

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
[2016] EWHC 3340 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/07/2018

Before:

DAME ELIZABETH GLOSTER DBE
LADY JUSTICE KING
and
LORD JUSTICE SIMON

Between:

Euro-Asian Oil SA
(formerly Euro-Asian Oil AG)

Respondent/
Cross-
Appellant
(Claimant)

and

Credit Suisse AG

Appellant/
Cross-
Respondent
(Defendant)

and

Abilo (UK) Ltd

Second
Respondent
(Third Party)

and

Mr Dan Igniska

Fourth party

Mr Jeffrey Gruder QC and Ms Caroline Pounds (instructed by **Holman Fenwick Willan LLP**) for the Appellant

Mr Duncan Matthews QC and Mr Sudhanshu Swaroop QC (instructed by **Stephenson Harwood LLP**) for the Respondent

The Second Respondent and Fourth Party did not appear

Hearing dates 15 and 16 May 2018

Judgment Approved

Lord Justice Simon:

Introduction

1. This is an appeal from the judgment of Sir Ross Cranston ('the Judge'), sitting as a judge of the Commercial Court. The judgment is dated 21 December 2016, and the appeal raises three broad issues.
2. The first issue is whether a contract entered on 1 October 2010, in respect of which the claimant ('Euro-Asian') sued the 1st defendant in the first action ('Abilo') and the only defendant in the second action ('Credit Suisse'), was a contract for the sale and delivery of goods on CIF terms. The Judge held that it was, that Abilo was liable for breach of contract and that both Abilo and Credit Suisse were liable under the terms of a letter of indemnity which they signed as co-signatories. Credit Suisse submits that the Judge erred in making this finding. It argues that, in the light of the prior trading history between Abilo and Euro-Asian and on a proper legal analysis, the transaction was not a contract for the delivery of the relevant cargo on CIF terms and that Credit Suisse is not liable to Euro-Asian under the letter of indemnity.
3. The second issue relates to the measure of damages suffered by Euro-Asian for breach of the warranties contained in the letter of indemnity. The Judge found that damages were to be assessed by reference to Euro-Asian's sub-sale. Euro-Asian argues on the cross-appeal that it should be assessed by reference to the sound arrived market value of the cargo. Credit Suisse submits that the Judge was correct in his assessment of Euro-Asian's loss and its entitlement to damages.
4. The third issue is whether, on the assumption that the Judge was correct on the first issue and whether he was right or wrong on the second issue, Credit Suisse is entitled to a complete indemnity from its client Abilo or, as the Judge found, a contribution limited to 80% of the damages that it was liable to pay. Credit Suisse submits that the Judge was wrong in his assessment of its entitlement to contribution, and that it is entitled to a full indemnity from Abilo.

The fourth contract documents dated 1 October 2010

5. The sale contract which is in issue on this appeal was the fourth such contract entered into between Abilo (as seller) and Euro-Asian (as purchaser). It was entered into on 1 October 2010, and provided for the sale by Abilo to Euro-Asian of a cargo of 20,000 metric tons +/- 10% ultra-low sulphur diesel ('ULSD'):

CIF one safe port/berth Constantza in one full cargo lot per
M/T 'T.B.N' ... during the period 10 September- 31 December
2010.
6. Payment was to be made by letter of credit against original documents. The contract contained terms for the determination of quality and quantity of the cargo, inspection, laytime and demurrage, and insurance. There was an entire agreement clause and a provision that, where not otherwise inconsistent with the express terms, Incoterms CIF 2000 and subsequent amendments would apply.

7. The fourth letter of credit was dated 1 October and was opened by Credit Agricole (Suisse) SA ('Credit Agricole') in favour of Credit Suisse, with Euro-Asian named as the applicant and Abilo as the named beneficiary. The credit was stated to be valid until 31 January 2011 and provided for payment of US\$13,500,000 +/- 10%, against six enumerated documents. The first of these documents was a commercial invoice, the other documents (No. 2-6) included 'a full set of 3/3 original clean onboard charter-party bills of lading issued or endorsed to the order of the Credit Agricole (Suisse) SA,' as well as certificates of quality, quantity and origin, each in a prescribed form.
8. The fourth letter of credit also stipulated:
 - In the event that above listed documents No.2 through 6 are not available when payment becomes due, then payment shall be made against the presentation of the following documents:
 1. Beneficiary's invoice ...
 2. Beneficiary's letter of indemnity as per following wording ... countersigned by Credit Suisse AG Geneva.
9. There followed the text of a letter of indemnity to which it will be necessary to return later in this judgment.
10. Among the further material terms of the letter of credit was a clause which provided:
 6. Documents presented more than 21 days from bill of lading date but within documentary credit validity acceptable;and a proviso:
 - This documentary credit is subject to the Uniform Customs and Practice for Documentary Credits, 2007 revision, I.C.C. Publication Nr. 600 (UCP).

