Neutral Citation Number: **[2022] EWHC 957 (Comm)**

Case No: CL-2021-000020

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28/04/2022

Before:

MRS JUSTICE MOULDER

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Between:

UNICREDIT BANK A.G. Claimant

- and –

EURONAV N.V. Defendant

- -

- -

John Russell QC and Gemma Morgan (instructed by **HFW LLP**) for the **Claimant**

Robert Thomas QC and Paul Toms (instructed by **Preston Turnbull LLP**) for the **Defendant**

Hearing dates: **28-31 March 2022**

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MRS JUSTICE MOULDER

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to the National Archives. The date and time for hand-down is deemed to be 10:30am on 28th April 2022.

Mrs Justice Moulder :

1. This is a claim for damages brought by the Claimant, UniCredit Bank A.G. ("UniCredit" or the "Bank") for the alleged breach by the Defendant, Euronav N.V. ("Euronav" or the "Owners") of the bill of lading by delivering (part of) a cargo of low sulphur fuel oil (the “Cargo”) to a third party not against production of the bill of lading. Both liability and quantum are in issue. The Bank seeks damages of US$24,701,600.

Introduction

2. The Bank is a bank with its headquarters in Munich, Germany, which is involved in commodities trade finance.

3. The Defendant was at all material times the owner of the vessel "SIENNA" (the “Vessel”).

4. BP Oil International Ltd ("BP") were the sellers of the Cargo and the original charterers of the Vessel in relation to the carriage of the Cargo. (An issue about the role of BP Europa SE is dealt with below.)

5. Gulf Petrochem FZC ("Gulf") were the buyers of the Cargo from BP and became the charterers of the Vessel by a novation (the “Novation Agreement”).

6. By a bill of lading issued at Rotterdam and dated 19 February 2020 (the “Bill of Lading”) and signed by or on behalf of the Master of the Vessel, the Owners acknowledged shipment of the Cargo on board the Vessel in apparent good order and condition for carriage to and delivery at Fujairah, UAE. The Bill of Lading was made out to the order of BP or their assigns.

7. The Bank financed the purchase by Gulf of part of the Cargo ("the Financed Cargo") by way of letter of credit on or about 1 April 2020.

8. It was intended between the Bank and Gulf that the Financed Cargo would be re-sold to sub-buyers, approved by the Bank (the “Sub-buyers” or the “Offtakers”), on payment terms that required those Sub-buyers to pay the Bank directly, 90 days from the date of invoice against presentation of the invoice and a Certificate of Quantity issued by an independent surveyor.

9. The charterparty with BP was novated to Gulf on 6 April 2020.

10. The Financed Cargo was discharged from the Vessel by Owners by STS transfer to two other vessels, "KUTCH BAY" and "PRESTIGIOUS" between around 26 April and 2 May 2020 ("Discharge"). Discharge occurred without Owners requiring production of the Bill of Lading by any person.

11. The dates for payment of the invoices fell due in the period 26 July- 9 August 2020. Whilst in April/ May 2020 the Bank had no specific concerns about Gulf falling into default, according to the Bank’s evidence:

> “Things changed completely and rapidly in July of course once the market started to have suspicion of wide scale fraud”

By mid-July the Bank was aware that Gulf had a “liquidity distress” and suspected “fraudulent behaviour”.

12. On 7 August 2020, BP endorsed the original Bill of Lading to the Bank and this was received by the Bank in Hamburg on 13 August 2020.

Witnesses

13. For the Bank the Court heard from the following factual witnesses:

i) Ms Diana Bodnya employed by the Bank as Director Commodity Trade Finance, Switzerland. She was responsible for managing the relationship with Gulf.

ii) Mr Martin Borchert employed by the Bank as Head of Recovery Management Foreign Markets & Financial Institutions. Mr Borchert gave evidence relevant to the Bank's quantum case.

iii) Mr Patrick Cotasson employed by the Bank as Managing Director.

14. For the Owners the court heard evidence from Mr Christof Van de Gaer, employed as a Charterer at Euronav.

15. The court also has evidence from Captain Philippe De Meyer, Master of the Vessel during the voyage which is the subject of these proceedings. His evidence was admitted as hearsay.

16. Expert witnesses as to the value of the Financed Cargo were instructed but, in the event, they were not called as the value of the Financed Cargo at the date of delivery or the method of calculating the value if the value were not to be determined at the date of delivery was agreed by the time of trial.

17. The court did hear expert evidence on the counterfactual position in relation to the quantum case from Mr Daniel Corrigan, instructed by the Defendant, who was cross examined.

Financing arrangements

18. In 2019, the Bank agreed to provide financing to Gulf by way of a facility agreement and first demand guarantee dated 18 December 2019 ("Facility Agreement"). As security for this financing, the Bank and Gulf entered into a pledge agreement and a deed of assignment, both also dated 18 December 2019 (the "Pledge Agreement" and the "Deed of Assignment"). Under these agreements, amongst other things, all rights under bills of lading issued in respect of financed goods were pledged and assigned to the Bank.

19. It was not in dispute that some of the trades which are financed by the Bank proceed by way of the Bank's client on-selling the goods to its buyers. The repayment of the bank loan, so called "self-liquidating", is effected by the proceeds being paid directly by the sub-buyer to the Bank.

Issue 1: Did the Bill of Lading contain and/or evidence the/a contract of carriage in respect of the Cargo on or after 6 April 2020 (being the date of the Novation Agreement) and prior to the alleged misdelivery? Issue 2: Alternatively, were Owners' obligations as regards the carriage of the Cargo contained exclusively in the Charterparty and/or the Novation Agreement of 6 April 2020?

20. Issues 1 and 2 represent the cases advanced for the Claimant and the Owners respectively, as formulated by the parties during the trial in the Agreed List of Issues.

21. The crux of these issues is whether when BP ceased to be the charterer on 6 April 2020 by reason of the novation of the charterparty to Gulf, the contract of carriage at the time of delivery was contained in the Bill of Lading. BP remained the holder of the Bill of Lading at the time of delivery,

22. I understood it to be common ground that where a shipper is also the charterer the bill of lading is not the contract of carriage of goods but a mere receipt.

23. It is clear on the authorities that where a bill of lading is issued to a charterer and then indorsed to a third party, it attains contractual status upon indorsement on the basis that "a new contract

appears to spring up between the ship and the consignee on the terms of the bill of lading" (Tate & Lyle Ltd. v Hain Steamship Co. (1936) 55 Ll. L. Rep. 159, 174).

