Opinion issued December 8, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00309-CV

ENTERPRISE PRODUCTS OPERATING, LLC, Appellant

V.

TRAFIGURA AG, Appellee

On Appeal from the 333rd District Court
Harris County, Texas
Trial Court Case No. 2014-02806

MEMORANDUM OPINION

This appeal arises out of a decade-long contract dispute between Trafigura AG and Enterprise Products Operating, LLC. A jury found that Enterprise breached the contract between the parties and awarded Trafigura actual damages and attorneys' fees. On appeal, Enterprise brings four issues. First, it challenges

Trafigura's standing and capacity to sue Enterprise. Second, Enterprise argues that the trial court erred by submitting an unambiguous contract to the jury. Third, Enterprise also argues that the evidence is legally and factually insufficient to support the jury's finding of breach. Fourth, Enterprise contends the trial court improperly calculated prejudgment interest. We affirm.

Background

Trafigura is a commodities trading company that buys oil and gas products and transports and sells them internationally. Enterprise is a midstream energy services company. Enterprise has a facility and an export terminal on the Houston Ship Channel for processing oil and gas products and loading them onto refrigerated tankers before shipment.

Enterprise and Trafigura have entered into "over a hundred" transactions for the purchase of oil and gas products like the transaction here. Enterprise and Trafigura's course of dealing consisted of exchanging a short document highlighting the key terms of each transaction, such as the parties, dates, estimated price, quantity of goods, and other transaction-specific information. Enterprise and Trafigura incorporated standard terms by reference to a separate long-form contract.

In July 2009, Enterprise and Trafigura executed an Export Contract Amendment ("Export Contract"). Enterprise sold 400,000 barrels of propane and 125,000 barrels of normal butane (collectively, the "cargo") to Trafigura. The Export

Contract incorporated by reference general terms and conditions ("GTCs") that addressed other common provisions:

> Enterprise Products Operating LLC Natural Gas Liquids Purchase, Sale or Exchange General Terms and Conditions and Enterprise Ship Nomination and Dock Procedures (a copy of which shall be provided upon request) are incorporated herein by reference for all purposes.

These 2001 GTCs were not attached to the Export Contract.

According to the Export Contract, Enterprise had to sell Trafigura pure propane and butane that met Enterprise's export specifications. The parties attached a separate document listing various substances and compounds for the specific purity standards and prohibiting contamination of the cargo:

> This specification defines only a basic purity for this product. This product is to be free of any contamination that might render the product unusable for its commonly used applications. Specific contaminants include (but are not limited to) dirt, rust, scale, and all other types of solid contaminants, caustics, chlorides, heavy metals, and oxygenates.

After execution of the Export Contract, Enterprise began loading propane and butane into the tanks of the vessel named *Clipper Sirius* in September 2009. Intertek, Enterprise's independent inspection company, found black residue in the manifold strainer when it was checking the purity of the cargo during the quality inspection. The substance was described as a "black blob" that had a "mercaptan odor . . . like the stench of a skunk." The residue was conspicuously different from the appearance and smell of the cargo because propane and butane are "clear" and "odorless."

Intertek notified Enterprise about this finding. Despite the black blob, Intertek's composite test results revealed that the cargo met basic purity standards.

A dispute arose about whether the cargo was contaminated. Even though the parties had not resolved the dispute, Trafigura transported the cargo from Houston to Ecuador. When the *Clipper Sirius* arrived in Ecuador, Trafigura filtered the contaminants from the cargo, leaving the solid black matter in the *Clipper Sirius's* tanks. Trafigura resold the cargo for the full contract price of $27,711,654.68.

An inspection of the *Clipper Sirius* confirmed that the black solid matter at the bottom of the tanks tested positive for caustics, which have a high pH. Producers use caustic materials to remove acidic sulfur compounds from hydrocarbons. The *Clipper Sirius* required extensive professional cleaning to remove the caustic residue from the tanks. Under an implied term of a charter agreement between Trafigura and the ship owners, Trafigura was prohibited from transporting dangerous cargo, like caustics, without giving notice to the ship owners to "ensure that the cargo could be carried without causing damage." The ship owners sent a letter to Enterprise and Trafigura outlining the cleaning processes and procedures. The *Clipper Sirius* returned to Houston where the cleaning operations began. The ship owners incurred $1,459,791.85 in cleaning costs. The ship owners sent a notice to Trafigura about starting arbitration proceedings to recover cleaning costs and lost income they would have earned while the *Clipper Sirius* was being cleaned.

Meanwhile, in November 2009, Trafigura, through its counsel, sent a letter to Enterprise detailing Enterprise's potential liability for default under the Export Contract and requesting enforcement of the indemnity provision for loading contaminated cargo onto the *Clipper Sirius*. Under this provision, Enterprise had to defend, indemnify, and hold Trafigura harmless for all out-of-pocket expenses, including any legal costs, incurred if Enterprise disregarded its obligation to provide Trafigura conforming cargo in connection with damages resulting from contaminants, among other things. Enterprise denied any obligation to defend or indemnify Trafigura against any of the ship owners' claims.

Later, in 2011, the ship owners began arbitration proceedings against Trafigura. Following a formal invitation to participate in the arbitration proceedings between the ship owners and Trafigura, Enterprise continued to deny liability for any contaminated cargo, refused to indemnify Trafigura against the ship owners' claims, and declined to participate in the arbitration. In 2013, the ship owners filed a detailed claim submission in the arbitration proceedings.