The prior history

11. In order to put the issues in their proper context, it is necessary to set out some of the background to the relationship between Euro-Asian and Abilo, and the commercial dealings which led to the fourth sale contract.
12. The Judge carefully analysed the commercial relationship between Euro-Asian (and those involved in its trading, Mr Michailov and Mr Duman) on one side, and Abilo (and Mr Igniska) on the other. The analysis, which included reference to payments of commission to Messrs Michailov and Duman on business that Euro-Asian put the way of Abilo, is set out in the Judgment at [46] to [102].
13. In summary, between 2007 and 2009, Euro-Asian engaged in a number of transactions with Mr Igniska's companies importing and distributing gasoil within Romania. Because Mr Igniska's companies had limited credit lines, he was only able to finance the purchase of relatively small cargoes; and, since he wanted to purchase larger quantities with a view to increasing his profits, Euro-Asian agreed to a scheme

whereby it would buy cargoes of gasoil from companies such as Glencore, Select Energy, Motor Oil Hellas, Addax or Total for delivery CIF Constanza. Mr Igniska would negotiate such deals and Euro-Asian would decide whether it would agree to enter the contracts as purchaser. If it did, it would sell those cargoes to a company owned by Mr Igniska, either Abilo, Real Oil or Neptune, on extended payment terms: 90/120 days after the bill of lading date. On this basis Mr Igniska would organise the discharge of the cargo in Constanza and arrange for the oil terminal to issue an in-tank 'holding and title certificate' ('tank holding certificate'), confirming that it held the cargo in Euro-Asian's name and under pledge to Euro-Asian's financing bank. The product would then be released in parcels to Mr Igniska's companies on payment by instalments.

14. The commercial benefit to Euro-Asian was the difference between the price at which Euro-Asian bought the cargoes and the price it sold them to one of Mr Igniska's companies, usually a difference of about US\$2-US\$3.5 per mt, described as a 'financing fee'. The advantage for Mr Igniska under these arrangements was that he was able to obtain larger quantities of gasoil than he could otherwise afford, and save on costs such as freight. In addition, the transactions were structured so that Euro-Asian released the oil to Mr Igniska's companies in parcels, providing credit during that period. It was prepared to do that because it had the security of a tank holding certificate issued by Constanza oil terminal to its order, in practice pledged to its bank.
15. It is unnecessary to set out in further detail the Judge's findings at [72] to [79] of the judgment at this point. They are, however, highly material to the second issue on this appeal.
16. At [80] to [102] of the judgment, the Judge dealt with commission payments of approximately US\$1.5 mt shared between Mr Michailov and Mr Duman out of the 'financing fee.'
17. The way in which the four transactions at issue in this case were performed was described by Euro-Asian as a 'carousel'. In short, the contracted cargo was not delivered according to the terms of the sale contracts on conventional CIF terms, but was performed by means of tank holding certificates issued by the discharge terminal in relation to oil delivered from another vessel. To illustrate the way in which the 'carousel' operated it is convenient to refer to the first sale transaction.

The first sale transaction

18. This contract was dated 9 November 2009. Abilo agreed to sell and Euro-Asian agreed to buy a cargo of 19,100 mt of ULSD on CIF terms Constanza. The contract did not name the vessel, which was described as 'TBN', with a delivery period of 6 November to 31 December 2009. By a separate contract Euro-Asian agreed to sell the same quantity and quality of cargo to Mr Igniska's company, Neptune.
19. The oil supplied under this contract was cargo carried on the *Dominia*, which discharged at Constanza on 13 November 2009. As the Judge found, Abilo (and its local agent, DG Petrol) treated this consignment as its own property and concealed the delivery from Euro-Asian [135]. The cargo that had been carried on the *Dominia* was not available for delivery under the first contract. What was delivered instead was

product which was already in the holding tank at Constanza which had been delivered, on the Judge's findings at [171], by the *Nicos Tomasos* between 24-26 February 2010. The documents tendered under the first sale contract referred to a shipment in November 2009 and to the *Dominia*. A tank holding certificate was issued by the terminal on 5 March 2010. It did not refer to the *Nicos Tomasos* or its cargo. It was addressed to Euro-Asian and was issued in favour of its bank, BNP Paribas, which asserted a priority security interest in it. Mr Michailov's evidence was that he was relieved eventually to receive the tank holding certificate, but that this was not part of any agreed arrangement, and he did not envisage Abilo using the *Nicos Tomasos* documents for presentation under the letter of credit opened in relation to the second sale transaction [175]. As the Judge put it at [178]:

This was not what [Euro-Asian] intended or expected. I also accept that they did not persist in their protests because they were reassured by the entry into the second transaction, which enabled Mr Igniska to retrieve the situation, but more importantly, as Mr Michailov said, by the fact that they received a holding certificate for the requisite quantity of gasoil.

The second and third sale transactions

20. Euro-Asian's expectations in relation to the second sale contract were to be disappointed. Abilo performed its obligations under the second contract dated 12 February 2010 in a similar fashion. As noted above, the *Nicos Tomasos* had discharged its cargo of some 30,000 mt of ULSD at the Constanza terminal between 24-26 February 2010. It had been oil from this cargo that had been delivered by Abilo under the first sale transaction. Despite this, Abilo tendered the *Nicos Tomasos* documents in purported performance of the second sale contract; and delivered oil by a tank holding certificate which related to oil discharged from the *Histria Azure*.

21. As the Judge summarised the position:

221. Abilo delivered under the second sale contract product in tank at Constanza, by means of a holding certificate from the Constanza oil terminal dated 9 June 2010. There had been a discharge by the *Histria Azure* at Constanza around 6-7 June 2010 ...

222. That holding certificate did not identify that the product derived from the *Histria Azure*. In chasing Mr Igniska for the holding certificate on 8 June 2010, Euro-Asian had stated that for 'obvious reasons' it should not mention the name of any vessel.

22. The Judge set out his views as to the position prior to the third sale transaction:

226. It is therefore clear that by the end of May [2010] Mr Michailov was aware of what he described as the carousel. In other words, Mr Igniska was presenting documents under letters of credit in respect of one cargo, which had already been

discharged in Constanza, and using other gasoil and the holding certificate for it as a basis for a new transaction.

227. Nonetheless, Euro-Asian entered a further transaction. In evidence Mr Michailov said that he was prepared to run with it for another circle or two, until Mr Igniska extracted himself from his difficult situation, to avoid legal action and to resolve matters commercially.