24. However in this case there was no indorsement of the Bill of Lading to a third party; rather BP, the original shipper, ceased to be the charterer and thus from the date of the novation, the Bill of Lading was no longer in the hands of the charterer. (It seems to have been accepted for the Owners that the Bill of Lading was not endorsed to Gulf at any point - the Bank received the original Bill endorsed by BP in August 2020.)

25. It was submitted for the Bank that there was no reason to distinguish the situation in this case from the position which would result on indorsement of the Bill. To the extent that a further contract came into existence between Gulf and the Owners which was contained in the novated Charterparty, it is the Bank's case (Reply paragraph 8 and 9) that that contract had no bearing on the Bill of Lading contract of carriage, or the rights or liabilities contained therein; the Novation Agreement operated simply as a transfer of rights and obligations under the Charterparty from BP to Gulf.

26. It was submitted for the Owners that there was no authority to support this proposition for which the Bank contends. It was submitted that the Bank sought to draw a false analogy with the orthodox position and infer the creation of contractual rights. It was submitted (Defendant's skeleton paragraphs 95 and 96) that by the novation the arrangements between the Owners and BP were terminated and BP did not intend the relationship to be governed by the Bill of Lading if their existing relationship was dissolved.

Discussion

27. It was submitted for the Claimant (paragraph 63 of its skeleton for trial) that:

> "… where a bill of lading is in the hands of a charterer of the carrying vessel, the bill of lading, for that period of time, is not a contractual document in the full sense; as between charterer and shipowner, the bill is merely a receipt in a charterer's hands. The contractual relationship between the charterer and shipowner is governed by the charterparty itself." [Emphasis added]

28. The claimant relied on Aikens Bills of Lading (3rd edition,2020) at paragraph 7.23 for that proposition. However Aikens states:

> "7.23 An important exception to the rule that a bill of lading contains or evidences the contract of carriage is where the bill of lading is issued to (or indorsed to) the charterer, in respect of goods carried on board the chartered ship. At least where the carrier under the bill of lading is the same party as the "owner" for the purposes of the charterparty, a bill of lading has no contractual force, and constitutes a receipt only in the hands of the charterer, the relevant contract of carriage being contained in the charterparty." [Emphasis added]

29. In turn Aikens cites in support of that passage Rodocanachi v Milburn (1886) 18 QBD. 67, 75, 78 and Kruger & Co. v Moel Tryvan [1907] A.C. 272, 278.

30. This passage from Aikens would tend to suggest that in circumstances where the bill of lading is issued to the charterer (in this case BP) the bill of lading has no contractual force.

31. The Claimant has not provided support by reference to any authorities for its submission that the bill of lading is not a contractual document "in the full sense" whilst in the hands of the charterer, merely asserting (paragraph 67 of its skeleton) that the Bill "temporarily lost its full contractual status whilst in the hands of BP". [Emphasis added]

32. The Court was not taken to Rodocanachi (relied upon by Aikens in the passage above) in oral submissions (on the issue of liability). Rodocanachi does not appear however to support an analysis of the bill of lading as a document which has merely "temporarily lost its contractual force". Lord Esher MR stated:

> "In my opinion even so, unless there be an express provision in the documents to the contrary, the proper construction of the two documents taken together is, that as between the shipowner and the charterer the bill of lading, although inconsistent with certain parts of the charter, is to be taken only as an acknowledgement of the receipt of the goods". [Emphasis added]

33. I also note the following passage in the concurring judgment of Lindley LJ:

> "It was argued that, reading the cesser of liability clause and the 10th clause of the charterparty together, an intention was shewn that a new and different contract from the charterparty should be created as between the plaintiffs and defendants by the bill of lading. I cannot say that I see on the documents any trace of such intention. The authorities shew that prima, facie, and in the absence of express provision to the contrary, the bill of lading as between the charterers and the shipowners is to be looked upon as a mere receipt for the goods". [Emphasis added]

34. No argument was advanced for the Claimant that there was any intention by the parties (as referred to by Lindley LJ above) that a new and different contract should be created as between BP and the Owners by the Bill of Lading.

35. The Claimant appears to have sought to bolster its (pleaded) case by submitting in its skeleton for trial that the original contract of carriage was between BP Europa and the Owners and thus sought to establish a distinction between BP Europa as being the original holder of the Bill of Lading and BP as charterer and subsequent holder of the bill. However that factual case was not pleaded and was raised for the first time in the Claimant's skeleton. On its face the Bill states that the Cargo was shipped by "BP EUROPA SE· BP NEDERLAND O/B BP OIL INTERNATIONAL LTD". This would tend to suggest that BP Europa was shipping "on behalf of" BP and as this issue was not pleaded, no evidence has been sought or was advanced to counter the prima facie meaning and I proceed on the basis that the shipper and the original holder of the Bill of Lading was BP.

36. On the premise that the Bill of Lading "temporarily lost its full contractual status" whilst in the hands of BP, it was submitted for the Claimant (paragraph 68 of its skeleton for trial) that when the charterparty was novated to Gulf, the Bill was no longer in the hands of the charterer of the vessel and thus was no longer a mere receipt. However the premise in my view has not been established. The authorities do support the Claimant's submission (paragraph 66 of the skeleton for trial) that a new bill of lading contract "springs up" when the bill is transferred by the shipper to a new lawful holder. Aikens at 7.27 states:

> "Where a bill of lading is issued to a charterer and then indorsed to a third party, it attains contractual status upon indorsement on the basis that "a new contract appears to spring up between the ship and the consignee on the terms of the bill of lading"." [Emphasis added]

37. However the footnote to that paragraph of Aikens states:

> "Tate & Lyle Ltd. v Hain Steamship Co. (1936) 55 Ll. L. Rep. 159, 174. The theoretical difficulty with this is that it involves not just a "new" contract but a contract springing up from a mere receipt."

38. This latter observation tends to suggest that the author does not support the Claimant's submissions (paragraph 67 of its skeleton) that the Bill had contractual status which it has "temporarily lost" such that it could be "revived" but rather that the Bill in these circumstances is a "mere receipt" which then acquires or "attains" contractual status when a new contract "springs up".

39. This in turn is evident from Tate & Lyle itself where Lord Atkin said that

> "It must be remembered that, at any rate, so far as the Cuban sugar is concerned, at the time of loss and until transfer of the bills of lading in October, Messrs. Farr were the only persons in contractual relation with the ship. The bills of lading which they held were in their hand's merely receipts for shipment and of course symbols of the goods with which they could transfer the right to possession and the property." [Emphasis added]

40. Lord Atkin then went on to consider the position of Tate & Lyle which was the indorsee of the bill of lading and held that:

> "A new contract appears to spring up between the ship and the consignee on the terms of the bill of lading".