In January 2014, Trafigura sued Enterprise in state court alleging breach of contract and breach of warranty.[1] Trafigura alleged that Enterprise breached the Export Contract by delivering contaminated cargo and by failing to defend and

[1] In 2013, Trafigura sued Enterprise in federal court. The suit was dismissed without prejudice due to lack of federal subject matter jurisdiction. Trafigura refiled the lawsuit in state court in 2014.

indemnify it against the ship owners' claims. Trafigura also alleged that Enterprise breached the warranties in the "General Terms and Conditions for International Purchase and Sale of Propane, Mixed Butane And/Or LPG Mix," ("Propane GTCs.") Trafigura sought actual damages, attorneys' fees, and costs incurred here and in the arbitration proceedings. Trafigura also sought a declaratory judgment that Trafigura was entitled to be indemnified under the Export Contract. Enterprise answered and asserted affirmative defenses, such as statute of limitations, contractual limitations, and contractual risk of loss, among other defenses.

The trial court abated the proceedings while Trafigura's arbitration with the ship owners continued. In December 2017, Trafigura settled with the ship owners for $3,083,896.05 in damages and interest, $1,027,713.59 in attorneys' fees, and $32,581.88 in arbitration fees. Trafigura's insurer paid the settlement amount. The Trafigura-Enterprise litigation resumed, and Trafigura amended its petition, added claims for promissory estoppel, negligent misrepresentation, ambiguity, breach of contractual indemnification, and reformation of contract, and sought indemnification of the settlement payments and additional fees incurred during arbitration.[2] During discovery, Enterprise produced the 2001 GTCs, arguing that the Export Contract incorporated the 2001 GTCs and not the Propane GTCs.

---

[2] Trafigura incurred $399,571.94 in attorneys' fees and expert fees during the arbitration proceedings.

Enterprise filed a motion for summary judgment. Enterprise denied breaching the Export Contract, contending that it did not deliver defective or non-conforming goods to Trafigura. Enterprise argued that the Export Contract incorporated the 2001 GTCs, not the Propane GTCs, and that Trafigura failed to timely object in writing to the proposed terms of the 2001 GTCs. It also argued that the 12-month contractual limitations period in the 2001 GTCs barred Trafigura's claims because Trafigura sued Enterprise almost four years after its claims arose. Finally, it argued that the subrogation waiver in the 2001 GTCs precluded recovery for any amounts paid by Trafigura's insurer.

Trafigura responded to Enterprise's motion for summary judgment. Trafigura contended that the Export Contract incorporated the Propane GTCs, even though there was a discrepancy in the title. Trafigura contended that a latent ambiguity, or, in the alternative, a mutual mistake of fact existed. It asserted that their course of dealing showed that the parties relied on the Propane GTCs based on an irreconcilable system issue that prevented Enterprise from changing the title of the appropriate GTCs to the Propane GTCs.

Trafigura also asserted that all provisions that contained the 2001 GTCs—including the contractual limitations period and the subrogation waiver—did not apply because the Propane GTCs governed the Export Contract. Trafigura also argued that it timely sued Enterprise and that the contract limitations period was void

on public policy grounds because it shortened the statutory two-year limitations period to 12 months.

Enterprise also filed a plea to the jurisdiction seeking dismissal of the case. Enterprise alleged that Trafigura lacked standing and capacity to sue. Enterprise argued that Trafigura suffered no injury because Trafigura's insurance carrier, not Trafigura, paid for the arbitration and litigation proceedings.

After the hearings on Enterprise's motion for summary judgment and plea to the jurisdiction, the trial court denied Enterprise's plea and motion for summary judgment. The jury found that Trafigura and Enterprise agreed that the Export Contract would incorporate the Propane GTCs. The jury also found that Enterprise violated the Export Contract, and its failure was not excused by waiver or ratification. The jury awarded Trafigura $2,474,614.32 in actual damages. The jury also awarded Trafigura $889,158.76 in attorneys' fees.

The trial court entered judgment on the jury's verdict and awarded Trafigura pre- and post-judgment interest and court costs. Trafigura moved to modify the judgment to correct two scriveners' errors in the award, one related to the amount of attorneys' fees and the other to correct a computational error. The trial court granted the motion and signed an Amended Final Judgment. Enterprise appealed.

Standing and Capacity

In its first issue, Enterprise argues that the trial court erred by denying its plea to the jurisdiction because Trafigura lacked standing and capacity to sue.

A. Standard of review

We review de novo a trial court's ruling on a plea to the jurisdiction. *See Farmers Tex. Cnty. Mut. Ins. Co. v. Beasley*, 598 S.W.3d 237, 240 (Tex. 2020). A plea to the jurisdiction is a dilatory plea that seeks dismissal of a case for lack of subject matter jurisdiction. *Harris Cnty. v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004). A defendant may use a plea to the jurisdiction to challenge whether the plaintiff has met its burden of alleging jurisdictional facts or to challenge the existence of jurisdictional facts. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226–27 (Tex. 2004).