23. The third sale contract and third letter of credit, dated 3 and 4 June 2010 respectively, were in similar terms to those relating to the first and second transactions. As noted in [221] of the judgment (above), the *Histria Azure* had discharged her cargo at Constanza on 6-7 June. Abilo presented the documents in relation to the *Histria Azure* consignment, although this cargo was not available since its oil cargo had formed the basis of the tank holding certificate used for the second sale contract. Instead, as before, Abilo produced another tank holding certificate. It was dated 5 October, issued by the Terminal, addressed to BNP Parisbas (Suisse) SA and copied to Euro-Asian, in terms which were similar to the earlier holding certificates:

We, the undersigned company Oil Terminal SA Constantza, Romania hereby declare that we hold the quantity of 22,000 metric tons Diesel 10 PPM ('the goods) being the property of Euro-Asian Oil AG and pledged in favour of BNP Paribas ...

24. The source of this oil was cargo that had been carried on the *Ariadne* which had arrived and discharged her cargo of ULSD at Constanza between 3 and 5 October 2010.
25. As the Judge said:

242. What Abilo delivered under the third sale contract was ULSD by in-tank holding certificate. The *Ariadne* had arrived at Constanza sometime after 30 September 2010 under bills of lading dated 10 September 2010 ...

The fourth sale transaction

26. It is in relation to this transaction that the issues on the appeal arise. The terms of the fourth sale contract and the fourth letter of credit have been set out above. The Judge found that from 5 October 2010 Abilo intended to perform its obligations under the fourth contract by the use of a quantity of cargo discharged by the *Ariadne* and which had been delivered to Euro-Asian by the tank holding certificate under the third sale contract.
27. On the same date as the fourth sale contract (1 October 2010), Euro-Asian entered into a sub-sale of the ULSD to Real Oil. Its terms followed those of the fourth sale contract, including the delivery clause, although there was no reference on its face to the fourth sale contract and the contracts were not back to back.
28. Abilo presented two documents (dated 3 January 2011) under the fourth letter of credit. The first document was a commercial invoice naming *Ariadne* as the carrying

vessel with a bill of lading dated 10 September covering 22,000 mt +/- 10% of ULSD. The second document was a letter of indemnity in the form of the draft contained in the fourth letter of credit.

The terms of the fourth letter of indemnity

29. This document, which set out the terms of indemnity provided by Abilo and Credit Suisse, was presented to Crédit Agricole by Credit Suisse; and its terms are set out below. For ease of reference I have added lettering and numbering that does not appear in the original:

[A] We refer to the cargo of 20,000 m/tons of ULSD (max 10ppm) shipped on board the MT *Ariadne* at Puerto la Cruz, pursuant to bills of lading dated 10.09.2010.

[B] Although we have sold and transferred title to the above named cargo to yourselves, we have been unable to provide you with the full set 3/3 original bills of lading issued or endorsed to the order of Credit Agricole (Suisse) SA Geneva and other shipping documents covering the said sale.

[C] In consideration of Credit Agricole (Suisse) SA, Geneva for account of Euro-Asian Oil AG, paying us, full purchase price of US dollars 15,844,840.00, we hereby expressly warrant that (i) we have marketable title free and clear of any lien or encumbrance to such material and that we have the full right and authority to (ii) transfer such title to you and (iii) effect delivery of the said cargo to you.

(D) We further agree to locate and surrender to you only, the full set of 3/3 original bills of lading issued or endorsed to the order of Credit Agricole (Suisse) SA, Geneva and other shipping documents and to protect, indemnify and hold you harmless from and against any and all damages, costs and expenses (including reasonable attorney fees) which you may suffer by reason of the shipping documents including the original clean and negotiable bills of lading remaining outstanding or by reason of a breach of the warranties given above, including but not limited to any claims and demands which may be made by a holder or transferee of any original bill of lading or by any other third party claiming an interest in or lien on the cargo, bills of lading or on the proceeds thereof.

30. The fourth letter of indemnity also provided that it was to be governed by English law and that the English High Court had exclusive jurisdiction, and further provided:

(E) This letter of indemnity shall expire upon our tendering to the bank [Crédit Agricole] for your [Euro-Asian's] account the original shipping documents, including the full set of 3/3 original bill(s) of lading issued or endorsed to the order of

Crédit Agricole (Suisse) SA, Geneva, as required under documentary credit ...

31. Crucially for present purposes, the letter of indemnity was signed on behalf of Abilo; and was endorsed:

We, the undersigned Credit Suisse AG, Geneva, hereby agree to be jointly and severally obligated and bound by the above indemnity...

with a signature on behalf of Credit Suisse.

The presentation under the fourth letter of credit

32. On 5 January 2011, Mr Michailov warned Credit Suisse that there were indications that Abilo intended to draw fraudulently on the fourth letter of credit with no intended delivery of physical oil against payment. Credit Suisse was asked to postpone payment whilst Euro-Asian took steps to obtain an injunction. A letter in similar terms was sent by Euro-Asian to Crédit Agricole as the issuing bank under the fourth letter of credit.
33. On 6 January, Abilo sent the fourth letter of indemnity, specifically appropriating the cargo on the *Ariadne* to the fourth sale contract. This was the first time the *Ariadne* had been mentioned in the context of the fourth sale contract.
34. On 7 January, Euro-Asian applied to the Tribunal de Première Instance, Geneva for urgent provisional measures to prevent Credit Agricole paying out under the fourth letter of credit. The Tribunal held that it could not intervene except in serious cases, especially fraud, and Euro-Asian did not have sufficiently clear evidence of fraud for it to be wrong for Crédit Agricole to pay against documents that conformed on their face with the requirements of the fourth letter of credit. This was because the 5 October 2010 tank holding certificate could relate to either the third or the fourth sale contract.
35. The Judge noted that Mr Barras of Credit Suisse had accepted in his evidence that, if he had known that the cargo from the *Ariadne* had already been delivered to Euro-Asian under the third sale contract, he would have taken legal advice before proceeding with the presentation under the fourth letter of credit, with the letter of indemnity and the commercial invoice referencing the *Ariadne* cargo. However, since the Geneva Tribunal had refused provisional measures, Credit Suisse presented the invoice and the letter of indemnity. As already noted, both the commercial invoice and the letter of indemnity were in respect of cargo shipped on the *Ariadne* under bills of lading dated 10 September 2010.
36. Crédit Agricole paid US\$15,844,840.00 to Credit Suisse under the fourth letter of credit, and debited the sum of US\$15,856,873.63 from Euro-Asian's account, the difference in amount being its commission and charges. As the Judge noted, the result was that Euro-Asian had paid for four cargoes and received only three.

