Case Note on Septo Trading Inc v Tintrade Limited: Interpretation of alleged inconsistencies between bespoke terms and standard forms

Introduction

1. On 18 May 2021 the Court of Appeal handed down its judgment in the case of Septo Trading Inc v Tintrade Limited [2021] EWCA Civ 718. While the case does not change the law, it provides a helpful outline as to the approach to be taken to interpreting alleged inconsistencies between bespoke terms and the terms of standard forms within a given contract. The case will be of general interest to practitioners, in particular those whose practice incorporates construction or shipping work, where standard forms are commonplace.

Background

2. The dispute in Septo concerned the terms of an international fuel oil sale contract. The issue on appeal was whether a quality certificate issued in respect of the oil consignment at the load port was intended to be conclusive evidence of the quality of the oil. The parties had entered into a contract for the sale of the oil via an email confirmation of the transaction (the "Recap") which provided for the incorporation of the BP 2007 General Terms and Conditions for FOB Sales (the "BP Terms").

3. The Recap provided that the quality certificate issued at the load port would be binding on the parties in the absence of fraud or manifest error. However, the Recap also provided for the application of the BP Terms "*where not in conflict with the above".* The BP Terms themselves provided that the quality certificate would be conclusive and binding *"for invoicing purposes"* but without prejudice to the buyer's right to bring a quality claim. This raised the question of whether the Recap and the BP Terms were potentially inconsistent insofar as they described the extent to which the quality certificate was to be binding upon the parties.

4. In the event, the quality certificate issued at the load port certified that the fuel oil conformed to the contractual specification. However the judge at first instance (Mr Justice Teare) had found as a matter of fact that the consignment did not conform to the specification. On the question of construction regarding the binding status of the quality certificate, Teare J had held that the provisions in the BP Terms and the Recap could be read together, with the BP Terms qualifying the Recap term. As such, he held that the buyer ("Septo")'s quality claim should succeed and awarded damages of some USD 3 million.

5. The seller ("Tintrade") appealed, arguing that the term concerning the quality certificate in the BP Terms was inconsistent with the Recap and therefore should not be given effect.

6. In the only reasoned judgment (with which Moylan and Phillips LLJ agreed), Males LJ examined the antecedent case law concerning the interpretation of standard terms and bespoke terms or amendments before applying it to the instant case.

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The Clauses

7. The relevant clause in the Recap was entitled *"Determination of Quality and Quantity"* and provided as follows:

> *"As ascertained at loadport by mutually acceptable first class independent inspector, or as ascertained by loadport authorities and witnessed by first class independent inspector (as per local practice at time of loading). Such result to be binding on parties save fraud or manifest error. Inspection costs to be shared 50/50 between buyer/seller."*

8. The Recap also provided that:

> "*Where not in conflict with the above, BP 2007 General Terms and Conditions for fob sales to apply*"

9. Section 1.2.1 of the BP Terms provided as follows:

> *"Provided always the certificates of quantity and quality (or such other equivalent documents as may be issued at the Loading Terminal) of the Product comprising the shipment are issued in accordance with sections 1.2.2 or 1.2.3 below then they shall, except in cases of manifest error or fraud, be conclusive and binding on both parties for invoicing purposes and the Buyer shall be obliged to make payment in full in accordance with Section 30.1 but without prejudice to the rights of either party to make any claim pursuant to Section 26."*

10. Section 26 of the BP Terms was entitled "*Quality and claims in respect of quality/quantity".* It provided that unless otherwise stated in the Special Provisions, the quality of the consignment shall not be inferior to the specification set out in the Special Provisions. It further excluded conditions or warranties as to the description, quality or fitness for purpose of the consignment and set a time limit for any quality claim.

The Law

11. Males LJ noted (at [18]) that the law which applied to cases of alleged inconsistencies between standard forms and specially agreed terms of a contract is well settled. The leading case is Pagnan SpA v Tradax Ocean Transportation SA [1987] 3 All ER 565.

Pagnan

12. Pagnan (which also arose in the context of a shipping contract) concerned an alleged inconsistency between a bespoke term and the standard conditions of GAFTA contract form 119 that were also incorporated into the contract. A bespoke term of the contract provided that the sellers would provide an export certificate for the goods being sold. However, the GAFTA contract form 119 conditions included a GAFTA prohibition clause stating that in the event of prohibition of export or in the case of any executive or legislative act by the government of the country of origin restricting export, any unfulfilled portion of the contract would be cancelled, thus relieving the sellers of the obligation to provide an export certificate to that extent.

