC submitted that the words "Fuel meets Specification" were not a freestanding statement which could and should have been read independently of the rest of the certificate. I reject that submission.

216. I repeat the answers to issues 3 to 7 above.

217. The Certificate of Quality in relation to the shore composite blend stated in particular but without limitation that "Fuel meets Specification" (and contained a figure of 8.22 psi for RVP). This certificate contained false statements, including in particular the statement that "Fuel meets Specification". ITS had carried out the wrong test. The Vapour Pressure results by test method ASTM D323 stated in the certificates of quality for the regular cargo were probably wrong. On a balance of probabilities (a) the regular cargo was off-specification in the shore tanks and (b) ITS knew that the cargo would have been shown to be off-specification, if DVPE had been tested in accordance with D5191, once ITS knew the results of the Cooper re-tests.

218. Further the experts agreed in their second joint report that "the certificate should not have stated that the product 'meets specification'".

**9. Was ITS negligent in issuing certificates of quality that stated "FUEL MEETS SPECIFICATION" when ITS had used test D323 to test the fuel for RVP?**

219. In my judgment ITS was in breach of the duty to take reasonable care/negligent for the reasons given in answer to issues 3 to 8 above.

**10. As of 18 April 1996, or thereafter, did AIC in fact rely on the Certificates?**

220. In the course of the telephone conversation on 17 April 1996, Mr Lucas said "we will be standing by that certificate", in response to Mr Whitaker's statement - "I have a Quality Certificate … that says it is on specification".

221. I accept AIC's evidence to the effect that AIC relied on the certificate on and after 18 April 1996. Mr Sampino of AIC said in his witness statement "… we found out … that the method used to test the cargo's RVP at the load port was not the method stated in the CPS. However, I also remember Mobil insisting that the cargo was on-spec and ITS saying they would stand by the certificates of quality. ITS even accused Tom Whitaker of asking them to commit fraud, just because he asked them to correct the certificates of quality if they were not accurate … in the circumstances, despite Galaxy's complaints, we had no choice but to pay Mobil. Mr Hatcher and Mr Whitaker took that decision, but I would not have acted differently. A company like AIC does not refuse to pay an oil major without a very good reason, and certainly not when it is being told by the oil major that there is nothing wrong with a cargo and cargo inspectors are standing by certificates of quality that are to be final and binding."

222. Mr Lucas accepted when giving evidence that he made the statement on 17 April, "we will be standing by that certificate," intending that it should be relied on.

223. It was perfectly understandable commercially that AIC (with its very limited experience – see the answer to issue 1 above) would look to ITS (as an independent inspection company) for an answer one way or the other as to whether ITS was standing by the certificate which said "Fuel meets Specification", and act accordingly vis-à-vis Mobil or Galaxy. In the event AIC, relying on the certificate and Mr Lucas' further confirmation on 17 April, maintained the position as against Galaxy that the fuel met specification. I find that if on and after 17 April 1996, instead of standing by the certificate, ITS had issued material amendments to the certificate by way of a Supplement to the certificate, withdrawing the statement "Fuel meets Specification", AIC would not have continued to press Galaxy for payment of the full price and would not have required Galaxy to take delivery of the cargoes. On the contrary an early commercial settlement would probably have been arrived at between AIC and Mobil/Galaxy (and possibly ITS).

224. The statement "we will be standing by that certificate" played a real and substantial part in AIC's decision making process. The statement represented the broad effect of ITS' position as set out in the telephone conversation on 17 April when considered as a whole. (AIC did not have a transcript of the conversation). See further under issues 25 – 30 below.

225. Mr Sampino said in his witness statement: - "I recently found out that on 17 April 1996, when ITS were telling us that they would stand by their certificates of quality, they had in fact re-tested samples of the cargo taken at the load port using the method referred to in the Colonial Pipeline Specifications and found the cargo to be badly off-specification for RVP … . If Mobil or ITS had disclosed this information at the time, it would have changed everything. We would certainly not have agreed to pay Mobil in full for the cargo and then sought payment in full from Galaxy. If this information had been available to AIC, I doubt very much that Mobil would even have asked us to pay in full. We probably would have negotiated a discount with them and then passed it on to Galaxy, or agreed with Mobil and Galaxy to pay a fixed amount into escrow to allow time for the actual value of the cargo to be ascertained. … Without this new information or any evidence that Mobil or ITS might not be telling us the whole truth, we had no alternative but to take what they told us at face value, and seek to rely on the certificates of quality and shipping documents to obtain payment from Galaxy."

226. See further on this subject the evidence of Mr Hatcher, Mr Payne and Mr Charles.

227. On 18 April payment on behalf of AIC was made by Banque Paribas to Mobil. If on 17 April ITS had issued material amendments to the certificate by way of a Supplement to the certificate withdrawing the statement "*Fuel meets Specification",* in my opinion Mobil would probably not have been able to present conforming documents under the letter of credit issued by Banque Paribas. The letter of credit required "*certificates of quality/quantity issued at load port*". Further Mobil would not have been able to provide the beneficiary's statements called for under the letter of credit.

228. The commercial probabilities are that if ITS had issued material amendments to the certificate by way of a Supplement to the certificate withdrawing the statement "Fuel meets Specification", an early commercial solution would have been arrived at as between AIC and Mobil/Galaxy (and possibly ITS).

**11. As of 18 April 1996, or thereafter, could AIC reasonably rely on the statements in the Certificates that "fuel meets specification" (where applicable)? Further or alternatively, could AIC reasonably rely on the statements in the Certificates that "fuel meets specification" (where applicable), if what AIC had intended to instruct ITS to carry out was a test for DVPE such as that for which D5191 is required?**

229. I answer these questions in the affirmative for the reasons set out above under issues 3 to 10.

230. Further if the tests ASTM D323 and ASTM D5191 had been performed correctly the results should have been comparable.

**12. What is/was the uniform practice of arriving at the RVP result of a shore composite blend? What is/was the due method of arriving at the RVP result of a shore composite blend? Did the shore composite blend certificate represent that the RVP result stated therein had been obtained by analysis of a shore composite sample using test D323 and, if so, was ITS negligent in issuing a certificate in that form?**

231. The experts agreed in their second joint report that the certificates of quality stated the test methods used by ITS and the results found at the time, with the exception that the certificate for the shore tank composite did not state that the RVP had been calculated rather than determined directly by ASTM D323. The joint report continued "*however, [Dr Marshman] stated that this was common industry practice".*

232. In cross-examination it was suggested to Dr Marshman that a certificate produced by a chemist should record a result as calculated, if it was a result arrived at by calculation as opposed to analysis. Dr Marshman accepted that in many cases the suggestion was correct. "Where it is industry practice so to do … and certainly has been in the past … it has been omitted". Dr Marshman agreed that it would be prudent to record a calculated result as "calculated".

233. The evidence was unclear as to the nature and extent of any industry practice. I doubt whether Dr Marshman had the relevant expertise to give evidence as to industry practice. The NAMAS Accreditation Standard M 10 was probably the best guide to appropriate practice: -

"The certificate or report shall make it clear whether the results reported refer to … tests carried out on a single item, or on a batch of items. Where relevant, details of any sampling carried out shall be included".

234. In view of my conclusions in relation to other issues it is not necessary to consider this issue further.

13. Did Galaxy rely upon ITS' certification of the regular cargo when entering into the AIC/Galaxy contract?

235. FN communicated certain figures by telephone to Galaxy before Galaxy agreed to the sub-sale. According to the evidence of Mr David Hopper of Galaxy in the Swiss proceedings, Mr Utting of FN mentioned to him a RVP rate of 8.3 (the Certificate of Quality for the shore composite blend showed a result of 8.22 psi for RVP). In a fax timed 16:34 (local time Connecticut) on 2 April 1996, FN confirmed the sub-sale of the cargo by AIC to Galaxy. The Quality clause in the AIC/Galaxy sub-sale provided: "Quality: (A) M 2 meeting statutory baseline [i.e. CPS] with the following guarantees … RVP 9.0 psi … determination of quality: As ascertained at load port and confirmed by Caleb Brett". Thus Galaxy was bound by quality ascertained at load port and confirmed by ITS.

**14. What RVP samples were taken by ITS?**

236. Mr Mailey took the following samples from each of the shore tanks:

2 x 500ml samples for RVP

3 x 16oz (450ml) samples for other tests including density

1 x 2.5 litre (may have been 5 litre) sample sent to West Thurrock for testing.

The 500ml and 16oz samples would have been retained at Mobil Coryton in an unsealed condition post testing.

Mr Adams took:

2 x 2.5 litre samples for each shore tank

17 x 450ml individual ship tank samples and 2 x 5 litre ships composite for the regular gasoline parcel

In-line sample for retention

Mr Adams also prepared a 5 litre shore tank composite from the individual 2.5 litre samples.

