Neutral Citation Number: [2022] EWHC 564 (Comm)

Case No: CL 2021-000020

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 15/03/2022

Before:

MRS JUSTICE MOULDER

- -

Between:

UNICREDIT BANK A.G.	**Claimant**
- and -	
EURONAV N.V.	**Defendant**

- -
- -

JOHN RUSSELL QC, GEMMA MORGAN AND JOE GOURGEY (instructed by **HFW**) for the **CLAIMANT**
ROBERT THOMAS QC AND PAUL TOMS (instructed by **PRESTON TURNBULL**) for the **DEFENDANT**

Hearing date: 4 March 2022

- -

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 Bailii. The date and time for hand-down is deemed to be 10:00am on 15th March 2022.

Mrs Justice Moulder:

INTRODUCTION

1. This is the court's judgment on the issue raised by the Defendant, Euronav N.V. ("Euronav"), as to whether it may make certain amendments to its Defence on the basis that such amendments fall within the scope of a Consent Order approved by Butcher J dated 14 January 2022 (the "14 January Consent Order").

2. If the proposed amendments are found not to fall within the scope of the 14 January Consent Order, Euronav seeks, in the alternative, permission to make the proposed amendments now.

3. The Claimant, UniCredit Bank A.G. ("UniCredit"), resists the proposed amendments; it contends that the amendments are not within the scope of the 14 January Consent Order and that permission should not now be given at this "late" stage.

4. The trial in this case is due to commence on 28 March 2022.

5. This issue was the subject of a full day of submissions at the Pre-Trial Review, heard remotely (via Microsoft Teams) on 4 March 2022.

6. The Pre-Trial Review was originally listed to take place on 25 February 2022 but was subsequently relisted for 4 March 2022 because both parties ultimately accepted, on the day before the original hearing (after skeletons had been exchanged), that a half-day listing would be insufficient given the scope of what was in issue.

BACKGROUND

7. I set out below a brief summary of the background to the claim. (This is not intended to be a comprehensive summary of all the issues raised in the pleadings.)

8. By way of a letter of credit on or about 1 April 2020, UniCredit financed the purchase of part of a cargo of low sulphur fuel oil (the "Cargo") by Gulf Petroleum FZC ("Gulf") from BP Oil International Ltd ("BP").

9. Euronav was at all material times the owner of the vessel "Mt Sienna", which BP had originally chartered in relation to the carriage of the Cargo.

10. UniCredit alleges that Euronav delivered the Cargo to someone other than the lawful holder of the relevant Bill of Lading, or without authorisation of the lawful holder of the Bill of Lading.

11. Euronav contends in response that the lawful holder of the Bill of Lading at the time of discharge of the Cargo was either BP or Gulf, and that delivery/discharge was authorised by BP, alternatively Gulf.

12. Euronav further alleges that *if* UniCredit was the lawful holder of the Bill of Lading at the time of delivery/discharge, UniCredit authorised Gulf to request and obtain discharge/delivery without production of the Bill of Lading and/or has waived (or is estopped from exercising) any right that it might have had for delivery or discharge to be made only against production of the Bill of Lading.

13. UniCredit accepts that it had – vis-à-vis Gulf – authorised delivery of the Cargo to six identified sub-buyers (the "Sub-Buyers", also called the "Off-Takers") on payment terms that required those Sub-Buyers to pay UniCredit directly, 90 days after delivery. However, UniCredit says that the Cargo was in fact discharged from the Mt Sienna to two other vessels without production of the Bill of Lading. UniCredit says that it does not know to whom the Cargo was actually delivered.

14. UniCredit's claim against Euronav was originally quantified by UniCredit at US$26,367,200, which was said to be the market value of the Cargo at the time of the alleged misdelivery. This figure was then amended by UniCredit, by way of its Amended Particulars of Claim, to US$14,358,400. Euronav contends that the value of the Cargo at the time of the alleged misdelivery, and therefore the correct quantification of UniCredit's claim, is US$13,185,011.24.

15. However, UniCredit now claims that it is entitled to damages reflecting the value of the Cargo on a later date, which is said to be the date that the Cargo would have been sold in a counterfactual scenario (i.e., the earliest date upon which UniCredit could have reasonably mitigated its loss by taking delivery of the Cargo from Euronav and selling the Cargo into the available market). The value of the Cargo in that counterfactual scenario is alleged to be between US$24,280,800 – US$24,701,600.

EVIDENCE

16. The court had the following evidence in relation to the issue now before the court:

    i) for Euronav, the Third Witness Statement of Andrew James Preston of Preston Turnbull LLP ("Preston Turnbull"); and

    ii) for UniCredit, the First Witness Statement of Caroline Frances West of Holman Fenwick Willan Switzerland LLP ("HFW").