The first issue

37. Credit Suisse's argument before the Judge was that the contractual obligations that existed between Euro-Asian and Abilo were not those set out in the fourth sale contract. Whatever the express terms, the parties had agreed that it would not be performed according to its terms, particularly in relation to the delivery of the cargo, see the judgment at [310].
38. Mr Gruder QC's analysis of what he characterised as these 'separate arrangements' outside the written terms of the contract was put in two ways.
39. First, on proper analysis the fourth sale contract was not a CIF contract, whereby Euro-Asian would receive the *Ariadne* cargo under the bills of lading as documents of title. What it was to receive was a tank holding certificate from the Constanza oil terminal in its favour, pledged to Crédit Agricole, for an equivalent amount of ULSD without presentation of the bills of lading. It had been the tank holding certificates that had previously provided Euro-Asian with its security until its sub-purchaser, in this case Real Oil, paid for the oil. What went wrong was that Abilo suffered financial problems and it was unable to obtain a fifth cargo and an associated tank holding certificate, not that Abilo failed to transfer cargo still on board the *Ariadne* or to provide extant bills of lading relating to it, see the judgment at [312-313].
40. The second way Credit Suisse put its case was that, in broad terms, Euro-Asian had agreed to the 'carousel'. It had agreed that Abilo would present documents in performance of the fourth sale contract, as it had with the three prior transactions, representing cargo which had already been discharged and which had been used to obtain a tank holding certificate from the Constanza oil terminal. Again, what went wrong was Abilo's failure to obtain a fifth cargo, so as to continue the 'carousel' and 'close the circle', see the judgment at [314].
41. In summary, Credit Suisse's case was that, against the background of the commercial relationship between the parties, including the commissions paid to Mr Michailov and Mr Duman, Euro-Asian was a willing participant in these 'separate arrangements' and had no intention or expectation that Abilo would, at the time the fourth letter of indemnity was presented under the fourth letter of credit, still retain title to cargo on board the *Ariadne*, or have bills of lading capable of operating as documents of title. What was essential to Euro-Asian was obtaining the tank holding certificate from the Constanza oil refinery in its favour covering any gasoil of the requisite quantity and quality.
42. The Judge rejected this 'separate arrangements' argument. He concluded at [326] that it defied commercial sense, since it worked almost entirely to Abilo's benefit and exposed Euro-Asian to considerable risk. It would (through its bank) pay out nearly US\$16 million against a letter of indemnity and a commercial invoice which 'created no rights and had no bearing on whether there would ever be a cargo', since it would be relying entirely on Abilo producing a tank holding certificate covering the contracted ULSD in the tank at Constanza. Against this very considerable risk, which was ultimately realised, Euro-Asian's reward was 'the relatively small financing fee.'
43. The Judge also addressed the factual basis for Credit Suisse's 'separate arrangement' argument:

330. ... in my view there is no basis in the evidence for the existence of the separate arrangements Credit Suisse alleged in either of the forms it was advanced. Nothing express in the nature of a separate arrangement was identified, be it the emails or the witness evidence. To the contrary there were the emphatic denials of Mr Michailov which, as I have indicated, I accept.

331. Further, there was the evidence that Euro-Asian considered that the four transactions would work as ordinary CIF contracts in the oil industry. The pattern envisaged by Euro-Asian was contained in the explanation Mr Duman gave to Crédit Agricole in his email of 26 November 2009. It spelt out that Euro-Asian would buy cargoes of 20-30,000 mt, delivery CIF Constanza, to be sold back to back to Real Oil.

44. At [332] of the judgment, the Judge set out the particular items of evidence which indicated that Euro-Asian expected the contracts to work as CIF contracts and that there were no other arrangements and understandings. He added:

333. None of the evidence which Credit Suisse advanced to support its case on separate arrangements in my judgment bears the weight suggested. Particular expressions in emails must be read in context and not interpreted with the benefit of hindsight.

