CA on appeal from Commercial Court (Mr Justice Longmore) before Waller LJ; Laws LJ; Sir Christopher Staughton. 11th July 2000.

LORD JUSTICE WALLER giving the judgment of the court:

1. On 28 December 1992 a fire occurred in holds 5 & 4 of the Apostolis. The defendants were the owners of the vessel and we shall refer to them hereafter as the owners. As a result of the fire, the cargo of cotton being loaded into those holds was seriously damaged, the ship was seriously damaged and the ship was delayed before she could reload and set sail on 4 March 1993 for Brazil.

2. On 30 November 1995 Tuckey J, after 5 days of trial in the Commercial Court, commenced his judgment in this way:- *"On December 28 1992 there was a fire on board the defendants' ("owners' ") vessel, Apostolis, which damaged the plaintiffs' ("AMJ's") cargo of cotton. The contract of carriage was subject to the Hague-Visby Rules. AMJ say the fire was caused by welding carried out on deck which put owners in breach of the rules and therefore liable for their losses. Owners say the most probable cause of the fire was a discarded cigarette for which AMJ are liable and counterclaim their losses. There are issues of quantum but I have agreed to give my decision on liability before considering those. Here it is."*

3. His conclusion was that the cause of the fire was welding being carried out to a cylindrical pulley underneath the winch platform on the masthouse between holds 4 and 5. It followed that the owners' counterclaim for damage to the ship and for demurrage failed. Tuckey J had to consider the effect of Article III r.1. and r.2, and Article IV r.2 of the Hague-Visby rules on the liability of the owners for the damage to the cargo. He concluded in relation to Article III r.1 that the vessel was unseaworthy concluding that the carrier would not be making the hold of his ship fit and safe for the preservation of an inflammable cargo "when he was carrying out welding work above the hold which resulted in sparks raining into it." That conclusion rendered it unnecessary to consider Article III r.2 and Article IV r.2, but, in case he were wrong, he went on to consider the effect of those Articles and concluded that AMJ (who we shall hereafter call the Merchant) had established that the fire was caused with the actual fault or privity of the owners which thus made it impossible for them to rely on the Article IV r.2. fire exemption. The basis of Tuckey J's conclusion in this regard was that the evidence established that welding had taken place on a number of days prior to 28 December 1992 during loading and to the hold covers.

4. Tuckey J thereafter assessed damages at U.S. $2,359,761.43 together with interest at U.S. $351,594.04 and gave judgment in the Merchant's favour for those sums. He further dismissed the owners' counterclaim.

5. The matter then went to the Court of Appeal composed of Leggatt, Morritt, Phillips LJJ. Leggatt LJ commenced his judgment in this way:- *"On December 28 1992 a fire occurred aboard Apostolis. She was owned by Vangemar Shipping Co Ltd ("the owners"). She was in a berth alongside the quay at Salonika in Greece. The loading of bales of cotton had been suspended for the day. The charterers were A Meredith Jones & Co Ltd ("AMJ"). The fire damaged the cargo in No. 5 hold. AMJ say that it was caused by a spark from welding at some point above the hold, and that the owners were thereby in breach of the Hague-Visby Rules, to which the contract of carriage was subject. The owners on the other hand say that the fire was caused by a discarded cigarette for which AMJ are liable, and they counterclaim for their loss. . . ."*

6. Leggatt LJ by his judgment held (1) even if welding was the cause of the fire there was no breach of Article III r.1 of the Hague-Visby Rules and the owners were not liable on that ground; (2) even if welding had caused the fire there was no reliable evidence of welding having taken place at Salonika before 28 December 1992, that there was no suggestion that Captain Kavallaris (as the alter ego of the owners) knew of the welding on 28 December 1992 and that it followed that the allegation of privity against the owners must fail; (3) in a passage to which we will have to return Leggatt LJ held at the least that even if there was some welding being done to the pulley, Tuckey J was not justified in finding that welding was the cause of the fire. He, on any view, did not make any clear finding as to what was the cause, and then said this of the counterclaim:- *"Both Counsel agreed that if the appeal were allowed the counterclaim should be considered further. I would allow the appeal, set aside the Judge's orders, dismiss AMJ's claim, and remit the counterclaim to the Commercial Court for further hearing."*

7. Phillips LJ by his judgment held as follows:- (1) The judge was justified in finding welding was being done on 28 December 1992, the day of the fire; (2) in a passage to which again we will return, at the least that Tuckey J was not entitled to find that welding was the cause of the fire, but again he did not make a clear finding as to what in his view was the cause of the fire; (3) even if welding was the cause of the fire, that there was no liability on the owners under Article III r.1; (4) since there was no evidence of welding prior to December 28 1992 and the welding on 28 December was an isolated incident of which the Marine Superintendent would be unaware, AMJ's case on privity had not been established under Article IV r.2. He then said this in relation to the counterclaim:- *"The owners have a counterclaim. Considered argument was not addressed to us as to the potential consequence on that counterclaim should their appeal succeed. The parties have agreed that that question should be remitted to the Commercial Court."*

8. Morritt LJ agreed with both judgments and had nothing to add.

9. The order of the Court of Appeal drawn up on 16 May 1997 ordered

   "(1) that this appeal be allowed and that the orders of the Honourable Mr Justice Tuckey dated the 1st November 1995 and the 7th of November 1995 be set aside

   (2) the Plaintiff's claim be dismissed

   (3) the Defendant's counterclaim be remitted to the Commercial Court for further hearing . . . ."