A court may consider evidence that is relevant to jurisdiction. *See Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000). "[W]hen a plea to the jurisdiction challenges the existence of jurisdictional facts with supporting evidence, the standard of review mirrors that of a traditional summary judgment: all the evidence is reviewed in the light most favorable to the plaintiff to determine whether a genuine issue of material fact exists." *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 550 (Tex. 2019). If the defendant establishes that the trial court lacks jurisdiction, the plaintiff must then show that there is a material fact question about

jurisdiction. *Miranda*, 133 S.W.3d at 227–28. If the jurisdictional evidence raises a fact issue, the plea cannot be granted, and a fact finder must resolve the issue. *Id*. On the other hand, if the evidence is undisputed or fails to raise a fact issue, the plea is determined as a matter of law. *Id*. at 228.

B. Applicable law on standing

"In Texas, the standing doctrine requires a concrete injury to the plaintiff and a real controversy between the parties that will be resolved by the court." *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 154 (Tex. 2012). Generally, to have standing (1) the plaintiff must be injured; (2) the injury must be fairly traceable to the defendant's conduct; and (3) the injury must be likely to be redressed by the requested relief. *See id*. at 155. "A plaintiff does not lack standing simply because he cannot prevail on the merits of his claim; he lacks standing because his claim of injury is too slight for a court to afford redress." *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 305 (Tex. 2008).

C. Analysis of standing

Enterprise contends that Trafigura was not harmed because Steamship Mutual Underwriting Association (Bermuda) Ltd. ("Steamship Mutual"), Trafigura's insurer, paid the settlement, attorneys' fees, and expenses related to the arbitration proceedings and this lawsuit. In response, Trafigura asserts that standing does not

require Trafigura to pay damages, fees, and expenses itself, but merely requires that Trafigura be actually aggrieved. We agree.

The record reflects that the cargo provided by Enterprise was contaminated by caustics based on the jury's verdict. It also reflects that Trafigura breached its agreement with the ship owners based on the presence of contaminated cargo in the *Clipper Sirius*. Because the ship owners professionally cleaned the tanks to remove the caustic matter, the ship owners began arbitration proceedings against Trafigura and sought to recover cleaning costs and lost income.

The record also shows that Trafigura disclosed to Enterprise that it carried liability insurance for the claims asserted against it in the arbitration proceedings. T. Baker, Trafigura's in-house counsel, testified to this point at trial. He stated that Trafigura had paid a $50,000 deductible to Steamship Mutual towards the payment of all the fees, costs, and expenses associated with the arbitration proceedings. Baker also testified that Trafigura wanted to settle with the ship owners because the parties' expert reports concluded that Trafigura's liability was "clear" and that "a tribunal would determine that [Trafigura was] at fault for the damage caused to the ship" based on Enterprise's contaminated cargo.

Thus, the record reflects that Trafigura's injury was concrete, particularized, and definite. Trafigura's actual injuries arose out of arbitration proceedings with the ship owners and that Trafigura's injury is fairly traceable to Enterprise's conduct by

supplying contaminated goods to Trafigura. *See Heckman*, 369 S.W.3d at 157. These facts are sufficiently personal to Trafigura. *Id*. Additionally, Trafigura's injury is also likely to be redressed by the requested relief: actual damages, attorneys' fees, costs, and a declaratory judgment. *Salas v. LNV Corp.*, 409 S.W.3d 209, 216 (Tex. App.—Houston [14th Dist.] 2013, no pet.). Enterprise has not established that Trafigura lacked standing to maintain its claims. *See Diogu v. Ratan-Aporn*, No. 01-14-00694-CV, 2015 WL 3982531, at *6 (Tex. App.—Houston [1st Dist.] June 30, 2015, pet. denied).

D. Applicable law of capacity

Along with standing, a party must have capacity to sue. *See Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005). "[T]he issue of capacity is conceived of as a procedural issue dealing with the personal qualifications of a party to litigate." *Id.* (citation and internal quotation omitted); *Nootsie, Ltd. v. Williamson Cnty. Appraisal Dist.*, 925 S.W.2d 659, 661 (Tex. 1996) ("[A] party has capacity when it has the legal authority to act, regardless of whether it has a justiciable interest in the controversy."). Unlike standing, a challenge to a party's capacity must be raised by a verified pleading in the trial court. TEX. R. CIV. P. 93(1)–(2); *Sixth RMA Partners, L.P. v. Sibley*, 111 S.W.3d 46, 56 (Tex. 2003).

E. Analysis of capacity

Enterprise argues that Trafigura did not have the legal capacity to sue on behalf of Steamship Mutual. Trafigura argues that Enterprise waived its capacity argument because its pleading challenging Trafigura's lack of capacity was not verified by an affidavit as required by Rule 93(2) of the Texas Rules of Civil Procedure. TEX. R. CIV. P. 93(2).

Enterprise admits that it did not timely file a verified denial. Indeed, Enterprise asserts that the verified denial was filed after the court had already denied its plea to the jurisdiction. Enterprise concedes that it "originally had no basis to file a verified denial of Trafigura's claim of capacity . . . ." Because Enterprise failed to challenge Trafigura's capacity to sue in a verified pleading, we hold that Enterprise's issue is waived. *See Nine Greenway Ltd. v. Heard, Goggan, Blair & Williams*, 875 S.W.2d 784, 787 (Tex. App.—Houston [1st Dist.] 1994, writ denied) ("A party who fails to raise the issue of capacity through a verified plea waives that issue at trial and on appeal."); *King-Mays v. Nationwide Mut. Ins. Co.*, 194 S.W.3d 143, 145 (Tex. App.—Dallas 2006, pet. denied) (holding that failure to file verified denial of insurer's capacity to sue as subrogee led to waiver).

