Gimpex Ltd *v* Unity Holding Business Ltd and others
[2013] SGHC 224

Case Number : Suit No 390 of 2010

Decision Date : 28 October 2013

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Philip Tay and Yip Li Ming (Rajah & Tann LLP) for the plaintiff; Bazul Ashhab bin Abdul Kader, Leong Qing Jing Mabel and Tan Hui Juan Mabel (Oon & Bazul LLP) for the first, second and third defendants.

Parties : Gimpex Ltd — Unity Holding Business Ltd and others

Contract

28 October 2013 Judgment reserved.

Lai Siu Chiu J:

1 This case concerned a dispute over a contract for 40,000MT of coal which Gimpex Ltd ("the plaintiff") bought from Param Energy Pte Ltd ("the second defendant") which contract was to be performed by Unity Holdings Business Limited ("the first defendant") whose director is Vinay Parmanand Hariani ("the third defendant"). The third defendant is also a director and the sole shareholder of the second defendant.

2 The plaintiff is an Indian company based in Chennai, India, and it has been in the business of trading in commodities and raw materials since the 1950s. The first defendant is a company incorporated in the British Virgin Islands ("BVI") while the second defendant is a Singapore company and its business is that of a wholesaler in general trade.

3 By a contract dated 2 March 2010 ("the contract") the plaintiff agreed to buy and the first defendant agreed to sell and deliver to the plaintiff, 40,000MT (+/-10%) of coal ("the coal" or "the cargo" where appropriate) from Indonesia. The salient terms of the contract will be set out later. It was stipulated therein under Arts 18 and 19 respectively, that Singapore law would govern and would be the jurisdiction for, the contract.

4 The plaintiff's joint managing-director is Samir Goenka ("Samir") who is based in Chennai. The plaintiff has a Singapore subsidiary called SPG Mining Pte Ltd ("SPG") which was incorporated in late 2009. SPG's executive director is Avinash Kulkarni ("Kulkarni") who is based in Singapore.

5 In late 2009, the plaintiff was new to the coal trading business and wanted to deal with reliable coal companies and traders in Singapore. Samir said he had received feedback and read literature that advised him to avoid dealings with Indonesian coal companies. Samir and Kulkarni were introduced by the plaintiff's auditor to one Amit Vaishnav who in turn introduced Samir to the third defendant.

6 The initial dispute between the parties concerned an alleged representation (according to the plaintiff) made by the first defendant to the plaintiff that the first defendant is a Singapore company.

7 When Samir (with one Jayanta Sinha ("Jayanta") and Sashank Dixit) first met the third

defendant in February 2010, the third defendant introduced himself as the owner of the second defendant. Jayanta has since left the plaintiff's services and was not a witness for the plaintiff.

8 At a meeting on or about 2 March 2010 between the second defendant's representative Lalit Balchandani ("Lalit") and Samir, the former allegedly told the latter that the first defendant was/is a Singapore company. According to Samir, he made it clear to the third defendant and to Lalit that the plaintiff wanted to do business only with a Singapore company. The third defendant apparently used the first defendant's Singapore address to convince Samir that it was/is a local company. Samir was not aware until after the contract was signed, that the first defendant is a BVI company.

9 Lalit offered to contract through the second defendant and provided a draft contract to the plaintiff for that purpose. However, the plaintiff rejected the offer as the second defendant wanted a transferable letter of credit to pay its supplier, which term was not acceptable to the plaintiff. Consequently the first defendant was substituted as the contracting party on Lalit's proposal after a telephone discussion between him and Samir. According to the defendants' defence (and Interrogatories answered by the third defendant), the third defendant had "allocated" the contract to the first defendant. In the contract itself, the first defendant was described as "a group company of Param Energy Pte Ltd".

10 Samir was also under the impression that Lalit was an employee of the first defendant when in effect Lalit worked for and under the direction of the third defendant. The first defendant had neither staff nor employees and the persons who dealt with the plaintiff on the contract at all material times all worked for the third, not the first defendant. Besides Lalit, the other employees of the third defendant who dealt with the plaintiff were Kishore Chuharmal Mahtani ('Mahtani") and Prem Sangtani ("Prem").

11 It was the plaintiff's case that Samir was induced by the representations made by Lalit and/or the third defendant to enter into and sign the contract, which salient terms state:

1.1 Commodity: Coal – GVC 6,300-6,100 (ADB) (Indonesia origin);

1.2 Loading port: Taboneo Anchorage, South Kalimantan ("the Anchorage")

1.3 Contract period: Spot

1.4 Shipment terms: FOB

1.5 Partial shipment: Not allowed

1.6 Quantity: 40,000MT (+/-10%) at vessel's option

1.7 Value: US$2,640,000 (+/-10%).

The shipment dates were stated in the contract to be between 25 March and 3 April 2010. The other terms and conditions of the contract are set out in [45]. The coal was to be loaded at Batulucin in Kalimantan.

12 I should state at this juncture that the coal contracted was not meant for the plaintiff's use but for a Pakistani company called Awan Trading Pte Ltd ("Awan") to whom the plaintiff had sold the coal by a contract dated 20 February 2010 ("Awan's contract"). The plaintiff bought the coal from the first defendant at US$66 per MT and resold it to Awan at US$68 per MT. The first defendant

supposedly obtained the coal from an Indonesian company called PT Planet Resources ("PT Planet") of which the third defendant was/is a director and an indirect shareholder. However, in the course of the proceedings, the first defendant revealed that the coal was actually supplied by a third party called CV Berkah Mulya Abadi ("Berkah") with whom it had a contract. However, the contract with Berkah was not produced at the trial (as the first defendant claimed its copy of the document could not be located while Berkah would not furnish a copy at the first defendant's request).

13 Pursuant to Art 7 of the contract, the plaintiff was to pay for the coal by an irrevocable letter of credit. To that intent, the plaintiff applied to ING Bank Chennai branch ("ING"), for letter of credit no. 407FLC002199/09 of US$2,640,000 ("the L/C") to be issued in favour of the first defendant. The L/C allowed 21 days after the shipment date for negotiation.

14 The first defendant was also required under Art 7 of the contract, to present specific documents (including a full set of non-negotiable bills of lading) to ING in order to negotiate the L/C. Further, the first defendant had to fax and then courier a non-negotiable set of those documents to the plaintiff. Under the L/C, the plaintiff had the right to appoint an inspection agency to inspect the coal at the loading port.

15 As the contract was made on FOB terms, the plaintiff was required to nominate a vessel at the loading port for the first defendant to load and ship the coal to the port of Karachi in Pakistan. In this regard, the plaintiff's buyer Awan had nominated the MV Michalakis ("the ship") to carry the coal to Pakistan and the plaintiff notified the defendants of the nomination on 10 March 2010. Awan appointed PT Surveyor Carbon Consulting Indonesia ("SCCI") as its surveyor while the first defendant appointed PT Sucofindo ("Sucofindo") under Art 5.1 of the contract as the seller's loading surveyor.

16 The plaintiff informed Lalit on 22 March 2010 of the appointment of SCCI as the plaintiff's surveyors. According to Kulkarni, the defendants made it difficult for SCCI to carry out inspection of the cargo at the Anchorage. The coal would be delivered to the jetty and stockpiled there before being loaded onto barges and then taken to the ship which would be waiting at the Anchorage. The ship arrived at the Anchorage on or about 23 March 2010 and loading of the coal commenced on 11 April 2010 and was completed on 21 April 2010 at 0245 hrs.

17 Under Art 8.8(a) of the contract, demurrage was payable at US$10,000 per day, based on the charterparty rate of the ship. Kulkarni said he advised the defendants of the demurrage rate when the plaintiff nominated the ship on 10 March 2010.

18 Under Art 3.1 of the contract, loading time (*ie* "laytime") allowed was from 25 March to 3 April 2010 based on 8,000MT per weather working day, Sundays and holidays included except for five Indonesian public holidays (which did not apply here). For the 41,510MT loaded on the ship, the maximum laytime allowed was 5.1888 days. Kulkarni alleged he had agreed with Lalit (who denied it) at a meeting in Jakarta on 15 March 2010, that laytime would run from 30 March 2010 instead of 12 hours after Notice of Readiness ('NOR") had been given by the ship's Master.

19 Kulkarni alleged that he encountered great difficulty in arranging for SCCI to have access to inspect the coal. He had to communicate repeatedly with Lalit and Prem by email before he finally succeeded. Kulkarni was shocked to receive Awan's email dated 11 April 2010 informing him that SCCI had been "offloaded" and SCCI surveyors were not allowed to do sampling and witnessing of sampling of the cargo while it was being loaded onto the ship.

20 Kulkarni conveyed Awan's complaint to Lalit and Prem. On 13 April 2010, Prem informed Lalit (who in turn informed Samir) that the first defendant would prepare samples and deliver them to SCCI

and that was "the maximum they can do". When Kulkarni protested, Lalit responded by email on 13 April 2010 to say he had never said SCCI would be allowed to witness the loading – the plaintiff was free to send any buyer's representative to witness the loading.

21 Despite Kulkarni's further protests, the first defendant's representatives continued to refuse to allow SCCI to take coal samples although Lalit eventually agreed to SCCI witnessing the loading of the coal on the ship.

22 On its part, Sucofindo on behalf of the first defendant sampled the coal from: (i) a stockpile on the wharf, (ii) from barges and (iii) from the ship itself while the coal was being loaded on board.

23 The plaintiff also complained that the defendants failed to comply with the L/C requirements of forwarding copies of the bills of lading (see [14] above). The defendants only faxed the documents to the plaintiff on 29 April 2010 and later sent by courier only one bill of lading for 14,000MT of coal. However the first defendant subsequently tendered for negotiation of the L/C to ING through Bank of India, nine, completely different bills of lading. Eight of the nine bills of lading presented for negotiation were for 5,000MT of coal while the remaining bill of lading was for 1,510MT. Further, Lalit requested of the plaintiff on 3 May 2010 that the L/C be amended to reflect three bills of lading of 14,000MT each, that the bills of lading should state "shipped on board" instead of "clean shipped on board" and that negotiation of the L/C be extended by one week. That meant that the defendants had three and not nine bills of lading as of 3 May 2010. Again, the plaintiff accused the defendants of fraudulently tendering bills of lading to the plaintiff that differed from those presented to ING.

24 According to the plaintiff, it realised only after the coal arrived in Karachi on 8 May 2010, that the first defendant's refusal to allow SCCI to do sampling was due to the fact that the first defendant had shipped low grade coal and/or coal outside the contract specifications. The coal was discharged from the ship 8-12 May 2010. Awan appointed Intertek Pakistan (Pvt) Ltd ("Intertek") while the plaintiff appointed Inspectorate Griffith India Pvt Ltd ("Inspectorate") to inspect the coal after its arrival at Karachi port. The test results of Intertek and Inspectorate were vastly different from Sucofindo's as can be seen from the following table:

	Under the contract	**Sucofindo**	**Intertek**	**Inspectorate**
Gross calorific value	Not less than 6,100	6,266	5,638.86	5,255
Total moisture	16% not more than 18%	18%	26.44%	24.35%

25 Kulkarni alleged that upon discovering the fraud perpetrated by the first defendant, he tried desperately to contact the defendants but they stopped picking up their telephones. Awan rejected the coal on the ground it was completely off-specifications. After being discharged from the ship, the coal had been kept at the storage yard pending delivery to Awan.

26 In view of the plaintiff's rejection, the defendants attempted to find another buyer for the coal. On or about 15 June 2010, the defendants found a buyer in Rafeh Enterprises Pte Ltd ('Rafeh") at prices ranging from US$48 to US$68 per MT which actual price would be determined after a survey of the coal's quality, on an "as is where is" basis. The defendants sent Mahtani to Karachi to facilitate the sale to Rafeh. Mahtani alleged that he engaged SGS Pakistan (Pvt) Ltd to conduct the survey ("SGS") but was stopped by Awan who also disallowed samples of the coal from being taken by SGS. Mahtani further alleged that Awan took away three truckloads of the coal before he lodged a police report of the theft. Mahtani claimed he received telephone threats causing him to fear for his life and

to leave Karachi on 24 June 2010. The sale of the coal to Rafeh was aborted.

27 Eventually, on 1 July 2010, the defendants managed to sell the coal to International Energy Resources FZC ("FZC") on an "as is where is" basis at US$48.63 per MT. FZC is a company related to Awan.

28 On its part, the plaintiff called on the performance bond of US$50,000 amounting to 2% of the contract value, that had been provided by Sainik Mining & Allied Services Ltd ("SMASL"), the major shareholder of the first defendant, under Art 7.7 of the contract.

The pleadings

29 The plaintiff commenced these proceedings in Singapore and obtained an interim injunction on 31 May 2010 ("the injunction") to restrain the defendants from obtaining payment on the L/C. It obtained a similar injunction from the Karachi courts restraining ING from making payment under the L/C. By consent, the injunction was set aside on 27 July 2010 on the defendants' undertaking not to obtain payment under the L/C.