10. The owners did not seem to move with any great speed to get their counterclaim resolved. It seems however that in February 1999, Toulson J dealt with an application on the part of the owners to amend their pleadings. That was the first occasion on which the issue was raised as to the extent of the remission of the counterclaim by the Court of Appeal. Was the counterclaim to be retried? Had the Court of Appeal already decided that the cause of the fire was a cigarette of a stevedore? Had the Court of Appeal decided that no-one could prove what the cause of the fire was? Those were the questions. On this occasion before Toulson J the extent of the remission was not resolved.

11. The matter then came before Longmore J. We would say straight away that we have the greatest sympathy for the problem that faced the judge. He clearly had to start by considering what the extent of the remission was. The judge's ruling on this aspect is recorded in his judgment in these terms:-

"Mr Iain Milligan Q.C., who now appears for the cargo owners, submitted that the scope of the remission was merely to determine what result in law should follow from the judgments in the Court of Appeal, and that because the ship owners had obtained no finding that the cause of the fire was a matter for which the cargo owners were responsible, the counterclaim should now be dismissed.

I reject that argument because I do not believe that the Court of Appeal would have remitted the counterclaim to the Commercial Court for that apparently sterile exercise to be carried out, an exercise that they could easily have carried out themselves.

Conversely, I was asked by Miss Bucknall to admit further evidence on the hearing of the counterclaim; that application I also rejected, partly because the trial before Tuckey J. was intended to and did encompass all issues of liability, whether on the claim or on the counterclaim, and partly because, if I admitted fresh evidence, I might come to the conclusion on that fresh evidence that the original judgment of Tuckey J. was correct on the facts. That would hardly be consistent with the judgment of the Court of Appeal which reversed him; it cannot moreover have been the intention of the Court of Appeal that either side should have a fresh chance to establish the liability of the other in what is rapidly becoming a stale case.

The case has thus become transformed from a case where the ship owners were primarily concerned to defeat a claim for breach of contract made by the cargo owners on the basis of the Hague-Visby rules to a case where the ship owners are now themselves asserting that the cargo owners are in breach of contract in having failed to load the cargo carefully, and are responsible contractually for the fire which damaged the ship. The ship owners' counterclaim falls into three separate parts. There is firstly a claim for damages based on actionable fault on the part of the cargo owners or those for whom they are responsible. That is based on Clause 3 of the booking note which provides that the Merchant is to load the goods, and that the costs of loading and stowing the goods are to be borne by the Merchant. It is said that it is an implied term of that undertaking that the Merchant is to load the goods carefully, and if those for whom he is responsible have negligently caused a fire, then the Merchant is responsible for the ensuing damage. That damage is the diminution of the value of the vessel in the sum of approximately $250,000, and the various expenses said to have been incurred in Salonica as a result of the fire amounting to the sum of $643,793.57.

Alternatively to that claim, if there is no fault on the part of the cargo owners, there is a general average situation.

The third claim is the ship owners' claim for demurrage at Salonica which is accepted to be due in principle subject to two separate points:

(1) The fire was beyond the control of the Merchant and therefore comes within the specific exception to that effect in Clause 3 of the booking note; and

(2) Because the terms of the subsequent agreement,. . . . [a point which no longer arises]."

12. The judge then approached the matter in the following way. First, he refused to accept Miss Bucknall's submission on behalf of the owners that the matter was concluded finally in her favour by the judgments of the Court of Appeal. She had suggested that the Court of Appeal's conclusion was that welding was impossible, that a discarded cigarette was the only alternative and that thus the Court of Appeal had decided that a lighted cigarette of a stevedore was the cause of the fire.

13. Having refused to accept that submission he examined the evidence which pointed to a cigarette being the cause of the fire as submitted by Miss Bucknall. He then also examined the submissions of Mr Milligan insofar as they cast doubt on smoking as such being a cause of the fire. He finally dealt with what he described as Mr Milligan's most formidable argument that "*welding and cigarette smoking both possible causes but neither the probable cause.*" (see p.14). The process by which the judge then concluded that smoking was the probable cause was as follows:-

(1) A fair reading of the Court of Appeal decision is that the hatch covers were dropped and locked and that although they did not need to say so in terms, a possible cause (i.e. welding) had been effectively eliminated even though they only said that welding had not been proved to be the probable cause of the fire. [This stage in the judge's reasoning highlights the problem he faced. He did not accept Miss Bucknall's primary submission that the Court of Appeal had decided welding was not the cause, but he felt constrained by the views expressed to give effect to their decision as though they had so decided].

(2) The evidence was that the most common cause of fires was the discarding of a cigarette and since that was the only alternative to welding, fire by a discarded cigarette was the cause.

(3) It was more likely than not that the cigarette end was discarded by a stevedore and thus the judge was of the opinion that the fire was probably caused by a cigarette carelessly discarded by a stevedore.

