Contract or "mere receipt"?: Unicredit Bank A.G v Euronav N.V

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The interrelationship between a bill of lading and the underlying charterparty is notoriously complex. If there is a conflict as to whom goods should be delivered under these two documents, a carrier can find itself caught between the proverbial Scylla and Charybdis and at risk of misdelivery claims. One particular issue arises where a bill of lading is held by the voyage charterers, but the charterparty is novated and the voyage charterers are no longer "charterers" under that contract. If the charterparty provides for discharge without a bill of lading, and the goods are discharged on that basis, can the original charterers, or any party they have indorsed the bill of lading to, claim for misdelivery pursuant to that bill of lading? Or is the bill of lading in such a situation simply a "*mere receipt*" with no contractual force? The recent Court of Appeal decision in *Unicredit Bank A.G v Euronav N.V* [2023] EWCA Civ 471 dealt decisively with this issue and provided a useful overview of the relevant case law.

The facts

Gulf Petrochem FCZ ("**Gulf**") purchased 80,00 mt of very low Sulphur fuel (the "**Cargo**") from BP Oil International Ltd ("**BP**"), financed by Unicredit Bank A.G (the "**Bank**").

BP voyage chartered the MT Sienna from Euronav (the "**Owners**") on the terms of the BPVOY5 form (the "**Charterparty**"). Owners issued a bill of lading made out to the order of BP or their assigns (the "**Bill of Lading**"). Clause 30.7 of the Charterparty, as is commonplace in the industry, provided for the Owners to discharge the Cargo without the Bill of Lading in exchange for a letter of indemnity.

While Gulf requested that BP indorse the Bill of Lading directly to the Bank, delays caused by COVID meant this was not possible in time. The Owners, BP and Gulf therefore entered into a novation agreement whereby Gulf replaced BP as the voyage charterer. Consequently, Gulf could request discharge by providing a letter of indemnity, despite not being the Bill of Lading holder itself.

The Owners subsequently discharged the Cargo on Gulf's instructions, while the Bill of Lading was not endorsed to the Bank until more than three months later, following suspected "*fraudulent behavior*" by Gulf, and concerns about its financial position.

As the Bank were not repaid by Gulf, or the sub-buyers, it brought a claim against the Owners alleging a breach of contract for discharging a Cargo without production of the original Bill of Lading.

The High Court

The Bank claimed that, in delivering the Cargo without production of the original Bill of Lading, the Owners were in breach of contract. It argued its title to sue arose from s. 2(1) of the Carriage of Goods by Sea Act 1992 ("COGSA") which provides that the lawful holder of a bill of lading "*shall…*

have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract." Such *"contract of carriage*" being "*contained in or evidenced by*" the bill of lading.

However, Owners argued, and the High Court agreed (the "**First Finding**"), that, since BP was both the shipper and the voyage charterer, the Bill of Lading was and remained a "*mere receipt*" and not a contract of carriage. There is long-standing authority that where the carrier under a bill of lading is the same party as the "owner", and the bill of lading is issued to the same party who is the charterer under the charterparty, the bill of lading is simply a receipt for the goods, and not a contractual document. The contract of carriage is, in such a scenario, purely that set out in the charterparty. There was therefore no contract in place under the Bill of Lading at the time of discharge which could be breached and the contract for carriage of the goods remained as set out in the novated Charterparty. Owners were accordingly entitled to discharge to Gulf upon receipt of a letter of indemnity. Subsequently endorsing the Bill of Lading to the Bank made no difference, as the novation did not affect the fact that it was simply a "*mere receipt*" at the time of discharge, and no contract had sprung into existence between BP and the Owner following the novation.

Further, the Court held that, had the Owners refused to discharge the Cargo under the letter of indemnity, the Bank would have suffered the same loss in any event (the "**Second Finding**"). This was because the Bank would have instructed discharge without production of the Bill of Lading had it been asked to do so, as there were no concerns about Gulf defaulting at that time, so even had there been a breach, it was not causative of any loss.

The Court of Appeal

The Bank appealed against both findings.

<u>The First Finding</u>

On this issue the Bank succeeded. There were two key reasons for this.

Firstly, the "*mere receipt*" principle "*prima facie applies, but is subject to any express contrary intention*". The Novation Agreement provided that, if BP remained the holder of the Bill of Lading, it could make a claim for discharge without production of the Bill of Lading. As such, this was evidence that the parties intended the Bill of Lading to be more than just a receipt. Upon novation of the Charterparty, the Bill of Lading accordingly became a contractual document in BP's hands.

Secondly, even were this not the case, indorsement of the Bill of Lading to the Bank created contractual obligations which applied retrospectively. This is, in part, a consequence of the rather odd position that, while a bill of lading may just be a "*mere receipt*" in the hands of the charterer, when it is indorsed over to a third party, a new contract "*appears to spring up between the ship and the consignee on the terms of the bill of lading*"[1]. While there has long been debate about precisely how this new contract springs into existence, and in particular how it effects events which occurred prior to its formation, Popplewell LJ agreed in this judgment with the authors of *Scrutton on Charterparties and Bills of Lading (24th ed)* that this occurs pursuant to the wording of Section 2(1) of COGSA which means the lawful holder is treated as though it had always been a party to that bill of lading contract, and this contractual relationship is treated "*as having always existed*". This is in part a consequence of the presumed intention of the parties, in that carriage of goods by sea is unlikely to be intended to take place without any such contract being in place at all.

While this is a general presumption "*and subject to a contrary agreement or circumstances showing a contrary intention*", no such contrary indications existed in the present case, and nothing in the novation agreement displaced this presumption.

As such, the Court held that the Bill of Lading was not a mere receipt at the time of discharge but had become a document containing or evidencing the contract of carriage and remained so at the date of discharge. The Owners were accordingly in breach of that contract by discharging to Gulf without production of the Bill of Lading.

The Second Finding

On this issue the Bank failed as the Court upheld the Hight Court's decision that it would have suffered the loss irrespective of breach, as discharge would have been made to Gulf regardless.

As such, the appeal was dismissed.

Commentary

The judgment is a very helpful review of the relevant authorities and provides a clear and succinct overview of the law in this area. As such, it will be welcomed by the industry and provides some much needed clarity in particular on this retrospective effect of S2(1) of COGSA. It is also a reminder that care needs to be taken when novating rights relating to contracts of carriage, and that financing banks in particular need to be careful to ensure they are properly protected. The Bank's failure on the point of causation is a stark reminder that a technical breach of contract when it comes to discharge of goods may not be sufficient to permit recovery.

Postscript

On 19 October 2023, the UK Supreme Court refused to grant Unicredit permission to appeal the decision of the Court of Appeal and, as such, the dispute is now at an end.

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[1] Tate & Lyle v Hain Steamship Co (1936) 55 Lloyd's Rep 159