Having determined that Trafigura had standing to sue and that Enterprise waived its challenge to Trafigura's capacity to sue, we hold that the trial court did not err by denying Enterprise's plea to the jurisdiction.

We overrule Enterprise's first issue.

Breach of Contract

A. Whether the export contract is ambiguous

In its second issue, Enterprise contends the trial court erred by failing to construe the incorporated-by-reference provision to mean that the parties agreed to incorporate the 2001 GTCs. Enterprise also contends the trial court erred by failing to submit that issue to the jury.

1. Standard of review

The construction of an unambiguous contract is a question of law for the court, which we review de novo. *Kachina Pipeline Co., Inc. v. Lillis*, 471 S.W.3d 445, 449 (Tex. 2015). If the contract is unambiguous, the court must enforce the contract as written. *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996). If, however, the contract is ambiguous, then interpretation of the contract presents a fact issue for the jury. *Columbia Gas Transmission Corp. v. New Ulm Gas*, Ltd., 940 S.W.2d 587, 589 (Tex. 1996). A trial court errs if it does not construe an unambiguous provision as a matter of law, and instead, submits the issue to the jury. *Grohman v. Kahlig*, 318 S.W.3d 882, 887 (Tex. 2010) (per curiam); *Transcon. Gas Pipeline Corp. v. Texaco, Inc.*, 35 S.W.3d 658, 665 (Tex. App.—Houston [1st Dist.] 2000, pet. denied).

2. Applicable law

In construing a contract, we must look to the language of the parties' agreement to determine the true intentions of the parties as written. *Barrow-Shaver Res. Co. v. Carrizo Oil & Gas, Inc.*, 590 S.W.3d 471, 479 (Tex. 2019). "If we determine that the contract's language can be given a certain or definite legal meaning or interpretation, then the contract is not ambiguous and we will construe it as a matter of law." *El Paso Field Servs., L.P. v. MasTec N. Am., Inc.*, 389 S.W.3d 802, 806 (Tex. 2012). But if the contract is subject to two or more reasonable interpretations after applying the pertinent rules of construction, the contract is ambiguous, creating a fact issue on the parties' intent. *Columbia Gas*, 940 S.W.2d at 589. For an ambiguity to exist, both interpretations must be reasonable. *Id*.

3. The export contract contains a latent ambiguity

In the Export Contract, Enterprise and Trafigura agreed:

> Enterprise Products Operating LLC Natural Gas Liquids Purchase, Sale or Exchange General Terms and Conditions and Enterprise's Ship Nomination and Dock Procedures [the "2001 GTCs"] (a copy of which shall be provided upon request), are incorporated herein by this reference for all purposes.

Because the Export Contract named the set of GTCs, Enterprise contends that the Export Contract unambiguously incorporated the 2001 GTCs by reference. Enterprise also contends that the parol evidence rule barred Trafigura from using extrinsic evidence to change the unambiguous meaning of the incorporation-by-

reference clause to apply the Propane GTCs. In response, Trafigura asserts that the Export Contract contains a latent ambiguity as to which set of GTCs were incorporated because the circumstances around the parties' course of dealing shows that the parties never performed under the 2001 GTCs. Parol evidence was therefore admissible to show that the parties intended to incorporate the Propane GTCs.

The parol evidence rule prohibits a party to an unambiguous contract from presenting extrinsic evidence of prior or contemporaneous agreements "for the purpose of creating an ambiguity or to give the contract a meaning different from that which its language imports." *David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 450 (Tex. 2008) (per curiam); *see DeClaire v. G & B Mcintosh Family Ltd. P'ship*, 260 S.W.3d 34, 45 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (op. on reh'g). But the parol evidence rule "does not prohibit consideration of surrounding circumstances that inform, rather than vary from or contradict, the contract text." *Hous. Expl. Co. v. Wellington Underwriting Agencies, Ltd.*, 352 S.W.3d 462, 469 (Tex. 2011). A court may consider circumstances of the agreement to determine whether an ambiguity about the intent embodied in the contract's language exists, and it may admit extraneous evidence to make this determination. *URI, Inc. v. Kleberg Cnty.*, 543 S.W.3d 755, 765–66 (Tex. 2018); *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995) (per curiam). As the Texas Supreme Court observed:

> A contract ambiguity appears in two forms: patent or latent. *URI, Inc.*, 543 S.W.3d at 765. A patent ambiguity is evident on the face of the contract while a latent ambiguity arises when a contract which is unambiguous on its face is applied to the subject matter with which it deals and an ambiguity appears by reason of some collateral matter, such as the circumstances present when the contract was entered. *Id*.

Although the evidence shows that the Export Contract identifies the 2001 GTCs, the parties dispute the actual terms of the parties' agreement. The narrow issue here is whether the circumstances reveal a latent ambiguity. Enterprise argues that the evidence of the surrounding circumstances shows that Trafigura knew Enterprise refused to change the name to identify the Propane GTCs. The evidence, however, shows that a system issue prevented the parties from changing the title of the incorporation-by-reference provision in the Export Contract from the 2001 GTCs to the Propane GTCs.