30 In the statement of claim (Amendment no 3) the plaintiff alleged that;

(a) the second defendant on 2 March 2010 represented through Lalit that the first defendant was a Singapore company and that Lalit was an employee of the first defendant; Lalit did not disclose that the first defendant was a BVI company;

(b) It was stated in the contract that the first defendant's domicillium was Singapore, it had a Singapore address and that the third defendant was its representative and director;

thereby inducing the plaintiff to enter into the contract.

31 The plaintiff also alleged that the first and/or the second defendant and/or the third defendant had committed fraud by supplying grossly inferior coal under the contract while at the same time pushing ahead to procure payment under the L/C. To that intent and purpose, the defendants prevented the plaintiff's inspection agency SCCI from inspecting and drawing samples of the coal while it was being loaded on the ship.

32 The plaintiff alleged that as part of the defendant's fraud and conspiracy, the third defendant arranged for the coal to be supplied by PT Planet which company was owned by the first defendant and of which the third defendant was a director. In fact, the directors of the first defendant were also directors of PT Planet.

33 The plaintiff contended that the bills of lading presented by the defendants for negotiation of the L/C were suspicious in the light of the discrepancy set out earlier at [23] above.

34 The plaintiff asserted that the third defendant was in fact the *alter ego* of the first and/or second defendants and/or was their directing mind with complete control over the contracts, the business and assets of the first and/or second defendants, that he had directed and/or procured the fraud that had been perpetrated on the plaintiff through the first and/or the second defendants. The plaintiff averred that the corporate veil of the first and/or second defendants should be lifted and the second and/or the third defendants should be liable for the liability of the first defendant.

35 The plaintiff also made a claim for demurrage pursuant to Art 8 of the contract. The plaintiff

alleged that as the defendants took 21.9479 days to load the cargo as opposed to the contractually allowed 5.1888 (see [18] above), the defendants were liable for demurrage of 16.7591 days amounting to US$167,591 (16.7591 x US$10,000). The amount (according to the plaintiff) was less than what it paid Awan for demurrage for which its laytime commenced on 25 May 2010 at 1200 hrs.

36 The plaintiff's final claim was for damages for non-delivery of the coal on the basis that it had been rejected by Awan.

37 The three defendants filed a common defence (amendment No 4). The defendants admitted the contract and that the first defendant was a BVI company at all material times. They denied that any of them represented to the plaintiff that the first defendant was a Singapore company. The defendants further denied that the plaintiff was induced to enter into the contract based on the representations alleged by the plaintiff. They added that Art 20 of the contract (see [197] below) in any case superseded all prior representations as alleged or at all.

38 The defendants contended that Art 8 of the contract on demurrage had been varied between the parties in that the first defendant would not be liable for any demurrage nor was it entitled to any dispatch money.

39 The defendants alleged that it was the plaintiff that was in breach of contract in that the plaintiff should have furnished a clean and workable L/C by 13 March 2010. Instead, the plaintiff only procured the L/C on 23 March 2010 whereas the plaintiff had arranged for the ship to arrive by 22 March 2010.

40 The defendants denied they had conspired to injure or to defraud the plaintiff by unlawful or fraudulent means as alleged or at all. They further denied committing any of the acts complained of by the plaintiff. They denied the plaintiff had suffered the damage as alleged in the statement of claim or at all. However, the defendants admitted that the contract was allocated by the second defendant to the first defendant.

41 The defendants averred it had purchased the coal from PT Planet which company was owned by the first defendant and Classic Ventures Assets Incorporated ("Classic") but denied the coal was of grossly inferior quality, contending that their contract with PT Planet was back-to-back with the contract in relation to contractual specifications. Although PT Planet was owned by the first defendant and Classic, PT Planet had procured the coal from an independent third party that was neither controlled by nor related to, the first defendant or any of the defendants (alluding to Berkah whom the plaintiff described as shadowy in its closing submissions).

42 The defendants averred that the quality of the coal under the contract was to be determined by Sucofindo, an independent surveyor, and its findings showed that the quality complied with the defendants' contract with PT Planet and in turn with the defendants' contractual obligations to the plaintiff. They added that it was the plaintiff that had nominated Sucofindo under Art 4 of the contract and under Art 4.4, Sucofindo's findings on quantity and quality at the load port were final and binding on the plaintiff and the first defendant. They added that the plaintiff had also independently appointed SCCI to witness the sampling and loading of the coal on or about 12 April 2010. However, the defendants caught SCCI taking coal samples of low grade and stopped SCCI as the samples were not representative of the entire cargo that was shipped.

43 The defendants contended that having performed the contract, they were entitled to payment under the L/C. Consequently, they presented the L/C for negotiation. The defendants contended that the plaintiff had unlawfully rejected the coal and refused to pay the price of US$2,661,991.32.

Eventually, the defendants sold the coal to FZC at US$48.63 per MT. The defendants counterclaimed from the plaintiff for

(a) the difference between the contract price (US$2,661,991.32) and the sale price to FZC (US$2,018,631.30) amounting to US$643,360.02;

(b) charges of US$750.00 paid to SGS at Karachi for the aborted survey of the coal;

(c) expenses incurred by the defendants (US$6,804) in the aborted sale to Rafeh (which included Mahtani's travel and accommodation expenses);

(d) refund of the sum of US$50,000 paid to the plaintiff on the performance bond;

(e) an inquiry into the loss that they had suffered as a result of the injunction obtained by the plaintiff;

(f) alternatively, damages for the plaintiff's breach.

The evidence

44 A total of fifteen witnesses testified in the course of the ten days' trial. Besides Samir (PW1) and Kulkarni (PW2), the plaintiff's four other witnesses included two who came from Inspectorate, Pakistan and one from India. On their part, the defendants called nine witnesses including Lalit, the third defendant, Prem, Mahtani and a representative from Sucofindo (Nonot Imam Norbintoro). The parties also called expert witnesses. The plaintiff's experts were Sebastian Jon Norager ("Norager") and Liang Yun whilst Peter Robin Gunn ("Gunn") was the defendants' expert.

The plaintiff's case

45 Before I review the evidence that was adduced in court, it would be appropriate to first set out the other salient terms of the contract:

(a) Article 4.1 – The quality of coal to be supplied hereunder shall be with the following typical specifications determined and analysed as per ASTM standard by Sucofindo, Indonesia. All percentages used refer to percentage by weight.

Parameters	**Basis**	**Contracted Specifications**	**Rejection limits**
Total Moisture	ARB	16.00%	Above 18%
Inherent Moisture	ADB	8%-10%	
Gross Calorific value	ADB	6,300 kcal/kg	Below <6,100 kcal/kg

Guaranteed parameters for price basis:

GCV (ADB) 6,300 kcal/kg

Total moisture (AR) 16%

(b) Article 4.2 – The costs of inspection for sampling and Analysis described in this article shall be borne by the Seller.

(c) Article 4.3 – The consignment should be accompanied by Certificate of Sampling and Analysis as per ASTM standard issued by Sucofindo Indonesia.

(d) Article 4.4 – All reported findings on all inspections/surveys conducted at Origin in relation to quality, quantity and weights etc done at origin and/or port and place of loading shall be FINAL and binding to both Buyer and Seller.

(e) Article 4.5 – At least ten (10) days prior to the 1st day of load port laycan, Buyer has the option to appoint an independent inspection agency of their choice. All costs for this would be borne by the Buyer.

(f) Article 4.6 – One set of raw samples drawn by the surveyors on board the vessel would be duly sealed and signed by the surveyors.

(g) Article 5.1 – Seller shall appoint Sucofindo, Indonesia to determine the weight of cargo loaded onto the mother vessel at loading point and issue a Certificate of Weight, which shall be final and binding on both parties.

(h) Article 7.1 – payment will be made through an irrevocable Single restrictive Letter of Credit payable at 100% Sight issued by a Prime International Bank for 100% of the shipment value in a standard format acceptable to Seller.

(i) the clean and workable Letter of Credit must be established at least (20) days prior to the first day of lead port laycan.

(j) …

(k) L/C to call for the following

(l) …

(m) a full set (3+3) of "clean on board" Charter Party bills of lading consigned to the order of L/C opening bank and notify applicant marked "Freight payable as per Charter Party".

(n) Article 8.1 – At least 14 days before the first day of the load port laycan Buyer shall nominate a vessel or subs to the Seller stating the following:

Name and description of vessel or subs

Expected Time of Arrival at lead port

Expected cargo quantity

Demurrage and despatch rate

Age of the vessel

Seller to accept/reject such nomination within 24 hrs of such nomination.

(o) Article 8.5 – Laytime shall commence 12 hours after vessel's agent's tendering "NOR" unless sooner commenced.

(p) Article 8.7 – Demurrage/Despatch will be as per charter party. Seller shall provide laytime calculation to the buyer within 3 days after completion of discharge.

(q) Article 21 – Domicillium

All communications and/or notices under this Agreement shall be deemed to have been duly given in terms of this Agreement if they are sent by mail/facsimile or telex transmission to either Party at the following addresses:

Buyer

(i) Gimpex Ltd

Gimpex House

…

Seller

(ii) Unity Holdings Business Ltd

33 Ubi Avenue 3 #07-12

Tower "B" Vertex

Singapore 408868

…

46 The following words were defined in the contract:

(a) "ADB" stood for "air dried basis";

(b) "AR" or "ARB" meant "as received basis";

(c) "ASTM" stood for "the standard prescribed by the American Society for Testing and Materials";

(d) "k/cal" meant "kilocalories of energy per kilogram of coal.

47 I turn now to review the evidence adduced in support of the plaintiff's case, starting with Samir's testimony. Nothing much turns on his evidence as, apart from signing the contract on behalf of the plaintiff and what was allegedly represented to him by the third defendant and Lalit,, Samir did not have any further or significant dealings with the defendants as that task was essentially left to Kulkarni. Samir did allege that the third defendant (whom he described in his affidavit of evidence-in-chief ("AEIC") as the mastermind behind the fraud that was perpetrated on the plaintiff) had deceived the plaintiff.

48 Kulkarni dealt with the defendants on the shipping and/or L/C documentation. Citing the various

Arts of the contract (as set out in [45] above), Kulkarni gave examples in his AEIC of how the defendants had breached the contract.

49 Kulkarni criticised Sucofindo's certificate of sampling and analysis as not being in compliance with the contract citing the following certificate no. 03401/GAEDAD as an example; the extracts state:

> Gross sample were taken during loading and sample. TM (total moisture) was taken during loading to the vessel. The samples were prepared and tested started on April 8, 2010, showed the following actual results (average):

Parameter test	Result	Standard Methods
Total moisture (ARB)	18.0%	ASTM D3302-05
Gross calorific value (ADB)	6266 kcal/kg	ASTM D5865-04

> This certificate refers to sampling for quality analysis and sizing only and does not certify any other matters. It reflects to our finding at time and place of intervention only and is issued without prejudice.

(The above and other certificates of Sucofindo (save for the certificate of origin) were not signed by Nonot Imam Norbintoro ("Nonot") even though he testified Sucofindo's behalf).

50 Kulkarni pointed out that the above certificate gave the impression that sampling of the coal took place while the cargo was being loaded. That was not true as the samples were taken well before the coal was loaded on the ship. Further, the certificate did not specify from where and which part of the cargo the samples were taken or who had taken the samples. Kulkarni/the plaintiff viewed such a certificate as invalid since it did not comply with Art 4.3 of the contract set out at [45(c)] above.

51 In his AEIC, Kulkarni deposed that Awan had asked Sucofindo on 22 April 2010 to add the following words to the latter's certificate:

> This is to confirm that we have attended to the inspection of the loading of steam coal per MV Michalakis from the time of commencement of loading of the cargo till the loading was completed. We have taken samples, during loading of the vessel for analysis of all the quality parameters. Based on our inspection at time and place of loading, we hereby certify that we have supervised loading of the consignment in reference and the actual results are as under

but the defendants rejected the request.

52 Kulkarni also had issues with the bill of lading. In this regard, he denied Lalit's claim that it was at Kulkarni's telephone request made on or about 3 May 2010, that the cargo was split by the defendants into three bills of lading.

53 As for the defendants' contention that Kulkarni had inspected the stockpiles of the coal before shipment, Kulkarni recalled that between 24 and 27 March 2010, he had made one cursory visit to a coal stockpile, accompanied by Prem and the plaintiff's Jayanta Sinha (see [7]). He estimated the stockpile he saw to have between 5,000- 6,000MT of coal. Kulkarni could not ascertain the quality of

the coal just by a visual inspection of the stockpile which he recalled was near to a coal mine.

54 In the course of Kulkarni's cross-examination, counsel for the defendants ("Mr Bazul") sought to establish that the coal that had been loaded onto barges was the cargo that was delivered to the ship at the Anchorage. Counsel drew Kulkarni's attention to analysis reports of coal loaded on barges and cross-referred them with progress reports of loading on the ship. I note that the progress reports were sent to Awan by email from a company called IDT Agency ("IDT") whose identity was not told to the court and whose representatives, including the maker of the progress reports, did not appear as witnesses. Consequently, the court had no evidence to support the defendant's stand that the coal that was loaded onto the barges (from which samples were taken and tested) was loaded onto the ship. I had also pointed out to counsel for the defendants that there was no evidence before the court to even suggest that the coal stockpiled on the jetty was what was loaded on the ship.