The samples (RVP and 16oz) jointly sealed by ITS and SGS included the samples originally tested by Mr Mailey.

(The contents of this paragraph were agreed as between the experts).

237. An ITS document dated 3 April (with Mr Adams' name against the words Caleb Brett inspector) listed samples including the RVP samples from each of the shore tanks (2 x 500ml samples).

238. An ITS internal note from Mr Johnston to Mr Rackham dated 17 April instructed that load port samples were to be sealed. This was implemented. On or about 18 April SGS countersigned the document dated 3 April and Mr Twyford added his signature. SGS seal numbers were placed on the document.

239. Mr Lucas (in my view rightly) accepted in cross-examination that the residue of the RVP samples tested by Mr Mailey were potentially important samples, and that ITS should not have done anything to them (including the Cooper re-tests) without informing their clients, Mobil and AIC.

240. ITS relied on the fact that the loading report from ITS to AIC dated 10 April did not list the RVP samples originally tested by Mr Mailey. But the samples did appear on the document dated 3 April. The document dated 3 April 1996 which listed the samples originally tested by Mr Mailey contained the following: -

"*Distribution/Disposal of Samples:*

*Retained samples are intended to be held for a period of 90 days."*

241. There was only one set of RVP samples. These were the samples for each tank taken by Mr Mailey. These samples were listed on 3 April in the document bearing that date. On 16 April Mr Rackham arranged for the residues of these retained and broached individual load port shore tank samples to be sent to West Thurrock for testing by Mr Cooper in a Grabner machine of the type used under ASTM D5191. These samples (after the Cooper re-tests) were jointly sealed by SGS and ITS on or about 18 April.

**15. What was ITS' standard practice as regards sample retention? What material was subject to ITS' sample retention standards?**

242. ITS' internal procedures as to Sample Handling (issue date 24.9.98) included the following:

*"4.0 RESPONSIBILITY*

*4.1 It is the responsibility of the chemist/inspector to transport samples safely to the area office reception point. It is also his responsibility to carry out registration, labelling, and analysis requirements documentation. If samples are not required for testing, it is the responsibility of the Inspector to place them in the location's sample store. It is the laboratory supervisor/chemist's responsibility to receive samples for testing and comply with laboratory*

*booking in arrangements. Subsequent to testing, it is the laboratory staff's responsibility to place unused surplus sample material in the location's sample storage.*

…

*5.6 Samples shall be retained in storage for a minimum period of 90 days, unless the client's agreement to change this period can be obtained. It may be permitted to dispose of samples before the minimum period if causing a hazard or potential health problem.*

*5.7 Where it becomes necessary within the 90 minimum retention period to dispose of any sample due to either a risk arising form the hazardous nature of a sample [or] a potential health risk then the client on behalf of whom the sample is being retained shall be informed as soon as is reasonably practicable.*

*5.8 Where a client requests an extended period of retention beyond the 90 days normally granted and where this is agreed, such samples shall be segregated and clearly marked for extended retention.*

*5.9 Agreement to extend the normal retention time beyond the ninety day period normally granted shall be in writing and the disposal date now accepted shall be stated in the agreement.*

*5.10 On a monthly basis, samples are disposed of in accordance with local and statutory requirements."*

243. Although these procedures bore an issue date of 24.9.98 they probably reflected ITS' standard practice at the material time.

244. The document dated 3 April 1996 which listed the samples originally tested by Mr Mailey contained the following: -

*"Distribution/Disposal of Samples:*

*Retained samples are intended to be held for a period of 90 days."*

**16. What RVP samples were kept by ITS, if any; and in what condition? What residues of samples were kept by ITS; and in what condition?**

**17. What material was the subject-matter of the re-tests by Mr Cooper on 16 April 1996?**

245. I repeat the answer to issues 14 and 15.

**18. Was the material re-tested by Mr Cooper being held by ITS on behalf of AIC and Mobil?**

**19. Was the material re-tested by Mr Cooper properly to be regarded as the joint property of AIC and Mobil?**

**20. Should ITS have sought AIC's and Mobil's permission before conducting such re-tests and was ITS in breach of duty in failing so to do?**

246. Mr Hamblen QC for AIC submitted as follows.

*ITS was under a distinct contractual duty to inform its clients about the Cooper re-tests and the results thereof. This duty arose because the RVP samples which were tested by Mr Cooper were being retained on behalf of the clients and/or were properly to be regarded as the joint property of the clients and/or were potentially important to a known dispute between the clients. In such circumstances, ITS should not have re-tested the samples without first seeking its clients' permission and, if it did test or use the samples without its clients' permission, it came under a duty to inform the clients of the fact and consequences thereof.*

*The RVP samples were retain samples.*

*Even remnants of testing samples should be retained according to ITS' own procedures, and are in fact retained, by ITS. This is because they may be potentially relevant to the clients, as accepted by Mr Loughead and, at least in part, by Mr Lucas. In such circumstances, the duty is clear and was admitted by Mr Lucas in his evidence.*

*Even if the RVP samples were not retain samples, the fact is that they had been kept by ITS in a sample crate at the back of the store at the Coryton laboratory. Given that a dispute had arisen involving ITS' clients and given that the samples were potentially important to that dispute, as acknowledged by Mr Loughead and Mr Lucas, the same duty applied. Even Mr Chalmers accepted that the duty would apply to any potentially important samples.*

*In any event, the RVP samples tested by Mr Cooper are properly to be regarded as the joint property of AIC and Mobil. On no view can they be regarded as ITS' property. The product in the shore tanks was Mobil's property. Property in the product passed to AIC at the ship's manifold. Once loading of cargo commenced, samples taken and analysed and on the basis of which the cargo was certified for loading, became the joint property of AIC and Mobil. If the samples were the joint property of AIC and Mobil as at 16 April 1996, ITS was under a clear duty not to use those samples in any way without permission and, having done so on 16 April 1996, was under a duty to communicate to its clients the fact and consequences thereof.*

247. Mr Mildon QC for ITS submitted as follows.

*ITS' instructions were to carry out "full static shore tank samples and analysis" and to take certain other samples. ITS accepted those instructions and pursuant thereto provided the loading report. The loading report listed the samples which had been taken pursuant to the instruction to take samples and undertook to hold them for 90 days. The list included all the specific samples which ITS had been instructed to take, including not only the shore tank samples but also the inline samples and the ship's cargo tank samples. There has never been any suggestion from AIC that that list was non-compliant with its instructions or that AIC required anything else to be retained. The express terms of the contractual bargain were that ITS would retain for 90 days the samples listed in the loading report.*

*The samples agreed to be retained and listed in the loading report were sealed by ITS and given ITS seal numbers. Following Mr Sampino's request on the evening of 17 April 1996 the samples being retained by ITS pursuant to the above contractual obligations were double sealed by SGS.*

*The samples listed in the loading report were retained un-touched for at least 90 days. All of these were complete virgin un-broached original samples. These are not the residues of samples tested by Mr Mailey and then re-tested by Mr Cooper.*

*The retain samples listed in the loading report were the samples which ITS and AIC had contractually agreed to retain for the purposes of AIC's commercial interest in being able to investigate subsequent quality disputes.*

*In relation to the retain samples listed in the loading report, ITS accepts that it is normal inspection procedure to take a retain sample, that ITS' contract with Mobil required this to be done and that it would be standard industry practice to take such retain samples. It is unnecessary to imply a term that such samples be retained because the matter is regulated by the express terms of the bargain.*

*AIC's case that in addition to the retain samples covered by the express terms of the agreement a term should be implied that ITS would retain "all samples taken ... in relation to the cargo", including the residues of RVP testing samples left over from Mr Mailey's RVP tests, is wrong. Not only does it involve an attempt to legislate by a process of implication for something which is already covered by the express terms of the bargain. It is also unnecessary because AIC's commercial interest in being able to investigate subsequent quality disputes is sufficiently and better covered by the unbroached virgin samples the subject of the express retention obligation.*

*Further and in any event there is no evidence that industry practice in relation to the retention and disposal of residues is uniform.*

248. I analyse the position as follows.

249. I repeat the answers to issues 3 to 17 above.

250. I have set out above ITS' duty to take reasonable care to ensure that any certificate it issued was accurate as to those matters on which it was instructed to report. The duty to take reasonable care included the implied obligations to both Mobil and AIC set out in paragraph [192]. The implied obligations to Mobil and AIC included the following obligation.