CHRONOLOGY

17. So far as is material, the chronology of relevant events is as follows:

    i) on 22 November 2021, UniCredit circulated draft Amended Particulars of Claim to Euronav, with proposed amendments to its case on quantum;

    ii) on 23 November 2021, Preston Turnbull responded on behalf of Euronav, consenting to the proposed amendments save for those at paragraph 29 of the draft Amended Particulars of Claim which related to the counterfactual scenario referred to at [15] above;

    iii) on 15 December 2021, Butcher J approved a Consent Order (the "15 December Consent Order") granting UniCredit permission to amend its Particulars of Claim in the manner proposed, save for the amendments to paragraph 29 concerning the counterfactual scenario (as referred to above);

    iv) in early November 2021, Euronav sought disclosure from UniCredit of documents which had not previously been disclosed and which were produced by, or exchanged with, investigatory agents appointed by UniCredit (the "Off-Taker Documents");

v) UniCredit initially sought to invoke privilege over the Off-Taker Documents;

vi) in late December 2021, the parties reached agreement on both these matters: Euronav consented to the amendments to the Particulars of Claim relating to the counterfactual scenario referred to above; and UniCredit agreed to provide disclosure of the Off-Taker Documents. This agreement is the subject of without prejudice *inter partes* correspondence which, for reasons discussed below, the court has not considered;

vii) on 14 January 2022, Butcher J approved the 14 January Consent Order which directed, among other things, that:

a) UniCredit should serve its Amended Particulars of Claim, to include the amendments relating to the counterfactual scenario, by 14 January 2022;

b) Euronav should serve its Amended Defence by 18 February 2022 (which constituted an extension of the original deadline that had been stipulated in the 15 December Consent Order referred to above); and

c) UniCredit should disclose the Off-Taker Documents in two tranches, on 10 January 2022 and 21 January 2022;

viii) on 18 February 2022, Euronav served a draft Amended Defence, which included amendments said to have arisen out of the disclosure provided by UniCredit in compliance with the 14 January 2022 Consent Order; and

ix) on 22 February 2022, UniCredit objected to the amendments at paragraphs 33, 66, 71.3, 77.2 and 81 of the draft Amended Defence on the basis that they are not consequential on the amendments made to the Particulars of Claim.

THE PROPOSED AMENDMENTS

18. Euronav characterised the proposed amendments (paragraphs 22-24 of Mr Preston's witness statement) as falling within one of two categories:

i) amendments relating to the relationship between Gulf and the Sub-Buyers (those at paragraph 33); and

ii) amendments which refer to the connection between Gulf and the Sub Buyers and its impact as to whether there was a misdelivery and/or whether the Claimant suffered any loss as a result of the manner in which the Cargo was delivered (those at paragraphs 66, 71.3 and 81).

19. By way of its supplemental skeleton submissions filed ahead of the Pre-Trial Review, Euronav confirmed that it was no longer pursuing certain amendments it had proposed to make to paragraph 77.2 of its Defence.

Relationship between Gulf and the Sub-Buyers

20. Paragraphs 31 to 33 of Euronav's draft Amended Defence read as follows (with the proposed amendments underlined):

> "31. By email dated 15 April 2020, Mukul Agarwal provided Diana Bodnya with the details of the six buyers ("the sub-buyers") who would be purchasing the Financed Cargo and sent unsigned copies of the sale contracts and "credit endorsements". The email confirmed that the Financed Cargo was still on board the Vessel. Payment under those sub-sale contracts was said to be 90 days from delivery date (in accordance with the previous advice) and the security for each sale was said to be "credit insured". Gulf advised that it would "revert with sales invoices and BL copies once cargo is delivered".
>
> 32. On the same day, Diana Bodnya confirmed by email that the sub-buyers were acceptable to the Claimant but asked Gulf to confirm that none were related parties to Gulf. The Claimant also asked Gulf to confirm that these were not new sub-buyers and that Gulf had a positive track record with them. Since the contracts that had been sent to the Claimant were not signed, the Claimant asked for a deal recap/email trade confirmation and an updated insurance policy since the one the Claimant had was said to have expired in February 2020 "though endorsements are up to date". The Claimant also requested a "cash collateral" of 10% corresponding to US$2,723,338 to be paid by Gulf prior to release of the Financed Cargo to the sub-buyers.
>
> 33. On the same day, Mukul Agarwal confirmed to the Claimant that the sub-buyers were unrelated to Gulf, that they were not new and Gulf had been dealing with them for the past five plus years. Based on disclosure that has recently been made by the Claimant, the Defendant now understands that the statement that the sub-buyers were unrelated to Gulf was false with the possible exception of one of the sub-buyers, namely Iora International Pte Ltd (as to which no admissions are made). The Defendant further understands that it is the Claimant's position that it did not identify the links between the sub-buyers and Gulf despite allegedly performing certain routine due diligence checks concerning the sub-buyers. It said that "with each release, will transfer the CM. Currently cargo is on vessel itself and has not been delivered yet". Mukul Agarwal also promised to "share the updated insurance policy by tomorrow (Expected copy of the same from Insurers)". The Claimant is required in due course to disclose a copy of the insurance policy referred to." [Emphasis added]

Connection between Gulf and the Sub-Buyers and its impact on misdelivery

21. Paragraphs 66, 71.3, 77.3 and 81 of Euronav's draft Amended Defence read as follows (again with the proposed amendments underlined):