14. He decided on the construction of Clause 3 and Clause 20 of the Booking Note that the Merchant was under a duty to load with proper care, that Clause 20 did not affect that obligation and that thus the owners' claim for damages in relation to damage to the ship succeeded.

15. As regards demurrage he held that in all the circumstances of the case, even if the fire was caused by a cigarette discarded by a stevedore, the fire was beyond the Merchant's control for the purposes of Clause 3 and that the Merchant was not therefore liable for demurrage claimed as a result of the outbreak of the fire.

16. He gave both sides leave to appeal. So far as the appeal by the Merchant was concerned, his first ground was that the case had already been to the Court of Appeal and that "*fairness demanded mutuality*".

17. Thus it is that the owners' counterclaim is back before the Court of Appeal - not as previously simply in the context of what caused the fire, but in the context of complicated questions about what the Court of Appeal previously decided; whether the judge was right to rule as he did; and whether and to what extent it was open to the judge, and is open to the Court of Appeal on this occasion, to consider whether welding might be a cause competing with a discarded cigarette. That this should have happened is deplorable. We, like the judge, must however wrestle with the problems.

Remission

18. It is necessary to spell out in a little more detail the context in which the Court of Appeal Order remitting the counterclaim to the Commercial Court was made. Following the judgment of Tuckey J, the owners, by their notice of appeal, sought first to set aside the judgment entered against them in the Merchant's favour and sought *"judgment be entered for the appellants on their counterclaim, alternatively that the appellants' counterclaim be remitted to the Commercial Court for trial"*. In that notice of appeal were many pages dealing with evidence or lack thereof as to welding both prior to the 28 December 1992 and on 28 December 1992. But, in the context of asserting that welding had not been established as a cause, appeared the following paragraphs:-

(xvii) "When finding that the Port Authority had no incentive to conclude that welding was the probable cause of the fire, the learned Judge failed to have any or any proper regard to the fact that if welding by the ship's crew was not the cause, smoking by Port Authority employees was a very high probability; and

(xxi) In finding that there was very little evidence of smoking by the stevedores the learned Judge failed to give any or any sufficient weight to:-

(a) The evidence that the stevedores were forbidden to smoke . . . .;

(b) The evidence that on discharge at Brazil, cigarette butts/empty Greek cigarette packs were found in the holds;

(c) The evidence of Dr Foster . . . .;

(d) The evidence that the Salonica Port Authority and its staff made no effort to ensure that their own activities did not present a fire hazard to cotton cargoes".

19. Obviously, in relation to the cause of a fire fundamental to a claim and to a counterclaim, the parties and the court would contemplate in the absence of exceptional circumstances the issues being tried together. If there are competing causes it is part of the process of reasoning that if one cause is established, then another has been disproved [see Tuckey J, Phillips LJ and Longmore J in this very case].

20. It would thus not in our view be a permissible position for them to take up that they were simply seeking to appeal the question whether welding had been established by the Merchant as the cause, with (if they succeeded on that limited point) a remission to the Commercial Court to consider whether the only other competing cause was in fact the cause. The notice of appeal accordingly must be read as squarely raising for the Court of Appeal either that the owners could establish that a cigarette discarded by a stevedore was a cause, (which would affect the owners' counterclaim and the defence to the claim of the Merchant) or in the alternative that, although the owners could not establish a discarded cigarette as a cause, they could, in considering the question whether there should be judgment against them on the claim, establish that a discarded cigarette was at least a competing cause which the Merchant had not eliminated in the context of considering the owners' liability to the Merchant.

21. We are told that originally Counsel had given a 4 day estimate for the previous hearing in the Court of Appeal and that shortly before the hearing they were informed that the court would give only 1 day for oral hearing. Leggatt LJ's practice was to lay down strict time limits for oral hearings and to read material out of court to enable that to be done. In that context Miss Bucknall informed us that she prepared a full skeleton argument. She suggested that the time constraint made her re-think her strategy as regards the extent she would attempt to deal with the counterclaim in the Court of Appeal. We obviously accept that as regards the effects of any findings that the court might make as to causation on demurrage or general average neither side were prepared to deal with those matters before the Court of Appeal. But we cannot accept that Miss Bucknall, on behalf of the owners, did not put a discarded cigarette as a cause as part of her case. Furthermore, we cannot accept that she was not bound to do so once both the claim and the counterclaim were before the Court of Appeal. Indeed she would be bound to do so even if she had not appealed the judgment on the counterclaim. Furthermore it is clear from her skeleton and from the notice of appeal that a discarded cigarette was being put forward as a cause of the fire. What is also clear however, as Miss Bucknall frankly accepted before us and which is hardly surprising, and which is indeed reflected in the comments of Longmore J, is that Miss Bucknall was concerned primarily on behalf of the owners, in the time available, to overturn the judgment in excess of $2.5m, and there is, we are sure, no question but that she concentrated her oral argument to so doing. Indeed she told us that halfway through the first day of

oral hearing (which it is right to say did in fact go in to a second day) she was invited by the court to sit down. That no doubt was because the court was much in her favour on the points relating to the owners' defence.