The correct characterisation of the fourth contract

45. On this appeal, Mr Gruder recast some of the arguments that the Judge rejected under the heading, 'separate arrangements'. In essence, he submitted that the Judge erred in concluding that the fourth sale contract was intended to operate as a classic CIF contract, with title to the cargo on board the *Ariadne* passing on presentation of shipping documents before the vessel arrived at Constanza. This conclusion was essential to his decision that Credit Suisse was in breach of the warranties and undertakings in the fourth letter of indemnity. He submitted that the Judge failed to have regard to the principle that the passing of title in goods is determined by the intention of the parties, derived from the terms of the contract, their conduct and all the circumstances of the case, see section 17 of the Sale of Goods Act 1979; *Enichem Anic Spa and others v. Ampelos Shipping Co Ltd (the 'Delfini')* [1990] 1 Lloyd's Rep 252 (CA), Mustill LJ at 268-9; and Benjamin's Sale of Goods 10th Ed §19-099. Although the Judge placed emphasis on the fact that the sale contracts were expressed to be on CIF terms, the position was analogous to that in the *Delfini* at p.2711, where Mustill LJ acknowledged that the reference to CIF and the incorporation of Inco Terms CIF provisions was 'a strong pointer' but found that this was not conclusive. On the facts in the *Delfini*, everything pointed the other way.
46. I would accept that use of the term CIF is not conclusive. This is both consonant with principle and supported by other high authority, see for example, *Comptoir d'Achat et de Vente du Boerenbond Belge S.A v. Luis de Ridder Limitada, (The 'Julia')* [1949] AC 293, Lord Porter at p.309-310.

47. Mr Gruder submitted that the important circumstance that pointed the other way in the present case was that the parties never intended that property in the cargo under the fourth sale contract was to pass by tender and payment of documents. Both buyer and seller knew that the contract would be performed by the tender of *Ariadne* documentation which they also knew did not represent cargo on board that ship but in the terminal, and by a tank holding certificate provided from some other cargo. In other words, by another round of ‘the carousel.’ In short, he argued that, in the light of the facts found, the Judge should have concluded that Euro-Asian agreed to another round of ‘the carousel’ and therefore could not, and did not, rely on the warranties in the fourth letter of indemnity.
48. The difficulty with this argument is that the facts found by the Judge are inconsistent with this argument.
49. It scarcely needs recording that an appellate court does not interfere with findings of fact unless it is satisfied that the finding cannot reasonably be explained or justified, see for example, *Henderson v. Foxworth Investments Ltd* [2014] 1 WLR 2600 at [67], cited with approval in *Montgomery v. Lanarkshire Health Board* [2015] AC 1430 at [97]. This approach extends to a judge’s evaluation of those facts and the inferences to be drawn from them, unless there are compelling reasons to the contrary. The reasons for this diffidence have been set out in the judgment of Lewison LJ in *Fage UK Ltd and anor v. Chobani UK Ltd and anor* [2014] EWCA (Civ) 5 at [114], and include:
- ...
- iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
- v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
50. Furthermore, even without this inhibition against this Court reviewing and substituting its own findings of fact, in the present case there is a further and in my view insurmountable problem in Mr Gruder’s way. When granting permission to appeal, Beatson LJ specifically excluded any challenge to the Judge’s findings of fact.
51. I would accept that, as Mr Gruder demonstrated, there are passages in the judgment which indicate that Euro-Asian was historically willing to continue ‘the carousel’. At [219] of the judgment, the Judge set out evidence from Mr Duman as to why Euro-Asian did not stop ‘the carousel’ in June 2010 at about the time of the third sale contract. His evidence was that Euro-Asian accepted that ‘the carousel’ might continue. At [243], the Judge recorded the evidence of Mr Michailov that he was ‘prepared to support Mr Igniska’ at the time of the opening of the fourth transaction.
52. Mr Gruder was also able to point to passages in the judgment (perhaps particularly at [227] and [258]) which afford some support for Credit Suisse’s argument. The Judge recorded Mr Michailov saying that despite the uncontractual performance that was

characteristic of ‘the carousel’ he was ‘prepared to run with it for another cycle or two’; and that he was ‘continuing to help [Mr Igniska] sort out his situation.’

53. However, the Judge’s finding over-all were clear. Crucially, he found that Euro-Asian was never a willing participant in what Mr Matthews QC characterised as Abilo’s ‘mis-performance’ of the four contracts.

336. In my view, Euro-Asian was not a willing participant, as Credit Suisse suggested, in any separate arrangements. Mr Michailov and Mr Duman were eventually aware of the fate of the *Dominia* cargo and of what they called the carousel. Once they realized what Mr Igniska was doing was untoward they were especially vigilant in obtaining a holding certificate covering the same quantity of oil as contracted.

337. But this did not mean that they ever accepted or approved this way of performing the transactions. They continued with Abilo and Mr Igniska because there was no loss in the first three transactions. Their protection in each case was a holding certificate and that was why they were so anxious to obtain one in the first three transactions before presentation under the letters of credit.

338. Indeed it is difficult to see what opportunities Euro-Asian had to put a stop to Abilo’s mis-performance of the transactions. Mr Michailov’s explanations that he was giving Mr Igniska the opportunity to trade out of his difficulties, that he was avoiding legal action and wanting the situation to be resolved commercially, and that he was hoping that Mr Igniska would eventually ‘close the circle’, all ring true. The insertion of the *Ariadne* in the November 2010 commissions table must be seen against this background: Mr Igniska would ultimately close the circle, Mr Michailov hoped, perhaps but perhaps not, on this turn of the carousel. And of course, crucially, Euro-Asian could always fall back on letters of indemnity signed by Credit Suisse.

339. As to the commissions and other financial benefits which Mr Michailov and Mr Duman derived from the Abilo business, I accept Credit Suisse’s submission that Mr Michailov and Mr Duman had been misleading about these and the true nature of their relationship with Mr Igniska. The financial benefits may have been a factor in not taking a stronger line with Mr Igniska and allowing the situation to run.

340. However, I do not accept that these personal financial benefits would ever have induced Mr Michailov (and Mr Duman) to enter the Credit Suisse type separate arrangements, with their grave attendant risk that Mr Igniska, as happened in the Fourth transaction, could present documents for payment when he had no cargo to supply. The commissions were small

beer compared with the potential losses to their company and consequential repercussions for them.