> "66. The Defendant delivered/discharged the quantity of 75,517.86 mt (in air) and 26,133.68 mt (in air) to Gulf on to the MT Kutch Bay and MT Prestigious respectively without production of any Bill of Lading at the request, and in accordance with the instructions, of Gulf. The Defendant, thereby, delivered/discharged the Cargo to Gulf or to its order. In the circumstances of the case, and in particular, the scale of the fraud, the senior roles of those likely to have been perpetrating it, the fact that five of the six named off-takers were in fact GP / GP-related companies and the fact that only one of the off-takers has denied the existence of the relevant contract, it is to be inferred that delivery/discharge was to the order of the other five off-takers and/or to GP as their agent.
>
> …
>
> 71.3 If, which is denied, the Claimant was at the time of delivery/discharge the lawful holder of the Bill of Lading, the Claimant expressly authorised Gulf to request and obtain

discharge/delivery of the Cargo from the Defendant without production of the Bill of Lading. In the premises, delivery/discharge to Gulf (or to its order) was authorised by the lawful Bill of Lading holder and was not, therefore, a breach of contract and/or of any duties whether in bailment or otherwise. Further or alternatively, as set out at paragraph 66 above, delivery/discharge was to the order of at least five of the six off-takers and/or to GP as their agent.

…

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.

77.3 The Defendant relies upon the matters set out below at paragraph 81.

…

81. 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. Further or alternatively, the Defendant avers that the Claimant has caused its own loss and damage and/or the loss and damage that is claimed would have been incurred in any event even had the Defendant acted in accordance with the B/L Contract of Carriage and/or its duties:

> (1) As set out above, the Defendant now understands that the sub-buyers were, with the possible exception of Iora International Pte Ltd, related companies to Gulf.
>
> (2) In circumstances where the Claimant had authorised discharge/delivery to be made to the sub-buyers without the production of the Bill of Lading, had the Defendant discharged or delivered the Financed Cargo to the sub-buyers (or to their order) whether with or without the production of the Bill of Lading, the Claimant would not have been paid by the sub-buyers and/or by Gulf in circumstances where it is to be inferred that the identification and/or involvement of the sub-buyers was an intrinsic part of the fraud that Gulf perpetrated on the Claimant. In the premises, even had the Defendant complied with its obligations under the B/L Contract of Carriage and/or its duties and/or as authorised by the Claimant, the Financed Cargo would not have been delivered or discharged to the Claimant and the Claimant would not have been repaid the sums lent by it to Gulf in respect of the Financed Cargo and, as such, the Claimant would have suffered the loss it claims in these proceedings.
>
> (3) Further or alternatively, it is to be inferred that even had the Claimant been the lawful holder of the Bill of Lading and/or in possession of the same as at 26 April 2020, it would have authorised Gulf to arrange the discharge or delivery of the Financed Cargo (including authorising it to present the Bill of Lading) and, as a result, the loss and damage that it has suffered would have been suffered in any event."

ARE THE PROPOSED AMENDMENTS PERMITTED UNDER THE 14 JANUARY CONSENT ORDER?

22. The 14 January Consent Order provided as follows:

> "1. Paragraph 10 (2) of the 14 July Order shall be amended so that the expert reports may concern the market value of the Cargo in date range 26 April to 26 October 2020.
>
> 2. Paragraph 1 of the 15 December Order shall be amended so that the "save for the proposed wording set out in the first three sentences of paragraph 29 of the draft Amended Particulars of Claim" be removed and the deadline for service of amended particulars of claim extended to 4:30pm (London time) on Friday 14 January 2022.
>
> 3. Paragraph 2 of the 15 December Order shall be amended so that the Defendant shall serve an Amended Defence by 4:30pm on Friday 18 February 2022.
>
> 4. The Defendant shall serve witness evidence in response to the counterfactual scenario by 4:30pm (London time) on Friday 28 January 2022.
>
> 5. The Defendant shall serve expert evidence (if any) in relation to banking practice in response to the counterfactual scenario by 4:30pm (London time) on Friday 18 February 2022.
>
> 6. The Claimant shall serve witness evidence (if any) in response to those statements and reports served by the Defendant on 28 January and 18 February 2022 by 4:30pm (London time) on Friday 4 March 2022.
>
> 7. The Defendant shall serve an expert report (if any) on market value of Cargo in response to counterfactual scenario by 4:30pm (London time) on Friday 21 January 2022.
>
> 8. Paragraph 6 of the 15 December Order shall be amended so that the deadline for the experts in relation to market value of the Cargo to hold discussions shall be Monday 31 January 2022.
>
> 9. Paragraph 7 of the 15 December Order shall be amended so that the deadline for the experts in relation to market value of the Cargo to prepare and file a joint memorandum shall be extended to 4:30pm (London time) on Monday 14 February 2022.
>
> 10. Paragraph 8 of the 15 December 2021 Order shall be amended so that the deadline for the experts in relation to market value of the Cargo to simultaneously exchange short supplemental expert reports shall be extended to 4:30pm (London time) on Monday 28 February 2022.
>
> 11. The Claimant shall disclose by email un-redacted documents as set out at paragraphs 7(g)(i) - (iii) within the date range of 18 December 2019 to 13 August 2020 as set out in an email from Preston Turnbull to HFW dated 23 December 2021 (15:21) by 4:30pm (London time) on Monday 10 January 2022.
>
> 12. The Claimant shall disclose by email documents as set out at paragraphs 7(g)(i) - (iii) within the date range of 14 August to 31 December 2020 as set out in an email from Preston Turnbull to HFW dated 23 December 2021 (15:21) as early as practicable but, in any event, by 4:30pm (London time) on Friday 21 January 2022."