*Where a complaint or any other circumstance raised doubt concerning the quality of the tests, to ensure that the relevant work/tests were promptly audited/reviewed. Where the audit/review findings cast doubt on the correctness or validity of the test results such as to necessitate a Supplement to the certificate, to write to Mobil and AIC immediately enclosing the Supplement, with a statement to the effect that the Supplement to the certificate should be passed onto any person to whom the original certificate had been provided.*

251. By 16 April complaints and other circumstances had raised doubts concerning the quality of the tests carried out by ITS. This was clear from Mr Rackham's internal email message to Mr Chalmers of 16 April which included the statement: -

*"RVP was tested by ITS Lab Tech at Coryton to ASTM D323 as an oversight and error not picked up at reporting stage by Inspection office".*

252. Mr Rackham arranged for residues of the (retained and broached) individual load port shore tank samples at Coryton to be located and sent to West Thurrock for testing in a Grabner machine of the type used under ASTM D5191. Neither Mobil nor AIC were informed of the Cooper re-tests or the results thereof.

253. The document dated 3 April 1996 which listed the samples originally tested by Mr Mailey contained the following: -

"*Distribution/Disposal of Samples:*

*Retained samples are intended to be held for a period of 90 days.*"

254. On or about 16/17 April 1996 ITS (given its duties as an independent inspection company) should have sent to Mobil and AIC a Supplement to all certificates issued which contained the words *'Fuel meets Specification'*, to the effect that those certificates were withdrawn. Apart from other matters the wrong test had been applied by ITS. The experts agreed in their second joint report that *"the certificate should not have stated that the product 'meets specification"*. Mobil and AIC should have been informed of all samples held by ITS (including what remained of the RVP samples tested by Mr Mailey and listed in the document dated 3 April) and further instructions from Mobil and AIC should have been sought. ITS should have stated to Mobil/AIC that the Supplement to the certificates issued should be passed immediately to any person to whom the original certificates had been provided.

255. ITS should have recognised that what remained of the RVP samples tested by Mr Mailey represented important evidence which should in the circumstances have been held to the order of Mobil and AIC, once a complaint or other circumstance raised doubt concerning the tests (regardless of the precise legal status of that material prior to the complaint or other circumstance).

256. Mr Lucas agreed that the samples were potentially important and it was not appropriate to take them and use/re-test them without informing the clients.

257. The Cooper re-tests should not have been carried out, save pursuant to joint instructions from Mobil and AIC. ITS were in breach of the duty to take reasonable care in failing to seek permission from Mobil and AIC before conducting the re-tests.

258. In any event it was quite unacceptable that ITS should carry out the re-tests when
   i) if the results supported the contention that the cargo was on-specification, the results would be disclosed to Mobil/AIC, but
   ii) if the results did not support the contention that the cargo was on-specification, the results would not be disclosed to Mobil/AIC.

259. Mr Rackham (who had commissioned the Cooper re-tests) accepted when giving evidence that if the results of the Cooper re-tests had come out the way ITS hoped, the results would probably have been communicated to AIC.

**21. Are/were the results of the re-tests to be relied on for any purpose? Should ITS have informed AIC and Mobil about the fact of the re-tests and the results thereof and was ITS in breach of duty in failing so to do?**

260. I repeat the answer to questions 3 – 20.

261. The test methods ASTM D323 and ASTM D5191 state "do not perform tests on broached samples". Thus it is elementary that for the purposes of a certificate issued by an inspection company reporting on tests conducted pursuant to ASTM D323 or ASTM D5191, broached samples could not be used. But the results of the re-tests were relevant and of importance for other purposes as set out below.

262. The experts agreed that generally the results on broached samples will be lower.

263. The ASTM D5191 results reported by both ITS (US) and SGS at disport were broadly comparable. These two sets of results were also broadly similar but marginally higher than the Cooper re-test results, which were performed on broached samples. The ITS (US) and SGS Vapour Pressure results broadly corroborated each other and viewed together with the Cooper re-test results confirmed that the regular motor gasoline on board the Kriti Palm was on a balance of probabilities off-specification. The Vapour Pressure results by test method ASTM D323 stated in the ITS certificates of quality for the regular cargo were probably wrong. The results of the Cooper re-tests were a key piece of evidence, highly relevant to this conclusion. I find that Mr Lucas and Mr Chalmers knew, understood and appreciated the above matters.

264. In the present case a dispute had arisen. ITS had used the wrong test method. In practical terms Mobil and AIC (and Galaxy) were concerned to know whether this error was material, whether the shore tanks composite blend certificate was reliable, whether ITS stood by the same and whether on a balance of probabilities the cargo was on-specification or off-specification at load port?

265. On 16 April Mr Rackham was plainly of the opinion that it was a useful exercise to re-test the residues of the retained and broached individual load port shore tank samples. The entry in his logbook for the same day timed at 13.33 hours "JC re Kriti Palm. Harass UK need low RVP" suggests that Mr Chalmers (contrary to his evidence at trial) was of the same opinion on 16 April.

266. The Cooper re-tests should not have been carried out by ITS save pursuant to joint instructions from Mobil and AIC. It was I repeat quite unacceptable (and a breach of ITS' duty to take reasonable care) that ITS should carry out the re-tests when
   i) if the results supported the contention that the cargo was on-specification, the results would be disclosed to Mobil/AIC, but
   ii) if the results did not support the contention that the cargo was on-specification, the results would not be disclosed to Mobil/AIC.

**22. Should ITS have informed AIC about the fact of the re-tests and the results thereof in the telcon on 17 April 1996, and/or subsequent to the telcon, and was ITS in breach of duty in failing so to do?**

267. I repeat the answers to issue 21 above. For these reasons in my judgment ITS by Mr Lucas should have informed AIC about the fact of the re-tests and the results thereof during the telephone conversation on 17 April 1996. It should be remembered that ITS was jointly instructed by Mobil and AIC. Any information given to AIC should equally have been given to Mobil.

268. Mr Lucas said during cross-examination that if he had known of the results of the Cooper re-tests at the time of the telephone conversation on 17 April, he would have had to qualify certain of the statements he made to Mr Whitaker.

269. If contrary to my finding (see issue 23 below) Mr Lucas did not know of the re-tests and the results thereof at the time of the telephone conversation on 17 April, he and/or Mr Chalmers should have informed AIC and Mobil of the same as soon as they became aware of the results. (On any view both Mr Lucas and Mr Chalmers were aware of the re-tests and the results thereof (if not on 17 April) very shortly thereafter).

**23. Did Mr Lucas know of the re-tests and the results thereof (i) by the time of the telcon on 17 April 1996 and (ii) thereafter?**

270. In a witness statement Mr Rackham said "I briefed [Mr Lucas] about the matter and that Mr Whitaker wanted to speak to somebody more senior than me. I informed him that we had used test method ASTM D323 rather than

ASTM D5191. Otherwise, I am sure that I gave Nigel as full a briefing on events as possible, but I cannot now recall the detail."

271. When cross-examined Mr Rackham was asked "It is likely that you would have told [Mr Lucas] that both ITS (USA) and SGS [had] found the cargo to be off-spec for RVP on their analysis of the ship's tanks at New York?" Mr Rackham replied "It is likely I would have gone through all the pertinent points with him." I find that the overwhelming probability is that Mr Rackham informed Mr Lucas of the results of the ITS (USA) and SGS tests prior to the telephone conversation on 17 April.

272. Mr Rackham was then asked "The pertinent points would obviously include the facts of the re-tests and the re-tests results?" Mr Rackham answered "I would presume so, yes".

273. The importance and significance attached by ITS to the results of the Cooper re-tests was demonstrated by the note in Mr Rackham's logbook at 13.33 hours on 16 April – "JC re Kriti Palm. Harass UK need low RVP."

274. In my judgment the overwhelming probability is that Mr Rackham informed Mr Lucas of the Cooper re-tests and the results thereof in the course of briefing Mr Lucas prior to the telephone conversation on 17 April.

24. What was Mr Chalmers' knowledge of the re-tests and the results thereof by 17 April 1996 and thereafter?

275. I find that the entry in Mr Rackham's logbook at 13.33 hours on 16 April ("JC re Kriti Palm. Harass UK need low RVP") probably refers to a telephone conversation between Mr Rackham and Mr Chalmers. In cross-examination Mr Rackham accepted that the note suggested that Mr Chalmers was anxious to get the results. If Mr Chalmers did not learn the results prior to his return to the office, he would certainly have known them upon his return.