41. In Scrutton on Charterparties and Bills of Lading (24th edition 2021) the author considered the principles which may underlie the proposition that a new contract springs up when the bill of lading is endorsed (at paragraphs 6-014 and 6-015):

> "This view is so long established that it is scarcely open to question. It is, however, not easy to explain. The lawful holder has by statute transferred to him all rights of suit under the contract of carriage, i.e. ''the contract contained in or evidenced by'' the bill of lading and may in certain circumstances become subject to liabilities under that contract. But in the case of the indorsement from the charterer-shipper of a bill of lading differing from the charter, there is, per Lord Esher in Rodocanachi v Milburn, no ''contract contained in the bill of lading'', but only a ''mere receipt''. How, then, can the indorsement pass what does not exist? Does a contract spring into existence on the transfer to the lawful holder, which had no existence before? And, if so, what statutory authority is there for such a ''creation'', as opposed to the ''transference'' ordained by statute? It may be said, as in Leduc v Ward, that between shipowner and indorsee the bill of lading must be considered to contain the contract, ''because the shipowner has given it for the purpose of enabling the charterer to pass it on as the contract of carriage in respect of the goods''. But this view, which appears to rest on some sort of estoppel against the shipowner, fails in the numerous cases where the variation from the charter

> is in favour of the shipowner and against the shipper and is also difficult to reconcile with the admitted law that a shipowner may repudiate against an indorsee for value a bill of lading, which his agent had no authority to give.
>
> Possibly the difficulty may be resolved by a consideration of the wording of the Carriage of Goods by Sea Act 1992 itself. Section 2(1) transfers to the lawful holder of the bill of lading all rights of suit ''under the contract of carriage as if he had been a party to that contract''. The definition of ''contract of carriage'' in s.5(1)(a) presupposes that the bill of lading does contain or evidence a contract: but if it is a mere receipt and the governing document is the charterparty it does not do so. As, however, the words of the statute must be given a sensible meaning, it is submitted that the true meaning is that the lawful holder has vested in him all rights of suit ''as if there had been a contract in the terms contained in the bill of lading and he had been a party to that contract''. [Emphasis added]

42. Whilst the author acknowledges the difficulty raised by the conceptual analysis, in my view it does not tend to support the analysis for which the Claimant contends.

43. In Carver on Bills of Lading (4th edition 2017) the position is analysed at paragraph 5-052 as follows:

> "…A similar difficulty arises under the 1992 Act which provides for the transfer of rights to the transferee "as if he had been a party to" the "contract contained in or evidenced by" the bill of lading: again the difficulty is that before the transfer no contract of carriage is contained in or even evidenced by the bill of lading, the contract of carriage being at this stage contained in the charterparty. But the legislative history of the 1992 Act shows that there was no intention of departing from the previously established position that the transfer gave rise to a contractual relationship between carrier and transferee on the terms of the bill of lading. This was explained by saying that a new contract "sprang up" when the bill was indorsed. Exactly why or how such a contract should "spring up" at the time of the transfer between parties who were not at this stage in contact with each other is not altogether clear; perhaps the best explanation (if it can be regarded as one) is that such a contract was a legal device, invented to avoid what would otherwise be a commercially inconvenient result. At any rate, the argument that a new contract springs up is no weaker now under the 1992 Act) than it was under the Act of 1855..." [Emphasis added]

44. Again this passage whilst noting the lack of clarity concerning the notion that a new contract "springs up", tends to imply that no contract exists at the time when the holder of the bill and the charterer are the same and not that the contract is merely suspended or in abeyance and thus capable of being "revived".

45. The Claimant submitted that there was "no reason" to distinguish between the two different ways in which the Bill of Lading ceases to be a bill in the hands of the charterer, those two ways being transfer of the bill by indorsement, and novation of the charterparty.

46. However it was submitted for the Defendant that it was difficult to see why a new contract should arise on the facts of this case. In particular it was submitted (paragraph 97 of its skeleton) that the textbooks make clear that the reason why the transfer is said to give rise to the creation of a contract

is because the shipowner is taken to have issued the bill of lading to the charterer intending to pass it on to a third party as the contract of carriage. It was submitted that by contrast in this case, at the time the Bill was issued, BP and the Defendant plainly did not intend their contractual relationships to be contained in the Bill of Lading. Rather the charterparty regulated those relationships. Whilst BP and the Defendant should be taken to have intended at the time the Bill of Lading was issued that it would regulate the legal relationship between the Defendant and a third party if BP transferred or indorsed the bill of lading to a third party, there is no reason to conclude that they intended that their relationship would be governed by the terms of the Bill of Lading in the event their contractual relationship was dissolved as it was by the novation. Thus it was submitted that it would be perverse to infer the creation of contractual rights in a document which previously had no contractual status, from an agreement in which the existing contractual relations were terminated.

47. In my view in the light of the authorities and the various commentaries discussed above, the Claimant has not established that the Bill of Lading contained or evidenced a contract of carriage after the novation of the charterparty. If and to the extent that this issue is not settled by the existing authorities, no satisfactory answer was provided by the Claimant in response to these submissions of the Defendant as to the way in which the intention of the parties can and should be analysed in this case. I accept the submission that there is no reason to conclude that the parties intended that their relationship would be governed by the terms of the Bill of Lading at the point where the contractual relationship between them in the charterparty had just been terminated.

Conclusion on Issues 1 and 2

48. In my view for the reasons set out above the Bill of Lading did not contain the contract of carriage between the Owners and the lawful holder of the Bill, BP, on or after 6 April 2020 (being the date of the Novation Agreement) and prior to the alleged misdelivery.

49. For these reasons therefore the Claimant's claim fails.

Other issues

50. In the light of my finding above, the other issues of liability and quantum do not fall for determination. However if I were wrong on Issue 1 and 2, I propose to set out the alternative basis on which I find that the claim falls to be dismissed.

51. I therefore set out below my findings on Issue 8 (Causation) on the assumption that the contract of carriage was contained in or evidenced by the Bill of Lading on or after 6 April 2020 and that the Owners were in breach of that contract.

Issue 8: If the Owners were in breach: 8(1) Has the breach caused the Bank any loss, or would the Bank have suffered the same loss in any event? 8(2) Did the Bank cause its own loss?