22. After Mr Glennie QC completed his submissions for the Merchant, the court adjourned to consider on what assistance they needed from Miss Bucknall in reply. We have a transcript of the interchange which then took place. Leggatt LJ directed Miss Bucknall to three matters. The first was Article lll r.1; the second was to say anything that she desired to say which was not in her skeleton about welding in Salonika before 28 December; and the third he put as follows:-

"The third matter I must mention to you, and I apologise for not saying it before, is that we have assumed from the tenor of your skeleton argument and without my inviting attention to specific passages -- you will know what I mean -- we have assumed that because you approached this appeal on the footing that all you had to do was to show that the cargo owners have not proved that the fire was caused by welding, you are not pressing your counterclaim. Let me put that to you specifically. It seems to us that you may defeat the case against you, but it does not follow that in so doing you will have proved that the fire was not caused by welding, and therefore you could derive no impetus in support of the case that it was caused by smoking from that fact. If you wish to maintain the counterclaim you would therefore be driven to rely on such evidence as there is about smoking."

23. Then the interchange continued:-

***"Miss Bucknall**: The counterclaim, which is mainly the claim for demurrage, would certainly be supportable if the cause of the fire was secret smoking by those who were employed on behalf of the charterers to load the cargo. Although it is quite correct that my skeleton contains no material which is directed towards the counterclaim, in the event that the appeal were to succeed, I would invite your Lordships to make an order in a form which would enable the counterclaim to be assessed on some other occasion.*

***Lord Justice Leggatt**: Well then, we invite you for the present merely to say why we should do that*

***Miss Bucknall**: Let me expand a little on the counterclaim. It also includes a claim for general average which is, of course, defeated if the need for the general average, expenditure or sacrifice has arisen by reason of the fault of the shipowners. If there is no such fault then the counterclaim for general average also stands.*

My Lords, if the appeal were to succeed, and it was to be found by this court that the respondents had failed to establish on a burden on the balance of probabilities that the cause of the fire was welding by the crew, then in my submission it would be just to allow the appellants' counterclaim to be evaluated on the basis of the only other cause which is on the table, namely, smoking in the holds by the stevedores. I am not sure if that is a point on which I can elaborate further.

***Lord Justice Leggatt**: It is possible, of course, that the (inaudible) is the immediate answer that it may have been caused by welding occurring on the afternoon of 28 December without there having been any privity."*

There was then a further interchange at the conclusion of Miss Bucknall's response which provides as follows:-

***"Lord Justice Leggatt:** Before you do, Lord Justice Phillips has a question he would like to ask you.*

***Lord Justice Phillips:** Just on the counterclaim, if you are not coming back to the counterclaim, imagine we were to find that the cause of the fire was an isolated incident of welding, but that this did not render the ship unseaworthy and that there was no fault or privity, so that it was a single negligent act but one which should only be exempt from liability under the Fire Exemption, would it then follow that the shipowners would be entitled to their demurrage and would be entitled to a contribution in general average because they had committed no actionable fault?*

***Miss Bucknall:** If the fire was caused by negligent one-off welding by the crew, I think I would have to accept on the authorities that there might be difficulty with the claim for general average and I think that that would also probably defeat the claim for the physical damage to the ship. I think it would be difficult for the counterclaim to survive if that was the finding of this court.*

I see that your Lordship has offered me, as it were, a fact.

***Lord Justice Phillips:** It was just a question which I was not sure about the answer to. I thought that a claim for general average would lie (inaudible) unless there was actual fault. Why should you not have your demurrage if there is no actionable fault?*

***Miss Bucknall:** On reflection your Lordship is right, and I was too fast to disagree, so yes, even on that hypothesis the counterclaim would stand.*

This court is reviewing the evidence, is rehearing the case (inaudible) so it is open to this court to make findings of causation rather than simply approach the matter on the basis that the judgment cannot stand; it can substitute its own positive findings.

***Lord Justice Phillips:** It is not clear, of course, as far as general average is concerned who is going to be paying who, because the water damage to the cargo would give the cargo owners a claim for contribution.*

***Miss Bucknall:** That is right, so I would urge the court to make positive findings, if it feels it can do so. I hope that answers your Lordship's question sufficiently.*

***Lord Justice Phillips:** Thank you. "*

24. Then Lord Justice Leggatt invited Mr Glennie to deal with the matter. Mr Glennie said:-

"I am grateful. The course my learned friend, I think, urges upon your Lordships, is to make such findings as to fact generally as your Lordships feel able to do, and then to make some order which will enable the counterclaim to be, as I understand it, dealt with on another occasion, no doubt by considering the matter of fact to be for the attention of the commercial court. If I understood her submissions correctly to that effect, I would concur with her. The skeleton argument,

for example -- I make no criticism of this -- does not go into the "complicated matter" of whether we need actionable fault or simply fault to defeat a claim for demurrage. There is some authority, but we do not have it to hand.

