Quadrant CHAMBERS

Unicredit Bank A.G. v Euronav N.V. – Court of Appeal judgment in respect of misdelivery claims under Bill of Lading contracts

Robert Thomas KC & Paul Toms

9 May 2023

The Court of Appeal has today handed down judgment in a case likely to be of interest to shipowners, cargo interests and financing banks, ***Unicredit Bank A.G. v Euronav N.V.*** [2023] EWCA Civ 471.

The essential question for the Court was whether a shipowner, Euronav, was liable to the Bill of Lading holder, Unicredit, for delivering a cargo of oil from the vessel Sienna without production of the Bill of Lading.

The Facts

The Sienna had initially been voyage chartered by BP Oil International Limited ("BP") from Euronav. A Bill of Lading was issued by Euronav with BP named as shipper. Following the sale of the cargo by BP to Gulf Petrochem FZC ("Gulf"), Euronav, BP and Gulf entered into a novation agreement by which Gulf became the voyage charterer in place of BP.

Unicredit had financed Gulf's purchase of the cargo from BP. Gulf had, at Unicredit's request, asked BP to indorse the Bill of Lading and send it to Unicredit. However, due to COVID restrictions, that had not happened by the time of discharge. Rather BP remained in possession of the Bill of Lading.

Gulf instructed Euronav to discharge the cargo by STS transfer to two vessels in Oman which Euronav duly did.

Unicredit was not repaid by Gulf the sum which it had financed for the purchase of the cargo.

Therefore, when the Bill of Lading was subsequently indorsed to Unicredit, it brought a claim against Euronav alleging a breach of contract contained in or evidenced by the Bill of Lading by reason of the delivery of the cargo without production of the Bill of Lading

Decision of Moulder J

At first instance, Moulder J held that Unicredit's claim failed on the basis that:

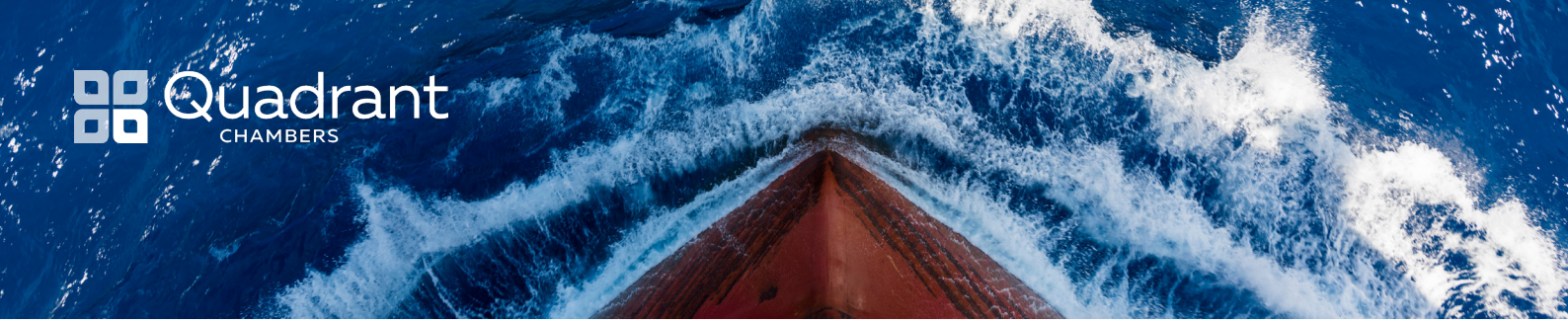
(1) Since the Bill of Lading was – on issuance – a mere receipt because the shipper and the voyage charterer were the same party, i.e. BP, it was not at that time a contract at all. She rejected the argument that when BP ceased to be the voyage charterer by virtue of the novation agreement, a contract came into existence at that stage. Accordingly, at the time of discharge, Euronav's contractual obligations were set out in the Charterparty alone, namely to discharge without production of the Bill of Lading if ordered to do so by the voyage charterer. As such, there was no breach of contract.

(2) Even had there been a Bill of Lading contract at the time of delivery, breach of the same had caused no loss or the same loss would have been suffered by Unicredit in any event.

The Appeal

Unicredit appealed against each of those findings.

As to the first finding, Unicredit's challenge to Moulder J's judgment succeeded.



Popplewell LJ, giving the judgment of the Court, identified the relevant question to be answered when determining whether a Bill of Lading contained or evidenced a contract as follows: what was the presumed intention of the parties at the time that the Bill of Lading was issued? The analysis as applied to the facts of this case was set out at paragraph 78 of the judgment as follows:

"I would therefore characterise the mere receipt principle as being that in issuing a bill of lading, the carrier usually contracts with the holder on those terms save only for so long as the holder is a charterer, and save to the extent thereafter (if at all) that the contractual relationship with the carrier for performance of the carriage remains governed by the charterparty (as it was for pre Novation Agreement conduct in the present case). The bill of lading will not otherwise be a mere receipt but will contain or evidence a contract of carriage. This reflects the presumed intention of the parties. It is no more than a general presumption, and is subject to a contrary agreement or circumstances showing a contrary intention".