55 Mr Bazul attempted to prove his point above in another way. He referred to Sucofindo's reports of analysis of cargo on the barges. He cross-referred the document to the same progress report of loading on the ship by IDT Agency, to support his point that the coal on the barges was indeed shipped. However, that method still did not overcome the problem that the maker of the progress report did not testify.

56 On the issue of the defendants' refusal to allow SCCI to inspect and take samples of the coal, Kulkarni referred to his email below to Lalit dated 13 April 2010:

> ...
>
> Our signed contract with you as well as our buyer provides for the witnessing sampling and we do not see any ground on which the buyer can be disallowed from witnessing sampling. Sure, you will agree, that witnessing loading is not equivalent to witnessing sampling. What we need is, to witness sampling and also a counter sample for each lot…
>
> Please note that any claims on us from our buyer's on this account will be directly passed on to you and you will be liable for the same.
>
> Hope you understand the gravity of the situation and resolve this issue amicably and allow SCCI to do their job of witnessing sampling and also instruct Sucofindo to handover one counter sample to SCCI…

57 The stand of the defendants was that the email did not state that SCCI was contractually allowed to take samples of the coal. The defendants' position was that SCCI was not entitled to do so under Arts 4.5 and 4.6 of the contract (see [45]) and that task was Sucofindo's responsibility.

58 Kulkarni's attention was drawn by Mr Bazul to an email dated 14 April 2010 from Jayanta Sinha to Awan which *inter alia* stated:

> …we have got a go-ahead from supplier and SCCI can witness sampling procedure carried out by Sucofindo. They will also be handed a counter sample by Sucofindo.

The email suggested that the defendants had acceded to Kulkarni's email request of 13 April 2010; Kulkarni disagreed. He testified that no counter samples were given by Sucofindo to SCCI; neither did he request for the samples.

59 Kulkarni was also cross-examined on events that transpired after the coal's arrival in Karachi.

Questioned on who he and/or the plaintiff had (unsuccessfully) attempted to contact from the defendants, Kulkarni testified they were Lalit and Prem. He said he discovered that the coal did not comply with the contract specifications after Awan complained, prompting the plaintiffs to apply to and obtain an injunction from the Madras court to restrain the defendants from obtaining payment under the L/C.

60 The issue of demurrage was also raised in Kulkarni's cross-examination. Kulkarni rigorously denied the defendants' contention that he had agreed to waive demurrage. Kulkarni referred to the exchange of emails between the plaintiff and the defendants to support his denial. This is set out below.

61 On 22 April 2010, Lalit had emailed Geetha, the plaintiff's staff-member as follows:

> Kindly note that we have agreed to load this vessel purely on NO Demurrage and NO Dispatch terms

62 This was in response to Geetha's email earlier that day setting out the plaintiff's demurrage claim of US$167,591.00 with a breakdown.

63 In his email response to Lalit of 23 April 201, Kulkarni said:

> …
>
> Reference our telecon,
>
> Yes, we did agree that there will not be any demurrage charges for three to four days. As you were having difficulty in getting the slots. The understanding was, you will start loading on 29/3/2010, if not then certainly by 30/3/2010. This understanding was not the same as agreeing to no demurrage and no dispatch term.
>
> Nevertheless, will still understand and if you need to make any correction in the demurrage we are ready to consider the same. But the delay after 30/3/2010, will be to your account.
>
> Appreciate your understanding.

64 Kulkarni then received another email from Lalit on 23 April 2010 stating:

> Also as you would realise and accept that the shipment was to be effected only after 20 days of receipt of the LC. You may kindly check when we received the LC.
>
> I have been trying to reach Mr Jayantha also…but guess he is avoiding my calls… for reasons best known.
>
> Here, I would like to once again re-iterate our stand...that this shipment was mutually agreed that between us to be done on a NO DISPATCH –NO DEMURRAGE terms…and we shall not entertain any arguments on this matter.

65 In Kulkarni's response to Lalit on the above email on the same day, he said *inter alia*:

> No dispatch no demurrage is your arbitrary declaration and definitely not acceptable. That is not a solution.

You will also have to remember that there is a Clause 20 as per the contract any amendments to the contractual terms, have to be agreed in writing. No dispatch and demurrage was never agreed to in writing.

66 Kulkarni was referred to other emails exchanged between IDT and Awan that suggested that there was a problem with loading the coal onto the ship because the cranes on the ship were old and/or slow and/or not working to the maximum. If that was true, Mr Bazul asserted (to which Kulkarni disagreed), the defendants were not liable for demurrage.

67 Emails from Sucofindo produced by the defendants seemed to show that it was PT Planet and not the defendants who had given instructions to Sucofindo to do sampling of the coal that was to be shipped from the Batulicin jetty at Banjarmasin. The defendants further disclosed a letter dated 7 April 2010 from PT Planet to Sucofindo giving instructions on pre-shipment, draught survey and analysis.

68 I turn now to the evidence that was adduced from the Pakistan surveyors of the plaintiff, after the coal's arrival in Karachi. Earlier (at [24]), I had identified the plaintiff's surveyor as Inspectorate. Majeed Qazi Muhammad Abdul ("Majeed"), the plaintiff's witness from Pakistan was not from Inspectorate but was the operations manager of Inspection Services Incorporated (Pvt) Ltd ('ISIP") who are the Pakistani agents of Inspectorate. Majeed (PW5) testified he had collected the coal samples certified by Inspectorate. A geologist by training, Majeed had collected samples at the custom bonded coal storage yard ("the yard") at Karachi port accompanied by three surveyors from his company. The coal was in a rectangular stockpile marked by the customs authorities with a signboard stating the name of the vessel it came from. Majeed was taken by the yard's supervisor to the stockpile marked with the ship's name. The stockpile was about 30-40 feet high and 90-100 feet across.

69 Majeed testified he collected the coal samples from the stockpile using the ISO 18283 standard. Markers were placed on the stockpile, marking the top, middle and bottom layers horizontally. Shovels were used to collect samples from each layer. It took about a day to complete the sampling after which the samples were sent to Inspectorate's office at Kolkata.

70 In cross-examination, Majeed testified that he would have taken 150 to 200 kgs of coal samples from the ship's stockpile.

71 The plaintiff also produced as a witness the assistant manager of Inspectorate Mallik Shyamal Kumar ("Mallik"), a chemist by training. In his AEIC, Mallik deposed to how he had carried out a chemical analysis of the coal samples for *inter alia*: (i) total moisture and (ii) gross calorific value, using the ASTM method. The analysis was carried out at Inspectorate's laboratory at Bhubaneswar ("the Laboratory").

72 In cross-examination, Mallik disclosed that the 800gms samples tested at the Laboratory came from Kolkata. However, he could not confirm that the samples came from the ship. He did not carry out the tests himself nor did he sign the test reports. The tests were done by two chemists in the Laboratory in compliance with standard procedures.

73 Not surprisingly, in their closing submissions, the defendants contended that Mallik's evidence was of little if not of no probative value since he did not conduct the Laboratory tests. Neither did he record the test results in or sign the Inspectorate certificate. Mallik was not even the person who received the coal samples from Inspectorate's Kolkata office.

74 The defendants further pointed to discrepant evidence from Mallik and Majeed on the weight of

the coal samples. Majeed had testified he had collected 150-200 kgs of coal while Mallik said the Laboratory received 800 gms of coal. The vast difference in the weight of the coal samples meant that:

(a) either Majeed or Mallik was lying or;

(b) not all the samples collected by Inspectorate were analysed at the Laboratory or;

(c) the samples analysed by the Laboratory were not from the samples collected by Majeed.

The defendants' suspicions are unjustified. It would be impossible for the Laboratory to have analysed all 150-200 kgs of coal collected by Majeed. The standard practice of any laboratory is to extract and test, a small portion of samples that are collected.

75 For added measure, the defendants' submissions described Majeed as an evasive and unreliable witness as he was unable or unwilling to answer when questioned on the inherent limitations of stack sampling. The defendants highlighted Majeed's testimony that Inspectorate had taken at the yard 75 samples allegedly from the stockpile containing the coal whereas during Norager's cross-examination (see [102]) Norager testified Majeed had informed him Inspectorate collected 50 samples from the stockpile. Further, although Majeed used shovels to take the coal samples, he did not notice any wetting of the coal whereas Norager testified that where the coal's total moisture is 24%, it would likely be wet even if the surface looks dry – by scraping a few centimetres below the coal's surface.

76 The plaintiff's closing submissions on the other hand argued that both Majeed and Malik had given direct evidence on the sampling and testing of the coal when the cargo arrived at Karachi.

77 No witness from Intertek testified for the plaintiff. Instead, an AEIC was affirmed by the plaintiff's legal manager Balagurusamy Nagamania Pillai Shankara Subramaniam ("Bala") which exhibited the tests report and inspection certificate of quality and quantity carried out by Intertek. Bala (PW3) deposed he had contacted Intertek to seek the cooperation and presence in court of the surveyor who had carried out the tests. His request was refused. On that basis, the plaintiff submitted that Intertek's certificate should be admitted into evidence, as it satisfied the requirements under s 32(1)(j)(iii) or (iv) of the Evidence Act (Cap 97, 1997 Rev Edn) ("The Evidence Act") Although the defendants disagreed with the plaintiff's submission, they themselves relied on s 32(1)(b) of the Evidence Act for their submission that the Sucofindo certificates are admissible and conclusive evidence (citing *Toepfer v Continental Grain Co* [1974] 1 Lloyd's LR11). I shall return to the issue of admissibility of Sucofindo's and Intertek's certificates later (see [201] onwards).

78 I turn now to the evidence of Norager (PW6); he holds a doctorate in chemistry and is from the Singapore office of DH Burgoyne & Partners (International) Ltd ("Burgoyne") who are consultant scientists and engineers. Norage filed two AEICs for the trial, the first (filed on 9 April 2013) contained his report while his second AEIC (filed on 6 May 2013) contained his supplementary report.

79 Norager's brief from the plaintiff was to address the following issues:

(a) could the calorific value and the total moisture content of the coal have changed to the extent of the differences between the Sucofindo and Inspectorate/Intertek certificates at [24] due to the shipment of the coal from Indonesia to Pakistan;

(b) would storing the coal at the custom bonded storage at Karachi for two weeks cause the calorific value of the coal to decrease from the figure of 6,266 kcal/kg stated in the Sucofindo

certificate to the figure of 5,255 kcal/kg in the Inspectorate certificate and the total moisture content to increase from 18% in the Sucofindo certificate to the 24.35% in the Inspectorate certificate?

(c) are there any inconsistencies between the Sucofindo certificate and the supporting documents and facts in terms of the total moisture figures?

(d) were the test methods used by Inspectorate consistent with the standards in the contract? Based on the Inspectorate test results, did the coal meet the specifications in the contract?

80 In his first report attached to his first AEIC filed on 9 April 2013 ('Norager's first AEIC"), Norager answered the four questions in accordance with the numbering as follows:

(a) no, the calorific value and the total moisture content of the coal should not have changed to the extent of the differences between the Sucofindo and Inspectorate/Intertek certificates simply due to the shipment of the coal from Indonesia to Pakistan;

(b) no, the storage of the coal at the custom bonded storage at Karachi for two weeks should not have caused the calorific value of the coal to decrease from the figure of 6,266 kcal/kg stated in the Sucofindo certificate to the figure of 5,255 kcal/kg in the Inspectorate certificate and the total moisture content to increase from 18% in the Sucofindo certificate to the 24.35% in the Inspectorate certificate;

(c) yes, there were inconsistencies between the Sucofindo certificate and the supporting documentation regarding the total moisture content figure of the coal;

(d) yes, the test methods used by Inspectorate for the determination of the total moisture content and the calorific value were consistent with the standards in the contract. Based on the Inspectorate test results, the coal did not meet the specifications in the contract.

81 Although the contract did not specify the type/quality of the coal, Norager noted that the certificates of Sucofindo and Inspectorate used the terms "steam coal" and "non-coking" coal while the Intertek certificates used the phrase "coal in bulk". Norager opined that "steam coal" is a generic term that can have different meanings while non-coking coal implied that the coal in not suitable for the steel manufacturing industry, which uses coking coal. "Non-coking" implied that the coal was probably intended for power generation, and the term is sometimes used interchangeably with "steam coal". In other words, the terms used in the certificates of Sucofindo and Inspectorate probably referred to the end-use of the coal rather than the type.

82 Relying on an extract from ASTM's classification and the calorific content described in the contract, Norager opined that ASTM would categorise the coal either as sub-bituminous or bituminous.

83 Norager explained that the loss of calorific value in coal is linked to the oxidation and weathering of the coal. Low rank coal was more prone to weathering and oxidation than high rank coal. Norager cited as an example that higher rank coal such as anthracite and bituminous coal would lose about 1% per year in calorific value during stockpiling as compared with sub-bituminous and lignite coals. Sub-bituminous coal was more prone to losing calorific value during storage than bituminous coal. Given that the loss of calorific value in coal was substantial in this case, Norager proceeded on the basis that the contracted coal was sub-bituminous. In this case, he found that:

(a) There was 3.5% loss of calorific value after three months storage;

(b) 5.6% loss of calorific value after ten months.