23. It is thus clear that the 14 January Consent Order referred back to the 15 December Consent Order, which in turn provided (so far as material):

> "1. The Claimant is permitted to serve an Amended Particulars of Claim on the basis set out in the draft Amended Particulars of Claim circulated by email on 22 November 2021 by 4:30pm on Friday 17 December 2021 save for the proposed wording set out in the first three sentences of paragraph 29 of the draft Amended Particulars of Claim
>
> 2. The Defendant is permitted to serve an Amended Defence by 4:30pm on 7 January 2022."

24. It was submitted for Euronav that once it had "*glimpsed*" the evidence that was disclosed by UniCredit in October 2021 – the key document being an (internal) email from Martin Borchert dated 6 August 2020 – Preston Turnbull had promptly written to HFW (in early November 2021) seeking certain follow-up disclosure.

25. This follow-up disclosure was to include, among other things, disclosure of documents relating to the source of a particular statement made by Mr Borchert in the 6 August 2020 email. That statement noted, referring to the Off-Takers, that:

> "5 of which linked to GP/GP people, likely fraudulent (one offtaker declined the existence of contracts)…"

26. However, in respect of the relevant follow-up disclosure, HFW responded in early December that:

> "*Investigation agents were instructed with the dominant purpose of litigation in mind. Our client therefore maintains that these documents are covered by litigation privilege.*" [Emphasis added]

27. Preston Turnbull challenged this assertion of privilege. According to the evidence of Mr Preston (in his Third Witness Statement):

> "18. Further discussions took place between the parties during December on a Without Prejudice basis. The culmination of these discussions was an agreement by the Defendants that they would consent to the Counterfactual Amendments and an agreement by the Claimants to provide the Off-taker Documents. The agreements in relation to the Counterfactual Amendment and the disclosure of the Off-taker Documents were enshrined within the 14 January Order.
>
> 19. It is important to note the 14 January Order was part of a wider agreement pursuant to which disclosure of the Off-taker Documents was provided. The reference in paragraph 3 of the 14 January Order should, I submit, be seen in this light:
>
> > '…the Defendant shall serve an Amended Defence by 4:30pm on Friday 18 February 2022.'" [Emphasis added]

28. Euronav received the additional disclosure referred to above, which included reports dated 5 August 2020 and 28 October 2020 prepared by investigation agents 'Athena Intelligence' on UniCredit's instructions (the "Athena Reports"), in two tranches, on 10 and 21 January 2022.

29. At the hearing of this issue, Euronav objected to any without prejudice documents being placed before the court but relied on the evidence of Mr Preston that, in effect, the agreement regarding the counterfactual amendments and the agreement to disclose the additional documents were inter-conditional. Euronav also relied on a letter from

Preston Turnbull of 13 December 2021 in which Preston Turnbull had opposed UniCredit's proposed counterfactual amendments but stated that Euronav would be making an application for specific disclosure (a reference to the earlier refusal by UniCredit to give additional disclosure), and if UniCredit refused to withdraw its counterfactual amendment then both issues would need to be "heard together".

30. It was further submitted for Euronav that:

i) the 14 January Consent Order should be construed against the factual background: the context for the Amended Defence was that it was understood that the additional disclosure was "*likely to lead to a revision of its case*";

ii) in the language of the 14 January Consent Order there was no limit on the amendments which could be made, and this was because if information came to light amendments to the pleadings were likely to be made and this was a "*real possibility*"; the defendant had fought a "*hard won battle*" on disclosure and it was unrealistic that it simply "*gave away the amendments on quantum for nothing*";

iii) it was unrealistic to say that the 14 January Consent Order did not allow for such amendments: if it had been intended to limit the amendments to consequential amendments then this should have been spelt out;

iv) it was unlikely that the parties had agreed that a further application for permission to amend the Defence would need to be made, and there was no justification for rewriting the order in a "*one sided fashion*"; and

v) the fact that the deadline for the service of the Amended Defence was pushed back to 18 February 2022 in the 14 January Consent Order, from the original deadline of 7 January 2022 in the 15 December Consent Order, reflects the fact that it was understood that Euronav would have the opportunity to respond to disclosure of the Off-Taker Documents.

31. In its submissions UniCredit accepted that (by the 14 January Consent Order) it agreed that Euronav could have permission to make amendments that were consequential to its own quantum amendments. However it was submitted for UniCredit that:

i) the existing consent was limited to amendments consequential on the quantum amendments; liability amendments are not within scope of Euronav's existing permission to amend;

ii) generally the court will not grant permission for amendments unless it has a draft of the proposed amendments before it; permission for consequential amendments is an exception to this principle;

iii) the principle which lies behind the approach is underlined by *Geodesign Barriers v Environmental Agency* [2015] EWHC 1121 (TCC) per Coulson J at [48], it would be a mistake for the court to grant permission to amend without the actual amendments being before the court:

> "48. The claimant originally sought permission to amend in the future, following the specific disclosure process. However, as I pointed out during the course of

> argument, that is entirely premature. Amendments must be dealt with in the normal way; save for permission to make consequential amendments to a defence or a reply, it is almost always a mistake for a court to grant permission to amend without the actual amendments being before the court";

and

iv) without prejudice correspondence between solicitors is admissible for the purpose of construing a consent order: *Admiral Management Services v Para-Protect Europe* [2002] 1 WLR 2722 in particular at [72], as noted in Matthews & Malek in *Disclosure* (5th Ed) at §14.15(i) and fn 71.