52. In response to the Claimant’s case that it had suffered loss in the amount of the market value of the Financed Cargo, the Defendant asserted that the loss had not been caused by the breach of contract. The Defendant pleaded in the Amended Defence as follows:

> "77. It is denied that the Claimant has suffered loss and damage by reason of the alleged breaches of contract and/or duty in bailment or otherwise. In particular:
>
> 77.1 Since, as set out above, the Financed Cargo was delivered to Gulf with the authority and approval of the Claimant, it is denied that it has suffered any loss and damage.

77.2 Any loss or damage was caused by the Claimant authorising and/or approving and/or requesting and/or permitting Gulf to arrange delivery/discharge of the Financed Cargo by the Defendant without production of the Bill of Lading by the lawful holder of the Bill of Lading." [Emphasis added]

53. It was also pleaded at 81 of the Amended Defence:

"As a matter of law, the Claimant is entitled only to damages to put it in the position it would have been in if the B/L Contract of Carriage had been performed in accordance with its terms. Since as at late April 2020 the Claimant required the Cargo to be discharged without the production of the Bill of Lading, the Claimant is required to particularise what it says the Defendant ought to have done (but did not do) in performance of its obligations under the B/L Contract of Carriage at the time of, or prior to, complying with the Claimant's request to discharge the Cargo without the production of the Bill of Lading. The Claimant is, thereby, put to proof that it would not have suffered the alleged loss and damage it claims to have suffered in any event, namely even if there had been no breaches as alleged." [Emphasis added]

54. In Reply the Claimant pleaded:

"60. Paragraph 77 and the sub-paragraphs thereof are denied. As set out above, the Bank did not authorise and/or approve and/or request and/or permit Gulf to arrange delivery/discharge of the Financed Cargo by the Owners to the "KUTCH BAY" and the "PRESTIGIOUS" without production of the Bill of Lading or at all.

...

64 As to paragraph 81, had the Owners performed the B/L Contract of Carriage in accordance with its terms it would not have discharged/delivered the Cargo without presentation of the original Bill of Lading and/or it would not have discharged/delivered the Cargo without the authorisation of the Bank and/or to any party other than the Bank or to the Bank's order." [Emphasis added]

55. In its skeleton for trial (paragraph 57) it was submitted for the Claimant that:

"Owners finally say that, even if they were in breach, the Bank has suffered no loss or caused its own loss because the Cargo was delivered to Gulf with the authorisation of the Bank. That is wrong for two reasons (i) the Bank did not authorise Owners (or anyone) to deliver the Cargo to Gulf (at all, and, a fortiori, not by STS at Sohar) and (ii) absent Owners' breach, the Cargo would not have been delivered to Gulf. It was Owners' breach which caused the discharge (and subsequent disappearance) of the Cargo, and thus defeated the Bank's ability to realise the value of its security interest in the Cargo." [Emphasis added]

56. In its Closing Note it was submitted for the Claimant that the Claimant did not "permit" Gulf to arrange discharge of the Financed Cargo without production of the Bill "generally" for the following reasons:

i) The Bank was not the lawful holder of the Bill at the time of discharge. It was therefore impossible for the Bank to have waived the rights of the lawful holder of the Bill or to give instructions about delivery.

ii) If Owners had not delivered the Financed Cargo, the Financed Cargo would have remained on board the Vessel and the Bank would have suffered no loss.

iii) The Bank was not the lawful holder of the Bill at the time of delivery. Nor was it Gulf's principal. It did not control how delivery occurred.

57. It was accepted for the Defendant that the Bank in this scenario was not the lawful holder of the Bill (paragraph 4 of its Closing Submissions) but it was submitted that:

i) either the Claimant caused its own loss by permitting Gulf to arrange delivery without production of the Bill (paragraph 4-5 of the Defendant's closing submissions); or

ii) the Claimant would have instructed or permitted Gulf to arrange discharge without production of the Bill and the Financed Cargo would have been discharged including by STS transfer at Sohar (paragraph 7 of the Defendant's closing submissions); or

iii) if the Bill of Lading was required to be produced the factual outcome would have been the same.

58. The Claimant submitted (in effect) that even if there may have been authorisation or approval by the Bank to Gulf to deliver without production of the Bill, there was no "general approval" and such agreement was only on the basis that it was delivered to the Sub-buyers, ex ship at berth and in Fujairah (Closing Note paragraphs 12 and 15). It was submitted (paragraph 13 of the Closing Note) that Ms Bodnya was clear in her evidence in cross examination that she did not approve Gulf making delivery to the Sub-buyers by STS (and did not learn until September 2020 that delivery had taken place at Sohar by STS) and that if she had been asked by Gulf to authorise discharge by STS she would not have done so.

59. It was submitted for the Defendant that on Ms Bodnya's evidence there was "no alternative reality" in which the misdelivery of the Financed Cargo would not have occurred (paragraphs 9-15 of its Closing Submissions):

i) The Bank had accepted that the Bill would not be available until after discharge had taken place and it is common ground that the financing scheme necessitated the Financed Cargo being discharged without production of a bill of lading.

ii) If the Claimant had been told that discharge would be taking place at Sohar by STS transfer it would have consented to such an operation.

iii) The Claimant trusted Gulf and would have left it to communicate its instructions to the Defendant.

60. To the extent that the Claimant relies on the fact that it was not the lawful holder of the Bill at the date of delivery and thus asserts that it was not entitled to authorise or permit delivery without production of the Bills, I note that in its Closing Note (paragraphs 45 and 46) the Claimant postulated what would have happened if the Owners had refused to discharge the Financed Cargo without production of the Bill. The Claimant asserted that the "likely sequence of events" is that the Owners would have contacted BP as the Bill of Lading holder to obtain instructions and had BP been contacted, it was "reasonable to assume" that BP would have advised Owners that the Bill had been sent for endorsement and transfer to the Bank, that the endorsement and transfer was likely to take

some time due to Covid restrictions and the Bank would have been contacted by the Owners and asked what it wanted to do. It is the Claimant's submission (paragraph 47(1) of its Closing Note) (relying on the evidence of Mr Borchert and Mr Cotasson) that the Bank would have "engaged with Owners and asked them not to discharge the Cargo without its consent".

61. I note that in closing submissions counsel for the Defendant objected to the Claimant having raised the scenario above on the basis that this was a new factual basis raised first in the Claimant's opening skeleton such that no evidence had been sought from BP. Further it was submitted that in light of the novation BP would have referred the owners to Gulf. In my view the key point for this purpose is that on the Bank's case, BP was the lawful holder of the Bill at that time yet the Claimant nevertheless accepts that it "is reasonable to assume" that the Bank would have been involved and would have sought to give instructions to the Owners (albeit that the Bank's case is that they would have told the Owners not to discharge the Financed Cargo).