84 Norager gave his views on the differing calorific values and total moisture content in [24] given by the three inspectors. He noted that all three inspectors used the same method, *ie* ASTM 5865 to carry out their tests. Norager further noted that the Intertek samples were taken during the discharge of the coal (8-12 May 2010) from the ship. The time interval between the shipment of the coal and the sampling by Intertek was at most 23 days while for Inspectorate it was 35 days. After discharge, the coal was stored at the yard for approximately six weeks (until 1 July 2010).

85 Accordingly, from the time the coal was loaded (21 April 2010) until 1 July 2010, less than three months had passed. On the basis of the information he had obtained from literature he had consulted, Norager considered that the calorific value of the coal could have decreased by between 0% and 3.5%, at the most, until 1 July 2010. However, according to Intertek's tests, the loss was 10% whilst Inspectorate's tests showed a loss of 16%.

86 As for the change in total moisture content, Norager noted from Sucofindo's draft surveys (41,150MT) and those of Intertek (41,150/65) that the weight discrepancy was only 0.65MT or 0.0016% of the total weight. Yet, the inspectors' tests showed great differences in total moisture content as reflected in [24] above. Norager surmised that it must be due to the coal being exposed to water at some stage, which would likely be during the loading operation or after discharge at Karachi.

87 Norager referred to Prem's AEIC which exhibited the barge schedules in the loading operations. He noted therefrom that loading stopped at some stages on 12, 19 and 20 April 2010 due to heavy rain. However, he also noted that samples for the total moisture content in Sucofindo's certificates were collected during the loading of the vessel at the Anchorage. Consequently, any wetting of the coal at the time of loading should be reflected in Sucofindo's analysis which it was not. Even so, Norager was of the view that the cargo's exposure to rain whether before or during the loading operation could not account for the vast differences reflected in the three inspectors' certificates.

88 The total moisture figures of Intertek and Inspectorate of 26.44% and 24.35% respectively were fairly consistent and they suggested that no wetting took place between the times the two samples were taken at Karachi. However, the two figures approximated 8% more than Sucofindo's tests, Norager extrapolated the figures and estimated that based on 41,150MT, it meant that for the increase in total moisture content from 18% to 26%, the coal was wet by approximately 4,488m³ of water.

89 Norager checked the Internet and ascertained therefrom that the average annual rainfall in Karachi showed that May is one of the driest months of the year with almost no rainfall (exhibiting in his AEIC printouts of his searches). That being the case, it was unlikely that the coal came into contact with rain after it was discharged at Karachi.

90 Based on his reasoning for the total moisture content, Norager opined that the calorific value of the coal should not have been reduced from 6,266 kcal/kg to 5225 kcal/kg while it was at the yard.

91 On issue (c) at [79], Norager elaborated on his confirmation in [80(c)] that there were inconsistencies between the Sucofindo certificates and the supporting documentation on the total moisture content of the coal.

92 Norager looked at the samples taken during the loading of the five barges identified in Nonot's AEIC. The barge analysis results for total moisture content and inherent moisture are as follows:

Barge Name	Cargo (MT)	Total moisture (%)	Inherent moisture (%)
Zulkifli	8205	14.7	5.3
Taurus 16	8383	14.6	4.6
RMN 304	8284	25.2	6.9
RIMAU 3009	8065	29.8	11.4
AR RAZZAQ 12	8584	11.4	4.7

93 Using the above figures, Norager was able to calculate the weighted total moisture content of the cargo in the five barges as 19%. This was just 1% above Sucofindo's figure in [24]. As the loading of the barges had stopped periodically due to heavy rain on certain days (see [87]), Norager did not think the cargo could have dried to any significant degree whilst it was on the barges waiting to be loaded onto the ship. He therefore concluded that either one or more of Sucofindo's barge analysis reports or the total moisture figure in Sucofindo's inspection certificate were incorrect.

94 Norager further noted that the cargo on the fifth barge Ar Razzaq 12 had the lowest total moisture content even though according to the barges' loading schedule exhibited in Prem's AEIC, there were at least three stoppages due to heavy rain during the loading of that barge. That meant that the cargo on the Ar Razzaq 12 would have been exposed to more heavy rain rainfall between 4 and 18 April 2010 when it came alongside the ship.

95 Norager testified that he could not verify that the coal supplied to the plaintiff was of the quantities and had the calorific values described by Lalit and Prem in their respective AEICs. Indeed, because of the significant differences in the calorific values and the total moisture contents between the certificates of Intertek, Inspectorate and Sucofindo, it was unlikely that the coal supplied was what was described in Sucofindo's certificates.

96 Norager was questioned by counsel for the plaintiff ("Philip Tay") whether it was possible to substitute the coal and/or to deceive the surveyors into sampling coal that was not actually shipped. While he admitted he had no direct experience of this happening during his visits to the Indonesian anchorages, Norager noted that barges that operate at coal anchorages in Indonesia are not usually marked with names. It was usually necessary to ask the stevedores on the barges or the tug's crew towing the barge for the barge name. He thought it would be possible for the wrong barge name to be supplied to a vessel waiting to load at the anchorage. Norager deposed in his AEIC that he had witnessed on a number of occasions, a rejected barge from one vessel being towed directly to another vessel for loading. This was a common occurrence as the barges could be several days' journey away from the loading jetties. In order to reduce the hire cost of tugs and barges, shippers may attempt to find alternative vessels to accept coal that had been rejected by their original intended recipients, to avoid the cost of towing the cargo back to shore.

97 In the above circumstances, Norager thought it was possible that the cargo loaded on the ship was not the coal that was sampled by Sucofindo at the Sungai Putting jetty.

98 As for the issue in [80(d)], Norager confirmed that the test methods used by Inspectorate in the analyses of the coal samples as described in Mallik's AEIC were ASTM standards. Based on the

test results of Inspectorate, which were supported by Intertek's test results, Norager was of the view that the coal from the ship did not meet the contractual specifications for total moisture content and calorific value.

99 Before I review the evidence that was adduced from Norager in cross-examination, I should state at the outset, that Norager's credentials showed he is familiar with coal shipments from Indonesia, having attended at coal loading anchorages in South and East Kalimantan. During his visits to those places, Norager had observed some stockpiles by the jetties and he had assessed the coal that was presented for loading at the anchorages. Norager testified he had made recommendations to shipowners and charterers to reject or accept cargoes of coal loaded in barges. He had also given directions to stevedores working at the anchorages to conduct trimming operations in order to reduce the temperature of the coal prior to loading. He had also conducted and overseen the monitoring of coal cargoes during and after the loading on the vessels, to determine the chemical properties of the coal cargoes.

100 In his second/supplementary report exhibited in his second AEIC filed on 6 May 2013 ("Norager's second report"), Norager gave his views on the report of the defendants' expert Gunn (see [44]), which was filed on 10 April 2013, a day after Norager's first AEIC/report. Essentially, Norager disagreed with the views/opinion of Gunn. I shall elaborate on this later when the court considers Gunn's testimony.

101 In cross-examination by Mr Bazul, Norager explained that he had witnessed coal sampling in Indonesia on the instructions of charterers of vessels. He said he was at the anchorages in South and East Kalimantan in 2010 and 2011 for ten days to two weeks respectively.

102 Norager emphasised that sampling was critical especially if the coal came from different stockpiles as sampling determined the quality of the coal that was being sold. Further, if the samples were not properly taken, the sampling may not be representative of all lots of coal in different stockpiles. Norager had spoken to Majeed who told him 50 samples were taken by Inspectorate from the coal at the yard. Norager said he did not query Majeed why only 50 samples were taken when ASTM standards called for 225 samples. Norager explained that stack sampling from a stockpile had its limitations as, unless there was heavy machinery (which was not the case here as shovels were used), samples could only be taken from the surface or just below the surface of the stack.

103 I should point out that in his AEIC, Majeed had deposed that samples were taken from the top, middle and bottom layers horizontally from the stockpile. In his report, Gunn had described such sampling as "extremely unsatisfactory and unprofessional" stating the results would not be representative of the cargo. Norager disagreed pointing out that (according to Prem's evidence which will be dealt with later) the coal in the stockpile would have been mixed four times by the time it reached the yard:

(a) first, when the coal was loaded;

(b) the second time was when the coal was discharged by the ship's grab at Karachi port;

(c) the third was when the coal was discharged onto the wharf and trucked to the yard; and

(d) the fourth time was when the coal was built into a stockpile at the yard.

It would appear from the defendants/Prem's subsequent testimony (see below at [111]) that Norager was right on the number of times the coal was mixed or 'blended'.

104 The plaintiff's other expert was Liang Yun ("Liang") who is a specialist in steam coal/iron ore/nickel and is the general manager of China Packing Corporation and two Chinese companies. Liang has extensive knowledge and experience of the coal trade industry including sourcing of coal and its transportation. Mr Bazul did not cross-examine Liang on her AEIC.

The defendants' case

105 I turn now to the evidence that was presented by the defendants, starting with that of Prem (DW5). Despite the pivotal role he played in the contract, Prem is not/was not an employee of any of the defendants. Instead, Prem deposed in his AEIC that he works for an Indonesian company called PT Anugrah Prima Colindo ("APC"), in which the third defendant holds 90% shares. The remaining 10% shares are held by Lalit from whom Prem received his instructions.

106 Prem supervised and co-ordinated the loading operations of the coal at the Anchorage and liaised with the ship's agents for the issuance of the bills of lading. Prem's involvement began even before the coal was loaded as he accompanied Kulkarni and Jayanta to inspect a coal mine in or about February 2010, at Binuang, Banjarmasin. Prem claimed (which Kulkarni denied) that again on Lalit's instructions, he took Kulkarni (accompanied by Jayanta) to visit coal stockpiles at Binuang on or about 18 March 2010. Prem deposed that four of the six stockpiles that were then inspected were the source of supply for the contract. Earlier, Prem had gone to Banjarmasin on or about 10 March 2010 to coordinate and make the necessary arrangements to load the coal. He arranged for the coal to be moved from the coal mines to the stockpiles at Binuang and from there to the two jetties at Sungai Putting.

107 Prem stationed a man to record the weights of the coal that was loaded on as well as the number plates of the dumper trucks that transported the coal from the stockpiles to the jetties at Sungai Putting and Batulicin. He himself travelled constantly between the stockpiles and the jetties, to monitor the hauling of the coal by trucks to Binuang and from there to the jetties, in the period 18 March 2010 to 3 April 2010. Prem returned to Banjarmasin on or about 5-6 April 2010 to supervise loading operations at Sungai Putting which began on or about 7 April 2010. His daily routine was to go to the Sungai Putting jetties in the morning to monitor the loading process of the coal onto barges and to the ship in the afternoon. At the jetties, the coal would be taken from the trucks, pushed onto hoppers and then placed on conveyor belts to bring to the barges.

108 According to Prem, the coal was loaded onto the ship by five barges, four barges at Sungai Putting and one (the AR Razzaaq) at Batulicin. He forwarded to the plaintiff's Ms Geetha the barge schedule via email on 10 April 2010. Loading of the four barges at Sungai Putting was between 7 and 13 April 2010 while loading of the AR Razzaaq at Batulicin was between 4 and 6 April 2010.

109 Prem explained that loading of coal onto trucks from a stockpile was done systematically – only after a specified quantity of coal from a stockpile had been loaded entirely onto the truck would loading from the next stockpile commence. That method also ensured that the loaded trucks would arrive at the jetties in sequence.

110 It was Prem's evidence that on 3 April 2010, Sucofindo attended at the stockpiles to conduct a pre-shipment analysis of the coal. Subsequently, Sucofindo conducted sampling of the coal between 7 to 13 April 2010 at Sungai Putting as it was being loaded into the barges. However, Sucofindo did not take samples of the coal at Batulicin. Prem deposed that Sucofindo had 2-3 inspectors during the barge loading operations and 5-6 surveyors who worked in shifts to draw samples. Using shovels, Sucofindo's representatives took samples at 2-3 minute intervals from the conveyor belt with each shovel holding 3kgs of coal. Sucofindo took around 500-800 kgs of samples at the conveyor belt for

each barge load of about 8,000MT. The samples were then tested at Sucofindo's laboratory. Sucofindo's representatives did further sampling of the coal from the barges while the coal was being loaded onto the ship. Coal samples would be taken from the top, middle and bottom layers of the coal on the barges.

111 Prem explained that the plaintiff was sold blended coal – the coal came from different stockpiles of different qualities. In this case, the cargo that was shipped to Karachi came from seven stockpiles – six from Binuang and one from Batulicin. The cargo was blended by being mixed manually during the loading operations at the barges. The coal from one stockpile would be loaded onto a barge together with coal from another stockpile; the coal from the two stockpiles would be blended. Further blending took place when the coal was being loaded onto the ship; the coal from each barge would be loaded into different hatches allowing further mixing of the coal from different stockpiles.

112 Although Prem attended at Sungai Putting to supervise the loading of the coal onto barges, he disclosed it was not possible for him to be present throughout the loading operation because he had to allocate some of his time to supervising loading on the ship which began on 11 April 2010. The barges at Sungai Putting did not complete their loading until 13 April 2010. Prem relied on his staff at Sungai Putting and Batulicin as well as on board the ship to supervise the loading process.