32. The court was not taken to any authorities on construction of a court Order and I note that the relevant Order here was a Consent Order and not one made following any hearing before the judge. However, it appeared to be common ground that as with a contract, the court's task is to ascertain the objective meaning of the language; and in order to do this, the court must consider the language used and ascertain what a reasonable person – that is, a person who has all the background knowledge – would have understood the parties/court to have meant. Where the language is capable of more than one meaning the court has to balance the language used and the factual context, including having regard to commercial common sense.

33. Nothing in the language used in clause 3 of the 14 January Consent Order would suggest that additional amendments arising out of disclosure were contemplated.

34. Taken in the context of the overall Order, the 14 January Consent Order is not confined to the amendments to the pleadings and the disclosure but also deals with expert evidence and witness evidence in response to the counterfactual scenario. There is no express or obvious link on the face of the Order between the amendments permitted by clause 3 of the Amended Defence and the disclosure ordered by clause 12 of the Order.

35. Euronav submitted that it should be implied that amendments arising out of disclosure were permitted and that if the parties had intended to limit the scope of the Order to consequential amendments they would have said so. In my view, the contrary is more likely to apply, in that if lawyers draw up a consent order, they can be expected to spell out what is agreed; and if it is silent on a matter, it is doubtful that they intended to imply other amendments (other than the normal practice in relation to consequential amendments).

36. The fact that the deadline for the service of the Amended Defence was pushed back to 18 February 2022 in the 14 January Consent Order does not in my view show that it was understood that Euronav would have the opportunity to respond to disclosure of the Off-Taker Documents. Rather it is consistent with an extension being granted from the earlier deadline to allow Euronav to respond to the new counterfactual case and the date of that extended deadline appears to be linked to the date by which Euronav had to provide its expert evidence in response to the new counterfactual case.

37. Euronav seeks to rely on the evidence of what was said to be a "wider agreement". In his Third Witness Statement Mr Preston does not go so far as to say an agreement was reached that amendments arising out of the disclosure were permitted within the scope of the Consent Order, or that the agreement on the two issues were "interconditional":

he merely stated that paragraph 3 of the 14 January Consent Order should be read in light of that agreement. In submissions, counsel for Euronav referred to correspondence which said that if the issues were not agreed, both matters would have to go before the court. The actual letter did not refer to any substantive linkage between the two issues – it merely indicated in my view that as a matter of convenience the two matters could be listed together. The relevant passage stated:

> "*We will be applying for specific disclosure and so, if you do wish to run the proposed contested amendment, it would be sensible for us to liaise on fixing a hearing date to ensure that both issues are heard together early in the New Year.*"

38. The evidence falls far short of establishing that the parties had agreed that the 14 January Consent Order should permit any amendments arising out of the disclosure. On this basis it seems unnecessary to go further and consider the without prejudice correspondence (and the question of whether it is admissible), which in any event is relied upon by UniCredit and not Euronav.

39. Similarly, submissions by counsel on behalf of Euronav that amendments were likely to be made (or were a real possibility) as a result of the additional disclosure do not establish that it was agreed that amendments could be made without any further agreement being required between the parties (or permission from the court). Counsel for Euronav was obliged to accept that he could not (and did not) submit that the scope of future amendments was entirely open by virtue of the absence of wording in the 14 January Consent Order limiting the future amendments to consequential amendments but sought to imply a limitation which allowed amendments arising out of the additional disclosure. *Geodesign* (cited above) supports the proposition that it is unlikely that the parties agreed that (contrary to the usual approach) unspecified amendments which advanced a new or different case and which were not merely consequential on matters which had already been pleaded were permitted. There is no reason to infer that the parties had in mind any particular delay which might be occasioned by an application to amend as a reason for agreeing to a broader set of permitted amendments.

40. It was submitted for Euronav that there is no justification for rewriting the words in a "one sided fashion", but in the absence of evidence that links the two issues as (in substance) "inter-conditional", in my view there is no justification for rewriting the words in the 14 January Consent Order as Euronav contend: the language makes no provision for additional amendments arising out of disclosure and the factual context does not establish a contrary interpretation.

41. Given the formal nature of the document and the fact that both parties were represented by competent solicitors this supports a conclusion that the wording of the document reflected what the parties intended and bears the usual meaning that only consequential amendments were permitted.

Conclusion

42. For these reasons, I find that the 14 January Consent Order does not permit the liability amendments sought by Euronav.