62. The Defendant submitted (paragraph 13 of its Closing Submissions) that had the Claimant been told that discharge would have taken place at Sohar by way of STS transfer it would have consented to such a discharge operation. The Defendant pointed to various occasions when Ms Bodnya was given information by Gulf and did not challenge the information. It was submitted for the Defendant (paragraph 30(14) and 31 of Closing Submissions) that if hypothetically Ms Bodnya had been told by Gulf that the Financed Cargo was to be discharged at Sohar to two STS Vessels she would not have objected and thus the breach (i.e. delivery without production of the Bill of Lading) did not cause the loss.

63. For the Claimant it was submitted (in oral closings, see the transcript at Day 4, p.50) that:

i) The evidence of Ms Bodnya should be accepted as truthful and representing the true position, that she would not have agreed to discharge into the Kutch Bay and the Prestigious, which is the necessary element for the Owners to establish any case of defence based on causation.

ii) The essence of her evidence was that the Bank had already made every allowance to Gulf in respect of the numerous delays and changes in plan, due in large part, she said, to Covid issues. But yet another change of plan in circumstances where it was expressly or directly inconsistent with what Gulf had said that they were doing, would have been the "final straw".

iii) Mr Van de Gaer's evidence was that it was “unheard of” for discharge to take place in small clips to, say, half a dozen receivers by STS.

64. As to whether the Claimant caused its own loss it was submitted for the Claimant that the only effective or proximate cause of the Bank's loss of its security interest was the misdelivery of the Financed Cargo from the Vessel, which meant that the Bank was not able to exercise its security interest set out in the financing documents over the Financed Cargo.

Evidence

65. On this issue in my view the significant evidence as to the chronology was as set out below.

66. On 25 March 2020 Ms Bodnya sought an update from Gulf on the transaction in an email to Mr Agarwal of Gulf as follows:

> "Will you please update me on the status of the BP transaction and the related transport documents.

> Are the goods still on the vessel or have they already arrived to Fujairah? Latest NOR was March the 24th
>
> Any news on the offtaker?"

67. Gulf responded by email on 26 March 2020:

> "…Goods are still on vessel and will not be discharged without approval from UniCredit.
>
> Traders are discussing sales with some counterparties. Once confirmed will let you know."

68. A further exchange that day led Ms Bodnya to ask Gulf whether the plan had changed:

> "…So what is the plan with the cargo? Discharge in your warehouse or re- sell from the vessel? If NOR has been tendered on the 16th already BP has to pay the freight?"

69. There appears to have been a discussion by telephone between Gulf and Ms Bodnya following which Gulf sent an email:

> "…Cargo will be sold in small clips of 5000-6000 MT each to regular customers - delivered from the vessel." [Emphasis added]

70. Ms Bodnya's evidence in cross examination in this regard was as follows:

> "A. At that date, my understanding was that there would be no delivery to the storage in Fujairah which was initially envisaged, as according to Mr Agarwal the storage tanks of the Fujairah terminal were full.
>
> Q. And so you say, we are going to deliver direct to the clients from the vessel, yes?
>
> A. We were discussing delivery at ship one safe berth Fujairah."

71. On 1 April 2020 Ms Bodnya wrote to Gulf requesting that the Bill be endorsed in light of the fact that the Financed Cargo was to remain on the Vessel:

> “With the reference to the todays payment to BP for the 80 KT of fuel oil, delivered DES Fujairah on vessel Sienna under the above mentioned LC, we ask you to provide endorsement of Bls to our order, since vessel will be used as floating storage until further transaction settlement. Thank you very much for providing us with the copies of endorsed Bls and further on originals upon their availability.”

72. On 3 April 2020 Gulf forwarded to Ms Bodnya a response from BP rejecting the request for copies of the endorsed bills but stating that the originals were being sent to BP in London and would then be endorsed "through the commercial chain":

"Apologies for the delayed response, I have been trying to track down the originals. They have been posted to our London offices so should arrive early next week. Access to these will be difficult due to COVID-19 restrictions here in the UK.

Unfortunately we cannot fulfil your request to endorse a scan of the BL to UniCredit Bank AG. The original docs will have to be endorsed through the commercial chain as soon as practicably possible as per normal procedure."

73. Ms Bodnya then responded to Gulf on the same day:

"Situation is well noted and completely understood. I believe to the point you would get the originals, the goods would already be with the offtakers. Given LOI in place and current situation it can take long indeed.

So we would proceed as agreed under consideration of below." [Emphasis added]

74. In cross examination Ms Bodnya was asked about this email. The relevant exchange was as follows:

"Q…So you now are aware that the goods will be discharged without the Bill of Lading being available, aren't you?

A. Yes, my Lady, I was aware about this fact and I was aware about the fact that in case there would be no original of the BLs the discharge would be done against LOI, which is more than practical in the oil business. I can repeat, this is specificity of the oil business, and this is not practicable for the other cargoes." [Emphasis added]

75. On 1 April 2020 Gulf emailed Ms Bodnya. The email read (so far as material):

"1. Transaction status: As discussed, cargo is still on board the vessel MT Sienna, though it has been offered/ sold to some credit insured counterparties. Will send the required counterparties and credit insurance shortly. Open Credit Tenure is basis 90 Days.

2. Releases: Will keep UniCredit Informed for each discharge and subsequently transfer 10 % CM on each discharge basis.

3. Endorsement: As our purchase terms are DES basis, BP needs an explanation for seeking endorsement. Kindly share such explanation asap. Will try our best to get the endorsement in Favor of Uni Credit."

76. On 15 April 2020 Gulf sent the names of the Offtakers and the terms of the contracts. Ms Bodnya responded the same day:

"We have checked the below offtakers and they are acceptable. Will you please confirm neither of the below is a related party of GP? My assumption is this is not the case.

I also understood that these are not new offtakers, and you have a positive track record with them.

Since contracts are not signed (this is market practice indeed), will you please provide a deal recap/ email trade confirmation by the relevant client?

I kindly ask you to provide me with the updated insurance policy, the one I have has expired in Feb. 2020, though endorsements are up to date.

As per my calculation we would require a cash collateral of 10%, which is corresponding to USD 2,723,338 for this transaction. Will you please ensure timely transfer (prior to release of the goods to the offtakers)? Please find below the details of calculation for your convenience." [Emphasis added]

77. Gulf replied that day, on 15 April 2020:

"1. Thanks for below confirmation on counterparty acceptability.