Lord Justice Leggatt: *No, we (inaudible).*

Mr Glennie: *To defeat a claim for general average similar questions might arise with maybe a different answer, maybe the same answer. Those are matters which, in my submission, can properly be both canvassed with your Lordships when your Lordships give judgment, not in detail but as to what is the proper course to take. The most likely course would be if your Lordships give a certain view is to send the matter back to a judge to deal with such arguments as may arise. Those are my submissions."*

25. In our view, a fair reflection of what Counsel were urging on the Court of Appeal was to make such findings as they could and then for the Commercial Court to work out on the findings of the Court of Appeal what the consequences were on the owners' counterclaim. It was particularly the owners' concern what the effect of such findings would be on their claim to demurrage and/or general average. It was not contemplated by Counsel, nor indeed by the court on that interchange, that if the matter went back to the Commercial Court the judge would embark on a fresh fact-finding exercise.

26. The Court of Appeal then delivered their judgment. I have already quoted passages in which they dealt with the counterclaim but it is in this context important to see what findings the court made so far as welding being a cause of the fire is concerned. Leggatt LJ at p.249 right hand column said:-

"In my judgment, because Mr Altayli's evidence was worthless, the conclusion that a gap remained after the hatches were closed through which sparks could penetrate into the hold, though convenient, was not justified.

If Mr Justice Tuckey had disregarded the evidence of Mr Altayli altogether, and had taken heed of the evidence of the master and other crew members about the state of the hatch covers, he would probably have concluded that they were not only closed but dropped and locked. That would have made impossible the ignition of the cotton by sparks. So the Judge would have been less inclined to find that welding had taken place, since it could not have caused the fire. Though there was no direct evidence that it was caused by a discarded cigarette, that remained a serious alternative.

As it is, in my judgment it is not safe to infer that the fire was caused by any welding that Mr Kalotrapezis may have seen. For that reason there was no breach of art.III, r.2; and no factual basis remains for the Judge's finding that the owners were in breach of art. III, r.1."

27. There then follows the conclusion and reference to the counterclaim already quoted.

28. Phillips LJ at p.256 to 257 said as follows:-

"Both experts agreed that, if the pontoons of No.5 hatch were not dropped, there was a possibility of a spark bouncing through the two centimetre gap into the hold. The theory that such a spark caused the fire also required one to postulate that the spark did not come to rest on the top of the stow, but bounced into a gap and fell several bales down in the port forward quarter of the hold before starting to ignite the cargo. The experts were not asked, and probably would have been unable without thought, and perhaps research, to evaluate the likelihood of this possibility. It depended however, on postulating that the pontoons were not dropped. The only evidence to this effect was that of Mr Altayli in his third statement. That evidence conflicted with the evidence of other witnesses, and particularly the bosun, that the hatch was dropped and locked, and more general evidence that this was routine after completion of a day's loading.

Whether, in those circumstances, the Judge was justified in concluding, nontheless, that welding caused the fire must depend, at least in part, on the alternative possibilities. There was only one runner -- a discarded cigarette end. It was common ground that such is a common cause of fires in cotton cargoes, and that a cigarette, if overstowed, could have smouldered for hours, or even days, before causing a fire. The Judge said that there was little evidence of smoking. That would perhaps not be surprising in circumstances where smoking was forbidden and might have been carried on clandestinely in the holds. In fact, however, a number of witnesses spoke of seeing stevedores smoking on the quay and the bosun caught stevedores smoking in the holds and got them to extinguish their cigarettes. On discharge in Brazil, evidence of Greek cigarettes was found in some of the holds.

Having regard to all the factors to which I have referred, I do not consider that there was evidence before the Judge which justified his conclusion that the fire was caused by welding. So unsatisfactory was the evidence that the only proper conclusion was that AMJ had failed to prove that welding was a more probable cause of the fire than a discarded cigarette end. "

29. Then after dealing with Article III r.1, and Article IV r.2 Phillips LJ concluded in relation to the counterclaim as already quoted.

30. What in our view Counsel were accepting, and what the Court of Appeal were ordering was, that the Commercial Court should work out the consequences of findings of the Court of Appeal. We do not think it was intended that the judge should enter into a further inquiry on the evidence. Longmore J thought that that would be a sterile exercise because it would simply lead to dismissal of the counterclaim. He may have misunderstood Mr Milligan's submissions but it was far from a sterile exercise to rule what the effect of the Court of Appeal's findings was on (for example) the owners' claim to demurrage, as the debate before us has demonstrated.

31. We would suggest that on a proper reading of the Court of Appeal's decision they held (1) the Merchant has not established welding as a cause of the fire; (2) the owners have not established, on the balance of probabilities, that

a discarded cigarette of a stevedore was the cause of the fire; and (3) that that leaves an issue as to whether in those circumstances demurrage is recoverable by the owners and might leave an issue on general average.

32. We accept that an alternative reading would also not have required further evidence and indeed is the reading for which Miss Bucknall seems to have contended before Longmore J. The alternative reading is that the Court of Appeal found (1) that the hatch covers were dropped and that thus welding was not a cause; (2) the only alternative was a cigarette discarded by a stevedore; and (3) that it follows that the counterclaim for damage to the ship succeeds.

33. But that alternative reading is inconsistent with the language used by the Court of Appeal and thus, in our view, is not the proper interpretation.