LATE APPLICATION TO AMEND

Principles

43. The principles which apply to late applications to amend are dealt with in a number of authorities and should be common ground. They are generally acknowledged to be as summarised by Coulson J in *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* [2015] EWHC 1345 (TCC) at [19]:

> "(a) The lateness by which an amendment is produced is a relative concept (*Hague Plant*). An amendment is late if it could have been advanced earlier, or involves the duplication of cost and effort, or if it requires the resisting party to revisit any of the significant steps in the litigation (such as disclosure or the provision of witness statements and expert's reports) which have been completed by the time of the amendment.
>
> (b) An amendment can be regarded as 'very late' if permission to amend threatens the trial date (*Swain-Mason*), even if the application is made some months before the trial is due to start. Parties have a legitimate expectation that trial dates will be met and not adjourned without good reason (*Brown*).
>
> (c) The history of the amendment, together with an explanation for its lateness, is a matter for the amending party and is an important factor in the necessary balancing exercise (*Brown; Wani*). In essence, there must be a good reason for the delay (*Brown*).
>
> (d) The particularity and/or clarity of the proposed amendment then has to be considered, because different considerations may well apply to amendments which are not tightly-drawn or focused (*Swain-Mason; Hague Plant; Wani*).
>
> (e) The prejudice to the resisting parties if the amendments are allowed will incorporate, at one end of the spectrum, the simple fact of being 'mucked around' (*Worldwide*), to the disruption of and additional pressure on their lawyers in the run-up to trial (*Bourke*), and the duplication of cost and effort (*Hague Plant*) at the other. If allowing the amendments would necessitate the adjournment of the trial, that may be an overwhelming reason to refuse the amendments (*Swain-Mason*).
>
> (f) Prejudice to the amending party if the amendments are not allowed will, obviously, include its inability to advance its amended case, but that is just one factor to be considered (*Swain-Mason*). Moreover, if that prejudice has come about by the amending party's own conduct, then it is a much less important element of the balancing exercise (*Archlane*)."

44. UniCredit also relied on the Court of Appeal's decision in *Nesbit v Acasta* [2018] EWCA Civ 268 and the first instance decision in *Rose v Creativity* [2019] EWHC 1043 (Ch).

45. In seeking to distinguish these cases, counsel for Euronav stressed that *Nesbit* dealt with a (late) application to amend before an appeal hearing, and that *Rose* involved substantial amendments which raised significant new issues.

46. To the extent that counsel for Euronav sought to limit *Nesbit* to its facts I do not accept that it materially affects or alters the principles for a late amendment, which were clearly stated at [41] of that judgment as follows:

> "The principles relating to the grant of permission to amend are set out in *Swain-Mason* and in a series of recent authorities. The parties referred particularly to Mrs Justice Carr's summary in *Quah Su-Ling v. Goldman Sachs International* [2015] EWHC 759 (Comm) at paragraphs 36-38 of her judgment. In essence, the court must, taking account of the

> overriding objective, balance the injustice to the party seeking to amend if it is refused permission, against the need for finality in litigation and the injustice to the other parties and other litigants, if the amendment is permitted. There is a heavy burden on the party seeking a late amendment to justify the lateness of the application and to show the strength of the new case and why justice requires him to be able to pursue it. These principles apply with even greater rigour to an amendment made after the trial and in the course of an appeal." [emphasis added]

47. Whilst I accept that in that particular case the court was concerned with applying the test to an amendment made in the course of an appeal (and in my view the reference in the passage above to the "need for finality in litigation" should be read in that light), the general proposition stands that there is a heavy burden on the party seeking a late amendment to justify the lateness of the application, to show the strength of the new case and why justice requires him to be able to pursue it.

Application of the principles to the proposed amendments

48. Turning to the application of those principles, Euronav seeks to justify its proposed individual amendments in turn. In my view, the proposed amendments now sought to be advanced are linked and the matter should be considered in the round.

Submissions for Euronav

49. It was submitted for Euronav (in summary) that:

    i) The amendments were proposed in response to disclosure which had only recently been given and should have been given earlier. It was submitted that there is no evidence that the dominant purpose of the Athena Reports was for their use in litigation – in fact, their true purpose was to locate the Cargo.

    ii) The disclosure went to an Agreed Issue in the case and an agreed issue for the purposes of disclosure (namely, Issue 4 as set out in section 1B of the Disclosure Review Document) and was within the scope of the relevant Model C request. There was no express agreement as to the date range for this request; in any event, the first report fell within the date range suggested by UniCredit (although the 2nd report did not).

    iii) The Athena Reports recommended further enquiries and it is UniCredit's fault if no such further enquiries were made; alternatively, the absence of any such further enquiries having been made, suggests that even if the amendments were permitted, UniCredit would not want to make further enquiries.

    iv) The proposed amendments have a reasonable prospect of success.

Submissions for UniCredit

50. It was submitted for UniCredit that:

    i) There was disclosure of the link between Gulf and the Sub-Buyers in October 2021, when the email dated 6 August 2020 from Martin Borchert of UniCredit was disclosed; and the application to amend could have been made at that time;

Euronav have failed to address in its evidence why the amendments could not have been made earlier.

ii) The Athena report states that the Cargo was not sold to the sub-buyers and thus the only way Euronav can plead its case is to seek an "inference" parasitic on the links.

iii) UniCredit had not been obliged to disclose the Athena Reports as they were privileged; if the issue of delivery to the sub buyers was significant Euronav could have carried out their own investigations.

iv) There would be prejudice to UniCredit if the amendments were permitted at this late stage. The evidence of Ms West is that had Euronav advanced a case in July 2021 (when the RFI referred to below was made) that the Cargo was delivered to the sub buyers, UniCredit would have taken further steps to establish what is in the Athena report and that less than a month before the start of trial, it is too late for UniCredit to instruct a new forensic investigator to conduct an investigation into whether the Sub-buyers received the Cargo. Further Ms West states that the fact that the current documentary evidence does not support an inference that the Cargo was delivered to the Sub-buyers does not mean that UniCredit would not have sought further evidence if it had known the allegation as to be part of the case it had to meet.

