

4. Euro-Asian Oil SA v Credit Suisse AG, Abilo (UK) Ltd, Mr Dan Igniska [2019] 1 All E.R.(Comm) 706

Facts

The case arose out of a series of four contracts, stated to be on CIF terms, for the sale of oil from Abilo (the seller) to Euro-Asian (the buyer). Each contract was financed by a letter of credit, with payment to Abilo due against Abilo's presentation of documents. These included title documents (bills of lading) or a letter of indemnity (**LOI**) counter signed by Abilo's bank (the **Bank**) if title documents were unavailable. Euro-Asian paid for the cargos of oil against Abilo's presentation of countersigned LOIs but Abilo failed to deliver any oil under the fourth contract.

Claims for breach of warranties

Euro-Asian claimed against both Abilo and the Bank for breach of the warranties in the fourth LOI that Abilo had title to, and could deliver, the oil specified in the fourth contract. These were untrue because Abilo was performing by a "carousel" (delivering oil out of step with the documents) and had already used that oil named in the third contract in the series. The Bank was unaware of the "carousel" and that these warranties were untrue.

High Court decision

At first instance, the Court held that the Bank, having co-signed the LOI, was jointly and severally liable with Abilo for the breach of the warranties, but liable to contribute to only a portion of Euro-Asian's losses.

Court of Appeal: no variation to contractual terms

On appeal, the Bank argued that the fourth contract was not intended to operate on normal CIF terms (with title to the oil passing on presentation of the prescribed documents) as Euro-Asian had agreed to another round of alternative "carousel" performance. The Bank argued that Euro-Asian could not therefore rely on the warranties as to title and performance in the LOI.

The Court of Appeal rejected this argument. It held that this would be inconsistent with the first instance findings of fact that Euro-Asian was never a willing participant to "carousel" performance and did not agree to vary the terms of the fourth transaction. The Court of Appeal echoed the first instance observation that it also would not have made commercial sense for Euro-Asian to give up its rights to insist on strict performance of the terms contracted.

Court of Appeal: effect of the indemnity

The Court of Appeal overturned the finding that the Bank should bear part of Euro Asian's losses. The Court of Appeal held that it was clearly implicit in the LOI that Abilo was the primary obligor and that the Bank could recover from Abilo if called to pay. The Bank could recover in full from Abilo, as it had assumed liability under the LOI for the benefit of Abilo, at its request, and unaware of how Abilo intended to perform.