2. We confirm that neither of the off takers a related party to GP.

3. Yes, these are not new off takers and we are dealing with them from past 5+ years.

4. As industry practice, contracts are not signed by both sides but as per your request have already requested the traders to arrange signed contracts from the counter parties (Please allow max time till Monday to arrange the same)

5. Will share the updated insurance policy by tomorrow (Expected copy of the same from Insurers)

6. For CM requirement, same is well noted. With each release, will transfer the CM. Currently cargo is on vessel itself and has not been delivered yet."

78. On 20 April 2020 Ms Bodnya chased Gulf for an update:

"…Your update on the BP deal would be highly appreciated.

According to the contracts the discharge location was supposed to be declared by the buyers by April the 4th. Please share the discharge schedule and kindly provide for the cash cover of the balance, together with the invoices you are issuing.

As per our correspondence the delivery was supposed to start last week…" [Emphasis added]

79. On 22 April 2020 in advance of a call that day with Gulf, Ms Bodnya wrote to Mr Agarwal setting out the matters to be discussed in relation to the Financed Cargo and seeking “full clarity”:

"…BP fuel oil - where are the original BLs? They should be endorsed to our order. Why delivery has not yet taken place, as envisaged? Will the clients agree to accept the goods with the March pricing period with is significantly higher? What is alternative scenario and what is the reason for delay?..." [Emphasis added]

80. Following that call there was an email apparently with the comments of Mr Cotasson in light of the information received on that call. I note that it records:

"Diana follows regularly vessel position - client confirmed that they have no concern on all the 6 offtakers, they will take the goods even higher prices - l.t experience with them -…"

81. On 27 April 2020 Ms Bodnya chased Gulf again:

"…BP fuel oil. when we will get BLs endorsed to our order/ instruction to BP, as well as delivery dates to the offtaker? What is the current transaction status?..."

82. Gulf responded that day:

"…BP Cargo

1. Please find enclosed endorsement instructions sent to BP for Endorsing the BL and BP Replies. Our ops is still chasing them for the same periodically

2. Expecting some deliveries within this week. Will keep you updated on the same.

3. Cargo is on vessel MT Sienna…" [Emphasis added]

83. On 30 April 2020 Ms Bodnya chased Gulf:

"Please provide us with an update for BP Cargo: deliveries were supposed to take place this week any update on this as well as on Bls?"

84. In a postscript she added:

"PS Vessel MT Sienna has changed the position and is moving please revert with the cash margin and update on the offtake/ discharge and invoices…" [Emphasis added]

85. In her witness statement Ms Bodnya said that she knew the Vessel was moving because she was tracking the Vessel's movements on the marine traffic website. She said she asked for an update because the Vessel had remained in the same position for some time and then started moving.

86. In cross examination Ms Bodnya accepted that she was aware the Vessel was then at Sohar:

"Q. So at that stage you would have known from checking the position that she was at Sohar anchorage C, wouldn't you?

A. Yes, I guess at the time I was checking it was at the Sohar anchorage, yes.

> Q. As we can see from the exchange leading up to this you knew that the vessel had either discharged or was in the course of discharging at that anchorage, weren't you?
>
> A. No, there is no way you can see from the marine traffic what the vessel was exactly doing. You can see the location of this vessel, but you cannot see what the vessel's doing, whether it's discharged, whether it's full, whether there is anything on the vessel.
>
> Q. You knew where she was.
>
> A. Yes, that's correct." [Emphasis added]

87. Gulf responded to the 30 April email on the same day:

> "Please advise required CM amount for this cargo.
>
> COQ and Invoices will be arranged by tomorrow/ Sunday."

88. On 4 May 2020 Gulf transferred the cash margin and sent the sales invoices to Ms Bodnya.

Discussion

89. I accept that it was inherent in the financing scheme that the Financed Cargo would be discharged without production of the Bill of Lading (this was common ground).

90. I also accept on the evidence that the Claimant had accepted that in this particular case the Bill of Lading would not be available until after discharge had taken place: the position was initially accepted by Ms Bodnya at the beginning of April and even when Ms Bodnya later (on 27 April) sought information as to when the Bill would be endorsed, she appears to have raised no protest on being told by Mr Agarwal that the matter was being chased by Gulf "periodically".

91. It was submitted for the Defendant that:

> "… as matters progressed it's clear from the correspondence, they were keen to ensure they received the cash margin and that the cargo was sold. They were keen to get the much-delayed cargo off to sub-buyers in order obviously so that they would be paid… it did not matter to the Bank how or where the cargo sold. Once they understood it was not going to the shore tanks, precisely where or how it was delivered to sub-buyers was not a matter of any consequence to the Bank or its security position. And the reality … is they were impatient to see it sold, irrespective of the Bill of lading position, and indeed irrespective of precisely where it was sold." [Emphasis added]

92. It seems to me on the evidence that Ms Bodnya was aware and did implicitly (if not expressly) approve discharge without production of the Bill of Lading: it was inherent in the structure of the financing and common practice in the relevant market; further on the facts of this case given the Covid restrictions, the endorsed Bill was not going to be available in time for discharge of the Financed Cargo.

93. In light of this evidence it is clear why the Claimant does not seek to press the argument that there was (or would have been) no approval by the Bank to discharge without the production of the

Bill but rather seeks to argue that there was no "general approval" from the Bank and no specific approval for delivery without production of the bill at Sohar by STS into Kutch Bay and Prestigious.

94. In considering whether there was a "general approval" of delivery without production of the Bill which would encompass delivery without production of the Bill at Sohar by STS, I note in particular the evidence of Ms Bodnya that she would not have agreed to discharge by STS for the following reasons:

i) the conditions of the financing had to be strictly followed;

ii) there were too many changes from the original agreement; and

iii) she would not have accepted a proposal to discharge by STS as reasonable.