K. Ballard, a Trafigura employee, testified about the circumstances of the parties' agreements. As for the parties' general course of dealing, Enterprise and Trafigura executed a short contract containing all specific terms and incorporated by reference a separate document containing general terms and conditions. Upon executing the short contract, Enterprise supplied Trafigura with a long contract containing the general terms and conditions upon request.

Trafigura presented evidence about the parties' course of dealing to show that the Trafigura and Enterprise had always performed under the Propane GTCs. During the parties' negotiations in 2004, about four years before the dispute, Ballard

reviewed a short contract and requested the general terms and conditions from B. Westerdahl, an Enterprise employee. Westerdahl emailed Ballard the Propane GTCs. Ballard noticed that the title of the document Westerdahl had sent did not match the title of the GTCs named in the short contract, which displayed the title of the 2001 GTCs. Ballard alerted Westerdahl to this discrepancy. Westerdahl informed Ballard that Enterprise had discontinued using the 2001 GTCs. Even though the short contract referenced the 2001 GTCs, Westerdahl instructed Ballard to rely on the Propane GTCs because he could not change the text from the 2001 GTCs to the Propane GTCs.

Dissatisfied with Westerdahl's response, Ballard contacted Enterprise on a separate occasion to amend the provision that inaccurately identified the 2001 GTCs. T. Blanton, another Enterprise employee, told Ballard that Enterprise could not update the language in the short contract to reflect the Propane GTCs due to a coding issue in the computer program. The computer program prevented any user from changing "hard-coded," boilerplate language because the system automatically generated the contracts containing the error. Despite the title discrepancy, the parties agreed to perform under the Propane GTCs.

Ballard also testified that Trafigura relied on the Propane GTCs because the title of the incorporation-by-reference clause in the Export Contract was identical to the clause in the prior short contract. Because the parties had already addressed the

title discrepancy and had always performed under the Propane GTCs, the parties never agreed to apply the 2001 GTCs as the governing terms of any of their transactions. In fact, Ballard testified that Trafigura had never even received a copy of the 2001 GTCs and that the first time she had ever seen the 2001 GTCs was when Enterprise deposed her.

Trafigura also presented evidence that the parties performed in accordance with the obligations in the Propane GTCs. According to the Propane GTCs, the parties agreed to share the inspection costs equally to address cargo quality issues. Trafigura introduced an inspection invoice for costs for cleaning up the *Clipper Sirius*. The invoice stated, "Your charges for this survey will be apportioned 50 percent Trafigura, 50 percent Enterprise." This particular cost-share term was not in the 2001 GTCs.

Enterprise and Trafigura's competing interpretations about the incorporation-by-reference clause are reasonable. *See Columbia Gas*, 940 S.W.2d at 589 (requiring reasonable contract interpretations). Although the Export Contract unambiguously named the 2001 GTCs, the meaning of the clause was not definite. The evidence of the circumstances present when the Export Contract was executed establishes a latent ambiguity about the applicable set of GTCs the parties intended to incorporate based on the factual context surrounding the execution of the Export Contract. *See CBI Indus., Inc.*, 907 S.W.2d at 521.

We therefore conclude that the incorporation-by-reference provision is latently ambiguous under these narrow circumstances. *See, e.g.*, *Zeolla v. Zeolla*, 15 S.W.3d 239, 241–42 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (holding that latent ambiguity existed because husband retired at age 57 but consent decree only contemplated retirement at age 65); *Ludwig v. Encore Med., L.P.*, 191 S.W.3d 285, 291 (Tex. App.—Austin 2006, pet. denied) (holding that the litigation expenses provision was latently ambiguous based on silent contractual term); *Franklin v. Jackson*, 847 S.W.2d 306, 310–11 (Tex. App.—El Paso 1992, writ denied) (holding lease of peanut allotment latently ambiguous because lease was silent on disposition of increase in allotment). As a result, the trial court properly declined to enforce the Export Contract as written and considered extrinsic evidence relating to the parties' intent about which set of GTCs was incorporated into the Export Contract. And the evidence is sufficient to support the jury's finding that Trafigura and Enterprise agreed to incorporate the Propane GTCs, and the jury's finding is supported by substantial evidence.

We overrule Enterprise's second issue.

B. Legal and factual sufficiency of evidence of breach

In its third issue, Enterprise challenges the legal and factual sufficiency of the evidence supporting the jury's finding that it breached the Export Contract. Enterprise argues that it delivered uncontaminated cargo that met quality

specifications. Enterprise also argues that the cargo was not "unusable for its commonly used applications" because Trafigura sold the cargo to third-party buyers.

1. Standard of review

In a legal sufficiency review, we consider the evidence in a light most favorable to the jury's findings, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). A party that challenges the legal sufficiency of a finding on which it did not have the burden of proof must show that no evidence supports the jury's finding. *Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 348 S.W.3d 194, 215 (Tex. 2011). "Jurors are the sole judges of the credibility of the witnesses and the weight to give their testimony." *Wilson*, 168 S.W.3d at 819. Because jurors "may choose to believe one witness and disbelieve another," we may not substitute our judgment for that of the fact-finder. *Id*.