54. Three points are apparent from these paragraphs. First, there was little or nothing from the surrounding circumstances that indicated that the fourth sale contract (as in each of the earlier contracts) was intended to be performed other than as a normal CIF contract with title to the cargo to pass on presentation of documents. Second, there was no contrary mutual intention sufficiently evidenced by the conduct of the parties. Third, whatever the position in relation to the payment of commission, it had not resulted in a separate arrangement whereby Abilo could present documents triggering payment without a cargo. In short, Euro-Asian did not, as Credit Suisse contended, willingly participate in arrangements such that the fourth sale contract no longer had the characteristic of a CIF contract and the warranties and bills of lading undertaking in the fourth letter of indemnity did not apply. There was no variation of the contract nor any warranty or representation by Euro-Asian that it would not insist on its rights in respect of the performance of the contract.
55. The position under the fourth sale contract was that Abilo had from 10 September to 31 December 2010 to find a cargo for discharge at Constanza. Euro-Asian was entitled to presentation of documents against the letter of credit, which would trigger the passing of title. As the Judge found, there was no agreement in relation to the fourth sale contract that Abilo could affect delivery by the production of a tank holding certificate, nor that it would be entitled to be paid on presentation of documents relating to the third sale contract.
56. As Mr Matthews submitted, adopting the Judge's observations, Credit Suisse's arguments would attribute to Euro-Asian a singular lack of commercial common-sense. Against a background of Abilo's repeated 'mis-performance' of the contracts which Euro-Asian was unable to stop, Euro-Asian would pay nearly US\$16 million under the fourth sale contract for a letter of indemnity and commercial invoices which created no rights and had no bearing on whether there would ever be a cargo under the contract of sale. That is not to say that, if a contractual physical cargo and a tank holding certificate had been provided, Euro-Asian would not have been sufficiently content with the security not to enforce its rights. However, no such oil and no such certificate was provided. In such circumstances, it was entitled to enforce its contractual rights to conforming documents under the fourth sale contract. Euro-Asian's crucial protection was the letter of indemnity signed by Credit Suisse.
57. Euro-Asian was entitled to succeed in its claim against the signatories of the fourth letter of indemnity which was tendered for payment under the fourth letter of credit. This was because Abilo had already tendered the *Ariadne* cargo under the third sale contract, and the warranties enumerated in paragraph [C], which triggered payment, were not true in relation to the fourth sale contract and the fourth letter of credit, as at 3 and 6 January 2011. It was these representations, that Abilo had marketable title, rights to transfer title and to effect delivery, that enabled it to obtain payment under the fourth letter of credit. None were true and Credit Suisse gave their name to each of them.
58. In the light of this conclusion it is unnecessary to consider the further argument that Euro-Asian were only entitled to receive bills of lading in relation to the *Ariadne*. The proposition that Abilo could have complied with this obligation by tendering the

Ariadne bills of lading in relation to the October cargo is plainly wrong, absent the agreement of Euro-Asian, for the additional reasons given by the Judge in his judgment at [348-349].

59. Mr Gruder advanced a further argument based on a statement in *Anonima Petroli Italiana Spa and Neste Oy v. Marculidez Armadora SA (the Filiatra Legacy)* [1991] 2 Lloyd's Rep 337 at 3431, in which Mustill LJ declined to treat warranties in similar terms to the warranties in paragraph [C] of the letter of indemnity in the present case, as constituting warranties of present title, but rather as warranties of title at the time property was purportedly passed, but rather 'whenever that might be.' However, that observation does not assist Credit Suisse in the present case on the facts found by the Judge.

Conclusion on the first issue

60. For these reasons, which largely depend on the Judge's findings of fact, and notwithstanding Mr Gruder's measured and well-argued submissions, I would dismiss Credit Suisse's appeal on the first issue.

The second issue

61. This issue raises a short point on the measure of damages to which Euro-Asian is entitled. It claimed damages on the basis of the sound arrived value of the cargo.
62. The Judge rejected this point shortly:

Quantum

352. Quantum was dealt with in writing. Euro-Asian claimed the market value of 22,000 mt of ULSD (max 10ppm) in Constanza on or about 7 January 2011 against Abilo and Credit Suisse for breach of the Fourth letter of indemnity, and against Abilo for breach of the Fourth contract of sale. Euro-Asian and Credit Suisse agreed that this was US\$18,360,320. Abilo and Mr Igniska took the market valuation date as at 13-17 September 2010.

353. In my judgment Euro-Asian's damages should be capped at US\$15,889,500, the price which Euro-Asian invoiced Real Oil under the Fourth Real Oil contract. It was always contemplated that Euro-Asian would nominate the same cargo to perform the Real Oil contracts which Abilo had nominated to perform the sale contracts. The market value rule for damages for failure to deliver goods under section 51(3) of the Sale of Goods Act 1979 is displaced.

63. Section 51 of the 1979 Act provides:

(1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

(3) Where there is an available market for the goods in question, the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered or (if no time was fixed) at the time of the refusal to deliver.