95. The relevant parts of her oral evidence were as follows:

> “Q …once you knew the cargo wasn't going to be stored in Gulf's tanks, but delivered from the ship to buyers, as I said to you, it wouldn't have made a difference to the Bank's security position how or where it was delivered. And that's why you weren't concerned about delivery to Sohar because as far as you were concerned the Bank's position was no different, whether it was discharged at Sohar or at Fujairah. That's the truth, isn't it?
>
> A. No, my Lady, this is not the truth. This is very important that the client follows agreement with the Bank. The financing is approved under certain conditions and those conditions needs to be strictly followed. We have discussed these transactions with GP several times. There were a few changes with the modus operandi. So we indeed were keen that Gulf Petrochem will this time really observe what was agreed upon.” [Emphasis added]
>
> "Q. What I suggest to you, Ms Bodnya, is that if in April, 25 April, you had been told by Mr Agarwal that the cargo was going to be discharged at Sohar to two STS vessels for delivery to the sub-buyers, you would have said, "Fine, that's not a problem."
>
> A. No, my Lady, I would not have said, "Fine". Because once again, this is really untypical that the parameters of the transaction change that often and putting cargo from one vessel onto another for the sales to six off-takers. So what is the reason why they cannot take it from this vessel at the port as it was discussed? For me it was already too many -- at that time there were too many parameters that have changed. And as you can see, I was really following it. I was really asking questions. I was raising questions. So I would by far not have agreed if the client would have approached me with this question to authorise the discharge." [Emphasis added]
>
> “A. I wanted this cargo to be sold. I have indeed accepted the explanations, the previous explanations, from Mr Agarwal because they were considered to be reasonable. But once again, in this particular situation I would not simply have accepted the suggestion to load -- to make an STS from one vessel to another without further investigating. So the answer is no, I would not have accepted it." [Emphasis added] [p160]

96. In considering the evidence of Ms Bodnya the court has to assess her general credibility and the reasons advanced in support of her evidence that she would not have agreed to discharge by STS at Sohar.

97. For the Defendant it was submitted that:

> "Witnesses often convince themselves that something must have been the case after the event, because that's the sequence of events that makes sense in the cold light of day. But it's often the way that witnesses fall down. And in this case, it is fair to say that Ms Bodnya obviously was conscious of having made some serious mistakes. This is a matter which cost her desk and her bank a very considerable amount of money. And her evidence, with respect, must be taken in that context."

98. For the Claimant it was submitted that Ms Bodnya was "patently an honest witness" though it was accepted that "there may be scope for argument as to whether her interpretation of documents or events at the time is objectively correct or not." It was submitted that she was "clearly giving honest evidence as to what her understanding was at the time" and she was adamant that she would not have agreed to discharge into the Kutch Bay and the Prestigious.

99. In my view the Defendant puts its case too highly to say that Ms Bodnya was "conscious of having made some serious mistakes". Many of the matters which the Defendant raise as "mistakes" are in my view so characterised only with the benefit of hindsight. However I accept that this case was a significant event for the Bank both in terms of the fraud and the size of the loss which it suffered. Mr Cotasson's evidence was that:

> "The sale of a cargo pursuant to a bank's security rights is very rare. This is not something which I have experienced personally".

100. Ms Bodnya as the person responsible for managing the day to day relationship with Gulf, was the main witness for the Bank in these proceedings and in reality, the only witness who could address the liability case. It is reasonable to infer that she would have been conscious when giving oral evidence of the significance of her evidence to the claim brought by the Bank.

101. Given what came to light concerning the fraud and the loss suffered by the Bank, it is also reasonable to infer that in hindsight with the knowledge of the fraud, she may wish that she had acted differently and in particular had not accepted what she was being told by Gulf/ had made further enquiries. Accordingly in my view her evidence to the Court as to what she would have done if the Bank had been asked to permit delivery without production of the Bill including discharge at Sohar by STS has to be approached with some caution.

102. In my view the evidence of the contemporaneous emails shows that although Ms Bodnya was actively chasing Gulf for updates as to the arrangements for the delivery of the Financed Cargo, she did accept the various explanations which were being given by Gulf over the period from the end of March to May 2020 including as to why the Financed Cargo could not be discharged into storage tanks at Fujairah, whether the Sub-buyers were related parties, why the Sub-buyers were willing to take the Financed Cargo at a price which was above the prevailing market price.

103. As referred to above, when the Bank first entered into this transaction with Gulf, it was envisaged that the Financed Cargo would be held in storage tanks and a holding certificate issued to the order of the Bank. However, the plan changed and Ms Bodnya understood on 26 March 2020 from

Gulf that the Financed Cargo would remain on the Vessel and would not be discharged as originally intended into Gulf storage tanks at Fujairah.

104. When it became clear that the Financed Cargo would not be discharged into storage tanks but the Vessel would be used as floating storage, she did ask Gulf to arrange for the original Bill of Lading to be endorsed to the Bank. However as noted above, Gulf informed Ms Bodnya that the Bill would not be endorsed and transferred for some time due (largely) to Covid restrictions. As is evident from her emails she accepted this position (and given the evidence as to the impact of the Covid restrictions there can be no criticism of her in this regard).

105. Ms Bodnya was then told by Gulf that the Financed Cargo would be sold in small clips of 5000-6000MT delivered from the Vessel. Her oral evidence was that she did not think however that there would be as many as 20 Offtakers and that she had only discussed with Mr Agarwal 6 or 7 Offtakers.

106. In relation to the Offtakers, Ms Bodnya said in oral evidence that she had done searches on the identity of the Offtakers.

107. As to whether the Sub-buyers were related parties to Gulf, Ms Bodnya insisted that she had done her own research and checked Gulf's financial statements. However this was not referred to in her witness statement (paragraph 38) where she said:

> "When the Bank receives details of proposed offtakers it performs the following routine checks: whether the offtakers appear on any sanctions or embargo lists; whether there are negative news stories about the offtakers in the press; whether the offtakers are known to the Bank from any prior transactions. In addition, the Bank asks the client to confirm whether the offtakers are related to the client and to confirm that the client has a proven track record with the offtakers."

108. I infer that Ms Bodnya would have been aware of the attempt by the Defendant in these proceedings to criticise the Bank's due diligence in relation to the Sub-buyers. The contemporaneous emails would suggest that she relied largely on the statements of Gulf that they were not related parties and that they had a positive track record. The significance of ascertaining whether the Sub-buyers were related parties was explained by Ms Bodnya in cross examination:

> "the credit insurance on which I was supposed to rely, on which I was relying, this credit insurance excludes related parties from the coverage".

109. Further it would appear that although Ms Bodnya queried whether, given that the market price had by then fallen significantly, the Sub-buyers would be prepared to take the Financed Cargo at the March pricing, the Bank accepted Gulf's explanation at face value that the Sub-buyers were prepared to do so because they were long term customers, an explanation which does not appear to have any commercial logic.

110. As to the importance to the Bank of the location of the discharge, I note that in her email of 20 April (above) Ms Bodnya referred to a need to declare the discharge location by 4 April. Ms Bodnya in cross examination stated that this was just because she was checking receipt of the various documents. This evidence seems at odds with the tenor of that email which contained both a request for the declaration of the discharge location and for a discharge schedule.