34. That the Court of Appeal intended to limit the exercise that the Commercial Court was to carry out to working out the consequences of the findings of fact of the Court of Appeal is, as it seems to us, supported by the following. First, it is supported by such consensus as can be spelt out from the interchange between the court and Counsel which we have quoted. The thrust of the consensus is for the court to make such positive findings of fact as it was able and then for the counterclaim to be evaluated by reference to those findings without a further fact-finding exercise. Second, from the language used by the Court of Appeal in remitting the counterclaim, the same follows. The language of Phillips LJ is clearest -- it is the *"consequence*" on the counterclaim which was to be remitted, not a further trial of the counterclaim. Morritt LJ agreed with both judgments and that would suggest that all three intended that only the *"consequence*" be worked out. Third, it is supported by what is now more obvious than it might have been when Longmore J was faced with having to decide what to do. If there was to be a further fact-finding exercise, how was that to be conducted fairly and yet consistently with the Court of Appeal judgment? If the owners were having their counterclaim tried in the ordinary way as they had had it tried before Tuckey J, all possible causes including welding could be considered in deciding whether a cigarette of a stevedore had been established on the balance of probabilities as the cause. But, unless it could be said that the Court of Appeal had decided on the balance of probabilities that a cigarette was the cause, how was the court at first instance now to approach the trial of the counterclaim and (a) try it fairly from the Merchant's point of view and (b) achieve consistency with the Court of Appeal decision which, although on this hypothesis had not found the cigarette established, had certainly indicated a high degree of scepticism for welding. It would be invidious for a court at first instance to review the fact-finding of the Court of Appeal and invidious for another Court of Appeal to do likewise; but, on the other hand, not to be able to consider the evidence on welding afresh would put any court in an impossible position. This is well demonstrated by stage 1 of Longmore J's reasoning as noted above.

35. In those circumstances it seems to us that all the Commercial Court was required to do was to work out the consequences of such positive findings as had been made by the Court of Appeal.

36. On those findings; (1) welding had not been established; (2) a stevedore's cigarette had not been established. It should have been a matter of no surprise that that meant that the owners' counterclaim for damage to the ship would fail. I say that because the interchange between Counsel and the court in the Court of Appeal previously would indicate that demurrage and general average were what all thought would be the main matters to be considered by the Commercial Court.

37. The above also leads us to a further conclusion. Mr Milligan, in case he was wrong in his submissions as to the narrowness of the remission, sought to persuade us that (1) the Court of Appeal had not decided that welding was not the cause and thus (2) it was open to the Commercial Court, and thus to us, to review the question of causation as if welding was a potential cause without being tied by the findings or expression of opinion by the previous Court of Appeal; and (3) on that review welding was still a possible cause and a sufficiently likely cause to prevent the owners establishing, on the balance of probabilities, that a stevedore's cigarette was the cause. Although we accept (1) we cannot accept the further steps. Since part of our reasoning for concluding that remission was a narrow one relates to the very fact that the Commercial Court, and indeed this court, should not be reviewing findings of fact or expressions of opinion of the previous Court of Appeal, we decline to embark on that exercise.

38. The above conclusion leaves the only live issue as demurrage. However, we still need to reach a conclusion on the question of liability for stevedores and the proper construction of the Booking Note. We also express shortly a view in relation to the assessment of damage.

Liability for Stevedores

39. We are told that the stevedores at Thessalonika were employed, or at any rate organised, by the port authority, and that neither the Merchant nor the owners had a choice as to what stevedores would be employed. We believe that such an arrangement would commonly exist in many parts of the world, although of course there could be other arrangements. In those circumstances it is agreed that neither the Merchant nor the owners would incur vicarious liability for acts or omissions of the stevedores as an employer; as between the parties such liability would be regulated only by the contract between them.

40. The contract in this case contained the following relevant terms:

"... the Carrier shall carry and the Merchant shall ship the following goods ...

3. On receipt of the Master's notice that the vessel is in every respect ready to receive and load the Merchant's goods ... the Merchant shall tender and load the goods at the average rate of not less that 400 metric tons per weather working day ... The cost of loading, stowing and discharging the goods shall be borne by the Merchant.

. . . . . .

20. Stevedore damage, if any, is to be settled directly between the Carrier and the Stevedore, but in case of a dispute/difficulties and/or non-co-operation of the stevedore, the Merchant to give all possible assistance in order for the case to be concluded."

41. The case for the owners is that, by the terms of the contract expressed or implied, the Merchant is responsible to them for negligence of the stevedores. It may be that the owners must first make an attempt to recover from the stevedores; but if the attempt fails, they are entitled to pursue a claim against the Merchant. It is true that the owners made no attempt to claim from the stevedores in the present case; but their failure to do so was not relied on by the Merchant in its pleadings and cannot be relied on now.

42. For the Merchant it is said that clause 20 in the contract is consistent only with the owners having no right at all to claim for stevedore damage against the Merchant; they must claim against the stevedores. In particular the second part of clause 20, which provides for the Merchant to give all possible assistance, plainly shows that to be the case.