In reviewing the factual sufficiency of the evidence, we "must consider and weigh all the evidence and should set aside the judgment only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Arias v. Brookstone, L.P.*, 265 S.W.3d 459, 468 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (citing *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam)). Unlike legal-sufficiency review, factual-sufficiency review requires that we review the evidence that both supports and contradicts the jury's verdict in a neutral light.

Samson Lone Star Ltd. P'ship v. Hooks, 497 S.W.3d 1, 11 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) (citing *Cain*, 709 S.W.2d at 176). The trier of fact may choose to "believe one witness and disbelieve others" and "may resolve inconsistencies in the testimony of any witness." *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 697 (Tex. 1986); *CCC Group, Inc. v. S. Cent. Cement, Ltd.*, 450 S.W.3d 191, 196 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

2. "Contamination" and "Quality Specifications"

First, Enterprise argues the evidence was legally and factually insufficient to show that it flouted the parties' agreed quality specifications because Intertek, a third-party inspector, determined that the sample complied with the parties' agreed quality specifications and showed no traces of contamination.[3] Enterprise also argues that any subsequent inspection by Trafigura's inspectors evidencing contamination was immaterial, considering that the parties agreed to be bound by Intertek's conclusions.

In response, Trafigura argues the quality specification results are irrelevant because the tests for basic purity could not determine whether is the cargo was contaminated. Trafigura contends that the concepts of "contamination" and "quality specifications" are two separate and distinct obligations under the Export Contract,

[3] Having previously held that evidence is sufficient to support the jury's finding that Trafigura and Enterprise agreed to incorporate the Propane GTCs, we need not address Enterprise's alternate arguments relating to the 2001 GTCs.

requiring Enterprise to: (1) meet basic purity requirements and (2) deliver products free of any contaminants. Trafigura does not dispute that the cargo passed the component tests for basic purity. But Trafigura asserts that Enterprise breached the Export Contract by delivering contaminated cargo.

a. Legal sufficiency

At trial, Trafigura cited the language of the Export Contract in support of its argument about Enterprise's obligations to meet specific purity standards and to deliver no product containing contaminants:

> This specification defines only a basic purity for this product. This product is to be free of any contamination that might render the product unusable for its commonly used applications.

Trafigura's expert witness testified about the differences between quality specifications and contamination. M. Grossey, a chemical consultant, testified that the quality specification of a product relates to the "typical or agreed quality or agreed purity of a product." Grossey also testified that tests to determine the basic purity of a product do not test for contaminants. He explained that a "specification can't take into account all possibilities for contamination. And, therefore, contamination or what might be considered a contaminate [sic] is not always included in a specification." Thus, a product may pass all tests for basic purity, yet still be contaminated. After explaining the differences between contamination and quality specification, Grossey testified that "Intertek tested the samples from the

composite sampler" and that "the samples were not tested for the presence of caustics."

Trafigura also introduced a letter of protest from Intertek reporting a "black blob" during Intertek's initial inspection. The letter was addressed to Enterprise and stated, "Vessel's manifold after the Cargo arm was disconnected had a black unknown residue visible in the manifold strainer." Trafigura also introduced photographs of the black substance in the manifold strainer.

The jury also heard from D. McGrath, a marine surveyor experienced in investigating contaminations on board large freighters. McGrath testified about his personal observations of the black residue during the inspection of the tanks. He inspected the *Clipper Sirius* and observed that the black substance in the propane tanks appeared "gritty" and smelled like "sewage or rotten eggs." His inspection confirmed that the black substance in the tanks was caustics. He also testified about the methods used to neutralize the caustics and clean the tanks.

The jury found that Enterprise breached the Export Contract by delivering contaminated butane and propane to Trafigura. Based on the evidence the jury heard, a reasonable and fair-minded person could conclude that the quality specification tests were not used to determine the presence of contamination and that the propane and butane was contaminated by caustics. As a result, the evidence was legally sufficient to support the jury's finding that Enterprise had breached the Export

Contract. *See Wheelbarger v. Landing Council of Co–Owners*, 471 S.W.3d 875, 888 (Tex. App.—Houston [1st Dist.] 2015, pet. denied); *AMS Constr. Co., Inc. v. K.H.K. Scaffolding Hous., Inc.*, 357 S.W.3d 30, 42–44 (Tex. App.—Houston [1st Dist.] 2011, pet. dism'd).

b. Factual sufficiency

The jury heard evidence from Trafigura about the "black blob." On top of this evidence, the jury heard evidence about the differences between contamination and quality specifications. Enterprise presented countervailing evidence that the cargo was not contaminated because the tests results showed that they met quality specification standards. Enterprise directed the jury to review the language in the Export Contract for the quality and quantity tests:

> Quality [s]hall be determined at Load Port based on Enterprise['s] [] shore composite sampler.
>
> Quantity [s]hall be determined at Load Port based on Enterprise['s] [] shore meter as measured by an independent inspector.

This language, according to Enterprise, means that the parties agreed to retain Intertek as the independent inspector of record and test the quality of the samples through a composite sampler at the terminal. Enterprise cites testimony from four witnesses showing that Intertek's inspection of Enterprise's cargo complied with the quality specifications set forth in the Export Contract. First, McGrath testified that "compositional analysis" displayed purity levels of "at least 96 percent," which

established that "both the propane and the butane passed the contractually agreed quality specifications." Second, Grossey testified about an email from T. Frazer, an Enterprise employee, to Ballard confirming the same result:

> Please find the attached complete analysis of both cargoes, including propane and normal butane, for the inline composite and each vessel tank separately. This analysis meets the specification.