Discussion

51. As is clear from the authorities, there is a heavy burden on the party seeking a late amendment: (i) to justify the lateness of the application; (ii) to demonstrate the strength of the new case; and (iii) to explain why justice requires him to be able to pursue it.

52. Counsel for Euronav submitted that the amendments were addressing a "*key issue*" in the case and was only a "*refinement of its case given that the fate of the Cargo and causative loss was already in issue*."

53. Whilst I accept that causation was already in issue (as with any contract case) that does not mean that any amendment to the case on causation is permitted on the basis that "causation" is in issue.

54. I accept that the "*fate of the Cargo*" was an issue in the sense that one of the issues in the case, as identified in the Agreed List of Issues, was the question of to whom the Cargo was delivered (see issue 4(i): "Did delivery take place to the approved sub-buyers?"); and that this was also one of the Issues for Disclosure identified in the Disclosure Review Document, in relation to which the following was sought by Euronav:

> "Any documents containing or evidencing investigations or enquiries made by or on behalf of the Claimant relating to the delivery of the Cargo and/or to whom the Cargo was delivered, in what amount, and/or the location at which the Cargo was delivered and the location of the Cargo after delivery."

55. However, when asked a series of questions by UniCredit (posed by way of an RFI dated 6 July 2021) as to whether (in substance) it advanced a positive case that the Cargo was

delivered to the Sub-Buyers, Euronav declined in its response (dated 27 July 2021) to state that it was advancing a case that the Cargo was delivered to the Sub-Buyers.

56. UniCredit's RFI had posed the following questions in this respect:

> "3. Please confirm to whom it is said that the Defendant delivered the Financed Cargo when it discharged the Financed Cargo onto the MT Kutch Bay and/or the MT Prestigious from the Vessel.
>
> 4. Please clarify whether it is the Defendant's case that the Financed Cargo was delivered from the Vessel onto the MT Kutch Bay and/or the MT Prestigious to (a) Gulf; (b) the approved sub-buyers; (c) another identifiable party; or (d) a party or parties unknown?
>
> 5. Please clarify whether or not it is the Defendant's case that the Financed Cargo was delivered from the MT Kutch Bay and/or the MT Prestigious to the approved sub-buyers.
>
> 6. If it is not the Defendant's case that the Financed Cargo was delivered from the MT Kutch Bay and/or the MT Prestigious to the approved sub-buyers, does the Defendant assert a positive case as to whom the Financed Cargo was delivered from the MT Kutch Bay and/or the MT Prestigious?"

57. Euronav's replies were as follows:

> "3. The Defendant's case is that the Financed Cargo was delivered to Gulf or to Gulf's order.
>
> 4. Reply 3 above is repeated. The Defendant does not presently know whether the Financed Cargo was in fact delivered to the approved sub-buyers.
>
> 5. Reply 4 above is repeated.
>
> 6. Replies 3 and 4 above are repeated." [emphasis added]

58. It is not correct in my view to characterise the proposed amendments as not a "*new*" case or merely a "*refinement*" of Euronav's existing case. In my view, counsel for Euronav accurately submitted that "*Euronav (now) wants to advance a case that the Sub-Buyers were involved in the fraud*", thereby implicitly recognising that this is a different case from that previously advanced.

59. As to why Euronav has only now decided to advance the positive case, Mr Preston's evidence (paragraph 26 of his witness statement) is that the amendments "*stem fro*m" the documents disclosed in January 2022 and "*are the conclusions of [UniCredit's] own investigators*".

60. I accept that the email of 6 August 2020 that was disclosed in October 2021 made a brief reference to the Sub Buyers being "*linked*" to Gulf and that they were "*fraudulent*". Euronav then sought to follow that up by requesting further information in November 2021 and when litigation privilege was claimed it sought to challenge this. Ultimately the claimant agreed to disclose the Athena Reports and did so in January 2022.

61. It is unclear why Mr Preston says that the amendments are the "*conclusions of UniCredit's investigators*" as the Athena reports do not appear to conclude that the Cargo was delivered to the Sub Buyers.

62. I note that in his skeleton submissions (at paragraph 33(3)) counsel for Euronav describes the documents which had not been disclosed (and were thus sought) as being documents which "*principally concerned the relationship of the sub-buyers to Gulf*" and not, as one might imagine given that the focus of the amendment is the alleged delivery to the Sub-Buyers, that the documents went to delivery to the Sub-Buyers.

63. I further note that Mr Preston in his Third Witness Statement stated as follows:

> "26. Whilst a matter for submissions at the hearing, I would make the following brief points:
>
> …
>
> 26.3 Finally, the Off Taker Documents go directly to the issue of whether, in fact, there was a misdelivery at all and/or whether the loss claimed by the Claimant would have been sustained in any event i.e. whether or not there was a breach on the part of the Defendant as alleged by the Claimant. The evidence is highly relevant, and the Court is entitled to draw the necessary inferences from those documents to find in favour of the Defendant. I believe the pleaded points set out in the Amendments have a good prospect of success." [Emphasis added]

64. Whilst I accept that the Athena Reports address the issue of where the Cargo was delivered, and to that extent may be said to be "relevant", it is wholly unclear on what basis Mr Preston then seeks to draw an inference from that disclosure.