**25. Was what was said (and not said) by Mr Lucas in the telcon on 17 April 1996 false and misleading?**

**26. Was Mr Lucas negligent in what he said (and did not say) during the telcon on 17 April 1996?**

**27. Was Mr Lucas dishonest in what he said (and did not say) during the telcon on 17 April 1996?**

**28. Did Mr Lucas intend AIC to rely upon what he said during the telcon on 17 April 1996?**

**29. On or after 17 April 1996 was ITS negligent in failing to correct or qualify or withdraw what had been stated in the certificates of quality?**

**30. On or after 17 April 1996 were Mr Lucas and/or Mr Chalmers dishonest in failing to correct or qualify or withdraw what had been stated in the certificates of quality?**

276. Mr Mildon QC for ITS submitted as follows.

*Mr Lucas was criticised for "standing by the certificate". If that oral remark had stood on its own it would raise high level policy issues. In fact it did not stand on its own because Mr Lucas threw the certificate back into doubt by refusing to comment on whether the certificate was inaccurate, saying he did not know whether the certificate was inaccurate information, refusing to say whether the certificate was inaccurate or not, and actively encouraging Mr Whitaker to put matters into the hands of AIC's lawyers. Early in the conversation, Mr Whitaker said he was looking for written confirmation that the wrong method had been used and "some sort of compensation from yourselves (ITS) for this amount of money I am going to have to pay in order to get this cargo discharged". This is not the language of somebody who is saying: "I do not know which way to jump. Will you please advise me." In this context Mr Lucas was not to trying to mislead Mr Whitaker into taking an erroneous position within the sale chain.*

277. ITS' case is that issues 25 to 30 should be answered in the negative.

278. I analyse the position as follows.

279. The tort of deceit involves a false representation made by the defendant, who knows it to be untrue, or who has no belief in its truth, or who is reckless as to its truth. If the defendant intended that the claimant should act in reliance on such representation and the claimant in fact does so, the defendant will be liable in deceit for the damage caused. (The 18th edition of Clerk & Lindsell on Torts at para. 15-01). See my judgment in Standard Chartered Bank v Pakistan National Shipping Corporation (No 2), [1998] 1 Lloyd's Rep 684 at 704 and Niru Battery Manufacturing v Milestone Trading supra Clarke LJ at paragraph 95.

280. In the telephone conversation on 17 April 1996 between Mr Whitaker of AIC and Mr Lucas of ITS (with Mr Rackham listening) Mr Lucas acknowledged that test D323 had been used instead of D5191.

281. In the course of the telephone conversation:

(1) Mr Lucas said "It is impossible to go back into any of the samples because no samples are kept under ice."

(2) (In answer to Mr Whitaker's statement "I have to find out some way of proving that it actually is off-specification – you are telling me that I cannot do that") Mr Lucas said "Not to the load port, but you can at the discharge port".

(3) (In answer to a statement from Mr Whitaker "I have a Quality Certificate from you that says it is on-specification") Mr Lucas replied "we will be standing by that certificate".

(4) (In answer to a question from Mr Whitaker "well if the test 323 was done where test 5191 should have been done – do you not see that as inaccurate?") Mr Lucas said "I can't say whether it is inaccurate or not".

282. When giving evidence Mr Lucas confirmed that on 17 April in the course of the telephone conversation he was telling Mr Whitaker that the certificate was and remained a good and valid certificate and that the fuel met specification. He added "That was my view at the time and is still my view today".

283. The telephone conversation must be considered as a whole. I accept Mr Hamblen's submission on behalf of AIC that the overall impression conveyed by Mr Lucas during the telephone conversation on 17 April was that the certificate for the regular cargo was and remained a good and reliable certificate. An inspection company will ordinarily either stand by its certificate, or issue material amendments to the certificate in the form of a further document by way of a Supplement to the certificate. Mr Lucas knew on 17 April that for the purposes of

    i) the contract between Mobil and AIC; and

    ii) any letter of credit in relation to the contract between Mobil and AIC; and

    iii) the contract between AIC and its sub-buyer (Galaxy); and

    iv) any letter of credit in relation to the contract between AIC and its sub-buyer,

    it was essential for all concerned to know whether ITS' certificate stood or did not stand.

    On 17 April Mr Lucas represented (i) that the shore composite blend certificate was and remained a good and valid certificate and (ii) that it was "impossible to go back into any of the samples because no samples [were] kept under ice" when

    a) ITS' duties as an independent inspection company were as set out in paragraph [192] above; and

    b) Mr Lucas knew (and confirmed to Mr Whitaker) that ITS had tested Vapour Pressure by test D323 instead of D5191; and

    c) The overwhelming probability is that Mr Rackham informed Mr Lucas of the Cooper re-tests and the results thereof (and the ITS (US) and SGS D5191 disport results) in the course of briefing Mr Lucas prior to the telephone conversation on 17 April; and

    d) Mr Lucas knew that the results of the Cooper re-tests established on a balance of probabilities that the tests ITS carried out before loading significantly understated the Vapour Pressure of the regular grade gasoline; and

    e) Mr Lucas knew that the Cooper re-test results indicated that the original D323 tests carried out by Mr Mailey were not in accordance with the stated test procedures and that at least some of the D323 results, as reported by ITS, were probably incorrect and significantly understated the Vapour Pressure of the gasoline in at least two of the shore tanks at Mobil Coryton; and

    f) Mr Lucas knew that the ITS (US) and SGS Vapour Pressure results broadly corroborated each other and when viewed together with the Cooper re-test results confirmed that the regular motor gasoline on board the Kriti Palm was probably off-specification; and

    g) Mr Lucas knew that the Vapour Pressure results by test method D323 stated in the ITS certificates of quality for the regular cargo were probably wrong and that the results of the Cooper re-tests were a key piece of evidence, highly relevant to this conclusion; and

    h) Mr Lucas knew from the results of the Cooper re-tests that the cargo would probably have been shown to be off-specification, if DVPE had been tested in accordance with D5191; and

    i) Mr Lucas knew that in all the circumstances then known to him it was wrong for ITS to maintain that a certificate which said "Fuel meets Specification" was and remained a good valid and certificate.

284. The representation that the certificate (which stated 'Fuel meets Specification') was and remained a good and valid certificate, was a false representation made by Mr Lucas who was reckless as to its truth. I find that Mr Lucas intended that AIC should act in reliance on the representation and I find that AIC did so.

285. Some of the answers which Mr Lucas gave in cross-examination serve to confirm these conclusions.

286. When asked "*if you had had knowledge of the Cooper re-tests you would … have had evidence, would you not, that the cargo was … off-spec in the shore tanks?*" Mr Lucas replied "*the point … I would have had to make to Tom Whitaker was that we [had] got this unusual set of results and I am struggling to rely upon it and I certainly could not produce a certificate from it …*" Mr Lucas was then asked "*but you would have to tell him what you had found?*" and he answered *"of course"*. Mr Lucas was then asked "*with those qualifications?*" and he answered *"Yes. The problem would have been getting Tom to realise that that is not the place that he should have been in relying on those results."*

287. There followed the following questions and answers.

    *"Q … If you had known that ITS had themselves just carried out tests in relation to load port, it would have been misleading to tell them there is nothing you can do?*

    *A. Firstly I did not know about the Cooper results. Secondly the Cooper results themselves would have caused a further problem of communication, because I could not have raised the certificate on the Cooper results.*

    *Q. You are agreeing with me that had you known about those results, you would have had to qualify the statement you are making there?*

    *A. That is right. But I think it shows that I did not know about the results.*

    …

    *Q ... So when he says to you, "I have a Quality Certificate … that … says it is on specification", and you say that you will be standing by that certificate, you are telling him that as far as you were concerned it is and remains a good certificate – yes?*

*A. Yes.*

*Q. And that it remains a certificate that says it is on specification?*

*A. That is exactly what I felt I said. …*

*Q. So you were convinced it was on-spec, you were convinced that what was loaded on board was on-spec?*

*A. I was convinced that the shore tank analysis showed that the cargo was on specification. …*

*A. … I knew nothing about the correlation between D323 and D5191 … .*

*Q. So are you saying … that you do not know whether the result is inaccurate or not because you do not know what the result would be by D5191?*

*A. That is quite true.*

*Q. But … if you had been aware that Mr Cooper had just done his tests using D5191 and had found that the cargo was off-spec, then again it would have been misleading to say that you simply cannot say whether it was inaccurate or not because you had further information?*

*A. That would be true, but also it would be true to say that if I'd known about the other cargo, I could have pointed out that there appeared to be quite a correlation between D323 and D5191. …*

*Q. … Did it not occur to you that when you did learn about the re-tests a day or so later, that you ought to have put the record straight so far as Mr Whitaker was concerned?*

*A. Let me stop you right there, if I may. Once you are under notice of a claim, that is the end of the communications, you just stop. That is how we do things in Caleb Brett."*

288. For the reasons set out above, in my judgment the representation that the certificate (which stated 'Fuel meets Specification') was and remained a good and valid certificate, was false and misleading.

289. Further, I find that Mr Lucas was reckless as to the truth of this representation made during the telephone conversation.