Third, Enterprise adduced testimony from Ballard. She testified about an email from an "intermediary" who concluded that the "samples taken from the vessel overnight has [sic] indicated that all product onboard is on spec." And finally, R. Moss, the Vice President of Houston region operations for Enterprise, testified that he notified Ballard about the samples meeting quality specifications. His email said, "[Ballard], attached is the results [sic] for the shore composite sample. As you can see, it meets contracted spec. It is also my understanding that the vessel tank samples also met spec."

Moreover, Enterprise introduced evidence that the parties could not dispute the results from the inspection under the binding language in the Propane GTCs. Section 14 of the Propane GTCs titled "Measurement, Sampling and Analysis" and provided that

> Except as otherwise set forth in the Agreement, an independent inspector appointed by Enterprise shall inspect for determination of quality and quantity at the Terminal. Costs of such inspector shall be shared equally between the Parties. The quality shall be based on shore composite at the Terminal and the quantity shall be based on shore figures at the Terminal. *Such inspection findings at the Terminal, for*

> *quality and quantity, shall be final and binding for Both parties save fraud and manifest error*.

Ballard confirmed Enterprise's interpretation of this provision and testified that it meant that "the inspector's quantity and quality testing at the terminal would be final and binding."

Based on the testimony of the four witnesses coupled with the language of the Propane GTCs itself, Enterprise argues that the evidence is factually insufficient to show that it had breached the Export Contract by providing Trafigura with contaminated cargo.

Viewing this evidence in a neutral light, we cannot conclude that it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See SMB Partners, Ltd. v. Osloub*, 4 S.W.3d 368, 373 (Tex. App.—Houston [1st Dist.] 1999, no pet.). The jury could have reasonably found Gossey's testimony about the differences between quality specifications and contamination compelling and weighed this testimony heavily against Enterprise. *See generally Capcor at KirbyMain, L.L.C. v. Moody Nat. Kirby Houston S, L.L.C.*, 509 S.W.3d 379, 385 (Tex. App.—Houston [1st Dist.] 2014, no pet.) ("As it is the jurors' role to resolve conflicts in the evidence, our review assumes that they did so in a manner consistent with their verdict."). The jury could have also reasonably determined that the tests for basic purity did not test for contamination and that, although the parties were

bound by Intertek's conclusions related to the initial composite tests for basic purity, Trafigura's later inspections of the black substance detected caustics. *See id*.

We therefore we hold that the evidence was factually sufficient to support the jury's implied finding that the cargo supplied by Enterprise was contaminated, and therefore, Enterprise had breached the Export Contract. *See WPS, Inc. v. Expro Americas, LLC*, 369 S.W.3d 384, 392, 401–02 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (evidence factually sufficient to support jury's finding that seller breached contract where parties had competing interpretations of governing terms of contract); *Glendon Invs., Inc. v. Brooks*, 748 S.W.2d 465, 468 (Tex. App.—Houston [1st Dist.] 1988, writ denied). We, therefore, overrule Enterprise's third issue.

Because we hold that legally and factually sufficient evidence supports the jury's finding that Enterprise breached the Export Contract by failing to deliver cargo free of any contamination, we do not reach Enterprise's remaining arguments about the term "commonly used applications," consequential damages, and risk of loss. *See* TEX. R. APP. P. 47.1 (requiring appellate courts to address every issue raised and necessary to final disposition of the appeal); *Levco Constr., Inc. v. Whole Foods Mkt. Rocky Mountain/Sw. L.P.*, 549 S.W.3d 618, 646 n.6 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

Prejudgment Interest

In its fourth issue, Enterprise contends the trial court improperly calculated prejudgment interest on the jury's damages award because the record does not establish when Steamship Mutual had paid any of the fees or expenses for which Trafigura sought indemnity from Enterprise. Enterprise also contends that the trial court erred in granting prejudgment interest on attorneys' fees incurred by Trafigura in the arbitration against the ship owners.

A. Applicable law

Prejudgment interest is compensation for the lost use of money owed as "damages during the lapse of time between the accrual of the claim and the date of judgment." *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 528 (Tex. 1998). There are two primary goals in awarding prejudgment interest: (1) compensating plaintiffs for the lost use of money and (2) encouraging both settlements and speedy trial. *Texas Black Iron, Inc. v. Arawak Energy*, 566 S.W.3d 801, 825 (Tex. App. – Houston [14th Dist.] 2018 (pet. denied).

"There are two legal sources for an award of prejudgment interest: (1) general principles of equity and (2) an enabling statute." *Kenneco Energy*, 962 S.W.2d at 528. Here, there is no statute enabling the recovery of prejudgment interest for a breach of contract and warranty. *See* TEX. FIN. CODE § 304.102 ("A judgment in a wrongful death, personal injury, or property damage case earns prejudgment

interest."). Under the common law, "prejudgment interest begins to accrue on the earlier of (1) 180 days after the date a defendant receives written notice of a claim or (2) the date suit is filed." *Johnson & Higgins*, 962 S.W.2d at 531.