64. The Judge found that the *prima facie* rule under s.51(3) was displaced because it was within the contemplation of both parties that Euro-Asian would nominate the same cargo in performance of a sub-sale to Real Oil.
65. Mr Matthews argued that there was an available market, as recorded by the Judge in [352] of the Judgment and there was no proper basis for disapplying the measure of loss set out in s.51(3).
66. Mr Gruder submitted that the Judge had found that the fourth sale contract formed part of a series of transactions involving Euro-Asian, Abilo and Real Oil which were designed to assist Mr Igniska's business. The basis and purpose of the fourth sale contract was that Euro-Asian would sell on, and ultimately deliver, the cargo to Real Oil. But for Abilo's breach of contract, Euro-Asian would have purchased the cargo for US\$15,844,840 and would have delivered the cargo to Real Oil at the price of US\$15,889,500, making a profit of US\$44,600. There was no possibility that Euro-Asian would have put the cargo to any other use. It followed that the Judge was right to assess the loss by reference to the sum that Euro-Asian would have received from Real Oil.
67. In the course of his submissions, Mr Gruder referred to what he described as the two fundamental principles underlying the award of damages for breach of contract. The first was the compensatory principle, that a claimant is to be placed as far as possible in the position it would have been in if the contract had been performed. The second is what is conveniently referred to as the rule in *Hadley v. Baxendale* (1854) 9 Exch 341, reflected in s.51(2) of the 1979 Act. In *Koufos v. C. Czarnikow Ltd (the Heron II)* [1969] 1 AC 350 at 424B, Lord Upjohn said this:
- What was in the assumed contemplation of both parties acting as reasonable men in the light of the general and specific facts (as the case may be) known to both parties in regard to damages as a result of the breach of contract ... each must be taken to understand the ordinary practices and exigencies of the other's trade ...
68. Although the parties' arguments developed by reference to two decisions of the Court of Appeal: *Slater and anor v. Hoyle & Smith Ltd* [1919] 2 KB 11 and *Bence Graphics International Ltd v. Fasson UK Ltd* [1998] QB 87, it is convenient to start with the language of s.51, which is in similar terms to the same provision in the Sale of Goods Act 1893.

69. In *Williams Brothers v. Ed. T. Agius Ltd* [1914] 510, the House of Lords made clear that in a claim for non-delivery, where goods sold were available on the market and there was evidence of a market price at the date of the seller's breach, the buyer's damages for non-delivery were not to be reduced by reference to the fact that they were in fact resold at a price below the market price at the time fixed for delivery. It is clear that in such cases what was referred to as 'accidental between the plaintiff and the defendant', for example a contract between the plaintiff and a third party was irrelevant.
70. It is unnecessary to set out the facts of *Slater v. Hoyle* (above) which was a case of defective delivery under s.53 of the 1893 Act. The damages were assessed by reference to the difference between the market value of sound cargo and the damaged cargo. The Court held that the buyer's damages were not to be reduced by taking into account the buyer's subcontract, under which the buyer had been able to deliver the defective goods and receive the full sub-contract price without any claim being made by the sub-buyer. Scrutton LJ expressed the general rule and what may be the exception at p.20:

It is well-settled that damages for non-delivery or delay in delivery of goods, where there is a market price, do not include damages for the loss of any particular contract unless that contract has been in the contemplation of the parties to the original contract: *Horne v. Midland Railway Co* (18730 LR 8 CP 131

71. In *Kwei Tek Chao and ors v. British Traders and Shippers Ltd* [1954] 2 QB 459 at 489, Devlin J addressed an argument that the plaintiffs were entitled to recover a lost profit on a sub-sale:

I do not think that that claim can succeed, first, because there is no evidence that that measure of damage was contemplated by the parties. It is perfectly true that the defendants knew that the plaintiffs were merchants who had bought for re-sale, but everybody who sells to a merchant knows that he has bought for re-sale, and it does not, as I understand it, make any difference to the ordinary measure of damage where there is a market. What is contemplated is that the merchant buys for re-sale, but if the goods are not delivered to him he will go out into the market and buy similar goods and honour his contract in that way. If the market has fallen he has suffered no damage; if the market has risen the measure of damage is the difference in the market price. There are, of course, cases where that prima facie measure of damage is not applicable because something different is contemplated. If, for example, a man sells goods of special manufacture and it is known that they are to be re-sold, it must also be known that they cannot be bought in the market, being specially manufactured by the seller. In such a case the loss of profit becomes the appropriate measure of damage. Similarly, it may very well be that in the case of string contracts, if the seller knows that the merchant is not buying merely for re-sale generally, but upon a string contract

where he will re-sell those specific goods and where he could only honour his contract by delivering those goods and no others, the measure of loss of profit on re-sale is the right measure.

In my judgment there is no evidence that the defendants had any knowledge that the plaintiffs intended to re-sell those very goods; indeed, I am not at all sure that the plaintiffs did intend to re-sell those very goods. I think that the highest that the case can be put is that the plaintiffs, if they did anything at all, appropriated those goods subsequently to the contract with Nam Hua. But there is no evidence that there was any system of string contracts; or that the defendants knew anything more than that the plaintiffs were buying for re-sale generally, and no evidence to show that it could ever have been contemplated that if the goods were not delivered it would be necessary for the plaintiffs to do anything except go out into the market and buy similar goods which would have taken their place.

72. The normal measure of damages for a failure to deliver goods is the estimated loss directly and naturally resulting, in the ordinary course of events from the seller's breach of contract, see s.51(2). Where there is an available market for the goods, the measure of damages is *prima facie* the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered or (if no time was fixed) at the time of the refusal to deliver, see s.51(3). However, the application of s.51(2) may mean that the *prima facie* rule in s.51(3) is not applied, or may be 'displaced' in the particular circumstances of the case. An example was given by Devlin J in the *Kwei Tek Chao* case (above): a string contract for specific goods. The issue in each case depends on the particular circumstances.
73. In the present case, the sale contracts formed part of a series of what were effectively financing transactions involving Abilo, Euro-Asian and Real Oil (or another of Mr Igniska's companies). They were not exactly string contracts, and I would accept that Euro-Asian could have performed its delivery obligation under the sub-sale other than through the purchase from Abilo. Nevertheless, there was a proper factual foundation, as set out at [72]-[79] of the judgment, which I have endeavoured to summarise at [12] to [14] above, for the Judge's conclusion that 'it was always contemplated' that Euro-Asian would nominate the same cargo to perform the Real Oil contracts that Abilo nominated to perform the sale contracts, so that he was entitled to his view that the damages he awarded was the measure of loss contemplated by the parties.
74. Accordingly, I would dismiss Euro-Asian's appeal on quantum.