290. Further, I find that Mr Lucas intended that AIC should act in reliance on the representation. Mr Lucas accepted when giving evidence that he did make the statement "we will be standing by that certificate", intending it to be relied on. Further I find that AIC did act in reliance on the representation.

291. If contrary to my finding set out above, Mr Rackham did not inform Mr Lucas of the Cooper re-tests and the results thereof in the course of briefing Mr Lucas prior to the telephone conversation on 17 April, he and/or Mr Chalmers should have informed AIC and Mobil of the same as soon as they became aware of the results. Mr Chalmers was provided with a transcript of the telephone conversation when it had been transcribed.

292. For the reasons set out above I hold that ITS are liable to pay damages to AIC for deceit.

**31. Did Mr Lucas and/or Mr Chalmers make a deliberate decision not to disclose the fact of the Cooper re-tests and/or the results thereof to AIC and Mobil in circumstances where the re-tests and/or the results thereof should have been disclosed to AIC and Mobil and/or Mr Lucas and/or Mr Chalmers knew that the re-tests and/or the results thereof should have been disclosed to AIC and Mobil?**

**32. If and to the extent that ITS was under a duty to disclose the fact of the Cooper re-tests and/or the results thereof (see issue 22 above), on or after 17 April 1996 were Mr Lucas and/or Mr Chalmers aware that ITS was under such a duty and did Mr Lucas and/or Mr Chalmers make a deliberate decision not to disclose the same?**

**33. Did ITS deliberately conceal a fact relevant to AIC's right of action against ITS?**

**34. If ITS did deliberately conceal a fact relevant to AIC's right of action against ITS, should AIC nevertheless have found out that fact by the exercise of reasonable diligence prior to 17 May 1996?**

293. Section 5 of the Limitation Act 1980 provides that an action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued. The general rule in contract is that the cause of action accrues, not when the damage is suffered, but when the breach takes place. The existence of a contractual relationship between the parties does not necessarily exclude a concurrent or independent cause of action in tort. So an action may be brought in tort for negligence in respect of professional services rendered by an inspection company within six years of the date when the claimant first sustains damage.

294. If there are one or more breaches of contract which do not give rise to a discharge either because they are not sufficiently fundamental or because the innocent party declines to accept them as having that effect, each will give rise to a separate cause of action. There may also be a series of breaches of a single covenant. Examples are failure to pay instalments of interest or rent. Or the breach may be a continuing one, e.g. of a covenant to keep in repair. In such a case the claimant will succeed in respect of so much of the series of breaches or the continuing breach as occurred within the six years before action brought. If the breach consists in a failure to act, it may be held to continue from day to day until the obligation is performed or becomes impossible of performance, or until the innocent party elects to treat the continued non-performance as a repudiation of the contract. (See Chitty on Contracts 29th edition, vol 1, paragraphs 28-035).

295. Section 32 of the Limitation Act 1980 provides so far as material: -

*"Postponement of limitation period in case of fraud, concealment or mistake*

*(1) … where in the case of any action for which a period of limitation is prescribed by this Act, either –*

*(a) the action is based upon the fraud of the defendant; or*

*(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; …*

*the period of limitation shall not begin to run unitl the plaintiff has discovered the fraud [or] concealment … (as the case may be) or could with reasonable diligence have discovered it.*

…

*(2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty."*

296. In view of the finding of deceit it is not strictly necessary to consider s 32 (1) (b) and s 32 (2). Nonetheless I add the following for completeness.

297. I turn to consider the meaning of "*any fact relevant to the plaintiff's right of action*."

298. In ***Johnson v Chief Constable of Surrey,*** The Times, 23 November 1992, Court of Appeal (Civil Division) Transcript No 961 of 1992 the plaintiff sought to bring an action for damages for false imprisonment after the expiry of six years from the accrual of the cause of action. He relied on section 32 (1) (b) of the Act of 1980. The plaintiff contended that the police had concealed material from him which demonstrated that they did not have reasonable grounds to suspect the relevant offence at the time of the arrest. The court construed the expression *"fact relevant to the plaintiff's right of action*" narrowly.

299. Rose LJ stated: - *"For my part I accept [the] submission that, in construing the section, there is no middle ground between facts and evidence … Facts which improve prospects of success are not, as it seems to me, facts relevant to the right of action … I accept that the construction proposed … is a narrow one, but unless it is correct it is difficult to see what purpose is served by the special provisions with regard to personal injury actions which are contained in section 33 of the Act."*

Rose LJ accepted the statement of claim test, that it is knowledge of the facts which should be pleaded in the statement of claim.

300. Russell LJ stated: - "*In order to give relief to the plaintiff any new fact must be relevant to the plaintiff's 'right of action' and is to be contrasted with the facts relevant, for example, to 'the plaintiff's action' or 'his case' or 'his right to damages.' The right of action in this case was complete at the moment of arrest. No other ingredient was necessary to complete the right of action. Accordingly, whilst I acknowledge that new facts might make the plaintiff's case stronger or his right to damages more readily capable of proof they do not in my view bite upon the 'right of action' itself. They do not affect the 'right of action,' which was already complete, and consequently in my judgment are not relevant to it."*

301. Neill LJ stated: - *"In one sense it is true to say that the tort of false imprisonment has two ingredients; the fact of imprisonment and the absence of lawful authority to justify it. … But as I understand the law, the gist of the action of false imprisonment is the mere imprisonment. The plaintiff need not prove that the imprisonment was unlawful or malicious; he establishes a prima facie case if he proves he was imprisoned by the defendant. The onus is then shifted to the defendant to prove some justification for it. If that be right, one looks at the words in section 32 (1) (b), 'any fact relevant to the plaintiff's right of action.' It seems to me that those words must mean any fact which the plaintiff has to prove to establish a prima facie case.*"

302. In ***C v Mirror Group Newspapers and Others*** [1997] 1 WLR 131 (a case concerned with s 32A of the 1980 Act) Neill LJ said at paragraph 138: -

*"In my judgment, the decision in Johnson, which is of course binding upon this court, must be applied to the relevant expression in section 32A as it applies to the expression in section 32 (1) (b). The relevant facts are those which the plaintiff has to prove to establish a prima facie case. That being so, the fact alleged to have come known to the plaintiff only in August 1993, that drug smuggling had not been mentioned in court, is not a relevant fact within the meaning of section 32A.*

*As well as being bound by it, I respectfully agree with the decision in J**ohnson**. In section 32A Parliament has for actions for libel or slander breached the protection which a period of limitation ordinarily gives to a defendant. I do not consider that Parliament has intended, in the words used in section 32A, to create a breach so wide as to enable facts relevant to possible defences to the action to be a relevant consideration. Given the public interest in finality and the importance of certainty in the law of limitation, I would have expected Parliament to use words different and more general had the broad construction, with the uncertainties it involves, been intended. The facts relevant to the cause of action are confined to the limited class of facts contemplated in Johnson."*

303. I turn to consider the meaning of "has been deliberately concealed from him by the defendant."

304. In ***Cave v Robinson Jarvis & Rolf (a firm)*** [2002] UKHL 18, [2003] 1 AC 384 Lord Millett (with whose speech Lords Mackay and Hobhouse concurred) said at paragraph 25: -

*"In my opinion, section 32 deprives a defendant of a limitation defence in two situations: (i) where he takes active steps to conceal his own breach of duty after he has become aware of it; and (ii) where he is guilty of deliberate wrongdoing and conceals or fails to disclose it in circumstances where it is unlikely to be discovered for some time. But it does not deprive a defendant of a limitation defence where he is charged with negligence if, being unaware of his error or that he has failed to take proper care, there has been nothing for him to disclose."*

305. Lord Scott (with whose speech Lords Slynn, Mackay and Hobhouse concurred) said at paragraph 60: -

*"…deliberate concealment for section 32(1)(b) purposes may be brought about by an act or an omission and that, in either case, the result of the act or omission, i e, the concealment, must be an intended result. But I do not agree that that renders subsection (2) otiose. A claimant who proposes to invoke section 32(1)(b) in order to defeat a Limitation Act defence must prove the facts necessary to bring the case within the paragraph. He can do so if he can show that some fact relevant to his right of action has been concealed from him either by a positive act of concealment or by a withholding of relevant information, but, in either case, with the intention of concealing the fact or facts in question. In many cases the requisite proof of intention might be quite difficult to provide. The standard of proof would be the usual balance of probabilities standard and inferences could of course be drawn from suitable primary facts but, nonetheless, proof of intention, particularly where an omission rather than a positive act is relied on, is often very difficult. Subsection (2), however, provides an alternative route. The claimant need not concentrate on the allegedly concealed facts but can instead concentrate on the commission of the breach of duty. If the claimant can show that the defendant knew he was committing a breach of duty, or intended to commit the breach of duty - I can discern no difference between the two formulations; each would constitute, in my opinion, a deliberate commission of the breach - then, if the circumstances are such that the claimant is unlikely to discover for some time that the breach of duty has been committed, the facts involved in the breach are taken to have been deliberately concealed for subsection (1)(b) purposes. I do not agree with Mr Doctor that the subsection, thus construed, adds nothing. It provides an alternative, and in some cases what may well be an easier, means of establishing the facts necessary to bring the case within section 32(1)(b)."*