111. More significantly Ms Bodnya was aware that the Vessel was at Sohar for a period of days although she said that she was not aware that the Vessel discharged the Financed Cargo at Sohar. Given the email from Gulf of 30 April 2020 stating that the Certificate of Quantity was about to be issued, it is surprising at least with hindsight that Ms Bodnya did not appreciate that discharge was occurring/imminent. In any event I infer from her evidence concerning the location of Sohar that she was not, or would not have been, particularly concerned about discharge at Sohar. Such an inference is consistent with the fact that the Bank had already accepted that the Financed Cargo would not be discharged into the storage tanks at Fujairah and thus the Bank's additional protection through the storage arrangements had been given up.

112. The Claimant submitted that if Ms Bodnya had been asked by Gulf to authorise discharge by STS she would not have done so. The Claimant did not seem to go so far as to submit that she would not have approved discharge at Sohar: in its submissions the Claimant submitted that Ms Bodnya did not know discharge was taking place by STS at Sohar. Although the Claimant submitted that it did make a difference to the Bank where and how discharge took place (paragraph 13(11) of its Closing Note) the Claimant did not appear to go as far as to submit that Ms Bodnya was unaware that discharge took place at Sohar or that she would not have agreed to discharge at Sohar.

113. The Claimant appeared therefore in its submissions to focus on the issue of discharge by STS.

114. The evidence of Mr Van de Gaer in cross examination was as follows:

> "Q. Now, if someone suggested to you that 80,000 metric tonnes of that was going to be discharged to six separate off-takers by way of six STS operators in lots of between 7,300 metric tonnes and 20,000 metric tonnes over the course of a week or more, what would your response have been?
>
> A. It would be a very -- my response would be that it would be an unusual situation, uncommon and not practical. The Suezmax is a very large oil tanker and not really made to discharge into these small clips --small parcels." [Emphasis added]

115. In her oral evidence Ms Bodnya said:

> "We have discussed with Mr Agarwal delivery at ship in Port of Fujairah. We have never discussed with Mr Agarwal delivery with STS transfer. And even more, like, delivery for STS transfer for such a small amount would barely make sense. Why? Because the STS delivery that is the method of shipment where the losses from passing the cargo from one vessel to another are maximum compared to the other. So it wouldn't make economic sense to make STS transfer for such small clips of 5,000 to 6,000 metric tonnes."

116. Whilst STS may not have been discussed with Gulf, the issue is whether it was agreed or permitted by the Bank as part of a "general agreement" or would have been agreed or permitted by the Bank. Although it was the evidence of Mr van Gaer that it was unusual and uncommon, it has to be weighed against the circumstances at the time. In this regard I note Ms Bodnya's evidence concerning the impact of Covid on (amongst other things) the logistics and access in the ports:

> "I guess the very important circumstance that cannot be taken out of context is the Covid. And one of the reasons why, for example, the modus operandi of this transaction has changed is because of Covid conditions. It's because of the fact that the market has

not been quite stable. The market has been disrupted. So just, I guess this is important to state, that the experience I was having in the previous transaction I was indeed relying on it. But in the circumstances of Covid, where there were problems with the access in the ports, where there were problems with the logistics, where there were problems with the personnel, that was something that I had to consider every time that the client was providing explanation to me. So what the client was referring in several cases was exceptional conditions in which not only GP but in which all the world had to deal. That was 2020. That was April and March, when there was the huge uncertainty everywhere. That is something I guess needs to be considered as well." [Emphasis added]

117. I further note this evidence of Ms Bodnya:

"… if you would allow me just to revert to the previous question why I was accepting the answers and why I was really dealing with the transaction as I did before in March and in April. I want to reiterate once again; this was absolutely an exceptional situation for the whole world. It was indeed very difficult to get to the offices. It was indeed -- there were irregularities everywhere. It was indeed impossible to get to the offices and get the BL indorsement. It was indeed impossible -- there were very huge logistics, also block-ups in the ports due to which it was not, for example, possible to timely deliver the cargo. These were not ordinary conditions under which you would have acted…" [Emphasis added]

118. In oral closing it was submitted for the Claimant that:

"it is just fanciful to suppose that in the case where the owners did not breach their Bill of Lading contract, and the cargo stayed on the vessel, and investigations then took place, that the Bank would have agreed to discharge into the Kutch Bay and the Prestigious".

119. The issue for the court is whether the failure by the Owners to require production of the Bill of Lading caused the loss or whether the Bank would have suffered the same loss in any event. Taking first the reasons advanced by Ms Bodnya as to why she would not have agreed to STS transfer, in my view:

i) the Bank did not and would not have taken the view that the conditions of the financing had to be "strictly followed" so far as discharge was concerned – the Bank accepted that the Financed Cargo would not be discharged into storage at Fujairah even though this meant that the Bank lost the additional protection of control over the storage facilities;

ii) any request for STS transfer would not have been the "final straw" – the Bank accepted the various explanations provided by Gulf even where in hindsight at least, it would appear that it should have challenged them e.g. the pricing of the Sub-contracts; and

iii) any request for STS transfer would in normal times have been unusual but these were not normal times: "in the circumstances of Covid, where there were problems with the access in the ports, where there were problems with the logistics, where there were problems with the personnel…".

120. Looking at the wider question of whether the Bank would have insisted on production of the Bill of Lading and whether it would have permitted discharge without production of the Bill, including by STS at Sohar, the evidence is that:

i) the Bank had no specific concerns about Gulf falling into default at this time;

ii) in relation to the Sub-buyers, Gulf had taken out trade credit insurance covering 90% of the receivables under the contracts with the Sub-buyers and the Bank had the benefit of an assignment of this policy and thus believed at the time that it was insured as to 90% against credit risk; and the Bank had received (or had no reason to believe that it would not receive) a 10% cash margin which covered the remaining credit risk.

iii) Ms Bodnya had been told the names of the Sub-buyers and had confirmed that they were acceptable and by 4 May 2020, had received the invoices.

121. Against this economic background, having regard to my assessment of the credibility of Ms Bodnya and in the circumstances discussed above including the impact of Covid, I find on the evidence that:

i) the Claimant did permit and in any event, would have permitted discharge without production of the Bill of Lading;

ii) the Claimant would have permitted discharge at Sohar by STS;

iii) if the Claimant had been aware, or told that discharge was to be made by STS at Sohar, the Claimant would not have halted discharge and have carried out investigations into Gulf and/or the Sub-buyers; and

iv) the loss would have occurred in any event.

122. I find that any breach by the Owners in discharging the Financed Cargo without production of the Bill of Lading did not cause the loss or in the alternative that the Bank would have suffered the same loss in any event. If therefore I were wrong on Issues 1 and 2, the claim falls to be dismissed on this basis.