43. Neither side's case, so far as we can tell, makes better sense than the other. The commonest form of stevedore damage is that caused by impact on the structure of the ship, which ought to be recorded and agreed upon by the stevedores and one of the ship's officers before she sails. On the other hand the Merchant is more likely to be local to the neighbourhood than the shipowner. The Merchant may, or may not, have a contract with the stevedores, in a case such as the present where it is for the Merchant to arrange and pay for the loading of the goods; the shipowner is, we suppose, likely to have a delictual remedy against the stevedores for negligence. Both parties have in practice at best only a limited degree of control over who the stevedores are and how they carry out their work.

44. Against that background the Owners rely on the case of ***Canadian Transport Company Ltd. v Court Line Ltd.*** (1940) A.C. 934. There a charterparty provided that the charterers were to load, stow and trim the cargo at their expense under the supervision of the captain. It was argued that this clause put the responsibility for bad stowage upon the shipowners, because the captain was to supervise. From the arbitrator (Mr Henry Willink K.C.) to the House of Lords, all were agreed in rejecting that argument. But we were referred in particular to what was said by Lord Porter (at pp. 951-2):

"In my opinion by their contract the charterers have undertaken to load, stow and trim the cargo, and that expression necessarily means that they will stow with due care. Prima facie such an obligation imposes upon them the liability for damage due to improper stowage. It is true that the stowage is contracted to be effected under the supervision of the captain, but this phrase does not, as I think, make the captain primarily liable for the work of the charterers' stevedores."

45. Mr Willink's award was described by Lord Atkin (at p. 936) as "*particularly niggardly of facts*". But one can find in the judgment of Scott L.J. in the Court of Appeal - (1939) 64 L.I.R. at p. 60 - that damage was caused to a part cargo of grain because unseasoned and damp timber was loaded on top of it.

46. The other cases relied on were ***Overseas Transportation Company v Mineralimportexport (The SINOE)*** (1971) 1 L.I.R. 514, (1972) 1 L.I.R. 201 and ***Gerani Compania Naviera SA v Toepfer (The DEMOSTHENES V)*** (1982) 1 L.I.R. 282. Both were concerned with provisions in a charterparty that demurrage, or despatch money, or both should be settled directly between shippers or receivers and the shipowners. In both cases it was nevertheless held that the charterers were liable for demurrage. ***The SINOE*** is memorable for the finding of Mr R.A. Clyde as umpire (at p. 515):

".... the stevedores were incompetent, inexperienced, too few in number, unequipped with sweepers to clear the escaped cement from the undischarged cargo, supplied with the wrong gear, and allergic to all orders and directions of the Master ..."

47. Donaldson J at first instance was almost as forthright, although his criticism was directed at the charterparty, which he said (at p. 515): *"was subject to extensive amendments and additions. Indeed all the problems in this case arise out of those additions which are most unhappily drafted."*

48. His conclusion (p. 519) on the point said to be relevant to the present dispute was that the parties expected demurrage to be settled by the shippers or receivers: *"not from motives of charity, but under the influence of a lien. Neither exculpates the charterers from liability if, as has happened, these expectations were not realized."*

49. Mr Coburn for the owners says that in ***The Sinoe*** the shipowners had a cause of action to recover demurrage against the receivers for demurrage at the Discharging port, because the bill of lading incorporated the terms of the charterparty. That might conceivably be right, if the receivers had in one way or another become a party to the bill of lading contract. But Donaldson J did not decide the case on that basis, as appears from the passage quoted above; he treated the shipowners' only right against the receivers as the lien.

50. Mr Coburn also submits that in ***The Demosthenes V*** the charterparty gave the shipowners a cause of action against the receivers. We can see no support for that submission. It is not surprising that in those circumstances the charterer remained liable. But in the present case the owner did, we presume, have a remedy at law against the stevedores.

51. Longmore J decided this issue in favour of the owners. He held that:- *"the Merchant's contractual and non-delegable duty of care is not a matter of implication liable to be defeated by an express term to the contrary, especially since clause 20 does not purport to exempt the Merchant from liability. The most that could be said is that clause 20 might oblige the carrier to look to the stevedore in the first instance but, even if that were to be what it means, no breach of that obligation has been alleged, let alone proved.....Clause 20 of the Booking Note is not, in*

my view, inconsistent with the cargo owner's responsibility for stevedore negligence, and it follows that the Plaintiffs are liable to the Defendants for damages resulting from the fire on board the vessel."

52. We do not agree with that conclusion. Mr Milligan argued that clause 3 of the contract was concerned only with the time in which the cargo was to be tendered and loaded by the Merchant, and not with the Merchant's obligation to tender and load. There may well be something in that. But the tenor of the contract as a whole is that the Merchant is either to load the cargo or to procure somebody else to load it. If clause 3 had stood alone and there had been no clause 20, it would necessarily have been implied that the Merchant would procure that the cargo was loaded and stowed with reasonable skill and care. If we may say so, it scarcely needed Lord Porter to say that - and indeed the contest in the ***Canadian Transport*** case was not about that obligation but as to whether it was displaced by the provision for the supervision of the captain.