B. Standard of review

When the source for an award of prejudgment interest is general principles of equity, then "the decision to award prejudgment interest is left to the sound discretion of the trial court, which should rely upon equitable principles and public policy in making its decision." *Dernick Res., Inc. v. Wilstein*, 471 S.W.3d 468, 487 (Tex. App.—Houston [1st Dist.] 2015, pet. denied); *Arawak Energy*, 566 S.W.3d at 825. We therefore review a trial court's decision to award of prejudgment interest for an abuse of discretion, giving only limited deference to the trial court's application of the law to the facts. *Wilstein*, 471 S.W.3d at 487. A trial court abuses its discretion when it acts without reference to guiding rules and principles or when it fails to analyze or apply the law properly. *Fortitude Energy, LLC v. Sooner Pipe LLC*, 564 S.W.3d 167, 188 (Tex. App.—Houston [1st Dist.] 2018, no pet.).

C. Analysis

The record establishes Trafigura filed this suit on January 22, 2014. And, the Amended Final Judgment establishes that the trial court relied on this date to calculate Trafigura's prejudgment interest:

> The Court RENDERS judgment on the verdict for Trafigura and against Enterprise and ORDERS that Trafigura AG recover from Enterprise Products Operating LLC, the following:
>
> (2) Prejudgment interest on that amount at the rate of 5% from January 22, 2014, through the day preceding the signing of this judgment . . . .

According to Enterprise, however, "[i]f the payment was not yet due when the plaintiff gave notice of its claim or filed its suit, then courts must calculate prejudgment interest from the date when the defendant was actually obligated to make the payment." Enterprise cites *Henson v. Southern Farm Bureau Cas. Ins. Co.*, 17 S.W.3d 652 (Tex. 2000), in support of its argument that an award for prejudgment interest accrues only when Trafigura's liability was established in the arbitration proceedings and when Steamship Mutual had paid the claims on behalf of Trafigura.

Henson, though, is an exception to the general rule and applies only in uninsured motorist cases where an insured sues their insurance company for failure to pay UIM benefits. *See Henson*, 17 S.W.3d at 653-54. The exception in *Henson* does not even apply in all UIM cases. *See, e.g.*, *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 309, 815 (Tex. 2006). Enterprise is not Trafigura's insurance company and we see no basis to extend *Henson* beyond its limited application.

In the absence of the exception Enterprise advocates, the general rule is that "prejudgment interest begins to accrue on the earlier of (1) 180 days after the date a defendant receives written notice of a claim or (2) the date suit is filed." *Johnson & Higgins*, 962 S.W.2d at 531. Accordingly, the trial court did not abuse its discretion

by setting the accrual date for prejudgment interest as the date suit was filed. *See Fortitude Energy*, 564 S.W.3d at 188.

We next examine Enterprise's contention that Trafigura had no right to recover prejudgment interest on attorneys' fees related to the arbitration proceedings between Trafigura and the ship owners. Several Texas courts have held that a prevailing party may not recover prejudgment interest on attorneys' fees. *See Hervey v. Passero*, 658 S.W.2d 148, 149 (Tex. 1983) (per curiam); *Power Reps, Inc. v. Cates*, No. 01-13-00856-CV, 2015 WL 4747215, at *22 (Tex. App.—Houston [1st Dist.] Aug. 11, 2015, no pet.) (mem. op.); *Berry Prop. Mgmt., Inc. v. Bliskey*, 850 S.W.2d 644, 670 (Tex. App.—Corpus Christi 1993, writ dism'd). Other Texas courts have allowed prejudgment interest on attorneys' fees paid by a party before judgment. *See Nova Cas. Co. v. Turner Const. Co.*, 335 S.W.3d 698, 706 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (op. on reh'g) (allowing recovery of prejudgment interest); *A.V.I., Inc. v. Heathington*, 842 S.W.2d 712, 718 (Tex. App.—Amarillo 1992, writ denied) (same). The narrow issue here is whether prejudgment interest is recoverable on attorneys' fees awarded as a component of an actual-damage award.

Here, the record reflects that the jury awarded attorneys' fees for the arbitration proceedings as a component of a party's actual damages. The jury was

asked to determine the amount of Trafigura's total actual damages for breaching the Export Contract:

> What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Trafigura for its damages, if any, that resulted from such failure to comply?

The jury awarded damages in five separate categories. The jury awarded actual damages totaling $2,474,614.32 to Trafigura. Part of that award included $299,678.96 for "[a]ttorneys' fees incurred by Trafigura in its defense of the London Arbitration." Based on the foregoing evidence, the trial court was within its discretion to award equitable prejudgment interest to Trafigura, as one of their grounds for recovery was breach of the Export Contract. *See Fortitude Energy*, 564 S.W.3d at 188; *see also Hand & Wrist Ctr. of Hous., P.A. v. Republic Servs., Inc.*, 401 S.W.3d 712, 717–18 (Tex. App.—Houston [14th Dist.] 2013, no pet.). We conclude that the trial court did not abuse its discretion when it awarded prejudgment interest to Trafigura.

We overrule Enterprise's fourth issue.

Conclusion

We affirm.

Sarah Beth Landau
Justice

Panel consists of Justices Keyes, Lloyd, and Landau.