306. In ***Williams v Fanshaw Porter & Hazelhurst (a firm)*** [2004] EWCA Civ. 157 Park J said at paragraph 14: -

*"I begin with the specific terms of s.32(1)(b): **'any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant'.** Those words describe the condition which must exist before the operative part of s.32(1) takes effect. There are four points on the wording of the paragraph which should be noted.*

*i) The paragraph does not say that the right of action must have been concealed from the claimant: it says only that a fact relevant to the right of action should have been concealed from the claimant.*

*ii) Although the concealed fact must have been relevant to the right of action, the paragraph does not say, and in my judgment does not require, that the defendant must have known that the fact was relevant to the right of action. In most cases where s.32(1)(b) applies the defendant probably will have known that the fact or facts which he concealed were relevant, but that is not essential. All that is essential is that the fact must actually have been relevant, whether the defendant knew that or not. The paragraph does of course require that the fact was one which the defendant knew, because otherwise he could not have concealed it. But it is not necessary in addition that the defendant knew that the fact was relevant to the claimant's right of action.*

*iii) The paragraph requires only that any fact relevant to the right of action is concealed. It does not require that all facts relevant to the right of action are concealed.*

*iv) The requirement is that the fact must be 'deliberately concealed'. It is, I think, plain that, for concealment to be deliberate, the defendant must have considered whether to inform the claimant of the fact and decided not to. I would go further and accept that the fact which he decides not to disclose either must be one which it was his duty to disclose, or must at least be one which he would ordinarily have disclosed in the normal course of his relationship with the claimant, but in the case of which he consciously decided to depart from what he would normally have done and to keep quiet about it."*

307. Mance LJ said at paragraph 27 and following: -

*"The wording of s.32(1)(b) refers to a situation in which:*

*"any fact relevant to the plaintiff's cause of action has been deliberately concealed from him by the defendant."*

This wording is open to differing interpretations. We have to consider what the words *"deliberately concealed"* require by way of (a) mental element and (b) conduct. The wording requires the defendant to know some fact, and the fact must be relevant to the plaintiff's cause of action. The wording clearly also requires a conscious decision by the defendant not to communicate that fact to the plaintiff. But those factors cannot be enough. A defendant may know a fact and may consciously decide not to communicate it for innocent reasons, e.g. because he fails to realise that it has any relevance whatever to the plaintiff. Must the defendant therefore realise that the fact is "relevant to the plaintiff's cause of action" against himself or herself? If so, this would seem to mean that the defendant must at least have in mind the possibility of an actual or potential cause of action against him, realise that there was a fact relevant to it and then conceal that. Or is the sole additional element to be found in the nature of the conduct, or of the context, implicit in the word "concealment"?"

308. Mance LJ then referred to Cave. He continued at paragraph 37: -

*"There are, as I have already indicated, two possible interpretations of the mental element required under s.32(1)(b). On the (slightly) more limited reading, s.32(1)(b) is confined to the typical situation; it therefore requires deliberate concealment of a fact in circumstances where the defendant realises that the fact has some relevance to an actual or potential claim against him (or is reckless as to whether or not it does). So read, s.32(1)(b) and s.32(2) can be said to present a more coherent scheme; and the running of a limitation period would not be postponed by a deliberate concealment of a fact by a defendant, which was in breach of a duty unrelated to the wrongdoing in respect of which the claimant later claims and which occurred in circumstances where the defendant did not realise that the fact suppressed had relevance to any such wrongdoing (and was not reckless in not realising this). The wider reading is that any deliberate concealment should carry the consequence attributed by s.32(1)(b), even though the defendant*

*did not (and it may be could not) realise that the fact concealed had any relevance to any actual or potential wrongdoing. Deliberate concealment, at least if that means active misleading or knowing breach of a duty to speak, is a particularly serious matter; if a person is as a result kept in ignorance of a fact which later proves to be relevant to a cause of action against the person concealing the fact, it may be thought just that the limitation period should not run against that defendant, even though he or she did not realise the relevance of the fact to any cause of action. On the other hand, that conclusion could lead to cases where, for example, a solicitor's deliberate decision out of, for example, laziness to delay communication of information about the general conduct of a matter for a month while he went on holiday would, if the information later proved relevant to some wholly unsuspected cause of action for negligence involving him or indeed some other member of the same firm, have the effect of restarting a limitation period as against his firm."*

309. At paragraph 39 Mance LJ did not arrive at any final view as to whether the wider or narrower meaning should be preferred: -

*"I see the force of the argument that any intentional concealment should be sufficient, at least if concealment involves active misconduct or breach of a duty to speak. However it is also possible to argue that the rationale and wording of the statute tend to point to the (slightly) more limited reading that I have mentioned. Whether the wider or the more limited reading should be preferred may perhaps also be influenced by the proper resolution of the potential difference between Lord Millett's and Lord Scott's formulation of the nature of the conduct involved in concealment – that is, by whether mere silent withholding suffices or whether there must be active concealment or breach of a duty to speak. This latter aspect was not explored before us. In these circumstances, and since I consider that it unnecessary on this appeal to arrive at any final view as to whether the wider or narrower meaning should be preferred, I prefer not to do so."*

310. At paragraph 51 Brooke LJ said: -

*"The claimant did not know a fact relevant to her cause of action until a date less than six years before this action was brought, and the reason why she did not know it was that Mr Brown intentionally concealed it from her when he was under a duty to tell her about it. These facts appear to me to fall within the compass of Lord Scott's exposition of the effect of section 32(1)(b) of the 1980 Act in paragraph 60 of his speech in* ***Cave.****"*

311. I turn to the facts of the present case. I repeat the answers to issue 22 above. In my judgment ITS by Mr Lucas should have informed AIC about the fact of the re-tests and the results thereof during the telephone conversation on 17 April 1996. (It should be remembered that ITS was jointly instructed by Mobil and AIC. Any information given to AIC should equally have been given to Mobil).

312. I find that Mr Lucas and Mr Chalmers made a deliberate decision not to disclose the fact of the Cooper re-tests and the results thereof to AIC and Mobil in circumstances in which the re-tests and the results thereof should have been disclosed to AIC and Mobil, and Mr Lucas and Mr Chalmers knew that the re-tests and the results thereof should have been disclosed to AIC and Mobil. I further find that Mr Lucas and Mr Chalmers were aware that ITS was under such a duty and that Mr Lucas and Mr Chalmers made a deliberate decision not to disclose the re-tests and the results thereof.

313. I turn to consider issue 33.

314. Mr Hamblen QC for AIC submitted as follows.

*The Cooper re-tests and results are directly relevant to a number of AIC's causes of action.*

*First, they are relevant to, and indeed form the foundation of, AIC's contractual cause of action that it should have been informed of the re-tests and the results, since they related to samples being retained for their benefit.*

*This is a cause of action of which AIC was not and could not have been aware until the Cooper re-tests were (finally) disclosed. It is therefore an a fortiori case of a "fact relevant to the plaintiff's right of action" being concealed.*

*Secondly, they are relevant to the tortious and contractual cause of action that pursuant to its duty of reasonable skill and care, ITS should have communicated the fact of the re-tests and the results. Again, this is a cause of action which plainly depends on knowledge of the Cooper re-tests.*

*Thirdly, they are relevant to the causes of action that there was an obligation (in the light of the re-test results) to correct or qualify or withdraw the certificates and/or representations made. The existence of the re-test results is clearly central to those causes of action.*

*The Cooper re-tests and the results also reveal facts relevant to the more general causes of action in negligence, negligent misrepresentation and deceit, namely: (1) that the cargo was off-spec on loading; (2) that the cargo would have been shown off-spec on loading if tested in accordance with D5191; (3) that something must have gone seriously wrong as regards the performance of the initial D323 tests; (4) that the original D323 results were not reliable; and (5) that ITS knew or should have known of these facts on or after 17 April 1996.*

*It is over-simplistic for ITS to say that a cause of action in negligence was pleaded before the Cooper re-tests were disclosed, and thus deliberate concealment is irrelevant to any claim in negligence.*