He further held that there was no term of the novation agreement which displaced this presumption. The Court, therefore, decided that at the time of discharge there was a Bill of Lading contract which was breached by Euronav discharging without production of the Bill of Lading: paragraphs 79-82.

Popplewell LJ also held that, even if the Court of Appeal was wrong that, by reason of BP ceasing to be the charterer under the novation agreement, the Bill of Lading acquired contractual status in BP's hands, Euronav was still in breach of contract. He held that the effect of s. 2(1) of the Carriage of Goods by Sea Act 1992 was that upon indorsement of the Bill of Lading to Unicredit subsequent to discharge, a contract on the terms of the Bill of Lading came into existence retrospectively which had been breached by discharge without production of the Bill of Lading: paragraphs 83-88.

However, the judgment of Moulder J in respect of causation was upheld. The Court of Appeal made clear that the Judge had asked herself the correct question i.e. to assess *"what would have happened to the Bank's security interest had Owners initially refused to discharge without production of the Bill"*: paragraph 103.

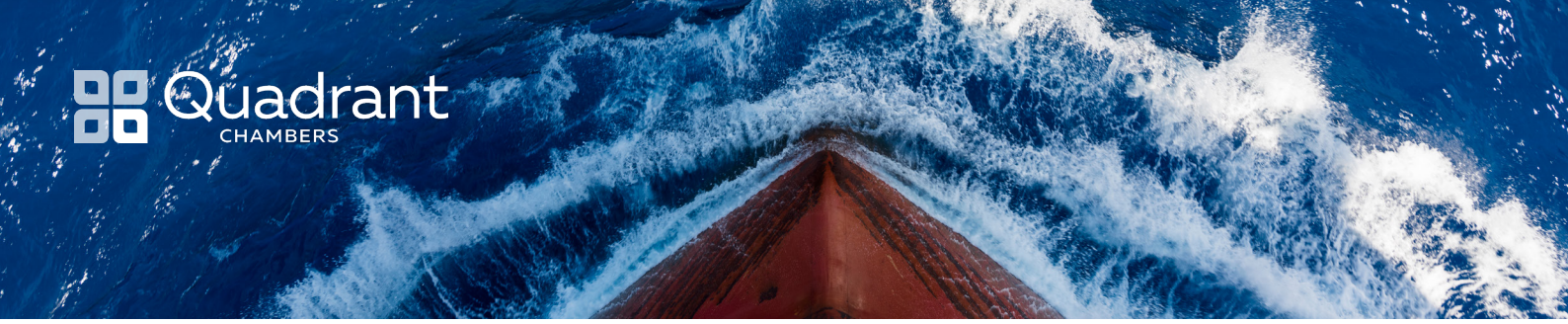
The Court noted that the Judge had made factual findings that had Euronav initially refused to discharge the cargo without production of the Bill of Lading, it would have sought instructions from Unicredit as to what should be done with the cargo and that Unicredit would have instructed Euronav to discharge without production of the Bill of Lading: paragraph 107.

Since *"the obligation to deliver against a bill of lading is a contractual one which can be varied by express consent …"*, the Court of Appeal held that delivery in those circumstances would not have been a breach of the Bill of Lading contract and would have caused no loss: paragraph 108.

In other words, the Court of Appeal upheld the Judge's analysis that the breach of contract did not cause any loss because had Euronav performed its obligations by refusing to discharge without production of the Bill of Lading, Unicredit would have required Euronav to discharge without production of the Bill of Lading such that Unicredit's security interest would have been lost in any event.

The Appeal was, accordingly, dismissed.

Robert Thomas KC and Paul Toms acted for Euronav instructed by Andrew Preston and Paul Best of Preston Turnbull LLP.



Robert Thomas KC

"Rob has a keen eye for the big picture, suitably balanced with an attention to detail that allows him to give advice that is spot on legally and shows an awareness of commercial considerations." (Chambers UK, 2023)

Robert is an established commercial silk. His practice focuses on the following core areas: shipping, commodities and international trade; energy and natural resources; international arbitration and commercial litigation (in particular, in commercial fraud and related relief).

> view Robert's full profile

robert.thomas@quadrantchambers.com

Paul Toms

"Paul is a talented and effective advocate, and is clearly respected by judges. He quickly gets to the heart of the issues and gives first-rate advice." (Legal 500, 2023)

Paul is an experienced junior barrister specialising in commercial and international trade disputes. He is described as "very erudite and quick on his feet; he has an unparalleled eye for detail and is careful, considered and astute" (Chambers UK 2020)

> view Paul's full profile

paul.toms@quadrantchambers.com