53. However, it is hornbook law that a contract must be construed as a whole. One cannot first interpret clause 3 and then afterwards alter the meaning of clause 20 in order to accord with it. In our judgment clause 20 is clearly saying that the Merchant is not to be liable for stevedore damage. Why else should the Merchant be obliged "to give all possible assistance for the case to be concluded"? That provision would be unnecessary if the owners retained a right to recover for stevedore damage from the Merchant. The suggestion of Longmore J that all the owners need do is look to the stevedores in the first instance does not meet the requirement that damage must be settled directly between the carrier and the stevedore.

54. It does not necessarily follow that the Merchant has no liability for negligence of the stevedore. Damage to the ship is, we suspect, the commonest form of stevedore damage, and that with which the owners are most directly concerned. Damage to the cargo of a third party by improper stowage, such as occurred in the ***Canadian Transport*** case, may yet be the ultimate liability of the party who has to arrange loading and stowage, even if there is a provision such as clause 20 in the contract. More significantly for present purposes, clause 20 does not deal with a claim for demurrage against the Merchant, even if the delay in loading arose from damage to the ship caused by stevedores.

55. It is said that clause 20 was not relied on before Tuckey J - or for that matter during the previous visit to the Court of Appeal, although there can have been precious little, if any, opportunity to rely on it then. In paragraph 19 of their Points of Defence and Counterclaim the owners asserted that under the terms of the contract or by implication the Merchant was obliged to load and stow properly and carefully, and the Merchant was entitled to meet that case by relying on clause 20, as Longmore J evidently thought. In view of the tortuous course of this action, with a number of changes in the legal team acting for the Merchant, it is not a matter of any weight that the defence under clause 20 was first raised at a relatively late stage. In our judgment if it had been established that a stevedore's cigarette had been the cause of the fire, clause 20 would have provided the answer to the owners' claim for damage to the ship.

Damages

56. In the event it is not necessary to express a final conclusion on this point. But we think it right to explain the issue and our preliminary view.

57. The judgment of Longmore J awarded the owners "US$155,000 being the value by which the vessel was diminished" (sic) and $583,981.70 in respect of losses and expenses set out in the Counterclaim. It is the first of those figures which is disputed as to amount. It was the judge's assessment of the cost of repairing damage to the ship caused by the fire. The owners accepted that the measure of damages was the diminution in the value of the ship, but claimed that the cost of repairs was equal to the diminution in value. The Merchant's case was that it was not economic or reasonable to repair at that cost. They produced evidence that the diminution in value was only $25K or $50K.

58. Repairs were postponed by the owners until the next Special Survey, due in three years' time. In the event the vessel was sold before then; the new owners did carry out repairs, perhaps because the freight market had improved significantly.

59. The conclusion of Longmore J was as follows:- *"My task is to assess the diminution in value of the vessel at the time of the breach.*

60. Basing himself on the expert valuation evidence of Mr Wilcox to the effect that the vessel was 20 years old, and only had a scrap value of $1,050,000, and that the sound value of the vessel was $1,225,000, Mr Milligan said it was uneconomic to repair (whatever the repair costs), and the diminution in value was nil. That seems to me altogether too artificial in a case where the vessel was not sold for scrap but as a going concern."

61. There was no challenge to the proposition that the owners could recover although the repairs had not been done, and no reliance was placed on the decision of the House of Lords in ***Ruxley Electronics & Construction Ltd. v Forsyth*** (1996) A.C. 344. The question then is whether, at the time when the damages fell to be measured, it was reasonable to repair the vessel. All the evidence was one way on that point, if one paid no regard to the possibility that freight rates might take a turn for the better in the future. Our provisional view is that the diminution in value was no more than $25K or $50K.

Demurrage

62. The issue before the judge was whether the owners were entitled to US$345,788.53 by way of demurrage. That depended on whether the delay in loading was caused, in terms of clause 3 of the contract, *"by any other cause beyond the control of the Merchant."*

63. As it turns out we have not been able to reach a conclusion as to what was the cause of the fire. It may have been welding. It may have been a stevedore's cigarette. In the former case it would have been beyond the control of the Merchant, but what if it was the stevedore? In our view the clause refers to causes which, by the contract, are under the control of the Merchant; the effect of clause 3 is that, as between the owners and the Merchant, the stevedores are under the control of the Merchant. The situation then is that the cause of delay may or may not have been caused by something which was not under the control of the Merchant. We cannot tell which. The defence is therefore not made out and the claim for demurrage succeeds.

Conclusion:

64. For the above reasons the Merchant's appeal in relation to damage to the ship caused by the fire is allowed, and the owners' cross-appeal in relation to demurrage is also allowed.

Order:

1. Appellant's appeal allowed with costs in the sum awarded and set off on against the other so that there be a net balance due; there is to be no payment on account of costs before Tuckey J.

2. Merchant to have 80% of their costs here and below.

3. Leave to appeal to the House of Lords refused.

4. Further orders set out in defendant's proposed form of order, as lodged with the court.

(Does not form part of approved judgment.)

Iain Milligan Esq QC, Mr Richard Lord (instructed by Richards Butler for the Appellants)
Belinda Bucknall QC, Mr Michael Coburn (instructed by Messrs Hill Taylor Dickinson for the Respondents)