113 Prem complained that the cranes and ship's grab worked very slowly and two of the four cranes kept malfunctioning while the other two worked below capacity. It should not have taken more than a day for each barge to offload its coal but the first barge took almost two days to offload its cargo. Consequently, Prem complained to the plaintiff in an email on 11 April 2010.

114 On 12 April 2010, Prem said he was told by Berkah that another set of surveyors *ie* from SCCI had boarded the ship and was taking samples. Prem boarded the ship and stopped SCCI's surveyors from taking samples as he had not received instructions beforehand that they could do so. He then contacted Lalit for instructions. Meanwhile, Awan had stopped the loading of the ship.

115 On 13 April 2010, Lalit informed Prem that it had been agreed with the plaintiff that representatives of SCCI could remain on board the ship to witness the sampling and loading process but they were not allowed to take samples. Prem was told that Sucofindo would hand over counter samples of the coal to SCCI after the sampling and loading process was completed (which the plaintiff alleged was never done). However, the master of the ship refused to allow loading to resume without confirmation from Awan. As the instructions from Awan to continue loading came on 14 April 2010, loading only resumed on 15 April 2010 and was finally completed on 21 April 2010.

116 After the ship had sailed, Prem remained behind at Banjarmasin to collect the certificates to be issued by Sucofindo for the cargo. These were the certificates (i) of origin; (ii) of weight; (iii) of sampling and analysis as well as (iv) the draft survey report. The certificates were passed by Sucofindo to Berkah who passed them in turn to Prem. Prem received first the draft bills of lading and then the amended draft bills of lading from Kishore.

117 Prem claimed he received instructions from Madhuri on 22 April 2010 informing him that the plaintiff wanted the bills of lading to be split into nine of which eight were to be for 5,000MT while the last bill of lading would be for 1,510MT of coal. The defendants obliged and the nine draft bills of lading were issued and sent to the plaintiff via email on 22 April 2010. On 7 May 201 Prem collected the original bills of lading from IDT.

118 In cross-examination it was established that Prem was not present when Sucofindo did the pre-shipment survey. Neither was he present when Sucofindo's representatives carried out tests nor

did he know what type of samples Sucofindo used in the tests or how the tests were done.

119 Although Prem did not accompany the loaded barges when they were towed to the ship, he insisted there was no possibility of the barges and their tugs going elsewhere other than the ship because the barges would have their names on the front and back ends of the barges and sometimes on the sides as well. In re-examination, Prem said the journey from the jetties to the ship took not 12 to 15 hours but 24 hours or more.

120 Prem disagreed with Philip Tay that the defendants could have switched the stockpiles of coal meant for the contract without the plaintiff's knowledge. He maintained that was not done and if a switch had been made, the plaintiff would have been informed. In any case, a representative from Awan was present when he showed Kulkarni the stockpiles. Further a representative from Awan and from Berkah were on board the ship at all times during the loading operations. However, Prem acknowledged that the plaintiff and Awan would not know if the coal in the stockpiles seen by their representatives was what was loaded onto trucks, taken to the jetties, loaded onto the barges and then on the ship. Neither did Prem know if Sucofindo went to the right stockpiles to carry out the pre-shipment analysis as he was not present; he was only told by Berkah (see [114]). Cross-examination revealed that whatever information Prem had on Sucofindo was not his personal knowledge but largely came from Nonot. Neither did he liaise with Sucofindo, as that was done by Berkah and/or PT Planet.

121 Prem was unable to explain why one of the five barges loaded coal at Batulicin but he hazarded a guess that the coal loaded there must have come from coal mines at Batulicin. The supplier of the Batulicin coal was also Berkah.

122 In the course of cross-examination, Prem conceded that he could have been mistaken that there were two visits and there may have been only one visit to view the stockpiles at Binuang as Kulkarni asserted.

123 Prem had exhibited to his AEIC the report of sampling and analysis of Sucofindo. It was noted therefrom that the analysis only covered 32,000MT of coal, leaving a shortfall of about 8,000MT stipulated under the contract. Prem said the certificate did not cover the coal that was loaded/ shipped at Batulicin.

124 Cross-examination of Prem also established that the four barges that carried coal to the ship were not covered and the cargo became wet when it rained.

125 I turn now to Lalit's testimony. Lalit (described by the third defendant as "his right hand man") played a crucial role in the contract negotiations and in the defendants' performance of the contract as he gave instructions to Prem, the first defendant's man on the ground.

126 In his AEIC, Lalit (DW4) deposed that he was familiar with the coal trade and assisted the first and second defendants in that regard. He contended that there was no truth in the plaintiff's allegation of conspiracy and alleged that the allegation was an afterthought by the plaintiff for the purpose of obtaining an injunction to prevent the defendants from receiving payment under the L/C. He maintained that the first and second defendants were separate legal entities in their own right and there was no conspiracy on their part to commit fraud on the plaintiff with the third defendant. If indeed the defendants intended to defraud the plaintiff, they would not have taken the trouble to negotiate the contract and would simply have signed any contract put forward by the plaintiff. Neither would the first defendant have reduced the contract price by US$68,668.68 from US$2,730,660 to US$2,661,991.32 on account of the findings by Sucofindo, that the coal differed

from the contract specifications.

127 Lalit disclosed that if the contract had been performed and everything had gone smoothly, the first defendant would only have made a small profit of 1.83%. If indeed the first defendant was a fraudster as the plaintiff alleged, it would have simply disappeared after collecting payment under the L/C. Instead, the first defendant returned the money to the negotiating bank.

128 Lalit denied that he had represented to the plaintiff that the first defendant was a Singapore company – the question of the first defendant's place of incorporation never arose. Neither did the plaintiff inform the first defendant of the importance it placed on signing the contract with a Singapore based company. He denied that the first defendant's Singapore address in the contract amounted to a representation and denied all other representations levelled against him by the plaintiff. Lalit contended that he had informed the plaintiff that the first defendant was part of the second defendant's group of companies and the plaintiff asked no further questions about the first defendant thereafter. He said the plaintiff was in fact desperate to conclude the contract as it had entered into Awan's contract first and it needed to procure the coal sold thereunder urgently.

129 Lalit maintained that the coal shipped to Karachi was certified by Sucofindo to be compliant with the contract specifications; Sucofindo's findings were final and binding under the contract and it was the plaintiff who was in breach of the contract in unlawfully rejecting the coal.

130 Lalit added that the first defendant was not liable for demurrage as the parties had varied the contract to ship the coal on a "no demurrage no dispatch" basis. In the alternative, Lalit contended that the first defendant was not liable for demurrage because (i) the plaintiff arranged for the ship to arrive earlier than the time given to the first defendant to load; (ii) the plaintiff instructed the ship to stop loading for an extended period and (iii) the plaintiff did not provide efficient and/or functioning cranes as required under the contract.

131 Lalit disclosed that PT Planet was/is owned by the first defendant and Classic (see [41]). PT Planet and the first defendant have common directors in Dev Sindhu ("Sindhu"), the third defendant, Dalip Nagar and Kuldeep Singh Solanki. However, the ultimate supplier of the coal purchased by the plaintiff was Berkah, an independent third party who was not related to or controlled by any of the defendants. APC (see [105]) had paid on behalf of PT Planet part of the price due to Berkah for the plaintiff's coal. Lalit holds 10% shares in APC with the remaining 90% being held by the third defendant.

132 As for demurrage, Lalit disclosed he had met Kulkarni in Singapore and Jakarta at about the time the ship tendered NOR on 22 March 2010 and shortly thereafter. Jayanta was absent from the meeting in Singapore but he was present at the Jakarta meeting. At both meetings, Kulkarni tried to persuade Lalit to accept the NOR but Lalit refused. Lalit told Kulkarni that he needed a minimum of 20 days to load the coal after the L/C was opened as Lalit wanted confirmation that payment for the coal was secured. That was also why the contract (at Art 7.1) provided for the L/C to be opened at least 20 days before the first date of laycan. In order to persuade the first defendant to load earlier, Lalit alleged that Kulkarni offered to have the shipment loaded on a "no demurrage and no dispatch" basis. Only then did Lalit agree he would do his best to load the coal earlier than the contractual requirement. Lalit promptly sent the following email to Geetha on 22 March 2010 at 4.44 pm:

> We cannot accept the NOR presently – as we are still not ready with our loading plan as informed earlier.
>
> Also, for this loading, as confirmed with Mr Avinash amd Mr Jayanta, we shall be working on No

Dispatch No Demurrage basis.

Lalit claimed the plaintiff did not reply to object to his email. Accordingly, he asserted, the defendants were not liable for demurrage. It was only on 22 April 2010 that Lalit received a copy of Geetha's email to Mahtani enclosing demurrage calculations amounting to US$167,591/- to which he replied immediately to dispute (see [61]).

133 As to why one out of the five barges were loaded at Batulicin jetty, Lalit explained that it was due to his difficulty in obtaining a jetty slot for the last barge to load at Sungai Putting. He had informed Samir of this fact in his email dated 19 March 2010. It was also because Lalit was unable to load the entire cargo required by the plaintiff from Sungai Putting due to insufficient notice being given by the plaintiff. Hence, he loaded the last barge from Batulicin, with small quantities of high quality coal obtained from Batulicin mines at higher prices. The quality of the coal was evidenced in the barge analysis report of Sucofindo for the coal loaded at Batulicin; it had 6,195 kcal/kg, which was well above the rejection limit of 6,100 kcal/kg set in the contract. Lalit denied the coal from Batulicin was inferior to that from Binuang. In any case, the plaintiff bought blended coal which necessarily meant that the coal supplied would be of varying qualities.

134 As for the first defendant's refusal to allow SCCI to do sampling, Lalit pointed out that it was not a contractual requirement; SCCI was only allowed to witness sampling. He noted that Awan's contract (see [12]) contained the same stipulation regarding SCCI's role. In any case, SCCI's findings would have no effect because it was Sucofindo's findings that bound the parties under Art 4.4 (see [45]) of the contract.

135 At this juncture, I should point out that Lalit's interpretation of the plaintiff's contract with Awan is incorrect – Art 4.6 of Awan's contract is not identical to Art 4.5 of the contract at [45(e)]. I shall revert to this issue later.

136 Lalit claimed that he did not instruct Prem to stop SCCI from taking samples of the coal *per se* – he told Prem to stop SCCI from taking samples of the poor quality coal. He added that in Sucofindo's pre-shipment analysis commissioned by PT Planet, the results complied with the contract as can be seen from the results below:

Cargo	Gross calorific value
14,000	6,369
13,000	4,967
13,000	7,218
1,500	6457

If the plaintiff wanted to purchase coal from a single mine, the price would have been much higher than the contract price of US$66 per MT – it would have been almost US$78 per MT at the material time. In any case, it was irrelevant whether the coal was blended or not as it only had to be comply with the contract specifications. Lalit contended that due to the imperfect nature of the blending process, different results could be obtained by different surveyors from the same coal analysed. The only purpose of appointing a second set of surveyors (according to Lalit) was to witness the loading and sampling of the coal to satisfy the plaintiff that the sampling process was proper. If the plaintiff

wanted to conduct tests as well, that could only be carried out on the same samples taken by Sucofindo. Lalit claimed that SCCI was given samples for testing. Yet, the plaintiff had not found out if SCCI had analysed the coal and if SCCI did, the plaintiff had not produced the results.

137 A large portion of Lalit's AEIC contained arguments and legal submissions countering the plaintiff's claim and allegations. It serves little purpose therefor to consider that aspect of his evidence as he went beyond his role as a factual witness. Lalit also dealt with the issue of the splitting of the shipment into nine bills of lading notwithstanding that this was Mahtani's responsibility.

138 It would therefore be more useful to refer to the evidence that was adduced from Lalit during his 1½ days of vigorous cross-examination. In cross-examination, Lalit said he had made a typographical mistake in his email dated 13 April 2010 to Kulkarni stating that SCCI was allowed to witness the loading – he meant to say SCCI was disallowed. He denied that he and Prem refused to take the plaintiff's calls after the ship arrived in Karachi. He pointed out that it was the first defendant's cargo that was stuck in Karachi. If indeed the plaintiff had called him, there was no reason for him not to accept the calls.

139 Cross-examined on the first defendant's Singapore address at No 33 Ubi Avenue 3 #07-12 stated in the contract, Lalit contended it had no significance as it was for communication purposes only. He understood the domicillium article (Art 21) to have the same purpose. Until it was drawn to his attention by counsel for the plaintiff, Lalit was unaware that it was the plaintiff who had inserted the domicillium article in the amendments to the initial draft of the contract he had given to the plaintiff. However, Lalit was aware that the plaintiff had amended his initial draft to remove provisions that disputes would go to arbitration and English law would apply, and replaced those articles with an exclusive jurisdiction article in favour of Singapore.