13. The contract also contained a clause dealing with the potential for inconsistencies between the standard form and

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the special terms as follows:

> *"Special terms and conditions contained herein and/or attached hereto shall be treated as if written on such contract form and shall prevail in so far as they may be inconsistent with the printed clauses of such Contract Form."*

14. Bingham LJ determined that the special condition provided for an absolute obligation on the seller to obtain an export certificate (subject to other relevant terms of the contract). He then turned to address the alleged inconsistency between that absolute obligation and the GAFTA prohibition clause which could excuse a seller's failure to procure an export certificate for reasons which fell within that prohibition clause. Males LJ highlighted the following extracts from Bingham LJ's judgment (see Septo at [20]-[21])

> *"It would in my my judgment be quite wrong to approach this question of construction with any predisposition to find inconsistency between the special condition and clause 19 [i.e. the prohibition clause]. They are all part of the same contract, and the parties expressly chose to make their contract subject to the terms of GAFTA Form 119. …*
>
> *On the other hand it is wrong to approach the contract on the assumption that there is no inconsistency. By including the inconsistency clause, the parties have acknowledged that there may be. One should, therefore, approach the documents in a cool and objective spirit to see whether there is inconsistency or not.*
>
> *The judge found the arguments on this issue finely balanced, but concluded that there was no inconsistency as submitted by the buyers. I agree with his conclusion, but I have less hesitation in reaching it. It is a commonplace of documentary construction that an apparently wide and absolute provision is subject to limitation, modification or qualification by other provisions. That does not make the later provisions inconsistent or repugnant."*
>
> and
>
> "It is not enough *if one term qualifies or modifies the effect of another; to be inconsistent a term must contradict another term or be in conflict with it, such that effect cannot fairly be given to both clauses"*

15. In Pagnan the Court of Appeal concluded that there was no inconsistency between the clauses under review. The standard prohibition clause qualified the requirement of the special provision concerning the export certificate but did not deprive it of effect. This was further consistent with commercial common sense as it reflected the apportionment of risk which the parties could reasonably be supposed to have intended.

16. Males LJ further highlighted the following extract from Dillon LJ's judgment in Pagnan:

> *"We have therefore merely to consider the printed words of the contract that the special condition is to prevail in so far as it may be inconsistent with the printed clauses of the GAFTA contract form. What is meant by inconsistency? Obviously there is inconsistency where two clauses cannot sensibly be read together, but can it really be said that there is inconsistency wherever one clause in a document qualifies another clause? A force majeure clause, or a strike and lock out clause, almost invariably does qualify the apparently absolute obligations undertaken by the parties under other clauses in the contract; so equally with an extension of time*

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clause, for instance in a building agreement. So equally, with a lease, the re-entry clause qualifies the apparently unconditional demise for a term of years absolute, but no one would say that they were inconsistent.

In my judgment the first task is to see if the clauses can sensibly be read together. If they cannot, there is inconsistency and the special condition is to prevail over the other clause in the printed form. But, if they can be read together, they should be and there is no inconsistency."

Alexander v West Bromwich Mortgage Co Ltd

17. Males LJ noted that the approach in Pagnan had been followed in many other cases. He referred in particular to Alexander v West Bromwich Mortgage Co Ltd [2016] EWCA Civ 496, which concerned allegedly inconsistent terms in a mortgage contract as to the interest rate which was chargeable (see Septo at [24]). The inconsistency was said to have arisen between the bespoke terms of the mortgage offer and the standard mortgage conditions.

18. Males LJ summarised (at [28]) the principles set out in Alexander v West Bromwich as follows:

"…there is a distinction between a printed term which qualifies or supplements a specially agreed term and one which transforms or negates it. In order to decide on which side of this line any particular term falls, the question is whether the two clauses can be read together fairly and sensibly so as to give effect to both. This question must be approached practically, having regard to business common sense, and is not a literal or mechanical exercise. It will be relevant to consider whether the printed term effectively deprives the special term of any effect (some of the cases describe this as the special term being "emasculated", but in my view it more helpful to say that it is deprived of effect). If so, the two clauses are likely to be inconsistent. It will also be relevant to consider whether the specially agreed term is part of the main purpose of the contract or, which is much the same thing, whether it forms a central feature of the contractual scheme. If so, a printed term which detracts from that scheme is likely to be inconsistent with it. Ultimately, the object is to ascertain the intention of the parties as it appears from the language in its commercial setting."