*One must focus carefully on the precise way in which the various causes of action in negligence and negligent misrepresentation are put. The causes of action premised on knowledge of the Cooper re-tests and results are significantly different from the causes of action originally pleaded. The basis of the original pleading was that the wrong test had been used and that, had the right test been used, the cargo would have been found to be off-specification because, as the defendant knew, the two tests gave different results with D323 giving lower readings than D5191. The basis of the case made in the light of the Cooper re-tests is that, although it is now accepted that the*

*two test methods would be expected to give similar results, in this case they would not have done so because the original D323 tests were not reliable or accurate, as the Cooper re-tests demonstrate. The allegations of negligence and the allegations as to why statements made were false, and should have been known to be false, are now premised squarely on the Cooper re-tests and results.*

*Further, even if AIC had been able to plead in 2002 (following the Swiss proceedings and the analysis of the expert evidence adduced therein) that the cargo was probably off-spec on loading regardless of which test was used as opposed to because of the test which was used, and to do so without knowledge of the Cooper re-tests and results, that does not mean that AIC knew that the cargo was in fact off-spec in this sense before 17 May 1996. In fact, AIC did not know at any time prior to 17 May 1996 that the cargo was in fact off-spec at the load port. This is hardly surprising given that (1) Mr Lucas had told AIC on 17 April 1996 that the cargo was on-spec at the load port and that the results at the disport did not show the contrary and (2) Mobil had made the same points on 17 April 1996 and 19 April 1996. In such circumstances, applying Lord Millett's approach in Cave v. Robinson, ITS' deliberate concealment of the Cooper re-test results remained an operative concealment of the fact that the cargo was probably off-spec on loading (as revealed by the re-test results) up to and well beyond 17 May 1996, with the result that the commencement of the limitation period is postponed to at least that date.*

315. Mr Mildon QC for ITS submitted as follows.

*The purpose behind section 32 (1) (b) of the 1980 Act is to cater for the case where, as a result of the deliberate concealment, the claimant lacks sufficient information to plead a complete cause of action. This is what is described as the "statement of claim" test. It is to be contrasted with the case where the information which has been deliberately concealed makes the claimant's case stronger or improves its prospects of success:* **Johnson v Chief Constable of Surrey** *(supra);* **C v Mirror Group Newspapers** *supra; see also* **Imperio v Heath** *[1999] 1 Lloyds Rep IR 571 at 593L.*

*It follows from the **"statement of claim"** test that s 32 (1) (b) can have no application to a case where the matters which are said to have been "deliberately concealed" emerge on disclosure during the proceedings. Such a case presupposes that the claimant had sufficient information to plead a statement of claim without the "concealed" material.*

*Section 32 (1) (b) cannot therefore apply to AIC's claim for **"initial negligence"** because this claim could be and was pleaded without access to the material (namely the Cooper re-tests) which is said to have been deliberately concealed.*

*The same applies to the pleas of negligent representation on 17 April 1996 and in the follow-up correspondence. This likewise was pleaded in the original Particulars of Claim. ITS did not need and did not rely on the Cooper re-tests in order to plead that the alleged misrepresentations on 17 April (and subsequently) were negligent, any more than it needed the Cooper re-tests to plead that the initial representation was negligent. The plea of negligent repetition of a previous misrepresentation adds nothing to AIC's case for limitation purposes.*

*If the plea of deceit is well founded then that claim would come within section 32 (1) (a) Limitation Act 1980. The alternative pleas in negligent misrepresentation fail the **"statement of claim"** test. With one exception the same applies to the pleas of breach of contract. AIC did not need the Cooper re-tests to plead breach of instructions to use method D5191. AIC knew about this in 1996. Nor did AIC need the Cooper re-tests to plead its case of contractual negligence in the conduct of the tests, nor its case as to the representations contained in the original certificates and said to have been repeated on and after 17 April.*

*The exception is the very recent contractual plea of an implied contractual duty to disclose the Cooper re-tests.*

*It is accepted that this is a different cause of action which could not have been pleaded without the Cooper re-tests. However the question under section 32 (1) (b) is whether the amendment introduces a different **"right of action"**, having regard to the purpose behind that section.*

316. I turn to consider these rival submissions.

317. In my judgment ITS (by Mr Lucas and Mr Chalmers) deliberately concealed a fact relevant to AIC's right of action against ITS.

318. The facts and circumstances of the present case are far more complex than those in Johnson v Chief Constable of Surrey supra. In that case the plaintiff established a prima facie case if he proved he was imprisoned by the defendant.

319. In the present case on 17 April 1996 AIC was party to contracts with Mobil and Galaxy containing (separate) provisions as to the determination of quality by independent inspectors (ITS).

320. By 17 April AIC knew that the wrong test method had been used for Vapour Pressure, but ITS by Mr Lucas were standing by the certificate.

321. I have set out in chapter 6 of this judgment the distinction between mistake and departure from instructions, and the relevant legal principles as clarified by the Court of Appeal in December 2001.

322. Mr Mildon in his closing submissions said: -

*"As at 17 April nobody knew whether the error was material or not … Mobil … was perfectly entitled to take the view that unless and until this departure from mandate is shown to have had a material effect on the end result and shown conclusively to have had that effect, we are entitled to rely upon it as being a binding published certificate."*

323. If the tests ASTM D323 and ASTM D5191 had been performed correctly the results should have been comparable.

324. The allegations of breach of contract/negligence made by AIC and the allegations as to why statements made were false, and should have been known to be false, are now to a critical extent premised on the Cooper re-tests and the results thereof. AIC's knowledge of relevant facts was incomplete without knowledge of the Cooper re-tests and the results thereof. AIC were not able to plead in 1996 that the Vapour Pressure results by test method ASTM D323 (stated in the ITS certificates) were probably wrong and other matters referred to below.

325. The results of the Cooper re-tests established on a balance of probabilities that the tests ITS carried out before loading significantly understated the Vapour Pressure of the regular grade gasoline.

326. The information now available (particularly the Cooper re-tests) indicates that the original D323 tests carried out by Mr Mailey were not in accordance with the stated test procedures and at least some of the D323 results, as reported by ITS, were probably incorrect and significantly understated the Vapour Pressure of the gasoline in at least two of the shore tanks at Mobil Coryton.

327. The ITS (US) and SGS Vapour Pressure results viewed together with the Cooper re-test results confirmed that the regular motor gasoline on board the Kriti Palm was on a balance of probabilities off-specification.

328. The Cooper re-test results were a key piece of evidence, highly relevant to the conclusion that the Vapour Pressure results by test D323 stated in the ITS certificates of quality for the regular cargo were probably wrong.

329. The Cooper analysis of the broached samples provided what Mr Revell described as a "check indication" as to the Vapour Pressure of the four shore tanks used in loading the Kriti Palm. The fact that the results, for two of the shore tanks, were found to be significantly higher in the Cooper re-tests, confirmed that at least some of the original tests were probably incorrect.

330. ITS knew that the regular cargo would probably have been off-specification in the shore tanks, if DVPE had been tested in accordance with test D5191, once ITS knew the results of the Cooper re-tests.

331. AIC could not have found out about the Cooper re-tests and the results thereof by the exercise of reasonable diligence prior to 17 May 1996 (issue 34).

**35. Are AIC's claims time-barred under section 2 and/or 5 of the Limitation Act 1980, save for the contribution claim?**

332. I answer this issue in the negative. AIC's claim in deceit succeeds. In addition to AIC's points about continuing duties, facts relevant to the claimant's right of action were deliberately concealed by ITS in the circumstances and for the reasons set out above (see issues 31-34).

**36. Did AIC rely upon what was said (and not said) during the telcon on 17 April 1996 and, if so, in what way did AIC so rely?**

333. I answer this issue in the affirmative for the reasons set out earlier in the judgment.

**37. What (if any) difference would it have made to AIC's conduct if ITS had disclosed the Cooper re-tests and the results thereof on 17 April 1996 or thereafter?**

334. I find that if ITS had disclosed the Cooper re-tests and the results thereof and/or issued a Supplement to the certificate (to Mobil and AIC) withdrawing the statement "Fuel meets Specification" or otherwise casting doubt on the certificate, AIC would have acted very differently. The commercial probabilities are that if ITS had issued material amendments to the certificate by way of a Supplement to the certificate withdrawing the statement "Fuel meets Specification", a commercial solution would have been arrived at as between AIC and Mobil/Galaxy (and possibly ITS).