140 Lalit disagreed with Philip Tay that under Art 3 of the contract, the latest date for the first defendant to load the coal was 3 April 2010. He relied on Art 7.1 for his contention that the plaintiff must first provide a satisfactory L/C to the first defendant at least 20 days prior to the first day of laycan. As the plaintiff only furnished the requisite L/C to the first defendant on 25 March 2010, Lalit argued that the first defendant had until 14 April 2010 (20 days later) to commence loading. The first defendant did not want to be out-of-pocket in paying for the cargo, jetty slots, barges *etc* before the L/C was established. As Lalit was led to believe that the L/C would be opened by 12 March 2010, he indicated to Samir in an email on 19 March 2010 that the first defendant would commence loading the cargo on 5 April 2010 at Sungai Putting.

141 Lalit denied that the first defendant's failure to produce its contract with Berkah (at [12]) was deliberate, as it did not want the plaintiff to know that Sindhu (see [131]) is also the boss of Berkah, besides his interest in PT Planet and the first defendant. Lalit denied that another reason for the non-disclosure was due to the fact that the quality of the coal in the Berkah contract differed from what Sucofindo had certified for the contract.

142 Lalit explained that he disallowed SCCI from sampling the coal on board the ship because the coal was mixed and/or blended. If two companies were to collect samples from the same cargo of coal, they would do so in different ways and thus obtain different results. He denied he ordered SCCI to leave the ship. Cross-examined, it was noted that Lalit's AEIC was incorrect. He had deposed that SCCI was present on board the ship to witness the loading and sampling done by Sucofindo throughout the process. The samples were actually taken by Sucofindo from the barges. He did not see but was informed by Prem that Sucofindo gave samples of the cargo to SCCI.

143 Questioned why the first defendant did not accede to Awan's email request dated 22 April 2010

that Sucofindo add the words set out at [51] to their certificates, Lalit prevaricated – he said the question should be asked of Sucofindo.

144 Contrary to what he said in his AEIC (that SCCI never raised issues on the loading and sampling process by Sucofindo), Lalit was shown email exchanges between Awan and Sucofindo which showed that the former complained of the latter's mode of sampling, which included an allegation that coal samples taken during loading of barges had been tampered with. Apart from his belief, Lalit had no evidence to support his suspicion that SCCI had analysed samples that were provided by Sucofindo and that SCCI's report confirmed that the coal it had tested complied with the contract's specifications, bearing in mind the plaintiff's case that SCCI was never given any samples by Sucofindo.

145 Although the defendants' position was they were the aggrieved party as part of the cargo was pilfered at Karachi port, Lalit agreed that the defendants refused when the plaintiff's solicitors proposed that a joint survey of the coal be carried out by a court-appointed surveyor. His excuse was that there was no need for such a survey since the cargo was the first defendant's as the plaintiff had failed to pay for it. He did not want to have anything further to do with the plaintiff. He disagreed his refusal was due to the fact that unlike Sucofindo, the defendants would not be able to control the court-appointed surveyor. Lalit disagreed that it was also because the defendants knew the cargo was off specifications.

146 I move next to the evidence of the third defendant (DW1). Not surprisingly, he denied all the allegations made by the plaintiff that he was/is the *alter ego* of and had complete control over the contracts, businesses and assets of the first and second defendants and that he had directed and/or procured the fraud perpetrated on the plaintiff. The third defendant accused the plaintiff of turning a simple case of its unlawful rejection of the first defendant's cargo into a wholly unsubstantiated case of fraud and conspiracy. The third defendant further alleged that the plaintiff's motive in obtaining an injunction to restrain the first defendant from receiving payment under the L/C was to stop the cash-flow of the first defendant to force it to settle the plaintiff's claim by giving a substantial discount on the price of the coal. The defendants were made to incur substantial legal costs by being dragged through lengthy legal proceedings. He added that the plaintiff's numerous applications for Discovery and Interrogatories were not only delaying tactics but an indication of the plaintiff's lack of evidence to support its case.

147 The third defendant explained that the first defendant is a joint venture between Sainik Mining (International) Ltd ("SMIL") and Classic (see [41]). The second defendant only became a shareholder of the first defendant on or about 17 March 2009. The shareholdings of SMIL, Classic and the second defendant in the first defendant are 51%, 24% and 25% respectively. The second defendant became a shareholder because of the third defendant's expertise in the Indonesian coal market; the first defendant was keen to enter that market. He pointed out that it would not make sense for the second defendant to carry out an elaborate fraud as alleged by the plaintiff as a mere 25% shareholder when its profit margin from the contract was less than 2%. The third defendant disclosed that besides the first and second defendants, he is also a shareholder and one of the four directors of APC. He is not a director or shareholder of either SMIL or Classic.

148 The third defendant explained that the first and not the second defendant contracted with the plaintiff because the latter refused to furnish a transferable L/C without which the second defendant did not but the first defendant did, have the means to purchase the contracted coal from its own supplier. That was because as of 15 March 2012, the first defendant's paid up capital was US$8,213,750.

149 The third defendant alleged that the plaintiff's unlawful rejection of the coal was evidenced in the plaintiff's solicitors' email dated 17 June 2010 to the defendants' solicitors and caused the defendant to suffer the losses which formed their counterclaim at [43]. The third defendant further alleged that the defendants suffered hardship and a loss to their credit standing with their bank (see [43(e)] as a result of the injunction obtained by the plaintiff. He complained that the plaintiff had the audacity to call upon the bank guarantee provided under the contract by SMASL (see [28]) who is a shareholder of SMIL, thereby putting the first defendant to further expense in mitigating its loss.

150 In cross-examination, the third defendant explained that the defendants refused the offer made by the plaintiff's solicitors at [145] to conduct a joint survey of the discharged coal because he thought it was pointless, citing the threats received by Mahtani at [26] and the pilferage of the cargo as his reasons, although he agreed that a court-appointed surveyor would have acted fairly. Another reason was the plaintiff and/or Awan's refusal to allow the defendants to take samples of the cargo even though it still belonged to the first defendant. The third defendant added that he did not want to accept Awan's offer to buy the coal because of the contract being "completely disregarded".

151 Between January and December 2012, the plaintiff had administered four sets of Interrogatories to the first/second defendants which the third defendant answered. In the third defendant's answers to the third set of Interrogatories, he had disclosed that the first defendant had no employees in Singapore but its employees outside Singapore included Sindhu and Ajay Pujani.

152 The third defendant admitted that although he rejected Awan's offer to buy the coal at Karachi port, he then sold the cargo to an associate of Awan *ie* FZC (see [27]) because he had no choice as the cargo was being pilfered and it was unattended.

153 Sindhu (DW2) testified even though he played no part in the contract. Sindhu is a director of the first defendant, Classic and SMASL as well as a shareholder of Classic and SMASL. Sindhu refuted the plaintiff's case that the third defendant controls the first defendant, pointing out that unlike Sindhu, the third defendant is not even a signatory to any of the first defendant's bank accounts. Sindhu is also the sole signatory of the first defendant's Standard Chartered Bank account and a joint signatory with Rudra Sen Sindhu of its Bank of India account.

154 Sindhu testified that the third defendant kept him apprised of the contract. He was aware that the original contracting party with the plaintiff was meant to be the second defendant. Contrary to the plaintiff' pleaded case, Sindhu asserted that he had every right to give instructions to Lalit and Mahtani on the contract and documentation relating to the L/C because they were assisting the first defendant on the contract, notwithstanding that they were employees not of the first defendant but of the second defendant; but he was not a director of the second defendant.

155 Kumar (DW3) who is an employee of SMASL echoed Sindhu's testimony that the third defendant did not/does not control the first defendant as the major shareholder of the first defendant is SMIL. Kumar is in charge of the finances and documentary records of the first defendant including its bank records and corporate documents. He pointed out that neither the second nor the third defendants has control over the accounts of the first defendant in the sense that they cannot unilaterally cause funds to be taken out or put into the first defendant. Kumar confirmed Sindhu's evidence at [153] on the signatories to the first defendant's bank accounts.

156 As nothing turns on the cross-examination of either Sindhu or Kumar, I move on to the testimony of Nonot from Sucofindo. As observed earlier at [49], Nonot was not the surveyor who did the sampling or surveys; he merely signed Sucofindo's certificate of origin for the pre-shipment survey.

157 In his AEIC, Nonot (DW7) deposed that Sucofindo was established in 1956 and its majority shareholder is the Indonesian government. He stated that Sucofindo carries out its inspections in accordance with international and national standards including ASTM. Instructions for the survey of the coal meant for the ship were given to Sucofindo's Banjarmasin office by PT Planet's letter dated 1 April 2010. PT Planet wanted a pre-shipment and draft survey with analysis. In the said letter, PT Planet was identified as the shipper, the plaintiff was the consignee, the first defendant was the notify party while the goods to be surveyed were 41,500MT of coal.

158 Nonot's AEIC then explained at length what Sucofindo did in carrying out PT Planet's instructions *vis a vis* preparing the pre-shipment analysis, conducting the sampling exercise and the certification process. Apart from his signing the certificate of origin for the pre-shipment survey, all the other certificates including the draft survey certificate and the certificate of weight were signed by Nonot's colleague M Eko Supriana who did not testify.

159 In cross-examination, Nonot said he "monitored and was involved in the shipment". Asked by the court to clarify his answer, Nonot explained he would communicate with his people at Sungai Putting from his Banjarmasin office. Later he would receive the test results carried out by his company's laboratory at Banjarmasin.

160 It was clear from his evidence in cross-examination that Nonot did not conduct any survey at Sungai Putting or Batulicin, he did not deliver to the laboratory the coal samples that were taken by Sucofindo's inspectors, he did not conduct the laboratory tests, he was not on the barges when the coal was delivered to the ship, he was not on the ship when the coal was loaded and he did not prepare any certificates of Sucofindo including the certificate of origin that he signed.

161 It also appeared from Nonot's cross-examination that although one of the five barges loaded coal at Batulicin, that was not strictly correct, the reason being that the coal for the barge AR RAZZAQ 12 actually came from Sepabah which place was eight hours away by road from Batulicin. For that reason, Sucofindo did not carry out the pre-shipment analysis for the Batulicin cargo because it did not have an office in Sepabah. Nonot disclosed he was given information on the Batulicin coal by the shipper's representative.

162 As he did not do the sampling. Nonot's evidence that Sucofindo's inspector would draw coal samples from the conveyor belt taking the coal to the barges at 2-3 minute intervals or 20 increments every hour was not evidence that the court can accept. He was either relying on documentation such as time sheets for his statements or on his own general knowledge of Sucofindo's *modus operandi*. Consequently, Nonot was in no position to tell the court how the sampling process was actually carried, how the coal in every barge was stockpiled before its delivery to the ship and whether sampling of the coal from the barges was from the top, middle or bottom layers of the barges or that a total of 60 increments were taken from every barge. In the case of the coal loaded at Batulicin, it was clear from Nonot's testimony that Sucofindo did not carry out any sampling or tests at all.

163 Even if the court were to accept Sucofindo's certificate of sampling and analysis dated 26 April 2010 at its face value, the information contained therein was inaccurate – the document stated the date of intervention (*ie* the date Sucofindo was involved in the shipment) was between 11 and 21 April 2010. Nonot testified that the certificate covered sampling from the jetties to the barges and from the barges to the ship. However, under further cross-examination, he agreed that the sampling could not have covered the barge loading operations as loading from the jetties onto the four barges at Sungai Putting took place between 7 and 13 April 2013 while loading at Batulicin was between 4 and 6 April (see Prem's evidence at [108]). The period 11 to 21 April 2010 could only have referred to loading on the ship (see [16]). However, Sucofindo's certificate also stated

…The samples were prepared and tested started on 8 April, 2001…

referring to the time when the barge loading operations were still in progress at Sungai Putting.

164 Nonot also did not know the people involved in the exchanges when Philip Tay referred him to emails between Awan's and the plaintiff's representatives.

165 Nonot's attention was then drawn to the fact that Sucofindo had at PT Planets request, changed the standard wording in its certificates from "gross samples were taken during loading *of barge* and sample TM were taken during loading to the vessel" to "gross samples were collected during loading and sample TM were taken during loading of the vessel". Nonot denied the removal of the two words "of barge" was significant or that it compromised Sucofindo's independence, asserting that the reader could tell from the certificate's wording the locations at which Sucofindo had carried out sampling. Even if the court accepts Nonot's explanation, it is to be noted that under Art 4.6 of the contract (at [45(f)]), the raw samples of the coal were to be drawn by the surveyors *on board the ship*. Sucofindo's omission of the two words therefore was misleading as it gave the reader the (wrong) impression that the samples of the coal were taken while the cargo was being loaded on board the ship and it was done on 8 April 2010.

166 I would also add that Sucofindo's certificate of sampling and analysis dated 7 April 2010 is also defective as it pertained to 32,000MT of coal, leaving a balance of 9,500MTof the contracted coal unaccounted for. The stockpile from which the samples were taken was also not identified. Again, Nonot did not carry out that survey.

167 It serves little purpose therefore to dwell further on Nonot's testimony as it is unhelpful to the court's determination of the issues involved. The attempts of Mr Bazul in re-examination to repair the inadequacies in Nonot's evidence did not remedy the situation. Mr Bazul had asked and Nonot had confirmed that he knew the coal samples were accurately taken by Sucofindo's surveyors because they were experienced and were aware of the standard methods and, he had reviewed their time sheets and results analysis. How does this evidence overcome the hearsay rule and the need to have primary evidence before the court? Not one of the makers of Sucofindo's documents (save for the certificate of origin signed by Nonot) or any of its surveyors testified for the defendants.