Application to Septo

19. Applying these principles to the facts of the case in Septo the Court of Appeal held that there was an inconsistency between the terms concerning quality certificates for the fuel oil. The terms could not fairly and sensibly be read together but rather the standard form term deprived the Recap term of all practical effect. Further, it was consistent with commercial common sense to give effect to the Recap and not apply the standard term. In circumstances where the parties had agreed a clear and specifically drafted term in the Recap dealing with a centrally important question such as the binding status of a quality certificate, it was unlikely that they in fact intended that the quality certificate should only be binding for invoice purposes as provided for in the standard terms.

20. In coming to this conclusion, Males LJ outlined the following three-stage approach:

20.1. The starting point was to ascertain the meaning of the bespoke term which was under review. The court needed to form a provisional view of what the term meant, which could then be tested against other clauses of the contract. No account should be taken of the allegedly inconsistent standard term at this stage however if the court's provisional view of the meaning of the bespoke term required significant modification when it came to take account of the standard term that was likely to be relevant to the issue of inconsistency (see [34]-[35]). Males LJ noted (at [35]) that:

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> "*[p]lainly, if a contract term means one thing when it is considered when it is considered on its own and means something very different when it is considered in the light of a printed term in a set of standard conditions, that is likely to shed considerable light on that issue*"

In the instant case, Teare J had been correct to conclude that the effect of the Recap term (considered alone) was that the quality certificate was binding on both parties for all purposes (see [36]-[37]). Males LJ noted (by reference to Professor Bridge's *The International Sale of Goods)* that such a provision was a central feature of many international sales contracts (see [38]);

20.2. The next step was to consider the effect of the term in the standard form. In the instant case, Section 1.2 of the BP Terms provided that the quality certificate was to be binding for invoicing purposes only. Since the contract was for a documentary sale, the buyer's bank was required to pay for the consignment under the letter of credit which it had issued provided the seller's documents (including the specified quality certificate) were presented to the buyer's bank and were in order. The buyer was subsequently entitled to pursue a quality claim pursuant to and in accordance with Section 26 of the BP Terms. Thus, Section 1.2 effectively provided that the quality certificate was not binding as to quality at all (see [39]-[40]);

20.3. Finally, it was necessary to turn to the question of inconsistency. The court concluded that Section 1.2 was in conflict with the Recap term. The two terms could not fairly and sensibly be read together. The printed term did not "*merely qualify or supplement the Recap term, but rather deprives it of all practical effect"* (see [41]-[45]). Males LJ had come to this view for the following reasons:

20.3.1. The Recap term provided for the quality certificate to be binding for all purposes but the BP Terms effectively provided that it was not binding at all;

20.3.2. A regime in which a quality certificate is binding is fundamentally different from one in which it is not. Males LJ agreed with Colman J's view in Navigas Ltd v Enron Liquid Fuels Inc [1997] 2 Lloyd's Rep 759 on this point, which concerned a similar conflict between bespoke and standard terms;

20.3.3. The provision in the Recap for the quality certificate to be binding was a central feature of the contractual scheme. It defined the seller's obligation regarding the quality of the consignment and provided *"an important measure of certainty".* Males LJ considered it unlikely that the parties intended or would want to substantially detract from this by incorporating the standard BP Terms; and

20.3.4. Finally, Males LJ's interpretation of the contract was commercially reasonable. He noted as follows (at [45]):

> *"As Lord Justice Phillips said in the course of argument, if the parties' intention was to provide that the quality certificate would not be binding in any real sense, they went about it in a very strange way, first by saying in the Recap that it would be binding and then by providing something different in standard conditions which would be argued to qualify and not to nullify what was said in the Recap"*

21. Males LJ further held for broadly the same reasons that Section 1.3 of the BP Terms (which Tintrade had relied upon it the alternative) had no application as it also provided for a fundamentally different regime from that set out in the Recap term and deprived the Recap of practical effect (see [46]-[49]).

22. For the above reasons, the appeal was allowed.

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Author: Helen Dennis

Editors: Jessica Stephens KC and Simon Hale

A copy of the full judgment is available here

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