65. Even if I were wrong on the conclusions of the Athena reports (and Euronav submitted that the court should make no findings on the additional disclosure at this interlocutory stage) the proposed amendments do not rely on the conclusions of the Athena reports to assert a case that delivery was to the Sub Buyers but (as set out in paragraph 66 of the proposed Amended Defence) merely invite the Court to draw an inference that delivery was to the order of five (of the six) Off-Takers: Euronav seek to plead that such an inference should be drawn based on:

> "the circumstances of the case, and in particular, the scale of the fraud, the senior roles of those likely to have been perpetrating it, the fact that five of the six named off-takers were in fact GP / GP-related companies and the fact that only one of the off-takers has denied the existence of the relevant contract…"

66. The court was not taken to any evidence recently disclosed in January 2022 which went to the factors (other than the "links") now relied upon in seeking such an inference: "the scale of the fraud" or "the senior roles of those likely to have been perpetrating it", nor was it explained how these factors were supported by or explained by anything in the recent disclosure.

67. By contrast in oral submissions counsel for Euronav was keen to stress to the court the awareness of the general background of the litigation concerning frauds committed by Gulf (also referred to at paragraph 7 of his skeleton submissions) and it was not suggested that the recent disclosure had revealed anything material as to the "scale" of the fraud. I note that Mr Preston referred in his Third Witness Statement (at paragraph 13) to "a wide-scale fraud that was discovered in the early summer of 2020":

> "13. The reference to GP here is a reference to Gulf Petrochem FZC ("Gulf"), the Charterers of the SIENNA at the relevant time and the architects of a wide-scale fraud that was discovered in the early summer of 2020."

68. In my view, therefore, whilst the recent disclosure may have caused Euronav to revisit its case, I am not satisfied that Euronav has justified the lateness of its application and in particular Euronav has not shown that this amended case, which in substance now alleged a positive case that (it should be inferred that) the Cargo was delivered to the Sub-Buyers, arises out of the recent disclosure and could not have been advanced earlier.

69. In light of my findings above, the issue of whether litigation privilege was properly claimed for the Athena Reports is irrelevant to the assessment of whether Euronav have justified the lateness of the application.

70. Secondly Euronav has to demonstrate the strength of its new case. I propose to assume that Euronav has met the relatively low bar of showing that the proposed amendments have a reasonable prospect of success (noting as set out above that the proposed amendments are not expressed to rely directly on the conclusions of the Athena Reports).

71. There were conflicting submissions on whether the issue of delivery was an essential element of the case advanced by UniCredit. It seems to be unnecessary to resolve that legal issue. If Euronav is right in its analysis then UniCredit will need to establish this issue as part of its case at trial but I cannot see that it would follow that Euronav should be allowed to plead a new and different case on delivery and a new case on causation.

72. Thirdly the court has to weigh the prejudice to UniCredit in allowing such amendments at this stage against the prejudice to Euronav if it is not allowed to run this amended case.

73. It was submitted for Euronav that "*justice requires*" that Euronav should be able to rely on the same evidence (i.e. the recent disclosure); and that since UniCredit sought to draw inferences from that evidence, so Euronav should be entitled to invite the court to draw inferences from the same evidence.

74. The fallacy in this submission is that there is no issue about the admissibility of the evidence that is the Athena Reports and the other material disclosed in January 2022 (although Euronav stresses that it relies on the totality of the evidence). Euronav will be entitled to rely on the recent disclosure to support its existing case; the issue is whether it should be allowed to advance a new case at this stage, albeit one that relies on the same evidence.

75. This is a late amendment: it is only some 3 weeks to trial. Even if the matter had been heard when originally listed it would have been approximately a month to trial.

76. I have to consider the potential prejudice to UniCredit at this stage. UniCredit has not prepared for trial to meet this new case. In my view, there was no reason why UniCredit should have anticipated needing to do so; Euronav's response to its RFI dated 6 July 2021 did not suggest that UniCredit would be required to do so. UniCredit has not

therefore made any further enquiries beyond the investigations carried out by Athena because there was no reason for it to do so.

77. In my view, therefore, UniCredit cannot be criticised for not having made any further enquires in relation to a case that was not being advanced and indeed – given the response to the RFI – it could reasonably assume was not being advanced. If the proposed amendments were permitted, I accept that UniCredit may well want to revisit the evidence, and there is insufficient time for it to make additional investigations. It was submitted for Euronav that UniCredit has not justified the need for a fresh investigation or what new investigations would have been carried out. This submission in my view ignores that the burden lies on Euronav to establish why a late amendment should be allowed.

78. Further, at this late stage, I do not ignore the prejudice to UniCredit if it now has to alter its trial preparations to meet this additional new case. Even if Euronav are correct that any new investigations into delivery would not affect the case on causation, UniCredit will still have to respond to such a case and there is prejudice to their trial preparations.

79. Whilst I accept that there is a prejudice to Euronav if it is not allowed to advance this new case, in my view Euronav has not discharged the heavy burden on it to justify the late amendment and the balance of justice lies in not permitting the proposed amendments.

Conclusion on late amendment

80. For the reasons discussed above, the application for permission to amend is refused.