168 It would not be necessary to review the evidence of the defendants' other factual witness Khubchandani Madhuri Sunder ("Sunder") in any great detail as nothing turns on her testimony. Sunder (DW6) worked for the second defendant as an administrative assistant to Mahtani at the material time and she testified that she complied with Mahtani's instructions and did fax copies of the draft non-negotiable bills of lading to the plaintiff on 29 April 2010. She followed up by forwarding (via courier service) the same documents to the plaintiff. If indeed (as was claimed) the plaintiff did not receive the documents, she found it strange that no one from the plaintiff informed her of the non-receipt.

169 As for Mahtani (DW8), his testimony has already been alluded to (at 26]). Mahtani essentially rebutted Kulkarni's testimony (at [23]) and alleged it was the plaintiff who requested that the shipment be split into nine instead of three bills of lading not to mention amendments to the same.

170 Finally, I turn to the testimony of the defendants' expert Gunn (DW9). Gunn, a geologist by training has had 34 years' experience in the coal business including coal mines, initially as a coal exploration geologist. Gunn is now the managing-director of a New Zealand and two Australian companies involved in the coal industry.

171 I should first point out that a number of paragraphs in Gunn's expert report filed on 10n April 2013 ("Gunn's first report") were expunged on the application of Philip Tay on the ground that they were speculative or without basis. Where Gunn gave his opinion on provisions in the contract (which is outside the purview of the functions of any expert unless he is a legal expert), the paragraphs were also struck out.

172 Gunn's brief from the defendants was to give his opinion on:

(a) whether the coal sampling and testing process conducted by Sucofindo was in line with the methodology of coal sampling under the ASTM standard;

(b) whether the first defendant had reasonably mitigated its losses by selling the coal to FZC on 1 July 2010;

(c) whether there was an available market in Indonesia for the plaintiff to purchase coal of the contracted specifications and quantity on or about 2 March, 11 April, 18 June and 1 July 2010.

In essence, Gunn answered "yes" to all three questions in his first report. In addition, he gave the following prices (from Platts report) of the market prices of the coal on the dates in [172(c)];

Date	**Platts K1 (5,900 kcal)**	**Platts K2 (5,000 kcal)**	**Rate**	**FOB price (5,800 kcal)**
2 March	US$69.57	US$54.34	---	US$66.00
11-25April	US$71.67	US$52.50	0.0213	US$70.54
17-21 May	US$83.05	US$62.63	0.026	US$81.78
10-12 June	US$88.00	US$62.29	0.033	US$88.19
14-21 June	US$89.93	US$65.29	0.031	US$88.19
22-25 June	US$90.00	US$63.50	0.033	US$88.06
26 June – 15 July	US$87.50	US$62.50	0.028	US$84.72

173 Gunn filed a supplementary report on 13 May 2013 ("Gunn's second report") purportedly in response to Norager's first and supplementary reports. However, Philip Tay raised a preliminary objection to the admission of Gunn's second report. He contended that it was a departure from the defendants' pleaded case. Gunn's second report presented a new case altogether for the defendants. Counsel then took the court through Gunn's second report to support his contention.

174 I accepted Philip Tay's objections as a result of which I struck out certain paragraphs in Gunn's second report for the reasons given below.

175 In Gunn's first report, he had stated that he would not comment on Intertek's sampling process and testing methods at Karachi since he understood from the defendants' solicitors that the document was not admissible (since the maker would not be a witness). In Gunn's second report, he said much the same thing. However, Gunn then went on to say that because Norager's first and second reports touched on Intertek's report and the latter accepted that Intertek's findings as accurate, he felt duty-bound as a neutral witness to explain to the court why the Intertek results did

not represent the cargo. Philip Tay pointed out that Norager had in fact made no comments at all on Intertek's findings in either his first or his second report. Norager merely took Intertek's findings at face value and accepted the calorific values set out in Intertek's report. In addition, Mr Bazul had not challenged Norager's reliance on Intertek's report/findings during cross-examination.

176 Gunn's second report then criticised Intertek's results. Philip Tay pointed out that had the plaintiff been given notice earlier that the defendants intended to challenge Intertek's findings when Bala testified (see [77]), then the plaintiff would have attempted to persuade Interterk's surveyor to come to Singapore to testify.

177 Gunn's second report went further to comment on the loading of coal from the conveyor belt into the barges. However, the basis for his opinion was never established from Nonot's testimony – Nonot did not say that Sucofindo sampled coal using a shovel that was inserted into the falling stream as the coal exited the hopper onto the conveyor belt. Gunn then criticised Sucofindo's sampling methodology. Again, his criticism should have been put to Nonot but was not. Gunn also opined that it was not the practice for buyers and sellers to get involved in the specific method of sampling to be employed as they were not in the business of surveying coal.

178 Although he was not present at the time the coal was loaded onto the ship from the barges, Gunn stated that there was no evidence to suggest that the barges that loaded coal from the jetties did not fully transfer the coal onto the ship. Gunn was in no position to comment on whether coal from the barges was loaded onto the ship as he was not at the Anchorage. His views on contractual sampling should have been but were not, told to Lalit and/or the third defendant while they were in the witness stand, to afford them an opportunity to comment.

179 Gunn went further to comment that the method of and the standard to adopt for, the survey of the coal was something for the surveyor to decide. His criticism of Inspectorate's report should have but was not put to either Majeed (see [68]) or Mallik (see [71]). Gunn made many more comments in the same vein. His views on survey methodology should have been put to Norager but counsel for the defendants failed to do so in cross-examination while the plaintiff had closed its case.

180 Gunn's second report also went far beyond commenting on Norager's first and supplementary reports. His views and comments should therefore have appeared in his first report to afford Norager an opportunity to response to the same. Indeed, Gunn's second report went to the extent of saying the coal sampled by Intertek and Inspectorate were not from Indonesia, which was a complete departure from the defendants' case.

181 Understandably therefore, Philip Tay objected to large portions of Gunn's second report as they went beyond his role and brief as an expert witness. Although Mr Bazul sought to show that Gunn's second report was a response to Norager's first and supplementary reports, the court was not convinced. In the result, the court expunged a considerable number of paragraphs in Gunn's second report. However, before the court did so, Philip Tay was tasked to ascertain if Majeed was available to be recalled so that Majeed could respond to the criticisms levelled against Inspectorate by Gunn. Philip Tay informed the court the following morning that it was not possible to secure Majeed's attendance as, besides the time constraints, Majeed needed a visa to come back to Singapore which application required time, a luxury which the court did not have. The possibility of recalling Mallik was therefore not explored.

182 Cross-examination of Gunn revealed that he had had considerable experience doing business in Indonesia (19 years since 1994). Gunn testified that by his calculations, the (average) moisture content of the coal at the loading port was 19%. In calculating the moisture content figure, Gun

relied on information contained in the AEICs of Prem and Nonot. His figure is to be contrasted with Sucofindo's certificate which showed 18% moisture content. Contrary to Norager's opinion that the 1% difference was significant, Gunn opined (in court and in his first report) that it was insignificant, even though under Art 4.1 of the contract (at [45]), the plaintiff was entitled to reject the coal if its total moisture exceeds 18%. It was pure speculation on his part when Gunn both in his first report as well as in court said that the samples of coal containing 19% total moisture was taken from the conveyor belt during loading of the barges. Gunn asserted that based on his experience, the results of the conveyor belt samples would be more sensitive as samples taken from the conveyor belt would be thinner and represent a greater surface area to volume ratio of the coal than samples taken on board the barges. He admitted he did not speak to Nonot on the issue.

183 In Gunn's first report, he had opined that the difference in the dry ash free values was due to the rounding of the weighted average numbers that were not reported in his figures. Cross-examined, Gunn said he did not speak to Nonot on this but he had sat down with Nonot, "went over some numbers" with Nonot and since he used the same methodology as Nonot, he made the foregoing assumption.

184 Although there was no evidence at all before the court (by way of the ship's log) or given to him as part of his brief, Gunn's first report assumed that if the ship's hatch covers were not "watertight, water seepage could also occur during the voyage from the seas or during rain"; he admitted during cross-examination his comment was pure speculation.

185 It was only after he had read Norager's supplementary report that Gunn withdrew his comment that Inspectorate had only sampled coal from the barge RIMAU 3009 which coal was of lower grade.

186 Sometimes Gunn's comments contradicted the evidence before the court. One instance was his theory that there could have been water in the coal. However, Prem had confirmed during cross-examination that there was no water ingress into the barges during the loading of the coal.

187 It serves no useful purpose to comment further on other shortcomings in Gunn's reports. Suffice it to say, they are set out extensively in the plaintiff's closing submissions. What is noteworthy is that in neither of his two AEICs exhibiting Gunn's first and his second report did he refer to Order 40A rule 2 of the Rules of Court (Cap 322, R 5 2006 Rev Ed) ("the Rules') which state:

> Expert's duty to the Court (O. 40A, r. 2)
>
> 2—(1) It is the duty of an expert to assist the Court on the matters within his expertise.
>
> (2) This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.

It was obvious that Gunn had paid no heed to O 40A of the Rules in either of his reports or in his oral testimony.

188 Not surprisingly and as alluded to earlier (at [100]), Norager (in his supplementary report) disagreed with Gunn's opinion/report, in particular on his many speculations.

The issues

189 The issues for this court's determination arising out of the dispute between the parties are:

(a) did the plaintiff inform any of the defendants that the plaintiff required the seller of the coal to be a Singapore company? If so, did the first and or third defendant represent to the plaintiff that the first defendant was a Singapore registered company?

(b) did the third defendant conspire with the first and/or second defendants to defraud the plaintiff?

(c) was the third defendant the *alter ego* of the first and or second defendants such that he directed their commission of fraud on the plaintiff?

(d) did the plaintiff agree to waive demurrage as the defendants asserted?

(e) was the first defendant correct in its contention that the NOR of the ship was tied to and dependant on when the plaintiff opened the L/C?

(f) were the findings of Sudofindo on quality, quantity and weight conclusive under Art 4.4 of the contract?

(g) was the coal loaded on the four barges at Sungai Putting and the one barge at Batulicin actually loaded on board the ship and subsequently discharged at Karachi port?

(h) was the coal supplied by the defendants in accordance with the specifications in the contract?

The findings

(a) Did the plaintiff inform any of the defendants that the plaintiff required the seller of the coal to be a Singapore company?

190 The plaintiff relied heavily on Art 21 of the contract (at [45]). When he was cross-examined on the meaning of the word domicillium, the third defendant said he understood it to mean "the place where it is housed and registered". Lalit on his part stated that the Singapore address of the first defendant was given for communication purposes only (at [139]. The complete Latin phrase is *domicillium citandi et executandi* which literal translation is "house for summoning and upkeep". The English equivalent for the Latin word is domicile. All that the Latin word means is the address nominated by a party in a legal contract where legal notices may be sent. For the plaintiff to equate the word domicillium with a representation by the first defendant that it is a Singapore registered company is really stretching and/or straining the meaning of the word.

191 It should also be noted that there was no evidence that either party had legal advice when negotiating the contract. The second defendant had presented the plaintiff with a draft contract to which the latter proposed a number of amendments including the inclusion of Art 21. It was also in evidence from Lalit and the third defendant that the second defendant's request for a transferable L/C was rejected by the plaintiff and that that was the reason why the contract was "allocated" (in the words of the third defendant) to the first defendant.

192 Consequently, it seems to me that none of the three defendants gave much thought to Art 21 at all. Apart from Samir's claim that he had orally informed Lalit and/or the third defendant that the plaintiff required the seller to be a Singapore company, there was no other evidence by way of email or other correspondence to substantiate the plaintiff's allegation. In the same vein, the plaintiff had no evidence to support its claim that Lalit and/or the third defendant had represented to Samir that

the seller was indeed a Singapore incorporated company. The fact that the first defendant's address in the contract was stated to be at 33 Ubi Avenue 3 #07-12, Tower "B" Vertex, Singapore 408868 does not *per se* equate to a representation by the first defendant that it was/is a Singapore company, bearing in mind my earlier observation in [190].

193 On a balance of probabilities therefore, I find that there was no representation by any of the defendants as pleaded by the plaintiff in its statement of claim. Accordingly, the plaintiff fails in its claim against the defendants on this issue.

(b) Did the third defendant conspire with the first and/or second defendants to defraud the plaintiff?

194 Again, no evidence was adduced in court that even remotely suggested that the third defendant conspired with either the first and/or second defendant to defraud the plaintiff. In the light of the common testimony of Lalit and the third defendant (see [127] and [147]) that the first defendant's profit margin would only have been 1.83% if the transaction had gone smoothly (which evidence the plaintiff did not challenge), what benefit was there for the third defendant to defraud the plaintiff?

(c) Was the third defendant the alter ego of the first and or second defendants such that he directed their commission of fraud on the plaintiff?