**38. What (if any) difference would it have made to AIC's conduct if, on or after 17 April 1996, ITS had qualified or withdrawn its certificate(s) of quality for the regular cargo?**

335. I repeat the answers to issue 37.

**39.What loss (if any) has been caused by any breaches of contract and/or duty by ITS?**

336. Mr Mildon QC submitted as follows.

337. Whether measured in terms of the cost of re-blending or as the diminution in value upon re-sale, the difference between a cargo with an RVP of 9.5 psi and one with an RVP of 9.0 psi is worth about US$50,000. Having been forced to take delivery Galaxy promptly sold the cargo to George E Warren on 9 July 1996 at US$0.5867 per gallon at a time when the Platts price for a 9.0 psi M2 cargo delivered New York was US$ 0.59875 per gallon, a difference which equates to about US$52,290 on a cargo volume of approximately 249,000 bbl. On any view the RVP differential could not have been greater than the US$200K being demanded by Galaxy.

338. Whether the question is looked at in terms of causation, remoteness or mitigation AIC cannot justify more than a tiny part of the quantum of its claim.

339. In circumstances where AIC was refusing Galaxy's requests for disclosure of the tank 61x4 certificate it is unsurprising that Galaxy should try and injunct the bank and that this would give rise to a procedural hiatus. Between the grant of the Swiss injunction on 23 April 1996 and its setting aside on 3 July 1996 (a) AIC racked up c US$344,000 of storage costs (b) the market value of the cargo dropped by between US$800,000 to US$1M and (c) legal costs were incurred by both sides. None of this would have happened if AIC had disclosed the 61x4 certificate and allowed Galaxy to argue as to its relevance on the merits.

340. A further major reason for the loss is that AIC allowed its claim against Mobil to become time barred. If as AIC now allege, the cargo was off-specification then the first and obvious point of recourse would be against Mobil for breach of the sale contract. An inspection company such as ITS will expect quality claims to be passed both up and down the supply chain. It will not expect to have to pick up a loss caused by allowing a quality claim to become time barred six years later. Alternatively the point is put as one of mitigation. ITS is under no liability to AIC to the extent that the alleged loss could reasonably be recovered from Mobil: cf. ***IM Properties v Cape & Dalgleish*** [1999] QB 297 at 307 D-F.

341. I analyse the position as follows.

342. The correct measure of damages in the case of the tort of deceit is an award which serves to put the claimant into the position he would have been in if the representation had not been made to him. This is subject to ordinary principles as to remoteness, mitigation and the like. (McGregor on Damages 17th edition, paragraphs 41 – 002 to 41-006).

343. In ***Doyle v Olby (Ironmongers)*** [1969] 2 QB 158, the Court of Appeal adopted the tortious measure.

In ***Smith Kline & French Laboratories v Long*** [1989] 1 WLR 1 CA, it was accepted that the correct measure of damages was the tortious measure and not the contractual.

In ***Smith New Court Securities v Scrimgeour Vickers***, [1997] AC 254, the legal principles were reviewed and it was held that in the case of deceit, the loss need not have been reasonably foreseeable.

The relevant legal principles can be summarised as follows. (i) The measure of damages is that which serves to put the claimant into the position he would have been in if the false representation had not been made to him. (ii) The defendant wrongdoer is liable for all the loss directly flowing from the representation whether or not the loss was reasonably foreseeable. (iii) For the loss to be direct, it is not necessary to show that the false representation was the sole cause of the loss: it is sufficient to demonstrate that it made a material contribution to it. (iv) Contributory negligence is no defence.

344. The claim in the Amended Schedule of Loss is as follows.

| **1. Liability to Galaxy Energy (USA) Inc.** | |
|---|---|
| (1) | US$1,165,037.62 plus interest thereon at 5% per annum from 15 April 1996. |
| (2) | US$51, 036.72 plus interest thereon at 5% per annum from 22 July 1996. |
| (3) Total accrued interest on the date of payment (12.12.03) – | US$465,771.82 |
| (4) Costs – CHF138,786.70 | (US$108,724). |
| Total liability to Galaxy – | US$1,681,846.10 plus CHF138,786.70 (US$108, 724) |
| **2. Expenses arising from Galaxy's refusal to accept cargo** | |
| (1) Demurrage at GATX terminal and IMTT-Bayonne terminal: | US$64,551.04 |
| (2) Costs of storage at IMTT – Bayonne terminal: | US$344,412.53 |
| (3) US Customs duties: | US$9,567.35 |
| Total expenses of Galaxy's refusal to accept cargo: | US$ 418, 530.92 |
| **3. Expenses arising from Galaxy injunction stopping payment under sale contract** | |
| Finance charges: | US$134,821.56 |
| **4. Costs in the Swiss proceedings** | |
| (1) Python Schifferli Peter & Associes - | CHF379,329.00 (US$297,163). |
| (2) Winter & Partner - | CHF6,786.20 (US$5,316.26). |
| Total costs in the Swiss proceedings- | CHF386,115.20 |
| **5. US lawyers' fees** | |
| (1) Curtis, Mallet-Prevost, Colt & Mosle- | US$40,294.17 |

| | |
|---|---|
| (2) Richards, Layton & Finger, PA- | US$8,089.65 |
| Total fees of US lawyers- | US$48,383.82 |
| **Total loss and damage** | (1) US$2,283,582 |
| | (2) CHF524,901.90 |

345. In the circumstances AIC are in my judgment entitled to recover the losses claimed, all of which have been vouched. All claims to interest will be determined after this judgment is handed down. Credit should be given for the recovery from Mobil.

346. The damage claimed flowed directly from the deceit and was caused directly by the deceit or constituted consequential losses caused by the deceit. AIC had the benefit of the letter of credit issued on the instructions of Galaxy. AIC (in the light of the matters then known to AIC) reasonably held Galaxy to the contract and claimed on the letter of credit. AIC did not act unreasonably in not disclosing to Galaxy the tank 61 x 4 certificate, given the terms of the AIC/Galaxy contract. The shore tanks composite blend certificate was the relevant certificate for the purposes of the AIC/Galaxy contract and superseded the earlier certificates. AIC became locked into litigation in Switzerland which was to prove disastrous. I have referred at paragraph (104) above to Mr Lucas' evidence in the Swiss proceedings. Documents relating to the Cooper re-tests and the results thereof were disclosed by ITS for the first time in the present proceedings. AIC did not discover the deceit until the results of the Cooper re-tests were disclosed.

**40. Did AIC fail to mitigate and/or did AIC aggravate its loss, and if so to what extent, by:**

**i) not disclosing certificate of quality for shore tank 61x4 to Galaxy and/or by drawing on Galaxy's letter of credit in the knowledge that the Certificates certified that the cargo had been tested to method D323?**

**ii) failing to reblend the cargo, or to cause the cargo to be reblended, prior to requesting payment from Galaxy and/or drawing on Galaxy's letter of credit?**

**iii) failing to agree a cargo discount with Galaxy?**

**iv) failing to resell the cargo in its existing condition at the prevailing market rates?**

**v) pursuing unsuccessful legal proceedings in Switzerland against Galaxy, whereby AIC was held liable on Galaxy's cross-claims and incurred legal costs?**

347. I do not consider that AIC failed to mitigate its loss. Nor do I find that AIC aggravated its loss. AIC made a reasonable offer to Galaxy. AIC acted reasonably (in the light of the matters then known to AIC) in refusing to agree a US$230,000 discount. AIC did not act unreasonably in deciding to call on the Galaxy letter of credit and enforce payment of the price by Galaxy. AIC acted reasonably in not selling the cargoes to blenders in New York.

348. AIC were as against Galaxy entitled to rely on the shore composite blend certificate only (provided it was a valid certificate).

**41. What were the foreseeable consequences of the alleged breaches of duty? Are the losses (or any of them) claimed by AIC too remote in law to be recoverable?**

349. I repeat the answer to issue 39. In the case of deceit, the loss need not have been reasonably foreseeable.

**42. Did AIC cause its loss in whole or in part by acting in bad faith in not disclosing certificate of quality for shore tank 61x4 to Galaxy and/or by drawing on Galaxy's letter of credit in the knowledge that the Certificates certified that the cargo had been tested to method D323?**

350. I answer this issue in the negative.

**43.Was ITS liable to Galaxy in tort (in negligence or deceit)?**

**44.Was ITS liable to Galaxy for the "same damage" in relation to which AIC was held liable to Galaxy in the Swiss proceedings?**

**45. Is ITS liable to provide an indemnity to AIC in respect of AIC's liability to Galaxy (as established in the Swiss proceedings)?**

**46. Is ITS liable to provide a contribution to AIC in respect of AIC's liability to Galaxy (as established in the Swiss proceedings) and, if so, what level of contribution is fair and just in all the circumstances?**

351. In view of my answers to issues 1 to 42 it is not necessary to consider issues 43 to 46.

## 8. CONCLUSION

352. In the result AIC's claim succeeds.

Mr N Hamblen QC and Mr M Ashcroft (instructed by Holman Fenwick and Willan) for the Claimants
Mr D Mildon QC and Miss Jessica Mance (instructed by Hill Taylor Dickinson) for the Defendants