Issue 3

75. This issue arises from the Judge's decision to award Credit Suisse an indemnity against Abilo confined to 80% of the joint liability of Credit Suisse and Abilo.
76. The Judge set out his reasons in Part VIII of the Judgment:

363. In written submissions Credit Suisse contended that it is entitled to an indemnity from Abilo under the Fourth letter of credit. That, it submitted, was a matter of construction or implication regarding the fourth letter of indemnity. Given its knowledge and involvement in the transaction, it must always have contemplated that, should any breach of warranty or undertaking occur, it would be Abilo (*via* Mr Igniska) who would, as between Abilo and Credit Suisse, have the greater responsibility for any such breach. A passage in *Vossloh Aktiengesellschaft v. Alpha Trains (UK) Limited* [2010] EWHC 2443 (Ch) [25] was cited in support.

364. In my view it is not possible to reach this conclusion on ordinary principles of construction or of the implication of terms. On the face of the fourth letter of indemnity Credit Suisse assumed joint and several liability with Abilo. This may have been common practice in the industry to give comfort to a buyer but that cannot affect the liability between a seller and the co-signing bank. In effect the fourth letter of indemnity on its face stated that Credit Suisse was assuming the same contractual responsibilities as Abilo and I cannot find that as a matter of construction or implication there is a term requiring Abilo to indemnify Credit Suisse should Credit Suisse be liable to Euro-Asian.

365. However, Credit Suisse is entitled in my judgment to a contribution from Abilo under the Civil Liability (Contribution) Act 1978 for the damages it must pay Euro-Asian. Credit Suisse seeks a one hundred percent contribution from Abilo having regard 'to considerations of relative causative potency as well as to comparative blameworthiness': see *Chitty on Contracts*, 32nd ed, para 17-034.

366. Earlier in the judgment I described the role of Credit Suisse. Abilo was their customer and the bank financed it by delaying presentation under what it regarded as tailor made arrangements and signing letters of indemnity regarding the situation as it was some months previously. On its own admission it was exposing itself to some risk. The reality was that in signing the letters of indemnity and acting in this way it was no longer a letter of credit bank.

367. In terms of the parties' comparative responsibility, however, it was Abilo (through Mr Igniska) which bears the major responsibility for Euro-Asian's loss. It was he who started the so-called carousel and, to continue with the Euro-Asian's terminology, it was he who never closed the circle. He kept what was happening from Credit Suisse, as explained earlier in the judgment.

368. In the result it seems to me that in terms of the parties' responsibility for the damage (see *White Book*, vol. 2, 9B-1092), Credit Suisse is entitled to a contribution from Abilo, one I assess at eighty percent.

77. The passage from the judgment of Sir William Blackburne in the *Vossloh* case at [25] reads as follows:

In contrast to the contract of guarantee is the contract of indemnity. In one sense all contracts of guarantee (strictly so called) are contracts of indemnity (as indeed are many contracts of insurance) since, in its widest sense, an indemnity is an obligation imposed by operation of law or by agreement of the parties. In the narrower sense in which, in the current context, the expression occurs, a contract of indemnity denotes a contract where the person who gives the indemnity undertakes his indemnity obligation by way of security for the performance of an obligation by another. Its essential distinguishing feature is that, unlike a contract of guarantee (strictly so called), a primary liability falls upon the giver of the indemnity. Unless (as is quite possible) he has undertaken his liability jointly with the principal, his liability is wholly independent of any liability which may arise as between the principal and the creditor. It will usually be implicit in such an arrangement that as between the principal and the giver of the indemnity, the principal is to be primarily liable, so that if the indemnifier has to pay first he has a right of recourse against the principal. (It will not be so if, for example, the indemnifier has not undertaken his indemnity obligation at the request of the principal.) It is this feature which leads to the person giving the indemnity to be described as a 'surety' although, strictly, the contract of indemnity cannot itself be a contract of suretyship.

78. Mr Gruder also referred to *Millett & Andrews, Law of Guarantees* (7th ed.) at §10-02 and *Chitty* (above) at §45-131, in support for the argument that the passage in the *Vossloh* case reflects both good commercial sense and good law. The relevant parts of the fourth letter of indemnity were primarily warranties given by Abilo. Credit Suisse signed the document making it jointly and severally liable for the warranties; but the nature of the letter of indemnity was such that it was clearly implicit that, as between Abilo and Credit Suisse, Abilo was the primary obligor and that if Credit Suisse had to pay, or pay first, it would have a right of recourse against Abilo. I do not accept the argument, which the Judge favoured, that Credit Suisse's rights of recovery are to be reduced for the reasons given by him: delays in presenting the documents. Credit Suisse undertook liability under the fourth letter of indemnity at the request, and for the benefit, of Abilo and knew nothing about how Abilo intended to perform its delivery obligations under the fourth sale contract. In these circumstances, I would hold that Credit Suisse should be entitled to recover 100% against Abilo.

Conclusion

79. I would propose that the issues on the appeal be decided as follows:
- i) (first issue) Credit Suisse's appeal on its liability under the fourth letter of indemnity should be dismissed;
 - ii) (second issue) Euro-Asian's cross-appeal on the measure of damages should be dismissed; and
 - iii) (third issue) Credit Suisse's appeal on the extent of its indemnity against Abilo be allowed.

Lady Justice King:

80. I agree.

Dame Elizabeth Gloster DBE:

81. I also agree.