195 It is not uncommon in Singapore and elsewhere for that matter for individuals to conduct their businesses through corporate entities. The third defendant was not an exception in this respect. That did not automatically mean that he was/is the *alter ego* of the first and/or the second defendants. In this regard, I am mindful of the evidence given by Sindhu at [153] that the third defendant is not even a cheque signatory of the first defendant's bank accounts. It was also in evidence from Kumar (at [155]) that the major shareholder of the first defendant is not the third defendant but SMIL. The third defendant cannot be the *alter ego* of the second defendant either as he only has 25% share in the company (see [147]) against the 51% shareholding of SMIL.

(d) Did the plaintiff agree to waive demurrage?

196 There are three observations the court makes on this issue. First, the plaintiff signed the Awan contract on 20 February 2010 which was before the date of the contract (5 March 2010). Second, Arts 8.3 and 8.4 of Awan's contract which spelt out the plaintiff's liability for demurrage were mirrored in Arts 8.6 and 8.7 of the contract. Third, the plaintiff did not respond to Lalit's email of 22 March 2010 (at [132]) where he clearly stated the shipment was on "no dispatch no demurrage basis". Instead, the plaintiff's Geetha sent to Lalit a month later on 22 April 2010 the demurrage calculations.

197 Although there was no evidence before the court, it would not be unfair to speculate that Awan most likely would have imposed demurrage on the plaintiff who in turn imposed the same charges on the first defendant. Because the plaintiff was obliged to have the cargo shipped as soon as possible after Awan gave NOR on 10 March 2010, Kulkarni must have in desperation promised Lalit that the plaintiff would waive demurrage in order to persuade the first defendant to accept the ship's NOR given by Awan to the plaintiff and in turn by Kulkarni to Lalit. Having achieved that objective, Kulkarni reneged on his promise to waive demurrage in his email of 23 April 2010 at [65] by relying on Art 20 of the contract which states:

> This Contract contains the entire Contract between Buyer and Seller with respect to the subject matter herein and supersedes all previous writing, understandings, negotiations representations or

Contracts with respect thereto.

198 It is noteworthy that the oral waiver of demurrage was agreed not *before* but *after* the contract was concluded. Hence, Art 20 does not apply. I am of the view that the plaintiff should not be allowed to resile from its position after having taken advantage of the first/second defendants, who acted on Kulkarni's waiver of demurrage in good faith to its detriment (by paying extra for earlier loading). Consequently, I find that Kulkarni had on the plaintiff's behalf, agreed to waive demurrage as well as dispatch.

(e) Was the first defendant correct in its contention that the NOR of the ship was tied to and dependant on when the plaintiff opened the L/C?

199 The salient clauses of the L/C are the following:

> 31C Date of issue: 100310;
>
> 31D Date and place of expiry: 100510 Singapore
>
> 44C Latest date of shipment: 100410
>
> 47A – 15. Vessel nomination should be advised by SWIFT through the L/C issuing bank, such a message to form part of the negotiating documents.

200 There was no mention of NOR in the L/C nor were there any conditions tying the opening of the L/C to the NOR. However Art 7 of the contract relating to payment terms (see [45]) stipulated that:

> the clean and workable Letter of Credit must be established at least (20) days prior to the first day of load port laycan…

As the L/C was opened on 10 March 2010, the first defendant was obliged to commence loading only 20 days later, which would be on or after 30 March 2010. The first defendant's refusal to accept the plaintiff's NOR on 22 March 2010 was therefore justified.

(f) Were the findings of Sudofindo on quality, quantity and weight conclusive under Art 4.4 of the contract

201 I first turn to the Evidence Act on how primary and secondary evidence of documents should be adduced under ss 64 and 65:

> Primary evidence
>
> 64 Primary evidence means the document itself produced for the inspection of the court.
>
> ...
>
> Secondary evidence
>
> 65 Secondary evidence means and includes —
>
> ...
>
> (e) oral accounts of the contents of a document given by some person who has himself seen

it.

202 As noted at [49], Nonot testified for the defendants on behalf of Sucofindo even though the only certificate he signed on Sucofindo's behalf was the certificate of origin (see [156]). Worse, the actual survey documents were not produced as primary evidence.

203 As stated at [77], the plaintiff sought to rely on s 32(1)(j)(iv) while the defendants relied on s 32(1)(b) of the Evidence Act. Section 32 states:

> 32 — (1) Subject to subsections (2) and (3), statements of relevant facts made by a person (whether orally, in a document or otherwise), are themselves relevant facts in the following cases:
>
> …
>
> (b) when the statement was made by a person in the ordinary course of a trade, business, profession or other occupation and in particular when it consists of —
>
> (i) any entry or memorandum in books kept in the ordinary course of a trade, business, profession or other occupation or in the discharge of professional duty;
>
> ...
>
> (iv) a document constituting, or forming part of, the records (whether past or present) of a trade, business, profession or other occupation that are recorded, owned or kept by any person, body or organisation carrying out the trade, business, profession or other occupation,
>
> and includes a statement made in a document that is, or forms part of, a record compiled by a person acting in the ordinary course of a trade, business, profession or other occupation based on information supplied by other persons;
>
> or is made by person who is dead or who cannot be produced as witness;
>
> (*j*) when the statement is made by a person in respect of whom it is shown —
>
> (i) …
>
> (ii) …
>
> (iii) that he is outside Singapore and it is not practicable to secure his attendance; or
>
> (iv) that, being competent but not compellable to give evidence on behalf of the party desiring to give the statement in evidence, he refuses to do so;
>
> …

204 The certificates and findings of Sucofindo were hotly disputed by the plaintiff and conversely, the findings of Intertek were not accepted by the defendants. The same shortcomings on Nonot's testimony are equally applicable to Intertek's reports. The fact that the Sucofindo and Intetek documents are found in the agreed bundles merely dispensed with the formality of proving those documents. The contents had to be proven by their makers. At the risk of repetition, Nonot was not the actual surveyor who took samplings and/or surveyed the coal while it was loaded on the barges

at Sungai Putting and Batulicin or on the ship at the Anchorage.

205 By the same token, no surveyor from Intertek testified. Majeed the operations manager from ISIP (see [68]) collected the coal samples which were then passed onto Mallik whose evidence revealed he did not carry out the analysis himself or sign the certificates for the test results.

206 The certificates of Sucofindo and well as Intertek and Inspectorate did not therefore satisfy the requirements of s 32 of the Evidence Act on admissibility. In the case of Intertek's test reports and inspection certificates, it is not enough for the plaintiff to have its legal manager testify that he had made unsuccessful efforts without more, to procure the attendance of the surveyor who conducted the tests. In order to persuade the court that Intertek's reports/certificates came within s 32(1)(j)(iii) of the Evidence Act, evidence must be produced to show what steps the plaintiff had taken to persuade the surveyor in question to come to Singapore to testify at this trial.

207 If the plaintiff wished the court to accept the findings in the certificates and tests reports of Inspectorate and Intertek, it would have to accept Sucofindo's certificates. Conversely, the defendants would equally have to accept the certificates and test reports of Inspectorate and Intertek if it wants the court to accept the contents of Sucofindo's documents as true.

208 Consequently, the testimony of the three witnesses who testified on the survey results/reports of the three surveyor companies has no probative value. In this connection, the defendants' reliance on the case of *Toepfer v Continental Grain Co* (*supra* [77]) is misconceived. Unless and until the defendants have proved the truth of the contents of Sucofindo's certificates to the court's satisfaction (which was not done) as the plaintiff challenged them, the defendants cannot rely on this case for the proposition that a contractually binding certificate from an independent person is binding and cannot be challenged for any reason other than fraud and collusion.

209 I should add at this juncture that the contract gave the plaintiff the right to appoint an independent inspection agency under Art 4.5 at its own cost. Hence, the first defendant was in breach in disallowing SCCI to go on board to witness the sampling/survey of the coal shipment. Earlier (at [67]), I had alluded to the letter from PT Planet to Sucofindo dated 7 April 2010 giving instructions of pre-shipment and draught survey, and analysis. Even though it was PT Planet and not the first defendant who gave instructions to Sucofindo, that does not relieve the first defendant from its contractual obligation to allow sampling by the plaintiff's surveyors under Arts 4.5 and 4.6 of the contract. The plaintiff had no privity of contract with PT Planet. Why did the first defendant allow a stranger to the contract to dictate terms to Sucofindo under Art 5.1 of the contract?

(g) Was the coal loaded on the four barges at Sungai Putting and the one barge at Batulicin actually loaded on board the ship and subsequently discharged at Karachi port?

210 The evidence on this issue is inconclusive in the light of the shortcomings in the reports and certificates of Sucofindo (at the port of loading) and of Inspecorate and Intertek at the discharging port. That said, if the court had to choose between the reports of Sucofindo and those of Inspectorate, then the latter are to be preferred. At least the person (Majeed) who collected the coal samples from the ship's stockpile for testing testified. While Norager did not say with any degree of certainty (at [96]) that sampled coal may not have been shipped, he nevertheless had experience in Indonesia of seeing barges with rejected cargoes of coal being towed to another vessel to be loaded. He thought it was possible that the coal loaded on the ship may not have been what was sampled by Sucofindo at the Sungai Putting jetty. I note in this regard Prem's testimony (at [119]) that the journey from the jetties to the ship took 24 hours or more. That being the case, the possibility cannot be ruled out that coal rejected by another vessel may have been loaded on the ship. No one from the

defendants or Awan was present on board the ship to safeguard against this possibility. In view of the shortcomings in their certificates and the lack of any credible evidence from Nonot, the court cannot rely on Sucofindo's certificates at all to confirm that the coal sampled at the jetties and barges was actually loaded on the ship.

211 In the case of coal loaded at the Batulicin jetty, it was Nonot's evidence in any case that Sucofindo did not even conduct preshipment analysis there. Hence, there is no evidence whatsoever that the coal loaded at Batulucin (which came from Sepabah (see [161]) complied with the contract's specifications.

212 Norager had opined (see [95]) that because of the vast discrepancies in the figures for calorific value and total moisture content shown in the certificates of Sucofindo, Intertek and Inspectorate as set out in [24] taking them at face value as compared with the contractual specifications in the table at [45], the coal that arrived at Karachi could not have been that sampled by Sucofindo and could not have been what was shipped; the coal from the ship did not meet the contract specifications for total moisture content and calorific value.

213 Norager had noted that the barge loading schedules exhibited in Prem's AEIC recorded heavy rain on three days. Yet, Sucofindo's certificates of samples collected for total moisture content during loading of the ship at the anchorage did not reflect this factor. However, even after making allowances for wetting of the cargo by rain, Norager said he still could not account for the vast differences in the certificates of the three sets of inspectors.

214 In this regard, I prefer Norager's testimony to Gunn's as Norager's reports were balanced and took into consideration all relevant factors and evidence. His testimony is to be contrasted with that of Gunn whom I found to be overly biased in the defendants' favour, in complete disregard of the duties of an expert under O 40A of the Rules.

215 A factor which in my view reinforces Norager's opinion was the defendants' refusal to conduct a joint survey of the coal at Karachi with the plaintiff. No valid/credible reason was given for the defendants' rejection of the plaintiff's request. In this regard, the third defendant had acknowledged that the plaintiff's proposal was reasonable yet he said it was "pointless" (see [150]). Why? Even if the telephone threats received by Mahtani were true (of which I am sceptical) what did those threats have to do with conducting a joint survey of the landed coal? As the defendants alleged that some of the coal had been pilfered by Awan no less, one would have thought that a joint survey would have been all the more necessary to determine the actual quantities and quality of the coal that remained in the yard. I believe the defendants rejected the plaintiff's proposal of a joint survey because a survey would have confirmed that the coal landed at Karachi did not meet the contract's specifications.

216 My finding is reinforced by Lalit's refusal to allow SCCI to do sampling of the coal on board the ship. Quite apart from the fact that Lalit's interpretation of Art 4.5 of the contract was wrong, his explanation (at [136]) that he told Prem to stop SCCI from taking samples of the poor quality coal is unconvincing. He himself had confirmed Prem's testimony that the plaintiff bought blended coal; by the time the cargo was loaded on the ship, the coal would have been blended at least twice according to Prem's testimony at [111]. Therefore, there was no possibility of SCCI only taking samples of poor quality coal

(h) Was the coal supplied by the defendants in accordance with the specifications in the contract?

217 On a balance of probabilities and following upon my observations in [210] and [211], I find that it was unlikely that the coal that arrived in Karachi was that sampled by Sucofindo at the Sungai Putting jetty.

218 It follows from the court's findings that the plaintiff succeeds in its claim against the first defendant although it fails in its claims against the second and third defendants for the reasons given earlier at [190] to [195]. The defendants' counterclaim is also dismissed.

Conclusion

219 The plaintiff is therefore awarded interlocutory judgment against the first defendant with damages to be assessed with the question of interest on the damages (when assessed) together with the issue of costs of the assessment reserved to the Registrar. The plaintiff's claims against the second and third defendants are dismissed with one set of costs (on a standard basis) to the two defendants (since the claims are intertwined). The plaintiff shall have its costs of the claim against the first defendant and the costs of the defendants' counterclaim on a standard basis to be taxed unless otherwise agreed.